Oil and Gas, Natural Resources, and Energy Journal

Volume 5 | Number 4

April 2020

Recent Case Decisions

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

Vol. V, No. IV April, 2020

Table of Contents

SELECTED OIL AND GAS DECISIONS 816
SELECTED WATER DECISIONS 819
SELECTED LAND DECISIONS 823
SELECTED TECHNOLOGY AND BUSINESS DECISIONS 832
SELECTED ENVIRONMENTAL DECISIONS 833

All case citations are as of 3-13-2020. The citations provided in this Case Report do not reflect changes made by Lexis or Westlaw, or the case's addition to a case reporter after that date. This Case Report contains case decisions issued through 2-08-2020. 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

U.S. Tax Court
Adams Challenge UK Ltd. v. Comm'r, No. 4816-15, 2020 WL 95692 (T.C. Jan. 8, 2020).

Company owns a support vessel which decommissions oil and gas wells and removes debris from hurricanes around the U.S. Continental Shelf. IRS claimed that Company's income from the vessel was subject to tax under the IRS code and subject to the bilateral income tax treaty between the United States and the U.K. First, the court considered whether the income from the vessel was subject to Federal income tax. The test that the court utilized asked whether Company's income was "effectively connected with the conduct of a trade or business within the united states." The court determined that section 638 of the IRS code provided jurisdiction over continental shelf areas for activities "with respect to mines, oil and gas wells, and other natural deposits." Further, the court determined that Company's income applied to this provision because their activity related to the exploitation of natural resources, even though that relationship was not direct and immediate. As a result, the court found that post-production activities were related to the exploitation of oil and gas wells under the IRS code. In sum, because the income was derived from the use of property and the performance of services in the U.S., its income was sourced in the U.S. and subject to the IRS tax code. Finally, the court held that the income was subject to the Treaty between the U.S. and the U.K. by looking to the language of section 638 and finding that it was intentionally analogous to the treaty. Because Company's activities were undertaken offshore, under article 21 of the Treaty, their activity did not exempt their vessel's income from Federal income tax.

N.D. Ohio
Bounty Minerals, LLC v. Chesapeake Expl., LLC, No. 5:17cv1695, (N.D. Ohio Dec. 23, 2019).

Operator brought a motion to strike and a motion for summary judgment against Oil Company. This dispute involved 6 leases held by Oil Company from 2013-2015; the leases varied with regard to royalty provisions on oil. Operator was the lessee under the leases. Oil Company argued that the revenue statements that it received were substantially less than the sales of

hydrocarbons with wells in the same vicinity, and during the same time frame. Operator requested summary judgment on three separate counts regarding the issue: Breach of Contract based on the alleged breach or Royalties Provisions; breach of the express covenants of good faith and reasonable prudent operator; and breach of the affiliate sales provision. For the first count, the key issue hinged on whether the phrase "computed at the wellhead applied to both sales to unaffiliated purchasers, and affiliated entities. The court agreed with Operator's contention that the phrase applied to both aforementioned entities. Secondly, the court sided with Operator on the issue of whether there had been a breach of good faith and reasonable prudent operator because Operator had paid royalties to Oil Company consistent with the lease royalty provision when it calculated royalties based on the value of the gas and oil "at the wellhead." Finally, the court, again, ruled with Operator as to whether there had been a breach of the affiliate sales provision. The court found that royalties were properly calculated at the wellhead via the netback method, and that there was no issue of material fact that the sales prices were not comparable to values that could be obtained in an arms-length transaction.

Midstream – State

Delaware
Marubeni Spar One, LLC v. Williams Field Servs. – Gulf Coast Co., L.P., C.A. No. 2018-0908-SG, 2020 WL 64761 (Del. Ch. Oct. 18, 2019).

Partner sued Operating Partner over the calculation of expenses for a floating oil and gas production system in the Gulf of Mexico. Partner sued under five counts: (1) breach of contract, (2) breach of fiduciary duty, (3) breach of the duty of good faith and fair dealing, (4) request for declaratory judgment regarding costs, and (5) request for an injunction regarding allocation of costs. Operating Partner moved to dismiss the action under Rule 12(b)(6). The court found that, given the complexity of the operation and the parties' competing contractual interpretations, the court could not decide counts 1 and 4 as a matter of law and denied the motion to dismiss. Additionally, the court found that count 5 survived the motion to dismiss because it was not a freestanding cause of action due to asking for equitable relief. The court found that count 3 must be dismissed as a deficient pleading because the application of the implied covenant of good faith and fair dealing, which is used as a gap-filler in Delaware courts, is inapplicable where the parties clearly contracted over the calculation of expenses. Finally, the court found that count 2 must be dismissed because the duty to allocate costs arose

through their contract so the claim rests in breach of contract, rather than common-law breach of fiduciary duty.

SELECTED WATER DECISIONS

Federal

M.D. Florida
Miller v. City of Fort Myers, No. 2:18-cv-195-FtM-38NPM, 2020 WL 60155 (M.D. Fla. Jan. 6, 2020).

Property Owners sued the City of Fort Myers (the "City") over water contamination caused by the City's dumping of lime sludge, a highly arsenic substance, on a Site it owned. The sludge remained dormant on the Site for over fifty years until Property Owners sued. The City then began clean up and remediation efforts to remove all the sludge, and once accomplished, won summary judgement in its favor. Property Owners' suit against the City was predicated on the expansive language from the Resource Conservation and Recovery Act (the "Act"), which stated that a person who has contributed to a disposal of hazardous waste may be sued for imminent and substantial dangers to public health. Although the sludge was removed, Property Owners could still show the District Court that a serious harm threatened to occur either now or in the near future through any of the four pathways of arsenic exposure. Property Owners' evidence however, did not support this as a reasonable inference, and thus failed to rise to the summary judgement ruling standard. Arsenic could travel through groundwater like wells, but testing of the wells near the Site shows no arsenic exposure. And for the wells that showed some level of arsenic, the record showed that no one drank from them and that the wells were opposite the direction where groundwater would naturally flow from the Site. Similar findings resulted from the remaining exposure pathways of soil, dust, and skin exposure. The arsenic levels found on these pathways did not exceed federally approved levels. Therefore, Property Owners' federal claims were dismissed, and the Court declined to exercise supplemental jurisdiction over the remaining state claims.

E.D. New York
Cornett v. Northrop Grumman Corp., No. 18CV06453DRHAKT, 2020 WL 59794 (E.D.N.Y. Jan. 6, 2020).

Corporation owned multiple sites in Bethpage, New York and also operated a reserve plant on behalf of the U.S. Navy. Individuals all lived in Bethpage and were diagnosed with cancer within two years of one another, likely due to contamination in their drinking water. In a negligence and strict liability

lawsuit against Corporation, Individuals alleged that Corporation discharged various hazardous contaminants into the Bethpage's groundwater systems. Notably, Corporation once owned an 18-acre hazardous waste dump site, which Corporation later donated to the Town of Oyster Bay, who then converted the site into a community park for children. Corporation did not disclose its previous dumping activities on the land. Children played little league baseball at Bethpage Community park, drank from its water fountains, and were exposed to its grass sprinkler systems. Individuals alleged that surrounding communities found volatile organic compounds ("VOC") known to cause kidney and testicular cancer in their drinking water. These VOC's were found at about 3000 times the acceptable level. Likewise, different semi-volatile organic compounds and metals were also found in the same areas. Corporation moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6); however, Corporation's motion was predicated on evidence outside of the complaint itself, which is inappropriate at preliminary stages. As a result, the court denied Corporation's motion to dismiss because Individuals pleaded enough facts to make a plausible claim for relief, and a motion to dismiss for failure to sufficiently plead a case deals specifically with what is in the complaint rather than what is out of it. Furthermore, even though the U.S. Navy enjoys immunity from strict liability claims, it is doubtful whether the immunity extends to Corporation.

D. Vermont

Sullivan v. Saint-Gobain Performance Plastics Corp., No. 5:16-cv-125, 2019 WL 7282104 (D. Vt. Dec. 27, 2019).

A class of homeowners ("Class") brought a class action suit against a Plastic Company for contamination of groundwater with harmful substances. Class sought to have the remedy of medical monitoring damages and/or creation of a new cause of action for medical monitoring damages. The court declined to create a new cause of action as they are federal court sitting in diversity, and they cannot create new law within the state. Plastic Company argued against the inclusion of medical monitoring damages because it would place a duty upon them to those who may not have a physical injury, a requirement for tort damages in Vermont. However, the court stated that because of the ease of setting an objective test for exposure to the chemicals and the relatively small number of potential victims, that it is likely a Vermont court would allow for the medical monitoring damages to be imposed despite the physical injury requirement. Class sought summary judgement as to their entitlement to

these damages, but the court denied it because "almost every fact in the case is at dispute." Plastic Company filed their own motion for summary judgement stating that the monitoring should not be available because the class has not shown evidence of specific or general causation. However, the court rejected this argument for the same reasoning as for the inclusion of medical monitoring damages. On the question of specific or general causation, the court stated that it would defer this decision to trial because although general causation looks right at this time, the lack of expert testimony showing each class members specific causation of health risk precludes summary judgement. Plastic Company also raised the argument that the class members had substantial differences, as two of the members did not have the requisite contamination levels. The court stated that the time to bring this concern had already passed. Furthermore, the plastics corporation claimed that some class members already received monitoring and therefore there would be an overlap in remedy. The court stated that this was a non-issue because the plastics corporation would only be on the hook for extra monitoring, not existing monitoring if they lost at trial. For these reasons, the court denied both parties' motions for summary judgment.

State

New York
Beer v. Town of New Paltz, No. 528273, 2020 WL 97038 (N.Y. App. Div. Jan. 9, 2020).

The New York City Department of Environmental Protection ("DEP") maintained different counties' water supply needs, including the Town of New Paltz ("New Paltz"). DEP sought to undergo a maintenance project in its systems which would cause an extended water supply interruption for New Paltz. Thus, New Paltz discovered an alternative water source and entered into a resolution with DEP for funding. After the resolution was finalized, New Paltz entered a petition to establish a new water district. Property Owner challenged the petition, but the New York Supreme Court dismissed Property Owner's case against New Paltz; Property Owner appealed. Property Owner alleged that New Paltz did not properly describe the boundaries of the new water district pursuant to Town Law § 191. The Court responded that Property Owner's allegations were unfounded because New Paltz substantially met the requirement of boundary description through the maps and list of tax map identification numbers provided. Property Owner also asserted that New Paltz petition included fraudulent

misrepresentations, but this assertion also failed because the Court found that Property Owner's allegations were merely conclusory in nature. Property Owner further alleged that New Paltz did not give proper notice of the details contained in New Paltz petition in accordance with Town Law § 191 and §193. This cause of action was found to be without merit because the reports submitted by New Paltz sufficiently outlined the details of the petition along with the estimated cost to the average user. Next, Property Owner claimed that New Paltz failed to provide the required signatures needed for the petition to stand, but the Court also found this allegation to be properly dismissed since the requirement was met. As such, the Court affirmed the dismissal of all of Property Owner's allegations.

Washington
Estate of Carter v. Carden, 455 P.3d 197 (Wash. Ct. App. 2019).

In 1986, Homeowners divided their property into two lots, A and B. They subsequently built a water well on lot A and granted Lot B Owners an easement to use the well. After Homeowners died in 2013, their Estate executed a purchase sale agreement ("2013 PSA") conveying Lot B to Buyer. This suit arose when the Estate sought to modify the 2013 PSA. The Estate accused Buyer of tortious interference of its attempted sale of Lot A, as well as failure to act in good faith and fair dealing; Buyer countered with a breach of contract claim. The trial judge granted partial summary judgement in favor of the Estate, but the appellate court, under discretionary review, reversed for two reasons: (1) the trial judge applied the standard for summary judgement backwards; and (2) the duty of good faith and fair dealing does not require Buyer to agree to a substantial modification from the original 2013 PSA. First, in granting summary judgement, the trial judge accepted as true the Estate's allegation that Buyer harassed Lot A's potential buyer in an attempt to block Lot A's sale. Buyer, who denied this allegation, was the non-movant, and the trial judge should have considered evidence in favor of the non-movant rather than the movant, here the Estate. Second, the Estate sought to substantially modify the 2013 PSA in an attempt to sell Lot A to new buyers by including a 30-day signing requirement that was not part of the 2013 PSA. The modification was substantial, such that it could not have been reasonably implied during the initial contract negotiations. Therefore, Buyer did not breach the duty of good faith and fair dealing by refusing to sign the modified agreement and was under no obligation to sign the Estate's 2013 PSA.

SELECTED LAND DECISIONS

Federal

E.D. Louisiana
Pan Am. Life Ins. Co. v. Louisiana Acquisitions Corp., No. CV 13-5027-WBV-DMD, 2020 WL 68612 (E.D. La. Jan. 7, 2020).

Insurance Company and Hotel Corporation filed cross motions for summary judgment on the issue of Insurance Company's liability for attorney's fees arising out of a dispute regarding the parties' operation of a hotel. Prior to the suit, Hotel Corporation entered into an agreement with Insurance Company, selling their interest in the hotel in exchange for a release of all claims by Insurance Company. After executing the agreement, Insurance Company filed suit. The court ruled that Hotel Corporation could be awarded attorney's fees for the contract action, despite not seeking rescission of the entire contract. The court reasoned that although there was no contractual provision authorizing it, and breach of contract claims normally do not allow for attorney's fees, the Hotel Corporation could be awarded attorney's fees based on a theory of fraud. The court further noted that the record unequivocally showed that the communications of the Insurance Company exhibited their intent to file a lawsuit after Hotel Corporation conveyed their interest in the hotel in exchange for the release of claims. As such, attorney's fees were recoverable by Hotel Corporation as a means of punishment of Insurance Company's fraudulent conduct.

D. New Jersey
Mensah v. Manning, No. 18-9247, 2020 WL 91089 (D.N.J. Jan. 8, 2020).

Homeowner brought action against Mortgage Company after Homeowner defaulted on a home loan and Mortgage Company commenced a foreclosure action in state court. Homeowner's original complaint was dismissed without prejudice for lack of subject matter jurisdiction and failure to state a claim under Rule 12(b)(6). Homeowner amended its complaint, and Mortgage Company subsequently filed a second motion to dismiss. The district court granted Mortgage Company's motion to dismiss with prejudice because Homeowner's amended complaint failed to establish which of the nine named defendants, if any, had violated federal law, even after being given the opportunity to amend their pleading deficiencies under Rule 8(a)(2), was on notice of the deficiencies, and failed to cure the deficiencies.

State

California
Hale v. Cerro Pampa LLC, No. A154602, 2019 WL 7479499 (Cal. Ct. App. Dec. 30, 2019).

This case determined whether the elements of an implied easement were met on two parcels of land that were previously joined and owned by one family. The trial court found that an implied easement existed, but the appellate court reversed for two reasons: (1) The elements of implied easements were not sufficiently satisfied; and (2) there was not an adequate showing of necessity at the time properties were conveyed. The property in question was a ranch once owned together by Homeowners. After their death, the ranch was divided amongst Homeowner's Relatives, with parcel 36 and parcel 38 carved out. Two different owners had parcel 36 and 38 ("Owner 36" and "Owner 38"). Adjacent to parcel 36 was a Third Property. Following the death of Owner 36, Relatives and the Trustee of Owner 36 sued Owner 38 in order to gain an implied easement in favor of parcel 36 over parcel 38. First, the appellate court rejected Trustee's contention that an implied easement existed. The court reasoned that the prior use of parcel 36 would not have led Owner 38 to believe that a permanent easement existed over his property, especially because Owner 36 and Third Property Owner did not renew their grazing lease. Thus, the Trustee failed to satisfy the second element of establishing an implied easement because Trustee could not show that Owner 38 knew an easement across parcel 38 existed. Second, Trustee did not demonstrate that a necessity existed for Owner 36 to gain access to the main road through parcel 38. Evidence of prior use showed that Owner 36 often accessed the main road through Third Property rather than parcel 38.

Maryland
Anderson v. Great Bay Solar I, LLC., 243 Md. App. 557 (Md. Ct. Spec. App. 2019).

Farmer owns two farming properties in Somerset County, the Ira Barnes Farm and the Ben Barnes Farm. In 2015, County entered into an agreement with Solar Company to install systems below and along county roads intersecting the farms to transport power from solar panels. Farmer contested Solar Company's installations, claiming that they had fee simple ownership of the roadbeds where Solar Company was burying the collection systems and they were trespassing by laying the systems down.

Experts traced title of the farms and noted that a common law dedication of property generally conveys to the government and the public only an easement. The court found Farmer owned the land under the roads, subject to the County's easement for the road. Based on the evidence by statute and common law, Farmer established ownership of the land underneath the road at issue. As for the trespass claim, the court remanded the issue to the circuit court in order to ascertain the purpose of the easement. Whether it is for passing and repassing, or whether the easement would have allowed for the collection systems to be implemented. As to the issue of whether Farmer waived the right to contest Solar Company's system, evidence of participation in county meetings and his refusal to permit the system sufficed to prove that he did not relinquish his right to contest the installation of the cables, nor does the doctrine of estoppel take effect because he did not vote to approve the cable installation at the county meetings. Finally, the Farmer's equitable claims were barred by the doctrine of laches because of their unreasonable delaying filing suit. Farmer knew that construction was scheduled to occur and did not assert the claim until the company had incurred costs installing the equipment. As a result, the circuit court's decision was affirmed in part and reversed in part for further proceedings.

Minnesota

In re. Minn. Power's Petition for Approval of EnergyForward Res. Package, No. A19-0688, 2019 WL 7042812 (Minn. Ct. App. Dec. 23, 2019).

This case stemmed from the decision of the Minnesota Public Utilities Commission ("Commission") to approve Utility Company's affiliated-interest agreements with Energy Company to construct and operate a power plant located in Wisconsin. In Minnesota, affiliated-interest agreements are not effective unless Commission approves them. The Minnesota Environmental Policy Act ("MEPA") requires government agencies like Commission to consider environmental consequences and to minimize negative impacts on the environment when deciding whether to approve any and all projects. Clean Energy Organizations were concerned with the potential negative environmental effects of the proposed power plant and petitioned the Minnesota Environmental Quality Board ("EQB") for an environmental assessment worksheet ("EAW") to be prepared with respect to the proposed plant. EQB then referred the decision whether to grant the petition for the EAW to the Commission, which subsequently denied the EAW petition while approving the affiliated-interest agreements to

construct and operate the new power plant, with conditions. Clean Energy Organizations then appealed Commission's decisions regarding the denial of the EAW and the approval of the power plant. The two issues on appeal were whether MEPA applied to affiliated-interest agreements and whether Commission had the duty to order an EAW for a project located outside of Minnesota. The appellate court held that because MEPA applies to affiliated-interest agreements and Commission does not lack jurisdiction to order an EAW for a power plant proposal outside of Minnesota that impacts the state's environment, Commission erred by denying the EAW petition and subsequently approving the affiliated-interest agreements without first determining whether the proposed project would have the potential for significant environmental effects. Accordingly, the court remanded the case for Commission to make this determination.

North Carolina

North Carolina, ex rel. Regan v. Wasc, LLC, No. COA19-355, 2020 WL 63913 (N.C. Ct. App. Jan. 7, 2020).

Financial Assurance Company ("FAC") appealed the trial court decision denying their motion to dismiss and granted the State's motion for summary judgment. The dispute surrounded whether FAC was the operator of the property in question when the State requested a "Part B post closure permit . . . under the Resource Conservation and Recovery Act. FAC stated that they were not the operator as the land had been sold to another party before the closing plan and documents could be completed. When the third party refused to be responsible to the state requirements, litigation resulted, and the court found FAC to be the operator in regard to the 3rd party in *Wasco I.* FAC did not complete a post-closure permit. State then filed suit. In the present case, FAC relied on new regulations hoping for an alternate outcome, because the new regulations made the old request by State moot. However, the court stated that nothing in the new regulations make changes the liability of the provider regarding the post-closure permit. FAC also argued that State failed to enjoin a necessary party, the third party from *Wasco I.* However, the court stated that dismissal would be inappropriate because the third party is known and able to be enjoined should it be deemed necessary. The court affirmed the trial court's decision granting the state's motion for summary judgement because no issues of material facts remained to be settled. FAC also argued that the trial court decision required them to do the impossible in order to comply with the judgement due to the current state of regulations and the third party's refusal to sign the permit. The court rejects the argument because the order does not

require the signature of the third party only that FAC act in good faith in drafting and submitting the permit. For these reasons, the court affirmed the trial court and *Wasco I* findings that FAC was the operator of the land and is liable for obtaining the post-closing permit.

Ohio

Erickson v. Morrison, No. 19CA18, 2019 WL 7369242 (Ohio Ct. App. Dec. 30, 2019).

This case concerned a dispute over mineral interests of approximately 139 acres. Transferor sold its property's surface rights but reserved the mineral rights. Transferor later sold the mineral rights to Transferee. Through transfers of sale, Landowners eventually took title to the surface rights. In 2015, Landowners sued Transferor, claiming that Landowners owned the surface and minerals of the property pursuant to the Ohio Marketable Title Act. The trial court granted summary judgement in favor of Landowners. In the issue at hand, Transferee sued Landowners and Transferor. The trial court granted Transferee's motion for declaratory relief and quiet title. This appeal was brought by Landowners seeking a declaratory judgment establishing that they are in full possession of the property's surface and mineral rights. The primary issue on appeal concerned whether Transferee's reservation of mineral interest was stated with sufficient specificity. Landowners argue, pursuant to the Ohio Marketable Title Act, that Transferee's mineral rights were extinguished because they did not contain information identifying the owner of the mineral rights in the title documents, and therefore were deemed a "general reference" which does not preserve the mineral interests. Because the 40-year time window from the root of title had passed, the mineral rights were extinguished by operation of law. Accordingly, the appellate court reversed the decision of the trial court in favor of Landowners.

Pennsylvania

Wayco Sand and Gravel v. Dep't of Envtl. Prot., No. 713 C.D. 2018, 2020 WL 57943 (Pa. Commw. Ct. Jan. 6, 2020).

Lessee conducted gravel processing operations on Landowner's land and was required to return the land to original condition after the lease expired. Lessee left two silt ponds on the land, as well as large piles of material. Lessee applied for and obtained a release of liability from the Department of Environmental Protection ("DEP") stating that Lessee had returned the land to original condition, despite the left-over structures. Landowner

appealed the DEP's release, but the appeal was denied. Landowner then appealed the DEP's issuance of release to the Environmental Hearing Board ("EHB"), who found that the remaining silt ponds and material-piles left the land unusable for its original purpose. Thus, the EHB reversed DEP's release of Lessee. Lessee then appealed EHB's decision. The court affirmed EHB's decision. Lessee argued that Landowner failed to exhaust administrative remedies, however the court reasoned that Lessee failed to preserve this issue for review. Next, Lessee argued that Landowner did not satisfy the burden of proving that the land was not returned to original condition because Landowner did not present expert testimony. The court disagreed, reasoning that the Pennsylvania rules of evidence allow for layperson testimony if it is helpful to determining a fact at issue and is only based on the witness's perception. Here the court held that Landowner's testimony as to the condition of the land before and after the lease met the lay person testimony rule and was thus admissible. As such, the court held that Landowner met the burden of proof through his layperson testimony, and thus the EHB's decision was affirmed.

Hayward v. LPR Energy, LLC, No. 794 WDA 2018, 2019 WL 7388588 (Pa. Super. Ct. Dec. 31, 2019).

Landowner sued Energy Company and Oil Company after Landowner assigned approximately 11,000 acres and claimed an overriding royalty interest ("ORRI") on any oil and gas-producing wells built on the property. Neither Energy Company nor Oil company honored or acknowledged the ORRI. Landowner originally assigned the acreage at issue to Oil Company, who agreed to Landowner's 3.125% royalty interest on all oil and gas produced on the land. Oil Company later assigned the lease to another company, which continued in a series of assignments until finally being assigned to Energy Company. The original master contract between Landowner and Oil Company was not officially recorded with the county until twelve years after it was executed. The trial court found that Landowner was entitled to an ORRI from Energy Company on the assignments that contained language referencing Landowner's royalty interest in the amount of 1,987 acres, but not on the remaining acreage because Landowner's royalty interest was not recorded in a timely manner as required by statute. Additionally, the trial court found that Oil Company breached its contract with Landowners because Oil Company did not disclose Landowners' royalty interest to its successive assignees. The trial court set Oil Company's breach of contract damages at $35,488,419. The

appellate court affirmed the judgment of the trial court in favor of Landowner.

Texas
WTX Fund, LLC v. Brown, No. 08-17-00104-CV, 2020 WL 91210 (Tex. App. – El Paso Jan. 8, 2020).

Grantors' Heirs appealed the lower court's grant of summary judgment to Grantees' Heirs regarding disputed royalty interests in a 1951 mineral deed. The appellate court held that the deed was not unambiguous, and therefore construction was reviewed as a question of law. Additionally, the deed reserved Grantors' Heirs non-participatory royalty interest for two reasons. First, the appellate court held that a "shall not affect" clause within the deed clearly reserved the royalty interest because of the plain language of the text. Second, the appellate court held that the use of the word "benefits" in the deed is a catch-all term for economic benefits and does not include the deed's royalty interests. The appellate court reversed the partial summary judgment of the trial court and rendered partial judgment for Grantors' Heirs and remanded to determine remedies.

Pacheco v. Rodriguez, No. 08-19-00129-CV, 2020 WL 57884 (Tex. App. – El Paso Jan. 6, 2020).

Dog Owner's dog attacked a person on Homeowner's property, and both parties were sued. Dog Owner filed a crossclaim against Homeowner, alleging that Homeowner was negligent in maintaining the fence that kept the dog out of Homeowner's yard. Dog Owner also sought reputation damages from Homeowner, alleging that the original lawsuit had made them pariahs. Homeowner filed a motion to dismiss the crossclaim pursuant to the Texas Citizen Participation Act ("TCPA"), which protects free speech from retaliatory lawsuits meant to silence parties. Homeowner claimed Dog Owner's request for reputation damages brought the crossclaim under the ambit of the TCPA. The trial court dismissed the motion, and this appeal followed. Homeowner first argued that Dog Owner never challenged the alleged defamatory statement, constituting a briefing waiver of the issue. The court ruled that a relaxed preservation rule was to be used to address motions to dismiss under the TCPA in order for the court to reach the merits of the case. Therefore, the court held Dog Owner had not waived the issue. Next, the court held that the TCPA did not apply to Dog Owner's crossclaim. The court reasoned that the crossclaim alleged no publication by Homeowner and that reputational damages are not limited

solely to defamation claims, thus the TCPA did not apply to bar Dog Owner's crossclaim. Furthermore, the court categorized Dog Owner's crossclaim as either a claim for contribution or a claim for damages based on Homeowner's breach of their duties to maintain the fence. The court reasoned that the TCPA did not apply to any of these categories of claim. For these reasons, the court affirmed the trial court's denial of Homeowner's motion to dismiss.

Peters v. Young, No. 11-18-00008-CV, 2019 WL 7372270 (Tex. App. – Eastland Dec. 31, 2019).

Buyer attempted to purchase Seller's lands pursuant to a Real Estate Contract and Option Agreement. The Option Agreement was to be exercised by Buyer signing and returning the Real Estate Contract to Seller. Buyer did so, however Seller refused to proceed under the Option Contract, causing Buyer to sue. The trial court ordered specific performance by Seller, which Seller appealed. The court affirmed the trial court's order of specific performance. The court reasoned that the contracts were unambiguous, as the plain language and contextual reading of the contract supported an interpretation of the purchase price in accordance with Buyer's interpretation, rather than Seller's interpretation, which required an out of context reading of certain provisions. The court then held that Buyer properly executed the Option by performing the specific terms agreed upon by the parties, namely executing and returning the Real Estate Contract to Seller. The court further reasoned that, despite Seller's contentions, Buyer's testimony was sufficient evidence for the trial court to factually find that Buyer was always ready and willing to purchase the property, therefore the court refused to reverse on those grounds. Finally, the court found that there was never any meeting of the minds regarding consideration for the mineral interests underlying the property, and as such, the trial court did not order a sale of those interests. The court reasoned that both contracts' separate reference to portions of the lands from those of the mineral interest showed that the parties had only agreed to considerations for the land, and as such, a sale of the mineral interest was not ordered. For these reasons, all of Seller's contentions on appeal were overruled and specific conveyance from Seller to Buyer was affirmed.

Manor v. Manor, No. 02-18-00056-CV, 2019 WL 7407740 (Tex. App. – Fort Worth Dec. 31, 2019).

Spouse-1 sued Spouse-2 regarding his interest in approximately 300 acres of land divided between them during their divorce proceedings. During the proceedings, Spouse-1 contracted with Spouse-2 to buy back some of the divided land, to which Spouse-2 agreed. Once the two parties signed their contract, however, Spouse-1 repeatedly delayed the closing. Spouse-1 then enforced a provision within their contract that awarded Spouse-2 the $35,000 earnest money payment provided by Spouse-1 as a penalty for missing the closing deadline established in the contract. Spouse-1 subsequently filed this lawsuit, claiming that the contract was unenforceable because it did not satisfy the statute of frauds since the property was not sufficiently described. Spouse-1 also claimed that even if the contract was enforceable, Spouse-2 did not have a right to the earnest money as a matter of law. However, because Spouse-2 showed the existence of a valid and enforceable contract that sufficiently described the property, that she performed her duties under the contract, that Spouse-1 breached the contract through his continuous closing delays, and that she was damaged as a result of Spouse-1's breach, the appellate court upheld the judgement of the trial court in favor of Spouse-2.

SELECTED TECHNOLOGY AND BUSINESS DECISIONS

Corporations

N.D. Texas
Exxon Mobil Corp. v. Mnuchin, No. 3:17-CV-1930-B, 2019 WL 7370430 (N.D. Tex. Dec. 31, 2019).

The Office of Foreign Assets Control ("OFAC") imposed a $2,000,000 fine on the Multi-National Oil and Gas Company ("Company") for alleged violations of Ukraine-related sanctions from 2014. These sanctions included prohibitions against personal dealings with the Chairman of a Russian Corporation individually, but not with the Russian Corporation itself. OFAC rules promulgated under the sanctions defined "property" and "property interests" broadly, including contracts and services. Company executed eight contracts with Russian Corporation, which were signed by Chairman, after the sanctions, without seeking guidance from OFAC. Guidelines published after the contracts were executed indicated that dealings with sanctioned individuals, even in those individuals' capacity as agents of non-sanctioned entities, would be violations. Previous guidelines gave an example that dealing with a sanctioned minister of a foreign government in the minister's capacity as the head of a non-sanctioned foreign agency could still be violations, but noted that prohibitions could vary based on the policy concerns underlying that sanctions behind them. The court vacated the fines on the grounds that Company lacked fair notice due under the Fifth Amendment that its actions were prohibited. Fair notice requires regulated parties to be able to identify with "ascertainable certainty" the prohibited conduct from regulations and public statements issued by agencies. The Court found that the plain text of the regulations did not give fair notice. The Court notes that fair notice is connected to void-for-vagueness doctrine and thus Company noting seeking guidance is relevant, but not dispositive. Ultimately however, Company was entitled to rely on public statements for guidance; these statements, suggesting Company could still have dealing with Russian Corporation, meant that Company lacked fair notice its conduct was prohibited.

SELECTED ENVIRONMENTAL DECISIONS

Federal

4th Circuit
Friends of Buckingham v. State Air Pollution Control Bd., No. 19-1152, 2020 WL 63295 (4th Cir. Jan. 7, 2020).

Environmental Group sought appeal of Government Agency decision to award a natural gas pipeline company a permit for construction of a compressor station. Environmental Group contends that Government Agency failed to consider electric turbines as a zero-emission alternative to the gas-fired turbines which were chosen. Additionally, Environmental Group contends that Government Agency failed to take into account the disproportionate health impacts on the community and failing to independently evaluate the viability of the site regarding its relationship to the African American community. Regarding the gas-power turbine decision, the court stated Government Agency action will survive a review if it "examined relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." The court found that there was no sufficient evidence to support the failure of the state department to consider electric turbines. Government Agency depended on "post hoc" justifications, such as the meaning of terms in its decision stating using the electric turbines would require an inadmissible "redefinition of source" by federal law. The court rejected this argument because post hoc justification are not appropriate for the court to consider for review, only the actual reasoning behind the decision. Overall, Government Agency decision was arbitrary and unsupported by substantial evidence. On the issue of Government Agency failure to independently evaluate the viability of the site and potential health risks, the court stated that Government Agency did not conduct proper research into how the Environmental Justice classification of the chosen area affected the impact the compressor may have on the health of the surrounding residents. The court stated that because the area was classified an Environmental Justice area, Government Agency was required to conduct research on the health effects regarding that area's independent characteristics not characteristics of the general population. For these reasons, the court vacated the permit decision by Government Agency and remanded it back for proceedings consistent with these findings.

D. New Mexico

WildEarth Guardians v. U.S. Army Corps of Eng'rs, No. 15-CV-159-WJ-KBM, 2019 WL 7038201 (D.N.M. Dec. 20, 2019).

United States Army Corps of Engineers ("Corps") decided to replace earthen levees along the Rio Grande with superior, more durable levees. Advocacy Group filed a Motion for Summary Judgment contending that Corp's actions threaten three endangered species and that agency failed to properly consider environmental impacts. The National Environmental Protection Act requires agencies to prepare Environmental Impact Statements before undertaking certain projects, which must include a discussion of alternative courses of action, and briefly discuss why those alternatives were not pursued. Advocacy Group was found to have suggested an alternative course of action during the public comment period. The Advocacy Group's first contention that Corps defined its objection too narrowly, and thereby unreasonably precluded the Group's suggested alternative, was rejected by the court as Corps had not acted in an arbitrary and capricious manner in defining the objection. The court also rejected the contention that Corps had not considered enough alternatives, noting Corps rejected several non-structural alternatives as insufficient to the goal of flood control. Furthermore, the court rejected the contention that Corps was required to consider a combination of multiple alternatives, rather than each alternative individually, as precedent suggesting such consideration might be required applied only where an agency's analysis of alternatives was "perfunctory." The court concluded that Corps complied with all of its statutory requirements in pursuing this project, and therefore denied the Advocacy Group's Motion for Summary Judgment.

D. Oregon

W. Watershed Project v. Bernhardt, No. 2:19-CV-0750-SI, 2019 WL 7040923 (D. Oregon Dec. 20, 2019).

Advocacy Groups brought suit against the Secretary of the Interior for, on his last day in office, granting a Grazing Permit to Ranching Company on federal lands without proper review. Two shareholders of the Family-Owned Ranching Company had previously been convicted of and sentenced for setting fires on grazing lands in violation of law. Because of this, the government revoked the Ranching Company's earlier permit, noting their "callous disregard for human life." However, the shareholders received a Presidential Pardon on July 10, 2018. The Secretary received a guidance memo from the office of the solicitor general, which noted that

the pardon eliminated the punishment, and not the crime, so the crime could still be considered by the government in granting the Permit. However, the pardon could also be considered as part of potentially changed circumstances since the revocation of the last permit. In an approximately three-page decision advising the government to grant the permit, the Secretary summarized the entire factual history of the case and the entire procedural history of the case, described the applicable law, and set out his legal analysis. The Court found that the Secretary had not conducted an adequate analysis to show that the Ranching Company was in substantial compliance with adequate law, as considering only the punishment and pardons did not sufficiently examine all the relevant factors. So, the Court granted the Advocacy Groups' Motion for Summary Judgment, vacated the grant of the permit, and remanded to the agency.

W.D. Wisconsin
United States v. Superior Refining Co. LLC, No. 10-CV-563-BBC, 2019 WL 7037791 (W.D. Wisconsin Dec. 20, 2019).

The United States, Wisconsin, the Louisiana Department of Environmental Quality, a Wisconsin Refinery, and Louisiana Refinery are parties to a consent order dating back to February 2011. That consent order has been modified twice, in May 2012 and again in May 2019. The parties have negotiated a third modification to account for the fallout from a 2018 explosion at the Wisconsin Refinery. However, in December 2018, Wisconsin passed a law requiring the state Justice Department to get legislative approval before settling certain cases. The Wisconsin Attorney-General asked the Court to declare that the law does not apply to this case so that the state Justice Department can modify the order without approval from the legislature. The Court declined for lack of ripeness, stating it would not be appropriate to issue an advisory opinion to interpret state law. However, the Court also noted that the parties could still file to have the modifications approved, and that the Court would not need to determine if the state followed its own policies to approve the modifications.

State

California
People v. Wetle, 43 Cal.App.5th 375 (Cal. Ct. App. 2019).

In 2016, Officers of the California Department of Fish and Wildlife found illegal crab traps in the Soquel Canyon State Marine Conservation Area.

Tags and permits attached to the traps identified Fisherman as the owner of the property. The first-degree principal confessed to placing the traps in the protected area and stated that he had leased them from Fisherman. This actor was not employed by Fisherman, nor did Fisherman tell him to place the traps in that area. Fisherman was charged with twenty-eight misdemeanor counts of violating 14 CCR § 632 and 14 CCR § 180.2. Following a four-day trial, the jury convicted Fisherman on all counts. The conviction was affirmed by the Monterey County Superior Court's appellate division. Fisherman contended that there was insufficient evidence to support a conviction when it was undisputed that the other person placed the traps, but the Attorney General argued that Fisherman was vicariously liable because he entrusted his traps with the principal in the first-degree. Even though the counts charged are strict liability offenses requiring no proof of mental state, the prosecution still had to prove Fisherman's action was criminal. The Attorney General argued that entrusting the traps with the first-degree principal was an act sufficient to merit criminal liability. Fisherman's contention that the evidence was insufficient to support a conviction was rejected. However, the Court of Appeals reversed and remanded the case upon holding that the trial court failed to adequately instruct the jury. The jurors were not required to find beyond a reasonable doubt that Fisherman performed an act prohibited by California law.

Kentucky

Quest Energy Corp. v. Slone, NO. 2018-CA-001239-MR, 2019 WL 6998654 (Ky. Ct. App. December 20, 2019).

Seller sold coal assets to Energy Company ("Company"). After Company failed to pay Seller royalty payments owed under agreement, Seller brought an action for payment of more than $2,000,000.00 and an accounting of coal mined. Company asserted the agreement was not breached and, in the alternative, argued the original agreement between the parties was modified. Company also counterclaimed alleging Seller made misrepresentations to Company to induce purchase of the assets. The trial court dismissed the counterclaim and awarded Seller over $2,500,000.00. Company appealed on the basis that the trial court's findings of fact were not supported by evidence and the conclusions of law were erroneous. The Court of Appeals affirmed the trial court. The evidence suggested Company was not fraudulently induced to enter into the agreement. Rather, the Company did not properly conduct their own due diligence prior to the consummation of the agreement. Moreover, the letter purportedly altering

the terms of the agreement was ambiguous. As such, it is to be held against the drafter. This letter, construed against the Company, could not be interpreted as amending the original asset purchase agreement.

Louisiana
Allison v. CITGO Petroleum Corp., No. 19-523, 2019 WL 6886812 (La. Ct. App. Dec. 18, 2019).

Petroleum Refiner appealed a trial court judgment awarding damages to twelve Workers in a personal injury suit. The suit arose from a spill of slop oil from Petroleum Refiner facility in southeast Louisiana that released toxic substances into the air and water that contaminated natural resources and presented severe dangers to surrounding biological organisms, including humans. Workers of Petroleum Refiner's facility claim personal injuries caused via exposure to the substances while remediating the spill. Following a trial ruling for Workers, Petroleum Refiner appealed the judgment, asserting that the court abused its discretion by relying heavily on Worker's pretrial memorandum in forming its final judgment and for awarding damages to Workers for injuries that were unsupported by the trial record. The Court of Appeals quickly dispensed with the first asserted error, explaining that reliance on Workers' memorandum was irrelevant to the validity of the judgment, because "the reasons for judgment are not the judgment itself." The Court of Appeals then affirmed the amount of general damages awarded to all but one of the twelve Workers. The award of medical expenses for the one Worker was deducted by approximately $400 because there was not any expert testimony that linked the Worker's facial swelling to his exposure to the toxins.

Pennsylvania
Philadelphia Gas Works. V. Pennsylvania Pub. Util. Comm'n, No. 1404 C.D. 2018, 2019 WL 6698103, (Pa. Commw. Ct. Dec. 9, 2019).

Gas Company petitioned for review of a final order issued by the Pennsylvania Public Utility Commission ("Commission"), which concluded that the Commission no longer had jurisdiction over rate issues related to the bills issued by Gas Company. Under that ruling, the late fees issued by Gas Company were no longer applicable to unpaid gas bills once liens attach to those bills. The Commonwealth Court of Pennsylvania recognized that the legal issues raised in this appeal were analogous to those in *Philadelphia Gas Works v. Pennsylvania Public Utility Commission* (Pa. Commw., No. 1291 C.D. 2018, filed December 9, 2019) (*PGW I)* and

Philadelphia Gas Works v. Pennsylvania Public Utility Commission (Pa. Commw., No. 1405 C.D. 2018, filed December 9, 2019) (*PGW III)*. The court followed their prior reasoning in the *PGW I* case, and subsequently held that the Pennsylvania Utility Commission case dated October 4, 2018 is reversed.

Texas

Creative Oil & Gas v. Lona Hills Ranch, NO. 18-0565, 2019 WL 6971659 (Tex. December 20, 2019).

Ranch brought trespass and trespass to try title actions against Oil and Gas Operator ("Operator"). Ranch alleged the underlying lease expired due to cessation of production. Lessee intervened. Ranch then dropped its trespass and title actions against Operator but maintained them with regard to Lessee. In response, Operator and Lessee brought various counterclaims against Ranch. The counterclaims fall into two categories. Under category number one, Operator and Lessee allege Ranch falsely told production purchasers from the lease that the lease was expired and that production payments should cease. Under the second category, Operator and Lessee maintain Ranch breached the lease by filing this suit and bringing an administrative action in the Railroad Commission seeking to terminate the lease. At the court of appeals, Ranch moved to dismiss the counterclaims on the theory that the counterclaims violated the Texas Citizens Participation Act ("TCPA"). TCPA permits a party to dismiss an action related to a party's exercise of free speech or the right to petition. The court of appeals dismissed all of Operator's counterclaims and the Lessee's category one counterclaim. The Texas Supreme Court held that Ranch's communications to purchasers were not protected by the TCPA as these communications did not fall within the areas of speech covered by the TCPA. While the TCPA protects speech made generally about products in the marketplace, the purchase of hydrocarbons from a particular lease cannot be fairly construed as speech generally made in a broader marketplace. So, the first category of counterclaims was not dismissed. The second category of counterclaims, however, falls under the protection of the TCPA. Accordingly, the judgment dismissing the operator's counterclaim with regard to the breach of lease was affirmed. Ranch did not file a timely appeal challenging the lessee's counterclaim under category two.

Crawford v. XTO Energy, Inc., No. 02-18-00217-CV, 2019 WL 6904298 (Tex. App. – Fort Worth Dec. 19, 2019).

In 1964, Grantor conveyed a parcel of land to Electrical Service Company while retaining the mineral rights. In 1984, Grantor conveyed land adjacent to the Electrical Service Company plot to another party, but the conveying instrument did not explicitly state anything about mineral rights. Grantor passed away in 2007 and Successor assumed interest in the parcel. Successor filed suit against Company, which had obtained interest in the parcel from the 1984 purchaser. The dispute centered on what benefits and interests were reserved by Grantor in the 1984 conveyance. The trial court ruled in favor of Company pursuant to a motion for summary judgment based on the strip-and-gore doctrine. This doctrine presumes that a grantor did not intend to reserve interest in a slim parcel of land that adjoins land conveyed. Based on the language of the 1964 and 1984 deeds, the Court of Appeals concluded that the doctrine applied. Because the strip-and-gore doctrine applied to the 1984 conveyance and Successor failed to raise a dispute of fact in rebuttal, the grant of summary judgment was affirmed.