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Chapter 1

Energy Law Update 2018: The Origins of Power

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Synopsis

§ 1.01. Introduction.

"Energy law" today is difficult to articulate in an elevator speech, and it is not much easier to capture in an "annual update." For starters, who exactly is our audience? Are energy lawyers the attorneys who practice before the Federal Energy Regulatory Commission ("FERC")? Or is energy law the domain of state law, for the lawyers familiar with the arcana of their respective public utility commissions? What about the lawyers with expertise in the regional wholesale markets, most of which are regulated by FERC? And what do we call the lawyers working upstream for the folks actually producing or harvesting the resources that fuel our energy: at the coal mines, or at the well heads, or with renewables operators? (Is there such a thing yet as the wind patch?) Are they just environmental and natural resources lawyers, or are they energy lawyers, too?

We are big-tent people and wrote this chapter, perhaps audaciously, to try to reach all of the above. To our eyes it appears "energy law" is taking place everywhere — downstream, upstream, midstream, and at the junction points alike. Further, it seems to us that the entire field of energy law has never been more frenetic—trying to keep up and explain it is certainly exhausting.

Albert Einstein spent his life searching for a unifying principle of physics. He never quite got there (nobody has yet), but he ended up doing okay. In this chapter, rather than being content with the classic "update" approach of laying out a series of case law updates in a vacuum, we had hoped to identify a unifying principle of energy law. We have concluded we are not Einstein (not even close). All the same, with this energy law update, we do try to showcase U.S. energy law, at least at the 60,000-foot level, as telling a consistent narrative. And although the terms are overused and we use them

here reluctantly (because they seem so perfectly apt), that narrative is one of crisis and disruption.

The crisis is multidimensional: on one side, environmental groups and activist organizations both large and small are fighting in every conceivable forum to keep fossil fuels from being extracted and consumed for energy. Coal seems to be the readiest target for their crusade but many of the anti-fossil forces are equally hostile toward oil and gas, even if it means tolerating them while they go relentlessly after coal. On the other side, there is industry pushing back and defending the place of fossil fuels in the energy mix, as a matter of resource abundance, reliability, and sound economics. The coal industry finds itself fighting an industry-wide stigma that seemed to metastasize during the last administration, but the main headline — climate change—seems to spare nobody in major industry. And then there are infinite pinch points in the interstices of the debate: the federal government and its various branches trying to shape energy policy from one election cycle to the next, and not always (or even usually) speaking with one voice; state governments with divergent, complex, and parochial interests of their own; the regional wholesale markets seeking to promote grid efficiency and reliability; and of course the consumers of energy — *all of us* — most (if not all) of whom (including your authors) have an imperfect understanding of how it all fits together.

The crisis has paved the way for the disruption. Consumer demand for energy in the United States is down, and it is also more selective or a la carte, meaning traditional fuels are feeling pinched by the drop in both need and demand. Meanwhile, many states continue to seek ways to drive energy policy within their borders, by way of renewable fuel portfolios and incentives for favored resources, ranging from nuclear power to energy storage to retail, customer-level self-generation. The world we occupy is one where the consumer has come to believe it can obtain whatever it wants upon demand. Energy — even fuel choice — is no exception. In this regard, the public image of and consumer marketing surrounding a particular fuel may be as important to the fuel's prospective success in the energy mix as its supply.

This chapter approaches energy law as a four-legged stool. We do not limit ourselves to appellate decisions, or decisions of any type for that matter.

In fact, we do not limit this update to court cases — interspersed in the discussion are policy and political actions that at least color the current energy narrative.[1] There is too much going on in energy law to limit an "update" to decided cases. Our goal is to identify activity worthy of an energy lawyer's attention both up and down the stream of commerce.

The first leg in our stool comprises cases and other activities showcasing what can only be described as the existential fight over the future of the U.S. coal industry. On one side of the divide are the various environmental groups fighting on virtually every front to eliminate coal from our energy fuel supply. There are many players that make up this leg, but prominent among them are the Sierra Club and its Beyond Coal campaign seeking to stamp out coal at the state level before public utility commissions and other state agencies of jurisdiction, WildEarth Guardians and other groups trying to block new federal coal leasing in the West, and state and local governments, environmentalists, and citizen groups in the West resolved to block the construction of new coal export terminals. A loud and unifying message in all of these matters rings clear: it is the stated mission of these groups and some municipalities and other local governments to end coal production and use in the United States and to do everything in their power to accomplish that goal. This is a well-funded army of true believers.

On the other side of the divide are the coal industry and its supporters, pushing back and defending coal's place in the domestic energy mix as a matter of sound economics, grid reliability, and even national security. In Washington, we see this at the programmatic level in various proposals, including a proposed rule issued to FERC by Secretary of Energy Rick Perry toward the end of 2017, under which FERC would have provided financial incentives to jurisdictional utilities with approximately three months of fuel supply on site — a proposal with obvious benefits for coal (and nuclear). The Trump Administration has also advanced coal-friendly policy goals through

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1 We did, however, at some point have to put down our pens. An "update" is necessarily a snapshot of the state of affairs at a particular time, and ineluctably is subject to quick erosion. We did our best to keep the subject matter of this chapter current up to our submission deadline.

its land management decisions, rolling back leasing moratoriums imposed by the Obama Administration and urging the agencies to expedite project review under the National Environmental Policy Act. We also see the fight playing out at the facility level, for example at the Navajo Generating Station, a decades-old coal-fired plant whose owners have put it on the chopping block, but where the Hopi Tribe, along with NGS's supplier mine's operator and union workforce, are suing to keep the plant operating.

The second leg of our stool is related, but is broader than any single industry or commodity: it is the ongoing effort by environmental groups, citizen groups, and certain local governments to use the courts to pass judgment on climate change — its existence, its causes, and its effects — and hold fossil fuel companies (along with other large industrial companies) liable. These cases might be thought of as a second wave of climate change litigation. The first wave — a series of common law lawsuits sounding principally in nuisance and negligence — played out roughly a decade ago with results generally favorable to industry (in that no defendant was held liable). But certain threshold questions were left unaddressed, such as the applicability of state law and public trust concepts underlying government's duties toward its citizens, and those open questions provide the grist for the current wave of cases. (And while it is an awkward fit, we also briefly discuss as part of this leg the current status of the administration's effort to replace the Clean Power Plan ("CPP"), since the CPP itself was a regulatory response to climate change.)

The third leg of our energy stool is made up of recent developments in natural gas and pipeline cases. As a fuel, natural gas sometimes escapes the climate change scrutiny and battles confronting coal and oil companies, as it finds itself more and more the baseload fuel of choice without drawing as much fire from the environmental community. But some members of this advocacy group argue either that baseload power may no longer be essential (since it can ultimately be replaced by renewables and storage). And even those who still advocate for natural gas as a "transition fuel" to a carbon-free economy are at least trying to wean the country's reliance on fracking. For example, a recent court decision in Pennsylvania portends a potential paradigm shift in the economics of shale gas extraction, tossing aside the

traditional rule of capture where extraction is by hydraulic fracturing. If the decision survives further appeal, look out.

Finally, the fourth leg takes a glimpse at the friction in the capacity markets overseen by the regional transmission organizations ("RTO") and independent system operators ("ISO") between states looking to support or subsidize favored technologies, and the preemptive role of FERC under the Federal Power Act. The RTO/ISO model is premised on free markets and is therefore inherently hostile to out-of-market mechanisms that favor particular fuels, as Secretary Perry's request to FERC was perceived. But the same is true of state policies based on fuel favoritism. Thus, if the result would be higher prices for the consumer, a state policy favoring renewables at the expense of cheaper fossil fuel-based power would presumably not be welcomed by the wholesale markets. And because the RTOs/ISOs are regulated by FERC, efforts by states that conflict with the stated business of the RTOs/ISOs encounter vigorous claims of federal preemption. Arguably this is good for coal (and certainly gas) in the short run, but it is uncertain how long the status quo will prevail.

Crisis and disruption — our unifying theme — run throughout the four legs of our energy law stool.[2] And while perhaps it has always been thus, it sure seems to us that these are peculiar times for energy law, as though we are watching an epochal shift in how we power our country. Only time will tell.

§ 1.02. The First Leg: Coal, a Fuel in Crisis.

The year 2017 and the first part of 2018 saw the judiciary taking a prominent role in shaping how we evaluate where our power comes from, where it goes, and how it gets there. This activity takes the form of both environmental activism challenging both Obama and Trump Administration land-use policies and state and local government efforts to deny permits and otherwise hamper efforts to export coal through their ports. At the same time, the Trump Administration, coal companies, and the power plants and grid managers reliant on them, are seeking creative mechanisms — including

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2 This law firm is involved in some of the cases discussed below. However, it is not the intention of the authors to present in this chapter an advocacy view as to any particular matter.