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## New Mexico

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# ONE J

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NEW MEXICO



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### I. Introduction

In 2020, New Mexico took aggressive, proactive measures in order to support the oil and gas industry during the COVID-19 pandemic, including the passage of a temporary rule allowing wells to be shut-in due to economic hardship. Litigation trends in New Mexico included a continuation of class action lawsuits brought by royalty owners and lease challenges brought by environmental groups.

### II. Legislative and Regulatory Developments

#### A. State Legislative Developments

##### *Hydraulic Fracturing Permit Prohibition Bill Stalls in Legislature*

For the second year in a row,<sup>1</sup> Senators Antoinette Sedillo Lopez and Patricia Roybal Caballero introduced a bill that would place limitations on hydraulic fracturing activities within the state. Senate Bill 104, titled “Prohibit New Hydraulic Fracturing Permits,” sought to take a four-year hiatus from issuing new permits, but would expire in 2024.<sup>2</sup>

Opponents of the bill, including the New Mexico Oil and Gas Association, noted that any moratorium on hydraulic fracturing would “imperil the state’s financial situation,” resulting in lost revenues of approximately \$3.5 billion to the state government and \$327 million to local governments.<sup>3</sup>

The bill was introduced, but was never discussed in committee or voted on.<sup>4</sup> According to Senator Sedillo Lopez, the purpose was to “generate public discussion,” and to “take a breather” to examine the environmental and public health implications of hydraulic fracturing.<sup>5</sup>

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1. See S.B. 459, 54th Leg., 1st Sess. (N.M. 2019); S.B. 104, 54th Leg., 2d Sess. (N.M. 2020).

2. S.B. 104, 54th Leg., 2d Sess. (N.M. 2020).

3. Tim Benson, *Research & Commentary: Proposed Fracking Moratorium In New Mexico Would Devastate State Economy*, NMOGA.ORG, (Feb. 13, 2020, 4:13 PM), [https://www.nmoga.org/research\\_commentary\\_proposed\\_fracking\\_moratorium\\_in\\_new\\_mexico\\_would\\_devastate\\_state\\_economy](https://www.nmoga.org/research_commentary_proposed_fracking_moratorium_in_new_mexico_would_devastate_state_economy) (last visited Aug. 31, 2020).

4. S.B. 104, 54th Leg., 2d Sess. (N.M. 2020), and see *Bill History* <https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=104&year=20>.

5. Dan McKay, *Temporary Ban on Nm Fracking Proposed*, ALBUQUERQUE J., (Jan. 14, 2020, 10:04 PM), <https://www.abqjournal.com/1409876/legislator-proposes-temporary-fracking-ban.html>.

### *B. State Regulatory Developments*

#### *Oil Conservation Division Allows Operators to Shut-In Wells for Economic Hardship*

On March 24, 2020, the Oil Conservation Division (“OCD”) of the New Mexico Energy, Minerals and Natural Resources Department issued formal guidance detailing how the OCD would operate during the COVID-19 pandemic.<sup>6</sup> In addition to addressing issues such as permitting and applications, time extensions, and general correspondence, the OCD established special procedures for shutting in wells for economic hardship.<sup>7</sup> The shut-in procedures state an operator may request shut-in status for wells for economic hardship under the following conditions: (i) the operator enters into an Agreed Compliance Order (“ACO”) not to exceed thirty-six (36) months; (ii) for good cause, the OCD may extend the ACO for an additional twelve (12) months; (iii) the operator must conduct a Bradenhead test<sup>8</sup> on each well in the ACO every twelve months after the effective date of the ACO (to extend the shut-in past four years, the operator must place the well in approved temporary abandonment pursuant to NMAC 19.15.25.12-14; and (iv) the operator shall submit a compliance report for each Bradenhead test no later than thirty (30) days after such test.<sup>9</sup>

In response to numerous industry questions, on April 30, 2020, the OCD issued an update to the March 24, 2020 guidance document.<sup>10</sup> The update first elaborated on the shut-in procedures, stating that the OCD would be flexible in the number of wells that producers can temporarily shut-in due to economic hardship, and that the OCD was already “actively issuing allowances for inactivity.”<sup>11</sup> The update then further explained time extensions, stating that there would not be blanket extensions due to regulatory requirements, and that requests for extensions should

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6. N.M. Energy, Minerals and Nat. Res. Dep’t, *Oil Conservation Division Operations During Declared Public Health Emergency* (Mar. 24, 2020), [http://www.emnrd.state.nm.us/OCD/documents/How\\_To\\_OCD\\_Business\\_Operations\\_During\\_Emergency\\_Declaration\\_3-20-20.pdf](http://www.emnrd.state.nm.us/OCD/documents/How_To_OCD_Business_Operations_During_Emergency_Declaration_3-20-20.pdf) (last visited Aug. 10, 2020).

7. *Id.* at 4.

8. Bradenhead tests measure shut-in pressure, or casing head pressure of a well.

9. *Id.*

10. N.M. Energy, Minerals and Nat. Res. Dep’t, *Oil Conservation Division Operations During Declared Public Health Emergency New Guidance to Solve Emerging Issues* (Apr. 30, 2020), <http://www.emnrd.state.nm.us/OCD/documents/20-04-30UpdateToOCDProceduresDuringPublicHealthEmergency.pdf> (last visited Aug. 10, 2020).

11. *Id.* at 2.

demonstrate good cause and a proposed alternative timeline.<sup>12</sup> The update then listed several mandatory requirements that remained unchanged by the OCD guidance, including financial assurance requirements, notice requirements, fee schedules set forth in the Oil and Gas Act, general sundries, State Land Office sundries, and the filing of C-104s to obtain an allowable and authorization to transport oil and gas.<sup>13</sup>

*Oil Conservation Division Proposes Draft Gas Capture Rule*

On July 20, 2020, the OCD proposed draft rules that would regulate the emission of methane gas in New Mexico.<sup>14</sup> The rule would require 98% gas capture in the industry by the end of 2026.<sup>15</sup> Under the proposed rule, companies would be required to report monthly emissions data beginning in 2021. Operators would then be required to reduce their emissions rate at a level determined by their baseline gas capture rate.<sup>16</sup> The OCD stated, “[i]f operators do not meet their gas capture targets, they risk enforcement actions,” adding that the rule allows for exceptions in the case of emergencies.<sup>17</sup>

The New Mexico Oil & Gas Association (“NMOGA”) released comments in response to the draft rule, which stated in part, “NMOGA and our members are committed to reducing methane emissions while providing a sustainable source of energy. As the state’s rulemakings move ahead, we will continue to collaborate with both agencies by sharing our technical and scientific expertise.”<sup>18</sup> Additionally, the Environmental Defense Fund called the draft rule “an important step” toward implementing comprehensive methane reduction in New Mexico.<sup>19</sup>

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12. *Id.* at 3.

13. *Id.* at 4–5.

14. N.M. Energy, Minerals and Nat. Res. Dep’t, OCD DRAFT JULY 20, 2020, VENTING AND FLARING OF NATURAL GAS, <http://www.emnrd.state.nm.us/OCD/documents/NaturalGasWasteDraftRules-July202020.pdf> (last visited Aug. 10, 2020).

15. Theresa Davis, *Nm Releases Draft Methane Reduction Rules*, ALBUQUERQUE J. (Jul. 21, 2020, 10:08 PM), <https://www.abqjournal.com/1478241/nm-releases-draft-methane-reduction-rules.html> (last visited Aug. 10, 2020); NMAC Proposed Rule § 19.15.27.9.

16. *Id.*

17. Matthew V. Veazey, *New Mexico Proposes 98% Gas Capture* (Jul. 21, 2020), [https://www.rigzone.com/news/new\\_mexico\\_proposes\\_98\\_gas\\_capture-21-jul-2020-162781-article/](https://www.rigzone.com/news/new_mexico_proposes_98_gas_capture-21-jul-2020-162781-article/) (last visited Aug. 10, 2020).

18. NMOGA COMMENTS ON NEW MEXICO’S DRAFT METHANE RULES, Jul. 20, 2020, [https://www.nmoga.org/nmoga\\_comments\\_on\\_new\\_mexicos\\_draft\\_methane\\_rules](https://www.nmoga.org/nmoga_comments_on_new_mexicos_draft_methane_rules) (last visited Aug. 10, 2020).

19. *Id.*

### III. Judicial Developments

#### A. Federal Court Cases

##### *Lease Royalty Provision Ambiguous as to Valuation Point*

In denying cross motions for Summary Judgment, the District Court held that the royalty provision, “the proceeds of the gas, as such,” was ambiguous and did not clearly contemplate calculations “at the well” or at some other downstream valuation point.<sup>20</sup> In the class action suit, the Plaintiff’s alleged breach of contract, breach of implied duty to market, and violations of the New Mexico Oil and Gas Proceeds Payment Act (OGPPA) for improper deductions of the New Mexico Natural Gas Processor’s Tax and post-production costs from their royalty payments.<sup>21</sup> The court held that the OGPPA applied to the subject leases because while the leases predated the effective date of the OGPPA, the leases were assigned to Southland in 2015, “so applying the Act’s payment requirements would not ‘impose significant new duties and conditions and take away previously existing rights.’”<sup>22</sup> Finally, the court granted summary judgment as to any claims by overriding royalty interest owners because, “royalties paid to owners of overriding royalty interests are governed by the overriding royalty provisions contained in the instrument that created each overriding royalty interest, and not the royalty provisions of the underlying oil and gas lease(s).”<sup>23</sup>

##### *Parties Course of Performance did not Render Lease Royalty Provision Unambiguous*

In a companion case Slip Opinion issued on the same day as *Ulibarri v. Southland Royalty Co.*, the court again held that the royalty provision, “the proceeds of the gas, as such,” was ambiguous.<sup>24</sup> The court addressed an additional argument by the Defendant that the course of performance between the parties rendered the royalty provision unambiguous. However, the court did not consider Plaintiffs’ previous receipt of royalties under Energen’s calculation method as evidence that the language was unambiguous where there was no evidence that “Plaintiff had experience in

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20. *Ulibarri v. Southland Royalty Co.*, 409 F. Supp. 3d 1264, 1267 (D.N.M. 2019).

21. *Id.*

22. *Id.* at 1276 (citing *Olympia Brewing Co.*, 565 P.2d 1019 at 1025 (N.M. 1977)).

23. *Id.* at 1277.

24. *Ulibarri v. Energen Res. Corp.*, No. 1:18-cv-294-RB-SCY 2019 WL 3997396, at \*1 (D.N.M. Aug. 23, 2020).

the industry suggesting he understood and acquiesced to how his payments were being calculated.”<sup>25</sup> The court also refused to resolve the issue of whether Energen owed Plaintiffs royalties for in-kind payments of natural gas liquids made to a third-party processing company, stating, “this issue should be resolved following further development of the record in this case after the class certification phase.”<sup>26</sup>

*Royalty Owners’ Statute of Limitations Tolloed by Related Class Action Lawsuit*

Plaintiffs sued Energen for underpayment of its royalty obligations on April 15, 2019, after being previous members of a class action lawsuit that sued Energen on September 20, 2013.<sup>27</sup> Subsequently, on December 5, 2019, the court narrowed the class in that matter to Colorado plaintiffs, excluding the Fullertons.<sup>28</sup> Energen then filed a Partial Motion to Dismiss the Fullertons’ suit, arguing that the claims were barred by the six-year statute of limitations, while Plaintiffs argued that the “limitations period was tolled for the claims of the Fullertons against Energen during the entire time that the class allegations in those previous class action cases were pending.”<sup>29</sup>

The court noted that a statute of limitations starts to run when an injury occurs or is discovered, but that the Supreme Court has also held that “[t]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.”<sup>30</sup> Since the *American Pipe* case, the circuit courts have attempted to explain what claims fall within the scope of its tolling standard. Because the Tenth Circuit has not yet ruled on this narrow issue, the District Court relied on Seventh and Eighth Circuit cases when it required, “for claims to receive tolling, they must: (a) assert the same cause of action originally filed in the class action complaint, and (b) arise from the same factual circumstances as the class action claims.”<sup>31</sup> The court found that the Fullertons’ claims

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25. *Id.* at \*7.

26. *Id.* at \*8.

27. *Fullerton v. Energen Res. Corp.*, No. 1:19-cv-00346-RB-KRS, 2020 WL 953976 at \*1–2 (D.N.M. Feb. 27, 2020).

28. *Id.*

29. *Id.*

30. *Id.* at \*2 (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)).

31. *Id.* at \*3 (citing *In re Copper Antitrust Litig.*, 436 F.3d 782, 787 (7th Cir. 2006); *Zarecor v. Morgan Keegan & Co.*, 801 F.3d 882, 888 (8th Cir. 2015)).

satisfied this two-prong test, and therefore tolled the statute of limitations to extend the Fullertons' claims for underpaid royalties back to September 20, 2007, being six years before the original class action complaint was filed.<sup>32</sup>

*Court Upholds Several Claims Related to Undisclosed Oil Spill under Terms of PSA*

Epic Energy LLC filed suit against Encana Oil & Gas (USA) Inc. in order to recover remediation costs caused by an undisclosed oil spill that occurred prior to the effective date of the parties' Purchase and Sale Agreement ("PSA").<sup>33</sup> Defendant moved to dismiss all four of Plaintiff's claims, which the court denied in part and granted in part. First, the court held that Plaintiff's claim for breach of contract stated a claim because the oil spill remediation costs constituted a "monetary sanction" under the terms of the PSA.<sup>34</sup> Next, the court held that Plaintiff's claim for breach of warranties pursuant to the PSA was barred by the PSA's survival clause and that the PSA's shortening of the statute of limitations for such cause of action from six years to six months did not violate public policy.<sup>35</sup>

In upholding Plaintiff's fraud claim, the court held, "Defendant referenced the environmental condition and investigations of the assets and was 'bound to speak honestly,' [and that] Plaintiff relied on Defendant's knowingly false statements about the environmental condition of the assets."<sup>36</sup> In a claim unrelated to the remediation costs, the court upheld Plaintiff's breach of contract claim for the payment of unpaid property taxes owed prior to the effective date of the PSA.<sup>37</sup> Finally, the court held that Plaintiff pled a cause of action under the Declaratory Judgment Act,<sup>38</sup> but did not sufficiently state a claim for injunctive relief.<sup>39</sup> However, the court left the door open for Plaintiff to amend its claim for injunctive relief.<sup>40</sup>

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32. *Id.*

33. *Epic Energy LLC v. Encana Oil & Gas (USA) Inc.*, No. CIV 19-0131 RB/JHR, 2019 WL 4303325, at \*1 (D.N.M. Sept. 11, 2019).

34. *Id.* at \*2-4.

35. *Id.* at \*4-7.

36. *Id.* (citing *V.S.H. Realty, Inc. v. Texaco, Inc.*, 757 F.2d 411 (1st Cir. 1985)).

37. *Id.* at \*9.

38. 28 U.S.C. §§ 2201-02.

39. *Id.* at \*10-13 (holding that Plaintiff was not required to exhaust administrative remedies under N.M. Stat. Ann. § 70-2-29 prior to filing the complaint).

40. *Id.* at \*13.



*Lease Operators/Pumpers Granted Class Conditional Certification in FLSA Class Action*

In August of 2016, the Department of Labor conducted an investigation into Defendant Mewbourne Oil Company's classification of its employees and determined, "Defendant had been misclassifying its Lease Operators as exempt from the overtime protections of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq."<sup>41</sup> As a result of the investigation, Defendant made back-wage payments to 53 of its Lease Operators and obtained DOL-approved releases from them; however, Plaintiff did not receive any back-wages or sign a release.<sup>42</sup> Plaintiff then filed suit "individually and on behalf of all others similarly situated," seeking conditional certification of "[a]ll persons who worked as a Lease Operator[ ] or Pumper for Defendant at any time between October 31, 2015 and June 21, 2017."<sup>43</sup>

In granting conditional class certification, the District Court rejected several of Defendant's arguments. First, the court rejected Defendant's claim that Plaintiff has the burden of proving that other similarly situated employees would be interested in joining the suit.<sup>44</sup> The court also rejected Defendant's arguments to limit the class by: (i) including only individuals who worked at its Hobbs, New Mexico, location;<sup>45</sup> and (ii) excluding all individuals who, in connection with the DOL investigation, accepted payment from Defendant for unpaid overtime wages.<sup>46</sup> The court also permitted equitable tolling of the statute of limitations, which the majority of courts, including the Tenth Circuit, has held is an available remedy under the FLSA.<sup>47</sup>

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41. *Felps v. Mewbourne Oil Co.*, No. 18-811 MV/GJF, 2020 WL 2520136 at \*1 (D.N.M. May 18, 2020).

42. *Id.*

43. *Id.* (quoting Doc. 44 at 3).

44. *Id.* at \*3 ("Because Plaintiff has undisputedly met his (only) burden of substantially alleging that he and the other proposed class members are similarly situated, conditional certification at this initial notice stage is appropriate.").

45. *Id.* ("Defendant's Lease Operators company-wide were 'together the victims of a single decision, policy, or plan.'" (quoting *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001))).

46. *Id.* at \*4 ("Defendant 'has not established that those [Lease Operators] were aware that cashing the checks waived their FLSA rights.'" (quoting *Fortna v. QC Holdings, Inc.*, No. 06-cv-16, 2, 2006 WL 2385303 at \*8, (N.D. Okla. Aug. 17, 2006))).

47. *Id.* at \*6 (tolling the statute of limitations from "the date on which Plaintiff filed his original motion through the date on which this Memorandum Opinion and Order is entered").

*Industry Groups Permitted to Intervene in Suit Brought by  
Environmental Group*

Plaintiff WildEarth Guardians filed suit against the U.S. Secretary of the Interior and the U.S Bureau of Land Management for approving oil and gas leases across more than 68,232 acres of public land in New Mexico.<sup>48</sup> Plaintiff alleged that Defendants violated the National Environmental Policy Act, the Federal Land Policy and Management Act, and the Administrative Procedure Act by failing to adequately assess the environmental impact of said leases.<sup>49</sup> Subsequently, two trade groups, the American Petroleum Institute (“API”) and the Western Energy Alliance (“WEA”), moved the court to intervene as defendants.<sup>50</sup>

Plaintiff did not oppose API’s intervention but challenged WEA’s intervention on the grounds that API adequately represented WEA’s interests in the litigation.<sup>51</sup> Additionally, Plaintiff sought to put conditions on the intervention of both industry groups; specifically, that the intervening parties: “(a) follow BLM’s briefing schedule; (b) limit their briefing to BLM’s arguments; (c) confer to avoid duplication; and (d) submit joint briefs.”<sup>52</sup>

The court allowed both industry groups to intervene as of right, stating, “API’s broader interests and representation of companies throughout the value chain bring different perspectives to the matter that WEA’s narrower constituency might not perceive.”<sup>53</sup> The court also denied all Plaintiff’s requested conditions on intervention. Specifically, Plaintiff requested for the intervening parties to: “(a) follow BLM’s briefing schedule; (b) limit their briefing to BLM’s arguments; (c) confer to avoid duplication; and (d) submit joint briefs.”<sup>54</sup>

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48. *WildEarth Guardians v. Bernhardt*, No. 1:19-cv-00505-RB-SCY, 2020 WL 672836 at \*1 (D.N.M. Feb. 11, 2020).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at \*4 (“WEA’s members are limited to smaller exploration and production companies in the Western United States.”).

54. *Id.* at \*5 (“Forcing API and WEA to limit their arguments to BLM’s would defeat the purpose of intervention as of right.”).