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1. Fracking rule may see jumbled comeback as court tosses case

Ellen M. Gilmer, E&E News reporter

Published: Friday, September 22, 2017



A drilling rig sits on public land in New Mexico. Ellen M. Gilmer/E&E News

Confusion and mixed messages dominated the conversation yesterday as court watchers unpacked a major ruling on the Obama administration's embattled hydraulic fracturing rule.

The 10th U.S. Circuit Court of Appeals **dismissed** litigation over the Interior Department's fracking rule without directly weighing the core legal question of whether the federal government has authority over the oil and gas extraction process.

But the panel of judges also scrapped a lower court's 2016 ruling that struck down the regulation, clearing the way for the rule to take effect — however briefly — even as the Trump administration works to rescind it. The court has not yet issued a final mandate in the case, and the rule won't be revived until then.

Supporters and opponents of the fracking rule pushed dueling messages in the wake of the decision yesterday, each declaring victory.

Environmental groups celebrated the revival of the rule, claiming vindication after a yearslong legal battle (*E&E News PM*, Sept. 21). Sierra Club attorney Nathan Matthews said the ruling "reinstates much-needed protections."

Industry groups, meanwhile, cheered the 10th Circuit's conclusion that it would be a waste of the court's resources to answer the underlying legal question of fracking authority.

"Today's court decision confirms what IPAA has advocated all along: Dismissing the appeal would protect independent producers from the uncertainty of whether it was necessary to comply with regulations that are certain to be revoked," Independent Petroleum Association of America President Barry Russell said.

But the legal tug of war is likely far from over.

The Trump administration, backed by industry and several Western states, is expected to move quickly to block implementation of the fracking rule. Any such effort by Interior's Bureau of Land Management will face legal pushback from environmentalists that have defended the standards since their unveiling more than two years ago.

New litigation will likely follow any attempt by the Trump administration to avoid implementing the rule. And separate lawsuits are expected once Interior finalizes its official rescission of the rule.

The 10th Circuit's judgment doesn't officially take effect until the court issues a mandate. For cases involving the U.S. government, courts have 52 days after a ruling to issue the mandate. That would give the Trump administration until mid-November to delay the regulation or finalize its rescission before having to implement it.

In a statement this morning, Interior said, "We are expeditiously working on a new rule that will fulfill the President's and Secretary's vision of good jobs for hardworking American families and are continuing to take comments on the proposed rescission of the 2015 hydraulic fracturing rule."

The fallout

Widespread uncertainty over what the court's ruling means and what happens next stems from procedural and timing complexities in the litigation. The Obama administration released the regulation in March 2015, but a Wyoming district court quickly blocked it and ultimately found that Interior has no authority over fracking. The rule has never taken effect.

The Obama administration and environmental groups appealed the Wyoming decision to the 10th Circuit, but while the case was pending, President Trump took office, and the new administration announced plans to roll back the rule. Trump lawyers urged the court to freeze the case in light of the rescission plans.

Instead, the court scrapped the case entirely and nixed the underlying Wyoming decision — putting pressure on the Trump administration to take quick action on its rollback plans. The opinion noted that it's unclear how much time BLM will need to complete its proposal to rescind the fracking rule.

"Here, the BLM stated at our very recent oral argument that the 60 day notice and comment period could be extended, to say nothing of how many additional months or years would be needed to issue a final rule rescinding the regulation," wrote Judge Mary Beck Briscoe, a Clinton appointee.

Judge Jerome Holmes, a George W. Bush appointee, joined the opinion. Judge Harris Hartz, another Bush appointee, joined in the determination that the court should dismiss the case but opposed scrapping the lower court's decision.

Vacating the Wyoming decision means there is no legal mechanism in place to stop the fracking rule from taking effect. Earthjustice attorney Mike Freeman, who argued the case for a coalition of environmental groups, said the bottom line of the decision is that the government's authority to regulate fracking is no longer in question.

"We're happy that the court reached the result it did," he told E&E News. "Vacating the lower court's decision takes us back to the legal status quo before the [Wyoming] court's ruling, which was that there's a century of case law and precedent that makes clear that BLM has the authority to do what it did here."

Freeman added that the environmental community is eager to see the fracking rule finally take effect.

Other lawyers in the case expressed uncertainty over whether the court intended to revive the fracking rule, noting that the opinion includes language that seems to contemplate a continued "status quo" that does not include the regulation.

"The only 'harm' the Citizen Group Intervenors will suffer is the continued operation of oil and gas development on federal lands, which represents no departure from the status quo since 2015," the opinion says.

Hartz's partial dissent included the most explicit acknowledgement of the immediate implications of the court's decision, noting that the majority was "giving effect to the Regulation." Hartz parted from his colleagues, arguing that the panel lacked sufficient information to do that.

Kathleen Sgamma, president of the industry group Western Energy Alliance, dismissed the uncertainty over the rule's status as "technicalities" that will be worked out quickly.

"We're pleased that after today, IPAA and Western Energy Alliance are even closer to finally putting BLM's ill-conceived fracking rule to bed," she said in a statement. "As with the royalty valuation rule that was recently completely rescinded, there are some technicalities to work through in the short term, but just as the court recognizes that it is not worthwhile to expend judicial resources on a rule that is being overturned, it is clear that implementing the rule in the short term is likewise a waste of industry and government resources."

For BLM's Obama-era valuation rule, a federal court ruled that the Trump administration was unlawful in its attempt to freeze the rule, but the court declined to take further action in light of the agency's recently finalized rescission of the rule (*Greenwire*, Aug. 31).

The Trump administration is in the middle of its effort to unwind the fracking rule. BLM released a proposal to rescind it in July. Public comments are due next week, and the agency will then reach a final decision. It is unclear whether BLM plans to eventually replace any elements of the rule.

An unpredictable path

Yesterday's decision is the latest twist in the unpredictable path of the Obama administration's fracking rule.

The years-in-the-making rule — President Obama's marquee effort to address concerns about the spread of high-volume fracking — was released in March 2015 and created a federal approval process for fracking on public and tribal lands. The rule set new standards for well construction, wastewater management and chemical disclosure for fracked wells.

It immediately faced legal challenges from industry groups, several Western states and American Indian tribes that saw it as an overly expensive and unworkable regulatory overreach. Wyoming and other states argued that it was beyond BLM's authority because the Safe Drinking Water Act put EPA in charge of fracking, and the Energy Policy Act of 2005 subsequently assigned that power to state overseers.

The U.S. District Court for the District of Wyoming promptly blocked the rule and eventually accepted the states' argument that the federal government lacks authority to regulate fracking.

The Trump administration has walked a fine line in legal briefs, defending its authority over fracking even as it seeks to scrap the regulation. Government lawyers urged the court to freeze the case while that rescission process plays out.

The 10th Circuit heard oral arguments in Denver in July (*Energywire*, July 28).

<http://bit.ly/2xuf4hq>

2. Navajo prepared to sue Trump over Bears Ears changes

Published: Friday, September 22, 2017

The Navajo Nation said it will sue the Trump administration if it tries to shrink Bears Ears National Monument in Utah.

The results of Interior Secretary Ryan Zinke's review of 27 national monuments have not been publicly announced, but a leak reveals he recommended reducing the size of sites including Bears Ears (*Greenwire*, Sept. 18).

"We are prepared to challenge immediately whatever official action is taken to modify the monument or restructure any aspect of that, such as the Bears Ears Commission," said Navajo Nation Attorney General Ethel Branch yesterday.

Utah lawmakers would like to shrink the monument to make room for expanded economic activities. President Trump has said previous presidents abused the Antiquities Act to protect too much land.

Branch said Zinke did not gather enough formal input from the five tribes of the Bears Ears Commission (Valerie Volcovici, *Reuters*, Sept. 21). — CS

<http://bit.ly/2wGLg2g>

3. Millions of acres of grouse habitat opening to mining

Scott Streater, E&E News reporter

Published: Friday, September 22, 2017



The Interior Department will reopen millions of acres of greater sage grouse habitat to mining when a two year moratorium on new claims ends Sunday. U.S. Department of Agriculture/Flickr

The Interior Department is set to reopen millions of acres of sensitive greater sage grouse habitat across six Western states to mining activity when a two-year moratorium on new mining claims ends Sunday.

Interior Secretary Ryan Zinke is not expected to issue a new moratorium order protecting the 10 million acres of "sagebrush focal areas," or SFAs, which were included in the Obama-era grouse plans finalized two years ago today. The federal plans describe the SFAs as "essential for the species' survival."

The Bureau of Land Management is conducting an environmental impact statement to determine whether all, part or none of the 10 million acres should be withdrawn from new mining claims for 20 years or more in the name of protecting the sage grouse and some of its most important habitat.

Former Interior Secretary Sally Jewell signed an order — published in the Sept. 24, 2015, *Federal Register* — that "temporarily segregated" the federal lands in Idaho, Montana, Nevada, Oregon, Utah and Wyoming for up to two years while BLM conducted the EIS.

The moratorium ends Sunday, but BLM is not expected to complete a final EIS until the end of the year, at the earliest.

"The expiration means that, yes, the area will be once more available for new mining claims, until and unless the Secretary determines otherwise," Michelle Barret, a BLM spokeswoman, said in an email to E&E News.

It is not clear whether Zinke will issue a new moratorium.

Representatives with the Interior Department, including Interior spokeswoman Heather Swift, did not respond to numerous requests to comment on this story by publication time.

But the proposed withdrawal of lands in the Obama-era plans has been controversial, earning criticism from Montana Gov. Steve Bullock (D), among others.

The National Mining Association has asserted that the lands at issue are "likely mineral rich."

A U.S. Geological Survey report last fall largely disputed that claim. It found that most of the areas proposed to be withdrawn from new mining claims comprise areas with less than 17 percent "high or moderate mineral potential," according to the study (*E&E News PM*, Oct. 4, 2016).

The exception is in southwestern and south-central Wyoming, where USGS estimated in the report that 66 percent of the proposed area for withdrawal has high or moderate mineral potential.

Starting Sunday, mining companies can once again stake claims on lands within the SFAs.

"We know of no specific company plans to resume or begin new exploration in these areas," said Luke Popovich, a National Mining Association spokesman.

But, Popovich added, once "the segregation moratorium period has expired, there is no reason to believe they will not."

The end of the mining moratorium comes shortly after a federal review team established by Zinke to analyze the federal grouse plans recommended making some fundamental changes, including moving away from focusing on habitat protection and instead allowing states to develop "appropriate population objectives" for complying with the plans (*Greenwire*, Aug. 7).

The expiration of the two-year moratorium applies only to new mining claims and does not remove the SFAs from the federal plans, which amended 98 BLM and Forest Service land-use plans to incorporate sage grouse protections across nearly 70 million acres in 10 states.

The Zinke review team report, however, recommended exploring amending resource management plans "to remove or modify sagebrush focal area designations."

The moratorium expiration concerns some conservation groups, which say Zinke should issue a new moratorium protecting the SFAs until the EIS is completed.

"These are lands specifically identified as most in need of protection, and Interior's indecision puts them at risk, breaking its public commitment and ignoring its scientists' findings," said Nada Culver, senior director of agency policy for the Wilderness Society. "It should concern every Westerner that by hollowing out necessary protections, Interior seems willing to jeopardize the Fish and Wildlife Service's determination that a listing was not warranted for the bird under the Endangered Species Act."

Race to save federal plans

Meanwhile, conservation groups and local government leaders are pressing Zinke to fully implement the federal sage grouse conservation plans that were finalized two years ago today.

The Western Leaders Network, which describes itself as a group of "pro-conservation local leaders" in Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, Utah and Wyoming, sent a three-page letter to Zinke today urging him to implement the federal plans.

"We, as local, western officials, respectfully ask that you leave these plans intact," the letter says.

"As local, western officials, we urge you to listen to us, as well as the governors, ranchers, sportsmen, industry officials, conservationists and other stakeholders who invested years of work into these management plans — and allow those plans to stay intact," they added.

And a broad coalition of more than 40 environmental groups, including the American Bird Conservancy, the Center for Biological Diversity, the Western Watersheds Project and WildEarth Guardians, plans to deliver a letter to Zinke on Monday urging Interior "to rigorously implement" the federal sage grouse plans, "and to abandon efforts to alter or undermine these plans through administrative changes of policy or implementation."

The **letter** criticizes the review team report to Zinke as being "tailored to support efforts to carve out additional uses that damage or degrade sagebrush habitat, and to tip the balance away from conservation toward development."

It's not clear what kind of impact the letters will have on federal sage grouse policies.

Zinke has already issued a memorandum directing BLM to take steps to implement the sage grouse review team's recommendations changing the federal plans.

Some of the environmental groups that signed the letter to be delivered to Zinke on Monday filed federal lawsuit last year challenging the Obama-era grouse plans as insufficient to protect the bird.

Those groups include the Western Watersheds Project, WildEarth Guardians and the Center for Biological Diversity. Attorneys with Advocates for the West, which also signed the letter, filed the lawsuit on behalf of the groups (*Greenwire*, Feb. 25, 2016).

What's more, some industry groups have criticized the Western Leaders Network as a front for environmental activists.

Gwen Lachelt, a La Plata County, Colo., commissioner and one of the Western Leaders Network's founders, is a former Earthworks activist who directed that group's Oil and Gas Accountability Project.

Boulder County, Colo., Commissioner Elise Jones, a Western Leaders Network board member, once directed the League of Conservation Voters Education Fund in Boulder.

Both Jones and Lachelt signed the letter the network sent today to Zinke.

<http://bit.ly/2hnj5i2>

4. Cliven Bundy wants a new lawyer

Jennifer Yachnin, E&E News reporter

Published: Friday, September 22, 2017



Nevada rancher Cliven Bundy informed District Judge Gloria Navarro yesterday that he plans to fire his attorney, Bret Whipple, less than a month before his trial in the 2014 Bunkerville standoff is set to begin. John Locher/Associated Press

Rancher Cliven Bundy is seeking to fire his attorney Bret Whipple less than three weeks before he is set to face trial on charges stemming from his 2014 armed standoff with federal agents near Bunkerville, Nev.

According to court documents filed by Whipple yesterday, Bundy has asked to terminate his contract with the Las Vegas-based defense attorney, whom he first hired in October 2016.

"The attorney-client relationship has been disrupted," Whipple wrote in a six-page filing to U.S. District Judge Gloria Navarro. "The Client will either need to discuss, with the Court, his right to represent himself or the appointment of substitute counsel, or whatever other outcome is appropriate, prior to the rapidly approaching trial date in this matter."

Whipple does not detail why Bundy has opted to terminate his services ahead of the Oct. 10 trial, writing that he cannot disclose "confidential communications."

"While undersigned counsel diligently prepared for trial ... the decision to relinquish undersigned counsel of his services in this matter is prohibitive or undersigned counsel's ability to function in an attorney-client relationship with the client," Whipple wrote.

Whipple requested Navarro set a hearing on the motion before Sept. 28, to coincide with pre-trial deadlines in the case. Navarro has yet to set a hearing on the motion at time of publication.

Bundy and his sons Ryan and Ammon, along with four other defendants, are set to stand trial on a variety of misdemeanors and felonies, including conspiracy, threatening federal officials and firearms charges.

The trial marks the federal government's fourth attempt to convict individuals involved in the 2014 standoff near Bundy's Nevada ranch, sparked when federal agents tried to seize the Bundy's cattle due to more than \$1 million in unpaid grazing fees.

But the government has struggled to win major convictions in those cases, as jurors have repeatedly deadlocked or opted to acquit the defendants.

To date, only Arizona resident Gregory Burleson and Idaho resident Todd Engle have been convicted in connection with the Bunkerville standoff. That trial ended in April.

Burleson, who was found guilty of threatening a federal officer, obstruction of justice and interstate travel to help extortion, was sentenced in August to 68 years in prison. Engle's sentencing has been delayed until mid-December. He faces up to 20 years in prison.

But that same April trial also resulted in a deadlocked jury on charges against four other defendants, requiring those individuals — Richard Lovelien, Scott Drexler, Eric Parker and Steven Stewart — to face a retrial in July. That retrial ended last month with no convictions for Lovelien or Stewart, as well as for most charges against Parker and Drexler.

But the jury could not decide on four charges facing Parker and two charges facing Drexler, prompting Navarro to combine their second retrial with the Bundy case that begins next month.

At least one other defendant, Ryan Bundy, will represent himself in court.

<http://bit.ly/2wMyEBY>

5. BLM explores 'flexibility' for ranchers on grazing permits

Scott Streater, E&E News reporter

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The Bureau of Land Management wants to give ranchers more "flexibility" in how they manage cattle and sheep grazing on federal lands. BLM

The Bureau of Land Management wants to adjust how compliance is gauged on grazing permits across the West, drawing praise from the livestock industry and concern from conservationists.

The goal of the "demonstration program" BLM unveiled today is to get land managers who oversee more than 18,000 livestock grazing permits in 13 states to work more closely with ranchers and to ultimately set ecological goals for improving and maintaining rangeland health.

BLM is trying to identify as many as a dozen "outcome based" demonstration projects that, if successful, could be used by ranchers to meet ecological rangeland health goals.

As long as the yet-to-be-developed standards are met, ranchers would be granted "more flexibility" in how they graze livestock on federal allotments, said BLM public affairs specialist Brian Lombard.

This would include allowing ranchers "to make adjustments in response to changing conditions such as drought or wildland fire," the agency said today in a statement.

"Farmers and ranchers know the wildlife and the land they work better than anyone, it only makes sense that we would enlist them in conservation efforts," Interior Secretary Ryan Zinke said in a statement.

"One of my top goals is for the government to be a better neighbor, land manager, and partner," Zinke said. "I think it's a great step in that direction."

BLM is accepting demonstration project proposals from ranchers through Oct. 27, Lombard said.

The Interior Department and BLM have targeted livestock grazing regulations as part of President Trump's deregulation agenda.

A "BLM Priority Work" list developed by the agency in April calls for, among other things, prioritizing the streamlining of "the grazing permit process" in an effort to "provide more flexibility to the American rancher" (*Greenwire*, April 10).

The latest proposal is supported by the livestock industry, which has long argued that no one works harder to protect rangeland health than ranchers, whose livelihoods depend on a healthy landscape.

They've also argued that well-managed grazing activity can keep grasses at heights that shield and protect wildlife while reducing invasive plant species like cheatgrass, which burns easily and can help spread wildfires rapidly.

"We're extremely excited that the BLM is looking for some of these new innovative ways to manage the permitting process and provide some of the flexibility that both permittees and the land management agencies recognize is needed in the process," said Ethan Lane, executive director of the Public Lands Council and the executive director for the National Cattlemen's Beef Association's federal lands program. "We look forward to participating."

The proposal comes less than a year after data compiled by Interior on the nearly 155 million acres on which grazing occurs showed that at least a quarter of federal rangelands don't meet land health standards (Greenwire, Oct. 7, 2016).

Public Employees for Environmental Responsibility circulated the data last year.

Among other things, the data show that in 2015, grazing may have damaged 29 million acres, which are now classified as "not meeting all standards" for rangeland health and not making significant progress. Another 11.6 million acres also do not meet the standards, but BLM attributes that to reasons other than livestock grazing.

The data also reveal that BLM had never assessed 59 million acres, meaning the agency has not taken samples in those areas to see whether livestock grazing has damaged the land.

Some environmental groups are concerned about the new effort.

Erik Molvar, executive director of the Hailey, Idaho-based Western Watersheds Project, said the latest proposal appears to be part of a broader effort by the Trump administration "to move away from measurable standards and enforceable regulations and toward a free-for-all approach to industrial and commercial uses of our public lands."

He added: "This is bad news for land health and wildlife populations that are going to be subjected to even worse overgrazing conditions. If you abandon the already minimal standards in place today, you will end up with much worse problems with overgrazing, cheatgrass and habitat degradation."

<http://bit.ly/2xusABL>