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ROCKIES WEBCAST SERIES

Multi-State Case Law Update

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Overview

- Colorado
- Wyoming
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Colorado

- Interpretation of mineral reservation – *Moeller v. Ferrari Energy, LLC,* 2020 COA 113, ___ P.3d ___, 2020 WL 4211739 (Colo. Ct. App. 2020)
- Constitutional challenge to force pooling statute – *Wildgrass Oil and Gas Comm. v. Colorado,* ___ F. Supp.3d ___, 2020 WL 1289559 (D. Colo. Mar. 18, 2020) (appeal pending)

Moeller v. Ferrari Energy, LLC

- Relevant Facts:
  - 1954: Burns to Todd, reserving 1/2 of all OGM
  - 1960: Todd to Wilsons, subject to Burns reservation
  - 1964: Wilsons to Katzdorns, "excepting and reserving to the Grantors an undivided 1/2 interest" in and to all OGM
  - Moellers take from Katzdorns with no new reservation
  - Ferrari takes interest, if any, reserved by Wilsons

Moeller v. Ferrari Energy, LLC

- Question: effect and scope of Wilson reservation
  - A: Reserved total 1/2 OGM interest (*i.e.* Burns reservation only) and conveyed 1/2 OGM interest to Katzdorn/Moeller
  - B: Reserved 1/2 OGM interest to Wilson/Ferrari (+ Burns reservation) and conveyed no OGM interest to Katzdorn/Moeller
- District Court ruled in favor of Wilsons/Ferrari (B)
  - Deed with Wilson Reservation was unambiguous
  - Moeller appealed

Moeller v. Ferrari Energy, LLC

- How did the Court of Appeals rule?
  - A: Reserved total 1/2 OGM interest (*i.e.* Burns reservation only) and conveyed 1/2 OGM interest to Katzdorn/Moeller

- or -

  - B: Reserved 1/2 OGM interest to Wilson/Ferrari (+ Burns reservation) and conveyed no OGM interest to Katzdorn/Moeller

Moeller v. Ferrari Energy, LLC

- Court of Appeals ruled in favor of Moeller (A)
  - Deed with Wilson reservation was ambiguous
  - Extrinsic evidence not dispositive of intent
  - Construe deed against Grantor (Wilsons/Ferrari)
- Final outcome
  - Burns = 1/2 OGM interest
  - Wilson/Ferrari = no OGM interest
  - Katzdorn/Moeller = 1/2 OGM interest

Wildgrass Oil and Gas Comm. v. Colo.

- Currently on appeal to 10th Circuit
- Relevant Facts:
  - Association of neighbors filed a complaint asserting constitutional challenges to COGCC order pooling interests
  - Force pooling statute = CRS § 34-60-116
  - Procedural issues raised

Wildgrass Oil and Gas Comm. v. Colo.

- Constitutional challenges:
  - First Amendment claims – forced association and subsidized private speech
  - Due process claims – forced association, unreasonably vague, and taking for private use
  - Contracts Clause claims – involuntary contract without mutual consent
- How did the District Court rule?

Wildgrass Oil and Gas Comm. v. Colo.

- District Court rejected all claims
  - First Amendment claims – statute does not compel association nor subsidization of private speech
  - Due process claims – failed to show forced association for impermissible reason and taking serves a political purpose
    - Abstained from deciding vagueness claims
  - Contracts Clause claims – no statutory contract between operators and non-consenting, force pooled owners

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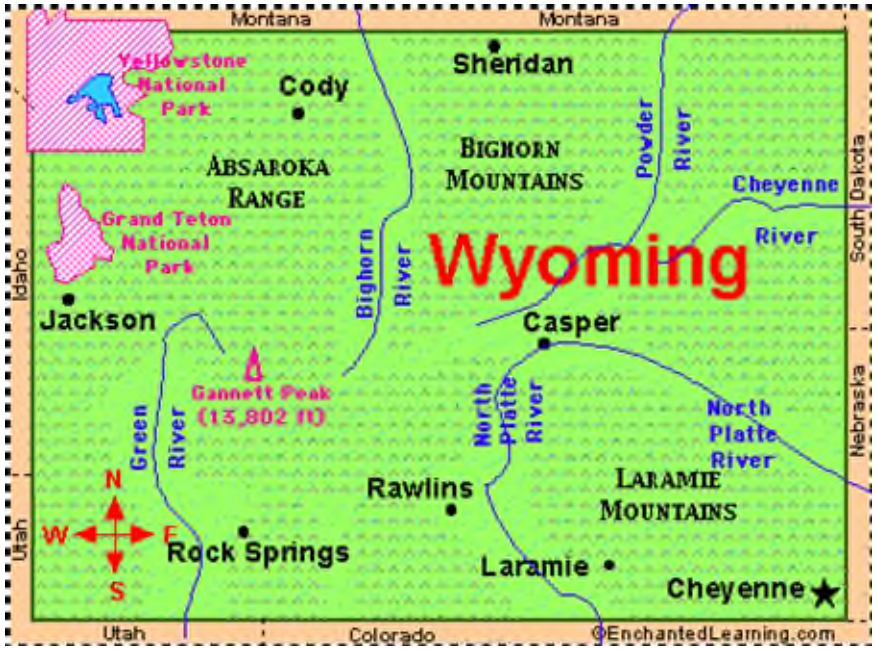
Wyoming

- Arbitrary and Capricious WOGCC Action – *Exaro Energy III v. WOGCC and Jonah Energy,* 2020 WY 8, 455 P.3d 1243 (Wyo. 2020)
- Testing the Validity of WOGCC Rules – *Black Diamond Energy of Delaware v. WOGCC,* 2020 WY 45, 460 P.3d 740 (Wyo. 2020)
- Exhaustion of Administrative Remedies – *Devon Energy Production v. Grayson Mill Operating,* 2020 WY 28, 458 P.3d 1201 (Wyo. 2020)
- Good Faith Offer in WY Eminent Domain Act – *EOG Resources v. Floyd C. Reno & Sons,* 2020 WY 95, 468 P.3d 667 (Wyo. 2020)



Exaro Energy III v. WOGCC and Jonah Energy

- Relevant Facts:
  - Exaro sought approval of 2 adjacent "stand up" DSUs in the Jonah Field
  - Jonah Energy protested on the basis of the proposed DSU orientation
  - The parties agreed at hearing that the same technical evidence would apply to both DSU applications
  - WOGCC approved one, denied the other

Exaro Energy III v. WOGCC and Jonah Energy

- Procedural History:
  - Exaro filed petition of review in state district court
  - Exaro then requested that district court certify the matter to the WY Supreme Court pursuant to Rule 12.09 of the WY Rules of Appellate Procedure
  - Su. Ct. accepted the case
- Standard of Review:
  - Set out in the WY Administrative Procedures Act
  - When a case certified to the WY Su. Ct. under W.R.A.P. 12.09, the standard of review set out in Wyo. Stat. Ann. 16-3-114(c) (part of the WY Administrative Procedures Act)
  - The reviewing court shall hold unlawful and set aside agency action if it is found to be either (1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, OR (2) unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute

Exaro Energy III v. WOGCC and Jonah Energy

- Issue:
  - Was the WOGCC's denial of one Exaro DSU application arbitrary and capricious, given that the WOGCC approved another DSU application based on the same evidence?
- Discussion:
  - Court noted that agency action is arbitrary and capricious if it lacks a rational basis
  - Court found that a fundamental norm of administrative procedure requires an agency to treat like cases alike
  - The WOGCC denied the DSU application for the stated reason that it wanted to see the data resulting from the DSU that it did approve, before it would approve the second DSU
  - Since the same technical data was used for both DSU applications, the cases were the same in all material respects, but the agency decision differed between the two, which precedent finds to be arbitrary

Exaro Energy III v. WOGCC and Jonah Energy

- Decision:
  - WOGCC decision to deny the DSU application was arbitrary and capricious, and therefore the agency action was *reversed*.
- Significance:
  - WOGCC tendency to act cautiously in areas of new development cannot always be legally supported – administrative law framework does not support "splitting the baby"
  - Decision gives support for tactic of filing multiple DSU applications in a given new area and moving to have them heard in a consolidated manner if they are protested

Black Diamond Energy of Delaware v. WOGCC

- Relevant Facts:
  - Black Diamond Energy of Delaware (BDED) had its blanket bonds forfeited by the WOGCC
  - BDED thought the WOGCC had incorrect facts supporting the bond forfeit, and so it challenged the validity of the decision to state district court pursuant to the Wyoming Oil and Gas Conservation Act (Conservation Act)
  - BDED filed its challenge 87 days after the WOGCC entered its order forfeiting the bonds (Conservation Act provides 90 days to challenge)

Black Diamond Energy of Delaware v. WOGCC

- Procedural History:
  - At district court, the WOGCC claimed the applicable appeal right was contained in the WY Administrative Procedures Act, which requires the appeal to be filed within 30 days of the agency order, rather than the 90 days afforded by the Conservation Act
  - State district court dismissed BDED's challenge, on the grounds that the challenge statute in the Conservation Act had been repealed by the WY Administrative Procedures Act, so that BDED's challenge was filed too late
  - BDED appealed
- Standard of Review:
  - De novo

Black Diamond Energy of Delaware v. WOGCC

- Issue:
  - Was BDED's complaint against the WOGCC properly brought pursuant to the Conservation Act?
- Discussion:
  - Court rejected the WOGCC's argument (and the district court's reasoning) that the WY Administrative Procedures Act either expressly or impliedly repealed the challenge mechanism of the Conservation Act
  - Court found that C.R.S. 30-5-113(a) (the challenge mechanism in the Conservation Act, which allows a party to "test the validity" of a WOGCC order, was akin to an action for declaratory judgment
  - Court noted the distinction between C.R.S. 30-5-113(a) (testing the validity) and C.R.S. 30-5-113(b) (general right of appeal pursuant to the rules of civil procedure) – significantly, the former allows 90 days for a filing while the latter allows only 30 days)

Black Diamond Energy of Delaware v. WOGCC

- Discussion continued:
  - Court then examined meaning of "test the validity" and found it to mean test the legal sufficiency, i.e., whether it is constitutional and within the scope of the rule-maker's authority
  - Court therefore found that a C.R.S. 30-5-113(a) action was like seeking a declaratory judgment concerning the validity of an agency's rules, but not seeking review of the merits of specific agency decisions (in BDED's case, the bond forfeiture)
  - Court found that what BDED was actually seeking was a review of the forfeiture action, and that BDED used the wrong procedural statute in its appeal
- Decision:
  - District court dismissal affirmed, but for different reasons than the district court's action

Devon Energy Production v. Grayson Mill Operating

- Relevant Facts:
  - Devon and Grayson Mill filed competing APDs at the WOGCC
  - Before any contested hearing was before the WOGCC, Devon filed a case in state district court claiming Grayson Mill trespassed while obtaining "resource data" for its APDs, and therefore pursuant to Wyo. Stat. Ann. 40-27-101 that resource data should be expunged from Grayson Mill's APDs, causing the APDs to be incomplete and rejected by the WOGCC
  - Separately, Devon filed applications at the WOGCC to deny or revoke Grayson Mills's APDs, but then asked that these proceedings be stayed until the district court rendered a decision regarding trespass

Devon Energy Production v. Grayson Mill Operating

- Procedural History:
  - At district court, Grayson Mill filed a motion to dismiss on the grounds that the WOGCC was the proper body to determine the trespass issue, and that Devon did not exhaust its administrative remedies before filing the lawsuit.
  - The district granted the motion to dismiss based on lack of subject matter jurisdiction
  - Devon appealed
  - After the appeal, the WOGCC dismissed Devon's applications to deny or revoke the Grayson Mill APDs; the WOGCC found that it did not have the jurisdiction to decide civil trespass under Wyo. Stat. Ann. 40-27-101
- Standard of Review:
  - De novo, as subject matter jurisdiction, is a question of law

Devon Energy Production v. Grayson Mill Operating

- Issues:
  - Did the district court abuse its discretion in dismissing Devon's complaint for failure to exhaust administrative remedies and under the primary jurisdiction doctrine?
  - Did Devon lack standing to bring a claim under § 40-27-101 and the Declaratory Judgments Act?
- Discussion:
  - The Court noted that the civil trespass statute of § 40-27-101 did not expressly exclude oil and gas matters from it, and so a “lessee of the land” could include an oil and gas lessee
  - The court found Devon pled sufficient facts to be considered a “lessee” for the purposes of § 40-27-101 and therefore had standing to sue Grayson Mill under that statute

Devon Energy Production v. Grayson Mill Operating

- Discussion continued:
  - After a review of the WOGCC's enabling statute, the Court found the WOGCC does not have jurisdiction to consider a civil trespass and, therefore, there was nothing for Devon to exhaust at the administrative level regarding its claim under § 40-27-101
  - The Court held the exhaustion of administrative remedies doctrine does not apply
  - The Court noted the doctrine of primary jurisdiction applies when the district court and the administrative agency both have jurisdiction over the matter and the court defers to the agency
  - The Court cited precedent that "Where it is clear from the terms or the implications of the statutory scheme authorizing administrative action, that the legislature did not intend the [agency] to make an initial determination, then the doctrine of primary jurisdiction cannot apply any more than could the doctrine of exhaustion of administrative remedies."

Devon Energy Production v. Grayson Mill Operating

- Decision:
  - Devon had standing under § 40-27-101
  - The doctrine of exhaustion of administrative remedies did not apply in this matter, since the WOGCC does not have jurisdiction over civil trespass matters
  - Primary jurisdiction doctrine does not apply, because the WOGCC cannot decide civil trespass claims and therefore the WOGCC is not better suited than the district court to address the issues of Devon's complaint
  - District court decision was reversed and remanded

EOG Resources v. Floyd C. Reno & Sons

- Relevant Facts:
  - EOG had been conducting activities on Reno surface pursuant to a 2010 surface use agreement (SUA)
  - EOG attempted to renegotiate SUA to gain more access
  - After back and forth, EOG sent a “final offer,” which was not accepted

EOG Resources v. Floyd C. Reno & Sons

- Procedural History:
  - EOG filed suit against Reno under the Wyoming Eminent Domain Act, seeking to condemn rights-of-way, easements, and surface use rights on approximately 2,100 acres
  - Later, EOG amended its complaint to revise the condemnation it was seeking, reducing it to a specific 70-acre pipeline easement
  - District court dismissed EOG's complaint on the basis that EOG had not met the good faith negotiation requirement of the Wyoming Eminent Domain Act, because EOG had not described the 70-acre pipeline easement in its final offer to Reno
  - EOG appealed, claiming it had met the act's requirements because the specific pipeline easement was included within the larger offer, and was depicted on maps that were given to Reno

EOG Resources v. Floyd C. Reno & Sons

- Issue:
  - Did EOG's final offer meet the requirements of the Wyoming Eminent Domain Act?
- Discussion:
  - Court found that a valid offer under the Wyoming Eminent Domain Act requires a sufficient resemblance between the property sought in the offer and the property sought in the condemnation action such that the subject of the negotiation was clear to both parties.
  - And there must be sufficient resemblance to allow a court to conclude that the offer might have been accepted as it related to the property ultimately sought to be condemned.
  - Court found it was not reasonable to expect Reno to see that EOG's offer contained a discrete sub-offer for the 70-acre pipeline easement from the map, proposed agreements and other detailed information covering 2,100 acres

EOG Resources v. Floyd C. Reno & Sons

- Decision:
  - Motion to dismiss the case was affirmed
- Take-aways:
  - Any oil and gas company who considers taking advantage of the Wyoming Eminent Domain Act must carefully decide on its offer that it may later seek to condemn
  - Offer to surface owner cannot be significantly revised after the fact when a condemnation proceeding has already been commenced

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Montana

- Determination of fossil mineral status – *Murray v. BEJ Minerals, LLC*
- Renewal of Clean Water Act Nationwide Permit - *Northern Plains Resource Council v. U.S. Army Corps of Engineers*
- Invalidation of federal leases under ESA - *Montana Wildlife Federation v. Bernhardt*


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Murray v. BEJ Minerals, LLC
464 P.3d 80 (MT 2020)

- George Severson owned unsevered fee surface and mineral estates on a ranch in Garfield County, MT

- Severson partnered with Liege and Mary Ann Murray, and entered into a lease to allow ranching activities

- Severson periodically transferred undivided interests in the lands to both his sons and the Murrays

- In 2005, Severson sold all remaining mineral interests in the lands to his sons and the Murrays in equal proportions, thus severing the remaining surface estate

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- Between 2005 and 2013, in the course of operating the ranch, the Murrays found various, highly valuable fossilized dinosaur remains

- Some fossils were sold, and some were offered for sale, but the parties agree that all fossils found are rare and have “one of a kind” values in the millions of dollars

- The Murrays first notified BEJ and RTWF of the fossil discoveries in 2008

- In 2013, BEJ and RTWF asserted an interest in all of the fossils, as owners of the mineral estate in the lands where the same were found

- The Murrays in turn filed suit, seeking a declaratory judgment that the fossils were their sole property, as the sole owners of the surface estate of the lands where the fossils were found

- Following federal court removal, BEJ and RTWF counterclaimed, seeking a declaratory judgment that the discovered fossils were part of the mineral estate in the lands where the same were found

- BEJ and RTWF argued that Montana had a settled test for determining mineral status

- Specifically, whether the substance is: (i) technically a mineral and (ii) “exceptionally rare and valuable”

- The Murrays argued simply that the “ordinary and natural” meaning of the term “mineral” does not include fossils under Montana law

- Looking to the Severson-Murray mineral deed, the Montana Supreme analyzed the factors to determine the meaning of “mineral” in the same

- First, the court found that the language of the mineral deed itself expressly referenced oil and gas, along with the right to access for development of the same

- Second, the court noted that while Montana law uses the word “minerals” in many contexts, none are found in conjunction with fossils, nor did the mineral deed contain any reference to fossils

- Third, the court found that because the fossils’ rarity and value did not stem from their chemical composition and usefulness, they did not fall within the ordinary and natural meaning of “minerals”

- Accordingly, the Montana Supreme Court held that the term “minerals,” as used in the Severson-Murray mineral deed, did not evidence any intent of the parties to include fossils

- Specifically, the court held that the term “minerals” does not include dinosaur fossils for purposes of a mineral reservation

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Northern Plains Resource Council v. U.S. Army Corps of Engineers

2020 WL 3638125 (D. Mont. May 11, 2020)

- The United States Army Corps of Engineers ("Corps") has authority to regulate discharges into navigable waterways under the Clean Water Act

- The Corps issued Nationwide Permit No. 12 in 1977 ("NWP 12"), which regulated utility line-associated discharges, including oil and gas pipeline discharges, of dredge/fill material into United States waters

- A collection of environmental groups sought further review of the Corps' decision to renew NWP 12, arguing that the Corps had failed to undertake necessary consultation under the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA")

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- Specifically, the environmental groups argued that consultation with the United States Fish and Wildlife and/or the National Marine Fisheries Services was required

- The Corps argued that because in renewing NWP 12 it had considered the environmental impacts, by inserting conditional language prohibiting activities likely to jeopardize endangered species or adversely modify critical habitats, no consultation was required

- The court first noted the low consultation threshold under the ESA, and due to the same, held that the Corps was required to initiate the subject consultations prior to renewing NP 12

- Specifically, the court disallowed the Corps' circumvention the ESA's consultation requirements by allowing project-level reviews or relying on NWP 12's conditional language

- Accordingly, the court enjoined the Corps' from authorizing any dredge or fill activities under NWP 12 until the required consultation was complete

Montana Wildlife Federation v. Bernhardt
2020 WL 2615631 (D. Mont. May 22, 2020)

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- In 2015, the United States Bureau of Land Management ("BLM") amended 98 resource management plan provisions, in an effort to protect sage grouse, and giving priority to leasing and development outside of sage grouse areas

- The Montana Wildlife Federation brought suit under the federal Administrative Procedures Act ("APA"), arguing that the BLM had violated the Federal Land Policy and Management Act ("FLPMA") by issuing leases between December 2017 and June 2018 covering lands entirely or significantly within general or priority sage grouse habitats

- In 2015, the United States Bureau of Land Management ("BLM") amended 98 land management plan provisions, in an effort to protect sage grouse, and giving priority to leasing and development outside of sage grouse areas

- The Montana Wildlife Federation brought suit under the federal Administrative Procedures Act ("APA") in Montana federal court, arguing that the BLM had violated the Federal Land Policy and Management Act ("FLPMA") by issuing leases between December 2017 and June 2018 covering lands entirely or significantly within general or priority sage grouse habitats

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- Federal lease sales are subject to FLPMA, which requires the development, maintenance and periodic revision of resource management plans ("RMPs"), to establish land area usage categories, and to determine allowable resource uses

- The subject RMPs directed BLM Field Offices to prioritize leasing outside of areas categorized as general or priority sage grouse habitat, and Instruction Memorandum 2016-143 provided additional guidance to implementation

- Instruction Memorandum 2018-026, replacing its predecessor, provided that the BLM "does not need to lease and develop outside of [sage-grouse] habitat management areas before considering any leasing and development within" them, and "should implement the new [Instruction Memorandum 2018-026]" where "the BLM has a backlog of Expressions of Interest for leasing"

- After finding that Instruction Memorandum 2018-026 was a final agency action, the court found that the BLM had violated FLPMA by contracting the RMPs via the amendment

- Specifically, the court found that the BLM had done so by: (i) limiting the outside-sage-grouse-areas prioritization only in areas with large expression of interest volumes and (ii) misconstruing the prior RMPs, rendering the prioritization requirement a mere procedural hurdle

- The court also found that the APA was violated when BLM failed to provide a "satisfactory explanation" for the decision to make the sage grouse prioritizations apply only in cases of a leasing backlog

- Finally, the court found that the subject leases sales also violated FLPMA, because they followed the rationale of the amended Instruction Memorandum 2018-026

- Accordingly, the court voided all connected federal lease sales, reasoning that the deficiencies began with that process, and infected everything beyond it

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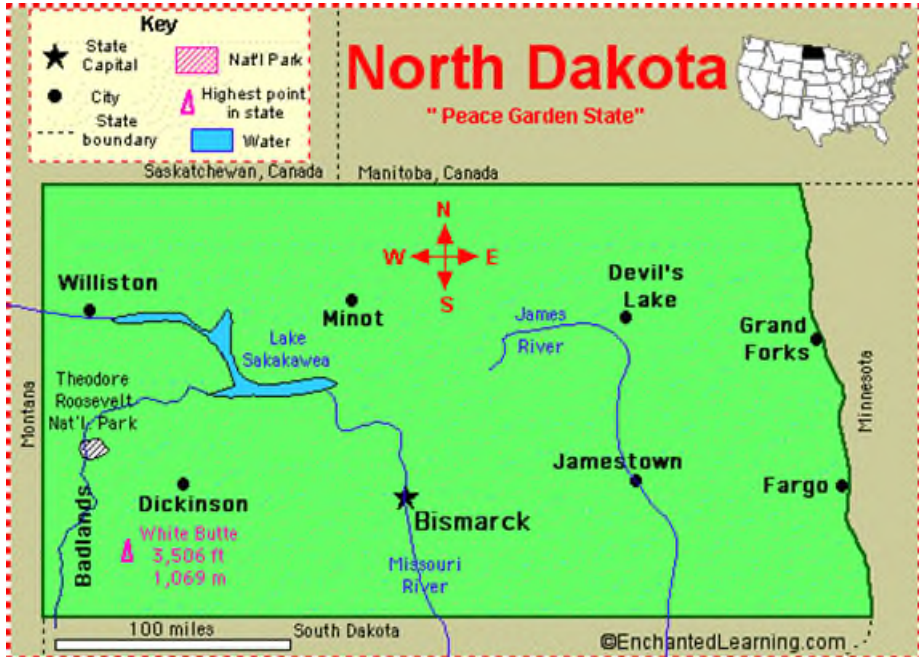
North Dakota

- Force majeure clause applicability – *Pennington v. Continental Resources, Inc.*
- Administrative remedy exhaustion - *Continental Resources, Inc. v. North Dakota Dep't. of Envtl. Quality*
- Actual drilling operations defined - *Hess Bakken Investments II, LLC v. AgriBank, FCB*
- Non-member tribal court jurisdiction - *Kodiak Oil & Gas (USA) Inc. v. Burr*
- Overpaid royalty recoupment - *Enerplus Resources (USA) Corporation v. Wilkinson*
- Top lease overriding royalty burdens - *Pitchblack Oil, LLC v. Hess Bakken Investments II, LLC*
- Interest on delayed overriding royalty payments under statute - *SunBehm Gas, Inc. v. Equinor Energy, LP*
- Costs not covenants running with the land - *Slawson Expl. Co., Inc. v. Nine Point Energy*
- *State-issued "gross proceeds" royalty calculation – Newfield Exploration Co. v. State of North Dakota*

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Pennington v. Continental Resources, Inc.
932 N.W.2d 897 (N.D. 2019)

- Pennington owned minerals in North Dakota, and in 2011 executed a lease bearing a three-year primary term, providing an option to extend, and containing a clause qualifying permit acquisition delays a force majeure events

- In 2014, Continental Resources acquired the lease, and exercised the one-year extension option when its North Dakota Industrial Commission (“NDIC”) request to establish a 2560-acre drilling unit was delayed due to endangered species issues

- Continental Resources subsequently sought and was granted NDIC establishment of a smaller, 1,960-acre drilling unit, which omitted the endangered species issues lands

- Continental Resources began drilling the wells in 2016, relying on the force majeure provision language regarding permitting delays to perpetuate the lease

- Pennington sued Continental Resources, arguing that the lease was expired, that the delay in “obtaining regulatory approval to drill” did not extend the lease, and that such delay was also unreasonable as Continental Resources could have drilled on other areas of the lease or adjoining lands to maintain the lease

- Pennington and Continental Resources both sought summary judgment

- The trial court found that the lease had been maintained by the force majeure clause language, and ruled in Continental Resources' favor

- On appeal, the North Dakota Supreme Court affirmed, holding that the force majeure clause was applicable both during the primary term and the lease's extended term

- However, the case was remanded to the trial court, for a determination of whether Continental Resources' efforts in obtaining permits to drill had been done diligently and in good faith

Continental Resources, Inc. v. North Dakota Dep't. of Envtl. Quality

935 N.W.2d 780 (N.D. 2019)

- Continental Resources sought a declaratory judgment, to resolve uncertainties in N.D.A.C. § 33-15-07-02(1), which provides that:

"[n]o person may cause or permit the emission of organic compounds, gases and vapors, except from an emergency vapor blowdown system or emergency relief system, unless these gases and vapors are burned by flares, or an equally effective control device as approved by the department."

- Continental Resources argued that current limits of technology did not permit compliance with the subject administrative rule

- Continental Resources also argued that by issuing a notice of violation concerning the subject administrative rule, the North Dakota Department of Environmental Quality ("NDDEQ") had altered its enforcement practices

- The NDDEQ simply argued that Continental Resources' concerns were not yet ripe for adjudication

- The NDDEQ filed a motion to dismiss with the trial court, which was granted, the court finding that administrative remedies remained available to Continental Resources

- On appeal to the North Dakota Supreme Court, Continental Resources argued that a declaratory judgment, even when administrative remedies remain, was proper because the claim involved questions of law

- Unpersuaded, the court reasoned that because the NDDEQ was the entity which determined whether the subject technology existed, and because the rule contained plain, unambiguous language, Continental Resources was simply trying to alter the subject administrative rule rather than seek clarification of it

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Hess Bakken Investments II, LLC v. AgriBank, FCB

2020 WL 4218029 (N.D. July 23, 2020)

- In 2004, Hess Bakken Investments II, LLC ("Hess") acquired from AgriBank non-operated, working interests in two leases expiring in early-April 2012, each of which contained clauses stating that the leases would not terminate if "actual drilling operations" were ongoing

- In March 2012, the operator conducted preparatory work for drilling operations, but in mid-April 2012, AgriBank executed new leases, covering the same acreage, with Intervention Energy and Riverbend Oil & Gas LLC (collectively, "Intervention")

- Hess sued to quiet title to its original two leases, and for a declaratory judgment that the same were not expired

- The trial court granted Intervention's motion to dismiss, finding that "actual drilling operations" as used in the leases meant "placing the drill bit in the ground and penetrating the soil," and holding that both leases had expired

- On appeal, Hess argued that the term "operations" as used in the leases included the preparatory work the operator had performed in March 2012, which would extend the leases

- Intervention argued that the subject term meant "drilling into the ground"

- The North Dakota Supreme Court held that because each party had rationale interpretations of the subject language, the same had been rendered ambiguous

- The existence of such ambiguity in turn rendered the granting of the motion to dismiss – which disposes of a suit as a matter of law – improper

- Accordingly, the case was remanded to the trial court for a decision on the merits

Kodiak Oil & Gas (USA) Inc. v. Burr
932 F.3d 1132 (8th Cir. 2019)

- In 2014, individual tribal members sought to recover royalties for allegedly improperly flared gas from Kodiak Oil & Gas (USA) Inc. (“Kodiak”)

- Kodiak filed suit in North Dakota federal court for declaratory and injunctive relief against the tribal members and certain tribal court officials

- The federal trial court granted Kodiak’s request for injunctive relief, and denied the tribal court officials’ motion to dismiss

- On appeal to the United States Court of Appeals for the Eighth Circuit, the tribal court officials argued that sovereign immunity barred Kodiak's lawsuit in federal court, and that Kodiak had not exhausted tribal remedies

- The appellate court first reasoned that the tribal court did not have jurisdiction, as the royalties claimed due and owing arose from oil and gas leases issued pursuant to federal law, and thus any lease interpretation dispute would be a federal question

- In addition, because tribal court jurisdiction over non-tribal members was limited to: (i) consensual commercial relationships and (ii) protection of tribal autonomy, and because neither existed here, tribal jurisdiction could not be based on either exception

- Accordingly, because federal law applied, and because non-tribal members were involved and neither tribal court jurisdiction exception existed, the appellate court found tribal court jurisdiction improper, that Kodiak had exhausted its tribal remedies, and that the trial court did not abuse its discretion in granting the injunctive relief and rejecting the tribal court officials' motion to dismiss

Enerplus Resources (USA) Corporation v. Wilkinson

Fed.Appx. 448 (8th Cir. 2020)

- In 2010, Peak North and Wilkinson entered into a settlement agreement, wherein Wilkinson acquired overriding royalty interests in certain Peak North federal oil and gas leases

- Peak North subsequently merged with and into Enerplus Resources (USA) Corp. ("Enerplus"), who via a clerical error, overpaid Wilkinson's overriding royalty interest by almost three million dollars

- Enerplus filed suit in North Dakota federal court, based on the forum selection clause in the parties' settlement agreement

- The trial court granted injunctive relief to Enerplus, denied Wilkinson's motion to dismiss, and ordered the disputed funds be paid into the court

- Wilkinson sought interlocutory appeal regarding the granting of injunctive relief, but the United States Court of Appeal for the Eighth Circuit affirmed

- Before the trial court again, Enerplus moved for summary judgment regarding the fund recoupment

- Wilkinson argued that Enerplus lacked standing to enforce the settlement agreement's forum selection clause, because the agreement incorporated the federal leases by reference, and those leases prohibit assignment except upon approval by the United States Secretary of the Interior, which had not occurred

- The trial court held that Enerplus had standing, as the federal leases had transferred via corporate merger, rather than by assignment

- Enerplus then filed a second motion for summary judgment, seeking to enjoin Wilkinson from further claims under the settlement agreement and enjoining the tribal court from taking jurisdiction

- The trial court ruled in Enerplus' favor, and awarded attorney's fees and costs

- On appeal, Wilkinson again argued standing, and that the amount of funds Enerplus claimed it was owed was incorrect due to Enerplus' calculation error, an issue of material fact as to the exact amount Enerplus was seeking to recover

- The United States Court of Appeals for the Eighth Circuit affirmed, holding: (i) Enerplus had standing on the non-assignment basis announced by the trial court and (ii) because Wilkinson failed to pursue any accounting evidence in discovery, there was no factual dispute as to the overpaid amounts

Pitchblack Oil, LLC v. Hess Bakken Investments II, LLC

949 F.3d 424 (8th Cir. 2020)

- In 2005, Rocky Mountain Exploration, Inc. ("RME") partnered with Pitchblack Oil, LLC and Whitetail Wave, LLC (collectively, "Pitchblack") in obtaining oil and gas leases with five year primary terms

- RME carved out overriding royalty interests from the leases, which were to apply to "all extensions and renewals," in favor of Pitchblack

- Other parties soon acquired top leases, and thereafter, Hess Bakken Investments II, LLC ("Hess") acquired nearly all of both the original leases and the top leases

- After the expiration of the original leases, Hess took the position that the top leases were not burdened by the Pitchblack overriding royalty interest

- Pitchblack filed suit in North Dakota federal court, which granted summary judgment in Hess' favor, because the original leases differed from the top leases

- Pitchblack appealed, arguing that Hess had a fiduciary duty to honor the overriding royalty burden

- United States Court of Appeals for the Eighth Circuit found that North Dakota does not have an implied fiduciary duty in contract agreements

- Accordingly, Pitchblack could only prevail by showing that the top leases were "extensions or renewals" of the original leases

- Relying on federal law precedent, the appellate court found that the top leases were not burdened by the subject overriding royalty interest

- Specifically, since the original and top leases differed materially as to lands covered, lease clauses and lessees, the court held that the top leases were not extensions or renewals of the original leases

SunBehm Gas, Inc. v. Equinor Energy, LP
2020 WL 2025355 (D.N.D. Apr. 27, 2020)

- SunBehm Gas, Inc. (SunBehm") owned overriding royalty interests in wells operated by Equinor Energy, LP ("Equinor")

- Although Equinor began operating in 2012, it failed to make timely payment of overriding royalty interests, under North Dakota Century Code Sec. 47-16-39.1, until 2017

- North Dakota Century Code § 47-16-39.1 provides that:

"if an operator fails to pay royalties to a mineral owner or their assignee within 150 days of the oil or gas being marketed, the operator owes interest on late payments at a rate of 18 percent per year"

- After SunBehm's demand for payment of interest was denied by Equinor, it filed suit in North Dakota state court

- Equinor removed the action to North Dakota federal court, and filed a motion to dismiss, arguing that North Dakota Century Code § 47-16-39.1 is inapplicable to the SunBehm overriding royalty interest

- In granting Equinor's motion to dismiss, the trial court found that since an overriding royalty interest is carved out of a lease, rather than the mineral estate, the statute was inapplicable

Slawson Expl. Co., Inc. v. Nine Point Energy, LLC

2020 WL 4045292 (8th Cir. July 20, 2020)

- Slawson Exploration Company ("Slawson") and Triangle Petroleum Corporation ("Triangle") entered into an exploration agreement, which contained an area of mutual interest clause ("AMI"), requiring Slawson to contribute 30% of its working interests in the AMI area and requiring Triangle to contribute 70% of its working interests in the AMI area

- The parties' agreement also required Triangle to pay an additional 10% of exploration and development costs for any wells in which it participated

- Triangle's successor in interest filed for bankruptcy, emerging as Nine Point Energy, LLC ("Nine Point"), and took the position that the additional 10% in costs was inapplicable going forward, as it was not a covenant running with the exploration agreement lands

- Slawson brought suit in ND federal court, seeking a declaratory judgment that the 10% in additional costs was a covenant running with the lands, a real property interest, or an equitable servitude

- The trial court granted summary judgment to Nine Point, holding that the additional 10% fee was not a covenant running with the land

- On appeal to the United States Court of Appeals for the Eighth Circuit, the judgment was affirmed for three reasons

- First, the appellate court found that the additional 10% fee did not benefit the land, nor was it a promise to develop or maintain property, and thus was not a covenant running with the land

- Next, the court found that the 10% fee was not an equitable servitude, because it did not satisfy the elements of an easement by estoppel

- Finally, the 10% fee was not even a real property interest, as it was an allocation of development costs

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Newfield Exploration Co. v. State of North Dakota

931 N.W.2d 478 (N.D. 2019)

- Newfield Exploration Company ("Newfield") owned various oil and gas leases issued by the State of North Dakota, all of which required the payment of royalties based on "gross proceeds," and further provided that:

"all royalties…shall be payable on an amount equal to the full value of all consideration for such products in whatever form or forms, which directly or indirectly compensates, credits, or benefits lessee"

- Newfield's gas production was gathered by a midstream company, which took title to the product upon delivery, processed the gas into "marketable forms," and then sold the gas to third parties

- This garnered Newfield roughly 70%-80% of the value of the gas when sold, with the midstream company retaining the difference to cover transportation and processing costs

- The State of North Dakota audited Newfield's royalty payments in 2016, taking the position that Newfield had reduced the royalty payments based on deductions which were improper under the leases

- Newfield sued for a declaratory judgment that all royalty calculated and paid by Newfield had been proper

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- Newfield sued in North Dakota state court for a declaratory judgment that all royalty calculated and paid by Newfield had been proper

- The trial court agreed with Newfield, holding that calculation of the royalty due – based on the amounts received by Newfield from the midstream company – comported with the language of the subject state-issued leases

- On appeal, the State of North Dakota argued that the trial court erred, because the ruling improperly requires the State of North Dakota to share in post-production costs, contrary to the terms of the subject leases

- The North Dakota Supreme Court held that the term “gross proceeds” meant the total amount received for the sale of gas, without any deductions for the cost to make the product marketable, while “net proceeds” indicates that the lessor will share in those cost deductions

- Accordingly, Newfield was required to pay royalty based on the price realized by the midstream company, not on the price realized by Newfield after deductions

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Utah

- Laches defense – *Estate of Price v. Hodkin*


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Estate of Price v. Hodkin
447 P.3d 1285 (Utah App. 2019)

- 2 sisters owned land in joint tenancy in for over 20 years, when one of the sisters passed

- The deceased sister's estate was administered, resulting in a court-approved deed, conveying the decedent's interest in the surface estate and purporting to reserve 50% of the mineral estate in a testamentary trust

- For over 15 years, the surviving sister and her successors in interest made payments of production proceeds to the testamentary trusts for its interest in the mineral estate

- The surviving sister's successor in interest brought suit to quiet title to the entire mineral estate

- The trial court granted the motion for summary judgment filed by the surviving sister's successor in interest

- This result was despite a defense of laches, with the trial court instead finding that there had been no failure to pursue the action after becoming aware of the facts

- The Utah Court of Appeals reversed, noting that to prevail on the defense of laches, a party must show: (i) failure of a party to diligently pursue its claims and (ii) an injury caused by that lack of diligence

- The first prong requires proof that the party's delay in bringing suit was temporally unreasonable following such party's "knowledge of the breach"

- Here, the trial court had simply misapplied the surviving sister and her successors in interest's knowledge, which could be either actual or constructive

- Accordingly, the Utah Supreme Court held that the surviving sister and her successors in interest's had constructive knowledge of the mineral ownership issue when the court-approved deed was recorded in 1966

- Thus, waiting over 47 years to assert the mineral ownership claim was unreasonable, and the defense of laches applied

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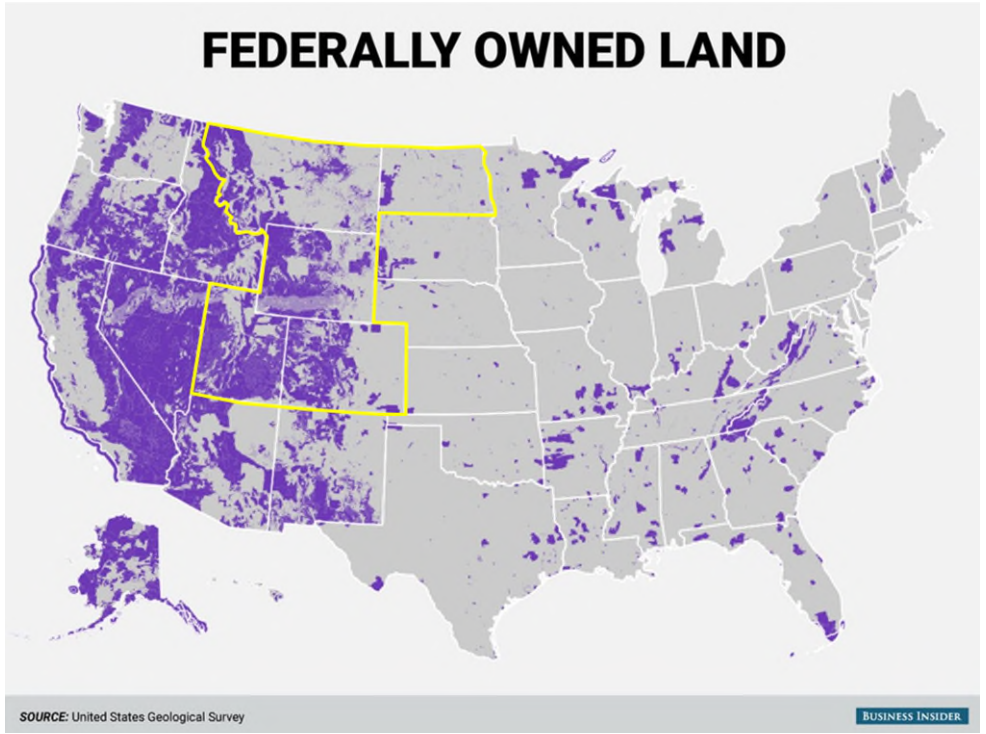
Federal Lands

- Federal leasing public participation - *Western Watersheds Project v. Zinke*
- Federal lease cancellation - *Solenex LLC v. Bernhardt*
- Dakota Access Pipeline - *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*
- Keystone XL Pipeline - *Rosebud Sioux Tribe v. Trump*



Western Watersheds Project v. Zinke
441 F. Supp. 3d 1042 (D. Idaho 2020)

- In 2018, the United States Department of the Interior, Bureau of Land Management ("BLM") issued a new Instruction Memorandum ("IM"), altering oil and gas leasing procedures to limit public participation in favor of expediting the process

- Western Watersheds Project and the Center for Biological Diversity (collectively, "Plaintiffs") sued the United States Secretary of the Interior, arguing that the changes made by the 2018 IM limited public participation, was both procedurally and substantively invalid under the federal Administrative Procedures Act ("APA") and the Federal Land Policy Management Act ("FLPMA"), and was arbitrary and capricious under the APA

- The Idaho federal district court first determined that the IM was a final agency action, and contained significant substantive and procedural changes directly impacting the rights of citizens and groups to participate in the federal leasing process

- The court held that the failure to make the IM subject to a public notice and comment period rendered it procedurally invalid, and because it removed the public involvement required by the APA and FLPMA, the IM was also substantively invalid

- The court also found the IM arbitrary and capricious under the APA as well

- Accordingly, the court vacated the offending portions of the IM, vacated prior lease sales conducted under the IM, and ordered the use of the prior 2010 Instruction Memorandum until a proper, procedurally and substantively valid replacement was issued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Solenex LLC v. Bernhardt
962 F.3d 520 (D.C. Cir. 2020)

- Solenex LLC ("Solenex") sued the United States Secretary of the Interior for the 2016 cancellation of a federally-issued oil and gas lease

- The cancellation was due to the leased acreage's unique cultural, religious, spiritual, historical and environmental significance, which were not properly analyzed under the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA") when the lease was issued 33 years earlier

- The federal district court held in favor of Solenex, finding that the time elapsed between the lease's issuance and cancellation violated the federal Administrative Procedures Act ("APA"), because the agency had failed to consider Solenex's reliance on the lease

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- The federal district court held in favor of Solenex, finding that the time elapsed between the lease's issuance and cancellation violated the federal Administrative Procedures Act ("APA"), because the agency had failed to consider Solenex's reliance on the lease

- This decision was reversed on appeal – the delay alone did not render the agency's decision arbitrary and capricious in violation of the APA

- Rather, the agency had reasonably considered the “harmful consequences” stemming from the delay

- The violations of NEPA and NHPA during issuance of the lease were discovered by environmental studies done on the land prior to surface-disturbing activity and issuance of drilling permits

- Solenex was notified, was advised that drilling permit issuance was not guaranteed, and was offered compensation for the harmful consequences considered

- Accordingly, the court held the lease cancellation valid under the APA, and required by NEPA and NHPA

Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers

440 F. Supp. 3d 1 (D.D.C. 2020)

- The Standing Rock Sioux Tribe ("Tribe") sued the United States Army Corps of Engineers ("Corps") regarding actions concerning the Dakota Access Pipeline

- The Tribe sought injunctive and declaratory relief under the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA"), the Clean Water Act ("CWA") and the Rivers and Harbors Act ("RHA")

- Specifically, the Tribe challenged the federal permits and authorizations issued to construct the Dakota Access Pipeline under the Missouri River

- Although this case was begun in 2016, several important rulings have been made recently

- In March 2020, the court granted partial summary judgment to the Tribe, ruling that the Corps violated NEPA by determining that an environmental impact statement was unnecessary

- The court also granted summary judgment in favor of the Corps on the Tribe's NHPA challenges

- In July 2020, the court vacated the Corps' original easement for the pipeline, and ordered the pipeline closed and emptied pending environmental impact statement completion

Rosebud Sioux Tribe v. Trump
428 F. Supp. 3d 282 (D. Mont. 2019)

- The Rosebud Sioux Tribe ("Tribe") brought an action against President Trump and various governmental agencies, seeking declaratory and injunctive relief

- Specifically, the Tribe argued that the defendants violated various tribal treaties, the United States Constitution and various federal statutes and administrative regulations by issuing the executive permit for the Keystone XL Pipeline

- The case remains pending, after defendant's motion to dismiss based on the Tribe's standing was denied

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Thank You!

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