# Oil and Gas, Natural Resources, and Energy Journal

## RECENT CASE DECISIONS

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## OIL AND GAS

*Upstream*

*Mark S. Hogg, LLC v. Blackbeard Operating, LLC*, 656 S.W.3d 671 (Tex. App. Nov. 17, 2022).

Lessor appealed a trial court decision in favor of Assignee regarding a lease assignment, arguing that a particular lease was not included in the assignment. Lessor issued two leases, one in 1994 and one in 1998, to Lessee, which covered land within the same 160-acre plot. The leases were subsequently assigned multiple times until ending up, under the assignment at issue, in the hands of Assignee. The assignment mentions, under its grant, two separate exhibits. The first exhibit mentions the 1994 lease and does not mention the 1998 lease. The second exhibit does not mention the 1998 lease, but rather a specific well that was drilled under the 1998 lease. The Court of Appeals reviewed the issue de novo and looked first at whether the assignment was ambiguous, finding that it was not. The court then determined that the assignment included the lease because it contained language granting all interests in any specified lands. Thus, because the lease is a held interest and the full 160 acres are specified in the assignment, which includes the 120 acres in the 1998 lease, that language specified the land applicable to the 1998 lease. The court then looked to language specifically granting all leases on specified lands to determine that the 1998 lease was assigned to Assignee. Finally, the court addressed two arguments in the alternative made by Lessor. First, a statute of frauds defense was found lacking because the court had already determined that the lands at issue were specified in the grant. Second, the court similarly dismissed the argument that only the well mentioned in the second exhibit was assigned because of the court's earlier determination that the full assignment was valid. Thus, the court ruled in favor of Assignee and found that both leases were included in the assignment.

*Hibernia Energy III, LLC v. Ferae Naturae, LLC,* No. 08-21-00092-CV, 2022 WL 17819744 (Tex.App., Dec. 20, 2022).

(Not reported in SW Reporter).

An energy company ("Creditor"), which was assigned a judgment lien encumbering a mineral lease, was granted summary judgment against another energy company ("Debtor") which held the debtor's interest in that same mineral lease. The trial court entered a final judgment foreclosing the

lien and issued an order of sale of Debtor's interest. Debtor appealed the judgment, arguing that the court erred in granting summary judgment because (1) the order of sale incorrectly described the mineral interests subject to the lien since a working interest in the lease was mistakenly included; (2) Creditor's evidence of the validity of lien was inadmissible; (3) the judgment was either fully or partially satisfied; (4) the trial court lacked the authority to calculate the amount; and (5) the trial court should have deferred summary judgment rulings given new evidence of previous debt pay-offs. Debtor further argued that it was necessary to join all past and present judgment creditors. The Court of Appeals of Texas agreed with the trial court's final judgment foreclosing the lien in favor of Creditor. The appellate court ruled that (1) the language of the sale order was improper because it gave Creditor more relief than requested; the Texas Property Code provides that a holder of a prior encumbrance on land or leasehold is not a necessary party, so the creditors do not need to be joined; (2) the argument against the admissibility of validity evidence went to form and not substance; (3) there was no satisfaction of the lien because the money in question was from an assignment, not a fulfillment of debts; (4) the Texas Finance Code and case law place interest calculation in the hands of the trial court; and (5) Procedurally, Debtor missed the opportunity to dispute the new evidence.

*Hughes v. UGI Storage Co.,* 43 A.3d 278, (Pa. Commw. Ct. Nov. 30, 2022).

The court considered whether Landowners waived their right to an evidentiary hearing if Company effected a taking of Landowners' rights in underground natural gas on their properties. The Federal Energy Regulatory Commission ("FERC") granted Company the right to operate a storage field for natural gas. Company also wanted a buffer zone around the storage field, but FERC only granted certification to create a buffer zone for those properties to which Company could acquire the rights. Landowners argue the application for buffer zone certification is an effective taking because no fracking is allowed in the buffer zone, and therefore, lessees do not want to lease oil and gas rights from Landowners. The trial court held that an entity must have property-specific eminent domain power to be liable for just compensation under Eminent Domain Code. The Supreme Court of Pennsylvania determined that no specific power of eminent domain was required for a de facto taking to occur. The Pennsylvania Supreme Court defined a "taking" as a public entity's interference with a private party's

beneficial use of her property for a public purpose. There was a 2016 hearing, off-the-record, and a 2019 trial court proceeding; Company claims that Landowners waived their right for an evidentiary hearing in both instances. The 2016 hearing was not transcribed, so the court refused to find a waiver without a record. However, the court determined that since the purpose of the 2019 proceeding was to determine the issue of eminent domain powers, Landowners did not waive the evidentiary hearing rights, but deferred them. The court concluded that Landowners had not waived their right to have an evidentiary hearing on whether Company effectuated a de factor taking. The court remanded the matter to The Court of Common Pleas of Tioga County to hold an evidentiary hearing.

*Madzia v. SWN Prod. (Ohio) LLC,* No. 2:20-CV-2608, 2022 WL 4237458 (S.D. Ohio Sept. 14, 2022).

Mineral holders sued SWN Production LLC ("Energy Company") for declaratory judgment, breach of contract, and breach of the covenant of good faith and fair dealing. Mineral companies alleged Energy Company failed to correctly interpret their oil and gas leases for oil wells in Ohio. Therefore, the Mineral holders were paid the incorrect amount of oil royalties. The oil well leases, which were executed in 2006 in Harrison County, called for the payment of royalties based on the volume of the oil sold. Energy company interpreted the lease as meaning the volume of oil produced at the wellhead, while Mineral holders alleged Energy Company misapplied the lease's oil royalty provisions, stating they are "entitled to the value of 1/8 of the volume of liquid hydrocarbons produced by the . . . wells . . . at the wellhead and that the royalties should be based on the value of 'oil' sold from the storage tanks." Energy Company argued the produced liquid hydrocarbons are "too volatile" to be marketable and must be processed before being classified as oil, a process that results in "substantial shrinkage." Both parties motioned for summary judgment. The district court first analyzed the breach of good faith and fair dealing claim, deciding it failed as a matter of state law because the contract was not silent on the issue. For the remaining issues, the court agreed with Energy Company that the produced liquid hydrocarbons were condensate, which is defined as a gas, rather than oil. "[T]hus the leases and amendments require royalties on condensate be paid pursuant to the gas royalty provision, to wit: 1/8 of the proceeds realized at sale." The court granted Energy Company's motion for summary judgment.

*Newfield Expl. Co. v. State ex rel. N. Dakota Bd. of Univ. & Sch. Lands*, 2022 ND 166, 979 N.W.2d 913.

The State of North Dakota appealed a judgment dismissing its claim against Newfield for underpayment of royalties. In 2017, the State audited wells located on government-owned land that Newfield operated. The State found that Newfield owed gas royalties. Newfield used a different calculation from the State to determine royalty payments; Newfield calculated royalties from gross proceeds with deductions, whereas the State calculated royalties from gross product with no deductions. In 2018, Newfield sued the State seeking a declaration that its payments were properly calculated by the terms of their lease. The State argued that the calculations were not proper, that Newfield was in breach of contract, and the State was entitled to penalties and interest. Both parties moved for summary judgment. The district court found in favor of Newfield, but the Supreme Court of North Dakota reversed and remanded, finding that royalty payments may not be reduced, either directly or indirectly. On remand, the district court found that the State did not establish a contract, so the court dismissed the case. The Supreme Court of North Dakota granted certiorari and found that the lower court erred in its ruling because (1) under N.D.C.C. § 9-01-05 a legal obligation arises under either a contract or the operation of law, and (2) the "operation of law" prong was satisfied because the State pled and proved N.D.C.C. § 47-16-39.1, which says "a lessee or a well operator must pay royalties to the mineral owner and shall pay interest on unpaid royalties" whether the interest is leased or unleased. The Supreme Court of North Dakota found that the lower court erred in dismissing the claim. The court reversed and remanded the case for findings of fact related to the State's damages and Newfield's affirmative defenses.

*Great N. Properties, LLLP v. Extraction Oil & Gas, Inc*., 2022 COA 110, 522 P. 3d 228 (Sept. 15, 2022).

GNP filed a motion for summary judgment asking the district court to enter a judgment that GNP owns mineral interests beneath three parcels of land that abut a right-of-way. The district court denied the motion based on an order it issued in November 2019. That order declared that the owners of the parcels abutting the right-of-way also owned the mineral interest beneath their parcels because of the centerline presumption doctrine. The doctrine says that where parcels abutting a right-of-way are conveyed, then it is presumed that the grantor intended to convey the title of the highest estate to the center of the right-of-way, unless otherwise indicated by the

grantor. On appeal, GNP argued that the district court erred in applying the centerline presumption. The issue was one of first impression, which the Colorado Court of Appeals reviewed de novo. The question on appeal was whether the centerline presumption applies to convey the mineral interests beneath a dedicated right-of-way to the owners of parcels that abut that right-of-way. The court of appeals affirmed the district court's determination of law and held that where the right-of-way presumption applies, it applies to all interests the grantor possesses in the property underlying a right-of-way, including mineral interests. However, the centerline presumption only applies if the following conditions are met: (1) the grantor conveys a parcel of land abutting a right-of-way; (2) at the time of the conveyance, the grantor owned the fee underlying the right-of-way; (3) the grantor conveys away all the property they own which abuts the right-of-way; and (4) no contrary intent appears on the face of the conveyance. All the conditions were met for the owners of the abutting parcels; therefore, they owned the mineral interests.

*Jump v. McFarland Est.,* No. 21-30729, 2022 WL 2437586 (5th Cir. July 5, 2022).

This case involves a decades-long dispute involving a group of parties that have fought for interests in an off-shore mineral lease and its revenues. The latest round of litigation at issue here centers on two parties. Company 1 appealed the U.S. District Court for the Western District of Louisiana's 2021 decision granting partial summary judgment in favor of Company 2, that validated Company 2's lien on the contested off-shore mineral lease. The Fifth Circuit acknowledged the history and complexity of the case and stated that this latest issue "boils down to a priority dispute" between the parties. The Fifth Circuit rejected Company 1's argument that Company 2's previously settled claims against them were barred by res judicata due to a previously recorded judgment, which the circuit determined lacked finality. Second, the Fifth Circuit denied Company 1's argument that prescription barred Company 2's claims "because Louisiana law governs the relevant statute of limitations." The court stated that one of Company 2's claims fell under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, which establishes its own statutory limitations. The issue of whether an enjoined party's claim was precluded was not relevant because that party's interest was subjected to the other party's valid lien. Third, the Fifth Circuit denied Company 1's prematurity argument regarding the annulment of the former purchase of the interest of the mineral lease during a marshal

sale. The Fifth Circuit stated that Company 1 could not proceed on this argument because prematurity was "not the sole cause of the annulment of the sale." The Fifth Circuit affirmed the district court's decision in its entirety.

*Blue Appaloosa, Inc. v. North Dakota Industrial Commission*, 975 N.W. 2d 578 (N.D. 2022).

Developer appealed North Dakota Industrial Commission's ("Commission") order that Developer violated administrative regulation by commencing construction on a waste treatment plan before obtaining the proper permitting from Commission. Developer alleged that Commission (1) did not have jurisdiction over the matter and (2) erroneously construed what it meant for Developer to have 'began construction' in violation of the administrative regulation. First, the Supreme Court of North Dakota upheld Commission's broad authority to regulate oil and gas development, and as such Developer properly fell under the purview of Commission upon acting with the intent to construct a waste treatment plant. The court held that submission of an application to construct a waste treatment plant was not necessary for Commission to have jurisdiction over the matter. Intent, established by Developer's email correspondence, was sufficient for jurisdiction. Furthermore, Commission's duty to investigate failures to obtain proper permits or bond negates the necessity of application jurisdiction. Second, Developer alleged its "dirt work" was not extensive enough to constitute the beginning of construction. The Court deferred to Commission's technical expertise and informed discretion to interpret and define such matters. Commission offered up evidence including Developer's performance of several projects—including but not limited to, building an entrance road, removing trees, and leveling the site—as well as their expressed intent to construct a waste treatment plant via email, to extend Developer's actions within Commission's purview. The court upheld Commission's interpretation that these projects were consistent with that of a waste treatment plant. The court affirmed the trial court's judgement and upheld Commission's order.

*Midstream*

*CL III Funding Holding Co., LLC v. Steelhead Midstream Partners*, LLC, 655 S.W.3d 844 (Tex. App. Oct. 27, 2022).

Midstream Company sued Pipeline Co-Owner for breach of their joint operating agreement after Pipeline Co-Owner obtained a judgment against

Midstream Company for a debt incurred during the construction of the pipeline. In previous proceedings, two predecessors in interest to the operating agreement had a statutory lien placed on the property for unpaid debts to Construction Company. Pipeline Co-Owner sought to purchase Predecessor One's fifty percent interest in the pipeline. Pipeline Co-Owner and Predecessor Two reached a settlement that would release Predecessor Two from claims of non-payment. However, the two parties did not agree on whether this included the pipeline construction debt. During this time, Pipeline Co-Owner paid the debt to Construction Company and sought to enforce the debt against Predecessor Two through a foreclosure suit. Additionally, Predecessor Two's interest was sold multiple times until ending up with Midstream Company. Pipeline Co-Owner prevailed in the foreclosure suit; however, Midstream Company sued Pipeline Co-Owner for breach of the operating agreement, arguing that Pipeline Co-Owner was solely responsible for the debt. The trial court ruled in favor of Midstream Company. However, the appellate court looked to the foreclosure suit to determine that Midstream Company was not a surety and thus was liable for the debt, because otherwise, Pipeline Co-Owner would not have been able to foreclose on the debt against Midstream Company. In essence, the contract claim was premised on Pipeline Co-Owner's sole responsibility for the debt. However, because the foreclosure court specifically found that Midstream Company was liable for the debt, Midstream Company had effectively waived its right to challenge the matter after dismissing its appeal of the foreclosure judgment. Thus, this suit was deemed an impermissible collateral attack on the foreclosure judgment by the appellate court, and the trial court's ruling was reversed in favor of Pipeline Co-Owner.

*Grayson L.L.C. (of Louisiana.) v. BPX Operating Co.*, NO. 21-44, 2022 WL 4370449 (W.D. La. Sept. 20, 2022).

Gas Marketer and Gas Producer entered into multiple agreements, granting Marketer the authority to sell Producer's gas with a clause discussing shared post-production costs. After disagreements regarding transportation deductions, Marketer filed a motion for partial summary judgment in response to Producer bringing a breach of contract claim based on the shipper-must-have-title rule.[1] In response, Marketer claimed the

1. Note: The shipper-must-have-title rule ("Shipper Rule") premises the concept that the shipper of natural gas through a pipeline must hold title to the gas it is shipping. *Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.) Inc.,* F.3d 181, 184 (1st Cir. 2012). The Federal

shipper-must-have-title rule did not create a private cause of action and their agreement was for Producer to "bear a share of *any* post[-]production costs without limitation;" therefore, their deductions were not dependent on Marketer's compliance with the Shipper Rule. To interpret contracts, Louisiana law looks to the contract language to determine the parties' common intent. The court determined the language of the parties' agreement was "clear and unambiguous," finding the parties' intent "was for [Marketer] to deduct '*any* post-production' expenses" from sales. And further, the court found that Producer's "acceptance to shoulder their share was not dependent on Marketer's compliance with the Shipper Rule." The court went on to shut down Producer's claim that there was an "implied obligation" for Marketer to comply under public policy, because admitting so would circumvent the National Gas Act's authority and because the court could not "conjure up a right of action where one never existed." The court granted Marketer's motion for partial summary judgement, dismissing Producer's breach of contract claim based on the violation of the Shipper Rule.

*Dressler Family, LP v. PennEnergy Resources, LLC*, 2022 PA Super 77, 276 A.3d 729 (Pa. Super Ct.)

Landowners sued a gas company for breach of contract and unjust enrichment after the two entered into an oil and gas lease. The issue before the trial court, as well as this court on appeal, was whether the term "gross proceeds" in the lease provision permitted the gas company to deduct post-production costs from the royalties owed to the landowners. In interpreting the provision, the trial court granted the gas company's motion for summary judgement and denied landowner's motion for partial summary judgement, finding the terms "gross" and "price for gas sold at the well" were clear and unambiguous, therefore providing for the deduction of post-production costs. The Superior Court of Pennsylvania reversed the trial court's order on several findings. First, while acknowledging that "custom in the industry or usage in the trade is relevant and admissible in construing a contract," the court held the trial court's interpretation of "gross" and "price for gas sold at the well" as having the opposite meaning did not support the conclusion that the language was plain and clear. Second, the court was unconvinced by the gas company's argument that the terms were "known and understood by a particular class of persons in a certain or

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Energy Regulatory Commission regulates this rule to promote transparency and prevent anti-competitive behavior in the interstate gas pipeline industry.

peculiar sense," and instead found that the terms of the royalties' provision were "reasonably susceptible of different constructions." Because ambiguous writings are to be interpreted by the finder of fact, the court only concluded the lease provision was ambiguous and remanded this case to trial court to determine the royalty provisions' proper meaning.

*Food & Water Watch v. Fed. Energy Regul. Comm'n*, 28 F.4th 277 (D.C. Cir. 2022).

Organization, jointly with another environmental activism organization, filed an objection to the Federal Energy Regulatory Commission's ("FERC") approval of a natural gas pipeline running from Massachusetts to Tennessee. After Organization's initial petition and request for rehearing were denied, Organization appealed to the D.C. Circuit Court of Appeals. The court affirmed FERC's decision in part and remanded in part but did not vacate the overall approval. Organization's main argument was FERC's approval of the project violated the National Environmental Policy Act ("NEPA") because FERC failed to gather adequate information to properly measure the potential adverse environmental effects of the pipeline. According to NEPA, FERC need not consider every feasible impact of a project such as this one, but it must evaluate effects that are "reasonably foreseeable," whether direct or indirect. Part of measuring reasonably foreseeable effects is an attempt to gain relevant information related to those potential effects. Applying an arbitrary and capricious standard of review, the court held FERC did not comply with NEPA in relation to measuring the "downstream gas consumption and the resulting greenhouse-gas emissions." The court held that foreseeability depends on both the destination and end use of the gas, and since FERC had reliable access to that information from earlier fact-finding, the effects of that downstream usage were more than reasonably foreseeable. Namely, the court points to the pipeline's increased output, location, and usage for Tennessee's residents as pertinent information requiring a deeper environmental analysis, which FERC failed to conduct. As such, the court remanded this portion of the petition to FERC. The remainder of Organization's claims were jurisdictionally barred because it failed to preserve the same issues during its hearing with FERC.

*Myers-Woodward, LLC v. Underground Servs. Markham, LLC*, No. 13-20-00172-CV, 2022 WL 2163857 (Tex. Ct. App. June 16, 2022).

Company sued Royalty Owners seeking a declaratory judgment regarding the means by which it could satisfy its royalty obligations. Company additionally sought a declaration that Company had the exclusive right to store oil, gas, and other resources in the subsurface cavern space formed by Company under Owner's property. For nearly four years after the initial suit was filed, Company continued to mine salt from Owner's property but did not pay royalties. After Owners brought a countersuit against Company, the court found that the royalties owed to Owners for the four-year period should be calculated "at the wellhead" so that the costs for post-production processing were deducted from the royalty payments. By applying the wellhead formula, the lower court found that Company owed Owners $258,850.41. On appeal, Owners argued that the royalties should be calculated under the proceeds-based/amount realized method so that post-production costs were not deducted from the royalties. The Court of Appeals of Texas, Corpus Christi-Edinburg, held that unless a contract explicitly calls for the application of the net proceeds/amount realized method, the law requires that royalties be measured at the wellhead and post-production costs be deducted. Because the contract between Company and Owners did not expressly call for the net proceeds/amount realized method, the court held that the royalties would be calculated by the wellhead formula. The court then remanded the case and ordered that the trial court correct the final judgment so that the damages awarded properly conformed with the findings of fact. On the claim involving ownership of the cavern, the court held that, as a matter of law, property owners own all of the subsurface property located beneath their land, including caverns. Accordingly, Company did not own the cavern and did not have the right to store resources within the cavern without Owner's permission.

*Downstream*

*L. Ruth Fawcett Tr. v. Oil Producers Inc. of Kan*., 315 Kan. 259, 507 P.3d 1124 (2022).

Class of royalty owners sued Operator, claiming that Operator breached its implied duty to the market. The district court granted partial summary judgment in favor of Class. On appeal, the Kansas Supreme Court held that an operator can satisfy its implied duty to the market by carrying out a good faith transaction when it sells gas at the wellhead, and such gas is in a condition that is acceptable to a third-party purchaser. The Court then

remanded the case to the district court. On remand, Class filed a motion to amend its petition. Class supported its motion by arguing that because of the Supreme Court's ruling, Class's original implied duty to the market claim now involved an implied duty of good faith and fair dealing. The district court denied the motion and found that Kansas's mandate rule barred the complaint from being amended. Class again appealed to the Kansas Supreme Court. The Kansas Supreme Court found that the mandate rule could not be applied because mandates were not supplied to the district court upon remand. Instead, the Court held that the "law of the case" doctrine barred Class from amending its complaint. Under the law of the case doctrine, decisions made by appellate courts during a prior appeal are considered settled and cannot be readdressed during subsequent appeals. There is an exception to the doctrine when a salient law is changed or created after the conclusion of the first appeal. However, the implied duty of good faith and fair dealing is well-established law and was not created by the court during the first appeal. Accordingly, the Court ruled that the issue of Owner's good faith was settled and could not be argued on remand because Class did not allege in the initial complaint that Owners had acted in bad faith.

## WATER

### *Federal*

*San Carlos Apache Tribe v. State*, 520 P.3d 670 (Ariz. Ct. App. 2022).

The Tribe appealed the decision of the Water Quality Appeals Board to uphold the Arizona Department of Environmental Quality's (ADEQ) renewal of a copper mining permit which authorizes a new copper mining site to discharge polluted water into impaired waterways. The Tribe argued those facilities were new sources, not existing sources under the Clean Water Act (CWA), and therefore should be subject to a new source analysis. ADEQ argued that all the sources in the new copper mining site were existing sources under the CWA because the mining site had existed since 1912, and any additional structure or facility was an existing source because the independently applicable standard applies to the "mine as a whole." The Arizona Court of Appeal reviewed the case de novo and vacated the superior court's orders based on several findings. First, a source producing pollution from copper mining activities may only be a new source if it was constructed after 1982, and the only applicable independent standard applies to mines. Second, the term "mine" does not mean "mine as a whole," but rather it means "a place where work or other activity related

to the extraction, removal, or recovery of metal ore is being [or will be] conducted." Third, although the new facility is integrated with the existing plant, it is substantially separate to be classified as a new source by essentially replacing the existing source. The appellate court found that the new copper mining sites were new sources and vacated the superior court's decision of the Board, upholding the validity of the permit.

*City of Salisbury, N. Carolina v. FERC*, 36 F.4th 1164 (D.C. Cir. 2022).

The city of Salisbury ("City") petitioned for review of the Federal Energy Regulatory Commission's (FERC) approval of a flood protection plan for City's pump station that required cooperation with State's conditions. City contended that the three clauses of the State's condition required the improvements and derived benefits to the pump station to be consistent with City's design, and FERC's approval was arbitrarily decided. The D.C. Circuit Court of Appeals held that FERC correctly interpreted the State's condition and reasonably approved the protection plan. First, City wrongly interpreted the condition to require physical modifications and benefits to be consistent with City's design. Only the improved access to the pump station must be consistent with City's design. Second, City alleged that FERC's approval was arbitrary because it failed to consider whether the protection plan would violate the State's design, siting, electrical and building codes, and whether the protection plan was consistent with sound engineering practices. The Federal Power Act reflects a division of authority between federal and state law. Thus, FERC correctly declined to assess whether the protection plan complied with state law. City's contention that FERC failed to consider sound engineering practices is irrelevant, because the federal statute that City relies on applies to "water power projects" and City's pump station exists to help turn river water into drinking water. Accordingly, the court held that FERC's approval was correctly interpreted and reasonably approved.

*California State Water Res. Control Bd. v. FERC*, 43 F.4th 920 (9th Cir. 2022).

State petitioned for review of Federal Energy Regulation Commission's (FERC) decisions that State waived water quality certification authority granted under Section 401 of the Clean Water Act by participating in a coordinated withdrawal-and-resubmission scheme. FERC accepted this practice for many years prior, but after a decision by the D.C. Court of Appeals which held that a state's engagement in a formal withdrawal-and-

resubmission agreement constituted a failure or refusal to act under the meaning of Section 401, FERC changed its position. The Ninth Circuit Court of Appeals granted the petition and vacated FERC's orders. In the three challenged orders, FERC reasoned that the dispositive factor in determining a waiver of authority is whether there is substantial evidence that shows the state coordinated with the applicant to afford itself more time to decide a certification request. The three projects that were the subjects of the challenged orders were each operating under interim after their expiration and acquired licenses yearly without ever furnishing the needed documentation for completion of the certification process. The court reasoned that this evidenced that the project applicants acted in their interests to delay the process rather than the state. The evidence also failed to show that the state acted cooperatively with the project applicants, but rather indicated that the state merely acquiesced in the project applicant's unilateral decision to withdraw. Accordingly, the court held that substantial evidence did not support FERC's orders and vacated the orders.

*3G AG, LLC v. Idaho Dept. of Water Res*., 509 P.3d 1180 (Idaho 2022).

The Idaho Department of Water Resources ("IDWR") denied Company's application for transfer of water rights. The application sought to unstack attached ground and surface water rights. Company appealed to the Idaho Supreme Court. Because approving the application would enlarge Company's water rights beyond their current allotment, the Court affirmed IDWR's denial thereof and held Company was not entitled to enlargement beyond its current rights. Company sought to separate or unstack the surface and groundwater rights on owned property to use the excess to irrigate a neighboring field. For a transfer that unstacks water rights to be approved under Idaho statutory law the transferor must show that such transfer would not: (1) injure other water rights; (2) constitute an "enlargement of use" of the original right; (3) be contrary to the conservation of water, or (4) be contrary to the local public interest. Company failed prominently on the second element because its new usage of the water, if approved, would have approximately doubled the acreage of land subject to that right, without ever acquiring more property or more water. Such increased coverage without subsequent increased water rights is textbook "enlargement" according to Idaho statutory and common law. The Court held that enlargement refers to an expansion of an existing water right's beneficial use—even when overlapped with separate water rights on the same property—including, but not limited to, a rise in the acreage

irrigated by such right. Since Company was increasing its irrigated acreage from a preexisting right, it was enlarging that right, and therefore violating IDWR's requirements for approved new usage.

*State*

*Lonsk v. Middlesex Water Co.*, No. 21CV19808 (EP) (ESK), 2022 WL 16552921 (D.N.J. Oct. 31, 2022).

(Not reported).

A Class of New Jersey citizens sued Defendants 3M Company (3M) and Middlesex Water Company (MWC) for concerns over perfluorooctanoic acid (PFOA) contamination. The Class alleged that PFOA manufactured and distributed by 3M in New Jersey contaminated the MWC water treatment plant, which supplied its drinking water. The Class sued MWC for negligence and 3M for negligence, nuisance, and trespass. Defendants moved to dismiss the claims on the grounds that there was no evidence to support the Class's claims. The Court found the Class adequately pled its negligence claims against MWC because (1) MWC had a duty of care to the Class to reasonably provide water, (2) it breached that duty by failing to promptly notify the Class of the contamination and remediate the contamination, (3) its breach of duty was reasonably foreseeable to cause injury by exposing the class to PFOA, and (4) the Class incurred costs to obtain alternative water sources. The Court also found a causal connection between 3M PFOA manufacturing and the contamination based on the extent of 3M's PFOA manufacturing, 3M's knowledge of the persistence of PFOA when released in the environment, and the composition of the PFOA found in the Class's water consistent with 3M PFOA production. The Court thus concluded that the Class adequately pled its claims of negligence, nuisance, and trespass against 3M. Accordingly, the Court denied Defendants' motions to dismiss.

*Baker Ranches, Inc. v. Zinke*, No. 318CV00261RFBCLB, 2022 WL 4017059 (D. Nev. Sept. 1, 2022).

Landowners owned land irrigated by the Snake and Baker Creeks located within Great Basin National Park. National Park Service (NPS) prevented Landowners from fixing a leaky pipeline in Snake Creek and removing obstacles that impeded the flow of Baker Creek. Landowners sued the federal government, arguing that the 1866 and 1891 Acts gave them a right-of-way to remove the obstacles in Baker Creek and fix the Snake Creek

Pipeline. The District Court of Nevada found that under the 1886 Act, Landowners possessed a vested right to use the water of Snake Creek. However, the court further found that a vested water right does not mean that one has a right-of-way over a water conveyance located on federal land. The 1866 Act only recognized a right-of-way over pre-installed ditches and canals, not natural channels of water. Therefore, under the 1866 Act, Landowners had no right-of-way over the actual natural channel of Snake Creek. Even if Landowners had access to the natural channel, the court found that they would still lack a right-of-way over the pipeline because the pipeline is a man-made structure and not a natural channel. The court also found that Landowners did not have a right-of-way under the 1891 Act because the Landowners and their predecessors did not follow the Act's procedural requirements. In regard to Baker Creek, the court found that while Landowners possessed a vested right to use the Creek's water, the 1866 Act did not give them a right-of-way over the natural channel. In removing the obstacles, landowners were not trying to remove material from a canal or a ditch. Instead, they were extracting obstructions from the actual creek. Because Landowners did not have a right-of-way over the creek, the court found that NPS could bar Landowners from removing the obstructions.

*Weatherford Int'l, LLC v. City of Midland,* 652 S.W.3d 905 (Tex. App. 2022).

Property Owner filed a second amended petition against City for recovery costs incurred under the Solid Waste Disposal Act (SWDA) from a contaminated well water located on the property. The trial court dismissed the Property Owner's claim for lack of subject-matter jurisdiction. The Court of Appeals affirmed this order. The appellate court reasoned that Property Owner failed to raise a genuine issue of material fact to overcome the trial court's lack of subject-matter jurisdiction and dismissal. Property Owner failed to address whether the SWDA's governmental immunity waiver provision applies to any alleged act by City. The SWDA waives governmental immunity if a governmental subdivision, such as City, is responsible for solid waste. However, Property Owner's pleading allegations were premised on the City's operation of a domestic sewer system—not the city's disposal of solid waste. Therefore, the SWDA waiver of immunity does not apply to the allegations that formed the basis of Property Owner's claims. For these reasons, the appellate court affirmed the order of the trial court.

*Stone v. High Mountain Mining Co.*, No. 19-cv-1246-WJM-STV, 2022 WL 4129398 (D. Colo. 2022 Sept. 12, 2022).

Stone, Rusan, and Murrow ("the individuals") sued High Mountain Mining Company ("High Mountain") under the citizen suit provision of the Clean Water Act ("CWA"). They alleged that High Mountain is discharging pollutants from their property into Middle Fork Lake without a permit. To prove this violation the individuals must prove High Mountain: (1) discharged (2) a pollutant (3) into navigable waters (4) from a point source (5) without a permit. There is no debate as to whether High Mountain obtained a permit; it did not. Additionally, there is no debate surrounding whether Middle Fork Lake is navigable water. The argument surrounds the point source element. This is because while the pollutants are coming from a "point source," in this case a pipe or other vessel discharging pollutants from High Mountain, these pollutants flow into groundwater, and not directly into Middle Fork Lake. Thus, the Court had to decide if pollutants traveling through groundwater are the equivalent of a direct discharge from a point source. The Court found that in this case, it is equivalent by using seven factors found in a previous decision. Only three of those factors came into play in this case because High Mountain did not present any evidence against the other four factors. Those three factors are: (1) distance traveled, (2) transit time, and (3) nature of the material through which the pollutants travel. The Court found that all three of these factors weigh in the individuals' favor and thus the groundwater does count as a point source. All five elements of the above-mentioned violations were met, and the Court ruled in favor of the individuals.

*Scheiber Ranch Properties, LLP v. City of Lincoln*, C091038, 2022 WL 4244011 (Cal. Ct. Sept. 15, 2022).

Scheiber Ranch Properties, LLP ("Business") and a trust ("Trust") sued the City of Lincoln ("City") after learning that City allegedly approved large development projects and would construct new wells, some of which were to be located within a mile of Business' and Trust's properties, which would decline their groundwater Basin resources. Business and Trust sought judicial declaration regarding City's rights to pump groundwater from the Basin via the anticipated new wells. City filed demurrers to Business' complaints, arguing that the claims were not ripe since they relied on City's potential plans to build new wells. The trial court sustained the demurrers based on the finding that the claims were not ripe for adjudication since the proposed wells had not been built yet and they might

never be built. The California Court of Appeal reviewed the case de novo and affirmed the trial court's decision based on several findings. First, the court cannot decide on City's appropriative rights because such rights depend on an actual taking of water, and here there is only the speculation of the potential taking of water. Second, neither Business nor Trust demonstrates that they would suffer hardship in the absence of an immediate judicial determination. Third, the court cannot decide on City's prescriptive rights since that requires a finding that City diverted some definite quantity of groundwater through the hypothetical new wells. The appellate court affirmed the trial court's judgment in sustaining the demurrers without leave to amend.

*Office of the State Eng'r v. Romero*, 521 P. 3d 56 (Sept. 26, 2022).

A landowner ("Landowner") sued New Mexico ("State") over a water rights declaration associated with a railroad's well for livestock purposes. Landowner sued on the basis that the usage of livestock right preserved 70% of his Railroad Right of water usage. State argued that because Landowner did not show evidence of water usage for railroad purposes, Landowner forfeited his larger Railroad Right. The Supreme Court of New Mexico affirmed the Court of Appeals' finding on the recognition of partial forfeiture of unused water based on several findings. First, the court determined that the role of forfeiture advanced the policy of beneficial use of water. Second, surface water forfeiture provisions explicitly allow for partial forfeiture, and the court determined that surface and groundwater forfeiture provisions must be read together; therefore, there is a legislative intent to provide for partial forfeiture of groundwater. Third, in absence of continuing beneficial use, the court determined that forfeiture is allowed as a penalty for nonuse in absence of deliberate waste. The court allowed for partial forfeiture of Landowner's unused water to return to the public and be subject to State's appropriation.

*City of San Buenavntura v. United Water Conservation District*, 79 Cal. App. 5th 110, 294 Cal. Rptr. 3d 491 (2022).

The City of San Buenaventura ("City") sued the United Water Conservation District ("District") because District charged Municipal and Industrial ("M&I") users three times as much as Agricultural ("Ag") users for groundwater extraction. City, an M&I user, challenged the constitutionality of Section 75594 of the Water Code, which required a minimum 3:1 groundwater rate extraction ratio between M&I and Ag users.

City argued (1) the ground water extraction rates, which District charged for water year 2019-2020, were "not allocated to City/M&I users in a manner that "bore a reasonable relationship to City's burdens on or benefits from District's activities," as article XIII C of the Constitution of California requires; therefore, the charges are taxes subject to voter approval under Proposition 26; and (2) Section 75594 of the Water Code was facially unconstitutional. See *Humphreville v. City of Los Angeles* (2020) 58 Cal. App. 5th 115, 122, 272 Cal. Rptr. 3d (Establishes test for exceptions to Proposition 26's definition of "tax" subject to voter approval). The trial court ruled in favor of City on both theories and the California Second District Court of Appeal affirmed. The appellate court found that (1) Independent review, a more rigid standard than rational basis, is the proper standard of review because the relevant proposition (Proposition 26) amended article XIII C of the Constitution of California in a series of voter initiatives designed to limit local governments' authority to tax without voter approval; (2) under the independent review standard, Section 75594 is facially unconstitutional; and (3) the test that replaces Section 75594 for ratio justifications is the "fair or reasonable relationship" test.

*Citizens for Higgins Lake Legal Levels v. Roscommon Cnty. Bd. of Comm'rs*, No. 353969, 2022 WL 815328 (Mich. Ct. App. Mar. 17, 2022).

Nonprofit sued for a writ of mandamus against Roscommon County Board of Commissioners ("Commissioners") based on a 1982 court order which provided for minimum and maximum lake levels and required that those responsible make "every reasonable effort" to take into account environmental factors to maintain the lake levels. The Department of Environment, Great Lakes, and Energy ("EGLE") requested to be joined in the suit as an interested party, and, while not directly implicated in the suit, the trial court agreed and joined EGLE. The trial court dismissed Nonprofit's claims as it determined that (1) the Commissioners' duties were discretionary and not ministerial, (2) maintaining the dam at the minimum levels could be impracticable and require Commissioners to violate the dam permit, and (3) the suggested "water banking" method would require Commissioners to exceed maximum water levels on the lake. Nonprofit appealed and the Court of Appeals of Michigan reversed the trial court's decision. The court found that the 1982 court order, establishing legal levels, was ministerial and not discretionary because it only prescribed that Commissioners maintain lake levels considering several environmental factors, and not that Commissioners could deviate from the prescribed

levels because of those factors. Additionally, the court held that if maintaining the required lake level was impracticable, the proper action was to seek an adjustment rather than deviate without court permission. Finally, the court affirmed the trial court's decision to join EGLE as an interested party. Based on those findings, the court reversed in part, affirmed in part, and remanded the case back to trial court for further proceedings.

*California Water Curtailment Cases*, 83 Cal. App. 5th 164, 299 Cal. Rptr. 3d 352, *as modified on denial of reh'g* (Sept. 29, 2022).

The State Water Resources Control Board ("Board") appealed from a judgment issuing peremptory writs of mandate. Board alleged, due to drought conditions and insufficient water to service priority of rights, that it maintained authority to curtail diversion or use of water by pre-1914 appropriative water rights holders under Water Code § 1052(a). The court of appeals disagreed and affirmed the trial court's judgment against Board. First, the court spoke to the proper construction of §1052(a), which states "[t]he diversion or use of water subject to this division other than as authorized in this division is a trespass." Accordingly, while the statute grants Board the right to factually determine whether pre-1914 appropriative water right claims are invalid or excessive in scope, it does not grant Board the power to curtail pre-1914 appropriative water rights solely on the basis that there will be insufficient water to service these rights. Board holds the authority to adopt emergency regulations when water is not available, but not preemptively as they acted in this case.

*Adobe Whitewater Club of New Mexico v. New Mexico State Game Comm'n*, 519 P. 3d 46 (Sept. 1, 2022).

Conservationists, along with other non-profit organizations and corporations, sought a writ of prohibitory mandamus to challenge newly enacted regulations that limited the public's access to water located on private property. The Commission enacted a series of regulations granting landowners the right to obtain certificates, which permitted closing public access to areas of public water that flowed over private property. Essentially, these regulations closed access to "'the riverbed or streambed or lakebed' located on private property." The issue before the Supreme Court of New Mexico was "whether the right to recreate and fish in public water also allow[ed] the public the right to touch the privately owned beds below those waters." The court held that these regulations were an

"unconstitutional infringement on the public's right to use public water" and that Commission "lacked the legislative authority" to enact such regulation. The court determined these regulations were a violation because the public's easement rights "to use the waters for the enjoyment of fishing and recreation," are superior to any riparian interest in the stream beds. The easement rights were limited to those "reasonably necessary to the utilization of the water itself" and any use had to be of "minimal impact" to the riverbeds and banks. This remains a state issue because "public access to waters for the purposes of recreational uses, is a matter of state law" because "states retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title." The court explained the federal navigability test is irrelevant in determining the "scope of public use of public waters."

*Solvay Specialty Polymers USA, LLC v. Paulsboro Ref. Co., LLC*, No. A-3981-19, 2022 WL 4392064 (N.J. Super. Ct. App. Div. Sept. 23, 2022).

Defendant appealed from an order of the Chancery Division directing Defendant to give Plaintiff physical access to Plaintiff's property to conduct environmental sampling of polyfluoroalkyl substance (PFAS) contaminants pursuant to N.J.S.A. 58:10B-16. Plaintiff argued that, because Defendant does not have an obligation to remove PFAS contaminants from Plaintiff's property, the trial court improperly awarded relief under N.J.S.A. 58:10B-16. Accordingly, the court of appeals reversed the trial court decision. Physical access to Plaintiff's property must be "reasonable and necessary to remediate contamination" under N.J.S.A. 58:10B-16(2). Although Defendant was obligated by the Department of Environmental Protection (DEP) Directive to identify the nature, extent, source, and location of PFAS contaminants, physical access was not necessary to identify other potential sources of PFAS contamination. Furthermore, Defendant satisfied its obligation to the Directive by documenting the possibility of PFAS contaminants from sources other than Plaintiff's property. Accordingly, the court of appeals reversed the decision of the trial court.

## LAND

*Easement*

*Hood v. Poorman*, 519 P.3d 769 (Idaho 2022).

Irrigation ditch Users appealed after seeking declaratory and injunctive relief for their ditch maintenance and damages. Landowners counterclaimed, arguing interference with property rights, declaratory and injunctive relief, and civil trespass. The district court granted Users a motion for partial summary judgment, and after a bench trial, declared the rights of the parties and awarded damages to Landowners. On appeal, the Supreme Court of Idaho found that Users unreasonably accessed the ditch when alternative routes existed. Additionally, the Supreme Court of Idaho found that the district court erred when it: (1) permanently enjoined Users from accessing these unreasonable routes, absent threatened or actual irreparable injury; (2) enjoined Users from conducting emergency ditch maintenance; (3) limited Users to conducting maintenance one week in March and one week in September; and (4) placed the burden of proof on Users to show the removal of an apple tree within the right-of-way on Landowners' property was reasonable. However, the Supreme Court of Idaho did find that the District Court correctly ruled to enjoin Users from unreasonably accessing the ditch, and Users were not permitted to remove culverts from the ditch. In this case, neither declaratory nor injunctive relief could run with the land. Accordingly, the Supreme Court affirmed in part, reversed in part, and remanded to the district court.

*Hall Ponderosa, LLC v. State*, 345 So. 3d 537 (La. App. 2 Cir. 2022).

Landowners sought declaratory relief against Louisiana to be named the owner of certain land along the Red River. Company was added as a defendant. The central concern was "the movement of the Red River in 1945" because it determined the owner of the disputed land and influenced all other issues before the court. Because the six issues before the court were findings of fact, the appeals court reviewed whether the trial court reasonably used its discretion. First, after reviewing all the expert testimony and evidence, the court affirmed the trial court's conclusion that State's expert was more persuasive in concluding that a second avulsion occurred. Second, the court held that testimony at trial reasonably supported that Company "openly and continuously possessed" the land during the "pertinent time period" of possession, which was from 1976 to 2010. Third, the court held that the "last remnant channel and low water mark" were "on

the descending bank of Oxbow," and therefore, the State owned no land subject to this litigation. Further, the court found that the remaining defendants owned any land to which they held title, except the land adjudicated to Company. Fourth, because State's witness was not present at a hearing for examination regarding his invoices and fees, the court reversed the amount of expert fees and remanded to the trial court for a contradictory hearing. Fifth, because the legal description included descriptions of the property in 1926 and 1952, and a survey of the last remnant channel, it was compliant with Louisiana code and there was no error. Sixth, because Landowners did not dispute the trespass, only the amount, the trial court was in the best position to determine damages and did not abuse its discretion.

*Other Use*

*In re Est. of Renz*, No. 08-21-00042-CV, 2022 WL 17721604 (Tex. App. Dec. 15, 2022).

(Not reported in SW Reporter).

Executor filed a motion to enforce against Heir's over a dispute involving the language of a mineral deed granted after settlement action over a contested will. The trial Court read the will in favor of Executor, granting them only mineral rights through the mineral deed and not surface rights. The ruling was appealed to the Court of Appeals of Texas. Appellants argued that the deed was misinterpreted. The Court of Appeals ruled that the mineral deed did not convey surface rights for several reasons. First, Texas courts construe the words of a contract in the context of the whole contract, with the goal of harmonizing any inconsistencies with the intent of the document as a whole. The Court used both the settlement agreement and the deed to determine that surface rights were never intended to be given. Second, if the mineral deed conveyed surface rights, the additional surface deed that was drafted would have been redundant, leading to the conclusion that surface rights were never meant to be conveyed in the mineral deed. The Court of Appeals affirmed.

*Hahn v ConocoPhillips Co.*, No. 13-21-00310-CV, 2022 WL 17351596 (Tex. App. Dec. 1, 2022).

(Not reported in SW Reporter).

Non-possessory Royalty Interest ("NPRI") Owner sued Lessor, alleging failure to pay full royalties from oil and gas exploration. NPRI Owner

appealed to the Court of Appeals of Texas, claiming the court erred in determining the royalty interest owed to NPRI Owner and in ruling that NPRI Owner must pay Lessor's attorney's fees. The Court of Appeals agreed with NPRI Owner and accordingly ruled that he was owed more royalties than calculated by the lower Court for several reasons. First, the resources here were pooled, and an executive cannot bind an NPRI to a pooling provision without the NPRI owner's consent, which was not given here. Second, Lessor's argument that NPRI Owner was not being underpaid for his royalties was improperly raised under the UDJA to award attorney's fees instead of as a counterclaim. The Court reversed.

*State ex rel. Tureau v. BEPCO, L.P.*, 2021-0856 (La. 10/1/22).

(Not reported in Reporter)

Property owner sued oil and gas companies seeking injunctive relief for the destruction of property caused by oil and gas production ventures. A Louisiana statute provided affected landowners the opportunity to sue oil and gas companies in such situations if the Commissioner of Conservation failed to do so. Oil and gas companies argued that the suit did not come in a timely manner and should not be allowed. Oil and gas companies also argued that Property Owner did not adequately bring a cause of action. Property owner argued that the legislation did not include a prescriptive period and therefore his claim should not be subject to prescription. Further, there was a cause of action because oil and gas companies violated conservation laws. The court ruled in favor of property owner. The court held that the relevant legislation did not include a prescriptive period, and oil and gas companies' potential violation of conservation laws was enough to establish a cause of action.

*Davis v. COG Operating, LLC*, 658 S.W.3d 784 (Tex. App. Dec. 6, 2022).

Successors sued heirs alleging ownership of a portion of the NPRI contained in a 1939 warranty deed. Successors alleged that they owned a one-fourth portion of the NPRI as outlined in the 1939 deed. The court ruled that the parties were operating under the estate misconception because (1) the deed was conveyed at the time when the estate misconception was prevalent, (2) 1/32 is a multiple of 1/8, and (3) the presence of a double fraction. This indicated that the parties were operating under the estate misconception. The 1939 deed also expressly reserved a royalty interest for the successors. Therefore, the conveyance was subject to the NPRI and the

successors were entitled to that portion of the NPRI. The court reversed its granting of summary judgment in favor of heirs and granted summary judgment in favor of successors.

*Marquette ORRI Holdings, LLC v. Ascent Res.-Utica, LLC*, 169 Ohio St. 3d 1430, N.E.3d 199.

Holders of overriding royalty interests under previous oil and gas leases sued lessee under later oil and gas leases for breach of contract on the extension and renewal clause. The Court of Appeals held that there was no privity of contract between holders and lessees based on several findings. First, the lessees were not parties to the original leases or the overriding royalty interest assignments. Second, the lessees never assumed these obligations; therefore, the extensions and renewal clauses were not binding on lessees since there was no privity of contract. The Court of Appeals affirmed the decision of the trial court and held that the holder's sole assignment of error is without merit.

*Adams v. Adient US LLC*, No. 1:20-cv-01197, slip op. 2022 WL 4131768 (W.D. Tenn. Sept. 12, 2022).

Property Owners ("Owners") sued Manufacturers after Manufacturers contaminated the drinking water and airspace on their land. Property Owners sued under theories of (1) negligence, gross negligence, and negligence per se, (2) intentional infliction of emotional distress, (3) negligent infliction of emotional distress, (4) trespass, (5) public nuisance, (6) private nuisance, (7) breach of duty to warn, (8) battery, (9) assault, (10) common law strict liability, (11) punitive damages, (12) injunctive relief, and (13) successor liability. Manufacturers removed the case to federal court claiming diversity jurisdiction and Class Action jurisdiction, then moved to dismiss all the claims. The Court denied Manufacturer's motions to all but count 1, and counts 2 and 3, as they apply to business entities based on the following findings. First, Manufacturers had a duty regarding contamination of the property. Second, the Tennessee environmental statutes do not provide a private cause of action or class of persons meant to be protected. Third, a reasonable person would not be able to cope with the stress caused by the contamination of their drinking water and air; however, those Owners which are corporations are not able to recover for emotional distress. Fourth, setting in motion a force that will damage another's property is trespass. Fifth, Owners could show unique property damage. Sixth, Owners could show an unreasonable and substantial invasion of their

property. Seventh, Manufacturers could have anticipated the type of harm alleged in the complaints and intentionally disposed of toxic waste in such a way that caused harm. Ninth, Manufacturers' dumping of large quantities of highly toxic chemical waste was an abnormally dangerous activity, and Manufacturers knew or should have known of the unsafe conditions and behaved recklessly. Eleventh, there is sufficient continuity between the two corporations for successor liability. The Court denied Manufacturers' motion to dismiss on all but two claims.

*Lyons Properties, Ltd. v. Mitra Elisha Simanian, D.D.S., Inc.*, B299230, 2022 WL 5239125 (Cal. App. 2nd Dist. Oct. 6, 2022).

Lessee is appealing a judgment in favor of Lessor in the California Second District Court of Appeals. The trial court held for Lessor in finding that the Lessee was not constructively evicted due to the Lessor's failure to disclose a forty-year-old septic leak (which was more than thirty feet underground and released Benzene, Toluene, Ethylbenzene, and Xylene) that was later cleaned up to almost non-detectable levels. Lessee contended the trial court erred in applying a de minimis exception to the California Health and Safety Code § 25359.7 which required disclosure of "any" hazardous substance, regardless of the amount. The appellate court held that while the Lessee was right that there was no de minimis exception to the statute, the Lessee failed to show any harm as a result of the failure to disclose and cannot prevail on a constructive eviction claim. The Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSSA") was designed to promote the timely clean-up of hazardous waste sites and is meant to hold those accountable for spills for any damages resulting from them. HSSA § 25359.7 provides that "any owner of nonresidential real property who knows, or has reasonable cause to believe, that any release of hazardous substance has come to be located on or beneath that real property shall prior to the lease, or rental of the real property provide written notice…". However, due to the failure to show that the Lessee was harmed, the appellate court affirmed the trial court's findings.

*Fonzi v Brown*, 202 N.E. 3d 604 (Ohio 2022).

Mineral Owners sued Surface Owners after Surface Owners sought to declare the mineral interests abandoned. Mineral Owners sued under a theory of quiet title and Surface Owners argued under theories of (1) quiet title; and (2) common-law abandonment. Competing motions for summary judgment were filed, and Mineral Owners appealed the trial courts finding

of summary judgment in favor of Surface Owners. The Seventh District Court of Appeals reversed the trial court's decision and granted summary judgment in favor of the mineral owners. Under the Dormant Mineral Act, one successfully gains mineral interests through abandonment only if (1) 20 years have passed without a saving event; and (2) proper notice has been given. Surface Owners failed to exercise reasonable due diligence in their search for potential heirs to the mineral interests before using service by publication, as required by the Dormant Mineral Act. This was the case because they failed to search the last known county of residence of the original mineral interest owner and instead chose only to search in the county the mineral interest was located in. The Supreme Court affirmed the Appellate Courts decision.

*Yates Energy Corp. v. Broadway Nat'l Bank, Tr. of Mary Frances Evers Tr.*, No. 04-17-00310-CV, 2022 WL 3047107 (Tex. Ct. App. Aug. 3, 2022).

A group of siblings received mineral interests in fee simple by way of trust in 2005. However, the trust mistakenly conveyed the mineral interests in fee simple to Sibling Four, rather than the intended life estate interest. A correction mineral deed was filed in 2006, but without Sibling Four's signature. In 2012, Sibling Four conveyed his mineral interest to Yates Energy Corporation ("Yates"), who then assigned parts of the interests acquired to varying companies. In 2013, a second correction mineral deed was executed, signed by Sibling Four, to correct the error. After the death of Sibling Four, Broadway National Bank Trust ("Trust") sued Yates and Yates assignees. Trust argued that the interests conveyed were only a life estate, and thus these interests were terminated upon the death of Sibling Four. Yates counterclaimed that (1) it did not have actual or constructive notice of the remainderman's claim to the life estate and that (2) Yates is a bona fide purchaser. On remand from the Texas Supreme Court, the Appellate court affirmed summary judgment against Yates and reversed the summary judgments as to the remaining companies. Yates failed to prove that it was a bona fide purchaser because it had actual notice of the 2006 correction deed. It was immaterial that the deed was unenforceable at that time, it still provided actual notice of a potential claim. The remaining companies did not have actual or constructive notice of the 2006 correction deed because the deed was not present in the chain of title. The Appellate Court remanded to the trial court for further proceedings to determine whether the remaining companies were bona fide purchasers and entitled to mineral interests after the death of Sibling Four.

*Mehaffy v. Clark*, 2022 Ark. App. 268, 646 S.W.3d 651 (2022).

Lessor 1 sued Lessor 2, alleging ownership of a larger percentage of mineral interests than he was currently receiving royalties for. The Lessors received interest from two brothers who received property from the same company by quit claim deeds recorded on the same day. Undivided and unreserved mineral interests were granted to the brothers. Lessor 1 sued under a theory of quiet title, and Lessor 2 counterclaimed under a theory of adverse possession. The trial court erred in finding that the intent of the original parties to the deeds conveying mineral interests could not be determined. Lessor 2 failed to prove that the deed filed, granting their mineral interests, was filed prior to the deed granting Lessor 1's mineral interests. The Court of Appeals of Arkansas reasoned that the deeds, filed the same day, were intended to split the mineral interests evenly between the two deeds. The Court held in favor of Lessor 1.

## ELECTRICITY

### *Traditional Generation*

*Delaware Riverkeeper Network v. FERC*, 45 F.4th 104 (D.C. Cir. Aug. 2, 2022).

Delaware Riverkeeper Network ("Nonprofit") challenged Federal Energy Regulatory Commission's (FERC) approval of the Aldephia Gateway Project ("Project"). The Project entailed the acquisition of an existing pipeline system in Pennsylvania and Delaware, as well as an extension of the pipeline and construction of facilities to operate the pipeline. Nonprofit challenged: (1) FERC's finding of a market need; (2) the sufficiency of FERC's environmental review; and (3) the constitutionality of FERC's preemption of the state and local authorities' ability to protect public health. Nonprofit appealed the administrative decision of FERC to the D.C. Court of Appeals. The court held for FERC. First, the Nonprofit's reports of overbuilding and future demand did not overcome the market need and established concrete obligations to purchase natural gas by precedent agreements provided by the project. The Updated Certificate Policy Statement of FERC, which stated that prospectively other evidence should be examined in addition to precedent agreements, was immaterial because the application was filed prior to the update. Second, Nonprofit failed to prove FERC's decision to let the Project continue after the environmental review was arbitrary and capricious. The court held that

FERC's decision was well-reasoned and properly discussed the relevant issues. Third, Nonprofit failed to raise a constitutional claim before the agency prior to appeal, and therefore, forfeited argument on such grounds. The court affirmed the administrative decision of FERC.

*Renewable Generation*

*In re Application of Maui Elec. Co., Ltd*., 506 P.3d 192 (Hawaii 2022).

Community Group sought review of Public Utility Commission's ("Commission") approval of power purchase agreement for renewable energy from solar-plus battery plan to electric company, following a competitive bidding process. Community Group alleged that Commission failed to (1) evaluate the use of the same counsel by the winning bidder under a "rule of reason" Sherman Act standard and (2) fulfill their public trust duties by deferring some decisions to other agencies with jurisdiction. The Supreme Court of Hawaii rejected both arguments and upheld the approval of Commission's power purchase agreement. First, the court declined to inject additional antitrust standards because state statutes already provide a framework for protecting the public interest. As such, the court held that Commission fulfilled their obligations—as provided by the state statutes—to protect and promote the justified use of resources through a balanced analysis that included an evidentiary hearing and consideration of the state's ambitious renewable energy goals. Furthermore, Community Group failed to present precedent of antitrust standards applied in public utility power purchase agreement approval proceedings and the state statutes already required assessment of anticompetitive practices. Thus, while required to perform a public interest analysis—which the court held they did—Commission was not required to use antitrust standards to do so. Second, the statutory duties of Commission demand adaptable core principles of balancing protection and utilization of public. The court declined to infuse water or land trust jurisprudence into the power purchase agreement approval context and instead focused on statutory trust principles. For lack of tangible evidence of a reasonable threat, Commission's factor-balancing within the statutory framework was sufficient. Further, deference to the jurisdiction and expertise of other agencies did not constitute an abandonment of duty, as is customary and within Commission's discretion. Thus, Commission satisfied its public trust obligation. The court held that Commission lawfully and dutifully approved the power purchase agreement.

*Rate*

*Appalachian Voices v. State Corp. Comm'n*, 879 S.E.2d 35 (Va. 2022).

Appalachian Voices ("Environmental Organization") appealed a State Corporation Commission ("SCC") order approving a petition by Power Company to increase electric rates in order to purchase CO2 emission allowances. The cap-and-trade market program permits electric utility companies to purchase the right to emit a certain amount of CO2. The emission allowances can be purchased through auctions or through an approved secondary market. Environmental Organization contended that Power Company should have reduced its emissions rather than purchasing allowances for said emissions. An electric utility company, under state regulation, may pass on this cost to its customers when the costs are necessary to comply with environmental laws. Environmental Organization argued that the costs weren't fully necessary because a reasonable reduction in emissions would reduce the allowances required. Additionally, Power Company purchased excess emissions to provide a buffer for customers. However, the court read the term "necessary" in light of the surrounding language and found that it was necessary for Power Company in this case to purchase allowances in order to be in compliance with the regulation. Further, the court found that Power Company owed a duty to provide reliable service to its customers under state law, so purchasing excess emissions allowances to safeguard against surges in demand was reasonable. Further, the main point of the program is to reduce emissions by certain specified dates, not necessarily within the first round of auctions. Finally, the court pointed to another regulation requiring Power Company to provide SCC with a least-cost renewable energy plan. Thus, litigating the issue here when a plan has already been requested under a separate proceeding would be less effective, especially considering the court's interpretation of what costs are deemed necessary. In light of those considerations, the court ruled in favor of Power Company and upheld the rate increase.

*Belmont Mun. Light Dep't v. FERC*, 38 F.4th 173 (D.C. Cir. 2022).

Several entities petitioned for review of orders of the Federal Energy Regulatory Commission's (FERC) approval of the Inventoried Energy Program (IEP), which compensated energy generators for keeping excess inventory on hand to mitigate risks caused by winter weather stress on power grids. Petitioners argued that FERC's approval was arbitrary and capricious because IEP included compensation for coal, hydroelectric,

biomass, and nuclear generators that already maintained excess inventory as part of their standard operating practices. The D.C. Circuit Court of Appeals upheld FERC's approval in part, and denied in part on the inclusion of coal, hydroelectric, biomass, and nuclear because the approval was arbitrary and capricious. First, FERC neglected its duties to provide a reasoned analysis of petitioners' argument that IEP is overly inclusive and will give windfall payments to coal, hydroelectric, biomass, and nuclear generators by dismissing the argument on grounds that the eligibility for IEP is appropriate because it provides "similar compensation for similar service." Second, FERC's approval is inconsistent with past decisions and its longstanding policy that rate incentives must show a "connection between the incentive and the conduct meant to be induced." In 2016, FERC denied a proposal to compensate generators, because the compensation would not change the behavior of the generators. Further, IED does nothing more but award past behavior, which does not induce future efficiency or benefit consumers. FERC did not address this change in position, which demonstrated a lack of reasoned decision-making. Thus, the court held that FERC's approval of the inclusion of coal, hydroelectric, biomass, and nuclear generators was arbitrary and capricious; however, the approval of the other components of IED was reasonable.

## TECHNOLOGY AND BUSINESS

### *Patents / Intellectual Property*

*Finite Resources, Ltd. v. DTE Methane Resources, LLC*, 44 F.4th 680 (7th Cir. 2022).

Coal mine owners in Illinois sued permit holders for using a vacuum pump to extract methane from the mine through permit holder's adjacent property. Mine owners sued under claims of conversion, trespass, accounting, and common law unitization; these claims center on the overall allegation that the permit holder's use of a vacuum pump resulted in damage or waste and therefore violated mine owner's correlative rights. Permit holders removed the case to Federal Court and moved for summary judgment. The district court granted permit holder's motion, and mine owners appealed. The Seventh Circuit concluded the case centered on two "core principles of oil and gas law–the rule of capture and correlative rights." Mine owner acknowledged the rule of capture governs coal mine methane and did not claim to possess "absolute" ownership rights in the mine's methane. But mine owner maintained that correlative rights negated the rule of capture in this case because of the alleged damage and risk.

However, the Seventh Circuit reasoned that because the Illinois Department of Natural Resources, which regulates oil and gas in that state, issued a vacuum permit to permit holder and never revoked the permit or sanctioned mine owners during its ten-years of usage, there was no reason to believe correlative rights should control. The Seventh Circuit held the rule of capture controls and "the doctrine of correlative rights does not prevent the use of vacuum pumps or otherwise vitiate the application of the rule in this case." The court declined to certify the question to the Illinois Supreme Court of whether the correlative rights doctrine prevents the use of vacuum pumps to extract methane.

*Cameron Int'l Corp. v. Nitro Fluids, L.L.C.*, No. 2021-1183, 2022 WL 636099 (Fed. Cir. Mar. 4, 2022).

This case arose out of a dispute between Oil & Gas Equipment Company-1 ("Company-1") and Oil & Gas Equipment Company-2 ("Company-2") about a patent for fracturing manifold systems and methods. The Patent Trial and Appeal Board upheld the patentability of Company-1's claims eighteen and eleven through fourteen while holding that claims one, three, four, eight, seventeen, and five were unpatentable or anticipated by another patent. Company-1 appealed as it pertains to the claims found unpatentable and Company-2 appealed on the claims found patentable. The case moved to the United States Court of Appeals, Federal Circuit and the standard of review was de novo. First, Company-1 argued that the Board did not define fracturing manifold properly and should have restricted the definition to those supplying only to individual wells rather than multiple. Second, Company-1 challenged the Board's broader definition of fracturing tree. Finally, Company-1 contended that the prior patent did not contemplate that a single, rigid piped, fluid pathway connected the fracturing manifold and tree. Alternatively, Company-2 disagreed with the Board's definition of fracturing manifold requiring "one or more valves." First, the court found that specifications in the prior patent at issue consistently considered multiple fracturing trees. Second, the court agreed with the Board and found that a fracturing tree could have a wide range of compositions and did not have to solely relate to the process of fracturing. Additionally, the court found that the prior patent, having one line going from the manifold and tree in its diagram, did contemplate a single, rigid piped pathway between the two. The court also rejected Company-2's argument regarding the valve requirement, finding that expert testimony, publications, and the patent at issue consistently described the

manifolds as having at least one valve. Thus, the court affirmed the Board's decision on all claims.

## ENVIRONMENTAL REGULATION

*Federal*

*In re Deepwater Horizon Belo Cases*, No. 3:19cv963-MCR-HTC, 2022 WL 17734414 (N.D. Fla. Dec. 15, 2022).

(Not reported in Federal Reporter).

Plaintiffs ("Workers") worked on the Deepwater Horizon cleanup effort for BP. Workers sued BP under a toxic tort theory, alleging the work for BP resulted in chronic sinusitis and ocular disease. Workers filed a spoliation motion. BP filed a motion for summary judgment and a motion to exclude Worker's expert testimony. The Court granted the motion to exclude and denied the spoliation motion for several reasons. First, Worker's expert did not meet the reliable and relevant requirement because it did not identify a harmful dose of the chemicals that could cause the medical conditions, nor did it identify a specific chemical that caused these effects, and no reliable methodology was used. Worker's expert's methodology was not reliable because he did not support his opinion by using at least one of the methods required by the Eleventh Circuit: (1) epidemiological evidence, (2) dose-response relationship, and (3) background risk of the disease. Second, a spoliation motion requires intentional destruction, mutilation, alteration, or concealment of evidence. BP simply did not do any testing, no actual evidence was destroyed, and BP had no duty to collect evidence. Third, an expert is required to establish general causation, which is essential to a toxic tort case. Accordingly, the Court granted BP's motion for summary judgment.

*Center for Biological Diversity v. Dep't of the Interior*, No. 22-cv-1716 (TSC), 2022 WL 16833967 (D.D.C. Nov. 9, 2022).

(Not reported in Federal Reporter).

Environmental Organizations sued the Department of Interior ("Department") challenging the Department's approval of approximately 4,000 applications for permits to drill ("APDs"). Environmental Organizations argued that the approval of the APDs violated the National Environmental Policy Act ("NEPA"), the Endangered Species Act

("ESA"), and the Federal Land Policy and Management Act ("FLPMA"). Environmental Organizations specifically argued that the Department failed to adequately consider the cumulative impact of greenhouse gases that would result from oil and gas production in the relevant regions. Environmental Organizations sought to vacate the existing APDs and enjoin the Department from approving more. Drilling Companies, Oil and Gas Producers, Energy Companies, Trade Associations, and the State of Wyoming sought to intervene as of right to protect issued APDs. The United States District Court for the District of Columbia granted the motion to intervene, holding that all parties demonstrated the necessary Article III standing and Rule 24(a) factors. Specifically, the court held that the parties would suffer an injury if the ADPs they had previously granted were vacated and were thus entitled to defend their interests in the suit.

*Suncor Energy (U.S.A.), Inc. v. United States Env't Prot. Agency*, 50 F.4th 1339 (10th Cir. 2022).

Suncor Energy, Inc. (Suncor) owned and operated two adjacent oil refining operations in Commerce City, Colorado. It applied to the EPA for two extensions, one for each operation, of the Clean Air Act's "small refineries" exemption from its Renewable Fuel Standard Program (Program). The EPA asked Suncor for information regarding the level of integration between the operations to determine whether they constituted one large refinery rather than two small ones. Suncor refused to provide this information, arguing that the level of integration was irrelevant in granting an extension and that the sole test was the daily average crude oil throughout at each refinery. The EPA then conducted its own research into the operations and denied the extension, concluding that the operations had become so integrated since Suncor acquired them that they now functioned as a single, large refinery. Suncor then filed a petition for review, arguing that the operations meet the definition of "small refinery" irrespective of their integration, and even if the EPA can consider their integration, it did so arbitrarily and capriciously.

The United States 10th Circuit Court of Appeals found that the Clean Air Act does not define the term "refinery," and the EPA's regulatory definition was ambiguous as applied because Suncor's operations could reasonably be considered one or two refineries under the definition. The EPA therefore had discretion to consider integration in determining whether the operations constituted one refinery. However, because the EPA did not reference its definition of "facility," which its definition of "refinery" incorporates, and

because it did not establish a bright line rule on incorporation, the EPA acted arbitrarily and capriciously in denying the extension. The court thus vacated the denial and remanded the case back to the EPA for proceedings consistent with the opinion.

*Yaw v. Del. River Basin Comm'n*, 49 F.4th 302, (3d Cir. 2022).

A coalition of parties comprising of state senators, a party caucus, and multiple municipalities ("Coalition") brought suit challenging the Delaware River Basin Commission's ("Commission") ban on hydraulic fracturing in the Delaware River Basin. Coalition sought declaratory relief. For injuries, Coalition asserted that (1) State senators have standing based on a legislative injury because the Commission's actions diminished their legislative powers, (2) Municipalities have standing because the ban precludes them from pursuing economic opportunities available to nearby areas, and (3) all three have standing because the ban affects their abilities to carry out fiduciary duties as trustees of the state public resources under the Environmental Rights Amendment to the state constitution. The district court rejected each theory, and Coalition appealed, arguing the court erred in its findings. The Court of Appeals for the Third Circuit affirmed the district court's decision. For the legislative injury theory, the court held that state senators lacked individual standing to assert "institutional injuries belonging to the legislature as a whole." The court rejected the economic theory because the injuries alleged were too old or speculative. Coalition pointed to a municipality's single instance of missed economic development as sufficient to sustain the theory, but the court rejected this argument because the parties sought declaratory relief, so their theory must be based on an imminent future harm instead of a previous injury. Finally, the court rejected the resource trustee theory of standing, finding that the Coalition failed to show why the ban on fracking will cause actual harm to them in their capacities as trustees.

*Voigt v. EPA*, 46 F.4th 895, (8th Cir. 2022).

Landowners filed a petition seeking a review of their challenge to the EPA's decision to renew a Clean Air Act ("CAA") Title V operating permit for a nearby coal-fueled electricity generating station. Landowners argued the permit was not compliant with CAA because it did not account for a mine that provided the station with its coal. Landowners further argued the station was connected to a mine by a conveyer belt that the station exercised complete control over, so the two constituted one stationary

source, which would affect emissions limits prescribed by the EPA. The EPA Administrator denied the petition because Landowners did not demonstrate that the mine and station shared common control. The administrator noted that there was no framework for determining the issue and largely relied on a memo from the North Dakota Department of Health ("NDDOH") describing its environmental engineers' findings that the mine and station constituted separate sources. The administrator specifically noted that Landowners failed to rebut NDDOH's claims. Landowners argued that the administrator erred in reaching this determination because they demonstrated common control over the mine and station and were not required to respond to NNDOH's memo. The Court of Appeals for the Eight Circuit denied the petition, noting the difficulty in determining the "demonstration" requirement before concluding that the record did not support Landowners' claim of a capricious or arbitrary decision.

*Gulf Restoration Network v. Haaland*, 47 F.4th 795 (D.C. Cir. 2022).

Three environmental groups sued the U.S. Department of the Interior ("Interior") and the Bureau of Ocean Energy Management for misguidance about the environmental impact statement prepared in 2018 connected to two oil lease sales held in the Gulf of Mexico. The National Environmental Policy Act requires government agencies to prepare environmental impact statements (EISs) to establish they have given "appropriate consideration" to proposals' environmental impact. EISs are performed in three steps. First, the agency publishes a "programmatic EIS to assess 'the broad environmental consequences attendant upon a wide-ranging federal program.'" Second, the agency publishes "narrower EISs analyzing the incremental impacts of each specific action taken as part of a program." The agency may publish supplements when there are substantial changes or new circumstances. Environmentalists alleged that the Interior's EISs did not comply with the National Environmental Policy Act (NEPA). Specifically, Environmentalists argued Interior did not assess a true "no action" alternative to its leasing plan because of the assumption this development would happen regardless. Environmentalists also alleged Interior "unreasonably assumed two rules for protecting the environment would remain in effect, despite the possibility of future modifications." Finally, Environmentalists argued the Interior "unreasonably assumed all such rules would be effectively enforced, despite a report suggesting otherwise." The district court granted the Interior's motion for summary judgment. The D.C. Circuit Court affirmed in part, agreeing the Interior

reasonably assumed development was inevitable and did not need to consider whether existing rules would change. However, the court held the Interior "unreasonably refused to consider possible deficiencies in environmental enforcement" despite a report bringing them to their attention. The court affirmed in part, reversed in part, and remanded for further findings.

*San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation Dist.*, 49 F.4th 1242 (9th Cir. 2022).

Advocacy organizations sued the Bureau of Reclamation and water conservation district ("Bureau"), claiming that the Twitchell Dam they constructed to conserve water was interfering with the reproduction of Southern California Steelhead, a salmonid common to the region. The organizations argued that this interference constitutes an unlawful taking in violation of the Endangered Species Act ("ESA") and moved for declaratory relief and enjoinment. The District Court granted summary judgment in favor of the Bureau, holding that PL 774, the statute that governs Twitchell Dam's operation, does not give them the discretion to alter the dam to preserve the Steelhead due to the constricting language in PL 774. The organizations appealed, and the Ninth Circuit Court of Appeals considered the argument. The Court held that the Bureau did have discretion to operate the dam for the purpose of preserving Steelhead reproduction under PL 774 and reversed the District Court's ruling. The Court found that Congress used broad language in PL 774, and thus likely intended for the dam's operation to change as needed. Because the language of PL 774 is so broad, the dam can operate for other purposes such as preserving the Steelhead population. Additionally, the Court found that PL 774 and the ESA can work in harmony because there is no clear and convincing congressional intent that suggests the statutes cannot work together. Lastly, the court found that because the Steelhead is a potential human resource, the argument that the statute states the dam may only be "operated for human use" fails. Under the express terms of PL 774, the Bureau does have the discretion to operate Twitchell Dam for the purpose of preserving the Steelheads.

*United States v. Chem. Waste Mgmt., Inc.*, 3:22-CV-132, 2022 WL 4957567 (S.D. Ohio Oct. 4, 2022).

The EPA sued Chemical Waste Management, Inc. ("Company") and entered an unopposed motion to enter a Consent Decree under the

remediation plan, Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The EPA entered the decree as a response to Company's disposal of liquid and hazardous waste in what is known as "the Barrell Fill." CERCLA authorizes the President of the United States to provide remedial action relating to pollutants, provides that parties are responsible for response costs, and allows the EPA to implement response actions or enter settlements with responsible parties for remediation. The Southern District Court of Ohio approved and implemented the consent decree based on several findings. First, the court determined that the decree was "fair" because it was the product of contentious negotiations, positive feedback from public comments, and requires implementation of the approved clean-up plan at significant costs. Second, the court determined that the decree was "reasonable and adequate" because it ensures prompt cleanup of hazardous sites, places the burden of costs on responsible parties, and encourages settlements. Third, the court determined that the decree served the "public interest" by facilitating the restoration of the environment with contributions from the responsible parties and did so without burdening taxpayers with clean-up costs. The court granted the EPA's unopposed motion to approve and adopt the consent decree.

*W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022).

The Environmental Protection Agency (EPA) enacted a new rule under the Clean Power Plan ("Plan") in 2015, determining that the best system for emissions reduction for existing power plants was to significantly decrease electricity production, or "subsidize increased generation by natural gas, wind, or solar sources." The Plan never became effective because many parties immediately petitioned for review of the rule. In 2019, the EPA repealed the Plan, concluding that the issue of authority invoked the "Major Question Doctrine." The EPA repealed the Plan, replacing it with the Affordable Clean Energy rule. States and private parties filed petitions for review of the repeal and replacement of the rule. The Court of Appeals held that the EPA was authorized by Section 111(d) to enact the Plan. This Supreme Court reviewed whether the plan for a generational shift to reduce emissions by transitioning to "cleaner" production systems was within the authority granted to the EPA to determine the best systems for emissions reductions. The Court held that this fell under the Major Questions Doctrine, requiring "clear congressional authority." The Major Questions Doctrine requires that in certain extraordinary cases, such as this, the Court should be hesitant to grant board authority based on its interpretation of

legislative intent. The Court finds this to be the EPA asserting a "highly consequential power" beyond what Congress could reasonably have meant to have granted. The EPA attempts to enact a regulatory scheme which Congress itself has declined to enact on numerous occasions. The Court relies heavily on this fact when considering the intended authority conferred. Upon this analysis, the Court was unconvinced that Congress granted the EPA such broad authority to entirely restructure energy production systems and held that this decision remained within the power of Congress, absent a clear delegation of that power to the EPA.

Justice Gorsuch, with Justice Alito joining, concurred in the decision. Gorsuch stated that the major questions doctrine is a vital component of "clear statement" rules that protect the Constitution's separation of powers, and that the doctrine was correctly applied by the majority because of the important questions raised by EPA's Plan. Gorsuch then explained circumstances when agency action is subject to the major questions doctrine: (1) when an agency claims the power to resolve a matter of great political significance; (2) when it seeks to regulate a significant portion of the American economy; and (3) when it seeks to intrude into an area that is the domain of state law. Lastly, the concurrence set out guidelines to determine what qualifies as a clear congressional statement: (1) look to the legislative provisions the agency relies on, and if the language is "oblique or elliptical," it cannot be a clear statement; (2) examine the age and focus of the statute the agency invokes; and (3) examine the agency's past interpretations of the relevant statute.

Justice Kagan, with Justices Breyer and Sotomayor joining, dissented in the decision for several reasons. First, congress charged the EPA with intentionally broad authority to regulate potentially catastrophic issues. Second, the Court had never used the "major questions doctrine" in prior opinions, and instead had traditionally relied on ordinary statutory interpretation when a broad statute was in question. The dissent argued that it is common sense that Congress would give the EPA broad powers through Section 111 because of their expertise, and that Section 111, most naturally read, authorized EPA to develop the Clean Power Plan.

*Citizens for Clean Energy v. U.S. Dep't of the Interior*, No. 4:17-CV-00030, 2022 WL 3346373 (D. Mont. Aug. 12, 2022).

Multiple environmental groups, states, and tribes, including Citizens for Clean Energy ("CCE"), sued the Department of the Interior, Secretary of the Interior, and Bureau of Land Management ("BLM") alleging violations

of the National Environmental Policy Act ("NEPA"). CCE alleged that BLM failed to comprehensively review a federal coal leasing program, known as the Zinke Order, under NEPA standards. CCE argued that BLM did not properly analyze the environmental effects of the Zinke Order under NEPA. The Secretary of the Interior, pursuant to a new order, issued a revised coal leasing program. The CCE expected that the subsequent order would reverse the Zinke Order. It did not. Both CCE and BLM sought summary judgement from the court. The court answered two questions: (1) does the new program render this controversy moot; and (2) if not, was the previous NEPA analysis of the Zinke Order sufficient? In answering the first question, the court ruled that the subsequent order did not render the controversy moot. The court reasoned that a case becomes moot only when it is impossible for a court to grant any relief whatsoever to the prevailing party. The new program left ongoing, detrimental environmental effects; thus, because the new program failed to return CEE to status quo, relief could be granted. In resolving the second issue, the court determined that BLM's previous NEPA analysis was not sufficient. The analysis failed to consider all direct, indirect, and cumulative impacts. Additionally, BLM did not consider the changes the Zinke Order made to the coal leasing program as opposed to the new program. The court found for CEE and ordered BLM to sufficiently analyze the Zinke Order under NEPA standards. In the meantime, the original order remained in effect.

*Ctr. for Biological Diversity v. Bernhardt*, 595 F. Supp. 3d 890 (D. Ariz. 2022).

Three organizations, including the Center for Biological Diversity ("CBD"), filed a motion for summary judgement. The matter challenged the conclusion contained in the U.S. Fish and Wildlife Service's ("FWS") 2014 Biological Opinion. The opinion determined that certain groundwater pumping near the San Pedro River Basin did not threaten certain fish species. Additionally, CBD asked the court to supplement the Administrative Record ("AR") with additional documents. CBD wishes to expand the AR by five documents: (1) an Easement Report ("ER"); (2) an Arizona Republic Article ("Article"); (3) a Cochise Conservation and Recharge Network Presentation ("Presentation"); and (5) the Prucha Hydrology Report ("Report"). CBD was required to show that the new documents point out an entirely new subject matter in order to be added to the AR. The court found that the ER, Presentation, and the Report to the AR should be added. Next, the court reviewed the AR under the arbitrary

and capricious standard. The court stated that it would not vacate FWS's decision unless: "(1) FWS relied on factors which Congress has not intended it to consider, (2) ignored an important aspect of the problem, (3) explained its decision with no evidence, or (4) provided an explanation that is so implausible that it . . . [was not] the product of agency expertise." The court found issue with FWS's calculation for easement credit, stating that it ignored an important aspect of the problem. Additionally, the court found that FWS's groundwater mitigation was "fundamentally flawed." The court ordered FWS to reinitiate formal consultation due to these oversights. The court denied in part and granted in part the motion for summary judgement. There has been an appeal in this case, but there is no alternative ruling.

*350 Montana v. Haaland,* 29 F.4th 1158 (9th Cir. 2022).

Environmental groups sued the Interior Department for allegedly violating the National Environmental Policy Act (NEPA) when it approved the expansion of a coal mine in Montana without investigating its potential environmental harm. The expansion of the coal mine was expected to emit approximately 190 million tons of greenhouse gases, amounting to .44% of the total greenhouse gases emitted globally each year during the eleven and a half years the mine was expected to operate, according to the published Environmental Assessment (EA). The report also included the greenhouse gases emissions "as a percentage of the United States' annual emissions and Montana's annual emissions, but these domestic calculations only included the emissions generated by extracting and transporting the coal. Emissions from combustion of the coal—which account for 97 percent of the projected GHG [(greenhouse gas)] emissions from the project—were not included in the domestic calculations." The Interior, as a result, declared that the expansion would not significantly impact the environment. The U.S. District Court for the District of Montana granted summary judgment largely in favor of the Interior, and the environmental groups appealed. The Ninth Circuit concluded the Interior violated NEPA by "failing to provide a 'convincing statement of reasons to explain why [the] project's impacts are insignificant.'" However, the Ninth Circuit ruled that the Interior was not required to utilize the environmental groups' preferred metric to "quantify the environmental harms stemming from the project's GHG emissions." The Ninth Circuit remanded the case to the district court for additional fact-finding to determine whether the Interior must publish an environmental impact statement. Note that this ruling has since been amended and superseded by 50 F. 4th 1254.

*Audubon Soc'y of Portland v. Haaland,* 40 F.4th 967 (9th Cir. 2022)

Conservation groups sued the Fish and Wildlife Service ("FWS") in response to FWS's proposed conservation plan for five refuges in Michigan. The trial court granted summary judgement in favor of FWS on challenges to two aspects of their conservation plan, and the two respective conservation groups appealed to the Ninth Circuit Court of Appeals. First, Center for Biological Diversity ("CBD") disputed the plan in two refuges on the grounds of pesticide usage allowances and that FWS did not present a lower-pesticide alternative or properly consider the effect of pesticides on the environment. Second, Western Watersheds challenged the plan in one refuge because of the grazing allowances and an experimental grazing season from March to mid-April, alleging both a lack of lower-grazing alternatives and proper consideration of the environmental impact. The court examined whether FWS's conservation plan was "arbitrary or capricious or otherwise unlawful" and focused on the decision-making process rather than on scientific determinations. The conservation groups each sued based on three separate conservation Acts. Regarding the pesticide claims, the court found that FWS did review an adequate range of alternatives because it looked at four alternatives for one refuge and three for another, all with differing prescriptions for pesticide use that fell within the purposes and needs of the plan. Further, FWS took years and considered many public comments when determining that agricultural activity should continue on the refuges, and thus pest control was necessary. Additionally, the court found that FWS presented sufficient environmental reasons in favor of regulated grazing, and thus a reduced grazing alternative wasn't necessary. The court also ruled that FWS properly considered the potential positive and negative environmental effects of grazing. Thus, the court affirmed the trial court's determinations on FWS's motion for summary judgement.

*Kern Oil & Refining Co. v. Env't Prot. Agency*, No. 21-71246, 2022 WL 3369528 (9th Cir. Aug. 16, 2022).

In 2017, the Environmental Protection Agency (EPA) granted Refiner an exemption to the Renewable Fuel Standard ("RFS") program found in the Clean Air Act. Refiner petitioned the 9th Circuit Court of Appeals for review of this order because the EPA granted the exemption *ex post facto* and did not compensate Refiner for the costs they accumulated complying with the RFS from which they were exempted. Such costs take the form of Renewable Identification Numbers ("RINs"), which oil refineries must

redeem to the EPA yearly if they are subject to RFS. These RINs expire, and Refiner sought reimbursement of the RINs that expired between the time they used them to comply with RFS before they attained the exemption to the time the EPA granted the exemption. The EPA's default remedy is simply to reimburse all unexpired RINs. The court held that the statute was ambiguous as to a specific remedy, and that given such ambiguity, the court gave the EPA's reading of the statute some level of deference. Holding that the default remedy of refunding only unexpired RINs reflected a persuasive interpretation of the statute, the court reasoned that the EPA, as creator and manager of the entire RIN system, had a responsibility to minimize RIN market disruptions, while still affording participants some financial relief upon granting an exemption, and that EPA's default remedy adequately fulfilled that responsibility. The court also held that the EPA was free to deviate from that default if they wished but was under no obligation to do so. However, because the EPA exceeded the 90-day decision period required by the statute in granting Refiner's exemption, it was obligated to either include the elongated time window in its default remedy or provide a reasonable justification for the delay.

*Oglala Sioux Tribe v. Nuclear Regul. Comm'n*, 45 F. 4th 291 (D.C. Cir. 2022).

The Oglala Sioux Tribe ("Tribe") sought review of the Nuclear Regulatory Commission's ("Commission") grant of a course material license to Powertech for the purpose of extracting uranium. Tribe alleges through numerous challenges that the Commission failed to meet requirements of the (1) National Environmental Policy Act ("NEPA") and (2) National Historic Preservations Acts ("NHPA"). Tribe challenged Commission's compliance with the required scoping of the project's environmental impact and failure to satisfy NEPA by inadequately addressing Tribe's cultural resources in the EIS. Tribe faults Commission's allowance of an "act first and comply later" attitude towards its analysis of hydrogeologic data alongside a failure to analyze the impacts of preexisting boreholes in the area. Tribe raised arguments challenging the treatment of disposal of byproduct generated by extraction: (1) Powertech was incorrectly licensed though it lacked a "site-specific disposal plan for byproduct material," (2) failure to include a NEPA analysis regarding byproduct material, and (3) failure to include an analysis of Powertech's failure to secure a disposal contract before beginning operations. Tribe's final challenge was regarding the adequacy of the mitigation analysis. Tribe

alleges a series of challenges under the NHPA including: (1) the agency did not adequately consult with Tribe, (2) the agency failed to survey the property, and (3) the agency allowed Powertech to begin operations before identifying historic properties due to its failure to survey. The court denied remand on each challenge. Justifications for denial by the court included adequate efforts made to gather environmental impact data, Tribe's own contribution to its dissatisfactions with the surveying process, reasonable reliance on industry practices, and reasonable inquiries made by Commission's investigations. The court found Commission to have satisfied its obligations under statutory authority, therefore rendering remand "pointless."

*United States v. IMC E. Corp.*, No. 18-CV-3818, 2022 WL 4134321 (E.D.N.Y. Sept. 12, 2022).

The United States ("Government") entered into a settlement agreement with IMC Eastern Corp. and Island Transportation Corp. ("Companies") after suing under CERCLA for contamination. Government and Companies sought a consent judgment reflecting the settlement agreement. Government published notice of the proposed consent judgment and a third-party objected, arguing the settlement is premature and based on an incomplete record. The Court found the settlement was fair, reasonable, and faithful to the objectives of CERCLA for several reasons. First, the settlement was procedurally fair because the parties conducted a mediation that included expert testimony from both sides, negotiations continued for over a year, and defendants were put on notice that settlement negotiations were occurring. Second, the settlement was substantively fair because it would require Companies to pay more than their monetary liability for the contamination based on expert analysis. Third, the settlement agreement was reasonable because it satisfactorily compensates the public for actual and anticipated costs by requiring Companies to pay more than their actual liability, and it effectively weighed the relative strength of the parties litigating positions. The Court approved the consent judgment.

*State*

*Am. Chemistry Council v. Dep't of Toxic Substances Control*, 86 Cal. App. 5th 146, 302 Cal. Rptr. 3d 52, 57 (2022), review denied (Mar. 29, 2023).

Trade Association and Coating Manufacturer appealed the trial court's determination that the Department of Toxic Substances Control

("Department") acted within its statutory authority and complied with California's Administrative Procedure Act ("APA") when it enacted regulation categorizing spray foam systems as a priority product under California's Green Chemistry law. Trade Association and Coating Manufacturer argued that the Department exceeded its statutory authority and violated the APA by designating spray foam systems as a priority product. Specifically, Trade Association and Coating Manufacturer argued that the Department failed to identify a threshold level of exposure and improperly combined two categories into a single classification. Trade Association and Coating Manufacturer also claimed that the Department violated the APA by failing to account for the costs imposed by the regulation and failing to propose reasonable alternatives. The Department cross-appealed the trial court's ruling, arguing that the regulation violated the California Environmental Quality Act ("CEQA"). The Department argued that the trial court's ruling was incorrect and untimely under the statute of limitations. The California Fifth District Court of Appeal held that Department did not exceed its authority because there was no requirement to identify a threshold level of exposure to prioritize a product. Further, the court held that there was no statutory or legal basis for Trade Association and Coating Manufacturer's contention that the Department may not include more than one category in a single prioritization process. The court also held that even if it assumed the Department violated the APA in its analysis of costs and benefits, Trade Association and Coating Manufacturer failed to show how the error would impact its decision. The court found that Department complied with its obligation to consider reasonable alternatives, but none existed. Finally, the court reversed the trial court's decision that the Department violated the CEQA's finding that the determination was barred by a statute of limitations.

*Env't Def. Fund v. Colorado Dep't of Pub. Health & Env't*, 524 P.3d 334 (Colo. Ct. App. Nov. 3, 2022).

Two environmental advocacy organizations (the "Organizations") appeal the Colorado District Court's order granting summary judgment to three environmental agencies in Colorado (the "Agencies"). The Colorado Court of Appeals affirmed the District Court's ruling. Colorado's Governor signed two bills, House Bill 19-1261, and Senate Bill 19-096, in the hopes of reducing statewide greenhouse gas ("GHG") emissions and combating climate change. H.B. 1261 sets forth goals to achieve a reduction in statewide GHG emissions from the years 2025 to 2050. The bill states that

Agencies have a responsibility to timely set forth rules and regulations that will allow them to meet these goals. S.B. 96 provides that Agencies must collect data and take various steps to ensure that they are monitoring their gas emissions, and by July 1, 2020, Agencies shall implement measures based on this data that would allow the state to meet its GHG emissions reduction goals. Organizations sued Agencies for their failure to abide by the above-mentioned laws and deadline. Agencies filed a cross-motion for summary judgment, stating that S.B. 96 was ambiguous and only required them to have data collected that would be used to inform the rules and regulations of H.B. 1261, not to have the rules completely set out. The Court analyzed the true meaning of the provision and ultimately concluded that S.B. 96 was ambiguous; thus, either party may be correct in their perception of the law. Ultimately, the Court held for the Agencies, reasoning that the Organizations' interpretation of the law was impractical.

*Atl. Richfield Co. v. California Reg'l Water Quality Control Bd., Cent. Valley Region*, 85 Cal. App. 5th 338 (Cal. Ct. App. 2022).

An oil company, Atlantic Richfield Company ("ARCO") appeals the California trial court's judgment in favor of California Regional Water Quality Control Board, Central Valley Region (the "Board"). In a cleanup order, the Regional Board directed ARCO to remediate hazardous waste associated with an abandoned mine that was owned by a subsidiary of ARCO. The Court was then tasked with deciding whether the cleanup order was applicable based on whether ARCO, a parent company, was liable for pollution caused by its subsidiary. The Court ultimately decided ARCO was liable, stating that ARCO "directed" the subsidiary and had "eccentric control" of the subsidiary's mining operations specifically related to pollution. ARCO appealed, contending: (1) the facts of this case were improperly applied; (2) Board abused its discretion by failing to exclude certain expert testimony as speculative; (3) ARCO's due process rights had been violated; and (4) the cleanup order erroneously imposed the joint and several liability of ARCO. The Court of Appeals rejected ARCO's appeal and affirmed the trial court. First, the Court applied the facts of this case to the standard set forth in the *Bestfoods* case. The Court of Appeals ruled that the District Court appropriately applied the *Bestfoods* standard when it found that an agent of ARCO exerted direct control over the subsidiary's mining process that caused the pollution. Therefore, ARCO was deemed to be liable for the pollution caused by its subsidiary. Additionally, the Court of Appeals held: (1) the Board did not abuse its discretion by failing to

exclude certain expert testimony; (2) ARCO's due process rights were not violated, as ARCO did not persuade the Court of this fact; and (3) the cleanup order did not erroneously impose the joint and several liability of ARCO, as ARCO misinterpreted the source in which it based its argument.

*Pennsylvania Env't Def. Found. v. Commonwealth*, 285 A.3d 702 (Pa. Commw. Ct. Nov. 8, 2022).

The Pennsylvania Environmental Defense Foundation (Foundation) sued the Commonwealth of Pennsylvania (Pennsylvania), Governor Tom Wolf (Wolf), the Pennsylvania House of Representatives and Senate (General Assembly), and individual legislators over amendments to Pennsylvania's Fiscal Code. The Foundation argued that the amendments, which planned for expansion of snowmobile and all-terrain vehicle (ATV) trails in state forests and parks, violated Pennsylvania's prohibition under the Environmental Rights Amendment to its state constitution from unreasonably causing likely or actual deterioration of public natural resources. The court first sustained Wolf's preliminary objection of misjoinder, agreeing with him that signing the amendments into law did not make him a proper party to a constitutional challenge. Furthermore, the court found that it could rule on the merits of said challenge without him, and that other "passing references" to his conduct in the Foundation's petition did not make him responsible for the legislation.

For the constitutional challenge, Pennsylvania and the General Assembly argued the Foundation failed to state a claim upon which relief could be granted. The court noted that the Foundation failed to list the Department of Conservation and Natural Resources, the agency charged with enforcing the amendments, as a party. Therefore, the Foundation could only prevail on a facial challenge to the amendments' constitutionality. To do that, the Foundation would have to show the amendments "cannot be valid under any set of circumstances." The Foundation failed to do so, instead claiming that ATVs are loud, while their trails compact the soil, fragment the forest, and concentrate water flow. The court found these allegations too "broad and conclusory" to accept as true in the pleading stage. The Foundation, therefore, failed to allege facts to show the amendments were facially unconstitutional, so the court sustained Pennsylvania and the General Assembly's objections and dismissed the petition for review.

*City of Lincoln v. County of Placer*, No. 2:18-cv-00087-KJM-AC, 2022 WL 4280158 (E.D. Cal. Sept. 15, 2022).

The City of Lincoln ("City") owned a landfill located within the County of Placer, California ("County"). City maintained that County disposed of hazardous waste in the landfill. City further argued that it incurred substantial costs after a Cleanup and Abatement Order issued by the California Regional Water Quality Control Board forced City to take action to prevent further contamination of the landfill and its surrounding areas. City filed six claims against County, including an equitable indemnity and contribution claim as well as a separate contribution claim under Section 113 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). County responded to these claims by filing 12(c) motions for judgments on the pleadings. The Eastern District Court of California granted County's motion relating to City's equitable indemnity claim because there was no case law suggesting a plaintiff can raise an equitable indemnity claim against a defendant before the plaintiff has incurred damages stemming from a settlement or judgment. Moreover, the court found that there was no case law supporting City's argument that their compliance with the Cleanup Order was a type of settlement that could serve as the basis for an equitable indemnity claim. The court also granted County's motion relating to City's contribution claim because City failed to allege that County was joint and severally liable for costs related to the cleanup. The court further rejected City's CERCLA Section 113 contribution claim because a state-issued Clean-Up Order is not considered a civil action under Section 106 or 107(a) of CERCLA. The court additionally rebuffed City's contention that it could gain contribution from County for the liability that City owed to the federal government in connection with another matter. The court found that because City had not been sued by the government under section 107(a) of CERCLA, it could not seek a contribution from County under section 113.

*Athletics Inv. Grp. LLC v. Dep't of Toxic Substances Control*, 83 Cal. App. 5th 953 (2022), as modified on denial of reh'g (Oct. 21, 2022).

An owner of a business neighboring a Schnitzer Steel Industries metal-shredding facility filed a petition for a writ of mandate compelling the Department of Toxic Substances (DTS) to rescind the conditional nonhazardous waste classification it granted to Schnitzer. This classification is referred to as an (f) letter because it is granted under subdivision (f) of California Code of Regulations, title 22, section

66260.200, and it allows Schnitzer to treat its waste that would otherwise be classified as hazardous as nonhazardous after it has been properly processed. After being processed, the waste still had hazardous levels of heavy metals, but was rendered immobile from the added chemicals, silicates, water, and cement. Importantly, in 1988, DTS issued its Official Policy and Procedure Number 88-6 (OPP 88-6), which broadened the scope of the (f) letters. OPP 88-6, since acknowledged as "outdated and legally incorrect," classified material as nonhazardous as long as it was nonhazardous by the time it left the facility. This allowed room for improper storage of actual hazardous waste. Plaintiff alleges that section 25150.82 of the Hazardous Waste Control Law (HWCL) (passed in 2014) imposes a mandatory duty to rescind (f) letters upon DTS. The court disagreed, finding nothing in the statutory text suggests this. Subdivision (k) of 25150.82 does not nullify (f) letters unless DTS rescinds the (f) letters or adopts alternative management standards. Likewise, subdivision (j)(3) asserts rescission as only an option DTS may take. Plaintiffs argue that the solution can be found in (j)(1), where the statute states metal shredder waste shall "be regulated pursuant to [the HWCL]." However, the (f) letters, despite being an exemption from the HWCL, are specifically provided for in the HWCL. Statutory meaning in 25150.82 is found in its requirement for DTS to undertake a detailed analysis and take "subsequent regulatory action before January 1, 2018."

*W. Virginia Highlands Conservancy, Inc. v. ERP Env't Fund, Inc.,* No. CV 3:11-0115, slip op. 2022 WL 5226026 (S.D.W. Va. Oct. 5, 2022).

Environmental groups sued ERP (successor to Patriot Coal Company) for violation of a consent decree that prohibits surface mining on all sites previously owned by Patriot Coal Company or its subsidiaries. Under the decree, surface mining that is necessary and incidental to reclamation is not prohibited. ERP acquired a license to mine two sites in the prohibited area. ERP claimed that because (1) state law requires reclaiming high wall areas to promote public safety, and (2) because the reclamation contract allowed for no-cost reclamation, surface mining of the two sites was necessary and incidental to reclamation. The Environmental groups claimed that mining was convenient, not necessary or incidental, and that the reclamation plan violated the consent decree, placing ERP in contempt of court. The court found that financial benefits were the focus of the mining project, and that the proposal did not meet the necessary or incidental requirement because it authorized mining outside of the need to generate material. The court held

that EPR was not in contempt of court, but ordered that ERP cease any plans to conduct surface mining at the two sites; were ERP to continue with the plan, it would be in contempt of court.

*Kia'I Wai o Wai'ale'ale v. Dep't of Water*, 151 Hawaii 442, 517 P.3d 725 (2022).

An environmental group challenged The Department of Water "water department" over a proposed water transmission line under the Hawaii Environmental Policy Act ("HEPA") for its failure to consider secondary impacts in its environmental assessment ("EA"). Water department proposed a relief line to help transport enough water to the community without exceeding the Hawaii water system standards' maximum allowable flow rates in the existing waterlines. In this proposal, the department had to address the environmental impacts of the line in a final EA. The group challenged that the proposal for the water relief line did not include a secondary impact study as to how the line would affect other water sources in the region, and by doing so it violated HEPA. The group also alleged that the studies conducted did not measure withdrawals from streams and secondary watersheds in the region and that the line was improperly segmented from other projects and a water treatment plant. The court granted summary judgment in favor of the department as to all the claims. The Hawaii Supreme Court held that the EA did not properly analyze secondary water impacts because it did not look beyond the physical footprint of the project site, and that any final EA must include this even if the line is meant to address constraints and provide reliability. The court held that when replacing an old water line with a new line larger in diameter, the old lines do not exempt the company from having to conduct a new EA for the larger line. The court also held that the line was improperly segmented from the rest of the waterline grid, but this is allowable when the project to install it would have occurred regardless of any other projects or waterlines in the area. The case was vacated in part, and remanded in part.

*Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt*., 36 F.4th 850 (9th Cir. 2022).

Environmental groups and the state of California sued government agencies, alleging the agencies' proposed oil well stimulation (fracking) activities violated (1) the National Environmental Policy Act (NEPA), (2) the Endangered Species Act (ESA), and (3) the Coastal Management Zone

Act (CZMA). The district court granted summary judgment in favor of the government agencies on the NEPA claim, but ruled in favor of the environmental groups on the ESA and CZMA claims. The ninth circuit affirmed in part, but reversed the district court's summary judgement of the NEPA claim. The court held that government agencies' environmental assessment (EA) failed to reach NEPA standards because the agencies did not take a "hard look" at the environmental impacts of their actions. Thus, under NEPA, the agencies should have prepared an environmental impact statement because the risks of their proposed fracking activities were unknown. In the ESA claim, the court used the Karuk Tribe test to determine whether the agencies took an "agency action," and ultimately found that the agencies took steps to authorize fracking, which qualified as "agency action." Further, the agencies had the "opportunity to change the activity for the benefit of a protected species." The court then held that the proposed fracking activities qualified as a "federal agency activity" falling within the scope of the CZMA, and the agencies should have conducted a consistency review with the California coastal management program. Accordingly, the court reversed summary judgement to the agencies on the NEPA claim, and affirmed summary judgement to the environmental groups and the state of California on the ESA and CZMA claims.

*Blackmon v. S.C. Dept. of Health and Envtl. Control*, 873 S.E.2d 774 (S.C. App. 2022).

Neighboring Property Owners appealed the South Carolina Department of Health and Environmental Control's ("Department's") issuance of agricultural permits for construction and operation of "no-discharge" proposed broiler facilities. On appeal, Property Owners argued that the Administrative Law Court erred in (1) deferring interpretation of relevant regulations to Department as to whether permittees were required to apply for a separate National Pollutant Discharge Elimination System (NPDES) permit or were allowed to avoid mandated aspects of permit evaluation; and (2) requiring Property Owners to establish actual discharges of pollutants by existing permittees. The court established the standard for deference, notwithstanding a compelling reason to otherwise differ, in matters where statute interpretation has been entrusted to that particular administrative agency. However, in reading the plain text of a regulation, deference is improper when interpretation is "arbitrary, capricious, or manifestly contrary to the statute." First on appeal, upon review of the plain language of the regulation, the court held that permittees' facilities were, by

definition, CAFOs. Moreover, it was contradictory for Department to equate and satisfy the regulation's requirement for "no potential to discharge" to a "no discharge" permit, and as such, they failed to consider and evaluate manure, litter, or process wastewater from permittees' facilitates as a circumstance for potential discharge. Second, in their statutorily mandated duty to prevent pollination of water and air, Department bypassed the case-specific evaluation and failed to consider specified factors to determine the stringency level applied in permit evaluation. Thus, their review of the proposed facilities and interpretation was arbitrary and not worthy of agency deference. Finding error in permit evaluation and regulation interpretation, the court reversed the decision to uphold the issuance of the permits and remanded the issue to Department for further evaluation pursuant to the relevant regulations.