Oil and Gas, Natural Resources, and Energy Journal

Volume 5 | Number 2
The 2019 Survey on Oil & Gas

September 2019

Recent Case Decisions

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

Vol. V, No. II September, 2019

Table of Contents

SELECTED OIL AND GAS DECISIONS 376
SELECTED WATER DECISIONS 382
SELECTED LAND DECISIONS 387
SELECTED ELECTRICITY DECISIONS 396
SELECTED TECHNOLOGY AND BUSINESS DECISIONS 397
SELECTED ENVIRONMENTAL DECISIONS 399

All case citations are as of 9-15-2019. 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 8-31-2019. 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

S.D. Texas
M-I L.L.C. v. Q'Max Sols., Inc., No. CV H-18-1099, 2019 WL 3565104 (S.D. Tex. Aug. 6, 2019).

An upstream oil and gas company ("Previous Employer") which developed hydraulic simulation software ("Software") sued one of their former employees ("Employee") for breach of contract. Previous Employer also sued Employee and his current employer (collectively "Current Employer") for trade secret misappropriation. While working for Previous Employer, Employee signed a confidentiality agreement requiring him to maintain Previous Employer's trade secrets confidential during and after his employment. After Employee left Previous Employer, Employee began working for his Current Employer. After Current Employer released a competing version of Previous Employer's Software, Previous Employer discovered that Employee had copied and retained Previous Employer's confidential information and was using it to help build Current Employer's new product. After filing suit, Previous Employer filed a motion for summary judgment as to their claims against Employee and Current Employer. The Court denied Previous Employer's motion regarding the trade secret misappropriation claim. The Court reasoned that questions of fact existed regarding whether the documents taken by Employee actually contained confidential information. The Court stated that Previous Employer's motion only included generalizations, rather than specifics, regarding the independent value of the documents taken by Employee and of Previous Employer's efforts to maintain the secrecy of their confidential information. The court further reasoned that questions of fact existed as to whether Current Employer actually used Previous Employer's confidential information, as required by misappropriation claims. The Court granted Previous Employer's summary judgment motion as to Employee's breach of contract but left the issues of the scope of the breach and the damages for trial. Employee admitted to breaching the contract but raised the affirmative defenses of waiver and laches. The Court held that Employee's affirmative defenses were inapplicable because Previous Employer promptly filed their action after learning that Employee had retained documents, and because Employee presented no evidence or argument to support his laches defense.

Upstream – State

Alaska
All Am. Oilfield, LLC v. Cook Inlet Energy, LLC, 446 P.3d 767 (Alaska 2019).

Oil Company contracted with Drilling Company for drilling services for numerous gas wells. Drilling Company successfully drilled and completed the gas wells. Oil Company never paid Drilling Company who filed liens against the wells and the natural gas within the reservoir itself before Oil Company filed bankruptcy. Drilling Company file a preferred mineral lien against the reservoir which the bankruptcy court found not to be valid and Drilling Company appealed. The Supreme Court of Alaska held that Drilling Company was not entitled to a preferred mineral lien because the natural gas had never been reduced to possession and thus did not fall within the ambit of the statute authorizing a preferred mineral lien. Additionally, the Court held that natural gas accumulating in a pipeline satisfies the preferred mineral lien statute as it has been reduced to possession and storage as required by the statute. Lastly, the Court held that the party seeking to enforce a preferred mineral lien must present evidence sufficient to show that the party's labor resulted in the extraction of minerals. Remanded the case back to the district court.

Pennsylvania
Marcellus Shale Coal. v. Dep't of Envtl. Prot., No. 573 M.D. 2016, 2019 WL 3268820 (Pa. Commw. Ct. July 22, 2019).

Natural Gas Industry Organization ("Organization") sought preliminary enforcement review against Department of Environmental Protection ("DEP") for passing a rule regulating hydraulic fracturing in unconventional wells. On remand from the Supreme Court of Pennsylvania, this court heard cross-applications for summary relief. The court held that (1) DEP could not establish a clear right for relief from Organization's claims that DEP exceed its statutory authority when promulgating certain provisions of the rules relating to pollution monitoring and remediation requirements; (2) contrary to Organization's claims, the rule's permitting, bonding, and notice requirements did not conflict with other state law; (3) while DEP had statutory authority to regulate waste storage permitting and set standards for well development impoundments, the arguments presented were not sufficient to warrant relief for either side on the issue of the constitutionality of the well development impoundment standards; (4) DEP's rulemaking

concerning site restoration requirements was issued under its statutory authority, was not so vague or facially ambiguous as to render it unenforceable, was issued according to the necessary procedures, and was not unreasonable; (5) the rule's spill remediation requirements posed no perceivable threat to the industry warranting the court's pre-enforcement intervention; and (6) the rule's waste reporting requirements was promulgated pursuant to DEP's statutory authority and did not conflict with other state law. For the above reasons, the court granted the cross-applications in part and denied in part.

Midstream – Federal

D. Kansas
Panel Specialists, Inc. v. Tenawa Haven Processing, LLC, No. 5:16-CV-04140-HLT, 2019 WL 3716451 (D. Kan. Aug. 7, 2019).

Instrumentation and electrical ("E&I") services company ("Services Company") brought action against a midstream natural gas processing company ("Processor") based on a contract between the parties regarding construction of Processor's new facility. Services Company asserted a breach of contract based on Processor's failure to fully pay, and Processor counterclaimed failure to pay was due to Services Company unreasonably marking up their E&I invoices. Both parties proffered expert testimony regarding the invoice markups, and moved to exclude the other's expert testimony. The Court denied Service Company's motion to exclude Processor's expert testimony which alleged Service Company's markups were unreasonably excessive. The court found Processor's expert testimony to be based on industry knowledge and experience from the relevant market, as well as from the expert's personal involvement on the project. The Court held that this testimony would be useful to the jury, who would determine credibility, regarding the industry customs on reasonable E&I invoice markups. The Court went on to exclude only a portion of Service Company's rebuttal expert testimony, which introduced new legal issues not pertaining to the rebuttal of Processor's expert testimony on E&I markups. The Court excluded Service Company's expert testimony regarding the importance of reviewing E&I invoices for accuracy, because Service Company's expert was only designated to proffer testimony about the invoice markups. The Court allowed Service Company's expert to offer rebuttal testimony as to the reasonableness of the markups because the expert testified based off of industry knowledge and experience which would be useful to the jury. The

Court concluded by stating that either party could re-raise the issue later in the case, after the Court heard the complete testimony of both experts.

Midstream – State

Texas
McDonald Oilfield Operations, LLC v. 3B Inspection, LLC, No. 01-18-00118-CV, 2019 WL 3330966 (Tex. App. July 25, 2019).

Pipeline Inspection Company ("Company") was sued by Competing Pipeline Inspection Company ("Competitor") after Competitor hired independent contractor previously employed by Company. Competitor brought claims under theories of business disparagement, defamation, and tortious interference with contract, alleging that Company made disparaging remarks about Competitor to Competitor's client. Company unsuccessfully moved to dismiss Competitor's claims pursuant to the Texas Citizens Participation Act ("TCPA"). An appellate opinion followed and Company successfully motioned for a rehearing. Upon rehearing, this court reversed and remanded back to the trial court. Under the TCPA, the trial court was obligated to dismiss Competitor's claims upon proof that the litigation was brought in response to Company's exercise of their right to free speech, unless Competitor establishes a prima facie case for each claim by clear and specific evidence. First, the court held that the TCPA was triggered because Company's alleged statements regarded the independent contractor's operator qualifications. Thus, Company was exercising their right to free speech because Company's statements implicated public safety issues and were related to a matter of public concern. Second, the court held that Competitor's claims were merely supported by conclusory statements, and thus insufficient to establish a prima facie case by clear and specific evidence. For these reasons, the court reversed and remanded, concluding that the trial court abused its discretion in denying Company's motion to dismiss pursuant to the TCPA.

Pearl Energy Inv. Mgmt., LLC v. Gravitas Res. Corp., No. 05-18-01012-CV, 2019 WL 3729501 (Tex. App.—Houston [1st Dist.] Aug. 7, 2019).

An oil and gas production company ("Production Company") sued a private equity firm, an investment fund, and one of the fund's portfolio companies (collectively, "Private Equity Firm"). Production Company spent considerable time and resources researching a potential property acquisition, which they developed a confidential financial report over. After an NDA was

signed, Production Company shared their report with Private Equity Firm, hoping Private Equity Firm's fund would help finance their acquisition. Private Equity Firm then communicated the confidential information from Production Company' report to their portfolio company and proceeded to purchase the property out from under the Production Company, using the information from the confidential report. Private Equity Firm filed a motion to dismiss Production Company's claims pursuant to the Texas Citizens Participation Act ("TCPA"), which was denied by the trial court. This prompted the Private Equity Firm to appeal to the Court of Appeals of Texas. On appeal, the Court affirmed the trial courts denial of Private Equity Firm's motion to dismiss. The Court reasoned that the purpose of the TCPA, on which Private Equity Firm based their motion, was to dispose of lawsuits designed to inhibit the first amendment rights of others. The Private Equity Firm's communication of the confidential report was not protected as a right of association under the TCPA because it did not concern the public good or citizen participation. The Court reasoned that construing the Private Equity Firms' communication as protected by the TCPA, merely because the Private Equity Firms communicated it to their portfolio company with a shared common interest, would not further the legislative goals of the TCPA. Further, the Court held that the Private Equity Firm's communications were not protected as free speech under the TCPA because they did not involve a matter of public concern, but only the Private Equity Firms' own financial interests. For these reasons, the Court affirmed the trial court's denial of Private Equity Firms' motion to dismiss pursuant to the TCPA.

Downstream – Federal

8th Circuit
Kodiak Oil & Gas (USA) Inc. v. Burr, 932 F.3d 1125 (8th Cir. 2019).

Tribe Members brought suit against Oil Company in tribal court alleging waste of natural gas through flaring and sought damages in terms of lost royalty payments for the flared natural gas. Oil Company contested tribal court jurisdiction but the tribal court found jurisdiction proper because Oil Company voluntarily entered into a contractual relationship with Tribe Members. Oil Company brought suit in federal district court seeking injunction to stop tribal court from exercising jurisdiction. The district court granted the injunction finding that tribal court cannot exercise jurisdiction over nonmembers. The United States Court of Appeals for the Eighth Circuit affirmed the district court's injunction blocking tribal court jurisdiction holding: (1) oil and gas leases on tribal land are wholly regulated by the

federal government so any regulatory actions by tribal court would be preempted; (2) tribal courts are not courts of general jurisdiction so they cannot hear federal question claims; (3) tribal officials could not avoid the injunction via sovereign immunity as the Oil Company was just seeking an injunction, not monetary damages.

D. Kansas

Hitch Enterprises v. Oxy USA Inc., No. 18-1030-EFM-KGG, 2019 WL 3202257 (D. Kan. July 16, 2019).

Well Owners ("Owners") sued Well Operator ("Operator") alleging Operator breached its lease because Operator underpaid royalties by wrongly deducting a portion of production costs from royalties. Operator removed case to federal court and Owners moved to certify a class of royalty owners in Kansas wells. Operator opposed the class certification and subsequently moved for partial summary judgment. The court denied Owners' motion to certify based on several findings. First, because the court concluded that in-Kansas gas can be marketable before it is marketed in a good faith transaction action, Owners' breach of duty argument cannot be resolved without evaluating individualized evidence. Second, Owners failed to present a determinative common question regarding deduction of costs from royalties. Third, Owners' proposed common question regarding Operator and Affiliate's payment of royalties was not common to the entire proposed class. Fourth, Owners' proposed common question that Operator failed to pay interest on refunded Conservation Fees was too minor to justify certification. Operator moved for partial summary judgment on three grounds: (1) all breach of contract claims based on deductions taken from July 1, 2007 to January 11, 2013 were barred by the statute of limitations; (2) Owners were not entitled to 10% interest on refunded Conservation Fees; (3) Operator already paid Owners royalties for all fuel used or lost in the field or at the plant. On the first ground, the court denied summary judgment because Operator was equitably estopped from asserting a statute of limitations defense. On the second ground, the court granted summary judgment because Owners were entitled to an interest rate of prime plus 1.5% pursuant to Kansas statute. On the third ground, the court granted summary judgment because Owners did not contest the issue.

SELECTED WATER DECISIONS

Federal

D. California
Glenn-Colusa Irrigation Dist. v. U.S. Army Corps of Eng'rs, No. 2:17-cv-120 WBS CKD, 2019 WL 3231748 (D. Cal. July 17, 2019).

Irrigation District brought action against the United States Army Corps of Engineers (USACE) alleging a breach of a construction contract. This dispute arose because of a failure to construct an irrigation facility according to the contract's specifications which were required in the Project Cooperation Agreement (PCA). The PCA required the USACE to contribute a minimum of 25% of total project costs for the facility. The focus of the USACE's motion concerns bank stabilization near River Mile 208. The PCA stated that the government may "carry out bank stabilization work in the riverbed gradient facility. . .if the Assistant Secretary of the Army determines that such work is necessary to protect the overall integrity of the project. The USACE never determined that bank stabilization work was necessary. Consequently, Irrigation District brought action against the government alleging that the PCA had been breached by failing to construct the gradient facility according to the PCA's specifications. The court noted that federal law governs contract interpretation where the United States is a party, and that contract interpretation starts with the language of the written agreement. After applying this rule, the court reasoned that the contract at issue in this case, define the obligations of the parties and the scope of the gradient facility project, however, nothing in the contract mentions an obligation related to bank stabilization of River Mile 208. Further, the court found that the authorization for the engineering and environmental work mentioned in the contract was an exercise of the Assistant Secretary's discretion. The Irrigation District contended that the government used funds for the project, and also that the government would not have performed the work if it did no have an obligation to. However, these contentions do not establish that River Mile 208 was the subject of any contractual obligations. Consequently, the court ruled granted the USACE's Motion for Partial Summary Judgment.

E.D. California
Cent. Sierra Envtl. Res. Ctr. v. Stanislaus Nat'l Forest, No. 1:17-cv-00441-LJO-SAB, 2019 WL 3564155 (E.D. Cal. Aug. 6, 2019).

Environmental Group brought suit against Forest Service challenging a permitting scheme regulating cattle grazing on allotted National Forest land. Environmental Group filed for summary judgment on multiples claims and Forest Service filed cross-motions for summary judgment in response. Environmental Group's first claim for relief centered around violations of the Clean Water Act ("CWA"), including violations of water-quality standards as a result of grazing and a failure to file proper reports concerning grazing discharges. The court rejected Environmental Group's claims because Forest Service's ongoing regulatory efforts to reduce water quality violations were reasoned and not arbitrary and capricious. Furthermore, under the Management Agency Agreement ("MAA") Forest Service is not required to file notices of discharge or obtain permits. Environmental Group's second claim for relief alleged Forest Service violated the National Forest Management Act ("NFMA") because it failed to comply with provisions of a forest and resource plan. The court found that Forest Service's general compliance with short-term and long-term forest plan standards and guidelines advanced the goals of the forest plan and was a reasonable interpretation of the forest plan. Additionally, the court found Forest Service is owed significant deference in determining the methodology it uses to measure forest data because of its agency expertise. The court thus denied Environmental Group's motion for summary judgment and granted Forest Service's cross-motions for summary judgment.

State

California
Barclay Hollander Corp. v. Cal. Reg'l Water Quality Control Bd., No. B284182, 38 Cal.App.5th 479, (Cal. Ct. App. 2019), *reh'g denied* (Aug. 27, 2019).

This case concerned Water Quality Control Board's ("Board") determination that Developer was jointly and severally responsible for the cleanup up of petroleum contaminants on a housing site where Developer had constructed and sold homes. Developer sought a reversal of judgment of the Los Angeles Superior Court denying its petition seeking to overturn the determination, alleging the Administrative Procedure Act ("APA") and its Bill of Rights should have applied to Board's proceedings and due process violations. The

appellate court affirmed the L.A. Superior Court's decision for several reasons. First, Developer failed to allege a statutory basis for the application of APA hearing procedures to Developer's claim. Second, Developer's waived its opportunity for a formal hearing because it failed to object in a timely manner to informal proceedings. Third, Developer mistakenly asserted with no statutory basis that the California Legislature engrafted the APA into the Code of Civil Procedure. Finally, in weighing due process principles, the appellate court concluded that Developer was afforded appropriate due process because Developer had opportunities to fully express its views and address its interests and the substantial governmental interest in water quality.

Maryland
Md. Dep't of the Env't v. Cty. Comm'rs, Nos. 5, 7, Sept. Term, 2018, 2019 WL 3561897 (Md. Aug. 6, 2019).

County 1 and County 2 appealed for judicial review of municipal storm sewer permits issued by Department of the Environment ("Department") that, for the most part, upheld Department action. The appellate court upheld Department permits holding that (1) a challenge to a permit term derived from a Total Maximum Daily Load ("TMDL") can only be raised in an action reviewing the EPA's approval of that TMDL because that action is reviewable under the Administrative Procedure Act ("APA"); (2) the Impervious Surface Restoration Requirement ("ISRR") was consistent with the EPA's interpretation of the Clean Water Act ("CWA") because the CWA permits agencies to include water quality limitations without referring to the Maximum Extent Practicable ("MEP") standard; (3) the inclusion of the ISRR was not arbitrary and capricious because it was consistent with area TMDLs, and the Department adequately addressed issues raised by County 2; (4) the Department did not exceed its authority under the CWA through ISSR county-wide baselines because county-wide baselines were necessary to achieve water quality standards; (5) Counties' arguments alleging restoration planning requirements exceeded the scope of the Department's authority could only have been raised in a challenge to the EPA's approval of the TMDL; (6) Counties cannot be relegated to a Phase II permit with less stringent regulations because Counties have been treated as Phase I jurisdictions for over thirty years and a change in distinction risks backsliding, among other reasons; (7) Department's failure to approve water quality trading in Counties' permits was not arbitrary and capricious because it occurred before the Department concluded ongoing review regarding water quality trading; (8) permit terms regarding future development do not

override State statutes because they do not restrict the Counties' obligation to cooperate with other entities under State law.

Michigan
Gottleber v. City. of Saginaw, No. 336011, 2019 WL 3521832 (Mich. Ct. App. Aug. 1, 2019).

This case is an inverse condemnation action that was reviewed on remand. County of Saginaw ("County") purchased land adjoining Landowner's parcel to serve as a Dredged Material Disposal Facility ("DMDF"). To combat the environmental effect of the DMDF, County also built a Wetland Mitigation Area ("WMA"). Landowner asserted that the WMA construction by County caused flooding on his land. This case was heard on remand from the Michigan Supreme Court to determine the following issues: (1) whether County had the legal duty to continue artificially pumping and draining water on its land for the benefit of Landowner; and (2) If such duty does not exist, whether County had abused its powers by affirmatively taking actions that were aimed at Landowner's property. On the first issue, the appellate court held that County does not have a legal duty to maintain an artificial water level on its land for Landowner's benefits. Landowner cannot complain that County does not maintain water on its land the same way a prior owner had. But, even though County is under no obligation to maintain artificial water level, County cannot divert the natural flow of surface water on its land so as to impose on one person what would have belonged to another. On the second issue, the court found that County did abuse its legitimate powers, meaning Landowner can proceed to trial on its inverse condemnation claim. By removing the existing drainage system and halting pumping activities in order to construct the WMA (all affirmative actions), County altered the natural flow of water and concentrated it in an adjacent area to Landowner's property.

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

Montana
United States Dep't of Army Corps of Eng'rs v. United States Dep't of Army Corps of Eng'rs, 2019 MT 174, 396 Mont. 433, 445 P.3d 828.

This case is about a dispute between Fort Peck, a town plagued with population decline ("Town"), and State on the correct water volume Town can claim. Town claimed 773 acre per year ("AFY"), while State

recommended 206 AFY. Both parties entered a joint pretrial order to determine the correct water volume. The Water Court set Town's volume at 171 AFY, and Town appealed with the following issues: (1) The Water Court erred in its contradiction of the pretrial order; (2) Water Court erred when it based its volume determination on current use, instead of Town's historical use and anticipated future use; and (3) Town was denied due process because it was not provided an opportunity to present evidence on its current water use. Town lost on all claims. First, the purpose of a pretrial order is to simplify issues and prevent surprises. In its phrasing of the pretrial order, the Water Court clearly provided notice to the parties that there will be a broader inquiry than what was in the pretrial order, and neither party objected. Second, State provided enough evidence that the volume amount claimed by Town was more than the amount needed to satisfy its current use plus future use. Historical use alone is not the basis of volume determination. Town's long history of water volume non-use was rightly considered by the Water Court. Lastly, Water Court's records indicated several exhibits were introduced at trial, which reflected Town's current water use. Thus, Town's due process was not violated, as it had adequate notice that its current water use might be considered.

SELECTED LAND DECISIONS

Federal

7th Circuit
Boucher v. United State Dep't of Agric., 934 F.3d 530 (7th Cir. 2019).

Property Owner petitioned for a review of a United States Department of Agriculture (USDA) determination that her property was converted wetland, which effectively rendered her ineligible for governmental benefits. USDA asserted that nine tree removals by Property Owner converted several acres of wetland into cropland. The district court agreed, and the Seventh Circuit reversed. First, the appellate court held in favor of Property Owner because USDA ignored compelling evidence offered by Property Owner showing that her property never qualified as a wetland. To determine whether a property qualifies as wetland, USDA must assess whether there is a predominance of hydrophotic vegetation, a prevalence of hydric soils, and wetland hydrology under normal circumstances. Property Owner's property does not meet any of the elements needed to classify her site as a wetland. Second, USDA's classification of Property Owner's property did not make any rational connection with the facts found by Property Owner and, instead, was based on an erroneous assumption. USDA's agent assumed that hydrology on Property Owner's property had been drained via the installation of tile. Property Owner repeatedly refuted this assumption with valid evidence, but such evidence was intentionally ignored by USDA. Third, USDA never sent a hydrologist to inspect Property Owner's property throughout the administration process, despite the fact that hydrology was at the heart of the dispute. Finally, USDA's assertion that removal of woody hydrophotic vegetation from hydric soil is sufficient to deem the site a converted wetland is an overreach and runs contrary to the definition's focus of hydrology. Overall, USDA's actions in the administrative process with Property Owner was arbitrary, capricious, and represented a blatant abuse of discretion.

W.D. Louisiana
Precht v. Columbia Gulf Transmission, LLC, No. 2:18-CV-0853, 2019 WL 3368600 (W.D. La. July 24, 2019)

Farmers claimed to have a verbally created farm lease over lands owned by Lessor. Lessor entered into a Right of Way Agreement ("ROWA") with Pipeline Company, granting Pipeline Company permission to create a pipeline across the farmland, while Farmers allege their lease was already in

existence. In the ROWA, Pipeline Company promised to pay for any damages to crops caused by pipeline construction. On the day the ROWA was executed, Lessor signed a release of all claims against Pipeline Company ("Release"). Farmers filed suit for damages to their farming operations caused by the pipeline construction. The parties then filed cross motions for summary judgment ("MSJ"). Pipeline Company argued the release barred Farmers' claims for damages under the ROWA, and Farmers' trespass claims failed because they could not establish ownership of the damaged crops. The Court ruled that the release was valid, despite lacking relevant restrictions, but because the Release was restricted to claims brought by Lessor, and not Farmers as Lessor's tenants, the Release did not restrict the Farmers' claims as third-party beneficiaries to the ROWA. The Court then held that, because the damages promise made by Pipeline Company did not restrict beneficiaries of the promise to Lessor, Farmers could claim a benefit under the promise as a third-party beneficiary to the ROWA. However, because questions of fact existed regarding the Lessor's agent's authority to enact the lease with Farmers, the Farmers' MSJ for damages as third-party beneficiaries to the ROWA was denied. The Court granted Pipeline Company's MSJ regarding Farmers' trespass claim, because Farmers could not show separate ownership over the crops trespassed on. This was due to separate ownership not having been established by an instrument, as Farmers' lease was verbal and was never recorded.

D. North Dakota

Wachter Dev., Inc. v. Martin, No. 20180379, 2019 WL 3421911 (D.N.D. July 30, 2019).

Realtor purchased land from Developer. Before Realtor obtained a warranty deed from Developer, Realtor sold a portion of the land to Purchaser. Prior to delivering the warranty deed to Realtor, Developer recorded a Declaration for Restriction and Obligation (DRO), which included a no fence restriction. Purchaser appealed a district court ruling that ordered a removal of a dog run on his property, because the dog run violated the DRO's no fence restrictions. Purchaser lost on all of the following raised issues: (1) the DRO was not applicable to Purchaser's property under the doctrine of equitable conversion; (2) Developer could not enforce the DRO because Developer waived its rights; and (3) the DRO was unconscionable. On the first issue, the Supreme Court of North Dakota held that the doctrine of equitable conversion was inapplicable to Purchaser. For equitable conversion to apply, one must have a fee simple title. In this case, Purchaser was constructively notified that Realtor's agreement to convey a fee simple title was conditioned

upon Realtor acquiring a fee simple title from Developer. Therefore, because Developer recorded the DRO prior to Realtor acquiring its fee simple title, Purchaser was bounded by the terms in the DRO as a covenant that runs with the land. Secondly, Purchaser was precluded from claiming that Developer waived its right to sue because a "no waiver" provision was included in the DRO. The no waiver provision was clear, barring Purchaser from raising the defense of acquiescence or waiver. Finally, the DRO was not unconscionable. Even though procedural unconscionability may have existed since the homeowners were not afforded the opportunity to negotiate the terms of the DRO, the DRO nevertheless contained no surprise component or substantive unconscionability so as to render it unenforceable.

State

California
Save the Hill v. City & Cty. of San Francisco, No. CPF-16515238, 2019 WL 3284589 (Cal. Ct. App. July 22, 2019).

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

Environmental Organizations (EO) appealed a denial of their petition for writ of mandate against the City's environmental impact report's (EIR) certification for a development plan. They also appeal the findings of the infeasibility of an alternative project under the California Environmental Quality Act (CEQA). The court considered the original agency's action under de novo review. The purpose of an EIR under CEQA is whether it includes enough detail to be understood by those outside of the project and whether it allows consideration of issues raised by the project. The court does not require scientific certainty but rather a good-faith effort at full disclosure. EO questioned the adequacy of EIR because certain issues were not addressed. However, EO failed to provide substantial evidence that there are reasonably foreseeable impacts not addressed by EIR. EO also contended that EIR was insufficient in its analysis of impact on traffic. However, EIR included the required analysis and outlined potential traffic mitigation measures. City determined by substantial evidence that alternative plans were infeasible. A determination of feasibility includes economic, social, environmental, and technological factors. Determinations by agencies are given great deference and presumed correct. The burden of overturning such determinations is upon the party seeking writ of mandate, which was not met here.

Minnesota
Minn. Ctr. for Envtl. Advocacy v. Minn. Dept. of Nat. Res., No. A18-1956, 2019 WL 3545839 (Minn. Ct. App. Aug. 5, 2019).

Environmental Group sought a declaratory judgment on the rule governing nonferrous mineral mining in Minnesota. In 2018, Government Agency issued the first permit for copper-nickel-platinum mine. Environmental Group sought to invalidate the administrative rules under which the permit was issued. The court stated the statutory grant of standing is broad, and those within the class of persons an act protects have standing. Government Agency contended that the statute of limitations and doctrine of laches allow for dismissal. The court stated, statute of limitations applies to declaratory judgments in the same extent as similar non-declaratory judgments. The rule in question has a unique statutory remedy, and there is no comparable non-declaratory action to derive a statute of limitations. Therefore, the court denied Government Agency's contention that the residual statute of limitations should apply. The court declined to apply the doctrine of laches to bar this action because laches is a discretionary doctrine whose application is infrequent in environmental litigation because often there are numerous parties injured. The court then went on to discuss the requirements for a court to declare a rule invalid. The rule must be: (1) in violation of the constitution, (2) exceed statutory authorization, or (3) be adopted through non-compliance with requisite steps for rulemaking. The court held that the rule exceeds statutory authority because the legislature instructed agencies to develop rules that emphasize agency goals while remaining flexible. Additionally, the general guidelines of the rule allow the court to conclude the rule does not abuse statutory authority through the commissioner's discretion. Environmental Group contends the rule is unconstitutional for vagueness. The court dismissed this contention by discussing the rule that another party may not assert another's constitutional rights. Additionally, the court held that Environmental Group provided no authority supporting environmental protection and property enjoyment as constitutionally protected property interests. Furthermore, the commissioner's discretion is not vague, as the permitting process provides definite requirements for a mine to receive a permit. Lastly, the court noted that the rule challenged was bettered suited for legislative resolution than judicial action.

Mississippi
Sullivan v. Maddox, No. 2011-CT-00820-COA, 2019 WL 3423397 (Miss. Ct. App. July 30, 2019).

Landowners sued Neighbor in an effort to prevent Neighbor from entering Landowners' property. In response, Neighbor asserted that he had an easement over Landowners' property. Many issues were raised, and the Mississippi Court of Appeal affirmed the following: (1) Chancellor's dismissal for failure to prosecute, and Chancellor's dismissal of Landowners' complaint with prejudice; (2) Chancellor's award of sanctions; and (3) Chancellor's judgement that Neighbor did not have an easement. Landowners argued that the Chancellor's dismissal of its claim for failure to prosecute was entered without reasonable notice, and thus affected their opportunity to be heard. The appellate court disagreed, citing that not every order given without notice is an automatic violation of due process. A district court has an inherent power to dismiss for failure to prosecute, in order to efficiently manage its docket. The complaint's dismissal with prejudice was also affirmed because the record indicated that Landowners purposefully delayed the case over time through different tactics. Next, Chancellor was within his discretion in awarding sanctions because the sanction was a result of various dilatory conduct the court frowns upon. Finally, the appellate court affirmed the ruling that Neighbor did not have an easement of record or easement by implication/necessity. The court also noted that the Chancellor was within his discretion in reviewing a previous motion for recusal and other information while determining sanctions. There was no easement of record because Neighbor knew or should have known that the only way to access his property was via the other adjoining land he owned at the time of purchase. There was no easement by necessity, partly because there are multiple ways that Neighbor could use to access his property.

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

New Jersey
Tecza v. Barone, Nos. A-5143-17T1, A-5306-17T1, 2019 WL 3282983 (N.J. Super. Ct. App. Div. July 22, 2019).

Construction Company demolished a small house on a lot and thereafter sold the lot to Homeowner. Adjacent Homeowner experienced water runoff on his property as a result of the house removal. Following the sale, Adjacent Homeowner's basement and yard frequently flooded. Adjacent Homeowner

brought suit to abate the nuisance. Previous law in New Jersey treated water as a common enemy that may be removed from property by any means without regard to neighboring property. However, the governing law now is that landowners owe a duty to not cause a nuisance by ridding water from their land onto that of their neighbors. Construction Company had created the nuisance by its demolition of the house. Homeowner was negligent by not taking the necessary action to correct the nuisance. Construction Company argued the New Jersey Supreme Court had ruled on this issue in a recent case. However, that case was distinguished because the defendant there did not act intentionally nor could have. Homeowner was on notice by Adjacent Homeowner of the flooding issue. Adjacent Homeowner prevailed at jury trial and the matter was handed to a Chancery judge to determine equitable relief. Adjacent Homeowner requested new drywells be installed to abate the nuisance. Construction Company again attempted to characterize the issue as one of Plaintiff's land, using an expert rather than presenting how the nuisance could be abated, which the Chancery Judge treated as an attempt at nullifying the jury's findings. With only one plan presented, the Chancery judge endorsed Adjacent Homeowner's plan.

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

Ohio

City of Cincinnati v. Triton Servs., Inc., No. C-170705, 2019-Ohio-3108, 2019 WL 3521934 (Ohio Ct. App. Aug. 2, 2019).

City sued General Contractor for breach of contract and unjust enrichment. City contracted with General Contractor for different sewer works, Project 1 and Project 2. Under Project 1, City accidentally paid General Contractor twice for its services. After City's multiple requests for General Contractor to return the original payment proved to be futile, City sued General Contractor for unjust enrichment. The Ohio Court of Appeals affirmed the trial court's ruling in favor of City. The double payment unjustly enriched General Contractor, and General Contractor's argument that it should be able to take advantage of City's mistake was meritless. On Project 2, General Contractor experienced delays due to unanticipated soil conditions. General Contractor sued City to recover unpaid contract balance and unabsorbed home office overhead. City countersued under spoliation of evidence doctrine, stating that General Contractor did not collect or preserve the soil samples needed for rebuttal. City further requested that the trial court exclude testimony of one of General Contractor's employee. The trial court ruled in

City's favor for both claims, and the appellate court reversed. First, the contract between City and General Contractor did not show that General Contractor had a duty to collect or preserve soil samples. Therefore, because no duty was imposed, there was no evidence that existed to be destroyed. Second, the trial court erred in excluding testimony of General Contractor's employee. General Contractor's testimony would not have caused City any unfair prejudice because the testimony would have appealed to a jury's intellect rather than to emotions that invoke an instinct to punish. General Contractor lost on its unabsorbed home office overhead claim; however, it lost because it failed to meet the prima facie element of being on standby and not being able to retain any work while on standby.

Texas
Ohio Dev., LLC v. Tapatio Springs Homeowners Ass'n, No. 04-18-00523-CV, 2019 WL 3432104 (Tex. App.—San Antonio July 31, 2019).

Development Company ("Developer") purchased a property ("Property") that shared a boundary line via a long strip of land (the "Strip) with a property owned by Homeowners Association ("HOA"). Developer filed an application seeking approval to develop Property, but its application was denied because Developer failed to show that it had access to cross the Strip. Developer commenced a declaratory judgement against HOA, stating amongst others, that it had an established easement to use the Strip to access Property. The trial court granted judgement in HOA's favor. Texas Court of Appeals reversed the trial court's decision, holding that Developer can cross the Strip because the Strip had an easement appurtenant. An easement appurtenant runs with the land. Unlike a gross easement, the benefit of an easement appurtenant are not personal to an individual. In concluding that the Strip, which was eventually conveyed to Developer, had an easement appurtenant, the appellate court examined prior deed conveyances, including a 1982 declaration that the Strip was subjected under. The 1982 declaration contained language that stated that a perpetual right of non-exclusive easement and right of way existed that will run with the land, binding on all future successors and assigns. The purpose of the easement was to provide vehicular and pedestrian access to adjoining and neighboring land, which is applicable in this case.

Wagenschein v. Ehlinger, No. 13-17-00515-CV, 2019 WL 3048462 (Tex. App.—Corpus Christi July 1, 2019).

Successors to rights of one grantor ("Successors") brought an action for reformation of a warranty deed against surviving grantors ("Grantors"). The trial court granted the Grantors' motion for summary judgment regarding the construction of a mineral interest reservation ("Reservation") in the deed. Successors appealed to the Court of Appeals of Texas. Successors asserted the Reservation created a tenancy in common, rather than the previously used interpretation of a joint tenancy. Grantors filed a cross-MSJ declaring that the Reservation created a joint tenancy in the surviving grantors, and that the Successors were estopped from bringing their claims. The Court held that the Successors were estopped from taking a position inconsistent with a previously held position from which they had benefited. The Court reasoned the Successors had previously and affirmatively signed amended deed division orders consistent with a joint tenancy, which entitled them to an increase in their interest from the Reservation. The Court further reasoned that Successors were not strangers to the transaction, as they were bound by the same deed which had bound their ancestors, and therefore estoppel applied. The Successors further argued that the interpretation of the deed created a tenancy in common, because a provision in the deed stated that interest in the Reservation would go to the "Grantors and Grantors' successors…." The Court disagreed, holding the interpretation of the deed unambiguously created a tenancy in common. The Court reasoned that in order to give effect to the entire deed, the term "successors" was synonymous with the term "survivors" which was used in the Reservations opening and closing statements and implied the creation of a joint tenancy in the surviving grantors.

Utah

Estate of Price v. Hodkin, No. 20170279-CA, 2019 UT App 137, 447 P.3d 1285.

Claimant sought quiet title to the mineral rights of two parcels, the deeds to which had been recorded forty-seven years before. The surface and mineral rights for both parcels were originally owned by two sisters as joint tenants with rights of survivorship. No other deeds were recorded for the parcels and one sister died in 1966, meaning that the rights to the surface and minerals of both parcels should have passed to the surviving sister. However, that did not happen. The executor for the deceased sister made a deal with the surviving sister: the surviving sister would get the surface interest in exchange for

forgiving a debt of the estate. The mineral rights were expressly left out of the deal. A new deed was executed pursuant to the deal in 1966. The proceeds from the retained mineral rights funneled into a testamentary trust, which named the deceased sister's daughters as beneficiaries. The surviving sister continued to make payments into the trust until her death in 1977. The new owner, Claimant, made a few payments to the trust as well, until bringing this initial action against Beneficiaries in 2013. Claimant argues that the original joint tenancy with rights of survivorship never severed, such that she is entitled to the entire surface and mineral estate as a matter of law. Beneficiaries claim that the 1966 deal effectively severed the joint tenancy, and even if it did not, this quiet title action is barred by laches and estoppel. Beneficiaries claim that, because Claimant made payments to the trust and did not bring suit for forty-seven years, Claimant acted in accordance with the new deed. Because Beneficiaries showed that (1) Claimant "failed to diligently pursue its claim," and (2) Beneficiaries were injured by the delay due to loss of evidence and surviving parties to the original deeds, the court found that Claimant's action was barred by laches.

SELECTED ELECTRICITY DECISIONS

State

Michigan
Cloverland Elec. Coop. v. Mich. Pub. Serv. Comm'n, No. 342552, 2019 WL 3307893 (Mich. Ct. App. July 23, 2019).

Electric Company appealed to the Michigan Court of Appeals in response to the judgement that a state reliability mechanism ("SRM") fee be imposed on their full-service customers. The suit was in response to the State passing legislation requiring Alternative Electric Suppliers ("AES") to demonstrate that they can provide adequate capacity for their customer's electricity demands. If an AES is unable to provide adequate capacity, Electric Company would, in this case, be required to supply the deficit and impose an SRM fee on the AES's customers. Electric Company sued Public Service Commission ("PSC") after PSC ordered Electric Company to charge an SRM fee on all of its full-service member customers, not just the full-service member customers who purchased electricity from an AES. On review, the court (1) rejected Electric Company's argument that PSC overstepped its statutory authority and held that PSC was authorized to impose the SRM fee on member-regulated electric cooperatives; (2) held that full-service customers were not exempted from the SRM fee; and (3) that PSC's did not act unreasonably or unlawfully when calculating the SRM fee imposed on Electric Company's customers. For these reasons, the court affirmed PSC's decision.

SELECTED TECHNOLOGY AND BUSINESS DECISIONS

Mergers and Acquisitions

D. Delaware
Richie v. Hillstone Envtl. Partners, No. 19-649-RGA-SRF, 2019 WL 2995178 (D. Del. July 9, 2019).

Transferor company and Transferee company entered into an Asset Purchase Agreement ("APA") for the sale of an environmental management services company ("Business"). The APA required Transferee to pay Transferor Earnout Payments based on Transferee's Earnout Statements for 2016, 2017, and 2018. Transferee's Earnout Statements for 2016 and 2017 reflected a loss. Therefore, Transferor paid Transferee nothing in Earnout Payments. Transferor alleged Transferee misrepresented the Earnout Statements. Accordingly, Transferor brought an action for fraud alleging Transferee diverted Business earnings to other companies in violation of the APA. Transferee moved to dismiss the complaint for two reasons. First, provisions in the APA permitted Transferor to request more information regarding the Earnout Statements within 30 days of receipt. Transferor failed to assert contractual rights in a timely fashion and therefore waived rights to recourse pursuant to the APA. Second, the Economic Loss Doctrine ("Doctrine") precludes Transferor from recovering on the tort of fraud because the Doctrine prohibits recovery in tort for risks negotiated by contract. In turn, Transferor maintained that the APA did not expressly preclude recovery for tortious actions. Moreover, Transferor alleged the Doctrine is not applicable to the APA because Transferee fraudulently misrepresented the Earnout Statements inducing Transferor to waive contractual rights of recourse. The court rejected Transferor's arguments and granted Transferee's motion to dismiss. Contrary to Transferor's theory that the APA did not prohibit tort recovery, the court noted the contract expressly provided mechanisms to serve as the "sole recourse" for disputes between the parties. The court addressed the Doctrine noting that exceptions for fraud may only be invoked where the contract was fraudulently induced. Transferee's alleged fraud occurred in the performance of the contract therefore the Doctrine prohibits Transferor from recovery.

Patents and Intellectual Property

Court of International Trade
Bell Supply Co. v. United States, No. 14-00066, 2019 WL 3453276 (Ct. Int'l Trade July 22, 2019).

This case considered the United States Department of Commerce's (Commerce) remand redetermination that occurred as a result of "Bell V," which remanded the application of the substantial transformation test regarding the scope of goods, particularly certain oil country tubular goods (OCTG) from China. The substantial transformation test weighs five factors in order to determine the country of origin for an imported article. These factors include: (1) the class or kind of merchandise; (2) the nature and sophistication of processing in the country of exportation; (3) the product properties, essential component of the merchandise, and intended end-use; (4) the cost of production/value added; and (5) the level of investment. Commerce employed the reasoning that many of the OCTGs are subject to a common heat treatment process, and that nothing distinguishes the equipment used throughout the industry. Because of these findings, the court held that Commerce's totality-of-the-circumstances determination is supported by substantial evidence. Specifically, because the physical and chemical characteristics of the merchandise are unchanged through their processing.

SELECTED ENVIRONMENTAL DECISIONS

Federal

4th Circuit
Defenders of Wildlife v. U.S. Dept. of the Interior, 931 F.3d 339 (4th Cir. 2019).

Environmental Group sued the U.S. Fish and Wildlife Service (FWS) in response to a Biological Opinion and Incidental Take Statement that FWS issued concerning the building of the Atlantic Coast Pipeline. The proposed pipeline would transport natural gas from West Virginia to Virginia and North Carolina. Because of the pipeline's length, its construction would require a great deal of land and resources to be utilized, which could potentially harm a variety of species. Environmental Group alleged that the opinions issued by the FWS improperly determined that pipeline construction would not jeopardize four endangered species—the rusty patched bumble bee, clubshell, Indiana bat, and Madison Cave Isopod. Moreover, Environmental Group argued that the opinions rendered by FWS were arbitrary and capricious. In evaluating Environmental Group's claim the United States Court of Appeals for the Fourth Circuit looked to the Endangered Species Act, which prohibits federal agencies from engaging in any action "likely to jeopardize the continued existence of any endangered species or threatened species." Moreover, under the Administrative Procedure Act (APA), federal agencies must review relevant data in issuing statements and may not render them arbitrarily, capriciously, or otherwise not in accordance with law. The court held that because FWS had issued their Biological Opinion and Incidental Take Statement counter to available evidence; without regarding the species' status as a whole; and without consider the pipeline's overall impact on the endangered species that FWS's actions were arbitrary and capricious. As a result, the court approved the petition and vacated the 2018 Biological Opinion and Take Statement.

D. Arizona
Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., No. CV-17-00475-TUC-JAS, 2019 WL 3503330 (D. Ariz. July 31, 2019).

Agency granted Mining Company permit to begin the operation and development of a large open pit mine located within federal land. Environmental Group filed suit seeking injunction to stop the mining activities alleging Agency's decision to grant the permit was arbitrary and capricious to numerous federal statutes. The court found that the Agency

failed to in numerous regards to support its finding that permitting the mine would not be contrary to federal statutes and regulations. The court reasoned that according to the record the that Mining Company's unpatented mining claims were never proved to be valid and without a valid unpatented mining claim Mining Company had no rights to develop the minerals within federal land or utilize the surface for that use. The court overruled Agency's decision to grant the permit and remanded it back to Agency for further review.

D. Connecticut

Norwalk Harbor Keeper v. U.S. Dep't of Transp., No. 3:18-cv-0091 (SRU), 2019 WL 2931641 (D. Conn. July 8, 2019).

The Administrative Procedure Act (APA) creates a private right of action for plaintiffs to challenge agency determinations that do not comply with the National Environmental Policy Act ("NEPA"). Environmental Group brought a private right of action to enjoin disbursement of federal funds for the replacement of the Norwalk River Bridge ("River Bridge") until the U.S. Department of Transportation ("DOT") completed an adequate Environment Analysis ("EA") pursuant to the requirements of NEPA. The court found the Environmental Group lacked standing and, in the alternative, granted summary judgment in favor of DOT on the merits. Additionally, the court found the Environmental Group failed to satisfy the first requirement of standing: injury. An injury satisfies Article III standing requirements if it is concrete and particularized and actual or imminent, not conjectural or hypothetical. Environmental Group failed to demonstrate how the DOT's allegedly non-compliant decision-making process would result in injury to the Environmental Group's recreational and aesthetic enjoyment of the area. +In the alternative the court granted DOT's motion for summary judgment. The court analyzed the DOT's assessment of the River Bridge through the arbitrary and capricious standard. Under the arbitrary and capricious standard, a court will affirm the agency's decision making if the processes have some rational basis. The court found a rational basis for the DOT's decision making and concluded the DOT's processes were NEPA compliant. NEPA requires an EA to be thorough and not improperly segmented. Therefore, an agency may not circumvent NEPA requirements by fractionally analyzing the impacts of a project. The court found the DOT's EA of the River Bridge adequately examined impacts and was not segmented. The DOT narrowed the scope of their project, considered alternatives, responded to public comments, conducted a thorough EA, and arrived at a rationally based plan to construct the River Bridge.

D. District of Columbia
WildEarth Guardians v. Bernhardt, No. 16-1724(RC), 2019 WL 3253685 (D.D.C. July 19, 2019)

Environmental Group brought suit under the National Environmental Policy Act (NEPA) challenging the Bureau of Land Management's (BLM) issuance of 473 oil and gas leases spanning three states—Wyoming, Colorado, and Utah. The focus of this case centers around the Environmental Group's two further motions to amend a minute order from May 29, 2019 to enjoin BLM from issuing permits to drill on Colorado and Utah leases. Moreover, Environmental Group sought to enforce a remand order from March 19, 2019 which remanded Wyoming leases to BLM for analysis and enjoined lease activities in Wyoming until BLM cured the deficiencies. In considering Environmental Group's Motion to Amend May 29, 2019 Minute Order, the court applied the Rule 54(b) standard for reconsideration of interlocutory motions in assessing claims. Under this standard, Environmental Group had to demonstrate (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order. The court articulated that the minute order did not contain a "clear error" because BLM did not admit that Colorado and Utah's lease activities were deficient. Moreover, Environmental Group argued that there may be irreparable damage, but the court conceded that a preliminary injunction should have been filed rather than an amendment to a minute order. For those reasons, the court denied Environmental Group's motion to amend the May 29, 2019-minute order. In considering Environmental Group's separate filing to enforce the March 19, 2019 remand order, the court articulated the rule that a prevailing plaintiff has to demonstrate that a defendant has not complied with a judgment entered against it. Here, Environmental Group failed because all relief required by the remand order was accomplished. Consequently, the court denied Environmental Group's motion to amend the May 29, 2019-minute order and denied its motion to enforce the March 19, 2019 remand order.

D. New Jersey
Stahl v. Bauer Auto., Inc., No. CV 15-361 (SRC), 2019 WL 3712175 (D.N.J. Aug. 7, 2019).

This case is a recovery action for clean-up costs brought under the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"). Stakeholders were individuals with interest in a property ("MCP") owned by Manufacturing Company. The Adjacent Property was

owned by Adjacent Property Owners. Stakeholders sold their interest in MCP to a third party via a Stock Purchase Agreement. The sale triggered a remediation obligation under New Jersey statutory law. In a dispute that resulted in an arbitration agreement, Stakeholders transferred their obligation to complete and control clean up procedures to MCP's new owners. In exchange, Manufacturing Company would be reimbursed by Stakeholders for remediation expenses. One of the remediation efforts that Manufacturing Company undertook unearthed a specific contamination on MCP Adjacent Property Owners caused. Subsequently, Stakeholders sued Adjacent Property Owners for recovery costs under CERCLA, but lost on all claims. The district court held that Stakeholders lacked standing to sue under CERCLA. Under CERCLA, a private party that incurs remediation expenses can recover cost. In this case however, Stakeholders did not assume any clean up obligation, and as such did not personally incur any remediation expense. Instead, Stakeholders had an indemnity agreement, where Stakeholders would pay for the remediation cost personally incurred by another party. Since the remediation cost was not incurred by Stakeholders, and because a private party who has not been sued under CERCLA cannot ask for a contribution claim under it, the district court granted summary judgement in favor of Adjacent Property Owners.

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

S.D. Texas
Yuen v. Triple B Servs. LLP, No. H-18-3277, 2019 WL 3069791 (S.D. Tex. July 8, 2019).

Property Owner brought suit against Development Contractor alleging Development Contractor unlawfully damaged Property Owner's real property in violation of state and federal laws. Development Contractor dumped hundreds of thousands of cubic yards of soil on Property Owner's property without authorization. As a result of this dumping, Property Owner alleged, the flood plain of the property changed. During Hurricane Harvey, resulting floods on the property caused flood water to accumulate and damage dikes surrounding oil tanks on the property. Property Owner further alleged that this illegal dumping is the proximate cause of oil spills that damaged the soil in the wake of the hurricane. Property Owner alleged this dumping violated the Resource Conservation Recovery Act ("RCRA") and the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). CERCLA and RCRA impose liability for persons who

improperly handle and dispose of hazardous materials. The court granted Development Contractor's motion to dismiss these claims because, while the soil dumping allegedly resulted in oil contamination, soil itself is not a hazardous waste within the meaning of CERCLA and RCRA. Property Owner also sought recovery for violations of the RICO statute. To successfully recover for a RICO claim, plaintiff must, *inter alia*, allege defendant engaged in predicate acts of interstate racketeering and derived income from this pattern of racketeering. Property Owner's complaint included only conclusory allegations of fraud and failed to allege with any particularity that Development Contractor committed predicate acts of racketeering. Accordingly, the court dismissed all federal claims of Property Owner and elected not to exercise supplemental jurisdiction over Property Owner's state claims.

D. Utah

WildEarth Guardians v. Zinke, No. 2:16-cv-00168-DN, 2019 WL 2929732 (D. Utah July 8, 2019).

In 2002 Coal Mining Company ("CMC") applied for a coal mining lease on federal lands in Utah. In accordance with requirements of the Mineral Leasing Act ("MLA") and National Environmental Policy Act ("NEPA"), the Bureau of Land Management ("Bureau") issued a Final Environmental Impact Statement ("FEIS") on the proposed lease. Bureau approved the lease. CMC abandoned the lease in 2002 but expressed interest around ten years later. In 2015, Bureau relied on the FEIS produced in 2002 and again approved the lease for development. Environmental Group brought this action against Bureau to supplement the administrative record and conduct limited fact discovery. Environmental Group contends that Bureau must update the administrative record to include data relevant to the lease approval. Generally, courts assume the administrative record is proper. Exceptions to this rule are rare. The court may find a record deficient if the record fails to include data on which the agency action was premised, or the record ignores relevant factors that should have been considered by the agency. The court reasoned the FEIS contemplated or should have contemplated the fair market value of the lease, a report on the greater sage-grouse in the region, and air quality permits and emission data. Therefore, the court required the record to be supplemented with regard to these exhibits. However, the court denied Environmental Group's motion to supplement the record as to other exhibits related to negative impacts of the greater sage-grouse, climate change, and greenhouse gases as these factors are not essential to Bureau's approval process. Additionally, the court denied

Environmental Group's request to conduct limited discovery to supplement the record because no clear evidence reflected a gap that would make such discovery necessary.

State

California
Highway 68 Coal. v. Cty. of Monterey, No. H045253, 2019 WL 3369837 (Cal. Ct. App. July 26, 2019).

Social Welfare Organization ("SWO") and Environmental Organization ("EO") challenged the district court's dismissal of their claims against Monterey County ("County"), on the approval of the Development Project ("Project"). Project was a proposal by County to develop a residential subdivision. County circulated a drafted Environmental Impact Report (EIR) for public review then prepared a finalized version, after taking the public comments into account. SWO and EO lost on all issues asserted, some of which included: (1) the project description for Project and EIR alternative analysis did not comply with California Environmental Quality Act ("CEQA"); and (2) recirculation of the EIR is required in light of the changes made. First, the California Court of Appeals held that the description for Project was adequate under CEQA because the basic attributes of the project remained unchanged. The changes listed in the EIR were made to reduce environmental impacts, a goal encouraged by the CEQA process. Furthermore, SWO's claim that EIR analysis does not comply with the CEQA because it failed to analyze a reasonable range of alternatives is untenable. An EIR need not consider every conceivable alternative to a project. The EIR alternatives listed by County were sufficiently within reason. Second, the appellate court concluded that recirculation of the finalized EIR is not mandated because the changes made were merely adding new information that clarified the previous version of the EIR. There were no changes made that would substantially impact the environment. As such, the court affirmed the trial court's decision denying judgment and dismissing the petition.

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

Maryland
Bd. of Cty. Comm'rs v. Perennial Solar, LLC, 212 A.3d 868 (Md. 2019).

This case brought local Maryland zoning ordinances into conflict with a state scheme promoting solar energy generation. The court focused its question on whether Maryland's state statutory scheme preempted local zoning authority regarding the certification of solar energy-generating systems ("SEGS"). Energy Company initially sought an application for a SEGS, which the County Zoning Board ("Board") approved. Perturbed landowners sought judicial review, Board intervened, and the Company filed a motion determining whether state law had preempted the County's authority on the subject matter. The court considered whether "state law preempt[s] local zoning authority with respect to solar energy generating systems that require a Certificate of Public Convenience and Necessity issued by the Maryland Public Service Commission." The court determined that the state statutory scheme impliedly preempted local zoning authority with respect to the SEGS. In examining whether state law has impliedly preempted local laws, the court examines a variety of factors to determine whether the General Assembly has enacted such a strong statutory scheme that its intent to oust local authority must be implied. Among those considerations is the pervasiveness of the regulations, whether any concurrent authority is expressly delegated, and whether the statute addresses local authority's role in the scheme. Here, the General Assembly's clearly intended the state Public Service Commission ("PCS") to have the final and exclusive authority in approving SEGS. The statute required the PCS to seek counsel and consider the recommendations of local zoning authorities while limiting local authority to a mere advisory role. Additionally, the legislative history showed that the General Assembly had ample opportunity to amend the statute so that PCS had concurrent authority with local zoning boards, but the General Assembly rejected this approach.

New Jersey
In re Adoption of Amendments to N.J.A.C. 14:8-1.2, No. A-4163-16T1, 2019 WL 3428515 (N.J. Super. Ct. App. Div. July 30, 2019).

Solar Energy Provider appealed amendments made to two regulations by the New Jersey Board of Public Utilities ("BPU") related to State law requiring utilities to increase their utilization of renewable energy sources. Electricity suppliers producing electricity could either generate their own renewable energy or purchase certificates generated by renewable energy suppliers. Solar Energy Provider argued that BPU's proposed amendments made it

more difficult for solar facilities to generate these certificates. The court rejected Solar Energy Provider's arguments that BPU exceeded its statutory authority and that the BPU amendments were arbitrary and capricious. The court held that BPU's amendments were promulgated under its broad statutory authority, the harm identified by Solar Energy Provider would not be triggered by the amendments because they were narrowly tailored, and that Solar Energy Provider could not supplement the record on appeal after failing to comply with notice and comment procedures. For these reasons, the court upheld the amendments.

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

In re N.J. Dep't of Envtl. Prot. CAFRA Permit No. 0000-15-000.71 CAF 150001, No. A-3293-16T1, 2019 WL 3282625 (N.J. Super. Ct. App. Div. July 22, 2019).

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

Individuals, along with an Environmental Organization (EO), challenged the issuance of a permit under the Coastal Area Facility Review Act (CAFRA) and the Freshwater Wetlands Protection Act (FWPA) by the New Jersey Department of Environmental Protection (Department) to New Jersey Natural Gas Company (Gas) that would disturb freshwater and wetlands areas. Gas appealed the standing of the parties. Individuals were found to not have proper standing, as they did not have sufficient stake in the outcome. However, the court found that EO had proper standing because of its stated goal of studying and conserving marine life and habitats. Before issuing such a permit, the Commissioner of the Department must meet statutory standards that EO has claimed were not met. The statutory standards are: (1) air, water, and radiation emissions; (2) prevention of effluents in excess of the recovery abilities of the area; (3) collection of trash and litter; (4) minimal interference of regenerative natural water supplies; (5) minimal interference with plant and animal life in the area; (6) no endangering human welfare; and (7) minimal degradation of the area. Department invited public comments and consulted with various state and federal regulatory agencies to meet the statutory standards. Department also issued a nine-page environmental report. Despite EO's assertions, Department need not respond and address each individual comment left during the comment period. The only requirement is to address each of the factors. Review of administrative

decisions is merely to determine if there is sufficient evidence to justify the determination. Great deference is given to these type of agency decisions. Department fulfilled its statutory requirements for the proper issuance of the permit.

US Masters Residential Prop. (USA) Fund v. N.J. Dep't of Envtl. Prot., No. A-78 Sept. Term 2017081137, 2019 WL 3402917 (N.J. July 29, 2019).

Property Owner appealed an arbitration decision to the New Jersey Supreme Court denying Spill Compensation Fund money after a hurricane carried and deposited oil onto Property Owner's private property. The Court held that Arbitrator's conclusion denying funds should be called into question because (1) Arbitrator's summary of expert testimony was based on a misrepresentation of evidence taken out of context and thus sufficient to render the decision arbitrary and capricious; and (2) Arbitrator prevented Property Owner from introducing expert testimony to counteract the evidence that was shared with them last minute, which undermined the fairness of the proceeding. For these reasons, the Court vacated Arbitrator's decision and remanded for new arbitration proceedings.

New York

Mamakating v. Bloomingburg, 174 A.D.3d 1175, 105 N.Y.S.3d 611 (N.Y. App. Div. 2019).

Town brought suit against Village to annul Village's reaffirmation of Company's real estate development plants. In 2009, an environmental impact statement was created for Village to consider when approving the development plans. Village accepted the environmental impact statement findings in 2010 and affirmed Company's plans. Town rescinded the affirmation in 2016 pursuant to a municipal agreement that gave Town the powers of Village's Board, the body that initially approved the environmental impact statement and development plans. Town brought suit, alleging that Village lacked the authority to reaffirm; Village argued that Town lacked standing to bring suit. The lower court found for Village and dismissed Town's claim. Town appeals. Without considering the standing issue, this Court held that Village had the requisite authority and that the reaffirmation was not arbitrary or capricious, such that the lower court properly dismissed Town. Village considered the impact of stormwater, increased water usage, effects on traffic flow, and other issues when reconsidering the development plans. Village had authority to reconsider the initial development plans because "the particulars of the amendment were

embraced within the original referral;" thus, Village did not have to refer the matter to Town in 2016.

North Dakota
Newfield Expl. Co. v. State ex rel. N.D. Bd. of Univ. & Sch. Lands, 2019 ND 193, 931 N.W.2d 478.

Company, lessee, brought suit against State, lessor, seeking a declaration that natural gas lease royalties be calculated based on proceeds from the sale of gas minus costs associated with making the gas marketable (aka, post-production costs). Company's lease states that royalties shall be based on "gross production or the market value thereof . . . such value to be determined by . . . gross proceeds of sale." State discovered that Company was paying royalties equal to the gross proceeds minus the post-production costs when State audited Company. State contends that this calculation runs afoul of the express lease terms. Company maintains that it has paid royalties calculated on gross proceeds because it sells the gas to a third party, which refines then sells the gas. Third party then pays Company approximately seventy to eighty percent of the final resale price. Applying contract interpretation law, the Court acknowledged that, generally, lessors and lessees split post-production costs. However, parties may allocate the obligation of making gas marketable. The term "gross proceeds" in oil and gas contracts means royalties based on the amount gas sold for after production, without splitting post-production costs. Conversely, "net proceeds" indicates that the lessor and lessee will share in post-production costs. Based on the plain language of the lease, the Court held that Company was impermissibly reducing State's royalties.

Pennsylvania
Pa. Envtl. Def. Found. v. Pennsylvania, No. 228 M.D. 2012, 2019 WL 3402922 (Pa. Commw. Ct. July 29, 2019).

Environmental Organization brought action against State after State appropriated money collected from rental and bonus payments made on oil and gas leases located on state-owned forest land. Environmental Organization alleges that, pursuant to the Pennsylvania Constitution, such money should be part of the corpus of an environmental public trust. On remand from the Pennsylvania Supreme Court, both parties brought cross-applications for summary relief. While proceeds from the removal and sale of natural resources constitutes the corpus of such a trust, the royalties and bonus payments at issue here were merely made in exchange for the right to

explore for resources and in consideration for executing the lease, not for the removal of the resources. However, State law, at the time, also provided that two-thirds of any rental proceeds is to be considered as principal and must be paid back into the corpus and the other third is to be considered income. Thus, the court concluded that only two-thirds of the rental and bonus payments were required to be designated as the corpus and the State's appropriation of the remaining third to the general fund was not unconstitutional since income does not have to remain in the corpus.