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Recent Case Decisions

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RECENT CASE DECISIONS

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Table of Contents

OIL AND GAS

Upstream

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

Blake v. Columbia Gas Transmission, LLC, No. 3:19-0847, 2021 WL 951705, slip op. (S.D. W. Va. Mar. 12, 2021).

Property owners ("Owners") sued a natural gas company ("Company") for nuisance claims relating to noise, and to light, dust, debris, and odor from Company's compressor station. Company motioned to dismiss and, alternatively, for summary judgment on both nuisance claims. *Id*. at 1. Company argues that the district court lacks subject matter jurisdiction because parties challenging the design and operation of compressor stations and other similar facilities must first bring their complaints to the Federal Energy Regulatory Commission ("FERC"), not a federal district court. *Id*. at 2-3. Company further argues that Owners' nuisance claim is preempted by federal law because they relate to the interstate transportation of natural gas. *Id*. at 3. Conversely, Owners, argue that they are not challenging the operation of the facility and instead raise a nuisance claim falling outside of the Natural Gas Act. *Id*. The Court found that noise relates directly to the facility's operation, implicating FERC's subject matter jurisdiction over facility operation. *Id*. Therefore the Court granted Company's 12(b)(1) motion relating to the noise nuisance. But the Court was hesitant to conclude that Owner's light, debris, dust, and odor nuisance complaint invoked FERC's regulatory regime, at least without further briefing. *Id*. The Court therefore dismissed without prejudice Company's 12(b)(1) motion relating to the light, dust, debris, and odor nuisance. *Id*. The Court lastly rejected Company's motion relating to Owners' damages on procedural grounds. *Id*. 4-5.

Wildgrass Oil and Gas Committee v. Colorado, No. 20-1151, 2021 WL 318203, (10th Cir. Feb. 1, 2021).

In July 2018, a committee of residents ("Residents") received lease offers from an Oil and Gas Corporation ("Corporation") for access to minerals on their property. When Resident's did not consent to lease offers, Corporation filed a pooling order application with Colorado Oil and Gas Conservation Commission ("Commission"), requiring Residents to lease their mineral interests if Commission found the offers reasonable. The

Residents' objected and the Commission set a hearing on the pooling application.

Prior to the hearing, Residents filed a complaint in district court seeking a temporary restraining order and injunction. Residents argued forced pooling, authorized by state statute, violates the Privileges and Immunities Clause, the First Amendment, the Contract Clause, and the Due Process Clause. The district court denied Residents' request for injunctive relief and found the claim unripe. The district court asked Commission to hear Resident's issues in a hearing. At the hearing, Commission found the leases' reasonable and approved Corporation's application to pool mineral interested owned by Residents for the purpose of extraction. Residents amended their complaint in district court, adding a procedural due process claim concerning the events at hearing. Commission filed a motion to dismiss based in part on the *Burford* abstention doctrine. The district court granted Commission's motion to dismiss and Resident's appealed. On appeal, the Court of Appeals for the Tenth Circuit reviewed the district court's decision for abuse of discretion. The appellate court held the district court did not abuse its discretion because Residents' procedural challenges raised questions of state law and a federal court resolving this matter risks causing tension with state policies. The appellate court affirmed.

In re Sanchez Energy Corp., 19-34508, 2021 WL 923182 (Bankr. S.D. Tex. Mar. 9, 2021).

Sanchez along with ten affiliates filed for chapter 11 bankruptcy in 2019. Prior to filing, Sanchez, an upstream oil and gas producer, issued $500 million of Senior Secured First Lien ("Senior Notes"). As collateral for these notes, Sanchez granted each of the Senior Noteholders a first-priority lien on all of its assets. Part of the collateral pledged by Sanchez were numerous oil and gas leases in Texas. The issue before the court is whether certain Senior Noteholders have valid liens on six challenged leases. If a challenged lease is not mentioned with reasonable certainty in the Deed of Trust it may be void according the Statute of Frauds and the Statute of Conveyances. Unsecured Creditors argue that the leases cannot be avoided in bankruptcy because the leases are not referenced in the Deeds of Trust with reasonable certainty. Under chapter 11, "unsecured creditors are entitled to share in the proceeds of any avoided leans." Senior Noteholders argue that the liens are valid because the "Deeds of Trust contained mere clerical errors, which do not create uncertainty regarding which leases are subject to liens." Any writing transferring and oil and gas lease must include "specific information revealing the locations of the leases." In

limited circumstances, a court may use extrinsic evidence to determine if the lease is referenced with reasonable certainty. Here, the court finds that three of the challenged leases are not referenced with reasonably certainty and therefore, the liens on those leases may be voided but the balance may not be. The court reasoned that two inconsistencies in the Deed of Trust make them uncertain. First, the Release and Savings clauses contradicted and created confusion. Second, the counties listed on the deed are not the same as listed on "Exhibit A lease schedules."

Hoffman v. Thomson, --- S.W.3d ---- (2021), 2021 WL 881286.

This opinion has not been released for publication and is subject to revision or withdrawal. Only the Westlaw citation is currently available.

Grantor conveyed a 1,070-acre tract of land to Grantee, reserving "an undivided three thirty-second's (3/32's) interest (same being three-fourths (3/4's) of the usual one-eighth (1/8th) royalty" in all of the oil and gas production from the conveyed land. The parties disputed whether the Deed reserved a floating or a fixed royalty interest, Grantor sought a declaratory judgment to construe the Deed. A fixed royalty interest would be a fixed fraction of total production, a floating royalty interest would vary depending on the negotiated royalty percentage. The trial court found the Deed conveyed a fixed Interest, Grantor appealed, and this court reversed. When construing the Deed, the court focused on (1) the intent of the parties expressed by the "four corners" of the Deed; and (2) harmonizing all parts of the Deed, even if the parts appear inconsistent. The court looked at the year the deed was executed, the plain language of the entire deed, and the structure of the deed and found: (1) in 1956 using a one-eighth royalty rate was so pervasive, it was seen as the standard and customary royalty, therefore the Deed should be construed accordingly; (2) applying a floating construct gave meaning to all the language of the Deed; and (3) using a floating construct did not create any conflicts and harmonized the entire Deed. In contrast, a fixed construct would render provisions inconsistent if a different royalty rate was ever to be negotiated. Therefore, the court found the Deed reserved a floating royalty interest for Grantor.

Midstream

In re First River Energy, LLC, 986 F.3d 914 (5th Cir. 2021)

Debtor, First River Energy, LLC ("FRE"), filed for Chapter 11 Bankruptcy relief in January 2018 through the U.S. Bankruptcy Court for the Western District of Texas. FRE had purchased oil from Oklahoma and

Texas Producers to sell downstream but failed to compensate the Producers. Thus, the Producers asserted a priority lien in the Bankruptcy proceedings against FRE for the oil sale proceeds. Simultaneously, Deutsche Bank Trust Company Americas, and associates ("Bank") also asserted a priority lien against the sale proceeds, as a secured creditor of FRE and its operations. Although the Producers were found to have not waived any rights to assert liens, statutory schemes under Texas, Oklahoma, and most importantly, Delaware law; which governed since FRE was organized in the state of Delaware, confirmed that the Bank's interests perfected and attached to the bank before any interest attached to most of the Producers. This provided the Bank with a priority lien over the security interests of the Texas Producers and most of the Oklahoma Producers. Additionally, the loan documents between the Bank and FRE did not cause the Bank's interests to be overshadowed by the unperfected interests of the Texas Producers and most of the Oklahoma Producers. However, due to the statutory scheme of the Oklahoma Lien Act, the Bank did not have complete priority over some of the Oklahoma Producers. Therefore, certain Oklahoma Producers of the oil had priority to place a lien on their share of the oil proceeds which FRE had obtained. Thus, the Bankruptcy Court's ruling granting in part and denying in part, the bank's Motion for Summary Judgement, was affirmed and thus, the affirmative defenses made by Producers were dismissed. Attorney's fee determinations were remanded back to the Bankruptcy Court for further determination, subject to the Oklahoma Producers successful proof of the Oklahoma Liens.

WATER

Federal

Severa v. Solvay Specialty Polymers USA, LLC, 1:20-cv-06906-NLH-KMW, 2021 WL 912850 (D.N.J. Mar. 10, 2021)

Plaintiffs brought a class action against Defendants Solvay Specialty Polymers USA, LLC and its predecessor (collectively "Solvay") for Solvay' improper disposal, which caused contamination of the municipal water supply in National Park, New Jersey. Solvay moved to dismiss based on lack of standing and pleading deficiency governed by Fed. R. Civ. P. 8(a)(2).

Solvay argued that Plaintiffs failed to show proximate cause. The court disagreed and found that on the face of Plaintiffs' amended complaint, it is not too remote that Solvay' actions of discharging chemicals resulted in the

claimed injuries. Regarding pleading sufficiency, the court addressed each count separately:

(1) Count I – Public Nuisance: Solvay argued that they did not control the public nuisance, but Plaintiffs alleged that the chemicals discharged into the environment, rather than the municipal water supply, constitutes the public nuisance, which was controlled by Solvay. Plaintiffs failed to plead the special injury, but a plaintiff must prove a special injury to be awarded money damages on a public nuisance claim, in this case Plaintiffs' requested relief was to enjoin or abate the public nuisance instead.

(2) Count II – Private Nuisance: the court distinguished *Ross v. Lowitz*, 120 A.3d 178 (N.J. 2015), and found that Plaintiffs have asserted a viable cause of action the Solvay's unlawful conducts were the proximate cause of an invasion of Plaintiffs' interest in the private use and enjoyment of land, in addition to a public nuisance.

(3) Plaintiffs also have alleged sufficient facts to support their Count II – Trespass, Count IV – Negligence, Count V – New Jersey Spill Compensation and Control Act, and Plaintiffs' request for medical monitoring.

The court dismissed Plaintiffs' Count IV – Punitive Damages, but Plaintiffs' request for punitive damages may still proceed. Therefore, the court granted Solvay' motions on one issue, but denied in all other respects.

Canton Drop Forge, Inc. v. Travelers Cas. & Sur., NO. 5:18-cv-01253, 2021 WL 930457 (N.D. Ohio. Mar. 11, 2021)

Plaintiff Canton Drop Forge, Inc. ("CDF") sued its insurer, Travelers Casualty & Surety Company ("Travelers") for a declaratory judgment that Travelers was obligated to indemnify CDF under one or more insurance policies for at least $5,000,000.

Plaintiff CDF operated an engineered wastewater recycling and disposal system, including retention basins known as Ponds. On January 22, 2013, after several inspections, the United States Environmental Protection Agency ("USEPA") issued a Notice of Violation to CDF related to the accumulation of oil within the Ponds (the "CDF Pond Closure Claim"). USEPA and CDF settled by entering a Consent Agreement and Final Order on September 18, 2014. CDF first notified Travelers of this claim on November 30, 2016.

Traveler moved for summary judgment, and the court granted the summary judgment as a matter of law. It was disputed that the claimed five umbrella policies exists, as neither party has located a complete copy and any of the policies, but Travelers was not seeking summary judgment as to

the existence of the policies, and the court granted the summary judgment assuming *arguendo* the existence of one or more policies of insurance.

The court found CDF failed to provide reasonable notice of its Pond Closure Claim to Travellers as the policy language required that notice be provided "as soon as practicable" and/or "immediately. CDF also breached the policy terms by settling the Pond Closure Claim without the consent of Travelers. Travelers was presumed that it was prejudiced by CDF's breach, and the court found Travelers suffered actual prejudice because CDF left Travelers with no opportunity to be involved in defending or negotiating a resolution to the Pond Closure Claim.

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

Ozark Steel Fabricators, Inc. v. SRG Global, LLC, 2021 WL 963491 (E.D. Mo. March 15, 2021).

Company 1 is a Missouri corporation owned by Missouri residents, Company 2 is a leading manufacturer of chrome plated plastic for automobiles parts. Sometime in 2017, plaintiff alleges moving Company 2's Plant Manager informed them that defendant had and was continuing to pollute their groundwater and soil with hexavalent chromium and was investigating the contamination. Testing confirmed this, but Company 1 claimed it was not actually informed of real or potential contamination until March 2019, by which time the pollutants had been found in the owner's blood. This led to multiple claims, including one for Negligent Misrepresentation against the Plant Manager. Plant Manager filed a motion to dismiss in December 2020, alleging Company 1 fraudulently joined him to avoid removal to federal court. Removal to federal court requires that no plaintiff be citizens of the same state as a defendant. "Joinder of a defendant is fraudulent where there exists no reasonable basis in law or fact to support the claim asserted against it." The real question is whether the plaintiff has a colorable claim against the non-diverse defendant. Plant Manager bears the burden of proving fraud. The court found the elements of negligent misrepresentation not supported by the alleged facts. Plant Manager did inform them there was the potential that Company 1's land was contaminated in 2017 and confirmed it in 2019, which were not false statements. Also, the statements were not made for the guidance of a limited group of persons in a business transaction, as the court found the drilling on Company 1's land not a business transaction but part of Company 2's investigation of the contamination. Motion to dismiss was granted.

Citizens Dev. Corp., Inc. v. Cty. of San Diego, No. 12CV00334 GPC-KSC, 2021 WL 510041 (S.D. Cal. Feb. 11, 2021).

In September 2011, San Diego Region of the California Regional Water Quality Control Board ("RWQCB") issued an Investigative Order alleging Corporation had released pollutants into lake. Corporation then filed suit against several California municipal corporations ("Municipalities") alleging Municipalities' discharge contaminated the lake from inadequate waste disposal and landscaping techniques, sanitary sewer overflows, septic system failures, groundwater infiltration, etc. Corporation asserted several causes of actions against Municipalities relating to their contamination of the lake, one being private recovery under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). One Municipality counterclaimed against Corporation for its contamination of the lake.

Corporation and one Municipality ("Settlers") reached a settlement in December 2020 and filed a Motion for Good Faith Settlement Determination and Request for Judicial Notice. Remaining Municipalities ("Remaining") filed a conditional opposition, stating Remaining will oppose the Motion if the Court does not take the settlement into account when determining Remaining's potential liability. The United States District Court for the Southern District of California found judicial notice of discovery materials, orders, party filings, and expert reports improper. However, the court took judicial notice of RWQCB's approval of the Remedial Report. Movants argue one of Settler's expert report cannot be considered in the court's determination of whether the settlement was made in good faith. The court disagreed and presumed the report's admissibility for purposes of determining the settlement agreement's good faith.

Based upon the evidence before the court, the court also found the Settlement Agreement was made in good faith as it is "fair, reasonable, and adequate, and is consistent with the purposes of CERCLA." The court discharged Remaining's liability for any act, omission, or misconduct on the part of Settlers in the lake's contamination. Court dismissed all claims against the settling party with prejudice.

Telford Borough Auth. v. EPA, No. 12-CV-6548, 2021 WL 392637 (E.D. Pa. Feb. 4, 2021).

Municipality sued EPA seeking judicial review of EPA's establishment of a total maximum daily load regulating the number of pollutants found in the Indian Creek Watershed. In August 2019, Municipality filed a motion for leave to amend its Complaint, seeking to include additional averments

and 14 additional claims against EPA. EPA opposed the addition of 17 of the additional averments, and eight of the new claims. In February 2020, the United States District Court for the Eastern District of Pennsylvania granted Municipality's motion to include additional averments and all but two of the additional 14 claims. EPA filed a motion to reconsider the district court's ruling. In June 2020, Municipality filed a motion to leave to supplement its response. The court granted Municipalities motion. EPA argued Municipality's additional claims violate the Federal Rules of Evidence as they "inappropriately disclosed details of the parties' settlement negotiations." Municipality argued only one claim references a settlement agreement and only because EPA had referenced said settlement discussions in a previous denial to Municipality's alternative watershed restoration plan. The district court disagreed and struck paragraphs and counts from the complaint which referenced settlement negotiations, in any form, including reference to the lack of meetings between Municipality and EPA to negotiate settling Municipality's claims.

State

Eureka Cty. v. Sadler Ranch, LLC, 480 P.3d 837 (Nev. 2021).

Eureka County appealed a district court order granting a petition for judicial review of an issuance of a permit for mitigation water rights by the State Engineers. Sadler Ranch applied for two permits: one to alter the point of diversion for their surface water rights in Big Shipley Springs ("the Spring") and another to allow Sadler Ranch to draw Basin groundwater to alleviate the lack of surface water available.

State Engineers granted both permits, but the groundwater permit was subservient to the diversion permit. Sadler Ranch sought clarification on the specific quantity allowed, in total, under both permits. However, before the clarification was made, State Engineer made a final determination that clarified Sadler Ranch's rights. Therefore, the Supreme Court of Nevada held that the various calculations of the rights that are at issue in this appeal are moot. Additionally, Eureka Springs failed to properly raise the issue of Sadler Ranch's quantification of rights in their opening brief. Because of their failure to raise the issue, the claim was waived and is now a matter for the district court.

Aji P. by and through Piper v. State, 480 P.3d 438 (Wash. Ct. App. 2021).

Multiple minors ("Youths") sued the State and Governor of Washington, and other various state agencies and their directors ("Washington"), seeking declaratory judgment and injunctive relief. Youths alleged that Washington caused and continues to cause injury by furthering a fossil-fuel based energy system. Amongst other claims, Youths argued that Washington knew the fossil fuel energy system results in greenhouse gas emissions, causing environmental damage. Trial court granted Washington's motion for judgment on the pleadings and Youths appealed.

First, Youths sought remedy in the form of a declaration that a healthy climate system is a fundamental right and that the court develop and enforce a climate recovery plan. The Court of Appeals of Washington, Division 1, held that the Youth's requested remedy would violate the separation of powers doctrine because those tasks are reserved to the legislative and executive branches under the Washington State Constitution.

Second, Youths asserted that their claims were justiciable under the Uniform Declaratory Judgment Act. The court rejected this argument because, even if the court could resolve the claims, the resolution would not be final since adopting a climate plan would require continual enforcement.

Third, Youth brought substantive due process and equal protection claims; however, the court was unwilling to create a fundamental right in a safe and healthy environment due to a lack of social or legal history recognizing such a fundamental right. And because Youths failed to show that such fundamental rights existed, no substantive due process or equal protection rights were violated.

Next, Youths' state-created danger claim was rejected by the court because Youths failed to show how Washington's actions placed them in a worse position. Lastly, Youths' public trust doctrine claim failed because Washington has not expanded the doctrine to specifically include the atmosphere and the court was unwilling to do so.

Mountain Valley Pipeline, LLC v. N. Carolina Dep't of Env't Quality, 990 F.3d 818 (4th Cir. 2021).

Pipeline Company sought to extend a natural gas pipeline from a mainline project under construction through North Carolina. Under the Natural Gas Act, the pipeline required a certificate from the Federal Energy Regulatory Commission (FERC) and state authority that regulated the pipeline under the Clean Water Act. FERC issued a certificate of public convenience because the mainline project had all the required federal

permits, which was disputed in multiple lawsuits. Pipeline Company applied for certification through the North Carolina Department of Environmental Quality (Department) to satisfy state requirements. Department's hearing officer recommended that it will not pass until the federal requirements are met or to deny state certification. Department then denied certification.

The Fourth Circuit of Appeals reviewed the conclusion of the certification, holding it must be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Pipeline Company made multiple arguments. First, it argued that the proposed activity lacked practical alternatives and had a less adverse impact on surface waters or wetlands than the hearing officer admitted of the Department. The court held the uncertainty of the Mainline Project could result in impacts to water if not completed.

Second, Pipeline Company contends that the Clean Water Act prescribes certain authority, and the Department exceeded that authority. Under the Clean Water Act, the rules must be to maintain beneficial uses of water, and North Carolina's rules fall under that because it is protecting the riparian buffers.

Lastly, Pipeline Company argued that the decision was arbitrary and capricious because the officer did not explain the decision. The court held that the disagreement between the hearing officers and the department should be remanded due to the contradiction. The court also remanded to obligate the Department to explain its denial instead of a conditional approval.

Town of Concord v. Water Dep't of Littleton, 487 Mass. 56 (2021).

An 1884 Act permitted Concord to take and hold the waters of the Nagog Pond. The Act permitted surrounding towns of Littleton and Acton also to use the water. In 1909, Concord specifically exercised the right to take the water from the Nagog Pond. Later in 1985, the legislature passed the Water Management Act (WMA) to improve the legal framework for water and demand. The WMA implemented a regulatory program and registration for water usage and permits, and Concord registered the water takings from the Nagog Pond in 1991. In 2017, Littleton reported a need for water and notified Concord of the intent to take water from Nagog Pond under the Act. Concord sought a declaratory judgment in that the WMA superseded the Act, and Concord, therefore, had the superior claim to water usage. Both parties filed for summary judgment, and the district court granted Concord's motion.

The Supreme Judicial Court of Massachusetts reviewed the decision of law de novo on whether the WMA repealed the Act. The WMA did not expressly repeal the Act; therefore, the standard was whether the statutes are so repugnant and inconsistent that both cannot stand. The court held that the Act's taking provision was repugnant because it interfered with the WMA's regulatory provision. The WMA restricted water usage, and allowing both Littleton and Acton to take water based on town need would override procedures placed by WMA. Acton and Littleton argued that taking for water supply purposes was permitted. The court agreed that allowing the taking of Nagog Pond would put them in the WMA process and not interfere with its purpose. Therefore, Littleton and Acton may apply through WMA and use water from Nagog but not gain priority over Concord.

In re Reissuance of an NPDES/SDS Permit to United States Steel Corp., 954 N.W.2d 572 (Minn. 2021).

Steel Producer was granted a National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permit from the Minnesota Pollution Control Agency (MPCA) in 1987. Steel Producer's production allowed wastewater with sulfate to discharge into groundwater. MPCA starting in 1987, expressed concern over the sulfate, and in 2000 sent a warning letter to Steel Producer. The sulfate levels of Steel Producer rose until MPCA issued in 2018, permit to limits sulfate levels by 2025. MPCA set out a 250 mg/L sulfate standard promulgated by Class 1 secondary drinking water standards. Steel Producer challenged the limits because the regulations were not groundwater nor clarify groundwater.

The Minnesota Court of Appeals ruled in favor of the Steel Producer. MPCA provides NPDES/SDS through the Clean Water Act and required permit to discharge pollutants into state water. MPCA also designated water into different classes in part by water purity and quality through seven classes of water. The first class was used for drinking or other domestic purposes, and quality control is necessary for public health.

The Supreme Court of Minnesota ruled on whether Minnesota Rules classify groundwater as Class 1 water. The court determined that many rules provide that groundwater is Class 1 water. However, the court also acknowledged discrepancies between potable water and Class 1, and issues on whether that water is safe for consumption. Thus, the court employed other tools of construction to hold that groundwater was indeed Class 1 water. The court gave considerable deference to MPCA's own interpretation throughout the years and its history of that determination.

Other rules gave a numeric and narrative standard, including secondary drinking water and incorporating the intent to incorporate groundwater into that. The court remanded for further proceedings.

DeBuff v. Montana Dep't of Nat. Res. and Conservation, 2021 MT 68, DA-200071, 2021 WL 972408.

Landowner proposed to divert groundwater by four wells and a pit. Landowner applied for water use through the Montana Department of Natural Reservation and Conservation (DNRC), who denied the application in a 1987 Final Order without prejudice. Landowner then assessed the aquifer test in 2014 and found that there was little impact. After back and forth on the validity of the test, in February of 2016, Landowner reapplied for a water use permit. The parties proceeded to issue more tests and reports. In March of 2018, Landowner amended his application and downsized his proposal. And in August, a preliminary determination issued by the Water Resources Regional Officer denied the amended application. Landowner objected, requested a show cause hearing, and presented evidence.

In January of 2019, Hearing Examiner issued a Final Order which denied the Landowner's application. Landowner then petitioned a review from the Water Court, who then entered judgment in favor of Landowner and DNRC appealed.

The Montana Supreme Court used the following test to determine whether the agency finding was clearly erroneous: (1) The record was reviewed to determine whether findings are supported by substantial evidence; (2) whether the agency misapprehended the effect of evidence; and (3) if so, a court may still hold findings as clearly erroneous if the record showed a definite and firm conviction of mistake. First, the court held that DNRC use of the 1987 order, was not improper due to its use as evidence in Landowner's show cause hearing, and the Landowner was put on notice for its inclusion. The court then held that DNRC continuously moved the requirements and did not explain its decision regarding the evapotranspiration test. The court held that DNRC rejected without proper basis and should move forward in the process.

LAND

Other

Glacier Park Iron Ore Properties, LLC v. United States Steel Corp., No. A20-0687, 2021 WL 416695 (Minn. Ct. App. Feb. 8, 2021).

Mineral Owner sued Surface Owner over Surface Owner's accumulation of waste rock on property from mining operation conducted on neighboring property. Mineral Owner sued under theories of nuisance and trespass. Mineral owner sought relief through declaratory judgment and injunction to prevent further accumulation. Surface Owner moved for dismissal under lack of subject matter jurisdiction and failure to state a claim on which relief could be granted. The lower court granted Surface Owner's motion, and dismissed Mineral Owner's trespass claim. Further, the lower court dismissed Mineral Owner's claims of nuisance and resulting declaratory judgment. Mineral Owner appealed, asserting the lower court erred in dismissing its complaint with specificity towards nuisance and declaratory judgement. On appeal, the court reviewed Mineral Owner's complaints de novo.

On review, the court reversed dismissal of Mineral Owner's nuisance claim, holding that Mineral Owner pled sufficient factual allegations to prove injury, thus surviving of a motion of dismissal. The court contended that Mineral Owner proved injury by correlating Surface Owner's accumulation of waste rock to a decreased value in Mineral Owner's rights within his estate. The court remanded Mineral Owner's nuisance claim back to the lower court for further determination. Conversely, the court affirmed the lower court's dismissal of Mineral Owner's request for declaratory judgment, holding that Mineral Owner's claim was insufficient in entitling it to relief.

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

Western Watersheds Project v. Bernhardt, No. 1:16-cv-00083-BLW, 2021 WL 517035 (D. Idaho. Feb. 11, 2021).

Four Environmental Groups ("Groups") brought action against The Bureau of Land Management ("BLM") and Forest Service challenging the cancellation of BLM's withdrawal application of a considerable portion of federal lands for mining entry. Groups argued that BLM failed to properly analyze the impact of easing restrictions on their respective regions, thus allegedly devaluating harm to a bird species in rapid population decline.

Groups also alleged BLM's cancellation violated the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"). Before litigation, BLM proposed plans to tighten restrictions and surface usage within bird species' habitat. Following the proposal, BLM, with support from FWS, applied to withdrawal a considerable portion of land for mineral entry. The Secretary of Interior approved the withdrawal application. BLM subsequently canceled the withdrawal application, citing environmental statements and lack of need for the conservation effort. Both parties sought summary judgment.

Groups argued BLM's cancellation risks (1) to the enjoyment and use of members and (2) risk for observation and photography of the bird species. Defendants argue Groups lack jurisdiction to challenge BLM's actions due to (1) lack of final agency action, (2) lack of standing, and (3) Groups' standalone Administrative Procedure Act ("APA") claims are incapable of judicial recognition.

In deciding agency action, the court held that BLM's decision constitutes final agency action, therefore subject to judicial review. Next, the court determined that Groups have standing. The court found for Groups' standing by assessing the risk of harm to the bird species habitat, and pertinence to the mission of each respective organization. Finally, the court determined that Groups' APA claims were cognizable. Taken together, the court ultimately determined that Groups' challenge warrants judicial review.

Addressing Groups' challenge to BLM cancellation of withdrawal, the court determined that BLM failed to consider several impacts of allowing mineral entry. The court deemed the BLM's decision as arbitrary and capricious, thus vacating the decision and remanding it to BLM for further consideration. Additionally, the court granted Groups' motion for summary judgment on their APA violation claims. The court ultimately denied Groups' NEPA violation claim and denied Defendant's motion for summary judgment.

Builders League of S. Jersey v. Borough of Haddonfield, No. A-5588-18, 2021 WL 806933 (N.J. Super. Ct. App. Div. Mar. 3, 2021).

The case involves Association challenging Borough's adoption of an ordinance governing stormwater management in the municipality. Borough appeals from the lower court's decision finding the ordinance invalid. Association claimed the ordinance was invalid because it subjected new home construction to a review process that contradicts State statute and regulations. The Superior Court of New Jersey, Appellate Division affirms

the lower court's orders for the following reasons. The New Jersey Legislature delegated its authority to regulate land use to municipalities under the Municipal Land Use Law ("MLUL"). Municipalities are required to strictly follow the MLUL. The MLUL authorized the New Jersey Department of Environmental Protection ("DEP") to adopt regulations governing municipal stormwater management plans. Each municipality must therefore conform to the DEP's regulations. The DEP's stormwater regulations applied to "major developments," whereas Borough's ordinance broadly applied to "all new homes and commercial buildings." The MLUL also provides that detached one or two dwelling-unit buildings shall be exempt from certain reviews, but under the ordinance these dwellings are subject to all the relevant reviews. The state supreme court has also recognized that one of the major purposes of the MLUL was to create statewide uniformity. The court ultimately held the ordinance to be in conflict with the MLUL and therefore, invalid.

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

Spire STL Pipeline LLC v. 3.31 Acres of Land, No. 4:18 CV 1327, 2021 WL 842601, slip op. (E.D. Mo. Mar. 5, 2021).

This case involves various motions to dismiss expert testimony by both parties—a natural gas pipeline constructor ("Constructor") and landowners ("Owners"). The expert witnesses are to appear before a Commission deciding the value of Owners' easements that the Constructor acquired through eminent domain to construct its pipeline. *Id*. at 1. Most of the expert witnesses can testify using Federal Rules of Evidence 702. *Spire* at 5-7 and 10. In allowing the testimony, the Court also stated that questions about the expert's methodology or lack of knowledge go to the weight of the evidence, not its admissibility. *Spire* at 5-7, 10, and 17. Constructor argued that expert testimony regarding soil damage was unnecessary because it had a continuing obligation under the Federal Regulatory Energy Commission to resolve soil damage. *Id.* at 5. But the Court found Owners' expert testimony admissible and of factual import because it was unclear what obligations Constructor had toward Owners, especially because Constructor categorized the obligation as merely to "investigate and as necessary address" any landowner concern. *Id*. at 5. Additionally, non-speculative expert testimony concerning the quality of the land parcel is admissible. *Id*. at 6-7. Relatedly, a Ph.D.'s testimony regarding the quality of the topsoil and potential remedial measures (including the possible use of earthworms) is admissible even with the expert's wording of "time will

tell" or it being an "educated guess." *Id*. at 11-12. Constructor's expert witness can rebut this testimony, however. *Id*. at 16-17. Some testimony regarding future crop loss allegedly caused by the pipeline construction was excluded as too speculative under Missouri law, but testimony concerning past crop loss is admissible. *Id.* at 8 and 13.

Mountain Valley Pipeline, LLC, v. 8.60 Acres of Land, No. 7:19-cv-223, 2021 WL 833959, slip op. (W.D. Va. Mar. 4, 2021).

This case involves the enforceability of a contract between a natural gas pipeline ("Pipeline") and a Landowner. Specifically, it involved the meaning of a contractual provision requiring Landowner to "comply with 811" if it was necessary for Landowner to repair a waterline crossing the pipeline. *Id*. at 1 and 3. 811 is a national calling system to be used before digging to ensure there are no pipes or lines in the excavation area. *Id*. at 1. A magistrate reported there was no meeting of the minds about what this provision meant and the district court, reviewing de novo, agreed. *Id*. One issue is what law the parties intended the provision to invoke: the federal law that required calling 811 before digging via mechanical and hand-tool means or Virginia's law that exempted hand-tool digging from the 811 call in requirements. *Id*. at 1-2. The Court found that the parties, through several negotiations, continued to attach different meanings to what Landowner's compliance with 811 would mean. *Id.* at 3. Additionally, Landowner rejected a proposal that required it to call 811 and to notify Pipeline before digging, which further evidenced a lack of a meeting of the minds. *Id*. Therefore, the Court found there was no agreement on what the provision meant, and no enforceable contract.

Selbert v. *Shelton Planning & Zoning Comm'n,* 2020 WL 8765933 (Conn. December 23, 2020).

Plaintiffs appealed a decision rendered by the Shelton Planning & Zoning Commission approving the defendant's application for a site plan regarding redevelopment of property located in Shelton, Connecticut. The parcel of land contains gasoline pumps, a convenience store, and a storage shed in the back, for which the Defendant proposed demolishing the storage shed for the addition of a storage and cooler to the Commission. The defendant contends that the proposed plan does not violate regulations because "essentially moving the shed to the rear of the store structure does not result in an increase in any nonconformity." The plaintiff's main argument on appeal was that the Commission's ruling that the defendant's

site plan complied with zoning regulations was arbitrary, illegal, and an abuse of discretion.

The applicable standard for a reviewing commission is General Statutes § 8-3(g) which provides, "A site plan may be modified or denied only if it fails to comply with the requirements set forth in the zoning or inland wetlands regulations…" The court ultimately ruled that the defendant's site plan violated applicable regulations. The City of Shelton has regulations prohibiting the enlargement or extension of legal nonconformities, further the court found "the proposed addition to the existing structure represents a material physical enlargement of the store." The court further noted that since the site plan did not involve an increase in the business of the gas station, nor involved the intensification of a pre-existing nonconforming use of a gas station, the defendant's assertion that the site plan followed regulations was pre-mature. Finally, the court found that defendant's assertion that the use was an "extension" of the gas station was inapplicable. In part, that defendant "is seeking to physically enlarge the structure…not just use any existing unused space." The Plaintiff's appeal was sustained.

MRC Permian Co. v. Point Energy Partners Permian LLC, No. 08-19-00124-CV, 2021 WL 960927 (Tex. Ct. App. Mar. 15, 2021)

Original Oil Lessee brought a claim against the Lessor, Current Lessee, Mineral Owners, and Financial Backer. Original Lessee sought a declaratory judgement on its invocation of the force majeure clause to extend drilling deadline. This force majeure clause in the lease provided Original Lessee could extend any drilling deadline given a non-economic event beyond its control delayed drilling operation. The clause did not require Original Lessee to provide notice until the deadline had passed; however creating issues as Lessors would not know whether their lease had terminated when the deadline was not met. Both parties filed competing motions for summary judgment when an incident like this occurred. Trial court certified three controlling question for interlocutory appeal. The first inquiry is the interpretation of the force majeure clause, which will ultimately decide whether the lease automatically terminated. This court held that the unavailability of the rig met the "off-lease" requirement triggering the clause because an "on-lease" condition was not included. The causation element of the force majeure clause does not require a triggering event have caused the missed deadline; a mere delay is sufficient. Summary judgement is precluded due to genuine issue of material fact regarding the options once the delay was encountered. The second certified question for

the court is the size of the production unit and the number of acres Lessee maintains if the lease was terminated. This court did not decide whether the lease was terminated, therefore this question is not ripe for this court and any opinion would be advisory. The last controlling question asks whether tortious interference was present in the contract. Issue of material fact exist in determining whether willful and intention interference was present in the lease and whether economic damage was sustained.

Ross v. Flower, 2021 WL 904864.

Not reported in SW Reporter. Only Westlaw citation is currently available.

Grantor conveyed a 20-acre tract of land to Grantee's predecessors in interest, Grantor brought suit against Grantee to declare ownership of the mineral estate. Both Grantor and Grantee agree the Deed is valid but disagree as to whether the Deed's "subject to" clause reserved the mineral estate from the conveyance. The trial court found the "subject to" clause did not operate to reserve the mineral estate from the conveyance, Grantor appealed, and this court affirmed. Because neither party argued the Deed was ambiguous, the court proceeded with its analysis of an unambiguous deed. Usually, a grantor will convey all of the estate owned to the grantee unless there are specific reservations or exceptions that reduce the estate conveyed. A "subject to" clause in a deed usually functions to protect a grantor against a claim of breach of warranty by the grantee when there is already a mineral interest outstanding. In this case, the court found the "subject to" clause in the Deed did not reserve the mineral estate because: (1) the "subject to" clause also referenced "any and all validly existing encumbrances" indicating an intent by Grantor to avoid a breach of warranty claim rather than an intent to reserve the mineral estate; (2) Grantor had previously executed oil, gas, and mineral leases, indicating again, the "subject to" was meant to protect against a breach of warranty arising from an outstanding mineral interest rather than a reservation of the mineral estate; and (3) the "subject to" clause also referenced surface materials, and Grantor did not dispute conveying all the rights in the surface estate. In conclusion, from the "four corners" of the Deed, the court found the "subject to" clause to protect against a breach of warranty claim against Grantor rather than reserve the mineral estate.

Franklin v. Regions Bank, No. CV 5:16-1152, 2021 WL 867261 (W.D. La. Mar. 8, 2021).

Three landowners filed a complaint against a bank that managed Landowners' oil, gas, royalty, and mineral interests of 1805.34-acre land track, alleging a violation of their contract when Bank signed an improperly drafted lease extension. Two landowners had written agreements with the bank to manage and supervise their interest; however Third landowner had an oral agreement with the bank to manage her interests. Both Bank and Third landowner filed summary judgment motions and both were denied. Bank argued that Third landowner lacked an enforceable agreement because it was not in writing and no corroborating circumstances existed. The court found that no requirement existed for the agreement to be in writing because the agreement advised Landowner of her interests rather than created the authority for Bank to sign a lease extension. Corroborating circumstance, as required by the Louisiana Civil Code, was met through Landowner testimony, meeting the first requirement of having a witness, and the affidavits and videotaped depositions presented by Landowner, meeting the second requirement of additional corroborating evidence. Landowner argued a motion for summary judgment should be granted in her favor because a binding oral contact, with corroborating circumstances, existed. The court denied the motion because Bank presented evidence supporting its argument that no contract existed, and it did not advise the landowner regarding the lease extension; and therefore material issues of fact existed.

ELECTRICITY

Traditional

Barsanti v. *Montana Pub. Serv. Comm'n,* 2021 MT 54N, 481 P.3d 232, 2021 WL 790805 (Mont. March 2, 2021).

Plaintiff's appeal an earlier decision dismissing their claim regarding their 2018 petition of North Western Energy approval of a proposed electrical utility service rate increase by defendants. Since the plaintiff's intervened into the 2018 case late, the only intervention right the plaintiffs were entitled was "street lighting issues, and related cost allocation and rate design." Defendants issued a written order partially granting and dismissing certain intervenor testimonies, excluding specifically the plaintiff's testimony of their counsel. The plaintiff's petition further alleged that "PSC excluded portions of their pre-filed Testimony and Doty Testimony on

erroneous evidentiary grounds…and further precluded counsel (Doty) from serving both as Barsantis' counsel and witness."

Defendants responded with a motion to dismiss asserting lack of jurisdiction by the court due to plaintiff's failure to exhaust their administrative remedies. The district court granted the motion finding that plaintiffs failed to exhaust their administrative remedies. The Supreme Court of Montana further concluded that the plaintiffs did not exhaust all their administrative remedies, by example, filing a motion for reconsideration or a staying injunction incident to their petition for judicial review. The court recognized that there are two exceptions to exhausting remedies prior to seeking judicial review: "(1) exhaustion of an administrative remedy is unnecessary if the remedy would be futile as a matter of law and (2) exhaustion of administrative remedies is also unnecessary if the asserted administrative error depends on a pure question of law." The court found that the plaintiff's assertions of administrative error did not involve "pure questions of law." The court further concluded that neither of the jurisprudential exceptions were applicable in the present case. The court affirmed the district court's determination that the plaintiff's failed to exhaust all their administrative remedies.

Renewable

Solarize Indiana, Inc. v. S. Indiana Gas and Elec. Co., 163 N.E.3d 880 (Ind. Ct. App. 2021)

Per Indiana state law, the Indiana Utility Regulatory Commission ("IURC") possesses broad regulatory powers akin to that of a legislative body. Pursuant to a Congressional Act, known as PURPA, state regulatory agencies were required to adopt or reject certain regulatory provisions, such as to conserve energy, be more efficient, and promote equitable energy rates; of which the Indiana General Assembly partially adopted. Defendant, doing business as Vectren Energy ("Vectren"), filed with the IURC, two requests to alter operations. Under Indiana law, there exists a "thirty-day rule" by which objections to certain utility changes may be filed, and if objections meet certain requirements, a hearing must be held to resolve the matter before the initial filings are approved or denied. Plaintiff, Solarize Indiana ("Solarize"), filed objections to Vectren's two filings on grounds that the changes violated PURPA. In response, the IURC denied both objections on the grounds that, as implemented in Indiana, the claimed provisions of PURPA were inapplicable, thus no hearing was held and Vectren's changes were approved. This prompted Solarize to appeal to the

Indiana Court of Appeals. The Court affirmed IURC's finding against Solarize. The Court further found that due to the IURC properly responding to Solarize's objections before Solarize responded with new expanded arguments, IURC was in the clear to proceed with approving or denying Vectren's proposed changes. The Court likened this to the process of filing a brief in court and how once a response to the initial brief has been filed, the matter is deemed resolved, and that new arguments of error may not then be put forward in a reply brief. Thus, ultimately finding (1) the IURC did not err in approving Vectren's filings and (2) was well within its discretionary power to find that Solarize's objections were not compliant with the "thirty-day rule".

TECHNOLOGY AND BUSINESS

Mergers and Acquisitions

Dieckman v. Regency GP LP, C.A. No. 11130-CB, 2021 WL 537325 (Del. Ch. Feb. 15, 2021).

Plaintiff, Dieckman, a member of a class of limited partners of a subsidiary corporation, Regency Energy Partners LP ("Regency"), brought suit through two counts of an Amended Complaint. The suit was brought against Regency's general partner over how an acquisition by merger situation was handled. The counts centered upon breach of the Regency's Limited Partnership Agreement by which a second subsidiary, Energy Transfer Partners ("ETP"); also owned by the same parent company which owned Regency, acquired Regency in a "unit-for-unit [m]erger." The Limited Partnership Agreement is governed by Delaware Law; as Regency was organized in Delaware. First Dieckman asserted that Regency, through the general partner, breached the express provision of the partnership agreement, which dictated the merger had to be fair and reasonable. Second, Dieckman asserted that the Partnership had breached the implied covenant of good faith and fair dealing to the class of limited partners. The court determined that although there were some discrepancies regarding some of the information provided by Dieckman, the discrepancies were not on the part of Regency or ETP, thus the information was not useful for proving the first count of the Amended Complaint. Further, Regency was able to prove that the merger was fair to the partnership and its shareholders. Dieckman was unable to prove that the general partner acted in bad faith or otherwise illegally through the merger. Last, Dieckman was unable to prove damages to the partnership stemming from the "unit-for-unit [m]erger." Thus, the court entered judgement in favor of Regency and

against Dieckman on counts I and II of the Amended Complaint. This is an unpublished opinion of the court; therefore, state (or federal) court rules should be consulted before citing the case as precedent.

Other

Red Rock Granite, Inc. v. Kafka Properties, LLC, No. 2019AP1633, 2021 WL 446132 (Wis. Ct. App. Feb. 9, 2021).

Granite Company-1 sued Granite Company-2 over breach of restrictive covenant. Granite Company1 claimed Granite Company2's construction of a mineral fabrication facility and storage of finished products violated a restrictive covenant not to conduct mining, excavation, or sell minerals underlying Property. Granite Company-2 moved for summary judgment with support of an affidavit denying its violation of the restrictive covenant. In opposition, Granite Company-1 submitted affidavits claiming the covenant (1) bars adverse impact on Granite Company-1, (2) Granite Company-2's actions upon Property constitute mining and (3) Granite Company-2's storage of finished product on Property resembled advertisement for sale. The court rejected Granite Company-1's assertions. The lower court determined that Granite Company-2's actions, including storage, did not resemble sale, as enumerated within the restrictive covenant. Additionally, the lower court rejected Granite Company-1's interpretation of adverse impact, holding that their interpretation was overly broad. Granite Company-1 appealed.

On appeal, Granite Company-1 argued that Granite Company-2's actions adversely impacted Granite Company-1's economic interest, and Granite Company-2's construction on Property constituted removal and sale of underlying minerals. Conversely, Granite Company-2 argued its facility construction did not violate the restrictive covenant, as the restrictive covenant merely restricted quarrying. The court affirmed, finding that Granite Company-1 failed to provide adequate evidentiary basis warranting discovery.

In re Southland Royalty Co. LLC, 624 B.R. 331 (Bankr. D. Del. 2021).

Oil field service provider (Service Provider) constructed wells for an upstream energy company (Energy Company). At a later date, Energy Company filed for bankruptcy. Service Provider then recorded a lien encumbering some of Energy Company's wells. Service Provider proceeded to send a purchaser of Energy Company's oil and gas (Purchaser) notice informing it of the lien; however, Service Provider did

not obtain relief from the automatic stay that resulted from the bankruptcy proceeding before filing the lien or before sending notice to Purchaser. Service Provider filed a petition with this court to maintain, continue, or perfect the lien, claiming an interest in Energy Company's oil and gas production (Production), and sent notice to and Energy Company. Prior to Service Provider filing the petition, Energy Company entered into credit agreements with various lenders. The issues presented in this suit were: (1) whether Service Provider's interest extended to Production; and (2) whether the Lien took priority over Energy Company's subsequent credit agreements. Usually, a creditor's interest in debtor's property relates back to when the interest was created; however, the relation back exception does not apply to liens on Production. Production, in this case, could not be encumbered until notice was provided to both Purchaser and Energy Company; however, Service Provider did not give notice to Energy Company until after it filed this petition and after an imposition of an automatic stay. Therefore, because a lien on Production does not relate back to a time before the filing of a petition and because it violated the automatic stay, Service Provider's interest in Production is void. Because the court found the lien on Production void, it did not discuss the second issue of priority.

ENVIRONMENTAL REGULATION

Federal

Sw. Org. Project v. *U.S. Dep't of the Air,* 2021 WL 965478 (D.N.M. March 15, 2021).

Plaintiffs along with other entities filed for injunctive relief to "abate and mitigate endangerment" under the Resource Conservation and Recovery Act against the Defendant, a United States agency. The defendants allegedly have operated a fueling facility which has continued to store fuels of different kinds at the Kirtland Air Force Base. There was discovery of a fuel leak contamination in November 1999, which led the NM Environment Department to further investigate. The investigation found that the leak has "created a plume of contaminated soil and groundwater extending…off the Kirtland Air Force Base property beneath a residential neighborhood." Plaintiffs seek injunctive relief against the defendant for the present and past handling of the fuel leak.

Defendants filed a motion to dismiss stating that the court lacks subject-matter jurisdiction pursuant to Rule 12(b)(1). Further, the defendants argue that pursuant to the Primary Jurisdiction Doctrine, the court should defer to

the NM Environment Department's Expertise in regulating the defendant's actions. The court granted the defendants motion on the grounds that it did not have subject-matter jurisdiction over the plaintiff's claim under the RCRA. The court relied on the following two findings, the plaintiffs did not advance their claim properly under the RCRA, and the action of exercising jurisdiction would "severely undermine the RCRA's limited judicial review provisions under 42 U.S.C. § 6976(b)." The court further found that the appropriate measure would be to defer to the NM Environment Department pursuant to the Primary Jurisdiction Doctrine. The court found that the issues presented were outside the realm of the judge's experience, which would result in an undue delay and burden on both parties. Additionally, that the regulatory action would be best served by the NM Environment Department which includes their scientific and technical experience. The defendant's motion to dismiss is granted.

WildEarth Guardians v. Wehner, No. 17-cv-00891-RM, 2021 WL 915931 (D. Colo. Mar. 10, 2021)

Petitioners WildEarth Guardians and the Center for Biological Diversity (collectively "WildEarth") brought this action under the Administrative Procedure Act ("APA") seeking a declaration that Wildlife Services and relevant federal departments, have violated the National Environmental Policy Act ("NEPA").

The court review was highly deferential to the agency, in this case, Wildlife Services' Colorado branch ("WS-Colorado"), unless the agency decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

WildEarth claimed that WS-Colorado did not take a "hard look" at the environmental impacts of the predator damage management ("PDM"). Because NEPA only imposes procedural instead of substantive requirements on an agency action, the court found that WS-Colorado followed the procedure prescribed under NEPA regarding lethal PDM activities. Furthermore, the environmental assessment ("EA"), issued by WS-Colorado, explicitly considered the impacts of oil and gas development on animal habitats. WS-Colorado also has sufficiently reviewed factors contributing to increased black bear and human conflicts under NEPA, and relied on a scientific study regarding coyote density in Colorado. Therefore WS-Colorado had a rational basis and considered relevant factors sufficiently in reaching its determination, thus satisfied NEPA's "hard look" requirement.

WildEarth also claimed that WS-Colorado was required but failed to prepare an environmental impact statement ("EIS"). The court determined whether EIS is necessary based on whether the agency had a rational basis in analyzing environmental effects and took into consideration the relevant factors. WildEarth failed to show an EIS was required on either of following five factors: (1) cumulative impact on target predator populations, (2) human health and safety, (3) ecologically critical areas, (4) highly controversial and uncertain risks, (5) endanger protected species. Therefore, the court found WS-Colorado's evaluation of the significance factors was not arbitrary or capricious, and denied WildEarth' petition for review.

Center for Biological Diversity v. United States Forestry Service, 2021 WL 855938 (S.D. Ohio March 8, 2021).

This is a sequel case to a previous decision that found the Forestry Service had failed to take a "hard look" at the impact of fracking in the Wayne National Forest prior to granting leases. The parties were to brief on the availability of remedies besides complete vacatur or remand, and they came back with conflicting views on whether to apply the Allied-Signal Test advanced by the Service, while Organizations claimed agency actions that violated the National Environmental Policy Act must be vacated. Allied-Signal stated that a two-factor balancing test that looks at the seriousness of deficiencies and disruptive consequences of an interim change that may itself be changed to determine if vacatur is appropriate. Ordinarily, Organizations are right. However, this court agreed with Service, and chose to adopt Allied-Signal like so many other courts had already done. Under Allied Signal, courts have found defendants/parties opposing vacatur bear the burden to show that compelling equities demand anything less than vacatur. In addressing the first part of Allied-Signal, the court agreed with Organizations that seriousness of defect should be measured by the effect the error had in contravening the relevant statute, and that Organizations concern that keeping the leases and only requiring the hard look be done risks the Service not properly conducting the review was valid, but still found for Service as a serious possibility the agency could substantiate its decision existed. Service also stated that there would be serious economic disruptions if the leases were vacated due to revealed bidding strategies and wasted funds in oil exploration by bidders, which the court found outweighed the Organizations concerns on pure economic harms being insufficient to deny vacatur.

N. Cascades Conservation Council v. United States Forest Serv., No. 220CV01321RAJBAT, 2021 WL 871421 (W.D. Wash. Mar. 9, 2021).

Conservations challenged a tree thinning and construction Project, alleging violations of the National Environmental Policy Act and National Forest Management Acts. This opinion addresses two Contractors' motion to intervene as defendants. The Project requires 3,000 to 4,000 acres of thinning and about thirty miles of road construction. The Project has three contracts to take care of this work. Both Contractors each have one of these contracts. The United States District Court for the Western District of Washington granted Contractors' motion to intervene for the following reasons: Contractors' motion was timely, their contracts were significant protectable interests, Contractors' only way to protect those interests would be by actively participating, and Contractors were not adequately represented by existing parties. The contracts were protectable interests (1) because of their contractual nature; (2) because as users of public timber, they had a broad interest in any lawsuit that could hurt their ability to obtain timber; and (3) because they had interests in forest health and community resilience that are cognizable under Rule 24 of the Federal Rules of Civil Procedure.

United States v. Acquest Transit LLC, No. 09-CV-55S, 2021 WL 809984 (W.D.N.Y. Mar. 3, 2021).

In 2009, the Government filed suit against Contractor for violating the Clean Water Act ("CWA") by disposing of fill from Contractor's property into waters of the United States. The United States District Court for the Western District of New York issued a preliminary injunction against Contractor because it found they were dumping into water that was connected to "waters of the United States" by man-made ditches. At the time, man-made ditches were allowed to connect water to "waters of the United States" for purposes of jurisdiction under CWA. Before the court is an issue arising from a recent change in the definition of "waters of the United States." The Navigable Waters Protection Rule ("NWPR") (effective June 22, 2020) does not allow man-made ditches to connect bodies of water to satisfy the definition of "waters of the United States." Contractor moved to dismiss counts one and three of the amended complaint because Contractor believed the NWPR applied retroactively to this case, therefore the water in question would be excluded from CWA jurisdiction since it was connected by man-made ditches. Government argued that the NWPR only applied prospectively and did not affect this case. The court agreed, finding that the NWPR cannot be applied

retroactively because it created new regulation rather than clarified existing law. Therefore, the Government's claims did not automatically lack jurisdiction. The court denied Contractor's motion to dismiss because findings of fact need to be made to determine the navigability of the water in question for purposes of CWA jurisdiction. The court also ordered the trial to be bifurcated with a jury trial to determine whether Contractor is liable under CWA, and if so, a bench hearing will determine the punishment.

Taylor Energy Co. v. Dep't of the Interior, 990 F.3d 1303 (Fed. Cir. 2021)

After Hurricane Ivan irreparably damaged Lessee's offshore oil well operations, Lessee entered into statutorily required decommissioning operations, placing funding into trusts for the Department of the Interior ("DOI") to disburse. The agreements required Lessee to seek insurance reimbursements, which would offset Lessee's required deposits, but also stated Lessee could not receive funding disbursements for such amounts as reimbursed by insurance. Lessee proposed to DOI a full and final deposit into the trust account, without any deposit offsets, but that Lessee would then keep all insurance proceeds and reimbursements received for work performed. DOI rejected the proposition because Lessee "(1) must make the full deposit due because [Lessee] had 'not yet completed any phased of the [work]; and (2) must reimburse the trust account for any disbursements [Lessee] received that duplicated reimbursement from [Lessee's] insurance company. The DOI also rejected another request for some delay in labor costs. Lessee appealed both decisions to the Interior Board of Land Appeals (IBLA), which affirmed in favor of DOI. In the District Court, Lessee sought judicial reversal of IBLA's decisions as "arbitrary, capricious, contrary to law and an abuse of discretion," and sought breach of contract relief in a related suit in the Claims Court on the same facts. The Claims Court dismissed its case for lack of subject matter jurisdiction, but Lessee then moved to transfer the district court action to the Claims Court and the district court granted the motion. DOI appealed the transfer order. The appeals court determined that under the Administrative Procedure Act, the IBLA decision is binding on the claims court, that claims court could not provide an adequate remedy, and Lessee may only seek judicial review of ILBA decisions in district court in order to recover any money damages.

S.G. v. City of Los Angeles, No. LA CIV17-09003, 2021 WL 911254 (C.D. Cal. Feb. 4, 2021).

Students sued City of Los Angeles and city developers ("City") seeking declaratory relief; statutory relief, and injunctive relief requiring City to consider needs of people with disabilities affected by development projects and prohibiting City from continuing to engage in the practices complained of, and seeking punitive damages. City planned and approved a construction project that was immediately adjacent to the school Students attend, which is a participant school in the Deaf and Hard of Hearing ("DHH") program. Students alleged violations of the Americans with Disabilities Act ("ADA"); 42 U.S.C. §§ 12131, *et. seq.*, the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794; violations of the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983; violation of the First Amendment, pursuant to 42 U.S.C. § 1983; violation of the Unruh Act, Cal. Civ. Code §§ 51–53; violations of the California Constitution, art. I, §§ 2 and 7; negligence under Cal. Civ. Code §§ 1714 and 3333, and Cal. Government Code § 815.2; and violation of mandatory duties. The court dismissed or denied all claims. The court applied narrow interpretation of licensing and permitting regulations. It applied forum analysis to dismiss the First Amendment claim but also noted the issue was dismissed without prejudice to the extent of a qualified immunity issued on factual record. The court applied due process and municipal liability to the Fourteenth Amendment claims, dismissing them lacking the necessary substantive predicates or mandatory language. The court dismissed the state law claims due to lack of any allegations that were not conclusory in nature, and no substantive allegations showing breach of mandatory duty. The court did leave open for Students' revision of their claim on the single issue of City's claim of immunity. This case has since been appealed, but there is no decision from the higher court as of publication.

Sierra Club v. Dep't of the Interior, 990 F.3d 898 (5th Cir. 2021).

A wildlife advocacy organization ("Organization") challenged a Department of the Interior Fish & Wildlife Service ("DOI") biological opinion and incidental take statement authorizing "harm or harassment" of one ocelot in connection with a natural gas pipeline project. The issue before the court was whether the decision was arbitrary and capricious, and whether the DOI complied with the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, in its authorization decision determining the project was unlikely to jeopardize the cat's life. Per the ESA, an incidental take statement, specifying the extent of impact, is required when the agency

determines the action will not endanger the life of the animal but will result in harm or harassment. Incidental takes are permissible if conditions are reasonable and prudent measures designed to minimize the extent of the take. The court reviewed the incidental take statement under the Administrative Procedure Act's narrow and highly deferential standard to determine whether it is arbitrary, capricious, an abused of discretion, or otherwise not in accordance with law. The court held the take statement was not arbitrary or capricious because it clearly specified the anticipated take of the cat, set a clear and enforceable re-initiation trigger, and provided for action in the event of the cat's death. The court also rejected Organization's challenge of the DOI's finding of no jeopardy to the cat's life, finding DOI appropriately came to this conclusion after its formal consultation process and evaluations of the direct and indirect impacts of the action on the cats against the applicable environmental baseline. The court noted that the DOI took all required actions and made all required considerations such that its decision could not reasonably be classified as arbitrary and capricious, particularly under the highly deferential legal standard of review.

Kern Oil & Ref. Co. v. U.S. Envtl. Prot. Agency, 840 Fed.Appx. 188 (9th Cir. 2021).

Company seeks review of an EPA decision granting an application for "small refinery exemption" under the Renewable Fuel Standard program. EPA contends that the matter should be remanded because EPA failed to provide an explanation for its remedy decision. Therefore, the court orders EPA to determine an appropriate remedy for Kern within 90 days of this order. Further, the court denies Kern's request for an order for the EPA to provide a specific remedy.

U.S. v. Dico, Inc., 4:10-cv-00503, 2021 WL 351993 (S.D. Iowa Feb. 1, 2021).

This Motion to Enter Consent Decree originates out of two major judgements against Original Owner and Subsequent Purchaser of a property which is now an EPA superfund site. In 1974, the EPA found TCE in the Des Moines water supply and traced it back to Owner's property. EPA, via CERCLA, created a superfund site which is nowhere near completion at present date. A judgement was set against them including a multi-million-dollar judgement. In 1994, PCB's were discovered in Owner's buildings and the EPA ordered repair, capsulation, and maintenance of the buildings to prevent further leaks. Purchaser later sold the building materials to a

Third Party which demolished and repurposed some of the condemned material. The EPA discovered this grievance a year later and moved for another judgement which was filed in 2010 and finalized in 2017. At the time of this case Purchaser had made no attempt to settle either judgment fine. In September 2020, the EPA lodged a proposed Consent Decree with the court to settle all outstanding claims and fines as one with additional procedural compliance. The court affirmed the order based on a four-part approval test. (1) Procedural Fairness – The court found no issues in the negotiation process. (2) Substantive Fairness – The court found that since the fines/procedures had been settled once before there was no issue here. (3) – Reasonableness – The court initially showed skepticism of the settlement but after weighing the costs against the interest of the public and finally settling the case they approved it. (4) – Consistency with CERCLA – The court found no issues in this area. The court found this settlement as "fair, adequate, and reasonable" while protecting the public interest. The order was approved.

Backes v. Bernhardt, No. 1:19-CV-00482-CL, 2020 WL 906313 (D. Or. Feb. 24, 2020).

Mine Operators brought a cause of action challenging the final decision by the Bureau of Land Management ("BLM") and the Internal Board of Land Appeals ("IBLA"). The Mine Operators received two Noncompliance Notices from BLM claiming they violated BLM regulations regarding mining operation and occupancy of public land, seemingly signed by a "Jim Bell." Mine Operators submitted a Freedom of Information Act request to determine the identity of the person, Jim Bell, who acted on behalf of BLM, alleging no one associated with the name "Jim Bell" worked at the local BLM offices where the notices originated from. Mine Operators did not raise the issue of the signature on the Noncompliance Notices during administrative proceedings. Discovery is typically not permitted in APA judicial proceedings; however, there are four exceptions. Mine Operators claimed the second exception – "necessary to determine whether the agency has relied on documents not in the record" – and the fourth exception – "a plaintiff makes a showing of agency bad faith" – applied in their situation. The court found that the signature was not a factor in IBLA's decision, therefore IBLA did not rely on documents not in the record to make its decision. The court also found no evidence of bad faith because BLM provided good reason for not disclosing the identity of the signer. Mine Operators claim BLM failed to properly delegate the authority to sign the

Noncompliance Notice. There is no statute that creates a duty to delegate the signatory authority and therefore there is no legal basis for the claim.

State

Dorrell v. Woodruff Energy, Inc, 2021 WL 922446 (N.J. Super. App. Div. March 11, 2021).

Individual owned a store and while preparing to sell the property, discovered it had been contaminated with petroleum products, with kerosene or fuel oil being undisputed as contaminants. Under the New Jersey Spill Compensation and Control Act (Spill Act), plaintiff claimed that Company 1 and Company 2 were persons "in any way responsible for the hazardous substances found" and therefore liable. Company 1 did deliver fuel oil to a one thousand gallon above ground storage tank (AST) in the store's dirt floor basement and a leak from this tank is undisputed, Company 2 is alleged to have delivered gasoline to three underground storage tanks (UST) that were later removed or abandoned. The disputed facts came from Individuals expert witness with a degree in earth science that had done site remediation work in the past. The trial court certified him as an expert in investigating subsurface conditions, but not to identify specific contaminants. The trial court later appeared to reopen the question on whether the expert could identify contaminants but never resolved that question. The trial court found that no evidence necessarily linked Company 1 with the leak in the basement and Company 2 had more likely than not delivered gasoline to the other three tanks, relying on plaintiff's expert testimony as no other defense experts found gasoline on the site. Individual appealed, and lost, claiming that trial court applied to high a burden on her claims against Company 1. Appeals court said that the trial had quoted the controlling case and applied the correct standard. Company 2 also appealed, and won a remand, on the qualifications of the plaintiff's expert as the plaintiff had never properly established their expert's qualifications as required.

State by Smart Growth Minneapolis v. City of Minneapolis, 954 N.W.2d 584 (Minn. 2021).

Interest Groups filed petition alleging that City's "scheduled approval of comprehensive plan violated Minnesota Environmental Plan Act (MERA)." The District Court granted City's motion to dismiss and Interest Groups appeal. The Court reverses the District Court's holding and finds that City's comprehensive plan under Metropolitan Land Planning Act (MEPA)

violates the MERA because it will likely cause materially adverse environmental results. The MERA was enacted to "provide every person 'with an adequate civil remedy to protect air, water, land and other natural resources … from pollution, impairment, or destruction.'" (internal citation omitted). To Court clarifies that "pollution, impairment, or destruction" is defined as any action "by any person … which materially adversely effects or is likely to materially adversely affect the environment." Following the enactment of the MERA, the legislature passed three additional environmental acts " 'to complement the MERA,' one of which was the MEPA." The MEPA was passed with the purpose of requiring entities to prepare an impact statement when "there is potential for significant environmental effects." The issue before the Court is whether the exemption of comprehensive plans under MEPA means that comprehensive plans are exempt from actions brought under the MERA. The Court notes that this is a question of statutory interpretation. Precedent leads the Court to determine that MERA will not be applied broadly absent "*express* statutory language form to that effect" and there is no express language exempting MEPA from review under MERA. Therefore, MEPA does not prevent comprehensive plans from being reviewed under MERA. The Court also considered whether Interest Group's petition "sets forth a legally sufficient claim for relief." Because the facts in the petition, if true, provide grounds for relief, the District Court erred in dismissing Interest Group's petition.

State v. Bedford LLC, 137 N.Y.S. 3d 248 (Misc. 2020).

This order arises out of a continuous litigation between State and Property Owner regarding the cleanup of a "Brownfield" site. The Owner had no reason to believe that contaminates had passed through and/or were dumped on the property and that it had contributed to the plume in the area. However, State informed them of differing findings and that there was a high chance of it. Owner had the choice of investigating themselves or reimbursing State following the State's investigation. The owners eventually chose to join the cleanup program as a volunteer and not participant. The important distinction being that Volunteers are not liable for offsite contamination and/or cleanup while participants are. The State subsequently accepted the application but made Owner a participant, against their applications intentions. Litigation continued regarding this and other issues, mostly pertaining to access to the property for testing by State and the classification of Owner. Under the agreement the State has the ability to investigate and monitor Brownfield sites as needed and can

upgrade the site to a State Superfund site, however, Owner disagrees since they contend they did not agree to these terms and is outside the State's powers through various statutes. The parties had differing expert opinions on the flow origin; however, the court focuses on the undisputed fact that there are high levels of contaminants. The court holds that no evidentiary trial is needed since by allowing access the State could resolve most issues. The Owner is ordered to allow and facilitate the access and testing by the State to further determine issues. This is granted because the State does have statutory power to do so and they did not have to prove that it was contaminated since that was undisputed.

Tenn. Dep't Of Env't and Conservation v. Roberts, No. M2020-00388-COA-R3-CV, 2021 WL 388611 (Tenn. Ct. App. Feb. 3, 2021).

Original case concerned the Department putting in an order for fund recovery from Property Owners. Owners had uncovered rusted-out oil tanks when renovating the property and smelled petroleum. Department cleaned up and destroyed contaminants and filed for fund recovery. The original administration judge found that Owners were "responsible parties" and the release "occurred" upon discovery. Tanks had been covered and abandoned prior the Owners' purchase of the property. Owners appealed to the Board and an administrative judge ordered differing interpretations and reversed. Department appealed to the trial court which then reversed the second judge by finding an abuse of discretion and scope. Question on appeal on what the judge "when sitting with the board" can decide and/or advise the full board on. Board has full power to change initial orders dependent on the proper application of the legal framework. A judge who is sitting with the board can interpret or decide procedural questions of law. However, broad deference must be given to the initial judge regarding evidence since they act like that of "a trial judge in a civil action." Therefore, the Board is only able to rule on the record and not decide evidentiary standards. Sitting board judges are allowed to decide procedural questions only not decide the substantive legal issues brought up. Darnell was found to have overstepped his power and scope by deciding new interpretations of "occurrence" and "responsible party". He also erred in barring the Department from arguing alternative theories. The sitting judge does have the absolute ability to inform the board of their theory or alternative theories but may not decide the issues for the board itself. Decision was affirmed in part, reversed in part, and remanded for further proceedings.

Beer v. New York State Dep't. of Envtl. Conservation, 189 A.D.3d 1916 (2020).

Department of Environmental Conservation ("DEC") issued a water withdrawal permit to Town of New Paltz ("Town") to develop new water well with the Village of New Paltz ("Village"). The purpose of the project was to supply another water source to Catskill Aqueduct customers during planned outages. Beer, representing property owners in the area, sought to cancel the permit issued by DEC for the new well on both procedural and substantive grounds.

Procedurally, Beer claimed DEC altered the proposed plan after the required 15-day public comment period by imposing new conditions on development. Substantively, Beer claimed the proposal did not satisfy the statutory requirements under ECL 15-1503(2) and failed to consider the well's proximity to a nearby sand and gravel mine.

DEC asserted that Beer was collaterally estopped from bringing the claims and that the claims were time barred. New York's Supreme Court, Appellate Division, agreed with DEC on both the procedural and substantive claims. The standard of review for administrative decisions is a lack of rational basis or whether the decision was arbitrary and capricious.

The court held that the conditions imposed after the public comment period were not substantial and did not constitute a modification. Beer failed to show that DEC lacked a rational basis for the conditions. On the substantive claims, the court held that Beer's challenge was properly dismissed as untimely and barred by collateral estoppel because of the four-month statute of limitations. Additionally, the court held that the mining activity was above the water table and no rational basis existed to modify the mining permits because of the new water permit.