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Recent Case Decisions

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TABLE OF CONTENTS

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Federal

3d Circuit

Del. Riverkeeper Network v. Sec'y Pennsylvania Dep't of Env't Prot., 833 F.3d 360 (3d Cir. 2016).

Environmental conservation groups challenged permits issued by the Pennsylvania and New Jersey Departments of Environmental Protection ("NJDEP" and "PADEP," respectively) for a natural gas pipeline expansion. Although the states held the power to oversee environmental permitting processes, the court claimed jurisdiction to review the federally required permits. On the merits, the court found that neither agency acted arbitrarily or capriciously because they (1) adequately considered alternatives, even adopting some and explaining rejection of others; (2) balanced concerns for endangered species against the practicalities of the project; and (3) minimized economic impact by using existing rights-of-way. Finally, any errors made were not prejudicial to the environmental groups because the project did not begin until the operator received all applicable federal authorizations, including preliminary water quality certification, which required full environmental impact review. As a result, the court found the agencies had appropriately issued the permits and denied the environmental groups' petitions.

6th Circuit

Journey Acquisition-II, L.P. v. EQT Prod. Co., 830 F.3d 444 (6th Cir. 2016).

An oil and gas producer ("Purchaser") sued its predecessor ("Seller") for alleged continued operation on some conveyed land that Seller had not intended to transfer. The trial court granted summary judgement for the Purchaser, finding an unambiguous description of properties in the transfer and a willful, bad faith trespass by the Seller. The award included prejudgment interest and the transfer to the Purchaser of the Seller's interest in the trespassing wells. On appeal, the Seller challenged the decision on the merits for ambiguity and the preclusion at trial of testimony regarding the Seller's intent. The appellate court affirmed the trial court's finding that the sale agreement was unambiguous; other less clear provisions in the agreement did not contradict this interpretation. The court also found no abuse of discretion by excluding testimony regarding the Seller's intent because facts showed that the Seller received ample notice of possible differing interpretations of the agreement, so evidence of intent would have had little probative value compared to those facts. Last, the court found that the transfer of the wells was appropriate because bad faith actors may not offset the expenses incurred in the offending operations.

10th Circuit

Trans-Western Petroleum, Inc. v. U.S. Gypsum Co., 830 F.3d 1171 (10th Cir. 2016).

A prospective lessee called a lessor to inquire about top-leasing the lessor's minerals upon expiration of an ongoing assignment. The lessor executed a lease with the prospective lessee, but the assignee protested, claiming the lease remained valid, so the lessor rescinded the lease. The prospective lessee file suit against the assignee seeking declaratory judgment that the lease expired, and the court agreed. The prospective lessee also filed a second amended complaint seeking damages against the lessor for breach of contract and breach of the covenant of quiet enjoyment, requesting expectation damages because of the missed opportunity to assign the lease early in its primary term at the market's peak. The lessor, in contrast, argued that courts should measure damages for breach of an oil and gas lease, like any real property, at the date of the breach. The federal district court sided with the lessor but noted that Utah state courts had yet to address damages for an oil and gas lease. On appeal, the Tenth Circuit certified the question of expectation damages to the Utah Supreme Court, which directed the Tenth Circuit to measure general (or direct) damages "as the difference between the contract price of the lease and the market value of the lease at the time of the breach" and consequential (or special) damages as those reasonably foreseeable by the parties at the contract's execution—by the gains that the promised performance could produce or the loss produced by the absence of such performance. Therefore, the Tenth Circuit remanded the issue of consequential damages for recalculation.

D.C. Circuit

Petro Star Inc. v. Fed. Energy Regulatory Comm'n, 835 F.3d 97 (D.C. Cir. 2016).

A federal district court concluded that the Federal Energy Regulatory Commission ("FERC") acted arbitrarily and capriciously after dismissing an oil

company's petition that challenged the FERC's methodology for determining the value of "resid" crude oil commingled in a pipeline's common stream. In 2013, FERC began an investigation into resid pricing during which time an oil company challenged the agency's methodology, arguing that the formula used undervalues resid in an unjust and unreasonable manner by including a capital recovery factor. The FERC rejected the oil company's challenge without meaningful response to evidence presented by the oil company and further concluded that the oil company's failure to provide a viable alternative methodology was itself an independent ground for its decision. The court concluded, by applying *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286 (D.C. Cir. 2000), that the oil company's evidence suggesting undervaluation established a prima facie case warranting re-examination of the resid valuation formula and a meaningful response.

State

Georgia

Columbia Cas. Co. v. Plantation Pipe Line Co., 790 S.E.2d 645 (Ga. Ct. App. 2016).

Insurer appealed the trial court's grant of Insured's motion for summary judgment regarding coverage for a pipeline leak. Insured sued Insurer to recover money it had spent to settle claims and remediate soil contamination traceable to a pipeline leak that Insured had immediately repaired. At the time of the leak, Insurer agreed to indemnify Insured for losses exceeding the limits of Insured's underlying policy, and the underlying policy covered "occurrences taking place during its policy period." Insurer argued that because of the progressive nature of environmental contamination, Insurer should allocate the losses across the several policies issued to the Insured over the three decades that contamination accrued. Insurer reasoned that its policy would not trigger under this approach because the losses per policy would not exceed the limits of the policy. The underlying policy, however, covered the leak because it took place during the policy period. Thus, the court of appeals affirmed the trial court and held that allocation was not at issue because Insured's policy, by its plain terms, covered the leak and resulting damages.

Indiana

Schuchman/Samberg Invs., Inc. v. Hoosier Penn Oil Co., Inc., 58 N.E.3d 241 (Ind. Ct. App. 2016).

The owner of a contaminated site sued the site's former operators under Indiana's Environmental Legal Actions statute ("ELA") and Petroleum Releases statute ("PR") to recover expenses for remedial work. The owner had noticed stained soil before purchasing the property and became aware of environmental reports shortly afterward but failed to file its complaint for ten years. The former operators filed a motion for partial summary judgement, arguing that the owner's ELA claim was untimely and the PR claim was invalid. The trial court granted the motion. On interlocutory appeal, the court affirmed, first addressing whether the appropriate statute of limitations ("SOL") for the ELA claim was six years (Indiana's requirement for damage to real property) or ten years (Indiana's catch-all statute of limitations). The owner argued for the latter because its claim was one of contribution. The court decided that a contribution claim must originate from a party already found liable for damage; rather, the owner sought to recover for property damage. Therefore, the Court applied the six-year SOL to determine that the owner, who had early knowledge of possible contamination, failed to file a timely complaint. Additionally, the court found that Indiana's PR unambiguously permits recovery of costs for remediation only by the State, not private parties. Therefore, the owner could not recover under the PR.

New Mexico

Ulibarri v. Southland Royalty Co., LLC, No. CIV 16-00215, 2016 WL 3946800 (D.N.M. July 20, 2016).

A royalty owner in natural gas wells commenced a putative class action against an out-of-state natural gas company alleging that, under the "marketable condition rule" ("MCR"), the company had a duty to bear post-production costs, including the natural gas processors tax ("NGPT"), of putting gas into marketable condition. First, the court acknowledged the State's longstanding recognition of implied covenants. Before the court could consider whether an implied duty to market includes MCR, the court had to determine if the contract at issue included a duty to market. In doing so, the court found no support under state law to imply MCR in a contract. Therefore, the company may deduct post-production costs from royalties for processing natural gas into marketable condition. Second, the court noted the owner's failure to offer authority

supporting its proposed construction of NGPT and that, based on legislative history, the legislature modified the statute for efficient tax collection from a handful of processors rather than numerous royalty and working interest owners—not to exclude those royalty owners from a fair portion of the tax. Therefore, Owners share in the NGPT burden as a form of royalty deduction to cover reimbursement to processor who had to pay that tax.

North Dakota

Horob v. Zavanna, LLC, 2016 ND 168, 883 N.W.2d 855.

North Dakota's Supreme Court concluded that a lease may remain in effect under the terms of a communitization agreement even after a halt in production triggers the cessation of production clause. Upon learning of a well's recent lapse in production, oil and gas lessors sued lessees claiming the lease expired under a cessation of production clause. The lease covered a 1,057.72-acre area for ten years and as long thereafter as oil or gas was produced. If production stopped, the lease would terminate within sixty days unless the lessee commenced additional drilling or reworking. A well was drilled on a spacing unit containing part of the leased acreage. Acreage owned by lessors was pooled with federal lands pursuant to a communitization agreement. An oil company leased and operated a well on a 160-acre spacing unit containing 40 acres of the lessors' property, with the remaining acreage belonging to the United States. As a result, the court concluded that the lease agreement remained active because the agreement stated that production from it constituted production as to each lease committed to the agreement and because the lease agreement at issue did not contain a Pugh clause that would otherwise allow for severability of non-communitized portions of a lease.

Pennsylvania

In re Sunoco Pipeline, L.P., 143 A.3d 1000 (Pa. Commw. Ct. 2016).

A pipeline owner and operator sought to condemn multiple permanent, non-exclusive easements and temporary workspace easements for maintenance and expansion of pipeline. Condemnees claimed the owner had no power to condemn because it failed to meet requirements for a public utility, including categorization as an intrastate pipeline, status as a public utility corporation, regulation of the intrastate activity by the state, and demonstration of a public need. Though condemnees claim the pipeline is an interstate pipeline subject to federal regulation, the owner received approval from the state Public Utility Commission ("PUC"). Furthermore, the state certificated the owner and regulated its actions of intrastate service in seventeen counties, including the movement of natural gas liquids. Therefore, the owner is an intrastate public utility corporation actively regulated by the state. The demonstration of a public need is under the jurisdiction of PUC rather than the courts, and PUC determined the transport of natural gas liquids within the state meets the public demand for fuel during winter. The objections to the condemnation of easements were all overruled.

Texas

Combest v. Mustang Minerals, LLC, No. 04-15-00617-CV, 2016 WL 4124066 (Tex. App. Aug. 3, 2016).

Grantors conveyed land to Grantee by warranty deed, expressly reserving an undivided one-half interest in the underlying minerals. Grantee interpreted the deed language to mean that Grantors had merely reserved an interest in the minerals conveyed, but the Grantors argued that the deed had not conveyed an interest in minerals at all. Later, Operator executed an oil and gas lease with Grantors' successor-in-interest, who then conveyed the interest to LLC. Operator also executed a lease with Grantee, and both lessors received royalty payments after Operator pooled the leases. The dispute arose when Operator ceased making payments to Grantee after LLC claimed ownership of the entire mineral estate. In response, Grantee brought a trespass-to-try-title action, and the trial court granted summary judgment for LLC. On appeal, Grantee argued that the trial court misinterpreted the language of the deed or, in the alternative, that the deed was ambiguous. The court of appeals addressed whether the deed reserved a fraction of the minerals under the land conveyed or, instead, the land described. The court sided with LLC and held that, in light of the entire deed, Grantors reserved a fraction of the minerals from the land described such that Grantee received no mineral interest. Further, the court rejected Grantee's argument that the deed was ambiguous on its face and affirmed the judgment of the trial court.

Federal

9th Circuit

Pakootas v. Teck Cominco Metals, Ltd., 830 F.3d 975 (9th Cir. 2016).

The Ninth Circuit granted the operator of metal smelter an interlocutory appeal to determine whether the operator arranged for "disposal" of air emissions from smelter smokestacks within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The operator was amidst litigation with certain tribal nations regarding a different form of waste disposal when the tribal nations amended the complaint to add a CERCLA claim. The operator moved to strike or dismiss because CERCLA provides no foundation for liability under such allegations. The lower court denied the motions. One month later, after the court released an opinion interpreting "disposal" as used in the Resource Conservation and Recovery Act ("RCRA") to similar circumstances, the operator moved for reconsideration, arguing that CERCLA cross-references RCRA's definition of "disposal," foreclosing the tribal nations' air pathway claims. The lower court denied the motion. On interlocutory appeal, the Ninth Circuit concluded that "disposal" does not include the gradual spread of contaminants without human intervention, as explained in the RCRA case; therefore, the operator did not arrange for "disposal" of hazardous substances under CERCLA that resulted in airborne emissions contaminating land and water downwind.

United States v. Washington, 827 F.3d 836 (9th Cir. 2016).

The United States, on behalf of twenty-one Native American tribes, brought a complaint against the state of Washington seeking an injunction for violating treaties, which guaranteed off-reservation fishing rights, by building culverts that prevent mature salmon from returning to spawning grounds, juvenile salmon from going out to sea, and young salmon from escaping predators. Washington denied the treaties provided a cause of action for damage, but the Supreme Court viewed these treaties as the tribes would naturally understand them. Given the tribes' central need of fishing salmon and the governor's promise to the tribes of food and drink forever, the court decided the treaties protect the tribes' rights to both fish and be free from damages by Washington to the supply of fish. Culverts built by the state and the United States that block several hundred thousand salmon constituted a continuing violation of the treaties by both governments. The federal district court did not err in issuing an injunction for the state to correct the culverts because it took into consideration multiple causes of decline in salmon and courses to reverse the extensive effect of the culverts. The Ninth Circuit therefore affirmed decisions in favor of the tribes, including objections to the breadth of the injunction, the cost to the state, and a question of federalism.

D.C. Circuit

Mingo Logan Coal Co. v. EPA, 829 F.3d 710 (D.C. Cir. 2016).

A mining company brought suit against the EPA for the revocation of a permit to dispose of various mining byproducts in an area previously approved by a separate federal agency. The D.C. Circuit first established the EPA's jurisdiction to grant and revoke the relevant discharge permits. The court ran through three separate analyses for the proper revocation of the permit. First, the mining company forfeited the argument based on their reliance costs for failing to have raised them in the administrative hearing or at the trial court level. Second, the EPA properly acted under its authority to regulate adverse impacts on wildlife populations, while not overstepping the authority of the state agency to regulate municipal water quality. The EPA did not act outside of its congressionally mandated authority, and so the mining company's argument that the EPA's action was capricious fails. Finally, the court found that the EPA met the proper justification standards, even the heightened standard argued by the mining company, to revoke the permit, despite approving the permit previously. New data collected since the previous approval supports the EPA's current revocation of the permit.

State

California

Bay Area Clean Env't, Inc. v. Santa Clara Cty., 207 Cal. Rptr. 3d 334 (Ct. App. 2016), *reh'g denied* (Sept. 22, 2016), *review filed* (Oct. 11, 2016).

A non-profit, environmental organization brought writ of mandate against a county challenging approval of a quarry reclamation plan under the Surface Mining and Reclamation Act ("SMARA") and the California Environmental Quality Act ("CEQA"). The non-profit brought claims regarding

water quality and harm to downstream wildlife, specifically an endangered frog. The reclamation plan, along with an environmental impact report, faced a public review period for compliance with relevant regulation before certification. The non-profit claimed selenium levels in the water would increasingly degrade over the twenty-year reclamation period; however, the court found SMARA accepts a decline in water quality if necessary to complete a reclamation plan. Another claimed violation was the environmental impact report's failure to mention the endangered frog, but the court held that the county's analysis on downstream aquatic wildlife was sufficient. Furthermore, the court found the existence of a plan for a new quarry has no effect on the reclamation plan for the current quarry because the reclamation is a standalone project that meets CEQA requirements independently as opposed to a first phase in a larger development. Thus, the county properly certified the reclamation plan and the environmental report.

Colorado

Indian Mountain Corp. v. Indian Mountain Metro. Dist., No. 15CA1055, 2016 WL 4249745 (Ct. App. Colo. Div. I. Aug. 11, 2016).

A subdivision developer's successor allegedly held legal title to water rights and the water augmentation plan ("Plan") for the benefit of a subdivision and sought compensation for the water services it provided to the subdivision ("District"). The District filed a counter-claim seeking judgment against the successor, claiming that lot owners rightfully owned both the Plan and water rights as beneficiaries of constructive trust under a theory of unjust enrichment. The trial court ruled in the District's favor imposing a constructive trust as a remedy. The successor appealed. The appellate court reversed the trial court's decision. The court concluded (1) the successor did not benefit at the District's expense; (2) the successor's retention of the water rights and Plan is not unjust because the District stipulated to never having paid the original developer for water services; and (3) the successor's retention of water rights would not be unjust because local government agencies would hold the successor accountable for failure to comply with particulars of the Plan and because lot owners may opt into the Plan. Therefore, the costs related to the Plan were not part of sales price for subdivision lots such that the successor did not benefit from lot owners and was not unjustly enriched by seeking reimbursement from lot owners for costs affiliated with operating the Plan.

Montana

Kelly v. Teton Prairie LLC, 376 P.3d 143 (Mont. 2016).

On three separate occasions, the senior appropriators of the Teton River made calls upon the upstream junior appropriators to stop diverting their water. The district court granted an injunction. The company appealed. In Montana, the prior appropriation doctrine establishes which individual's right to water is senior to another individual's rights. Here, the company's rights were junior. The court held that senior appropriators do not have to make calls in order of seniority amongst the junior appropriators, that if any water could make it to the senior appropriators the call was not futile, and lastly, that the court has jurisdiction over water distribution matters. The company had to stop diverting water and was liable for any damages it caused to the senior appropriators by ignoring the call.

Mack v. Anderson, 2016 MT 204, 384 Mont. 368, 380 P.3d 730, *reh'g denied* (Sept. 28, 2016).

A property owner ("Owner") brought suit against adjacent property owners ("Neighbor") seeking an injunction for Neighbor to remove the dam diverting and blocking water flow at the point of diversion ("POD"). When Owner attempted maintenance on the ditch, Neighbor filed a complaint that Owner did not get appropriate permits; Owner later attempted to comply with the permit complaints, but Neighbor hindered them from working on the ditch by filling it with gravel. The district court granted a preliminary injunction for Owner to gain access to the POD and along the ditch that crossed Neighbor's land for installation and maintenance. Neighbor appealed, arguing that the district erred by determining the POD, a decision usually reserved for Water Court. Montana's Supreme Court determined the district court did not abuse its discretion to correctly maintain the status quo by allowing Owner use of his undisputed water rights through access to the POD. The Supreme Court reasoned that ditch or easement rights are decidedly separate from water rights, and the district court has the authority to supervise distribution of appropriated water rights.

New Mexico

Christopher v. Owens, No. 34,588, 2016 WL 4447516 (N.M. Ct. App. Aug. 22, 2016).

Individuals bought land with a natural water spring on it ("Rancher"). In the warranty deed, the seller retained a fifty-percent interest in the water on the ranch. The seller later sold his fifty-percent interest to another party ("Water Assignee") via a warranty deed. After the seller filed for an application to appropriate those waters from the ranch, the Rancher filed a complaint against the seller and the Water Assignee seeking a declaration that the seller's attempt to reserve an interest in the warranty deed was null because he did not seek approval of appropriations in that water source while he owned the property, and therefore the Water Assignee had no interest in the water source either. The district court agreed that the seller had no interest in the water. Additionally, the Water Assignee cross-claimed against the seller for breach of his warranty deed to convey and defend proper title. The district court dismissed the Water Assignee's claim. The appellate court, however, held that the seller did reserve a cognizable interest in the water source—not as the traditional, appropriated, certified water rights but as a right to pursue the development or perfection of such water rights. Therefore, the court held that the seller and Rancher could divide that interest between them. The appellate court did not view the case on a regulation basis but rather on the contractual terms between the buyer and seller. The appellate court reversed and remanded to the district for further proceedings.

North Dakota

In re 2015 Application for Permit to Enter Land for Surveys & Examination Associated with a Proposed N. Dakota Diversion & Associated Structures, 2016 ND 165, 883 N.W.2d 844.

Water Resource District ("District") filed applications with the district court to enter landowners' property to obtain soil samples for a proposed flood control project. The landowners objected, claiming the entry onto their property was a taking of private property per the North Dakota Constitution and requested a jury to determine the compensation for entering their lands. The district court granted the District the authority to enter the landowners' real property, and the landowners appealed. Landowners claimed under the North Dakota Rules of Civil Procedure ("N.D.R.Civ.P.") that the District must serve eminent domain summons before the district court could have jurisdiction. The Supreme Court of North Dakota held that the District sought entry onto land under North Dakota Century Code ("N.D.C.C.") Chapter 32-15, which falls under a specific exemption within the N.D.R.Civ.P. The exemption rule allows a district court to permit examinations like a soil sample because the entry onto the land was preliminary to a condemnation action. Therefore, the Court did not require the eminent domain summons and instead held the district court had proper subject matter jurisdiction.

Federal

9th Circuit

Helping Hand Tools v. EPA, 836 F.3d 999 (9th Cir. 2016).

Environmental groups brought suit for review of the EPA's grant of a Prevention of Significant Deterioration permit ("PSD") for the construction of a new biomass-burning power plant to a lumber company. The Ninth Circuit reviewed two issues specifically cited by the environmental groups: (1) the determination of the primary purpose for the project and (2) the allowance of the mixed fuel source. First the court found that the EPA took a "hard look" at the purpose for the project and properly found that the project's primary purpose was to use biomass waste produced in and around the plant, as proposed by the Lumber Company. Second, the court reviewed the company's ability to use a clean energy source rather than the "dirty" biomass fuel. Here, the Ninth Circuit made a finer distinction that, although natural gas might be a cleaner fuel, it falls outside the business of the lumber company. Therefore, the EPA did not abuse discretion by granting the lumber company's permit.

D.C. Circuit

Pub. Employees for Envtl. Responsibility v. Hopper, 827 F.3d 1077 (D.C. Cir. 2016).

Conservation organizations ("Conservationists") brought suit against the government claiming the Bureau of Ocean Energy Management ("Bureau") violated several federal statutes in permitting an energy company to lease land off the coast of Massachusetts to erect windmills. The Bureau allegedly violated the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). The district court dismissed the claims and granted summary judgment to the Bureau. The Conservationist appealed, disputing the Bureau's decision to lease without first procuring specific information about the sea floor. The Conservationists claimed the Bureau only used limited geological surveys as a basis for their decision to lease, violating NEPA. Even though the Bureau did issue an environmental impact statement ("EIS"), the D.C. Circuit held the Bureau violated NEPA by not sufficiently obtaining enough geological data to determine whether the sea floor could support windmills. The court vacated the previous EIS and required the Bureau to add the necessary information to the EIS before any construction could begin. The Conservationists also claimed a violation of the ESA because the Bureau's incidental take statement excluded a specific bird migration measure. The court held the Bureau violated the ESA when it refused to examine the Conservationists' submission to alter wind turbine use in times of low visibility or at night to cut back on the amount of endangered birds harmed by the windmills. Thus, the appellate court reversed and remanded the district court's decision on the violation of NEPA and ESA.

State

Illinois

Ill. Landowners All., NFP v. Illinois Commerce Comm'n, 2016 IL App (3d) 150099.

Company applied for public utility status in Illinois before starting construction of a high voltage transmission line that would run from northeast Iowa to northwest Illinois. After the Illinois Commerce Commission ("Commission") granted the Company public utility status under the Public Utilities Act ("Act"), the Illinois Landowners Alliance, Illinois Agricultural Association or Illinois Farm Bureau, and Commonwealth Edison Company ("Petitioners") challenged the order granting the public utility status. The Petitioners claim that the Company is not a public utility under the Act and no substantial evidence existed supporting the Commission's decision. The court determined under the Act that, to gain public utility status, a company must (1) own, control, or manage utility assets within the state and (2) offer its assets to the public without discrimination. The court found that the Company did not own, manage, or operate any assets in Illinois. Additionally, the Company's proposed transmission line would be discriminatory. The court ruled for the Petitioners, stating that the Commission did not have the authority to grant public utility status to the Company.

New York

Heeran v. Long Island Power Auth., 2016 N.Y. Slip Op. 05486 (N.Y. App. Div.).

Homeowners sued a public utility company ("PUC") for negligence to recover for property damage sustained after a hurricane caused an electrical fire. Homeowners claimed that, based on the declaration of emergency and evacuation order announced in anticipation of the hurricane, PUC should have foreseen that live electrical transmission lines would catch fire and property damage would occur. PUC and its subsidiary filed a motion to dismiss, arguing that PUC was immune from liability because it performed a "governmental function" in deciding not to shut off the area's electricity. The trial court denied the motion to dismiss, and the court of appeals affirmed. The court reasoned that although the state legislature created the PUC, the PUC's clear purpose was to serve as a substitute for private electricity companies. And because providing electricity has traditionally been a proprietary function, the court held that PUC was not immune under the governmental function exception. The court also denied the argument that PUC was acting in a "dual role" or on a "continuum of responsibility" amidst the natural disaster because private electric utilities in the area faced the same hurricane-related issues. The court concluded that it is not the "size of the task," but rather the "nature of the responsibility," that determines whether an action is governmental or proprietary.

Federal

9th Circuit

Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Dep't of the Interior, No. 14-15514, 2016 WL 3974183 (9th Cir. July 25, 2016).

Environmental associations ("Associations") brought suit under the National Environmental Policy Act ("NEPA") challenging approval by the Bureau of Reclamation ("Agency") regarding the interim renewal contracts that authorize delivery of water from federal reclamation facilities to certain water districts served by a federal water management project ("Project"). The Associations claimed that the environmental assessment ("EA") was inadequate and that the agencies should have prepared an environmental impact statement ("EIS"). The federal district court ruled against the Associations, which then appealed. A federal circuit court held that the agencies' EA did not comply with NEPA because it contained a "no action" alternative regarding continued delivery of water from federal reclamation facilities to state water districts under the project during interim contracts renewal periods. Additionally, the Agency's decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water qualities constituted an abuse of discretion. Last, the EA's geographic scope was sufficient such that requiring the agencies to trace the incremental effects of each water service contract on waterways subject to the project would be impractical.

Pacific Dawn LLC v. Pritzker, 831 F.3d 1166 (9th Cir. 2016).

A fish harvester brought action against the National Marine Fisheries Services ("NMFS") for limiting its share of allowable catch on the activities of 2003 and 2004 rather than years closer to 2010 when NMFS issued the regulation. The limitations require council to consider the participant's present and historical harvests and investments in and dependence on the fishery, with the objective of choosing the plan with the least disruption of current domestic fishing practices. To cause the least disruption, the council chose a control date in 2003. NMFS argued that abandoning the control date would signal to parties subject to the limitations to increase activity for later consideration of "present" use to determine their allowable catch. The district court granted summary judgment in favor of NMFS, and the appellate court held that the application of the 2004 control date did not violate the statute's requirement to consider "present" participation in fishery.

Pesticide Action Network N. Am. v. EPA, No. 14-71514, 2016 WL 3619950 (9th Cir. July 5, 2016).

Organization sought review in the United States Court of Appeals for the Ninth Circuit regarding the Environmental Protection Agency's ("EPA") denial of an administrative petition. The petition requested that the EPA, for the protection of local children, adopt interim prohibitions on toxic pesticides near places where children congregate for fear of pesticide drift. Organization argued that substantial evidence does not exist to support denial of the petition. The Ninth Circuit disagreed, and denied Organization's petition for review. The court agreed with the EPA that imposing express prohibitions was not the proper method for mitigating the risk of exposure given the numerous factors involved in pesticide drift and would direct limited agency funds away from established safety procedures. Moreover, the court sided with the EPA for its conclusion that the proposed course would not address the purported risk without unreasonably reducing other safe uses of pesticides.

State

Arizona

McCarthy Integrated Sys., LLC v. Evoqua Water Techs., 379 P.3d 263 (Ariz. Ct. App. 2016).

A company entered into a contract with supplier for aftermarket parts that the company was then going to resell for use in chlorination machines. In the contract was a termination clause, which stated that only the supplier could terminate the contract for cause in the first year, but after the first year, either party could terminate the contract with thirty days' notice. The supplier gave thirty days' notice of their desire to terminate the contract in its fifth year. The company sued, believing the termination to be wrongful under the Equipment Dealers Act ("EDA"), which prohibits suppliers from terminating contracts with dealers without cause, regardless of the contract terms. But the court held that the EDA only applied to agricultural machinery, and therefore not these chlorination machine parts, and granted summary judgment to the supplier.

California

Friends of the Hastain Trail v. Coldwater Dev. LLC, 205 Cal. Rptr. 3d 270 (2016).

Users of two different private trails brought action seeking to deem the trails a public easement. The trails initially served as roads for Los Angeles fire departments to use to fight wildfires. The trial court created a public easement by implied dedication because the public used the trails for five continuous years before the landowners' purchase. The trial court said the predecessors in ownership of the land had impliedly dedicated an easement to the public by not halting the use of the trails. On appeal, the landowners argued that the trial court applied the wrong law and the court should relocate the easement to serve equity so that the landowners may develop their land. The appellate court held that the trial court applied the proper test and that, to meet that test, the claimant must show the public used the private land as one would typically use public land. A substantial number of people must use the land without requesting permission or being deprived of use by the owners. The appellate court held that the trail users failed to meet that burden because only a handful of people testified to using both trails during the five years. Additionally, the appellate court held that the creation of the trails by the fire department was a limited public use that could not have placed the land owners on constructive notice that their land was ripe for implied dedication for a public easement. The appellate court reversed the judgement of the trial court.

Prop. Reserve, Inc. v. Superior Court, 375 P.3d 887 (Cal. 2016).

California's Department for Water Resources ("Department") sought to experiment with environmental and geological conditions for the construction of a tunnel or canal on private land through statutory pre-condemnation procedures. Department received a court order to perform the environmental tests, but the court denied its geological testing of drilling and refilling soil borings because the legislature allegedly did not intend the statute for use with deep drilling. After a series of appeals and remands, the Supreme Court held the statute did cover the testing based on the legislative history and the continued use of terms "test holes" and "borings." For testing to avoid violation of the takings clause, the statute requires a court order, a court security deposit, and compensation for damages from testing. The Supreme Court declared the pre-condemnation statute provide adequate measures for damages outside of the takings clause, if provided with a jury trial on damages. Furthermore, the geological testing of drilling and refilling holes would not be a permanent appropriation or damaging of property. Regardless, the statute provides adequate compensation for permanent damage or appropriation and therefore does not violate the state takings clause.

Maryland

Medford v. Cruz, No. 0073, Sept. Term, 2014, 2016 WL 4439992 (Md. Ct. Spec. App. Aug. 23, 2016).

Owner 17 and Owner 18 filed concurrent suits to quiet title as to the Disputed Area adjacent to their jointly-owned pier. Owner 18 claimed legal and equitable title to the Disputed Area based on past conveyances and a quitclaim deed. Owner 17 argued, however, that it had acquired title through adverse possession, by way of tacking, from its predecessors-in-interest. Ultimately, the trial court found that Owner 18 held title to the Disputed Area, subject to an easement appurtenant as to Owner 17's tract. The court of appeals reversed, holding that the Disputed Area was not among the assets Owner 18's predecessor had acquired by a certain court order, and therefore Owner 18's quitclaim deed was faulty and had not vested in him title to the Disputed Area. After a recitation of the property's history, the court concluded that Owner 17, in light of its predecessors' use of the land, had acquired title by adverse possession. First, the predecessors' conduct of mowing and removing debris from the Disputed Area constituted actual occupancy. Next, because each predecessor believed that the Disputed Area was part of Lot 17, privity of estate satisfied continuity for the statutory period. Last, the predecessors satisfied hostility under color of title, evidenced by their conduct on the land, and Owner 18 failed to prove that the predecessors' occupation was not hostile.

Massachusetts

Nelson v. Conservation Com'n of Wayland, 90 Mass. App. Ct. 133, 56 N.E.3d 889 (2016).

The landowner appealed a decision declaring a portion of his property to be wetlands under municipal bylaws, which provided a broader definition than utilized in the Wetlands Protection Act. The court found the declaration objectively reasonable because fifty percent of the vegetation on the landowner's property constituted protected vegetation and runoff water collects on the property. Further, the absence of hydric soil on the property does not, on its own, negate the lower courts finding.

Oregon

Dayton v. Jordan, A158858, 2016 WL 4013747 (Or. Ct. App. July 27, 2016).

A property owner ("Owner") and the adjacent property owners ("Neighbor") were rival ATV rental businesses, but Owner owned the road on the border of the properties that provided the only access to nearby sand dunes. Owner brought quiet title action against Neighbor and Neighbor claimed an implied easement over the road based on the inclusion of the road in a plat made for the transfer from the Owner's predecessor to the Neighbor. A later partition describes an easement on the road but does not provide a formal, deeded easement. The trial court adopted the Neighbor's argument in summary judgment based on the plat and the reference to the easement in the later partition. The appellate court denied an implied easement because it lacked evidence of intent to create an easement. Furthermore, the trial court erred when it relied solely on the depiction of a private road on a plat to determine an implied easement; instead, Oregon courts have traditionally considered factors such as historical use of the land, the extent to which the parties knew of that use, the terms of the conveyance and the consideration given for the conveyance, and the necessity of the easement.

Gilmour v. Linn Cty., 379 P.3d 833 (Or. Ct. App. 2016).

Farmer requested that County interpret the local code to determine whether his straw compressing operation amounted to "preparation of a farm crop" permitted on land zoned exclusively for farm use. The local code implemented a state statute defining farm use. The County found that the compressing operations amounted to processing, rather than preparation, of a farm crop and was thus not a farm use within the statute's meaning. Farmer appealed to the Land Use Board ("Board"), which reversed County's ruling. On judicial review, various parties sought reversal of the Board's decision, arguing that the Board erred in concluding that the compression operation constituted preparation because the Board should defer to the County's decision. First, the court held that the Board did not have to defer to the County because the regulation implemented a state statute and was, therefore, a matter of statutory construction. Finally, the court held that compression of baled straw amounted to a farm use because, under the statute, farm use included preparation, which included packaging of farm products for market. Therefore, the compression operation was a farm use because it was at least similar to the packaging of straw for market.

OIL AND GAS

David W. Savitski, *Price Tests for Market Power Analysis of Natural Gas Storage Providers*, 37 Energy L.J. 177 (2016).

Kelsea Wagner, *Coalbed Methane: The Past, Present, and Future Legal Landscape of the Gas Within A Solid*, 10 Appalachian Nat. Resources L.J. 93 (2016).

Monte Mills, *What Should Tribes Expect from Federal Regulations? The Bureau of Land Management's Fracking Rule and the Problems with Treating Indian and Federal Lands Identically*, 37 Pub. Land & Resources Law Review 1 (2016).

WATER

Logan Hoyt, *Standing on Thin Ice: How Nebraska's Standing Doctrine Prevents the Majority of Surface Water Users from Obtaining Judicial Relief Against Groundwater Users Interfering with Their Appropriations*, 94 Neb. L. Rev. 1054 (2016).

Matthew Ingber, *Paddling in Mr. Potter's Backyard: Navigating New York's Navigable In-Fact Doctrine* 32 Touro L. Rev. 453 (2016).

Reid Peyton Chambers & William F. Stephens, *Principles of International Law That Support Claims of Indian Tribes to Water Resources*, 63 UCLA L. Rev. 1530 (2016).

Sharmila L. Murthy, *A New Constitutive Commitment to Water*, 36 B.C.L.J. & Soc. Just. 159 (2016).

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Feng Xiufeng, *Smart Grids in China: Industry Regulation and Foreign Direct Investment*, 37 Energy L.J. 135 (2016).

Kenneth R. Chapman, *Burdens, Hurdles, and Limitations: A Comprehensive Discussion of the Evolution Facing Renewable Energy Development in Virginia*, 15 Appalachian Nat. Resources L.J. 99 (2016).

Lincoln L. Davies & Victoria Luman, *Incomplete Integration: Water, Drought, and Electricity Planning in the West*, 31 J. Envtl. L. & Litig. 167 (2016).

AGRICULTURE

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