February 2015 | Volume 7 | Issue 2

BEATTY & WOZNIAK, P.C.
ENERGY IN THE LAW

Recent Administration Overreach Under the Endangered Species Act Creates Harmful Precedent that Erodes and Threatens Valid Existing Lease Rights

By: Bret Sumner and Theresa Sauer

Recently, the U.S. Fish and Wildlife Service (Service) and Bureau of Land Management (BLM) authorized actions that are a vast overreach of the statutory parameters of the Endangered Species Act (ESA) and pose a harmful precedent and significant threat to valid existing lease rights.

On the west slope of Colorado, in the Piceance Basin, BLM and the Service authorized Colorado State University to conduct a research project to transplant and seed two plant species listed as "threatened" under the ESA on valid existing federal oil and gas leases and rights-of-way, without following the requirements of the ESA, Administrative Procedure Act (APA), or the National Environmental Policy Act (NEPA), and without prior notice to the companies holding lease rights.

Next, BLM unilaterally imposed restrictions upon these valid existing leases and property rights without consent or input from the lessees. Moreover, in the event these transplanted plants grow and become viable, BLM indicated that it will impose further no surface occupancy and other restrictions upon these valid existing leases and rights-of-way.

BLM and the Service fast-tracked this project without sufficient notice or public comment, and the agencies' authorization of this project also involves substantive violations of the ESA, NEPA, and the APA.

BLM's decision states that the research project for test plot sites for planting and seeding "could require relocation of future proposed surface facilities" for oil and gas and "would add an additional 15 acres of land restrictions for mineral development," and "if successful . . . [these restrictions] would increase to 450 acres." The imposition of these retroactive restrictions violates valid existing lease rights, NEPA, and the APA.

While the ESA provides for an "experimental population process" for species reintroduction, this process was not followed by BLM and FWS. BLM admitted that such a process takes three years, and BLM circumvented this process to fast-track this research project within the span of months.

This unlawful action creates dangerous precedent that erodes valid existing lease rights, making such lease rights conditional and subservient to other uses imposed by the federal government after lease issuance. This over-reach precedent is not limited to the two plant species for this unlawful research project. Rather, this government action creates precedent that BLM and FWS may unilaterally impose such projects upon valid existing leases and property rights for any plant species that is a listed or a candidate species under the ESA, and then retroactively impose restrictions on such leases under the guise of furthering the research project and protecting the transplanted species.

On January 5, 2015, West Slope Colorado Oil and Gas Association (WSCOGA) filed an Amended Complaint in federal court in Colorado challenging this BLM decision. Recently, the Department of Justice informed WSCOGA attorneys that the transplanting and seeding of these plants had already started in the fall of 2014. This case is in the early stages of litigation and bears close monitoring given the significant policy and legal precedent ramifications that this action has upon valid existing lease rights.

For further information, please contact Bret Sumner or Theresa Sauer.