# Trends November/December 2018

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SB 50: California sets a course to keep public lands public
Lisa Belenky and Kim Delfino

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After the 2016 election, the Trump administration made it clear that radical changes were coming for federal public lands management, including the widespread sale of federal public lands to private interests. In response, the California legislature took steps to ensure that the state itself, through the California State Lands Commission (SLC), would be given notice of any proposed sales from the purchaser or other interested party and receive either the right of first refusal or the right to arrange for transfer of those public lands to another entity before any land transfer was recorded or filed. See Senate Bill (SB) 50 (codified at Cal. Pub. Res. Code §§ 8560-8561 and Cal. Gov’t Code §§ 6223, 27338 (as amended 2018)).

Far from an academic or partisan exercise, SB 50 reflects a policy decision by the legislature to provide a backstop legal framework to protect public trust resources in California. The state of California includes more than 45 million acres of federal public lands (approximately 45 percent of the state). These lands include critical watersheds, habitats, forests, parks, national monuments, and other conservation lands. Privatization and development of these public lands could threaten California’s water resources, air quality, wildlife, viewsheds, recreation opportunities, and other resource values.

The Trump administration filed suit to challenge SB 50, arguing that it violates the doctrine of intergovernmental immunity and that it is preempted under the Property Clause of the U.S. Constitution. U.S. District Judge William Shubb ruled in favor of the federal government, finding that SB 50 violated the doctrine of intergovernmental immunity. Judge Shubb did not reach the issue of a violation under the Property Clause. It is unknown if California will appeal this decision. The fate of California’s novel approach to protecting federal lands within its borders currently hangs in the balance with this decision and, if left in place, could have larger implications for the balance between federal and state management of public lands.

Background

SB 50 was signed into law in October 2017 and amended in June 2018. The law provides that “conveyances of federal public lands in California are void ab initio unless the [SLC] was provided with the right of first refusal to the conveyance or the right to arrange for the transfer of the federal public land to another entity before registering a land sale.”

The fundamental purpose of SB 50 is to address sale, transfer, or conveyance of federal public lands in California that have significant public trust values, including lands within parks, forests, wildlife refuges, national monuments, and other conservation lands. Through the June 2018
amendments, the legislature narrowed SB 50’s scope so that conveyances of federally owned lands without significant public trust values could be quickly screened and registered through a certificate of compliance.

Specifically, SB 50 imposes requirements on those persons wishing to record deeds or conveyances of federal land as well as the recorders. Under the law, the SLC must issue a certificate of compliance for any conveyance of federal land, and may do so only if certain conditions are met. The certificate must be presented along with any deed for conveyance of federal public lands at the time of recording or filing. The only requirement that directly implicates federal agencies is that the deed or conveyance be titled “Federal Public Land Deed of Conveyance.”

The lawsuit

On April 2, 2018, the Trump administration filed suit to challenge SB 50, arguing that it is unconstitutional and that federal land transfers within California have been frustrated by the law’s requirements. United States v. California, 2:18-cv-00721-WBS-DB (E.D. Cal.).

The federal government argued that SB 50 is discriminatory because it applies only to federal land disposal and thus violates the doctrine of intergovernmental immunity, which prohibits states from directly regulating or discriminating against the United States. The federal government also argued that SB 50 is preempted by the Property Clause, the statute admitting California to the Union, and other federal statutes in which Congress has authorized federal conveyance of lands. SB 50’s defenders argued that the intergovernmental immunity doctrine is not triggered by SB 50 because the statute does not directly regulate the federal government. Instead, it regulates the private purchaser through the recording restriction, and treating purchases of federal public lands with sensitive resources differently from other land transfers is a permissible distinction based on these facts.

The federal government responded that, even if SB 50 directly restricts only a private party, SB 50 may still be unconstitutional as it frustrates and “embarrasses” the federal government in exercising its constitutional rights. The federal government’s arguments focused on specific examples of parcels failing to sell and/or losing property value, ostensibly due to the new certificate requirement. However, the state argued that because the statute provides California the right of first refusal or transfer to another entity, the state or the other entity would have to match the price agreed upon between the federal government and the private party, which means that the federal government will not, in fact, be disadvantaged. Similarly, while the requirement that deeds or conveyances be labeled “Federal Public Land Deed of Conveyance” does apply only to federal agencies, it does not in and of itself create a burden on those agencies or frustrate federal land transfers.
As for the federal government’s preemption argument, there is concern that it improperly assumes that the government’s power to dispose of property under the Property Clause is without limitation. The Supreme Court has held that state environmental rules are not preempted by federal statutes that guide how federal agencies manage federal lands. For example, in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), the Court explained that the relevant question is whether there is evidence Congress intended to specifically preempt state law. Here, there is no such evidence, and, in fact, the *Federal Land Policy and Management Act (FLMPA) of 1976* requires that federal land conveyances must be consistent with state law.

**U.S. District Court Judge Shubb** agreed with the federal government’s intergovernmental immunity argument. The judge rejected the state’s argument that since the title recordation requirements did not apply to the federal government, the right of first refusal also did not apply to the federal government. Instead, he found that right of first refusal under SB 50 was intended to be exercised directly against the federal government. Judge Shubb also found that even if SB 50 did not directly regulate the federal government, it still discriminated against the federal government and those with whom it deals, and the state had failed to show how the certain categories of federal lands subject to SB 50 are different than all other lands within California that have similar values as those regulated by SB 50.

**Looking ahead**

With the recent federal district court decision, the fate of SB 50 is uncertain. If California does not appeal this decision, it likely will look for other options to keep important lands in public ownership. For example, the state might adopt new legislation imposing zoning and planning regulations or restrictions on new owners of public lands. That kind of regulation would limit uses by new owners and remain in place long after transfer from federal ownership. Whatever SB 50’s fate, California has made, and is likely to continue to make, its view clear: federal lands that have important public values should remain in public hands.

**Federal and state promotion of power generation**

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When it comes to electric generation, the gap continues to widen between the energy goals of the federal government and the goals of many states. The starkest example of this gap is the U.S. Department of Energy’s (DOE)’s efforts in the last year or so to promote coal-fired power plants, at a time when many states are moving in the opposite direction and promoting renewable and

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zero-carbon sources of energy like solar and wind. Last year, DOE attempted to create subsidies for coal-fired power plants, as well as nuclear power plants, on the theory that these baseload power sources are necessary to ensure grid reliability. A number of states, on the other hand, have policies that favor decreasing our reliance on coal, because it is not renewable and it produces significant amounts of greenhouse gases and other forms of air pollution. In fact, two states—California and Hawaii—have effectively banned the use of coal after 2045 by requiring 100 percent zero-carbon electricity for their states by that date.

Federal and state authority over power generation

Although it may seem intuitive to think that the federal government should set policies regarding our energy mix, since environmental issues like greenhouse gas emissions cross state borders, it is in fact states that have historically been in the driver’s seat on matters of energy policy. Generally speaking, the Federal Energy Regulatory Commission (FERC) has exclusive authority over all interstate transmission and wholesale transactions of electricity. Congress has also specifically directed FERC to oversee reliability of the bulk power system. But matters of power generation are generally left to the states, which oversee the siting of energy projects, the retail distribution of electricity, and the makeup of power generation within their borders. As the U.S. Court of Appeals for the D.C. Circuit has held, this authority of the states includes the ability “to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities.” Connecticut Dep’t of Pub. Util. Control v. F.E.R.C., 569 F.3d 477, 481 (D.C. Cir. 2009).

Federal and state promotion of renewable power generation

Both the federal and state governments are involved in promoting particular forms of energy. Under the Public Utility Regulatory Policies Act of 1978, the federal government created an official policy of encouraging energy efficiency and the development of renewable energy. Federal tax incentives have also played a significant role in promoting renewable energy. But, consistent with the division of authority that leaves matters of power generation and retail distribution to the states, the states have arguably played a much larger role in determining the makeup of our electric portfolio. In addition to determining what energy projects are sited within their borders, around 30 states have also passed mandatory renewable portfolio standards. In doing so, these states have exercised their authority over in-state electricity suppliers to require the purchase of minimum amounts of renewable energy.

Federal promotion of coal-fired power plants

On September 29, 2017, DOE submitted a proposed rule to FERC to address the unexpected retirement of baseload coal and nuclear power sources, which the department determined to be a threat to grid reliability and national security. The proposed rule immediately generated
significant controversy, with the most controversial part being that the rule, if promulgated, would effectively subsidize coal-fired power plants at a time when many states are seeking to phase out coal-fired generation. FERC rejected the proposed rule in a 5–0 decision, with one commissioner describing the proposal as a “multi-billion dollar bailout targeted at coal and nuclear generating facilities” with “no evidence in the record to suggest that temporarily delaying the retirement of uncompetitive coal and nuclear generators would meaningfully improve the resilience of the grid.” Order Terminating Rulemaking Proceeding, Docket Nos. RM18-1-000 & AD18-7-000, slip op. at *2 of Commissioner Glick’s concurring opinion (Jan. 8, 2018). Consequently, this aspect of the federal government’s attempt to promote coal-fired power plants is on hold, at least for now.

As a result, the balance of power remains where it has historically been, with states playing the primary role in setting energy policy.

Endless liability? Evaluating whether to settle or litigate private environmental lawsuits at regulated sites
Jon Rauchway and Mave Gasaway

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Government-regulated environmental cleanups can last for decades. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), the primary federal statute for regulating large-scale environmental cleanups, has been described as “a black hole that indiscriminately devours all who come near it.” Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Living Tr., 32 F.3d 1364, 1366 (9th Cir. 1994). For companies responsible for such cleanups, it may seem—as with real black holes—that time slows down and they never emerge. Even when the end to regulatory liability is in sight, private-party lawsuits often follow. In recent years, we have seen an uptick in private lawsuits against companies responsible for government-regulated environmental cleanups, particularly at federal Superfund sites. Unlike most regulatory liability, however, private environmental suits are defensible and companies should think hard about approaching them in the same way as government enforcement actions, where the options are limited.

The problem: increased risk of lawsuits and the pressure to settle

Parties identified by the government as liable at contaminated sites, such as sites being investigated or remediated under CERCLA, face the threat of follow-on lawsuits from private landowners. Such companies are seen as easy targets. After all, there already has been a liability determination, and there often is a lengthy and public administrative record, which may be

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highly relevant to issues like causation and injury. These suits can pose significant risks in terms of both dollars and reputation.

As with any civil action, a defendant in a private environmental suit will be confronted with the question of whether to settle or take the case to trial. The statistics say the answer is almost always “settle.” It is often reported that up to 97 percent of all civil cases end before trial, most in the form of a settlement. And that percentage is undoubtedly higher for cases involving multimillion-dollar environmental claims because corporations often fear the attention that comes with a jury trial and the potential for a catastrophic verdict associated with environmental harm. The pressure to settle is still greater where the defendant has already been deemed liable for the contamination by the government under CERCLA or a similar regulatory scheme.

But the pendulum may have swung too far in favor of settling these kinds of cases. Although settlement certainly is the best option in some cases, it should not be a foregone conclusion, even when the defendant is liable to the government under federal or state environmental laws. This article discusses some tips, tools, and factors to consider when assessing options for resolution of private environmental lawsuits at regulated sites.

A case study

The authors recently defended a large company in an environmental tort suit. There was no dispute that the contamination on the plaintiffs’ property had come from the company’s facility, which is now a Superfund site. There also was no dispute that the contaminant was a carcinogen, present in concentrations far in excess of regulatory limits. The plaintiffs were well funded and sympathetic; they initially demanded over half a billion dollars in damages. Based on these facts, the case might seem like an obvious one to settle—the company had previously settled cases of similar magnitude.

We believed, however, there was a reasonable prospect the jury would not find the company liable and, even if it did, it was not likely to award damages exceeding the plaintiffs’ settlement demands. We vetted these assumptions carefully based on a variety of risk assessment tools and, ultimately, decided to try the case over three weeks in federal court. The jury returned a complete defense verdict.

Suggested approach: tools, tips, and considerations

As with any significant lawsuit, when confronted with a private suit at a regulated site, a defendant must thoroughly assess the risks associated with trial versus settlement. Available tools include jury consultants (to provide venue and jury pool research), focus groups and mock trials (to provide insight into how a fact finder might react to the evidence), and internal “peer review” sessions with client representatives and lawyers not directly involved in the case (to
provide more objective feedback). These and other tools can assist counsel and client in formulating case strategy and deciding whether to settle or go to trial.

Additional factors and considerations unique to environmental cases involving regulated sites include the following:

- **Regulatory liability does not equate to tort liability.** Liability under many regulatory schemes like CERCLA is “strict”—meaning parties are liable regardless of fault, culpability, or negligence—and the few established CERCLA defenses are narrow and rarely apply. Conversely, liability under most tort claims requires a showing that the defendant acted culpably or negligently, and there are additional defenses that are often easier to establish. And, facts irrelevant to regulatory liability—like conforming to a standard of care—can make all the difference in a tort suit. Accordingly, regulatory liability does not necessarily weigh in favor of settling a private lawsuit, as demonstrated by our example above.

- **The administrative record matters.** A regulated site can generate a voluminous administrative record. The record may contain admissions by the regulated party, findings and conclusions by the regulator, and other evidence that could impact the case, such as analyses of fate and transport of contaminants and risk assessments. Counsel involved in long-term remediation should be cognizant of what is included in the record and should be mindful of admissions and other statements that could negatively impact ongoing or future litigation.

- **Regulatory defenses may bar or limit private-party claims.** Some regulatory schemes include defenses to private suits. For example, CERCLA section 113(h) withdraws federal jurisdiction over any “challenges” to CERCLA response actions (with certain exceptions), which may cover certain tort claims. Additional common-law doctrines like administrative preclusion and primary jurisdiction may provide additional defenses. Defendants should carefully evaluate the applicability of any regulatory defenses to private suits.

By following these tips, counsel can assist the client in deciding whether to settle or go to trial.
**Gundy v. U.S.: Will the Supreme Court revitalize the nondelegation doctrine?**

Trish McCubbin

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In *Gundy v. United States*, the petitioner urges the U.S. Supreme Court to strike down under the nondelegation doctrine a statute authorizing the U.S. Attorney General to adopt rules requiring the registration of certain sex offenders because Congress failed to address the “fundamental policy questions” that would be at issue in the Attorney General’s rulemaking. The Court has not used the nondelegation doctrine in more than 80 years to declare a statute unconstitutional. However, in more recent years the Court has developed administrative law principles, most notably with its major rules doctrine, to give little or no deference to agency rules that address significant issues without clear congressional guidance. Now some justices may seek in *Gundy* to revitalize the nondelegation doctrine as a tool to rein in the administrative state by not merely invalidating individual rulemakings but striking down entire statutory provisions as unconstitutional.

**The nondelegation doctrine**

The nondelegation doctrine stems from Article I, Section 1 of the U.S. Constitution and requires Congress to provide an “intelligible principle” to guide an agency’s rulemaking discretion. *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928). Only twice—both times in 1935—has the Supreme Court used the nondelegation doctrine to strike down a statute. Instead, the courts consistently have upheld delegations with minimal guidance from Congress, such as requiring the Federal Communications Commission (FCC) to regulate broadcasting “as public interest, convenience or necessity requires” or the Attorney General to designate controlled substances as “necessary to avoid an imminent hazard to the public safety.” *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943); *Touby v. United States*, 500 U.S. 160 (1991).

In its most recent nondelegation decision, *Whitman v. American Trucking Associations, Inc.*, the Court concluded that the Clean Air Act provided the necessary intelligible principle merely because Congress directed the U.S. Environmental Protection Agency (EPA) to set national air quality standards at the level “requisite to protect the public health.” 531 U.S. 457 (2001). The Court found that the term “requisite” required EPA to set a standard “sufficient, but not more than necessary.”

**The Sex Offender Registration and Notification Act**

In *Gundy*, the petitioner claims that Congress provided no guidance whatsoever—and hence no intelligible principle—when directing the Attorney General to establish rules for the registration
of certain sex offenders under the federal Sex Offender Registration and Notification Act (SORNA). Although Congress established a detailed registration regime for sex offenders convicted after the effective date of SORNA, it specified no details for the registration of offenders convicted before then (called “pre-Act offenders”). Instead, Congress directed the Attorney General to determine whether pre-Act offenders should register at all and, if so, under what conditions.

In his brief, the petitioner argues that the pre-Act offenders provision “does not tell an Attorney General whether, when, or how she should expand the statute to cover pre-Act offenders.” He argues the statute “states no policy objective and lists no criteria or standards for the [agency] to consider.”

The government, by contrast, claims that Congress intended pre-Act offenders to register “to the maximum extent feasible.” The feasibility standard is not expressly stated in SORNA. Rather, the government argues that it stems from (1) Congress’s express goal of establishing a “comprehensive” registration system and (2) Congress’s recognition that registering pre-Act offenders might raise logistical challenges if, for example, all offenders (whether convicted two years or two decades ago) were required to register by the very same deadline. Finally, the government claims the feasibility standard is no less an intelligible principle than the vague congressional language upheld in earlier nondelegation cases.

**Parallels in Gundy to the major rules doctrine**

The petitioner suggests that because SORNA’s delegation to the Attorney General implicates “fundamental policy questions,” the nondelegation doctrine should be applied more forcefully than in prior cases, and Congress must provide particularly clear agency guidance. The petitioner argues that two issues about the registration of pre-Act offenders are “fundamental” or “significant.” The first is SORNA’s potentially retroactive imposition of criminal liability. The second is federalism and the interplay between sex offenders convicted under state law and the federal registration requirement.

The petitioner’s emphasis on the “fundamental” or “significant” issues in the constitutional challenge to SORNA has implications for the major rules doctrine of administrative law, which gives little or no deference to agency rules that address significant issues without direction from Congress. As the Supreme Court wrote in *Utility Air Regulatory Group v. EPA* when it invalidated certain greenhouse gas regulations, we “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.” 134 S. Ct. 2427 (2014). Likewise, the D.C. Circuit’s Judge Brett Kavanaugh observed, when criticizing the FCC’s net neutrality rule, that in “a series of important cases over the last 25 years, the Supreme Court has required clear congressional authorization for major agency rules of this kind.” *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).
In short, the major rules doctrine demands that Congress—rather than agencies—set the important policies of the nation. Just as the major rules doctrine reflects the Court’s increasing concern about unbridled agency authority, some justices may use Gundy to reinvigorate the nondelegation doctrine to address that same concern. After all, at least four justices voted to hear the case even though there was no circuit split and all 11 appeals courts had concluded that SORNA complied with the nondelegation doctrine.

If the Court demands clear guidance from Congress because of “fundamental” or “significant” issues at stake in SORNA, the decision could open many environmental, energy, and natural resources statutes to nondelegation challenges.

Justice Kennedy: Takings in the balance

Nancie G. Marzulla

Nancie G. Marzulla is an attorney in Washington, D.C. whose practice focuses on Fifth Amendment takings cases, property rights, and environmental claims. She has participated in virtually all of the landmark takings claims in the Supreme Court.

During his three decades on the Supreme Court, Justice Kennedy often provided the crucial swing vote in the Court’s major Fifth Amendment takings decisions. Justice Kennedy thus played a pivotal role in developing modern takings law.

Emergence of modern takings law

When Justice Kennedy joined the Supreme Court in 1988, the Court had only begun to grapple with the takings implications of federal regulatory schemes on private property. At that time, the test was quite rudimentary for determining when the Fifth Amendment’s requirement that “nor shall private property be taken, without just compensation,” applied and it gave little guidance to trial courts. Under the leading cases of Pennsylvania Coal Company v. Mahon and Penn Central Transportation v. New York City, judges were told simply to look at the totality of the circumstances to determine if a regulation had “gone too far” and thus violated the Fifth Amendment’s Takings Clause.

Soon after Kennedy joined the Court, however, takings jurisprudence began to take on more definite contours as the Court started to draw lines that the lower courts could apply with greater certainty. In the landmark case of Lucas v. South Carolina Coastal Council, for instance, Justice Kennedy joined Justice Scalia’s majority opinion in which the Court announced a newly formulated per se taking rule. In Lucas, the Court held that if a regulation took all the
economically beneficial and productive use of land, that action would be recognized as a taking without regard to other factors.

A majority vote

During his tenure on the Court, Justice Kennedy voted with the majority in 16 key takings cases, including:

- In *Dolan v. City of Tigard*, Kennedy joined in the 5–4 majority holding that a local government’s permit conditions imposed on private property must be “roughly proportional” to the public burdens created by the proposed land use.
- In *Phillips v. Washington Legal Foundation*, he supported the Court’s 5–4 holding that the public’s use of interest earned on lawyer trust funds violated the Just Compensation Clause.
- In *Koontz v. St. Johns River Management District*, Kennedy agreed with the 5–4 holding that the government may not conditionally approve land-use permits unless the conditions are connected to the proposed land use, and disproportional conditions can be challenged even if the permit had not yet been granted.
- In *Kelo v. City of New London*, he joined the 5–4 majority holding that condemnation of a private property for private economic development as defined in the city’s economic development plan qualified as a “public use” within the meaning of the Fifth Amendment.
- In the 5–4 majority decision in *Horne v. Department of Agriculture*, Kennedy joined in the holding that the U.S. Department of Agriculture’s regulation imposing a reserve requirement on the sale of raisins constituted a *per se* taking because it could not be fairly characterized as a voluntary exchange for a governmental benefit.

Kennedy’s take on takings

In the decisions he authored, Justice Kennedy further revealed himself as a vigorous advocate for Fifth Amendment protections. In *City of Monterey v. Del Monte Dunes*, Kennedy wrote the majority decision holding that takings plaintiffs were entitled to a jury trial on the just compensation issue in a challenge brought under 42 U.S.C. § 1983 (deprivation of constitutional rights under color of state law). He explained that the right to jury trial under the Seventh Amendment attached when the remedy was legal in nature. And the Justice concluded that just compensation is a legal remedy because in a taking case, “the question is what has the owner lost, not what has the taker gained.”

In *Palazzolo v. Rhode Island*, a wetland taking case, joined by four other justices, Kennedy held that the Rhode Island Supreme Court had erred in holding that Palazzolo could not challenge the regulation as a taking because he acquired title to the land with notice of the regulations.
Rejecting what he described Rhode Island’s “sweeping rule” barring later purchasers from challenging land-use restrictions as a taking, Kennedy wrote:

> Were the Court to accept that rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

In Kennedy’s final taking case on the Court, *Murr v. Wisconsin*, the Court addressed the nettlesome problem that had stumped courts for years—how to determine the denominator or relevant parcel in a taking analysis. In *Murr*, the plaintiffs owned contiguous lots, one of which they planned to sell and use the proceeds to develop the other. In analyzing both lots as a single parcel for takings analysis, and holding that the Murrs had not suffered a taking, Kennedy summed up his core belief about the Fifth Amendment and its role in balancing public burdens against private harms:

> Like the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. See *Arkansas Game and Fish Comm’n v. United States*, 568 U.S. 23, 31, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012). Courts must instead define the parcel in a manner that reflects reasonable expectations about the property. Courts must strive for consistency with the central purpose of the Takings Clause: to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong*, 364 U.S. at 49, 80 S. Ct. 1563. Treating the lot in question as a single parcel is legitimate for purposes of this takings inquiry, and this supports the conclusion that no regulatory taking occurred here.

**Conclusion**

Supreme Court nominees have a way of charting their own courses once they take their seats on the Court. Justice Kennedy was not, at the time of his appointment, perceived as the key swing vote on Fifth Amendment just compensation cases (nor on other key issues for that matter). The person who replaces him may or may not be influential on takings issues—and any one of the nine could turn out to be the new swing vote.
In Brief

John R. Jacus

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Breach of contract


The U.S. Court of Appeals for the Federal Circuit affirmed an award of damages by the U.S. Court of Claims to a group of oil companies for a breach of contract by the United States with respect to their World War II-era production of aviation gasoline or “avgas” fuel for the war effort. The Federal Circuit had previously ruled that the United States did breach its contract with the appellant oil companies, which had agreed to work around the clock to provide the fuel for U.S. armed forces aircraft. The claims at issue were based on contracts entered in 1942 and 1943 for the production of avgas, which resulted in large volumes of acid sludge waste being generated at the appellants’ refinery sites. The United States argued that the Court of Claims had wrongly awarded damages, but the Federal Circuit disagreed, finding that appellants had proffered unrebutted evidence showing damages incurred by them as a result of the breach. The appellate court also held that the amount of acid sludge and other wastes attributed to the contracts in question was properly determined by the court below.

CERCLA


The U.S. District Court for the District of Idaho held that plaintiff Asarco, LLC, had previously released its right to seek contribution with respect to the Bunker Hill Superfund Site in connection with Asarco’s prior bankruptcy settlement with defendant Union Pacific Railroad Co. The court held in the alternative that even if Asarco hadn’t released its right to contribution, it had failed to prove it paid more than its proportionate share of liability and, therefore, could not assert a right to contribution from Union Pacific. Asarco had filed for bankruptcy in 2005 in the Southern District of Texas. Asarco first settled with the United States for $483 million in response costs and natural resource damages. The bankruptcy court also approved a settlement between Asarco and Union Pacific resolving proofs of claim and past response costs, and reserving claims for future costs by Union Pacific. As part of that bankruptcy settlement, the parties also agreed to release claims against one another. The instant case was subsequently filed by Asarco in 2012 seeking contribution under section 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Asarco contended it had paid substantially more than its allocated share from the settlement with the United States.
Asarco also maintained that the release of claims it gave to Union Pacific in their bankruptcy settlement only applied to proofs of claim, but the court did not agree. The court took note of the lack of factual support for Asarco’s claim that it had overpaid and its attempted inclusion of late payment interest in the payment amount claimed by Asarco.


Exxon Mobil Corp. (Exxon) brought suit in two separate actions against the United States under CERCLA section 113(f) in contribution, after incurring costs for the cleanup of contamination at two of its refinery sites, located in Baytown, Texas, and Baton Rouge, Louisiana. After finding both parties liable under CERCLA in a prior opinion, the U.S. States District Court for the Southern District of Texas focused in this phase of the trial on the recoverability of costs claimed and certain aspects of the allocation of costs between the parties. These contribution claims were based upon the United States having contracted with predecessors of Exxon at the two refinery sites for the production of fuels and other petroleum products needed by the military. The United States challenged whether costs incurred by Exxon in connection with a Resource Conservation and Recovery Act (RCRA) Facilities Investigation of one of the refineries’ RCRA activities constituted necessary costs of response under CERCLA. Exxon argued that such RCRA-related costs were necessary and resulted in a more cost-effective and efficient cleanup. The court agreed with Exxon, finding that at least some of the RCRA-related costs were recoverable, while deferring the identification of those cleanup costs attributable to wartime-related production to a subsequent phase of trial. The United States also challenged whether the actions taken by Exxon at the two sites were remedial actions subject to a three-year statute of limitations or removal actions that were still ongoing and not subject to a limitations period, as was argued by Exxon. The court again agreed with Exxon, since it had not yet achieved any comprehensive or permanent remedy at the sites on a facility-wide basis and no record of decision had been issued for either site. Finally, on the issue of allocation, the United States advocated for a temporal allocation of wartime-related control by the government, but the court held that production-based allocation would be more equitable, since it reflected the variation between wartime production and non-wartime production and was supported by other CERCLA allocation decisions.

**Clean Water Act**


Plaintiff environmental nongovernmental organizations (NGOs) filed suit in the U.S. District Court for the Central District of California over the U.S. Environmental Protection Agency’s (EPA’s) denial of their petitions seeking to require the issuance of Clean Water Act section 402 permits for various industrial sources of stormwater discharges that were contributing to violations of state water quality standards in the Dominguez and Los Cerritos Channels. EPA had previously determined that stormwater pollution entering both channels contributed to violations of California’s state water quality standards but declined to require National Pollutant
Discharge Elimination System (NPDES) permits to regulate the facilities that discharge to stormwater entering the channels. The NGOs petitioned EPA to require NPDES permits for industrial and commercial dischargers to both streams, but in October 2016 the agency denied plaintiffs’ petitions primarily on the ground that other federal, state, or local programs were sufficient to address the issue. The district court agreed with the NGOs, noting that the Clean Water Act expressly requires EPA to regulate stormwater discharges through the issuance of section 402 permits if the discharges are contributing to violations of state water quality standards. Additionally, the court agreed that reliance on other federal, state, or local programs to regulate such discharges was improper because it was contrary to the specific language of the statute. Because EPA’s decision was based in part on this improper factor, the court held that its decision not to regulate was arbitrary and capricious. The court granted plaintiffs’ motion for summary judgment and ordered EPA to require permits for the stormwater dischargers at issue or to enforce the Clean Water Act to prevent such discharges from continuing.


Plaintiff environmental NGOs brought suit against EPA and the U.S. Army Corps of Engineers alleging that a rule suspending the effectiveness of the 2015 Clean Water Rule (WOTUS Rule) violated the Administrative Procedure Act (APA). On February 6, 2018, EPA published a rule suspending the effect of the WOTUS Rule until 2020 (the “Suspension Rule”) in the *Federal Register*. The plaintiffs filed this action on the same day the Suspension Rule went into effect, alleging a violation of the APA due to inadequate public notice and comment, a failure to consider the substantive implications of suspending the WOTUS Rule until 2020, and the failure to restore the prior rule concerning jurisdictional waters of the United States during the suspension period. Concerning the Suspension Rule’s narrow opportunity for comment, the district court noted that when an agency refuses to consider comments on a rule’s substance and merits in issuing a suspension rule the content restriction is “so severe in scope” that “by preventing any discussion of the ‘substance or merits’ of either set of regulations” the opportunity for comment “cannot be said to have been a ‘a meaningful opportunity,’” citing *North Carolina Growers’ Ass’n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012). The defendant agencies tried to distinguish other unsuccessful attempts to suspend all or parts of previously enacted regulations by the current administration on the ground that some narrow rulemaking and attendant notice and comment had been afforded, but the court was not persuaded, stating that “[a]n illusory opportunity to comment is no opportunity at all.” Thus, the court found the agencies were arbitrary and capricious in promulgating the Suspension Rule. Concerning the scope of injunctive relief, defendant agencies argued that the court should not issue a nationwide injunction, but the court could identify no principled reason why the Suspension Rule should be enjoined in some states but not others, and enjoined the Suspension rule nationwide.
Climate change and GHG litigation


Plaintiff New York City (City) sued defendant multinational oil companies for damages from rising sea levels allegedly caused by greenhouse gases emitted through use of fossil fuels produced and marketed by defendants. The City alleged tort claims of public nuisance, private nuisance, and trespass, and sought compensatory damages for past and future costs to protect infrastructure and the public from the impacts of climate change within the City. The defendants moved to dismiss the claims as arising under federal common law and therefore being displaced by the federal Clean Air Act, among other grounds. The court first found that the City’s claims are governed by federal common law, since the international nature of the controversy makes it inappropriate for state law to control, and the City’s allegations of global dispersion of greenhouse gases (GHGs) from use of defendants’ fossil fuels are exactly the type of “transboundary pollution suit” to which federal common law should apply, citing Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 855–58 (9th Cir. 2012) (Kivalina). The court then turned to whether the federal Clean Air Act displaces the City’s federal common law tort claims, as was held in Kivalina and American Electric Power Co. v. Connecticut, 564 U.S. 410, 131 S. Ct. 2527 (2011) (AEP). Because Congress has expressly delegated to EPA the determination as to what constitutes a reasonable amount of GHG emissions under the Clean Air Act, that statute displaces the City’s claims seeking damages for past and future domestic GHG emissions brought under federal common law. The City argued that because the Clean Air Act “does not regulate the production and sale of fossil fuels,” its claims are not displaced; however, the court disagreed, noting that the City alleged damages from the use of fossil fuels, not from their production and sale. The court also held that state law tort claims were not available to the City given the interstate nature of its claims. Finally, the court considered the City’s claims for damages arising from nondomestic emissions of GHGs from the use of defendants’ fossil fuels, since the Clean Air Act displacement of the City’s claims would be limited to the statute’s domestic scope of regulatory authority. Such nondomestic-emissions-based claims, though not displaced by the Clean Air Act, were nonetheless barred by the presumption against extraterritoriality and the need for judicial caution regarding serious foreign policy consequences. Accordingly, the motion to dismiss was granted and the City’s amended complaint was dismissed with prejudice in its entirety.


In a split decision, the U.S. Court of Appeals for the Ninth Circuit rejected a challenge to Oregon’s low-carbon fuel standards by energy industry trade associations alleging the Oregon Clean Fuels Program unconstitutionally discriminated against out-of-state fuels. The industry trade associations had argued the program violates the Commerce Clause of the U.S. Constitution by unfairly favoring in-state fuel sources under the guise of providing an economic advantage to fuels that emit less CO2-equivalent greenhouse gases. The appellant trade associations had appealed the dismissal of their original suit filed in the U.S. District Court for the District of Oregon, which held the program was neither discriminatory nor violative of
federal law. The majority opinion found that even though the program labeled fuels by state of origin, that did not make the program impermissibly discriminatory, since the economic incentives provided are not tied to state of origin. Appellants also argued that the program violated the Commerce Clause by attempting to control commerce in fuels occurring wholly outside Oregon’s borders, but the court disagreed, noting that this issue had been raised unsuccessfully with respect to California’s similar program, which the court had found to be legal. The dissenting opinion raised concerns about the possibly discriminatory effect of the program’s credit-generating scheme, whereby in-state fuel producers can avoid buying credits, which disfavors out-of-state producers.

RCRA


Environmental NGOs and industry associations brought separate suits challenging certain provisions of EPA’s 2015 Final Rule regulating the disposal of coal combustion residuals such as fly ash and bottom ash produced by coal-fired power plants. The Final Rule was promulgated under RCRA to establish criteria designed to ensure that human health and the environment are protected from coal residuals being released from impoundments being used by the industry. On cross motions for summary judgment, the court of appeals first turned to the issue of unlined impoundments, which the Final Rule did not require be closed. The court found such a failure to regulate so-called legacy ponds to be arbitrary and capricious given EPA’s own data in the record showing they are prone to leaking. The Final Rule’s approach of relying on leak detection followed by closure was held to be arbitrary and contrary to RCRA, as that approach does not address the identified health and environmental harms documented in the record. The court also held that EPA acted arbitrarily and capriciously and contrary to RCRA in classifying so-called “clay-lined” impoundments as lined, providing that EPA did not explain how the Rule’s contemplated detection and response could assure “no reasonable probability of adverse effects to health or the environment,” and characterizing clay liners as nothing more than compacted soil. With respect to the Final Rule’s exemption of inactive impoundments from regulation, the court ruled in favor of environmental petitioners, finding that EPA failed to articulate a rational explanation for their dissimilar treatment and, therefore, rejected the legacy pond exemption as arbitrary and capricious. The court summarily rejected industry petitioners’ contentions that inactive ponds were not subject to regulation under RCRA and characterized them as open dumps prohibited under the Act. Finally, the court found the Final Rule’s alternative closure procedure to not be arbitrary and capricious, as asserted by industry petitioners, since RCRA did not qualify the prohibition on open dumps by requiring the consideration of costs to comply. The court vacated and remanded the inactive impoundment, unlined impoundment, and clay-lined impoundment provisions for further rulemaking.
Standing: State wetlands mitigation


Appellant Bluefield Ranch Mitigation Bank Trust (Bluefield) had petitioned the South Florida Water Management District (SFWMD) for a hearing on the issue of whether the Florida Department of Transportation (FDOT) had properly satisfied applicable statutory criteria for mitigation of wetlands impacts associated with the widening of the Beeline Highway near Lake Okeechobee. FDOT had purchased a certain number of mitigation credits for the project from Bluefield, located in the same watershed area, and had also purchased a number of credits from the Dupuis Management Area (Dupuis), not located in the area. SFWMD dismissed Bluefield’s petition for lack of standing, holding that Bluefield’s interests were purely economic and, therefore, insufficient for standing to challenge the purchase of credits from Dupuis. On appeal to the Fourth District Court of Appeal, the court reversed the SFWMD’s dismissal of Bluefield, finding that the harm to wetlands alleged in Bluefield’s petition met the injury-in-fact requirement for standing and that Bluefield has a substantial interest in ensuring FDOT’s compliance with mitigation requirements that is not purely economic. The court went on to observe that if any entity could challenge FDOT’s allegedly unlawful mitigation, it would be a permitted mitigation bank in the watershed, such as Bluefield. The case was remanded to SFWMD for a hearing on the merits.

Views from the Chair
Amy L. Edwards

*Amy L. Edwards* became the Section of Environment, Energy, and Resources’ 92nd chair during the Section’s annual business meeting in August 2018. A long-time Section member, Edwards has previously served as education officer, Council member, 21st Fall Conference planning chair, and chair of the Environmental Transactions and Brownfields Committee. She is a partner with Holland & Knight LLP in Washington, D.C.

When you read this column, we will have concluded our successful 26th Section Fall Conference in San Diego. We hope that you were able to hear the remarks of our keynote speakers Jeff Wood, Jonathan Brightbill, and Matt Leopold; to learn from our many timely and instructive panels; and to reflect on the accomplishments of our Section awardees. We also hope that you participated in our networking events and Leadership Day. Many thanks to Juge Gregg and his planning committee for a great conference! (Remember to mark your calendars now for the 37th Water Law Conference to be held March 26–27, 2019, in Denver, and the 48th Spring Conference to be held March 27–29, 2019, in Denver.)
The theme of the next few months will be that “the times, they are a-changing.” You may have noticed that the ABA website at www.americanbar.org now offers a new look and features. The new site should provide members with easier access to information, better search functionality, and a more mobile-friendly format.

You will also be hearing about the ABA’s New Membership Model (NMM). We want to be sure that you understand what this is and what it means for you. The ABA NMM is a new dues structure that was approved by the ABA House of Delegates (HOD) on August 6, 2018, in Resolution 177. There will be five dues categories:

- $75 for new bar admittees, paralegals, and lawyers in their first 4 years of practice;
- $150 for solo practitioners, retirees, government attorneys, non-profit attorneys, small firm lawyers, judges, lawyers in practice 5–9 years, international lawyers, and affiliated professionals;
- $250 for lawyers who have been practicing 10–14 years;
- $350 for lawyers who have been practicing 15–19 years; and
- $450 for lawyers who have been practicing at least 20 years.

These new dues will go into effect in the 2019–2020 ABA bar year.

The ABA is currently offering a significant new member discount to qualifying non-member judges, lawyers, and associates. This offer is for 50 percent off full membership dues and one free Section membership for the membership year ending August 31, 2019. This offer is not valid if you were a member during the 2017–2018 membership year. Contact our membership officer, Jeff Dennis, at jdennis@aei.net, if you know anyone who would be eligible and interested. Alternatively, encourage anyone who might be eligible to visit ambar.org/discount19 and apply the discount code DISCOUNTABA19 at checkout or call the ABA Member Service Center at 800-285-2221 and mention the discount code. This is a great opportunity!

In addition, the ABA will be increasing member benefits by offering more free CLE webinars and other e-content that are curated to meet the interests of ABA members. Think Amazon and how it directs you to related products once you have bought one type of offering. E-content includes articles, journals, newsletters, scholarly papers, reports, case summaries, outlines/checklists, podcasts/blogs, short videos, breaking legal news, and updates on legal and policy issues. The Section’s leadership has been thinking about its e-content creatively.

You are probably already familiar with some of our e-content available at www.americanbar.org/environ/: issues of Natural Resources & Environment and Trends, committee newsletters, and annual editions of The Year in Review. But do you know that we have curated webpages on topics including Waters of the United States and Toxic Substances Control Act reform, podcasts, short videos, and conferences papers? And this year, Section committees will begin publishing individual “newsletter-type” articles on a rolling basis to bring information to you more quickly than they had done in the past with traditional newsletters. We
encourage every Section member to contribute e-content to the Section on a regular basis. Please consider posting on SEER Connect, our Section’s new interactive online web platform, your case summaries, short articles, checklists, and white papers and send us (via your committee(s) or the Section’s content convergence coordinators, Rich Ericsson and Stephen Smithson) suggestions for topics for CLE webinars, podcasts, and the like. Let’s “strut our stuff” and show other ABA members (and non-members) why we are the premier forum on environmental, energy, and resource law!

If you are interested in developing or providing content for the Section, a great place to start is with the Section’s substantive committees. Please contact the chair or appropriate vice chair of the relevant committee with your article, case summary, proposal, or offer to help. You can also watch the monthly “Section Source” email for calls for article proposals for *Natural Resources & Environment* or propose an article to the editor-in-chief of *Trends*. And, as always, please let me know if I can help you become involved in Section activities!

In addition to our Section’s e-content, beginning in September 2019, as an ABA member you will have access to a new ABA-wide online Content Library. With offerings from entities throughout the ABA, new content will be added regularly to the library to help keep you current. And you will have the opportunity to explore other ABA sections, divisions, and forums. Each month you will have access to several items of “members-only” e-content from entities of which you are not currently a member.

In conclusion, “the times, they are a-changing,” and we need to be changing with them. I trust that you will be with us in these changing times. Let’s show the world why we are the premier forum on environmental, energy, and resource law! But we need your regular and timely contributions of quality e-content to do so. It will take only a few minutes of your time.

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**People on the Move**

James R. Arnold

*Jim Arnold* is the principal in *The Arnold Law Practice in San Francisco* and is a contributing editor to *Trends*. Information about Section members’ moves and activities can be sent to Jim’s attention, care of ellen.rothstein@americanbar.org.

Meaghan A. Colligan has joined Holland & Knight LLP in the firm’s Washington, D.C., office, and will also support the firm’s New York City office. Prior to joining Holland & Knight, Colligan practiced with Knauf Shaw LLP throughout the state of New York. She holds a joint JD/MS from Pace University School of Law and Bard College. Colligan focuses her practice on brownfields cleanup transactions and compliance, environmental due diligence, environmental litigation, permitting, and regulatory compliance for a broad array of clients. She also has

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experience with land use, municipal, real estate, corporate, and energy law. Colligan is a vice chair for Marketing and Communications and for Social Media for the Section’s Environmental Transactions and Brownfields Committee and is a member of the Section’s Web Board.

Lucy K. Infeld has joined Beveridge & Diamond PC in the firm’s Seattle office, from the Mentor Law Group in Seattle. Infeld’s experience includes assisting clients in court litigation and administrative hearings with regulatory agencies. She has represented and counseled clients regarding water rights, the federal and state hazardous substances laws, the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, and the Washington State environmental policy and growth management acts.

Bob Martineau has joined the real estate development company LHP Capital as president of the company’s subsidiary LHP Management. Martineau will manage the operations of LHP Management’s properties, which includes almost 60 affordable housing developments with 6,000 units in seven states. For the past seven years, he had served as the Tennessee Commissioner of the Department of Environment and Conservation. As the state’s head of environmental protection, state parks, and energy agency, Martineau managed a staff of 2,500 people, with a budget of $370 million. He has also served as president in 2014–2015 of the Environmental Council of States. Before joining state government, Martineau was a partner in the Waller Lansden Dortch and Davis LLP firm in Nashville.