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Fracking Ruling May Stymie Oil, Gas Projects On US Land

By **Keith Goldberg**

Law360, New York (April 19, 2013, 6:30 PM ET) -- A California magistrate judge's recent ruling that the federal government needs to assess the risks of fracking before granting oil and gas leases will spark a fresh wave of legal challenges and a re-examination of outdated leasing policies, leading to longer waits for companies eager to tap federal lands, attorneys say.

U.S. Magistrate Judge Paul S. Grewal of the Northern District of California said March 31 that the U.S. Department of the Interior violated the National Environmental Policy Act by failing to assess the risks of fracking before leasing 2,700 acres of California land for oil and gas extraction in 2011.

In granting summary judgment to the Center for Biological Diversity and Sierra Club, the judge said DOI's Bureau of Land Management unreasonably relied on outdated projections that oil companies would install a single well on 1 acre as proposed and should have studied the potential environmental effects of fracking before leasing the land, which sits atop the Monterey Shale formation.

Both the BLM's environmental assessment and the agency's finding of no significant impact based on the assessment and its resulting decision not to prepare an environmental impact statement were erroneous as a matter of law, Judge Grewal said.

"What this decision really says, I think, is that BLM is relying on a resource management plan from several years ago and the judge said that's not reasonable anymore," McDermott Will & Emery LLP partner James Pardo, who has represented the oil and gas industry, told Law360. "It needs to be redone in a way that accounts for the fact that there will be more drilling, more oil and gas development on this land than [BLM] anticipated."

Attorneys predict the decision will spur suits seeking to block lease sales on similar grounds. In fact, the CBD and Sierra Club sued the BLM in the same court on Thursday over the December leasing of nearly 18,000 acres of California land.

"The bottom line is that to the extent that this was a consistent program followed by the BLM and the BLM approached similar sites in a similar way, you're going to expect copycat suits," Martin Booher, co-leader of BakerHostetler's national shale practice team, told Law360.

It may also force the agency to revisit and revise its resource management plans — not only for federal lands atop the Monterey shale, but other lands as well — to account for the recent surge in fracking activity. That combination could gum up the leasing process, attorneys say.

"The court’s discussion suggests that a hard look at the impacts of fracking in an environmental impact statement may be necessary before BLM approves fracking in federal minerals," said Perkins Coie LLP attorney Tyler Welti, formerly the lead fracking litigator for the U.S. Department of Justice's Environment and Natural Resources Division. "Given that many other public land areas beyond the Monterey Shale formation may be similarly situated in terms of existing NEPA review, accepting the court’s reasoning would mean that BLM has a significant NEPA workload ahead of it before fracking on federal land can hit full steam."

NEPA requires federal agencies to take a so-called “hard look” at every significant aspect of the environmental impact of a proposed action. Center for Biological Diversity staff attorney Brendan Cummings, who successfully argued the case before Judge Grewal, says the BLM's reliance on outdated resource management plans reflect a leasing process that has "devolved into a rubber-stamp, cut-and-paste process," and the judge's ruling affirmed the environmental groups' contention that the process wasn't acceptable.

"NEPA is ultimately a law about informed decision-making — the regulators need to be informed and the public needs to be informed," Cummings told Law360. "If [new Interior Secretary Sally Jewell] is going to allow oil and gas development to continue to occur on public lands, then the Interior Department has to be honest on what the environmental impacts are."

And while Judge Grewal's ruling represents the view of a single magistrate judge in a single judicial district, Pardo believes similar challenges elsewhere could be successful, because BLM's oil and gas resource management plans for other regions are similarly outdated.

"It's really no wonder that the BLM assumed one well would be put in there — until a few years ago, the shale oil beneath these lands was considered to be largely unrecoverable," Pardo said. "That RMP made sense then, but with the development of hydraulic fracturing and horizontal drilling that has opened up this shale oil, those RMPs really are outdated and they probably need to be updated."

While the decision may spur the BLM to do updated analyses more frequently, given the rapid advances in drilling technology, it raises the specter of whether the agency can ever be current in its analyses, according to Ron Tenpas, who co-chairs Morgan Lewis & Bockius LLP's environmental and climate change practices.

"Given the dynamism of industry and technological improvements, it's always going to be challenge for an agency, especially if you have courts really flyspecking about how old their analyses are," Tenpas said.

Ultimately, given the growth of the shale industry — and plenty of potential opportunities to drill on non-public lands — some oil and gas operators may decide it's not worth it to endure what may be a lengthy wait to get a crack at federal lands such as the land atop the Monterey shale, according to Booher.

"There's lots of opportunities out there," Booher said. "The Monterey shale is a tremendous resource, but at the end of the day, if it's going to be difficult to exploit, companies could go elsewhere."

--Editing by John Quinn and Chris Yates.