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Wyoming v. Zinke, 871 F.3d 1133 (10th Cir. 2017)

Jaclyn R. Van Natta

In *Wyoming v. Zinke*, the Bureau of Land Management attempted to update a regulation governing hydraulic fracturing from the 1980s, but oil and gas industry companies opposed, and brought suit. The district court held in favor of the industry petitioners, and the Bureau of Land Management and citizen group intervenors appealed. In the wake of appeal, Donald J. Trump became President of the United States. The administration change caused the Bureau of Land Management to alter its position and align with the new administration. Secretary of the Interior, Ryan Zinke, via executive order, began rescinding the new fracking regulation, which rendered the issues prudentially unripe for review.

I. INTRODUCTION

Since the 1940s, hydraulic fracturing (“fracking”) has been a vital resource to the oil and gas industry.¹ Fracking is a technique that allows producers to obtain large volumes of oil and natural gas.² Currently, ninety percent of fracking is hydraulic—a hybrid of horizontal drilling and traditional fracking.³ Due to increased public concern over fracking pollution, the Bureau of Land Management (“BLM”) published proposed Regulation 43 C.F.R. § 3162.3-3 (“Fracking Regulation”) on March 11, 2012 to regulate fracking on “lands owned or held in trust by the United States.”⁴ The Fracking Regulation significantly increased the cost of drilling by requiring stricter well construction, testing, flowback requirements, and disclosure of chemicals.⁵ The Fracking Regulation also increased BLM’s oversight power.⁶

On May 20, 2015, the Independent Petroleum Association of America and Western Energy Alliance (collectively “Industry Petitioners”) challenged the legality of the Fracking Regulation under the Administrative Procedure Act (“APA”) on two separate counts.⁷ Industry Petitioners cited the arbitrary and capricious standard and asserted that no statute gave the BLM authority to enforce the Fracking Regulation.⁸ The States of Wyoming, Colorado, North Dakota, Utah, and the Ute Indian Tribe joined the Industry Petitioners, and opposed the new regulation.⁹ A

1. Wyoming v. Zinke, 871 F.3d 1133, 1137 (10th Cir. 2017).
2. *Id.*
3. *Id.*
4. *Id.* at 1138.
5. *Id.* (See Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27,691-92, (May 11, 2012).
6. *Id.*
7. *Id.* at 1138-39 (citing 5 U.S.C. §§ 706(2)(A), (C) (2013)).
8. *Id.* at 1139.
9. *Id.*

number of citizen groups intervened (“Citizen Group Intervenors”) in support of BLM’s proposed regulation.¹⁰

The district court addressed the issues put forth by the Industry Petitioners, *supra*, and held the BLM violated the APA and exceeded its statutory authority.¹¹ The BLM and Citizen Group Intervenors appealed. However, while appeals were pending, Donald J. Trump became President of the United States and subsequently directed the BLM to abrogate the Fracking Regulation.¹² The policy shift required the court to first address the constitutional question of ripeness before it could reach the underlying issues of the case.¹³

II. FACTUAL & PROCEDURAL BACKGROUND

The Department of Interior (“DOI”) codified Fracking Regulation 30 C.F.R. Part 221 (“Predecessor Fracking Regulation”) in 1982.¹⁴ Under the Predecessor Fracking Regulation, the oil and gas industry rarely sought fracturing job approval, resulting in minimal BLM regulation.¹⁵ In 2005, Congress amended the Safe Drinking Water Act (“SDWA”).¹⁶ The amendment precluded all federal regulation of non-diesel fracking, which effectively limited regulation of fracking to state power.¹⁷ Despite the SDWA amendment—and due to increased public concern—the BLM drafted Fracking Regulation 43 C.F.R. § 3162.3-3 in 2010, *inter alia*, requiring disclosure of the effects of hydraulic fracking on underground water sources.¹⁸ Due to the increased regulatory costs the Fracking Regulation would have on the oil and gas industry, Industry Petitioners objected, stating the BLM’s Fracking Regulation violated the APA and lacked statutory power.¹⁹ On March 26, 2015, the BLM published its final version of the Fracking Regulation, which would have gone into effect on June 24, 2015. However, the district court halted the effective date, pending the outcome of Industry Petitioners’ preliminary injunction motions.²⁰

The BLM and Citizen Group Intervenors appealed the district court’s grant of preliminary injunction on September 30, 2015.²¹ On June

10. *Id.*

11. *Id.*

12. *Id.* at 1140.

13. *Id.* at 1141.

14. *Id.* at 1138.

15. *Id.*

16. *Id.*

17. *Id.* at 1139-40.

18. *Id.* at 1138.

19. *Id.* (See 5 U.S.C. §§ 706(2)(A), (C). Post SDWA amendment, the statutory provisions of the Federal Land Policy Management Act, the Mineral Leasing Act, the Indian Mineral Leasing Act, and Indian Mineral Development Act did not provide the BLM any statutory power to promulgate the Fracking Regulation).

20. *Id.* at 1138-39.

21. *Id.* at 1139.

21, 2016, the district court entered judgment setting aside the Fracking Regulation.²² In the wake of pending appeal, President Trump issued two Executive Orders, the first in January 2017 and the second in March 2017.²³ Secretary of the Interior, Ryan Zinke (“Zinke”), proposed rescission of the Fracking Regulation, and stated that the Fracking Regulation “unnecessarily burden[ed] industry with compliance costs and information requirements that [were] duplicative of regulatory programs of many states and some tribes.”²⁴

On September 21, 2017, the United States Court of Appeals for the Tenth Circuit asserted the issue at bar was greater than deciding whether a statute existed “provid[ing] the BLM with authority to regulate fracking[.]”²⁵ but rather rested upon the question of whether the court should proceed on the merits due to ripeness concerns.²⁶

III. ANALYSIS

On appeal, the United States Court of Appeals for the Tenth Circuit first addressed the validity of the procedural process by evaluating whether the ripeness doctrine justified its denial to exercise Article III power.²⁷ Prudential ripeness was evaluated by dissecting two elements: (1) fitness for review by judicial decision and (2) the hardship parties would face if the court withheld judicial review.²⁸ Second, the court decided whether dismissal or abatement of the appeals was proper.²⁹ Finally, the court decided if vacatur was appropriate.³⁰

A. Prudential Ripeness

The court explained that under the prudential ripeness doctrine a federal court has jurisdiction, but exercise of jurisdiction would be unwise.³¹ Prudential ripeness was evaluated by assessing fitness of the issues for judicial review as well as hardship the parties would recognize in the absence of a court decision.³²

22. *Id.* at 1140.

23. *Id.*

24. *Id.* at 1141.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1143.

30. *Id.* at 1146.

31. *Id.*

32. *Id.* at 1141.

1. *Fitness for Review*

The United States Supreme Court established three factors to evaluate whether an issue was fit for review.³³ These factors include: (1) whether the issues on appeal were purely legal, (2) whether the dispute in question was a final agency decision, and (3) whether further factual development was needed for the court to make a proper decision.³⁴ The tenth circuit recognized two additional factors; (4) whether administrative action would be inappropriately impeded by the court's decision, and (5) whether further factual development of the issues in question would be beneficial to the court.³⁵

Factors one and two were met because the issue was purely legal and the agency's decision was final.³⁶ However, factors three, four, and five were not met. Since the Fracking Regulation was in the process of being rescinded, invalidation of the Fracking Regulation by the district court was too dependent on future contingent factors.³⁷ Factor four was not met because the BLM was still in the process of rescinding all or part of the Fracking Regulation and it would have been inappropriate for the court to interfere.³⁸ Finally, factor five was not met because the court determined an unusual circumstance existed where "it was better to wait until the agency's regulatory revision was complete."³⁹

2. *Hardship to the Parties of Withholding Review*

Under the hardship analysis, the court focused on harm caused by the challenged Fracking Regulation. The court continued its prudential ripeness evaluation by determining whether withholding review would cause "adverse effects of a strictly legal kind"⁴⁰ to the Citizen Group Intervenors and the BLM.⁴¹ To determine hardship, the court assessed financial repercussions and innocence of the defendants' actions regarding plaintiffs' interests.⁴²

The court held that withholding review would not cause hardship—financial or otherwise—upon the parties seeking judicial review.⁴³ Withholding judicial review caused the Citizen Group Intervenors no further harm than already existed.⁴⁴ However, where

33. *Id.*

34. *Id.*

35. *Id.* at 1142 (*See* Ferrell-Cooper Min. Co. v. United States Dept. of the Int., 728 F.3d 1229, 1234-35 (10th Cir. 2013).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1143.

43. *Id.*

44. *Id.*

withholding review would neither improve nor worsen conditions for Citizen Group Intervenors, withholding review proved more beneficial for the BLM.⁴⁵ When the BLM changed position under the Trump Administration, the BLM's desire to repeal the Fracking Regulation made withholding judicial review favorable.⁴⁶ Ultimately, because the court held the hardships unsubstantial and the overall issues unfit for judicial review, the case was not ripe for review.⁴⁷

B. Dismissal of Appeal

The court ultimately held that dismissal of appeal was more favorable than abatement.⁴⁸ The court's decision was partially a timing concern.⁴⁹ The court would have likely abated the appeal for a short, definite period; however, no time limit existed here.⁵⁰ Further, it was not within an Article III court's role "to supervise or monitor the rulemaking efforts of an Article II agency."⁵¹ Ultimately, because the appeal challenged the district court's final judgment instead of a direct judicial review of the BLM's Fracking Regulation, dismissal of appeal was favorable.⁵² Due to the unripe and undeveloped record, coupled with the uncertain future of the Fracking Regulation, dismissal rather than abatement was appropriate.⁵³

C. Vacatur of District Court's Order

The next issue the court addressed was whether vacatur of the district court's order was appropriate. Prior precedent said that vacatur was generally appropriate when an appeal was moot, and its mootness was not caused by the party that sought vacatur.⁵⁴ The only party seeking vacatur in the case at hand was the Conservation Group Intervenors, not Zinke or the BLM.⁵⁵ Further, the court used hypothetical rationalization to determine that even if Zinke and the BLM had sought vacatur, evading review was not their motive.⁵⁶ Therefore, the court held that vacatur was appropriate.⁵⁷ The court also held that dismissal of the underlying action without prejudice was appropriate because the district court could do no more with the prudentially unripe issues than the appellate court.⁵⁸

45. *Id.*
 46. *Id.*
 47. *Id.*
 48. *Id.*
 49. *Id.* at 1144.
 50. *Id.*
 51. *Id.*
 52. *Id.* at 1144-45.
 53. *Id.* at 1145.
 54. *Id.*
 55. *Id.*
 56. *Id.*
 57. *Id.* at 1146.
 58. *Id.*

D. Judge Hartz's Dissent

While agreeing with the majority's opinion that it would be a waste of judicial resources to determine whether the district court erred in invalidating the Fracking Regulation, Judge Hartz argued that the majority erred on two counts.⁵⁹ Judge Hartz argued that the majority first erred when it vacated the district court's order because the appellate court lacked sufficient information to make such a determination.⁶⁰ Second, Judge Hartz argued that the majority erred when it failed to affirm a partial injunction on behalf of the Ute Tribe.⁶¹ Because the Ute Tribe's issues went unchallenged by opposing parties, Judge Hartz asserted that a partial injunction would have resolved the matter and would not have wasted any judicial resources.⁶²

IV. CONCLUSION

Wyoming v. Zinke illustrates that the legal basis for determining ripeness is well established: ripeness is evaluated by assessing fitness of the issues for judicial review as well as hardship the parties would recognize in the absence of a court decision. Nevertheless, if a contingent event exists that has yet to occur, such as the BLM's proposed rescission of the Fracking Regulation, a court may, under Article III of the Constitution, determine that a claim is not ripe for adjudication. Since it is impossible to foresee all possible future contingent events, a natural conflict arises. Waiting for all future contingencies to be resolved would invariably result in judicial paralysis; however, the rescission of the Fracking Regulation by the new administration and Secretary of the Interior rendered a prudentially ripe case into an unripe one. Here, the court could not hold whether the BLM's rescission of the Fracking Regulation was arbitrary and capricious because the contingent event—the BLM's rescission of the Fracking Regulation—was possible, but had not yet occurred. Rendering further litigation before the BLM actually rescinded the Fracking Regulation would have been a waste of judicial resources.

59. *Id.*

60. *Id.*

61. *Id.* at 1147.

62. *Id.*