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Recent Case Decisions

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RECENT CASE DECISIONS

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Table of Contents

All case citations are as of 11-18-2018. 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 9-14-2017. 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

4th Cir.
Berghoff v. Chesapeake Appalachia, LLC, No. 17-1336, 2018 WL 4044059 (4th Cir. Aug. 24, 2018).

Mineral Owners ("Owners") executed mineral lease, which gave Company the right to extract oil and gas from their properties and contained a pooling provision. The lease required Company to notify Owner of any pooling. A conditional five-year secondary term followed a five-year primary term if the Company was still operating in the search for oil and gas at the expiration of the primary term. Due to a dispute regarding the location of the well pad, Company built the well on an adjacent plot, where it could still successfully pool with Owners' parcel. Owners sought declaratory relief that the lease expired at the end of the primary term and sought compensatory damages for Company's unauthorized extraction following the lease's expiration. The court found that Company failed to comply with its notification requirements regarding the pooling during the primary term, and thus failed to extend the lease. Company mailed its notification two years after the pooling declaration was recorded, but, since mailing was a prerequisite to pooling, Company never actually completed the pooling in accordance with the lease. Company's defense of the doctrine of substantial performance failed, as Owners did not prevent Company from complying with the pooling provision; in such cases the doctrine of substantial performance would have been successful only if misconduct by lessor had prevented lessee from fulfilling its duties. By failing to comply strictly with the terms of the lease, Company failed to extend the lease.

This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

S.D. Alabama
Matthews v. Ankor Energy, LLC, No. 17-0062-CG-B, 2018 WL 3832851 (S.D. Ala. Aug. 13, 2018).

Landowner alleged Company committed waste and breached implied covenants contained in oil and gas leases issued by Landowner. This matter comes from the Report and Recommendation of the magistrate judge

pertaining to the case. The magistrate judge concluded that Defendants' motions to dismiss the case should only be granted as to their contention "that count five should be dismissed because no statutory claim for waste exists under Ala. Code § 9-17-19." The magistrate judge concluded that the motions to dismiss should be denied as to Defendants' other bases. Landowner moved for reconsideration of the dismissal of Count Five concerning the statutory claim for waste and Company moved for review of the dismissal of the motion to dismiss on all other grounds. The court concurred with the conclusions of the magistrate judge as to the dismissal of Company's motion to dismiss, finding: (1) it was not necessary to invoke primary jurisdiction to the State Oil and Gas Board of Alabama; (2) Landowners had exhausted their administrative remedies; (3) Landowners' complaint was not an improper collateral attack on the Board's Orders; (4) Landowners' complaint was not barred by res judicata; (5) Landowner did not fail to comply with the notice requirements in the lease; (6) Landowner may be able to maintain tort claims because they may arise from duties created by the leases, and it would be inappropriate to dismiss tort claims at this time; (7) Company had not shown orders that supersede the contractual terms; and (8) Company could not show Landowner could not recover for punitive damages. As to Landowner's request for consideration, the court found that the Alabama statute did provide a private right of action for waste, and Count Five of the motion to dismiss should have been denied. Thus, Company's motion to dismiss was denied in its entirety.

D. Idaho

Citizens Allied for Integrity & Accountability, Inc. v. Schultz, No. 1:17-cv-00264-BLW, 2018 WL 3848397 (D. Idaho Aug. 13, 2018).

Mineral interest owners ("Owners") brought action against the Idaho Department of Lands ("IDL") and the Idaho Oil and Gas Conservation Committee ("IOGCC") for violation of their due process rights, alleging that IDL and IOGCC violated their rights by failing to provide meaningful opportunity to oppose an integration application filed by an oil and gas operator ("Operator") seeking to develop a pool of natural gas. Following the issuance of the Final Order by the IOGCC approving the integration application, Owners filed a complaint challenging the Final Order under 42 U.S.C §1983, which provides a remedy for the violation of constitutional rights. Owners sought summary judgement on all claims except as to financial damages, and IDL and IOGCC sought summary judgement as to all of Owners' claims. To establish a due process violation, Owner must show a protected property interest and a deprivation of the property without

receiving the process that is constitutionally due. The court found that a due process violation occurred to the extent that Owners' motion for partial summary judgment was granted and the cross motion was denied in part. Specifically, Owner had a protected property interest; because the Idaho legislature had decided "that for landowners with the property overlying a pool of hydrocarbons, that 'bundle' consisted not only of a royalty and bonus payment, but also just and reasonable terms." *See* Idaho Code § 47-320. As to deprivation of property, the court held Owners were provided an opportunity to present their objections in a hearing, and the hearing officer provided a reason for the decision that was made. "However, the lack of any explanation as to what would guide the decision of whether the terms of the integration order were just and reasonable meant that Plaintiffs' opportunity to be heard was not 'meaningful,' as required to satisfy due process."

Upstream – State

Alaska
State Dep't of Nat. Res. v. Alaskan Crude Corp., No. S-16308/16407, 2018 WL 4170932 (Alaska Aug. 31, 2018).

Lessee attempted to extend the term of an oil and gas lease by conducting drilling activities on the last day of the lease. However, in contravention of the terms of the lease, the Alaska State Department of Natural Resources ("Department") informed Lessee two days later that the lease had expired. Department cured its error by reinstating the lease. Lessee contended that the Department added unsavory terms in the reinstatement and sought legal remedy. Department terminated the lease six months later, citing Lessee's failure to adequately pursue development. The Supreme Court of Alaska concluded that Department materially breached the lease by failing to extend it upon lessee's continued development, however, Department cured that breach when it reinstated the lease. The Court overturned the lower court's reinstatement of the lease that Department terminated due to a lack of development. The Court reasoned that while there was a limited time for Lessee to resume drilling operations, Lessee had chosen to litigate the lease issues rather than continue developing the resources. The Court agreed with the Commissioner's assessment that litigation activities are not "drilling activities" as required by the lease for retention of drilling rights.

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

California

Ctr. for Biological Diversity v. Dep't of Conservation, 236 Cal.Rptr.3d 729 (Cal. Ct. App. 2018).

Environmental organization ("Organization") sought mandamus against Department, requiring immediate closure of oil and gas wells that were injecting and polluting underground aquifers, violating the Safe Drinking Water Act ("SDWA"). SDWA protects potential sources of drinking water, including underground aquifers. One way SDWA provides this protection is through required, statewide programs that control underground injection. Injections may be permitted within the state plan. Mandamus compels an agency to perform a ministerial act that corrects past actions or abuses of discretion; however, mandamus cannot compel an agency to perform a ministerial action in a specific way. For an act to be ministerial, it must be required and its processes governed by a legal authority. EPA and Department, pursuant to SDWA, administered the State's program that controlled underground injection, the cause of the aquifer pollution. Later, Department did not comply with the plan. Upon receipt of a letter from EPA, Department implemented a corrective action plan, which was essentially a nonsubstantial revision of the original plan. The corrective plan allowed limited injection into aquifers that could potentially be a source of drinking water, but only until February of 2017; however, injections continued after that date. Certain permitted oil and gas wells were injecting into potential underground drinking sources. Given these extraordinary circumstances with permit discrepancies, Department and EPA conducted an interest balancing test and chose to continue the injections. Under SDWA, Department had the duty to protect aquifers and not endanger potential drinking sources, but Department retained its discretion in how best to carry out that task. The Court held that SDWA did not require Department to immediately stop the fluid injections into groundwater aquifers.

Kansas

LCL, LLC, v. Fallen, 390 P.3d 571 (Kan. Ct. App. 2017).

Company filed a lawsuit seeking to quiet title to its one-half interest in mineral rights. Owners filed a counterclaim also seeking to quiet title. Owners and Company settled quiet title, but Owners filed a lawsuit against Third Party for negligence, breach of implied contract, and breach of fiduciary duty. Third Party sought summary judgment based on statute of

limitations. On the claim of negligence, which alleged that Third Party negligently filed and recorded sale of property by not excluding the interest in mineral rights in the sale, the court found that the Owners did not suffer substantial injury until they stopped receiving royalty payments due to them. Because the loss of royalty payments did not begin until 2014, Owners were not barred by the statute of limitations and had an actionable injury for a negligence claim. Breach of implied contract was definitively barred by the statute of limitations. The court found that the claim for the breach of fiduciary duty was not barred by the statute of limitations, because it did not rise until 2014 when Owner stopped receiving royalty payments. The court affirmed in part, reversed in part, and remanded for further proceedings consistent with the court's ruling.

Ohio

Am. Energy-Utica, LLC v. Fuller, No. 17 CA 000028, 2018 WL 3868119, 2018-Ohio-3250.

Gas Company asserted that the Maryland Public Service Commission ("Commission"), the circuit court for Montgomery County, and the court of special appeals erred in their statutory analyses related to distribution pipeline projects. Commission regulates public service companies, including Gas Company. Commission may order an adjustment of a public service company's rates if the income they receive year deviates from the prior year. The STRIDE statute allowed the recovery of reasonable and prudent costs of investments so long as Commission approves the investments. Gas Company filed a STRIDE plan to recover costs for investing in the pipeline system. However, the lower courts did not agree that Gas Company should recover for the investments in pipeline that are not located in the state of Maryland because the STRIDE statute only applies to in-state projects. The court found the plain language of the statute to be unambiguous in providing that costs can be recovered for projects located in the state of Maryland. According to the court, to disregard the clear language would violate the basic principles of statutory interpretation. Moreover, the legislative intent, although not required, aids in determining that the recovery costs only apply to projects in the state of Maryland. Looking at the documents of the bill, the court determined the sole focus was on projects within the state of Maryland.

Am. Water Mgmt. Serv., LLC v. Div. of Oil & Gas Res. Mgmt., No. 17AP-145, 2018 WL 3640989, 2018-Ohio-3028.

Company appealed orders from Agency requiring Company to shut in injection wells. The orders were issued due to alleged induced seismicity from the use of the wells. The Court of Common Pleas found the Agency's decision unreasonable because there had been a reasonable plan submitted for the reinstatement of wells that had not been considered. The Agency then appealed the Court of Common Pleas' decision to the Court of Appeals. The Court of Appeals affirmed the decision of the Agency while holding that the trial court lacked authority to issue an order requiring Agency to perform certain duties. The court reasoned that under the Ohio Constitution and statute, the Court of Common Pleas could take any action that the Agency could and that some of their holdings could not have originally been promulgated by the Agency and were therefore inappropriate.

Texas

Allen Drilling Acquisition Co. v. Crimson Expl. Inc., No. 10-15-00277-CV, 2018 WL 3944676 (Tex. App. Aug. 15, 2018).

Oil Company 1 ("Company 1") brought action against Oil Company 2 ("Company 2") alleging breach of an agreement related to development of oil and gas interests in two counties. Company 2 brought a counterclaim for breach of the same agreement. Trial court entered judgment for Company 1 and Company 2 appealed. The appeal involved the interpretation of a series of agreements relating to the interests. The appellate court made the following findings that resulted in the court affirming in part and reversing in part the decision of the trial court who erred in its interpretations of the agreements. First, initial agreements were not superseded by subsequent agreements, because "even if subsequent agreements contained a merger clause, the merger clause does not supersede the initial joint operating agreement." Second, the Original Joint Operating Agreement ("Original JOA") was not limited to the original formation but could include subsequent formations, because if the parties desired to impose a depth restriction on the properties acquired under the Area of Mutual Interest ("AMI"), they could do so and should have used explicit language that specifically limited the JOA and the AMI to the original formation. Third, Company 2's breach of contract counterclaim relating to leases Company 1 excluded Company 2 from are barred by the statute of limitations. Fourth, "the trial court erred in dismissing Company 2's breach of contract claim

relating to participation in subsequent leases under the Original JOA AMI." The error was the result of the interpretation of the scope of the agreements and the strength of one agreement against another. Lastly, "Company 2 is in default under the [second] JOA, and Company 1 is entitled to exercise its remedies of suspension and foreclosure under the [second] JOA, though there is a fact issue remaining as to the amount of the default."

Yowell v. Granite Operating Co., No. 07-17-00112-CV, 2018 WL 3596744 (Tex. App. July 26, 2018).

The trial court found that an "anti-washout" clause within a mineral assignment did not extend to new leases. Successors in interest appealed. The "anti-washout" clause was drafted to ensure that an overriding royalty interest, benefiting Successors, survived if the original lease was altered or expired. When the original lease expired, Operator's top lease became effective. Operator refused to pay on Successor's overriding interest, and Successor brought suit. The trial court found that the "anti-washout" clause did not extend to the new top lease, Successor appealed, and the Court of Appeals of Texas, Amarillo affirmed. The court interpreted the clause, ruling that the extension of the interest would only trigger if there was a renewal or extension of the original lease, or if a new lease was executed on the same minerals. The court ruled that a top lease was not an extension or renewal of the original lease, but was a new lease altogether. The court then analyzed whether or not an "anti-washout" clause could attach to a new lease. The court found that the clause violated the Rule Against Perpetuities. In Texas, "no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of conveyance." Two parts of the clause contained contingencies of indefinite nature. First, the triggering of the clause was determinate on the expiration of the original lease. The original lease was to survive for as long as the minerals produced in economic quantities—in theory, the minerals could have produced for an infinite amount of time. Second, the "anti-washout" clause would attach the overriding royalty interest to any new lease covering the minerals in question. A new lease could have been executed over the minerals an indefinite amount of time after the expiration of the original lease. The court found that these two contingencies of indefinite nature violated the Rule Against Perpetuities and that the creation of an overriding royalty interest in the new lease was invalid. The court also affirmed the trial court's decision to refuse to reform the clause.

Midstream – Federal

3d Cir.
Twp. of Bordentown v. Fed. Energy Regulatory Comm'n, 903 F.3d 234 (3d Cir. 2018).

Township brought suit against FERC to combat the expansion of interstate natural gas pipeline facilities operated by Pipe Line Company ("Company"). Township claimed FERC arbitrarily and capriciously approved Company's project, violating several federal statutes governing approval and construction of such pipelines and other federal environmental protection laws. Township also alleged State Department of Environmental Protection ("Department") violated state law by improperly issuing permits and denying Township a hearing to challenge their issuance. Township claims that FERC knowingly issued a certificate for Company to conduct activity before obtaining the state permit, which Company was required to obtain first under the Clean Water Act ("CWA"). Because FERC issued the certificate on the condition that Company obtain the necessary state permit before engaging in construction, there was no violation of the CWA. Township claimed FERC was required to exert jurisdiction over the pipeline project or that absent jurisdiction, FERC must perform a cumulative analysis on the environmental impact of the project. The Third Circuit Court of Appeals held that FERC properly addressed the potential impacts and FERC's determination that it did not have jurisdiction was correct. Township also claimed FERCA violated NEPA with its treatment regarding the well impacts. However, the court disagreed. Township also challenged the need for the project and whether there was good faith notice, both lines of which the court rejected. None of Township's numerous challenges to FERC's approval survived. The Third Circuit did determine that Department misinterpreted the state regulation governing the hearing to challenge the permits and, therefore, should not have denied Township's request for a permit. Department interpreted the NGA to mean that the federal Courts of Appeals have exclusive jurisdiction regarding any challenges to final decisions granting permits and the Department's provisions for preliminary adjudicatory hearings were thus preempted. The Third Circuit remanded, requiring Department to fulfill Township's request for a hearing.

4th Cir.

Sierra Club, Inc. v. United States Forest Serv., 897 F.3d 582 (4th Cir. 2018).

Conservation Organization brought suit, seeking a review of decisions made by the Bureau of Land Management ("BLM") and the United States Forest Service ("USFR"). These decisions concerned a right of way granted to the Operator of an oil and gas pipeline through federal lands. The Fourth Circuit Court of Appeals may set aside a federal agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In reviewing USFR's adoption of a sedimentary analysis in its Environmental Impact Statement ("EIS"), the court found that BLM acted arbitrarily and capriciously. Initially, USFR had expressed concerns over how Operator had overestimated the reduction of sediment its proposed containment measures would yield. Despite these concerns never being addressed, the USFR still adopted the EIS containing the projections.

Berkley v. Mountain Valley Pipeline, LLC, 896 F.3d 624 (4th Cir. 2018).

On the route of a proposed natural gas pipeline, Landowners brought an action against the project and the Federal Energy Regulatory Commission ("FERC"), among several others. The primary basis of the suit was a constitutional challenge to the eminent domain provision of the Natural Gas Act ("NGA") as a violation of the Fifth Amendment. FERC filed a motion to dismiss on the basis of the NGA's exclusive jurisdiction provision, and that Congress intended to divest the district court of subject matter jurisdiction. The district court granted the motion without considering the merits of Plaintiff's claim, and the Fourth Circuit Court of Appeals affirmed, citing the implicit divestment of the district court according to *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

This case has been docketed for a Petition for Certiorari by *Orus Ashby Berkley v. Federal Energy Regulatory Commission* (Oct. 30, 2018).

Downstream – Federal

9th Cir.
Arandell Corp. v. Centerpoint Energy Serv., Inc., 900 F.3d 623 (9th Cir. 2018).

Consumers of natural gas brought suit against Company for its alleged knowledge of its parent company's price-fixing scheme. The district court granted summary judgment in favor of the Company and the Consumers appealed. The Ninth Circuit Court of Appeals reversed the lower court's grant of summary judgment and remanded the case back to the lower court. The circuit court explained that it was possible, based off of Supreme Court precedent, for a subsidiary to be liable based off of a parent company's misconduct. However, the court held, that there remained a genuine issue of material fact as to whether or not Company knew about the price-fixing scheme.

Downstream – State

Colorado
Bill Barrett Corp. v. Lembke, 2018 COA 134, 2018 WL 4225030.

Mineral lessees ("Lessees") appealed the trial court's order denying motion for a preliminary injunction to prevent Special District ("District") from taxing oil and gas produced from the mineral estate underlying an approximately 13,000-acre tract ("Tract") by Lessees. On appeal, Lessees raised three challenges to District's taxing authority: (1) under Colorado statute, the severed mineral estate underlying the 13,000-acre tract could not be included within District because "all the owners and lessees of that estate did not petition for and consent to inclusion"; (2) by including Tract within its boundaries to further its regional operations, District "modified its service plan, but did not obtain statutorily required approval from the board of county commissioners ("BOCC") in each of the affected counties"; and (3) by including Tract within its boundaries, District violated Colorado statute, because its services overlapped with those of another district. As to the third challenge, the appellate court held that the question of whether services overlapped was not properly before the court. As to the first challenge, the appellate court found mineral estate owners to be "fee owners" under the statute, but owners of severed mineral estates – in this case, the Lessees – were not. Therefore, District did not need to show consent of all Lessees for inclusion in the special district, and District's

taxing authority was not invalidated on that basis. The appellate court thus affirmed the trial court's entry of summary judgment as to Lessees' claim. As to Lessee's second challenge, the trial court's order denying Lessees' motion for a preliminary injunction was vacated based on Lessees' "ability to establish a reasonable likelihood of success on the merits as to whether District statute by failing to obtain BOCC approval, thereby precluding District from being able to tax lessee."

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

Kentucky
Nami Res. Co., LLC v. Asher Land & Mineral, LTD., 554 S.W.3d 323 (Ky. 2018).

Lessor brought action against Lessee asserting Lessee violated its contractual obligations by fraudulently underpaying royalties owed under the leases that governed Lessee's processing of the gas, and the market price for which gas was ultimately sold. Lessor's claims were brought under theories of breach of contract and fraudulent misrepresentation of the factors that determine the amount of royalties owed to Lessor. Following a jury trial, the trial court entered judgment in favor of Lessor for over $1.3 million in compensatory damages and over $2.6 million in punitive damages. Lessee appealed and Lessor promptly cross-appealed. The appellate court affirmed the ruling of the trial court and the case then went before the Supreme Court of Kentucky for discretionary review. The Court affirmed the award for compensatory damages, because Lessor adequately proved the breach of contract claim through evidence and expert testimony that supported a jury finding that Lessees' royalty payments were unreasonable or miscalculated. While the Court affirmed the compensatory damages, it reversed the punitive damages. Case law in Kentucky states "when a plaintiff may obtain complete relief for his contractual losses by means of compensatory damages under a breach of contract claim, even when the breach is motivated by malice and accomplished through fraud, he may not simultaneously recover punitive damages after being made whole on his contractual damages." Upon application of the foregoing, the Court found Lessor was made whole through its compensatory damages award for unpaid royalties. Additionally, the Court affirmed the appellate court's rulings that: (1) post-verdict motions were timely, (2) no errors committed during the trial warrant a setting aside of the verdict and the granting of a

new trial, and (3) the trial court properly denied Lessor's motion to amend its complaint based on procedural grounds.

SELECTED WATER DECISIONS

Federal

4th Cir.
Sierra Club v. State Water Control Bd., 898 F.3d 383 (4th Cir. 2018).

State certified that Project would not degrade State's water. Environmental Advocates petitioned for review. The court found that State was allowed to regulate Project under the Clean Water Act. Such regulation must assure that "the activity will be conducted in a manner which will not violate applicable water quality standards." State was required to consider the general water quality criterion and anti-degradation policy. State determined that Project would not permanently affect surface waters and would restore surface waters through State's recommendations. The court found that Environmental Advocates had standing because they could trace injury-in-fact to the certification that State issued and that there was a "realistic possibility" that Environmental Advocates could be granted relief. The court also found that State had sufficient basis to find that water quality would not be adversely, permanently affected, and therefore had not acted arbitrarily in certifying Project. Court denied the petitions.

5th Cir.
Redburn v. City of Victoria, 898 F.3d 486 (5th Cir. 2018).

Owner of property brought suit challenging a Texas City's ("City") use of a drain and sewage system consisting of an open ditch running through Owner's property. The trial court granted summary judgment in favor of City. The primary issues presented upon appeal were (1) whether City had acquired an easement on the property, and (2) whether the system constituted a physical taking under the Fifth Amendment. In regard to whether City had acquired an easement to the property, the Fifth Circuit Court of Appeals found that substantial factual issues existed that precluded summary judgement on this claim. Specifically, the court found that there were issues as to whether the preceding owner of the property allowed the city to drain water through his property creating an implied easement. Further, issues of fact existed as to whether the preceding owner of the property intended to assume any risk from the storm sewer that would preclude Owner's claims. Finally, the court held that Owner was aware of the potential damage to his property which began the statute of limitations for when he could file a claim and was thus time-barred by its expiration at

the time of suit. As a result, the court dismissed the Fifth Amendment taking claim.

9th Cir.
Ctr. for Biological Diversity v. Zinke, 900 F.3d 1053 (9th Cir. 2018).

Environmentalists challenged the findings of Fish and Wildlife Services ("FWS") that did not classify the Arctic Grayling as endangered or threatened. Environmentalists argued that FWS used an incorrect definition of "range" resulting in its exclusion from the endangered or threatened categories. The district court held in favor of FWS on a summary judgment motion. The Ninth Circuit Court of Appeals reversed. Environmentalists believed that the definition of "range" should include the Grayling's historical range, which Environmentalists believed would prompt its inclusion on endangered or threatened lists. Through a *Chevron* analysis, the Ninth Circuit determined that the word "range" in the Endangered Species Act was ambiguous. The Ninth Circuit then determined that the FWS exclusion of the Grayling was arbitrary and capricious for a variety of reasons including: (1) ignoring decreasing numbers; (2) failing to explain its belief in a cold water refuge in Big Hole River; (3) failing to consider the effects of climate change; and (4) conducting too short of a study to determine the viability of the Ruby River population. The Ninth Circuit therefore reversed the holding of the district court because FWS failed to consider the relevant factors and articulate a rational connection between those factors and the decision it reached. The issue was remanded to FWS to reconsider the listing of the Grayling in accordance with the findings.

Fed. Cir.
Crow Creek Sioux Tribe v. United States, 900 F.3d 1350 (Fed. Cir. 2018).

Native American Tribe ("Tribe") filed an action against the United States claiming it was entitled to monetary damages and injunctive relief from the alleged taking of its water rights and the alleged mismanagement of Tribe's water by the United States. The court found that Tribe's water rights were based wholly on the U.S. Supreme Court's opinion in *Winters v. United States*, which stated that Indian Reservations carry implied rights to water "to the extent needed to accomplish the purpose of the reservation." 207 U.S. 564 (1908). However, the U.S. filed a motion to dismiss, claiming that Tribe lacked standing to sue. The Federal Circuit found that in light of *Winters*, the scope of the water rights depends on Tribe's need for the water, and here, Tribe had not alleged that the amount of water flowing into

the reservation and available for use was insufficient for its purpose. By extension, the court found that Tribe had failed to allege an injury in fact and therefore granted the motion to dismiss based on lack of standing to sue.

State

California

Envtl. Law Found. v. State Water Res. Control Bd., 237 Cal. Rptr. 3d 393 (Cal. Ct. App. 2018).

Foundation asked the court to determine whether the public trust doctrine applied to groundwater, and if so, whether the legislature replaced them with the 2014 Sustainable Groundwater Management Act ("SGMA"). The issue was whether the SGMA replaces or crystalizes "the common law duty to consider the public trust interests before allowing groundwater extraction that potentially harms a navigable waterway." The lower court found that the public trust doctrine did apply to groundwater connected to the public resources of the Scott River, the County had to consider the public trust when giving permits for groundwater wells, and County's common law public trust duties didn't conflict with the SGMA. County appealed whether Board actually had a duty and authority to regulate groundwater extraction, and whether such a duty under the public trust doctrine even existed. The court rejected County's claim that the public trust doctrine should not apply to non-navigable groundwater, because groundwater extraction that negatively affects the public trust waters of the Scott River is, indirectly, part of the public trust. The court also rejected the idea that the reasonable use doctrine overrides the public trust doctrine, because the Supreme Court held in a previous case that different standards can exist simultaneously. The court also held that Board had the authority to "protect the public trust" and not be limited by the confines of the Board's license and permit authority. The court rejected County's assertion that the SGMA occupied the field of law and supplanted the public trust, because the SGMA did not completely cover the issues of groundwater in its terms. The court held that there was no violation of the separation of powers, because there was no apparent legislative intent to supersede the public trust doctrine in the SGMA. The court affirmed the lower decision.

Washington

Puget Soundkeeper All. v. State, 424 P.3d 1173 (Wash. 2018).

Alliance challenged Ecology's issuance of a permit to a company for discharging waste water on an issue with the testing practice required by the permit. Alliance challenged the amount of PCB allowed and wanted Ecology to use the more sensitive test 1668C to check for compliance on the limits of polychlorinated biphenyls ("PCB") in the waste water, as opposed to Ecology's Method 608 test. The Pollution Control Hearings Board ruled that Ecology could ask the EPA to approve use of rule 1668C but did not have to, because Method 608 was the only test presently approved by the EPA. Alliance appealed and the court of appeals affirmed the Board's ruling. Alliance appealed again to the Supreme Court of Washington, claiming that the testing under regulation WAC 173-201A-260(3)(h), Method 608, was insufficient to test for PBC water quality standards required under statute RCW 90.48.520, thus requiring use of Method 1668C. Review of the Board's decision was carried out de novo. The Court rejected the arguments of Alliance, because the Court held that the EPA standard only required a "sufficiently sensitive" test for water discharge permits and Method 608 was such a "sufficiently sensitive" test. The relevant statute required a test to be known, available, and reliable. The Court held that Method 1668C was an unreliable test, because it could not determine the source of PBCs and was not EPA approved. The only other way for Method 1668C to be used was if it was a superseding test, which the Court held that it was not, because the EPA published Method 1668C to be used in conjunction with other water quality tests. The Court held that a supplementary test cannot usurp a normal test, like Method 608. The Court held for Ecology and affirmed the Board and appellate court decisions.

SELECTED LAND DECISIONS

Federal

N.D. California
Geysers Dev. P'ship v. Geysers Power Co., LLC, No. 17-cv-06834-WHO, 2018 WL 3730129 (N.D. Cal. Aug. 6, 2018).

Developer brought action to enforce and clarify an easement within the largest geothermal energy field in the world. Developer owns the property, while Power Company holds a 99-year lease to develop and extract steam to generate electricity. Both parties filed for summary judgment to resolve whether the easement is unfettered access or merely purposes related to electrical generation and maintenance, particularly what rights Partnership retained and what rights Power Company held. The court granted Partnership's motion and denied Power Company's, holding that Partnership may restrict third party access to the site and prevent the use of facilities on the property from being used to process steam generated off-site.

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

State

Connecticut
City of Hartford v. CBV Parking Hartford, LLC, 192 A.3d 406 (Conn. 2018).

City, in an attempt to beautify its downtown area, used eminent domain to purchase several pieces of property being used as parking lots. Owner of the property sued the city and claimed the property had been improperly valued, citing the increased utility of the land as a result of the development of a minor league baseball stadium adjacent to the lots. The lower court increased the value of the property by approximately $3 million with an interest rate of 7.22 percent. City appealed, contending that the lower court improperly valued the property and exceeded its authority in awarding interest. The Delaware Supreme Court affirmed the valuation but overturned the award of interest. The Court dismissed City's argument that the lower court used the wrong test for valuation. The Court found that the

lower court was reasonable in its valuation of the property on the belief that City would combine the lots with others to be used in its upscale development of the neighborhood. The Court found, however, that the lower court exceeded its authority in awarding an interest rate of 7.22 percent. Connecticut statute demands the method of calculating interest in eminent domain suits as the "weekly average one-year constant maturity yield of United States Treasury securities . . . for the calendar week preceding the date of taking." Thus, the Court affirmed the valuation of the property but remanded the issue of interest to be decided in line with statutory guidelines.

Kentucky
C.W. Hoskins Heirs v. Wells, 2017-SC-000004-DG, 2018 WL 3914711 (Ky. Aug. 16, 2018).

Owner brought suit against Lessee, alleging that Lessee did not pay coal royalties. Lessee brought adjacent landowners ("Adjacent") into the action to determine whose land the coal was on. Owner and Adjacent had the burden to establish the location of the boundary line between their lands. The lower court used Owner's survey to determine the boundary line rather than Adjacent's because Adjacent's surveyor did not consider surrounding deeds, which is a violation of a surveyor's standards of practice. Finding in favor of Owner's property line, the Kentucky Supreme Court held that Owner was entitled to Lessee's coal royalties.

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

New Jersey
Seaside Heights Borough Pub. Beach v. Seaside Heights Borough & AFMV, Inc., Nos. A-4585-15T3, A-5372-15T3, A-0557-16T4, 2018 WL 3614590 (N.J. Super. Ct. App. Div. July 30, 2018).

Three Parties appealed decisions made by the New Jersey Department of Environmental Protection ("DEP"). The DEP decisions approved plans to convey a beach parcel to a pier owner in exchange for other parcels of property. Parties argued that the DEP did not have the authority to approve the conveyance under state statute. The Superiors State Court affirmed the decisions of the DEP. The court explained that the replacement land in the conveyance was "reasonably equivalent" as a whole, the fair market value of the replacement land exceeded that of the beach parcel, and the required

replacement ratio of 1:4 was far exceeded. The court further held that certain policy decisions had been appropriately made by the DEP in consideration of the transaction.

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

Oregon
Cascadia Wildlands v. Oregon Dep't of State Lands, 427 P.3d 1091 (Or. Ct. App. 2018).

Environmental Group filed suit challenging the sale of a parcel of land by the Oregon Department of State Lands ("ODSL") to Timber Company. Previously, the trial court held that Environmental Group lacked standing to sue and dismissed the claim without reaching the merits of the case. However, on appeal, the court found that under Oregon law, standing is based on a statutory source, in this case ORS 183.480, which allows anyone with aggrieved interest to have standing. In this case, one of the members of the Environmental Group alleged that he was no longer able to enjoy the forest and was thus aggrieved. The court agreed, and thereby determined that since a member of Environmental Group was aggrieved, they had standing. Given that Environmental Group had standing, and that the record was fully developed, it proceeded to the merits of the case. Environmental Group posited that the sale of the parcel was prohibited by ORS 530.450. ODSL did not contest that the sale was prohibited but chose to argue that the statute itself was unconstitutional under the Oregon Constitution. However, the court found that the plain text of the statute was intended to prevent this exact situation and that it was constitutional. As a result, the case was reversed and remanded for further proceedings.

Washington
Maytown Sand & Gravel, LLC v. Thurston Cty., 423 P.3d 223 (Wash. 2018).

Company sued County for interference, negligent misrepresentation and a § 1983 due process violation. Company received the property and permit to mine from a prior occupant of the property and faced several challenges from environmental groups over its mining operation. Company agreed to mine a significantly reduced amount and reclaim the property after obtaining the reduced amount. Under pressure from concerned groups, County insisted upon additional environmental testing not stipulated by the

State, and Company complied. After completing the testing, County insisted upon adjusting the permit formally and hold a hearing before mining would start. The Washington Supreme Court held that there was sufficient evidence to uphold the § 1983 action, that Company's property rights were violated, that there was tortious interference, and that Company was not entitled to attorney's fees.

SELECTED ELECTRICITY DECISIONS

Traditional Generation

9th Cir.
Turlock Irrigation Dist. v. Fed. Energy Regulatory Comm'n, 903 F.3d 862 (9th Cir. 2018).

California Districts ("Districts") challenged FERC's decision denying their complaint against Gas and Electric Company ("Company") for breach of agreement. The California Department of Water Resources ("Department") entered into a contract with Company for Company to provide Department with various services. Company then entered into an Interconnection Agreement ("Agreement") with Others, providing the terms of the operations. Department had such large power needs, so it participated in a Remedial Action Scheme ("RAS") to manage the system. Before the contract was set to terminate, Department notified Company it would cease the RAS. Districts approached the State and Company regarding potential Adverse Impact of the loss of the RAS on their systems. Company disagreed with Districts' concerns, so Districts filed a complaint against Company. FERC decided a reprogramming of the RAS "was not likely" to have an Adverse Impact on the Districts' Systems. Districts appealed. The issue depended on the interpretation of "Adverse Impact" in the Agreement. FERC concluded that "Adverse Impact" only applied to material degradation of a system's reliability, but did not consider the second alternate definition, which applies to reductions in import capabilities. Because FERC too narrowly interpreted the meaning of Adverse Impact, FERC's orders were arbitrary and capricious. The court also found that FERC used an incorrect standard in evaluating Districts' request under the Agreement for a study on the impact of the RAS reprogramming. The court remanded for further proceedings, ordering FERC to use the broader definition of Adverse Impact and the proper standard for requesting a study on whether Company breached the Agreement by reprogramming the RAS and reducing the import capabilities of Districts' Systems.

Massachusetts
New England Power Generators Ass'n v. Dep't of Envtl. Prot., 105 N.E.3d 1156 (Mass. 2018).

Energy Companies ("Companies") assert that State overstepped its authority with an Act that (1) imposes decreasing greenhouse gas emission

limits on State's electric sector, (2) will actually increase Statewide emissions, and (3) contains a sunset provision prohibiting regulations after 2020. The Act has two relevant provisions regarding the allegation that State exceeded its authority. The first, § 3(c), allows the executive office and department to control emissions of the electric sector. The second, § 3(d), generally allows for regulations to establish a declining level of aggregate emissions for all sources. Companies argue that the existence of the § 3(c) targeted provision exempts the electric sector from § 3(d). The court determined that the two provisions are complements, and the electric sector is not exempt from regulations created under § 3(d)'s authority. Therefore, State has the authority to create regulations under § 3(d) that establish emission caps on the energy industry. The Court determined that the regulatory scheme for emission reduction includes provisions that would counter the possibility of outsourcing electricity, resulting in an increase of emissions outside of the state. Most significantly, the regulations require electricity providers to obtain increasing amounts of clean-energy-sourced electricity each year. Lastly, the Court did not interpret the sunset provision, which required regulations to expire at the end of 2020, to mean the entire State's authority of the statute also expired. The Court interpreted the text in light of the entire regulatory scheme and determined just the current provisions would expire, but State would still have the authority to create new regulations under § 3(d).

Vermont
In re Green Mountain Power Corp., 2018 VT 97, 2018 WL 4266393.

Renewable Energy Company ("Company-1") appealed the Vermont Public Utility Commission's ("PUC") denial to intervene as a party in proceedings concerning whether Power Company ("Company-2") could purchase power generation facilities from outside the state. PUC granted several certificates of public goods ("CPGs") to Company-2, allowing it to purchase out-of-state power facilities. Company-1 sought intervention, claiming it had a right to do so as (1) it has a substantial interest which might be adversely affected, (2) there are no alternative proceedings to protect that interest, and (3) its interests are not already adequately represented. PUC denied Company-1's motion to intervene for lack of a "substantial, particularized interest," as Company-1 had no interest that separated itself from any other ratepayer that might be affected from a change in electricity rates as a result of the CPGs. While the PUC's rule does not explicitly require a "particularized" interest, the Court must give enormous consideration to the PUC's application of its own rules. Thus, the Court deferred to the PUC's

interpretation. Company-1 also had no substantial interest from its status as a competitor that would require the PUC to join Company-1 to the CPG proceedings. The Court determined that, absent any substantial interest, the PUC properly denied Company-1's motion to intervene. The Court also dismissed Company-1's appeal of the CPG grants.

Renewable Generation

Fed. Cir.
Alta Wind I Owner Lessor C v. United States, 897 F.3d 1365 (Fed. Cir. 2018).

This dispute between Government and Windfarm Owners ("Owners") centered around the proper method of calculating cash grants for certain renewable energy facilities under the American Recovery and Reinvestment Act. Owners used the "unallocated method" of calculation, which calculated the allocable amount as the difference between the purchase price and grant-ineligible tangible property. The Government contended the "residual method" of § 1060 of the Internal Revenue Code was proper: the purchase price less the grant-ineligible tangible property must then be allocated between grant-eligible tangible personal property and grant-ineligible intangibles. Owners argued that intangibles, such as goodwill, could not exist as the facilities were not operational when Owners purchased them. The court determined that the residual method was proper, as the purchases constituted an "active trade or business. . . to which goodwill or going concern value could. . . attach." The mere possibility of the existence of goodwill and other intangible assets required the use of the residual method. The court relied on the existence of transmission rights, the possibility of goodwill accruing through contracts, and customer relationships, as evidence of potential intangibles.

Rate

D.C. Cir.
Util. Workers Union of Am. Local 464 v. Fed. Energy Regulatory Comm'n, 896 F.3d 573 (D.C. Cir. 2018).

Union brought suit against Agency after the closure of a coal-fired electrical plant. The closure was announced immediately before the annual forward capacity auction ("FCA"), without enough time for other large electricity suppliers to supplant the deficit caused by the closure, and Union

argued this resulted in a spike in the auction price to the detriment of electricity customers. Union attempted to challenge the closure through Commission, but the FCA auction went into effect before Commission ruled. Union brought essentially the same suit in the subsequent two FCAs, continuing the same argument that the closure manipulated market prices to an unfairly high rate. Agency submitted a motion for summary judgment on direct review, which was granted. The D.C. Circuit Court of Appeals held that Union could not prove proximate causation between the closure of the plant and the harm in the subsequent years, and that any injury caused in the year of the closure lacked an appropriate remedy.

SELECTED ENVIRONMENTAL DECISIONS

Federal

2d Cir.
Cooling Water Intake Structure Coal. v. Envtl. Prot. Agency, 905 F.3d 49 (2d Cir. 2018).

Suit consolidating four petitions: (1) challenging a Final Rule concerning entrainment and impingement requirements for cooling water intake structures under § 316(b) of the Clean Water Act ("CWA") as arbitrary and capricious and in conflict with provisions of the Endangered Species Act ("ESA"); (2) challenging the same Final Rule as going beyond the authority given to the EPA under the CWA, that Final Rule's primary supporting biological opinion was erroneous, and that the EPA did not engage in sufficient notice and comment under the APA; (3) challenging the Final Rule as insufficient under APA notice and comment requirements by defining "new units" of cooling water intake structures so vaguely as to not provide actual notice; (4) arguing that EPA's Final Rule was arbitrary and capricious by applying these standards to intake structures that do not draw water for the purpose of cooling. The Second Circuit concluded that in relation to the first and second petition, the Final Rule was sufficiently supported by the evidence and within the CWA and ESA. In the case of the third petition, the court stated the EPA rationally narrowed the Final Rule after notice and comment, which they are encouraged to do. The court also rejected the final petition as baseless.

4th Cir.
Sierra Club v. U.S. Dep't of the Interior, 899 F.3d 260 (4th Cir. 2018).

Organization challenged Department's decisions pertaining to the approval of the Atlantic Coast Pipeline pursuant to the Endangered Species Act and the Mineral Leasing Act. The Organization, specifically, challenged the authorization of an incidental take statement which allowed for the kill or harm of five species on the endangered or threatened list, and the decision to allow a right of way through the Blue Ridge Parkway. The Fourth Circuit Court of Appeals concluded that the Department's decisions were arbitrary and capricious, and vacated the Department's decisions. The court reasoned that the decision granting the right of way lacked an explanation demonstrating the pipeline's consistency with the purposes of the Parkway, as required under the Blue Ridge Parkway Organic Act, and that the incidental take statement set vague and unenforceable limits.

Sierra Club v. Va. Elec. & Power Co., 903 F.3d 403 (4th Cir. 2018).

Group brought action against Company, alleging Company's liability for introducing arsenic pollution from ash storage in settling ponds. The action commenced years after Company had first become aware of high pollutant levels and entered into a corrective action plan with Agency, a state entity. Group alleged that Company was in violation of the Clean Waters Act ("CWA") by allowing pollution from "point sources," as well as two conditions of discharge permits Company obtained as part of its corrective action plan with Agency. The lower court found Company in violation of the CWA but deferred to the Agency's understanding that Company had not violated the discharge permits. Both parties appealed, and the appellate court held for Company in both respects. The court noted that a CWA violation turned on the definition of "point source," as the CWA was strictly limited to pollutants discharging from such sources, and that other environmental protection laws, such as the Resource Conservation and Recovery Act ("RCRA"), contemplated restrictions on other sources of pollution. The appellate court noted that the term "conveyance" was essential to understanding a point source, and that the carefully defined terms of the CWA constrained its applicability. Under that understanding, settling ponds were not point sources, as they allow diffuse seepage and therefore distribution but do not convey a pollutant as a pipe or channel would. The distinction removed Company's settling ponds from CWA liability. The court noted that RCRA still applied to Company's obligations, and therefore Company was still directed to manage the pollutants. However, the discharge permits at question were obtained from Agency in compliance with RCRA. Therefore, Company remained responsible for pollutants, Agency's determination that the discharge permits were not to be understood via a CWA analysis was appropriate, and Company was not in violation of the CWA.

9th Cir.
Bohmker v. Oregon, 903 F.3d 1029 (9th Cir. 2018).

State passed a law that placed a temporary moratorium on in-stream mining, in an effort to protect indigenous fish species and improve their habitat. Miners with claims on federal lands challenged the law on preemption grounds three months before it went into effect. The lower court granted State's motion for summary judgment finding that the regulation was reasonable and not preempted. State then repealed and replaced the

temporary moratorium with a permanent ban in areas deemed essential salmon habitat. Miners appealed. The Ninth Circuit Court of Appeals surveyed federal law on the issue of mining on federal lands determining that while the federal government intended to encourage mining and stewardship of the minerals it did not intend to do so at the expense of the environment and wildlife. The court determined that State's legislation was not preempted by the theory of field preemption nor was it by conflict preemption. The court affirmed the judgment of the lower court. Judge Smith delivered a passionate dissent saying that he would reverse the lower court's decision either on the theory of field preemption or under his belief that State's restriction is so severe that it is de facto land use plan.

Pakootas v. Teck Cominco Metals, Ltd., 905 F.3d 565 (9th Cir. 2018).

Tribes brought a CERCLA action against State and Company for the dumping of waste into the Columbia River. After the trial court entered judgment in favor of Tribes, Company appealed to the Ninth Circuit Court of Appeals. On appeal, Company asserted it had provided a sufficient defense of divisibility. The court noted that CERCLA liability is usually joint and several, but on rare occasions can be apportioned if the damage is shown to be divisible. The divisibility analysis involves two steps. First, the court determined whether or not the environmental damages could be theoretically apportioned. Then the court determined if the record provided a "reasonable basis" to apportion liability. At both steps, the party asserting the defense bears the burden a proof. It is a high burden to meet and intensely factual, but a preponderance of the evidence standard applies. Company's expert conducted a study focusing only on the pollutants Company had released into the river. The study did not consider what other pollutants were already in the river. The court determined that due to the study overlooking the possible environmental damages resulting from the aggregation of toxic chemicals, Company had not met its burden to show that the damage could have been theoretically apportioned. The court also found that Company had not met its burden to show that there was a rational basis for apportionment. Company's methods for apportioning liability were all volumetric in nature. The court held that volumetric apportionment methods are only useful when it can be reasonably assumed that independent factors made no significant effect on the scope of environmental harm. The court found that a reasonable person would have to consider geographic and temporal factors when determining the environmental impact of pollution. The court affirmed the judgment against Company.

10th Cir.
Chance v. Zinke, 898 F.3d 1025 (10th Cir. 2018).

Landowner sued the government for violation of the National Environmental Policy Act ("NEPA"). Landowner claimed that the Bureau of Indian Affairs ("BIA") violated NEPA by granting permits to drill new wells without conducting required environmental-impact assessments before approving the drilling permits. The district court dismissed Landowner's claim against the government for lack of subject-matter jurisdiction. The Tenth Circuit Court of Appeals reversed and remanded to have the claim dismissed for failure to state a claim. The court explained that Landowner's claims were untimely due to the expiration of the applicable statute of limitations and, thus, dismissal for failure to state a claim was appropriate.

D.C. Cir.
Boston Delegation v. Fed. Energy Regulatory Comm'n, 897 F.3d 241 (D.C. Cir. 2018).

FERC approved a pipeline operator's ("Operator") request to upgrade its pipeline to increase its capacity. Concerned Citizens ("CC") alleged that FERC failed to consider safety issues when issuing its permit to Operator. CC argued that FERC failed to comply with NEPA because it improperly segmented the project when performing its environmental review and did not give enough weight to the cumulative environmental impacts of the pipeline upgrade. The D.C. Circuit Court of Appeals held the segmentation was proper because of the functional and timing uniqueness of the projects and FERC did not fail to comply with NEPA. Additionally, the D.C. Circuit held that no violation of NEPA occurred because FERC did adequately consider the cumulative environmental impacts based on the information available to the agency at the time of its determination. CC argued that FERC's determination that the pipeline upgraded created no additional safety risk lacked substantial evidence. The D.C. Circuit found FERC's determination of no increased safety risk to be supported by substantial evidence because it properly relied on expert opinion and denied CC argument. CC finally alleged that the third-party contractor used to formulate FERC's environmental impact study had a conflict of interest. The Court held that despite CC being able to show a conflict of interest, that the conflict would only invalidate if it destroyed the NEPA process, which CC could not show. D.C. Circuit denied the petitions under review.

Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency, 901 F.3d 414 (D.C. Cir. 2018).

EPA promulgated a final rule governing disposal of coal combustion residuals ("coal residuals") pursuant to the Resource Conservation and Recovery Act ("RCRA") which allowed states to regulate coal residuals in the interim while EPA considered regulating disposal on the federal level and set minimum criteria for disposing of coal residuals. Environmental Groups and Industry Groups both petitioned to review the final rule. The D.C. Circuit allowed EPA's motion to voluntarily remand some provisions of the final rule for reconsideration but denied remand on all provisions currently in dispute by the parties. Environmental Groups challenged provisions allowing (1) unlined surface impoundments ("USIs") to continue operation until they caused ground water contamination, (2) "clay-lined" surface impoundments to be classified as "lined" and therefore treated the same as impoundments lined with a geomembrane, and (3) the exemption of inactive impoundments at inactive facilities ("legacy ponds") from current regulations for similar inactive impoundments. The court vacated all three provisions as arbitrary and capricious because (1) both the responsive approach of detecting leaks in USIs and EPA's regulation of "clay-lined" impoundments did not address and respond to the identified health and environmental harms and was thus contrary to the requirements of RCRA, and (2) EPA's decision to exempt legacy ponds due to difficulties of identifying responsible parties disregarded the substantial risk posed by legacy ponds and was contradicted by the record. The court rejected the Industry Group's challenges to the final rule, holding that EPA (1) had the authority to regulate inactive impoundments since RCRA confers EPA authority over "open dumps", (2) provided adequate notice to parties on location requirements for existing impoundments, (3) regulations for seismic impact zones were not arbitrary and capricious, and (4) did not have to consider costs when providing alternatives for sites having to close due to the final rule.

N.D. Alabama

Black Warrior Riverkeeper Inc. v. U.S. Army Corps of Eng'rs, No. 2:17-cv-00439-LSC, 2018 WL 3869983 (N.D. Ala. Aug. 14, 2018).

Environmental advocates ("Advocates") moved for summary judgment against Corps, and Corps cross motioned for the same. Company requested a jurisdictional determination from Corps so that it may expand its mining

operations. Corps accepted Company's project proposal and monitored the progress to ensure Company complied with the Clean Water Act ("CWA") and the National Environmental Policy Act ("NEPA"). However, Corps did not require Company to produce an environmental impact statement ("EIS"), nor did Corps investigate whether or not wildlife would be harmed from the expansion, concluding that the mining site was too distant from areas with known endangered species. Advocates claim that Corps conducted its duties in an "arbitrary and capricious" manner, violating the Administrative Procedure Act ("APA") in relation to the Endangered Species Act ("ESA"), CWA, and NEPA. For such a claim, the court may only set aside an agency's action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"; if the action was rational, the court may not set aside the action. If the following criteria exists, an agency's decision not to require an EIS is likely not arbitrary: (1) the agency correctly identified the environmental concern; (2) the agency considered the concern in a critical light; (3) the agency found that no significant impact is made and can make a convincing case for that finding; (4) if there is a significant impact, the agency found that safeguards sufficiently reduce the impact. The court found for Corps, stating that Advocates did not file their ESA claim timely, that Corps followed proper procedure in determining that the project did not need an EIS, and that Corps correctly assessed the potential harm of the project.

D. Colorado

High Country Conservation Advocates v. U.S. Forest Serv., 2018 WL 3804099 (D. Colo. Aug. 10, 2018).

Organization challenged Agency's decision to approve an exception to the Colorado Roadless Rule ("CRR"). The exception allowed for road construction on previously protected land. Organization brought action under the National Environmental Policy Act ("NEPA") and the Administrative Procedures Act ("APA"). The challenge was brought in conjunction with a dispute over proposed coal exploration and mining activities. The court affirmed the Agency's decision. The court explained that the Agency considered alternatives, and disclosed and considered the baseline environmental data, as required by NEPA. Further, the court noted that though NEPA imposes procedural requirements on agencies, it does not determine the substantial conclusion reached by agencies.

This case has since been appealed to the Tenth Circuit, but there is no decision from the higher court as of publication

Rocky Mountain Peace & Justice Ctr. v. U.S. Fish & Wildlife Serv., No. 18-CV-01017-PAB, 2018 WL 3772864 (D. Colo. Aug. 9, 2018).

Organization appealed the administrative decisions of the Fish and Wildlife Service ("FWS") pursuant to the Administrative Procedures Act ("APA"), National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA"). Organization sought preliminary injunctive relief against the construction of rerouted trails and the allowance of public access to trails at the Rocky Flats National Wildlife Refuge. The Refuge was located near a decommissioned nuclear processing facility. Organization claimed that FWS's administrative decisions would pose irreparable harm to Organization members. Particularly, Organization argued that the disturbance of the soil would likely result in harm to Organization members. The court denied Organization's motion for injunctive relief holding that they had failed to meet the burden of proof. The court explained that the Organization was burdened to at least show that there was no standard safe level of exposure to plutonium and that the administrative action may exasperate the risk of exposure.

M.D. Florida

Sierra Club, Inc. v. St. John's River Water Mgmt. Dist., 320 F.Supp.3d 1298 (M.D. Fla. 2018).

Environmental advocates ("Advocates") brought suit against the water management district ("District") and Corps, alleging that permitting the development of part of an embankment violated the Clean Water Act ("CWA"), the Administrative Procedure Act ("APA"), and the National Environmental Protection Act ("NEPA"). As long as an agency's actions were rational and followed an established procedure, those actions will not be considered arbitrary under APA standards. The court may not review the agency's actions with the benefit of hindsight; such determinations must be made in light of the circumstances in existence at the time of the action or decision. District and Corps followed established procedures regarding the permission to develop and reduce the size of the bank; CWA even outlines the process for granting such permission. State agencies, like District, have the ability under CWA to regulate their own waters. The court granted District's motion for summary judgment because Advocates failed to show that permitting development of the bank and allowing a reduction of the bank's size violated CWA, or APA and NEPA subsequently.

D. Idaho

W. Watersheds Project v. Zinke, No.: 1:18-cv-00187-REB, 2018 WL 4550396 (D. Idaho Sept. 21, 2018).

Organization brought action against BLM, challenging BLM's instruction memorandum. The court found that Organization had standing because members of Organization showed that they "frequently and extensively utilize the areas where oil and gas leases overlap with sage-grouse habitats and populations." Because Organization showed personal stake in the controversy, it had properly established standing. Further, Organization's request for injunctive relief was found to be ripe because BLM's actions cause specific hardships to Organization. The court also found that Organization was likely to succeed on the merits of their claim. BLM's actions were found to be subject to judicial scrutiny, and under various required statutes, the court found Organization's claims likely to prevail. The court also found that if they did not grant the injunction, Organization was likely to suffer irreparable harm due to BLM's incomplete observance of environmental laws. Finally, the court found that the balances of hardships to BLM in relation to a preliminary injunction are not supported in denouement of third quarter oil and gas sales. All subsequent quarters and sales, however, were not found to be unduly burdened.

D. Montana

Indigenous Envtl. Network v. United States Dep't of State, 317 F.Supp.3d 1118 (D. Mont. 2018).

Environmental organizations ("Advocates") filed a motion for summary judgment against the State Department ("Department"). Advocates alleged that when Department published its record of decision and national interest determination, and issued a Presidential permit allowing the construction of a cross-border pipeline, it violated the Administrative Procedure Act ("APA"), National Environmental Policy Act ("NEPA"), and Endangered Species Act ("ESA"). APA standards governed the review of Advocates' claims, requiring that a rational connection must exist between the facts found and the conclusions made in support of Department's actions. If the action is found to be arbitrary or an abuse of discretion, or otherwise not in accordance with the law, the court may set aside the action. The court found that Department did violate NEPA because Department was required to issue a supplemental environmental impact statement when it changed the originally approved route of the pipeline. Agencies still have an obligation

to prepare supplemental environmental impact statements where permitting decisions have already been made, but the project is not yet complete.

Native Ecosystems Council v. Marten, CV 18-87-M-DLC, 2018 WL 3831339 (D. Mont. Aug. 13, 2018).

Environmental advocates ("Advocates") brought suit against Forester, alleging that the failure to consult an amended forestation plan that may affect an endangered species violated the Endangered Species Act ("ESA"). If an agency's actions could have an effect, positive or negative, on an endangered species or critical habitat, the agency must conduct a consultation under ESA – this triggering threshold is very low, as Congress has given first priority to the protection of listed species and habitats. The court granted Advocates motion for preliminary injunction, finding that the current forestation plan could have an adverse effect on an endangered population as it reduces the amount of "old growth" forest that would be preserved.

S.D. Ohio

Hobart Corp. v. Dayton Power & Light Co., No. 3:13-cv-115, 2018 WL 3978094 (S.D. Ohio Aug. 20, 2018).

Three companies ("Companies") voluntarily entered into a settlement agreement with the EPA and incurred cleanup costs of a contaminated site containing hazardous waste. Companies later filed suit against other allegedly responsible companies, Asphalt Company and Power and Light Company ("P&L"), to recover costs Companies incurred from the cleanup pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). Both Asphalt Company and P&L filed counterclaims against Companies asserting that they incurred response costs of their own after release of hazardous substances from the cleanup site. Companies moved to dismiss these counterclaims for failure to state a claim. Under CERCLA, private parties may recover cleanup costs either under section 107 or section 113. Under section 107, a private party may recover costs they incurred voluntarily, and under section 113, parties who are themselves liable under CERCLA may ask for compensation from other responsible parties in order to distribute the cost of cleanup equitably. Under the settlement agreement between Companies and the EPA, Companies were protected from liability arising under section 113. Noting precedent holding that remedies from either section are mutually exclusive, the court held that since Asphalt Company and P&L were eligible for relief

under section 113, they are thus not eligible for relief under section 107 even if such an outcome resulted in other companies shouldering a disproportionate cost of cleanup. However, the court did allow for Asphalt Company to recover cost of identifying other potentially responsible parties since those costs fell outside the scope of the protections contained in the settlement agreement between Companies and the EPA. Therefore, the court sustained in part and overruled in part Companies' motion to dismiss.

W.D. Virginia

Drummond Coal Sales, Inc. v. Norfolk S. Ry. Co., No. 7:16cv00489, 2018 WL 4008993 (W.D. Va. Aug. 22, 2018).

Coal Producer entered into an agreement with Railroad to supply certain minimum levels of coal to be transported by Railroad and sold at 23 power plants. The contract stipulated that if Coal Producer did not meet its minimum amount of coal, it must pay heavy fees to Railroad. It was undisputed that these minimum volumes were not met and that Coal Producer had paid millions of dollars in fees. At trial, Coal Producer brought six claims: (1) to be excused from performance; (2) unjust enrichment; (3) force majeure; (4) frustration of purpose; (5) impracticability; or (6) rescission of the contract. First, the court held that a factual question precluded summary judgment for excused performance since it was alleged that Railroad entered into subsequent contracts with the power plants, limiting their ability to buy from Coal Producer, which may have constituted a breach of the duty of good faith, an issue to be decided by the factfinder. However, because unjust enrichment was premised upon the breach of contract in the first count, the claim for unjust enrichment failed as a matter of law. Third, the court found that none of the circumstances constituting a force majeure as defined in the contract had occurred. Next, the court determined that Coal Producer failed to establish that its ability to carry out the contract was commercially impracticable or that the contract's purpose had been frustrated. Finally, the court determined that the final count, modification of the contract, was also based on the findings of the jury on the issue of breach of contract. Thus, summary judgment on this issue would be inappropriate.

W.D. Washington
Seattle Times Co. v. LeatherCare, Inc., C15-1901 TSZ, 2018 WL 3873562 (W.D. Wash. Aug. 15, 2018).

Previous property owner ("Former") brought suit against former tenant ("Tenant") for contaminating the property with hydrocarbons and petroleum products in the course of Tenant's dry-cleaning business, violating the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as well as Washington's Model Toxics Control Act ("MTCA"). Tenant then brought suit against current property owner ("Current"). Current countered and crossclaimed against Tenant and Former. After Current bought the property, it had to excavate over 100,000 tons of contaminated soil and install injection wells to address the contaminated ground water. The court found that the president of Tenant was not personally liable for Current's clean-up costs because he was not an "operator" under CERCLA and applicable state law; however, Tenant as a corporation was liable for seventy percent of Current's soil transportation and disposal costs while Former was liable for the remaining thirty percent. Under the orphan share doctrine, Former, Tenant, and Current almost evenly split liability for Current's groundwater treatment and regulatory review costs, with Current assuming slightly more liability than the others. The orphan share doctrine governs that when liability for environmental clean-up efforts fall on an insolvent or otherwise unavailable entity, the liability will be equitably apportioned amongst the available, responsible parties. Furthermore, because the parent company of Former obtained Former as a sole shareholder rather than a successor company, the corporate veil did not need to be pierced and parent company cannot assume Former's liability for Current's clean-up costs under CERCLA.

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

State

California
Forest Pres. Soc'y v. Dep't of Forestry & Fire Prot., No. A148182, 2018 WL 4091010 (Cal. Ct. App. Aug. 28, 2018).

Society petitioned a writ of mandate against Department for allegedly failing to properly assess a timber harvesting plan's ("the Plan") negative environmental impacts before granting approval. The trial court denied the

petition, and Society appealed to the California Court of Appeal. The court reviewed the case de novo, but with deference to Department decisions and Society bearing the burden of proving such decisions erroneous. The court held that Department did not abuse its discretion, or violate the California Environmental Quality Act ("CEQA"), in choosing the California Air Resources Board's Scoping Plan to measure greenhouse gas emissions, because there was no requirement to use the 2020 and 2050 emission reduction targets as the goal. Department was also able to aptly explain how the Scoping Plan would address the goals of reducing greenhouse gas emissions. The court held that the disagreement over which plan would better advance the goals of reducing emissions, while maintaining the forests, was not enough to merit a rejection of Department's actions. The court rejected Society's claims that the Plan was required to have quantitative data supporting the "carbon sequestration projections", because the CEQA does not have any such requirement. The court rejected Society's claims that Department's analysis of the Plan's cumulative greenhouse gas effects was flawed, because the available information and the expected carbon sequestration rate under the Scoping Plan allowed Department to make a reasonable conclusion that the Plan's "greenhouse gas emissions will not significantly impact climate change." The court rejected claim of improper consideration of short-term carbon conditions, because documents in the record plainly showed otherwise. The court held the Plan's mitigation measures were appropriate and legally enforceable, because the Plan included a monitoring program by Department and a permit-seeking requirement for any deviations from the Plan. The court affirmed the lower court decision.

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

San Franciscans for Livable Neighborhoods v. City & Cty. of San Francisco, 236 Cal.Rptr.3d 893 (Cal. Ct. App. 2018).

San Francisco neighborhood association ("Association") filed suit against City alleging that City's environmental impact report ("EIR") did not comply with the requirements of the California Environmental Quality Act ("CEQA") when City developed its 2009 plan for housing ("Housing Element"). The lower court ruled that City's EIR was sufficient except for the analysis of project alternatives and possible mitigation measures. Association appealed. The appellate court upheld all aspects of the EIR. First, the court determined that the Housing Element EIR properly used

future conditions of the city in calculating the environmental impacts of the project since using current baseline conditions of the city would be misleading given the city's high level of growth. Second, the court held that the EIR's environmental impact analysis concluding that there would no substantial impact on land use and aesthetics, traffic, and water were adequate because: (1) the Housing element did not change any current land use allowances or building restrictions; (2) the EIR noted potential traffic increases but justified a low impact on traffic by encouraging and identifying policy measures that would mitigate these effects; and (3) the water use and source analysis sufficiently provided notice of possible consequences of the proposed plan on water supply when it relied on a water demand study. Lastly, the court held that Association had not met its burden in proving the rage of alternatives provided and considered by City's EIR was manifestly unreasonable.

Sierra Club v. Cty. of Kern, No. F071133, 2018 WL 3360567 (Cal. Ct. App. July 10, 2018).

Club sued County over County's specific plans for regional development, alleging that the attached environmental impact report ("EIR") violated the California Environmental Quality Act ("CEQA") by (1) improperly examining long-term impacts of greenhouse gas emissions, (2) ineffectively mitigating environmental impacts, (3) ineffectively mitigating impacts on agricultural resources, and (4) "deferring the formulation mitigation measures for air quality impacts." The lower court rejected Club's petition for writ of mandate and claims, so Club appealed. This court reviewed under an abuse of discretion standard. The court held that County established its threshold of significance in relation to greenhouse gases properly, because County examined other agencies' thresholds of significance, were reasonable at the time of creation, and did not conflict with judicial precedent. County adequately considered the 2050 greenhouse gas emission reduction target, but chose not to use it. The court held that County had properly analyzed long term environmental affects, because the EIR was made to evolve with new scientific knowledge and environmental legislature. The court rejected Club's assertions of gas emission exceptions for small projects, because the EIR language was not suitable to such an interpretation. The court rejected the assertion that County took position of powerlessness in relation to land use mitigation and the assertion that County would not consider transportation mitigation measures, because language in the Specific Plan and the EIR discussed both of these issues. The court held that County's 1:1 ratio of agricultural conservation was

proper, because such mitigation is not required as a matter of law and Club fails to identify a defect in the scheme. The court held that the EIR language requiring mitigation of negative air quality impacts "where feasible" failed as an objective standard, and the court held that this failure violated the CEQA. The court thus reversed and remanded the case.

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

SWVP-GTIS MR, LLC v. Pinal Cty., No. 1 CA-TX 16-0017, 2018 WL 3853598 (Ariz. Ct. App. Aug. 14, 2018).

Company leased property to Lessee for ranching purposes. Lessee made improvements on the land. Company applied to County for agricultural property tax classification, but County denied the application. Company sued County for the denied classification, but County motioned to significantly limit Company's evidence showing that the land is used for agricultural purposes. The lower court found for County, as Company could not meet its burden. Company appealed. To be classified as agricultural, grazing property must have "a minimum carrying capacity of forty animal units and contain[ ] an economic feasible number of animal units," and the property must show "a reasonable expectation of operating profit, exclusive of land cost, from the agricultural use of the property." The legal presumption is that County correctly denied the classification request, though it may be overcome with a factual showing. Because of County's motion, Company could not produce evidence in regard to grazing lands or the water use on the property. The Arizona Court of Appeals held that the lower court erred in precluding Company's evidence and remanded for a new trial.

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

Massachusetts

Miramar Park Ass'n, Inc. v. Town of Dennis, 105 N.E.3d 241 (Mass. 2018).

Association sued Town, in 2014, under the theory that Town violated state environmental rules by placing materials dredged from a tidal river mouth on a publicly-owned beach, rather than Association's privately-owned beach to fight sediment loss. The lower court granted summary judgment to the Association, because Town's 1990 expansion of the jetty activated

responsibilities under 310 Code Mass. Regs. § 10.27 (2014) and denied Town's motion for summary judgment. The lower court even issued an injunction requiring Town to dredge the river on occasion and deposit the material on Association's beach. Town appealed to the Supreme Judicial Court of Massachusetts. The Court discussed the interplay of multiple state statutes, which allowed citizens to bring complaints for environmental damage, promulgation of wetland protection by local authorities, and regulations of water quality that permitted Association to even bring this suit against Town. The Court reviewed the grant of summary judgment de novo. The Court held that the actual disputed 2014 dredging did not create an environmental harm. Additionally, the Court rejected the idea that the 1990 extension of the jetty by Town created ongoing obligations to renew Association's beach, because Association failed to prove that the jetty expansion was made under "an order of conditions that was issued by the conservation commission" that would actually create obligations under the Massachusetts statute. This order is a necessary element to allowing such environmental modifications, and only where an order of conditions was attached that created an obligation to renew Association's beach could such an obligation exist. The Court held that no such order of conditions existed. The Court concluded that Association had thus failed to prove environmental harm from the dredging and no obligation form the jetty expansion. The Court reversed the lower decision, vacated the injunction, and granted summary judgment to Town.

Michigan

Howard v. Glenn Haven Shores Ass'n, No. 340174, 2018 WL 3594782 (Mich. Ct. App. July 26, 2018).

Landowners brought suit against Association for damages to properties incurred due to excessive erosion. Landowners owned three plots of land, adjacent to Lake Michigan, located in the subdivision managed by Association. Landowners claimed that the excessive runoff was due to construction activities performed by Association and that Association owed them a duty to take affirmative steps to lessen or stop surface water runoff onto their property. The trial court granted Association's motion for summary judgment, ruling that Association owed Landowners no duty to affirmatively prevent erosion and runoff. Landowners appealed. The Court of Appeals of Michigan affirmed the trial court's finding, ruling that Association, as the dominant estate owner, owed no duty to take affirmative action. The court did find, however, that dominant estate owners do have a duty to refrain from negligent conduct that would increase the natural flow

of surface water so as to cause more erosion than would otherwise occur naturally. The court found that Landowners had not made a pleading sufficient to support their claim and affirmed the trial court's summary judgment ruling.

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

Minnesota
Minnesota Sands, LLC v. Cty. of Winona, 917 N.W.2d 775 (Minn. Ct. App. 2018).

Mineral Company brought suit against County alleging that its zoning ordinance banning companies from industrial mineral operations within County was unconstitutional under both the Minnesota and United States constitutions. Specifically, Company claimed that the zoning ordinance violated the dormant Commerce Clause and that the ordinance was a regulatory taking of the Company's property interest. However, the court found that the provision in question was even-handed in its application, burdened both in-state and out-of-state interests, and was not facially discriminatory. Therefore, the provision did not violate the dormant Commerce Clause. Further, the court was not persuaded by Company's argument that the ordinance constituted a regulatory taking of its property interest in the minerals in County. More precisely, the court held that Company failed to fulfill a condition precedent necessary for its interest to accrue. Thus, they were not compensable property interests. As such, the court affirmed the previous summary judgment in favor of County.

New Jersey
State v. Quaker Valley Farms, LLC, 192 A.3d 996 (N.J. 2018).

New Jersey's State Agriculture Development Committee ("SADC"), seeking to enforce restrictions placed on the use of farmland by the Agriculture Retention and Development Act ("ARDA") and a deed of easement's command to conserve soil, brought action against a farmland Owner to stop disruption of prime quality soil. The SADC initiated an investigation of Owner, which showed that Owner excavated and leveled twenty acres of the farm previously used for the production of crops to erect hoop houses where flowers can be grown. The trial court granted summary judgement in favor of SADC, halting Owner's project and ordering the remediation of the despoiled land. The appellate court reversed finding "the

imperative of soil conservation had to be reconciled with the permissible construction of buildings for agricultural purposes under both the deed of easement and the ARDA." The case then went before the Supreme Court of New Jersey. The Court held that the appellate court erred in its grant of summary judgement for the SADC. Based on the evidence, it was determined that Owner permanently damaged soil in violation of the ARDA and the existing SADC regulation. While Owner had the right to erect hoop houses in furtherance of his business, Owner did not have the authority to permanently damage a "wide swath of premier quality soil." This court acknowledged that SADC had yet to promulgate guidelines that would permit farmland owners to make informed decisions about permissible agricultural uses of land under the ARDA and similar deeds of easement. However, even under the existing law and present deed, "any reasonable person should have known that despoiling so much prime quality soil was an unauthorized activity." The Court remanded to the trial court to continue with the prior ordered remediation plan.

Pennsylvania

Del. Riverkeeper Network v. Dep't of Envtl. Prot., No. 1571 C.D. 2017, 2018 WL 3637059 (Pa. Commw. Ct. Aug. 1, 2018).

Organization sought judicial review of the Pennsylvania Environmental Hearing Board's ("EHB") decision to deny Organization's petition to challenge the Department of Environmental Protection's approval of a natural gas pipeline project. The court opined that their review of the decision of the EHB could only extend to a determination of whether there had been errors of law or constitutional violations and whether or not there was substantial evidence to support the decision. The court found that EHB did not abuse its discretion. The court reasoned that because Organization failed to show "good cause" to permit the filing of the petition, EHB's decision was appropriate.

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

EQT Prod. Co. v. Dep't of Envtl. Prot., 193 A.3d 1137 (Pa. Commw. Ct. 2018).

The reviewing court evaluated Board's assessment of a civil penalty against Company for the infiltration of wastewater into groundwater. The resulting significant and undisputed pollution from the infiltration allowed for a fine

of up to $10,000 per day, per violation under the terms of the Clean Streams Law ("CSL"). Company disputed the amount of the penalty determined by Board (the "maximum"), and the appellate review of the Board's decision was limited by administrative reviews, which limits review to questions of law or clear error of fact. The court evaluated the Board's decision based on a record that supported Board's contentions. The dispute, held as an administrative hearing, took place over ten days and developed a considerable record of fact, analysis, and conclusions of law. The ample record allowed the court to point to multiple sources in favor of Board's assessment. Company challenged the penalty in its length of time determination and willfulness enhancer. The Board's determination of the violation time relied on expert testimony that used scientific methods to testify with a "reasonable degree of scientific certainty" that the pollution took place as described. As it determined the testimony to be reasonable, scientific, and contrary to Company's allegation, the reviewing court upheld the Board's determination. The Board also relied on multiple circumstances and evidentiary proofs to come to the conclusion that Company acted willfully in failing to appropriately respond to the pollution. The totality of the circumstances that Board considered, as well as specific evidences of Company apparently ignoring significant notices of potential problems, satisfied the reviewing court that Board's determinations were not arbitrary or capricious. The court also noted that there was no legal error in Board's calculations, as that court's rulings to the contrary had been overturned themselves by the state Supreme Court. Therefore, the court upheld Board's determination.

Flick v. Salerno, No. 1966 EDA 2016 & No. 551 EDA 2017, 2018 WL 4339662 (Pa. Super. Ct. Sept. 11, 2018).

Owner-1 sought indemnification for penalties and costs associated with groundwater pollution from Owner-2 and Engineer. Owner-2 was the prior owner of the afflicted property, and alleged no knowledge of any pollution or waste during the sale. Furthermore, Owner-1 had directed an environmental inspection by Engineer of the property prior to completing the sale. Years after the sale, a neighboring Company's tests revealed pollutant levels exceeding the state standards. Following the settlement of litigation between Owner-1 and Company, in which Owner-1 admitted responsibility and damages for the pollutants, Owner-1 filed the indemnification action. The trial court denied the action as barred by the statute of limitations. The appellate court affirmed, noting that Owner-1 initially filed suit against Owner-2 long after a breach of contract claim

would be timely. Even if the allegation was accurate, the court noted: (1) Owner-1 acknowledged notice of a potential breach in 2003; (2) the statute of limitations would run for four years; and (3) that the suit was filed in 2014. The court acknowledged that a pure indemnification claim may not mature until judgment was finally determined in prior litigation, but noted that the present indemnification claim, even if interpreted most favorably to Owner-1, matured upon discovery of the damages that were arguably negligently caused by a third-party, here Owner-2. Therefore, the same analysis that barred the breach of contract claim related to indemnification, in that the discovery of pollutants acted as notice of potential legal claims, and the limitations of six years on indemnification claims had run prior to filing. Lastly, the court affirmed fee shifting in favor of Owner-2 because the claim properly came under the purview of the Clean Streams Law which allows for fee shifting at the trial court's discretion.