

## Devon Energy Seeks Appellate Review of Application of Marketable Condition Rule

Oklahoma-based Devon Energy Corporation has filed an application for interlocutory appeal with the New Mexico Court of Appeals in a case that could have a significant effect on oil and gas law in New Mexico. If the court accepts the application and agrees to hear the appeal at this juncture, it will decide whether New Mexico recognizes the Marketable Condition Rule. The court's decision on this question could impact royalty payments across the state.

In 2003, a class action lawsuit was brought against Devon on behalf of several hundred royalty and overriding royalty owners in the San Juan Basin. The lawsuit alleged that Devon improperly reduced royalty payments when it deducted from royalties a share of the costs of compressing, dehydrating, treating, and transporting coalbed natural gas from the wellhead to the interstate pipeline.

One of the central questions in this case is whether New Mexico recognizes the Marketable Condition Rule. The Marketable Condition Rule, recognized by several states including Colorado, requires that a producer bear all costs to place gas into marketable condition and prohibits these costs from being imposed on royalty owners. Other states, such as Texas, have rejected this rule and allow deductions to be taken from royalty payments.

Recently, Santa Fe Judge T. Glenn Ellington held that the Marketable Condition Rule applies in New Mexico and imposes upon an oil producer, such as Devon, an obligation to put natural gas into marketable condition and includes the requirement that the producer bear all of the necessary costs to place the gas into a condition acceptable to be bought and sold in a commercial marketplace that were not apportioned by express agreement of the parties.

Devon now seeks to have the Court of Appeals decide whether New Mexico does, in fact, recognize the Marketable Condition Rule. If the application for appeal is granted, the parties would file briefs and potentially participate in oral argument before the Court of Appeals. If denied, the parties would continue litigating the case in the trial court, with any appeal to follow trial.

\*Disclaimer: The author of this article previously worked for the law firm representing the Class in this litigation.