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Wyoming v. Dept. of Interior Rejects Hydraulic Fracturing Rule on Federal and Tribal Lands as "End Run" around Congress

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In Wyoming v. Department of Interior[1], *the Obama Administration faced a setback to its environmental agenda, as a federal district court judge struck down Bureau of Land Management (BLM) regulations on hydraulic fracturing on federal and Indian lands. Those pleased and disappointed by the decision are alternatively characterizing it as a broadly applicable rebuke to agency overreach, a vindication of tribal sovereignty, or an environmental disaster. In fact, it is the latest word in an ongoing saga of legislation, regulation and prior litigation, leading Congress to expressly bar the U.S. Environmental Protection Agency (EPA) from regulating hydraulic fracturing in most situations. Heeding that clear directive, the district court concluded that, "[h]aving explicitly removed the only source of specific federal agency authority over fracking, it defies common sense for BLM to argue that Congress intended to allow it to regulate the same activity under a general statute that says nothing about hydraulic fracturing."[2] The Administration has already appealed the decision.*

BLM's Hydraulic Fracturing Rule

BLM manages about 700 million acres of federal mineral-bearing lands and administers an additional 56 million acres of Indian mineral-bearing lands across the United States. Over 90 percent of hydrocarbon

[1] Case No. 2:15-cv-00041-SWS (D. Wyo. filed June 21, 2016).

[2] *Id.* at 25.

extraction wells drilled on federal lands use hydraulic fracturing.[3] BLM's hydraulic fracturing regulations, adopted in March 2015 (the HF Rule) imposed new requirements for wellbore integrity, water quality, and public disclosure of hydraulic fracturing operations and chemical use on federal and Indian lands.[4]

The HF Rule is the first major update to BLM's oil and gas regulations since 1988. While BLM viewed the rule as long overdue, it was opposed by western states, Native American tribes and the industry as duplicative of state regulation, an encroachment on tribal sovereignty, and disadvantageous to gas production in the West where most federal and Indian lands are located. In two consolidated cases, the states of Colorado, North Dakota, Utah and Wyoming, the Ute Indian tribe, the Western Energy Alliance, and the Independent Petroleum Association of America challenged the rule.

The Court's Decision

On June 21, 2016, the U.S. District Court for Wyoming issued a final ruling setting aside the HF Rule. BLM had relied on general statutory authorities in promulgating the rule, primarily the Federal Land Policy and Management Act of 1976 (FLPMA), which authorizes BLM to prevent unnecessary or undue degradation of public lands under its management, as well as the Mineral Leasing Act of 1920, Indian Mineral Leasing Act of 1938, and Indian Mineral Development Act of 1982. The court disagreed and concluded that none of these laws grants BLM specific authority to regulate hydraulic fracturing. Instead, the court held that Congress had delegated regulatory authority over hydraulic fracturing to EPA and later specifically withdrew that authority except regarding use of diesel fuel fracturing fluids.

In the Safe Drinking Water Act (SDWA),[5] Congress directed EPA to develop an underground injection control (UIC) program, administered by the states under EPA oversight, "to prevent underground injection which endangers drinking water sources."[6] For two decades, EPA's view was that hydraulic fracturing did not fall within its regulatory definition of underground injection. That view was challenged, however, and in 1997 the U.S. Court of Appeals for the Eleventh Circuit held that the SDWA required EPA to regulate all underground injection under the UIC program, and that the statutory definition of underground injection—"the subsurface emplacement of fluids by well injection"—encompassed hydraulic fracturing.[7]

Following the Eleventh Circuit's decision, authority to regulate hydraulic fracturing rested with EPA. However, the Eleventh Circuit's decision was legislatively overruled when Congress enacted the Energy Policy Act of 2005 (EP Act) which, among numerous other things, excluded non-diesel fuel hydraulic fracturing operations from EPA's regulatory reach. In an effort to promote domestic oil and gas development, the EP Act amended the SDWA to exclude from the scope of the UIC program "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities."[8]

In the *Wyoming* case, the district court found that Congress has spoken directly to the topic at hand and that BLM is barred from promulgating the HF Rule under any of BLM's statutory authorities. Indeed, the court noted, EPA's own comments on the HF Rule indicated that the rule attempted to regulate hydraulic fracturing in the manner EPA otherwise would have done, but for the EP Act. The court concluded that

[3] Bureau of Land Management, "Department Releases Final Rule to Support Safe, Responsible Hydraulic Fracturing Activities on Public and Tribal Lands" (March 20, 2015).

[4] *See* 80 Fed. Reg. 16128, 16129-130 (Mar. 26, 2015).

[5] Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§300f to 300j-26).

[6] 42 U.S.C. §300h(b)(1).

[7] *Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1474-75 (11th Cir. 1997).

[8] 42 U.S.C. §300h(d)(1)(B)(ii).

BLM had "attempted an end-run around" the EP Act and vacated the HF Rule.[9] "If agency regulation is prohibited by a statute specifically directed at a particular activity, it cannot be reasonably concluded that Congress intended regulation of the same activity would be authorized under a more general statute administered by a different agency."[10]

A Narrow Decision and Broader Implications

The Department of Interior promptly filed a notice of appeal to the Tenth Circuit Court of Appeals on June 24. In press statements, the Department portrayed the decision as a "delay" in implementation of the HF Rule and criticized the holding that the EP Act trumps other laws authorizing BLM to manage public lands for the public welfare. Environmental groups that intervened in the case also indicated they will appeal.

Assuming the decision is upheld on appeal, it is arguably a narrower holding than many have suggested. Following the lengthy sequence of legislation, litigation and regulation, the decision rests on the fact that Congress spoke with unusual clarity and specificity in the EP Act, when it substantially curtailed federal authority to regulate hydraulic fracturing. In future litigation, assuming the decision withstands appeal, parties may cite this case variously for the proposition that courts will strike down rules based on broad agency claims of authority arising from general statutory language or, conversely, that rules will be upheld absent a very explicit legislative intent to preclude regulation.

Operators on federal and Indian lands are not affected immediately by the decision because the HF Rule was stayed by the district court before BLM could enforce it. Moreover, neither the rule nor the ruling affect oil and gas operations on privately held land.

More broadly, on the heels of the Supreme Court's stay of the Clean Power Plan in February, and a federal judge's preliminary injunction in August 2015 against the EPA's Clean Water Act rule defining "waters of the United States," the *Wyoming* decision marks another judicial rejection of the Obama Administration's major, late-term environmental regulations. *Wyoming* may embolden opponents of BLM regulation to challenge the agency's authority in other contexts. In particular, BLM expects to finalize a proposed rule to regulate venting, flaring and leaks during oil and gas production activities, before the end of the President Obama's term.[11] Litigation over this Administration's environmental regulations will continue long after the President leaves office.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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[9] *Wyoming* at 25.

[10] *Id.* at 22.

[11] *See* "Waste Prevention, Production Subject to Royalties, and Resource Conservation; Proposed Rule," 80 Fed. Reg. 6616 (Feb. 8, 2016)

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