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I. Introduction

New Mexico courts rendered few oil and gas opinions of any precedential value this year. Likely, the topic of most interest is that the New Mexico Court of appeals upheld the 2013 Amendment to the "Pit Rule," the latest update in the ongoing battle between environmentalists and the New Mexico Oil Conservation Commission.

II. Judicial Developments

A. Appellate Activity

2013 Amendment to the "Pit Rule" Upheld

Earthworks' Oil & Gas Accountability Project v. New Mexico Oil Conservation Commission, 374 P.3d 710, 713 (N.M. Ct. App. 2016).

The New Mexico Oil Conservation Commission (the "Commission") promulgated the "Pit Rule" in 2008 ("2008 Rule"),[1] and amended said rule in 2009 and 2013 ("2013 Amendment").[2] Although Earthworks' Oil & Gas Accountability Project ("Earthworks'") supported the 2008 Rule and the 2009 amendment, it disagreed with the 2013 Amendment, which oil and gas industry entities largely supported.[3] In the First Judicial District Court, Petitioner Earthworks' sought a writ of certiorari to force the Commission to hold a rehearing to reconsider the 2013 Amendment, and the District Court certified the case to the Court of Appeals (the "Court"), requesting that the Court either vacate the Commission's order promulgating the 2013 Amendment, or to reverse and remand the 2013 Amendment.[4] The Court found Earthworks' assertions lacking and affirmed the promulgation of the Commission.[5]

In addition to jurisdictional and procedural challenges that the Court did not find persuasive,[6] Earthworks' asserted that the Commission acted improperly on the merits in promulgating the 2013 Amendment.[7] In reviewing the 2013 Amendment on its merits, the Court looked to "(1) whether the agency acted fraudulently, arbitrarily, or capriciously; (2)

1. Earthworks' Oil & Gas Accountability Project v. New Mexico Oil Conservation Comm'n, 374 P.3d 710, 713 (N.M. Ct. App. 2016).
2. N.M. CODE R. § 19.15.17 (2016).
3. *Earthworks'*, 374 P.3d at 716-17.
4. *Id*. at 713-14.
5. *Id*. at 723.
6. *Id*. at 714-15.
7. *Id*. at 715.

whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence; (3) whether the action of the agency was outside the scope of authority of the agency; or (4) whether the action of the agency was otherwise not in accordance with law."[8]

The Court heavily analyzed the arbitrary and capricious component of the assertion. Earthworks' contended that the 2013 Amendment was arbitrary and capricious because "(1) the 2013 Rule is radically different from the 2008 Rule, despite being based on largely the same evidence; (2) the Commission did not entirely explain its reason for departing from the 2008 Rule; (3) the Commission did not explain why the 2013 Rule is performance-based, instead of prescriptive; (4) the Commission gave no explanation of its lowered groundwater contamination criteria, and (5) the Commission gave no explanation of how it was able to accomplish more cost saving measures than the 2008 Rule while still protecting water supplies, public health, and the environment."[9]

The Court found that the agency did not act in an arbitrary or capricious act manner for multiple reasons. First, even though the 2008 Rule and the 2013 Amendment are different, that does not automatically result in the 2013 Amendment being arbitrary or capricious.[10] Second, the Commission is not required to respond to all concerns raised during rulemaking hearings.[11] The Commission explained that the 2008 Rule has negatively impacted the oil and gas industry in New Mexico, and the Commission presented a detailed report of fifty pages, ensuring that its reasoning was adequate.[12] Third, the Commission needed only to comply with its statutory duties, which it did; it is not obligated to create a prescriptive or performance based rule or explain why it chose a more performance based rule.[13] Fourth, "the Commission is not required to 'justify its departure' from the 2008 Rule; it is only required to explain its reasoning for adopting the 2013 [Amendment]."[14] The Court found that comparing the two promulgations is not the correct standard of analysis to apply.[15] The correct standard is determining whether the Commission's actions are consistent with the statute it is implementing, and the Court found the Commission

8. *Id*. at 715-16 (citing NMRA, Rule 1-075).
9. *Id*. at 716.
10. *Id*. at 717.
11. *Id*. at 718.
12. *Id*.
13. *Id*.
14. *Id*. at 719.
15. *Id.*

acted properly in this regard.[16] Finally, Court found the Commission's primary objective in establishing the 2013 Amendment was to simplify the process and to make the Pit Rule less cumbersome to regulators.[17] While the Commission may consider economic factors, this was not its primary objective in promulgating the 2013 Amendment.[18]

Although future challenges to the Pit Rule could be forthcoming, this case stands for the notion that the Commission properly promulgated 2013 Amendment to the Pit Rule.

B. Trial Activity

Overriding Royalty Owners Have Standing to Pursue Claims for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and Breach of the Implied Covenant to Market

Abraham v. WPX Prod. Prods., LLC, 2016 WL 3135647 (D.N.M. Apr. 25, 2016).

Owners of overriding royalty interests (the "Plaintiffs") brought claims against several exploration and production, and midstream companies (the "Companies") for breach of contract, breach of the covenant of good faith and fair dealing, and breach of the implied covenant to market.[19] The Companies filed a Motion to Dismiss the claims, asserting that the Plaintiffs lacked standing because they owned only overriding royalty interests.[20] The Court noted that while the issue of whether overridingly royalty interest owners had standing to pursue a breach of contract claim in New Mexico had previously been recognized,[21] the issue of whether overriding royalty interest owners have standing to pursue a breach of the covenant of good faith and fair dealing, and breach of the implied covenant to market, had not yet been decided in New Mexico.[22] Citing Texas and Colorado law, the Court concluded that the New Mexico Supreme Court would likely find that Plaintiffs have standing to pursue claims for breach of the covenant of

16. *Id*.
17. *Id*. at 721.
18. *Id*. at 720.
19. Abraham v. WPX Prod. Prods., *LLC*, 2016 WL 3135647, *1-2 (D.N.M. Apr. 25, 2016).
20. *Id.* at *26.
21. *Id.* at *33 (citing Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1108 (10th Cir. 2005)).
22. *Id.* at *26.

good faith and fair dealing, and breach of the implied covenant to market, and denied the Companies' Motion to Dismiss.[23]

23. *Id.* at *40.