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Recent Case Decisions

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RECENT CASE DECISIONS

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SELECTED OIL AND GAS DECISIONS

Upstream – Federal

3d Cir.
Wayne Land & Mineral Grp. v. Del. River Basin Comm'n, 894 F.3d 509 (3d Cir. 2018).

Corporation sought a declaratory ruling by the court that Commission's moratorium on fracking projects in the "Basin States" area was inappropriate. The district court ruled in favor of Commission, finding that the fracking activities under review fell within Commission's oversight authority, which was the power to oversee all projects related to the water resources of the Basin, and, therefore, Corporation's claim was subject to dismissal for failure to state a claim for which relief may be granted. Both the district court and appellate court dismissed Commission's complaint that Corporation lacked the appropriate standing to bring its claim for failure of ripeness or a failure to exhaust administrative options, as Corporation sought a declaratory judgement regarding disparate and ongoing legal positions rather than an administrative appeal of a final judgment. Contrary to the lower court's opinion, however, the appellate court found that Commission's "Compact," from which its oversight authority was derived, did not specifically address fracking activities and was therefore subject to further fact-finding on remand. Although the Compact broadly addressed projects and water resources, which, if liberally construed, could allow for the regulation of fracking activities by Commission, the presence of the word 'for' as a conjunctive between projects and water resources created ambiguous context for the intentions of the Compact. Corporation argued that the Compact was too loosely read to allow for regulation with the mere connection of a project and a water resource. Further, ambiguity in the term 'project' required more fact-finding to determine the true intentions of the Compact. Although the appellate court remanded the case for further factual determinations as requested by Corporation, the court made no endorsement of the interpretive efforts of either party.

N.D. Texas
Segner v. Ruthven Oil & Gas, LLC, No. 3:12-CV-1318-B, 2018 WL 3155827 (N.D. Tex. June 28, 2018).

Transferor engaged Transferee to help it find and acquire mineral interests in certain Oklahoma counties. Transferee acquired 197 interests and was paid by Transferor. Transferor filed for bankruptcy and then sued Transferee in bankruptcy court, claiming that the transfer was avoidable. The court found that the transfer *was* avoidable. However, Transferee was able to establish the affirmative defense that it received the money in exchange for value, in good faith, and without knowledge that the transfers were avoidable. The court ruled in Transferee's favor and Transferor moved for a judgement as a matter of law and a new trial. Transferor argued that the court should award it judgment as a matter of law because Transferee acted in bad faith, did not present evidence regarding the value of the mineral interests transferred, and failed to establish defense elements for each one of the 197 transfers. The court denied Transferor's judgment as a matter of law for several reasons. First, Transferee acted in good faith during the transaction. Second, Transferee did not have to present evidence regarding the value of the mineral interests transferred, only the value sufficient to support a contract. Third, Transferee submitted sufficient evidence to the jury. Transferor also argued that the court should order a new trial because the jury was prejudiced after the discussion of attorney fees, the jury was not instructed to look at the defense elements for each of the 197 transfers, the court erred in its prior findings, and the verdict was against the weight of the evidence. The court denied the motion for a new trial after finding that the jury was properly instructed, not prejudiced, and the verdict was not against the great weight of the evidence.

N.D. W. Virginia
Games v. Chesapeake Appalachia, LLC, No. 5:17CV101, 2018 WL 3433280 (N.D.W. Va. July 16, 2018).

Lessor sued Lessee on claims of: (1) declaratory judgment; (2) breach of duty of good faith and fair dealing; (3) breach of the implied covenant to market; (4) emotional distress; and (5) punitive damages. Lessor alleged that leases between the parties expired at the end of the primary term and that no secondary term had been established by "Delay in Marketing" payments. Lessee moved for summary judgment, arguing that the record lacked any evidence supporting Lessor's claims. The district court granted the motion for summary judgment based on several findings.

First, the court found that the leases were properly pooled with adjoining tracts and thus extended into secondary terms. Second, Lessor could not establish any evidence to substantiate its claims of violation of the implied covenant to market and act in good faith. Third, Lessor did not allege any personal injury and thus could not recover for emotional distress. Fourth, the Lessor could not prove by a preponderance of the evidence any gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others. As such, the court dismissed the civil action.

Upstream – State

North Dakota
Agri Indus., Inc. v. Franson, 2018 ND 156, 915 N.W.2d 146.

Company sued Property Owner for breach of contract regarding failure to pay for well-drilling services. Property Owner then commenced a third-party action against Corporation, alleging that Corporation was responsible for initial damage to the property that necessitated Company's services. Following a lower court's finding, the Supreme Court of North Dakota affirmed the judgment in part and reversed in part, holding that the lower court's granting of summary judgment in favor of Corporation was legally and factually supported, whereas the lower court's granting of prejudgment interest in favor of Company was not. The Court noted the plain language of the state statute, which expressed that recovery under Property Owner's theory of third-party liability required a certified water quality or quantity test that could support the allegation of damage. The test was not performed within one year preceding the drilling operation as required by statute, so Corporation could not be liable for Property Owner's failure to pay for drilling services as a matter of law. The lower court erred, however, in granting a post-trial motion by Company for prejudgment interest. The lower court held a jury trial to resolve the contractual dispute between Property Owner and Company following Corporation's dismissal. The jury awarded Company the full amount of the contract, to which the district court added the interest award. Although judicial opinions had established the context by which an interest award would be appropriate—through contractual agreement and not jury determinations—the appellate court held that neither party had objected to the presence of interest determinations in front of the jury. Therefore, the Court found it appropriate in the context of the case to uphold the jury verdict and return the award amount to the jury's initial determination.

Gerrity Bakken, LLC v. Oasis Petroleum N. Am., LLC, 2018 ND 180, 915 N.W.2d 677.

Trustees sought an appeal from a quiet title judgment in favor of Lessees. Lessees originally brought suit seeking an interpretation of two deeds conveying mineral interests. The Supreme Court of North Dakota affirmed the district court's decision. The Court affirmed for two reasons. First, the Court considered the sensible construction and plain and unambiguous language of the deeds, finding that the fraction in the granting clauses of the deeds had to be applied to the fractions comprising the individual descriptions of the property interests conveyed by the granting clause. The district court properly construed the deeds by multiplying the granting clause fraction and the property description fraction. This calculation resulted in a conveyance of interests to Lessees. Second, the Court held that because Lessees did not acquire their interest until two years before a 2013 quiet title judgment, the privity doctrine did not apply. Trustees argued that the district court's findings constituted an impermissible collateral attack on the 2013 judgment. The Court, however, ruled that the privity doctrine did not apply concerning a judgment to which Lessees were not a named party.

Siana Oil & Gas Co., v. Dublin Co., 2018 ND 164, 915 N.W.2d 134.

Claimant initiated a quiet title action regarding the proceeds from the production of an oil and gas well against a multiplicity of interested parties claiming their own royalty interests ("Group"). Claimant asserted a sixteen percent (16%) interest, whereas Group asserted an eleven percent (11%) interest contained within Claimant's own interest but allegedly severed in a 1938 assignment. Claimant appealed the district court's grant of summary judgment in favor of Group. Both parties asserted that their interests could be traced in an unbroken chain of title to their respective beginnings. The real property involved was subject to a 1931 tax foreclosure purchase by the county, after which the property was sold to a private party in 1945. The issue before the Supreme Court of North Dakota was the 1938 assignment and whether it was an appropriate instrument of transfer of severed mineral rights, or whether the mineral rights remained attached to the property, and thus transferred to Claimant as the eventual holder of the real property rights. The Court held that previous findings supported the notion that, even if earlier conveyances purported to sever a royalty interest, the tax deed

gave the county title to the whole estate, which was then transferred in full, including the royalty interests, to Claimant's predecessor in interest. Therefore, Claimant had title as a matter of law and the appellate court reversed the lower court's judgment. Furthermore, because the Court concluded that royalty interests in mineral rights cannot be possessed until extraction, Group's assertions of a statute of limitations defense, adverse possession, or laches was not applicable. Royalty interests were not, therefore, attached to the real property, but rather, were conceptually personal property once extracted and not subject to adverse possession. Following satisfaction of title in Claimant, the Court remanded for further proceedings regarding recovery on completed royalty payments.

Oklahoma
Hall v. Galmor, 2018 OK 59, 2018 WL 3133124 (Okla. June 26, 2018).

Lessee-1 brought suit against Lessee-2 to quiet title in favor of Lessee-1's top leases and against Lessee-2's lower leases. The district court found in favor of Lessee-2 and Lessee-1 appealed. The Supreme Court of Oklahoma affirmed in part, reversed in part, and remanded for further proceedings. The Court's decision was based on several grounds. First, Lessee-1 lacked standing to claim error in the district court's decision to refuse to quiet title in his favor to some of the land. Second, the district court was right to reject Lessee-1's definition of "capable." The higher court chose a flexible definition, holding that that if the well was complete and producing in paying quantities when it was shut in, then the well remained capable. Third, based on the clear weight of the evidence, the district court appropriately found that the wells in question were capable of producing in paying quantities. Fourth, the well leases had not terminated under the habendum and cessations clauses. Fifth, the district court was correct in finding that the leases in question could not be canceled, based on case law governing the implied covenant to market, because the prerequisites for a demand to market had not been met. Sixth, the district court erred in not quieting title to Pugh Clause lands in Lessee-1's favor. The Pugh Clause prevents a spacing unit well's production from satisfying the habendum clause of any lease concerning acreage outside of the unit. The Pugh Clause does not constitute a taking in violation of the Oklahoma Constitution. Lastly, the district court erred in quieting title to Non-Unit Leases in Lessee-2. The habendum clauses for the Non-Unit Leases were never satisfied, and therefore, Lessee-2's rights to the lands terminated upon expiration of the primary term of the leases.

Thompson v. Taeda Invs., *LLC*, No. 12-17-00195-CV, 2018 WL 3196628 (Tex. App. June 29, 2018).

Trustee signed a property management agreement with Agent in connection with the management of mineral property owned by the Trust. Trustee agreed to pay Agent as consideration for managing the mineral property for a four-year term. Also, upon the execution of any oil, gas, and mineral lease, Trustee agreed to pay the Agent an overriding royalty interest. Agent negotiated a lease with a third-party. Trustee made some payments to Agent but refused to pay more. Agent sued for breach of contract and, alternatively, for declaratory judgment. The trial court granted three of Agent's motions for summary judgment. First, the court declared that the contract was not ambiguous and payments were to continue to be made by Trustee. Second, it ruled that Trustee breached the agreement by failing to pay. Third, the court ordered Trustee to specifically perform. Trustee appealed, arguing: (1) that the agreement was ambiguous; (2) that the term "overriding royalty interest" created fact issues and therefore summary judgment was not appropriate; and (3) that it fully performed, and thus, specific performance was not appropriate. With regards to the first and second issue, the court held that "overriding royalty interest" did not create fact issues and therefore summary judgement was appropriate. As to the third issue, the court reasoned that the terms of the agreement were certain, and Trustee did not perform. Therefore, specific performance was appropriate. For these reasons, the court affirmed the trial court.

U.S. Shale Energy II, LLC v. Laborde Props., L.P., 551 S.W. 3d 148 (Tex. 2018).

Holders of nonparticipating royalty interest in oil and gas brought action against Landowner, seeking a declaratory judgment that a deed reserved a floating 1/2 interest, resulting in a 1/10 royalty under the lease. Landowner counterclaimed, asserting that the deed reserved a fixed 1/16 royalty. The dispute centered around the interpretation of two different clauses from the deed: "an undivided one-half (1/2) interest in and to [the royalty]…in and under…the above described premises, the same being equal to the 1/16th of production." The court reasoned that when the first clause was read independently, it indicated a floating royalty. The Supreme Court of Texas held that the second clause was not meaningless, and both clauses continued to be given effect in the face of leases departing from what was once a ubiquitous 1/8 royalty. The 1/16th clarified what a 1/2 interest in the

royalty amount was when the deed was executed. In support, the Court referred to the comma placement in the second clause, which indicated a nonrestrictive dependent clause. Such a clause gives additional description or information that is incidental to the central meaning of the sentence. For these reasons, the Court found that the deed reserved a floating 1/2 royalty interest and ruled in favor of Holders. The dissent argued that the first clause did not clearly indicate a floating royalty and also that the two clauses should have been analyzed in isolation.

Midstream – Federal

4th Cir.
Ergon-W. Va., Inc. v. United States Envtl. Prot. Agency, 896 F.3d 600 (4th Cir. 2018).

Oil Company petitioned for a review of EPA's denial of a small refinery exemption from renewable fuel standard program ("Program"). Program requires that companies blend a certain percentage of renewable fuels into their output but has an exception for refineries whose average aggregate yearly output does not exceed 75,000 barrels, if said refinery would endure a "disproportionate economic hardship" because of it. 45 U.S.C. § 7545(o)(9)(B)(i). The determination of this economic hardship is performed by Department of Energy guidelines and the individual profitability and gross-net refining margins of each company. Oil Company primarily produces lubricants, and only a small fraction of its output is sold as fuel, but nonetheless is categorized as a refinery. EPA only considered in its review the viability of impact on Oil Company to comply with the standards, not the impairment of refining operations in the aggregate. The court granted petition for review, vacated EPA's denial, and remanded for further proceedings.

D.C. Cir.
Big Bend Conservation All. v. Fed. Energy Regulatory Comm'n, 896 F.3d 418 (D.C. Cir. 2018).

Federal Energy Regulation Commission ("FERC") authorized Company to construct and operate an export facility including a 1,093-foot pipeline from Presidio County, Texas to the international border, where the facility was located. FERC authorized the facility under Section Three of the Natural Gas Policy Act ("NGPA"), which allows intrastate pipelines to transport gas on behalf of interstate pipelines at prices deemed fair by FERC. FERC

also found that the pipeline would not have a significant impact on the human environment and did not require Company to complete and Environmental Impact Statement ("EIS"). Conservation Alliance brought three arguments against this authorization, one of which the reviewing court lacked jurisdiction to hear because Conservation Alliance did not raise it in agency adjudication. The remaining two arguments were decided under the "arbitrary and capricious" standard of the Administrative Procedure Act. Conservation Alliance first contended that Company should be subject to Section Seven—regulating interstate pipelines—rather than Section Three of the NGPA. However, the court held that FERC met the arbitrary and capricious test for this argument. There was sufficient evidence that Company would be engaged only in the transport of intrastate gas and, therefore, subject only to regulation by the State of Texas. Conservation Alliance next argued that the pipeline should be subject to federal regulation because the export facility connected to it. The court dismissed the "connected actions regulation" argument based on precedent. Finally, Conservation Alliance contended that even if the pipeline was intrastate, the court should "federalize" the pipeline. The court quickly dismissed this argument because Conservation Alliance claimed FERC should use a test to determine its control over the pipeline that had been previously rejected by the court and replaced with a new test by FERC.

Midstream – State

Virginia
Barr v. Atl. Coast Pipeline, LLC, 815 S.E. 2d 783 (Va. 2018).

Landowners appealed a declaratory judgment granted to Natural Gas Pipeline Company ("Company"), which affirmed Company's authority to enter Landowners' private property for conducting preliminary surveys and other activities within a range of dates to evaluate the potential location of a natural gas pipeline without the express permission of the landowner. On appeal to the Supreme Court of Virginia, the Court considered the following. First, "whether the trial court erred in its interpretation of Va. Code Ann. § 56-49.01(A) (2018) ("statute")." Landowners alleged that the word 'and' as used in the pertinent part of the statute, was conjunctive. They believed the statute required Company to prove that its activities were necessary both "to satisfy any regulatory requirements" and "for the selection of the most advantageous location or route." The Court disagreed with Company's argument and held that the lower court did not err when interpreting the language at issue in the disjunctive because reading the

language as conjunctive "would render certain portions of the statute meaningless." Second, the Court considered whether the trial court misapplied the statute. The Court held that the statute was not misapplied for the following reasons: (1) the trial court did not rely on improper facts in deciding landowners demurrer; (2) the trial court did not permit Company to conduct activities that were not allowed by statute; and (3) the Court found no merit in Landowner's argument that the statute did not permit Company to provide multiple date ranges when it would conduct its activity. Because the Court held that the trial court did not misapply the Statute, it did not need to undertake further consideration of whether Company's subsequent authorized entry onto Landowners' property resulted in an illegal taking. As such, the Court affirmed the prior judgement.

Downstream – Federal

N.D. Texas
In re Goodrich Petroleum Corp., 894 F.3d 192 (5th Cir. 2018).

Non-Debtor, as part of a settlement agreement with Debtor, executed a ratification of a previously disputed mineral lease in favor of Debtor. The settlement agreement required Debtor to make substantial cash payments over time to Non-Debtor; the recorded ratification of the lease did not reflect this and indicated that consideration had been paid for the ratification. Debtor did not pay and filed bankruptcy shortly after. Non-Debtor filed a motion seeking to compel assumption or rejection of the settlement agreement. Alternatively, it sought to dissolve the settlement agreement in its entirety. The bankruptcy court denied the motion and the district court affirmed. The Bankruptcy Code affords a debtor-in-possession the abilities of a bona fide purchaser for the debtor's interest in immovable property. First, Non-Debtor argued that bona fide purchasers are not covered under the Louisiana Public Records Doctrine and that Debtor remains responsible for its obligation. The Fifth Circuit Court of Appeals disagreed and found that bona fide purchasers are covered under the law and are not responsible to pay the obligation under the settlement agreement. Second, Non-Debtor argued that it could dissolve the settlement agreement and strip the Debtor of its interest in the mineral lease. The court again disagreed, reasoning that under Louisiana law, if the public record shows that the purchase price was paid, the seller's dissolution rights are not effective against third-parties. Since the lease

ratification showed the purchase price had been paid, the Non-Debtor could not dissolve the agreement. As such, Fifth Circuit court affirmed the judgment of the lower court.

SELECTED WATER DECISIONS

Federal

Supreme Court of the United States
Florida v. Georgia, 138 S.Ct. 2502 (2018).

The Supreme Court of the United States exercised original jurisdiction regarding apportionment of water from an interstate river basin ("Basin"). Chattahoochee and Flint Rivers converge in Lake Seminole, then merge downstream as the Apalachicola River. Florida, the downstream state, sued Georgia, the upstream state, asking the Court for an equitable apportionment of Basin's waters. Florida claimed that Georgia's overuse of water from Basin resulted in decreased downstream flow, harming, for instance, Florida's oyster industry. Florida sought a remedy in the form of a cap on Georgia's water consumption from the Flint River. The lower court appointed a Special Master to investigate, and the Special Master concluded that Florida failed to make an initial showing because there was no "clear and convincing" evidence that the injury could be redressed by a decree capping Georgia's consumption without binding the Corps, which had several dams and reservoirs along the Chattahoochee, where it stores water and controls water that flows downstream to Florida. The Special Master explained that relief without binding the Corps was plausible, but Florida had failed to show such relief was justified and adequate. On appeal, the Court determined that the "clear and convincing" standard was too strict, and the standard for a State establishing redressability is one of flexibility and approximation. The Special Master determined, and the Court accepted, that: (1) Florida had suffered harm as a result of the decreased water flow into the Apalachicola; (2) Georgia consumed too much water from the Flint; and (3) this overconsumption injured Florida. Thus, the Court determined the prime issue was "whether Florida had shown that a cap on Georgia's consumption would redress its injury if the decree did not bind the Corps as well." The Court determined that a cap was likely to fix the problem without necessarily binding the Corps and the extra water would be likely to redress Florida's injuries, but those issues were remanded for further findings.

State

Colorado
Coors Brewing Co. v. City of Golden, 2018 CO 63, 420 P.3d 977 (2018).

Beverage Manufacturer appealed a district court's ruling that Beverage Manufacturer could only reuse return flows of water by adjudicating a new water right. Beverage Manufacturer's original application was to amend its decreed augmentation plan to reuse return flows from water it had purposefully diverted itself. The court found that because State water licenses are based on a right to use, and not ownership, Beverage Manufacturer must adjudicate a new water right and could not amend its original augmentation plans. The augmentation plans did not allow reuse and successive use of water, and, therefore, Beverage Manufacturer did not adjudicate the rights of reuse and successive use. The court also found that Beverage Manufacturer did not own the water and, therefore, water that was not used in Beverage Manufacturer's initial use had to be returned to the public stream. The returned flows were subject to appropriation by other water users because the flows are state waters. Beverage Manufacturer would have automatic right to reuse if the water was foreign and imported by Beverage Manufacturer. The Supreme Court of Colorado held that the water court correctly interpreted Beverage Manufacturer's decrees providing that Beverage Manufacturer would return all unused water back into the native stream. The court correctly interpreted the decrees to be requirements as to where the water must be returned, not only options, as Beverage Manufacturer argued. The Court affirmed the water court's judgement and remanded the case for proceedings consistent with its opinion.

SELECTED LAND DECISIONS

Federal

Fed. Cir.
Shell Oil Co. v. United States, 896 F.3d 1299 (Fed. Cir. 2018).

This appeal centered on issues created by contracts between the United States government and several oil companies ("Companies") during World War II to guarantee a steady supply of 100-octane aviation gas. In a related 1991 suit filed by the U.S. and the State of California, the Ninth Circuit found the U.S. liable for 5.5% of the environmental impact violations under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Companies, which were parties to both the 1991 suit and World War II contracts, then filed suit in an effort to recover the rest of the clean-up costs based on alleged breach of the World War II contracts. The contract clause in question specified that the U.S. would reimburse Companies for any additional costs they might incur during production, manufacture, delivery, or sale of the aviation gas. The suit was appealed on two motions: (1) granting Companies' motion to prevent discovery into insurance coverage and settlements; and (2) denying the U.S.' motion for leave to amend its answer. The United States Court of Appeals for the Federal Circuit found that the lower court was correct in its calculation of damages and allocation of damages between parties. Additionally, the court held that a claim to offset damages by monies received from another source, such as insurance, is an affirmative defense and was therefore waived by the U.S. The lower court did not err in denying the U.S.' motion for leave to amend because the U.S. was neither prejudiced by nor subject to some undue delay in understanding that the oil companies had insurance policies. Therefore, the U.S. lost the affirmative defense when it failed to assert it in the answer.

N.D. W. Virginia
Wickland v. Am. Mountaineer Energy, Inc., No. 1:17CV205, 2018 WL 3029273 (N.D. W. Va. June 18, 2018).

Landowners sued Company for breach of contract, claiming that Company (1) failed to make an advance royalty payment in 2017; (2) failed to mine coal during the lease; (3) transferred rights in the lease without Landowners' consent; (4) failed to transfer various documents, permits, and surface rights; and (5) failed to provide maps, reports, drilling logs, and

surveys. Company sought to have the 2017 advance royalty payment, failure to mine, lost production royalties, transfer of surface rights, transfer of permits, and good faith and fair dealing claims dismissed. The district court first clarified that Landowners' inclusion of multiple breach of contract claims under one count for relief did not insulate those independent claims from possible dismissal. The court denied Company's motion to dismiss the 2017 advance royalty payment claim and lost production royalties claim because the court found that both claims were used as measures of damages sustained rather than actual claims that could be assessed and possibly dismissed. The court denied the motion to dismiss the permit transfer claim because the lease had ambiguous language as to this provision, which precluded dismissal. The court denied the motion to dismiss the surface rights transfer claim because the court found that this claim came down to a question of contract interpretation inappropriate for dismissal. The court granted Company's motion to dismiss the failure to mine claim because the lease, as a whole, could not be reasonably interpreted to place such an obligation on Company if the lease was terminated before mining began. Finally, the court granted the motion to dismiss the good faith and fair dealing claim because Landowners failed to state implied good faith and fair dealing claims that were not already covered by other breach of contract claims.

W.D. New York
Morabito v. New York, No. 6:17-cv-06853-MAT, 2018 WL 3023380 (W.D.N.Y. June 18, 2018).

Landowners filed suit against State for alleged violations of the Fifth Amendment Takings Clause and the Fourteenth Amendment Due Process Clause because State banned high-volume hydraulic fracturing in the state, including on Landowners' property. State prevailed and Landowners filed suit in the Federal District Court for the Western District of New York. Before the district court, Landowners filed two motions to amend their complaint, and State filed a motion to dismiss the claims. The court granted State's motion to dismiss and denied Landowners' motions to amend for several reasons. First, the court granted State's motion to dismiss because the state had not waived its immunity to suit under the Eleventh Amendment and thus, the Landowners' complaint was barred and required dismissal. Second, Landowners' attempt to circumvent the Eleventh Amendment by suing the State Department of Environmental Conservation Commissioner in his individual capacity is denied because the amended complaint fails to show any personal actions by the Commissioner that

would open him to suit in an individual capacity. Finally, the Landowners' Due Process claim amendment was denied under the theory of collateral estoppel because the issue had already been fully litigated in state court and decided against Landowners.

State

Alaska
Fink v. Municipality of Anchorage, 424 P.3d 338 (Alaska 2018).

The dispute centers around a special assessment made by Municipality to Property Owners of newly developed parcels of land in order to pay for the recent construction of road, water, and sewage improvements to the benefit of the parcels. Property Owners alleged the costs were improperly assessed for unrelated municipal projects. They also alleged that the assessment exceeded the cap set by local ordinance and that, because the costs outweighed the benefits provided by the improvements, they violated municipal and state law. Municipality complied with local ordinance by keeping separate accounts on the unrelated project and the improvements to Property Owners' parcels. Because Property Owners did not allege unfair bias or malice in assessing the costs, the Supreme Court of Alaska rejected this argument. The court also rejected Property Owners' argument that the assessment exceeded a cap in AMC 19.30.040(A). The provision provided a cap on assessments but included an exclusion for it as assessed elsewhere in the title. Three provisions relating to assessment costs on road, water, and sewage improvements existed elsewhere in the title and were applicable. The costs assessed to Property Owners complied with these provisions. Finally, Property Owners alleged the assessment was grossly disproportionate to the increase in property value. The Court reasoned that property value was not the only factor to take into account when calculating benefit; the assessment provided roads and basic utilities necessary for residential development as well. The discrepancy between the total benefit and the assessment was not grossly disproportionate. As such, the Court affirmed the lower court's decision.

Florida
City of Clearwater v. BayEsplanade.com, LLC, No. 2D17-2006, 2018 WL 3077188 (Fla. Dist. Ct. App. June 22, 2018).

Company sued City to quiet title to land that was submerged beneath a channel, City counterclaimed to quiet title to the same piece of land. Both

parties' claims originated from quitclaim deeds: Company's from 1957 and City's from 1934. The lower court granted summary judgment to Company, and City appealed. The appellate court held that the 1934 deed was not ambiguous because the granting of "all lands" to a certain point clearly conveyed both normal and submerged land up to that point. The court then held that the lower court erred in (1) concluding that there was ambiguity in the 1934 deed and (2) allowing extrinsic evidence to color the interpretation of the deed. The court also stated that using Company's interpretation of the 1934 deed would have made the word "all" have no purpose, which runs counter to the court's direction to follow interpretations that allow every word in a document to affect the meaning. Accordingly, the appellate court reversed the lower court's decision and remanded the case to have quiet title granted to City.

Louisiana

Grace Ranch, LLC. v. BP Am. Prod. Co., 17-1144 (La. App. 3 Cir. 7/18/18); 2018 WL 3454981.

Landowner Company sued Oil Companies, alleging that Oil Companies contaminated the land prior to Landowner Company's possession of the land. The lower court granted summary judgment for Oil Companies, and Landowner Company appealed the case with five claims of error: (1) the claim should not have been dismissed under the subsequent purchaser rule; (2) the assignments of surface and mineral rights from previous owners should have provided a claim; (3) one particular assignment of claims should not have been found invalid; (4) prescription should not have been used for dismissal; and (5) the *jurisprudential* subsequent purchaser rule should not have been used, since the claim had statutory support. The appellate court rejected the inapplicability of the subsequent purchaser rule to a purely mineral estate claim because the court found from previous case decisions that the rule is properly applicable for cases of both surface and mineral ownership. It then rejected the claim that statutory language made a mineral lease a real right, inherited with the land, which would allow a subsequent purchaser to sue for prior property damages because statutes and previous case decisions indicated that a mineral lease is a real right which does not automatically attach to property. It also rejected the argument that the acquisition of the property would allow suit to be brought against those with a mineral lease to the property because the mineral leases had expired before Landowner Company actually

acquired the property. The one assignment of claims found invalid was upheld as invalid because the company that gave that assignment dissolved itself as a corporation and waived its right to pursue any "outstanding claims," so it could not pass them. The court declined to address the issue of prescription because Landowner Company had "no right of action." Accordingly, the lower court's decision was affirmed.

Pennsylvania
New Hope Crushed Stone & Lime Co. v. Dep't of Envtl. Prot., No. 1373 C.D. 2017, 2018 WL 3447581 (Pa. Commw. Ct. June 7, 2018).

Company petitioned court to review an order to dismiss Company's appeal from Department's modification of Company's Reclamation Plan. Company mined a quarry located in the same township as Solebury School. Department had determined that the mining and dewatering of the water table was creating a public nuisance and causing sinkholes to open on School grounds. The court affirmed the order to dismiss for several reasons. First, the disputed adjudication pertaining to the quarry was never appealed to the Environmental Hearing Board and was decided by applicable law correctly. Second, the determination that the quarry was a nuisance was subject to collateral estoppel and administrative fidelity. Third, there were no improper restrictions imposed on Company's discovery requests relating to School grounds connected to the quarry. Fourth, the Department's modified requirements for the Company were not made arbitrarily or capriciously.

This is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing this case as precedent.

Wyoming
BNSF Ry. Co. v. Box Creek Mineral Ltd. P'ship, 420 P.3d 161 (Wyo. 2018).

Mineral Company sued Railroad Company to get declaratory judgment and quiet title to the mineral rights in land given to Railroad Company via two deeds from 1913. The lower court found the deeds to be ambiguous and thus refused summary judgment. At a bench trial, the lower court found that the deeds only conveyed an easement to Railroad Company, so the court granted Mineral Company its declaratory judgment and quiet title. Railroad Company appealed the decision to the Supreme Court of Wyoming with

issues as to (1) whether the deeds were actually easements or not and (2) whether the lower court was correct in admitting Mineral Company's expert witness testimony. The Court starts its analysis by agreeing with the lower court's finding that the deeds are ambiguous because "both deeds convey a 'strip of land' without any limitation," but also grant the use of land for specific purposes, implying limitations on granted land rights, and both deeds granted an ambiguous "right of way" on the land. The Court then upheld the finding that the deeds granted easements because the meaning of "right of way," as understood in 1913, meant an easement and, additionally, the terms of the deed as a whole only make sense when read as granting an easement, and not a limitless estate in the land. The Court found fault with the admission of Mineral Company's expert witness testimony because the lower court provided no specific findings as to how it determined the expert witness as admissible. However, the Court found that this error was ultimately harmless because the lower court could still have found the deeds to be granting nothing more than an easement without the expert testimony. Thus, the Court upheld the lower court's decision to quiet title to the disputed mineral rights.

SELECTED ELECTRICITY DECISIONS

Rate

11th Cir.
Newton v. Duke Energy Fla., LLC, 895 F.3d 1270 (11th Cir. 2018).

In a putative class action suit, utility customers ("Customers") brought suit against two electric utility companies ("Utilities"). Utilities had been collecting rate increases from Customers for the construction of a nuclear plant. Construction of the nuclear plant ceased, but Utilities continued to collect rate increases as authorized by two provisions of the Florida Renewable Energy Technologies and Energy Efficiency Act ("Act"), which allowed for the creation of the Nuclear Cost Recovery System (NCRS). Customers alleged that the NCRS was invalid under the Dormant Commerce Clause ("DCC") and that the Atomic Energy Act ("AEA") preempted the NCRS. Customers sought injunctive relief through the Act's invalidation. The United States District Court granted Utilities' motion to dismiss for failure to state a claim and denied Customers' request for leave to amend. Customers appealed to the Eleventh Circuit Court of Appeals, and the court affirmed the decisions of the District Court. First, the court affirmed the dismissal of the Utilities' DCC claim – "Utilities are not 'states' such that their actions could give rise to DCC claims from an out-of-state person or entity." Second, the court held the AEA did not preempt the NCRS. Customers could not show that "state laws promoting investment in new nuclear power plants, or shifting the costs of nuclear plant construction," were preempted by government regulation in the AEA. Third, the court held that the District Court did not abuse its discretion in denying Utilities' request for leave to amend on procedural grounds and on the grounds that amendment sought would violate the Eleventh Amendment. In affirming the findings of the District Court, the court also affirmed that the Utilities' complaint failed to state a claim.

Renewable Generation

E.D. Michigan
Tuscola Wind III, LLC v. Almer Charter Twp., No. 17–cv–10497, 2018 WL 2937409 (E.D. Mich. June 12, 2018).

Wind Company brought suit against Township for denying its Special Land Use Permit ("SLUP") to build a wind farm. Wind Company alleged that

Township's denial of its SLUP violated Wind Company's procedural due process and equal protection rights. Wind Company further argued that the moratorium on wind farms violated the Zoning Enabling Act, and Township violated the Open Meetings Act when four newly-elected members met before a public meeting. Township moved for summary judgment on all counts. The court found that Wind Company's procedural due process rights were not violated because pending building permits cannot create a property interest and granted Township's motion. The court found no equal protection violation occurred when Township denied the SLUP. Township had complete discretion to deny a SLUP, and Wind Company failed to show that Township denied the SLUP due to animus towards Wind Company. The court found that Township had not violated the Zoning Enabling Act when it passed a moratorium on wind farm because the issue was moot. The decision would therefore count as an advisory opinion. The court denied Township's motion for summary judgment in part for the alleged violation of the Open Meeting Act. Members-elect were not specifically mentioned in the Act and members-elect have no power to bring them within the ambit of the Act. Township did not prove as a matter of law that no violation occurred during an email chain between Township members and denied Township's motion for summary judgment regarding that issue.

North Carolina

Recurrent Energy Dev. Holdings, LLC v. SunEnergy1, LLC, No. 18-1164, 2018 WL 3105507 (N.C. Super. Ct. June 22, 2018).

Purchaser contracted with Developer for the sale of two solar energy projects and a tax equity transaction with a third solar project. Purchaser signed a Confidential Letter of Intent ("LOI") with Developer granting exclusive rights to purchase two of the solar energy projects with an agreed upon timeline for development. The parties expressly agreed to negotiate in good faith for the tax equity investment to go through with the third solar energy project. Developer agreed to reimburse Purchaser for costs associated with this transaction. Purchaser sued Developer for breaches of the LOI and the fee letter and sought a declaratory judgment. Developer counterclaimed for breach of LOI. Purchaser moved for summary judgment on its claims. The court found that: (1) Developer breached the LOI when it failed to meet deadlines for the solar energy projects; (2) Developer failed because of a wetland permitting issue; and (3) Purchaser requested a full refund instead of accepting a replacement solar energy project. The court also found that Purchaser was entitled to an additional refund for the Haslett

Exclusivity Payment pursuant to the LOI in the amount of $750,000. The court found that the breach by Purchaser did not excuse Developer of his obligations. The court denied Purchaser's motion for summary judgment involving the breach of good faith allegation by Developer because intent of a party is a question for the jury. The court denied Developer's motion for summary judgment because the LOI expressly stated that Purchaser could only exercise a replacement project provision in lieu of a full refund with a written statement. The court denied that Purchaser's actions constituted acceptance of a replacement site project and read the contract as written, stating that there must be written notification of an exercise of the LOI. Thus, Purchaser's allegations of breach of good faith, and the breach of fee letter will proceed to trial.

This is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing the case as precedent.

Rate

Georgia
Ga. Power Co. v. Cazier, 815 S.E.2d 922 (Ga. 2018).

Consumers sued Power Company, alleging that Power Company was collecting franchise fees in excess of the amounts authorized by the Public Service Commission ("Commission"). The Supreme Court of Georgia affirmed the decision of the appellate court, holding that the trial court erred when dismissing Consumers' putative class action for failing to exhaust administrative remedies with the Commission. The Court noted that there was no statute giving Commission exclusive jurisdiction over such claims and pointed out that Commission's power was legislative in nature and limited to regulating rates. As a result, Consumers were not required to exhaust administrative remedies and were free to seek judicial relief, even though Consumers' allegations against Power Company implicated Commission's ambiguous terms concerning franchise fees. The Court noted that the doctrine of primary jurisdiction would have allowed the trial court to suspend the trial and refer the issue of the ambiguous language concerning the collection of franchise fees to Commission. For those reasons, the Court affirmed the appellate court's decision to vacate the trial court's dismissal.

Texas

Tex. Indus. Energy Consumers v. Pub. Util. Comm'n of Tex., No. 03-17-00490-CV, 2018 WL 3353225 (Tex. App. July 10, 2018).

Electric Power Company ("Company") filed an application with the Public Utility Commission of Texas ("Commission") to authorize Company to build a substantial coal-fire power plant. Commission granted the application if Company amended its certificate of convenience and necessity to show all receipts and agreements required for construction in the future. Commission capped the spending at $1.522 billion by relying on the current estimate for costs. Company looked to increase the spending by $83 million. Company took this increase to the State Office for an administrative hearing in front of an ALJ. ALJs found that Company justified its power plant based on a relative price of coal to natural gas. The price fell, and a reasonable utility manger would have considered cancelling the construction of the power plant. ALJs concluded that Company did not evaluate all the relevant factors regarding building the plant and concluded that a reasonably prudent utility manager at the time would have cancelled the project. Commission adopted the ALJs' findings. However, Commission departed from the ALJs' finding that Company's decision to continue the construction of the plant was unreasonable. Company appealed the Commission's decision on the amount of capital costs. To determine the capital costs, the appellate court determined whether the Commission correctly found that Company met its burden of proving that it was prudent to continue construction. According to the appellate court, Company did not evaluate the decision reasonably, because it used the testimony of its own employees. Because the issue is dispositive of the appeal, the appellate court reversed the trial court's judgment that Company met its burden of proving that it was prudent in continuing to complete the plant.

SELECTED ENVIRONMENTAL DECISIONS

Federal

4th Cir.
Ohio Valley Envtl. Coal., Inc. v. Pruitt, 893 F.3d 225 (4th Cir. 2018).

Multiple environmental and citizen groups ("Advocates") brought suit against EPA for failing to perform its "nondiscretionary duty to promulgate [total maximum daily loads ("TMDL")] for biologically impaired waters," as West Virginia has yet to do so. Each state is responsible for submitting a list of TMDLs to EPA for approval. If EPA rejects the list, EPA has a duty to create a new list for the state to implement. West Virginia postponed the development of TMDLs for pollutants found in contaminated waters, as required by the Clean Water Act. The district court determined that West Virginia's failure to provide TMDLs to EPA constituted "constructive submission" of TMDLs, requiring EPA to effectively reject the state's inaction, triggering EPA's duty to create TMDLs for West Virginia. There is a circuit court split over the existence and application of the constructive submission doctrine. However, the Fourth Circuit did not have to apply the doctrine. In jurisdictions that apply the doctrine, EPA's duty is not triggered where the state has submitted some TMDLs and has a legitimate plan to create more TMDLs. Because West Virginia satisfied both prongs, the constructive submission doctrine did not apply, and EPA had no duty to act for West Virginia. As such, the appellate court held for EPA.

Schoene v. McElroy Coal Co., No. 16-1788, 2018 WL 3202769 (4th Cir. June 29, 2018).

Owners of surface estate ("Surface Owner") brought suit against owners of subsurface estate ("Subsurface Owner") alleging (1) a claim for loss of support to the surface estate under West Virginia common law and (2) a statutory claim based on the West Virginia Surface Coal Mining and Reclamation Act. Importantly, the deed transferring the coal rights contained an express waiver of damages for loss of surface support. The Supreme Court of West Virginia, in response to certified questions, held that, under West Virginia common law, the contractual provision was enforceable and barred recovery for damages from loss of surface support attributable to the Subsurface Owner. Accordingly, the Fourth Circuit Court of Appeals reversed the district court's finding that the Surface Owner had a cause of action under common law. Further, the Fourth Circuit found that the district court needed to resolve a threshold issue of whether the

Subsurface Owner's mining activities caused material damage to the surface owner's land or residence before deciding whether they were entitled to relief under the West Virginia statutes. Since the district court's findings only concerned the measure of damages, the Fourth Circuit remanded the case with instructions for the jury to consider whether the subsurface owner violated a rule, order or permit under the Act that would enable the surface owner to recover for the loss of support.

This is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing the case as precedent.

7th Cir.
Orchard Hill Building Co. v. United States Army Corps of Eng'rs, 893 F.3d 1017 (7th Cir. 2018).

Company challenged a jurisdictional decision by Corps of Engineers ("Corps") that designated a 13-acre plot of Warmke wetlands purchased by Company as "jurisdictional waters" of the United States pursuant to the Clean Water Act ("CWA"). The aim of the CWA is to prevent pollution of navigable waters, or waters of the United States, designated by the Corps. The closest navigable water to the Warmke wetlands is the 11-mile-away Little Calumet River. Corps determined the Warmke wetlands were adjacent to the Midlothian Creek, a tributary of the River, and thus, waters of the United States. While this case was on appeal, the Supreme Court determined that Corps' jurisdiction over similar wetlands depends upon a significant nexus between the wetlands and navigable waters. Corps repeatedly determined that the Warmke wetlands, "alone or in conjunction with the area's other wetlands, have a significant nexus to the Little Calumet River." Company then sought judicial review of Corps' decision as a "final agency action" under the APA. The APA allows courts to set aside an agency determination if it is unsupported by substantial evidence. Corps' proposition that the Warmke wetlands have the "ability" to pass pollutants along is too speculative to support a significant nexus. Additionally, the Warmke wetlands comprise 2.7 percent of the Midlothian Creek watershed, which is relatively insubstantial. The record did not show that the wetlands in the Midlothian Creek watershed are adjacent to the same tributary and thus U.S. waters. Thus, the Seventh Circuit Court of Appeals held that Corps failed to show substantial evidence of the wetlands' significant nexus to navigable-in-fact waters, and the case was vacated and remanded for Corps to reconsider.

9th Cir.
Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States, 894 F.3d 1005 (9th Cir. 2018).

Non-profit environmental organizations ("Environmental Organizations") sued Bank for alleged violations of several environmental protection Acts including the Endangered Species Act, Administrative Procedure Act, and the National Historic Preservation Act for providing loans for two liquid natural gas projects near the Great Barrier Reef. Bank moved for summary judgment on the grounds of lack of standing, claiming that there was no method of redress the injuries, since they merely funded the projects. The district court granted summary judgement, finding that Environmental Organizations failed to establish redressability due to the Bank's minor role in the projects. Essentially, the district court found that Bank was not a party necessary to the completion of the project and, therefore, additional performance of procedures would not redress the injuries. On appeal, the Ninth Circuit Court of Appeals held that there was nothing in the record suggesting that the Bank had any ongoing influence on the operation of the projects. Further, the projects were already under construction before the Bank authorized the loans, which only consisted of a small portion of the total funding. Due to these shortcomings, the Ninth Circuit held that Environmental Organizations failed to show that performing any additional procedures under the Acts could redress the injuries allegedly sustained and affirmed summary judgment.

D.C. Cir.
Del. Riverkeeper Network v. Fed. Energy Reg. Comm'n, 895 F.3d 102 (D.C. Cir. 2018).

Environmental Organization ("Organization") filed suit against Federal Energy Regulatory Commission ("FERC") alleging FERC's funding structure deprived it of due process under the Fifth Amendment. The United States District Court granted the FERC's motion to dismiss for failure to state a claim. The appeal by Organization presented "broad due-process challenges to how the FERC conducts business." The complaint alleged that FERC's "funding structure creates structural bias, in violation of the Due Process Clause . . . , by incentivizing the Commission to approve new pipelines." The complaint also challenged FERC's use of tolling orders. Organization alleged that FERC routinely allowed construction to proceed on approved projects, while the application was still pending, which frustrates judicial review, in violation of the Due Process Clause.

Organization grounded its due process claim in environmental interests and in real-property interests. The court concluded that the state-created right to clean air, pure water, and preservation of the environment did not qualify as a federally protected liberty or property interest for due process purposes. On whether any protected liberty or property interest was implicated, the court held that FERC was not structurally biased for the following reasons: (1) FERC did not control the funds it collected; (2) fees and charges did not go into FERC coffers; (3) FERC's budget was fixed regardless of how many pipelines FERC approved; and (4) FERC did not have influence over Congress. Further, the court had long held that "FERC's use of tolling orders is permissible under the Natural Gas Act, and Organization has not shown that FERC's tolling practice violates due process in each instance such that the standard should be overturned." Because Organization's due process claims lacked merit, the D.C. Circuit affirmed the district court's judgement.

Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n, 896 F.3d 520 (D.C. Cir. 2018).

Company applied to the U.S. Nuclear Regulatory Commission ("Commission") for a license to operate a uranium mine in Tribe's territory. Tribe intervened to challenge the application, citing possible damage to Tribe's cultural sites. Commission's licensing process includes three stages: (1) the Commission Staff's ("Staff") review; (2) the Atomic Safety and Licensing Board's ("Board") review; and (3) Commission's own review and subsequent approval or rejection. While in Staff review, Staff drafts an Environmental Impact Statement ("EIS"), which outlines the effects of the license holder's operations on the environment. In the case at hand, Staff drafted the EIS and approved the license but failed to include any possible adverse effects the operation would have on the tribe's cultural sites. Board ruled that this omission was a "significant deficiency" and ordered Staff to cure the deficiency but refused the Tribe's request to stay the license during the cure period. The matter then came to Commission, who generally upheld the license approval, and Tribe appealed. On review, the United States District Court analyzed only the decision to leave Applicant's license in effect while the Staff cured the deficiency. The court analyzed the Board's ruling and noted that the Board had contemplated that the EIS was to be completed *before* granting a license. The court concluded that an EIS conducted with a "significant deficiency" was incomplete for purposes of granting a license. Thus, the license should not be effective

before the deficiency is cured. The court made clear that this ruling was limited to EIS drafts with "significant deficiencies," and that the Board still had the power to effectuate licenses while less severe deficiencies are being cured. The court dismissed the Board's "irreparable harm" requirement as uprooted in statute.

W. Org. of Res. Councils v. Zinke, 892 F.3d 1234 (D.C. Cir. 2018).

Environmental advocates ("Advocates") brought suit against the Secretary of the Interior ("Secretary") in order to compel Secretary to update and supplement the Federal Coal Management Program. The district court dismissed the action and Advocates appealed. In order for Advocates to prevail on an Administrative Procedure Act claim, they would have to show that Secretary failed to perform a ministerial, incomplete, federal action. A court can only compel an agency to act when the agency has a nondiscretionary duty to perform that same action and has failed to do so. Outdated provisions in the program required occasional updates to reflect new science regarding pollution and the environmental impact. In 1979, Secretary completed and implemented the program, which included provisions about updating the program. In 1982, Secretary updated the program and removed the provisions that governed how to modify the program. The D.C. Circuit Court held that Secretary's federal, ministerial action was completed with the 1982 update and that there was no further intention to continue changing the program, evidenced by the removal of relevant provisions. Thus, the only federal action was the creation of the program, not the on-going activities of the program. As such, the appellate court affirmed the judgment for Secretary.

D. Montana

ASARCO LLC v. Atl. Richfield Co., CV 12–53–H–DLC, 2018 WL 3122340 (D. Mont. June 26, 2018).

Lessor brought suit against Lessee for damages incurred at a site that was determined under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to be a National Priorities List ("NPL") site. As a NPL site, the EPA required environmental remediation for the environmental contamination produced by the plants owned by both the Lessor and Lessee. As the part of an earlier settlement, Lessor had paid over $111.4 million in response costs for the site. The court found that Lessee's zinc fuming operations released arsenic into the groundwater at the site, partially driving the cleanup effort. Further, the court found that

Lessee was a "person," as defined by the Act as an owner and/or operator of a facility from which hazardous substances were disposed. As a result, Lessee caused Lessor to incur response costs, and Lessor was entitled to seek contribution payments from Lessee. Lessee argued that the lease agreement barred Lessor's claim, but the court found that the plain language stated that Lessor did not assume the liability arising from Lessee's operation of the facility. The court also found that Lessor had already paid more than its equitable share of the response costs and that Lessee was liable under CERCLA for its equitable share of contribution costs paid by Lessor. The court used the so-called Gore Factors to guide its allocation of cleanup costs and found that Lessee's equitable share of the costs was 25% of the response costs paid by Lessor. Additionally, the court found that Lessee had repeatedly made misrepresentations and misled the EPA in the amount of emissions and contaminants flowing from the plant. As a result, the court awarded the Lessor an additional payment of $1 million for the lack of cooperation.

D. New Mexico

Nuclear Watch N.M. v. U.S. Dep't of Energy, No. 1:16-cv-00433 JCH/SCY, 2018 WL 3405256 (D.N.M. July 12, 2018).

A citizen action group ("Group") filed a citizen's suit against the United States Department of Energy ("DOE"), a private contractor ("Contractor"), and New Mexico Environment Department ("NMED") for alleged violations of a compliance and consent order ("2005 Order") instituted to remediate dangers to the environment posed by the presence of hazardous waste at Los Alamos National Laboratory ("Laboratory"). Eventually, a new order ("2016 Order") expressly superseded the 2005 Order. The 2016 Order included all alleged outstanding violations of the 2005 Order and encompassed the full scope of corrective actions mandated by it. In the complaint, Group: (1) sought declaratory and injunctive relief to stop the implementation of 2016 Order; (2) sought to discontinue deadline extensions of the 2005 Order; and (3) requested civil penalties for violations of the 2005 Order. DOE, NMED, and Contractor all filed motions to dismiss. To the extent that the complaint sought declaratory and injunctive relief, the court granted the motions to dismiss. The court found that this was a "case of one consent order replacing another." In the eyes of the law, the 2005 Order no longer existed. The claims for injunctive and declaratory relief were moot as NMED, DOE, and contractor could not be held liable for alleged violations of an order that no longer existed. To the extent the complaint sought civil penalties, the court denied the motions to

dismiss. Prior rulings had left the imposition of civil penalties for violations that had already taken place to the discretion of district courts. For the civil penalties to be moot, DOE, NMED and Contractor had a burden to prove that the 2016 Order would make the alleged violations of the 2005 Order unlikely to recur, and the court found that they had not met their burden of proof.

D. North Dakota

Voigt v. Coyote Creek Mining Co., No. 1:15-cv-00109, 2018 WL 3244408 (D.N.D. July 3, 2018).

Ranchers brought suit against Mining Company for allegedly not obtaining the correct type of Clean Air Act permit for the construction and operation of its coal mine. Mining Company had applied for a "minor source permit" with the North Dakota Department of Health ("NDDOH"), pursuant to EPA regulations that rely on states for implementation and enforcement. Ranchers moved for partial summary judgment in regard to certain issues of liability while Mining Company moved for summary judgement of dismissal. The primary issue for the court was whether Mining Company's open coal storage pile and haul road constituted part of the coal processing, which would be subject to Subpart Y's regulations for emission standards. Unable to find a clear answer from the regulations themselves, the court turned to guidance from the EPA, which stated that the beginning of coal processing is when it is dropped at the first hopper for receipt of coal. Again, the court found that this answer was not clear enough to make a decision. In response to the lack of clarity, the court gave deference to the NDDOH's determination that the coal piles and haul roads did not constitute part of the coal processing facility and, therefore, were not subject to Subpart Y. Additionally, the court had previously found that the majority of the open coal storage pile was not simply temporary storage but, rather, largely unprocessed coal, leading to the conclusion that it would not be consistent with EPA policies to allow it to count as part of the coal processing facility. The court found that even if it accepted Ranchers' estimates on emissions, Ranchers had not sufficiently shown an ability to prove that the 250 tons per year major threshold could be reached. As a result of these findings, the court granted the Mining Company's motion for summary judgment.

S.D. Texas
Edgar v. Anadarko Petroleum Co., No. 17–1372, 2018 WL 3032573 (S.D. Tex. June 19, 2018).

Investors sued Company for making false statements that misled shareholders, thereby violating the Exchange Act and the Security Exchange Commission's Rule. Company filed a motion to dismiss, making various statements that Investors claimed were misleading, but the statements were not specific or concrete enough to be considered more than "corporate cheerleading." Furthermore, the timeline of evidence that Investors cited showed that Company made almost all of the alleged false statements before the events that retroactively made the statements false. Essentially, Company's statements were not false at the time they were made. While the court found that the majority of the statements did not establish a prima facie case, one statement Investors pointed to in their pleadings was temporally correct in alleging that Company made false statements. However, the legal test underlying the allegation could not be satisfied completely based on the pleadings because Investors failed to show that Company spoke with scienter. For those reasons, the court granted Company's motion to dismiss without prejudice, and gave time for Investors to amend their pleadings.

State

Delaware
Stevenson v. Del. Dep't of Nat. Res. & Envtl. Control, C.A. No. S13C-12-025 RFS, 2018 WL 3134849 (Del. Super. Ct. June 26, 2018).

Delaware passed a regulation called the Regional Greenhouse Gas Initiative ("RGGI"), and Ratepayer alleged that it created a financial injury to its customers. RGGI placed a cap on carbon dioxide emitted by power plants. RGGI removes an allowance if a power plants produces more carbon dioxide than is allowed. Ratepayers in states that have energy efficient programs receive the allowance. Because of this regulation electric companies must raise prices when they lose an allowance. Ratepayer argues that RGGI affects the price of electricity by raising it. The appellate court found Ratepayer to have no standing, but the appellate court provided examples of how a regulation would affect a customer and give them standing. To show that it would be probable for the regulations to increase prices, plaintiffs must show research methods, data, evaluation techniques that support the conclusion. Finally, according to the appellate court,

because there was no proof of the regulations causing the increase in prices, a favorable decision would not guarantee a remedy. Accordingly, the Superior Court of Delaware dismissed the case because the Ratepayer failed to provide expert testimony that demonstrated standing.

Maryland
Stevens v. Prettyman Manor Mobile Home Park Wastewater Treatment Plant, 187 A.3d 715 (Md. Ct. Spec. App. 2018).

Objectors appealed a trial court's affirmation of the Maryland Department of the Environment's ("MDE") issuance of Permit to Wastewater Company to discharge treated wastewater into a tributary. Objectors asked for judicial review on questions of: (1) whether MDE published proper notice; and (2) whether Permit grants discharge of solids in a different way than described in a 2012 application. The court held that MDE's revised application published in 2014 did not require notice because the 2014 application was only a revised application of the previously published 2012 application. The court found that this interpretation of Notice Requirement was reasonable, as the revisions were not substantial. Furthermore, Objectors waived their right to object by making their objections after the official comment period. Additionally, the court also found that MDE worked with Wastewater Company for several years to effectively revise the 2012 application to comply with statutory requirements. MDE did not find these differences substantial enough to warrant a new notice. Because MDE is an expert in permits, the court granted deference to its expertise. The court found that an agency's application of statutes is given weight pursuant to the agency's experience and expertise. As such, the appellate court affirmed the judgement of the circuit court.

New Jersey
320 Assocs., LLC v. New Jersey Nat. Gas Co., No. A-1831-16T2, 2018 WL 3189466 (N.J. Super. Ct. App. Div. June 29, 2018).

Property Owner sued Natural Gas Company ("Company") asserting various claims, including negligence, violation of New Jersey statutes, and nuisance for allowing migration of coal tar pollution onto Property Owner's land. As a result, Property Owner claimed that it was unable to obtain an unconditional "no action letter" from the Department of Environmental Protection, which was necessary in order to execute an agreement to buy with their tenant, causing a permanent diminution in value to the property.

Allegedly, Property Owner could not obtain the letter due to Company's failure to abate the pollution. Company filed a motion to dismiss based on the applicable six-year statute of limitations. The court then applied the discovery rule and held that since Property Owner, at best, learned of the condition in 2008, its claim for diminution in value was untimely. Further, the court held that the migration of the pollutants did not constitute a new discharge under the Spill Act, and therefore, Property Owner's claim for negligence was also untimely. However, the court found that the failure to abate the pollution constituted a continuing tort and was therefore timely. For this claim, the court held that since the land could never be remediated to reverse the damage to the land, Property Owner could only seek claims to the extent the land could be remediated and for the unreasonable delay in abating the nuisance. Since the record was silent regarding factual findings, the court affirmed in part and remanded the case for further proceedings regarding the nuisance claims.

This is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing the case as precedent.

New York
State v. Ronney, 163 A.D.3d 1315, 2018 WL 3463146 (N.Y. App. Div. July 19, 2018).

State sued owners of an oil storage facility ("Owners") to recover governmental funds spent on cleaning up Owners' oil leak. The district court denied Owners' motion for partial summary judgment to reduce State's claimed damages, and Owners appealed. The Navigation Law ("Law") holds oil dischargers strictly liable for any spills or leaks and requires that the discharger contact the Department of Environmental Conservation ("DEC"). At that point, DEC sends agents to clean the contamination. State obtained federal grant funds to aid the clean-up process. Owners argued that State recovering those funds would result in unjust enrichment because State would effectively recover twice. Owners also argued that recovering funds that came from the federal grant would effectively be compensation, which is barred by Law. The New York Appellate Division Supreme Court held that since State would be replenishing the funds and accounts used for the clean-up, Owners would actually receive a windfall if they did not reimburse State. Such reimbursement is not considered to be compensation, as the source of the federal grant is not contemplated in the Law's language.

Ohio

Harris Design Servs. v. Columbia Gas of Ohio, Inc., No. 2017–0436, 2018 WL 3147958, 2018-Ohio-2395.

Customer brought suit against its natural gas service Company for alleged failure to give adequate notice of disconnection. When a cable company hit a gas line and disconnected the service, Company sent a technician to repair the line. When the technician finished the repairs, he left the valve locked so no gas could enter the structure until the service was reestablished. He then left a tag on Customer's door notifying them to contact Company to reestablish the line pursuant to Company policy. When the line was damaged again, the technician left another tag on the door. Eventually, Customer brought a claim in the Public Utilities Commission of Ohio ("PUCO") after the gas line froze and the structure's pipes burst, causing damage. PUCO ruled in favor of Company, and Customer brought three issues on appeal to the Supreme Court of Ohio: (1) that PUCO, who acted as the fact-finder in this case, erred in finding that door-tags were placed on the door; (2) that PUCO's rehearing process for the case was inadequate; and (3) that PUCO erred in the exclusion of certain evidence. On the first issue, the Court deferred to the PUCO's finding that the door-tags constituted adequate notice because there was sufficient probative evidence in the record that the tags were actually placed there, and there was nothing unlawful or unreasonable in PUCO's holding that it was adequate. On the second issue, the Court held that since the issues Customer raised on appeal were not raised in their rehearing arguments, it could not consider these arguments for the first time. Further, the Court held that PUCO did not err by affirming the exclusions of evidence by the attorney examiner since it did not reflect an abuse of its very broad discretion to conduct its hearings.