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Recent Case Decisions

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Oklahoma Oil and Gas, Natural Resources, and Energy Journal RECENT CASE DECISIONS

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All case citations are as of 7-29-2017. The citations provided in this Case Summary do not reflect changes made by Lexis or Westlaw, or the case's addition to a case reporter after that date. This Case Report contains case decisions issued through 6-9-2017. This PDF version of the Case Summary is word-searchable. If you have any suggestions for improving the Case Summaries, please e-mail the editorial staff at ou.mineral.law@gmail.com.

SELECTED OIL AND GAS DECISIONS*Upstream – Federal***Fifth Circuit**

Guilbeau v. Hess Corp., 854 F.3d 310 (5th Cir. 2017).

Landowner purchased property on which—more than three decades earlier—Operator had conducted oil and gas operations. Operator had plugged and abandoned its wells in 1973 after its oil and gas leases expired. Landowner sued Operator, alleging damages based on contamination from the on-tract drilling activities. Operator moved for summary judgment. Applying Louisiana law, the district court granted Operator’s motion, reasoning that the subsequent-purchaser rule barred Landowner’s claims. Landowner appealed and the Fifth Circuit Court of Appeals affirmed. In Louisiana, the subsequent-purchaser rule provides that a landowner may not recover from a third party for damage inflicted on a tract *before* landowner’s purchase unless a predecessor assigned such right to the landowner—in other words, it is a *personal* right. And though the Louisiana Supreme Court had not addressed the question, decisions from the state courts of appeals revealed a “consensus supporting the application of the subsequent purchaser doctrine to cases involving mineral leases.” Citing these decisions, the court held that the subsequent-purchaser rule barred Landowner’s claims against Operator.

T D X Energy, L.L.C. v. Chesapeake Operating, Inc., 857 F.3d 253 (5th Cir. 2017).

Unit Operator (“Operator”) force pooled a unit with several lease owners to effectively develop the area. One Unit Lessee (“Lessee”) acquired its leases from the mineral owners after Operator spudded the well, but prior to completion. Lessee requested an accounting, which Operator failed to send, while Operator requested Lessee pay its share of drilling costs and risk charge associated with operations. State statute required that Operator send all unleased interest holders an accounting upon request. Operator contended that Lessee did not meet this definition, while Lessee contends that because its lease occurred after Operator began spudding the well, the statute applied to Lessee. Because Operator failed to send timely reports pursuant to state statute, it forfeited its rights to collect contribution of drilling costs from Lessee. Operator additionally alleged that state statute

required Lessee to pay a risk charge on the well. However, the statute required Operator to send notice of drilling prior to commencement of drilling to be able to collect a risk charge. Because of Operator's untimely notice, Lessee owes neither drilling costs nor a risk charge to Operator.

Sixth Circuit

Atlas Noble, LLC v. Krizman Enters., No. 15–4385, 2017 WL 2260988 (6th Cir. May 23, 2017).

Buyer executed a purchase and sale agreement (“PSA”) with Seller respecting certain oil and gas leases. On closing day, Buyer notified Seller via email that Buyer was unilaterally terminating the agreement, alleging that Seller had not cleared title on a sufficient percentage of the subject acreage. After receiving Buyer's email, Seller took no further action on the PSA and refused to release certain escrowed funds. Buyer sued Seller, arguing that Seller breached by refusing to authorize the release of escrowed funds to Buyer per a provision of the PSA. Seller counterclaimed that *it* was entitled to the funds, arguing that *Buyer* had breached. The district court granted summary judgment for Seller, reasoning that Buyer anticipatorily breached with its closing-date email. But the district court denied Seller's request for damages amounting to the PSA's total value, reasoning that the parties intended the escrow account to act as a liquidated damages clause. The Sixth Circuit Court of Appeals reversed in part and affirmed in part. First, the court reversed the district court's conclusion that Buyer anticipatorily breached because at least some evidence suggested that Seller could not have completed the transaction on time—in other words, fact issues remained and precluded summary judgment. Second, the court affirmed the liquidated damages ruling because: (1) the escrow percentage was not unreasonably large relative to the PSA's value and (2) liquidated damages in a PSA for oil and gas leases are reasonable given the regular fluctuation in lease value.

Eight Circuit

Hill v. Sw. Energy Co., 858 F.3d 481 (8th Cir. 2017).

Landowners sued Producers engaged in hydraulic fracturing operations, alleging that Producer's fracking waste disposed near Landowners' property migrated into the subsurface after refusing to lease property to Producer. Landowners asserted theories of trespass and unjust enrichment.

The trial court granted Producer's summary judgment motion at the end of the first discovery phase on the issue of whether the waste fluid migrated to the subsurface strata of Landowners' property. Although the evidence gathered at the end of this discovery phase on the issue of subsurface migration "seems likely," trial court granted Producer's motion because it concluded that a reasonable juror would have to speculate to conclude that a trespass by migration actually occurred. Landowners appealed. The Eighth Circuit Court of Appeals held that the expert report estimating how far injected fracking waste had spread was admissible in Landowners' lawsuit. Additionally, an issue of material fact existed as to whether there were sealing formations in the property's subsurface that would otherwise prevent Producer's fracking waste from migrating. Given this, the court reversed and remanded the case.

Tenth Circuit

Fletcher v. United States, 854 F.3d 1201 (10th Cir. 2017).

A certified class of Osage tribal members in Oklahoma brought a class action suit against the federal government, claiming a mismanagement of the oil and gas royalty funds that the federal government was to hold in trust for the Osage people. The Osage members were seeking an accounting, which the trial court granted on a limited basis. The Osage members appealed, claiming that they had the right to receive an accounting of funds since 1906 and that they should receive a full audit of the funds since that time. The appellate court affirmed the lower court's decision, citing one major reason for limiting the audit as the funds in question were not worth very much. About \$15 per member of the class per year. For this reason, the appellate court agreed with the 2002 starting point for the audit and the limited information that was required to be provided.

D. Wyoming

Kaiser-Francis Oil Co. v. Noble Casing Inc., No. 2:16-CV-00309, 2017 WL 1947506 (D. Wyo. May 10, 2017).

Operator sued Casing Company—who supplied casing crews and power casing tongs at Operator's wellsite—for negligence and breach of contract after Operator detected a leak in the casing of its well during a hydraulic fracturing operation. Operator alleged that such leak caused all fracturing operations to cease and that Operator incurred damages exceeding \$1.5

million. Casing Company counterclaimed that Operator assumed all liability for Casing Company and agreed to defend and hold harmless Casing Company under the parties' Master Service Agreement ("MSA"). Operator moved to dismiss, arguing that the indemnitee provision was void as against public policy based on a Wyoming statute that prohibited all agreements "pertaining to any well for oil, gas or water" that purport "to relieve the indemnitee from loss or liability for his own negligence." The district court concluded that MSA's indemnitee provision was void and unenforceable to the extent it indemnified Casing Company for its own direct conduct because the activities that led to Operator's claims were "closely related to oil well drilling." Moreover, to construe MSA as requiring Operator to defend Casing Company would render certain provisions of MSA meaningless. Thus, the court granted Operator's motion to dismiss Casing Company's counterclaim and denied Casing Company's motion for summary judgment.

M.D. Florida

Nat. Res. Def. Council v. Nat'l Park Serv., Case No: 2:16-cv-585-FtM-99CM, 2017 WL 1438238 (M.D. Fla. April 24, 2017).

Mineral Interest Owners ("MIOs") owned interest found within a national park. MIOs hired an E&P Company to conduct seismic on some land above the mineral interest. In accordance with federal law, E&P Company filed an application to the National Park Service ("NPS") to conduct seismic on over 400 square miles of the total mineral interest within the national park, but later changed it to 110 square miles. After much back and forth, two unrequired notice and comment periods and conferencing with the Fish and Wildlife Service ("FWS") about both the environmental assessment ("EA") and biological assessment ("BA"), the final plan was approved, a Finding of No Significant Impact ("FONSI") was issued and forty-seven mitigation measures were implemented. Environmental Groups sued NPS and others for declaratory and both temporary and permanent injunctive relief under the Administrative Procedures Act ("APA"), the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). Environmental Groups had eight claims against NPS arising from NEPA, APA, and ESA requirements for failure to: (1) prepare an environmental impact statement, (2) take a "hard look" at the effectiveness of the mitigation measures, (3) to take a "hard look" at the adverse impacts caused by conducting seismic, (4) consider all reasonable alternatives, (5) obtain technologically feasible alternatives, their costs and environmental impact,

(6) follow consultation requirements with E&P Company throughout the process, (7) reinstate consultation after changes in the plan and (8) reinstate consultation on the Preserve Management Plans as a new endangered species had been added to the list since last consultation. Ultimately the district court found that NPS did follow the requirements under NEPA, APA, and ESA as required and denied both the declaratory and injunctive relief. Environmental Groups have since appealed, but there is no decision from the higher court.

N.D. Illinois

Buchanan Energy (N), LLC v. Lake Bluff Holdings, LLC, No. 15 CV 3851, 2017 WL 1232973 (N.D. Ill. Apr. 4, 2017).

Two energy companies entered into a lease agreement which contained an option to purchase the leased premises during the term of the lease. The purchase price was to be the average of three appraisal values done on the premises. The valuations of the land were vastly different. The purchasing company's appraiser valued the land at \$295,000, the mutually agreed appraiser valued the land at \$493,100, and the selling company's appraiser valued the land at \$695,000. Both the purchasing company and the selling company sought to have the other's appraisal voided. The court ruled that, because the average of two appraisals that were done by the companies averaged very closely to the mutual appraisal, the court could not equitably strike one or the other, allowing a windfall to the other party. Thus the court denied the motions to exclude the expert's evaluation.

N.D. West Virginia

Bison Res. Corp. v. Antero Res. Corp., No. 1:16CV107, 2017 WL 1164500 (N.D. W.Va. 2017).

A resources corporation ("Corporation A") purchased from another resources corporation ("Corporation B") oil and gas leases that Corporation B owned. In those leases was a right of first refusal to drill, which Corporation B acquired through the acquisition of a third company that held the right of first refusal. Corporation A, without giving notice to Corporation B, began drilling and producing natural gas from the leases on which Corporation B held the right of first refusal. Corporation B brought suit and the Corporation A filed a motion for summary judgment. Corporation A argued that the right of first refusal that Corporation B held

was invalidated under two different theories. The first was that the right of first refusal was nontransferable and thus, when Corporation B received the rights, they expired. The court dismissed this claim as Corporation B did not purchase the rights, but rather, purchased the third company that held them. This was not a transfer but an assumption, so the rights were still valid. The second argument was that the rights of first refusal should be barred by the rule against perpetuities as the right had not been used within twenty-one years and ten months or a life in being at the time of transfer. The court dismissed this defense as the right of first refusal is not a property conveyance and thus not affected by the rule against perpetuities. Corporation A's motion for summary judgment was denied.

Reynolds v. Ascent Res. - Marcellus, LLC, No. 1:16CV77, 2017 WL 1959220 (N.D. W.Va. May 11, 2017).

An oil and gas company ("Company") leased Landowner's mineral interest. Following lease execution, Company found from the state regulatory agency that production already existed on the property, and so the land was already subject to an oil and gas lease. Company issued a bonus check to Landowner less the amount of the land subject to the lease already in existence, which Landowner deposited. Company then partially released Landowner's interest and did not pay the additional bonus amount, for which Landowner sued for breach of contract. The lease contained a general warranty of title, and Company argued that this exempted its requirements under the lease, because the Landowners warranty failed. Landowner countered that the remaining interest could still be produced, despite the other lease. Genuine issue of fact remains as to the status of title at the time Company and Landowner executed the lease, and so the court denied the parties' mutual motions for summary judgment.

W.D. Oklahoma

McKnight v. Marathon Oil Co., No. CIV-17-00264-R, 2017 WL 1628981 (W.D. Okla. May 1, 2017).

Lessors sued Lessee after learning that Lessee allegedly passed the cost of making any unprocessed natural gas marketable to Lessors. Lessors sued under theories of (1) breach of contract, (2) accounting, (3) fraud, (4) unjust enrichment and (5) breach of state law regarding revenue standards. Lessee removed case to federal court claiming diversity jurisdiction and then moved to dismiss the fraud and unjust enrichment claims. The trial court

approved Lessee's motion based on several findings. First, Lessors failed to allege an "indispensable element" of a fraud claim—detrimental reliance. Second, Lessors failed to allege specific damages caused by Lessee's fraud rather than breach of contract, violating the general rule that "a claim for fraud must be distinct from a claim for breach of contract." Third, Lessors incorporating all allegations in the complaint—including breach of oil and gas leases—in addition seeking an equitable remedy because Lessee allegedly benefitted from Lessors' expense and detriment, violated a long-standing state rule that plaintiffs may not pursue an equitable remedy when an adequate remedy at law is available. The court approved Lessee's motion to dismiss.

Upstream – State

Arkansas

Panhandle Oil & Gas, Inc. v. BHP Billiton Petroleum Fayetteville, LLC, 2017 Ark. App. 201, No. CV-16-884, 2017 WL 1277422.

Working Interest Owner ("WIO") sued Operator for its failure to send well proposals and failure to properly account for production. The lower court dismissed all of WIO's arguments for failure to state a claim on which relief could be granted. WIO appealed arguing that the court improperly dismissed these claims as WIO met the burden under state law to state a claim. State law only required that WIO plead that a valid, enforceable contract existed and that WIO demonstrate facts sufficient to show a claim of unjust enrichment. WIO produced two contracts executed by Operator's predecessor-in-interest, which met the low burden to establish a validly executed contract. WIO also provided sufficient well data to meet the minimum requirement for factual evidence for an unjust enrichment claim. However, WIO's claim for an accounting only constituted a remedy and not a cause of action. The appellate court remanded the contract and unjust enrichment claim for further proceedings.

Louisiana

Moore v. Chevron USA, 2016-0805 (La. App. 1 Cir. 5/25/17); NO. 2016 CA 0805, 2017 WL 2303318.

Landowner purchased land from an oil and gas company ("Company"). Shortly after, Landowner noticed environmental damage. Landowner took

some informal steps to cure the harm then, but did not file any legal proceedings against Company to remedy the environmental defects Landowner had found. Several years later Landowner sued to compel Company to remedy the issues with the property. Company claimed that this was no longer its responsibility to fix as Landowner waited beyond the statutory year long period to demand remedy of the defect. Landowner claimed that the yearlong limitation had not yet started tolling as he did not have sufficient information about the defect to begin the tolling of the year-long clock. Company counter-claimed that the clock had begun running when Landowner first brought the informal proceedings to remedy the defects. The court agreed, ruling in favor of Company, leaving Landowner with the cost of the defect, court costs, and attorney fees.

Sweet Lake Land & Oil Co. v. Oleum Operating Co., 2016-429 (La. App. 3 Cir. 3/8/17); No. 2016-429, 2017 WL 914767.

Oilfield Owner (“Owner”) sued Operator, Operator’s Successor-in-Interest (“Successor”), and Operator’s Predecessor-in-Interest (“Predecessor”) for environmental damages to the property and failure to abide by lease remediation provisions. The lower court found Predecessor responsible for the damage and required Predecessor submit a remediation plan to the state environmental agency. On appeal by Owner, the court found that Operator violated express lease requirements that gave Operator a six-month window to begin its remediation plans, which Operator failed to do. In addition, the court found that Operator’s council violated a motion in limine which prohibited any discussion of attempts to remediate very close to trial to protect the integrity of the jury. In addition to these damages, Successor allowed the old lease to lapse and signed a new lease which contained express clean-up provisions, with which Successor failed to comply. The parties all greatly contested the costs of a potential cleanup, therefore the court remanded in order to properly assess the dollar figure required in order to sufficiently comply with the lease remediation provisions.

North Dakota

Black Stone Minerals Co. v. Brokaw, 2017 ND 140, 893 N.W.2d 498.

Rival mineral interest owners, a Mineral Company and a Predecessor’s Heirs (“Heirs”), disputed ownership of the minerals under a tract based on a district court judgment and successive conveyances overtime. Mineral Company’s successors initiated a quiet title against Heirs to determine the

proper ownership of the mineral interest based on the earlier judgment. The judgment conveyed title to Heirs predecessors in fee simple, but failed to specify the percentage of interest. Mineral Company contended that the judgment vested the entire interest in one of Heirs' predecessors. The North Dakota Supreme Court held that, per state statute, and property interest that vested between numerous people vested as tenants in common. Thus, when one of the Heirs' predecessors conveyed his whole undivided interest to Mineral Company, this only conveyed one-half the mineral interest. Mineral Company then claimed to have adversely possessed the other one-half, but the court found that adverse possession time period could only begin for minerals when Mineral Company produced the minerals, which had not reached the appropriate number of years. Company also included challenges for laches and good-faith purchaser defenses, but the court rejected these because these are affirmative defenses under state law and cannot be used as Mineral Company sought to use them. Finally, Mineral Company challenged the district court's refusal to correct the judgment. The district court may only correct its judgments, but not make substantial changes to the law of the judgment, as Mineral Company sought it to do. The court found that Mineral Company's successor in interest to be record title owners to half of the mineral interest, and Heirs to be record title owners to the other half. With this decision, the court affirmed in part and reversed in part the lower courts decisions and remanded the case.

Ogren v. Sandaker, 2017 ND 105, 893 N.W. 2d 750.

Conveyees of a royalty interest in land brought quiet title action on the royalty interests arguing the original assignment conveyed "fractional royalty interest". The trial court granted summary judgment finding that the nearly sixty-year-old royalty assignment conveyed a fraction of the royalty interest. Conveyees appealed trial court decision. The North Dakota Supreme Court held that the royalty assignment unambiguously conveyed a "fraction of royalty" and not a "fractional royalty" to the Royalty Interest Owner's seven siblings ("Conveyees"). The court reasoned that although the conveying language was like examples of language that conveyed a fractional royalty, here, the deed had to be examined as a whole. The language in the deed's assignment's intent clause instructed that computation of the royalty interest be so that each conveyee receive an undivided one-eighth share of the total royalty, not the total production.

THR Minerals, LLC v. Robinson, 2017 ND 78, 892 N.W.2d 193.

An oil and gas royalty assignee (“Assignee”) sued Assignor to quiet title to mineral royalty ownership in certain property. The dispute surrounded interpretation of a 1942 royalty assignment from Assignor’s predecessor to Assignee’s predecessor. Assignor’s predecessor owned a one-third interest in the relevant property. Even so, Assignee argued it was entitled to 6.25 percent (%) of the royalty in the *entire* property, not just the predecessor’s one-third share. Ultimately, the trial court agreed with Assignee, granting summary judgment in Assignee’s favor. Assignor appealed, and the North Dakota Supreme Court affirmed. The court highlighted the assignment’s pertinent language: The predecessor granted “all our right [to 6.25 % royalty of the oil and gas] produced and saved from the hereinafter described lands.” Assignor seized on the assignment’s use of the word “our,” reasoning that the predecessor could not grant more interest than it actually owned. Assignor thus argued that the trial court’s ruling amounted to a windfall for Assignee. But Assignee—and ultimately the court—argued that although “our” showed possession of *something*, it did not demonstrate *how* the royalty interest was to be calculated. In siding with the trial court, the court held that the assignment’s language immediately following the 6.25 % royalty defined “how the . . . royalty was to be calculated” and unambiguously showed the predecessor’s intent to grant Assignee a percentage royalty based on minerals produced “from the entire tract of land described.” Thus, the court affirmed the trial court’s judgment.

Ohio

Greer v. Frye, NO. 14 BE 0032, 2017 WL 2333722 (Ohio Ct. App. May 30, 2017).

Original Owners owned both mineral and surface interest, and retained a portion of the mineral interest when they conveyed both the remainder of the mineral interest and full surface interest to a third party. Through a series of conveyance from third party to another, Landowners claimed both surface interest and mineral interest. Mineral Interest Owners (“MIOs”) claimed their mineral interest as heirs of Original Owners. Landowners published a Notice of Abandonment in January 2011, in the local newspaper to try and rejoin all outstanding mineral interest to the surface interest. MIOs filed an Affidavit to Preserve Mineral Interest within sixty days of the Notice of Abandonment to preserve their interests. Two years later, Landowners filed a quiet title action under the 1989 Ohio Dormant

Mineral Act (“1998 ODMA”). MIOs answered and requested the action be viewed under the 2006 Ohio Dormant Mineral Act (“2006 ODMA”). The trial court found for Landowner in a summary judgment decision under the 1989 ODMA saying that MIOs did not act to preserve their interest within the 20-year requirement. MIOs appealed on two issues: (1) the trial court should have not used the 1989 ODMA, but the 2006 ODMA and (2) MIOs are the rightful owners under the 2006 ODMA. The appellate court found for MIOs, reversed the trial court’s decision, and granted summary judgment in favor of MIOs. The court held: (1) the 2006 ODMA did apply based on case law saying it applied to all claims asserted after 2006 and (2) MIOs timely filed their claim to preserve under the 2006 ODMA and are therefore the rightful owners.

Harmon v. Capstone Holding Co., CASE NO. 14 NO 0413, 2017 WL 2438560 (Ohio Ct. App. June 5, 2017).

Original Owner of the property severed the mineral and surface estate by conveying the surface estate to a third party and retaining the full mineral estate in the deed. Current Landowners came to own the surface estate through several conveyances. Original Owner also later conveyed the mineral estate to the current Mineral Interest Owner (“MIO”). In 2008, Landowners notified Original Owner of intent to declare the mineral interest abandoned and received no response, so they filed an affidavit of abandonment. Four years later, MIO filed an affidavit to preserve its interest, yet had never been notified by Landowner of affidavit of abandonment. A year later Landowner filed a quiet title action, which the trial court held Landowner did not own the mineral interest under either the 1989 and 2006 Ohio Dormant Mineral Act (“ODMA”). The trial court held that under the 1989 ODMA it would be Landowners’ predecessor in interest that owned the mineral estate, and under the 2006 ODMA it was the MIO because it was never provided record notice of intent to abandon. Landowners appealed and the appellate court affirmed the trial court’s judgment holding that the 2006 ODMA applied and that given lack of notice, MIO still owned the mineral interest.

Oklahoma

Stephens Prod. Co., a Div. of SF Holding Corp. v. Larsen, 2017 OK 36, 394 P.3d 1262.

Production Company filed to exercise eminent domain for underground natural gas storage easements and surface easements. More than 140 landowners challenged the petition for eminent domain, but eventually, all but one Landowner in this case settled. This Landowner continued the litigation and claimed that the amount offered to him was well below what his land was worth. Production Company argued that it followed the broad rules of eminent domain by finding a reasonable fair market value at a price it could have been sold “by a person desirous of selling to a person wishing to buy.” The lower courts found that the amount given to Landowner was calculated using general condemnation principles and found in favor of Production Company. Because the state does not permit special pricing due to boom or fancy values, the Oklahoma Supreme Court affirmed the trial court’s decision of a lower value for the easement in favor of Production Company.

Pennsylvania

EQT Prod. Co. v. Borough of Jefferson Hills, No. 1184 C.D. 2016, 2017 WL 2180678 (Pa. Commw. Ct. May 18, 2017).

Town appealed court order that reversed the decision of the Town Council (“Council”) denying the conditional use application of Producers to construct, operate, and maintain a natural gas production facility on an area of its property. Council supported its position with Producers’ alleged failure to satisfy a town Zoning Ordinance, which states: “The use shall not endanger the public health, safety or welfare nor deteriorate the environment, as a result of being located on the property where it is proposed.” On review, appellate court affirmed the trial court’s decision holding that Council erred when it concluded that the conditional use would constitute a detriment to the public health, safety, and welfare exceeding that ordinarily to be expected from the proposed use. The court also held that Town’s evidence does not constitute the required substantial evidence needed to thwart Producers entitlement to a conditional use as a matter of right.

Murphy v. Karnek, 160 A.3d 850 (Pa. Super. Ct. 2017).

Heirs brought a quiet title action for a declaratory judgment regarding ownership of oil and gas rights in a parcel of land once owned by Landowner who died intestate. A family partnership formed by the widow of one of Landowners' sons and widow's son opposed the Heirs' quiet title action. Trial court had granted summary judgment, and ordered distribution of rents and royalties according to each party's share. All parties appealed. The primary issue on appeal was whether the trial court correctly concluded that until Landowner's death, Landowner's widow had a life estate and Landowner held the remainder interest in the oil and gas in the parcel in dispute. State superior court held that Landowner's deed that conveyed a land parcel but excepted and reserved all the parcel's oil and gas unambiguously said that the conveyance was made subject to a previous deed "by which conveyance all the oil and gas rights were conveyed to" grandmother, did not change or convey the grandmother's life estate in the oil and gas of which the grandfather held the remainder interest. Had a right existed at the time of the conveyance, the deed's language treated this as an exception, and grandmother's life estate existed before the deed in question. However, because no right existed at the time of conveyance, Landowners' deed from approximately eighty years prior in which the conveyed land parcel did not change. Further, grandmother's will conveyed to specified daughter the one-third remainder interest in the oil and gas that grandmother had inherited upon grandfather's death. The rationale was the description of the specific lot did not reduce the general devise, and it was in harmony with grandmother's general intent to give daughter income and a place to live to care for the other daughter.

Snyder Bros., Inc. v. Pa. Pub. Utility Comm'n, 157 A.3d 1018 (Pa. Commw. Ct. 2017).

Under Pennsylvania law, a "stripper well"—unlike a "vertical gas well"—does not pay certain environmental impact fees. In this case, the state enforcement bureau filed a complaint alleging that a gas producer ("Producer") failed to pay impact fees on its wells. The state Public Utility Commission ("PUC"), relying in part on an ALJ's recommendation, concluded that a gas well is a "stripper well" only if its incapable of producing 90,000 cubic feet of gas per day during *every* month of the year. Producer appealed, arguing that the relevant statutory language—"during *any* calendar month"—meant any *one* month of the year, not *all* months. The court agreed with Producer, concluding that because a calendar year

consists of twelve individual months, the most natural construction of “any” meant at least “one” month of the year, no matter which one. The court noted that to apply PUC’s construction of the word would “engraft non-existent verbiage” into the statute. Producer’s wells were “stripper wells” because they produced less than 90,000 cubic feet of gas in at least one month. And the court noted that even if the word “any” was truly ambiguous, the rule of lenity would apply to resolve the ambiguity in Producer’s favor. Thus, the court reversed PUC’s imposition of interest and penalties on Producer.

Texas

Davis v. Mueller, No. 16–0155, 2017 WL 2299316 (Tex. May 26, 2017).

An out-of-state resident conveyed to Landowner her mineral interest in ten “vaguely described” tracts in the County. The deed contained a Mother Hubbard clause and a general granting clause, the latter of which stated that Landowner was to receive “all of the mineral, royalty, and overriding royalty interest owned by [grantor in the] County.” At the same time, another out-of-state resident conveyed separate interests in the County to Landowner using an identical deed. Two decades later, the out-of-state residents independently deeded these interests to Claimant, who sued Landowner to quiet title in the mineral interests. The trial court granted Landowner’s motion for summary judgment without stating the grounds. The court of appeals reversed, agreeing with Claimant that the deed’s general granting clause was ambiguous. The Texas Supreme Court reversed and rendered judgment for Landowner. The court noted that unlike the deed at issue in an earlier case—*J. Hiram Moore, Ltd. v. Greer*—the general grant in this case actually *resolved* an ambiguity. Moreover, curing the deficiencies of the deed’s specific grants was “precisely the purpose” of the general grant language. The court reasoned that the general grant’s conveyance “could not be clearer.” And because the conveyances to Landowner preceded those to Claimant, Landowner had superior title.

Lightning Oil Co. v. Anadarko E&P Onshore, LLC, No. 15-0919, 2017 WL 2200343 (Tex. May 19, 2017).

Operator A owned an oil and gas lease for the mineral estate separated from but lying under Ranch’s surface estate, and had three current producing wells located on Ranch’s surface estate. Operator B leased the mineral estate adjacent to Operator A from State, but the lease did not allow

Operator B to use State's surface estate for drilling. Operator B contracted with Ranch to use its surface estate to drill horizontal wells into Operator B's mineral estate. Operator A sued for trespass and tortious interference arguing that Operator B needed Operator A's consent as it owned the mineral estate not Ranch's consent as it only owned the surface estate. Both Operators moved for summary judgment on the issue, and the trial court granted for Operator B. Operator A appealed, and the appellate court affirmed the trial court holding that Operator B only owned the minerals within the mineral estate, not the subterranean structures holding the molecules. Operator A appealed to the Supreme Court of Texas which affirmed the lower courts holding that: (1) Operator B's rights are not greater than that of Ranch's rights, and thus they fall within the accommodation doctrine, (2) that any loss of minerals Operator A will suffer is not sufficient to support trespass claims as it will be limited to only what is brought up through the drilling process, (3) that allowing Operator A as mineral estate owner to prevent subsurface and surface use of the land would greatly alter the accommodation doctrine and (4) the drilling plans of Operator B did not amount to tortious interference with Operator A's operations.

Norhill Energy LLC v. McDaniel, 517 S.W.3d 910 (Tex. App. 2017).

Lessee had taken a lease with a 2-year primary term from Lessor that allowed the primary term to be extended if there were "drilling or reworking operations" conducted "in good faith." Towards the end of the primary term, Lessee had drilled six non-producing wells, and was planning on drilling a seventh, but Lessor convinced Lessee to try and use a submersible pump to remedy the water production, saying he would consider it "reworking" under the lease. Lessee installed the pump, but no oil was produced. One month after the original expiration date of the lease, which was still held by the "reworking" operation of the pump, Lessor and Lessee executed a new agreement that that Lessee would assign the lease back to Lessor for \$50,000 within thirty days of executing the agreement. Lessee waited several months, but never received the \$50,000 and when Lessee met with Lessor, Lessor made a statement to the point of he was trying to get out of the agreement. Lessee sued Lessor for breach of contract, fraud, money had and received, and promissory estoppel. The jury found for Lessee on all but the fraud account, but granted Lessee damages of \$50,000 only on the money had and received account. Both parties motioned for judgment notwithstanding the verdict, which the trial court granted in favor of the Lessor such that Lessee received no damages.

Lessee appealed, and the appellate court affirmed the jury verdict, holding Lessee should receive the \$50,000 on the money had and received account but not on the breach of contract claim.

Permian Power Tong, Inc. v. Diamondback E&P, LLC, NO. 12-16-00092-CV, 2017 WL 2588158 (Tex. App. May 31, 2017).

Operator hired Casing Company to case several wells through a Master Service Agreement (“MSA”). At one well, after casing was complete, Operator was unable to continue drilling, and after several attempts to repair the well and casing, it made the decision to plug and abandon the well. Operator sued Casing Company for breach of contract and the jury found for Operator. Operator was granted around: (1) \$824,000 in actual damages, (2) \$319,000 in attorneys’ fees for trial, (3) \$150,000 in conditional attorneys’ fees for an intermediate appellate case, (4) \$75,000 in conditional attorneys’ fees for a supreme court case and (5) \$3,500 in court costs. Casing Company appealed and raised five main issues: (1) the lack of legal and factual evidence to support a jury finding Casing Company’s breach of the MSA caused the damages, (2) Operator exacerbated its own damages and failed to mitigate damages, (3) the trial court abused its discretion in allowing in certain evidence to support damages, (4) jury’s award for damages are not supported by the evidence and excessive and (5) the evidence does not support attorneys’ fees for both trial and appellate work. The appellate court affirmed the trial court on: (1) there being sufficient evidence to find breach of the MSA, (2) Operator did not exacerbate own damages and (3) the trial court did not abuse its discretion in allowing evidence supporting damages claims. The appellate court did suggest a remittitur for actual damages based on the evidence and reversed the trial court’s findings on the attorneys’ fees as it found Operator failed to show segregation of some of the fees. Operator timely filed its Notice of Formal Acceptance of Suggestion of Remittitur and accepted the slightly lower actual damages costs. Overall the case was affirmed in part and reversed and remanded only as to the trial attorneys’ fees.

Reed v. Maltzberger/Storey Ranch, LLC, No. 04–16–00231–CV, 2017 WL 1683717 (Tex. App. May 3, 2017).

Unleased Mineral Owners (“Owners”) sued Lessee, arguing that Owners were entitled to a greater share of royalty than Lessee had been paying. The dispute involved a 1942 deed (“Deed”) to which Owners’ predecessor was the grantee. Deed granted “an undivided one-fourth interest in and to all the

oil, gas and other minerals in and under and that may be produced” from certain lands but also stripped the grantee of certain mineral rights, such as bonus and delay rentals. Owners believed they owned a one-quarter mineral interest and thus Lessee owed them one-quarter of the existing lease’s percentage royalty. Lessee counterclaimed, arguing for its part that Owners were entitled to only a 1/32 fixed royalty. Both parties sought summary judgment, and the trial court granted Lessee’s motion. The court found that the Deed conveyed a fixed nonparticipating royalty interest to Owners’ predecessor and thus Lessee was correct in paying the fixed royalty. Owners appealed. The court of appeals reversed. Drawing on treatises, Texas Supreme Court cases, and its own precedents, the court concluded that the Deed’s granting clause contained “traditional hallmarks of mineral fee ownership.” Moreover, the provision that “stripped” the grantee of *other* mineral rights was telling; if the grantor had intended a royalty interest—rather than a mineral ownership interest—such stripping “would be redundant” because a royalty interest owner “has no such rights.” Thus, the court of appeals (1) held that the Deed conveyed to Owners’ predecessor a one-quarter mineral ownership interest and (2) remanded the case to the trial court for consideration of Owners’ request for attorney fees.

Texas Outfitters Ltd., LLC v. Nicholson, No. 04-16-00392-CV, 2017 WL 2124494 (Tex. App. May 17, 2017).

Non-executive mineral interest owners (“Owners”) brought action against executive mineral interest rights and surface owners (“Executives”) for breach of fiduciary duty by refusing to lease Owners’ mineral interest. Executives received two offers in one year to lease the interests, but refused the options to protect the deer breeding business that occupied the surface. After a failure to come to an agreement for Owners to buy back the executive rights, Executives sold the executive rights and surface property to a third party. The executive rights holder has a duty of utmost fair dealing to Owner that is fiduciary in nature but does not require the same obligation to place the other party’s interests before its own. This generally allows the refusal of leases if maintaining the status quo; however, because Executives’ business on the surface benefitted from the refusal to execute a lease rather than maintaining the status quo, the refusal is a breach of duty. The appellate court found sufficient evidence for this decision and held that Executives breached their duty of utmost fair dealing by refusing to execute a lease to the benefit of Owners.

*Midstream – Federal***Eighth Circuit**

Webb v. Exxon Mobil Corp., 856 F.3d 1150 (8th Cir. 2017).

Servient tenement owners (“Servient Owners”) brought putative class action against dominate tenement owner, Pipeline Company alleging that Pipeline Company breached easement contracts (“Easements”) by failing to reasonably operate, maintain, and repair the pipeline. Servient Owners sought either rescission of the Easements, the pipeline’s removal or replacement, or damages. The trial court decertified class action and entered summary judgment for Pipeline Company and Servient Owners appealed. The appellate court affirmed the judgment holding that Pipeline Company did not have duty to repair or maintain pipeline under the Easements with Servient Owners. Therefore, Pipeline Company had no liability under state law for breach of Easements where Easements contained no express contractual provision imposing duties of maintenance or repair. Further, these duties were not implicit, and Servient Owners did not show any physical injury to the properties, even if Pipeline Company operated in an unreasonable manner.

D.C. Circuit

Del. Riverkeeper Network v. Fed. Energy Regulatory Comm’n, 857 F.3d 388 (D.C. Cir. 2017).

Pipeline Company filed an application to extend an existing natural gas pipeline and to build new facilities across multiple states. In cooperation with federal law, Pipeline Company conducted an environmental assessment that passed standards but had the requirement of obtaining “all applicable authorization required under federal law,” including water quality certifications. The Federal Energy Regulatory Commission issued a certificate approving construction of the project upon the condition of those certifications. Environmental Group petitioned for review of the approval due to the lack of water quality certifications and the miscalculation and misidentification of specially protected wetlands. The D.C. Circuit Court of Appeals held that the approval was not to be revoked because the condition approval did not affect any water quality due to the delay on parts of the project until after proper certification and the misidentification of wetlands

according to Environmental Group's proposed standards was not enough be judged as prejudicial error.

M.D. Pennsylvania

Transcon. Gas Pipe Line Co. v. Permanent Easement for 1.41 Acres, No. 4:17-CV-0570, 2017 WL 2180366 (M.D. Pa. May 18, 2017).

Pipeline Company received a certificate of public conveyance from Federal Energy Regulatory Commission ("FERC") to construct a pipeline and various other associated pieces of infrastructure across several states. Pipeline Company filed the condemnation suit after Landowners desired unreasonable compensation for the right-of-way. Pursuant to federal law regarding pipelines, to condemn the easements for its pipeline, Pipeline Company must show: (1) it received the public conveyance from FERC, (2) the rights-of-ways to be condemned were necessary for the project and (3) the Pipeline Company has been unable to obtain rights-of-ways from Landowners. Company provided sufficient evidence that each of these factors applied to its pipeline project. Additionally, Landowners failed to reply to the summary judgment motion, so the court found for Pipeline Company on procedural and substantive grounds.

Midstream – State

Michigan

Buggs v. Dep't of Nat. Res., No. 329782, 2017 WL 2131506 (Mich. Ct. App. May 16, 2017).

Two Landowners sued the Department of Natural Resources ("DNR"), attempting to compel them to revoke a gas pipeline easement granted to an oil and gas corporation. While this proceeding was going through an appeal and remand, Landowners brought an additional suit to compel the DNR to revoke the easement. This action was based off of, among other things, the testimony of a man who believed he found two dead Kirkland's Warblers, a protected species of bird, by the pipeline. The court stated that before it issues a writ of mandamus compelling an official or agency to do something, it must be proven that the action the movant is trying to compel the agency to make is within the agency's responsibility and that the movant has a legal right to demand the action be taken. Here the court did not find that DNR had a responsibility to revoke the easement. The

evidence presented was that a layman thought he saw two dead birds that looked like Warblers but never produced the dead birds. This was not enough to create a responsibility for DNR to remove the pipeline easement. The immediate injunctive relief was denied and the prior case seeking the writ of mandamus will proceed. This case is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

In re Application of Encana Oil & Gas re Garfield 36 Pipeline, No. 329781 & 329909, 2017 WL 2130276 (Mich. Ct. App. May 16, 2017).

Citizens challenged a decision granting permission to Pipeline Company to build and operate natural gas pipelines due to the insufficient environmental impact assessments and the failure to study its effects on a certain bird population in the area. Citizens argued that the environmental assessment needed to be for the entire surrounding area, not just along the chosen route of the pipelines. However, the trial court found for Pipeline Company stating that there were no threatened or endangered species within the proposed easement and the construction methods to be used will limit damage to topsoil. The appellate court held that, considering the environmental impact assessments as well as supplemental information provided by Citizens, the trial court did not err in its decision in favor of Pipeline Company. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Pennsylvania

In re Condemnation by Sunoco Pipeline L.P., No. 565 C.D. 2016, 2017 WL 2291693 (Pa. Commw. Ct. May 24, 2017).

Pipeline Company condemned certain lands to construct a pipeline, in accordance with state law, and Homeowners challenged Pipeline Company's ability to use condemnation powers among other arguments. Pipeline Company properly possessed condemnation powers as a public utility for years prior, following the state utility agency's showing that Pipeline Company provides a public service. Homeowners argued that Pipeline Company built two pipelines, though FERC only approved one such pipeline, but the court followed state and federal precedent that stated the commingling of transportation did not impact jurisdiction, and since the state utility agency approved the intrastate portions, and FERC approved the interstate, Pipeline Company complied with the law. Because Pipeline

Company possessed the condemnation powers of a public utility because the project benefited the public in numerous ways, Pipeline Company properly used state eminent domain powers. Finally, the court denied Homeowners' collateral estoppel claim because the case cited by Homeowners pertained to a different factual situation, and therefore did not apply.

Utah

Concophillips Co. v. Utah Dep't of Transp., 2017 UT App 68, No. 20160221-CA, 2017 WL 1422974.

Pipeline Company sued State Agency and general contractor (collectively, "Government") for highway construction project alleging that wick drains installed during construction damaged anti-corrosion coating on pipeline, asserting claims for breach of contract and negligence. After a jury trial, the trial court entered judgment in favor of Pipeline Company and Government appealed. The appellate court affirmed the trial court holding that the purported expert who performed direct-current-voltage-gradient test on underground pipeline for purposes of determining if wick drains installed during highway construction project damaged the anti-corrosion coating, was not a qualified expert witness. Further, any error in not striking and not instructing jury to disregard, unsolicited expert opinion offered by fact witness invited error. Lastly, the cumulative error doctrine did not apply.

Downstream – State

Minnesota

M & G Servs. v. Buffalo Lake Advanced Biofuels, LLC, 895 N.W.2d 277 (Minn. Ct. App. 2017).

Ethanol plant operator ("Operator") appealed a foreclosure decision based on a mechanic's lien filed by industrial contractor ("Contractor"). Contractor attached the lien to the ethanol plant, as well as the excess stillage produced as a by-product of the ethanol production process. Contractor alleges that the stillage constituted an improvement to the property, as Operator profited from its sale to local livestock feed lots. Although the ethanol production will inherently create this stillage by-product, the court compared the removal of stillage to the removal of medical waste from a hospital: a necessary task, but not one that creates an

alteration or repair to the real property on which a lien may be applied. In addition, Contractor cannot lien the material furnished and labor for the removal of the stillage as these do not fall into the statutory language for a mechanic's lien.

SELECTED WATER DECISIONS*Federal***Fourth Circuit**

North Carolina v. Alcoa Power Generating, Inc., 853 F.3d 140 (4th Cir. 2017).

North Carolina (“State”) commenced action against power generation company (“Company”), claiming that State owns a stretch of river Company has developed with four hydroelectric dams used to supply power to a smelting plant. The river would be the property of State if, at the time of statehood in 1789, the river was navigable. The historical record of such a small river is scarce, but the stretch of water was “shallow, steep, swift-moving, rocky.” There was no record of commercial use of the area, and the common pole boats and flats of the time would have been extremely difficult to use in such terrain. There are more recent records of further failed navigation attempts. A river is legally navigable when used “as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” The district court found the river to be unnavigable at the time of statehood, and the Fourth Circuit Court of Appeals affirmed that decision. State also claims that Company falls into an exception to adverse possession based on public trust rights. However, there is no solid basis for such an exception, and in North Carolina, any person vested with real property of record for thirty years or more, has marketable title. Company had openly acted as the sole owner of the riverbed for more than fifty years, and the circuit court affirmed the decision in favor of Company.

Federal Claim

Clear Creek Cmty. Servs. Dist. v. United States, 132 Fed. Cl. 223 (Fed. Cl. 2017).

Water District sued United States claiming breach of water services contract with Department of Interior’s Bureau of Reclamation (“BOR”), inverse condemnation, and declaratory relief. United States moved to dismiss for lack of subject matter jurisdiction, for failure to state a claim, and for summary judgment. The Federal Claims Court found that: (1) Water District’s breach of contract claims against BOR were time barred, (2) a

factual issue remained as to breach of contract regarding water delivery and (3) the taking claim depriving Water District's contractual right to receive up to 15,300 feet of water annually was not actionable because of the existence of a water services contract reduced to writing. Accordingly, the court granted United States' motion for summary judgement in part and denied in part.

State

Colorado

Select Energy Services, LLC v. K-Low LLC, 2017 CO 43, 394 P.3d 695.

Water Right Owner ("Owner") had purchased the property and subsequent water rights from a Previous Owner that had requested a new water rights decree ("New Decree"). The Original Decree had granted the original property owner rights to water diverted from farther upstream and rights to water in a Ditch along the property. In the New Decree the Previous Owner asked the diversion point to be moved downstream to a pump located on the property. When Owner bought the property and water rights, it sued Pipeline Company for trespass for trying to build a water pipeline along the Ditch. Pipeline Company filed suit in water court and moved for partial summary judgment on the determination that the New Decree did not grant Owner the right to divert water from the Ditch. The water court found for Pipeline Company, and Owner appealed arguing that the New Decree still granted Owner the right to divert water from the Ditch. The Supreme Court of Colorado affirmed the water court's judgment holding that the New Decree only cited the Ditch as a source not a diversion point, and therefore Owner could only get water from the Ditch that flowed to the pump as located in the New Decree.

Florida

Hill v. Suwannee River Water Mgmt. Dist., 217 So. 3d 1100 (Fla. Dist. Ct. App. 2017).

Landowners sued Water District for recovery for alleged takings by Water District after Water District drained a reservoir across their land numerous times. Landowners allege that the draining deprived them of the viable and beneficial use of their property without compensation. Water District countered that judicial or quasi-judicial immunized itself from such claims.

Water District rested its claim on the fact that it acted under contempt orders issued by the court for Landowners failure to drain the pond themselves. To meet the judicial standard, Water District must have proven that: (1) the act take was a “judicial act” and (2) that Water District possessed jurisdiction to make such a ruling. To meet the quasi-judicial standard, the claiming party must prove that their action fictionally compares to that of judges. The court held that the draining of ponds onto Landowners land does not constitute a part of the judicial process, nor does it functionally compare to the work of judges. Therefore, the court reversed and remanded the proceedings.

Kansas

Doce Ltd. P’ship v. Sandridge Expl. & Prod., LLC, No. 16-1045-EFM-KGG, 2017 WL 1836977 (D. Kan. May 8, 2017).

Lessor sued Lessee after learning Lessee had been using leased land to dispose millions of barrels of water produced from its other oil and gas operations. Lessor alleged that disposing of off-lease water constituted a breach of contract and trespass. Lessor also asserted theory of unjust enrichment by disposing off-lease water without the right to do so. After filing suit, Lessor and Lessee each filed cross-motions for summary judgment. The court granted Lessee’s summary judgment motion and dismissed Lessor’s claims after reviewing the Surface Easement on which both parties relied in asserting their arguments. Taking into consideration: (1) the facts and outcome of an identical Louisiana case, (2) the custom of Kansas law that oil and gas leases convey to the operator the right to drill and operate a disposal well to dispose of on-lease water and (3) the language in the second paragraph of the Surface Easement; the court concluded that the only reasonable interpretation granted Lessee an easement to construct and operate a disposal well to dispose of off-lease water.

Michigan

Kowalchuk v. City of Jackson, No. 330463, 2017 WL 2262876 (Mich. Ct. App. May 23, 2017).

Landowners filed suit against the city water supply (“City”) because of City’s pumping of groundwater which Landowners’ alleged deprived them of their property rights without just compensation. State water law adopted

the reasonable use doctrine which allowed a private party to develop the water beneath its land, so long as the use of the water does not interfere with another's right to use the water beneath his or her own land. As long as City reasonably used the water it produced, then the action of pumping the water out of the ground did not constitute a taking under state water law. The court rejected Landowners' claim that City must condemn the area vacated by produced ground water, because Landowners do not own the water beneath their land. Landowners also failed to establish the numerosity requirement of a class certification and failed to prove that an actual injury occurred. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the opinion as precedent.

Missouri

Mo.-Am. Water Co.'s Request for Auth. to Implement a Gen. Rate Increase for Water & Sewer Serv. Provided in Mo. Serv. Areas v. Office of Pub. Counsel, No. WD 79988, 2017 WL 2333056 (Mo. Ct. App. May 30, 2017).

Utility Company provided, in the state of Missouri, water for hundreds of thousands of people through nineteen different water systems. Utility Company wished to consolidate all nineteen systems into three water districts and set a tariff schedule. The Public Service Commission ("PSC") regulates the public utilities, so Utility Company sought permission from PSC to consolidate the nineteen systems into three districts. The Office of the Public Counsel and a multitude of other defendants (collectively "OPC") fought the consolidation. OPC claimed that the statutory protections against utility companies overcharging for necessary utilities prevents Utility Company from consolidating the districts as some citizens will be forced to pay more for their water than Utility Company pays. PSC ruled in favor of Utility Company, holding that the statute in question, which prevents price gouging from the utility company, does not mandate that Utility Company charge solely what it pays for water, but rather, that it not overcharge for the water overall. The consolidation plan does increase the cost of water for some, but it at the same time decreases the cost of water for others, resulting in a "wash." OPC appealed and the appellate court affirmed PSC's decision.

Oregon

Coos Waterkeeper v. Port of Coos Bay Or., 395 P.3d 14 (Or. Ct. App. 2017).

Port sought from the Department of State Lands (“DSL”) a permit to dredge a portion of a bay to create a new multipurpose slip, marine terminal, and access channel connecting the bay and slip. Port used a single application to apply for authorization from the Corps of Engineers under federal law and DSL under the state’s fill-and-removal law. DSL issued a fill-and-removal permit to Port, and Environmental Group (“Group”) requested a contested case hearing. The ALJ issued a proposed order in Port’s favor, and DSL’s director issued a final order adopting the ALJ’s findings and conclusions. Group sought review in the state court of appeals, raising two arguments: (1) that DSL erred by concluding it need not consider the effects of the proposed terminal’s operation in deciding whether to grant Port’s application and (2) that DSL erred by concluding that the second of two phases of Port’s plan did not fall under DSL’s jurisdiction because the activities would not involve “waters of the state.” As to the first argument, the court held that the text, context, and legislative history of the relevant statute counseled that “project” as used in the statute refers to a removal or fill activity and not—as Group argued—any effects of the development’s future operation. As to the second argument, the court rejected three ways in which Group claimed DSL had jurisdiction over the plan’s second phase. Thus, the court of appeals affirmed DSL’s final order.

Kramer v. Lake Oswego, 395 P.3d 592 (Or. Ct. App. 2017).

Patrons brought action against city and state (collectively, “Government”) seeking declaratory and injunctive relief relating to public access to a lake and an adjoining bay for recreational use. The trial court granted Government’s motion for summary judgment in a dispute centering on a city ordinance that restricted the access to a lake and an adjoining bay, and dismissed the action. Patrons appealed, and the appellate court vacated and remanded the trial court’s judgment. It held that a trial court does not have to enter a declaratory judgment on whether the lake was a navigable body of water even though state statute authorized trial court to grant partial declaratory relief. Further, resolution was possible without issuing a declaration on the water’s navigability because the dispute centered on whether the state law preempted the city’s ordinance, not on whether the lake is considered navigable water. Moreover, even assuming the lake was

public and that the public-trust doctrine was applicable, Government had no obligation to provide public access to the lake from city parks. The rationale: Although the concept of a public trust requires protection of the public's right to use navigable waters, it does not carry an obligation to ensure access to a waterway over adjoining uplands not likewise held in trust. Finally, appropriate disposition after granting Government's summary judgment motion was a declaratory judgment determining parties' rights rather than dismissal.

SELECTED LAND DECISIONS*Agricultural Use***Minnesota**

Legatt v. Legatt, No. A16-1255, 2017 WL 1316144 (Minn. Ct. App. Apr. 10, 2017).

One landowner (“CP Landowner”) installed a center pivot irrigation system on his farm that would cross over onto another landowner’s (“DI Landowner”) land. DI Landowner installed drip irrigation on his farm that required pipes to be buried under CP Landowner’s farm. Both landowners received from the other an easement to allow their irrigation systems to cross the other’s property. In unrelated litigation between the landowners, the trial court held that the easements were reciprocal. DI Landowner appealed that holding, stating that his easement was perpetual, and that CP Landowner’s easement was set to expire at the end of his lease. The appellate court held for DI Landowner. Later, CP Landowner brought suit stating that if it had to remove its center pivot, then DI Landowner should have to remove its drip irrigation pipes. The trial court ruled for CP Landowner, again finding them to be reciprocal. On appeal, the court held that, since the appellate court had already ruled the easements were not reciprocal years ago, CP Landowner had missed its opportunity to challenge the ruling. DI Landowner’s pipes did not have to be removed, as its easement was perpetual. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Pennsylvania

Branton v. Nicholas Meet, LLC, 159 A.3d 540 (Pa. Super. Ct. 2017).

Neighbors sued several farms and a slaughterhouse (collectively “Farms”) for negligence and private nuisance due to the storage and spreading of food processing waste (“FPW”) on the Farms that caused a malodor at times. Neighbors claimed the spreading and storing of FPW violated state law because: (1) Farms were violating the regulations in how they spread FPW, (2) the spreading of FWP was not a normal agriculture operation and (3) the building of one of the storage tanks was a substantial change under state law and Neighbors were within the statute of limitations to file a

nuisance claim. The trial court found for Farms and granted summary judgment. The Pennsylvania Superior Court held that state law only requires Farms to substantially comply with the law, and that Farms did as they only were cited for minor infractions which were quickly rectified. It also held that Farms had been spreading FPW or over a year at the point Neighbors filed their complaint and that spreading FPW is a normal agriculture operation. Therefore, the appellate court upheld the summary judgment in favor of Farms being able to continue to spread FPW. The appellate court did vacate and remand the summary judgment in favor of Farms 2,400,000 gallon storage tank holding that it was a substantial change to existing practices as there was no storage tank on that property beforehand, and that Neighbors filed their nuisance claim within one year of the storage tank being operational as required by state law. Therefore, the appellate court remanded the case to the trial court on this issue for further proceedings.

Easements - Federal

Eight Circuit

Barfield v. Sho-Me Power Electric Coop. LLC, 852 F.3d 795 (8th Cir. 2017).

Landowners sued rural electric cooperative and its subsidiary (collectively “REC”) for trespass and unjust enrichment stemming from REC’s selling access capacity on its telecommunication lines for public use. Landowners argued the selling of access capacity violated the easements REC had, as it was only given easements for electrical use of actions associated with electric use. The district court found in favor of Landowners and granted summary judgment on both trespass and unjust enrichment claims, and a jury awarded approximately \$79 million in damages based on the unjust enrichment claims. REC appealed arguing that it was within its easement rights to sell its excess capacity of telecommunication lines. The Eighth Circuit Court of Appeals upheld the summary judgment on the trespass issue, citing state case law that had previously upheld trespass claims when utility companies had sold excess capacity of communication lines or power lines that were not within the original scope of the respective easements. The court overturned the summary judgment on the unjust enrichment claim, also citing state case law that previously listed four types remedies in this situation that did not include unjust enrichment. Because the unjust enrichment claim was overturned, the jury award was also overturned, but

the court held that on remand Landowners could seek an award based on the trespass claim.

Tenth Circuit

Pub. Serv. Co. of New Mexico v. Barboan, 857 F.3d 1101 (10th Cir. 2017).

A utility company (“Company”) had an easement over two parcels of land for the right to run electrical lines across the properties. There were multiple Landowners, one of which was an Indian tribe. While the easements worked for Company to accomplish its purpose, it wished to acquire the properties so that it no longer had to go through the process of receiving easements. Without receiving consent of all Landowners, it had to go through a condemnation process to acquire the land. The issue was whether New Mexico held the authority to condemn tribal land. Tribal land is held by the federal government in trust for the Indian tribes, so if New Mexico were to condemn this property, it would be condemning land legally owned by the U.S. Government. The Tenth Circuit Court of Appeals upheld the district court’s ruling stating that the state did not have the authority to condemn federally held land.

W.D. Oklahoma

Davilla v. Enable Midstream Partners, L.P., No. CIV–15–1262–M, 2017 WL 1169710 (W.D. Okla. Mar. 28, 2017).

Native American landowners (“Landowners”) sued the owner and operator of a natural gas transmission pipeline (“Midstream Operator”) for trespass. Landowners also sought a permanent injunction to require Midstream Operator to remove certain pipelines from Landowner’s property. The dispute arose following termination of a term right-of-way in favor of Midstream Operator’s predecessor. Landowners refused Midstream Operator’s request to renew the right-of-way, and the Department of Interior’s Bureau of Indian Affairs (“BIA”) determined that it lacked authority to grant the right-of-way without Landowners’ consent. Undeterred, Midstream Operator continued using the natural gas pipeline. The district court granted Landowners’ motion for summary judgment on both claims. First, the court concluded that obtaining consent forms from various tenants-in-common to Landowners’ property failed to satisfy the requirements of a federal statute governing easements across Indian trust lands. That statute required consent from owners of a *majority* of the

interests in a tract, and any defense based on state law did not apply to the case. Second, the court concluded that a permanent injunction was proper. Even though BIA advised Midstream Operator's predecessor that it should remove the pipeline if the right-of-way was not renewed, Midstream Operator did nothing to move the pipeline when its negotiations with Landowners failed. Moreover, Midstream Operator's continuing trespass on Landowner's property was clearly intentional. This case has since been appealed but there is no final decision from the higher court as of publication.

Easements – State

California

Hinrichs v. Melton, 218 Cal. Rptr. 3d 13 (Cal. Ct. App. 2017).

Landowner A inherited two parcels of property that were connected, and parcel 1 had to be crossed to access parcel 2. Landowner A inherited the properties while he was living away from the land, and decided to sell parcel 1 to Landowner B. Once parcel 1 was transferred to Landowner B parcel 2 was completely landlocked. Landowner A later tried to get an easement on parcel 1 from Landowner B to access parcel 2, but Landowner B refused. This suit then commenced with Landowner A asking the court to grant an equitable easement. Landowner B's reasoning for not giving Landowner A the easement is that it was Landowner A who landlocked his property and, for that reason, he should face the implications of his actions. The court found in favor of Landowner A, granting the easement, finding that the actions of Landowner A, land-locking his own property, did not bar him from receiving an equitable easement.

Connecticut

Thurlow v. Hulten, 173 Conn. App. 694 (2017).

Landowner and Neighbor disputed whether easements for Landowner existed over Neighbor's property. In the trial court, Landowner argued that Neighbor interfered with Landowner's right to access its landlocked property via easements over Neighbor's property. Neighbor's property contained two adjacent lots. As to the first, Landowner claimed an express easement. As to the second, Landowner claimed an easement by necessity or an easement by implication. For its part, Neighbor argued that

Landowner had been trespassing and sought to quiet title to the disputed property. Neighbor claimed that any easement—if one existed—was limited to the first lot. Neighbor also sought to enjoin Landowner’s use of the second lot to access its property. The trial court rejected Landowner’s claim, concluding that it had no easement over Neighbor’s second lot because it could not prove necessity and could not prove intent on the part of Neighbor or its predecessor. Further, and among other relief, the court denied Landowner’s request for injunction to prevent Neighbor from blocking access to the second lot. Both parties appealed. The court of appeals summarily affirmed the judgment of the trial court, simply adopting the “thorough and well-reasoned decision” as its own.

Indiana

Hochgesang v. McLain, No. 13A01-1608-PL-1944, 2017 WL 2492577 (Ind. Ct. App. June 9, 2017).

Landowner appealed trial court conclusion that it failed to establish the existence of a prescriptive easement by clear and convincing evidence alone. Landowner appealed raising the sole issue of whether trial court committed error in its judgment. The appellate court affirmed the lower court’s decision because Landowner could not establish intent. This jurisdiction’s case law generally disfavors prescriptive easements such that a party claiming one must meet stringent requirements including: (1) control, (2) intent, (3) notice and (4) duration. Based on the record, appellate court found that Landowner did not meet its evidentiary burden and as such the court could not find that the trial court erred in its judgment. Further, the appellate court declined to give more weight to certain evidence in the record as such tasks remains with the trial court. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Michigan

Twp. of Lockport v. City of Three Rivers, No. 331711, 2017 WL 1927859 (Mich. Ct. App. May 9, 2017).

City purchased land from private landowners through which Township owned an easement for its underground water-transmission line. City later approved a resolution to annex the land. Township objected and sued City to prevent the annexation. The trial court entered a temporary restraining

order but ultimately (1) denied Township's motion for preliminary injunction and (2) granted summary judgment for City. The trial court reasoned that City could annex the land because it was "vacant" within the meaning of the relevant state statute. Township appealed, and the court of appeals reversed. The court noted that although the statute does not define the word "vacant," the court's cases—relying on the word's plain meaning—had interpreted the word as referring to land that is "not put to use." Here, neither party disputed that Township "currently and constantly" used the land for its water transmission line. Thus, the land was not "vacant" for purposes of the statute. Had Township's use of the land been merely temporary or seasonal, the court's precedents might have required a different outcome, but those were "simply not the facts" at issue. Moreover, and contrary to City's arguments, the court stated that the statute's use of the word "property" clearly contemplated "the space below the surface" of the land. The court thus remanded to the trial court for entry of an order of summary judgment in Township's favor.

Minnesota

Doran Dev., LLC v. Se. Props., Inc., A16-1091, 2017 WL 2062055 (Minn. Ct. App. May 15, 2017).

Development Company filed suit against two Property Owners ("Owner 1" and "Owner 2") to enforce a right to easements contained in a Purchase Agreement between the parties. Owner 2 filed counterclaims against Development Company and Owner 1. Owner 1 and Development Company stipulated a dismissal of claims between them, and Development Company and Owner 2 entered into an unwritten Settlement Agreement. Development Company later informed Owner 2 that it no longer wished to abide by the terms of the Settlement Agreement. Because no writing existed to finalize the Settlement Agreement, it failed to satisfy the statute of frauds. It also failed to rise to the level of partial performance or promissory estoppel against Development Company. Owner 2 also asserted that the access easement granted to Owner 1 constituted a breach of the Purchase Agreement. Although the easement differed slightly from the terms of the Purchase Agreement, the differences did not rise to the level of a breach of the agreement because the variances still fit within the catchall provisions of the easement portions of the Purchase Agreement. Finally, the court denied Owner 2's argument that the easement be disregarded under the doctrine of contemporaneous transaction. This opinion is an unpublished

opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

North Carolina

Mills v. Majette, No. COA16-1145, 2017 WL 2118723 (N.C. Ct. App. May 16, 2017).

Homeowners' property was setback from the road, and thus they were granted an easement across the strip of land to the road. Homeowners' used the easements regularly and even built two different driveways across the land. Property Owners owned the strip of land, approximately ten acres behind Homeowners' property, and other nearby lands. State cited Property Owners for deficiencies in their lands needing repair, and included Homeowners', both of whom eventually settled with State. In making the necessary repairs, Property Owners damaged and blocked Homeowners' easements. Homeowners' and one Property Owner reached a settlement agreement ("Agreement"), which the court approved, and Property Owner began to follow through on. Then two Property Owners no longer agreed the issue had been settled and filed a motion for summary judgment arguing that: (1) there was no meeting of the minds to create an official contract and (2) that the one Property Owner did not have the authority to bind the other two. The trial court found for the Homeowners' and granted their motion to enforce the Agreement, which the two Property Owners appealed. The appellate court held that: (1) there was an adequate evidence to prove there was a meeting of the minds and (2) that there was not adequate evidence to prove that the one Property Owner had the power to bind the other two Property Owners' besides his familial relationship with them. The court ultimately affirmed the trial court in part and reversed and remanded in part. This case is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Oregon

Lenn v. Lane Cty., 285 Or. App 520 (Or. Ct. App. 2017).

Property Owner land was burdened by an easement for Neighbor to access its property. County amended its easement width requirements, requiring them to be wider, and then Neighbor partitioned to separate out almost two acres of its property. County approved the partitioning and grandfathered in the original easement to stay at its original width. Property Owners sued

arguing the petition should not have been granted because it cancelled out the current grandfathered easement that is narrower than required. Both County and the trial court affirmed the interpretation that even with the partitioning of the property the easement remained grandfathered in under the narrower width. On appeal Property Owner argued its original argument that the partition should not be allowed because there would no longer be a legal easement to Neighbor's property and that the easement should not be grandfathered in because there are other access points to Neighbor's property. The appellate court affirmed the trial court's finding that the easement was not destroyed and dismissed the argument on other access points as Property Owner did not raise the issue at the county or trial court level.

Washington

Kave v. McIntosh Ridge Primary Rd. Ass'n, 394 P.3d 446 (Wash. Ct. App. 2017).

A residential community ("Community") brought suit against a Landowner, trying to quiet title in easements across Landowner's property. When Landowner purchased his property from the community, it was burdened by several easements across the property. However, the trails that were used to cross Landowner's property did not cross the land that was covered by the easements. It was for this reason that Landowner tore down some fences and benches, as they were on parts of his property not burdened by the easements. Community sued, asking the court to alter the easement so that it covered the land currently being used as a trail rather than the land that was actually burdened by the easement. The trial court found in favor of Community and granted the request as well as fees of \$237,000. Landowner appealed and the appellate court reversed, stating that the trial court did not have the authority to alter the easement in this manner.

Wyoming

Whaley v. Flitner Ltd. P'ship, 2017 WY 59, 395 P.3d 653 (Wyo. 2017).

Landowners appealed the decision which created a new access road for numerous parties, but created an easement across Landowners' property in perpetuity. Landowners desired the creation of a new access road, as climate and upkeep limited access via existing roads. Landowners argued that the state private road statute required the review board ("Board") to

locate the road along the route as included in the proposal by Landowners. Although the road must follow the general path of the proposal, because of notice requirements to affected landowners, Board may alter the exact route of the road beyond the exact bounds of the proposal. Landowners also argued that Board's determination of the most convenient route violated case law and was illogical based on the evidence presented. The Wyoming Supreme Court found that the case law cited by Landowners did not compel Board to abide by Landowners' choice, and the evidence did not render Board's decision illogical.

Other Land Issues – Federal

Sixth Circuit

Tenn. Valley Auth. v. Jones, No. 16–6342, 2017 WL 1969488 (6th Cir. May 12, 2017).

Tennessee Valley Authority (“TVA”) sued Landowner for trespass and violation of the federal Tennessee Valley Authority Act (“Act”). In 1939, TVA acquired a certain strip of land along the southern bank of a river. Some fifty years later, Landowner purchased land away from the bank but adjacent to TVA's riverside strip. Landowner sought TVA's permission to build private water-use facilities on the river's edge, but TVA denied the request. Landowner then acquired a right of way through TVA's property to a riverside landing. Believing he owned the landing itself, Landowner again sought TVA's permission to build, which TVA again denied. Undeterred, Landowner spent the next two decades building upon and modifying the riverside area he regarded as his landing; Landowner built a launch ramp, a dock, and a boathouse. During that period, TVA consistently warned Landowner that his structures violated the Act. After TVA sued, the district court issued a permanent injunction requiring Landowner to remove the riverside structures. Landowner appealed, and the Sixth Circuit Court of Appeals affirmed. The court stated that regardless of whether Landowner *actually* owned the landing, the Act required him to obtain TVA's approval before building the structures. Landowner failed to do so, repeatedly ignoring TVA's warnings regarding the Act. Moreover, the court held that the district court's permanent injunction was not an abuse of discretion: among other things, any hardship befalling Landowner was foreseeable rather than undue because “he chose to build the structures without a permit at all.” This case is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

Federal Circuit

Estate of Hage v. United States, No. 2016-1330, 2017 WL 1406500 (Fed. Cir. Apr. 20, 2017).

Landowners appealed a ruling denying their ability to bring a claim against the Federal Government (“Government”), which alleged that Government’s alleged harassment and threats of prosecution constituted a taking of their property rights. Landowners’ rest their claim on a previous appellate court’s remand that ordered “further proceedings consistent with [that] opinions.” Landowners contended that that phrase allowed them to challenge Government’s harassment regarding the restriction of their water rights. Government contended that such previous court rulings precluded such an argument as already decided. The court found that the previous ruling on this issue foreclosed Landowners’ ability to challenge Government’s action as previous appeals rendered judgment on the issue in the favor of Government. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

Federal Claims

Haggart v. United States, 131 Fed. Cl. 628 (Fed. Cl. 2017).

Landowners are two members of a class of landowners (“Class”) that had filed a class action suit against the Government for an improper taking of their lands when the government converted the right-of-way held by the railroad to one used for recreational trails under federal law. After a series of cases certifying the Class and then breaking it down into smaller Classes, a final settlement agreement (“Settlement”) was finally approved awarding the whole Class \$110,000,000 plus attorney fees. Landowners objected to the attorney fees and to the valuation of their property. After a fairness hearing, the district court approved the Settlement, and Landowners appealed both the Settlement approval and the attorney fees. Government supported Landowners’ position that the award should be allocated differently, but did not appeal itself. The appellate court reversed the Settlement and required that full disclosure on the method for evaluating the different properties be disclosed. While the disclosures were made, there was no discussion on reallocation, and Government changed its position on the of the property values based on the outcome of a similar case in another district. After establishing a new procedural schedule,

Government and Landowners filed for various summary judgments, to which the Class filed a motion to enforce the Settlement as agreed upon. The trial court denied Government's and Landowners' various summary judgments finding that: (1) some of the motions were moot and (2) subsequent changes in the law after a binding Settlement is reached will not change the Settlement. The trial court granted the Class's motion to enforce the judgment as is, with room to reallocate the already awarded amount as need be.

S.D. Florida

JAWHBS LLC. v. Arevalo, No. 15-CV-24176, 2017 WL 1345141 (S.D. Fla. Mar. 21, 2017).

Challenger brought a claim of collusion against prior property buyers ("Buyers") for their efforts to drive down the price of particular land pursuant to a bankruptcy sale. Challenger alleges that Buyers conversed with one another and participated in a scheme to push out other potential buyers and cut the purchase price to nearly half of the property's true value. Buyers sought to dismiss the claims for failure to state a claim. The court denied the motion as to certain members of Buyers, as their actions constituted what could reasonably be construed as a violation of federal and state anti-trust statutes. However, the court dismissed the remainder of Buyers. The court additionally dismissed the claims for punitive damages, civil aiding and abetting and tortious interference.

Other land Issues – State

Alabama

SIMA Props., L.L.C. v. Cooper, No. 2160132, 2017 WL 1291130 (Ala. Civ. App. Apr. 7, 2017).

Operator brought inverse condemnation action against director of state agency and city (collectively, "Government") after it closed a driveway adjacent to a highway. Government moved to dismiss Operator's suit, which the trial court granted causing Operator to appeal. The appellate court reversed and remanded case for several reasons. First, sovereign immunity did not time bar Operator's inverse condemnation action; an exception to sovereign immunity existed for a valid inverse-condemnation action brought against a government official in its representative capacity.

Second, Operator's allegations that by closing driveway Government interfered with its right of access from highway, which it obtained by its being an abutting landowner, did in fact state a claim for inverse condemnation against Government. Although Operator did not own property situated near closed driveway, this fact did not preclude Operator's claim.

Hawaii

City of Kaia'I v. Hanalei River Holdings Ltd., 394 P.3d 741 (Haw. 2017).

County condemned three properties that were next to each other that were all owned by the same property owner or his business (collectively "Property Owner"). Based on this condemnation action there were three main issues that arose throughout the case. The issues were whether: (1) the trial court could allow County to withdraw money from the compensation fund ("Fund") when it was appraised a lower amount than originally appraised for the properties, (2) Property Owner was entitled to severance damages for the easement he owned across a neighboring property and (3) the trial court correctly calculated the interest on the Fund. The appellate court held that: (1) the trial court could allow County to withdraw from the Fund, (2) that Property Owner was not entitled to severance damages based on state and federal common law and (3) that the amount of the interest was correct, but incorrectly calculated by the trial court. Property Owner appealed to the Supreme Court of Hawai'i that held: (1) the trial court could allow County to withdraw from the Fund, (2) Property Owner was not entitled to severance damages, but for slightly different reasoning than the trial and appellate courts found, and (3) that the appellate court correctly calculated the interest on the Fund.

Florida

Mathers v. Wakulla City, No. 1D16-0582, 2017 WL 1655252 (Fla. Dist. Ct. App. May 2, 2017).

A dispute arose between adjoining landowners on a dead-end gravel road ("Road"). Road was the only means of ingress and egress for the residences it served. Landowner built a fence and gate to block Neighbor from using Road. After Neighbor proceeded through the gate, Landowner chained it closed. The county sheriff's office responded to the dispute. Neighbor claimed that Road was publicly owned and thus Landowner had no right to

obstruct Neighbor's passage; but County declared that Road was private. Neighbor sued Landowner and County, seeking a declaration that Road was public property based on statutory dedication. At trial, both Neighbor and County moved for summary judgment. The trial court granted County's motion, reasoning: (1) private parties could not invoke the dedication statute and (2) dedication did not occur because County did not accept ownership of Road. The court of appeals reversed in Neighbor's favor, holding that acceptance is not an element of statutory-presumed dedication and that private parties may invoke the statute. Moreover, the court remanded the case for further proceedings because a fact issue remained regarding whether County had maintained or repaired Road for the statutorily-prescribed period.

Sabal Trail Transmission, LLC v. Real Estate, No. 1:16-cv-063-MW-GRJ, 2017 WL 2783995 (N.D. Fla. June 27, 2017).

Landowner owned land that a natural gas company ("Company") sought to condemn to use for part of its public utility efforts. Company was trying to condemn the property under the federal law, the Federal Power Act ("FPA"). Landowner was seeking to have the land valued under the state condemnation legislation, the Natural Gas Act ("NGA"). The reason for the difference was the state of Florida provided a "full compensation" condemnation valuation for the property, which was more than the value under FPA. The federal court held that, because this was eminent-domain condemnation with a private party, Company, taking the land of another private party, Landowner, state law applies so that Florida's NGA applied, rather than FPA, requiring Company to pay full price for the condemnation.

Illinois

Whipple v. Vill. of N. Utica, 2017 IL App (3d) 150547, 2017 WL 1506057.

A Landowner sued the Village of North Utica ("Village"), seeking an enforcement of zoning laws to keep a mining company ("Company") from opening a mine right next to his land. The Landowner claimed that Company's operations would be a private nuisance and is seeking injunctive relief. The lower court dismissed the nuisance claim on a summary judgment motion, stating that, because the mining operation was not yet underway, there were no specific damages that Landowner could base his claim upon to receive the injunctive relief. However, on appeal, the court held that summary judgment was inappropriate as Landowner could

provide facts that would support a private nuisance claim. Facts like Company producing continuous light and noise, constant truck traffic hauling loads of sand, creation of dust, etc. were enough to deny Village's motion for summary judgment, allowing Landowner to bring a claim.

Kentucky

Drakes Creek Holding Co. v. Franklin-Simpson Cty. Bd. of Zoning Adjustment, 518 S.W.3d 174 (Ky. Ct. App. 2017).

Landowners sought a conditional-use permit ("Permit") from the local Board of Zoning Adjustment ("BZA") to operate a rock quarry on certain properties. These properties were accessible only by a narrow county road ("Road"). After a lengthy and hotly-disputed public hearing, BZA granted Permit because the quarry would "benefit the community by creating jobs and increasing competition." Neighbors appealed BZA's decision to the trial court. Meanwhile, the local government issued various ordinances, one of which prohibited commercial trucks from accessing Road. To reach the quarry, trucks began using a private haul road. In view of the ordinances, BZA scheduled a hearing and revoked the Permit, reasoning that Landowners no longer complied with the Permit's conditions. Landowners sought review in the trial court, which concluded that the Permit was properly issued and improperly revoked. The court of appeals affirmed. The court concluded that BZA had a sufficient basis for issuing Permit as: (1) the quarry was a proper conditional use for the area's zoning, (2) the quarry served the public interest and (3) the Permit did not violate Neighbor's due process rights. Moreover, BZA "erroneously concluded" that the ordinances made it "impossible" to comply with Permit. Though the ordinances made it *difficult* to comply with BZA's conditions, "uncertain commercial feasibility does not equal impossibility." Thus, revocation was arbitrary, and the trial court properly reinstated Permit.

Sw. Clark Neighborhood Ass'n, Inc. v. Branham, NP. 2015-CA-001645-MR, 2017 WL 1193184 (Ky. Ct. App. Mar. 31, 2017).

Mining Company applied for a zoning change to allow it to mine limestone on a 103-acre track. The original application was denied by Planning Commission for various reasons. After acquiring additional land and changing the mine from a surface mine to an underground mine Mining Company reapplied for the zoning change. There was then an open hearing on the application in front of Planning Commission, in which both Mining

Company and Neighborhood Association which opposed the mine got to present their sides. Planning Commission recommended the denial of the amendment, but sent the recommendation to the fiscal court (“CCFC”) for final decision. CCFC went through the public record from the hearing and allowed both sides to state their opinions before making the decision to allow the change in zoning, finding the change appropriate and that the current zoning was inappropriate. Neighborhood Association appealed to the trial court that affirmed CCFC findings. Neighborhood Association then appealed. The appeals court held that CCFC’s finding that the amendment was appropriate and that the current zoning was inappropriate as it was only supposed to find one or the other, but otherwise upheld the amendment to the zoning ordinances in favor of CCFC and Mining Company. This opinion is an unpublished opinion of the court; therefore, state court rules should be consulted before citing opinion as precedent.

Louisiana

Duncan Oil, Inc. v. State of La. Mineral & Energy Bd., 2016-988 (La. App. 3 Cir. 4/19/17); 216 So. 3d 861.

In this action, the Louisiana State Mineral and Energy Board (“State”) sought to recover land from an oil and gas company (“Company”) and the tract’s current owners, another oil and gas company and individual landowner (“Owners”). Company had acquired the land and used it for oil and gas exploration until Owners acquired the land through a 1983 redemption and 1984 tax sale. The land Owners purchased was described by both an acreage amount and in legal description. The challenge comes from State, saying that the land purchased by the owners is far less than the acreage amount put in the description. The legal description of the property only conveyed a small fraction of the acreage described, the acreage that Owners thought they had purchased. The court looked at the claims by State and granted Owners’ request for summary judgment, in large part, because State was collecting taxes from Owners as if they were the owners of the whole acreage listed in the description, rather than just the legal description acres.

Michigan

Bugai v. Ward Lake Energy, No. 331551, 2017 WL 1337476 (Mich. Ct. App. Apr. 11, 2017).

Snowmobiler suffered injuries after being ejected from his snowmobile while crossing Operator's well-site access road. Notably, Snowmobiler did not pay Operator a fee to ride on the property. Snowmobiler sued Operator for his injuries, alleging that Operator breached a duty owed to riders by failing to properly maintain the road or warn riders of danger. Operator moved for summary judgment, arguing that the state's Recreational Land Use Act ("RUA") barred Snowmobiler's claim; RUA protects landowners from liability for injuries suffered by nonpaying recreational users of land. The trial court denied the motion, finding that RUA applied only to land "in its natural state" and that the plowed road and resultant snowbanks were manmade. The court of appeals reversed in Operator's favor. The court began by noting that RUA applied because the Michigan Supreme Court had overruled the case that the trial court cited for its "natural state" rule under RUA. Based on the Supreme Court's ruling, RUA does not limit its application "to any particular type of land." Because RUA applied, Snowmobiler was required to show that his injuries were the result of Operator's gross negligence or willful misconduct. In the appellate court's view, there was no evidence that Operator was extremely indifferent to potential rider injuries or intended to cause harm. To the contrary, Operator plowed and maintained the road, therefore the court reversed the trial court's opinion. This is an unpublished opinion by the court; therefore, state court rules should be consulted before citing the opinion as precedent.

New York

Blanchfield v. Town of Hoosick, 53 N.Y.S.3d 226 (N.Y. App. Div. 2017).

Landowner operated a dog training and handling business on certain property. After Landowner's neighbors complained about noise, the local Zoning Board of Appeals ("ZBA") advised Landowner that her activities violated local land-use laws. To continue operating her business, Landowner needed to obtain a special-use permit. Landowner sought such permit before ZBA. ZBA—after public hearings—denied Landowner's application, citing the "foreseeable impact of dog noise" on neighbors. Landowner sought review before the state trial court, which dismissed Landowner's petition. The court of appeals reversed, holding that ZBA's

determinations lacked sufficient support in the record. The court highlighted that ZBA identified no specific shortcomings with Landowner's noise-mitigation measures and that Landowner "offered scientific measurement of the noise level" at the public hearing. Because no reliable evidence rebutted Landowner's claims, there was nothing in the record to suggest Landowner failed to meet the land-use law's conditions. The court concluded by noting that ZBA simply "bowed to generalized objections" from Landowner's neighbors.

In re Eagle Creek Land Res., LLC, 52 N.Y.S.3d 160 (N.Y. App. Div. 2017).

Hydroelectric Company operated energy producing facilities in Northeast United States. Hydroelectric Company had received a license from the Federal Energy Regulatory Commission ("FERC") to operate these facilities. One condition to that license was that Hydroelectric Company had to maintain a public recreational area on the waterway. Hydroelectric Company opened a boat launch with a fifteen-car parking lot to be used by the public, meeting that requirement. Later, Developing Company purchased all the land around the boat launch and developed a high-end gated residential community ("Community"). This effectively blocked the access to the boat launch and parking lot. When Hydroelectric Company attempted to transfer the FERC license, FERC denied the transfer as Hydroelectric Company failed to keep open the boat launch for the public to access. Hydroelectric Company then condemned a portion of the land to ensure use of the boat launch for the public. Community brought suit and the trial court awarded it \$297,000 for the land as a condemning entity must pay fair market value of the land that was condemned. Community appealed, stating that the actual damage caused by the condemnation was much more, bringing in experts stating that the damage was multiple millions of dollars as now Community was no longer a private gated community. The appellate court affirmed the trial court's decision, finding no abuse in the lower court's discretion to disregard the appraisals.

Tomhannock, LLC v. Roustabout Resources, LLC, 51 N.Y.S.3d 671 (N.Y. App. Div. 2017).

Original Landowner conveyed a deed for almost sixteen acres of land that contained a ten year option to have three and one-half acres reconvened to Original Landowner. Through a series of conveyances Current Landowner held the deed to the property, but refused to reconvey the three and one-half acres when Original Landowner exercised its option. Original Landowner

sued for specific performance under the option, and Current Landowner's defense was that Original Landowner never recorded the reconveyance deed. The trial court granted partial summary judgment for Original Landowner, requiring Current Landowner to sign the reconveyance deed within 30 days. Current Landowner appealed and the appellate court upheld the summary judgment.

North Dakota

Goodall v. Monson, 2017 ND 92, 893 N.W.2d 774.

Landowner A and Landowner B entered into a contract to convey land. The deed was drafted and a receipt was issued officially conveying the land and evidencing the sale. The deed was drafted with ambiguities on its face though. Landowner B brought suit, claiming that Landowner A did not own what he was asserting. Landowner B tried admitting into evidence the purchase contract and receipt, but under North Dakota law, parol evidence is generally not admissible to interpret a deed. This was Landowner A's defense, stating that the instruments of the sale were not to be admitted. On appeal, the North Dakota Supreme Court held that when a deed is ambiguous on its face, the court may use extrinsic evidence to clarify the unclear. The evidence admitted cannot rebut superior evidence, the deed, but can clear up any ambiguities the deed has on its face.

Huebner v. Furlinger, 2017 N.D. 145, 896 N.W.2d 258.

Heirs to an estate were seeking to quiet the title of their mineral interests in a property that they inherited. This required notice to be given to any potential claimants of the property. Heirs had an attorney conduct research to find all potential claimants and then proceeded to mail notices to the claimants that were found. One of the claimant's address came up without a zip code, so Heirs applied a zip code to the address prior to the mailing. After the requisite time, Heirs brought the quiet title action and Claimant whose address had been altered by applying the zip code to the address came forward to defend his interest in the mineral rights. Heirs stated that Claimant should be estopped as he did not come forward when the notice was mailed out. However, the court held that when dealing with the mineral interested, Heirs had an obligation to use the mailing address exactly as it was on the records they received it from. By adding the zip code to Claimant's mailing address, the notice was not valid for purposes of estopping Claimant, therefore, the quiet title action failed.

Sorenson v. Bakken Invs. LLC, 2017 ND 127, 895 N.W.2d 302.

Landowner A and Landowner B have previously litigated over property, with the first of three judgments being rendered in 2010. In the 2010 action Landowner A entered into a settlement agreement without representation by counsel. This resulted in a quiet title action in favor of Landowner B. There was no appeal. Landowner B brought another quiet title action in 2012, and again prevailed. In 2016 Landowner A brought this action requesting that the court reconsider the judgments rendered in 2010 and 2012. The court ruled in favor of Landowner B, holding that Landowner A's decision not to appeal those decisions then had made them finalized. The Supreme Court of North Dakota affirmed the lower court judgment upholding Landowner B's title in the land.

Oregon

Boardman Acquisition, LLC v. Dep't of Revenue, 393 P.3d 1147 (Or. 2017).

Taxpayer conveyed property that was previously entitled to the state's farmland special assessment ("Assessment"). Where Assessment applies, land has a reduced value for property-tax purposes. But when the land becomes disqualified for Assessment, taxes previously avoided are added to the next property assessment and tax roll. Sometimes an exception applies. Taxpayer had leased the property for farm purposes. When the lease expired, Taxpayer requested that the county assessor ("Assessor") disqualify the property for Assessment. Even after conveying the property, Taxpayer agreed to pay taxes previously avoided. Taxpayer later sought a refund, arguing that an exception applied such that it did not owe the taxes previously avoided. Assessor denied the refund, and Taxpayer sued the Department of Revenue ("Department"). The tax court found that the relevant exception did not apply to the land, and the Oregon Supreme Court affirmed. The exception at issue applied to land that was: (1) public property, (2) which the owner had leased and (3) where the reason for disqualification was termination of the lease. Importantly, the exception applied *only* when each of those factors was true "as of the date the disqualification [was] taken into account on the assessment and tax roll." The court agreed with Department that the disqualification was "taken into account" on the first day of the following year, not the day Taxpayer gave notice to Assessor. Because none of the exception's factors were true on the

day the disqualification was taken into account, Taxpayer was not entitled to the exception and owed taxes previously avoided.

Tennessee

Thomas v. Thomas, No. W2016-01412-COA-R3-CV, 2017 WL 1404353 (Tenn. Ct. App. Apr. 17, 2017).

Transferees appealed trial court's ruling that sole ownership of property in dispute belonged to Transferors because of Transferees' non-payment of taxes and the applicable theories of prescriptions and unjust enrichment. This dispute concerned farm property where the deed recites ownership as one-half to Transferors and one-fourth each to two Transferees. The appellate court addressed Transferees' issues, and articulated several findings. First, although Transferees never paid taxes on property, state law does not prevent Transferees from defending title once Transferors claim full ownership right, nor does it prevent Transferees from suing Transferors for partition of property absent evidence of ouster. Second, trial court erred in applying state case law because Transferors did not successfully raise presumption of title by prescription, as Transferors did not show they possessed and used the land to the exclusion of the Transferees for at least twenty years. Third, Transferors cannot assert unjust enrichment theory because their payments for the property and titling of interest in Transferees' names over thirty years prior constituted voluntary acts for which the record did not reflect the Transferors desire to seek reimbursement in the future. The court reversed and remanded the case to trial court for it to determine if Transferees can acquire a partition.

Vermont

Davis v. Maxwell, No. 2016-381, 2017 WL 1506426 (Vt. Apr. 24, 2017).

Farmer owned land through which County acquired a right-of-way ("ROW"). Farmer conveyed most of the property to Landowner but retained a one-acre lot for a residence. Land surveys indicated that the one-acre lot's eastern boundary was the western edge of ROW. Landowner conveyed her property to Neighbor and acquired the one-acre lot from Farmer. A boundary dispute arose between Landowner and Neighbor when Neighbor drove farm equipment over what Landowner believed was her front lawn. Landowner blocked passage by placing boulders in the area. Neighbor filed a quiet title action against Landowner, and the trial court

ruled for Neighbor. On appeal, Landowner argued that: (1) she was presumably the owner of the land to the centerline of ROW and (2) she acquired title to the disputed area by adverse possession based on her (and her predecessor's) use of the area. In rejecting the first argument, the Vermont Supreme Court held that an earlier deed "unambiguously established" that the eastern boundary of Landowner's lot was the western edge of the ROW. Thus, the "centerline presumption" did not apply because Landowner's deed clearly expressed a different intention. And in rejecting the second argument, the court held that the evidence failed to demonstrate hostile use and was vague as to duration, scope, and location of claimed uses. The trial court's conclusion that Landowner failed to show "a claim of right to the disputed property for a period of fifteen years" was not clearly erroneous. Thus, the court affirmed the trial court's judgment. This decision was reached by a three-justice panel of the court, and therefore is not considered binding precedent within the state.

Washington

Bowers v. Dunn, 198 Wash. App. 1034 (Wash. Ct. App. 2017).

Homeowner appealed trial court order restricting contact between it and its Neighbors and establishing the parties' rights and responsibilities regarding maintenance of a private road on the parties' property. Appellate court held that trial court erred in issuing its order for two reasons. First, the court did not have statutory authority to issue injunctive relief under state law. Second, although the trial court had equitable authority to issue injunctive relief, an injunction was not the appropriate remedy as the Neighbors had adequate remedy available under the State's anti-harassment provisions. Further, appellate court held that the trial court erred in applying certain provisions of the road maintenance order to non-parties. Accordingly, the appellate court affirmed in part, reversed in part, and remanded to trial court with instruction to (1) vacate no-contact order and (2) modify the road maintenance order. This case is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Wyoming

AllEnergy Corp. v. Trempealeau County Env't & Land Use Comm., 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368.

Mining Company sought a permit to mine non-metallic mineral mine for silica to be used for fracking sand. The county committee (“Committee”) denied Mining Company’s permit after the Committee conducted a public hearing and took testimony. The court denied that Committee acted outside of its jurisdiction, as asserted by Mining Company, because County’s legislative board created Committee to conduct very specific tasks related to land use and the environment. Committee and each member that disapproved of the permit, stayed within the confines of this limited jurisdiction. Mining Company also incorrectly attempted to apply the state rules of evidence to the permit review process, and the Wisconsin Supreme Court found that even if the rules applied, Committee did not go against the clear weight of evidence to make their decision, nor did Committee rely on hearsay. The court refused to adopt Mining Company’s proposed standard, that if a permit seeker met all the required criteria, then the permit should be granted. Because the court did not adopt a new standard for mining permits and Committee properly acted within its jurisdiction based on the evidence, Committee properly denied the permit.

SELECTED ELECTRICITY DECISIONS*Traditional Generation***First Circuit**

AES Puerto Rico, L.P. v. Trujillo-Panisse, 857 F.3d 101 (1st Cir. 2017).

A coal-fired power plant (“Power Plant”) sued Puerto Rican municipalities (“Municipalities”) to challenge certain ordinances that restricted Power Plant’s use of ash derived from coal combustion. The dispute arose when Power Plant delivered ash to certain municipal landfills. After Power Plant disposed of the ash, Municipalities responded by fining the landfills, sending various notices, and physically blocking entrances to the landfills. Power Plant argued that the ordinances violated commonwealth law because they prohibited activities that the Puerto Rico Environmental Quality Board (“EQB”) had explicitly authorized. The district court denied Power Plant’s motion for summary judgment and declined to exercise jurisdiction over the commonwealth preemption claim. The First Circuit Court of Appeals vacated and remanded, concluding that EQB resolutions and permits—which authorized beneficial use and disposal of coal combustion residuals like ash—preempted Municipalities’ restrictive ordinances. To reach its conclusion, the court of appeals relied on a recent Puerto Rico case that noted EQB may exercise its regulatory power in “expressly preempting the field” regarding use of coal combustion residuals.

Sixth Circuit

Wilmington Tr. Co. v. AEP Generating Co., 859 F.3d 365 (6th Cir. 2017).

A coal-burning power plant owners’ trustee (“Trustee”) sued power plant lessees (“Lessees”), raising three claims: (1) that Lessees breached a facility lease by imposing an impermissible lien, (2) that Lessees breached a participation agreement through conduct that adversely affected the economic useful life of the plant and (3) that Lessees breached the covenant of good faith and fair dealing. The dispute involved a complicated sale-and-leaseback agreement and featured “several interlocking instruments” that sought to provide “some protection to the plant’s residual value.” The district court dismissed each of Trustee’s claims and entered judgment in favor of Lessees. Applying New York law, the Sixth Circuit Court of Appeals reversed in part, affirmed in part, and remanded for further

proceedings. The court held that the district court misinterpreted the facility lease by concluding that Lessees' commitment to install a scrubber at the plant *after* lease expiration was not an impermissible lien. Lessees made such commitment in a modified consent decree after numerous parties filed suit under the Clean Air Act; Lessees had modified certain power plants without installing proper pollution controls. Having reversed the first claim in Trustee's favor, the court of appeals also reversed the participation agreement claim. But the court affirmed the district court's dismissal of the good faith and fair dealing claim on the grounds that it was duplicative of the breach of contract claims.

Traditional Generation – State

Arizona

Ariz. Elec. Power Coop., Inc. v. Ariz. Dep't of Revenue, 393 P.3d 146 (Ariz. Ct. App. 2017).

Electric Power Cooperative ("EPC") sought tax refunds from the Arizona Department of Revenue ("DOR") for use taxes EPC had paid on certain out-of-state purchases of coal and natural gas. After unsuccessful protests before DOR and the Office of Administrative Hearings, EPC appealed to the state tax court. The tax court sided with DOR, concluding that EPC's out-of-state purchases of coal and natural gas were subject to the use tax. Undeterred, EPC appealed once more—this time to the state court of appeals. The court held that EPC's out-of-state purchases were subject to the state use tax because EPC clearly "uses and consumes" coal and natural gas to generate electricity within the meaning of state law. Moreover, the court held that such purchases were not exempt from the use tax because EPC's fuels "do not directly enter into or become an ingredient or component part of the electricity" as required by the state manufactured-product exemption.

*Renewable Generation***D.C. Circuit**

Portland Gen. Elec. Co. v. Fed. Energy Reg. Comm'n, 854 F.3d 692 (D.C. Cir. 2017).

Wind Farm and Public Utility disputed how much—and by what means—Public Utility was required to purchase Wind Farm’s power. Resolving the dispute required analysis of the parties’ power-purchase agreement (“PPA”) and the Public Utility Regulatory Policies Act (“PURPA”). Wind Farm argued that the PPA required Public Utility to purchase *all* of Wind Farm’s power and to do so using dynamic transfer services. For its part, Public Utility argued that the PPA required purchase of Wind Farm’s power based on day-ahead schedules. Wind Farm filed a complaint with the Federal Energy Regulatory Commission (“FERC”), which concluded that the PPA—and its PURPA regulations—required Public Utility to accept Wind Farm’s entire net output. But FERC denied Wind Farms specific request for dynamic scheduling and Wind Farm’s claims under the Federal Power Act (“FPA”). Both parties filed petitions for review with the D.C. Circuit Court of Appeals. First, the court concluded that it lacked jurisdiction under PURPA to review Public Utility’s petition. Second, the court held that Public Utility did not violate FPA by denying Wind Farm’s dynamic transfer services while providing those services to Public Utility’s own power-generation resources. And finally, the court held that Public Utility did not violate FPA by directing its transmission personnel to deny dynamic scheduling services to Wind Farm.

Federal Claims Court

Entergy Gulf States, Inc. v. United States, 132 Fed. Cl. 59 (Fed. Cl. 2017).

Utility Companies filed suit claiming Department of Energy (“DOE”) breached the contract it entered under the Nuclear Waste Policy Act, by failing to collect and dispose of Utility Companies’ spent nuclear fuel (“SNF”). In one earlier cases the court awarded Utility Companies’ partial judgment of \$42,341,604 in damages for site modification, payroll and materials loaders, and additional security. In another earlier cases the court awarded Utility Companies \$5, 197,764 for cask loading costs, and subsequently denied Utility Companies claims for \$562,020 in fuel characterization costs. Utility Companies moved for reconsideration for

denied claims. In this case, the court found Utility Companies can recover full award of \$562,020 in fuel characterization costs because Utility Companies incurred fuel characterization costs in non-breach world. Additionally, because Utility Companies incurred fuel characterization costs for loading storage casks that did not require expert opinion or modeling of costs in non-breach world, and Utility Companies would not have to store SNF in casks had DOE collected and disposed of the SNF.

D.C. District Court

Swecker v. Midland Power Coop., No. 16-1434, 2017 WL 2189496 (D.D.C. May 17, 2017).

Owners of a wind turbine attempted to bring action against public utility companies (“Utilities”) for failing to follow regulations and Federal Energy Regulatory Commission (“FERC”) for failing to enforce the regulations. Owners decided to bring action in a federal district court, but failed to meet their burden to show the court had personal jurisdiction over Utilities. Though Utilities may be part of a national federation like most public utilities, that does not prove ample enough connection to the specific federal district, so the case against Utilities was dismissed. As for FERC, the trial court relied on United States’ Supreme Court precedent holding that “an agency’s decision not to take enforcement action should be presumed immune from judicial review,” and dismissed this case as well.

Rate Case – Federal

Ninth Circuit

Cal. Pub. Util. Comm’n v. Fed. Energy Regulatory Comm’n, 854 F.3d 1136 (9th Cir. 2017).

During an energy crisis, the Federal Energy Regulatory Commission (“FERC”) ordered governmental and non-public utilities to pay refunds, but that order was overthrown in an earlier case. FERC decided to calculate the refund deficit by investigating net sales and purchases at hourly intervals. Groups of public utilities (“Groups”) in the state brought claims against the calculation of refunds, claiming that the refunds must be calculated over the entire energy crisis period. The Ninth Circuit Court of Appeals held that FERC did not act arbitrarily or capriciously in its calculations of the refunds, and the refunds ordered by FERC should stand.

*Rate Case – State***Indiana**

Citizens Action Coal. of Indiana, Inc. v. N. Ind. Pub. Serv. Co., 76 N.E.3d 144 (Ind. Ct. App. 2017).

Public Service Company (“PSO”) filed a petition for a new rate design with the Indiana Utility Regulatory Commission (“IURC”) that was immediately challenged by several industrial organizations (“Organizations”). Organizations and PSO soon reached a settlement agreement, and IURC approved the agreement. A coalition dedicated to protecting ratepayers then challenged the settlement agreement due to the lack of protection for low income customers. The rate design did not include a low income payment assistance plan or the collection and reporting of its customers’ data. However, the trial court found the rate plan of a fixed charge plus a variable energy charge with different rates for large and small commercial or residential customers was sufficient to approve the agreement PSO and Organizations. The trial court also found that there was no requirement to create a payment plan for low income customers or to record their data. The appellate court found sufficient evidence to uphold these claims and affirmed the decision.

Missouri

Laclede Gas Co. v. Office of the Pub. Counsel, WD 79830, 2017 WL 1149140 (Mo. Ct. App. Mar. 28, 2017).

The Office of Public Counsel (“OPC”), a public organization representing the rights of utility customers, challenged the administrative ruling of the state public service commission (“Commission”). Commission held for natural gas and utility provider (“Provider”) on Provider’s application to alter its surcharges associated with the cost of infrastructure replacement. To successfully establish these surcharges to recover infrastructure costs, state statute dictates that Provider must file a petition with Commission. OPC challenged the petitions arguing that the requested amount included costs not yet incurred and that Commission unreasonably granted of the petition. The court found that state law did not prevent the inclusion of budgeted costs in the petition for infrastructure spending, and that state law did not prevent updated amendments of those budgets. As long as Commission had proper time to review and audit these infrastructure

spending proposals, the petitions and subsequent amendments and Commission's approval thereof did not unreasonably violate state law. OPC also challenged the ruling on due process grounds, but the court found that OPC had time to review submissions, and failed to timely audit the petitions.

Pennsylvania

HIKO Energy, LLC v. Pa. Pub. Util. Comm'n, No. 5 C.D. 2016, 2017 WL 2471054 (Pa. Commw. Ct. June 8, 2017).

State Utility Commission ("Commission") issued a civil penalty against an Electricity Supplier ("Supplier") for Supplier's billing actions during the polar vortex, that exceeded the Supplier's designated rates. Supplier countered that the penalty violated the Pennsylvania and United States Constitutions because of the excessive nature of the penalty, and that Commission abused its discretion in its calculation method. Supplier marketed energy to residents through acquisition from third-party generators, which Supplier then resold to consumers. Supplier solicited customer contracts in a number of ways, with a variable rate set in each contract for the first 6 months of the contract. The polar vortex caused a massive increase in energy prices, which drove up Supplier's costs; Supplier in turn decided to raise the prices on its customers above the variable rate stipulated in the contract. Supplier failed to prove that the penalty constituted excessive punishment in violation of the state and U.S. Constitutions, because Supplier had a history of violation and it relied on settlements rather than litigation evidence to prove the proper amount. The constitutions only bar fines which unreasonably charged Supplier in clear excess of the gravity of the offense, which here did not occur. Supplier deliberately overcharged thousands of customers and so long as each bill sent to customers constituted its own violation of the contract, then Commission properly calculated the penalty amount. Supplier intentionally sought to overcharge customers to cover its own costs and regardless of the lack of financial hardship of the customers as a result, Supplier still violated the terms of the contract signed with the customers.

*Transmission - Federal***D.C. Circuit**

Norhill Energy LLC v. McDaniel, 517 S.W.3d 910 (Tex. App. 2017).

Lessee had taken a lease with a 2-year primary term from Lessor that allowed the primary term to be extended if there were “drilling or reworking operations” conducted “in good faith.” Towards the end of the primary term, Lessee had drilled six non-producing wells, and was planning on drilling a seventh, but Lessor convinced Lessee to try and use a submersible pump to remedy the water production, saying he would consider it “reworking” under the lease. Lessee installed the pump, but no oil was produced. One month after the original expiration date of the lease, which was still held by the “reworking” operation of the pump, Lessor and Lessee executed a new agreement that that Lessee would assign the lease back to Lessor for \$50,000 within thirty days of executing the agreement. Lessee waited several months, but never received the \$50,000 and when Lessee met with Lessor, Lessor made a statement to the point of he was trying to get out of the agreement. Lessee sued Lessor for breach of contract, fraud, money had and received, and promissory estoppel. The jury found for Lessee on all but the fraud account, but granted Lessee damages of \$50,000 only on the money had and received account. Both parties motioned for judgment notwithstanding the verdict, which the trial court granted in favor of the Lessor such that Lessee received no damages. Lessee appealed, and the appellate court affirmed the jury verdict, holding Lessee should receive the \$50,000 on the money had and received account but not on the breach of contract claim.

*Transmission – State***Michigan**

City of Coldwater v. Consumers Energy Co., 895 N.W.2d 154 (Mich. 2017).

This is a consolidated case of two similar cases from lower courts. In both cases the ownership of property changed hands and there was a break in the electric service between the original owners and New Owners. Also in both cases, New Owners switched electric service from Utility Company to City. Utility Company filed suit arguing under state law that it had the right to

provide service not the local City because it had been the first to provide electricity to the consumer, which it defined as the property itself. The trial courts found that the definition of consumer was not the property but the actual owner of the property, and therefore as there was a break in the electric service before New Owners turned electricity on, they could use City as the electric provider instead of Utility Company. Utility Company appealed, and both the appellate court and the Supreme Court of Michigan affirmed the trial court.

SELECTED TECHNOLOGY AND BUSINESS DECISIONS*Merger and Acquisition***Delaware**

In re Massey Energy Co. Derivative & Class Action Litig., 160 A.3d 484 (Del. Ch. 2017).

Shareholders of a Mining Company brought a direct and derivative suit against Mining Company's Directors ("Directors") on claims of a breach of their fiduciary duties following a fatal mine explosion. Shareholders alleged that Directors conducted business in a deliberate and systematic way as to avoid safety regulations, leading to the mine explosion. Investigations showed that those in charge of Mining Company willfully violated state and federal safety regulations, and a few of Mining Company's executives received criminal convictions because of the mine explosion. Mining Company then went through a merger in which it became a subsidiary of Successor Company ("Successor"). Shareholders approved the merger, and following several stays on various actions, the merger became finalized. Directors moved to dismiss the claims arguing: (1) Shareholders lost standing following the merger, (2) the suit did not fit into one of the exceptions and (3) the Shareholders failed to convert their derivative claim into a class action claim. The two exceptions for the lack of standing would have required (1) the merger itself be subject to a fraud claim, perpetuated with the purpose to deprive shareholders of the derivative claim, or (2) the merger only reorganizes the existing organization. The court found neither of the exceptions apply to Shareholders suit, and so Successor properly owns the rights of Shareholders litigation because of Shareholder approval of the merger.

*Other Issues – Federal***Fifth Circuit**

In re Deepwater Horizon, 858 F.3d 298 (5th Cir. 2017).

After a settlement agreement to those damaged by a large oil spill in the Gulf of Mexico ("Claimants"), the federal district court approved multiple methods of calculating compensation by the Claims Administrator. Annual Variable Margin Methodology ("AVMM") and Industry-Specific Methodologies ("ISM") were both used to calculate compensation.

Claimants challenged the methods of calculation. The settlement agreement is ambiguous in aspects but is clear that the claimant be allowed to choose a time period within limits from which to calculate compensation. AVMM allows this choice by Claimants, but ISM allows the Claim Administrator to pick funds outside of the designated period. Because of the limitations of the time period, the Fifth Circuit Court of Appeals held that Claimants were subject to AVMM, and that ISM did not fall within the plain meaning of the settlement agreement.

Neiman v. Bulmahn, 854 F.3d 741 (5th Cir. 2017).

Shareholders sued former Operating Company's Executives ("Executives") for fraud claiming Executives has scienter of the poor economic and cash situation of the Operating Company prior to its bankruptcy as evident by its misrepresentation of: (1) production from a new well, (2) available funds to complete a pipeline project and (3) why a newly hired CEO stepped down before even signing an employment agreement. The district court dismissed the case with prejudice, and Shareholders appealed. The Fifth Circuit Court of Appeals affirmed the district court stating that Shareholders failed to adequately plead facts to support their three claims.

Tenth Circuit

Energy W. Mining Co. v. Estate of Blackburn, 857 F.3d 817 (10th Cir. 2017).

Coal Miner worked in a coal mine for years. In addition to breathing the dust from a coal mine, he smoked cigarettes for a large part of his life. Later, Coal Miner became disabled from a lung disease, emphysema. Coal Miner filed for statutory benefits under the Black Lung Benefits Act ("Act"). The Act provides statutory benefits to miners who can no longer work due to lung disorders' caused by their employment. There is a rebuttable presumption that the disease is caused by the coal mining, and Coal Miner's employer fought to rebut the presumption. Two of three doctors said that the emphysema was caused by his smoking, not the coal mine. The third doctor said that the disease was caused by Coal Miner's time in the mine. Ultimately the ALJ ruled in favor of Coal Miner, finding the disease being caused by the work in the mine, granting benefits to the miner.

Gaedeke Holdings VII LTD v. Baker, Nos. 16-6004 & 16-6017, 2017 WL 1173608 (10th Cir. Mar. 30, 2017).

Interest Holder sued Developer for misappropriation of trade secrets in the development of oil and gas interests, among other claims. Interest Holder moved for a new trial following a positive ruling, and subsequently appealed the lower verdict award. Developer alleged that Interest Holder lacked standing to assert the misappropriation claim. Under Oklahoma's trade secrets statute, Interest Holder possessed standing to sue under this claim, even though other parties also possessed standing. Oklahoma specifically took out the portion of the statute that required that complainant have ownership of the trade secrets. Because Interest Holder need not prove ownership of the trade secrets, but merely show an interest therein, Interest Holder properly possessed standing under Oklahoma law. Interest Holder, however, could not appeal the second lower verdict, as parties cannot pick and choose the most favorable verdict in their favor. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the opinion as precedent.

D.C. Circuit

AquAlliance v. United States Bureau of Reclamation, 856 F.3d 101 (D.C. Cir. 2017).

Water Conservation Group ("Group") petitioned the Bureau of Reclamation ("Bureau") to turn over all records of water transfers across northern California pursuant to a Freedom of Information Act request. Litigation eventually prompted Bureau to turn over requested information, but Bureau redacted water well information. Bureau argued that the water well information fell into a specific exception to the request under federal law. The exemption allowed for Bureau to withhold "geological and geophysical data." Group asserted that water wells do not fall into the category of the exemption. The court found that well depth and location, the information redacted, necessarily reveals geological and geophysical data. The court held the unambiguous language of the exemption under federal law applied to water wells and Bureau correctly redacted such information.

S.D. New York

Harry v. Total Gas & Power N. Am., Inc., No. 15-CV-9689 (JGK), 2017 WL 1134851 (S.D.N.Y. Mar. 27, 2017).

Buyers and sellers (collectively, “Class”) with physical natural gas and derivative financial natural gas contracts filed a putative class action against Traders, alleging monopolization and manipulation of natural gas contracts, and on the commodity futures and options markets. Class sued alleging violation of the Commodity Exchange Act (“CEA”), the Sherman Act, and the Clayton Act. Traders moved to dismiss suit. The trial court held that the complaint failed to sufficiently allege economic injury because of the alleged manipulation of monthly index prices of physical natural gas at regional hubs required for statutory standing to bring class action claims. The court reached this decision even though allegations included that Traders manipulated monthly index settlement prices of natural gas at four regional hubs because the complaint failed to allege specific transactions made at a fifth hub, where Class’ transactions transpired, had any direct connection to the monthly index prices at the other four hubs. Alternatively, had statutory standing existed, motion remained appropriate because the complaint failed to state class action for manipulation under CEA. Further, the complaint failed to sufficiently allege antitrust injury required for Sherman Act monopolization claim. The complaint failed to allege that Class were participants in the same market directly restrained by Traders’ misconduct. Finally, Class was not efficient enforcer of antitrust laws required for standing of a putative class action under Sherman Act since it was indirectly related to the primary violation asserted, and its alleged damages are at most speculative.

Other Issues - State

California

Hardesty v. State Mining & Geology Bd., 219 Cal. Rptr. 3d 28 (Cal. Ct. App. 2017).

Surface Miners (“Miners”) sued to challenge findings of the state Mining and Geology Board (“Board”). Board effectively denied Miners a “grandfather exemption” from the mining permit requirement under the state’s Surface Mining and Reclamation Act (“SMRA”). SMRA required all surface miners to obtain “an approved reclamation plan and approved

financial assurances to implement the plan.” The state legislature included in SMRA a grandfather provision to avoid takings claims from “miners [who] had extant private property rights” upon SMRA’s passage. The trial court denied Miners’ petition for writ of mandamus, and Miners timely appealed to the state court of appeals. Miners argued that Board and the trial court failed to recognize the legal force of Miners’ nineteenth-century federal mining patents; they argued that such patents “establish a vested right to surface mine” after the SMRA’s passage. But the court of appeals concluded that a federal mining patent “has no effect on the application of a state regulation of mining.” In short, the fact that Miners worked mines on the property “years ago” did not guarantee that surface mining existed when the Act took effect—a requirement for the grandfathering of surface mining rights. Thus, the court affirmed the trial court’s judgment.

Louisiana

Vekic v. Popich, 2016-0508 (La. App. 4 Cir. 3/29/17); 215 So.3d 483.

Owner of oyster property sued for a sublease agreement with Buyer for damaged incurred by the 2010 oil spill in the Gulf of Mexico. Before the oil spill and settlement involving the property, Owner gave a sublease with the option to purchase the property exercisable with notice in writing at any time before the end of the lease. When the settlement was reached, both Owner and Buyer registered as recipients for damages to the property, and subsequently sued for the proceeds. The trial court found that the parties’ intent was to give Buyer title, and then Buyer would receive the rights to any settlement proceeds or future damage protection. However, the appellate court held that the language of the sublease agreement was a normal lease with the option to purchase that was not exercised. Because Buyer did not meet the requirements to buy the property, he was not the leaseholder of record on the day of the oil spill, and the sublease agreement did not specify anything involving settlement claims, thus Buyer is not entitled to any settlement proceeds. Accordingly, the appellate court reversed the trial court’s decision.

Pennsylvania

Smith ex rel. Smith Butz, LLC v. Pa. Dep't of Env'tl. Prot., 1431 C.D. 2016, 2017 WL 1833472 (Pa. Commw. Ct. May 8, 2017).

A company (“Requester”) appealed the decisions of State Records Office’s (“Office”) determination denying Requester’s request the State Environmental Agency (“Agency”) for documents related to a Technology Company’s drilling and use of radioactive tracers under a state right-to-know laws. Technology Company argued that the records were protected or exempt from the right-to-know law on various exemptions. The appellate court held that Agency properly denied disclosure on the basis that certain: (1) requested records were subject to attorney client or work project privilege, (2) records may jeopardize public safety if disclosed, (3) records contained trade secrets, (4) records constituted “working papers and notes” and (5) documents were still under determination by Agency. The appellate court held that although some documents regarding non-criminal investigations of Technology Company’s operations were exempt, state law required that Agency disclose other documents.

SELECTED ENVIRONMENTAL DECISIONS*Federal***Ninth Circuit**

Arizona ex rel. Darwin v. EPA, 852 F.3d 1148 (9th Cir. 2017).

State, cement kiln owner, and copper smelter owner (collectively, “Owners”) petitioned the Ninth Circuit Court of Appeals for judicial review of EPA’s Federal Implementation Plan (“FIP”) promulgated under the Clean Air Act (“CAA”). EPA issued FIP to replace rejected portions of the State’s Implementation Plan (“SIP”), which listed proposals to reduce emission and improve air visibility in federal wilderness areas located in the State. However, after reviewing Owner’s petition, the court found that Owner’s challenges to FIP were either not ripe for review or lacked merit. For instance, EPA’s imposition of emissions-control technology called “selective non-catalytic reduction” to control cement kiln constituted valid agency rulemaking because EPA considered all expressed factors including visibility improvement, though not weighing all factors evenly. Further, EPA’s limit on nitrogen oxides emissions from copper smelters to improve air visibility in federal wilderness areas intrastate constituted valid rulemaking even though the emissions did not currently exceed the allowed limit set by the EPA. The rationale: Because smelters were best available retrofit technology (“BART”) eligible sources likely to emit over the prescribed limit, and BART determination centered on a source-by-source basis rather than pollutant-by-pollutant. EPA’s limit on particulate matter emissions from copper smelter constituted valid agency rulemaking. Although EPA determined no additional controls could reduce emissions of particulate matter, EPA had an obligation to set emission limits for each source subject to BART. Finally, EPA’s limit on sulfur dioxide emissions from copper smelter constituted valid rulemaking because EPA relied on smelter’s own representation of control efficiency rate when imposing limit from smelter data that showed such limit was feasible to achieve. EPA also articulated its rationale for its findings.

Defrs. of Wildlife v. Zinke, 856 F.3d 1248 (9th Cir. 2017).

Wildlife Protection Group (“Group”) challenged the issuance of a permit by various Federal Agencies (“Agencies”) in connection with a right-of-way associated with a solar energy project (“Project”). Group argued that the

Project threatened the well-being of a desert tortoise and the decisions to grant the permit arbitrarily and capriciously violated the terms of federal law. Group argued that Agencies improperly relied on the remedial measures of the project, and that the threat to the tortoise far outweighed any value of remedial measures. However, the Ninth Circuit Court of Appeals determined that Agencies relied more on the lack of a measurable threat to the tortoise, so the inclusion of remedial measures by Agencies was not arbitrary or capricious. The court additionally rejected Group's challenge against the project's placement in proximity to the critical area might affect the tortoise because the placement would not actual reduce the critical area, but the land that connects two critical areas. The court finally rejected the arguments that Agencies requirements for initiation of further reviews of the project violated federal law. Group failed to prove that any of the actions of the Agencies rose to the level of arbitrary or capricious to warrant an injunction against the project.

In re Big Thorne Project, 857 F.3d 968 (9th Cir. 2017).

The United States Forest Service ("USFS") approved a logging and road building project ("Project") in southeast Alaska. Environmental Groups sued USFS attempting to derail the Project and protect the territory of specific type of wolf. The district court granted summary judgment for USFS, and Environmental Groups appealed arguing that USFS violated the National Forest Management Act ("NFMA") in approving the Project because USFS did not make sure that, even with the Project, the forest could support a sustainable or even viable wolf population. The Ninth Circuit Court of Appeals affirmed the district court, holding that under NFMA, USFS need only provide where possible a sustainable wolf population, which provides USFS flexibility to balance competing uses of the land. And as USFS balance in favor of jobs and the economy was reasonable, especially as the forest did not already support a sustainable wolf population, the court has no authority to overturn USFS's decision.

D.C. Circuit

Waterkeeper Alliance v. EPA, 853 F.3d 527 (D.C. Cir. 2017).

Environmental Group sought review of the rule issued by EPA regarding an exception to two federal statutes regarding the requirement to report the release of large amounts of hazardous material. EPA rule exempted farmers from the reporting requirement specifically related to the air release of

animal waste. EPA then walked the exemption back and required that large animal feeding operations, with hundreds or thousands of animals in concentrated areas, still report large air releases of waste. Environmental Group challenged EPA's ability to issue this rule, specifically arguing that the rule extended beyond the *de minimis* power of EPA to create similar ruling. Environmental Group argued that this rule amounted to an alteration of the federal statutes, a power which EPA does not possess. Rather than interpreting a particular area of the statute, as allowed under agency law, the final rule sets forth unrelated exemptions under the law, exemptions not prescribed anywhere in the law. Additionally, the exemptions would deprive Environmental Group, and others, of public information regarding pollution releases, one of the explicit goals of the federal laws. Because Environmental Group suffered an injury in fact and the rule goes beyond the power of EPA, the appellate court vacated the rule.

D. Idaho

Friends of Clearwater v. Probert, No. 3:16-cv-00485-REB, 2017 WL 2367048 (D. Idaho May 31, 2017).

Environmental Group ("Group") sought to enjoin a proposed Wildfire Protection Project ("Project"), arguing that the Project's activities would cause "irreparable harm to potential wilderness values" in the area. Project would involve removing numerous trees and building a road to enhance public safety and protect homes and other structures from wildfires. Ultimately, the district court denied Group's motion for preliminary injunction of Project. The court stated that although the nature of Project's activities would impact the area's natural landscape, Project's purpose was "critical" to the community and safety of persons using and living nearby that region's national forest. Moreover, there was evidence that the Forest Service's approval of Project complied with relevant environmental laws, including the National Environmental Policy Act. Thus, based on the present record, Group did not have a likelihood of success on the merits of its claims as required for issuance of a preliminary injunction. The court emphasized that this was not a final decision on the merits of the case.

S.D. West Virginia

Ohio Valley Env'tl. Coal., Inc. v. Pruitt, No. 3:15-0271, 2017 WL 1712527 (S.D. W.Va. May 2, 2017).

Environmental Groups challenged EPA's failure to regulate and enforce federal water standards law on an uncompliant state. The state did not adopt standards for its waterways, as required by federal law, and in turn, EPA did not follow the law by imposing its own standards for the state's waterways when the noncompliance became apparent. The lower court granted Environmental Groups' motion to force EPA to adopt standards for the state in compliance with federal law. EPA in turn sought a stay of the order pending appeal. To successfully receive the stay, EPA needed to show that: (1) a likelihood of success on appeal, (2) that EPA would be irreparably harmed without the stay, (3) lack of the stay will irreparably injure the interested parties and (4) the public interest favors a stay. EPA failed to prove all four points, and so the court denied its stay pending appeal.

W.D. Oklahoma

Sierra Club v. Chesapeake Operating, LLC, CIV-16-134-F, 2017 WL 1287546 (W.D. Okla. Apr. 4, 2017).

Environmental Organization sought to enjoin an oil and gas operator ("Operator") from activities regarding waste water injection relating to seismicity. Organization alleged that Operator's actions violated numerous federal laws and increased the likelihood of earthquakes in the region. At the same time, the state regulatory agency reviewed the same issues regarding injection relating to seismicity. Operator moved to dismiss, claiming that the district court should abstain from ruling on a matter to be properly decided by the state regulatory agency. The court found that, as Organization only sought equitable remedies, the state regulatory agency's review board constituted the proper avenue for Organization to seek relief. Because the state regulatory agency already had ongoing review of this issue, the court dismissed the case as redundant.

State

California

Aptos Council v. City of Santa Cruz, 216 Cal. Rptr. 3d 142 (Cal. Ct. App. 2017).

Community council (“Council”) challenged a County’s adoption of three ordinances under the State Environmental Quality Act (“SEQA”), claiming that County’s adoption resulted from an improper piecemeal review of environmental impacts. Council claimed that County should have considered the ordinances as a single project under the SEQA because County’s goal was to reform and modernize zoning regulations. The appellate court addressed the issue whether County’s passage of the three ordinances constitute a single project under the SEQA, and whether County violated SEQA by not considering environmental impact reports. County’s ordinances authorized: (1) administrative approval of minor exceptions to zoning site standards, (2) administrative approvals of sign exceptions with a public notice and (3) denser hotel developments. The court found each ordinance to be three separate projects. According to the court, SEQA requires an environmental impact report for projects if their effects are “reasonably foreseeable consequence.” Here, the court emphasized “consequence” and found that although the ordinances shared the common objective of modernizing zoning regulations, because the regulatory reforms operated independently of each other and because County could implement each regulation separately, there was no SEQA violation.

Assoc. of Irrigated Residents v. Dep’t of Conservation, 218 Cal. Rptr. 3d 517 (Cal. Ct. App. 2017).

Interest groups (“Groups”) challenged the California Department of Conservation, Division of Oil, Gas and Geothermal Resources (“DOGGR”) after it issued permits to 214 new hydraulic fracturing oil wells in one county. Groups claimed that the permitting of all wells was done without any environmental review and in violation of the California Environmental Quality Act (“CEQA”). DOGGR argued that the case was barred due to a final judgment in a prior action in another county. Groups claimed that the case was not barred because the prior action was dismissed due to the enacting of a new law making the case moot. The appellate court held in favor for Groups, finding that the CEQA applies, meaning this case is not

moot. The court sent the case back down to trial court for further proceedings.

Banning Ranch Conservancy v. City of Newport Beach, 392 P.3d 455 (Cal. 2017).

City approved the development of a large parcel of land and performed an environmental impact report (“EIR”). Conservation Group took legal action to set aside the approval of the development arguing the EIR was inadequate and City did not work with the California Coastal Commission (“Commission”) to identify wetlands and habitats affected by the development. In California, the EIR must follow the guidelines of the California Environmental Quality Act (“CEQA”), which requires an EIR for areas which may qualify as environmentally sensitive habitat areas under state law. The trial court found for Conservation Group because environmentally sensitive habitats must be identified before approval of a development project requiring Commission being consulted before the EIR and before approval. The appellate court reversed. The California Supreme Court then held that CEQA requires that an EIR must identify environmentally sensitive areas, or areas that might be identified as such, and City’s EIR is inadequate due to its lack of cooperation with Commission to identify the correct areas.

Cal. Chamber of Commerce v. State Air Res. Bd., 216 Cal. Rptr. 3d 694 (Cal. Ct. App. 2017).

The California Chamber of Commerce (“Chamber”) brought suit against the California State Air Resources Board (“Board”) over its implementing regulation setting a “cap-and-trade” on the right to emit greenhouse gas (“GHG”). The California legislature passed, by a simple majority, the California Global Warming Solutions Act of 2006 (“Act”), which granted Board regulatory authority over emissions. Board set up a program where companies could purchase “compliance instruments” that would allow them to emit certain GHGs. These emission allowances were sold at quarterly auctions by Board. This stifled business operations, so Chamber sued, seeking to invalidate this regulation. The first assertion was that Board’s decision to sell these emission allowances at an auction exceeded the authority granted to Board by California’s Legislature. The court disagreed with this assertion, finding Board held ample authority to conduct the auctions. The second assertion by Chamber was that the Act imposes a tax on the companies having to purchase the emission allowances, and, as per

the California constitution, the imposition of this tax requires a two-thirds supermajority vote in the legislature. The court also disagreed with this assertion as a tax is: (1) compulsory for the payee and (2) something for which the payee receives nothing in return. Board's auction is voluntary and is a sale of something of value. For these reasons, Board's regulation was not found to be a tax and was upheld.

POET, LLC v. Cal. Air Res. Bd., 160 Cal. Rptr. 3d 681 (Cal. Ct. App. 2017).

State Air Quality Board ("Board"), in charge of the state plan to reduce greenhouse gas emissions, sought to comply with an earlier court order related to low carbon fuel standards ("Standards"). A Biofuel Company challenged Board's finding that certain emissions disqualified Biofuel Company to receive state environmental credits, and that such emission standards violated state law. The court previously ordered Board to correct such standards. Board improperly used an antiquated baseline for the emissions of greenhouse gasses related to biofuels which deprived the public of vital information, in violation of state environmental law. To facilitate Board to remedy its deficiencies, the court ordered that the regulations remain frozen so that Board need not hit a moving target. Finally, the court found that Board made a bad faith selection as to its baseline standards for the biofuel emissions.

Sierra Club v. Cty. of Sonoma, 217 Cal. Rptr. 3d 327 (Cal. Ct. App. 2017).

Environmental Group challenged the City Commissioner's ("Commissioner") determination that the issuance of a permit for a vineyard was a ministerial act, which exempted the decision from state environmental law. County ordinance required vineyard operators to obtain an erosion control permit from Commissioner prior to commencement of operation. Operators, also a party in interest with Commissioner, submitted their permit, and after several alternations to the plans, Commissioner approved the permit. Later, Commissioner labeled the issuance as ministerial and exempted from state law. The ministerial exemption only covers decisions regarding projects that does not require Commissioner's discretion. A project lacks discretion if Commissioner would lack the power to stop it regardless of further environmental review under the state law. Environmental Group argued that the issuance of the permit always requires Commissioner discretion and thus the ministerial exemption should never apply. Environmental Group cited many state provisions that created

discretion, but the court summarily rejected the application of these provisions to this type of erosion control permit. Finally, Environmental Group argued that because Commissioner may request additional actions be taken, this stripped the decision of its ministerial label. The court found that the ability to request additional information does not rise to the level as to forgo the ministerial status, and therefore approved the permit. The court limited its opinion only to Operator's permit, and did not extend its decision to any other permits to be issued.

Delaware

Clean Harbors, Inc. v. Union Pac. Corp., C.A. No. N15C-07-081 MMJ CCLD, 2017 WL 1175664 (Del. Super. Ct. Mar. 28, 2017).

The dispute arose between a hazardous waste facility operator ("Operator") and the Operator's Predecessor-in-Interest ("Predecessor") regarding an indemnity clause in a stock purchase agreement ("SPA"). Predecessor agreed to indemnify Operator for certain environmental liabilities up to a certain dollar amount, and for a certain period from the effective date of the SPA. EPA and state environmental agency investigated contamination on the facility property and required Operator to remediate the contamination damages. Operator took necessary steps to clean up the contamination in a timely manner and submitted claim for costs of remediation to Predecessor pursuant to the SPA. The claim hinged on whether EPA and state agency were third parties to the contamination claims, a necessary requirement to trigger the indemnity. On summary judgment, the court found that EPA and the state agency met the third-party requirement, but issues of fact still existed regarding the extent of the remediation claim and the actual dollar figure that Predecessor must indemnify. The court also found for Predecessor and dismissed Operator's claim for lost profits and excluded Operator's expert witness. This is an unpublished opinion of the court; therefore, state court rules should be consulted before publication.

Louisiana

Borcik v. Crosby Tugs, L.L.C., 2016-1372 (La. 5/3/17), No. 2016-QC-1372, 2017 WL 1716226.

A federal circuit court certified a question to the Louisiana Supreme Court to determine the definition of "good faith" in reference to a state environmental quality statute. The law protects employees who identify or

complain of an environmental violation, so long as the employee does so in good faith and with the reasonable belief that the violation occurred. At trial in the federal court system, a tug boat operator (“Employer”) fired Employee after Employee claimed that his superiors ordered him to dump waste oil into navigable waters. Employer claimed that the firing occurred because of insubordination. The court found that a broader definition of good faith more adequately captured the goals of the environmental protection law, to encourage employees to identify environmental violations. Therefore, the Louisiana Supreme Court adopted the definition that “good faith” means that the employee acted with an honest belief that a violation of a law occurred.

New Jersey

In re Final Surface Water Renewal Permit Action NJPDES Permit No. NJ0102563, No. A-5803-13T1, 2017 WL 1550009 (N.J. Super. Ct. App. Div. May 1, 2017).

Environmental Groups challenged the issuance of a permit to the Waste Treatment Corporation (“Corporation”) on the claims that the permit violates state environmental laws. Corporation sought the permit to discharge treated waste water into a river. Environmental Groups allege that the permit did not receive proper review and the prolonged procedure, which stretched back close to a decade, should prohibit the issuance of a permit. Corporation claims that its permit process complied with all the applicable review procedures. A state law required that Corporation discuss plans and receive approval from a regional commission on the permitted plans. The court found that, although Corporation produced evidence of telephonic communication between Corporation and the regional commission, no proof existed of approval, or what was discussed. Therefore, the court remanded the permit back to the administrative level. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

New York

In re Zahav Enters., Inc. v. Martens, 53 N.Y.S.3d 679 (N.Y. App. Div. 2017).

Landowner, owned and operated a gas station up until 2007, when it sold the land to third party to be used as a pharmacy. Per state law, Landowner

was responsible for environmental clean-up associated with the land and the removal of the underground storage tanks. When the storage tanks were removed petroleum contamination was found and reported to the New York State Department of Conservation (“DEC”). After a year of back and forth between DEC and Landowner on how to clean up the contamination, DEC sent Landowner a final notice letter requiring it to have a plan for dealing with the contamination by November 2010. Landowner did not respond or submit a plan, so DEC moved for the regulatory commission (“Commission”) to issue an order citing Landowner for three different violations and fine Landowner \$112,500. Commission ultimately cited Landowner for the three violations, but decreased the fine to \$60,000. Landowner then commenced a proceeding against DEC for acting in bad faith and one of its employees for violating state law. The appellate court found that the Landowner’s contentions were without merit, that the stipulation was valid.

Town of Marilla v. Travis, No. 151 A.D. 3d 1588 (N.Y. App. Div. 2017).

Town challenged the State Environmental Agency’s (“Agency”) decision to grant a waste treatment storage facility to Facility Operator. Facility Operator sought a permit to store treated waste water in containers to be held until the waste water could be used as fertilizer. Agency appointed itself as the proper review agency after Town failed to create a review process. The court found that Town improperly argued that Agency did not follow proper procedure. Agency properly reviewed scientific and engineering data in compliance with all statutes to make its permit decision. Facility Operator complied with each Agency request for additional information or tests. Under state law, if the court finds that Agency properly followed all relevant procedure, then the court will not substitute its decisions for that of the Agency. Because Agency followed procedural and the permit grant did not violate the clear evidence, Agency properly granted the storage permit.

North Carolina

WASCO LLC v. N.C. Dep’t of Env’t & Nat. Res., 799 S.E.2d 405 (N.C. Ct. App. 2017).

This dispute involved a cleanup site (“Site”) that various parties once used to operate a textile business. Beneath the Site were storage tanks containing hazardous dry-cleaning solvents, which had leaked. Pursuant to the federal

Resource Conservation and Recovery Act (“RCRA”) and state Hazardous Waste Program (“HWP”), agencies sought to hold entities responsible for cleanup of the Site. Meanwhile, former manufacturer (“Company”) provided financial assurances to the state Division of Waste Management (“DWM”) and was actively involved in the Site’s post-closure environmental issues. After DWM declared that Company was liable as an “operator” of the Site, Company sought a declaration from an ALJ that it was not an operator under relevant laws. The ALJ disagreed and granted summary judgment for DWM. Company sought review in the trial court, which affirmed the ALJ’s ruling. The court concluded that Company was “an operator of a landfill” for purposes of HWP. Company appealed to the court of appeals, which affirmed the trial court’s order. The court held that the trial court properly sought guidance from federal law—including the Comprehensive Environmental Response, Compensation, and Liability Act—in assessing whether Company was an operator under HWP. Moreover, the court held that HWP’s definition “includes those parties in charge of directing post-closure activities” under RCRA. Finally, the court concluded that the facts on which the trial court relied insisted that Company was a party in charge of such post-closure activities.

Pennsylvania

Nat’l Fuel Gas Midstream Corp. v. Pa. Dep’t of Env’tl. Prot., No. 116 C.D. 2016, 2017 WL 2391719 (Pa. Commw. Ct. June 2, 2017).

This case addressed whether a state Department of Environmental Protection (“DEP”) may, for air pollution control purposes, aggregate two facilities owned by separate entities that ultimately derive from a common company when one of the entities is exempt from permitting requirements. A well-pad operator (“WPO”) and compressor-station operator (“CSO”) were wholly-owned subsidiaries of Parent Company; WPO was exempt from the permitting requirements at issue. The permitting requirements stemmed from the federal Clean Air Act and state Air Pollution Control Act. Under those statutes, DEP may aggregate two related natural gas operations into a single source for permitting purposes; various standards bear on whether two facilities amount to a single source. This case focused on the third prong of DEP’s three-part test: whether the facilities are “under common control.” Although DEP and the Environmental Hearing Board (“EHB”) construed “common control” in different ways, both concluded that WPO and CSO were a single source for permitting purposes. WPO and CSO raised three arguments on appeal: (1) that EHB misconstrued the

common-control test; (2) that EHB could not impose obligations on WPO as an exempt party; and (3) that EHB's conclusion that WPO and CSO fell within the "common sense notion of a plant" was arbitrary and capricious. First, the court held that EHB's "power to influence" standard for common control was too lax; in the court's view, the proper test was "ability to direct." Second, the court held that to aggregate an exempt facility, DEP must show either the Parent Company's direct involvement in operations or pierce the corporate veil. And finally, the court remanded the "notion of a plant" issue in view of the fact that EHB applied the wrong standard for "common control."