

Legal Sidebar

Federal Court Rules That Bureau of Land Management Likely Lacks Authority to Promulgate Fracking Rule

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At the end of September, a federal district court judge in Wyoming [preliminarily enjoined](#) the Bureau of Land Management (BLM) from enforcing its March 2015 [final rule](#) applicable to hydraulic fracturing operations on federal and Indian lands. BLM, an agency within the Department of the Interior (DOI), oversees leasing and permitting for oil and gas on these lands. Hydraulic fracturing, or “fracking,” is a well stimulation technique used to recover oil and natural gas from underground low permeability rock formations via the injection of water, sand (or other propping agent), and specialized chemicals under enough pressure to fracture the formations holding the oil or gas. Use of fracking has significantly increased domestic production of oil and natural gas, but has also raised concerns over potential impacts on public health and the environment.

BLM’s final rule, which is discussed in more detail in a [CRS Sidebar](#) and [Report](#), would require well operators that plan to employ fracking as part of an oil or natural gas drilling operation on federal or Indian lands to document to BLM compliance with requirements with respect to submission of a plan for the operation; well construction and integrity; management of recovered “flowback” fluids; and disclosure of the chemicals used in the operation, among other things.

After BLM promulgated the rule, four states, the Ute Indian tribe, and industry groups challenged it on various grounds in federal court. The state petitioners argued that, among other things, BLM lacked statutory authority to promulgate the rule. In granting the petitioners’ motion for a preliminary injunction, the court agreed, finding that the petitioners had demonstrated a likelihood of success on the merits of this argument. (The court also found that petitioners were likely to succeed in arguing that BLM acted arbitrarily or capriciously when promulgating the rule, and that the rulemaking record did not provide sufficient justification for various aspects of the rule. However, this sidebar addresses only the court’s decision concerning BLM’s statutory authority.)

The court cited as a basis for its holding that BLM lacked statutory authority amendments to the Safe Drinking Water Act (SDWA) enacted by Congress as part of the Energy Policy Act of 2005 (EPAct) which [removed](#) the Environmental Protection Agency (EPA)’s authority to regulate fracking under the SDWA’s Underground Injection Control (UIC) Program, except where diesel fuels are used. The court wrote that “[t]he SDWA specifically addresses protection of underground sources of drinking water through regulation of ‘underground injection,’ and Congressional intent as expressed in the EPAct indicates clearly that hydraulic fracturing is not subject to federal regulation unless it involves the use of diesel fuels.”

The court’s ruling that BLM likely lacks statutory authority to regulate hydraulic fracturing and related oil and gas activities because of the EPAct amendments to the SDWA seems puzzling in light of BLM’s broad authority under federal law to regulate oil and gas operations on federal and Indian lands. For example, section 226(g) of the Mineral Leasing Act of 1920 (MLA) [authorizes](#) DOI to “regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter [and] determine reclamation and other actions as required in the interest of conservation of surface resources.” Both the plain meaning of this language and the D.C. Circuit’s [interpretation](#) of similar language in a separate provision in the MLA suggest that it authorizes DOI to regulate oil and gas operations to protect non-mineral surface resources from environmental harm. In addition, the Federal Land Policy and Management Act of 1976 (FLPMA) [states](#) that DOI shall “[in] managing the public lands ... by regulation or otherwise, take any action necessary

to prevent unnecessary or undue degradation of the lands”—a grant of authority that arguably authorizes DOI to take measures to protect both surface and subsurface federal lands from environmental harm. Fracking activities may involve significant environmental impacts—and possible degradation—to federal surface and subsurface resources as a result of trucks hauling equipment, water, sand, and chemicals to the well site; storage of flowback fluid from fracking operations in tanks or pits; preparation of fracking fluids at the well site; and well construction and operation, among other activities. Thus, BLM arguably may regulate these operations—as it has sought to do in the fracking rule—under the MLA, FLPMA, and other federal laws that give it authority over oil and gas activities on federal lands.

Moreover, BLM’s existing regulations and orders address many aspects of onshore oil and gas operations on federal lands, both on the surface and underground. [These regulations include requirements for submission of drilling plans and applications for permits to drill; surface use plans; and plans for hydraulic fracturing operations.](#) They also set forth requirements for [drilling and control of wells; protection of freshwater-bearing formations; and well integrity.](#) The regulations [contemplate](#) protection of both surface and subsurface environmental quality. BLM has also promulgated several onshore oil and gas [orders](#) setting forth requirements for underground activities like drilling and disposal of produced water.

Nevertheless, the court wrote in its opinion that “it defies common sense to interpret the more general authority granted by the MLA and FLPMA as providing the BLM authority to regulate fracking when Congress has directly spoken to the issue in the EPAct.” Although this is a tenable argument, the EPAct amendments to the SDWA address only EPA’s authority to regulate hydraulic fracturing under the SDWA’s UIC program and are silent with respect to BLM’s authority over the practice and its associated oil and gas activities occurring on federal lands. Just because Congress prohibits one federal agency from regulating a particular practice [does not necessarily mean](#) that another federal agency thereby lacks jurisdiction over the practice under other federal laws.

Generally, courts issue preliminary injunctions to maintain the status quo in a lawsuit until the court renders a final decision on the merits. Thus, the court in this case is not bound by its ruling that BLM likely promulgated the rule without statutory authority. However, much of the language in the court’s opinion indicates that it will issue a permanent injunction in this case. [Federal law](#) allows DOI to appeal the court’s issuance of a preliminary injunction to the 10th Circuit Court of Appeals before the court renders a final decision.

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