

## NEW MEXICO



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The paucity of New Mexico oil and gas law precedent this year is equaled only by the state's scarcity of rain and the brevity of the New Mexico Supreme Court's February 12, 2014 order denying a writ of certiorari on a natural gas royalty class action certified to it by the First Judicial District Court.

### I. NEW MEXICO SUPREME COURT: *DAVIS V. DEVON ENERGY CORP.*

The Defendants in *Davis v. Devon Energy Corp.* petitioned the New Mexico Supreme Court for a *writ of certiorari* to consider, on an interlocutory basis, the District Court's Order Granting the Class's Motion for Summary Judgment to Define the Marketable Condition Rule in New Mexico.<sup>1</sup> The District Court had ruled:

[U]nder the implied duty to market, that the Marketable Condition Rule applies in New Mexico. The implied duty to market is a legal duty implied on gas producers in equity. The implied duty to market incorporates the legal duty to put the coalbed methane natural gas, produced by Defendants in the San Juan Basin of New Mexico, into a marketable condition.<sup>2</sup>

After granting industry organizations leave to file amicus briefs, the New Mexico Supreme Court allowed oral arguments on Devon's petition on February 12, 2014 and then ruled unanimously from the bench as follows:

Whereas, this matter came on for consideration by the Court upon petition for writ of certiorari filed pursuant to Rule 12-502 NMRA, response thereto, amicus briefs, responses thereto, and oral argu-

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1. *Davis v. Devon Energy Co.*, No. D-0101-CV-2003-01590.

2. *See* Aug. 20, 2013, Order.

ment of the parties on February 12, 2014, and the Court having considered said pleadings and oral argument and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Richard C. Bosson, Justice Edward L Chávez, Justice Barbara J. Vigil, and Judge J. Miles Hanisee, sitting by designation, concurring:

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari hereby is DENIED; and

IT IS FURTHER ORDERED that Hon. T. Glenn Ellington shall complete this case by the end of the year.

IT IS SO ORDERED.<sup>3</sup>

Thus, the New Mexico Supreme Court declined, at least on an interlocutory basis and without the record of a full trial on the merits, to confirm, overturn, or otherwise comment on the district court's declaration that the Marketable Condition Rule is a legal duty implied in New Mexico by equity to require producers to place coalbed methane natural gas into a marketable condition.<sup>4</sup> And it appears that neither industry nor scholars will enjoy a jury ruling either since on August 29, 2014, the district court granted preliminary approval of settlement of the class action.<sup>5</sup>

## II. NEW MEXICO COURT OF APPEALS

The New Mexico Court of Appeals did not publish any opinions relating to oil or gas law in New Mexico during the period covered by this survey, August 1, 2013–July 31, 2014.

## III. UPDATE ON THE NEW MEXICO OIL CONSERVATION COMMISSION PIT RULE SAGA

New Mexico's hotly contested, debated, and revised "Pit Rule" went into effect on June 28, 2013, with little friction.<sup>6</sup> But the saga continues as environmentalists carry on their fight in the courts. On April 21, 2014, Earthwork's Oil and Gas Accountability Project and the New Mexico Wilderness Alliance filed their Brief in Chief before the New Mexico Court of Appeals seeking to throw out the New Mexico Oil Conservation Commission's 2013 amendments to the Pit Rule and reinstate the portions of the 2008 Pit Rule that address permitting, siting requirements, design and construction, operations,

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3. Feb 12, 2014, Order.

4. *See id.*

5. *See* Order Preliminarily Approving Class Settlement, Directing the Issuance of Class Notice, and Scheduling Final Fairness Hearing, *Davis v. Devon Energy Corp.*, No. D-0101-CV-2003-01590 at 3 (1<sup>st</sup> Jud. Dist. Ct. N.M. Oct. 22, 2014).

6. The "Pit Rule" is the more common name given to the New Mexico Oil Conservation Division of New Mexico's Energy, Minerals, and Natural Resources Department's ("OCD") Rule 17, when first promulgated in December 2003 at title 19, chapter 15, part 17 of New Mexico's Administrative Code. *See generally* N.M. CODE R. § 19.15.17 (LexisNexis 2013).

and closure.<sup>7</sup> The result of the appeal will be reported here, though the process could take more than two years to conclude.

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7. See Petitioner's Brief in Chief, Earthworks' Oil and Gas Accountability Project v. N.M. Oil and Gas Conservation Comm'n, No. 33,451, (N.M. Ct. App. Apr.21, 2014), *available at*: [http://nmenvirolaw.org/images/pdf/140421\\_PitRule\\_Appeal\\_BiC.pdf](http://nmenvirolaw.org/images/pdf/140421_PitRule_Appeal_BiC.pdf).