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Renewable Energy Case Law Update

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I. Introduction

This case law update describes a selection of renewable energy cases from 2015. It is not intended to address all renewable energy cases over the previous year, but rather, highlight a few that are more likely to be of interest to the attendees of this conference and those involved in the renewable energy industry, including developers, investors, consultants, attorneys, and other counselors. The discussion of cases begins with a status update on the challenges to the Environmental Protection Agency's ("EPA") regulation of carbon dioxide ("CO_2") emissions from existing electric generators and then proceeds through a series of environmental cases, cases challenging the constitutionality of state renewable energy standards and conflicts with federal law, a selection of contract cases, and concludes with a short discussion of nuisance and trespass cases.[1]

II. The Environmental Protection Agency's Clean Power Plan

a. State of West Virginia, State of Texas, et al. v. EPA, No. 15-1363 (D.C. Cir.).

In the fall of 2015, EPA finalized its regulation of CO_2 emissions from existing electric generators. Known as the "Clean Power Plan,"[2] and ostensibly targeted at fossil-fuel generation, the rule could provide a huge boon to renewable energy development in this country. It is beyond the scope of this paper to go into great detail on the specific requirements of the Clean Power Plan, but an abbreviated summary is necessary to understand the foundation of the cases challenging the rule.

The Clean Power Plan requires states to adopt plans to significantly reduce the states' CO_2 emissions from the electric generation industry. Compliance requirements are based on state-specific targets requiring significantly scaling back the coal-fired electric generation fleet, placing some limitations on natural gas generation, and significantly expanding renewable generation to replace both of these resources, especially coal. EPA also anticipates that many states will also impose changes regarding demand-side electricity use, and ultimately, impose an economy-wide compliance system. If state plans do not meet EPA criteria, then EPA intends to adopt its own federal plan for these states a model of the federal plan has been separately proposed.

State plans implementing the Clean Power Plan are due 2016 (initial plans due for states with extension; full plans due for states without extensions). For those states with

[1] This case law update touches on the high-level aspects of the included cases but does not attempt to provide an in-depth analysis into any of the cases' holdings or their potential applicability to other factual scenarios.

[2] U.S. Environmental Protection Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

extensions, full plans are due in 2018. Compliance with the emissions targets begins in 2022, with the limits increasing in stringency until 2030.

The Clean Power Plan anticipates that renewable resources will generate as much as 706 million *new* megawatt hours of electricity (from 2013 onward) by 2030. EPA's Integrated Planning Model ("IPM"), which looks at installed capacity under a separate predictive model, anticipates that by 2030, the U.S. will see up to 84 gigawatts of new installed non-hydroelectric renewable generation capacity;[3] this number swells to up to 330 gigawatts by 2050.[4] At the same time, there will be significant forced early retirements of existing coal generation.

Given the potential impact of the Clean Power Plan to coal-fired generation and the intent of EPA to impose Federal Plans on states that fail to submit plans meeting EPA's criteria, numerous parties have filed suit against EPA regarding the Clean Power Plan. Over two dozen states, led by West Virginia and Texas, and dozens of industry petitioners and intervenors have challenged the Clean Power Plan in the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit"). Eighteen states, including two that are exempted from the rule, and numerous parties have filed interventions supporting EPA. The majority of these cases have been consolidated into a single overarching case – *State of West Virginia, State of Texas, et al. v. EPA*.[5]

In December 2015, petitioners filed motions that the rule be stayed pending a decision of the D.C. Circuit. This was accompanied by dozens of declarations on the immediate and irreparable harm that the rule will cause if the rule is not stayed. In response, EPA and intervening parties filed responses and their own declarations opposing these motions to stay and proposing an accelerated briefing schedule. On January 21, 2016, a three-judge panel of the D.C. Circuit *denied* the motions for stay and *approved* the accelerated briefing schedule. This means that there will be no court-imposed delay in the implementation of the rule. Initial briefs are now due April 15, 2016 and final briefs are due April 22, 2016. Oral argument is scheduled before the D.C. Circuit on June 2, 2016. It is anticipated that the decision of the D.C. Circuit, which is expected this fall, will be challenged to the U.S. Supreme Court by either losing group of parties.

Note that, concurrently, many of the same parties also filed suit challenging EPA's separate rule directed at limiting emissions from <u>new</u> fossil-fueled sources.[6] Similarly, numerous petitions have been consolidated but the case is proceeding separately and at a slower pace than the Clean Power Plan.

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[3] *See Clean Power Plan, Integrated Planning Model v.5.15*, August 3, 2015, Rate Based Analyses of the CPP. Under a mass-based program, this total is projected to be 81 GW of new non-hydroelectric power by 2030. This is in addition to an existing baseline amount of non-hydroelectric power of 100 GW.

[4] *See Clean Power Plan, Integrated Planning Model v.5.15*, August 3, 2015, Mass Based Analyses of the CPP. Under a rate-based program, this total is projected to be 324 GW of new non-hydroelectric power by 2030. This is in addition to an existing baseline amount of non-hydroelectric power of 100 GW.

[5] No. 15-1363 (D.C. Cir.)

[6] Multiple cases have been consolidated into the lead case, *State of North Dakota, et al., v. EPA*, No. 15-1381 (D.C. Cir.)

III. Adequacy of Environmental Review and Protection of Endangered Species

The last year has seen multiple cases regarding the sufficiency of environmental review for renewable energy projects and the impact that these projects can have on the environment and species.

a. *Deborah Shearwater et al. v. Daniel Ashe, et al.*, No. 14CV02830LHK, 2015 U.S. Dist. LEXIS 106277 (N.D. Cal. Aug. 11, 2015).

The U.S. Fish and Wildlife Service ("USFWS") is still in the early stages of developing and implementing its programmatic eagle take permit program under the Bald and Golden Eagle Protection Act ("BGEPA"). Building on its recently finalized rules to implement this permit program, the USFWS in 2013 issued a final rule to extend the maximum duration of take permits[7] under the BGEPA from 5 to 30 years (the "30-Year Rule").[8] The purpose of this extension was to more closely align the lifespan of the permit with the projected lifespan of renewable energy projects, particularly wind farms.[9]

This 30-Year Rule was challenged by various environmental groups in the Federal Northern District Court of California claiming, among other issues, that the USFWS did not follow the procedural requirements of National Environmental Policy Act ("NEPA") in promulgating this extension. The Court upheld the challenges and has now remanded the matter back to the USFWS to conduct a NEPA review. At the time of the writing of this paper, 30-year incidental take permits are not available to project developers until USFWS completes its NEPA review and reissues the rule based on these new findings.

USFWS did not prepare an environmental impact statement ("EIS") or an environmental assessment ("EA") in connection with the 30-Year Rule. USFWS found that the 30-Year Rule was categorically "excluded from further NEPA analysis in an Environmental Assessment or an Environmental Impact Statement" because the rule is "primarily administrative in nature."[10] USFWS added that the rule's "environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively, or case-by-case."[11] Further, USFWS concluded that no "extraordinary circumstances" precluded reliance on a categorical exclusion.[12] The USFWS had also found that the "rulemaking is not expected to have

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[7] The BGEPA prohibits the unpermitted "taking, possessing, purchasing, bartering, offering to sell, transporting, exporting or importing bald or golden eagles, whether the eagle is alive or dead, or "any part, nest, or egg" of an eagle without a permit. "Take" includes to "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." *See* 16 U.S.C. §§ 668(a) and 668c. Eagle Take permits allow for removal of inactive nests and for takes of eagles incidental to otherwise lawful activities, including in situations (such as windfarm) where there is potential for recurring take. *See Deborah Shearwater et al. v. Daniel Ashe et al.*, No. 14CV02830LHK, 2015 U.S. Dist. LEXIS 106277, at *9 (N.D. Cal. Aug. 11, 20150. (citing 50 C.F.R. §§ 22.26 & 22.27).

[8] *78 Fed. Reg. 73,704, 73,704 (Dec. 9, 2013)* (codified at *50 C.F.R. § 22.26(i)*).

[9] *See id.* at *16. (citing 77 Fed. Reg. 22,267, 22,275 (Apr. 13, 2012)).

[10] *Id*. at *28. (citing 78 *Fed. Reg. at 73,721-22* (quoting *43 C.F.R. § 46.210(i)*)).

[11] *Id.*

[12] *Id.*

any potentially significant environmental effects on future protection of eagles or other environmental resources," and that "the effects of this rule are not highly controversial."[13]

The District Court concluded that "FWS did not adequately explain its reliance on [the categorical exclusion] as a basis for avoiding further NEPA review" and that its actions were unreasonable.[14] The District Court found that FWS had not shown that the 30-Year Rule is administrative in nature and had "not adequately explained why the environmental effects of the 30-Year Rule are 'too broad, speculative, or conjectural to lend themselves to meaningful analysis.'"[15] Finally, the Court concluded that even if USFWS was able to demonstrate that the categorical exclusion applied, "that 'extraordinary circumstances' preclude FWS from relying on the [categorical exclusion]."[16] At a minimum, the District Court found that "there is substantial evidence in the record indicating that the Final 30-Year Rule's increase in the maximum duration for programmatic take permits may have 'highly controversial environmental effects' on bald and golden eagles.'"[17] Therefore, the Court ultimately concluded that USFWS "ha[d] failed to show an adequate basis in the record for deciding not to prepare an EIS--much less an EA--prior to increasing the maximum duration for programmatic eagle take permits by six-fold."[18] Interestingly, central to much of the District Court's factual analysis was internal communications between various members of the USFWS, questioning going forward with the 30-Year Rule without further NEPA analysis and expressing concerns about challenges to the 30-Year Rule.[19]

The plaintiffs made an additional claim that the USFWS failed to comply with Endangered Species Act ("ESA") consultation requirements. The District Court rejected this argument, referencing that plaintiffs only spent two sentences of their motion and entered four pages into the record on this argument, and ultimately concluded that the plaintiffs have "not pointed to evidence in the record" to support their ESA claim.[20]

The practical effect of this decision remains to be seen. The USFWS had originally appealed the District Court's decision to the 9th Circuit; however, on January 19, 2016, USFWS withdrew this appeal. At the time of the drafting of this paper, it is still not clear why USFWS withdrew its appeal and what plans the USFWS has for future durations of eagle take permits. Further, USFWS is expected to issue a new rule to revise other aspects of the eagle take permitting program, which will possibly include revisions to the 30-year permit term. For the time being, developers must rely on the 5-year permit.

[13] *Id.*
[14] *Id*. at *48-*49.
[15] *Id*. at *48-*50.
[16] *Id*. at *65.
[17] *Id*. at *67. (citing 43 C.F.R. § 46.215(c)).
[18] *Id*. at *77.
[19] *See id*. at *71-*72.
[20] *Id*. at 80.

b. *Union Neighbors United, Inc. v. S.M.R. Jewell, et al.,* 83 F. Supp. 3d 280 (D.D.C. 2015).

In Union Neighbors United, Inc. v. S.M.R. Jewell, et al.,[21] an Ohio non-profit corporation – established specifically to address issues relating to the siting of wind turbines – filed a suit challenging the U.S. Department of Interior ("DOI") and the USFWS for its decision to grant an incidental take permit for the killing of endangered Indiana bats at the Buckeye Wind Power Project ("Buckeye Project") in Ohio.[22]

The Buckeye Project was subject to a NEPA analysis and an EIS was prepared.[23] USFWS considered three action alternatives, in addition to a no-action alternative, in its EIS analysis. These were:

> "First, the Service considered Buckeye Wind's proposal of feathered cut-in speeds, as described [in the project's Habitat Conservation Plan], that vary based on habitat sensitivity and season.
>
> Second, the Service evaluated the maximally restrictive alternative that required full turbine curtailment at night for a seven month period, thereby eliminating altogether the take of Indiana bats.
>
> Third, the Service considered a minimally restrictive alternative that required a 5.0 m/s cut-in speed from August through October, the timeframe when most bats of all species are killed."[24]

The first alternative – variable feathered cut-in speeds – was selected. Plaintiffs claim that the USFWS did not meet the requirements of the ESA, specifically that "[a] permit for such incidental taking shall issue if there is a finding, inter alia, that the applicant 'will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.'"[25] Plaintiffs argue that USFWS was not "'minimizing' the take to the lowest possible amount before applying mitigation measures to offset any take that could not possibly be avoided or minimized."[26] The Court, while finding that plaintiffs' "two-step approach may be reasonable," found the USFWS is not bound by this interpretation and the "agency's interpretation must be upheld."[27]

The District Court found that "maximum extent practicable" is ambiguous, and citing *Chevron* deference, the Court deferred to the USFWS' determination that the Buckeye Project has:

> "'minimization measures and mitigation measures that are fully commensurate with the level of impact' and that the Project 'implements

[21] 83 F. Supp. 3d 280 (D.D.C. 2015).
[22] *Id*. at 282.
[23] *Id*. at 283.
[24] *Id*. at 284.
[25] *Id*. at 286.
[26] *Id*.
[27] *Id*.

> mitigation that offsets the impacts of the take,' and, as a result, the Project has 'minimized and mitigated to the maximum extent practicable.'"[28]

The District Court concluded that "[o]nce the impact was fully mitigated, it was not necessary for [USFWS] to determine whether more mitigation was possible, or whether the impact could possibly be minimized further."[29]

The District Court found that USFWS used "the best available scientific evidence and modeling, as well as its expertise to conclude that the Proposal will adequately protect the Indiana bat,"[30] and that the "Service made a finding that Buckeye Wind's proposal contained mitigation measures that would 'fully offset' the impacts of the taking, and that the Project would therefore not have statistically significant population impacts on the Indiana bat."[31] The District Court added that the USFWS did not violate NEPA requirements as the USFWS considered a reasonable selection of alternatives.[32]

This case reemphasizes that when an incidental take permit is to be issued to take an endangered species, there will be an in-depth level of review, but that the USFWS will be provided a certain degree of deference. Ultimately, the USFWS will not have to pursue the absolute best plan to minimize the most amount of takings, but rather, can rely on some degree of deference to choose a plan that is "fully commensurate with the level of impact."[33]

The case has been appealed to the D.C. Circuit, with oral argument scheduled for March 8, 2016.[34]

c. *United States v. CITGO, et al.*, 801 F.3d 477 (5th Cir. 2015).

Though not in the context of a renewable energy project, the U.S. Court of Appeals for the Fifth Circuit's ("5th Circuit") opinion in *United States v. CITGO*[35] may have placed significant limitations on the scope of strict criminal liability under the Migratory Bird Treaty Act ("MBTA") – at least for the states located within the 5th Circuit.[36] The 5th Circuit reversed a lower court's convictions against CITGO Petroleum Corporation and CITGO Refining and Chemical Company, L.P. ("CITGO") for violating the "taking" limitation in the MBTA for the unintended or indirect killing of migratory birds. CITGO had been found liable for "taking" migratory birds that died in oil-water separate tanks that did not contain roofs to prevent birds from entering the tanks.

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[28] *Id*. at 287.
[29] *Id*. at 287.
[30] *Id*. at 288.
[31] *Id.*
[32] *Id*. at 289.
[33] *See id.* at 287.
[34] *Union Neighbors United, Inc. v. Sally Jewell, et al.*, No. 15-5147 (D.C. Cir.).
[35] 801 F.3d 477, 488 (5th Cir. 2015).
[36] The Court in *United States v. CITGO* also addressed an issue relating to the Clean Air Act, which is not discussed in this paper. The geographic region of the 5th Circuit includes: Texas, Louisiana, and Mississippi.

CITGO appealed the decision of the District Court, which had held that "an illegal 'taking' is an ambiguous term that involves more activities than those related to hunting, poaching and intentional acts;" that "strict liability requires, in this context, only that the actor proximately caused the illegal 'taking;'" and that "violations of federal and state regulations that require roofs for these types of tanks could support the company's misdemeanor convictions."[37] CITGO argued that "illegally 'taking' migratory birds involves only 'conduct intentionally directed at birds, such as hunting and trapping, not [] commercial activity that unintentionally and indirectly causes' migratory bird deaths."[38]

The 5th Circuit found in favor of CITGO and concluded that CITGO's MBTA convictions must be reversed. The 5th Circuit relied on decisions from the 8th and 9th Circuit federal courts, which held that "taking" is "limited to deliberate acts done directly and intentionally to migratory birds."[39] The 5th Circuit took an in-depth analysis of the meaning of "take" in the MBTA. This included looking at the common-law meaning of "take," which the 5th Circuit found to be incorporated into the MBTA when it was passed in 1918 and comparing the definition of "take" in the MBTA to the ESA and other statutes – which have a broader definition of "take." The 5th Circuit viewed these as arguments that "take" should not include unintentional acts, as subject in this case.

The 5th Circuit recognized that the 2nd and 10th Circuit federal courts have taken broader views of the MBTA and that these courts would have reached different conclusions. The 5th Circuit declined to adopt these Circuit Courts' "broad, counter-textual reading of the MBTA" and disagreed that "because misdemeanor MBTA violations are strict liability crimes, a 'take' includes acts (or omissions) that indirectly or accidentally kill migratory birds."[40] The 5th Circuit concluded with a more pragmatic argument that since so many other industries and actions take numerous migratory birds – "big windows, migratory communication towers, *wind turbines, solar energy farms*, cars, cats, and even church steeples" – that interpreting these "takes" to be a violation of the MBTA would "enable the government to prosecute at will and even capriciously."[41] Ultimately, the Court concluded that the "MBTA's ban on 'takings' only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds."

The practical effect of this decision in the 5th Circuit is that those in industries that unintentionally take birds protected by the MBTA *may* have greater protections against liability under the MBTA. However, any protection will be inherently a fact-specific situation and would be limited to the area and jurisdiction of the 5th Circuit. More broadly, now that there is a split among the federal circuit courts, as highlighted by the 5th Circuit in its *CITGO* decision, there is a higher likelihood that this conflict between the circuits may ultimately need to be resolved at the U.S. Supreme Court.

[37] *United States v. CITGO at* 488.
[38] *Id*.
[39] *Id*. at 488-489.
[40] *Id*. at 492.
[41] *Id*. at 494. (emphasis added).

d. *Sierra Club v. Bureau of Land Mgmt*., 786 F.3d 1219 (9th Cir. 2015).

Given the sheer expanse of federal land ownership, including ownership of large open spaces in the Western United States conducive to renewable energy project development, there is a likelihood that projects can be sited near or on federal land. In the case of *Sierra Club v. Bureau of Land Mgmt.*[42] before the U.S. Court of Appeals for the Ninth Circuit ("9th Circuit"), a wind project developer – North Sky River Energy, LLC ("North Sky") – attempted to construct a wind project near federally-owned land.

North Sky filed an application with the U.S. Bureau of Land Management ("BLM") for an easement over federally-owned land to connect a wind project ("Wind Project") to an existing state highway. North Sky sought to improve and expand existing BLM roads leading to the project site ("Road Project"). Importantly, as part of the project, North Sky also had a private road option to connect the wind project to the highway. North Sky rejected the private road option in favor of the access Road Project "to utilize as much existing road as possible, and thereby minimize environmental impacts."[43]

Regarding the Road Project, BLM initially informally consulted with the USFWS under the ESA (before withdrawing this consultation) and ultimately issued a Finding of No Significant Impact ("FONSI") under the National Environmental Policy Act ("NEPA").[44] BLM concluded that the private road option served as a viable alternative route as part of its review and noted that the Wind Project was going to be developed regardless of whether BLM approved the right-of-way over federal land.[45] Therefore, BLM did not assess the Wind Project as part of its overall review and approved the Road Project.

Plaintiffs, including Sierra Club and others, sued BLM, arguing that the BLM should have analyzed the Wind Project as part of the Road Project under both NEPA and the ESA. The court rejected both arguments, holding:

> "The BLM did not violate the ESA when it determined that consultation was not required under the ESA for the Wind [*1227] Project because the federal Road Project and the private Wind Project are two separate projects, the Wind Project is not an indirect effect of the Road Project, and the two projects are not interrelated or interdependent. The BLM did not violate NEPA when it determined that no EIS analyzing the Wind Project was required because the Road and Wind Projects have independent utility and are not connected actions."[46]

Applying the requirements of the ESA, the 9th Circuit read the ESA to require agencies to consider direct and indirect effects of agency actions "authorized or carried out by the agency" to ensure that they are not likely to jeopardize the existence of critical habitat of

[42] 786 F.3d 1219 (9th Cir. 2015).
[43] *Id*. at 1222.
[44] *Id.* at 1223.
[45] *Id*.
[46] *See id. at* 1226-1227.

any endangered species.[47] The 9th Circuit found that the Wind Project was not a direct effect of the Road Project (not directly funded, authorized, or carried out by BLM) and that it was not an "indirect effect" either, because the Road Project did not "cause[] the Wind Project or brought it into existence."[48] The 9th Circuit further held that the Road Project and Wind Project were not interrelated or interdependent and rejected Sierra Club's argument that "but for" BLM's approval of the Road Project, the Wind Project would not have occurred. The Court through most of its justifications returned to the private road option as part of the bases for its findings.

Applying the requirements of NEPA, the 9th Circuit found that since the BLM had no control or responsibility over the Wind Project, the court held that the Wind Project did not constitute a "major federal action."[49] Therefore, under the terms of NEPA, an environmental impact statement ("EIS") for the Wind Project was unnecessary. Further, the 9th Circuit found that the Road Project and Wind Project were "not connected, cumulative, or similar actions."[50] Applying an "independent utility test" and assessing whether "each of the two projects would have taken place with or without each other," the 9th Circuit concluded that the projects had independent utility.[51] Finally, the 9th Circuit found that regardless of its legal assessments, BLM's environmental assessment of the Road Project "sufficiently evaluated the Wind Project as a cumulative effect of the Road Project," which included a detailed analysis of wind farms within a specified 25-mile distance of the Road Project (including the North Sky wind farm).[52]

The 9th Circuit's decision in *Sierra Club v. BLM* has important implications for project developers who propose projects that span both private and federal land. It emphasizes the need for careful project siting, as it may allow for more streamlined environmental review of portions of the project on federal land. For example, in *Sierra Club v. BLM*, key factual considerations of the 9th Circuit included a proposed and analyzed viable[53] private road option and that the road had independent utility.[54] Importantly, though, different agencies have different standards of review and implement NEPA differently. Therefore, the ultimate planning decision will be fact, agency, and circuit-court specific.

IV. Status of Revised Definition of "Waters of the United States"

a. *Ohio v. United States Army Corps of Eng'rs (In re EPA & DOD Final Rule)*, 803 F.3d 804 (6th Cir. 2015).

In May 2015, EPA and the U.S. Army Corps of Engineers ("Corps") finalized a rule to redefine the definition of "waters of the United States" ("WOTUS") under the Clean Water Act ("WOTUS Rule"). This definition is critical to determining the scope and

[47] *See id.* at 1223-1224.
[48] *Id*. at 1225.
[49] *Id*.
[50] *Id*. at 1225-1226.
[51] *Id*. at 1226.
[52] *Id*.
[53] BLM had determined the private road was "neither remote nor speculative." *Id*. at 1223.
[54] According to BLM, this independent utility included "dust control, reducing erosion, and controlling unauthorized vehicle access to a national trail." *Id*.

implementation of the requirements of the Clean Water Act ("CWA"), particularly CWA Section 404 permitting – permitting of the discharge of dredged or fill materials in the waters of the United States. Following the petition of numerous states and other parties, on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit ("6th Circuit") issued a nationwide stay of the WOTUS Rule in *Ohio v. United States Army Corps of Engineers.*[55]

According to the EPA and the Corps, the purpose of the WOTUS Rule was to "clarify the scope" of WOTUS, in "light of [the CWA], science, Supreme Court decisions in *U.S. v. Riverside Bayview Homes, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), and *Rapanos v. United States* (Rapanos), and the agencies' experience and technical expertise."[56] EPA and the Corps added that the "rule makes the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources."[57]

The primary changes of the WOTUS Rule impact the assessment tributaries to the traditionally navigable waters, adjacent wetlands/waters, and isolated or "other" waters.[58] The WOTUS Rule includes new definitions, criteria, setbacks, and potentially subjective considerations. Instead of clarifying the definition of WOTUS, many felt that these new definitions, concepts, and distance criteria added ambiguity to the rule. This presents developers with potential new permitting requirements, or at a minimum, the need to conduct a more comprehensive WOTUS analysis as part of the development process. This is particularly relevant for projects covering large areas of land with various types of intermittent and ephemeral water bodies, and/or bodies of water near traditionally defined WOTUS, such as wind and other renewable project developments.

The 6th Circuit stayed the WOTUS Rule, finding that "petitioners have demonstrated a substantial possibility of success on the merits of their claims."[59] The Court cited to Petitioners' argument that "tributaries, 'adjacent waters,' and waters having a 'significant nexus' to navigable waters is at odds with the Supreme Court's ruling in *Rapanos*" and that the WOTUS Rule's distance limitations that were not in the proposed rule were not "logical outgrowth[s]" of the proposed rule, thereby failing to satisfy notice-and-comment requirements.[60] "Balancing the harms" of staying the rule, the Court found that "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo [the existing rule] for the time being."[61]

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[55] *Ohio v. United States Army Corps of Eng'rs (In re EPA & DOD Final Rule)*, 803 F.3d 804 (6th Cir. 2015).
[56] U.S. Environmental Protection Agency, U.S. Army Corps of Engineers Clean Water Rule: Definition of "Waters of the United States," Final Rule, 80 Fed. Reg. 37,054, 37,054 (June 29, 2015).
[57] *Id*. at 37,055.
[58] *See* generally, *id.* 37,057-37,059.
[59] *Ohio v. Corps*. at 807.
[60] *Id*.
[61] *Id*. at 808.

Interestingly, there was also a legal jurisdictional question – whether the 6th Circuit has the authority to rule on a challenge to the WOTUS Rule. The key question is whether under the CWA challenges to the rule are to be brought in district or circuit courts. The 6th Circuit, in issuing its stay, stated that it would accept briefing on the subject but determined it was still appropriate to issue the stay.[62]

EPA and the Corps has stated that they are "fully complying with the stay" of the rule, which includes implementing the old – pre-WOTUS Rule finalization – rules. However, the EPA and Corps are "look[ing] forward to vigorously defending the merits of the Clean Water Rule."[63] Therefore, for now, the old rules apply but this may change once a final decision has been reached on the WOTUS Rule.

V. Constitutional Challenges to State Renewable Portfolio Standards and Other Clean Energy Targets

In the last few years, there have been numerous suits that challenged states' renewable portfolio standards ("RPS"), renewable energy standards ("RES") and other clean energy targets. Many of these challenges make claims based on the dormant commerce clause of the constitution, as discussed below.

a. *Energy and Environmental Legal Institute, et al.* v. *Epel,* 793 F.3d 1169 (10th Cir. 2015).

Colorado implements a renewable energy mandate which requires a certain percentage of electricity sold to Colorado consumers comes from renewable sources. The targets increase over time, and vary depending on utility type and service size, but generally the key sections of the law establish the following renewable targets by 2020: Investor-owned utilities: 30%; Electric cooperatives serving 100,000 or more meters: 20% by 2020; Electric cooperatives serving fewer than 100,000 meters: 10% by 2020; and Municipal utilities serving more than 40,000 customers: 10% by 2020.[64]

The Energy and Environment Legal Institute ("EELI") challenged this mandate, largely on constitutional grounds, in the case *Energy and Environmental Legal Institute, et al.* v. *Epel*,[65] before the U.S. Court of Appeals for the Tenth Circuit ("10th Circuit"). EELI claimed that the law violates a branch of dormant commerce clause jurisprudence – basically that the law unduly interferes with interstate commerce.[66] EELI's key argument as summarized by the 10th Circuit is as follows:

> "Colorado consumers receive their electricity from an interconnected grid serving eleven states and portions of Canada and Mexico. Because electricity can go

[62] *Id*. at 807.
[63] *See* Gina McCarthy, Administrator, U.S. Environmental Protection Agency, Jo-Ellen Darcy, Assistant Secretary for Civil Works, U.S. Department of Army, Memorandum: Administration of Clean Water Programs in Light of the Stay of the Clean Water rule; Improving Transparency and Strengthening Coordination, (Nov. 16, 2015).
[64] Colorado Revised Statutes 40-2-124.
[65] 793 F.3d 1169 (10th Cir. 2015).
[66] *Id*. at 1170-1171.

> anywhere on the grid and come from anywhere on the grid, and because Colorado is a net importer of electricity, Colorado's renewable energy mandate effectively means some out-of-state coal producers, like an EELI member, will lose business with out-of-state utilities who feed their power onto the grid. And this harm to out-of-state coal producers, EELI says, amounts to a violation of one of the three branches of dormant commerce clause jurisprudence."[67]

The 10th Circuit, upholding a lower district court decision, rejected EELI's complaint.[68] The 10th Circuit concluded that "only price control or price affirmation statutes that link in-state prices with those charged elsewhere and discriminate against out-of-staters are considered by the Court so obviously inimical to interstate commerce" that they are *per-se* unconstitutional under the extraterritorial test of the dormant Commerce Clause.[69] The Court found while "fossil fuel producers like EELI's member will be hurt," that "as far as [the 10th Circuit] know[s], all fossil fuel producers in the area served by the grid will be hurt equally and all renewable energy producers in the area will be helped equally."[70] Therefore, since EELI "offers no story suggesting how Colorado's mandate disproportionately harms out-of-state business," the Court ruled against EELI on its commerce clause claim.[71] Ultimately, the 10th Circuit stated that the law "isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters," and based largely on that assessment, found that the standard did not violate the dormant commerce clause.[72]

The 10th Circuit also rejected a procedural claim by EELI on the district court's ruling on Colorado's summary judgment motion and matters related to discovery.

In October 2015, EELI filed a petition for a writ of certiorari with the U.S. Supreme Court, joined by several amicus parties. The petition was denied in December 2015.[73]

b. *American Fuel & Petrochemical Manufacturers, et al. v. Jane O'Keefe, et al.*, No. 3-15-CV-00467-AA, 2015 U.S. Dist. LEXIS 128277 (D. Or. Sept. 23, 2015).

In *American Fuel & Petrochemical Manufacturers, et al. v. Jane O'Keefe, et al*,[74] the Oregon Federal District Court was tasked with determining whether the state's renewable

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[67] *Id*. at 1171.

[68] The Court noted that there are three dormant-clause tests. While Petitioner relied on all three at the district level – and lost on all three – Petitioner only cited to one of the tests. Therefore, the 10th Circuit only addressed that one cited challenge. This was referred to as the *Baldwin* test, which finds its roots in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and as summarized by the 10th Circuit, "is said to apply to certain price control and price affirmation laws that control 'extraterritorial' conduct — that is, conduct outside the state's borders. Here too laws of that sort are deemed almost per se invalid." *See id.* at 1171-1172. (citing earlier case law). The 10th Circuit noted that the U.S. Supreme Court has only struck down three state laws relying on the *Baldwin* precedent. *See id.*

[69] *Id*. at 1174.

[70] *Id*.

[71] *Id*.

[72] *Id*. at 1173-1175.

[73] *Energy & Environment Legal Inst. v. Epel, Joshua, et al.*, No. 15-471 (U.S. Dec. 7, 2015) (order denying certiorari).

standard violated the dormant commerce clause of the U.S. Constitution or was preempted by federal law. At issue were rules developed by the Oregon Environmental Quality Commission's ("OEQC"), at the impetus of the state legislature, to limit lifecycle greenhouse gas ("GHG") emissions from transportation fuels ("Oregon Program"). Over the course of two phases, the OEQC adopted rules requiring regulated parties to register for the Oregon Program, record volumes and carbon intensities of fuel, and ultimately, meet annual clean fuel standards and begin holding requisite credits to demonstrate compliance.[75]

Industry petitioners claimed that the Oregon Program illegally discriminated against out-of-state fuels and regulated extraterritorial activities in violation of the U.S. Constitution's Commerce Clause; industry petitioners also claimed that the Oregon Program was preempted by two sections of the Clean Air Act and the EPA's reformulated gasoline rule.[76] The Oregon District Court denied petitioners' claims and dismissed the case.

Regarding the commerce clause claims, the Oregon District Court found that Oregon's clean fuel program was not facially discriminatory against petroleum, did not have a discriminatory purpose, and "does not grant preferential treatment to in-state biofuels over out-of-state petroleum and Midwest ethanol."[77] The Oregon District Court added that "[t]here are no plausible allegations demonstrating that out-of-state producers will be commercially disadvantaged or considerably burdened."[78] The Oregon District Court further added that the Oregon Program did not control conduct wholly outside the state and was not impermissible extraterritorial regulation.[79]

Regarding the preemption claims, the Oregon District Court found that the Oregon Program was not preempted by the federal Clean Air Act and EPA's Reformulated Gasoline Rule ("RFGR").[80] The Oregon District Court found that the RFGR's finding that "no control or prohibition relating to the [greenhouse gas] methane is necessary for transportation fuels" under the Clean Air Act was limited to ozone-forming VOC.[81] Therefore, it did not prevent Oregon from implementing its clean fuel program. Finally, the Oregon District Court found that Oregon's Program was not preempted by the Energy Policy Act of 2005 ("EPAct 2005") and the requirements implemented under that act,

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[74] No. 3-15-CV-00467-AA, 2015 U.S. Dist. LEXIS 128277 (D. Ore. Sept. 23, 2015).
[75] *Id*. at *8-*9.
[76] *Id*. at *9-*10.
[77] *Id*. at *16-*28. The Court noted that "at the outset, that plaintiffs' discrimination claim is largely barred by on-point precedent: the Ninth Circuit held that the [California Low Carbon Fuel Standard] did not facially discriminate against out-of-state ethanol or petroleum, and did not discriminate in purpose or effect against out-of-state petroleum. *Id*. at 18. (citing to *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013), reh'g denied en banc, 740 F.3d 507 (9th Cir.), cert. denied, 134 S. Ct. 2875, 189 L. Ed. 2d 835 (2014)). The Court added "the Oregon Program is not facially discriminatory because it distinguishes among fuels based on lifecycle GHG emissions, not origin or destination" and "[p]etroleum's higher carbon intensity values exist for a legitimate, nondiscriminatory reason." *Id*. at 19-20.
[78] *Id*. at *28-*29.
[79] *Id*. at 30.
[80] *Id*. at 33-35.
[81] *Id*.

specifically, ethanol requirements.[82] Regarding EPAct 2005, the Oregon District Court found that plaintiffs lacked prudential standing as they did "not contend to generate or sell the type of biofuel the Oregon Program allegedly penalizes, or that their interests are closely aligned with those whose rights are at issue,"[83] and found that the plaintiffs' allegations failed for four distinct additional reasons.[84]

This case has been appealed to the 9th Circuit.[85]

c. *John A. Nichols and FuelCell Energy, Inc. v. Jack Markell, et al.*, No. 12-777-CJB, (D. Del. Oct. 19, 2015) (order granting settlement agreement).

The State of Delaware took a different approach to address commerce-clause challenges to its Renewable Energy Portfolio Standards Act, specifically provisions related to limitations on, and benefits to, fuel cell manufacturing. In 2015, Delaware settled a claim against the state's RPS, where plaintiffs John A. Nichols and FuelCell Energy, Inc. ("FuelCell") sued the state over its renewable energy standards in *John A. Nichols and FuelCell Energy, Inc. v. Jack Markell, et al.*, No. 12-777-CJB, (D. Del.).

In 2011, the Delaware legislature amended the State's RPS to provide benefits to a fuel cell manufacturer that intended to build a manufacturing facility and a fuel cell-powered generator in Delaware. This included allowing generation located in Delaware and using fuel cells manufactured in Delaware to generate renewable energy credits and avail themselves of other privileges not extended to other types of power sources.[86] The law required the Delaware Public Service Commission ("DPSC") to impose a tariff to provide cost recovery on the state's only investor-owned utility for a 30 MW facility located in Delaware and powered by these fuel cells.[87]

Plaintiff FuelCell Energy was a manufacturer of fuels cells located in Connecticut, with the intention of competing for fuel cell and renewable energy business in Delaware. FuelCell had alleged that the Delaware RPS provision related to fuel cells protected a Delaware fuel-cell manufacturer and discriminated against FuelCell Energy and other similarly situated out-of-state renewable energy companies. Because of this, FuelCell alleged that the Delaware RPS violated the dormant commerce clause of the U.S. Constitution.[88] FuelCell had been joined by a private individual (Mr. Nichols) in its dormant commerce clause claims. Mr. Nichols had also made an equal protection claim. Mr. Nichols was dismissed from the case (prior to the settlement),[89] but the Delaware District Court allowed FuelCell's dormant commerce clause challenge to continue. In October 2015, the State of Delaware (and its relevant administrative agencies) reached an

[82] *Id*. at 36-39.
[83] *Id*. at 38-39.
[84] *Id*. at 39-40.
[85] *American Fuel & Petrochemical, et al. v. Jane O'Keefe, et al.*, No. 15-35834 (9th Cir.).
[86] *See* Delaware Federal District Court's earlier decision on motions to dismiss. *John A. Nichols v. Markett, et al*., No. 12-777-CJB, 2014 U.S. Dist. LEXIS 52976, *6 (Apr. 17, 2014).
[87] *Id*. at *7-*8.
[88] *See John A. Nichols and Fuel Cell Energy, Inc. v. Jack Markell, et al*., No. 12-777-CJB, (D. Del. Oct. 19, 2015) (order granting settlement agreement).
[89] *Id*.

agreement with FuelCell to drop the law's geographic requirements.[90] The State defendants agreed to consider any manufacturer of fuel cells a "qualified fuel cell provider" without regard to its location or whether state officials designated the manufacturer an economic development opportunity.[91] Similarly, when reviewing a utility tariff associated with a fuel cell project, the defendants agreed not to consider the location of the fuel cell manufacturer.[92]

VI. State Programs to Encourage Renewable Energy Development and Conflicts with the Federal Power Act and the Public Utility Regulatory Policies Act

a. *Allco Fin. Ltd. v. Klee, et al*., 805 F.3d 89, 2015 U.S. App. Lexis 19452 (2nd Cir. 2015, amended December 1, 2015).

Allco Fin. Ltd. v. Klee, et al. is a case centering around the ability of a state to implement programs designed to encourage and award contracts to new renewable energy development. In this case the plaintiff, Allco Financial, Ltd. ("Allco") challenged Connecticut's implementation of a 2013 state statute that empowered the Commissioner of Connecticut's Department of Energy and Environmental Protection to solicit proposals for renewable energy, select winners of the solicitation, and direct Connecticut's utilities to enter into wholesale energy contracts with the chosen winners.[93] Allco claimed that the Commission's actions violated the limitations of the Federal Power Act and the Public Utility Regulatory Policies Act ("PURPA"). The U.S. Court of Appeals for the Second Circuit ("2nd Circuit") ultimately denied Allco's claims.

As summarized by the 2nd Circuit:

> "[t]he Federal Power Act gives the Federal Energy Regulatory Commission ("FERC") exclusive authority to regulate sales of electricity at wholesale in interstate commerce. States may not act in this area unless Congress creates an exception. PURPA contains one such exception that permits states to foster electric generation by certain power production facilities ("qualifying facilities") that have no more than 80 megawatts of capacity and use renewable generation technology…. PURPA imposes obligations on each state regulatory authority to implement FERC's PURPA regulations."[94]

Various parties submitted projects to the Commissioner, including Allco, which submitted five solar projects, all of them below the 80 MW cutoff identified in PURPA.[95] In 2013, the Commissioner selected one entity (Number Nine) as a recipient of a contract

[90] *See id*.
[91] *Id*.
[92] *Id*.
[93] *Allco Fin. Ltd. v. Klee, et al*., 805 F.3d 89, 2015 U.S. App. Lexis 19452, *5 (2nd Cir. 2015, amended December 1, 2015).
[94] *Id*. at *3-*4. (Internal citations omitted).
[95] *Id*. at *5-*6.

with a utility and the Commissioner also directed utilities to enter into a separate fixed-price contract with Fusion Solar.[96] Allco did not receive a contract under the State act and sued the Commissioner and others. According to Allco, "Number Nine was too large to be a qualifying facility under PURPA and that the Commissioner's action in compelling a wholesale electricity transaction could be lawful only with respect to a qualifying facility under PURPA."[97] Additionally, Allco asserted that the Commissioner violated PURPA by selecting a higher bid from the qualifying facility Fusion Solar instead of one of Allco's lower-priced bids.[98]

Importantly, despite PURPA including of a "private right of action to 'qualifying cogenerator[s]' to enforce a state's obligations under PURPA," Allco did not avail itself of this private right of action.[99] Rather, Allco sought damages and fees under 42 USC §§ 1983 and 1988, as well equitable relief in the form of voiding the other parties' contracts and enjoining the Commission from violating the Federal Power Act and PURPA going forward.[100]

The District Court had granted Connecticut's motion to dismiss, finding that Allco lacked standing:

> "both because its injuries were not within the Federal Power Act and PURPA's 'zone of interests' and because its injuries were not likely to be redressed by a favorable judgment. In the alternative, the [D]istrict [C]ourt concluded that Allco failed to state a claim, both because the Commissioner's actions were not preempted and because there was no right of action available to Allco under 42 U.S.C. § 1983."[101]

The 2nd Circuit affirmed the district court's judgment on three alternative grounds:

> "(1) Allco cannot bring claims under §§ 1983 and 1988 to vindicate any rights conferred by PURPA because PURPA's private right of action forecloses these remedies;
>
> (2) Allco failed to exhaust its administrative remedies, a prerequisite for any qualified facility to bring an equitable action seeking to vindicate specific rights conferred by PURPA; and
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> (3) Allco lacks standing to bring a preemption action seeking solely to void the contracts awarded to Intervenors Fusion Solar and Number Nine."[102]

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[96] *Id*. at *6.
[97] *Id at* *7.
[98] *Id*.
[99] *Id*. at *3-*4.
[100] *Id*. at *2.
[101] *Id*. at *7-*8. (Internal citations omitted).
[102] *Id*. at *2-*3.

On the third count, the Court found that Allco failed to "show, at a minimum, that the requested relief" of voiding the other parties' contracts "provides a path for Allco to eventually obtain a […] contract… [I]nvaliding the […] contract awarded to Fusion Solar and Number Nine would simply deny Allco's competitors a contractual benefit without redressing Allco's injury."[103]

The Allco case highlights that, beyond arguing on the merits of a claim, it is important to fully avail oneself of relevant statutory rights of action as well as exhaust all potential claims under a law.

VII. U.S. Supreme Court Review of Challenge to FERC's Order 745

a. FERC v. Electric Power Supply Association, et al. No. 14-840 (U.S.)

On October 14, 2015, the U.S. Supreme Court heard oral argument on the Federal Energy Regulatory Commission's ("FERC") Order 745.[104] This was an appeal from the D.C. Circuit which, in a 2-1 decision, vacated rule in its entirety as ultra vires agency action.[105]

As summarized by the D.C. Circuit,

> "Order 745 establishes uniform compensation levels for suppliers of demand response resources who participate in the 'day-ahead and real-time energy markets.' The order directs [Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs)] to pay those suppliers, including aggregators of retail customers, the full locational marginal price (LMP), or the marginal value of resources in each market typically used to compensate generators. The Commission conditioned the payment of full LMP on the ability of a demand response resource to replace a generation resource and required demand response to be cost effective. Cost effectiveness would be determined by a newly devised 'net benefits test,' which FERC directed ISOs and RTOs to implement... Finally, the rule allocated the costs of demand response payments proportionally to all entities that purchase from the relevant energy markets during times when demand response resources enter the market. Commissioner Moeller dissented, arguing the Commission's retail customer compensation scheme conflicted both with FERC's efforts to promote competitive markets and with its statutory mandate to ensure supplies of electric energy at just, reasonable, and not unduly preferential or discriminatory rates."[106]

The D.C. Circuit held that the FERC Rule violated the "Federal Power Act[, which] unambiguously restricts FERC from regulating the retail market,"[107] and as such, FERC could not avail itself of *Chevron* deference.[108] Even if FERC could avail itself of

[103] *Id.* at *20.
[104] *FERC v. Electric Power Supply Association, et al.* No. 14-840 (U.S.)
[105].Electric Power Supply Association v. FERC, et al. 753 F.3d 216, 225 (D.C. Cir. May 2014).
[106] *Id*. at 219-220 (internal citations omitted).
[107] *Id*. at 224.
[108] *Id*.

Chevron deference, the majority in the D.C. Circuit held that "[b]ecause FERC's rule entails direct regulation of the retail market—a matter exclusively within state control—it exceeds the Commission's authority."[109] The D.C. Circuit found that FERC's action was "arbitrary and capricious."[110]

The D.C. Circuit's opinion was appealed to the U.S. Supreme Court, and in May 2015, the Supreme Court granted review on the following questions:

> "1) Whether the Federal Energy Regulatory Commission reasonably concluded that it has authority under the Federal Power Act, 16 U. S. C. 791a et seq., to regulate the rules used by operators of wholesale electricity markets to pay for reductions in electricity consumption and to recoup those payments through adjustments to wholesale rates.
>
> 2) Whether the Court of Appeals erred in holding that the rule issued by the Federal Energy Regulatory Commission is arbitrary and capricious."[111]

At the time of the drafting of this paper, the Supreme Court had yet to release its decision in this case, though a decision is expected in mid-to-late January 2016. The decision in this case will likely have wide-ranging impacts on FERC's authority over demand response, and more generally, what role the federal government can take in power markets.

VIII. Protection and Federal Enforcement of Native American Mineral Rights

a. *U.S. v. Osage Wind, LLC, et al.*, 2015 U.S. Dist. LEXIS 132480 (N.D. Okla. Sept. 30, 2015).

Osage Wind, LLC ("Osage Wind") is the developer of a wind farm project in Osage County, Oklahoma – the Osage Wind Farm Project ("Osage Project"). This Project includes 84 turbines and associated transmission lines, access roads, and meteorological towers spread over 8,400 acres of leased property.[112] At issue are the turbine foundations. Each foundation is approximately 10 feet deep and between 50 and 60 feet in diameter and required excavation of soil, sand and rock.[113] Following excavation, the excavated materials were pushed back into the foundation site or left in place.[114] These materials were not moved to another location (except for backfilling) and none of the excavated materials were used in the concrete foundation, sold, or used for any other purposes.[115]

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[109] *Id*.
[110] *Id*.
[111] *FERC v. Electric Power Supply Association, et al.* No. 14-840 (U.S. May 4, 2015) (grant of writ of certiorari).
[112] *U.S. v. Osage Wind, LLC, et al.*, 2015 U.S. Dist. LEXIS 132480, *2 (N.D. Okla. Sept. 30, 2015).
[113] *Id*.
[114] *Id*. at *2-*3.
[115] *Id*.

In 2011, the Osage Nation attempted to sue Osage Wind to prevent interference with its oil and gas rights as a result of a "digging incident," but the case was dismissed on the merits.[116] In November 2014, the United States (plaintiff) commenced this action alleging that Osage Wind and others (defendants) interfered "with the Osage Nation's reserved mineral rights, [and] failed to obtain the necessary prior approvals before excavating the turbine foundations for the Project."[117] Specifically, the United States alleged that defendants "violated 25 C.F.R. § 211.48, which prohibits 'exploration, drilling, or mining operations on Indian land' without obtaining permission from the Secretary of the Interior ('Secretary'), and 25 C.F.R. § 214.7, which forbids 'mining or work of any nature' on reserved Osage County land unless a mineral lease covering such land is approved by the Secretary."[118]

Defendants' primary responses were that: "Osage Wind's construction activities do not constitute 'mining' for purposes of the regulations and therefore no lease or permit pursuant to either regulation is required," and that "the final judgment in the [2011 litigation] bars the United States' claims in this action under the doctrine of res judicata."[119]

The District Court for the Northern District of Oklahoma found that the 2011 litigation did not bar the United States' claim because "it is settled law that when the United States is acting on behalf of an Indian tribe, the United States cannot be bound by a prior action brought by the tribe in which the United States did not participate."[120] Despite the United States' ability to proceed with the suit, the United States' claims "fail as a matter of law" and lost on summary judgment.[121]

The Court had to look to two sets of Department of Interior regulations governing these actions: 1) general regulations for the development of reserved Indian tribal solid mineral resources (25 C.F.R. part 211); and 2) a separate set of regulations (25 C.F.R. part 214) which implements the Osage Allotment Act of 1906 ("Osage Act") – a tribe-specific act.[122]

Under the Part 211 regulations, the Court found that "mineral development" referred to the "business of developing minerals," and not the actions of an "entity that incidentally encounters minerals in connection with surface construction activities. In other words, a commercial mineral development purpose is required to invoke the leasing requirements of [25 CFR] § 211.48."[123] Effectively, the Court refused to find that excavation and backfilling for the purposes of constructing the wind farm did not meet the criteria of the C.F.R. The Court added that the United States' proposed broad definition of mining to

[116] *Id*. at *3-*4.
[117] *Id*. at *4.
[118] *Id*.
[119] *Id*. at *7-*8.
[120] *Id*. at *9. Note, the Court added that "where the United States has litigated an issue affecting an Indian tribe, the *tribe* may not re-litigate the matter, the *reverse* is not true." *Id*. at 10. (internal citations omitted).
[121] *Id*. at *31.
[122] *See id*. 12-13.
[123] *Id*. at *15.

include these activities "would cover such a broad range of activity as to render the term meaningless."[124]

As part of its Part 214 claims, the United States quoted language in the regulations stating that approval of the Secretary of the Interior is required for "mining or *work of any nature*."[125] The District Court read this language to relate to "mining operations and mining-related activities,"[126] adding that "'work of any nature,' read in isolation, could describe any kind of 'work,' but the phrase takes meaning when read as work related to 'mineral development.'"[127] Looking to other allowed uses of the surface estate, including houses, orchards, barns, and plowed land, the District Court concluded that the definitions were not so broad to also include "incidental" backfilling and excavation subject to the suit.[128] The District Court found that the mineral right holder has "lost nothing because the excavated minerals are replaced and not used for any purposes."[129] Finally, the District Court chose not to give *Chevron* deference to the United States, because its "reading of the regulations defies their plain language and is accordingly not a reasonable interpretation or a 'permissible construction of the Statute' requiring deference."[130]

The *Osage* case is fact specific and focuses on a narrow set of regulations relating to Native-American tribes, generally, as well as the specifically impacted tribe. However, there are broad take-aways from the case. This includes that excavation for surface construction will be less likely found to conflict with the interests of a mineral-rights holder if impacts are incidental to surface construction, especially if the excavated materials are reintroduced into the ground and are not sold or used for another commercial purpose. Again, this assessment would be very fact and mineral-right holder/agreement specific.

IX. Interpretation of Power Purchase Agreement in Light of Changing Market Conditions

a. *Benton County Wind Farm, LLC v. Duke Energy Indiana*, No. 1:13-cv-01984-SEB-TAB (Sept. 8, 2015, Order on the Parties' Motions for Summary Judgment).

The U.S. District Court for the Southern District of Indiana was recently tasked with settling a dispute of the obligations under a power purchase agreement ("PPA") between Benton County Wind Farm, LLC ("BCWF") and Duke Energy Indiana, Inc. ("Duke").[131] As summarized by the Court, "[t]he dispute between the parties in this litigation boils down to a determination of their existing contractual relationship in view of significant

[124] *Id*. at *18-*19.
[125] *Id*. at *22. (citing 25 C.F.R. § 214.7; emphasis added).
[126] *Id*. at *26-*27.
[127] *Id*. at *24.
[128] *See id*. at *24-*27.
[129] *Id*. at *29.
[130] *Id*. at *31.
[131] *Benton County Wind Farm, LLC v. Duke Energy Indiana*, No. 1:13-cv-01984-SEB-TAB (Sept. 8, 2015, Order of the Parties' Motions for Summary Judgment).

changes in the manner of wind energy production and distribution that have occurred following the execution of their long-term agreement."[132]

BCWF and Duke entered into a PPA on September 1, 2006 where Duke agreed to purchase energy generated by BCWF's wind farm.[133] At the time the BCWF became operational, on April 19, 2008, Midwest Independent Transmission System Operator, Inc. ("MISO") "treated wind generation facilities as Intermittent Resources ("IR"), meaning that MISO accepted all available produced energy at the prevailing market price ("LMP") and MISO managed congestion issues manually."[134]

As summarized by the District Court:

> "After BCWF began generating energy for Duke's purchase, several additional wind farms entered the market area, which ultimately caused electrical transmission lines to be congested and gave rise to the need for manual generation curtailments. For a period of time, because the Wind Farm was a 'must run' facility, Duke suffered a negative fiscal impact of the oversupply of energy based on the negative LMPs. However, after wind energy was re-classified as [Dispatchable Intermittent Resource ("DIR")], the negative impact of the additional wind energy generation shifted to BCWF who was faced with curtailment orders from MISO, requiring it to decrease its output by approximately 41%."[135]

The District Court identified two issues under the PPA: 1) does the PPA's requirement that Duke "reasonably cooperate" with BCWF when bidding require that the bids result in BCWF's maximum production of electricity; and 2) "when Duke makes bids to MISO that result in the curtailment of BCWF's production, is Duke indirectly violating the PPA's prohibition against Duke's curtailment of BCWF's output."[136] The answer to both of these questions turned "on whether the PPA is properly construed as an output contract or a take-or-pay contract, the latter requiring Duke to purchase all the power BCWF was (is) capable of producing."[137]

BCWF sought to compel Duke to purchase all of the power that BCWF is able to generate, which would force Duke to make aggressive bids to MISO.[138] BCWF claimed that Duke was improperly shifting the market risk allocation agreed to under the PPA.[139] Duke claimed that the PPA provided a legitimate means of shielding itself from excessive negative LMPs resulting from congested wind energy transmission lines. Duke claimed that it agreed to pay for a specific amount of wind energy generated by BCWF (the Electric Output) measured at the Point of Metering, which according to Duke, means that

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[132] *Id*. at 28.
[133] *Id.* at 4. The parties also, in December 2007, entered into a Joint Energy Sharing and Operating Agreement ("JESOA") with another third party. *See id.* at 10.
[134] *Id*. at 13.
[135] *Id*. at 28. MISO's DIR rules took effect on March 1, 2013. *See id*. at 22.
[136] *Id*. at 28.
[137] *Id*.
[138] *Id*. at 29.
[139] *Id.*

it is not obligated to pay for "deemed generation – i.e., generation that does not meet the definition of Electrical Output."[140] Therefore, according to Duke, "so long as [it] purchases all of BCWF's 'Electrical Output,' Duke is not liable to BCWF for liquidated damages."[141]

Neither party claimed that performance under the PPA was impractical or that the purpose of the PPA was frustrated by the changing wind energy landscape.[142] Further, neither party argued that the PPA is void or voidable.[143] Importantly for the purposes of the District Court's review of the PPA and relevant facts, "the parties stipulate[d] that the contracts at issue are 'clear and unambiguous.'"[144] What this meant for the District Court was that, because the parties have stipulated that the PPA is unambiguous, the District Court was limited to reviewing the plain terms of the contract; and despite a voluminous record, could give no consideration to the "abundance of extrinsic evidence."[145]

Based on these facts, and the limitations on its review, the District Court concluded that:

> "Duke did not breach its agreement under the PPA or the JESOA. The parties agreed that Duke would purchase 'Electrical Output' delivered to the 'Point of Metering,' which Duke has done; and that Duke would make reasonable offers to MISO, which Duke has done; and that Duke would not curtail BCWF's production, which Duke has not done."[146]

The District Court went on to add that:

> "[t]he difficulty in interpreting and enforcing this agreement stems primarily from the fact that, in major respects, events have passed it by. The parties' contract no longer mirrors the parties' commercial/economic needs and expectations or the realities of the much expanded and more complex marketplace. For the Court to conclude that the PPA is an output contract requiring Duke to purchase all BCWF's output without regard to the effect of negative LMPs or MISO's curtailment orders, we would need to rely on extrinsic evidence [which the Court had found it could not.]"[147]

The decision has been appealed to the U.S. Court of Appeals for the Seventh Circuit.[148]

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[140] *Id.*
[141] *Id.*
[142] *Id*.
[143] *Id*. at 30.
[144] *Id*. at 3, 30.
[145] *Id*. at 30-31.
[146] *Id*. at 30.
[147] *Id*.
[148] *Benton County Wind Farm, LLC v. Duke Energy Indiana, Inc.*, No 15-2632 (7th Cir.).

X. Nuisance and Trespass Cases Brought By Neighbors

a. *Terra Walker, et al. v. Apex Wind Construction, LLC*, No. CIV-14-914-D, 2015 U.S. Dist. LEXIS 76279 (W.D. Okla. June 12, 2015).

As has occurred in most years, there were a series of nuisance and trespass claims against wind generators. These cases are inherently fact specific. One of these cases is *Terra Walker, et al. v. Apex Wind Construction, LLC*.[149]

In *Walker v. Apex*, the U.S. District Court for the Western District of Oklahoma ("Oklahoma Western District") granted a wind developer's motion to dismiss and rejected neighboring plaintiffs' claims for anticipatory trespass.[150] The basis of the plaintiffs' claims was that the turbines would kill airborne animals that will fall onto their properties; that ice will accumulate on the blades and be thrown onto their properties; and that the turbines will suffer mechanical failures that will throw pieces of the turbines onto their properties.[151] Plaintiffs allege that the result would be physical damage to their properties.[152] The Oklahoma Western District in an earlier decision had already denied plaintiffs' claims regarding noise generated at the wind farm.

The Oklahoma Western District found that the plaintiffs made no allegations in their complaint regarding anticipatory trespass due to dead birds or bats, so the Court focused on the ice and mechanical failure arguments. The Court found that plaintiffs' allegations were "based on nothing more than speculation and conjecture."[153] Plaintiffs made "no allegations to show that ice throw is likely to occur as to *these* wind turbines and *their* properties," and that "[t]here are no factual allegations regarding the frequency [of how often] mechanical failures occur, or the nature of such potential failures."[154] Therefore, the plaintiffs' allegations were dismissed.

XI. Conclusion

The renewable industry, especially wind and solar electric generation, is growing at an incredible rate. This growth will likely continue, particularly if costs of development continue to decline and if significant regulatory drivers – like EPA's Clean Power Plan – are implemented, which will incentivize even more growth. This means that lawsuits concerning renewable energy sources will likely grow as well. New legal questions will need to be addressed as development is brought closer to populated areas and as new technologies are introduced. Despite these advances, it is also expected that common claims – such as nuisance suits – will continue to be a fixture of renewable energy litigation.

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[149] No. CIV-14-914-D, 2015 U.S. Dist. LEXIS 76279 (W.D. Okla. June 12, 2015).
[150] *Terra Walker, et al. v. Apex Wind Construction, LLC*, No. CIV-14-914-D, 2015 U.S. Dist. LEXIS 76279, *2 (W.D. Okla. June 12, 2015).
[151] *Id*. at *3-*4.
[152] *Id*. at *3.
[153] *Id*. at *6.
[154] *Id*. at *6-*7.