City & County of Honolulu v. Sunoco LP—Ninth Circuit rejects another attempt to remove from state to federal court climate-related challenge to oil and gas companies' exploration and extraction activities

The City and County of Honolulu and the County of Maui sued various oil and gas companies in state court alleging Hawaii law-based claims for nuisance, failure to warn, and trespass related to harms that the companies knew, but concealed, attended their energy exploration and extraction. The defendant companies removed the action to federal court, principally asserting federal officer jurisdiction (28 U.S.C. § 1442(a)(1)), federal enclave jurisdiction, and Outer Continental Shelf Lands Act jurisdiction (43 U.S.C. § 1349(b)(1)). The district court rejected these grounds for federal jurisdiction and remanded the case to state court. *City and County of Honolulu v. Sunoco LP*, Nos. 20-cv-00163-DKW-RT & 20-cv-00470-DKW-KJM, 2021 WL 531237 (D. Haw. Feb. 12, 2021). The Ninth Circuit affirmed. *City & County of Honolulu v. Sunoco LP*, Nos. 21-15313 & 21-15318, 2022 WL 2525427 (9th Cir. Jul. 7, 2022).

The panel's decision broke no new ground and instead relied extensively on the recently decided *San Mateo v. Chevron Corp.* (*San Mateo II*), 32 F.4th 733 (9th Cir. 2022), that examined in detail the three sources of claimed federal court jurisdiction in a similar action predicated on California law claims. A summary of *San Mateo II* appears at https://files.constantcontact.com/48922045201/c42f20b0-67a5-4abf-8632-5cb42ea6c068.pdf.

With regard to federal officer jurisdiction, the panel concluded generally that the defendants' "arguments fail because they set out only normal commercial or regulatory relationships that do not involve detailed supervision." More specifically, it rejected the contention that they "act under federal officers when they produced oil and gas during the Korean War and in the 1970s under the Defense Production Act" because when complying with the DPA they "did not serve as government agents and were not subject to close direction or supervision. The government sometimes invoked the DPA in wartime, but ... Defendants' compliance with the DPA was only lawful obedience." Nor did they "act[] under federal officers when they repaid offshore oil leases in kind and contracted with the government to operate the Strategic Petroleum Reserve" since, again, they did not serve as "government agents" but engaged in "actions ... more like an arm's-length business deal." Their offshore oil operations failed for reasons like those identified in *San Mateo II*; i.e., "Congress endorsed oil operations and considered making a national oil company, but that does not show that oil production was a basic governmental task[,]" and mere "Government oversight for offshore leases is not enough to transform activities" into the "'close direction'" essential to federal officer jurisdiction. The panel next held that "Defendants did not act under federal officers in operating the Elk Hills oil reserve"—a joint venture between the Navy and a Chevron USA Inc. predecessor. It quoted from *San Mateo II* for the proposition that "[r]ather than acting for the government, Standard Oil and the Navy had 'reached an agreement that allowed them to coordinate their use of the oil reserve in a way that would benefit both parties,' and so 'Standard [Oil] was acting independently.'" Lastly, acquiring federal officer jurisdiction requiresd "Defendants to 'assert a colorable federal defense.'" The companies failed to satisfy this prong given that "[m]ost [of their] defenses do not flow from official duties" and that the exceptions—"government contractor and immunity defenses"—were not "colorable."

As in *San Mateo II*, the defendants' federal enclave jurisdiction assertion foundered because "Plaintiffs' claims are not about Defendants' oil and gas operations, and Defendants' activities on federal enclaves are too remote and attenuated from Plaintiffs' injuries." The panel further rejected another "ploy" advanced by the defendants to justify federal enclave jurisdiction:

> They argue that because some conduct happened on federal enclaves, the conduct relates to injuries from Defendants' deceptive practices. We reject such a broad application. Under *San Mateo II*, Defendants' alleged tortious conduct is too attenuated from Plaintiffs' claimed injuries. Federal enclave jurisdiction needs a direct connection between the injury and conduct. ... As in *San Mateo II*, there is no link. Even if much of Defendants' oil and gas operations occurred on federal enclaves, that still does not transform Plaintiffs' claims about deceptive practices into claims about the conduct itself.

Jurisdiction based upon OCSLA was equally foreclosed by the reasoning in *San Mateo II* because here, as there, "Defendants' sporadic OCS activities cannot shoehorn OCSLA jurisdiction for just any tort claim." Although "[t]he parties agree that some Defendants engaged in exploration, development, and production on the OCS[,] ... federal jurisdiction does not exist because oil and gas companies' OCS activities are too attenuated and remote from Plaintiffs' alleged injuries." The panel explained additionally:

> Plaintiffs' claimed injuries from Defendants' deceptive practices do not stem from activities on the OCS, even if OCS-produced oil accounts for 30% of annual domestic production, as Defendants assert. As the district court stated, "failing to warn and disseminating information about the use of fossil fuels have nothing to do with such direct acts or acts in support" of OCS operations.

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/07/07/21-15313.pdf