[Oil and Gas, Natural Resources, and Energy Journal](https://digitalcommons.law.ou.edu/onej)

Volume 3 | Number 4

November 2017

Recent Case Decisions

Recommended Citation

Recent Case Decisions, 3 OIL & GAS, NAT. RESOURCES & ENERGY J. 1015 (2017), https://digitalcommons.law.ou.edu/onej/vol3/iss4/5

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

Vol. III, No. IV November, 2017

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SELECTED OIL AND GAS DECISIONS

Upstream – Federal

Fifth Circuit

Claimant ID 100236236 v. BP Expl. & Prod., Inc., No. 16-30521, 2017 WL 2791395 (5th Cir. June 27, 2017).

Property Owner filed a Business Economic Loss claim in July 2013, under the Deepwater Horizon Economic & Property Damages Settlement Agreement ("Settlement Agreement"). To recover under the Settlement Agreement, Property Owner must have been an entity doing business or operating in the Gulf Coast areas between April 20, 2010, and April 16, 2012. Property Owner's last commercial lease ended in August 2008. Property Owner then employed a broker until September 2009, to find someone to lease the property. Although, Property Owner alleges that the broker continued to search for tenants that could rent the property, up until the time of the oil spill, and claims that there were serious offers to rent the property at the time of the spill. Property Owner's first claim was denied in November 2014. Claims Administrator stated that Property Owner was not doing business in the designated areas at the time of the spill, because he received no revenues during the designated time-period. In October 2015, Property Owner filed a notice of appeal. The Appeal Panel affirmed the denial. Property Owner appealed to the district court, and it refused to review his appeal. Property Owner appealed that decision. The Fifth Circuit Court of Appeals held that the district court did not abuse its discretion in choosing not to review Property Owner's claim because it did not involve a question on how to interpret or implement the Settlement Agreement. Therefore, because the district court's decision to not review was not an abuse of discretion, the denial was affirmed. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

Claimant ID 100128765 v. BP Expl. & Prod., Inc., No. 16-31087, 2017 WL 4310087 (5th Cir. Sept. 27, 2017).

A Louisiana Real-Estate-Appraisal Company ("Company") negatively affected by the Deepwater Horizon oil spill was required to show causation to recover losses in a class-action settlement against Producer. To recover losses, Company was required to establish causation through one of various tests, one of which was the "Decline Only" test. This test contained the following three subparts: (1) The decline in percentage of revenue over three consecutive post-Spill months in 2010 compared to the same months in the Benchmark period; (2) specific documentation that identifies factors outside the control of the claimant that prevented the recovery of revenues in 2011; and (3) the Customer Mix Test. The prong at issue was the second prong which lists six possible factors, one of which must be supported by documentation for Company's claim to be upheld. Company submitted two articles explaining the struggles of appraisal companies in 2011 because of the passage of the Dodd—Frank Wall Street Reform Act. The claims administrator denied Company's "Business Economic Loss" claim because the documents submitted were not "sufficient to establish that [its] lost revenue occurred as a result of the Spill." The appeal panel upheld the denial of Company's claim, the district court then denied discretionary review, and the appellate court affirmed, holding that the district court did not abuse its discretion in denying Company's petition for discretionary review. It reasoned that Company did not satisfy its requirement to provide specific documentation addressing one of the second-prong enumerated factors of the "Decline Only" test.

D. North Dakota

Raaum Estates v. Murex Petroleum Corp., Case No. 4:14-cv-024, 2017 WL 2870070 (D.N.D. July 5, 2017).

Operator is the successor-in-interest to an oil and gas lease granted by Lessors. Operator created a saltwater disposal system that piped saltwater from a well on Lessors' surface estate to be injected into the subsurface of an adjacent estate. Operator obtained a right-of-way grant to construct pipelines for the system and an access road consent to haul saltwater from Lessors. After construction, Operator used the system to dispose of saltwater from on-lease, off-lease, and third-party wells. Lessors noticed a substantial increase in truck traffic due to the increase in disposals and spoke with Operator about additional compensation. Negotiations between Operator and Lessors broke down when the parties could not come to an agreement. Lessors then brought several claims against Operator. The district court found that: (1) neither of the two agreements between Operator and Lessors, nor the original lease, gave Operator right to dispose of off-lease and third-party saltwater; (2) Operator's use of the property for off-lease saltwater disposal was civil trespass; (3) Operator was permanently enjoined from using property for off-lease saltwater disposal unless agreement was made with Lessor to allow; and (4) Lessor was entitled to damages plus interest for the past trespasses of Operator.

E.D. Arkansas

JS Interests, Inc. v. Hafner & Assoc., CASE NO. 4:16CV00586 BSM, 2017 WL 3612857 (E.D. Ark. Aug. 22, 2017).

Oil and gas production company ("Company") and Landowner entered into oil and gas leases ("Leases") giving Landowner working interest in the oil, gas, and other minerals sold by Company. Leases were governed by joint operating agreements ("JOAs"). Landowner assigned royalty interests in its Leases with Company to Third Parties giving them a small percentage of profits acquired by Landowner. After the death of Landowner, Third Parties had not received royalty interest payments owed to them and sued for breach of contract and willful withholding of overriding interest payments. Company cross claimed, asserting that Landowner's estate must indemnify Company for any judgment Third Parties receive against Company. Company moved for summary judgment on all claims. The district court: (1) denied Company's motion for summary judgment on Third Parties' breach of contract claim because they were third-party beneficiaries of the JOAs between Company and Landowner; (2) denied Company's motion for summary judgment on its claim for indemnification from Landowner's estate because there was a material issue of fact as to whether Company's failure to pay Landowner's estate under the JOAs' terms was a material breach relieving Landowner's estate of its obligation to indemnify Company; and (3) granted summary judgment against Third Parties' claim to an Arkansas statutory penalty because Third Parties failed to provide notice to Company of their claims. Accordingly, the court denied in part and granted in part Companies summary judgement motion.

Lipsey v. SEECO, Inc., No. 4:16CV00149 JLH, 2017 WL 2662977 (E.D. Ark. June 20, 2017).

Lessor commenced action against Companies alleging they failed to pay him the full amount of royalties owed to him under his lease. Lessor sued under the theories of: (1) conversion; (2) unjust enrichment; (3) violation of state oil and gas royalties code; and (4) violation of the Arkansas Deceptive Trade Practices Act ("ADTPA"). Companies moved for summary judgment on all four counts, and Lessor conceded his claims to count three. Lessor removed case to federal court on the theory of diversity jurisdiction.

However, the federal district court held that there was no diversity jurisdiction because it demonstrated, to a legal certainty, that the amount in controversy would not meet the minimum monetary requirement. However, subject-matter jurisdiction was obtained under the Class Action Fairness Act ("CAFA") because it was likely the amount in controversy would be met with the number of class members. The court granted summary judgment for Companies for several reasons. First, Lessor failed to establish a claim for conversion because Companies had the right to possess the gas, because they had a lease with Lessor. Second, Lessor cannot assert unjust enrichment because unjust enrichment does not apply when an express contract exists, except in special circumstances. Lessor did not argue those special circumstances, so the court did not do it for him. Third, Lessor cannot sue under the ADTPA because its "safe harbor" provision does not allow for a private right of action.

E.D. Kentucky

EQT Prod. Co. v. Magnum Hunter Prod. Co., 5:16-CV-150-JMH, 2017 WL 3052979 (E.D. Ky. July 19, 2017).

Lessor sued Operator alleging a variety of breach of contract claims stemming from Operator's: (1) failure to pay unremitted shut-in fees, royalties, overriding royalties; (2) underpayment for the sale of natural gas; and (3) improper post-production deductions from royalties. The claim arose from eleven Farmout Agreements ("FOA") that allowed Operator to drill wells on Lessor's land in exchange for royalties. The FOAs provided for the deduction of Lessor's proportionate share of applicable severance tax, transportation, and processing costs before determining the adjusted basis for the Lessor's royalty payments. Because the FOAs, does not explicitly define "oil and/or gas", the court analyzes the FOAs under subsets based on whether: (1) the respective FOAs incorporate a defining Model Form Operating Agreement; (2) the FOAs themselves define "oil well" and "gas well"; or (3) the FOAs fail to define the relevant language. The court held that the FOA's "gas well" language does not contemplate produced NGL from subject wells since NGLs are liquid in form and, thus, excluded in FOAs using the term "gas". The court accordingly granted each parties motions in part and denied in part.

N.D. West Virginia

JJK Mineral Co. v. Noble Energy, Inc., Civ. Action No. 5:16CV112, 2017 WL 2662196 (N.D. W. Va. June 20, 2017).

Sublessees asked Lessor to amend an oil and gas lease ("Lease") to include pooling rights. Lessor subsequently executed an amendment and supplement. Sublessees later notified Lessor that they refused to execute the terms but nevertheless drilled wells on the Lease units to produce natural gas. Lessor filed a civil action against Sublessees alleging: (1) willful breach of the Lease; (2) breach of good faith and fair dealing under the Lease; (3) the amendment and supplement were invalid; (4) Sublessees did not have pooling rights; (5) Sublessees owe royalties; and (6) the Lease had been rescinded by Sublessees' willful breach. In response, Sublessees filed motions for partial dismissal. The court found that willful breach of the Lease was a "duplicative breach of contract claim." Accordingly, it granted Sublessees' motions for dismissal of the breach of good faith and fair dealing count. Regarding rescission by willful breach, the court found that equitable forfeiture or partial rescission may be an appropriate remedy, and Lessor had sufficiently alleged facts to establish that damages alone would not remedy the breach. The court made no conclusions regarding the appropriateness of forfeiture or partial rescission as a remedy or whether damages would be sufficient to remedy any breach. Thus, the court denied Sublessees' motions as to rescission by willful breach.

Mountaineer Minerals, LLC v. Antero Res. Corp., No. 1:16CV28 2017, 2017 WL 3446529 (N.D. W. Va., August 10, 2017).

Company sued Corporation claiming that Corporation was not a bona fide purchaser of mineral rights arising out of an oil and gas lease ("Lease"). This dispute follows a chain of assignments of the Lease, and Company claimed that it lawfully acquired the mineral rights from the last entity to be assigned the Lease. This court granted Company's motion for summary judgment and denied Corporation's motion for summary judgment for one primary reason. Despite Corporation's contention that it conducted due diligence to assess all property interests and that Company failed to inform Corporation that the assignment at issue was recorded in a different county than the other Lease assignments, Corporation was on inquiry notice of a competing claim. Inquiry notice of a competing claim was found even though the Fourth Circuit Court of Appeals has before deemed a party a bona fide purchaser despite "non-specific references to contractual obligations," but that is not the case here. In this case, during the two-year-long negotiation between Company and Corporation, Corporation was obligated to investigate competing claims when its legal manager was sent an email which implied a third party's interest and concern in the mineral rights and Lease. Moreover, an ownership report given to Corporation before purchase listed a third person as the owner of the mineral rights. Therefore, even though Corporation claims to have made a purchase with a clean chain of title, other circumstances put it on inquiry notice of a third party's interest. This case has since been appealed, but there is no decision from the higher court as of publication.

Bankruptcy

In re Samson Res. Corp., 569 B.R. 605 (Bankr. D. Del. 2017).

Heirs sought royalties from an oil and gas lease. Heirs dispute whether the lease was valid and the amount of the royalties owed therefrom. Heirs had the burden of proving the validity of their claims by a preponderance of the evidence. Heirs asserted four primary arguments: (1) the lease terminated and is not a valid lease; (2) Debtor underpaid Heirs on their royalty interests; (3) Heirs own an interest in the sixty-nine-acre tract; and (4) Heirs believe their claim should be classified as a secured claim, priority claim, or an administrative claim. Debtor argued: (1) the lease was valid; (2) Heirs received all of their royalty interests in the twenty-five-acre tract; and (3) Heirs could not prove any valid interest in the sixty-nine-acre tract. Therefore, Debtor did not believe Heirs' claims were valid. The court found that the lease remained in effect because a well which was drilled within the primary period of the lease continues to produce. The court also found that Heirs did not prove their ownership of any royalty interests in the sixty-nine-acre tract. Finally, the court found Debtor did not owe Heirs a larger royalty payment because the effective lease had been perpetuated by production. There was a final issue regarding the legitimacy of the transfer of one-half of one of the Heirs' interest to National Locater and the payments from Debtor for that transfer, and the court found that the particular Heir transferred one-half of his royalty interests to National Locater and that Debtor complied with the terms of the transfer. The court sustained the Second Omnibus Objection, in part, and disallowed Heirs' claims in their entirety. The Claims Reserve Motion was found to be moot regarding Heirs' claims.

Upstream – State

Colorado

Kinder Morgan CO_2 Co., v. Montezuma Cty. Bd. of Comm'rs, 2017 CO 72.

Taxpayer appealed decision regarding action challenging the retroactive tax assessment on oil and gas leaseholds. The amount taxed is based on "quantity and value" of the tapped resource, but this value is based on Taxpayer's assessment of value given in its produced annual statement. This assessed amount is based on the price "at the wellhead," but the value is not assessed there, requiring Taxpayer to speculate the proper amount. This estimate includes an evaluation of how much it can deduct for processing. Here, the Supreme Court of Colorado found that Taxpayer deducted more than it should have for production costs because it was dealing with a related company, while taking the higher deduction allowed in using an unrelated company. The court was tasked with determining whether it was acceptable to retroactively assess a tax when only the estimated price from the wellhead was inaccurate or underreported. Also, the court determined whether the calculations were wrong because Taxpayer was dealing with a related party, or whether that designation was inaccurate. For both questions, the court determined that the Board of Assessment Appeals got it right in its decisions. First, the court found that underreported value is considered "omitted property" judging from the legislative history of the applicable statutory scheme, and so should be subject to the tax. Also, the court offers that audit procedures are in place, that would be irrelevant if there was no related authority to impose remedial retroactive assessments. The court also agreed that the companies were related because of a substantial partnership interest, so Taxpayer estimated the incorrect amount of deduction. Therefore, the Colorado Supreme Court affirmed the appellate court's decision that this retroactive tax assessment was acceptable.

Kansas

In re Matter of Protest of Barker, 398 P.3d 870 (Kan. Ct. App. 2017).

Landowners operated an oil lease in Kansas. The Board of Tax Appeals ("BOTA") found the lease but not the equipment used to produce oil and gas on said lease to be tax-exempt under state law as a "low-production oil lease." Landowner appealed that decision, arguing that the definition of "oil lease" in the exemption statute included the equipment used to produce the oil. By considering the statute's plain language and other relevant statutory provisions the Kansas Court of Appeals first noted that tax *exemption* statutes are construed *in favor* of imposing the tax. Second, the court found relevant a provision in the *state appraisal guide* which states that "production equipment [does] not qualify for the exemption." Third, the court disagreed with Landowners main argument—that the words "together with" in the statutory phrase "oil and gas leases and all oil and gas well . . . *together with* all casing . . . and *all other equipment*" is an inclusive phrase which expands the exemption to include the equipment. Instead, the court held that "together with" was a distinguishing phrase, which separated the equipment from the oil lease itself. The court therefore concluded that equipment is not exempted under the statute and affirmed the decision from BOTA.

Lewis v. Kan. Prod. Co., 401 P.3d 177 (Kan. Ct. App. 2017).

Landowners property was subject to an oil and gas lease ("Lease") dating back to 1972 which granted the right to explore for and produce oil on a 160-acre tract. Assignor acquired the lease and in 1994, assigned his interest to Assignee who then partially assigned his interest to his Production Company. Assignor retained the upper strata and continued to produce oil from them. Production Company never produced oil or gas from the deeper strata. In response to a 2004 lawsuit that sought to terminate Production Company's Lease, Production Company drilled a well, and the court declined to terminate the lease. After several years of no exploring or developing, Landowners sued to terminate Production Company's Lease. The district court found Production Company had breached an express provision of the lease by never producing oil or gas and had also breached a statutorily implied covenant to explore and develop in the Deep Horizons Act ("Act") and terminated Production Company's Lease. The appellate court affirmed part of the ruling finding Production Company breached the Act's implied covenant to explore; however, the express terms of the Lease were not breached, because habendum clause does not apply to each leasehold interest when a portion of an oil and gas lease is assigned. Furthermore, the habendum clause was satisfied by Assignor's production of oil in producing quantities; the demand letter sent by Landowners' attorney did not waive any breach; and the time between the district court's order from an earlier suit, July 2009, and the time Landowners sued in November 2013 was the appropriate time-period for measuring a breach of the implied covenant. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Louisiana

Glassell Producing Co. v. Naquin, 16-0549 (La. App. 1 Cir. 7/5/17); 224 So. 3d 56.

Current Operator impleaded Buyer of royalty interests and Sellers of royalty interests in inherited land to determine which party was entitled to current royalty payments. Subsequent to a lease in 1947 to Previous Operator, Sellers sold their royalty interests at the rate established in the 1947 lease to Buyer in 1993. In 1998, the lease to Previous Operator was released and surrendered, so Buyer leased the land to Current Operator. Sellers contended that the 1993 deeds only conveyed the royalty interests under the previous lease, and the royalty interests reverted to Sellers once the lease terminated. The lower court found that the deeds conveyed all of Sellers' royalty interests in the land, and that Sellers were not entitled to royalty payments under the new lease. The appellate court reversed and held that the 1993 deeds conveyed only the royalty interests that were attached to the lease at the time it was executed, and that the general royalty interests reverted to Sellers once the previous lease was terminated.

Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 51-077 (La. App. 2 Cir. 6/2/17); 223 So.3d 1202.

Lessor granted a mineral lease to Lessee, granting exclusive right to produce minerals from any depth under the land. Lessee then assigned an undivided forty-nine percent interest to Assignee. Lessee and Assignee both obtained individual mortgages from Bank. Lessee contracted with an oil and gas company to drill on the property of the lease. Lessor notified Lessee that lease had expired in part or in whole due to lack of production in paying quantities. Lessee did not release the lease. Lessor brought action against Lessee and Assignee alleging that they failed to produce a recordable act showing continuation of lease, that not releasing the lease prevented Lessor from releasing the interest, and that Lessee and Assignee failed to pay royalties A bench trial declared the lease expired due to lack of drilling and no production. Lessee appealed. The appellate court affirmed the trial court holding it correctly awarded unpaid royalties and damages for the unpaid royalties because it may do so when the lack of payment was fraudulent, willful, or without reasonable grounds.

North Dakota

Abell v. GADECO, LLC, 2017 ND 163, 897 N.W.2d 914.

Producer entered into a contract with Landowner for the mineral rights to her property. The contract posited that Producer had the right to develop the mineral interests on the property for a primary term of five years, terminating on January 9, 2017. Producer entered into discussions with Landowner concerning surveying and staking areas for well locations multiple times throughout the primary term. Landowner gave permission to survey and stake one area and then told Producer that it must move somewhere else on the property which it did. Upon receiving a well permit from the Industrial Commission to drill, the primary term had passed and Landowner sued seeking costs and attorney fees for violating a terminated lease while Producer brought a counterclaim for breach of contract and damages. The trial court granted Landowner summary judgment declaring the lease had terminated and awarded Landowner costs and attorney fees. Producer appealed. The Supreme Court of North Dakota determined that the trial court erred in granting summary judgment finding the lease had terminated because there were genuine issues of fact concerning the preparatory activities. The court said that the trial court's language in determining summary judgment was "cryptic" and did not address these issues. The court also found the trial court's language concerning the dismissal of Producer's breach of contract claim "puzzling" and only consistent if the lease termination ruling was upheld which it was not. The court reversed and remanded the judgment.

Dixon v. Dixon, 2017 ND 174, 898 N.W.2d 706.

Trustee brought action against trust Beneficiary, seeking injunctive relief, declaratory judgment, and to quiet title to mineral interests, or alternatively, for reformation of Warranty Deed that granted Beneficiary a life estate which transferred mineral interests to the exclusion of his siblings. The trial court reformed the Warranty Deed to reserve and except the minerals, and to retain the mineral interests as property of the trust. Beneficiary appealed, arguing there was no mutual mistake and the statute of limitations precluded the reformation claim. The Supreme Court of North Dakota affirmed. The court held: (1) it was the intent of the trustor, as evidenced by the trust agreement, that the mineral interests connected to the subject property be reserved and retained as property of the trust; (2) that the

Warranty Deed conveying the mineral interests into a life estate held by Beneficiary was made in error; (3) that a subsequent mineral deed failed to correct the mistake as it conveyed a *fee simple* interest to the original beneficiaries from Beneficiary's *life estate*; and (4) that reforming the Warranty Deed to reflect the true intent of the trust agreement was justified. The court disagreed that latent ambiguity existed in the above-referenced conveyances because no doubt existed as to "the object which the intention applies.". The court did not consider Beneficiary's argument that the statute of limitations bars Trustee's reformation claim.

Fahey v. Fife, 2017 ND 200, 900 N.W.2d 250.

The children of previous mineral interest owner ("Children"), sought cancellation of a quit claim deed of mineral rights executed by their mother to their deceased father. The lower court deemed the deed invalid, but the mineral rights then became subject to the state's intestacy scheme, which distributed the rights to the deceased father, and consequently, his surviving spouse. Through this action, Children questioned their mother's competency in executing the deed and, because they did not want the rights in question to go to their father's surviving spouse, Children argued that the court did not value the estate accurately. This valuation impacts the application of intestacy laws in their jurisdiction, thus impacting Children's distributed share of their father's estate. In review, however, the Supreme Court of North Dakota presumed the lower court's competence with such matters and in the absence of clear error it found that Children did not address the issue of undervaluation, or the lack of accounting of the real property with the mineral rights in earlier proceedings, and therefore cannot bring up the issues on appeal. The court thus denied Children's claim for equitable relief, offering that unfortunate circumstances do not necessarily change the law or how it is applied. The court affirmed the lower court's judgment that the subject mineral rights were property distributed to the surviving spouse's wife, pursuant to the relevant intestacy scheme.

Hokanson v. Zeigler, 2017 N.D. 197, 900 N.W.2d 48.

Under a Contract for Sale patent from the State Board of University and School Lands of the State of North Dakota ("Board"), North Dakota retains the legal title to the property as security for the purchaser's compliance with the contract. North Dakota also retains fifty percent of the mineral interests in the property. The purchaser holds equitable title until the terms of the installment sales contract is completed and a patent has been issued.

Thereafter, the legal title merges with the equitable title, perfecting title, relating back to the date of the contract. In 1957, Board and Purported Owners entered into an Installment Sale Contract for the purchase of property. Then in 1967, Purported Owners conveyed the property to Predecessor by Warranty Deed excepting and reserving any mineral interests. Then in 1971, Predecessor conveyed to Surface Owners the property by Warranty Deed "except easements of record and subject to exceptions, reservations of . . . minerals of record." Additionally, in 1971, North Dakota issued a patent for the property to Predecessor. In 2014, Surface Owners initiated a quiet title action, claiming a fifty percent mineral interest in the property. Surface Owners argued they received this interest because the property was conveyed to them from Predecessor with no reservations of mineral interest appearing in a 1971 Warranty Deed. Surface Owners argued the predecessor-in-interest to Predecessor was North Dakota who conveyed to Predecessor the surface and fifty percent minerals by a 1971 Patent. The Supreme Court of North Dakota concluded that an Installment Sales Contract for patent is the same as a Contract for Deed regarding the ability to convey and reserve equitable interest. Therefore, Purported Owners reserved equitable title to fifty percent of the minerals in the 1957 Warranty Deed. Therefore, Surface Owner did not have title to any of the mineral interests.

Langveld v. Continental Res., Inc. 2017 ND 179, 899 N.W.2d 267.

Mineral Owner challenged the North Dakota Industrial Commission's ("Commission") approval of Developer's application to modify and create oil and gas well spacing units and well set requirements for several pools. Mineral Owner claimed that the granted application negatively impacted his bargaining power with Developer and that his royalty payments would decrease. At an evidentiary hearing, Developer offered evidence in support of its application demonstrating the inefficiency of the current spacing unit scheme and demonstrated that it was unsuccessful in negotiating surface use agreements with Mineral Owner. On the other hand, Mineral Owner failed to present any expert evidence at the evidentiary hearing. Consequently, Commission approved Developer's application because, the evidence suggested increased efficiency. In reviewing Commission's decision, the North Dakota Supreme Court emphasized its limited review of Commission orders. Given the substantial deference the court gives Commission compounded by the facts that Mineral Owner failed to present expert evidence at the evidentiary hearing and the "substantial evidence" supporting increased efficiency—precisely the type of finding North

Dakota law delegates to Commission—the court affirmed Commission's judgment.

Mosser v. Denbury Res., Inc., 2017 ND 169, 898 N.W.2d 406.

Surface Owners sued Operator for nuisance, trespass, and damages pursuant to North Dakota's Oil and Gas Production Damage Compensation Act. Surface Owners allege that Operator unlawfully disposed saltwater into their pore space. At issue here are several certified questions issued by a magistrate judge to the North Dakota Supreme Court. The first question was whether Surface Owners own the pore space below their properties absent a conveyance of that pore space to a third person when Surface Owners have severed the mineral estate. The court reasoned that Surface Owners in this circumstance do own the pore space because North Dakota law specifically states that "[t]itle to pore space in all strata underlying the surface of lands and waters is vested in the owner of the overlying surface estate." Second, the court concluded that Surface Owners may be entitled to compensation for lost land value and "lost use of and access to" their surface estate for three reasons. First, the answer to question one was yes. Second, it was the purpose of the North Dakota legislature to "provide the maximum amount of constitutionally permissible protection to surface owners." Third, as the pore space is part of the surface estate, Surface Owners may be entitled to compensation for lost land value and "lost use of and access to" their surface estate. Finally, questions three through five can be characterized as evidentiary issues determining the Surface Owner's compensation. Ultimately, the court concluded that Surface Owners were entitled to compensation under one of the remaining certified questions. Specifically, the Surface Owners may recover damages for unlawful use of pore space when the only evidence available to calculate damages is what other Surface Owners are being paid and the number of saltwater barrels likely being injected into the pore space.

Wilkinson v. Bd. of Univ. & Sch. Lands, 2017 ND 231, No. 20160199, 2017 WL 4296216.

Successors in Interest ("Successors") brought action against Board of University and School Lands ("Board") for injunctive relief and a declaration regarding ownership of mineral interest in property, alleging a takings claim. The district court granted summary judgment for Board, determining that it owned certain property below the ordinary high watermark of the Missouri River, and that the disputed property was below that watermark. However, while the case was pending, a new law was passed that governed mineral rights of land inundated by the Pick-Sloan Missouri Project Dams, which included the disputed land. This new law provided that the "state sovereign land mineral ownership of riverbed segments . . . extends only to the historical Missouri riverbed channel up to the ordinary high watermark." Since this law was enacted while the case was pending, and since it does apply retroactively, the Supreme Court of North Dakota held that it applied to this case. The ordinary high watermark determination under this law is retroactive and applied to all oil and gas wells spud after January 1, 2006, for purposes of mineral ownership. Successors also asserted that the district court erred in finding that Board's actions were not a taking that required just compensation. Board compensated for the surface, but never for the mineral interest. Successors are entitled to compensation if it is determined that Board's actions resulted in a "taking" of the mineral interests. The court held that the district court erred in determining there was no taking and that the district court must consider this issue on remand if it determines the Board owns the disputed minerals. Thus, the case is reversed and remanded.

Ohio

Sheba v. Kautz, 7th Dist. Belmont No. 14 BE 0008, 2017 WL 4167407 (Sept. 18, 2017).

Property Owner, and Company to which Property Owner gave an undivided oil and gas interest, brought action against Heirs of prior owners, who had transferred land in 1848 but reserved to themselves and Heirs the right to all the minerals and coal lying under a portion of the land. Property Owner sought a declaratory judgment and quiet title, claiming the reservation did not reserve title to the oil and gas, the oil and gas interest was abandoned under the 1989 version of the Dormant Mineral Act ("DMA"), the oil and gas was abandoned under the new version of DMA, and adverse possession of the oil and gas. Trial court found for Property Owner and Heirs appealed. Appellate court held that the grantor in the 1848 deed did not reserve the oil and gas interests as the use of the term "mineral" in the reservation showed intent of the parties was to reserve coal and other non-migratory minerals, not migratory minerals. Important to the analysis was that the first oil and gas commercial well was not drilled in Ohio until 1860, so the parties likely did not intend to reserve oil and gas. Also, after looking to locality and timeframe, appellate court also noted that the deed's easement language pertained to mining of minerals in place, and not migratory minerals such as oil and gas. Furthermore, appellate court held that the lower court erred when it found the mineral interest was abandoned under the 1989 DMA because the 1989 DMA was not self-executing and could not result in automatic abandonment. Therefore, since the complaint in the present case was not filed until 2013, the 1989 DMA could not be applied and the newer version was applicable. The court affirmed the decision of the lower court.

Pennsylvania

United Ref. Co. v. Dep't of Envtl. Prot., 163 A.3d 1125 (Pa. Commw. Ct. 2017).

Refinery owns and operates an eighty-three-acre petroleum refinery, on which it has never drilled an oil and gas well. Operator applied for a permit to drill a slant well, with the top hole across the street from Refinery's property, and the bottom hole underneath Refinery's property. After some negotiation, the Department of Environmental Protection ("Department") issued permits for Operator's desired wells, and Refinery appealed to the Environmental Hearing Board ("Board"), citing concerns about potential damage from Operator's hydraulic fracturing operations. Board found that Refinery did not prove by a preponderance of the evidence that Department abused its discretion—acting unreasonably and/or in violation of the laws—by issuing the permit, and dismissed Refinery's appeal. Refinery appealed Board's decision to the trial court. The court held that: (1) because Refinery failed to meet its burden of proof as to how the drilling or fracturing would have the negative impact it alleged, Board did not err in its conclusion that Refinery failed to show that Department abused its discretion in issuing the permit; and (2) whether Department considered that evidence in reaching its decision to issue the permit is immaterial.

Texas

Apache Deepwater, LLC v. Double Eagle Dev., LLC, No. 08-16-00038-CV, 2017 WL 3614298 (Tx. App. Aug. 23, 2017).

Property Owner sued mineral lessee ("Lessee"), demanding that Lessee relinquish its interest to several tracts of land. The land in dispute was divided in two four equal tracts. Property Owner argues that because the wells on three of the four tracts of land had stopped producing, that Lessee no longer had legal right to the tracts. Lessee, on the other hand, argued that because one of the wells was still producing at the relevant time-period, and because the lease had a habendum clause, that the lease to the entire plot of land—including all four tracts—was still held. The court ultimately held that the entire tract of land was still under proper control of Lessee for several reasons. First, the language of "leased premises" used in the lease refers to the entire plot of land, including all four tracts. Second, there is specific language in this lease's habendum clause and drilling operations clause which made clear that so long as one of the wells on one of the four tracts is producing or that drilling operations were taking place on it, the lease for the whole plot of land continues. This is despite Property Owner's contention that the lease's retained acreage clause ends the right to an individual tract when it stops producing because the lease itself contained no clear intent in the retained acreage clause to negate the habendum clause. Implicit in Property Owner's argument is that the lease should be understood as a continual relinquishment agreement, but the court said that if that were intended, such language would have and should have been included in the original lease.

Fairfield Indus. Inc. v. EP Energy E&P Co., No. 14-15-00586-CV, 2017 WL 2882187 (Tex. App. July 6, 2017).

Licensor, a provider of seismic data, sued Licensee, who contracted to use Licensor's seismic data, after Licensee underwent a change in control, and attempted to unilaterally terminate the parties' licensing agreement and not pay a transfer fee as set forth in the same agreement. Licensee's theory for its actions was that since it returned Licensor's seismic data, it was not obligated to pay the fee or continue to be obligated by the licensing agreement. At trial, Licensee moved for summary judgment to dismiss Licensor's claims and the trial court granted Licensee's motion. On appeal, the court reviewed the grant of summary judgement and the claims made by the parties. First, the court analyzed the licensing agreement to determine if a change of control would require Licensee to pay a transfer fee to Licensor for data licensed under the agreement that the acquiring company did not already have a license from Licensor for the same type of date. The court held that the unambiguous language of the agreement determined that any change in control of Licensee required that the fee be paid regardless of whether any of Licensor's data was actually transferred to the acquiring party. Regarding the same matter, the court held that the trial court mistakenly found that industry custom and usage confirmed that Licensee was obligated to pay the transfer fee only if Licensee actually transferred the data to its acquiring company. Finally, the court analyzed the unilateral actions of Licensee. The court held that nothing in the agreement allowed any unilateral actions by Licensee to terminate the contract, and its attempt to terminate would not relieve it of its obligation to pay the transfer fee.

Freeman v. Harleton Oil & Gas, Inc., 528 S.W.3d 708 (Tex. App. 2017).

Owner of a working interest in deep rights below several oil and gas properties brought action against Vendors and Purchaser of such interests, asserting claims for breach of contract, negligent misrepresentation, and unjust enrichment seeking specific performance and the imposition of a constructive trust. Purchaser answered, asserting that Owner lacked standing to sue, and filed cross-claims against Vendors. All parties moved for summary judgment. Trial court granted Vendors' motions to dismiss Owner's claims, and denied Purchaser's motions against Vendors. Purchaser and Owner appealed. The appellate court held that: (1) Owner's unjust enrichment claim was not entitled to benefit of tolling of two-year statute of limitations; (2) Purchaser's claims against Vendor were governed by agreement to assign rights, rather than a claim for unjust enrichment; (3) Purchaser could not recover supposed overpayment to Vendor; (4) Owner was not a third-party beneficiary to contract whereby Purchaser agreed to purchase interests from Vendors; and (5) president and sole-shareholder of Vendor could not be held individually liable for any damages stemming from Vendor's purported breaches of agreement.

GB Tubulars, Inc. v. Union Gas Operating Co., 527 S.W.3d 563 (Tex. App. 2017).

Operator sued Manufacturer for several causes of action, including products liability, negligence, and breach of express and implied warranties following the failure of Operator's well during hydraulic fracking operations. Operator claimed the cause of the well failure was Manufacturer's coupling. Jury found, that Manufacturer breached an express warranty resulting in $3 million in damages. After the trial, Operator was granted a new bench trial on attorney fees and the trial court's final judgment included a damage award to Operator for "damages for breach of an express warranty and attorney's fees, but did not reduce the damages award based on [Operator's] own negligence." On appeal, Manufacturer properly preserved four issues, but the court denied all issues and affirmed. First, viewing the evidence in the light most favorable to the trial court's finding, Operator provided evidence sufficient for the jury to conclude Manufacturer breached express warranties because the expert testimony presented by Operator directly addressed its theories of recovery.

Moreover, Manufacturer failed to cite any conclusive evidence in support of its counter evidence. Second, the evidence of other well failures presented by Operators was properly admitted because the presented evidence showed that the other failures "failed in the same way with many of the same factors as were present in the case at hand." Third, the trial court was correct to refuse reduction of Operator's damage for its own negligence because the statutory scheme that calls for such a reduction is not applicable in breach of express warranty cases. Finally, the trial court was correct to grant a new trial on attorney's fees because the jury did not render an incomplete or inconsistent verdict, nor did Manufacturer cite any authority indicating Operator waived a new trial by first moving to accept the verdict.

Hardin-Simmons Univ. v. Hunt Cimarron Ltd., No. 07-15-00303-CV, 2017 WL 3197920 (Tex. App. July 25, 2017).

Lessors sued Lessee for: (1) breach of express covenant to explore and develop land for oil and gas; and (2) breach of implied covenant to drill initial wells, develop premises, protect premises from damage, and market produced oil or gas. Lessors also sought a declaratory judgment concerning Lessee's failure to file a release describing mineral interests. The trial court returned a verdict in favor of Lessee. Lessor appealed, asserting that the trial court erred in denying its motions for judgment and new trial because: (1) the subject lease expired at the end of the primary term regarding non-productive acreage; (2) the jury's finding that Lessee had not breached certain lease covenants was against the preponderance of the evidence; (3) the jury's failure to find that Lessee had breached the lease by not executing a release was against the preponderance of the evidence; and (4) the jury's finding that certain wells were producing in paying quantities was against the preponderance of the evidence. The appellate court determined that Lessors met their burden of proof regarding issues (1) and (3) but did not meet their burden of proof to show that issues (2) and (4) were against the "great weight and preponderance of the evidence." Accordingly, the appellate court reversed the trial court's "take-nothing" judgment in favor or Lessee and declared the entire acreage of the subject lease terminated except for a forty-acre tract associated with certain wells.

Jarzombek v. Ramsey, No. 04-16-00571-CV, 2017 WL 2561556 (Tex. App. June 14, 2017).

Landowners owned the surface estate of two tracts plus 1/16 royalty in one tract and the entire mineral interest in the second. Landowners executed a real estate transaction with Purchaser, in which Purchaser agreed to purchase the surface estate of both tracts of land. The contract stipulated that Landowners were to keep one-half of the mineral and royalty interest in the estates for a twenty-year period and the other half would be vested in Purchaser. However, upon closing of the purchase, the deed conveying the property to Purchaser only reserved a 1/32 royalty interest to Landowners. Landowners sued Purchaser seven years later on numerous causes of actions including deed reformation, alleging the deed was inconsistent with the language in the real estate contract. Purchaser claimed the statute of limitations ("SOL") barred Landowners' action. The court of appeals reviewed whether the trial court erred in concluding Landowners' deed reformation claim was barred by the SOL. Landowners' argument rests on the discovery rule, which would prevent the SOL from running until the discovery of the mistake in the deed. However, the court of appeals determined that Texas state law says a grantor or property owner is charged with knowledge of the material terms of an unambiguous deed upon execution of said deed. The court held that the mistake in the deed was plainly evident on its face, thus Landowners were charged with actual knowledge of what the deed included, and subsequently the "discovery rule is inapplicable, and limitations began to run from the date the deed was executed."

Samson Expl., LLC v. T.S. Reed Props., Inc., 521 S.W.3d 766 (Tex. 2017).

Lessors and Stakeholders requested review action regarding underpayment for mineral interests. The Lessors and Stakeholders originally claimed that an overlap in a pooling unit prevented them from receiving appropriate royalties for their interests. Lessee had previously conducted a re-designation of boundaries for units applying to pooling agreements and in that process created the overlap of one assignment well to another unit. Lessee argues that the avenue for royalties amounts to a conveyance of legal title to property rights and thus cannot be conducted to two different parties. The Supreme Court of Texas however, addressed this case as a contract dispute, and held that Lessee breached the contract by not paying royalties as agreed upon pursuant to the valid contract. The court denied Lessee's impracticability defense, determining that Lessee caused the situation, and had notice prior to issues arising. Likewise, the court rejected Lessee's defense that the overlap was a scrivener's error as such error requires both parties to be under the same misunderstanding. Lessee's quasi-estoppel claim was also rejected, despite Lessor's and Stakeholders' prior payments, because of the ambiguity of the payments. The court affirmed the appellate court's judgment, and restricted Lessee from reclaiming any payments from Lessors and Stakeholders, because the payments were made voluntarily, with understanding of the pooling issues without effort to remedy.

Spellman v. Love, No. 13-16-00011-CV, 2017 WL 3431801 (Tex. App. Aug. 10, 2017).

Former Royalty Owner sued Mineral Interest Owner for money received pursuant to obtaining his expired royalty interest. Former Royalty Owner's interest expired due to the lack of a producing well on the property on a given date. The month after that expiration, a well began to operate on the property, and Mineral Interest Owner—who had obtained the expired royalty interest—began collecting royalty payments. Former Royalty Owner sued on multiple counts, including money had and received, and unjust enrichment (the two at issue in this appeal). The trial court issued summary judgment to Mineral Interest Owner, and the appellate court affirmed. The court held that money had and received is essentially an equitable doctrine existing to prevent unjust enrichment, and that because the record showed Former Royalty Owner had no claim, "[i]n equity or good conscience" to the money received by Mineral Interest Owner, summary judgment against him was appropriate. Summary judgment for the unjust enrichment claim followed naturally, because it is not an independent cause of action.

Wenske v. Ealy, 521 S.W.3d 791 (Tex. 2017).

Grantor sued Grantee after a dispute regarding whether the language of their warranty deed that conveyed a mineral estate and the land above it passed the entire burden of a non-participating royalty interest ("NPRI") to Grantee or if the burden of the NPRI was to be proportionately shared by both parties. When the Supreme Court of Texas reviewed the issue, it stressed the importance determining the parties' intent. The court held that it is intent that governs interpretation of the deed, not arbitrary rules. In this case, the deed and how the NPRI was to be paid was determined by the intent of the parties, using careful analysis of the deed and the provisions contained therein. The court noted that parties are free to contract in the deed whatever division of interests they desire, and this express intent would control. Generally, a NPRI is burdened by the entire mineral estate, so without an express intention to stray away from that principal of mineral conveyance it would govern. This leads to the burden of the NPRI in this case to be proportionately shared by Grantor and Grantee because alternate intent was not expressed. Additionally, the court held that although the court of appeals reached the same conclusion, it did so incorrectly by relying only on a default rule that the NPRI should be proportionately shared by the mineral ownerships instead of reviewing the intent of the parties when the warranty deed was created. Therefore, the court affirmed the judgement of the appellate court, but on different grounds.

Washington

In re Estate of Johnson, No. 34315-4-III, 2017 WL 2984030 (Wash. Ct. App. July 18, 2017).

Decedent owned mineral rights to a piece of land in North Dakota, which he purportedly left to his alleged testate successor ("Successor") in 1977. In 2011, Oil Company contacted Successor and entered into an oil and gas lease for the land. Oil Company began exploring for oil and asked Successor to probate Decedent's estate, but the original last will and testament of Decedent could not be found. Successor brought action under the Trust and Estate Dispute Resolution Act ("TEDRA"), seeking to admit and confirm the validity of her photocopy of the will. The trial court determined that the photocopy was authentic and admitted to probate. Successor's children appealed the trial court's decision. The appellate court affirmed, holding that: (1) the trial court had discretion under TEDRA to hold an evidentiary hearing; (2) the trial court did not err in applying the dead man's statute; (3) the will was validly executed; and (4) the will was authentic. This case is an unpublished opinion of the court; therefore, state court rules should be consulted before citing as the case precedent.

Midstream – Federal

Second Circuit

Constitution Pipeline Co. v. New York State Dep't of Envtl. Conservation, 868 F.3d 87 (2nd Cir. 2017).

Pipeline Company with proposed natural gas pipeline project applied for water quality certification from New York State Department of Environmental Conservation ("NYSDEC"). After reviewing Pipeline Company's application, NYSDEC denied the application for failing to provide sufficient information that its proposed natural gas pipeline would comply with state water quality standards. Pipeline Company petitioned to the Second Circuit Court of Appeals for review. Pipeline Company contends that: (1) NYSDEC failed to issue its decision within a reasonable time and was therefore a nullity and (2) it submitted sufficient information and NYSDEC's decision should be vacated on the grounds that denial was arbitrary, capricious, and ultra vires. The court of appeals dismissed the petition in part and denied in part. First, on the nullity claim, the court found that a failure to act by NYSDEC would be within the exclusive jurisdiction of the District of Columbia Circuit Court of Appeals, thus the claim was dismissed for lack of jurisdiction. Second, the court deferred to NYSDEC's expertise in the information requested from Pipeline Company to determine the certification. Because Pipeline Company refused to provide relevant information despite repeated requests, the court held that NYSDEC's denial was not arbitrary or capricious and denied the petition.

Third Circuit

Delaware Riverkeeper Network v. United States Army Corps of Eng'rs, 869 F.3d 148 (3d Cir. 2017).

In 2015, Energy Company submitted an application to the Federal Energy Regulatory Commission ("FERC") for approval of an interstate pipeline project, which included a discussion and rejection of compression alternatives. FERC published its environmental assessment, recommending a Finding of No Significant Impact, then issued a certificate approving the project. The United States Army Corps of Engineers ("Corps") then issued a Section 404 Permit authorizing construction. Environmental Organization petitioned for review of the Corps' approval of Energy Company's application to build an interstate pipeline project. Environmental

Organization challenges Corps' approval of the project on the grounds that the Corps acted arbitrarily and capriciously by rejecting a compression alternative. According to Environmental Organization, construction of the pipeline would lead to deforestation, destruction of wetland habitats, and other forms of environmental damage. Environmental Organization asserts that such damage could be avoided by building or upgrading a compressor station. The court held that Corps' approval of the project was neither arbitrary or capricious, reasoning that the project's basic purpose did not arbitrarily constrain the Corps' alternatives analysis. The court also noted that, despite Environmental Organization's argument that the Corps arbitrarily or capriciously ignored the compression alternative, a compression alternative was evaluated in Energy Company's application and expressly referenced in the Corps' findings. Lastly, the court held that the Corps did not erroneously reject the compression alternative, reasoning that a compression alternative would have more significant adverse environmental consequences than would result from Energy Company's project. The court acknowledged the Corps' well-founded and clear preference for temporary environmental impacts in direct contrast to the permanent impacts of compression. The Corps' conclusion, therefore, was not arbitrary or capricious.

Delaware Riverkeeper Network v. Sec'y of Pa. Dep't of Envtl. Prot., 870 F.3d 171 (3rd Cir. 2017).

Environmental Organization appealed Department of Environmental Protection's ("DEP") order approving Pipeline Company's application to build an interstate pipeline project. Environmental Organization claimed DEP made an erroneous water dependency finding and improperly rejected a compression alternative to the pipeline project. Further, Environmental Organization challenged the jurisdiction of the Third Circuit Court of Appeals to rule on the petition because it claimed DEP's order was not final. The court held that it could exercise jurisdiction because DEP's order was final and the Natural Gas Act grant the court jurisdiction over review of an order of a state agency. The court upheld the order because it determined DEP's interpretation of water dependency was reasonable and worthy of deference, and DEP considered and rejected alternative definition for reason that were supported by the record.

Transcon. Gas Pipe Line Co. v. Permanent Easement for 2.59 Acres in Pine Grove Twp., Schuylkill Cty., Pennsylvania, Case No. 17-1829, 2017 WL 1105237 (3rd Cir. Sep. 11, 2017).

Landowner filed suit against Pipeline Company after the two parties failed to reach agreement on the compensation owed to Landowner after the Federal Energy Regulatory Commission ("FERC") granted Pipeline Company a certificate of public convenience and necessity to build a natural gas pipeline, which required rights of way on Landowner's property. The certificate had been granted after thorough administrative review—in which Landowner did not participate—including notice and opportunity for Landowner to respond. The district court granted Pipeline Company's motions for partial summary judgment—leaving only the issue of just compensation to be determined—and for a preliminary injunction for immediate possession of the rights of way. Landowner appealed, pro se, to the Third Circuit Court of Appeals, which affirmed the lower court's ruling, holding that the district court did not err or abused its discretion in weighing relevant factors or issuing the preliminary injunction. The court held that: (1) Landowner's received notice and opportunity to respond in FERC's administrative proceedings, combined with the opportunity to litigate just compensation for condemned property at the district court, constituted due process in Landowner's action under the Natural Gas Act; (2) Pipeline Company's ability to demonstrate success on the merits of its eminent domain claim weighed heavily in favor of the issuance of a preliminary injunction for immediate possession of the rights of way; 3) monetary harm that would be suffered by Pipeline Company if possession was not allowed had not been weighed in favor of the injunction; and 4) because the public would be able to access natural gas carried by the pipeline, the public interest factor weighed in favor of granting the injunction.

Forth Circuit

Columbia Gas Transmission, LLC v. 76 Acres, More or Less, In Baltimore and Harford Ctys., Maryland, No. 15-2547, 2017 WL 2983908 (4th Cir. July 13, 2017).

Pipeline Company commenced a condemnation action seeking to acquire certain temporary and permanent easements over Landowners' properties to construct a natural gas pipeline. Pipeline Company was granted an injunction to take possession of the land and begin construction. Trial then commenced to determine Landowners' just compensation. Before trial, Pipeline Company filed motions in liminie to exclude testimony of Landowners' expert, as well as exclude claims by Landowners alleging the size of the temporary easements that Pipeline Company took were larger than the easements described in the order granting possession. The district court denied both of these motions. Pipeline Company appealed the district court's decision allowing the Landowners to modify the size of the taking and the court's denial of Pipeline Company's motions in liminie. The Fourth Circuit Court of Appeals held that it was within Pipeline Company's discretion to determine the size of the easements. Landowners did not have a right to challenge that, but instead have a right to recovery through just compensation for the land that was taken and damages caused by construction to the remaining property. The appellate court also upheld the district court's denial of Pipeline Company's motions in liminie because it was challenging the expert witness's opinion, not qualifications. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

Tenth Circuit

N. Nat. Gas Co. v. L.D. Drilling, 862 F.3d 1221 (10th Cir. 2017).

Company owned and operated the Cunningham Field, which was converted into an underground storage facility due to depletion of the field's natural resources. Before depletion, this area was certified by the Federal Energy Regulatory Commission ("FERC") for gas storage. In 2010, Company's certified boundaries expanded to a 12,320-acre area located about five miles north of the original boundaries. Company negotiated and obtained storage leases on approximately 3,040 acres of this Extension Area but over time realized that volumes of storage gas was migrating outside of the field's primary storage area boundaries. Company brought a condemnation action against Landowners to acquire the other 9,000 subsurface acres for its natural gas storage field. It also sought an immediate injunction against further exploration, production, and operation, asking the district court to order that Producers' wells be closed. The trial court entered a final judgment, at the recommendation of a court-appointed commission, requiring Company to pay $7,310,427 in principal, plus interest to Producers. The appellate court reversed the trial court's finding that the value of storage gas in and under the Extension Area should be included when calculating the condemnation award, reasoning that Producers had no right to produce such gas after the date of certification because Company owned all of the gas within its certified field boundaries after the date of certification. The trial court's valuation of gas storage and buffer rights for Extension Area traces, its valuation of Extension Area wells, and its denial of attorneys' fees were affirmed.

D. District of Columbia

Millennium Pipeline Co. v. Seggos, 860 F.3d 696 (D.D.C. 2017).

Natural Gas Company sought approval from Federal Energy Regulatory Commission ("FERC") to extend its natural gas pipeline. As part of the permitting process Natural Gas Company applied for a water-quality certificate from the New York State Department of Environmental Conservation ("DEC"). DEC took no action for more than one year, and Natural Gas Company filed this action to compel DEC to act on the application. The District of Columbia Circuit Court of Appeals found that even if DEC put off acting on Natural Gas Company's water-quality certificate application for over a year, that inaction constituted a waiver under the Clean Air Act, enabling Natural Gas Company to gain approval from FERC. That waiver erased Natural Gas Company's alleged injury, meaning it lacked the ability to meet the actual injury requirement necessary for standing. Natural Gas Company also claimed that DEC failed to comply with the schedule issued by FERC. The court pointed out though, that FERC regulations state that its deadlines will apply unless federal law otherwise establishes a schedule—which the Clean Water Act does. The court dismissed Natural Gas Company's petition for review.

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101(D.D.C. 2017).

Tribes sued Government under Administrative Procedure Act ("APA") alleging that the construction of the pipeline violated National Environmental Policy Act ("NEPA"), Rivers and Harbors Act ("RHA"), and Mineral Leasing Act ("MLA"). Both Tribes and Government moved for a partial summary judgment. Specifically, Tribes argued Government did not sufficiently consider the environmental effects of the pipeline before granting permits to construct it under a federally regulated waterway. Tribes seek summary judgment on three claims: (1) that not preparing an environmental impact statement ("EIS") is a violation of NEPA; (2) Government's decision to grant an easement was arbitrary, capricious, and contrary to law because Government reversed a prior policy without reason;

and (3) Government wrongfully concluded that pipeline activities satisfied terms and conditions of Nationwide Permit 12 ("NWP 12"). "[A]n agency has taken a 'hard look' at the environmental impacts of a proposed action if the statement contains sufficient discussion of the relevant issues and opposing viewpoints, and the agency's decision is fully informed and well considered." The environmental assessment ("EA") was inadequate where it failed to address the effects of a spill on Tribes fishing and hunting rights, where it failed to consider the environmental-justice implications of the project, and failed to take a "hard look" at environmental consequences. These inadequacies were not enough to violate NEPA or require an EIS. Government's grant of easement was not arbitrary and did not breach Government's trust duties to Tribes because controlling law did not require fiduciary or trust duty toward Tribes. Furthermore, Government only had to show good reason for a new policy, which it did by displaying awareness that it was changing its position, and by providing a reasoned explanation for the change. The court held that Government did not have to comply with all conditions to receive the permit, but it must comply with conditions to remain eligible for the permit. district court ordered the parties to submit briefs arguing whether remand or vacate is the appropriate remedy in light of the EA's deficiencies.

E.D. Louisiana

Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., CIVIL ACTION NO. 16-713, 2017 WL 3706314 (E.D. La. Aug. 28, 2017).

This case involves Right of Way Servitude Agreements for pipelines, specifically addressing contractual obligations regarding width restrictions. Landowners claim that Pipeline Company had inadequately and negligently maintained pipelines causing property damage and that width restrictions were exceeded, breaching the agreement. Pipeline Company's first argument in summary judgment is that remedies for the contract breach should be limited because: (1) there is no remedy in the servitude contract for restoration and (2) the jurisdiction only allows damages for the value of land lost. The court found Pipeline Company did not account for a remedy in the contract because it did not account for the impacts of erosion, therefore the omission of remedy provisions is not meaningful. Likewise, the court asserted a precedent that damages are governed by the contract, not the value of the property lost. The court refused Landowners' claim that because the contract was breached in bad faith, damages are not restricted to value difference of land itself. The court ultimately relied on a "good faith standard of foreseeability of damages at the time the contract was made." The court also determined that Pipeline Company did not meet its burden of proof to establish that ownership of the eroded land shifted from Landowners to the state. The court also said it would be an absurd result to grant Pipeline Company's last argument and allow it to take any actions within the right of way, even though the actions were initially restricted, to maintain the pipeline at a certain width. The court thus denied all motions.

N.D. Ohio

Rover Pipeline LLC v. 5.9754 Acres of Land, More or Less, in Defiance County, Ohio, No. 3:17CV225, 2017 WL 3130244 (N.D. Ohio, July 24, 2017).

Pipeline Company was granted a Certificate of Public Convenience and Necessity by the Federal Energy Regulatory Commission to build a 713-mile-long natural-gas pipeline running partially through Ohio. Pipeline Company filed suit to condemn the land on which its pipeline would run, and sought a preliminary injunction that it could take immediate possession of the land to start building, deferring the issue of Landowners' just compensation. Pipeline Company proceeded to settle with all 141 defendant Landowners in the case as to immediate possession, and came to terms with all but eight landowners regarding just compensation. Regarding the eight landowners still arguing about the level of compensation, Pipeline Company filed this motion for the court to appoint a commission to determine just compensation. district court found that while Landowners requested a jury in the appropriate time frame, it was left to the court's discretion to determine whether a jury or a commission would be the more appropriate body to determine just compensation. Landowners argued that the uniqueness of their individual tracts of land made individual jury trials the appropriate forum for this determination, and that being all represented by the same law firm would help maximize judicial economy. The court sided with Pipeline Company, deciding that a commission was appropriate because the proceeding involved multiple individually owned parcels, presented complex valuation issues, and would put a heavy burden on the court's docket if sent to jury trial. The court also detailed the benefits of a commission—including party review of the commissioners appointed, and the ability to have experts examining complex subjects—as well as the process for appointing the commissioners.

Midstream – State

Colorado

In re Condemnation by Sunoco Pipeline L.P., No. 2030 C.D. 2016, 2017 WL 2805860 (Pa. Commw. Ct. June 29, 2017).

Landowners appeal action stemming from Pipeline Company's assertion of eminent domain for pipeline construction project. After other claims were foreclosed in a prior condemnation challenge, Landowners challenged Pipeline Company 's authority to assert eminent domain under Property Rights Protection Act ("PRPA"), since Pipeline Company is a private entity not a public entity. The court agreed with Landowners that the PRPA does not allow the imposition of eminent domain for "private enterprise," but ultimately agrees with Pipeline Company that it is an entity providing public utility services and therefore is exempted from this restriction. The court found that even though, as Landowners contend, there is no pressing necessity for additional services, the services provided by Pipeline Company are still considered a public benefit, and therefore it is irrelevant that no new activity is needed, as Pipeline Company was granted a Certificate of Public Convenience ("CPC") by the Public Utility Council. The court also clarified that once a CPC is granted, and the entity is categorized as providing a public benefit, the court has no authority to challenge that categorization or determine if the designation was warranted. The court affirmed the lower court's order overruling Landowners' objections to Pipeline Company's Declaration of Taking.

Illinois

Enbridge Pipeline, LLC v. Monarch Farms, LLC, 2017 IL App (4th) 150807.

The Illinois Commerce Commission granted Pipeline Operator eminent-domain authority to acquire easements over certain real estate for the construction of a pipeline project. Pipeline Operator filed separate complaints for "condemnation of permanent and temporary easements for common-carrier pipeline" against Landowners. In response, Landowners filed a "traverse and motion to dismiss," seeking dismissal of Pipeline Operator's condemnation complaints. Trial court granted a directed verdict to Pipeline Operator and awarded Landowners just compensation totaling $124,000. Landowners appealed. The appellate court held that the trial court acted within its discretion in excluding proposed valuation testimony by Landowners' experts, but the trial court erroneously considered Landowners' traverse motion to be motions to dismiss asserting an affirmative matter outside complaint that barred or defeated action. Accordingly, the case was vacated and remanded for the limited purpose of conducting an expedited traverse hearing.

Enbridge Pipeline, LLC v. Temple, 2017 IL App (4th) 150346.

The Illinois Commerce Commission ("ICC") granted Pipeline Company eminent-domain authority to acquire easements over real property to facilitate planned construction of a 170-mile liquid petroleum pipeline. Pipeline Company then sued Landowners for "condemnation of permanent and temporary easements for common-carrier pipeline." Landowners sought a "traverse and motion to dismiss," which was denied by the trial court. Pipeline Company then filed for summary judgment regarding just compensation for the easements, alleging that it was entitled to such judgment due to procedural errors by Landowners and Pipeline Company's compliance with state rules requiring the filing of affidavits in support of its motion. The trial court granted Pipeline Company's motion, and Landowners appealed. The appellate court for the held that the trial court's denial of Landowners' traverse motion deprived them of the ability to: (1) rebut the statutory presumptions created by the Eminent Domain Act that the acquisition of private property for public use is "primarily for the benefit, use, or enjoyment of the public and [is] necessary for a public purpose" and (2) refute the ICC's determination that Pipeline Company negotiated Landowners' compensation in good faith. As such, the trial court failed to properly provide Landowners with their sole opportunity to challenge the ICC's condemnation powers. Therefore, the court vacated the trial court's denial of Landowners' traverse motions, and remanded for further proceedings. The court declined to decide on the trial court's granting of Pipeline Company's summary judgment motion, waiting to make such decision until the traverse hearing was held and the new record was certified to the court.

Michigan

Lowery v. Enbridge Energy Ltd. P'ship, 898 N.W.2d 906 (Mich. 2017).

Company appealed appellate court's decision finding for Landowner regarding a toxic tort claim. Landowner allegedly suffered injuries due to a significant pipeline oil spill into a woodland area and nearby creek and river. Landowner claims he was exposed to toxic substances from the spill, subsequently developed symptoms that resulted in a major surgery. The Supreme Court of Michigan disagreed with Landowner's 'post hoc propter hoc' reasoning regarding his injuries, saying that despite an alleged relationship between the spill and Landowner's injuries, Landowner has not shown sufficient evidence of causation. The court accordingly reversed the appellate court's decision and reinstated the trial court's decision.

Pennsylvania

In re Condemnation by Sunoco Pipeline L.P., 165 A.3d 1044 (Pa. Commw. Ct. 2017).

Condemnees sought review of the trial court's dismissal of their preliminary objections to Pipeline Operator's declaration of taking. Pipeline Operator intended to condemn easements on Condemnees' property for pipeline construction. State law allows public utility corporations to condemn private property to transport natural gas for the public through the state's regulatory commission. Noting that the Rules of Civil Procedure have been repeatedly held as not applying to eminent domain proceedings, the appellate court held that Pipeline Operator had demonstrated a public need or demand for the proposed pipeline. The appellate court held that the trial court did not err in dismissing Condemnee's objections as Pipeline Operator's notice of taking satisfied the requirement of demonstrating a public need for the proposed service. The court also held that Pipeline Operator's notice of taking was not deficient since Condemnees were the only party responsible for defending any unrecorded bridle path easement as the neighboring community likely would not be harmed by Pipeline Operator's alleged notice deficiency.

Lankard v. Lauren Mountain Midstream Operating, LLC, No. 1367 WDA 2016, 2017 WL 2539844 (Pa. Super. Ct., June 12, 2017).

Landowner sued Midstream Operator ("Operator") following the placement of a natural gas pipeline on a portion of Landowner's property. Landowner alleged seven causes of action: (1) ejectment; (2) trespassing; (3) continuing trespass; (4) private nuisance; (5) conversion; (6) fraudulent misrepresentation; and (7) a demand for equitable accounting. The trial court granted Operator's motion for summary judgment and Landowners properly preserved four issues on appeal. Appellate court denied all four.

First, the trial court did not improperly interpret the record against the non-moving party because the trial court explicitly noted its careful review of all available materials regarding Landowner's specific claims. Regarding the remainder of Landowner's claims, the court—relying on the trial court's analysis—agreed that the "crux of [Landowner's] averments [sic] is that [Operator] intentionally violated" the terms of a contract comprising of an easement and one separate letter of agreement agreed to by both parties. The court held the contract as valid because Operator "precisely followed" the terms of the contract. More specifically, the trial court had two reasons to enforce the contract and, thus, discount Landowner's claims. First, introduction of parol evidence by Landowner to prove inducement was inappropriate because it was Landowner's choice to sign the final contract and the final contract was clear enough to enforce. Second, the trial court was satisfied that there was no spoliation of evidence after four motions to compel were filed, no sanctionable discovery mishaps occurred. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Transcontinental Gas Pipe Line Co., LLC v. Permanent Easement for 0.16 Acres, Temp. Easement for 0.55 Acres, & Temp.Access Easement for 7.75 Acres in Coal Twp., Northumberland Cty., Pennsylvania, No. 4:17-CV-005445, 2017 WL 3412375 (M.D. Pa. Aug. 9, 2017).

This is one of seven cases Pipeline Company brought against various Landowners to use eminent domain to condemn the property. Pipeline Company seeks to build a new pipeline across multiple states, including Pennsylvania, and thus sought and received a certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC"). Pipeline Company was unable to reach a compensation deal with the various Landowners, and thus sought to condemn the lands through eminent domain. After filing its initial complain, Pipeline Company filed a motion for partial summary judgement and a subsequent motion for preliminary injunction. The court granted both motions finding that: (1) Landowners had been given a chance to challenge the FERC Order and failed to do so; (2) Pipeline Company is not required to negotiate in good faith; (3) it is not abuse of discretion to grant Pipeline Company immediate use and possession of the property while other cases are ongoing; and (4) the harm to Pipeline Company in delaying is more than just monetary harm. In the related cases, the court granted whichever motions were at issues, which varies as Pipeline Company and some

Landowners reached agreements on certain issues. These motions were granted based on the same reasoning above.

Virginia

Chaffins v. Atl. Coast Pipeline, LLC, 801 S.E.2d 189 (Va. 2017).

Company is engaged in the underground storage and transportation of natural gas and is subject to regulations of the Federal Energy Regulatory Commission ("FERC"). Company is seeking approval from FERC to construct a natural gas transmission line. Company sent Landowners along the proposed route letters seeking permission to enter their properties to conduct surveys, tests, examinations, and appraisals. When Landowners withheld their permission, Company provided Landowners with notices of intent to enter their properties "on or after" a specific date. The notices explained that Virginia law authorized operator to enter land without permission to complete the sought-after conduct. Landowners argued that the notices failed to "set forth the date of *intended* entry" as required by state law. The Virginia Supreme Court concluded "on or after" notices do not meet the requirement to "set forth the date of the intended entry" because they are too vague and do not provide Landowners with a way to determine when the entry would occur. The Virginia Supreme Court held that notices of intent must provide Landowners with intended dates in which Company is certain to enter the property.

Palmer v. Atl. Coast Pipeline, LLC, 801 S.E.2d 414 (Va. 2017).

Pipeline Company sought permission to enter Landowner's property to conduct surveys necessary to build a natural gas transmission line. Landowner denied Pipeline Company's access to the property. Pipeline Company sought declaratory judgment granting entry to the property under state law. Landowner filed a plea in bar and a demurrer, claiming that the relevant statute applies only to Virginia public service companies and that the statute impermissibly burdens her fundamental right to exclude others from property. The trial court overruled Landowner's plea and demurrer. The Supreme Court of Virginia affirmed, holding that the statute applies to all corporations that are doing business within the Commonwealth of Virginia. Additionally, the court held that the Landowner's right to exclude others is not absolute, and that Virginia law grants entry-for-survey privilege specifically to public service corporations and natural gas companies.

Downstream – State

Illinois

Vanguard Energy Servs., L.L.C. v. Shihadeh, 2017 IL App (2d) 160909.

Supplier alleges that Buyer breached several agreements in terminating his agreement to purchase natural gas and argues, on appeal, that the breaches should not be barred by the statute of frauds. Supplier contends that the gas was set aside for Buyer specifically, and that Supplier subsequently took a loss by salvaging the sale on the open market. Because a contract where the goods are specially manufactured specially for the buyer alone are still enforceable under the UCC absent a written contract, the court looked at whether: (1) Supplier intended the gas for Buyer in particular; (2) the gas becomes more difficult to sell without Buyer within Supplier's ordinary course of business; (3) Supplier had already substantially committed to fulfilling the agreements; and (4) the Supplier had reasonably indicated through its substantiated actions prior to Buyer providing Supplier notice of the contractual repudiation. The appellate court affirmed the trial court and held that neither the merchant exception nor the specially manufactured good exception applied in exempting Supplier's contract from the statute of frauds writing requirement.

SELECTED WATER DECISIONS

Federal

Sixth Circuit

Boler v. Earley, 865 F.3d 391 (6th Cir. 2017).

Between 1967 and 2014, City sourced its water from Lake Huron via the Detroit Water and Sewerage Department ("DWSD"). On March 29, 2013, City decided to join a water supplier, the Karegnondi Water Authority ("KWA"), that was still in the development stages. Shortly after this decision was made, DWSD informed City that its contract would terminate in April 2014, spurring City to decide on an interim water source to be used until the KWA was complete. Officials chose the Flint River despite a 2011 report that determined that the water in the river would need to be treated to meet safety regulations and that the cost of the treatment of the water would be more than the proposed KWA contract. Immediately after the switch, residents complained that the water "smelled rotten, looked foul, and tasted terrible." In October 2015, County officials declared a public health emergency advising residents not to drink the water. Residents filed suit against Former City Managers citing twelve different causes of action both state and federal. The Residents filed for a preliminary injunction, seeking to enjoin Former City Managers from billing Flint residents for water but the case was dismissed for lack of subject matter jurisdiction because the district court said the Safe Drinking Water Act ("SDWA") precluded the federal claim, leaving only state law claims. Residents also sued Governor, citing six causes of action, four of which were federal. On appeal, the Sixth Circuit Court of Appeals stated that the residents' federal claims were not preempted by SDWA and reversed and remanded. This case has since been appealed, but there is no decision from the higher court as of publication.

Herr v. U.S. Forest Serv., 865 F.3d 351 (6th Cir. 2017).

Landowners of a private lakefront property sued U. S. Forest Service ("USFS"), claiming that its prohibition of gas-powered motorboats and limitation of electrically powered motorboats to no-wake speeds exceeded USFS's regulatory authority. The Michigan Wilderness Act of 2007 ("Act") granted USFS the ability to regulate any use of the lake "subject to valid existing rights." The district court dismissed the suit, holding that Landowner's rights did not exist at the Act's enactment, because

Landowners had not yet purchased the property. The Sixth Circuit Court of Appeals reversed, holding that the valid existing rights ran with the land, and Landowners inherited those existing rights when they purchased the property. In determining whether the regulations interfered with those rights, the court looked to the lake's history and Michigan law and determined that the use of a gas-powered boat or an electrical boat above a low-wake-zone speed was "reasonable." Accordingly, USFS's regulations prohibiting recreational boating in this manner interfered with Landowners' valid existing rights, and therefore were invalid.

Ninth Circuit

United States v. Gila Valley Irrigation Dist., 859 F.3d 789 (9th Cir. 2017).

The district court entered a Consent Decree in 1935 to govern the distribution of water from the Gila River among Community, Tribe, and other landowners. The Decree allows parties to divert the water from the Gila River for the beneficial use and irrigation of land. Additionally, the Decree allows parties to change the point of diversion, if they do not injure the rights of the other parties. In 1993, the district court outlined the procedures to sever and transfer water rights. The party seeking to sever and transfer must file an application. If there are objections, either party may request an evidentiary hearing in which the applicant has the burden to show a prima facie case of no injury to the other parties. In 2007, Community, United States, and individual landowners entered into the Upper Valley Forbearance Agreement ("UVFA"). The UFVA allows parties to sever and transfer certain water rights to lands that were not originally covered by the Decree. Pursuant to the UFVA, in 2008, Corporation filed fifty-nine applications. The Ninth Circuit Court of Appeals concluded that Corporation failed to meet its prima facie burden of no injuries to other parties. The court held that Corporation failed to address the delay in time that parties would receive water downstream of the proposed diversions, the return flow of the water into the Gila River, the impact of the water quality, and the *cumulative* effect of the diversions and not just each individual diversions' effect. The court also concluded that Corporation abandoned the water rights on a one and four-tenths acre parcel of land because Corporation failed to use the water rights for at least eleven years. The court held that Corporation's involvement in prior negotiations and litigations does not defeat a claim of abandonment under Arizona law.

Federal Claim

Magnus Pac. Corp. v. United States, No. 13-859 C, 2017 WL 3765524 (Fed. Cl., Aug. 31, 2017).

Corporation sued the United States Section of the International Boundary and Water Commission ("Government") under the Contract Disputes Act ("CDA") over a contract to restore a levee on the Rio Grande. Corporation brings four claims. In the first claim, Corporation asserts that it had to fill the levee more than a reasonable bidder on this contract should have. In the second claim (the "riprap claim"), Corporation asserts that Government required it to do work beyond the scope of the contract. In the third claim, Corporation asserts that Government wrongfully retained "disputed credit owed the [G]overnment for a mid-project change to the levee design." In the final claim (the "slope change credit claim"), Corporation asserts that after a mid-contract design change to the physical slope of the levee, Government retained too much of the contract payments owed Corporation. The court found in favor of Corporation on all of its claims. The court found Corporation did fill more than was originally thought. Second, analyzing the riprap claim under the constructive change doctrine due to a change in the contract mid-performance, the court found that the riprap work done was beyond the scope of the contract documents and the fault for the constructive change lies with Government. Finally, because Corporation "realized minimal financial benefits from" the slope change in an amount "far less than [Government] retained from the contract price due" Corporation, Corporation prevails on the slope change credit claim. Because Corporation prevails on all of its contract claims, it is also inappropriate for Government to retain the contract funds.

Stockton E. Water Dist. v. United States, 133 Fed.Cl. 204 (Fed.Cl. 2017).

District sued United States claiming that Bureau of Reclamation ("Bureau") failed to provide District with contractually required volumes of surface water from reservoir. The court determined that District was not entitled to expectancy damages based on Bureau's breach of its contractual obligation to make minimum amounts or surface water available to District because: (1) District failed to produce sufficient evidence quantifying the level of demand required; and (2) even if the demand estimates were reliable, District did not show that Bureau's breaching announcements were the actual cause of demand falling below what District had identified as expected demands. Thus, the court determined that any expectancy damages would be speculative and were therefore unjustified. This case has been appealed, but there is no decision from the higher court as of publication.

D. District of Columbia

Gov't of the Province of Manitoba v. Zinke, Civil Action No. 02-2057 (RMC), Civil Action No. 09-373, 2017 WL 3437658 (D.D.C. August 10, 2017).

Province sued under National Environmental Protection Act ("NEPA") to prevent the Bureau of Reclamation ("Bureau") from proceeding with a project to supply water from a foreign lake to certain communities in need of water. The foreign lake water would transfer through pipes across a divide which separated two other large water basins, causing the waters to co-mingle. Province argued this co-mingling could introduce dangerous, invasive species into the existing basins and as a result, threaten the health of the indigenous species living there. Province also claims that the environmental impact statement ("EIS") provided by Bureau is insufficient. Both parties moved for summary judgment. The district curt assessed the EIS to ensure Bureau took a "hard look" at the environmental consequences of the project. The court determined that Bureau, after several years of "studious" efforts, produced an EIS which satisfies the NEPA. The court found that Bureau adequately considered the implications of the plan, proposed feasible alternatives, and showcased effort to mitigate the negative effects. Any deficiencies which were present in the previous EISs provided by Reclamation had been corrected. Accordingly, the court granted Bureau's motion for summary judgment against Province. This case has since been appealed, but there is no decision from the higher court as of publication.

D. Idaho

Idaho Conservation League v. Atlanta Gold Corp., No. 1:11-cv-00161-REB, 2017 WL 4099815 (D. Idaho Sept. 15, 2017).

Corporation was responsible for contamination of a waterway and was sued by Conservationists in 2005 to reduce the contamination. The lawsuit was settled by a consent decree that required Corporation to construct a water treatment facility and obtain a discharge permit. The permit required that

Corporation keep the contamination below a specified level, which it failed to do on many occasions. Because of the failures, Conservationists sued Corporation a second time and obtained an injunction in 2012 requiring Corporation to comply with the terms of the permit. Following the injunction, Corporation took steps to comply with the permit, but progress was impeded by a large forest fire that occurred the same year. After the fire, Corporation had brought the contamination to significantly lower levels than it had been, but consistently not low enough to accord with the permit. In 2017, Conservationists filed a motion to reopen the case and a motion for civil contempt for Corporation's consistent violations of the injunction. Corporation argued that compliance with the injunction would not be possible, considering the difficulties presented by the geography and climate of the region. The court held that although Corporation had suffered hardship by the 2012 forest fire and compliance with the terms of the permit would be costly because of its location, compliance was not impossible. The court found for Conservationists, imposed monetary sanctions on Corporation. The court also ruled that Corporation must comply with the permit limits within a year.

D. Minnesota

Richland & Wilkin JPA v. U.S. Army Corp of Eng'rs, Case No. 13-2262, 2017 WL 3972471 (D. Minn. Sept. 7, 2017).

Interest Group and Department of Natural Resources ("DNR") sued U.S. Army Corps of Engineers and Flood Diversion Board of Authority (collectively "Corps"), alleging a violation of state and federal laws when it signed a project partnership agreement and began constriction for a permanent flood protection project without obtaining requisite permits from the state. Interest Group and DNR further sought a preliminary injunction to prevent Corps from continuing construction until it obtained the requisite permits. The court looked at four factors to determine if injunctive relief was appropriate: (1) the probability the moving part would succeed on its merits; (2) the threat of irreparable harm to the moving party; (3) the balance of harms between the parties; and (4) the public interest. After weighing the factors, the court granted Interest Group and DNR motions for preliminary injunction to stop construction on the project. The court reasoned that construction of a project before compliance with state laws creates the risk of a steamroller effect that could make it difficult to mitigate damages. This case has since been appealed, but there is no decision from the higher court as of publication.

S. D. West Virginia

Foster v. EPA, No. CV 14-16744, 2017 WL 3485049 (S.D. W. Va. Aug. 14, 2017).

Landowner challenges an Administrative Compliance Order ("ACO") imposed by EPA on four tracts of land. The substantive issue challenged is whether the "relevant reaches" of the property is considered federal "waters" under the Clean Water Act ("CWA"). One section of the property was subject to violations of the CWA. The waters on the section were subsequently filled and questions arose regarding whether they were navigable waters and the definition of the term. The court analyzed the CWA violation pursuant to EPA's counterclaim for "injunctive relief and civil penalties." The court found affirmatively for most factors since the violation was carried out: (1) by a person (or entity); (2) by a "discharge"; (3) from a point source; and (4) without the authority of a permit. The court applied the decided-upon permanent flow test and nexus test to determine that the property was dry, with no substantial flow and no actual physical link to downstream water. Additional questions were raised of whether the water had a continuous flow prior to its filling and whether jurisdiction of the CWA was cut off due to the disruption of the "ordinary high water mark." The court granted EPA's motion for summary judgment regarding the procedural due process claim, First Amendment retaliation claim, and challenge to the reasonableness of the ACO pertaining to one section of land at issue. The court found that the administrative record supported EPA's decision, with sufficient evidence provided. However, the court also granted Landowners' motion for summary judgment regarding the reasonableness of the ACO pertaining to three remaining sections of land because it found insufficient evidence of those particular tracts' impact on a navigable water in the administrative record.

State

California

Orange Cty. Water Dist. v. Sabic Innovative Plastics US, LLC, 222 Cal. Rptr. 3d 83 (Cal. Ct. App. 2017).

County Water District ("District") sued Operators and former Operators (collectively, "Operators") for damages under state statute ("HSSA"), a county water district act ("OCWD"), and tort claims for negligence, nuisance, and trespass. In this consolidated appeal, the court addressed each cause of action individually. First, District can bring an HSSA cause of action because it "incurred response or corrective action costs." Moreover, on Operator's motions for summary judgment, this court reasoned that no defendant made an adequate evidentiary finding to rise to the level that justified summary adjudication. Second, the trial court was incorrect to grant summary judgment on District's OCWD claim in favor of Operators because merely characterizing their incurred costs as "investigatory" is not dispositive for an OCWD claim. However, the trial court was correct to grant summary judgment for one specific Operator because it was not responsible for a fire that caused the disputed water contamination. Third, applying the legal theory of "continuous accrual," this court reasoned that due to the breadth of District's complaint, most Operators insufficiently addressed each allegation. However, summary judgment against District's negligence claim was appropriate as to an Operator which District merely acknowledged Operator's statute of limitation argument and another for whom District failed to prove any causation under the OCWD. Fourth, District has generally "raised a triable issue of fact regarding its property interest in groundwater," but because this is based on District's recharge activities, District has a viable nuisance claim, but not a viable trespass claim. Finally, the court reasoned that District's declaratory relief claim should be revived because it "incorporates the allegations of its other causes of action" and at least one other cause of action has been revived. Accordingly, the court affirmed in part and reversed and remanded in part.

San Diego Cty. Water Auth. v. Metro. Water Dist. of S. Cal., 220 Cal. Rptr. 3d 346 (Cal. Ct. App. 2017).

Purchaser is an independent public agency that serves as San Diego County's regional water wholesaler and is a customer of Seller. In Seller's capacity as the state government's water delivery company from the Colorado River and the Hoover Dam to the southern-most region of the state, Seller has developed a system of rate costs for water delivery. After many years of disputes concerning Seller's prices, the two parties had reached an uneasy agreement with a set price that was subject to change over time. In June 2010, Purchaser filed an action challenging the water rates Seller adopted for 2011 to 2012 and then filed another action in June 2012 challenging the 2013-2014 rates. The trial court coordinated the two claims together, bifurcating the bench trial, and found that the rates adopted by Seller "…over-collect from wheelers, because at least a significant portion of these costs are attributable to supply, not transportation," and invalidated the rates for both rate cycles. The court awarded Purchaser total damages of $234,932,782. The appellate court found that the lower court was incorrect in its valuation of damages in including State Water Project transportation charges and excluding Purchaser's payments under the exchange agreement when calculating its preferential right to water supplies in the event of a shortage. Additionally, it concluded that Seller's termination of Purchaser's membership due to filing or participating in litigation against it was unconstitutional. The case was reversed and remanded.

Colorado

Gallegos Family Props., LLC v. Colo. Groundwater Comm'n, 2017 CO 73.

Owner of senior surface water rights ("Senior Owner") sought to de-designate a portion of a designated ground water basin ("Basin") and have its boundaries re-drawn to exclude twenty-five wells in order for the State Engineer to curtail those junior groundwater rights ("Junior Owners") in favor of Senior Owner's surface water rights. Junior Owners opposed the petition because so long as their properties remain within the Basin, the State Engineer is unable to curtail their groundwater rights. The trial court denied Senior Owner's effort to de-designate a portion of the Basin, and issued an order awarding Junior Owners a portion of their litigation costs. Senior Owner appealed. The Colorado Supreme Court held that Senior Owner failed to meet its burden of providing enough evidence to show that Junior Owners were pumping water connected to the creek in a way that created future conditions, supported by data, justified de-designation of the Basin. That the creek and groundwater were connected at the time of designation was inadequate to de-designate a portion of the basin because it did not show that a condition arose or was discovered since the date of designation, and therefore does not satisfy the statutory requirements for de-designation. The petition also fails due to claim preclusion because connectivity—the question of whether a sufficient enough linkage between surface water and groundwater to mean augmenting or depleting groundwater would impact the availability or flow of surface water—could have been litigated during the designation proceeding. Finally, the court held that Junior Owners who had been joined as indispensable parties were able to recover costs as prevailing parties, and the expert fees they claimed were both reasonable and necessary. Therefore, the court affirmed the trial court's decision.

Idaho

City of Blackfoot v. Spackman, 396 P.3d 1184 (Idaho 2017).

City applied for a water right to appropriate 9.71 cubic feet per second of groundwater to be used for irrigation. The Idaho Department of Water Resources ("Department") denied the application. City appealed to the district court and again to the Supreme Court of Idaho. The court affirmed the district court, ruling that City must apply for a transfer of water resources to use water seepage for "recharge" of groundwater drawn for irrigation. To offset the injury resulting from the appropriation, City wishes to use 1,066 afa of mitigation credit resulting from seepage that occurs under Water Right No. 01-181C ("181C"). The court held that 181C authorizes five different use purposes: irrigation storage, irrigation from storage, diversion to storage, recreation storage, and irrigation. City argues that although "recharge" is not included in the purpose of use element, it is still an authorized use of 181C. The court rejects this argument finding that "recharge is a statutorily recognized beneficial use" and as such it must be included in the purpose of use element before being used for recharge. Additionally, the court found that since recharge is not a listed use, the only way to alter, add or subtract from a judicially decreed purpose of use element is through an application for transfer, so if City wishes to use 181C for recharge it must file for a transfer. The court ruled that a water right under 181C could not be used for groundwater recharge without an approved transfer application and could not be used as mitigation until such transfer was approved. District court finding was affirmed.

Montana

City of Helena v. Cmty. of Remini, 2017 MT 145, 388 Mont. 1, 397 P.3d 1.

Junior Owner appealed Water Court's decision to try and protect his water rights. The central issue is whether City forfeited or abandoned its water rights after a period of inactivity. The appeal addresses whether the Water Court was wrong to find a presumption by applying provisions of state law that City did not intend to abandon water rights. The court held that "[i]f the City can establish that it has used "any part" of the water right and also satisfies one of the four additional requirements under" the pertinent section of the law, then it is presumed not to have abandoned its water right. The Supreme Court of Montana determined that City's construction activity on the pipeline creates a presumption of nonabandonment because it displays City's intent to use the water rights. The court ultimately held that there was error in the Water Master's decision that City abandoned its water rights; holding instead that City did not abandon its water rights under state law. The court remanded, ordering the lower court to restore City's entire water right.

Clark Fork Coal. v. Tubbs, 2017 MT 184, 388 Mont. 205, 399 P.3d 295.

The Montana Water Act allows permit exceptions for certain new ground water appropriations. It exempts appropriations of outside streams that are less than ten acre-feet per year and run for less than thirty-five gallons per minute, unless the combined appropriation from the same source was of two or more wells exceeds ten acre-feet, regardless of the rate of water flow. The Montana Department of Natural Resources ("Department") had a rule in 1987 that stated that combined appropriation did not need to physically connect or have a combined distribution system to fall under the category of combined appropriation. Department issued a new rule in 1993 defining combined appropriations "as an appropriation of water from the same source acquired by two or more groundwater developments that are physically . . . the same system." Senior water rights owners ("Owners") petitioned Department regarding the new rule and then moved for judicial review of the rule. The district vacated the 1993 rule finding the new rule inconstant with the statute and therefore invalid. On appeal, the Montana Supreme Court affirmed that decision but reversed district court decision to award attorney's fees to Owners under the private attorney general. The court reasoned that the award of attorney's fees under the private attorney general doctrine only in cases "vindicating constitutional interests." In the case at bar, the underlying issue was a challenge to a statute and therefore the district court abused its discretion in awarding attorney fees.

South Dakota

Rumpza v. Zubke, 2017 S.D. 601, 900 N.W.2d 601.

Landowner's property was separated from Neighbor's property by a rural road. Neighbor's property was immediately adjacent to West Neighbors. Water flowed from Landowner's property onto Neighbor's property via a culvert dug under the road. In 2012, Landowner constructed a dam and a ten-foot pit on his side of the culvert, with a pump inside. When the water in the pit reached a certain level, it pumped the contents of the pit over the dam and onto Neighbor and West Neighbor's property. Neighbor and West Neighbor sued Landowner, seeking an injunction and damages. They argued that the increased water flow onto their properties had extended the time that water lingers on the properties, ruining land that they had previously been able to farm. Trial court returned judgment for Neighbor and West Neighbor, prohibiting Landowner from operating the pump and awarding damages of $12,465 and $16,173 respectively. The Supreme Court of South Dakota held that the trial court did not err in granting the injunction against Landowner. The court held that as the dominant landowner, Landowner may not "transfer the burdens imposed by nature on his land to that of the lower owner." Additionally, under South Dakota law, the dominant landowner may not transfer surface waters on his property to a lower owner in "unusual or unnatural quantities." Because Neighbor and West Neighbor's properties used to dry out gradually, and are now "continually wet" since the installation of the pump, an injunction to prevent the damage to their land was proper. However, Neighbor, unlike West Neighbor, failed to deduct appropriate expenses from his damage calculation. Therefore, the court did not have sufficient data to calculate Neighbor's damages. The injunction and West Neighbor's damages were affirmed; Neighbor's damages were reversed.

Surat Farms, LLC v. Brule Cty. Bd. of Comm'rs, 2017 SD 52, 901 N.W. 2d 365.

Company appealed Board of County Commissioners' ("Board") decision, which found that Company impermissibly blocked watercourse drainage with tile installation. The circuit court affirmed Board's decision. South Dakota Supreme Court affirmed the circuit court's decision, holding that the award of injunctive relief was proper and supported by evidence. The court said the tile created a problematic elevation difference, which thereby caused significant water backup on an upstream Landowner's property. The court determined that a "civil law rule" applies requiring that Company not interfere with drainage on another's property under rural property requirements. The court denied Company's claim that Landowner suffered no actual damages by highlighting the lack of evidence Company presented for this particular claim. Additionally, the court held that Company did not have the right to create water backup and impact a neighboring property owner's land. The court also held that Company's claim that Landowner misrepresented his property's use was inaccurate and unnecessary, since damages were not calculated factoring in the use of the land. Thus, the court affirmed the injunctive relief granted to Landowner, enforcing

Company's requirement to "restore the natural flow of water" on his own and Landowner's property.

Texas

Bexar-Medina-Atascoas Ctys. Water Control & Improvement Dist. No. 1 v. Bandera Cty. River Authority & Groundwater Dist., No. 04-16-00536-CV, 2017 WL 4014703 (Tex. App. Sept. 13, 2017).

Bandera Water District ("Bandera") sued the Bexar-Medina-Atascoas Counties Water District ("BMA") seeking a declaratory judgment that BMA has no jurisdiction in Bandera County to do any of the following: (1) inspect private or public wells; (2) enforce any jurisdiction or rules over groundwater or surface water; (3) investigate any types of alleged water well violations; (4) promulgate any rules relating to groundwater; and (5) exercise any rights as a water control and improvement district. BMA entered a plea to the jurisdiction asserting contrarily, that Bandera could not show any of the five enumerated items have occurred or are imminent; therefore, there is no justiciable controversy for determination. The trial court denied BMA's plea, and subsequently granted Bandera's motion for summary judgment, however, the court denied Bandera's request for attorney's fees. Both parties appealed. The appellate court reversed and remanded. In its holding, the court noted that there is no general right to sue a state agency for a declaration of rights, and that although Bandera attempts to define its claim as one challenging the validity of the application of a Texas statute, its challenge aims to restrain BMA's actions; therefore, BMA is immune from the claims under the doctrine of sovereign immunity. However, Bandera requested that the case be remanded to allow it to amend its pleading to pursue ultra vires claims against BMA's officers. The court held that because BMA raised its immunity challenge for the first time on appeal, Bandera did not have an opportunity to amend its pleadings and should therefore the proper course of action was to remand the cause with instructions to allow Bandera an opportunity to amend its pleading.

Washington

Chelan Basin Conservancy v. GBI Holding Co., 399 P.3d 493 (Wash. 2017).

A local Environmental Group, sued lakeside Property Owner, seeking abatement and removal of fill material which Property Owner added to elevate and keep its property permanently above the artificially raised seasonal water fluctuations of a public lake. Environmental Group's cause of action was based upon the State of Washington's public trust doctrine, which protects the public right to use water in place along navigable waterways. The lower court held that State previously consented to Property Owner's fill and impairment pursuant to a "Savings Clause" found in the State's statutes. The clause protects from public trust challenges to any fill improvements made pre-*Wilbour* (1969 case wherein Supreme Court held that private property owners may not extinguish the public right to use navigable waters by artificially elevating their own property). As Property Owner's fill had been added in 1961, Environmental Group's public trust claim was barred. Environmental Group appealed. The Supreme Court of Washington affirmed the lower courts holding that State had consented to Property Owner's fill improvement pursuant to the Savings Clause, however, the court reversed and remanded to the trial court to determine whether the Savings Clause violates the public trust doctrine all-together. The court also held that Environmental Group has standing to raise its claim under a public nuisance theory notwithstanding the provisions and protections afforded in the Savings Clause.

Hamilton Corner I, LLC v. City of Napavine, 402 P.3d 368 (Wash. Ct. App. 2017).

Property Owner sued City, challenging the city council's ruling that Property Owner owed $170,329.02 after being assessed due to the construction of a public water system. City's local improvement district ("LID") instituted water system improvements to promote development through providing City's water to an area not previously serviced by public water. City's public health and city code requirements required completed public water systems that provide potable drinking water and the appraisal cited that the completed public water system would allow for full development of Property Owner's property and surrounding properties. The LID appraised the improvements through obtaining "before and after" market values of Property Owner's property. Property Owner did not present any alternative appraisals of its own and Property Owner only argued that its property was sufficiently serviced by its own private water systems. The court held Property Owner's argument that City's confirmation of the assessments was arbitrary and capricious as invalid because the LID's fundamental purpose was accomplished. While Property Owner does not benefit from a specific nearby well that was improved, the court found the special benefit gained by Property Owner to be related from the public water delivery system improvements generally and that Property Owner was afforded reasonable notice to an opportunity to meaningfully present its objections to the city. The court therefore affirmed the assessment.

SELECTED LAND DECISIONS

Agricultural Use

Iowa

Thompson v. JTTR Enviro, L.L.C., No. 16-1610, 2017 WL 3065159 (Iowa Ct. App. July 19, 2017).

Landowner purchased 146 acres of farmland from Seller. The contract between them stated that Landowner would give Seller a permanent easement on the 146 acres and a separate manure easement agreement ("MEA") that would be created at closing. The MEA was drafted, signed, and recorded as permanent and running with the land, binding upon all successors and interest, noting that Landowner would receive as much animal waste generated from the hog facility on Seller's land as needed for his 146 acres, and that he would receive the benefit of reduced costs and expenses regarding fertilizer application. Months following the MEA, Neighbor purchased the neighboring 10.25 acres from Seller and filed a manure management plan, under which Landowner could only receive seventy-three acres of manure annually. Landowner filed suit, alleging that Neighbor breached the MEA. The trial court found in favor of Landowner and the appellate court affirmed, reasoning that: (1) the terms of the MEA explicitly impose a burden upon Neighbor as Seller's successor to supply Landowner with enough manure to cover the 146 acres; (2) nothing in Neighbor's argument supports the conclusion that the MEA's broad wording was not meant to include manure from a finishing barn as opposed to that of a farrowing barn; and (3) simply because Landowner planted soybeans in year one—which do not require the same level of fertilization as corn--does not provide proof of what Landowner would have done and intended to do had manure been provided.

South Dakota

Hoffman v. Van Wyk, 2017 S.D. 48, 900 N.W.2d 596.

Landowners applied for a writ of mandamus to compel County Planning and Zoning Administrator and Planning and Zoning Commission ("County") to revoke a building permit for a hog confinement unit applied for by another party, arguing that building the unit would be in violation of

County's zoning ordinance. The circuit court denied Landowners' request. Landowners appealed, and County, in a notice of review, argued that the court erred in determining that the unit was not a permitted use under the ordinance. On appeal, the Supreme Court of South Dakota reversed the lower court decision, in part, determining that the hog confinement facility was a permitted use and did not require a variance or conditional-use permit. Further, although the court determined that the permit should not have been issued, it affirmed the lower court's decision in denying Landowners a writ of mandamus, noting that construction of the facility had already been completed at the time of the trial and a writ of mandamus would be ineffective.

Easements - Federal

Sixth Circuit

Green Hills Mall TRG, LLC v. BakerSouth, LLC, Case No. 16-5758, 2017 WL 4217450 (6th Cir. Sept. 22, 2017).

Parking Lot Owner sued Property Owner for a declaratory judgment challenging Property Owner's claim to a parking easement that was purportedly granted through the deed associated with Property Owner's purchase. Long prior to Property Owner's purchase, the deed's trustee died without appointing a successor. Parking Lot Owner contended that the original deed no longer contained an enforceable easement because a deceased trustee's heirs serve only as mere conceptual placeholders. Arguing the contrary, Property Owner repurchased the property after the deceased trustee's heirs took title. Because Tennessee state law offers no explicit answer to what occurs with trust property when a trustee dies, the Sixth Circuit Court of Appeals looked to state case law in holding that the trustee's heirs only maintain "naked legal title" that automatically divests when the court appoints a successor. Thus, the court affirmed the lower court's judgment that the conveyance did not give Property Owner an enforceable right to the easement as a trustee's heirs may not freely convey trust property in fee simple to third parties under state law. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing as the case precedent.

Federal Circuit

Caquelin v. United States, No. 2016-1663, 2017 WL 2684180 (Fed. Cir. June 21, 2017).

Landowners owned property that was subject to a railroad easement. Railroad and its predecessors had held the easement since 1870, which was limited to railroad use only. In May 2013, Railroad sought to abandon the line, effective July 5, 2013. The Surface Transportation Board ("Board") issued a Notice of Interim Trail Use or Abandonment ("NITU") that prohibited Railroad from abandoning the line for 180 days, which blocked the easement interest from reverting to Landowners. Landowners sued the United States under the Tucker Act, alleging that the temporary blocking of the reversion constituted a compensable temporary taking. Relying on a prior decision, the district court granted summary judgement in favor of Landowners, finding that a categorical taking had occurred. The United States appealed, arguing that the standard for regulatory takings and temporary takings should have applied. The Federal Circuit Court of Appeals vacated the judgment and remanded the case so the record could be further developed to determine whether the proper standard was used in resolving the merits of Landowners' takings claim. This case is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

Easements – State

Alabama

Commonwealth Savingshares Corp. v. Fayetteville Holdings, LLC, No. 2150916, 2017 WL 2822317 (Ala. Civ. App. June 30, 2017).

Servient Estate Owner ("Servient") brought an action seeking an injunction and damages based on theories of trespass and nuisance. After an annexation in 2004, the properties became subject to Scottsboro Zoning Ordinance. Servient argued that the ordinance prohibits the presence of the Dominant Estate Owner ("Dominant"), an industrial conveyor, and extinguishes the easement. The general rule in Alabama is that "an easement given for a specific purpose terminates as soon as the purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment." Servient argued that the ordinance made the easement impossible for accomplishment. However, the ordinance allows nonconformities to continue to exist if the nonconformities existed before the ordinance began to govern the property. Therefore, the court had to determine whether the use of the easement continued to exist. Existing use is determined regarding the fact of discontinuance or apparent abandonment. However, in Alabama, discontinuance in zoning ordinances is equivalent to abandonment. Under Alabama law, a temporary cessation is generally not held to be abandonment. The appellate court held that while Dominant was not actively using the easement during the annexation, testimony supports the lack of intent to abandon the use of the easement. Therefore, the court determined that Dominant qualified as a permissible nonconformity under the ordinance. Servient further argued that Dominant was not registered as a nonconformity and the easement should not be preserved. However, the court held that failing to register only creates a rebuttable presumption of abandonment and Servient failed to demonstrate an intent to abandon. The court further held that Servient is not entitled to damages for nuisance because Servient purchased the property with notice of the easement and presented no facts that Dominant acted outside the scope of the easement.

Arkansas

Clark v. Caughron, 2017 Ark. App. 409, 2017 WL 3724989.

Landowner asked Neighbor for a right-of-way to gain access to landlocked property, but Neighbor refused. Landowner subsequently sued to quiet title for encroaching fence line and unlawfully removing timber belonging to Landowner. Neighbor counterclaimed that fence line established boundary by acquiescence, or in the alternative, by adverse possession. After a bench trial, the trial court held that "by acquiescence and open and notorious possession for a period in excess of seven years that the parties' boundaries in the areas in dispute should be fixed by the old fences," and found in favor of Neighbor. On appeal, the appellate court determined that the trial court was correct in finding that the fence boundary lines were established by acquiescence and further, that Neighbor owned the disputed property by adverse possession. As such, the court affirmed the trial court's ruling, holding that its findings were not clearly erroneous.

California

DIII Properties LLC, v. EDF Renewable Energy, Inc., A148356, 2017 WL 3712454 (Cal. Ct. App. Aug. 9, 2017).

The predecessor-in-interest of Landowner granted an easement over its land to the predecessor-in-interest of a wind energy project Operator to allowing Operator to maintain a wind farm to generate electricity ("Project"). A dispute arose over the scope of the easement and whether it allowed the use of underground lines placed by Operator across a corner of Landowner's property to transmit electricity generated by wind turbines on neighboring pieces of property. Landowner brought this action for declaratory relief, quiet title, and trespass. The trial court concluded the written easement, as clarified by a subsequent letter agreement, did allow the placement of the line and its use to transmit off-site electricity. It accordingly granted summary judgment in favor of Operator on Landowner's claims. Landowner appealed and the appellate court affirmed. The court held that because a letter agreement and related email correspondence show that the easement allows the placement of lines transmitting energy from all of the Project's turbines, and because the evidence shows the Project includes turbines not located on the property in dispute, the Landowner could not prevail on its claims for relief and summary judgment in favor of the Operator was proper. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Hawaii

Gold Coast Neighborhood Ass'n v. State, 403 P.3d 214 (Haw. 2017).

Neighborhood Association sued State, seeking a declaration that State was required to maintain a seawall. State filed a separate declaratory judgment against Neighborhood Association, seeking a declaration that it did not have an easement over the seawall. The two actions were consolidated. State contended that state law requires State's formal consent as a condition of implied dedication of private property, while Neighborhood Association argued that state law did not require State's formal acceptance as a condition of implied dedication. Relying on common law and case law, the court held that formal acceptance is not a necessary prerequisite to implied dedication. Because of State's statements and its repairs and maintenance of the seawall as well as its use by the public, the court ruled that State had acquired an easement over and across the seawall by virtue of implied dedication and that State did not own the seawall or the real property underneath it by virtue of surrender.

Idaho

Fuquay v. Low, 397 P.3d 1132 (Idaho 2017).

Property Owners sued Neighbors, seeking declaratory judgment for prescriptive easement across private road on Neighbors' properties. District court granted summary judgment for Neighbors concluding that Property Owners failed to present evidence of any hostile or adverse taking, a required element in proving the existence of an easement by prescription. Accordingly, the trial court found the easement was permissive and could be withdrawn by Neighbors at will. Owners appealed. The Supreme Court of Idaho affirmed, holding first that Property Owners use of the easement was presumptively permissive because the use of the easement was "in common" with Neighbors and that Property Owners had not rebutted that presumption with an independent act that would have put Neighbors on notice that the use of the easement was no longer permissive. Second, the court reemphasized the need for an adverse taking and that no use can be considered adverse unless it constitutes an actual invasion on the rights of the owner.

Regan v. Owen, No. 43848, 2017 WL 3927024 (Idaho Sept. 8, 2017).

Easement Holder sued Landowner after a dispute arose as to whether a prescriptive easement was extinguished by operation of a former Idaho statute when the land was sold by a tax deed. This case represents the second time the issue has been appealed Supreme Court of Idaho. The first came after the district court found that the deed contained mutual mistake and should be reformed to reflect an express easement, but on appeal the court held that the deed should not be reformed. On remand the court found that the prescriptive easement was extinguished based on Idaho statute stating that tax deeds convey property free of all encumbrances. By the time the supreme court heard this case, the statute had been amended as a response to the court's first impression so that title conveyed by tax deeds are free and clear of encumbrances monetary in nature, not all encumbrances. Regardless, the court began by determining that the district court was correct in finding that the prescriptive easement was an encumbrance, based upon the plain, literal interpretation of the statute, and was therefore extinguished in the tax deed conveyed to Landowner. Even though the statute had been amended to prevent easements from being terminated by the conveyance of a tax deed, the court then determined that the amended statute did not apply retroactively. Additionally, the court affirmed the district court's dismissal of Easement Holder's due process claim that it did not receive notice of the pending issuance of a tax deed for the servient estate. Since the easement was prescriptive, there was no official filing that it existed. Therefore, the existence of the easement was likely unknown, even if valid, and notice to surrounding landowners not required, just to record owners or parties in interest.

Kentucky

Majestic Oaks Homeowners Assn., Inc. v. Majestic Oaks Farms, Inc., 2016-SC-00213-DG, 2017 WL 4310491 (Ky. Sept. 28, 2017).

Homeowners' Association ("HOA") sued Developer to stop Developer's continued use of an easement for ingress and egress after a majority of HOA members voted in favor of its termination. Developer's recorded subdivision plat included a declaration of covenants, conditions, and restrictions incorporated in the homeowners' deeds that provided Developer's possessory interest terminated at any time by a sixty-seven percent vote. Holding that Developer's easement in gross was defeasible through the declaration's granting language, the Supreme Court of Kentucky found the term easement to fit under the declaration's covenant and restriction umbrellas. The court also noted the contract canon of contra proferentem that construes ambiguity against the drafter when a contract is susceptible to two meanings. Therefore, the court ruled in favor of HOA and found the easement to be defeasible and as having been validly removed.

Shields v. Univ. of Louisville Found., Inc., No. 2015-CA-001679-MR, 2017 WL 2705402 (Ky. Ct. App. June 23, 2017).

Landowner and Neighbor each conveyed a one-half undivided interest to each other in their abutting property. At issue in the case is if Neighbor was also granted in fee simple the fifteen-foot roadway across Landowner's property, or if Neighbor was only granted an easement across the property. Landowner argued that the roadway was an easement across its property for Neighbor's use, whereas Neighbor argued it owned it in fee simple. Based on the language of the deeds, the trial court found for Landowner, that

Neighbor only had an easement across Landowner's property. The appellate court affirmed.

Massachusetts

Baker v. Town of Plymouth, 16-P-996, 2017 WL 3623502 (Mass. App. Ct. Aug. 24, 2017).

Landowner sued Town, claiming that a decree of registration for land written in 1911 gave Landowner an easement, and he sought to enjoin Town from interfering with the easement. The trial court granted Town's motion for summary judgment, finding that no easement existed beyond Landowner's narrow implied easement to cross Town's land to the sea. In affirming the judgment, the appellate court held that no express easement existed, because there was no language within any deed that suggested that Town, the dominant estate, intended to grant Landowner any easement. The language "with all the privileges and appurtenances thereto belonging" is insufficient to create an easement. That language is similarly insufficient to create an implied easement, because the court could not infer an intent on the part of the grantor to grant an easement over Town's land. Therefore, Landowner has no easement greater than any citizen who may use Town's road for the limited purpose of traveling along one road to the sea. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Michigan

Oakland Twp. Parks & Recreation Comm'n v. Marlowe, No. 332020, 2017 WL 2989062 (Mich. Ct. App. July 13, 2017).

Landowners appeal the trial court's decision favoring Township in a dispute regarding adjoining parcels of real property. The appellate court affirmed the trial court's decision. In this case, a portion of real property owned by Township was utilized by Landowners without Township's consent. Township sent many notices to Landowners to stop using the property, but to no avail. Township filed a four-count complaint against Landowners alleging claims of trespass and quiet title or ejectment. The issue was whether a genuine issue of material fact exists as to whether ownership rights to the property at issue had vested to Landowners or the previous owner fifteen years prior. The appellate court reviewed the issue de novo and held that Landowners had no vested property rights in the disputed property, affirming the decision of the trial court. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Montana

Fox v. BHCC II, Inc., 2017 MT 218, 388 Mont. 443, 401 P.3d 705.

Easement Holder ("Holder") held a secondary easement that permitted him to distribute irrigation water and maintain an irrigation ditch on Landowner's property. Holder sued Landowner, alleging that by planting trees and shrubs and expanding the landscape, Landowner had interfered with Holder's easement because Holder was no longer able to access the ditch with his large equipment and the foliage shedding disrupted the flow of the water. Instead of ordering Landowner to remove the trees and shrubs, the district court accepted Landowner's judicial admission and tender and found that Holder failed to prove that Landowner unreasonably interfered with Holder's rights under the secondary easement. The Montana Supreme Court affirmed. The court noted that Holder could still access the property to inspect, repair, or maintain the irrigation ditch; while Holder may no longer utilize his large equipment, he could still use smaller equipment to maintain the ditch; and, moreover, Holder would not be required to purchase smaller equipment, because Landowner, and not Holder, had been performing the maintenance regularly since 1999.

New York

Bank of Akron v. Spring Creek Athletic Club, Inc., 59 N.Y.S. 3d 214, (N.Y. App. Div. 2017).

Grantee held solar and wind energy easements over two properties. Bank initiated foreclosure proceedings regarding the two properties. Bank moved for summary judgment, and the lower court granted its motion. Grantee appealed, arguing that the easements he held were not subject to foreclosure. The court determined that the easements were interests in reality that were subject to foreclosure, and since the mortgage was prior in time to Grantee's easements, the easements were subject to the mortgage.

Pennsylvania

In re Petition of Adams, 170 A.3d 584 (Pa. Commw. Ct. 2017).

Landowner leased his land to a natural gas production company that created a private road ("Road") for business operations that ran through Neighbor's property. Neighbor initially used the Road as a convenient right of way, but then gates were erected to keep him out. Neighbor had a separate accessway to his property by way of a treacherous path once used by a logging operation to roll logs downhill. Neighbor filed a petition to open the Road. The trial court granted the petition and appointed a Board of View ("Board") to visit the properties and determine if the use of the Road was necessary for access to Neighbor's property. The Board found that the additional logging accessway would be too expensive and arduous to feasibly be created into a safe road, so Neighbor's property was effectively landlocked without access to the Road. The trial court accepted the Board's findings, and Landowner appealed. On appeal, Landowner argued that the Road was not necessary for Neighbor's access to his property since the logging trail also granted access to the property. The appellate court, using state precedent, declared that "necessary" did not mean absolutely necessary, and that if all other accessways are "extremely difficult and burdensome" the land will be considered virtually landlocked. Neighbor argued that the use of the Road by the natural gas company supplied a public utility, and the taking was for a public use. Neighbor also argued that his property was dedicated for public hunting, which is also a matter of public concern. The appellate court found these arguments to be compelling and held that the taking was reasonably necessary and for a public use, affirming the trial court.

Tennessee

Stinson v. Mensel, No. M2016—00624—COA—R3—CV, 2017 WL 2972219 (Tenn. Ct. App. July 12, 2017).

Landowner's property was burdened by an easement for Neighbor to ingress and egress to its home. Landowner sued Neighbor, alleging that it unlawfully bulldozed the easement, encroached onto Landowner's property, and used threats and intimidation to prevent Landowner from coming on or using the non-exclusive easement. Neighbor counter-sued, alleging that Landowner was preventing Neighbor from enjoying the peace and use of its easement, which was part of Neighbor's driveway. The trial court found that Landowner was liable to Neighbor for nuisance, intentional infliction of emotional distress, and invasion of property. The court enjoined Landowner from having any use of the easement. Landowner appealed and the appellate court affirmed the trial court's judgment regarding the nuisance claim, but reversed the judgment of the trial court with respect to the intentional infliction of emotional distress and invasion of privacy claims. The court reasoned that Neighbor could not have expected privacy or seclusion on the land encompassing the easement that it shared with Landowner. Furthermore, the court noted that Neighbor did not meet its burden of proof that it experienced "serious mental injury," as required in an intentional infliction of emotional distress claim. The court also vacated the injunction against Landowner, noting that such an injunction would prohibit it from the lawful use of its property.

Texas

Muhammad v. Plains Pipeline, L.P., No. 12—16—00189—CV, 2017 WL 2665180 (Tex. App. June 21, 2017).

Company originally filed a petition in a condemnation action against Landowner seeking easement rights for the construction and operation of a pipeline through and across real property. In response to the petition, the trial court appointed three disinterested special commissioners to assess damages due to the acquisition through eminent domain. The special commissioners held a hearing to assess the damages, at which Landowner appeared in person. The special commissioners awarded landowner $3,191 in damages, which was then filed with the court two weeks later. Neither party objected to the award. Company filed a motion for judgment in absence of any objections and the court held a hearing at which it entered a judgment of condemnation adopting the special commissioner's recommendation of $3,191 in damages. Landowner appealed. The appellate court held that it lacked jurisdiction to consider the appeal because neither party filed objections to the special commissioners' award. It specifically referenced the property code and reasoned that no appeal can be taken when the trial court renders judgment based on an award to which neither party filed objections, because it is the judgment of the special tribunal. The court dismissed the appeal for want of jurisdiction.

Utah

Garfield Cty. v. United States, 2017 UT 41, No. 20150335, 2017 WL 3187505.

Utah brought actions in federal court against the United States, "seeking to quiet title to 1,510 rights of way located on federal land." The issue in the case at hand is whether a state code and its predecessor are statutes of limitations or statutes of repose. The Supreme Court of Utah addressed three main issues to this question: (1) should it address the certified question at the risk of issuing an advisory opinion; (2) should it interpret the code and its predecessor as statutes of limitations or statutes of repose; and (3) if it is to interpret the statutes as of repose, should it reform the statutes under its absurdity doctrine. After reviewing the case, the court held it should address the question on its merits, and that even though the plain language rendered them statutes of repose, the court construed the statutes as statutes of limitations as to the claims. The court points to the legislature's intent and the triggering action to determine which to apply to the statute.

Vermont

In re Vermont Gas Sys., 2017 VT 83, Bo. 2016-396, 2017 WL 4216473.

Utility Company, in 2012, had filed a petition with the Public Service Board ("Board") to construct a natural gas pipeline, and under state law. Utility Company could not begin until Board issued a certificate of public good ("CPG") authorizing the project. Board ultimately issued a CPG in 2013 and Utility Company began construction in 2014. Utility Company subsequently sought an easement though a park to complete its pipeline expansion. A group of Vermont residents ("Intervenors") appealed Board's order authorizing Utility Company to condemn the easement. On appeal, Intervenors argued that Board erred in authorizing the condemnation as the park was already dedicated to a public use and the condemnation was thus necessary under the Vermont statute. The Supreme Court or Vermont concluded that because the easement would not materially impair use of the park, the prior use doctrine did not prohibit condemnation. Further, the evidence in the record supported a finding that condemnation of the easement was necessary. The court accordingly affirmed Board's decision but remanded to amend the initial order to reflect that the town would have a right to use the easement area pursuant to the restrictive covenant attached to the land and subject to specified limitations in Board's order.

Washington

Schoenfelder v. Larson, No. 48885-o-II, 2017 WL 3726805 (Wash. Ct. App. Aug. 29, 2017).

Neighbor sued Property Owner, alleging that Property Owner's building of a fence along or near the road would interfere with the purpose of an expressed easement between the parties. Because Neighbor uses a section of Property Owner's property to accommodate passing vehicles via turnout areas, Neighbor sought to quiet title in the express easement and for a prescriptive easement in the turnout areas. To determine whether Neighbor had established a prescriptive easement, the court examined whether the claimant had used the land for a period of ten years and showed that: (1) the claimant used the land in an open and notorious manner; (2) the use was continuous or uninterrupted; (3) the use was on a uniform route; (4) the use was averse to Property Owner; and (5) the Property Owner had knowledge of the use and could have asserted and enforced his rights. Property Owner argued that the prescriptive easement was unsupported by substantial evidence as it alleged that the former property owner had not blocked access to the turnout areas as an assertion of its ownership rights. The court ruled against Property Owner's attempt to construct a fence in proximity to the easement and affirmed the trial court's reliance on extrinsic evidence to determine the intentions of the original parties due to the express easement's ambiguity. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Other Land Issues – Federal

Supreme Court

Murr v. Wisconsin, 137 S. Ct. 1933 (U.S. 2017).

Landowners own two Lots, Lot E and Lot F, which they inherited from their parents in 1995 and 1994 respectively. The Lots were located along the St. Croix River, in Wisconsin, and subject to State preservation laws which said that separate lots must have at least one acre suitable for development unless neighboring lots, with less than one acre suitable for development, were owned by separate owners in 1976, when the law was passed. Additionally, state law allowed for a merger of lots when neighboring lots came under common ownership, meaning that even if the lots fell under separate ownership regulations pre-1976, if sold or granted to a common owner after 1976, the neighboring lots would merge and the one acre suitable for development requirement would be instituted. Landowners' parents held the Lots in separate ownership until they granted the Lots to Landowners, at which time the Lots merged. Landowners sought a variance from County, so that Landowners could sell Lot E to fund improvements on Lot F. County denied the variance sighting that the Lots had merged and that even with the merged Lots, the total land suitable for development was still less than one acre, therefore the variance to sell Lot E could not be granted. Landowners sued arguing that by not allowing the variance, the State effectively took their property without just compensation. The state courts held there was no taking under the merger regulations, the proper property unit was the combined Lot E and F, the decrease in value was less than ten percent, and Landowners knew the laws when they acquired the Lots. The Supreme Court of the United States affirmed finding that Landowners had not experienced a taking under *Lucas*, which requires Landowners to be deprived of all economically beneficial use of their property, or under the more general *Penn Central* test.

Third Circuit

Norfolk S. Ry. Co. v. Pittsburgh & W. Va. R.R., 870 F.3d 244 (3d Cir. 2017).

Railway sought a declaratory judgment that it was not in default of a Lease between Railway and Railroad Company. The district court determined that Railway was not in default any Lease provisions. The Third Circuit Court of Appeals affirmed, holding that: (1) the district court appropriately considered course-of-performance evidence in interpreting the Lease; (2) Railroad Company did not expressly reserve any subsurface rights in the Lease, which allowed Railway to enter into third-party subsurface extraction agreements; (3) Railway had not violated the Lease's indebtedness provision; (4) the Lease did not require Railway to pay Railroad Company's attorney or litigation costs; and, (5) Railway was entitled to nominal damages for fraud.

Forth Circuit

Quinn v. Bd. of Cty. Comm'rs for Queen Anne's Cty. 862 F.3d 433 (4th Cir. 2017).

County planned to extend sewer systems to all streets on an island with failing septic systems. Both developed and undeveloped lots on those streets would receive the sewer service, but the service would not extend to streets with only vacant lots. This plan would also prevent future connections outside the initial service area, unless the lot fell within the Grandfather/Merger provision for lots smaller than the minimum size under the zoning regulation but are merged with larger contiguous lots. Landowner sued after realizing that he would be prohibited from developing his smaller isolated lots that fell outside of the initial service area. Landowner argued that County's plan was a regulatory taking, requiring compensation under the Fifth Amendment, and County's action violated his due process and equal protection rights. Landowner also argued the State violated his due process rights by approving the sewer extension plan. The district court dismissed Landowner's claim against the State and granted County summary judgment. On appeal, the Fourth Circuit affirmed the decision. The court rejected Landowner's Fifth Amendment Takings Clause claim based on his lack of sewer service due to: (1) the lack of economic harm suffered by Landowner; (2) the highly speculative nature of the initial purchase of land; and (3) the reasonableness of the Grandfather/Merger provision in preventing overdevelopment and health hazards from failing septic systems. The court denied Landowner's due process challenge to the Grandfather/Merger provision because State law does not recognize a property interest in sewer services. Finally, the court denied Landowner's equal protection claims, because County's purposes of limiting costs for the sewer system and preventing overdevelopment provide a rational basis for the disparate treatment of landowners on the island.

Schoene v. McElroy Coal Co., No. 16-1788, 2017 WL 3037455 (4th Cir. July 18, 2017).

Landowner sued Mining Company for alleged damage to the surface estate and residence caused by subsurface operation. Landowner filed both common law claims for loss of support to the surface estate and statutory claims under the Mining Control and Reclamation Act ("Act"). Mining Company moved for partial summary judgment, alleging that a waiver clause contained in the 1902 deed precluded relief on Landowner's common law claim and that the Act did not authorize the relief Landowner sought in his statutory claims. The trial court denied Mining Company's motion for summary judgment and eventually awarded Landowner $547,000. Mining Company appealed to the Fourth Circuit Court of Appeals. The appellate court remanded the case to the Supreme Court of Appeals of West Virginia because deciding the issues on appeal—specifically the deed language—in the case will require the application of competing principles of case law and the interpretation of West Virginia statutory and regulatory provisions that are silent on the disputed issues in this case. This case is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

Sixth Circuit

Lyles v. RDP Co., Nos. 16-6346, 16-6347, 2017 WL 3393947 (6th Cir. Aug. 8, 2017).

Lessors sued Lessees asserting numerous claims and a declaration that their leases granting Lessees a right to quarry limestone on their property is no longer valid. Lessors became frustrated with the quarrying operations, felt there was overuse under the lease, and the ability for the lease to be extended by Lessees. Both Lessors had separate, but similar, leases dating back to the 1977. Generally, the leases provided Lessees could mine for limestone on the property and provide a royalty payment to Lessor and that Lessees could extend the lease in five-year increments for ninety-nine years from the year of the original lease execution. At trial the court found for Lessees. The Sixth Circuit Court of Appeals reviewed the case. The court held that any trespass claims brought by Lessors were without merit because Lessees had obtained a prescriptive easement on the property by continuing with the alleged overuse for more than fifteen years after an objection by one Lessor. Additionally, the court held that lease did not obligate Lessees to provide notice or some sort of writing when they elected to extend the lease for another five-year increment. Since Lessors continued to accept and cash royalty payment checks, many of their complaints that Lessees did not comply with terms of the lease were waived. The court also reviewed Lessors request that the leases be reformed because a change in circumstances rendered the lease unconscionable and because they were procedurally and substantively unconscionable when they were originally executed. The court rejected the request and affirmed the district court's refusal to reform the leases. This is an unpublished opinion of the court;

therefore, federal court rules should be consulted before citing the case as precedent.

Ninth Circuit

Guidiville Rancheria of Cal. v. Zinke, No. 15-15221, 15-17069, 2017 WL 3327828 (9th Cir. Aug. 4, 2017).

The Guidiville Band of Pomo Indians ("Tribe") sued City for breach of a Land Disposition Agreement ("LDA") between City and Tribe as well as for breach of the implied covenant of good faith and fair dealing. Trial court granted City's motion for judgment on the pleadings and dismissed the breach of contract and bad-faith claims, denied Tribe leave to amend, and awarded City legal fees. The Ninth Circuit Court of Appeals held that Tribe plead a plausible claim of breach of the implied covenant of good faith, reasoning that a third amended complaint evidenced City violating such by interfering with Tribe's ability to obtain federal approval for a casino, thereby preventing Tribe from satisfying a condition precedent of the LDA. The court agreed that the amended complaint regarding breach of express terms of contract were conclusory and unsupported by any specific allegations, however, Tribe should have been able to augment these allegations in a fourth amended complaint. Disallowing such, the court concluded, was an abuse of the lower court's discretion and that determination is reversed. This opinion has not been released for publication; therefore, federal court rules should be consulted before citing the case as precedent.

E.D. Louisiana

Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., No. 16-713, 2017 WL 3601215 (E.D. La. Aug. 22, 2017).

Landowner sued Pipeline Company, alleging that Pipeline Company failed to maintain canals which Pipeline Company's predecessors constructed on a right of way servitudes across Landowner's property. There was no dispute that the canals had grown to a size not contemplated in the original agreements, and Landowner brought actions for trespass, breach of contract, and negligence. The district court first dismissed Landowner's trespass claim after deciding that Louisiana law requires intentional, affirmative action to establish trespass. The court then found that Landowner's breach of contract claims had not prescribed because the suppletive rules on servitudes, which Landowner argued imposed an ongoing duty to maintain the canals, applied to the servitude agreements at issue in this case. Because those suppletive rules applied in this case, the court granted Landowner's motion for summary judgment on four of the breach of contract claims. The lack of particular language in the two remaining contracts, however, led the court to dismiss Landowner's two other breach of contract claims. The court also denied Pipeline Company's motion for summary judgment on its duty to dam the canals finding issues of fact to be resolved. Because it could not settle the prescription issue on the duty to dam claim, the court also denied Landowner's summary judgment motion on its claim that Pipeline Company had breached its duty to dam. Finally, the court dismissed Landowner's claims for negligence based on Pipeline Company's failure to maintain the canal because the violation of the duty to maintain at most constitutes a passive breach of contract, which does not also give rise to a tort claim.

E.D. Texas

Tareco Properties, Inc. v. L&S Minerals, *LLC*, No. 6:16-CV-482, 2017 WL 3414868 (E.D. Tex. Aug. 9, 2017).

Development Company held two judgments against Debtors. Debtors quitclaimed 92.71 acres of property to Mineral Company; Debtors allegedly asked Mineral Company to pay them a bonus and to quitclaim the property back to them. Development Company sought to use the property to satisfy the judgments and initiated a lawsuit seeking a Turnover Order. Development Company moved for summary judgment against Debtors and Mineral Company, arguing that Debtors were still asserting a claim to the property against Mineral Company and further argued that it had a claim to the property because the property transfer lacked consideration. Debtors argued that they no longer had an interest in the property, they had no control over the property, and had further released any claim they would have against Mineral Company for the property. Mineral Company failed to respond to Development Company's summary judgment motion. The district court granted Development Company's motion on two grounds: (1) undisputed facts showed that the Debtors did have a claim to the property; and (2) the subsequent release was insufficient to release that claim since it did not expressly mention a contemplated claim against Mineral Company.

N.D. Alabama

Ryals v. United States, No. 1:16-cv-01879-JEO, 2017 WL 2984881 (N.D. Ala. July 13, 2017).

Landowner acquired title to a forty-acre tract of land ("Property") located within the Talladega National Forest ("Forest") in 1993. Landowner had been familiar with the Property since the 1950's. Landowner sued United States to quite title to the Property pursuant to the Quiet Title Act. United States argued that Landowner or his predecessors knew or should have known of its claim as early as 1936 and, therefore, the twelve-year statute of limitations bared Landowner's claim. The district court held that the claim was not time bared for several reasons including: (1) the President's proclamation in 1936 was insufficient to constitute notice because it did not specifically assert a claim to any private property located within the Forest; (2) the 1986 land survey did not properly mark the property so as to put Landowner or his predecessors on notice; (3) there was no evidence that a 1997 forest map was widely disseminated so as to constitute notice; (4) Landowner repurchased the property in 2014 to remove a cloud from the title; (5) Landowner had been paying the taxes on the Property since he purchased it in 1993; and (6) Landowner complained to the Forest Service about a control burn in 2010 or 2011 which damaged the Property. Therefore, the court granted in part and denied in part the United States' motion to dismiss.

S.D. California

United States v. Kriegsmann, Case No. 15-cv-02744-BAS-BGS, 2017 WL 3966580 (S.D. Cal. Sept. 1, 2017).

In August of 2017, Landowner, Bank, and the Government filed a Joint Motion to Enter Judgment and for Order of Foreclosure and Judicial Sale. This order pertained to two parcels of land and a 1992 promissory note, secured by a deed of trust encumbering the two parcels of land at issue. Landowner executed the promissory note, promising to pay Bank the principal sum of $150,750.00 plus interest and other costs contained in the note. The Government had valid tax liens on all property and rights to property of Landowner. The Government protected its liens by filing Notices of Federal Tax Liens with the County Recorder. Therefore, the Government is entitled to enforce its liens against the property in order to apply the proceeds towards the tax liabilities of Landowner. The court held that the Government's federal tax liens against Landowner's property were foreclosed, thus authorizing the United States Marshal ("Marshal") or an IRS Property Appraisal and Liquidation Specialist ("PALS") to offer the property for public sale. The court then gave the Marshal or PALS representative the responsibility to, upon confirmation of the sale or sales, promptly execute and deliver a deed of judicial sale conveying the property to the purchaser or purchasers. The court also placed the responsibility of preserving the land, including all buildings, improvements, fixtures, and appurtenances thereon, upon the Landowner up until the property was sold. Once the property is sold by the Government, Bank's lien will be paid in full from the sale proceeds before the federal tax liens or any other junior lienholders.

W.D. Wisconsin

Pronschinske Trust Dated March 21, 1995 v. Kaw Valley Cos., No. 16-cv-640-slc, 2017 WL 3498712 (W.D. Wis. Aug. 15, 2017).

Landowner entered into a Mining Lease Agreement ("Lease") with Company granting Company exclusive right to conduct mining operations on Landowner's property. The lease contained three separate provisions for sequential payments to be made by Company. These payments included an "Initial Royalty Credit" to be paid upon the execution of the lease, and the other two, "Commencement Royalty Credit" and "Production Royalties", which were to be paid to Landowner subsequent to mining operations. However, Company walked away from the Lease before ever conducting any mining operations. While Landowner was paid the Initial Royalty Credit, it sued to recover the two remaining payments it believed it was entitled to. Company claimed the plain language of the Lease provide that the two remaining payments were not due to Landowner until materials had been extracted or mined from Landowner's property. The court found that under a plain meaning of the Lease, the two payments subsequent to execution of the Lease were only payable upon commencement of mining operations on the land, not simply preparation for such operations. Thus, Operator's motion for summary judgment was granted. This case has since been appealed, but there is no decision from the higher court as of publication.

Bankruptcy

In re Eicher v. Candler, No. 1:12—bk—10283—NWW, 2017 WL 3732012 (Bankr. E.D. Tenn. Aug. 29, 2017).

Debtors owned two pieces of property, Property 1 and Property 2, at the time of foreclosure. Because Tennessee is a title theory state, a trustee under a deed of trust, not the debtor, holds legal title to a property following foreclosure. In a motion to reconsider, Debtors argued that there was unity of ownership in Property 1 and Property 2 that was severed upon foreclosure of the former, and that upon foreclosure, an implied easement of necessity for the benefit of Property 2 resulted. However, the court held that there was no such unity and no implied easement. In its reasoning, the court noted that it could not be inferred that the Trustee intended to grant an easement over Property 1 for the benefit of Property 2 in which he never held an interest. Had the Debtors transferred their equitable interest in the property, an implied easement from prior use or by necessity may have arisen for the benefit of Property 2 through Property 1. However, because Debtors were not the granters or parties to the actual transfer at issue, any possible inferred intent on their part to reserve an easement for the benefit of Property 2 was irrelevant. The court also reasoned that Debtors did not own Property 2 at the time Mortgagee's deed of trust encumbering Property 1 was executed, so they did not have unity of ownership in Property 1 and Property 2 that could be severed with the execution of the deed of trust encumbering only Property 1. The court also held that even if it was to be assumed that an implied easement arose upon the foreclosure of Property 1, it was then extinguished by the foreclosure. It reasoned that it is well-settled law in Tennessee that a foreclosure extinguishes interests in property, including easements, which are junior to the deed of trust.

Other land Issues – State

Georgia

DeKalb Cty. v. Speir, 801 S.E.2d 627 (Ga. Ct. App 2017).

Lessor and Lessee sued County after a piece of their property was condemned for road improvements. Lessee operated a business from the property and claimed after condemnation and resulting alterations the property, its use for the business was no longer viable. At trial, damages were awarded to both Lessor and Lessee. However, part of the damages awarded were based on the obligation of Lessee to continue making lease payments to Lessor for the duration of the lease, even if the business was no longer viable. County challenged the ruling that allowed in the evidence regarding the post-taking lease obligation used in calculating damages, claiming that the evidence should have been limited to the market value of the land before the taking and immediately after, and not any post-taking lease payments. Upon review, the appellate court noted that business loss evidence is admissible for calculating damages to a lessee after a condemnation action if the evidence shows that there was a diminution in value of the land not condemned. Additionally, the court held that the correct measure of damages awarded to a business after condemnation is the value of the business before and after the taking. Therefore, the obligation to pay the future lease payments affected the market value of Lessee's business after the taking and was properly included.

Idaho

Fletcher v. Lone Mountain Rd. Ass'n, 396 P.3d 1229 (Idaho 2017).

Landowner sued Road Association ("Association") seeking a declaration of rights and obligations regarding a road adjacent to Landowner's property because Landowner wanted to address the dust clouds created by the road's use near his home. The district court found that the lot owners on the property lot that used the road had waived their right to demand contribution to the road from the owners that had not used the road. The court also found that Association's covenant regarding maintenance of the road was ambiguous, and that each owner who used the road had a right to maintain the road but could not force any other owner to contribute to the maintenance without a two-thirds vote of the owners that used the road. The Idaho Supreme Court held that: (1) Association's covenant was not ambiguous; (2) there was no waiver of the right to demand contribution for maintenance of the road after two-thirds of the landowners on each property voted in favor; (3) the dust on the road was not an additional burden on Landowner's servient estate; and (4) Association had no right to maintain the road or obtain involuntary contributions for past expenditures.

Kansas

Grimmett v. Luellen, 399 P.3d 292 (Kan. Ct. App. 2017).

Landowner and Neighbor own adjoining parcels of land. Landowner sued Neighbor to assert he had either an easement by prescription or by implication for a water meter and water lines serving his parcel of land and an easement area adjoining parcels of land owned by both Landowner and Neighbor. The lower court wholly denied Landowner's petition. Appellate court reviewed this case to determine whether the lower court relied on "substantial competent evidence" to support its findings. First, the court held that Landowner did not have an easement by implication for the water lines and water meter on Neighbor's property because—in direct conflict with a state law factor of implied easements— "the water meter and lines are the servitude and were 'in uses at the time of severance.'" Moreover, nothing stopped Landowner from installing his own water lines and meter. Second, Landowner does not have an implied easement for the area adjacent to his parcel because despite Neighbor's placement of a fence in the area both claim right to inconvenience Landowner's mobile home tenants, Landowner failed to prove his claimed easement was necessary. Third, Landowner does not have a prescriptive easement for the water lines and meter because he failed to show exclusivity. Namely, there is no exclusivity because water service to Landowner's parcel continued after Neighbor capped off what he believed to be the only water line. Landowner also fails to show he has a prescriptive easement over the disputed area between the parcels for the same reason. Specifically, Landowner's claim that Neighbor's testimony that he had not used the property for storage units is insufficient in proving exclusivity because that testimony does not mean the disputed property was not *at all* used. Landowner is entitled to no easements. This case is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Shepherd v. Thompson, 397 P.3d 1257 (Kan. Ct. App. 2017).

Seller sold property to Buyer after a divorce where Seller was the sole owner of the surface and water rights. Seller delivered Buyer with a general warranty deed conveying "the surface and water rights" to the real property reserving unto grantor a life estate in and to all the oil, gas, and other minerals lying in and under that may be produced. A few years later a writ of execution was issued in the divorce case of Seller and spouse. The sheriff executed an order of sale that directed the mineral rights of Seller's property conveyed to Seller's spouse. After the death of Seller, Buyer filed petition to quiet title the real property arguing that after the death of Seller, Buyer was the sole owner in fee simple to the mineral rights of the property. The Kansas Supreme Court found that the deed granted Buyer surface and water rights in the real property and reserved life estate in all oil, gas, and other mineral rights to Seller. The court found the deed remained silent as to who received the mineral rights after the death of Seller. The court looked at the rule of construction in interpreting the deed and based on that found that the use of "life estate" showed Seller's intent to retain something less than fee simple title to the mineral rights. This case is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Michigan

Goodrich v. Cook, No. 333418, 2017 WL 3441495 (Mich. Ct. App. Aug. 10, 2017).

Landowners purchased four parcels of land, three of which were properly conveyed to them while the fourth was mistakenly left out of the conveyance. Despite this mistake, Landowners occupied all four parcels, including the disputed property, believing it had been conveyed to them along with the other three parcels. Five years later, Landowners constructed a barn that was partially situated on the disputed fourth parcel of land. After Landowners defaulted on their mortgage, Buyers moved into the house and disputes began concerning the use of a well and liquefied petroleum tank on Buyers' land. Buyers built a fence that blocked an easement that Landowners used to access the water well, meanwhile Buyers also learned that the disputed fourth parcel of land had never actually been conveyed to Landowners. After consulting the tax assessor and discovering who the actual owners were, Buyers contacted said owner, who subsequently deeded the disputed property to them. Buyers then served Landowners with a notice to quit, requesting that they remove their belongings from the disputed property. Landowners refused and filed a quiet title action based on adverse possession. The trial court found for Landowners and the decision was appealed. The appellate court found no basis for reversal, holding that Landowners showed they possessed the disputed property openly, adversely, exclusively, and continuously for the statutorily-specified minimum period. Specifically, the court noted that there was privity of estate between Landowners and their predecessors in interest and that Landowners never intentionally relinquished their claim to the disputed property. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Minnesota

Wescott v. Wabasha Cty. Bd. of Comm'rs, No. A16-1358, 2017 WL 2729597 (Minn. Ct. App. June 26, 2017).

Citizen appealed the decision of the County Board to grant a conditional use permit to construct and operate an agronomy center in a land zoned for agricultural use. The appellate court stated that the threshold question under state statute for determining if a permit was wrongfully granted was whether there was material evidence of potential significant environmental effects. The court held that Citizen had not established material evidence of potential significant environmental effects, thus County Board's grant of the application for a conditional use permit is appropriate. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the cases as precedent.

Nebraska

Andrew v. Vill. of Nehama, No. A-16-208, 2017 WL 2774067 (Neb. Ct. App. June 27, 2017).

In July 2014, Landowners began to install two 12,000-gallon anhydrous ammonia storage tanks upon their property, 0.5 miles north of Village limits, without first notifying Village and requesting a building permit. In September 2014, Landowners submitted an application for a building permit, which was ultimately dismissed by the Village Board of Trustees, who determined that the storage facility was unsafe and a nuisance to the public. In May 2015, the Board of Appeals denied Landowners' appeal. Landowners subsequently filed a petition in error with the district court, seeking reversal of the decision that the storage tanks constituted a nuisance, reversal of the building permit application denial, and an order directing Village to issue a building permit. The court denied Landowners' petition in error, and Landowners then appealed stating that the district court erred in; (1) placing the burden of proof on Landowners to prove the storage tanks did not constitute a nuisance; (2) finding that Village did not need to provide evidence that the storage tanks did constitute a nuisance; (3) finding that there was sufficient evidence to prove that the tanks did constitute a nuisance; (4) finding that there was sufficient evidence to support Village's finding that it lacked adequate protection from an anhydrous ammonia leak; (5) relying on an invalidly enacted Ordinance 2014—1; and (6) failing to direct Village to issue a building permit. The appellate court affirmed the district court decision, holding that Village provided sufficient evidence to deny the permit because the tanks did constitute a nuisance. This case is an unpublished opinion of the court; therefore, state court rules should be consulted before citing as precedent.

New Hampshire

Carlson v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons, Inc., No. 2016-0251, 2017 WL 4182892 (N.H. Sept. 21, 2017).

Church and Trustee both claimed rights to use a third party's private driveway to access a lake and property on the lake. The trial court issued a ruling that Trustee lacked standing to quiet title to the driveway, but that she did have standing to pursue her claim for declaratory relief against Church, ruling that Church had no right to use the driveway. Both parties appealed. Church argued that an easement holder, such as Trustee, only has standing to challenge an alleged trespass if the trespass interferes with the easement holder's rights. Conversely, Trustee argued that regardless of interference, she had standing to challenge Church's trespass. The Supreme Court of New Hampshire vacated the trial court's judgment in favor of declaratory relief against Church, reasoning that Church's claimed right to use the driveway is not inherently adverse to Trustee's right to use the driveway. Furthermore, there was no evidence that Church's use of the driveway interfered with Trustee's use of the driveway, and there was no evidence that Church was likely to overburden or interfere with Trustee's right in the future. Trustee's asserted invasion of rights she seeks to prevent is purely speculative. The court also reasoned that because an easement is a non-possessory interest in land, Trustee cannot bring an action that is traditionally established to protect possession, such as trespass and ejectment. The court then affirmed the trial court's ruling that Trustee had no standing to maintain a quiet title action against Church because the relevant statute provides that a person may only bring a quiet title action against another who may claim to have an adverse interest. Here, no such adverse interest exists.

North Dakota

Paving Dist. 476 Grp. v. City of Minot, 2017 ND 176, 898 N.W.2d 418.

Landowners sued City, alleging that the errors in City's notice of roadway improvements violated Landowners' constitutional due process rights and therefore City's assessments should be invalidated. City performed a special assessment to establish the costs of a proposed roadway improvement project. Notice of the results of that assessment were sent to Landowners, as well as published in the local newspaper. That notice contained maps of the assessment and the cost of the assessment for each property, along with the time and date of a public hearing on the assessment. The City Council approved the assessment one month later, but at the hearing it was made known that the published notices contained an error in the description of the assessment—the resulting fix did not increase the cost, and no new notice was sent out. Three months after the assessment was approved, Landowners sued City for improper notice. The district court granted City's motion for summary judgment without reaching the question of the notice requirement because Landowners failed to follow the state statute requiring such actions to be filed within thirty days of the adoption of the resolution. The Supreme Court of North Dakota did examine the notice requirement, and held as follows: 1) City's decision to create the assessment district and make improvements did not deprive Landowners of property rights, and therefore they had no constitutional right to notice and opportunity to be heard; and 2) North Dakota's constitutional "gift clause" does not reach claims such as this. The decision of the district court, granting City's motion for summary judgment, was affirmed.

Ohio

Ford v. Baska, 7th Dist. Harrison NO. 16 HA 0008, 2017 WL 2665144 (June 19, 2017).

Landowner-1 sued Landowner-2 for breach of warranty deed and seeking a declaratory judgment quieting title against Landowner-2. The trial court granted Landowner-2's motion to dismiss because a previous landowner "lacked authority to transfer the entire mineral interest estate [to Landowner-1] because she did not own the minerals." On appeal, Landowner-1 argues, among other things, that Landowner-2 relied on the wrong state law in its motion to dismiss. Although this court agreed with Landowner-1 on this particular issue, this case instead turns on whether

Landowner-1 was a bona fide purchaser of the land at issue. Landowner-1 could not be a bona fide purchaser if he knew or was on constructive notice of Landowner-2's mineral interests at the time he believed he purchased the land. The court concluded that Landowner-1 was on constructive notice of Landowner-2's mineral interest because Landowner-1's "certificate of transfer referred to the underlying probate matter" which outlined the proper and enforceable conveyance of mineral rights to Landowner-2. Appellate court affirmed the case's dismissal.

Texas

Carter v. Harvey, 525 S.W.3d 420 (Tex. Ct. App. 2017).

Majority Owner, owning 7/8 interest, of a tract of land brought a partition action against Minority Owner, owning the remaining 1/8 interest. Minority Owner responded by raising a claim for equitable adjustment, claiming that improvements on the property that he made through a previously dissolved corporation entitled him to over one-quarter of those improvements. Majority Owner filed and was granted a motion for partial summary judgment as the court held "that the claim in question [was] a corporate claim of [the corporation] that was required to have been brought within three years of [the corporation's] dissolution … [and] was not." Upon later bench trial, the court found that partition in-kind would significantly diminish the value of the land and thus ordered a public sale of the land with the net proceeds being split between the two parties according to their respective ownership shares of the land. Minority Owner appealed claiming that the trial court erred in summarily dismissing his equitable adjustment claims and that the trial court had no jurisdiction because it did not join a necessary party to the case. The court of appeals affirmed the lower court's decision, overruling all of Minority Owner's claims. It stated that he could not stand in the shoes of a dissolved corporation and bring an equitable adjustment claim that the corporation, itself, could not bring; that the sale of the property was in the best interest of both parties and the trial court was in the best position to determine so.

Wisconsin

Scenic Pit LLC v. Vill. of Richfield, 2017 WI App 49, 377 Wis. 2d 280, 900 N.W.2d 84.

Operator managed a solid waste facility and desired to purchase an abandoned gravel pit for a "clean fill" facility, a low hazardous waste landfill. After purchase, Municipality told Operator that land would need to be rezoned for such purpose and that construction, storm water, and erosion permits must be obtained. Operator applied for permit, and Municipality denied. Operator sought declaration that it need not comply with any local approvals. The lower court granted summary judgment for Municipality because the local approvals were not "diametrically opposed" to state interests. Operator appealed. The appellate court held that: (1) local ordinances that conflict with state legislation are preempted by state law; (2) state law exempts clean fill facility operators from applying for local approvals; (3) zoning was expressly enumerated as a local approval by state law; and (4) state law was broad enough to include permitting requirements as a local approval. Thus, the Municipality had no power to require Operator to comply with local approvals. The court reversed and remanded.

SELECTED ELECTRICITY DECISIONS

Traditional Generation

D.C. Circuit

City of Orangeburg v. Fed. Energy Regulatory Comm'n, 862 F.3d 1071 (D.C. Cir. 2017).

Citylocated a willing supplier of wholesale power in neighboring North Carolina but, according to City, the deal was scuttled by the North Carolina Utilities Commission ("NCUC"). The Federal Power Act ("Act") states that authority over interstate *wholesale* power sales belong to the Federal Energy Regulatory Commission ("FERC"), not state agencies like NCUC. City alleges that, in exercising its *retail* ratemaking authority, NCUC interposed itself as a gatekeeper for access to the neighboring state's most affordable and reliable wholesale power, thereby intruding upon FERC's exclusive jurisdiction. City challenged FERC's approval of an agreement between two utilities, arguing that the agreement constitutes an authorization of NCUC's "unlawful regime." FERC interposed a threshold objection to City's petition, arguing that City lacks constitutional standing for reviewing such a petition. The District of Columbia Circuit Court of Appeals emphasized that the Act affords judicial review only to parties who have been "aggrieved" by an order issued by FERC and a party is "aggrieved" only if it has standing. To satisfy these "twin demands," City must show an actual or imminent injury in fact, traceable to the challenged agency action, that will likely be redressed by a favorable decision. The court held that City had standing to challenge FERC's approval because City demonstrated an imminent loss of the opportunity to purchase a desired product (reliable and low-cost wholesale power), and that injury is traceable to the FERC's approval of the agreement at issue. Accordingly, the court vacated in part the orders approving the agreement and denying rehearing, and remand to FERC for further explanation.

Traditional Generation – State

New York

Riverkeeper Inc. v. N.Y. Dep't of Envtl. Conservation, 59 N.Y.S.3d 806 (N.Y. App. Div. 2017).

Environmental Group sued Department of Environmental Conservation ("DEC") after DEC issued updated operating permits to the owners of an electrical production Station. Prior to issuing the permits, DEC made available draft versions which the public could comment on or raise objection to. Environmental Group argued that DEC was also required to hold a public adjudicatory hearing prior to issuing the final permits, and thus sought declaratory judgment to annul the final permits and DEC's determination that Station would have no significant impact on the environment. The lower court dismissed Environmental Group's claim; its appeal followed. The appellate court affirmed. The court reiterated the premise that its judgment is not substituted for that of the agency responsible for making the determination, but may only ascertain whether there is a rational basis for the agency's decision or whether it is arbitrary and capricious. The court held that DEC's determination that an adjudicatory hearing was not required prior to issuing permits was not arbitrary and capricious, reasoning that the burden fell upon Environmental Group to raise its concern which would illuminate a need for such a hearing, which it did not met. The court also held: (1) DEC had rational basis to conclude that discharge of hot water would comply with regulatory requirements; (2) DEC's determination that owner of Station was not required to undergo new source review under Title V of Clean Air Act was rational; and (3) DEC complied with state law.

Renewable Generation - Federal

Second Circuit

Allco Fin. Ltd. v. Klee, 861 F. 3d 82 (2d Cir. 2017).

The State legislature enacted a Statute authorizing the Department of Energy and Environmental Protection ("DEEP") to solicit proposals for renewable energy, select winners, and direct the state's utilities to enter into power purchase agreements with the winners. Development Company submitted proposals for five solar projects; none were selected.

Development Company sued DEEP, alleging that implementation of the Statute effectively fixed wholesale energy prices and was preempted by the Federal Power Act ("FPA"). Development Company sought to void the contracts with the chosen projects and further sought to enjoin DEEP from violating the FPA or the Public Utilities Regulatory Policies Act ("PURPA"). There was a question as to whether Development Company had standing, which was ruled in the affirmative by the Second Circuit Court of Appeals. Still, the appellate court affirmed the district court's decision to dismiss Development Company's complaint. The court found that the Statute's authorization of DEEP to direct utilities to enter into contracts did not amount to compulsion and, therefore, did not violate the FPA. Regarding Development Company's preemption claim, the appellate court found that State had the regulatory power to specify the sizes and types of generators that may bid into the 2015 request for proposal, and, furthermore, incidental effects on wholesale prices did not amount to a regulation of the interstate wholesale electricity market that would infringe on FERC's jurisdiction. Regarding Development Company's dormant commerce clause claim, the appellate court rejected the claim of discrimination against two of its facilities for two reasons. First, the court found that DEEP's rejection of another state's renewable energy certificate simply had an indirect effect of interstate commerce. Second, the court found that Company failed to show that the charged it alleged were discriminatory were anything more than use fees. This case has since been appealed, but there is no decision from the higher court as of publication.

Forth Circuit

City of Rockingham v. Fed. Energy Regulatory Comm'n, No. 15-2535, 2017 WL 2875112 (4th Cir. July 6, 2017).

Anticipating expiration of its license, Operator filed a renewal application with the Federal Energy Regulatory Commission ("FERC") for its two North Carolina hydroelectric facilities. After FERC issued its "Order Issuing New License" to Operator, City filed a petition for review claiming that FERC violated the: (1) Federal Power Act ("FPA"); (2) the National Environment Policy Act ("NEPA"); and (3) the Endangered Species Act ("ESA"). First, City does not claim that FERC's order falls outside its discretion pursuant to the FPA, it only claims that its preferences for what should have been in FERC's order were not properly considered. However, because City's preferences were not specifically required by law and FERC sufficiently addressed City's concerns in its order and elsewhere, the court reasoned that FERC did not violate the FPA. Additionally, several of the conclusions made by FERC in its order were made with scientific expertise., which the court readily deferred to. Second, City failed to prove FERC violated NEPA because it conceded that FERC's "considered and rejected" it's proposal regarding water flow that City now requests be reviewed. Third, the court reasoned that FERC did not violate the ESA because FERC's choice to use a particular type of analysis falls squarely within its discretion and such a "scientific determination" is not a decision the court was willing to make. Further, FERC's decision to not consider City's alternative plan for minimum water flow was not found to be arbitrary and capricious. Ultimately, because City failed to prove the violations of law it claims FERC made and review of the order is therefore denied. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent. This case has since been appealed, but there is no decision from the higher court as of publication.

Renewable Generation - State

Alaska

Daggett v. Feeney, 397 P.3d 297 (Alaska 2017).

Landowner cancelled a Contract with Renewable Energy Contractor ("Contractor") to install wind turbines on his property after discovering that it would violate subdivision's land-use covenant. The Contract expressly held that Contractor would be responsible for all permits, variances, and height restriction waivers. Landowner sued to rescind the Contract and to recover his down payment to Contractor. The lower court found that Contractor was not properly licensed and Landowner was entitled to rescission for misrepresentation. Additionally, the court awarded damages to Landowner minus Contractor's equitable setoff. After Contractor failed to satisfy judgment with ninety days, the lower court issued an amended final judgment and concluded that Contractor's successor company was liable to Landowner. Contractor appealed and Landowner cross-appealed the determination of the setoff amount. The Supreme Court of Alaska held that the lower court had clearly erred in its the setoff calculation because it used what was supposedly paid and not the lower wholesale price actually paid by Contractor. While Contractor was entitled to offset its cost, the court concluded, it could only do so to the "extent that their costs are greater than the profit they gained." Therefore, the court reversed and remanded to the lower court to determine the setoff amount, and affirmed the remaining judgements.

Pennsylvania

Hommrich v. Commonwealth, No. 674 M.D. 2016, 2017 WL 3203437 (Pa. Commw. Ct. July 28, 2017).

Resident sought to develop alternative renewable energy assets, specifically solar facilities, for his own use and for the benefit of himself and his heirs. He planned to build one facility per year between 2017 and 2019, each facility having a nameplate capacity of 3,000 kilowatts in size. The proposed projects were within the service territory of Pennsylvania's electric distribution companies ("EDCs"). The General Assembly authorized Public Utility Commission ("PUC") to develop technical and net metering interconnection rules under state law. Resident claimed that PUC exceeded its statutory authority by deciding eligibility for net metering, arguing that his proposed projects qualify for net metering under the state law but could be disapproved under PUC's imposition of new regulatory definitions and review process. This regulatory threat, Resident argued, would prevent investors and lenders from even participating in the due diligence phase, thus preventing him from obtaining funding for his projects. PUC responded with preliminary objections, asserting that the regulations have no direct and immediate effect on Resident. The court sustained PUC's preliminary objection for legal insufficiency, reasoning that Resident did not allege how the application of the regulations against the existing projects would cause him present harm to justify bypassing the normal post-enforcement review process.

Vermont

In re New Haven GLC Solar, LLC, 2017 VT 72, SUPREME COURT DOCKET NO. 2016-125, 2017 WL 3668583.

Town appealed decision of the Public Service Board ("Board"), which had issued a certificate of public good ("CPG") to Company for construction of a net-metered solar array within Town. Town asserted that Board acted in excess of its authority by issuing the CPG without: (1) holding a hearing on issues raised by Town; (2) giving due consideration to Town's recommendations or Town plan; and (3) following its own mandatory regulations on interconnection procedures. The Supreme Court of Vermont held that while Board was required to hold a technical hearing to consider the project's ability to interconnect with the existing system, it was not required to hold a hearing based on Town's general objections. The court reversed the Board's CPG issuance and remanded to consider Town's comments.

In re Programmatic Changes to Standard-Offer Program & Investigation into Establishment of Standard-Offer Prices, 2017 VT 77, Case No. 2016-399, 2017 WL 3662392.

Applicant appealed State Board's denial of a motion to reconsider following the decision of State Board to award standard offer contract to five wind projects and two solar projects. Applicant argued on appeal that State Board was required to award standard-offer contracts to several solar projects because they provided sufficient benefits to the operation of State's electric grid, as noted in state statute. The Supreme Court of Vermont held that because Applicant's claims related to benefits to the electrical grid were not raised or decided previously, the court must decline to address them on appeal. The court concluded that State Board did not err in denying Applicant's motion of reconsideration.

Rate Case – Federal

Sixth Circuit

MISO Transmission Owners v. Fed. Energy Regulatory Comm'n, 860 F.3d 837 (6th Cir. 2017).

Members of an association of public utilities ("Members") petitioned for review orders of Federal Energy Regulatory Commission ("FERC") that permitted two departing utility members to not pay costs under provisions of Tariff for projects that an independent system operator approved after announcement of their departure but before they left. On appeal, Members claim that FERC's interpretation of the Tariff was incorrect and did not align with the rational of its prior orders. The Sixth Circuit Court of Appeals affirmed FERC's interpretation based on several findings. First, based on the language of the Tariff, departing utility members had no monetary obligations when they left because construction of projects had not begun. Second, departing utility members could not be responsible for future costs after departure because the Tariff reallocates costs annually to members based on energy withdrawn. Third, prior orders of FERC related to projects that preceded the existence of current projects, and thus could not conflict with the orders in this case. The court denied Members' petition for review.

D.C. Circuit

La. Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n, 860 F.3d 691 (D.C. Cir. 2017).

Louisiana Public Service Commission ("LPSC") petitioned the District of Columbia Circuit Court of Appeals to review the Federal Energy Regulatory Commission's ("FERC") "bandwidth remedy" which outlined the maximum difference of production costs for several energy-producing companies. LPSC made a complaint to FERC that because energy companies in different states use different depreciation rates to calculate their production costs, Louisiana customers were put at a disadvantage because other states used depreciation rates in a way that was "unjust, unreasonable, unduly discriminatory or preferential." FERC did not agree with LPSC's arguments and continued use of the "bandwidth remedy." LPSC makes three arguments which are reviewed on an arbitrary and capricious standard—thus affording FERC substantial deference. First, that FERC did not give appropriate consideration to evidence submitted by LPSC regarding undue discrimination for Louisiana customers under the "bandwidth formula." Although, LPSC sufficiently demonstrated that states use different depreciation rates, FERC considered this issue and determined LPSC did not meet its burden, which meets this court's requirement that the evidence be confronted. Second, FERC did not depart from its own rules requiring it use its own depreciation rates because it was only overseeing the "bandwidth agreement"—not engaging in ratemaking itself. Finally, FERC did not unlawfully delegate its jurisdiction over wholesale rates because the Fifth Circuit Court of Appeals made clear on this same argument because it has lawfully "exercised, and intends to exercise its . . . review authority." For these reasons, the appellate court denied LPSC's petition for review.

Seminole Elec. Coop., Inc. v. Fed. Energy Regulatory Comm'n, 861 F.3d 230 (D.C. Cir. 2017).

Electrical Cooperative claimed Power Company overcharged it for electricity. Federal Energy Regulatory Commission ("FERC") accordingly ordered a refund, but Electrical Cooperative claims it was entitled to a larger refund for overcharges arising out of Power Company's applied rate. Electrical Cooperative alleged that Power Company violated Schedule 4 of the tariff governing rates that Power Company may charge. Electrical Cooperative claimed that: (1) FERC improperly interpreted the twenty-four-month time-bar provision in the service agreement to limit Power Company's refund liability; and (2) that Schedule 4 of the tariff required Power Company to use apportionment, rather than non-apportionment, to calculate Electrical Cooperative's charges. The District of Columbia Circuit Court of Appeals held that; (1) FERC was correct in concluding that the service agreement between parties required Electrical Cooperative to make any challenges within twenty-four months of receiving the bill; and (2) FERC was reasonable in interpreting ambiguity in tariff to allow Power Company to use non-apportionment to charge Electrical Cooperative for deviating from scheduled usage because the text of the tariff did not compel apportionment. Thus, the appellate court denied Electrical Cooperative's petition for review.

Rate Case – State

California

Jacks v. City of Santa Barbara, 397 P.3d 210 (Cal. 2017).

City imposed a surcharge on electricity bills, which Consumers challenged. Consumers argued that the surcharge is an improper tax, because it was not approved via community-wide vote. The Supreme Court of California determined the surcharge qualified as "compensation for use of government property" rather than a tax. The court holds that Proposition 218, which Consumers rest their argument on, does not place restrictions on City's ability or authority to gather payment for selling or leasing City property, as long as the compensation is reasonably proportional to the value of the property interest conveyed. If it is disproportionate, then it is considered a tax, but the court held this fee is not disproportionate. The court asserts that Proposition 218 does not actually impose any limitations on fees, only on taxes. The court determined that the restrictions are mainly in place to combat abuse, so they only limit disproportionate, outrageous fees. The court overturned the appellate court's order supporting summary adjudication for Consumers, but affirms the appellate court's reversal of the grant of City's motion for judgment.

Russell City Energy Co. v. City of Hayward, 222 Cal. Rptr. 3d 162 (Cal. Ct. App. 2017).

Utility formed a Cooperation and Option Agreement ("Agreement") with Municipality in 2005 to facilitate the construction and operation of Operator's power plant. Agreement contained a Payments Clause that stated Municipality was prohibited from imposing any taxes on the "development, construction, ownership and operation" of Utility's power plant except those taxes linked to the ownership of real property. In 2009, voters approved a Utility Users Tax Ordinance ("Utility Tax") on the usage of electricity and gas. In 2011, Municipality informed Utility that it had to pay the Utility Tax. In 2014, Utility filed a claim against Municipality for breach of contract. Municipality argued that the Payments Clause violated article XIII, section 31 of the California Constitution. Section 31 states that the power to tax may not be surrendered by contract. Utility argued that the Payments Clause should be interpreted as a PILOT (payment in lieu of taxes) agreement and is an exercise of Municipality's taxing power. However, the court found, and Utility conceded, that the complaint does not refer to the Payments Clause as a PILOT agreement and should be interpreted as claimed. Additionally, the court concluded that the Payments Clause, whether interpreted as stated or as a PILOT agreement, violated section 31 and is therefore invalid and unconstitutional. However, the court did conclude that Utility should be allowed to amend its complaint to allege a quasi-contractual restitution claim.

Colorado

Carestream Health, Inc. v. Colo. Pub. Utils. Comm'n, 2017 CO 75.

A health corporation ("Corporation") was a customer of the Public Service Company of Colorado ("Provider"). Though Corporation was a new customer, Provider used information from the previous customer's meter to calculate Corporation's energy usage resulting in an underreport of about 15%. When Provider realized the mistake three years later and attempted to back-bill Corporation for the resulting $716,919.71, Corporation filed a formal complaint with Provider stating that although Provider's tariff allows it to recover for billing errors, it is required to "exercise all reasonable means to assure accurate computation of all bills for gas service," which Corporation argued it did not. Upon a formal hearing, an ALJ determined that Corporation's complaint should be denied because it failed to prove a direct violation of a tariff provision. Corporation's exceptions to the decision were denied by Provider which stated that "[Corporation] did not provide sufficient evidence from which it can be concluded that [Provider] should have foreseen the problem and thereby taken reasonable means to prevent it," and that decision was affirmed in a district court. Upon appeal, the Supreme Court of Colorado agreed with Provider and the district court and compounded that the language "all reasonable means" as read in the tariff meant that rather than requiring some bright-line rule, the tariff called for appropriate measures to be taken given the circumstances; wherein Provider served millions of customers and could not be expected to prevent unforeseeable errors. The court determined that the tariff correctly contemplated this issue by realizing that undercharges were inevitable and creating a policy to back-bill customers to make up for these mistakes. The court also noted that "[a] foreseeability requirement confines the inquiry to those errors [Provider] could have taken reasonable steps to avoid."

Massachusetts

Energy Express, Inc. v. Dept. of Pub. Util., 80 N.E.3d 309 (Mass. 2017).

Because of the unbundling process that took place in Massachusetts in the 1990s, some consumers began purchasing their gas from one entity (a marketer) and having it transported to them by another (a local distribution company). Here, Marketer of natural gas, competing as a supplier of natural gas in the Commonwealth, requested a proportional share of Federal Energy Regulatory Commission's ("FERC") ordered pipeline-rate refunds that Local Distribution Company ("Company") received and had to pass on to its customers under an order from the Department of Public Utilities. The issue in this case was whether the assignment of pipeline capacity by Company to Marketer causes Marketer to become a "customer" of Company, such that Marketer is entitled to a share of that refund under State law. The Supreme Judicial Court accepted the conclusion that only an end consumer, not Marketer, is entitled to the refund. It held that Marketer was not Company's customer and did not actually consume the gas, so it did not qualify it for the department-ordered refunds. However, the court noted that the department-ordered refunds to Marketer's customers, rather than Marketer, did not violate the filed-rate doctrine, which requires that interstate power rates filed with FERC must be given binding effect by State utility commissions determining intrastate rates.

Ohio

In re Duke Energy Ohio, Inc., 150 Ohio St. 3d 437, 2017-Ohio-5536, 82 N.E.3d 1148.

Utility Company's predecessor operated one or two manufactured-gas-plant sites, making Utility Company liable for remediation of those sites under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). After a third party purchased one of the sites and announced plans to construct a residential development on the land, Utility Company initiated remediation of both sites through the Ohio Environmental Protection Agency's Voluntary Action Program. Utility Company then applied to the Public Utilities Commission ("Commission") to have its future remediation costs deferred. Commission granted the application without determining whether Utility Company could recover its deferred costs before filing an application for cost recovery. Utility Company then applied to increase its natural gas distribution rates and to recover its deferred costs. Commission authorized Utility Company to recover its remediation costs, holding that while shareholders should bear some responsibility, Utility Company instituting a "Rider MGP" to recover costs from ratepayers on a per-bill basis is appropriate under state law. Ratepayers appealed the decision of Commission. The Ohio Supreme Court held that: (1) Commission was correct to refuse to apply the "used-and-useful standard" because Utility Company sought to recover costs for environmental remediation not capital investment, and (2) Commission did find a relationship between Utility Company's recovery of remediation costs related to manufactured-gas-plant sites and its current distribution service provision, thus it is proper to allow Utility Company to recover those remediation costs from current distribution customers. The court held that Ratepayers were required to demonstrate Commission's order was either unjust, unreasonable, or unlawful, and that it failed to do so. Accordingly, the court affirmed Commission's order.

Virginia

Old Dominion Comm. for Fair Utility Rates v. State Corp. Comm'n, 803 S.E.2d 758 (Va. 2017).

State Corporation Commission ("Commission"), regulates electric company rates, and reviews occur every two years. During this biennial review, "the Commission considers the company's rates, terms, and conditions for the provision of generation, distribution and transmission services for the preceding two years.”. In 2015, the state legislature enacted legislation which suspended Appalachian Power Company's (“APCO”) biennial reviews until 2020 (to review 2018–2019) and prohibited Commission from adjusting APCO's base rates for any part of this interim period, except for possible temporary, emergency increases requested by APCO. This essentially effected a four-year base rate freeze for APCO. An association of large industrial customers of APCO (“Association”), filed a petition asking the court for: (1) a declaratory judgment that legislation violates the state constitution and, accordingly, that APCO is to make biennial review filings in 2016 and 2018 and (2) an order directing APCO to make such filings. Association asserted that state constitution does not grant the legislature the power to transfer the Commission’s ratemaking authority to itself and that this legislation does just that. Commission stated instead that the constitution was not intended to bequeath to it a plenary power to legislate that is exclusive and superior to that of the legislature as Association implied. The Supreme Court of Virginia stated the same and upheld Commission’s decision that the legislation is constitutional.

Washington

King County v. Washington Utils. & Transp. Comm’n, Case No. 49347-1-II, 2017 WL 3601890 (Wash. Ct. App. Aug. 22, 2017).

County appealed Commission’s order that denied County a declaration that Utility Company was obligated to replace an electrical extension line and recover replacement costs through customer rates. County argued that Commission’s order was erroneous, arbitrary, and capricious because it: (1) found that the electrical extensions line was not a part of the Utility Company’s general distribution system (2) misinterpreted Utility Company’s service agreement with County; (3) considered Utility Company’s economic feasibility; and (4) applied a fact-based analysis. County further argued that the order was discriminatory because it granted undue preference to Schedule 24 customers and resulted in rate discrimination. The trial court affirmed Commission’s order. On appeal, the appellate court held that the order was neither erroneous, arbitrary, or capricious because it was not willful and unreasoning or taken without regard to the attending facts and circumstances. The court declined to review the discrimination issue because there was no actual or existing dispute regarding a discriminatory effect of any rate requiring County to replace the electrical extension line.

Transmission - Federal

D.C. Circuit

Advanced Energy Mgmt. All. v. Fed. Energy Regulatory Comm'n, 860 F.3d 656 (D.C. Cir. 2017).

Organizations objected to the Federal Energy Regulatory Commission's ("FERC") approval of revisions to the rules governing the capacity markets operated by a regional transmission organization. The regional transmission organization wanted to ensure organizations that made capacity commitments in the capacity market provided electricity when their capacity was needed, so the regional transmission organization received approval of revised capacity market rules to FERC. After approval by FERC, Organizations raised numerous challenges on appeal to the District of Columbia Circuit Court of Appeals. First, it claimed that FERC did not adequately consider the increased costs of the new rules being just and reasonable under the Federal Power Act ("Act"). The court held that FERC properly weighed the various costs and benefits of the new rules prior to approval. Next, the court deferred to FERC's determination that some of the proposed rules were reasonable and just while also determining that some of the prior rules were unreasonable and unjust under the Act. The court also deferred to FERC's finding that the penalties a resource will face if it fails to fulfil its capacity commitment are not too low and inadequate to ensure performance by all resources. Additionally, the court deferred to FERC's finding that the default offer cap in the capacity market was appropriate. The new rules also allowed bids from non-year-round resources to pair up together in the capacity market, but year-round resources were forbidden from doing so. Organizations claimed this aggregate offer accommodation imposed undue discrimination, but FERC did not believe there was undue discrimination and the court agreed. The court also rejected a claim that FERC accepted the rules without adequate explanation by the regional transmission organization. Lastly, the court agreed with FERC that capacity performance penalties were acceptable even when operating limits caused non-performance in the capacity market.

S.D. California

Imperial Irrigation Dist. v. Cal. Indep. Sys. Operator Corp., Case No.: 15-CV-1576-AJB-RBB, 2017 WL 4228832 (S.D. Cal. Sept. 22, 2017).

The dispute centered on access to California's electric transmission grid. Imperial Irrigation District's ("IID") alleged that California Independent System Operator Corporation's ("CAISO") duped IID into incurring millions of dollars in expenses and then used IID's facilities, without authorization, to import substantial out-of-state power. IID alleged that this unauthorized use of its facilities rendered such use unavailable to IID and the entities it served. Also, IID asserted that those burdens ultimately affected the rates passed onto the public. So, IID filed suit alleging conversion and a claim under California's unfair competition law ("UCL"). CAISO moved for judgment on the pleadings. CAISO argued that the conversion claim failed because conversion only applied to personal property, and transmission lines are real property. Furthermore, CAISO argued that the unfair UCL claim must fail because there was no harm to competition based only on the increase in prices. Before the record before it, the court could not determine whether the transmission lines were real or personal property, and thus denied CAISO's motion to this claim. Next, CAISO argued that injury to a competitor is not injury to competition, and an increase in consumer prices is insufficient to show harm to competition. However, as the court pointed out, this argument ignored that when these two categories of allegations are coupled, they can state an "antitrust injury or an injury the antitrust laws were designed to prevent" and, thus an unfair UCL claim. Therefore, CAISO's motion was denied on this claim. Also, the court found it appropriate to allow IID to amend its complaint because it had done so only once before, and granting the request would not delay the proceedings because they were still in the early stages.

Transmission – State

Illinois

Illinois Landowners All., NFP v. Illinois Commerce Comm'n, 2017 IL 121302.

Illinois Commerce Commission ("Commission") granted a certificate of public convenience and necessity to Company for a project to construct power transmission lines to connect with wind generation facilities. Various parties sought administrative review. The appellate court reversed finding that because Company could not meet the requirements of Illinois's Public Utilities Act ("Act") to qualify as a public utility, the Commission had no legal authority to issue Company a certificate of public convenience and necessity. Commission, Company, and others appealed to the Illinois Supreme Court alleging the appellate court: (1) "adopted an unreasonable and erroneous construction and application of the governing statutes"; (2) did not follow recognized principles of administrative review; and (3) usurped the power of the Commission in the regulatory process. The court concluded that to qualify as a public utility under the Act, a company must presently own, control, operate, or manage a plant, equipment, or property associated with the transmission of power. As such, the court held that Company lacked ownership to qualify as a public utility and was ineligible for a certificate of public convenience and necessity granted by Commission. Thus, the court affirmed the appellate court's decision.

Indiana

NIPSCO Indus. Group v. N. Ind. Pub. Serv. Co., 78 N.E.3d 730 (Ind. Ct. App. 2017).

Utility brought action against Regulatory Commission appealing Regulatory Commission's enactment of a state statute that designated improvements to gas transmission, distribution, and storage systems through a seven-year plan. Utility estimated the plan to exceed projected estimated capital costs by $149.1 million and filed an appeal, which the court found to be lacking in sufficient detail regarding whether the proposed plan was "reasonable" and a "best estimate of the cost" of the improvements. Utility argued on appeal that Regulatory Commission erred in approving the fourth proposed plan. The appellate court found Regulatory Commission to have erred in approving the fourth plan, holding that the updated plan did not include new projects and that the subsequent identifying of improvements that had been previously approved by Regulatory Commission was proper.

New Jersey

Cty. of Cumberland v. Atlantic City Elec. Co., No. C-70-15, 2017 WL 2797431 (N.J. Super. Ct. App. Div. June 28, 2017).

County sued Electric Company to pay for the movement of high-voltage power lines that were in the way of County's courthouse improvement project. The Law Division judge ordered that Electric Company show cause for why it should not pay to move the lines. Electric Company answered, counterclaimed against County, and named Contractor as a third-party defendant. The judge heard arguments from all parties and ruled that Electric Company was responsible for bearing the cost of the movement of the lines because under the common law a public utility is financially responsible for relocation in return for the allowance to use the public right-of-way. Electric Company appealed the judgment. On appeal, the appellate court reversed the lower court and held that precedents only require a public utility company to bear the costs of moving power lines if the government is engaging in a road widening project, therefore Contractor must pay the cost of moving the lines even if the costs end up being shifted to County by Contractor. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

SELECTED TECHNOLOGY AND BUSINESS DECISIONS

Merger and Acquisition

D.C. Circuit

Office of the People's Counsel v. Pub. Service Comm'n, 163 A. 3d 735 (D.C. Cir. 2017).

In June 2014, various related entities ("Companies") requested a merger approval from the Public Service Commission ("PCS"). After multiple community hearings and evidentiary hearings, PCS concluded the merger was not in the public interest in August 2015. Just two months later, Companies moved to reopen the record where PCS would consider a Non-Unanimous Settlement Agreement ("NSA") executed by Companies, the Office of the People's Counsel ("OPC") and several other parties. PCS agreed to consider the NSA, reopened the record, and held multiple hearings, after which it determined the NSA was still not in the public interest in February 2016. One PCS Commissioner concurred with the decision and proposed a Revised NSA ("RNSA") that she believed would be in the public interest and Companies were instructed to file a notice with PCS indicating their opinion concerning the RNSA or instead to request further relief. When they did neither, PCS approved the merger under the terms of the RNSA and denied Companies' resulting application for reconsideration. Companies brought the matter to the District of Columbia Circuit Court of Appeals on grounds that PCS made procedural errors, exceeded its statutory authority, approved merger terms that are contrary to law or unreasonable, did not clearly explain its reasoning, and failed to make an independent finding that the merger was in the public interest. Upon appeal, the court determined that PCS's legal conclusions were reasonable and based upon factors within its expertise. Specifically, the court concluded that rejection of the NSA was made upon logical reasoning and with a proper consideration of alternatives, namely the RNSA, and that the explanation of the decision was reasonable and sufficient when considering the extensive proceedings involved in considering the merger.

Patent Issues – Federal

Federal Circuit

In re Smith Int'l, Inc., 871 F.3d 1375 (Fed. Cir. 2017).

Company appealed decision of United States Patent and Trademark Office ("PTO") Patent and Trial Appeal Board ("Board") affirming Examiners rejection of Company's patent claims. The claims were for an expandable tool used for drilling oil and gas wells. The case turned on the proper interpretation of the term "body." The PTO Examiner rejected the claims, determining that "body," as read in the context of the claims, referred to multiple components of the tool, meaning there is no definition or limiting features of the term "body." Board affirmed PTO Examiner's rejection of the claims based on the broad reading of the term "body." The Federal Circuit Court of Appeals determined that Board's interpretation was unreasonably broad, holding that Company's failure to expressly define the term "body" in its claims did not preclude Company's interpretation of the term—that it does not include other separately identified components. For that reason, the court reversed the Board's rejections of the appealed claims.

E.D. Louisiana

Wright's Well Control Servs., LLC v. Oceaneering Int'l, Inc., CIVIL ACTION NO. 15-1720, 2017 WL 3706344 (E.D. La. Aug. 28, 2017)

This case involves Patent Holder's motion for summary judgment against Company for infringing on one of its patents and Company's partial motion for summary judgment. Patent Holder and Company are both involved in providing "hydrate remediation services for the oil and gas industry" and Patent Holder developed a system that remediates hydrates "from subsea, deepwater pipelines." The court granted Patent Holder's motion for partial summary judgement which, in turn, dismissed Patent Holder's patent infringement claim. The court came to this conclusion by first determining that because this is a method claim, Patent Holder must first demonstrate that Company used the patented method. Consequently, because Patent Holder failed to prove "use," it legally cannot prove infringement of its patent.

E.D. Texas

Effective Expl., LLC v. Bluestone Nat. Res. II, LLC, No. 2:16-CV-00607-JRG-RSP, 2017 WL 3193322 (E.D. Tex. July 27, 2017).

Patent Applicant-1 ("Applicant-1") and Patent Applicant-2 ("Applicant-2") filed claims disputing the meaning of several terms used in a patent ("840 Patent"). Applicants made eight claims, and court found as follows. First, in construing the phrase "subterranean zone or shale" and "wherein the subterranean zone is shale," the court applied the plain language of the 840 Patent and construed these terms to mean "the depth interval includes one or more layers of rock composed primarily of shale and is in the aggregate composed primarily of shale." Second, the second disputed phrase, "a . . . wellbore extending from the surface . . . and a . . . substantially horizontal drainage bore," carries the plain meaning of the language used in the 840 Patent. Third, the phrase "proximate to the subterranean zone" means "in or near the subterranean zone" as depicted in the figures and as the most common and ordinary meaning of the word "proximate." Forth, the phrase "extended in the subterranean zone in different directions of each other" means "in different drainage regions within the subterranean zone." Fifth, the phrase "extend in substantially opposite directions" was insufficient to "inform, with reasonable certainty, those skilled in the art about the scope of the invention" and, thus, the meaning was indefinite. Sixth, that "different types of measurements or measurement locations could lead to different results." And finally, the word "cavity" carries its plain and ordinary meaning as the specification did not support either of the Applicant's proposed constructions.

Other Issues – Federal

First Circuit

Ironshore Specialty Ins. Co. v. United States, 871 F.3d 131 (1st Cir. 2017).

Insurance Company sued Marine Company and United States under the Oil Pollution Act ("OPA") to recover monies paid to reimburse an insured's cleanup costs that resulted from a ship's oil spill. Insurance Company also sued for negligence. The district court granted summary judgment to United States and Marine Company; it also dismissed Insurance Company's negligence claim sua sponte. Insurance Company appealed. The Third Circuit Court of Appeals held that the district court did not err by considering documents outside the pleadings – a contract between United States and Marine Company – when it decided United States' motion to dismiss, because the OPA exempts public vessels from liability, and the contract was necessary to make such determination. The court further held that the ship was "operated" by the United States because Marine Company was acting under the operational control of United States. Additionally, the court reinstated Insurance Company's negligence claim against United States, holding that the OPA did not affect admiralty and maritime law as applied to public vessels prior to the OPA's enactment. However, as a result, the negligence claim against Marine Company could not stand due to the Suits in Admiralty Act's exclusivity provision, which stated that "if a remedy is provided by this chapter, it shall be exclusive of any other action arising out of the same subject matter against the . . . agent of the United States . . . whose act or omission gave rise to the claim."

Third Circuit

In re Semcrude L.P., 864 F.3d 280 (3d Cir. 2017).

Midstream Company had bankruptcy protection agreements with Purchasers, but not Producers. Subsequently, when Midstream Company filed for Chapter 11 bankruptcy, Purchasers were paid in full, but Producers were only paid in part. The Bankruptcy Court recommended summary judgment in favor of Purchasers because the oil was purchased free of any security interest either as: (1) buyers for value or (2) buyers in the ordinary course. The district court overruled Producers' objections to the recommendation and granted summary judgment to Purchasers. On appeal, the Third Circuit held that Texas and Kansas Producers cannot rely on the Uniform Commercial Code's ("U.C.C.") language granting Producers an automatically perfected security interest which would require Purchasers to pay off Producers' liens. The court held that this reliance on the U.C.C. was improper because: (1) the security interests were not perfected;(2) Purchasers bought the oil from Midstream Company, qualifying them as "buyers for value"; and (3) Purchasers did not have knowledge of the Producers' security interests. The court also rejected Producers' claims of fraud for lack of evidence. Purchasers invested heavily in premiums to secure a price in oil and protect themselves against an oil-price increase. The fact that Midstream Company did the opposite was a risky strategy that did not pay off does not demonstrate that Purchasers ever intended to take oil from the Producers without payment. Additionally, Oklahoma Producers cannot rely on the Oklahoma state law that Producers claim implied a trust-like relationship between all oil producers and any downstream purchasers. The Third Circuit refused to extend this trust-like relationship to "anyone who has unwittingly filled a gas tank with Oklahoma-produced oil." The court affirmed the ruling of the district court, and upheld summary judgment for Purchasers.

Fifth Circuit

United States v. Third Coast Towing, LLC, CAUSE NO. 3:16-CV-34-CWR-FKB, 2017 WL 4051766 (5th Cir. Sep. 12, 2017).

The United States sued Barge Owner ("Owner"), Tug Boat Operator ("Operator"), and Insurer under the Oil Pollution Act of 1990 ("OPA") following an accident involving a tug pushing a barge that struck a bridge spilling oil into the Mississippi River. The United States sued for "oil spill removal costs and civil penalties." Before the court is Operator and third party's motion in limine, their motion for summary judgment, and the United States' motion for partial summary judgment. Predominantly, the parties disagreed about who is liable for the removal costs and damages. The court granted United States' motion and denied the others. First, the court noted that the OPA creates strict liability for the "responsible party" which is statutorily defined as "any person owning, operating, or demise chartering the vessel." Because this language is rather vague, the court turned to the Coast Guard's analysis on the common understating of what it means to "operate." In this case, because the tug had control over the barge's movement, it was determined that it was the "operator." Therefore, it is liable for more of the removal costs and does not enjoy compensation from the OPA's oil spill trust fund. Second, because this court found Operator liable, the issue of whether it waived reimbursement is irrelevant. Finally, the administrative record, including the Coast Guard's finding that Operator is not entitled to reimbursement will not be stricken because there is no authority to do so and Operator failed to show that the disputed portions of the administrative record are material. This case has since been appealed, but there is no decision form the higher court as of publication.

C.D. Illinois

Monsanto Prod. Supply L.L.C. v. Rosentreter, No. 3:16-cv-03038, 2017 WL 4284566 (C.D. Ill. Sept. 27, 2017).

Production Company sued Farmer for patent infringement of its seeds, which contained Production Company's biotechnology, and sought a permanent injunction. The court granted the permanent injunction, holding that: (1) Production Company would suffer irreparable harm because infringement of seeds could cause widespread proliferation of Production Company's technology; (2) there is no adequate remedy at law because Farmer is likely to continue infringing on Production Company's patent without a permanent injunction, which would require a multiplicity of lawsuits; (3) the balance of hardships weighs in favor of granting the permanent injunction because Farmer would still be able to farm without using Production Company's technology, it does not create a new burden on Farmer, and Production Company would be prevented from fully protecting its intellectual property without the injunction; and, (4) no public interest would be disserved by the injunction. The court awarded compensatory damages based on a hypothetical contractual price. Furthermore, due to the willful nature of Farmer's infringement and Farmer's litigation misconduct, the court held that enhancements and attorney fees and costs were warranted. The court also awarded prejudgment interest to accrue from the date on which Farmer should have made royalty payments.

E.D. Louisiana

Wolverine Indus., LLC v. Monforte Expl., LLC, CIV. ACTION NO: 16-14691, 2017 WL 2599211 (E.D. La. June 15, 2017).

Company sued Operator alleging that Operator had failed to pay Company over $460,000 for labor, services, equipment, and supplies used in drilling two oil wells. Company moved for summary judgment on the theory of an open account. The court found that Company's submission of invoices sent to Operator seeking payment could not establish the existence of an open account. Operator's denial of the existence of an open account creates a material issue of fact; summary judgment, therefore, was improper. Company's other theory for summary judgment rested on the recognition of its privilege on the two wells pursuant to the Louisiana Oil Well Lien Act ("LOWLA"). Operator claimed that LOWLA did not apply to the oil wells at issue, because the wells were located on the Outer Continental Shelf ("OCS"), and exclusively regulated by federal law. The court held that because Louisiana is an adjacent State to the OCS, State law is applicable as surrogate law so long as it is not inconsistent with federal law. Therefore, Company can qualify as a contractor or laborer under LOWLA, but that alone cannot entitle Company to summary judgment. Company failed to prove the existence of a contract between the parties showing Operator owes an obligation. Because no obligation had been established, the court denied Company's motion for summary judgment.

N.D. California

Oster v. Caithness Corp., Case No. 16-cv-03164-WHO, 2017 WL 3727174 (N.D. Cal Aug. 30, 2017).

Employee brought an action against her former Employer alleging that she is entitled to invest in an energy project but was denied. The court affirmed Employer's motion for summary judgment because Employee failed to: (1) establish that a contract existed; (2) establish fraud and misrepresentation; and (3) prove promissory estoppel. Employer is an energy corporation. Employer approached Employee regarding the Vice President position. Before accepting, Employee requested to become a partner. Employer said not right away, but mentioned she could have a potential opportunity to become an investor in the projects she worked on. Employee accepted the Vice President position. The employment agreement outlined the salary and the target performance bonus and job benefits. Employer offered Employee the opportunity to invest in a specific project. Employee did not receive any details or any paperwork regarding the equity investment. Employer stated that if Employee won the bid on the project then she could invest. She did not win the bid and never received paperwork regarding the bid. At different times Employer mentioned that "she would have the opportunity or right to invest" but nothing official happened, no terms were agreed upon, and no paperwork drafted. The court found that Employee failed to demonstrate she reasonably relied upon any promise to her detriment made before or after her employment with Employer. Therefore, the district court granted Employer's motion for summary judgment on all issues. This case has since been appealed, but there is no decision from the higher court as of publication.

S.D. New York

Schiller v. Duthie, No. 15-CV-4933 (CS), 2017 WL 3726993 (S.D.N.Y. Aug. 28, 2017).

Energy Service Consultant ("ESC") brings an antitrust and conspiracy action against multiple Energy Service Consultants ("Consultants"). To survive a motion to dismiss by Consultants, ESC must describe the applicable geographic market, assert an antitrust injury, and assert behavior in violation of antitrust laws. Consultants filed a motion to dismiss stating that ESC did not allege an antitrust injury. ESC alleged four alternative theories for an antitrust injury. First, ESC alleged that it is competitors of Consultants and Consultants actions made the market less competitive. Second, ESC alleged that it competes in a market in which it is subcontractors of its energy suppliers. Third, ESC alleged that Consultants participated in a hub-and-spoke conspiracy. ESC did not elaborate how this theory constitutes an injury to ESC. Fourth, ESC contended that its injuries were "inexplicably intertwined" with the injuries of market participants. However, after analyzing the four theories presented, the court concluded that ESC did not satisfy the injury requirement of an antitrust claim. ESC also alleged that Consultants conspired with a Municipality to publicly discredit and defame ESC in retaliation for challenging Municipality's conduct. The court determined that while ESC did sufficiently allege a conspiracy against Municipality, ESC did not plausibly allege a conspiracy claim against Consultants. The court concluded that ESC did not assert any facts to support that there was an agreement or meeting of the minds among Consultants and the mere fact that Consultants were involved in the incident with Municipality does not establish a conspiracy.

W.D. Louisiana

Hilcorp Energy Co. v. JP Oil Co., No. 6:16CV0598, 2017 WL 3528865 (W.D. La. Aug. 14, 2017).

Owner bought gas and oil leases from Seller. Pursuant to an agreement, Owner agreed to indemnify Seller for "obligations and liabilities." Owner then sold the same lease to Buyer. Buyer agreed to indemnify Owner for "obligations and liabilities." Two property owners filed law suits against Seller alleging that oil and gas operations of Seller and Buyer had contaminated their property. Seller requested that Owner defend and indemnify the action. Owner did so and then requested that Buyer indemnify Owner. Owner filed suit against Buyer in federal court requesting reimbursement for the $100,000 that Owner paid Seller. Each side filed motions for summary judgment. The court granted Owner's motion for summary judgment finding that the assignment sale was clear as to the terms and Buyer agreed indemnify Owner for "obligations and liabilities" arising from the leases. The court reasoned that broad indemnification terms did not preclude this action because the language in the assignment of the lease to Buyer conveyed the intent of Buyer to take over all of Owner's obligations arising from the property.

Bankruptcy

McDermott v. Fonner (In re Fonner), 573 B.R. 741 (Bankr. S.D. Ohio 2017).

Bankruptcy Trustee claimed that Debtor fraudulently failed to disclose signing bonus payments for oil and gas leases mere months prior to his Petition for Bankruptcy. At the Creditor's Meeting Debtor testified that his report of assets was correct, but later acknowledged leases to the Bankruptcy Trustee ("Trustee"). Two separate attorneys contacted Trustee on behalf of Debtor, mentioning some, but not extensive details about the leases and undisclosed income. Debtor was granted discharge approximately one month later, and Trustee filed an Amended Complaint to seek revocation of said Discharge due to Debtor's fraud a year earlier. The court granted the revocation for the following reasons. One is that Debtor had a duty of candor, but failed to disclose relevant and essential information. The court found that this negatively modified the balance between protecting Debtor and creditors. The court found this to be evidence that Debtor had little regard for the legal system, since he openly defied direct advice from his trustee by cashing a check. Debtor made a materially false statement at the Creditors' Meeting and the court does not believe that he could have forgotten about the lease payments in such a short amount of time, or did not understand that he needed to disclose the lease payments. Another reason the court found that the Trustee did not know of the fraud prior to the discharge, so it is proper to revoke the discharge.

Other Issues - State

Alabama

Drummond Coal Sales, Inc. v. Kinder Morgan Operating LP "C", No. 2:16-cv-00345-SGC, 2017 WL 3149442 (N.D. Ala. July 25, 2017).

Company and Transporter entered a long-term contract ("Agreement") to transport coal via Transporter's terminal. Under the Agreement, Company must meet a minimum yearly volume of coal to be handled by Transporter's terminal. If the minimum volume was not met, penalties were to be paid to Transporter. After an increase in environmental regulations on coal use, the market for coal substantially decreased and Company was consistently unable to fulfil the volume requirements of the contract resulting in substantial monetary penalties. Therefore, Company sought a declaration that it not be required to fulfil the requirements of the Agreement or face the monetary penalties for the remainder of the contract term, citing four claims: (1) frustration of purpose; (2) force majeure (3) impossibility or impracticability of performance; and (4) excused performance due to Transporter's inability to perform. Under the Agreement, New York law controlled. First, the district court found that frustration of purpose as insufficient for Company's breach because environmental regulations affecting the market for coal were foreseeable. Second, in the analysis of the force majeure clause of the contract the court found that after a narrow interpretation of the clause, environmental regulations did not constitute a force majeure event within the definition of government intervention. Third, the court found that financial hardship and a reduction in the coal market did not serve as grounds for applying impossibility to the contract. Lastly, the court allowed the claim for excused performance to continue because there was an actual dispute regarding Transporters obligations if Company was unable to meet volume requirements and the financial implications of not meeting those requirements.

Alaska

Comsult LLC v. Girdwood Mining Co., 397 P.3d 318 (Alaska 2017).

Corporation sued Consultant it retained to obtain new capital investments, seeking declaratory judgment that consulting contract violated state securities law and seeking both equitable rescission of contract and cancellation of shares of stock and royalty interests granted under the contract. The trial court determined that the contract was illegal and denied relief to both parties. Corporation appealed. The Supreme Court of Alaska held that state law, which bars suits based on contracts that violate Alaska securities law, did not render unenforceable stock and mineral royalty interests stemming from illegal contract. The court reasoned that because "both stocks and mineral royalty interests are property," both are protected by sources of law outside of state contract law. Therefore, Consultant owns the stock and royalties, and its rights to enforce them remain valid.

Missouri

Union Elec. Co. v. Estes, No. WD 80659, 2017 WL 4244396 (Mo. Ct. App. Oct. 13, 2017).

Public Utility Company ("Company") appealed the State Tax Commission's ("Commission") determination affirming valuation of Company's real property interest in natural gas pipeline. Tax assessors were tasked with valuing the property at hand for tax purposes. Assessors were given a form promulgated by Commission for guidance. This form required considering depreciation. However, the assessors did not affirmatively consider depreciation because they believed the figures provided to them by Company had already factored in depreciation. Meaning, they believed that if they had accounted for depreciation, Company would enjoy "double depreciation." During a hearing before Commission, however, the assessors admitted this was not the case. Therefore, because Commission adopted a valuation method which required accounting for depreciation, the court determined that it was unlawful for Commission to decide which excluded depreciation. The court's determination stands despite a couple of the assessor's claims. First, even though the assessor's expert's valuation comes close to the valuation including depreciation, the court found no authority to side with assessors' valuation method just because it was 'close' to a valuation method accounting for depreciation. And second, there is no authority to support the contention that the assessors' valuation method is 'correct'—it was entirely within Commission's authority to use a valuation method including depreciation. Because of that, however, Commission is now legally obliged to account for depreciation.

Texas

Tex. Black Iron, Inc. v. Arawak Energy Int'l Ltd., 527 S.W.3d 579 (Tex. Ct. App. 2017).

A Seller distributes oil and gas drilling equipment entered into a deal and executed a purchase order with Purchaser to supply various sizes and quantities of casing and pup joints at set prices. Purchaser prepaid $2.8 million to Seller for the services. Seller delivered nearly all the purchased materials and refunded Purchaser $400,000 for the equipment that was never delivered. Purchaser then returned the rest of the equipment, seeking an additional refund of $768,304 for those materials under the buy-back condition of the parties' contract, but Seller did not refund any of this amount. Purchaser filed suit against Seller in Texas district court claiming breach of contract and suit on sworn account, also requesting a temporary restraining order and temporary injunction against Seller. During trial, it was asserted that Seller did not pay the additional refund because the market was weak and it did not have the money to do so. Purchaser requested the injunction because it was concerned that Seller might resell the equipment to someone else while the court proceedings were being held. The court recognized this concern and issued an injunction against Seller and set trial for a later date. Seller appealed arguing that the trial court abused its discretion in granting the injunction as it fails to set forth sufficient reasoning for its issuance. The appellate court determined that the trial court did not abuse its discretion in determining Purchaser's probable right to recover nor did the trial court overstep in choosing the terms of the injunction.

Wyoming

PacifiCorp, Inc. v. State Dep't of Revenue, 2017 WY 106, 401 P.3d 905.

Utility engages in the manufacture of electricity through coal-fired electrical generation facilities, and petitioned for judicial review of the Board of Equalization's ("Board") decision affirming the Department of Revenue's ("Department") denial of Utility's exemption from sales tax on chemicals and reagents used in the generation of electricity sold to customers. Specifically, Utility thought it qualified for either the manufacturers' sales tax exemption or the wholesalers' sales tax exemption because it manufactured electricity and purchased its chemicals as a wholesaler. Board found that certain chemicals, because they are not used directly to generate electricity, are not exempt from sales tax under state statutes. Board also found that the purchases of certain chemicals and catalysts do not constitute wholesale purchases exempt from taxation under the statute. Utility's sales tax refund request was denied. Department argued that because the electricity produced by Utility contains no coal, Utility cannot be considered a manufacturer; Department cited the definition of manufacturing: "the raw or prepared material must be produced into a final form of the same material." The court found this definition and reasoning of the Department's to be unconvincing and held that Utility is a manufacturer under the Wyoming statutory definition. However, the court also held that because the chemicals used by Utility in its water and pollution control systems are not ingredients or components of the electricity produced, they are not subject to the manufacturers' sales tax exemption. Finally, the court held that because Utility does not purchase the chemicals at wholesale for the purpose of selling them in a subsequent sale, the Board did not err when it determined that Utility does not qualify for the wholesalers' exemption in this case.

<u>SELECTED ENVIRONMENTAL DECISIONS</u>

Federal

Forth Circuit

Murray Energy Corp. v. EPA, 861 F.3d 529 (4th Cir. 2017).

Company brought a suit against EPA alleging violations of the Clean Air Act ("CAA"). Company claimed that EPA failed to perform a non-discretionary duty under CCA. The district court granted Company's motion for summary judgment. The CCA section at issue provides that the "[a]dministrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provisions of this chapter." Company requested that EPA conduct evaluations and be prohibited from engaging in regular activities until it conducts the evolutions. The district court ruled in favor of Company and EPA appealed. On appeal the Fourth Circuit Court of Appeals found that the CAA provision imposed a broad, open-ended mandate to the administration and enforcement of the CAA on a continuing basis. Therefore, EPA is left with considerable amount of discretion in the management under that CAA provision. The court further found that because the provision falling under the operations of an agency the court lacked jurisdiction because the CAA did not authorize the suit in this instant case. This case has since been appealed, but there is no decision from the higher court as of publication.

Sixth Circuit

Emp'rs Ins. of Wausau v. McGraw-Edison Co., No. 16-1264, 2017 WL 2829379 (6th Cir. June 30, 2017).

Insurer sued Manufacturer seeking a declaration that Manufacturer released its insurance claims regarding groundwater pollution from Manufacturer's wastewater-treatments system, or settling pond, at one of Manufacturer's battery plant. Many years earlier, there was a claim for contamination on a separate battery plant on the same property in which the Insurer sued Manufacturer. That suit resulted in a settlement where Manufacturer released any claim for coverage that involved contamination from part of that plant. Therefore, as the EPA notified Manufacturer that a local river may be contaminated from plant operations, Insurer claimed that this release in the earlier settlement precluded Manufacturer from making a claim from contamination for both plants on the property not just the one involved in the earlier settlement. The Sixth Circuit Court of Appeals analyzed the settlement agreement to determine if the agreement intended to waive claims for the entire property or just the plant involved at that point. The court held that the agreement unambiguously referred to only the plant involved and not all plants on Manufacturer's property. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

Newell Brands, Inc. v. Bosgraaf, Nos. 16-2331/2403, 2017 WL 2629054 (6th Cir. June 19, 2017).

Buyer bought land from Seller knowing that chemicals pollutants contaminated the land.
Under Michigan law the prior owner of land is responsible for cleaning up pollution. To clean up pollution Seller needed access to the land which Buyer denied. According to state law, courts may "provide compensation to the property owner or operator for damages related to the granting of access." Seller brought an action against Buyer to gain access to the land. Buyer counterclaimed for damages for the court to grant compensation when it grants access onto someone's land for the loss of the use of property. Seller and Buyer stipulated to an order of the court granting Seller access to the land. Seller moved for summary judgment arguing the lack of Buyer's entitlement to damages because Buyer knew of the pollution when purchasing the land and that even if damages were proper the limit should be to the fair market value of a license to access the property. The district court granted Seller's motion to limit damages to the grant of access opposed to the ongoing presence of contamination itself. On appeal the Sixth Circuit Court of Appeals agreed with the district court because during the litigation, Buyer never drew a link between damage to the court granting access as opposed to the pre-existing pollution. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

Ninth Circuit

All. For the Wild Rockies v. Pena, 865 F.3d 1211 (9th Cir. 2017).

Environmental Organization brought action against United States Forest Service ("USFS"), arguing that USFS violated the National Forest Management Act and the National Environmental Policy Act when it approved a forest restoration project for a national forest. Environmental Organization sought a preliminary injunction against USFS. In order to receive a preliminary injunction, Environmental Organization had to show that: (1) it was likely to succeed in its merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. The district court found that Environmental Organization did not satisfy any of the four required factors, and thus denied the request for an issuance of a preliminary injunction. The Ninth Circuit Court of Appeals affirmed the decision, holding that Environmental Organization did not provide proof it met all four factors.

Cent. Or. Landwatch v. Connaughton, 696 Fed. App'x 816 (9th Cir. 2017).

City has long sourced drinking and municipal water from two creeks—both tributaries of a river which runs through Deschutes National Forest ("Forest")—and has been authorized by the United States Forest Service ("USFS") to operate an intake facility and pipeline for withdrawing that water. Conservation Group sued after USFS approved issuance of a Special Use Permit ("SUP") authorizing City to upgrade its intake facility, construct a new pipeline, and operate the system for twenty years subject to certain requirements (collectively, the "Project"). Conservation Group alleged that USFS's decision to authorize the Project was arbitrary and capricious in violation of the Federal Land Policy and Management Act ("FLPMA"), National Forest Management Act ("NFMA"), and National Environmental Policy Act ("NEPA"). The Ninth Circuit Court of Appeals disagreed, affirming the validity of the Project. In doing so, the court held the Project was not arbitrary and capricious, reasoning that "substantial deference" must be given to USFS's determination that the Project is consistent with the Forest's Plan. The court also held that the Project satisfied the requirements under NEPA because USFS included a "brief discussion of reasonable alternatives" during the proposal of the Project. Lastly, the court held that because USFS provided an explanation as to why a "quantitative" analysis of the Project's impact on climate change could not be provided, a discussion in "qualitative" terms was permissible under NEPA. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing as the case as precedent.

Nw. Res. Info. Ctr. v. Nw. Power & Conservation Council, No. 15-71482, 2017 WL 3049570 (9th Cir. July 19, 2017).

Environmental Group petitioned for review of the 2014 fish and wildlife program promulgated by Northwest Power and Conservation Council ("Council") alleging that Council: (1) "improperly equated its mandate" under the Northwest Power Act ("NPA") with the "substantive requirements of the Endangered Species Act ("ESA"); (2) arbitrarily and capriciously failed to adopt "quantitative, measurable biological objectives;" (3) rejected recommendations for improper reasons; (4) arbitrarily and capriciously refused to include environmental measures that would be in effect unless the "economical and reliable power supply" of the region was threatened; and (5) was improperly influenced by the Columbia Basin Fish Accords ("CBFA"). The court found that Council: (1) did not improperly equate its mandate because the aims of the NPA and ESA largely coincide; (2) did adopt quantitative biological objectives, although the quantitative measures could be improved; (3) did not improperly reject recommendations because the recommendations were either economically infeasible or possibly harmful; (4) was not required to take every environmental mitigation step until the region's power supply was threatened; 5) may have misunderstood its obligations under the CBFA, but the misunderstanding did not affect the outcome of the program. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

W. Watersheds Project v. Ruhs, No. 15-17031, 2017 WL 3034308 (9th Cir. July 18, 2017).

Environmental Group challenged United States Bureau of Land Management's ("BLM") issuance of an environmental assessment. The district court granted summary judgment in favor of BLM, and Environmental Group appealed, arguing that the assessment violated the National Environmental Policy Act ("NEPA") by: (1) failing to carefully consider the assessment's potential effects on surrounding habitat; (2) inadequately considering impact of other past, present, and future projects in the area; and (3) failing to assess potential impact of the project's "rangeland improvements." The appellate court affirmed the lower court's grant of summary judgment, holding that Environmental Group failed to show that the assessment was deficient under NEPA. This case is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

Wild Equity Inst. v. EPA, No. 15-70199, 2017 WL 3700996 (9th Cir. Aug. 28, 2017).

Environmental Organization sought review of EPA's denial of its Petition for Objection to Permit. A local California entity responsible for enforcing elements of the Clean Air Act ("CAA") permitting requirements issued a Title V Permit to Utility Company for its Gateway Generating Station in California without objection from the EPA Administrator. Environmental Organization then filed its Petition for Objection to the Title V Permit, which was denied by EPA. The Ninth Circuit Court of Appeals reviewed Environmental Organization's Petition and determined that EPA did not err in its determination that Environmental Organization failed to demonstrate that the Title V Permit failed to comply with the CAA. The court pointed to Utility Company's permitting history with EPA to justify its determination that EPA did not err in judgment, and therefore denied Environmental Organization's Petition. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

Wild Wilderness v. Allen, 871 F.3d 719 (9th Cir. 2017).

The Dutchman Flat and Tumalo Mountain ("Mountain") is ideal for both snowmobilers and cross-country skiers, creating conflict between motorized recreationalists and non-motorized recreationalists, further fueled by the lack of parking. In 2006, the United States Forest Service ("USFS") began considering the effects of adding a parking structure, began an Environmental Impact Statement ("EIS"), but then withdrew the EIS and issued a Finding of No Significant Impact and an Environmental Assessment ("EA"). Organization first alleged that USFS's 2006 approval violated the National Forest Management Act ("NFMA"). NFMA states that USFS's actions must be consistent with the governing Land and Resource Management Plan ("Plan"). The Plan states that when conflicts develop between non-motorized and motorized recreationalists, certain steps will generally be taken. The court concluded that the Plan articulates "an aspiration, not an obligation." Organization then alleged that USFS violated the National Environmental Policy Act ("NEPA"). NEPA states that when USFS determines an EIS is no longer needed, USFS must publish a withdrawal notice. Organization argued an additional and implicit requirement is established that USFS must issue a reasoned explanation for why an EIS is not needed. However, the court concluded that Organization provided no support for this requirement. The court also concluded that USFS did not violate NEPA by failing to provide a convincing statement of reasons why the plan would not significantly affect the environment. When analyzing the significant impact on the environment, USFS must analyze both context and intensity of the impact. One factor of intensity is the degree to which the plan impacted the environment is not likely to be highly controversial. However, the court determined that controversial refers to the size or nature of the plan, not whether or how passionately people oppose the plan.

Tenth Circuit

Chevron Mining, Inc. v. United States, 863 F.3d 1261 (10th Cir. 2017).

Company sued Government under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), seeking funds for cleanup costs arising from a mining operation. At issue is whether Government is liable under CERCLA as a "potentially responsible party ("PRP")," and owes funds to Company to aid cleanup costs. CERCLA holds "covered persons" strictly liable for remedial action, and other necessary response costs. "Covered persons" includes: (1) owners'; (2) operators; (3) arrangers; and (4) transporters. Government did not assert any of CERCLA's defenses to avoid liability. Owner liability reaches "any person who at the time of disposal of any hazardous substance owned . . . any facility at which such hazardous substances were disposed of." Under CERCLA, an owner is also the legal title holder of contaminated land. Government held legal title to the lands where significant waste disposal occurred, and actively exercised its ownership by conveying portions of its land for waste rock disposal and for a tailings pond. The Tenth Circuit Court of Appeals held that Government was an owner of portions of the mining site, and therefore was a PRP that was strictly liable to contribute its share of the cleanup costs.

Wildearth Guardians v. U.S. Bureau of Land Mgmt., 870 F.3d 1222 (10th Cir. 2017).

Activist sued U.S. Bureau of Land Management ("BLM"), claiming that BLM's approval of four mine leases ("Leases") violated the National Environmental Protection Act ("NEPA"). Under NEPA, in evaluating a lease that may result in increasing carbon dioxide emissions, BLM had the option of approving the Leases or taking a "no action" alternative and deny the leases. BLM reasoned that there was no real difference in carbon emissions between approving the Leases and the no action alternative, because other sources of coal would fill the void in the market if the Leases were denied. Furthermore, BLM reasoned that removing the coal from the market would not result in a higher demand from the product, with a corresponding increase in price. The district court found BLM's actions were reasonable, and upheld the leases. On appeal, the Tenth Circuit Court of Appeals held that BLM's reasoning was arbitrary and capricious. The court explained that BLM ignored the basic economic principle that a force that drives up the cost of coal would drive down consumption, thus leading to a decrease in carbon emissions. Furthermore, BLM neglected to include any data to suggest why that basic economic principle would not apply to the case at hand. BLM was therefore not entitled to any deference on behalf of the court. In reversing the trial court's decision, the Tenth Circuit did not vacate the Leases; it instead remanded the case to the trial court, and entered an order requiring BLM to revise its studies and evidence.

D.C. Circuit

Alaska v. U.S. Dept. of Agric., Civil Case No. 11-1122 (RJL), 2017 WL 4221057 (D.D.C. Sept. 20, 2017).

Alaska sued the United States Department of Agriculture ("USDA") because it passed the Roadless Area Conservation Rule ("Rule"), limiting road construction and timber harvesting in national forests, including Alaska's Tongass National Forest. Alaska claimed the Rule was mandated in an unrealistic timeframe, without considering the states' needs, and without properly considering multiple-use management of national forests. Alaska brought these claims as violations of a multitude of federal laws. The court analyzed the claims by first addressing Alaska's assertion that the Rule violated of the National Environmental Policy Act ("NEPA"), in that USDA did not fully consider the environmental effects of its actions. However, after finding: (1) there was a true need for the Rule; (2) that USDA did not mislead the public as to the cumulative effects of the Rule; (3) that the USDA properly gathered informed comment and decision making regarding the accelerated adoption of the Rule; and (4) that the draft environmental impact study preceding the Rule and the final study were not substantially different enough to require a supplemental study, the court found that USDA complied with NEPA. Next, the court analyzed specific challenges to the Rule as it applied to Alaska. First, it addressed whether the Rule violated the Tongrass Timber Reform Act ("Act") by rendering the possibility of meeting timber demand under the Act impossible. The court found that USDA should try—but is not obligated to—meet demand under the Act. Second, the court found that USDA did not violate federal law by withdrawing public land from Alaska without congressional approval. Then, the court analyzed whether USDA violated NEPA as it specifically applies to Alaska and similarly found that USDA complied with the statute. This case has since been appealed, but there is no holding from the higher court as of publication.

Am. Petroleum Inst. v. EPA, 862 F.3d 50 (D.C. Cir. 2017).

Organizations sought review of EPA's rule defining "solid waste" under the Resource Conservation and Recovery Act ("RCRA"). The District of Columbia Circuit Court of Appeals held that: (1) the requirement that secondary hazardous materials be handled as "valuable commodities" was reasonable; (2) EPA failed to demonstrate a rational basis for notice and recordkeeping requirements regarding recycling hazardous wastes into products for which there was a use; (3) EPA's update of the rule that excluded hazardous materials that were transferred to a third-party for reclamation from regulation under RCRA, was consistent with RCRA; (4) EPA failed to demonstrate a rational basis for an update of its transfer-based exclusion that added a requirement that waste generators only use third-party recyclers that were approved by EPA or state regulators; (5) the court would sever and maintain the portions of EPA's verified recycler exclusion that severed and retained emergency preparedness and containment requirements; (6) the trial court did not have jurisdiction to consider Organizations' claim that EPA could not treat off-specification commercial chemical products as hazardous secondary materials subject to regulation under RCRA; and (7) the court did not have jurisdiction to consider Organizations' challenge to EPA's decision to defer the decision on whether to apply containment and notification requirements to generators of excluded materials.

Ams. for Clean Energy v. EPA, 864 F.3d 691 (D.C. Cir. 2017).

EPA announced a final rule that set several renewable fuel requirements for the years 2014–2017. Several environmental organizations challenged EPA's final order on several grounds. Some felt EPA set the renewable fuel requirements too low, while others felt the requirements were too high. The District of Columbia Circuit Court of Appeals rejected all challenges except one petition arguing that EPA erred in its interpretation of the "inadequate domestic supply" wavier provision. The appellate court held: (1) EPA wrongly concluded that "inadequate domestic supply" applied to the supply of renewable fuel available to consumers rather than refiners, blenders, and importers supply of volume needed to meet statutory requirements of the provision and (2) EPA incorrectly considered demand-side factors affecting the demand for renewable fuel, instead of considering the supply-side factors as required by the provision. Thus, the court adopted this petition for review, vacated EPA's decision to reduce the volume requirement for renewable fuel, and remanded the final rule to EPA for further consideration.

Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017).

Environmental Organizations filed an emergency motion for stay regarding EPA's decision to stay, pending reconsideration, implementation of portions of a final rule regarding methane and greenhouse gas emissions. Groups connected to oil and gas industry ("Industry Groups") petitioned for reconsideration of the rule under the Clean Air Act ("CAA"). Under CCA there are two circumstances when EPA *must* reconsider a rule: (1) if it can be demonstrated that it was impracticable to raise such an objection within the notice and comment period: and (2) if such objection is of central relevance to the outcome of the rule. Industry Groups argued that those requirements were met because several provisions in the final rule were not in the proposed rule, therefore, they were unable to raise objections to said final rule. Environmental Organizations argued the stay violates CAA because the issues raised by Industry Groups were debated during the comment period, and therefore, Industry Groups could have raised objections. EPA then argued the court has no jurisdiction over this case, because the decision to grant reconsideration of the rule was not a "final action." However, the District of Columbia Circuit Court of Appeals found that it was a "final action" because it was a decision that could have legal consequences. Furthermore, the court held the only way EPA could grant the stay, is if CAA conferred to it that power. The court held that EPA had no authority because CAA only conferred authority to grant a stay if the two elements above were satisfied. The court held that those two elements were not satisfied because evidence showed that all issues Industry Groups claimed were not in the proposed rule, were debated during the comment period, and could have been raised. The court granted Environmental Organizations' motion to vacate the stay.

Mexichem Flour, Inc. v. EPA, 866 F.3d 451 (D.C. Cir. 2017).

Manufacturers petitioned for review of the EPA's decision to remove Hydrofluorocarbons ("HFCs") from the list of substitutes for ozone-depleting substances, placing it on list of prohibited ozone-depleting substances under Clean Air Act ("CAA"). EPA's decision is based on its finding the HFCs contribute negatively to climate change. Manufacturers claimed the decision exceeded EPA's authority under the CAA. The CAA requires manufacturers to "replace ozone-depleting substances with safe substitutes." However, even though HFCs were placed on the prohibited list, EPA never made a finding that HFCs deplete the ozone. EPA's new rule essentially forces manufactures and others to replace HFCs with substitutes without finding HFCs cause the damage some entities claim. The District of Columbia Circuit Court of Appeals used the *Chevron* analysis to determine whether, under the CAA, EPA had statutory authority to issue a decision regulating the use of HFCs. Under the step one analysis of *Chevron*, the court focused on the meaning of the word "replace" in the statute. EPA argued that because manufacturers "continue to 'replace' ozone-depleting substances with HFCs every time [they] use HFCs in their products," EPA continues to have authority regulate manufactures' use of HFCs. The court found this interpretation to be too broad and without limits. The court denied this interpretation of the term "replace." The court found that the plain-text of the statute along with legislative history proves that Congress' focus was on preventing the use of "ozone-depleting" substances. EPA's new rule goes beyond the reasonable interpretation of the statute, and Congress' intent, thus the court vacated EPA's rule to the extent it requires manufacturers to discontinue the use of HFCs.

Sierra Club v. Fed. Energy Regulatory Comm'n, 867 F.3d 1357 (D.C. Cir. 2017).

Landowners and Environmental Groups challenged Federal Energy Regulatory Commission's ("FERC") decision to allow three natural gas pipeline be built. A primary question is whether the Environmental Impact Statement ("EIS") is adequate. The court looed to see if the deficiencies in the EIS hinder public participation in the process, according to National Environmental Policy Act ("NEPA"). The court said that one EIS for the three pipelines was adequate; it answered the question of whether the projects have a dramatically negative impact on certain subsections of the population. An EIS is required to be "reasonable and adequately explained," but the path, or methodology, to that objective is given deference. The court held this EIS is adequate in this regard because "[i]t discussed the intensity, extent, and duration of the pipelines' environmental effects" and how those effects would impact certain environmental-justice communities. The court said that the EIS could have been more elaborate in some areas, but the statement still meets the goal of NEPA. The court said that FERC should have included an estimate of emissions in its EIS, or if such an estimate was not practical or possible, Commission should have explained why it did not include an estimate. FERC followed its jurisdictional precedent regarding return on investment, imposing a capital structure to make adjustments when it deemed a return on investment too high and thus imbalanced. The court held this decision was not arbitrary or capricious. Accordingly, the court remanded the petition for FERC to prepare an EIS including more information about emissions from the pipelines.

Sierra Club v. U.S. Dep't of Energy, 867 F.3d 189 (D.C. Cir. 2017).

Environmental Group challenged Department of Energy's ("Department") compliance with National Environmental Policy Act ("NEPA") and the Natural Gas Act ("NGA"), for its grant of an application to export liquefied natural gas ("LNG") using terminal and liquification facilities in Brazoria County, Texas. The District of Columbia Circuit Court of Appeals held that Department had complied with both NEPA and the NGA. In determining whether Department complied with NEPA, the court looked at whether Department had adequately considered and disclosed the environmental impact of its action and whether that decision is arbitrary or capricious. The court held that Department had adequately considered the potential environmental impacts of concern to Environmental Group, including impacts on water resources, greenhouse gas emissions, and coal usage. In determining whether Department complied with the NGA, the court considered whether the approved application was inconsistent with public interest. The court held that Environmental Group had not presented any evidence to show that Department worked contrary to public interest when it approved the application. Accordingly, the court denied Environmental Group's challenged to Department's decision.

C.D. Illinois

E.O.R. Energy L.L.C. v. Messina, No. 3:16-CV-03122, 2017 WL 4181346 (C.D. Ill. Sept. 20, 2017).

Company sued Director of Illinois EPA and the Illinois EPA (collectively "IEPA") after previous litigation was decided in the Illinois court. The prior case related to an IEPA complaint against Company that alleged Company unlawfully transported hazardous waste from Colorado to Illinois and that the waste had been disposed of unlawfully in Illinois injection wells without obtaining the proper permit. The Illinois Pollution Control Board ("Board") issued orders affirming the violations made by Company and ordered them to cease. On appeal, the appellate court affirmed Board's findings. In the current case, Company sought protection using the *Ex Parte Young* exception. The federal district court found that because the Illinois appellate court had already upheld Board's finding that Company violated IEPA regulations that it was therefore powerless to overturn the Illinois court. The district court analyzed the implications of the Eleventh Amendment in connection with the case. The court reasoned that in this situation it had to determine whether Company is seeking protection from ongoing violations of federal law. The district court found that Company failed to establish facts supporting the argument that IEPA was continuing to violate a federal law. Therefore, Company's claims fail. This case has since been appealed, but there is no decision from the higher court as of publication.

D. Alaska

Gavora, Inc. v. City of Fairbanks, No. 4:15-cv-00015-SLG, 2017 WL 3161626 (D. Alaska July 25, 2017).

Property Owner sued Predecessor for the cost of past and present clean-up operations. For a period of forty years, Predecessor owned the property, and leased to Property Owner for twenty-one of those years. During this period, a dry-cleaning company operated out of the property, causing contamination to the surrounding soil and groundwater. The court looked at a number of factors in assessing liability for clean-up costs, including: (1) the ability of the parties to demonstrate that their contribution to the discharge of a toxin can be distinguished; (2) the amount of the waste involved; (3) the degree of toxicity of the toxin involved; (4) the degree of involvement by the parties in the generation or disposal of the waste; (5) the degree of care exercised by the parties with respect to the toxin; and (6) the degree of cooperation by the parties with government officials to prevent any harm to the public health or the environment. The court found that it was equitable to allocate the Predecessor 55% of the recoverable response costs, and to allocate Property Owner 45% of the recoverable response costs.

D. Arizona

Concerned Citizens & Retired Miners Coal. v. U.S. Forest Serv., No. CV-16-03115-PHX-DGC, 2017 WL 3896290 (D. Ariz. Sept. 6, 2017).

San Carlos Apache Tribe ("Tribe") sued the U.S. Forest Service ("USFS") to challenge its approval of Operator's plan to gather environmental data related to Operator's potential development of an underground copper mine ("mine") and mine tailings storage facility ("TSF"). Operator thereafter intervened as a defendant. To plan for the possible construction of the mine, Operator proposed to conduct a baseline assessment of groundwater and subsurface conditions in proximity to the possible location. Tribe contended that the assessment violated the National Environmental Policy Act, the National Historic Preservation Act, and the National Defense Authorization Act ("NDAA"), as well as regulations related to these statutes. USFS approved the baseline assessment after conducting an environmental assessment through which it issued a Finding of No Significant Impact. The court noted that this approval of the baseline assessment by USFS did not constitute approval of the mine or the TSF. In determining whether the potentially subsequent mine construction is a "connected action" of the baseline assessment and, thus, should have been included in USFS's assessment. The court reviewed whether the actions: (1) automatically trigger other actions that could require additional environmental impact statements; (2) cannot or will not proceed unless other actions are taken previously or in conjunction; or (3) are interdependent parts of a larger action and depend on the larger action for their justification. The court ultimately found the baseline assessment and mine construction to not be connected actions because the mine construction is not dependent on nor automatically triggered by the baseline assessment. As the baseline assessment had independent utility outside the scope of mine construction and because Tribe failed to show a violation of the NDAA, the court ultimately ruled in favor of Operator in terminating the action.

El Paso Nat. Gas Co. v. United States, No. CV-14-08165-PCT-DGC, 2017 WL 3492993 (D. Ariz. Aug. 15, 2017).

Natural Gas Company sued the United States under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), hoping to recover costs incurred in remediating former uranium mines located on an Indian reservation. CERCLA holds liable virtually everyone that has a connection to the property or the contamination. This typically includes owners, operators, arrangers, and transporters. For purposes of holding the United States liable, Company moved for summary judgment for its claims that the United States is an owner and therefore potentially liable for remediation costs. The court found that the United States is a fee holder of the Indian reservation and that although the United States has granted a significant property interest to the Indian nation, it has retained substantial power over the land. Therefore, since the United States is an owner under CERCLA, the court granted Company's motion for summary judgment.

WildEarth Guardians v. Provencio, No. CV-16-08010-PCT-SMM, 2017 WL 4286189 (D. Ariz. 2017).

The Kaibab National Forest ("KNF") is located in northern Arizona and consists of three ranger districts ("Districts"). All three Districts provide recreational opportunities, are home to several plant and animal species, and are home to numerous cultural resources. Each District undertook projects to designate a system of roads throughout their prospective districts to improve management of motorized vehicle use in accordance with the 2005 Travel Management Rule. Each District also developed an environmental assessment presenting the results of the analysis of the direct, indirect, and cumulative environmental effects of the proposed action and alternatives to the proposed action. The decisions implementing the chosen actions for each District were documented in Decision Notices signed by the KNF Supervisor noting Findings of No Significant Impacts. Environmental Group commenced this action in January 2016 alleging violations of the National Environmental Policy Act ("NEPA") and other environmental preservation acts. Environmental Group moved for summary judgment on the grounds that the Forest Service violated the Travel Management Rule ("TMR"), NEPA, and the National Historic Preservation Act ("NHPA"). The court found in KNF's favor in granting its cross-motion for summary judgment, citing that KNF took every proper step and considered every potential violation in its actions and Environmental Group made no significant show of any violation of the TMR, NEPA, NHPA, or any other statutory provision. This case has since been appealed, but there is no decision from the higher court as of publication.

D. District of Columbia

Ctr. for Biological Diversity v. EPA, 861 F.3d 174 (D.D.C. 2017).

Environmental Group brought two actions against EPA alleging that it violated the Endangered Species Act ("ESA) and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). EPA announced the registration of a new pesticide and invited public comment regarding it. EPA conducted an "Environmental Fate and Ecological Risk Assessment for the Registration of the New Chemical" that determined the chemical was "highly toxic or very toxic" to invertebrates such as butterflies and beetles. ESA mandates that "every federal agency 'shall … insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species'" or threaten their habitat. ESA contains a broad citizen-suit provision allowing any person to "commence a civil suit on his own behalf" against any person, including the United States. FIFRA authorizes EPA to regulate the distribution and sale of pesticides to prevent the unreasonable effects on the environment. FIFRA contains a narrower civil suit provision granting jurisdiction only to appellate courts. EPA moved to dismiss Environmental Group's suit. The district court granted it because the suit gave rise to an actual controversy as to the validity of FIFRA and therefore it did not have jurisdiction. The court relied on the fact that when there are special statutory review procedures Congress intended for those jurisdictions to have judicial review of those cases. Environmental group appealed requesting a consolidation of both its claims in district court. The District of Columbia Circuit Court of Appeals found that even though EPA failed to have consultation regarding the new chemical and further failed to register it, registration should remain in effect until it is replaced by an order consistent with the court's opinion to maintain enhanced protection.

D. Idaho

Paradise Ridge Def. Coal. v. Hartman, No. 1:16-cv-374-BLW, 2017 WL 3723636 (D. Idaho Aug. 29, 2017).

Landowner sued Administrator, claiming that Administrator's extension of a highway over Landowner's endangered ecosystem violated the National Environmental Policy Act ("NEPA"). Landowner sought to enjoin any work on the project until Administrator complied with NEPA. Both parties moved for summary judgment. In finding for Administrator, the court held that while NEPA requires agencies to "rigorously explore and objectively evaluate all reasonable alternatives" to a plan with significant environmental effects, the plan will be reviewed under a "rule of reason." Therefore, Administrator only had to consider reasonable or feasible alternate plans, and the plan would be disallowed only if the reason for selecting a plan with significant environmental effects was arbitrary and capricious. Because Administrator had spent considerable time and resources investigating the effect on wetland erosion, wildlife collision, and crash data, the court found that its selection of the plan that crossed Landowner's property was not arbitrary or capricious. Additionally, while Administrator did not obtain "prior occurrence" from State and Federal agencies for the plan, only about ten percent of the types of projects Administrator sought to complete require prior concurrence in the first place. This case has since been appealed, but there has been no decision from the higher court as of time of publication.

D. Maryland

SPS Ltd. P'ship LLLP v. Sparrows Point, LLC, No. JFM-14-589, 2017 WL 3917153 (D. Md. Sept. 6, 2017).

Shipyard Owner (Owner) is seeking recovery under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and four Maryland common law claims; negligence, trespass, nuisance, and strict liability. Owner asserted that Steel Manufacturer (Manufacturer) had caused an "ongoing and continuous discharge of pollutants" onto the property previously owned by Manufacturer, and now owned by Owner. Manufacturer acquired the property via an order under §363 of the Bankruptcy Code, which authorized it to acquire the property without assuming liability for any environmental contamination that occurred prior to the purchase date. However, if a hazardous substance was disposed of on the property while Manufacturer owned said property, it could be liable. Although here, Manufacturer was not liable under CERCLA because it did not contribute to the contamination in any way, and because the bankruptcy order protected it from liability. Likewise, Manufacturer was granted summary judgment on all tort claims. Manufacturer was not negligent because it was unclear what its duty was to Owner, and whether it was breached. There was no trespass because Manufacturer did not control the hazardous substance on Owner's property. And there were no grounds for private nuisance because Owner contributed to the flow of the hazardous substance by its own activities, and was aware of the contamination as early as 2004, eight years before Manufacturer purchased property. Furthermore, when Manufacturer purchased the property, it was not engaged in an "abnormally dangerous activity" simply because it was aware of the contamination. Rather, Manufacturer was engaged in remediating and redeveloping the property, and therefore, was not liable under strict liability. The district court granted Manufacturer's motion and denied Owner's motion.

D. Nevada

Center for Biological Diversity v. United States Bureau of Land Mgmt., Case No. 2:14-cv-00226-APG-VCF, 2:14-cv-00228-APG-VCF, 2017 WL 3667700 (D. Nev. 2017).

To combat southern Nevada's longtime water crisis, the Southern Nevada Water Authority ("SNWA") has been developing a massive pipeline to convey water from eastern-central Nevada to Las Vegas since 1989. Under the Federal Land Policy and Management Act ("FLPMA") the Bureau of Land Management's ("BLM") must decide whether to give SNWA permission to build the pipeline. The project also depends on SNWA's ability to secure the right to water from the State of Nevada which it was grated in March of 2012 shortly before BLM approved its application for a right-of-way for the first phase of the project, which included the main pipeline. BLM decided to approve the project in stages because of the complexity and scope of the project. Environmental Group sued BLM on multiple counts related to violations of the National Environmental Protection Act ("NEPA") and the FLPMA, namely focused on tribal, religious, and cultural land use rights. Both parties moved for summary judgment and because the court found at BLM failed to explain how it would mitigate losses of habitat in the development of the pipeline, it violated the NEPA's requirements for its Environmental Impact Statement, both motions were granted in part and denied in part and the case was remanded back to the BLM to address these deficiencies. The case has since been appealed, but there is no decision from the higher court as of publication.

D. New Hampshire

Conservation Law Found., Inc. v. Pease Dev. Auth., Case No. 16-cv-493-SM, 2017 WL 4310997 (D.N.H. Sept. 26, 2017).

Non-Profit Organization filed claims under the Clean Water Act ("CWA") alleging Developer is discharging stormwater runoff containing pollutants from Developer's airport without proper permits. Non-Profit Organization alleged eight violations by Developer. Developer argued: (1) it is a state agency and therefore immune from suits under the Eleventh Amendment; (2) it already has a CWA permit; and (3) the specific permit Non-Profit Organization is discussing expired in 2008. The immunity under the Eleventh Amendment protects the states themselves and entities deemed arms of the state. The court applied a two-step process to determine if Developer is an "arm of the state": (1) whether the state has indicated an intention that Developer share state's sovereign immunity and if not then the structural indicators of the intention and (2) whether the state's treasury would be at risk in the event of a judgment against the entity. The district court found that Developer fit under the arm of the state because the New Hampshire legislature shows the intent that the entity has sovereign immunity in several statutory provisions. The court further found that Non-Profit Organization failed on its claim regarding the claims against the officers and directors of Developer for past failure. However, the court found the claim regarding continued failure of a federal law fell within the *Ex Parte Young* exception of Eleventh Amendment immunity. Accordingly, the court dismissed some of Non-Profits claims, but not all.

D. Rhode Island

Emhart Indus., Inc. v. New England Container Co., C.A. No. 06-218 S, 11-023 S, 2017 WL 3535003 (D.R.I. Aug. 17, 2017).

Industries and Container had been in litigation for ten years to determine which parties were responsible and what the appropriate remedy for toxic chemical pollution at a project site in Rhode Island. In the end, the court found that Industries was jointly and severally liable for the release of dioxin at the site. EPA created a remedial action plan ("Plan") using the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the National Contingency Plan ("NCP"), but the court found several decisions the Plan violated CERCLA as they "were arbitrary, capricious, or otherwise not in accordance with law." These decisions were: (1) labelling Source Area groundwater as potential source of drinking water; (2) assuming that there are no largemouth bass in Allendale Pond; and (3) using fourteen grams as the reasonable maximum consumption rate for anglers fishing at the Site. The court held that until the issues with decisions are resolved, Industries is not required to pay fines or fees accruing from non-compliance during this time.

D. Utah

Grand Canyon Trust v. Energy Fuels Resources (U.S.A.) Inc., Case No. 2:14–cv–243, 2017 WL 4122614 (D. Utah Sept. 15, 2017).

Advocacy Organization sued Uranium Mill ("Mill") seeking declaratory and injunctive relief for Mill's violations of the Clean Air Act ("CAA"). Advocacy Organization alleged that Mill did not comply with Subpart W of the CAA by: (1) exceeding the two-cell limit for tailings impoundments and (2) failing to properly monitor and conduct testing of its radon emissions. The court granted summary judgement to Mill for several reasons. First, Mill did not violate the two-cell limit because one of the cells was an evaporation pond that did not count against the limit. Second, because there is five-year statute of limitations for CAA citizen suits, no other combination of cells could be considered since no other cell was constructed within five years of the complaint. Third, Mill did not exceed radon flux limit because cell two was not subject to Subpart W's radon flux limit. Finally, the court deferred to the Department of Air Quality regarding proper scheduling and testing methods and concluded cell three was not in violation of the radon flux limit. Advocacy Organization's claims were dismissed with prejudice.

E.D. Washington

Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., NO. 2:16-CV-0293-TOR, 2017 WL 2962771 (E.D. Wash. July 11, 2017).

Environmental Group sued United States Forest Service ("USFS") for creating a Community Protection Line ("CPL") to address a wildfire that had spread throughout the region. Environmental Group alleged that USFS violated the National Environmental Protection Act ("NEPA") by constructing the CPL. Both parties motioned for summary judgment. NEPA requires that a federal agency consider and file public reports over the environmental impact of actions that could significantly affect the environment to the fullest extent possible. Because of the exigency of the situation, the trial court found that USFS did not need to incur the wait to compile an environmental impact report before addressing the wildfire by constructing the CPL and granted summary judgment for USFS.

M.D. Tennessee

Tenn. Clean Water Network v. Tenn. Valley Auth., No. 3:15-cv-00424, 2017 WL 3476069 (M.D. Tenn. Aug. 4, 2017).

Environmental Organizations sued the Tennessee Valley Authority ("TVA") over TVA's operation of a coal plant near the city of Gallatin, alleging that TVA: 1) unlawfully discharged pollutants in to state waters through hydrologic flow from its ash ponds; 2) was responsible for unauthorized point source discharges from its then active ash pond complex; and 3) violated four different sections of its National Pollutant Discharge Elimination System ("NPDES") permit. The district court dismissed some of the claims on merit, others due to an ongoing state enforcement proceeding, and then held a bench trial on the remaining issues. The court stated that Environmental Organizations would prevail if able to show either that discharges from the "Non-Registered Site" were being made into a local river or that discharges from the Ash Pond Complex via hydrologic flows were taking place and were not seeps alone. The court found that: 1) the discharges did qualify as point source discharges; 2) discharges of pollutants from the Non-Registered Site into the local river constituted an ongoing violation of the Clean Water Act ("CWA"); 3) the active ash pond complex was a violation of the CWA; 4) Organizations' claims were not prohibited by a diligent prosecution bar because of the ongoing state action; 5) a finding that the CWA was violated was not precluded by the "permit shield doctrine;" 6) the ash pond complex violated the NPDES permit's "removed substances provision;" and 7) the ash pond complex did not violate the NPDES permit's provision requiring operation and maintenance which complies with the permit's terms. Accordingly, the judgement was for TVA in part and for Environmental Organizations in part.

N.D. Illinois

LAJIM, LLC v. Gen. Elec. Co., No. 13-CV-50348, 2017 WL 3922139 (N.D. Ill. Sept. 7, 2017).

Illinois state court produced a Consent Order in 2010 requiring Company to remedy contamination from its facility onto Landowner's property. Landowner contended that measures outlined in Company's Remedial Action Plan ("Plan") were inadequate to remove contamination and subsequently sought an injunction that would require Company to complete an investigation of the site to identify measures required to remove the contamination. Company argued that an injunction would be improper and would interfere with the parallel state-court order. Under the Resource Conservation and Recovery Act ("RCRA"), to obtain a permanent mandatory injunction in federal court, Landowner was required to establish: (1) it had suffered irreparable injury; (2) legal remedies were inadequate to compensate for injury; (3) an equitable remedy was warranted; and (4) the public interest would not be disserved by such an injunction. The court accordingly denied Landowner's request for a mandatory permanent injunction, holding that it had failed to establish that it would suffer any irreparable harm if the injunction was not granted.

N.D. Oklahoma

Cyprus Amax Minerals Co. v. TCI Pacific Commc'ns., Inc., Case No. 11–CV–0252–CVE–PJC, 2017 WL 2662195 (N.D. Okla. June 20, 2017).

Owner sought to hold Predecessor liable for contribution under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), claiming some of the costs related to the release of hazardous substances from a zinc smelting site were the fault of Predecessor. Both parties filed motions for summary judgment. The court found that in order for Owner to hold Predecessor liable under CERCLA, it must prove that: (1) Predecessor is a "covered person" under CERCLA; (2) a "release" or "threatened release" of any "hazardous substance" at the site in question has occurred; (3) the release or threatened release caused Owner to incur costs; (4) Owner's costs are "necessary" costs of response; and (5) Owner's response action or cleanup was consistent with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"). The court denied both motions for summary judgment, finding that: (1) Owner had produced evidence giving rise to a genuine dispute of material fact as to whether Predecessor was a "covered person" under CERCLA; (2) hazardous substances were released from the disputed facility; (3) a genuine dispute of material fact exists as to whether air emissions from the plant caused Owner to incur costs; and (4) Owner produced evidence that at least some of the response costs incurred were necessary.

United States v. Doe Run Res. Corp., Case No. 15-CV-0663-CVE-JFJ, 2017 WL 4270526 (N.D. Okla. Sept. 26, 2017).

United States and the State of Oklahoma ("State") submitted a proposed consent decree that would resolve prior claims against two mining company Operators under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for violations occurring in the Tri-State Mining District ("TSMD") for most of the 20th century. In 1983, the EPA placed approximately forty square miles of northeastern Oklahoma on the national priorities list and designated the area as the Tar Creek Superfund Site. Since then, the United States has resolved most of its claims with several potentially responsible parties for the damages to Tar Creek. This decree would protect Operators from contribution claims by any potentially responsible party. An Operator who previously settled with the United States for its negative contributions to Tar Creek, objected to the decree arguing that it has an interest in protecting its right to contribution against the Operators, and claimed that the United States failed to present evidence that the settlement was the result of an arms-length negotiation. The Operator also objected to the proposed decree because it was not permitted to participate in the settlement negotiations. The district court disagreed with these assertions. The court held that, from the plain language of CERCLA, the right of contribution of a settling potentially responsible party against a non-settling party is subordinate to the interests of the United States, and CERCLA permits the United State to cut off a settling party's right to seek contribution with other such parties. Thus, the court reasoned, the fact that Operator was not permitted to participate in the negotiation of the decree *does not* show a lack of procedural fairness in the proposed consent decree. The court also found that the negotiations lasted for years, and that both parties had ample opportunity to weigh the strengths of their cases, and this was enough to satisfy the "arms length" requirement of fair negotiating. Accordingly, the court approved the proposal, thus cutting off Operator's right to contribution from remaining Operators.

N.D. New York

Benoit v. Saint-Gobain Performance Plastics Corp., 1:16-CV-930, 2017 WL 3316132 (N.D.N.Y. Aug. 2, 2017).

Citizens sued Manufacturer alleging that it contaminated groundwater by discharging perfluorooctanoic acid ("PFOA") from its manufacturing facility that operates within the village. Due to the contamination, Citizens alleged that they suffered from decrease in property values, and accumulation of PFOA in their blood serum and bodies. Manufacturer argued that Citizens cannot allege decreased property values due to contaminated groundwater because Citizens do not own groundwater in New York. Therefore, Manufacturer argued Citizens had no standing to sue. Next, Manufacturer argued that the "vast majority" of Citizens alleged a risk of increased illness, not a present illness caused by PFOA. Lastly, Manufacturer argued that Citizens' nuisance and trespass claims should fail because the injury was common across thousands – not special to one or a few. The district court granted Manufacturer's motion in part, and denied in part. Citizens that alleged decreased property values, and only *rented* the home, had their claims dismissed because Citizens cannot recover for damage to property they do not own. Next, the court upheld Citizens' personal injury claims because precedent did not state they needed present symptoms to ask for medical monitoring. Lastly, Citizens alleged trespass and nuisance claims. The court dismissed the trespass claims regarding Citizens that received their water from the city, but did not dismiss the claims of Citizens that had private water wells. The court found similarly regarding the nuisance claims. Citizens that had private water wells did not have their claims dismissed because they had sustained a special loss, unlike those who received their water from the state.

Donavan v. Saint-Gobain Performance Plastics Corp., 1:16-CV-924, 2017 WL 3887904 (N.D.N.Y. Sept. 5, 2017).

Manufacturer was found responsible by the EPA for polluting a town's water supply. Landowner, a member of the town, alleged that the water pollution had caused him both health problems and property damage because, although his own well was not contaminated, wells near his property were contaminated and allegedly dropped his property's value. Manufacturer moved to dismiss the property damage complaint because Landowner did not show that the pollution had adversely affected his property. Landowner argued that the pollution in nearby areas had stigmatized his home and reduced its value, so contamination of nearby properties should be enough. Landowner also alternatively moved to amend his complaint to allege actual damage to his property. The trial court granted Manufacturer's motion to dismiss because Landowner had to show that contamination affected his property—which he did not—for a negligence claim, and granted Landowner's motion to amend because the amendment would not prejudice Manufacturer and was not in bad faith.

S.D. California

San Diego Unified Port Dist. v. Gen. Dynamics Corp., Case No. 07-cv-01995-BAS-WVG, 16-cv-02026-BAS-KSC, 2017 WL 2655285 (S.D. Cal June 20, 2017).

Company and Successor leased property in District's ports, with both companies using the property to test various designs of boats and submersible vehicles. Company leased the property from 1954 to 1970, and Successor leased the property from 1970 to 1983, and again from 1986 until 1991. After concentrations of pollutants in the leased properties were discovered, District sued Successor to recover costs for the cleanup of the site. The estimated cost to remove the contaminated sediment at the site was \$3.3 million. After lengthy settlement negotiations, Successor agreed to be solely responsible for costs related to the cleanup up to \$2.5 million. Company agreed to contribute to \$850,000. In exchange, District agreed to not bring claims for further damages to the land in dispute. All parties sought approval of the settlement agreement and an order providing them with contribution protection under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). CERCLA encourages settlements by preventing participating parties from being later sued for contributions by other joint tortfeasors. In scrutinizing the settlement reached by the parties, the court analyzed whether the agreement was procedurally and substantively "fair, reasonable, and consistent with CERCLA's objectives," which the court concluded it was. Accordingly, the court approved the settlement.

S.D. New York

Cytec Indus. Inc. v. Allnex (Luxembourg) & CY S.C.A, 14-cv-1561 (PKC), 2017 WL 2634177 (S.D.N.Y. June 19, 2017).

Buyer and Seller entered into an Agreement for the purchase of a coating resins business and several facilities owned by Seller. A disagreement arose as to which party was responsible for the environmental remediation costs of a particular facility contemplated in the Agreement. The Agreement stipulates that Buyer was to assume all liabilities "relating to Environmental Laws with respect to any facilities." Seller sought declaratory judgment that Buyer is responsible for the costs of cleanup, while Buyer contends that the Agreement limits its liability to contamination caused only by coating resins (not in dispute). Both parties moved for summary judgment. The court first noted that because the parties previously agreed that the provisions of the Agreement were unambiguous, the Agreement must be interpreted without considering extrinsic or parole evidence. The court then considered the plain language of the Agreement and held that Buyer had assumed "any and all" liabilities pertaining to environmental remediation and as such, were bound by the Agreement to remediate the facility in question. This case has since been appealed, but there is no decision from the higher court as of publication.

S.D. Texas

USOR Site PRP Grp. v. A&M Contractors, Inc., No. 4:14-CV-2441, 2017 WL 3310942 (S.D. Tex. Aug. 2, 2017).

Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the Texas Solid Waste Disposal Act ("TSWDA"), several Corporations sued City to collect response costs and expenses related to environmental contamination at one of its treatment facilities ("Site") and a recycling facility ("Facility"). Corporations sought partial summary judgment against City, claiming that t City was subject to liability for the release of hazardous substances prior to selling the treatment plant. The court found that City had admitted the genuine facts it had alleged was in dispute. City admitted to: (1) "using hazardous substances in its wastewater treatment process; (2) the presence of hazardous substances and discharges of sludge; and (3) that various spills, leaks, releases, and overflows from the treatment facility had occurred."

The court found that based on those facts, City was subject to liability under CERLA and TSWDA and granted Corporations motion.

W.D. Virginia

S. Appalachian Mountain Stewards v. Zinke, Case No. 2:16CV00026, 2017 WL 4171391 (W.D. Va. Sept. 20, 2017).

Two environmental groups ("Groups") sued pursuant to the judicial review provision of the Surface Mining Control and Reclamation Act ("SMCRA") alleging that they were aggrieved by and administrative decision of the Secretary of the Interior ("Secretary"). The district court noted that when Secretary has reason to believe someone is violating a SMCRA requirement or permit condition, Secretary must notify the state regulatory agency by issuing what is known as a ten-day notice. If the state does not appropriate action to correct the violation, then Secretary must "immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring." And if a state fails to enforce its federally approved program, Secretary may provide for federal enforcement. The court subsequently held that Secretary's decision that no SMCRA violation existed failed to address key evidence, and Secretary's finding that a water sample showed no violation of Virginia's water quality standards runs counter to the record evidence and fails to address an important aspect of Groups complaint. In contrast to Secretary's argument, the court held that Groups do not have to provide samplings from four consecutive days, as it would be unreasonable and unduly burdensome. What the Groups did instead, the court concluded, was to appropriately rely upon data provided by the state. This data showed that a mine was violating SMCRA, and because the state organization charged with correcting such a violation did not take the required corrective action, Secretary should have ordered an immediate federal inspection. Failure to do so, the court concluded, was an arbitrary and capricious decision and Secretary was thus directed to conduct a federal inspection to address the allegations made by Groups.

State

California

Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts, 397 P.3d 989 (Cal. 2017).

egional Planning Agency ("Agency") was sued by Environmental Organizations challenging the adequacy of an environmental impact report ("EIR") prepared in preparation of Agency's regional development plan meant to plan for transportation infrastructure. The California Environmental Quality Act ("Act") requires public agencies to report the impacts their projects will have on the environment and whether the project will result in a significant increase in greenhouse gas emissions. A 2005 Governor's Executive Order ("Order") set greenhouse gas emission targets for California and mandated that by the year 2050 emissions be reduced to eighty percent below 1990 levels. This began a slew of regulatory and legislative actions by California to address and reduce the effects of climate change. Agency was accused of inadequately preparing its EIR by not addressing the potential impact of the regional development plan on greenhouse gas emissions and the requirements of the Order. Even though Agency updated its plan to address the Order, the Supreme Court of California reviewed the case to determine whether a prepared EIR must analyze the Order's 2050 greenhouse gas emission requirements to comply with Act. The court held in favor of Agency that its original EIR was adequate because the varying analysis and methods used in the report could adequately inform on the project's impact to greenhouse gas emissions. Further, the court noted however that Agency's report should not be a template for other planning agencies' EIRs and they should instead ensure their Act analysis stays in line with changing scientific updates and regulatory plan of the state.

Orange Cty. Water Dist. v. Sabic Innovative Plastics US, LLC, 222 Cal. Rptr. 3d 83 (Cal. Ct. App. 2017).

District brought an action against Industrial Site Operators ("Operators") under the Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA") for allegedly contributing to groundwater contamination. District also brought common law claims against Operators for negligence, nuisance, and trespass. Operators argued that summary judgement was proper because District never incurred any recoverable costs under the

Orange County Water District Act ("OCWD"), and that District's incurred costs were wholly investigatory and not encompassed within recoverable remediation costs. The trial court entered judgments in favor of Operators on all of District's claim, summarily adjudicating each one. District appealed and the appellate court held that Operators did not demonstrate their entitlement to summary adjudication of the District's HSAA claim. The court reasoned that reasonable costs actually incurred in cleaning up or containing the contamination or pollution are recoverable under the OCWD, without regard to whether they could also be characterized as investigatory. The court also held that Operators failed to adequately address District's negligence claim and did not meet their burden to show it had no merit. Regarding District's trespass claim, the court held that District did not have a possessory property right sufficient to support a claim for trespass, and that the trial court's summary adjudication of that claim against District was appropriate. Finally, the court held that because the District had relevant, appropriate water rights based on its recharge activities, Operators were not entitled to summary adjudication of District's nuisance claim. The court accordingly affirmed in part and reversed in part the trial court's decision.

Illinois

County of Will v. Ill. Pollution Control Bd., 2017 IL App (3d) 150637-U.

Pollution Control Board ("Board") implemented 'front-end' regulations on construction materials, but rejected provisions calling for groundwater testing for pollution that may be residual from the construction materials. County appealed Board's decision to reject the groundwater testing regulations. County argued that 'back-end' groundwater testing regulations are a valuable safeguard against operators who fail to comply with the front-end regulations and a way to monitor contamination from older materials not covered by the revised front-end regulations. Essentially, the groundwater testing subpart is a necessary supplement to the front-end materials regulations and is still extremely cost effective, so greatly benefits the public. County needed to show that Board regulations are invalid in its challenge. The court considered three factors for determining whether decision was arbitrary and capricious. First, the court looked at whether the consideration of 'waste' in evaluating the statute was relevant and not improper, considering the intent of the legislature. Second, whether Board considered past occurrences and practices, as well as the subpart's costs and their impact on regulations as vital parts of the issue. Lastly, whether the explanation for Board's decision deviates dramatically from the evidence presented or is implausible and not simply justified by Board's specialized expertise. The court found Board met all three factors, therefore its decision is proper, not arbitrary and capricious. Therefore, the decision of the Board is affirmed. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

D & L Landfill, Inc. v. Ill. Pollution Control Bd., 2017 IL App (5th) 160071.

Applicant sought review of Illinois Environmental Protection Agency's ("IEPA") denial of certification of completion of post-closure care of a sanitary landfill. Illinois Pollution Control Board ("Board") granted IEPA's motion for summary judgment on the matter and Applicant sought further review with the state appellate court. Applicant argued that per a state statute, it was only required to monitor its landfill for fifteen years after completing the final cover. IEPA counter-argued that Applicant could be required to monitor its landfill longer if future violation of state law were possible. The appellate court held that IEPA has the authority to order Applicant to continue to monitor groundwater exceedance until such a time as it reaches acceptable levels, even if this period exceeds the fifteen-year post-closure rule in the statute.

Louisiana

La. Envtl. Action Network v. Welsh, 16-0906 (La. App. 1 Cir. 6/14/17); 224 So.3d 383.

Environmental Groups challenged an order from the Louisiana Commissioner of Conservation ("Commissioner") that approved an application for construction of a waste transfer station on four grounds: (1) Commissioner failed to consider conflicts with the local city's master plan; (2) the facility's storage tanks would not with stand a 100-year flood as mandated by the Commissioner's rules; (3) the facility violates local zoning ordinances; and (4) Commissioner acted arbitrarily by allowing the company to open a second facility before closing its first one. The trial court upheld Commissioner's order. However, on appeal, the appellate court over turned the trial court's decision on the basis that the administrative record provided no rational basis for the decision to allow the company to operate both transfer stations. Case was remanded to the trial court.

Massachusetts

Cave Corp. v. Conservation Comm'n of Attleboro, 79 N.E.3d 1096 (Mass. App. 2017).

The Conservation Commission of Attleboro ("Commission"), was established as part of the Wetlands Protection Act ("Act") "to protect the wetlands, water resources, and adjoining land areas in Attleboro…" Corporation filed a notice of intent with Commission, proposing construction of infrastructure associated with subdivision development in a land area acknowledged as having the presence of vegetated wetlands. Commission approved the proposal with certain conditions. Corporation appealed the conditions to the Department of Environmental Protections ("DEP") and was awarded a superseding order. Additionally, Corporation issued a notice of intent for work on certain lots in the proposed subdivision that was not approved until after the twenty-one days required for a hearing under the Act. Corporation sought and was granted another superseding order of conditions from DEP. However, Commission still considered the proposed work precluded by its order and Corporation filed with the trial court, seeking review and declaratory relief. The court concluded that the conditions issued by Commission remained applicable to the subdivision, notwithstanding the superseding order of conditions issued by DEP. Corporation appealed on the grounds that the order by DEP should supersede any conditions imposed by Commission, that Commission lost jurisdiction over the work described in the second notice of intent when it failed to hold a timely hearing, and that the record does not contain substantial evidence supporting the imposition of the conditions for the first notice of intent. The court affirmed holding that, by the language of the Act, Commission may impose more stringent requirements than DEP, and that Commission did not lose jurisdiction in the second notice of intent because its conditions for the work in the first notice still covered the work described in the second.

Michigan

Lowery v. Enbridge Energy Ltd. P'ship, 898 N.W.2d 906 (Mich. 2017).

Company was responsible for an oil spill that released 840,000 gallons of crude oil. This spill eventually made it into the Kalamazoo River and spread nearly forty miles. Homeowner alleged the oil spill caused him to experience illness, and eventually injury. The Supreme Court of Michigan held for Company, and reversed and remanded because Homeowner attempted to show "cause in fact" through speculation, by arguing that Company was responsible for his illness because his symptoms did not appear until after the spill. While this may be true, the court held that a temporal relationship is not enough to show "cause in fact."

Montana

Bitterrooters for Planning, Inc. v. Montana Dep't of Envtl. Quality, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

Environmental Organization petitioned for review of environmental assessment used by Department of Environmental Quality ("Department") in issuance of groundwater pollution control system permit for a contemplated commercial development. The trial court granted summary judgment to Environmental Organization finding that Department violated the Montana Environmental Policy Act ("MEPA") in failing to consider environmental impacts other than water quality impacts, and that Department failed to identify the actual contemplated owner and operator of the facility. Department appealed. The Supreme Court of Montana reversed the lower court's summary judgment because Department had violated the MEPA for failing to consider environmental impacts other than water quality impacts. The court held that the lower court erroneously concluded that Department had violated MEPA because the issuance of the permit was not a legal cause of environmental impacts of the larger construction and operation of the facility unrelated to water quality or construction of required wastewater treatment system. The court, however, affirmed the lower court's summary judgment that Department must identify the actual owner or operator of the facility because it is required to do so under the MEPA.

New Jersey

In re Dep't of Envtl. Prot., No. A-2316-10T2, 2017 WL 3225723 (N.J. Super. Ct. App. Div. July 31, 2017).

Environmental Organizations sued the New Jersey Department of Environmental Protection ("DEP") after it accepted a plan by Developer and released conservations restrictions on the conversion of protected land, a former landfill, into a solar energy facility. Several state laws placed conservation restrictions on the land that prohibited the release of these restrictions unless DEP approved. DEP partially released the restrictions based on the idea that the solar project would provide the public with needs and benefits, have no irreparable impacts on the habitats of plants and animals, and that there were no feasible alternatives. In reviewing the issue, the appellate court noted that its ability to review an administrative agency decisions are severely limited, only reversing if the decision is: (1) arbitrary, capricious, or unreasonable; (2) in violation of express or implied legislative policies; (3) in violation of the State or Federal Constitution; or (4) lacking support from substantial and credible evidence in the record. The court began by weighing the competing public interests of leaving the land in its natural state and providing a public interest of renewable energy, concluding that DEP acted within its authority in determining that the land use would provide a substantial public benefit. After Environmental Organizations claimed that DEP violated its own rules which rendered its decision arbitrary, capricious, and unreasonable. However, the court held that due to the DEP's considerable expertise and experience in making development and conservation decisions, its decision was not arbitrary, capricious, or unreasonable. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

Oklahoma

City of Bethany v. Rockwell Automation, Inc., CIV-16-1005-D, 2017 WL 3741556 (W.D. Okla. Aug. 30, 2017).

Before the court is Company's Motion to Dismiss City's claims for injunctive relief for lack of subject matter jurisdiction and failure to state a claim. Furthermore, Company moved for partial dismissal of the complaint, challenging a claim under the Resource Conservation and Recovery Act ("RCRA"), and claims of nuisance and trespass. The district court found that City's RCRA claims and its demands for injunctive relief were barred by the doctrine of primary jurisdiction, and that City's action should only proceed on the tort claims. At issue was the alleged contamination of soil and groundwater, and a threat to City's public water supply wells, caused by Company. Company voluntarily began remediation under the supervision of the Oklahoma Department of Environmental Quality ("DEQ"). The requirements of clean-up would be satisfied when DEQ gave written notice that Company had demonstrated that all terms of the order had been completed. Company moved to dismiss City's RCRA claims for lack of subject matter jurisdiction, moved to dismiss City's tort claims, and moved to dismiss the RCRA action for failure to state a claim. Furthermore, Company asserted that City's claims were moot because there was already a consent order in place that would serve the same purpose as the injunction. The court reserved the issue of mootness for decision upon further factual development. However, the court held that the doctrine of primary jurisdiction did apply, and that City's RCRA and tort claims should be deferred because DEQ is responsible for enforcing environmental regulations in Oklahoma.

Pennsylvania

Borough of St. Clair v. Dep't of Envtl. Prot., No. 1026 C.D. 2016, 2017 WL 2883246 (Pa. Commw. Ct. July 7, 2017).

Town petitioned for review of an order of the Environmental Hearing Board ("Board") after it upheld the issuance of a solid waste management permit, in the neighboring town, for the development of a landfill. Town appealed the decision arguing that the Department of Environmental Protection ("Department") interpreted the Harms/Benefit regulation erroneously, that the contract between Township and consulting group ("Consultants") was invalid because it gave Consultants impermissible powers in operating the facility, and that the permit must be revoked because a mining permit was not issued in conjunction. A trial was held, and the matter was remanded for further review. However, Department reissued the permit for the landfill. Town appealed and another trial was held. Again, Board upheld the issuance of the permit and Town appealed. The appellate court affirmed the order of Board. The court found that Department did not erroneously interpret the Harms/Benefit regulation by choosing not to consider potential costs or liabilities of the landfill. The court found that it was not necessary for Department to perform an in-depth analysis of the finances of a project, and that Department interpreted the Harms/Benefit regulation reasonably. Next, the court found that the contract between Township and Consultants was not impermissible because Consultant's powers did not override Township's duty to comply with the law. Furthermore, the court found that Town had no standing to challenge the contract because it had not been aggrieved by said contract. Lastly, the court found that a mining permit did not have to be issued in conjunction with the waste permit. The rule is that if applicant has a reasonable likelihood of acquiring one when it comes time to mine, it does not have to be issued in conjunction. Testimony showed obtaining such permit when the time came, would not be an issue.

Consol Pa. Coal Co. v. Dep't of Envtl. Prot., No. 112 C.D. 2017, 2017 WL 3271480 (Pa. Commw. Ct. Aug. 2, 2017).

Company petitioned for review an order issued by the Environmental Hearing Board ("EHB") that prohibited Company from conducting longwall mining within 100 feet of any portion of the Kent Run Stream. In 2007, Company sought to expand its mining business into the Bailey Mine Eastern Expansion Area which consisted of five longwall panels. In May 2014, the Department of Environmental Protection ("DEP") issued Permit Revision No. 180, which authorized longwall mining in those five longwall panels, but not under Polen Run or the Kent Run Streams. In February 2016, Company sought a permit to mine beneath these two areas, and DEP authorized it December 2016, on the condition that Company implements an approved stream restoration plan. Third parties attempted to halt the mining when they filed an application for supersedes. EHB granted the application for supersedes in part preventing Company from mining beneath and within 100 feet of Kent Run, but since Company had already completed mining beneath Polen Run before the EHB could hear the petition for supersedes, that issue was moot. In May 2017, Company filed a report that effectively stated it would forego longwall mining beneath Kent Run. Because Company agreed to forego mining in Kent Run, the court refused to grant Company the relief it requested with respect to the supersedes order.

Moretran Realty, LLC v. Baldev Patel & Son, LLC, DOCKET NO. A-2753-15T3, 2017 WL 3611595 (N.J. Super. Ct. App. Div. Aug. 23, 2017).

Realtors purchased commercial real estate ("Property") in 2009. An environmental report revealed two environmental issues on the Property. Both issues involved contamination discovered after two underground heating oil storage tanks were removed. Following remediation efforts for both issues, the New Jersey Department of Environmental Protection issued a No Further Action letter. In 2012, Developer contracted to purchase Property from Realtors. Pursuant to a separate agreement, Realtors placed funds in escrow for environmental issues; the funds were to be released within six months from the closing date or upon an adjacent facility ("Facility") assuming cleanup of the Property, whichever occurred first. Facility denied responsibility for cleanup, and Realtors refused to take care of the cleanup or release the escrowed funds for Developer to use for clean-up costs. Developer sought a declaratory judgment under the Spill Compensation and Control Act that Realtors were liable for clean-up costs and indemnification. The trial court granted Developer's motion for summary judgment. The appellate court affirmed, holding that, under the escrow agreement, the funds had to be released no later than six months after closing, and, furthermore, that the discovery of contamination on the Property would not have had a bearing on whether the escrow funds had to be released. This is an unpublished opinion of the court; therefore, state or court rules should be consulted before citing the case as precedent.

Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017).

Environmental Organization brought declaratory judgment action against Commonwealth challenging, under the Environmental Rights Amendment, whether budget-related decisions that resulted in additional oil-and-gas lease sales was constitutional. The lower court granted summary relief to Commonwealth and Environmental Organization appealed. The Supreme Court of Pennsylvania reversed in part, vacated in part, and remanded with six holdings: (1) "laws that unreasonably impair the right to clean air, pure water, and environmental preservation are unconstitutional;" (2) "proceeds from the sale of oil and gas from the public trust remain in the corpus of the trust;" (3) assets of the natural resources trust should only be used for conservation and maintenance purposes; (4) "the appellate record was not sufficiently developed to conclude whether all revenues generated by leases remained in corpus of trust;" (5) "public trust provisions of the Environmental Rights Amendment are self-executing;" and (6) "statutory provisions relating to royalties are facially unconstitutional." The court looked to the language of the statutes to determine that the intent of the statutes was to benefit all the people and that it unambiguously and clearly indicates assets of the trust are to be used for conservation and maintenance purposes.

Utah

Living Rivers v. Exec. Dir. of the Utah Dep't of Envtl. Quality, 2017 UT 64, No. 20160503, 2017 WL 4172929.

This is a second appeal by an Environmental Organization of State Department of Environmental Quality decision to grant permits. The court determined that Environmental Organization failed to adequately address the claim that Environmental Organization waived its right to challenge because a previous, identical claim precluded the new claim. Environmental Organization challenged the issuance of permits to Operator for tar sands mining on grounds of potential water pollution caused by the operation. The court held that through the "permit by rule" process Operator used to obtain its permit, the operation was deemed to have a "de minimus" impact on the groundwater. The court held that Environmental Organization repeated its earlier challenge to the permit by rule process and that was rejected because it failed to present any independent grounds for the challenge. The court determined that Environmental Organization had an opportunity to present a fresh argument with the new challenge, but merely duplicated its prior argument. Even if explicitly targeted at modifications to the plan rather than the original plan, this redundant argument failed to illuminate why the prior decision was improper and should be reversed. Therefore, the challenge is dismissed.