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Recent Case Decisions

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RECENT CASE DECISIONS

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OIL AND GAS

Upstream

Tyger v. Precision Drilling Corp., ___ Fed. Appx. ___ (3d Cir. 2020), 2020 WL 6268335.

Employees sued Driller under Fair Standards Act ("FLSA") for unpaid overtime wages for time spent putting on and taking off PPE and time waiting before and after the same. The Court faced three issues raised by the Employees: exclusion of Employees' expert witness testimony, summary judgment finding that putting on and taking off PPE was not *integral and indispensable*, and summary judgment finding Driller did not willfully violate FLSA. First, the Court upheld the trial court's dismissal of Employees' expert witness testimony because the testimony was unreliable, specifically because there was no data concerning the levels of hazardous material at the drilling site. Second, the Court remanded the case to determine whether putting on and taking off PPE is integral and indispensable, as compensable overtime wages are required to be under FLSA. Specifically, the Court held that expert testimony was not needed to establish toxicity that could render PPE integral and indispensable. Lastly, Circuit Court affirmed there was no genuine issue of material fact regarding Driller's alleged willful violation of FLSA and affirmed Driller's motion for summary judgment on this point.

Siana Oil & Gas Co. v. White Oak Operating Co., No. 01-18-00962-CV, Slip op. 6140177 (Tex. Ct. App. Hous. Oct. 20, 2020).

Appellant-defendant ("Siana") appealed the granting of a motion for summary judgement by the trial court on behalf of appellee-plaintiff ("White Oak") on July 27, 2018. In May 2014 White Oak obtained operating interests and began operations in August 2014 as an oil and gas operator over a plot of land in Webb County, Texas. Prior to White Oak's acquisition, Siana owned interest in the plot of land as a non-operating company under a Joint Operating Agreement (JOA). Siana continued making payments under the JOA, these payments known as Joint Interest Billing's (JIB) promptly stopped in November 2014. Shortly thereafter White Oak filed suit seeking damages. Siana answered denying the claims and brought numerous counterclaims. In March 2018 counsel for Siana filed a motion to withdraw representation. The trial court granted the motion in April and provided Siana with thirty days to retain new counsel. On July 19, approximately a week before the July 27, 2018 hearing date set

for White Oak's MSJ, Siana's new counsel filed their appearance and on July 24 motioned for an extension of the hearing while also filing their late response to the MSJ. The trial court denied the extension motion and on July 27 granted White Oak's MSJ providing White Oak with damages and various declaratory reliefs. On appeal, the court found that Siana's reasoning for the delay in acquiring replacement counsel; including lack of competence of one acquired counsel, conflict of interest with a second acquired counsel, and otherwise inability to acquire timely counsel was of no fault or negligence of Siana and the requested extension by Siana's new counsel should have been granted. The extension would have caused no significant delay and would not have harmed or caused undue prejudice to White Oak. The case was reversed and remanded.

Mountaineer Minerals, LLC, v. Antero Resources Corp., 2020 WL 5351044 (Sept. 4, 2020).

Plaintiff and Defendant dispute ownership of oil and gas leaseholds, including the right to extract oil and gas. Specifically, the parties each claim ownership of the right to extract oil and gas from the Marcellus Formation and disagree whether the leasehold conveyed in the agreement included only two wells or if the rights were inclusive of the entire parcels.

In 2016, Plaintiff filed suit against Defendant for declaratory relief and to quiet title. Following discovery, the court granted Plaintiff's motion for summary judgment. Defendant appealed and the Fourth Circuit vacated the judgment and remanded the case to determine which rights in the agreement had been assigned.

On November 5, 2019, the court granted Defendant's supplemental motion for summary judgment. The court concluded that Plaintiff could not meet its burden of proof, because "(1) the Subject Assignment pertained to the Assigned Wells; and (2) the Assigned Wells … did not reach the Marcellus Shale Formation."

Plaintiff seeks a new trial based on newly discovered evidence contained in two affidavits. Additionally, Plaintiff asks the court to review the affiant's use of four wells on the property that were not specifically conveyed in the agreement.

Plaintiff is not entitled to Relief from Judgment. Relief from judgment is not appropriate because there were no extraordinary circumstances that landed plaintiff in the position it is in now. The basis for relief is rooted in the clear and unambiguous language in the agreement and Plaintiff's failure to timely gather evidence.

Additionally, Plaintiff is not entitled to a new trial. Procedure for a new trial under Federal Rule of Civil Procedure Rule 59(a) and (b) is only applicable after a bench or jury trial. For judgments entered without a trial, a party should file a motion to amend or alter the judgement under Rule 59(e).

This case is procedural.

Thoroughbred Assoc., L.L.C. v. Kansas City Royalty, 469 P.3d 666 (2020).

This case is the latest case in a 17 yearlong battle over revenue from oil and gas leases in an operating unit. The issue is whether a lease is owned by Plaintiff, the unit's former operator. If so, Defendant and others are entitled to a share of profits from unit production. The lease included a provision that allowed Plaintiff to unitize the leases if certain conditions were met. Plaintiff unitized the leases when parties agreed, but the conditions were not met. Plaintiff now claims that because the conditions were not met, that its lease should not be included in the unit. Defendant counters that the terms in the lease as to unitization were ambiguous and that the parties agreed to allow the unitization by filing a declaration. The district court held that Defendant had an interest in the lease from the surface to a dividing line within the formations. Based on its finding the court awarded Defendant $597,420.95.

The Kansas Supreme Court determined that the parties waived the condition requirements in the lease agreement when they filed the Declaration and consistently acted as if the lease was included in the unit. The parties also had a duty to read all terms of the lease agreement and were therefore should have had knowledge regarding the unitization conditions. Equitable estoppel prevents Plaintiff from acting as if the lease was included in the unit for three years and later claiming that the lease should not be included in the unit because the conditions are unmet. The court articulates that this is precisely what the doctrine of equitable estoppel is designed to prevent.

Mitchell/Roberts P'ship v. Williamson Energy, LLC, 2020 IL 5-19-0339 (Ill. App. Ct. 2020).

This dispute arose over several series of mineral deeds, severable and conveyable, executed and recorded in 1913 and 1914. The Severed Mineral Interest Act says surface owner is entitled to subjacent support from the owner of subjacent mineral interest, waivable by strictly construed agreements. The court examined only one of the series, noting its analysis would apply to all the other series. The deeds comprised 127 parcels of land

sharing similar "together with" granting language and organizational structure, granted coal mining rights with ingress and egress rights, and the right to construct railroad across the land as necessary for the mining. Deeds went parcel by parcel, granting nearly identical rights, and listing a Surface Option price for each parcel.

Partnership, under claim that it is the successor in interest to grantors, filed a complaint: (1) seeking a declaration of rights of legal construction of several series of deeds' conveyance of subsidence rights. The lower court granted summary judgment to the defending group of energy companies ("Companies") on all counts because of deeds' "together with" conveyance language application as a collective package to all parcels. The lower court denied Partnership's partial summary judgment on count (1), seeking to apply the language only to parcel directly preceding the next parcel, thus excluding Companies subsidence rights from all but the first twelve parcels. The Court of Appeals reviewed de novo, holding that the rules of deed construction clearly apply the "together with" language to the parcels as a series. The court affirmed that Deeds clearly waived rights of subjacent support as a matter of law. The court affirmed the lower courts grant of summary judgment to Companies, confirming Companies' subsidence rights in all 127 parcels of land.

Ohio Dep't of Nat. Res. v. Big Sky Energy, Inc., 2020-Ohio-4374, No. CT2019-0086, 2020 WL 5413844.

The Ohio Department of Natural Resources, Division of Oil and Gas Resources Management ("Division") Chief issued three separate orders between 2011 and 2013 to the oil and gas production corporation ("Corporation"), ordering Corporation to plug three different oil production wells it owned and operated and restore the sites. Upon inspection, Division found Corporation did not comply. Division then issued two orders in 2014 declaring forfeiture of Division's $15,000 bond as a result of the failure to comply, and prohibited Corporation from operating any wells in the State of Ohio. Division filed a complaint for statutory injunction based on Corporation's violations of the orders to plug and restore the well sites. Corporation pled impossibility of performance; the trial court found for Division. Corporation appealed, alleging the trial court abused its discretion. The Ohio Court of Appeals, Fifth District, held that impossibility of performance is a contractual doctrine and does not apply to performance of responsibilities imposed by statute, as in this case. Thus the trial court did not abuse its discretion on that count. Corporation further alleged abuse of discretion in the civil penalties the trial court imposed. The

court disagreed, noting the statute allowed the trial court to assess and determine the appropriate civil penalty, and that such discretion will not be reversed upon appeal without evidence of abuse of discretion. The appeals court held no such abuse occurred, because the trial court assessed penalties of only one percent of the maximum permissible statutory penalties.

Peter D. Holdings LLC v. Wold Oil Properties, LLC, No, 17-CV-212-R, 2020 WL 5406238 (D. Wyo. Aug. 12, 2020).

Limited liability company assumed all working interest in the contract areas of an oil and gas lease from a company that focused its operation in exploring coalbed methane gas (CBM) and creating CBM wells. LLC filed suit against two oil and gas companies. This court found LLC had a real-party-in-interest in its accounting claim, however it did not in respect to its two breach of contract claims and its conversion claim. This Court considered judicial estoppel because: (1) LLC took a position "clearly inconsistent with [the CBM company's] earlier position" in a prior suit and the cases are so intertwined that "it is fair and reasonable to bind [LLC's] holdings with the [CMB company's] prior statement", (2) this position created an impression that the previous court was misled, and (3) equity demands estoppel in order to not give an unfair advantage to a party. This court found that Companies complied with their obligation in the contract regarding the conveyance of depth in the working interest because of clear and unambiguous terms in the contract. Companies did not fail "to convey any additional interests because [the original CBM company] failed to earn them" by failing to dewater the wells, an essential element to wells producing gas. Therefore, Companies had no obligation to convey the interest. In the second contractual breach claim, LLC breached the contract, not Companies. LLC failed to absorb the cost of the wells until they were completed, a requirement of the contract. This court found that the accounting claim lacked evidentiary and legal support because there was no breach of contract. The conversion claim was barred by a four-year statute of limitation.

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

Devon Energy Prod. Co. v. Sheppard, 2020 WL 6164467, (Tex. App. – Corpus Christi-Edinburg, 2020).

Appellees filed suit against the appellants alleging "that appellants were selling the oil and gas produced from the leases under contracts which contain an $18-per-barrel "reduction" in the sales price attributable to

"gathering and handling, including rail car transportation." Appellees further allege, "that appellants breached the leases by failing to add the $18-per-barrel "reduction" to the amount upon which the royalty is calculated." Appellees main argument was that the leases unambiguously required the appellants to add any "reductions" before calculating the appellees royalty. The issue in this case is whether royalty is to be calculated "at the well" or "gross proceeds" from the sale of the minerals. The trial court granted summary judgement in favor of appellees on all of the issues specified in their stipulation. The appellants appealed the ruling.

Under Texas Law, "gross proceeds" means the among the producer actually receives in the sale of the minerals at issue." Appellants made royalty payments based on their "gross proceeds" but "without any additions pursuant to paragraph 3(c)," which is comparable to a non-deductions clause. The appellants argued that the "gross proceeds" language in the leases at issue "necessarily controls over all others." The court found that paragraph 3(c) was highly unique compared to others and "shows that the parties intended to allow the royalty base not only to exceed the market value at the well, but also to exceed appellant's gross proceeds."

The court reversed the trial court's judgement on "Stipulated issues 1, 3, 5, 6, 14, 16, 17, 18, 19, 20, 21, 22, and 23…and reverse the trial court's judgement on Stipulated Issue 15 insofar as it concerns the fixed fee of three cents per gallon on the sale of drip condensate."

Am. Petroleum Inst. v. United States Dep't of Interior, 823 Fed. Appx. 583, 2020 WL 4515995 (10th Cir. 2020).

The American Petroleum Institute ("API") challenged a promulgated final rule created by the Office of Natural Resources Revenue ("ONRR") amending civil regulations under the Federal Oil and Gas Royalty Management Act ("FOGRMA"). API filed a petition in the district court challenging the rule and requesting that it be vacated, in which the district court, "vacated one challenged petition but rejected API's challenges to several other provisions." API appealed to the Supreme Court of California, where the court found that "API lacks standing to challenge ONRR's 2016 rule." The court vacated the district court's ruling and remanded for dismissal for API's claim for lack of jurisdiction.

ONRR crafted a final rule amending FOGRMA's civil penalty regulations, that ensured "lessees accurately reported the value of their oil and gas production." The amendment defined "knowingly or willfully" as "maintains false, inaccurate, or misleading information," further how ONRR will determine the amount of a civil penalty. API filed a petition

challenging ONRR's statutory authority under the act. The court stated that to establish standing, a plaintiff must show the following: (1) injury in fact, (2) causation, and (3) redressability. The court found that API did not demonstrate a sufficient threat of injury because: (1) "API failed to allege any of its members are subject to any disciplinary action under FOGRMA as a result and the amendments," and (2) "API has failed to allege evidence of any intention, on the part of its members, to engage in a course of conduct that could violate FOGRMA." The court concluded that API's injury analysis was based on the following, "API's claims amount to a mere possibility of future injury."

The court vacated the district court's decision because "API has not demonstrated a sufficiently imminent threat of injury," resulting in lack of standing for API.

Midstream

Sabal Trail Transmission, LLC v. Lasseter, 823 Fed. Appx. 914 (11th Cir. 2020).

Constructor received a certificate to build and operate a natural gas pipeline. Constructor filed an action to condemn easements on Landowner's property to build the pipeline. Landowner and environmental groups petitioned the District of Columbia Circuit ("D.C. Circuit") to review Constructor's certificate. Landowner also motioned to dismiss the condemnation action, but this was dismissed because Constructor was issued a new certificate before D.C. Circuit issued its mandate. Landowner was also denied expert witness testimony opining that the property would contain twelve lots and be more valuable than Constructor argued because this testimony failed to show the lots were "reasonably probable or financially feasible." Additionally, the trial court denied Landowner the opportunity to state "subjective fears about pipeline dangers." Landowner provided no evidence to challenge Constructor's valuation of the easement at $24,096.50; however, the jury valued the easement at $103,285. The trial court denied Constructor's motion for judgment as a matter of law, finding a jury could have reasonably inferred the property had a higher value. Eleventh Circuit faced three issues. First, Eleventh Circuit held trial court properly denied Landowner's motion to dismiss because Constructor never lacked authority to build the pipeline because D.C. Circuit's mandate was not a final judgment until all appeals were exhausted. Second, Eleventh Circuit held the trial court properly denied Landowner's testimony and Landowner's expert witness testimony for procedural and evidentiary

reasons. Third, the Circuit Court reversed trial court's dismissal of Constructor's motion for judgment as a matter of law because "[t]he testimony and trial regarding compensation was uncontradicted" and "the jury necessarily had to engage in impermissible speculation" to find a higher land valuation. Therefore, the easement was valued at $24,096.50.

PNE Energy Supply LLC v. Eversource Energy, 974 F.3d 77 (1st Cir. 2020).

In two separate suits against an operator of a natural gas utility ("Operator"), a group of end consumers ("Consumers") and a wholesale energy purchaser ("Purchaser") sued under federal antitrust laws for manipulation in gas transmission markets. The suits arose out of an environmentalist group's report, alleging Operator regularly bought and refused to release excess pipeline transmission capacity, thus driving up electricity prices in the market by twenty percent. After the cases failed on the merits of the antitrust claims, the Fifth Circuit Court of Appeals examined whether any differences between the two cases warranted a different outcome. The court determined that the controlling caselaw which guides the application of the federal regulations allowed Operator to release or not to release any excess transmission capacity at its discretion due to considerations for variable, unpredictable demand. Purchaser further alleged Consumer's conduct differed from the controlling case law because of a secondary sale market and because they manipulated a price index, which differs from a mere failure to release excess capacity. The court adjudged no merit in the first distinction because even a secondary market falls within the federal regulation's purview. The second attempted distinction, the court viewed as a mere restatement of the original complaint. The court further declined to acknowledge any provision within the controlling regulation permitting use of an antitrust suit to enforce that regulation. And finally, the court declined to reconsider the controlling caselaw to find a different outcome in the present case. The court upheld the dismissal of both suits.

Downstream

New York v. Nat'l Highway Traffic Safety Admin., 974 F.3d 87 (2d Cir. 2020).

Several states, the District of Columbia, and two environmental groups sued National Highway Traffic Safety Administration ("NHTSA") to institute higher corporate average fuel economy ("CAFE") penalties after

NHSTA attempted to roll them back. CAFE penalties apply to vehicles falling below fuel efficiency standards. CAFE penalties were capped at $5.50 in 1997, but in 2016, Congress removed certain inflation caps and required agencies to adjust penalties for inflation. In 2016, NHSTA found that CAFE penalties should increase from $5.50 to $14 but delayed implementing the new penalty. However, in 2017, NHSTA reversed course, reinstituting the $5.50 penalty, and finding that CAFE penalties were not *civil monetary penalties*. Additionally, in 2019 NHSTA cited negative economic impacts to keep CAFE at $5.50. Circuit Court faced two questions. First, the Court held that CAFE penalties are civil monetary penalties because they are "assessed and enforced by an agency . . . pursuant to a federal law" and were for a specific monetary amount. Specifically, the Court held CAFE penalties involve a specific dollar amount that is determined via a formula after qualifying credits are applied. Further, the Court did not defer to NHTSA's penalty reduction because CAFE were unambiguously civil monetary penalties, and any ambiguity would have been resolved after the same CAFE language was used across multiple statutes. Secondly, the Court found NHTSA could not consider economic factors to reduce the penalty after Congress' timeline passed because such penalties were meant to build off each other and NHTSA missed its window to consider economic factors in January 2017. The Court vacated NHTSA's 2019 rule and held the $14 penalty to be in force.

Federal

Taylor Energy Co. v. United States, 975 F.3d 1303 (2020).

Appellant filed suit in the Court of Federal Claims asserting four claims involving Louisiana state law: "(1) breach of Trust Agreement for inserting an indefinite term; (2) request for dissolution of the trust account based on impossibility of performance; (3) request for reformation or rescission based on mutual error; and (4) breach of the duty of good faith and fair dealing."

The United States responded by filing a motion to dismiss for lack of jurisdiction based on the six-year statute of limitations and a 12(b)(6) motion to dismiss for failure to state a claim.

Appellant contends that claims (2) and (3) should not have been dismissed because it properly stated a claim for relief under Louisiana law. Additionally, application of trust law for claims (1) and (4) was erroneous, because contract law should have been applied.

The court did not resolve these issue because for Outer Continental Shelf ("OCS") claims, federal law is applicable if it addresses the relevant issue. Claims (1) and (4) are based on the application of La. Civ. Code. Art. 1778, which requires the parties to complete their contractual obligations within a reasonable period of time when the agreement does provide a specific time. But, federal law addresses the amount of time an OCS lessee has to complete its decommissioning obligations. Louisiana law effectively limits the period in which the lessee can be liable, which conflicts with the Outer Continental Shelf Lands Act. Therefore, federal law should be applied.

Claims (2) and (3) rely on La. Civ. Code Art. 1876 and 1877, which provides that a contract is dissolved when parties have completed their obligations. But, decommissioning obligations are addressed by federal law . Therefore, Appellant fails to state a claim upon which relief can be granted, and the case should be dismissed.

This case is procedural.

State

Prot. Our Water & Envtl. Res. v. Cnty. of Stanislaus, 10 Cal. 5th 479, 268 Cal.Rptr.3d 148, 472 P.3d 459 (Cal. 2020).

This case involves "the distinction between discretionary and ministerial projects," which the latter does not require environmental review through the CEQA. Stanislaus County ("County") issues "well construction permits under an ordinance that incorporates state well construction standards." The plaintiff's in this case challenge the County's practices, "alleging the permit issuances are actually discretionary projects requiring CEQA review." The trial court found that the practice of permit issuances were ministerial, leading the court of appeals to reverse the trial court's decision. The Supreme Court of California found that, "classifying all issuances as ministerial violates CEQA…plaintiffs are entitled to a declaration to that effect. But they are not entitled to injunctive relief, because they have not demonstrated that all permit decision covered by the classification practice are discretionary."

A project is discretionary when "an agency is required to exercise judgement or deliberation in deciding whether to approve an activity." A project is ministerial when "the law requires [an] agency to act…in a set way without allowing the agency to use its own judgement." Chapter 9.36 "requires a permit from the county health officer to construct, repair, or destroy a water well." Chapter 9.37 "prohibits the unsustainable extraction and export of groundwater." The court concluded, "the County's practice of

categorically classifying all the permits as ministerial violates the CEQA." The court reasoned that, "when an ordinance contains standards…give an agency the required degree of independent judgement, the agency may not categorically classify the issuance of permits as ministerial." The county can classify a particular permit as ministerial and "develop a record supporting that classification," but must do so on a permit by permit basis.

The court affirmed the court of appeals holding that the plaintiffs were entitled to relief but remanded the case to reassess the plaintiff's entitlement to relief.

WATER

State

Abatti v. Imperial Irrigation Dist., 266 Cal.Rptr.3d 26 (Cal. Ct. App. 2020).

Farmer filed a petition for writ of mandate against Water Supplier after the enactment of an equitable distribution plan relating to water apportionment. In his filing, Farmer asserted that the distribution plan unlawfully and inequitably took away his rights entitling him to receive sufficient amounts of water necessary for irrigation. Additionally, Farmer asserted claims of breach of fiduciary and taking against Water Supplier for enacting the distribution plan. The trial court granted Farmer's petition, holding that farmers retain constitutionally protected property rights with respect to the waters appurtenant to their lands and that Water Supplier abused its discretion in apportioning quantities of water received by farmers at a lesser priority to other users. Further, the trial court entered a declaratory judgment barring the Water Supplier from distributing water pursuant to the equitable distribution plan, and instead, required Water Supplier to employ a historical apportionment method. Furthermore, the trial court dismissed Farmer's claims of breach of fiduciary duty and taking. Water Supplier appealed, and Farmer cross-appealed on his claims relating to breach of fiduciary duty and taking. The court affirmed the trial court's findings that Water Supplier erred in its apportionment method and that Water Supplier's apportionment method did not constitute a breach of fiduciary duty or taking. Alternatively, the court reversed the trial court's issuance of declaratory relief, holding the Water Supplier had the discretion to modify their apportionment method.

Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co., 2020 UT 47, 469 P.3d 1003.

Irrigation companies acquired direct flow rights allowing storage of river water in respective reservoirs. In early 1900s, the Fifth District Court adjudicated the river establishing the 1931 Beaver River Decree ("Decree"). The Decree established priority dates and use limitations of water rights and divided the river into upper and lower sections. Users in upper portion diverted water *prior* to lower users, despite differing priority dates. The Decree also prohibited diverting water without proper equipment, including measuring devices. In 1953, lower user of river water ("Lower User") entered into an agreement ("Agreement") with upper user ("Upper User") in which both parties agreed not to dispute the other party changing and/or expanding reservoirs. In 2010, Lower User sued Upper User for water right interference, conversion of water rights, and negligence. Lower User asserted interference by Upper User's direct storage changes and failure to measure usage in accordance with the Decree. Upper User filed a counterclaim seeking clarification of parties' water rights under Agreement. Lower User lost on all claims and appealed. The Utah Supreme Court issued a decision in July 2019 and both parties filed petitions for rehearing. The court held, during rehearing, the district court erred in: (1) denying Lower User's motion for summary judgment as there *was* a dispute regarding rights under Agreement; (2) refusing to declare Upper User must follow the measurement requirements of the Decree; (3) awarding attorney's fees to Upper User because Lower User did not act in bad faith. The court also held the district court did *not* err in: (4) refusing to declare Upper User could not store efficiency gains because Lower User failed to show how Upper User's efficiency gains *caused* lower return flows; and (5) not rescinding Agreement because the breaches were not material. The court affirmed and reversed in part and remanded.

Arave v. Pineview W. Water Co., NO. 20180067, 2020 WL 6110141 (Utah Oct. 15, 2020).

Senior water right holders previously sued Junior water right holder with the lower court finding for Senior on their allegations of interference and negligence by Junior. Junior appeals this ruling. Senior operates two wells that pull from the same reservoir as Junior, who operates 5 much more powerful wells. When "Well 4" of Junior's system operates it makes one well of Senior useless and the other almost impossible to use. Court notes that Junior's water rights are about thirty-three times larger than all of Seniors' rights combined. Prior to litigation, Junior was aware of the issue

via testing and made an agreement for Senior to pay Junior for a certain amount of water. After this agreement ended the Senior brought forward this suit. Court notes that determination of interference with a water right is a mixed question of law and fact and gave broad deference to the lower court on this fact-dependent case. Additionally, while first in time first in right applies the goal is the maximum utilization of the water. Court reiterated a five-factor holding that Senior failed to show three and four. With three being that Senior's diversion methods are reasonable and four being that despite reasonable efforts they cannot access their entitled to water. The court holding that Senior had rights to the water but not to a specific water table level. Additionally, they failed to make reasonable efforts to adjust their welling operations to account for the lowered table level. The court found this argument applicable to both of Senior's well claims. The court reversed the lower court's decision on interference and remanded the negligence holding. Since the negligence decision stemmed from the interference charge in the lower court's previous decision.

Federal

Ak-Chin Indian Cmty. v. Maricopa-Stanfield Irrigation & Drainage Dist., No. CV-20-00489-PHX-JJT, 2020 WL 5517307 (D. Ariz. Sept. 14, 2020).

Landowner sued irrigation and drainage districts ("Districts") to permanently enjoin Districts from lowering the quality of water that Landowner is entitled to receive under federal law and contract with the United States. The 1984 Settlement Act ("Act") granted Landowner water supply of at least 75,000 acre-feet for agricultural use, 50,000 coming from the highest priority water in the Central Arizona Project. The 1985 Contract ("Contract") added a provision limiting Landowners use of groundwater, except during a shortage. In 1998, the U.S. and Districts entered into an agreement for Districts to operate and maintain several water distribution facilities, including the conveyance facility, a canal, that Landowner receives its water from. Landowner alleges Districts lowered the water's quality by pumping groundwater from district wells into the canal where Landowner's water comes from. Landowner asserts: (1) interference with Landowner's high priority water rights; (2) nuisance; (3) trespass; and (4) unjust enrichment. Districts move to dismiss for abstention and failure to join the U.S., a necessary party. Districts argue the court lacks jurisdiction because the Colorado River Doctrine allows federal courts the right to dismiss or refrain from hearing a case when a parallel matter is being heard in state court. The District Court for the District of Arizona held Districts

failed to show how the similar matter in state court would result in a similar proceeding. The court also found the U.S. is a necessary party because the court is unable to grant relief to either party without forcing one to break contractual agreements with the U.S.. Joinder is feasible because the U.S. waived sovereign immunity under the Reclamation Reform Act as both parties' agreements with the U.S. were executed under Federal reclamation law.

United States v. Sweeney, No. 2:17-cv-00112-KJM-KJN, 2020 WL 5203474 (E.D. Cal. Sept. 1, 2020).

United States ("Government") sued Company for unauthorized levee construction, placement of structures, and other acts in violation of the Clean Water Act ("CWA"). Government seeks declaratory and injunctive relief. Company purchased an island in the San Francisco Bay in April 2011. Prior to Company's purchase, the island functioned as a tidal channel and tidal marsh wetlands system. Over the years, the island's levee had eroded which allowed the island to naturally return to a tidal marsh. In 2012, Company began operating a kiteboarding business on the island, without a working levee. In 2014, Company began construction of a mile-long levee on the island, with a permit. Government asserts Company's activities on the island and the construction of the levee harmed the surrounding waters and the island's wetland which caused the island to cease functioning as a tidal channel and marsh ecosystem. The District Court for the Eastern District of California found for Government. The court explained the Company violated, and continues to violate, the CWA by being (1) personally responsible for constructing a levee, (2) without a permit, (3) by adding pollutants, (4) from point sources (5) to waters of the United States. Company argues the court should not grant Government's injunction because it is a violation of the Takings Clause and Government's assertion of Company violating the CWA is an "unconstitutional condition" prohibited by the Takings Clause. The court determined Company's Taking Clause defense was not properly before the court and did not bar Government's requested injunction. The court also rejected Company's assertion that the term "wetlands" is void for vagueness as Company claims it was not on notice the CWA governed its activities. Court declined to determine an appropriate remedy for the injunction until a later proceeding.

San Luis Obispo Coastkeeper v. U.S. Dep't of the Interior, No. 19-16655, 2020 WL 628260 (9th Cir. Oct. 26, 2020).

Conservator appealed the lower court's dismissal of their complaint. The lower court found that the United States, through the Department of the Interior, had not waived its sovereign immunity under the McCarren Amendment. The previous litigation did not qualify as comprehensive adjudication of the United States' water rights to waive their sovereign immunity. Neither the United States nor its impound and usage rights were subject to this litigation therefore it was not a "comprehensive adjudication" of all the claims. Conservator first claimed that local district's water rights—which were in the prior litigation—equate to the United States being involved. This court held that it did not equate to the United States being involved in one area, the right to use the impounded river water for flood control purposes. Which was the subject of the previous litigation. Conservator than alleged that via a "chain of water rights" argument that this includes the United States water rights. Conservator stated that since all water in a specific area was been apportioned that upstream users who had a prior or appropriative right were directly involved in the apportionment. The court held that this argument had no apparent legal basis. The court further held that since there was no comprehensive adjudication of the United States' right to impound the River water the question of the suit being an administration of rights is not judiciable. The court affirmed the dismissal.

Courtland Co., Inc. v. Union Carbide Corp., No. 2:19-cv-00894, 2020 WL 6265080 (S.D.W. Va. Oct. 23, 2020).

Landowner initially sued Neighbor for environmental pollution and filed a motion to file a supplemental complaint. Neighbor owns a railyard and landfill adjacent to Landowner's property. Landowner alleged that Neighbor has stored toxic chemicals within the railyard—no later than 1971—that have leached into the environment. The same is alleged regarding the landfill, which operated from the 50s to the 80s. Landowner asserts that Neighbor still illegally operates the landfill since it was never properly closed under applicable law. Landowner alleged ten original counts ranging from injunctive relief to punitive damages. Plaintiff sought to file a supplemental complaint to add a citizen suit under the Clean Water Act due to continued illegal water discharge without a permit by Neighbor. The citizen suit can only be filed at least sixty days after notice is given to the required parties. The notice period allows for the authorities to intervene and/or the violators to come into compliance. Landowner provided notice to

the authorities; however, the notice period had not expired before the suit was filed. After the period expired, the Plaintiff then filed their motion to add the citizen suit to their complaint. Neighbor objects on the grounds that the events did not occur after the suit was filed—pursuant to FRCP15(d)—and the notice provided contained insufficient information. The court found that the supplemental complaint sufficiently related back. Landowner provided notice to neighbor on two occasions that Neighbor allowed "pollutants" to enter into the water for decades. The court found the notice was insufficient for: (1) alleging information to the complaint that was not in the notice; (2) the terms "some ethers" and "wastes" being too broad for adequate notice; (3) and failing to provide specific dates and point source locations of the violations. The court ordered for the Motion to be denied.

ELECTRICITY

Renewable Generation

Nextera Energy Res., LLC v. Dep't of Pub. Util., 485 Mass. 595, 152 N.E.3d 48, 2020 WL 5241169.

Energy company ("Company") challenged Department of Utilities ("Department") approval of certain power purchase agreements ("PPAs") between a group of Electric Companies and a hydroelectricity producer ("Producer"). Company contended the PPAs violated a state statute ("the Statute") by: (1) not adhering to the "firm service" requirement; (2) allowing Producer to verify electricity came from hydroelectric sources alone; and (3) using the New England Power Pool Generation Information System ("NEPOOL GIS") to track the state's environmental energy goals. The Supreme Judicial Court of Massachusetts upheld the Department's decision that the PPAs conformed with the Statute. Company first argued the "firm service" language in the Statute required service without interruption. The court held it unreasonable to require Producer to guarantee uninterrupted energy supply for three reasons: (1) interruption may be outside Producer's control (2) the PPAs required Producer to compensate Electric Companies for any supply shortfalls and to pay penalties; and (3) PPAs allowed Producer not to supply hydroelectricity to Electric Companies during negative local marginal pricing (LMP) periods in support of the Statute's intent to reduce greenhouse gas emissions and other environmental goals. Company then argued Department was required to verify hydroelectricity supplied to Electric Companies came from hydroelectric sources alone under the laws of physics. The court held as long as the PPAs contractually required Producer to supply only

hydroelectricity generated energy, Department was not required to ensure no other energy source contaminated the supply lines before the supplied energy reached Electric Companies. Lastly, Company argued NEPOOL GIS was not a sufficient tracking system. The court held NEPOOL GIS was sufficient because it was well-established, and it was the industry standard. Ultimately, the court rejected all of Company's challenges to the PPAs, and upheld Department's approval.

Rate

S.C. Costal Conservation League v. Dominion Energy S.C, Inc., No. 2018-001165, 2020 WL 5405398 (S.C. filed Sept. 9, 2020).

The Public Service Commission ("PSC") sets rates an electric utility must pay to qualifying energy producers (collectively "Qualifying Facilities") for electricity the company will then sell to customers. Two environmental protection organizations (collectively "Organizations") and a solar business alliance ("Business Alliance") appealed a 2018 PSC rate order. Organizations were not Qualifying Facilities, and Business Alliance represented only one Qualifying Facility. The Supreme Court of South Carolina dismissed Organizations' appeal due to lack of standing, and dismissed Business Alliance's appeal due to mootness. Under federal law, the Public Utility Regulatory Policies Act ("PURPA") requires electric utilities to offer to purchase renewable energy from Qualifying Facilities. In 2018, South Carolina required PSC to set rates for purchasing renewable energy from Qualifying Facilities. In 2019, the General Assembly enacted the South Carolina Energy Freedom Act ("Act"), which set forth new procedures for the PSC to set rates for renewable energy under PURPA. Only a party in interest may appeal a PSC order, therefore, because the rates only impact Qualifying Facilities, the court held Organizations did not have standing to appeal the 2018 PSC order. Additionally, the court held Organizations' intervention at the PSC hearing did not give Organizations a right to appeal a PSC order, and further, Organizations did not have associational standing because none of their members had an individual right to sue. Next, the court held Business Alliance's appeal for two 2018 PSC rates as moot, because the Act superseded one rate, and the other 2018 rate did not apply to Business Alliance's represented Qualifying Facility. Additional issues raised by Business Alliance were also considered moot because the 2019 Act addressed them directly. Because Organizations lacked standing to appeal, and Business Alliance's appeal was moot, the court dismissed all claims.

I believe this is a procedural opinion only. The opinion addresses dismissal of all claims on appeal for lack of standing and mootness; there is no substantive law addressed in this opinion.

T&B

Bankruptcy

White Star Petroleum, LLC v. MUFG Union Bank, 2020 OK 89, ___ P.3d ____.

Several Vendors filed an involuntary bankruptcy petition against Operator after non-payment of various contracts. Operator subsequently filed a voluntary bankruptcy petition under Chapter 11 in a separate bankruptcy court. The bankruptcy court transferred Operator's voluntary petition and consolidated into a single proceeding with the Vendors' involuntary petition. During the bankruptcy proceedings, Vendors filed adversary proceedings seeking adjudication of statutory lien claims pursuant to Oklahoma statute against Operator's interests and established trust fund claims under Oklahoma statute. Operator filed two counter adversary proceedings seeking (1) adjudication of mechanic's and materialman's liens and (2) a directive to purchasers to turn over money held in suspense after purchasers received lien notices from mechanic's and materialman's lien claimants. The bankruptcy court stayed the Vendor's adversary proceedings. Because of the adversary proceedings filed by both parties, the bankruptcy court certified two questions to the Oklahoma Supreme Court to aid in the resolution of the proceedings. The bankruptcy court asked the court to interpret (1) whether Oklahoma statute limits revenue held in trust for payment of lienable claims from non-operator joint working interest owners, and (2) whether Oklahoma statute grants operators and non-operating working interest owners a lien that is superior to any subsequent claim by the holder of a mechanic's and materialman's lien. In its answer to the first question, the court determined that Oklahoma statute does not limit types of revenue held in trust, and instead applies to all lienable claims. In its answer to the second question, the court found that Oklahoma statute also does not grant operators and non-operating working interest owners a lien superior to any claim of a mechanic's and materialman's lien. This case remains pending in bankruptcy court.

Corp

David H. Arrington Oil & Gas Operating, LLC v. Wilhusen, No. 11-19-00318-CV, 2020 WL 5241131 (Tex. App.—Midland Sept. 3, 2020).

Former Employee sued Employers after not receiving promised payment in the form of an overriding royalty interest or payment equivalent to an overriding royalty interest in exchange for a reduced cash bonus for the production from a previous project. Former Employee sued under theories of (1) fraud, (2) conversion, (3) and conspiracy. Employers moved to dismiss all three claims, arguing that withholding payment was a justifiable exercise of their right of association pursuant to the Texas Citizens Participation Act. The trial court heard the motion to dismiss, but only offered a letter suggesting the court should grant the fraud claim, and deny the remaining claims. Employers interpreted the letter from the trial court as a ruling and subsequently filed an interlocutory appeal. Following the appeal, the appellate court informed the parties that the trial court denied the motion to dismiss by operation of law. The appellate court upheld the trial court's motion to dismiss denial on Employers' fraud claim, holding that the Employers failed to meet their burden to show the TCPA applied to Former Employee's claims. This is because the communications regarding Former Employee's compensation do not constitute a matter of public or community interest, a requisite element for claims under the TCPA. The appellate court also upheld the trial court's motion to dismiss denial regarding the remaining claims and remanded the case back to the trial court.

This case is largely procedural. Most of the case is centered around whether the trial court granted Former Employer's motion to dismiss prior to the motion's denial by operation of law. Of the three issues raised, only one is discussed in a relatively substantive manner.

ENVIRONMENTAL REGULATION

Federal

Earthworks v. U.S. Dept. of the Interior, No. 09-1972 (RC), Slip. op. 6270751 (D.D.C Oct. 26, 2020).

Plaintiffs, a coalition of environmental groups ("Coalition"), brought suit in the D.C. Federal District Court against defendants Bureau of Land Management, U.S. Department of the Interior, and other federal entities ("Interior") centering around two Rules enacted in 2003 (dealing with the Interior and other defendant parties not collecting fair market value for

unpatented mining claims) and 2008 (dealing with the amount of land and its configuration which a claimant may claim for a "mill site". Both the Coalition and Interior have filed cross-motions for summary judgement. The Coalition made four claims, specifically: (1) the 2008 Mining Claim Rule and related policies violate the Mining Law and the FLPMA by improperly restricting the application of the FLMPA's fair value market mandate, (2) the 2003 Mill Site Rule and related policies violate the Mining Law by allowing excessive mill site acreage, (3) the 2003 Rule and 2008 Rule violate NEPA by not adequately providing for review and public comment, and (4) the 2003 Mill Site Rule violates the notice-and-comment requirement of the APA by departing radically from the 1999 proposed rule. The Coalition established both constitutional and prudential standing for each of their claims. The "2008 Rule" claim failed due to the determined impracticability of evaluating fair market value of mining operations on public lands. The "2003 Rule" claim failed because the Interior explained and justified its change of policy. The NEPA violation claim failed due to the Interior's determination that there would be no significant effect on the human environment and adequate public feedback was received. In summary, the 2003 rule nor the 2008 violated NEPA. The APA notice-and-comment claim failed because the Interior based its decision to retain its prior position following review of public comments. The court granted the Interior's motion for summary judgement and denied the Coalition's motion.

WildEarth Guardians v. Bernhardt, No. 20-56, 2020 WL 6255291 (D.D.C. Oct. 23, 2020).

This lawsuit incurred from that Federal Defendants failed to comply with the National Environmental Policy Act ("NEPA") with respect to twenty-seven oil and gas leasing decisions across Colorado, Utah, Wyoming, New Mexico, and Montana. Federal Defendants, including the United States Bureau of Land Management ("BLM"), moved for voluntary remand without vacatur. Plaintiffs did not oppose remand, but asserted the Court should order vacatur as the appropriate remedy. Courts in the District of Columbia Circuit generally grant the motion to remand so long as the agency intends to take further action to review the original agency decision, and because Plaintiffs also consent to remand, the Court remands the decisions without vacatur.

The District Court of the District of Columbia held that vacatur was not an appropriate remedy because the Court has not had an opportunity to review, thus it has no basis to vacate the agency action. Plaintiffs further

requested that the Court should impose reasonable conditions on BLM's post-remand decisions, but have not filed a motion for preliminary injunction requesting these conditions. Therefore, the Court declines to exercise its injunctive power to impose conditions on BLM.

Asarco LLC v. Atl. Richfield Co., 975 F.3d 859 (9th Cir. 2020).

Asarco, a refining company owned and operated a smelting facility in East Helena, Montana. Atlantic Richfield, an oil company then leased from Asarco, an area in East Helena for a zinc fuming plant, until 1972 when Asarco operated the plant. In 1984, the EPA added the facilities to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) to remedy the damage done to the environment. Multiple settlements and consent decrees were drawn until 2005 when Asarco filed for Chapter 11 Bankruptcy. The last consent decree was drawn in 2009 with the Montana Environmental Trust Group (METG) as the trustee to improve the facilities. Asarco paid around $111,400,000 to clean up the East Helena Site. In 2012, Asarco brought a contribution action under CERCLA against Atlantic Richfield to help remedy the damages during the lease. An initial question regarding the statute of limitations was raised and determined timely by the Ninth Circuit. The district court found Atlantic Richfield liable for 25% of the total remedy Asarco paid. Atlantic Richfield appealed because the lower court errored in the total amount and should be adjusted to funds already spent. Additionally, Atlantic Richfield argued that the percentage attached was excessive. The Ninth Circuit reviewed de novo and held that the total amount was erroneous because it should only include the "incurred" costs under CERCLA, and speculative and potential costs do not fall under that meaning. METG had only spent about half of the provided funds and had no concrete spending for the rest. Ninth Circuit held that the district court's finding of a 25% contribution was not in clear error. The district court correctly used the "Gore Factors" and had extensive assessments of liability allocation. Thus, the Ninth Circuit affirmed in part, vacated in part, and remanded back to the district court.

Brooklyn Union Gas Co. v. Exxon Mobil Corp., No. 17-CV-45 (MKB), 2020 WL 5519116 (E.D.N.Y. Aug. 19, 2020).

Brooklyn Union Gas Company ("Brooklyn Union") brought an initial complaint under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) to remedy the damage done to the environment by Exxon Mobil Corporation and other oil companies ("Oil Company"). Oil Company moved for dismissal under Rule

12(b)(6) for failing to state a claim. A Magistrate filed a report and recommendation ("R&R") to dismiss the alleged section 113 claim with prejudice. The R&R also included a dismissal of section 107 claims with amend to leave because the complaint failed to demonstrate the facilities requirement of CERCLA. Lastly, the R&R also recommended dismissing the alleged Declaratory Judgement Act because it must be in conjunction with a valid section 107 claim. The district court adopted the R&R in its entirety and dismissed the claims. Brooklyn Union thereafter filed a second amended complaint (SAC). Oil Company moved that the SAC was unchanged and moved the court for dismissal again under 12(b)(6). Brooklyn Union's claim was dismissed ultimately according to the R&R. Brooklyn Union argued revival of the 113 claims due to a disagreement and preservation of the issue for appeal. The district court reinforced the R&R and dismissed the section 113 claim with prejudice. Brooklyn Union then argued that it pled sufficient facts to render the facilities requirement. However, the district court claimed that Brooklyn Union alleged parcels into one facility, and parcels that do not share either a common historical ownership or a common contaminant, do not meet the broad meaning of "facility" required under CERCLA. The district court additionally dismisses the state law claims under 28 U.S.C. § 1367.

Pastor Enter. v. GKN Driveline N. Am., Inc., Civ. No. 19-21872 (KM) (JBC), 2020 WL 5366286 (D.N.J. Sept. 8, 2020).

Property Owner sued Automotive Company for contamination of soil and groundwater on Property Owner's property in New Jersey District Court. Automotive Company moved under Federal Rules of Civil Procedure 12(b)(2) for lack of personal jurisdiction. Property Owner must only present factual allegations that suggest with reasonable particularity that possible existence of requiring contacts between the party and the forum state, such that the claim is not frivolous. Automotive Company contended that though its predecessor had contacts in New Jersey, the successor did not retain those contacts. The connection for specific jurisdiction is that Automotive Company must have allocated the predecessor involved in the sale of industrial services and not be engaged in other parts of the business. The district court found that these were plausible allegations of personal jurisdiction and are significant in permitting jurisdictional discovery. Property Owner did not set forth a plausible case for general jurisdiction because Property Owner's attempted tag of an agent did not meet the district court's standard.

Wild Virginia v. Council on Envtl. Quality, No. 3:20CV00045, 2020 WL 5494519 (W.D. Va. Sept. 11, 2020).

Conservation Groups filed a motion for a preliminary injunction or stay of the Council on Environmental Quality (CEQ) action in passing a rule that changed and added to the National Environmental Policy Act of 1969 (NEPA). President Trump, through an executive order, stated that the primary purpose of the rulemaking to change how the government conducted environmental reviews, which in turn strengthens the economy. The proposed changes was tracked through the administrative rulemaking process, and received comments until published in 2020. The rule changed the term "possible" to "practicable", reinforced page limits, and changed the specificity of comments on environmental impact statements. Conservation Groups alleged that the rule was inconsistent with NEPA because 1) it removed the requirement to consider cumulative and indirect impacts on the environment, 2) it eliminated requirements for agencies to evaluate alternatives, 3) stated that actions must be major before effect to the environment is considered, 4) enabled projects to proceed and operate during NEPA process, and 5) it reduced the input from real qualitative knowledge. The district court concluded that there was not a clear showing to succeed in the case. It would likely take interpretative testimony and expert opinions for the rule's validity, and the CEQ raising questions about standing and ripeness will also require evidence. The district court denied the motion for preliminary injunction or stay.

New Jersey Dep't of Envtl. Prot. v. Am. Thermoplastics Corp. 974 F.3d 486 (3rd Cir. 2020).

Company 1 settled with the New Jersey Department of Environmental Protection (NJDEP) and discharged all the claims against NJDEP for an environmental cleanup action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA provides incentive for polluters to settle with both the state and federal governments for cleaning up sites by making settlers immune to contribution claims from polluters who do not settle. The United States sued Company 2 for pollution of the same area and sought contribution from Company 1, which argued its settlement with NJDEP protected it.

After first deciding that the United States had standing to appeal the grant of summary judgement because the judgement against Compaction was contingent on Company 2 getting eleven million dollars from contribution claims, the Third Circuit turned to Company 1's liability under CERCLA. The court ruled that because Congress intended to induce

settlements with respect to the sites for both federal and state cleanup efforts, a settlement with a state does not protect a polluter from contribution claims relating to federal cleanup efforts.

The court relied on *Akzo Coatings, Inc. v. Aigner*, 30 F.3d 761 (7th Cir. 1994) to hold that settlement agreements should be interpreted narrowly to determine what claims had been settled. CERCLA clearly describes how the costs are shared between the federal and state governments, giving the lion's share to the federal government. In addition CERCLA encourages suits against only one party by the governments and contribution suits to reduce taxpayer funded lawsuit expenses, making it against Congresses intention to require the federal government to recover directly from Company 1 as well.

Northern New Mexico Stockman's Ass'n v. United States Fish and Wildlife Serv., NO. CIV-18-1138 JB\JFR, 2020 WL 6048149 (D.N.M. 2020).

The Stockman's Association (the "Association") believed that the Fish and Wildlife service had not properly followed the Endangered Species Acts process for determining the economic impact before designating an area as critical habitat for the Jumping Mouse. This limited the Association member's ability to graze their cattle on federal land. First, the Association asserted that the Fish and Wildlife service abused its discretion by failing to consider costs of compensation for allegedly taking water rights from members. Second, the Association also noted that the Fish and Wildlife service acted arbitrarily and capriciously in not providing a reasoned explanation for why certain units were not excluded from the designation.

After stating that the Fish and Wildlife service must afford the conservation of Threatened and Endangered Species the highest priority, the District Court of New Mexico held that the Association had standing because the interests it sought to protect, were germane to the Association's purpose and the members had sufficient economic injury in fact. Next, the court ruled that the Fish and Wildlife's decision to use the incremental effects because the incremental effects approach is not a legislative rule but an interpretive approach is not inconsistent with the mandate of considering the economic impact of designating critical habitat. Furthermore, the court held that Fish and Wildlife did not abuse its discretion because (1) the service has discretion and must act prudently based on the best scientific and commercial data available, and (2) the service reasonably did not base their judgement on speculative water rights. Overall, the decision to exclude certain units of land was not arbitrary or capricious because the Association administratively waived their claim by failing to challenge the decision in a

timely manner, and the service offered a sufficiently reasoned explanation for their actions.

Swomley v. Schroyer, No. 19-CV-01055-TMT, 2020 WL 5250550 (D. Colo. 2020).

Twenty-one residents ("the residents") of the Upper Fryingpan Valley in Colorado brought an action against Schroyer ("the Forest Service"), alleging violations of the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"). The alleged violations followed the Forest Service's authorization of a logging project near the residents' homes.

The residents sued on three counts of violations. The first alleges the Forest Service's failure to review the project's impact on climate change in violation of NEPA. The second alleges the Forest Service's failure to consider the project's impact on mycelium, the vegetative portion of a fungus, in violation of NEPA. The third asserts a violation of the APA for failing to produce an environmental impact statement ("EIS").

The United States District Court of Colorado rejected all of the residents' counts. The District Court rejected the first count, citing authority negating the need for an extensive greenhouse gas emission analysis, because of the nominal contribution to emissions that result from a project of this size. The District Court also rejected the residents' second argument regarding mycelium because the Forest Service contemplated the project's impact in their Environmental Assessment ("EA") and concluded that the project would impact the area's mycelium, but would ultimately strengthen the surrounding fungal community. The residents' scientific evidence to support this count was contradictory to the Forest Service's expert analysis, but the court recognized the Forest Service's discretion in relying upon their own expert's analysis. The court rejected the residents' final count because an EIS is only required under APA if an EA indicates a significant environmental impact. The EA for this project did not indicate a significant environmental impact, eliminating the need for an EIS. Therefore, the court dismissed the resident's Petition and granted judgment to the Forest Service.

Nanouk v. United States, 974 F.3d 941 (9th Cir. 2020).

Nanouk owns land in Alaska near a former United States Air Force facility ("the base"). The base contained hazardous chemicals, namely toxic polychlorinated biphenyls ("PCBs"). Vehicles used by Nanouk to access her property tracked PCBs from the base to her property.

In 2015, Nanouk sued the United States for Nuisance and Trespass, pointing to three actions by the Air Force. The first action was the failure to contain the PCBs during the operation of the base. The second action was the abandonment of the chemicals after operations commenced. The third was the Air Force's failure to discover and rectify the contamination in a timely manner after 1990.

The United States District Court for the District of Alaska held that Nanouk's claims were barred by the Federal Tort Claims Act (FTCA); Nanouk appealed. FTCA analysis is a two-step test. The government must prove that the act or omission in plaintiff's claim was discretionary. If not, the government must prove that the decision was "subject to policy analysis."

The first action failed the first portion of the test because no federal regulation or statute directed the Air Force's procedure for disposing of PCBs. Therefore, the disposal was within the Air Force's discretion, barring the claim. The second action was not deemed discretionary, but was barred by the second test because the action was "subject to policy analysis." Lastly, the third action was deemed to be within the Air Force's discretion, but the record lacked factual support to show that the decision was based on a policy consideration. The United States Circuit Court of Appeals for the Ninth Circuit agreed with the district court regarding the Air Force's first two actions, but vacated the judgment as to the third action and remanded the issue back to the district court.

California v. U.S. Envtl. Prot. Agency, 978 F.3d 708 (9th Cir. 2020).

EPA promulgated new landfill emissions guidelines in 2016, and several states failed to come up with a plan to comply, so EPA had to create a federal plan that would govern in those states. EPA had a deadline of November 30, 2017 to make the plan and they did not make that deadline. Several states sued to force EPA to come out with the plan. EPA then began creating a rule that would give it more time to create federal plans, and in the meantime, the district court found for plaintiff states and issued an injunction forcing EPA to make a plan within six months. The injunction gave EPA a deadline of November 2019, while EPA's new rules, which were completed two months after the injunction was ordered, would give them until August 2021. EPA asked the district court to modify the injunction and the court declined. The Court of Appeals for the 9th Circuit had to decide whether the district court abused its discretion by refusing to modify the injunction after the EPA's new rules would permit the EPA to blow its previous deadline, which was the basis for injunction in the first

place. The Appeals Court held that the district court abused its discretion by failing to modify an injunction after the legal basis for that injunction had been removed by the EPA's new guidelines, and the case was reversed and remanded.

TDY Holdings, LLC v. United States, 825 F. App'x 525 (9th Cir. 2020).

Operator appeals from the district court's allocation of remediation costs between Operator and the government under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. The 9th Circuit reviewed the case for abuse of discretion and clear error in its allocation of costs. In 2018, the 9th Circuit sent an appeal back to the district court because the district court allocated all the costs to Operator and none to the government. *TDY Holdings, LLC v. United States,* 885 F.3d 1142 (9th Cir. 2018). The 9th Circuit held that their mandate in that 2018 decision was not violated by the district court. They held that the district court did not abuse their discretion in allocating the costs because they (1) considered the parties' course of dealings; (2) correctly applied cases that that the Circuit Court had told them to apply in 2018; and (3) allocated at least some of the cleanup costs to the government. The Circuit Court also held that the district court was free from clear error because they correctly tailored the government's allocation to only the costs for contamination caused by the use of those chemicals that the government had acquired. Similarly, the district court wasn't wrong to allocate 10% of cleanup costs to the government for a groundwater plume because the district court permissibly found that sewer dumping related to the plume was most equitably related to the government's role. Finally, because the government did not mandate the use of polychlorinated biphenyls, the district court permissibly allocated all the costs linked to cleaning up the biphenyls to Operator. Therefore, the district court did not clearly err in its cost allocation or abuse its discretion. The 9th Circuit affirmed the district court's decision.

State

Pennsylvania Envtl. Def. Found. v. Commonwealth of Pennsylvania, No. 358 M.D. 2018, Slip op. 6193643 (Pa. Commw. Ct. Oct. 22, 2020).

Article 1, Section 27 of the Pennsylvania Constitution dictates that proceeds collected from resources on public land are placed into a trust. The Commonwealth ("Commonwealth") acts as Trustee and the citizens are beneficiaries. Legislation over leasing of public lands for oil and gas

exploration has brought conflict over lease proceeds. The Commonwealth diverted funds from land restoration where oil and gas exploration occurred to preserving other natural resources around the state and general operation expenses. This prompted Pennsylvania's Environmental Defense Foundation ("Foundation") to petition for Declaratory Relief. The Foundation seeks that: (1) appropriations from the Lease Fund in sections of the 2017 and 2018 General Appropriations Acts are facially unconstitutional, (2) use of appropriations for initiatives beyond Pennsylvania's Marcellus Shale Region are unconstitutional, (3) repeal of the "1955 Lease Fund Act" was unconstitutional, (4) Section 1601.2-E is unconstitutional, (5) Section 1726-G of Fiscal Code is unconstitutional, and (6) Section 27 requires affirmative legislation and detailed accounting of the Lease Fund. The Commonwealth filed cross-applications seeking counter declarations of each claim. First, the court did not declare appropriations under the Act unconstitutional, but an accounting is necessary before they are consistent with Section 27. The court denied both applications. Second, the court granted the Commonwealth's cross-application for Trust Fund use for other conservation initiatives per the trust's purpose. Third, the court granted the Commonwealth's cross-application because Section 27 does not require the governmental branches to provide affirmative measures or written evaluation of amendments. Fourth, the court granted the Commonwealth's cross-application on 1601.2-E because it is unclear whether transfers were trust principal or income. Fifth, the court granted the Commonwealth's cross-application on 1726-G because the transfer of funds from a separate fund does not affect the Commonwealth's role as trustee and no requirement of public notice exists. Sixth, the court denied both the Commonwealth's and Foundation's applications, because it is not the court's role to direct the actions of the other governmental branches. The court granted the applications in part and denied in part. This is an unpublished opinion of the court; therefore, state (or federal) court rules should be consulted before citing the case as precedent.

Powder River Basin Res. Council v. Wyoming Dep't of Envtl. Quality, 473 P.3d 294 (Wyo. 2020).

Brook Mining Company applied to the Wyoming Department of Environmental Quality (WDEQ) for a permit to develop and operate a new surface coal mine in Sheridan County, Wyoming. After WDEQ staff determined the application was technically complete and recommended it for publication, the permit has received written objections. After the

Director of WDEQ denied the request for an informal conference and EQC held a contested case hearing, the EQC concluded the permit application was deficient in the areas of hydrology, subsidence, and blasting, then the Director of WDEQ denied the permit application. Brook Mining Company appealed, meanwhile revised its permit application. The Director of WDEQ held an informal conference based on request, and approved the revised permit application.

The Supreme Court of Wyoming held the issues were moot, and dismissed the appeal, based on the mootness doctrine: a case is moot when the determination of an issue will have no practical effect on the existing justiciable controversy, and a court should not hear it.

There are three exceptions to the mootness doctrine, but none of them applies here: (1) "Great public importance" exception, which generally is for issues of constitutional magnitude. (2) The exception to necessarily provide guidance to the district courts or to administrative agencies does not apply because the legislature already changed the regulatory structure for approving new coal mine, eliminating pre-decision contested case hearing. (3) The exception for controversies capable of repetition yet evading review applies when two requirements are met: (a) the duration of the action is too short for completion before its cessation or expiration, and (b) there is a reasonable expectation to bring same action again. Neither element is met here: WDEQ already approved the revised permit application, and the legislature already changed the regulatory structure.

Sw. Org. Project v. Albuquerque-Bernalillo County Air Quality Control Board, NO. A-1-CA-36398, 2020 WL 6111477 (N.M. Ct. App. Oct. 15, 2020).

Plaintiffs SouthWest Organizing Project, Esther Abeyta, and Steven Abeyta (collectively, SWOP) challenged the issuance of an authority-to-construct permit to Honstein Oil & Distributing, LLC, based on the New Mexico Air Quality Control Act (the AQCA), and sued the City of Albuquerque Environmental Health Department's (EHD), which issued the permit, and the Albuquerque-Bernalillo County Air Quality Control Board (the Board), which ordered to uphold the issuance.

The Court of Appeals of New Mexico disagreed with Plaintiff's contends and affirmed the Board's order. The Court held:

First, based on the plain language and an overview of the statutory structure of the AQCA, even though Section 74-2-2(B) requires the Board to apply the reasonable probability of injury analysis when engaging in rulemaking, Section 74-2-7 does not impose on EHD or the Board a

requirement to independently apply the reasonable probability of injury standard when granting a permit, nor this requirement is the only way to prevent or abate air pollution. Section 74-2-7 does not expressly require the Board or EHD to separately consider health or safety concerns, either.

Second, EHD and the Board met the requirement of permitting public testimony regarding potential adverse impact on a community's quality of life during the permitting process. Additionally, EHD and the Board were not required to address public testimony regarding quality of life issues in resolving the permit application.

Third, SWOP offers no compelling reason to conclude that the hearing officer permitted the discovery of irrelevant information. The hearing officer did not act arbitrarily, capriciously, or not in accordance with the law in granting the request for discovery.

Fourth, it was proper for the hearing officer to exclude the testimony on causation, and the hearing officer was permitted to apply the rules of evidence that govern the admissibility of evidence.

Chernaik v. Brown, 367 Or. 143 (Or. 2020).

Two minor children acting through their guardians ("Plaintiffs") contended that the State of Oregon had a fiduciary duty to protect the atmosphere and other natural resources from the effects of climate change and sought declaratory judgements to affirm that contention. Plaintiffs believed that the public trust doctrine extended to the atmosphere, water resources, navigable waters, submerged and submersible lands, shorelands and coastal areas, wildlife and fish assets in the state, and that the state had a fiduciary duty to protect those assets.

The Supreme Court of Oregon held that only navigable waters and the submerged and submersible lands were covered by the public trust doctrine based on the history of the common law public trust doctrine in Oregon and its past expansions. The court noted that the doctrine may be extended but declined to do so in this case because the Plaintiff's proposed test was so broad as to potentially include all natural resources.

The court also held that the state does not have a fiduciary duty to protect the public trust resources because public trust duties are different from common law private trust duties, though overlap between the doctrines exists. The duty the state has as public trustee of these resources extends only to ensuring that the public has the use of the resources for navigation, recreation, commerce, and fishing. The court held that the only declaration the plaintiffs were entitled to was that the trial court had erred in excluding navigable waters in its original decision.

Town of Weymouth, Massachusetts v. Massachusetts Dep't. of Envt'l Prot., 2020 WL 5264535, 973 F.3d 143 (1st Cir. 2020).

On June 3, 2020, the First Circuit Court of Appeals vacated an air permit granted by the Massachusetts Department of Environmental Protection ("DEP") for a compressor station operated by Algonquin Gas Transmission, LLC, ("Algonquin") in Weymouth, Massachusetts. The vacatur was ordered so DEP could redo the Best Available Control Technology ("BACT") analysis.

In deciding to vacate the permit, the court weighed three factors: the gravity of errors, the ease of which those errors may be corrected without changing the order, and the balance of equities and public interest. The Court determined that the factors weighed in favor of vacatur, but DEP would accelerate its analysis on remand with a seventy-five-day deadline for completion to avoid further delay. Since the order of vacatur, DEP concluded that it was unable to meet this deadline. Additionally, since the original order, DEP's preliminary review concluded that the electric motor used by Algonquin was in compliance and the permit will not likely be revoked.

Algonquin sought a rehearing on the remedy of vacatur, arguing that the delay will inhibit Algonquin's ability to meet the increased demand for natural gas resulting from winter temperatures in the region. On rehearing, the First Circuit determined that the altered the balance of equities and public interest factors, now favored Algonquin. In considering these new factual developments, the First Circuit remanded the proceeding without vacating the air permit and extended DEP's BACT deadline.

Schaefer v. Franzoni, No. C-17-CV-17-000267, 2020 WL 6194702 (Md. Ct. Spec. App. Oct. 22, 2020).

Partner A and Partner B jointly own two businesses, Company and Shooting Range. Company owns a property and leases the land to various tenants, including Shooting Range, which operates a shooting range on the property. After allegations of violating the Clean Water Act and threats of litigation, the two partners could not agree on a course of action. Partner A sent a letter requesting that Partner B consent to several "major decisions" including the dissolution of Company and listing its property for sale. The Company operating agreement says that if a member requests another member to consent to a major decision, consent shall be given if they don't reply within thirty days. Partner B didn't respond in thirty days, but later filed a counterclaim against Partner A. Partner A then moved for specific performance of the operating agreement that would have the circuit court

enter an order compelling Partner B to cooperate in closing the shooting range, resolving the Clean Water Act lawsuit, and selling Company's real estate. The court granted the motion for specific performance because Partner B didn't reply to Partner A's letter within thirty days, therefore consenting to the operating agreement's terms. The circuit court, rather than order the relief requested by Partner A's motion, appointed a third-party receiver to "wind up" Shooting Range's affairs. Partner B appealed and the Court of Special Appeals held that the circuit court does not have discretion to resolve the partners' gridlock by selecting a course of action not presented by the partners themselves. Because the motion for specific performance did not request the court to appoint a third-party to serve as a receiver for Shooting Range, the Court of Special Appeals vacated the circuit court's judgment.

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

LAND

Easement

Columbia Gas Transmission, LLC v. Heaster, No. 1:20-CV-238, 2020 WL 6121164 (N.D.W. Va. Oct. 16, 2020).

Corporation responsible for a natural gas pipeline filed for a motion for a preliminary injunction against Landowner and his property in West Virginia for blocking access to an alleged contracted easement by locking a gate on the property and preventing Corporation's employees from gaining access to the easement needed to repair a slip that occurred on the property. Corporation alleged the easement provided the only safe access to the slip. Corporation had the burden of proving a clear showing that it was entitled to the easement under four different factors. Corporation failed to establish the first factor, success on the merits, because it failed to establish its express rights to use the easement through a valid, enforceable contract. Corporation met some of the elements in the second factor, irreparable harm, such as safety of its workers, however the court found that "unauthorized interference with real property" deserved more serious consideration in this factor because of the insufficient remedies to this harm, and Corporation failed to prove a real property interest in the easement. The third factor, balance of equites, leaned in favor of Corporation due to the environmental and employee safety, however the court decided the benefit was still not proportional to Landowner's injuries. The last factor, public interest, balanced the state legislature's express

public policy in protecting natural gas resources with the public interest in enforcing only legitimate contracts. The court found Corporation failed to establish it is likely to succeed on its merits of a breach of contract, therefor the contractual rights of Landowner weighed heavier. Corporation then claimed an easement by necessity, however it failed to show the easement in question was necessary and contended it could ultimately access the slip from another direction.

Other Use

Crum v. Yoder, 7th Dist. Monroe No. 20 MO 0005, 2020-Ohio-5046.

This is an unpublished opinion, look to state supreme court rules for "reporting of opinions and weight of legal authority."

In a 1990 deed, Parents conveyed their interest in the subject property to Siblings, excepting and reserving the oil and gas interest to themselves. Siblings conveyed the subject property in 1994, including an exact recitation of the mineral rights in the 1990 deed. The property was then conveyed to Landowners and the mineral rights provision of the 1990 deed was repeated again. Landowners transferred the mineral rights after producing a notice of abandonment by publication in 2011. The trial court denied Siblings' motion for summary judgment and the appellate court affirmed. Siblings raised three issues on appeal. This court upheld the trial court's decision regarding the first issue, deciding that Landowners did not fail to attempt service by certified mail at the "last known address of record holders." The public record search provided Landowners with the address for the property in question and the tax mailing address of Landowners, when the deed was conveyed to them. The second issue was a failure to use "diligence in searching for the heirs before publication." Although use of "reasonable due diligence" to find holders of the mineral interest is required, this Court determined due diligence equated to searching probate and deed records, which Landowners completed, therefore this court affirmed the trial court's decision. This court affirmed the trial court's decision on the third issue by Siblings, whether abandonment had occurred because of a savings event in the 1994 deed. This error hinged on whether the term "reserving and excepting" in the deed was intended to mean reserving or expecting. This court held that the deed "'[e]xcepted' the mineral from the grant," and Siblings argument for the third issue failed.