Energy & Resources Notes

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Christina Sheehan and Frank Davis, co-editors

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Proposed Clean Water Act Rulemaking: What is a Water of the United States?

The Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") have proposed a new rule to define the scope of "Waters of the United States" regulated under the Clean Water Act, and have requested public comments on the proposed rule by October 20, 2014.[1] Reactions to the rulemaking in congressional hearings and in comments reported in the press have been generally unfavorable, asserting that the agencies are engaged in a vast expansion of federal power, and that, if adopted, the rule would more than double the miles of waterway subject to regulation under the Clean Water Act. Resource companies, agricultural interests, the construction industry, and developers are concerned about potential regulatory impacts, particularly in the Southwest where dry conditions already make jurisdictional determinations difficult.

Why It Matters: The scope of Waters of the United States is important because the Clean Water Act imposes significant regulatory requirements on private activities. Section 404 requires Corps permits for placement of "fill" material into Waters of the United States. Section 311 mandates provisions for oil spill prevention and response. Section 402 imposes requirements for point source discharges, and Section 401 requires state or tribal water quality certifications. Issuance of a Clean Water Act permit is a federal action that triggers the requirements of the National Environmental Policy Act and other federal statutes, including the Endangered Species Act and the National Historic Preservation Act. A determination that an activity triggers regulatory jurisdiction under the Clean Water Act can result in significant delays and expense.

Current Definition of Waters of the United States: The Clean Water Act provides the Corps and EPA authority to regulate activities in Navigable Waters, which include "Waters of the United States, including the territorial seas."[2] Such waters do not have to be "navigable in fact," but must have a connection to interstate or foreign commerce.[3] The agencies have defined Waters of the United States to include features such as rivers and lakes that are considered traditionally navigable waters, as well as interstate waters including wetlands, impoundments of Waters of the United States, tributaries of Waters of the United States, adjacent wetlands, and some intrastate waters with interstate commerce connections.[4] Under the current rules and practice, the agencies make case-by-case jurisdictional determinations.

Reasons for the New Definition: The agencies state their intent is to clarify the definition of "Waters of the United States" following the confusion that arose in the wake of the U.S. Supreme Court's decisions in *SWANCC*[5] and *Rapanos*,[6] to make it easier and faster to obtain a jurisdictional determination, and to provide greater jurisdictional certainty for the regulated community. In *SWANCC*, the Supreme Court ruled that isolated water features, which have no surface connection to a "traditionally navigable water" and whose only basis for an interstate commerce connection is use by migratory birds, are not Waters of the United States subject to Clean Water Act regulation. Such water features can include playa lakes, vernal pools, and abandoned sand and gravel pits. The Supreme Court's multiple opinions in *Rapanos* injected a great deal of uncertainty regarding the extent of jurisdiction over tributaries and wetlands adjacent to tributaries. The Court was unable to reach a majority opinion, but the plurality opinion authored by Justice Scalia generally held that a jurisdictional water must be a relatively permanent water feature and adjacent wetlands must have a continuous surface connection to such waters. The concurring opinion by Justice Kennedy concluded that

upstream tributaries (and adjacent wetlands) are jurisdictional only if they, either alone or in combination with "similarly situated lands in the region," significantly affect other Waters of the United States – this is called the "significant nexus" test. These two rulings resulted in substantial confusion about what evidence is sufficient to establish an interstate commerce connection and a significant nexus with other Waters of the United States. As a result, the agencies spent considerable time and resources on case-by-case determinations and litigation. The agencies' objectives in the proposed rule are to clear up that confusion, provide greater predictability, and minimize the number of case-specific determinations in order to speed up permit processing.

Key Changes: The proposed rule would make most types of waters "jurisdictional by rule." In particular, *all tributaries* of waters otherwise identified as Waters of the United States would be jurisdictional by rule, and would not require field analysis or a case-specific determination of jurisdiction. Tributaries can include natural or man-altered waters, including some ditches. The proposed rule makes a categorical finding of significant nexus for all tributaries, including headwaters far upstream from any traditionally navigable water, regardless of whether or how often water actually flows from the headwaters to the downstream navigable water.[7] The proposed rule provides no distinction between an upstream or headwater tributary and other upstream and headwater features that are not considered jurisdictional, such as rills, gullies, and swales. Appendix A to the rulemaking, which provides a detailed legal analysis, asserts that the key difference may be the presence or absence of an "ordinary high water mark" which is the field indicia of a Water of the United States. However, since the proposed rule requires no case-by-case field analysis of headwater tributaries, it is unclear whether this distinction will have much force or effect in implementation of the definition.

Exclusions and Exemptions: The proposed rulemaking retains the existing exclusions from jurisdiction, including prior converted cropland, some limited ditches, artificial features, and groundwater (but groundwater can still provide a connection to a Water of the United States to establish a significant nexus, and to establish connectivity between upstream and downstream waters). The proposed rule also retains the existing exemptions from jurisdiction, including some agricultural activities and temporary mining roads.

Take-away: This proposed rulemaking could have serious implications for private activities that affect waterways, channels, and wetlands. In the arid Southwest, upstream channels and arroyos can be dry most of the time and carry water only sporadically after intense precipitation events, and then only for short distances. The application of the proposed "jurisdictional by rule" definition would result in all tributaries being subject to regulation, regardless of whether case-specific evidence exists to justify that conclusion in particular circumstances. Further, it remains unclear how far upstream a tributary designation would extend. That can be a particularly complex determination in arid Southwest channels, but the proposed definition provides no clarity on that point.

Public comments on the proposed rule are due on **October 20, 2014**. For more information, please contact Joan Drake.

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1 79 Fed. Reg. 22188 (April 21, 2014), available at: http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.

2 33 U.S.C. § 1362(7).

3 The waters must be presently used, used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce. 33 C.F.R. Part 329.

4 33 C.F.R. § 328.3, 40 C.F.R. § 230.2.

5 *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2011).

6 *Rapanos v. United States*, 547 U.S. 715 (2006).

7 This conclusion relies on various technical studies that are reviewed in Appendix B to the rulemaking.

Another Clean Water Act Triennial Review Underway In New Mexico

The New Mexico Environment Department ("NMED") has formally petitioned the Water Quality Control Commission ("WQCC") to amend certain portions of the Standards for Interstate and Intrastate Waters (20.6.4 NMAC). NMED's petition is the formal initiation of the 2013 Triennial Review. The Triennial Review is mandated by the federal Clean Water Act, which requires the WQCC to review, and revise as necessary, New Mexico's water quality standards every three years in a public hearing process. The Triennial Review process allows for interested stakeholders to provide input on proposed amendments to the water quality standards, as well as the opportunity to propose their own revisions to the water quality standards. New Mexico's last Triennial Review concluded in 2010 and resulted in several significant amendments to New Mexico's Standards for Interstate and Intrastate Surface Waters (20.6.4 NMAC).

Some of the key amendments proposed by NMED for the 2013 Triennial Review include a new procedure that would allow the WQCC to adopt temporary standards for all or part of a surface water, an additional means to report and/or measure E.coli, revisions that provide WQCC approval is not required for the use of a pesticide when such use is covered by a federal NPDES permit, and an update to the aluminum standards. NMED has also petitioned the WQCC to designate certain waters as "ephemeral" based on NMED's Use Attainability Analyses, which were granted technical approval by the EPA. In addition to the changes proposed by NMED, the Triennial Review process allows all other interested parties to propose their own changes to the New Mexico's Water Quality Standards.

A schedule for the Triennial Review has been adopted by the WQCC. Key dates and deadlines for parties interested in participating in the Triennial Review include:

September 30, 2014: Deadline for persons other than NMED to file proposed changes to the surface water quality standards.

December 12, 2014: Deadline for all parties to file Notices of Intent to Present Technical Testimony, pre-filed direct testimony and exhibits.

February 13, 2015: Deadline for all parties to submit pre-filed rebuttal technical testimony and exhibits.

April 14, 2015: First day of the Triennial Review hearing.

New Mexico's surface water quality standards affect many persons and entities. Several interested parties and stakeholders have already provided comments on the water quality standards during the scoping phase and public discussion draft periods. NMED's proposed amendments, the complete schedule, public comments already received during the scoping phase and public discussion draft periods, and other pleadings filed in the Triennial Review to date can be located on NMED's website here.

For additional information, please contact Jennifer Clements or Stuart Butzier.

D.C. Circuit Clean Air Act Decision Vacates EPA's "Summit Directive" Involving Aggregation of Natural Gas Facility Sources

In *Nat'l Envtl. Dev. Association's Clean Air Project v. EPA*, the D.C. Circuit Court of Appeals vacated the United States Environmental Protection Agency's ("EPA") December 2012 directive entitled "Applicability of the *Summit* Decision to EPA Title V and NSR Determinations" (the "*Summit* Directive"),[1] dealing another blow to EPA's expansive use of "interrelatedness" in making source aggregation determinations.[2]

Background: The *Summit* Decision

EPA issued the *Summit* Directive in response to the Sixth Circuit Court of Appeals' August 2012 decision in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012), which had vacated EPA's determination that Summit Petroleum Corporation's natural gas sweetening plant and approximately 100 gas production wells scattered across an area of roughly 43 square miles constituted a single stationary source under the Clean Air Act's Title V permitting program. Under the Title V permitting program, every "major source" of air pollution must obtain an operating permit. A "major source" is defined to include "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, 100 tons per year of any pollutant . . . ."[3] A "stationary source," in turn, is defined as "any building, structure, facility, or installation which emits or may emit a regulated [air] pollutant." Multiple pollutant emitting activities can be aggregated together and considered a single stationary source only if those activities (1) are under common control, (2) "are located on one or more contiguous or adjacent properties," and (3) belong to the same major industrial grouping under the Standard Industrial Classification code.[4]

Summit's wells were located at distances from the gas plant ranging from 500 feet to roughly 8 miles. While Summit owned subsurface pipelines that connect each of its wells to the sweetening plant, Summit did not own the property between the individual well sites or the property between the individual wells and the gas plant. "None of the well sites share a common boundary with each other, nor do any of the well sites share a common boundary with Summit's [sweetening] plant."[5] EPA determined that Summit's facilities constituted a single stationary source because EPA considered the wells and sweetening plant to be interdependent and therefore "adjacent" for purposes of regulation under Title V.

On review, the Sixth Circuit rejected EPA's contention that the term "adjacent" is "unquestionably ambiguous because the EPA has never defined a specific physical distance by which it is defined or with which it is simultaneous."[6] The court declared:

> EPA makes an impermissible and illogical stretch when it states that one must ask the purpose for which two activities exist in order to consider whether they are adjacent to one another.... Whether the distance between two facilities enables a given relationship to exist between them is immaterial to the concept of adjacency – it merely answers the question of whether a certain activity can or cannot occur between two locations that were, or will continue to be regardless of whether they host the activity, physically distant or physically adjacent.[7]

The Sixth Circuit concluded that the EPA's interpretation of the requirement that activities be "located on contiguous or adjacent properties, i.e., that activities can be adjacent so long as they are functionally related, irrespective of the distance that separates them, undermines the plain meaning of the text, which demands, by definition, that would be aggregated facilities have physical proximity."[8] The court also rejected EPA's contention that its interpretation of

"adjacent" was entitled to heightened deference because the agency had employed the definition for a long time. "An agency may not insulate itself from correction merely because it has not been corrected soon enough, for a long-standing error is still an error."[9]

The court also ruled that EPA's interpretation of its regulatory requirement that Title V single stationary sources are located on "'contiguous or adjacent properties' was entirely inconsistent with: (1) the regulatory history of its Title V permitting plan; and (2) its own guidance memorandums regarding the application of its Title V regulations to the oil and gas industry."[10] The Sixth Circuit noted that EPA first established the stationary source test in its Prevention of Significant Deterioration ("PSD") program in the wake of the 1979 decision in *Alabama Power Company v. Costle*. The Sixth Circuit explained that "[i]n the preamble to the 1980 amendments to the final PSD rules, the EPA recognized that *Alabama Power* required a new definition of a single stationary source to, *inter alia*, 'approximate a common sense notion of a plant [and]. . . avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of building, structure, facility, or installation.'"[11]

The functional relationship test, which EPA admittedly now uses to determine whether activities are adjacent to one another, was one of the additional criteria that EPA considered and rejected during its post-*Alabama Power* rulemaking process. First, the EPA "asked for comment on whether factors other than proximity and control, such as the functional activity to another, should be used [in stationary source determinations]." Then, after due consideration, the EPA rejected the option of adding a third requirement (in addition to ownership and proximity) that the activities comprising a single stationary source be functionally related to one another. The EPA specifically found that assessing whether activities were sufficiently functionally related to constitute a single source "would be highly subjective" and would make "administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses."[12]

The court found that EPA's "decision not to employ a functional relatedness test was categorical and unqualified."[13] "Far from advocating the use of a functional relatedness assessment as part but not all of the stationary source analysis, the EPA expressed the sweeping conclusion that any reference to the operational relationship between activities 'would be highly subjective,' would 'make administration of the definition substantially more difficult,' and would burden 'the Agency in numerous, fine-grained analyses.'"[14] Thus, the Sixth Circuit concluded, "EPA had failed to convince why the criterion it considered, and then strongly rejected, is now indispensable to its ability to make adequate stationary source determinations."[15]

The Summit Directive:

In December, 2012, the Director of EPA's Office of Air Quality and Standards issued the *Summit* Directive to the Regional Directors of each of the ten EPA Regions "to explain the applicability of the decision by the [Sixth] Circuit Court of Appeals." The *Summit* Directive states that "EPA may no longer consider interrelatedness in determining adjacency when making source determination decisions in its title V or NSR permitting decisions in areas under the jurisdiction of the [Sixth] Circuit." The *Summit* directive, though, then declared:

> Outside the [Sixth] Circuit, at this time, the EPA does not intend to change its long-standing practice of considering interrelatedness in the EPA permitting actions in other jurisdictions. In permitting actions occurring outside the [Sixth] Circuit, the EPA will continue to make source determinations on a case-by-case basis using the

> three factor test in the NSR and Title V regulations at 40 C.F.R. 52.21(b)(6) . . . .[16]

The D.C. Circuit Decision:

The National Environmental Development Association's Clean Air Project, an association of resource extraction and manufacturing companies, then filed a petition for review with the D.C. Circuit arguing that "by establishing inconsistent permit criteria applicable to different parts of the country, the *Summit* Directive violates the CAA and EPA regulation."[17] EPA argued that the petition should be dismissed for three reasons. First, EPA argued that the petitioner lacks standing because the alleged injury is entirely speculative. Second, EPA argued that the *Summit* Directive was not subject to judicial review because it was not a final agency action. Third, EPA asserted that the Petitioner's claim was not ripe for review because it did not raise a concrete issue fit for judicial review.[18]

The D.C. Circuit found "no merit in the EPA's arguments in opposition to" the petition for review. The D.C. Circuit explained:

> The *Summit* Directive creates a standard that gives facilities located in the Sixth Circuit a competitive advantage. It therefore causes competitive injury to Petitioner's members located outside the Sixth Circuit. The Directive is a final agency action because it sets forth EPA's binding and enforceable policy regarding permit determinations. And Petitioner's claim is ripe for review because it presents a purely legal issue that will not benefit from further factual development.[19]

On the merits, the D.C. Circuit then found that the *Summit* Directive "must be vacated because it violates EPA's 'Regional Consistency' regulations without purporting to amend those regulations."[20] The applicable regulations, 40 C.F.R. § 56.3, state "in clear terms that it is EPA's regulatory policy to 'assure fair and uniform application by all Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the act' and to '[p]rovide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by Regional Office employees in implementing and enforcing the act.'"[21] Those regulations further direct that officials in the EPA regional offices "shall assure that actions taken under the act [are] as consistent as reasonably possible with the activities of other Regional Offices."[22] The D.C. Circuit concluded that the *Summit* Directive is plainly contrary to the EPA's own regulations, which require EPA to maintain national uniformity in measures implementing the CAA, and to identify and correct regional inconsistencies by standardizing criteria, procedures and policies.

For further information, please contact Bill Scott.

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1 Stephen D. Page, Director, Applicability of the Summit Decition to EPA Title V and NSR Source Determinations (Dec. 21, 2012), http://www.epa.gov/region07/air/nsr/nsrmemos/inter2012.pdf.

2 *Nat'l Envtl. Dev. Association's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014).

3 42 U.S.C. § 7602(j); see also 40 C.F.R. §71.2.

4 See 40 C.F.R. § 71.2, 52.21(b)(5)-(6).

5 *Summit Petroleum Corp.*, 690 F.3d at 736.

6 *Id.* at 741.

7 *Id.* at 742.

8 *Id.* at 744.

9 *Id.* at 746.

10 *Id.*

11 Summit Petroleum Corp., 690 F.3d at 747.

12 *Id.*

13 *Id.* at 748.

14 *Id.*

15 *Id.*

16 The Summit Directive, at p. 1.

17 *Nat'l Envtl. Dev. Association's Clean Air Project*, 752 F.3d at 1003.

18 *Id.*

19 *Id.*

20 *Id.* at 1009.

21 *Id.*

22 *Id.* at 1003.

Recent New Mexico Case Law Impacting Oil and Gas Working Interest Owners

An opinion recently issued by the United States District Court of New Mexico covers a variety of novel issues arising under New Mexico Oil and Gas law such as exhaustion requirements with the New Mexico Oil Conservation Division ("OCD") and Oil Conservation Commission ("OCC"), the permissibility of collateral attacks on administrative orders, and the application of co-tenancy in tort claims asserted by working interest owners.[1]

The Facts of the Case:

In *Harvey E. Yates Co. v. Cimarex Energy Co*, working interest owners of oil and gas interests in the S/2 of Section 21, Township 19 South, Range 31 East, NMPM, Eddy County, New Mexico (the "South Half of Section 21") filed a variety of tort claims against the defendant—a working interest owner and operator of oil and gas interests in the N/2 of S/2 of Section 21, Township 19 South, Range 31 East, NMPM, Eddy County, New Mexico (the "North Half of Section 21").[2] The potential for oil and gas production was greater in the South Half of Section 21 than it was in the North Half of Section 21. The defendant proposed to drill several horizontal wells running across north and south portions of Section 21: Penny Pincher Federal Well ("Penny Pincher") Nos. 1, 2, 3 and 4. The proposed wells "were horizontally oriented from north to south, such that drainage of oil and gas reserves through the horizontal lateral portion of the wells would be greater from the South Half of Section 21."[3]

In order to drill the wells, the defendant filed compulsory pooling applications with the OCD. The OCD approved the defendant's compulsory pooling application for the Penny Pincher No. 1 well. As a result, the defendant immediately began to drill the well in the Penny Pincher No. 1 well in the South Half of Section 21, pursuant to a farmout agreement. The designated operator under the Joint Operating Agreement for the South Half of Section 21 challenged the compulsory pooling application for the Penny Pincher No. 1 well. After a hearing on the application, the OCD approved the application. The operator then appealed the compulsory pooling order for the Penny Pincher No. 1 well with the OCC, and the pending compulsory pooling application for the Penny Pincher No. 2 well. While the appeal was pending, the defendant also entered into term assignment ("Term Assignment") related to the Penny Pincher No. 1 well, through which it acquired a working interest in the South Half of Section 21.

In addition, the defendant filed similar compulsory pooling applications for the Penny Pincher No. 3 and 4 wells; however, none of the working interest owners in the South Half of Section 21 challenged those applications. In part, this was allegedly because "the applications for Penny Pincher Nos. 3 and 4 were bifurcated" and the plaintiffs were not allowed to participate in those proceedings.[4]

Despite the pending OCC appeal, the defendant decided to begin production from the Penny Pincher No. 1 well prior to obtaining a final decision from the OCC. The OCC, however, decided to reverse the OCD's compulsory pooling order for the Penny Pincher No. 1 well, finding that "there were disparate interests in the proposed project areas" for both the Penny Pincher Nos. 1 and 2 wells, such that the allocation formula proposed in the defendant's application would violate the correlative rights of the working interest owners.[5] As a result, the working interest owners in the South Half of Section 21

filed a lawsuit, alleging a variety of tort claims related to defendant's compulsory pooling orders, including claims for trespass, conversion, tortious interference with contract and prima facie tort.

Defendant's 12(b)(1) Arguments Challenging Jurisdiction:

In a motion asserting both 12(b)(1) and 12(b)(6) arguments, the defendant argued that the court lacked jurisdiction over the plaintiffs' claims related to the Penny Pincher Nos. 3 and 4 wells. This argument was based, in part, on the fact that the working interest owners in the South Half of Section 21 failed to exhaust their administrative remedies because they had not challenged the compulsory pooling application for those wells. The court disagreed, explaining that the OCD and OCC do not have jurisdiction to consider tort claims for monetary damages. In contrast, when reviewing a plaintiff's claim for injunctive relief, the court found that NMSA 1978, S 70-2-29 vests the OCD and OCC with authority to grant injunctive relief to private parties to enjoin violations of the New Mexico Oil and Gas Act and related rules, regulations, or orders. As a result, the court indicated that prior to filing private lawsuits for injunctive relief parties should first comply with the exhaustion requirements in S 70-2-29.

Next, the defendant argued that the working interest owners in the South Half of Section 21 could not use tort claims to collaterally attack the compulsory orders issued by the OCD. In determining the merits of this argument, the court applied the elements of collateral estoppel. It found that the moving party must demonstrate "(1) the party to be estopped was a party to the prior proceeding, (2) the cause of action is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation."[6] In regard to the Penny Pincher No. 1 and 2 wells, the plaintiffs argued that their tort claims did not attack the final order issued in the appeal filed with the OCC. The court agreed. The court explained that defendant's action would "not be immunized by the interim order of the [OCD]" under the circumstances of the case because the defendant "was aware months before it completed drilling of the Penny Pincher No. 1 that the Division Order might not be the final order of the [OCC]."[7]

Concerning the Penny Pincher No. 3 and 4 wells, the court found that there was a factual dispute pertaining to whether or not the plaintiffs could be considered parties or privies with the original parties to the OCD proceedings. Since plaintiffs alleged in their complaint that they were unable to participate in the compulsory pooling proceedings for the Penny Pincher No. 3 and 4 wells due to a bifurcation in a separate proceeding, the court concluded that it could not determine in the context of the 12(b)(1) motion whether or not plaintiffs had the requisite notice and opportunity to fully and fairly litigate the issues in the OCD hearing.

Defendant's 12(b)(6) Co-Tenancy Arguments

Challenging the plausibility of plaintiffs' tort claims, the defendant argued that it could not be liable as a matter of law because it was a co-tenant to the oil and gas interests in Section 21. In general, "[o]wners of undivided interests in oil and gas in and under real estate are tenants in common."[8] The court explained that "undivided fractional interest holders in oil and gas leases are co-tenants in the leasehold estate."[9] As a result, co-tenants have the right to extract minerals from the lease without first obtaining consent from a fellow co-tenant. However, when a "tenant in common produces oil or gas without the consent of other cotenants the operating cotenant must account to the

non-consenting cotenants for the latters' proportionate share of the value of the oil or gas produced, less a proportionate share of the expense of production and marketing, or for the revenues minus expenses."[10]

The court ultimately found that there were factual issues as to whether or not the defendant could be considered a co-tenant in the South Half of Section 21. While the court acknowledged the fact that the defendant had indeed acquired working interests in the South Half of Section 21, it concluded that the plaintiffs' allegations suggested the defendant's working interest rights were somehow limited and insufficient to allow for entry and drilling. Thus, the court found that the mere fact that defendant acquired a working interest in the South Half of Section 21 was insufficient to negate plaintiffs' allegations. Going forward, plaintiffs indicated that they intended to prove that the Term Assignment which governed the defendant's working interest did not convey an unrestricted right to enter and drill. As a result, the vast majority of plaintiffs' claims survived dismissal.

The Take-Away for Working Interest Owners Operating in New Mexico:

As oil and gas production increases within the state, working interest owners should be cognizant of the holdings in this decision. In sum:

Administrative Exhaustion: There is now precedent in New Mexico clarifying that working interest owners do not need to exhaust tort claims for monetary damages with the OCD and OCC. However, the court's opinion indicates that exhaustion may be required for claims seeking injunctive relief.

Collateral Estoppel: Collateral estoppel arguments will not bar an interest owner's claims where there is a factual question as to whether or not the interest owner had an adequate opportunity to fully litigate the pending issues.

Co-Tenancy: The mere fact that all the parties in the case are working interest owners is not necessarily sufficient to prove co-tenancy as a matter of law. The court's opinion, however, indicates that certain claims by working interests against one pursuing operations as a co-tenant may be precluded as a matter of law where the operator can establish ownership of a working interest that includes an unrestricted right to enter and drill.

For more information, please contact Jennifer Bradfute.

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1 *Harvey E. Yates Co. v. Cimarex Energy Co.*, No. Civ. 12-857 (D.N.M. Mar. 5, 2014) (J. Herrera).

2 No. Civ. 12-857, at *5-7 (D.N.M. Mar. 5, 2014) (J. Herrera).

3 *Id.* at p. 7.

4 *Id.* at p. 11.

5 *Id.* at p. 10.

6 *Id.* at p. 21.

7 *Id.* at p. 25-26.

8 *Id.* (quoting De Mik v. Cargill, 485 P.2d 229, 233 (Okla. 1971)).

9 *Id.* (quoting Britton v. Green, 325 F.2d 377, 381 (10th Cir. 1963)).

10 *Harvey E. Yates Co. v. Cimarex Energy Co.,* No. Civ. 12-857, at *29 (D.N.M. Mar. 5, 2014).

Endangered Species Act and Agency Management: *Aransas Project v. Shaw* Update

On June 30, 2014, the Fifth Circuit Court of Appeals issued a significant decision under the Endangered Species Act ("ESA"). *See Aransas Project v. Shaw*, No. 13-40317 (5th Cir. June 30, 2014). The Fifth Circuit's decision reversed *Aransas Project v. Shaw,* 930 F.Supp.2d 716 (S.D. Tex. 2013), a controversial case involving whooping cranes in which the U.S. District Court for the Southern District of Texas had granted The Aransas Project ("TAP")—a non-governmental organization—an injunction against the Texas Commission on Environmental Quality ("TCEQ"). In granting the injunction, the District Court found that TCEQ had violated the ESA with an unlawful "take" of 23 endangered whooping cranes under Section 9 of the ESA. The lower court's holding that there had been a take was based upon its opinion that TCEQ had mismanaged freshwater inflows to the Aransas National Wildlife Refuge during the winter of 2008-2009, thereby exacerbating the effects of drought in the region. *See* 930 F.Supp.2d at 723 and 780. The District Court's injunction prohibited TCEQ from issuing new permits to withdraw water from rivers feeding an estuary that serves as habitat for whooping cranes.

The Fifth Circuit held that the District Court failed to apply a proximate cause analysis when determining whether TCEQ had violated the ESA. The Circuit Court stated that the District Court did not address the "multiple, natural, independent, unpredictable and interrelated forces that affect the cranes' estuary environment...," and, "[h]ad the court considered proximate cause carefully, it [would have necessarily] concluded that the unusual die-off of cranes was, in the nearly half century of their population recovery process, a fortuity from the standpoint of TCEQ's water regulation." *Aransas Project v. Shaw*, No. 13-40317 at 31. Further, even if TCEQ were liable for a take under the ESA, because the District Court did not analyze proximate cause and did not provide subsidiary findings to support its finding of future and imminent harm, the Fifth Circuit held that the injunction issued by the District Court was an abuse of discretion. *Id.* at 32-33.

For more information, please contact Zoë Lees.

Endangered Species Act: FWS' Lesser Prairie-Chicken Regulatory Framework

On March 27, 2014, the U.S. Fish and Wildlife Service ("FWS") announced the listing of the lesser prairie-chicken as a threatened species pursuant to the Endangered Species Act ("ESA").[1] Concurrently, the FWS promulgated a "special" 4(d) take rule allowing states to retain a greater degree of responsibility for management and conservation efforts.[2] The 4(d) rule also allows for incidental takes of the lesser prairie-chicken when associated with conservation or routine, existing agricultural practices.[3] In combination, these two actions established an unprecedented regulatory framework for conservation efforts to protect the lesser prairie-chicken.

While the lesser prairie-chicken's habitat ranges over five states, the habitat is particularly significant to New Mexico given that the range includes significant sections of oil-producing acreage in southern New Mexico.[4] Prior to listing the prairie-chicken, the Western Association of Fish and Wildlife Agencies (WAFWA), a quasi-governmental organization in which New Mexico actively participates, developed the Range-wide Oil and Gas

Candidate Conservation Agreement with Assurances ("Agreement"). The Agreement outlines the rights and responsibilities of landowners and businesses that are associated with habitat of the lesser prairie-chicken. By signing the formal agreement and enrolling in the Candidate Conservation Agreement with Assurances ("CCAA"), landowners and businesses consent to conduct certain conservation activities. Participants also pay a small fee.

The special 4(d) take provision of the promulgated rule carves out an exception to incidental takings for participants in the CCAA and WAFWA. Generally, the ESA prohibits a taking of endangered or threatened species without a permit.[5] Under the ESA, "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or attempt to engage in any such conduct."[6] However, the special 4(d) regulation set forth by the FWS does not prohibit incidental takings.[7] The special 4(d) regulation for the lesser prairie-chicken acknowledges the participation in the Agreement of private landowners and businesses by exempting those participants from certain provisions of the regulation. In exchange for voluntary enrollment and participation in the Agreement, private landowners that are part of the special 4(d) rule are exempt from the take prohibitions of the ESA, and need not perform additional actions typically required of private landowners under the ESA.

In particular, the special rule allows for incidental take of the lesser prairie-chicken associated with (1) activities conducted pursuant to the WAFWA Lesser Prairie-Chicken Range-wide Conservation Plan and related Natural Resources Conservation Service activities focused on lesser prairie-chicken conservation; (2) conservation practices carried out in accordance with a conservation plan developed by the Natural Resources Conservation Service in connection with the Lesser Prairie-Chicken Initiative; and (3) the continuation of routine agricultural practices on existing cultivated lands.[8] Since the announcement of the regulation, the FWS's approach to regulating the lesser prairie-chicken has drawn criticism from both environmental and industry groups.

For more information, please contact Deana Bennett or Jordan Kessler.

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1 U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service Lists Lesser Prairie-Chicken as Threatened Species and Finalizes Special Rule Endorsing Landmark State Conservation Plan (March 27, 2014), http://www.fws.gov/news/ShowNews.cfm?ID=04F68986-AE41-6EEE-5B07E1154C2FB2E7.

2 *Id.*

3 *Id.*

4 The range includes New Mexico, Oklahoma, Texas, Kansas and Colorado.

5 16 U.S.C. § 1538.

6 16 U.S.C. § 1532.

7 50 C.F.R. Part 17.

8 *Id.*

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