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Recent Case Decisions

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RECENT CASE DECISIONS

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All case citations are as of 2-7-2019. 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 11-15-2018. 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.

SELECTED OIL AND GAS DECISIONS

Upstream – Federal

9th Cir.
Murray v. BEJ Minerals, LLC, 908 F.3d 437 (9th Cir. 2018).

The surface estate and one-third of the mineral estate of a ranch in Montana was sold to Current Owner, while two-thirds of the mineral estate was retained by Previous Owners. Dinosaur fossils were found on the ranch's property, and the two parties disputed over who owned the fossils and whether the fossils were minerals or not. Current Owner sought a declaratory judgment that they own the fossils as owners of the surface estate, while Previous Owners removed the case to federal court and sought their own declaratory judgment that the fossils were part of the mineral estate and that Previous Owners owned two-thirds of the fossils. The district court granted summary judgment to Current Owner, stating that the fossils were not minerals under Montana law. Previous Owners appealed. The Ninth Circuit Court of Appeals first refuted the district court's definition of mineral as requiring something to be mined and refined, which excluded the fossils. Instead, the court found that the dinosaur fossils were minerals in the sense that, like coal or oil, they were composed of once living beings, and the fossils fit the more generic word "use" in the sense that they are displayed and viewed in museums. The court next found that the Montana Supreme Court used the *Heinatz* test to determine if something is a mineral, whether it fits the scientific definition of mineral, and whether it has a special quality to make it valuable. The court rejected Current Owner's argument that this non-categorical test is too confusing. The court applied this test to the fossils and found that the fossils were scientifically minerals and had special value. The court held that the fossils were minerals and thus part of the mineral estate. As such, the court reversed the decision of the lower court.

Solenex LLC v. Jewell, 334 F. Supp. 3d 174 (D.D.C. 2018).

Lessee sued several federal agencies and officers ("Agencies") for cancelling its oil and gas lease in violation of the APA, seeking injunctive and declaratory relief. The lease, originally approved in 1982 by the Bureau of Land Management ("BLM"), was suspended in 1993 to conduct additional environmental assessments, but was then suspended each year

after for approximately 20 years. After litigation and a court order to submit a revised schedule, Agencies cancelled the lease, asserting that the original lease violated the NEPA and the NHPA. In the present case, Lessee alleged that: (1) the cancellation was arbitrary and capricious; (2) the cancellation fell outside the statute of limitations; (3) Agencies should be estopped from cancelling the lease; and (4) the lease was properly issued in compliance with the NEPA and NHPA. The court found that Agencies acted arbitrarily and capriciously by: (1) giving no notice of the cancellation; (2) not considering Lessee's reliance interests; and (3) waiting 33 years to correct an agency error which was easily discoverable. In finding the Agency's actions to be arbitrary and capricious, the court found no need to address the remaining issues and granted Lessee's motion for summary judgment.

Upstream – State

Louisiana
Gilmer v. Principle Energy, L.L.C., 52,218 (La. App. 2 Cir. 9/26/18); 256 So. 3d 1139.

On April 1, 2008, Landowner executed a royalty conveyance to Operator, which had a prescriptive period of three years, with a clause stating that a shut-in well would perpetuate the term of the deed. Within a year, a well was completed on Landowner's property, but was never placed in production as it was awaiting pipeline. The well was classified as a shut-in well by the state regulatory agency. In May 2009, the state agency created a unit and designated the well as the unit well. A new well was completed on April 30, 2011, which was then authorized to be the unit well and produced in paying quantities. Landowner sued, arguing that the prescription had accrued and sought a release from the royalty conveyance. The trial court granted summary judgement in favor of Operator. Here, the court affirmed the trial court's decision. Citing precedent holding that the existence of a completed, shut-in well on a validly created unit is enough to interrupt a prescription, the court held that the prescription was interrupted and began anew in May 2009 when the state agency created the unit and designated the original well as the unit well. Since the alterative unit well started producing within a three years from the new prescription period, the prescription had been continuously interrupted by the production of minerals from the well. For these reasons the court affirmed the trial court's grant of summary judgement in favor of Operator.

Marlborough Oil & Gas, L.L.C v. Baker Hughes Oil Field Operations, Inc., 2018-0557 (La. App. 1 Cir. 11/14/18); No. 2018 CA 0557, 2018 WL 5961770.

Operator perfected an oil well lien on a well owned by Lessee that was found to be a dry hole. The trial court found that the lien had no real legal effect, and Operator appealed. The trial court found in favor of Lessee in part because the description of the operating interest was deficient—it only referenced the particular well and not a description of an operating interest. However, the appellate court ruled that Louisiana Revised Statute 9:4868(A)(5) permits a description including the name and serial or other identification of the well and the name of the field where it is located in relation to perfecting an oil well lien. As such, the court reversed the trial court in favor of Operator.

North Dakota

Johnson v. Statoil Oil & Gas LP, 2018 ND 227, 918 N.W.2d 58 (N.D. 2018).

Petitioner appealed the district court's grant of summary judgment for Oil Company in a dispute over oil and gas leases. The parties' dispute revolved around five out of eight well-heads that were not producing oil in "paying quantities" and whether the lease for such wells was finished at the end of the three-year lease under Pugh clauses, or extended because of ongoing drilling operations elsewhere on the leased property under "the habendum and continuous drilling clauses." The Supreme Court of North Dakota first clarified that the Pugh clauses in this case are different from the Pugh clause in the case of *Egeland v. Continental Resources, Inc.*, which Oil Company relied on. The Pugh clauses in the current case identified "both the land subject to an extension and the method of the extension" as opposed to the *Egeland* Pugh clause that only defined the land subject to extension. The Court then concluded that the Pugh clauses, which defined extension by production quantity of oil, the continuous drilling operations clauses, and the habendum clauses, which defined extension by production or drilling, were incompatible and could not be "harmonized" as Oil Company would like. The Court then concluded that because the Pugh clauses were actually added by the parties, as opposed to the other clauses which were just part of the forms to begin with, the Pugh clauses should govern the method of extension. Since the Pugh clauses governed the method of extension as production of oil in "paying quantities," which the

five well-heads were not producing, the Court found that the lease for those five wells could not be extended. The Court accordingly reversed the judgment of the district court.

Ohio

Dundics v. Eric Petroleum Corp., 2018-Ohio-3826, No. 2017-0448, 2018 WL 4627711.

Two oil and gas professionals ("Landmen") met with a petroleum corporation ("Corporation") to discuss the venture of acquiring oil and gas leases. Corporation entered into an agreement by which Landmen would find property owners and negotiate leases for exploration and production of oil and gas. In exchange, Corporation would compensate Landmen with fixed payment for every leased acre and a percentage of the proceeds from working wells. Landmen brought an action for damages, breach of contract, conversion, fraud, unjust enrichment, and quantum meruit. Corporation moved to dismiss because Landmen were not licensed real estate brokers and could not bring an action for conducting real estate activities. The issue was whether Landmen needed to be licensed real estate brokers to enter into oil and gas leases. The Ohio Supreme Court held that an oil and gas lease falls within the definition of real estate set forth in Ohio law and the negotiation of which requires a real-estate-broker's license pursuant to Ohio law. The Court was aware of the historical role landmen played in Ohio, but reasoned that the plain meaning of the statutes clearly expressed the intent to include negotiating oil and gas leases within the scope of activities that require a real estate broker's license.

Thompson v. Custer, NO. 2017-Ohio-4476, 2018 WL 5794135 (Ohio Ct. App. Nov. 5, 2018).

Surface Owner owned the surface on the disputed tract of land, as well as a ½ undivided interest in the minerals. Mineral Owner owned a ½ undivided interest in the minerals beneath the disputed tract of land. Both Surface Owner and Mineral Owner possessed an undivided right to lease their minerals. Surface Owner leased the entire disputed tract of land to Operator. Operator discovered that ½ of the minerals did not belong to Surface Owner, and only paid Surface Owner a bonus proportionate to his ½ interest in the minerals beneath the disputed tract of land. Surface Owner then filed an Affidavit of Abandonment on Mineral Owner's interest, and Mineral Owner Responded. Mineral Owner then sought ½ of the bonus

payment paid onto Surface Owner. The Court of Appeals of Ohio took the case to weigh in on the bonus payment question and abandonment question. The court ruled that even though Mineral Owner had responded to the Affidavit of Abandonment in time to protect their title, they were not due a share of the proceeds from the leases entered into by opposite mineral interest owner. The court ruled that an undivided ½ mineral interest owner who has an undivided ½ power to lease does not have to pay a proportionate share of royalties, or bonuses from the leases he enters into, to the other ½ mineral interest owner. Furthermore, the operator does not have to pay ½ of the royalty to the non-leasing mineral interest owner. Finally, Surface Owner argued that the lands had been unconstitutionally taken from them, but the court quickly dispensed with this issue, as the minerals owned by Mineral Owner had never vested in Surface Owner, so they could not be unconstitutionally taken away. Mineral Owner was not entitled to half of the bonus payment but did retain the title to their minerals.

Pennsylvania
Protect PT v. Penn Twp. Zoning Hearing Bd., No. 39-42 C.D. 2018, 2018 WL 5831186 (Pa. Commw. Ct. Nov. 8, 2018).

Objector challenged Zoning Board's ("Board") grant of special exceptions to Company for oil and gas operations, specifically that: (1) Company's proposal failed to satisfy toxic water storage requirements; (2) the proposal failed to protect citizens' environmental rights; and (3) the proposal represented a high probability of danger to the public health and safety. The first issue was a question of fact, so the appellate court deferred to the fact-finder, Zoning Board. The special exception, by its nature, was noted as presumptively operating within the zoning requirements, and the record further supported Board's finding that Company's proposed wastewater storage did not violate ordinance requirements as the storage was of "brine" rather than toxic materials. Objector's second issue challenged the sufficiency of Board's environmental protection measures taken in conjunction with granting the special exceptions to Company. The appellate court noted that applicants such as Company can, and did, bear the burden of evidentiary proof and persuasion, but in this specific context, Board considered expert testimony offered by both parties and appropriately determined that Company's studies were more persuasive for granting the exception. In addition, Board attached a condition of environmental monitoring and protection to the grant. Lastly, Objector

argued that substantial evidence existed that the oil and gas operations would cause harm to the public health and safety, as well as general community interests. The court denied Objector's claims because adverse impacts must be argued in specificity, and Objector's claims were too speculative to overturn Board's rulings. Many claims, such as concerns over noise or air quality, were explicitly discussed by the Board's conditional approval of Company's exceptions, making Objector's general complaints less credible. Other concerns, such as traffic, required proofs of harm (such as accident reports) prior to receiving a court's consideration. Therefore, the court upheld Board's decision.

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

Texas

Archer v. Tregellas, No. 17-0093, No. 17-0094, 2018 WL 6005071 (Tex. Nov. 16, 2018).

The dispute concered the statute of limitations on a claim for breach of a right of first refusal. A mineral interest was conveyed by Grantor without giving Holder, the holder of the right of first refusal, notice of the potential conveyance. The court ruled that a right of first refusal is breached when the property is conveyed to a third party without giving notice to the right holder. However, the discovery rule applies, and the statute of limitations on the claim only runs once the right holder knows, or should know, of the breach. The Supreme Court of Texas ruled that Grantor breached Holder's Right of First Refusal by not giving Holder notice of the potential conveyance.

CCI Gulf Coast Upstream, LLC v. Circle X Camp Cooley, LTD, No. 10-17-00325-CV, 2018 WL 4624012 (Tex. App. Sept. 26, 2018).

Lessor sued Lessee, asserting that Lessee violated the lease agreement by denying Lessor free use of gas produced on the property. The trial court found in favor of Lessor, and Lessee appealed, arguing that: (1) the free-gas clause in the lease was indefinite and therefore violated the statute of frauds; and (2) that enforcement of the free-gas clause would implicate public health and safety concerns due to the level of hydrogen sulfide contained in the gas. The appellate court affirmed the trial court's decision, rejecting both of Lessee's arguments, instead holding that: (1) the lease language allowing Lessor to use gas free of charge "out of any gas not

needed for operations hereunder" for "lands in the vicinity owned by the lessor" was quantifiable and determinable; and (2) Lessee did not articulate any statute, regulation, opinion, or public policy which would be violated by the free-gas clause and thus failed to raise a genuine issue of fact as to the clause's enforceability. For these reasons, the court affirmed the trial court's decision.

Endeavor Energy Res., L.P. v. Energen Res. Corp., 563 S.W.3d 449 (Tex. App. 2018).

Company appealed summary judgment in favor of Corporation regarding the judicial interpretation of contractual oil and gas agreements between the parties. Specifically, Company objected to an interpretation of unused days as it applied to a continuous development program described in the contract. The contract allowed Company to retain a leasehold interest after the primary term of the lease expired so long as it maintained a continuous development program. The appellate court reviewed the summary judgment de novo. The court reviewed the lease agreement as a contractual relationship, and so afforded the terms of the contract their plain meaning and used the terms of the contract to give effect to the intent of the parties. The terms stated that Company could accumulate unused days in any 150-day term to be used in the next. Company asserted it could continue to accumulate unused days so long as it continued to drill every 150 days, whereas Corporation would limit the accumulation of unused days to the immediately preceding well. Applying plain definitional meanings to the terms, the court recognized the use of the word "next" within the contract. As "next" was defined as "immediately adjacent," the court accepted Corporation's interpretation. Although Company argued that the 150-day limit was merely a "label," upon which unused days could be added so long as they were available, the court recognized the continued use of the phrase within the contract as descriptive, and therefore instructive to the interpretation. Taken in conjunction with the term "next," "150-days" was a clear limitation agreed to by the parties. The court noted, "[w]hen the terms of a contract are plain, definite, and unambiguous, courts must enforce the contract as written." The plain language also supported economic development of the land, and therefore the court affirmed the interpretation in favor of Corporation.

M&M Res., Inc. v. DSTJ, LLP, NO. 09-18-00083-CV, 2018 WL 5986002 (Tex. App. Nov. 15, 2018).

Assignor brought this action against Assignee. Assignor sued Assignee to recover back payments and decide who held rightful title to the mineral interests. The trial court ruled in favor of Assignor and vacated Assignee's title to the mineral interests. This dispute addressed the confusion surrounding whether claimant is seeking relief related to property interests through a trespass-to-try-title action or a suit under the Declaratory Judgement Act. The two actions cannot be brought together. The appellate court affirmed the trial court and ruled that a dispute involving a claim of superior title and the determination of possessory interests in the property must be brought as a trespass-to-try-title action. Because the dispute involved the ownership of a possessory interest in the mineral estate at issue, a trespass-to-try-title action was proper.

Weed v. Frost Bank, No. 04-17-00811-CV, 2018 WL 5927987 (Tex. App. Nov. 14, 2018).

The dispute concerns the estate of Husband and Wife and the mineral interests therein. Husband has perished, and Descendants brought this action to contend that the disputed oil and gas interests were separate property from the marital estate. Bank, as the independent executor of Husband's estate, contended that the mineral interests were community property of the marital estate as a matter of law. While Husband was married to Wife, he entered into a number of oil and gas leases, several of which included recitals indicating Husband was entering into the leases independent of anyone else—including Wife. However, the appellate court sided with Bank, finding that the interests were, in fact, community property of the marital estate. Husband spent time, toil, and effort acquiring the oil and gas interests. Oil and gas was the primary business of Husband and Wife. It was immaterial whether or not Husband spent his own separate funds purchasing and leasing the minerals, because, under the Texas community property system, any property or rights acquired by one of the spouses after marriage by toil, talent, and efforts are assets of the community estate—the rationale being that any talent, time, or effort expended by a spouse is the asset of the community estate. As such, the court ruled in favor of Bank finding that the oil and gas interests in dispute were a part of the community estate.

Midstream – Federal

S.D. Illinois
Nodine v. Plains All Am. Pipeline, L.P., No. 10-CV-163-SMY-DGW, 2018 WL 4636242 (S.D. Ill. Sept. 27, 2018).

Environmentalist filed class action suit against Operator under the Oil Pollution Act ("OPA") and Illinois state law after the rupture of a pipeline fitting at a pump station, alleging that it had a defective leak detector causing crude oil to leak into a containment dike. Environmentalist also alleged that Operator knew erosion caused the leakage up to eight days before the spill. Environmentalist contended that 4,000 gallons of crude oil contaminated the surrounding area and water sources of the nearby communities. In response, Operator filed a motion to dismiss for failure to state a claim of recoverable damages under OPA, arguing that the court lacked subject matter jurisdiction after Environmentalist failed to satisfy the mandatory presentment clause of OPA. Environmentalist's complaint included a "sum certain" assessment of the damage to the environment and a quantification of socioeconomic damages to the putative class. Environmentalist's claims included damage to 380 residential parcels and 120 agricultural parcels. Because the court found that the claims were sufficiently pleaded for the purposes of an initial complaint, the motion to dismiss was denied.

SELECTED WATER DECISIONS

Federal

6th Cir.
Ky. Waterways All. v. Ky. Util. Co., 905 F.3d 925 (6th Cir. 2018).

The court in this case answered whether pollution that reaches navigable waters by way of groundwater is subject to the Clean Water Act ("CWA"). The Sixth Circuit Court of Appeals determined that it is not, however, it is the Resource Conservation Recovery Act ("RCRA") that governs this conduct. Conservationists brought suit against Company, alleging that Company's coal ash storage in coal ash ponds led to contamination of a nearby lake in violation of the CWA and RCRA. The court made a strong delineation between the CWA, which governs water pollution, and the RCRA, which governs solid waste. Company combines its excess coal ash with water and pumps that wastewater mixture into nearby ponds for disposal. The ash ponds were built on karst terrain, which allows for groundwater to move more quickly through the earth. Conservationists argued that this type of terrain effectively transforms the groundwater into a point source, from which the ash solution pollutes nearby navigable waters. However, the court determined that the CWA does not apply to groundwater, regardless of the type of terrain it travels through to reach navigable waters, thus rejecting Conservationists' "point source" theory and "hydrological connection theory." The court noted that a point source is a discrete conveyance, which does not describe the seeping of coal ash into groundwater. This lack of directness excluded Company from CWA liability. However, the court did note that the RCRA does apply to this case, Conservations met the requirements of bringing an RCRA claim, and the federal courts should exercise jurisdiction over this claim.

Tenn. Clean Water Network v. Tenn. Valley Auth., 905 F.3d 436 (6th Cir. 2018).

Conservation Organization brought suit against the Tennessee Valley Authority ("TVA"), claiming breaches of the Clean Water Act ("CWA") regarding the discharge of coal ash pollutants through groundwater hydrologically-connected to navigable waters. Additionally, organization alleged TVA violated the National Pollutant Discharge Elimination System ("NPDES") by violating its permit regarding effluent limitations and sanitary sewer outflow provision. TVA engaged in common practice of

"sluicing" of coal ash and disposing of the mixture in coal ash ponds, where leaks into the groundwater occurred, eventually discharging the mixture into the Cumberland River, which is a navigable waterway. The Sixth Circuit Court of Appeals dismissed "hydrological connection theory," which argues that the discharge of pollutants from the coal-ash mixture into the groundwater constituted a point source consistent with the CWA. The court reasoned that the introduction of pollutants into groundwater did not fall within the gambit of the CWA. Additionally, the court determined that TVA did not violate its NPDES permit, containing removed-substances and sanitary-sewer overflow provisions, by discharging the coal-ash mixture, as those provisions plainly did not apply to such discharge. As such, the court determined that the district court's injunction was an abuse of discretion and reversed, finding no CWA liability for TVA.

SELECTED LAND DECISIONS

Federal

Fed. Cl.
Inter-Tribal Council of Ariz., Inc. v. United States, 140 Fed.Cl. 447 (Fed. Cl. 2018).

Council sued Government for breach of trust pursuant to the Arizona-Florida Land Exchange Act and the American Indian Trust Fund Management Reform Act of 1994 ("Acts"). Council claimed that Government failed to meet trust obligations under the Acts. The court had previously dismissed portions of Council's initial complaint but addressed ongoing district court litigation between Government and a private corporation to enforce the sought-after payments, of which the corporation was supposed to have paid under the Acts and an agreement with Government. Though the corporation paid a settlement to Council, Council filed the current complaint, claiming that the payment did not resolve the dispute with Government. The court held that parts of the claim were barred by statutes of limitation and other parts of the claim were insufficiently pleaded. Further, the court held that Government satisfied its obligation of adequate security by suing the private corporation in federal district court for more than the Release Level Amount and was not required to make up default payments. The court reasoned that because Government sued the private corporation to provide sufficient security, it was not liable for any deficiencies in annual interest payments.

State

California
Rozanova v. Uribe, No. H044161, 2018 WL 5000022 (Cal. Ct. App. Oct. 16, 2018).

Landowner 1 owns a lot with the portion of the parking lot in dispute, while Landowner 2 owns the neighboring lot where the rest of the parking lot is located. Landowner 2 filed claims against Landowner 1 claiming (1) prescriptive easement, (2) equitable easements, (3) easement by estoppel, (4) agreed boundary, and (5) declaratory relief. Landowner 1 asserted trespass claims against Landowner 2 and sought injunctive relief. The trial court found in favor of Landowner 1. Landowner 2 appealed, and the appellate court found no error in any of the trial courts findings, but

remanded the case back to the trial court to determine whether Landowner 2 had rights to the portion of the parking lot on their own property. The appellate court held that the trial court's order enjoining Landowner 2 from entering into Landowner 1's land was ambiguous. Thus, the injunction could be seen as precluding Landowner 2 from entering it owns lot. The appellate court reversed and remanded the order so the trial court could ensure that it could not be so construed as precluding Landowner 2 from the use of his private road.

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

Pennsylvania
Cogan House Twp. v. Lenhart, 197 A.3d 1264 (Pa. Commw. Ct. 2018).

Township alleged that Landowners were improperly modifying drainage systems and easements by a road. Landowners brought an injunction, claiming that Township made modifications in violation of several laws and trespassed. Township had modified roads and drain-ways that affected storm water runoff, which triggered duties under the Storm Water Management Act ("SWMA"). Such duties included a duty to prevent injury from the changes and a duty to submit plans for permits from the State Department of Environmental Protection to prevent erosion and sediment movement. The court found that Township had violated its duties to submit and gain approval of its plans and to mitigate liability to adjacent properties. The court also found that Landowners had failed to comply with SWMA in the same manner when modifying the road to mitigate the changes caused by Township. Finally, the court concluded that the violation by Township did not create a liability in quantifiable damage to Landowners, and that failure to comply with SWMA did not create a liability. As such, the court reversed and remanded for further proceedings consistent with this opinion.

Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677 (Pa. Commw. Ct. 2018).

Landowners challenged a zoning ordinance that allowed petroleum and natural gas operations in all districts. They also challenged Board's grant of a permit for a gas well by Landowners' farm. Board rejected Landowners' challenges. Landowners sought judicial review of the rejections, and the court affirmed the Board's determination. Landowners subsequently

appealed. States have the power to zone and plan under their general police powers. Zoning ordinances must balance community interest and the due process rights of private property owners. So long as the State's zoning determinations are reasonably related to the public health, safety, morals, and general welfare of its population, its decision is constitutional and the court will defer. When a Zoning Board makes a finding of fact based on substantial evidence, the findings are binding on courts of review. Landowners feared that putting a pump on the land would significantly alter the land, such that they would not be able to use it for farming purposes once the drilling was done. Board found that the disruptive pumping Landowners complained of would only occur within a short period of time, and after that, the land would return to its current state. Furthermore, Board found that such use would benefit the community by allowing other property owners to fully utilize their mineral and oil deposits. Also, such use would not affect neighboring property owners. Based on these findings of fact, the court affirmed the Board's rejection.

Texas
In re Wood Grp. PSN Inc., No. 04-18-00418-CV, 2018 WL 4760139 (Tex. App. Oct. 3, 2018).

County brought suit against twenty-nine Oilfield Businesses asserting claims of negligence, negligence per se, and gross negligence. Specifically, County claimed that Oilfield Businesses negligently or intentionally used the road in a manner that damaged the road when accessing their oil and gas leases. Oilfield Businesses asked the court to dismiss the claims against them with prejudice as they claimed they could not be held liable for ordinary wear and tear of the road and because County failed to point to specific instances of damage causing negligence. The court determined the key issue was whether Oilfield Businesses owed a duty to exercise reasonable care to protect County's road from injury other than by ordinary wear and tear. Critically, the court ruled that County's allegation that Oilfield Businesses used the road in an abnormal manner was conclusory. Further, County had not alleged that the road was intended for a specific group or that there was any notice that heavy vehicles could not use the road. As a result, the court concluded that County's pleading failed to show a basis in law that Oilfield Businesses had anything more than a moral duty to not damage the roads.

SELECTED ELECTRICITY DECISIONS

Traditional Generation

Utah
Wasatch Cty. v. Util. Facility Review Bd., 2018 UT App 191, 2018 WL 4846256 (Utah Ct. App. Oct. 4, 2018).

County was forced by Review Board to issue a conditional use permit so that a power company could construct transmission towers and lines after County tried to refuse the permit and sought, but did not obtain, a stay from Review Board. County sought judicial review, but did not seek a stay on the issuing of the permit, so the permit was issued and the transmission lines constructed during the judicial review proceedings. The appellate court found the entire appeal moot, because County failed to obtain a stay from this court regarding the construction of the towers and the towers had already been fully built by the time of the judicial process. The completed construction and failure to seek and obtain a stay, under prior Utah case law, rendered the case moot. Additionally, the court found that County's sought remedy, "revocation of the conditional use permit," was unavailable, because the permit had not been obtained through "mistake of fact, misrepresentation, or fraud" as prohibited in the county code. Thus, the county code was inapplicable and the remedy made unavailable. As such, the court dismissed the case as moot.

Renewable Generation

North Carolina
In re De Luca, 817 S.E.2d 919 (N.C. Ct. App. 2018).

De Luca appealed a North Carolina Utilities Commission decision, which declared that Energy Company was not a public utility and thus not under the Commission's jurisdiction in its dealings with another company. The court reviewed the Commission's decision *de novo*. The court found that Energy Company was not a public utility for two reasons. First, the court determined that Energy Company did not sell energy to the public, as required by statute to qualify as a public utility, because it only produces energy for sale to another company, which then sells that energy to the public. The court also decided that just because the subsequent company sells the energy to the public and qualifies as a public utility, this does not

make the electricity production company a public utility. Second, the court found that Energy Company's production of electricity did not create competition in the marketplace of public electricity sales and thus kept with North Carolina's established regional monopolies for the sale of electricity to keep the sales well-regulated. As such, appellate court affirmed the Utilities Commission's decision.

Rate – Federal

W.D. Pennsylvania
Brown v. Agway Energy Servs., LLC, 328 F. Supp. 3d 464 (W.D. Pa. 2018).

Customer sued Electric Generation Supplier ("EGS"), a seller of electricity, in a class action for breach of contract. Customer alleged that EGS improperly priced electricity in terms of rates. EGS purchased energy from energy production companies and sold energy to consumers. The court applied three elements to determine whether or not there was a valid breach of contract claim: (1) the existence of a contract; (2) a breach of duty imposed by the contract; and (3) damages. The court held that there was no breach of duty pursuant to EGS's pricing for electricity. The court reasoned that because the consumer contract included discretion and varying factors in calculation of rates, Customer had failed to state a claim for breach of contract. The court dismissed the case with prejudice.

This case has since been appealed, but there is no decision from the higher court as of publication.

Rate – State

Nebraska
City of Sidney v. Mun. Energy Agency, 917 N.W. 2d 826 (Neb. 2018).

Agency sued Energy Provider over monthly transmission rate charges. An arbitration board ruled that Energy Provider breached the agreed upon service schedule. The board opined that Energy Provider "unnecessarily and unilaterally" changed transmission paths. The board ruled that the transmission rate was excessive, unfair, and unreasonable. Energy Provider brought the current action for review of the board's decision. The Supreme Court of Nebraska ruled that the increased rate was not arbitrary. The Court further opined that the increase was necessary for the continued operation of Energy Provider. The Court reasoned that the increase complied with the

agreed upon service schedule and was therefore permitted. As such, the Court reversed the decision of the arbitration board.

SELECTED TECHNOLOGY AND BUSINESS DECISIONS

Bankruptcy

Bankr. D. Delaware
Green Field Energy Servs., Inc. v. Moreno, No. 13-12783(KG), 2018 WL 4629302 (Bankr. D. Del. Sept. 27, 2018).

Debtor's estate Trustee sued Special Purpose Entities ("SPEs") for breach of fiduciary duty and breach of contract. Trustee sought to avoid transfers made in a Chapter 11 bankruptcy proceeding. Debtor was an oil service business that engineered the use of frac pressure pumps powered by aero-derivative turbine engines. During a decline in demand for frac services, Debtor sought alternative sources of capital from the SPEs. Debtor filed for bankruptcy in 2013. The court held that Trustee could not recover from the SPEs manager for the preferential transfers as an "entity for whose benefit the transfers were made." The court reasoned that because Trustee could not demonstrate that the manager had access to the transfers Trustee had not met the burden of proof and could not recover any portions of the transfers from the manager.

SELECTED ENVIRONMENTAL DECISIONS

Federal

3d Cir.
Giovanni v. U.S. Dep't of Navy, 906 F.3d 94 (3d Cir. 2018).

Landowners sued Department of the Navy ("Navy") for an array of health monitoring services after it was discovered that dangerous chemicals from Navy's facilities had entered the water supply. The chemicals in question have been shown to increase the risk of testicular, kidney, and thyroid cancers. Navy asserted a lack of subject matter jurisdiction under a provision of CERCLA. The provision in question, as interpreted by the district court, would prevent state or federal courts from exercising personal jurisdiction because it would interfere with the current cleanup of the area. The appellate court engaged in the statutory interpretation of CERCLA in order to determine whether the district court correctly decided that these claims were barred by CERCLA. The appellate court determined that certain claims met the definition of "challenges" to the cleanup and would be barred by CERCLA, but that others—like the cost of private party medical monitoring—were not. The court clarified that the types of "challenges" that lack subject matter jurisdiction under the law are those: (1) which delay or interfere with a cleanup; (2) which question the cleanup plan; or (3) where the relief requested interferes with the cleanup.

5th Cir.
United States v. Nature's Way Marine, L.L.C., 904 F.3d 416 (5th Cir. 2018).

United States ("Government") brought action against Tugboat Owner ("Owner") seeking to recover the cost of money spent by various agencies to clean up an oil spill on the Mississippi River. The spill occurred when two oil-carrying barges moved by Owner collided with a bridge. Owner spent $2.99 million on clean-up, and various government agencies spent an addition $792,000. Government initiated litigation to recover the $792,000 spent on clean-up from Owner. Owner claimed it was not liable and counterclaimed that the National Pollution Funds Center ("NPFC") violated the Administrative Procedure Act ("APA") "by deeming it to be an 'operator' of the barge and consequently ineligible for reimbursement of the $2.13 million-plus' that Owner spent on clean up." Government moved for,

and the trial court granted, partial summary judgement finding only that the NPFC did not violate the APA by declaring owner an "operator" of the barge and denying reimbursement of clean-up costs. Owner appealed and the Fifth Circuit Court of Appeals affirmed. The appellate court held that the statutory interpretation of the word "operator" under the OPA would "include someone who directs, manages, or conducts the affairs of the vessel." It then follows that "operating" a vessel under the OPA would include piloting or moving the vessel. This definition is based on the Supreme Court's analysis of the word "operator" in a similar statute. Because Owner navigated the barge through the river requiring a great degree of discretion and judgment, it would be a strain beyond the ordinary meaning of the word to say Owner was not "operating" the barge at the time of collision.

10th Cir.

Audubon Soc'y of Greater Denver v. U.S. Army of Corps of Eng'rs, 908 F.3d 593 (10th Cir. 2018).

Organization filed petition for judicial review of approval of U.S. Army of Corps of Engineers' ("Engineers") project to store more water in reservoir. Organization argued that approval of the project did not comply with the National Environmental Policy Act ("NEPA"), and the Clean Water Act ("CWA"). The petition was denied, and Organization appealed. NEPA required Engineers to include an Environmental Impact Statement ("EIS") "in every recommendation or report on proposals for . . . major Federal actions." An EIS must "inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts." Organization argued Engineers failed to do so. In choosing to store more water in the reservoir, Engineers initially proposed thirty-eight alternatives, which they narrowed down to the four options that best addressed the purpose, cost, and impacts of the project. Engineers chose the third option, deciding it best minimized costs and met the needs of the project. Organization argues that Engineers dismissed the three other options without sufficient explanation, and suggested even more alternatives. The Tenth Circuit Court of Appeals found that Engineers' decision to not analyze these options was not "arbitrary or capricious." The court noted found that Engineers appropriately explained why they disregarded other alternatives, finding them unviable. Further, under CWA, Organization argued that Engineers did not appropriately analyze alternatives to permitting discharge of materials. The court found that, because the scope of the analysis was ambiguous, the court should defer to agency expertise.

The court also found that Engineers' interpretation was not plainly erroneous or inconsistent with the regulation. As such, the court affirmed the district court's decision.

D.C. Cir.
Angelex, Ltd. v. United States, 907 F.3d 612 (D.C. Cir. 2018).

Shipowner brought action against Coast Guard for allegedly unreasonably detaining its vessel for six months pending criminal trial pursuant to the Act to Prevent Pollution from Ships ("Act"). In accordance with the Act, Coast Guard requires that ships maintain a record book of discharges into the sea, and violation of this provision constitutes a felony. When Coast Guard agents inspected the ship, one of the crew members passed a note saying that the operator was using a special pipe to discharge oil and other contaminants without logging them. Coast Guard deemed this to be reasonable cause to believe a violation was committed and revoked clearance required to leave an American port pursuant to the Act. Further, Coast Guard and Shipowner entered into negotiations to set bond to allow the ship to leave pending trial. Coast Guard demanded $2.5 million for bond, with additional non-monetary conditions, which Shipowner refused. Because the maximum fine in this situation was $3 million, the court determined the bond amount to be reasonable. Further, the court stated that since the Coast Guard was explicitly given the power to detain the ship with reasonable cause, and the Ship Owner was indicted, the Coast Guard did not act unreasonably in detaining the ship. As such, the court affirmed summary judgment for the Coast Guard.

D. Colorado
Wilderness Workshop v. U.S. Bureau of Land Mgmt., Civ. No. 1:16-cv-01822-LTB, 2018 WL 5043909 (D. Colo. Oct. 17, 2018).

Non-profit challenged U.S. Bureau of Land Management's ("Bureau") Resource Management Plan ("RMP") regarding land in the Colorado River Valley. Non-profit used the Administrative Procedure Act ("APA") to bring suit against Bureau, as the National Environmental Policy Act ("NEPA") does not provide for a private cause of action. Non-profit alleged the Bureau's RMP violated the Federal Land Policy and Management Act because, according to non-profit, it had failed to closely examine the impacts to the people and environment and consider a reasonable range of alternatives. Specifically, Non-profit claimed Bureau failed in its RMP to adequately review the severity and impacts of greenhouse gas emissions,

methane emissions, their impact on climate change, and the effects of oil and gas on human health. Court determined that Bureau violated NEPA by failing to closely scrutinize the indirect effects resulting from the combustion of oil and gas in the RMP's considered land area, due to Bureau using energy output estimates in the RMP, but failing to estimate effects of those outputs. The district court found Bureau properly conducted a meaningful cumulative impact analysis regarding potential impact on climate change. The court determined Bureau was not required, as Non-profit suggested, to perform cost-benefit analysis regarding GHG emissions. The court did not find Bureau breached its obligation to examine methane potency in its RMP, nor did Bureau improperly use industry assumptions regarding emission volume of methane. However, the district court did determine that, in failing to consider reasonable alternatives that would meaningfully limit oil and gas leasing and development within the planning area, BLM violated NEPA.

D. District of Columbia
Moncrief v. U.S. Dept. of Interior, 339 F. Supp. 3d 1 (D.D.C. 2018).

Lessee sought summary judgment against the Department of Interior ("DOI") and director of the local Bureau of Land Management ("Director") for violating the Administrative Procedure Act ("APA") and the Mineral Leasing Act ("MLA"). More than thirty years after a federal oil and gas lease was suspended from drilling and extracting activities, DOI and Director cancelled the lease without giving notice to Lessee. Generally, agencies have the power to revisit and rescind their previous decisions, including those granting leases, so long as that power is exercised within a reasonable amount of time. All agency decisions and actions must be reasonable with reasonable explanations. Under the APA, an agency's action is arbitrary and capricious rather than reasonable if: (1) the agency relied on factors outside of those Congress intended be considered; (2) the agency completely failed to consider an important element of the issue it decided on; or (3) the agency offered an explanation for its action or decision that is contrary to the evidence available. Reasonableness in light of cancelling a lease must include consideration of the Lessee's reliance interests at stake. Furthermore, arbitrary cancellation of a federal lease without notice and wrongdoing on Lessee's behalf violates Lessee's bona fide purchaser rights under the MLA. According to various environmental impact statements that Director contributed to over the years, the land the lease applied to was appropriate for use; however, Director continued to suspend the lease. Eventually, that land was incorporated into a Native

American "traditional cultural district." Lessee requested a hearing with DOI, which DOI never responded to. The lease was subsequently cancelled. The court granted Lessee's motion for summary judgment because DI and Director's decision failed to consider Lessee's reliance interest and because they cancelled the lease without providing any notice.

This case has since been appealed, but there is no decision from the higher court as of publication.

E.D. Michigan
Indigenous Envtl. Network v. U.S. Dep't of State, No. CV-17-29-GF-BMM, 2018 WL 5840768 (D. Mont. Nov. 8, 2018).

Environmentalists continue to oppose the Keystone Pipeline. This case centers on a motion for summary judgment and an alleged violation of the Administrative Procedure Act ("APA"). Environmentalists offered several claims as to how Department violated the APA. The court denied Environmentalists' first contention, claiming that Company's purpose statement was insufficient. Next, the court dismissed the contention that Department failed to consider all appropriate alternatives. The court found that Department considered all relevant alternatives. The court then refused to consider some lesser claims. The court, however, did find that Department failed to comply with NEPA and the APA in its failure to fully articulate its reasoning in its record of decision. The court remanded the issue to Department with instructions for Department to fully explain its reasoning in a way that does not contradict itself.

This case has since been appealed, but there is no decision from the higher court as of publication.

E.D. Washington
All. for the Wild Rockies v. Pena, No. 2:16-CV-294-RMP, 2018 WL 4760503 (E.D. Wash. Oct. 2, 2018).

Conservationists challenged U.S. Forestry Service's ("Forestry") approval of a new restoration, logging, and timber sale project. Conservationists challenged the validity of the bidding process for the contract, which went to a private Third-Party. Third-Party then, per the contract, sub-contracted another company to perform an environmental impact assessment of the proposed project. Conservationists claimed conflict of interest with regards to the contract bidding as well as claiming the environmental analysis and

Forestry's approval of the project was arbitrary and capricious. The district court determined that Conservationists lacked standing to sue under the Administrative Procedure Act ("APA") or the National Environmental Policy Act ("NEPA"), due to Conservationist's lack of injury-in-fact, yet continued to rule on the merits of Conservationists' claims to complete the record for review. First, the court determined that the bidding competition under the National Forest Management Act ("NFMA") was open and fair, and the contract award was proper. The court could find no conflict of interest and reasoned that even had there been a conflict of interest, Forestry's oversight of the environmental assessment would have cured such defect. The court also found Forestry did not violate NEPA, because a proper environmental analysis was carried out. The court found no defect in the manner in which sub-contractor performed the environmental analysis, particularly with regards to the separation of the project into two different geographical areas for analysis. Conservationists could not raise a genuine issue of material fact regarding its claims that the environmental assessment failed to consider the overall impact of the project on fish-bearing streams and furbearing populations.

W.D. Washington
Coalview Centralia, LLC v. Transalta Centralia Mining LLC, No. C18-5639 RBL, 2018 WL 5619027 (W.D. Wash. Oct. 30, 2018).

The case arises out of a dispute over the performance of a series of agreements related to the reclamation of a coal mine and associated power plants. The company that owned the mine ("Mining") hired a reclamation firm ("Reclamation") to clean up and restore three waste coal slurry impoundment sites ("ponds"). The contract specifically at issue in this case was the Master Services Agreement ("MSA"). Subsequently, a dispute arose concerning the invoices. Mining refused to pay invoices submitted by Reclamation, alleging Mining overpaid Reclamation for work completed and threatening to terminate the relationship if Reclamation did not refund the excess payments. Reclamation sued, claiming Mining breached the parties' agreements, and sought to (1) enjoin Mining from terminating the relationship and (2) require Mining to comply with the "continuing to diligently perform while the dispute is resolved" aspect of the MSA. The trial court granted the temporary restraining order ("TRO"). The court made its judgement based on four factors: (1) Reclamation can show a chance of success on the merits because, at the very least, there are serious questions as to how the merits of Reclamation's claims would play out and a verdict for Mining is not guaranteed; (2) Reclamation can show that the absence of

a TRO would result in irreparable harm, namely that Reclamation would close and cease to exist; (3) the balance of hardships tips sharply in favor of Reclamation and in favor of injunction, because if no injunction was granted and Reclamation shut down, Mining would have no means for recovering the alleged debt owed by Reclamation and Reclamation could not recover the alleged unpaid invoices; and (4) the public interest goes to granting the TRO because the public interest would not be served by the clean-up work stop altogether. For these reasons the trial court granted the TRO.

State

California

High Sierra Rural All. v. Cty. of Plumas, 239 Cal. Rptr. 3d 874 (Cal. Ct. App. 2018).

Environmental Group challenged County's adoption of a city plan update and Environmental Impact Statement ("EIS") as required under California Environmental Quality Act. Environmental Group challenges the EIS and County Plan ("CP") in areas outside of the current planning area. Environmental Group alleged that the CP violated the California Timberland Productivity Act of 1982 ("Act") and Government Code Section 51104 ("Code"). Environmental Group also argued that the EIS was defective because it did not take into account newly allowed clustered subdivisions, and that it should be recirculated because County added substantial information about the development after the comment period had closed. The district court found that the CP did not violate the Act because it failed to recite the statutory language in the Code, and because that section was sufficient to provide restrictions on structures in timber production zones. Additionally, the EIS adequately analyzed reasonably foreseeable development within the area. The EIS was thus sufficient because the population of the county was decreasing, and development outside of the current planning area was unlikely. If there were to be new developments, County would undergo additional analysis.

Save Our Heritage Organization v. City of San Diego, 239 Cal. Rptr. 3d 231 (Cal. Ct. App. 2018).

A heritage organization ("Organization") had been trying to gain pedestrian access to historic portions of an urban park. As part of the longwinded litigation, Organization filed a writ of mandamus challenging City's grant

of an environmental impact report ("EIR") for changes to the project. The lower court affirmed City's approval. Under the California Environmental Quality Act ("CEQA"), addendums could be made to EIRs to make corrections without creating an entirely new EIR and without making any new findings. When changes were made to the park plan to meet current City standards, City did not conduct another EIR, but rather, made minor adjustments through an addendum within the existing EIR. Organization felt that the changes were significant enough to require a new EIR, and that City, by not requiring a new EIR, was neglecting an express duty. However, the reasons City gave for not requiring a new EIR met the relevant standards under CEQA, so no other EIR was conducted. CEQA requires that City balance the public environmental consequences with the finality and efficiency of the decision. The court determined that Organization did not meet its burden in showing that the addendum process was invalid because the changes were minor, made pursuant to City codes and green initiative standards, and made the park more accessible. Furthermore, the addendum process and guidelines were appropriate under federal law and were a proper use of the State's traditional police powers.

Indiana

Elkhart Foundry & Mach. Co. v. City of Elkhart Redev. Comm'n, 112 N.E.3d 1123 (Ind. Ct. App. 2018).

This case centers on an appeal as to which statute governs the statute of limitations for environmental lawsuits in Indiana. City, who won at the trial court, contended that a statute relating to environmental legal actions governed, as did its ten-year statute of limitations. Company argued that the general statutes governing property injuries and its six-year statute of limitations governed. The appellate court sided with the trial court, affirming that the ten-year environmental legal action statute of limitations governed. Through statutory interpretation, the court found that the language of the environmental legal action statute is meant to be considered the appropriate statute of limitations in this case. The court disregarded Company's argument because the case it cited was filed two years before the enactment of the relevant statute. The court then declined to decide issues relating to Indiana's mini-CERCLA. The court then analyzed City's claim of a continuing nuisance resulting from the site's contamination. The court sided with Company, because according to Indiana case law, there must be continued activity to constitute a continuing nuisance. The mere continued existence of the pollution was insufficient. Therefore, City missed the six-year statute of limitations for this cause of action.

New York

Nat. Fuel Gas Supply Corp. v. Scheuckler, 88 N.Y.S.3d 305 (N.Y. App. Div. Nov. 9, 2018).

Federal Energy Regulatory Commission ("FERC") granted Company's application to construct a natural gas pipeline. Company then attempted, under Eminent Domain Procedure Law, to acquire easements over Owners property. Company argued it did not need to have a public hearing or finding about eminent domain because FERC's certificate exempted it. Owner argued that because Company had its application denied under the Clean Water Act ("CWA"), its certificate was invalid under FERC. The lower court granted Company's petition, which Owners appealed. The appellate court found that Company was not exempt from Eminent Domain Procedure Law under FERC because the certificate issued to Company was "subject to" various conditions. One such condition was that, through the CWA, Company must receive a water quality certification, which Company failed to do. Because State did not issue Company a water qualification certification, Company's FERC Certificate was made invalid. As such, the court reversed, holding that Owners had no exemption and no certificate.