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One of BLM's Numerous Regulatory Actions Halted as Federal Court Invalidates Fracking Rule

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Proponents of State rights and industry—not to mention advocates of the Constitutional separation of powers—achieved a victory last week, as United States District Court Judge Skavdahl set aside the Bureau of Land Management's (BLM) regulations governing hydraulic fracturing on federal and Indian lands. Judge Skavdahl's opinion found that the regulations exceeded the authority granted to the agency by Congress.

BLM initially proposed rules to regulate fracking in 2012 to address concerns over the safety of the process. The highly debated proposal received well over a million public comments and underwent revisions before BLM issued its final rule in March 2015. States, industry groups, and the Ute Indian Tribe quickly and successfully moved to enjoin the rule, setting the stage for this decision.

BLM asserted that it had broad authority to promulgate fracking regulations under the Mineral Leasing Act, Federal Land Policy and Management Act, Indian Mineral Leasing Act and Indian Mineral Development Act. Indeed, BLM emphasized that it already regulated fracking. Accordingly, BLM published its rule to regulate underground injections, claiming the new rule merely supplemented existing requirements.

The rule required approval of fracking operations and regulations on well integrity, disclosure of chemicals used and storage of recovered fluids. Significantly, BLM sought to control this procedure despite the fact that fracking is already regulated by many states, local zoning and permitting legislation, and numerous pieces of federal legislation. Indeed, nearly every Application for Permit to Drill approved in the year prior to BLM's proposal was in a state that already had wellbore construction and/or fracking regulations.

Judge Skavdahl refused to acknowledge BLM was provided with the authority necessary to issue its rules, however. Instead, Judge Skavdahl intimated the legislation under which BLM claims authority actually provides authority to prevent waste of minerals, manage federal lands, and protect miners and prices — not to engage in comprehensive rulemaking to address environmental effects of fracking.

Moreover, Judge Skavdahl explained that Congress has already determined whether fracking should be regulated, and chose not to subject the process to federal regulation. Congress initially granted the Environmental Protection Agency (EPA) authority to regulate underground injection in the Safe Drinking Water Act (SDWA). Congress amended that portion of the SDWA with the Energy Policy Act of 2005, expressly excluding fracking from the underground injection regulated by the EPA. By prohibiting agency regulation of fracking under the SDWA, Judge Skavdahl reasoned that Congress did not thereby intend for BLM to regulate the activity under a different statute. Judge Skavdahl concluded that "[h]aving explicitly removed the only source of specific federal agency authority over fracking, it defies common sense for the BLM to argue that Congress intended to allow it to regulate the same activity under a general statute that says nothing about hydraulic fracturing." Opinion at 25.

Over the past few decades, improvements in technology and practices have made oil and gas development more efficient and environmentally friendly. However, the Obama Administration has proposed numerous agency regulations over the last few years which significantly restrict or discourage oil and gas exploration and development on federal and Indian lands. In response, states, tribes and industry groups alike have united to oppose these measures. The order setting aside BLM's proposed fracking regulation serves as a victory for those efforts to restrict agency overreach, and sets a precedent that agency action is not limitless.

For more information on the District Court's ruling, please contact Michael Cross or Bret Sumner.