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STATE OF WYOMING V. U.S. DEP'T OF THE INTERIOR CONFUSED AGENCY OVERLAP WITH PRECLUSION:

BLM HAD AUTHORITY TO PROMULGATE THE FRACKING RULE FOR PUBLIC LANDS, NOT TRIBAL LANDS

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I. Introduction

Hydraulic fracturing ("hydrofracking") is an increasingly used form of "clean energy" production, but, like anything in life, it has associated costs. Associated costs include potential groundwater contamination caused from chemicals used during the hydro-drilling and fracking process. In December 2016, the EPA released a study, which found that hydrofracking is associated with the "contamination of underground sources of drinking water and surface waters resulting from spills, faulty well construction, or by other means."[1]

At first glance, it would appear that the most direct source for regulating groundwater contamination caused by hydrofracking would be the Underground Injection Control Program ("UICP") of the Safe Drinking Water Act ("SDWA").[2] In 2005, however, Congress expressly excluded hydrofracking from the Environmental Protection Agency's ("EPA") UICP authority in the Energy Policy Act.[3] Public and legal commentary refers to this exclusion as the "Halliburton Loophole."[4]

Given the regulatory gap that the Halliburton Loophole created, on March 25, 2015 the Bureau of Land Management ("BLM") promulgated the "Fracking Rule."[5] The Fracking Rule amends 43 C.F.R. Part 3160 of the Federal Land

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[1] U.S. ENVTL. PROTECTION AGENCY, EPA/600/R-16/236F, *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States (Final Report)* (2016), *available at* https://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=332990.

[2] *See* 42 U.S.C. §§ 300h-f, 1581 (2005).

[3] *See* Energy Policy Act of 2005 § 42 U.S.C. § 15801 (2005); Pub. L. No. 109-58 (Aug. 8, 2005).

[4] *See* Opinion, *The Halliburton Loophole,* N.Y. TIMES (Nov. 2, 2009), http://www.nytimes.com/2009/11/03/opinion/03tue3.html.

[5] BUREAU OF LAND MANAGEMENT, *Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands*, 43 C.F.R. § 3160 (2015) [hereinafter "Fracking Rule"].

Policy and Management Act of 1976 ("FLPMA") to create a comprehensive regulatory scheme for managing hydrofracturing and groundwater contamination caused by such drilling and well operations. The Fracking Rule's regulatory scheme attempts to address three areas of hydrofracking on federal and tribal lands: (1) wellbore construction; (2) chemical disclosures; and (3) water management.

The BLM argues that promulgating the Fracking Rule is a part of its "regulatory sphere."[6] BLM claims this regulatory sphere is created by comprehensively reading several statutes together, which include the FLPMA,[7] Mineral Leasing Act of 1920 ("MLA"),[8] Indian Mineral Leasing Act of 1938 ("IMLA"),[9] and the Indian Mineral Development Act of 1982 ("IMDA").[10] The BLM used both the FLPMA and MLA for its authority to regulate hydrofracking on federal lands, whereas the BLM used the IMLA and IMDA for its authority to regulate hydrofracking on tribal lands.

Because the Fracking Rule has the potential to change the fracking industry, several states—including Wyoming, Colorado, North Dakota, and Utah—along with several gas companies and the Ute Indian Tribe, sued the Department of the Interior challenging aspects of the rule.[11] In *State of Wyoming*, Judge Skavdahl held that the BLM violated the scope of authority granted to it by Congress in promulgating the Fracking Rule.[12] In setting aside the Fracking Rule, the court provided three connected, yet independent, reasons for reaching its holding. First, the court held that since both the FLPMA and MLA are silent as to hydrofracking, the BLM exceeded its congressionally delegated authority in adopting the rule.[13] Second, the court reasoned that the EPA has regulatory authority over hydrofracking, which precluded the BLM from promulgating the Fracking Rule.[14] Finally, the court asserted that administrative structure created

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[6] 80 Fed. Reg. at 16,129.
[7] 43 U.S.C. §§ 1701-1787.
[8] 30 U.S.C. § 187.
[9] 25 U.S.C. § 396.
[10] 25 U.S.C. §§ 2101-2108.
[11] *See Wyoming v. United States Dep't of the Interior*, 136 F. Supp. 3d 1317 (D. Wyo. 2015), *vacated and remanded sub nom. Wyoming v. Sierra Club*, No. 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016). On September 30, 2015, in *Wyoming v. United States Dep't of the Interior*, the U.S. District Court of Wyoming granted a preliminary injunction that enjoined the BLM from enforcing the Fracking Rule pending litigation. *Id.* However, on July 13, 2016 the Tenth Circuit Court of Appeals vacated the district court's injunction and remanded the case. *Wyoming v. Sierra Club*, No. 15-8126, 2016 WL 3853806, at *1 (10th Cir. July 13, 2016). Meanwhile, in a separate order, *State of Wyoming v. United States Dep't of the Interior*, the District Court invalidated the Fracking Rule on June 21, 2016. *State of Wyoming v. United States Dep't of the Interior*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *1 (D. Wyo. June 21, 2016).
[12] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *1.
[13] *Id.* at *6.
[14] *Id.* at *9.

by Congress restricts the BLM authority to land use planning; rules relating to environmental protection are solely under the jurisdiction of the EPA.[15]

State of Wyoming does not discuss the BLM's authority under IMLA or IMDA for regulating hydrofracking on tribal lands at all. This is curious since, in the September 30, 2015 *Wyoming* decision, Judge Skavdahl did examine the Ute Indian Tribe's contention that the BLM breached its fiduciary duty to Indian tribes when promulgating the Fracking Rule.[16] Specifically, Judge Skavdahl held that IMDA requires meaningful efforts to involve tribes in the regulatory decision-making process, which the BLM breached.[17]

This article argues that the U.S. District Court of Wyoming improperly decided *State of Wyoming*, and the Tenth Circuit should confirm the validity of BLM's Fracking Rule on appeal. Specifically, *State of Wyoming* mistakenly assumed that the EPA's SDWA authority and the Halliburton Loophole precluded the BLM's authority under FLPMA. But when Congress created the Halliburton Loophole in 2005, it only intended to alter the EPA's regulatory authority under the SDWA and not BLM's authority. With the FLPMA and MLA, the BLM has broad authority to prevent public lands from being unnecessarily degraded by mineral extraction. By providing regulatory checks on hydrofracking through the Fracking Rules chemical disclosure requirements and other requirements—such as sufficient cement casing for hydrofracking wells, the BLM is acting within its broad authority.

Nevertheless, the BLM lacks authority under the IMDA and IMLA to apply the Fracking Rule to tribal lands. Tribal lands are unique, and the BLM owes tribes special fiduciary duties under the IMDA and IMLA.[18] Specifically, the government must act in the best interest of the tribe when promulgating a rule that affects tribal economic activities and mineral leases.

This article first establishes the current scientific and public understanding that hydrofracking does adversely impact ground water quality. Second, BLM's Fracking Rule is discussed, and the 2015 *State of Wyoming* decision is critiqued in light of well-established administrative principles. Third, I outline the statutory controls for regulating hydrofracturing fluid. Fourth, I argue how the Fracking Rule squarely fits within this statutory framework. Finally, I argue that the BLM improperly failed to consider the special jurisdictional limitations when extending the Fracking Rule to tribal lands.

II. Hydrofracking Process and Contamination of Groundwater

A. Basics of Hydrofracking

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[15] *Id.* at *8-9.
[16] *See Wyoming*, 136 F. Supp. 3d at 1317.
[17] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *2.
[18] *See* 25 U.S.C. § 2103(b) (1982); 25 U.S.C. §396a (1938).

With our national trend towards clean energy consumption,[19] hydrofracking has become an increasingly significant method for supplying clean-burning natural gas.[20] Hydrofracking is a method of extracting natural gas from shale and other rock deposits located beneath the earth's surface.[21] Traditionally, the subsurface extraction of natural gas occurred in rock formations that were "both porous, meaning capable of holding substantial liquids or gases, and permeable, meaning capable of transmitting the liquids or gases through the formation."[22] With technological advancements overtime, gas companies have become increasingly able to extract natural gas from hard-rock formations, such as shale.[23] Most hard-rock formations are porous, but not permeable.[24]

To reach these porous rock formations, gas companies vertically drill wells "hundreds to thousands of feet below the land surface."[25] Once the vertical well is drilled, "horizontal or directional" sections may be drilled out from the vertical well's base to expand the reach of the well's impact.[26] Companies then create outward fractures from the vertical and horizontally drilled wells by "pumping large quantities of fluids at high pressure down a wellbore into the target rock formations."[27] The injection of these fluids, which contain "water, sand, and certain chemicals," create "fissures in the rock and allow oil and gas to escape for collection in a well."[28]

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[19] *See* U.S. ENERGY INFORMATION ADMINISTRATION, *Natural Gas Consumption (Annual Supply & Disposition): U.S. Natural Gas Total Consumption (Million Cubic Feet)* (Mar. 31, 2017), https://www.eia.gov/dnav/ng/hist/n9140us2a.htm (showing that natural gas consumption in the U.S. has increased every year since 2009; U.S. consumed a total 22,910,078 million cubic feet of natural gas in 2009, whereas U.S. consumed a total of 27,496,889 million cubic feet of natural gas in 2016). *See also* EPA, Energy and the Environment: Clean Energy Programs (Jan. 24, 2017), https://www.epa.gov/energy/clean-energy-programs; Lincoln L. Davies & Victoria Luman, *The Role of Natural Gas in the Clean Power Plan*, 49 J. MARSHALL L. REV. 325, 326 (2015);

[20] *See* Christopher Goncalves, *Breaking Rules and Changing the Game: Will Shale Gas Rock the World?*, 35 ENERGY L.J. 225 (2014).

[21] *See* U.S. DEP'T OF ENERGY, *How is Shale Gas Produced*, https:perma.cc/VJE9-399W (June 21, 2016); EEC ENVIRONMENTAL, *A Brief History of Hydraulic Fracturing*, http://eecenvironmental.com/services/258-a-brief-history-of-hydraulic-fracturing (last visited Mar. 11, 2017) (tracking the history of hydrofracking and noting that the modern fracking technique was invented in 1997 by Nick Steinsberger, an engineer at Mitchel Energy).

[22] Mark Squillace, *Managing Unconventional Oil and Gas Development As If Communities Mattered*, 40 VT. L. REV. 525, 529 (2016)

[23] *See id.*

[24] *See id.*

[25] EPA, *The Process of Hydraulic Fracturing*, https://www.epa.gov/hydraulicfracturing/process-hydraulic-fracturing (last visited Mar. 11, 2017).

[26] *See* NATIONAL GROUNDWATER ASSOCIATION, *Water Wells in Proximity to Natural Gas or Oil Development: What You Need to Know* (2012), *available at* https://www.ngwa.org/docs/default-source/default-document-library/publications/water-wells-in-proximity-to-natural-gas-or-oil-development.pdf?sfvrsn=4aa79ce1.

[27] *Id.*

[28] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *2 (D. Wyo. June 21, 2016).

An estimated "ninety percent of new wells drilled on federal lands in 2013 were stimulated using hydraulic fracturing techniques."[29] Hydrofracking wells are mainly located in the Great Plains and Appalachian Mountains regions with various outlying sites scattered throughout the U.S.[30] Nevertheless, most of the hydrofracking activities occur in and around Pennsylvania, down from North Dakota to Texas, and in California."[31]

B. Hydro-Drilling and Fracking Impact Groundwater Quality

Many hydrofracking wells are located directly on top of or in close proximity to major aquifers,[32] and contamination from chemicals used during the fracking process pose human-health risks.[33] Part of the concern arises from chemicals injected as part of the fracking process. A March 2015 report released by the EPA looked at the fracking fluid chemicals used by "14 leading oil and gas service companies" across the United States.[34] The report found that hydrofracking companies used about 692 "unique" ingredients in the well-fracking process.[35] Of these 692 unique ingredients, 598 were chemical ingredients.[36] The non-chemical ingredients include water, sand, and other rock materials such as quartz.[37]

In contrast, two studies prepared for Congress in 2011 examined chemical ingredients used by the same gas-extraction companies, and those studies suggest

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[29] Fracking Rule, *supra* note 5; 80 Fed. Reg. 16127, 16131 (Mar. 26, 2015).
[30] *Id.*
[31] U.S. ENVTL. PROTECTION AGENCY, *supra* note 1.
[32] United States Geological Survey (USGS), *USGS Groundwater Information: Principal Aquifers*, *available at* https://water.usgs.gov/ogw/aquiferbasics/alphabetical.html (last visited Mar. 11, 2017).
[33] U.S. ENVTL. PROTECTION AGENCY, *supra* note 1.; BUREAU OF LAND MANAGEMENT, *Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands*, 80 Fed. Reg. 16127 (Mar. 26, 2015); Fracking Rule, *supra* note 5.
[34] *See* U.S. ENVTL. PROTECTION AGENCY, EPA/601/R-14/003: Analysis of Hydraulic Fracturing Fluid Data from the FracFocus Chemical Disclosure Registry 1.0, 32, (2015) (*available* at https://www.epa.gov/sites/production/files/2015-03/documents/fracfocus_analysis_report_and_appendices_final_032015_508_0.pdf). Examples of major aquifers closely located to fracking wells include, but are not limited to: Ada-Vamoosa aquifer (Oklahoma); Arbuckle-Simpson aquifer (Oklahoma); Blain aquifer (Oklahoma and Texas); Central Valley aquifer system (California); Coastal lowlands aquifer system (Gulf Coast); Edwards-Trinity aquifer system (Oklahoma and Texas); Lower Tertiary aquifers (northern Great Plains); Paleozic aquifers (northern Great Plains); Pecos River Basin alluvial aquifer (Texas and New Mexico); Pennsylvanian aquifers (central and eastern U.S.); Piedmont and Blue Ridge carbonate-rock aquifers (eastern U.S.); Rush Springs aquifer (Oklahoma); Seymour aquifer (Texas); Silurian-Devonian aquifers (northern Midwest); Southeastern Coastal Plain aquifer system; Surficial aquifer system (eastern U.S.); Texas Coastal Uplands aquifer system (Texas); Upper Carbonate aquifer (Minnesota and Iowa); Upper Cretaceous aquifers (Wyoming); Valley and Ridge aquifers (eastern U.S.). United States Geological Survey (USGS), USGS Groundwater Information: Principal Aquifers, *available at* https://water.usgs.gov/ogw/aquiferbasics/alphabetical.html (last visited Mar. 11, 2017).
[35] *Id.* at 32.
[36] *Id.*
[37] *Id.*

that the EPA's 2015 findings were too conservative.[38] The 2011 Waxman study found 750 different chemical ingredients.[39] Of the 750 chemicals found, some "were common and generally harmless, such as salt and citric acid[;] . . . some were unexpected, such as instant coffee grounds and walnut hulls[; but] some were extremely toxic, such as benzene and lead."[40] Extremely toxic chemicals, which are "known or possible human carcinogens, regulated under the SDWA for their risks to human health or listed as hazardous air pollutants under the Clean Air Act" were found in "650 different products used in hydraulic fracturing."[41] The 2011 Colborn study found 632 chemicals in the fracking fluids used by the same 14 major gas-extraction companies.[42] Although the Colborn study identified 118 fewer chemical ingredients than the Waxman study, both studies found roughly the same number of toxic chemicals in the fracking fluids.[43]

Given the concerns raised by the two 2011 studies and 2015 EPA study, the EPA released a new hydrofracking report in December 2016 addressing the potential impact of hydrofracking on drinking water supplies.[44] The December 2016 report "found scientific evidence that hydraulic fracturing activities can impact drinking water resources under some circumstances."[45] There are four ways fracking contaminates drinking water. First, drinking water contamination from fracking occurs from "spills during the handling of hydraulic fracturing fluids and chemicals or produced water that result in large volumes or high concentrations of chemicals reaching groundwater resources."[46] Second, groundwater contamination occurs from the "injection of hydraulic fracturing fluids into wells with inadequate mechanical integrity, allowing gases or liquids to move to groundwater resources."[47] Finally, contamination occurs from the "injection of hydraulic fracturing fluids directly into groundwater resources" and the "disposal or storage of hydraulic fracturing wastewater in unlined pits result in contamination of groundwater resources."[48] Although the 2016 report is an acknowledgement by the EPA regarding the harmful effects hydrofracking chemicals have on groundwater quality, the EPA has not proposed a rule that would remedy groundwater contamination.[49] Nevertheless, the EPA does

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[38] *See* Staff of H.R. Comm. on Energy and Com., 112th Cong., Chemcials Used in Hydraulic Fracturing (Comm. Rep. Apr. 2011).; Theo Colborn, Carol Kwiatowski, Kim Schultz & Mary Bachran, *Natural Gas Operations from a Public Health Perspective*, 17 Human and Ecological Risk Assessment 1039 (2011).
[39] House Report Chemicals Used in Hydraulic Fracturing at 1.
[40] *Id*.
[41] *Id*.
[42] Colborn, *supra* note 38, at 1045.
[43] *Id.*; House Report Chemicals Used in Hydraulic Fracturing at 1.
[44] U.S. ENVTL. PROTECTION AGENCY, *supra* note 1.
[45] *Id.* at 10-3.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*

currently regulate the direct discharge of fracking wastewater through the Clean Water Act ("CWA")[50] and Resource Conservation and Recovery Act ("RCRA").[51]

III. Congressional Regulation of Hydrofracking

A. The Safe Drinking Water Act's Underground Injection Control Program and the 2005 Energy Policy Act Amendments

The SDWA is the primary law in the United States used to ensure safe drinking water for the public.[52] Section 300f provides that Congress adopted the SDWA "to protect public health by regulating the nation's public drinking water supply."[53] Under the UICP, the EPA is required to promulgate rules aimed at regulating the underground injection of fluids that adversely affect the nation's drinking water supply.[54] For many years, "the EPA operated according to the principle that the definition of 'underground injection' in Section 300h of the SDWA was designed to address subterranean fluid storage and not oil and gas extraction techniques such as hydraulic fracturing."[55] But in *Legal Envtl. Assistance Found., Inc. v. U.S. E.P.A.*, the Eleventh Circuit invalidated the EPA's reading of Section 300h by finding that Section 300h covered hydrofracking.[56] The court expressly rejected the EPA's argument that regulating underground injection of fracking fluids "would be both inefficient and inconsistent with Congress' expressed admonition that EPA not prescribe unnecessary requirements related to oil- and gas-related injection."[57] Because Section 300h applied to the underground injection of hydrofracking fluids, hydrofracking became subject to EPA UICP regulation.[58]

In response to *Legal Envtl. Assistance Found.*, Congress amended the SDWA UICP in the Energy Policy Act of 2005 to create the Halliburton Loophole.[59] The provision amended the SDWA definition of "underground injection" to expressly exclude the "injection of fluids and propping agents, other than diesel fuel, undertaken pursuant to hydraulic fracturing."[60] Since the creation

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[50] *See* Clean Water Act § 2770, 92nd Cong. § 402 (1972), *Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities*, 71 Fed. Reg. 33628-01 (June 12, 2006) (codified at 40 C.F.R. 23.2).
[51] *See* Jeffrey M. Gaba, *Flowback: Federal Regulation of Wastewater from Hydraulic Fracturing*, 39 COLUM. J. ENVTL. L. 251, 253 (2014).
[52] 42 U.S.C. § 300f(b)(i)(II) (2018).
[53] *Id.*
[54] *Id.* at § 300h.
[55] Cameron Jefferies, *Unconventional Bridges over Troubled Water - Lessons to Be Learned from the Canadian Oil Sands As the United States Moves to Develop the Natural Gas of the Marcellus Shale Play*, 33 ENERGY L.J. 75, 98 (2012) (quoting 42 U.S.C. § 300h(d)).
[56] *Legal Envtl. Assistance Found.*, 276 F.3d 1253, 1256 (11th Cir. 2001).
[57] *Id.*
[58] *Id.*
[59] *See* 42 U.S.C. § 15801 (2005).
[60] *Id.*

of the Halliburton Loophole, the EPA has largely been hands-off in regulating the underground injection of hydrofracking fluids.[61]

B. Mineral Leasing Act of 1920

Congress enacted the Mineral Leasing Act ("MLA") in 1920 to ensure that oil and gas companies would procure such resources with "reasonable diligence, skill, and care." [62] MLA serves a number of functions. The most important MLA provisions relating to the Fracking Rule involve those that grant the Department of the Interior power, through the BLM, to grant companies authority to drill and extract minerals from "*public-domain* lands."[63] The BLM has the authority to deny or limit the ability of companies to drill for subsurface minerals.[64] Inherent in this authority is the BLM's ability to draft rules necessary "for the protection of the interest of the United States . . . and for safeguarding of the public welfare."[65] Courts interpreting the scope of the BLM's Section 187 authority have held that the BLM must be given great deference when the BLM prescribes "necessary and proper rules and regulations."[66]

Additionally, BLM's Section 189 contains a clause that "none of such provisions shall be in conflict with the laws of the State in which the leased property is situated."[67] Confusion existed as to which "such provisions" Section 189 referred to; however, *Ventura County v. Gulf Oil Corp.* held that the "such provisions" proviso only applies to the sentence preceding the clause.[68] The preceding sentence specifically references "employment practices, prevention of undue waste and monopoly, and diligence requirements."[69] It does not relate to "land use planning controls," nor does it recognize "concurrent state jurisdiction."[70]

C. Federal Land Policy Management Act of 1976

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[61] Adam Kron, *EPA's Role in Implementing and Maintaining the Oil and Gas Industry's Environmental Exemptions: A Study in Three Statutes*, 16 VT. J. ENVTL. L. 586, 587 (2015).
[62] 30 U.S.C. § 187.
[63] *Id.* at § 181 (emphasis added). *See BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 87 (2006).
[64] 30 U.S.C. § 181.
[65] *Id.* at § 187.
[66] *See Thor-Westcliffe Dev., Inc. v. Udall*, 314 F.2d 257, 259 (D.C. Cir. 1963); *United States v. Ohio Oil Co.*, 163 F.2d 633, 638 (10th Cir. 1947); *Amoco Prod. Co. v. Baca*, 300 F. Supp. 2d 1, 5 (D.D.C. 2003), *aff'd sub nom. Amoco Prod. Co. v. Watson*, 410 F.3d 722 (D.C. Cir. 2005), *aff'd sub nom. BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 127 S. Ct. 638, 166 L. Ed. 2d 494 (2006); *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1981).
[67] 30 U.S.C. § 189.
[68] *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1082-87 (9th Cir. 1979), *affirmed* 445 U.S. 947 (1980).
[69] *Id.* at 1087.
[70] *Id.* at 1087-88.

Like the MLA, the Federal Land Policy Management Act ("FLPMA") gives the BLM discretion when managing public lands. The FLPMA directs the BLM to manage "*public lands* . . . in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archaeological values." [71] Public lands subject to BLM's control are expressly defined in the FLPMA as "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management without regard to how the United States acquired ownership, except . . . lands held for the benefit of Indians."[72] Thus, the FLPMA applies to all federally owned lands, but excludes reservation lands.[73]

To manage federally owned lands for the benefit of the public, the BLM's management strategy must balance oil and gas development—such as hydrofracking—against adverse effects to natural resources—such as drinking water—by considering "multiple use and sustained yield" principles. [74] Section 1702(c) defines the term "multiple use" as "the management of public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people."[75] Section 1702(c)'s general definition gives the BLM broad authority in regulating public lands.[76]

In *Norton v. Southern Utah Wilderness Alliance*, the U.S. Supreme Court noted that multiple use management "is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put."[77] To help rein in the BLM's broad management authority, Congress articulated the slightly stricter—yet still broad—sustained yield principle.[78] Section 1702(h) defines "sustained yield" as the "achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."[79]

The multiple use and sustained yield principles suggest a balanced approach for the BLM, but Section 1701(a)(12) allows the BLM to manage natural resources "in a manner which recognizes the Nation's need for domestic sources of minerals . . . from public lands."[80] To implement Section 1701's multiple use and sustained yield principles, the BLM adopted the federal regulations set forth in 43 C.F.R. Sections 1601.0 to 1610.8 for "developing,

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[71] 43 U.S.C. § 1701(a)(8).
[72] 43 U.S.C. § 1702(e).
[73] *See Id.*
[74] 43 U.S.C. §§ 1701(a)(7), 1702(c).
[75] 43 U.S.C. § 1702(c).
[76] *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 56-9 (2004).
[77] *Id.* at 58. *See* 43 U.S.C. §§ 1701(a)(7), 1702(c).
[78] 43 U.S.C. §§ 1701(a)(7), 1702(h).
[79] *Id.*
[80] 43 U.S.C. § 1701(a)(12).

maintaining, and revising resource management plans."[81] The regulations apply to all development projects on federal lands.

To comply with these provisions, the BLM completes three management steps in approving hydrofracking activities.[82] First, the BLM develops management plans to decide which "areas will be open to" hydrofracking development and "the conditions placed on such development."[83] Next, the BLM issues leases for developing certain hydrofracking wells and drilling sites.[84] Finally, after these two steps are completed and the BLM issues fracking leases, the BLM determines whether to approve fracking-well-drilling permits for each specific site.[85]

In short, Congress granted the BLM broad authority to regulate the natural gas industry under the FLPMA, and under its general regulatory framework the BLM has adopted numerous specific regulations that limit what gas procurement companies can do with their wells.[86] Such BLM-imposed limitations include the injection of "useless liquid products" in wells and chemical-disclosure requirements.[87] BLM regulations also require companies to comply with certain specifications for well castings, drilling, and cementing techniques.[88]

D. Indian Mineral Leasing Act of 1938

Congress adopted the Indian Mineral Leasing Act ("IMLA") in 1938 to bring uniformity to mineral leasing matters between companies and tribes, provide tribes with greater authority in deciding whether to approve mineral leases, and to protect tribal economic investments.[89] The IMLA requires the Secretary of the Interior—by and through the Bureau of Indian Affairs("BIA")—to regulate mineral leases in a way to ensure that tribes receive maximum benefit from the leases.[90] Importantly, Section 396d of the IMLA states that:

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[81] *ForestWatch v. United States Bureau of Land Mgmt.*, No. CV-154378-MWFJEMX, 2016 WL 5172009, at *3 (C.D. Cal. Sept. 6, 2016).
[82] *N.M. ex rel Richardson v. BLM*, 565 F.3d 683, 689 n.1 (10th Cir. 2009) (citing 43 U.S.C. § 1712(e)).
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *See e.g.* BUREAU OF LAND MANAGEMENT, *Drilling Applications and Plans*, 43 C.F.R. § 3162.3-1 (2014); BUREAU OF LAND MANAGEMENT, *Subsequent Well Operations; Hydraulic Fracturing*, 43 C.F.R. § 3162.3-3 (1983); BUREAU OF LAND MANAGEMENT, *Operating Regulations to Govern the Production of Oil and Gas*, 30 C.F.R. § 221.9 (1938).
[87] *See e.g.* 30 C.F.R. §§ 221.11, 221.21, 221.32 (1942).
[88] *See e.g.* 43 C.F.R. §§ 3162.3-1-3162.5-2 (2014).
[89] *See* S. Rep. No. 985-2 (1937); H.R. Rep. No 1872-1 (1938); *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil and Gas Conservation of State of Montana*, 792 F.2d 782, 796 (9th Cir. 1986).
[90] 25 U.S.C. § 396a.

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of Sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of Sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development of oil or gas from land covered by such lease.[91]

While the Secretary of the Interior is delegated the authority to "make such rules and regulations as may be necessary for the purposes of carrying the provisions of the section into full force and effect," the IMLA imposes a fiduciary duty on the U.S. government.[92] Many regulations were drafted with the purpose of stressing that the Secretary of the Interior must act in the best interest of the tribe when regulating mineral leases on tribal lands.[93] Two of the regulations drafted by the BIA, 25 C.F.R. Sections 211.4 and 225.4, specifically relate to the authority delegated from the BIA to the BLM regarding mineral leases.[94] Section 211.4 relates to the BLM's delegated authority under the IMLA, whereas Section 225.4 regulates to the BLM's delegated authority under the IMDA.[95] Both provisions give the BLM authority to draft regulations only for the following purposes:

> (1) Approval of oil and gas operations; (2) "compliance . . . with the regulations in Title 43; (3) the "protect[ion] of other natural resources and the environmental quality"; (4) "protect[ion] of life and property"; (5) any process to ensure "the maximum ultimate recovery of oil and gas with minimum waste"; (6) "to enter into cooperative agreements with States [ ] and Indian tribes relative to oil and gas development and operations"; and (7) to "issue written and oral orders to govern specific lease operations."[96]

Although the authority delegated to the BLM under both Sections 211.4 and 225.4 appear nearly identical, a key difference exists.[97] Section 211.4 includes the words "as amended" and Section 225.4 does not.[98] This may mean that IMLA drafters meant to incorporate future changes through Section 211.4, but IMDA was not intend to incorporate changes after July 8, 1996.[99]

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[91] *Id.* at § 396d.
[92] *Id.*; *U.S. v. Navajo Nation*, 537 U.S. 488 (2003).
[93] *See* 25 C.F.R. §§ 211.1-211.43.
[94] 25 C.F.R. §§ 211.4, 225.4.
[95] *See id.*
[96] *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1181 n.10 (10th Cir. 2011) (quoting 43 C.F.R. § 3161.2).
[97] 25 C.F.R. §§ 211.4, 225.4.
[98] *See id. See also* Brief for Intervenor-Appellee Ute Indian Tribe, *State of Wyoming v. U.S. Dep't of the Interior* (2016), Nos. 16-8068, 16-2059, at *15-20.
[99] *See generally id.*; *Shoshone Indian Tribe of Wind River Reservation, Wyoming v. U.S.*, 52 Fed. Cl. 614 (Fed. Cl. 2002); *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *1-12;

E. Indian Mineral Development Act of 1982

Congress adopted the IMDA in 1982 to "further the policy of [tribal] self-determination and. . .to maximize the financial return tribes can expect for their valuable mineral resources."[100] To accomplish these objectives, the IMDA sought to remedy the major issues with the IMLA that placed restraints on tribal authority.[101] Specifically, the IMDA gives tribes more power and the federal government less power with mineral, including oil and gas, procurement on tribal lands.[102] Plainly stated, "IMDA applies to a broader spectrum of lands than IMLA, covers every mineral resource, permits mineral development arrangements of all types, and accords tribes increased control over, and potentially increased revenue from, mineral development on Indian lands."[103] Congress intended to leave the IMLA in place after adopting IMDA only "so that tribes that prefer to use the existing competitive leasing process can do so."[104]

IV. BLM Regulation of Hydrofracking: Fracking Rule Aims to Regulate Groundwater Contamination on Federal and Tribal Lands

On March 26, 2015, the BLM finalized the Fracking Rule, which it drafted in response to the risks posed by hydrofracking to groundwater.[105] To promulgate the Fracking Rule, the BLM drew its congressional grant of authority from four statutes.[106] The four statutes include the MLA, [107] FLPMA, [108] IMLA, [109] and IMDA.[110] Accordingly, the BLM drew its authority for public-land regulation from the FLPMA and MLA,[111] whereas the BLM claimed authority for tribal lands from the IMLA and IMDA.[112]

The BLM specifically drafted the Fracking Rule to address "public concern about whether fracturing can lead to or cause the contamination of

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United States v. Newmont USA Ltd., No. CV-05-020-JLQ, 2008 WL 4621566, at *2 (E.D. Wash. Oct. 17, 2008).
[100] S. Rep. No. 472, 97th Cong., 2d Sess. 2 (1982). *See Quantum Exploration Inc. v. Clark*, 780 F.2d 1457, 1458 (9th Cir. 1986).
[101] *See id.*
[102] 25 U.S.C. § 2105 (1988). *But see* S. Rep. No. 472, 97th Cong., 2d Sess. 5 (1982).
[103] Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541, 585 (1994).
[104] S. Rep. No. 472, 97th Cong., 2d Sess. 5 (1982).
[105] Fracking Rule, *supra* note 5.
[106] *See id.*
[107] 30 U.S.C. § 187.
[108] 43 U.S.C. §§ 1701-1787.
[109] 25 U.S.C. § 396.
[110] 25 U.S.C. §§ 2101-2108.
[111] *Id.* at §§ 1701-1787; 30 U.S.C. § 187.
[112] 25 U.S.C. §§ 396, 2101-2108.

underground water sources."[113] The public expressed concern through "increased calls for stronger regulation and safety protocols"[114] in light of scientific studies showing the connection between hydrofracking fluids and human health problems.[115] When drafting the Fracking Rule, the BLM received "more than 1.5 million [public] comments . . . [f]ollowing a robust and transparent public process."[116]

The Fracking Rule's regulatory scheme attempts to address three areas of oil and gas procurement on federal and tribal lands: (1) wellbore construction, (2) chemical disclosures, and (3) water management.[117] Specifically, the BLM promulgated the Fracking Rule with four main goals in mind. First, the BLM wants to "ensure the protection of groundwater supplies by requiring a validation of well integrity and strong cement barriers between the wellbore and water zones through which the wellbore passes."[118] Second, the Fracking Rule seeks to "increase transparency by requiring companies to publicly disclose chemicals used in hydraulic fracturing to the Bureau of Land Management through the website FracFocus, within 30 days of completing fracturing operations."[119] Third, the Fracking Rule imposes "higher standards for interim storage of recovered waste fluids from hydraulic fracturing to mitigate risks to air, water, and wildlife."[120] Finally, and perhaps most importantly, the Fracking Rule seeks to decrease the "risk of cross-well contamination with chemicals and fluids used in the fracturing operation, by requiring companies to submit more detailed information on the geology, depth, and location of preexisting wells to afford the BLM an opportunity to better evaluate and manage unique site characteristics."[121]

Thus, the rule requires full disclosure from fracking companies regarding fracking-fluid chemical ingredients and sets well construction standards to prevent leakage of fracking-fluid chemicals into the water supply.

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[113] BUREAU OF LAND MANAGEMENT, *supra*, note 106, at 16,128.
[114] *Id.*
[115] Henry A. Waxman, Edward J. Markey, & Diana DeGette. *Chemicals Used in Hydraulic Fracturing*, US House of Representatives Committee on Energy and Commerce (Apr. 2011); Colborn, *supra* note 38, at 1039-1056; Lisa Sumi, *Our Drinking Water at Risk: What EPA and the Oil and Gas Industry Don't Want Us to Know About Hydraulic Fracturing,* Earthworks Sanction Organization Oil & Gas Accountability Project (Apr. 2005), https://www.earthworksaction.org/files/publications/DrinkingWaterAtRisk.pdf (noting in 2005 that "in Alabama, Colorado, New Mexico, Virginia, West Virginia, and Wyoming, incidents have been recorded in which residents have reported changes in water quality or quantity following fracturing operations of gas wells near their homes.").
[116] BLM OFFICE OF THE SECRETARY OF THE INTERIOR, *Interior Department Releases Final Rule to Support Safe, Responsible Hydraulic Fracturing Activities on Federal and Tribal Lands* (Mar. 20, 2015), https://www.blm.gov/wo/st/en/info/newsroom/2015/march/nr_03_20_2015.html.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*

V. *State of Wyoming v. U.S. Dep't of the Interior* Erroneously Invalidated the Fracking Rule with Regard to Federal Lands, but Not Tribal Lands

Promptly after the BLM finalized the Fracking Rule, a few states—Wyoming, Colorado, North Dakota, and Utah—and the Ute Indian Tribe petitioned the U.S. District Court of Wyoming for review of the Fracking Rule.[122] This initial petition triggered a series of opinions that ultimately resulted in the June 21, 2016 decision, which held that the BLM lacked congressional authority to promulgate the Fracking Rule.[123] That decision, however, has been appealed and is currently docketed with the Tenth Circuit Court of Appeals. Before the district court issued its June 21, 2016 merits decision, it issued its preliminary injunction order. However, the Tenth Circuit ultimately vacated the district court's preliminary injunction.

A. Preliminary Injunction Litigation Preceding *State of Wyoming*: *Wyoming v. U.S. Dep't of the Interior*

On September 30, 2015, Wyoming, Colorado, North Dakota, Utah, and the Ute Indian Tribe filed a preliminary injunction to enjoin the BLM from enforcing the Fracking Rule pending merits litigation.[124] In deciding to grant the preliminary injunction, U.S. District of Wyoming Judge Skavdahl wrote a 29-page opinion outlining why the rule lacked a "rational justification"[125] and substantial supporting evidence.[126]

To find a lack of substantial supporting evidence, the court examined the findings published in the preamble of BLM's Fracking Rule.[127] The preamble expresses concern about blow-outs and spills of hydrofracking fluids caused by "unplanned surges of pressurized fluids from one oil and gas wellbore into another oil and gas wellbore."[128] However, Judge Skavdahl expressed skepticism over BLM's finding. While Judge Skavdahl conceded that these unplanned surges "have resulted in surface spills and caused the loss of recoverable oil and gas, they have not yet been shown to be a source of contamination of usable water."[129] Additionally, Judge Skavdahl dismissed[130] BLM's reference to growing "public concern" about the risks posed by the "chemicals used in fracturing process" to "human health."[131] The court found BLM's human-health concerns unpersuasive

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[122] *Wyoming*, 136 F.Supp.3d at 1317.
[123] *Id.*; *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *1.
[124] *Wyoming*, 136 F.Supp.3d at 1317.
[125] *Id*. at 1337.
[126] *Id*. at 1339.
[127] *Id*. at 1338.
[128] 80 Fed. Reg. at 16,193.
[129] *Wyoming*, 136 F.Supp.3d at 1317.
[130] *Id.* at 1338-39.
[131] 80 Fed. Reg. at 16,128.

because "both experts and government regulators have repeatedly acknowledged a lack of evidence linking the hydraulic fracturing process to groundwater contamination."[132]

The court also found that the law did not support a rational justification for BLM-authority in drafting the Fracking Rule.[133] To arrive here, Judge Skavdahl started with the premise that "the final rule raises the risk of groundwater contamination as a primary concern motivating the many provisions."[134] The court concluded that the 2005 amendments to the Energy Policy Act expressly removed the EPA's "regulatory authority over non-diesel hydraulic fracturing."[135] By expressly removing EPA authority, the Energy Policy Act "likewise precludes the BLM from regulating that activity, thereby removing fracking from the realm of federal regulation."[136]

Finally, the court noted that the BLM's Fracking Rule is inconsistent with the "administrative structure that Congress enacted into law."[137] The court reasoned the structure created by Congress through the SWDA, FLPMA, and MLA makes the EPA responsible for environmental-protection regulation, whereas land-management regulation is within the BLM's domain.[138]

Importantly, the court examined the Ute Indian Tribe's contention that "the Fracking Rule is contrary to the Federal trust obligation to Indian tribes."[139] As trustee of tribal lands, the federal government must satisfy its fiduciary duties to tribes.[140] Those fiduciary duties are codified in the IMDA and 25 U.S.C. Sections 2 and 3, which require the federal government to meaningfully and comprehensively consult with tribes during the regulatory planning process.[141] The Ute Indian Tribe claimed that the BLM breached its fiduciary duty in failing to engage meaningfully and comprehensively in tribal consultation.[142] However, in defense of fulfilling its trust obligation to tribes, the BLM contended that:

> It engaged in extensive tribal consultation when promulgating the Fracking Rule by holding four regional tribal consultation meetings ("information sessions") and distributing copies of a draft rule to affected tribes for comment in January 2012, and offering to meet individually with tribes after those regional meetings.[143]

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[132] *Wyoming*,136 F.Supp.3d at 1337.
[133] *Id.* at 1338-339.
[134] *Id.* at 1339.
[135] *Id.* at 1335.
[136] *Id.*
[137] *Id.* at 1336.
[138] *Id.* at 1336.
[139] *Id.* at 1328.
[140] 25 U.S.C. §§ 2-3, 396; 43 U.S.C. §§ 2101-2108.
[141] *Id.*
[142] *Wyoming*,136 F.Supp.3d at 1344.
[143] *Id.* at 1345 (citing 80 Fed. Reg. at 16,132).

From January 2012 to March 26, 2015—when BLM finalized the Fracking Rule—the BLM had only informally met with the Ute Indian Tribe twice.[144] However, throughout this three-year period the Ute Indian Tribe repeatedly told the BLM that the "BLM has not been consulting with the Tribes in good faith."[145]

Given the scant consultation efforts by the BLM, the court held that the BLM breached its fiduciary duties because the BLM's consultation efforts "reflect little more than that offered to the public in general."[146] Merely consulting with the tribes a little more than the public is a breach, because the IMDA and "DOI policies and procedures require *extra meaningful* efforts to involve tribes in the decision-making process."[147] The lack of meaningful tribal consultation is not only evident by only meeting with the tribes twice, but it is also evident on the face of the Fracking Rule.[148] Tribal consultation resulted in only two minor changes to the Fracking Rule:

The preamble cites only two changes resulting from tribal consultations: a clarification that tribal and state variances are separate from variances for a specific operator, and a requirement that operators certify to the BLM that operations on Indian lands comply with applicable tribal laws.[149]

These two minor changes do not accurately reflect major tribal concerns over the Fracking Rule.[150] For example, several tribes, including the Ute Indian Tribe, continuously sought to "assert their sovereignty by encouraging an 'opt out' provision for Indian tribes" or a provision in the Fracking Rule that would allow the tribes to promulgate their own regulations for hydrofracking.[151] Both options were ignored in the final rule. As a result, the district court granted the preliminary injunction because the BLM acted arbitrarily and capriciously in ignoring tribal concerns, which resulted in a fiduciary breach.

The BLM appealed the district court's September 30, 2015 decision and filed a motion to stay the district court proceedings pending appeal to the Tenth Circuit.[152] On December 17, 2015, however, Judge Skavdahl opined that "it would be a waste of resources to pursue further litigation while the Tenth Circuit is reviewing the Court's ruling that BLM lacks legal authority to adopt the Rule."[153] On July 13, 2016 the Tenth Circuit released a short, three sentence opinion ordering the district court to vacate its September 30, 2015 decision. About one month before the Tenth Circuit published its July 13, 2016 order, the

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[144] *See* 80 Fed. Reg. at 16,132.
[145] *Wyoming*,136 F.Supp.3d at 1345. *See* Brief for Intervenor-Appellee Ute Indian Tribe, *State of Wyoming v. U.S. Dep't of the Interior* (2016), Nos. 16-8068, 16-2059, at *1.
[146] *Id.* at 1345-46.
[147] *Id.* at 1346 (emphasis in original).
[148] *Id.*
[149] *Id.* (citing 80 Fed. Reg. at 16,132).
[150] *Id.*
[151] *Id.*
[152] *Wyoming v. Sierra Club*, No. 15-8126, 2016 WL 3853806, at *1 (10th Cir. July 13, 2016).
[153] *Wyoming v. United States Dep't of Interior*, No. 2:15-CV-041-SWS, 2015 WL 9463708 (D. Wyo. Dec. 17, 2015).

U.S. District Court decided the separately filed case entitled *State of Wyoming v. U.S. Dep't of the Interior*.[154]

B. District Court's Decision in *State of Wyoming v. U.S. Dep't of the Interior*

On June 21, 2016, the U.S. District Court of Wyoming revisited the validity of the Fracking Rule in *State of Wyoming v. U.S. Dep't of the Interior*. Again Judge Skavdahl held that the BLM violated the scope of authority granted by Congress when drafting the Fracking Rule.[155] Like the September 30, 2015 preliminary injunction decision, *State of Wyoming* has been appealed to the Tenth Circuit and is currently awaiting review.[156]

Judge Skavdahl's June 21, 2016 opinion largely recapitulates his September 30, 2015 opinion except that he omitted the Fracking Rule discussion regarding tribal lands.[157] With regard to the Fracking Rule for federal lands, Judge Skavdahl provided three independent reasons for setting aside BLM's Fracking Rule.[158] First, the court reasoned that agency action must be limited to the authority Congress delegate, but the BLM acted outside of its congressionally delegated authority in drafting the Fracking Rule.[159] Second, the court reasoned that the EPA has "regulatory dominion" over hydrofracking, which precluded the BLM from promulgating the Fracking Rule.[160] Finally—in a similar, but distinct argument—the court reasoned that the BLM is not permitted to administer the FLPMA or MLA in "a manner that is inconsistent with the administrative structure that Congress enacted into law."[161] Therein, the Fracking Rule offends the structure designed by Congress.[162]

1. The Fracking Rule and BLM's Delegated Authority

The court reasoned through a separation of powers argument that the BLM did not have authority to regulate hydrofracking.[163] Congress covered hydrofracking in the SDWA, but ultimately chose to deregulate hydrofracking in its 2005 amendments to the Energy Policy Act.[164] The court framed the issue as "not whether hydraulic fracturing is good or bad for the environment or the citizens of the United States," but rather "whether Congress (the legislative

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[154] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *1.
[155] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *1-12.
[156] *See id.* Oral argument hearing scheduled for March 22, 2017 was continued on March 16, 2017, and will be rescheduled upon the competition of supplemental briefing. Supplemental briefing for the U.S. Bureau of Land Management due on May 16, 2017. *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* at *1-9, 12.
[160] *Id.* at *9-12.
[161] *Id.* at *10.
[162] *Id.*
[163] *Id.*
[164] *Id.*

branch) delegated authority to the Department of Interior to regulate hydraulic fracturing."[165] After narrowly framing the issue, the court emphasized that "regardless of how serious the problem an administrative agency seeks to address;. . .it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'"[166]

To support the notion of limited agency power, the court drew heavily on Section 706 of the Administrative Procedures Act ("APA").[167] Section 706 of the APA allows a court to set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; or . . . [is] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[168] Citing the APA, the court said that, while agency action usually is entitled to the "presumption of regularity," the presumption of regularity does not "shield the agency from a 'thorough, probing, in-depth review.'"[169] Thus, the BLM must pass the *Chevron* test.[170]

The court offered several reasons under its congressional delegation analysis for why the BLM violated *Chevron*. First, the court asserted that Section 187 of the MLA "does not reflect a broad authority to the BLM to regulate for the protection of the environment. . .instead the language requires only that certain, specific lease provisions appear in all federal oil and gas leases for the safety and welfare of miners' prevention and undue waste."[171] Second, the court reasoned that Congress did not delegate authority to BLM to regulate hydrofracking under the FLPMA, because the FLPMA's multiple use and sustainable yield mandate is too general and does not specifically mention hydrofracking.[172] Instead, the multiple use and sustainable yield mandate is aimed at "striking a balance among the many competing uses to which land can be put."[173] According to the court, the FLPMA is a management statute and not an environmental protection statute: "Nothing in FLPMA provides BLM with specific authority to regulate hydraulic

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[165] *Id.* (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).
[166] *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).
[167] *Id.* at *3; 5 U.S.C. § 706(2)(A) &(C).
[168] 5 U.S.C. § 706 (1966).
[169] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *3 (quoting *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994)).
[170] "Under *Chevron,* a reviewing court must first ask whether Congress has directly spoken to the precise question at issue. If Congress has done so, the inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress. But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. Such deference is justified because the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." *Id.* at *3 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).
[171] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *7.
[172] *Id*. at *8.
[173] *Id.* (quoting *Norton*, 542 U.S. at 58).

fracturing or underground injections of any kind; rather, FLPMA primarily establishes congressional policy that the Secretary manage the land use planning statute." [174]

The court's delegation argument, however, fails in a couple key respects. First, the court's characterization of the FLPMA ignores the unnecessary degradation requirement built within the "sustainable yield" principle. The unnecessary degradation requirement forces the BLM to manage lands in a manner to prevent federal natural resources, such as drinking water, from becoming contaminated.[175] This requirement applies to both surface and subsurface resources,[176] and creates a regulatory overlap between the EPA and BLM.[177] Second, the court oversimplified and mischaracterized MLA Section 187, since Section 187 expressly gives the BLM authority to regulate "for the protection of the interest of the United States. . .and for safeguarding of the public welfare."[178] Public welfare is much broader than "welfare of miners' prevention and undue waste," and water contamination is definitely a public-protection-welfare issue.[179] Finally, a well-developed body of scientific research suggests that human-health effects may be caused by hydrofracking fluids.[180]

2. EPA Regulatory Dominion Over Fracking Precluded BLM Authority

Next, *State of Wyoming* claimed that the "explicit removal of the EPA's regulatory authority over non-diesel hydraulic fracturing likewise precludes the BLM from regulating that activity, thereby removing fracking from the realm of federal regulation."[181] Under this argument, the court ruled that the BLM had acted arbitrarily, capriciously, and outside of its congressional grant of authority.[182] The BLM acted arbitrarily, because Congress already created the SDWA's UICP to cover such activities, but Congress expressly excluded subsurface injection of hydrofracking chemicals from the program.[183] Thus, "it cannot be reasonably concluded that Congress intended regulation of the same

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[174] *Id.*
[175] *See* 43 U.S.C. § 1732(b); *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011).
[176] *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72.
[177] *See id.*; *Mineral Pol'y Ctr. v. Norton*, 292 F.Supp. 2d 30, 42 (D. D.C. 2003).
[178] 30 U.S.C. § 187.
[179] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *7. *Compare id. with* 30 U.S.C. § 187.
[180] *See* U.S. ENVTL. PROTECTION AGENCY, *supra* note 1; EPA March 2015 Study: Analysis of Hydraulic Fracturing Fluid Data from the FracFocus Chemical Disclosure Registry 1.0, 1-155 (*available* at https://www.epa.gov/sites/production/files/2015-03/documents/fracfocus_analysis_report_and_appendices_final_032015_508_0.pdf); Henry A. Waxman, Edward J. Markey, & Diana DeGette. *Chemicals Used in Hydraulic Fracturing*, US House of Representatives Committee on Energy and Commerce (Apr. 2011); Colborn, *supra* note 38, at 1039-1056.
[181] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *10.
[182] *Id.*
[183] *Id.*

activity would be authorized under a more general statute administered by a different agency."[184] The court emphasized that the regulatory authority proclaimed by an agency does not control but, rather, Congress' intent controls.[185] Therein, "Congressional [*sic*] intent as expressed in the 2005 EP Act indicates clearly that hydraulic fracturing is not subject to federal regulation unless it involves the use of diesel fuels."[186] In making this argument, the court relied on separation of powers principle, and the court expressed concern over agency aggrandizement.[187] In illustrating this point, Judge Skavdahl posited that "if this Court were to" recognize BLM's authority "there would be no limit to the scope or extent of Congressionally [*sic*] delegated authority BLM has, regardless of topic or subject matter."[188]

Judge Skavdahl's separation of powers argument, however, is a rather dramatic mischaracterization of both BLM's asserted FLPMA authority and the purported scope of the Fracking Rule.[189] The Fracking Rule is intended to prevent the significant degradation of our nation's groundwater,[190] which is different from the purpose of the SDWA's UICP.[191] The UICP is meant to safeguard public health.[192] As such, BLM seeks to prevent negative impacts to public natural resources, whereas the EPA is tasked with preventing negative impacts to public health.[193]

3. Fracking Rule is Inconsistent with the Administrative Structure that Congress Enacted into Law

Finally, *State of Wyoming* emphasized the different roles of BLM and EPA by noting that "[t]he Executive Branch is not permitted to administer [an] Act in a manner that is inconsistent with the administrative structure that Congress enacted into law."[194] Here, the court found significant that the FLPMA provides the BLM with land-management regulatory authority, whereas the SDWA provides the EPA with environmental-protection regulatory authority.[195] To prove this point, *State of Wyoming* cites[196] the U.S. Supreme Court's *Cal.*

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[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.* at *11.
[188] *Id.*
[189] *Id.*
[190] *See* Fracking Rule, *supra* note 5.
[191] *See* 42 U.S.C. § 300h.
[192] *See* ENVIRONMENTAL PROTECTION AGENCY, *Safe Drinking Water Act Underground Injection Control Provisions* (Oct. 17, 2016), https://www.epa.gov/uic/underground-injection-control-regulations-and-safe-drinking-water-act-provisions.
[193] *See id.*
[194] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *10 (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).
[195] *See Id.*at *8-10.

Coastal Comm'n v. Granite Rock Co. decision, which distinguishes between environmental regulation and land use planning:

> The line between environmental regulation and land use planning will not always be bright. . . .However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities. . . .Congress has also illustrated its understanding of land use planning and environmental regulation as distinct activities by delegating the authority to regulate these activities to different agencies. . . .Congress clearly envisioned that although environmental regulation and land use planning may hypothetically overlap in some instances, these two types of activity would in most cases be capable of differentiation.[197]

Certainly, the Supreme Court was correct in distinguishing the two and in contemplating potential overlap; however, *State of Wyoming*'s application of *California Coastal Comm'n* to the Fracking Rule is misguided. First, *State of Wyoming* collapses FLPMA and MLA together and mischaracterizes BLM's authority as merely being land use planning.[198] FLPMA is more than a land use planning statute, since the FLPMA broadly focuses on resource management.[199] Second, *Cal. Coastal Comm'n* is inapplicable, since *Cal. Coastal Comm'n* distinguished between a State's land-use planning authority and the environmental regulation of the U.S. Forest Service.[200] Instead, the Fracking Rule deals with the overlapping authority of two federal agencies, and the BLM and EPA have regulated the same regulatory sphere in the past.[201] Finally, the court

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[196] *Id.* at *8-9.
[197] *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587-88 (1987).
[198] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *8-10.
[199] *See* 43 U.S.C. § 1701(a)(8); Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005) ("When dispute involves validity of federal agency action, preempted force of action does not depend upon express congressional authorization. . .law but, rather, if Congress has authorized administrator to exercise his discretion, judicial review is limited to determining whether administrator has exceeded his authority or acted arbitrarily, and when . . . whether regulations are reasonable, authorized and consistent with statute.").
[200] *See Cal. Coastal Comm'n*, 480 U.S. at 587-88.
[201] For example, under the CalFed Water Quality Rule, the EPA and BLM expressly agreed to "work closely. . .to address the severe and continuing decline" in water quality in the San Francisco Bay and Delta. U.S. EPA, *Water Quality Standards for Surface Waters of the Sacramento River, San Joaquin River, and San Francisco Bay and Delta of the State of California*, 60 Fed. Reg. 4,664 (Jan. 24, 1995) (codified in 40 C.F.R. Part 131). While both agencies managed within the same regulatory space, the BLM was primarily responsible for the use and contamination of Delta/Bay water from corporate farms especially in the San Joaquin Valley area. *Id.* The EPA handled the reporting of water quality standards under the CWA. *Id.* As shown by CalFed, the BLM is not precluded by the EPA regarding water quality standards. *Id.*

somehow seems to think that the Fracking Rule is more about environmental protection than resource management,[202] but that is not accurate.[203] As previously stated, the BLM was fully acting within its FLPMA authority to prevent the degradation of groundwater.[204] Nothing prevents two agencies from operating in the same regulatory sphere.[205]

VI. BLM's Authority to Promulgate Fracking Rules For Publically-owned, Federal Lands

A. BLM Has Broad Authority to Regulate Hydrofracking

The BLM had authority to promulgate the Fracking Rule for federal lands because the rule is wholly within the BLM's organic statute and is a reasonable interpretation of the FLPMA and MLA.[206] FLPMA is the BLM's "organic act," which "establishes the agency's multiple-use and sustained yield mandate to serve present and future generations."[207] The sustained yield mandate is broad and gives the BLM authority for the "management, use, and protection of the public lands."[208] Certainty it has never been disputed—until the District of Wyoming

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Instead, as in CalFed, the BLM is traditionally responsible for the use of the water resources by corporations and the EPA is responsible other issues arising under the SDWA and CWA. *Id.* CalFed's inter-agency cooperation and modular approach has been a huge success and operates seamlessly even today. CA.GOV, *CalFed Bay-Delta Program, The CalFed Agencies*, *available at* http://calwater.ca.gov/calfed/index.html (last visited Mar. 16, 2017). Despite the CalFed's extraordinary example of inter-agency cooperation, sometimes agencies and courts disagree as to whether one agency's promulgated regulation is invalid because that action is within another agency's authority, as was litigated in *State of Wyoming v. United States Department of the Interior*. *See State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *1-10. *See also United States v. Vernon Home Health, Inc.*, 21 F.3d 693 (5th Cir. 1994).

[202] *See State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *8-10.

[203] *See* THE ENVTL COUNSELOR, *Green groups win lifting of injunction in federal fracking rule case (C.A.10)*, 336 Env. Couns. NL 2 (Aug. 2016) (*"*The BLM's rule seeks to require oil and gas drillers to disclose the chemicals used in the fracking process and take certain steps to prevent leakage from wells on federally owned land.").

[204] *See* Fracking Rule, *supra* note 5.

[205] Inter-agency regulatory competition "generate[s] benefits that outweigh costs." *See* Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 VA. L. REV. 685, 690-94 (2009). Inherent in a benefits-costs approach to interagency competition is the economic theory of regulation. Xingxing Li, *An Economic Analysis of Regulatory Overlap and Regulatory Competition: The Experience of Interagency Regulatory Competition in China's Regulation of Inbound Foreign Investment*, 67 ADMIN. L. REV. at 690 (2015). The economic theory of regulation generally takes two forms, which include jurisdictional competition and competition in the same regulatory space. The regulatory space jurisdiction may be applicable to the BLM Fracking Rule because it stands for the notion that "different federal regulators may engage in competition for authority over the same regulatory matter." Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 8 (1977).

[206] *See* Fracking Rule, *supra* note 5.

[207] Pub. L. 94-579, App'x A (Oct. 21, 1976), *as amended through* Dec. 19, 2014.

[208] *Norton*, 542 U.S. at 56.

issued its June 21, 2016 *State of Wyoming* decision—whether FLPMA's "multiple-use" mandate includes environmental protection.[209] Well-established case law suggests inclusion.[210]

In *Utah v. U.S. Dep't of the Interior*, the Tenth Circuit held that "under the multiple use requirement, BLM must strike a balance that avoids 'permanent impairment of the productivity of the land and quality of the environment.'"[211] The court directly drew from the language of FLPMA Section 1701 that instructs the BLM to manage lands "in a manner which recognizes the Nation's need for domestic sources of *minerals*, food, timber, and fiber from the public lands."[212] This gives the BLM a broad discretion in managing mineral procurement in an environmentally responsible manner.[213] By promulgating the Fracking Rule, the BLM follows its organic statue by ensuring the responsible procurement of natural gas in a manner that preserves groundwater for future generations.[214]
BLM's organic statute is much more than a planning statute. FLPMA also allows the BLM to promulgate regulations that protect the environment from "unnecessary or undue degradation."[215] Courts have held that the undue degradation rule extends to subsurface mineral-extraction activities. [216] Like Section 1701, Section 1732 gives the BLM much deference, especially when determining the degree natural gas extraction unduly degrades subsurface resources.[217] In *Theodore Roosevelt Conservation P'ship v. Salazar*, for example, the D.C. Circuit held that the undue degradation standard must be understood in light of BLM's broad, "overarching mandate that [it] employ principles of multiple use and sustained yield."[218] Importantly, the court noted that:

> By following FLPMA's multiple-use and sustained-yield mandates, the Bureau will often, if not always, fulfill FLPMA's requirement that it prevent environmental degradation because the former principles already require the Bureau to balance potentially degrading uses—e.g., mineral extraction, grazing, or timber harvesting—with conservation of the natural environment. If the Bureau appropriately balances those uses and follows principles of sustained yield, then generally it will have taken the steps necessary to prevent unnecessary or undue degradation.[219]

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[209] *See State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *1-10.
[210] *See Utah v. U.S. Dep't of the Interior*, 535 F.3d 1184, 1188 (10th Cir. 2008).
[211] *Id.* at 1187 (quoting 43 U.S.C. § 1702(c)).
[212] 43 U.S.C. § 1701(a)(5).
[213] *See id.*
[214] *See id.*
[215] 43 U.S.C. § 1732(b).
[216] *See Mineral Policy Center*, 292 F.Supp.2d at 45-6.
[217] *See Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72.
[218] *Id.* at 77.
[219] *Id.* at 77-8.

By applying the D.C. Circuit's conception of the undue degradation standard and multiple use and sustained yield mandate, it is evident that the Fracking Rule falls within the BLM's broad authority under the FLPMA.

B. Neither the SDWA Nor the Halliburton Loophole Prevents the BLM from Regulating Hydrofracking Under the Fracking Rule

Neither the SDWA nor the Halliburton Loophole prevents the BLM from regulating hydrofracking on public lands, because the Fracking Rule is: (1) consistent with the SDWA legislative history; (2) supported by *Massachusetts v. EPA*; (3) authorized by *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*; and (4) consistent with other BLM-EPA dual-management schemes.[220] In determining whether the BLM acted unreasonably in promulgated the Fracking Rule, a court must find that Congress "unambiguously expressed intent" to preclude the BLM from this regulatory sphere. [221] No unambiguity exists. [222]

1. SDWA Legislative History Supports BLM's Authority for the Fracking Rule

The legislative history of the SDWA contemplates BLM's continued regulation of underground natural gas extraction under the MLA.[223] Congress wanted to "preserve the Interior Department's efforts. . .to prevent groundwater contamination under the Mineral Leasing Act."[224] Significantly, Congress expressly explained that the Commerce Committee "does not intend any of the provisions of the [SDWA] to repeal or limit any authority the BLM may have under any other legislation."[225] But when *State of Wyoming* held that the SDWA precluded the Fracking Rule, the court completely ignored the SDWA's legislative history.[226]

Additionally, the fact that Congress amended the Energy Policy Act of 2005 to reinstate the Halliburton Loophole and exempt hydrofracking from the SDWA's UICP means nothing in terms of the Fracking Rule.[227] Instead, what Congress did not do is more important.[228] When Congress exempted hydrofracking from the UICP in 2005, it could have easily amended the FLPMA

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[220] *See* 42 U.S.C. § 300h.
[221] *Chevron, U.S.A., Inc.*, 467 U.S. at 843.
[222] *See id.*; Fracking Rule, *supra* note 5.
[223] *See* H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. (1974).
[224] *Id.*
[225] *Id.*
[226] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *1. *See* Brief for Intervenor-Appellant Sierra Club, *State of Wyoming v. U.S. Dep't of the Interior* (2016), Nos. 16-8068, 16-2059, at *10-2.
[227] *See id.*
[228] *See id.*

and MLA as well, but Congress chose not to.[229] Supporting Congress' inaction is the well-established canon that "Congress is assumed to act with the knowledge of existing law and interpretations when it passes new legislation."[230] Applying this canon, the U.S. Supreme Court has confirmed agency authority similar to the authority the BLM asserted in promulgating the Fracking Rule.[231]

In making the 2005 Energy Policy Act amendments, Congress undertook a substantial reevaluation of hydrofracking regulation and the injection of underground chemicals.[232] Although Congress was aware of how the BLM could use the FLPMA and MLA regarding hydro-fracking regulation, Congress chose not to limit the BLM's authority under either the FLPMA or MLA.[233] This inaction is significant.[234] Therefore, *State of Wyoming* wrongly claimed that "it defies common sense for the BLM to argue that Congress intended to allow it to regulate the same activity under a general statute that says nothing about hydraulic fracturing."[235]

2. Overlapping Agency Authority is Permitted Under *Massachusetts v. EPA*

State of Wyoming was also incorrect to suggest that it defies common sense to think that Congress retained BLM's authority while limiting EPA's authority over hydrofracking.[236] The court's analysis is outdated, since the U.S. Supreme Court has already overturned such thinking.[237]

Over ten years ago, in the landmark *Massachusetts v. EPA* decision, the Court reminded the EPA that obligations of two federal agencies "may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."[238] *Massachusetts* involved a situation similar to that in *State of Wyoming*, which turned on the overlapping authority between the EPA and Department of Transportation ("DOT").[239] The EPA argued that it was precluded from regulating carbon dioxide as an air pollutant under Section 202(a)(1) Clean Air Act ("CAA").[240] CAA Section 202(a)(1) provides that the EPA must set applicable emissions standards for classes of motor vehicles that emit air pollutants that "may reasonably be anticipated to endanger public health or welfare."[241] The EPA contended that the only means to regulate carbon

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[229] *See id.*
[230] *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 n.66 (1982).
[231] *C.f. id.*; *Massachusetts v. EPA*, 127 S.Ct. 1438, 1462 (2007).
[232] *See id.*
[233] *See id.*
[234] *See id.*
[235] *Id.*
[236] *See id.*
[237] *Massachusetts*, 127 S.Ct. at 1462.
[238] *Id.*
[239] *Id.* at 1443.
[240] *Id.*; 42 U.S.C. § 7521(a)(1) (2018).
[241] *Massachusetts*, 127 S.Ct. at 1443. At issue for the EPA was the scope of Section 202(a)(1) of the CAA, which provides that: "The [EPA] Administrator shall by regulation prescribe (and from

dioxide was under the mileage standards "Congress has assigned to the [DOT]" under Section 2(5) of the Energy Policy and Conservation Act ("EPCA").[242] To bolster its argument, the EPA explained, "if carbon dioxide were an air pollutant, the only feasible method of reducing tailpipe emissions would be to improve fuel economy."[243] The EPA said that its regulation of carbon dioxide under CAA Section 202(a)(1) would be either in conflict with the DOT authority or superfluous.[244] Its regulation would be either in conflict with the DOT or superfluous, because "Congress has already created detailed mandatory fuel economy standards subject to" DOT administration. [245] Because Congress expressly assigned motor vehicle carbon dioxide regulation to the DOT through the EPCA, EPA thought the EPCA completely absolved it of obligations under the CAA.

The Court found EPA's argument "unpersuasive"[246] by holding that agency overlap does not preclude both agencies from regulating in the same regulatory sphere.[247] Specifically, the Court noted that "DOT's mandate to promote energy efficiency by setting mileage standards may overlap with EPA's environmental responsibilities in no way licenses EPA to shirk its duty to protect the public 'health' and 'welfare.'"[248] EPA's CAA Section 202 obligations are independent of the DOT's EPCA Section 2(5) obligations.[249] In reaching this conclusion, the Court relied on commonsense: "While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete."[250] Because Congress chose to broadly word Section 202(a)(1), Congress made an "intentional effort to confer the flexibility

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time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. . . ." 42 U.S.C. § 7521(a)(1). The EPA denied that "carbon dioxide" fit within the statutory definition of "air pollutant." *Massachusetts*, 127 S.Ct. at 1462. CAA defines "air pollutant as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g). In contrast, the DOT statutory obligation arises under the Energy Policy and Conservation Act Section 2(5). 42 U.S.C. § 6201(5). Section 2(5) requires the DOT "to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products."

[242] *Massachusetts*, 127 S.Ct. at 1443.
[243] *Id.* at 1451.
[244] *Id.*
[245] *Id.*
[246] *Id.* at (quoting 42 U.S.C. § 7521(a)(1)).
[247] *Id.* at 1462.
[248] *Id.*
[249] *See id.*
[250] *Id.*

necessary to forestall such obsolescence."[251] As such, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. . .it demonstrates breadth."[252]

Like *Massachusetts*, Congress chose to word the FLPMA broadly by giving the BLM authority to promulgate regulations under Section 1732(b).[253] Section 1732(b) allows the BLM to manage public mineral resources in a manner that prevents unnecessary degradation.[254] BLM's broad Section 1732(b) power is supported by the broad definition of the multiple use and sustainable yield mandate, which suggests inherent flexibility necessary to change with mineral-extraction techniques over time.[255]

Additionally, like the *Massachusetts* regulations, Congress had the opportunity to limit BLM's authority under FLPMA and MLA when it limited EPA's the SDWA's UICP authority, but Congress chose not to limit BLM's authority.[256] Congress likely chose not to limit BLM's authority, because as *State of Wyoming* concedes, the BLM and EPA have wholly independent obligations under the different statutes although their spheres may overlap.[257] Even if Congress did not contemplate the differences between the BLM and EPA's obligations, BLM must receive *Chevron* deference when interpreting its own jurisdictional scope.[258]

3. *Chevron* Deference Applies to the BLM's Interpretation of Its Own Jurisdictional Scope

As when examining the scope of any agency action, *Chevron USA, Inc. v. Natural Resource Defense Council, Inc.* must be examined.[259] *Chevron* guides courts in reviewing agency interpretation.[260] Under the *Chevron* two-part analysis, courts are "instructed to defer to an agency interpretation unless, first, Congress has directly spoken to the precise issue, or second, the Agency's construction does not fall within some reasonable range of interpretations of the statute."[261] By using the traditional *Chevron* two-step, *State of Wyoming* held that Congress "has

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[251] *Id.*
[252] *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998).
[253] *See Massachusetts*, 127 S.Ct. at 1462; 43 U.S.C. § 1732(b).
[254] *See* 43 U.S.C. § 1732(b).
[255] *See id.* at § 1702(c). *See also Norton*, 542 U.S. 56-9.
[256] *See* 43 U.S.C. §§ 1701(a)(7), 1702(c); 42 U.S.C. §§ 300h-f; 30 U.S.C. §§ 181, 187; *Massachusetts*, 127 S.Ct. at 1462; *Yeskey*, 524 U.S. at 212.
[257] *C.f. State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *1; *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295 (D. Vt. 2007) (Preemption doctrines do not apply to the interplay between the EPA authority to regulate carbon dioxide under the CAA and the DOT's authority to promote energy efficiency by setting mileage standards under the EPCA.).
[258] *See Chevron, U.S.A., Inc.*, 467 U.S. at 843.
[259] *Id.*
[260] *Id.*
[261] Jeffrey M. Gaba, *Regulation by Bootstrap: Contingent Management of Hazardous Wastes Under the Resource Conservation and Recovery Act*, 18 YALE J. ON REG. 85, 118 (2001) (citing *Chevron, U.S.A., Inc.*, 467 U.S. at 837).

expressly removed federal agency authority to regulate the activity, making its intent clear" in the 2005 amendments to the Energy Policy Act.[262] However, as previously discussed, this part of the *State of Wyoming*'s decision is incorrect as a matter of law under *Massachusetts v. EPA*.[263] Nevertheless, *State of Wyoming* proceeded to the second step of *Chevron* by arguing that BLM's Fracking Rule falls outside of the reasonable range of authority granted to it under the FLPMA and MLA.[264] Here, the court admonishes the BLM by claiming that it stretches "the outer limits of its 'delegated' statutory authority by revising and reshaping legislation."[265] However, a special brand of *Chevron* deference exists when an agency interprets its own jurisdictional scope, which *State of Wyoming* fails to analyze comprehensively.[266]

The brand of *Chevron* that addresses an agency's own interpretation of its jurisdictional scope "has been articulated in a variety of ways, ranging from concerns about agency aggrandizement and self-interest, to traditional common law retrains on an entity's judging the scope of its own jurisdiction, to problems arising when agencies enter areas beyond the scope of their expertise."[267] *State of Wyoming* attempted to fit all of these concerns under the umbrella of *Utility Air Regulatory Group v. EPA*. In *Utility Air Regulatory Group*, the Supreme Court noted:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," [the Court] typically greet[s] its announcement with a measure of skepticism. [The Court] expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[268]

This is *State of Wyoming*'s only discussion on the special type of *Chevron* deference dealing with agency-discretion for determining its own jurisdictional scope.[269]

Chevron deference regarding the scope of an agency's jurisdiction is much more complex than purported by *State of Wyoming*.[270] For example, the most

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[262] *State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *12.
[263] *See Massachusetts*, 127 S.Ct. at 1462.
[264] *See State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *12.
[265] *Id.*
[266] *See id.*; *Chevron, U.S.A., Inc.*, 467 U.S. at 843.
[267] Jeffrey M. Gaba, *Regulation by Bootstrap: Contingent Management of Hazardous Wastes Under the Resource Conservation and Recovery Act*, 18 YALE J. ON REG. 85, 118 (2001) (citing Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990); Quincy M. Crawford, Comment, Chevron *Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957 (1994)).
[268] *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *Food & Drug Admin. v. Brown & Williamson*, 529 U.S. 120, 159-60 (2000)).
[269] *See generally State of Wyoming*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *1-12.

comprehensive analysis for *Chevron* deference regarding agency-jurisdictional scope remains Justice Scalia's *Mississippi Power & Light Co. v. Mississippi* concurrence.[271] In *Mississippi Power*, Justice Stevens wrote for the majority, but gave short shrift to the agency-jurisdictional issue by merely noting that the Federal Energy Regulatory Commission's ("FERC") "jurisdiction had been established" over the matter.[272] Nevertheless, Justice Scalia set forth a test for determining the appropriate level of deference courts should give agency interpretations of their own jurisdictional scope.[273]

Justice Scalia offered three considerations a court should give in determining agency-jurisdictional interpretations.[274] First, courts must give deference to an agency-jurisdictional interpretation if "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority."[275] Nevertheless, Justice Scalia conceded that under this consideration "[v]irtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'"[276] Second, "deference in jurisdiction matters is appropriate if it is consistent with the general rationale for deference: Congress would *naturally expect* that the agency would be responsible, within its broad limits, for resolving statutory authority or jurisdiction."[277] Third, it is evident from the statutory language that "Congress would neither anticipate nor desire ambiguity" in the agency-regulatory scheme.[278]

Under Justice Scalia's *Mississippi Power* approach, it is evident that the BLM's self-defined jurisdictional scope of the FPLMA and MLA comports with *Chevron* and *Mississippi Power*.[279] When Congress enacted the MLA, it would have naturally expected the BLM to regulate hydrofracking on public lands because hydrofracking is inseparably linked to natural gas leases.[280] Moreover, Congress broadly worded the FLPMA's unnecessary degradation mandate, which logically encompasses groundwater.[281] Finally, it is difficult to imagine that Congress desired ambiguity in its regulation of hydrofracking, which is critical to the Nation's energy production.[282] When Congress amended the SDWA's UICP

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[270] *Compare id. with* Quincy M. Crawford, Comment, Chevron *Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957 (1994)).

[271] *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 356-57 (1988). Recent cases applying the test articulated in Justice Scalia's concurrence include, for example: *F.E.R.C. v Electic Power Supply Ass'n*, 136 S. Ct. 760 (2016); *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016); *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863 (2013).

[272] *Mississippi Power & Light Co.*, 487 U.S. at 374.

[273] *Id.* at 380-81 (Scalia, J., concurring).

[274] *See id.* (Scalia, J., concurring).

[275] *Id.* at 380 (Scalia, J., concurring).

[276] *Id.* (Scalia, J., concurring).

[277] *Id.* at 381 (Scalia, J., concurring) (emphasis added).

[278] *Id.* at 382 (Scalia, J., concurring).

[279] *See id.*; *Chevron, U.S.A., Inc.*, 467 U.S. at 843.

[280] *See* 30 U.S.C. §§ 187-189.

[281] *See* 43 U.S.C. § 1702.

[282] *See* H.R. Rep. No. 93-1185, 93d Cong. 2d Sess. (1974).

in 2005, it had the opportunity to also amend the FLPMA, but chose not to.[283] As such, the BLM must receive *Chevron* deference in defining its jurisdictional scope regarding hydrofracking.

4. The EPA and BLM Balance Dual Roles in Other Regulatory Spheres and Hydrofracking is No Different

The EPA and BLM balance dual roles over other environmental resources and the Fracking Rule is no different. For example, under the CWA Section 404, the EPA regulates wetlands.[284] "Wetlands are increasingly seen as critical aspects of the ecosystem that not only support wildlife, but also purify water and limit flooding."[285] But under 40 C.F.R. Section 122.3(e) the EPA expressly excluded from the Section 404 permitting process "pollutants from nonpoint-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands."[286]

Despite EPA's regulation, however, the BLM continues to regulate such activities under its FPLMA authority.[287] Those regulations are codified in 43 C.F.R. Sections 4180.1 and 4180.2.[288] Section 4180.1 focuses on rangeland health, whereas Section 4180.2 sets the rangeland standards and guidelines for grazing administration.[289] Section 4180.1 sets the policy for why the BLM should protect wetlands under the FLPMA by acknowledging that:

> Watersheds are in, or are making significant progress toward, properly functioning physical condition, including their upland, riparian-wetland, and aquatic components; soil and plant conditions support infiltration, soil moisture storage, and the release of water that are in balance with climate and landform and maintain or improve water quality, water quantity, and timing and duration of flow.[290]

After announcing the importance of wetlands in Section 4180.1, the BLM provides standards that, at first glance, appear to conflict with EPA's exceptions under 40 C.F.R. Section 122.3.[291] Section 4180.2 provides that the BLM will regulate and manage grazing within wetlands and other ephemeral waterways.[292]

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[283] *See id.*
[284] Clean Water Act § 404, 33 U.S.C. § 1344.
[285] JEFFREY M. GABA, *Environmental Law: Black Letter Outlines*, 247 (2009).
[286] 40 C.F.R. § 122.3(e) (2018).
[287] 43 C.F.R. §§ 4180.1-4180.2 (2018).
[288] *Id.*
[289] *Id.*
[290] 43 C.F.R. § 4180.1 (2018).
[291] *Id.* at § 4180.2.
[292] *Id.* at § 4180.1(f)(2)(xv) ("Grazing on ephemeral (annual and perennial) rangeland is allowed to occur only if reliable estimates of production have been made, an identified level of annual growth

Wetlands regulation is analogous to the BLM and EPA's shared roles in hydrofracking regulation. Like the wetland's regulation, the BLM and EPA regulate different aspects of natural gas procurement.[293] However, the EPA and BLM have distinct roles in this regulatory sphere, which do not overlap.[294] Through the Fracking Rule, the BLM regulates the degradation of groundwater through chemical disclosures and well-casing requirements. [295] In contrast, the EPA regulates all other aspects of hydrofracking except the underground injection of fracking chemicals.[296]

VII. BLM Did Not Have Authority to Promulgate Fracking Rule for Tribal Lands

Unlike the public lands component of BLM's Fracking Rule, the BLM did not have authority to promulgate the Rule for tribal lands.[297] Tribal lands are not public lands, and whenever a federal agency promulgates a rule that affects tribal lands, meaningful tribal consultation must occur.[298] No such meaningful consultation occurred, which resulted in a breach of fiduciary duty.[299] Moreover, the BLM relied on two different statutes—different from the public lands portion of the Fracking Rule—for extending the Fracking Rule to tribal lands. However, both statues are jurisdictionally limited and hinge on principles of tribal self-determination.

A. Neither IMDA Nor IMLA Gives the BLM Authority to Apply the Fracking Rule on Tribal Lands

Mineral leasing and mining activities on tribal lands are governed by the IMLA and IMDA, which provide the BIA sole rulemaking authority.[300] The BIA may delegate—at its discretion—IMLA or IMDA authority to the BLM for regulating mining activities on tribal lands, but the BIA must do so expressly and unambiguously.[301] However, the BIA has not expressly and unambiguously

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or residue to remain on site at the end of the grazing season has been established, and adverse effects on perennial species are avoided.").

[293] *See* Fracking Rule, *supra* note 5; *Legal Envtl. Assistance Fund*, 276 F.3d at 1256.

[294] *See id.*

[295] *See id.*

[296] *See* 42 U.S.C. §§ 300h-f; *Legal Envtl. Assistance Fund*, 276 F.3d at 1256.

[297] *See* Fracking Rule, *supra* note 5.

[298] U.S. DEPARTMENT OF THE INTERIOR, Office of American Indian Trust Resources, 512 DM § 2 (Dec. 1, 1995).

[299] *See* Fracking Rule, *supra* note 5.

[300] 25 U.S.C. §§ 187, 2101-2108.

[301] *See id.*; *Alaska v. Native Village of Venetie Tribal Gov't*. 522 U.S. 520, 534 n.6 (delegation of authority can only be achieved by "some explicit action by Congress (or the Executive, acting under delegated authority.").

delegated authority to the BLM with regard to trust lands.[302] Only "restricted Indian land" authority has been delegated to the BLM.[303]

In the BLM's *State of Wyoming* brief, the BLM contended that the BIA delegated "future rulemaking authority" to it when the BIA drafted 25 C.F.R. Section 211.4.[304] Section 211.4 allows the BLM to regulate IMLA issues pursuant to the activities expressly limited by 43 C.F.R. Section 3160.[305] However, Part 3160 only applies to restricted Indian lands,[306] which is different from the *trust lands* the BLM seeks to regulate in the Fracking Rule.[307] Part 3160 expressly states that IMLA only applies to "restricted Indian Land leases,"[308] which is a more limited type of land than trust lands. Thus, BLM inappropriately tries to grab authority under a broader definition, which has not been delegated to it by the BIA.[309]

Additionally, like the IMLA, the BIA drafted a regulation for IMDA that delegates some rule making authority to the BLM.[310] Section 225.4 is identical to Section 211.4 in every way, but for one critical distinction.[311] Like Section 211.4, Section 225.4 gives the BLM authority for activities listed in 43 C.F.R. Part 3160.[312] However, the major distinction between Sections 211.4 and 225.4 is that Section 211.4 provides that "[t]hese regulations, *as amended*, apply to minerals agreements approved under this part."[313] This is contrasted with the subsequent

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[302] 25 U.S.C. § 396d; 25 C.F.R. § 211.4.
[303] 25 U.S.C. § 396d.
[304] *See* Brief for Appellee Bureau of Land Management, *State of Wyoming v. U.S. Dep't of the Interior* (2016), Nos. 16-8068, 16-2059, at *2.
[305] 25 C.F.R. § 211.4.
[306] 43 C.F.R. § 3160.0-1. *See* Brief for Intervenor-Appellee Ute Indian Tribe, *State of Wyoming v. U.S. Dep't of the Interior* (2016), Nos. 16-8068, 16-2059, at *3.
[307] 43 C.F.R. § 3160.0-1; Fracking Rule, *supra* note 5.
[308] *Id.* Restricted Indian Land is defined as: "Land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of the limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations." 25 C.F.R. § 151.2(e). However, trust land is all land in Indian Country. *Native Village of Venetie Tribal Gov't*. 522 U.S. at 527. Indian Country is defined as: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151. Despite this definition being located in the Criminal Code, it is also used for civil-jurisdictional purposes. *Native Village of Venetie Tribal Gov't*. 522 U.S. at 527. "Whether particular land is Indian Country is purely a question of law." *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999).
[309] *Id.*
[310] 25 C.F.R. § 225.4.
[311] *Compare id. with* 25 C.F.R. § 211.4.
[312] 25 C.F.R. § 225.4.
[313] *Id.* (emphasis added).

Section 225.4 provision, which states "[t]hese regulations, apply to minerals agreements approved under this part."[314] Note that BIA deleted "as amended" from Section 225.4, but mistakenly left the comma after "regulations."[315]

The deletion of "as amended" from Section 225.4 is meaningful, because courts must give effect "if possible, to every word clause and sentence of a statute."[316] When an agency uses one term or phrase in one regulation, but not in another, the agency intended the omission.[317] With regard to Sections 211.4 and 225.4, the omission of "as amended" in 225.4 means that the BIA did not want to delegate authority to BLM that did not exist before March 30, 1994.[318] As a result, the authority delegated to the BLM by the BIA under the IMDA is even more limited than that delegated under the IMLA.[319]

B. Fracking Rule is Inconsistent with the Federal Trust Obligations to Tribes

A well-established federal Indian law principle holds that the extent of an agency's authority under a federal statute must be interpreted along the contours of a federal agency's trust obligation to tribes. This means that the federal-tribal trust relationship is distinct from traditional trust principles. For example, in *United States v. Jicarilla Apache Nation*, the Supreme Court held that—while private trusteeship provides an analogue for the federal-tribal trust relationship—the usefulness of that analogy is limited.[320] In *Jicarilla Apache Nation*, the tribe brought suit against the federal government for breach of trust and asserted the evidentiary rule that a trustee cannot invoke attorney-client privilege against a trust beneficiary.[321] The Court noted:

> The trust obligations of the United States to Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law. The reasons for the fiduciary exception—that the trustee has no independent interest in trust administration and that the trustee is subject to a general common-law duty of disclosure—does not apply in this context.[322]

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[314] 25 C.F.R. § 211.4 (emphasis added).
[315] *See id.*
[316] *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 214 (1995).
[317] *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184 (10th Cir. 2015); *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2010); *Triestman v. U.S.*, 124 F.3d 361 (2d Cir. 1997); *In re Surface Mineral Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980); *U.S. v. Cook*, 432 F.2d 1093 (7th Cir. 1970).
[318] *See* S. Rep. No. 472, 97th Cong., 2d Sess. 5 (1982).
[319] *See* 25 C.F.R. §§ 211.4, 225.4.
[320] *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2318 (2011).
[321] *Id.*
[322] *Id.*

Thus, when an applicable statute contains specific trust obligations, federal agency regulatory power is narrowly limited to those articulated standards.[323] But if no specific statutory duties exist, "federal agencies discharge their trust responsibilities if they comply with the statutes and general regulations."[324]

Here, both the IMLA and IMDA expressly provide the contours of the federal trust obligations to tribes regarding regulations that affect mineral leasing on tribal lands. Both regulations provide that "acting in the capacity as a trustee, the Secretary. . .must manage Indian lands so as to make them profitable for the Indians."[325] Moreover, "as a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues."[326] Agency regulations affecting a tribe's economic interest must be in the "best interest of the tribe."[327] "Best interest" of the tribe means that "the Secretary shall consider any relevant factor, including, but not limited to: economic considerations, probable financial effects on the Indian mineral owner, marketability of mineral products; and potential environmental, social and cultural effects."[328]

While the Fracking Rule certainly satisfies the last factor – environmental effects – in the best interest test, all other factors weigh against the BLM's action.[329] Economic considerations and financial effects of the Fracking Rule substantially weigh against the BLM.[330] The IMDA codifies the federal policy of tribal self-determination in an effort to "maximize the financial return tribes can expect for their valuable mineral resources,"[331] and tribes have profited under this framework in recent years.[332] One hydrofracking operation on the Blackfeet reservation in Montana, for example, "generated 49 jobs for tribal members – a substantial feat in a place where unemployment is as high as 70 percent."[333] Additionally, in 2013 approximately 92,000 natural gas wells were located on tribal lands, which provided 13 percent of the natural gas produced in the U.S.[334] Because hydrofracking generates millions of dollars for tribal governments, the Fracking Rule adversely affect this revenue stream.[335] Even the BLM admitted

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[323] *Id.*
[324] FELIX COHEN, *Cohen's Handbook of Federal Indian Law* 232, 531 (2012 ed.).
[325] 25 C.F.R. §§ 211.3, 225.3.
[326] *Kenai Oil and Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982)
[327] 25 C.F.R. §§ 211.3, 225.3.
[328] 25 C.F.R. § 225.3.
[329] BUREAU OF LAND MANAGEMENT, *Oil and Gas: Hydraulic Fracturing on Federal and Indian Lands*, 43 C.F.R. § 3160 (2015).
[330] *See id.*
[331] 25 U.S.C. § 2105.
[332] Jack Healy, N.Y. TIMES, *Tapping Into the Land, and Dividing Its People* (Aug. 15, 2012), http://www.nytimes.com/2012/08/16/us/montana-tribe-divided-on-tapping-oil-rich-land.html.
[333] *Id.*
[334] Alysa Landry, NAVAJO TIMES, *New Rules to Address Fracking on Indian Lands* (May 23, 2013), http://navajotimes.com/politics/2013/0513/052313fra.php.
[335] *See id.*

that the Fracking Rule would cause an economic impact of $10 million on tribal lands.[336]

C. BLM Had a Duty to Consult with the Tribes and It Breached that Duty

Finally, as Judge Skavdahl found in *Wyoming*,[337] the BLM breached its fiduciary duty when it failed to meaningfully consult with the tribes during the regulation-drafting process. IMDA expressly requires the BLM to "consult with national and regional Indian organizations and tribes with expertise in mineral development both in the initial formulation of rules and regulations and any future revision or amendment of such regulations."[338] Nevertheless, the BLM only formally met with tribes twice during the three-year regulatory process, and only incorporated two minor changes in the final regulation that the tribes requested.[339] The lack of tribal incorporation also failed to satisfy the BLM's own policies.[340] For example, the Department of the Interior Policy on Consultation with Indian Tribes require that the BLM, "as trustee, fully incorporate tribal views in tis decision-making processes."[341] Two meetings and two changes does not satisfy this self-imposed mandate.[342]

Central to the unique trust relationship between the federal government and tribes is meaningful tribal consultation. It is based on a fundamental, government-to-government that predates the ratification of the Constitution.[343] However, in drafting the Fracking Rule regarding tribal lands, the BLM failed to respect these principles.[344]

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[336] BLM Respondent-Brief, Motion for Preliminary Injunction, Wyoming v. United States Dep't of the Interior, No. 15-8126 (May 18, 2015).
[337] *Wyoming*, 136 F.Supp.3d at 1336.
[338] 25 U.S.C. § 2107.
[339] *Wyoming*, 136 F.Supp.3d at 1336.
[340] U.S. DEPARTMENT OF THE INTERIOR, Office of American Indian Trust Resources, 512 DM § 2 (Dec. 1, 1995).
[341] *Wyoming*, 136 F.Supp.3d at 1336.
[342] *See id.*; U.S. DEPARTMENT OF THE INTERIOR, Office of American Indian Trust Resources, 512 DM § 2 (Dec. 1, 1995).
[343] In *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), Chief Justice Marshall explained that: "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. . . ." Further, the Chief Justice explained that: "In the executive, legislative, and judicial branches of our government, we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people." *Id.* at 520. Currently, Congress and the Executive branches of the U.S. government have adopted a policy of tribal self-determination, which recognizes the unique governmental identity of tribes. *See e.g.* 74 Fed. Reg. 57,235 (2013) (President Barack Obama adopting the self-determination policy); 67 Fed. Reg. 67,773 (2002) (President George W. Bush adopting the self-determination policy); 65 Fed. Reg. 67,773 (2000) (President Bill Clinton adopting the self-determination policy).
[344] *See* Fracking Rule, *supra* note 5.

VIII. CONCLUSION

Hydrofracking technology has become central to U.S. energy production. Going into the future, responsible regulation of natural gas mining is critical for sustainable economic development. A growing number of scientific studies have examined the potential effects hydrofracking chemicals have on our Nation's water supply. This is alarming, given the high number of hydrofracking wells located in close proximity to some of the largest aquifers in the U.S. Luckily, the BLM took action by drafting the Fracking Rule, which requires fracking companies to disclose chemicals used during the drilling and extraction process.

The BLM had authority to promulgate the Fracking Rule for federal lands, but not for tribal lands. The FLPMA gives the BLM broad authority to draft rules to fulfill its multiple use and sustained yield mandate. Inherent in the FLPMA's sustained yield mandate is the concept of unnecessary degradation. The Fracking Rule faithfully adheres to its obligation in preventing unnecessary degradation to our Nation's groundwater supply by imposing a number of necessary restrictions on the activities of hydrofracking companies.

Moreover, neither the EPA nor the exclusions Congress created in the SDWA UIPA preclude the BLM's hydrofracking regulatory authority. A line of Supreme Court case law shows that the regulatory authorities of two agencies can permissibly overlap. Additionally, the history between the EPA and BLM shows that both agencies have overlapped in other areas, such as the regulation of wetlands. Finally, a special brand of *Chevron* deference gives agencies broad discretion when defining their own jurisdictional scope, especially when Congress broadly drafted the statutes under which the agency is acting.

Nevertheless, just because the BLM had authority to draft the Fracking Rule under the FLPMA does not mean that it had authority to extend the Fracking Rule to tribal lands. When Congress enacted both the IMDA and IMLA, it delegated the BIA with rule making authority. The BIA did delegate a limited amount of its IMLA and IMDA authority to the BLM, but that authority is limited to restricted Indian lands. However, when drafting the Fracking Rule, the BLM tried to apply it to all Indian trust lands. This was an overextension of BLM's authority. Even with the assumption that the BIA did delegate such authority to the BLM, the BLM breached the fiduciary duty it owed to tribes. The BLM failed to adequately consult with the tribes. The BLM also acted inconsistently with the fiduciary requirements articulated in the IMLA and IMDA, along with the Department of Interior's own Indian policy.

As a result, when the Tenth Circuit visits the Fracking Rule in *State of Wyoming*, the court should find that the BLM did not have authority to draft the Fracking Rule for tribal lands. However, the validity of the rule should stand with regard to federal lands.