TEXAS TECH UNIVERSITY SCHOOL OF LAW

CONTINUING LEGAL EDUCATION PROGRAM

RECENT DEVELOPMENTS IN OIL AND GAS LAW

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NEW MEXICO

- I – JOINT OPERATING AGREEMENTS
  - Enduro Operating, LLC v. Echo Production Co., 2018-NMSC-016, 413 P.3d 866

    - Commencement of Drilling Operations – Well proposal
    - Similar to Oil and Gas Lease Well Commencement or Continuous Operations Clauses
    - Williams & Meyers, Oil and Gas Law sec. 618
    - Canons of Construction –
      - 1. Time of contracting not time of dispute;
      - 2. Look to "all the circumstances;
      - 3. If principal purpose is ascertainable, "give it great weight."

NEW MEXICO

- ENDURO OPERATING (Cont.)
  - What does the word “commence” mean? Do we need canons of construction to define a word?
  - Rule: “A party has commenced operations if it engages in actions that demonstrate a present good-faith intent to diligently carry on drilling activities until completion.”
    - Does the rule provide any guidance to the fact finder?
    - Williams & Meyers supports the position
    - Good faith means subjective intent
    - Spudding is not required
    - Well site preparation may be sufficient
    - Should it matter whether court is interpreting a lease or a JOA?

NEW MEXICO

- ENDURO OPERATING (Cont.)
  - Is a well permit required? Compare Goble v. Goff, 42 N.W.2d 845 (Mich. 1950) (yes) with Gray v. Helmerich & Payne, 834 S.W.2d 579 (Tex. App. 1992) (no)
  - Should the term “commence” mean the same in a private contract and in a public regulation? NMAC dealing with drilling permits uses the term commence so that drilling activities may not be engaged in without a permit?
  - No intent that use in standard form JOA of the term “commence” intended to incorporate NMAC definition

NEW MEXICO

- ROYALTY LITIGATION
- ANDERSON LIVING TRUST v. ENERGEN RESOURCES CORP., 886 F.3d 826 (10th Cir. 2018)
  - Class action royalty underpayment case
  - One of many in New Mexico over the past 10-15 years
  - Key Findings
    - Elliott Industries Limited Partnership v. BP America Prod. Co., 407 F.3d 1091 (10th Cir. 2005) held that New Mexico while applying an implied covenant to market had not expanded that implied covenant to adopt what is called either the “marketable condition” doctrine or “first marketable product” doctrine
    - Elliott is binding on subsequent Federal courts unless:

NEW MEXICO

- Anderson Living Trust (Cont.)
  - A: New Mexico Legislature adopts marketable condition rule, or:
  - B: New Mexico Supreme Court adopts the rule
    - New Mexico Supreme Court has had several opportunities to announce the acceptance or rejection of marketable condition rule but has "punted"
    - See e.g., ConocoPhillips Co. v. Lyons, 299 P.3d 844 (N.M. 2012); Davis v. Devon Energy Corp., 218 P.3d 75 (2009)
    - Judge Browning's prediction and/or belief that NM applies marketable condition rule cannot impact the decision in Elliott; Anderson Living Trust v. WPX Energy Prod. Co., 27 F. Supp.3d 1188, 1225 (n.12) (D. N.M. 2014).
    - No need to certify since NMSC has had the opportunity to "correct" 10th Circuit's Erie guess but has chosen not to

NEW MEXICO

- Anderson Living Trust (Cont.)
  - New Mexico Gas Processors Tax (N.M. Stat. Ann. 7-33-4)
    - Prior to 1998 amendment tax applied to “Every interest owner”
    - 1998 Amendment applies to “processors” for the privilege of operating a natural gas processing plant
    - Clearly 1998 Amendment shifts to processors the duty to pay the tax
    - Real question is whether it shifts the contractual allocation of the tax as determined by the lease or ORRI instrument language
    - Lessee can deduct from Lessor/ORRI owner its proportionate share of tax

NEW MEXICO

- Anderson Living Trust (Cont.)
- Free Use Clause
- Gives to Lessee the right to use “free of cost” gas, oil and water for its operations (Williams & Meyers 644.5)
- Is the use restricted to use on the leased premises?
- ConocoPhillips v. Lyons, supra, said no but it was interpreted a state lease
- Language in two of the Plaintiff’s leases do not restrict use to leased premises so long as there is a nexus between use and the lease

NEW MEXICO

- Anderson Living Trust (Cont.)
- Free Use Clause
  - N-R Trust ORRI instrument requires payment on “all oil and gas produced” from said lands
  - Language suggests that royalty is owed on 100% of production not 100% less volumes used on or off the leased premises: BUT ORRI measures royalty “at the well” so it is possible that the natural gas so used may be used in the netback methodology as a valid post-production cost – 10th Circuit remands
  - Tatum Trust – Free use clause applies to “all operations hereunder” BUT leased lands in CO which does apply marketable condition rule – Another remand

NEW MEXICO

- Ulibarri v. Southland Royalty Co., LLC, 209 F. Supp.3d 1227 (D. N.M. 2016), 2019 U.S. Dist. LEXIS 1122, 2019 U.S. Dist. LEXIS 43022, 2019 U.S. Dist. LEXIS 56477, 2019 U.S. Dist. LEXIS 57334
- Class Action Royalty Case
- Expert Testimony at Class Certification Hearing
- Class Amended after Anderson Living Trust/Energen
  - 1. Proceeds Royalty Provisions;
  - 2. Gross Proceeds Royalty Provisions;
  - 3. Great of Market Value or Gross Proceeds;
  - 4. Gross Proceeds Without Deduction of Post-Production Costs.

NEW MEXICO

- PUBLIC LANDS
- Cibola Energy Corp. v. United States Department of the Interior, 2018 U.S. Dist. LEXIS 86562 (D. N.M. May 23, 2018)
  - It's awfully hard fighting City Hall or BLM
  - Well completed in 1990
  - Never produced
  - 2002 – Cibola files TA (temporary abandoned) status petition
  - BLM orders casing integrity test (CIT)
  - 2004 -2011 – No TA petitions filed but shut-in payments made
  - 2011 – BLM sends letter to Cibola about well

NEW MEXICO

- Cibola Energy (Cont.)
  - 2011 – Cibola requests TA status
  - 2011 – BLM requests Cibola to do new CIT
  - 2011-12 Cibola appeals District Office decision to State Director and to IBLA
  - 2012 – IBLA affirms decision requiring new CIT

  Judicial review standard – APA arbitrary, capricious and abuse of discretion test;

  Did agency rely on factors that Congress did not intend it to so rely?

  Did agency "totally fail" to consider an important aspect of the problem?

  Did agency offer a reasoned analysis for its decision?

  District Court's review role is "narrow"

  IBLA decision upheld