



MOSTEK LAW

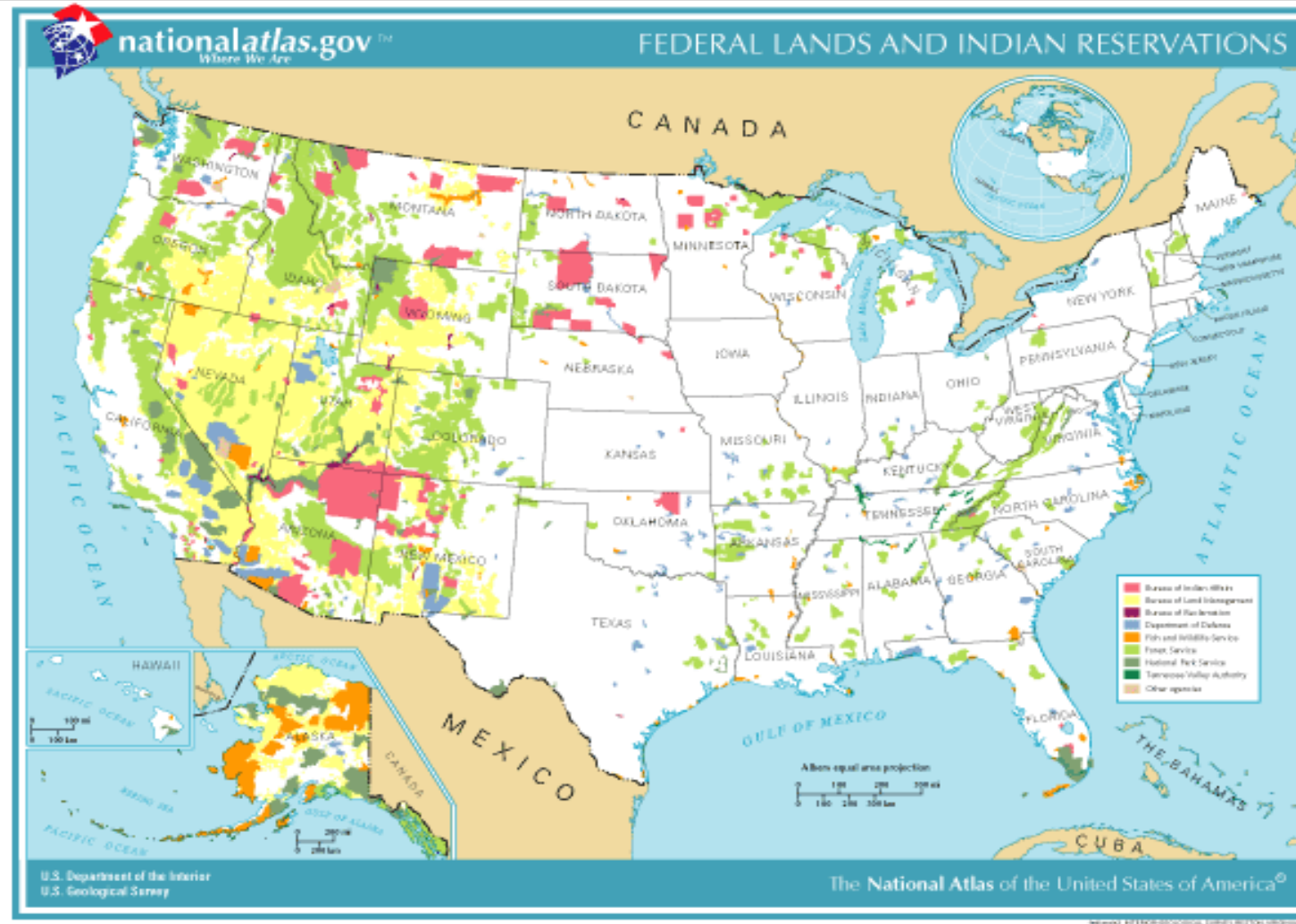
# FEDERAL LAW AND CASE UPDATE

SEPTEMBER 13, 2017  
2017 ANNUAL REAL ESTATE INSTITUTE

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# FEDERAL LANDS – U.S.



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# FEDERAL LAND OWNERSHIP

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- The federal government owns around 640 million acres of land (about 28 percent) of the 2.27 billion acres of land in the United States. Around 92 percent of federally owned acres are in 12 Western states.
- Four federal agencies—the U.S. National Park Service (NPS), U.S. Fish and Wildlife Service (FWS), and U.S. Bureau of Land Management (BLM) within the U.S. Department of the Interior, and the U.S. Forest Service (USFS) in the U.S. Department of Agriculture—oversee roughly 95 percent, or 608 to 610 million acres, of federal land.

Source: [https://ballotpedia.org/Federal\\_land\\_ownership\\_by\\_state](https://ballotpedia.org/Federal_land_ownership_by_state)



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# FEDERAL LAND HIGHLIGHTS

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- Alaska had the most federal land (223.8 million acres) while Nevada had the greatest percentage of federal land within a state (84.9 percent).
- Connecticut and Iowa tied for the lowest percentage of federal land at 0.3 percent each.
- The federal government owned around 23.5 million fewer acres in 2013 than in 1990, a 3.8 percent decrease.



# FEDERAL LANDS - NEBRASKA



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# FEDERAL LANDS IN NEBRASKA

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- Federal Land Acreage – 546,759 acres
- Total Nebraska Acreage – 49,031,680
- Percent of Federal Land – 1.1 %

Source: [https://ballotpedia.org/Federal\\_land\\_ownership\\_by\\_state](https://ballotpedia.org/Federal_land_ownership_by_state)



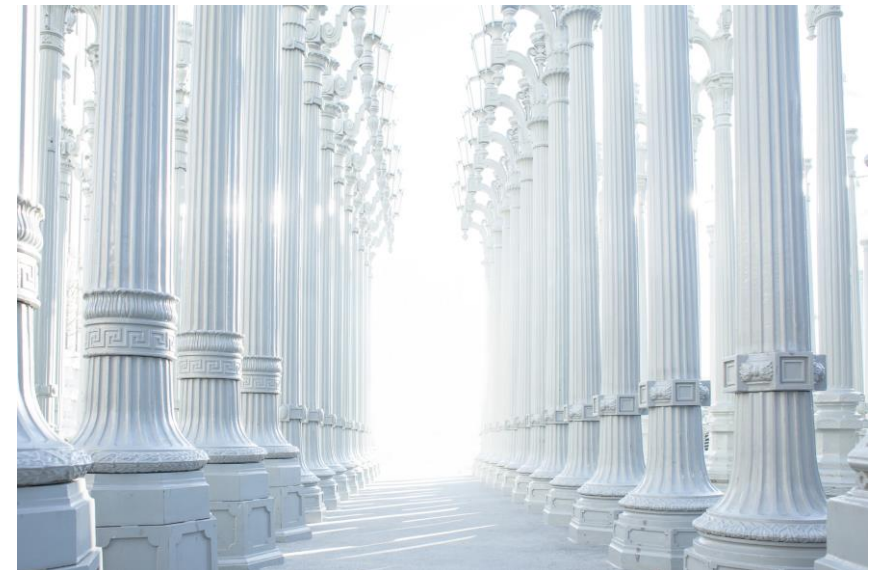
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# SCOPE OF UPDATE

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## Update on Federal Law – Sept. 2016 to Sept. 2017

- Federal Register – Notices, Regulations, Executive Orders
- Public Laws
- Federal Cases
  - Supreme Court
  - Federal Circuit Court of Appeals
  - District of Columbia Circuit Court of Appeals
  - 8th Circuit Court of Appeals



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# LEGISLATIVE BRANCH

## Public Laws Update



Public Laws | Congress.gov | Library of Congress <https://www.congress.gov/public-laws/115th-congress>

CONGRESS.GOV | Legislation | Congressional Record | Committees | Members

### Public Laws

Enacted bills and joint resolutions appear on this list after [HABSA](#) assigns public law (PL) numbers. PL numbers link to [plain law](#) texts after they have been published by [GPO](#). ([Private laws](#) are in a separate list.)

Show:

#### 115th Congress (2017-2018)

Public Law Number	Bill Number and Title	Date
PL 115-55	<a href="#">H.R. 2288</a> - Veterans Appeals Improvement and Modernization Act of 2017	08/23/2017
PL 115-54	<a href="#">H.J. Res. 76</a> - Granting the consent and approval of Congress for the Commonwealth of Virginia, the State of Maryland, and the District of Columbia to enter into a compact relating to the establishment of the Washington Metrorail Safety Commission.	08/22/2017
PL 115-53	<a href="#">H.R. 338</a> - Northern Mariana Islands Economic Expansion Act	08/22/2017
PL 115-52	<a href="#">H.R. 2430</a> - FDA Reauthorization Act of 2017	08/18/2017
<a href="#">PL 115-51 (TXT   PDF)</a>	<a href="#">H.R. 873</a> - Global War on Terrorism War Memorial Act	08/18/2017
<a href="#">PL 115-50 (TXT   PDF)</a>	<a href="#">H.R. 510</a> - Rapid DNA Act of 2017	08/18/2017
<a href="#">PL 115-49 (TXT   PDF)</a>	<a href="#">H.R. 374</a> - To remove the sunset provision of section 203 of Public Law 105-384, and for other purposes.	08/18/2017
PL 115-48	<a href="#">H.R. 3218</a> - Harry W. Colmery Veterans Educational Assistance Act of 2017	08/16/2017



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# LEGISLATIVE BRANCH

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- 2017 Public Laws – 55 Total through Sept. 8, 2017
- Highlights:
  - Securing our Agriculture and Food Act 6/30/17
  - Repeal Federal Highway Admin/Federal Transit Admin
  - Metropolitan Planning Organization Coordination
  - And Planning Area Reform 5/12/17
  - Disapproving the rule submitted by DOI relating to Bureau of
  - Land Management .....land use plans pursuant to
  - The Federal Land Policy Management Act of 1976 3/27/17
  - Disapproving the rule submitted by DOI known as the
  - Stream Protection Rule 2/16/17



# LEGISLATIVE BRANCH

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- 2016 Public Laws – 138 Total

- Highlights

- Federal Property Management Reform Act of 2016 12/16/16
- National Park Service Centennial Act 12/16/16
- Prescribed Burn Approval Act of 2016 12/14/16
- National Forest System Trails Stewardship Act 11/28/16
- Housing Opportunity Through Modernization Act of 2016 7/29/16
- Global Food Security Act of 2016 7/20/16
- Indian Trust Asset Reform Act 6/22/16
- Amend Federal Water Pollution Control Act\
- Reauthorize the National Estuary Program 5/20/16
- Foreclosure Relief and Extension for Servicemembers Act of 2015 3/31/16
- Directing Dollars to Disaster Relief Act of 2015 2/29/16




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# EXECUTIVE BRANCH

## Federal Register Update




**MOSTEK LAW**  
 2017 Annual Real Estate Institute - Federal Register Update

Agency	Citation	html url	pdf url	Publication Date	Title	Type	Summary
<b>NOTICES</b>							
Agriculture Department; Grain Inspection, Packers and Stockyards Administration	82 FR 41913	<a href="https://www.federalregister.gov/documents/2017/09/05/2017-09-05/2017-18633/opportunity-for-comments">https://www.federalregister.gov/documents/2017/09/05/2017-09-05/2017-18633/opportunity-for-comments</a>	<a href="https://www.federalregister.gov/documents/2017/09/05/2017-18633/opportunity-for-comments">https://www.federalregister.gov/documents/2017/09/05/2017-18633/opportunity-for-comments</a>	9/5/2017	Opportunity for Designation in the Lincoln, Nebraska, Area; Request for Comments on the Official Agency Servicing This Area	Notice	<a href="https://www.federalregister.gov/2017-18633/r-3">https://www.federalregister.gov/2017-18633/r-3</a>
Agriculture Department; Grain Inspection, Packers and Stockyards Administration	82 FR 41909	<a href="https://www.federalregister.gov/documents/2017/09/05/2017-09-05/2017-18637/proposed-posting-posting-and-depositing-of-stockyards">https://www.federalregister.gov/documents/2017/09/05/2017-09-05/2017-18637/proposed-posting-posting-and-depositing-of-stockyards</a>	<a href="https://www.federalregister.gov/documents/2017/09/05/2017-18637/proposed-posting-posting-and-depositing-of-stockyards">https://www.federalregister.gov/documents/2017/09/05/2017-18637/proposed-posting-posting-and-depositing-of-stockyards</a>	9/5/2017	Proposed Posting, Posting, and Depositing of Stockyards	Notice	<a href="https://www.federalregister.gov/2017-18637/r-3">https://www.federalregister.gov/2017-18637/r-3</a>
Small Business Administration	82 FR 40825	<a href="https://www.federalregister.gov/documents/2017/09/28/2017-09-28/2017-18130/ceastid">https://www.federalregister.gov/documents/2017/09/28/2017-09-28/2017-18130/ceastid</a>	<a href="https://www.federalregister.gov/documents/2017/09/28/2017-18130/ceastid">https://www.federalregister.gov/documents/2017/09/28/2017-18130/ceastid</a>	8/28/2017	Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Nebraska	Notice	This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of NEBRASKA (FEMA-4325-DR), dated 08/01/2017. Incident: Severe Storms, Tomadoes, and Straight-line Winds.
Federal Emergency Management Agency; Homeland Security Department	82 FR 39891	<a href="https://www.federalregister.gov/documents/2017/09/22/2017-09-22/2017-17741/nebrask">https://www.federalregister.gov/documents/2017/09/22/2017-09-22/2017-17741/nebrask</a>	<a href="https://www.federalregister.gov/documents/2017/09/22/2017-17741/nebrask">https://www.federalregister.gov/documents/2017/09/22/2017-17741/nebrask</a>	8/22/2017	Nebraska; Amendment No. 1 to Notice of a Major Disaster Declaration	Notice	This notice amends the notice of a major disaster declaration for State of Nebraska (FEMA-4321-DR), dated June 26, 2017, and related determinations.
Federal Emergency Management Agency; Homeland Security Department	82 FR 39898	<a href="https://www.federalregister.gov/documents/2017/09/22/2017-09-22/2017-17746/nebrask">https://www.federalregister.gov/documents/2017/09/22/2017-09-22/2017-17746/nebrask</a>	<a href="https://www.federalregister.gov/documents/2017/09/22/2017-17746/nebrask">https://www.federalregister.gov/documents/2017/09/22/2017-17746/nebrask</a>	8/22/2017	Nebraska; Major Disaster and Related Determinations	Notice	This is a notice of the Presidential declaration of a major disaster for the State of Nebraska (FEMA-4325-DR), dated August 1, 2017, and related determinations.

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# EXECUTIVE BRANCH

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- **132 Federal Register Entries**
  - **45 Notices**
  - **30 Proposed Rules**
  - **57 Rules**
- **Federal Register Highlights**
  - **SBA – Declaration of Major Disaster (June Storms) for Loan Assistance in Nebraska – 82 FR 36846**
  - **TransCanada Keystone Pipeline – Application for Permit – 82 FR 10429**
  - **Recodification of Pre-Existing “Waters of the U.S.” Rules – 82 FR 34899**



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# EXECUTIVE BRANCH

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- **Federal Register Highlights Continued**
  - **Crop Insurance Basic Policy Provisions 82 FR 28983**
  - **Amendments to Due Diligence Requirements under CERCLA, 82 FR 28009**
  - **CERCLA Partial Deletion of Omaha Lead Superfund Site, 82 FR 17151**
  - **Certification of Pesticides Applicators, 82 FR 952**
  - **Revocation and Amendment of Class E Airspace in Nebraska, 81 FR 65274**
  - **Right-of-Way Early Acquisition for road projects, 81 FR 57175**
  - **Rural Single Family Housing Loan Guarantee Program, 81 FR 31163**
  - **Farm Storage Facility Microloans, 81 FR 25587**
  - **Direct Farm Ownership Microloan, 81 FR 3289**



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# EXECUTIVE BRANCH

## Executive Orders



Federal Register :: Executive Order Disposition Table <https://www.federalregister.gov/executive-orders/donald-trump/2017>

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LEGAL STATUS

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LEGAL STATUS

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### 2017 Donald Trump Executive Orders

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In 2017, Donald Trump published 45 executive orders, from EO 13765 through EO 13809.  
These 45 executive orders can be downloaded in CSV/Excel

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<b>2017 DONALD TRUMP EXECUTIVE ORDER DISPOSITION TABLE</b>		<b>EXECUTIVE ORDER DISPOSITION TABLES</b>
EO 13809:	Restoring State, Tribal, and Local Law Enforcement's Access to Life-Saving Equipment and Resources (/documents/2017/08/31/2017-18679/restoring-state-tribal-and-local-law-enforcements-access-to-life-saving-equipment-and-resources)	Executive Order Index (/executive-orders)
	Signed: 08/28/2017	<b>Donald Trump</b>
		2017 <<
		Back to Home



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# EXECUTIVE ORDERS

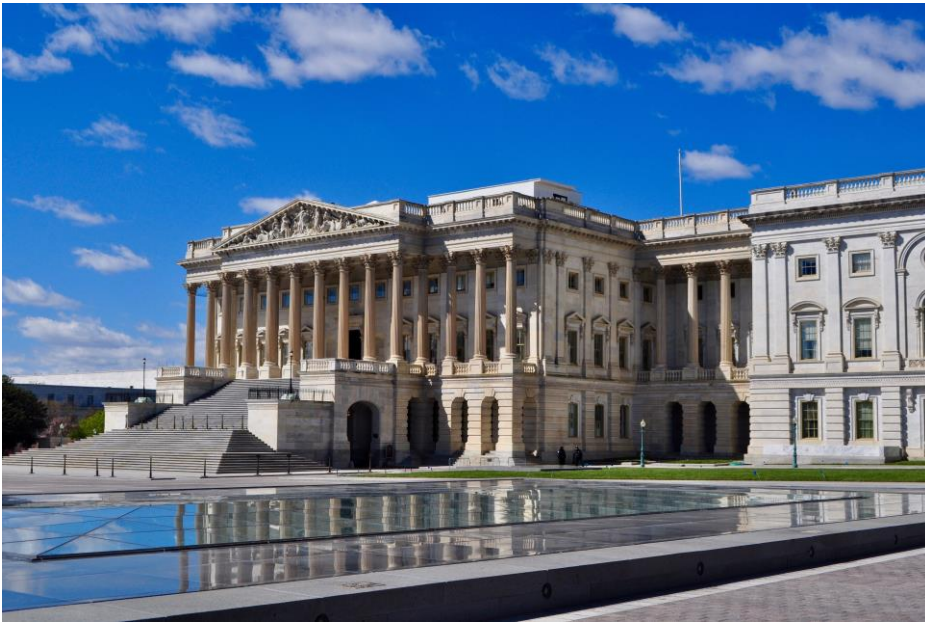
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- **45 Executive Orders -- Highlights:**
  - **Discipline and Accountability in Environmental Review & Permitting for Infrastructure Project. Signed 8/15/17**
  - **Establish Presidential Advisory Council on Infrastructure, Signed 7/25/17**
  - **Promoting Agriculture and Rural Prosperity in America, Signed 4/25/17**
  - **Restoring Rule of Law.....Reviewing WOTUS, Signed 3/3/17**
  - **Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, Signed 1/24/17**



# JUDICIAL BRANCH

## Case Law Update



2017 Annual Real Estate Institute – Case Law Update

Case Name	Legal Provision	Court Syllabus or Summary
U.S. Supreme Court		
BAY POINT PROPERTIES, INC., FKA BP PROPERTIES, INC. v. MISSISSIPPI TRANSPORTATION COMMISSION, ET AL., 582 U.S. ____ (2017) (No. 16-1077 June 26, 2017)	Takings Clause	<p>ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI The petition for a writ of certiorari is denied and the pending motions for leave to file briefs amici curiae are granted.</p> <p>Statement of JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, respecting the denial of certiorari.</p> <p>When a State negotiates an easement limited to one purpose but later uses the land for an entirely different purpose, can the State limit, by operation of statute, the compensation it must pay for that new taking? The Mississippi Supreme Court held that it may do just that. But this decision seems difficult to square with the teachings of this Court’s cases holding that legislatures generally cannot limit the Compensation due under the Takings Clause of the Constitution. See <i>Monongahela Navi. Co. v. United States</i>, 148 U.S. 312, 327 (1893). Tension appears to exist, too, between the decision here and decisions of the Federal Circuit. See, e.g., <i>Toews v. United States</i>, 376 F.3d 1371, 1376 (2004). And the matter is one of general importance as well, for many states have adopted statutes like Mississippi’s and the question presented implicates a fundamental feature of the compact between citizen and State. Given all this, these are questions the Court ought take up at its next opportunity.</p>
JOSEPH P. MURR, ET AL., PETITIONERS v. WISCONSIN, ET AL., 582 U.S. ____ (2017) [No. 13-214, June 23, 2017]	Takings Clause	<p>ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT III The St. Croix River, which forms part of the boundary between Wisconsin and Minnesota, is protected under federal, state, and local law. Petitioners own two adjacent lots - Lot E and Lot F along the lower portion of the river in the town of Troy, Wisconsin. For the area where petitioners’ property is located, state and local regulations prevent the use or sale of adjacent lots under common ownership as separate building sites unless they have at least one acre of land suitable for development. A grandfather clause relaxes this restriction for substandard lots which were in separate ownership from adjacent lands on January 1, 1976, the regulation’s effective date.</p>

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4825-9118-2191, v. 1



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# JUDICIAL BRANCH

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## Case Law Update includes 25 Cases

- 3 Cases - Supreme Court
- 5 Cases - Federal Circuit Court of Appeals
- 9 Cases - D.C. Circuit Court of Appeals
- 8 Cases - 8<sup>th</sup> Circuit Court of Appeals



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# JUDICIAL BRANCH

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## Case Law Update by Number of Cases and Type

- 7 - Takings Clause
- 3 - Federal Lands
- 3 - Freedom of Information Act
- 3 - Endangered Species Act
- 2 - Energy
- 2 - Bankruptcy



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# TAKINGS CASES BY COURT

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3 - Supreme Court

3 - Federal Circuit Court of Appeals

1 - D.C. Circuit Court of Appeals



# SUPREME COURT TAKINGS CASES – BAY POINT

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When a State negotiates an easement limited to one purpose but later uses the land for an entirely different purpose, can the State limit, by operation of statute, the compensation it must pay for that new taking? The Mississippi Supreme Court held that it may do just that.

Statement of JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, respecting the denial of certiorari.

*BAY POINT PROPERTIES, INC., FKA BP PROPERTIES, INC. v. MISSISSIPPI TRANSPORTATION COMMISSION, ET AL.*, 582 U.S. \_\_\_\_ (2017) (No. 16-1077 June 26, 2017)



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# SUPREME COURT TAKINGS CASES - MURR

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Local government may deny a variance request without working a taking under the Takings Clause even though adjoining lots of real estate were acquired in different years and were in separate ownership when a grandfather clause was enacted allowing construction on lots of less than one acre.

*JOSEPH P. MURR, ET AL., PETITIONERS v. WISCONSIN, ET AL.*, 582 U.S.\_\_(2017) [No. 15-214, June 23, 2017]



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# WHEN REGULATION GOES TOO FAR - MURR

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Regulatory takings jurisprudence recognizes that if a regulation goes too far it will be recognized as a taking. This area of the law is characterized by ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances. The Court has, however, identified two guidelines relevant for determining when a government regulation constitutes a taking.

- First, "with certain qualifications ... a regulation which 'denies all economically beneficial or productive use of land will require compensation under the Takings Clause.'"
- Second, a taking may be found based on "a complex of factors, " including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

*JOSEPH P. MURR, ET AL., PETITIONERS v. WISCONSIN, ET AL.*, 582 U.S. \_\_, \_\_ (2017) [No. 15-214, June 23, 2017]



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# THE PENN CENTRAL CASE

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**"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole -- here, the city tax block designated as the "landmark site."**

*Penn Central Transportation Co. v. New York City, 438 U.S. 104, 130-31 (1978)*



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# DEFINING THE “PROPERTY” -MURR

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“What is the proper unit of property against which to assess the effect of the challenged governmental action? Put another way, because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.”

*JOSEPH P. MURR, ET AL., PETITIONERS v. WISCONSIN, ET AL.*, 582 U.S. \_\_\_, \_\_\_ (2017) (Internal quotations and citations omitted) [No. 15-214, June 23, 2017]



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# NUMERATOR AND DENOMINATOR

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- **Numerator:** The value that has been taken from the property.
- **Denominator:** The value that remains in the property.
- **“To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.”**

*JOSEPH P. MURR, ET AL., PETITIONERS v. WISCONSIN, ET AL.*, 582 U.S. \_\_, \_\_ (2017) (Internal quotations and citations omitted) [No. 15-214, June 23, 2017]



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# THREE (+) PART TEST - MURR

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**“[N]o single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. *These include* the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. . . .**

- **First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property. . . .**
- **Second, courts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. . . .**
- **Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. . . . “**

*JOSEPH P. MURR, ET AL., PETITIONERS v. WISCONSIN, ET AL.*, 582 U.S. \_\_, \_\_ (2017) (Internal quotations and citations omitted) [No. 15-214, June 23, 2017]



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# HOLDING AND CONCLUSION- MURR

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- Wisconsin Court of Appeals was correct to analyze the property as a single unit.
- Petitioners were not deprived of all economically beneficial use – decrease in value less than 10%.
- No reasonable expectation to sell the lots separately.
- Government action was a reasonable land-use regulation over properties on a scenic river.

*JOSEPH P. MURR, ET AL., PETITIONERS v. WISCONSIN, ET AL.*, 582 U.S.\_\_(2017) [No. 15-214, June 23, 2017]



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# DISSENT- MURR

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**“Put simply, today's decision knocks the definition of ‘private property’ loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis. The result: The majority's new framework compromises the Takings Clause as a barrier between individuals and the press of the public interest.”**

Chief Justice Roberts, with whom Justice Thomas and Justice Alito join, dissenting. [Justice Gorsuch was not seated for arguments and did not participate in the case.]

*JOSEPH P. MURR, ET AL., PETITIONERS v. WISCONSIN, ET AL.*, 582 U.S.\_\_(2017) [No. 15-214, June 23, 2017]



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# SUPREME COURT TAKINGS CASES – CHESTER

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At least one plaintiff must have standing to seek each form of relief requested in the complaint. That principle also applies to interveners of right: For all relief sought, there must be a litigant with *standing*, whether that litigant joins the lawsuit as a plaintiff, a co-plaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that requested by the plaintiff. That includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names.

*TOWN OF CHESTER, NEW YORK, PETITIONER v. LAROE ESTATES, INC.*, 581 U.S. \_\_\_\_ (2017) [No. 16-605, June 5, 2017]



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# MOVING ON -FEDERAL CIRCUIT TAKINGS CASES

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**The Forest Service may install “bat gates” over a mine entrance infested with a colony of bats without working a taking when the owners of the unpatented mining claim had not applied for or received authorization to operate the non-working mine.**

*GENE CHITTENDEN, ALLEN D. HALL, Plaintiffs-Appellants v. UNITED STATES, Defendant-Appellee, 663 Fed. Appx. 934 (Fed. Cir. 2016) (Disposition is Nonprecedential).*



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# FEDERAL CIRCUIT TAKINGS CASES

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**The plaintiffs did not suffer a compensable temporary taking where regulatory hurdles delayed operation of a mine for more than 10 years.**

*REOFORCE, INC., THEODORE SIMONSON, RONALD STEHN, Plaintiffs-Appellants v. UNITED STATES, Defendant-Appellee*, 853 F.3d 1249 (Fed. Cir. 2017)



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# FEDERAL CIRCUIT TAKINGS CASES

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**Takings claims involving mineral servitudes on government land, in a complex case with a decades-long history, were dismissed for lack of jurisdiction.**

*PETRO-HUNT, L.L.C., Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee*, 862 F.3d 1370 (Fed. Cir. 2017)



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# D.C. CIRCUIT TAKINGS CASE

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**A trade council has standing to challenge a critical habitat designation on behalf of its members when they show a substantial probability of a decrease in timber supply from the lands in question which will cause the members to suffer economic harm.**

*CARPENTERS INDUSTRIAL COUNCIL, ET AL., APPELLANTS, LEWIS COUNTY, A MUNICIPAL CORPORATION OF THE STATE OF WASHINGTON, ET AL., APPELLANTS v. RYAN ZINKE AND JAMES KURTH, APPELLEES, 854 F.3d 1 (D.C. Cir. 2017)*



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# 8<sup>TH</sup> CIRCUIT FOIA CASE

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*American Farm Bureau Federation; National Pork Producers Council, Plaintiffs – Appellants v. U.S. Environmental Protection Agency et al., Defendants - Appellees*, 836 F.3d 963 (8th Cir. 2016)

- EPA released personal information about confined animal feeding operations (owner/operator, location, mailing address, email address, primary phone number).
- Plaintiffs brought a “reverse” FOIA case for unlawful release of personal information.
- District Court erred in dismissing for lack of standing. The plaintiffs established a concrete and particularized injury in fact traceable to the EPA’s action.
- EPA abused its discretion in deciding that the information at issue was not exempt from mandatory disclosure under Exemption 6 of FOIA.



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# QUESTIONS?

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# THANK YOU!

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