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Colorado

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In some respects, the year has been without significant new revisions to the oil and gas law in Colorado. This has been primarily a year of assimilation and implementation of laws and regulations passed in 2008, 2009, and early 2010. The following developments should be noted by those involved with Colorado oil and gas matters.

I. JUDICIAL DEVELOPMENTS

In *San Juan Citizens Alliance v. Stiles*, five environmental advocacy groups ("SJCA") challenged the approval by the U.S. Forest Service ("USFS") and the Bureau of Land Management ("BLM") of the Northern San Juan Basin Coal Bed Methane project ("Project").[1] The SJCA alleged that the record of decision ("ROD") was unlawful, and that the federal defendants had violated the National Forest Management Act ("NFMA") and the National Environmental Policy Act ("NEPA").[2] They alleged that approval of the Project was inconsistent with provisions of the San Juan National Forest Plan ("Forest Plan") with respect to protecting old-growth ponderosa pines, wildlife habitats, and riparian areas. They alleged that the approval of the Project violated NEPA in that the environmental impact statement ("EIS") prepared pursuant to NEPA and assessing the environmental impacts of the Project did not adequately analyze impacts to the riparian areas, and did not adequately address cumulative impacts, including potential cumulative impacts to air quality and visibility on nearby

1. San Juan Citizens Alliance v. Stiles, 654 F.3d 1038, 1040–41 (10th Cir. 2011).
2. *Id.* at 1401 (referencing National Forest Management Act, 16 U.S.C. §§ 1600–1614 (2006); National Environmental Policy Act, 42 U.S.C.A. §§ 4321–4370 (West 2003 & Supp. 2011)).

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national parks and wilderness areas. The district court had ruled in favor of USFS and BLM.

The 10th Circuit affirmed in part and remanded in part, agreeing with the district court that there was no violation of NEPA, but concluding that the challenges based upon violations of NFMA were not ripe.[3] The court found that because the Project approval was primarily for a conceptual drilling plan, additional review and approval would be required for specific well sites. While finding that the ROD approved five individual wells and denied two others, there was no evidence that any of these wells were located in riparian areas, in old-growth areas of the forest, or in protected habitat areas. Thus, the court found that "[t]he ROD did not, however, permit commencement of all the proposed construction; it specifically authorized only five wells. Development of the rest of the Project requires additional agency action . . . ."[4] Because additional approvals would be required to drill the remaining wells, as well as pipelines and roads requiring special use permits, the court remanded the case to the district court to vacate that portion of the judgment pertaining to the NFMA violations and dismiss those claims without prejudice. The 10th Circuit affirmed the district court's order regarding the NEPA claims and certain NFMA challenges to specific wells.

The Colorado Court of Appeals, in *Whiting Oil and Gas Corp. v. Atlantic Richfield Co.,* was asked to review an agreement between the parties to determine whether there had been a material breach of the agreement and to interpret the Colorado Statutory Rule Against Perpetuities Act ("Act").[5] The case involved an option to purchase a certain parcel of land. The court affirmed the trial court's determination that the breaches were not material to the option. In considering whether the option agreement violated the common law rule against perpetuities, the trial court found that the option did indeed violate the common law because it named no life in being and could be exercised more than twenty-one years after the parties entered into the option agreement. The trial court then applied the Act to reform the option agreement. On review, the appellate court was asked to determine whether the Act applied beyond probate instruments. The court concluded that the intent and language of the Act were clear and that the Act "supersedes and abolishes the rule of the common law known as the rule against perpetuities."[6] The court found that the General Assembly limited the types of interests that can be invalidated by the Act but concluded that as the Act was remedial in nature and was

3. *Id.* at 1041.

4. *Id.* at 1044.

5. Whiting Oil & Gas Corp. v. Atl. Richfield Co., No. 09CA1081, 2010 WL 3432211, at *1–2 (Colo. App. Sept. 2, 2010), *cert. granted*, No. 10SC688, 2011 WL 3276261 (Colo. Aug. 1, 2011).

6. *Id.* at *4.

intended to give effect to the contractual intent of the parties, application of the Act to the option agreement would merely save the option agreement from violating the common law rule and did not result in an unconstitutional and retrospective taking of vested rights.[7]

In *Bledsoe Land Co. v. Forest Oil Corp.*, the court was asked to review a dispute alleging violation of an oil and gas lease in which the trial court found in favor of the plaintiffs whose alleged breach resulted in the termination of a lease.[8] The lease, entered into in 2001 by the plaintiff with a predecessor of the defendant, was a "Producers 88 – Paid Up" form contract to which had been added several additional lease provisions and exhibits, including legal descriptions of the property. The lease contained a standard habendum clause setting forth the duration of the lease and the lessee's interest in the property. The language in that clause provided for a term of five years from the date of the lease and continuously after that "so long as operations are being continuously prosecuted on the leased premises or on acreage pooled therewith; and operations shall be considered to be continuously prosecuted if not more than ninety (90) days shall elapse between the completion of abandonment of one well and the beginning of operations for the drilling of a subsequent well."[9]

However, Exhibit A to the lease contained a modification of the habendum clause: "this lease shall not terminate so long as drilling or reworking operations are being continuously prosecuted if not more than 180 days shall lapse between the completion of abandonment of one well and the beginning of operations for the drilling of another well."[10] The plaintiffs alleged that the lease had been breached and terminated when Forest Oil failed to drill a new well within 180 days of completion, thus failing to continuously prosecute drilling and reworking operations on the premises.

The trial court found in favor of the plaintiffs.[11] Forest Oil appealed on grounds that the trial court misconstrued and misapplied the terms "completion" and "continuously prosecute."[12] The court of appeals agreed, reversing the trial court, and found that the term "completion" is not ambiguous and, in the context of a Producers-88 oil and gas lease, means that the well is "capable or ready to produce gas."[13] As the term was unambiguous, the trial court erred in hearing additional testimony on interpretation of the term. The court further concluded that the well in question was not completed until it was hydraulically fractured, thus only 176 days had passed between "com-

7. *Id.* at *7–8.
8. Bledsoe Land Co., v. Forest Oil Corp., No. 09CA2807, 2011 WL 2474407, at *1 (Colo. App. June 23, 2011).
9. *Id.* at *1.
10. *Id.*
11. *Id.* at *2.
12. *Id.* at *3.
13. *Id.*

pletion" of one well and commencement of the next well. The court also ruled that "continuously prosecuted" in the context of the lease was defined in Exhibit A as drilling a new well every 180 days, thus concluding that Forest Oil had not breached the lease by drilling a new well 176 days after completion of the prior well. The decision has been appealed and accepted by the Colorado Supreme Court.

An important case ruled on by the Colorado Court of Appeals in June 2010 has been appealed to the Colorado Supreme Court, with oral arguments scheduled in November 2011. The issues before the court in *Colorado Oil and Gas Conservation Commission v. Grand Valley Citizens Alliance* are related to who may initiate an adjudicatory hearing before the COGCC.[14] In rules promulgated in 2009, the right to initiate a hearing regarding an application to drill a well ("APD") was limited to the operator, surface owner, relevant local government, or state environmental agencies. The trial court had held that the citizens groups who had filed a request for a hearing had no standing under the regulations and dismissed the plaintiffs' complaint. The court of appeals reversed, holding that the COGCC regulations could not supersede either the Oil and Gas Conservation Act or the Colorado Administrative Procedures Act, and that the plaintiff citizen groups were entitled to a hearing under both statutes.[15] The Colorado Supreme Court granted certiorari on March 21, 2011.

In November 2010, the Colorado Supreme Court reversed the decision of the court of appeals and remanded for further proceedings the 2009 decision in *Gypsum Ranch Co. v. Board of County Commissioners.*[16] In reversing the lower appellate court ruling, the Supreme Court determined that the court of appeals had misconstrued the law prior to a 2008 statute regarding acquisition of mineral interests in land condemned for highway purposes. At issue was whether the Colorado Department of Transportation ("CDOT") had acquired the mineral interest in land it condemned for a highway in 1975. Gypsum filed an action to quiet title to the mineral interests, claiming that CDOT had no statutory authority to acquire mineral interests. The district court had found that the interest acquired by CDOT was a fee simple absolute and included the mineral estate. On appeal by Gypsum, the court of appeals reversed the district court. On appeal, the Supreme Court determined that legislation enacted in 2008 amending both the eminent domain provisions in Colorado statutes (title 38), as well as the CDOT statutory authority (title 43), was clear in prohibiting governmental entities from acquiring a right to mineral resources

14. Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n, No. 09CA1195, 2010 WL 2521747, at *1 (Colo. App. June 24, 2010), *cert. granted*, No. 10SC532, 2011 WL 976732 (Colo. Mar. 21, 2011).

15. *Id.* at *1, *5.

16. Gypsum Ranch Co. v. Bd. of Cnty. Comm'rs, 219 P.3d 365 (Colo. App. 2009), *rev'd sub nom.* Dep't of Transp. v. Gypsum Ranch Co., 244 P.3d 127 (Colo. 2010).

beneath real property that was condemned.[17] The Court rejected the argument, however, that language in the legislation's title or summary referring to the intent of the bill as merely clarifying an existing limitation on the condemnation power of governmental agencies was determinative of legislative intention where no language in the body of the statute contained such a clear statement of intent. The Court further concluded that the law prior to the 2008 statute was clear in prohibiting acquisition of mineral rights where the land condemned was a "right-of-way," but was not clear when the title acquired by condemnation was fee simple and concluded that the prior law did not limit the ability of CDOT to condemn more than easements or to acquire mineral estates in condemnation for highway purposes. The Court remanded the case to the court of appeals for further proceedings with respect to other arguments made by the parties that were not addressed by the court of appeals.

In *B.P. America Production Co. v. Patterson*, the Supreme Court affirmed the ruling of the court of appeals, which had upheld the ruling of the trial court, that class certification was appropriate.[18]

II. REGULATORY DEVELOPMENTS

The Colorado State Engineer adopted regulations, as required under the Colorado Ground Water Management Act, after proceedings commenced in 2009.[19] These regulations were required pursuant to provisions of the Colorado Ground Water Management Act revised by the General Assembly in 2010.[20] In accordance with the Produced Nontributary Ground Water Rules, petitions have been filed for findings that ground water in various formations and in various parts of the state are nontributary. All but one of these petitions has been granted by the State Engineer, with one petition pending as of August 31, 2011. The result of the petitions being granted is that water intercepted in those geologic formations, and in the locations included in the petitions, is presumed to be nontributary, eliminating a need for the producer to make an application for water rights or to replace water withdrawn from the pertinent oil or gas wells.

As in other parts of the country, concerns have been raised by various environmental groups and members of the public regarding the safety of hydraulic fracturing and potential impact of hydraulic fracturing fluids on water quality. Following Governor Hickenlooper's request in August, the Colorado Oil and Gas Conservation Commission has initiated a rulemaking proceeding for the purpose of adopting

17. *Dep't of Transp. v. Gypsum Ranch Co.*, 244 P.3d at 130–31.

18. BP Am. Prod. Co. v. Patterson, No. 10SC214, 2011 WL 5120779, at *12 (Colo. Oct. 31, 2011).

19. COLO. CODE REGS. § 402-17 (2010); COLO. REV. STAT. § 37-90-101 (2011).

20. Act of June 2, 2009, sec. 3, 2009 Colo. Sess. Laws 2107, (codified at COLO. REV. STAT. §§ 37-90-137(7)(c) (2011)).

rules governing the public disclosure of hydraulic fracturing chemicals and notification of hydraulic fracturing operations. The hearing is scheduled for December 2011.