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Recent Case Decisions

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RECENT CASE DECISIONS

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SELECTED OIL AND GAS DECISIONS

Upstream – Federal

6th Circuit

Eclipse Resources-Ohio, LLC v. Madzia, No. 17-3145, 2017 WL 5903351 (6th Cir. Nov. 20, 2017).

Lessor entered into and oil and gas lease with Lessee, which was later assigned to Assignee. Upon assignment, Lessor and Assignee amended the lease to mandate compliance with all laws, to require prompt delivery of documents and other instruments and to take action reasonably necessary to carry out the amendment, and to include a pooling provision. Subsequently, the parties entered into another agreement which granted Assignee a subsurface easement on Lessor's tract. Two sets of wells were at issue: one set was located on Lessor's property and a second set was located nearby. Assignee originally sought declaratory judgment entitling it to drill the second set of wells from Lessor's property. Lessor counterclaimed asserting numerous claims, all of which were dismissed by the district court except for the breach of the covenant of good-faith claim. Consequently, the district court found it appropriate for Assignee to drill the second set of wells through Lessor's property based upon the lease and amendments. On appeal, the court considered whether the district court erred in determining that Assignee had the right to drill the second set of wells from Lessor's property, whether it erred in granting summary judgment against Lessor for his breach of contract claim, and whether it erred in granting summary judgment against Lessor that Assignee did not breach the covenant of good-faith. The court affirmed the district court's ruling, holding that the lease, unmodified by the easement agreement, unambiguously granted Assignee the right to drill the second set of wells from Lessor's property. Additionally, the court held the lease and amendments were not breached by failure to comply with all applicable laws and agreed that Assignee did not breach the covenant of good-faith. This case is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

9th Circuit

Energy Invs., Inc. v. Greehey & Co., Ltd., 705 Fed. Appx. 655 (Mem) (9th Cir. 2017).

After the district court found that the Area of Mutual Interest Agreement ("AMI") unambiguously required Company-1 to pay Company-2 prospect fees for mineral acreage acquired by Company-1 or its agents, Company-1 appealed, arguing that the AMI for oil and gas leases contained a latent ambiguity because it did not contain language stating Company-1 had to pay Company-2 a prospect fee for shale prospects, nor did it describe the circumstances under which a fee must be paid. However, the Ninth Circuit Court of Appeals found that the contract defined a prospect fee to mean "[a] fee of $50.00 per net mineral acre for all Oil and Gas Interest acquired by [Company-1] or [a Company-1] subsidiary during the terms of this Agreement, payable to [Company-2] subject to the terms of this Agreement." It reasoned that the language of this provision was "reasonably susceptible to only one construction" and that Company-1 had to pay Company-2 $50.00 for each net mineral acre that was acquired by Company-1 or its subsidiary during the term of the AMI, even if Company-2 did not contribute to securing the lease. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

D. New Mexico

XTO Energy v. Furth, Case No. 15 CV 1180 JAP/KK, 2017 WL 5891740 (D.N.M. Nov. 11, 2017).

Lessee obtained a federal oil and gas lease. Lessee assigned the lease to Assignee but reserved for himself a production payment. The payment consisted of a limit of $920,000.00. The payment came from five percent of the market value of the oil and gas produced. When Lessee died, the interest became the property of his wife, and upon her passing became property of a Trust established to benefit Wife's daughters. In 2002, Company obtained the lease and started making payments to the Trust. In 2014 payments stopped because of the realization that the Trust had been overpaid. In order for a Company to prevail in an unjust enrichment Company must show that Trust knowingly benefited at Company's "expense and that it would be unjust for [the Trust] to retain the benefit." When Company obtained the lease, the Assignee had already paid the trust

$468,643.44 leaving $451,356.56 of remaining interest. Trust makes the argument that Company negligently failed to check the payments it was required to make and that because it overpaid because of its own actions it is not required to receive restitution. The court denied both parties motion for summary judgment because although Company had a valid claim for restitution, denial was appropriate on the grounds of equity and it failed to provide sufficient evidence to support the motion.

E.D. Oklahoma

Chieftain Royalty Co. v. B.P. Am. Prod. Co., No. 16-CV-444-JHP, 2017 WL 5012586 (E.D. Okla. Nov. 2, 2017).

Royalty Owners, as a class, sued Producer for breach of its express duties to pay royalties on fuel gas. Royalty Owners claimed that Producer knowingly underpaid royalties by not paying royalties on fuel gas and failed to disclose the practice to Royalty Owners. Royalty Owners sought to recover owed royalties and brought claims for: (1) breach of contract; (2) tortious breach of contract; (3) unjust enrichment; (4) fraud and deceit; (5) an accounting; and (6) an injunction. Producer sought to dismiss all claims due to issue preclusion. First, the court allowed breach of contract claim because Royalty Owners included specific allegations about the express lease terms and were not required to attach all the leases. Second, the court dismissed Royalty Owners' claim for tortious breach of contract because requisites were not met, and courts are reluctant to expand the required "special relationship" to oil and gas leases. Third, Producer unsuccessfully argued the unjust enrichment claim should be dismissed because there is an adequate remedy for the alleged breach of contract. Fourth, the court denied Producer's motion to dismiss the fraud and deceit claims because the allegations were sufficiently particular for such claims, Royalty Owners were not required by Oklahoma law to request royalty information from Producer, and violation of Oklahoma's reporting requirements was an adequate basis for a fraud claim. Finally, the court denied Producers' motion to deny an accounting and an injunction because Royalty Owners sufficiently pleaded a request for equitable relief.

N.D. Ohio

Lutz v. Chesapeake Appalachia, LLC, No. 4:09-cv-2256, 2017 WL4810703 (N.D. Ohio Oct. 25, 2017).

Lessors claimed that their leases, which provided that Lessee pay them a royalty equal to one-eighth the value of the gas produced each month, were breached when Lessee began to deliberately and fraudulently underpay the full gas royalty in the name of post-production cost deductions. They further alleged that, although the gas wells at issue produced oil in addition to gas, no oil royalties were ever paid. At issue was whether the "at the well" rule, which Lessee argued in favor of, applied or the "marketable product" rule, which Lessors argued in favor of, applied. The court concluded that the Ohio Supreme Court would adopt the "at the well rule" in favor of Lessee, which advocated a simple application of the clear and unambiguous language of the leases. The court reasoned that the issue could be put in terms of where the gas was to be valued for purposes of determining plaintiff's royalty payments. Thus, it understood the use of the language "market value at the well" in the royalty provision to identify the location at which the gas was valued for purposes of calculating Lessors' royalties. Construing the lease under the "marketable product" rule would ignore the clear language that royalties are to be paid based on "market value at the well."

N.D. Oklahoma

Petroflow Energy Corp. v. Sezar Energy, L.P., No. 16-CV-700-TCK-JFK, 2017 WL 4399193 (N.D. Okla. Oct. 3, 2017).

Operator-1 and Operator-2 entered into an agreement to exchange working interests and jointly develop wells and infrastructure in an area of mutual interest. The parties later disputed the meaning of certain terms and provisions in the agreement. Operator-1 filed suit in state court for breach of contract based upon the disputed terms of the agreement; Operator-2 removed to federal court based upon diversity jurisdiction. Both parties then moved for summary judgment on Operator-1's breach of contract claim and each's own affirmative defenses of failure of consideration. Additionally, Operator-1 moved for partial summary judgment regarding certain arguments and defenses made by Operator-2. The court denied Operator-2's motion because, after reviewing the plain language of the agreement, it found that Operator-2 did not show that Operator-1's breach

of contract claim failed as a matter of law. Additionally, regarding the affirmative defense of failure of consideration, the court found that Operator-2 was not entitled to rescind the contract for lack of consideration. Next, the court reviewed Operator-1's motion for partial summary judgment in which they sought to preclude Operator-2 from asserting five different defenses or arguments. The defenses all dealt with the interpretation of the specific agreement between the parties. After analysis, the court granted Operator-1's motion for partial summary judgement.

N.D. West Virginia

Bezilla v. Tug Hill Operating, LLC, No. 5:17CV123 (STAMPT), 2017 WL 5297941 (N.D.W. Va. Nov. 13, 2017).

Landowner sued Lessee for breach of an oil and gas lease and for trespass on his land. Lessee filed a motion to dismiss for failure to state a claim, asserting that Landowner sought to terminate the lease without the consent of his mineral interest cotenants. Landowner argued that the cotenants' consent is not required because his property rights are separate from the rights of his cotenants. The district court granted Lessees motion to dismiss. The court rejected Landowner's argument, finding that the mineral interest was leased jointly with the other mineral owners; therefore, Landowner could not seek to unilaterally terminate the lease without the consent of his cotenants.

S.D. Ohio

Crothers v. Statoil USA Onshore Props., Inc., No. 2:16-cv-261, 2017 WL 6035232 (S.D. Ohio Dec. 6, 2017).

Landowners sued Operators, alleging that Operators' activities near their home caused physical damage to their home's foundation and a diminution in property value. Landowners also charged Operators with interfering with the use and enjoyment of their land via noise, light and air pollution, and substantial inconvenience and mental anguish. Landowners claimed that Operators operated a well in certain proximity of their home and their barn in violation of an agreement between Operators and a prior owner. Operator moved for summary judgment, and the lower court granted Operator's motion on all claims except for the nuisance claim. The court found that Landowners did not legally own the land – instead, it was under one of their father's name. Nevertheless, the court ruled that Landowners could still

pursue their nuisance allegations claiming interference with their daily use of the property due to loud noises, vibrations, dust, and light pollution. Landowners subsequently moved for summary judgment on the nuisance claim, asserting that they have more than enough legal interest as long term occupants of the subject residence to pursue their nuisance claims. The court held that Landowners' lawsuit against a hydraulic fracturing operator could proceed because they have a right to occupy their property free of nuisance and further held that Landowners had standing for their claim despite the frac-well being on property owned by someone else.

W.D. Louisiana

Magee v. BHP Billiton Petroleum Props. (N.A.), L.P., No. 15-2097, 2017 WL 5472521 (W.D. La. Nov. 13, 2017).

Lessee sued Operator, seeking royalties, damages for nonpayment of royalties, additional bonus payments, and accounting for the relevant wells. The leases between Lessee and Operator contained language that allowed Operator to remain free from default on royalty payments until thirty days after any suit, claim, dispute or question has been entirely resolved. Additional language in the leases provided that Operator would pay Lessee an additional consideration of $4,975.00 per net mineral acre if Lessee successfully establish that the Mineral Servitude expired prior to each lease's granting period. Under a ruling by the district court and affirmed by the Second Circuit Court of Appeals, Lessee was found to be due unpaid balances on the bonuses with interest. After Operator failed to pay the prescribed payments due, Lessee mailed Operator a copy of the Second Circuit's judgment and, thereafter, Operator paid Lessee the full amount due. Citing state law, the district court found that Operator did not violate the lease by withholding the payment because Lessee was not found to be in strict compliance in providing the requisite documents in order to provide the required certified proof. Because the leases states that specific parties must furnish the certified copy of judgment disposing of the previous suit, the court held Lessee did not meet the strict compliance required by having a third-party to the original leases send Operator the required documents. Because Lessee and Operator entered into agreement that discovery for the amount of royalties due was incomplete, the court held Lessee's order of accounting to be premature. The court dismissed Lessee's additional claim for legal interest on the bonus payment as the payment was not due until Operator received the requisite documents.

Upstream – State

Illinois

Ramsey Herndon, LLC v. Whiteside, 2017 IL 121668.

Operator sued Partner when it learned that Partner had extracted oil from Lessor's property without paying Operator its overriding royalty interest ("ORRI"). Partner claimed that the Assignment signed by Operator assigning Partner "all of [their] right, title and interest in and to the oil, gas and mineral leases . . . together with a like interest in and to all personal property located therein" included the ORRI originally held by Operator. Operator claimed that because paragraph six of the Assignment read that the Partner's interest shall "bear its proportionate share of . . . [ORRI] there must be some [ORRI] that for [Partner] to pay." The Illinois Supreme Court found that the language of the contract was unambiguous, and Operator had willingly conveyed "all" of its interest in the estate, including the ORRI. Therefore, paragraph six functioned to show that an ORRI still exists, but Operator had conveyed it to Partner. Therefore, Partner still must pay the owner of that interest the ORRI. However, since Partner owns the ORRI, this is not strictly necessary. Because the Assignment did not contain any reservation clauses found in other contracts, Operator's entire interest was conveyed by the instrument, and Partner owes Operator no ORRI payments.

Kansas

G & B Mining, LLC v. Schemm, 404 P.3d 701 (Table) (Kan. Ct. App. 2017).

Landowner owned all surface rights and one-half of the mineral rights to the land at issue. A previous owner conveyed the other half of the mineral rights to Joint Mineral Owner ("Owner") through a mineral deed. Based on the mineral deed, Owner also claimed ownership of one-fourth of Landowner's mineral rights. Owner sued to recover possession of the mineral interest and/or to eject Landowners from the portion of land to which Owner claimed mineral rights. They further sought to "quiet title in themselves of their interest." The trial court dismissed Owner's claims for failure to prosecute; all claims were dismissed with prejudice except for the partition claim. Subsequently, Owner again sued seeking the partition he previously requested. This request was again dismissed for failure to state a claim and Owner appealed. The appellate court found that no new evidence

or facts had been presented by Owner since his first petition for partition and held that since Owner had not addressed the grounds for the district court's dismissal nor shown error in the previous judgments, the judgment was presumed valid and should be affirmed.

Louisiana

Suire v. Oleum Operating Co., 2017-117 (La. App. 3 Cir. 11/21/17); 2017 WL 4987635.

Overriding royalty interest ("ORRI") Owners brought suit against current oil and gas Operator for unpaid ORRI, penalties, and attorney fees. Additional royalty interest owners intervened. Operator filed reconventional demand, asserting that it was entitled to an offset and/or recoupment of ORRI, and seeking damages for a misrepresentation of the condition of a wellbore. Operator also filed third-party complaint against a Prior Operator, claiming that it was entitled to reimbursement of ORRI payments erroneously made to Prior Operator and for damages related to the wellbore. Prior Operator filed a reconventional demand against current operator, alleging breach of purchase and sale agreement. Trial court entered judgment in favor of Owners and Operator appealed. The appellate court affirmed and remanded, holding that the proportionate reduction clause contained in the conveyance documents of the assignment of the prior lease from Prior Operator to Operator did not affect calculation of ORRI and that the failure of the trial court to award ORRI owners penalties or attorney fees for Operator's failure to pay ORRI was not a manifest abuse of discretion.

Sweet Lake Land & Oil Co. v. Oleum Operating Co., 2017-464 (La. App. 3 Cir. 10/18/17); 229 So.3d 993.

Operator was found liable for environmental damage due to oil and gas exploration activities on Landowner's property. At trial, Operator moved to adopt State Regulator's remediation plan under state law, which states that the court should adopt the plan for "evaluation or remediation" unless another party proves by a preponderance of the evidence that another plan is more feasible. The trial court denied Operator's motion and ordered Operator to perform additional work, and because the plan was only partially remedial in nature, some elements of the plan called for evaluation in the form of future testing. On appeal, the appellate court conceded that while the plan was denied without any evidence that another plan was more

feasible, the trial court did not err. The panel reasoned that the trial judge acts as a "gatekeeper," to ensure that land is remediated effectively. Therefore, courts have the power to reject a plan it determines is incomplete, despite the language found in the state law.

North Dakota

Black Hills Trucking, Inc. v. N.D. Indus. Comm'n, 2017 ND 284, 904 N.W.2d 326.

Transporter appealed a judgment affirming a large penalty imposed by North Dakota Industrial Commission ("Commission") for illegally dumping saltwater, a byproduct of oilfield production, on local roads near a saltwater disposal well. Commission received multiple reports of incidents of the illegal disposal. Commission claimed violations of state administrative code for dumping the fluids on multiple occasions, for allowing the fluid to infiltrate the soil, and for failure to properly remove the discharged fluids from the roads. An evidentiary hearing was held in front of an ALJ which recommended that the complaints against Transporter be dismissed. However, the Commission rejected the ALJ's recommendations and approved an alternate decision against Transporter by civilly penalizing it $950,000.00. The district court affirmed Commission's order. On appeal, Transporter first argued that Commission lacked jurisdiction to impose a penalty for the discharge of waste away from an oil and gas site. Interpreting state administrative code broadly, the court found that Commission properly exercised its jurisdiction over Transporter's illegal discharge. Second, Transporter claimed that if Commission had jurisdiction, its penalty encroached on the jurisdiction of the Department of Health ("Department"). However, the court held that the Department did not have primary jurisdiction over the oilfield waste matter and either Department or Commission could have exercised jurisdiction. Third, Transporter claimed that the penalty was excessive in violation of the state constitution. The court held that Transporter did not meet the evidentiary burden of proving that the actions of Commission were unconstitutional. Accordingly, the Supreme Court of North Dakota affirmed the Commission's order.

Hallin v. Inland Oil & Gas Corp., 2017 ND 254, 903 N.W.2d 61.

Lessors sued Operator claiming that oil and gas leases did not cover the entirety of a certain parcel of land. Lessors argued that the lease covered

only sixty acres and the remaining twenty acres were not leased. Operator argued that leases covered eighty acres because it conveyed all of Lessors' mineral interests. Lessors and Operator moved for summary judgment. After concluding the leases were unambiguous, the district court granted summary judgment to Operator. Lessors appealed. The Supreme Court of North Dakota affirmed for several reasons. First, the court agreed that the lease was unambiguous because the leases specified that included was "all that certain tract of land" within the parcel. Second, because the leases were clear and unambiguous, extrinsic evidence was inadmissible. Finally, because Lessors had executed unambiguous leases conveying all of their mineral interest to Operator, Lessors were not entitled to equitable relief of partial cancellation.

Sundance Oil & Gas, LLC v. Hess Corp., 2017 ND 269, 903 N.W.2d 712.

Lessee 1 was granted a lease by Lessors in 2011 and recorded the lease in the same year. Lessee 1 then drilled three wells on the land. Lessee 2 performed an investigation and title search into the land leased to Lessee 1, but did not find Lessee 1 or Lessors in connection with the land. Lessee 2 petitioned to create a trust for the predecessor in interest of Lessors, which the court granted because Lessee had done the investigation. The trustee executed a lease with Lessee 2 in 2013. Lessee 2 then filed a quiet title action to have title of the property declared to belong to it and not Lessee 1. Lessee 2 moved for summary judgment, asserting that the trust action caused res judicata on the issue of title to the leasehold interest. Lessee 2 also contended that it was a good faith purchaser of the interest because of its prior title search and investigation. The district court agreed with Lessee 2 and granted summary judgment. The Supreme Court of North Dakota reversed, holding that res judicata does not apply since the quiet title action was different in kind from the trust action. The court also held that there was a genuine dispute over the material fact of whether Lessee 2 was a good faith purchaser. To be considered a good faith purchaser according to the court, an entity must not be on actual or constructive notice of superior title of another before the purchase. The court observed that applicable North Dakota law stated that the recording of a lease puts all others on constructive notice of an entity's claim of superior right. The court then reversed the grant of summary judgment and remanded for further proceedings.

Wilkinson v. Bd. of Univ. & Sch. Lands, 2017 ND 231, 903 N.W.2d 51.

Mineral Owners conveyed land to State but reserved the mineral estate. State built a dam and flooded the area conveyed, then later leased the minerals to various companies. Mineral Owners brought suit to quiet title to the mineral estate. The trial court granted summary judgment for State giving it both the mineral and surface estate. Mineral Owners appealed alleging that the State had committed a taking for which it had not compensated the Mineral Owners for, that new statutory law that had been enacted after trial but before appeal applied, and that summary judgment was improper because there was a genuine issue as to material facts. The Supreme Court of North Dakota agreed with Mineral Owners on all issues. State had committed a taking if the mineral estate had been granted to State and if the flooding by the state had deprived Mineral Owners of their rights although Mineral Owners had been able to lease to oil and gas companies despite the flooding. The new statutory law applied because it was enacted during the appellate period and stated that it had a retroactive effect. There were disputed material facts because the parties disputed whether the flooding was a result of State action and whether the flooded area is part of Lake Sakakawea or of the Missouri River.

Texas

Bradley v. Shaffer, No. 11-15-00247-CV, 2017 WL 5907319 (Tex. App. Nov. 30, 2017).

Beneficiary, along with his sister, was vested one-third of a mineral trust established by his grandparents. The trust contained the following provision pertaining to its duration: "This Trust shall be for a term of twenty (20) years from the latest date of execution by an initial Trustor. This Trust may be continued upon unanimous agreement of all beneficiaries hereunder." Beneficiary conveyed his ownership of the land in question to Recipient and later granted Recipient his mineral interests which were subject to the trust and any interest held in trust that he might acquire in the future. Prior to the twenty-year anniversary of the trust, the Trustees along with Beneficiary filed suit against Recipient seeking a declaratory judgment that the conveyances to Recipient were void with respect to the mineral interests held by the trust. Subsequent Trustees executed an extension of the trust that extended it for another twenty years. In the suit, the Trustees asserted that the trust owned all the mineral interests and that Beneficiary did not have any title in the minerals to convey to Recipient. Recipient

subsequently asserted that Beneficiaries interest was officially conveyed to him out of the trust after the death of his grandfather, the original trust holder, and the extension of the trust by Trustees was void because it violated the rule of perpetuities. The trial court found that Beneficiary did not have authority to convey his interest to Recipient and voided all conveyances to Recipient. Recipient appealed, and the appellate court affirmed the lower court, holding that an extension of a trust does not violate the rule of perpetuities and since the mineral interest never left the trust, Beneficiaries conveyance to Recipient was void as a matter of law.

Fitzgerald v. Cadle Co., NO. 12–16–00338–CV, 2017 WL 4675513 (Tex. Ct. App. Oct. 18, 2017).

Creditor obtained an agreed judgment against a mineral interest owner ("Owner"). After several failed attempts to collect the judgment, Creditor asked the trial court to order Owner to turnover royalty payments from the mineral lease to him. The trial court issued such order and further ordered Owner to provide disclosures of all property and to file periodic accountings. Owner filed a motion to vacate the turnover order, asserting that the property was his homestead and, therefore, the royalty payments were protected from turnover. The trial court denied the motion and Owner appealed. The appeals court reversed and remanded the order for two reasons. First, Owner and Creditor stipulated that the property in question was Owner's homestead. Under Texas law, homestead property is exempt from turnover. As such, the royalty payments are protected from turnover, and the trial court abused its discretion in denying Owner's motion to vacate. Second, the trial court abused its discretion in ordering Owner to provide disclosures and accountings because the trial court abused its discretion by ordering the turnover of exempt property and there was no evidence of any other non-exempt property.

Hahn v. Gips, No. 13-16-00336-CV, 2017 WL 4837877 (Tex. App. Oct. 26, 2017).

Landowner 1 sued Landowner 2 and Company claiming he had a one-eighth ("1/8th") royalty interest in Tract A of land and that he had a one-fourth ("1/4th") mineral interest in Tract B of land. In response, Landowner 2 filed motion for summary judgment claiming that previous conveyances (the "2002 partition deeds," or "partition deeds") did not refer to reservations of mineral estates and, therefore, Landowner 1 only retained a 1/8th royalty interest in Tract A. Among other things, the lower court

granted Landowner 2's motion for summary judgment and, denied Landowner 1's partial motion for summary judgment and, as such, Landowner 1 is only entitled to a 1/8th royalty interest for a term of fifteen years. On appeal, the appellate court found that because other cotenants of the mineral estate were not included in the partition deeds, no cotenant is bound by the partition deed. This means it was an error of the lower court to find that the partition deeds transferred "anything more than the surface estate of Tract A and Tract B," and after the partition deeds Landowner 1 retained a 1/4th interest of the mineral estate. Therefore, the subsequent deed between Landowner 1 and Landowner 2 which reserved a 1/8th royalty interest, conveyed a one hundred percent transfer of the surface estate to Landowner 2 and a 1/4th interest in the mineral rights of the parent property (Tracts A and B).

VirTex Operating Co. v. Bauerle, No. 04-16-00549-CV, 2017 WL 5162546 (Tex. App. Nov. 8, 2017).

Landowners owned the surface estate of an 8,500-acre tract of land that they used to run a commercial hunting business and cattle operation; the main source of income for the ranch stemmed from the hunting leases under which hunters used helicopters for a number of game operations, including deer captures and predator control. Oil Company owned the full mineral fee estate underlying the property and executed an oil and gas lease to Lessee. Lessee drilled several wells and paid monthly royalties to Landowners, after which Landowners entered into a surface use agreement with Lessee that allowed it to install tank batteries. Lessee intended to install overhead power lines to generate power to the pump jacks, so it asked Landowners to sign an easement allowing the installation. Landowners filed a declaratory judgment action requesting that the trial court declare that Lessee's installation of the overhead power lines would substantially impair Landowners preexisting use of the "lateral surface and super-adjacent airspace" of the property, which included use of the helicopters for game operations. Lessee counterclaimed, asserting that Landowners were interfering with its right to extract the minerals by prohibiting the installation of the overhead power lines. The jury returned a verdict in favor of Landowners and Lessee appealed. The appellate court held in favor of Landowners, reasoning that they produced sufficient evidence to meet the elements of the Accommodation Doctrine. Specifically, Landowners showed that: (1) their use of the surface and adjacent airspace would be substantially impaired by the installation of the overhead power lines; (2) there were no reasonable

alternative methods by which Landowners could continue leasing the ranch to hunters who managed the property by helicopter; and (3) there was a reasonable and industry-accepted alternative by which Lessee could power the pump jacks.

XTO Energy Inc. v. Goodwin, No. 12-16-00068-CV, 2017 WL 4675136 (Tex. App. Oct. 18, 2017).

Lessee failed to pay the proper bonus amount to Lessor, so the lease was void. Lessee, despite the voided lease, drilled horizontal wells that crossed Lessor's property line, pooled the lease with others near it, and paid Lessor, after he signed a division order, a royalty for his contribution to a pool that did not include the horizontal well. Lessor sued Lessee for trespass, bad faith trespass, conversion, fraud, and bad faith pooling. In the trial court, the jury found that Lessee committed trespass, bad faith trespass, conversion, and bad faith pooling and denied Lessee's motion to recover the costs of paying Lessor the royalty. The appellate court affirmed the finding of trespass because Lessor had an interest in preventing trespass of any property at any depth not within the mineral interest, but reversed on the amount of damages because the calculation was based on unreliable testimony. It also affirmed the denial of Lessee's motion to recover the royalty payment because although Lessor was unjustly enriched, Lessee was on notice that it did not need to pay Lessor and voluntarily did so. The appellate court reversed on the issues of bad faith trespass, conversion, and bad faith pooling. Bad faith trespass was reversed because the jury did not find malice or fraud prerequisite for bad faith. Bad faith pooling was reversed because Lessee could not have pooled at all since the lease was void and the power to pool was based on the lease. Conversion was reversed because Lessor's theory of recovery for conversion was based upon the bad faith pooling, which was reversed.

West Virginia

Kidder v. Montani Energy, LLC, No. 16-1109, 2017 WL 5509927 (W. Va. Nov. 17, 2017).

Landowners conveyed their property to four of their six children but excepted oil and gas royalties in the conveyance ("1910 deeds"). Landowners died intestate and the reserved interest passed to all six children. Child One and her husband conveyed their interest to Child Two, but reserved oil and gas royalties in the same way her parents did in their

initial conveyance. Operator One later acquired oil and gas leases for portions of the property in dispute. Another party claimed to have purchased oil and gas rights from Child Two's interest on a date before Operator One claims to have gotten any interest. Several operators filed a "Complaint to Determine Title" in the lower court, and the heirs of Child 1 ("Heirs") responded to the complaint which Operator One then responded to. The lower court granted summary judgment in favor of Operator One because the 1910 deeds "reserved a royalty interest only, and the oil and gas ownership rights thus passed with the land conveyance." Heirs now claim that: (1) the 1910 deeds reserve royalty interest and "the oil and gas in place;" and (2) the lower court failed to consider "ownership of all of the oil and gas that was conveyed in the 1910 deeds." First, the court found the 1910 deed did not convey the oil and gas in place because a mere reservation of oil and gas royalties conveys the ownership interest in the oil and gas and the Landowners did not make clear an intention to reserve the oil and gas in place. The Heirs' second argument was dismissed because it related to a tract of land which Operator One did not request relief for. Accordingly, summary judgment was affirmed. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Wyoming

Bear Peak Res., LLC v. Peak Powder River Res., LLC, 2017 WY 124, 403 P.3d 1033 (Wyo. 2017).

Acquirer and Developer entered into a purchase and sale agreement ("PSA") whereby Developer agreed to purchase certain oil and gas interests owned by Acquirer. The PSA also contained an agreement for procurement of additional mineral interests within an Area of Mutual Interest ("AMI") over a two-year term, which contemplated situations where Acquirer would purchase interests in the AMI and would then offer Developer the opportunity to purchase the interests. In 2013, Developer sent two separate notice letters stating that Acquirer was not performing its obligations based on reasonable industry standards. In July 2013, Developer notified Acquirer that Acquirer continued to fail to perform and that the AMI was terminated. The trial court determined that Developer was entitled to summary judgment. The Supreme Court of Wyoming affirmed in part and reversed and remanded in part. The court found that the PSA's plain language was unambiguous because Developer was able to purchase interests only in three specified instances and did not allow Developer to purchase interests

for any reason. The court concluded that the trial court erred when it determined that Developer properly terminated the AMI. Instead, under the PSA, the trial court should have considered what the reasonable industry standards were to determine whether Developer's dissatisfaction was "reasonably determined." The court determined that some interests that were acquired were after Developer had proposed a well, and, therefore, the AMI did not apply. Additionally, the court concluded that the trial court did not err when it applied the conventional definition of "proposed a well" because Acquirer did not offer any evidence to show that "proposed a well" was a term of art in the industry.

Lon V. Smith Found. v. Devon Energy Corp., 2017 WY 121, 403 P.3d 997 (Wyo. 2017).

Trustee, a California resident, obtained numerous oil and gas interests in his lifetime, including an overriding royalty interest ("ORRI") carved from a federal oil and gas lease located in Wyoming. In his will, Trustee bequeathed the ORRI, along with all of his oil and gas interests, to his Wife for life, with the remainder to go to his Foundation. After Trustee's death, a California court conducted the probate and granted Wife only the oil and gas interests but never included the ORRI. Later, a Wyoming court accepted and adopted the California probate order ("the Order"). Lessee of the land upon which the oil and gas interest lay sued the Foundation, claiming ownership of the ORRI. The district court ruled in favor of Lessee, finding that the Order was a final order and the intent of Trustee was irrelevant after a final order had been made. Foundation appealed, but the Wyoming Supreme Court affirmed. It held that the Order was never appealed and was a final order when it was adopted in Wyoming, thereby giving its terms effect regarding Wife's property. Therefore, since the ORRI was not included in the probate, it passed to Wife in fee simple instead of a life estate and thus did not pass to Foundation upon Wife's death.

Midstream – Federal

Fifth Circuit

Boerschig v. Trans-Pecos Pipeline, L.L.C., 872 F.3d 701 (5th Cir. 2017).

Landowner filed suit against Company for violation of due process in Company's natural gas pipeline condemnation. The Fifth Circuit Court of

Appeals reviewed Company's motion to dismiss Landowner's appeal, finding that Landowner's appeal was not irrelevant, even though some construction on the project had begun, because the court could still enforce some effective relief, restoring the land to its state prior to the condemnation. Although the lower court cited an Anti-Injunction Act ("Act") as support for its refusal to grant an injunction, the court held that the applicability of such act is questionable in this case. Since in Texas there are separate processes, administrative and judicial, but those processes could be thought to merge at some point, there is a question of whether the Anti-Injunction Act would apply, depending on how the process was interpreted. The court here declined to determine whether or not the Act does apply in this case, instead evaluating whether the criteria for granting an injunction are met. The court determined that these criteria are not met because Landowner's constitutional challenge did not hold high likelihood of success, so it would not meet the necessary requirements for the granting of an injunction. Further, even though Company's actions constituted a "quick taking," it was nevertheless allowed and not seen as a violation of due process based on the relevant statute's history. This is because the standards in place guiding the requirement that the land be considered necessary for public use, and the judicial review of such determination, allow condemnation by Company to move forward, even though it is a private entity. The court noted that the constitutional challenge might be more likely to succeed if there was only a private benefit, rather than a public one, conveyed by the taking, but that was not the case here.

D. District of Columbia

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (JEB), 2017 WL 6001726 (D.D.C. Dec. 4, 2017).

Native American tribes ("Tribes") sued the U.S. Army Corps of Engineers ("Corps"), claiming improper analysis on the potential environmental impact of a pipeline crossing underneath a lake which borders the Tribes' reservations in violation of the National Environmental Policy Act ("NEPA"). This court previously refused to stop oil from flowing through the pipeline because the it found a "'significant likelihood' that the Corps could substantiate its prior conclusions" that did not violate NEPA. However, this court "left open the possibility of imposing other, interim conditions during remand [and] ordered further briefing . . . which is now complete." Although this court previously decided that it had jurisdiction "to order interim remedies," the Corps now argues that the court's

conditions on remand go beyond the court's authority. This court rejected the Corps' argument because it mischaracterizes what the Tribes seek as an injunction—but that is not what the Tribes seek. Because the interim conditions set out by the court are no more than information-gathering measures which do not interrupt the remand process, they are within the court's lawful authority. What's more, the court reasoned that recent oil spills demonstrate that some level of oversight is necessary. As to the conditions themselves, they are: (1) finalization and implementation of spill response plans; (2) a third-party audit; and (3) public reporting of pipeline operations. The first will stand because even though the Corps contends the parties are themselves carrying out the condition, the court will enforce the order because "of the case's history of contested versions of discussions." The second condition will stand because it is reasonable to have a third-party audit. Finally, the third condition will stand because it is not unduly burdensome on the pipeline developer which agreed "to 'voluntarily' report on many of the issues raised by the Tribes."

D. Montana

Indigenous Envtl. Network v. United States Dep't of State, No. CV-17-29-GF-BMM, 2017 WL 5632435 (D. Mont. Nov. 22, 2017).

After the United States Department of State ("Department") approved and issued a Presidential Permit to Pipeline Company to construct, connect, operate, and maintain an 875-mile long pipeline across the border of the United States, Organization challenged the decision to issue the Presidential Permit, seeking for Department to withdraw its approval of the pipeline and Presidential Permit until Pipeline Company has complied with National Environmental Policy Act ("NEPA"). Department moved to dismiss Organization's complaint for lack of jurisdiction and failure to present a cause of action; it also argued that the issuance of a Presidential Permit by a federal agency pursuant to an Executive Order constitutes Presidential action immune from judicial review under the Administrative Procedure Act ("APA"). Here, the court held that the Department's regulations would require a NEPA review. The court also looked at whether Organization lacked standing due to vague allegations regarding adverse environmental and cultural impacts from the pipeline, and for failing to allege a sufficient concrete interest in listed species that would be harmed. The court analyzed whether Organization established: (1) injury-in-fact; (2) plausible connection between Department's conduct and Organization's injury; and (3) redressability, holding that Department's

motions to dismiss were denied, and Organization's motions to dismiss were also denied.

D. North Dakota

Olin v. Dakota Access, LLC, No. 1:17-cv-007, 2017 WL 4532581 (D.N.D. Oct. 10, 2017).

Developer of a pipeline ("Company 1") hired Company 2 (together, "Companies") to contact Landowners to negotiate easements. Landowners make four claims against the Companies: (1) Company 1 violated North Dakota law by using "unfair tactics in acquiring land easements;" (2) Company 1 committed fraud; (3) Company 2 committed fraud; and (4) the Companies committed civil conspiracy. Landowners claim that Company 2 represented, among other things, to them that if they signed easement agreements, they would get a twenty percent signing bonus, but if they refused to sign the Landowners would get little if anything in eminent domain proceedings. Landowners further allege that they signed the easement agreements because of the representations made by Company 2 and that other landowners received more money for easements. The court disagrees with the Landowners' two fraud claims for three reasons. First, Landowners do not meet heightened particularity standard because their amended complaint only refers to agents or employees of the Companies—not individual names—nor does it include times when negotiations occurred or by what means any conversation took place. Second, the fraud is not actionable in North Dakota because alleged factual statements were all contingent on future events. Third, any statements made outside of the contract itself could not be relied upon because of the easement contracts' integration clause. The Companies also did not violate North Dakota law by using unfair tactics in acquiring easements because all of the alleged statements are merely sales talk and puffery, not misrepresentation, deception, fraud, or something else required by statute. Finally, Landowners' civil conspiracy argument fails because "there is not an actionable underlying tort claim to support the civil conspiracy claim." Company 2's motion to dismiss and Company 1's motion for judgment on the pleadings are both granted. This case has since been appealed, but there is no decision from the higher court as of publication.

E.D. Michigan

Nexus Gas Transmission, LLC v. 0.4 Acres +/- Permanent Easement and 0.8 +/- Temporary Easement of Land in August Township, Washtenaw County, Michigan, Case No. 17-cv-13220, 2017 WL 4778727 (E.D. Mich. Oct. 23, 2017).

Company brought a condemnation act seeking an easement over Landowner's property. The court granted Company's motion for summary judgment finding: (1) the Federal Energy Regulation Commission ("FERC") issued a certificate of public service and necessity to Company authorizing the pipeline; (2) the use of the easement is necessary for the construction of the project; and (3) Company cannot acquire the easement by contract if it cannot come to an agreement with the owners on compensation. The court granted Company's partial summary judgment because Company had a valid certificate of public convenience and necessity issued by FERC pursuant to the Natural Gas Act. The court also granted Company's preliminary injunctive relief for three reasons. First, Company won on the partial summary judgment which waves heavily in favor of granting the injunction. Second, court found irreparable harm where a gas company needed to proceed construction of pipeline where construction delays could add costs to the project. Third, it would not cause substantial harm to Landowners.

M.D. Pennsylvania

Tennessee Gas Pipeline Co. v. Permanent Easement for 7.053 Acres, Permanent Overlay Easement for 1.709 Acres and Temporary Easement for 8.551 Acres in Milford and Westfall Townships, Pike County Pennsylvania, No. 3:12-CV-01477, 2017 WL 4954093 (M.D. Pa. Nov. 1, 2017).

Pipeline Company filed a complaint in condemnation of property on July 31, 2012 seeking to acquire a permanent easement and temporary easements on properties owned by Landowner. Pipeline Company owned an existing permanent easement of varying width across the property. On October 2, a Stipulated Order was entered granting the right to access, and Pipeline Company immediately adhered to the stipulation therein and took access and possession of the rights of way. The action was administratively reopened, and the parties participated in discovery. The court granted in part and denied in part Pipeline Company's motion for summary judgment on August 30, 2017. On September 21, 2017, Landowners filed a motion

requesting the Memorandum and Order from the most recent decision be certified to the Third Circuit Court of Appeals for an interlocutory appeal. The court determined that this case was of such an unsettled nature and so recurrent in the court, that it was the type of "exceptional case" that warrants an interlocutory appeal and granted the motion.

N.D. Florida

Sabal Trail Transmission, LLC v. +/- 18.27 Acres of Land in Levy Cty., Florida, No. 1:16CV93-MW/GRJ, 2017 WL 5494552 (N.D. Fla. Nov. 15, 2017).

In 2016, the court granted Pipeline Company's motion for partial summary judgment as to its right to condemn an easement through Landowners' property to build a natural gas pipeline. Pipeline Company took possession and began and ended construction of the pipeline within a year's time. The activities caused a great deal of emotional pain and destroyed several mature live oak trees on the property during construction, prevented Landowners from leasing pasture to cattle farmers, and prevented Landowners from planting more profitable crops. Pipeline Company brought the issue to the court to determine whether these kinds of losses may be compensated and moved for partial summary judgment. The court determined that the use of eminent domain decreased the value of Landowners' land and caused Landowners to not be able to plant watermelon in the affected fields. Landowners would have had a higher net income despite the construction, so the court denied Pipeline Company's summary judgment motion as to the issue of crop-income losses. Additionally, the court denied the balance outlined in Pipeline Company's motion as a jury may consider evidence of lost grazing fees and watermelon crop income losses in determining full compensation. However, the court granted the motion for partial summary judgment to the extent that Landowners sought compensation for the separate appraisal value of each oak tree and Landowners were permitted to present evidence of severance damages resulting from the loss of the trees.

Midstream – State

Louisiana

Chauvin v. Shell Oil Co., 16-609 (La. App. 5 Cir. 10/25/17), No. 16-CA-609, 2017 WL 4800236.

Landowners' descendants ("Descendants"), after learning of their possible ownership, brought suit alleging trespass and damages caused by oil and gas pipelines installed on land. Oil and Gas Company ("Company"), along with several others who were granted servitudes over the property, filed a motion for summary judgment claiming that Company had purchased the land from Landowners. The district court granted the motion and Descendants appealed. The appellate court affirmed the judgment for several reasons. First, both parties' surveyors concluded that the property which Company purchased from Landowners included that which the pipelines now extend. Second, if Landowners had believed that they still owned some of the property, they would have bequeathed it to their heirs as they did with other real property. Third, the actions by Company on the property and the non-actions taken by Landowners suggest that parties intended Company to acquire ownership of the property. Finally, Company's ownership was further established by acquisitive prescription because they had satisfied the requirements for ownership via thirty years of possession.

Mississippi

Elmore v. Dixie Pipeline Co., No. 2015-CA-01499-COA, 2017 WL 4386686 (Miss. Ct. App. Oct. 3, 2017).

Operator operated a pipeline in which liquid propane was transported. The pipeline was constructed in 1961 and was manufactured using a low-frequency electric resistance welding ("ERW") process. In the late 1980's, the Pipeline and Hazardous Materials Safety Administration ("Administration") issued an alert notice to all hazardous-liquid propane operators who used ERW pipelines and advised them of the pipelines' operational failures. The notices contained recommendations by the Administration but did not require the operators to cease operation or remove and replace the pipes. In 2007, Operator's pipeline ruptured, and some propane vaporized and exploded. Landowner claimed that his house suffered structural damage from the shockwaves. Landowner sued Operator

for negligence, strict liability, and punitive damages. The National Transportation Safety Board ("NTSB") investigated the rupture and concluded that no defects or anomalies existed and that the rupture was not a result of corrosion, excavation damage, the controller's actions, or the operating conditions of the pipeline. Operator moved for summary judgment. The lower court granted its motion as to the strict-liability and punitive damages claims. Operator later renewed its motion for summary judgment on the negligence claim after Landowner's expert witness's testimony was excluded. The court granted the motion, and Landowner appealed. The appellate court affirmed, holding that the transportation of liquid propane was not considered an ultrahazardous activity and, therefore, was not subject to strict liability. Additionally, based on the NTSB's determinations, the court concluded that there was no evidence that the pipeline would not have ruptured had Operator used proper care.

Pennsylvania

Foster II v. Dickson, No. 1553 WDA 2016, 2017 WL 4679749 (Pa. Super. Ct. Oct. 18, 2017).

Brother sued Sister in a dispute over future payments stemming from gas pipeline operations. Their Parents, original owners of several tracts of land, entered into a right of way agreement with an energy company. In the agreement, Parents conveyed to the energy company a right of way and easement along a specified route to install gas pipelines. Later, Parents conveyed their land to Sister, by deed, granting all surface rights and payments for surface use and damages, reserving however to the parents one-half of all future payments for the placement of right of ways and/or pipelines across the land. Immediately after this conveyance to Sister, the parents assigned to Brother all of their one-half undivided interest in and to future payments for the placement of right of ways and/or pipelines across the property. The energy company later installed a pipeline, paid one-half the consideration to Sister, but withheld the remaining half of the consideration from Brother. Brother filed suit for declaratory judgment, claiming that he was entitled to the funds as they represented fifty percent ("50%") payment for placement of right-of-ways and pipelines on the property. Sister claimed she was entitled to the remaining proceeds as they were payments simply for "surface use and damages." Trial court entered judgment for Brother and Sister appealed. The appellate court affirmed, reasoning that the deed explicitly stated that Parents reserved 50% of the amount received for the placement of pipelines on or across the property in

the future. By the plain meaning of the language in the deed, the court continued, Parents and Sister were to split equally the payment for new pipelines, and thereafter the assignment grants to Brother any interest that would go to the parents. Thus, Brother was entitled to 50% of the total amount as the trial court determined.

In re Condemnation by Sunoco Pipelines L.P., No. 1780 C.D. 2016, 2017 WL 4783584 (Pa. Commw. Ct. Oct. 24, 2017).

Transporter sought to condemn a permanent easement, a temporary workspace easement, a permanent road easement, a permanent block valve easement, and a fenced-in block valve site for the construction and operation of a portion of its pipeline project. Condemnee objected to the condemnation and alleged that it violated state law regarding eminent domain. The trial court overruled Condemnee's objections. Condemnee appealed, raising several issues including: (1) whether Transporter's pipeline was needed to meet the state's natural gas liquids demand; (2) whether state public utility commission's procedures unconstitutionally excluded landowners impacted by the pipeline; (3) whether there was a trustee of the state's natural resources for the pipeline; and (4) whether the trial court abused its discretion by not holding excessive taking and bond sufficiency hearings. In analyzing the public need, the court addressed Transporter's status as a public utility and the nature of the pipeline project. The court agreed with previous cases dealing with the same pipeline company which found that Transporter, a private company, may exercise eminent domain since it had been certified a public utility by the court. Furthermore, due to procedural timing issues, the court held that Condemnee had waived its claims regarding landowner exclusion, lack of notice, its natural resources trustee claim, and its excessive takings claim. However, the court found that the trial court should have held a bond sufficiency hearing before overruling Condemnee's objections and remanded the issue back to the trial court. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Downstream

10th Circuit

Sinclair Wyo. Ref. Co. v. United States Envtl. Prot. Agency, 874 F.3d 1159 (10th Cir. 2017).

Congress issued an amendment to the Clean Air Act ("CAA") in 2005 that directed the EPA to operate a Renewable Fuel Standards Program ("Program") in order to increase the use of renewable fuels by oil refineries; however, Congress added an exception for small oil refineries. For small refineries that would suffer a "disproportionate economic hardship," EPA was required to grant exemptions from the Program on a case-by-case basis. In a study conducted by the Department of Energy ("DOE"), Operator was considered to be a small refinery to which the Program would cause such hardship. In evaluating the petitions for exemption from the Program, EPA was required to consult with DOE and consider the findings of the study DOE had conducted. Operator petitioned for an exemption from the Program, but EPA denied the petition because it determined that Operator was profitable enough to pay the Program's cost. Operator sought review from the court. The court determined that, according to EPA, "disproportionate economic hardship" meant a threat to the existence of the small refinery or a significant threat to the operation of the business. However, the court concluded that a plain meaning of "disproportionate economic hardship" was required. The court determined that the definition should be one that makes the businesses life difficult to continue and financially sustain. The court concluded that "an experience that causes hardship is less burdensome than an experience that threatens one's very existence." EPA's definition was too strict, too narrow, and it was completely at odds with Congress's statutory command. Therefore, the court held that EPA exceeded its statutory authority and vacated EPA's decision.

Louisiana

Cormier v. CITGO Petroleum Corp., 2017-104 (La. App. 3 Cir. 10/4/17); 228 So.3d 770.

Oil Refinery Workers ("Workers") filed personal injury suit against Oil Company alleging exposure to slop oil after spill at facility. The district court found in favor of Workers and awarded damages. Oil Company

appealed the amount of the award, alleging that the district court abused its discretion because the awards were much higher than those given in similar cases. The Third Circuit Court of Appeals affirmed the amount of damages, holding that although the awards were on the high end for the particular injuries suffered, they did not amount to an abuse of discretion by the trial judge. The court also held that the awards were not grossly disproportionate to the medical expenses incurred by Workers because, due to the nature of the injuries sustained, medical expenses in their case would be low compared to the general damages suffered by Workers.

SELECTED WATER DECISIONS

Federal

9th Circuit

Ecological Rights Found. v. Pac. Gas & Elec. Co., 874 F.3d 1083 (9th Cir. 2017).

Environmental Organization filed suit against Utility Company under the citizen suit provision of the Clean Water Act ("CWA") and the Resource Conversation Recovery Act ("RCRA"). It alleged that Utility Company had disregarded toxic wood treatment chemicals at its facility. The district court granted Utility Company summary judgment on RCRA claim. On appeal, the Ninth Circuit Court of Appeals affirmed in part and reversed and remanded in part. RCRA is an environmental statute that governs treatment, storage, and disposal of solid and hazardous waste. It allows for private enforcement through citizen action. The endangerment provision does not require private citizen to prove any specific violation of RCRA requirements. The court held that there was no evidence that Utility Company's trucks picked up contaminants on their trips and carried them offsite. court held that the district court erred in applying the RCRA anti-duplication provision. The abuse of the CWA permit did not trigger RCRA's anti-duplication provision. Utility Company failed to provide legal requirements to show why permits were necessary. The court reversed the district court's summary judgment on Utility Company and the denial of Environmental Organization's arguments regarding storm water and remanded to consider the Environmental Organization's storm water pathway and solid waste. It affirmed the partial summary judgment on the tire-tracking pathway.

Navajo Nation v. Dep't. of the Interior, 876 F.3d 1144 (9th Cir. 2017).

A federally recognized Indian Tribe ("Tribe"), living in parts of Arizona, New Mexico, and Utah relies heavily on the Colorado River waters, considering that most of its lands are "of the desert kind." It was previously held in Arizona v. California, where the United States Supreme Court reaffirmed the vitality of the Winters doctrine – reserving water rights for federal lands –, and that water from the Colorado River was essential to the life of the tribes, their people, the animals they hunted, and the crops they

raised. The Decree awarded five tribes a right to Lower Basin water but declined to reach the claims of the twenty other tribes, one being Tribe. Since this Decree, Tribe has repeatedly asserted its right to water in the Lower Colorado but these rights have not yet been recognized. Tribe filed its initial complaint against Department of the Interior ("DOI"), alleging that DOI failed to adequately consider and protect Tribe's rights to water, thus violating the National Environmental Policy Act ("NEPA"). The district court dismissed Tribe's claims, finding that the alleged harm to Nation's unrecognized Winters rights was too speculative to confer standing. The court of appeals affirmed the district court's dismissal, reasoning that Tribe could not show that harm to its concrete interests—here, its possible Winters rights—was reasonably probable. It also held that the alleged adverse effect on Tribe's generalized interest in availability of water did not show that Tribe suffered injury required for Article III standing.

United States v. Robertson, 875 F.3d 1281 (9th Cir. 2017).

Developer appealed his conviction in district court for violating the Clean Water Act ("CWA") by: (1) knowingly, and without a permit, discharging dredged material from a point source into a United States water source; and (b) willfully injured United States' property by constructing a series of ponds on both National Forest System Lands and on privately owned mining land. The Ninth Circuit Court of Appeal upheld his conviction, holding that: (1) the test for determining whether creek and wetlands into which Developer discharged dredges material is subject to the CWA whether or not there was a significant nexus between them and the navigable waters in the traditional sense; (2) Developer had fair warning that without a permit his conduct was considered criminal; (3) for expert witness testimony it did not matter if the expert used the binding regulations or the enforcement guidelines; (4) the ordinary high water mark was properly considered by the expert witness in evaluating whether the material was dredge material being disposed of; (5) the exclusion of the Army Corps of Engineers manual was not an abuse of discretion by the court; and (6) it was not an abuse of discretion to exclude the study looking at existing contamination.

10th Circuit

City of Eudora v. Rural Water Dist. No. 4, Douglas Cty., Kansas, 875 F.3d 1030 (10th Cir. 2017).

Water District and City disagreed as to which entity could provide water services to particular areas in the county. Water District had to obtain financing to expand and to ensure water services to all parts of its service area; at approximately the same time, City annexed the Water District's service area. Under state law, a municipality replaces a rural water district after annexation. However, Water District believed that if it restructured its financing to include a federally-guaranteed loan, it would receive federal protection that would prevent City from assuming its water customers while the USDA loan was in repayment. This case addressed the third appeal to determine who is entitled to provide water service to the disputed service area. City sought declaration from the court that it may provide water service to the annexed area without violating Water District's rights after the reaffirmation. The district court again found for City, because even under its new strategy of obtaining federal protection, Water District did not meet the requirements set forth in subsequent cases dealing with this matter. Water District appealed, claiming that City's action was barred by res judicta, that City's action was barred by the rule against claim-splitting, and that its new legal and financial structure of the federally-guaranteed loan provided them with the requirements under state law to receive federal protection. The court noted that Water District's arguments for res judicta would only be successful if all claim preclusion requirements were met. The court determined that the reaffirmation of the loan's guarantee did not constitute a separate transaction for claim preclusion purposes. Additionally, the court found that Water District's other claims were without merit and irrelevant.

Federal Claims

Baley v. United States, No. 1-591L, 2017 WL 4342771 (Fed. Cl. Sept. 29, 2017).

Class of Farmers ("Class") sued the Federal Government following termination of water and water delivery service out of precaution to respect certain tribal rights and to adhere to the Endangered Species Act. Following a trial, several substantive issues remained. First, the court determined that Federal Government's motion for summary judgment against shareholders

of a company that contracted with for purposes of water delivery should be granted. The motion was granted because of a previous order by this court which bars claims of those shareholders. In that order, this court determined that the shareholders' claims are barred because their interests are only derivative of the company's water rights instead of being beneficial water rights of their own. Therefore, the shareholders' claims were dismissed. Next, the court turned to the issue of whether the Government's actions constituted a taking under the Fifth Amendment. Those remaining plaintiffs who claimed water rights through Warren Act contracts or lease agreements for land in the National Wildlife Refuge did not have an actionable takings claim because those agreements changed the water rights of those people in such a way that they cannot seek compensation against the Government. The remaining class members did, however, demonstrate a sufficient interest in property over the water because they were not subject to the same contractual terms. However, of those remaining class members, none were capable of recovering on the basis of a Takings Clause claim because several tribes had superior water rights when the Government terminated water delivery service. This case has since been appealed, but there is no decision from the higher court as of publication.

Jackson v. United States, Nos. 14–397L/15–194L, 2017 WL 5586679 (Fed. Cl. Nov. 20, 2017).

Property Owners sued Government alleging that a taking had occurred when the Surface Transportation Board issued a Notice of Interim Trail Use or Abandonment pursuant to the National Trails System Act. Property Owners argued that the prior landowners granted easements to the Middle Georgia & Atlantic Railway for the sole purpose of operating a railroad, and that the property reverted back to the Property Owners in fee simple once the easements were no longer being used for railroad operations. The court found that the easements were not broad enough to encompass trail use, thus siding with Property Owners and granting their motion for summary judgment, returning the property in fee simple to them.

Sacramento Grazing Ass'n, Inc. v. United States, No. 04–786 L, 2017 WL 5029063 (Fed. Cl. Nov. 3, 2017).

Ranching Group filed a complaint against United States Forest Service ("USFS") for an adjudication of its right to beneficial use of stock water sources within the Sacramento Allotment of the Lincoln National Forest that pre-dated federal control. USFS had installed enclosures that limited

the use of stock water resources. The court determined that: (1) Ranching Group's Fifth Amendment Taking Clause claims were not barred by the statute of limitations; (2) Ranching Group had established a property interest, recognized by New Mexico law, in making beneficial use of stock water resources in the Lincoln National Forest; and (3) Ranching Group's right to make beneficial use of stock water was abrogated by actions undertaken by the USFS in violation of the Fifth Amendment's Takings Clause.

St. Bernard Parish Gov't v. United States, No. 15-637C, 2017 WL4675686 (Fed. Cl. Oct. 18, 2017).

On June 30, 2017, United States entered into an Agreement with Parish which provided that under the provisions of the Emergency Watershed Protection Program ("EWP"), United States was authorized to assist Parish in relieving hazards created by natural disasters that cause sudden impairment in a watershed. It also stated that the parties agreed to install emergency watershed protection measures to relieve hazards and damages created by Hurricane Katrina. In this action, Parish alleged that United States breached the Agreement by not paying it all the money it was due for the removal of sediment in the bayou in the aftermath of Hurricane Katrina. United States moved to dismiss the action, arguing that because the Agreement was not a contract but rather a "Cooperative Agreement" under the Federal Grant and Cooperative Agreement Act ("FGCAA"), or alternatively that because the Agreement lacked consideration on the part of United States, the court lacked jurisdiction. The court held that the Agreement was to be considered a cooperative agreement and, therefore, Parish lacked jurisdiction in the court under the Tucker Act. It reasoned that not only was the Agreement labeled "Cooperative Agreement," but that Parish was unable to point to any specific provision in the Agreement contemplating money damages for breach by United States. The court also noted that there was no consideration that rendered a benefit to United States, so the Agreement was not an enforceable contract in the court. This case has since been appealed, but there is no ruling from the higher court as of publication.

D. Arizona

Roosevelt Irrigation Dist. v. United States, No. CV-15-00448-PHX-JJT, 2017 WL 4364108 (D. Ariz. Sept. 30, 2017).

Utility Company filed a motion for partial summary judgement. Irrigation District sought judicial review regarding its contract to determine if it had the "right to pump ground water from its East Side Wells and transport the water for [its] use … does not terminate on October 26, 2020." The court denied Utility Company's motion for partial summary judgment and granted part of RID's motion and denied part of it. Where the United States is a party, federal law governs the interpretation of such contracts. Contracts should be read as a whole, and extrinsic evidence of trade usage and course dealing may be considered when there is an ambiguity. The court looked at the plain language of the contract to determine the length of the contractual term. The court determined that the language of the contract was ambiguous regarding the contractual length of term. The court further determined that since it was ambiguous and extrinsic evidence could be support by each party that a determination should be made at trial. Utility Company contends that the contract requires the water Irrigation District receives distrusted in compliance with the "'Warren Act' which limit the use of waters pumped from United States Reclamation Service Projects to 160 acres for any one land owner." The court found Irrigation District failed to show a lack of genuine dispute regarding facts of Irrigation District's right to pump under the contract beyond the date and that the length of the contract must go to trial. The court also noted that the contract at issue is not a Warrant Act contract, because no dispute existed as to the Secretary of the Interior as a non-party to the agreement. However, the court noted that a genius dispute existed as to the extent of which the parties incorporated terms of the Warrant Act. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

State

Arizona

Henline v. Gregg, No. 1 CA-CV 16-0524, 2017 WL 4638258 (Ariz. Ct. App. Oct. 17, 2017).

Members belonged to Water Co–Op, a co-operative association formed to supply water to an eighty-acre tract of land around a well in County. Members of Water Co-Op acquire interests therein proportionate to the number of acres they own; the Water Co-Op itself owns the well and water distribution equipment. Members conveyed Water Co-Op-property to Grantee through quitclaim and warranty deeds; however, neither of these deeds granted Grantee membership to Water Co-Op. Grantee later erected a fence around his property that blocked Members' access to a north-south road, an east-west road, and to Water Co-Op equipment. Members sued to quiet title and sought a temporary restraining order and preliminary and permanent injunctions to enjoin Grantee from blocking the roads. Members also sought a declaration that they were entitled to easements along the roads and that Grantee was not a member of Water Co-Op. Grantee counterclaimed, alleging that he was entitled to water from Water Co-Op because he acquired the land through a warranty deed from a Member of Water Co-Op and that membership ran with the land. The lower court found that Grantee must provide access to Water Co-Op equipment and was prohibited from interfering with the equipment. It also granted summary judgment to Members, holding that Grantee was not a Water Co-Op member and that the Members had a prescriptive easement for use of the roads because they had used them for more than ten years. Grantee appealed, and the appellate court affirmed, holding that neither of the deeds awarded Grantee membership, and the prescriptive easement that belonged to Members prohibited Grantee from blocking roads on his land. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

California

City of San Buenaventura v. United Water Conservation Dist., 406 P.3d 733 (Cal. 2017).

City brought suit seeking writs of mandate and administrative mandate along with reverse validation and declaratory relief against Water

Conservation District ("District"), challenging the constitutionality of District's groundwater pumping charges to City and other operators for certain consolidated water years. District cross-claimed, seeking a declaratory judgment to uphold its charge. The district court issued a declaratory judgment and the writs of mandate, ordering District to refund City for certain years of charges. Both parties appealed. The Supreme Court of California held that District's groundwater charges fell outside the purview of Article IIID of the California Constitution as they were not "imposed . . . upon a parcel or upon a person as an incident of property ownership" within that phrase's constitutional meaning, because in executing the groundwater pumping, District was not providing a service to City in its capacity as owner of the lands where the groundwater wells were located, but rather in its capacity as an extractor of groundwater from areas managed for the public's benefit. The court determined that because District's charge qualified as one imposed for a specific benefit given directly to the payor that is not given to those not charged, and because the charge did not exceed reasonable costs to the local government for conferring the benefit or privilege, the charge was exempt from the Constitutional definition of a "tax." On that question, the court remanded the issue with instructions to examine the record for evidence that the charges in question carried a "reasonable relationship to the benefits of its conservation activities" as is constitutionally required.

Living Rivers Council v. State Water Res. Control Bd., 223 Cal.Rptr.3d 703 (Cal. Ct. App. 2017).

Objector filed petition for writ of mandate to require Water Resources Control Board ("Board") to rescind its approval of policy designed to maintain instream flows in certain coastal streams. The trial court denied the petition and Objector appealed. The appellate court affirmed, holding that a revised substitute environmental document was not misleading with respect to whether policy-induced increases in groundwater use would cause significant impacts; that such document adequately described subterranean stream delineations as potential, but unadopted, mitigation measure; and evidence was sufficient to support finding that subterranean stream delineations were infeasible as mitigation measure. This case was ordered not published; therefore, state court rules should be consulted before citing the case as precedent.

Pleasant Valley Cty. Water Dist. v. Fox Canyon Groundwater Mgt. Agency, No. 2d Civil No. B281425, 2017 WL 5589178 (Cal. Ct. App. Nov. 21, 2017).

Water District sued groundwater management agency ("Agency"), seeking to invalidate an ordinance clarifying the rules for groundwater extraction surcharges ("Ordinance"). Agency was created to address groundwater overdrafts with the objective of balancing water supply and demand. Water District is a water purveyor and is a special district with its acreage all within land under Agency's authority. Ordinance was created in response to the Governor's 2014 declaration of a statewide drought emergency and sought to clarify which water sources are subject to a groundwater surcharge if not used efficiently by an agricultural operator. Water District contended that Agency lacked the statutory authority to consider river surface water use in calculating the groundwater extraction surcharge. The trial court found Agency's ordinance as not exceeding its lawmaking authority and that the ordinance is categorically exempt from California Environmental Quality Act and does not violate the equal protection clause of the California constitution. Because the state legislature granted Agency with broad authority in adopting ordinances to preserve, protect, and enhance groundwater resources as well as the authority to implement conjunctive use objectives for groundwater management, the appellate court held that Agency's control is not limited to only groundwater basins. While Agency was not primarily created to monitor river surface water use, the appellate court found the activity to be within the grant of Agency's expressed and implied powers. In regard to the equal protection claim, the appellate court held that Water District failed to show how Ordinance treated Water District differently from similarly situated persons and that Agency had a rational basis for determinations based on the source of groundwater used for irrigation. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Monterey Coastkeeper v. Monterey Cty. Water Res. Agency, 226 Cal. Rptr. 3d 592 (Cal. Ct. App. 2017).

Program filed a petition for writ of mandate against Agency, claiming five causes of action. Program claimed that Agency violated the local Porter-Cologne Water Quality Control Act ("Act") by discharging waste into local water sources without filing a report on such discharge. Program also claimed violations by failure to comply with the Act's requirements

regarding the waste discharge itself, and the water quality plan. Program also claimed that Agency breached its fiduciary and public duty through such actions and created a public nuisance. Since the State Water Board had already begun an investigation, but with no final action taken, the court relied on their information, determining that Agency was in fact a waste discharger. The court held that there was an administrative remedy which should have been pursued before filing petition for writ of mandate. Program could have asked the Regional Water Board to step in, as it is authorized to do under the Act, and order Agency to file the required discharge report, imposing civil repercussions if such an order was not complied with. The state and regional water boards have direct authority to manage water quality and waste discharge, so the grievance should have started with them, not the court system. However, the court found that the Act does allow for judicial review, despite Agency's claim otherwise, because even though the State Water Board's review of the Regional Water Board's decision is discretionary, their denial of review triggers further judicial review. According to the record, Program never filed a petition requesting the State Water Board's review of the Regional Water Board's inaction. Thus, this court held that Program could not get "extraordinary relief" because it had not expended all administrative remedies.

Santa Clara Waste Water Co. v. Cty. of Ventura Envtl. Health Div., 225 Cal. Rptr. 3d 885 (Cal. Ct. App. 2017).

In November 2014, an explosion at Operator's facility led to a criminal investigation in which Health Division assisted in executing a search warrant. Health Division discovered nineteen 275-gallon totes and seven 50-gallon drums of Petromax and determined that twenty-four of the totes and drums were hazardous because their high pH levels had accumulated over time. Because the district attorney's office ("DA") had already filed a criminal action against Operator, Health Division chose to use an informal enforcement action, which notifies the operator of noncompliance and puts in place an action and date for the correction, but it does not impose any sanctions. Operator sued Health Division arguing that Petromax was not hazardous waste and that it had a right to an administrative hearing to determine whether Petromax constituted hazardous waste. Health Division filed a motion to strike the petition as a "strategic lawsuit against public participation" ("Anti-SLAPP"). The trial court denied the motion. The appeals court reversed the denial, holding that Health Division made a prima facie showing that Operator's cause of action arose from an act of

free speech in connection with a public issue and that Operator failed to carry its burden of establishing a probability of prevailing on its claim.

Idaho

Paslay v. A&B Irrigation Dist., 406 P.3d 878 (Idaho 2017).

Landowners filed suit seeking injunctive relief and declaratory judgment against Irrigation District for diverting a portion of their water source to other property owners in the district. The district court granted District's motion to dismiss on all counts—count I, which sought a declaratory judgment enforcing Landowners' water rights, and count III, which sought injunctive relief for breach of fiduciary duty, were dismissed for lack of justiciability, and count II, which challenged the project's assessment as a violation of Landowners' property rights, was dismissed as being barred by res judicata. Landowners appealed, arguing that: (1) the legal standard used by the lower court in granting dismissal was improper, and (2) neither justiciability nor res judicata barred their claims. The Idaho Supreme Court affirmed the determination that counts I and II were not justiciable because their claim that District's project will cause "dilution" of Landowners' available water supply did not constitute an actual or threatened injury to Landowners. However, the court reversed and remanded the lower court's decision to dismiss Landowners' claim for declaratory relief on procedural grounds.

Montana

In re Scott Ranch, LLC, 2017 MT 230, 388 Mont. 509, 402 P.3d 1207.

This water rights case involves tribal lands allotted to a deceased party, later converted to fee simple and procured by Purchaser. Purchaser sought associated water rights, but was denied by the Water Court because the court determined that the rights were preexisting, originating from the Crow Water Rights Compact, were exempt because they were for "livestock or individual use" and therefore required no adjudication. The Water Court said Purchaser could share in the collective allotted share of the Tribal Water Rights. On review, the Montana Supreme Court determined that these rights are 'existing rights' under the relevant statute because "[a]s the non-Indian successor-in-interest to allotment lands conveyed by a tribal member, [Purchaser] possesses *Walton* water rights as appurtenances to the lands it acquired." *Walton* rights are non-tribal members' "right[s] to share

in reserved waters." However, the court held that the claims fell under the jurisdiction of state law, rather than Tribal Water Rights, since the water rights were obtained through the allocation of the converted land, not as part of the Crow Compact which created the shared rights. Additionally, the land was purchased by a private party and no longer held via trust by the government. Even though a claim filing deadline (that had long passed) was imposed by state law, it would have been impossible for Purchaser to comply with such a deadline, considering the date of sale. Therefore, the court reversed and remanded the claims, finding that the Water Court erred in deciding that these rights were still part of the collective Tribal Water Rights. It also offered instructions that Purchaser may still submit a claim, despite the past deadline.

Quigley, 2017 MT 278, 389 Mont. 283, 405 P.3d 627 (Mont. 2017).

Landowner and Neighbor brought suit against one another, asserting conflicting claims of ownership over irrigation water rights. Water Master based a report dividing the four rights on proportional ownership rights of the irrigated acres owned by each party. The case was appealed to the Supreme Court of Montana after the Water Court largely adopted Water Master's report. Landowner contend that Water Master and the Water Court erred in failing to interpret a past decree to only include water rights where Neighbor put the water to beneficial use. The Montana Supreme Court ultimately held that Neighbor's pleadings do not control the place of use of the rights decreed to Neighbor. The court affirmed the Water Court's order.

Nevada

Bosta v. King, 404 P.3d 397 (Nev. Oct. 13, 2017).

The district court denied a preliminary injunction and dismissed water rights owners' ("Owners") complaint in a water rights action. On appeal, Owners argued that State Engineer lacked authority to regulate well usage because: (1) percolating groundwater is private property, under which water lies; and (2) even if percolating groundwater was not private property, Owners were not "persons" within the meaning of the relevant state law. In response, the Supreme Court of Nevada disagreed with both contentions, finding that: (1) the Legislature, in the 1939 Water Act, determined percolating groundwater as belonging to the public; and (2) state law at issue does not expressly prove a separate definition of "person," but instead expands another provision's general definition of "person," which owners

fall under. Accordingly, the Supreme Court of Nevada affirmed the decision of the district court. This is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing the case as precedent.

State Eng'r v. Eureka Cty., 402 P.3d 1249 (Nev. 2017).

Company filed many applications to amend the water usage in Valley. The State Engineer granted Company's application. The State Engineer noted that the ruling would impact some of the senior water rights but that Company would be able to mitigate the impact. Company still had to prepare a monitoring, management, and mitigation plan before diverting the water. The County's request for a judicial review was denied. Company and State Engineer argue that the district court exceeded its authority when it vacated the permits rather than remanding the case for further fact-finding. The Supreme Court of Nevada disagreed. The court stated that when it remands a case, "the district court 'must proceed in accordance with the mandate and the law of the case as established on appeal.'" The court determined that State Engineer's determination that Company could mitigate the preexisting water was not based on substantial evidence and therefore could not stand. At no point did the court direct the district court to remand the case for further fact-finding. Therefore, the district court acted consistent within the instructions of the Supreme Court of Nevada. The court affirmed the lower court because it complied with the direction of the Supreme Court of Nevada.

New York

Vill. of Woodbury v. Seggos, 65 N.Y.S.3d 76 (N.Y. App. Div. 2017).

Village had been building a thirteen-mile long pipeline to tap into an aqueduct. Because authorization to withdraw water would not be granted unless Village proved that it had an adequate backup water source, Village acquired property in neighboring town ("Town") that was suitable for a needed pump station and provided access to an abundant potential water supply. Village then applied to the Department of Environmental Conservation ("DEC") for a permit to develop a well field at the Town. Village's application was reviewed under the State Environmental Quality Review Act ("SEQRA"), and no adverse environmental impact was found. The water supply permit was further submitted and reviewed by DEC, and Village was issued a final permit in 2015. Interest Groups brought two

different claims seeking relief, including annulment of the water withdrawal permit and an injunction barring the withdrawal. DEC and Village moved to dismiss both claims on grounds that Intervenors lacked standing. The trial court found that the Intervenors lacked standing to bring the suit and further noted that even those parties' challenges to the SEQRA determination were barred by res judicata and belied by "overwhelming documentary evidence," and dismissed the petitions. On appeal, the appellate court affirmed for several of the Intervenors, but held those that were neighboring landowners and towns had standing to sue, but that the SEQRA challenge was time-barred, and the DEC had rational basis for granting the permit application and acted within its discretion in doing so.

Ohio

State ex rel. Dewine v. Osborne Co., 11th Dist. Lake No. 2016-L-091, 2017 WL 4779213 (Oct. 23, 2017).

State sued Operator alleging three causes of action; each alleged a violation of State's Water Pollution Control Laws. State claimed that: (1) Operator failed to obtain certification from State's EPA before engaging in certain activities along the river; (2) that Operator failed to obtain a construction storm water discharge permit before engaging in activities that disturbed the land along the river; and (3) that Operator polluted the river, without a permit, by discharging storm water into the river. Operator had been placing dredged material into the river, degraded certain portions of the river, and threatened other portions in order to increase water flow. Operator was also removing material from the center of the river and placing it on the water banks. The trial court found Operator personally liable. Operator appealed bringing four assignments of error. First, that the trial court wrongly interpreted that all of the work performed was without a permit; secondly and thirdly, that the trial court erred in assessing a civil penalty and awarding State injunctive relief beyond the scope necessary; and lastly, that the trial court erred in finding Operator personally liable. Resolving the first assignment of error, the appeals court found that while Operator's actions violated other statutory provisions, State did not allege those provisions. The court remanded Operator's second and third assignments of error based on the court's resolution of the first assignment of error. Finally, the court held that the fourth assignment of error was without merit, because under State law, an individual may be held personally liable when the court finds "personal participation" in the unlawful act.

Oregon

Willamette Water Co. v. Waterwatch of Or., Inc., 407 P.3d 923 (Or. Ct. App. 2017).

Company applied for a permit to use public water for a quasi-public use. Commission proposed a conditional permit which Public Interest Group protested. An ALJ heard arguments and denied the application because the applicable law stated that projects to divert public water must be completed within five years of the grant of a permit, and Commission determined that the project would take over ten years to complete. Company appealed and alleged that: (1) Commission misconstrued the applicable law when it determined that Company had only five years to complete the project; (2) the ALJ disregarded a witness with contrary evidence to its determination that the project would take over ten years; and (3) Commission misconstrued applicable law when it determined that it was required to deny the application based on the lack of land use approvals for Company's project. The appellate court held that Commission did not misconstrue applicable law to either the necessary time span to complete the project or to deny the application based upon the lack of approvals because the interpretations were made using the plain language of the statutes in question. The appellate court also held that the ALJ only disregarded objected-to portions of the witness's testimony regarding the time Company would take to complete the project, so the evidence was otherwise completely taken in to consideration. The appellate court ruled that Commission did not err in denying the application.

Texas

Mt. Peak Spec. Util. Dist. v. Pub. Util. Comm'n of Texas, No. 03-16-00796-CV, 2017 WL 5078034 (Tex. App. Nov. 2, 2017).

Utility District sued the Public Utility Commission ("PUC"), seeking judicial review of PUC's ruling concerning Utility District's water service transmission to the City. PUC had previously granted City's petition for expedited release of a portion of its property from the certificated service area of Utility District. Upon review of the district court, Utility District contended that the statutory requirements for expedited release had not been satisfied because City was in fact receiving water service from Utility District. Utility District also argued that PUC should not have approved the decertification petition as six and seven-tenths ("6.7") acres of property

within Utility District's certificated service area and owned by City was excluded from City's petition. Ruling against Utility District, the district court affirmed PUC's approval of City's petition. The appellate court, the court affirmed the lower court's ruling on all issues. With regard to the exclusion of the 6.7-acres, the court examined whether there are water facilities or lines committed to serving the property and ultimately held that City's exclusion of the 6.7-acres from its petition is not a basis for reversing PUC's approval. The court also held that City was not receiving water service by examining the evidence presented in the decertification proceedings. Because the existence of water lines near a property does not necessarily mean the area is receiving water service, the court found reasonable support to PUC's fact-based determination affirming City's argument. The court also held that PUC's order does not conflict with a previous agency order since the agreement in question between Utility District and City was an agreement separate to the one approved by PUC.

Utah

Utah Stream Access Coal. v. Orange St. Dev., 2017 UT 82, No. 20150439-SC, 2017 WL 5634226 (Utah Nov. 22, 2017).

A group of citizens ("Group") sued, alleging that a one-mile stretch of the river was navigable water and, therefore, should be open for recreation under the Public Waters Access Act ("Act"). Group sought only recreational use rights and no title determination to the waters. The trial court concluded that the disputed section of the river was navigable under the "navigability for title" standard set forth in federal "equal footing" law. It further accepted the testimony of Group's expert showing regular commercial use of the river, including the use for transporting timber, which would be less economical on land. The trial court thus issued an injunction preventing landowners and state officers from interfering with the recreational use rights of the public on the stretch of river. Finally, the trial court concluded that the streambed below the water was held in title by the State, thus quieting title to the streambed although Group did not assert this claim. On appeal, the Utah Supreme Court found that the trial court improperly quieted title to the streambed, that its improper reliance on federal law was harmless error, and that the evidence in the case was sufficient to support the trial court's determination that the stretch of water was navigable under the Act.

Vermont

TransCanada Hydro Ne. Inc. v. Town of Newbury, 2017 VT 117, No. 2016-061, 2017 WL 6210911 (Vt. Dec. 8, 2017).

Dam Owner ("Owner") owns and operates a dam on the Connecticut River in Hartford, Vermont. The dam is downstream from Town, and Owner has flow easements that give it the right to flood land abutting the river in Town. Town had valued the flow easements at $1,532,211.00 for property tax purposes and Owner challenged the valuation arguing that it was unsupported by the admissible evidence. Owner argued that the value could not be based on comparable sales of flow easements because no evidence of comparable sales existed, and sale prices are influenced by the Owner's right to take such easements by eminent domain. Owner and Town had expert appraisers analyze the surrounding land of the dam and evaluate the value of the possible flooding easements. Owner's expert focused on the acres of land that were actually flooded, whether the flooding was directly influenced by the dam, and each flooded acre's possible utility value. Town's expert valued all the acres included in the easement as possible flooding spots and valued them all the same, resulting in a much higher value. The trial court concluded that the dam was, at any given point, always liable, at least in part, for all flooding and was able to find middle ground from both arguments and find a valuation in between the two experts' findings – $1,532,211.00. The Vermont Supreme Court affirmed, holding that the trial court could use the uniform per-acre value in appraising the value of flow easements and that Owner failed to rebut the presumption that Town's valuation of flow easements was valid.

SELECTED LAND DECISIONS

Agricultural Use

E.D. North Carolina

In re NC Swine Farm Nuisance Litig., No. 5:15-CV-00013-BR, 2017 WL 5178038 (E.D.N.C. Nov. 8, 2017).

Property Owners living near swine farms sued Farm Owner, seeking monetary damages for nuisance and negligence. Both parties filed several motions and cross motions for partial summary judgment and motions to seal. After determining that Property Owners lawfully occupied the affected properties, the district court denied Farm Owner's motion for partial summary judgment. The court found as follows: (1) because the use of Property Owners' lands as residences did not extend into an agricultural area and was in existence long before Farm Owner began his operations, and because Property Owners' nuisance claims had nothing to do with changed conditions in the area, their claims were not barred by the state's right-to-farm law and Property Owners were entitled to summary judgment on that defense; (2) the constant nature of the unpleasantness caused by the farm made the nuisance a recurring one, meaning Property Owners' nuisance claim was not barred by the statute of limitations, but recovery was barred beyond the three years prior to filing suit; (3) Farm Owner presented sufficient evidence to preclude summary judgment against him on the defenses of contributory negligence and assumption of risk; (4) because they owned or occupied their property lawfully and the annoyance and discomfort alleged flowed from the wrong purportedly created by Farm Owner, if Property Owners could establish a nuisance, they are entitled to recover damages for discomfort and annoyance; (5) evidence of Property Owners' fear of disease or adverse health effects was not barred in support of their discomfort and annoyance claims; and (6) the question of punitive damages was to be decided at the end of Property Owners' case in chief or after all evidence was heard.

California

Citizen's Voice St. Helena v. City of St. Helena, A146887, 2017 WL 5167817 (Cal. Ct. App. Nov. 11, 2017).

Interest Group and two citizens (together, "Interest Group" or "Group") challenged an approved use permit for a wine production facility. The Group brought two causes of action: (1) violation of the California Environmental Quality Act ("CEQA") by failing to prepare an Environmental Impact Report ("EIR"); and (2) violation of planning and zoning laws. Interest group now appeals the denial of their challenge. City first argued that Interest Group's appeal should fail because it failed to exhaust its administrative remedies. On this issue, the appellate court determined that the lower court erred in determining that the Group's appeal to the City Council does not count as a sufficient attempt to exhaust administrative remedies because the hearing carried out by a planning commission included an appeal to the City Council. The court then determined an EIR was unnecessary because Group failed to provide any substantial evidence of a potential significant environmental impact after City presented mitigation measures which addressed the Group's concerns. Finally, the plan for the winery did not violate City's planning or zoning laws. The plan did not violate planning laws because the winery was not for a "[s]trictly tourist-serving retail" purpose, and that determination by the lower court was not unreasonable. Further, the winery plan did not violate City's zoning law because Group failed to provide any authority demonstrating the zoning law was a categorical rule not subject to a previously established exception for "building[s] that existed prior to 1993" like the one at issue in this case. Therefore, despite the error by the lower court regarding the scope of attempted administrative remedies, there is no basis to accept Group's two causes of action. The lower court was affirmed. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Missouri

Hill v. Mo. Dept. of Conservation, No. ED 105042, 2017 WL 4507991 (Mo. Ct. App. Oct. 10, 2017).

Owners of hunting preserves and breeding operations ("Owners") challenged amended regulations enacted by the Missouri Conservation Commission ("Commission"). The regulations were aimed at the captive

cervid – elk and deer – industry in an effort to manage the threat of Chronic Waste Disease ("CWD") which can be fatal to the cervid population in the state. Owners sought to enjoin Commission from enforcing the regulations on the grounds that captive cervids were not "game" or "wildlife resources of the state" and that the regulations interfered with their right to farm. The trial court found all of the challenged amended regulations to be invalid and prohibited Commission from enforcing them. Commission appealed, alleging three points of error: (1) the trial court erred in entering judgment for Owners' claim that Commission lacked authority to regulate captive cervids as "game" or "wildlife resources of the state" because the Commission does have constitutional authority to enact regulations concerning captive cervids that could pass CWD to the state's non-captive cervids; (2) the trial court erred in entering judgment for Owners on their claim that the regulations violated their right to farm because Owners were not engaged in farming or ranching practices and therefore Commission could regulate Owners; and (3) alternatively, the trial court erred in enjoining enforcement under Owners' right to farm claim because the injunction is overbroad and void as to non-parties. The appeals court held that it would reverse the trial court on points one and two. However, because of the general interest and importance of the questions involved, it transferred the case to the Missouri Supreme Court.

Wisconsin

Multerer v. Wis. Dep't of Revenue, 2017 WI App 71, 378 Wis. 2d 327, 904 N.W.2d 408.

Landowners' properties are subject to permanent wetland conservation easements under federal law preventing future farming on the land. According to the Wisconsin Administrative Code the properties are not distinguished of "agricultural use." Without this distinction, Landowners cannot take advantage of agricultural property tax breaks. Landowners sued the Department of Revenue ("DOR"), challenging the validity of this definition, and alleging a violation of their state and federal equal protection rights and the Uniformity Clause of Wisconsin's Constitution. Specifically, Landowners argue that they are similarly situated to, but treated differently than, owners of land that have temporary restrictions on agricultural use. They also alleged that the provision in question was promulgated without environmental review as required by the Wisconsin Environmental Policy Act ("WEPA"). The circuit court granted DOR's motion for summary judgment and Landowners appeal. The appellate court affirmed. Finding

rational basis as the appropriate level of scrutiny the court held the legislature was reasonable in giving preferential tax treatment to land that can be put to agricultural use in the future, as it encourages such landowners to keep open the possibility to put their land to agriculture use at a later date Taxing land at preferential rates that cannot be returned to such production provides no incentive to Landowners to preserve their land for farmland, and this difference in goals provides a rational basis for excluding such land from the definition of "agricultural use" in the state code. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Easements

Tax Court

Palmolive Bldg. Inv'rs, LLC. v. Comm'r of Internal Revenue, 149 T.C. 18 (2017).

Company executed a conservation easement deed to preserve the exterior perimeter walls of its building's façade. The deed prohibited Company from demolishing, removing, or altering the protected elements without permission from State's preservation council ("Council"). At the time of the execution two mortgages encumbered the building. Before executing the deed with Council, Company secured agreements from both lenders to subordinate their mortgages in the property rights to enforce the purposes of the easements. The deed had provisions regarding the insurances and who must pay whom. During tax court proceedings, the court noted that in order to meet the perpetuity requirements, a property interest retained by the donor must also be subject to legally enforceable restrictions. The court looked at how a mortgage on the property affects whether a donation of easement on the property has a lasting value. The court found that the deed did not satisfy the perpetuity requirements under the tax code and the mortgage were not subordinated to the easement. Under the tax code "no deduction will be permitted … for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property of the right of the qualified organization." The property in this case was not free and clear, instead the owner borrowed money and used the property as collateral for his loans. The whole property was insured. Even though Company donated the façade easement, the façade continued to benefit Company and its lenders by supporting the insurance coverage. The court stated that where an owner subject to a mortgage and covered by insurance

seeks to donate a perpetual easement interest in a façade, the owner may not hold back an interest in it by using it as collateral for mortgage loans. The mortgagee's right in the property must be subordinate to the interest of the donor. Therefore, the court held that because the requirements of the tax code were not satisfied at the time of the gift, the conversation easement is not protected in perpetuity.

California

S. Cal. Edison Co. v. Antelope Valley Water Storage, LLC, F072320, 2017 WL 4532471 (Cal. Ct. App. Oct. 10, 2017).

A water storage company ("Water Company") challenged a trial court's denial of its motion to dismiss an eminent domain complaint filed by a public utility company ("PUC"). Among other things, Water Company contends the trial court erred when it interpreted PUC's easements over Water Company's property as being exclusive and giving PUC the right to restrict Water Company's use of the easement property. The appellate court affirmed the trial court decision, holding that the lower court correctly interpreted the easements to give PUC the power to limit or exclude Water Company's proposed use of the easements. The easements in question expressly reserved certain rights to the property and prohibited the property owners from engaging in various activities the court reasoned. Specifically, per the easement Water Company cannot deposit any substance or material that, in PUC's opinion, would endanger or interfere with PUC's transmission lines, and, because water is a substance, and water banking it is an activity which PUC deemed dangerous to its transmission line activities, PUC had the right to preclude Water Company from using the property subject to the easements for water banking. This case is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Georgia

PHH Invs. v. Dep't of Transp., 808 S.E.2d 431 (Ga. Ct. App. 2017).

Landowner's property, Parcel 6, is near Georgia Highway 400 and has a strip mall on it. Within that strip mall there is a smaller partial that is owned by Company. Company leases that parcel to Restaurant. No driveway existed when Restaurant opened and so it obtained an easement from Parcel 6. In 2014, the Department of Transportation ("DOT") started a project to

ease traffic flow at busy intersections. DOT filed petitions to condemn part of Parcel 6 including the easement that Restaurant owned. Company argued that the reduced access to the highways would impact its business and that it was entitled to recover diminution in market value. Company appealed the trial court's finding that it could not recover the diminution in value of its contiguous parcel based on the partial taking of its easements over the adjoining condemned property. The appellate court affirmed the lower court. The court found that Company cannot recover consequential damages for Parcel 6 since it does not own it and its neighboring properties were not condemned.

Kentucky

Majestic Oaks Homeowners Ass'n. Inc. v. Majestic Oaks Farms, Inc., 530 S.W.3d 435 (Ky. 2017).

Homeowners sued Developer after Developer continued to utilize an easement created by a declaration in Developer's original conveyance of land to Homeowners, revocable only by a sixty-seven percent majority vote by Homeowners. Both parties filed motions for summary judgment. The trial court granted Developer's motion, and the appellate court affirmed. The Kentucky Supreme Court first began by noting that this type of defeasible easement is recognized in Kentucky, and ends when a specified action occurs. Finding that easements are a type of restriction mentioned in the original conveyance from Developer to Homeowners, it was a revocable easement in areas of both property law and contract law. Therefore, the court held that the trial court improperly granted summary judgment to Developer, and instead entered summary judgment for Homeowners.

Michigan

Collins v. Schmidt, No. 336967, 2017 WL 4798253 (Mich. Ct. App. Oct. 24, 2017).

Landowners had an appurtenant easement across a road that went through Neighbor's property. Neighbor built a garage on his property and re-graded the road to have access to the garage from the road. Landowners claimed that the re-grading unilaterally modified the easement and caused them to lose rights to their easement because of the degree that must be climbed. It also caused them to lose the ability to move their mobile home to their property. The trial court heard oral argument over the issues for two days

and decided that Neighbor had not modified the easement and had not unreasonably interfered with the easement because the road was still passable after the modifications. The appellate court affirmed that there was no modification to the easement due to Neighbor's use of the property, but vacated and remanded on the issue of whether Landowner's mobile home can be transported to their property because according to the easement, Neighbors may not interfere with Landowners' rights to use the road for such. On appeal, Landowners also brought up an issue of denial of due process because the trial court did not rule on trespass from soil from the re-grading being deposited upon their property, but the issue was not preserved for appeal and was not specifically brought before the trial court in the pleadings, so the appellate court held that there was no denial of due process. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Douglass v. Barrett, No. 334352, 2017 WL 5759780 (Mich. App. Ct. Nov. 28, 2017).

Landowner 1 sued Landowner 2 over the use of two driveways, one gravel and the other paved. The gravel driveway ran on both Landowners' properties. The lower court ruled in favor of Landowner 1 regarding the gravel driveway because of the doctrine of acquiescence. Further, the lower court determined that Landowner 2's claim against Landowner 3 should be denied because Landowner 3 had an easement appurtenant which burdened Landowner 2's property. Landowner 2 blocked access to the gravel driveway, forcing Landowner 1 to use a dirt two-track to access his home. Landowner 2 further claimed that it had maintained and used the gravel driveway for twenty-eight years and a witness (Landowner 1's neighbor) testified Landowner 1's long-time use of the gravel driveway. Despite Landowner 2's contention, the appellate court determined that Landowner 1 properly demonstrated acquiescence for the statutory period (fifteen years) over the gravel driveway. This was because Landowner 1 demonstrated by a preponderance of the evidence that it had the exclusive right to the driveway for over two decades—the testimony was sufficient and the court deferred to the lower court's factual finding. What's more, Landowner 2 failed to provide any authority for its proposition that the statute of frauds should be applied. Regarding the dispute between Landowners 2 and 3, the appellate court determined that the lower court did not err in its conclusion that there should be termination of the right-of-way easement along Landowner 3's property line. This was because an easement appurtenant was found and no evidence was submitted to the lower court that there was

"a merger of [Landowner 3's] parcels, abandonment of the easement, or termination of that easement." This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Gunther v. Apap, No. 333169, 2017 WL 4654975 (Mich. App. Oct. 17, 2017).

Lakefront Property Owners brought suit against Backlot Property Owners, seeking a permanent injunction in regard to a pathway and boating activity in front of Lakefront Property Owners' homes. The trial court granted summary disposition to Backlot Property Owners, holding that Lakefront Property Owners lacked standing because Lakefront Property Owners did not have a property interest in the pathway used by Backlot Property Owners to access the lake. Lakefront Property Owners argue that Backlot Property Owners possess an interest only in a right of way over the strip solely for pedestrian purposes without any riparian rights allowing Backlot Property Owners to construct a dock and keep boats in the water on a long term basis. On appeal, Lakefront Property Owners argued that they themselves own the nine-foot strip of land in question. Alternatively, Lakefront Property Owners argue that, even if they themselves do not own the strip, Lakefront Property Owners' riparian property rights are affected since Backlot Property Owners activities extend beyond the strip and onto bottomlands owned by Lakefront Property Owners. Citing Michigan law, which holds that a right of way for pedestrian access does not extend to riparian rights, the appellate court held that Lakefront Property Owners' lack of apparent ownership of the strip is not dispositive. Thus, the appellate court examined, more broadly, whether Backlot Property Owners' activities give rise to a trespass or a nuisance with respect to Lakefront Property Owners' undisputed riparian rights and property interest. The appellate court ultimately held that Lakefront Property Owners should be allowed to amend their complaint to add a claim for nuisance and a claim to quiet title to their riparian property. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Mississippi

Mayton v. Oliver, No. 2015–CA–01875–COA, 2017 WL 5907555 (Miss. Ct. App. Nov. 30, 2017).

Landowners sued Neighbor, alleging that Neighbor had violated a restrictive covenant and interfered with express or prescriptive drainage easements when Neighbor blocked a PVC pipe that emptied water from Landowners' properties onto Neighbor's. The trial court found for Neighbor, and decided that Landowners had failed to establish the existence of either an express or prescriptive easement. Therefore, Landowners claims for relief for damages were denied. On appeal, the appellate court affirmed the trial court's decision that Landowners had not established that an easement existed.

Montana

Edmiston v. Gerken, 2017 MT 255N, 404 P.3d 709 (Table).

Landowners obtained an easement through a sale of land from the previous owner and from previous owners of the adjoining tracks of land. The easement stated that it was "intended to be a driveway to serve Tracts 44 and 37 and [was] not intended to establish or create a roadway, easement, or travel corridor to serve any other Tract or property other than that described herein." The easement also included a provision regarding gates: "No gate or obstruction shall be placed over, through, or across the easement granted . . . without the prior written consent of the owners of each such tracts." Landowners purchased Tract 37. After granting Landowners the easement, the seller sold Tract 44 to the new owner of the adjoining tracks ("Neighbors"). Landowners subsequently built a gate without prior consent from Neighbors or the previous owner and placed timber and brush from their property on to Neighbors' land. Neighbors sued Landowners claiming that the gate obstructed their use of the easement to access parts of their land and that the timber's placement was a nuisance. The lower court found that the timber and brush pile was a nuisance and that the construction of a gate required permission from Neighbors and the previous owner. On appeal, the Montana Supreme Court affirmed, holding that the easement required permission to build a gate and that the purpose of using the easement as a driveway would be frustrated if any tract owner could erect a gate blocking the easement without obtaining permission from the remaining tract owners. This is an unpublished opinion of the court;

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

New Jersey

Lake Grinnell Ass'n v. Post, No. A-3224-15T2, 2017 WL 4818718 (N.J. Super. Ct. App. Div. Oct. 26, 2017).

Landowners own a lakefront residence and enjoy an appurtenant easement for use of the lake. A lake association ("Association") issued upon Landowners an order to pay a sum of money as their pro rata share of maintenance fees for the lake and a dam. After refusing to pay, Association brought a collection suit, demanding judgment for the amount owed, plus interest, fees, and costs. The trial court granted Association's motion for summary judgment based upon the complaint and several certifications which were entered on Association's behalf. Landowners appealed, and the appellate court reversed and remanded. The court concluded that the motion record did not show there was no genuine issue as to any material fact challenged, the summary judgment standard. The court further reasoned that the record did not support the trial court's finding that the fees the Association charged Landowners were reasonable. Summarily, the court held that on the summary judgment record, there were inadequate facts from which a court can analyze and resolve the equitable considerations underlying the parties' contentions. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

New York

GMMM Westover LLC v. N.Y. State Elec. & Gas Corp., 63 N.Y.S.3d 754 (N.Y. App. Div. 2017).

Utility Corporation appealed the trial court's ruling that a reciprocal easement agreement ("REA") was still in place and, thus, Utility Corporation was required to vacate Power Plant Operator's ("Operator") facilities. The appellate court affirmed, holding that Utility Corporation was required to vacate Operator's premises because a plain reading of the REA provided that Utility Corporation was required to have severed its transmission facilities from the premises no later than a previous date.

Pennsylvania

Gravel Hill Enters. v. Lower Mount Bethel Twp. Zoning Hearing Bd., 172 A.3d 754 (Pa. Commw. Ct. 2017).

Owners purchased land in 2008 after previous owner defaulted on a federal load. In 2014, Owners filed an application with the Township Zoning Hearing Board ("Board") seeking variance to permit the operation of a stump shredder and grinder to produce mulch and top soil. Neighboring property owners ("Intervenors") appeared at the hearing to oppose Owners' application. Board denied Owner's application, stating that the proposed use would be detrimental to the public welfare, have a negative impact on the character of the neighborhood, and did not constitute the minimum variance to afford relief. Owners appealed. In 2015, Intervenors filed a petition to intervene with the trial court, and Owners filed an answer opposing the petition asserting that it was untimely, Intervenors' interests were already adequately represented by Board, and granting the petition would cause undue delay to the resolution of the matter at hand. The trial court, on October 30, 2015, granted Intervenors' petition to intervene. In November 2015, the trial court approved a settlement agreement and adopted it as an order, to which Intervenors appealed, arguing that the trial court had abused its discretion in approving the settlement. On appeal, the appellate court held that: (1) Intervenors did not waive their right to an appeal; (2) Intervenors were not deprived of due process; and (3) the trial court did abuse its discretion in approving the settlement. Accordingly, the court affirmed in part and reversed in part the trial court order.

Other Land Issues – Federal

Federal Claims

Balagna v. United States, Nos. 14–21L/16–405L, 2017 WL 4416820 (Fed. Cl. Oct. 5, 2017).

Landowners sued Government alleging an improper taking of land that abutted a railroad right-of-way. The court reviewed cross-motions for summary judgement involving several issues, including: (1) Government's contention that the railroad owned portions of property underlying the railroad corridor; (2) Government's contention that the issuance of a Notice of Interim Trail Use ("NITU") did not result in a taking of access to certain properties; and (3) Government's claim that it had not taken the property of

two municipal corporations. The court concluded that Government was entitled to summary judgement on all three claims. The court determined that: (1) Illinois state law provided that the railroad owns the part of a railroad corridor crossing Landowners' properties; (2) that Illinois law guaranteed Landowners a right of access to property, and, thus, the issuance of an NITU does not affect those state law crossing rights; and (3) that the state consented to use of the Municipal properties as a trail.

Other Land Issues – State

Iowa

C & D Mount Farms Corp. v. R & S Farms, Inc., No. 16-1586, 2017 WL 4570434 (Iowa Ct. App. Oct. 11, 2017).

This case involved a berm that separated a dominant estate owner's ("Landowner-1") farmland from the servient owner's ("Landowner-2") farmland. In 2014, Landowner-1 obtained a permit from the Iowa Department of Natural Resources to increase the berm's height. Landowner-2 sued Landowner-1 alleging that the berm raised the elevations of Landowner-1's land and caused excess water to flow onto and remain on Landowner-2's land. Landowner-2 brought claims for nuisance, trespass, and breach of common law and statutory duty. The lower court concluded that the berm did not create a nuisance or trespass because the level of water flow would be the same whether the berm existed or not. Testimony from both Landowners' experts established that Landowner-2's land would always receive water before Landowner-1's, regardless of whether Landowner-1's land receives water. Additionally, because the berm and ditch kept Landowner-1's land dry while also draining Landowner-2's land, and because Landowner-2 acknowledged the existence of the berm prior to Landowner-2's acquisition of the land, Landowner-2 failed to prove that Landowner-1 had abandoned the prescriptive easement. Therefore, the court concluded that Landowner-2 failed to prove that Landowner-1 violated common law or statutory duties. The lower court concluded that the berm did not increase the area of Landowner-2's land affected by floodwater. The court affirmed the lower court's conclusion that no nuisance or trespass occurred. Landowner-2 then sought injunctive relief to prevent Landowner-1 from increasing the height of the berm. The court concluded that there was no apparent invasion or threatened invasion of a right.

Kansas

Jenkins v. Chi. Pac. Corp., 403 P.3d 1213 (Kan. 2017).

Landowner sued to quiet title to real property that a now-abandoned railway once ran through. Landowner traced her ownership to a deed which conveyed the lots in question to a railroad company ("Railroad"). After Railroad abandoned the railway, it quitclaimed its interest to a company that eventually quitclaimed its interest to Landowner. The court considered whether the deed expressly or impliedly conveyed the property for use as a right of way. If the deed conveyed the property for use as a right of way to the railroad company, the deed would have only granted an easement that would revert to the original landowners once the railway was abandoned, because railroads who receive property in this manner only receive an easement from the deed. If the deed did not expressly or impliedly convey the property for use as a right of way, or if it indicated no specific use by a railway, absolute title would have been conveyed. The district court entered summary judgement against Landowner, finding that the deed conveying the property to the railroad described the property in a manner that could be construed as a right of way. Therefore, only an easement was granted, and it reverted back to the original landowners when the railway was abandoned. As a result, when Railroad quitclaimed its interest to its successor company who quitclaimed to Landowner, Railroad deeded land that it did not legally own. The Supreme Court of Kansas agreed with the lower courts that the conveyance to Landowner from Railroad's successor was in error since the deed had conveyed only an easement to Railroad, not a grantable estate.

Louisiana

Thompson v. FRF Properties, 2017-0152 (La. App. 4 Cir. 11/2/17); 229 So.3d 598.

Landowners of Lot A had ancestors in title who created a servitude in favor of Lot B (an adjacent lot owned by Company) "for the purpose of maintaining a driveway to provide access to [Lot B]." The servitude driveway sat on both Lots. Landowners began a dispute with a resident of Company's four-plex regarding where the resident parked her vehicle. After this dispute began, Landowners claimed that they built a fence on the Lot B side of the driveway and that the driveway was not used to access the rear of the property—the original intent of the servitude. The lower court ruled

in favor of Landowner, terminating the servitude for nonuse. Company makes two arguments on appeal: (1) it provided sufficient evidence demonstrating use which would overcome the required ten years of nonuse for termination, and (2) the lower court's dismissal of some uses of the servitude as "illegal uses," which do not quality as 'use' for termination purposes. The appellate court agreed with Company's first argument because the lower court did not have any factual basis to come to its decision. Specifically, one of Company's witnesses testified that he saw people use the driveway routinely to access Lot B for thirty-four of the forty years he lived in the four-plex on Lot B. The court also determined this argument is moot because the lower court did not terminate the servitude on this ground. Finally, the court determined that, given the language of the original servitude (use of the word "access" to Lot B), it's purpose is for passage to the Lot, not just the rear of the lot. Therefore, because the driveway was used to access Lot B, the lower court's judgment was reversed.

Minnesota

Resolution Setting Forth Findings of Fact & Conclusions of Law & Order Denying S. M. Hentges & Sons, Inc. & Jordan Gravel, LLC Application for an Interim Use Permit for Aggregate Mining & Processing Operation in Sand Creek Twp., No. A16-1768, 2017 WL 5242456 (Minn. Ct. App. Nov. 13, 2017).

Developer challenged County's denial of an application for an interim use permit to operate an aggregate mine on a parcel of land that allowed for mining as an interim use. Developers proposed a mine that would be located above and below the water table and would require a large groundwater pond in the center of the parcel and around a maximum of 110 round trips per day of mine-related truck traffic. The surrounding landowners operated water wells that drew from the aquifer. Additionally, the parcel in question was located in a floodplain, which historically flooded multiple times per year. County claimed that the wells would be negatively impacted by floodwaters entering the aquifer via the pond and that, in addition to financial security for well replacements, Developer should be responsible for monitoring and mitigation of water aesthetics. County ultimately denied the application as it felt that the project would have a negative impact on public roadways, water wells, and the public health due to the potential impact the project could have on the safety and aesthetic of water from the aquifer. The court reviewed Developer's claim

that denial of the application by County was arbitrary and capricious because the County's findings were not supported in the record and negative impacts of the project could be remedied by imposing permit conditions. The court found that County was justified in denying the permit because they had a rational basis supported by the record to deny Developer's application. Therefore, the denial was not arbitrary and capricious. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

New York

In re New Creek Bluebelt, Phase 3, 65 N.Y.S.3d 552 (N.Y. App. Div. 2017).

Landowner sought compensation for property, which had been designated as wetlands, that was acquired by City for a stormwater management project. After concluding that Landowner had established a reasonable probability that the burden of the wetlands regulations on the property would constitute an unconstitutional taking, the trial court awarded Landowner an incremental amount above the regulated value of the property. City appealed, arguing that a purchaser of property that is already subject to wetlands regulations is barred from pursuing a regulatory takings claim. The appellate court affirmed for several reasons. First, because there was no showing that the regulation was a background principle of state law, the reasonable probability incremental increase rule may still be applied when valuing regulated wetlands property taken by condemnation. Second, because a diminution in value, along with prohibition on development of the property, was effectuated by the regulations, Landowner established that there was a reasonable probability that the burden of the wetlands regulations on the property would constitute a regulatory taking. Finally, because the incremental amount awarded by the trial court was not supported by sufficient evidence or satisfactorily explained, the court reduced the amount awarded based upon market data and remitted for entry of an appropriate final decree.

Ohio

Bosky Grp., LLC v. Columbus & Ohio River R.R. Co., Fifth Dist. Muskingum, No. CT2017–0027, 2017 WL 4786758 (Oct. 19, 2017).

Railroad appealed the trial court's decision granting Property Owner summary judgment on its claim that Railroad was required build a rail crossing on Property Owner's lot pursuant to an agreement made between Railroad and a prior property owner. The court determined the issue in the case was whether the promise contained in the prior agreement to construct a rail crossing was binding on Railroad after the property had since been purchased by Property Owner. The court found that the trial court did not err in finding that a right to a rail crossing runs perpetually with the land. The court determined that the intent of the parties alone is dispositive to determining whether an easement, such as a rail crossing, runs with a piece of land. In this case, the court determined that it was the intention of the parties when the agreement was signed in 1890 that the easement would be perpetual in nature, therefore, Railroad was obligated to construct a rail crossing on Property Owner's land.

Pennsylvania

UGI Utilities, Inc. v. City of Reading, No. 499 M.D. 2015, 2017 WL 5580066 (Pa. Commw. Ct. Nov. 21, 2017).

Utility Company sued City seeking a declaratory judgment that certain city ordinances were invalid and sought to permanently enjoin City from enforcing those ordinances. Utility Company argued that an ordinance that imposed restrictions on the location of gas meters in historic districts was preempted by state code. Utility Company moved for partial summary judgment on this ground. The court held that City's ordinance was preempted and could not be applied to the regulated utility. The court found that: (1) the regulatory code of the state governs itself; (2) the public utility commissions have exclusive authority over the regulation of public utility facilities; and (3) the local ordinance conflicted with the code of the state. Therefore, the court granted partial summary judgment to Utility Company and enjoined City from enforcing its ordinance.

South Dakota

Long v. State, 2017 S.D. 79, 904 N.W.2d 502.

State constructed a highway with culverts that could only withstand up to a certain amount of rainfall, but had a twelve and one-half percent chance of being exceeded in any given year. On July 30, 2010, the culverts capacity was exceeded and runoff flooded Landowners' properties. Landowners sued State and City for inverse condemnation. Landowners and City came to a settlement, but the case was heard against State at the appellate court. State sought for City to either contribute or indemnify it for any judgment against it, which the court denied because State did not show that City was responsible for the property damage. The court granted relief to Landowners and State appealed to the Supreme Court of South Dakota. On appeal, State contended that the appellate court erred on the issues of whether the: (1) claims were barred by sovereign immunity; (2) highway construction caused of the property damage; (3) State was entitled to contribution or indemnification against City; and (4) State had a drainage easement over the damaged property. The South Dakota Supreme Court held that: (1) State did not have sovereign immunity against the claim because the claim was grounded in the State's constitution; (2) the highway construction and failed culverts were the proximate cause of Landowners' property damage and such was established conclusively by Landowners' expert witnesses; (3) State was not entitled to contribution or indemnification because State did not prove that City was also responsible for the property damage although Landowners would be paid twice for their property values from both City and State; and (4) State did not argue over the issue of a drainage easement at trial so State could not now raise the issue. The court affirmed the findings of the lower court.

Tennessee

Lutzak v. Phoenix Am. Dev. Partners, L.P., No. M2015-02117-COA-R3-CV, 2017 WL 4685300 (Tenn. Ct. App. Oct. 18, 2017).

Property Owner sued Developer, seeking a declaratory judgment that restrictive covenants governing Developer's adjacent subdivision did not apply to Property Owner's undeveloped property. On cross-motions for summary judgment, the lower court held that the undeveloped property was not covered by the express terms of the Declaration of Covenants, which governed the property to which the restrictive covenants applied. In doing

so, the court rejected Developer's argument that chain of title extended the covenants to the undeveloped property. The court also refused to impose the restrictive covenants as implied negative reciprocal easements because Developer expressly chose to retain a right to deviate from the initial plan by altering the property contained within the subdivision and subjecting additional property to the restrictive covenants in the declaration. Reviewing the lower court's decision *de novo,* the appellate court affirmed both the lower court's decisions and its reasoning.

Texas

Dragon v. Trial, No. 04-16-00758-CV, 2017 WL 5162180 (Tex. App. Nov. 8, 2017).

In 1932, the property at issue—237 acres of land—was conveyed in equal shares to seven siblings owning an undivided 1/7th interest in the property. One sibling signed and recorded a deed conveying one-half (½) of all his right, title and interest in and to the property to his wife ("Wife"). Purchasers purchased the 237 acres from the still-living siblings in 1992, following which Wife's husband died. Under the Gift Deed, Wife was the independent executrix of the estate and trustee of her husband's Trial Trust. Wife continued to accept and endorse payments made for the purchase of the property and then died. Under Wife's will, her Sons received the corpus of the trust estate, which included a mineral reservation that expired after fifteen years, at which point the mineral estate vested in Purchasers. As oil and gas production continued, the Lessee paid a portion of the royalties to Sons. Purchasers filed suit against Sons, alleging breach of contract (the 1992 Deed), estoppel by deed, trespass to try title by limitations, suit to quiet title by limitations, and promissory estoppel, arguing that in the 1992 Deed, each sibling purported to convey 100% of their 1/7th interest and not merely a portion of their interest. The court held in favor of Purchasers, reasoning that because the sibling conveyed one-half of all his interest to Wife and thus did not actually own a full 1/7th interest in the land, he breached the warranty contained in the 1992 Deed "at the very time and execution of the deed" because he purported to convey what he did not own. The court also held that Sons were remainder beneficiaries of the estate and trust, and, therefore, bound by the recitals in the 1992 Deed and estopped from asserting title to any interests in contradiction to their father's duty to defend Purchasers against all claims to all that certain parcel or tract of land.

Virginia

Woolford v. Va. Dep't of Taxation, 806 S.E.2d 398 (Va. 2017).

The Department of Taxation ("Department") rescinded $4,900,000.00 in land preservation tax credits that it had previously awarded to Landowner, citing Landowner's speculative analysis, conflicting data, lack of qualifications, and failure to meet the requirements of the State's Code. The trial court sustained the decision, reasoning that the appraiser that Landowner hired was not a qualified appraiser within the statutory meaning, noting that he was not formally educating in appraising minerals, specifically the sand and gravel market. Landowner appealed. The Virginia Supreme Court disagreed with the trial court, holding that the appraiser hired by Landowner was a qualified appraiser. It reasoned that the appraiser was qualified by virtue of his experience in evaluating properties that contained sand and gravel deposits, and that the record unequivocally showed that he expended considerable effort in learning about sand and gravel mines in general and about the local and regional market for those products in particular. The court also noted that unless Department could conclude in good faith that the value of the conservation easement Landowner donated to the Virginia Outdoors Foundation is zero, it would need to award Landowner tax credits for the fair market value of the donation.

West Virginia

Tex. E. Transmission, LP v. W. Va. Dep't of Envtl. Prot., 807 S.E.2d 802 (W. Va. 2017).

Coal Company claims ownership of certain coal reserves. It further contends that the West Virginia Department of Environmental Protection ("WVDEP") issued a mining permit authorizing expiration, development, and extraction of coal. Coal Company submitted a substance control plan as part of the permit revision application. transmission and gas companies ("Companies") objected to Coal Company's permit revision. A public hearing was held and WVDEP approved the permit revision application. Companies appealed the revision to the circuit claiming a defect because Coal Company failed to conduct the mining operations in a way that would protect the Companies' pipeline, and failed to specify that subsidence

control plan measure would be taken to protect Companies pipeline from damage. The court agreed with Coal Company, and Companies appealed again to the West Virginia Supreme Court of Appeals. Companies argued that Coal Company failed to meet the requirement of demonstrating that its permit revision application complied with the West Virginia Utility Protection Standard. The court noted the Utility Protection Standard is a performance one and should not be confused with application requirements for pre-mining permits and permit revisions. Under state law each applicant for underground mining permit must contain a subsidence control plan. This plan must contain a survey that identifies structures and give a narrative whether substance could cause material damage or diminution of value. Companies argued that Coal Company failed to comply with this requirement by failing to include a narrative indicating whether or not subsidence could cause damage and the minimization steps it would take. The court noted that the state law used phrases include which demonstrates examples not giving an exclusive list. Regarding the pipeline, Coal Company did contain a narrative describing the substance control plan. Furthermore, it set out the action it would take thus meeting the necessary requirements. The court recognized that the "[regulation] may not be interpreted to be less stringent than its federal counterpart." The court held "that [state statute] does not abrogate state common law with respect to subjacent support waivers contained within coal severance deeds."

SELECTED ELECTRICITY DECISIONS

Renewable Generation

First Circuit

Allco Renewable Energy Ltd. v. Mass. Electric Co., 875 F.3d 64 (1st Cir. 2017).

Solar Facilities Developer sued Electric Company, seeking to compel Electric Company to purchase power from Solar Facilities Developer at a negotiated rate rather than under a lower-priced standardized rate. Under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Solar Facilities Developer argued that the state-approved standard power purchase rate offered by Electric Company was unenforceable. The Massachusetts Department of Public Utilities denied Solar Facilities Developer's petition, holding that Electric Company's offer had been both reasonable and consistent with its own regulations. While Solar Facilities Developer could have sued the state utility regulatory agency for a PURPA violation, the district court denied Solar Facilities Developer's attempt to sue Electric Company and granted Electric Company's motion for summary judgment. The First Circuit Court of Appeals ultimately held that, because there is no express or implied private right of action for initiating suit in its statutory language, PURPA does not authorize claims between electric utility companies and cogeneration facilities. The appellate court additionally noted that Electric Company had never previously agreed to any specific cost rate with Solar Facilities Developer. The court held that Solar Facilities Developer failed to show that Congress had unequivocally conferred a private right of action for qualifying facilities against utilities to enforce PURPA's must-buy provision. Rather than for a qualifying facility such as Solar Facilities Developer to bring private action against an electric utilities company, the qualifying facility may file a petition with the state commission and appeal any potential adverse decision in state court.

N.D. California

Winding Creek Solar LLC v. Peevey, No. 13–CV–04934–JD, 2017 WL 6040012 (N.D. Cal. Dec. 6, 2017).

Solar energy provider ("Provider") sued the Commissioners of the California Public Utilities Commission ("CPUC") arguing that as three CPUC orders conflicted with federal law they violated the Supremacy

Clause of the United States' Constitution, and thus Provider should not have to follow them. Provider sought declaratory and injunctive relief from a program established by CPUC orders called "Re-Mat" (Renewable Market-Adjusting Tariff), which regulates the terms on which utility companies must purchase power from alternative energy facilities, like Provider. Following a one-day bench trial, the court granted summary judgment in favor of Provider. The court reasoned that the Re-Mat program violated the Public Utility Regulatory Policies Act and was thus in conflict with federal law. Accordingly, the court granted Provider the injunctive and declaratory relief it requested, but nothing more. This case has since been appealed, but there is no decision from the higher court as of publication.

Rates

Maryland

Wash. Gas Light Co. v. Md. Pub. Serv. Comm'n, 172 A.3d 927 (Md. Ct. Spec. App. 2017).

Utility Company appealed lower court's affirmation of Commission's denial of some parts of a proposed strategic infrastructure development plan ("Plan"). Utility Company claimed that Commission relied on its misinterpretation of a state code in making its determination. Commission should have instead, Utility Company argues, allowed for recovery of some expenses for infrastructure improvements that would ultimately benefit the public. In contrast with other "rate-making" cases, however, the proposed Plan incorporated a mechanism for funding derived from a local law, and the funds derived under that law operated differently. Such funds were only eligible for projects within the state, even if some outside-state projects ultimately benefited the same state long-term in a less direct way through the company's development. This court examined the Commission's determination and found Utility Company's arguments unpersuasive, entertaining only two of the three (dismissing Utility Company's policy argument). The court determined that the statute must be read in its entirety to appropriately discern the legislature's meaning, which supports Commission's interpretation. Additionally, the court found that the legislative history, with emphasis on comments regarding infrastructure improvement using these types of funds within the state of Maryland, pointed to an intent to use those funds for projects within the state. Therefore, the court affirmed Commission's decision, holding that "the

STRIDE law's accelerated cost recovery mechanism is available only for projects located in Maryland."

Michigan

In re Consumers Energy Co., No. 330675, No. 330745, No. 330797, 2017 WL 4518895 (Mich. Ct. App. Dec. 28, 2017).

Energy Company self-implemented a rate increase of $110,000,000.00 above its current rates for the sale of electricity, as well as an elimination of customer credit. These actions raised its retail rates by $166,000,000.00 with a return on common equity ("ROE") of ten and seven-tenths percent. The ALJ issued a Proposal for Decision ("PFD") recommending that Energy Company's overall rate of return be set at six and nine-one hundredths percent including an ROE of ten percent. Following the PFD, the Public Service Commission ("PSC") issued an order authorizing Energy Company to raise its rates, rejecting requests by the Attorney General and the Residential Customer Group ("RCG") to terminate the Advanced Metering Infrastructure ("AMI") system requested by Energy Company. The Attorney General appealed. The appellate court upheld the PSC's order approving an ROE of ten and three-tenths percent reasoning that it was lawful, reasonable, and not arbitrary or capricious; the court noted that such a rate was consistent with ROEs approved in other Midwestern states and that lowering the company's ROE would impede Energy Company's ability to secure financing for future investments. The PSC is statutorily required to consider and give due weight to all lawful elements necessary to determine an appropriate rate, and the court found that it acted consistently with its statutory authority. The court also held that the installation of a smart meter on a customer's home did not violate the customer's rights under the Fourth Amendment because Energy Company was not a state actor, reasoning that the Fourth Amendment applies only to government actions.

Missouri

Matter of Application of Laclede Gas Co. to Change Its Infrastructure Sys. Replacement Surcharge in Its Missouri Gas Energy Serv. Territory v. Office of Pub. Counsel, No. WD 80544, 2017 WL 5574857 (Mo. Ct. App. Nov. 21, 2017).

Public Counsel appealed an order from the Missouri Public Service Commission ("Commission") granting Gas Company, a public utility gas corporation, an increase in existing infrastructure system replacement surcharges imposed on its and Missouri Gas Energy's service territories. Gas Company successfully sought increased surcharges from Commission to recover costs of temporary plastic mains and service lines installed as patches in association with the replacement of existing deteriorating cast iron and unprotected steel gas infrastructure systems. Public Counsel objected to the recovery of costs by an increase in the surcharges. Public Counsel alleged that the replacement costs were not eligible for an increase under state law because the plastic service lines being replaced were not worn out or deteriorated and their replacement was not done to comply with government-mandated safety requirements as the law mandates. Gas Company initially argued, and Commission agreed, that the plastic service lines were installed as an integral component to temporarily extend the life of the deteriorating cast iron and steel systems while entire systems were being replaced and was thus eligible for a surcharge increase. The court noted that no party claimed that the plastic service lines where in a worn out or deteriorated condition, a condition that the law mandates and is narrowly interpreted in order to be eligible for a surcharge increase. As such, the court found that a surcharge increase to recover costs associated with the replacement of the plastic service lines did not meet the conditions stated in the plain language of the state law. Therefore, the court reversed the Commission's order.

Tennessee

B&W Pipeline, LLC v. Tenn. Regulatory Auth., No. M2016-02013-COA-R12-CV, 2017 WL 5135977 (Tenn. Ct. App. Nov. 6, 2017).

Utility proposed to Authority a rate increase pertaining to the supply of gas to three counties. In determining the base rate, Utility contended that the investment made in purchasing the pipeline and wells, totaling over $2,600,000.00 should be included as a reasonable estimate of the original cost of the pipeline. Authority denied the inclusion of the purchase price of the pipeline and wells, instead relying on a 2008 tax return as the more accurate measure of the pipeline's original depreciated cost. Finding that the purchase of the pipeline and wells cost less than the value to repair existing infrastructure, Authority set the cost of the equipment as reflected in the tax forms, lowering the cost to Utility to $854,000.00. This lower cost to Utility therefore did not justify the substantial rate increase to be

passed onto customers, and the increase was denied by Authority. On appeal, the court of appeals upheld the base calculation, finding no abuse of discretion or public policy considerations that would justify overturning Authority's decision.

SELECTED TECHNOLOGY AND BUSINESS DECISIONS

Bankruptcy

D. Delaware

In re La Paloma Generating, Co., Case No: 16-12700 (CSS), 2017 WL 5197116 (Bankr. D. Del. Nov. 9, 2017).

Company owns a natural gas-fired electricity plant. Operation of this facility includes the release of greenhouse gases into the atmosphere. In 2015, the facility had emissions of 2,0678,035 metric of tons of carbon dioxide. Emissions of gas have continued at the same rate in 2016 and 2017. Company satisfied all of its obligations required by regulation. On December 6, 2016, Company filed a voluntary petition with the court for relief under chapter 11. Company plans to sell all of its assets, but at issue here is whether or not it can sell the assets without surrendering compliance instruments under the California Cap-and-Trade Program. Company argues that it can sell its assets free and clear of all interest under the bankruptcy code, whereas California Air Resources Board ("CARB") argues that it's interest – the compliance instruments – in the assets, including the electric plant, does transfer to the successor owner. The court held that neither the bankruptcy code nor State law imposes such successor liability, therefore, Company can sell the plant without surrendering the compliance instruments for greenhouse gas emissions.

E.D. Missouri

In re Peabody Energy Corp., No. 16-42529-399, 2017 WL 4843724 (Bankr. E.D. Mo. Oct. 24, 2017).

Energy Company sued seeking an order enjoining City and Counties from prosecuting their complaints and requiring them to dismiss those actions with prejudice after Company successfully filed for relief under Chapter 11 of the Bankruptcy Code. Alleging that Energy Company's behavior was responsible for various types of climate-change-related damage in California, City and Counties asserted eight causes of action—one count of public nuisance on behalf of citizens of the state of California, and the following seven counts on behalf of residents of City and Counties: (1) public nuisance, (2) strict liability for failure to warn, (3) strict liability for design defect, (4) private nuisance, (5) negligence, (6) negligence for

failure to warn, and (7) trespass. The crux of this action was the interpretation of the Plan and Confirmation Order Provisions set forth by the court in the bankruptcy action, which was negotiated extensively between Energy Company and several government agencies. The EPA added clarifying terms which City and Counties contended altered the agreement in a fashion that allowed their claims to continue. The district court found that: (1) because City and Counties were aware of Energy Company's bankruptcy case and failed to file proof of claims or otherwise participate in that action, they failed to establish any "pre-petition" claims, and their current claims should be discharged; (2) none of City and Counties asserted claims fell within the exceptions to the discharge of the EPA provisions; and (3) the first cause of action on behalf of all citizens of California constitutes a "claim" as defined in the Bankruptcy Code because the relief it sought was clearly enumerated in the Code.

N.D. Texas

In re Aeon Operating, Inc., No. 15-33935-hdh7, 2017 WL 4457437 (Bankr. N.D. Tex. Oct. 3, 2017).

Debtor filed suit against Oil Companies, seeking the avoidance and recovery of certain prepetition transfers as either fraudulent transfers or preferences. Alternatively, Debtor sought recovery against Oil Companies for breach of contract. Debtor is an oil and gas operator responsible for both production, sales, and expenses associated with the production of the relevant wells. Oil Companies own a working interest in the relevant wells through a Purchase and Sale Agreement ("PSA"). Debtor filed for bankruptcy under chapter 7 several months after the PSA interest transferred. In conjunction with the PSA, several wire transfers occurred through a revenue sweep prior to Debtor's bankruptcy filing. At the time of the revenue sweep and the related wire transfers, Debtor was insolvent. The court held that, pursuant to Bankruptcy Code, the revenue sweep was an avoidable fraudulent transfer because Debtor received "less than a reasonably equivalent value in exchange and was insolvent on the date of such transfer." Similarly, the court held the first wire transfer as an avoidable fraudulent transfer. Unlike the first wire transfer, the second wire transfer was made for the benefit of a creditor related to an antecedent debt, which enabled the creditor to receive more than it would in a chapter 7 filing. Because Oil Companies did not present evidence for an ordinary course of business defense under Bankruptcy Code, the court held the second wire transfer as an avoidable preference pursuant to Bankruptcy

Code. In regard to Debtor's breach of contract claim relating to the PSA between Oil Companies, the court found the claim lacking because Debtor was neither a party nor an intended third party beneficiary to the PSA.

S.D. Texas

In re Montco Offshore, Inc., NO: 17-31646, 2017 WL 4417588 (Bankr. S.D. Tex. Oct. 3, 2017).

In 2015, Creditors filed an involuntary chapter 7 bankruptcy petition against Offshore Operation Company ("Debtor"), which subsequently entered into a Contract with Service Company. In performing under the Contract, Service Company alleged that it encountered wells, equipment, and structures undisclosed in the Contract, requiring it to perform substantial unanticipated work, but Debtor refused to pay Service Company for the additional work. In 2017, Service Company filed its own Chapter 11 bankruptcy petition and filed an adversary proceeding seeking to recover amounts due under the Contract. Debtor filed motions to dismiss Service Company's amended complaint. As a result, the court found that Service Company's declaratory judgment claim added nothing to its existing breach of contract claims against Debtor, in both, alleging that Debtor failed to pay for services it completed pursuant to the Contract. All such breach of contract claims, with the exception of one, were dismissed. Thus, Count VI of Service Company's amended complaint was moot or would add nothing beyond the breach of contract claims. Accordingly, the court dismissed Service Company's amended complaint.

Other Issues

N.D. California

California v. United States Bureau of Land Mgmt., No. 17-cv-03804-EDL, No. 17-cv-885-EDL, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017).

California and New Mexico, together with a coalition of conservation and tribal groups ("Coalition"), sued the Bureau of Land Management ("BLM") and others for violating the Administrative Procedure Act ("APA") when BLM sought to postpone certain compliance dates for a rule after the rule's effective date had passed. The Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule ("Rule") was designed to help reduce methane emissions by limiting flaring and venting of natural gas on

federal and tribal lands. BLM issued a notice of postponement of January 17, 2018 compliance dates, and the district court ruled that BLM had acted outside its authority to postpone the "effective date" of a rule under the APA. The court rejected BLM's argument that "effective date" in the APA also encompassed compliance dates and found that BLM had violated the APA's notice-and-comment rulemaking requirements. The court ruled that BLM's postponement of the compliance dates was arbitrary and capricious because it considered only the Rule's costs to the oil and gas industry and ignored the Rule's benefits, such as decreased resource waste, air pollution, and enhanced public revenues. Therefore, the court vacated the Postponement Notice and held that BLM violated the APA when it issued the notice. This case has since been appealed, but there is no decision from the higher court as of publication.

W.D. Wisconsin

Larchmont Holdings, LLC v. N. Shore Servs., LLC, No. 16-cv-575-slc, 2017 WL 5197415 (W.D. Wis. Nov. 9, 2017).

Buyer agreed to pay Seller $4,000,000.00 on a land contract for 300 acres of wooded land in Wisconsin. Buyer intended to set up a frac sand mine that it hoped would reap millions in yearly profits. However, the mining operation never progressed and left Buyer past due on installment payments. Buyer brought this action and asserted seven different claims for relief: (1) fraudulent inducement; (2) frustration of purpose; (3) unjust enrichment; (4) reformation; (5) breach of the implied covenant of good faith and fair dealing; (6) illusory contract; and (7) breach of contract. Seller counterclaimed for strict foreclosure of the contract and for breach of the implied duty of good faith and fair dealing. Seller sought summary judgment on its strict foreclosure counterclaim and on all seven of Buyer's claims. In response, Buyer raised several affirmative defenses, including laches, equitable estoppel, and unclean hands. The court granted in part and denied in part Seller's motion for summary judgment. The court denied Seller's motion for summary judgment with respect to the counterclaim for strict foreclosure, but only to the extent that Buyer may proceed on the affirmative defenses of laches, equitable estoppel, and unclean hands, because Seller never mentioned Buyer's affirmative defenses. The court granted Seller's motion in all other aspects.

Delaware

Mooney v. Pioneer Nat. Res. Co., No. N17C-01-225 RRC, 2017 WL 4857133 (Del. Super. Ct. July 27, 2017).

Investor sued Producer for fraudulent misrepresentation of financial performance. Investor invested in securities of Producer and suffered a financial loss after a partial divesture of his position. As a result, Investor claimed that Producer fraudulently misrepresented the financial position of the company via publicly released quarterly reports in order to induce investors to buy its securities. Specifically, Investor claimed that Producer said it was hedging via derivatives to reduce risk when it was really taking on risk. Producer claimed that Investor invested during a downturn in commodity prices and was attempting to claim fraud to recoup his investment. Producer moved to dismiss Investor's claim arguing that the claim was not adequately pleaded with the requisite particularity. In determining whether Investor's complaint met the heightened pleading standards required by state court rules, the court held that Investor failed to adequately plead a claim for common law fraud by not adequately pleading with particularity any of the five elements of common law fraud. Therefore, the court granted Producer's motion to dismiss. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Louisiana

Vekic v. Popich, 2017-0698 (La. 10/18/17); 2017–C–0698, 2017 WL 4737160.

Sublessee filed petition for writ of certiorari, stemming from a claim for settlement proceeds resulting from an oil well explosion's damage to oyster leases. The Supreme Court of Louisiana reversed the appellate court's decision, holding that Sublessee should have had the exclusive right to manage any claims for damages resulting from the oil spill, and accordingly should receive damages from settlement proceeds, rather than Sublessor. The court here disagreed with appellate court's finding that Sublessee, who ultimately became Purchaser, was precluded from recovering damage proceeds from the event occurring prior to the official purchase. Instead, the court held that the oyster lease agreement between the parties included a provision delegating the responsibility for all claims for damages to oyster leases to be managed by Sublessee. The court found no merit in Sublessor's

argument that Sublessee is a "subsequent purchaser," and was thus precluded from claiming damages regarding the oyster leases. The court held instead that all "rights and responsibilities" were placed on Sublessee through the lease agreement in exchange for the rent payment before the damages occurred, and accordingly, the court found that the proceeds belong to him. Additionally, because the agreement was unclear on who would receive proceeds in amounts that would be in excess of the normal rent payment, the court found it reasonable to examine extrinsic evidence to make that determination. However, the court added that even without examining extrinsic evidence, the agreement itself pointed to the parties' intent that no additional proceeds would go to Sublessor, over and above the amount of the rent payment. The court asserted here that the outcome of the claims for damages was irrelevant for these purposes, and the mission here was merely to exercise "contractual interpretation" to determine who held the responsibility to handle claims.

SELECTED ENVIRONMENTAL DECISIONS

Federal

4th Circuit

Pieper v. United States, No. 16-2035, 2017 WL 5033023 (4th Cir. Sept. 15, 2017).

Residents brought action under the Federal Tort Claims Act ("FTCA") for injuries resulting from the United States Army's waste disposal and remediation practices at an active base. Residents claimed: (1) the Army negligently disposed of hazardous chemicals; and (2) the Army failed to adequately remediate the resulting groundwater contamination. United States moved to dismiss for lack of subject matter jurisdiction, arguing that Residents were barred by the discretionary function exception to the FTCA. The district court granted the motion and dismissed the case, finding that the waste disposal and remediation decisions fell within the discretionary function exception because: (1) the decisions involved discretionary judgment; and (2) were susceptible to policy analysis. On appeal, the Fourth Circuit Court of Appeals affirmed the finding and reasoning of the district court, holding that the Army's waste practices did fall within the discretionary function exception to the FTCA. This is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing the case as precedent.

5th Circuit

United States v. Am. Commercial Lines, L.L.C., 875 F.3d 170 (5th Cir. 2017).

United States brought action against tugboat owner ("Owner") after 300,000-gallon oil spill in Mississippi River. Owner was found responsible under the Oil Pollution Act ("OPA"), and United States sought recovery of government payments made to clean the spill, as well as declaration that Owner was liable for all costs and damages resulting from the spill. The district court entered summary judgment in favor of United States, but Owner appealed, contending that it was entitled to the third-party defense under OPA or, alternatively, that it was entitled to limit its liability. Under OPA, a party must establish that it exercised due care with respect to the oil concerned and took precautions against foreseeable acts or omissions of the third party. Under an alternative section, limits on liability do not apply if

the incident was proximately caused by gross negligence or willful misconduct of or the violation of an applicable Federal safety, construction, or operating regulation by the responsible party, or someone acting under a contractual relationship with the responsible party. Upon appeal, the Fifth Circuit Court of Appeals affirmed the district court's determination, holding that: (1) the phrase "in connection with," under OPA, necessitated third party conduct that was causally or logically related to a contractual relationship; and (2) the phrase "pursuant to," under OPA, necessitated that third party conduct be committed in the course of carrying out the terms of the contract. The Fifth Circuit thus found that Owner was not entitled to a third-party defense under the OPA, nor was it entitled to the OPA's general limit on liability.

9th Circuit

TDY Holdings, LLC v. United States, 872 F.3d 1004 (9th Cir. 2017).

Operator of an aeronautical manufacturing plant sued the United States under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") to get compensation for costs associated with cleaning up soil and groundwater contamination around the plant. Operator's primary client was the United States Military, and some of Operator's contracts with the Military required using some hazardous substances which led to the contamination. Operator complied with remediation requirements under CERCLA. The district court found for the government and allocated all cleanup costs to Operator and the Ninth Circuit Court of Appeals reversed and remanded. There is no dispute that Operator and the government are potentially responsible parties—a threshold requirement of CERCLA. On appeal, Operator argues that: (1) the district court incorrectly analyzed liability on the basis of "fault" instead of strict liability; (2) the district court incorrectly determined that the government's status as "owner" and not "operator" is dispositive regarding cost allocation; and (3) the government should bear greater costs because of the contractual requirements of using hazardous material. The appellate court determined that the lower court's "fault" analysis was not an abuse of discretion because "of the evolving awareness of the hazardous nature of the chemicals at issue, and [Operator's] adaptation to more stringent environmental standards." The district court's "owner" vs. "operator" analysis was not an abuse of discretion either because of the government's two-decades-long absence from the operation site. However, the district court did err by treating two circuit precedents as being "outliers."

Specifically, these precedents were similar because in those cases the government also required use of hazardous substances. Ultimately, the court reversed by noting it would be a "180 degree departure from our prior case law" if it were to allocate to operator "100 percent of CERCLA cleanup costs that were largely incurred during war-effort production."

D.C. Circuit

Mayo v. Reynolds, 875 F.3d 11 (D.C. Cir. 2017).

Wildlife photographers ("Photographers") sued the National Park Service ("NPS"), challenging the NPS's elk hunting program. The program sought to reduce elk overpopulation by authorizing recreational hunting of elk and a reduction of supplemental feed in Wyoming's Grand Teton National Park("Park"). Photographers argued that the NPS was required to prepare a new NEPA analysis every year that it implemented the fifteen-year elk-reduction program, disclosing and analyzing the unique environmental effects of each year's hunt. Because no such analysis was done in 2015, Photographers claimed that the NPS's action violated NEPA. NPS moved for summary judgment. The trial court granted NPS's motion, finding that NPS could rely on the 2007 Environmental Impact Statement ("EIS") in making its annual elk-reduction decisions because that document "took the requisite 'hard look' at the potential environmental effects that might result from continuing the elk reduction program in the Park as a method of managing the herd." Photographers appealed, and the District of Columbia Circuit Court of Appeals affirmed, holding that all the environmental effects seen during the years after the 2007 EIS had been anticipated and analyzed in the original environmental assessment and, therefore, NPS had no duty to prepare a supplemental or new environmental impact statement. Additionally, the court ruled that because an agency's decision whether to prepare a supplemental environmental impact statement under NEPA requires substantial agency expertise, the court must defer to the agency's informed discretion.

C.D. California

Limo Co. v. Chem. Milling Int'l Corp., No. 2:17-cv-02345-SVW-RAO, 2017 WL 4358423 (C.D. Cal. Sept. 28, 2017).

Landowner sued prior tenant, Corporation, claiming that Corporation violated Comprehensive Environmental Response, Compensation, and

Liability Act ("CERCLA") regulations and caused contamination, health hazards, and damage to Landowner's property. In this suit's procedural history, the district court granted the motion for default judgment that is the subject of this case because procedural requirements for default judgment were met. The court relied on factors laid out in case law, used to determine when it is appropriate to grant default judgment. Using these factors, the court determined that, first, there would have been no other recourse for remedy in this case, so there was a high possibility of prejudice. Second, evaluating the merits of the case, the subject site met CERCLA's definition of "facility," and strict liability was imposed as a result of Corporation's actions. Further, a remedial compensation lawsuit was authorized under the California Hazardous Substances Account Act ("Act"). Therefore, Landowner was authorized under the Act to pursue responsible parties who have caused damage, and could hold them liable for "past and future response costs" via declaratory decree. Since Corporation was a tenant and held a duty not to damage the subject property, but instead caused groundwater and soil contamination which depleted the property of its proper use, Landowner's negligence, nuisance and waste claims were each meritorious. Likewise, the ongoing nature of the contamination reflected an ongoing trespass. Since there had been no contest, or even appearance by Corporation, and therefore no explanations or additional evidence given in defense, the court found that the grant of default judgment was allowable. All factors considered supported granting of default judgment in this case.

D. Idaho

FMC Corp. v. Tribes, No. 4:14-CV-489-BLW, 2017 WL 4322393 (D. Idaho Sept. 28, 2017).

Company operated a phosphorus production plant on 1,450 acres of property that it owned which lied mostly within a Tribal Reservation. Its operations produced twenty-two million tons of waste products that were stored on the Reservation in twenty-three ponds; the waste was radioactive, carcinogenic, poisonous, and likely to persist for decades with no safe method to move it off-site. The EPA declared the site a Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") Superfund clean-up site and charged Company with violating the Resource Conservation and Recovery Act ("RCRA"). To avoid litigation over the RCRA charges, Company negotiated with the EPA over a consent decree with the condition that Company had to obtain Tribal permits for work it would do on the Reservation under the Consent Decree. Tribe demanded

$100,000,000.00 for the permits, or would drop the fee to $1500,000.00 a year if Company consented to Tribal jurisdiction. Company consented to get the lower permit fee and subsequently challenged the fees by showing evidence that the stored waste had caused no harm and that the EPA's containment program got rid of any need to impose substantial fees. Tribe produced evidence that the waste was severely toxic, and the Tribal Appellate Court issued a judgment against Company requiring them to pay the annual fee of $1,500,000.00. Company appealed and brought the issue to the federal district court of whether Tribe could enforce the judgment. The court found that Tribe had jurisdiction over Company based upon Company's consent and the catastrophic threat Company's waste poses to Tribal governance, cultural traditions, and health and welfare. The court reasoned that the recognition and enforcement of tribal judgments in federal court rests upon principles of comity. This case has since been appealed, but there is no decision from the higher court as of publication.

Pinnacle Great Plains Operating Co. v. Swenson, No. 1:17-cv-00120-DCN, 2017 WL 4855846 (D. Idaho Oct. 26, 2017).

Purchaser attempted to consolidate a prior suit with a new claim naming Broker as responsible party, claiming misrepresentation of the subject property's groundwater and soil prior to a land purchase. In determining if Purchaser's claims should be dismissed or if the claims should be consolidated, the district court ultimately granted Broker's motion for partial dismissal of negligence claim and partially granted Broker's motion for summary judgment. The court held that the cases should not be consolidated because to do so would hinder efficiency of the court system and would be an unfair burden on the Broker. However, the court did allow for the second case to be stayed until there was a resolution of the first case. The court found both sides' arguments regarding statute of limitations valid, but said the date from which the statute of limitations begins to run is a matter for the jury. The court applied a four-year statute of limitations because the violations were of the Brokerage Act, not only a breach of contract. Despite Purchaser's objection to the defense that the claim is time-barred, the court said that even though Broker concealed relevant information, Purchaser has not asserted that it relied on Broker's information to make the decision not to file. Therefore, the court determined that Broker could assert statute of limitations as a defense. The court held that the claim is not precluded because the new claim is against a new defendant, (not against Realty Company, party to the previous case) and no final judgment had been rendered. However, the court determined

that, since the claims derived from the "same transactional nucleus of facts" and that there was privity between Broker and Realty Company, (through their "principal-agent" relationship) these were duplicative claims and could not be brought separately in the same court.

W. Watersheds Project v. United States Forest Serv., No.: 1:15-cv-00218-REB, 2017 WL 4927660 (D. Idaho Oct. 31, 2017).

Environmental Group sued United States Forest Service ("USFS") for permitting cattle grazing near streams that contained protected fish species. Cattle Grazers intervened in the lawsuit. Environmental Group alleged that: (1) the grazing had diminished the quality of the streams; (2) the fish population had decreased; and (3) USFS had arbitrarily and capriciously allowed the destruction of the habitats that USFS had a duty to protect under the INFISH strategy previously promulgated by USFS. Both USFS and Cattle Grazers asserted that INFISH protections did not apply to cattle grazing operations and that even if they did, there is no demonstrated causation between the cattle grazing and degradation of the streams. All parties moved for summary judgment. The district court found that INFISH does apply to the cattle grazing operations, even on lower priority streams that do not contain endangered fish. The court also decided that USFS did not act arbitrarily and capriciously when it granted grazing permits and that Environmental Group needed to demonstrate that the grazing has caused poor stream quality. Because Environmental Group did not demonstrate the causal nexus, the court granted summary judgment for USFS and Cattle Grazers. This case has since been appealed, but there is not final decision from the higher court as of publication.

W. Watersheds Project v. United States Forest Serv., No. 1:17-CV-434-CWD, 2017 WL 5571574 (D. Idaho Nov. 20, 2017).

Organization sued United States Forest Service ("USFS") alleging that: (1) USFS had violated the National Environmental Policy Act ("NEPA"); and (2) USFS had violated the National Forest Management Act ("NFMA"). Organization sought a preliminary injunction to prevent USFS from allowing domestic sheep to graze on the Snakey and Kelly Canyon allotments ("Allotments") in the Caribou-Targhee National Forest ("Forest"). Organization argued that allowing domestic sheep to graze on the Allotments posed a risk to the bighorn sheep population due to the potential transmission of pneumonia pathogens. The court found that USFS raised significant issues regarding the likelihood of success on the merits

for Organization's NEPA claim because of the potential applicability of a 2013 settlement agreement. The court concluded that without further information, it could not sufficiently assess the likelihood of success of the NEPA claim. However, the court found that Organization's NFMA claim was likely to succeed on the merits, that irreparable harm was likely, that the balance tipped in favor of Organization, and that the injunction would be in the public interest. Therefore, the court granted Organization's motion for a preliminary injunction against USFS.

D. Nevada

Diamond X Ranch LLC v. Atl. Richfield Co., No. 3:13-cv-00570-MMD-WGC, 2017 WL 4349223 (D. Nev. Sept. 29, 2017).

Ranch Owner filed suit against Oil Company concerning the cleanup of acid mine drainage from a Superfund site and its surrounding areas. Ranch Owner claimed that its ranch was contaminated by Oil Company's acid mine drainage to the point that the ranch could not be developed into a residential subdivision. The district court first determined that Nevada choice-of-law standards would control Ranch Owner's tort claims because the subdivision was to be located entirely in Nevada and the diversion point in the creek leading to the contamination was in Nevada. The court then ruled on several motions as follows: (1) it granted Oil Company's motion to bar Ranch Owner's strict liability claim based on the statute of limitations but was denied as to the state law tort claims for nuisance, trespass, negligence, and misappropriation of water rights; (2) the court granted Oil Company's motion for summary judgment regarding Ranch Owner's public nuisance claim because in Nevada, no private right of action for public nuisance existed; (3) the court denied Oil Company's motions for summary judgment for trespass and to limit damages based on geographic location; (4) a genuine issue of material fact existed as to Ranch Owner's remaining state law tort claims and, thus, summary judgment on those claims was denied; (5) Ranch Owner was precluded from recovering costs after February 2012—when Oil Company included ranch in a study regarding the issue in contention—but Oil Company's motion for summary judgment on Ranch Owner's first Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") claim was otherwise denied; and (6) Oil Company's motion for summary judgment on Ranch Owner's second CERCLA claim was granted because Ranch Owner was a covered person for purposes of liability under federal law regarding contiguous properties.

D. New Jersey

New Jersey Dep't of Envtl. Prot. v. Amerada Hess Corp., No. 15-6468 (FLW)(LHG), 2017 WL 4953903 (D. N.J. Nov. 1, 2017).

Department of Environmental Protection ("DEP") sought to recover natural resource damages from Company after Company discharged MTBE, an organic chemical compound derived from methanol and isobutylene that spreads easily into groundwater supplies, into groundwater of DEP's trial sites. Such contamination made the drinking water unacceptable for consumption, posing a risk to human health. A dispute existed between the parties concerning the damages to which DEP might be entitled should the factfinder find in DEP's favor on its strict liability Spill Act claim, which sought primary restoration damages for the cost of restoring the contaminated groundwater at the trial sites to its condition before contact with human civilization. Company argued that DEP was not entitled to primary restoration damages because Company was already remediating the groundwater under New Jersey Spill Compensation and Control Act ("NJDEP")-approved remediation plans. The court held that Company's motion in limine for leave to file a motion for partial summary judgment based upon the alternative burden of "a significant threat to human health, flora, or fauna" was not supported by good cause and thus denied. It also held that DEP's burden of proof at trial on its claims for primary restoration damages would be to establish by a preponderance of the evidence that its primary restoration plan was "practicable," meaning "reasonably capable of being done" in light of site-specific realities. Such a standard would require a fact and circumstance specific inquiry.

Strategic Envtl. Partners, LLC v. N.J. Dep't of Envtl. Prot., No. 12-3252, 2017 WL 4678199 (D.N.J Oct. 16, 2017).

In 2010, Company bought property containing a landfill which it intended to develop into a solar energy farm. Company claims that from the 1950s through the 1970s, when the landfill accepted solid waste, Former Owners sent garbage containing hazardous substances to the landfill, causing contamination that needed to be cleaned up. In October 2011, Company entered into an agreement with Former Owners concerning the closure of the landfill and the post-closure plans for the land. It also entered into an Administrative Consent Order ("ACO") with Former Owners stating that the parties were consenting to the ACO's terms pursuant to the authority of Former Owners under the Solid Waste Management Act ("SWMA").

Through the process of closing and capping the landfill, Company incurred extensive response costs and alleged that this high cost arose from Former Owners' polluted and contaminated of the landfill with hazardous substances. Thus, Company argued that Former Owners were liable for part of the cost under the Comprehensive Response Compensation and Liability Act ("CERCLA"). Both parties moved for summary judgment on the issue of CERCLA liability. Company claimed that it discovered the hazardous substances on the property due to testing and laboratory measures undertaken in 2011 and that it should be reimbursed by Former Owners for the testing costs and the costs of the cleanup because of the agreement it had entered into with Former Owners and because Former Owners had polluted the landfill. Former Owners disagreed, arguing that the response costs were undertaken prior to the investigation and discovery as evidenced in the ACO and that the laboratory costs were part of Company fulfilling its responsibilities under the ACO. The court granted summary judgment in favor of Former Owners, holding that Company lacked evidence of incurring CERCLA response costs. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

D. Puerto Rico

United States v. Puerto Rico Indus. Dev. Co., No. 15-2328 (FAB), 2017 WL 6061011 (D.P.R. Dec. 7, 2017).

Contamination was discovered in water beneath Company's property, so the EPA investigated and attempted to decontaminate the water. The United States sought reimbursement under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") from Company for expenditures made to decontaminate the water. United States filed for summary judgment for the court to find that: (1) Company is prima facie liable under CERCLA; (2) Company is ineligible for the secured creditor exemption from CERCLA; and (3) Company cannot claim the defenses of third party fault, innocent landowner, and contiguous landowner later in litigation. The district court found that Company is prima facie liable under CERCLA because United States demonstrated that Company's property is a facility, that Company is potentially responsible for the contamination, that a release of hazardous substances had occurred on Company's property, and that United States had incurred response costs from the contamination. The court also found that Company was not eligible for the secured creditor exemption from CERCLA because to

qualify an entity must only have indicia of ownership of the property such as a creditor would have, whereas Company actively managed the property. The court concluded that summary judgment was not appropriate for the issues of third party fault, innocent landowner, and contiguous landowner defenses because United States had not discovered the source of the contamination, which was a necessary determination before the preclusion of defenses based on information about the source of the contamination. Company also filed a third-party complaint against tenants on the contaminated property, which the court the parties to confer upon prior to the next pretrial conference to set forth their positions regarding the complaint. Company filed a motion to defer the disposition of the summary judgment motion, which the court denied because no more discovery by Company would bear upon the issues presented in the summary judgment motion.

D. Utah

United States v. Par. Chem. Co., No. 2:09-cv-804-CW, 2017 WL 4857547 (D. Utah Oct. 24, 2017).

Trustee held the assets of a former chemical company and pharmaceutical corporation (collectively, "Company"). Investment Company owned property adjoining the Trust Property ("Property"), which it leased to a drywall business, and also held an easement ("Easement") on the Property. Trustee attempted to sell the Property free and clear of its easement. However, Investment Company opposed the sale because the sale of the Easement would require it to relocate the business at "significant expense." Investment Company argued that: (1) the United States' Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") lien ("Lien") on the Property was not perfected under Utah law and, thus, was junior or secondary to the Easement; and (2) that the court lacked authority to extinguish the Easement in these circumstances. The court ruled that it need not address whether CERCLA preempts state law on lien filing requirements because the EPA sent Company a letter notifying it that the CERCLA Lien had been perfected by recording the Notice of Federal Lien with the Utah County Recorder, which complied with Utah law. Additionally, the court held that it did have the authority to sell the Easement pursuant to its authority from "the court's general equitable power to order sales of property within its jurisdiction on terms ordered by the court." Upon these findings, the court exercised its inherent authority and discretion to order the sale of the Property free and clear of the

Easement. This case has since been appealed, but there is no decision from the higher court as of publication.

E.D California

Conservation Cong. v. United States Forest Serv., No. 2:16-CV-00864-MCE-AC, 2017 WL 4340254 (E.D. Cal. Sept. 29, 2017).

Conservation Group asserted twelve claims of relief against United States Forest Service ("USFS") related to USFS's decision to push forward its Lava Hazardous Fuels Reduction Project ("Lava Project"). Specifically, Conservation Group claimed violations of the National Environmental Policy Act ("NEPA"), the National Forest Management Act ("NFMA"), the Administrative Procedures Act ("APA"), and the Endangered Species Act ("ESA") challenging USFS's decision to exclude the Gray Wolf from its Biological Assessment analysis of the potential effects of its Lava Project on certain species. Conservation Group sought permission to add fourteen documents exhibiting the "movement and presence of the Gray Wolf in California" which supported multiple of its claims. The court noted that under the APA, the scope of the court's review was limited to the administrative record to the agency at the time of the challenged decision. However, this rule only applies when there is "no other adequate remedy in court," and since the ESA provides a citizen suit remedy, the APA does not apply in those suits. The court stated that its review in context of the claims brought under the ESA's substantive citizen suit provision must not be limited by the APA and, thus, granted Conservation Group's motion submit the additional evidence.

Earth Island Inst. v. Elliott, No. 1:17-cv-01320-LJO-MJS, 2017 WL 5526572 (E.D. Cal. Nov. 17, 2017).

Environmental Organization sued Forest Supervisor and the United States Forest Service ("USFS") seeking a preliminary injunction to halt two projects to fell large swaths of dead and dying fire-damaged trees. Environmental Organization feared that the projects would adversely affect endangered and non-endangered wildlife in the area and argued that the circumstances required further analysis before the project could begin and sought to postpone it. Forest Supervisor argued that the felling project fit within one of three categorical exclusions to the National Environmental Policy Act, allowing it to go forward without further analysis than what was done via an Environmental Impact Statement or an Environmental

Assessment. The district court denied Environmental Organization's motion. It found that: (1) Environmental Organization did not show that its likelihood of success on the merits; (2) Environmental Organization did not establish a likelihood of success on the merits for its claim that the sensitive wildlife species that would be affected was enough to create an extraordinary circumstance that made a categorical exclusion inappropriate; (3) Forest Supervisor was not required to assess the two projects' effects as cumulative or connected; (4) on the present record, the limited scope of the project did not amount to a sufficient showing of irreparable harm; (5) Environmental Organization did not make a sufficient showing of environmental harm to outweigh the risk of economic harm associated with delaying the project; and, (6) the safety concerns attendant to a delay of the project significantly outweighed Environmental Organization's chances of showing environmental harm on the merits, leading public interest to weigh strongly against the preliminary injunction.

S.D. California

Cox v. Ametek, Inc., No. 3:17-cv-01211-GPC-AGS, 2017 WL 4792424 (S.D. Cal. Oct. 24, 2017).

Decedent's Family brought suit against Manufacturer, asserting a wrongful death claim related to the death of their mother ("Decedent"). Manufacturer used land in California to manufacture aircraft engine parts for two decades that was located near Decedent's residence. Manufacturer stored toxic waste in an underground sump beneath its property, which leaked chlorinated solvents and other chemicals into the groundwater and subsurface soil. This leak thereafter migrated into groundwater beyond Manufacturer's property boundary. Measurements taken in 1987 and 2007 showed that the measured chlorinated solvent concentrations exceeded California's "Basin Plan Water Quality Objectives." Several of the chemicals contained in the leakage are associated with serious health risks, including cancer, according to the EPA. In 1998, the California Regional Water Quality Control Board ("Board") named Manufacturer a responsible party in a cleanup and abatement order ("CAO") that required Manufacturer to duly delineate the plume and comply with remediation tasks. Manufacturer chose not to comply with the order and ignored subsequent letters and violation notices sent by Board. Decedent lived directly above the groundwater contamination plume from 1976 until her passing in 2001, which was caused by a kidney tumor. In the present case, Manufacturer filed a motion to dismiss, arguing that Decedent's Family failed to satisfy the elements for

causation. The district court rejected Manufacturer's motion to dismiss because the complaint of Decedent's Family sufficiently states a plausible claim that Manufacturer's inaction caused Decedent's untimely death. The court rejected Manufacturer's argument that its failure to comply with the CAO could not have contributed to Decedent's death since Decedent had already been exposed to the chemicals for two decades prior to the CAO because a cleanup effort could have plausibly allowed Decedent to have lived longer because her exposure could have been lessened.

S.D. Ohio

Hobart Corp. v. Dayton Power & Light Co., No. 3:13-cv-115, 2017 WL 5956911 (S.D. Ohio Nov. 30, 2017).

Corporations owned a landfill site that was contaminated. In 2013 and 2016, Corporations entered into settlement agreements with the EPA to remedy the contamination. Corporations then sought contribution under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") from eight other Companies, alleging that the other Companies were also responsible for the contamination of the sight. Each of the Companies then moved for summary judgment on the issues of whether each Company used the landfill and if it did, whether it dumped hazardous materials in it. The district court in this case only addressed the first issue of whether each Company had used the landfill. In doing so, the court found for three of the Companies finding that they had not used the landfill for various reasons, and thus granted summary judgement in Companies favor. For the remaining five companies, there remained an issue of fact about their use of the landfill, thus their motions for summary judgement were not granted and the cases against them are proceeding.

S.D. New York

In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., No. 04 Civ. 4968 (VSB), 2017 WL 5468758 (S.D.N.Y. Nov. 13, 2017).

Water District was charged with maintaining groundwater quality in Orange County, California and alleges that the use and handling of Methyl Tertiary Butyl Ether ("MTBE") contaminated groundwater within its jurisdiction. Oil and gas companies ("Companies") negotiated a case management order ("CMO"). Following the adoption of the CMO, the judge granted judgment in favor of Companies, dismissing all claims

against them based on res judicata and finding that consent judgments from 2002 and 2005 barred claims in this action. Water District appealed that and the summary judgment decisions to the Second Circuit Court of Appeals, which vacated and remanded the decision back to the district court. Water District also made a motion requesting an issue of a suggestion of remand to the judicial Panel on Multidistrict Litigation ("Panel") to remand the remaining proceedings to the another district court. In response, first district court found that all consolidated pretrial proceedings were complete and accordingly granted Water District's motion.

State

California

Ctr. for Biological Diversity v. Cal.Dep't of Fish & Wildlife, 226 Cal. Rptr. 3d 432 (Cal. Ct. App. 2017).

Environmental Group brought a mandate petition under the California Environmental Quality Act ("CEQA") challenging the environmental impact report (EIR) and related project approvals for two natural resource plans for a proposed development. At trial, the court set aside the project approvals, ordered Department of Fish and Wildlife ("Department") to set aside its certification of the final EIR, and enjoined Department from proceeding. The appeals court reversed. The California Supreme Court reversed the appellate court, holding that the EIR was deficient both because its finding that the project's greenhouse gas emissions were insignificant was "not supported by a reasoned explanation based on substantial evidence," and because its measure of protecting a fish species by capturing and relocating it was a prohibited taking under the Fish and Game Code. Following remand, the trial court entered judgment in favor of Environmental Group as to greenhouse gas emissions and in favor of Department on all other issues. On appeal, the court affirmed, holding that: (1) a trial court has the authority to partially decertify an EIR under CEQA following a trial, hearing, or remand; (2) a trial court has the power to leave Department's project approvals in place after partially decertifying an EIR; and (3) the trial court acted within its discretion in declining to set aside all project approvals after court suspended project activity pending correction of partially-decertified EIR.

Washoe Meadows Cmty. v. Dep't of Parks & Recreation, 225 Cal. Rptr. 3d 238 (Cal. Ct. App. 2017).

Community sought to set aside approval of a project intended to address environmental concerns posed by a golf course on the basis that the proposed plan violated the California Environmental Quality Act ("CEQA"). The trial court set aside the approval of the project, and the State appealed. The appellate court affirmed the trial court on the basis that the project description was not "accurate, stable, and finite" as required by CEQA. Instead of providing an accurate, stable, and finite plan so that the public may comment on the proposed plan, the State provided five very different alternatives which may or may not have been ultimately approved. Therefore, this did not give the public anything concrete to grasp which impaired their "ability to participate in the environmental review process"—something that is essential to CEQA. Presenting the public with such a moving target was prejudicial (showing prejudice is a CEQA requirement) because it was not certain that any of the alternative plan would ultimately be selected or approved. Accordingly, the court affirmed the lower court's determination that the plan's approval should be vacated.

Michigan

Michigan Dep't of Envtl. Quality v. City of Flint, No. 17-12107, 2017 WL 4641897 (E.D. Mich. Oct. 17, 2017).

In response to public health risks associated with City water supply, the EPA, in January 2016, determined that the water posed an imminent and substantial endangerment to the public health. The EPA then issued an Emergency Administrative Order ("Order") imposing requirements on City to improve the water conditions. Due to lack of action by City, State Department of Environmental Quality ("DEQ") asked the court to order City to take action and brought a motion for summary judgment. Accordingly, the district court found that DEQ had established the necessary requirements for a permanent injunction to compel City to enter a long-term water supply contract consistent with the EPA Order. As a result, the court granted DEQ's motion for summary judgment in part and further ordered that City choose a satisfactory long-term drinking water source under EPA's Order on or before October 23, 2017.

New Hampshire

Brown v. Saint-Gobain Performance Plastics Corp., No. 16-cv-242-JL, 2017 WL 6043956 (D.N.H. Dec. 6, 2017).

Landowners sued Manufacturer for economic damages after Manufacturer allegedly released contaminants into public water systems and contaminated Landowners' properties. Manufacturer moved to dismiss the complaint in its entirety. First, Manufacturer claimed that the release of the chemicals into public systems constitutes an injury only to the groundwater, which Landowners did not have rights to that groundwater. The court rejected this argument, holding that the groundwater's contamination could have reasonably led to the lost use and enjoyment of Landowners' real property. Dismissal at this point in the litigation was therefore improper. Second, Manufacturer claimed that the lack of physical symptoms to Landowners' themselves did not warrant the reward of medical monitoring damages. Finding that New Hampshire law was not well-adapted to answer this question, the court denied Manufacturer's motion to strike the reward without prejudice, and is considering whether to certify the question to the New Hampshire Supreme Court. Third, Manufacturer claimed that the claim of trespass was improper, because there was no deliberate entry onto Landowners' properties. The court denied this motion, because the claim included language that the trespass could have been negligent rather than deliberate. Finally, the court did grant the Manufacturer's motion to dismiss any claims regarding unjust enrichment, because New Hampshire law does not recognize claims of unjust enrichment outside of contract law.

New York

Matter of Global Cos. LLC v. New York State Dep't of Envtl. Conservation, 155 A.D.3d 93 (N.Y. App. Div. Oct. 26, 2017).

In a case arising from a cross appeal from a judgment of the Supreme Court, Albany County, Applicant owned a sixty-three-acre petroleum transfer and storage facility in the City of Albany. In 2013, he submitted an application to the Department of Environmental Conservation ("DEC") to modify its clean air permit under the Clean Air Act in an attempt to expand its crude oil storage capabilities. In 2015, DEC notified Applicant that it would rescind the notice of completed application ("NOCA") and rendered a negative declaration under the State Environmental Quality Review Act ("SEQRA"). In May 2015, DEC notified Applicant that it was rescinding

the NOCA and intended to rescind the negative SEQRA declaration. In response, Applicant commenced a proceeding for declaratory judgment against DEC seeking a judgment: (1) compelling DEC to make a final decision on its permit application; (2) annulling DEC's rescission of the NOCA and compelling DEC to complete its permit application review; (3) declaring that DEC failed to act in a timely manner and could not rescind the negative SEQRA declaration; and (4) compelling DEC to issue an amended negative SEQRA declaration. The trial court partially dismissed Applicant's action for declaratory judgment. It also directed DEC to render a decision on the permit application within sixty days, but the court dismissed Applicant's third and fourth causes of action. The appellate court, found that the prior court properly granted intervenor status but erred in directing DEC to act on the permit application within sixty days because DEC was authorized to rescind the NOCA and the rescission was both timely and rationally based. The Supreme Court accordingly affirmed in part and reversed in part.

Vill. of Pomona v. Town of Ramapo, 64 N.Y.S.3d 80 (N.Y. App. Div. 2017).

Village was dissatisfied with determinations of Town Board on a proposed development project, an amendment to the Town Plan to permit the project, and the rezoning of the property on which the project was to be constructed. Village sought to invalidate the determinations, contending that Town Board did not adequately consider the effect of the project on community character or the environmental impact of the project in proximity to a pipeline. Village also asserted that Town Board violated municipal law. The trial court denied Village's petition and dismissed the proceeding. The appellate court reversed, holding that Town Board did not adequately consider the environmental effect of the project's proximity to the pipeline.

Youngewirth v. Town of Ramapo Town Board, 65 N.Y.S.3d 540 (N.Y. App. Div. 2017).

An Individual commenced proceeding seeking review of determinations of Town Board resolving to approve a findings statement pursuant to the State Environmental Quality Review Act ("SEQRA") in connection with a proposed development project, to amend a comprehensive plan of the town so as to permit the development project, and to rezone the real property on which the development project was proposed to be constructed. The county court denied petition and Individual appealed. The appellate court reversed

and granted Individual's petition, holding that Town Board failed to take a "hard look" at the environmental impact of placing proposed development in close proximity to existing gas pipeline, that Individual did not establish that rezoning of property was in clear conflict with the town's comprehensive plan, and that town's change in zoning did not violate Town Law governing zoning districts.

Pennsylvania

Becker v. Dep't of Envtl. Prot., No. 560 C.D. 2017, 2017 WL 5907706 (Pa. Commw. Ct. Dec. 1, 2017).

Trustee petitions from an order of the Environmental Hearing Board ("Board") dismissing an appeal from the Department of Environmental Protection's ("Department") decision finding that he had rerouted a stream without a permit and caused water pollution in violation of the Clean Streams Law ("CSL") and Dam Safety and Encroachments Act ("DSEA"). Trustee appealed, contending that Board erred because the channel he routed was not a "stream" as defined under the laws. The appellate court concluded that the Trustee's channel at issue satisfied the definitions of a regulated stream under the CSL and the DSEA because the stream on his property was a channel of conveyance of surface water with defined bed and banks and an intermittent flow. Accordingly, the court affirmed Board's order but remanded for the limited purpose of imposing an alternate remedy on Trustee or obtaining permission to permit the work to be done and coordinating enforcement of the final orders.

West Virginia

State ex rel. ERP Envtl. Fund, Inc. v. McGraw, 805 S.E.2d 800 (W. Va. 2017).

Residents sued alleging that a coal company ("Company") contaminated their well water, even after the Department of Environmental Protection ("DEP") determined that Company did not cause contamination. Residents sought to require Company to provide emergency, temporary, and permanent water replacement. After determining that Company's operations affected Resident's water supply, the circuit court granted a writ of mandamus ordering DEP to compel Company to provide emergency water and temporary replacement water until a permanent supply was established by Company. DEP issued an order to Company to provide water

replacement and an order to ERP Environmental Fund ("ERP") to ensure compliance. ERP petitioned for a writ of prohibition against enforcement of the mandamus. The Supreme Court of West Virginia granted the writ of prohibition. It held that the circuit court lacked the necessary grounds to compel water replacement to Residents because DEP found no contamination in the permitted area. Furthermore, without a finding of contamination by DEP, there was no basis for issuing a violation. Therefore, DEP did not fail to perform a non-discretionary duty for which mandamus could be granted.