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Recent Case Decisions

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RECENT CASE DECISIONS

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SELECTED OIL AND GAS DECISIONS

Upstream – Federal

D. Wyoming
Cloud Peak Energy Inc. v. U.S. Dept. of the Interior, No. 19-CV-120-2WS, 2019 WL 5058582 (D. Wyo. Oct. 8, 2019).

Producers moved for a preliminary injunction to set aside the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform Rule ("Valuation Rule"). A unit of the U.S. Department of Interior, the Office of Natural Resources Revenue ("ONRR"), enacted the Valuation Rule to change how federal lessees calculate royalty payments owed to the federal government. Producers contend the Valuation Rule exceeds the statutory authority of the ONRR and is arbitrary and capricious. In order to receive a preliminary injunction, a movant must show: it will suffer irreparable harm without the injunction, it is likely to succeed on the merits, and the preliminary injunction will be equitable to the public and the agency. First, Producers successfully demonstrated industry groups would suffer irreparable compliance injury without an injunction. The court recognized that compliance costs, especially those that would not be recoverable due to sovereign immunity, constitute irreparable financial harm. Second, Producers demonstrated they would likely succeed on some of their claims. Producers failed to demonstrate the ONRR lacked statutory authority to enact the Valuation Rule and that the ONRR acted arbitrary and capriciously when it made new valuation rules for oil and gas. However, the court determined Producers would probably win with respect to the Valuation Rule's calculation of coal royalties. An agency acts arbitrarily and capriciously, in part, when it entirely fails to consider an important aspect of the problem. The Valuation Rule ties the calculation of coal royalties, in the absence of an arm's-length transaction, to the sale of electricity generated from burning that coal. This does not logically follow because "trying to value coal based on the sale of electricity is akin to valuing wheat based on the sale of a cake." Accordingly, the court granted Producers preliminary injunction only to calculations of coal royalties.

Upstream – State

Texas
Dyke v. Hall, No. 03-18-00457-CV, 2019 WL 5251139 (Tex. App. Oct. 17, 2019).

Oil lease beneficiary ("Beneficiary") contracted with oil lease manager ("Manager") to maintain the lease. Following settlement of a dispute with Beneficiary's family over ownership of oil lease, Beneficiary filed for declaratory judgment to determine what was owed to Manager. Later, Beneficiary amended the complaint by claiming Manager was his attorney and therefore breached fiduciary duties when Manager entered into a contract which personally benefitted. Manager counterclaimed and sought a motion to dismiss the breach of duty claim, which the trial court denied. On appeal, Manager argued that (1) the trial court erred by not dismissing Beneficiary's amended claims, (2) the prima facia case presented by Beneficiary was insufficient, and (3) a preponderance of the evidence rebutted the amended claim. Manager claimed the contractual agreement was unambiguous and he was not acting in his capacity as Beneficiary's attorney. However, Beneficiary asserted Manager presented himself as an attorney and the eight percent share of mineral profit that was stated in the contract was a contingency fee for attorney services. The court held that Beneficiary provided a prima facia case for a controversy, that if true, would result in an attorney-client relationship being formed. Because there had been sufficient evidence of an attorney-client relationship, Beneficiary did not have to prove the breach, causation, or damages elements of the case. The court also held that even though violation of the rules binding attorney conduct can not give rise to civil action, they can be used to determine public policy violations. Therefore, Manager had not met the burden to prove a prima facie case and the trial court's denial of Manager's motion to dismiss was proper.

Dyer v. Tex. Comm'n on Envtl. Quality, No. 03-17-00499-CV, 2019 WL 5090568 (Tex. App. Oct. 11, 2019).

Waste Disposal Company ("Company") sought to obtain a permit to operate an existing well and up to three new injection wells. Operation or construction of an injection well requires a permit from Texas Commission on Environmental Quality ("TCEQ"), which demands submission of a no-harm letter from Railroad Commission ("RC"). Company obtained RC letter and submitted it to TCEQ. During the administrative proceeding,

mineral title holding company filed to intervene, claiming that Company's wells would interfere with their operations. RC withdrew its letter and called for a rehearing of the case, after which they permanently rescinded the letter. However, before RC made a final decision regarding the letter, TCEQ granted the permit. City and County appealed TCEQ permit grant by demanding a reversal because of the ultimate rescission of the RC letter. The court held, first, the original letter submitted by Company was sufficient for TCEQ to make a decision because the letter was not rescinded until after the permit was granted. Second, TCEQ did not act arbitrarily and capriciously when they did not consider the new evidence RC was evaluating because it would have caused an undue delay. Third, the legislature did grant the ability of TCEQ to dismiss findings that were not based on the majority evidence available. Fourth, the two statutory requirements were met: proper written explanation by TCEQ of decision and TCEQ gave sufficient hearing and notice. Fifth, the facts were supported by substantial evidence. The court affirmed the permit grant.

Scribner v. Wineinger, No. 02-19-00208-CV, 2019 WL 5251134 (Tex. App. Oct. 17, 2019).

An assignment of mineral interest was conveyed to Leaseholder in 2002. In 2018, Leaseholder sued Oil and Gas Company ("Company") for trespass and conversion and Company countersued for quiet title. Company claimed superior title through a five-year statutory limitation period where it, and its predecessors, held working interest assignments from April 2010 to April 2015. They also claimed that they exclusively collected all royalties during the period in question. Leaseholder maintained that the statute of limitations never ran because Company acknowledged Leaseholder title three different times in 2016, and limitation of the title is defeated if the adverse possessor admits to not having ownership before the limitation period runs out. The court held that once the statutory period ends, the adverse possessor may admit their lack of title with no repercussion. Two questions were addressed by the court: (1) did the acknowledgment of title by Company to Leaseholder prevent the limitation from running and (2) did the acknowledgment resemble a material fact as to if the possession was adverse. All evidence referenced occurred in the middle of 2016, which was outside the five-year limitation period that ended in mid-2015. The court held that the correspondence admitting to Company's lack of ownership did not bar the adverse possession because it fell outside the five-year statutory period making the admission nonmaterial. The grant of summary judgment was affirmed.

Midstream – State

Delaware
Dieckman v. Regency GP LP, No. 11130-CB, 2019 WL 5576886 (Del. Ch. Oct. 29, 2019).

Unitholder of the defendant Company, a midstream natural gas company, sued Company over the validity of the merger between it and an affiliate of the Company given the conflicting interests of ownership between the companies. Both parties motioned for summary judgement. Company's motion for summary judgment was ultimately denied because the court found that a material fact existed whether Company actually relied on its investment bank's fairness opinion as stipulated in the partnership agreement. The court agreed with the evidence provided by Unitholder that Company's Conflicts Committee had already pre-determined that that the merger was in its unitholders' best interests, before receiving any opinion from its investment bank. On the other hand, Unitholder's motion for summary judgment was partially granted because the court found that Company's Conflicts Committee was not validly constructed because one of its two members was serving on the board of one of Company's affiliates while simultaneously serving on the Conflicts Committee, which negated the Special Approval provision of the partnership agreement and potentially invalidated the merger. In addition, the court found that the proxy statement for the challenged transaction was materially false and misleading because it was approved by the non-independent Conflicts Committee, which potentially negated the Unitholder Approval provision of the partnership agreement thereby invalidating the unitholder vote to approve the merger. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Pennsylvania
Main v. Columbia Gas Co., No. 1470 WDA 2018, 2019 WL 4273896 (Pa. Super. Ct. Sept. 9, 2019).

Worker appealed the trial court order granting summary judgment for Gas Company. Worker was an employee of Gas Company's subcontractor. Gas Company hired subcontractor to 'pig' natural gas service lines. Pigging operations involve employees shooting a foam pig through a detached service line to clear the line. Worker was on one end of the line and another coworker of the subcontractor was on the other. The coworker poured methanol from the bottle into the service line. Shortly afterwards, Worker's

end of the service line exploded injuring his foot and ankle. Gas Company was responsible for bringing the methanol onto the worksite. The court considered whether Gas Company was liable for Worker's injuries independently, liable on the basis of its position as the employer of the subcontractor, or liable under the theory that Gas Company created a peculiar and unreasonable risk when it brought methanol to the worksite without taking special precautions. The court affirmed the trial court's grant of summary judgment for Gas Company on all three issues. First, Gas Company was not independently liable for Worker's injury because it was not the proximate cause of the injury. Gas Company merely brought the methanol for use on other operations. It did not pour the methanol into the service line or cause methanol to be poured to the service line. Second, employers are not vicariously liable for the actions of subcontractors unless the employer retained actual control over the subcontractor. No actual control was asserted. Thus, Gas Company cannot be vicariously liable. Finally, Worker waived the issue of whether or not the methanol was a peculiar and unreasonable risk when he failed to include it in his Statement of Errors.

Traditional Generation – State

Delaware
PPL Corp. v. Riverstone Holdings LLC, No. 2018-0868-JRS, 2019 WL 5423306 (Del. Ch. Oct. 23, 2019).

Holding Company sued a private equity firm ("Firm"). The issue arose when Holding Company sold a substantial portion of its assets and spun-off by creating Energy Corporation and transferring into it the assets and liabilities of Holding Company's power generation business. Holding Company's stockholders received a majority of Energy Corporation's stock and Holding Company retained all excluded assets and liabilities. Firm also transferred power generating assets into Energy Corporation and became the largest individual stockholder in the new entity. Within a year after the spin-off, Firm executed an agreement with Energy Corporation to acquire the remainder of its shares and take it private. Approximately a year after the take-private transaction closed, Firm began issuing substantial dividends to itself from the coffers of Energy Corporation to the financial detriment of its stockholders. Shortly thereafter, Energy Corporation and a creditor filed a lawsuit against Holding Company. Holding Company accuses Firm of being the party responsible for the lawsuits in an attempt to find Holding Company responsible for the liability that Firm acquired

during the spin-off. Holding Company then filed this suit against Firm consisting of nine counts of contract breaches and declaratory relief. The specific issue concerns a forum selection clause in the parties' Separation Agreement and whether Holding Company had stated a viable claim for relief related to its interpretation of the Separation Agreement. Regarding the forum selection clause, the court determined it had jurisdiction over this case according to express terms of the parties' Separation Agreement. As for the interpretation of the agreement, the court found that Holding Company pled facts with sufficient particularity, and accordingly, nearly all of Holding Company's claims survived Firm's motions to dismiss. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

SELECTED WATER DECISIONS

Federal

D. Montana
Helena Hunters & Anglers Ass'n v. Marten, CV 19-47-M-DLC, 2019 WL 5069002 (D. Mont. Oct. 9, 2019).

Environmental Group sought preliminary injunction to stop vegetation treatments along the Lewis and Clark National Forrest deemed necessary to protect a township's watershed and prevent fire damage. Environmental Group claims that treatments are unlawful because Government Agency failed to assess the possible effects on grizzly bear populations and include the findings of such research as required by the Endangered Species Act ("ESA"). An additional claim states that the vegetation treatment will increase road traffic beyond what is authorized in the National Forest Management Act which could further negatively impact grizzly bear populations. Normally for a party to win a preliminary injunction they must prove to the court that they would suffer irreparable harm in the absence of the preliminary injunction, and the injunction is in favor of public interest it will be granted. When the ESA is involved, the test is changed so that the equities and public interest factors always tip in favor of the protected species. Thus, Environmental Group only has to show that they would suffer irreparable harm. The court found that Environmental Group failed to show irreparable harm to grizzly bears, though they did show that its members would suffer irreparable harm by not being able to enjoy nature. The Court discounted this argument because the project was targeted at dead or dying tries, and the injunction would only serve to prevent the Government from doing what would occur naturally in the coming years and denied the preliminary injunction.

D. Utah
W. Watersheds Project v. Interior Bd. of Land Appeals, No. 1:19-cv-95-TS-PMW, 2019 WL 5191244 (D. Utah Oct. 15, 2019).

Conservation Group presented evidence to the Bureau of Land Management ("BLM") that renewing grazing permits for certain land in Utah would degrade habitats and violate environmental laws, but BLM approved the permits regardless. Conservation Group appealed to an ALJ, who reversed and remanded, but BLM appealed to Board, who overruled the ALJ and reinstated BLM's decision. In response, Conservation Group

filed this case against Board in the District Court for Idaho, and the State of Utah moved to intervene. Board moved to transfer venue to the District of Utah without ruling on State's motion to intervene. Under Federal Rule of Civil Procedure 24, intervention as a matter of right, if not otherwise granted by federal statute, may be granted only if the motion is timely, the party claims an interest in the subject matter of the lawsuit, the party's interests may practically be impaired or impeded, and those interests are not adequately represented by another party already involved in the lawsuit. The parties do not dispute the timeliness of the motion. State can legitimately claim an interest in the proceedings because it has interests in the environmental quality, economy, and grazing operations within its borders. Intervention should be granted, especially in cases involving significant public policy concerns, to resolve as many lawsuits as possible without diminishing due process and efficiency. The burden to satisfy impairment is minimal, and State meets it because it may lose revenue and because its ability to regulate its economy and environmental quality will be impacted. The burden to satisfy inadequate representation is similarly low. Courts deny intervention to those whose interests are identical to those of other parties to the litigation. State and the federal agencies have different interests, so the court granted the Motion to Intervene without needing to consider permissive intervention.

W.D. Washington

Coal. to Protect Pugent Sound Habitat v. U.S. Army Corps. Of Eng'rs., No. 17-1209RSL, 2019 WL 5103309 (W.D. Wash. Oct. 10, 2019).

Environmental Group the challenged Government Agency's issuance of a nationwide permit authorizing discharges, structures, and work in waters of the United States in relation to commercial shellfish aquaculture activities. Environmental Group requested the vacation of the permits and for Government Agency to adhere to their statutory mandate when issuing new permits. Prior to this case, the Government Agency made "minimal adverse effect findings" as required by statute when issuing permits. Environmental Group argued that the conclusions reached by Government should be invalidated the record does not support the issuance of the permit and does not take into account the environmental effects of shellfish operations. Government Agency's findings were that the impacts would be minimal, especially in comparison to harm caused by coastal development and human activities. The court found that such a blanket permit failed to take into account the differing ways in which shellfish activities are undertaken in various regions of the United States. Through this blanket permit, the

Government Agency read the "similar in nature" requirement too broadly. Therefore, the Government's findings failed to consider the impacts of the of shellfish activities and its findings, based primarily on the limited findings of a single study, are not supported by substantial evidence. The court set aside Government Agency decision and remanded the issue back for reconsideration.

State

California
Scher v. Burke, No. B290011, 2019 WL 5615458 (Cal. Ct. App. Oct. 31, 2019).

Landowner-1 sued Landowner-2 to appeal a declaratory judgment entered against Landowner-1 by the district court, arguing that the judgment materially deviates from the remand instructions and exceeds the scope of the issues contained in the pleadings. The underlying claim originated when Landowner-1 sued for quiet title, to enjoin Landowner-2 from interfering with Landowner-1's use of two roads abutting Landowner-2's property, and a declaration of rights pertaining to the use of the two roads. At trial, although Landowner-1 obtained quiet title to the easements and received a judicial declaration that the Landowner-2 would not interfere with the Landowner-1's use of the easements, on appeal, the findings in favor of Landowner-1 were reversed. The court then allowed Landowner-1 to enter a proposed judgment that the court subsequently dismissed as wholly inadequate and too substantively similar to the judgment on file. Regarding Landowner-1's claim that the judgement exceeds the scope of the issues contained in the pleadings, the court held that judgement was invalid insofar as it purports to adjudicate any other property owned by Landowner-1 not at issue in this litigation. Accordingly, the judgement was reversed, and the trial court was directed to enter a new declaratory judgment reflecting this opinion.

Georgia
Old Republic Nat'l Title Ins. v. RM Kids, L.L.C., A19A0971, 2019 WL 5257548 (Ga.
Ct. App. Oct. 17, 2019).

This dispute concerns property contaminated by Pipeline Company's petroleum spill. Pipeline Company acquired property to clean up the spill in compliance with a government order. Pipeline Company sold property to

ranch, and the deed contained an exhibit listing easements and restrictions regarding the government order. The property was rezoned and sold to Developer, but the exhibit was excluded, and Insurer provided title insurance. Predecessor-Lender supplied a loan to Developer for purchase of the property. Successor-Lender acquired loan from Predecessor-Lender, then learned of the exhibit, and acquired property after Developer defaulted on the loan. Successor-Lender unsuccessfully inquired to Insurer if the exhibit constituted a defect triggering coverage, and then sued for breach of contract. After a second trial a jury awarded damages to Successor-Lender, and Insurer appealed the denial of its motion for a directed verdict on the grounds that the alleged loss was not a title defect. The court denied the appeal. It reasoned that (1) coverage exceptions are construed narrowly against insurers; (2) insurance contracts are to be read from the perspective of a layman; and (3) insurers have the burden of proof to show exceptions to coverage, so the court would not conclude as a matter of law that the easements and restrictions listed in the exhibit were not excepted from coverage. Any ambiguity in the contract language was for the jury to resolve, and with Successor-Lender's supplied expert testimony, the jury had sufficient evidence to find a title defect. The court further elaborated that encumbrances or defects to title (including easements) and unmarketability are two separate, independent avenues to triggering coverage under titled insurance. So, arguments that the property could still be sold were misplaced, and regardless the change in economic value would be used in calculating damages. Those damages were upheld because the standard of review was if the jury had any evidence to support its verdict.

Idaho

First Sec. Corp. v. Belle Ranch, LLC, No. 46144, 2019 WL 5539589 (Idaho Oct. 28, 2019)

This case was a consolidated appeal involving separate quiet title actions over contested water rights. Both Purported-Owners and Property-Owner derived ownership claims to irrigation water rights on Property-Owner's property from the same party ("Predecessor"), based on a long string of transactions. In a partial decree, and after Predecessor transferred water rights which ended up in the hands of the parties to the case, a district court decreed all of the water rights to be in the name of Predecessor. Only Property-Owner contested this decree by filing an administrative transfer of water rights application, which was accepted. Subsequently, the same district court issued a final decree against all persons, superseding all transfers of water interest except those properly claimed under

administrative procedure. Next Purported-Owners brought suit against Property-Owner to quiet title to their purported ownership of water rights. At trial, the district court quieted title in Property-Owner, which the Supreme Court of Idaho affirmed. The court reasoned that the final decree acted as a final judgment on the merits. Further, the court reasoned that because all parties derived their ownership from Predecessor, who was a party to both the partial and final decrees, and because a successor in interest is considered to be in privity with a predecessor, then all the parties involved in the appeal were the same parties involved in the partial and final decrees. Finally, the court reasoned that Purported-Owners' claims on appeal arose out of the same cause of action as claims filed during the time between the partial and final decrees. Thus, their claims could have been asserted in prior adjudication. The court then held that Property-Owner properly filed their administrative action during this timeframe, and therefore the court affirmed the decision to quiet water rights title in Property-Owner, and barred Purported-Owners claims based on res judicata.

Kentucky

Morgan v. Storey, NO. 2018-CA-000517-MR, 2019 WL 5091918 (Ky. Ct. App. Oct. 11, 2019).

After Farm Owner's death in 2008, the Farm was divided into seven tracts, which were distributed to Farm Owner's Son, Daughter, and Granddaughter. Son owned Tract 2 and a separate piece of land adjoining Tract 3, which was owned by granddaughter. The deeds concerning Tracts 2 and 3 described a "perpetual" easement for the purpose of access to the adjoining land from Tract 2 across Tract 3. This easement was described as running from a point on the border between the adjacent land, across Tract 3, and then across Tract 2 to a lane. When Son died, Tract 2 and the adjoining land passed to Heirs. Heirs approached Granddaughter to purchase Tract 3 but were declined. Heirs then locked the gate on Tract 2, denying Granddaughter access across it to the lane. Granddaughter sued for declaratory judgement for a right-of-way access. The trial court granted the easement by considering extrinsic evidence because of ambiguity in the deeds, finding it to be a mutual easement to both properties from the lane. On appeal, Heirs argued there was no ambiguity and that therefore extrinsic evidence should not have been considered. The court held that the language plainly burdened Tracts 2 and 3 for the adjoining lands, described as the lands of Son, and said nothing of burdening Tract 2 for the benefit of Tract 3, so there was no ambiguity. Therefore, no easement was created in the

deeds across Tract 2 for the benefit of Tract 3, and the trial court's decision was reversed. However, because the trial court inconclusively discussed quasi-easements, the case was remanded to resolve whether such a quasi-easement did exist.

Massachusetts

Concord v. Littleton Water Dep't, 18 MISC 000596 (JSDR), 2019 WL 5100376 (Mass. Dist. Ct. Oct. 11, 2019).

Town has drawn water from a pond since Town was granted that right by the state legislature in 1884. Town has acquired land for that purpose, including land in two other cities, including one for which Department manages the water supply. In 1985, that state adopted a Water Management Act ("WMA"). Under that act Town applied for, was granted, and continually renewed its right to continue drawing from its historic sources; Department never commented on these renewals. Department asserted rights to draw from Pond in conflict with Town's rights, including Department's wells drawing from the same groundwater source as Pond; the two could not resolve their differences and Town filed for declaratory relief. Third City, in which Town also owns property for drawing from Pond, was allowed to intervene, asserting it also had rights under the 1884 Act. Parties filed cross-motions for summary judgment. The court first established that an actual controversy existed, as the cities were expanding significant resources to develop their ability to draw water. Then the court explained that repeal of earlier laws by later ones must generally be explicit, in this case the WMA implicitly repealed the 1884 because the two laws clearly conflict and because the WMA is clearly intended to cover the subject of regulation and water rights comprehensively. The WMA is comprehensive because its plain language broadly describes such scope, legislative history indicates a contemplated need for an overarching, statewide system, and providing for a grandfathering mechanism made explicit repeal of earlier acts unnecessary. With the 1884 Act repealed, the rights of Department and Third City under that act were extinguished.

Connelly v. Fisichelli, No. 16 SBQ 03200 06-001, No. 18 SBQ 03200 01-001, 2019 WL 5159769 (Mass. Dist. Ct. Oct. 15, 2019).

In these two consolidated cases, Inland Property Owners ("Property Owners") seek to have the court amend Trustee's certificate of title to recognize expressly Property Owners' claimed appurtenant easement rights to pass over Trustee's land to access the Atlantic Ocean. Owners and

Trustee's Land resulted from the division of a larger parcel of land, and the court found that at the time of the division, the developers intended for the easement to extend across the Trustee's land. The court first disposed of Trustee's argument that Property Owners lacked standing as circular—Trustee argued they could not have standing without judicial notice of their rights, which was the very thing they were seeking. The court the explained that those asserting an easement bear the burden of proving its existence and that to be enforceable, easements generally must be noted on the certificate of title. However, an exception applies in this case: the facts described by the certificate would prompt a reasonable purchaser to investigate further. Trustee's property was originally intended to serve as a street connecting the highway to the beach, and the court described the property as obviously being for this purpose, so Trustee should have inquired further. The court granted the easement to pass over Trustee's land by foot, but not by car, noting that Owners did not seek that right.

Wolpe v. Haney., No. 14 MISC. 486868, 2019 WL 5090528 (Mass. Dist. Ct. Oct. 10, 2019).

Case involves dispute over ownership of the area of land between the line of the upland and the low water mark, hereafter referred to as "the marsh," between Landowner-1, Landowner-2 and Town. Landowner-1 claims ownership of the land on the waterside of their properties, while Landowner-2 claims that the title of the property is held in a trust. Town asserts that the marsh is theirs via adverse possession. The marsh was originally community owned but that ended ownership ended when the land was separated into tracts by the legislature to be owned separately. After an analysis of the land records regarding the marsh and the surrounding properties, the court found that when the descriptions of the plots used different wording it was purposefully to describe differing lands and water areas. Having used the property descriptions to find that the Landowner-1, Landowner-2, and Town's interests in the marsh, the court then addressed whether any of these interests had been lost through adverse possession. The court shot down Town's adverse possession claim because the town offered no evidence supporting evidence. The court allowed the Landowner-1 to tack their interests with the prior owners, as there had been no severance in the continuous use between the previous owners. The court found that for the purpose of adverse possession, the existence of a dock transfers interest in the land which it covers as the requirements were satisfied. However, children playing in the land or adults walking near the border of the marsh did not satisfy the elements of adverse possession.

Michigan
Deer Lake Prop. Owners Ass'n v. Independence Charter Twp., No. 346965, 2019 WL 5092617 (Mich. Ct. App. Oct. 10, 2019).

This case is the culmination of a lengthy legal battle between two lakefront Homeowners Associations ("HOAs") over the Smaller HOA's four season docks, which moor up to ten boats. Township, through its planning commission, granted the smaller HOA a special land use permit ("SLUP") for the docks. Township had previously granted Smaller HOA a nonconforming validation certificate ("NVC") for two docks, which Smaller HOA appealed, but Larger HOA did not challenge the appeal and that action was stayed pending the resolution of this one. The Commission held a two-hour hearing and received extensive, conflicting evidence concerning overcrowding and other issues potentially caused by the docks before approving the SLUP. Larger HOA appealed to the circuit court, Smaller HOA intervened as a defendant, and the circuit court affirmed the commission. Larger HOA argued the SLUP was an unlawful expansion of a nonconforming use. However, the court concluded that was a challenge to the NVC, which Larger HOA had not opposed previously, therefore the issue was not properly before the court. The court also held the SLUP was properly granted, following a hearing a supported by sufficient evidence. Larger HOA appealed again. The Court upheld the commission's authority to issue the SLUP as the issue of whether it was effectively an illegal expansion of the NVC was not properly before the court. The court held that the commission had substantial evidence to support its decision from the hearing, and that the decision was owned deference and so would not be overturned. Lastly, Smaller HOA asserted Larger HOA lacked standing, but the court affirmed Larger HOA's standing, as it pleaded loss of property values as well as aesthetic and environmental concerns.

Minnesota
In Re the Denial of A Contested Case Hearing Request and Modification of a Notice of Coverage Under Individual Nat'l Pollution Discharge Elimination Sys. Feedlot Permit No. MN0067652, for the Proposed Expansion Of Daley Farms Of Lewiston L.L.P., Daley Farms of Lewiston L.L.P. 1, and Daley Farms Of Lewiston L.L.P. 7 Section 16, Utica Township (A19-0207), A19-0207A19-0209, 2019 WL 5106666 (Minn. Ct. App. Oct. 14, 2019).

Farm applied for modifications to its feedlot permit to significantly increase its dairy operation. Before granting the permit modification, Agency

completed an Environmental Assessment Worksheet ("EAW") that included Farm's proposed manure management plan ("MMP"), upon which the permit would be conditional. During the comment period Environmental Group objected that the MMP was insufficient to protect water quality, did not account for greenhouse gas emissions and further requested Agency produce a more exhaustive Environmental Impact Statement ("EIS"). Farm updated its proposed practices to account for some concerns, but Agency did not begin an EIS or address the greenhouse gas concerns. Environmental Group requested a contested-case hearing, but Agency denied on the grounds that questions of law alone, and not of fact, were disputed. On appeal the court ruled that Agency's decision that an EIS was unnecessary was arbitrary and capricious and that an EIS must precede the modification, reversing and remanding to Agency. However, the Court also ruled that the agency had sufficient evidence to deny a hearing and that agency's decision to not issue a commissioner's report before granting the permit modification was not based on a procedural error. Not completing the EIS was arbitrary and capricious because Agency was charged to consider all potentially significant environmental effects, and by not considering greenhouse gas emissions, Agency failed to take a "hard look." Not granting the hearing was supported by substantial evidence because the evidence Environmental Group presented did not create a question of fact but instead disputed the advisability of a regulation. The failure to provide a commissioner's report was not an error because the body to which the report was to be made no longer exists, and Environmental Group does not explain how this failure could otherwise affect the decision.

Montana
Lyman Creek, LLC v. City of Bozeman, 2019 MT 243, 450 P.3d 872.

Property-Owner and City both owned water rights sourced by the same creek. Property-Owner complained to the Montana Department of Natural Resources and Conservation ("DNRC") that City was engaging in unpermitted water use, then filed suit against City seeking injunctive relief under the Montana Water Use Act ("Act"). At trial, City's motion to dismiss was granted, and property owner appealed. The Supreme Court of Montana focused their analysis on whether the Act precluded a private right of action for judicial enforcement. The Court affirmed the trial court's dismissal of the case based on an interpretation of the portions of the Act relevant to Property-Owner's claims. First, the Court held that implying a private right of action would not be consistent with the Act as a whole, because the Act authorized only the DNRC, the attorney general, and

county attorneys to petition a court for injunctive relief, while providing Property-Owner with a remedy to protect only the water use authorized by its water rights. Next the Court considered the plain language of the Act. The Court held that implying a private right of action into the Act would subvert the role the legislature sought for the DNRC, by allowing private actors to skip statutory guidelines prescribing that the DNRC should enforce the act. Third, the Court held that implying a private right of action could result in absurd results, allowing actors to subvert the Act's bedrock principle of first in time first in right, through private actions for injunctive relief. Finally, the Court held that Property-Owner had not successfully alleged that DNRC, as the administrator of the Act, had placed a construction on the relevant statute tending to show an implied right of private action. For these reasons, the Court determined that the Act does not provide an implied private right of enforcement.

Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, DA 18-0110, 2019 WL 4267359 (Mont. Sept. 10, 2019).

Environmental Group brought suit against Environmental Agency alleging Environmental Agency violated the Montana Water Quality Act ("WQA") and federal Clean Water Act ("CWA") when it renewed a mining company's Montana Pollutant Discharge Elimination System Permit ("Permit") to discharge pollutants into tributaries of the Yellowstone River. Permit requires operators to control discharges of pollution to navigable waters through established effluent limitations and other means set forth by Environmental Agency. Effluent limitation requirements, provided by state and federal law, require an operator to treat pollutants before discharges are sent to navigable waters. Permits issued by Environmental Agency to the mining company removed effluent monitoring and limitation requirements applicable to new source outfalls. Environmental Agency's justification for exempting the Permit from ephemeral limitations was premised on a re-classification of state receiving waters. This was unlawful, according to Environmental Group, because the WQA authorizes the Board of Environmental Review ("Board") to classify state waters, not the Environmental Agency. Even if Environmental Agency could reclassify state waters, Environmental Group continues, Environmental Agency could do so only after conducting attainability use analysis of the receiving waters. Environmental Agency asserted their decision was sound because the statutory meaning of ephemeral contemplates hydrological characteristics of receiving water, not their use, as Environmental Group contends. Thus, under a hydrological characteristics' basis, no analysis

would be needed. The Montana Supreme Court held Environmental Agency's Permit did not reclassify state waters in violation of the WQA. Rather, the Environmental Agency lawfully interpreted receiving waters as possessing ephemeral characteristics under the statute. Nevertheless, Environmental Agency may have acted arbitrarily and capriciously when it applied this interpretation to a certain tributary and relaxed monitoring standards. Accordingly, the Court remanded for disposition of these issues.

Pennsylvania

Berner v. Montour Twp. Zoning Hearing Bd., 217 A.3d 238 (Pa. 2019).

Farmer applied for a special exception to the zoning board to be able to build a swine nursery barn. The issue at heart in this case is whether the Nutrient Management Act ("Act") preempts local regulation of nutrient management by agricultural practices that are not subject to the act's requirements. Farmer's actions of building a swine nursery with a concrete manure storage does not fall under the Act's requirements of a Nutrient Management Plan as a concentrated animal operation. The zoning board granted the exception with conditions which added increased hardship more than what was required by the Act. Plaintiff appealed this decision. Generally, preemption comes in three forms (1) express preemption, (2) conflict preemption, and (3) field preemption. The Act in question contained an express preemption provision. The court looked at the legislative intent of this provision and found that the provision was meant for the Act to occupy the whole of the field and leave no room for the local ordinances to add more requirements. The Court held that the Act purposefully did not place requirements on smaller livestock operations, and the local townships may not add requirements to these smaller operations.

Red Lion Mun. Auth. v. Pennsylvania Pub. Util. Comm'n, No. 186 C.D. 2019, 2019 WL 5561416 (Pa. Commw. Ct. Oct. 29, 2019).

The Commonwealth Court of Pennsylvania affirmed the Pennsylvania Public Utilities Commission ("PUC") and Administrative Law Judge's ("ALJ") decision dismissing Water Supplier 2 claims against Water Supplier 1. Water Supplier 1 entered into an Emergency Interconnect Agreement ("Agreement") with Municipal Authority. In the Agreement, Water Supplier 1 would build a distribution system and supply water to Municipal Authority, when called upon. and that Water Supplier 1 would charge Municipal Authority a minimum monthly fee. On appeal, Water

Supplier 2, the sole water supplier for Municipal Authority prior to the Agreement, made several allegations concerning the Agreement, including the following: (1) the Agreement was not in the public's best interest; (2) the Agreement was actually a bulk water purchase agreement; and (3) the merging of Water Supplier 1 and Municipal Authority's different water systems will negatively impact water chemistry. The court rejected each of Water Supplier 2's allegations. First, Municipal Authority sufficiently pleaded evidence showing that Water Supplier 2 often failed to meet its contractual obligations. Municipal Authority has received multiple complaints of water discolorations and other issues from its customers, which was what prompted Municipal Authority's search for an alternative water supplier. Having a high-quality alternative water supply in case of emergency was in the public's best interest. Second, the emergency label on the Agreement was correct, because there is a possibility that Municipal Authority would never call on Water Supplier 1 for water supply. Water supply under the Agreement would only be needed if there was ever an interruption from Water Supplier 2. Finally, Water Supplier 1 testified that it had successfully supplied water to different municipalities in the past that had the same system as Municipal Authority. Thus, there is no reasonable expectations of operational issues resulting from the merging of Water Supplier 1 and Municipal Authority water system.

This is an unreported panel decision that may be cited for persuasive authority but not as binding precedent in accordance with Pennsylvania law.

Virginia

Sumner Partners, LLC v. Venture Invs., LLC., No. 181259, 2019 WL 5268643 (Va. Oct. 17, 2019).

Developer and Real Estate Company entered a purchasing agreement stating that the parties would close on the contract on a certain date after the specified "study period" granted all the conditions precedent to Developer's obligations had been met. If any of the conditions precedent had not been met then Developer could (with notice of the Real Estate Company) do any of the following: waive the condition, terminate the agreement, or take actions to satisfy the conditions with costs off set by the purchase price. One of the conditions was not met, as the study showed the property contained hazardous materials and Developer notified Real Estate Company that they were exercising their right to extend the closing date to fix and satisfy the condition. Real Estate Company disagreed that the condition had

not been satisfied. After negotiations failed, Developer sought declaratory judgement that they had the right to enter the property to fix the issue. Trial court stated that the amendment of the extended closing date was effectual but the denied that the material found on the land was hazardous. The Court on appeal held that the expert opinions in this case did not state that total petroleum hydrocarbons were not hazardous materials, only that federal law exempts petroleum products from definitions of hazardous waste. Therefore, hazardous material did exist on the property and thus the condition was not satisfied at time of closing. The court held that the language giving rise to the right to extend the closing date served as an exception to the language in the section defining when the closing date was to be determined. For these reasons, the court reversed the trial court's decision against Developer and remanded the case for further proceedings.

Washington
Crown Res. Corp. v. Dept. of Ecology, No. 35199-8-III, 2019 WL 4942459 (Wash. Ct. App. Oct. 8, 2019).

Resource Company appealed the terms of the federal and state discharge permit issued to it by Government Agency. Resource Company claims that the aspects of the permit are contrary to law, not supported by substantial evidence, or arbitrarily given. Chiefly it's more stringent water quality limits, interim limits and compliance period, and new mapping of a capture zone. Furthermore, Resource Company claims that the lower court erred in not staying the new permit, granted in 2014, while they appealed to the board. Resource Company's new permit was issued as a renewal to its 2007 permit. Regarding Resource Company's issue with the new mapping of capture and discharge zones, the court found that the understanding of the science and interpretation of the new mappings were in accordance with the Final Supplemental Environmental Impact Statement ("FSEIS"), because of the adherence and Resource Company's lack of evidence backing its claim that the lines were arbitrarily drawn to keep some of their structures from complying and disregarded this claim. Regarding the term limits issue, the court stated that using the 2007 permit's "end of pipe" limits as the basis for the new interim limits was not unreasonable and well within Government Agency discretion. Finally, the court struck down Resource Company's argument that the new final limits were contrary to law, unsupported by substantial evidence, or arbitrary. The Court struck down this argument with many of the same points as it used to justify the temporary limits, establishing that Government Agency was within its description to use pre-

mining background values. For these reasons, the court upheld the findings of the lower court.

SELECTED LAND DECISIONS

Federal

E.D. Louisiana
Parker v. John W. Stone Oil Distribs., No. 18-2666, 2019 WL 5212285 (E.D. La. Oct. 16, 2019).

Seaman alleges to have suffered serious head and neck injuries in an accident caused by Shipowner's negligence and maintenance of an unseaworthy vessel. Shipowner contends Seaman failed to follow proper safety and equipment inspection protocols. Seaman filed motions in limine to exclude the anticipated testimony of four expert witnesses regarding Seaman's medical history. The court denied these motions but noted they could be raised later at trial. It held that relevance determinations are contextual and that the court did not have enough information to exclude the expert testimony as irrelevant at this stage of the proceedings. Similarly, it held that while the court is to act as a gatekeeper of expert testimony, it is the job of the adversarial system to attack "shaky but admissible" evidence. The court also explained that the testimony likely either would not be hearsay or would be admissible under an exception such as the business records exception; but, if one of the expert began to present inadmissible hearsay, such as by reading a report prepared by another at trial, Seaman could object then.

E.D. Oklahoma
Cline v. Sunoco, *Inc.*, No. 6:17-cv-313-JAG, 2019 WL 5589047 (E.D. Okla. Oct. 30, 2019).

Royalty Owner sued Company and the court certified a class action alleging that Company failed to pay interest on late payments. Royalty Owner filed a motion to stay the case until its appeal of the class certification was decided. The district court denied Company's motion, finding that: (1) Company failed to raise arguments that it will likely succeed on the merits that the Tenth Circuit had not previously addressed; (2) Company's alleged substantial legal costs of preparing for a class action suit do not amount to irreparable harm; (3) Company failed to show that Royalty Owner will not be substantially injured by staying the case since staying would likely result in continued failure to pay interest on late payments; and (4) Company failed to show that public interest regarding class confusion and judicial

economy favors staying the case due to the fact that class claims would not present substantial differences in pre-trial issues than an individual suit.

D. Utah

W. Watersheds Project v. Interior Bd. of Land Appeals, No. 1:19-CV-95-TS-PMW, 2019 WL 5191244 (D. Utah Oct. 15, 2019).

Utah ("State") sought an intervention in a case between Conservation Group and Bureau of Land Management ("BLM"). Conservation Group sought to appeal a decision from the Interior Board of Land Appeals that allowed BLM to renew its grazing activities on the Duck Creek allotment. Conservation Group alleged that the grazing permits renewal violated environmental statutes by degrading fish and wildlife habitats. In granting the State's motion to intervene as of right, the District Court of Utah reviewed the following factors: (1) The State's timely application; (2) The State's interest; (3) Impairment of the State's interest; and (4) whether the parties adequately represent the State's interest. First, the State's timely motion to intervene is undisputed. Second, the State indeed presented multiple legitimate interest to Conservation Group's action at hand. For example, the State had a financial interest and an interest in the environmental quality of its properties. Third, the disposition of Conservation Group's action could potentially impair the State's interest either through stare decisis or preclusion doctrines. For example, if Conservation Group wins on its claims and grazing on Duck Creek allotment is prohibited, the State could lose a source of revenue. Finally, the federal defendants did not adequately represent the State, because the State's obligatory public interest is not congruent with the federal defendant's interest. Plus, the federal defendant's interest does not share the same level of urgency as that of the State. Furthermore, the district court had discretion to allow a party to intervene under permissive intervention where there is a statutory provided conditional right to intervene, or where there is a common question of law/fact. Here, because the grazing of livestock on Duck Creek allotment shared a common question of law and fact with Conservation Group's action, the State's permissive right to intervene was granted.

E.D. Virginia
Atl. Coast Pipeline, LLC v. 1.52 Acres, More or Less, in Nottoway Cty., No. 3:17-CV-00814-JAG, 2019 WL 5598316 (E.D. Va. Oct. 30, 2019).

A natural gas company ("Company") filed suit to exercise its eminent domain power, pursuant to Section 7(h) of the Natural Gas Act ("Act"), to condemn non-responding Landowners' property for an interstate project. The Federal Energy Regulatory Commission Certificate issued to Company gives it the power to condemn any land necessary for its project. Company is constructing and operating natural gas pipelines from West Virginia to Virginia and North Carolina. In order to complete the project, Company must obtain temporary and permanent easements on the land on which they are laying pipeline, but the various Landowners named in this suit have not responded to Company's complaints. The court reasoned that without Landowners' grants of the easements, Company's interstate project cannot be constructed in a timely manner. The court found that default judgement against Landowners was proper partly because the Act provided Company with the authority to exercise eminent domain if it and Landowners could not agree on a price for the property interest at stake. The court also found that default judgment was proper because Landowners did not file responses in a timely manner as required by Section 12(a) of the Federal Rules of Civil Procedure. Because the non-responding Landowners had the burden of proving the amount of just compensation owed to them for the easements on their land, the court sided with the valuation provided by Company's analyst and found that Company could take immediate possession of its requested easements upon payment of the just compensation.

N.D. West Virginia
Columbia Gas Transmission, LLC v. 84.53 Acres of Land, No. 1:18CV9, 2019 WL 4934952 (N.D. W. Va. Oct. 7, 2019).

This case is about a summary judgement granted in favor of Company. Company undertook a project to build natural gas pipeline along 170.9 miles stretch of land. To complete its project, Company needed easements across certain properties, but was unable to do so through agreement, and thus sought judicial recourse to condemn the property under eminent domain, which was granted under a partial summary judgment motion. A year later, Company moved for summary judgement to determine just compensation owed to the remaining Property Owners for the easement. None of the Property Owners ever appeared in court to protect their

interest. Just compensation is the monetary amount necessary to put a landowner in a good financial position after his property has been seized, measured by the difference in reasonable market value of the land immediately before and after the taking. Because none of the defendant appeared before the court, the court concluded that there were no disputed facts, and used Company's evidence of property value to determine the amount Company owed each defendant. Using the property value provided by Company's appraisal expert, and multiplying the value by each defendant's interest in said properties, the court determined that Company owed Property Owner 1 $20.72, Property Owner 2 $6.22, and $13.86 to Property Owner 3. Pre-judgement interest owed on these amounts was determined to be 2.15% per annum according to the 2018 federal interest rates.

State

California
Conforti v. Diamond Springs Fire Protection Dist., C086226, 2019 WL 4462656 (Cal. Ct. App. 3d Dist. Sept. 18, 2019).

Natural Gas Company owns, operates, and leases propane tanks for commercial purposes. When Natural Gas Company received permits for its tanks in 2000, the tanks satisfied Fire Protection District's ("FPD") setback requirements. At that time, FPD regulations merely required the propane tanks be at least fifty feet from residential areas. Ten years later, setback requirements increased from fifty feet to a half mile. In 2012, Natural Gas Company's lessee removed the propane tanks. Later that year, Natural Gas Company leased the premises to a new lessee and obtained permits to rebuild the tanks as they were in 2000. FPD approved initial permits and Natural Gas Company completed construction of the tanks. However, when it came time for FPD to give final approval, FPD refused to do so on the basis that the new tanks were noncompliant with existing setback requirements. Natural Gas Company brought this action against FPD seeking a declaratory judgment to approve the construction of the new tanks. The court held FPD could not refuse to approve the new tanks. When zoning laws change, users in compliance with pre-existing zoning regulations assume a right known as a nonconforming use. The owner of a nonconforming use is permitted to act in accordance with preexisting regulations unless the nonconforming use is intentionally abandoned. A nonconforming use is not abandoned unless the owner overtly acts, or fails to act, with an intent to abandon the right. Contrary to FPD's assertion, the

actions of the lessee in 2012 did not constitute an overt act to abandon the nonconforming use. As such, FPD was required to approve the final construction of the tanks.

Connecticut

Briarwood of Silvermine, LLC v. Yew St. Partners, No. FSTCV195021434S, 2019 WL 5431403 (Conn. Oct. 4, 2019).

Company 1 filed suit against Company 2 alleging adverse possession, a prescriptive easement, trespass, obstruction of a right-of-way, nuisance, absolute nuisance, a permanent injunction, and destruction of personal property. Following Company 1 resting their case, Company 2 filed a motion to dismiss for failure to state a prima facie case, which was granted. Company 2 also filed counterclaims against Company 1 alleging trespass and intentional infliction of emotional distress. The court found that Company 1 was liable for trespass because Company 2 successfully proved the three prima facie elements of trespass by a preponderance of evidence. Additionally, the court determined that Company 1 had no lawful possessory interest in the property. Despite Company 2 showing an ongoing trespass and damages as a result of emotional distress, the court found that Company 1 was not liable for intentional infliction of emotional distress because Company 1's conduct showed no intent to inflict emotional distress. As such, Company 2 could not show that Company 2's conduct exceeded all bounds tolerated by society and could not be deemed outrageous. This is an unpublished opinion of the court; therefore, state (or federal) court rules should be consulted before citing the case as precedent.

Commerce Park Assocs., LLC v. Robbins, 193 Conn. App. 697 (Conn. App. Ct. 2019)

Landlord sued Tennant for unpaid rent owed under a lease following a string of sewage backups to the premises ("Rent Action"), and Tennant filed a counterclaim alleging gross negligence by Landlord in its failure to repair the sewage problem ("Tort Action"). Both parties appealed the trial courts findings that Tennant owed back rent to Landlord, but that Tennant had been constructively evicted in the Rent Action, and that Landlord owed Tennant damages based on the Tort Action. The actions were consolidated and the Appellate Court of Connecticut affirmed the finding that Tennant owed back-rent to landlord for a period under the lease because nothing in the record showed any portion of the premises was untenable, justifying rent abatement for the relevant lease period, as Tennant Argued. However,

the court agreed with Tennant that the amount owed was miscalculated at trial because it did not credit partial payments made by Tennant, and therefore reduced the back-rent amount. On Appeal, the court further affirmed the finding that Tennant owed nothing for the remaining lease period, because Tennant had been constructively evicted as a result of continued sewage backups which Landlord had a reasonable time to address but did not. On appeal of the Tort Action, the court affirmed the award of gross negligence damages to Tennant. The court reasoned that despite Connecticut's nonrecognition of negligence degrees, Tennant's cause of action sounding in negligence encompassed gross negligence and was properly pleaded, contrary to Landlord's arguments. However, the court decreased the amount of damages awarded, refusing to include two optional lease extension periods in the calculation of damages. This was because, per the terms of the lease, Tennant could not have exercised those options due to its failure to strictly comply with the lease, as evidenced by Tennant owing back-rent.

Georgia

Chisolm v. Danforth, LLC, No. A19A1438, 2019 WL 5558644 (Ga. Ct. App. Oct. 29, 2019)

Property-Owners of a neighborhood sued Homeowners' Association ("HOA") challenging the validity of assessments levied against them by the HOA as Declarant, pursuant to a declaration by the HOA (the "Contract"). First, it should be noted that the trial court and the appellate court agreed that the declaration should be considered a contract. Property-Owners appealed the following trial court findings: (1) that the HOA had the power to declare assessments as the Declarant under the Contract, (2) that the Property-Owner's motion for partial motion for summary judgment (MSJ) alleging the HOA breached the Contract by unilaterally levying assessments against the Property-Owners' property should be denied, and (3) the order requiring the Property-Owners reimburse the HOA for mediation expenses. The appellate court held that the HOA was not the proper Declarant, and therefore the denial of Property-Owners' partial MSJ should be reversed and the order for mediation fee reimbursement should be vacated. The appellant court reasoned that the original Declarant of the neighborhood had not properly conveyed Declarant rights to HOA, per the Contract. The appellant court further noted that the Contract unambiguously stated there could only be one Declarant at a time, and in the chain of Declarant right ownership alleged by HOA there had been multiple holders of Declarant rights for portions of the neighborhood serving at the same

time. The court reasoned that this further supported there holding that HOA was not a proper Declarant under the Contract. Based on this holding, the court of appeals necessarily reversed the trial court's denial of Property-Owners' partial motion for summary judgment alleging breach of the Contract by HOA, and further vacated the trial courts order requiring Property-Owners to reimburse HOA for mediation expenses.

Ohio
Senterra Ltd. v. Winland, 7th Dist. Belmont No. 18 BE 0051, 2019-Ohio-4387.

Company purchased the surface of two tracts of land and attempted to quiet title by claiming that Heirs' oil and gas interests in the land were extinguished under the Marketable Title Act ("MTA"). Heirs appealed the trial court's granting of summary judgment to Company. The appellate court upheld the trial court on two issues and reversed the trial court on a third issue. To the first issue, the appeals court held that the trial court was correct in using the MTA, instead of the Dormant Mineral Act ("DMA"), to extinguish the interests in question because Heirs failed to argue that the DMA applied at the trial court level and because case law supports the application of the MTA to oil and gas interests. Heirs' argument that the DMA and MTA were irreconcilable conflict failed because effect can be given to both. Additionally, the court held that Company's use of the MTA to extinguish the mineral rights after previously benefitting from the DMA was valid because Company was raising alternative theories of recovery. To the second issue, the court held the interests in Reservations one through four were extinguished because the trial court correctly determined the "root of title" using the MTA's 40-year lookback period and there was no reference to the Heirs' interest within such period. To the third issue, the court held that the trial court erred in determining the validity of Reservation five because the trial court should have applied the MTA, rather than the Talbot Rule, because there were not competing preserved interests.

Pennsylvania
Whiddon v. Northcraft, No. 356 WDA 2019, 2019 WL 5095786 (Pa. Super. Ct. Oct. 11, 2019).

Property owner founded a non-profit winery and church ("Church") situated on a landlocked tract of land. Church used the property for large gatherings, services, and events by using a private road that crossed other

Property Owners' land. Church filed to have the easement recognized, having the ultimate intent of widening and repairing the road. The trial court entered a judgment granting the easement by necessity but limited it to the existing road such that Church could not make it wider. Additionally, the trial court said that Church's corporate use of its easement was unreasonable in light of the road originally being used for farming. Church appealed the misuse claim saying it was ambiguous and the claim of unreasonable use was undefined. The Superior Court held that the misuse was unreasonable if it interfered with the enjoyment and use of the servient estate. The court found this to be the case because Church blocked Owner's access to farmstock, tore down fences, and filled Owner's field with dirt. The court affirmed the trial court's limitation on the easement's use and refereed Church to the trial court for further clarification if they required it.

Texas
In re Estate of Ethridge, No. 11-17-00291-CV, 2019 WL 5617630 (Tex. App. Oct. 31, 2019).

Testatrix passed away, leaving a one-page will drafted without the aid of an attorney. The will stated that Testatrix's intent was to dispose of her "entire estate, real, personal and mixed."[1] Testatrix named an Executor and gave said Executor all of her "personal effects."[2] Later, Executor began receiving royalties from Testatrix's mineral interests, which had not been specifically accounted for in the will. Upon discovery, Testatrix's Heirs brought suit against Executor, alleging the mineral royalties belonged to them. On appeal, the Court of Appeals of Texas held that the mineral interest passed to Heirs. Because of this, the court held that Executor had misapplied Testatrix's property in contravention of his fiduciary duties and therefore should be removed as executor of the will. The court noted that since the will was unambiguous, the intent of Testatrix was to be construed from the plain meaning of the language within the four corners of the will, and that no extrinsic evidence would be used in construing the intent of the document. Based on these principles, the court reasoned that the will only left Executor the "personal effects" of Testatrix, and the ordinary and legal understanding of "personal effects" included only articles bearing an intimate relation to the Testatrix, which would not include mineral interests.[3] Further, the court noted that mineral interests are real property

[1] *In re Estate of Ethridge*, No. 11-17-00291-CV, 2019 WL 5617630, at *1 (Tex. App. Oct. 31, 2019).
[2] *Id*.
[3] *Id*. at *3-4.

until the minerals become personal property when extracted. Because the minerals in question had not been extracted prior to Testatrix's death, the mineral interests were deemed real property, rather than personal property. Therefore, the court held that Testatrix died intestate as to her mineral interests, and as such the mineral interests should pass to Heirs rather than Executor.

Melton v. Waddell, No. 07-18-00105-CV, 2019 WL 5609690 (Tx. App. Oct. 30, 2019).

Sister filed suit against Brother, her cotenant, for claims of breach of fiduciary duty, conversion, and unjust enrichment arising from alleged misuse of a joint bank account. The trial court granted Brother's motion for summary judgment on all claims because limitations barred Sister's claim of breach of fiduciary duty. Sister appealed, and the appellate court reversed on three grounds. First, the court held that the discovery rule applied to claims of breach of fiduciary duty and that Sister was relieved of the responsibility of inquiry. As a result, a material issue of fact existed as to whether the statute of limitations had lapsed. Second, Brother failed to present any evidence in their motion regarding their failure to share profits from use of the shared land such as when the claim accrued, if he ceased cattle operations, or if Sister knew of his operations. Third, Brother failed to assert that limitations had run on Sister's claims of conversion and unjust enrichment, which constituted error. Additionally, Brother's attempt to invoke a harmless error exception failed because Brother did not establish that Sister was not owed a share of profits from use of the shared land.

Texas v. Signal Drilling, LLC, No. 07-17-00412-CV, 2019 WL 5609648 (Tx. App. Oct. 30, 2019).

Drilling Company sued Texas for fee simple ownership of contested mineral rights along the Canadian River following the end of a ten-year State Mineral Lease. Texas entered a plea to the jurisdiction with the trial court, asserting sovereign immunity. The trial court denied this plea and Texas appealed. The appellate court upheld the denial of the plea to the jurisdiction on three grounds. First, Drilling Company successfully raised an *ultra vires* claim by asserting that the Texas Land Commission acted without legal authority by renewing the State Mineral Lease after it had expired, constituting wrongful trespass, and ownership rights should revert to Drilling Company. This successful *ultra vires* claim defeats Texas' sovereign immunity claim. Second, Drilling Company's attempt to argue in

the alternative that a narrow exception to sovereign immunity applies was not successful because the agreement entered into by the parties did not arise from a settlement of a formal lawsuit. However, this argument's failure was not dispositive because of the court's findings on the first issue. Third, Drilling Company contended that Texas' actions did not enjoy sovereign immunity because they were an unconstitutional taking. The court upheld this claim because it sounded in property, rather than breach of contract, and because Texas failed to preserve their argument that Drilling Company failed to allege intent by the State at the trial court level.

SELECTED ELECTRICITY DECISIONS

State

Missouri
Union Elec. Co. v. Missouri Pub. Serv. Comm'n, No. WD 82492, 2019 WL 5382251 (Mo. Ct. App. Oct. 22, 2019).

State Office of Public Counsel ("OPC") appealed the decision of the Public Service Commission ("PSC") that allowed Electric Company to take advantage of multiple programs simultaneously to eliminate the balance of its interim depreciation expense caused by the construction of a wind farm. OPC did not challenge Electric Company's entitlement to defer a majority of its interim depreciation expenses on the wind farm under the plant-in-service accounting ("PISA") statute. Instead, OPC only challenged PSC's decision to allow Electric Company to recover the remainder of the depreciation expenses in its Renewable Energy Standard Cost Recovery Mechanism ("RESRAM"). After an extended debate over whether the PISA statute was the sole means to be used to pass on interim depreciation costs to customers, the court ultimately held that the RESRAM statute does not conflict with the PISA statute and could also be used by Electric Company to allow all of the interim depreciation expenses caused by construction of the wind farm to be recouped via interim surcharges to Electric Company's customers.

SELECTED TECHNOLOGY AND BUSINESS DECISIONS

Mergers and Acquisitions

Virgin Islands
In re Alumina Dust Claim, NO. SX-09-MC-031, 2019 WL 5197518 (V.I. Oct. 15, 2019).

This case of first impression concerns whether the court should approve a stipulation releasing individual Companies from suit. Group of Former Employees ("Group") sued multiple Companies in their individual and successor capacity for workplace-related injuries. Some Companies had merged and were claiming they had no responsibility for the debts of predecessors. Group diverged on which Companies should be released from the lawsuit. The questions before the court were (1) whether there had to be unanimous signatures from all defendants to stipulate to a dismissal of a party as a defendant without court approval, and (2) whether court approval is proper in this specific case. The court found that prior multi-defendant litigation precedent required that for a stipulation of dismissal to be valid under the plain language of the law, all parties who have appeared, both those currently involved and already dismissed, must sign the dismissal. The dismissal was not proper because not all parties listed as defendants signed the stipulation in this case, making court approval necessary. The court found that it could not approve the stipulation because Group's ability to sue the merged company had not been determined.

Corporations

Delaware
PWP Xerion Holdings III LLC v. Red Leaf Res., Inc., No. CV 2017–0235–JTL, 2019 WL 5424778 (Del. Ch. Oct. 23, 2019).

In 2012, Partner Company entered into a joint venture ("JV") agreement with Corporation. Corporation's stockholder agreement with preferred Stockholder included several clauses that would trigger Stockholder's consent before Corporation could act. In 2016, Partner Company announced its withdrawal from the JV and sought to settle its unfulfilled contractual obligations. Since this would constitute a material change in Corporation's business plan, the settlement triggered the clauses requiring Stockholder's consent to the settlement. When Corporation proceeded to act without acquiring Stockholder's consent, Stockholder sued for breach of

contract. The Delaware Court of Chancery ruled in favor of Stockholder for partial summary judgement on the Interested Party Clause and Business Plan Clause breach claims, but rejected Stockholder's claim on the stockholder's agreement Redemption Clause. Under the Interested Party Clause, Corporation needed Stockholder's approval for transactions that would benefit an affiliate of the Corporation's board of directors. Affiliates of an entity generally includes its officers/employees. Therefore, Corporation breached the Interested Party Clause because the JV withdrawal terms would benefit Partner Company, whose Employee was serving on Corporation's board and approved all transactions relating to the Settlement. The Business Plan Clause required Stockholder's approval whenever there is a material alteration in Corporation's business plan. This clause was breached because Corporation substantially altered its business plan without Stockholder's consent, both when it entered into the Settlement Agreement and when it sought to move its technology use to another country following Partner Company's withdrawal. Finally, the Chancery Court found that Corporation did not breach the Redemption Clause. Stockholder's consent is needed whenever Corporation authorizes a purchase or redemption of its common stock. None of Corporation's dealings with Partner Company, regarding Partner Company's return of Corporation stock following its JV withdrawal triggered this clause because the Settlement Agreement conditioned its redemption of Partner Company's stock on Stockholder's consent.

SELECTED ENVIRONMENTAL DECISIONS

Federal

1st Circuit
Breiding v. Eversource Energy, 939 F.3d 47 (1st Cir. 2019).

Consumers brought suit against Utility Company alleging violations of the Sherman Act and state anti-trust laws by artificially restricting the supply of natural gas in the New England market. Consumers allege Utility Company manipulated no notice contracts for pipeline transmission capacity, which led to a cost increase of natural gas in the spot market and subsequently higher electricity prices. Procedurally, the district court dismissed the defendant's claim concluding that the plaintiffs failed to show antitrust standing and failed to plead a plausible claim for an antitrust monopolization suit. The United States Court of Appeals for the First Circuit, in analyzing this issue, applied the filed-rate doctrine, which prohibits antitrust challenged to agency approved tariffs in energy markets. Because Consumers' complaint alleged no conduct that was prohibited by the city's approved tariffs, and because the conduct conformed with a FERC approved regulatory scheme, the 1st Circuit held that the file-rate doctrine applied. Moreover, because the maintenance of the efficient use of limited transmission capacity is within the scope of the FERC's regulatory aims, no claim could be brought by Consumers. Additionally, the 1st Circuit applied this rational and authority of the filed-rate doctrine to the analogous state law claim brought in this suit and affirmed the district court's ruling.

5th Circuit
Claimant ID 100235033 v. BP Expl. & Prod., Inc., 941 F.3d 801 (5th Cir. 2019).

Technology Support Company sought recovery for economic loss under a court-appointed settlement program arising from Exploration Company's oil spill. The settlement program contained streamlined procedures that simplified inquiries into a causation analysis. Technology Support Company's claim was denied because during a period of the time in question, Technology Support Company was implicated in illegal activity by a Senate Committee report and FTC enforcement actions. However, the FTC closed its inquiry into Technology Support Company without a penalty or settlement. Additionally, Technology Support Company entered into a settlement agreement with the Florida Attorney General that included

no admission of liability or wrongdoing. Technology Support Company appealed this decision on the grounds that it was never formally charged with illegal activity, however the Appeal Panel affirmed the denial. The district court denied review of the decision. On further appeal, the Fifth Circuit reversed the district court's denial as an abuse of discretion because review would have raised a recurring issue regarding Technology Support Company's involvement with illegal activity where the parties failed to articulate any standard for why Technology Support Company should or not should be entitled to recovery. Specifically, the court determined that the parties' briefs focused more on the history of the case and Panel splits than the standards involved, meaning the arguments for standards had not yet been subjected to full adversarial testing. As a result, the Fifth Circuit remanded the case for further proceedings to determine the legal standard that should govern whether Technology Support Company engaged in illegal conduct, which would take it out of the settlement program's parameters.

Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co., No. 18-20493, 2019 WL 4410259 (5th Cir. Sept. 13, 2019).

This copyright infringement dispute appeared before the U.S. Court of Appeals for the Fifth Circuit for review of the trial court's grant of summary judgment. In 1982 Oil and Gas Exploration Company ("Surveyor") obtained a permit from the Canadian government to conduct offshore geographic surveys and, in accordance with Canadian law, it turned over copies of the survey that was performed to the government. Canadian law provided Surveyor with five years of confidentiality for the surveys. In 1999, Energy Exploration and Production Company ("Recipient") requested and received copies of the 1982 survey from the Canadian government. Surveyor argued that the importation of the documents constituted copyright infringement. If Surveyor granted a license to the Canadian government to copy and distribute the 1982 survey, then its claim would fail. Determination of whether Surveyor granted the government a license is based on "the totality of [Surveyor's] conduct" in 1982. When Surveyor submitted the survey, Canadian law clearly explained that after the period of confidentiality expired the government was free to make copies of the survey available to the public. Recipient provided sufficient evidence demonstrating that in 1982 Surveyor knew or should have known that the survey would be made public. In opposition, Surveyor was unable to articulate a dispute of material fact. Therefore, the Fifth Circuit affirmed the grant of summary judgment for Recipient.

Sierra Club v. EPA, No. 18-60116, 2019 WL 4876451 (5th Cir. Oct. 3, 2019)

Two different groups, Environmental Petitioners and Industry Petitioners, both petitioned for review of EPA's Final Rule approving Louisiana's state implementation plan ("SIP") for controlling regional haze as mandated by the Clean Air Act ("CAA"). Both groups' petitions were denied for several reasons. Louisiana's SIP contained two alleged problems, despite which the EPA approved the plan: the air-pollution model used to measure how much individual power plants contributed to regional haze and the lack of detail in the SIP of how the state "weighed five mandatory statutory factors in determining the Best Available Retrofit Technology ("BART")" at a specific plant (Nelson). Environmental Petitioners challenged both the EPA's approval of Louisiana's choice of low-sulfur coal as BART for controlling emissions of hazing-inducing SO2 at Nelson and Louisiana's statutorily required reasonable progress goals for achieving better visibility conditions. The court denied these challenges and determined the EPA's approval was not arbitrary and capricious. The standard of review is both narrow and highly deferential to the EPA, giving weight to claims from the Louisiana Department of Environmental Quality ("LDEQ") that they carefully considered the statutory and relevant factors when making its recommendation for BART. The state's long term strategy had already been partially approved in 2012, disallowing Environmental Petitioner's objections to it. Industry Petitioners challenged the decision that two particular plants were subject to BART determinations at all, claiming that the reliance by LDEQ on the CALPUFF model of measuring emissions was arbitrary and capricious. CALPUFF remains the preferred model by the EPA for determining which locations are subject to BART. The court denied these challenges and deferred to the EPA's approval of the CALPUFF model because the Petitioner had not "carried their 'considerable burden' to overcome the 'presumption of regularity'" that is afforded to the EPA's method of analytics, despite its flaws.

9th Circuit

San Juan Capistrano v. Cal. Pub. Utils. Comm'n, 937 F.3d 1278 (9th Cir. 2019).

City of San Juan Capistrano ("City") opposed a project proposed by California Public Utilities Commission ("Commission") to repair and replace utility equipment owned by Regional Power Company. Following

an administrative hearing at the Commission, the administrative judge first recommended that the proposed plan be altered; but following an ex parte hearing, it changed the recommendation to approve of the plan. Application for rehearing was denied, and no action was filed in state court. City alleged that its due process right of having a fair hearing was violated by the Commission because of this ex parte hearing and sued in Federal court seeking a declaration that the Commission's recommendation is unenforceable, an injunction against the Commission from putting the plan into progress, and attorney's fees. The trial court dismissed the complaint with prejudice on the basis that the City lacked standing. The Ninth Circuit has established precedent that as political subdivisions, cities do not have "standing to challenge state law on constitutional grounds in federal court." The court rejected that its precedent only barred facial challenges to state law and affirmed that the City lacked standing. The court held further that the Commission could not be sued because as part of the state government, it is protected by sovereign immunity by the Eleventh Amendment. Additionally, because City failed to move to amend its complaint to add the Commissioner as a party, the City had waived its right to amend.

D. District of Columbia

Cal. By & Through Brown v. EPA, 940 F.3d 1342 (D.C. Cir. 2019).

In 2012, the EPA adopted emissions standards for model year 2022-2025 motor vehicles and committed to conducting a midterm review over the appropriateness of those standards, with a final decision set for April 1, 2018. In January 2017, the EPA concluded this review and determined the 2012 standards were feasible and appropriate. However, following a change in presidential administrations, the EPA withdrew this determination because the standards were found to be inappropriate and prepared to institute a new notice and comment period to revise the standards. Coalition brought suit, challenging that the EPA's action as arbitrary and capricious under the Administrative Procedure Act. To be judicially reviewable under the APA, a challenged decision must be final, which requires consummation of the Agency's decision-making process and the decision must determine legal rights or obligations or have legal consequences flow from it. Here, the Circuit court held that the EPA's action was not judicially reviewable as a final action because the revised determination does not determine legal rights or obligations or impose any legal consequences, nor does it change the 2012 emission standards, which remain in effect until the EPA changes them by rulemaking.

Cont'l Res., Inc. v. Gould, Civil Action No. 14-65(RDM), 2019 WL 4889273 (D.D.C. Oct. 3, 2019)

Lessee sued the Department of the Interior ("DOI") to challenge a demand for additional royalties for gas extracted from federally leased land. Lessee and DOI disputed on the appropriate method that should have been used to value its sale of unprocessed gas to Third-Party whose affiliation is under dispute. DOI determined Third-Party and Lessee are under common control, and therefore the royalties paid to the government for several years should have been higher. When Lessee appealed this decision to the Director of the Office of Natural Resources Revenue ("ONRR"), the Director issued a decision Lessee contended was arbitrary and capricious. The court held that the Director's decision, which applied a standard for the sale of processed gas to a sale of unprocessed gas, was arbitrary and could not be "squared with the plain language of the valuation regulation." The court set aside the order and remands the matter to ONRR for recalculation.

Harrison Cty. Coal Co. v. Fed. Mine Safety & Health Review Comm'n, No. 18–1320, 2019 WL 5390958, (D.C. Cir. Oct. 4, 2019).

The Federal Mine and Safety Health Act ("The Act") has a carve out for protected activities that shields miners from retaliatory actions from employers, when miners report unsafe working conditions. Here, Miner working for Mining Company reported unsafe working conditions and was subsequently fired under a pretext of insubordination. Miner sued and the Administrative Law Judge ("ALJ") awarded him $16, 324.80 in backpay amongst other damages. The D.C. Circuit appellate court denied Mining Company's petition to review on all claims, except for the backpay based on the following: (1) Miner's actions fell under The Act's protected activity carve out; (2) There is enough connection between Miner's actions and Mining Company's retaliatory reaction; (3) Mining Company's insubordination excuse for firing Miner was pretextual; (4) The ALJ provided insufficient calculation for the backpay awarded; and (5) Miner had a justifiable reason for his late complaint. First, because Miner filed multiple discrimination, retaliation, and safety hazard complaints, Miner's actions are under the protected activity umbrella. Second, the nexus between Miner's complaints and his firing was proven through Mining Company's knowledge of Miner's complaints, hostility towards the activities, the time coincidence of when Miner was fired, and disparate treatment of Miner. Third, Mining Company's reason for firing Miner was pretextual because it was not aligned with Mining Company's normal

business practices since there was no evidence that Mining Company had ever fired an employee for insubordination. Fourth, even though the ALJ stated that a precise calculation of backpay was needed, the ALJ never undertook the calculation. Because confidence in ALJ's backpay award is undermined, the award must be recalculated. Finally, even though Miner filed his complaint 20 days late under The Act, Miner was justifiably excused because he pursued an internal grievance process, which gave Mining Company adequate notice.

Wisconsin v. EPA, 938 F.3d 303 (D.C. Cir. 2019).

In 2016, the EPA updated the National Ambient Air Quality Standards ("NAAQS") and developed air pollution regulations to enforce the Good Neighbor Provision of the Clean Air Act ("CAA"). This provision addresses problems caused by air pollution produced in one state and then blown into another state by the wind. Two groups sought review of the EPA regulation: States and Industrial Groups claim that it is too strict, while Environmental Groups and Delaware claim that its leniency falls short of the baseline emissions control contained in the CAA. The CAA requires a State to fall into compliance in regulating significant contributions of downwind ozone by a certain date, but the 2016 rule does not specify a date for compliance. The appellate court agreed with Environmental Groups that this rule is inconsistent with the law. The court held that by failing to impose a deadline for compliance, the EPA had impermissibly breached its statutory authority as defined by the Good Neighbor Provision of the CAA. Environmental Groups also challenged the EPA's decisions in implementing the 2016 updated rule. The court rejected these arguments, and it granted deference to the EPA in making these decisions. The court also rejected Delaware's challenge. The myriad of challenges made by the States and Industrial Groups were all rejected by the court for various reasons. Primarily, the court held that the EPA's policies were reasonable, that they did not constitute "over-control," or that the agency did not abuse its power or act arbitrarily in updating the rule. The court remanded the case without vacatur of the regulations.

D. Hawaii

Lake v. Ohana Military Cmtys., LLC., Civ. No. 16-00555 LEK, 2019 WL 4794536 (D. Haw. Sept. 30, 2019)

Former Residents of Kaneohe Marine Corp Base Hawaii ("MCBH") sued Managers of their former residences due to their belief the soil in their

neighborhoods was contaminated with organochlorinated pesticides ("OCPs"). They alleged that Management had failed to both "perform adequate remediation measures and failed to disclose the contamination" to the Residents. Residents' claims that remained included breach of contract, breach of the implied warrant of habitability, negligent failure to warn, negligent infliction of emotional distress, fraud, negligent misrepresentation, and nuisance. Managers moved for summary judgment on all claims, which was granted except for the nuisance claim brought by a portion of the residents caused by dust from neighborhood construction. Residents failed to present any evidence or expert witnesses to dispute the studies conducted confirming the success of remediation methods in areas impacted by OCPs. They failed to allege any injury caused by the presence of OCPs and claimed they were not required to show that their homes or recreational areas were exposed to OCPs. Residents' arguments were rejected. Their claims were greater than those of ordinary negligence and required expert testimony to dispute the position of Managers on the safety and habitability of the MCBH. The evidence in the record of appropriate mediation of any contaminated areas is undisputed, and therefore the court granted summary judgement on most of the claims in favor of the Managers. The only area of disputed fact was the construction dust caused by neighborhood building and remediation efforts. The claim of some of the Residents of nuisance from the dust stands, excluding arguments that the dust was contaminated by OCPs.

D. Idaho

W. Watersheds Project v. Schneider, No. 1:16-CV-83-BLW, 2019 WL 5225454 (D. Idaho Oct. 16, 2019).

The trial court granted injunctive relief to enjoin the amended plan from being implemented until the conclusion of litigation. A combination of Government Entities ("Government") released several reports concerning a plan to protect the Sage-Grouse on Government lands. Environmentalists brought suit claiming Government should have looked at the plan as a whole not fragmented through different reports. During litigation, the plan was placed on review after a change in administration. At the completion of the review, Government amended the plan allowing, among other things: oil and gas operations to proceed in the birds' habitat, elimination of buffer zones around where the birds lived, and removing trigger systems for when the population dropped below a certain level. The court first ruled that venue was proper and Government's motion to separate litigation among the various state jurisdictions was denied. Expert testimony, not previously

in the record, was allowed at the hearing because the court found that proper consideration had not been taken by Government. The court found that the Environmentalists met the three factors for injunctive relief: Government had not considered viable alternatives to the amendment, Government failed to take a hard look at the environmental consequences of the amendment, and the likelihood of Environmentalists' success was probable. Likelihood of success was found two-fold by the court. First, Government failed to take into consideration the complete environmental impact of the amendment, and second, Government did not open the issue for public comment.

D. Minnesota

WaterLegacy v. USDA Forest Serv., 2019 WL 4757663 (D. Minn. Sept. 30, 2019)

Environmental Groups brought three separate actions against the Forest Service to challenge the Final Decision of the Director to exchange federal for private land with Mining Company. The court examined each of the four claims individually and dismissed each plaintiff for lacking Article III standing. The groups alleged that their members would be injured by the land exchange or that endangered animals would be harmed due to the Mining Company's future intention to create an open-air mine. The court held that each group lacked standing because the land exchange did not authorize Mining Company to create a mine. Other government entities are responsible for decisions relating to the creation of mines. The land exchange would not meaningfully impact enjoyment of the land, as it was not accessible to the public even as federal land, and no animals would be harmed.

E.D. Missouri

Cooper Indus., L.L.C. v. Spectrum Brands, Inc., No. 2:16 CV 39 CDP, 2019 WL 4345670 (E.D. Mo. Sept. 12, 2019).

In 1980, the legal predecessor of Home Appliances Manufacturer ("Purchaser") bought a factory from the legal predecessor of Home Appliances Producer ("Seller"). Both parties had used the chemical trichloroethylene ("TCE") as a degreasing agent. Starting in the early 1990s TCE contamination was identified in the land around the factory. Investigations were conducted by the Missouri Department of Natural Resources and the EPA. Instead of undertaking remedial action, Purchaser sold the land to a third-party, transferring all liability for remediation, then

sued it for indemnity and settled the matter. It wasn't until 2015 that Purchaser notified Seller of the contamination and the recovery efforts. Remediation costs were paid to the State and Federal governments, and now the parties seek a determination of contribution. This action comes under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), which governs matters such as these. Following a bench trial, the court concluded that Purchaser was responsible for 95% of the contamination and that Seller was responsible for the remaining 5%. This conclusion was largely based on testimony from Seller's employee who had witnessed 2-3 gallons of TCE spill in 1977, and Purchaser's employee who stated that a hole in the TCE storage tank caused 100 gallons to leak out in 1983. An expert witness called by Seller used a REMChlor-MD model to study the movement of TCE in the soil. The witness concluded that the TCE contaminating the land was released on the surface in 1983 at the earliest. Because Purchaser did not notify Seller of the contamination until 2015, the court modified the contribution to 96% for Purchaser and 4% for Seller. Additionally, the court offset the damages owed by Seller by $480,000.00, reflecting the settlement amount paid by the third-party to Purchaser. The court denied awarding attorney's fees.

D.C. Montana
Talen Mont. Retirement Plan v. PPL Corp., No. CV-18-174-BLG-SPW, 2019 WL 4410347 (D.C. Mont. Sept. 13, 2019).

Mining Companyremoved a class action filed in Montana state court using the Class Action Fairness Act ("CAFA"). This law expands federal subject matter jurisdiction to class actions of national significance. The class, constituted by Mining Company's retirement plan beneficiaries, affiliates, and creditors moved to have the case remanded back to state court. In order to have a class action remanded the movant must prove by a preponderance of the evidence that the "Local Controversy Exception" applies. The Company argued that the exception did not apply because (1) two-thirds of the class of plaintiffs were not citizens of Montana; (2) none of the defendants "from whom significant relief and whose conduct serves as a significant basis of claim" is a citizen of Montana; and (3) the principle injuries occurred nationally and were not limited to the state of Montana. A court's determination of CAFA exceptions rests solely on its subject matter jurisdiction, decisions of class certification and merits are irrelevant. Upon finding that the class satisfied each of the qualifications for the Exception, the court concluded that the matter was truly a local issue, and not one of

national significance. Therefore, the court remanded the matter back to state court.

D. New Mexico
In re Gold King Mine Release in San Juan Cty., Colo., No. 1:18-md-02824-WJ, No. 1:18-cv-00744-WJ-KK, 2019 WL 5212797 (D.N.M. Oct. 16, 2019).

Following a mining spill, Property Owners sued group of Companies and EPA whom they held responsible for the accident. Property Owners then filed to amend complaint by releasing three Companies from the suit and adding additional claims of trespass and nuisance. The request was filed within the allotted time period by the rules of Federal Civil Procedure. Companies fought the amendment by claiming it was untimely and Property Owners' claims were futile because (1) they did not have the possessory interest, (2) they had not alleged actual encroachment of the property, and (3) the actions of Companies did not impede the use of the land. The court found that the amendment was not untimely because it was filed well within the period that both Companies and Property Owners had agreed upon. The claims of Property Owners were sufficient to overcome futility because Property Owners possess the property rights associated with the property affected by the spill, Companies caused intrusion on the property without permission, Companies caused destruction of property rights through harm to crops, and Companies caused an interference in the use and enjoyment of Property Owners' land. The court allowed Property Owners to amend complaint.

N.D. New York
Macera v. Vill. Bd. of Ilion, No. 6:16-CV-668, 2019 WL 4805354 (N.D.N.Y. Sept. 30, 2019).

Landowner sued Village Board, Fire Chief, and Police Chief for civil rights violations after an extended dispute with two subsequent owners of the neighboring property. Landowner sued under theories of (1) violations of their due process rights, (2) retaliation for the exercise of the Landowner's First Amendment rights by failing to enforce code violations, and (3) violations of New York's Freedom of Information Act. The parties submitted cross-motions for summary judgment. The motions were denied in part and granted in part based on several findings. First, Landowner "has no legal entitlement to the enforcement of local zoning or traffic laws," and there is broad discretion given to local officials in the enforcement of those

laws. Because the underlying actions were constitutional, there could be no violations of due process rights for failure to train government employees. Therefore, the due process claims against the Board, Fire Chief, and Police Chief each individually fail. Second, the court examined Landowner's claim that code violations were not enforced in relation for legal exercise of their First Amendment rights. Summary judgment for the claims against Police Chief were granted in his favor, as Landowner failed to raise a genuine dispute of material fact for his actions. The claims against the Board and Fire Chief for their failure to respond to complaints in the period from June and July 2013 do contain a disputed issue of material fact, and therefore the claims stand.

W.D. New York
Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., L.L.C., No. 6:18-CV-06588-EAW, 2019 WL 4415682 (W.D.N.Y. Sept. 16, 2019).

In August of 2018, Residential Organization sued Waste Management Company ("Utility"), which operates a large landfill in upstate New York and has a contract with New York City ("NYC").. The Residential Organization alleged one claim under the Clean Air Act ("CAA") and two claims under the Resource Conservation and Recovery Act ("RCRA"), including an "Endangerment Claim," as well as common law torts of nuisance, negligence, gross negligence, and trespass. Utility moved to dismiss the complaint on the bases of abstention, political question, failure to state a claim, and the "first-to-file" doctrine. NYC similarly moved on those bases, and it asserted governmental immunity. The court rejected the absentition arguments, finding that neither the *Burford* nor *Colorado River* doctrines applied to the case. There was no political question, because Congress empowered the judiciary to handle such disputes by providing the citizen suit provisions in the CAA and RCRA. The court rejected defendant's first-to-file argument on the basis that the two actions are different and that both of the matters were before the same judge. The court rejected NYC's assertion of immunity because the doctrine could not be used as a shield against claims provided by U.S. law. The court granted the motion to dismiss against the claim of private nuisance, but denied it for the public nuisance claims, finding that the allegations were sufficiently plead. The negligence claim against Utility was valid because it owes a duty "to operate the Landfill in a reasonable manner." The gross negligence claim was legitimate, because it was sufficiently plead by the Neighbors. Neighbor's trespass claim was dismissed with prejudice because New York law does not recognize intangible intrusions on property.

E.D. North Carolina
AVX Corp. v. Corning Inc., No. 5:15-CV-542-FL, 2019 WL 4727851, (E.D.N.C. Sept. 26, 2019).

Corporation filed claims against Glass Company, for costs associated with environmental contamination that occurred from 1962-1987 on property that Corporation purchased from Glass Company. Incident to the purchase, an agreement was signed between the parties which required that any liabilities that occurred from violations of environmental laws should be indemnified by Glass Company. Moreover, after Corporation acquired the property, Glass Company filed false reports with the state misstating their knowledge of certain environmental contaminants on the premises such as a dry well that contained harmful chemicals and a concrete slab that used to harbor drums filled with TCE that damaged the soil beneath the slab. Corporation's 12th and 13th claims allege that Glass Company misrepresented facts according to Unfair and Deceptive Trade Practices Act were not successful because they failed to show "actual reliance" on the misrepresentation and that such reliance was a proximate cause of the injury. Moreover, the court considered that the North Carolina Supreme Court has recognized liability for information negligently supplied for the guidance of others, however, the court here struck down Corporation's argument because there was no plausible basis to infer that Glass Company supplied false information for the guidance of others. Additionally, Corporation's claim that the Glass Company violated contractual agreements for the purchase of the property was refuted by the court because Corporation were unable to show a genuine issue of fact as to the breach of the contract by Glass Company or its agents.

D. Oregon
Cascadia Wildlands v. Bureau of Land Management, No. 6:19-cv-00247-MC, 2019 WL 4467008 (D. Oreg. Sept. 19, 2019).

Environmental Group claimed that the Bureau of Land Management ("BLM") violated the Federal Land Policy and Management Act (FLPMA) by authorizing regeneration harvesting. Moreover, Environmental Group alleges that BLM violated the National Environmental Policy Act (NEPA). The primary concern of the Environmental Group was that a timber harvest conducted by Resource Company would put adjacent communities at risk of fire hazards and that it would reduce recreational opportunities. The court noted that agency decisions are entitled to a presumption of regularity

and should be overruled if they are found to be arbitrary or capricious. A decision is arbitrary and capricious if the agency fails to articulate a satisfactory explanation for its action—a rational connection between the facts found and the choices made. As for the first claim, the FLPMA requires BLM to manage lands and to protect natural resources. Because BLM acted in accordance with statute regarding certain timber sales, and because that authorization was consistent with management directives, the court found that BLM did not violate FLPMA. However, the Coastal Oregon Record of Decision and Resource Management Plan (2016 RMP), directed BLM to provide recreational opportunities to be managed with other resources. Because BLM authorized a "cut the trees first, zone the buffer later" tactic, the court ruled that it ignored the framework mandated by the Willamalene Parks and Recreation District. Therefore, the court required BLM to designate trails and establish a Recreation Management Zone before logging. Secondly, with respect to the plaintiffs NEPA claim, the court evaluated the "hard look" requirement, which looks to the foreseeable direct and indirect impact. Here, the court found that BLM improperly diluted the proposed action's effects by analyzing it as part of a 1.3 million acre planning area. Moreover, BLM failed to include crucial information and deprived the public of meaningful participation. As a result, the court ruled in favor of the Environmental Group regarding their NEPA claim.

E.D. Tennessee
Oak Ridge Envir. Peace All. v. Perry, No. 3:18-cv-150, 2019 WL 4655904, (E.D. Tenn. Sept. 24, 2019).

Environmental Group monitors and informs the public about nuclear weapons production and has brought four claims against the defendants, the Department of Energy (DOE) and the National Nuclear Security Administration (NNSA), stemming from the DOE and NNSA's revised plan to produce a Uranium Processing Facility. The revised plan came about because of the unforeseen financial costs associated with the facility and because of newly discovered seismic activity that geologists discovered in the area where they planned the facility to be built. The complaints contended that (1) the defendant intentionally "segmented" a modernization plan for a nuclear facility (Y-12) in order to avoid disclosing environmental impacts for the facility; (2) that they should be required to write a new environmental impact statement; (3) that the NNSA masked the importance of refurbishing buildings under the "Extended Life Program;" (4) and, that the NNSA should write a new impact statement that includes the new

seismic information—displaying the overall seismic risk increase in Tennessee. The court ruled that the standing requirements, along with the modernization plan were satisfied under the National Environmental Policy Act. However, the court focused primarily on categorical exclusions and integral elements that were required for the environmental impact statement and found that the defendants failed in applying 69 categorical exclusions regarding the environmental impact statement. The defendant's argued that because they "checked the box" to assert that no ordinary circumstances applied, that they had complied with the regulations; however, this was contrary to the National Environmental Protection Agency's findings and the court reasoned that further elaboration was necessary rather than checking the boxes. As a result, the court held that the categorical exclusions violated the National Environmental Policy Act.

W.D. Virginia
S. Appalachian Mountain Stewards v. Red River Coal Co., No. 2:17CV00028, 2019 WL 4674318, (W.D. Vir. Sept. 24, 2019).

Environmental Group sued the Coal Company for allegedly discharging pollutants into streams. They allege that the defendant did not have valid permit authority for discharging the pollutants, and as a result, has violated the Clean Water Act (CWA), the Surface Mining Control and Reclamation Act (SCRA), and the Resource Conservation and Recovery Act (RCRA). The court recognized that to establish a claim under the Clean Water Act, four elements must be satisfied: (1) a discharge; (2) of a pollutant; (3) into waters of the United States; (4) from a point source; (5) without a NPDES permit. The fourth and fifth prongs of the statute are what Environmental Group contested. As for the point source element, Coal Company strategically tried to concede this fact in order to potentially subject them to liability under the CWA, because it may avoid liability under the RCRA. However, the court refused to allow the defendant to dodge litigation and found that the underdrains did constitute a point source—satisfying the fourth prong. Finally, the court considered the permit requirement, which is discerned primarily through contract interpretation. Because the permit, read as a whole, limited the mine's discharge into specific listed point sources, the court concluded that the defendant's discharge from the point sources were not allowed. However, even where a permit does not expressly authorize certain discharges, they may be allowed under a "permit shield" under the CWA. This shield allows a defendant to claim its protection when the permit holder complies with the express terms of the permit and that the permit holder does not make a discharge of pollutants

without reasonable contemplation of the authority on which it was issued. Because Coal Company complied with the Division of Mined Land Reclamation they were not subject to liability under the CWA claim. As for the Surface Mining Control and Reclamation Act, the court found that it could not be brought based on the application of a 6th Circuit case—*Sierra Club v. ICG Hazard, LLC,* 781 F.3d 281. Finally, the RCRA claim could not be brought because of the point source determination by the court.

N.D. West Virginia
Dominion Energy Transmission, Inc. v. 0.11 Acres of Land, More or Less, in Doddridge Cty., W. Va., Civil Action No, 1:19CV182, 2019 WL 4781872 (N.D.W. Va. Sept. 30, 2019)

Energy Corporation petitioned court to condemn certain property adjacent to their existing easement for the purpose of repairing a slip resulting from construction of a natural gas pipeline and containing the property damage. Corporation already possessed a certificate from the Federal Energy Regulatory Commission ("FERC") empowering them to exercise the right of eminent domain when necessary to construct the pipeline. Corporation met the three elements necessary to exercise eminent domain over the land in question: (1) they possessed the required certificate from the FERC, (2) acquisition of the land was necessary for the construction or operation of the pipeline, and (3) they had been unable to contact the owner to acquire the property interest. Their motion for summary judgment was granted. The court also granted Corporation's motion for preliminary injunction and immediate possession because they were likely to succeed on the merits of their case and it was equitable to the landowner.

E.D. Wisconsin
Coal. to Save the Menominee River Inc. v. U.S. Envtl. Prot. Agency, No. 18-C-1798, 2019 WL 5394202 (E.D. Wis. Oct. 21, 2019).

Environmental Coalition ("Coalition") filed suit against the EPA, asserting that the U.S. Army Corps of Engineers ("Corps") should exercise jurisdiction over a permit to construct a mine along a Michigan river, rather than the Michigan Department of Environmental Quality ("MDEQ"). Pursuant to the Clean Water Act, the Corps can issue permits for discharge of certain materials into navigable waters, but the EPA retains oversight over the permit process. The EPA may also grant a state permission to oversee its own permit process, which Michigan had obtained through the MDEQ, but the EPA still oversees any action taken by the state. After the

MDEQ issued a permit to for the mine, which had gone through several rejections by the EPA and subsequent revisions, Coalition filed suit. Coalition first argued an as-applied challenge under the Administrative Procedures Act ("APA"). The court held that the EPA's rejections of the application did not constitute final agency actions, a requirement for APA as-applied challenges, Therefore, the decision was not reviewable. Coalition next argued that the EPA's decision to eventually withdrawal its objections to the application were an abuse of discretion, and therefore reviewable by the court pursuant to the APA. The court held that an exception to the APA standard applied, whereby judicial review is not afforded in cases where agency actions are committed to agency discretion by law. The court reasoned that the exception applied because Coalition, nor the EPA's regulations, identified any meaningful standards by which to judge the EPA's decision to revoke its objections. Further, EPA's own regulations were drafted too broadly to provide any standard by which to judge their exercise of discretion. For these reasons, the court held that Coalition had failed to state a claim and granted the EPA's motion to dismiss.

State

California
Atl. Richfield Co. v. Cent. Valley Reg'l Water Quality Control Bd., 253 Cal. Rptr. 3d 888 (Cal. Ct. App. Sept. 13, 2019).

Water Board brought an action against Mining Company for damages arising from toxic mining discharge. Water Board asserted Mining Company assumed remediation liability for a mine when it acquired the mine through a merger with Copper Mining Company in 1988. Copper Mining Company's subsidiary operated the mine from 1909 until production ceased in 1941. While the mine produced, Copper Mining Company's subsidiary disposed of mine drainage into the watershed. Whether Mining Company assumes liability for this drainage is contingent on the control Copper Mining Company exercised over the subsidiary during the active operation of the mine. Ordinarily, a parent company is not the subject of derivative liability for the actions of a subsidiary in which it holds stock. A parent company exercising erratic control of the subsidiary deviates from the normal rule and assumes the liability of the subsidiary. To determine whether or not the parent company exercised erratic control, the trial court looked to Copper Mining Company's control over a number of mining activities. The trial court found that Mining Company was not liable

for the actions of the subsidiary because it was inconclusive as to whether Copper Mining Company exercised control over waste disposal. The court of appeals held the trial court erred in this conclusion. The appropriate test, according to the court of appeals, is to incorporate the language of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") into the control analysis. With this incorporation, the pertinent question isn't simply whether Copper Mining Company exercised control over waste disposal. Rather, the question is whether Copper Mining Company exercised control over waste disposal or leakage. Under this revised question, the actions of Copper Mining Company will be more broadly construed as control over the subsidiary. This case was remanded for disposition under this test.

Connecticut

Wozniak v. Town of Colchester, 193 Conn. App. 842 (Conn. App. Ct. 2019).

Property-Owner sued Town for a writ of mandamus requiring Town to change the status of the property from a flood prone area to a non-flood prone area on maps dictating flood insurance rates under the National Flood Insurance Act ("NFIA"), which is administered by the Federal Emergency Management Agency (FEMA). Property-Owner alleged that a brook was mistakenly depicted on the insurance-rate-map of the property, thereby improperly designating property flood prone. Based on this, Property-Owner alleged Town, as a mapping partner to FEMA, should file a correction on Property-Owner's behalf. Summary judgment was granted to the Town at trial, which the appellate court affirmed. The court held that Town had no duty under NFIA regulations to file a correction. This was because no physical change to the property had been alleged by Property-Owner, as unambiguously required by the regulations before a correction could be filed. Property-Owner further alleged that the regulations imposed a ministerial duty on Town to file a correction, and therefore a writ of mandamus was appropriate. The court reasoned that the duty was not ministerial because NFIA regulations required Town to exercise discretion in determining if any other practicable alternatives to revising flood prone boundaries existed prior to filing a correction. Therefore, a writ of mandamus was inappropriate. Finally, the court also noted that a writ of mandamus would only be appropriate if Property-Owner could show no other adequate remedy at a law. Because Property-Owner could have filed an application for correction on his own behalf pursuant to NFIA regulations and was notified of this fact by Town, the court held that

Property-Owner could have applied for LOMRs from FEMA individually. Based on this, the court held the trial court had correctly granted summary judgment on behalf of Town, in denying the writ of mandamus.

New York
Adirondack Wild v. New York State Adirondack Park Agency, No. 69, 2019 WL 5352449 (N.Y. Oct. 22, 2019).

Environmental Groups ("Groups") challenged a determination made by the New York State Department of Environmental Conservation ("DEC") in consultation with the Adirondack Park Agency ("APA"), that permitted seasonal snowmobile use on a stretch of road recently obtained by the state and added to the Adirondack Forest Preserve. The Court of Appeals of New York affirmed the Appellate Division order that the determination should stand. In reaching their decision, the Court interpreted the Rivers Act, which restricted motor-vehicle use on certain lands within a half-mile of environmentally protected rivers, as the contested stretch of road was. However the Rivers Act provided for an exception to this restriction, allowing for existing land uses to continue, so long as they were not expanded. The Rivers Act also granted DEC exclusive jurisdiction over all river areas on state land. Groups argued that DEC's determination conflicted with the more stringent APA regulations, triggering a conflict provision of the Rivers Act whereby the more stringent regulation should govern. The Court disagreed, reasoning that the Rivers Act and the APA regulations unambiguously gave DEC the authority to approve motor-vehicle use on areas, like the roadway, within a half-mile of protected rivers. Groups then argued that the existing land use exception of the Rivers Act was improperly applied by the DEC. Again, the Court disagreed. The Court noted that judicial review of the DEC's application of the exception was limited to whether DEC's determination was irrational or contrary to law. The Court reasoned that the DEC's determination passed this standard of review, because it was based on reports outlining the factual history of the contested area and containing affidavits of individuals familiar with the historic use of the land. For these reasons, the DEC's determination allowing for seasonal snowmobile use was upheld.

This case is unpublished and subject to revision.

Pennsylvania
W. Penn Power Co. v. Pa. Pub. Util. Comm'n, No. 1548 C.D. 2018, 2019 WL 4858352 (Pa. Commw. Ct. Oct. 2, 2019).

Electric Company sought a review of the Pennsylvania Public Utility Commission's ("Commission") decision regarding its use of an herbicide to remove plant growth under powerlines. Utility asserted that the Commission lacked jurisdiction over the use of herbicides in managing power line rights-of-ways. In 2017, a property owner filed a formal Complaint with the Commission in protest of Utility's proposal to use an herbicide on a right-of-way that went through the owner's land. A Complaint may be sustained by the Commission "where the public utility violates the Code, Commission regulation, or a Commission order." Commission precedent established that it had jurisdiction over Utility's vegetation control practices. The court held that the Commission had jurisdiction over the Electric Company's herbicide use. The court then concluded that the Commission's approval of the Complaint was improper. For a Complaint to be sustained, "substantial evidence" must be submitted and the Commission cannot rely on the "personal opinion, speculation, or conjecture" of the Complainant. In this case the Complainant relied primarily on his own personal opinions of herbicide use. Therefore, the evidence submitted to the Commission was not substantial, and the decision was reversed.

Texas
Neches & Trinity Valleys Groundwater Conservation Dist. v. Mountain Pure TX, LLC, NO. 12-19-00172-CV, 2019 WL 4462677 (Tex. App. Sept. 18, 2019).

Groundwater Conservation District ("District") is responsible for conserving, preserving, and preventing waste of groundwater in a number of Texas Counties. District brought suit against Bottling Plant after its refusal to comply with District rules requiring owners of groundwater wells to obtain permits to drill and operate such wells. Bottling Plant claimed it did not, contrary to the assertions of District, operate a water well. Rather, Bottling Plant insisted that it drew water from an underground formation of water that naturally flows to the surface. According to Bottling Plant, this distinction is critical as it removes the operations of Bottling Plant from the scope of District's regulations. Bottling Plant brought a number of counterclaims under state and federal law. The trial court dismissed Bottling Plant's state law counterclaims because District enjoys sovereign

immunity. However, the protection of sovereign immunity does not extend to a properly pled takings claim under the Fifth Amendment. To determine the validity of a regulatory takings claim, the court will look to two factors: the economic impact of the regulation and the extent to which the regulation interferes with investment backed expectations. Bottling Plant's pleadings failed to demonstrate sufficient facts for both. First, the pleadings demonstrate no economic impact of the regulation. While the pleadings demonstrate an economic impact of District's civil enforcement procedure, this alone cannot serve as the basis for a regulatory takings claim. In regard to the second factor, District's fee is too marginal to upset investment backed expectations. Accordingly, all counterclaims were dismissed, and District's claim was remanded to trial court for disposition.