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Recent Case Decisions

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RECENT CASE DECISIONS

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All case citations are as of 3-30-2018. The citations provided in this Case Report do not reflect changes made by Lexis or Westlaw, or the case's addition to a case reporter after that date. This Case Report contains case decisions issued through 1-26-2018. This PDF version of the newsletter is word-searchable. If you have any suggestions for improving the Newsletter, please e-mail the editorial staff at ou.mineral.law@gmail.com.

SELECTED OIL AND GAS DECISIONS

Upstream – Federal

D. Colo.

Estate of Simmons v. N.G.L. Holdings, LLC, No 16-cv-02462-RBJ, 2017 WL 6310482 (D. Colo. Dec. 11, 2017).

This case concerns a property dispute wherein Estate claims ownership to a mineral estate beneath the surface estate owned by Company. The property at issue was conveyed to Company from Estate, but Estate argues that the mineral and surface interests were severed and that only the surface interest was conveyed. Company disputes, claiming that the mineral and surface interests automatically merged into one ownership interest under Estate and that when the property at issue was conveyed to Company, both the surface and mineral interests were transferred. On this, Company moved for summary judgment. The District of Colorado denied Company's motion. The court noted that this is a matter of first impression before the court, the issue being "do mineral and surface estates automatically merge as a matter of law when they are united ownership?". Drawing from Colorado law in the boundary and easement contexts, the court held that, yes, mineral and surface interests automatically merge when united under common ownership. However, the court denied Company's motion because a genuine issue existed as to whether Estate intended to "re-sever" the mineral estate before conveying the property to Company.

S.D. Texas

Glassell Non-Operated Interests, Ltd. v. Enerquest Oil & Gas, L.L.C., No. H-16-1573, 2017 WL 6626652 (S.D. Tex., Dec. 28, 2017).

Developers, individuals, and other entities (collectively, "Developers") jointly entered into an Agreement to share in the "royalties, minerals, or other rights in a 40-Square-mile tract" of land. The Agreement included a provision which required that if any of the Developers acquired the interest held by any other Developer, the acquiring Developer must share the acquired interest among the rest. One Developer ("Acquiror") obtained an interest from two other Developers but refused to share. First, Acquiror claimed the Agreement exempted it from sharing, but the court found that because Acquiror did not obtain these new interests before the agreement was finalized, it must share. Second, Acquiror claims the statute of frauds bars enforcement of the agreement because its surveyor claimed the relevant tract was not described "with reasonable certainty." But, the court concluded that because Acquiror's survey was "inadequately precise" and another surveyor came

to the opposite conclusion, the statute of frauds does not bar enforcement of the Agreement. Finally, because Acquiror did not partially perform, the Agreement is enforceable, and it must share in its newly obtained interests. This case has since been appealed, but there is no decision from the higher court as of publication.

Federal Claims

Waverly View Inv'rs, LLC v. United States, 135 Fed. Cl. 750 (Fed. Cl. Jan. 5, 2018).

Property Owner sued Government, claiming that Government's operation of pollution-monitoring wells on Property Owner's land constituted a physical taking of Property Owner's property. Government had originally obtained consent for the wells based on a right of entry agreement. However, the wells remained after the right of entry agreement had expired. The court determined that Government's continued activities on Property Owner's land after the right of entry agreement expired constituted a physical taking. Furthermore, the court stated that Property Owner was entitled to compensation for each square foot of occupied property.

Upstream – State

Colorado

Stockdale v. Ellsworth, 2017 CO 109.

In 2009, Corporation filed an interpleader action to determine who held rights to certain oil and gas proceeds and seeking declaratory judgment. It was determined California Heirs, Kansas Heirs, and two business entities managed by Manger all had valid claims to the proceeds. The Kansas Heirs and one of Manger's business entities withdrew their claims, leaving only the remaining business entity ("Company") and the California Heirs. Company claimed that it was entitled to the proceeds because it had obtained the mineral deeds from the California Heirs; the California Heirs counter-argued that Company had obtained the deeds through fraud and deceit. The trial court found that Manager had represented Company in the dealings and had told the California Heirs that there was no production in the mineral interest at issue, even though he had already received over $1 million in proceeds from the lands. The trial court also determined that Company was merely an alter ego of Manager, and thus pierced the corporate veil, leaving Manager and Company jointly liable for Corporations' litigation fees and granted fees and costs. Manager was subsequently successful in the court of appeals on his argument that he had not been made a party to the case when he was held liable. However, Manager's petition for exemplary damages against the court was denied by the Supreme Court of Colorado. The court did granted certiorari for Corporation's writ, stating that Manager was properly joined in the case. It found that Company was

simply Manager's alter ego which pierced the corporate veil, making his joint and several liability proper, especially since the court found that Manager had adequate notice and opportunity to contest said decision after the judgment was filed.

Kansas

Adamson v. Drill Baby Drill, LLC, 409 P.3d 874 (Table) (Kan. Ct. App. 2018).

Landowners claimed that Exploration Company's ("Company") two oil and gas leases had terminated for cessation of production in paying quantities. Both Landowners and Company moved for summary judgment, and the trial court granted summary judgment to Company for both leases. Landowners appealed and Company cross-appealed for attorney's fees. The court of appeals affirmed summary judgment for several reasons. First, the court held that the lower court properly determined that Landowners had the burden of proof because the party claiming cessation of production in paying quantities must present factual evidence that it has ceased. Second, summary judgement was proper because Landowners failed to show that there was a cessation of production in paying quantities. Third, summary judgement was proper because Landowners failed to refute ratification of one of the leases by the mineral interest owners. Finally, the court remanded Company's cross-appeal because the trial court had not ruled on any award for attorney's fees.

Louisiana

Briarwood Group, L.L.C. v. Calhoun, 51,732 (La. App. 2 Cir. 1/18/18), No. 51,732-CA, 2018 WL 458145.

Landowner conveyed "non-executive mineral rights" to Mineral Owner and later conveyed an oil and gas lease to Lessee, which was later assigned to Assignee. Later Mineral Owner transferred interest to Subsequent Mineral Owners, and had an agreement that Subsequent Mineral Owners and Landowner would each receive a twenty-five percent royalty, and that Landowner's royalty and non-executive right would terminate upon her death. One Subsequent Mineral Owner later sued Landowner arguing Landowner did not have the right to execute the lease. The lower court granted summary judgment in favor of Landowner on the basis that Landowner "signed the [conveyance of mineral rights] in their individual capacity." Subsequent Mineral Owners claim it was improper for the lower court to grant summary judgment "because an issue of material fact exists as to whether [Landowner] intended convey their individual interests." Here, the appellate court agreed with Subsequent Mineral Owners and reversed summary judgment. The primary reason for this is that intent of the landowner was disputed and, by its nature, a "determination of intent is not appropriate for summary judgment." This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Maryland

Ellis v. McKenzie, 457 Md. 323 (Md. 2018).

Surface Owners had Mineral Owners mineral interests terminated in January 2013 pursuant to Maryland's Dormant Mineral Interests Act ("Act"). Mineral Owners challenged the constitutionality of the Act. The trial court found that the Act was constitutional and terminated Mineral Owners' mineral interests; the appellate court affirmed. Mineral Owners appealed to the additional appellate court. That court also affirmed, holding that the Notices of Intent were invalid because they were not filed prior to the Petition for Termination. The court further held that the Act was not retrospective as to violate Mineral Owners' due process rights and did not take property without just compensation.

Oregon

Columbia Pac. Bldg. Trades Council v. City of Portland, 412 P.3d 258 (Or. Ct. App. 2018).

City appealed a regulatory decision in favor of Interest Group which found that City's zoning laws violated the Dormant Commerce Clause ("DCC") of the United States Constitution as well as several state laws. Generally, the zoning laws restrict expansion of "Bulk Fossil Fuel Terminals." The appellate court determined that the zoning laws were not a violation of DCC because there was not an adequate showing by Interest Group that there was discrimination between in-state and out-of-state business. Specifically, the court noted that the two groups identified by Interest Group, "in-state purchasers and end users," could not satisfy the DCC discrimination requirement because they were not "substantially similar out-of-state and in-state economic entities." What's more, the court determined that any burden imposed on interstate commerce was not "clearly excessive in relation to the putative local benefits" here, those benefits include things like protecting health and public safety. The first state law at issue provides that laws such as the zoning laws passed by City must have "[A]n adequate factual base" for their conclusions. The appellate court found it appropriate for the regulatory entity below to determine that one of the factual bases of the zoning laws lacked "substantial evidence." Finally, the zoning laws do comply with state law providing that "A transportation plan shall . . . facilitate the flow of goods and services. . . ." This is because there is no dispute that the zoning laws do not "directly alter a [transportation system plan.]"

Texas

Bupp v. Bishop, No. 04–16–00827–CV, 2018 WL 280408 (Tex. App. Jan. 3, 2018).

Grantees sued Grantors seeking a declaration that no reservation or exception of royalty interests had been conveyed by a warranty deed. The trial court determined that the warranty deed did convey all royalty interests to Grantees and granted summary judgment in favor of Grantees. Grantors appealed. The court of appeals reversed for several reasons. First, even though the deed grouped reservations and exceptions under a singular heading, the four items listed were exceptions to the conveyance. Second, the fourth exception unambiguously referenced all royalty interests devised to Grantors by a previous will. Third, the exception prohibited the deed from passing all of the royalty interest to Grantees because the interests remained vested in Grantors. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Crimson Expl., Inc. v. Magnum Producing L.P., Number 13-15-00013-CV, 2017 WL 6616740 (Tex. App. Dec. 28, 2017).

Since the early 1990s, Owner has held a mineral interest in an oil and gas lease ("Lease #1"), which was operated by Operator. In 2006, a trial court deemed Lease #1 invalid as of year 1996. Before that judgment, Owner and Operator entered into a Master Settlement Agreement ("MSA") guaranteeing Owner's interest in the Lease (after the lease expires) and granting Owner an overriding royalty interest that could be converted into a working interest. The parties also entered into a letter agreement ("Letter") which concerned Owner's interest in several top leases which Operator held. In 2006, shortly after the judgment nullifying Lease #1, Operator changed its records to reflect that Owner in fact did not have any interest in any well on the acreage. Owner sued for breach of contract and was awarded summary judgment by the trial court. Operator appealed arguing that the Letter was not "formal enough" to confer Owner with an interest in the lease. The court disagreed with Operator and affirmed the trial court. The court held that it is not necessary to use formal language found in deeds to affect a conveyance of real property and that the Letter plainly ensured Owner's interest in current and future top leases. Similarly, the court held that Letter shows that both parties intended to be bound by the agreement and thus Operator breached the contract when they stopped paying working interest to Owner. Finally, the court held that pre-judgment interest was not due to Owner because Operator reasonably doubted Owner's title to the working interest at issue.

Haywood WI Units, Ltd. v. B&S Dunagan Investments, Ltd., No. 13-15-00454-CV, 2017 WL 6379737 (Tex. App. Dec. 14, 2017).

Royalty Owner sued Lessor claiming that he owned a larger royalty interest than that which he was being paid and that Lessor was not the holder of the executive right. The dispositive issue was whether Lessor owned a quarter of the royalty interest, or less as Royalty Owner claimed. Lessor originally owned a one-half interest in the mineral estate. The court determined that Lessor owned a quarter royalty interest even after conveying part of its interest to a third party by deed. The deed stated that Lessor would "share equally in the mineral lease bonuses, rentals, royalties or other sums received." The court held that this language meant that Lessor retained one half of its original royalty interest, making its current royalty interest one quarter. The court determined that the second issue did not need to be decided because Royalty Owner was properly paid his fair share of royalty.

Midstream – Federal

D. District of Columbia

Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 280 F.Supp.3d 187 (D.C. Cir. 2017).

Native American Tribe ("Tribe") brought a claim requesting that the court insure three specific conditions on an oil pipeline: "(1) the finalization and implementation of oil-spill response plans at Lake Oahe; (2) completion of third-party compliance audit; and (3) public reporting of information regarding pipeline operations." The court agreed with these requests, finding them reasonable and necessary. Accordingly, the court imposed these measure on the Army Corps of Engineering.

N.D. Ohio

Nexus Gas Transmission, LLC v. City of Green, No. 5:17-2062, 2017 WL 6624511 (N.D. Ohio Dec. 28, 2017).

Company sought to condemn city property to conduct evaluations to properly install a pipeline. Company brought a motion for partial summary judgment and motion for preliminary injunction and both were granted by the district court. Regarding the motion for partial summary judgment, the court analyzed that Company only holds the "substantive right to condemn" if certain elements are met. The court determined that Company did meet those elements, finding first that the project was authorized by the Federal Energy Regulatory Commission, despite attempts to challenge the certificate of authorization. Second, the subject land was indispensable to the project. Lastly, Company did conduct "good faith negotiations," to gain access to the property prior to initiating the condemnation,

and the court also found that it did not need to follow special procedures set out by state law, even though the public land was held by a municipality, because "the federal right of condemnation . . . [is] superior" to the state law on such procedure. The court therefore held that the company had the power to condemn and such action would cause little harm in this case because the access was for a specific and narrowly defined section of property, for a specific purpose, and the project was being carried out for public benefit. Regarding the motion for temporary injunction, the court held that the request was for only narrowly defined sections of property directly related to the placement of the pipeline and only to evaluate/survey for alignment/proper placement of the pipeline and environmental concerns/issues related to pipeline. Furthermore, even though this is challenged as a "quick take," since the court determined that Company has the power of eminent domain, they should also be granted right to possess immediately. This case has been appealed, but there is no decision from the higher court as of publication.

SELECTED WATER DECISIONS

Federal

7th Circuit

Alexander v. Ingram Barge Co., 876 F.3d 269 (7th Cir. 2017).

Flood Victims ("Victims") filed suit against Federal Agency and Company after Company's barge broke apart in a storm and damaged a local dam, causing significant flooding. The district court found that responsibility for the incident rested solely with Federal Agency, which was exempt from suit under the doctrine of sovereign immunity. Victims filed appealed, alleging that Company shared some of the blame for its negligent actions. Victims' argument hinged on the assertion that Company violated three Inland Navigation Rules—Rules 2, 5, and 7. The Second Circuit Court of Appeals examined the case and held as follows: (1) the district court made no clear error in its determination that Rule 2 was not violated; (2) because the findings of the lower court in its examination of whether Rule 5 was violated were supported by the record and not clearly marred by legal error, the only available conclusion was that the lower court's reasoning was sound; and (3) without finding clear error in the lower court's ruling that the facts did not establish a violation of Rule 7, it too must be upheld. For those reasons, and because the district court's finding that Federal Agency was solely responsible was also free of any clear error, the court affirmed the district court's ruling.

D. Colo.

Audubon Soc'y of Greater Denver v. U.S. Army Corps of Engineers, No. 14-cv-02749-PAB, 2017 WL 6334229 (D. Colo. Dec. 12, 2017).

Environmental Organization brought suit against Federal Agency challenging Federal Agency's reallocation plan to move water from "flood control to storage for municipal and industrial use." Environmental Organization's complaint included claims brought under the National Environmental Policy Act ("NEPA") and the Clean Water Act ("CWA"). Operating under a presumption of validity, the the district court assessed Federal Agency's action. First, the court held that Federal Agency had not violated NEPA because: (1) the use of the language that was not clearly defined did nothing to take away from the objective, reasonable, good faith showing of the topics that must be addressed under NEPA to allow for public participation; (2) Federal Agency's failure to specifically discuss potential changes to water rights due to its action was not significant enough that it frustrated public participation by withholding information necessary to have informed participation; and (3) Federal Agency sufficiently considered the reasonable alternatives put forth by Environmental Organization. The court then held that Federal Agency's action

did not violate the CWA because: (1) the position that "NEPA alternatives" should have been examined as part of Federal Agency's CWA analysis was unsupported by sufficient case law, and thus rejected, and (2) there was no legal or policy reason to apply the NEPA anti-segmentation rule to the CWA analysis. For those reasons, the court affirmed Federal Agency's decision. This case has since been appealed, but there is no decision from the higher court as of publication.

Federal Claims

Welty v. United States, 135 Fed. Cl. 538 (Fed. Cl. 2017).

Farmer's land was flooded by water because of a levee on Neighbor's land that was constructed voluntarily in conjunction with a federal conservation agency ("Agency"). Farmer sued Neighbor in 2005 for the damage to the property, but the suit was dismissed. Farmer then brought suit against Agency for inverse condemnation without adequate compensation. The trial court found that although equitable tolling of the statute of limitations could not be granted because Farmer was on notice of the damage to his land in 2005 and neither Agency nor Neighbor fraudulently concealed the damage to the property, the stabilization doctrine applied which allowed Farmer to bring the suit whenever it became clear that Agency's actions had amounted to a taking of his property. The court ultimately dismissed the case for failure to state a claim, however, because Farmer had failed to show that Agency's actions were the direct cause of Farmer's injury. This case has since been appealed, but there is no decision from the higher court as of publication.

State

California

Dep't of Finance v. Comm'n on State Mandates, 18 Cal. App. 5th 661, 226 Cal. Rptr.3d 846 (Cal. Ct. App. Dec. 12, 2017).

Water Board provided county "and the cities located in the county" (together, "County") with a particular permit. Pursuant to issuance of the permit, County had "to implement various programs to manage [its] urban runoff." Related to these requirements, the state constitution requires that the state pay local governments in certain circumstances. The state, however, is not constitutionally obligated to pay local government when the regulations imposed by local government are "mandated by a federal law or regulation." The court ultimately determined that this was not a case where regulations were mandated by the federal government because it only required regulation of "pollutants to the maximum extent practicable," and no other specific regulation was required. Accordingly, the case is

reversed and remanded such that the state is required to reimburse some of the costs for complying with its requirements.

Idaho

Black Canyon Irrigation Dist. v. State, 408 P.3d 899 (Idaho 2018).

The United States was decreed rights to specific quantities of water in the Cascade and Deadwood Reservoirs, whose stream flows often exceeded their respective capacities. On January 31, 2013, the United States filed a Late Claim to assert "supplemental beneficial use storage water rights" claims against State and Water Company in the two reservoirs, in which Irrigation District, in response, asserted that such claims were unnecessary. The district court granted summary judgment in favor of Irrigation District but also rejected the assertion that the Late Claims were unnecessary. On appeal, the Supreme Court of Idaho affirmed the district court decision holding that: (1) the grant of summary judgement against United States was appropriate because all three requirements of *res judicata* had been met, thus barring Irrigation District from attempting to supplement water quantities which had been previously granted; (2) the special master, who made recommendations in the lower proceeding, exceeded the district court's orders of reference by making an "alternative basis" recommendation because it intruded upon the Director's duty of administering water; and (3) because Irrigation District acted in good faith, no attorney fees were to be granted.

Barnes v. Jackson, 408 P.3d 1266 (Idaho 2018).

Landowner-1 claimed that Landowner-2 and his predecessor in interest had forfeited the water right to the land in 2014 because it had not been used for over five years. Landowner-1 alleged that the predecessor to Landowner-2 had not made beneficial use of the water right for over five years, so it was forfeited before being purportedly conveyed to Landowner-2. The trial court granted summary judgment to Landowner-2. The appellate court affirmed, holding that even if Landowner 2's predecessor had forfeited his right, the "no control" exception applied to the predecessor and caused the five-year time period for water right forfeiture to restart when the predecessor sold the property to Landowner-2 in 2012.

Ohio

Maumee Watershed Conservancy Dist. v. Buescher, 3rd Dist. Putnman, No. 12-17-06, 2017 WL 6450826 (Dec. 18, 2017).

Water conservation district ("District"), to address its floodplain, appraised and attempted to purchase acreage from Landowners 1 and 2 to divert water from a nearby river. Both Landowners refused to sell, so District filed a petition to take the land by eminent domain. The trial court granted judgment on the pleadings to

District, and Landowners appealed. On appeal, both Landowners claimed that the trial court did not have jurisdiction because District's purchase price offer was too low to be considered realistically, and because District's petition was not in accordance with the state's eminent domain laws. Because District gave both Landowners thirty-days' notice of its intent to acquire the property, had given a written good faith offer to Landowners, and had adequately shown the public need for the property in its petition, the appellate court affirmed.

Vermont

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

Company erected a dam and entered into a negotiation with Township for a flow easement, which is a right to commit trespass in the form of intentional flooding of land upstream from the dam. In calculating the land affected by this trespass, Company calculated that 19 acres of land would be directly subject to the flooding caused by the dam. Township, however, argued that the effects of a dam would instead affect over 1964 acres. The trial court agreed with Township's survey, removed certain land that fell beyond the 100-year flood level, and set the appropriate amount of acreage covered under the flow easement at 1859 acres. On appeal, the Supreme Court of Vermont agreed with this acreage calculation, and recognized that every flood has unique peak levels, and that subsequent floods may continue to add to the cumulative area flooded by the dam. Furthermore, in determining the price per acre to be paid in the easement, Company calculated the easements historically paid for the 19 acres of "limited utility" property and argued that the appropriate price per acre for the easement was $500. Township instead calculated the median price for flow easements over the much larger 1964 acres calculated in its initial survey and argued that the appropriate value was $1,100 per acre. The trial court accepted Township's method of valuation, but adjusted for a number of economic factors to arrive at a price of $836 per acre. On appeal, the Supreme Court of Vermont noted that a presumption of validity attached to Township's valuation model, and the burden rested on Company to overcome that presumption. Because Company failed to take into account the proper amount of acreage affected by the flooding and to price accordingly, they presented no evidence to rebut the presumption. The Supreme Court of Vermont therefore affirmed the calculations of the trial court, maintaining the overall value of flow easements at $1,554,124.

SELECTED LAND DECISIONS

Agricultural Use

Arkansas

VanMatre v. Davenport, 2017 Ark. App. 703, 537 S.W.3d 287.

Landowner-1 purchased land that already had a twenty-five-foot easement which included a fence originally built to keep cattle off of the land. The fence had been there for eight years but, according to Landowner-1's predecessor, its removal would not negatively affect ingress and egress to the property. The fence was taken down by Landowner-2 and Landowner-1 sued for an injunction to have the fence rebuilt and argued that he had been given an exclusive easement by the agreement with his predecessor. The trial court granted injunctive relief to Landowner-1 and ordered that Landowner-2 restore the fence. It also found that Landowner-1 had an exclusive right to the twenty-five-foot easement. The appellate court reversed the trial court's finding, holding that there was no exclusive easement given to Landowner-1. It reasoned that the necessary intent to grant an exclusive easement to Landowner-1 was impossible to find when examining the four corners of the original agreement between Landowner-1 and his predecessor. The court remanded to the trial court on the issue of who was responsible to rebuild the fence.

California

Clews Land & Livestock, LLC v. City of San Diego, 227 Cal. Rptr. 3d 413 (Cal. Ct. App. 2017).

Landowner sued City after City approved a plan to construct a schoolhouse on acreage adjoining Landowner's property used to raise and train horses. Landowner alleged that City improperly accepted a mitigated negated declaration ("MND") in evaluating the environmental impact of the school's construction rather than an Environmental Impact Report ("EIR"). The trial court held that Landowner opposed the project only because it negatively impacted his business economically, rather than for environmental concerns, and found in favor of City. The appellate court affirmed the trial court, first noting that Landowner's claim was disallowed because he failed to exhaust his administrative remedies, but considered the merits of the case as well. The court discussed that a MND may be adopted without demanding an EIR, unless a party challenging a project can show a fair argument that the project may have a significant effect on the environment. Landowner argued that the project would create a fire hazard, increase or impede traffic and transportation, increase noise, reduce recreational activities, and affect historical resources. However, Landowner offered no evidence as to why the project would do so, and the court noted that the school's developers had actually taken concrete

measures to reduce the risk of these hazards lower than the risk posed before the project was underway. Therefore, because there was no showing that there were no significant effects on the environment, adoption of the MND without an EIR was permissible. Finally, while Landowner argued that the project violated the town's "open space" policies, he offered no evidence as to why City's determination to adopt the project was unreasonable, which is the burden of proof in challenging an agency's interpretation of its own open space policy.

Minnesota

Rosenquist v. Circle K Family Farms, A17-0279, 2017 WL 6418872 (Minn. Ct. App. Dec. 18, 2017).

Citizen was against a conditional-use permit ("CUP") application by Farm to build a hog-confinement facility. Citizen argued that the facility would violate a number of minimum mandatory requirements set forth in the county zoning ordinance. Specifically, Citizen was worried the facility would lower property values, create environmental problems, violate the odor-offset ordinance, and create a nuisance. The trial court disagreed, finding for Farm. It turned to the Minnesota Pollution Control Agency's ("MPCA") analysis of these issues, which found nothing in Farm's application that would pose an environmental risk or violate the county zoning ordinance. The appellate court affirmed the County Board of Commissioners' ("Board") decision, holding that it would be acceptable to grant a conditional-use permit to Farm so that it could build a hog-confinement facility. It held that the Board did not abuse its discretion in the granting of Farm's CUP. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

New Jersey Tax Court

Russo v. Twp. of Plumsted, No. 015983-2012, 2017 WL 6629174 (N.J. Tax Dec. 28, 2017).

Landowner purchased a parcel of land and started farming activities on the land. The municipal Tax assessor granted farmland assessment for the property in 2000. That treatment remained in place until 2010. In 2011, Landowner submitted an application to the assessor for farmland assessment of the property for the 2011 tax year. Tax Assessor only granted farmland assessment to part of the land because Landowner was using the land for both farming and non-farming purposes. Landowner continued to request the same tax assessment the next year. Landowner filed an appeal of the denial with the County Board of Taxation ("Board"). The Tax Assessor never visited the property to conduct her assessment of the property; however, she determined that the dominate use of the land had returned to agricultural or horticultural use. However, farmland assessment is based on the active devotion of the property to agricultural or horticultural use for two

successive years immediately preceding the tax year at issue. The Board issued a judgment affirming the Tax Assessors decision. Landowner filed a complaint challenging the judgment. The tax court noted that the statute regarding farmland assessment required the two years active agricultural or horticultural use before it may be granted. The court found that although Landowner used the property for agricultural or horticultural use, he failed to produce evidence establishing the nature and extent of the use. There is no evidence regarding the number of livestock or the crops planted or harvested. Because the Landowner failed to meet the preponderance of evidence requirement that the property was devoted to or dedicated to agricultural or horticultural use during the 2012 tax year the court up held the Board's judgment. This is an unpublished opinion of the court; therefore, consult state court rules before citing the case as precedent.

Easements

D. New Mexico

Pueblo of Jemez v. United States, CIV 12-0800 RB/JHR, 2017 WL 6512230 (D.N.M. Dec. 19, 2017).

Native American tribe ("Tribe") sought action against United States under Quiet Title Act and state common law. Tribe alleges that United States, after purchasing land in 2000, made attempts to limit members from enforcing their aboriginal title. Gas Company intervened, asserting its easement rights in relation to a pipeline which crosses the land in dispute. Gas Company deposed another tribe, ("Tribe-2") who has also used the same land for confidential purposes, by written questions to maintain Tribe-2's confidentiality. Tribe notified Gas Company that it planned to attend the next confidential deposition of a third tribe ("Tribe-3") Gas Company subsequently moved for a protective order precluding all parties and associated counsel from attending Tribe-3's deposition, and Tribe opposed the motion. The district court granted the Protective Order and denied Tribe's Motion to Strike, finding that depositions by written questions are generally not attended by parties, and even when this is allowed, counsel is unable to interject. Further, Tribe-2's deposition cannot be stricken as it is not a pleading.

E.D. Oklahoma

Dobbs v. United States Forest Serv., No. CIV-16-112-RAW, 2017 WL 6598537 (E.D. Okla. Dec. 26, 2017).

Landowner owns 160-acre tract of land that is completely surrounded by Upper Kiamichi Wilderness ("Wilderness") in Oklahoma. Because the property is completely surrounded, the only access onto the property is on a foot path. Landowner filed an application for special access to build a gravel road to his property. During the pending application, Landowner attempted access on the foot

path and fell and broke his leg. The United States Forest Service ("USFS"), who manages the Wilderness, issued an Environmental Assessment ("EA") denying Landowner's request. The Wilderness Act allows for adequate access to private property that is within the Wilderness. Another Act requires for reasonable enjoyment of private land within the USFS. Landowner appealed USFS's final decision. USFS noted that it did not preclude Landowner from requesting a last intrusive access to the property. USFS's EA noted that granting Landowner special access would go against the USFS's own interpretation of their regulations. The district court noted that it must give deference to the USFS interpretation of regulations. The court concluded that USFS based its decision on an adequate review of the evidence. It noted that the decision was not arbitrary or an abuse of district. Therefore, the district court upheld USFS's decision. This case has since been appealed, but there is no decision from the higher court as of publication.

Tax Court

Salt Point Timber, LLC v. Comm'r of Internal Revenue, 114 T.C.M. (CCH) 633 (Tax 2017).

Company granted a conservation easement to a Conservation Organization and listed the conservation easement as a charitable deduction its taxes. The IRS denied the deduction. The tax court determined that the IRS was correct to deny the deduction for two primary reasons. First, after analyzing the possible outcomes of what may happen to the conservation easement, the tax court determined that the easement could end up in the hands of an entity that is not considered a "qualified organization" as defined by the relevant tax regulation. Second, Company failed to adequately demonstrate that even if it were possible that the conservation easement was to end up in the hands of an entity that was not a "qualified organization," that such a "possibility that the easement will be replaced is negligible."

Alaska

Reeves v. Godspeed Props., LLC, Nos. S-15461/15482, 2018 WL 561386 (Alaska Jan 26, 2018).

Landowner 1 sued Landowner 2 over the validity of an appurtenant easement allegedly created by deed. Landowner 1 argues that one of the words in the deed is not actually a word and, therefore, the deed is ambiguous. The Supreme Court of Alaska said, however, that although the language Landowner 1 refers to is akin to a spelling mistake, such mistakes are not dispositive. Further, the use of that word only had "one reasonable interpretation." The court also considered what kind of easement was created by the deed. Here, because that determination was ambiguous, the court analyzed "the facts and circumstances surrounding the conveyance." On this issue, the court deferred to the lower court's determination that because the way the easement existed, it "clearly created a servient estate [] in

favor of a dominant estate." Therefore, the court said, an appurtenant easement was created. Next, the court determined that it was error for the lower court to determine "that the entire easement was terminated by prescription." Instead, the court determined that only part of the easement was terminated. Part of the easement was extinguished because a gold plant on part of the properties in dispute was determined to be "a permanent improvement," and it was not clear error for the lower court to determine that. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

California

Jaffe v. Bradshaw, D069824, 2017 WL 6505782 (Cal. Ct. App. Dec. 19, 2017).

Landowner owns land immediately above the lot that Neighbor owns. Landowner bought the property in 1982 and maintains and harvests a part-time commercial enterprise. Neighbor bought his land in 2009 and does not live at the home full time. The only vehicle access to Neighbor's property is a road that runs alongside the edge of Landowners property. Neighbor has an easement to use the roadway set forth in the legal description of Neighbor's property. After Neighbor purchased the property, he started making improvement to the easement of the road by widening the road and providing a turnabout. The improvements caused problems to Landowner's property. Neighbor had installed a pipe adjacent to Landowner's property when it was owned by the previous land owner. Neighbor brought a cause of action to which Landowner brought a cross claim. The trial court found that Neighbor failed to meet the burden of proof about his claims of public nuisance, negligence, and private nuisance. The trial court granted Landowner's request for declaratory relief concerning Neighbor's temporary parking easement road because it found that as a matter of law, this request to prevent Neighbor from parking on the easement because the act is a means to interfere with Landowner's reasonable use of the property. The trial court also found that the injunction will cause no harm to Neighbor. The trial court also found that it was not illegal for Land Owner to put in the pipe. The appellate court affirmed the lower court finding that Neighbor's arguments failed because of the factual premise. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

McBride v. Smith, A147931, 227 Cal. Rptr.3 d 390 (Cal. Ct. App. 2018).

This dispute between adjacent landowners involved an easement allowing the use of a shared driveway for secondary ingress and egress or emergency access. Landowner-2's complaint alleged that Landowner-1 installed fixtures on the easement area that prevented Landowner-2 from using the driveway as pursuant to the easement terms and the longtime use as primary access by herself and her predecessors. Landowner-2 claims that she had been using the easement for primary access openly for years and so had a prescriptive easement for primary

access. The appellate court reversed the lower court's decision and remanded for several reasons. First, the court held that Landowner-2 did not have enough supporting evidence to show that Landowner-2 had committed a nuisance, effectively depriving Landowner-2 of access to and enjoyment of *her property*. Landowner-2 only introduced facts that showed that her access to the easement for secondary access was compromised, not that she could not access the property that she actually owned. However, second, the court held that Landowner-2 presented enough support for a claim for a prescriptive easement, since she claimed that her use had been open, known and on a "daily basis" for years, which is a dramatic deviation from the original terms of the easement. The court held that she had a nuisance claim but did not adequately state how the installed poles and chains disturbed or prohibited her use of her property right in the secondary access easement. However, the court held that she did have a "claim as a matter of law" because the facts presented support a claim for prescriptive easement. Therefore, the court reversed and remanded the case to the lower court for resolution in accordance with the appeal court's opinion.

Colorado

City of Lakewood v. Armstrong, 2017 COA 159.

In 1984, a prior landowner granted a permanent public easement to County who then deeded the same to City. In 2011, the current landowners ("Landowners") bought the land subject to the easement and attempted to prevent access to the easement by locking a gate to its entrance. In 2015, City sought to quiet title and sought other remedial measures. Landowners counterclaimed, arguing that the easement was invalid. Both parties moved for summary judgment. The court determined that the easement was valid and entered summary judgment in favor of City. The appellate court affirmed, founding that the easement was validly conveyed and that the lack of express description of the dominant estate and the lack express notice did not invalidate the easement. The court determined that easements are reasonably certain and valid when they provide "in accurate detail, the size, dimensions, type of use, and location of the easement on the servient tenement, as well as the precise legal description of the servient property." It further noted that an easement recorded in the County Clerk's Office is sufficient to amount to constructive notice.

Florida

Goldman v. Lustig, No. 4D16-1933, 2018 WL 527011 (Fla. Dist. Ct. App. Jan. 24, 2018).

Landowners filed an action seeking to declare their right to use a portion of a dock on Waterfront Landowner's property. Landowners also sought an injunction against Waterfront Landowner disallowing any prohibition against using the dock.

The community in which Landowners and Waterfront Landowner lived established a homeowner's association. The homeowner's association formed an Agreement with Waterfront Landowner that severed all riparian rights of a portion of the dock that was located on Waterfront Landowner's property. Landowners argued that they had the right to use the dock pursuant to the Agreement and an easement by necessity. The court held that Landowners had a right to the portion of the dock that was expressed in the Agreement. The court concluded that Waterfront Landowner waived any arguments against the Agreement when he conceded at trial that he only owned and had rights to a certain portion of the dock. The court also held that Landowners were not entitled to an easement by necessity of Waterfront Landowner's property, concluding that, because the Landowners also lived off waterfront property and could construct a pier to allow access to the dock from their own properties, it was not an absolute necessity for Landowners to use Waterfront Landowner's property to get to the dock.

Illinois

Rainbow Council of Boy Scouts of Am. v. Holm, 2018 IL App (3d) 160715.

A Boy Scouts of America Troop ("Troop") filed a temporary restraining order against Landowner for the use of a path adjacent to property Troop used for its scouting activities. Landowner argued that Troop could access the property without use of the path by driving six or seven miles, and that Troop was trespassing on his property when using the path. The trial court granted the injunction, reasoning that Troop had a prescriptive easement to use the path to access the property. It noted that to restrict such use would cause an irreparable injury to Troop. Landowner appealed, and the appellate court upheld the trial court's findings. Landowner argued that Troop brought suit with unclean hands, but the court found that Troop was guilty of no misconduct, fraud, or bad faith, and that it had made reasonable efforts to prevent its invitees from accidentally trespassing Landowner's driveway. It further held that there was no reasonable alternative for Troop to access its property and that the trial court did not abuse its discretion in granting the injunction.

Kentucky

Ellington v. Becraft, 534 S.W.3d 785 (Ky. 2017).

Individual sued for a declaratory judgment against Property Owner asking that a passway be recognized as a public road. The district court entered judgment for Individual, holding that the road was a public passway and that Individual had obtained an easement by prescription. The appellate court reversed and Individual appealed to the Supreme Court of Kentucky. The Supreme Court affirmed in part and reversed in part, holding that evidence was insufficient to prove that the road was entirely public, but that the portion which passed over the Individual's

property was public. The court also abrogated a prior decision relevant to the legal issues presented, that "proof of county control for any period of time is not necessary to establish a common law public road." Lastly, the court held that six years of non-use was insufficient to evidence abandonment of an easement. 3

Massachusetts

Nicoli v. Gooby Indus. Corp., 16-P-1652, 2017 WL 6390941 (Mass. App. Ct. Dec. 15, 2017).

Servient Landowners filed an action to enforce a contract between Servient Landowners and Dominant Landowner. The contract provided that Servient Landowner would convey an easement to Dominant Landowner to allow Dominant Landowner to erect a retaining wall of the edge of Servient Landowners' property. In return, Servient Landowners could purchase a piece of land from Dominant Landowner. Dominant Landowner argued that the agreement was unenforceable because it did not satisfy the Statute of Frauds and the terms were too indefinite. The court held that the agreement had been taken outside of the Statute of Frauds because Servient Landowners completely fulfilled their obligations. Additionally, Servient Landowners were free from the restraints and penalties of the Statute of Frauds because they substantially relied on Dominant Landowner's promise to convey the piece of land to Servient Landowners. The court also held that the agreement was definite enough to be enforced. The court concluded that when looking at the agreement and taking into account the intention of the parties, the agreement terms could be construed and ascertained with reasonable certainty. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the opinion as precedent.

Michigan

In re Joseph M. Drago Revocable Tr. Agreement Dated Aug. 11, 1992, No. 335472, 2018 WL 442219 (Mich. Ct. App. Jan. 16, 2018).

The trial court denied Landowner's request to remove a dock at the end of a private road. Landowner appealed, arguing that Lot Owners were "riparian" owners who only had a right to build and maintain a dock at water's *edge*. The appellate court held that the caselaw did not limit private access to water's edge, but rather indicates an intent to allow access *into* bodies of water. Landowner also argued that by allowing overnight mooring of boats, the trial court erred because this would constitute unlimited use of the dock, but the appellate court held that the trial court never stated that "temporary mooring" included overnight mooring. As to all of Landowner's arguments, because the trial court was not clearly erroneous in its interpretation of the caselaw, the decision of the trial court was affirmed. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Montana

Hudson v. Irwin, 2018 MT 8, 390 Mont. 138, 408 P.3d 1283.

Landowner-1 sued neighboring Landowner-2 for declaratory relief, arguing that Landowner-1 was entitled to use an airstrip located on Landowner-2's property pursuant to a prior easement grant. The trial court concluded that Landowner-1's property was not benefitted by an easement to use the airstrip because there was no express reservation of the easement in the prior agreement. The Supreme Court of Montana affirmed the decision of the lower court but for alternative reasons. The court held that Landowner-1 did not have an easement because the agreement only allowed for the use of one airplane on the airstrip, and to allow for another landowner to use the airstrip would permit more than one airplane to use the airstrip, thus violating the agreement.

Nebraska

Royal v. McKee, 905 N.W.2d 51 (Neb. 2017).

Property Owner sued Utility District, contending that he should be given fee title ownership of a 200-foot right-of-way that went across Property Owner's property. Utility District then filed a counterclaim, arguing that it had acquired ownership via adverse possession. Although the trial court held that Utility District had acquired an easement in the right-of-way through its predecessor's eminent domain in 1869, the court ultimately ruled that neither Property Owner nor Utility District had established the elements of adverse possession necessary to quiet title. The court ruled against Utility District's adverse possession claim because its use of the right-of-way was not hostile. Giving deference to the lower court's holding, the court ruled against Property Owner's adverse possession claim because Property Owner did not establish the claim in his amended complaint. Because the court found that neither party had established adverse possession over the right-of-way, the court vacated the trial court's default against all parties other than Utility District and Property Owner.

New Jersey

Xiaofei Wang v. Mei-Yu Tsai, No. A-0171-16T3, 2018 WL 389185 (N.J. Super. Ct. App. Div. Jan. 12, 2018).

Landowner and Neighbor owned adjoining properties that were once a part of a larger parcel of land. At some point, the land split, and the previous owner sold the parcel of land now owned by Neighbor, reserving for themselves the other half of the land and a strip of land in between to operate as a right of way, which is now owned by Landowner. The right of way appeared in all subsequent deeds.

Landowner erected a fence down the middle of the right of way, and Neighbor made repeated, unsuccessful attempts to remove the fence. Neighbor sued for a declaratory judgement to declare the continued existence of the right of way and sought an order to require Landowner to remove fence. The lower court ruled for Neighbor, finding that there was no evidence that the interest in the right of way had ever been abandoned and that the easement was "available as a general way." On appeal, appellate court affirmed the lower court and held that Neighbor was the dominant tenement, and that Landowner did not meet its burden of proof to support a finding of abandonment. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing to the case as precedent.

New York

Maicus v. Maicus, 156 A.D.3d 1019 (N.Y. App. Div. 2017).

Landowner-1 appealed a trial court's order which determined that adjoining Landowner-2 possessed a right-of-way to two dirt roads located on Landowner-1's property. The court affirmed the trial court's decision, reasoning that the deeds used by Landowner-1 to show a chain of title provided Landowner-1 with actual notice that a right-of-way had been reserved by prior landowners. The actual notice was evidenced by the language in a deed which reserved access to the two dirt roads to "the remaining property owned by" the preceding landowners to Landowner-2's property.

Patel v. Garden Homes Mgmt. Corp., 68 N.Y.S.3d 87 (N.Y. App. Div. 2017).

Landowners' property was encroached upon by runoff water from Corporation's land, so Landowners sued for trespass to recover damages and an injunction. Corporation countered that it had acquired a proscriptive easement over Landowners' property. The trial court rendered judgment for Corporation, finding that Corporation had an easement that precluded Landowners' cause of action. The appellate court reversed and remanded because: (1) Corporation's use of Landowners' property was not proven to be continuous by clear and convincing evidence and therefore it had no proscriptive easement, and (2) the trespass to Landowners' property was continuous so their action was not time-barred.

North Carolina

Turnage v. Cunningham, 808 S.E.2d 619 (Table) (N.C. Ct. App. 2018).

Landowners owned a landlocked tract, so they filed for an easement by necessity through Neighbors' property. The predecessors in interest to Landowners filed a Petition for Cartway through Neighbors' land, which was denied. Landowners won the easement at trial on a summary judgment motion, so Neighbors argued on appeal that any implied easement that Landowners' predecessors in title acquired

had been abandoned long since and any implied easement owned by Landowners' or their predecessors had been adversely possessed by Neighbors. The appellate court affirmed because no easement was abandoned because it was only recently granted and no easement could have been adversely possessed for the same reason. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Ohio

Blanton v. Eskridge, 4th Dist. Scioto No. 16CA3783, 2017 WL 6371730 (Dec. 11, 2017).

Landowner lived on land that had been landlocked since 1962. The state had built a limited access entrance to Landowner's land from State Route 52 across the land eventually owned by Neighbor. Landowner had lived on the land for less than a year when he received a cease and desist letter from Neighbor concerning his use of the private roadway. Landowner filed a complaint claiming both a prescriptive and a necessity easement. After the trial, Landowner dropped his prescriptive easement claim and proceeded with only the necessity easement claim; the trial court ruled in favor of Landowner. Neighbor appealed. The appellate court determined that "[p]rior unity of ownership of both the dominant and servient estate [was] the *sine qua non* for establishing an easement by necessity." The court noted that Landowner never established such prior unity of title and also failed to prove that his land was landlocked when originally subdivided. Because Landowner did not meet the requirements for an easement by necessity, the court reversed the lower court's decision.

Bd. of Dirs., Maumee Watershed Conservancy Dist. v. Army, 3rd Dist. Van Wert NO. 15-17-09, 2017 WL 6450822 (Dec. 18, 2017).

Water conservation district ("District") obtained land right easement from Landowners in 1994. District learned in 2012 that Landowners had sold the property to Trustees, who had plans to develop the property subject to the easement. In 2016, District was made aware that Trustees had cut down trees and drained a pond, exceeding the limits placed upon the property by the easement. District brought action against Trustees, and the trial court granted summary judgment in favor of District. On appeal, Trustees asserted that trial court erred in granting summary judgment, but the appellate court held that summary judgment was appropriate because no genuine issue of fact existed as to the issues of the permanent injunction, damages, and imposed fine. Additionally, the court found that there was no abuse of discretion by the trial court in its denial of Trustees counterclaim and request for continuance. Accordingly, the appellate court affirmed the decision of the lower court.

City of Sidney v. Spring Creek Corp., 3rd Dist. Shelby No. 17-17-07, 2017 WL 5989073 (Dec. 4 2017).

Corporation appealed lower court's decision granting summary judgment for City in a dispute regarding control over an aquifer below Corporation's property. Corporation was landowner of the two subject parcels, holding a conservation easement for use of the water from the aquifer below said parcels. The conservation easement was only in place after negotiations for the sale of the property from Corporation to City fell through. Afterward, City sought fee simple title to the subject property and the related groundwater from the underlying aquifer below. The appellate court affirmed the trial court's decision in favor of the City because it determined that the easement in question could not be considered a conservation easement, despite the Tribe's assertion. This is because the easement language did not reflect an effort to preserve the land from physical change or development. Instead, although the underlying aquifer was meant to remain intact, by the easement terms the surface land is allowed and intended to be drastically altered. Furthermore, the court agreed with City's finding that the conservation easement went against public policy and state law. Therefore, the court affirmed the lower court's decision in favor of City.

Pennsylvania

Bartkowski v. Ramondo, Nos. 432 EDA 2017, 521 EDA 2017, 2018 WL 495213 (Pa. Super. Ct. Jan. 22, 2018).

Servient Owner had constructed a driveway with the permission of the previous dominant property's owner to access its own property. Dominant Owner sued Servient Owner for trespass and ejectment after Dominant Owner acquired the property. Servient Owner argued that it had either acquired the property underlying the driveway via adverse possession or that it had an easement by either prescription, necessity, or implication. The trial court found that the Servient Owner had an easement by prescription and dismissed the other claims. Dominant Owner appealed. Additionally, Servient Owner challenged the trial court's lack of finding of an easement by necessity and its failure to grant Servient Owner title to the driveway's land under the doctrine of consentable line. On appeal, the court found that the trial court erred by finding that the Servient Owner had a prescriptive easement because the trial court incorrectly determined that there was unity of ownership before separation of the parcels creating the basis for the easement. However, the court agreed with the trial court in finding there was no easement by necessity because difficulty and expense did not equate with impossibility. Lastly, in dealing with the issue of the doctrine of consentable line, the court affirmed the trial court's finding to not grant the Servient Owner the property underlying the driveway, holding the driveway was not running along a boundary of the properties but was fully within the Dominant Owner's property. This is an unpublished

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

Imhoff v. Deemer, No. 303 WDA, 2017, WL 6330801 (Pa. Super. Ct. Dec. 12, 2017).

Landowner and Neighbor own adjacent properties. Neighbor obtained a building permit to construct a barn on their property. They also obtained permits to construct a riding area for their horses. A year later, heavy rainfall came that caused huge amounts of water, soil, and debris to flow from Neighbor's property onto Landowner's. Neighbor constructed a split fence along the property line. Landowner filed a complaint alleging private nuisance. At a bench trial, the trial court issued an order in favor of Neighbor. Landowner applied arguing that the barn and riding area needed to be set back 150 feet because they were "structures for animal raising and care." The appellate court found that Landowner failed to prove that Neighbor lacked in meeting the 150-foot requirement. This was because Landowner did not provide evidence of how the fixtures failed to be 150 feet away from the property line. The court also rejected the issue of Landowner's claiming that Neighbor had a responsibility regarding the heavy rainfall causing debris to come on Landowner's land. The court noted that owners do become liable for damage that is caused by natural discharge when they alter the natural conditions to change the flow of the water. In this case, Landowner's actions were not enough to constitute an alteration that changed where the water flowed. Therefore, the court upheld the trial courts order in favor of Neighbor. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Plows v. Roles, No. 631 WDA 2017, 2018 WL 494775 (Pa. Super. Ct. Jan. 22, 2018).

Landowner-1 appealed a trial court's judgment that granted Landowner-2 the right to install a sewage line through Landowner-1's property. The court affirmed the decision of the lower court, reasoning that the use of the easement listed in Landowner-1's deed provided Landowner-2 with the right to construct a sewage line through Landowner-1's property. Further, the court reasoned that there were no limitations on the ability of Landowner-2 to use the easement for ingress or egress; thus, the installation of a sewer line would be proper to make Landowner-2's property livable. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Thomas A. Robinson Family Ltd. P'ship v. Bioni, 178 A. 3d. 839 (Pa. Super. Ct. 2017).

Company sued Landowner after Landowner installed a large steel post on his sidewalk that prevented Company from accessing public roads with its large paving vehicles. Company claimed that through years of continuous use by itself and its predecessor, they had a prescriptive use to the two feet of "sidewalk" that ran across Landowner's property. Trial court found in favor of Company and that both Company and the public had a prescriptive easement to the sidewalk. The appellate court affirmed that Company had met the twenty-one-year continuous and uninterrupted use element of a prescriptive easement. Although Company had only been in business for twenty years at the time of the lawsuit, the use of Company's predecessors of the easement was sufficient to meet the twenty-one-year requirement. However, the court vacated the portion of the trial court's finding that the general public has the right to traverse Landowner's property. No claim to a public prescriptive easement was made in this case, no claim was made to the public easement at trial, and Company did not argue in defense of a public easement on appeal.

Texas

Bujnoch v. Copano Energy, LLC, No. 13-15-00621-CV, 2017 WL 6616741 (Tex. Ct. App. Dec. 28, 2017).

Landowner gave Energy Company a thirty-foot wide easement for the construction and maintenance of a pipeline. Subsequently, Energy Company approached Landowner again asking for another easement for a second gas line, which Landowner granted. Energy Company's attorney then sent e-mails to Landowner stating that Energy Company would pay $70 per foot of the pipeline, to which Landowner agreed. However, Landowner later received written letters from a different Energy Company representative stating that it would only be paying $20 to $40 per foot of the second pipeline. Landowner then brought a breach of contract claim and a tortious interference claim against Energy Company. The trial court found in favor of Energy Company and granted summary judgment on both the breach of contract claim and the tortious interference claim. The appellate court reversed the trial court's findings on the breach of contract claim, holding instead in favor of Landowner. It reasoned that there was a breach of contract because the emails sent to Landowner included essential terms and could be read together so as to satisfy the statute of frauds. The appellate court affirmed the trial court's summary judgment in favor of Energy Company on the tortious interference claim.

Utah

Hall v. Peterson, 2017 UT App 226, 409 P.3d 133.

Landowner denied Neighbor access to a dirt road Neighbor claimed to be the only way to access another road leading to Neighbors land. Neighbor sued, arguing that an easement by estoppel was created on the dirt road, and thus, he was entitled to use of the road. A jury found sufficient evidence to support an easement by estoppel. Landowner appealed, arguing that there was not enough evidence to support a finding of an easement, and thus, the trial court erred when it denied Landowner's motion for a directed verdict. appellate court held that because easement by estoppel has never been recognized by the state, the elements under the restatement definition, which requires: (1) permission to use, (2) reasonable foreseeability of reliance by user, and (3) a substantial change of position by user and these elements, were questions of fact for the jury. It further held that the evidence was not sufficient to prove estoppel because there was no evidence that the dirt road was ever used by a predecessor in title and, regardless, it was not pervasive enough to give notice to Landowner. Thus, the court found that it was not reasonable to deduce reliance from Landowner's silence to Neighbor's use of the dirt road and that Neighbor failed to provide any evidence of actual reliance. Because Neighbor failed to meet all the requirements of easement by estoppel, the appellate court reversed the jury finding of the lower court and remanded the case.

Wisconsin

Campbell v. Vill. of DeForest, No. 2017AP601, 2017 WL 6398534 (Wis. Ct. App. Dec. 14, 2017).

Property Owner ("Owner") purchased certain property in 1999. Owner knew that the property was burdened by a public pedestrian and bicycle easement, which was subject to both use by the general public of the Village and to management and improvement by the Village itself. In 2015, the Village constructed a raised boardwalk within the easement for the use of walkers and cyclists. Owner filed a petition for inverse condemnation seeking compensation for loss of ability to use the part of her land that was subject to the easement. The court agreed that the boardwalk created a barrier preventing her use; however, it also determined that the Village's design of the boardwalk was fully within its broad rights under the easement's language and concluded that no taking occurred. Thus, Owner's claim was dismissed. On appeal, the Court of Appeals of Wisconsin affirmed. The court echoed the sentiment of the lower court, stating that the easement agreement was very broad, and that the Village did not exceed the thirty feet allowed for the easement. The court also noted that the point of an easement is that the "[Owner's] right to freely use her property must succumb to the Village's use and enjoyment of the easement." This is an unpublished opinion; therefore; state court rules should be consulted before citing the case as precedent.

Fankhauser v. Fankhauser, No. 2017AP776, 2018 WL 565854 (Wis. Ct. App. January 25, 2018).

Landowner sued Neighbor after Neighbor obstructed Landowner's access to his property by blocking an easement. Landowner argued that the parties had negotiated an end to the lawsuit, but Neighbor refused to sign two documents necessary to complete the agreement. Landowner argued that the negotiations constituted a binding settlement agreement. Trial court held that the parties had reached an "agreement in principle" and that the terms were therefore enforceable. On appeal, the court adopted the "formal contract doctrine" under Wisconsin law, in which where parties negotiate and contemplate signed documents as necessary to complete the agreement, the parties are only bound by those documents if they are signed. The court also noted that because the negotiations included the conveyance of an easement that was required to be recorded with the County Register of Deeds; one of the formal requirements under State law for a conveyance is that the instrument is to be signed by both parties. This was further evidence that the parties intended the affidavit to be in writing. Therefore, the court reversed the trial court, and concluded that no binding agreement existed between the two parties. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Other Land Issues

Fifth Circuit

Banco Panamericano, Inc. v. City of Peoria, 880 F.3d 329 (5th Cir. 2017).

Company signed a lease with City allowing Company to collect gasses emanating from City's landfill to be converted into electricity. A provision in the lease stated that upon termination of the contract, City had the right to "retain all 'structures' and 'below-grade installations and/or improvements.'" Eventually, the lease was terminated and City kept the property. Later, though, Company filed for bankruptcy and refinanced in such a way that creditor claimed a lien on the property in dispute. Creditor then sued City, claiming a right to the property in dispute because of its lien after Company defaulted on their agreement with creditor. The lower court, however, found that City's claim to the property in dispute should prevail because Creditor "could not have obtained any rights greater than those held by [Company] even with" its interest acquired through bankruptcy. The Fifth Circuit Court of Appeals affirmed the lower court, finding that City's claim to the property should prevail because termination of the contract gave it such a right.

9th Circuit

Havasupai Tribe v. Provencio, 876 F.3d 1242 (9th Cir 2017).

The United States' Forest Service ("USFS") restricted certain land near the Grand Canyon from mining practices, but this restriction did not apply to existing mining rights of Companies. USFS determined that Companies had a preexisting right to mine, so were not prevented by the land designation. The court held that USFS's action was final because it was a "practical requirement" for continued mining by Companies, and they were aware of its importance. Additionally, the court held that the lower court was correct in its unfavorable determination of the merits of Tribe's claim for several reasons. First, the court held that the Mineral Report issued was a federal action, and no further environmental impact studies were required under NEPA because this decision was a follow-up to a temporary halt in a previously approved operation, so no changes to the operations were intended. Second, the Mineral Report was found to be an "undertaking" under NHPA only to the extent that it "acknowledged the continued vitality of the original approval" for mining. Therefore, the court found that no other evaluation was needed for this acknowledgement. Information on the property's historic preservation status was not introduced by the earlier approval because it was not yet applicable for this property, and Tribe asserted that such information should have been introduced later, when it was available. However, the court held that this requirement was eliminated by a revision to the pertinent statute. Therefore, no "continuing obligation" to reevaluate later in the process was no longer imposed. The court also held that Tribe asked for more stringent evaluation and remedies than could legally be provided by the NHPA and that the legislation that was the basis for Tribe's claims was not in place to protect private property interests, so Tribe had no standing to bring such a claim for violation.

Massachusetts

Gentili v. Town of Sturbridge, 15 MISC 000570, 2018 WL 446353 (Mass. Land Ct. Jan. 10, 2018).

The facts of this case took place over a period of over sixty years. About twenty years before Trust brought this action against Town, Trust decided it wanted to make adjustments to a property road. It observed nearby drainage structures so it asked the town conservation commission ("Commission") if the road was subject to state wetlands regulation. Commission told Trust it was not, but then six years later Commission said it found a clearly observable stream running across the property and forming a wetland. Any developments Trust made would thus be subject to the state's wetlands regulatory act. Trust brought an action against Town for discharging stormwater onto its property. It argued that Town had no prescriptive easement or other right to discharge water onto its property, which discharge was creating the wetlands. The court held that decades before Trust

brought this action, Town had already acquired the right to discharge stormwater onto Trust's property because it was collecting and discharging surface water continuously, openly and adversely under a claim of right, on Trust's property, for more than twenty years. Town satisfied the requirements to gain a right or easement by prescription and Trust's claims against it were dismissed.

Nebraska

Cappel v. State Dep't of Nat. Res., 905 N.W.2d 38 (Neb. 2017).

Property Owners sued the Nebraska Department of Natural Resources ("DNR") for claims of inverse condemnation, public health and welfare, due process, and restitution. The district court dismissed the complaint, finding that Property Owners had failed to state a claim on the count of inverse condemnation. Property Owners appealed. The Nebraska Supreme Court first held that Property Owners' public health and welfare claims should have been barred for lack of subject matter jurisdiction because the claims were being made against a state, which held sovereign immunity against them. The court then found that the district court correctly determined that Property Owners had failed to articulate a compensable private property right in their claim for inverse condemnation, because the relevant authority holds that water is a public resource, and the manner in which DNR regulated it did not constitute a physical or regulatory taking required for a compensable claim of inverse condemnation. Finally, the court held that Property Owners' final two claims must also be dismissed for lack of subject matter jurisdiction because: (1) due process violations fail to create independent causes of action seeking monetary damages, meaning Property Owners' sole remedy was the public health and welfare claims already discussed, and (2) Property Owners did not follow either of the procedures that the Nebraska legislature has provided to allow suits for restitution against the state, so sovereign immunity still applied. Therefore, the court affirmed the district court's dismissal of Property Owners' inverse condemnation claim and remanded the issue with instructions for the lower court to dismiss the remaining claims for lack of subject matter jurisdiction.

New York

Matter of City of N.Y., (CY) 4018/07, 2018 WL 413750 (N.Y. Sup. Ct. Jan. 12, 2018).

In this condemnation proceeding, the court analyzed the compensation owed to Landowner for the property taking done by City. The property was regulated as wetlands, so development was unlikely, if not impossible. Landowner had purchased the already wetland designated property at a foreclosure sale. The main issue was calculating the value of the property. Typically, wetland properties are valued based upon their use as restricted by the regulation. However, there is an exception if Landowner establishes that the regulation on the property is a

regulatory taking. If Landowner establishes the regulation as a taking, the property value calculation would be based upon the current value of the property as regulated plus an added amount that a subsequent purchaser may pay for the property for the possibility of successful litigation to deregulate the property. The court first determined whether the fact that Landowner purchased the property after the wetland regulation precluded him from challenging the wetland regulations and found that it did not. The court then determined whether a successful challenge to the wetland regulations on the property could be undertaken to warrant an increase in the value of the property. The court first concluded that the regulations deemed the property useless for economic reasons and removed all but a minor residual value for the property. Therefore, the court assigned a value to the property with the added value of potential successful deregulation. This amount was established by experts and analysis by the court through reviewing what amount of the difference of the unregulated value of the property, minus costs for deregulation litigation, and regulated value of the property should be added to the condemnation value.

Troy Sand & Gravel Co. v. Fleming, 156 A.D.3d 1295 (N.Y. App. Div. 2017).

Operator applied to the Department of Environmental Conservation for a mining permit to operate an open pit, hard rock quarry. Operator's plans for the land, which was located within a rural residential area, required the blasting of solid rock formations. Commercial excavation was permitted in this district subject to the procurement of a special use permit; the Town Board ("Board") denied Operator's application for the permit. Operator brought suit seeking to annul the Board's denial. First, Operator argued that the Board violated an agreement between the parties to review the application under a local law, which required a special use permit application be subject to a public hearing. Operator claimed the Board violated this agreement when it held its own public hearing separate from the initial hearing and it accepted additional environmental information beyond the initial Environment Impact Statement ("EIS"). Operator further claimed that the Board's decision was arbitrary and capricious because it did not rely on the EIS. The court held that the deviations from the agreement did not violate any local law, nor did such deviations violate the agreement itself. The court further held that Board's denial of Operator's permit application "properly found its rationale in the EIC." Finally, the court rejected Operator's contention that the Board's decision was an error due to conflicts of interest and bias of members of the Board, holding that these claims of conflict and bias lacked merit. For these reasons, the New York Supreme Court affirmed Board's denial of Operator's application for a special use permit.

North Carolina

Little River, LLC v. Lee Cty., 809 S.E.2d 42 (N.C. Ct. App. 2017).

Miner applied for a special use permit to develop an aggregate rock quarry in an area zoned primarily for residential agriculture but that allowed quarry development. After multiple public hearings, County denied Miner a special use permit, claiming Miner failed to meet the permit requirements, namely, that the quarry would not adversely affect public health, safety, and neighboring property values, that all conditions of the permit were met, and that the quarry could be developed in harmony with the surrounded area. Miner appealed County's decision to the court which upheld County's denial. Miner then appealed the lower court's decision. The appellate court found that Miner adequately presented evidence to meet the aforementioned requirements of a special use permit for the quarry and that County was incorrect in finding that the requirements were not met. Additionally, the court found that County's reasons for denial were not supported by material and substantial evidence and that the lower court was incorrect in its review of the evidence and subsequent affirmation of County's decision. Therefore, the court remanded the issue for County to reconsider Miner's application for a special use permit for the quarry.

South Dakota

Croell Redi-Mix, Inc. v. Pennington Cty Bd. Of Comm'rs, 2017 S.D. 87, 905 N.W.2d 344.

County Board of Commissioners ("Board") appealed the circuit court's decision to grant Company a construction permit to expand its mining operations into land controlled by the County Zoning Ordinance ("CZO"). The Supreme Court of South Dakota reversed the circuit court's decision to grant the construction permit, finding that CZO demanded that any extraction of any substance exceeding 100 cubic yards required a mining permit. Furthermore, the statute's language was so unambiguous that the city's interpretation of the CZO was not entitled to any deference from the court. Finally, even though Company's operations predated the CZO, the fact that it sought to expand its operation into areas not previously used as a quarry demanded the use of a CZO permit.

Washington

Movrich v. Lobermeier, 905 N.W.2d 807 (Wash. 2018).

Property Owners, whose property is located upland from a creek, sued waterbed property owners ("WB Owners"), asserting a right to access flowage from the creek and to install a pier directly from Property Owner's property. The district

court granted summary judgment for Private Owners and WB Owners appealed to the Supreme Court of Washington. Three issues were presented in the case: (1) whether Property Owners have riparian rights, and, when combined with their rights under the public trust doctrine, those rights become superior to WB Owners' property rights; (2) whether the public trust doctrine grants WB Owners the right to install a pier from over the portion that is privately held; and (3) whether the public trust doctrine requires Property Owners to access the flowage from a public access point. First, the court held that Property Owners did not hold rights superior to WB Owners and that Property Owners may enjoy the flowage in ways consistent with WB Owners' rights. Second, the court held that "the public trust doctrine conveys no private property rights, regardless of the presence of navigable water." Lastly, the court held that the public trust doctrine allows Property Owners to access the flowage from their private property so long as they use the flowage in ways consistent with the doctrine.

Verjee-Van v. Pierce Cty., No. 48947-3-II, 2017 WL 6603662 (Wash. Ct. App. 2017).

Landowner claimed both that Neighbor-1's pier was improperly constructed and that Neighbor-2's fence was improperly placed according to local zoning laws, so she filed complaints to County to have them removed. County deemed both to be in accordance with the laws, and Landowner did not appeal its decision. Instead, Landowner filed a writ of mandamus to force County to remove the complained-of property features. The trial court found that mandamus was inappropriate and dismissed the complaint. On appeal, the court affirmed and held that mandamus was inappropriate because Landowner had failed to appeal County's decision to administrative authorities and also because Landowner would have had a "plain, speedy, and adequate" remedy at law if her case was meritorious. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

SELECTED ELECTRICITY DECISIONS

Traditional Generation

E.D. Kentucky

Kentucky Waterways All. v. Kentucky Utils. Co., No. 5:17-292-DCR, 2017 WL 6628917 (E.D. Ky. Dec. 28, 2017).

Environmental Organization sued Utility Company ("Company") for violating the Resource Conservation and Recovery Act ("RCRA") and the Clean Water Act ("CWA"). The CWA claim alleged that Company's actions in disposing of waste from its coal-powered generating plant constituted pollution of navigable water without a permit, and the RCRA claim alleged that Company's "handling, storage, treatment, transportation, or disposal of solid waste" at the station could provide for "imminent and substantial endangerment" both to human health and to the environment in the community. Company moved to dismiss Environmental Organization's claims. The district court granted Company's Motion in regards to the RCRA claim for lack of standing. The court also granted Company's motion to dismiss the CWA claims by refusing to adopt any theory that pollution that groundwaters would eventually flow into navigable waters fell under the reach of the CWA and its permitting requirement. For those reasons, both claims brought by Environmental Organization were dismissed. This case has since been appealed, but there is no decision from the higher court as of publication.

Hawai'i

In re Application of Maui Electric Co., 408 P.3d 1 (Haw. 2017).

Environmental Organization filed a motion to intervene in Utility Company's ("Company") application with Public Utilities Commission ("PUC") to approve a power purchase agreement. PUC ultimately denied the motion, and the Supreme Court of Hawaii granted Environmental Organization's writ of certiorari, which presented the issue of whether due process under Hawaii's Constitution included protections for individuals "asserting the constitutional right to a clean and healthful environment." The court determined that Environmental Organization's claim fit within the public interest exception to the mootness doctrine and allowed the case to move forward. In order to have a due process claim, Environmental Organization must have a property interest at stake. The court determined that state law relating to environmental quality should be interpreted to establish such a right in Environmental Organization's interest in a "clean and healthful environment." The court further held that because of its due process rights, Environmental Organization was entitled to a hearing by PUC to evaluate any impacts of Company's application on Environmental Organization's right to a "clean and healthful environment." Finally, the court held that Environmental Organization

had standing. For those reasons, the court held that Environmental Organization was entitled to a due process hearing by PUC in order to protect its guaranteed "property right to a clean and healthful environment," and remanded the case for further proceedings.

Renewable Generation

Delaware

Exelon Generation Acquisitions, LLC v. Deere & Co., 176 A.3d 1262 (Del. 2017).

Wind farm seller ("Seller") sued wind farm buyer ("Buyer"), arguing that Buyer had breached the Purchase Power Agreement. The Purchase Agreement contained an earn-out provision that could be triggered if Seller reached prescribed goals related to wind farm projects already under development when the sale occurred. Following the sale from Seller, Buyer acquired an additional site from an unrelated party after a nearby site purchased from Seller was blocked due to civic opposition. Because the site purchased from an unrelated party was financially successful, Seller argued that the earn-out provision had been triggered by a "Power Purchase Agreement" on the grounds that Buyer had simply relocated the unsuccessful wind farm to the new site acquired from the unrelated party. Reversing the lower court's summary judgment in favor of Seller, the Delaware Supreme Court held that the earn-out provision had not been triggered because the term "wind project" in relation to the "Power Purchase Agreement" contained a geographical characteristic that distinguished the two wind farms in question.

Hawai'i

Hilo Project, LLC v. County of Hawai'i Windward Plan. Comm'n, 409 P.3d 784 (Table) (Haw. Ct. App. 2018).

Adjacent Property Owners appealed the appellate court's decision to uphold the approval of Operator's Special Management Area ("SMA") permit to convert a coal-burning power plant into a renewable electrical power generation facility. The appellate court held the public trust doctrine as inapplicable because the State of Hawai'i does not have ownership of the land at issue. On appeal to the Supreme Court of Hawai'i, Property Owners argued that approval of the SMA permit will have a negative environmental impact and that the public trust doctrine was misapplied by the appellate court. The Supreme Court of Hawai'i affirmed in part and remanded in part on the issue of the application of the public trust doctrine. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Minnesota

In re Order Approving Application by DG Minn. CSG 2, LLC, Case No. A17–0099, 2017 WL 6567653 (Minn. Ct. App. Dec. 26, 2017).

Landowners appealed County's decision to grant a conditional use permit ("CUP") for a third party to construct a solar farm. The court determined that the County's decision would stand unless the entity acted "unreasonably, arbitrarily, or capriciously." The court affirmed the decision of County to grant the CUP because it reasonably interpreted its zoning ordinance to allow for a solar farm to stand as a conditional use. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

New Jersey

Minnesota Solar, LLC v. Carver Cty. Bd. of Comm'rs, A17–0504, 2017 WL 6418179 (Minn. Ct. App. Dec. 18, 2017).

Producer applied for a conditional use permit ("CUP") to construct and operate a large solar farm. County Board of Commissioners ("Board") denied Producer's CUP. Producer appealed, claiming that the Board's decision was arbitrary, capricious, and unreasonable. The court of appeals affirmed Board's decision for several reasons. First, Board's denial of the CUP was legally sufficient for the stated reasons of "health, safety, and welfare of the community." Second, the record supported the reasons for the Board's denial of the CUP. Third, Producer could not establish that a violation of its equal protection rights occurred because it failed to show that "similarly situated persons have been treated differently." This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

North Carolina

Ecoplexus Inc. v. Cty. of Currituck, 809 S.E.2d 148 (N.C. Ct. App. 2017).

Developer applied for a permit to use property owned by City to build a solar farm. After finding that Developer's proposed solar farm would be dangerous to public safety or health, would not "be in harmony with the surrounding area," and would fail to conform to the 2006 Land Use Plan, the county board of commissioners ("Board") denied Developer's application. Developer appealed Board's decision to the trial court, which upheld the order. The appellate court held that the denial of Developer's permit was inappropriate because Developer was able to make a prima facie showing that it was entitled to the permit, and opponents to the permit did not present evidence sufficient to overcome that showing. The court held that Board "relied on generalized lay concerns, speculation, and 'mere expression of opinion'"

to deny Developer's application rather than requiring the level of evidence needed to rebut Developer's prima facie showing that it was entitled to the permit. The court therefore reversed the Board's denial and remanded the issue.

Transmission

D.C. Circuit

Ameren Servs. Co. v. Fed. Energy Regulatory Comm'n, 880 F.3d 571 (D.C. Cir. 2018).

Transmission Company brought this suit against Federal Energy Regulatory Commission ("FERC") after FERC issued orders allowing incoming Midcontinent Independent System Operator ("MISO") generators to bring in new sources of power, connect them to the existing grid, and self-fund the new construction regardless of current grid owners' interests. Transmission Company argued that involuntary generator funding would force it to have to construct and operate its facilities without any returns, as if it was a non-profit manager of the facilities. It would have to take on costs that it would never recoup. FERC argued that it would be unjust and discriminatory to deprive an interconnection customer of the ability to self-fund. The court remanded the case based on this issue, holding that FERC failed to fully consider Transmission Company's arguments and that its potential-discrimination argument against interconnection customers was weak.

Arizona

Else v. Arizona Corp. Comm'n, No. 1 CA-CV 17-0208, 2018 WL 542924 (Ariz. Ct. App. Jan. 25, 2018).

Landowner sued the Arizona Corporation Commission ("Commission") in regard to its approval of Operator's proposed transmission line project. Landowner contended that, while Operator argued the project would "create[ ] access to stranded renewable [energy] resources," the actual project could be substantially different from Operator's proposed project. Additionally, Landowner argues that there was insufficient evidence for the Commission to grant approval of the project. Because Landowner failed to meet the burden of proof in demonstrating that the Commission's grant was either "unreasonable or unlawful," the appellate court upheld the lower court's affirmation of the grant of a Certificate of Environmental Compatibility by Commission.

South Dakota

Montana-Dakota Utils. Co. v. Parkshill Farms, LLC, 2017 SD 88, 905 N.W.2d 334.

Utilities Company ("Company") sought to construct transmission line across several miles of land. After unsuccessful negotiations with Landowners to obtain easements, Company filed petition for condemnation. The trial court granted the petition, and a jury awarded Landowners just compensation for the easements. Landowners appealed based on three issues: (1) the easements were not taken for public use; (2) the easements were not necessary; and (3) the trial court erred in refusing Landowner's requested jury instruction for compensation of damages. The Supreme Court of South Dakota held that the easements were for public use because Company is required by law to provide service to the general public. Additionally, the court held that the easements were necessary and Company did not abuse its discretion because the easements' uses were limited in purpose, instead of for all uses. Finally, the court reversed and remanded for a new trial because the jury instructions did not adequately account for other rights acquired by the easements, even though they might never be used.

Rates

California

California Pub. Utils. Comm'n v. Fed. Energy Regulatory Comm'n, 879 F.3d 966 (9th Cir. 2018).

Public Utilities Commission petitioned for a determination on the validity of the Federal Energy Regulatory Commission's ("FERC") finding that Gas and Electric Company ("Company") was eligible for an "incentive adder." The Ninth Circuit Court of Appeals held that FERC's determination that Company was eligible for an incentive adder was arbitrary and capricious because FERC determined that Company was eligible due to its membership in a regional transmission organization, even though such membership was mandated by state law. Therefore, FERC's interpretation of Order 679, which was created to incentivize utility companies to join regional transmission organizations, was plainly erroneous. The court reasoned that the language of Order 679 implied that "an incentive cannot 'induce' behavior that is already legally mandated." Moreover, the language of the Order suggested that ongoing membership in a regional transmission organization was not sufficient alone to justify eligibility for an incentive adder. Without a more reasoned explanation by FERC, Company was not entitled to an incentive adder. Thus, the court granted Commission's petition for review and remanded back to FERC.

SELECTED TECHNOLOGY AND BUSINESS DECISIONS

Bankruptcy

W.D. Texas

In re Primera Energy, LLC, 579 B.R. 75 (Bankr. W.D. Tex. 2017).

Investors brought action against debtor Oil and Gas Companies ("Companies"), asserting claims for fraud and breach of fiduciary duty. Companies, in response, contend that Investors failed to adequately asserted a cause of action, and moreover, no fiduciary relationship between the parties existed, nor did Companies partake in any instances of fraudulent behavior. Based on the evidence presented, the Bankruptcy Court held that under Texas state law, Investors' fraud claims were not precluded based on oral representations, members could be held individually liable for fraudulent acts of debtor Companies, and Companies' representations that they would use Investor's funds as provided in relevant contracts was material in support of claims of fraud. Further, because the transaction involved real property interests, the first element for a cause of action for statutory fraud in a real estate transaction was satisfied. Moreover, Investors' negligent misrepresentation claims were supported by showing that Companies did not exercise reasonable care when obtaining and communicating false information. Additionally, evidence showed that the transfer of investment funds was done with intent to hinder, delay, and defraud investors. Thus, Investors were entitled actual damages of the value of their investments.

Other Issues

Fifth Circuit

WBH Energy, L.P. v. CL III Funding Holding, Co., 708 F. App'x 210 (Mem) (5th Cir. Jan. 10 2018).

In September 2011, a Joint Operating Agreement ("JOA") was formed between the Corporation, Debtor Company-1, and Debtor Company-2. The JOA stipulated that in the event of any legal proceeding between any of the parties, the prevailing party would be entitled to all reasonable attorneys' fees from the opposing party. Based on four previous legal actions, Corporation claimed entitlement to attorneys' fees thereunder. However, the lower court found that all of these proceedings were brought seeking temporary injunctive relief and not to enforce a "financial obligation" as required by the language of the JOA, thus denying the attorney's fees. The Fifth Circuit Court of Appeals agreed and affirmed.

D. Kansas

Energy Intelligence Grp., Inc. v. CHS McPherson Ref., Inc., No. 16-01015-EFM-GLR, 2018 WL 447730 (D. Kan. Jan. 1, 2018).

Company-1 published newsletters and distributed them to subscribers. Company-1 tried registering *Oil Daily* with the United States Copyright Office for twelve years. Company-2 was a subscriber to *Oil Daily* for over twenty years and *Petroleum Intelligence Weekly* for over thirty; it would receive the publications in print and then distribute them to executives throughout the office. Once Company-1 went digital with its publications, Company-2 continued to distribute them via email. Company-1 sued Company-2 for infringing the copyrights of its publications, and Company-2 denied the infringement and filed a motion to refer the matter to the Register of Copyrights, arguing that Company-1's copyright registrations were not valid because it allegedly made known misrepresentations to the United States Copyright Office when registering for the *Oil Daily* publications. The court denied Company-2's motion, concluding that Company-1 did not provide inaccurate information to the United States Copyright Office when it went to register *Oil Daily*. The court noted that even if it assumed inaccurate information was provided, it was not fraudulent because Company-1 did not do so intentionally.

Delaware

City of Birmingham Ret.& Relief Sys. v. Good, 177 A.3d 47 (Del. 2017).

Several Environmental Groups brought an action against Corporation, an energy company based in North Carolina, under the Clean Water Act ("CWA") for the release of coal and ash into the lakes in North Carolina. CWA says that without a permit by the EPA, discharge of pollution is unlawful. The North Carolina environmental group and Corporation negotiated a consent decree where Corporation would pay a fine and complete a compliance schedule. Corporation never completed an investigation of the pipe. Some investigation indicated that if Corporation had conducted an inspection of the pipe, it would have detected the corroded pipe. The Stockholders of Corporation filed a suit after a storm water pipe ruptured. The rupture caused coal and ash to go into the River. Corporation plead guilty to several criminal misdemeanor violations. Some Stockholders of the Corporation filed a suit against the directors and officers. The directors moved for dismissal of the claim alleging that the Stockholders were required to make a demand on the board of directors before pursuing litigation. The trial court agreed with the Directors that in order for the Stockholders to hold the directors personally liable for a *Caremark* violation they first needed to show the directors intentionally breached their fiduciary duty and -rose to the occasion of bad faith. The Supreme Court of Delaware upheld the trial court's decision and found that the stockholders were required to first make a demand to the directors before pursuing litigation.

North Carolina

Continental Res., Inc. v. P&P Indus., LLC I, 2018 ND 11, 906 N.W.2d 1.

Producer sued Service Provider for breach of contract, tortious interference, and fraud and deceit, claiming that Service Provider improperly billed Producer for transportation and water hauling services. Service Provider counterclaimed, seeking damages for breach of contract, tortious breach of contract, breach of fiduciary duty, constructive fraud, and promissory estoppel. The trial court granted summary judgment on Service Provider's breach of fiduciary duty and constructive fraud counterclaims. A jury found for Producer on its claims of fraud and deceit and found in favor of Service Provider on its claims of fraud, deceit, and breach of contract. However, while the court ordered damages to be paid to Producer on its prevailing claims, it provided neither damages nor relief for Service Provider, and excused Producer from performing the breached contract. Service Provider motioned the court to enter a judgment notwithstanding the verdict or a new trial, but both motions were denied. Service Provider appealed, claiming that the lower court erred when it denied its motions arguing that it is entitled to recover damages for the value of materials and services it provided in the contract breached by Producer as well as the value of its destroyed business. The Supreme Court of North Dakota reversed the trial court and remanded the case, holding that the jury's finding that Producer was excused from performing the contract it breached due to Service Provider's prior material breach was inconsistent and perverse and could not be reconciled by law, and Service Provider was only entitled to the net profits it would have lost during the thirty-day notice period of contract terminations.

Ohio

Kinnear Rd. Redevelopment, L.L.C. v. Testa, 151 Ohio St.3d 540, 2017-Ohio-8816, 90 N.E.3d 926.

Tax Commissioner ("Commissioner") challenged the Board of Tax Appeals' ("Board") finding that Developer was entitled to a tax exemption under state law. The exemption, also known as the "brownfield exemption," was created for developers who remediated a hazardous-waste contaminated property and provided a tax break for the developers based upon the increase in market value of the property upon remediation. Developer remediated a vacant and contaminated property and constructed an apartment building on the land. Commissioner granted an exemption for the increase in property value based upon the remediated land but did not provide an exemption for the increase in property value due to the newly constructed apartment building as Commissioner felt it was not covered under the statute. Board disagreed with Commissioner and found that Developer should have been granted an exemption based on both the remediation and the improvements. Based on the plain language of the statute, the court agreed with Board's conclusion that the exemption applies to the land and improvements. The court also

concluded that Commissioner's argument that the timing of the construction of the improvements and the time of the tax assessment prevented the improvements exemption had no merit.

SELECTED ENVIRONMENTAL DECISIONS

Federal

9th Circuit

Nat'l Mining Ass'n v. Zinke, 877 F.3d 845 (9th Cir. 2017).

Miners challenged the Department of the Interior's ("DOI") decision to temporarily withdraw, under the Federal Land Policy and Management Act ("Act"), over one-million acres of federal land around the Grand Canyon from any new uranium mining claims for the maximum period allowed – twenty years – in order to protect the land from potential uranium contamination in the surrounding environment and groundwater. The Act imposed on DOI a twenty-year limitation on withdrawals, issuance of a report to Congress detailing the statutory requirement, and the possibility that Congress may veto DOI's withdrawal; the Act also contained a severability clause. The district court upheld DOI's decision to withdraw the lands. On appeal, the Ninth Circuit Court of Appeals held that the congressional veto provision was unconstitutional, but because of the severability clause it did not affect DOI's ability to withdraw federal lands. Regarding Miners' challenge to DOI's compliance with the Act's multiple-use requirement, which required DOI to weigh economic benefits of the land with the preservation of the land, the court concluded that DOI complied. Regarding whether current laws and regulations would adequately protected the land in question, the court found that DOI correctly concluded that existing laws were inadequate. The court dismissed Miners' remaining claims. This case has since been appealed, but there is no decision from the higher court as of publication.

Protecting Ariz.'s Res. & Children v. Fed. Highway Admin., No. 16-16586, No. 16-16605, 2017 WL 6146939 (9th Cir. Dec. 08, 2017).

District court granted Federal Highway Administration's ("FHA") motion for summary judgment regarding Advocacy Group's contention that the approval of a section of freeway violated the National Environmental Policy Act and the Department of Transportation Act (collectively "Acts"), which Advocacy Groups subsequently appealed. The Ninth Circuit Court of Appeals held that FHA adequately specified its purpose and need for the proposed freeway and provided reasonable alternatives. Moreover, FHA adequately discussed hazardous spill probabilities and potential mitigation strategies as well as the proposed freeway's potential impact on children's health and groundwater wells. Thus, FHA's Environmental Impact Statement was sufficiently compliant with the Acts. The Ninth Circuit accordingly affirmed the findings of the district court. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent

D.C. Circuit

Friends of Capital Crescent Trail v. Fed. Transit Admin., 877 F.3d 1051, (D.C. Cir 2017).

Activists challenged Agency's approval of a new rail project, asserting that there are problems with another rail service within the city and those problems impacted the analysis. State maintained that the systems are largely separate and do not significantly impact one another. The lower court found that the systems do impact one another, agreeing that if there is a "diminished ridership," then there is an impact on the new light rail system, since many existing users would transition over to or take advantage of the new system. The lower court required further evaluation and retracted the Record of Decision but allowed Agency to independently evaluate the required depth of further analysis based on their examination of the new and existing rail systems. Agency claimed that the project would function as expected for its intended purpose under any anticipated scenario and would cause no negative impacts other than the impacts reported on the first Environmental Impact Statement ("EIS"), so they did not think a formal supplemental environmental impact statement was necessary. The district court disagreed, and still required a supplemental EIS because Agency did not adequately address concerns about the project and did not show evidence to support their determination that new system would work as intended in every scenario. The appeals court disagreed with the lower court, finding that Agency was not required to explicitly address Tribe's every concern. Instead, the appeal court held that Agency should receive deference because they explained the reasoning behind their decision not to do a EIS, which relied upon their specific, specialized knowledge and experience. The appeals court likewise affirmed the district court's determination that Activist's challenges to the original EIS, specifically the evaluation of alternatives, were unfounded.

Natural Res. Defense Council v. U.S. Nuclear Regulatory Comm'n, 879 F.3d 1202 (D.C. Cir. 2018).

The Natural Resources Defense Council and the Powder River Basin Resource Council ("Councils") sued the U.S. Nuclear Regulatory Commission ("Commission"), seeking a review of Operator's license to conduct in situ leach ("ISL") uranium mining. Councils contended procedural and substantive errors by Commission in approving Operator's license and raised several issues before the court. Because of the proximity between potential aquifers and the layers of uranium-bearing sandstone, Commission requires production applicants to consider the environmental impact and plans for groundwater restoration of proposed projects. Along with procedural claims, Councils argued that Operator will "inevitably" be required to restore the groundwater associated with the mined aquifer, which Councils claimed was unconsidered by Commission during the license's application phase. The District of Columbia Circuit Court of Appeals

upheld Commission's decisions during Operator's licensing approval process because Commission was not obligated to address Council's contention that operator had additional expansion plans.

N.D. Alaska

Abner v. United States Pipe & Foundry, Co., 2:15-cv-02040-KOB, 2018 WL 522771 (N.D. Ala. Jan. 23, 2018).

After the EPA discovered contamination on their properties, Landowners filed both tort and property damage claims against Company based upon the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Company filed a motion for summary judgment on most of Landowners' claims based upon failure to state a claim as well as being barred by the state's statute of limitations. The trial court found for Landowners and ruled that they did not need to allege that they bore costs of remediating the contamination of their properties for a CERCLA claim, but only needed to show that the EPA had expended costs. The court also ruled that, since CERCLA applied, the statute of limitations did not accrue until the CERCLA action was commenced by the government. This case has since been appealed, but there is no decision from the higher court as of publication.

N.D. Indiana

Valbruna Slater Steel Corp. v. Joslyn Mfg. Co., No. 1:10-CV-044 JD, 2018 WL 446645 (N.D. Ind. Jan. 16, 2018).

Corporations filed a contribution action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") against Manufacturers to help pay for pollution that they were responsible for on Corporations' property. The trial court found that Manufacturers were entirely liable for the costs of the cleanup. The appellate court reapportioned the costs to twenty-five percent to Corporations and seventy-five percent to Manufacturers because, despite Manufacturers and other third parties being entirely at fault for the contamination, Corporations bought the property at a reduced price due to the contamination and were aware of it prior to purchase.

W.D. Virginia

Red River Coal Co. v. Sierra Club, No. 2:17CV00021, 2018 WL 491668 (W.D. Va. Jan. 19, 2018).

Organizations brought a collective citizen suit against a Coal Company. Organizations alleged that the Coal Company violated the federal Clean Water Act

("CWA") and the Surface Mining Control and Reclamation Act ("SMCRA"). Coal Company filed a Motion to Dismiss the suit for lack of subject matter jurisdiction and sought declaratory judgment. Organizations argue that the district court lacked subject matter jurisdiction over the declaratory judgment. Each party moved to dismiss the others claims. The district court found that it did have federal subject matter jurisdiction because the Organizations' claim arouse under the CWA. Organizations claim that Coal Company is discharging pollutants without permit authorization under the CWA. These discharges result in elevated levels of total dissolved solid and conductivity in the streams into which the underdrains discharge. Organizations also claim that Coal Company is required to comply with Virginia SMCRA under its SMCRA permit. A Virginia state regulation requires that waters must be free from substances or waste that are "inimical or harmful to human, animal, plant, or aquatic life." The district court found that there is a genuine issue of fact regarding whether the CWA controls underdrains and are therefore subject to the CWA's permit requirement. Therefore, because the court did have subject matter jurisdiction and there was a claim, the court dismissed the Coal Company's motions to dismiss.

State

California

Central Coast Forest Ass'n v. Fish & Game Comm'n, 227 Cal. Rptr. 3d 656 (Cal. Ct. App. 2018).

Companies harvested timber from lands in an area where coho salmon spawn. Companies petitioned the Fish and Game Commission ("Commission") to delist the coho salmon south of San Francisco from the endangered species register in California. For a species to be considered endangered in an area, it must be wild and native to that area. Companies argued that coho salmon were never native to the streams south of San Francisco; instead, Companies argued that the fish only existed within these streams because of hatchery plants or artificial placement. Commission denied Companies' assertions that the coho salmon were not native to the streams, and subsequently denied the petition to delist them as an endangered species in this area. Commission relied on evidence dating back to the time when the coho salmon were listed. Companies appealed. The Supreme Court of California held that the California Endangered Species Act ("the Act") permitted Companies to bring a petition for the delisting of a species using new evidence and reversed and remanded the issue. On remand, the appellate concluded, however, that the evidence presented by Companies did not meet the necessary threshold for a delisting. The court held that the petition did not contain sufficient scientific evidence, considered in light of the department's scientific report and expertise, to justify delisting the coho salmon south of San Francisco, and, therefore, there was no sufficient evidence that the delisting might have been warranted.

City of Long Beach v. City of Los Angeles, A148993, 2018 WL 387934 (Cal. Ct. App. Jan. 1, 2018).

Group, comprised of individuals and government officials, filed a suit seeking to set aside the Final Environmental Impact Report ("FEIR") allowing the construction of a new railyard a few miles from the Port of Los Angeles. The trial court found that the FEIR was deficient because it failed to address the impact of the project on the growth. The trial court also found that the FEIR was inadequate on the impact of the project on the noise, air pollution, and air quality. The circuit court of appeals noted that the FEIR was not misleading about the project and noted that the operation of the project would have a significant impact on the air quality due to the air pollution. The appeals court also noted that the FEIR adequately met the requirements of the California Environmental Quality Act.

City of Modesto v. Dow Che. Co., 227 Cal. Rptr. 3d. 764 (Cal Ct. App. 2018).

City sued dry cleaning businesses ("Business"), alleging that Businesses had caused damage to City's groundwater. City sought damages for past, present, and future costs of the contamination's cleanup under the Polanco Redevelopment Act ("Polanco"), which authorizes redevelopment agencies to remediate contamination found at property within the agency's jurisdiction. The appellate court vacated the trial court's ruling, holding that the causation standard should be whether it is more likely than not that Businesses were a substantial factor in creating the contamination. Under Polanco, liability could be proven through circumstantial evidence if sufficient to lead a reasonable finder of fact to find that a defendant's activity was a contributing factor to the contamination. This opinion of the court is certified for partial publication; therefore, state court rules should be consulted before citing the case as precedent.

Louisiana

Adams v. Grefer, 17-250 (La. App. 5 Cir. 12/13/17), 234 So.3d 201.

Residents alleged that Oil and Gas Corporations ("Corporations") operations exposed them to naturally occurring radioactive material. The trial court granted summary judgment in favor of Corporations and fifty-six Residents appealed. On appeal, the appellate court held that Corporations had met their burden of proof that their actions did not cause harm to Residents. Under Louisiana law, Residents must provide evidence that Corporations "substandard conduct was a cause-in-fact of the plaintiff's injuries." Under the facts of the case, Corporations met this burden by providing affidavits from an expert health physicist in support of their motions, shifting the burden to Residents to show that a genuine issue of fact existed, which they were unable to do. The appellate court accordingly affirmed the trial court decision.

Montana

Atlantic Richfield Co. v. Mont. Second Judicial Dist. Court, 2017 MT 324, 390 Mont. 76, 408 P.3d 515.

Mining Company appealed the trial court's order that required Mining Company to pay Property Owners restorative damages under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The court considered three issues: (1) whether Property Owners' claim complied with CERCLA's timing of review provision; (2) whether Property Owners were "potentially responsible parties," meaning that their restoration activities required EPA approval; and (3) whether Property Owners' claim was preempted because it conflicted with CERCLA. As to the first issue, the court determined that Property Owners' claim complied with CERCLA's timing of review provision because the claim did not qualify as a challenge to the CERCLA mandated cleanup. As to the second issue, the court determined that Property Owners were not potentially responsible parties because they did not fall into any of the three recognized categories of responsible parties. The court reasoned that the designation as a potentially responsible party can occur through three ways: (1) when the party voluntarily settles with the EPA; (2) when a court makes a determination that an actor is a responsible party; and (3) when a party is a defendant in a CERCLA lawsuit. As to the third issue, the court determined that there was no express nor implied preemption of Property Owners' claim by CERCLA.

New Jersey

Raritan Baykeeper, Inc. v. N.J. Dept. of Envtl. Prot., Nos. A–3485–13T1, A–5407–13T1, 2017 WL 6546973 (N.J. Super. Ct. App. Div. Dec. 20, 2017).

Property Owner applied to Department of Environmental Protection ("DEP") for a permit and exception to begin a "remedial action work plan." DEP granted the application and a related Company's application for a Class B Recycling Center permit to produce alternative fill for use in the plan on Property Owner's property. Environmental Conservation Group appealed DEP's approval of both applications based upon several arguments. The court of appeals, rejecting many of the arguments and finding others lacked merit, affirmed the DEP's approval of both applications. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Yadav v. N.J. Dep't of Envtl. Prot.-Land Use Regulation, No. A–4035–15T2, 2017 WL 6398931 (N.J. Super Ct. App. Div. Dec. 15, 2017).

Property Owner appealed the New Jersey Department of Environmental Protection's ("DEP") decision to cancel Property Owner's application for a letter of interpretation authenticating the position of wetlands, transition areas, and State

open waters on their land. The court stated that Property Owner had the burden of showing that the DEP's decision was "arbitrary, unreasonable or capricious." The court determined that Property Owner did not meet this burden of proof, because the record evidenced that Property Owner had failed to comply with DEP's reasonable requests for modifications to their application. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

New Mexico

Cmtys. for Clean Water v. New Mexico Water Quality Control Comm'n., NO. A-1-CA-35253, 2017 WL 6884309 (N.M. Ct. App. Dec. 27, 2017).

Clean water advocates ("Advocates") sued State Water Quality Control Commission ("Commission") after Advocates' request for a public hearing was denied by State Environment Department ("Department"). Advocates request for a public hearing was in relation to a Department of Energy water discharge permit application. After the request was denied by Department on the grounds that the permit had "already contemplated community involvement and was in the public interest," Commission upheld the denial by a nine-to-two vote. Because governing state law provides that Commission can deny a request for public hearing only when there is no substantial public interest, Advocates argued that Commission exceeded its discretionary authority by denying the request for public hearing. Commission argued that its denial complied with state law and that the relevant regulation's language requiring an "opportunity for a public hearing" does not necessarily require a public hearing. Noting the relevant state law's plain language and the U.S. Supreme Court's holdings on comparable language, the appellate court held that the state legislature had meant to empower the Department with only "limited discretion" in making public hearing determinations. Because the appellate court found that the factors cited by Commission in upholding the denial were not supported by substantial evidence, the court ultimately reversed Commission's upholding of the denial of Advocates request for public hearing.

New York

In re Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 90 N.E.3d 1253 (N.Y. 2017).

Operator applied to the Department of Health ("DOH") for consent to construct a new nursing home on a vacant lot in New York City located next to Organization's school. Operator filed an Environmental Assessment Statement ("EAS") which triggered the State Environmental Quality Review Act ("SEQRA") review process. The review found that the project posed a potential risk of exposure to lead and lead dust. The review also analyzed the potential impact of construction noise to the surrounding area. DOH concluded that the potential impact of lead and lead

dust were mitigated and would not pose a risk because the excavated dirt would be removed from the site and the monitoring and containment measures in place to combat the dust, including tarps and sprinklers, were sufficient to prevent the dust from getting into the public airways. After public hearings, DOH imposed additional procedures on Operator, which included installing noise-reducing windows to Organization's school, installing window air conditioners to the classrooms lacking them, and erecting a 16-foot sound barrier wall. Organization sought to vacate the determination by DOH arguing it did not adequately address the environmental concerns, particularly the use of a tent over the construction site and the installation of central air conditioning for Organization's school. Organization argued that the standards that DOH used to evaluate the lead and dust were outdated. The court held that DOH used accepted federal and state standards when it evaluated the site. The court also held that DOH acted within is authority when choosing between alternatives to mitigate the dangers. The fact that Organization preferred different actions did not mean DOH did not make the required "hard look" at the concerns.

Pennsylvania

United Envtl. Grp., Inc. v. GKK McKnight, LP, 176 A.3d 946 (Pa. Super. Ct. 2017).

The gas station's Previous Owner sold the property to Purchaser. Previous Owner asked Environmental Company to perform environmental remediation services, including removing tanks. Environmental Company submitted a quote for its work and Previous Owner accepted and entered into a contract for the services. Environmental Company immediately began work and discovered contaminated soil on the land. Environmental Company immediately notified Previous Owner and Purchaser, as well as the Pennsylvania Department of Environmental Protection and Pennsylvania's Underground Storage Tank Indemnification Fund, which reimburses individuals for remediation costs. Environmental Company informed Previous Owner and Purchaser that due to this discovery, more work would have to be done, which the parties agreed to. After remediation was complete, Previous Owner and Purchaser failed to pay the full balance of their invoices due to Environmental Company, and Environmental Company sued for breach of contract, unjust enrichment, continuing services, and damages under the Contractor and Subcontractor Payment Act ("Act"). At trial, a jury found for Environmental Company; however. Environmental Company appealed the verdict because it was not granted relief for its claim under the Act. The Supreme Court of Pennsylvania held that the trial court erred when it held that Environmental Company's claims under the Act were foreclosed as a matter of law because the claims were never tried before any factfinder. However, the court held that the trial court properly declined Purchaser's motion for judgment notwithstanding the verdict because there was sufficient evidence to support a finding that the parties

agreed to alter the contract. The judgment of the lower court was affirmed in part and reversed in part.

Washington

Douglass v. Shamrock Paving, Inc., 406 P.3d 1155 (Wash. 2017).

Paving Company ("Company") used Landowner's land for storing, cleaning, and fueling its machines while carrying out a paving project. During that time, Company spilled unknown amounts of heavy lube oil on the property causing damage to the soil. Landowners engaged an environmental consulting firm to investigate the contamination and to perform cleanup, which consisted of removing sixty-eight tons of soil. Landowners sued Company for trespass and nuisance and also asserted a claim under the Model Toxics Control Act for cleanup costs. Landowners prevailed on the trespass and nuisance claims, but the court denied cleanup costs on the grounds that Landowners failed to prove that the substance was an environmental threat. On appeal, the court reversed the lower court's decision, finding Landowner did conduct remedial action when Landowners tested the soil. However, the court deferred to the trial court's findings that Landowners could not recover for cleanup costs because the lube oil was not a hazardous substance. Both parties appealed to the Supreme Court of Washington, and the court held that the costs of soil testing could be recovered as remedial costs, but not the costs incurred in cleaning up the spill.