Natural Resources, Energy and Environmental Law Section

State Bar of New Mexico

Vista

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Introduction to the Summer 2012 NREEL Newsletter

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In this edition of NREEL Vista, Nicholas Trost considers some benefits and inevitable shortcomings of the Oil Conservation Commission's new rules regulating horizontal drilling in New Mexico. Next, Frank Davis provides an update on efforts to list Mount Taylor on New Mexico's State Register as a Traditional Cultural Property. Finally, Kelly Davis tells the story of remediation and revival via renewable energy at the Questa Chevron Mine, which became a Superfund site in 2011.

If you would like to submit an article for the Winter 2013 edition of NREEL Vista, please contact me at sally.paez@gmail.com. I am deeply grateful to NREEL Board Members Paul Halajian and

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Compulsory Pooling Horizontal Well Project Areas:
An Analysis of the New OCC Rules and Why The Legislature Needs To Act

By Nicholas J. Trost[1]

Introduction

When the New Mexico Legislature enacted the Oil and Gas Act in 1927, oil and gas was produced using vertical wells. Today, oil and gas is increasingly produced using horizontal wells. To account for this technological shift, the Oil Conservation Commission ("OCC") recently adopted new rules to regulate horizontal wells. And though the new rules make strides to better address the legal uncertainty presented by the transition from vertical wells to horizontal wells, issues remain unresolved. One unresolved issue is the extent of the OCC's and the Oil Conservation Division ("OCD")'s authority to compulsory pool horizontal well project areas. The legislature should amend New Mexico's compulsory pooling statute to better fit the realities of horizontal drilling.

Background

New Mexico's OCD, a division of the Energy, Minerals, and Natural Resources Department, has authority over oil and gas operations in the state.[2] The legislature tasked the OCD with two primary duties regarding the conservation of oil and gas: (1) the prevention of waste, i.e., the inefficient or improper recovery of energy;[3] and (2) the protection of mineral owners' correlative rights to produce an equitable share of the oil and gas in a common pool.[4] In 1927, New Mexico's Oil and Gas Act (Act) created the OCC[5] and gave it "concurrent jurisdiction and

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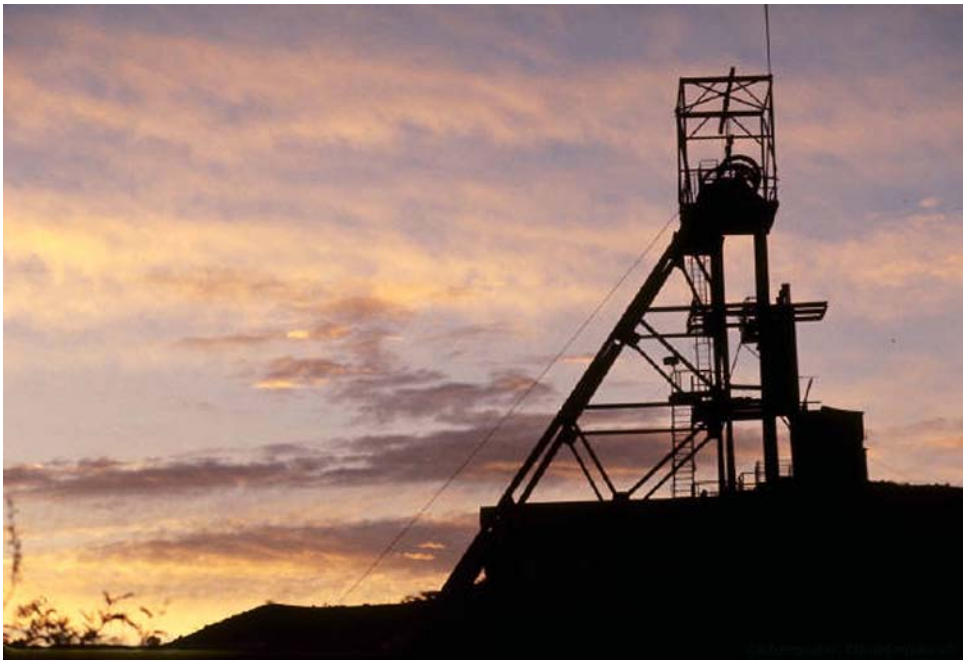

> When two or more separately owned tracts of land are embraced within a spacing or proration unit … the owner or owners thereof may validly pool their interests and develop their land as a unit [voluntarily pooling]. Where, however, such owner or owners have not agreed to pool their interests … the [OCD], to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste, shall pool all or any part of such lands or interests or both in the spacing or proration unit as a unit [compulsory pooling].[15]

authority with the [OCD] to the extent necessary for the [OCC] to perform its duties."[6] Generally, the OCC hears (1) appeals from the OCD decisions entered in cases presented to an examiner; and (2) applications for rulemaking.[7]

To prevent waste and protect correlative rights, the legislature granted the OCD and OCC authority to bring together separately owned mineral or royalty interests that share a common underground reservoir of oil or gas, known as a "pool,"[8] in order to grant a well permit.[9] This concept is known in the field of oil and gas law as "compulsory" pooling, as opposed to the more common "voluntary" pooling, where each mineral or royalty owner voluntarily agrees to combine their interests in the land.[10] By pooling small tracts of land, the OCD and OCC minimize the number of wells that have to be drilled in order to efficiently drain a reservoir.[11] Compulsory pooling also avoids unnecessary dissipation of reservoir energy and protects the correlative rights of the parties over the common source of supply.[12]

When the legislature enacted one of the nation's first compulsory pooling statutes in 1935, the technology to drill horizontal wells did not exist.[13] Thus, while there is widespread agreement that New Mexico's compulsory pooling statute applies to vertical drilling, there is uncertainty as to whether the statutory language applies to horizontal drilling as well.[14] In relevant part, New Mexico's compulsory pooling statute, Section 70-2-17(C), states:

In other words, this statute gives the OCD and OCC the authority to compulsory pool "two or more separately owned tracts of land embraced within a spacing or proration unit." A spacing unit is the acreage assigned to a well under a well spacing order or rule,[16] while a proration unit is the area that can be efficiently and economically drained and developed by one well.[17] But the separately owned tracts of land impacted by a horizontal well are not contained within a single "spacing or proration unit." A horizontal well traverses a larger geographic area, known as a "project area," made up of *multiple* spacing units.[18] The incongruity between the compulsory pooling statute and the reality of horizontal drilling creates an ambiguity as to whether the OCD and OCC have any statutory authority to compulsory pool horizontal well project areas.[19]

New Mexico courts have provided little guidance on how to define the OCD and OCC's statutory authority to compulsory pool non-standard spacing units or project areas. In *Rutter & Wilbanks Corporation v. Oil Conservation Commission,*[20] the New Mexico Supreme Court touched on this issue in regards to a vertical well. In that case, the Rutter and Wilbanks Corporation brought an action to reverse orders of the OCC, which created two non-standard gas proration units and compulsory pooled the tracts combining the units.[21] Rutter and Wilbanks argued the OCC's authority to pool is limited to lands "embraced within a spacing or proration unit," as described in plain language of Section 70-2-17(C).[22] Because the OCC had the authority to establish oversize, non-standard spacing units, the Court

concluded "it would be absurd to hold the [OCC] does not have the authority to pool separately owned tracts within an oversize non-standard spacing unit."[23] Though *Rutter* suggests that the OCC may have the power to compulsory pool non-standard spacing units created by horizontal wells, *Rutter* only dealt with vertical wells. In addition, the oversize non-standard spacing unit in *Rutter* was approximately 50% larger than the standard spacing unit.[24] Today, horizontal wells impact 4-6 standard spacing units of 40-acres each, while vertical wells are comprised of only one 40-acre tract.[25] Given these distinguishing facts, it remains unclear whether *Rutter* can be stretched far enough to give the OCC the authority to compulsory pool the much larger non-standard spacing units of horizontal wells.

In the recent case of *Cimarex Energy Co.*, the OCC expressed considerable uncertainty regarding its authority to compulsory pool non-standard spacing and proration units in a horizontal well project area.[26] Cimarex Energy Co. applied for a compulsory pooling order of non-standard oil spacing and proration units in a horizontal well project area.[27] The OCD granted the application without establishing the relative values of the tracts subject to pooling[28] because it assumed each tract contributed a relatively equal share of the production to the well.[29] Lynx Petroleum Consultants, Inc., appealed the OCD's decision and the OCC heard the appeal.[30] Lynx argued the application, if granted, would impair its correlative rights because the evidence established that most of the production came from the property in which Lynx owned its interests.[31] The OCC agreed with Lynx and denied Cimarex's application to compulsory pool the non-standard spacing unit because the OCC found that Lynx could not produce its just and equitable share of the oil or gas.[32]

Though this case seems more relevant than *Rutter* because a horizontal well is involved, it is unclear whether *Cimarex* should be interpreted narrowly or broadly. If interpreted narrowly, *Cimarex* simply resolved a dispute where one owner did not have the opportunity to produce its equitable share of oil and gas based on the compulsory pooling order. If interpreted broadly, the case indicates that the OCC may not be willing to compulsory pool horizontal well project areas because its authority to do so is uncertain and because correlative rights will often be an issue based on the nature of horizontal drilling, which often goes through many tracts of land of varying production capacities. The OCC adopted its new rules to try and resolve this controversy.

The OCC's New Regulations

Horizontal drilling is the new trend in New Mexico's oil and gas industry.[33] But even though the OCD administratively accepts applications to create and compulsory pool horizontal well project areas, the OCD and OCC are unsure whether they have the statutory authority to compulsory pool horizontal well project areas. This lack of certainty may increase the number of trespass and conversion claims, as horizontal drill operators will be forced to invest in wells without legal certainty.[34] Facing this reality, the OCC adopted new rules to better address the legal uncertainty that has accompanied the technological development of horizontal drilling,[35] including new rule 9.15.16.15 NMAC, which creates special rules applicable to horizontal wells.[36]

To deal with contemporary trespass issues, the new rules clarify what interests must be voluntarily committed to the well prior to drilling. Under 9.15.16.15 NMAC, operators are now required to obtain the consent of a lessee or owner of a mineral interest in each tract of land the horizontal well penetrates prior to approval of an application for permit to drill.[37] Before the promulgation of 9.15.16.15 NMAC, the OCD and OCC did not require this type of consent before granting a permit to drill.

In addition to addressing the potential for subsurface trespass claims, the drafters of the new OCC rules singularized the definition of a horizontal well "project area" in an effort to place horizontal wells under the existing authority of the compulsory pooling statute. For example, the new rules amended the definition of a 'project area' created by a horizontal well by adding the words "*that are developed by the horizontal well*" to the definition: "An area that comprises one or more complete, contiguous spacing units (in one section or more than one section) *that are developed by the horizontal well*."[38] Arguably the OCC intended to make a horizontal well project area into a single unit so it could fit under New Mexico's already existing compulsory pooling statute, which uses singular language: "When two or more separately owned tracts of land are embraced within a spacing or proration unit …"[39]

But the OCC is still unclear whether it has the authority to compulsory pool the project areas of horizontal wells. In its application to amend 19.5.14.8 and 19.15.16, the OCC expressed uncertainty regarding its authority to establish the non-standard spacing units of horizontal wells, even though it has the power to establish non-standard spacing units of vertical wells. The OCC stated there was not suf-

ficient judicial or OCC precedent to grant itself the authority to compulsory pool horizontal well project areas:

> "[Finding #71] The power to compulsory pool extends to non-standard, as well as standard spacing units. *Rutter and Wilbanks v. OCC*, 87 N.M. 286, 532 P.2d 582 (1975) … [Finding #72] The Commission and Division have the power to establish both standard and non-standard spacing and proration units. NMSA 1978, Section 70-2-11(B)(10). … [Finding #73] However, the extent of the Commission's and the Division's authority to establish non-standard spacing or proration units or special spacing or proration for horizontal wells has not been clearly delineated by either judicial or Commission precedent."[40]

Thus, the OCC remains unsure whether it has the authority to compulsory pool horizontal well project areas under the current New Mexico Compulsory pooling statute, hindering its ability to consolidate ownership in a project area as necessary prior to the production of a well dedicated to that project area.[41] If a horizontal drill operator wants to drill in a project area and the different owners of the royalty or mineral interest do not want to voluntarily pool, the OCC may lack the power under New Mexico's current compulsory pooling statute to intervene and compulsory pool the interests. Furthermore, if the interests cannot be pooled, and the resources are being drained, there may be potential for trespass and conversion claims.[42]

Although the OCD and OCC are aware of the unresolved issues posed by horizontal drilling, they cannot expand by regulation the authority granted to them by the legislature. As explained by the New Mexico Supreme Court in *Marbob Energy Corporation v. New Mexico Oil Conservation Commission*:[43]

> "[W]e defer, as we must, to the Legislature for the grant of that authority, and so too must the Commission. The Commission's enabling statutes are undeniably dated, and perhaps inadequate to face the contemporary challenges the Commission appears to claim. However, any enactments to the Commission's authority must come from the same legislative body that created the Commission in the first instance."[44]

Like the statute at issue in *Marbob Energy*, New Mexico's compulsory pooling statute is undeniably dated and inadequate to address whether the OCC has the authority to compulsory pool horizontal well project areas. The New Mexico Legislature could resolve this ambiguity by amending Section 70-2-17(C) to allow compulsory pooling of "two or more separately owned tracts of land … embraced within a spacing or proration unit … *or a division-approved horizontal well project area*." But if the legislature chooses not to act, the inevitable alternative may be costly litigation that could result in some future guidance by New Mexico's appellate courts.

Conclusion

By promulgating new rules regulating horizontal drilling, the OCC exercised its rulemaking authority in an attempt to keep pace with the new technology of horizontal drilling. The OCC rules address contemporary subsurface trespass issues by requiring drilling operators to get consent of at least one lessee or owner of a mineral interest in each tract of land before drilling. The rules do not, however, dissipate the confusion regarding the OCC's authority to compulsory pool the non-standard spacing units or project areas created by horizontal wells. Though the OCC made progress by enacting the new rules, either the legislature or New Mexico's courts will need to clarify this important area of the law.

Endnotes

[1] Nicholas J. Trost is a 2013 J.D. candidate at the University of New Mexico School of Law. Nicholas is the 2012-13 Student Articles Editor for the New Mexico Law Review. Nicholas would like to thank Sally Paez for her excellent editorial help and William F. Carr for his encouragement and insight.

[2] NMSA 1978, § 70-2-4 (1935, as amended through 1987).

[3] NMSA 1978, § 70-2-3 (1935, as amended through 1965).

[4] NMSA 1978 § 70-2-11 (A) (1935 as amended through 1977); *Santa Fe Exploration Co. v. Oil Conservation Comm'n of N.M.*, 114 N.M. 103, 112, 835 P.2d 819, 828 (1992); Williams & Meyers, Manual of Oil and Gas Terms 198 (Fred D. Nation, Jr., et al. eds., 7th ed. 1987) (defines "correlative rights").

[5] NMSA 1978, § 70-2-4 (1935 as amended through 1987).

[6] NMSA 1978, § 70-2-6 (1935 as amended through 1979).

[7] *See id.*

[8] Williams & Meyers, *supra* note 4, at 726.

[9] NMSA 1978, § 70-2-17(C) (1935 as amended through 1977).

[10] *Id.*

[11] 1 Bruce M. Kramer & Patrick H. Martin, *The Law of Pooling and Unitization*, §10.01 (3d ed. 2003).

[12] *Id.*
[13] Interview with David Brooks (Mar. 2012). Mr. Brooks is an attorney and hearing examiner for the OCD and one of the persons responsible for the proposed amendments to the OCC; *see e.g.* Order of the Commission at 11, Application of the New Mexico Oil Conservation Division for Amendments of 19.15.14.8 and 19.15.16 (Case No. 14744), available at http://ocdimage.emnrd.state.nm.us/imaging/CaseFileView.aspx?CaseNo=14744&FilingDate=9/16/2011%2012:00:00%20AM (last visited Apr. 4, 2012)(to access order select second image in case file)(implying the OCC's and OCD's authority to compulsory pool project areas has never been an issue until the present day).
[14] *Id.* (The OCC is unsure whether it has the authority to compulsory pool horizontal well project areas under the existing compulsory pooling statute).
[15] NMSA 1978, § 70-2-17(C) (1935 as amended through 1977).
[16] 19.15.2.7(S)(9) NMAC (12/1/08).
[17] NMSA 1978, § 70-2-17(B) (1935 as amended through 1977).
[18] A standard spacing unit for a vertical well is a 40-acre tract. 19.15.15.9 NMAC (12/1/08). Horizontal wells are comprised of "non-standard" spacing units, usually 4-6 40-acre tracts. But this has not been clearly delineated by either judicial or Commission precedent. Order of the Commission to Amend 19.15.14.8 and 19.15.16, at 11.
[19] The OCD has the authority to establish non-standard spacing units, but the statute is silent on the OCD's ability to compulsory pool those non-standard spacing units. NMSA 1978, § 70-2-18(C) (1969 as amended through 1977); Order of the Commission to Amend 19.15.14.8 and 19.15.16, at 11.
[20] 87 N.M. 286, 532 P.2d 582, (1975)
[21] *Id.*
[22] *Id.* at 289, 532 P.2d at 585.
[23] *Id.*
[24] *Id.* at 287, 532 P.2d at 583.
[25] Brooks Interview, *supra* note 13.
[26] Order of the Commission at 1, Applications of Cimarex Energy Co. for a Non-Standard Oil Spacing and Proration Unit and Compulsory Pooling, Eddy County, New Mexico (Case No. 14480), available at http://ocdimage.emnrd.state.nm.us/imaging/CaseFileView.aspx?CaseNo=14480&FilingDate=1/10/2011%2012:00:00%20AM (last visited Apr. 4, 2012) (to access order please select first image in case file).
[27] *Id.* at 1.
[28] *Id.* at 2, 3.
[29] *See id.* at 2.
[30] *Id.* at 2.
[31] *Id.* at 4.
[32] *Id.* at 6.
[33] Testimony by David Brooks (Mar. 2012).
[34] Bruce M. Kramer, *Pooling for Horizontal Wells: Can They Teach An Old Dog New Tricks*, http://www.colorado.edu/law/centers/nrlc/events/documents/shaleplays/6%20-%20Kramer%20-%20presentation[1].pdf (§ XX.02 discusses the need for horizontal pooling to prevent trespassing).
[35] Order of the Commission to Amend 19.15.14.8 and 19.15.16, at 4.
[36] *Id.* at 8.
[37] *Id.* at 5, 8.
[38] *Id.* at 6. *See also* 19.15.16.7.L(1) NMAC (12/1/08) (to see changes reflected in the NMAC).
[39] NMSA 1978, § 70-2-17(C) (1935 as amended through 1977).
[40] Order of the Commission to Amend 19.15.14.8 and 19.15.16, at 11.
[41] *Id.* at 9.
[42] Kramer, *supra* note 34, at § XX.02.
[43] 2009-NMSC-013, ¶ 23, 146 N.M. 24, 206 P.3d 135.
[44] *Id.*

Introduction

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Samantha Ruscavage-Barz for their editorial support. The views expressed in these articles are those of the authors alone and not the views of the NREEL Section or the editors.

Thank you for your support,
Sally Paez
Editor

When Size Matters:
Properties Listed on the State Register

By Frank T. Davis Jr.[1]

Mount Taylor is located midway between Albuquerque and Gallup in the southwestern corner of the San Mateo Mountains. From its summit to its surrounding mesas, Mount Taylor is one of New Mexico's most culturally significant and resource abundant treasures. At least 30 Native American tribes have historic ties to Mount Taylor dating back more than 300 years.[2] Members of the Navajo Nation have traveled to Mount Taylor for years to gather medicines, minerals, and soil for use in Navajo ceremonies.[3] Moreover, the Mount Taylor area contains archeological sites, burial grounds, shrines, and petroglyphs.[4] For many, it is a sacred mountain and "regarded as a living breathing being."[5] Mount Taylor also "contains the largest uranium resource in the United States."[6]

As a result of uranium drilling requests made to the Forest Service, the Hopi Tribe, Navajo Nation, and the Pueblos of Acoma, Laguna, and Zuni (collectively "Nominating Tribes") nominated approximately 700 square miles[7] of Mount Taylor and its adjoining mesas for emergency temporary listing on the New Mexico State Register as a Traditional Cultural Property ("TCP").[8] The Nominating Tribes made this request pursuant to the New Mexico Cultural Properties Act ("CPA"), the purpose of which is to "provide for the preservation, protection and enhancement of structures, sites and objects of historical significance within the state."[9] The New Mexico Cultural Properties Review Committee ("CPRC") approved the Nominating Tribes' emergency request.[10]

Subsequently, in April 2009, the Nominating Tribes submitted a revised application, requesting permanent listing of Mount Taylor on the State Register as a TCP.[11] The Nominating Tribes understood that the CPRC's procedures allowed a State Register listing applicant to use either the state or federal forms.[12] In aid of their position, the Nominating Tribes cited the CPA, which expressly states that it is to be read "in a manner conforming with, but not limited by" the National Historic Preservation Act ("NHPA").[13] The Nominating Tribes ultimately decided to use the federal forms and federal substantive criteria to nominate Mount Taylor for listing on the State Register, in part, because of the "wealth of interpretive material" available with respect to the NHPA.[14] During the CPRC's consideration process, interested parties objected to the Nominating Tribes' application for permanent listing.[15] Despite these concerns, the CPRC issued an Order approving the permanent listing of Mount Taylor on the State Register.[16]

In *Rayellen Resources, Inc. v. New Mexico Cultural Properties Review Committee*,[17] the Cebolleta Land Grant, along with private landowners, mineral estate owners and lessees successfully challenged the CPRC's Order listing Mount Taylor on the State Register.[18] The District Court held that the designation of over 700 square miles of "raw land…was overbroad and arbitrary because the CPRC cannot reasonably inspect and recommend repairs and maintenance of such a diverse and constantly changing mass of land."[19] The District Court's holding was based on the CPA's requirement that the CPRC "shall inspect all registered cultural properties periodically to assure cultural or historical integrity and proper maintenance."[20] The District Court's decision on this issue—and others—was certified to the New Mexico Supreme Court,[21] with

the Nominating Tribes arguing that the CPRC's Order listing Mount Taylor as a TCP was proper and should be reinstated because it was not arbitrary and capricious.[22]

In addition to arguing that it was within the province of the CPRC to determine whether Mount Taylor satisfied the criteria for listing on the State Register, the Nominating Tribes challenge the District Court's construction of the CPA.[23] Rather than strictly interpret the *shall* be capable of inspection and maintenance requirement of the CPA, the Nominating Tribes and the CPRC argue that any attempt to impose a size limit on properties nominated for listing on the State Register "would be inconsistent with the provisions of the [CPA] that require [it] [be] [read] [in] conformity with the NHPA and other federal law."[24] The NHPA and its implementing regulations do not require that a property nominated for listing on the National Register be capable of inspection and maintenance.[25]

From the text of the CPA, it is clear that the New Mexico Legislature intends for TCPs listed on the State Register to be capable of periodic inspection and maintenance by the CPRC. However, the CPRC is the entity ordinarily charged with determining whether it can inspect and maintain a nominated property.[26] And, its position is that the CPA should not be applied "mechanically," but rather the provision of the CPA mandating inspection and maintenance should be contextualized by the CPA's overarching goal of preserving historically significant sites and by the eligibility requirements for listing on the National Register set forth in the NHPA.[27] To the contrary, the District Court apparently applied a plain meaning interpretation of the CPA, and, in essence it ruled that "the M[ount] Taylor TCP is too large to be a cultural property."[28] On one hand, the District Court's decision might serve to curtail the CPRC's statutorily vested discretion to determine whether a property meets the criteria for listing on the State Register. On the other hand, the District Court's holding that a nine-member committee is incapable of routinely inspecting and recommending repairs and maintenance for an area roughly the size of the state of Rhode Island is well-founded.

The New Mexico Supreme Court has the unique opportunity to decide if size matters when determining whether a property should be designated a TCP. In so doing, the Court faces the challenge of discerning the legislature's intent when it created the requirement that a TCP be capable of inspection and maintenance by the CPRC. The Court's construction of the CPA will resolve the dispute over whether an area the size of Mount Taylor should be listed on the State Register.

Endnotes

[1] University of New Mexico School of Law, J.D. May 2012.

[2] *See* News From Indian Country, *New Mexico Tribes Applaud Committees Designation of Mt. Taylor as Cultural Property* (June 2009), http://indiancountrynews.net/index.php?option=com_content&task=view&id=6839&Itemid=99999999.

[3] *See id.*

[4] *See* Brief in Chief of the Pueblo of Acoma at 18, Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm., No. 31,064 (2012).

[5] *See* Cynthia Buttery Benedict & Erin Hudson, U.S. Nuclear Regulatory Comm'n, *Mt. Taylor Traditional Cultural Prop. Determination of Eligibility, Heritage Res. Report #2008-03-021* at 36 (Feb. 4, 2008), http://pbadupws.nrc.gov/docs/ML0904/ML090440287.pdf.

[6] *See* General Atomics, http://www.ga.com/riogrande.php (last visited Mar. 26, 2012).

[7] In the District Court's decision, the geographic area at issue ranged from 660 to 819 square miles. Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm., No. CV-2009-812, slip op. at 16 (5th Jud. Dist. N.M. Feb. 4, 2011).

[8] *See* Application for Registration, *N.M. State Register of Cultural Activities* (Feb. 14, 2008), submitted by Nominating Tribes. To date, there has not been an application to list Mt. Taylor on the National Register.

[9] NMSA 1978, §§ 18-6-1 to -17 (2004).

[10] Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm., No. CV-2009-812, slip op. at 4 (5th Jud. Dist. N.M. Feb. 4, 2011).

[11] Mt. Taylor Cultural Landscape Nomination (Apr. 22, 2009), submitted by Nominating Tribes.

[12] *See* Brief in Chief of the Pueblo of Acoma, *supra* note 4, at 17.

[13] *See id.* at 17 (citing NMSA 1978, §18-6-2 (2004)).

[14] *See* Brief in Chief of the Pueblo of Acoma, *supra* note 4, at 16-18.

[15] Stan N. Harris, *State and Fed. Traditional Cultural Props.: The Designation Process and Consequences for Res. Dev.*, 57 Rocky Mt. Min. L. Inst. 4-1 (2011). This case involves a total of eighteen parties and fifteen briefs. Rayellen Resources, Inc. v. N.M. Cultural Props. Review Comm., No. CV-2009-812, slip op. (5th Jud. Dist. N.M. Feb.

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Chevron Questa Mine:
Superfund National Priority Listing Rouses Remediation and Revival in Northern New Mexico

By Kelly J. Davis[1]

The Chevron Questa Mine Superfund site in Taos County is officially a hazardous waste priority. The U.S. Environmental Protection Agency (EPA) placed the molybdenum mine on its Superfund National Priorities List in September 2011, over a decade after the initial listing proposal.[2] Since the initial listing proposal, the mine has acquired new owners, a new name, and a new, hefty $500-800 million cleanup plan.[3] Full remediation of the site is expected to take 20-30 years,[4] but revival is already underway. An advanced solar energy facility on site is providing jobs and energy for the Village of Questa while demonstrating the potential for renewable energy on contaminated lands.[5]

Background on the Mine and the Contamination

The Chevron Questa Mine has been in continual operation for over 90 years.[6] Molycorp, Inc. owned the mine for most of its operating history, but Chevron Mining Inc. acquired the site in 2006.[7] The site is located in and near the village of Questa in Taos County and has two separate areas: the mine facility and the tailings ponds. The mine facility is located 4 miles east of Questa,[8] surrounded by Carson National Forest and the Latir Peak Wilderness area,[9] and the tailings ponds are located 1 mile west of Questa.[10] Both are near the Red River, a tributary of the Rio Grande.[11] While no people live within a mile of the mine facility itself, approximately 1,100 people live within a mile of the tailings ponds.[12]

There have been three distinct phases of mining operations at the site. First, from 1919 to 1958, the site was used for conventional mining.[13] Second, from 1958 to the early 1980s, the site was used for open pit mining.[14] And third, from 1983 to the present, the site has been used for underground block cave mining.[15] The open pit mining phase resulted in 328 million tons of acid-generating waste rock.[16] Throughout the life of the mine, over 100 million tons of tailings have been disposed at the tailings ponds.[17]

Environmental contamination from the mining operations is severe and pervasive throughout the Questa region. The soil, surface water, groundwater, Red River, river tributaries, Eagle Rock Lake, and a cold-water state fish hatchery are all contaminated.[18] Primary contaminants include molybdenum, PCBs, and other heavy metals, such as arsenic, boron, cadmium, cobalt, manganese, nickel, vanadium, and zinc, all of which have been detected in the Red River.[19] Heavy metals can cause detrimental human health effects, including reduced growth and development, various cancers, organ damage, and even death.[20]

The contamination stems from several of the mine operations. The open pit and waste rock dump sites used

during the open pit mining phase were left un-reclaimed when those operations ceased in the early 1980s.[21] Because of this, acid-generating rock was exposed to rain and snow for decades and the metals seeped into the environment.[22] A pipeline used to transport slurry from the mining facility to the tailings pond has caused further contamination.[23] This pipeline crosses the Red River, private farmland, and residential property in several locations and has ruptured many times, spilling out tailings into these areas.[24] The tailings ponds themselves also percolate into and contaminate the groundwater.[25]

Superfund, National Priorities List, and Remediation

Superfund is the common name for the Comprehensive Environmental Response Compensation and Liability Act, the federal environmental law that governs the remediation of hazardous waste sites posing a threat to human health or the environment.[26] Pursuant to Superfund, the EPA must create the National Priorities List (NPL) of contaminated sites eligible for long-term remedial action.[27] NPL listing guides the EPA in determining which sites warrant further investigation, identifying what remedial actions are appropriate, notifying the public of sites that warrant further investigation, and providing notice to potentially responsible persons that a Superfund-financed remedial action may be undertaken.[28] Importantly, NPL listing allows the EPA both to commence remediation efforts and to hold potentially responsible persons financially accountable for the remediation efforts.[29]

The Chevron Questa Mine was listed on the NPL on September 16, 2011, allowing needed remediation efforts to commence.[30] The Molycorp molybdenum mine site was originally proposed for listing in 2000, but there was not enough information on the contamination available at that time for eligibility under the Hazard Ranking System, which determines if a listing is warranted.[31] After being re-proposed and in the process of listing, EPA changed the name of the site in response to public comments to reflect that Chevron Mining Inc. is the potentially responsible person accountable for financing the remediation.[32] As the current owner, Chevron is liable under Superfund even though the company did not own the mine when most of the operations causing the contamination occurred. Chevron has offered to perform the cleanup and is a willing participant in the process, commenting that they look forward to commencing the remediation.[33] The company and the EPA are presently in ongoing settlement negotiations regarding the specific remedial designs.[34] The New Mexico Environment Department is also involved in these negotiations alongside the EPA.

The remediation will be an expensive and extensive process. The Record of Decision, or cleanup plan, estimates the remediation efforts will cost $500-800 million dollars and last 20-30 years.[35] According to the Record of Decision, remediation projects will include disposing of contaminated soils, building a water treatment facility, improving seepage collection from the waste rock piles, improving seepage collection from the tailings ponds, dewatering the underground mine, dredging contaminated sediments, and adding inlet storm water controls at Eagle Rock Lake.[36] Most of these projects are slated to begin this year.[37]

Revival via Renewable Energy

In addition to the remediation efforts, Chevron is undertaking a groundbreaking renewable energy initiative at the Chevron Questa Mine site, which promises to revive the Northern New Mexico area. In 2010, Chevron began constructing a concentrating photovoltaic (CPV) solar energy facility on the mill tailings area of the mine facility.[38] CPV is a burgeoning renewable energy market that will combine cost-effective energy and high levels of efficiency.[39] CPV is space technology that uses high-efficiency lenses to collect and focus solar radiation onto layers of cells to generate energy.[40] The technology functions best in regions like New Mexico where there are high levels of direct sunlight.[41]

The 1-megawatt CPV solar facility has already demonstrated success, as it is currently generates enough electricity to power 500-600 homes—the entire village of Questa. [42] The EPA hopes that "Questa will no longer be seen as 'just another mining town," but rather "a renewable energy leader."[43] Indeed, the initiative is improving the mine's legacy in the area and underscoring the potential for renewable energy on contaminated lands during and after Superfund remediation.

Endnotes

[1] University of New Mexico School of Law, J.D. expected May 2013 with a certificate in Natural Resources & Environmental Law; University of Chicago, A.B. in Environmental Studies, 2008.

[2] Susan Montoya Bryan, *UPDATED: Questa Mine Added to EPA's List of National Priorities*, ABQJournal Online, September, 15, 2011, available at http://www.abqjournal.com/main/2011/09/15/abqnewsseeker/questa-mine-added-to-epa's-list-of-national-priorities.html.

[3] J.R. Logan, *EPA Sets Stage for $500M Questa Mine Cleanup*, The Taos News, January 31, 2011, available at http://www.taosnews.com/news/article_d60ad015-404d-59d4-b5b0-22e8758b6e9f.html.

[4] Bryan, *supra* note 2.

[5] U.S. Environmental Protection Agency Superfund Redevelopment Initiative, *Celebrating Success: Molycorp, Inc. Questa, New Mexico* (Apr. 2011), http://www.epa.gov/superfund/programs/recycle/pdf/molycorp-success.pdf [hereinafter "Celebrating Success"].

[6] U.S. Environmental Protection Agency, *NPL Site Narrative for Chevron Questa Mine* (Mar. 1, 2012), http://www.epa.gov/superfund/sites/npl/nar1841.htm [hereinafter "NPL Site Narrative"].

7 Logan, *supra* note 3.

8 EPA Region 6, *Chevron Questa Mine (Taos County) New Mexico* (May 1, 2012), http://www.epa.gov/region6/6sf/pdffiles/0600806.pdf [hereinafter "EPA Region 6 Profile"].

[9] NPL Site Narrative, *supra* note 6.

[10] EPA Region 6 Profile, *supra* note 8.

[11] NPL Site Narrative, *supra* note 6.

[12] EPA Region 6 Profile, *supra* note 8.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] EPA Region 6 Profile, *supra* note 8.

[17] *Id.*

[18] U.S. Environmental Protection Agency, *Molycorp, Inc. (Chevron Mining, Inc.)*, http://www.epa.gov/region6/region-6/nm/nm_molycorp.html (last visited June 5, 2012) [hereinafter "Groundbreaking"].

[19] NPL Site Narrative, *supra* note 6.

[20] World Resources Institute, *Heavy Metals and Health*, http://www.wri.org/publication/content/8375 (last visited June 5, 2012).

[21] Amigos Bravos, *Molycorp Mine – Background* (2012), http://www.amigosbravos.org/molycorp_background.php.

[22] *Id.*

[23] *Id.*

[24] U.S. Environmental Protection Agency, *Record of Decision*, 3-144 (Dec. 20, 2010).

[25] *Id.*

[26] 42 U.S.C. § 9601 *et seq*.

[27] Terry C. Clarke, *A Practitioner's View of the National Priorities List*, 2 Envtl. Law 57, 59 (1995).

[28] U.S. Environmental Protection Agency, *National Priorities List Basic Information* (Mar 2, 2012), http://www.epa.gov/superfund/sites/npl/npl_hrs.htm.

[29] Clarke, *supra* note 27.

[30] EPA Region 6 Profile, *supra* note 8.

[31] NPL Site Narrative, *supra* note 6.

[32] EPA Region 6 Profile, *supra* note 8.

[33] Matthew van Buren, *Cleanup Actions to Begin Soon in Questa* (Apr. 30, 2012), http://www.taosnews.com/news/article_77bef030-8fe0-11e1-bd1a-0019bb2963f4.html

[34] *Id.*

[35] Logan, *supra* note 3.

[36] *Id.*

[37] Van Buren, *supra* note 33.

[38] Celebrating Success, *supra* note 5.

[39] Gitika Chanchlani, *Global Concentrated Photovoltaic Market Growth and Investments*, GlobalData (Feb. 1 2012), http://www.renewableenergyworld.com/rea/news/article/2012/02/global-concentrated-photovoltaic-market-growth-and-investments.

[40] Dorothy Kosich, *3 Mine Sites (One Active), Former Zinc Smelter Are New EPA Superfund Sites*, MineWeb (Sept. 16, 2011), http://www.mineweb.com/mineweb/view/mineweb/en/page68?oid=135580&sn=Detail&pid=68.

[41] *Id.*

[42] U.S. Environmental Protection Agency, RE-Powering America's Land Fact Sheet: Siting Renewable Energy Projects While Addressing Environmental Issues (Dec. 2011), http://www.epa.gov/oswercpa/docs/decision_tree_fact-sheet.pdf.

[43] Celebrating Success, *supra* note 5.

A team representing the University of New Mexico School of Law advanced to the quarter-final rounds at the National Environmental Law Moot Court Competition in late February 2012. Members were Caela Baker (J.D. 2012), Owen Johnson (J.D. 2012), and Chelsea Van Deventer (J.D. 2012). In advancing past the preliminary rounds, the UNM team placed higher than at least 50 teams out of a field of 77 teams.

The Pace National Environmental Law Moot Court Competition is an annual inter-law school appellate moot court competition sponsored by Pace University School of Law, in White Plains, NY. It is the preeminent environmental moot court competition in the country, one that aims to help students develop expertise in environmental law appellate advocacy.

The annual problem typically involves three parties: industry, government and an environmental protection group, and includes a variety of environmental law statutory issues, administrative law issues, constitutional issues and common law claims. The team received praise and positive feedback from the judges. Professor Eileen Gauna served as the team's adviser. Volunteer judges from the New Mexico Bar and the UNM law school helped prepare the team for their competition. As in years past, the NREEL Section helped support this year's team, both financially and through the time and efforts of volunteer judges.

When Size Matters

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4, 2011) (Certification Order Mar. 8, 2012). The main thrust of the 15 named Appellees' objection to the listing of Mt. Taylor as a TCP appears to be that the CPRC provided the parties inadequate notice of the nomination, and of the public hearings related to the nomination, of the Mt. Taylor TCP in violation of the due process clause in Article 2, Section 18 of the New Mexico Constitution. *See* Rayellen Resources, Inc. v. N.M. Cultural Props. Review Comm., No. CV-2009-812, slip op. at 19-20 (5th Jud. Dist. N.M. Feb. 4, 2011).

[16] *See* "Final Order Approving Nomination for Listing on N.M. Register of Cultural Props.," *N.M. Cultural Props. Review Comm.* (Sept. 14, 2009), http://www.nmhistoricpreservation.org/documents/cprc/FINALORDER-14September09.pdf.

[17] No. CV-2009-812, slip op. at 4 (5th Jud. Dist. N.M. Feb. 4, 2011).

[18] *Id.*

[19] *See id.* The parties also dispute whether the proposed Mt. Taylor TCP lacks integrity, an issue related to its size and changing boundaries. That issue is not addressed herein.

[20] *See* NMSA 1978, § 18-6-5(D).

[21] *See* Rayellen Resources, Inc. v. N.M. Cultural Props. Review Comm., No. CV-2009-812, slip op. (5th Jud. Dist. N.M. Feb. 4, 2011) (Certification Order Mar. 8, 2012).

[22] *See* Brief in Chief of the Pueblo of Acoma, *supra* note 4, at 27-30.

[23] *Id.* at 27; *see also* N.M. Cultural Props. Review Comm.'s Reply Brief at 8-16, Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm., No. 31,064 (2012).

[24] Brief in Chief of the Pueblo of Acoma, *supra* note 4, at 26; *see also* N.M. Cultural Props. Review Comm.'s Reply Brief at 10, Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm., No. 31,064 (2012) (stating that "[t]he [CPA] does not tie the duty of inspection to the standards for designation of the property.").

[25] *See* NHPA, 16 U.S.C. §§ 470-470x-6 (2006); *see also* 36 C.F.R. 60 (2011).

[26] NMSA 1978, § 18-6-5A (2004).

[27] *See* N.M. Cultural Props. Review Comm.'s Brief in Chief at 11-21, Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm., No. 31,064 (2012); *see also* Brief in Chief of the Pueblo of Acoma, *supra* note 4, at 24-26.

[28] *See* N.M. Cultural Props. Review Comm.'s Brief in Chief at 11, Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm., No. 31,064 (2012).

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