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Recent Case Decisions

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RECENT CASE DECISIONS

1.

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All case citations are as of 5-26-2018. 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 4-5-2018. 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

8th Circuit

Roberts v. Unimin Corp., 883 F.3d 1015 (8th Cir. 2018).

Lessors claimed that a 1961 mining lease to Lessee should be deemed a tenancy at will and that the lease which provided for use as long as mining activities occurred on the property was unconscionable and had led to Lessee's unjust enrichment. The trial court found that the lease created a determinable leasehold, and Lessors appealed that ruling in response. On appeal, the Eighth Circuit Court of Appeals analyzed the lease in question as well as the characteristics of both a tenancy at will and determinable leaseholds. The Eighth Circuit ultimately agreed that the interest created was a determinable leasehold. Accordingly, the court found that the leasehold in question created a determinable amount of time because it provided that it shall remain in effect as long as mining activities are actively occurring on the land. The determining event was not too vague and was the common and accepted lease language for mining leases.

9th Circuit

Gardner v. Chevron Capital Corp., 715 Fed. App'x 737 (9th Cir. 2018).

Landowner brought suit against Gas Station Operator ("Operator") for its contamination of property. The trial court dismissed Landowner's claim for failure to state a claim because Landowner only alleged contamination of property through substances that fell within the petroleum exception under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Landowner appealed to the Ninth Circuit Court of Appeals. The appellate court affirmed the ruling of the lower court, finding that Landowner was unable to sufficiently allege that xylene, the substance that contaminated Landowner's property, was not a substance that derived from petroleum, and thus, did not fall under the petroleum exception of CERCLA. Because the appellate court found that landowner was not able to offer any details to support allegations that xylene was not a petroleum-based chemical, the suit was barred under CERCLA, and the claim was dismissed with prejudice.

10th Circuit

Trans-W. Petroleum, Inc. v. U.S. Gypsum Co., 718 Fed. App'x 712 (10th Cir. 2018).

Buyer of an oil and gas lease ("Buyer") brought suit against the seller of the lease ("Seller") for breach of contract when Seller attempted to rescind the lease before the lease took effect, instead extending its own lease on the property. At trial, the court granted Buyer declaratory judgment after finding Seller's prior lease on the land had expired on the date Buyer's intended lease was to take effect. Seller appealed this decision. On appeal, the 10th Circuit Court of Appeals affirmed the decision of the lower court regarding the breach of contract. However, the appellate court found that the lower court erred when it declined to award Buyer damages for failure to show lost profits. The appellate court ruled that Buyer had shown with reasonable certainty that it suffered around $4,800,000 in lost profits as a result of Seller's breach, an amount which need not be calculated to mathematical certainty.

N.D. West Virginia

Fout v. EQT Prod. Co., No. 1:15CV68, 2018 WL 1595870 (N.D. W. Va. Apr. 2, 2018).

Lessors owned an undivided interest in oil and natural gas subject to a lease agreement with Developer, which secured Lessors a flat-rate royalty payment in exchange for development and production rights. Lessors contended that Developer underpaid the royalties owed and incorrectly deducted from the royalties, as well as failed to provide a truthful accounting of production on the lease. The district court determined that Lessors did not present evidence sufficient to prove (1) failure to properly account, (2) breach of contract, (3) fraud, or (4) negligent misrepresentation. Additionally, the court pointed out that punitive damages were not available in this case because Lessors had previously waived their right to punitive damages, and such remedy would not be available regardless in a contract claim, as was the case here.

Lucey v. SWN Prod. Co., LLC, No. 5:17–CV–66, No. 5:17–CV–126, 2018 WL 771725 (N.D.W. Va. Feb. 7, 2018).

Landowners entered into an oil and gas lease with Producer. Operator attempted to extend the lease, but the extension was denied by Landowners. Landowners subsequently brought suit seeking a declaration by the court that the lease had been terminated. The matter, however, was settled and dismissed by both parties. The settlement provided for an oil and gas lease between the two parties, subject to more requirements, with the right of Producer to pool the lease with other units. When Producer pooled the lease into a unit, Landowners brought suit for breach of contract, declaratory judgment, trespass, and private nuisance. Landowners claimed that the agreement required Operator to pay additional consideration if it failed to commence production on 2 wells on the property within 1 year of the effective date. However, Landowner claimed that because Operator obtained permits to pool the land before the effective date of the lease, the wells that were produced by Operator were not within the date specified. Thus, Operator breached the contract by not paying consideration for the lack of wells drilled within the specified date. Operator defended by claiming that Landowners failed to state a claim, because under the language of the contract, there was no breach. Trial court found that the lack of evidence of actual injury and failure to provide notice of the breach by Producer was sufficient to uphold Operator's argument for failure to state a claim. Trial Court dismissed the claim accordingly. Please note that Landowners have since filed an appeal to the Fourth Circuit.

S.D. California

Plumley v. Sempra Energy, No. 3:16-cv-00512-BEN-AGS, 2018 WL 1470224 (S.D. Cal. Mar. 26, 2018).

This case constituted a class-action suit against Energy Services Company ("Company"). The complaint centered around a natural gas leak in Aliso Canyon, California. Investors sued Company, alleging that Company made false and/or materially misleading statements regarding Company's commitment to safety, the scope of the Aliso Canyon gas leak, and the risks posed by the gas leak. The complaint alleged violations against the Exchange Act of 1934 and Securities and Exchange Commission's ("SEC") Rule 10b-5. Company moved for and was awarded a dismissal of the first complaint for failing to adequately plead the existence of materially false or misleading statements. The California district court found that Investors had

not meet the pleading burden to establish a strong inference of scienter against Company. Investors presented evidence that Company had both (1) knowledge that the gas well in question lacked a proper safety valve and (2) a financial motive and opportunity to omit the information from its reports, but the court stated that although the allegations showed a motive and opportunity to commit fraud, there was not a strong inference of deliberate recklessness.

Upstream – State

Louisiana

J & L Oil Co. v. KM Oil Co., 51-898 (La. App. 2 Cir. 2/28/18) No. 51,898-CA, 2018 WL 1075402.

An oil and gas lease containing a Pugh clause provided that Lessee must drill five wells within a given time period. Moreover, Lessee must continue to produce in paying quantities in order to hold the entire acreage under the lease. Based on the language of the lease, with which the Court of Appeal of Louisiana agreed, if the five wells were not drilled within the time period or ever ceased to produce in paying quantities, then only a small amount of acreage surrounding the producing wells would be held by the lease. There was no question raised whether or not the five wells were drilled within the allotted time, however, there was question as to whether the lease was held by production. The court held that Lessor did not bear its burden of showing that there was no disruption in production on the five wells and that the subsequent producers adequately pointed out an absence of facts proving that there was continuous production.

State v. Louisiana Land & Expl. Co., 2017-830 (La. App. 3 Cir. 3/14/18) No. CA 17–830, 2018 WL 1312208.

School Board sued Developer, seeking remediation of environmental damage caused by oil and gas exploration and production. Under Louisiana's Oilfield Remediation Statute, the remediating party is obligated to receive awarded damages only for remediation as required to fund the expressed plan. On appeal, following a jury verdict in favor of School Board, School Board argued that it is the proper party to accept damages and perform remediation. The appellate court held that, because the Oilfield Remediation Statute's purpose is to create an obligation to perform

remediation work, the trial court was correct in determining that Developer was responsible for the mandated remediation.

New York

Keyspan Gas E. Corp. v. Munich Reinsurance Am., Inc., 96 N.E.3d 209 (N.Y. 2018).

Insured sought declaratory judgment asserting that it was entitled to coverage and indemnification from Insurer for costs of environmental cleanup at two former manufactured gas plant sites. Insurer argued that it was not liable to cover costs incurred by Insured that occurred outside of the policy period and that any costs it was entitled to cover should be allocated pro rata over the entire period during which property damage occurred. However, Insured claimed that Insurer was liable for this time period because there was no applicable insurance coverage available on the market. The district court denied Insurer's motion for partial summary judgment regarding the years in which the relevant insurance coverage was otherwise unavailable in the marketplace. Insurer appealed, and the appellate court ruled that under the applicable insurance policies, Insurer was not obligated to indemnify Insured for losses that were attributable to time periods when liability insurance was otherwise unavailable in the marketplace.

Pennsylvania

EQT Prod. Co. v. Dept. of Envtl. Prot. of the Commonwealth of Pennsylvania, No. 6 MAP 2017, 2018 WL 1516385 (Pa. Mar. 28, 2018).

Oil Producer became subject to civil penalties under the Clean Streams Law in 2012 due to leaks of impaired water from hydraulic fracture gas wells. Environmental Department theorized that the penalty should have been based on a "continuing violation," wherein the penalty would last as long as any contaminants remained in the subsurface soil to passively enter into groundwater. Oil Producer expressed concerns that this theory would create uncertainty and unending liability. Oil Producer's own theory was based on penalty being assessed and doled out for only days that pollutants were discharged from impoundment. Oil Producer at the time filed suit seeking declaration of unlawful calculation of the penalties. The Supreme Court of Pennsylvania determined that mere presence of contaminants in water

sources is not a violation of the Clean Streams Law which cites movement as the necessary element.

Briggs v. Sw. Energy Prod. Co., 2018 PA Super 79.

Landowners owned eleven acres in Pennsylvania, adjacent to two different gas wells operated by Natural Gas Developer ("Developer"). These wells have been continuously operated since 2011. Landowner asserted trespass and conversion claims against Developer, alleging that Developer had been unlawfully extracting natural gas from beneath Landowners' property. On motions of summary judgment by both parties, the trial court determined that the rule of capture precluded recovery by Landowners. Landowners appealed to the Superior Court of Pennsylvania, claiming that the trial court erred in its determination that rule of capture precluded any liability on the part of Developer. As this was a question of first impression, the appellate court examined all evidence including (1) the depth of the alleged subsurface trespass, (2) the amount of oil and gas that was alleged to have been taken, and (3) the time period that had passed during the ongoing "trespass." The appellate court determined that, although there did not seem to be evidence as to how far the subsurface fractures extended into Landowners' property, there was a proper question of whether a trespass had occurred, and the entry of summary judgment for Developer was premature.

Texas

Allen Drilling Acquisition Co. v. Crimson Expl. Inc., No. 10–15–00277–CV, 2018 WL 1219122 (Tex. App. Mar. 7, 2018).

Two Operators entered into a Joint Operating Agreement together for the development and exploration of leased lands. The Majority Leaseholder (Majority Operator) held 77.5% of the leasehold in the agreement while the minority leaseholder ("Minority Operator") owned the remaining 22.5% of the leasehold. Majority Operator brought suit against Minority Operator for breach of contract for its failure to pay its share of the costs of developing the project. Minority Operator counterclaimed that because Majority Operator failed to convey all of the leases required under the agreements, Majority Operator breached the Joint Operating Agreement first. At trial, Minority Operator motioned for summary judgment for its claims that Majority Operator breached the agreement. However, the trial court denied the motion and granted the Majority Operator summary judgment. Minority

Operator appealed asserting that the trial court erred when it granted Majority Operator's summary judgment motion and denied its motion. On appeal, the Court of Appeals of Texas, Waco reviewed whether the agreements that embodied the Joint Operating Agreement entitled Minority Operator to the leases it claimed it was entitled to. The appellate court found that the trial court erred in its interpretations of the agreements, thus its determination of which Operator breached the agreement and was accordingly entitled to summary judgment was improper. Thus, the court reversed the trial court's ruling of summary judgment for Majority Operator and remanded the case to the trial court with the proper interpretation of the agreement.

Dimock Operating Co. v. Sutherland Energy Co., LLC, No. 07–16–00230–CV, 2018 WL 1310095 (Tex. App. Mar. 13, 2018).

Lessee sued Operator, arguing that Operator collected more revenue than was authorized in the parties' Seismic Exploration and Farmout Agreement ("SEFA"). The agreement provided that once Operator's cumulative revenue equaled two times Operator's costs from the well's production revenue as compensation, Operator had reached "project payout." Once Operator reached "project payout," Operator would assign its well operations back to Lessee. Farmee claimed that Section 2.1 of the SEFA gave Lessee sole discretion to determine the extent of expenditures necessary for seismic exploration operation, and should thus be considered in determining Farmee's "costs." Lessee claimed that Operator's seismic and land exploration expenditures were limited by an ensuing Operating Agreement, restricting Farmee's authorized "costs" to projects not explicitly permitted by Lessee. The appellate court upheld the trial court in finding that expenses incurred for land and seismic operations are "costs" to be considered in determining "project payout" under the SEFA. Furthermore, the appellate court upheld that Operator's ability to incur those costs were governed by the original SEFA agreement and not limited by the ensuing Operating Agreement, which was meant to govern expenditures made by Operator moving forward from the signing of that agreement. Please note that this opinion has been withdrawn and superseded on denial of rehearing.

Martin v. Newfield Expl. Co., No. 13–17–00104–CV, 2018 WL 1633574 (Tex. App. Apr. 5, 2018).

In 2001, Lessor entered into oil and gas leases with Developer. These leases covered the rights to production on approximately 600 acres of land. Over the next seven years, different parts of the land were assigned from party to party, eventually leading to Developer holding claim to fifty-five percent of all leases therein. Developer subsequently filed a designation of pooled unit on other nearby properties totaling 570 acres. Lessor asserted that Developer wrongfully pooled its land and that it failed to protect against drainage of Lessor's unit as required under the lease agreements. Developer filed for summary judgment stating that it had no interest in the lease complained under and that it had no duty to protect against drainage because Lessor's land was not adjoined to the land Developer had pooled. The trial court granted Developer's motion for summary judgment and Lessor appealed. On appeal, the court determined that even if Developer did owe a duty to protect against drainage, the lands in question were not "adjoining," thus the duty was never triggered.

Midstream – Federal

2d Circuit

New York State Dep't of Envtl. Conservation v. Fed. Energy Regulatory Comm'n, 884 F.3d 450 (2d Cir. 2018).

Department requested judicial review of Commission's decision to approve natural gas pipeline construction, and Commission's determination that Department forfeited the authority to review and control certification regarding water quality for the pipeline construction. Landowners intervened in this action, siding with Department to also oppose Commission's actions regarding the pipeline construction. A Certificate of Water Quality is generally needed for such projects and is requested from Department because such a pipeline would contact and potentially impact bodies of water in its construction path. After receiving the Company's request for a certificate, Department requested more information from Company twice, determining each time that their application was incomplete. Department ultimately rejected Company's application for construction, but Commission then approved the application and determined that Department failed to respond within its allowed period for review for a clean water certificate, which was one year. Thus, its authority

to do so was deemed to be waived. The Second Circuit Court of Appeals denied Department's request for review, also deeming them to have waived the opportunity to manage the request for water quality certification, which Company filed timely. The court gave no deference here to state agency, because Commission was not in a position to approve their application of the statutory requirements – in this case, the waiver period and when that time period started to run. Commission, a federal agency, and Department, a state agency, conflicted on their interpretations of when the waiver period begins to run, and this court sided with Commission. This court also determined that, as a federal agency, Commission did have jurisdiction to decide on Company's application for pipeline construction (over state agency Department) because the pipeline is essentially part of an interstate, not intrastate system of distribution.

D. District of Columbia

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16–1534 (JEB), 2018 WL 1385660 (D.D.C. Mar. 19, 2018).

Tribe challenged Agency's allowance of oil pipeline construction on property protected by preservation and conservation acts and other requirements, including National Environmental Policy Act ("NEPA"), National Historic Preservation Act (NHPA), and United Nations Declaration on the Rights of Indigenous Peoples (UNIDRIP), asserting that such construction disrupted their tribal lands. Both Tribe and Agency filed motions for summary judgment asserting their opposing claims. In its motion, Tribe claimed that Agency must evaluate the environmental impacts caused by the pipeline holistically, rather than as "segmented" impacts. Tribe also asserted that it was denied notice and consent, which is in violation of treaty and trust requirements. Agency's motion asserted that the NHPA claim was inapplicable due to the completion of the pipeline construction. The lower court held for Agency, determining that Tribe's action was properly brought, but ultimately held that Agency's actions authorizing the pipeline construction were not actually in violation of the referenced regulations. This court affirmed the lower court's decision in favor of Agency, also concluding that Tribe had standing through its demonstrated use and concern for the land, and potential injury by Agency's actions. The court also held, however, that no remedy was available regarding the violation of NHPA claim because the pipeline construction had already been completed. Numerous assessments were conducted by NEPA with no significant issues reported. The outcome of

these determinations was previously remanded for further review, which is still pending. The court ultimately denied Tribe's Motion for Summary Judgment, dismissing Tribe's first count, while granting Agency's cross-motion for summary judgment.

N.D. West Virginia

Columbia Gas Transmission, LLC v. 84.53 Acres of Land, No. 1:18CV9, 2018 WL 1004483 (N.D.W. Va. Feb. 21, 2018).

Pipeline Operator sued Landowners, seeking condemnation and easements related to the construction and operation of a natural gas pipeline. Additionally, Pipeline Operator sought access and possession to land prior to paying Landowners just compensation. After the issuance of a certificate by Federal Energy Regulatory Commission ("FERC"), Pipeline Operator's project was subject to the Natural Gas Act in order to acquire property through eminent domain. The court found that Pipeline Operator was entitled to a preliminary injunction in order to access and possess the easements in order to avoid significant cost based on exigencies such as tree clearing and inactivity. The district court also determined that, in conjunction with granting Pipeline Operator's preliminary injunction for access and use of Landowners' properties, Pipeline Operator would obtain and post a surety bond to secure compensation.

W.D. Texas

Cotton v. Texas Express Pipeline, LLC, No. 6:16–CV–453–RP–JCM, 2018 WL 1419346, (W.D. Tex. Mar. 22, 2018).

Landowner conveyed land, subject to an easement, to Purchaser through a quitclaim deed. Purchaser brought suit for breach of contract claiming that Landowner transported radioactive materials through the pipeline easement against the terms of the easement contract. The contract provided that natural gas and gas liquids are to be transported through the pipeline, but radioactive materials are prohibited from being transported through the pipeline. Landowner argued that the clause that permitted natural gas to be transported rendered the prohibition against radioactive materials moot because natural gas is radioactive. Thus, Landowner motioned to dismiss the suit for failure to state a claim. A magistrate judge agreed with Landowner and recommended dismissal of the claim. Purchaser objected to this recommendation, and the case was removed to the Western District of

Texas. The court, reviewing the recommendation by the magistrate judge de novo, found that the magistrate ruled improperly when it recommended a dismissal of the claim. The court instead found that all natural gas is not radioactive and Purchaser should be entitled to amend its complaint to account for its previous failure to plead that Landowner was actually transporting ultra-hazardous material through the pipeline.

Midstream – State

Pennsylvania

B & R Res., LLC v. Dep't of Envtl. Prot., 180 A.3d 812 (Pa. Commw. Ct. 2018).

Company requested review of a Board adjudication decision dismissing their appeal of an order issued by Agency requiring Company to plug several dozens of their wells. Agency contacted Manager to inquire about wells that appeared to be abandoned, later issuing a notice that Company would be required to plug the wells. These orders were met with noncompliance from Manager, and Agency requested additional information regarding a proposed schedule for plugging the wells. Manager asserted during these interactions that the wells were not abandoned, but that Company still intended to use them for production. This noncompliance with an order to plug the wells resulted in numerous alleged violations by Company. Company later stipulated that the wells were abandoned but that no funds were available to use for plugging the wells, so Company should be relieved of liability. Company also stipulated that Manager held no permits and did not operate any of the wells and thus should also not be held responsible. During administrative adjudication, Manager was determined to be an operator, with full authority to take action of the wells, and was on notice regarding the requirement to plug the wells. Therefore, Manager was personally responsible for the violations, since its actions were intentionally in opposition to the imposed plugging requirements, despite its authority to take action to comply with them. However, this individual accountability, labeled "participation theory," was not supported by the administrative adjudication's determination. The court reversed and remanded because the reviewing administrative board failed to assess Manager's ability and resources to remedy the violations, or how much Manager could have remedied the situation, if it had made an effort.

Flynn v. Sunoco Pipeline L.P., No. 942 C.D. 2017, 2018 WL 1463443 (Pa. Commw. Ct. Mar. 26, 2018).

Landowners sued Public Utility Company ("Company"), arguing against Company's development of a pipeline system. In 2012, Company announced its intent to develop an integrated pipeline system to serve this purpose, the Mariner East Program. The first phase of the program utilized existing pipeline infrastructure to ship 70,000 barrels of natural gas liquids across the state. The second phase of the program would require construction of 351 miles of new pipeline to allow for movement of an additional 275,000 barrels per day. Company received authorization for the program's second phase from the Pennsylvania Public Utility Commission ("PUC"), and Landowners filed a complaint through enforcement of Township's Subdivision and Land Development Ordinance ("SALDO"). The district court dismissed the complaint on the grounds that (1) the court lacked subject matter jurisdiction, (2) the attempt to enforce SALDO against Company was preempted by state and federal law, and (3) that Landowners had failed to state a claim. The appellate court affirmed the lower court's decision, stating that Landowners had no claim under SALDO because PUC had exclusive jurisdiction and regulatory authority over Company.

MarkWest Liberty Midstream and Res., LLC v. Cecil Twp. Zoning Hearing Bd., No. 1809 C.D. 2016, 2018 WL 1440892 (Pa. Commw. Ct. Mar. 23, 2018).

Company engaged in midstream services filed an application for a special zoning exception from Board to construct a natural gas compressor. Board added numerous conditions as a result of that special exception request, from which Company appealed. The court began by noting that Board was a legislatively created body that was given narrow powers to enforce health and safety standards, but it was not given power to regulate the operations of a private business. The court found that Board failed to show that Company compressor's impacts would pose a threat to the health and safety of the community, and thus abused its discretion in enacting conditions outside of Board's authority. Upon reviewing each condition, it was found that twenty-one of Board's twenty-five imposed conditions were unreasonable and an abuse of discretion. The only conditions found to be reasonable and enforceable by the court were that Company: (1) provide a spill prevention and control plan to the Township; (2) provide training for first responders at its expense; (3) provide copies of all procedures to be

followed in the event of an emergency at the site; and (4) work with local first responders to outline procedures that nearby residents should observe in the event of an emergency at the station. Please note that this is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Texas

Armour Pipe Line Co. v. Sandel Energy, Inc., No. 14–16–00490–CV, 2018 WL 1546697 (Tex. App. Mar. 28, 2018).

Assignors brought a claim against Assignees for ownership and payment for royalty interest in oil and gas leases. This case is an appeal of the lower court's decision to grant a motion for summary judgment in favor of Assignees and denying Assignors' motion for summary judgment, rejecting Assignors' claimed royalty interest. The court reversed and remanded the lower court's decision, determining that the trial court was in error because it granted a motion in favor of Assignees without adequate evidence that Assignors held no royalty interest and then granted a motion dismissing an accessory party, which was involved via farmout agreement on the basis of the initial erroneous summary judgment. The court also held, however, that the lower court was not in error in denying Assignors' motion for summary judgment, since there was still a valid question regarding Assignors' still-held royalty interest. The court determined that Assignors would have to provide evidence that they were interest holders in the leases in place when the assignment in question was executed and they have not presented conclusive evidence to show this. The court relied on the remand procedure to determine the alternative claim by Assignors, since the court reversed and remanded the first claim, on which the second claim is dependent. The court also reversed and remanded the lower court's award to Assignees of attorney fees since such an award is inappropriate considering the reversal of their grant of summary judgment.

Downstream – Federal

10th Circuit

Anderson Living Tr. v. Energen Res. Corp., 886 F.3d 826 (10th Cir. 2018).

Landowners brought suit against Operator for failure to pay oil and gas royalties. At trial, the lower court granted Operator's motion for summary

judgment on all claims. Landowners appealed. The appellate court upheld some of the lower court's rulings but reversed others. The court found, in pertinent part, that the claims for royalties by Landowners based on state law were properly denied because of the precedent of the circuit court which rejected the marketable condition doctrine, that allowed Operator to deduct certain marketing costs before calculating royalties. Additionally, the court found in favor of Operator regarding whether it was proper to deduct taxes from royalties owed. However, the appellate court reversed the lower court's decision regarding royalties to be paid to Landowners for gas used by third-parties, ruling instead that the free use clauses in the lease required Operator to pay royalties on all gas produced. The Tenth Circuit Court of Appeals thus remanded the case to the lower court to calculate the royalties as provided by the opinion.

E.D. Michigan

MRP Props., LLC v. United States, No. 17–cv–11174, 2018 WL 1621562 (E.D. Mich. Apr. 4, 2018).

Company brought a claim against Government, requesting compensatory damages and declaratory judgment for contamination and hazards that Company claimed were allegedly caused by Government's previous wartime action and control. Government attempted to dismiss all parties except Company or transfer the case to another venue. This attempt was unsuccessful, so Government then filed a motion to dismiss. This motion was granted because the court found that Company provided insufficient evidence to support its claim for "arranger liability" which "attaches to persons who specifically arrange for the disposal of that hazardous waste," even though it did have sufficient support for its "operator liability" claim since it could show that Government exerted control over general operations but not specific intent or specific actions regarding the subject hazards or contamination. The court dismissed Company's initial amended complaint but designated such dismissal without prejudice to allow Company to later file an amendment within a specific time, giving it an opportunity to potentially provide more adequate support for its 'arranger liability' claim.

Downstream – State

New Jersey

Jack's Friendly Serv., Inc. v. Twp. of Fairfield Zoning Bd. of Adjustment, No. A–0433–16T4, 2018 WL 1440002 (N.J. Super. Ct. App. Div. Mar. 23, 2018).

Constructor who sought to build and operate a convenience store and gas station on a tract of land sought variances and major site approval from the Board of Zoning. The Board approved and granted requests of Constructor. Interested Parties filed a complaint challenging the Board's approval of Constructor's application claiming the Board erred because it failed to apply the proper standards of analysis for the application. Upon review, the trial court affirmed the decision of the lower court and dismissed the claim, finding Interested Parties' claims to be without merit. Interested Parties appealed their case. On appeal, Interested Parties argued that the application should not have been approved absent a showing that the proposed construction would enhance the welfare of the township that had prohibited new gas stations entirely. The appellate court affirmed the decision of the lower court after citing that the Board was entitled to deference, and, unless its decision was arbitrary and capricious, the court would not overturn it. When applying the correct standards to the application, the court found no reason to disturb the decisions of either the Board or the trial court. Please note that this is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing the case as precedent.

SELECTED WATER DECISIONS

Federal

Supreme Court

Montana v. Wyoming, 138 S.Ct. 758 (2018).

Montana and Wyoming are subject to the Yellowstone River Compact ("Compact"). Broadly, the Compact governs appropriative rights of the Yellowstone River. After ordering that costs shall be awarded to Montana, the Court provided several guidelines in its decree which are as follows. The Court first provided some general provisions, which outlined the compact and detailed the procedure for calls between the states. Next, it appeared that the exercise pre-1950 appropriative rights were generally non-violative of the Compact. The Court provided general reservoir rules and also placed specific limitations on Wyoming storage reservoirs as well as the Tongue River Reservoir. Montana and Wyoming are also bound by rules regarding the exchange of information. Finally, the Court's decree has no impact on "the water rights of any Indian Tribe or Indian reservation."

2d Circuit

Bethpage Water Dist. v. Northrop Grumman Corp., 884 F.3d 118 (2d Cir. 2018).

Water District brought suit against industrial manufacturer ("Manufacturer") alleging groundwater pollution due to operations at its manufacturing facilities. Water District asserted claims of negligence, trespass, and nuisance for the alleged contamination caused by volatile organic compounds entering multiple drinking water units operated by Water District. However, the issue presented to the court concerned when the statute of limitations for the listed claims should begin when said claims are caused by water pollution. Specifically, the court looked at whether its discovery igniting the statute of limitations began once (1) the pollution was detected in the well, (2) actual injury occurred, or (3) when Water District learned of the potential need to remediate or protect the well from contamination, either present or future. The Second Circuit Court of Appeals ultimately determined that the statute of limitations for claims arising out of contamination begin when the injured party had enough knowledge that the contamination would require "an immediate or specific

remediation effort." The court rejected the notion that the statute of limitations begins only after there is actual contamination, rather than the mere existence of potential for contamination, in the well.

9th Circuit

Hawai'i Wildlife Fund v. Cty. of Maui, 886 F.3d 737 (9th Cir. 2018).

County appealed a lower court finding that County was in violation of the Clean Water Act ("CWA"). County operated four injection wells used to disposed of treated wastewater from its municipal wastewater plant. The treated wastewater is either injected into the wells for disposal or sold for irrigation purposes. The injected, polluted water may then find its way into the Pacific Ocean. County challenged the lower courts fining that it was in violation of the CWA through use of all four of its wells by not obtaining a special permit before discharging the treated water into the ocean via groundwater. On appeal, the court agreed with the lower court's ruling that County was liable under the CWA. Accordingly, the Ninth Circuit Court of Appeals affirmed the lower court's ruling for the following reasons: (1) there was an immediately traceable source of the pollution – a "point source" under the act; (2) the act requires a permit to discharge into the ocean, even if the discharge was not direct, because the pollution was traceable; and (3) discharge into wells and not navigable waters is not excluded by the CWA.

Federal Circuit

Meridian Eng'g Co. v. United States, 885 F.3d 1351 (Fed. Cir. 2018).

Contractor sued the government alleging breach of contract, breach of the duty of good faith and fair dealing, and a violation of the Contract Disputes Act. The government tasked Contractor with constructing flood control features and the parties' contract was later modified several times after Contractor discovered potential structural damage due to an unforeseen water-producing sand layer, groundwater, and saturated soil. After the government suspended Contractor's work based on structural failure, the U.S. Army Corps of Engineers terminated the flood control project. Ruling in favor of the government, the Federal Circuit found that saturated soils had been indicated in the contract and that Contractor had not undergone a Type 1 differing site condition. The court found that Contractor was not acting as a reasonable and prudent contractor in failing to foresee the

saturated soil and saturated subsurface conditions since the contract had made reasonably accurate representations of the location conditions.

E.D. California

N. Coast Rivers All. v. U.S. Dep't of the Interior, No. 1:16–cv–00307–LJO–MJS, 2018 WL 1256657 (E.D. Cal. Mar. 12, 2018).

Conservationist filed a claim of relief, claiming that the Department of the Interior ("Department") violated the National Environmental Policy Act ("NEPA") by failing to prepare an Environmental Impact Statement ("EIS") for a series of renewal contracts that authorize the delivery of water from federal reclamation facilities to certain water districts within California. Department filed for dismissal of the claim because (1) the contracts do not alter the status quo of current water delivery systems, and (2) that an EIS is only required in Federal actions which significantly affect the quality of the human environment. The court found that because the contracts were not an irreversible commitment of resources, an EIS was not necessary. Therefore, the court granted Department's motion to dismiss.

E.D. New York

Hicksville Water Dist. v. Philips Elecs. N. Am. Corp., No. 2:17-cv-04442 (ADS)(ARL), 2018 WL 1542670 (E.D.N.Y. Mar. 29, 2018).

Water Provider is a public utility that obtains its water form the Long Island Aquifer System. Electronics Manufacturer performs machining, heat treating, and chemical cleaning among other operations at a property alongside the Long Island Railroad tracks. Water Provider alleged that Electronics Manufacturer used Dioxane in its manufacturing process throughout use of the property. This chemical completely dissolves in water and is widely used in paint strippers, greases, and waxes. The chemical has been cited as likely carcinogenic to humans and can cause damage to the liver and kidneys. Electronics Manufacturer had ceased its operations at the factory in 2014 and reported to have removed all manufacturing equipment. Water Provider was forced to shut down one of its wells and alleged that Electronics Manufacturer contaminated its groundwater and was liable for remedial damages in the amount of $350,000,000 in addition to $600,000,000 in punitive damages. Defendant moved to dismiss the complaint. The district court determined that Electronics Manufacturer's motion should be granted due to the fact that Water Provider was precluded

from advancing on negligence or trespass claims, but denied that Water Provider was able to proceed on all other counts including its public nuisance, failure to warn, and Comprehensive Environmental Response, Compensation, and Liability Act claims.

N.D. Oklahoma

Taylor v. Michelin N. Am., Inc., No. 14–CV–293–JED–FHM, 2018 WL 1569495 (N.D. Okla. Mar. 30, 2018).

Citizens sued Tire Company alleging that their personal and real property had been contaminated by toxins released as a result of Tire Company's conduct. Citizens sought damages for medical monitoring certification of the citizens who resided on the property, as well as damages for the recovery of real property affected by the toxins. In addition to damages, Citizens sought injunctive relief requiring Tire Company to remediate all contaminated properties. Tire Company moved for summary judgment claiming that the Oklahoma Department of Environmental Quality ("ODEQ") had primary jurisdiction over remediation for the contaminated property and thus the request for injunctive relief for such should be denied. The trial court rejected this argument and denied Tire Company's request for partial summary judgment on the ground that the primary jurisdiction doctrine does not prevent a court from exercising jurisdiction where an agency fails to diligently pursue enforcement against a party violating regulation. Additionally, Tire Company asserted that the claims for medical monitoring costs should be dismissed because Oklahoma courts have not allowed such claims for relief without proof that parties actually suffered physical injury. The trial court agreed and dismissed Citizens' request for medical monitoring damages due to their failure to present evidence of physical injuries attributable to contaminates from the plant. The trial court also denied Tire Company's motion for summary judgment on claims by fifty-two Citizens who purchased their property after 2002, because it found a genuine dispute was present regarding whether there was a diminution in the value of the property of those individuals due to continuing contamination after 2002.

State

California

Santa Barbara Channelkeeper v. City of San Buenaventura, 228 Cal. Rptr. 3d 584 (Cal. Ct. App. 2018).

Environmental Organization filed suit against City, alleging that City's diversion of water from a local river was "unreasonable" due to its effect on fish during the summer when water levels are low. City filed a cross-complaint against other parties who also divert water from the river, alleging that it is the other parties whose water diversion is "unreasonable." The trial court struck City's cross-complaint, and City appealed. The California appellate court held that (1) reasonableness of water usage is a case-by-case determination, and although in California there is public trust interest in how the state's water is used, that interest is not absolute; (2) in order for a cross-claim to be proper, the claims must be "related to the same transaction," and the relation is determined by the facts surrounding the cause of action; and (3) regardless of Environmental Organization's interest in proceeding solely against City, City had the right to bring in the other potentially liable parties in order for the court to examine whether junior or senior appropriators must share the obligation to maintain a higher water level in the river during summer months. The court held that because Environmental Organization was complaining based only on the water flow in the river, the court must consider other water users before it was able to issue even a declaratory judgment. The court also found a second reason to reverse the trial court's striking of the cross-complaint in that the claim at issue implicated City's property rights, giving it the right to cross-complain under California's Civil Procedure laws. Accordingly, the appellate court reversed the trial court's decision to strike City's cross-complaint and remanded the case for proceedings consistent with its judgment.

Connecticut

Town of Glastonbury v. Metro. Dist. Comm'n, 179 A.3d 201 (Conn. 2018).

Non-Member Town ("Town") sued Water Provider, alleging that Water Provider charged Town an illegal surcharge for its services. After the court of original jurisdiction found in Town's favor and granted summary judgment, the state legislature passed a bill allowing Water Provider to

establish a surcharge on non-member towns, subject to certain limitations. Water Provider attempted to dismiss the ruling based on the retroactive legislation but the court determined the legislation was not retroactive, and therefore did not affect the prior unlawful surcharges. On appeal, Water Provider claimed error on the part of the district court determining that plaintiff's claim was not rendered moot by the legislation. The Supreme Court of Connecticut determined that the claim was justiciable and that Town's status as non-member town did not disqualify it from bringing the suit. Additionally, the Court concluded that prior to enactment of the legislation, Water Provider did not have authority to impose the surcharge on the non-member towns, ruling in favor of Town.

Idaho

Lemhi Cty. v. Moulton, 414 P.3d 226 (Idaho 2018).

Downhill Landowner ("Downhill") was in a dispute with Uphill Landowner ("Uphill") as to whether irrigation wastewater could flow across Downhill's property into an adjoining river. This case follows a claim brought successfully by County in which it asserted Downhill was blocking the flow of Uphill's irrigation wastewater from reaching the river via a draw on Downhill's property. The blockage caused County's road to flood. Thus, Downhill was forced to allow the flow of wastewater. Subsequently, Downhill claimed Uphill sent too much water down the draw and challenged Uphill's ability to send the wastewater across Downhill's land. The lower court found that the draw on Downhill's property was a natural waterway and that Uphill accordingly had a natural servitude and a prescriptive easement in which to send a certain volume of wastewater across Downhill's land to the river. Downhill challenged the establishment of the easement and the scope of the easement granted. The Supreme Court of Idaho held that the lower court correctly found the presence of the requisite factors for a prescriptive easement and also held that the scope of the easement was appropriate. Downhill also challenged the basis for the natural servitude theory, but the court found that the natural basin drainage was a natural watercourse in which wastewater could flow, subject to the volume limitation set by the lower court. However, the court did find that the lower court did not adequately describe the location of the drainage basin for the prescriptive easement or natural servitude and the court should have better identified the property subject to the easement. Therefore, the Supreme Court of Idaho remanded the case to the district court for modification of its previous judgment.

Montana

Teton Coop. Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

Irrigation Company appealed a decision by a water court. In 1902, Irrigation Company filed a Notice of Appropriation claiming 3,000 cubic feet per second from the Tenton River for irrigation and claiming of lands. A Secondary Irrigation Company later began using portions of water that Irrigation Company had claimed. Irrigation Company brought complaints regarding the water rights claims of Secondary Irrigation Company, as well as a dissatisfied water user complaint because a water commissioner reduced its flow to half of that available in the Teton River. The district court removed these claims to the state water court. The state water court found that the 1902 Notice of Appropriation was valid. However, Irrigation Company was barred by the doctrine of laches from claiming senior priority of its 1902 notice. Both parties appealed. On appeal, the Supreme Court of Montana upheld the water court's decision, holding that the water court did not err in finding that the 1902 Notice of Appropriation was valid but the claim brought by Irrigation company was barred by the doctrine of laches.

Nevada

King v. St. Clair, 414 P.3d 314 (Nev. 2018).

Landowner found an abandoned well on his property and applied for a permit requesting to temporarily change the point of diversion from that well to another location on Landowner's property for the water source located underground. Upon review, the State Engineer ("Engineer") denied the permit application, finding that although a prior owner had established a vested right to the water source, a following owner had abandoned that right due to non-use. This finding was overruled by the district court which found that there was insufficient evidence to demonstrate an intent to abandon the water ownership right on the part of any previous owner. The Supreme Court of Nevada affirmed, holding that Engineer's finding that non-use alone was sufficient to establish an intent to abandon water rights was a misapplication of Nevada law. Rather, the party asserting abandonment of a water right must prove with clear and convincing evidence that Landowner or any prior owners intended to abandon it, which was not found here.

New Mexico

Gila Res. Info. Project v. New Mexico Water Quality Control Comm'n, 2018-MNSC-025, 2018 WL 1192748.

This case arises out of a compilation of cases in which environmental organization and various other parties ("Environmental Organization") filed suit seeking review of Water Control Commission's ("Commission") enactment of an amendment to the Water Quality Act ("Act"), arguing that the amendment actually violated the Act. The Amendment in question provided new regulation for the copper industry. The New Mexico Supreme Court held that (1) the regulation was based on a permissible construction of the Act because the language, "place of withdrawal," within the regulation did not suggest a categorical bar on the regulation's containment strategy, but rather gave Commission flexibility to implement practices that it deemed prudent; (2) the regulation did not permit "widespread pollution . . . at open pit copper mine facilities"; (3) even if the regulation created a "point of compliance" system, the Act did not prohibit such a system; (4) even if the regulation broke from past Commission practice, a legislative decision put Environmental Organization on notice that such variation was possible, and moreover, Commission was not constrained by prior decisions; and (5) Environmental Organization's contentions that the regulation's closure provisions were improper were baseless. Accordingly, the Court determined that the regulation did not violate the Water Quality Act and thus affirmed Commission's adoption of the regulation.

State ex rel. State Engr. v. United States, No. A-1-CA-33535, 2018 WL 1616612 (N.M. Ct. App. Apr. 3, 2018).

The United States has had an extensive relationship with the Navajo Nation, dating back to 1849 when the parties entered into a peace treaty moving the Navajo people to eastern New Mexico. A second treaty then moved the Navajo Nation to a portion of their ancestral territory as their "permanent home." This tribal movement led to a claim on the part of the tribe regarding the water feeding into the San Juan River from the Colorado River through the Grand Canyon. In 2005, after a decade of negotiation, the claims of the Navajo Nation were settled. State's legislature then appropriated $50,000,000 to pay State's cost of the settlement agreement and brought suit seeking judicial approval regarding State's share of the water. The district court ruled in the affirmative on all counts and approved

the settlement. The court rejected all objections by non-settling parties, all of whom then appealed to the New Mexico Court of Appeals. Because the parties all appealed separately from each other and on more than fifty different claims, the appellate court ruled on them categorically. Ultimately, the appellate found that the district court's finding was fair and adequate to the public interest, state laws, and federal laws.

North Carolina

Wilkie v. City of Boiling Spring Lakes, 809 S.E.2d 853 (N.C. 2018).

Landowner sued City after City artificially raised the water level of the lake on which Landowner owned property, resulting in Landowner losing significant amounts of usable land. Landowner alleged that the action amounted to a taking of his property for which he was not compensated by City. The trial court ruled in favor of Landowner. On appeal, City claimed that because the action was not taken in furtherance of public use or purpose, Landowner's claim for inverse condemnation was unjustified. The appellate court reversed the trial court's finding, holding that there can be no inverse condemnation when property is not taken for a public use. The North Carolina Supreme Court reversed the appellate court decision, holding that the language of N.C.G.S. §40A-51(a) only specifies which entities against whom a statutory inverse claim can be asserted, not the purposes for which a claim may be brought. The court remanded the case to the appellate court for review of Landowner's remaining challenges to the trial court's order.

Oregon

Ciecko v. Dept. of Land Conservation & Dev., 415 P.3d 1122 (Or. Ct. App. 2018).

Individuals brought challenge against Conservation Department concerning the validity of rule development for part five of the 1994 Territorial Sea Plan ("TSP"). The Ocean Policy Advisory Council ("OPAC") was developed in 1991 to assist Conservation Department in managing Oregon's territorial sea. The TSP has since gone through multiple editions with the rules being edited to best serve their purpose and protect coastal waters. In 2008, OPAC began work on part five of the TSP, proposing and discussing different amendments, most of which were focused on renewable energy sites and where best to locate them and protect the

surrounding area from any negative effects. After extensive discussions between OPAC and Conservation Department concerning how best to amend the TSP, OPAC proposed multiple amendments, which Conservation Department then reviewed and modified before submitting the edited TSP. Individuals brought this suit concerning the rule-making process, claiming that Conservation Department violated state-based statutory rule-making procedures. Individuals alleged that the rules allowed for Conservation Department to modify any amendments to the TSP by OPAC, but that it must then return them to OPAC for revision. The court agreed, and because Conservation Department did not follow this procedure, the appellate court ruled in favor of Individuals, holding the amendments invalid.

Tennessee

StarLink Logistics, Inc. v. ACC, LLC, No. M2014–00362–COA–R3–CV, 2018 WL 637941 (Tenn. Ct. App. Jan. 31, 2018).

Property Owner filed claims against Landfill Operator after it was discovered that a landfill controlled by Landfill Operator, which primarily held aluminum recycling waste, was leaching chloride and ammonia into groundwater and surface water of two lakes owned by the Property Owner. Landfill Operator and State of Tennessee ("State") developed a plan to remediate and prevent storm water from entering the site. Property Owner claimed that the adopted plan was inadequate to prevent leaching of pollutants into lakes. Additionally, Property Owner claimed that the adopted plan did not provide oversight via a permit under the federal Clean Water Act ("CWA") and rather, would allow for continued contamination into the lakes from the landfill site. However, the Court of Appeals of Tennessee found that the adopted plan did not allow for infinite pollution into the lakes and that the plan was the only cost-effective way of remediating the site. Further, Property Owner claimed that the state agency involved did not have authority under state law to implement the adopted plan, but the court found the state was not obligated to follow federal law requiring a permit under the CWA, and instead, state environmental law could be applied.

Texas

URI, Inc. v. Kleberg Cty., 61 Tex. Sup. Ct. J. 565 (Tex. 2018).

County sued Company for breach of contract, alleging that a prior settlement agreement demanded that Company restore all drinking and agricultural waters affected by Company's mining operation to an acceptable quality before mining operations could resume. The lower courts found in favor of County by allowing extrinsic evidence at the time of the settlement's execution to prove the intent of the parties. On appeal, the Court determined that there was no evidence of "proof" that the water quality had returned to consumable quality. Instead, the settlement only required a statement from Company's officer certifying to the judge that well restoration was completed before mining could commence. There was not any requirement for that assertion to be honest. Therefore, because the trial court found that the breach was unintentional and without deliberate intent, there was no bad faith on the part with regard to the water quality, and Company had not breached the settlement agreement.

Washington

Brewer v. Lake Easton Homeowners Ass'n, 413 P.3d 16 (Wash. Ct. App. 2018).

Landowners sued Homeowners Association ("HOA") over a water systems agreement ("Agreement"). In relevant part, the agreement in conjunction with the formation of the HOA "delegate[d] their water management obligations [instead of taking] them on directly." This is due, in part, to the valid formation of the HOA. The HOA is valid because it meets all three requirements of a valid HOA: that it is "[1] a corporation, unincorporated association, or other legal entity, each member of which [2] is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and [3] by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member." Consequently, assessments were properly paid to the HOA.

Chelan Basin Conservancy v. GBI Holding Co., 413 P.3d 549 (Wash. 2018).

Conservation Organization sued Landfill Owner, alleging that Landfill Owner's fill of a dam built in 1927 raised property elevation and obstructed the public right to use navigable waters. Company argued that the State of Washington's RCS 90.58.270 ("Savings Clause"), which protected legislative consent to projects built before 1967 that violate public water rights, barred the action. Conservation Organization disagreed, arguing that the dam violated the public nuisance statute of the state, which was enacted prior to the Savings Clause. The court ruled in favor of Landfill Owner, holding that the Savings Clause's purpose was to protect all such project built before 1967, regardless of whether they violated pre-existing public nuisance statutes.

SELECTED LAND DECISIONS

Easements – Federal

6th Circuit

Johnson v. APJ Props., LLC, No. 17-1970, 2018 WL 1633467 (6th Cir. Apr. 5, 2018).

Landowner sued Property Company ("Company"), alleging that Company overburdened its prescriptive easement over Landowner's property by acquiring an additional parcel adjacent to Landowner's property and erecting a boathouse and other additions. Landowner argued that the improvements exceeded the easement's historical scope. The district court denied Landowner's request for an injunction, and the Sixth Circuit Court of Appeals affirmed, holding that there is no *per se* overburdening of an easement by the addition of land to a dominant estate. Rather, the appellate court ruled that only an increase in the actual use of an easement may overburden the easement.

D. Montana

Montana Mine Land Holdings, LLC v. U.S. Dept. of Agric., CV 17-65-H-CCL, 2018 WL 1640866 (D. Mont. Apr. 5, 2018).

Mining Company held patented mining claims in the Helena-Lewis and Clark National Forest. Two of the claims are served by a closed private road under the 2005 North Belts Travel Plan ("Travel Plan"). According to the Travel Plan, parties to the mining claims must apply for a special use permit to access the road. Mining Company challenged this requirement, asserting that it was entitled to use of the road by right of way conferred upon the claims by the General Mining Act of 1872 before the national forest was established. Mining Company sought declaratory judgment that Federal Government cannot require the special use permit. The court, however, determined that easements across federal lands are different than those on private lands and that a drawing of a road on a patent document does not provide an easement. The court also found that a grant of easement by the United States must be expressed. Because there was no expressed reference whatsoever on any document provided by Mining Company, the court determined that Federal Government can require Plaintiffs to obtain a special use permit for access to the private road.

N.D. Ohio

Baatz v. Columbia Gas Transmission, LLC, 295 F. Supp. 3d 776 (N.D. Ohio Feb. 14, 2018).

Landowners brought suit against Gas Company alleging both trespass and unjust enrichment claims, asserting that Gas Company unlawfully stored gas underneath Landowner's property before proper acquisition of rights to the property occurred through eminent domain. The issues presented to the court were: (1) whether Gas Company's acts constituted trespass by storing gas on Landowner's property without first condemning gas storage easements by eminent domain; and (2) whether the aforementioned conduct unjustly enriched Gas Company. The United States District Court for the Northern District of Ohio granted Gas Company's motion for summary judgment regarding trespass finding that (1) Gas Company's failure to pursue gas storage easements did not automatically invalidate its certificate allowing gas storage; (2) Gas Company did not trespass because Landowners could not meet their burden of proving that there was any physical harm to their properties or any present or reasonably foreseeable interference with the use of their respective properties; (3) Landowners did not have standing to recover for unjust enrichment; and (4) Landowners are not entitled to punitive damages because there was no evidence of actual malice.

Nexus Gas Transmission, LLC v. City of Green, No. 5:17CV2062, 2018 WL 1638647 (N.D. Ohio Apr. 5, 2018).

Producers of a pipeline ("Producer") sought preliminary injunction against Landowners to access property owned by Landowners. The trial court analyzed Producer's motion for preliminary injunction by considering the 4 factors: (1) likelihood of success on the merits, (2) irreparable harm to movant, (3) whether injunction would cause substantial harm to others, and (4) whether public interest would be served by injunction. The court found that Producer had already met its burden for proof of success on the merits on a summary judgment motion on the issue of condemnation. Additionally, Producer submitted evidence showing it would incur roughly $530,000 in losses if the property at issue was skipped in production of the pipeline, due to Producer's ongoing schedule. Landowners claimed that they would suffer harm because the trees and soil on their land would be destroyed. However, because Producer had access to the land through

eminent domain, landowners would be compensated for any harm to their property. Lastly, Producer claimed the pipeline is in the public interest because it was being installed to ensure consumers would have access to natural gas at reasonable prices. The court found in favor of Producer on all factors and subsequently granted the preliminary injunction, permitting Producer access to easement on Landowners' property. Please note that an appeal has been filed to the Sixth Circuit Court of Appeals.

S.D. Indiana

Panhandle E. Pipe Line, Co., L.P. v. Plummer, No. 1:16-cv-02288-JMS-DLP, 2018 WL 1505013 (S.D. Ind. Mar. 27, 2018).

Pipeline Owner brought suit against Landowners for failure to remove obstructions for right-of-way easement, as required by an agreement concerning the easement between the two parties. Pipeline Owner sought an injunction prohibiting Landowner from interfering with access to the right-of-way easement as well as damages. Landowners counterclaimed that Pipeline Owners had abandoned the pipeline subject to their agreement and thus were not entitled to access to the easement. Both parties moved for summary judgment. At trial, Landowners conceded that they had released their abandonment claim in a previous agreement between the parties and thus agreed summary judgment was proper with regards to that claim. The court, however, also granted Pipeline Owner's summary judgment motion on the injunction after finding that all 4 factors considered for an injunction weighed in favor of Pipeline Owner's. Additionally, the court found that Pipeline Owner had shown sufficient evidence proving it had suffered $6,000 in damages as a result of mobilization and demobilization fees it paid to clear the Property. Finally, the court found that in addition to the $6,000 in damages, Pipeline Owner was also entitled to attorney's fees and costs, pursuant to the terms of the prior agreement between the parties.

S.D. West Virginia

Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate & Maintain a 42-inch Gas Transmission Line, No. 2:17-cv-04214, 2018 WL 1004745 (S.D. W.Va. Feb. 21, 2018).

Company filed a partial motion for summary judgment and easement access against Landowners, who also filed motions to dismiss and a motion to stay proceedings. Company claimed power of eminent domain against

Landowners through the authority of the Natural Gas Act and the Federal Energy and Regulatory Commission ("FERC") and asserted that authority after attempting to obtain the easements, which are required for Company's pipeline project, through negotiations with Landowner. Landowners claimed that the court possessed the authority to review and approve the stay, but the court disagreed, holding instead that Landowners' challenges may not be heard by the court because such eminent domain authority is given by FERC and such review should be part of the condemnation process. Accordingly, the court denied Landowners' motions. The court granted Company's motion to strike and motion for a preliminary injunction because Company was acting with the power of eminent domain, and its actions were deemed to be in the public interest. Additionally, the court held that Company's eminent domain activity may not be stayed, except by an appeal court or FERC, without creating significant harm; therefore, the preliminary injunction was appropriate. Please note that this case has been appealed and is pending in the 4th Circuit.

Easements – State

Alabama

Hubbard v. Cason, 2160473, 2018 WL 670470 (Ala. Civ. App. Feb. 2, 2018).

Landowner-1 filed a trespass suit against Landower-2 after a dispute regarding ownership of a roadway that was used to access each owner's property. Landowner-1 claimed he was the owner of the roadway either by deed or adverse possession. Landower-2 claimed that Landower-1 was granted a right-of-way in the roadway and that he, Landowner-2, owned the land subject to Landower-2's easement in the roadway. The trial court found that Landower-1, based on grant, and Landowner-2, based on adverse possession, only had an easement in the roadway and the underlying property was owned by a third landowner. On appeal, the Court of Civil Appeals of Alabama reviewed past deeds and treatment of the property in order to determine who owned rights in the roadway. The court held that the deed, which originally granted the property now owned by Landower-1, only granted an easement in the roadway. Therefore Landower-1 could not own the roadway outright and only held an easement therein. Landower-1 also claimed on appeal that Landower-2 failed to adequately satisfy adverse possession in the roadway. After analysis of adverse possession, the

appellate court also held that Landower-2 properly satisfied the requirements and held an easement in the land via adverse possession.

Arkansas

Peregrine Trading, LLC v. Rowe, 2018 Ark. App. 176, 2017 WL 1178183.

Company sued Landowner, alleging that Landowner committed trespass when his sewage line ran underneath Company's adjoining property and leaked sewage into the ground. Trial court granted a directed verdict for Landowner, holding that Company was made aware by the presence of the sewage line for the statutory period necessary to establish a prescriptive easement. The appellate court affirmed, holding that because the line had been installed in 1993 and because portions of the line were visible from above the ground, a reasonable inspection by Company would have put Company on notice of the presence of the lines. Additionally, because Landowner diligently inspected his sewage line, the appellate court upheld the trial court's decision to dismiss Company's claims of negligence and nuisance.

Colorado

CAW Equities, L.L.C. v. City of Greenwood Vill., 2018 COA 42M, No. 17CA0212, 2018 WL 1417920.

Landowner sued City, alleging that City's proposed public walkway through Landowner's property was an unauthorized exercise of eminent domain. Landowner argued that Colorado Const. art. XVI, § 7 ("§7"), which allows for private condemnation of public projects if ditches and culverts are necessary, is self-executing and that Landowner did not need to show any injury in order to privately condemn such projects that interfere with private ditches that allow for the flow of water. The court disagreed, holding that §7 was not self-executing and may be regulated by eminent domain statutes. To hold otherwise, the court explained, would allow private property owners an unfettered ability to condemn property without any guiding principles. Furthermore, so long as City could build its trail without extinguishing Landowner's prior public use of the ditch, no exigency existed which required the condemnation of the trail project. Therefore, Landowner lacked the legal authority to condemn City's public trail, and his claim was dismissed.

Michigan

LaFave v. McCaleb, No.336004, 2018 WL 662267 (Mich. Ct. App. Feb. 1, 2018).

Property Owners appealed trial court's ruling that they had abandoned their easement interests, disputing an undeveloped roadway's use and claiming that they used it multiple times per year and that they hoped to develop the roadway further. The roadway was not necessary to access any of the surrounding properties as Property Owners used an alternate, developed roadway. The Court of Appeals of Michigan analyzed the roadway's use and found that Property Owner had abandoned any easement interest in the land underlying the undeveloped roadway for the following reasons: (1) Property Owner did not use the roadway; (2) there were numerous impairments preventing public use of the roadway; and (3) there was an alternate roadway that could be used to access the properties. Therefore, Property Owner had abandoned any easement interests in the roadway, which was already vacated locally as a public road.

North Carolina

Regency Lake Owners' Ass'n, Inc. v. Regency Lake, LLC, No. COA17–1117, 2018 WL 1597712 (N.C. Ct. App. Apr. 3, 2018).

Landowners' Association brought suit for declaratory judgment seeking (1) a declaration that Landowners on the property had a private easement on the area and (2) an injunction preventing Development Company from altering or restricting access to the easement. The area in which the easement is located is owned by Development Company. The trial court granted a preliminary injunction in favor of Landowners' Association and ordered that all remaining owners of property in the area be joined as parties to the action. Landowners' Association appealed the court's order for joinder. On review of the interlocutory appeal, the Court of Appeals of North Carolina reviewed whether the order itself affected a substantial right of the Landowners' Association sufficiently to warrant the interlocutory appeal. Landowners' Association argued that the order's requirement to join other landowners in the area deprived it of a substantial right by eliminating its individual property rights and replacing these rights with a group property right, which it claimed only exists when exercised along with other Landowners. The Appellate Court found that Landowners' Association failed to prove a substantial right to seek declaratory relief, without joinder

of other necessary parties who had claims and interests in the property at issue that would be effected by the court's order. Thus, the court found that the order of the trial court did not effect a substantial right of Landowner's association, and the interlocutory appeal was dismissed.

Texas

City of Richardson v. Oncor Elec. Delivery, 539 S.W.3d 252 (Tex. 2018).

This case set out to determine whether Electric Distributor ("Utility") or City was responsible for payments associated with electric utility infrastructure relocation of utility poles, wires, and related equipment, after the widening of a public alleyways. Parties filed suit against one another in response to City's request that Utility move its infrastructure, at its own expense, after widening of City's alleyway. Under Texas statutory and common law, utilities must bear relocation or removal costs of any equipment placed in public rights-of-way upon the reasonable request of the municipality. Additionally, this requirement was incorporated into the contract between Utility and City. However, Utility argued that a newly adopted tariff – a schedule of the utility containing rates, regulations, and other items concerning the relationship with its customers – relieved Utility from its duty to pay relocation costs. The Supreme Court of Texas found that (1) the contract between Utility and City governed when a municipality requests utility relocation for public rights-of-way purposes, and alternatively (2) the tariff would govern when the municipality was acting as an end-use customer in its request. Therefore, in this case, common and statutory law would be controlling, and Utility would be responsible for the relocation costs of the electric utility infrastructure.

XTO Energy, Inc. v. EOG Res., Inc., No. 04–17–00046–CV, 2018 WL 1610940 (Tex. App. Apr. 4, 2018).

In a title dispute over a mineral estate, Producer sought a declaration of ownership over Landowners. The dispute arose regarding a clause in the deed granting title to Landowners, which authorized grantor to convey title to the 7/8 mineral interest free and clear of a Lien and Deed of Trust lien to Landowners. Producer filed a trespass-to-try title suit against Landowners claiming that it owned the full mineral interest pursuant to the Deed. At trial, the lower court found that according to the chain of title, all of the rights and interest in the mineral estate belonged to Landowners and their predecessors-in-interest. Producer appealed claiming Landowners failed to

carry their burden for summary judgment to establish superior title to the Mineral Estate and that it had carried its own burden in showing its ownership of the Mineral Estate. The parties presented competing interpretations of the clause in the deed at issue. The appellate court chose to look at the plain language of the clause in its interpretation. Based on the four corners and the plain language of the deed, the court ruled that the Landowners were in fact the owners of the mineral estate, and the trial court properly granted summary judgment.

Other Land Issues – Federal

E.D. Kentucky

M.L. Johnson Family Props., LLC v. Zinke, No. 7:16–CV–6–KKC, 2018 WL 1413380 (E.D. Ky. Mar. 21, 2018).

This case arises out of a dispute between common owners regarding whether their collectively held property should be opened up for mining. Owner-1 requested judicial review, bringing this challenge of the administrative decision in favor of Owner-2, effectively terminating a mining cessation order and allow mining activity on the property. The "right to enter and surface mine" was conveyed under the authority of the Surface Mining Control and Reclamation Act, which requires that the mining operations must be agreed to by owners or be consistent with relevant state law. Owner-2 claimed that this regulation allowed the mining activity to be valid even without all consent because of the applicability of state co-tenancy laws, since the mining regulations "should not be interpreted as preempting common law rights of entry." The court affirmed the administrative decision to allow the mining permit and activity, using the *Chevron* test for deference to the administrative agency, essentially determining that the relevant statute was not ambiguous and the agency's actions were not unreasonable. The court denied Owner-1's motion for summary judgment and granted cross-motions for summary judgment filed by mining company and by the reviewing administrative department in support of Owner-2. Please note that this decision has been appealed to the Sixth Circuit.

Federal Claims

Waverley View Inv'rs, LLC v. United States, 136 Fed. Cl. 593 (Fed. Cl. 2018).

Landowner sued United States, claiming that Army affected a permanent physical taking of Landowner's property when it installed a gravel access well and monitoring wells. The trial court determined that Landowner was entitled to $1.06 per square foot of the property physically occupied by Army, but neither party could provide the court with an estimate of the area. Landowner claimed that Army occupied 53,353 square feet of the property, while Army claimed that it occupied only 29,928 square feet. However, the court determined that because Army failed to include a twenty-five foot "buffer zone" to allow for maneuverability and routine use in their calculations, Landowner's calculation was proper, and that calculation of property occupied by Army was the proper measurement. Please note, an appeal has since been filed by Landowner to the Federal Circuit.

N.D. California

State v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054 (N.D. Cal. 2018).

State opposed Agency's action suspending or relaxing its regulations on natural gas waste management and conservation and seeking a preliminary injunction. Intervenors and Agency requested a transfer to District of Wyoming because of a related case in that jurisdiction. However, the court here stated that the claims were too different, involving separate legal issues, even though the subject rules were somewhat correlated. Agency did not show that the transfer would be best overall and clearly in its favor, which it must do to effectively request transfer. Convenience for all parties involved is still a dominant factor considered, even when the cases are directly related. Further, it was not imperative for the "interests of justice" that the case be reviewed along with the case regarding the underlying regulation in Wyoming. The court held that Agency must have some legitimate justification for the suspension rule and the change in its regulations. The court held that such changes cannot be inconsistent with the general scheme of regulations without some good reason. The court also found that there was no evidence that the original rule negatively impacted the energy sector or had other significant negative effects, so the suspension rule was not well-supported as a necessary measure. The court offered that,

in this case, it was not tasked with reviewing the underlying rule, rather, merely whether the change in rules was justified by Agency. The court granted State's request for a preliminary injunction due to the high likelihood that State would win its challenge, because Agency's action was not significantly supported with good evidence. Also, the court held that State suffered "irreparable injury caused by the waste of publicly owned natural gas, increased air pollution and associated health impacts, and exacerbated climate impacts." Therefore, the court determined that State would continue to suffer additional harm via "significant and imminent" air pollution if the preliminary injunction was not granted.

N.D. New York

Cooper Crouse-Hinds, LLC v. City of Syracuse, No. 16-CV-1201 (MAD/ATB), 2018 WL 840056 (N.D.N.Y. Feb. 12, 2018).

Companies ("Company") sued City and County over two consent orders regarding company's landfill site ("Site"). Company sought relief under CERCLA and several state law claims, and City moved to dismiss. The district court found that Company may proceed under section 107 of CERCLA regarding one consent order "[b]ecause [it] does not resolve [company's] liability." As for another consent order in which liability is conditioned upon a "certificate of completion," the Second Circuit has not resolved that issue and district courts have split as to whether conditional liability will allow a party to go forward under section 113(f)(3)(B). The court did not decide that issue considering the parties did not sufficiently brief it. As for the state law claims, all but one were dismissed for "failure to comply with the relevant notice-of-claim requirements." Company's claim for breach of contract against County survive the motion to dismiss, however, because it is timely and not preempted by CERCLA considering the CERCLA issues are still unresolved.

Other Land Issues – State

California

Citizens for Open & Pub. Participation v. City of Montebello, B277060, 2018 WL 636250 (Cal. Ct. App. Jan. 31, 2018).

Advocacy Group ("Advocate") claimed that City improperly approved and enabled development of a residential real estate project. Specifically,

Advocate challenged the trial court's finding (1) that City did not violate the Ralph M. Brown Act or local planning and zoning laws and (2) that the court abused its discretion in striking portions of Advocate's brief as outside the scope of its claims. The California appellate court began by reviewing the brief's claims and held that the trial court was properly within its authority to exclude portions of Advocate's brief. Next the court analyzed the Brown Act which places public notice requirements on local agencies regarding the project being considered for approval before a meeting is held. Advocate claimed that notice was properly given to the public via paper notice but that the location of meeting was mistakenly listed on City's website. The appellate court held that City had complied with the act and that the mistake was not prejudicial. Lastly, the court addressed whether the approved project was outside of the general plan of City's planning and zoning laws. However, the court held that the project was not inconsistent with City's general housing plan. Please note that this is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing the case as precedent.

Florida

Pelican Creek Homeowners, LLC v. Pulverenti, No. 5D16–4046, 2018 WL 664239 (Fla. Dist. Ct. App. Feb. 2, 2018).

Property Owners appeal the denial of an injunction seeking to remove Dock Owners' boathouse and dock from their property. The dispute arises from a dedication in 1960 by the property developers. To determine who owns the property, the court had to determine three issues: (1) was the dedication a common law dedication or a statutory dedication, (2) did the developer reserve the land to itself in the dedication, and (3) how much land was subject to the dedication. The court concluded that the dedication was a common law dedication because the dedication itself did not reference the state statute governing statutory dedications and the parties did not intend to form a statutory dedication. The court then concluded that the developer did not reserve the land to itself because it was not clearly provided in the dedication and the general rule is that a dedication does not reserve any rights to the conveyor unless expressly stated in the dedication. Finally, the court concluded that all of the land is subject to the dedication and therefore the Property Owners own the property dedicated in the conveyance. The general rule is that abutting land owners each receive half of the property dedicated. However, the exception to this rule is where the dedication is of

land at the edge of the plat, which is applicable here. Under the exception, abutting land owners receive full ownership of the property dedicated.

Louisiana

St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., 2017-0434 (La. 1/30/18); 239 So. 3d 243.

Port Authority selected Land Owner's property for expropriation in order to facilitate expansion. Land Owner removed the expropriation case to a federal court, which rejected Land Owner's request for dismissal and found in favor of Port Authority on the ultimate purchase price for the land. An appellate court affirmed the trial court's ruling, and Land Owner appealed to the Supreme Court of Louisiana. The Court affirmed in part, holding that nothing in the record indicated that the trial court was "manifestly erroneous" in its findings that Port Authority's intended use of the property (1) qualified as a "Public Purpose," as the state constitutionally required for such a taking, and (2) qualified under the "business enterprise clause," and was neither to halt Land Owner's revenue stream nor halt its competition. The Court also held though that the trial court used the wrong standard in evaluating Property Owner's claim that the land was not valuated under the proper presumption that the land would be used to its "highest and best use." The Court also held that the appellate court's failure to use a *de novo* standard of review on the issue exacerbated the error. Accordingly, the Court affirmed in part and reversed in part, remanding the case for a proper determination on the question of what amount would constitute just compensation in this case.

Nebraska

Cain v. Custer Cty Bd. of Equalization, 906 N.W.2d 285 (Neb. 2018).

County Assessor ("Assessor") raised the value of Property Owner's property, increasing the property tax by nearly 250 percent, primarily due to Assessor's re-classification of the property away from "irrigated grassland." Property Owner protested the assessment due to the fact that he had not been granted an evidentiary hearing before the County Board of Equalization. Property Owner petitioned Tax Equalization and Review Commission ("TERC"), which affirmed Assessor's increased evaluations. Property Owner appealed, resulting in a finding of plain error and reversal,

remanding the case to the TERC, which then issued a new order reversing Assessor's evaluations for three of the ten parcels of property in question, but once again affirming the other seven parcels. Property Owner appealed once more. The Supreme Court of Nebraska held that: (1) Property Owner's due process rights were not violated because there is no due process right to oral argument specifically; (2) TERC's decision to disregard Property Owner's testimony—and that of a real estate appraiser—as evidence in its determination resulted in an erroneous evidentiary standard being followed; and (3) that Property Owner satisfied his burden to show "by a preponderance of the evidence" that Assessor's valuation was excessive. The Court also held that a lower number was appropriate, providing the total valuation of Property Owner's land. Based on these holdings, the Court reversed and remanded for further proceedings consistent with its judgment.

New Jersey

Rapisardi v. Lange, No. A–3722–16T2, 2018 WL 1473918 (N.J. Super. Ct. App. Div. Mar. 27, 2018).

Landowner-1 sued Landowner-2 for trespass, alleging that Landowner-2's boat ramp that extended over Landowner-1's small strip of land violated his riparian rights. Landowner-2 argued that while the ramp did extend over that small strip of land, it was irrelevant because the land was completely submerged under water and below the mean high-water mark of the creek. The trial court held that the small strip of submerged land was granted to Landowner-1 by the State and was a riparian grant, rather than a riparian right. Therefore, Landowner-1 did not possess the exclusive right to use that land. The appellate court affirmed, explaining that there is a difference between a riparian right and a riparian grant, which is a separate estate in land. Landowner-1 lost title to the small strip of land once it became submerged below the mean high-water mark, and can therefore not restrict access to the creek from Landowner-2's property. Please note that this is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Ohio

Wendt v. Dickerson, 2018-Ohio-1034, No. 2017 AP 08 0024, 2018 WL 1391624.

Surface Owner initially brought a claim against Mineral Owner, asserting its rights to all severed mineral interest in the subject property. Surface Owner appealed a lower court decision denying its motion for summary judgment against Mineral Owner, which was brought after significant legal history regarding this issue between the two parties. Surface Owner attempted to gain mineral rights through the state's Dormant Mineral Act, asserting that its mineral interest in the property had vested through the inaction of Mineral Owners. The court affirmed the lower court's decision to deny Surface Owner's motion for summary judgment, determining that Mineral Owner had taken appropriate steps in accordance with the relevant state laws to assert and protect its mineral interest in the subject property. Accordingly, such property was not determined to be judicially abandoned. The court also disagreed with Surface Owner's claim that a potential dormant mineral interest was a vested property interest and held that such an interest was not considered a taking or violation of due process.

Tennessee

Harakas Constr., Inc. v. Metro. Gov't of Nashville and Davidson Cty., No. M2016–01540–COA–R–CV, 2018 WL 583919 (Tenn. Ct. App. Jan. 29, 2018).

Construction Company ("Company") filed suit against Local Government and Developer after all three parties' work on a sewer line project for a local condominium project led Company to miss out on promised payment from the project. The trial court granted motions for summary judgment by both Local Government and Developer, holding that Local Government had sovereign immunity and was thus precluded from the suit, and that the suit against Developer was insufficient because (1) Developer had shown that its operations met the standard of care required for the work performed, and (2) Company's negligence allegation against Developer was not the proximate cause of any harm to Company, because all harm in question was caused by the original financer of the project filing for bankruptcy. In response, Company appealed the dismissal of both claims. The Court of Appeals of Tennessee held that: (1) no exception existed which erased or

caused Local Government's sovereign immunity to be waived in this case; (2) because no statement was made which Company could have detrimentally relied on, Government was not estopped from using such a defense; and (3) because the evidence in the record supported the trial court's decision, there was no error in the granting of summary judgment to Developer. Accordingly, the court affirmed the decisions of the trial court.

Texas

Bush v. Lone Oak Club, LLC, No. 01-17-00140-CV, 2018 WL 1003540 (Tex. App. Feb. 22, 2018).

Landowner sued Texas Land Commission ("Commission"), alleging ownership of the bed of a bayou on their property. Commissioner had previously determined that the beds of tidally influenced watercourses were owned by Texas and subject to public use. Landowner argued that the Commission had attempted to "cloud" or "impair" its title by claiming state ownership and was interfering with Landowner's right to possession and quiet enjoyment of the property by encouraging public use of the contested waterways. Because the court found supporting state law on "watercourse or navigable stream" as not excluding water that is "tidally affected," the court found that the non-conveyance of land influenced by State-owned water deprived Landowner.

SELECTED ELECTRICITY DECISIONS

Traditional Generation

New Mexico

New Energy Econ., Inc. v. New Mexico Pub. Reg. Comm'n, No. S-1-SC-35697, 2018 WL 1149928 (N.M. Mar. 5, 2018).

The Public Service Company of New Mexico ("PNM") is part-owner and operator of the San Juan Regional Generation Station ("San Juan Plant"). The San Juan Plant consists of four coal-powered units and is subject to large production of emissions that cause or contribute to haze. PNM held multiple hearings and discussions with the New Mexico Governor and other interested parties to determine the best way for PNM to comply with the Federal Clean Air Act. Meeting participants determined that the best way to do so was to retire two of the units at the San Juan Plant. Regulatory Commission rejected this plan because PNM could not produce evidence of capability of replacing the lost production from the two retired units. After hiring a hearing examiner to address the merits of the application for shutting down the units and submitting multiple supplemental stipulations, the hearing examiner advised Regulatory Commission to accept the application subject to multiple additional stipulations. Energy Advocate objected multiple times throughout the process, alleging that Regulatory Commission accepted PNM's limited alternatives in violation of the law and challenged the final decision in the Supreme Court of New Mexico. The Court ultimately held that Regulatory Commission comprehensively considered the merits of PNM's proposals during multiple different stipulation proceedings and that its decision to support the proposal and dismiss the protests against it was lawful.

Renewable Generation – Federal

D. Colorado

SPower Dev. Co. v. Colorado Pub. Util. Comm'n, No. 17–cv–00683–CMA–NYW, 2018 WL 1014142 (D. Colo. Feb. 22, 2018).

Company filed claims for injunctive relief and declaratory judgment, claiming that it was restricted from contracting its quality facilities ("QF") with a utility without a specific bidding process, which is in conflict with

the Federal Energy and Regulatory Commission's ("FERC") regulations on such activity. Commission filed a Motion to Dismiss, claiming that since Company had an opportunity to participate in electronic resource planning ("ERP"), which would have allowed it to contract with utilities outside of a bidding process, its challenge to the regulation was not substantiated with a legitimate injury. Therefore, it had no standing to bring a claim. The court disagreed with this argument, stating that it was irrelevant whether or not Company could participate in ERP, since it still suffered an injury, which was caused by Commission's action. The court also addressed the argument that it should take a "Burford abstention," essentially leaving complicated state-related matters to state courts. The court held that a situation calling for such an abstention is rare and not relevant for this case because this case involved preemption of federal rules and was thus appropriate for a federal court. The court accordingly denied Commission's Motion to Dismiss.

Renewable Generation – State

Arizona

SolarCity Corp. v. Arizona Dep't of Revenue, 413 P.3d 678 (Ariz. 2018).

Solar Producer sued State, seeking tax-friendly treatment on solar panels installed on the properties of Solar Producer's customers. Because the solar panels are considered to have no value under the relevant tax code, Solar Producer argued that the equipment should be assessed as having "zero value". The Supreme Court of Arizona concluded that State's department of revenue does not have the statutory authority to value Solar Producer's panels and, therefore, remanded the case to the lower court to determine whether county assessors possess the valuation authority. The court found that because Solar Producer profited through leasing the panels to its customers, the panels should be valued under the tax code's business personal property classification rather than as personal property.

Maryland

Dan's Mountain Wind Force, LLC v. Allegany Cty. Bd. of Zoning Appeals, 2018 WL 774760 (Md. Ct. Spec. App. 2018).

Constructor seeking to build wind turbines on leased property applied for variances and special exceptions from the Board of Zoning ("Board")

because the areas in which it desired to construct the turbines were within separation distances. Board denied the request for variances citing that Constructor failed to show the areas of land were sufficiently unique to each other that the multiple number of variances requested were in harmony with the spirit and intent of the zoning regulations, as required by state law for the issuance of a variance. Constructor appealed this denial of variances to the Court of Special Appeals of Maryland. The appellate court found that Board applied the incorrect standard in reviewing Constructor's application. It held that Board improperly found that the areas were not unique because they were similar to each other. Because Board failed to apply the proper standards and analysis for the variance application, the appellate court remanded the case back to Board to apply the proper analyses without making any decisions on the merits of the case. Please note that this is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing the case as precedent.

New Jersey

Napier v. Pub. Serv. Elec. & Gas Co., A–4408–15T2, 2018 WL 1308868 (N.J. Super. Ct. App. Div. Mar. 14, 2018).

Complainant filed a claim asserting that Company was receiving more renewable energy credits than it should be, based on its own formula for calculations. Complainant also claimed that Company failed to comply with regulations regarding energy reporting. These claims were brought on behalf of a group, with Complainant as an interested party. The claims, based on "unfair competition and unjust enrichment," were brought due to the negative economic impact caused by the undervaluing of such credits, which was a result of Company's actions. Upon review, the ALJ determined that there was "no issue of material fact" and granted Company's motion for summary judgment. On appeal, the trial court granted a motion to dismiss brought by Company, because Complainant did not bring a claim that could be granted relief. The court also agreed with the lower court that Complainant's discovery requests were not necessary and could be denied because Company had already responded adequately. First, the court ultimately affirmed the lower court's decision because (1) Board did approve the method of calculation and measurement of the credits, and (2) such methods were in accordance with Board's regulations, despite Complainant's assertion to the contrary. The court determined that when Board approved Company's metering

program, it, in effect, allowed and approved such methods. Second, even though Complainant claimed that Company failed to show that Complainant did not present a genuine issue of fact, the burden to be met was not assigned to Company. Though the court affirmed the lower court's decision, it also designated the dismissal to be without prejudice, so that Complainant could bring potential future meritorious claims. Please note that this is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing the case as precedent.

Virginia

Virginia Elec. & Power Co. v. State Corp. Comm'n, 810 S.E.2d 880 (Va. 2018).

Service Provider filed suit with the State Corporation Commission seeking declaratory judgment order asserting its right to sell electricity provided from renewable energy to large customers within the operating territory of Public Service Company authorized by the state to provide electricity. Normally, large customers would be subject to five-years' advance notice requirement if they wished to return to Public Service Company. The State Corporation Commission determined that large customers could purchase electricity provided from renewable energy from competitive service provider without being subject to notice requirement. Public Service Company appealed. The Supreme Court of Virginia affirmed the order of the State Corporation Commission, holding that certain large customers may purchase electricity from any licensed supplier of energy in the state without being subject to the statutory notice requirement. It found that customers who satisfy the size requirements of the statutory definition of "large" could purchase electricity from a competitive service provider under section (A)(5), so long as they satisfied other requirements under the statute. However, the 5-year notice requirement doesn't apply to purchases of electric energy provided by renewable energy from competitive providers.

Rates – Federal

D.C. Circuit

Nw. Corp. v. Fed. Energy Regulatory Comm'n, 884 F.3d 1176 (D.C. Cir. 2018).

Utility requested review of Federal Energy Regulation Commission's ("FERC") order requiring that Utility revise their framework for charges to customers, and determining that such charges were "not just and reasonable." Commission allows utilities to charge utility customers additional rates to compensate for extra energy production and used to balance electricity demands, called "regulation service." However, while charges for this additional power produced are allowed to be charged generally to customers, they still must be "just and reasonable." After struggling to meet demand while still maintaining cost efficiency, Utility constructed a new facility to generate additional power and make "regulation service" more effective. Utility attempted to transfer the costs of this new facility to its customers in the same way that it had the previous regulation costs. Commission found Utility's modifications to its rates, which imposed these additional costs, to be unreasonable and required it to compensate its customers for these charges. The Court of Appeals for the District of Columbia determined that this was an "overcollection" case rather than a "cost-allocation" case, as Utility asserted, which made a difference in what precedent was applied and whether a refund was appropriate. Thus, the court held in favor of Commission, finding Commission's decision "reasonable and reasonably explained."

Rates – State

Arizona

Freeport Minerals Corp. v. Arizona Corp. Comm'n, No. 2 CA-CC 2017-0001, 2018 WL 1633287 (Ariz. Ct. App. Apr. 5, 2018).

Electric utility service provider ("Utility") filed a notice of intent to change its rates in 2015 to increase its return on invested capital. Many government bodies, advocacy groups, and corporations intervened, and multiple settlement discussions followed. Over the process of settlement, Utility agreed to lower the total revenue increase it sought. However,

nothing was changed concerning allocation among rate classes. Upon review of the revenue allocation, the Arizona Corporation Commission ("Commission") adopted a nearly identical allocation scheme as was proposed by Utility despite challenges and objections by Oil Company and others. Subject to Commission's decision, Oil Company requested review challenging alleged constitutional and statutory violations of the allocation portion of the decision. Oil Company also proposed alternative rate allocations. However, on appeal, the court determined that Commission was empowered by the Arizona Constitution to have sole discretion in rate allocation. The appellate court also concluded that Oil Company failed to clearly demonstrate that Commission's decision was arbitrary, unlawful, or lacked substantial evidence. Thus, the court accordingly affirmed the lower court's ruling.

SELECTED TECHNOLOGY AND BUSINESS DECISIONS

Bankruptcy

S.D. Texas

Oklahoma State Treasurer v. Linn Operating Inc., No. 6:17-CV-0066, 2018 WL 1535354 (S.D. Tex. Mar. 29, 2018).

Operator voluntarily filed for Chapter 11 relief in Bankruptcy Court. Operator, in its application, requested that claims of owners of approximately $1,000,000 in unclaimed royalties held by Operator would be discharged upon confirmation of the plan and thus Operator would hold on to royalties. The bankruptcy court approved the plan, but the State Treasurer filed an adverse action seeking proof of claims against Operator seeking possession of all unclaimed royalties, specifically $965,000 in oil and gas production proceeds it characterized as abandoned property. The bankruptcy court dismissed Treasurer's complaint after finding that the claim was merely a post-confirmation collateral attack on the debtor's plan. Treasurer appealed the dismissal of the claim to the Southern District of Texas. On appeal, the court reversed the lower court and ruled that the unclaimed oil and gas royalties were held in trust by Operator for the Landowners. Thus, the unclaimed royalties were never property of Operator and were not properties subject to the bankruptcy court's jurisdiction or to confirmation of Operator's Chapter 11 plan.

Intellectual Property

Federal Circuit

Paice LLC v. Ford Motor Co., 881 F.3d 894 (Fed. Cir. 2018).

Automobile Technology Company ("Tech Company") filed suit against Automobile Manufacturer ("Manufacturer") for patent infringement on several different patents for "hybrid vehicle technology." Automobile Manufacturer then filed several inter partes review petitions, which were reviewed by Patent Trial and Appeal Board ("PTAB"), which invalidated several of Company's claims as obvious and unpatentable. Company appealed. The Federal Circuit Court of Appeals held that: (1) PTAB's finding that a previously issued patent rendered several of Tech Company's claims obvious was supported by sufficient evidence; (2) a previous

publication, which qualified nominally as "prior art" to the patents at issue in this case, was not actually prior art based on the language included in the text of a previous application by parties to this case; thus, (3) the patents invalidated by PTAB based on that previous publication were cast aside incorrectly. Accordingly, the Federal Circuit affirmed PTAB's determinations on thirteen of the patent's claims, and vacated Board's determination on six claims, remanding the case for further proceedings consistent with the court's holdings.

E.D. Texas

EnerPol, LLC v. Schlumberger Tech. Corp., No. 2:17-CV-00394-JRG, 2018 WL 1335191 (E.D. Tex. Mar. 15, 2018).

This case concerns the proper construction of claim terms in a patent application for a degradable polymer made to assist in the process of creating fractures in the subsurface during oil and gas fracking. The parties were in dispute concerning the term "polymer-continuous liquid phase." Company-1 contended that the phrase constituted two terms while Company-2 construed it as only one term. Company-1 also proposed that the term "polymer continuous" entails a network of polymer while Company-2 contended it is simply a polymer. Finally, the parties disputed whether or not the term "liquid phase" meant the polymer must be entirely in liquid form as claimed by Company-2. In this phrase, the court seemed to find a middle ground, determining that the term meant "polymer in a liquid state that is greater than fifty percent (50%) by volume of the fluid that does the fracturing in the formation." The court further defined the terms "selected" and "low viscosity" as having their ordinary meanings and "solid form" as meaning "solid bulk form."

Other Issues – Federal

D. North Dakota

El Petron Enters., LLC v. Whiting Res. Corp., No. 1:16–cv–090, 2018 WL 1322391 (D.N.D. Mar. 14, 2018).

Lessee sued Distributor, alleging that Distributor had improperly deducted from the overriding royal interests of Lessee. Lessee argued that Distributor's deduction for third-party post-production costs was improper because of language in the assignment's overriding royalty reservation.

Distributor claimed that the "free and clear of all costs" language in the assignment described the free-of-production-costs feature of an overriding royalty, while Lessee contended that the language changed the "at the well" rule with respect to post-production costs. Citing North Dakota Supreme Court precedent, the district court held that Distributor should include post-production costs in assessing an overriding royalty's value, but Distributor cannot deduct costs from that sum. The court determined that Distributor could properly deduct post-production costs when used in the Production Royalty calculation.

Other Issues – State

Colorado

Maralex Res., Inc. v. Colorado Oil & Gas Conservation Comm'n, 2018 COA 40, No. 17CA0051, 2018 WL 1417462.

Operator challenged both the search and finding of violations through the search by Commission. Commission's search revealed several ongoing violations, including contaminated soil and equipment not being properly stored. The Colorado appellate court held that Commission's search was not a constitutional violation because the industry is "closely regulated." Additionally, the search satisfied a multi-part test that requires: (1) a legitimate government or public interest, (2) that the search is required to carry out that government interest; and (3) that the search is part of a regular or routine schedule and was not completely unforeseeable. Since Commission's searches were intended and required to monitor oil and gas sites and were conducted on a relatively consistent schedule, the test was satisfied. The court also found that Operator's claim of interference with the surface estate was not persuasive because an expansive "surface use agreement" was in place between Operator as an entity and surface owner (surface owner owns the company and also acts as Operator). The court disagreed with the decision of Commission and the lower court in only one respect: the court reversed the district court's support of Commission's finding that Operator did not reasonably provide Commission access to the subject property. According to the court, this finding was arbitrary and capricious on the part of Commission. Ultimately, the court held that Commission's search of Operator's premises, while impromptu, was not in violation of the state constitution's protections, even though Operator's family resided on the property. The court reversed and remanded the district

court's decision regarding the one violation mentioned above but affirmed the other elements of the decision.

Illinois

Rogers Cartage Co. v. Travelers Indem. Co., 2018 IL App (5th) 160098, No. 5–16–0098, 2018 WL 1661799.

Insurer breached its duty to Policyholder when it refused to defend and indemnify Policyholder's $7,500,000 settlement in an underlying suit disputing responsibility of toxic spill cleanups in Illinois. The lower court found that Insurer's failure to settle was in bad faith and Insurer therefore had a duty to pay the settlement. In addition, the court awarded Policyholder attorney fees. Insurer appealed and argued that the policy's pollution exclusions applied and barred coverage because Policyholder intended or expected contamination to result from its actions and because Policyholder's toxic discharge was illegal. The Illinois appellate court upheld the lower court's finding and held that Insurer breached its duty to defend by threatening to end coverage if Policyholder settled. Due to the breach of Insurer's duty to defend, Insurer was estopped from raising defenses to coverage. Additionally, the court held that even if Insurer did not breach this duty, its arguments against coverage held no merit. The court further held that Policyholder did not intend to cause contamination, it took measures to contain toxins, and there was insufficient evidence to show that Policyholder's actions were illegal. Appellate court also upheld the lower court's award for attorney's fees.

Louisiana

Red Sox Invs., LLC v. City of Shreveport, 51-817 (La. App. 2 Cir. 2/28/18) No. 51,817-CA, 2018 WL 1076799.

This case involves the treatment of several tracts of land that had been adjudicated to City after the property in question failed to be sold at tax sale. After the failed sale, City executed mineral leases on the adjudicated properties. Property Owner claimed that the City illegally took the property, misallocated mineral lease revenue from the properties, and denied other owners the opportunity to execute mineral leases on the affected properties. Property Owner claimed that any lease revenue was to be applied toward past-due taxes and any amounts over given to the property owners. City claimed that the law requiring the distribution of lease revenue did not

apply to mineral leases. Ultimately, the Court of Appeals of Louisiana agreed and held that City adequately followed the procedure following the tax sale and that Property Owner was not deprived of the right to lease the minerals in question and could have done so before City.

Texas

ConocoPhillips Co. v. Koopmann, 61 Tex. Sup. Ct. J. 605 (Tex. Mar. 23, 2018).

Lessee requested review of a lower court decision to determine whether the rule against perpetuities was violated by a lease clause allowing a distinction for Lessor to hold a non-participating royalty interest "as long thereafter as there is production" from a well. The Supreme Court of Texas held that such interest was not eliminated because the referenced interested was actually "certain to vest" at the time of the lease, even though it was a future interest. Additionally, the Court noted that since this was a mineral interest, the issues that accompany the rule against perpetuities, like the feared restrictions on alienability, are not applicable as in a case of conveyance of property. The Court also held, however, that the savings clause contained in the lease, specifically the provision of "other similar payments," was too ambiguous, did not provide adequate clarity, and could not be considered a reflection of the intent of each party. Accordingly, the Court agreed with the lower court that the ambiguity of the savings clause required further review and interpretation. The Court also affirmed the appellate court's decisions regarding attorney's fees and that Lessor's claim for breach of contract was not barred by the state Natural Resources Code.

SELECTED ENVIRONMENTAL DECISIONS

Federal

9th Circuit

TDY Holdings, LLC v. United States, 885 F.3d 1142 (9th Cir. 2018).

This opinion is an amended decision of a case that was summarized in a previous volume of the ONE-J journal. The present opinion denied a petition for rehearing. For the full summary of the previous opinion, please see Volume 3.5, at page 1291.

10th Circuit

Donelson v. United States, No. 16-5174, 2018 WL 1638825 (10th Cir. Apr. 5, 2018).

Through a class action suit, Complainants appealed Department's decision to approve regulatory oil and gas activity because the party claimed such activity violated NEPA and its private property rights. Complainants asserted a trespass tort claim, requesting monetary damages and injunctive relief from such activity. Specifically, Complainants claimed that there was no follow up activity or monitoring regarding an initial Environmental Assessment conducted by the Bureau of Indian Affairs in order to assess potential impacts of the oil and gas leases and activity permits, even after the details of such oil and gas arrangements had changed. Complainants own surface interests in land which are also involved, via the severed mineral interests, in oil and gas leasing conducted and approved by the Bureau of Indian Affairs. The Tenth Circuit Court of Appeals affirmed the lower court's decision, finding that Complainants' claims were appropriately dismissed due to Complainants' failure to "adequately identify the particular agency actions that aggrieve them and explain how they are final." According to the court, Complainants ultimately lacked standing and the courts lacked jurisdiction to hear such a claim due to the inadequacy of the supporting information provided. Please note that this is an unpublished opinion of the court. Therefore, state or federal court rules should be consulted before citing the case as precedent.

D.C. Circuit

Sierra Club v. EPA, 884 F.3d 1185 (D.C. Cir. 2018).

After EPA proposed new, revised regulations regarding air quality, the proposed rules were challenged by Advocates. Advocates challenged in two ways. First, Advocates claimed that a regulation purporting to control organic pollutant emissions was modified in a way that was inconsistent with the Clean Air Act ("CAA"). Second, Advocates claimed that the regulations that controlled operations of boilers were too lax, neglecting to impose technical pollutant requirements and imposing "qualitative 'work practice' standards" or recommendations to initiate boiler operations "as expeditiously as possible." The Court of Appeals for the District of Columbia held that Advocates' first challenge was valid but that the second was not. Because EPA did not provide enough support for its change to organic pollutant limits and its deviation from existing standards, Advocates' challenge was granted regarding that claim. However, the second challenge to EPA's proposed modified regulations was denied because such standards, even though not precise, are reasonable estimates and so were still consistent with the existing regulations.

D. District of Columbia

Nat. Res. Def. Council, Inc. v. EPA, No. 16–1861 (JDB), 2018 WL 1568882 (D.D.C. Mar. 30, 2018).

In accordance with the Clean Water Act ("CWA"), which requires states to develop plans to regulate water pollution levels, Maryland and the District of Columbia together developed a plan to control the amount of trash in the Anacostia River. But, rather than set "total maximum daily load" ("TMDL") of pollutants may enter the river, as is discussed in the CWA, the two jurisdictions instead jointly created a water quality plan ("Plan") establishing a minimum amount of waste to be removed or prevented from entering the river in order to satisfy the water quality standards. Consequently, Environmental Advocacy Organization ("Environmental Organization") filed suit, challenging EPA's approval of the Plan and contending that its proposed approach would be inconsistent with the language of the CWA. Ultimately, the United States District Court for the District of Columbia found for Environmental Organization noting that the Plan, as currently laid out, did not adequately establish a "maximum daily load" consistent with the plain language and meaning of the phrase as used

in the CWA. As such, approval of the Plan was vacated and remanded to the EPA.

D. Montana

W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt., No. CV 16-21-GF-BMM, 2018 WL 1475470 (D. Mont. Mar. 26, 2018).

Conservation Advocates challenged the Bureau of Land Management's ("BLM") plan revisions related to habitat management of federally owned lands throughout Colorado, Montana, North Dakota, South Dakota, and Wyoming. Conservation Advocates sought recourse from a variety of environmental claims based on BLM's alleged violation of the National Environmental Policy Act. The district court ruled that, because the BLM did not entirely update the plans to reflect a full consideration of climate change impacts on resources, BLM would be required to prepare environmental analyses to supplement the existing updated management plan. The court did not make a final ruling on Conservation Advocate's request to enjoin the leasing or development of energy resources on the effected land. The court found the BLM's failure to develop alternative levels of potential coal development as inadequate for allowing the BLM's to make a "reasoned choice" about the best course of action as to closing land for coal mining.

N.D. Illinois

Hammond, Kennedy, Whitney & Co. v. Honeywell Int'l, Inc., No. 16-cv-9808, 2018 WL 587182 (N.D. Ill. Jan. 29, 2018).

Manufacturer acquired, via a stock purchase, a property that was later found to have contamination due to underground gas storage tanks. Attorney, acting on behalf of the property's predecessor, filed suit seeking a declaratory judgment that Attorney would not have to indemnify Manufacture for environmental cleanup and related costs at the site. As required by state law, once the contamination was discovered and certain level of pollutants detected, Manufacturer notified the state and relayed to Attorney that the stock purchase agreement provided for indemnification for the contamination. Attorney brought suit seeking a declaration that Attorney was under no duty to indemnify Manufacturer for the remediation and associated costs arising out of the storage tank contamination. The stock purchase agreement was governed by New York law, while the

environmental claims were subject to the laws of Indiana, the state in which the contamination took place. The stock purchase agreement contained warranties and indemnity provisions outlining Manufacturer's process for future environmental issues. The court found that Attorney did not meets its burden in seeking the declaration from the court. Manufacturer properly notified Attorney of the breach of warranty, the reasoning for the warranty claims, and the legal duty and requirement for Manufacturer to remediate. Therefore, the United States District Court for the Northern District of Illinois, Eastern Division, found that Attorney failed to prove that no material fact existed regarding Manufacturer's remediation claims.

W.D. Pennsylvania

EQT Prod. Co. v. Terra Servs., LLC, No. 14-1053, 2018 WL 658871 (W.D. Pa. Feb. 1, 2018).

Operator filed suit against Water Treatment Company ("Company") for breach of express warranty, breach of contract, contractual indemnification, and common law indemnification for Company's actions resulting in damage which caused "leakage of impaired fluids . . . into surrounding land and water." Company filed for partial summary judgment on its claim for attorney's fees in the action, and on Operator's Petition for Review of the civil penalty assessed against it by the Environmental Hearing Board ("Board"). The Pennsylvania district court found that (1) there was no basis in the language of the contract for Company's assertion that the document directly contemplated the allowance of attorney's fees; (2) the Restatement of Contracts was inapplicable, and the facts of this particular instance were enough that a court could find consequential damages allowable; and (3) because the civil penalty was assessed to Operator without consideration of the potential liability of its subcontractors. Thus, Operator's Petition for Review of the civil penalty was not barred by res judicata. Accordingly, the court denied both of Company's partial motions for summary judgment.

State

California

Don't Cell Our Parks v. City of San Diego, 230 Cal. Rptr. 3d 294 (Cal. Ct. App. Mar. 15, 2018).

Preservationist filed a writ of mandate against City, claiming that City had impermissibly approved the construction of a small cellphone service tower in a public park. Preservationist claimed that the project fell within an alteration to legislation demanding that parks may only be used for recreational purposes and that any other purpose must be agreed upon by a two-thirds majority vote by the city council. The trial court denied Preservationist's petition. The appellate court explained that City has the discretion to set aside this two-thirds majority vote requirement for any purposes deemed necessary by City. Because the proposed cellphone tower would lead to enhanced coverage for the community and because the tower was relatively inconspicuous on a nine-acre plot of land, the appellate court affirmed and allowed the construction of the tower.

Rodeo Citizens Ass'n v. Cty. of Contra Costa, 22 Cal. App. 5th 214 (Cal. Ct. App. 2018).

Citizens Association ("Citizens") appealed a decision in which the trial court issued a peremptory writ of mandate, in Citizens' favor, requiring a county to reevaluate various air quality issues in an Environmental Impact Report ("EIR"), but rejected Citizens' remaining arguments. The California Court of Appeal for the First District, Division 3 found that the following did not fail to comply with the requirements set forth in the California Environmental Quality Act ("CEQA"): (1) the description of the "Propane Recovery Project" and (2) the analysis used in making determinations regarding greenhouse gas emissions and environmental hazards. Accordingly, the appellate court found no error by the lower court and affirmed the writ as originally issued.

New Jersey

New Jersey Dep't of Envtl. Prot. v. Exxon Mobil Corp., 181 A.3d 257, (N.J. Super. Ct. App. Div. 2018).

New Jersey Department of Environmental Protection ("NJDEP") brought suit against oil refinery owner ("Refinery") for claims under the Spill Act, common law claims of public nuisance, trespass, and strict liability, and sought natural resource damages ("NRD") for the discharge of hazardous substances at two facilities. During trial, NJDEP provided public notice of a previous settlement proposed by Refinery in order to release certain NRD claims. The release of the information regarding the settlement caused an uproar with people objecting to the settlement. At trial, the court rejected the applications of environmental groups and a state senator to intervene finding that these parties did not have standing, and the court approved the consent judgement regarding the proposed settlement. These environmental groups and state senator appeal the rejection of their motions to intervene and the consent judgment. On appeal, the Superior Court of New Jersey, Appellate Division, upheld the lower court's consent judgment. However, it found that the environmental groups had standing to appeal the trial court's consent judgment based on their broad representation of citizens' interests throughout the state, but the state Senator lacked standing because he lacked a personal or pecuniary interest adversely affected by the judgment.

North Carolina

EnvironmentaLEE v. N.C. Dep't of Envtl. & Nat. Res. Div. of Waste Mgmt., No. COA17-907, 2018 WL 1597452 (N.C. Ct. App. Apr. 3, 2018).

Citizens appealed Agency's decision regarding standing of a permit to use coal ash as infill for mines. The ALJ converted Citizens' motion for summary judgment into a motion for involuntary dismissal, which was then granted because Citizens failed to provide sufficient proof that their interests were violated or that Permittees otherwise acted inappropriately. The court partially affirmed and partially reversed the decision, holding that the applicability of the final decision regarding mined or excavated areas was affirmed, but the applicability of the final decision regarding unmined or unexcavated areas was reversed, and related permits were improperly approved and issued and were therefore revoked. This judgment meant that mining activity was allowed to go on in already active mined areas, "but coal ash may only be used as structural fill in the areas mined or excavated

at the time the permits were issued." The court held that the ALJ and superior court erred in both interpreting procedural rules and applying standards of review. Therefore, this matter was remanded to fix the referenced errors and allow Citizens to provide additional supporting information, as needed.

Pennsylvania

Consol. Rail Corp. v. ACE Prop. & Cas. Ins. Co., 2018 PA Super 68, No. 1376 EDA 2015, 2018 WL 1442507.

Railroad sued Insurer, claiming that the insurance policy between the two parties was ambiguous in its definition of the "occurrences" for which Railroad would be insured. Railroad argued that the contamination that damaged a third party's property was attributable to Railroad's predecessor in interest, but that this "occurrence" was covered by Insurer's ambiguous policy. However, because Railroad could not point to specific instances of a predecessor's activities that caused the contamination, it failed to meet the requisite burden of proof, so the matter of contract interpretation was moot. Insurer claimed that Railroad knew that the sites covered by the policy were contaminated and that any losses suffered as a result of acquiring those properties were covered by the "Known Loss Doctrine." Therefore, Insurer claimed that any policy covering these sites was unenforceable. However, the court denied Insurer's motion for summary judgment on this theory, finding that Insurer failed to adequately prove Railroad's knowledge of the contamination at the time it acquired the properties.