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Recent Case Decisions

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Oklahoma Oil and Gas, Natural Resources, and Energy Journal

RECENT CASE DECISIONS

VOL. II, NO. VI

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All case citations are as of 3-18-2017. 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 2-12-2017. 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

5th Circuit

Basic Energy Serv. v. Occupational Safety & Health Review Comm'n., 666 F. App'x 364 (5th Cir. 2016).

An ALJ found that an operator of mobile oil and gas rigs failed to meet the Occupational Safety and Health Administration (“OSHA”) standard for “fixed stairs” and guardrails on their mobile rigs. The operator argued first that applying these two standards to mobile rigs creates an absurd result. The court rejected that argument based on the OSHA Secretary’s definition of “fixed stairs,” meaning “attached in some way to prevent movement,” as opposed to the operator’s definition—“permanently attached.” The court defers to the Secretary’s interpretation if it is consistent with regulatory language and not otherwise unreasonable. The operator next argued that stairs on mobile rigs fall into an exception for “articulated stairs.” The court noted that, although mobile rigs have multiple, independently articulated sections, these rigs do not fall into the exception, which targets stairs with base support that rises and falls. The court finally refused to consider the operator’s argument that the guardrail provision does not apply to mobile rigs, due to Operator’s failure to raise the argument before the Commission.

8th Circuit

Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minnesota LLC, 843 F.3d 325 (8th Cir. 2016).

A natural gas pipeline owner-operator brought a breach of contract suit against a customer to enforce performance of monthly payments in exchange for transporting natural gas to the customer. The district court held that it had federal question jurisdiction under the Natural Gas Act (“NGA”). The Eighth Circuit held that nothing in the NGA allowed a breach of contract claim in federal court and vacated the district court’s ruling for lack of subject matter jurisdiction.

10th Circuit

Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297 (10th Cir. 2017).

A startup natural gas producer filed an antitrust action against established competitors for violation of sections one and two of the Sherman Antitrust Act. The new producers sought an agreement to transport natural gas

through the old producers’ pipelines. The district court dismissed the new producer’s claim. The Tenth Circuit affirmed, holding that the essential facilities doctrine did not apply because the evidence presented by the new producer involved a larger, more expensive pipeline, which did not exist at the time of the alleged anticompetitive behavior. Therefore, the court could not conclusively find that the new producers faced a barrier to entry into the market due to cost concerns. Additionally, the Tenth Circuit held that the new producer failed to show how the old producers exhibited anticompetitive behavior under the rule of reason standard. The new producer never explicitly sought this standard and failed to provide evidence defining a relevant geographic market, market power, and product market as it related to upstream or downstream natural gas production.

State

Alaska

Chevron USA, Inc. v. State Dep’t of Revenue, 387 P.3d 25 (Alaska 2016).

In an administrative decision, the Department of Revenue (“DOR”) treated separate oil and gas fields operated by common producers as a single entity when calculating the producers’ tax obligations. The DOR had determined that the separate fields were “economically interdependent” within the meaning of a tax-aggregation statute because the fields could “be reasonably treated as an economically unitary activity.” The producers appealed, arguing that DOR effectively promulgated a regulation without following the requisite procedures. The state supreme court held that the decision was not a regulation but rather a “commonsense interpretation” of the tax-aggregation statute, which did not trigger the requisite procedures. The decision added no specific criteria to the tax-aggregation statute’s terms, instead merely clarifying its language. Moreover, the “commonsense interpretation” was narrowly tailored to the case’s facts and was foreseeable given the well-known purposes of the state’s tax regime.

Louisiana

Encana Oil & Gas, Inc. v. Brammer Eng'g, Inc., No. 51,045-CA, 2016 WL 6776075 (La. App. 2 Cir. Nov. 11, 2016), *reh'g denied* (Jan. 5, 2017).

Operators filed a concursus proceeding to resolve a contract dispute between mineral owners and their agent regarding royalty-based compensation to the agent. The mineral owners believed the contract required the agent to reserve an additional free overriding royalty fee on their behalf to trigger the agency's own compensation in the overriding royalty interest. The dispute arose after a third-party approached the agent with a bid package to extract resources near the mineral owners' interests, but the agent negotiated an overriding royalty interest only for his own compensation, per his interpretation of the earlier contract. The district court granted partial summary judgment in favor of the agent, and the owners appealed. The state appellate court found the contract's language unambiguous, concluding that it required the agent to reserve an additional royalty interest for the mineral owners beyond a lessor's royalty to earn compensation himself from an overriding royalty interest.

Gladney v. Anglo-Dutch Energy, 2016-468, 2016 WL 7402427 (La. Ct. App. 3 Cir. Dec. 21, 2016), *reh'g denied* (Jan. 25, 2017).

A lessor appealed the judgment in favor of a lessee for failure to make royalty payments under the mineral lease. The lease contained a one-fifth royalty provision of all oil and gas produced. The lessee subsequently sought to pool the lessor's interest into a production unit. The state regulatory agency approved the unit and issued a conditional allowable and an effective date for the unit. The lessor argued that, up to the effective date of the unit, the lessee owed royalty payments according to the lease. The lessee contended, in contrast, that the conditional allowable, as defined by the state regulatory agency, governed the royalty payment to lessors and abrogated the lease terms. The court rejected the lessee's argument; the conditional allowable does not abrogate the lease terms prior to the effective date of the unit. Unless explicitly stated by the agency's unitization order, the terms of the mineral lease govern the relationship between lessor and lessee until the effective date of the regulatory order.

Texas

Aruba Petroleum, Inc. v. Parr, No. 05-14-01285-CV, 2017 WL 462340 (Tex. App. Feb. 1, 2017).

In a memorandum opinion, a state appellate court reversed a jury verdict that held an operator liable for damages under private nuisance theory. Landowners sued the operator for "environmental contamination and polluting events," resulting in a verdict against the operator for over \$2.9 million. The operator appealed, arguing that the evidence in the record did not support the jury's finding of intentional private nuisance. The appellate court relied on *Crosstex North Texas Pipeline, L.P. v. Gardiner*, No. 15-0049, 2016 WL 3483165 (Tex. June 24, 2016) for the proposition that a defendant intentionally creates a nuisance when it "actually desired or intended to create the interference" or actually knew or believed "that the interference would result." Evidence that the operator intentionally engaged in conduct that *caused* the interference will not suffice to establish an intentional nuisance. Although evidence supported the landowners' claims of correspondence between employees of the operator and the operator's affiliate firms and complaints filed with state environmental agency, the landowners did not cite evidence establishing the operator intended or desired to create an interference with the landowners' enjoyment of property.

Denbury Green Pipeline v. Texas Rice Land, No. 15-0225, 2017 WL 65470 (Tex. Jan. 6, 2017).

A pipeline company applied for and received "common carrier" status from the Texas Railroad Commission, which allowed them to condemn land for a carbon dioxide pipeline. Landowners attempted to stop the pipeline from crossing their land. The pipeline company filed for a temporary and permanent injunction; in the case's second appearance before the Texas Supreme Court, the Court determined that the pipeline company was a common carrier because it could show a reasonable probability that the project would serve the public; thus, the right to eminent domain was reasonable. The pipeline company had produced sufficient evidence of a reasonable probability of serving the public at some point in the future. The lower courts' application of "substantial public interest" was erroneous: a slight public interest, such as contracting to transport carbon dioxide for one or more customers, is sufficient for common carrier status.

Parker Cty Appraisal Dist. v. Bosque Disposal Sys., LLC, 506 S.W.3d 665 (Tex. Ct. App. 2016).

Landowners petitioned to review the tax assessment of four subsurface saltwater disposal wells as separate property from the surface, causing the landowners to be subject to double taxation. The landowners claimed that the wells were not separate property interests because the surface and subsurface estates were not severed and argued that the tax code does not allow double taxation of the same property. The Texas tax code and common law, however, permit property appraisal based on individual characteristics and additionally provide that double taxation is not automatic just because a fee simple estate overlaps with other taxable categories such as leasehold or mineral interest. The separate assessment of the disposal wells used an approved revenue-based method plus the value of the surface based on its market real estate value. Because the landowner's argument was largely based on the mistaken understanding of the tax code, the appeals court held that the assessor could tax the that wells separately from the surface and reversed and remanded the trial court's summary judgment for landowners.

Richardson v. Mills, No. 12-15-00170-CV, 2017 WL 511893 (Tex. App. Feb. 8, 2017).

Grantees' successors-in-interest appealed a district court finding that a earlier document pertaining to minerals under certain property was a lease between the grantors and grantees that the grantees had released in a later document. On appeal, the Court of Appeals of Texas, Tyler held that the earlier document was instead an unambiguous mineral deed because the habendum and warranty clauses contained the word "forever." "Forever" signaled no limitation or condition on the conveyance of the mineral interest to the grantees. Additionally, the appeals court held that the later document was an unambiguous release of an unrecorded lease rather than a release related back to the earlier document—the deed. Only three of the six signers of the earlier document signed the later release. Plus, the later release referred to a definite period for the lease to exist, which the earlier document did not contain. The appeals court held that the grantees' successors-in-interest still owned the one-half mineral interest.

Ring Energy v. Trey Res., Inc., No. 08-15-00080-CV, 2017 WL 192911 (Tex. App. Jan. 18, 2017).

The operator of secondary recovery injection wells obtained permits from the Texas Railroad Commission ("Commission"). A neighboring oil and gas developer sought a restraining order and injunction, claiming "imminent danger of irreparable harm" to its mineral interests. The operator moved to dismiss the claim for lack of subject matter jurisdiction, arguing that § 85.241 of the Texas Natural Resources Code ("Code") requires claims against Commission decisions be brought in the Commission's Travis County seat. The operator also argued that § 85.321 of the Code prohibits "equitable relief" without plaintiff first suffering injury. The trial court granted the motion to dismiss. On appeal, the court held that the Code does not preclude pre-injury equitable relief but specifically contemplates the existence of claims either in Travis County or at the "local courthouse" where the threat of the injury exists, negating any argument of exclusive jurisdiction within Travis County.

Westport Oil & Gas Co., L.P. v. Mecom, No. 04-15-00714-CV, 2016 WL 7234056 (Tex. Ct. App. Dec. 14, 2016).

Gas royalty owners brought an action against a gas producer for underpayment of royalties. The lease's royalty clause calculates the royalties as a percentage of the market value of the gas produced from that well. The royalty owners argued that the market value is subject to the gas purchase agreement clause, which contains a formula for minimum payments of gas purchases. The producer paid royalties for the strict percentage of market value at the well, which was lower than the minimum used in the gas purchase agreement clause. However, the appeals court found that the plain language of the two clauses keeps them independent with no reference to the other and no uncertain or doubtful language susceptible to more than one meaning. Though the royalty payment may use the gas purchase agreement formula, in this lease, the gas purchase agreement clause only applies to future purchases and the royalty clause alone controls royalties.

Federal

7th Circuit

Benton Cty. Wind Farm LLC v. Duke Energy Ind., Inc., 843 F.3d 298 (7th Cir. 2016).

A wind energy producer and a local electricity company contracted for the Company to buy electricity from the producer's wind farm for \$52 per MWh produced and sell it to the grid under Midcontinent Independent System Operator ("MISO") for twenty years. When the producer's wind farm came online in 2008, it was the only wind farm in the area, and the company could purchase and sell all 100 megawatts. By 2013, the producer was no longer the only wind farm; total generation capacity had exceeded total transmission capacity in the area, such that MISO now treated wind farms like other electrical generation units, requiring curtailment. With MISO's changes, the company began bidding \$0 for the producer's wind production where the market clearing price was \$0 or above, even though it paid \$52 per MWh produced to Producer no matter the market clearing price obtained, thus usually operating at a loss. If the market clearing price is below \$0, then MISO did not buy the producer's generation and the company did not pay the producer the \$52 per MWh. The company did not elect to drop its regular bid below \$0, nor did it choose to build additional transmission lines to increase capacity. The producer sued the company for failure to lower the bid price or help increase transmission capacity, meaning the company owed the producer liquidated damages under the contract.

The producer did not argue for liquidated damages when MISO would not take the producer's electricity for other reasons. The district court found for the company. But the appeals court found for the producer: non-clearing price bids fell within the liquidated damages clause because of the company's "failure to obtain Transmission Services" either by lower bids or by finding alternative transmission services.

State

Texas

City of San Antonio v. Pub. Util. Comm'n of Texas, 506 S.W.3d 630 (Tex. App. 2016).

A wholesale electricity market participant had agreed to provide non-spinning reserve services to an independent systems operator. But due to a combination of harsh weather, mechanical failure, and questionable management oversight, the state public utility company ("PUC") penalized the market participant for violating a state administrative rule by failing to perform. The market participant exercised its right, under state rule, to seek judicial review of the PUC's decision. The market participant argued that the PUC "interpreted and applied" the state rule in a "new and novel manner" that conflicted with *TXU Generation Co., L.P. v. Public Utility Commission of Texas*, 165 S.W.3d 821 (Tex. App. 2005). The appellate concluded that the PUC did not enforce a new interpretation of the state rule because the language was plain and unambiguous.

Federal

4th Circuit

Ohio Valley Envtl. Coal. v. Fola Coal Co. LLC, 845 F.3d 133 (4th Cir. 2017).

Environmental groups sued to enjoin a coal company from allegedly violating the Clean Water Act (“Act”). The coal company argued that its permit issued pursuant to the Act shielded it from liability. The district court agreed with the environmental groups, finding that the coal company’s permit required it to adopt the state’s water quality standards, even if the permit language does not specifically enumerate those standards. On appeal, the coal company argued that the permit controls the conduct of the state regulator, rather than the regulated entity. The court rejected this argument, citing that unambiguous language in the permit refers to the regulated entity’s actions, not the regulator’s actions. Even if the court found the permit ambiguous and used extrinsic evidence to interpret it, extrinsic evidence supported the finding that the permit required compliance with state water quality standards. The court additionally found that the coal company’s disclosure of its planned discharges during the permitting process does not shield it from liability. The appellate court upheld the lower courts findings that the coal company violated its permit.

9th Circuit

All. for the Wild Rockies v. Krueger, 664 Fed. App’x 674 (9th Cir. 2016).

An environmental group moved to enjoin a National Forest Service (“NFS”) project, alleging violations of the Endangered Species Act (“ESA”), the National Forest Management Act (“NFMA”), and NEPA. The trial court found no such violations and granted summary judgment for NFS. The group appealed, and the court of appeals affirmed: First, NFS had not violated ESA because it properly relied on Fish and Wildlife Service records, which indicated that no grizzly bears inhabited the project area. Moreover, NFS had not violated NFMA because it relied on the “best available science” in implementing the project and ignored no relevant data. Finally, the impact statement regarding the project fully addressed the perceived environmental effects and thus was not arbitrary and capricious.

State

Colorado

Grand Valley Water Users Ass’n v. Busk-Ivanhoe, Inc., 386 P.3d 452 (Colo. 2016), *reh’g denied* (Jan. 9, 2017).

A municipality owns the rights to divert water from one river to a river basin to supplement irrigational uses. Beginning in 1987, however, the municipality diverted water to different, undecreed river basins. The municipality also diverted water to a reservoir to be used for later supplementation, which was outside of its decreed rights, but it had done so with no objection since the 1920s. In 2009, it finally filed an Application for Change of Water Rights. This application calls for a representative study period of beneficial use to determine the legitimacy of the need for a change in rights. The appeals court found that the law regarding transmountain water does not provide for automatic rights to store that water in a decree for rights to use the direct flow of that water, nor was the right to storage implied in the decree. The court required the years of undecreed use were to still be included in the representative study period needed for the change of rights then remanded the case to the Water Division to determine the future use of water rights.

Montana

United States v. Barthelmess Ranch Corp., 386 P.3d 952 (Mont. 2016).

Objectors appealed the Water Court’s decision in favor of the Bureau of Land Management (“BLM”), which claimed control over five reservoirs and one natural pothole lake. The objectors claimed that the Water Court erred in both its determination that BLM holds rights under Montana law in these reservoirs on federal land and that BLM owns reserved rights for stockwatering by permittees in the pothole lake under federal executive power. The court found BLM’s claims to the water arise from its reservoir construction, which the objector’s ancestral free grazing rights under Montana law does not preclude. Further, the enabling statutes and executive order properly reserved the pothole lake to the federal government; therefore, BLM correctly claimed rights to this water.

Pennsylvania

Lester v. Dep't of Envtl. Prot., No. 1778 C.D. 2015, 2017 WL 127805 (Pa. Commw. Ct. Jan. 13, 2017).

Pennsylvania's Department of Environmental Protection ("DEP") ordered a landowner's son to remove certain underground storage tanks from his family's land. The Environmental Hearing Board upheld the order, finding that the landowner's son financially responsible as "operator" of the tanks per the spill-prevention statute. The landowner's son appealed, arguing that he was not the operator of the tanks. But the court held that he had "managed, supervised, altered, controlled, or had responsibility for the operation" of the tanks, making him an "operator." Moreover, the landowner's son had claimed operator status in several instances when completing DEP forms. The Son also argued that because he did not own the tanks, imposing financial responsibility on him amounted to a taking. The court reasoned, however, that the spill-prevention statute was a valid exercise of the state's police power. Because the order served the statute's purpose of eliminating contamination and removing underground tanks, requiring tank operators to expend financial resources was not unduly oppressive.

Washington

Quinault Indian Nation v. Imperial Terminal Services, LLC, 387 P.3d 670 (Wash. 2017).

Two oil terminal companies operating on the coast of Washington wanted to expand their storage capabilities to facilitate more traffic. Between the two proposals, rail traffic could increase by 973 transits (133%) per year and ocean vessel transit would increase by 520 transits (310%) per year. The Department of Ecology ("DOE") and the city both approved the permits, but a Native American tribe and ecological conservation groups (collectively, "Petitioners") challenged the permits. The Petitioners claimed that the DOE and city incorrectly applied the Ocean Resources Management Act ("ORMA"). The Court of Appeals held that the ORMA regulations are narrow and do not govern these permits. On appeal, the Washington Supreme Court reversed those limitations of the ORMA. ORMA intends to protect against the dangers of oil transportation on oceanic life. The terminal companies argued that their proposed activities did not fall within this regulation as it was not "transportation" or "ocean uses" as defined by the DOE. The Supreme Court also held this to be incorrect. For these reasons, the permits required review under ORMA.

Federal

9th Circuit

Marilley v. Bonham, 844 F.3d 841 (9th Cir. 2016).

Non-resident commercial fishermen (“Non-residents”) filed a class action against the Director of a State Fish and Game Department claiming violations under the Privileges and Immunities Clause and the Equal Protection Clause. The dispute arose under statutory mandates that charged Non-residents higher fees for fishing licenses, vessel registrations, Dungeness crab permits, and herring gill net permits (collectively, “fee differentials”). A federal district court granted the Non-residents summary judgment; the Director appealed. The Ninth Circuit reversed. Although the fee differentials

burdened the Non-residents’ “common calling” to commercial fishing, they did not violate the Privileges and Immunities Clause because the state had a substantial interest in recouping the loss in revenue from Non-residents that it could collect from state taxpayers. And the fee differentials did not violate the Equal Protection Clause because they were rationally related to a legitimate state interest of recovering the Non-residents’ share of benefit provided to them by the state’s management of its commercial fishery.