Oil and Gas, Natural Resources, and Energy Journal

Volume 3 | Number 3
The 2017 Survey on Oil & Gas

September 2017

New Mexico

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Recommended Citation
Zach Gaver, *New Mexico*, 3 OIL & GAS, NAT. RESOURCES & ENERGY J. 749 (2017),
https://digitalcommons.law.ou.edu/onej/vol3/iss3/15

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NEW MEXICO

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I. Introduction

Although few New Mexico court opinions are of any precedential value to the oil and gas industry this year, two may have significant ramifications.

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Unless appealed, one of those opinions, *Enduro Operating LLC v. Echo Prod., Inc*., may prove to be more confusing than clarifying.

II. Judicial Developments

Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276 (10th Cir. 2016).

Plaintiffs must show a "likelihood of success on the merits" among other factors to obtain a preliminary injunction.

In the United States District Court for the District of New Mexico, the court denied the Environmentalists' request for a preliminary injunction against the drilling of oil and gas wells in the San Juan Basin in New Mexico.[1] On appeal, the Circuit Court of Appeals cited four factors that must be met to obtain a preliminary injunction: "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest."[2] The District Court found that the Environmentalists were able to show irreparable harm but could not satisfy the other three factors.[3] The Environmentalists contended that after showing irreparable harm, the court should have applied a modified test under which the Environmentalists could have met their burden for a preliminary injunction.[4]

Previously, in *Davis*, the court had held that plaintiffs, in general, who demonstrated a strong likelihood of prevailing on the merits could "receive a preliminary injunction based only on a possibility, rather than a likelihood, of irreparable harm," or a "sliding scale"[5]. The court noted that this holding is inconsistent with the Supreme Court of the United States' decision in *Winter v. Natural Resources Defense Council*, which stands for this proposition: To obtain preliminary relief, one must show the likelihood of irreparable harm, rather than merely a possibility of irreparable harm.[6] Applying the *Winter* standard, the court held that the district court did not abuse its discretion in concluding that the Environmentalists did not show a

1. Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276, 1280 (10th Cir. 2016).
2. *Id*. at 1281 (citing Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2002)).
3. *Id*.
4. *Id*. at 1282, 1286-87.
5. *Id*.
6. *Id*. (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008)).

substantial likelihood of success on the merits, and as a result, declined to address the three other factors for preliminary relief.[7] The court affirmed the district court's denial of a preliminary injunction.[8]

Enduro Operating LLC v. Echo Prod., Inc., 388 P.3d 990 (N.M. Ct. App. 2016).

A New Mexico court adopted an "individual analysis" standard for determining commencement of operations.

In *Enduro*, the court attempted to clarify an earlier decision from *Johnson v. Yates Petroleum Corp.*, in what constitutes the commencement of operations.[9] In *Johnson*, the court found that the work performed by a lessee, including "stak[ing] and survey[ing] the location, appl[ying] for and receiv[ing] a permit to drill the well, and beg[inning] prepa[tion] and [construction of] the well location prior to the expiration of the primary term," constituted the "commencement of drilling operations."[10] The court also stated that to "constitute the commencement of drilling operations, it appears that any activities in preparation for, or incidental to, drilling a well are sufficient."[11]

In *Enduro*, the proposing party had a 120-day period to drill, or to commence operations.[12] The court found that although the well location was surveyed, staked, and steps were taken to satisfy necessary permits, the only step taken during the relevant period was to contract with a drilling company.[13] Although the court noted in *Johnson* that "any activities" are sufficient,[14] in *Enduro* the court found that fewer steps were taken than in *Johnson*, where the proposing party received the "approval of the necessary permits, moved heavy equipment onto the well site, and took steps to clear brush and level the ground at the well location."[15] The court reiterated that the proposing party "signed a drilling contract instead and applied for a

7. *Id.* at 1285.
8. *Id*.
9. Enduro Operating LLC v. Echo Prod., Inc., 388 P.3d 990, 991 (N.M. Ct. App. 2016).
10. Johnson v. Yates Petroleum Corp., 981 P.2d 288, 291 (N.M. Ct. App. 1999).
11. *Id*. (citation omitted).
12. *Enduro*, 388 P.3d at 995.
13. *Id.*
14. *Johnson*, 981 P.2d at 291.
15. *Enduro*, 388 P.3d at 995.

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permit in the waning days of the 120-day period. Neither case contains facts in which any on-site activity occurred, other than preliminary staking."[16]

In summary, the court stated "that undertaking meaningful on-site actions ancillary to actual drilling can, under some circumstances, amount to commencement, but each case requires an individual analysis of the actions taken by the proposed driller."[17] The "individual analysis" standard, set out above, is currently unclear and will require careful consideration by operators moving forward.

16. *Id*. at 997.
17. *Id.*