Oil and Gas, Natural Resources, and Energy Journal

Volume 2 | Number 5
SPECIAL ISSUE

January 2017

Recent Case Decisions

Recommended Citation
Recent Case Decisions, 2 OIL & GAS, NAT. RESOURCES & ENERGY J. 565 (2017),
https://digitalcommons.law.ou.edu/onej/vol2/iss5/7

Oklahoma Oil and Gas, Natural Resources, and Energy Journal
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VOL. II, NO. V JANUARY, 2017

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Federal

2d Circuit

Petroterminal De Panama v. Houston Casualty Co., 15-2941-cv, 2016 WL 4703898 (2d Cir. Sept. 8, 2016).

An insured party transported and stored oil in Panama. There, a pipeline failure caused an oil spill, and certain parties sued Insured and a firm that stored oil with the insured. To secure jurisdiction over the firm—a Swiss company—the Panamanian court issued an attachment of the firm's oil. The firm later sued the Insured in New York for consequential damages associated with the spill and judicial attachment. The court found that the foreign court's attachment amounted to a force majeure, relieving the insured of liability to the firm. The insured then filed this action against its insurer to collect costs incurred in defending the firm's suit. Because the marine liability policies imposed a duty to indemnify—rather than defend—the insurer was only liable for the insured's defense costs if the policies covered the firm's claims. And because the attachment of the firm's oil fell squarely within the policies' exclusion provisions, the court affirmed the trial court and held that the insurers had no duty to reimburse the insured its defense costs.

3d Circuit

Pollock v. Energy Corp. of Am., No. 15-2648, 2016 WL 6156313 (3d Cir. Oct. 24, 2016).

An energy corporation appealed a jury verdict alleging not enough evidence existed for the jury to find that the energy corporation breached its mineral leases with the lessor class action group by improperly deducting marketing and transportation costs from royalty payments. Although evidence of contracts for sale of natural gas existed requiring the buyer pay for the cost of marketing and transportation, the appeals court held that the lessors paid a one-eighth percentage of the marketing and transportation costs based on testimony of the energy corporation's executive. Thus, the court found ample evidence to support the jury verdict and affirmed district court ruling in favor of the lessors.

5th Circuit

Cazamias v. Devon Energy Prod. Co., L.P., No. 16-40214, 2016 WL 4784029 (5th Cir. Sept. 13, 2016).

Non-operators in two oil and gas leases brought an action in state court against the operator seeking damages and declaratory relief. The non-operator argued that the operator did not adhere to the joint operating agreement ("JOA") after unsuccessful development without prompt plugging of a gas well no longer in operation. The operator removed the case to federal court on basis of diversity jurisdiction and counterclaimed against the non-operators under the state's Natural Resources Code ("SNRC") to recover plugging costs and moved for summary judgment on the non-operators' claims and the counterclaim. The operator argued it was not subject to the JOA because the lease to which the JOA was applicable expired before the operator assumed control such that its obligations to plug the well were statutory and not contractual, and the court agreed. On appeal, the district court affirmed on two points: First, the operator was not subject to the JOA because the lease expired before the operator assumed control. Second, the operator proved it paid for plugging costs but the non-operators had yet to reimburse the operator, making the non-operators liable under the SNRC.

10th Circuit

Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276 (10th Cir. 2016).

An environmental group sued BLM under NEPA, challenging numerous drilling permits in the San Juan Basin. The group argued that prolific horizontal drilling and multi-stage fracing presented environmental risks for which BLM's outdated resource plan did not account. The group also moved for a preliminary injunction to prevent drilling while the suit was pending. Although the group showed irreparable harm, the trial court denied its motion because the group failed to prove the other required elements for a preliminary injunction. The court of appeals—affirming the trial court on narrow grounds—addressed only the "substantial likelihood of success on the merits" prong of the test. First, the court determined that the trial court applied the proper test for "substantial likelihood" considering Supreme Court case law. Further, even if the proposed drilling was different in kind from past methods, the amount of activity and related surface impacts were within BLM's anticipated levels. Finally, the group's other arguments were not sufficiently developed to prove "substantial likelihood of success on the merits" under the agency-deferential standard of review. The court noted that because of the case's interlocutory posture, the decision on the group's motion would not preclude an ultimate judgment in the group's favor.

U.S. Energy Dev. Corp. v. Stephens Energy Grp., LLC, No. 15-6188, 15-6215, 2016 WL 5210888 (10th Cir. Sept. 21, 2016).

Producer *A* executed a participation agreement ("PA") with Producers *B* and *C* under which *B* and *C* agreed to join *A* in the development of certain lands. A separate joint operating agreement ("JOA") governed the drilling, but both agreements named Producer *C* as operator. Later, Producer *C* sold *D* all its rights, title, and interests in the lands. Consistent with the PA, Producer *C* filed a form with the state regulatory commission to assign its operator status to *D*. Producer *A* argued that *C*'s assignment triggered the JOA's resignation provision, requiring that the parties elect a new operator by majority vote. Producers *A* and *B* elected *A* and sought an injunction and declaration against *D*. The trial court concluded that the JOA outlined the terms for changing operators and, giving effect to those provisions, ruled for Producers *A* and *B*. The court of appeals reversed. Under relevant case law, the court presumed that contractual rights and duties are assignable. Moreover, the PA's language made "rights, duties, and obligations"—and therefore operator status—assignable. Because the parties expressly agreed that the PA controlled conflicts between the two writings, the court reversed. It noted that although the JOA controlled operator status in some circumstances, it did not render operator status unassignable under the PA.

Court of Federal Claims

LCM Energy Solutions v. United States, 128 Fed. Cl. 728 (Fed. Cl. 2016).

A solar power installation company used benefits from the American Recovery and Reinvestment Act (ARRA) to install solar panel systems without collecting payment from customers and profiting from the government stimulus for renewable energy systems. The Treasury Department fully refunded the first installation for retail installation price. After several more installations, the Treasury reimbursed $482,504 of its requested $889,638, so the company sued for the rest. Treasury countersued with claims of fraud, asking the court to revoke the refund. The ARRA calls for a refund of thirty percent of the cost basis for solar energy property. The company's solar energy systems and the cost of their installation undoubtedly qualify for a refund under ARRA; the amount owed, however, was thirty percent of the total cost basis with profit—the original amount given by the Treasury, not the amount requested by the company. Furthermore, the court found the Treasury's allegations of fraud "completely unfounded" by the court, viewing the company's owners as highly credible businessmen without college degrees and unlikely to plot such a complex scheme of fraud. The Treasury's allowance of the full amount on the first installation led to the reasonable belief that the Treasury should reimburse the company.

State

Louisiana

Stephenson v. Wildcat Midstream Caddo, LLC, No. 50,982–CA, 2016 WL 6649228 (La Ct. App. Nov. 10, 2016).

Purported landowners ("Purported Owners") of a three-acre strip containing a pipeline brought an action against the pipeline owner ("Pipeline") for injunctive relief and money damages. The Pipeline bought a right-of-way agreement from a neighbor adjacent to the landowners to build on that strip. The trial court dismissed the Purported Owners' action, and they appealed. The appellate court relied on the State Civil Code ("SCC") to determine that the Purported Owners' did not meet their burden of proof. The appellate court affirmed the trial court's decision for two reasons: First, the strip was susceptible to acquisitive prescription, and the quitclaim deed conveyance of the strip to the neighbor was just title making applicable the acquisitive prescriptions requirements of the SCC. Second, evidence did not suggest that the neighbor did not exercise a good faith possession; rather it constructed a fence that enclosed the strip and paid property taxes on the strip. Owners knew of these events but did not dispute the boundary lines until eighteen years later.

XXI Oil & Gas, LLC v. Hilcorp Energy Co., 2016-269, 2016 WL 5404650 (La. App. 3 Cir. Sept. 28, 2016), reh'g denied (Nov. 9, 2016).

An operator recompleted a well on a unit owned by the State of Louisiana, though it did not hold a lease. A lessee acquired a lease covering the unit and sued the operator for failure to provide the quarterly accounting of costs required under La.R.S. 30:103.1 ("§ 103.1"). The operator filed an exception of no cause of action claiming the statute did not apply to the lessee, which the trial court denied. The trial court granted partial summary judgment in favor of the lessee, and the operator appealed, but the appellate court affirmed the judgement and held monetary penalties were the appropriate remedy under La.R.S 30:103.2 ("§103.2"). The trial court entered judgement against the operator, and the operator again appealed, arguing that §§ 103.1 and 103.2 do not apply to lessees and maintaining that the required accounting of costs for "drilling operations" under § 103.2 does not include post-production costs. On appeal, the court affirmed, first maintaining that a mineral lessee may demand an accounting from an operator or producer working on the property covered by the lease. Next, it held that "drilling operations" under § 103.2 include post-production costs because the term is clear when read in conjunction with § 103.1; there would otherwise be "no incentive for the operator or producer to provide the quarterly reports" under the § 103.1. Finally, the Court held that Operator had no standing to challenge the validity of the leases in such a case under the doctrine of "personal right," finding that a party cannot demand performance of an obligation in the "absence of an assignment or subrogation."

Montana

Carbon Cty. Res. Council v. Mont. Bd. of Oil & Gas Conservation, 380 P.3d 798 (Mont. 2016).

The county's council challenged the state board's approval of an operator's request to conduct diagnostic fracture injection tests. The council claimed the board denied it a "meaningful opportunity to participate" in the permit process in violation of the state constitution. Initially, the operator submitted a proposal to drill an exploratory well, and the board organized a public hearing when the council objected. Although the proposal did not mention fracing, residents testified regarding the council's opposition to fracing at the site. The board nonetheless granted the operator's permit. Later—and without another hearing—the board approved the operator's request concerning the diagnostic tests. The council argued that this amounted to an expansion of the permit's original scope because drilling permits allow such tests. The court sided with the board, which argued that the board had not expanded the permit's scope. And because the tests did not amount to fracing, the court held that the council "meaningfully participated" in the board's approval of the operator's diagnostic tests.

New Jersey

In re Petition of S. Jersey Gas Co., 149 A.3d 13 (App. Div. 2016).

A gas company planned to construct a natural gas pipeline through the New Jersey Pinelands Forest Area and applied to the Pinelands Commission ("Commission") for a permit, contingent upon a determination that the project complied with the Pinelands Comprehensive Management Plan ("CMP"). The Company also petitioned the Board of Public Utilities ("Board") for a waiver of Municipal Land Use Laws ("MLUL"). The Commission determined the project did not meet CMP requirements and denied the application. The Commission's Executive Director ("Director") approved a second amended application. Therefore, the Board granted the Company's MLUL petition. Environmental groups appealed, claiming that the Director lacked authority to find CMP compliance and that the Board lacked authority approve of the MLUL petition. On appeal, the Superior Court of New Jersey held that the failure of the first application did not divest the Commission of its authority to review the amended application or the Board of its jurisdiction to review the MLUL petition since the amended application and resulting determination by the Director were a separate matter. However, the Court found that the Board lacked authority to approve Company's MLUL petition, as such a decision was contingent upon CMP compliance. The Court found that determinations of CMP compliance, including a review of determinations issued by the Director, fall under the authority of the Commission. The Court remanded the Director's determination of the project's CMP compliance to the Commission for review and instructed the Board to issue a modified order conditioning approval of the Company's MLUL petition upon a final determination of CMP compliance by the Commission.

Ohio

Corban v. Chesapeake Expl., L.L.C., No. 2014-0804, 2016 WL 4887428 (Ohio 2016).

A federal court certified two question to the Ohio Supreme Court regarding dormant mineral rights: First, which version of the state law regarding dormant minerals applies regarding the automatic divestiture to the surface owner in the event of abandonment? And second is the payment of delay rentals during the primary term a title transaction and a saving event under state law? For the first question, the court found that the dormant mineral estate does not automatically pass by operation of law to the surface owner; the surface owner must follow the statutory provisions to rejoin the severed estate. Second, a delay rental payment constitutes neither a title transaction nor a savings event under state law.

Lutz v. Chesapeake Appalachia, L.L.C., No. 2015-0545, 2016 WL 6519011 (Ohio Nov. 2, 2016).

A federal court submitted the following certified question to the Ohio Supreme Court: Does Ohio follow the "at the well" rule or the "marketable product" rule? The case arose from a class action suit against a lessee for the underpayment of mineral royalties to the lessors. The court held that since the oil and gas lease in Ohio is a contract, that traditional rules of contract interpretation apply, and therefore declined to answer the question. Two justices dissented each arguing differing answers to the certified question. One justice uses policy based arguments to support the argument that Ohio follows the "marketable product" rule. The justice in support of the "at the well" rule looks to Ohio case law regarding the implied covenant to reasonable development.

Walker v. Shondrick-Nau, No. 2014-0803, 2016 WL 4908778 (Ohio Sept. 15, 2016).

Under Ohio's Dormant Mineral Act ("ODMA"), severed mineral rights merge with surface rights. Under the 1989 version of the ODMA, the mineral rights would automatically merge without any filings or proceedings by the surface owner or the mineral owner once deemed "abandoned." The 2006 version of the ODMA, however, requires that the surface owner file an Affidavit of Abandonment of Mineral Interest and send a copy to the mineral owner who then has 60 days to respond to keep the mineral interest from merging with the surface rights. The property at question had its surface and mineral rights severed in 1965. In 2012, the surface owner claimed that the 1989 ODMA automatically merged the two interests. The mineral owner claimed that the 2006 ODMA applied and his timely response kept his property from the abandoned classification. The court ruled that under *Corban v. Chesapeake Exploration, LLC*, No. 2014-0804, 2016 WL 4887428, the 1989 ODMA is not self-executing so the 2006 ODMA applies to any claim brought after 2006, giving mineral owners the opportunity to retain their interests in the property. The surface owners filed a petition for certiorari in December 2016.

Oklahoma

Scott v. Peters, No. 114,913, 2016 WL 6216169 (Okla. Oct. 25, 2016).

A grantor brought action against a grantee alleging that he had intended to transfer the surface only and retain the mineral interest in the property. The grantor had executed a warranty deed conveying 120 acres to the grantee. Three years later, the grantor conveyed surface rights of another 40 acres to the grantee by warranty deed. Although filed with the county clerk, the grantor did not retain any mineral rights in this 40-acre deed. Approximately eight months later, the grantor conveyed the same real property to a housing developer by warranty deed that also made no reference reserving mineral interests. The developer then conveyed the same property to a trust, also with no reference to mineral rights. The grantee obtained a quit-claim deed from the trust to clear title of all 160 acres for a mortgage on the property. The grantee leased those 160 acres to a land company. More than fourteen years later, the grantor filed quiet title action against the grantee for the mineral interests in and under the 160 acres. The grantee counterclaimed for slander of title. The grantee filed a motion for summary judgment arguing that the lawsuit was untimely. The trial court granted the grantee's summary judgment motion. On appeal, the state supreme court affirmed because the statute of limitations began to accrue when the grantor filed the initial deed excluding mineral reservations.

Pennsylvania

Birdie Assocs, L.P. v. CNX Gas Co., LLC, 2016 PA Super 228 (Pa. Super. Oct. 20, 2016).

Landowners leased to a coal mining company the right to mine for "coal and its constituent products" on roughly 300 acres of land. The agreement was for a monthly royalty and a tonnage royalty off *coal* sales. The coal mining company never actually sold any coal and even stated that it was not its intention to mine the coal. Instead, the company sold the coal bed methane gas ("CBM") from the mine without paying any CBM royalty to the landowners. Landowners sued claiming that the coal company owed them royalty on the CBM pursuant to a statute granting landowners a royalty on gas sold from their land. Pennsylvania law, however, established that when a landowner leases the right to mine for coal and its constituent products, the landowner "sells" the coal and its constituent products to the coal mining company. Under this doctrine, the coal mining company had already purchased the coal and the

CBM, so it owed no royalty to the landowners on the sale of CBM.

Texas

Greer v. Shook, No. 08-15-00040-CV, 2016 WL 6092963 (Tex. App. Oct. 19, 2016).

A property owner ("Grantor") leased his minerals retaining a one-eighth royalty in the production. The Grantor then deeded an undivided one-sixteenth interest in all minerals to a Grantee but "covers and includes [one-half] of all of the oil royalty" due under the first lease "[a]nd it shall never be necessary for said grantee or his assigns to join I the execution of any future leases made on said lands." Successors of both the Grantor and Grantee (collectively "Successors") agree the lease expired, and the Grantor's successors entered a new lease with the Operator that filed this suit asserting the deed was ambiguous: it was uncertain whether the Grantee's successors owned (1) one-sixteenth of the production in any lease on the property regardless of the royalty set by the lease or (2) half of the royalty interest set by the terms of the lease. Successors filed cross-claims seeking declaratory relief and motions for summary judgment. A party holding a royalty without owning the mineral interest is a non-participating royalty holder; parties can express this type of interest as a fraction of the total royalty or as a floating royalty (varying with the size of the landowner's royalty). Based on the "four corners" approach, the court viewed these seemingly conflicting fractions in the only way that would reconcile the two: the Grantor's intent must have been a permanent one-half mineral interest. This also supports the "legacy of the one-eighth royalty"—the standard royalty in all lease agreements at the time of the lease in question.

HighMountain Expl. & Prod. LLC v. Harrison Ints., Ltd., NO. 14-15-00058-CV, 2016 WL 5853302 (Tex. App.—Houston 14th Dist. Oct. 6, 2016).

Following its reservation of an NPRI in certain real property, a royalty owner executed a royalty agreement with the operator's predecessor in interest. A dispute arose concerning the interpretation of two provisions. First, the owner claimed that the operator improperly withheld the owner's share of "gross proceeds" from gas produced and used as fuel for the operator's equipment. The agreement defined "gross proceeds" as "the entire economic benefit" the operator received from such production. In affirming the trial court's judgment for the owner, the court of appeals reasoned that the operator's benefit was not having to purchase fuel elsewhere. And contrary to the operator's assertion, the record clearly showed it was possible to quantify this benefit. Second, the owner claimed that the operator wrongly deducted marketing costs from its share based on the cost of operating certain compressors. Under the agreement, the operator could only deduct such costs if the compressors were "downstream from a central facility." Because the owner proved as a matter of law that the compressors were not downstream, the court held that operator had breached the agreement and affirmed the trial court's judgment for the owner.

Richardson v. Mills, No. 12-15-00170-CV, 2016 WL 7488860 (Tex. App., Dec. 30, 2016).

Appellants appealed the trial court decision in favor of the Appellees, determining they own a one-half interest in the oil, gas, and other minerals described in two instruments. The appellate court reviewed the two instruments. Appellants argued that the first instrument constituted an unambiguous mineral deed to Appellants rather than a lease as ruled by the trial court. The appellate court agreed. Appellants argue that the second instrument refers to an unrecorded oil and gas lease, whereas the Appellees state that the second instrument refers to the first instrument, the mineral deed. Appellees argue that the second instrument contains a "latent ambiguity" which allows for the use of extrinsic evidence to prove the intent of the parties. The appellate court disagreed and ruled the second instrument to be unambiguous; therefore, extrinsic evidence was inadmissible. The appellate court rejected Appellants claim to review a stipulation made granting an undivided 4.1666% of the disputed mineral interest. Thus, the Appellees hold no interest in the oil, gas and other minerals in the described property, save the stipulated 4.1666%.

Shell W. E & P, Inc. v. Pel-State Bulk Plant, LLC, No. 04-15-00750-CV, 2016 WL 6247007, (Tex. App. Oct. 26, 2016).

An oil company appealed a $3 million judgment against it from an oil field services sub-contractor. The oil company hired a contractor to perform fracking services on a 106,000-acre mineral lease in Texas. The contractor then hired a subcontractor to provide fuel and other services in the exploration of the lease. The sub-contractor sent a lien claim notice to the oil company, which informed it that the contractor was not paying for the work on the lease. The sub-contractor later perfected a mineral lien and eventually sued the oil company and the contractor for the unpaid amount. The contractor filed for bankruptcy, and the oil company sold its interests on the lease. On appeal, the oil company argued that the sub-contractor should not be granted the cumulative sum of the contracts between the oil company and the contractor and instead should only be awarded the sum of contracts where the sub-contractor provided services. The appeals court affirmed and held that the subsequent agreements between the oil company and the contractor were all part of one contract because there was no language in the fracking agreement to support that each well agreement or work order was a separate contract. The oil company also argued that under Texas law, the oil company could only be liable for the amount the oil company owed to the subcontractor on the lien notice date. The appeals court held that because the dealings between the oil company and the contractor were part of one contract and the oil company owed $10 million to the contractor at the time of the lien notice, the sub-contractor could recover the $3.2 million from the oil company.

Federal

9th Circuit

Sierra Club v. Tahoe Reg'l Planning Agency, 840 F.3d 1106 (9th Cir. 2016).

An environmental group challenged the environmental impact statement ("EIS") accompanying an agency's regional plan update ("Plan") for the Lake Tahoe Region. The agency developed the Plan—which restricts development in the region—over more than a decade, incorporating recommendations from concerned citizens and local governments. The group primarily complained that the Plan inadequately addressed local effects of runoff, which it believed threatened the lake's superior water quality. The trial court granted the agency's motion for summary judgment, and the group appealed. In affirming, the court of appeals concluded that the EIS analysis of the effects of future development was not "arbitrary or capricious" and adequately addressed the Plan's impacts. It also held that substantial evidence support the EIS assumption concerning best management practices—which aim to prevent pollutants from entering the water—even though the agency had struggled to enforce such practices in the past.

State

Arizona

Silver v. Pueblo Del Sol Water Co., 384 P.3d 814 (Ariz. Ct. App. 2016).

A private water company sought a water supply designation, which would allow it to supply water to a planned residential development. BLM filed an objection, asserting that the company failed to consider BLM's existing claim to water about a nearby conservation area. BLM could not quantify its right to water; the extent of its claim remained uncertain, pending the conclusion of an ongoing suit between numerous claimants. The Department of Water Resources ("Department") denied BLM's objection, concluding that the company's application satisfied the designation requirements. BLM appealed, and an ALJ found that BLM failed to show the Department's decision was contrary to law. BLM then filed a complaint in state court. The trial court vacated the ALJ's decision, concluding that the Department must consider existing legal claims in evaluating water supply availability for designations. On review, the court of appeals vacated the trial court's decision. First, the court held that Department properly determined that water

would be "continuously, legally and physically available" for the company's operation. Next, the court stated that while the Department need not "specifically quantify" BLM's water rights, it must "consider" BLM's rights in regulating designations. Finally, the court held that the Department need not separately evaluate the impact of pumping on the nearby conservation area.

Montana

Granite Cty. Bd. of Commissioners v. McDonald, 383 P.3d 740 (Mont. 2016).

A farmer downstream of a hydroelectric dam operated by the county sued the county for failing to release the water required for him to irrigate his crops. The county claimed the creek was merely low and no water could pass through the dam. Applying the *Schuh* Decree—which held that downstream users have the right to the natural flow of the stream, nothing more—the county argued the creek would naturally have periods of reduced water. But the farmer argued that the county should maintain the average natural flow because it was responsible for releasing water at a set rate. The court sided with the county, stating that a downstream claimant only has a right to the water that flows into the dam, not the water held within the dam.

New Mexico

State Eng'r of New Mexico v. Diamond K Bar Ranch, LLC, 385 P.3d 626 (N.M. 2016).

Farmers sought to dismiss the state engineer's complaint over the farmers use of appropriated water to irrigate farmland that was not part of the permitted water right. The farmers argued that the state engineer did not have statutory authority over the diverted water because the diversion began in Colorado and flowed into New Mexico through a ditch. The farmers also argued permits were unnecessary because the ditch was in existence before a state water appropriation law. The Supreme Court of New Mexico held the State Engineer did have jurisdiction to enjoin the farmers from using the water from the ditch on farmland outside the area of the ditch because the State Engineer could apply for an injunction against anyone for unlawful use or water diversion without a legal right to do so. The farmers argued that the water used came from a man-made ditch so the waters are private and the State Engineer cannot regulate a private water way. The court held that no water within New Mexico is private and that users only have a right to use a certain amount of water for beneficial use. The court held that the ditch was a community ditch, which did not require the farmers to acquire a permit to use the water on appurtenant land. However, the court held that for the farmers to use the water on land that was not appurtenant the farmers, they must file for a permit with the State Engineer.

South Carolina

Simmons v. Berkeley Elec. Coop., Inc., No. 2013-001477, 2016 WL 6520167 (S.C., Nov. 2, 2016).

A landowner sued for trespass and unjust enrichment against two separate utility companies for their use of his land for water and power lines. The trial court granted summary judgement in favor of the utility companies, which the appellate court affirmed in part and reversed in part. The Supreme Court of South Carolina first clarified the elements of a "perspective easement." The court noted that the terms "adverse use" and "claim of right" do not constitute separate options to prove perspective easement; rather, these terms are the same. The court, therefore, determined that a genuine issue of fact existed regarding whether the water utility's use of the landowner's groundwater was open and notorious because the water was underground, bushes hid the meter, and the location of the water main was not widely known, precluding summary judgment on utility's claim for prescriptive easement. The court affirmed the prescriptive easement for the distribution line at the point it crossed the landowner's property, however, because utility supervisors indicated that the line operated for thirty years without interruption and was visible from the road.

Texas

City of Socorro v. Campos, No. 08-14-00295-CV, 2016 WL 4801600 (Tex. App. 2016).

When a new subdivision built in a natural flood zone flooded, the city built several drainage channels to divert water away from the neighborhood. The channels instead brought the flood waters to another neighborhood that had never flooded before, and its residents were denied flood insurance for not being in a "flood prone" area. The new channels resulted in one to three feet of flooding, and the homeowners sued the city under the state takings clause and for nuisance. The city asked for dismissal of the claim contending one flood was not enough for a required taking, but the court has shown several times that multiple flooding events are important evidence for proof but are not a pleadings requirement. The court only decided on the pleadings, and for those purposes, the homeowners have provided enough to meet the lower standard of proof for pleas, even with skepticism of their ability to meet the substantial evidentiary burden in court.

Virginia

TransCanada Hydro Ne. Inc. v. Town of Rockingham, 2016 VT 100.

A privately owned hydroelectric power plant ("Taxpayer") challenged the property valuation by a municipality ("Town") at about $108 million. The Taxpayer's expert witness, an engineer, used an income-based discounted cash flow ("DCF") analysis to determine an $84 million fair market value. The Town's expert, an appraiser, also used a DCF method along with a comparable sales approach, and taking both into account came to a value of $130 million and $108.5 million attributable to the Town. The experts differed in areas such as the number of years used for average power (and income) generation and equity rates. The rejection of the taxpayer's witness's uncommon approach by the court and its reliance on the accepted methods and explanations provided by the Town's witness were within the court's discretion. The Taxpayer claimed the Town's valuation did not account for adjustments in its comparable sales analysis, but the Town's expert accounted for the plant's location, taxpayer's control of the river system, ability to sell into multiple markets, high overhead, facility conditions, and on and off-peak generation when adjusting twelve similar market sales. The court upheld all decisions to rely on the Town's witness except the comparable sales, which were only offers of sales and never completed, and adjusted the price to $127.4 million.

Washington

Center for Envtl. Law v. Washington Dep't of Ecology, 383 P.3d 608 (Wash. Ct. App. 2016)

An environmental group appealed the government agency's approval of a hydroelectric dam, claiming the government agency erred in approving the project without studies. The court looked to state law regarding the flow requirements for hydroelectric projects and found that, for the environmental group to overturn the approval of the project, it had the burden of demonstrating that approval violates the state mandated minimum flow requirements—a burden the group failed to meet. The agency properly followed state law in exercising their ability to approve projects. Additionally, the agency did not abuse discretion in not waiting to approve the project before a final determination of the study.

State

Montana

NorthWestern Corp. v. Montana Dep't of Pub. Serv. Regulation, Montana Pub. Serv. Comm'n, 380 P.3d 787 (Mont. 2016).

An electric company appealed the decision of the Public Service Commissioner ("Commissioner") that the electric company failed to act prudently in their risk management practices. Montana law allows a utility company to increase rates to cover unexpected costs of doing business *if* approved by the Commissioner. When the electric company built a new system that required ramping up energy production with turbines, the company insured its equipment but did not insure the costs of purchasing energy if production machines broke down. The turbines did break down, and the company began purchasing energy, resulting in nearly $1.5 million of unexpected expenses. The Commissioner did not allow the company to recover this cost through increased rates. On appeal, the court agreed with the Commissioner that the company was not prudent in their risk management as they failed to inquire about additional insurance for the cost of purchasing energy. A company does not have to purchase insurance to be prudent, but it must research insuring that risk.

Pennsylvania

Sunrise Energy, LLC v. FirstEnergy Corp., 148 A.3d 894 (Pa. Commw. Ct. 2016).

A solar power generator ("Seller") and electric distribution company ("Buyer") executed an agreement under which the Buyer agreed to purchase the Seller's excess electricity. Later, the Buyer terminated the agreement and refused to pay the Seller, alleging that the Seller was not a "customer-generator" within the meaning of a state alternative energy statute ("Act"). The Seller sued the Buyer on contract claims and sought a declaration of its "customer-generator" status. The Buyer filed objections, arguing that the statue utility commission ("Commission") had exclusive jurisdiction over questions concerning the Act. The trial court dismissed the Buyer's objections, reasoning it was competent to resolve the case as a matter of statutory construction. The Buyer appealed the jurisdictional issue, and the court of appeals affirmed. The Buyer argued that the Commission had exclusive jurisdiction over the "customer-generator" question or, alternatively, had primary jurisdiction such that the court should defer to it before deciding the other claims. The court disagreed with both arguments, reasoning that statutory construction is a matter for the courts. Moreover, the Commission had no authority to resolve matters arising under the Act—the legislature had not given it that power. Finally, the court stated that jurisdiction with Commission was not necessary to preserve consistent interpretation of the Act. Commission's expertise, the court concluded, "is not a talisman dissolving a court's jurisdiction."

Texas

North Shore Energy, L.L.C. v. Harkins, 501 S.W.3d 598 (Tex. 2016).

An energy company entered an option agreement with landowners to lease multiple parcels of land, paying per acre. The described land is "1210.8224 acres of land, more or less, out of the 1673.69 acres" in an attachment referencing another lease. The referenced lease explicitly excluded a 400-acre tract of the 1,674 acres. The energy company attempted to exercise its option and drilled a well within the 400 acres. The landowners then leased the 400-acre tract to a second company. The energy company sued the landowners for breach of contract, claiming a reasonable interpretation included the 400-acre tract. The energy company claimed up to any 1,210 acres of the 1,674 acres of land described was in the option. The court, however, disagreed with this interpretation because the lease twice deemed the land around 1,210 in size, and the energy company paid for that exact acreage. Furthermore, the referenced lease explicitly exempts the 400 acres from the 1,674-acre tract. The court decided the only reasonable interpretation was that the option lease excluded the 400-acre tract, and the energy company had no cause of action against landowners because it had not yet exercised the option agreement.

Federal

9th Circuit

All. for the Wild Rockies v. Christensen, No. 14-35069, No. 14-35123 (9th Cir. Nov. 1, 2016).

The United States Forest Service and the United States Fish & Wildlife Service (collectively "agencies") initiated two projects in the Gallatin National Forest. An activist group sued for an injunction under the Endangered Species Act ("ESA"), claiming the agencies' activities would cause irreparable harm to the lynx and grizzly bear populations in the area. The court held that the agencies adequately considered the effects of road density and helicopter logging; therefore, they did not act arbitrarily or capriciously regarding the grizzly bear issue. The agencies did not, however, use specific location information on conducting the research for the lynx, so the court upheld the injunction on the agencies until they conducted adequate research considering effects to the lynx population.

State

Georgia

Nemchik v. Riggs, 792 S.E.2d 347 (Ga. 2016).

Lot 9 went through foreclosure and the plaintiff bought it with the intent to develop it; the defendant, however, claimed an easement on the property and began clearing trees. The plaintiff sought an injunction to prevent the defendant from entering the property until the court could decide whether an easement existed, which the court granted. The defendants appealed, claiming the plaintiff failed to show a substantial likelihood of success on the merits and that the defendant's injury outweighed the possible injury to the plaintiff—both necessary for an injunction. On appeal, the court found that the defendants offered no evidence of their easement, losing the first point, and cleared trees causing irreparable damage, losing the second point. The court upheld the injunction.

Illinois

AUI Const. Grp., LLC v. Vaessen, 2016 IL App (2d) 160009.

Property owners entered an agreement granting a wind energy developer ("Developer") an easement on their property. Afterward, the developer entered an agreement with a general contractor ("Contractor") to supply the wind turbine and tower. The contractor manufactured wind turbines but entered a fixed-priced contract with a wind turbine company ("Company") to design a prototype tower to support its wind turbines. The Company entered a cost-plus agreement with a sub-contractor to build the foundation and tower it designed. Once completed, the sub-contractor billed an amount greater than $5 million. The Company paid in part, leaving a balance of approximately $3 million. The sub-contractor filed arbitration demand against the Company and the arbitrator entered an award of approximately $3.5 million despite the Company filing for bankruptcy. The sub-contractor filed to foreclose a mechanic's lien against the Owners for the work it performed for the Company because its labor improved the property. The owners filed a motion to dismiss the sub-contractor's complaint. The contractor filed a motion for summary judgment on the sub-contractor's claims. Both motions asserted that the wind turbines remained the Developer's personal property and constituted a non-lienable trade fixture and not an improvement to the property. The trial court, applying three factors from *Crane Erectors & Riggers, Inc. v. La Salle National Bank,* 466 N.E. 2d 397 (1984) to determine whether equipment becomes a lienable fixture, granted both motions concluding that the turbines remained Developer's personal property and were unlienable. The sub-contractor appealed, but the appellate court affirmed the trial court's application of *Crane* and other factors such as the easement agreement that provided additional evidentiary support that the turbines constructed by sub-contractor remained personal property of the Developer.

Oklahoma

Calvert v. Swinford, 382 P.3d 1028 (Okla. 2016).

When landowners sold their property, not intending to sell the minerals, they hired an attorney and abstract company to make sure the transaction went as planned. The deed sent to them to sign did not reserve the mineral rights, so landowners sent it to the lawyer, who claimed to have fixed it. The landowners never read the deeds filed in 2002, which did not reserve mineral rights to the original owners. In 2014, the landowners filed suit against the lawyer, the royalty company, and the abstract company. Defendants filed a motion for summary judgment because the claim was years past the statute of limitations. Landowners contended that the statute of limitations did not start with the filing of the deed but when they first learned of the mistake in the deeds in 2013. Applying the discovery rule would allow the statute of limitations to start in 2013, but the court has only applied that rule in circumstances where negligence was not discoverable to plaintiffs exercising due diligence. The landowners were not exercising due diligence as they did not take advantage of the opportunity and obligation to read the deed they signed. Therefore, the statute of limitations accrued from the time of filing.

Oregon

Martin v. Lane County, 383 P.3d 903 (Or. Ct. App. 2016).

A landowner filed a complaint for declaratory ruling in circuit court over the correct zoning and application of state law to a county's zoning ordinances. The land was in an "Agriculture, Grazing, and Timber Raising" zone that had five-acre minimum lot sizes. Then a county ordinance rezoned the area as "Exclusive Farm Use" with a forty-acre minimum lot size. The landowner attempted to build and develop the land per its earlier zoning and lot size but the county's land management department denied it. The county claimed that land use decisions were the exclusive jurisdiction of the Land Use Board of Appeals of Oregon ("LUBA"). The court found that the complaint did qualify as a land use decision, and landowner could not bring a declaratory judgment action on a question of interpretation of County ordinance because it was under exclusive jurisdiction of LUBA.

Pennsylvania

Balady Farms, LLC v. Paradise Twp. Zoning Hearing Bd., 148 A.3d 496 (Pa. Commw. Ct. 2016).

Farmer sought judicial review of a township zoning board's decision denying the farmer a zoning permit for a poultry processing facility on his property because the proposed facility did not fall within the ordinance's definition of "agriculture" interpreted by the board. While the ordinance did not expressly prohibit the farmer's proposed facility, it defined "agriculture" as "'[a]n enterprise that is actively engaged in the commercial production and preparation . . . [of poultry] and [poultry] products.'" But the ordinance did not define the words "commercial," "production," or "preparation." The board based its conclusion that the definition of "agriculture" does not include a commercial poultry processing facility on the history of agriculture within the township and comments by property owners adjacent to the farmer's property. To resolve the dispute, the commonwealth court referenced the ordinance that explicitly stated "[w]ords, phrases, and terms not . . . defined shall be used in their ordinary context'" and dictionary definitions and then compared these facts to *Tinicum Township v. Nowicki*, 99 A.3d 586 (Pa. Cmwlth. 2014). In *Tinicum*, the Board denied a property owner a zoning permit for an on-site mulching operation because the mulch raw materials did not originate on the property. Here, the court concluded that because the farmer raised the chickens on the property, this operation is distinguishable. Based on the State's Municipalities Planning Code defining agricultural activities as "'some connection to or utilization of the land itself.'" Therefore, the proposed facility fell within the definition of "agriculture" as used in the ordinance.