

1844104 (Colo. Dist. Ct. Feb. 28, 2008). The court of appeals affirmed the trial court's decision.

#### UNPUBLISHED COURT OF APPEALS OPINION ADDRESSES APPROVAL OF A CLASS ACTION SETTLEMENT

In another unpublished decision (see note above re citation), *Miller v. EnCana Oil & Gas (USA) Inc.*, No. 08CA2131, 2009 WL 1629949 (Colo. Ct. App. June 12, 2009), the Colorado Court of Appeals affirmed the trial court decision approving a settlement in a class action involving royalty payments. The court upheld the trial court's decision that it was reasonable for the settlement to include claims regarding the decimal interest of each owner for claims prior to January 1, 2008. The court also found that the trial court was correct in not giving the two objecting class members a second opportunity to opt out of the class at the time the notice of settlement was received. The appellate court upheld the trial court's determination that the settlement was fair for a number of reasons, including that each side would have presented extensive expert testimony at trial and that the outcome would have been predicated on the jury's assessment of each side's evidence regarding the location of the first commercial market for the natural gas produced in Colorado. The court stated that the case was therefore uncertain and risky for both sides which, among other reasons, supported the trial court's conclusion that the settlement was fair.

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## MINNESOTA — MINING

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#### MINNESOTA COURT OF APPEALS HEARS ORAL ARGUMENT IN MINNESOTA STEEL CASE

In July 2009, the Minnesota Court of Appeals heard oral argument on an appeal filed by the Minnesota Center for Environmental Advocacy (MCEA). *Minnesota Center for Environmental Advocacy v. Minnesota Department of Natural Resources*, No. A08-2171. The case stems from MCEA's claim that the Environmental Impact Statement (EIS) prepared for a proposed taconite mine and processing facilities was inadequate because it did not properly evaluate the impact of greenhouse gas emissions from the project or the cumulative impact of climate change. The decision in this appeal has significant implications for the degree of environmental review required for greenhouse gas emissions associated not only with metallic mineral mines, but with any other project that potentially emits greenhouse gases.

Minnesota Steel Industries, L.L.C., proposed the construction of an open pit taconite mine, adjacent stockpile, a tailings basin, and production facilities, including a steel mill. Under Minnesota law, an EIS is mandatory for the construction of a new metallic mine and processing facilities. Minn. R. 4410.4400, subpt. 8. Consequently, the Minnesota Department of Natural Resources (MNDNR), in cooperation with the U.S. Army Corps of Engineers (COE), undertook the preparation of the EIS. See Minn. R. 4410.4400, subpt. 8 (stating that MNDNR is responsible for pre-

paring an EIS for metallic mineral mines). After the MNDNR had completed a draft EIS, the MCEA submitted comments suggesting that the EIS should evaluate the "[p]redicted consequences of climate change," including drought, heavier rain events, increased flooding, violent storm events, and habitat changes.

In response to the MCEA's comments, the final EIS included a carbon footprint analysis, which estimated the total CO<sub>2</sub> emissions of the mine and processing facilities, and a detailed list of mitigation measures to reduce the estimated greenhouse gas emissions. The final EIS, however, indicated that a comprehensive analysis of the project-related CO<sub>2</sub> emissions was not possible because a reliable model or other analytical tool for predicting such effects does not exist. Additionally, the final EIS stated that, despite consensus in the scientific community about climate change occurring, any long-term impact of climate change in the project area would only be speculation.

The MCEA filed suit, claiming that the EIS was inadequate because, among other things, it failed to address the cumulative impacts of the project on climate change, did not evaluate mitigation measures to reduce greenhouse gas emissions, and neglected to account for climate change in its modeling. The MCEA and MNDNR filed cross motions for summary judgment, and the Itasca County District Court denied the MCEA's motion and granted the MNDNR's motion. The district court concluded that, because climate change is global in nature, the Minnesota Steel project would emit a relatively insignificant amount of CO<sub>2</sub> and that the MNDNR properly addressed the amount of such emissions. *Minnesota Center for Environmental Advocacy v. Holsten*, CV-07-3338 (Minn. Dist. Ct. 2008). The court also upheld the adequacy of the EIS's presentation of mitigation measures, which included a more efficient project design as a substantial improvement over traditional steelmaking. Finally, the court held that the MNDNR did not completely ignore climate change, but instead excluded the potential impacts from its modeling because of their speculative nature. According to the court, this decision was not arbitrary and capricious.

The Minnesota Court of Appeals is anticipated to issue a decision in this case in approximately three months. At that time, mining companies intending to construct new metallic mineral mines and processing facilities as well as the state's regulatory agencies should have better guidance on the degree to which future EISs must evaluate greenhouse gas emissions and climate change.

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## NEBRASKA — OIL & GAS

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#### INGRESS/EGRESS EASEMENT ALLOWS REASONABLE UPGRADE OF ROAD

Although the following case involved an easement on residential property, it is reported here because the same issue could arise with an oil and gas agreement. In a declaratory judgment action, *Homestead Estates Homeowners Association v. Jones*, 278 Neb. 149, 768 N.W.2d 436 (2009), the Nebraska Supreme Court