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RECENT CASE DECISIONS

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OIL AND GAS

Upstream

Miller v. Rice Drilling D LLC, No. BE 0050, 2023 WL 6457084 (Ohio Ct. App. Sept. 28, 2023).

Surface Owners sued to quiet title to the oil and gas mineral interest in their real estate. Surface Owners sought a determination that they were the rightful owners of the property's mineral interests, and they argued that Drilling Company's interests were extinguished under the Marketable Title Act, abandoned under the Dormant Mineral Act, and/or Drilling Company breached the lease agreement by failing to pay royalties. The trial court granted summary judgment in favor of Drilling Company on all counts and found that Drilling Company's oil and gas mineral interests were not extinguished or abandoned and there was no breach of contract. The appellate court affirmed the trial court's judgment. The court first held that Drilling Company's oil and gas mineral interests were not extinguished under the Marketable Title Act, because the original deed did not account for the interest the Surface Owners claimed to have record marketable title to. Although the temporal element for a root of title was satisfied, the substantive element was not because the deed created less of an interest than the interest claimed by Surface Owners. Second, the court held that Drilling Company's mineral interests were not abandoned via the Dormant Mineral Act, because the claim to preserve in this case generally complied with the statutory requirements and operated to preserve the interests of Drilling Company. There is no requirement that the claim to preserve be filed by an undisputed and actual holder. Finally, the court held that Drilling Company did not breach its oil and gas lease agreement with Surface Owners by failing to pay royalties, because Drilling Company could not pay royalties corresponding with Surface Owners' proportionate share when the amount of their share was undetermined. The appellate court affirmed the trial court's judgment.

Self v. BPX Operating Co., 80 F.4th 632 (5th Cir. 2023).

Owners of Unleased Mineral Interests ("Owners") part of a forced drilling unit brought a class action suit against Appointed State Operator ("Operator") alleging that Operator improperly deducted post-production costs from Owners' pro rata share of production. Operator removed the case to federal court based on diversity and federal question jurisdiction and subsequently moved to dismiss the claim. The district court granted the

motion and certified its ruling for interlocutory appeal. The Fifth Circuit Court of Appeals held that it was proper to certify question to Louisiana Supreme Court regarding whether doctrine of *negotiorum gestio* applied. The appellate court used three factors to decide whether to certify: (1) the closeness of the question and existence of sufficient sources of law; (2) the degree to which considerations of comity are relevant considering the issue and case to be decided; and (3) practical limitations on the certification process. First, Louisiana law was unsettled on the issue. Second, comity interests favored certification because the doctrine presented a complex and novel issue for Louisiana state courts. Finally, the appellate court could not foresee any practical impediments to certification. The appellate court held that it was proper to certify question to state supreme court regarding whether doctrine of *negotiorum gestio* applied.

Pacer Energy, Ltd. v. Endeavor Energy Res., LP, 675 S.W.3d 390 (Tex. App. 2023).

Grantee's Successors-in-Interest sought declaration that a deed conveyed a fixed royalty interest. In 1923, Grantor conveyed a warranty deed of royalty interest rights to Grantee. In the 1960s, both parties described the conveyed interest as "one-eighth of all of the oil, gas and mineral rights . . . as a free royalty interest." Grantee's Successors-in-Interest sought declaration that the deed conveyed a fixed royalty interest. The trial court granted summary judgment in favor of Grantee's Successors-in-Interest and held that the deed conveyed a fixed one-eighth royalty interest. Grantor's Successors-in-Interest contended that the deed conveyed a floating one-eighth of the royalty interest to Grantee's Successors-in-Interest. The appellate court affirmed the trial court's judgment that the deed conveyed a fixed royalty interest, rather than a floating royalty interest. A fixed royalty is a fraction of gross production, and a floating royalty is a fraction of the royalty reserved in an oil and gas lease. In this case, the words "Oil and Mineral rights" in the 1923 deed was a reference to the royalty interest to be derived from the mineral estate. Additionally, the 1960s declarations did not change the description of the conveyed interest by its reference to "one-eighth of the oil, gas, and mineral rights" because "mineral rights" is also a reference to the mineral estate. Grantors did not reserve the full interest in the minerals because the reservation was subject to the interest they conveyed to Grantee. Thus, the appellate court affirmed the trial court's judgment that the deed conveyed a fixed royalty interest, rather than a floating royalty interest.

French v. Ascent Res.-Utica, LLC, No. 22 JE 0024, 2023 WL 5934666 (Ohio Ct. App. Sept. 12, 2023).

Farmers sued Lease Assignee seeking declaratory judgment that leases expired by their express terms and by operation of law. Farmers leased their family farm's oil and gas rights to various third parties in three different leases set to expire five years from execution. However, the leases contained a provision that their terms could be extended if a lessee commenced oil and gas operations on the farm. The trial court granted Farmers' motion for summary judgment and found that Lease Assignee failed to commence operations prior to the expiration of the lease. The appellate court affirmed the trial court's judgment. To begin the process of operations under the lease, Lease Assignee must have (1) secured a drilling permit from Ohio; (2) entered on the farm or upon property included in a drilling unit with the necessary equipment to build access roads; and (3) began and completed the drilling of a well. First, Lease Assignee failed to secure a drilling permit from Ohio. Instead, Lease Assignee obtained three strategic well permits. Second, Lease Assignee did not control or own all acreage it attempted to include in the proposed drilling unit. Furthermore, Lease Assignee did not get the consent required for the effective formation of a drilling unit before the lease expired. Finally, Lease Assignee failed to commence and complete the drilling of a well on the farm. Therefore, the leases expired automatically by their express terms and by operation of law, and the appellate court affirmed the trial court's judgment granting Farmers' motion for summary judgment.

Stingray Pressure Pumping, LLC v. Harris, 172 Ohio St. 3d 130, 2023-Ohio-2598, 222 N.E.3d 597.

Company brought suit to challenge Tax Commissioner's decision that certain materials used in the fracking process did not qualify for Ohio's tax exemption related to materials used directly in the production of oil and gas. During litigation, legislation promulgated an amendment to the relevant statute. The Ohio Supreme Court considered: (1) whether the materials qualified as "things transferred" and (2), if so, whether the materials qualified for the exemption. First, the court held that the majority of the materials qualify as a "thing transferred" except for the data van. This determination turns on a primary use test and whether the primary use of the materials is to store and hold or if the materials are to be used directly in the fracking process. If the primary use is the latter, then it qualifies as a

"thing transferred." Second, the court held that the materials that qualify as a "thing transferred" also qualify for the tax exemption. Under the original statute, the phrasing indicated that the exemption only applied to materials directly used in oil and gas production. The new statute kept this phrasing but also added a non-exhaustive list of materials that qualify as a "thing transferred." The court held that to focus only on the "direct use" language and not also allow a "thing transferred" to qualify would render the lists largely meaningless. The court affirmed the decision in regard to the data van and reversed in regard to the rest of the at issue materials.

Zavanna, LLC v. GADECO, LLC, 2023 ND 142, 994 N.W.2d 133.

Assignee of the Top Lease (Top Lease) sued for quiet title of oil and gas leaseholds under the theory that the Bottom Leases had expired due to cessation of production. Lessees of the Bottom Lease (Bottom Lease) appealed. The Supreme Court of North Dakota considered: (1) whether Bottom Lease bore the burden of proving that production did not cease, (2) whether evidence submitted was sufficient to prove cessation of production, and (3) whether the force majeure clauses of the leases apply. First, the court held that Bottom Lease did not bear the burden of proving cessation of production. Because Top Lease sought to terminate, the burden fell on Top Lease to prove cessation of production. Second, the court held that the evidence presented was enough to prove cessation of production across three periods of time. The leases did not fully define the "reworking operations" necessary to avoid a total cessation of production, but established guidelines provide that operations must continue with due diligence. Bottom Leases failed to prove that any reworking operations moved beyond the "minimal preparatory steps" to meet that due diligence. Third, the court held that the force majeure clauses did not apply. Bottom Lease argued that weather conditions affected cessation period three, but as the court already found cessation of production for the first two periods, the matter was irrelevant. Additionally, Bottom Lease failed to bring sufficient evidence showing it was unable to obtain materials. The court affirmed the lower court's decision.

Goble v. CNX Gas Co., LLC, No. 22 MO 0014, 2023 3 WL 6459016 (Ohio Ct. App. Sept. 28, 2023).

Landowners appealed a judgment entry of the Monroe County Court of Common Pleas which granted summary judgment in favor of oil and gas lessee ("Lessee"). Landowners argued the trial court erroneously

determined that a one-half interest in oil and gas rights constituted a deed exception rather than a reservation, and claimed that words of inheritance were necessary in order to create an inheritable fee simple interest. This action involved a dispute over the ownership of a one-half interest in the oil and gas rights underlying a 115.891 acre tract of land. There was no dispute that Landowners own the remaining one-half interest. This dispute solely involved the remaining one-half interest which was created within an August 17, 1914 deed. In that deed of conveyance, the grantors of the parcel included the following clause: "The Grantors hereby reserve an equal one-half interest in the oil and gas lying in and under the above-described premises." The court found that based on the nature of the right owned prior to the execution of the deed, the language in the deed regarding the right being kept, and its effect on the transfer, the grantors expressed throughout that they were keeping for themselves all the rights to the specific minerals (including oil, gas, and coal) that they enjoyed prior to the transfer of the remainder of the property. Without question, the grantors enjoyed the right to these minerals in fee simple prior to executing the deed in question. Hence, pursuant to Ohio law, the grantors' language was an expression of their retention of their fee simple interest, whether or not specific words of inheritance appear in the deed. For the reasons provided, the court found that Landowners' arguments were without merit and the judgment of the trial court was affirmed.

Faith Ranch and Farms Fund, Inc. v. PNC Bank, Nat'l Ass'n, 8th Dist. Harrison, 2023-Ohio-3608, 2023 WL 6458672.

Appellant challenged the trial court's grant of summary judgment for Appellee on a dispute over eleven parcels of land owned by Appellee. The appellate court, under *de novo* review, considered whether title to the oil and gas was excepted and thus reserved from the conveyance of the eleven parcels of land. The deed reserved the coal "and other minerals." The lower court held that there was no evidence to suggest "other minerals" included oil and gas and that the reservation unambiguously did not reserve oil and gas. The district court noted that the presumption of law is in favor of construing "other minerals" to include oil and gas, but found that the parties' intent was ambiguous based on the language of the reservation and considered parole evidence. Such evidence showed that the same conveyer had explicitly reserved oil and gas in other conveyances, but not the present conveyance. Therefore, while the appellate court did not agree with the

lower court that the reservation unambiguously did not include oil and gas, it affirmed the motion for summary judgment anyway.

Partners and Friends Holding Corp. v. Cottonwood Mins, L.L.C., 2023 WL 8649880 (5th Cir. Dec. 14, 2023).

Farmee brought action against Farmor and Affiliate (collectively "Companies") to recover part of a settlement paid from Third Party to Affiliate. The dispute began when Farmee and Farmor entered into a Farmout Agreement ("FA") regarding certain oil and gas leases that were subject to a title dispute between Farmor and Third Party. Under FA, Farmee would pay most litigation costs in exchange for (1) Farmor's "good faith" effort to obtain clear title in the disputed leases, (2) a portion of the working interest in the leases, and (3) an understanding that part of any money paid from Third Party to Farmor in settling the dispute would be used to pay down Farmee's litigation contribution. An omnibus settlement agreement ("Agreement") settled title concerning several oil and gas leases, some between Farmor and Third Party and others between Affiliate and Third Party. Under the terms of Agreement, Third Party (1) surrendered title to the leases at issue in the dispute with Farmor with no money changing hands and (2) paid $850,000 to Affiliate in exchange for title to the leases in that separate dispute. Farmee sued Companies after receiving no portion of the settlement paid to Affiliate, bringing claims for (1) breach of contract, (2) fraudulent inducement, and (3) money had and received. The trial court granted Companies' motion to dismiss and awarded attorneys' fees pursuant to a fee-shifting provision in FA. The Fifth Circuit found the Agreement "makes clear" that Third Party agreed to pay Affiliate, not Farmor. Farmee contended on appeal that Third Party's payment to Affiliate was a ploy to avoid repaying litigation costs, but the court noted that Farmee had failed to allege those facts in its initial complaint. Ultimately, the court wrote, Farmee "got everything it bargained for" under FA.

Cambiano v. Ark. Oil and Gas Comm'n, 2023 Ark. App. 581, 2023 WL 8610496 (Dec. 13, 2023).

Successors-in-interest of certain mineral rights ("Successors") brought action seeking judicial review of the Arkansas Oil and Gas Commission's ("AOGC") denial of their 2019 application to vacate a 2007 integration order ("Order"). In 2006, an energy company ("Company") applied to integrate and pool all uncommitted and unleased mineral interests over a

certain 124 acres in western Arkansas. Company made efforts to locate the recorded owners or their heirs ("Heirs") of the mineral rights at issue ("Rights") that included a title examination, sending an affidavit of heirship to a suspected family member, and publishing notice in a local newspaper. AOGC entered Order after no one came forward on behalf of Heirs. After three years and a quiet title action, Company began paying royalties to Heirs. Heirs, without Company's knowledge, conveyed a 35 percent interest in Rights to their attorney, who in 2010 conveyed Rights to Successors. In 2014, Successors brought action against Heirs to recover their share of the royalties. That case settled in 2016. Company made royalty payments directly to Successors for several years. Successors later applied to vacate the 2007 integration order, claiming Company had not made reasonable efforts to locate and negotiate with Heirs. The AOGC denied the application, and upon judicial review, a circuit court judge affirmed, finding that Successors had produced no evidence establishing that Heirs did not receive proper notice in 2007. The Arkansas Court of Appeals affirmed because (1) the Company made an exhaustive, eight-month effort to locate Heirs before issuing Order, (2) the subsequent quiet title action shows that Heirs' interest in Rights was unclear when Order was entered, and (3) despite believing Order to have been improper, Successors admit accepting royalty payments from Company for many years because of the integration.

Bd. Of Cnty. Comm'rs of Boulder Cnty. v. Crestone Peak Res. Oper. LLC, 2023 CO 58, 538 P.3d 745 (Colo. Nov. 20, 2023).

Municipal lessor under oil and gas leases ("Lessor") brought action against lessee production company ("Lessee") for failure to surrender leases, surface and mineral trespass, and unjust enrichment, claiming that a temporary four-month shutdown for necessary repairs had triggered termination under the leases' respective cessation-of-production clauses. Lessor and Lessee were each successors-in-interest to the leases, both of which originated in the early 1980s. In March 2014, necessary repairs forced Lessee's predecessor-in-interest to shut in some wells for four months. Production resumed and Lessor continued accepting royalty payments from Lessee's predecessor-in-interest and from Lessee. Lessor sued Lessee in 2018. The trial court granted Lessee's motion to dismiss, finding that "marketing," but not "production" bad ceased during the shut in. A division of the Colorado court of appeals ("COA") affirmed. But in affirming, COA adopted the "commercial discovery" rule, broadly defining

"production" as "capable of producing oil or gas in commercial quantities." The Colorado Supreme Court affirmed the judgment, but also held that COA's adoption of the commercial discovery rule was not appropriate. Regarding the "commercial discovery" question, the court "reaffirmed the well-established tradition in Colorado" of interpreting each oil and gas lease on its own terms and within its own context. Then, analyzing the language of the leases in question, the court interpreted the cessation-of-production clauses to become operative not during temporary shutdowns, but shutdowns that would be permanent unless corrected by "drilling or reworking operations." In this case, the court wrote that requiring "reworking or drilling" to maintain the leases during the shut in would have caused economic and environmental waste. During the shut in, the wells remained commercially viable, Lessee's predecessor-in-interest made regular site visits, and there was no indication that anyone believed the lease had been terminated.

HL Hawkins Jr. Inc. v. Capitan Energy Inc., 2023 WL 5158051, (W.D. Tex. Aug. 10, 2023)

Lessor entered into an oil and gas lease with Lessee, who authorized an Agent, to operate the four wells in the lease and pay Lessor royalties on Lessee's behalf. Lessor claimed Lessee and Agent did not pay the appropriate royalties. Both parties moved for summary judgment on their respective interpretations of the lease. The court stated if Lessor wanted certain prohibitions of deducting post-production costs, they could have included that in the language of the original lease. The court found Lessee liable for interest on late payments under the Texas Natural Resources Code section 91.402(a) because the evidence showed Lessee did not pay some amount of royalties owed to Lessor within the applicable period. Lessor's Motion for Summary Judgment was granted in part and denied in part; granted for Lessee's violation of the Texas Natural Resources code and denied for Lessor's lease interpretation. Lessee's Motion for Summary Judgment was also granted in part and denied in part, allowing Lessee to use some exceptions built into the lease while denying them others and denying the tolling of the statute of limitations.

Oil Valley Petroleum, LLC v. Moore, 2023 OK 90, 536 P. 3d 556 (Oct. 3, 2023).

Oil Valley filed suit seeking quiet title, cancellation of base lease, and declaration that top-lease to be in full-force and effect. Defendant Moore

counterclaimed for quiet title, slander of title, and tortious interference of business relations. Both parties moved for partial summary judgement on the quiet title issue and Defendant also moved for partial summary judgement on tortious interference. The District Court granted Defendant's summary judgement motions and denied Plaintiff's cross-motion. Plaintiff appealed the quiet title decision, and the Court of Civil Appeals reversed. Defendant appealed and was granted certiorari. Plaintiff argued that it had a lessee's release of interest in the well that extinguished Defendant's lease. Defendant argued that the well in question was profitable, and that Plaintiff had unclean hands in regard to obtaining the release. The Supreme Court of Oklahoma vacated the Court of Civil Appeals decision and reversed the order granting Defendant partial summary judgement, remanding for further proceedings. The Supreme Court found that there was a dispute of material fact regarding the profitability of the well in question. Even with Plaintiff's argument that the commercial viability of the well did not matter due to the release, the court held that Moore's argument of unclean hands when obtaining the release was enough to defeat Plaintiff's argument at the summary judgement stage. Since the District Court had not been presented enough facts regarding either the commercial viability of the well nor the unclean hands argument, the court vacated the Court of Civil Appeals decision and reversed the District Court's partial summary judgement decision, remanding the case for further proceedings.

Midstream

In re Sanchez Energy Corp., 648 B.R. 592 (Bankr. S.D. Tex. 2023).

A Midstream Provider had contractual agreements for the gathering of natural gas with Debtors, who are going through bankruptcy proceedings. The Plan of Reorganization ("Plan") Debtors created as a result of the bankruptcy proceedings required Midstream Provider to timely object to debtors' then-proposals if so desired, which Midstream Provider failed to do in the hearing, therefore waiving that right under the terms of the Plan. Midstream Provider sued Debtors under theories of breach of contract and anticipatory breach of contract. Debtors removed the case to the United States Bankruptcy Court for the Southern District of Texas and filed a motion for judgment on the pleadings. The bankruptcy court approved Debtor's motion for several reasons. First, Midstream Provider's claims are barred under the Plan because of Midstream Provider's failure to raise objections to the Plan at the hearing when allowed and required to do so. Second, even if Midstream Provider was not barred from bringing forward

these breach of contract claims, they fail as a matter of law since the language of the Plan and the prior contracts demonstrate that the Plan and prior contracts are in "harmony with one another." The court will issue a separate judgment for debtors.

Jonah Energy LLC v. Wyo. Dep't of Revenue, 2023 WY 87, 534 P.3d 902 (Aug. 29, 2023).

Mineral producer ("Producer") sought judicial review of a decision by the Board of Equalization ("Board") that upheld the Department of Revenue's ("DOR") decision that Producer had miscalculated the taxable value of natural gas liquid ("NGL") production for 2014 through 2016. A Wyoming district court certified the case to the state supreme court, which accepted it. Producer had, in calculating the "sales price" of NGL on tax forms, deducted Shortfall Capacity Deficiency Fees ("Fees") charged by the buyer company ("Buyer") for months Producer did not deliver enough of a certain type of NGL. Using statutory definitions and a plain-language analysis, the court defined "sales price" as "the cost at which [NGL] was bought by [Buyer] and sold by [Producer] under the Purchase Agreement." The court then turned to the Purchase Agreement itself to determine the contractual definition of "sales price." The court determined that, from the four corners of the contract, it was clear that Fees were not considered part of the sales price. There was a specific formula used to determine the sales price that did not include Fees, which were invoiced separately and were only paid during months when Producer failed to deliver enough NGL. The two items appeared in different sections of the contract. Finally, other Buyer-invoiced items were defined in the section involving Fees, but those items were not deducted by Producer in sales price calculation. The court also rejected Producer's attempt to introduce testimony from an expert regarding the history and regulation of NGL, finding that it fell "outside the four corners of the contract and was not being used to define any particular term."

In re Cresent Trading LLC, 2023 WL 6307468, (Bankr. S.D. Tex. Sept. 27, 2023).

Broker and Seller engaged in various Letters of Intent and a Confidentiality Agreement relating to the purchase of a pipeline system. Ultimately, Seller sold the pipeline system to another party. Broker sued both Seller and the other party for tortious interference with a contract. Two defendants in this lawsuit filed for bankruptcy, and the third moved for

summary judgment. Summary judgment was denied by lower courts, and on appeal Broker argued summary judgment should be denied again on the basis that lower courts had done so. The court granted Seller's Motion for Summary Judgment on Broker's claims for tortious interference with contracts because the last remaining entity that was not bankrupt was not the one that had signed the Letters of Intent or the Confidentiality Agreement and was not bound by those documents.

Downstream

Corder v. Antero Res. Corp., 57 F.4th 384 (4th Cir. 2023).

Lessors sued Lessees over Lessors' deduction of post-production costs when distributing royalties to three types of leases: (1) leases that were silent on post-production costs; (2) leases that explicitly prohibited any post-production costs; and (3) leases that permit post-productions costs as long as certain criteria are met. Lessors sued Lessees under theories of breach of the terms in the lease agreements, breach of fiduciary duty, and fraud. Lessees removed the case to federal court on diversity jurisdiction. Lessees appealed the district court's judgment, and Lessors appealed to the United States Court of Appeals for the Fourth Circuit from the district court's order dismissing their claim of fraud. The Fourth Circuit affirmed in part and vacated in part for remand for several findings. Regarding the breach of contract claim, the court first found that all the types of leases were subject to the *Tawney* standard. Under this finding, the leases that were silent on the production costs do not satisfy any of the three *Tawney* requirements, so they are prohibited from deducting post-production costs. The leases that explicitly prohibited any post-production costs were also prohibited from deducting these costs. The leases with clauses that permit these post-productions costs are permitted to deduct the costs as long as the product becomes marketable, but on remand the court will need to decide if specific criteria according to the clause are met. Regarding the fraud claim, the court adopted the relaxed view of Federal Rules of Civil Procedure 9(b), but held that Lessees failed to state that claim with particularity in their complaint because they did not provide enough facts and did not name the Lessors specifically. The court affirmed in part, vacated in part, and remanded.

Devon Energy Prod. Co., L.P. v. Sheppard, 668 S.W.3d 332 (Tex. 2023), *reh'g denied* (June 16, 2023).

Lessors sought declaratory judgment against Lessees in Texas state court for improper calculation of oil and gas royalties. The parties did not dispute that the royalty calculation must be free of costs "between the wellhead and point of sale," nor that the producer could not charge the landowners for a share of said costs. The provision at issue deviated from industry standard and stated that "[i]f any disposition, contract, or sale of oil and gas shall include any reduction or charge for the expenses or costs of production, treatment, transportation, manufacturing, process[ing] or marketing of the oil and gas, then such deduction, expense or cost, shall be added to . . . gross proceeds so that Lessor's royalty shall never be chargeable directly or indirectly with any costs or expenses other than its pro rata share of severance or production taxes." The lower courts determined that royalties were payable on gross proceeds and post-sale postproduction costs. As a matter of first impression, the Supreme Court of Texas considered whether the provision "manifest[ed] contractual intent" to include postproduction costs into the base royalty and affirmed the appellate court. First, the court labeled the leases as "proceeds plus" leases. Royalties under proceeds plus leases included gross proceeds plus the postproduction costs deducted in the selling price. The court noted the importance of consistency in interpreting oil and gas provisions and that its decision only applied to the specific language in the case on appeal. Second, the court waived arguments regarding transportation and fractionation costs not briefed in the appellate court. The court held that the parties were bound by the "atypical" language they chose for their lease and affirmed summary judgment on the issues.

WATER

Federal

Hill v. U.S. Dep't of the Interior, No. CV 22-1781 (JEB), 2023 WL 6927266 (D.D.C. Oct. 19, 2023).

Tribal Members holding allotments of land on Reservation in Montana challenged the Crow Tribe Water Rights Settlement Act ("Act") by seeking declaratory relief against the federal government. The Act waived and released all claims for water rights that Tribal Members could have asserted against the United States upon satisfaction of certain conditions, certified by the Secretary of the Interior. Tribal Members asserted that the United States breached its trust responsibilities to them and violated the

Administrative Procedure Act ("APA"), the Settlement Act, and due process and equal protection guarantees of the Fifth Amendment. Department of the Interior ("Dept") moved to dismiss for lack of standing and failure to state a claim. The D.C. District Court found Tribal Members did have standing, but that none of their claims were sufficient to survive a motion to dismiss. The court found no merit in the alleged violations of the APA and Settlement Act. Further, Tribal Members failed to allege breach of a specific trust duty, as well as lay the necessary foundation to succeed in their Fifth Amendment claims. The court found Tribal Member's pleadings legally conclusive and factually insufficient and granted the Tribal Member's motion to dismiss for failure to state a claim.

E. Valley Water Dist. v. Or. Water Res. Comm'n, 539 P.3d 789 (Or. Ct. App. 2023).

Water District petitioned for judicial review a final order from the Oregon Water Resources Commission (Commission) which denied Water District's application for a permit that would allow 12,000 acre-feet of water annually from a creek to be stored in a reservoir. The issue arose due to the potential conflict between the proposed reservoir and the instream water right in the creek which provides stream flows for cutthroat trout migration, spawning, egg incubation, fry emergence, and juvenile rearing. Commission's decision established that the new water storage right conflicted with the instream water right and thus denied the application. Water District appealed the decision on several assignments of error which included that the final order exceeded the commission's delegated authority, that it is legally erroneous, and is not supported by substantial evidence and reason. Water District also cited to previous decisions where similar permits have been approved with conditions by Commission. The Oregon Court of Appeals affirmed the denial of the permit holding that the Commission was permitted to consider whether the proposed reservoir impacted stream flows for cutthroat trout and that it was the Water District's burden to prove that the proposed use as a reservoir would not be detrimental to the public interest. It determined that the beneficial purpose of in-stream water rights would have been frustrated by issuance of the permit that Water District sought. This supports Commission's finding. Finally, the court of appeals found substantial evidence supporting Commission's conclusion that the use of the creek for a reservoir would have inundated the creek and frustrated the protection of flows that support the life stages of cutthroat trout. Based upon these holdings, the Oregon

Court of Appeals affirmed the Commission's denial of the district's permit application.

Cheek v. GL NV24 Shipping, Inc., No. 2:22-CV-86, 2023 WL 5963185 (S.D. Ga. Sept. 13, 2023).

Plaintiffs brought suit against Defendants after Defendants capsized a vessel, polluting the surrounding water. Plaintiffs sued under theories of (1) strict liability under the Oil Pollution Act of 1990 (OPA), (2) negligence under federal maritime law and state law, (3) negligence per se, (4) public nuisance, (5) trespass, and (6) negligence and strict liability for ultrahazardous activity. Plaintiffs also sought punitive damages and attorney fees. Defendants filed a motion to dismiss. Defendants argued that Plaintiff's presentments under the OPA claim were insufficient, but the District Court rejected this argument. Plaintiffs not only met the minimum standard of the necessary sum certain, but exceeded it by being more detailed than necessary about how the damages were calculated. However, the presentments did fail in that they asserted damages in the amended complaint which were not in the presentments, one being subsistence use damages. These damages are not available to businesses, like Plaintiff, and Plaintiff failed to show sufficient facts of personal subsistence use damages in their presentments. Regarding property damages, only some of the Defendants made the proper included descriptions of property damages in their presentments. Defendants also argued that the OPA displaced Plaintiff's federal maritime claims. The OPA specifically covers the types of claims Plaintiffs asserted and they were indeed displaced. Defendants also argued that maritime law and not state law governed the claims. State law and maritime law can govern concurrently. The alleged negligence took place in navigable waters, and the activity giving rise to the incident was maritime-related. However, the wreck occurred in Georgia's territorial waters, allowing state law to also govern. Defendants' motion to dismiss was granted in some respects and denied in others.

Oroville Dam Cases, 96 Cal. App. 5th 173, 314 Cal. Rptr. 3d 247 (2023).

District Attorney filed suit on behalf of the People against Department of Water Resources ("DWR"), seeking civil penalties and injunctive relief following DWR's release of water from Lake Oroville down the Oroville Dam's gated flood control spillway and emergency spillway in February 2017. The People sued under the state's Fish and Game Code, section

5650.11, which authorizes civil penalties against any "person" who has deposited harmful materials into the waters of the state. The trial court granted summary judgement for the DWR, finding that the complaint failed to state a viable cause of action since DWR is not a "person." The People appealed, arguing: 1) DWR is a person under the statute, and 2) even if DWR is not a person, DWR did not negate the People's cause of action with respect to injunctive relief. The appellate court denied the first argument, citing California case law which explains that "[t]he state is neither a natural person, partnership, corporation, association, nor other 'organization [] of persons.'" Other sections of the Fish and Game Code further illustrate this point by distinguishing between persons, public agencies, and entities. The appellate court reasoned that since the Legislature did not expressly include public agencies in the relevant section of the code, it did not intend for the provision to apply to state agencies such as DWR. The appellate court also denied the People's argument for injunctive relief. The court held that an injunction is only appropriate where an injury is impending—it cannot be used as a remedy for past acts which are unlikely to reoccur. The court reviewed the People's complaint and found that it did not allege any ongoing conduct but rather was based on the 2017 flood emergency. For these reasons, the trial court's judgement was affirmed.

Allen v. United States, 83 F.4th 564 (6th Cir. 2023).

Homeowners sued the United States under the Federal Tort Claims Act ("FTCA"), alleging the United States negligently entrusted the operation of an upstream dam to an unfit operator, resulting in the dam's collapse and the destruction of their home. The trial court dismissed the complaint for lack of subject matter jurisdiction, holding that the United States government was entitled to sovereign immunity. Homeowners appealed, and the Sixth Circuit affirmed. The issue on appeal was whether the United States waived its sovereign immunity. To answer this question, the Sixth Circuit reviewed and interpreted the scope of the immunity provision of the Federal Powers Act ("FPA"), a statute passed in 1920 to regulate the development of hydroelectric power. The FPA specifies that, as a condition of receiving license to operate a dam, each licensee "shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor." Homeowners argue that the FPA does not grant immunity in this case because the failed dam was not "constructed

under the license." Rejecting this argument, the Sixth Circuit relied on canons of statutory construction to hold that the phrase "constructed under the license" in the FPA modifies only its immediate antecedent, "work appurtenant or accessory thereto," making the licensee liable—and the government immune—for damages caused by project works, regardless of whether those project works were constructed under a license. For these reasons, the trial court's judgement was affirmed.

City of Memphis v. Horn Lake Creek Basin Interceptor Sewer Dist., No. 2:19-CV-2864-MSN-CGC, 2023 WL 6200074 (W.D. Tenn. Sept. 22, 2023).

On March 28, 2018, Plaintiff (Director of Public Works) sent a letter to Defendant stating that they would no longer supply wastewater treatment services after September 22, 2023. From 2019 to 2022, the parties had negotiations and mediation which ultimately proved unsuccessful. A final pretrial order was filed scheduling trial for five days between April and May 2023. The issues presented at trial included: (1) the time necessary for Defendant to disconnect from Plaintiff's wastewater treatment system, (2) the rate that the Defendant should pay to the City for wastewater services after the Agreements ended, (3) whether the court should enjoin all new sewer connections with Defendant, (4) whether court should permanently enjoin the Defendant from accepting additional flows, and (5) whether the court should order parties to enter into an agreement that satisfied the Inter-Jurisdictional Agreement Program (IJAP). Due to Plaintiff's failure to include defenses in their pretrial order Plaintiff forfeited that defense. Furthermore, Plaintiff's lack of treating Defendant's wastewater would lead to violations of the Clean Water Act and create environmental harm. Using its equitable powers, the court compelled Plaintiff to continue treating Defendant's wastewater beyond September 22, 2023. While Plaintiff advocated for entering the IJAP, the evidence at trial did not favor the court ordering the parties to enter IJAP. Furthermore, little evidence favored permanently enjoining the Defendant from accepting new sewage wastewater flows and new sewage connections. No evidence was presented quantifying the current level or industrial flow or showing the potential volume of any growth. Lastly, using expert testimony, the court found 8 years measured, from October 1, 2023, to be the time most equitable for Defendant to disconnect from Plaintiff's wastewater systems.

United States v. Abbott, 87 F.4th 616, (5th Cir. 2023), *reh'g en banc granted, opinion vacated*, No. 23-50632, 2024 WL 174374 (5th Cir. Jan. 17, 2024).

The United States (U.S) brought action against the state of Texas and its governor claiming that the state's construction of a floating barrier in the Rio Grande without authorization from the Army Corps of Engineers or Congress was a violation of the Rivers and Harbors Appropriation Act (RHA). The U.S sought an injunction which was granted by the lower court. Texas appealed and the case was heard in the United States Court of Appeals for the Fifth Circuit. The court analyzed whether (1) the river is considered navigable, (2) the structure is considered an obstruction, (3) it qualifies as an "other structure" within the definition in the RHA, (4) Texas's right to defend itself from invasion should it be exempt from the RHA, (5) and whether there is a likelihood of irreparable harm should the preliminary injunction not be granted. The court first determined that the river was navigable. The court then determined that the structure qualified as an obstruction based on evidence the United States presented and the fact that Texas's intent with the structure was to obstruct illegal entrance. Texas tried to argue that to be an "other structure," the construction would need to be permanent. The court disagreed, and even if Texas was right, no evidence suggested that their structure was not permanent. The court also determined that Texas's self-defense argument did not preclude the preliminary injunction and there was no evidence they would suffer irreparable harm. Finally, based on current relations with Mexico, the court determined that the lower court was correct in determining there would be irreparable harm to the United States absent the preliminary injunction. The court affirmed the lower court's holding.

Uhrich & Brown Ltd. P'ship v. Middle Republican Nat. Res. Dist., 998 N.W.2d 41 (Neb. 2023).

Landowners leased land to farmers. In September 2020, the Board of the Natural Resources District (NRD) found that Landowners violated the Nebraska Ground Water Management and Protection Act (NGWMPA). In late October, the Board conducted hearings in which NRD's attorney represented them. The Board found there was sufficient evidence that the landowners violated the NRD's rules and the NGWMPA. In its resolution, the Board stated it consulted with NRD's counsel to come up with its conclusion. The landowners appealed under the Administrative Procedure Act (APA) to the district court arguing the hearings denied them their equal

protection and due process rights, especially since there was extensive participation by NRD's counsel in the dispute. The district court held that the involvement of NRD's counsel in the decision-making process, after acting as investigators and prosecutors for the NRD, violated the landowner's due process right to a neutral decision maker. NRD appealed to the Supreme Court of Nebraska, claiming the district court erred by (1) failing to review the Board's decision de novo, (2) failing to find the landowners violated NRD's & NGWMPA regulations, and (3) ruling that NRD's hearing did not conform with due process. The Supreme Court held that the inquiry in final order from a district court, is based on whether the decision conforms to the law and supported by competent evidence, not de novo review. Additionally, the Supreme Court cited the US Supreme Court's precedent in *Withrow v. Larkin*, holding that a combination of prosecutorial and adjudicative functions in the same person is incompatible with due process. Using *Withrow's* precedent, the Nebraska Supreme Court held that the district court was correct in finding NRD's actions violated due process. The Nebraska Supreme Court affirmed the district court's order.

S.F. Baykeeper v. City of Sunnyvale, No. 5:20-cv-00824-EJD, 2023 WL 8587610 (N.D. Cal. Dec. 11, 2023).

The District Court of the North District of California, San Jose Division, allowed Defendant Cities (Cities) to file a motion for reconsideration on the court's summary judgment (Prior Order) only as to the question of whether *Sackett v. Env't Prot. Agency* changed the conclusion that the at issue bodies of water are Waters of the United States (WOTUS) under the Clean Waters Act "CWA." The court specifically did not allow new evidence and only permitted the parties to use the existing discovery. Cities conceded that one of the at issue bodies of water is WOTUS, but requested reconsideration for the rest. Plaintiff filed an objection claiming that Cities' new evidence was improper. Plaintiff then filed a separate motion for leave to take deposition and file a surreply to counter Cities' response to Plaintiff's objection. The court determined that the new evidence was improper as it was not existing discovery. The court therefore sustained plaintiff's objection and terminated plaintiff's motion as moot. At the time of the prior order, WOTUS had not been defined under the CWA. Two main tests developed: a "relatively permanent test" (referring to the body of water being relatively permanent) and a "significant nexus" test (referring to there being a significant nexus between the wetland and its navigable

waters). The Prior Order used the significant nexus test, but the Supreme Court later decided on the relatively permanent test in *Sackett*, eliminating the significant nexus test. The court here determined that this did not alter its conclusion as the waters are still WOTUS under the relatively permanent test. The court denied Cities' motion for reconsideration.

Carlsbad Irrigation Dist. v. D'Antonio, No. A-1-CA-39378, 2023 WL 6969728 (N.M. Ct. App. Oct. 18, 2023).

Water owners appealed the district court's determination that the owners forfeited their water rights in excess of 5,813.6 acre-feet per year and abandoned all but 150 acre-feet per year of their remaining water rights. On appeal, owners argue that the district court: 1) deprived owners of due process in adjudicating their water rights, 2) erred in finding the owners forfeited their water rights, and 3) erred in finding the owners abandoned their remaining water rights. The court of appeals rejected the owners first argument because the owners were given notice of, and agreed to, expedited inter se proceedings. Further, the district court provided the owners with an opportunity to be heard by allowing them to proffer evidence regarding their use of the water rights. The court of appeals also rejected the owners second argument based on its finding of clear and convincing evidence that there was a nonuse period of at least four years for both consumptive and non-consumptive use water rights. Additionally, the court reviewed the evidence and found nothing to support the owner's claim that the nonuse was based on circumstances outside of their control. Finally, the court of appeals rejected the owner's third argument, holding that the owners acted as speculators and did nothing to beneficially use the water or protect the facilities over an extended period of time. The court held that the owner's only made a diligent effort to transfer 150 acre-feet of water per year to another corporation; all other interests in water rights had been abandoned due to nonuse. Owners also argued that the district court erred in denying their joint motion to intervene. However, because the court of appeals affirmed the district court's conclusion that the owners lost their water rights, the court of appeals deemed the issue moot. Affirmed.

City of Marina v. Cnty. of Monterey, 97 Cal. App. 5th 17, 315 Cal. Rptr. 3d 230 (2023), *reh'g denied* (Dec. 1, 2023), *review filed* (Dec. 22, 2023).

City challenged Salinas Valley Basin (SVB) groundwater sustainability agency's plan, as adopted by County, and posted by the Department of Water Resources (Department). County filed cross-complaint for

declaratory relief requesting declaration that City's groundwater sustainability agency was void and that County was the exclusive groundwater sustainability agency. Following a bench trial, the judge held that the plan adopted by County was the operative groundwater sustainability plan. On appeal from the judgment, City argued that the trial court erred in denying City's petition because: (1) City's notice of its groundwater sustainability agency was timely; (2) Section 10724 did not authorize the County to become a groundwater sustainability agency for the CEMEX area due to the overlap in jurisdiction between the City and SVB; (3) City became the exclusive groundwater sustainability agency for the CEMEX area when SVB excluded the CEMEX area from its jurisdiction; (4) County failed to submit a groundwater sustainability plan by the appropriate deadline; and (5) Department lacked authority to post SVB Groundwater Sustainability Agency's plan. The court held: (1) the timeliness of City's notice was immaterial since County was the presumptive groundwater sustainability agent on other grounds; (2) County was authorized to step in as the presumptive groundwater sustainability agent when City and SVB failed to reach an agreement to allow prompt designation of a sustainability agent for the disputed CEMEX area, (3) SVB only excluded CEMEX from its jurisdiction after Department confirmed that County was the exclusive groundwater sustainability agent for the area, (4) there was no statutory penalty for missing the filing deadline and therefore, the deadline was directory but not mandatory, and (5) Department did not lack the authority to post SVB's groundwater sustainability plan because SVB and County entered into a coordination agreement for the CEMEX area.

Washington Cnty. Water Co., Inc. v. City of Sparta, Illinois, 77 F.4th 519 (7th Cir. 2023).

Water Company sued City of Sparta "Sparta" after learning that the Village of Coulterville "Coulterville" bought water services from Sparta. Since Coulterville had its own water treatment facility until 2019, Water Company did not service Coulterville's residents except for one customer one meter north of the county line. Water Company communicated to Coulterville that it had service available if Coulterville ever needed additional water services. Water Company alleged that Sparta encroached upon their 7 U.S.C §1926(b) protection which prohibited municipal encroachment on a rural water association's service area. The District Court granted summary judgment in favor of Sparta. The court found that Water

Company was not entitled to §1926(b) protection because it did not have a legal right under Illinois state law to service Coulterville since Water Company was not designed to produce at least 20 percent more than Coulterville's maximum average daily demand. Water Company appealed, arguing "designed to produce" refers to its pumping capacity and not its contractual capacity. By using the pumping capacity framework, Water Company argued its pumping stations pumped water exceeding Coulterville's maximum daily average plus the 20 percent reserve. The Seventh Circuit Court of Appeals held that "designed to produce" refers to the water association's ability to furnish sufficient water to residents, meaning that both the contractual and pumping capacities must meet the demand. After reviewing Water Company's pumping and contractual capacities, the court determined Water Company's contractual capacity was insufficient to comply with Illinois state regulations. The Circuit Court affirmed the District's Court decision.

United States of America v. A.R. Prods., No. 601CV00072DHUJMR, 2023 WL 6439488, (D.N.M. Oct. 3, 2023).

Defendant has five water features on property in the Zuni River Basin: two wells, two ponds for livestock, and one industrial pond. Plaintiffs alleged that under the three-part *Mendenhall* test Defendants failed to satisfy the third element, which required Defendant to "apply the water to beneficial use within a reasonable time." Plaintiffs filed suit for a court-ordered declaration setting forth the parties' rights to use of the water and moved for summary judgment. The Magistrate Judge recommended that only one water feature should be granted summary judgment, the industrial pond, and Plaintiffs asked this Court to overrule the Magistrate Judge's decision and grant their summary judgment to all five water features. The United States District Court for the District of New Mexico affirmed the Magistrate' Judge's recommendation and overruled Plaintiffs' objection. The Court found that first, the two wells satisfied the third element because 130 years to apply the water to beneficial use was a reasonable amount of time due to the circumstances and nature of Defendant's mining activities; furthermore, the court found that while "'[a]n intended future use' does not establish beneficial use, the relation doctrine accommodates *questions of future use* by industry and municipalities." Second, the two livestock ponds filled by surface runoff satisfied the third element because evaporation loss could be considered a beneficial use. Finally, Plaintiffs had the burden of proof as the moving party and failed to meet the "conclusive" standard of

evidence that their motion for summary judgment required. The Magistrate's recommendation is affirmed, and the U.S.'s objection is overruled.

Kanawha Forest Coal. v. Keystone WV, No. 2:22-CV-00367, 2023 WL 6466210 (S.D.W. Va. Oct. 4, 2023).

Non-profit environmental organizations ("Organizations") filed this case pursuant to the citizen suit provisions of the Clean Water Act ("CWA") and the Surface Mining Control and Reclamation Act ("SMCRA") on behalf of their members, whose use and enjoyment of certain navigable waters has been adversely affected by a mining company's ("Company") (1) alleged discharge of pollutants without a permit at Rush Creek Surface Mine No. 2 and KD Surface Mine No. 1 and (2) failure to report certain test results as required by permit for Rush Creek Surface Mine. Company does not dispute that until April 14, 2023, it did not have a permit and that it failed to file the required report for Rush Creek Surface Mine from November 2021 through November 2022. Organizations sought a declaration of the violation, to enjoin Company's continuing violations, and to assess civil penalties for the violations already committed. Organizations and Company both filed cross-motions for summary judgment. The court found that Company violated both the CWA and SMCRA between November 26, 2021, and April 14, 2023, by discharging pollutants from Rush Creek Surface Mine No. 2 without a valid permit. The court further found that from November 2021 through November 2022, Company violated the CWA and SMCRA by failing to satisfy the reporting requirements. The court however did not find that Company was in continuing violation of the CWA and SMCRA, as it acquired a permit for all outfalls and monitoring stations and is submitting the reports required under that permit. Therefore, injunctive relief was denied. The assessment of civil penalties is to be held in abeyance while the court determines the number and severity of Company's violations. Organizations' motion and Defendant's motion were each granted in part and denied in part.

HomeFed Vill. III Master, LLC v. Otay Landfill Inc., No. 3:20-cv-0784, 2023 WL 4498503, (S.D. Cal. Jul. 12, 2023).

A Property Developer sued surrounding businesses for contamination of groundwater on their property during a development project in September 2021. Property Developer seeks damages for the costs incurred and harm done by the contamination. Defendant, a vehicle processing facility

("Facility"), argued that Property Developer did not "establish a migration pathway" and prove Facility was the cause of the groundwater contamination. Property Developer filed their second amended complaint on August 6, 2022, and Facility filed a motion for summary judgment on September 19, 2022. The court outlined how Property Developer had to establish a causal link between Facility's actions and the contaminated groundwater, and they raised enough admissible evidence of that possible causation through the reports of their experts. The court also found there was a genuine dispute of a material fact in Facility's contention that the source of the contamination was from algae in a nearby pond rather than Facility's actions. The court found that summary judgment was not appropriate for Property Developer's claim of public nuisance because Property Developer raised enough plausible evidence about the possible effects of the contamination on nearby recreational waters. Therefore, the court denied Facility's motion for summary judgment.

U.S. v. Abousleman, No. 6:83-CV-01041-KWR-JMR, 2023 WL 6314882 (D.N.M. Sep. 28, 2023).

The United States, on behalf of, inter alia, a native tribe ("Tribe") brought suit against a coalition of water users of the Jemez River ("Coalition") to adjudicate the water rights of the parties. Five issues were presented in this case: (1) does the Tribe possess aboriginal water rights, and if so, have they ever been modified or extinguished; (2) does the Winans doctrine apply to Tribe's grant or trust lands; (3) if Tribe possess aboriginal or Winans reserve rights, what standards apply to quantify those rights; (4) are these rights appurtenant to trust lands, and if so, how are those rights measured; and (5) is Tribe entitled to any riparian rights? This opinion addresses the resolution of further proceedings pursuant to an order from an interlocutory appeal on issue (1). The court here held that neither Spain nor Mexico ever extinguished, if present, Tribe's aboriginal title, though it did hold the United States in the Treaty of Guadalupe-Hidalgo did extinguish aboriginal title of water not used by Tribe. Additionally, none of the Acts of 1866, 1870, 1877, 1924, 1933, nor the Indian Claims Commission Act affected Tribe's water rights. Despite limited extinguishment of aboriginal title, the court held Tribe retains a Winans right to the water which is not exclusive, but by special provision does reserve an aboriginal water right to Tribe. Finally, the court denied a motion to take judicial notice (of a pending 2022 Supreme Court case) as the court did not find a material relationship between the cases.

Gila River Indian Cmty. v. Schoebroek, No. CV-19-00407-TUC-SHR, 2023 WL 5723400 (D.Ariz. Sep. 5, 2023).

An Indian community ("Community") sought summary judgment enjoining landowner farmers ("Farmers") from using four wells to pump groundwater for their farming activities. Community maintains the wells were pumping water from the "mainstem" of the Gila River, over which federal courts have jurisdiction, as opposed to a tributary, over which the Gila Adjudication Court has jurisdiction pursuant to a 1935 Globe Equity Decree ("Decree"). The court agreed the Decree grants exclusive jurisdiction to settle mainstem disputes to federal courts. Further, the court found the Farmers misstated and misunderstood a 2005 settlement agreement ("Agreement") which explicitly reserved Community's right to sue any landowners who did not acquire Special Hot Lands status, as is the case for Farmers in this action. Farmers argued preclusion of Community's claims due to previous claims being withdrawn with prejudice. The court found the voluntary withdrawal to be for the purpose of final settlement of the Agreement, at which time Community agreed to withdraw its claims with prejudice and instigate a new action removing named defendants. Thus, preclusion did not apply to Community's claims in this action. After addressing additional procedural disputes, the court analyzed Community's claims: the Farmers' four wells are pumping mainstem subflow from the Gila River and as such Community is entitled to a court order directing the Gila Water Commissioner to seal the wells. The court determined, by Farmers' own expert testimony, three of the wells are pumping mainstem subflow without Decree Rights and ordered them sealed, concluded the three wells were in a saturated area, and declined to grant an injunction against future pumping of these wells. Finally, the court denied a motion to dismiss intervenor claims against Farmers which were identical to Community's, denied a motion to strike, and denied a motion for sanctions.

State

Buchanan v. Water Res. Dep't of Or., No. 1:23-CV-00923-CL, 2023 WL 5093879 (D. Or. Aug. 9, 2023).

Junior Rights Owners filed for judicial review of Oregon Water Resources Department's ("OWRD") order regulating off water use. Bureau of Indian Affairs ("BIA") requested Oregon Water Resources Department monitor water levels in a basin because the water level was predicted to fall below usable water levels guaranteed by federal treaties and affirmed by a 1975 adjudication. After conducting a review of the water level at various

elevations, OWRD determined junior rights to water within the basin should be regulated off to maintain water levels necessary to maintain tribal rights and issued an order to forty-five landowners, including petitioners. then filed for judicial review, which automatically stayed OWRD's order. The case was removed, and OWRD denied the automatic stay of its order under Oregon law because of the potential of a substantial public harm by upholding the stay. A magistrate judge rejected all petitioner's arguments and affirmed the OWRD's denial of the stay, thus requiring lesser right owners to stop diverting water from the basin.

Reser v. Pollution Control Hearings Bd., No. 39115-9-III, 2023 WL 6628641 (Wash. Ct. App. Oct. 12, 2023).

Landowners sought review of Department of Ecology's ("DOE") determination that the water rights on Landowners' farm terminated because of lack of use for more than five years; and that estoppel did not preclude DOE from asserting the water rights were relinquished. The Court of Appeals of Washington characterized the issue as "whether the nonuse of water for fifteen years resulting from a tenant gaining possession of a farm and changing the crop grown on the land from irrigated asparagus to dryland wheat constitutes a "crop rotation." After receiving complaints in 2017, DOE investigated water usage at the farm to determine if the water rights had a period of nonuse for at least five consecutive years. After investigation and proceedings, in 2020 DOE concluded no water had been used from 1997–2016, there was not sufficient cause for an exemption from relinquishment, and thus declared the water rights were relinquished – subject to appeal to Pollution Control Hearing Board's ("PCHB"). PCHB upheld the DOE's determinations. The Appellate Court considered whether evidence established a temporary crop rotation within the window of nonuse that would have exempted the use requirement. The court found the farming activities during the period of nonuse of water did not constitute crop rotation; and that agricultural burning did not necessarily show crop rotation occurred. The court briefly disposed of Landowners' estoppel argument because equitable estoppel does not apply to matters of law.

CV Land, LLC v. Millers Lake, LLC, 373 So.3d 529 (La. App. 2023).

Property Owner downstream from a lake on adjacent land sued Adjacent Property Owner for damages and to have the natural flow of water restored to bayou thus allowing Property Owner to use water for agricultural irrigation. The two tracts had originally been owned by the same individual

who constructed levees to create a lake, later the property was severed into separate tracts which the parties eventually came to own. The 13th Louisiana District Court had dismissed the case based on a peremptory exception of no right of action, to which Property Owner appealed. The trial court found that the owner of both tracts in the early 1900's had voluntarily alienated and renounced any riparian rights of the downstream tract by constructing the levees which now constitute the lake on the upstream tract. The court further reasoned the tract had lost any cause of action by accrual of acquisitive prescription, and the lack of assignment of riparian rights in Property Owner act of sale. The 3rd Circuit Court of Appeals of Louisiana reasoned that since the lake was an unauthorized obstruction of public flowing waters, Adjacent Property Owner could not acquire any ownership interest. Further, as a public thing, the water could also not be privately acquired prescriptively. The appellate court also rejected the trial court's application of the subsequent purchaser doctrine.

Leo v. Okla. Water Resources Bd., 2023 OK 96, 2023 WL 6418755 (Oct. 3, 2023).

A group of landowners in Pushmataha County, Oklahoma, (Collectively "Landowners") brought action against the Oklahoma Water Resources Board ("OWRB") following its final order on October 10, 2017, granting the City of Oklahoma City ("City") a permit to divert stream water from the Kiamichi River. City moved to dismiss the case because it argued that Landowners' failure to add City as a party was fatal under the Oklahoma Administrative Procedures Act ("OAPA"). The Supreme Court of Oklahoma held, first, that the current version of OAPA requires only that the agency be named as respondent in the caption of a petition for judicial review. Second, the court rejected Landowners' argument that City failed to satisfy notice requirements, reasoning that Landowners' participation in the OWRB hearing and subsequent litigation demonstrates that they had notice. Third, the court addressed Landowners' argument that City's stream water permit was an "unconstitutional taking of . . . water rights." The court held that the OWRB's approval of the permit "was a proper exercise of the state's police power." Landowners did not present any specific evidence that their rights were harmed. In fact, the administrative hearing included evidence that there is, on an average annual basis, more unappropriated water there than City's application requests, "even after existing appropriative uses and domestic riparian uses are considered." Finally, the Court held that City's application satisfied the required "four points of law"

under Oklahoma statute with no clear error that would prejudice landowners. The court rejected Landowners' argument that the ORWB is required to consider environmental impact in issuing permits. "Environmental impacts are not a statutory or common law element to be considered by the OWRB."

HomeFed Village III Master, LLC v. Otay Landfill, Inc., No. 3:20-CV-0784-L-JLB, 2023 WL 5813736 (S.D. Cal. Sept. 6, 2023).

Housing Developer filed a complaint seeking declaratory and injunctive relief, or damages, against Landfill Owner under theories of violating the Resource Conservation and Recovery Act ("RCRA"), as well as common law theories of public nuisance, private nuisance, and trespass. The procedural posture of the case currently is in regard to a Motion for Summary Judgment and Motion to Exclude Report and Testimony of Expert Witnesses by Landfill Owner. Based on several findings, the trial court denied both motions. First, the court reasoned that Housing Developer had shown "by a preponderance of the evidence that [experts] report and testimony rely on sufficient reliable methodology to be admissible under Daubert," hence not excluding the expert testimony report. Second, Automobile Parts Manufacturer ("Manufacturer") through [expert's] testimony, has raised a genuine issue of material fact with regard to whether Landfill Owner and not Manufacturer was the source of petroleum-based contamination." Finally, in regard to the RCRA violation claim, the court reasoned that [d]espite the monitoring and control program in place with LEA, there is no evidence before the Court that LEA's oversight actions and regulation have actively addressed the subsurface migration of landfill gas migration off the landfill." Therefore, the court denied the RCRA claim as well as both motions.

Trevino v. Patel, No. 01-20-00445-CV, 2023 WL 5124662 (Tex. App. Aug. 30, 2023).

Landowners sued Sand Excavator for damages and injunctive relief arising from Sand Excavator's diversion of natural surface water caused damage to Landowners' property. Landowners sued under allegations violating the Texas Water Code § 11.086, which prohibits a person from (1) diverting or impounding (2) the natural flow of surface water (3) in a manner causing damage to another's property. At the trial court, Excavators motion for summary judgement was granted on the basis that no issue of material fact was raised, as Landowners could not prove Excavators

construction activity actually caused the damage alleged, sending it to the Texas Court of Appeals (14th Dist.). First, the court noted that Landowners expert report was unverified, and courts have held that unverified expert reports are not competent summary-judgment evidence. Second, although the report in fact states that overflow from the sedimentation pond "flows in part across [Landowners'] property," according to the court, nothing in the report established that any such overflow causes damage to the [Landowners']' land. Finally, while the Landowners' expert stated that discharge from the "[Excavator's dewatering pipe '*could have caused'* standing water to accumulate on appellants land", such speculative opinion testimony was insufficient in the court's view to create a fact issue. The Court of Appeals affirmed the trial court's decision regarding Landowners' motion for summary judgment.

Flathead Lakers, Inc. v. Montana Dep't of Nat. Res. and Conservation, 530 P.3d 769 (Mont. 2023).

The Supreme Court of Montana addressed whether a water bottle company's ("Company") beneficial use permit was erroneously granted and whether Flathead Lakers Inc. and Water for Flathead's Future (Objectors) are entitled to attorney fees. *Flathead Lakers I* dealt with the decision that the application was incomplete because the DNRC conducted their analysis based on a report with missing information, had not fulfilled the statutory obligations under the Montana Water Use Act (MWUA), and the "additional aquifer testing was arbitrary and capricious." Company and DNRC argue that the Hearing Examiner's (HE) findings should be confirmed because they were supported by substantial evidence: Expert testimony stated omissions were immaterial to any determinations of the physical availability of water within the well, despite any Form 633 omissions. The court rejects this argument concluding that the issue was whether the additional aquifer testing that DNRC had conducted was arbitrary and capricious, making HE's evaluation irrelevant except to the issue of the "application's correctness and completeness." The court found Company's application noncompliant. DNRC committed legal errors during the application processing because DNRC failed to submit all the required data and failed in its duty to identify and analyze all potentially affected sources. These omissions "undermine confidence in the agency's determinations." Turning to attorney fees, Objectors argue that they were the prevailing party in litigation, a fact that the court notes is shown in the record of 7 years of litigation and extensive expert testimony and records in

support of their claims. The court finds that the MCA governs, holding "if a final decision of the department on an application for a permit … is appealed to district court, the district court *may* award the prevailing party reasonable costs and attorney fees", reversing the denial and finding for the Objectors.

LAND

Easement

Holladay v. Alexander, NO. 2022-CA-0537-MR, 2023 WL 4981690 (Ky. Ct. App. Aug. 4, 2023).

Landowners brought suit against Neighbor violating their easement allowing Landowners to park on Neighbor's property. Landowners initially sued under theories of interference of their easement rights on the part of Neighbors. Trial court ruled in favor of Neighbors, providing that the easement could be terminated upon finding that its intended purpose is being frustrated by the new construction and alternative uses. However, the appellate court disagreed with this conclusion reasoning that the easement still could serve a useful purpose and that the parties' minor misuse of the restricted region did not warrant such action This included granting injunctive relief and terminating the easement. The court held Landowners' alleged "misuse" of the easement—"having a yard sale, placing garbage cans, and allowing their daughter to play in the easement area"—was not appropriate to warrant termination of the easement. The court reversed and remanded the case back down to the trial court for further proceeding.

Thornberry v. Wolfe, 2022-CA-0937-MR, 2023 WL 5311988 (Ky. Ct. App. Aug. 18, 2023).

Landowners claimed exclusive ownership of a road by deed while Neighbors claimed a valid prescriptive easement. The parties entered a mediated settlement agreement requiring (1) a mutual survey with property line demarcations, (2) Neighbors quitclaim the disputed part of the deed to Landowners, and (3) Landowners grant a permanent easement running with the land to the road for ingress and egress to Neighbor's tract. However, Landowners did not execute the deeds but instead built a fence over part of the road, which led to a contempt motion and removal order. The fence was removed, but the deeds were not executed. Landowners alleged the easement expanded the mediation agreement by (1) allowing all invitees of the Neighbors' use and (2) the term that the easement was to run with the

land was written-in and never agreed to. The Circuit Court rejected Landowners' characterizations and ordered compliance with the mediation agreement and Landowners appealed. The Court of Appeals of Kentucky reasoned the easement was appurtenant, not gross, because the language of the mediation agreement created a permanent easement that would run with the land. It also reasoned the scope of the easement allowing any legal entrant to use the easement for ingress and egress did not expand the easement beyond the mediated agreement.

Cain v. William J. Huff II Revocable Tr. Declaration Dated June 28, 2011, No. 1:23-CV-00923-CL, 2023 WL 4854843 (Ind. Ct. App. July 31, 2023).

Servient Tenement Holders ("STH") challenged summary judgment and a declaratory judgment in favor of Dominant Tenement Holders ("DTH") allowing access by easement owners to their entire property without regard for the delineation between their two parcels. A trust owned the so-called parcel of land with an appurtenances easement to cross an abutting neighborhood. The trust then acquired a second tract, and litigation ensued regarding the scope of the easement with respect to both parcels. The trial court granted partial summary judgment suggesting the delineation between the two parcels was extinguished, which broadened the declaratory judgment from what STH petitioned for. The Court of Appeals of Indiana affirmed the trial court's partial summary judgment for dominant estate holders. Then it applied doctrine of judicial restraint to the trial court's declaratory judgement to exclude the implication the delineation between parcels was extinguished when the second parcel was acquired, so the judgment was reduced to what the movants had asked for: a statement that they are entitled to use the easement so long as they do not intensify the easement.

Hinman v. Cornett, 891 S.E.2d 572 (N.C. Ct. App. 2023).

Landowners alleged trespass over a strip of land adjacent to a driveway easement where defendants had placed landscaping, and Neighbors counterclaimed asserting title by adverse possession over that strip of landscaping adjacent to the easement, and nuisance regarding a fence the abutting owners erected to block use of the easement. The prior owner of Neighbors' property owned two lots, acquired separately, with an easement across tract 1 to access tract 2, which had no road frontage. Then both the lots and the easement were conveyed by that prior owner to the Neighbors

in a single deed, which described the easement. However, because the easement was appurtenant and better title cannot be transferred from inferior title, the trial court property held the easement was only for tract two, and Neighbors use the easement for tract one was a misuse or overburdening of the easement. The Superior Court of Forsyth County granted summary judgment for the plaintiffs and dismissed Neighbors' counter claims. Neighbors then appealed to the Court of Appeals of North Carolina, which affirmed the trial court's ruling that the easement was only for access to tract two, despite the single granting deed. But the appeals court found error in the dismissal of Neighbors' counter claim of adverse possession because Neighbors had plead enough supporting evidence to bring the claim, and thus also found error in granting summary judgment to plaintiffs on the issue of trespass without adjudicating whether the strip of land had been adversely possessed.

Alaska R.R. Corp. v. Flying Crown Subdivision Addition No. 1 & Addition No. 2 Prop. Owners Ass'n, 82 F.4th 762 (9th Cir. 2023).

Railroad Corporation filed a suit to quiet title in response to Housing Subdivision's letter to Corporation requesting that Housing Subdivision formally relinquish their title to an airstrip overlapping with Railroad Corporation's easement. The issue is whether the easement in question is exclusive or non-exclusive. The 1914 Act granting the easement did not speak on exclusivity, so the Ninth Circuit relied on the common law which directs them to look towards the intentions and purpose behind the easement. The court noted that at the time of the Act, Alaska was a vast underdeveloped territory, similar to a frontier-era America, and in the absence of a private railroad the federal government needed to provide access to transportation so that settlers may have access to goods and services. In frontier-era America this was accomplished through the use of exclusive easements, and the court holds that it must have been intended that Alaska be granted the same exclusivity in their easement. Additionally, the court observed that the sovereign-grantor canon instructs that ambiguity in land grants should be resolved in favor of the government rather than against it. Finally, a subsequent 1982 Act read in conjunction with the 1914 Act and supports a reading of an exclusive easement. The 1982 Act allowed the transfer of federally held lands to Alaska which (1) were in Railroad Corporation's right of way (2) were conveyed prior to January 14, 1983, and (3) were authorized pursuant to 45 U.S.C. § 1203(b)(1)(B). The 1982 Act states that land transfers under the act shall not be less than an

exclusive-use easement. Since the 1982 Act's requirements are met, the court held Railroad Corporation's easement is exclusive.

Williams v. Green Power Ventures, LLC, No. 1:19-cv-04757-TWP-MKK, 2023 WL 6202476 (Conn. App. Ct. Jan. 26, 2023).

Dominant Estate Holder appealed judge trial referee's holding that (1) limited an easement to foot passage only; (2) denied dominate estate holder's request for injunctive relief, attorney's fees, and trespass claim; (3) awarded the dominate estate token damages on their nuisance claim; and (4) denied dominant estate's motion to reconsider. The Appellate Court of Connecticut held that the deed and the map it referred to actually granted a general right of way easement over the lot without use restrictions. The court held that because the trial court referee failed to give property effect to the general language of the deed, it did not consider if the plaintiff's use of the easement was reasonable, thus it remanded the case for a new trial.

Hughes v. Cromer, No. 39024-1-III, 2023 WL 6571014 (Wash. Ct. App. Oct. 10, 2023).

Landowners appealed summary judgment grant of preliminary injunction enjoining their use of a private easement. Landowners admitted they have no legal right to the easement, which they do not use. The Court of Appeals of Washington denied interlocutory review but remanded the case to the trial court for an actual trial necessary to enforce such a broad injunction. The easement was established in 1969 and is appurtenant to Landowners and Neighbors' parcels. In 2021, after the Landowners purchased six parcels to the west of Neighbors' land, they negotiated an access easement across the Cromers' parcel to the original easement. When Nearby Landowner learned about this, he brought this litigation seeking declaratory judgments effectively denying the Landowners any use of the original easement. The Appeals Court of Washington determined that because the trial court did not decide all issues raised by the parties, its injunction was temporary and not a final judgment, so it was presumptively not appealable. The Court also found it was not appealable under RAP 2.2(a)(3), which would allow for appeal of a decision determining action. The Court also denied appealability under RAP 2.3(b)(1) and (b)(2) because there was no obvious or probable error in the trial court's preliminary injunction. The Court denied the appeal as a matter of right and discretionary review and remanded the case for trial on facts and evidence to determine the

appropriate scope of its discretionary power to issue appropriate injunctions.

Prismatic Found. v. Eliot St., LLC, No. 360450, 2023 WL 6324419 (Mich. Ct. App. Sept. 28, 2023).

University Club ("Club") appealed a circuit court's summary judgment which declared Club did not have an easement for parking, but only for ingress and egress; and that three of four Property Owners possessed an easement for ingress and egress over a portion of Plaintiff's property to the Court of Appeals of Michigan. The Court concluded the circuit court did not err by finding that: (1) no express easement nor any prescriptive easement granted Club parking rights; (2) that three of the Property Owners hold an easement over a portion of Club's property; (3) Property Owners' easement for ingress and egress over the disputed property was not abandoned; and (4) Club is not entitled to attorney fees and costs under MCL 565.108. The Court did find error in the circuit court's determination that the scope of the easement was only for ingress and egress because parking along the street was a reasonably foreseeable activity and can be assumed to have been granted by the conveyor. On cross appeal Property Owners attempted to assert a new argument based on discrepancies between two different plats describing Club's easement rights, but since Property Owners did not raise the issue at the circuit court, the Appellate Court deemed it waived and did not grant any appellate relief through defendants' cross appeal. The case was remanded for further proceedings in the circuit court.

Shah v. Maple Energy Holdings, LLC, No. 08-22-00198-CV, 2023 WL 4879905 (Tex. App. July 31, 2023).

Lessee sued Lessor after Lessor attempted to deny Lessee access to Lessee's easement as agreed upon in their lease. Lessee sought (1) a declaratory judgment, (2) an injunction, and (3) attorney's fees. Lessee sued Lessor in state court and was granted a motion for summary judgment on all issues, including a total of $95,154.50 in attorney's fees. Lessor appealed, contending that the court erred in granting the motion and awarding attorney's fees, as well as in denying Lessor's cross-motion for summary judgment. The appellate court affirmed the decision of the trial court on issues (1) and (2), and remanded issue (3) with a remittitur. Lessor made 17 total claims with only six being valid. The six issues were considered in three parts: (1) the granting of the motion in favor of Lessee,

(2) the denial of Lessor's cross-motion, and (3) the error in awarding attorney's fees. Under part (1), the court found that Lessee met its burden for establishing the right to a declaratory judgment and injunctive relief, and Lessor failed to provide evidence otherwise or file a response to the motion. Upon part (2), Lessor failed to assert any counterclaims. Therefore, the trial court had no grounds to issue summary judgment in Lessor's favor. Upon part (3), Lessor failed to show evidence of improper billing practices by Lessee's attorneys regarding the award of $85,416.50. Lessor did, however, successfully show that the award of $9,738 was not valid because "the trial court erred . . . in treating [Lessor's] motion to dismiss as a Rule 91a motion." Therefore, the court remanded this issue with a remittitur. Lessee also moved for sanctions for frivolous appeal, but the motion was denied by the court because Lessor "did raise a meritorious issue regarding 91a attorney's fees."

B&N Coal, Inc. v. Blue Racer Midstream, LLC, 2023-Ohio-2641, 222 N.E.3d 140.

Lessor sued Lessee after Lessee laid a pipeline as agreed upon in Lessor's easement granted to Lessee. Lessor sued Lessee, asserting claims for (1) a permanent injunction, (2) damages, and (3) a declaratory judgment. Both parties moved for summary judgment. Lessee moved the case to federal court where the District Court granted Lessee's motion for summary judgment. Lessor appealed, and the Circuit Court vacated the judgment for lack of subject matter jurisdiction and remanded the case back to the District Court. The District Court then remanded the case to the state court. Upon appeal, Lessor argued that the trial court's grant of summary judgment in favor of Lessee was improper because evidence presented by Lessor was not rebutted by Lessee. Moreover, Lessor argued that its own motion for summary judgment should have been granted instead. The appellate court affirmed the findings of the trial court on multiple grounds. First, Lessor's claim for a declaratory judgment was moot because Lessee acknowledged its rights were "subservient to [Lessor's] right to mine." Second, Lessor's "right to 'otherwise operate' for its coal reserves" was not ripe because a mining permit had not been granted, and therefore could not be ruled upon. Third, because the above claim was not yet ripe, the permanent injunction request to remove Lessee's pipeline was also not yet ripe. Further, Lessor's evidence failed to show that Lessor would suffer irreparable harm for which no legal remedy existed if the pipeline was laid. Fourth, because all issues presented by Lessor were moot or not yet ripe,

the claim for damages could not be satisfied. Lastly, no claim for trespass was ever raised in Lessor's complaint. Therefore, they could not ask for damages in accordance with the salient claim. Appellate court held that the trial court appropriately granted Lessee's motion on all claims.

Davenport v. EOG Res., Inc., No. 04-23-00385-CV, 2023 WL 5068556 (Tex. App. Aug. 9, 2023).

Ranchers and Leaseholder each asked the trial court to grant a temporary injunction against the other. Ranchers sued to limit Leaseholder's entry to an agreed-upon entrance. Leaseholders counterclaimed alleging interference with estate rights and sought a declaratory judgment to determine property rights under its lease. The trial court denied Rancher's application and granted Leaseholder's. The appellate court held that the trial court had not abused its discretion. To obtain a temporary injunction, the Leaseholder had to first prove there was a cause of action against the Ranchers. The trial court found that a declaratory judgment satisfied this element. Leaseholder were then required to establish proof of a probable right to relief sought. Leaseholder argued it had the right to do whatever was reasonably necessary to perform duties encompassed in its oil and gas lease. The trial court found this a sufficient demonstration of the probable rights to relief sought by Leaseholder. Lastly, Leaseholder needed to prove irreparable injury. The trial court found that if the injunction was not issued, Leaseholder would suffer immeasurable losses from production delay and reservoir damages. The appellate court concluded that since each element had some evidence to reasonably support the trial court's findings, the trial court did not abuse its discretion in granting Leaseholder's application for a temporary injunction. The trial court found that Ranchers failed to plead each element of a temporary injunction and denied their application. Having already concluded that the trial court did not abuse its discretion by granting Leaseholder's application, the appellate court held that some basis existed for the trial court to reach that conclusion. Accordingly, the appellate court could not conclude that the trial court abused its discretion and affirmed the trial court's orders.

Christianson v. United States, No. 4:20-CV-00325-DKG, 2023 WL 8602836 (D. Idaho Dec. 12, 2023).

Landowner sued Neighboring Landowner seeking an easement over Neighboring Landowner's property in order to access an irrigation ditch. Landowner claimed that they had an implied easement over Neighboring

Landowner's land and sought relief under the Quiet Title Act. The existence of the easement was contingent on whether or not the land was reserved or unreserved for a period of time before Neighboring Landowner acquired title to it. Both parties moved for summary judgment and Neighboring Landowner moved to dismiss. The district court granted the Neighboring Landowner's motions. The district court found for the Neighboring Landowner for multiple reasons. First, Landowner's claims for declaratory relief and relief under state law were dismissed with prejudice for lack of subject matter jurisdiction. Further, the Neighboring Landowner was a federal entity, and state actors have no ability to acquire an easement over federal land. Second, the easement was found to never exist in the first place. When the land was first purchased and utilized, before it was reserved property, it was under common ownership, meaning by way of the merger doctrine no easement would have existed. When the Neighboring Landowner acquired land years later, this common ownership was extinguished but the easement could still not exist through implication. A theory of implied easement necessarily failed because the land was now owned by a federal entity. Further, the theory of an implied easement was not presented by Landowner until the summary judgment stage. The presentation of the easement at this stage went against the rules of civil procedure. Thus, the claim was barred from full consideration. For these reasons, Landowner was denied summary judgment and their right to an easement over Neighboring Landowner's land.

Columbia Gulf Transmission, LLC v. 14.226 Acres More or Less, in Lafourche Par., No. CV 23-2793, 2023 WL 7112828 (E.D. La. Oct. 27, 2023).

Limited Liability Company (LLC) filed a motion seeking condemnation and a preliminary injunction granting immediate access to Servitudes. The motion was unopposed and granted by the court for the following reasons. LLC sought condemnation of the land as part of their project of transporting natural gas. To condemn land under the Natural Gas Act, a party must show: "(1) that it holds a FERC Certificate of Public Necessity authorizing it to construct the facilities contemplated by the project; (2) that it has been unable to acquire the property rights in question by contract with the landowner; and (3) that the condemnation is for a public and necessary purpose." Here, LLC's project had already been approved by FERC and held the necessary certificate. Secondly, LLC was unable to contact the landowners of the condemned land because many were either deceased or

had never responded to their attempts at contact. Lastly, the project was determined to be for the public good because it is generally presumed that FERC approved projects are in the best interest of the public. LLC also sought and was granted a preliminary injunction. The court determined all requirements for the injunction were met. LLC had established their likelihood of succeeding on the merits because they had already established their right to condemn. Secondly, without access to the condemned property, LCC's project would have been hampered. Third, the harm to non-respondent landowners would have been minimal at best, as determined through the act of condemnation, and LLC would further deposit funds in a registry of the court to alleviate losses. Finally, because FERC had approved the project, it was presumed to be in the public interest. For these reasons, LLC was granted the motion to condemn the properties and granted a preliminary injunction to begin construction upon them.

Logan v. Collins, No. 2022-CA-0731-MR, 2023 WL 6766116 (Ky. Ct. App. Oct. 13, 2023).

Servient Estate sued Dominant Estate to extinguish an easement, recover damages, and gain specific performance. The lower court found for the Dominant Estate but awarded the Servient Estate damages. The Servient Estate appealed the lower court's decision. The appellate court affirmed the lower court's decision in part and reversed and remanded back to the lower court for further proceedings on the award for specific performance and damages. The appellate court made their decision based on multiple findings. First, Servient Estate claimed the easement only existed between the original tenants and therefore no longer applied. The court found that the language in the original deed contained "no language limiting the easement" to the original Grantor and Grantee. The deed stated, "the easement of ingress and egress is for [Dominant Estate], and [their] heirs and assigns forever." This language exhibited the intent to grant an easement appurtenant. Secondly, Servient Estate argued that the easement reverted back if Dominant Estate failed to construct a gravel road. The court found there was no language whatsoever in the original deed that the easement was to revert back to the Servient Estate if the Dominant Estate failed to construct a gravel road. While the deed did specify the length and width of the easement, it said nothing further regarding its specifications. Lastly, the court found the amount awarded in damages to Servient Estate was improper because it was based purely on speculation. Therefore, the

damages consideration was remanded back to the lower court for further presentation of evidence as to the amount accrued in damages by Servient Estate.

Kristof v. Mealey, 538 P.3d 920 (Or. Ct. App. 2023).

Plaintiffs brought suit to attempt to establish the existence and location of a 16-foot easement across defendant's land. Defendants counterclaimed and sought summary judgment, claiming that the 1959 deed in question granted plaintiffs a fee simple title to a 16-foot strip of land. The Court of Appeals of Oregon understood the parties' positions to be that they differed primarily in the location of the 16-foot right of way. The court determined that three aspects of the deed could show, as a matter of law, that plaintiff's position was correct. First, the deed described where the right-of-way runs. Second, the language of the deed stated that the right of way runs "over and across" a parcel of land. This is language that is normally used with an easement and not with the granting of a fee simple title. The wording in the deed itself led the court to believe that the intention and purpose of the deed could only be to grant an easement. The court reversed and remanded for further proceedings.

Amelia v. 10 Juniper Hill Rd., LLC, 2023 WL 6174281 (Mass. Land Ct. Sept. 22, 2023).

Successors-in-interest to a parcel of land in Waltham, Massachusetts, once owned by Cambridge Council, Boy Scouts of America (Collectively "Plaintiffs") brought action against successors-in-interest to adjacent land (Collectively "Defendants"), seeking to have a 32-foot-wide concrete wall with a planter on top ("Barrier") removed from the middle of a private road that runs between subdivisions. From 1940 until 1970, the Boy Scouts used the parcel for camping and related activities. During that time, neighboring landowners rented a portion of their parcel to the Boy Scouts for use as additional camp sites, over time creating an easement by prescription covering a 20-foot-wide area that went through the middle of the 50-foot-wide private road. A 1984 court ruling recognized the easement but limited it to "the use through which it was created." Owning a fee in the private road and with the support of abutting landowners, a predecessor-in-interest to one of Defendant's parcels in 2002 erected the Barrier, blocking Plaintiffs from using their 20-foot-wide easement in the road. The court ruled for Defendants, finding that allowing Plaintiffs—and the rest of their now-70-lot subdivision—access to the private road would be a "substantial

departure" and "a mutation, not a normal progression," from the easement's origin, which consisted of seasonal access for Boy Scout campers and year-round access for the Boy Scout property's caretaker. The caretaker left the property and the camp ceased operations in 1970. The court concluded that allowing such a substantial departure would "overburden" the easement.

Williams Ohio Valley Midstream, LLC v. Kittle, No. 5:23-CV-310, 2023 WL 8480088 (N.D. W. Va. Nov. 1, 2023).

Plaintiff filed a complaint requesting injunctive relief, alleging Defendant blocked its right of way by interfering with Plaintiff's access to key egress and ingress areas. Plaintiff, as successor to a 2010 Right of Way Agreement, had rights to access a pipeline and areas necessary for its maintenance. Plaintiff also had the right to permanent easements for pipeline construction. When Plaintiff attempted to move soil to protect and stabilize its pipelines from potential hazards of coal development near the pipelines, Defendant blocked Plaintiff from accessing the needed land by blocking the ingress and egress point with a tractor and trailer. Plaintiffs were therefore physically barred from completing necessary mitigation activity. The court granted the injunctive request after finding Plaintiff met its burden of proof. The court analyzed Plaintiff's request for injunction on: 1) its likelihood to succeed on the merits, 2) the likelihood of irreparable harm to Plaintiff, 3) whether the balance of equities tipped in Plaintiff's favor, and 4) whether the injunction would benefit the public interest. The court found that Plaintiff met all factors. First, Plaintiff proved it had the contractual right to access the disputed land, succeeded on the merits. Second, Plaintiff proved irreparable by showing the costs associated with the continued dispute and by showing that should the access be denied, it would not be able to meet its contractual mitigation obligations. Third, the Court found that Defendant had no legal right to block the land, so should the court grant the injunction, Defendant would not suffer legal harm. Finally, the court noted West Virginia's public interest in natural gas development, and therefore Plaintiff met the last factor. The Court prohibited Defendant and their associates from blocking the ingress/egress point and from incitement of such.

Other Use

St. Maron Props, L.L.C. v. City of Houston, 78 F.4d 754 (5th Cir. 2023).

City of Houston ("Houston") used Property Owners' vacant lots as a dumping ground for construction debris, rendering the land unable to

absorb water. A neighboring subdivision was frequently flooded, so Houston filed a lawsuit on its behalf. The county court entered a permanent injunction, which ordered remediation efforts that ultimately damaged Property Owners' lots. Property Owners brought state law and 42 U.S.C. § 1983 claims for municipal liability against Houston under (1) the Takings Clause, (2) the Due Process Clause, (3) the Equal Protection Clause. The district court dismissed the state law and § 1983 claims, but Property Owners appealed, alleging that Houston trespassed on and damaged their properties. The Fifth Circuit Court of Appeals reversed the district court's dismissal of the § 1983 claims and affirmed the district court's dismissal of the state law claims. First, Property Owners sufficiently alleged an official government policy because Houston made the deliberate decision to use Houston services to get an injunction, which Houston used to justify entering and modifying Property Owners' lots. Second, Property Owners sufficiently alleged an official policymaker because the mayor and city council make up Houston's governing body. Third, Property Owners sufficiently alleged a direct causal link between municipal policy and alleged constitutional deprivation because Houston infringed on their rights of just compensation, procedural due process, and equal protection by relying on the injunction. Finally, sovereign immunity protected Houston from state law claims because the Texas Tort Claims Act includes "sanitary and storm sewers" in its non-exhaustive list of government functions. The appellate court reversed the district court's dismissal of the § 1983 claims and affirmed the district court's dismissal of the state law claims.

Upstream Watch v. City of Belfast, 299 A.3d 25 (Me. 2023).

Non-Profit sought review of Belfast Zoning Board of Appeals ("ZBA") dismissal of Non-Profit's appeal of a city planning decision based on lack of administrative standing. The Supreme Judicial Court of Maine found error by ZBA as a matter of law because ZBA mischaracterized ordinance regarding Non-Profit's administrative standing and ordinances regarding ZBA's own procedure as an appeals board. The Court held that because at least one of Non-Profit's members was an aggrieved person as defined by ordinance, Non-Profit as a legal entity had administrative standing to challenge the decision of the planning board, so ZBA erred in dismissing Non-Profit's appeal for lack of standing. The case was remanded through the Superior Court to ZBA to consider Non-Profit's original appeal.

Smith v. Tumalo Irrigation Dist., 500 F.Supp.3d 1148 (D. Or. 2023).

Landowners filed action against Natural Resources Conservation Service ("NRCS") bringing a variety of claims under the National Environmental Policy Act ("NEPA") and the Watershed Protection and Flood Prevention Act ("Watershed Prevention Act"). NRCS decided to implement Irrigation Modernization Project (the Project) to update antiquated and inefficient open-canal irrigation waterways. To pass, NRCS needed to complete an Environmental Assessment ("EA"). Landowners allege that their property will suffer significant damage and their economic interests will be adversely affected by the Project. As a result, they claim that NRCS abused its discretion, acted capriciously and arbitrarily, and exceeded its statutory authority. Landowners also allege that the EA is inadequate because it failed to meet requirements of current law, to provide an adequate cost benefit analysis, and because the Project allows for hydroelectric development. Landowners had previously brought state law claims which were dismissed. Both NRCS and Landowners filed crossclaims for summary judgement which the US district court considers here. The court found that summary judgement for NRCS was appropriate because (1) NRCS considered a reasonable range of alternatives; (2) NRCS properly analyzed cumulative effects of the Project; (3) Landowners' cost-benefit claim is unsupported; and (4) NRCS properly recognized a public safety risk from open irrigation channels. Regarding the Watershed protection act claims, the court agreed with NRCS's argument for summary judgement that the EA cost-benefit analysis met the requirements of the of the Watershed Protection Act. The court also found that the property owners claim that the Project was ineligible for federal funding was not present in the operative complaint. The court granted NRCS's motion for summary judgement and denied property owner's motion for summary judgement.

Van Dyke v. Daniels, No. 11-19-00196-CV, 2023 WL 5963083 (Tex. App. Sept. 14, 2023).

Grantee filed a motion requesting the court to lift the abatement and either reverse or vacate the trial court's judgment that a 1924 deed reserved a one-half interest of the mineral estate in favor of the Grantors and that the presumed-grant doctrine required that the Successors-In-Interest to the Grantor ("Successors") keep a one-half interest. Grantee argues that "one-half of one-eighth of all minerals and mineral rights" is a term of art referring to all of Grantor's mineral estate. Grantee further argues that the deed reserved one-half interest of the mineral estate in favor of the grantors.

Successors argues for a purely mathematical approach to the interpretation of the phrase which would reserve one-sixteenth mineral interest in favor of Grantors. The court remanded that case for further proceedings. The court vacated the trial court's rendering of summary judgement because neither party has filed any briefs and proceeding on the merits would likely result in unnecessary expense and delay give that the Supreme Court has already decided this. The court remanded for further consideration in light of the holding in the previous case.

Marsh v. Atkins, 536 P.3d 811 (Ariz. Ct. App. 2023).

Applicant appealed denial of two Mineral Exploration Permits ("MEP") from the Arizona State Land Department ("ASLD"). The land in the MEP's were subject to the ownership rights of Mining Corporation and Investment Firm who have the power of first rights of refusal. First, the ASLD denied the MEP's for an insufficient reason, as determined by their settlement discussions. Then, Mining Corporation and Investment Firm exercised their first rights of refusal. The ASLD did not issue a new written notice of refusal but orally informed Applicant that their new basis of denial was the exercise of first rights of refusal by the landowners. Applicant then filed suit, arguing that the ASLD improperly denied their MEP's and failed to follow procedure. The ASLD held that although a landowner exercising first rights of refusal is not statutorily listed as a proper reason for denial of an MEP, the language of the statute does not indicate it's list of reasons to be comprehensive. Additionally, it would make little sense for an MEP applicant to possess more land rights than he held before filing. The application for an MEP, the court holds, cannot trump a landowners rights of first refusal. Marsh argues that notice should not have been given to land owners that an MEP is filed, however that scheme would violate the owners due process rights. The court agreed that the ASLD failed in their duty to provide proper notice of denial for the second denial. However, the court held that this failure of notice does not waive the land owner's rights of first refusal.

EEE Mins., LLC v. North Dakota, 81 F.4th 809 (8th Cir. 2023).

Grantors reserved mineral interests in a warranty deed that conveyed surface land to the United States under the Flood Control Act of 1944. Successors-in-Interest to Grantor sued State and Board of University and School Lands ("Board") after State and Board leased and claimed ownership to the mineral interests. Successors-in-interest sought damages,

an injunction, and declaratory relief. Successors-in-Interest alleged that the Flood Control Act preempted state law related to mineral ownership, and State and Board unconstitutionally took Successors-in-interest's mineral rights. The Eighth Circuit Court of Appeals affirmed the district court's decision to dismiss the action, and the appellate court held that the Flood Control Act did not preempt state law related to mineral ownership. State law is preempted when it frustrates federal law. However, state law related to mineral ownership did not interfere with the Flood Control Act's objective: to acquire surface property for the construction, operation and maintenance of the dam and reservoir. The appellate court also held that State and Board did not take property without just compensation, in violation of the Fifth Amendment. First, Successors-in-interest's claims for damages and injunctive relief were barred by the Eleventh Amendment because federal courts generally may not entertain a private party's suit against a state as long as state courts remain open to the action. Second, Successors-in-Interest are not entitled to equitable prospective relief under the *Ex parte Young* exception to the Eleventh Amendment, because Successors-in-Interest reformulated a request for retrospective relief. Therefore, the appellate court affirmed the district court's decision to grant State and Board's motion to dismiss.

DD Oil Co. v West Virginia ex rel. Ward, No. 22-ICA-74, 2023 WL 8588491 (W. Va. Dec. 8, 2023).

Oil Company appealed a final order from the West Virginia Environmental Quality Board (EQB) which had dismissed its appeal from an order declining to annul several notices of violation for various wells owned by Oil Company. EQB found that it lacked subject-matter jurisdiction because the notices of violation being contested had been annulled and the order in question had been vacated shortly before the hearing on the appeal. This essentially made the matter moot, and EQB dismissed Oil Company's appeal. The court reviewed the decision under a de novo standard. Although administrative agencies are given great deference regarding their decisions, when it comes to an administrative agency's conclusion of law, it is proper for the court to review the matter under a de novo standard. The court held that the appeal was not moot because annulling the notices of violation was not the only form of relief that EQB could grant to Oil Company on the matter. Additionally, the court found that even if the matter was moot, EQB had the jurisdiction to review the actions because their actions present a great public interest as they were

"capable of repetition yet evading review." Thus, the court reversed and remanded EQB's decision to dismiss Oil Company's appeal.

Echols Mins., LLC v. Green, 675 S.W.3d 344 (Tex. App. 2023).

Appellants originally brought suit regarding a reservation of a non-participating royalty interest (NPRI) in a 1952 general warranty deed. The trial court granted summary judgment for Appellees. The appeals court considered: (1) whether the 1952 deed needed to be read alone or in conjunction with another 1952 guardian deed, (2) whether this deed presented an issue under *Duhig,* and (3), if so, whether there was an available remedy under *Duhig*. First, the court held that the 1952 deed was to be read and interpreted alone. Absent an allegation of fraud, ambiguity, mistake, or accident, an unambiguous deed such as this one is restricted to its four corners. Second, the court held that the deed did present an issue under *Duhig*. As this deed conveyed more interest than was owned, *Duhig* was applicable. However, on the third question, the court held that there was no remedy under *Duhig* as its scope has been narrowed. Appellants do not own the mineral interest to remedy the over-conveyance of title. Additionally, they are not required to own it in order to reserve the NPRI. The court sustained Appellants objection to summary judgment and reversed and remanded. This case has not been released for publication.

Wildcat Coal LLC v. Pac. Mins., Inc., No. 22-CV-0102, 2023 WL 5290986 (D. Wyo. Aug. 17, 2023).

This suit arose from cross-motions for summary judgment between lessor and lessee of a coal mining lease. Specifically at issue was the interpretation of the lease. The District Court of Wyoming considered various factors such as (1) whether lessee owed lessor an advance royalty for a specified period and, if so, what the amount should be; and (2) which area of land was covered under the phrase "adjoining lands" in the lease. First, the court held the writing of the lease was unambiguous and provided a formula for calculating advance royalties. Any other interpretation beyond the outlined formula would effectively read terms out of the lease. Second, the court held that the phrase "adjoining lands" included all contiguous leases in permits identified in the lease. The phrasing of "any" within the lease must be read with the plain meaning of the word. If parties had wanted a different interpretation, it would have been written in. Any other interpretation would read terms into the lease. Summary judgment was

granted in part and reversed in part for both parties. This case has since been amended and superseded.

Rich Land Seed Co. Inc. v. B L S W Pleasure Corp., NO. 3:21-CV-01070, 2023 WL 5186862 (W.D. La. Aug. 11, 2023).

Lessor sued Insurance Company for Lessee's contamination of its properties through oil and gas exploration activities. Lessor alleged Insurance Company was liable for both surface and subsurface pollution of property caused by Lessee's drilling operations. Specifically, Lessor claimed Lessee's insurance policy covered acts of negligence and property damage caused by Lessee. Insurance Company claimed the insurance policy excluded property damage from pollution. Insurance Company filed a Motion for Summary Judgment. The district court denied Insurance Company's motion. The insurance policy contained two exclusions of which Lessor and Insurance Company had competing interpretations. The court found an issue of fact as to whether the insurance policy's Pollution Exclusion applies. If pollutants were brought onto Lessor's property from operations not undertaken on the property, the court found the Pollution Exclusion would not apply. Additionally, if the finders of fact found the work performed to not be remedial in nature, then the Pollution Exclusion would not apply. It was not clear whether the alleged property damage was caused by pollutants brought onto the property in connection with operations on the property or from other operations. Thus, the court found an issue of fact to exist and therefore denied summary judgment as to the Pollution Exclusion. The court further found an issue of material fact regarding the Damage to Property Exclusion and the presence of two riders purporting coverage. The Insurance Company claimed no injury to Lessor's property that falls under the policy's definition. The Lessor argued the two riders grant coverage to the operations on Lessor's property. The court found that the Insurance Company's attempt to rebut the Lessor's reliance on these riders conceded that an issue of fact was present. The court concluded that because this was an issue of material fact, summary judgment must be denied.

City of Kyle v. Knight, NO. 03-21-00378-CV, 2023 WL 5597360 (Tex. App. Aug. 30, 2023).

City Residents sued challenging City's approval of a Development Agreement concerning several acres of Owners' property. Residents sought an injunction to enjoin the Development Agreement and enjoin City from

future expenditures of public funds to implement City's obligations under the Development Agreement. The trial court denied City's plea to the jurisdiction, motion to dismiss, and partial summary judgment. The appellate court held that Residents have standing and affirmed the trial court's denial of partial summary judgment. Residents claimed City's actions were ultra vires, the Development agreement should have been invalidated for violating certain association's statutory and procedural rights along with the legislative zoning authority, and City unconstitutionally bartered away its legislative authority to a private entity. The court first found Residents had standing because they owned land that was at risk of impacts caused by the Development Agreement and paid taxes that were expended on the allegedly unconstitutional activity. Residents successfully pleaded that City acted without authority when it approved the Development Agreement. Residents also pled that the approval was inconsistent with provisions of City's comprehensive plan and transportation plan. The court found Residents' detailed allegations of City acting beyond its legal authority as sufficient to show City acted without legal authority in approving the Development Agreement. The court affirmed the trial court's order denying partial summary judgment and remanded the case to the trial court.

Carrano v. Colon, No. LT-302102-23, 2023 WL 8266336 (N.Y. Civ. Ct. Nov. 13, 2023).

Landlord sued Tenants to repossess apartment. Landlord claimed that the original rent stabilization stipulation entered into by Tenants in 1992 did not run with the land and therefore did not apply to current Tenants. Landlord filed suit seeking a final judgment from the state civil court. The court found for the Tenants for multiple reasons. First, the court looked to the language of the original contract signed by the 1992 Tenants. The language in the contract implied that the rent stabilization stipulation was meant to run with the land, stating "[Tenants] are hereby deemed rent stabilized tenants, entitled to all rights of the rent stabilization law, including renewal leases." Because the written agreement was "clear and unambiguous," the court favored an interpretation that allowed the rent stabilization clause to run with the land. Secondly, Landlord claimed that even if the clause was valid, the Rule Against Perpetuities would apply and invalidate the clause. However, the Rule Against Perpetuities does not apply to renewal leases, which is what the original and current Tenants had entered into with the Landlord. Therefore, the rent stabilization clause was

not invalidated by the Rule Against Perpetuities. For these reasons, the court found for the Tenants and determined the rent stabilization clause did in fact run with the land.

Kohler Co., v. Wisconsin Dep't of Nat. Res., No. 2021AP1187, 2023 WL 8432369 (Wis. Ct. App. Dec. 5, 2023).

Company sought a permit from Department for a "wetland individual permit" to discharge materials into acres of wetlands. Department initially granted the permit. However, after the intervenors filed a petition for a contested hearing an administrative law judge (ALJ) issued a decision to reverse Department's permit. Department accepted the ALJ's decision as its final decision. Company appealed to Wisconsin's appellate court. On appeal, Company argued the ALJ erred in the following: (1) erred considering the entire proposed project, including wetlands and unregulated activities not related to the wetlands to be filled, (2) incorrectly found that the Department did not have enough information at the time it issued the permit, (3) did not have substantial evidence that the proposed project would cause significant adverse impacts, (4) improperly reversed the Department's decision instead of modifying the permit, and (5) erred in requiring Department and Company to make quantitative findings with regard to secondary impacts. The court held that the plain meaning of Wisconsin law required the Department to consider impacts beyond the physical footprint of directly impacted wetlands, which therefore required Department to consider the entire proposed project. In response to Company's second and third arguments on appeal, the court held that based on the relevant information reasonable minds could have arrived at the same conclusion as the ALJ. The court also held that the ALJ did not err by reversing Department's decision without first modifying the permit because Company never raised the issue with the ALJ and thus forfeited that argument. Lastly, the court held that although the ALJ did not require Company nor Department to make quantitative findings, he was concerned with the lack of information regarding the adverse impacts. The court therefore affirmed the ALJ's decision.

Anderson v. Reliant Title Agency, LLC, 537 P.3d 892 (Nev. 2023).

Grantee sued Grantor for negligence and breach of fiduciary duty as well as compensatory damages for financial injury incurred after learning Grantor did not transfer the water rights to Grantee at the close of escrow. The district court granted summary judgment in favor of Grantor. Grantee

appealed and the appellate court subsequently affirmed the decision of the district court. The court's ruling was based on multiple findings. First, Grantee went into closing with Grantor under the belief that the transfer of the water rights would be included in the deed. When Grantee found they were not, they brought this action. The court, however, found that Grantee failed to establish that Grantor's omission of the transfer of water rights (and the lack of disclosure of the omission) was the proximate cause of any injury accrued by Grantee. Without proximate causation, the claims for negligence and breach of fiduciary duty failed. Grantee's fiduciary claim further failed because the escrow agent had no duty to investigate if there were no facts or circumstances to lead a reasonable escrow agent to believe fraudulent behavior occurred, which the court did not find here. Lastly, the economic loss doctrine barred Grantee's ability to recover, and Grantee failed to show that they fell under any exception to this doctrine. Because Grantee did not establish that the failure to transfer water rights at escrow or failure to disclose this omission by Grantor did not proximately cause any damages incurred between non-possession and possession of water rights, the court affirmed the motion for summary judgment in favor of Grantor.

U.S. Polyco, Inc. v. Texas Cent. Bus. Lines Corp., No. 22-0901, 2023 WL 7238791 (Tex. Nov. 3, 2023).

In 2013, Petitioner contracted with Respondent to build a new manufacturing plant that would have direct railroad service. The parties' agreements were memorialized in two contracts: the Transload Agreement and the Railroad Allowance Agreement. A dispute emerged regarding the manner in which the Railroad Allowance Agreement allocated costs for building the infrastructure. The parties also disagreed about whether Section 1.1(3)'s requirement of a further written agreement required the Respondent's further written agreement for work involving concrete slabs on the land. The Petitioner sued the Respondent for breach of contract and moved for partial summary judgment on the interpretive issue. The trial court found the provision to be a matter of law and left it to the jury to resolve liability and damages. The jury found that the Respondent breached the Agreement. Respondent appealed to the court of appeals claiming the trial court erred in its reading of Section 1.1(3). The court of appeals reached the same result as the trial court. However, the court of appeals determined that the parties' disagreement about the intent and application of the contractual provision allowed for multiple, reasonable interpretations of

Section 1.1(3). These factors led the court to deem the contract as ambiguous and unable to be considered a matter of law. Therefore, the court reversed the trial court's holding. Petitioner appealed to the Texas Supreme Court. The Supreme Court ruled that the court of appeals analysis was erroneous. The Supreme Court held that parties' disagreement about their intent is irrelevant to whether the text is ambiguous. The Supreme Court also held that if there were multiple interpretations, a court could not choose among them, which would render the text truly ambiguous and a matter to be determined by the jury. The Supreme Court reversed and remanded the court of appeal's decision.

Elmen Holdings, L.L.C. v. Martin Marietta Materials, Inc., 86 F.4th 667 (5th Cir. Nov. 15, 2023).

Original parties executed a sand and gravel mining lease on Texas land in 1970. The lease was to continue as long as (1) materials were being mined or produced, or (2) the lessee paid a minimum annual royalty. The lease included a notice-and-cure provision; upon nonpayment and notification, the lessee had 10 days to pay before termination. No mining operations took place on the land after 1973. The original lessee transferred leasehold interest to Company 1 in 2014. Company 1 attempted to pay the 2017 royalty to the original lessor, unaware that she had died. Heirs emailed Company 1 one month later, requesting a payment that never came. Company 2 took title of the underlying land in 2018 and sued Company 1, seeking a declaration that the lease was terminated by the 2017 nonpayment. Company 1 claimed it had made all payments required or, alternatively, that it never received the required notice. The district court granted Company 2's summary judgment motion, holding that the lease had terminated automatically upon nonpayment because there was no active mining. On appeal, the Fifth Circuit affirmed the judgment but used different reasoning. Applying the notice-and-cure provision, the court considered three questions: First, did Company 1's attempted payment to a deceased lessor satisfied the 2017 royalty payment? The court held that it did not, because she was no longer the lessor. Second, did Heirs' email provide sufficient notice to Company 1 had it had not paid? The court held that the email did provide such notice because it "substantially complied" with the terms of the contract. Finally, did Company 1 fail to pay within 10 days of that notice? Yes, the court held, affirming summary judgment, and terminating the lease.

Calif. Constr. and Indus. Materials Ass'n v. Cnty. of Ventura, 315 Cal.Rptr.3d 190 (Cal. Ct. App. Nov. 13, 2023).

County passed ordinance creating a wildlife migration corridor ("Project"). Opponents brought action, claiming that Project violated the Surface Mining and Reclamation Act ("SMARA") and the California Environmental Quality Act ("CEQA"). Trial court found for the County. On appeal, Opponents argued that (1) under SMARA, County was required to submit a statement of reasons because it was "permitting a use" that could adversely affect the ability to extract minerals, and (2) Project is not exempt from CEQA's environmental review process. County that neither SMARA nor CEQA applied to Project. The California appellate court rejected both arguments. Regarding SMARA, the court wrote that it doesn't apply because the ordinance did not "permit a use," but rather changed permit requirements, and that even if it did permit a use, it was for wildlife, which "is loath to seek permission from the County." Under CEQA, if something is deemed a "Project" within the law's meaning, it is subject to further environmental review unless it meets one of the exceptions and isn't exempt from the exceptions. The court found that Project was subject to regulatory exceptions for actions taken to maintain or enhance natural resources and protecting the environment. The court also held that Opponents failed to show Project would have an "adverse environmental effect," which is required for the exemption to the exception. The court rejected Opponents' claims that Project would prohibit or prevent access to mining as mere speculation.

Powell v. Statoil Oil and Gas LP, 2023 N.D. 235 (N.D. 2023).

In April 2010 an oil and gas lease for June Slagle's life estate minerals was recorded between her power of attorney and Brigham Oil and Gas, L.P. - later acquired by Statoil Oil & Gas, L.P. (company). This said that the lessee would pay the lessor a 20% royalty with Brigham providing a $223,980 check to the power of attorney as consideration, however a power of attorney was never recorded in the office. Representatives commenced this action in May 2019 alleging that company breached their obligation to pay timely royalties which company argued that the claims were time barred and they were allowed to suspend payments based on a dispute of title. Summary judgement was granted to company by the District Court. Representatives for the estate argue against the dismissal stating that the court erred in concluding there was a title dispute while company argues this action is barred by the statute of limitations. Company contends that the

action must have commenced within three years after the claim for relief accrued and that the 18% interest is a penalty – not interest; while representatives assert the 10-year statute of limitations applies. Since the lease included royalty payments and company failed to meet those payments, the action was not time barred and the 10-year limitation applies. Representatives assert that the district court erred when it stated a dispute of title existed, allowing company to suspend royalty payments which company disputes based on successfulness of title disputes. The Supreme Court of North Dakota found that company failed to provide evidence of notification to Slagle of the dispute and it was undisputed that company paid royalties during her lifetime therefore they must pay the 18% interest rate. The action was not barred and the court erred when it stated company lawfully suspended royalty payments.

Nicholson v. Severin POA Group, LLC, No. 22ICA207, 2023 WL 7487311 (W. Va. Ct. App. Nov. 13, 2023).

At issue is the Circuit Courts interpretation of a deed as reserving ½ of the oil and gas mineral estate instead of the 1/16 that is on the face of the deed and being unambiguous. The Nicholsons (Owner) argue that by interpreting the deed as unambiguous the plain meaning of the deed is changed which undermines deed confidence especially when including a grant or reservation of an undivided mineral interest. The 1902 handwritten deed conveyed 117.55 acres of the 224-acre estate to Owner but reserved 1/16th of all the oil and gas under said land for Severin (Conveyor). In 1977 Owner's predecessor in title released the interest for the oil and gas to Rockwell who then assigned a portion to Antero which was later conveyed to Owners – who have owned the property since November 1999. Antero began producing and selling oil and gas thus making royalty payments to Owners in 2017. Owners argue that Conveyer reserved only a 1/16th right for himself because a dispute arose regarding the amount of mineral interests held by Owner while the Conveyor's decedents argue that based on the "commonly accepted practices and customs used" at the time a 1/16th conveyance was understood to be a reservation of ½ that interest. West Virginia Intermediate Court of Appeals ("Court") noted that just because parties disagree as to construction of a deed that does not make it ambiguous, and that regular contract interpretation applies. Using this, the Court finds that Conveyor meant what he wrote when he allotted 1/16th of the rights to himself and that it would not make sense for 1/16th to mean ½. The Court did not find the deed to be ambiguous based on the record – the

language used was clear and unambiguous conveying 1/16th not ½ royalty interest.

Nortex Minerals, L.P. v. Blackbeard Operating, LLC, No. 022300027CV, 2023 WL 7401052 (Tex. App. Nov. 9, 2023).

Nortex Minerals, L.P. and Petrus Investment, L.P. ("Lessor) appealed the trial court's decision that the provision at issue in the oil-and-gas lease required Blackbeard Operating, LLC and Bluestone Natural Resources II, LLC ("Company") to obtain consent from Lessors before transferring ownership to Diversified Production, LLC. The Court of Appeals noted that the sale did not constitute a transfer of interest, so the leases' consent provision was not triggered, and the lessors' interpretation of the assignment provision is declined. Appellants argument that a sale of membership interests in a lessee would constitute a transfer of interest in a lease (triggering their consent right) was not supported by the "plain language of the unambiguous Limited Assignment Provision." In determining if the sale of equity constituted a transfer of interest, the court used the following framework to analyze the question: (1) did a transfer occur, (2) if a transfer occurred then was it permitted, (3) if the transfer was not permitted and consent was required then the court must determine if the provision is an "unenforceable restraint on alienation." The unambiguous language of the lease states that only a transfer of ownership would trigger the consent clause, but the court finds that this was not a transfer but an equity sale thus the clause did not apply, and the framework analysis is complete. Lessors emphasize the carve out on the permitted transfers portion, specifically focusing on mergers, however this too requires a transfer which did not occur.

Powder River Mineral Partners, LLC v. Cimarex Energy Co., No. 08-23-00058-CV, 2023 WL 8703418 (Tex. App. Dec. 15, 2023).

Powder River Mineral Partners, LLC ("Lessor") sued Cimarex Energy Co ("Lessee") for failure to pay lessor the full proportionate share that was attributable to lessor under the Deed. Lessee interplead other parties that held interest in the mineral estate which caused lessor to be joined on the May side of the lease. The action was originally filed between lessors/lessees it is "truly between the May successors and Chapman successors" with lessee being the operator agreeing to pay the royalties to the owner of the royalty interest. The issue was whether the Chapman-May deed conveyed a fixed 3/128th royalty interest (Chapman position) or a

floating 3/16th interest (May position). The trial court granted summary judgement that it was a floating royalty. When interpreting an oil-and-gas deed, standard contract interpretation applies and here because the parties agree the deed is not ambiguous then the court operates under the assumption that it is not. The double fraction nature of the deed means the court must determine the parties' intent by looking at the document in its entirety during their analysis. It is presumed that 1/8 was used as a "placeholder for future royalties generally" and not as a mathematical value so the court presumes that the parties intended for the 1/8 to be used in its historical standard thus intending a 3/16 floating royalty. Lessors attempt to rebut this by distinguishing cases; states the royalty conveyance is only applicable if the subject property was leased for minerals; and the double fraction language rebuts the presumption. The court disagrees with all of these arguments because of deed language and the necessity of double fraction presumption. Lessors failed to identify language in the deed to rebut the presumption and it is found that the Chapman-May Deed conveyed a floating 3/16 royalty.

Glover v. EQT Corp., 2023 WL 7397486 (N.D. W.Va. 2023).

At issue is royalty payments made to Lessor after Lessee took over production on the Goshorn Lease. Lessor entered conversations to resolve the issue and upon receipt of the first royalty remittance statement from EQT Production (Company) on March 14, 2018, lessor questioned the nonseparation of NGLs in the statements, beginning the investigation into payment methods. Lessor entered into a summary agreement in September 2019 to release all claims alleged in the original action up to the first payment date of royalties. Lessor amended the complaint to a class action after 2 years of disclosure from company as to the NGL royalty method. Goshorn Lease was acquired December 2020 and Lessor received its last royalty payment in January 2021 for November 2020 production. In defending the motion for summary judgement, Company argued that lessor's fraud claim is time-barred thus initiating a five-step analysis from the Supreme Court of Appeals of West Virginia that focuses on the causes' statute of limitations, the requisite elements for the action, discovery rules being applied for when plaintiff knew/should have known, if plaintiff is not entitled to the discovery rule then determine if the defendant fraudulently concealed facts to prevent discovery by plaintiff, and the court or jury should determine if the statute of limitations was arrested by a tolling doctrine. Lessor had sufficient knowledge since April 2017 and their initial

lawsuit did not include fraud claims. Fraud claims were not added until the conduct was "observed" after royalty payments began. Lessor's fraud claim is time barred. Even if the claim was not time-barred it would have tolled on its merits because lessor did not bring evidence that they relied to their detriment or suffered damages so the motion for summary judgement is granted. The fraud claim fails as a matter of law so Lessor is not entitled to punitive damages.

Chevron U.S.A. Inc. v. Cnty. of Monterey, 15 Cal.5th 135, 532 P.3d 1120 (2023).

Mineral Rights Holders brought suit against County for declaratory and injunctive relief by contending county ordinances banning land use in support of oil and gas wells and wastewater injection in unincorporated areas of the county are invalid. Mineral Rights Holders alleged local ordinance was preempted by state and federal law and that it was vague and created inconsistencies with the County's general plan. Intervenors joined the action, the trial court struck down the ordinances, County appealed, where the court affirmed, and the Supreme Court of California granted review. The court held the ordinance was preempted because it conflicted with a state statute granting state oil and gas supervisors authority to oversee drilling operations. The court based its holding on the following reasons. First, the local ordinance—which "bans the use of [r]isky [o]il [o]perations" for anyone—contradicts a state statute. The state statute outlines that the state "shall" supervise operation in a way that permits methods the supervisor has approved, therefore, because the local ordinance could not be "reconciled with state law" and is "inimical thereto," it is preempted. Second, Intervenors argument that "no inimical conflict will be found where it is reasonably possible to comply with state and local laws" fails because the court cannot say that it is reasonably possible for well operators to comply with the local ban without regarding what the state law permits. The court held that the local ordinance contradicts and is preempted by the state statute.

Placid Oil LLC v. Avalon Farms, Inc., 2023 WL 6471694, (N.D. Tex. Oct. 3, 2023).

Appellant-Plaintiff Oil Company appealed a Bankruptcy Order that did not discharge the claims for alleged environmental contamination and remediation made against them by Farm. Oil Company argues that since Farm did not come forward as a creditor, Oil Company's debts towards

them were discharged. The court found it was undisputed that Farm did not receive actual notice of the bankruptcy proceedings. Oil Company also disputes the bankruptcy court's findings that their contractual relationship with Farm was an assignment rather than a sublease of the land. The court affirmed the Bankruptcy Order against Oil Company, agreeing that the land agreement was an assignment rather than a sublease, and dismissed the appeal with prejudice. Oil Company was required to give Farm actual notice of the bankruptcy proceedings, and since they did not, the debts to Farm are not discharged.

Punxsutawney Hunting Club, Inc. v. Pa. Game Comm'n, No. 456 M.D. 2021, 2023 WL 6366772 (Pa. Comm. Ct. Sept. 29, 2023).

Hunting Clubs sued Commission challenging the constitutionality of provisions within the Game and Wildlife Code in the state, alleging that it conflicts with a section in the state constitution, which forbids warrantless searches of "possessions." Hunting Clubs allege that private land is a "possession," falling under constitutional protection, but both parties have filed cross-applications for summary relief. The trial court denied Hunting Clubs' application for summary relief and granted Commission's application for summary relief, entering judgment in its favor, based on several findings. First, based on binding precedent determining that the provisions in the state constitution are indeed constitutional, the trial court found that the powers of the state constitution do not extend to open fields. Second, precedent stated that state conservation officers "did not violate the landowner's rights to be free from unreasonable searches and seizures." Third, because this binding precedent is the state's supreme court decision, this trial court did not have the authority to refuse to apply it nor overturn it. The trial court granted the Commission's application for summary relief but denied Hunting Clubs' application for summary relief. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing this case as precedent.

Cromwell v. Anadarko E & P Onshore, LLC, No. 08-22-00129-CV, 2023 WL 4994526 (Tex. App. August 4, 2023).

Owner sued Operator after Operator deemed Owner's oil and gas leases as expired at the end of their primary terms and "leased to [third] parties"—Operator being the "third parties." Owner (1) sued for declaratory judgment and trespass-to-try-title action; (2) sought damages for revenue proceeds Owner argues are his because the leases never expired and because he

participated in drilling sufficient to carry out the leases into the secondary term; and (3) alleged he and Operator formed a partnership in which Operator breached and committed fraud under. Operator moved for summary judgment as to all claims—except the trespass-to-try-title claim—contending they are barred by limitations, and Owner moved for a cross-motion for partial summary judgment alleging that the leases are valid. On appeal, the court affirmed the trial court's judgment in granting Operator's summary judgment motion based on several reasons. First, Owner was never given the opportunity to enter into a joint operating agreement with Operator; thus, Operator's use of the term "Owner" does not suggest both parties engaged in conduct indicating a joint operating relationship existed. Second, Owner did not actively participate in drilling of the wells by participating in the liabilities, risks, and costs of Operator's production. Because Owner did not engage in production of oil and gas on the land subject to the leases, Owner's leases ended at the end of their primary terms. Third, Owner failed to raise evidence of a partnership with Operator, Owner was considered a cotenant, and, when looking at both parties' intent, subject to the statute of frauds, neither Owner nor Operator owed one another fiduciary duties. The court does not address the legal question of whether the leases were valid at the end of their primary terms. In conclusion, the court granted summary judgment in favor of Operator.

Kocher v. Ascent Resources-UTICA, LLC., 2023 WL 6458674, (7th Dist. Ct. App. Sept. 28, 2023).

The alleged owners of mineral interests in six parcels of real property ("Mineral Owners) appealed and claimed the defendant-appellees ("Surface Owners") wrongfully leased the mineral rights. Mineral Owners brought suit to quiet title to the mineral rights. The trial court granted summary judgment in favor of the Surface Owners, finding they had unbroken chains of title and Mineral Owners' interests were terminated by law. Mineral Owners appealed, arguing the trial court erred in finding that the root of title was proper for all of the mineral rights, and therefore summary judgment should have been given in their favor. Finding this argument persuasive, the court found proper chain of title. Ultimately, the court reversed the prior decision terminating Mineral Owners' interests and remanded the case to trial court to decide damages and whether to quiet title.

Thomson v. Hoffman, 674 S.W.3d 927 (Tex. Sept. 1, 2023).

A 1956 deed expressly reserved "an undivided three thirty-second's (3/32's) interest (same being three-fourths (3/4's) of the usual one-eighth (1/8th) royalty in and to all of the oil, gas and other minerals" but later referred only to "3/32" without using the double-fraction description. The Supreme Court of Texas considered whether the reservation was a "floating 3/4 interest" of the royalty rather than a fixed 3/32 interest. The court of appeals, in 2021, held the reservation a floating 3/4 interest. But that preceded the supreme court's decision in Van Dyke v. Navigator Group, 668 S.W.3d 353 (Tex. Feb. 17, 2023), which held that old mineral instruments containing "1/8" within a double fraction raises a rebuttable presumption that 1/8 was a term of art meant to refer to the total mineral estate. The parties in Thomson v. Hoffman had filed briefs to the supreme court before the Van Dyke decision. In a per curiam opinion, the court thus remanded the case to the court of appeals so that it could, in the first instance, apply the new Van Dyke standard.

ELECTRICITY

Renewable Generation

In re Application of Firelands Wind, L.L.C., No. 2022-0055, 2023 WL 4770456 (Ohio July 27, 2023).

Black Swamp Bird Observatory ("BSBO") and Nearby Residents appeal a decision by the Ohio Power Citing Board ("OPCB") authorizing Wind Farm Developer ("Developer") to construct a wind farm in Huron and Erie Counties. OPCB granted permission for the project, which was subsequently appealed the State Supreme Court. BSBO and Nearby Residents brought suit under theory that the board improperly determined that the wind farm satisfies the statutory requirements (R.C. 4906) for constructing a major utility facility. They assert that the project could disrupt the area's water supply, create excessive noise and "shadow flicker" for residents near the wind farm, and kill bald eagles and migrating birds. The Supreme Court of Ohio denied the appeal based on several findings, primarily ruling due to the complaint against the construction of the wind turbine development had not established that the board's order was unlawful or unreasonable. The board issues licenses after examining eight impact criteria, three of which are at issue in the case at hand. Specifically, BSBO and Nearby Residents contend that the board failed to meet its obligations "to find and determine" the following under R.C. 4906.10: (1) [t]he nature

of the probable environmental impact; (2) [t]hat the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations; [and] (3) [t]hat the facility will serve the public interest, convenience, and necessity. The court held the burden of proof of showing disruption was not met. Accordingly, the Supreme Court of Ohio affirmed OPCB's order.

Solar Energy Indus. Ass'n v. United States, 86 F.4th 885 (Fed. Cir. 2023).

Trade Association brought action for declaratory and injunctive relief against the federal government. Trade Association challenged Presidential Proclamation 10101, which "modified" Proclamation 9693 by withdrawing the exclusion of bifacial solar panels from safeguard duties on imported solar panels. Trade Association argued that the proclamation exceeded the President's power because the statutory authority to "modify" a safeguard was limited to trade-liberalizing, rather than trade-restrictive, changes. The trade court found for Trade Association and the US appealed. The Federal Circuit reversed the trade court's judgment. The Trade Act provided the President with the power to impose safeguards protecting domestic industries from serious injury caused by imports. The President also had the power to reduce, modify, or terminate a safeguard when the domestic industry made a positive adjustment to import competition. Here, the President's interpretation of the applicable statute was not a clear misconstruction because nothing in the safeguard statutes limited the President's authority only to making modifications that liberalize trade. The statute did not expressly indicate whether "modify" included trade-restrictive changes or was limited to trade-liberalizing changes, and the appellate court viewed this statutory silence as favoring the federal government's broader view. The context of the broader structure and stated purpose of the statute also supported the appellate court's conclusion. Furthermore, the court held that President did not commit any significant procedural violation of the Trade Act. The court also held that President did not violate the "on such basis" procedural requirement for adopting a modification and was not required to reweigh the costs and benefits when modifying a safeguard measure. Finally, the court held that the President also did not violate the procedural requirement that the domestic industry "has made" a positive adjustment to competition from imports because the distinction between "has made" and "has begun to make" was too narrow to

be a clear misconstruction. Therefore, the Federal Circuit reversed the trade court's judgment.

Brookview Solar I, LLC v. Mount Joy Twp. Bd. Of Supervisors, No. 1055 C.D. 2022, 2023 WL 8264544 (Pa. Cmwlth. Nov. 30, 2023)

Plaintiff/Appellant ("Appellant") appealed a trial court decision affirming a township board's ("Appellee") facility application rejection. Appellant sought to construct a solar energy system within a township's boundaries, and the township's planning commission recommended denial of said system. Appellant appealed Appellee's decision to the trial court. After *de novo* review, the trial court denied the conditional use application. Appellant then appealed to the Commonwealth Court of Pennsylvania, arguing that the trial court erred by: 1) using de novo review; 2) holding that Appellant did not meet zoning requirements for conditional use; 3) finding Appellant's glare analysis report inadmissible; and 4) finding that Appellant had the burden of proof and persuasion regarding the proposed system's impact on the public welfare. The court analyzed the claims in turn. First, it held that the trial court correctly used de novo review because Appellee's board meeting resulted in a tie with no vote on substantial findings of fact. Second, the court reviewed the trial court's criteria used to determine that Appellant did not meet zoning requirements, including: the completeness of the application, a stormwater management plan, dimensional requirements, and access road and interior travel aisles. Overall, the court agreed that the appellee did not meet the requirements. Third, the court found that the trial court's ruling on the inadmissibility of the glare report was correct because Appellant offered no authentication of the report. Finally, the court affirmed the trial court's ruling on the burden of proof and persuasion factor, citing earlier cases to show that an applicant, rather than an objector, could maintain the burden of proof should objections over their project be related to public welfare. The applicant shoulders the responsibility of proving that the proposed site would not significantly alter the neighborhood.

Rate

Transource Pennsylvania, LLC v. DeFrank Transource Pa., LLC v. DeFrank, No. 1:21-CV-01101, 2023 WL 8457071 (M.D. Pa. Dec. 6, 2023).

The Federal Energy Regulatory Commission ("FERC") ordered a regional transmission organization ("RTO") to create a regional transmission plan for thirteen states, Pennsylvania among them. In 2016,

RTO identified certain regional transmission constraints which were preventing low-cost electricity from reaching intended electricity consumers, increasing the per-unit cost of electricity in constrained areas. RTO initiated a long-term plan and solicited a congestion relief plan for the affected areas. Plaintiff is an electric utility ("Utility") and despite approval from RTO and FERC, the state commission ("Commission") denied the purported siting and permitting plans. The court found that the denial of Utility's permits and siting requests violated both the Supremacy Clause and Dormant Commerce Clause. Specifically, the court found the following: 1) Utility's claim against Commission was not barred by claim preclusion because Utility split its claims and Commission failed to object; 2) because FERC has exclusive authority to regulate interstate and regional transmission lines, and FERC determined the project was necessary, preemption bars Commission from determining the project to be unnecessary; 3) the court expressly chose not to rule on whether Commission's order conflicted with federal law as it found Commission's order was preempted by the Supremacy Clause; 4) state regulatory regimes may not create obstacles to federal objectives, such as Commission's order denying Utility's requests; 5) FERC did not exceed its authority under the Federal Power Act; 6) contrary to Commission's arguments, Utility's requests were not siting issues, which are state issues, and thus Commission's order was contrary to federal policy objectives; and 7) because the FERC order dealt with regional transmission, the court found Commission's order an act of protectionism, which is a per se violation of the Dormant Commerce Clause.

TECHNOLOGY AND BUSINESS

Patents / Intellectual Property

FMC Techs., Inc. v. Murphy, 679 S.W.3d 788 (Tex. App. 2023).

Oil and Gas Equipment Company ("Company") brought a suit against Former Employee and Competitor, for misappropriation of trade secrets under the Texas Uniform Trade Secrets Act. The trial court found in favor of Former Employee and Competitor, then Company appealed based on insufficiency of Competitor's expert witness' testimony, erroneous jury instructions on the definition of trade secrets, and insufficiency of evidence supporting the jury's findings that Company did not own any trade secrets. On the first issue, the Texas Court of Appeals overruled Company argument against Competitor's expert witness opining on whether or not FMC took reasonable measures to protect the information. The court noted

that Company did not object at the time, and they had their own expert witness testify about the same matter. The court overruled the second issue because the definition of trade secrets as existing in a combination of characteristics which by themselves may exist in the public domain but together adds value to the product beyond the sum of its parts is in accordance with the Fifth Circuit's holding in *Catalyst & Chem. Servs., Inc, v. Global Ground Support*. The court overruled the third issue because the jury verdict was not so contrary to the overwhelming evidence as to be clearly wrong and unjust. The undisputed evidence shows that Competitor filed its system design patent for their subsea tree design first and had the patent for their subsea tree system issued only a few months after Company's initial filing of their subsea tree system patent. Additionally, expert testimony showed that the mechanisms claimed to form the trade secret are the natural progression of trying to build that system and the files Former Employee kept from Company and took to Competitor were mere mathematical templates with no input or output from Company. Thus, Company lost its appeal.

Gen. Elec. Co. v. LPP Combustion, LLC., CV 22-720-GBW, 2023 WL 5748787 (D. Del. Sept. 6, 2023).

In 2023, General Electric ("GE") filed suit seeking declaratory judgement of non-infringement and invalidity of three patents held by LPP Combustion, LLC ("Defendant"). The court issued this Memorandum Order defining various disputed terms in the patents-in-dispute. First, the court held that "diluent gas" is "gas with a reduced oxygen concentration relative to ambient air." Second, "inert" means "reduced oxygen concentration relative to air, and without chemically reactive species such as hydrocarbons." Third, "configured" means "based on its design and operation, spontaneous ignition of the fuel prior to the desired flame location in the combustion device would occur if the vaporized fuel gas were to be premixed with the second gas containing oxygen without any diluent gas being present." Fourth, "fuel gas" means a gas. Fifth, "reaction of the fuel upstream of the combustion zone is suppressed" means "chemical reaction that could lead to autoignition upstream of the combustion zone is slowed or prevented such that no auto-ignition would occur prior to combustion zone." Sixth, the court concluded that the system must provide an enhancer or a retardant rather than both additives. Finally, "acceptable range" is determined to mean "the range of values for a given sensed characteristic that will not require introduction of an additive. Put

simply, if a sensed characteristic falls within the system's acceptable range, no additive is required. But, if a sensed characteristic falls outside the system's acceptable range, an additive is required to bring then combustion to within specifications." The court adopted these definitions and will issue an Order consistent with the terms in this Memorandum Opinion.

Magema Tech. LLC. v. Phillips 66, No. H-20-2444, 2023 WL 320180 (S.D. Texas Jan. 19, 2023).

Company sued Energy Companies for infringement under the Patent Act for refining marine fuel oil. Upon the alleged patent infringement, Company raised several pending issues, including (1) motions to strike opinions of Energy Companies' experts; a (2) motion for partial summary judgment of infringement and application of 35 U.S.C. § 295; and a (4) motion to strike the declaration of Energy Companies' expert in support of its previous motions. Whereas Energy Companies' pending issues are a (1) motion for partial summary judgment of noninfringement and exclusion of expert testimony; and a (2) request for leave to supplement its response to Company's motion for partial summary judgment of infringement. The court (1) denied Energy Companies' request to supplement; (2) denied Energy Companies' motion for partial summary judgment; (3) granted Company's motion for partial summary judgment in part and denied in part; (4) denied Company's request for application of 35 U.S.C. § 295; and (5) denied all pending motions to strike and/or exclude expert testimony. Energy Companies' request to supplement was denied because it would reopen discovery filed nearly a year after fact discovery closed. Motions to exclude expert testimony were denied because the opinions are necessary to effectively rule on issues during the course of trial. Because the two parties disagree as to the inclusions and exclusions of Heavy Marine Fuel Oil ("HMFO"), partial summary judgment as to the feed of a specific product could not be granted for either party because it qualifies as a fact issue for trial. However, the motion for partial summary judgment as to the specific product itself was granted. Accordingly, the application of 35 U.S.C. § 295 was denied because Energy Companies have produced sufficient documentation in showing the process used to produce low sulfur HMFO as the applicable refineries.

G. W. Aru, LLC v. W. R. Grace & Co.-Conn, No. JKB-22-2636, 2023 WL 7170356 (D. Md. Oct. 31, 2023).

Patentee sued Competitor alleging patent infringement. Patentee alleges they invented a new process of refining crude oil which uses far fewer noble gases in the process, resulting in significant cost savings in the refining process. Patentee alleges Competitor entered into a joint-marketing agreement with Patentee for the sole purpose of acquiring Patentee's patented process for manufacturing its microscopic "[carbon monoxide] to [carbon dioxide] combustion promoter." This order assigns definitions to seven disputed terms from the patent as the parties prepare for trial. Generally, the court rejected attempts to assign definitions which were unique or did not comport with the commonly understood definition of words such as "combustion," "each," "outer region," "centre [*sic*]," and others. Though it did rule on definitions of the seven contested terms, the court declined to rule on the issue of indefiniteness, though it did indicate that the parties may brief the issue of indefiniteness when they file motions for summary judgment.

Mergers and Acquisitions

Energy Transfer, LP v. Williams Companies, Inc., 2023 WL 6561767, (Del. Oct. 10, 2023).

Both parties are large fuel companies who have been litigating a failed merger for multiple years. Company 1 terminated the merger in 2016, initiating litigation over claims to contractual termination fees. Company 2 counterclaimed, seeking a billion dollars in termination fees. The lower court awarded fees to Company 1 and dismissed Company 2's breach-of-contract counterclaim. Company 2 appealed. Company 1 argued that Company 2 or individuals in their leadership structure breached the merger agreement, and that the trial court erred in finding there was no breach. Company 2 argued the agreement was ambiguous, and according to their interpretation they did not breach it. Company 1 also argued that the lower court abused its discretion in finding that Company 2's attorney's fees were reasonable because it was a shifted contingent fee. The court found that Company 2's interpretation of the merger agreement was supported by extrinsic evidence, and because the agreement itself was ambiguous, that evidence was allowed in. The court went on to find that Company 2's attorney's fees were reasonable. The court affirmed the lower court's decision to require Company 1 to pay reimbursement fees and related attorney's fees and denied the counterclaimed termination fee.

Bankruptcy

In re Sanchez Energy Corp., No. 19-34508, 2023 WL 4986394 (Bankr. S.D. Tex. Aug. 3, 2023).

During bankruptcy proceedings, Original Debtor and Corporation agreed to litigate Corporation's right to reject an executory contract after a reorganization plan was created. Subsequent to the completion of the plan, Reorganized Debtor sought to reject an executory contract entered into by Corporation and Original Debtor. Corporation sought to enforce the contract, by arguing that under the Bankruptcy Code only the original "trustee or debtor-in-possession," (and not the Reorganized Debtor) could reject the contract. The court disagreed and found that the executory contract could be rejected by Reorganized Debtor. Because Corporation had agreed to litigate the matter of executory contracts after the confirmation of the reorganization plan, Corporation forfeited its right to raise a Section 365 post-effective date rejection argument. According to the Supreme Court, a bankruptcy plan can be enforced against parties - even if the plan contradicts the Bankruptcy Code - if all parties are aware that the plan defies the Code, and a timely rejection is not filed. However, the issue of rejection of a contract and extinguishment of real property covenants are two separate issues. So, while Reorganized Debtor could reject the performance of the contract itself, the court held that the real property covenants established by the contract would have to stay in place. The court's decision represents a growing jurisprudence regarding the ability of parties to reject agreements that contain real property covenants. For the aforementioned reasons, the court upheld Reorganized Debtor's rejection of the executory contract and sustained the enforcement of the real property covenants.

In re Great Atl. & Pac. Tea Co., Inc., No. 22-CV-4825 (KMK), 2023 WL 6289988 (S.D.N.Y. Sept. 27, 2023).

Collector sought payment from Current Tenant after sale of land by Debtor. Collector claimed that Current Tenant was liable for environmental remediation costs to cover pollution caused by Debtor, arguing that the costs were lumped into the monthly maintenance fees to be paid by the Current Tenant. The prior action in the bankruptcy court was for the enforcement of a sale order entered into by Current Tenant and Debtor by Collector. The bankruptcy court found Collector was not entitled to environmental remediation costs owed by Debtor. Collector appealed the decision to the district court. The district court affirmed the decision of the

bankruptcy court upon appeal for multiple reasons. First, the original environmental remediation costs were brought upon Debtor due to their contamination of the site, not Current Tenant's ongoing pollution. Further, Debtor and Current Tenant signed a lease agreement stating that Current Tenant's only obligation was to pay monthly rent and that the property would remain free of all encumbrances created by the Debtor, such as the environmental remediation costs. Collector's argument that the environment remediation costs applied to Current Tenant's monthly payments failed because the claim Collector had to the costs pre-dated the sale order enacted between Current Tenant and Debtor. Thus, Current Tenant was not liable for those fees. For these reasons, the district court upheld the decision of the bankruptcy court.

In re Energy Conversion Devices, Inc. v. Ovonyx, Inc., 654 B.R. 462 (Bankr. E.D. Mich. 2023).

A trust created pursuant to a Chapter 11 Reorganization ("Trust") sued a semiconductor manufacturer ("Manufacturer") for nonpayment of royalties. The court previously dismissed part of Trust's complaint, and construes Trust's current action to be a motion for reconsideration of the previous dismissal. This order is a response to 1) Trust's motion for reconsideration and 2) Manufacturer's motion to dismiss. The court denied Trust's motion for reconsideration for the following four reasons: 1) it incorporated by reference and re-affirmed its original reasoning for partial dismissal; 2) the court rules dictate a 14-day period to move for reconsideration, so this motion is untimely by more than three years 3) because the motion does not show a "palpable defect" and instead "merely represents the same issues ruled upon," Trust is not entitled to reconsideration; and 4) because the October 2020 order did not dismiss the entire complaint, and Trust did not demonstrate any of the three required showings under Fed. R. Civ. P. 54(b), Trust was not entitled to reconsideration. The court concluded by granting Manufacturer's motion for partial dismissal of the amended complaint.

Corporations

Grissom, LLC v. Antero Res. Corp., No. 2:20-CV-2028, 2023 WL 5002127 (S.D. Ohio Aug. 4, 2023).

This case involved a class action against Corporation. Class sued for money damages after learning Corporation underpaid Class members for their royalties as contracted. Class sued Corporation alleging breach of contract for "underpaying [Class] for NGL products" and " Y-Grade

products." Class filed the case in federal court and received class certification. Corporation claimed the "Market Enhancement Clause" included in the contract started the deductions of royalties when the natural gas stream was extracted from the wellhead. In contrast, the Class claimed deductions began when the natural gas was "separated into residue gas and NGL purity products." Class filed a partial motion for summary judgment, and Corporation filed a motion for summary judgment. Court granted Class's motion and denied Corporation's motion for the following reasons. First, the court analyzed the Market Enhancement Clause and determined that because the clause is based on normal rules of contracts, there is no application of the default "at-the-wellhead" or "marketable product" rules. Therefore, the court agreed with Class's interpretation of the contract because the contract language was "unambiguous" in its definition of "marketable form," which involves when the deductions began. Further, the court did not side with Corporation because it did not wish to make the district follow a particular default rule, which Corporation suggested in their argument. The court also based its ruling in the fact that the court's interpretation of the contract would not render the Market Enhancement Clause meaningless, as Corporation claimed, because the deduction would still be applicable to all products Corporation sells, and any value enhancements made to products in the future will be deduced from royalties once the products become marketable. Because the court did not wish to impose a default rule, and Class properly interpreted the contract, the court granted Class's partial motion for summary judgment on the issue of breach of contract.

Palczynsky v. Oil Patch Grp., Inc., No. 221CV01125DHUKRS, 2023 WL 4865030 (D.N.M. July 31, 2023).

Third Party Company sought to intervene in a suit alleging Corporation failed to compensate Workers for overtime hours. Third Party Company owned and operated an app used by independent contractors in the oil industry. The terms and agreement of the app included an arbitration clause. Third Party Company intervened under theories of (1) breach of contract, and (2) attorneys' fees. Workers filed against Corporation in federal court alleging violations of state and federal laws, and Third-Party Company asked for Workers to voluntarily withdraw their claims. Upon Workers' refusal to withdraw their claims, Third Party Company moved to intervene as of right, or under the discretion of the court. The District Court approved Third Party Company's motion based on several findings. First, the court

agreed that the terms and agreements of the app included an arbitration clause that Workers explicitly agreed to. Second, the court determined that all three elements of intervention, (1) timeliness; (2) interest in the subject of the lawsuit and potential impairment of that interest; and (3) inadequate representation by existing parties, were met. In regard to the first element, Third Party Company filed the motion "about four months after the complaint was filed," and Workers had no objection to the timeliness of the motion. In terms of the second element, the court determined that Third Party Company's interests in maintaining the structure of their app, as well as Workers' classification as independent contractors, were sufficient interests, and Third-Party Company stood to lose the integrity of their business model, including the arbitration agreements. Regarding the third element, because Corporation did not compel arbitration, Third Party Company's interests were not adequately represented.

Antero Res., Corp. v. C&R Downhole Drilling, Inc., 85 F.4th 741 (5th Cir. 2023).

Natural Gas Exploration Company ("Company") brought suit against Drilling Operator for a breach of fiduciary duty arising from Drilling Operator's alleged abuse of its position as operations supervisor to award drillout service contracts to companies owned by Drilling Operator's friend who would deliberately perform work slowly and overbill Company then share the proceeds with Drilling Operator. A jury found Drilling Operator liable for $11,897,689.39 as recoupment for value Drilling Operator received from the breach, and the district court ordered Drilling Operator to pay prejudgment interest and to forfeit 130,170 stock shares that employee held in Company. Drilling Operator argues that Company failed to prove that it was damages because of the breach of fiduciary duty and that the district court should have allowed him to take post-trial discovery on the amount of a settlement which it should have discounted. The Fifth Circuit Court held that under Texas law, use of an expert's testimony as to loss suffered by employer constituted a calculation of out-of-pocket damages to a reasonable degree of certainty and that employer was not required to provide evidence of a competitor drillout company's rate in order to recover out-of-pocket damages based on inefficiencies in companies which received contracts with employer. Additionally, the court held that the post-trial discovery of a third-party settlement is generally permissible. Thus, the court affirmed the damages portion of the judgement, but found the district

court's decision to deny Drilling Operator the opportunity to pursue post-trial discovery to be an abuse of discretion and remanded the case.

Equinor Energy LP v. Lindale Pipeline LLC, NO. 01-21-00712-CV, 2023 WL 8041045 (Tex. App. Nov. 21, 2023).

Energy Company contracted with Pipeline to construct and operate a freshwater pipeline to supply water for their oil and gas wells in a portion of North Dakota. When the oil and gas industry fell on hard times in 2014, Energy Company decided to begin buying water from other suppliers instead of the water that Pipeline could have delivered using the freshwater pipeline that it constructed for Energy Company. Pipeline sued Energy Company for breach of contract. Energy Company countersued for breach of contract. A jury found that both parties had breached and awarded damages to both companies accordingly. Energy Company appealed that verdict. Energy Company argued that the trial court erred by finding that a contested portion of the parties' contract was ambiguous. It then contended that there was no evidence to support the jury's finding of the amount of Pipeline's damages Finally, Energy Company asserted that the jury charge permitted the jury to rely on an unreasonably interpretation of the contested portion of the contract. The court reviewed the matter using a legal sufficiency standard of review. This requires the party bearing the burden of proof to show that no evidence supports the finding of a jury. The court granted Pipeline's motion to dismiss the cross appeal and affirmed the decision of the trial court. The court found that there was legally sufficient evidence to support the jury's verdict. Thus, the court affirmed the trial court's decision.

Flywheel Energy Prod., LLC v. Arkansas Oil & Gas Comm'n, 2023 Ark. App. 483 (2023), *reh'g denied* (Dec. 6, 2023).

Flywheel ("Company") purchased all membership interests in SWN in 2018. While reviewing SWN business practices, they understood "net proceeds" to mean expenses occurring between the wellhead and place of sale and thought those would be deducted in calculating the statutory royalty. AOGC received complaints from royalty holders about the deductions made by Company and the staff of AOGC sent a letter requesting an explanation. Company asserted that the AK Code entitled them to deductions. Staff requested a determination on such from AOGC. AOGC held a hearing where Staff argued that the definition was ambiguous, and that Company's predecessor historically operated with the

understanding that "only deductions for taxes, assessments, and true third-party expenses" were permitted for royalty owners. Staff states the history of dealing with company's predecessor and their behavior should control. Company conceded their predecessors interpretation but holds that the definition is unambiguous. The AOGC found in favor of Staff finding that "net proceeds" is ambiguous and found that the long-term dealings should apply. Company appealed and the circuit court held that the sole issue for consideration was interpretation of whether the code required deduction of postproduction expenses from royalties thus finding that the term is ambiguous. Company raises these issues on appeal (1) unambiguous language; (2) AOGC's order did not use proper statutory construction; (3) extrinsic evidence used by AOGC does not support its conclusion; and (4) AOGC lacked authority to require Company to place disputed funds in escrow. Standard of review is directed at the agency, de novo, not the circuit court. The Court of Appeals did not accept any of Company's arguments and deferred to the "superior position of the agency" while referring back to the same reasonings purported by AOGC.

ENVIRONMENTAL REGULATION

Federal

Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 75 F.4th 743 (7th Cir. 2023).

A consortium of Environmental Non-Governmental Organizations ("ENGOs") sued US Army Corp of Engineers ("USACE") under allegations that a supplemental environmental impact statement ("SEIS") issued by USACE to support its decision to continue building river training structures to maintain navigable channel in Middle Mississippi River did not comply with Water Resources Development Act ("WRDA") or National Environmental Policy Act. The trial court entered summary judgment in USACE favor based on several findings. First, WRDA "did not require USACE to prepare specific mitigation plan, and SEIS reasonably defined purpose and need for project." Second, "it was not unreasonable for USACE to eliminate from consideration alternative[s] that would use upstream water level management techniques to ensure navigable channel," and it was indeed reasonable for Corps to eliminate from consideration alternative that would propose ecological restoration. Third, the SEIS "was not required to specify where future dredging and construction would take place." Finally, USACE did not act unreasonably in declining to provide more detailed economic analyses to estimate the amount of future

construction and dredging. The appellate court affirmed the lower court's judgment finding the SEIS as sufficient and conforming with regulations.

Idaho Conservation League v. Bonneville Power Admin., 83 F.4th 1182 (9th Cir. 2023).

Petitioner appealed an administrative agency decision on ratemaking to the United States Court of Appeals for the Ninth Circuit. Federal statute 16 U.S.C. § 839(h)(11)(A) requires that Respondent consider fish and wildlife welfare and equity in decision-making. Petitioner alleged Defendant did not meet this statutory requirement in its ratemaking decision. Petitioner claimed Respondent had an obligation to set aside more funds for fish and wildlife mitigation efforts, and these financial obligations might not be met under the approved ratemaking scheme. Respondent claimed that the statutory obligations did not extend to ratemaking. The court found that it had jurisdiction and that Petitioner had standing. The court then concluded that the statute did not apply to ratemaking. The court analyzed the statute by its ordinary meaning and "its place within the broader statutory scheme of which it is a part." As to its ordinary meaning, 16 U.S.C. § 839(h)(11)(A) does not mention ratemaking. However, a different section of the Act, § 7, discusses ratemaking explicitly and at length. Said section does not mention or point to 16 U.S.C. § 839(h)(11)(A). The court found that Congress did not intend to apply 16 U.S.C. § 839(h)(11)(A) to ratemaking, as the statute clearly had the opportunity to do so if Congress wished and denied the petition. The dissent did not disagree on the merits of the case, rather, argued that the court did not have subject matter jurisdiction over the petition for want of causation.

Crum v. GL NV24 Shipping, Inc., No. 2:22-CV-85, 2023 WL 5962097 (S.D. Ga. Sept. 13, 2023).

Members of Shrimping and Crabbing Industry ("Crabbers") brought suit against Shipping Company asserting (1) strict liability under the Oil Pollution Act of 1990; (2) Negligence under federal maritime law and state law; (3) Negligence per se; (4) public nuisance; (5) trespass; and (6) Negligence and strict liability for ultrahazardous activity against the salvage company relating to a capsized ship. The court granted Shipping Company's motion to dismiss Crabbers' claims to natural resource damages and subsistence use damages under the Oil Pollution Act. Motion to dismiss for any remaining Oil Pollution Act claims were denied. The court also granted the vessel owner's motion to dismiss Crabbers' federal maritime

negligence claims since the Oil Pollution Act displaces that claim. However, the court held that the state law causes of action for negligence, negligence per se, public nuisance, and trespass are not preempted and thus denied the motion to dismiss those claims.

Healthy Gulf v. U.S. Army Corps of Eng'rs, 81 F.4th 510 (5th Cir. 2023).

Local Establishments filed petition for review of decision of United States Army Corps of Engineers granting Natural Gas Pipeline Developers' application for permit under Clean Water Act (CWA), as part of project to build liquefied natural gas (LNG) production and export facility in Louisiana, under theories "alleging that the Corps' decision violated the governing statute and was arbitrary and capricious." The appeals court denied the motion. The court based its decision on four factors. First, the court reasoned that the "unavailability of specific alternative site that Corps failed to study did not moot petition for judicial review." Second, "organizations failed to administratively exhaust argument that Corps was required to consider specific alternative site. Next, the court noted that "Corps was not required to establish that higher-priority compensatory mitigation options were unavailable before allowing permittee-responsible mitigation." Additionally, the court determined that Corps adequately explained its approval of mitigation plan, under which permittee would beneficially use dredged material to restore marshlands. Finally, the court held that Corps adequately addressed concerns that beneficial use of dredged material would spread contaminants. Therefore, the motion was ultimately denied.

United States v. Jacob, No. CV 21-1594 (GMM), 2023 WL 5805856 (D.P.R. Sept. 7, 2023).

United States filed for motion for declaratory judgment action against Shipping Company and Insurer to recover reimbursement and damages arising from significant threat of oil discharge from tanker grounded near coral reefs off coast of Puerto Rico. United States brought suit under theories "pursuant to Section 1017(f)(2) of the OPA for all uncompensated damages to natural resources arising out of the grounding of the oil tanker, including assessment costs and loss, loss of use, or injury to said natural resources; (2) to enter a judgment against the Shipping Company for compensation paid by the Fund to Trustees for natural resource damages arising from the tanker incident as well as all costs incurred by the Fund

due to those claims including interest, attorney's fees, adjudicative, and administrative costs; (3) enter a judgement for the United States, on behalf of the National Oceanic and Atmospheric Administration ("NOAA"), for all natural resource damages; and (4) award any additional relief as the Court deems appropriate." The trial court denied Shipping Company's motion based on various findings. First, the court found that it could make its decision under the "arbitrary and capricious" standard without copy of a "substantial threat" determination. Second, it determined that additional discovery was not needed by Shipping Company. Finally, the court held "substantial threat" determination was found not arbitrary and capricious.

Denney v. Amphenol Corp., No. 119CV04757TWPMKK, 2023 WL 6276072 (S.D. Ind. Sept. 26, 2023).

Group of Homeowners ("Homeowners") moved for class certification in action against Corporations. Beginning with their initial complaint in December 2019, Plaintiffs allege defendants conduct associated with operations of a manufacturing facility exposed their properties to toxic and hazardous substances. Homeowners assert private e nuisance, strict liability, battery, and negligence or gross negligence against the defendants. In December 2022, Homeowners moved for certification of its class, and in March 2023, plaintiffs and one defendant filed a joint motion for dismissal with prejudice, which was promptly granted. The District Court for the Southern District of Indiana denied the motion for class certification because Homeowners failed to satisfy the prerequisite requirements of Rule 23(a) and, even if they could, Homeowners could not satisfy the predominance or superiority requirements of Rule 23(b)(3), nor were they entitled to injunctive relief pursuant to Rule 23(b)(2). The Court relied on Seventh Circuit precedent to express caution in class certification especially where plaintiff seeks damages resulting from alleged environmental contamination where individualized inquiries are commonly necessary. Because Homeowners' class certification motion was denied, motions to strike and exclude were deemed moot, Homeowners were granted leave to supplement their class certification with new evidence, and Corporations were granted leave to supplement their responses. Therefore, the potential class action case is not dead, but brewing, as to whether the Former Amphenol Site in Franklin discharged hazardous volatile organic compounds into the soil, air, sewer, and groundwater that plaintiffs allege.

Earth Island Inst. v. U.S. Forest Service, 87 F.4th 1054 (9th Cir. 2023).

Non-Profit brough action against U.S. Forest Service ("USFS") alleging a violation of NEPA by USFS failing to consider proposed alternatives to a Forest Restoration Project ("Project"). USFS approved the Project to re-invigorate part of the forest and drafted then published its final environmental analysis ("EA") regarding it. Prior to the final EA, Non-Profit commented on the plan, advocating against burning or thinning the trees. The court held that this argument failed because Non-Profit did not offer an alternative, instead seemingly urging against the Project. Non-Profit advocated for the alternatives of pre-commercial thinning and prescribed fires. The court held that these are not reasonable alternatives since they accomplish nothing different than what USFS already has in the EA. Non-Profit then alleged a violation of both NEPA and the USFS's internal regulations in failing to provide a public comment period after making numerical modifications to the published EA. The court held that the modifications were minor because they merely changed numbers into ranges or modified numerical values by a small value. Because the modifications were minor and contained no new information, the court held according to NEPA and the USFS's internal regulations they were not required to have another public comment period. During the litigation, a beetle outbreak occurred in the Project's area and USFS decided to remove the effected acreage from the Project. Non-Profit alleged that this required a supplemental EA under NEPA because that land is home to a species of bird. The court held in favor of the Service because that land is only a small part of that bird's habitat within the entire forest and removing the acreage from the project will have no significant effect on the bird.

W. Watersheds Project v. Perdue, No. CV-21-00020-TUC-SHR, 2023 WL 6377287 (D. Ariz. Sept. 29, 2023).

Petitioner filed a complaint against the Forest Service alleging that the Forest Service failed to comply with the National Environmental Policy Act ("NEPA") in authorizing a livestock grazing project- the Apache-Sitgreaves and Gila National Forests (the "Project"). The parties filed cross motions for summary judgement. Petitioner argued that the Forest Service's decision to authorize the Project was unreasonable, arbitrary, and capricious under the Administrative Procedures Act because the Forest Service failed to: (1) take a "hard look" at the Project's impacts on Mexican Wolves, the Blue Range Primitive Area, and inventoried roadless areas; (2) prepare an Environmental Impact Statement ("EIS") based on the context and intensity

of the Project; and (3) consider a reasonable range of alternatives. Addressing the first argument, the court held that the administrative records supported the Forest Service's conclusion that the negative impacts on the Mexican Wolves, the Blue Range Primitive Area, and the inventories roadless areas were minimal. For the second argument, the court held that Petitioner failed to show that the Project would have a significant effect on the environment based on the context and intensity factors. Finally, the court held that the Forest Service's consideration of two alternatives (to allow grazing or to not allow grazing) was reasonable, and the range of alternatives considered achieved NEPA goals of public discussion and informed decision-making. Based on these findings, the trial court held that the Forest Service's decision to authorize the Project was not arbitrary or capricious and granted the Forest Service's motion for summary judgement.

Lowman v. Fed. Aviation Admin., 83 F.4th 1345 (11th Cir. 2023).

Private Individuals brought filed a petition for review against Federal Aviation Administration ("FAA"). Private Individuals alleged that FAA violated the National Environmental Policy Act ("NEPA") during its approval of airport expansion projects by (1) improperly segmenting the larger overhaul into multiple, smaller projects to make the project's environmental effect appear less significant; (2) failing to consider the project's cumulative effects; and (3) failing to analyze all air quality impacts. FAA countered that it did not violate NEPA and that the petition for review should be denied. The Eleventh Circuit denied Individuals' petition for review because FAA satisfied NEPA's requirements. NEPA required FAA to assess the environmental effects of its proposed actions. The appellate court had to uphold FAA's decision unless it was arbitrary or capricious. First, Individuals offered no evidence that FAA broke the project apart to avoid a more onerous environmental review because Phase II was not pending before FAA, or seriously contemplated, when it approved Phase I. Second, FAA's cumulative effects analysis was sufficient because it assessed the cumulative impacts of forty past, present, and future actions across fourteen different fields and limited the scope of its assessment as permitted by statute. Third, FAA properly analyzed air quality according to its regulations interpreting NEPA because the role of environmental analyses under the NEPA was to gauge whether there were "significant" impacts, not to assess "all air quality impacts." Therefore, the Eleventh Circuit denied Individuals' petition for review.

City & Cnty. of San Francisco v. U.S. Env't Prot. Agency, 75 F.4th 1074 (9th Cir. 2023).

City petitioned the Ninth Circuit to review EPA's final order which denied review of City's federal National Pollution Discharge Elimination System ("NPDES") permit for its Oceanside sewer and wastewater treatment facility. An NPDES permit allows a city to discharge its wastewater into the ocean so long as certain environmental protection criteria are satisfied. City contended that EPA acted contrary to the Clean Water Act of 1972 by including in City's permit: (1) two narrative prohibitions on discharges that create pollution, contamination, or nuisance, or otherwise violate applicable standards for water quality; and (2) a requirement that City update its long-term control plan for sewer overflows. City argued EPA's decision to include these provisions was arbitrary and capricious. The Ninth Circuit denied City's petition, holding that the Clean Water Act authorizes EPA to include the challenged provisions. The court reasoned that an Agency's decision is only arbitrary and capricious if it offers an explanation for its decision that is contrary to the evidence before the agency. Here, EPA's decision to include the challenged provisions was rationally connected to evidence in the record. Regarding the narrative provisions, the Ninth Circuit reasoned that (1) EPA was not required to follow procedures outlined in 40 C.F.R. § 122.44(d)(1) for deriving pollutant-specific effluent limitations, (2) the general narrative prohibitions acted as a "backstop" to more specific provisions provided in the permit, and (3) EPA's decision was rationally supported by evidence of the negative impacts of sewage overflows on users of City beaches. Regarding the long-term control plan update requirement, the court reasoned City's current long-term control plan had not been updated in over thirty years, and it was found to be inadequate to ensure compliance with the Clean Water Act and other applicable state water quality standards. Thus, the court denied City's petition for review.

Melone v. Coit, No. 1:21-cv-11171-IT, 2023 WL 5002764 (D. Mass. Aug. 4, 2023).

Concerned Environmentalist sued National Marine Fisheries Service and Wind Farm for interfering with Environmentalist's environmental well-being and hindering their ability to observe right whales. Specifically, Environmentalist sued Fishery, alleging violations of the Marine Mammal Protection Act ("MMPA") and the Administrative Procedure Act ("APA") in issuing an Incidental Harassment Authorization ("IHA") to Wind Farm.

Both Fishery and Wind Farm asserted that Environmentalist lacked standing and asserted that Fishery complied with the MMPA. After Environmentalist filed his second amended complaint, adding Fishery as a defendant, both sides moved for summary judgment. The court found that Environmentalist had standing but failed to show Fishery's unlawful behavior in issuing the IHA. The court found Environmentalist had established sufficient standing as to Fishery's alleged violation of the MMPA because he suffered an injury through his reduced likelihood of seeing right whales, there was a small yet adequate probability of marine death in connection with Wind Farm's actions, and there was a possibility that a favorable decision would redress injury. The court then found that although Fishery did not comply with the timing requirements of the MMPA, the arguments that these violations removed the public's opportunity to comment for lack of notice and prevented receiving information about the IHA within a mandated time frame did not outweigh the conclusion that the impacts were harmless. The court, therefore, denied Environmentalist's Motion for Summary Judgment and granted Fishery and Wind Farm's motion. The court lastly found that all of Environmentalist's challenges to Fishery's interpretations of the MMPA were insufficient. The court found that Environmentalist had not sufficiently shown that Fishery, through its interpretation of the statute or reliance on four-year-old data, acted arbitrarily, capriciously, or otherwise unlawfully in authorizing the Wind Farm IHA. Accordingly, the court granted Fishery and Wind Farm's Motions for Summary Judgment and denied Environmentalist's.

San Diego Coastkeeper v. Pick-Your-Park Auto Wrecking, No.: 22-CV-1693 TWR, 2023 WL 4879832 (S.D. Cal. July 31, 2023).

Nonprofit sued Corporation alleging that improper handling and disposal of stormwater had detrimentally affected nearby waters. Corporation requested a Motion to Partially Dismiss Nonprofit's complaint for failure to allege standing and failure to state a claim. Nonprofit requested a Judicial Notice. The Judicial Notice was granted and the Motion to Partially Dismiss was granted in part and denied in part. The court found each of the four requested exhibits to be publicly available documents whose accuracy could not be reasonably questioned and therefore granted the unopposed Request for Judicial Notice. The court found that Nonprofit successfully alleged an injury in fact by demonstrating their members' reduced use and enjoyment of the now polluted waters. Nonprofit satisfied the traceability element by alleging that the various discharges from Corporation's facilities

caused the reduction in enjoyment. Nonprofit successfully alleged a favorable decision would redress injuries by elaborating that unless Corporation was required to limit discharges to comply with the Clean Water Act ("CWA") it may continue violating the Act. The court also found that Nonprofit had adequately alleged standing. The court found Nonprofit's allegations of Corporation's stormwater discharges containing iron contributing to total dissolved solids near Corporation's facilities sufficient to deny Corporation's Motion to Dismiss on this claim for relief. Additionally, the court found that Nonprofit plausibly alleged CWA violations through prohibited non-stormwater discharges such as fluid spills and leaks and denied Corporation's Motion to Dismiss Nonprofit's claim. The court found Nonprofit sufficiently alleged some discharges fall within the definition of solid waste and granted Corporation's Motion to Partially Dismiss as to all discharges covered by the Resource Conservation and Recovery Act and denied the remainder.

Graymor Properties LLC v. Battery Properties, Inc., No. 123CV00754JMSTAB, 2023 WL 6382594 (S.D. Ind. Sept. 29, 2023).

Current Landowner filed suit in federal court against Legal Successor and Prior Landowner alleging environmental contamination by Prior Landowner. Prior to this action, Legal Successor filed suit alleging environmental contamination by Prior Landowner in state court. Current Landowner filed suit in federal court against Prior Landowner under CERCLA, while Legal Successor filed suit in state court against Prior Landowner for liability for contamination cleanup. Prior Landowner and Legal Successor filed a motion to stay the federal action by Current Landowner. The federal court reviewed the Motion to Stay. The court denied the argument that the concurrent actions are parallel, and ordered the parties to confer on a Case Management Plan that coordinates between the state and federal actions. The court completed a two-part analysis in determining whether the state and federal actions were parallel: (1) were the actions substantially the same issues; and (2) were parties substantially the same? Legal Successor and Prior Landowner were fruitless in satisfying element (1) of the analysis. The claim brought by Current Landowner in the federal action, a CERCLA claim, is exclusive to federal jurisdiction and therefore cannot be raised and sufficiently adjudicated in state court. Legal Successor and Prior Landowner also failed on element (2) because, both Legal Successor and Current Landowner sought to recover from Prior Landowner, which created opposing legal interests which would result in a

potentially zero-sum outcome. Because the Legal Successor and Prior Landowner failed to show the concurrent actions are parallel, the court decided to allow both state and federal actions to proceed concurrently.

Holiday v. E.I. du Pont de Nemours & Co., No. 2:16-CV-525-PPS-JPK, 2023 WL 6160832 (N.D. Ind. Sept. 20, 2023).

Former Residents sued Landowners and Manufacturer for lead contamination of (1) the land on which they lived and (2) the water supply from which they drank. Former Residents sued under theories of (1) failure to warn; (2) negligence; and (3) negligent infliction of emotional distress (NIED). Landowners and Manufacturer brought a motion to dismiss for failure to state a claim upon which relief can be granted. The court denied in part and granted in part the motion for the following reasons. After a tumultuous procedural history, the court ruled in favor of Former Residents in regard to their failure to warn and negligence claims. Further, the court ruled in favor of three former residents in regard to their NIED claim. While Landowners and Manufacturer argued that Former Residents had been put on notice of lead contamination far in advance of formal notice given in 2016, the threshold for pleading was just the mere plausibility that the Former Tenants were unaware of the contamination until 2016. The complaint displayed this plausibility. However, a multitude of the Former Residents' negligence claims were denied because any evidence of injury caused by mere exposure to lead contamination would be speculative at best. Only three Former Residents were allowed to continue with their negligence claims because they were the only claimants who showed direct injury caused by lead contamination from Landowners and Manufacturer. Further, only the three successful negligence claimants could bring claims of NIED because a valid negligence claim must exist as a prerequisite to any NIED claim. For these reasons, the motion to dismiss was denied in part and granted in part.

Adams v. Atl. Richfield Co., No. 2:18-CV-375-PPS-JPK, 2023 WL 6381346 (N.D. Ind. Sept. 29, 2023).

Former Residents sued Landowners and Manufacturers for lead and other toxic contamination within Former Residents' property. Former Residents sued under theories of (1) failure to warn; (2) negligence; (3) negligent infliction of emotional distress (NIED); (4) strict liability; and (5) nuisance. Landowners and Manufactures brought a motion to dismiss for failure to state a claim upon which relief can be granted as well as a motion

to dismiss for failure to meet the statute of limitations. The court denied in part and granted in part the motion to dismiss for failure to state a claim. For multiple reasons, the court entirely denied the motion to dismiss for failure to meet the statute of limitations. The negligence claim against Prior Neighboring Landowner was denied because they owed no duty to the future neighboring landowners. The failure to warn claim against Landowners and Manufacturers previously on Former Resident's land, however, was granted. The negligence claim against Landowners and Manufacturers was also granted because the court found the alleged causation potentially plausible. Further, only those Former Residents with cognizable negligence claims were granted the ability to bring NIED claims, all other Former Residents were denied this claim. The claim for strict liability was denied because the court found that Landowners and Manufacturer's activity was not abnormally dangerous. Lastly, the nuisance claim was denied because the contamination was not found to be ongoing since the Landowners and Manufacturers no longer inhabited or utilized the land Former Residents lived on. The motion to dismiss for failure to meet the statute of limitations also failed because it was plausible the Former Residents were not on notice of the contamination until 2016, and the suit was filed within the 2-year limitation in 2018.

Barnes v. Dresser LLC, No. 1:21-CV-00024, 2023 WL 6164036 (W.D. La. Sept. 21, 2023).

Landowners sued Facility for improper disposal of pollutants into the groundwater and soil of surrounding areas of the facility, which partially comprised property owned by Landowners. Landowners also sued for excess groundwater remediation damages under the state's Groundwater Act. Facility filed a motion for partial summary judgment on the applicability of the Act to Landowners claims. The court denied Facility's motion as premature for multiple reasons. Facility argued that no provision in the Act entitled Landowners to the monetary relief they sought, and Facility had no contractual obligation to provide the monetary relief to Landowners. Landowners, in turn, pointed to provisions of the Act that allowed for public and private damages to be awarded to Landowners affected by contamination of useable groundwater. The court recognized the arguments but found the motion for summary judgment as premature because the application of the Act to the Landowners' claims should have been an issue of fact for a jury to decide. The court thus denied the partial motion for summary judgment.

Higgins v. Huhtamaki, Inc., No. 1:21-cv-00369-JCN, 2023 WL 6516538 (D. Me. Oct. 5, 2023).

Plaintiff-Homeowners sued Defendants, the operator of a paper mill (Operator) and three chemical companies (Suppliers), alleging that Defendants were responsible for contaminating their groundwater wells and exposing them to health risks in the form of per- and polyfluoroalkyl substances (PFAS). Suppliers sought dismissal for failure to allege an actional claim. Plaintiffs originally brought suit in state court and Operator removed the case to federal court. The complaint alleged nine various counts of negligence, nuisance, trespass, strict liability, and strict product liability. The District Court listed the elements Plaintiffs needed to prove for each claim. Suppliers attempted to argue that there was no duty to warn the Plaintiffs of the risks of PFAS exposure, but the court rejected this argument. Plaintiffs were within a class that Suppliers should have expected to be exposed to the PFAS, and thus Suppliers had a duty to warn Operator. This duty to warn was not precluded by any alleged sophistication of Operator as there was no evidence in the pleadings that Plaintiffs knew of Operator's expertise. Suppliers also tried to argue that a necessary element of products liability was not met as the alleged injuries did not arise from the intended use of the product. The alleged injuries came from the disposal of the chemicals and Suppliers argued that disposal was not an intended use. The court also rejected this argument as disposal was a reasonably expected use. The court further found that Plaintiff's met the pleading standard for the rest of the allegations. The court thereby denied Suppliers motion to dismiss.

Vandestreek v. Lockheed Martin Corp., No. 6:21-cv-1570-RBD-DCI, 2023 WL 6396087 (M.D. Fla. Sept. 27, 2023).

Plaintiffs brought action against Defendants alleging that its weapon manufacturing facility gave off toxic chemicals that contaminated the surrounding air, soil, and groundwater, causing plaintiffs to suffer from glioblastoma. Defendants moved the District Court for summary judgment on the issue of general causation. Defendants also moved to exclude Plaintiff's general causation expert. When dealing with general causation, a case falls into one of two categories: either the medical community recognizes a substance as toxic and causing the type of alleged harm, or the medical community does not recognize a substance as such, and the court must then conduct a *Daubert* analysis for general causation. The court listed

various methods of proving general causation but did not need to perform the full analysis in this case because the expert failed to show general causation. The expert's epidemiological review was unsound, and his methodology was unsound for a jury to rely upon. Each step of the analytical process must be reliable for the testimony to be admissible, and this standard was not met. Because of this, Defendants motion to exclude the expert witness was granted. The motion for summary judgment on the issue of general causation was necessarily granted as the exclusion of the expert meant Plaintiffs could not prove general causation as a matter of law.

W. Watersheds Project v. U.S. Dep't of the Interior, No. 2:23-cv-00435-CDS-DJA, 2023 WL 6880397 (D. Nev. Oct. 18, 2023).

Environmental Org brought an action for declaratory and injunctive relief against United States Department of the Interior ("Department"). Environmental Org argued Department's project violated the (1) Administrative Procedure Act ("APA"), (2) National Environmental Policy Act ("NEPA"), and (3) Federal Land Policy and Management Act ("FLPMA"). Department countered that Environmental Org failed to demonstrate an injunction was warranted and mischaracterized the project's purpose. The court denied Environmental Org's motions for a preliminary injunction and a temporary restraining order. The court considered Environmental Org's motions together. Under the traditional test, the court required Environmental Org to prove that (1) they were likely to succeed on the merits; (2) they were likely to suffer irreparable injury in the absence of preliminary relief; (3) the balance of equities tipped in their favor; and (4) an injunction was in the public interest. Environmental Org failed to show a likelihood of success on the merits for all NEPA claims and two of their three FLPMA claims. NEPA required Department to take a "hard look" at the environmental impacts of its proposed action and prepare a detailed statement concerning any actions "significantly affecting the quality of the human environment." APA governed judicial review of Department's actions under NEPA. Under APA, the court had to uphold Department's decision unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Here, Environmental Org argued that Department failed to address site and project-specific impacts. However, Department prepared an Environmental Assessment that included site-specific impacts, habitat-or species-specific impacts, and the cumulative impact of livestock grazing. FLPMA required Department to produce land use plans. Although Department failed to adequately address

the replacement of lost habitats of special status species at a 2-to-1 ratio, Department adequately proscribed fire requirements in sage-grouse habitats. Therefore, the court denied Environmental Org's motions for a preliminary injunction and temporary restraining order.

WildEarth Guardians v. U.S. Dep't of Agric. Animal and Plant Health Inspection Serv. – Wildlife Serv., No. 3:21-cv-00508-LRH-CLB, 2023 WL 5529163 (D. Nev. Aug. 28, 2023).

Environmentalists sued Wildlife Services, U.S. Forest Service, and Bureau of Land Management (collectively "Wildlife Services") for adopting a predatory damage management (PDM) approach it found would not have a significant impact on the environment. Environmentalists claimed Wildlife Services violated the National Environmental Protection Act (NEPA), the Wilderness Act and related Nevada statutes, and exceeded their statutory authority. Both parties requested summary judgment and Environmentalists requested the court to consider an extra-record declaration. The court denied Environmentalists' motion for summary judgment and motion to consider an extra-record declaration and granted Wildlife Services' cross-motion for summary judgment. The court found Wildlife Services' analysis reasonably reflected the scope of the activities the prepared environmental assessment was analyzing and was not arbitrary or capricious. The court then found that Wildlife Services reasonably concluded that PDM would not have significant environmental impacts and therefore NEPA would not require an EIS. The court reached this conclusion by finding (1) that PDM is not highly controversial, (2) PDM does not have individually insignificant effects that amount to significant effects, (3) the produced EA adequately addressed the safety of PDM, and (4) none of the factors raised by Environmentalists indicated that PDM will have significant environmental effects. Finally, the court found that NEPA does not require a separate analysis for annual work plans because they are not major federal actions. The court found that the Wilderness Acts' exception for livestock grazing encompassed Wildlife Services' management of livestock depreciations and therefore neither the Wildlife Act nor any raised Nevada statutes were violated. Lastly, Environmentalists failed to do more than raise nuanced points about the issue as required for the court to consider an extra-record declaration. The court therefore denied Environmentalists' motion for summary judgment and motion to consider an extra-record declaration and granted Wildlife Services' motion for summary judgment.

Greater Hells Canyon Council v. Wilkes, No. 2:22-cv-00859-HL, 2023 WL 6443823 (D. Or. Aug. 31, 2023).

Environmental Organizations sued United States Forest Services, the American Forest Resource Council, and the Counties Association (collectively "Services") for the amendment of the 21-inch standard prohibiting the logging of trees over 21 inches in diameter. Organizations claimed this decision violated the National Environmental Protection Act (NEPA), the National Forest Management Act ("NFMA"), and the Endangered Species Act ("ESA"). All parties cross-motioned for summary judgment. The court granted Organizations' summary judgment in part and denied Services motions. Services failed to persuade the court that an undersecretary's signature on a decision notice exempts a lower-ranking official's proposal plan from the NFMA's objection process. The court also found it plausible that the amendment may affect aquatic species, and Services cannot disregard these effects and rely on PACFISH's regulations on riparian areas to find that aquatic species would not be affected. The court found this flawed assumption violated the ESA since Service failed to conduct biological assessments for impacts on aquatic species. In analyzing the need for an EIS, the court found the amendment significant enough to warrant an Environmental Impact Statement (EIS). The court found the uncertain effects atop the massive scope and setting of the project, along with evidence of potential impacts on endangered species, justified the need for an EIS. Finally, the court found Services' belief that specific guidelines would be mandatory and PACFISH's direction would avert effects on aquatic species led to an inadequate "hard look" under NEPA. The court therefore granted Organizations' motions for summary judgment on all claims except a violation of NFMA for failure to prepare an EIS, which the court denied as moot, and denied Services' motion for summary judgment.

Glynn Cnty., Georgia v. GL NV24 Shipping Inc., No. 2:22-CV-28, 2023 WL 5671934 (S.D. Ga. Sept. 1, 2023).

On September 8, 2019, the M/V Golden Ray, a vessel owned by Company, capsized, causing an oil leak that polluted the water and surrounding lands. In response, the National Pollution Funds Center "NPFC" issued a public notice in accordance with the Oil Pollution Act of 1990 "OPA" stating that Company was accepting claims for damages and removal costs resulting from the discharge. Claimant submitted an initial OPA claim against Company, and later submitted a second amended complaint asserting claims against other relevant parties for multiple state

claims and federal maritime negligence. Defendants filed motions to dismiss Claimant's second amended complaint due to Company's presentment and displacement of federal maritime negligence claims. Particular Defendants took issue with Plaintiff's lack of presentment to all parties and the sum certain asserted. The court held that Company followed the procedure set forth in the NPFC's public notice. Regarding the sum certain, the court pointed out that OPA does not define the term sum certain and that Plaintiff's sum certain would satisfy the Seventh and Eleventh Circuits' sum certain standards used for claims under the Federal Tort Claims Act. Thus, the court denied the Defendants motion to dismiss for the presentation claims. The court granted dismissal claims for the federal maritime negligence claims using the Eleventh Circuit's holding in *Savage* that the OPA displaces federal common law oil removal remedies. The court also pointed out that provisions of the OPA hold responsible parties strictly liable for removal. The court explained that Plaintiff's claims were not preempted by federal law claims nor the OPA.

Tailored Chemical Products, Inc. v. Kiser-Sawmills, Inc., No. 521CV00069KDBSCR, 2023 WL 8704263 (W.D.N.C. Dec. 15, 2023).

Manufacturer sought equitable division of the money spent on clean-up efforts after Various Entities failed to fulfill their contractual obligations involving the disposal of waste material. The district court equitably allocated the cost of cleanup, with 92% to be paid by Manufacturer, and the remaining 8% to be paid by the Entities with remaining monetary resources. The district court based their conclusion on multiple factors. First, the wastewater from the Manufacturer was hazardous. Once the wastewater was found to be hazardous, the EPA enlisted a National Contingency Plan, which all parties followed. Secondly, some Entities who were found to be liable were not asked to contribute to the damages because they were no longer in operation or were unable to pay. These Entities failed to dispose of all wastewater brought to their site and returned half as many gallons to Manufacturer as Manufacturer delivered to them. Third, one Entity tried to assert an innocent landowner defense but failed because the actions done on their land were foreseeable. Fourth, only one Entity in the litigation was found to be not liable for any of the damages. Here the court found that this Entity lacked the specific intent to not dispose of hazardous materials. Lastly, the court employed a series of factors to determine the allocation of the damages, like actions in good faith, compliance with the National Contingency Plan, toxicity of the wastewater and the amount involved,

intent of the parties, and more. Taking all of this into consideration, the court allocated 92% of damages to Manufacturer, 6% to the landowner of the site, and 2% to the owners of two of the Entities who failed to dispose of the wastewater.

Ctr. for Biological Diversity v. Haaland, 87 F.4th 980 (9th Cir. 2023).

The Center for Biological Diversity (CBD) challenged a U.S. Fish and Wildlife Service (Service) biological opinion under the Administrative Procedure Act (APA). CBD claimed the Service's opinion violated the Endangered Species Act (ESA) because the opinion found that the U.S. Army's use of groundwater from the San Pedro River Basin did not jeopardize protected wildlife species. The district court granted summary judgement for the Government in part. CBD appealed. The first issue on appeal was whether the Army's conservation easement was "reasonably certain" to result in water savings. The Service's biological opinion assumed the easement would result in water savings by preventing agricultural uses. However, there was no evidence in the opinion to support the assumption that the land would in fact be used for agriculture if the easement did not exist. Since the land had not been used for agricultural purposes for more than a decade prior to the conservation easement, the Ninth Circuit held that the Service was not "reasonably certain" the conservation easement would produce water savings. As a result, the Court deemed the biological opinion arbitrary and capricious. The Ninth Circuit vacated the biological opinion, reversed the district court's grant of summary judgement, and remanded with instructions for the Army and the Service to reevaluate its water-saving analysis.

U.S. v. HVI Cat Canyon Inc., No. CV 11-5097, 2023 WL 2212825, (C.D. Cal. Feb. 25, 2023).

The United States of America and the State of California brought this suit against an oil and gas producer ("Producer") for violations of the Clean Water Act (CWA), Oil Pollution Act (OPA), and California Fish and Game Code sec. 5650, from spills in their oil and gas operations from 1999 to 2020. Before a bench trial, the court granted in part and denied in part a motion for summary judgment brought by the United States; granted that Producer was liable for 10 of the 12 oil spills in the United States' complaint pursuant to the CWA, granted that Producer was liable for three oil spills and one threatened spill under the OPA, and denied the motion for summary judgment regarding other spills where there were triable issues.

Based on the totality of the oil spills, the court stated Producer showed habitual recklessness and disregard for industry standards and was negligent in their actions and/or omissions. The court pointed out Producer failed to correct known deficiencies, outlining multiple instances where Producer was made aware of an issue, could have taken steps to prevent the outcome, but did not take those steps. Therefore, the court found Producer liable for over $40 million to the federal government and over $7 million to the state of California.

Okla. ex rel. Drummond v. Tyson Foods, Inc., No. 05-CV-329-GKF-SH, 2023 WL 259895 (N.D. Okla. Jan. 18, 2023).

In 2005, State of Oklahoma ("State") brought action against Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; Cobb-Vantress, Inc.; Cal-Maine Foods, Inc.; Cargill, Inc.; Cargill Turkey Production, LLC; George's, Inc.; George's Farms, Inc.; Peterson Farms, Inc.; and Simmons Foods, Inc. ("Producers"), challenging land application of poultry litter that polluted the Illinois River Watershed ("IRW") with phosphorus under federal and state laws. The court found that Producers generated and deposited "environmentally significant quantities" of phosphorus-rich poultry waste in the IRW. State proved that Producers had known about these hazards since the 19080s and continued applying poultry waste to the IRW. Accordingly, the court found in State's favor on a claim of federal common law nuisance and four claims under Oklahoma law (statutory nuisance, trespass, unlawful discharge, and pollution). The court rejected Producers' affirmative defenses that the Clean Air Act preempted federal common law nuisance; that compliance with Arkansas law immunizes Producers from injunctive relief; and that principles of federalism prevent the court from enforcing an injunction regarding conduct in another state, among others. "Arkansas cannot 'permit' nonpoint source pollution of Oklahoma's waters." Further, the court held that under Oklahoma law, Producers were vicariously liable for any trespass or nuisance created by their growers in spreading poultry litter on land in the IRW. The court directed the parties to meet and attempt to reach an agreement on the remedies to be imposed by this action. The remedy must be court-approved and must both restore the watershed and control any future pollution. In the event that the parties cannot reach an agreement, the court shall enter judgment. On June 9, 2023, the Parties jointly submitted to pursue mediation.

Eagle Cnty., Colo. v. Surface Transp. Bd., No. 22-1019, 2023 WL 5313815 (D.C. Cir. Aug. 18, 2023).

Eagle County, Colorado ("County") and the Center for Biological Diversity, et al ("Center") sought review of a Final Exemption Order ("the Order") from the Surface Transportation Board ("Board") authorizing the construction and use of an 80-mile railway in the Uinta Basin of Utah. The court consolidated petitioners' claims. The Seven County Infrastructure Coalition ("Coalition") intervened as the party responsible for project and permit planning. Coalition, citing COVID-19 impacts, sought exemption from formal application requirements under the ICC Termination Act ("ICCT Act") to construct the railway. Federal agencies, including Board, are required to consider environmental and historical impacts under National Environmental Protection Act ("NEPA"), the Endangered Species Act, and the National Historic Preservation Act ("NPHA") in their decision-making. Board exempted Coalition from the longer application process after relying on an environmental impact statement ("EIS"), which in turn relied on a Biological Opinion ("BiOp"). After unsuccessful objections to Board, County and Center brought this action alleging that the Order violated NEPA provisions. County individually claimed Board violated the NPHA and Center individually objected to the BiOp used in the EIS. Finally, petitioners challenged Board's ruling as arbitrary and capricious. The court determined that petitioners had standing, vacated the Order as arbitrary and capricious, and remanded the case back to Board. The court reasoned that first, Board failed to take a "hard look" at the environmental impacts of the railway, as required by NEPA obligations, by ignoring potential upstream and downstream impacts. Second, the BiOp failed to consider impacts on fishes in the Colorado River and Board's reliance on the BiOp was arbitrary and capricious. Finally, the Final Order was arbitrary and capricious under the ICCT Act because it did not sufficiently consider economic viability. The court determined that, because of County's failure to notify, Board did not violate the NPHA.

Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv., No. 21-CV-5706 (LJL), 2023 WL 5747882 (S.D.N.Y. Sept. 5, 2023).

Environmental advocacy organizations ("Organizations") challenged U.S. Fish and Wildlife Service's ("FWS") April 4, 2019 decision and twelve-month finding that the eastern hellbender does not warrant listing as a threatened or endangered species under the Endangered Species Act. Organizations brought their challenge under Section 702 of the

Administrative Procedure Act, which requires an agency decision to be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Organizations sought a declaration that the FWS determination was unlawful and an order vacating the listing determination. Both parties moved for summary judgment in their favor. Organizations advanced five arguments in support of their claim: (1) FWS failed to articulate a rational and legal basis for its not-warranted determination; (2) FWS relied on unproven or uncertain future conservation measures in reaching its not-warranted determination; (3) FWS failed to consider the adequacy of existing regulatory mechanisms; (4) FWS's definition of "a significant portion of its range" is arbitrary; and (5) FWS arbitrarily truncated consideration of the "foreseeable future" by limiting its analysis to twenty-five years. FWS argued that the determination was reasonable, supported by the administrative record, and adequately explained. FWS also argued that their technical and scientific expertise was owed deference and that mere disagreement with their conclusions was insufficient to their motion. The court evaluated each argument separately and found that FWS' consideration of the conservation efforts was arbitrary and capricious and not in accordance with law, and relied on improper factors. Organizations' motion for summary judgment was granted and FWS' motion for summary judgment was denied. FWS's determination was vacated and the matter was remanded to FWS for further proceedings.

Ctr. for Biological Diversity v. United States Env't Prot. Agency, 82 F.4th 959 (10th Cir. 2023).

In a May 2022 final rule, the U.S. Environmental Protection Agency ("EPA") approved a revision to Colorado's State Implementation Plan (SIP). The revision certified that Colorado's existing, EPA-approved Nonattainment New Source Review permit program regulating new or modified major stationary sources of air pollution in the Denver Metro-North Front Range area meets the requirements for attaining the 2015 National Ambient Air Quality Standards for ozone. The Center for Biological Diversity ("Organization") brought this case challenging EPA's final rule on procedural and substantive grounds. Procedurally, Organization argued that EPA violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706, by failing to include the state regulations that comprise Colorado's permit program in the rulemaking docket during the public-comment period. And substantively, Organization asserted that EPA acted contrary to law when it approved Colorado's SIP revision because

Colorado's permit program excludes all "temporary emissions" and "emissions from internal combustion engines on any vehicle" in determining whether a new or modified stationary source is "major" and therefore subject to the permit process. According to Organization, the Clean Air Act (CAA) and its implementing federal regulations do not authorize these exclusions. Because EPA's notice of proposed rulemaking was adequate under the APA, the United States Court of Appeals for the 10th Circuit rejected Organization's procedural challenge. However, the court agreed with Organization's substantive argument, finding that EPA acted contrary to law in allowing Colorado to exclude all temporary emissions under its permit program; The Clean Air Act and its federal regulations do not authorize such an exclusion. Organization identified no similar problem with EPA allowing Colorado to exclude emissions from internal combustion engines on any vehicle. The court therefore granted Organization's petition in part, vacated a portion of EPA's final rule, and remanded for further proceedings.

Solar Energy Indus. Ass'n v. FERC, 80 F.4th 956 (9th Cir. 2023).

A solar energy association and environmental organizations ("Organizations") brought this action to determine whether the Federal Energy Regulatory Commission's (FERC) 2020 revised rules are consistent with Public Utility Regulatory Policies Act of 1978 (PURPA) and satisfy the requirements of the Administrative Procedure Act (APA). Organizations challenged four components of Order 872: (1) the modified site rule, (2) modified fixed-rate rule, (3) creation of the locational marginal price (LMP) rebuttable presumption and (4) the revised-market presumption. Organizations assert that FERC violated the National Environmental Policy Act (NEPA) when it did not prepare an environmental assessment (EA) before issuing Order 872. The Court of Appeals for the Ninth Circuit holds that PURPA directs that FERC has power to prescribe and thereafter revise rules it determines necessary to encourage the development of Qualifying Facilities. First, the court finds that the site rule is not retroactive because individuals relied on the previous rule for an extended time and FERC has an agency role, allowing it to change positions and revise rules over time. Second, the fixed-rate argument survives step one of *Chevron* analysis since Congress gave FERC broad discretion; also, FERC was unambiguous and express in their acknowledgment of the changes. Next, since both parties agreed to use a test in *Cablevision* and since the rebuttable presumption is rational and

unambiguous, argument three fails. Finally, FERC expressly explained why these changes were necessary given the changes in industry standards, thus providing a "reasonable explanation" under APA standards. FERC did not supply an EA as required by NEPA, but the court determined it would be "extraordinarily disruptive" to vacate the Order. The revised rules of Order 872 are consistent with both PURPA and APA standards. Concurrers would use statutory interpretation – not *Chevron* analysis, and the dissenter holds there was no standing for the NEPA issue.

Ctr. for Biological Diversity v. United States Forest Serv., 80 F.4th 943 (9th Cir. 2023).

Plaintiff/Appellant appealed the district court's grant of Appellee's (United States Forest Service ("USFS")) motion to dismiss. Appellant claimed that USFS contributed to lead ammunition disposal in the Kaibab National Forest, violating the Resource Conservation and Recovery Act ("RCRA"). The United States Court of Appeals for the Ninth Circuit ("the court") reviewed *de novo*. Appellant claimed the District Court erred, first by not finding USFS as a contributor to the lead ammunition disposal, and second, by not allowing Appellant to amend its complaint. Appellant also requested that, on remand, the case be assigned to a different judge. The court affirmed the lower court's judgment. First, the court rejected Appellant's claim that USFS maintained a degree of control over Kaibab to make it a "contributor," stated that "contributing" to something must mean *active* contribution. The court determined that the USFS's plenary regulatory authority, control over hunters via Special Use permits, and status as a nominal owner did not amount to more than passive control. Second, the court rejected Appellant's claim that it should have been given leave to amend its complaint to add Arizona officials as defendants because the proposed amendments failed to allege any new federal violations and the Ex Parte Young exception did not apply. The court stated that the claim against the additional defendant would fail for the same reason the claim against USFS failed. Finally, the court did not address the remand request because it rejected the two preceding claims. Accordingly, the court affirmed the District Court's judgment.

Desert Prot. Soc'y v. Haaland, No. 2:19-CV-00198-DJC-CKD, 2023 WL 6386901 (E.D. Cal. Sept. 29, 2023).

Plaintiff alleged Defendant (Bureau of Land Management ("BLM")) and others violated the National Environmental Policy Act ("NEPA") as well as

the Federal Land Policy Management Act ("FLPMA"), therefore violating the Administrative Procedure Act ("APA"), by granting right of way to an electrical line and water supply pipeline. The court considered whether BLM acted in an arbitrary or capricious manner, denied Plaintiff's motion for summary judgment, and granted BLM's motion for summary judgment. Plaintiff claimed that BLM failed to undertake an environmental assessment under NEPA's requirements, and thus, its decision was arbitrary and capricious. Plaintiff argued that BLM should have undergone an independent environmental assessment instead of relying on the Federal Regulatory Commission's Environmental Impact Statement. The court considered whether BLM took a "hard look" at all the potential issues with the right of way and found that it satisfied the requirements. The court noted BLM's consideration (either through FERC's EIS or through their own supplement) of decommissioning, acid rock drainage, groundwater overdraft, wildlife impacts, global warming, and cumulative impacts. In addition, BLM considered mitigation and alternative means. Accordingly, the court found that BLM did not act in an arbitrary or capricious manner. The court then addressed Plaintiff's second claim that BLM's approval of the pipeline violated the FLMPA, and thus violated the APA. Plaintiff argued the decision violated the FLMPA because: (1) it conflicted with other land use standards; (2) it did not properly balance interests; (3) it did not appropriately mitigate harm; and (4) it acted contrarily to its mandate. The court rejected these arguments, holding that: (1) BLM complied with land use standards; (2) the Environmental Assessment sufficiently weighed the balance of interests; (3) BLM tried to minimize harm; and (4) BLM's decisions satisfied FLPMA requirements.

Lowman v. Fed. Aviation Admin., 83 F.4th 1345 (11th Cir. 2023).

Plaintiff, five individuals, sought review of a Federal Aviation Administration ("FAA") decision approving the second phase of the City of Lakeland's airport expansion projects. The second phase sought to expand the airport's air cargo facility, office, and related infrastructure. Plaintiff claimed FAA violated the National Environmental Protection Act ("NEPA") by: (1) segmenting its review of the expansions; (2) failing to consider the various projects' cumulative impacts; and (3) failing to consider all the projects' potential air quality impacts. The United States Court of Appeals for the Eleventh Circuit ("the court") determined that Plaintiff had standing and had exhausted its administrative remedies but found that the case failed on the merits. The court emphasized that NEPA

concerns decision-making processes, not results. The court considered whether the FAA acted in an arbitrary or capricious manner and analyzed each stage of approval between the City and the FAA. It also stated related projects do not have to be analyzed as one combined project and that there was no evidence to suggest the FAA segmented the projects to avoid perception of a larger environmental impact. Moreover, the court determined that Plaintiff was actually attempting to challenge the first phase of the airport's expansion. The court held that this objection was untimely. The court rejected Plaintiff's other segmentation claims, stating that Plaintiff failed to point to binding precedent on inappropriate segmentation. Next, the court rejected Plaintiff's second claim, holding that the FAA conducted a "robust analysis" of the cumulative impact of the projects, including consideration of any alternatives and the impacts on air quality, noise, and other hazards. Finally, the court found that the FAA met its NEPA requirements for air quality review by analyzing whether the project would have a "significant impact" on air quality. Accordingly, the court denied Plaintiff's petition for review.

Idaho Conservation League v. U.S. Forest Serv., No. 1:22-cv-00225-BLW, 2023 WL 5000514 (D. Idaho Aug. 4, 2023).

Natural Resources Conservation Org ("Org") challenged U.S. Forest Service's ("USFS") approval of a Project a National Forest. Org alleged the USFS's approval was arbitrary and capricious, thus violating the National Environmental Protection Act ("NEPA"), the Organic Act, and the Administrative Procedures Act. In 2008 and 2014 USFS approved intervenor Mining Company to undertake mineral exploration activities. In 2017, Mining Company sought approval of another exploration project that USFS approved, and which was challenged by Idaho Conservation League ("ICL") in an earlier case where the District Court vacated the USFS's approval. In 2020, Mining Company submitted a revised operations plan to remedy their rejected plan, which was approved in 2021. ICL moved to reopen the case, but the Court instructed it to be filed as a new case, which is the immediate case. Considering cross-motions for summary judgment, the Court granted USFS and Mining Company's motions, and denied ICL's motion. The court rejected ICL's claims regarding the potential for ground water contamination because they were based on an assumption the drilling was likely to cause contamination, although the USFS determined the risk of contamination was non-existent or insignificant, satisfying NEPA. The court further denied ICL's claims that the USFS did not take a hard look

considering the cumulative effect of the Project, but USFS conducted an analysis satisfactory to the NEPA. The court also rejected ICL's claims that the USFS had to prepare an EIS, because ICL's hard look claim failed. Finally, the court rejected ICL's claims under the Organic Act, which failed because one tracking sight for the drilling operations was sufficient, the USFS determined the sumps from the drilling would have very minimal impacts, and the USFS's reports established the impact to wildlife was negligible.

Migrant Clinicians Network v. EPA, No. 21-70719, 2023 WL 8613493 (9th Cir. Dec. 13, 2023).

Petitioners petitioned the United States Court of Appeals for the Ninth Circuit for review of EPA pesticide registration decisions. The EPA granted emergency exemptions for agricultural companies to use the pesticide streptomycin to combat a growing plant disease impacting citrus trees and fruit. Later, the EPA amended the registration for unconditional use. Petitioners asked the court to set aside the EPA approvals, claiming that the approvals did not comply with the Endangered Species Act (ESA) and Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The court granted review in part, vacated the amended registration, and remanded in part. The EPA conceded its failure to comply with the ESA, so the court did not address it at length. Instead, it focused on the alleged FIFRA violation. Petitioners claimed that the EPA: 1) didn't properly access streptomycin's impact on antibiotic resistance; 2) failed to assess streptomycin's potential threat to bees; and 3) "credited streptomycin with providing benefits absent evidentiary support." The court sided with the EPA on the first point, finding that the EPA sufficiently considered potential antibiotic resistance by analyzing various methods of transmission, consulting with other relevant agencies, and by taking action to mitigate antibiotic resistance. On the second point, the court sided with Petitioners, noting that the EPA itself admitted its "pollinator data were incomplete." The court granted review on this issue, allowing the EPA to either gather the necessary additional data or better explain the absence of additional data. Finally, on the third point, the court sided with Petitioner for some areas, and with the EPA for others, finding that the EPA had not provided sufficient information indicating that streptomycin is an effective preventative, rather, only proved it as an effective treatment. In sum, the court found that the EPA did not completely comply with FIFRA requirements.

Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt., No. 3:23-CV-00058-SLG, 2023 WL 7410730, (D. Alaska Nov. 9, 2023).

Plaintiffs sued Bureau of Land Management ("BLM") alleging that BLM's Environmental Impact Statement ("EIS") and Supplemental Environmental Impact Statement ("SEIS") that were prepared in order for ConocoPhillips to commence an oil drilling project on a national reserve failed to comply with various Federal Acts. Plaintiffs sought to prohibit ConocoPhillips from commencing the oil drilling project by challenging the validity of BLM's EIS and SEIS. Plaintiffs were previously denied injunctive relief and a temporary restraining order, but their claims ripened. The United States District Court of Alaska dismissed Plaintiffs' claims for several reasons. First, regarding Plaintiffs' National Environmental Policy Act ("NEPA") claim that a reasonable range of alternatives was not properly evaluated, the court found that BLM did consider a reasonable range of alternatives for the oil drilling project when BLM only considered alternatives that resulted in "considerable quantities of economically recoverable oil" because Congress has a policy towards resource extraction. Additionally, under NEPA, BLM properly analyzed the reasonably foreseeable impacts of the project's greenhouse gas emissions, even though it went into a cumulative analysis and not an individual analysis. Second, regarding Plaintiffs' Naval Petroleum Reserves Production Act ("NPRPA") claim that a reasonable range of alternatives was not properly evaluated, the court ruled the same was as it did under the NEPA claim. Third, regarding Plaintiffs' Alaska National Interest Lands Conservation Act ("AMILCA") claim, the court found that BLM only considered alternatives that would still result in full field development for the two-step test, but that those are appropriate alternatives to reduce impacts to subsistence uses. Fourth, regarding Plaintiffs' Endangered Species Act ("EPA") claim, the court found that BLM properly evaluated the impact on endangered species and the greenhouse gas emissions when they considered relevant factors and made the nexus between the facts and their conclusion. The district court dismissed Plaintiffs' claims.

Bledsoe v. FCA US LLC., 416-CV-14024-TGBRSW, 2023 WL 2619132 (E.D. Mich. Mar. 23, 2023).

Plaintiffs filed a putative class action based on manufacturers' alleged marketing of trucks with "clean diesel engines" while knowing that the engines produced excessive nitrogen oxide. Plaintiffs sued under theories of (1) RICO violations, (2) state-law consumer protection, (3) breach of

contract, and (4) fraud. Defendants moved for summary judgement, claiming Plaintiffs' lack of Article III standing, preemption of Plaintiffs' claims by the CAA, lack of standing to bring RICO claims, and various state law claims. The trial court denied in part and granted in part the motion based on several findings. First, Plaintiffs suffered injuries-in-fact that were traceable to Defendants' conduct and thus had Article III standing. Second, Plaintiffs' lacked RICO standing because they purchased the trucks indirectly. Third, Plaintiffs' claims were not preempted by the CAA, as the state level claims were about misrepresentation rather than enforcement of standards barred by the CAA. Fourth, in examining state law fraud claims, the court granted summary judgement for the claims involving Michigan, Idaho, North Carolina, Texas, and in part Illinois and California law, while denying the claims involving South Carolina, New Mexico, and in part Illinois and California law. Fifth, the Court granted summary judgment for the Illinois, New Mexico, North Carolina breach-of-contract claims. The court dismissed thirteen counts against FCA and Cummins, as well as other counts abandoned by Plaintiffs. All other counts remain.

W. Watersheds Project v. United States Bureau of Land Mgmt., 76 F.4th 1286 (10th Cir. 2023).

Organizations sued Bureau of Land Management ("BLM") after BLM approved a project to extract natural gas resources without adequately considering the impacts it would have on sage- grouse populations and pronghorn antelope grazing patterns and migration. Organizations brought action under Administrative Procedure Act ("APA"), National Environmental Policy Act, and Federal Land Policy and Management Act ("FLPMA"). An appeal followed after the action was transferred, where the leaseholder for the project and the state intervened on BLM's behalf and the trial court found for BLM. This court held that BLM sufficiently reviewed and gathered information on the sage-grouse and pronghorn populations and its selection of the developmental plan met the required statutory provisions for several reasons. First, Organizations failed to exhaust administrative remedies through its argument that BLM violated FLPMA through its failure to request compliance with the plan's overall design. Second, BLM explained the impact the project would have on the sage-grouse populations' living areas during winter in its Environmental Impact Statement ("EIS"), therefore, BLM's approval of the project was adequately within the bounds of NEPA. Third, Organizations alleged BLM

was required to use "special care" or pay "special attention" to the pronghorn antelope's migration and grazing patterns in the project's final EIS, but the court found that BLM was not required to do so under NEPA. Fourth, BLM's approval of the project was not capricious or arbitrary under APA because the EIS sufficiently noted migratory routes and any negative consequences the project could cause. Fifth, Organizations failed to administratively exhaust their argument that BLM did not take a "hard look"—as required by NEPA—at how the project would affect the national park area in question. The court affirmed the decision of the district court.

Wyo. v. EPA, 78 F.4th 1171 (10th Cir. 2023).

Wyoming, pursuant to the Clean Air Act (CAA), submitted a State Implementation Plan (SIP) to reduce haze-producing pollutants for three of its power plants to the EPA. The SIP identified Wyoming's proposed Best Available Retrofit Technology (BART) for these three plants, though the CAA guidelines are non-binding for these locations as their generation falls below the 750 megawatt threshold outlined in the CAA. Despite the non-binding guidelines for these locations, the EPA rejected the SIP for one of the plants and issued a final rule implementing a Federal Implementation Plan (FIP). The FIP identified more expensive technology and far stricter pollution tolerances for the specified plant. Even though the CAA was non-binding for these plants, the circuit court noted that Wyoming, nonetheless voluntary submitted an SIP which hit the statutory requirements of the CAA and would result in savings of roughly $160,000,000 compared to the EPA's final FIP. Because the CAA is not binding authority on these plants, the EPA owed Wyoming deference and discretion in crafting pollution-mitigating guidelines for its smaller plants. The circuit court notes that the EPA seemingly rejected the SIP based upon one of the five factors outlined in the CAA: the methodology used to determine the cost of implementing BART for the plant. Regardless of the EPA's preferred methodology for examining cost, Wyoming voluntarily implemented a SIP and thus the EPA did not have the authority to either 1) reject Wyoming's proposed SIP or 2) replace it with the EPA's FIP. As such, the circuit court vacated the EPA's order rejecting the state SIP for the specified plant and remanded the case back to the EPA for further proceedings.

Ctr. for Biological Diversity v. U.S. Forest Serv., No. CV 22-114-M-DWM, 2023 WL 5310633 (D. Mont. Aug. 17, 2023).

In this consolidated case, environmental organizations ("Organizations") challenged a joint final decision of the U.S. Forest Service and U.S. Fish and Wildlife Service (USFS/FWS) concerning the Kootenai National Forest Black Ram Project ("Project"). The Organizations asserted that the USFS/FWS violated the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the National Forest Management Act (NFMA), and Administrative Procedure Act (APA) in issuing their final decision concerning the Project. The Project seeks, inter alia, to promote resilient vegetation, maintain or improve watershed conditions, and reduce the potential for high intensity wildfires. Despite these aims, the project overlaps with two USFS/FWS Bear Management Units (BMU). BMU seek to promote the population growth of grizzly bears, an endangered species. The court ultimately determined the following: 1) the Project violated the ESA in ignoring female grizzly bear mortality; 2) USFS/FWS were entitled to determine that grizzly bear populations in the affected region are not isolated; 3) USFS/FWS were not required to make a jeopardy determination at the sub-species level; 4) USFS/FWS did not use the best science available and did act in an arbitrary and capricious manner; 5) a mere mentioning of the Project's impact upon climate change violates the "Hard Look" requirement of NEPA; 6) though the USFS/FWS were not statutorily required to make a baseline determination, they were practically required to make a baseline determination and failed to do so; 7) USFS/FWS were required to complete an environmental impact statement (EIS) and failed to do so; and 8) USFS/FWS violated NEPA in failing to disclose their methodology for calculating compliance with NEPA's Access Amendment. For these reasons, the USFS/FWS's environmental assessment, "finding of no significant impact," and biological opinion concerning the Project were vacated, the case was remanded back to the USFS/FWS, and the Project was halted until deficiencies are corrected.

Patagonia Area Res. All. v. U.S. Forest Serv., CV-23-00280-TUC-JGZ, 2023 WL 5723395 (D. Ariz. Sept. 5, 2023).

Eight environmental groups filed for an injunction against United States Forest Service ("USFS") claiming that USFS's approval of two drilling sites (Sunnyside Project and Flux Canyon Project) in the Coronado National Forest violated the National Environmental Policy Act ("NEPA"). As NEPA contains no private cause of action, plaintiffs brought this action

under the Administrative Procedures Act. Regarding both projects, plaintiffs claimed USFS did not adequately consider cumulative impacts. Regarding Sunnyside, plaintiffs argue that USFS failed to take a hard look at the Sunnyside Project's impacts to Mexican spotted owls and that USFS did not adequately analyze baseline water conditions. For Flux Canyon, plaintiffs contend that USFS "failed to complete a cumulative-impacts analysis, invoked a CE, and discounted extraordinary circumstances." The court held that plaintiffs were not reasonably likely to succeed on the merits regarding either project. First, the court found that USFS had adequately analyzed the cumulative environmental impacts of Sunnyside, but also other projects taking place on private land. This analysis included noise and visual disturbances as well as habitat degradation. Second, the court found that USFS adequately investigated the impact the drill site would have on the owl habitat, concluding that there would be no long-term harm. The court found USFS's analysis of water resources to be reasonable based on a 2001 baseline study and the project's safety features regarding groundwater. Regarding Flux Canyon, the court found that the project qualified for a categorical exception that did not require the USFS to conduct another cumulative impact analysis. Finding no reasonable likelihood of the plaintiff's success on the merits, the court denied Plaintiff's Motion for Preliminary Injunction.

Calumet Shreveport Refin., L.L.C. v. U.S. EPA, No. 22-60266, 86 F.4th 1121 (5th Cir. Nov. 22, 2023).

Refineries challenged EPA's after its determination to deny Refineries' requested exemptions of their obligations under the Renewable Fuel Standard ("RFS") of the Clean Air Act ("CAA"). Refineries challenged EPA's denial actions pertaining to two separate compliance years based on contentions that (1) EPA's actions were impermissibly retroactive; (2) EPA's interpretation of the CAA was contrary to law; and that (3) EPA arbitrarily acted in failing to engage in reasonable decision-making. Upon Refineries' petitions, EPA motioned to transfer venue to the District of Columbia Circuit. The circuit court denied EPA motions to transfer venue and granted Refineries' petitions for review based on several findings. First, in distinguishing whether EPA's denial actions were "nationally applicable" versus "regionally applicable," the circuit court held that the actions were "locally or regionally applicable," resulting in a presumption that venue was proper. Second, upon overcoming this presumption, EPA must have taken the action based on a determination of nationwide scope or effect, and

it successfully did so. Third, the circuit court held that EPA's actions were indeed retroactive because it applied its new CAA interpretations to Refineries' older exemption petitions. Fourth, EPA's denial actions were contrary to law as to the exemption provision of the CAA because EPA's interpretation of what qualifies as "disproportionate economic hardship" cannot only be displayed by RFS compliance costs. Finally, EPA's denial actions were arbitrary and capricious as applied to Refineries' exemption petitions because it was contrary to evidence about compliance costs based on local market data. The circuit court granted the petitions for review and denied the motion to transfer venue.

State

Md. Dep't of the Env't v. Assateague Coastal Trust, 484 Md. 399 (2023).

Environmental Advocacy Organization ("Org") filed a petition in circuit court seeking judicial review of water pollution control permit issued by Maryland Department of the Environment ("MDE") pursuant to the Clean Water Act and Maryland state law. The circuit court vacated the permit and provided MDE with instructions to incorporate water quality standards into the permit. The Supreme Court of Maryland granted Org's writ of certiorari. The court first considered whether MDE's decision to issue the permit was reasonable and complied with the water quality standards established under the Clean Water Act and Maryland's water pollution control law. The court held that MDE's decisions in issuing the permit were reasonable and consistent with both federal and state law. The court then considered whether the permit conditions that addressed ammonia emissions where reasonable and complied with the water quality standards required by Maryland's water pollution control law. The court held that MDE has the authority to regulate ammonia emissions through permit and that MDE's individually tailored best management practices put in place to control ammonia emissions was reasonable. The court acknowledged that MDE was given discretion in creating these regulations. Thus, the court determined that MDE's individually tailored efforts to control emissions were not an abuse of its discretion. The court reversed the circuit court's judgement.

In re Appeal of N.J. Dep't of Env't Prot.'s June 1, 2020, Adopted Amends., No. A-0307-20 2023 WL 4939334 (N.J. Super. Ct. App. Div. Aug. 3, 2023).

New Jersey Department of Environmental Protections ("DEP") released new rule amendments concerning perfluorooctanoic acid and perfluorooctanesulfonic acid presence in drinking water. Sussex County Municipal Authority along with other associations and councils challenged the amendments on the basis that they were (1) not adopted in accordance with the rule-making requirements of the Administrative Procedures Act ("APA"); and (2) arbitrary, capricious, and unreasonable. The New Jersey Superior Court ruled against them on both challenges. First, the court found that the DEP substantially complied with the APA requirements. The APA requires that DEP provide interested parties notice of anticipated impacts of their proposed rules and describe expected costs associated. The court found that DEP fulfilled this requirement, the only costs they did not specify are ones that greatly vary depending on circumstances which are not able to be anticipated. DEP similarly identified numerous entities and individuals that would be impacted and listed the potential impacts. This is sufficient despite the Authority's claim that DEP should have provided more specific information. Second, the amendments were not arbitrary, capricious, or unreasonable because they were in accordance with EPA guidelines for scenarios in which sufficient data does not exist to determine a chemical-specific relative source contribution. Thus, the court affirmed the lower court's findings in favor of DEP. This was an unpublished opinion from the court.

Liberty Mut. Fire Ins. Co. v. Copart of Conn., Inc., 75 F.4th 522 (5th Cir. 2023).

Landowners sued Auto Auction alleging that Copart's salvage junkyard and car facilities were creating chemical waste that was carried along a stream into the Landowners' property. Auto Auction had an underlying insurance policy which created duty for Insurer to defend Auto Auction except for when the suit is a result of pollutants. Auto Auction has a secondary insurance policy from Insurer which is triggered when the limits of the underlying insurance have been exhausted or when the damages sought are not covered by the underlying insurance with another pollutants exception. Insurer was granted summary judgment on the grounds that Insurer had no duty to defend or indemnify Auto Auction, and Auto Auction appealed. Auto Auction first challenge was that by the

Landowners' allegation that polluted water trespassed onto their property they naturally alleged that both water and pollutants individually caused their harm which would trigger Insurer's duty to defend because if Insurer must defend one portion of the suit, they must defend it all. The Fifth Circuit Court found this unpersuasive because reading the complaint together shows that the Landowners' allegations concerned polluted water as a singular entity and not independent substances. Auto Auction's second challenge was that the court impermissibly assumed Insurer had no duty to indemnify because they had no duty to defend. The court found this persuasive because the standards for the duty to defend and indemnify are different and it is possible that in court evidence could show the plaintiff's injury was caused by water without pollutants and thus trigger Insurer's duty to identify. Thus, the court affirmed in part and remanded in part.

Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, 271 N.C. App. 674, 845 S.E.2d 802 (2020).

The North Carolina Department of Environmental Quality ("Department") issued a permit to Building Company which allowed that company to discharge 12 million gallons of mining wastewater into certain North Carolina tributaries. In 2016, an administrative law judge affirmed the issuance of the permit. Two Environmental Conservation Orgs ("Orgs") filed a petition for judicial review with the superior court. The superior court reversed the affirmation because Department had failed to ensure reasonable compliance with the biological integrity standard. The court of appeals reversed the superior court stating that the permit was consistent with applicable regulations and was thus, valid. The Supreme Court of North Carolina reviewed this matter de novo determining the statutory scheme and whether the administrative law judge and the court of appeals correctly applied the law. The court explained that biological integrity can be different for different bodies of water because it is based on the conditions that must be maintained to support the ecosystem. If the usage does not disrupt the vitality of the particular ecosystem, the permit is found to be valid. Thus, the Court affirmed the court of appeal's holding to uphold the administrative law judge's decision to issue the permit.

Louisiana v. Haaland, No. 2:23-CV-01157, 2023 WL 6450134 (W.D. La. Sept. 21, 2023).

State of Louisiana filed suit against Bureau of Energy Management ("BOEM") asking court to void lease stipulation and for a preliminary injunction. BOEM was to lease a certain amount of acreage in the Gulf of Mexico to the State of Louisiana. The lease plan was approved in 2017 to occur in 2022. Following approval, BOEM consulted with the National Marine Fisheries Service ("NMFS") to make sure the lease complied with the Endangered Species Act. NMFS determined that the lease would endanger a whale species. Despite BOEM's disagreement with that determination, a month before the statutory deadline for the lease sale they modified the lease by withdrawing six million acres and inserting a lease stipulation which would restrict vessel activity in the leased area. The court held that the lease insertions were procedurally invalid because they made significant changes so last minute that it deprived the affected parties of an opportunity to review and comment on them. The court held that the lease insertions should be set aside because, aside from being procedurally invalid, they were also arbitrary considering that there was no reason for BOEM to decide the insertions were needed to protect the whale based on one opinion they disagreed with despite a wealth of contradictory evidence. Additionally, the court found that a preliminary injunction was appropriate because (1) there is substantial likelihood of success on the merits for the previous stated reasons (2) the stark reduction in acreage and the restrictions will cause severe and irreparable injury to the plaintiff (3) the balance of inequities favors a preliminary injunction; and (4) there is no public interest in the perpetuation of an unlawful action by an agency.

In re Permit 0807-0002.1, No. A-1897-21, A-2270-21, 2023 WL 8069486 (N.J. Super. Ct. App. Div. Nov. 21, 2023).

Non-Profit challenged Department of Environmental Protection's ("DEP") issuance of a variety of permits to Oil and Gas Transportation Company ("Company"). These permits included a flood hazard area permit, a waterfront development permit, a coastal wetlands permit, a freshwater wetlands permit, and a water quality certification. These permits authorized Company to build a new railway loop in the area. Non-Profit argued that DEP acted capriciously, arbitrarily, and unreasonably in issuing the permits for railway loop. Specifically, it argued that DEP should have waited to issue the permits until after the Federal Energy Regulation Commission ("FERC") issued a declaratory order regarding its possible jurisdiction over

the proposed rail, and that construction had been improperly segmented for purposes of seeking permits from DEP, that DEP failed to provide sufficient information about the potential stormwater impacts of the loop, that DEP did not provide site-specific information demonstrating that the railway loop will not harm coastal habitats, and that the railway loop will cause unacceptable adverse impacts to threatened and endangered species. The court pointed out that it could only overturn the decision to issue the permits if there was a "clear showing" that the issuance was arbitrary, capricious, unreasonable, or lacks fair support in the record. Using that standard of review, the court rejected each of Non-Profit's arguments using the circumstances at play and prior legal precedent. The court ultimately determined that DEP did not act arbitrarily, capriciously, or unreasonably when issuing the permits. The court found that Company's application adequately addressed the environmental concerns at play and imposed appropriate conditions and requirements to minimize the disturbance to habitats. Thus, the court affirmed the issuance of the permits.

Montana Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC, 414 Mont. 80 (2023).

Environmental Advocacy Org ("Org") sought judicial review of an administrative decision by Board of Environmental Review ("Board") upholding the Montana Department of Environmental Quality ("DEQ") grant of a mining permit for expanding coal mining operations. Org sued under theories claiming that the mining permit violated the Montana Strip and Underground Mine Reclamation Act ("MSUMRA"), claiming it was located in an area that impaired its ability to support adequate aquatic life standards. The procedural posture of the case is on appeal, with a motion to dismiss from the defendants, accompanied with a motion for attorney's fees from Org and request for review of the administrative decision. The permit was vacated by the district court and attorney's fees were awarded to Org. The courts analysis focused on whether the Board: 1) applied the wrong burden of proof; 2) improperly limited Org's evidence; 3) improperly relied on facts and opinions regarding salinity concentrations that were not included in the Cumulative Hydrologic Impact Assessment; 4) erred in holding that extending the duration, but not the magnitude, of a water quality violation could not constitute material damage; 5) improperly excluded the cumulative impact of mining activity from its analysis; 6) improperly relied upon evidence regarding aquatic life; 7) whether the District Court erred in its award of attorney fees; and 8) whether the Board

was properly included as a party on judicial review. On appeal from the trial court's ruling, the Court ruled on each issue as follows reasoning that 1) Org had the burden of proof before Board to show that DEQ's issuance of permit violated MSUMRA; 2) that the Board did indeed improperly limit objectors' evidence and argument on issues not raised prior to contested case proceeding; 3) the Board could indeed consider statistical analysis not included in the cumulative hydrologic impact assessment as rebuttal to testimony by objectors' expert; 4) that extending the duration of a water quality violation could indeed constitute material damage under MSUMRA; 5) remanding back to Board was required to address potential cumulative impact of mining activity; 6) the Board's reliance upon report on macroinvertebrate survey was not arbitrary and capricious; 7) Trial court had statutory authority to award attorney fees to objectors for both the judicial review and administrative hearings process; and 8) Objectors could not recover attorney fees from DEQ for work on issues on which objectors and DEQ were aligned against applicant; and finally, that the Board was not a permissible party. In summary, the District Court's conclusions regarding issues One, Three, Six, Seven, and Eight were reversed, and the District Courts decisions on issues Two, Four, and Five were affirmed.

People of Illinois v. 3M Co., No. 422CV04075SLDJEH, 2023 WL 6160610 (C.D. Ill. Sept. 21, 2023).

State sued Manufacturer after learning of Manufacturer dumping toxic PFAS into wastewater at a state facility. State sued under theories of (1) violation of the state Environmental Protection Act; (2) violation of the state Fish and Aquatic Life Code; (3) negligence; (4) trespass; (5) common law public nuisance; and (6) common law prohibition on unjust enrichment. State brought motion to remand the action back to state court after Manufacturer filed for removal to federal court under the federal officer removal statute. The court granted the State's motion to remand for multiple reasons. The federal officer removal statute allows a defendant to remove a state court action to federal court if the defendant can illustrate that a (1) person (2) acting under the United States, its agencies, or its officers (3) that has been sued for or relating to any act under such color of office, (4) has a colorable federal defense to the plaintiff's claims. In the present case, Element (1) was met because a corporation is considered a person under the law. Element (2) was met because the manufacturer was contracted by the US Military to produce MilSpec AFFF products- a job that the Military would otherwise have their agents do- which resulted in

the PFAS waste. Element (3) was satisfied because Manufacturer raised the defense of being a government contractor. But the arguments failed under Element (4) because State sought to recover for contamination from PFAS dumped into wastewater at a state facility, which was not associated with Manufacturer's contracted work with the US Military. Therefore, manufacture did not have a colorable federal defense. Because the Manufacturer failed to meet element (4), the motion to remand to state court was granted.

Martha's Vineyard Reg'l Sch. Dist. v. Town of Oak Bluffs Plan. Bd., No. 22 MISC 000294 (KTS), 2023 WL 5704480 (Mass. Land Ct. Sept. 5, 2023).

Martha's Vineyard Regional School District ("District") brought suit against the Town of Oak Bluffs Planning Board ("Board") when the Board denied District's special permit application to construct an artificial turf playing field. District filed a motion for partial summary judgement, which the court granted. The issue was whether, under the Dover Amendment, the water protection regulations found within local zoning bylaws apply to District's playing field. The Dover Amendment bars local zoning bylaws from prohibiting, regulating, or restricting land used for educational purposes. However, the amendment allows reasonable regulations concerning the "bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." Board argued that the field would be comprised of toxic materials and endanger the water quality of the island's aquifer—its sole source of drinking water. Board further contended that it had the authority to regulate this land use under the "open space" exception to the Dover Amendment. In granting District's motion for partial summary judgement, the court relied on canons of statutory construction to ascertain the Legislature's intent. The court reasoned that where words are grouped together in a statute, they must be read in harmony with one another. Courts are not at liberty to give one term a broader interpretation than its neighbors. Here, the other terms in the list—bulk and height of structures, yard sizes, lot area, setbacks, parking and building coverage requirements—are all dimensional limitations in that they control the size, shape, and location of buildings that may be a part of educational uses. Therefore, the court reasoned it is logical to conclude that the Legislature included the words "open space" as another dimensional limitation on the land and not a use limitation.

N.C. Dep't of Env't Quality v. N.C. Farm Bureau Fed'n, Inc., 895 S.E.2d 437 (N.C. Ct. App. 2023).

The Bureau played a role in drafting General Permits for North Carolina farmers using certain animal waste management systems. From 2019 through 2021, the Bureau engaged in hearings with the Office of Administrative Hearing (OAH), which ultimately decided that the provisions of the General Permit conditions were rules under North Carolina's Administrative Procedure Act (NCAPA). The parties to the administrative hearings appealed to the Wake County Superior Court, and the Superior court reversed the OAH determination that the General Permit conditions were rules. The Bureau appealed to the appellate court challenging the superior court's reversal of the OAH's rule determination. The appellate court held that the superior court erred in reversing the OAH's determination. The appellate court explained that for the General Permit conditions to be held as rules, they must be a regulation, standard, or statement. The court found the General Permits were regulations because they were authoritative directives dealing with details of animal waste management systems. The appellate court determined that regulations must have general applicability to be a rule. The appellate court explained that a rule is generally applicable if it applies to most situations. The court held that the General Permits have general applicability because they are to be used for a wide degree of animal waste management systems. For these reasons, the appellate court held that the superior court erred in reversing OAH's decision that the General Permit conditions are rules under the NCAPA.

Texas Architectural Aggregate, Inc. v. Texas Comm'n on Env't Quality, No. 03-22-00169-CV, 2023 WL 8459511 (Tex. App. Dec. 7, 2023).

This case came centered on an appeal to a final judgment that affirmed Commission's administrative penalty against appellant and required corrective actions regarding appellant's mining operations at a site leased by appellant. Appellant brought six issues: (1) that Commission did not have jurisdiction to discipline appellant, (2) that Commission's finding of a violation was not supported by the law or substantial evidence, (3) that Commission abandoned its claims, (4) that Commission applied an overbroad interpretation of "storm water discharge," (5) that Commission lacked authority to change the administrative law judge's (ALJ's) finding of no violation, and (6) that Commission's order was arbitrary and capricious. Appellant argued that it fell under an exception, but the court held that

Commission did have jurisdiction due to the legislature granting Commission the power to enforce the Texas Water Code. The court overruled the first issue. Next, Commission did have sufficient evidence in the record to support its decision, and so the second issue was also overruled. The administrative record showed that Commission did not abandon its claim, and the court overruled the third issue. In regard to the fourth issue, Commission's interpretation of "storm water discharge" was an adoption of the federal regulation and was not overbroad. The court thus overruled the fourth issue. Next, Commission had been granted a broad level of authority to amend a proposal for a decision, even a finding of fact, so long as it was based solely on the record and explained itself. Because of this, the court also overruled the fifth issue. Defendant argued that the ordered measures were arbitrary and capricious because they no longer had a leasehold on the site. However, because they still had equipment on site, this argument failed, and the sixth issue was overruled. The trial court's judgment was affirmed.

EmpowerNJ v. Dep't of Env't Prot., No. A-1451-21, 2023 WL 5018375 (N.J. Super. Ct. App. Div. Aug. 7, 2023).

Environmental Organizations appeal from Department of Environmental Protection ("DEP") final agency decision denying petition for rulemaking under the Global Warming Response Act ("GWRA"). Environmental Organizations allege the GWRA requires DEP to adopt regulations demonstrating interim benchmarks approaching GWRA's limit on greenhouse gas ("GHG") emissions and setting limitations on fossil fuel-related projects. After DEP denied Environmental Organizations' rulemaking requests under the GWRA, Environmental Organizations appealed, arguing DEP was required to set rule benchmarks and failure to do so was unreasonable. Following DEP's rationale, the appellate court denied the rulemaking provision of the petition, deeming it reasonable on the record for several reasons. First, Environmental Organizations interpreted the specific interim benchmark provision in the GWRA to mean "if necessary" or "as necessary," alleging the DEP had to establish benchmarks. But the statute refers to "any" interim benchmarks, following the DEP's contention that the GWRA conditions its rulemaking to DEP's discretion. Second, Environmental Organizations challenge the use of the term "shall" in the GWRA, but because DEP has the discretion to establish its rulemaking procedures, this term is not considered dispositive or ambiguous, as this court does not attempt to interpret this statute. Finally,

Environmental Organizations failed to show DEP's denial of the rulemaking provision was arbitrary, capricious, or unreasonable—or that the rulemaking measures were "necessary to achieve the 2050 limit"—as DEP reasonably interpreted the GWRA in finding it had the discretion to deem necessities before establishing benchmarks. The court affirms the decision of DEP in denying the rulemaking provisions of the GWRA. This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

Nucor Coatings Corp. v. Precoat Metals Corp., No. N22C-11-222 MAA CCLD, 2023 WL 6368316 (Del. Aug. 31, 2023).

Parent Company sued Facility after forming a contract, alleging that Facility was operating in violation of environmental-related laws and that a majority of the equipment used was irreparable. Parent Company sued Facility on three counts of breach of contract, after attempting to indemnify several times and alleged that Facility's Guarantor was also responsible for performing Facility's obligations pursuant to the parties' contract. Facility filed a motion to dismiss the breach of contract action. The trial court denied Facility's motion to dismiss based on several findings. First, based on Count I of the contract, the court reasoned that a plain reading of the contract displayed that Parent Company would not be responsible for any liabilities that are related to environmental law or hazardous material violations prior to closing the contract. Second, based on Count II, the court reasoned that subjected provisions of the contract display clear and unambiguous terms that state the obligations of the contract are not waived unless either party have expressly waived that right in writing. Both Counts were not going to be dismissed because Parent Company sufficiently pled the basic elements of a breach of contract action at this stage of the proceeding. Third, because Parent Company sufficiently alleged Counts I and II based on Facility's refusals to indemnify and misrepresentations of the contract, Facility's Guarantor may have future obligations for damages which Facility is directly liable. The court denied Facility's motion to dismiss.

WildEarth Guardians v. New Mexico Envtl. Improvement Bd., A-1-CA-39522, 2023 WL 8539616 (N.M. Ct. App. Dec. 4, 2023).

Plaintiff sues Defendant over the granting of one air quality and three construction permits. Plaintiff argues that (1) Defendant's requirement that a facility's emissions not "cause or contribute to" a violation of National

Ambient Air Quality Standards (NAAQS) does not allow use of a de minimis standard; (2) the air quality permit and registrations at issue were improperly granted because evidence demonstrates they will cause or contribute to a violation of the NAAQS; and (3) the registrations at issue were improperly granted because they are located in nonattainment areas. This case was heard on appeal of the Board's decision involving the permits. The court affirmed the permit's approval. The court found that the relevant part of the New Mexico air quality act and the Clean Air Act was nearly identical and other courts had consistently found a de minimis standard. This, combined with New Mexico's version of Chevron deference led the court to find the de minimis standard was appropriate. Next, the court found that while the Board's conclusions that minor sources of ozone do not contribute to ozone excess were too broad and thus struck four paragraphs of the final order, the amount of ozone would still be below the requirements and thus the registrations were properly granted. Finally, the court held that the regulatory language went beyond the statutory language, it was unenforceable, and therefore the exceptions to the regulatory language were allowed. The court affirmed the permit approval.

La. Wetlands, LLC v. Energen Res. Corp., No. 2022 CA 1169, 2023 WL 8290245 (La. App. 1 Cir. Nov. 30, 2023).

Company sued Oil and Gas Operations after conducting soil and groundwater testing on the property subject to the suit revealed contamination and environmental damages caused by the Oil and Gas Operations. Company sued based on theories that Oil and Gas Operations conducted a series of production and operation activities and should have known that their activities were going to cause pollution and contamination upon Company's property. Following a proposed remediation plan and the trial court's finding that Oil and Gas Operations were to submit a bond to fund the implementation of the plan, Company appealed. Company sought review of standards and potential exceptions of the regulatory requirements under the plan. The appellate court affirmed the lower court's decision, holding the lower court did not err in confirming the proposed remediation plan. The appellate court first determined that the Company failed to prove by a preponderance of the evidence that its proposed plan was more feasible to "adequately protect the environment and the public health, safety, and welfare." Second, the appellate court held that, upon review, the proposed plan first needed to establish groundwater classifications and soil standards before numeric values were necessary, despite the Company's argument

these values should be determined at the outset. Lastly, the appellate court held the Company's contention that the Oil and Gas Operations could seek exceptions under the remediation plan lacks merit because the environmental damage of the plan must be fully evaluated before a plan is even approved. The trial court's decision was affirmed.