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Sovereign Lands

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SOVEREIGN LANDS

Melissa Dixon *

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I. Introduction

The biggest activity in the area of sovereign lands has been in the area of federal regulations, governed by the Bureau of Land Management (“BLM”) under the supervision and direction of the Secretary of the Interior (“SOP”). Two federal regulations issued during the Obama administration were subject to many challenges and resulted in much litigation, the Waste Prevention Rule¹ and the Fracing Rule.² Both rules were issued by the BLM and address drilling on federal and Indian lands. The Trump administration issued orders³ soon after inauguration aimed at reducing

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1. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016).

2. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015).

3. See Exec. Order No. 13,771, 82 Fed. Reg. 9339, (Jan. 30, 2017) (Ordering agencies to reduce regulations and cap costs); Exec. Order No. 13,783, 82 Fed. Reg. 16,093, (Mar. 28, 2017) (“It is in the national interest to promote clean and safe development of our Nation’s vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.

federal regulations overall and promoting energy development. The result was that both rules have, or are in the process, of being revoked or revised.

*II. Waste Prevention Rule*⁴

The Waste Prevention Rule, published on November 18, 2016, prohibited venting, except in emergencies or when flaring is technically infeasible.⁵ Both the capture percentage and the flaring allowance would phase in over a ten-year period.⁶ The BLM's primary purpose was waste prevention, while methane and other air pollutant reductions were "ancillary."⁷ The States of Wyoming, Montana, and North Dakota attempted to enjoin the Rule claiming "it exceed[ed the] BLM's statutory authority and [was] otherwise arbitrary and capricious."⁸ The court denied the injunction concluding that the Petitioners had not met the requisite showing of a clear and unequivocal likelihood of success on the merits and irreparable harm.⁹ The Petitioners appealed and awaited trial regarding the final merits, but the appeal was stayed with the transition to the Trump administration.

President Trump issued an Executive Order directing the BLM to review the Waste Prevention Rule and to suspend, revise, or rescind it.¹⁰ The BLM reviewed the rule and "found that some impacts were under-estimated and many provisions of the rule would add regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation."¹¹ The BLM has proposed a revision of the rule to reduce "unnecessary compliance burdens" and put the regulations back to

Moreover, the prudent development of these natural resources is essential to ensuring the Nation's geopolitical security.").

4. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016).

5. Wyoming v. U.S. Dep't of the Interior, No. 2:16-CV-0280-SWS, 2017 WL 161428, at *1-*2 (D. Wyo. Jan. 16, 2017), *judgment vacated, appeal dismissed sub nom.* Wyoming v. Zinke, 871 F.3d 1133 (10th Cir. 2017).

6. *Id.*

7. *Id.* at *3.

8. *Id.* at *1.

9. *Id.* at *12.

10. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,093 (Mar. 28, 2017).

11. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924 (proposed Feb. 22, 2018) (also available at <https://www.federalregister.gov/documents/2018/02/22/2018-03144/waste-prevention-production-subject-to-royalties-and-resource-conservation-rescission-or-revision-of>).

their status before the Waste Prevention Rule.¹² The revision was published on February 22, 2018 and the official comment period closed April 23, 2018, but the final rule has not been published.¹³ According to the BLM's website, portions of the rule have been suspended and portions are currently under revision.¹⁴

III. Fracing Rule¹⁵

The Fracing rule was issued on March 26, 2015, effective June 24, 2015, and applied to hydraulic fracturing on federal and Indian lands with the stated purpose of addressing concerns of underground water contamination and safety.¹⁶ The regulations specifically related to wellbore construction, chemical disclosure, and water management.¹⁷

Challenges were filed by the states of Wyoming and Colorado, and separately by the states of North Dakota and Utah, contending that the regulations were arbitrary, did not accord with the law, and exceeded the BLM's authority.¹⁸ The District Court of Wyoming consolidated the suits and enjoined implementation of the regulations pending the outcome of the case, and ultimately held that that the regulations were in excess of the BLM's statutorily confined authority.¹⁹ The BLM appealed the court's decision to the 10th Circuit.

President Trump issued Executive Order 13,783 ordering agencies to immediately review regulations that potentially burden the development or use of domestically produced energy resources and, as appropriate, suspend, revise, or rescind those that unduly burden domestic energy resources development.²⁰ The Secretary of the Interior followed with a Secretarial Order directing the BLM to expeditiously rescind the Fracing

12. *Id.*

13. *Id.*

14. <https://www.blm.gov/policy/ib-2018-048>.

15. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015).

16. Wyoming v. U.S. Dep't of Interior, No. 2:15-CV-043-SWS, 2016 WL 3509415, at *1-12 (D. Wyo. June 29, 2016), *judgment vacated, appeal dismissed sub nom.* Wyoming v. Zinke, 871 F.3d 1133 (10th Cir. 2017).

17. *Id.* at *1.

18. *Id.* at *3.

19. *Id.* at *12.

20. See Exec. Order No. 13,783, 82 Fed. Reg. 61,924 (Dec. 29, 2017)

Rule.²¹ The BLM issued a rule, effective December 29, 2017, rescinding the Fracing rule and restoring the regulations to the language that existed immediately before the rule took effect.

The 10th Circuit noted the new President and administration were rescinding the regulations and therefore concluded the appeal was unripe and the district court's opinion was vacated.²²

21. U.S. Dep't of Interior, Secretarial Order No. 3349, (Mar. 29, 2017), (available at https://www.doi.gov/sites/doi.gov/files/uploads/so_3349_-_american_energy_independence.pdf).

22. *Wyoming v. Zinke*, F.3d 871 1133, 1146 (10th Cir. 2017).