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Christina Sheehan and Stuart Butzier, co-editors

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New Mexico's Mancos Shale Development: "Go Ahead" to BLM on Oil and Gas Well Approvals is Affirmed by the U.S. Court of Appeals

On October 27, 2016, the U.S. Court of Appeals for the Tenth Circuit issued its opinion in *Dine' Citizens Against Ruining Our Environment et al. v. Jewell*, Tenth Circuit Cause No. 15-2130, affirming the decision of the Honorable James Browning which rejected the environmental non-government organizations' ("NGOs") claims that the U.S Bureau of Land Management ("BLM") had violated the National Environmental Policy Act ("NEPA") when approving certain applications for permits to drill submitted by oil and gas companies seeking to explore and develop the Mancos Shale in the San Juan Basin of northwestern New Mexico. In the process, a majority of the Tenth Circuit panel tightened the Tenth Circuit's standard for issuing preliminary injunctions based on its reading of the U.S. Supreme Court's decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008).

The Mancos Shale in New Mexico's San Juan Basin has been the focus of both oil and gas exploration and development activities in recent years. The BLM had been approving individual Applications for Permits to Drill ("APDs") for well drilling in accordance with a 2003 Amendment to the Farmington Resource Management Plan ("Farmington RMP") which included a "reasonably foreseeable development scenario" or "RFDS" predicting an estimated 9,970 wells would be drilled in the planning area over the ensuing 20 years, 3,988 of which would be gas wells drilled in the Dakota/Mancos formations and 180 of which would be oil wells drilled in the Mancos shale.

Following issuance of the 2003 RMP Amendment and final Environmental Impact Statement ("EIS"), on receipt of an APD, the BLM had prepared individual environmental assessments ("EAs") to assess the environmental impacts of each proposed well. In preparing the EAs, the BLM would "tier" from the 2003 Final EIS. "Tiering" is an approved method for complying with NEPA. The U.S. Department of the Interior's NEPA regulations expressly address the manner in which one NEPA document can "tier" from another. *See* 43 C.F.R. §46.140(c), which provides in part:

> An environmental assessment prepared in support of an individual proposed action can be tiered to a programmatic or other broader-scope environmental impact statement. An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects.

"Beginning in about 2014, the BLM began receiving more APDs than anticipated for oil wells in the Mancos Shale," according to the Tenth Circuit. *See* Mem. Op. at 5. The increase in applications was attributed to technological advances making it economical to drill horizontal wells into the Mancos and conduct multi-stage fracturing activities in lieu of more traditional vertical wells. *Id*. at 5-6. As a result of the increased interest in Mancos Shale drilling, the BLM prepared a new Reasonably Foreseeable Development Scenario ("RFDS") and began work on a further amendment to the Farmington RMP to account for the increased estimates of Mancos Shale gas and oil well development. *Id*. at 6.

In March, 2015, Dine' CARE and other environmental NGOs filed suit against Secretary of the Interior Sally Jewell, the BLM, and its Director alleging the BLM was violating NEPA and challenging the issuance of 260 APDs in the Mancos Shale. The Plaintiffs then sought a preliminary injunction "to prevent drilling on approved wells while [the] litigation is ongoing." *Id*. The district court denied the application for a preliminary injunction, concluding that the Plaintiffs had failed to meet their burden to show three of the four elements or requirements to obtain preliminary relief. Judge Browning concluded that: (a) the Plaintiffs were not likely to succeed on the merits of their claims; (b) the environmental harm alleged by the Plaintiffs was outweighed by the economic harm to oil and gas operators; and (c) the public interest would not be served by preliminary relief. *See Id*.

On appeal, the Tenth Circuit considered only the first part of Judge Browning's opinion: Whether the NGOs had presented a sufficiently strong case on the merits to justify entry of a preliminary injunction. The three-judge Tenth Circuit panel concluded that the NGOs had not made a sufficient showing on the merits and chose not to address the other bases for rejecting injunctive relief that Judge Browning had addressed.

Importantly, two of the Tenth Circuit Judges held that the U.S. Supreme Court's decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), rendered portions of the Tenth Circuit's authority on the standard for preliminary injunctions inconsistent with the Supreme Court's ruling. In *Winter*, the Supreme Court reversed a Ninth Circuit Court of Appeals ruling that applied a more relaxed standard for the irreparable harm element of preliminary relief when the plaintiff demonstrated a strong likelihood of success on the merits.

> The [Supreme] Court held that the Ninth Circuit had impermissibly deviated from the Supreme Court's "frequently reiterated standard" for preliminary relief, which requires a showing of a likelihood of harm, and permitted a more lenient standard of relief "inconsistent with [the Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

See Memo Op. at 10, *citing Winter*, 555 U.S. at 22. Two judges on the Tenth Circuit panel went on to conclude that the lesson or "rationale" of *Winter* means that "any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible." *Id*. at 10-11.[1]

> We accordingly hold that the district court did not abuse its discretion in simply applying the Supreme Court's "frequently reiterated standard" for preliminary relief, including the requirement that the plaintiff must show he is likely to succeed on the merits.

Id. at 11.

Applying this standard, the Tenth Circuit rejected the NGOs' claims that "the new horizontal drilling and multi-state fracturing techniques being applied in the San Juan Basin will lead to harm of a greater magnitude than was anticipated when the BLM drafted the 2003 RMP." *Id*. Specifically, the NGOs asserted that these techniques would result in greater surface impacts, air pollution emissions, and water consumption. And, the NGOs asserted that the impacts were of a different nature or type of impact or harm than had been evaluated in the

2003 Final EIS. The Court of Appeals concluded that the NGOs had not presented sufficient evidence to support their claims, particularly given the deferential standard of review the courts apply to agency decisions. *Id.* at 11-15.

Finally, the NGOs argued that the BLM's decision to prepare a new RFDS and to propose a further revision to the Farmington RMP demonstrated that BLM had acted arbitrarily in continuing to issue APDs using EAs tiered from the 2003 Final EIS. This argument was also rejected: "The agency's decision to improve its plan for managing federal lands in the San Juan Basin does not immediately invalidate the old plan or prevent the agency from referring to it." Id. at 16-17. Disagreements with agency decisions do not equate to a determination that an agency abused its discretion or acted arbitrarily.

The decision in *Dine' CARE v. Jewell* is a victory for BLM and the oil and gas industry by upholding BLM's decision making regarding the grant of APDs for development of the Mancos Shale based on the 2003 Final EIS even as the BLM is seeking to update that NEPA document based on increased activity and interest in the Mancos Shale. The opinion also seeks to harmonize Tenth Circuit standards for preliminary injunctive relief with recent Supreme Court precedent, confirming that preliminary injunctions are indeed to be issued only in extraordinary circumstances. At the same time, comments in the opinion clearly reflect that the courts will continue to scrutinize closely NEPA challenges to agency decision making. Moreover, Dine' CARE and its companion NGOs have demonstrated ongoing tenacity in their efforts to ensure that federal agencies comply with their statutory and regulatory obligations regarding the fossil fuel economy in New Mexico and beyond.

For more information, please contact Walter Stern.

[1] While Tenth Circuit Judge Lucero concurred in the result, including that the NGOs had not presented sufficient evidence to meet their burden on the merits, Judge Lucero disagreed with the majority's reading and application of *Winter*, asserting that Winter should be limited to its specific ruling – that plaintiffs making a showing of a strong likelihood of success on the merits must still show a likelihood (and not a mere possibility) of irreparable harm.

EPA's Final Assessment Regarding the Impact of Hydraulic Fracturing on Drinking Water Resources

In December 2016, the Environmental Protection Agency ("EPA") released its final assessment analyzing the potential impacts of hydraulic fracturing ("fracking") on drinking water resources.[1] The draft assessment, issued in June of 2015, was summarized in our Fall 2015 issue.[2] Overall, this final report does not differ much in substance from the prior draft. The final assessment's takeaway is essentially the same: EPA cannot point to any widespread, systemic impacts on drinking water resources caused by fracking. Yet, EPA removed its statement to that effect from the final assessment, which has allowed many to report that EPA has backtracked on its prior conclusion.[3] However, closely scrutinized, the report reaches the same basic conclusion as before – when reviewing all activities within the hydraulic fracturing water cycle – which include everything from acquiring the water, mixing the water with chemicals, injecting the fluids to the production well, collecting the wastewater, and managing the wastewater through disposal or reuse – "EPA found

scientific evidence that hydraulic fracturing activities can impact drinking water resources under *some* circumstances."[4] These circumstances are less about fracturing rock hydraulically than they are about overall practices in some way associated with fracking, such as water withdrawals where there is low water availability, surface spills during handling of fluids, injection into wells that lack mechanical integrity or adequate cementing, injection of fracturing fluids directly into groundwater resources, discharges of improperly treated wastewater to surface waters, and the use of unlined pits in the disposal or storage of wastewater. In other words: poor fracking-related practices.

Neither the final report, nor the draft report, point to any direct data indicating that fracking practices cause widespread, systemic impacts on drinking water resources – nor do either conclude that proper fracking practices, except in areas of low water availability, have any impact on drinking water resources. Although EPA stated that its reason for eliminating the prior statement was that no scientific evidence could be found to quantitatively support it,[5] this explanation obviously should not be interpreted to mean that scientific evidence exists to support the opposite proposition.

Overall, the final report indicates that while there are many data gaps and uncertainties, and that improper fracking-related practices may impact drinking water resources, EPA is still unable to directly cite hydraulic fracturing as having widespread impacts, despite the removal of this statement.

If you have any questions concerning the final report, please contact Robin James or Stuart Butzier.

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[1] *See* United States Environmental Protection Agency, Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States (Final Report) (2016), *available* here.

[2] *See* Stuart Butzier, *EPA Assesses Potential for Hydraulic Fracturing to Impact Drinking Water Sources*, Energy & Resources Notes, Fall 2015, at 7-8, *available* here.

[3] *See, e.g.*, Coral Davenport, *Reversing Course, E.P.A. Says Fracking Can Contaminate Drinking Water*, The N.Y. Times, Dec. 13, 2016, *available* here.

[4] Final Report, *supra* note 1 (emphasis added).

[5] *See* Juan Carlos Rodriguez, *EPA Can't Prove Fracking Doesn't Affect Drinking Water*, LAW360 (Dec. 13, 2016, 3:36 PM).

The BLM's New Venting and Flaring Rule: Potential Future Developments

As noted in our Spring 2016 issue, the Bureau of Land Management ("BLM") published a proposed rule concerning Waste Prevention, Production Subject to Royalties, and Resource Conservation in the Federal Register on February 8, 2016, commonly referred to as the BLM's "Venting and Flaring Rule."[1] This rule has now been finalized and is set to go into effect on January 17, 2017,[2] just before the Trump administration takes office. One major goal of the rule is to increase the capture of gas associated with oil development. The rule prohibits venting of natural gas, with certain exceptions, and requires operators to reduce flaring of gas and increase capture percentages over time. Pursuant to the rule, beginning in 2018, operators will be required to capture 85% of their adjusted total volume of gas produced each month. This will increase to 90% in 2020; 95% in 2023; and finally to 98% in 2026.

Concerns regarding the viability of this rule have been expressed nationwide, and a lawsuit has been filed challenging the BLM's authority to implement a rule of this type.[3] However, these concerns may be premature as there is still the potential that the rule will be overturned by congressional action, known as a joint

resolution of disapproval.[4] In accordance with the Congressional Review Act, a rule cannot take effect until both the House and Senate receive a copy of the rule and at least 60 days have passed from the time of receipt, or from the date the rule was published in the Federal Register, whichever is later. During these 60 days, Congress can pass a joint resolution of disapproval, effectively rendering the rule invalid. When a report is submitted 60 session or legislative days before Congress adjourns, an additional 15 days are added for the new Congress to review the rule. Therefore, once the new Congress convenes this January, it will have 75 days to pass a joint resolution of disapproval if it does not want the rule to be enacted. As long as the President does not veto this resolution,[5] the rule will be overturned.

If a joint resolution of disapproval is not approved within 75 days of the new Congress convening, these expressed concerns with regard to the new rule may be valid. One major concern is that some operators may have a hard time moving forward with projects while still complying with the capture rules, as there may not be a feasible way of getting additional newly captured gas to consumers. Many have complained about this current underlying problem, which relates to the backlog in many departments with regard to rights-of-way applications.[6] The concern is – that because of the current backlog in rights-of-way applications – operators may have no place for this excess gas to go. This is a major reason some operators are forced to flare. While the BLM heard comments with regard to this concern, it did not believe it was necessary to make major changes to the final rule, stating that this is not a major problem nationwide. This concern has been continually expressed in certain states which lack adequate transportation infrastructure, including New Mexico.

According to Aubrey Dunn, New Mexico Commissioner of Public Lands, "If BLM's proposed rules are implemented, the Land Office will most likely see a large-scale abandonment of oil and gas wells on State Trust Lands, with marginal wells being pushed beyond their economic thresholds."[7] Dunn also stated that "[t]he irony of the proposed rule is that a local task force charged with identifying key reasons for venting and flaring of natural gas in New Mexico named a lack of access to rights-of-way for pipelines on federal lands – lands managed by BLM – as a major contributor to venting and flaring within the state."[8] This leaves operators in New Mexico potentially in a Catch-22 type of situation – not able to comply with a rule imposed by the BLM because of a backlog in rights-of-way applications within the BLM. This could require operators to either abandon wells or violate the rule. According to the American Petroleum Institute Director of Upstream and Industry Operations, Erik Milito, "[t]he BLM should [instead be] focus[ing] on fixing permitting, infrastructure and pipeline delays that slow [the] ability to capture more natural gas and get it to consumers."[9]

However, it should be noted that the final rule does allow for the BLM "to adjust the capture target for an operator on an existing lease that demonstrates to the BLM that meeting the target would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease."[10] While it is unknown exactly how the BLM will construe this language, the rule states that it will take into account "the costs of gas capture, and the costs and revenues of all oil and gas production on the lease" in its determination.[11]

It has yet to be seen what will come from the BLM's new Venting and Flaring Rule, if anything. It will be important to follow these developments, as the rule

could have devastating effects on oil and gas operators on federal lands within many states.

If you have any questions concerning the BLM's new venting and flaring rule please contact Robin James or Jennifer Bradfute.

[1] *See* Jennifer Bradfute, *BLM's Venting and Flaring Proposal*, ENERGY & RESOURCES NOTES, Spring 2016, at 6, *available* here.

[2] *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 27,637 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, and 3170), a*vailable* here.

[3] The Independent Petroleum Association of America and Western Energy Alliance, along with Wyoming, Montana, and North Dakota, have challenged this rule in federal court, while New Mexico and California have requested to intervene in support of the rule. *See* Christine Powell, *Don't Put BLM Flaring Rule on Hold, Feds Tell Judge*, LAW360 (Dec. 16, 2016, 9:37 PM).

[4] *See* the Congressional Review Act, 5 U.S.C. §§ 801-802 (1996). However, it should be noted that this Act has only been successfully used one time since its enactment to void an agency rule. *See* David J. Arkush, *Annual Review of Administrative Law: Article: Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1511 (2013); *see also* CONGRESSIONAL RESEARCH SERVICE, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS (2016), *available* here.

[5] This is unlikely given the Trump administration's expressed desire to deregulate the energy industry. *See* John W. Miller, *Donald Trump Promises Deregulation of Energy Production*, THE WALL STREET JOURNAL, Sept. 22, 2016, *available* here.

[6] While the proposed rule did consider comments with regard to rights-of-way ("ROW"), the BLM's response stated that, "The BLM's experience is that while processing time for ROW applications can sometimes be an issue, particularly in a handful of offices where staff retention has been difficult over the past few years, processing time is not the primary cause of the large volume of current flaring. For example, BLM data indicate that many applications to flare gas come from wells that are already connected to pipeline infrastructure, or for which operators are not seeking ROWs to build new pipelines."

[7] Aubrey Dunn, *Despite attacks, I'm doubling down on my opposition to BLM's proposed rules*, NMPOLITICS.NET, June 9, 2016, *available* here.

[8] *Id.*

[9] Carlton Carroll, *API: BLM Adds to Regulatory Onslaught with Unnecessary New Rules*, ENERGYAPI, Jan. 22, 2016, *available* here.

[10] Waste Prevention, Production Subject to Royalties, and Resource Conservation, *supra* note 2.

[11] *Id.*

Considerations with Renewable Energy Development and Severed Mineral Estates

Renewable energy developments include hundreds of millions of dollars of capital investment and rely on micro-siting of generation equipment to ensure optimal performance. Therefore, these developments are particularly sensitive to any possibility of surface use for mineral exploration and development that could require removal or relocation of the renewable generation equipment. New Mexico's recognition of the dominance of the mineral estate, its prevalence of severed mineral estates, and its title insurance regulations for surface damage from mineral development create challenges to assuring non-disturbance of the renewable energy development.

New Mexico law recognizes the dominance of the mineral estate over the surface estate, and the law does not require mineral interest owners to accommodate surface uses. Instead, the mineral developer has the right to use so much of the surface as is reasonably necessary to explore and develop the minerals. Except for the Surface Owner Protection Act, which requires oil and gas developers to offer a surface use agreement, and regulations of the Bureau of Land Management, which require advance notification to owners of surface lands derived from the Stock Raising Homestead Act prior to entry to explore for valuable minerals and stake mining claims under the General Mining Law of 1872 on mineral estates reserved by the United States,[1] there is

no legal requirement for a mineral developer to notify or coordinate with the surface owner. Of course, most mineral developers will do so, but such industry practice usually does not provide sufficient comfort to lenders and tax equity investors seeking to reduce risks for their investment.

It is common in New Mexico for the mineral estate to be severed from the ownership of the surface estate. On many parcels, this severance occurred at the time the United States patent was issued. Ownership of the minerals varies from federal, state to private ownership. In mineral-rich areas of the state, ownership of the severed minerals may be fractionalized into many undivided interests. Therefore, obtaining surface waivers from all interest owners can be time-consuming and difficult.

Developers, tax equity investors and lenders often look to title insurance to insure the risk of surface damage from mineral development. New Mexico's title insurance industry is highly regulated. Only title endorsements allowed by regulation can be issued, and they can be issued only in accordance with the regulations. The New Mexico regulations provide for an endorsement to both owners' and lenders' policies to insure surface damage from mineral development; however, the surface damage endorsement is available only in the case of a severed mineral estate where all of the mineral interest owners waive their rights to use the surface estate. In the case of fractionalized mineral ownership, finding all of the mineral interest owners can be challenging. Then, obtaining the surface waivers from all of them adds an additional challenge.

These challenges need to be considered at the time of siting the project in order to understand the likelihood of the existence of economically developable minerals, the ownership structure of those minerals, and the path to obtaining the necessary waivers in order to obtain title insurance, as desired or required. Allowing time for obtaining title abstracts for the mineral ownership as well as seeking the waivers can avoid delays in financing and tax equity investment.

For more information, please contact Meg Meister.

[1] *See* 43 CFR Part 3838

EPA Publishes Final Resource Conservation and Recovery Act Hazardous Waste Generator Improvements Rule

On November 28, 2016, the Environmental Protection Agency ("EPA") published the final RCRA Hazardous Waste Generator Improvements Rule ("HWGI Rule"). *See* 81 FR 85732, November 28, 2016. The HWGI Rule is one of the most significant and comprehensive hazardous waste rulemakings that EPA has promulgated since the mid-1980s. This regulation affects all hazardous waste generators regardless of size, industry or location in the United States. The rule is over 300 pages and includes a number of changes to 40 C.F.R. parts 260-265, 268, 270 and 279.

The HWGI Rule updates the hazardous waste generator requirements to make them easier to understand. It is intended to facilitate better compliance, provide greater flexibility in how hazardous waste is managed, and close important gaps in the regulations. Id. The HWGI Rule also notably reorganizes and consolidates the current rules so that the requirements for each generator category are in separate rule sections. Two key provisions of the rule are intended to provide flexibility for generators by allowing a hazardous waste generator to avoid increased burden of a higher generator status

when generating episodic waste provided the episodic waste is properly managed, and by allowing a very small quantity generator ("VSQG"), formerly known as a conditionally-exempt small quantity generator ("CESQG"), to send its hazardous waste to a large quantity generator under the control of the same person. Some additional highlights of the HWGI Rule include:

- A new waiver option for facilities storing ignitable and reactive wastes within 50 feet of the property line;
- A requirement for quadrennial small quantity generator notifications (which are due September 1, 2021)
- A requirement to document all hazardous waste determinations (EPA removed the proposed requirement to document non-hazardous waste determinations, but be aware of the practical need for maintaining waste determinations for non-hazardous industrial waste streams, and of individual state requirements);
- Changes in labeling requirements; and
- Clarifications regarding satellite accumulation and central accumulation (90-day and 180-day storage) requirements.

The HWGI Rule goes into effect May 30, 2017.

For more information contact Christina Sheehan.

Mineral Reservation Clause Allowing Mining Did Not Constrain Surface Owner's Public Opposition

A New Mexico state court judge has rejected a mineral estate owner's attempt to constrain a surface owner from publicly opposing its mining project on the basis of a strongly worded mineral reservation that expressly reserved mining rights and attendant surface rights. *See Lone Mountain Ranch, LLC, et al. v. Santa Fe Gold Corp., et al.,* First Jud. Dist. Ct. Case No. D-101-CV-2013-02581 (Summary Judgment Order of Sept. 20, 2016) (no appeal taken). According to the court's Order, to prohibit a surface owner from participating in public processes and expressing objections or opposition to mining on split estate lands resulting from a mineral reservation, "the reservation itself must include specific covenantal language prohibiting such conduct." *Id.*, p. 4.

The high-profile land involved in the litigation was part of the 27,000 acre Ortiz Grant in the Galisteo Basin of Santa Fe County. In 1947, the owners of the Ortiz Grant deeded part of the surface estate to Lone Mountain Ranch, LLC in fee simple absolute, but expressly reserved all "oil, gas, coal, metals and minerals, in, on or under the surface of the lands and real estate hereby conveyed," as well as "the right and license of exploring, mining, developing or operating, for any, or all of said products, upon said lands, and of erecting thereon all necessary buildings, pipe lines machinery and equipment necessary in and about the business of mining, developing, or operating, for any of said products, to the same extent and with the full rights of an owner operating on his own lands." *Id.*, pp. 2-3.

In 1947, of course, the myriad public comment and hearing opportunities that today are afforded members of the public under numerous environmental and mine permitting regimes at the federal, state and—in the case of Santa Fe County, local—levels did not exist. The question the court clearly had to grapple with,

accordingly, was whether the parties to the 1947 deed intended, or could be thought of as having hypothetically intended, that the surface owner grantee would be able to utilize such as yet non-existent public participation processes to effectively stymie the mining rights expressly reserved by the grantor "*to the same extent and with the full rights of an owner operating on his own lands.*" *Id*. (emphasis added). Inasmuch as many lands throughout New Mexico were severed into split estates by similarly worded—albeit typically not as strongly worded—mineral reservation clauses that predated the public participation processes placed in issue by this case, the First Judicial District Court's decision potentially has broad-ranging implications throughout the state.

Although not addressed by the court given the reservation clause's express reservation of surface rights, the case by logical extension also probably limits the existing doctrine of implied surface rights recognized under New Mexico law. That line of authority affords mineral estate owners—even mineral estate owners whose interest derived from mineral reservation clauses that are silent as to surface rights—an implied right to use so much of the surface as is reasonably necessary to explore for, develop and mine the minerals that are part of the reserved mineral estate. Fairly clearly those implied rights likely do not include rights to prohibit a surface owner's public participation opposition after the *Lone Mountain Ranch* decision, at least in the First Judicial District.

At first blush, by coming down on the side of a surface owner's public participation rights in the absence of "specific covenantal language prohibiting such conduct," the court's decision might be viewed as having suggested a possible drafting fix for mineral estate owners, who generally are deemed to hold the "dominant" estate under existing New Mexico authorities. Upon closer consideration, however, where a mineral estate title derived from pre-existing mineral reservation clauses, after *Lone Mountain Ranch*, those holding the mineral estate likely are powerless to hereafter employ careful drafting and recording of additional instruments as means of expressly prohibiting a surface owners' public participation opposition. The reason is fairly simple: for existing mineral estate owners, the *Lone Mountain Ranch* decision effectively stands for the proposition that the right to prohibit a surface owner's public opposition is not one of the property right "sticks" it received when the bundle of sticks were apportioned between the surface and mineral estates by the pre-existing mineral reservation clause.

In other words, the only drafting queue and comfort provided by the court's implicit acknowledgment that a reservation clause might include "specific covenantal language" would be in situations where the current owner of an entire fee estate *hereafter* deeds its land and creates a *new* severance of its wholly-owned real estate through a carefully drafted reservation clause that includes such an express restraint on the surface owner's public participation. Even then, however, there may still be an open question about the enforceability of such an attempt to restrict the surface owner's public process participation; the Lone Mountain Ranch court was presented with, but did not reach, the intriguing constitutional question of whether such a prohibition in a real property instrument would be a violation of the surface estate owner's free speech rights under the First Amendment. That issue is one that looms for the future.

For more information, please contact Stuart Butzier.

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