Tenth Circuit Dismisses Litigation Over Federal Hydraulic Fracturing Rule

By Chris Reagen | October 2, 2017

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On September 21, 2017, the Tenth Circuit dismissed two appeals in connection with the Bureau of Land Management's ("BLM") Final Rule implementing its regulations imposing new standards and obligations on hydraulic fracturing on federal and Indian lands ("Fracking Rule"). The appeals had been filed challenging the district court's prior ruling that struck down the rule in the face of industry, state, and tribal challenges. However, the Fracking Rule itself has come to face an uncertain future with the Trump administration's proposed retraction of the rule. As a result of the proposed action, the Tenth Circuit determined that the appeals had become moot leading the court to dismiss the appeals and remand with directions to vacate the district court's opinion and dismiss the action without prejudice.

Keeping with its expressed agenda, the new administration has expressly reversed policy in implementing Obama-era federal oil and gas regulations. More specifically, while the appeals to the Tenth Circuit were pending, Secretary of the Interior, Ryan Zinke, issued Secretarial Order No. 3349 on March 29, 2017, confirming that the BLM would rescind the Fracking Rule in full. On July 25, 2017, the BLM published a Notice in the Federal Register opening the notice and comment period for a proposed rule that would entirely rescind the Fracking Rule. The comment period closed on September 25.

With the process to rescind the rule well underway, the Tenth Circuit concluded that dismissal was appropriate because there would be nothing for the district court to do upon remand except wait for the BLM to finalize its rule rescinding the Fracking Rule. Given the changed and changing circumstances, the Tenth Circuit determined the appeals to be "prudentially unripe" and dismissed them with directions to vacate the district court's judgment invalidating the Fracking Rule.

But, simply vacating the lower court's decision has sparked confusion and caused disagreement as to whether the Fracking Rule is now in effect until it is formally rescinded. In September 2015, the district court had granted a preliminary injunction that halted implementation of the Fracking Rule. While the decision was on appeal, the district court reached a decision on the merits and on June 21, 2016, the court struck down the Fracking Rule as exceeding the BLM's statutory authority.

In its decision, the Tenth Circuit noted, in what appears to be mere *dicta*, its belief that, as a result of the timing of the district court's rulings, the Fracking Rule had never taken effect. But, the statement has not quelled the diametrically opposed claims of the underlying players. It should come as no surprise that environmental groups have interpreted the decision as giving effect to the Fracking Rule by vacating the underlying district court action striking it down, while industry groups do not believe that the Fracking Rule has taken effect at all. If the Fracking Rule is deemed to take effect, it is unclear whether the BLM will enforce its requirements or whether companies will invest in compliance measures while awaiting its formal rescission. And so the saga continues.

View the decision.

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