Texas A&M Journal of Property Law

Volume 6
Number 3 *Survey on Oil & Gas*

Article 10

12-1-2020

New Mexico

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Recommended Citation

Sharon T. Shaheen & John McIntyre, New Mexico, 6 Tex. A&M J. Prop. L. 85 (2020).

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NEW MEXICO

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I. STATE CASES

The New Mexico appellate courts issued no opinions relating to oil and gas in the past year.

II. STATE LEGISLATION

DOI: https://doi.org/10.37419/JPL.V6.I3.10

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A. *Produced Water Act, HB 546, codified at NMSA 1978, 70-13-1 to -5 (2019).*

Under the Produced Water Act ("Act") enacted in the 2019 regular legislative session, the New Mexico Legislature authorized the New Mexico Oil Conservation Division ("OCD") and the New Mexico Water Quality Control Commission ("WQCC") to regulate produced water resulting from oil and gas drilling or production.[1] The Act governs the transportation and sale of produced water,[2] recycled water (also referred to as recycled produced water),[3] and treated water (also referred to as treated produced water).[4] Unless otherwise provided by law or a legally binding document, responsibility and control of all produced water lies with both the working interest owners and the well operator. This responsibility and control remains until the water is transferred to another operator, transporter, pipeline, midstream company, plant, processing facility, refinery, or an entity engaged in recycling or treating services, at which point the transferee assumes responsibility and control.[5] The working interest owners and well operator have a possessory interest in the produced water, including but not limited to the right to transfer, sell, reuse, recycle, treat, or dispose of it, and that right passes to a transferee.[6] However, a transfer of responsibility and control under these provisions does not absolve one with responsibility and control with respect to claims made by third parties for damages.[7]

A state engineer permit is not required to transfer or dispose of produced water, treated water, or recycled water, and disposition of

1. Produced Water Act, N.M. STAT. ANN. § 70-13-3 (West 2019).
2. N.M. STAT. ANN. § 70-13-2(B) (West 2019) (Produced water is defined as "a fluid that is an incidental byproduct from drilling for or the production of oil and gas.").
3. § 70-13-2(C) (Recycled water and recycled produced water are both defined as "produced water that is reconditioned by a recycling facility permitted by the oil conservation division.").
4. § 70-13-2(D) (Treated water and treated produced water are both defined as "produced water that is reconditioned by mechanical or chemical processes into a reusable form.").
5. N.M. STAT. ANN. § 70-13-4(A)(1)-(2) (West 2019).
6. § 70-13-4(A)(1) to (3).
7. § 70-13-4(B).

such water does not establish a water right.[8] If the disposition of water falls under an activity regulated by the WQCC, however, then the party using the water must obtain a permit from the department of environment prior to use.[9] The following type of provisions in any agreement entered into on or after July 1, 2019 are considered against public policy and void: (1) allowing a private party to charge a tariff or fee for movement of produced water, treated water, and on surface lands owned by the state, if the agreement does not provide transportation services; (2) requiring an operator to purchase fresh water when produced water, treated water, or recycled water is available for use and the operator so chooses; or (3) relating to the purchase of water and precluding an operator from using produced water, treated water, or recycled water when available.[10]

Among other things, the Act also revised NMSA 1978, § 70-2-31, to provide authority to the OCD to impose civil penalties for violation of the Oil and Gas Act or any provision of a rule, order, permit, or authorization issued under the Act.[11] The Act provides a 30-day opportunity to cure after a notice of violation is entered, before a penalty is assessed.[12] A civil penalty may not exceed $2,500 per day of noncompliance for each violation unless the noncompliance poses a risk to public health or safety or of causing significant environmental harm, or unless the noncompliance continues beyond a time specified in a notice of violation or order, whereupon the penalty may not exceed $10,000 per day of noncompliance for each violation.[13] The Division will be publishing a proposed rule relating to penalties, and the hearing on the proposed rule is set for January 2, 2020. However, the new provisions of Section 70-2-31 become effective January 1, 2020.

B. *Relating to Oil and Gas; Imposing Fees; Creating a Fund; Making an Appropriation, SB 553, codified at NMSA 1978, § 70-2-39 (2019) (Fees; appropriation)*

8. § 70-13-4(C).
9. § 70-13-4(D).
10. N.M. STAT. ANN. § 70-13-5 (2019).
11. N.M. STAT. ANN. § 70-2-31 (2019) (effective Jan. 1, 2020).
12. § 70-2-31(B) to (C).
13. § 70-2-31(D).

In SB 553, New Mexico enacted legislation creating a fund to develop and modernize the OCD's and Oil Conservation Commission's ("OCC") electronic systems.[14] The fund will assist with modernization for case management and electronic filings. To pay for such modernizations, New Mexico now imposes the following non-refundable fees:

(1) $500 fee for applications for permits to drill on non-federal and non-Indian land;[15] applications for a fluid injection well permit;[16] and applications for an administrative hearing, re-hearing, or *de novo* hearing.[17]
(2) $150 fee for applications for administrative approval of a non-standard location, for downhole commingling, for surface commingling, for off-lease measurement, for release notification and corrective action, for a change of operator, for a modification to a surface waste management facility, for a request to create a new pool, for a proposed alternative method permit, for a closure plan application, or for authorization to move produced water.[18]
(3) $150 fee for applications for a continuance of an administrative hearing, re-hearing, or *de-novo* hearing.[19]
(4) $10,000 fee for applications for a permit to construct a surface waste management facility, a landfill, or a landfarm.[20]

III. FEDERAL CASE

A. *Diné Citizens Against Ruining Our Environment v. Bernhardt, 923 F.3d 831 (10th Cir. 2019)*

The primary issue in *Diné Citizens Against Ruining Our Environment v. Bernhardt*[21] is whether the Bureau of Land Management ("BLM") violated the National Historic Preservation Act

14. N.M. STAT. ANN. § 70-2-39(C) (2019).
15. § 70-2-39(A)(1).
16. § 70-2-39(A)(3).
17. § 70-2-39(A)(5).
18. § 70-2-39(A)(2).
19. § 70-2-39(A)(6).
20. § 70-2-39(A)(4).
21. 923 F.3d 831, 835 (10th Cir. 2019).

("NHPA") and the National Environmental Policy Act ("NEPA") in granting Applications for Permits to Drill ("APD"). The 10th Circuit affirmed the district court's dismissal of Appellants' NHPA claims but reversed and remanded the district court's dismissal of their NEPA claims. The Court held that the BLM failed to consider the cumulative impacts of water use when it approved APDs that would allow the drilling of thousands of wells located in the Mancos Shale of the San Juan Basin. The opinion focuses on three sections of legal analysis: (1) standing; (2) NHPA violations; and (3) NEPA violations.

The 10th Circuit first considered whether Appellants' members had "standing to sue in their own right" asking if Appellants' members had "(1) . . . suffered an injury in fact that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[22] The Court concluded that Appellants could establish an injury in fact, linking BLM's actions to increased environmental risks, by showing that issuance of the APDs could impact the visual landscape, view of the sky at night, peacefulness, and public health and safety.[23] The Court further concluded that the injury in fact was concrete and particularized[24] because Appellants' members regularly visited the areas that covered the APDs for recreational amusement, saw increased truck traffic and development activity, and witnessed air pollution created by trucks and machinery.[25] The Court determined that Appellants' allegations of BLM's failure to comply with NEPA evidenced a link between BLM's uninformed decision-making and a risk of harm.[26] Finally, the Court concluded Appellants established a likelihood that their injury would be redressed by a favorable decision because requiring BLM to comply with NEPA would avert the possibility that BLM may have missed significant environmental consequences.[27] Thus, the Court concluded that Appellants had standing to bring their claims.

22. *Id.* at 839.
23. *Id.* at 840–41.
24. *Id.* at 841.
25. *Id.* at 841–42.
26. *Id.* at 842–43.
27. *Id.* at 844.

Before moving to the merits, the Court bemoaned the "dramatic insufficiency of the record," noticing that Appellants challenged more than 300 individual agency actions, yet provided a complete record for only a few.[28] Consequently, the Court limited its review of the merits to only six of the challenged actions.[29]

The Court first considered whether BLM had violated the NHPA. Satisfying the NHPA requires a four-step process: (1) defining an "area of potential effects" ("APE"); (2) locating historic sites within the area;[30] (3) determining whether the proposed activity being permitted will "adversely affect" the historic sites; and (4) if activity will have an adverse effect, whether alternatives or modifications will "avoid, minimize, or mitigate" such effects.[31] The Court determined that BLM satisfied the requirements of the NHPA because, *inter alia*, a separate indirect-effects APE was not required,[32] BLM identified cultural properties outside of the direct-effects APE, that BLM considered indirect effects on those properties,[33] that no historical sites existed within the geographic area,[34] and that BLM was not required to consult with the state historic preservation office.[35] Therefore, the Court concluded that Appellants' NHPA failed.[36]

The Court then considered Appellants' NEPA claims. Under NEPA, an agency must evaluate environmental impacts "significantly affecting the quality of the human environment."[37] Applied to APDs, the BLM must examine the environmental impacts of proposed drilling activities by either issuing an environmental assessment ("EA") or an environmental impact statement ("EIS") associated with approving an APD.[38] An EA must analyze the direct, indirect, and cumulative effects of a proposed project.[39] The preparer of an EA can reach one of three conclusions: (1) the action will result in a significant

28. *Id.*
29. *Id.* at 845.
30. *See id.* at 846. If no historic properties exist within the geographic area, then the analysis does not move to steps 3 and 4.
31. *Id.*
32. *Id.* at 847–48.
33. *Id.* at 848.
34. *Id.* at 849.
35. *Id.* at 850.
36. *Id.*
37. *Id.* at 850–51 (citing 42 U.S.C. § 4332(2)(C)).
38. *Id.* at 837, 851.
39. *Id.* at 837, 851 (citing 40 C.F.R. §§ 1508.7 and 1508.8).

environmental impact; (2) the action will not result in a significant environmental impact; or (3) the action will not go forward.[40] If a significant environmental impact will result, then an EIS is required; if not, then there is a "finding of no significant impact," or a "FONSI."[41] When reviewing a complaint for NEPA violations, courts look at whether "the agency has adequately considered and disclosed the environmental impacts of its actions."[42] In doing so, a court uses "a 'rule of reason standard' to determine whether claimed NEPA violations 'are merely flyspecks, or are significant enough to defeat the goals of informed decision making and informed public comment.'"[43]

In approving the six APDs considered by the Court, BLM tiered the pertinent EAs to an EIS prepared in 2003.[44] Subsequent to the 2003 EIS, however, when the development of the Mancos Shale began in earnest, BLM issued a "reasonably foreseeable development scenario" ("RFDS"), which estimated that full development would result in 3,960 new wells.[45] Because the EAs relating to the six APDs did not consider the cumulative impacts of drilling 3,960 new wells, the Court concluded that Appellants' claims under NEPA could go forward.[46] Among other things, Appellants challenged BLM's failure to analyze the cumulative impacts of the 3,960 wells on air and water.[47] The Court rejected Appellants' claims relating to air pollution because Appellants failed to provide a sufficient record. [48] However, the Court found that BLM failed to consider the cumulative effect of 3,960 wells on water use concerning five EAs and therefore reversed the district court's dismissal of Appellants' EPA claims concerning those five EAs.[49] By failing to consider the cumulative impacts that drilling would have on water resources, the BLM acted arbitrarily and

40. *Id.* at 837 (citing 40 C.F.R. § 46.325).
41. *Id.* at 851 (citing 40 C.F.R. § 1508.13 and 42 U.S.C. § 4332(C)).
42. *Id.* at 851 (quoting Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin., 843 F.3d 886, 902 (10th Cir. 2016)).
43. *Id.* at 852 (quoting Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1163 (10th Cir. 2002)).
44. *Id.* at 851–52. .
45. *Id.* at 837.
46. *See id.* at 852.
47. *Id.*
48. *Id.*
49. *Id.*

capriciously when it issued the APDs associated with the five EAs.[50] Therefore, the Court remanded the case to the district court with instructions to vacate the five APDs and to remand the case back to BLM to conduct a proper NEPA analysis.[51]

50. *Id.* at 857.
51. *Id.* at 859.