ARNOLD & PORTER LLP

Hydraulic Fracturing Legal Update

February 11, 2014

Arnold & Porter LLP is pleased to provide this digest of judicial decisions, settlements, case filings, and other litigation- and enforcement-related documents on hydraulic fracturing and related activities around the United States. It accompanies a litigation chart that the firm has posted online and will continually update, where the cases are organized by topic and where links are found to many of the decisions and pleadings.
This digest includes cases for which there have been developments since our last litigation update. Other past hydraulic fracturing articles and advisories are available here. To be added to the free subscription list for this update service, or to send us additional decisions, complaints, or other litigation documents for posting, please e-mail Margaret Barry. You may also be interested in the Digest of Hydraulic Fracturing Cases published in January 2013 by the Center for Climate Change Law at Columbia Law School.
Arnold & Porter attorneys have a long history of counseling energy companies on regulatory compliance and defending their interests in enforcement proceedings and litigation. Information about the firm's experience with hydraulic fracturing is available here.

FEATURED DECISION

Robinson Township v. Pennsylvania, Nos. 63, 64, 72 & 73 MAP 2012 (Pa. Dec. 19, 2013; Jan. 2, 2014; Jan. 21, 2014). A plurality of the Pennsylvania Supreme Court issued a decision expansively invoking the Environmental Rights Amendment of the Pennsylvania Constitution to invalidate portions of a 2012 amendment—known as Act 13—to Pennsylvania's Oil and Gas Act. Among other things, Act 13 restricted local government regulation of hydraulic fracturing in their jurisdictions. The plurality's opinion, authored by Chief Justice Castille, held that Act 13 impermissibly commanded municipalities to ignore their obligations under the Environmental Rights Amendment and to take affirmative actions to undo existing local protections of the environment. The plurality also held that Act 13 did not meet the legislature's obligation under the Environmental Rights Amendment to enact legislation that restrained private parties from harming the environment. The plurality drew comparisons between the potential impacts of hydraulic fracturing and the significant historical environmental impacts of the "industrial exploitation of Pennsylvania's coalfields," which formed the backdrop and impetus for the passage and ratification of the Environmental Rights Amendment in 1971. Justice Baer wrote a concurring opinion indicating that he would not join the key portions of the "pioneering opinion" of the plurality, but that he would have held the Act 13 provisions unconstitutional on substantive due process grounds. Two justices authored dissenting opinions. Justice Saylor's dissent emphasized the position that the Environmental Rights Amendment conferred obligations on the "Commonwealth," and that municipalities did not obtain "a vested entitlement in their delegated authority to manage land use or the right to dictate the manner in which the General Assembly administers the Commonwealth's fiduciary obligation to the citizenry at large relative to the environment." He questioned what he viewed as the plurality's granting of standing to municipalities to vindicate individual rights. Justice Eakin joined Justice Saylor's dissent, but also authored his own, expressing "significant concern" about "the alchemy that recognizes in municipalities the ability to enforce individual constitutional rights." On January 2, 2014, attorneys for the Pennsylvania Public Utility Commission and Pennsylvania Department of Environmental Protection filed an application for reargument seeking a remand to the Commonwealth Court for further factual development. On January 21, 2014, the Pennsylvania Supreme Court affirmed the Commonwealth Court's denial of the request by the heads of the two houses of the state legislature to intervene in the Act 13 challenge. The Supreme Court said that the legislators merely sought to weigh in on the "correctness of governmental conduct," which did not supply a basis for standing. The standard for legislator standing requires that the power or authority of the legislators' offices or the "potency of their right to vote" be at stake.

DECISIONS AND SETTLEMENTS

- Civil Tort Actions

NEW CASES AND FILINGS

DECISIONS AND SETTLEMENTS

Civil Tort Actions

Reece v. AES Corp., No. CIV-12-0457-JH (E.D. Okla. Jan. 8, 2014). Plaintiffs from LeFlore County, Oklahoma alleged that they sustained personal injuries and property damage from defendants' improper handling, transporting, storage, or disposal of waste fluids from oil and gas drilling operations as well as coal combustion waste from a power plant. The federal district court for the Eastern District of Oklahoma dismissed strict liability claims against all but the owners/operators of a commercial disposal pit and dismissed the trucking companies that brought the coal and drilling fluid waste to the pit from the action entirely. Although the court rejected arguments for dismissing trespass, nuisance, and unjust enrichment claims against the oil producer defendants, the court also ruled that plaintiffs' allegations of damages were insufficient. The court gave plaintiffs 15 days to file an amended complaint with sufficient allegations of personally sustained injuries that resulted from the oil producers' conduct—and warned that this would be plaintiffs' last opportunity to amend their complaint.

Leighton v. Chesapeake Appalachia, LLC, No. 1:13–CV–2018 (W.D. Pa. Nov. 26, 2013). Landowners who had entered into an oil and gas lease with Chesapeake Appalachia, LLC commenced an action seeking damages and declaratory relief against Chesapeake Appalachia and three other entities. Plaintiffs alleged that defendants' natural gas drilling activities had resulted in the damages. Defendants sought to compel arbitration pursuant to a provision in the lease. The court preliminarily found that the claims fell within the arbitration clause's broad scope, and that under an agency theory two defendants affiliated with Chesapeake Appalachia whose interests were directly related to it could enforce the arbitration agreement. The court concluded that the fourth defendant could not enforce the arbitration agreement under either an agency or an equitable estoppel theory. The court ordered a short discovery period on the issue of whether the three defendants who were not parties to the lease were agents of Chesapeake Appalachia, and subsequent briefs on whether the information obtained in discovery altered the court's conclusions.

Hagy v. Equitable Production Co., No. 12-1926 (4th Cir. Oct. 8, 2013). In this action asserting claims for property damage and personal injury as a result of defendants' drilling operations, the Fourth Circuit affirmed the decision of the district court granting summary judgment to defendants on plaintiffs' trespass and negligence claims. The Fourth Circuit found no error in the district court's determinations that plaintiffs had released their claims against the drilling company defendant and that plaintiffs had failed to present any

evidence of negligence or trespass on the part of the defendant that had performed cementing services on wells.

Carter v. EOG Resources, Inc., No. 4:12–CV–003 (D.N.D. Oct. 4, 2013). Jereme Mortinson died in 2009 after an explosion that occurred while he was operating a fresh water truck used for oil drilling and fracking operations in North Dakota. Mortinson's common law spouse commenced a wrongful death and survival action on behalf of his estate and his heirs and next of kin, and later sought to amend the complaint to add her claims as common law spouse. The federal district court for the District of North Dakota granted her motion to amend the complaint. The court rejected defendants' arguments concerning the timeliness of the motion, finding that the amendment simply made the assertion of the common law wife's right to recover under North Dakota's wrongful death statute more explicit.

Hiser v. XTO Energy Inc., No. 4:11-cv-00517-KGB (E.D. Ark. Sept. 30, 2013). Plaintiff alleged that her home was damaged by vibrations resulting from nearby drilling activity and brought claims for negligence, nuisance, and trespass. After a jury verdict in favor of plaintiff ($100,000 in compensatory damages, $200,000 in punitive damages), defendant moved for judgment as a matter of law and for a new trial or for remittitur. The district court for the Eastern District of Arkansas denied the motion. The court concluded that there was sufficient evidence to send the punitive damages issue to the jury because plaintiff "complained early and often" about the drilling and defendant never had a construction expert examine her property or test for vibrations until after plaintiff filed her lawsuit. The court also rejected the contention that a new trial was warranted because the defendant was prejudiced by the jury's extra-record discussion of fracking. Jurors had apparently discussed fracking and had sent the court a note asking, "Were they drilling only or were they also fracking?" Defendant contended that the discussions of fracking were prejudicial because of the negative attention fracking had received in the press and other media.

Hill v. Southwestern Energy Co., No. 4:12–cv–500–DPM (E.D. Ark. Sept. 26, 2013). A group of Arkansas landowners commenced a lawsuit in the federal district court for the Eastern District of Arkansas against three companies with whom all but one of the landowners had entered into mineral rights leases. The three companies injected waste fluids from hydraulic fracturing in wells on parties owned by third parties. The landowners alleged that the waste fluids had exceeded the capacity of the wells and migrated to their properties. The court ruled that plaintiffs had standing to pursue the claims but dismissed most of the claims, including claims under the Racketeer Influenced and Corrupt Organizations Act and Arkansas Deceptive Trade Practices Act; claims of fraud, civil conspiracy, strict liability, and conversion; and a claim for breach of contract and violation of the covenant of good faith and fair dealing implicit in the mineral leases. However, the court found that plaintiffs had stated claims for trespass and unjust enrichment.

Whiteman v. Chesapeake Appalachia, L.L.C., No. 12-1790 (4th Cir. Sept. 4, 2013). The Fourth Circuit affirmed the district court's granting of summary judgment to defendant on plaintiffs' common law trespass claim. Plaintiffs owned the surface rights to 101 acres in West Virginia on which they farmed. Defendant owned mineral rights and operated three natural gas wells and installed permanent waste disposal pits on ten acres of plaintiffs' property. For trespass claims involving the rights of owners of mineral estates to enter the surface estate owner's land, West Virginia law requires that the invasion be "reasonably necessary" and that it not impose a "substantial burden." In this case, the Fourth Circuit found that the record established that the waste pits did not impose a "substantial burden" on plaintiffs' surface rights, where defendant's expert opined—and plaintiffs did not rebut—that the waste pits had not affected plaintiffs' property value at all. The Fourth Circuit also concluded that plaintiffs had failed to prove that the waste pits were not "reasonably necessary" given that the open pit disposal system was the "common and ordinary" disposal method in West Virginia at the time of the drilling and was consistent with state permitting requirements.

Magers v. Chesapeake Appalachia, LLC, No. 5:12-cv-49 (N.D. W. Va. Aug. 19, 2013; Dec. 6, 2013). Plaintiffs alleged that multiple defendants' gas drilling and storage activities on property adjacent to plaintiffs' land caused methane pollution in their well. In particular, plaintiffs alleged that the shallow gas wells of defendant CNX Gas Company, LLC (CNX) contaminated the well. The federal district court for the Northern District of West Virginia granted CNX's motion to dismiss for failure to state a claim. The court held that the statutes cited by plaintiffs as the basis for their action did not provide a private right of action to adjacent landowners. The court also held that plaintiffs had not adequately pleaded the duty and breach elements of a negligence claim. In December 2013, the court denied plaintiffs' motion to alter or amend the judgment. However, the court allowed plaintiffs to amend their complaint to recouch their negligence claim against the other defendants.

Challenges to Municipal Action

Beezley v. Broomfield, No. 2013CV30304 (Colo. Dist. Ct. Dec. 10, 2013). On December 10, 2013, a Colorado District Court enjoined the City of Broomfield from certifying the results of a recount for an election in which City voters approved a measure to amend the City's home rule charter to impose a five-year moratorium on hydraulic fracturing and the disposal of hydraulic fracturing waste. The parties agreed to place the action on hold pending the Colorado Supreme Court's determination of Hanlen vs. Gessler, another lawsuit that concerns the elections process.

Matter of Norse Energy Corp. USA v. Town of Dryden, Mot. No. 2013-604, APL-2013-00245 (N.Y. Aug. 29, 2013). The New York Court of Appeals granted leave to appeal the decision of the intermediate appellate court that held that state law did not explicitly or impliedly preempt local laws restricting hydraulic fracturing and other drilling activities. Briefing for the appeal was completed in January 2014. The date for oral argument has not been set, but it may not take place until May or June.

Challenges to Agency Action

Center for Biological Diversity v. California Department of Conservation, No. RG12652054 (Cal. Super. Ct. Jan. 13, 2014). A California Superior Court dismissed an action by four environmental groups in which they alleged that the California Division of Oil, Gas, and Geothermal Resources (CDOGGR), a division of the California Department of Conservation, had violated the California Environmental Quality Act (CEQA) by issuing permits for oil and gas drilling without analyzing the risks posed by fracturing. It found that the claims regarding CDOGGR policy and practices prior to January 1, 2015 were moot, because SB 4—the California hydraulic fracturing law passed in 2013 after the commencement of the lawsuit—and emergency regulations issued pursuant to SB 4 establish the requirements for issuing permits prior to issuance of final regulations. (SB 4 requires issuance of the final regulations by January 1, 2015.) The challenge to policy and practices after January 1, 2015 was not ripe because the final regulations had not been issued yet.

Hilcorp Energy Corp. v. Pennsylvania, EHB Docket No. 2013-155-SA-R (Pa. EHB Nov. 20, 2013). Hilcorp Energy Corp. (Hilcorp) filed a complaint and application with the Pennsylvania Environmental Hearing Board (EHB) seeking an order establishing well spacing and drilling units for more than 3,000 acres covering the Utica Shale. Hilcorp had filed a similar application with the Pennsylvania Department of Environmental Protection (PADEP), which had disclaimed authority to consider the application and directed Hilcorp to apply to the EHB. The EHB determined that it did not have original jurisdiction to issue well spacing orders. Instead, applications for such orders should be submitted to PADEP, with appeal to the EHB available after PADEP renders its determination. A concurring opinion noted that "[r]ather than re-learning how to apply this longstanding but seldom used regulatory authority to issue orders establishing well spacing and drilling units to the new circumstances involving the development of the Utica Shale," PADEP appeared to be attempting to "abdicate" its authority to the EHB. If PADEP ultimately grants Hilcorp's application, it would be the first use of force pooling in Pennsylvania in the context of horizontal hydraulic fracturing.

Impact Energy Resources, LLC v. Jewell, No. 12-1290; **Uintah County, Utah v. Jewell**, No. 12-1291 (U.S. Oct. 7, 2013). The U.S. Supreme Court denied two petitions for writs of certiorari that sought review of the Tenth Circuit's September 2012 decision that dismissed as time barred lawsuits brought by energy companies to challenge the Bureau of Land Management's decision not to lease oil and gas rights for certain parcels in Utah for which the companies had submitted the high bids. The Tenth Circuit held that the Mineral Leasing Act's 90-day statute of limitations for challenging leasing decisions started no later than February 6, 2009, the date on which the Secretary of the Interior submitted a memorandum to BLM's Utah State Director in which he memorialized the decision not to issue the leases. Plaintiffs had filed suit 90 days after February 12, 2009, the date on which a BLM official sent letters to the high bidders notifying them that the leases would not be issued.

Minard Run Oil Co. v. U.S. Forest Service, No. 12-4160 (3d Cir. Sept. 26, 2013). The Third Circuit affirmed the district court order granting summary judgment to the plaintiffs. Plaintiffs had challenged a 2009 settlement agreement between the U.S. Forest Service (USFS) and environmental groups that required USFS to conduct environmental reviews prior to authorizing new oil and gas drilling in connection with privately owned mineral rights in the Allegheny National Forest. The court rejected the argument that the district court should not have applied the law of the case doctrine with respect to the Third Circuit's September 2011 decision that upheld a preliminary injunction and held that USFS has only limited authority over privately owned mineral rights. In its September 2013 decision, the Third Circuit noted that the district court was correct that the September 2011 decision had not merely considered plaintiffs' likelihood of success on the merits but had "decisively resolved" the legal claims.

Challenges to State and Federal Laws and Regulations

Rodriguez v. Krancer, No. 3:12-cv-1458 (M.D. Pa. Oct. 23, 2013). Plaintiff, a nephrologist, challenged the provisions of Pennsylvania's Act 13 that placed restrictions on health professionals' ability to disclose information released to them about the chemical content of hydraulic fracturing fluids and waste products. On October 23, 2013, the court granted defendants' motion to dismiss on the ground that the doctor lacked standing. The court ruled that plaintiff's alleged injury was "too conjectural" to satisfy Article III's injury-in-fact requirement, noting that he had not alleged that he had needed or tried to obtain information regulated by Act 13 or that he had been required to enter into a confidentiality agreement under the Act. Nor had plaintiff shown that he had a "well founded or reasonable fear of prosecution" or that he had incurred economic losses due to Act 13's requirements. The court ruled, moreover, that plaintiff appeared to lack prudential standing to mount an overbreadth challenge to the statute. Plaintiff's attorney has indicated that he will appeal the decision.

Government Enforcement Actions

U.S. v. Stinson, No. 1:12-cr-00012-JHM-HBB (W.D. Ky. Jan. 16, 2014). The federal district court for the Western District of Kentucky sentenced two men, Charles Stinson and Ralph Dowell, and an oil well operating company, Logsdon Valley Oil Company, Inc., for criminal violations of the Safe Drinking Water Act. The two men had pleaded guilty to conspiracy to commit violations of an underground injection control (UIC) program, and the company had pleaded guilty to violation of a UIC program. EPA's press release indicated that defendants had configured piping to inject fluids brought to the surface in connection with oil production into sinkholes and that they had ignored orders to stop discharging the waste into the sinkholes. The individuals were sentenced to two years of probation, and one of the individuals must personally pay a $45,000 fine and also provide documentation that the well used for the illegal injections has been plugged and abandoned in a way that is protective of groundwater.

U.S. v. Chesapeake Appalachia, LLC, No. 5:13-cv-00170 (N.D. W. Va. Dec. 19, 2013). Chesapeake Appalachia (Chesapeake) reached an agreement with the U.S. and West Virginia over alleged violations of the Clean Water Act (CWA) and the West Virginia Water Pollution Control Act related to its natural gas extraction activities. The U.S. and West Virginia alleged that the company discharged dredged or fill material without a permit in connection with these activities. Under the terms of a consent decree lodged in the federal district court for the Northern District of West Virginia, Chesapeake will pay a $3.2 million civil penalty, half to the U.S. and half to the state. The consent decree notes that it does not impose a civil penalty in connection with Chesapeake's activities at the Blake Fork, which resulted in a December 2012 guilty plea in a federal criminal proceeding involving CWA violations. The consent decree also requires Chesapeake to purchase stream and wetland mitigation credits from mitigation banks and to undertake mitigation and restoration activities at sites that have not already been restored. The agreement sets forth steps Chesapeake must take to assure that all of the sites remain undisturbed. It also establishes a compliance protocol for existing and future surface impoundments, ponds, compressor stations, pipelines, well pads, and associated access roads, and requires a training program for Chesapeake employees and contractors to ensure CWA compliance.

Wisconsin v. Preferred Sands of Wisconsin, LLC, No. 2013 CX 000001 (Wis. Cir. Ct. Dec. 13, 2013). The State of Wisconsin and the operator of a sand mining operation that produced sand for hydraulic fracturing resolved the State's claims that the sand mine operator had violated storm water and air pollution control requirements. The stipulation and judgment entered by a Wisconsin Circuit Court require the company to pay $195,000 in five installments through 2017 as well as $5,000 in attorney fees. This was reportedly Wisconsin's first environmental enforcement action against a sand mine.

United States v. XTO Energy, Inc., No. 4:13-cv-01954-MWB (M.D. Pa. Sept. 18, 2013). The federal district court for the Middle District of Pennsylvania entered a consent decree that resolved a federal Clean Water Act enforcement action against XTO Energy, Inc. (XTO). The consent decree required payment of a civil penalty of $100,000. It also required XTO to undertake what the government estimate would be a $20-million plan to improve wastewater management practices, including by recycling flowback and produced fluid to the maximum extent practicable and restricting the waste treatment facilities at which XTO could dispose of such fluid. The settlement required XTO to implement a spill prevention plan under the oversight of EPA.

United States v. Guesman, No. 1:13 CR 113 (N.D. Ohio Aug.29, 2013) On August 29, 2013, defendant Michael Guesman pleaded guilty to violating section 309(c)(2)(A) of the Clean Water Act. The indictment charged that Guesman discharged fracking waste liquids into a storm drain that flowed into a tributary of the Mahoning River in Ohio.

Oil & Gas Lease Disputes

Henry v. Chesapeake Appalachia, L.L.C., No. 12-4090 (6th Cir. Jan. 14, 2014). The Sixth Circuit reversed a

decision by the federal district court for the Southern District of Ohio that granted a judgment against Chesapeake Appalachia that its lease with plaintiffs had expired. The Sixth Circuit agreed with Chesapeake that the term of the lease was extended by Chesapeake's filing of a Declaration and Notice of Pooled Unit (DPU) (which declared the creation of a unit that included plaintiffs' properties) a few days before the primary term of the leases expired. The court held that filing of the DPU constituted the "commencement of operations " and thus triggered the extension of the leases.

Lewis v. EnerQuest Oil and Gas, LLC, No. 12-CV-1067 (W.D. Ark. Jan. 13, 2014). Plaintiffs asked the federal district court for the Western District of Arkansas to cancel the portion of mineral leases in formations in the Chalybeat Springs Unit in Arkansas that were not producing. Plaintiffs alleged that defendants had violated their implied covenant to develop the unit. In response, defendants said that development in the formation would require horizontal wells and that other operators had spent millions of dollars drilling three such wells since June 2013 that were now abandoned or shut in. The court ruled that plaintiffs had failed to give defendants notice of the alleged breach of the implied covenant and time to comply. The court was not persuaded that plaintiffs' commencement of a proceeding in the Arkansas Oil and Gas Commission (AOGC) in 2010 to dissolve the unit provided the required notice since the hearing before AOGC took place before defendants assumed operational control over the unit.

EQT Production Co. v. Opatkiewicz, No. GD 13-013489 (Pa. Ct. Comm. Pl. Dec. 26, 2013; Jan. 6, 2014). Plaintiff, which is in the business of exploring for, developing, and producing natural gas, brought an action in July 2013 against a number of defendants who were parties to oil and gas leases with plaintiff. Plaintiff alleged that in spite of its exclusive rights under the leases, including its right to have access to the surface area of the properties in furtherance of the development of the oil and gas resources, a group of the defendants had banded together to prevent plaintiff from entering their properties in an attempt to force plaintiff to renegotiate their leases. Citing a recent amendment to Pennsylvania law that permits pooling of leases, plaintiff sought a declaration of its rights under the lease as well as injunctive relief. In December 2013, the Court of Common Pleas issued an order enjoining defendants from interfering with plaintiff's rights to enter their properties for seismic testing. The court ordered plaintiff to pay a $25,000 bond. A separately issued opinion indicated that the leases conferred the right to conduct the seismic testing and the prerequisites for a preliminary injunction had been met. The court concluded that an injunction would likely benefit the public interest. On January 10, 2014, the court agreed to reconsider the decision and scheduled a hearing for February 7.

Springer Ranch, Ltd. v. Jones, No. 04-12-00554-CV (Tex. Ct. App. Dec. 20, 2013). In a case involving the allocation of royalties from horizontal wells that cross property lines, the Texas Court of Appeals affirmed the trial court's holding that the contract required royalties from the horizontal wells to be allocated based on the productive portions of the wells underlying the parties' properties. The contract allocated royalties to the owner of the surface estate on which a well was "situated." The court concluded that the horizontal wells were "situated" on all of the properties that they traversed. The court rejected the contention that the allocation should be based on the entire length of the well, not just the productive portions of the well.

Southwestern Energy Production Co. v. Forest Resources, LLC, 2013 PA Super 307 (Pa. Super. Ct. Nov. 27, 2013). Trusts that owned land in Pennsylvania sought to invalidate oil and gas leases, alleging that they violated Pennsylvania's Guaranty Minimum Royalty Act (GMRA). The Superior Court reversed the trial court and ruled that the provisions of certain letter agreements that provided for the lessor to pay back 50 percent of royalties were to be construed as part of a single lease agreement, and that the lease, so construed, was in violation of the GMRA. Reargument was denied on February 4, 2014.

Caldwell v. Kriebel Resources Co., LLC, No. 372 WAL 2013 (Pa. Nov. 26, 2013). The Pennsylvania Supreme Court denied a request to hear an appeal from the Pennsylvania Superior Court decision dismissing landowners' attempt to terminate their oil and gas lease on the basis of the leaseholder's failure to initiate development activities in the Marcellus shale.

BP America Production Co. v. Zaffirini, No. 04-11-00550-CV (Tex. Ct. App. Nov. 7, 2013; Aug. 30, 2013). In this dispute over the construction of the bonus terms in oil and gas leases, the Texas Court of Appeals on November 7, 2013 denied the lessors' motions for rehearing and for reconsideration en banc. In its August 30 decision, the Court of Appeals had determined that the leases unambiguously created an "unallocated" bonus, with no separation consent-to-assignment fee, and that BP had not breached the contracts. The Court of Appeals also ruled that lessors were not entitled to summary judgment on BP's common law fraud, fraud-in-the-inducement, or fraud by nondisclosure claims.

Community Bank of Raymore v. Chesapeake Exploration, L.L.C., No. 08-12-00025-CV (Tex. Ct. App. Nov. 6, 2013). Plaintiff and defendants entered into four blocks of oil and gas leases covering 16,000 acres in

Texas. During the lease's primary term, defendant Chesapeake Exploration, L.L.C. (Chesapeake) drilled producing wells in one of the blocks; the deepest of the wells extended 5,672 feet below the surface. When the primary term ended, Chesapeake refused to release its rights to formations below that depth. Plaintiff sued for breach of contract. In an opinion turning on the meaning of conjunctions, the Texas Court of Appeals affirmed the district court's ruling in favor of the leaseholder defendants. The court held that the lease's "horizontal Pugh clause," which provided for termination of the lease below the base of the deepest formation from which the leaseholder was then producing oil or gas, "never sprang into life." The Pugh clause was triggered by "the expiration of the Primary Term or the conclusion of the continuous development program," and the court considered the meaning of "or," as well as the clause's interplay with other provisions of the lease and the commercial impacts, and ruled that because there had been no cessation of continuous development, the Pugh clause had not been triggered. The court also ruled that the expiration of the primary term had not triggered the lease's severance clause to break the block into 17 producing units, each separately governed by the lease's terms (which would have been to plaintiff's advantage). The court held that the lease provided that the severance clause was triggered only after the expiration of the primary term "and" any extension of the primary term. Rehearing was denied on January 15, 2014.

Liggett v. Chesapeake Exploration, L.L.C., 5:12CV2389 (N.D. Ohio Oct. 11, 2013). In 2005, Willard and Ruth Liggett put their interests in real property located in Dennison, Ohio in trusts in each of their names. Several years later they entered into oil and gas leases for the property using their personal signatures without disclosing that they held the property as trustees. They subsequently accepted payments under the leases. In 2013, they brought an action to invalidate the leases based on their signing in their personal capacities rather than as trustees. The court denied their motion for summary judgment on their ejectment claim, finding that the Liggetts had not established that defendants had possession of the property and were unlawfully keeping the Liggetts out of it. The court also granted defendants' motion for summary judgment on their request for a declaratory judgment that the leases were valid and enforceable. The court found that the Liggetts believed they had the power to enter the leases, intended to enter into the leases, and believe that they had entered the leases. The court also based its decision on the fact that the Liggetts had warranted title and entered a covenant to defend it. Because the lease was valid and enforceable, the court ruled that the Liggetts' frivolous conduct claim was without merit.

Wiley v. Triad Hunter LLC, No. 2:12-cv-00605 (S.D. Ohio Sept. 27, 2013). A group of landowners in Noble County, Ohio entered into oil and gas leases. The oil and gas rights were eventually transferred to certain Chesapeake Exploration, L.L.C. entities (Chesapeake) and Triad Hunter LLC (Triad). The leases contained identical "Paragraph 14s" entitled "Preferential Right to Renew" that provided that the landowners would give notice to the leaseholders upon receiving bona fide offers from third parties to lease the oil and gas rights, and that a leaseholder would have a 30-day period in which to advise the landowner of its agreement to match the terms of any third-party offer. Landowners brought an action against Triad (in which Chesapeake intervened) seeking, among other things, a declaration that failure to match the terms of a third-party offer would terminate and cancel the lease. On motions for summary judgment, the federal district court for the Southern District of Ohio noted that earlier decisions had interpreted the same contractual language and joined those courts in ruling the provision unambiguously stated that should the leaseholder not advise that it would match the terms of the third-party offer, the current lease would continue until it ended according to the terms of the contract. The court also granted Triad's motion to toll the terms of its leases; the leases would be tolled from the date of service to the date of final disposition of the landowners' claims.

Stewart v. Chesapeake Exploration, L.L.C., Nos. 12-4457; 12-4466; 12-4517; 13-3021 (6th Cir. Oct. 30, 2013). In a subsequent "Paragraph 14" case, the Sixth Circuit affirmed the district court's ruling in favor of defendant Chesapeake Exploration, L.L.C. in cases brought by a number of Ohio landowners. Like other courts before it, the court rejected a reading of Paragraph 14 that would have permitted the landowners to terminate their leases with Chesapeake immediately if Chesapeake declined to match third-party offers. The Sixth Circuit played down the landowners' concern that they would never be able to eject Chesapeake from their properties even if Chesapeake did not attempt to extract oil or gas. The court noted that Ohio law creates an implied obligation to perform a contract in good faith and that Chesapeake's interest in developing its oil and gas rights were aligned with the landowners'. The court stated: "We are therefore confident that, if Chesapeake declined in bad faith to explore or drill on a landowner's property, and instead sought merely to hold the property indefinitely, Ohio law would provide the landowner a remedy."

Amarado Oil Co., Ltd. v. Davis, No. 5:12cv627 (N.D. Ohio Sept. 17, 2013). Plaintiff sought to recover more than $2 million it paid for mineral leases in the Utica Shale formation with a "catastrophic title defect" that defeated defendant sellers'--and thus plaintiffs'--title. The federal district court for the Northern District of Ohio granted seller defendants' motion to dismiss in part and denied it in part. The court dismissed the breach of contract claim for breach of established contractual course of conduct, finding that plaintiff had attempted to

reject the leases after it had accepted them and after the deadline prescribed in the contract, as well as the fraud, unjust enrichment, and promissory estoppel claims. The court declined to dismiss the breach of warranty claim and the partial rescission claim insofar as it was an alternative remedy or theory for plaintiff's claim of breach of contract for failure to return the purchase price on leases that could not be held by production, which was not the subject of the motion to dismiss.

Demchak Partners L.P. v. Chesapeake Appalachia, L.L.C., No. 3:13-cv-02289 (M.D. Pa.). In late August 2013, Chesapeake Appalachia, L.L.C. (Chesapeake) reached a settlement with a group of Pennsylvania landowners who alleged that Chesapeake underpaid royalties owed to them because it deducted costs for gathering, dehydration, and compression of natural gas so that it could be delivered in "marketable form" to the interstate pipeline system. Plaintiffs moved for preliminary approval of the settlement and asked the court to certify the settlement class, and on September 11, 2013 the court issued an order granting the preliminary approval and certifying the settlement class. The terms of the settlement provide that Chesapeake would pay 55 percent of all of the post-production costs deducted from royalty payments prior to September 1, 2013, and 27.5 percent of all such deducted costs from September 1 to the effective date of the settlement (a total payment of approximately $7.5 million). In the future, class members would bear 72.5 percent of the post-production costs. Another group of Pennsylvania landowners who were pursuing similar claims against Chesapeake in arbitration moved to intervene and urged the court to reject the settlement. Chesapeake asked the court to permanently enjoin the arbitration proceedings.

Aukema v. Chesapeake Appalachia LLC, No. 3:11-cv-00489 (N.D.N.Y. Sept. 12, 2013). After reaching a settlement with approximately 200 New York landowners, Chesapeake Appalachia LLC (Chesapeake) and StatoilHydro USA Onshore Properties, Inc. (StatoilHydro) withdrew their appeal of the November 2012 ruling of the federal district court for the Northern District of New York that the State's moratorium on hydraulic fracturing did not constitute a force majeure event allowing them to extend their leases. As part of the settlement, Chesapeake and StatoilHydro agreed to terminate their leases for approximately 13,000 acres.

Brown v. Chesapeake Appalachia, LLC, No. 5:12CV71 (N.D. W. Va. Aug. 21, 2013). Plaintiff brought a putative class action seeking a declaratory judgment regarding the construction and/or validity of certain oil and gas leases held by defendant and to quiet title to the oil and gas rights associated with the leases. Defendant had notified plaintiff at the end of the five-year primary term of the lease that it was extending the lease for five years pursuant to Paragraph 19 of the lease. Plaintiff contended that Paragraph 19 did not permit defendant to unilaterally extend the lease, but merely gave defendant a "priority option" to negotiate a new lease. In August 2013, the federal district court for the Northern District of West Virginia granted summary judgment to defendant as to the meaning of Paragraph 19, ruling that the plaintiff's construction was at odds with the plain meaning of the provision because it attributed the same meaning to the words "renew" and "extend." The court also held that the defendant's reading of Paragraph 19 did not render the lease in violation of the rule against perpetuities. Plaintiff has appealed the decision.

Humberston v. Chevron U.S.A., Inc., No. 1270 WDA 2012 (Pa. Super. Ct. Aug. 20, 2013). Plaintiffs who owned approximately 133 acres in Pennsylvania and who had entered into an oil and gas lease in 2006 brought an action to quiet title and for trespass. Plaintiffs challenged defendants' right to construct and maintain an 11-acre freshwater impoundment on plaintiffs' property for storing water for use in the development of gas wells. The Pennsylvania Superior Court affirmed the dismissal of the action. In an opinion first issued as an unpublished memorandum and then subsequently issued as a published opinion upon defendant Chevron's motion, the court noted that the lease and Pennsylvania law permitted use of the surface area of the plaintiffs' property as "reasonably necessary or convenient" and that plaintiffs had not alleged that the freshwater impoundment was not necessary to the extraction of gas from the Marcellus shale. The court also rejected plaintiffs' contention that the use of hydraulic fracturing was not anticipated at the time at which they entered into the leases; the court noted, as had the trial court, that the lease explicitly provided that lessees were not restricted to using current technologies.

Other Land Use and Property Rights Disputes

Chesapeake Exploration v. Buell, No. 2:12-cv-916 (S.D. Ohio Jan. 4, 2014). The federal district court for the Southern District of Ohio certified two questions concerning the Ohio Dormant Mineral Act to the Ohio Supreme Court: (1) Is the recorded lease of a severed subsurface mineral estate a title transaction under the DMA? (2) Is the expiration of a recorded lease and the reversion of rights granted under that lease a title transaction that restarts the 20-year forfeiture clock under the DMA at the time of the reversion? The answers to these questions will determine whether an oil and gas lease held by plaintiff Chesapeake Exploration is for mineral interests that have been abandoned under the provisions of the DMA and have therefore vested in the owners of the surface rights.

Reep v. North Dakota, Nos. 20130110 & 20130111 (N.D. Dec. 26, 2013). The North Dakota Supreme Court ruled in the State's favor when it determined that the State held the mineral rights to the "shore zone," the area between the high and low watermarks. The court held that at the time of statehood, the State owned the shore zone mineral rights, and that the anti-gift clause in the State's constitution precluded ruling that ownership of the mineral rights was conferred on upland owners by a state statute that provided that an upland owner's property extended to the low watermark. The contested areas included portions of the Missouri River that run through the Bakken Shale.

Rolla v. Tank, No. 20130035 (N.D. Oct. 2, 2013). Prior to his death, a father executed two quitclaim deeds to convey part of his property in North Dakota to his son. After the father's death, ConocoPhillips ceased making production payments, believing that the son owned the mineral rights. A sister brought a quiet title action in her capacity as personal representative of her father's estate to determine ownership of the mineral estate. The North Dakota Supreme Court affirmed the district court's determination that the quitclaim deeds reserved the mineral interests to the father. The reservation of a life estate for the surface of the property therefore did not extend to the mineral interests, and the mineral interests therefore passed to the father's successors.

Wellington Resource Group LLC v. Beck Energy Corp., No. 2:12-CV-104 (S.D. Ohio Sept. 20, 2013). Beck Energy Corp. (Beck), which owned oil and gas leases in Ohio, purportedly entered into an agreement with Wellington Resource Group LLC (Wellington) in which Wellington agreed to bring prospective purchasers of the leases to Beck. Wellington entered into a co-brokerage agreement with Transact Partners International, LLC (Transact) under which Wellington would pay Transact a percentage of the total transaction price. After Beck sold the oil and gas leases and related properties to XTO Energy for approximately $85 million, Wellington told Transact that it would not pay the fee. Transact intervened in a suit by Wellington against Beck, and Beck sought to dismiss Transact's claims in part on the ground that oil and gas leases constituted real estate under Ohio law and that Transact was therefore not entitled to fees because it was not a licensed real estate broker. The federal district court for the Southern District of Ohio rejected this argument and declined to dismiss Transact's "real estate claims." After a "thorough survey of Ohio case law," the court concluded that the Ohio Supreme Court would rule that oil and gas leases are not real estate under Ohio law.

Freedom of Information Lawsuits

Ohio ex rel. Bott Law Group, LLC v. Ohio Department of Natural Resources, No. 12AP-448 (Ohio Ct. App. Nov. 26, 2013). Attorneys for an Ohio city and a water treatment plant commenced an action requesting that the Ohio Court of Appeals order the Ohio Department of Natural Resources (ODNR) to provide public records in response to requests made in 2011 and 2012. The city and water treatment plant were involved in litigation against ODNR challenging provisions of the fracking permits that had been issued to them, and the records requests were made in conjunction with this litigation. In the course of discovery in 2012, the attorneys became aware of a document that should have been produced in response to the earlier public records requests. ODNR subsequently provided more than 1,200 additional public records. The Ohio Court of Appeals agreed with the attorneys that ODNR had failed to meet its clear legal duty under the public records law when it incompletely responded to the 2011 and 2012 records requests. The court said that ODNR was required to recover e-mails that had been deleted in violation of retention policies as well as documents from the personal computers of personnel who had subsequently left ODNR. The complexity and expansiveness of the records request did not relieve ODNR of its obligations. The court did not award attorney's fees as the attorneys were, in essence, proceeding as pro se litigants who had not incurred attorney fees.

Constitutional Claims

Trail Enterprises, Inc. d/b/a Wilson Oil Co. v. City of Houston, No. 12-0906 (Tex. Oct. 18, 2013). The Texas Supreme Court denied the petition of review filed by Trail Enterprises, Inc. d/b/a Wilson Oil Co. in this inverse condemnation action. A jury had awarded Trail and other parties $17 million after the trial court found that the City of Houston's restrictions on oil and gas drilling in the vicinity of Lake Houston constituted a compensable taking. In reversing this judgment, the appellate court found that two of the three Penn Central factors weighed heavily in the City's favor because protection of water sources was a primary governmental function and Trail and the other mineral lessees demonstrated minimal reasonable and distinct investment-backed expectations.

Other Disputes

Star Insurance Company v. Bear Productions, Inc., No. CIV-12-149-RAW (E.D. Okla. Oct. 16, 2013). An

insurer filed an action seeking a declaratory judgment that it was not obligated to defend or indemnify Bear Productions, Inc. (Bear) in a class action lawsuit brought against Bear and other parties for environmental damage in connection with the transportation of oil and gas drilling waste fluids. The federal district court for the Eastern District of Oklahoma granted the insurer's motion for summary judgment, ruling that the relevant policies' pollution exclusions barred coverage. Bear had negotiated a limited exception to the exclusion for "pollution incidents," but the allegations in the underlying action did not qualify for the exception.

NEW CASES AND FILINGS

Civil Tort Actions

Key Operating & Equipment, Inc. v. Hegar, No. 13-0156 (Tex. Dec. 13, 2013). On February 4, 2014, the Texas Supreme Court heard oral arguments in this case involving a trespass claim made by property owners who alleged that a company drilling a well on an adjacent property made improper use of a roadway on their land to reach the well. A portion of the mineral estate underlying the property on which the roadway was located was subject to a pooling agreement that was signed after the mineral rights were severed from the surface estate. An intermediate appellate court ruled (reversing a 2011 ruling)

that the pooling agreement was not part of plaintiffs'-respondents' title and that the pooling agreement therefore did not authorize the company to use the road to reach a well on another property. The Texas Supreme Court agreed to review the case on December 13, 2013.

Environmental Processing Systems LC v. FPL Farming Ltd., No. 12-0905 (Tex. Jan. 7, 2014). On January 7, 2014, the Texas Supreme Court heard oral arguments in the appeal by a disposal company of an appellate court decision that revived trespass claims against the company by the owner of a rice farm. The rice farm owner alleged that subsurface migration of wastewater from an underground injection well constituted a trespass. The appellate court held that the trial court should have placed the burden of proof on the issue of consent on the disposal company, not on the owner. The oral argument raised the question of whether a subsurface trespass claim in Texas should require some showing of harm or interference with the use of property.

Antero Resources Corp. v. Strudley, Case No. 2013SC576 (Colo. Aug. 29, 2013). Defendants filed a petition for writ of certiorari in the Colorado Supreme Court seeking review of the ruling of the Colorado Court of Appeals that Lone Pine orders are not permitted as a matter of state law. *Lone Pine* orders require plaintiffs to produce prima facie evidence of their claims after initial disclosures but prior to discovery.

Challenges to Municipal Action

Colorado Oil & Gas Association v. City of Fort Collins, No. 2013CV031385 (Colo. Dist. Ct., filed Dec. 3, 2013). The Colorado Oil and Gas Association (COGA) challenged a November 2013 ballot measure in the City of Fort Collins that imposed a five-year moratorium on hydraulic fracturing. COGA asserted that state law preempts the local moratorium because there is an express or operational conflict between the local measure and Colorado's Oil and Gas Conservation Act and the rules of the Colorado Oil and Gas Conservation Commission (COGCC) implementing the Act.

Colorado Oil & Gas Association v. City of Lafayette, No. 2013CV031746 (Colo. Dist. Ct. Dec. 3, 2013). COGA also challenged a ballot question passed in November 2013 by City of Lafayette voters that bans oil and gas extraction within the City's borders. Just as in the Fort Collins case, COGA argues that state law preempts the local measure. The State indicated that it did not intend to intervene in the cases challenging the 2013 local bans. Instead, the State will await the outcome of the July 2012 COGCC lawsuit (discussed in a previous update) challenging the City of Longmont restrictions on hydraulic fracturing. A COGA spokesperson indicated that it had not filed a lawsuit challenging a ban in the City of Boulder because there are no active wells in Boulder.

Protect Our Loveland, Inc. v. City of Loveland, Case No: 2013CV31142 (Colo. Dist. Ct. Sept. 30, 2013). Plaintiff is a non-profit organization that petitioned to place on the November 2013 ballot a proposed ordinance that would establish a two-year moratorium on hydraulic fracturing in the City of Loveland, Colorado. Plaintiff sought a preliminary injunction in Colorado District Court in Larimer County after the Loveland City Council voted to take no action on the proposed ordinance pending the outcome of a lawsuit initiated by Larry Sarner, who had filed an unsuccessful protest of plaintiff's petition. Plaintiff asked the court to order the City to place the proposed ordinance on the November ballot or to hold a special election for the ordinance no later than

January 24, 2014.

Challenges to State and Federal Laws and Regulations

American Petroleum Institute v. EPA, No. 13-1289 (D.C. Cir., filed Nov. 22, 2013; consolidated Dec. 3, 2013; held in abeyance Dec. 27, 2013). Five energy industry groups filed petitions in the D.C. Circuit seeking review of EPA's rule extending deadlines for installing storage tank pollution controls to comply with the 2012 new source performance standards (NSPS) for the oil and gas sector. The five petitions have been consolidated into one proceeding. On December 27, 2013, the D.C. Circuit granted a request to hold the proceedings in abeyance pending EPA's responses to requests for reconsideration. The D.C. Circuit is also holding challenges to the 2012 NSPS in abeyance pending EPA's action on petitions for reconsideration.

Challenges to Agency Action

Wallach v. New York State Department of Environmental Conservation, Index No. 6770-2013 (N.Y. Sup. Ct. Dec. 17, 2013). The bankruptcy trustee for Norse Energy USA, which holds oil and gas lease rights to approximately 130,000 acres of land in New York, commenced an action seeking to force New York State to end the de facto moratorium on fracking in the state. Specifically, the lawsuit seeks to force the state to issue a final supplemental generic environmental impact statement (SGEIS) and findings with respect to oil and gas permits involving horizontal drilling and high-volume hydraulic fracturing. The suit also seeks a declaration that the Commissioner of the Department of Environmental Conservation (DEC) improperly delegated DEC's environmental review obligations by referring the draft SGEIS to the State Department of Health for input on potential public health impacts, and that Governor Cuomo was illegally interfering with the review process.

WildEarth Guardians et al., Petition to Department of the Interior and Bureau of Land Management Concerning Sage Grouse Habitat (Oct. 24, 2013). WildEarth Guardians, the Biodiversity Conservation Alliance, and the American Bird Conservancy formally petitioned the Department of the Interior and the Bureau of Land Management to take a number of actions that the conservation groups alleged were necessary to protect the habitat of the greater sage grouse. The groups asked the agencies to prohibit new roads or wellpads in the Douglas Sage Grouse Core Area in Wyoming until resource amendments plan amendments for sage grouse protection are completed and to restrict new wells to currently active wellpads. The U.S. Fish and Wildlife Service (FWS) is scheduled to complete its determination of the greater sage grouse's status under the Endangered Species Act sometime in 2015, and the conservation groups assert that enforcement of existing protections for the sage grouse are necessary in order for FWS to rely on them in making its determination.

Center for Biological Diversity, Request to Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement, Pacific Region, Regarding Offshore Hydraulic Fracturing (Oct. 3, 2013). CBD submitted a letter to the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement, Pacific Region, requesting that they impose an immediate moratorium on new approvals of oil and gas approvals involving hydraulic fracturing and that they suspend fracking and other unconventional oil and gas extraction activities occurring under existing approvals. CBD asked that the agencies conduct a supplemental environmental review under the National Environmental Policy Act.

Davis v. Bureau of Land Management, Case No. 1:13-cv-00971 (W.D. Mich. Sept. 5, 2013). Husband and wife plaintiffs brought a lawsuit challenging the U.S. Bureau of Land Management's (BLM's) compliance with the National Environmental Policy Act (NEPA) in connection with its decision to lease federally owned mineral rights within the Allegan State Game Area in Michigan for oil and gas development.

Center for Biological Diversity Notice of Intent to Sue (Sept. 5, 2013). On September 5, 2013, the Center for Biological Diversity (CBD) announced that it had submitted a formal notice of intent to sue BLM under the Endangered Species Act in connection with BLM's decision to lease publicly owned mineral rights in the Allegan State Game Area in Michigan. CBD asserts that drilling in the area would damage habitat critical to the survival of endangered species, including the Karner blue butterfly and the Indiana bat.

Government Enforcement Actions

City of Denton, Texas v. EagleRidge Energy, LLC, No. __ (Tex. Dist. Ct., appl. for TRO Oct. 18, 2013; notice of non-suit Oct. 22, 2013). The City of Denton, Texas filed an application for a temporary restraining order to stop defendants from constructing and operating certain new wells within City limits. The City alleged

that defendant had not obtained required approvals and permits for the new wells. Less than a week later, the City filed a notice of non-suit without prejudice. The case was closed on October 23, 2013.

Citizen Suits

Clean Water Action v. Waste Treatment Corp., No. 13-00328 (W.D. Pa., filed Oct. 28, 2013). Plaintiff, a non-profit organization, commenced an action in the federal district court for the Western District of Pennsylvania alleging that defendant had violated the Clean Water Act, the Pennsylvania Clean Streams Act, and the Endangered Species Act. Plaintiff seeks declaratory and injunctive relief, penalties and litigation fees and costs. Plaintiff alleges that defendant violated effluent limits in its National Pollutant Discharge Elimination System (NPDES) permit and discharged oil and gas wastewater without authorization. The complaint also alleges that defendant's discharges to the Allegheny River constitute an unlawful taking of the endangered Northern Riffleshell mussel. A proposed consent decree in a related action pending in state court (*Department of Environmental Protection v. Waste Treatment Corp.*, No. 463 M.D. 2013 (Pa. Commw. Ct.)) may lead to a quick disposition of this citizen suit.

Oil & Gas Lease Disputes

French v. Occidental Permian Ltd., No. 12-1002 (Tex. Jan. 15, 2014). The Texas Supreme Court agreed to review a royalty dispute that concerns mineral leases in the Cogdell Canyon Reef Unit oil field in Texas. The Texas Court of Appeals ruled in October 2012 that the oil companies had properly deducted the cost of removing carbon dioxide from natural gas that had been recovered by using carbon dioxide injection from royalties paid to landowners.

Conglomerate Gas II L.P. v. Chesapeake Operating, Inc., No. 096 269136 13 (Tex. Dist. Ct., filed Nov. 8, 2013). Plaintiff entered into an exploration and development (E&D) agreement with Chesapeake entities under which plaintiff contributed leases for Chesapeake to develop wells in the Barnett Shale (approximately 6,000 below ground level) while plaintiff's interest in shallower formations would be held by Chesapeake's production. Plaintiff alleged that Chesapeake's plugging and abandonment of wells (and plans for plugging and abandonment), termination of leases, and permitting leases to lapse violated the E&D agreement and related agreements. Plaintiff seeks declaratory and injunctive relief as well as damages.

City of Fort Worth v. Chesapeake Operating, Inc., No. 048 268798 13 (Tex. Dist. Ct. filed Oct. 17, 2013). The City of Fort Worth, Texas sued Chesapeake Operating, Inc. and Total E&P (USA), Inc., alleging that they violated their oil and gas leases with the City by underpaying on royalty payments due to the City, including through use of sham sales to affiliates and by improperly deducting the costs of gas gathering, transportation, separation, treatment, and other production services. The City of Arlington and individual landowners have previously sued Chesapeake and Total on similar grounds.

Sorenson v. Burlington Resources Oil & Gas Co., L.P., No. 4:13-cv-00132-DLH-CSM

(N.D. Dist. Ct., filed Oct. 16, 2013; D.N.D., removed Nov. 14, 2013, first amended compl. filed Jan. 2, 2014, mot. to dismiss Feb. 5, 2014). In one of ten class action lawsuits commenced in October by mineral lessors in North Dakota alleging improper gas flaring, plaintiffs alleged that defendant—the operator of a well that produces oil and gas from their mineral interests—has flared gas in violation of North Dakota law. Plaintiffs seek to recover royalties for the flared gas. They also allege causes of action based on conversion and common law waste. On November 14, 2013, defendant removed the action to federal court on the basis of diversity and the Class Action Fairness Act of 2005. Plaintiffs filed an amended complaint on January 2, 2014, and defendant filed a motion to dismiss on February 5, 2014, arguing that the dispute should be heard, if heard at all, by the North Dakota Industrial Commission.

Defamation and SLAPP Suits

In re Lipsky, No. 02-12-00348-CV (Tex. Ct. App. Oct. 10, 2013); No. 13-0928 (Tex. Lipsky pet. for writ of mandamus Nov. 25, 2013; Range Resources pet. Dec. 2, 2013). On October 10, 2013, the Texas Court of Appeals denied motions for rehearing and en banc reconsideration made by Steven Lipsky and by Range Resources Corp. The motions pertained to the court's April 2013 decision in which it declined to dismiss Range Resource's defamation and business disparagement claims against Lipsky, but dismissed all other claims against Lipsky and also dismissed all of Range Resource's claims against Lipsky's wife and an environmental consultant. On November 25, 2013, Lipsky filed a petition for a writ of mandamus in the Texas Supreme Court arguing that it was a clear abuse of discretion not to dismiss all claims against him. He also sought review on

the question of whether appeal following final judgment was an adequate remedy for the erroneous denial of a motion to dismiss under the Texas Citizens Participation Act. On December 2, 2013, Range Resources filed its own petition for mandamus, arguing that the appellate court had misapplied the evidentiary threshold under the TCPA, which requires the plaintiff to prove "by clear and specific evidence a prima facie case for each essential element of the claim in question."

Freedom of Information Lawsuits

Powder River Basin Resource Council v. Wyoming Oil and Gas Conservation Commission, No. S-13-0120 (Wyo. Nov. 20, 2013). Oral argument took place in the Wyoming Supreme Court on November 20, 2013 in the appeal by the Powder River Basin Resource Council and other groups of the state district court's ruling that the Wyoming Oil and Gas Conservation Commission (WOGCC) properly withheld information about the identity of hydraulic fracturing chemicals when it responded to Public Records Act request. The district court affirmed the WOGCC determination that the information constituted trade secrets. Halliburton Energy Services, Inc. intervened on behalf of WOGCC in the appeal.

Contract Disputes

GMX Resources Inc. v. Oneok Rockies Midstream, L.L.C., 5:13-ap-01111 (Bankr. W.D. Okla., filed Nov. 22, 2013). GMX Resources Inc. (GMX) filed an adversary proceeding against Oneok Rockies Midstream, L.L.C. (Oneok) in conjunction with GMX's pending bankruptcy proceedings. GMX sought to block Oneok from converting its natural gas gathering pipeline to a high-pressure line that would prevent the line from carrying gas from GMX's wells and forcing GMX to shut in its wells. GMX alleged that Oneok's actions are a violation of the automatic stay imposed in the bankruptcy proceeding because the actions are an improper attempt to exercise control over property of the GMX's bankruptcy estate.

Other Disputes

Cherry Canyon Resources, L.P. v. Halliburton, No. 2:13-cv-00238 (S.D. Tex., filed July 31, 2013). Plaintiff filed a class action complaint alleging that Halliburton, Schlumberger, and Baker Hughes conspired to restrain free trade in the market for fracking pressure pumping services in the United States. Plaintiff alleged that the defendants controlledd 60 percent of the pressure pumping service market in North America and are the only companies that provide "full service" operations in all regions of the U.S. The lawsuit was commenced after the U.S. Department of Justice Antitrust Division confirmed that it was investigating anticompetitive practices in the pressure pumping services market.

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