Oil and Gas, Natural Resources, and Energy Journal

Volume 2 | Number 1

May 2016

Recent Case Decisions

Oklahoma Oil and Gas, Natural Resources, and Energy Journal
RECENT CASE DECISIONS

VOL. II, NO. I MAY, 2016

TABLE OF CONTENTS

All case citations are as of 5-25-2016. The citations provided in this Case Report do not reflect changes made by Lexis or Westlaw, or the case's addition to a case reporter after that date. This Case Report contains case decisions issued through 5-8-2016. This PDF version of the newsletter is word-searchable. If you have any suggestions for improving the Newsletter, please e-mail the editorial staff at ou.mineral.law@gmail.com.

Federal

Supreme Court of the United States

Hughes v. Talen Energy Marketing, 136 S.Ct. 1288 (2016).

The Federal Power Act (FPA) vests in the FERC the exclusive jurisdiction over interstate electricity sales; the FERC uses an auction to ensure wholesale rates are "just and reasonable." The FERC's auction ensures a stable capacity price for any new generator's first three years but also requires a new generator to bid capacity at or above a certain price unless the generator can prove that costs actually fall below the minimum. Maryland, concerned that the FERC system does not promote new electricity generation within the state, enacted its own program to provide subsidies to new generators on the condition that the generator sell into the FERC auction. Competitors of Maryland's new electricity generators filed a lawsuit to invalidate Maryland's subsidy scheme under the Supremacy Clause. Maryland's scheme required new generators to enter into a twenty-year stable pricing contract where Maryland would pay the difference between the guaranteed contract price and the auction price. The Fourth Circuit held that Maryland's scheme intruded on FERC authority to set rates, standing "as an obstacle to the [. . .] objectives of Congress." The Supreme Court affirmed, but limited its holding to Maryland's specific program rather than conjecturing about other measures a state may or may not take to encourage energy development—"So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable."

State

Colorado

BP America Prod. Co. v. Colorado Dep't of Revenue, No. 12SC996, 2016 WL 1639829 (Colo. 2016).

A natural gas producer challenged the decision of the Colorado Department of Revenue ("CDOR") denying certain deductions associated with the transportation and processing of natural gas. At issue is the "cost of capital," which refers to the rate of return that could have been earned had the same money been put into different investments of equal risk. The Court of Appeals found that cost of capital is not deductible. On appeal, the Supreme Court of Colorado held that deductions for transportation, manufacturing, and processing costs are appropriate, and therefore cost of capital is deductible.

City of Fort Collins v. Colo. Oil, 2016 CO 28.

An oil and gas association brought suit against a city requesting declaration and permanent injunction related to the city's fracking moratorium that prohibited operators from fracking or storing fracking waste in the city. The case presented a question of whether state law preempts the city's fracking moratorium. The Supreme Court of Colorado held that fracking is a matter of state and local concern, so the city's moratorium is subject to preemption by state law. The Court held the city's five-year moratorium on fracking and the storage of fracking waste operationally conflicts with the effectuation of state law, i.e. prevents operators who abide by the Commission's rules and regulations from fracking until 2018 and impedes the effectuation of the state's interest in efficient and responsible development of oil and gas resources. Accordingly, the moratorium was preempted by state law.

City of Longmont v. Col. Oil & Gas Ass., 2016 CO 29 (Colo. 2016).

A city banned fracking and the storage and disposal of fracking waste within city limits. An industry association sued, seeking injunction enjoining the city from enforcing the local ordinance because it conflicted with Colorado's Oil and Gas Conservation Act (Act). Home-Rule Cities have the authority under the state constitution to supersede state laws within the city's jurisdiction that conflict with the city's charter. That power, however, solely applies to matters of local-concern. When the charter conflicts with state law on a matter of statewide or mixed-state-and-local concern, the state law preempts the charter. On appeal, the Supreme Court of Colorado found that the conflict was a matter of mixed-state-and-local concern because subterranean oil and gas pools do not conform to any city's boundaries thus having an extraterritorial impact and requiring statewide uniformity of regulation, but the city has authority over zoning land uses. Because the Act, which promotes maximum production, prevents waste, and protects owners with coequal and correlative rights, conflicts with the city's ban on fracking, a process already heavily regulated to protect public health and safety and initially created

to maximize production, the local ordinance is preempted.

Pennsylvania

Loughman v. Equitable Gas Co., LLC, 2016 PA Super 71.

Individual landowners contracted with an exploration company to lease land for hydraulic fracturing. The exploration company failed to find oil or gas on the land, so lessors sought the lease be terminated. Further, lessors sought termination of a sublease by the exploration company. The exploration company countered that the sublease did not sever storage or production rights. The trial court denied the landowner's summary judgment motion to sever the production and storage rights of the sublease. On appeal, the Supreme Court of Pennsylvania determined that the lease clearly and unambiguously permitted a sublease and affirmed the denial of summary judgment.

Texas

Aery v. Hoskins, Inc., No. 04-14-00807, 2015 WL 1237985 (Tex. App. Mar. 30, 2016).

Surface and mineral estate interest owners of three tracts of land brought action against interest holders in two other tracts seeking declaratory relief based on competing claims to royalty interests in said tracts. The cause of action arose from three siblings' agreement to pool and share royalties on three separate tracts of land. The Court of Appeals was asked to determine whether an undivided royalty interest held by one sibling in the other siblings' tracts included in the pool became an appurtenance and passed with conveyance of the land. The Court of Appeals determined that because there was a pooling agreement, each sibling held an undivided royalty in the pooled unit. In addition, the court held that the siblings' interest conveyed by general warranty deed should not include an undivided interest in the tracts belonging to his other two siblings.

Haider v. Jefferson Cty. Appraisal Dist., No. 09-14-00311-CV, 2016 WL 1468757 (Tex. App. Apr. 14, 2016).

Mineral owners and the city of Beaumont disputed whether the pooling of minerals resulted in the owners of the tract at issue owning minerals within the city's tax boundary. Under Texas law, the lease language determined whether pooling grants to mineral owners of a tract within the unit a legal interest in the minerals located elsewhere in the unit. When a lease contains language that prevents a cross-conveyance of the lessor's minerals to others who own minerals in the pooled unit, the lessor cannot own a percentage of the minerals associated with the other tracts in the unit. The Texas Court of Appeals held that the trial court should have denied both parties' motions since the relevant mineral lease was not filed in support of either motion to establish whether a cross-conveyance of minerals could occur.

Samson Lone Star LP v. Hooks, No. 01–09–00328–CV, 2016 WL 1019217 (Tex. App. Mar. 15, 2016).

Lessor entered into an oil and gas lease containing "Offset Obligations," which created a 1,320 foot buffer zone around the leased premises. If the lessee drilled into the buffer zone, he must either 1) commence drilling an offset well with due diligence, pay the lessor compensatory royalties, or 3) release the offset acreage. The lessee began drilling on a pooling unit outside of the buffer zone, but the lessee's Railroad Commission filings showed that the directional well would bottom out within the buffer zone. The lessor agreed to pool fifty acres of his lease into the lessee's pooling unit relying on the lessee's assertion that the second well would need to be outside the buffer zone and lessee's misleading plat created and filed in lessor's name before lessor consented. Subsequently, the lessee drilled the second well within the buffer zone. The lessor sued the lessee for fraud. The Court of Appeals of Texas held that there was only enough evidence to support $17,461,162.57 of fraud damages based on the compensatory royalties and late fees that would have been due under the original lease.

State

Montana

Curry v. Pondera Cty. Canal & Reservoir Co., 2016 MT 77.

A landowner filed a complaint against a water provider alleging interference with water rights. The Supreme Court of Montana held that the controlling principle of Montana water law is beneficial use, which is determined by intent, contemplated use, and actual use. The provider put the water to a beneficial use by providing water for sale and issuing shares of stock up to its allowed maximum acreage; the Water Court had incorrectly determined the provider's rights were limited by the actual acreage irrigated by its shareholders. Additionally, the Supreme Court affirmed the lower court's decision to grant the provider a service area rather than a place of use based on historically irrigated lands. The Court further found that the water was not beneficially used in a certain area prior to 1973 since evidence proved the area was either not included in the project or the provider's lack of issuances of stock to water users in that area equated to nonuse; thus, the Court excluded that location from the service area. Finally, the Court affirmed the tabulation of claims without a volume determination since the decision by the Water Court to limit a water right by volume discretionary.

In re Eldorado Coop Canal Co., 2016 MT 94.

The senior water rights holder to the Teton River obtained the rights of three others and sought to obtain more, totaling eight claims. Upon objection of those claims, the Water Master limited the acre-feet per year for each claim, allowing a total of 10,350 acre-feet per year. The Water Court denied the Water Master's volume quantification. Instead, the Water Court set the *total* volume quantification at 15,000 acre-feet per year. The Supreme Court of Montana affirmed the Water Court's ruling, finding that 1) evidence supported the maximum volume determination, 2) the Water Court had the right to assign one combined maximum total instead of four individual maximums, and 3) the senior holder had acquired seventy-five inches of irrigation and stockwater rights.

Nevada

Jackson v. Groenendyke, No. 67289, 2016 WL 1381495 (Nev. 2016).

At issue in this case are water rights to an unnamed spring that had been improved with piping and crossed a number of properties. Aggrieved parties filed exceptions to the final order of the State Engineer, which determined that properties to the south and east of the water had vested rights in the spring. The Court affirmed that the State Engineer's findings were not clearly erroneous. In addition, the Court held that certain parties are entitled to limited access for repairs because said repairs arise out of the same transaction or occurrence as the vested water rights.

Washington

Fox v. Skagit Cty., No. 73315-0-I, 2016 WL 1438377 (Wash. Ct. App. Apr. 11, 2016).

Property owners were denied a building permit because they failed to obtain an adequate and reliable source of water for their proposed home. The owners' only source of water was a well located on their property, which was in hydraulic continuity with the Skagit River. The instream flow rule prohibits the exercise of water rights when the minimum flow requirements are not met for the Skagit River — a regular occurrence. The owners argued that their well was exempt because its use would not exceed 5,000 gallons per day for single domestic use. The lower court denied the owner's writ of mandamus. The Court of Appeals affirmed because the owners were subject to prior appropriations and the county had the authority to determine whether the well infringed upon senior rights and the instream flow rule.

Federal

8th Circuit

Foster v. Vilsack, No. 14-3887, 2016 WL 1399365 (8th Cir. Apr. 11, 2016).

Property owner filed suit to challenge USDA determination that the owner's farmland was protected wetland in accordance with the Food Security Act of 1985 "swampbuster" provision, which deems individuals who convert wetlands ineligible to receive federal farm subsidies. USDA's reports demonstrated that the property, located within the Southern Black Glaciated Plains Major Land Resource Area (SBGP MLRA), had 1) predominantly hydric soils, 2) saturation of groundwater at a frequency and duration sufficient to support hydrophytic vegetation, and 3) the ability to support hydrophytic vegetation under normal circumstances—the three controlling criteria for a wetland determination. The district court granted summary judgment in favor of the USDA. The owners had failed to prove by a preponderance of evidence that comparing color differences in pre-conversion aerial photographs to identify "wetness signatures" was erroneous. The owners also did not prove that the comparison site that the USDA used in favor of closer sites was improper; the USDA was free to reject closer locations that had been disturbed by cropping in favor of an undisturbed location within the SBGP MLRA. The Eighth Circuit affirmed.

OIL AND GAS

George A. Somerville, *Common Law Groundwater Rights Under Virginia Law*, 34 Va. Envtl. L.J. 204 (2016).

Kathryn Scherpf, *Advocating for the Adoption of West Virginia's Substantial Burden Standard Across the Mining States*, 43 B.C. Envtl. Aff. L. Rev. 181, 181 (2016).

Tracey M. Roberts, *Picking Winners and Losers: A Structural Examination of Tax Subsidies to the Energy Industry*, 41 Colum. J. Envtl. L. 63, 65 (2016).

WATER

Frank Chitwood, *Who Owns Alabama's Coosa River? Citizens' Impact on the Tri-State Water Wars Muted by Private Ownership of Riparian Rights*, 34 Va. Envtl. L.J. 230 (2016).

Janet M. Howe, *Arizona Water Law: A Parched Public Interest*, 58 Ariz. L. Rev. 541, 541 (2016).

Joseph Belza, *A Texas Takings Trap: How the Court in Edwards Aquifer Authority v. Bragg Fell into A Dangerous Pitfall of Takings Jurisprudence*, 43 B.C. Envtl. Aff. L. Rev. 211, 211 (2016).

AGRICULTURE

For a more complete list of articles related to agricultural law, please consult the Agricultural Law Bibliography of the National Agricultural Law Center, http://www.nationalaglawcenter.org/reporter/caseindexes/. This bibliography is updated quarterly and provides a comprehensive listing of agricultural law articles.