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Recent Case Decisions

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Federal

3rd Circuit

Alder Run Land, LP v. Northeast Natural Energy LLC, 2015 WL 4720213, No. 14-2739 (3rd Cir. 2015).

Lessee acquired certain oil and gas interests from a third party, including the 2010 Leases. Lessee and Lessor amended the 2010 Leases, as well as produced Letter Agreements, which contained a provision that required Lessee to lease certain additional interests from Lessor. Lessor tendered additional oil and gas interests, which Lessee refused to accept. Lessor brought suit against Lessee for refusing to honor their agreement to enter into additional oil and gas leases. The lower court dismissed the claim and ordered the parties to proceed with arbitration, finding that the purchase agreement under earlier oil and gas leases contained an arbitration provision. The Third Circuit affirmed, stating the Letter Agreements and the 2010 Leases must be read together, therefore enforcing the arbitration provision.

7th Circuit

In re Bulk Petroleum Corp., 2015 WL 4591743, No. 13-1870 (7th Cir. 2015).

Petroleum Corporation is a large regional gasoline distributor and held a Kentucky license to operate as a gasoline dealer. Subsequently, the state's department of revenue (DOR) revoked Petroleum Corporation's license to operate. The license revocation altered the method in which the DOR collected the gasoline tax ultimately bringing the issue of taxation before the court. Petroleum Corporation argued in their adversary proceeding that it had improperly paid an excise tax when it purchased gasoline from suppliers in Louisville therefore seeking a refund from the DOR. The DOR maintained the petroleum corporation was unlicensed during that period, was not a "taxpayer" within the meaning of the state statute, and therefore not entitled to a refund from the state. The lower courts agreed with the state and held in their favor. On appeal, the Circuit Court held Petroleum Corporation was the party from whom the DOR collected the gasoline tax. The Circuit Court reversed and remanded the lower court's judgment, thereby requiring the DOR to pay Petroleum Corporation a tax refund.

U.S. Court of Appeals, District of Columbia

Gunpowder Riverkeeper v. Federal Energy Regulatory Comm'n, 2015 WL 4450952

The Federal Energy Regulatory Commission (FERC) issued a certificate of public convenience and necessity to a Gas Transmission Company, authorizing the company to extend a natural gas pipeline into Maryland. An environmental protection organization (Organization) petitioned for review of the FERC order on grounds that the certificate violated both the Clean Water Act (CWA) and National Environmental Policy Act (NEPA). The United States Court of Appeals addressed jurisdiction over the case pursuant to Article III of the Constitution with the zone of interests addressed in the Natural Gas Act (NGA). The Court held that (1) the Organization had Article III standing but that the Organization's interests did not fall within the zone of interests protected by the NGA due to the NGA not shielding injuries arising out of violations of other statutes and (2) the Organization's interest did not fall within zone of interests because the claim was economic, rather than environmental, in nature. Thus, the Court denied the Organization's petition for review.

U.S. District Court, New York

In re Petrobras Securities Litigation, No. 14-CV-9662 JSR, 2015 WL 4557364 (S.D.N.Y. 2015).

Investors alleged that Oil Company was involved in multi-billion dollar bribery and kickback scheme which resulted in the overpayment for several refineries. In connection with alleged corruption scheme, Investors claimed Oil Company made false and misleading statements in violation of the Securities Exchange Act of 1934 (Exchange Act), the Securities Act of 1933 (Securities Act), and Brazilian law. Oil Company filed motions to dismiss the Investors' claims, which were granted in part and denied in part. The Court denied Oil Company's motion to dismiss the Exchange Act claims, holding that the complaint adequately pleaded that the alleged misrepresentations were both material and false. With respect to Securities Act claims, the Court granted Oil Company's motions to dismiss the claims based on 2012 notes offering as barred by Securities Act three-year statute of repose. Lastly, the Court granted Oil Company's motion to dismiss the claims asserted under Brazilian law on behalf of investors who

purchased Oil Company's shares on the Bovespa, Sao Paulo Stock Exchange, because the claims were subject to mandatory arbitration pursuant to the Oil Company's bylaws.

State

Alaska

Jacko v. State, Pebble Ltd. Partnership, 353 P.3d 337, No. S-15516 (Alaska 2015).

The Lake and Peninsula Borough (Borough) "Save our Salmon" Initiative permitting standard for resource extraction was set higher than the State's permitting standard. The State and Mining Company sued the Borough for declaratory and injunctive relief on grounds that Borough's initiative exceeded its power to legislate on matters governing land use permit requirements. The Superior Court granted summary judgment for the State and Mining Company, enjoining the Borough from enforcing the initiative. On appeal, the Supreme Court of Alaska affirmed the lower court's judgment and held that (1) the dispute was ripe because the initiative's enactment infringed on the State's sovereign power and thus imposed a concrete harm and (2) the initiative was preempted by state law because the Borough's ability to veto resource development could not supersede authorization of state and federal regulations.

Kentucky

Appalachian Land Co. v. EQT Production Co., No. 2013-SC-000598-CL, 2015 WL 4972511 (Ky. 2015).

Natural Gas Lessor brought class action suit against Lessee claiming that Lessee underpaid gas royalties under the terms of the lease by improperly deducting severance taxes. The lease provided that Lessee shall pay Lessor a royalty on natural gas extracted from the land at the rate of one-eighth (1/8) of market price of gas at the well. The District Court granted Lessee's motion for judgment on the pleadings. But, because the issue of apportionment of natural gas severance tax had not been directly addressed under Kentucky Law, the Court of Appeals certified the question to the Supreme Court of Kentucky. The Supreme Court held that in absence of a specific lease provision apportioning severance taxes, natural gas lessees may not deduct severance taxes prior to calculating royalty value.

Baker v. Magnum Hunter Production, Inc., 2015 WL 4967131 (Ky. 2015).

Landowners entered into oil and gas leases with Lessee's predecessor. Landowners brought suit against Lessee alleging that Lessee had miscalculated and underpaid royalties and that post-production costs could not be deducted from royalties. Additionally, Landowners sought a declaration that the leases had expired pursuant to the habendum clauses. The trial court rejected these claims. The Supreme Court of Kentucky affirmed, stating the use of "market price at the well" in the leases granted Lessee power to deduct post-production costs from Landowner's share of the royalty.

Nami Resources Company, LLC v. Asher Land and Mineral, Ltd., 2015 WL 4776376 (Ky. Ct. App. 2015).

Landowner entered into multiple gas leases with Lessee in 1929, 1952, and 1953. These leases provided a one-eighth (1/8) royalty for Landowner from each well where gas is found and produced. Lessee deducted post-production costs and a share of Kentucky's severance tax from the royalty. In 2006, Landowner brought suit against Lessee alleging breach of the leases. The lower court awarded Landowner a substantial amount of compensatory and punitive damages for breach of contract and fraud. On appeal, the Kentucky Court of Appeals confirmed the decision holding that Lessee had breached the leases because there was sufficient evidence to show that the deductions taken by Lessee from the royalties were either unreasonable or were not actually incurred. In addition, the court found that the severance taxes could not be deducted because it is a tax on the privilege of severing and processing natural resources, not on the product itself.

Minnesota

Guardian Energy v. County of Waseca, 868 N.W.2d 253 (Minn. 2015).

Energy Company (Company) owned an industrial complex that contained 27 tanks used for ethanol production. County classified the tanks as taxable real property and determined the fair market value of the taxable industrial tanks. Company filed a petition challenging County's valuation of Company's facility. The Tax Court found that the 27 tanks were taxable real property and determined the fair market value of property based on an external analysis. The Supreme Court of Minnesota affirmed the Tax Court's ruling that the 27 tanks were taxable real property because although the tanks were equipment, they had an exterior shell that provided protection from the elements thereby performing a structural

function. In addition, the Court reversed and remanded the external analysis provided due to the valuation finding being unsupported by the record.

North Dakota

EOG Resources, Inc. v. Soo Line. R. Co., 867 N.W.2d 308, 2015 ND 187 (N.D. 2015).

Well operators (Operators) brought quiet title action against Railroad Company (Railroad) to obtain the property rights in a parcel of land that they argued Railroad owned as a surface easement. Railroad and its lessee argued that they were granted a fee simple interest in the disputed property therefore owning the mineral rights beneath the surface. The Railroad appealed the lower court's grant of summary judgment. The Supreme Court of North Dakota held that the language of six out of the seven deeds in dispute were unambiguous and granted Railroad a fee simple interest to the property and its mineral estate. The Court remanded the case to the trial court in regards to the seventh parcel of land, finding that summary judgment was inappropriate. The deeds did not contain any limiting language, which the Court indicated the parcel grantor's intent was to convey a fee simple interest to the Railroad.

Yesel v. Brandon, 2015 ND 195, 2015 WL 4657550 (N.D. 2015).

Owner of surface rights (Surface Owner) sought a quiet title action against the owner of the mineral rights underlying the property. A state statute requires that owners of mineral rights affirm their ownership every twenty years. Seeking royalty payments, Surface Owner published a lapse of mineral rights in the local newspaper on the basis that the rights had been abandoned. An heir of the mineral owner (Heir) responded to the action. Heir claimed that because the property had been leased during the previous twenty years, and was producing oil, abandonment could not be concluded. The lower court entered summary judgment for the Heir, determining that the abandoned mineral statutes doctrine did not apply to the royalty payments. After summary judgment, Heir brought a counterclaim against Surface Owner for unjust enrichment, slander of title, conversion, and negligence. The Supreme Court of North Dakota affirmed the lower court's finding that abandonment did not occur, but reversed on Heir's counterclaims.

South Dakota

Northern Border Pipeline Co. v. South Dakota Dept. of Revenue, 2015 SD 69, 2015 WL 4656720 (S.D. 2015).

Pipeline Company owned and operated an interstate natural gas pipeline that transported gas after production. Although Pipeline Company did not own any of the transported gas, a tariff mandated by the Federal Energy Regulatory Commission (FERC) allowed midstream transporters to divert and burn natural gas to power the pipeline compressors. The South Dakota Department of Revenue (DOR) sought to tax Pipeline Company for the diverted gas. On appeal, the Supreme Court of South Dakota concluded that use tax requires the use, storage, and consumption of the property, and that the property must be purchased in the state. Because Pipeline Company was solely a transporter of the gas, it was merely possessing the gas and, moreover, required by tariff to burn gas to power the existing pipeline system. Therefore, the Supreme Court affirmed that the diverted gas was not subject to the use tax.

Texas

In re XTO Energy Inc., No. 05-14-01446-CV, 2015 WL 4524197 (Tex. App. 2015).

In 1998, Oil and Gas Company (Company) and Bank of America (BOA) created a trust that was entitled to receive 80% of the net proceeds Company received from the sale of oil and gas from certain properties. Following Company's initial public offering in 1999, the trust is now traded on the New York Stock Exchange. In May 2013, a Unit Holder (Unit Holder) of the trust sent a letter to BOA requesting that BOA bring suit against Company and affiliates. Unit Holder asserts that Company misappropriated sixty million dollars in royalties that should have been paid into the trust. The court denied mandamus relief and dismissed the claims against Company and affiliate, but provided that Unit Holder may amend any claims on its own behalf against BOA.

Federal

7th Circuit

Pioneer Wind Farm, LLC, v. F.E.R.C., 2015 WL 4927002, Nos. 13-2326, 14-3023 (7th Cir. 2015).

To connect wind farms to the electric grid, the Federal Energy Regulatory Commission (FERC) requires Wind Farm Operators to request a three-part study by the Grid Operator, which assesses any mandatory updates to the grid to support the proposed facilities while providing non-binding estimates regarding the updates. A Grid Operator miscalculated the costs of mandatory updates in a study, and FERC assigned the additional costs to the wind farms instead of to the mistaken Grid Operator. The Wind Farm Operators filed suit against FERC for unreasonably assigning corrective costs. The court upheld FERC's decision stating that customers should assume costs of necessary upgrades to the grid when that customer is the "but for" cause of the upgrade. Further, the Grid Operator gave the Wind Farm Operators the option to either reduce the output from the facility or withdraw the proposal, and prior to the suit, the wind farms refused both options.

State

Wyoming

In re General Adjudication of All Rights to Use Water in Big Horn River System, 2015 WY 104, 2015 WL 4761438 (Wyo. 2015).

The State authorized the elimination of water permits under the Farmers Canal Permit (FCP) without a hearing. Tract 109, owned by Landowner, had originally received water under the FCP. In the 1920s, the Landowner's predecessor filed an affidavit to cancel the water permit under the FCP in order to receive water under the Perkins Ditch Enlargement (PDE). Despite being filed under the PDE, Tract 109 has received water from FCP since 1942. The State recommended canceling the FCP for Tract 109, so that it would receive water solely from the PDE. The District Court ruled to eliminate the FCP for Tract 109, therefore establishing that the Landowner is bound by his predecessor's actions. On appeal from the Landowner, the Supreme Court of Wyoming affirmed the lower court, holding that the historical elimination of the permit by Landowner's predecessor shall stand.

Federal

3rd Circuit

American Farm Bureau Federation v. U.S. Environmental Protection Agency, 792 F.3d 281, 80 ERC 1837 (3rd Cir. 2015).

The Environmental Protection Agency (EPA) published in 2010 the "total maximum daily load" (TMDL) of nitrogen, phosphorous, and sediment that can be released into the Chesapeake Bay to comply with the Clean Water Act (CWA). The TMDL is a comprehensive framework for pollution reduction designed to restore and maintain the chemical, physical, and biological integrity of the Bay. Trade associations with members who will be affected by the TMDL's implementation including the American Farm Bureau Federation, the National Association of Home Builders, and other organizations for agricultural industries that include fertilizer, corn, pork, and poultry operations (collectively, Farm Bureau) filed suit. Farm Bureau alleged that all aspects of the TMDL that go beyond an allowable sum of pollutants exceeded the scope of the EPA's authority to regulate, largely because the agency may intrude on states' traditional role in regulating land use. The District Court ruled against the Farm Bureau. On appeal, the Third Circuit affirmed that decision holding: (1) TMDL regulations did not take over traditional state power to regulate land use, (2) TMDL regulations fell within Congress's commerce power to regulate interstate waterways, and (3) TMDL regulations were reasonable and reflected a legitimate policy choice by agency in administering the ambiguous term "total."

9th Circuit

Building Industry Ass'n of the Bay Area v. U.S. Dept. of Commerce, 792 F.3d 1027 (9th Cir. 2015).

Organizations representing business and property owners as well as building associations brought action against the government alleging that the National Marine Fisheries Service's (NMFS) designation of critical habitat for a threatened species–the southern distinct populations segment of green sturgeon–violated the Endangered Species Act (ESA). The lower court entered summary judgment in favor of the government. On appeal, the Organizations' main contention was that when designating critical habitat for the green sturgeon, NMFS violated the ESA by failing to follow a specific, obligatory methodology imposed by the statute requiring agencies to balance the conservation benefits of designation against the economic benefits of exclusion from designation. After analyzing the minimal economic impact of its designation, the Ninth Circuit affirmed in favor of NMFS, holding that it complied with the ESA and was therefore not required to follow the specific balancing-of-the-benefits methodology proffered by the Organizations.

Wildearth Guardians v. U.S. Dept. of Agriculture, 795 F.3d 1148 (9th Cir. 2015).

Environmental Group (Group) brought suit against the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) seeking to enjoin the federal government's participation in killing predatory animals in Nevada. The basis of the Group's claim was that the APHIS's 2011 programmatic environmental study (PEIS), which incorporated by reference two prior studies conducted in 1994 and 1997, respectively, was based on analysis from studies conducted in the 1970s and 1980s that has been questioned by more recent research. In response to APHIS's motion to dismiss for lack of standing, the Group submitted a declaration from one of its members who had engaged in recreational activities in portions of Nevada affected by the government's predator control activities (subject area). The district court granted APHIS's motion, holding that the Group failed to allege a sufficiently concrete injury traceable to APHIS's activities and that the likelihood that unregulated private predator control activities would replace the government's program prevents the court from redressing the Group's injury. The Court of Appeals reversed, holding that Group's aesthetic and recreational enjoyment of the subject area was impacted by the government's program and the concern about private predator management necessarily ensuing from ceasing such program was merely hypothetical.

11th Circuit

Florida Wildlife Federation Inc. v. Administrator, U.S. Environmental Protection Agency, 2015 WL 4081495, No. 14-10987 (11th Cir. 2015).

A number of conservationist organizations (Organizations) brought suit against the Environmental Protection Agency (EPA), seeking increased federal oversight of Florida's water usage. Both parties agreed to a consent decree in 2009, but, five years later, the district court modified that consent

decree over the Organizations' objections. The Organizations appealed the 2014 order modifying the decree. Shortly after the consent decree in 2009, which required the EPA to increase federal oversight of Florida's failure to implement regulations consistent with the Clean Water Act (CWA), Florida passed new regulations. The EPA approved these new regulations as compliant with the CWA. Pursuant to the compliance finding, the EPA moved the district court to modify the consent decree to relieve it of its obligation to regulate the waters of Florida. The Organizations contend that the lower court erred by not holding an evidentiary hearing, and that even without an evidentiary hearing the court should have denied EPA's motion to modify the consent decree. The Eleventh Circuit held that the district court did not abuse its discretion in regard to the evidentiary hearing and affirmed the decision.

U.S. District Court, District of Columbia

EME Homer City Generation, L.P. v. E.P.A., 2015 WL 4528137, No. 11-1302 (D.C. Cir. 2015).

A group of state and local governments, joined by industry and labor groups, petitioned for review of the Environmental Protection Agency's (EPA) Transport Rule, which called for cost-effective allocation of emission reductions among upwind states to improve air quality in polluted downwind areas under good neighbor provisions of the Clean Air Act (CAA). The D.C. Circuit Court vacated the rule in its entirety. On a grant of certiorari, the Supreme Court reversed, remanded, and held that (1) the CAA does not command the states be given a second opportunity to file a state implementation plan (SIP) after EPA has quantified the State's interstate pollution obligations and (2) the EPA's cost-effective allocation of emission reductions among upwind States is a permissible, workable, and an equitable interpretation of the Good Neighbor Provision. On remand, the D.C. Circuit rejected Petitioners' broader challenge to the Transport Rule. However, the D.C. Circuit determined that EPA was required to revise overly stringent emissions standards in thirteen states and remanded for further determination.

State

Florida

Florida Audubon Society v. Sugar Cane Growers Cooperative of Florida, 2015 WL 4680969, 40 Fla. L. Weekly D1850 (Fla. Dist. Ct. App. 2015).

Florida Audubon Society (Audubon), brought suit against the South Florida Water Management District (District) and several sugar cane growers (growers) alleging that permits issued by the District to the growers violated the Everglades Forever Act (EFA). The permits allowed the growers to discharge water from their farms into infrastructure that transports the water to Stormwater Treatment Areas (STAs), where it is treated before reaching the protected areas of the Everglades. In exchange for the permits, the growers were required to implement Best Management Practices. On February 10, 2014, an Administrative Law Judge (ALJ) rejected Audubon's contention that the permits violated the EFA, found that the District should continue issuance of the permits, and issued a recommended order. On April 17, 2014, the District entered a final order, adopting the ALJ's recommended order and approving the issuance of permits. The Court of Appeals affirmed, finding the District's interpretation of the EFA was permissible, but noting that, "Audubon should have challenged the STA permits approving these measures and allowing that discharge." Because the District's actions were part of a long-term plan to reduce phosphorous levels in the protected area, its actions were in keeping with the intent of the legislature.

New Mexico

Woody Inv., LLC v. Sovereign Eagle, LLC, 2015 WL 4550127 (N.M. Ct. App. 2015).

Landowners and Grazing Lessees (Lessees) filed a complaint against an Oil and Gas Operator and Survey Company (Companies), seeking damages for negligence, breach of contract, violation of the Surface Owners Protection Act (SOPA), and trespass after the Survey Company entered their property and conducted geophysical seismic surveys. The District Court granted summary judgment on the SOPA and breach of contract claims, and following trial, entered judgment for Companies on negligence and trespass claims. Thereafter, the Lessees appealed the summary judgments granted on the SOPA and breach of contract claims. The Court of Appeals held that the geophysical seismic survey is an oil and gas operation under SOPA, thereby subjecting Companies to strict liability for statutory damages. Further, the Court of Appeals held that the complaint gives adequate legal and factual notice in alleging damages to the surface, and that such damages were improperly excluded by the grant of summary judgment, and therefore will be addressed on remand to the lower court.

Washington

Sunshine Heifers, LLC v. Washington State Dept. of Agr., 2015 WL 4458028 (Wash. Ct. App. 2015).

Cattle Company brought action against the Washington State Department of Agriculture (Department) for negligence and breach of fiduciary duties. The case in controversy allegedly occurred from negligent cattle inspections that allowed a cattle lessor to transport and sell cattle out of state without Cattle Company's consent. The trial court granted summary judgment to the Department based on the public duty doctrine precluding the Department's negligence liability. On appeal, the Court of Appeals found that government entities are liable for damages arising out of their tortious conduct, including the tortious conduct of their employees to the same extent as if they were a private person or corporation. However, under the public duty doctrine, the government may be held liable for negligence only if it breaches a duty owed to a particular individual, rather than a duty owed to the general public. Because the conduct of the Department was one that is performed exclusively by government entities, the public duty doctrine was held to apply. Therefore, the Court of Appeals affirmed the lower court's holding that the public duty doctrine precluded any liability for a governmental entity's governmental functions.

OIL, GAS & ENERGY

Daniel I. Waxman, *Shipping Coal Through Safe Harbors: Application of the Bankruptcy Code Safe Harbors to Coal Supply Agreements*, 53 U. Louisville L. Rev. 229 (2015).

Smith Monson, *Treating the Blue Rash: Win-Win Solutions and Improving the Land Exchange Process*, 2015 Utah L. Rev. 241 (2015).

Tina Calilung, *The Clean Power Plan: An Introduction to Cooperative Federalism in Energy Regulation*, 4 Am. U. Bus. L. Rev. 323 (2015).

James M. Van Nostrand, *Getting to Utility 2.0: Rebooting the Retail Electric Utility in the U.S.*, 6 San Diego J. Climate & Energy L. 149 (2015).