Federal Court Rejects BLM's Power Grab to Regulate Hydraulic Fracturing

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PRACTICES Energy, Power and Natural Resources, Litigation

A Wyoming federal court has struck down the Bureau of Land Management's ("**BLM**") Final Rule implementing its regulations that sought to impose new standards and obligations on hydraulic fracturing, or fracking, on federal and Indian lands ("**Fracking Rule**") on the grounds that BLM's efforts exceeded its statutory authority. On June 21, 2016, U.S. District Judge Scott Skavdahl issued a much-anticipated order rejecting the BLM's argument that it had the statutory authority to regulate the very activity that Congress had explicitly removed from federal agency oversight in the Energy Policy Act of 2005 ("**EPAct 2005**"). Finding that Congress had spoken directly to the issue of federal regulation of hydraulic fracturing, the court rejected the BLM's argument that it had the regulatory authority based on the more general authority granted under various federal statutes. Taking aim at BLM's attempt to work around the express exclusion of hydraulic fracturing from federal regulation in EPAct 2005, the court expressly rejected BLM's attempt to regulate fracking by administrative fiat after another federal agency had been expressly prohibited by Congress to do so. In doing so, the court provided a limited yet significant win for industry and states in a time of rapidly increasing federal oversight of oil and gas exploration and production activities.

The BLM issued the Fracking Rule in March 2015 with the stated purpose of strengthening regulations related to well-bore integrity, addressing water management concerns, and increasing chemical disclosures for hydraulic fracturing operations. Originally intended to take effect on June 24, 2015, implementation of the Fracking Rule was delayed when four states (Wyoming, Colorado, North Dakota, and Utah), the Ute Indian Tribe, and two industry groups challenged the agency's authority for the rulemaking. The challengers argued that the BLM promulgated the Fracking Rule largely in response to public concern and increased calls for more burdensome regulation and safety protocols of the fracking process instead of providing a reasoned basis for its implementation. Thus, challengers argued, the rule was a broad overreach of agency authority and not in accordance with law.

Judge Skavdahl had ordered a preliminary injunction in September 2015 against the rule taking effect. In doing so, he expressed doubt about the rule's legitimacy in the face of BLM's inability to cite specific Congressional authorization or delegation for such action. Specifically, BLM had relied principally upon the "broad authority" granted under a variety of federal statutes as the statutory basis for the Fracking Rule, including the Federal Land Policy and Management Act of 1976 ("**FLPMA**"), the Mineral Leasing Act of 1920 ("**MLA**"), the Indian Mineral Leasing Act of 1938 ("**IMLA**"), and the Indian Mineral Development Act of 1982 ("**IMDA**").

In the June 21 order, the court examined the array of federal statutes presented by BLM but ultimately focused its attention on the Safe Drinking Water Act ("**SDWA**"). Under this statute, as amended, Congress had explicitly removed the only source of specific federal agency authority over hydraulic fracturing. Before 2005, the SDWA granted EPA with the authority and duty to regulate hydraulic fracturing on all federal, state, and tribal lands. However, EPAct 2005 eliminated this agency authority by amending the SDWA to exclude from its scope fluids or propping agents (other than diesel fuels) used in to hydraulic fracturing operations related to oil or gas production

activities. Because Congress had spoken directly to the issue of hydraulic fracturing in EPAct 2005, the court rejected the BLM's argument that the more general authority granted under statutes such as the MLA and FLPMA provide the BLM the authority to regulate the very same activity that Congress had explicitly excluded from EPA jurisdiction under the SDWA.

Finding that Congress had explicitly removed the only source of specific federal agency authority over hydraulic fracturing, Judge Skavdahl did not address the other points raised by challengers in support of setting aside the Fracking Rule and limited his ruling to the BLM's statutory authority for the rule. Notably, in what will likely be viewed as a narrow reading of the *Chevron* doctrine[1] that sets forth the parameters for extensive deference to agency decisions, including when deciding the extent of their own jurisdiction[2], the court rejected the BLM's reliance on *Chevron* deference. Highlighting in its analysis the lack of statutory authority for the Fracking Rule and noting that "an agency may not bootstrap itself into an area in which it has no jurisdiction,"[3] the court found that such reliance was improper because Congress had not expressly granted BLM the regulatory authority over hydraulic fracturing in the first place, and because Congress had further made its intent clear by removing federal agency authority to regulate the activity in connection with the EPA.

When viewed in the broader context of current regulation, it is important to recognize that this decision does not remove fracking from current regulation of oil and gas operations. States have authority over the development of oil and gas resources within their boundaries, and, in the absence of federal regulation that preempts state authority, state regulations apply to federal lands.[4] Virtually all states—including the four states that challenged the Fracking Rule, Wyoming, Colorado, Utah, and North Dakota—regulate the oil and gas operations and the competing correlative rights of owners of hydrocarbon estates. Many states have already promulgated regulations addressing various aspects of hydraulic fracturing, such as safety requirements, setbacks, and disclosures of fracking fluid components.[5] The BLM's Fracking Rule arguably would intrude on states' rights to regulate in this area, disrupt uniformity of state regulation that protects correlative rights, and create competing federal and state regulatory regimes within a single state.

States have strenuously sought to retain their regulatory authority concerning fracking in the face of challenges on the federal front by the Fracking Rule, as well as in the face of challenges by municipalities and statutory cities and counties. Attempts to usurp or alter state regulatory authority have been made not only by the BLM via its Fracking Rule, but also by cities and counties across the country that have attempted to regulate fracking on the basis of land use authority, by state legislatures, and by state residents who have attempted to amend state constitutions to prohibit fracking. Most recently, the Colorado Supreme Court held two municipal fracking bans to be preempted by state law. Needless to say, similar battles on fracking will continue in many states.

Likewise, the order preserves the ability of Indian tribes to determine whether and to what extent certain aspects of oil and gas development activities should be regulated on Indian lands. It also prevents the addition of more burdensome costs and administrative delays that have historically served as impediments to the development of Indian mineral resources.

It is expected that the federal defendants will appeal the decision claiming that the BLM has the requisite authority for the Fracking Rule. Unless and until the 10th Circuit overturns the recent order, the future of fracking on federal lands will depend in each state on its statutory and regulatory scheme for fracking and the outcome of challenges to it. Other points raised in support of setting aside the Fracking Rule may be taken up by the Tenth Circuit. Whether these controversies on the state level will govern the federal lands within each state may well be impacted by an appeal of the current order.

View a copy of the order.

For additional information contact one of the lawyers listed below.

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[1] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The court in Chevron set forth a two-step analysis for review of an agency's construction of its enabling statute: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 842–43 (internal citations omitted).

[2] *See, e.g., City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1871 (2013).

[3] *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (citing *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)) (internal quotation marks omitted).

[4] *See* Dep't of Int., Bureau of Land Mgt., Final Rule, Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128, 16,178 ("All state laws apply on Federal lands, except those that are preempted by Federal law.")

[5] Currently, the states that have promulgated regulations addressing hydraulic fracturing include Wyoming, Colorado, Utah, North Dakota, Alaska, Arkansas, Illinois, Michigan, New Mexico, Ohio, Oklahoma, Pennsylvania, Texas, California, Montana, and Nevada.