Denver Law Review

Volume 55
Issue 3 *Tenth Circuit Surveys*

Article 11

February 2021

Lands and Natural Resources

Baine Kerr

Wendy Bush

Barbara Bill

LANDS AND NATURAL RESOURCES

OVERVIEW

INTRODUCTION

The Tenth Circuit was surprisingly idle in this area of heightened regional activity. Little litigation in natural resources reached the federal appellate level; those cases that were decided all involved oil and gas (and the derivative product of helium), and not mining. Public lands and environmental law—the other two areas addressed in this section—yielded even fewer decisions in the Tenth Circuit, although it is to be expected that 1977's congeries of new federal legislation[1] will shortly begin generating important cases in both fields.

Noteworthy Tenth Circuit lands and natural resources decisions are described below. Two in particular may have far-reaching consequences. In *Backus v. Panhandle Eastern Pipe Line Co.*,[2] state ability to regulate natural gas pipelines was shown to be significantly hedged by constitutional restraints. In *Leo Sheep Co. v. United States*,[3] the court, by finding an implied reservation of federal easements of access, created a potentially troublesome federal incursion on some private lands that adjoin the public domain.

I. NATURAL RESOURCES

The Tenth Circuit decided four cases of interest in the natural resources area. In *Marathon Oil Co. v. Kleppe*,[4] Judge McWilliams held that water injection wells located off the participating area may be counted in determining the royalty owed to the United States. The royalty is calculated by dividing the average daily production of all wells by the total number of wells, and subjecting the result to the percentage rates specified by the

[1] Toxic Substances Control Act, 15 U.S.C.A. §§ 2601-2629 (West 1977); Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 7 ENVIR. L. REP. 42,401 (1977) (to be codified in 30 U.S.C. §§ 1201-1328); Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901-6987 (West 1977); Clean Air Act, *as amended*, 7 ENVIR. L. REP. 42,201 (1977) (to be codified in 42 U.S.C. §§ 7401-7642); Federal Land Policy and Management Act, 43 U.S.C.A. §§ 1701-1782 (West 1977).

[2] 558 F.2d 1373 (10th Cir. 1977).

[3] No. 76-1138 (10th Cir., May 17, 1977).

[4] 556 F.2d 982 (10th Cir. 1977).

lease.[5] Thus it is to the lessee's advantage to have the nonproducing, water-injection wells included in the total number of wells.[6] The court decided to include the well not located in the participating area based on the following: The plain meaning of the governing regulation and unit agreement, a refusal to resort to technical grammatical interpretation, and the policy of encouraging the most efficient production techniques, including off-area injection wells.[7]

In the second case, *McCombs v. Federal Power Commission,* the Tenth Circuit decided that a formal application is not essential to an abandonment under section 7(b) of the Natural Gas Act.[9] The parties' recognition of the gas well's depletion and the Commission's participation in that recognition through two letters requesting a formal application were deemed by the court to be sufficient for abandonment.[10] The holding of abandonment in *McCombs* meant that, although the abandoned tract had previously been certified for interstate service, new wells, on the same tract, discovered several years after abandonment were not subject to the certification and so could be used freely for intrastate service without violation of the Natural Gas Act.[11]

In another oil and gas decision, Judge Breitenstein in *Backus v. Panhandle Eastern Pipe Line Co.*[12] held unconstitutional an Oklahoma statute[13] which required pipeline companies to furnish gas on request to landowners whose land the pipeline crossed. The statute violated the commerce clause[14] because it operated to "withdraw a large volume of gas from an established interstate current,"[15] and so interfered with interstate commerce.[16] The

[5] *Id.* at 983. The provision setting the royalties in this case is found at 30 C.F.R. § 221.49 (1977), *quoted* in 556 F.2d at 984. As a similar provision was incorporated in one of the unit agreements before the court, the agreement provision was controlling in that instance. 556 F.2d at 983.

[6] 556 F.2d at 983.

[7] *Id.* at 984-86.

[8] 542 F.2d 1144 (10th Cir. 1976).

[9] 15 U.S.C. § 717f(b) (1976).

[10] 542 F.2d at 1148-49.

[11] *Id.* at 1149. The certification provisions of the Natural Gas Act appear at 15 U.S.C. § 717f (1976).

[12] 558 F.2d 1373 (10th Cir. 1977).

[13] OKLA. STAT. tit. 52, § 10 (1971).

[14] U.S. CONST. art. I, § 8, cl. 3.

[15] 558 F.2d at 1375 (quoting FPC v. Louisiana Power and Light Co., 406 U.S. 621, 633 (1922)).

court considered the possible cumulative effect of service to the landowners to be substantial enough to bring the statute within the commerce clause, even though the service to any one landowner would probably be insignificant.[17]

The Oklahoma statute was also violative of the supremacy clause,[18] since it "frustrated the full effectiveness"[19] of the Natural Gas Act.[20] The Act gives the Federal Power Commission authority to regulate, among other things, natural gas pipeline companies.[21] The Oklahoma provision trespassed the Commission's authority by creating an exception to its jurisdiction,[22] and so was unconstitutional under the supremacy clause. The court noted additionally that the Commission had previously acted in the area of service to those whose lands were crossed by pipelines.[23] The area was thus pre-empted by the federal agency, and the state could exercise no authority.

The other major case in the natural resources area this year, *Ashland Oil, Inc. v. Phillips Petroleum Co.*,[24] dealt with the purchase price of helium under the Helium Act.[25] The majority opinion, written by Judge Seth, held that the price paid to the owners of the helium, extracted from natural gas and sold to the United States, is determined by the "work-back method."[26] The Tenth Circuit rejected the market price-comparable sales method because there is no free market in helium gas and other sales of helium were not comparable.[27] Expert testimony as to the value of the helium was rejected as mere opinion.[28]

In applying the work-back method, the court noted that elements of proper starting value from which to "work-back," return

---

[16] 558 F.2d at 1375.

[17] *Id.*

[18] U.S. CONST. art. VI, § 2.

[19] Perez v. Campbell, 402 U.S. 637, 654 (1971), *cited at* 558 F.2d at 1376.

[20] 15 U.S.C. §§ 717-717w (1970).

[21] *Id.* § 717.

[22] 558 F.2d at 1376.

[23] *Id.* at 1375 (citing Northern Natural Gas Co., F.P.C. Op. No. 773 (Aug. 13, 1976)).

[24] 554 F.2d 381 (10th Cir. 1977). The court also considered the procedural issues of limitations, prejudgment interest, attorneys fees, and choice of law. *Id.* at 389-92. Judge Doyle dissented, objecting to the use of the work-back method. *Id.* at 393-98.

[25] 50 U.S.C. §§ 167-167n (1970).

[26] 554 F.2d at 387-88.

[27] *Id.* at 386.

[28] *Id.* at 387.

on investment, costs allocable to gas production, and various other factors should be considered.[29] The result of the work-back method is not tied to any contract price for helium negotiated between the natural gas producer and the government,[30] and in the *Ashland* case the method appeared to result in a higher value than that agreed upon between the gas producer (Phillips) and the government.[31]

II. PUBLIC LANDS

In *Leo Sheep Co. v. United States*[32] the United States appealed a summary judgment in favor of the Leo Sheep Company for declaratory and injunctive relief under the Quiet Title Act.[33] Appellees, who owned certain odd-numbered section of land as successors-in-title to the Union Pacific Railroad, claimed that the United States unlawfully entered their property by blading a road across their section corners in order to give the public access to interlocking sections of public domain.

Reversing the Wyoming District Court, the Tenth Circuit found that in the original grant of land to the railroad in 1862, "Congress by implication intended to reserve an easement to permit access to the even-numbered sections which were surrounded by the lands granted to the railroad."[34] If the contrary were true, the court continued, the remaining public domain lands would have been inaccessible and under the railroad's exclusive control, a state of affairs Congress could not have intended.[35]

In support of their finding of an implied easement, the court cited the Unlawful Inclosures Act of 1885,[36] which outlawed obstruction of passage over or through the public lands, and three early cases. The cases forbid fencing of private lands in such a manner as to encircle government lands,[37] and allowed a passage

---

[29] *Id.* at 388-89.
[30] *Id.* at 389.
[31] *Id.*
[32] No. 76-1138 (10th Cir., May 17, 1977).
[33] 28 U.S.C. § 2409a (Supp. II. 1972).
[34] No. 76-1138 slip. op. at 8.
[35] *Id.* at 8.
[36] 43 U.S.C. §§ 1061-1066 (1970).
[37] Camfield v. United States, 167 U.S. 518 (1897).

for sheep trailing over the privately-owned interlocking sections to reach pasturage on publicly owned lands.[38]

The dissent argued that the majority misstated the issue—"whether the United States may *take the private land for access purposes without compensation*"—and argued that the government had not claimed such an easement for 110 years.[39]

Plains Electric Generation & Transmission Coop. v. Pueblo of Laguna removed a lingering threat to the sovereignty of Pueblo lands in New Mexico. Plains brought a condemnation action for an electrical transmission line and substation right-of-way through lands held by the Laguna Pueblo. Jurisdiction was based on the Act of May 10, 1926,[41] which allowed condemnation of Pueblo lands in accord with New Mexico law for any public purpose. The Pueblo and the United States' motion for dismissal for lack of jurisdiction was denied by the New Mexico District Court.[42] The Tenth Circuit reversed and dismissed the case, finding that the 1926 Act had been repealed by implication and that the district court was without jurisdiction.

The court voted that, although repeals by implication are not favored, the legislative history and congressional intent of the Act of April 21, 1928,[43] demonstrated that the Act was intended to be a substitute for the 1926 Act, thereby replacing it. The earlier act had been passed to allow the state to get a right-of-way for a railroad through the plaza of the Pueblo. The railroad was built before a New Mexico district judge found the 1926 Act to be insufficient to authorize condemnation because there was no mechanism to join the United States as a party.[44] Congress passed the 1928 Act to give its ratification to the already existing railroad and to allow future rights-of-way through the Pueblo "under such rules, regulations and conditions as the Secretary of the Interior may prescribe."[45] The Tenth Circuit found that Congress' method

[38] Buford v. Houtz, 133 U.S. 320 (1890); Mackay v. Uinta Dev. Co., 219 F.2d 116 (8th Cir. 1914).

[39] No. 76-1138 slip. op. at 1-2 (Barrett, J., dissenting) (emphasis in original).

[40] 542 F.2d 1375 (10th Cir. 1976).

[41] Act of May 10, 1926, 44 Stat. 498.

[42] 542 F.2d at 1376.

[43] Act of April 21, 1928, 45 Stat. 422, 25 U.S.C. § 322 (1970).

[44] 542 F.2d at 1377.

[45] 25 U.S.C. § 322 (1970).

did not amend the earlier act, but supplanted it, since if the 1926 Act were still in effect, the section of the 1928 Act requiring the Secretary of Interior's permission would be without effect.[46]

The New Mexico judge dissented, saying that the Pueblo and the United States had not adequately met the burden of proof necessary to demonstrate repeal by implication.

The remaining case of interest in the public lands area is *Boyd v. United States.*[48] Plaintiffs alleged an agreement made with a Corps of Engineers attorney to exchange Boyd's piece of property, which would be required for a Corps flood control project, for property not required by the project which had been purchased by the Corps was binding on the government. However, sole authority to exchange government land for private property in relation to river improvement rests with the Secretary of the Army.[49] Since the Secretary did not approve, the agreement was without effect. The Tenth Circuit relied on longstanding principles to find that "unauthorized acts of government agents cannot result in the government's loss of its property."[50]

III. ENVIRONMENTAL LAW

The Clean Air Act[51] and the Federal Water Pollution Control Act[52] produced no Tenth Circuit decisions, and the 1977 amendments to the former have, or course, yet to make their effects felt. Likewise, federal acts for the preservation of wilderness or wildlife[53] gave rise to no Tenth Circuit cases in 1977, and the "second generation" of federal act[54] remain too recent for Tenth Circuit interpretations. The only two environmental law decisions of 1977 both arose under the National Environmental Policy Act of 1969

---

[46] 542 F.2d at 1379.

[47] *Id.* at 1381 (Seth, J., dissenting).

[48] No. 76-1398 (10th Cir., July 18, 1977) (Not for Routine Publication).

[49] 33 U.S.C. § 558b (1970).

[50] No. 76-1398 at 9.

[51] 7 ENVIR. L. REP. 42201 (1977) (to be codified in 42 U.S.C. § 7401-7642).

[52] 33 U.S.C. 1251-1376 (Supp. 1975).

[53] Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1970); Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1970); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (Supp. 1975).

[54] Toxic Substances Control Act, 15 U.S.C.A. §§ 2601-2629 (West 1977); Surface Mining Control and Reclamation Act of 1977, 7 ENVIR. L. REP. 42401 (1977) (to be codified in 30 U.S.C. §§ 1201-1328); Safe Drinking Water Act, 42 U.S.C. §§ 300f-j-9 (Supp. 1975); Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901-6987 (1977).

(NEPA)[55] and they, in the main, only refine established, though controversial, Tenth Circuit constructions of that legislation.

In *League of Women Voters v. United States Army Corps of Engineers,*[56] the Tenth Circuit prolonged a split in the circuits by applying the irreparable harm test for a preliminary injunction pending a decision on whether an environmental impact statement is required. The League had requested an injunction of contract negotiations between the Corps of Engineers and the City of Tulsa concerning water storage rights in the Oolagah Reservoir.[57] The League sought the injunction separately from its principal suit challenging the Corps' failure to file an EIS with regard to the contract.

Judge McWilliams, in allowing the principal suit to proceed without halting the contract negotiations in the meantime, relied on the conventional preliminary injunction test of irreparable harm.[58] The district court had found that, as the contract was only at the negotiation stage, no immediate and irreparable harm could be shown.[59] The Tenth Circuit affirmed that finding, as no abuse of discretion was indicated,[60] and affirmed the denial of the injunction.

In adverting to the irreparable harm test, Judge McWilliams cited four cases,[61] none of which dealt with NEPA. That the subject matter of the requested injunction was merely an unsigned contract, and nothing more irrevocable, did provide a reasonable context for invoking this test.[62] Even so, other circuits have adopted a special test for preliminary injunctions under NEPA: A preliminary injunction pending a decision on the need for or adequacy of an EIS requires only a showing that a major federal action is involved.[63] In other words, a prima facie showing that

---

[55] 42 U.S.C. §§ 4321-4374 (1970) (hereinafter cited as NEPA).

[56] No. 77-1401 (10th Cir., Aug. 19, 1977) (Not for Routine Publication).

[57] *Id.* at 2.

[58] *Id.* at 4. The court did not find it necessary to reach the other traditional preliminary injunction issue of likelihood of success on the merits. *Id.*

[59] *Id.* at 3.

[60] *Id.* at 4.

[61] Penn v. San Juan Hosp., Inc. 528 F.2d 1181 (10th Cir. 1975); Tape Head Co. v. RCA Corp., 452 F.2d 816 (10th Cir. 1971); Chris-Craft Indus., Inc. v. Bangor Punta Corp., 426 F.2d 569 (2d Cir. 1970); Crowther v. Seaborg, 415 F.2d 437 (10th Cir. 1969).

[62] *But see* National Helium Corp. v. Morton, 455 F.2d 650, 657 (10th Cir. 1971), where the Tenth Circuit held that contract termination was sufficient to require an EIS.

[63] *See, e.g.,* Friends of the Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975). *See*

NEPA has been violated warrants a preliminary injunction.[64] The court could have analyzed the unsigned contract as not being a major federal action significantly affecting the environment,[65] but instead chose to remain indifferent to injunction exigencies under NEPA[66] by applying the standard of irreparable harm.

In *Manygoats v. Kleppe*[67] an injunction was sought against the performance of an agreement, approved by the Department of Interior, between the Navaho Tribe and Exxon Corporation for the mining of uranium on 400,000 acres of tribal land. Seventeen members of the tribe challenged the adequacy of the EIS filed by the Bureau of Indian Affairs relating to the mining lease.[68] Judge Breitenstein affirmed the denial of the injunction on the ground that the EIS was adequate.

After holding that, under Rule 19(b) of the Federal Rules of Civil Procedure, the Navaho Tribe need not have been joined,[69] the court reviewed the adequacy of the EIS under the three-part test of *National Helium Corp. v. Morton*:[70]

> (1) Whether [the statement] discusses all of the five procedural requirements of NEPA.
>
> (2) Whether the environmental impact statement constitutes an objective good faith complaince with the demands of NEPA.
>
> (3) Whether the statement contains a reasonable discussion of the subject matter involved in the five required areas.[71]

The court stated that the EIS was adequate as to each part and

---

also Note, *Injunctions, The National Environmental Policy Act of 1969, and the Fourth Circuit's Chimera of Revocability*, 60 IOWA L. REV. 362 (1974), and F. ANDERSON, NEPA IN THE COURTS 240 (1973). It appears that only the Tenth and Fourth Circuits have backed away from the per se rule for preliminary injunctions under NEPA.

[64] Bradford Township v. Illinois State Toll Hwy. Auth., 563 F.2d 537, 539 (7th Cir. 1972).

[65] *See* Grand Canyon Dorries, Inc. v. Walker, 500 F.2d 588 (10th Cir. 1974); Note, *Environmental Law—The National Environmental Policy Act of 1969 Standard of Review of Agency Action in the Tenth Circuit*, 52 DEN. L.J. 299, 305-07 (1975). *League of Women Voters* may be read as enforcing the Tenth Circuit's unwillingness to view agency inaction as a negative EIS determination, although that issue was not reached.

[66] In an earlier case, Vivant v. Trans-Delta Oil & Gas Co., Nos. 74-1115, 74-1116 (10th Cir., Nov. 27, 1975) (Not for Routine Publication), the Tenth Circuit also applied the irreparable harm test under NEPA.

[67] 558 F.2d 556 (10th Cir. 1977).

[68] The court confirmed that mining leases of Indian lands do engage NEPA requirements. *Id.* at 557.

[69] *Id.* at 559.

[70] 486 F.2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

[71] 558 F.2d at 560.

rejected each of the plaintiffs' six objections to it.[72]

The case may be criticized for utilizing the *National Helium* test to effect excessively low standards for EIS adequacy. Inquiry into three of the objections was avoided through the court's characterization of them as "conflicting scientific findings."[73] EIS consideration of the cumulative effect of the project with other resource development projects was not required because to do so would involve "prophecy beyond the capabilities of both scientists and courts. . . . It is enough that the EIS mentions and discusses foreseeable problems."[74] The court appeared to be secure in its less than extensive scrutiny of this EIS because of the project's "continuing federal control."[75] That federal supervision will prevent environmental depredations by Exxon is, perhaps, arguable. And, at any rate, the intent of NEPA is that the EIS be a method of guaranteeing that federal action is deliberate, prudent, and informed of risks to the environment. Thus, that a private action will be federally supervised ought not to excuse a superficial EIS.

Manygoats is significant in two regards: (1) Because the case was not dismissed for nonjoinder of the tribe, it is apparent that the Tenth Circuit will treat Indian lands under NEPA in the same way as any other lands, and not through special supervision by the tribe; (2) the *National Helium* standard of review of an EIS will be characterized by deference to the agency.

Baine Kerr
Wendy Bush
Barbara Bill

---

[72] *Id.* at 560-61.

[73] *Id.* at 560. These objections concerned inadequate discussion of dewatering, tailings seepage, and permanent contamination of aquifers. *Id.*

[74] *Id.* at 560-61.

[75] *Id.* at 561.