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Wyoming v. United States Department of Interior

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***Wyoming v. United States Department of Interior*, No. 2:14-CV-043-SWS, ___ F. Supp. 3d ___, 2015 U.S. Dist. LEXIS 135044, 2015 WL 5845145 (D. Wyo. Sept. 30, 2015)**

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In a scathing opinion, the United States District Court for the District of Wyoming granted a motion for preliminary injunction, effectively blocking the BLM's new Fracking Rule from being implemented on federal and tribal lands in the United States. The court held not only was the BLM's new rule likely arbitrary and capricious, but the department lacked the authority to regulate fracking. The opinion relied on the Safe Drinking Water Act and the Energy Policy Act to determine that Congress explicitly removed fracking from federal regulation. Pending an appeal, the new Fracking Rule will not be implemented.

I. INTRODUCTION

At issue in *Wyoming v. United States Department of Interior* was the validity of the Bureau of Land Management's ("BLM") final regulations concerning Hydraulic Fracturing on Federal and Indian Land ("Fracking Rule"),[1] which applies to hydraulic fracturing on federal and Indian lands.[2] Petitioners from various western states, tribes, and industries filed for a preliminary injunction of the rule, contending that it "should be set aside because it is arbitrary, not in accordance with the law, and in excess of the BLM's statutory jurisdiction and authority," as well as contrary to the federal trust obligation to tribes.[3] The court held in favor of the petitioners on all arguments.[4] The court found that regulating the process of fracking was outside the BLM's congressionally delegated authority.[5] The court also found that the Fracking Rule was likely arbitrary and violated the federal trust doctrine.[6] Additionally, the court held that petitioners would suffer irreparable harm without an injunction.[7] Lastly, the court held that the balance of equities, including the public interest, tipped in favor of the petitioners.[8] Thus, the court granted a preliminary injunction against the BLM's Fracking Rule.[9]

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[1] Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015).

[2] Wyoming v. U.S. DOI, No. 2:15-CV-043-SWS, ___ F. Supp. 3d___, 2015 U.S. Dist. LEXIS 135044 (D. Wyo. Sept. 30, 2015).

[3] *Id.* at *11.

[4] *Id.*

[5] *Id.* at *16.

[6] *Id.* at *59-60.

[7] *Id.* at *69.

[8] *Id.* at *75.

[9] *Id.* at *82.

II. FACTUAL AND PROCEDURAL BACKGROUND

Over the last decade, domestic oil and gas production has increased through the technique of fracking.[10] In response to this increase and public concern about fracking's effect on ground water sources, the BLM undertook rulemaking to increase regulations and oversight of fracking.[11] The initial proposed rule set out three goals: (1) to disclose the chemicals used in hydraulic fracturing; (2) to strengthen well-bore integrity regulations; and (3) to address concerns regarding water produced during oil and gas operations.[12] The initial proposed rule received 177,000 public comments.[13] The BLM issued a revised proposal just over a year later, which expanded the set of cement evaluation tools, revised the reporting process for chemicals, and expressed an intent to work with states and tribes.[14] This revised proposed rule received over 1.35 million comments.[15] The final rule was published on March 26, 2015.[16] The industry petitioners, Wyoming, and Colorado each filed separate Petitions for Review of Final Agency Action pursuant to the Administrative Procedure Act ("APA") in March.[17] The Ute Indian Tribe, North Dakota, and Utah joined the petitioners, and the court granted a motion to consolidate.[18]

III. ANALYSIS

A. Likelihood of Success on the Merits

The court used the standards set forth in Section 706 of the APA to conduct a "thorough, probing, in-depth review."[19] The court set out to determine whether the BLM acted within the scope of its authority, complied with prescribed procedures, and whether its actions was otherwise arbitrary, capricious, or an abuse of discretion.[20]

1. BLM's Authority

The court found that the BLM did not have the authority to regulate fracking.[21] The BLM claimed authority under the Federal Land Policy and Management Act ("FLPMA"), the Mineral Leasing Act ("MLA"), among

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[10] *Id.* at *6.
[11] *Id.* at *7.
[12] *Id.* at *8 (quoting 80 Fed. Reg. at 16,131).
[13] *Id.* at *8.
[14] *Id.*
[15] *Id.* at *9.
[16] *Id.*
[17] *Id.*
[18] *Id.* at *9-10.
[19] *Id.* at *12 (quoting Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir. 1994)).
[20] *Id.*
[21] *Id.* at *16.

others.[22] The court addressed each act individually and held that none of them gave the BLM authority to regulate fracking.[23] The court first held that the MLA only gives rulemaking authority to BLM to carry out the purpose of the act, which is to regulate surface-disturbing activities.[24] The court then held that while the Right-of-Way Leasing Act and the Mineral Leasing Act for Acquired Lands expanded the authority of the MLA, they only did so with regards to location, and did not authorize the BLM to regulate non-surface-disturbing activities.[25] The court next held that the Federal Oil and Gas Royalty Management Act of 1982 simply created a system for collecting and accounting for royalties and were not applicable to the Fracking Rule either.[26]

The court next addressed the BLM's claim that the Indian Mineral Leasing Act and the Indian Mineral Development Act granted the authority for the Fracking Rule.[27] The court held neither act delegated more authority than the MLA.[28] The court then addressed the BLM's claim that the rule was simply a supplement to existing regulations set out in Onshore Oil and Gas Orders 1, 2, and 7.[29] The BLM claimed that these "cradle-to-grave" regulations, promulgated pursuant to authority from the MLA, already include the regulation of fracking.[30] Because of this, the BLM argued that the Fracking Rule simply expanded current regulations as the demand for fracking increased.[31] The court again rejected the BLM's claim of authority and held that the BLM's only previous regulations of fracking were to prevent further surface disturbance and to establish reporting requirements, but were not regulations of the fracking process itself.[32] Lastly, the court addressed the BLM's claim of authority under the FLPMA.[33] The court's analysis focused on the multiple-use balancing act of the FLPMA and the broad authority granted to the BLM as it pertained to land-use planning.[34] Because of this focus, the court held that the FLPMA was primarily a planning statute and did not grant the BLM regulatory authority beyond the issuance of permits.[35]

After the court rejected the BLM's list of authorities, the court pointed to the Safe Drinking Water Act ("SDWA") to show that Congress had invested the Environmental Protection Agency ("EPA") with the authority to regulate fracking.[36] Although the EPA had initially taken the position that fracking was not subject to the SDWA, the court relied on an opinion from the United States

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22 *Id.* at *16-17.
23 *Id.* at *17-26.
24 *Id.* at *17.
25 *Id.* at *18-19.
26 *Id.* at *19.
27 *Id.* at *19-20.
28 *Id.* at *20.
29 *Id.* (citing 80 Fed. Reg. at 16,129).
30 *Id.* at *20.
31 *Id.*
32 *Id.* at *21.
33 *Id.* at *22-25.
34 *Id.* at *24-25.
35 *Id.*
36 *Id.* at *26-27.

Court of Appeals for the Eleventh Circuit, which held that Congress had intended fracking to fall under the statutory definition of "underground injection."[37] The court then analyzed this authority under the Energy Policy Act of 2005 ("EPAct").[38] Under the EPAct, Congress expressly revised the definition of "underground injection" to exclude fracking, except where diesel fuels are used.[39] In doing so, the court held that Congress completely removed the regulation of non-diesel fuel fracking from federal authority.[40] The BLM argued that because the SDWA and the EPAct did not prohibit any regulation by the BLM, they should not be applied because a regulatory gap would result.[41] The court rejected the argument, refusing to "presume a delegation of power simply from the absence of a withholding of power."[42] The court held that a regulatory gap was not enough evidence and that power must come from a valid grant of authority from Congress.[43] Lastly, the court dismissed any deference argument by holding that "*Chevron* [sic] 'is not a wand by which courts can turn an unlawful frog into a legitimate prince.'"[44] The court conducted no further analysis regarding agency deference.

2. APA Standards

The court additionally ruled that even if the BLM had the authority to regulate fracking, the rule was arbitrary and should be set aside.[45] This holding was based on the BLM's failure, in the eyes of the court, to establish a problem the rule is meant to address or identify a gap in existing regulations that the rule would fill.[46] The court rejected the BLM's concerns about groundwater contamination, stating that the BLM failed to reference a confirmed case of contaminated groundwater and found that their concerns warranted further study but not comprehensive rulemaking.[47] Additionally, the court rejected the BLM's argument that the rule is needed due to the lack of uniformity in state regulations.[48] The court held that a desire for uniformity is insufficient because the BLM failed to show that any of the regulations are inadequate.[49] While the

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[37] *Id.* at *27-28 (referencing Legal Envtl. Ass'n Found., Inc. v. EPA, 118 F.3d 1467 (11th Cir. 1997)).

[38] *Id.* at *28 (referencing 42 U.S.C. § 300h-1(b), (c), (e) (2012)).

[39] *Id.* at *29 (referencing 42 U.S.C. § 300h(d)(1)(B)(ii) (2012)).

[40] *Id.* at *29-34.

[41] *Id.* at *31-32.

[42] *Id.* at *32 (quoting Chamber of Commerce of U.S. v. NLRB, 721 F.3d 152, 160 (4th Cir. 2013)).

[43] *Id.* at *33-34 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000)).

[44] *Id.* at *34 (quoting Associated Gas Distribs. v. FERC, 824 F.2d 981, 1001 (D.C. Cir. 1987)).

[45] *Id.* at *42.

[46] *Id.* at *34-35.

[47] *Id.* at *34, 40.

[48] *Id.* at *40-41.

[49] *Id.* at *41.

court did not go into every detail of why the rule was arbitrary, it focused on mechanical integrity testing, the "usable water" definition, and pre-operation disclosures as arbitrary.[50]

3. Consultation with Indian Tribes

In its last step analyzing the merits of the case, the court held that the BLM failed to properly consult with Indian tribes in accordance with Order No. 3317 issued by the Secretary of the Interior to guide consultation.[51] The court held that BLM's consultation process with tribes, which included comments and meetings, was little more than what the BLM offered to the general public and overall insufficient to meet the BLM's own consultation standards.[52] This supported the conclusion that the BLM's actions were arbitrary and capricious.[53]

B. Irreparable Harm

The court held that the state, tribal, and industry petitioners all demonstrated a likelihood of irreparable harm in the absence of a preliminary injunction.[54] The court determined the harm to be the infringement of sovereign authority, and economic losses in the form of substantially decreased royalty and tax revenue for the petitioner states and tribes.[55] These harms were sufficient due to the inability to recover any money lost from the immune federal sovereign.[56] The court found that the industry petitioners would suffer irreparable harm in the form of compliance costs.[57] The compliance costs met the standards of irreparable harm due to plans of some petitioners to complete wells using fracking in the coming months.[58] The BLM argued that these costs would only be incurred due to the voluntary action of drilling, but the court held this argument invalid due to the BLM's failure to consider other costs in planning and drilling.[59]

Additionally, the court relied on the potential disclosure of trade secrets under the new Fracking Rule's requirements to hold that the industry petitioners would suffer irreparable harm without an injunction.[60] This holding relied heavily on the BLM's own admission that some of the information would be subject to Freedom of Information Act requests outside of the Fracking Rule's authority.[61]

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50 *Id.* at *42-54.
51 *Id.* at *54.
52 *Id.* at *59.
53 *Id.* at *60.
54 *Id.* at *69.
55 *Id.* at *61-62.
56 *Id.* at *63.
57 *Id.* at *64-69.
58 *Id.* at *67.
59 *Id.*
60 *Id.* at *69.
61 *Id.*

C. Balance of Equities and Public Interest

The last step in analyzing a motion for preliminary injunction a balancing of the equities, and when the government is a party, the court may take the public interest into account as well.[62] The court held the public interest here to be a toss-up between the interest in safe and environmentally responsible development and larger proceeds from development.[63] The court then balanced the interests of the BLM and the petitioners. The BLM's interests were held to be limited to inconvenience. The court further analyzed BLM's failure to adequately prove that the rule protects against any environmental harm.[64] Because the court already held that the Fracking Rule was likely without authority, arbitrary, and unlikely to prevent any environmental harm, the interests of the industry regarding reduced compliance costs was held to outweigh the BLM's sole interest of inconvenience.[65] Additionally, because the court held that there is no possible environmental harm, the public interest was best served by an injunction as well.[66]

IV. CONCLUSION

The court made two major holdings that may have widespread effects on the regulation of federal and tribal lands in the western United States. First, limiting the BLM's authority of oil and gas on federal and tribal lands to specific methods and processes explicitly set aside by Congress could have a long-term effect on the efficiency of land management and resource development. Under the court's proposed model, the BLM will be required to ask Congress for authority with each new development in drilling practices and techniques. Additionally, the court held that with the exception of spills or other accidents, there is no negative environmental impact from fracking. This holding may develop in the future as more cases go to trial over water contamination. Furthermore, this case highlights the need for a cooperative regulatory structure between the BLM and the EPA in regards to water quality management as it relates to oil and gas development. This decision is on appeal and may have further implications in the regulation of fracking.

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62 *Id.* at *70.
63 *Id.*
64 *Id.* at *70-71.
65 *Id.* at *74-75.
66 *Id.*