1. ***Estate of Robbins v. Chebeague and Cumberland Land Trust*****,** --- A.3d --- 2017 WL 370891, 2017 ME 17(Supreme Judicial Ct. of Me., Jan. 27th, 2017) (JJ)
2. ***Eddy v. Coastal Resources Management Council (CRMC)***, No. PC-2013-1213, 2016 WL 5866016 (R.I.Super.) (Oct. 3, 2016) (JJ)
3. ***City of San Diego v. Caryon Properties LLC***, No. D065915, 2015 WL 5097136 (Cal. Ct. App. 4th Dist., Div. 1, Aug. 31, 2015) (AB) (together with ***United States v. 1.57 Acres of Land***, No. 12cv3055-LAB (S.D. Cal. Sept. 8, 2015); (S.D. Cal. Jan. 11, 2016) (AB)
4. ***Cty. of Santa Barbara v. Double H Properties, LLC***, No. B264223, 2016 Cal. App. Unpub. LEXIS 1869 (Cal. App. 2nd Dist. Div. 6 March 15, 2016) (AB)
5. ***Crain v. Hardin Cty. Water Dist. No. 2***, Court of Appeals of Kentucky, No. 2015-CA-000499-MR, 2016 Ky. App. Unpub. LEXIS 416 (Ct. App. Ky. June 17, 2016) (JJ)
6. ***Telzrow v. US***, US Court of Federal Claims, No. 15-1359C, May 26, 2016 (JJ)
7. ***Benson v. Russell's Cuthand Creek Ranch***, Ltd., No. 5:14-cv-161-JRG, 2016 U.S. Dist. LEXIS 58810 (E.D. Texas, Texarkana Div. May 3, 2016) (AB)
8. ***Ecotone Farm LLC v. Ward (Ecotone IV decision)***, U.S. Dist. Court, D. New Jersey, Civ. No. 2:11-5094, November 21, 2016. (AB)
9. ***Spanish Lake Restoration, LLC v. Petrodome St. Gabriel II***, LLC, No. 2015–CA–0451, --- So.3d --- (La. App. 4th Cir., Jan. 13, 2016) (JJ)
10. ***Columbus, Georgia, Board of Tax Assessors v. The Nature Conservancy***, No. SU14-CV-3634-08 (Super. Ct. Muscogee Cty. March 30, 2016) (JJ)
11. ***Town of Silverthorne v. Lutz***, 2016 COA 17, --- P.3 --- (Ct. App. Colo. Feb. 11, 2016) (AB)
12. ***King v. Newman***, No. 2015CV30066 (Dist. Ct. Colo. Montrose Cty. Dec. 1, 2016) (AB)
13. ***Beeson v. Beeson***, 2015 IL App (2d) 150158-U (App. Ct. Ill. 2nd Dist. Dec. 11, 2015) (JJ)

[All CASE SUMMARIES ADAPTED FROM LTA CASE-LAW UPDATES AND SUMMARIES]

(1) Maine Supreme Court determines no neighbor standing in conservation easement case
Estate of Merrill P. Robbins v. Chebeague & Cumberland Land Trust No. CUMSCCV-14-523 (Me. Super. Ct., Cum. Cnty. May 5, 2015); --- A.3d ----2017 WL 370891, 2017 ME 17(Supreme Judicial Ct. of Me., Jan. 27th, 2017).
Facts/Issues: In 1997, Marion Payson donated a conservation easement on 100 acres of coastal land in the Town of Cumberland (the Town) to the Chebeague & Cumberland Land Trust (CCLT). The easement allowed for 10 building lots. In June 2014, the Payson heirs agreed to sell the bulk of the protected property to a developer, and the family retained only a two-acre parcel. Between the execution of the purchase and sale contract and the closing, the developer (unbeknownst to the Payson family) sold the Town a 25-acre portion of the protected property for $3 million. The Town proceeded to develop a beachfront park, including paving an existing dirt access road and grading a parking area and adding portable toilets and a pier. Cumberland voters narrowly approved the beach park purchase in November 2014. CCLT informed the Town that it had determined that the Town's plans were permitted under the conservation easement.

The Payson family objected to the sale to the Town and filed suit against CCLT and the Town, claiming that the park improvements would violate the conservation easement. The Town and CCLT filed motions to dismiss, contending that the Payson Estate (the Estate) had no standing because it owned only the two-acre parcel, which was separate from the beach park parcel. At issue on the motions to dismiss was whether a landowner can bring an action to enforce the conservation easement as it pertains to another landowner under the same easement (i.e., a broad standing application). Or, in fact, does a landowner have standing only with respect to her specific portion of the protected property (i.e., a narrow standing application)? The trial court held in favor of the narrow application and dismissed all claims against the Town and CCLT; the Estate appealed.
Holding: The Maine Supreme Judicial Court affirmed, holding that a landowner of one geographic portion of a conservation easement protected property does not have standing to enforce that easement as

it pertains to a separate area of the protected property owned by another person. The court found that the phrase "owner of an interest in the real property burdened by the easement" was ambiguous, as it could mean either the broad or the narrow standing application. The court went on to conclude that the underlying policy and legislative intent of the Maine conservation easement enabling statute supports the narrow reading. The Supreme Judicial Court, Saufley, C.J., held that the landowner lacked standing to bring a lawsuit seeking the enforcement of the easement on other land that, although burdened by the same conservation easement, was not owned by that landowner and in which the landowner had no other legal interest. Affirmed in part, vacated in part, and remanded. Alexander and Jabar, JJ., filed a dissenting opinion.

Notes/Analysis: The Maine Supreme Court has issued an important opinion that sharply circumscribes who has standing to enforce conservation easements in Maine. Although the specific holding concerns a relatively rare situation, the broader and more significant implication of the opinion is to confirm that Maine's conservation easement enabling act does not confer standing on neighbors or the public at large. The court likened the Payson heirs' attempt to enforce the easement to a private attorney general action. And because Maine's enabling statute was amended in 2007 to allow for only limited standing by the Maine Attorney General, the court concluded that the Maine Legislature did not intend to allow for expanded standing by members of the public acting as private attorneys general. Maine's statute expressly grants the Maine Attorney General limited standing to initiate and intervene in conservation easement suits. Second, Maine's statute does not grant standing to "a person authorized by other law." In fact, the trial court rejected standing on a "special interest" theory precisely because of this omission. The omitted language arguably allows the owner of a portion of an easement-protected property such standing on a "special interest" or "intended beneficiary" common law theory. In the only case that is directly on point, a Connecticut trial court judge in *McEvoy v. Palumbo*, 52 Conn. L. Rptr. 745 (Conn. Super. Ct. Nov. 16, 2011) also applied the narrow standing approach.

Queries: What are the rights of a neighbor under a common easement to have input about what happens to the land they do not own? To object if they disagree with how the land trust interprets or enforces the easement as applied to land they do not own? These questions are at the forefront of easement practice today. Few easement drafters specify that each subdivision is treated as a separate easement and the owners have no rights of enforcement as to their neighbor's land. It makes sense for easement holders but there are those who disagree. If the easement is silent on this issue, it is a matter of state law, in particular the easement enabling statute.

(2) Conservation easement inspections not "fruits of a poisonous tree"

Eddy v. Coastal Resources Management Council (CRMC), No. PC-2013-1213, 2016 WL 5866016 (R.I.Super.) (Oct. 3, 2016). [case active]

Facts/Issues: In 1997, the Coastal Resources Management Council (CRMC) — an administrative agency in that state that holds conservation easements in order to preserve coastal shoreline, approved a 46-unit subdivision in the City of East Providence. One of the conditions of approval was the conveyance of a conservation easement along a 100-foot wide buffer zone to CRMC and the City. As with any conservation easement, CRMC was granted the right as holder to enter upon the protected property for monitoring and inspection purposes. Michael Eddy purchased a residential lot in the subdivision in 2001, and two years later the CRMC found that Eddy had violated the conservation easement. Then in 2011, CRMC found two more violations, after visiting the buffer zone by accessing it from an abutting parcel. CRMC alleged that Eddy had turned the buffer zone into a lawn and had installed a dock. These violations resulted in orders to remove the structures and restore the vegetation, as well as the assessment of $5,000 in fines. Eddy was dismayed to learn that CRMC had entered onto the protected property allegedly without his consent or knowledge. During the administrative appeal and before the trial court upon further appeal, Eddy claimed that CRMC had exceeded its constitutional and statutory authority when its employees entered the protected property to conduct an inspection without first obtaining a warrant. Thus, Eddy sought to apply the "exclusionary rule" to have all of the evidence acquired from CMRC's investigation excluded from CMRC's consideration at the hearing as fruit of the poisonous tree.

Holding: Following federal and Rhode Island case law, the court declined to apply the exclusionary rule to an administrative proceeding that was fundamentally different from a criminal proceeding. Furthermore, the court held that Eddy's 2003 and 2005 applications to construct improvements within the buffer zone included consent for CMRC to access the property at all times thereafter to ensure compliance. Next, the court noted that the conservation easement itself conveyed an express right of access to CMRC. And the court found that the violations were easily visible from public waters and neighboring properties, thus triggering the "plain view" exception to any warrant requirement. Finally, the court held that CMRC had put forth sufficient evidence to demonstrate that the mowing and the dock violated the conservation easement. The court affirmed the findings of the CRMC that the landowners had violated a conservation easement by constructing a dock and clearing vegetation.
Notes/Analysis: CRMC discovered the violations in an inspection of the property, via the neighboring property. Much of the evidence used to prove the violations was obtained through the inspection. The landowners challenged the CRMC's finding in court on the ground that the evidence was obtained in violation of their constitutional protections against unlawful searches. The court rejected the landowners' attempts to apply the criminal-law doctrine requiring the suppression of illegally obtained evidence to civil actions, such as the CRMC's enforcement of the easement at issue. The court also held that even if this doctrine was applicable, the CRMC's inspection was not unconstitutional and the evidence obtained during it would not be suppressed because the landowners had consented to the inspection under the easement and under a consent order that the landowners previously signed. Furthermore, suppression would not be required because the violations were in open sight or "plain view" from the neighboring property, to which the CRMC accessed lawfully.

There have been a couple cases where landowners have sought to bar conservation easement holders from accessing the protected property for monitoring and inspection purposes, but this is the first case where a landowner has sought to apply the exclusionary rule to bar evidence of a violation. Fortunately, the court soundly rejected this aggressive argument. Land trusts and other easement holders should not be intimidated if a landowner claims that monitoring is unconstitutional or illegal.

(3) City condemns own open space and flowage easement and shorts value

City of San Diego v. Caryon Properties LLC, No. D065915, 2015 WL 5097136 (Cal. Ct. App. 4th Dist., Div. 1, Aug. 31, 2015).
Facts/Issues: The City of San Diego (City) exercised eminent domain along a parcel to widen a road. A portion of the parcel was subject to a narrow linear open space easement and an abutting flowage easement, both presumably held by the City. The flowage easement provided for the natural flowage of waters and prohibited structures, surface alterations and vegetative plantings. Caryon Properties, LLC, owned the subject parcel and challenged the City's eminent domain valuation. At issue was whether it was reasonably likely that the parcel could be rezoned from agricultural and open space to light industrial. The trial court and the appellate court both held that the flowage easement had similar purposes and impacts as an open space easement and thus the probability of rezoning to light industrial was not likely.
Holding: The trial court and the appellate court both held that the flowage easement had similar purposes and impacts as an open space easement and thus the probability of rezoning to light industrial was not likely.
Notes/Analysis: The City was arguing for a robust interpretation of the flowage easement not to protect the parcel but rather to set a lower valuation for its exercise of eminent domain. This case and *United States v. 1.57 Acres of Land* are both examples of condemning authorities arguing for a low or zero valuation to conserved land. The City condemned its own interest in the open space easement and the flowage easement, with no apparent discussion of the environmental consequences.

(3.5) Case against 1.57 acres settles

United States v. 1.57 Acres of Land, No. 12cv3055-LAB (S.D. Cal. Sept. 8, 2015); (S.D. Cal. Jan. 11, 2016).

Facts/Issues: In 2012, the United States filed an action to condemn approximately 1.57 acres of land for the purpose of securing the United States and Mexico border. The condemned area affected a trail easement held by the County of San Diego (the County), and the parties spent two years working to preserve the trail. Unbeknownst to the County, the condemned property was also part of a 90-acre conservation easement that had been granted to the County earlier in 2012 as mitigation for development of a salvage yard. The United States used about 0.43 acres of the condemned property to build a vehicle turnaround. The County alleged that the turnaround will destroy burrowing owl habitat, but the United States contested that claim.

The County did not challenge the condemnation but disagreed with the United States on how to value the 0.43 acres. The fee owner disclaimed any interest in compensation. The United States claimed that the conservation easement had zero value because all value had been extinguished by the easement. The United States further claimed that the County's "public benefit" interest in the easement was not compensable because it was not an "economic" value. The United States filed a motion seeking to exclude any evidence of "non-economic" value, as well as any evidence of the cost of substitute conservation land, taking the position that only the traditional market value must be determined.
Holding: The court granted the motion to exclude any evidence of non-economic value or the cost of substituting the conservation land. On the first issue, the court noted that the County had not demonstrated any intent to claim a non-economic value, but nevertheless prohibited the County from doing so in the remaining proceedings. At the same time, the Court posited in dicta that "the fact that the fee owner was able to obtain economically valuable development rights in exchange for the conservation easement suggests that the conservation easement may have nontrivial economic value." On the second issue, the Court found that the force majeure clause excused the County from obligations under the MSPC and therefore its substitution costs could not be considered in determining just compensation.
Notes/Analysis: The question of how to value a conservation easement in a takings context is of great significance to the land conservation community, and so this case bears watching. What is particularly concerning is the federal government's attempt to declare that the conservation easement has zero value. As the County pointed out in its brief, this conclusion would have a terrible policy impact for it would incentivize the condemnation of conservation easement properties. Thus, the Court's statement in dicta, quoted above, is encouraging. However, the specific issues resolved on this motion are rather tangential, because the County had not sought to value the easement based on anything other than its market value. Furthermore, the decision did not resolve the ultimate question of how much the County must be compensated for the taking. As the Court pointed out, the facts about the quality of the owl habitat are still at issue. The question of how to value a conservation easement in a takings context is of great significance to the land conservation community. What is particularly concerning is the federal government's attempt to declare that the conservation easement has zero value. As the County pointed out in its brief, this conclusion would have a terrible policy impact for it would incentivize the condemnation of conservation easement properties.
March 2016 Update: The County and the United States settled the matter in January 2016, with the United States agreeing to compensate the County $20,000 for the taking. This is a propitious outcome for discouraging future conservation easement condemnation attempts based on a zero value theory.

(4) Tiger Salamander ecosystem services and condemnation
Cty. of Santa Barbara v. Double H Properties, LLC, No. B264223, 2016 Cal. App. Unpub. LEXIS 1869 (Cal. App. 2nd Dist. Div. 6 March 15, 2016).
Facts/Issues: In 2011, the County of Santa Barbara purchased a conservation easement on 16 acres of a 160-acre recreational ranch. The purpose of the easement was to establish wetlands habitat for the endangered California Tiger Salamander, as mitigation for a development project elsewhere. But the property was subsequently foreclosed upon by a mortgagee and the easement was extinguished. So in 2013 the County exercised its power of eminent domain to acquire another easement over the same protected property. The County's appraiser determined a fair market value of $42,000, with no value for severance damages because the easement was not deemed to interfere with the recreational use of the

larger ranch property. Kioren Moss, the landowner's appraiser, found a fair market value of $43,000, but with an additional $133,000 in severance damages. Moss also offered an alternative theory of damages based on the hypothetical value of marketable mitigation credits, which arrived at a valuation of $217,000. The County filed a motion in limine to exclude evidence of this alternative valuation method as too speculative because the property had not been registered to qualify for such credits, and the trial court granted the motion.

Holding(s): The appellate court affirmed the granting of the motion in limine, finding no abuse of discretion by the trial court. The appellate court also agreed with the trial court's holding that the existence of the salamander habitat prior to the eminent domain action was not enough evidence to establish habitat value as the highest and best use of the property. In 2011, the County of Santa Barbara purchased a conservation easement on 16 acres of a 160-acre recreational ranch to establish wetlands habitat for the endangered California Tiger Salamander. A subsequent foreclosure on the ranch extinguished the county's easement rights. In 2013, the County exercised its power of eminent domain to acquire another easement over the same protected property.

Notes/Analysis: In County of Santa Barbara v. Double H Properties a novel use of ecosystem services in an eminent domain case appeared. This case should not be misread as standing for the general notion that ecosystem services or mitigation credits cannot be the basis of valuing conservation easements. Rather, in this case, the County successfully argued that there was indeed a market for mitigation credits, but that the landowner had not taken any steps to register the protected property for that market. Thus, the alternative valuation method was based on the "extraordinary assumption" that it already qualified for such credits. Ultimately, a jury awarded damages of $88,000, including severance damages.

(5) Easement not sufficient to show prior public use; **Kentucky court rules conservation easement did not prohibit condemnation**

Crain v. Hardin Cty. Water Dist. No. 2, Court of Appeals of Kentucky, No. 2015-CA-000499-MR, 2016 Ky. App. Unpub. LEXIS 416 (Ct. App. Ky. June 17, 2016).

Facts/Issues: In 2004, Norman and Mona Crain sold an agricultural conservation easement on their 270-acre farm to the Kentucky Department of Agriculture (KDOA). The Crains conveyed an agricultural conservation easement to the Purchase of Agricultural Conservation Easement Corporation (PACE), which is administratively part of the Kentucky Department of Agriculture that was established to administer and hold title to the agricultural preservation easements (Kentucky Revised Statutes 262.906). The easement was purchased in part with federal funds, and the U.S. Department of Agriculture (USDA) held an executory interest in the easement. Hardin County Water District No. 2 (the District) is pursuing a wastewater project in connection with a large economic development project. The wastewater project requires the installation of sewer lines, one of which the District proposes to run through the Crains' land. To do that, the District proposed to use eminent domain power to take an easement across the Crain property. In 2013, Hardin County (the County) negotiated with Crain to purchase a sewer line easement across a portion of the protected property, but the parties were unable to reach mutually agreeable terms. The County exercised its power of eminent domain.

Neither the KDOA nor the USDA objected to the condemnation, but Crain claimed that the agricultural conservation easement prohibited the taking based, in part, on the prior public use doctrine. This common law doctrine holds that land already devoted to a public use may not be condemned for another public use except by express statutory authorization or by necessary implication.

The Crains challenged the District's right to take the sewer easement. The Crains argued that the condemnation is prohibited by the "prior public use doctrine." As explained by the court, "the doctrine provides that land devoted to a public use may not be taken for another public use under the power of eminent domain."

Holding(s): The appellate court affirmed, noting that the state enabling legislation for agricultural conservation easements expressly allows for sewer lines. The appellate court also rejected the application of the prior public use doctrine, finding that the easement's restriction against certain kinds of uses does not constitute an affirmative public use, even if it serves a valid public purpose. The court said that the

applicability of the doctrine in this case depended on the distinction between public use and public purpose and held that while the easement had a public purpose, it did not create a public use. The court held that the agricultural conservation easement simply granted the right to "restrict certain future development of the property" but did not grant either the commonwealth or the public a right to come onto the Crains' property. This right, while "clearly a public purpose … does not constitute a prior public use."

Notes/Analysis: The question of whether a publicly held conservation easement establishes grounds for the application of the prior public use doctrine is an interesting one that will likely arise in other jurisdictions. The opinion here is unpublished and establishes no precedent in Kentucky or elsewhere. It seems likely that the question would have been a tougher call for the court if the Kentucky Department of Agriculture or the USDA had asserted the application of the doctrine, rather than acceding to the sewer line taking. Another factor influencing a court's decision would be if the easement guaranteed public recreational access, which was not the case here.

The trial court ruled that the conservation easement did not prohibit the sewer line condemnation. The appellate court affirmed, noting that the state enabling legislation for agricultural conservation easements expressly allows for sewer lines. The Court of Appeals of Kentucky found that putting an agricultural conservation easement on property does not necessarily establish public use of that property that would protect it from an eminent domain taking. The appellate court also rejected the application of the prior public use doctrine, finding that the easement's restriction against certain kinds of uses does not constitute an affirmative public use, even if it serves a valid public purpose. Another factor influencing a court's decision would be if the easement guaranteed public recreational access, which was not the case here.

(6) Trial may proceed on U.S. liability for failure to remove mechanic's lien as federal court dismisses attempt to nullify easement for failure to pay contractor

Telzrow v. US, US Court of Federal Claims, No. 15-1359C, May 26, 2016.

Facts/Issues: In 1997, United States Department of Agriculture, acting through the Natural Resources Conservation Service (NRCS) purchased a Wetlands Reserve Program (WRP) conservation easement which allows federal officers and their contractors to enter the land and perform wetlands restoration work, from Nancy Telzrow. The easement granted NRCS the affirmative right, "at its own expense," to undertake wetlands management and restoration activities on Telzrow's 299-acre Illinois farm. This particular easement granted the U.S. "the right to enter unto the easement area to undertake, at its own expense or on a cost share basis with the [l]andowner or other entity, any activities to restore, protect, manage, locate and mark the boundaries, maintain, enhance, and monitor the wetland and other natural values of the easement area." In 2012, NRCS contracted with a business to perform certain wetlands restoration work on the protected property. The U.S. awarded a contract for restoration work on the land to a contractor who did the work using materials purchased on credit from a subcontractor. The government paid the contractor, but he then filed for bankruptcy and never paid his subcontractor, who then obtained a mechanic's lien on the farm. The owners, James Telzrow and Nancy Telzrow, asked NRCS to pay the subcontractor's claim, but it refused. When NRCS refused to pay the subcontractor, claiming it was an innocent third party to the dispute, Telzrow paid the claim in order to remove the cloud on title and then filed suit against NRCS for breach of contract.

The landowners sued, representing themselves, the government in federal court for breach of contract (i.e. the conservation easement), demanding damages. Telzrow attempted to nullify the easement as an invalid contract. The government failed to answer the complaint by the deadline. The landowners moved for the government to lose by default, which the government opposed asking for additional time to respond and moving to dismiss for failure to state a claim. The court allowed the government additional time to respond, but to rule on the government's motion to dismiss, the court had to decide if the landowner had plausibly alleged a breach of contract.

Holding: The Court of Federal Claims denied NRCS's motion to dismiss, holding that Telzrow could bring a breach of contract action. At the same time, the court dismissed the attempt to nullify the easement. The court then had to interpret the contractual language of the conservation easement.
Notes/Analysis: The court emphasized the provision of the easement stating that NRCS would undertake any wetlands restoration work "at its own expense." The court found that the easement language contemplates that restoration work is "undertake[n]" by the United States at its sole option and does not give the landowner any rights or responsibilities in the restoration work, citing a Ninth Circuit decision holding that this form of NRCS deed "nowhere grants [a landowner] the power to veto a conservation plan of which it disapproves." *Big Meadows Grazing Ass'n v. United States ex rel. Veneman*, 344 F.3d 940, 943 n.4 (9th Cir. 2003). The court interpreted Big Meadows to mean that the U.S. "can and does assume sole responsibility to perform and pay for restoration." The court also cited *Big Meadows Grazing Ass'n v. United States ex. rel. Veneman*, 344 F.3d 940 (Ninth Circuit 2003) for the notion that the government assumes unfettered authority to conduct such restoration work pursuant to WRP easements and any participation by the landowner is merely at the government's discretion. The court said that landowners "are or should be shielded from the burdens of restoration absent a separate and further agreement."

The court found that in this instance part of the cost of restoration ultimately was imposed on the landowners, despite the U.S. obligation to pay for such costs. The court held that is sufficient to state a plausible claim for breach of contract, either in terms of breach of warranty or failure to perform an affirmative obligation, so it denied the government's motion to dismiss for failure to state a claim allowing a trial on the merits to proceed. The case will proceed to trial, barring any settlement. Mechanics liens are not usually addressed by most historic preservation and conservation easements, but this opinion suggests they should be.

(7) Natural disaster liability under a federal conservation easement

Benson v. Russell's Cuthand Creek Ranch, Ltd., No. 5:14-cv-161-JRG, 2016 U.S. Dist. LEXIS 58810 (E.D. Texas, Texarkana Div. May 3, 2016).

Facts/Issues: In 2001, the U.S. Natural Resources Conservation Service (NRCS) and Ducks Unlimited (DU) agreed that DU would manage the Wetlands Reserve Program (WRP) for NRCS. In 2002, NRCS accepted a 30-year WRP easement on a Texas farm owned by the Russel family. The easement conveyed affirmative wetlands management and restoration rights to NRCS. Pursuant to the cooperative agreement, NRCS delegated these rights to DU.

In 2014, the Bensons, abutting landowners, filed suit in Texas state court against the Russells and later added DU and NRCS to the complaint. The Bensons contended that a levee system built by DU on the Russell property was causing flooding and erosion on their property. DU successfully removed the case to federal court, but when the court added NRCS as a party to the case, it moved for a remand back to the state court.

Holding: The federal court held that DU was acting under the direction of NRCS and that jurisdiction before the federal court was proper.

Notes/Analysis: The immediate question at issue was whether DU was acting under the direction of NRCS when it built the levee and therefore whether the federal court had proper jurisdiction. But the larger background question was whether DU or NRCS was at fault, and which party, if either, was potentially liable to the Bensons. Although disputes between a government agency and a nonprofit program contractor are not common, the instant case suggests some of the complications that can arise when a land trust steps into the shoes of a government agency to manage a public program such as the WRP.

(8) Civil conspiracy and tort alleged against land trust in easement enforcement action

Ecotone Farm LLC v. Ward (Ecotone IV decision), U.S. Dist. Court, D. New Jersey, Civ. No. 2:11-5094, November 21, 2016. [case active]

Facts/Issues: Ecotone Farm LLC (through its managing member, William Huff) owns a 31-acre parcel in Harding Township, where it conducted farming activity. The New Jersey Conservation Foundation (NJCF) holds a conservation easement over the property. Starting in 2008, the dispute began between neighbors Huff and Edward and Sally Ward about Huff's efforts to renovate a house and two barns on the farm property and a driveway shared by the Ecotone Farm LLC and Ward properties. A bitter feud ensued with its neighbor, who during the dispute was elected to the Township Committee. The dispute escalated as the Wards involved Harding Township (the Township) and the Township engineer, Paul Fox. As part of the approval process, NJCF was asked whether the renovation complied with the conservation easement. The easement specifically allowed for the renovation and repair of existing structures. However, NJCF objected to the certain activities for violating a prohibition on the dumping or placing of soil or other materials.

Ecotone eventually filed suit in federal court against twelve separate defendants, including his neighbor, the Township, various Township employees and elected officials, and NJCF. Essentially, Ecotone alleged that its neighbor, the Township and NJCF improperly leveraged the easement to violate his property rights. In particular, Ecotone claimed that because the easement allowed replacement of existing structures, then it also implicitly allowed reasonable activities ancillary to the authorized construction, such as the temporary placement of soil and construction materials. Huff's complaint alleged that NJCF "took baseless positions in relation to regulatory processing of Huff's land use applications … [and] colluded with the [Fox] to further its own overbroad interpretation of the easement."
Holding: After some preliminary decisions by the court that are not relevant to any conservation issues, NJCF filed a 12(b)(6) motion to dismiss the three state law claims of civil conspiracy; declaratory judgment as to the parties' rights under the easement; and prima facie tort.
Notes/Analysis: The current decision (Ecotone IV) came in response to the motion of NJCF and one of the Wards to dismiss the state law causes of action against them in Huff's complaint: civil conspiracy, declaratory judgment as to the parties' rights under the easement and prima facie tort. The court wrote that the idea that NJCF acted "in concert with Fox and Ward, to further their similar interest, is far from an inescapable inference, but it is sufficiently plausible at the pleading stage." Thus, the civil conspiracy count against NJCF was allowed to proceed. NJCF lost their District Court motion to dismiss state law claims when rules of federal court civil procedure on a motion to dismiss a claim assume that the facts alleged in the complaint by the moving party (William Huff, in this case, the managing member of Ecotone Farm) are true. See the Court of Appeals, Third Circuit, in *Ecotone Farm LLC v. Ward, No. 14-3625, 2016 WL 335837, January 28, 2016* (Ecotone III) (a nonprecedential decision), and of the District Court in *Ecotone Farm LLC v. Ward*, Civ. No. 2:11-5094 (KM)(MAH), July 23, 2014 (Ecotone II), in which the Third Circuit in part overruled in Ecotone III.

The court found that there was enough of a disagreement about interpreting the easement's language that it was inappropriate to make a legal determination at this stage. While NJCF and Ward argued that the count of prima facie tort should be dismissed because it didn't allege anything that wasn't alleged by the rest of Huff's complaint and therefore was superfluous, the court disagreed, saying that, "because other counts are going forward, there is no pressing need to address the redundancy argument; there will be time enough [later in the proceedings] to narrow the theories." The actual events will be the subject of the full trial and court decision to come next.

(9) Limited, localized impact language may not prevent costly litigation on interpretation
Spanish Lake Restoration, LLC v. Petrodome St. Gabriel II, LLC, No. 2015–CA–0451, --- So.3d --- (La. App. 4th Cir., Jan. 13, 2016). [case active/remanded]
Facts/Issues: In February 1999, Lago Espanol, LLC (Lago), the owner of both the surface and mineral rights on various undeveloped parcels of land, established a wetlands mitigation bank with the U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, and the Louisiana Department of Wildlife and Fisheries. Pursuant to the mitigation bank agreement, Lago was required to execute and enforce a conservation easement (called a "conservation servitude" in Louisiana) on the lands in the mitigation bank. An easement on a particular parcel was granted in March 1999. The

easement permitted subsurface mineral exploration and extraction, provided that such activities resulted in no more than a "limited, localized impact" and no "permanent destruction of any conservation values" to the surface of the protected property. Lago subsequently leased the subsurface mineral rights, and after further transfers the lease eventually came to be held by Petrodome St. Gabriel II, LLC (Petrodome), while the conserved property was owned by Spanish Lake Restoration, LLC (Spanish Lake).

In 2011, Petrodome improved two access roads and installed an aboveground natural gas gathering pipeline across the surface of the conserved property. Spanish Lake filed a trespass action against Petrodome, claiming that the pipeline and road improvements violated the conservation easement provisions that limited mineral-exploration activities to those that "will not be greater than a limited, localized impact" and that will not permanently impair conservation values. The court refused to issue a pretrial judgment because interpretation of the relevant language had to be subjected to proof at trial. In particular, Spanish Lake claimed that the road created a "man-made hydrologic barrier" across the protected property. The trial court ruled on summary judgment that Petrodome did not trespass on Spanish Lake's property or violate the conservation easement and acted within its rights under the mineral lease and the mitigation bank agreement. The court reached this holding despite affidavits from an ecologist and an environmental engineer, stating that the pipeline adversely affected conservation values. Spanish Lake appealed.

Holding: The appellate court reversed and remanded, finding that questions of material fact remained as to whether Petrodome's actions were consistent with the conservation easement, and whether it had properly purchased mitigation credits for its activities.

Notes/Analysis: The U.S. Court of Appeals for the Fourth Circuit addressed a conflict between a conservation easement and mineral rights lease. The mineral rights standard in this conservation easement mirrors the Treasury regulations for mining surface impacts for tax-deductible easements. Treasury Regulation §1.170A-14(g)(4)(i) provides a limited exception for mining activities that have a "limited, localized impact on the real property but that are not irremediably destructive of significant conservation interests." There are no reported cases in which a court has had to interpret what level of activity exceeds this standard. Reliance on a "limited, localized impact" provision alone may not alone save an easement holder from costly litigation to interpret and apply that provision to particular activities on the property.

(10) Red-Cockaded Woodpecker does not have to pay taxes, court says

Columbus, Georgia, Board of Tax Assessors v. The Nature Conservancy, No. SU14-CV-3634-08 (Super. Ct. Muscogee Cty. March 30, 2016).

Facts/Issues: Between 2008 and 2011, the Nature Conservancy (TNC) acquired contiguous parcels totaling 817 acres of undeveloped land in Muscogee County from the Fort Benning Army Base. TNC managed the property for conservation purposes, including the restoration of longleaf pine communities and habitat for threatened and endangered species such as the Red-Cockaded Woodpecker and the Relict Trillium. Access by the general public was not permitted, except on a case-by-case basis by appointment.

In 2013, TNC applied for property tax exemption but was denied by the Town of Columbus because TNC generated incidental income from a hunting lease (to control wild populations of deer and feral hogs) and from timber harvesting. TNC filed suit in court to appeal the exemption denial.

Holding: The trial court held for TNC, finding that it met the statutory and common law standards for a "purely public charity."

Notes/Analysis: In particular, the court noted that the hunting and timber activities were in furtherance of TNC's conservation purposes, and not conducted primarily for the generation of income. Furthermore, any such income was devoted exclusively to TNC's conservation purposes.

This is another in a series of decisions recognizing that conservation properties qualify for property tax exemption. One notable feature here was the lack of general public access, which the court found consistent with TNC's purpose of habitat conservation. The court also noted that TNC's vegetation management expenses substantially exceeded its timber harvesting income.

(11) Evidence of project funds inadmissible

Town of Silverthorne v. Lutz, 2016 COA 17, --- P.3 --- (Ct. App. Colo. Feb. 11, 2016).

Facts/Issues: The Town of Silverthorne undertook to construct the Blue River Trail (Trail), a network of trails for non-motorized recreation along the Blue River. The Town sought to purchase land and easement rights for the Trail, but landowner Matthew Lutz rejected all offers. The Town then exercised its right of eminent domain to condemn a trail easement, which the trial court upheld. In addition, the Town received project funds from the Great Outdoors Colorado (GOCO) fund. GOCO's authorizing constitutional amendment provides that "[n]o moneys received by any state agency pursuant to this article shall be used to acquire real property by condemnation through the power of eminent domain." At trial, Lutz sought to introduce this issue as evidence of the Town's lack of eminent domain authority. The Town filed a motion in limine to bar this evidence, which the trial court granted based upon Colorado case law holding that evidence on project funds sourcing is inadmissible in a condemnation proceeding. At trial and on appeal, Lutz claimed that the GOCO provision prohibiting acquisition through eminent domain extended to any project planning, engineering and surveying. In other words, the Town's use of GOCO funds to plan the entire trail project rendered the Town ineligible to exercise its eminent domain powers to condemn any land for the project. The Town and GOCO, as an amicus curiae, countered that the GOCO provision was to be much more narrowly construed so as to prevent only the use of GOCO funds as just compensation for condemned property.

Holding: The appellate court affirmed, holding that a project's funding source is inadmissible in a condemnation proceeding. The court further held that the GOCO provision was to be construed narrowly so as to prohibit using GOCO funds to pay just compensation for condemned property, but had no relevance to a project's planning or construction costs.

Analysis/Notes: Several state conservation easement enabling statutes and conservation funding programs include anti-condemnation provisions similar to the GOCO amendment, so this opinion could have applicability beyond Colorado.

(12) Buyers subject to knowledge of record title, court rules and awards costs

King v. Newman, No. 2015CV30066 (Dist. Ct. Colo. Montrose Cty. Dec. 1, 2016).

In 2000, Montrose County approved a three-unit subdivision of a 39-acre parcel. All three lots were accessed by a "historic driveway" on a common easement. In addition, the subdivision plat showed a "proposed driveway" across a steep and marshy area of Lot 3, along with a note indicating that the proposed driveway would replace the historic driveway as the access to Lot 3. At the time of subdivision approval, all three lots were accessed by a single driveway, the "historic driveway." The plat showed a "proposed driveway" across a steep and marshy area that was apparently intended to provide an alternative access to Lot 3, along with a plat note stating that before any lot was sold, the proposed driveway must be constructed. There were numerous conveyances after the original approval of the subdivision, however, and the proposed driveway was never constructed.

In 2004, Theodore Dekker granted a conservation easement on the three lots to BCRLT. The easement allowed for the maintenance of existing roads but prohibited new roads except with BCRLT's prior approval, which was conditioned on any new road not adversely affecting the conservation values. The baseline documentation stated that the only existing road was the historic driveway. After a series of interim conveyances, Richard and Marianne King and Lance and Marnae Woodland purchased Lots 1 and 2. Jared Newman purchased Lot 3. Prior to purchasing Lot 3, Newman consulted with BCRLT regarding access, and BCRLT drafted a letter stating that the construction of the proposed driveway would cause unacceptable and irreparable damage to the conservation values of the protected property. The easement allowed the maintenance of existing roads, but prohibited new roads except with BCRLT's prior approval, which was conditioned on the new road not adversely affecting the conservation values. The baseline documentation stated that the only existing road was the historic driveway.

The Kings and Woodlands filed suit against Newman and BCRLT, seeking a declaratory judgment and injunctive relief to establish the proposed driveway as the sole access to Lot 3. They argued that BCRLT accepted the conservation easement subject to the plat note identifying the proposed

driveway as the replacement access to Lot 3 and that BCRLT was required to approve its construction. They also claimed that Dekker had no authority to agree to any restrictions on the approval of the proposed driveway, which was a reserved property right under the plat. Finally, they claimed that because the baseline included an image of the plat depicting the unbuilt proposed driveway, it was an "existing road" under the easement.
Holding: The trial court ruled that the conservation easement clearly prohibited the plaintiff's proposed driveway unless Black Canyon Regional Land Trust (BCRLT) expressly approved it and, further, that BCRLT was not required to approve it if it conflicted with the conservation values. After a bench trial, the trial court ruled that BCRLT had complete discretion to approve or deny the driveway based upon a determination that its construction would adversely impact the protected conservation values.
Notes/Analysis: The trial court's delivery of a victory for the land trust was based on the straightforward application of conservation easement restrictions. The court also noted the plaintiffs had acquired title to their lots subject to the express terms of the conservation easement as recorded and should have been aware of the restrictions prior to buying. While the plaintiffs articulated a number of creative theories as to why the plat note should override the easement, the court didn't embrace any of them. An award of attorney's fees was not available in this case, but the court did award BCRLT its costs, including expert, non-testifying witnesses.

(13) Beeson settlement affirmed on appeal
Beeson v. Beeson, 2015 IL App (2d) 150158-U (App. Ct. Ill. 2nd Dist. Dec. 11, 2015).
Facts/Issues: May Beeson established a trust in 2002 and passed away in 2008. Her trust named two of her eight children, Charles and Susan, as co-trustees. All eight children were beneficiaries of the trust. One asset of the trust was a 102-acre parcel of land on which Charles operated a commercial nursery. In 2009, the co-trustees donated a conservation easement on most of the property to the Land Conservancy of McHenry County. In 2012, three of the siblings filed suit against Charles and Susan, alleging that the donation of the conservation easement violated their fiduciary duties to maintain the full value of the trust. The trial resulted in a directed verdict for Charles and Susan on most of the issues, including that they had the discretion under the trust to donate the conservation easement.

Shortly after the trial, the parties reached a settlement agreement that was read into the record by the court. However, two of the siblings apparently had second thoughts and refused to abide by the settlement agreement. In 2015, the trial court affirmed the existence of the settlement agreement, and the two siblings appealed.
Holding: The appellate court held that a settlement agreement had been reached, and that the attorney for the two siblings failed to object when the agreement was read into the court record.
Analysis and Notes: The key substantive issue on appeal is not specific to land conservation, but this case is instructive in showing how a land trust could get caught up in a family dispute. Although there is no suggestion that the Land Conservancy did anything wrong here, land trusts should act with appropriate caution when dealing with landowners who own property in trust or through an entity whereby not all of the interested parties are required to sign the conveyance documents.