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Editor's Note

Welcome to the Winter 2017 issue of the NREEL Vista Newsletter. This edition of the Vista Newsletter contains four articles by talented student authors from the University of New Mexico School of Law. Lindsay Welton examines constitutional takings claims in the context of local oil and gas regulations. Cruz Lopez describes the multiple lawsuits arising from the mining runoff contamination of the Animas and San Juan Rivers in Colorado and New Mexico. Nadine Padilla presents the regulatory framework for uranium mining in groundwater aquifers, and argues for additional protections for the Westwater Canyon aquifer on the Navajo Nation. Finally, Logan Glasenapp describes the recent EPA rulemaking on Waters of the United States, the subsequent litigation, and what it all may mean for New Mexico.

I want to extend my great appreciation to NREEL board

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Regulatory Takings and the Parcel as a Whole Problem: Local Oil and Gas Regulation in New Mexico

Lindsay Welton[*]

In April of 2013, Mora County, New Mexico enacted the Mora County "Community Water Rights and Local Self-Governance Ordinance" which prohibited all extraction and storage of oil and gas in Mora County.[1] In 2014, Shell Western Exploration Production Inc. (hereinafter "SWEPI"), a mineral owner, sued alleging numerous constitutional violations, including a violation of the Fifth Amendment Takings Clause.[2] While the Mora Ordinance was invalidated in 2015, the takings claim was never decided. The Court found the takings claim was unripe for SWEPI's failure to exhaust its statutory compensation remedies,[3] but not before eluding that SWEPI may have suffered a taking because the highly restrictive nature of the Mora Ordinance "deprive[d] SWEPI, LP all economic value in its leases." [4]

Not all local restrictions on oil and gas development, however, are as restrictive as the Mora Ordinance. For example, consider the San Miguel Oil and Gas Ordinance (hereinafter the "San Miguel Ordinance"), the Santa Fe Oil and Gas Ordinance (hereinafter the "Santa Fe Ordinance"), and Sandoval County's proposed Ordinance (hereinafter the "Sandoval Ordinance"). Each of these ordinances contain numerous prohibitions and mandates that fall short of an outright ban, but are so restrictive that production is likely economically prohibitive. The San Miguel and Santa Fe Ordinances impose large application fees, land assessment requirements, location restrictions, and infrastructure cost contracts.[5] The Santa Fe Ordinance prohibits the use of synthetic fracturing fluids allowing

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only sand and fresh water to be used for hydraulic fracturing.[6] In contrast, the Sandoval Ordinance contains setbacks ranging from 200-1000 feet, but does not contain hydraulic fracturing specific regulations.[7] Unfortunately, there is no clear legal threshold as to how restrictive a regulation must be to cause a taking; although the outcome of a takings analysis may depend on the extent of the property interests owned by the plaintiff.

Sangre de Cristo Mountains, photo by Dave Hensley available at https://flic.kr/p/5k55V2g

Primer on Takings Law

The Fifth Amendment to the United States Constitution offers a single sentence takings clause that guarantees that private property cannot be taken for public use without just compensation.[8] State law determines the property rights that may be the subject of a takings claim under the U.S. Constitution.[9] The New Mexico Constitution, Article II, Section 20 offers a nearly identical takings provision to the U.S. Constitution, and NMSA 1978 § 42A-1-29(A) provides statutory compensation for the present value of property upon being taken or damaged during the exercise of eminent domain. The U.S. District Court for New Mexico has found that mineral interests are real property under New Mexico law and are subject to New Mexico's takings provisions,[10] but neither the New Mexico nor the U.S. Constitutions set out a standard as to the extent to which a landowner must be restricted in the use of his property before a regulation results in a taking which must be compensated. While New Mexico case law interpreting both Article II § 20 and NMSA 42A-1-29(A) has proven that regulatory inverse condemnation is compensable,[11] the judiciary has struggled to determine when compensation is required.

Categorical and Non-Categorical Takings

The closest thing to a bright line taking is a per-se or categorical taking. Categorical takings occur when government action completely deprives a landowner of his or her property interest.[12] In *Lucas v. South Carolina Coastal Council*, the Court found that when a regulation deprives a landowner of all beneficial use of property and the property right is not a nuisance under background principles of common law, then the regulation amounts to a taking and must be compensated.[13] This is a narrow and deceptively simple "all-or-nothing-rule".[14] The landowner who retains some ability to beneficially use her property is not entitled to recover under this test, but those who suffer a total loss will be compensated.[15]

A claimant who falls short of the *Lucas* categorical rule may still succeed in showing a taking under the *Penn Central* balancing test. This test requires courts to apply a balancing approach that considers three non-dispositive factors: (1) the economic impact of the regulation on the landowner, (2) the effect of the government action on the landowner's distinct investment backed expectations, and (3) the character of the government action.[16] Under this test, the greater the diminution in the value of the property caused by the regulation and the greater the investment by the owner in the property, the more likely a taking will be found. Both the categorical test and the balancing test thus depend on just how much property can no longer be used as intended.

The Parcel as a Whole Problem

When assessing the totality of a taking, the court must

first determine the apportionment or bundling of the property rights. Property rights might be evaluated in one of two ways: an aggregate "parcel as a whole" approach that considers the entire bundle of property rights owned by the landowner (such as the surface, minerals, adjacent properties, etc.), or a disaggregate approach that considers separate property rights separately.[17] If a court adopts the parcel as a whole approach, it will take into account property rights, including other uses that might be made of the property, that have not been eliminated by the regulation. For example, if a regulation bans hydraulic fracturing, the mineral owner or oil and gas lessee might still produce oil and gas using conventional drilling techniques. Or, if a regulation bans oil and gas production altogether, an owner of a fee interest might still use the surface estate for ranching or farming. In contrast, if a court applies a disaggregate approach and considers the mineral estate separate from the surface estate, then a ban on production may constitute a taking where the complaining mineral owner or lessee owns only a mineral interest or interest under an oil and gas lease. Although some earlier Supreme Court cases applied a disaggregate approach, more recent Supreme Court jurisprudence favors the parcel as a whole approach.[18] Thus, the smaller the property interest owned by the complaining landowner and the more restrictive the regulation, the better chance a claimant has of proving a taking.

Application To New Mexico Ordinances

SWEPI challenged the Mora Ordinance in 2015 alleging in part that it affected SWEPI's real property interest by rendering its 36 oil and gas leases useless.[19] The Court noted that because "[t]he leases each state that they only provide the right to oil and gas…[t]he only use and the only value of the leases lie in the ability and right to extract oil and gas, which the Ordinance prohibits."[20] In dicta, the Court determined that SWEPI had entirely lost access to its property rights,[21] which under *Lucas,* implies a categorical taking.[22]

In contrast, the Santa Fe Ordinance, the San Miguel Ordinance and the Sandoval Ordinance are unlikely to cause a taking under most facts and circumstances. Under the *Lucas* categorical rule, each of these ordinances theoretically allows some other use of the mineral estate.[23] Under the *Penn Central* balancing test, the economic impact factor is similar to the total loss inquiry in *Lucas*, but the Supreme Court has stated that commercial impracticability alone is insufficient to prove a taking.[24] Economic impact must be determined by the actual impact on a particular property.[25] The investment backed expectation factor depends on the particular claimant and his or her knowledge, expectation, and level of monetary investment in the property. This factor would likely depend on the amounts paid for the property, whether costs were already incurred for exploration, and whether other discoveries have been made in the area or field. Further, there is little to no exploration or production activity in Santa Fe or San Miguel Counties, although there is some limited activity in Sandoval County. Now that these ordinances are in place (or almost in place in the case of the Sandoval Ordinance), any investment would be with the expectation of compliance with the existing ordinances. The third *Penn Central* factor considers whether the ordinance disproportionately burdens the claimant for the public good.[26] A regulation that applies uniformly to all landowners in a particularly large area as part of a comprehensive scheme to reduce air and noise pollution would likely fall short of this "singling out" factor.[27]

In conclusion, while there is some possibility that local oil and gas ordinances that are less restrictive than a complete ban may be preempted by state law,[28] it is unlikely that such an ordinance will cause a constitutional taking under many circumstances.

Endnotes

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[1] *See* Mora Cnty., N.M., Ordinance No. 2013-01 § 5.1 (Apr. 29, 2013), http://www.harmonywithnatureun.org/content/documents/199Ordinance-Mora%20County--.pdf.

[2] *SWEPI, LP v. Mora County, N.M.*, 81 F. Supp. 3d 1075 (D.N.M. 2015).

[3] Id. at 1158.

[4] Id. at 1150. *See also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (explaining that, "a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.").

[5] *See* San Miguel Cnty. Ord. 11-12-14 O&G (Nov. 12, 2014), http://www.smcounty.net/_WebDocs/_Ordinance/O&G%20Ordinance.pdf. *See also* Santa Fe Cnty. Ord. 2008- (Dec. 9, 2008), http://www.santafecountynm.gov/userfiles/file/oilandgas/oilandgasordinanceREV.pdf.

[6] Santa Fe Cnty. Ord. at §18(b).

[7] *See* Sandoval County Draft Ord. § 5.3, http://www.sandovalcounty.com/uploads/Downloads/Divisions/PlanningZoning/legal/2016/PZAug2016_OG_Ordinance.pdf.

[8] U.S. Const. amend. V.

[9] *SWEPI, LP*, 81 F. Supp. 3d 1075 at 1149.

[10] *SWEPI, LP*, 81 F. Supp. 3d at 1149.

[11] *Santa Fe Pac. Trust, Inc. v. City of Albuquerque*, 335 P.3d 232, 238 (N.M. Ct. App. 2014).

[12] Patrick H. Martin et al., The Law of Oil and Gas 1392 (10th ed. 2016) (Citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

[13] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

[14] Alex Ritchie, Local Control over Oil and Gas, 60 Rocky Mt. Min. L. Inst. § 11.03[2][b][ii], 11-38 (2014).

[15] *Id.* at 11-33.

[16] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

[17] Alex Ritchie, Local Control over Oil and Gas, 60 Rocky Mt. Min. L. Inst. § 11.03[2][b][ii], 11-38 (2014).

[18] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 480 (1987).

[19] *SWEPI, LP,* 81 F. Supp. 3d at 1149.

[20] *Id.* at 1150.

[21] *Id.*

[22] *Id. See also, Lucas*, 505 U.S. at 1027.

[23] Drilling and development has been banned, similar to the Mora County Ordinance, in all but the Easternmost stretch of San Miguel County. Mineral owners that own only mineral rights in restricted portions of San Miguel County are affected similar to those in Mora County. *See* San Miguel Cnty. Ord. 11-12-14 O&G (Nov. 12, 2014).

[24] *Keystone Bituminous*, 480 U.S. at 491.

[25] *Id.* at 494.

[26] *Schmude Oil, Inc. v. Department of Environmental Quality*, 856 N.W. 2d 84, 53 (Mich. Ct. App. 2014).

[27] *Id.*

[28] Alex Ritchie, On Local Fracking Bans: Policy and Preemption in New Mexico, 54 Nat. Res. J., 287, (Spring 2014).

Editor's Note *continued from cover*

members Alex Ritchie, Bill Grantham, and Sally Paez for their excellent and invaluable editorial work on these articles. Many thanks to you all!

The news and updates section includes a profile of NREEL's Lawyer of the Year, Greg Ridgley, a recap of the NREEL annual CLE, and a report on the NREEL board retreat on the Chama River last August.

We welcome and encourage submissions from our law student and attorney readers. If you would like to submit an article for the Summer 2017 edition of NREEL Vista, please contact the incoming NREEL Vista Editor Chris Shaw at Chris.Shaw@state.nm.us. The views expressed in the articles published in the NREEL Vista are those of the authors alone and not the view of the NREEL Section. Thank you for your continued support of the NREEL Section of the State Bar.

Thank you,
Luke Pierpont, Editor

Finding Fault in Disaster: Litigation in the Aftermath of the Gold King Mine Spill

Cruz Lopez[*]

The Animas River, turned yellow from pollution from the Gold King mine, available at https://www.flickr.com/photos/mmoorr/20902459192

In 2014 the United States Environmental Protection Agency (hereinafter the "EPA") began work in the Gold King mine, beginning the long—and long overdue—process of cleaning up toxic wastewater from some of Colorado's most prominent water pollution sources.[1] The work began with an analysis of the mine, drafting the best-case scenario for draining the water out of the mine, and a decision to suspend the work until conditions became more favorable.[2] Upon returning to the mine in 2015 the EPA unwittingly released a decades long buildup of over 3 million gallons of heavy-metal laden wastewater into Cement Creek in the headwaters of the Animas River, a tributary of the San Juan River in New Mexico, which flows ultimately into Lake Powell in Utah.[3] New Mexico, where the San Juan River is a source of irrigation and drinking water, recreational fishing, and water sports, suffered a significant amount of the damage from the release of the toxic plume.[4] The spill caused lasting effects for both New Mexico and the Navajo Nation, which borders and heavily relies on the water of the San Juan River.[5] This article describes the substantial impacts of the spill and the subsequent legal proceedings initiated by both the state of New Mexico and the Navajo Nation against the EPA and the owners and steward of the Gold King mine.

The Making of an Environmental Disaster

The state of Colorado is steeped in mining history. Hopeful prospectors began to mine in the San Juan Mountains around Silverton in the late 1800s looking for gold and silver deposits.[6] The Gold King mine is a remnant of that period in Colorado's history. Although production from the mine stopped in 1923, the mine changed ownership several times.[7] Ultimately, the mine ended up in the hands of Sunnyside Mining Corporation and later, parent company Kinross Gold Corporation.[8] After the abandonment of mining operations Gold King and other surrounding mines began to fill with runoff and groundwater.[9] Sunnyside maintained a water treatment facility in Gladstone, Colorado, for treatment of the contaminated mine water.[10] The Gladstone facility, located a half mile northeast of the Gold King mine,[11] was required by the EPA for compliance with the Clean Water Act's National Pollutant Discharge Elimination System (NPDES).[12] The water treatment facility served to offset some of the pollution that came from the Sunnyside mine, part of a network of mines including the Gold King mine.[13] The high cost of operating the water treatment plant led Sunnyside to search for an alternative to handle water leaking from the mine network.[14] The state of Colorado Department of Health and Environment and Sunnyside Gold agreed to a plan that allowed for the installation of bulkheads in the

Sunnyside mine, which prevented water from escaping.[15] When executed, however, this plan resulted in the flooding of the Gold King mine complex, and the subsequent leaking wastewater.[16] The EPA's venture into the mine then, was part of an ongoing effort to stop the leakage and remediate the toxic water that was accumulating in the mine. However, many officials in Colorado believe the spill was a result of negligent activity. Colorado Senator Michael Bennet called the EPA's conduct that resulted in the spill "unacceptable," and insisted that the EPA be held responsible for any "…gross mistakes or negligence."[17]

Gold King Mine release incident, available at https://response.epa.gov/site/site_profile.aspx?site_id=11082

Equal and Opposite Reaction

In the aftermath of the spill the damages began to mount for the state of New Mexico and the Navajo Nation. Agriculture on the Navajo reservation began to dry up as irrigators were unable to irrigate their crops with the polluted water,[18] and portions of the New Mexico economy that relied on the river for tourism, recreation, and trophy fishing began to wither as well.[19] In response to the damages, on May 23, 2015, the State of New Mexico filed suit against the EPA, as well as the government contractor in charge of the mine cleanup at the time of the spill, Environmental Restoration, and the owners and operators of the mine, Kinross Gold, for the activities of their subsidiary, Sunnyside Gold.[20] The suit alleges that the Defendants were grossly negligent in allowing the buildup of, and ultimately the release of, the chemical laden water that made its way to New Mexico.[21] In the *State of New Mexico v. EPA et al.,* case filings, the spill is alleged to have "cost the State of New Mexico millions of dollars in taxes, fees, and other income from regional economic activities."[22] In a separate but related lawsuit, New Mexico targets the State of Colorado for its alleged role in maintaining and contributing to an atmosphere conducive to the negligence that resulted in the mine spill, claiming "…Colorado is directly responsible for the hazardous conditions that preceded the catastrophe."[23] In its Motion for Leave to File a Bill of Complaint before the United States Supreme Court, New Mexico asserts that "Colorado's direct role in the Gold King Mine release" contributed to the damages suffered by New Mexico.[24] The State of New Mexico filed two separate suits citing that two distinct actions are necessary because of Colorado's direct role in New Mexico's stated injuries, extrajudicial relief is inadequate or unavailable for the extent of the damages suffered, and because the U.S. Supreme Court has original jurisdiction over issues between the states.[25]

In its filing, the Navajo Nation declared damages in excess of two million dollars as a result of its impact assessment, water sampling, and community monitoring and response directly attributable to the spill.[26] The suit mentions that, while the costs are extraordinary, they "…do not reflect the full harm suffered by the Nation as a result of the Release…."[27] While fish in the river have been declared safe to eat,[28] and the river itself has been declared to be at pre-spill levels of contaminants,[29] there is still a warning to those in the area to avoid contact with the water,[30] and the primarily Navajo farmers who rely on the river for irrigation have yet to return to the river for water.[31] The president of the Navajo Nation, Russell Begaye,

authored an impassioned plea to Congress to "…pass legislation that clears the way for the Navajo Nation and all harmed Navajo people to obtain full recovery."[32] The Navajo Nation has also filed suit against the same defendants as New Mexico, with the addition of Harrison Western Corporation.[33] In *Navajo Nation v. EPA et al.*, the Navajo Nation alleges that the defendants were grossly negligent in the release of the wastewater from the mine.[34]

In both the lawsuit filed by New Mexico[35] and the lawsuit filed by the Navajo Nation,[36] the EPA is alleged to have failed to do the proper site reconnaissance to determine the actual level of the water in the mine. This claim is supported by the findings of an independent investigation done by the Department of the Interior, which stated that the EPA had considered using a drilling rig to determine the actual level of the water, had not done so, and "had [the drilling] been done, the plan to open the mine would have been revised, and the blowout would not have occurred."[37] Additionally, the Navajo Nation alleged that the EPA failed to adhere to the National Contingency Plan (hereinafter "NCP") for release of pollutants.[38] The Navajo Nation alleged that the EPA failed to notify the Nation until two days after the release event, longer than would be "prompt" as required by the NCP.[39] New Mexico also points to the State of Colorado as a contributing party in the spill by allowing the environmental hazard to increase without resolution;[40] allowing Kinross Gold to discontinue water treatment required by the Clean Water Act (hereinafter "CWA");[41] resisting Superfund designation by the EPA under the Comprehensive Environmental Response, Compensation and Liability Act (hereinafter "CERCLA");[4243] and, for the Colorado Department of Mine Reclamation and Safety's direct contribution to the EPA's excavation on August 5, 2015, resulting in the spill.[44]

Legal Proceedings and Conclusion

The fledgling cases against the EPA by both New Mexico and the Navajo Nation seek to enforce statutes mandating clean water protections and a predetermined communication, cleanup, and recovery response to environmental catastrophes. The NCP and CERCLA contain provisions governing the alert process,[45] clean-up and environmental restoration,[46] and victim compensation.[47] Even before any damages have been awarded in these lawsuits, the federal government has already paid dearly for the spill. Over two-million dollars in Clean Water Act funds have been granted to New Mexico and the Navajo Nation;[48] nearly four-million dollars in CERCLA reimbursements have been issued;[49] the EPA has authorized twenty-nine million dollars in funds for the clean up;[50] and, the costs are projected to rise.[51] Additionally, while some post-spill contaminant levels have returned to the pre-spill level,[52] there is concern that "sinks" of heavy metals will continue to carry the metals through the San Juan for an indeterminate amount of time.[53] It is also still too early to assess long-term impacts of the spill on the ecology of the San Juan River.[54] In response to the spill, the EPA has moved to designate the Gold King mine, and 47 other mines in Colorado, as Superfund sites under CERCLA, allowing for additional federal funding to clean up mine wastewater.[55]

Meanwhile the owners of the Gold King mine, Kinross Gold Co. and Sunnyside Gold Co, have not shown the same initiative in providing relief for the victims of the spill. In response to the cases brought by New Mexico and the Navajo Nation, Kinross and Sunnyside have moved to dismiss for lack of jurisdiction.[56] In the New Mexico case, in addition to alleging New Mexico has failed to state a claim, Kinross alleges that "the requisite 'minimum contacts'" to establish either personal or general jurisdiction have not been established.[57] In the Navajo suit, Sunnyside contends that since the cause of the pollution occurred in Colorado, the New Mexico federal court has no jurisdiction over the matter unless the state of Colorado is joined in the suit.[58] Additionally, because the lawsuit involves the sovereign Navajo Nation, Sunnyside tenders that Colorado cannot be included in the suit because the 11th amendment to the Constitution precludes the states from suit by "Citizens or Subjects of any Foreign State."[59] Should these cases survive these jurisdictional challenges, the case for negligence against Kinross and its subsidiaries is a complicated one. Kinross's alleged circumvention of the CWA by installing bulkheads to prevent leakage, rather than treat the water, and the actual and demonstrable knowledge of the harm posed by the polluted water, combined with Kinross's failure to substantively address the systemic flooding of the Gold King mine complex seems to demonstrate willful ignorance of the potential consequences. However, approving the Gold King bulkhead installation and cooperating in the EPA's drainage plan also engaged the state of Colorado in Kinross's alleged misconduct as well, while the spill itself was caused by the EPA. While the EPA has taken steps to correct the situation after the release of the polluted water, it is clear that the EPA was involved in the release, and their conduct may have been avoidable. The EPA's liability will surely factor into Kinross' arguments as well, as the com-

bined defendants attempt to apportion responsibility for this preventable disaster. Time will tell whether the suits make it to a resolution on the merits, but the legal and monetary implications make this story one worth continuing to follow.

Endnotes

*Cruz Lopez is a First Year Law Student at the University of New Mexico School of Law, Class of 2019.

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[2] United States Department of the Interior, *Technical Evaluation of the Gold King Mine Incident* 35-42, Reclamation Managing Water in the West (October 2015), http://www.usbr.gov/docs/goldkingminereport.pdf

[3] *Id.* at 1-3.

[4] American Geosciences Institute, *Interactive Map of Colorado's Gold King Mine spill,* (2016), http://www.americangeosciences.org/critical-issues/maps/gold-king-mine-spill

[5] Alysa Landry, *Navajo Crops Drying Out as San Juan River Remains Closed After Toxic Spill,* INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 21, 2015), http://indiancountrytodaymedianetwork.com/2015/08/21/navajo-crops-drying-out-san-juan-river-remains-closed-after-toxic-spill-161461

[6] Sam Brasch, *The Gold King Mine: From An 1887 Claim, Private Profits and Social Costs,* COLORADO PUBLIC RADIO (Aug. 17, 2015), http://www.cpr.org/news/story/gold-king-mine-1887-claim-private-profits-and-social-costs

[7] *Id.*

[8] Jonathan Thompson, *A Gold King Mine Timeline*, HIGH COUNTRY NEWS (May 2, 2016), http://www.hcn.org/issues/48.7/silvertons-gold-king-reckoning/a-gold-king-mine-timeline

[9] United States Department of the Interior, *Technical Evaluation of the Gold King Mine Incident* 17-18, Reclamation Managing Water in the West (October 2015), http://www.usbr.gov/docs/goldkingminereport.pdf

[10] *Id.*

[11] *Id.*

[12] 40 C.F.R. § 122

[13] Environmental Protection Agency, *Gold King Mine – Watershed Fact Sheet,* EPA (2015), https://www.epa.gov/sites/production/files/2015-08/documents/goldkingminewatershedfactsheetbackground.pdf

[14] United States Department of the Interior, *Technical Evaluation of the Gold King Mine Incident* at 18, Reclamation Managing Water in the West (October 2015), http://www.usbr.gov/docs/goldkingminereport.pdf

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[16] Jesse Paul, *Review: Gold King Mine spill was preventable, disaster potential not understood*, THE DENVER POST (Oct. 22, 2015), http://www.denverpost.com/2015/10/22/review-gold-king-mine-spill-was-preventable-disaster-potential-not-understood/

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[20] Complaint of Plaintiff at 9, *State of New Mexico vs. Environmental Protection Agency,* No. 1:16-CV-00465 (NM Dist. Ct. May 23, 2015)

[21] *Id.* at 4.

[22] *Id.* at 92

[23] Motion for Leave to File Bill of Complaint at 8, *State of New Mexico vs. State of Colorado,* Original Action 147, in the Supreme Court of the United States.

[24] *Id.*

[25] Brief in Support of Motion for Leave to File Complaint at 10-27, *State of New Mexico vs. State of Colorado*, Original Action 147, in the Supreme Court of the United States.

[26] Complaint of Plaintiff at 112, *Navajo Nation vs. Environmental Protection Agency,* No. 1:16-CV-00931 (NM Dist. Ct. Aug. 16, 2016)

[27] *Id* at 113.

[28] Jonathan Romeo, *Health officials OK eating fish from Animas River,* THE DURANGO HERALD (Oct. 19, 2016), http://www.durangoherald.com/article/20161018/news01/161019549/

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[33] Complaint of Plaintiff, *Navajo Nation vs. Environmental Protection Agency,* No. 1:16-CV-00931 (NM Dist. Ct. Aug. 16, 2016)

[34] *Id*. at 3.

[35] Complaint of Plaintiff at 4, *State of New Mexico vs. Environmental Protection Agency,* No. 1:16-CV-00465 (NM Dist. Ct. May 23, 2015)

[36] Complaint of Plaintiff at 3, *Navajo Nation vs. Environmental Protection Agency,* No. 1:16-CV-00931 (NM Dist. Ct. Aug. 16, 2016)

[37] United States Department of the Interior, *Technical Evaluation of the Gold King Mine Incident* at 2, 77-83, Reclamation Managing Water in the West (October 2015), http://www.usbr.gov/docs/goldkingminereport.pdf

[38] 40 C.F.R. § 300.405(e)); 42 U.S.C. § 9603

[39] *Id.*; 40 C.F.R. § 300.320(a)(5)

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[45] 40 C.F.R. § 300.405(e)

[46] 42 U.S.C. § 9621

[47] 42 U.S.C. § 9609

[48] Environmental Protection Agency, *Gold King Mine: CERCLA Reimbursements and CWA Grants,* EPA (2016), https://www.epa.gov/goldkingmine/frequent-questions-related-gold-king-mine-response

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Unacceptable Risk: Uranium Mining Within the Westwater Canyon Aquifer

*Nadine Padilla**

Abandoned uranium mines near Grants, NM, available at https://flic.kr/p/S4rLaC

Every day thousands of Navajo Nation residents haul water to meet their daily needs. An estimated 40% of the population does not have access to running water.[1] Residents often haul water from great distances for domestic, livestock, and agricultural uses. As much as 97% of water on the Navajo Nation is provided from groundwater sources.[2] While water is a scarce resource throughout the Navajo Nation, one particular aquifer in western New Mexico, the Westwater Canyon Aquifer, is the site of conflict between Navajo community members and uranium mine companies who want to mine uranium from within the aquifer.

Uranium mining has a long and troubled history throughout New Mexico. For 30 years beginning in 1948, the Grants Mineral District (extending from Laguna Pueblo west to the Arizona border) produced more uranium than any other district in the world and accounted for more than one-third of all the uranium produced in the United States during that period.[3] The legacy of uranium mining has left 520 abandoned uranium mines on the Navajo Nation[4] and 259 additional abandoned mine sites in New Mexico, more than half of which have no record of reclamation.[5] In addition to abandoned mines, Church Rock, New Mexico, is the site of the single worst nuclear disaster in U.S. history. The Church Rock Uranium Mill Tailings spill occurred in 1979 when an earthen dam failed, releasing 1,100 tons of radioactive mill waste and 95 million gallons of acidic mill effluent into the Rio Puerco.[6] The contamination traveled as far as 80 miles downstream into Arizona.[7] The Church Rock spill released more radiation than the Three Mile Island accident.[8] Only an estimated 1% of the waste was reclaimed,[9] and community members along the Rio Puerco have reported increased rates of cancer and other ailments.[10] Only recently, more than 30 years after uranium production stopped in New Mexico, have state and federal agencies begun to address the devastating impacts of the uranium legacy. In 2009, several agencies, including the Environmental Protection Agency (hereinafter the "EPA"), create a five-year plan to serve as a "possible roadmap for the future recovery" of the Grants Mineral District.[11]

Navajo Nation Targeted for New Uranium Mines

A spike in uranium prices in 2007 sparked a resurgence of interest in uranium mining in New Mexico, particularly in the Navajo communities of Crownpoint and Church Rock. In those two communities, there are four proposed uranium projects.[12] The peak uranium prices of 2007 were short-lived, and by the end of 2008, the price had

plummeted back to forty dollars a pound.[13] However, the interest in mining remains.

As opposed to conventional underground mining, the four proposed mines in Crownpoint and Church Rock would use a method of mining called in-situ leach mining (hereinafter "ISL mining") in which solutions are injected into the ore body to mobilize uranium for extraction.[14] While touted by the uranium industry as an "advanced"[15] technology, ISL mining has been used in the U.S. and around the world since the 1960s.[16] The process of ISL mining inevitably results in the contamination of groundwater[17] and many have concluded that this contamination is irreversible. The Nuclear Regulatory Commission (hereinafter "NRC") has conceded that it is "virtually impossible" to restore an aquifer to a pre-mining condition after ISL mining has ended.[18] EPA has also stated, "Based on EPA's experience with other in-situ mining projects, EPA believes there is a high likelihood that, following mining activities, residual waste from mining activities will not remain in the exempted area," and that waste will travel outside the exempted aquifer area.[19]

Past ISL mining operations in Texas have confirmed the local community's concerns that ISL mining contaminates groundwater sources. According to a U.S. Geological Survey study, more than half of the reclaimed uranium sites studied had higher levels of uranium in groundwater, after mining and reclamation than it did before mining began.[20] Independent studies have also confirmed that contamination from ISL mines have spread to nearby private drinking wells.[21]

The Westwater Canyon Aquifer and the Safe Drinking Water Act

Hydro Resources, Inc. (hereinafter "HRI") holds the mineral rights in the Crownpoint and Church Rock properties subject to the proposed ISL mining projects.[22] The Church Rock property consists of two parcels of land, Section 8 and Section 17.[23] The Westwater Canyon Aquifer underlies the Section 8 property.[24] The aquifer is part of the Morrison Formation and is identified as a significant aquifer in the region.[25] Given that the aquifer would be affected by the proposed mining project at Church Rock, HRI was required to obtain an aquifer exemption to remove that portion of the aquifer from the protections of the Safe Drinking Water Act (hereinafter "SDWA").[26]

The SDWA was passed in 1974 and amended in 1996.[27] The purpose of the SDWA is to assure that drinking water sources meet minimum national standards for the protection of public health "to the maximum extent feasible."[28] Congress intended that the SDWA be "liberally construed so as to effectuate the preventative and public health protective purposes of the bill."[29] Congress sought to protect not only currently-used sources of drinking water, but also "potential drinking water sources for the future."[30] Congress explicitly stated that contamination of potential drinking water sources should "not be permitted if there is any *reasonable likelihood that these sources will be needed in the future* to meet the public demand for drinking water and if these sources may be used for such purposes in the future."[31]

To protect drinking water, the SDWA directs the EPA to establish minimum requirements for controlling underground injection processes, including ISL mining.[32] A state may apply for primacy enforcement of Underground Injection Control (hereinafter "UIC") permits upon a showing that the state's program meets the requirements of the SDWA.[33] The EPA approved New Mexico's UIC program in 1983.[34] Companies wishing to mine uranium in New Mexico through the ISL process must obtain a UIC permit from the State and an aquifer exemption from the SDWA from the EPA.

The EPA promulgated rules for exempting aquifers from the SDWA in 1980.[35] An aquifer qualifies for an exception if that aquifer has "no real potential to be used" as a source of drinking water.[36] HRI applied for and received an UIC permit from New Mexico in 1989.[37] At that time, HRI also received in aquifer exemption from the EPA.[38] An aquifer exemption is a revision to the state's UIC permit, which must be approved by the EPA.[39] HRI qualified for an aquifer exemption because the exempted portion of the aquifer was (1) not then used as a current source of drinking water, and (2) contained minerals in producible quantities.[40]

Navajo Nation Designates Westwater Canyon Aquifer a Future Drinking Water Source

Today the Westwater Canyon Aquifer provides drinking water to an estimated 15,000 community members.[41] The average total dissolved solids at the Church Rock site is 369.75 mg/L, which is lower than the EPA drinking water standard of 500 mg/L. Accordingly, the groundwater is "generally suitable for drinking."[42]

In 2010, the Navajo Nation along with the U.S. Bureau of Reclamation, the U.S. Bureau of Indian Affairs, the Indian Health Service, and the Navajo Tribal Utility Authority developed a Conjunctive Groundwater Plan, which described groundwater supplies to be used for long-term demands.[43] In the plan, the Navajo Nation identified the Westwater Canyon Aquifer, along with the Dakota Aquifer and Cow Springs Aquifer (which lie directly on top of and below the Westwater Aquifer, respectively), as a source of future water supply for three municipal subareas on the Navajo reservation.[44]

Meanwhile, the state of New Mexico has taken other measures to protect groundwater sources for present and potential future use. In 2004, 15 years after HRI received an exemption permit from EPA, the Water Quality Control Commission lowered the groundwater quality standard for uranium from 5 mg/l to 0.03 mg/l.[45] HRI's 1989 discharge permit exceeded this new standard, and as a result, the New Mexico Environment Department (NMED) revoked HRI's discharge permit in December 2015. NMED does not, however, have the authority to revoke the aquifer exemption permit that was granted by EPA,[46] and EPA has thus far declined to withdraw HRI's exemption permit.

EPA Should Revoke Aquifer Exemption

Given the significant developments that have occurred since 1989 when the exemption permit was granted, the EPA should revoke HRI's aquifer exemption permit. The EPA must take immediate action to protect the Westwater Canyon Aquifer, a critical source of drinking water for the Navajo Nation. HRI's exemption permit undermines the mandate of the SDWA to protect all sources of drinking water, it violates the State's 2004 standards for uranium in drinking water, and it deliberately sacrifices an entire community's current and future drinking water supply. Groundwater is a precious resource in New Mexico and should be ardently protected, as Congress intended. Thus, the EPA should honor the mandate of the Safe Drinking Water Act and revoke HRI's aquifer exemption.

Endnotes

*Nadine Padilla is a second year law student and the University of New Mexico School of Law.

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A Song of Water and Land;The Clean Water Rule and Its Potential Impacts on New Mexico

Logan Glasenappp[*]

Diablo Canyon arroyo outside of Santa Fe, New Mexico, potentially a water of the United States. Available at https://www.flickr.com/photos/mypubliclands/20519470805/in/photolist-HQdyXX-JLuyaa-JDEE54-HQdyen-wjdj1w-xgeDMp-x1ndNJ

The Army Corps of Engineers (hereinafter the "Corps") is charged with the permitting program under Section 404 of the Clean Water Act (hereinafter the "CWA"). While the Corps makes the day-to-day section 404 permitting decisions, the Environmental Protection Agency (hereinafter the "EPA") handles the bigger picture aspects of the 404 program.[1] Under Section 404 no one may discharge dredged or fill material into "navigable waters," without a permit.[2] The definiation of "navigable waters" has gone through a series of changes since its inception in the CWA, which is limited to "waters of the United States, including the territorial seas."[3] A trilogy of Supreme Court cases have struggled to create a clear and concrete definition of waters of the United States (hereinafter "WOTUS") to delineate the Corps' jurisdiction. Justice Kennedy's concurring opinion in the most recent of these cases forms the basis of the "Clean Water Rule: Definition of 'Waters of the United States,'" promulgated by the Corps and EPA in 2015. This article will briefly explore the history of WOTUS, address New Mexico's involvement in the current challenge to the WOTUS rule, and identify potential impacts on New Mexico.

WOTUS, According to SCOTUS:

In *United States v. Riverside Bay View Homes*, the Supreme Court determined that 404 jurisdiction could be extended to traditionally non-navigable waters. A company owning 80 acres of "low-lying, marshy land" in Michigan planned to construct a new housing development.[4] The developers began dumping fill material, and the Corps filed suit for violation of the Clean Water Act. The Corps based its complaint on the theory that the land was an "adjacent wetland," and therefore a water of the US. The Court looked to the 1985 definition of adjacent wetlands "inundated *or saturated* by surface *or ground water* at a frequency and duration sufficient to support…a prevalence of vegetation…" to determine that these 80 acres were under the Corps Section 404 jurisdiction.[5]

The next case in the WOTUS trilogy was *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), in which the Supreme Court determined the Corps' jurisdiction did not extend to an old gravel pit.[6] Applying the Migratory Bird Rule,[7] the Corps asserted jurisdiction because several species of migratory birds were using the pit as a rookery. SWANCC was planning to turn the old gravel pit into a solid waste dump, had already acquired the necessary permits from Cook County and the state of Illinois, but was prevented from development by the Corps' determination.[8] The Court saw the Corps' action as an illegitimate extension of the CWA. While *Riverside* had largely relied on *Chevron* deference, the Court used a stricter standard in *SWANCC*, stating that "when an administrative interpretation of a statute invokes the *outer limits of Congress' power*, we expect a clear indication that Congress intended that result."[9] While the CWA defines navigable waters as waters of the United States, the Court relied on a plain-

language reading of Congress' use of "navigable waters," rejecting the Corps' argument that "navigable waters" was simply a term lifted from the Rivers and Harbors Act for administrative simplicity.[10] The Court refused to allow the Corps to extend its jurisdiction to cover isolated ponds, as that would "result in a significant impingement of the States' traditional and primary power over land and water use," with no "clear statement from Congress that it intended" such broad regulation under the CWA.[11]

Finally, the Supreme Court most recently addressed the issue in *Rapanos v. United States*. Landowners in Michigan ignored the Corps' jurisdictional determination that certain wetlands on their property were waters of the U.S. and began dumping fill material.[12] Sending the case back to the Sixth Circuit, the Court provided a conceptually clear method of determining whether wetlands are waters of the U.S.; the waters must have a "continuous surface connection to bodies that are 'waters of the United States'…so that there is no demarcation between 'waters' and wetlands…."[13] Despite being theoretically clear, water rarely behaves in the way Justice Scalia envisioned. Justice Kennedy penned a concurring opinion suggesting an alternative method of determination, now known as the "significant nexus test."[14] This test is narrower than the "adjacent wetland" approach from *Riverside Bay View Homes*, but allowed for more flexibility than the rigid surface connection requirement described by the plurality.[15] Justice Kennedy recognized that wetlands are integral in the ecology of water environments, and saw the reasonability in regulating these areas under the CWA. This approach has subsequently been applied by the Corps on a case-by-case basis.[16]

The Clean Water Rule and New Mexico

The WOTUS Rule was promulgated to "ensure protection for the nation's public health and aquatic resources, and [to] increase CWA program predictability and consistency."[17] Justice Kennedy's concurrence in *Rapanos* was the impetus behind the new WOTUS rule, which extends the Corps' jurisdiction to tributaries, adjacent waters, and other waters on a case-specific basis.[18]

In New Mexico, the area most impacted by this declaration of CWA jurisdiction are the arroyo systems. Largely maintained by local entities like the Albuquerque Metropolitan Arroyo Flood Control Authority, most arroyos empty into traditional waters of the U.S. and could potentially be deemed tributaries under the new definition. Including arroyos as WOTUS would have sweeping impacts across New Mexico, and there is precedent to suggest that the Corps would assert jurisdiction over arroyos. In late 2012, a couple living south of Santa Fe cleaned up the arroyo behind their property by removing garbage and dead trees.[19] The Corps sent them a letter to alert them that they had violated the CWA, and would need to get a Section 404 permit for their clean up. The Pacific Legal Foundation filed suit on behalf of the landowners against the Corps for their "federal land grab." The Smith's attorney said on the subject, "the Smiths' arroyo simply doesn't fit the Supreme Court's tests for being a 'water body' subject to federal oversight and control," and went on to predict an ominous future; "if the federal government can tell the Smiths what they can and can't do on their own land, by twisting the Clean Water Act and essentially using a divining rod to conjure a 'water body' out of dry soil, then no property owner, anywhere, is safe from federal intrusion."[20] The issue was not resolved through litigation however, as the Corps dropped its jurisdictional determination and the case was mooted.[21]

The New Mexico Environment Department (hereinafter "NMED") and Office of the State Engineer (hereinafter the "OSE") have joined as parties to a multistate challenge to the WOTUS rule. Former NMED Secretary Ryan Flynn characterized the new WOTUS rule as "unlawfully impos[ing] federal authority over state lands and waters beyond what Congress allows under the Clean Water Act," and asserted that it "greatly infringes on state and local authority to manage and regulate lands and waters within our boundaries."[22] The OSE is challenging the new WOTUS rule "to protect [OSE's] exclusive authority to supervise the appropriation and distribution of our State's surface and groundwater."[23] While the agencies are challenging the rule on grounds of state sovereignty, there are likely impacts on the day-to-day functions of these agencies should the rule be upheld. Because of the expansion of waters to be protected under the Clean Water Act, NMED would be charged with regulating a greater amount of water and waterbodies within the state. The likely impacts to OSE are more difficult to predict, but it's likely that any change in the environmental protection of water could have an impact on the quantity of water available for users.

Presently, the WOTUS Rule is stayed across the country,[24] and the responsible agencies are enforcing the CWA according to previous regulations. The WOTUS rule may find its way to the Supreme Court, but it's hard to

know what would result. The Court may be lead in new directions as a result of the next few appointments, adding different ideologies to the highest legal institution in the country. Unfortunately, there is seldom a bright line between the law and ideology, and the history of this issue shows that the law is far from settled.

Endnotes

*Logan Glasenapp is a second year law student at UNM School of Law pursuing the Natural Resources and Environmental Law certificate.

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[8] *SWANCC,* at 162

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[12] Rapanos v. United States, 547 U.S. 715 (2006).

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[14] "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* at 779 (Kennedy, J., concurring)

[15] *Id.* (Kennedy, J., concurring)

[16] *Id.* at 782 (Kennedy, J., concurring)

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[23] *Id.*

[24] Ohio v. United States Army Corps of Eng'rs (In re EPA & DOD Final Rule), 803 F.3d 804 (6th Cir. 2015)

NREEL SECTION ANNUAL WINTER CLE

Living With Turmoil In The Oil Patch: What It Means For New Mexico

In December the NREEL Section held its annual Winter CLE, entitled "Living with Turmoil in the Oil Patch: What it Means for New Mexico." This well attended CLE focused on oil and gas law, including regulatory issues and the current and future issues of declining oil and gas revenues in the state of New Mexico. A total of 63 attendees – live audience and via the web – enjoyed presentations and discussions by a broad range of speakers from industry, state government, non-governmental organizations, and academia.

NREEL 2016 Lawyer of the Year: Greg Ridgley

Sally Paez

Greg Ridgley has been selected as the "2016 Lawyer of the Year" by the Natural Resources, Energy and Environmental Law (NREEL) Section of the State Bar. Mr. Ridgley was selected because he is held in high regard by water law practitioners throughout the West and is a master of the nuanced area of Western water law.

Mr. Ridgley has served at the Office of the State Engineer for over eighteen years in a variety of positions. During that time he has worked to resolve water right issues involving private parties, acequias, irrigation and conservancy districts, Indian Pueblos, Tribes, and Nations, federal agencies, and local governments. He has a wide range of experience and a deep familiarity with New Mexico water law and the water management challenges facing New Mexico and the Office of the State Engineer.

Mr. Ridgley received his Bachelor's Degree magna cum laude from Harvard University and a Juris Doctorate cum laude from University of California, Hastings College of the Law. He has been a member of the New Mexico Bar since 1992. Mr. Ridgley was chosen by Governor Martinez to serve as General Counsel for the Office of the State Engineer in 2014 after serving for ten years as the OSE Deputy Chief Counsel.

Deanna Bennet (L) NREEL Chair and Sally Paez (R) Past NREEL Chair, present Greg Ridgley the NREEL Lawyer of the Year Award

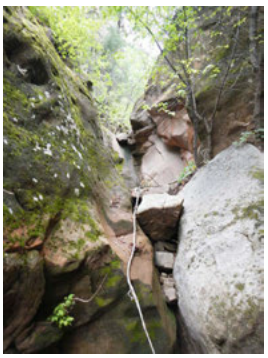
Mr. Ridgley displays professionalism and integrity, superior legal service, and is a life-long public servant. He cares deeply for the State of New Mexico, the practice of law, developing and mentoring younger NREEL attorneys, and acting in ethical and disciplined ways.

Mr. Ridgley was chosen by a committee made up of members of the NREEL Section Board of Directors. The Board advertised the award and sought nominations from Section members. Mr. Ridgley was then selected from the list of nominations received.

The award recognizes a lawyer who, within his or her practice and location, is the model of a New Mexico natural resources, energy, or environmental lawyer. Additionally, the NREEL Section Board of Directors sought to award a candidate who promoted the stated purpose of the Section: (1) to provide Section members, the State Bar, and the public with information and dialogue concerning issues affecting natural resources, energy and the environment; and (2) to share ideas, legal research, and networking with the goal of providing the highest possible quality of legal services to New Mexicans in the areas of natural resources, energy, and environmental law.

NREEL Section: Rio Chama Board Retreat

Adrian Oglesby, NREEL Past-chair
Sally Paez, NREEL Chair



In most years the Board of Directors of the Natural Resources, Energy and Environmental Law Section takes a retreat to discuss hot legal topics, plan section activities and get to know one another better. In August, the Board retreat took the form of a three-day rafting trip down the Rio Chama, a major tributary of the Rio Grande located in Northern New Mexico. The group gathered just below El Vado Dam and floated a 31 mile stretch of the river to Abiquiu Reservoir. The paddling route transected the Chama River Canyon Wilderness and covered over 24 miles of river included in the National Wild and Scenic Rivers System. Red rock cliffs, blue herons and class II and III rapids greeted the group as they enjoyed good weather, tasty meals and great company. Campfire discussions centered on water law and river management, including environmental restoration and remediation. Participants represented a cross section of our membership, coming from the State Land Office, the Attorney General's Office, the Supreme Court, and the Utton Center. Many thanks to all who participated and to the excellent and accommodating guides from Far Flung Adventures. For more information about the Section, visit www.nmbar.org/NREEL. ■

From left to right: UNMSOL Utton Center Student Technical Specialist, Colin McKenzie, and NREEL Board members Adrian Oglesby, Bill Grantham, Sally Paez, and Michelle Miano.

Far Flung Adventure guide Steve Harris' dog, Stubby

Natural Resources, Energy & Environmental Law Section

Board of Directors