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Sovereign Lands

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SOVEREIGN LANDS

Melissa Stewart[*]

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I. Introduction

The following are some key cases and legislative activities impacting oil and gas development on Sovereign lands. Recent federal auctions of oil and gas leases with disappointing results have led some commentators to suggest that federal regulation of the industry is hindering development of federal minerals.[1] In March, an auction of federal acreage in Nevada

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1. Brian Scheid, *Without incentives, industry sees regulation hindering US oil production*, PLATTS (Mar. 14, 2016), http://www.platts.com/latest-news/oil/houston/without-incentives-industry-sees-regulation-hindering-21093118 ("Claims that federal overreach and bureaucratic red tape are holding up drilling have become somewhat cliché…") (last visited Sept. 20, 2016).

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resulted in zero bids,[2] and in August an online auction, the first ever, of acreage off the Gulf of Mexico received only three bids.[3]

II. State of Wyoming v. United States Department of Interior

A. Background and Facts

The Bureau of Land Management ("BLM") issued regulations on March 26, 2015, to be effective on June 24, 2015, that applied to hydraulic fracturing on federal and Indian lands with the stated purpose of addressing concerns over underground water contamination and safety.[4] The regulations specifically related to wellbore construction, chemical disclosure, and water management.

Two separate suits were filed seeking judicial review of the regulations by the states of Wyoming and Colorado, and industry parties.[5] The states of North Dakota and Utah and an Indian tribe intervened on the side of the parties seeking judicial review and the District Court of Wyoming consolidated the suits. The District Court of Wyoming enjoined the implementation of the regulations pending the outcome of the case.

The States and industry parties contended that the regulations were arbitrary, did not accord with the law, and exceeded the BLM's authority.[6] The court focused its attention on the BLM's authority to regulate hydraulic fracing and held that the regulations were in excess of the BLM's statutorily confined authority.

B. Analysis

The BLM claimed broad authority to regulate oil and gas drilling on federal and Indian lands through several statutes, most importantly the MLA[7] and the FLPMA[8]. The purpose of the MLA, as recognized by court,

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2. *Id.* (noting that between June of 2015 and March of 2016, there had been three bids of federal acreage in Nevada that had zero bids).

3. *See* Janet McConnaughey, *Dismal Time for Gulf Oil = Record Low Lease Bidding*, AP THE BIG STORY (Aug. 24, 2016 5:09 PM), http://bigstory.ap.org/article/267c4018cf2f4dde986a6f3db771a3df/us-oil-and-gas-lease-sale-be-broadcast-live-internet.

4. Wyoming v. United States Department of Interior, No. 2:15-CV-043-SWS, 2016 WL 3509415, at *1-12 (D. Wyo. June 29, 2016), *appeal filed*, No. 16-8069 (10th Cir. June 29, 2016).

5. Industry parties included Independent Petroleum Association of America and Western Energy Alliance.

6. *Wyoming*, 2016 WL 3509415, at *3.

7. Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287.

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is to allow the BLM to organize and manage the leasing of minerals on federal lands.[9] The BLM asserted that hydraulic fracturing, as a method of extracting oil and gas, fell within the program of oil and gas management that the MLA specifically authorized the BLM to create.[10]

The court disagreed. After explaining that the historical role of hydraulic fracing regulation focused on preventing surface disturbance and reporting,[11] the court determined that the primary concern of the MLA was the promotion of mineral development and the protection of mineral reserves.[12] The court noted that "the principal focus [of the MLA] was . . . protection of the petroleum resource from the effects of water incursion and not on protection of water resources."[13]

The court underlined the necessity of a Congressional grant of authority to an agency to regulate an activity and detailed the process by which the BLM, as a federal agency, obtained its authority.[14] The court noted the absence of an express grant of authority to the BLM over hydraulic fracturing and found that, in fact, Congress had itself addressed fracing, thereby precluding the BLM from regulating the activity.[15] The court determined that the Energy Policy Act of 2005,[16] which amended the Safe Water Drinking Act[17] to exclude from the definition of underground injection all fluids or propping agents other than diesel fuels, precluded federal regulation of hydraulic fracing except as to diesel fuels.[18]

The BLM has appealed the court's decision to the 10th Circuit.

III. Barlow & Haun, Inc. v. United States

A. Background and Facts

In *Barlow & Haun, Inc. v. United States*, Barlow, lessee under federal leases covering lands in Wyoming, appealed the decision of the Federal

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8. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1787 The court noted others but discussed these two in detail.

9. *Wyoming*, 2016 WL 3509415, at *5.

10. *Id.* at *6.

11. *Id.*

12. *Id.* at *5.

13. *Id.* (quoting U.S. Dep't of Energy, *State of Oil and Gas Regulations Designed to Protect Water Resources* (May 2009)).

14. *Id.* at *3.

15. *Wyoming*, 2016 WL 3509415, at *4.

16. 42 U.S.C.A. § 15801 (2005).

17. 42 U.S.C. §§ 300f-300j-26.

18. *Wyoming*, 2016 WL 3509415, at *10-11.

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Claims court denying their breach of contract and takings claim against the Bureau of Land Management ("BLM").[19]

Barlow had 26 leases covering federal lands in Wyoming taken sometime prior to 2008. The lands covered by the leases were also used for the mining of trona, which entailed underground mining. To accommodate the mining of trona and ensure the safety of underground miners, the BLM developed a resource management plan for the lands, with the final version affirmed in 2010.[20] The plan stated that the lands would be unavailable for "new fluid mineral leasing until the oil and gas resources can be recovered without compromising the safety of underground miners."[21]

The court held that the appellate court was correct in holding that the leases had not been breached and that the takings issue was not ripe.

B. Analysis

Drilling on federal lands requires a Lessee to file an application for a permit to drill ("APD") and obtain approval from the BLM to drill. Barlow did not file an APD to drill, but instead sued the BLM claiming that the plan, indicating that the lands would be indefinitely unavailable for oil and gas drilling, breached their leases and resulted in a taking.[22]

Barlow claimed that the leases were breached because the new regulations prevented them from using the leases to develop the oil and gas, being the "only purpose" of the leases, and by altering the terms of the leases by requiring new conditions.[23]

The court began its analysis by noting that the plan explicitly applied to "new" drilling and that it included language indicating that the BLM recognized the necessity of accommodating its preexisting leases.[24] The court further noted that the BLM had approved the APD of other lessees.[25]

The court next addressed the claim that new regulations in the plan regarding trona miner safety constituted new contract terms not contemplated by the parties. The court determined that although at the time the leases were executed there were not specific trona miner safety regulations, there were regulations allowing the BLM to regulate operations

19. 805 F.3d 1049, 1053 (2015).
20. *Id.* at 1056.
21. *Id.*
22. *Id.* at 1059.
23. *Id.* at 1054-55.
24. *Id.* at 1056.
25. *Id.*

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in a manner that "protects life and property."[26] These regulations, the court concluded, were no different.

The court held that the leases were not breached because, as noted above, the BLM under the plan could still approve an APD and the new regulations did not constitute new contract terms.

The court next addressed Barlow's claim of a taking and found that the issue was not ripe because Barlow had not filed an APD.[27] The court again noted that the BLM had approved other APDs, and could, under the plan, approve Barlow's APD. They also held that before a takings claim could be pursued, a final agency decision was necessary, and without the APD, there had been none.[28]

IV. Legislative Activity

The Bureau of Land Management ("BLM"), the agency responsible for management of oil and gas development on Sovereign lands, finalized a rule, which increased civil penalties for violation of regulations falling under 43 C.F.R. Part 3163.2. Effective July 28, 2016, this new rule provides that operators failing or refusing to comply with any laws or terms of leases or permits are subject to civil penalties.[29] The stated purpose of the increase is to account for inflation and maintain the deterrent effect the penalties are intended to have.[30]

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26. *Id.* at 1057.
27. *Id.* at 1059.
28. *Id.* at 1058.
29. 43 C.F.R. § 3160.
30. Onshore Oil and Gas Operations—Civil Penalties Inflation Adjustments, 81 Fed. Reg. 124 (June 28, 2016) (interim final rule effective on July 28, 2016) *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-06-28/pdf/2016-15129.pdf.

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