NATURAL RESOURCES, ENERGY & ENVIRONMENTAL LAW SECTION
of the State Bar of New Mexico

June 2000

RETROACTIVELY APPLIED RECLAMATION LAW IS CONSTITUTIONAL, BUT DOES NOT APPLY TO COMPANY'S URANIUM MINES, ACCORDING TO NEW MEXICO COURT

By Stuart R. Butzier, Modrall Sperling Roehl Harris & Sisk, P.A.

Among other things, New Mexico's non-coal reclamation law – the New Mexico Mining Act of 1993, §§ 69-36-1, et seq., *NMSA 1978 (1997 Repl.) ("the Act") – applies retroactively to extraction operations that produced marketable minerals for a total of at least two years between January 1, 1970 and June 18, 1993. Since the Act's passage, many believed the Act swept within its scope numerous mines comprising the once-booming uranium industry that operated in western New Mexico between the late 1940s and early 1980s, at least those mines where commercial production continued into the 1970s. The constitutionality of the Act's retroactive application and whether the Act applies to uranium mines are two issues that recently came to a head in one company's appeal from state regulatory enforcement proceedings.* See United Nuclear Corporation v. New Mexico Mining Commission, et al., *First Jud. Dist. Ct. of N.M. Cons. App. Nos. SF 96-1961, -1962 and -1963 (April 10, 2000) (*"United Nuclear"*).*

In United Nuclear, *the court held that although the Act's retroactive application is constitutional, the three United Nuclear operations in question were expressly exempted by certain of the Act's definitions. Specifically, the Act's definition of "minerals" excludes, among other things, "commodities, byproduct materials and wastes that are regulated by the nuclear regulatory commission . . . ." § 69-36-3(G). Similarly, the Act's definition of "mining" excludes "the extrac-*

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tion, processing or disposal of commodities, byproducts or wastes or other activities regulated by the federal nuclear regulatory commission." § 69-36-3(H). According to the court, "the only commodity that was mined at these mines was uranium ore, all mined as a source material and specifically excluded from regulation of the Mining Act." The court reasoned that regulation of uranium ore and the extraction of uranium ore "is subject to regulation by the Nuclear Regulatory Commission and not the New Mexico Mining Commission."

The Mining and Minerals Division ("MMD") and Mining Commission ("the Commission"), the relevant New Mexico regulatory bodies, have consistently taken the position that surface operations at New Mexico's uranium mines fall within the scope of the Act. Indeed, after passage of the Act in 1993 and adoption of its implementing regulations, several uranium companies either sought approval of prior reclamation efforts or initiated permitting proceedings, at least provisionally, and conducted reclamation pursuant to the regulatory performance standards adopted pursuant to the Act. United Nuclear itself took certain steps toward permitting its sites, but ultimately refused to complete the process, leading to MMD's issuance of Notices of Violation ("NOVs") in connection with United Nuclear's failure of reclamation at its Saint Anthony, Northeast Churchrock and Section 27 mines. United Nuclear perfected an administrative appeal to the Commission, which upheld MMD's issuance of the NOVs, and this judicial appeal followed.

The First Judicial District Court dismissed the NOVs on the grounds described above. According to counsel for MMD, the agency will seek a further appeal to the New Mexico Court of Appeals. United Nuclear likely will not only defend the court's core holding relative to the exclusionary language in the Act's key definitions, but may also cross-appeal or otherwise argue for affirmance on the basis of the constitutionally-grounded theories it lost in United Nuclear. *Those theories consisted of both a challenge based on the Act's retroactive effect, as well as several theories relating to the specific application to United Nuclear, including alleged defects in the NOVs and the hearings conducted thereon and alleged interferences with United Nuclear's contractual relationships to the property owners at the three mines. Accordingly, the appeal to the Court of Appeals likely will present again the full panoply of issues decided by the District Court.*

JOINT DEVELOPMENT OF POTASH AND OIL AND GAS RESERVES; THE TENTH CIRCUIT DEFERS TO THE IBLA RATHER THAN TO BLM

By Stuart R. Butzier, Modrall Sperling Roehl Harris & Sisk, P.A.

The Tenth Circuit's March 16, 2000 decision in *IMC Kalium Carlsbad, Inc. v. Interior Board of Land Appeals, et al., [http: www.kscourts.org/ca10/cases/2000/03/99-2047.htm], weighs in on the side of oil and gas developers in their long-standing dispute with potash interests over certain leasing opportunities on public lands in southeastern New Mexico. In the process, the court clarified whether, under the Administrative Procedures Act, courts are to pay deference to decisions of the Bureau of Land Management ("BLM") where a separate appellate level decision is reached by the Interior Board of Land Appeals ("IBLA") within the Department of Interior. According to the Tenth Circuit, judicial deference is properly paid to the IBLA, not BLM, and the court's review standard does not change just because the IBLA arrived at a different result than BLM when it reviewed BLM's decision* de novo.

The case arose from BLM's 1992 competitive auction of a potash lease for public lands containing both potash and oil and gas reserves. Two oil and gas companies, Yates Petroleum Corp. and Pogo Producing Co. ("Yates/Pogo"), jointly submitted the highest bid for the potash lease after BLM had failed to approve their applications for permit to drill oil and gas wells in the same area on the basis that the proposed wells were in potash ore zones and could lead to waste of potash.[1] Noting conflicting statements of Yates/Pogo regarding

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whether they would seriously attempt to develop the potash, BLM subsequently rejected Yates/Pogo's bid for the potash lease on the basis that it was made in bad faith. BLM instead awarded the potash lease to the second highest bidder, IMC Kalium Carlsbad, Inc. ("IMC"), a potash company with existing operations in the same basin.

The IBLA reversed BLM in Pogo Prod. Co., 138 I.B.L.A. 142 (1997). The IBLA found that the record did not disclose "a rational basis for the rejection" of Yates/Pogo's bid. IMC then brought suit in federal district court, which gave deference to BLM in reversing the IBLA on the grounds that "[t]he record provides ample evidence to support BLM's rationale for rejecting [Yates/Pogo's] highest bid." IMC Kalium Carlsbad, Inc. v. Babbitt, 32 F. Supp. 2d 1264, 1276-77 (D. N.M. 1999). Yates/Pogo then appealed the district court's decision to the Tenth Circuit Court of Appeals.

The Tenth Circuit reversed the district court in its March 16, 2000 opinion. According to the Tenth Circuit, the district court erred in paying deference to the BLM. Instead, deference should be paid to the IBLA as the body voicing the final decision of the agency, i.e., the Department of the Interior. The IBLA properly conducted a de novo *review of BLM's decision and was entitled to draw reasonable inferences from the evidence.*

According to the Tenth Circuit, there was substantial evidence in the record before the IBLA to support the findings that Yates/Pogo's bid was not made in bad faith, and that there would be no undue waste of potash. Specifically, the IBLA could reasonably infer – from Yates/Pogo's express goal of "pursuing the profitable development of both oil and gas and potash" and from the difference in timing of the alleged contradictory statements – that Yates/Pogo was not bidding in bad faith. Further, according to the court, the mere fact that a Yates/Pogo consultant differed with BLM on whether certain of the potash zones were commercially viable "does not mean that those zones will be wasted should [Yates/Pogo] be awarded the lease."

Thus, the Tenth Circuit's decision has significance on both substantive and procedural levels. First, from the oil and gas developers' perspective, the decision provides some comfort in the face of a frustrating BLM policy that arguably favors potash developers in the basin in question; the decision acknowledges oil and gas developers' rights to participate in the potash leasing process and conduct its own analyses to determine the commercial viability of potash reserves in the area. Second, the Tenth Circuit has clarified that, in appeals from the IBLA, courts must give any due agency deference to the IBLA and not to a division within Interior (such as BLM in this case); such is true even where the IBLA decision reversed the front-line decision.

At least as of this writing, no petition for writ of certiorari to the United States Supreme Court has been filed. If the seesaw history of this case is any indication, however, it may be reasonable to assume that IMC will seek a final review if no settlement is achieved in the interim. Meanwhile, the Tenth Circuit may provide Yates/Pogo with certain collateral benefits in pending appeals from the denials of APDs (Application for Permit to Drill) in the area.

[1]In a 1986 Order, the Secretary of Interior had established a policy of protecting correlative rights in the basin at issue, and in that context had clarified that the Department generally would "deny approval of most applications for permits to drill oil and gas test wells from surface locations within the potash enclaves" where potash ore is economically and technically feasible. See Oil, Gas & Potash Leasing and Development Within the Designated Potash Area of Eddy & Lea Counties, New Mexico, 51 Fed. Reg. 39,425 (1986). Yates/Pogo has an ongoing dispute with BLM over the feasibility of certain potash zones, and part of Yates/Pogo's original motivation to bid on the potash lease apparently was to gain access for further feasibility study by their own consultants.

FIFTH CIRCUIT REJECTS INTERNATIONAL ENVIRONMENTAL CLAIMS BROUGHT AGAINST MINING COMPANY OPERATING IN INDONESIA

By Stuart R. Butzier, Modrall Sperling Roehl Harris & Sisk, P.A.

A recent case from the Fifth Circuit, *Beanal v. Freeport-McMoran, Inc., involved the question of whether an international tort action may be brought under the Alien Tort Statute, 28 U.S.C. § 1350, for claims of environmental damage resulting from the activities of an American mining company's subsidiary operating in the Pacific Rim. The Fifth Circuit held that the particular "violations" alleged did not give rise to environmental torts cognizable under the "law of nations" prerequisite in the Alien Tort Statute, which requires a violation of a universally accepted environmental standard or norm.*

A resident of the Republic of Indonesia and leader of the Amunge Tribal Council, Tom Beanal, originally brought the action against Freeport-McMoran in 1996. The pleadings alleged, among other things, certain environmental abuses and injuries to the Amgume's environment and habitat resulting from the operation of Freeport-McMoran's "Grasberg Mine" on Jayawijaya Mountain in Irian Jaya, Indonesia. For example, Beanal's Third Amended Complaint alleged that the mining company "deposits approximately 100,000 tons of tailings per day in the Aghwagaon, Otomona and Akjwa Rivers," and that the tailings deposits have: (1) "diverted the natural flow of the rivers;" (2) rendered the rivers "unusable for traditional uses including bathing and drinking;" (3) affected the "body tissue of the aquatic life in said rivers;" (4) resulted in tailings overflows which have caused the destruction of "lowland rain forest vegetation;" and (5) "increas[ed] the likelihood of future flooding." The same pleading alleged that Freeport-McMoran "has or will cause . . . 3 billion tons of 'overburden' to be dumped into the Wanagon and Carstensz," which has created "the likely risk of massive landslides" and acid rock drainage "rendering the Lake Wanagon an 'acid lake' extremely high in copper concentrations."[1]

Beanal's environmental tort claims were first addressed by the United States District Court for the Eastern District of Louisiana, after Freeport-McMoran challenged Beanal's standing and argued that his claims failed to state a claim upon which relief can be granted. The federal district court held that Beanal had standing to bring claims on his own behalf for the claims of environmental torts, but ultimately dismissed the claims under the Alien Tort Statute "because Freeport's alleged environmental practices do not appear to have violated the law of nations." Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 383 (E.D. La. 1997).

The environmental law principles relied on by Beanal included the "Polluter Pays Principle," the "Precautionary Principle" and the "Proximity Principle" derived from Phillipe Sands' Principles of Environmental Law I: Frameworks, Standards and Implementation (1995 ed.) ("Sands"). According to the district court, those principles "do not constitute international torts for which there is universal consensus in the international community as to their binding status and their content." 969 F. Supp. at 384. The court relied on Sands' statement that the only environmental principles substantive enough to give rise to an international remedy are the obligation reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, namely, "that states have sovereignty over their natural resources and the responsibility not to cause environmental damage." Id., citing Sands at 183.

On appeal, the Fifth Circuit concluded that the district court did not err when it dismissed Beanal's pleadings for failure to state an international tort claim under the Alien Tort Statute. According to the Fifth Circuit, the sources of international law cited by Beanal and certain amici supporting Beanal "merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts." The court went on to note that "federal courts should exercise extreme caution when adjudicating

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environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments."

The Alien Tort Statute at issue in Beanal was first passed in 1789. Through most of the intervening years the statute has largely been ignored, although more recently it has been used as a basis for international human rights litigation. The statute itself is short, and reads in its entirety:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. Courts have found that this statute creates a private right of action and that three elements must be satisfied in order to state a claim. See, e.g., In re Estate of Ferdinand Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995); Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995). First, the suit must be brought by an alien to the United States. Second, the claim asserted must sound in tort. Third, the tort alleged must violate the "law of nations" or a "treaty of the United States." Kadic, 70 F.3d at 238, citing Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2nd Cir. 1987), rev'd on other grounds, 488 U.S. 428 (1989).

Certain claims under the statute, such as non-genocide related human rights violations, also require a showing of state action, that is, an "official action" (or inaction) by an "agent of a government or of any political subdivision, acting within the scope of such authority." See Restatement (Third) of Foreign Relations Law of the United States § 207 comment c. The federal district court in Beanal engaged in an extensive discussion of state action and concluded, by analogy to actions under 42 U.S.C.§ 1983, that a private corporation can be found to be a state actor under certain circumstances. 969 F. Supp. at 370-380. According to the court, a corporation might be a state actor where, for example, there is a sufficiently close "nexus" or "symbiotic relationship" between the State and the challenged action of the regulated entity or where the corporation willfully engages in joint activity with the State or carries out a function traditionally the exclusive prerogative of the State. Id. at 376-377, quoting Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995). The district court concluded that Beanal failed to sufficiently allege state action, but the Fifth Circuit ultimately concluded that it was not necessary to reach the state action question given the insufficiency of Beanal's pleadings in other respects under Fed. R. Civ. P. 12(b)(6).

Courts have noted that the "law of nations" element of the Alien Tort Statute is dynamic, rather than static. Thus, "courts must interpret international law not as it was in 1789, but as it has evolved and exists among nations of the world today." Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1988). In ascertaining the law of nations for purposes of the Alien Tort Statute, courts look to the customary sources for international law, including treaties and accords, the usage of nations, judicial opinions and the works of jurists. Id. According to the Fifth Circuit in Beanal, "[t]he law of nations is defined by customary usage and clearly articulated principles of the international community."

Because of the dynamic nature of the "law of nations" and the ever-evolving environmental agendas being played out on the world stage, natural resources development companies clearly should not view the Fifth Circuit's rejection of the claims against Freeport-McMoran as the end of the story in terms of the potential for exposure to international environmental torts under the Alien Tort Statute. Nor should environmental laxity on the part of a particular country or regime drive the environmental policies of subsidiaries operating internationally. Rather, prudent companies operating abroad should (and already do) hold themselves to stringent standards that are driven as much by domestic environmental standards (i.e., standards that would apply in the United States) and prevailing practices and technologies, as by the environmental framework which may be established, more or less, by a particular nation of interest abroad.

[1]Beanal also alleged that Freeport-McMoran engaged in certain acts of genocide and "cultural genocide" and asserted claims for individual human rights violations both under the Alien Tort Statute and the Torture Victim Protection Act of 1991. The Fifth Circuit also upheld the dismissal of those claims. This article focuses on the environmental tort claims exclusively.

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