Wyoming Environmental Compliance and Public Land News - August 2016

Insight — 8/01/2016

Public Land News

Judge Skavdahl Strikes Down BLM's Fracking Rule
Determining that the U.S. Bureau of Land Management (BLM) lacked congressional authority to promulgate the rule, on June 21, 2016, a Wyoming federal district court judge struck down the BLM's fracking rule for federal and Native American lands (Fracking Rule).

Issued on March 26, 2015, the BLM Fracking Rule sought to impose strict well casing and wastewater storage requirements and required drillers to disclose the chemicals used in their fracking operations. Implementation of the Fracking Rule was blocked by the court in September 2015 until the litigation concluded.

In the litigation, BLM asserted authority to promulgate the Fracking Rule under an array of statutes: the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1787; the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181-287; the 1930 Right-of-Way Leasing Act, *id*. §§ 301-306; the Mineral Leasing Act for Acquired Lands, *id*. §§ 351-360; the Federal Oil and Gas Royalty Management Act of 1982, *id*. §§ 1701-1759; the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396g; and the Indian Mineral Development Act of 1982 (IMDA), *id*. §§ 2101-2108. Substantively, the BLM relied on the MLA, FLPMA, IMLA and IMDA as granting BLM “broad authority” to regulate all oil and gas operations on federal and Indian lands.

The states of Wyoming, Colorado, North Dakota, Utah, the Ute Tribe, and the Southern Ute Tribe, who brought the lawsuit challenging BLM's ability to craft and impose the Fracking Rule, argued that none of the enumerated statutes authorize the BLM to regulate hydraulic fracturing activities.

After a detailed analysis of the statutes relied on by BLM, U.S. District Court Judge Scott Skavdahl ruled that Congress has not delegated authority to the Department of Interior (DOI) to regulate hydraulic fracturing and BLM's efforts to do so through the Fracking Rule exceeds BLM's authority and are contrary to law. To review the district court's Order on Petitions for Review of Final Agency Action, click here.

It is anticipated that the DOI will appeal the district court's decision.

BLM's Land Use Planning 2.0 Rules Under Scrutiny
In June, the Senate held hearings on BLM's proposed revisions to its land

use planning rules. The majority of the testimony was critical of the proposals. Wyoming Senator John Barrasso summarized the sentiment that the planning changes “will be less efficient, more costly, and marginalize experts who are integral to public land management.” A number of Western stakeholders, including the Western Governors Association, ranchers, and oil and gas companies also voiced their concerns in testimony that the proposed revisions would reduce the role of the states, counties, and other local governments and experts.

BLM Director Neil Kornze defended the proposal, but also saw room for improvement. The purpose of the change, he described, is to speed up the planning process, make it more transparent, and engage more stakeholders “early and often.” Director Kornze acknowledged, however, that reducing public comment time periods may not have been the best approach to meet the intended purpose and also indicated some changes might be warranted to the “landscape scale” planning currently proposed.

ONRR Announces Final Valuation Rules for Coal, Oil and Gas
The DOI's Office of Natural Resources Revenue (ONRR) has announced final regulations regarding the valuation of coal and oil and gas production on public lands.

Under the new rule, the market value of these resources will be calculated according to the gross proceeds from the first arm's-length sale. ONRR stresses that the “improved” regulations ensure that taxpayers are fairly paid for public resources, while providing a more efficient and consistent process for lessees.

Energy companies and their congressional allies contend that the new rule lacks clarity, is overly burdensome, and gives too much discretion to ONRR. The energy industry is already considering its legal options, and a lawsuit appears inevitable.

The new rule falls in line with a White House report issued in June detailing the economic and environmental impacts of a royalty increase on coal production on public lands. The report concluded that, although an increase in royalties would lead to a decline in coal production, it would generate more revenue for state and federal governments. To review the final rules, go here.

State News

Wyoming Revises Compensatory Mitigation Framework
Wyoming Governor Matt Mead recently issued a revised compensatory mitigation framework for the Greater Sage-Grouse. The framework, which can be found here, outlines the process by which impacts to sage-grouse habitat should be avoided, minimized, and mitigated. When avoidance and minimization of impacts is not sufficient, compensatory mitigation may be required. The framework provides “the greater the impact, the greater the required offsetting compensation.” The framework establishes a credit and debit trading system and provides that impacts and benefits must be evaluated on a landscape scale, focusing on habitat quality and connectivity. State agencies must adhere to the framework when

permitting or advancing projects requiring compensatory mitigation.

In a letter to federal agencies transmitting the revised framework, Governor Mead asks “all agencies to operate under a single, manageable framework on mitigation” to “maintain consistency and ensure direct benefit to the species.” In this letter, Governor Mead also questions federal authority to require a net conservation benefit or net gain, but assures federal agencies that Wyoming's framework seeks to do just that. Governor Mead asks federal agencies to incorporate the framework into permitting programs.
