

BRIGHAM KANNER PROPERTY RIGHTS CONFERENCE
PANEL 3: NATURAL GAS AND OTHER ENERGY TAKINGS: PROTECTING PRIVATE PROPERTY RIGHTS WHEN
THE PUBLIC INTEREST IS PROMOTED BY A NON-GOVERNMENTAL ENTITY

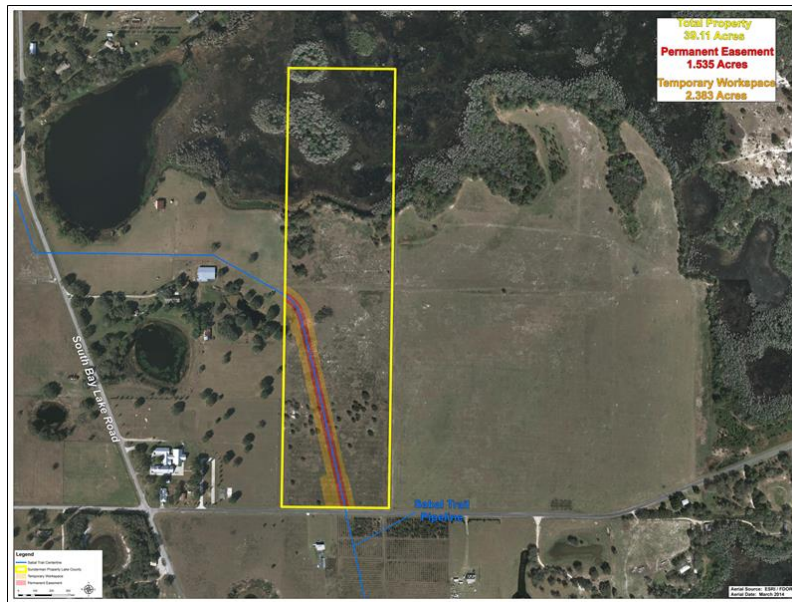
CASE SUMMARY OF *SUNDERMAN GROVES, INC.*

ANDREW PRINCE BRIGHAM, ESQ.*

The first Sabal Trail case in Florida that proceeded to jury trial was tried the week of February 26, 2018, and is styled as *Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.)*.¹

The owner of the property subject to Sabal Trail's eminent domain taking is Sunderman Groves, Inc., a holding company whose principals are Chuck and Jan Sunderman. Chuck's grandfather came to Florida in 1927 and assembled a tract of some five thousand acres, leaving approximately one thousand acres to Chuck and Jan. Finding that it was no longer feasible to replant citrus groves, the Sundermans began to sell off portions of this remaining one thousand acres, primarily as rural residential lots of ten acres to twenty acres. In the past twenty-five years, the Sundermans have completed about forty to forty-five of these transactions. Today, there are only a few remaining tracts from the 480 acres remaining that are still available for sale, given topography and location. The property is located in Bay Lake, Florida, a rural area in what is also known as a watershed recharge area for the Green Swamp near the metropolitan area of Orlando, Florida.

Figure 1. Sunderman Groves Property



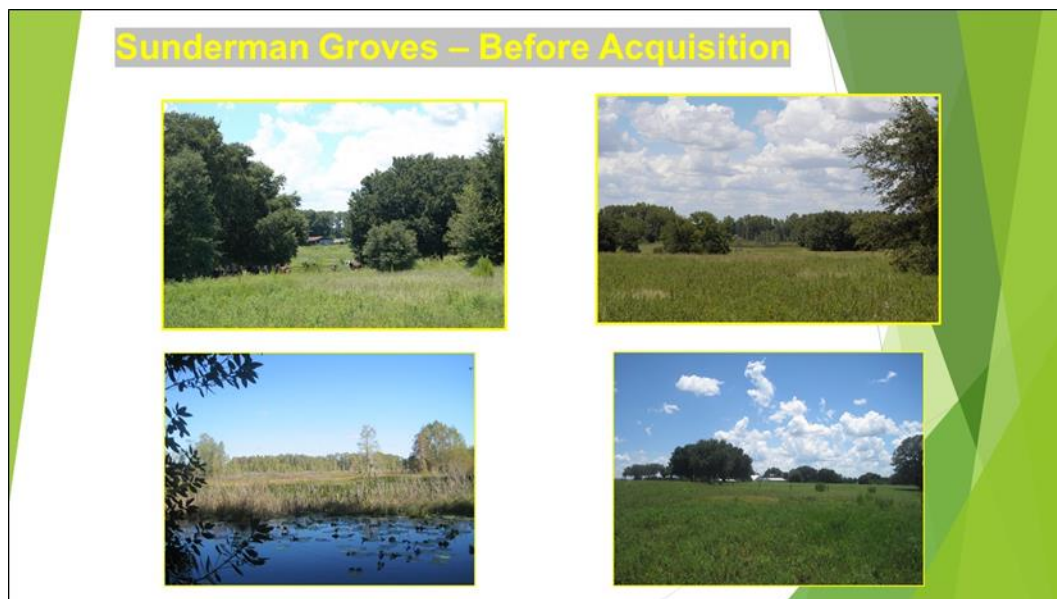
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¹ No. 5:16-cv-00178-JSM-PRL (M.D. Fla. 2016) (Honorable James S. Moody presiding). A complete transcript of the trial can be found on the federal Electric Case File ("ECF") as Docs. 127, 128, 129, 130, Transcripts of Trial, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Feb. 26–Mar. 1, 2018).

The property through which Sabal Trail acquired both temporary and permanent easements is one of these remaining tracts totaling 39.11 acres, consisting of 26.8 acres uplands and 12.3 acres of wetlands. The tract is located on a paved road and has gently rolling topography toward the rear of the property, which overlooks a wetland marsh. The neighboring properties include a white-steeped church, and a farm with a rustic barn and small herd of cattle.

The overall aesthetic characteristics of the property is rural, almost pastoral. Prior to the easement takings, the appraisers for both Sabal Trail and the Sundermans identified the “highest and best use” of the tract to be for rural, residential use, but they differ on whether the tract could be subdivided into either two or three lots. As depicted in the aerial photographs above, Sabal Trail’s easements cut diagonally through the center of the tract for a distance of 1,336 feet. The permanent easement is fifty feet in width with the temporary easements for construction purposes extending an additional twenty-five feet on either side.

Figure 2. Sunderman Groves—Before Taking



After the easement takings, Sabal Trail’s pipeline is identified by color markers at regular intervals along its centerline. It is in the midst of developable area. Access to any developable portion of the 40-acre tract requires the owner to cross the pipeline easement. There are also two above ground AC mitigation devices that are located some distance apart from one another within the permanent easement area. Sabal Trail operates the thirty-six-inch-diameter pipe with a maximum operating pressure of 1,456 pounds per square inch (“psig”), typically buried four feet underground. The pipeline has the capacity to transmit one billion cubic feet of natural gas a day.

Upon final judgment, Sabal Trail’s easement will be publicly recorded and become part of the chain of title included in the title report that is subject to the closing of any real estate transaction. The Sundermans, like other owners, received a “Notification of Initial In-Service” letter from Sabal Trail, which outlines the *do’s and don’ts* associated with the permanent easement area. It basically confirms *who’s the boss* with respect to Sabal Trail’s dominant rights over the owner’s now servient estate. What’s more, the letter is sealed with the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration’s emblem, urging everyone to “[k]now what’s below.”²

² See Transcript of Trial, Doc. 129, at 216–17, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Feb. 28, 2018).

Figure 3. “Know What’s Below” Logo³



In so far as further details about the pipeline, the testimony and evidence regarding fear or stigma, for the entire trial, was without any witness on the owner’s side of the case mentioning the word “explosion.” Instead, Sabal Trail’s own expert engineering witness opened the door regarding more detailed testimony as to the condemnor’s use of the easement by testifying as to the “benefits” of natural gas as follows:⁴

- Q. What’s the purpose of the Citrus County Lateral?
A. **To supply natural gas to a power plant.**
Q. Are there any benefits that you are aware of for using natural gas to create energy for power plants?
A. **Yes, sir. It's abundant. It's a domestic fuel. It's a clean burning fuel, much cleaner than coal and oil.**
Q. What do you mean by it's a "clean burning fuel?"
A. **It emits less carbon and greenhouse gases than the other fuels.**
Q. Any other benefits associated with using natural gas for the creation of electricity? Sorry.
A. **It has a very high BTU, which is a heat rating of the gas, and it can fire turbines, basically what the power plants are using.**

In cross-examination, Sabal Trail’s expert was asked to elaborate:⁵

- Q. All right. So would you say that 36 inches is a large diameter pipe?
A. **Yes, sir.**
Q. All right. And it is brought onto the property, when constructed, in sections?
A. **Yes, sir.**
Q. How are those sections put together?
A. **It's steel pipe so the sections would be put together with and welding**

³ Defendant’s Trial Exhibit #173, *Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida* (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Feb. 28, 2018); Credit: www.primis.phmsa.dot.gov; www.call811.com

⁴ Doc. 127, pp. 115-116, *Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida* (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Feb. 26, 2018).

⁵ Doc. 127, pp. 137-139, *Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida* (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Feb. 26, 2018).

process. We use certified welders, certified inspectors, and certified inspectors to oversee the process.

Q. All right. Isn't it true that this pipe will have a capacity to have gas at a maximum pressure of 1456 PSI?

A. **Yes, sir.**

Q. Could you describe for the Jury what PSI is?

A. **Pounds per square inch.**

Q. That's high pressure, is it not?

A. **Yes, sir.**

Q. And you indicated the natural gas has a high BTU. What does that mean?

A. **That means -- it's British Thermal Unit, which is basically the heat rating of the natural gas.**

Q. Is it flammable?

A. **Yes, sir.**

Q. Is it transporting a capacity per day of one billion cubic feet of gas?

A. **Yes, it can.**

Q. Is that what Sabal Trail is seeking to do?

A. **Yes, sir.**

Q. So they are looking for customers, such as Duke Energy or Florida Power and Light, they would like to be able to push this gas through at the maximum capacity?

A. **Yes, sir.**

Defense counsel also asked in cross-examination some details concerning the pipeline markers:⁶

Q. Okay. How many pipeline markers are on the subject property?

A. **I don't know the exact number. I think there is around four to six pipeline markers.**

Q. All right. What does the pipeline marker say?

A. **It basically is a communication tool that shows the name of the company, what is in the pipeline, emergency telephone numbers.**

Q. What does it say, sir?

A. **It says, "Sabal Trail Transmissions Natural Gas Pipeline," and then it has our 188 number.**

Q. Is there any term that's also used on this marker?

A. **"Caution, gas pipeline."**

Q. Is the word "warning" used?

A. **Yes, sir.**

⁶ Doc. 127, pp. 134-135, *Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.)*, No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Feb. 26, 2018).

Figure 4. Sunderman Groves – After Taking



Assuming that the portions of the transcript cited above fairly represent the extent of the condemnor's use of the taken property, testimony and evidence of fear or stigma was not accentuated. It did not become a feature of the trial. Rather, it is more likely the case that the existence of any fear or stigma that may be associated with the transmission of a tremendous volume of a flammable substance such as natural gas, at a high pressure, proceeding through an interstate pipeline buried four feet underground speaks for itself. As such, it is not without reason to think that testimony and evidence concerning that fear can be focused on what impact such fear or stigma has on those who transact in the marketplace, without accusing the owner of “fear mongering” or “employing scare tactics” in presenting its case for severance damages.

Figure 5. Sunderman Groves—After Taking



1. Appraisal Testimony

Moving to the presentation of the evidence of marketplace value at trial—based on what he referred to as a “natural gas pipeline study”—Sabal Trail’s appraiser (who was paid by Sabal Trail over \$4.1 million dollars for his appraisal services) concluded that there was zero damages from fear or stigma. Based on a separate “bifurcation study,” however, the appraiser testified that there was 25% severance damages solely caused by the “physical bifurcation” of the 40-acre tract. Both studies employed a paired-sales analysis. His total estimate of full compensation, therefore, was predicated on payment for the temporary easement at \$5,000, the value of the permanent easement at \$8,100, and his 25% severance damage of the remainder property at \$43,700, for a total compensation of \$56,800.

On cross-examination, it was shown that approximately two-thirds of the data relied upon by Sabal Trail’s appraiser in his study was data that he used in past pipeline cases that, in certain instances, occurred ten years prior.⁷ This old, retread data seemed too remote in time or distance to be considered applicable to current market conditions or preferences.⁸ So too, much of the data, which showed only little differences in price, did not include properties of the same highest and best use for rural, residential use. Some of the more current data relied upon by Sabal Trail’s appraiser needed correction, and the data that was accurately reported or verified showed that substantial differences in price existed between impact properties with pipeline easements and non-impact properties without pipeline easements.⁹

In summary, once the data relied upon by the expert to form his opinion underwent the opportunity to “*kick the tires*” and be examined, it appeared that the appraiser’s conclusion of zero

⁷ In regards to time, it is reasonable to consider how market participants are more informed today concerning pipelines than, say, ten years ago. One need only recall that Apple introduced its popular iPhone in 2007. Information concerning pipelines is readily available if asking either *Siri* (iPhone) or *Alexa* (Amazon) to search the internet.

⁸ For example, as part of his study, Sabal Trail’s appraiser paired sales within a 48-lot equestrian subdivision named Sherman Woods Ranches in Okeechobee County, Florida. Of the 48 lots, all of which were approximately ten acres in size, seven lots were subject to a natural gas pipeline easement in favor of Gulfstream Natural Gas. Lot sales of all 48 lots occurring in 2005 showed little difference in the approximate \$300,000 paid for either impact or non-impact lots. On cross-examination, however, it was questioned whether the peak real-estate-market conditions in South Florida in 2005 were truly comparable to the subject’s property market in Bay Lake, Florida in 2016. Further, it was shown that all 48 lots of the Sherman Woods Ranches subdivision were sold within a six-hour time period in highly promoted lot offerings to those in suburban areas that would want rural equestrian lots for their horses. It was questioned whether, in this “frenzied” sale condition, any of the lot purchasers were aware of the existence of a natural gas pipeline; to which the appraiser was unable to confirm either a “yes” or “no” response. Moreover, it was shown that only three of the 48 lots have been developed since 2005, that many of the lots that sold for \$300,000 were later subject to default and foreclosure, and that current lot sales averaged around \$30,000—all of which adds up to the tell-tale characteristics of a “failed subdivision.” Finally, the defense counsel asked Sabal Trail’s appraiser if his study of Sherman Woods Ranches was a fair comparison to use in determining a just compensation for the Sundermans who owned property in Bay County, Florida, with a 2016 date of taking. The appraiser responded that, in his opinion, it was a fair comparison. See Transcript of Trial, Doc. 129, at 94–109, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Feb. 28, 2018); see also Transcript of Trial, Doc. 130, at 158–60, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Mar. 1, 2018). The jury, of course, was free to accept or reject such expert opinion.

⁹ Once corrected, the appraiser’s paired sales of residential five-acre tracts along Faye Street bordering the Wekiva Basin State Preserve in Orange County showed a diminution in value about 70% to 80% when the pipeline was placed, more or less, diagonally through the middle of the impact five-acre tracts. See Transcript of Trial, Doc. 129, at 131–34, 136–43, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Feb. 28, 2018); see also Transcript of Trial, Doc. 130, at 162–64, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Mar. 1, 2018).

damages from fear or stigma was simply because he “said so,” or *ipse dixit*.¹⁰ Additionally, once corrected, his more current data showed that the appraiser’s loss estimate for bifurcation was understated.

By contrast, the owner’s appraiser testified that he considered the language used by Sabal Trail in its easement that denoted the easement holder’s dominant rights and the underlying fee owner’s servient estate.¹¹ In determining severance damages, he further testified concerning his own paired-sales analysis in which he considered twenty-two pairs of impact and non-impact properties in rural Florida counties-including Levy, Lake, and Marion Counties-all of which had transacted within five years of the 2016 date of taking. Considering the price differential between impact and non-impact properties as well as the indication of loss in light of the property characteristics derived from those respective pairings, the owner’s appraiser estimated a 60% damage resulting from fear or stigma associated with Sabal Trail’s taking of both temporary and permanent easements running diagonally through the middle of the Sundermans’ 40-acre tract.¹² His total estimate of full compensation, therefore, was predicated on payment for the temporary easement at \$15,013, the value of the permanent easement at \$26,249, and his 60% severance damage of the remainder property at \$273,777, for a total compensation of \$315,039 (which was reduced to \$312,839 after considering Sabal Trail’s project manager’s testimony of the early release of the temporary easement, following the completion of Sabal Trail’s construction).¹³

2. Owner’s Testimony

In addition, the property owner, Jan Sunderman, testified as to both the before and the after value of the property, quantifying severance damages based on her knowledge of the property and personal experience in selling similar tracts over the previous twenty-five years, from the larger, former citrus property.¹⁴ She further testified to her familiarity with Sabal Trail’s easement holder’s rights and her own “common sense” understanding of what the market perception has been of Sabal Trail’s use, given her own knowledge and experience with potential purchasers of residential, rural properties over twenty-five years.¹⁵ In the before condition, she considered the value of her property to be equivalent to \$18,000 per upland acre and \$1,500 per wetland acre, or approximately \$500,000 if considering its highest-and-best use for three rural, residential lots. After Sabal Trail’s taking, she considered the value of her property to be diminished and equivalent to \$140,000, with the two front lots valued at \$35,000 each and the remaining rear lot valued at \$70,000. In recognition of such loss, she testified as to the measure of full compensation being, in her opinion, \$360,000.¹⁶

¹⁰ See Transcript of Trial, Doc. 130, at 164–65, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Mar. 1, 2018).

¹¹ See Transcript of Trial, Doc. 129, at 171–76, 213–21 Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178 -JSM-PRL (M.D. Fla. Feb. 28, 2018).

¹² See Transcript of Trial, Doc. 130, at 35–36, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. Mar. 1, 2018).

¹³ See *id.* at 35–42.

¹⁴ See *id.* at 85–96.

¹⁵ See *id.* at 98–99.

¹⁶ See *id.* at 99–101.

3. Jury Verdict

After considering the respective lawyers' closing arguments and completing their own deliberations, the jury returned a verdict specifically finding that Sabal Trail pay \$17,800 for the permanent easement taken, \$10,000 for its temporary easement taken, and \$282,000 for severance damages, for a total measure of full compensation of \$309,500.¹⁷ It was apparent that Sabal Trail's assertion of zero damages from fear or stigma did not motivate the jury to simply "split the difference," instead it returned a verdict in favor of the property owner against the pipeline company.

Most assuredly, the baseline of an eminent domain proceeding is drawn upon the basic constitutional understanding of the nature behind the exercise of governmental power and of the need to establish limits to protect individual liberties; in this case, the civil right of private ownership. In deciding whether the jury's verdict in the case of Sunderman Groves, Inc., was "just" or "fair," consider how the debate over the measure of compensation was framed by the defense counsel in closing arguments for this case:

I asked you in voir dire, you might recall, [have] any of you—any of you ever thought about property rights? Have you ever thought about the virtue and value of owning property as a civil right? Let me suggest to you that this exercise we have been a part of[,] I hope will bring this home to you.

Private property ownership balances power. How is that? If you think about our country and what makes it great, many would point to our system of government when it works. But think about it, our founding fathers were putting together our nation, and how were they going to establish balancing power[,] because that's what Government has[?] The Government has power and it's supposed to be exercising it for the good of those it governs. We have the Constitution. A social contract. People agree to be governed, but the Government is limited in its power. That's our Bill of Rights. One of the Bill of Rights that we have is the right to own private property, and when it is acquired for a public purpose, then compensation needs to be paid. A compensation that is just under our Federal Constitution and full under our Florida Constitution.

Let's think about that. How does it balance power? Our founding fathers knew that power had to be exercised by people and people have human nature, and even though they have good intentions o[f] accomplishing the public good, there needs to be a way to check and balance power. So, we have three branches of Government, Executive, Legislative, Judicial. We are in the Judicial Branch. Sabal Trail is exercising a government power for the good of providing power to homes for electricity. They are a for-profit company that will profit because of their efforts, their investment. That's the energy industry. But when people have their property taken, the only means by which we can balance the exercise of the eminent domain power is to have the Judicial Branch make a decision, and the decision that is in your hands as a jury working in the Judicial Branch is what is full compensation?

The Judge will be instructing you as to the law. These are not suggestions. These are not guide[li]ne[s]. The jury instructions are the law that you should apply, that you are under duty to apply to the facts, but the law is good. So, I want to cover a few of the jury instructions, and then I would like to look at the case through the lens of the jury instructions that you should be following.

17. See Jury Verdict, Doc. 126, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178-JSM-PRL (M.D. Fla. March 1, 2018).

. . . .

Again, your verdict is important because it balances power. Sabal Trail had the power to take the property. But it is our Constitution, and it's the application of the law in making you . . . the Jury . . . that makes them pay a fair and just price to the Sunderman[s']. And the Sunderman[s'], after today, will be the party that will either find out that your verdict was sufficient or that it wasn't.¹⁸

4. Eleventh Circuit Appeal

The case of Sunderman Groves, Inc., is not yet completed. Following the denial of a Motion for a New Trial¹⁹ and a Motion for Rehearing or Relief from Judgment,²⁰ Sabal Trail has filed an appeal to the U.S. Eleventh Circuit.²¹

Specifically, Sabal Trail appeals the trial court's rulings regarding the application of state substantive law rather than federal law to the measure of compensation and the admissibility of the owner's testimony (with respect to the owner's opinion of value in the "after" condition and the quantification of severance damages). As of the writing of this case summary, briefs are complete, and the parties await oral argument.

¹⁸ See Transcript of Trial, Doc. 130, at 136–38, 171, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178 -JSM-PRL (M.D. Fla. Mar. 1, 2018).

¹⁹ See Transcripts of Hearing, Doc. 132, 134, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178 -JSM-PRL (M.D. Fla. Mar. 28, 2018; Apr. 3, 2018).

²⁰ See Motion for Rehearing or Relief from Final Judgment (Plaintiff), Response to Motion for Rehearing or Relief from Final Judgment, and Order Denying Motion for Rehearing or Relief from Final Judgment, Docs. 144, 152, 154, Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 5:16-cv-00178 -JSM-PRL (M.D. Fla. Apr. 30, 2018; Apr. 15, 2018; May 29, 2018).

²¹ Sabal Trail v. 3.921 Acres of Land in Lake County, Florida (Sunderman Groves, Inc.), No. 18-11836-G (11th Cir. 2018).