

The Biggest Energy Rulings Of 2021: Midyear Report Part 2

By **Keith Goldberg**

Law360 (July 8, 2021, 3:05 PM EDT) -- Federal courts issued guidance to the energy industry on the permitting and construction of several controversial pipeline projects while refiners scored a win in a battle over renewable fuel requirements, and a pair of state courts decided key oil and gas royalty fights.

Here, Law360 breaks down those decisions in the second of a two-part series on the biggest energy-related court decisions so far this year.

U.S. Supreme Court Sides With Pipeline in Land Rights Fight

The U.S. Supreme Court on June 29 allowed the pipeline industry to breathe a sigh of relief when it ruled that states can't use sovereign immunity to prevent gas pipelines from being built on state-owned land.

In a 5-4 ruling, the justices reversed a 2019 Third Circuit ruling that developers of the \$1 billion PennEast pipeline couldn't seize New Jersey-owned land for the project. The majority said that the federal government — in this case, the Federal Energy Regulatory Commission through the Natural Gas Act — can give pipeline companies the authority to condemn necessary rights of way on state land as well as private land. The majority said states surrendered their sovereign immunity from the exercise of federal eminent domain power when they ratified the U.S. Constitution.

Attorneys say the high court has effectively endorsed unfettered eminent domain authority for pipeline companies and helped vindicate FERC's primary jurisdiction over approving interstate gas pipelines. Covington & Burling LLP senior counsel William Massey, a former FERC commissioner, said the ruling also has implications for the development of other infrastructure, such as highways, bridges and telecommunications facilities.

"Had the court agreed with the arguments of the state, the installation of pipelines and infrastructure needed for commerce and the transportation of people and products would face major, perhaps insurmountable obstacles if the project could not cross state-owned land because the state refused to consent to the exercise of eminent domain authority granted by federal law," Massey said.

The case is PennEast Pipeline Co. LLC v. New Jersey et al., case number 19-1039, in the Supreme Court of the United States.

DC Circ. Pokes Holes In FERC Pipeline Approval Policy

In concluding that FERC unlawfully rubber-stamped a \$286 million gas pipeline project in Missouri and Illinois while ignoring evidence of self-dealing by the pipeline's developer, the D.C. Circuit on June 22 gave the agency plenty to think about as it mulls a revision of its 1999 pipeline approval policy.

A unanimous D.C. Circuit panel said that FERC wrongly based its 2018 approval of the Spire STL pipeline on a single precedent agreement between Spire Inc. and its affiliate, gas utility Spire Missouri. FERC greenlighted the project despite no evidence suggesting the pipeline would serve any new demand or lower consumer costs, and the agency's "ostrich-like approach" doesn't even pass muster under its existing certification policy, the panel said.

The appeals court's ruling vacates FERC's construction certificate of the now-completed Spire STL pipeline, which raises questions about whether it can still operate. Former FERC commissioner Cheryl LaFleur said the vacatur of the pipeline's certificate will heap more urgency on the agency to complete any revision of its pipeline approval policy, which includes a rethink on how much FERC should rely on precedent agreements — commitments by entities to purchase pipeline capacity — in determining whether a project is needed.

"It's a strong signal," LaFleur said. "It'll force the commission to grapple with what to do about this."

The case is Environmental Defense Fund v. FERC, case number 20-1016, in the U.S. Court of Appeals for the District of Columbia Circuit.

DC Circ. Nixes Dakota Access Pipeline Permit

The D.C. Circuit on Jan. 26 handed down a split decision for several tribes seeking to close the controversial Dakota Access pipeline, affirming a lower-court decision vacating an Army Corps of Engineers easement for the pipeline but reversing an order to shut it down and drain it of oil.

A D.C. Circuit panel said the Corps inadequately reviewed the environmental risks of the Dakota Access pipeline before granting an easement near tribal lands. That warrants the easement's vacatur and the preparation of a more-stringent environmental impact statement by the Corps, the appeals court said.

But the D.C. Circuit said U.S. District Judge James E. Boasberg didn't adequately support his July 2020 order to shut down the pipeline by conducting a four-factor test under the National Environmental Policy Act, which the U.S. Supreme Court said was necessary in 2010's *Monsanto Co. v. Geertson Seed Farms*. One of those factors is whether a party seeking an injunction faces irreparable harm if it isn't granted.

Upon remand, Judge Boasberg reversed his shutdown order, saying May 21 that the Standing Rock Sioux Tribe and other tribes hadn't shown they'd be irreparably harmed if the pipeline remained open.

The case is Standing Rock Sioux Tribe et al. v. Army Corps of Engineers, case number 20-5197, in the U.S. Court of Appeals for the District of Columbia Circuit.

Supreme Court Backs Refiners In Renewable Fuels Row

The Supreme Court on June 25 handed the petroleum industry a small victory in its constant battle with the agricultural industry over the implementation of the federal renewable fuel blending program, wiping out a Tenth Circuit ruling that eliminated exemptions handed out to small refiners.

In a 6-3 ruling, the high court sided with refiners HollyFrontier Corp. and CVR Energy Inc. in their bid to undo the Tenth Circuit's voiding of their small-refinery economic hardship exemptions from renewable fuel blending requirements handed out by the U.S. Environmental Protection Agency, exemptions that were challenged by biofuel industry groups.

The majority agreed with the refiners' assertion that the Clean Air Act provisions covering the Renewable Fuel Standard allow the EPA to extend small-refinery exemptions even if they have lapsed. Writing for the majority, Justice Neil Gorsuch noted that refiners are allowed to receive exemptions "at any time," which suggests a more "expansive meaning" of the term "extension."

In siding with the refiners, the high court also overruled the Biden administration, which did an about-face from the Trump administration that originally granted the small-refinery exemptions. The Biden administration had argued that exemption renewals are not extensions of preexisting ones.

The case is HollyFrontier Cheyenne Refining LLC et al. v. Renewable Fuels Association et al., case number 20-472, in the Supreme Court of the United States.

State High Courts Settle Oil & Gas Royalty Rows

Top courts in two major oil-producing states weighed in on a persistent tug-of-war between drillers and landowners over royalties: who foots the bill for so-called post-production costs — getting the oil and gas from the wellhead to where it can be shipped and sold.

On March 12, the Texas Supreme Court affirmed that BlueStone Natural Resources shorted Lone Star State royalty owners by charging them for post-production costs, rejecting the company's arguments that an addendum to the lease required that the royalty be based on the "gross value received," which superseded language in the standard lease form that said the payment would be based on market value at the well.

Then on May 20, the North Dakota Supreme Court held that a lease provision at issue in five pending federal proposed class actions allows for post-production expenses to be deducted from oil royalty payments. The court said the royalty language in the lease — "free of cost, in the pipeline to which lessee may connect wells on said land" — can be unambiguously interpreted to value oil produced under the lease at the wellhead.

The rulings are from two different state courts, and royalty cases always turn on the language of the disputed leases. Still, there's more industrywide certainty each time courts address particular aspects of oil and gas royalties, said Baker Botts LLP energy litigation partner Jason Newman.

"The valuation point is always a big point of contention," Newman said. "These cases just add more certainty as to how you'll calculate the royalty, which should eliminate [cases] that depend on similar claims and similar arguments."

Contract law, while state-specific, is still relatively uniform, and contract interpretation rules are pretty similar from state to state, said Skadden Arps Slate Meagher & Flom LLP litigation partner Kenneth Held.

"And with Texas, being just such a big energy state, I would think that even its state law interpretations would have sway over other state courts that might be facing similar issues," Held said.

The cases are BlueStone Natural Resources II LLC v. Randle et al., case number 19-0459, in the Supreme Court of Texas; and Blasi v. Bruin E&P Partners LLC et al., case number 20200327; Blasi v. Lime Rock Resources Operating Co. Inc. et al., case number 20200328; Blasi v. Kraken Development III LLC, case number 20200329; Blasi v. Continental Resources Inc., case number 20200330; and Blasi v. EOG Resources Inc., case number 20200331; all in the Supreme Court for the State of North Dakota.

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