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I. STATE CASES

A. Marker v. New Mexico Oil Conservation Commission

A pro se litigant appealed the New Mexico Oil Conservation Commission's ("the Commission") rulemaking involving amendments to the rules of financial assurance, 19.15.2, 19.15.8, and 19.15.25 NMAC.[1] As a precondition to drilling or producing a well under the New Mexico Oil and Gas Act ("the Act"), an operator of a well must provide financial assurance to the Oil Conservation Division of the Energy, Minerals, and Natural Resources Department ("the Division"), "which runs 'to the benefit of the state and [is] conditioned that the well be plugged and abandoned' upon cessation of use."[2] The Division may order any well plugged and abandoned if an operator fails to comply with the Act or the rules promulgated thereunder.[3]

The Act establishes two categories of financial assurance for active wells: (1) a blanket plugging financial assurance for temporarily abandoned wells and (2) one well-plugging financial assurance in amounts determined sufficient to reasonably pay the cost of plugging the wells covered by the financial assurance, which is required for any well that has been held in temporarily abandoned status for more than two years.[4] In 2018, the Legislature increased the cap on blanket assurance from $50,000 to $250,000, and the Commission proposed four tiers of blanket plugging financial assurance based on a range of wells owned by an operator.[5]

In 2018, the Division filed an application for rulemaking to amend the rules governing financial assurance.[6] After the hearing, the petitioner appealed the financial assurance amendments to the New Mexico Court of Appeals, arguing that: (1) the Commission's amendment was not supported by substantial evidence, (2) the adoption of the rule was arbitrary and capricious, (3) the Commission did not follow rulemaking procedure, and (4) the Commission violated his rights to due process. The court affirmed the Commission's amendments.[7]

1. Marker v. N.M. Oil Conservation Comm'n, No. A-1-CA-37860, 2021 WL 1530751, at *1 (N.M. Ct. App. Apr. 19, 2021).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at *2.
7. *Id.*

First, the court determined that the amendments were supported by substantial evidence because the Commission reviewed data regarding costs incurred by the State of New Mexico, which included an exhibit showing the costs of plugging wells over a four-year period.[8]

Second, the court determined that a four-tier approach was not arbitrary because the tiers were based on an operator's well volume.[9] The Commission followed its statutory directive to promulgate rules that effectuated the legislative cap increase.[10]

Third, the Commission did not violate rules of administrative procedure because it provided reasonable notice under the New Mexico Rules Act and the Commission's procedural rules for rulemaking hearings.[11] In addition, the lack of a public comment period prior to the conclusion of the hearing did not violate rulemaking procedures.[12] The court reasoned that the Commission requested further information from the parties to better understand the competing proposals, and the parties introduced the information at the hearing.[13] The court also noted that the New Mexico Rules Act does not require the Commission to provide a reason for limiting the issues on rehearing.[14]

Fourth, the court ruled that the petitioner's due process rights were not violated because he failed to identify a legitimate property interest of which he was deprived.[15] Lastly, the Court determined that the statute did not apply retroactively, as the petitioner unsuccessfully argued.[16]

B. Jalapeno Corp. v. New Mexico Oil Conservation Commission

This is another case in which an appeal was brought against the adoption of regulations following an administrative rulemaking.[17] In 2018, the Division sought to comprehensively revise the rules governing horizontal wells under the Act.[18] The Commission revised 19.15.15 and 19.15.16 NMAC ("the 2018 Rules").[19]

8. *Id.* at *3.
9. *Id.* at *4.
10. *Id.*
11. *Id.* at *6.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at *8.
16. *Id.*
17. Jalapeno Corp. v. N.M. Oil Conservation Comm'n, No. A-1-CA-37449, 2020 WL 5743659, at *1 (N.M. Ct. App. Sept. 23, 2020).
18. *Id.*
19. *Id.*

The Jalapeno Corporation ("Jalapeno") appealed the adoption of the regulations, arguing that the 2018 Rules establishing guidelines for well spacing, infill horizontal well, and transitional provisions were arbitrary and capricious and contrary to law.[20] The court affirmed.[21]

First, Jalapeno argued that the Commission's failure to set acreage requirements for horizontal spacing units contravened its purported duty to establish spacing units based on the area that can be efficiently and economically drained by one well and abdicated its statutory obligation to fix well spacing.[22] The court held that this argument was misplaced because it relied on a statute that addressed the standard for proration units, not spacing units.[23] It recognized that the New Mexico Supreme Court had established a clear distinction between a proration unit and a spacing unit.[24]

Second, Jalapeno argued that the new definition of an "infill horizontal well" violates the correlative rights of non-consenting owners bound by compulsory pooling orders and that the imposition of a 200% risk charge on multiple infill horizontal wells ignores the language of the statute authorizing those charges.[25] The court determined that the Commission considered the impacts on correlative rights and reasoned that those rights are protected by the notice and hearing requirements under the Act.[26]

Jalapeno also challenged the new definition of an infill horizontal well on the grounds that it includes proposed wells in addition to completed wells, which differs from the definition of other "infill wells" which must be "completed and not plugged and abandoned."[27] The court was unpersuaded and reasoned that the new definition was appropriate to reduce waste in the furtherance of the Commission's legislative mandate.[28] Jalapeno also argued that the new definition ran afoul of section 70-2-17(C) by disregarding the permissive language in the statute and expanding the risk charge from its application to a specific, identified well that is the subject of a compulsory pooling agreement to all infill side-by-side wells.[29] Again, the court held that

20. *Id.*
21. *Id.*
22. *Id.* at *3.
23. *Id.*
24. *Id.*
25. *Id.* at *6.
26. *Id.* at *7.
27. *Id.*
28. *Id.*
29. *Id.*

the notice and hearing requirements satisfy the Commission's statutory obligation to determine risk on a case-by-case basis.[30]

Third, Jalapeno challenged the transitional provisions in the 2018 Rules, which provide as follows:

> Any horizontal well drilled, commenced or permitted prior to June 26, 2018 shall retain as its horizontal spacing unit the standard or non-standard spacing unit or project area originally dedicated thereto. If that area is not a standard horizontal spacing unit as provided in Subsection B of 19.15.16.15 NMAC, that area is hereby approved as a non-standard horizontal spacing unit for the horizontal well so drilled, commenced or permitted.[31]

Jalapeno argued that the Commission did not explain the basis for the rule and failed to provide notice to those impacted by this rule.[32] The court determined that the Commission's rationale for adopting the rule changes demonstrated a rational connection between the testimony regarding the transitional provisions and the Commission's adoption of the same.[33]

Finally, Jalapeno argued that due process required the Commission to provide notice to "several compulsory pooled owners" that the rulemaking would address horizontal spacing units that had been previously pooled.[34] The court pointed out that Jalapeno's argument relied on a case that involved an adjudicatory proceeding and not a rulemaking.[35]

II. FEDERAL CASES

A. WildEarth Guardians v. Bernhardt

WildEarth Guardians ("Guardians") challenged the Bureau of Land Management's ("BLM") issuance of oil and gas leases covering more than 68,232 acres of federal land for violating the National Environmental Policy Act ("NEPA"), the Federal Land Policy and Management Act ("FLPMA"), and the Administrative Procedure Act ("APA").[36] BLM follows a "three-phase process" in issuing leases,

30. *Id.* at *8.
31. *Id.*
32. *Id.*
33. *Id.* at *9.
34. *Id.*
35. *Id.*
36. WildEarth Guardians v. Bernhardt, 501 F. Supp. 3d 1192, 1201 (D.N.M. 2020).

which involves a resource management plan, competitive bidding, and an application for a permit to drill.[37] The general thrust of Guardians' argument was that BLM failed to adequately assess the cumulative impacts of oil and gas development.[38]

Guardians made five discrete arguments under the APA standard of review of agency action under 5 U.S.C. § 706(2)(A), (C)–(D): (a) BLM violated NEPA by failing to take a hard look at the environmental impacts of oil and gas development; (b) BLM failed to provide a sufficient rationale for not preparing an environmental impact statement ("EIS"); (c) BLM issued the leases unlawfully in the midst of a resource management plan review; (d) BLM adopted new guidance unlawfully by violating FLPMA's public participation requirements and NEPA's implementing regulations; and (e) BLM's adoption of new guidance violated public notice and comment requirements.[39]

The court determined that BLM took a hard look at how the issuance of the leases would affect the regional environment, air quality, and water quality.[40] BLM was not required to use specific climate change methodologies to assess the cumulative effects of oil and gas development.[41] In its interpretation of NEPA, the court found "nothing in its text and nothing in its associated regulations specifically mandates that agencies perform a particular analysis or subscribe to particular methodology."[42]

Also, contrary to Guardians' argument, BLM was not required to apply the social cost of carbon protocol to quantify the project's contribution to costs associated with global climate change.[43] The court agreed with BLM that the "regulations preserve ample decision space for federal agencies to use the metrics and methodologies best suited to the issues at hand."[44] BLM appropriately considered the impact on air quality in approving the new leases by way of its Air Resource Technical Reports and discussion of the National Ambient Air Quality Standards in detail in the environmental assessments ("EA" or "EAs").[45] It also appropriately considered the impact on water quantity and quality by developing a foreseeable development report listing

37. *Id.*
38. *Id.*
39. *Id.* at 1204.
40. *Id.* at 1206.
41. *Id.* at 1207.
42. *Id.* at 1209.
43. *Id.* at 1211.
44. *Id.* at 1212.
45. *Id.* at 1213–14.

current water usage and analyzing casing specifications, respectively.[46]

The court ruled that BLM reasonably determined that an EIS was not needed to authorize the new leases.[47] The court reasoned that the EAs adequately and properly analyzed the direct and indirect effects of oil and gas development in the region; that they contextualized the leases on the local, national, and state level; and that BLM drew conclusions that the leases would not significantly impact the environment.[48] Therefore, BLM was not required to prepare an EIS for each lease.[49]

Next, the court concluded that Guardians had organizational standing to challenge new agency guidance that detailed a new process for competitive bidding.[50] Guardians argued that it violated the FLPMA and NEPA by removing public participation.[51] In order to challenge this guidance, however, the new guidance must constitute final agency action.[52] While the court found that the new guidance was the consummation of the agency's decision-making process, it was not a final agency action because it did not affect legal rights and obligations.[53] The court acknowledged that BLM abided by the statutory requirements to include public participation, but it found that the new guidance violated the FLPMA and NEPA regulations by altering previous language stating that "field offices *will* provide for public participation" to state that field offices "*may*" provide for public participation.[54] The court reasoned, however, that vacation of the leases for a minor alteration of BLM guidance would be a mark of judicial overreach.[55] The court urged BLM to alter the language in its new guidance to make it consistent with NEPA and FLPMA regulations by reverting to prior regulatory language.[56]

46. *Id.* at 1215.
47. *Id.* at 1216.
48. *Id.* at 1217.
49. *Id.* at 1218.
50. *Id.* at 1221.
51. *Id.*
52. *Id.* at 1222.
53. *Id.* at 1221.
54. *Id.* at 1224 (emphasis added).
55. *Id.* at 1225.
56. *Id.*

B. Anderson Living Trust v. Energen Resources Corporation

This opinion was authored by the magistrate judge, who proposed findings and recommended disposition to the district court, as explained below. This class-action suit involved allegations of systematic underpayment of royalties on oil and gas wells in the San Juan Basin.[57] After eight years of litigation, the parties filed a motion for court approval of a settlement in the amount of $5,610,000.00 for the class members.[58]

The court employed Federal Rule of Civil Procedure 23(e)(2) to approve the final stage of settlement.[59] The court must determine that the settlement is fair, reasonable, and adequate in the final stage of approval.[60] The Tenth Circuit has developed a four-factor test to determine whether a proposed settlement meets Rule 23(e)(2)(A)–(F).[61]

The first factor considers whether the class representatives and class counsel have adequately represented the class.[62] The court found that class counsel gained an adequate appreciation of the case's merits and obtained a substantial settlement, thus meeting the first factor.[63]

The second factor inquires whether the parties negotiated the proposal at arm's length.[64] The court reasoned that the second factor was satisfied because experienced attorneys who were intimately familiar with the legal and factual issues in an eight-year-long litigation obtained the result.[65]

The third factor queries whether the proposal treats class members equitably relative to each other.[66] The court found that the settlement was allocated to the class based on the amount of monthly underpayments for the failure to pay royalty on fuel gas and when that alleged underpayment occurred.[67] The allocation plan also accounted for all attorney fees, costs, and administrative expenses, and that it allocated those expenses pro rata.[68]

57. Anderson Living Tr. v. Energen Res. Corp., No. CV-13-909WJ/CG, 2021 WL 3076910, at *1 (D.N.M. July 21, 2021).
58. *Id.*
59. *Id.* at *2.
60. *Id.*
61. *Id.* at *3.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at *4.
68. *Id.*

The fourth and final factor considers whether the relief provided for the class is adequate. This final factor includes four subfactors that consider: (a) the costs, risks, and delay of trial and appeal; (b) the effectiveness of any proposed method of distributing relief to the class; (c) the terms of any proposed award of attorney's fees, including the timing of payment; and (d) any agreement required to be identified under Rule 23(e)(3).[69] The court found that the final factor was met and that the four prongs under Rule 26(e)(2)(A)–(F) were ultimately satisfied.[70]

The Tenth Circuit also requires the court to consider fairness under the four *Rutter* factors:

> (1) whether the settlement was fairly and honestly negotiated; (2) whether serious legal and factual questions place the litigation's outcome in doubt; (3) whether the immediate recovery is more valuable than the mere possibility of a more favorable outcome after further litigation; and (4) whether the parties believe the settlement is fair and reasonable.[71]

For the provision on attorneys' fees, the Tenth Circuit utilizes the "percentage of fund" method, does not use the lodestar method, and mandates courts to consider the 12 *Johnson* factors.[72] The court recommended approval of the settlement under the *Rutter* factors and an award of attorneys' fees because each of the *Johnson* factors weighed in favor of class counsel.[73]

69. *Id.* at * 4–5.
70. *Id.*
71. *Id.*
72. *Id.* at *7 (The Johnson factors include: "1. the time and labor involved; 2. the novelty and difficulty of the questions; 3. the skill requisite to perform the legal service properly; 4. the preclusion of other employment by the attorney due to acceptance of the case; 5. the customary fee; 6. any prearranged fee—this is helpful but not determinative; 7. time limitations imposed by the client or the circumstances; 8. the amount involved and the results obtained; 9. the experience, reputation, and ability of the attorneys; 10. the undesirability of the case; 11. the nature and length of the professional relationship with the client; and 12. awards in similar cases.").
73. *Id.* at *6, 9.