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## Maralex Resources, Inc. v. Barnhardt

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***Maralex Resources Inc. v. Barnhardt*, 913 F.3d 1189 (10th Cir. 2019)**

**Bradley E. Tinker**

In *Maralex Resources v. Barnhardt*, Maralex and property owners brought an action to protect private property from BLM inspections of oil and gas lease sites. The Tenth Circuit looked at the plain meaning of a congressional statute and held in favor of Maralex, finding that BLM lacked authority to require a private landowner to provide BLM with a key to inspect wells of their property. The Tenth Circuit held BLM has the authority to conduct inspections without prior notice on private property lease sites; however, it is required to contact the property owner for permission before entering the property.

I. INTRODUCTION

In *Maralex Resources Inc. v. Barnhardt*, both property owners and lessees challenged the United States District Court for the District of Colorado decision allowing the United States Bureau of Land Management (“BLM”) to freely access oil and gas lease sites on private property, and moved for a judicial review of the decision under the Administrative Procedure Act (“APA”).<sup>1</sup> Several parties comprised the plaintiffs in this case, including Maralex, and families: the O’Hares; the Kenners; and the Rowses (collectively, “Plaintiffs”).<sup>2</sup> The land is owned by the Southern Ute Tribe (the “Tribe”) and the three families of Plaintiffs.<sup>3</sup> Plaintiffs brought this action against the Secretary of the Interior, the United States Department of the Interior, and the United States (collectively, “Defendants”).<sup>4</sup> The central issue of the case was whether BLM has the authority to access wells located on private property at will.<sup>5</sup> Plaintiffs argued BLM lacked the authority to freely conduct inspections of wells on private property because of congressional statutes and regulations protecting private property.<sup>6</sup>

The Tenth Circuit interpreted the authority of BLM to inspect oil and gas wells located on private land under the Federal Oil and Gas Royalty Management Act of 1982 (“FOGRMA”) and supporting regulations.<sup>7</sup> Under FOGRMA, BLM has the authority to inspect oil and gas wells on federal and tribal land.<sup>8</sup> However, FOGRMA is silent on BLM’s authority to access lease sites on private land, and therefore includes some inherent ambiguity about BLM access to private land.<sup>9</sup>

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1. 913 F.3d 1189, 1191–92 (10th Cir. 2019).
  2. *Id.* at 1192.
  3. *Id.*
  4. *Id.*
  5. *Id.* at 1189.
  6. *Id.* at 1194.
  7. *Id.* at 1189, 1201.
  8. *Id.* at 1200.
  9. *Id.*

## II. FACTUAL AND PROCEDURAL BACKGROUND

The property at issue in this case is a 320-acre parcel of land in southwest Colorado, in which property owners leased out the mineral rights for their separate tracts.<sup>10</sup> The first lease was issued by the Tribe in 1984 under the Indian Mineral Leasing Act of 1938, for the exploration and development of oil and gas.<sup>11</sup> The lease was approved by the Bureau of Indian Affairs, and under 30 U.S.C. § 1718(b), BLM had the right to inspect the wells on site because the land belonged to the Tribe.<sup>12</sup> The two remaining tracts were leased to Maralex and SG Interests III, Ltd. (“SG”); one was leased collectively by the three families, and one was leased individually by the O’Hares.<sup>13</sup>

In 1996, Plaintiffs, SG, and the Tribe entered into a communitization agreement (“CA”) which stated that the production of minerals produced would be allocated to the interest owners in proportion to the amount of property owned.<sup>14</sup> This agreement stated the parties had agreed “that the Secretary of the Interior, or [their] duly Authorized Officer” would supervise the oil and gas production.<sup>15</sup> The CA’s language was used in conjunction with FOGRMA, which authorizes representatives to enter the lease sites without advanced notice for lease site inspections on federal and Indian lands.<sup>16</sup> BLM interpreted this language to mean it can supervise and inspect the wells—even those on private land—to ensure proper security and measure production.<sup>17</sup>

Maralex controlled four oil wells located on two tracts from leases on the O’Hares’ private property.<sup>18</sup> BLM wished to conduct site inspections on the wells and contacted Maralex and the O’Hares for property access, which was denied.<sup>19</sup> BLM then issued four Notices of Incidents of Noncompliance (“INC”) because Maralex and the O’Hares declined to ““permit properly identified authorized representatives’ . . . ‘to enter upon, travel across and inspect lease sites . . . without advance notice.’”<sup>20</sup> Maralex and the O’Hares appealed the INCs and sent a letter to BLM arguing it only had authority to conduct annual inspections of their wells.<sup>21</sup> They argued that BLM’s request to have a key to freely access their private property was beyond the authority of BLM and violated their Fourth and Fifth Amendment rights.<sup>22</sup> In August 2013, BLM’s Deputy State Director for Energy, Lands, and Minerals, Colorado State Office,

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10. *Id.* at 1192–93.

11. *Id.* at 1192.

12. *Id.* at 1193 (citing 30 U.S.C. § 1718(b)).

13. *Id.* at 1192.

14. *Id.* at 1193.

15. *Id.*

16. *Id.* at 1200 (quoting 30 U.S.C. § 1718(b)).

17. *Id.* at 1194.

18. *Id.* at 1193.

19. *Id.* at 1193–94.

20. *Id.* at 1194 (quoting 43 C.F.R. § 3162.1(b)).

21. *Id.*

22. *Id.*

reviewed the letter and promulgated a point-by-point response disagreeing with Maralex’s annual inspections arguments.<sup>23</sup>

After receiving the response letter from BLM, Maralex appealed the BLM decision to the Interior Board of Land Appeals (“IBLA”), which affirmed the INCs.<sup>24</sup> Plaintiffs then brought suit in district court because the IBLA failed to address the issues of whether BLM can require a key to gate locks.<sup>25</sup> The district court affirmed the IBLA decision, allowing BLM to access the lease sites without advanced notice.<sup>26</sup> The decisions of the BLM State Director, IBLA, and the district court each failed to address whether BLM can require the land owners or well operators to provide a key to access lease site gates or if BLM can use its own lock on the gates.<sup>27</sup>

### III. ANALYSIS

The Tenth Circuit analyzed the extent of BLM authority by evaluating the plain language of the statute and the proper deference owed when the statute is silent or ambiguous.<sup>28</sup> Two additional issues in this appeal were: (1) whether Plaintiffs waived their argument that BLM lacked authority to access lease sites, and requiring Plaintiffs to give BLM a gate key or allow it to place its own lock for immediate access was proper; and (2) whether BLM had authority via statutes and regulations to require Plaintiffs to supply BLM with a key or lock for unfettered access to lease sites.<sup>29</sup>

#### A. *Chevron and Waiver of Claims*

The Tenth Circuit reviewed the district court decision by applying the test from *Chevron v. Natural Resources Defense Council*, and found no ambiguity in the applicable statute’s language, thereby declining to defer to the agency’s decision and instead following the statute’s express intent.<sup>30</sup> The Tenth Circuit then addressed whether Plaintiffs waived their argument that BLM lacked authority to immediately access private property, either by a key to locked gates or by placing a BLM lock on the gates.<sup>31</sup> Because this argument was not specifically addressed in Plaintiffs’ initial appeals of the INCs, the district court declined to analyze the issue.<sup>32</sup> The Tenth Circuit looked at both the IBLA briefs and the CA, which both deny that BLM has unbridled and unlimited access to conduct inspections

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23. *Id.* at 1194–95 (quoting 30 U.S.C. § 101(b)).

24. *Id.* at 1195.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 1199–1200.

29. *Id.* at 1195–96.

30. *Id.* at 1198–99 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

31. *Id.* at 1196.

32. *Id.*

without notice.<sup>33</sup> An order was issued to show cause to whether BLM would continue to seek access, and the BLM confirmed they would.<sup>34</sup>

### B. BLM Authority

BLM interpreted FOGRMA and the CA as the source of its authority to inspect lease sites.<sup>35</sup> FOGRMA states:

Authorized and properly identified representatives of the Secretary may without advanced notice, enter upon, travel across and inspect lease sites on Federal or Indian Lands and may obtain from the operator immediate access to secured facilities on such lease sites, for the purpose of making any inspection or investigation for determining whether there is compliance with the requirements of the mineral leasing laws and this Act.<sup>36</sup>

FOGRMA gives authority to BLM to inspect the federal or tribal lands.<sup>37</sup> The CA provides that the Secretary of the Interior, or authorized officer shall have the right to inspect “all operations within the Communitized Area” to the same extent that the Tribe is a lessee governed and regulated by the Department of the Interior.<sup>38</sup>

The Tenth Circuit found that authorized representatives of the Secretary may conduct inspections of a lease site without advanced notice, but authority needs to be specified to do this on private land.<sup>39</sup> Because FOGRMA was silent to the authority given to access privately held land, statutory directives in 43 C.F.R. § 3161 were used to interpret BLM authority to access property.<sup>40</sup> The Tenth Circuit cited the regulations that stated agencies have the authority to inspect “all wells and facilities on State or privately owned lands committed to a unit or communitization agreement, which include Federal or Indian lease interests.”<sup>41</sup> The CA was approved by the Secretary of the Interior, and allows annual inspections when the applicable wells are producing in significant quantities, or when sites have a history of noncompliance with federal law.<sup>42</sup>

The Tenth Circuit found that the authority to conduct annual inspections does not construct a limitation, but only a minimum for allowed inspections; therefore, BLM had authority to inspect the wells

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33. *Id.* at 1197.

34. *Id.* at 1196.

35. *Id.* at 1200.

36. *Id.* (citing 30 U.S.C. § 1718(b)).

37. *Id.*

38. *Id.* at 1193.

39. *Id.* at 1201–02 (citing 43 C.F.R. § 3161.3).

40. *Id.* at 1201.

41. *Id.* (quoting 43 C.F.R. § 3161.1(b)).

42. *Id.* (citing 43 C.F.R. § 3161.3(a)).

without prior authorization.<sup>43</sup> Using the language of the regulations, a property owner or operator is not required to supply a key to access a lease site on private land, or to allow BLM to install its own lock on a gate.<sup>44</sup> However, when the lease site is on privately-owned lands, BLM must first seek entry from the land owner or well operator to afford them entry to conduct lease inspections.<sup>45</sup>

#### IV. CONCLUSION

The United States Tenth Circuit Court of Appeals focused on the extent of BLM's authority to access private property and held BLM has the authority to access private property. However, courts must balance the interests of private property owners against government interests. This holding required BLM to get entry approval to access private property lease sites. Without this holding, BLM would have interpreted its own authority to extend to practically unfettered access to private property in order to conduct inspections when federal or Indian land is involved with the lease.

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43. *Id.* at 1203 (citation omitted).

44. *Id.* at 1204 (citing 30 C.F.R. §§ 3163.1(a)(5), 3163.3).

45. *Id.*