Volume 2, Number 4
January 2022

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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FEATURE ARTICLE

MISSISSIPPI V. TENNESSEE: U.S. SUPREME COURT DETERMINES THAT EQUITABLE APPORTIONMENT DOCTRINE APPLIES TO INTERSTATE GROUNDWATER DISPUTES

By Jason Groves and Lisa Claxton

In a *unanimous* opinion issued on November 22, 2021, the U.S. Supreme Court in *Mississippi v. Tennessee*, 595 U. S. ___ (2021) extended the equitable apportionment doctrine to a dispute over groundwater. As a case of first impression, the Court determined the groundwater contained within the Middle Claiborne Aquifer was an interstate resource "sufficiently similar" to the Court's past applications of the equitable apportionment doctrine to warrant the same treatment. However, because Mississippi declined to request equitable apportionment of the Middle Claiborne Aquifer to remedy its alleged harms, the Court dismissed Mississippi's complaint seeking $615 million in damages against Tennessee.

Background: Mississippi and Tennessee's dispute over the Middle Claiborne Aquifer

The aquifer at issue–the Middle Claiborne Aquifer–spans tens of thousands of square miles underneath portions of eight states in the Mississippi River Basin, including Mississippi and Tennessee. The City of Memphis (City), through its public utility Memphis Light, Gas and Water Division, pumps groundwater from the Middle Claiborne Aquifer to supply the City with clean, affordable drinking water. The City's 160 wells are all located within Tennessee and provide the City with approximately 120 million gallons of water per day to meet its municipal needs. Some of the wells are within a few miles of the state's border with Mississippi. Pumping from the City's wells contributes to a regional cone of depression that extends into Mississippi.

In 2005 during prior litigation, the State of Mississippi sued the City of Memphis and its public utility in U.S. District Court, alleging that Memphis had wrongfully appropriated Mississippi's groundwater. The U.S. District Court dismissed the case for failing to join an indispensable party, Tenessee. *Hood ex rel. Miss. v. Memphis*, 533 F.Supp.2d 646 (N.D. Miss. 2008). The Fifth Circuit Court of Appeals affirmed the lower court's dismissal. *Hood ex rel. Miss. v. Memphis*, 570 F.3d 625 (5th Cir. 2009). The District Court and the Fifth Circuit's decisions turned on whether the Middle Claiborne Aquifer should be equitably apportioned among the states. Mississippi petitioned for *certiorari* and requested leave to file a bill of complaint over the alleged taking on Mississippi's water. In 2010, the Sureme Court denied Mississippi's request without prejudice. *Mississippi v. City of Memphis*, 559 U.S. 901 (2010); 559 U.S. 904 (2010).

In 2014, Mississippi again filed for leave. The Supreme Court granted Mississippi leave to file a bill of complaint against the State of Tennessee, the City of Memphis, and the City's public utility (Tennessee). In this litigation, Mississippi alleged that Tennessee's groundwater pumping from the Middle Claiborne Aquifer created a substantial drop in pressure and groundwater levels, altering the historical flow of groundwater within the Middle Claiborne Aquifer. Furthermore, Mississippi asserted the resulting cone of depression from Tennessee's pumping extended into Mississippi and hastened the natural flow of groundwater from one state to the other. According to Mississippi, this allowed Tennessee to forcibly siphon billions of gallons of high-quality groundwater from portions of the aquifer underlying Mississippi that, under natural circumstances, would have never reached Tennessee. Mississippi also argued that Ten-

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nessee's groundwater pumping had required Mississippi to spend additional money to deepen its wells within the Middle Claiborne Aquifer and use more electricity to pump water to the surface.

Mississippi did not seek equitable apportionment. Instead, Mississippi based its claims on an absolute ownership theory and pursued various tort claims against Tennessee, seeking at least $615 million in damages.

The Special Master's Report

The Supreme Court appointed Judge Eugene E. Siler, Jr. of the Sixth Circuit Court of Appeals as Special Master to conduct an evidentiary hearing and issue a report. After a five-day hearing, the Special Master determined the features and physical characteristics of the Middle Claiborne Aquifer made it an interstate resource and therefore subject to equitable apportionment between the states. [*Report of Special Master* at 26; https://www.ca6.uscourts.gov/sites/ca6/files/documents/special_master/Mississippi%20v.%20Tennessee%20Special%20Master%20Report.pdf]

In reaching that conclusion, the Special Master considered four different theories that all highlighted the interstate character of the groundwater contained within the Middle Claiborne Aquifer.

First, under the Aquifer Theory, the Special Master found the Middle Claiborne Aquifer is a single interconnected hydrogeological unit underneath several states. Geographically, the aquifer extends from portions of Kentucky to portions of Louisiana, Mississippi, and Alabama, making the Middle Claiborne Aquifer interstate in character and an interstate resource. Mississippi conceded that when viewed as a whole, the aquifer crosses multiple state boundaries but argued that water within two subunits are only found within Mississippi. According to Mississippi, the two subunits should be treated separately from the larger aquifer. The Special Master found that a subunit's presence within a single state "did not extinguish its interstate nature" as a component of a regional hydrogeologic unit.

Second, under the Pumping Effects Theory, the Special Master found that the cone of depression caused by Tennessee's wells within Tennessee affected the groundwater underneath Mississippi and created a drawdown that could be seen across the region. The pumping effects from Tennessee's wells demonstrated the Middle Claiborne Aquifer's interconnectedness as a single hydrogeological unit that spans across state boundaries. In fact, Mississippi's complaint acknowledged some degree of hydrogeologic connection based on its well-to-well interference claims against Tennessee, underscoring the interstate character of the aquifer.

Third, under the Flow Theory, the Special Master found that the natural flow of water inside the Middle Claiborne Aquifer indicated the water would ultimately flow, even if slowly (as little as one to two inches per day), across the Mississippi-Tennessee border. This interstate movement of water under natural conditions further supported the finding that the aquifer is an interstate resource and a component of an interconnected hydrological unit.

Lastly, under the Surface Connection Theory, the Special Master found that some of the water inside the Middle Claiborne Aquifer discharged into the Wolf River, an interstate tributary of the Mississippi River. According to the Special Master, any connection to an interstate surface stream demonstrated the aquifer and its groundwater were, in fact, interstate resources.

Equitable Apportionment is Mississippi's Exclusive Remedy

After finding the Middle Claiborne Aquifer an interstate resource under each of the four theories, the Special Master concluded that equitable apportionment is Mississippi's exclusive remedy for its dispute with Tennessee over the interstate water resource. Since Mississippi and Tennessee had not previously entered an interstate compact to allocate the groundwater, the Special Master saw no compelling reason "to chart a new path for groundwater resources" by allowing a damage claim to proceed rather than equitable apportionment between the two states. *Id.* at 26. Accordingly, the Special Master recommended the Court dismiss Mississippi's complaint, but with leave to bring a new claim for the equitable apportionment of the Middle Claiborne Aquifer.

Mississippi filed exceptions in response to the Special Master's Report, arguing the Special Master erred in concluding the aquifer should be equitably apportioned. Tennessee also objected to the Special Master's Report, but only because the Special Master should not have recommended the Court to grant Mississippi leave to amend its complaint.

Equitable Apportionment under the Supreme Court's Original Jurisdiction

Traditionally, states involved in a dispute over interstate waters have two choices: enter an interstate compact or petition the Supreme Court to equitably apportion the resource. The equitable apportionment doctrine is a federal common law doctrine first pioneered by the Supreme Court in 1907 to govern disputes between states concerning their rights to use interstate bodies of water. *Kansas v. Colorado*, 206 U.S. 46 (1907).

Since its inception, the Court has applied equitable apportionment as the exclusive remedy for interstate disputes over interstate rivers and streams when there is no controlling statute, compact, or prior apportionment. *Mississippi v. Tennessee*, 585 U.S. ___ (2021) (slip op., at 4). Over time, the doctrine's guiding principle–that states have an equal right to make reasonable use of a shared water resource–led the Supreme Court to extend the doctrine's application beyond typical disputes over interstate rivers and streams. *Id.* at 7. The Supreme Court has applied the doctrine not only to disputes over interstate surface waters, but also to disputes over groundwater pumping that affected the flow of interstate streams (*Nebraska v. Wyoming*, 515 U.S. 1 (1995)) and to anadromous fish that migrate through interstate water systems (*Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983)). However, the Court had never considered whether equitable apportionment should also apply to competing claims to interstate groundwater.

The Supreme Court's Decision

In a 9-0 opinion authored by Chief Justice John Roberts, the Supreme Court held that the waters of the Middle Claiborne Aquifer are interstate waters subject to equitable apportionment. The Court's holding extends the doctrine to an interstate aquifer for the first time. However, in deciding the case of first impression, the Court:

> . . .resist[ed] general propositions and focus[ed] [its] analysis on whether equitable apportionment of the Middle Claiborne Aquifer would be 'sufficiently similar' to past applications of the doctrine to warrant the same treatment. *Mississippi v. Tennessee*, 585 U.S. ___ (2021) (slip op., at 7).

In other words, the Court stopped short of pronouncing any sweeping bright-line rule that would automatically categorize unallocated groundwater within any transboundary aquifer as interstate water subject to equitable apportionment. That said, the Court had little difficulty dispensing with Mississippi's arguments that the hydrogeologic nature of the Middle Claiborne aquifer, in particular, made it distinguishable from other interstate resources that the Court has equitably apportioned in the past.

Although the Court did not announce any specific test for determining whether a particular aquifer is an interstate resource, its rationale in this case is instructive. Here, the Court determined the Middle Claiborne Aquifer warranted equitable apportionment because the aquifer: 1) is a transboundary resource, 2) contains water with a natural transboundary flow, and 3) because the use of the aquifer in another state creates interstate effects.

Transboundary Resources

First, the Court noted as a threshold matter that all prior applications of the equitable apportionment doctrine concerned disputes over transboundary resources. The Court explained that the multistate character of the Middle Claiborne Aquifer was beyond dispute in this case. Both Mississippi and Tennessee have wells within their territories that provide access to the groundwater stored in the same aquifer that straddles both states. Furthermore, the Court emphasized that the expert scientific consensus in this case viewed the Middle Claiborne Aquifer as a single hydrogeological formation spanning multiple states, making it a transboundary resource.

Transboundary Natural Flow

Second, the Court pointed out that all past applications of the equitable apportionment doctrine occurred in cases involving a water resource that flowed naturally across state lines or the fish that lived in that water. Mississippi argued for different treatment due to the "extremely slow" natural flow rate in the aquifer. However, the Court did not find this persuasive since it had previously applied the doctrine to rivers that have occasionally run dry. *Kansas v. Colorado*, 206 U.S. 46, 115 (1907). Additionally, the Court explained that even the slow flow rate did not mean the total volume of water crossing state lines

was trivial. The evidence suggested that the mere "one or two inches" of transboundary natural flow from Mississippi to Tennessee amounted to over 35 million gallons (*i.e.*, 107 acre-feet) of water per day that crossed the state line. The Court concluded that a slow flow rate, at least in the context of this case, did not shield the aquifer from equitable apportionment.

Interstate Pumping Effects on the Aquifer

Lastly, and citing its 2021 opinion in *Florida v. Georgia*, 592 U.S. ___ (2021), the Court considered the interstate effects caused by transboundary use of the resource a hallmark of prior cases applying equitable apportionment. In this case, the evidence showed that when Tennessee pumps groundwater from the aquifer, a regional cone of depression spans multiple state lines. In fact, the interstate pumping by Tennessee had drawn down the aquifer to the point that Mississippi allegedly needed to drill deeper wells in the Middle Claiborne Aquifer to supply its own water needs. Thus, the Court reasoned that Tennessee's actions within its territory "reach through the agency of natural laws to affect the portion of the aquifer that underlies Mississippi" and warranted applying the equitable apportionment doctrine to the Middle Claiborne Aquifer.

State Sovereignty Does Not Mandate a Different Result

After determining the Middle Claiborne Aquifer is an interstate resource, the Court rejected Mississippi's argument that it maintains sovereign ownership of all groundwater originating within its state boundaries. Pointing to its 1938 case of *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938), the Court emphasized it has consistently denied the proposition that a state may exercise exclusive ownership or control of "interstate" waters flowing from within their boundaries. In the Court's view, a state's jurisdiction over the lands within its borders, including the beds of streams and other waters, does not confer unfettered "ownership or control" of flowing interstate waters themselves. Moreover, the Court explained, "The origin of an interstate water may be relevant to the terms of an equitable apportionment. But that feature alone cannot place the resource outside the doctrine itself."

Mississippi relied on the 2013 decision in *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614 (2013) for its sovereign ownership theory. The Court concluded *Tarrant* did not apply because it involved the interpretation of the Red River Compact in a dispute between water agencies in Texas and Oklahoma and was not an equitable apportionment case. Additionally, to the extent that *Tarrant* stands for the proposition that "one state may not physically enter another to take water in the absence of an express agreement," the Court reasoned, "that principle is not implicated here." Unlike the situation in *Tarrant*, the parties stipulated that Tennessee's wells were all vertical wells and that Tennessee did not physically enter or propose to enter Mississippi to divert its share of the water.

Lastly, the Court voiced concern with the potential policy implication of Mississippi's exclusive ownership and control theory. If taken to its logical end, Mississippi's position might allow an upstream state to attempt to cut off flow to downstream States.

Mississippi Disavows Equitable Apportionment of the Middle Claiborne Aquifer

In addition to dismissing Mississippi's complaint, the Court also declined to decide whether Mississippi should be granted leave to file an amended complaint seeking equitable apportionment in the present case. The Court noted that Mississippi never requested equitable apportionment as alternative relief in its Complaint and expressly rejected the doctrine as a desired remedy throughout the case. Therefore, the Court would not assume that Mississippi will seek equitable apportionment in the future.

Burden of Proof

The Court closed its opinion by highlighting the exacting burden of proof and joinder standards for equitable apportionment actions. Doing so seemed to signal caution to Mississippi and potentially other States who seek equitable apportionment to resolve interstate groundwater disputes going forward.

To receive equitable apportionment under the Court's original jurisdiction, a state "must prove by clear and convincing evidence some real and substantial injury or damage." The Court would also need to consider a broader range of evidence than Mississippi had previously presented, including not only

the physical properties and flow of a water resource, but also existing consumptive uses and return flow patterns, the availability of alternative water supplies, and the costs and benefits to the parties. Furthermore, an equitable apportionment action would likely require Mississippi to join additional parties, such as other states that rely on the Middle Claiborne Aquifer.

Conclusion and Implications

The Court's decision in *Mississippi v. Tennessee* marks a new era in interstate water jurisprudence. For the first time ever, the Court determined that certain groundwater can be classified as interstate water and allocated by the Court using the equitable apportionment doctrine. As prolonged western droughts continue creeping eastward and the demand for water increases across the county, the likelihood of new and intensifying disputes between states over interstate groundwater will likely follow. The Supreme Court showed its willingness to extend the equitable apportionment doctrine to assist states in allocating rights to disputed interstate groundwater. However, the Court also appears to warn states seeking equitable apportionment as their chosen remedy to be careful of what they ask for. Such cases will undoubtedly require extensive technical expert analysis of the hydrogeology of the interstate aquifer and the feasibility of alternatives, and the economic costs and benefits to all affected states.

As other equitable apportionment cases have shown, the fundamental premise of equitable apportionment is the states' equality of right to the resource, and not necessarily equality of the amount apportioned. The Court's opinion therefore begs the question: to what extent will this case motivate Mississippi, Tennessee, and other similarly situated states to attempt to negotiate an interstate compact addressing previously unallocated interstate groundwater? The Supreme Court's opinion is available online at: https://www.supremecourt.gov/opinions/21pdf/143orig_1qm1.pdf.

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ENVIRONMENTAL NEWS

LOWER COLORADO RIVER BASIN WATER AGENCIES REACH AGREEMENT ON 500+ PLAN AS DROUGHT RESPONSE EFFORTS CONTINUE

Last month, at the December 15, 2021 Colorado River Water Users Association conference held in Las Vegas, Nevada, water agencies from across Lower Colorado River Basin states came together with the U.S. Bureau of Reclamation (Bureau) to craft a plan for conserving water resources in the Southwest. The result was an agreement between the Bureau and several major water agencies from California, Nevada, and Arizona that proposes voluntary water reductions in order to keep the water level of Lake Mead from continuing its freefall. This agreement comes at a time when urgency to negotiate new rules for managing the waning watershed, which serves more than 40 million people, is at its height, as current guidelines and an overlapping drought plan are set to expire in 2026.

The Setting

The two largest reservoirs in the Colorado River system, Lake Mead and Lake Powell, are well below their halfway point for water elevations. Looking at the two reservoirs together, the Bureau of Reclamation's Lower Colorado Water Supply Report from December shows that they sit at about 34 and 28 percent of their storage capacities, respectively, so low that the federal government declared the first ever water shortage on the river in the early summer of 2021, triggering cutbacks in Arizona and Nevada. Further stressing the dire nature of the situation, forecasts released at the conference show Lake Mead's water levels continuing to drop if no further action is taken.

The Plan

Enter the 500+ Plan. In addition to the Bureau, the water agencies taking part in the 500+ Plan include the Southern Nevada Water Authority, Arizona Department of Water Resources, Central Arizona Project, and southern California's Metropolitan Water District. Coming in the form of a Memorandum of Understanding signed during the Colorado River Water Users Association's annual conference, the water agencies involved agreed to work together to keep an additional 500,000 acre-feet of water in Lake Mead over the next two years (through 2023). The additional water saved by the plan, a half-a-million acre-feet, would be enough water to serve about 1.5 million households a year and would add about 16 feet total to the reservoir's level, which saw record low levels this past summer.

On top of the water savings discussed in the 500+ Plan, the MOU also calls for financial investment from parties involved—$40 million from the Arizona Department of Water Resources, and $20 million each from the Southern Nevada Water Authority, Metropolitan Water District, and the Central Arizona Project, which operates a canal system that delivers Colorado River water in Arizona. The Bureau is also slated to match the funding, for a total of $200 million. This spending is accordingly designed to be used to incentivize farmers, water agencies and tribes to reduce their total water use, freeing up more water for return into the reservoir.

Conclusion and Implications

Agencies throughout the Lower Colorado River Basin have been cooperating for some time now to help curb the effects of the seemingly decades-long drought the basin has experienced. As recently as 2019, for example, the Lower Basin Drought Contingency Plan was crafted and included a provision requiring the three lower-basin states to consult and agree to additional measures to stabilize Lake Mead, at least in the short term. Well the time for consulting came much sooner than anyone had hoped and the 500+ Plan serves as the additional measures contemplated.

The 500+ Plan is also a significant agreement in that it builds on the partnerships of major Colorado River water agencies that began to form while the Drought Contingency Plan was coming together.

Now, over the course of the 500+ Plan, and moreover the Drought Contingency Plan and other plans sure to follow, we will be able to witness the efficacy of an interstate drought response fueled by unprecedented emergency. If the desired outcomes of the 500+ Plan can be attained by the 2024 horizon it will surely be a step towards re-establishing stability, even if only a small one, for all who are fueled by the lower Colorado. A link to the 500+ Plan is available online at: https://library.cap-az.com/documents/departments/planning/colorado-river-programs/cap-500plus-plan.pdf.
(Wesley A. Miliband, Kristopher T. Strouse)

NEW MEXICO'S WATER MANAGERS CONTINUE TO ADAPT TO WATER SCARCITY IN THE FACE OF DROUGHT-DRIVEN DIMINISHED WATER SUPPLIES

Western water managers bid farewell to 2021 amidst extreme drought conditions. November 2021 was the second driest month on record for the West and Southwest according to the National Oceanic and Atmospheric Administration (NOAA). Over the last 20 years, New Mexico has faced more dry than wet years. In addition, snowpack and run-off are suffering from the *La Niña* weather pattern, which is contributing to dry conditions throughout much of the West. New Mexico's State Engineer addressed the ongoing drought challenges by issuing, *inter alia*, an order for administration of surface and groundwater rights in the Lower Pecos River. In the Middle Rio Grande Valley, the Middle Rio Grande Conservancy District (MRGCD) will consider adaptive seasonal changes to its irrigation schedule at its meeting next month.

Background

The expansive drought facing the West did not go unnoticed by federal lawmakers and the United States Bureau of Reclamation (Bureau). Water managers declared a shortage on the Colorado River for the first time in the fall of 2021. By mid-December, the Bureau announced mandatory delivery reductions to the lower basin states within the Colorado River Basin. On December 15, 2021, in recognition that "for more than twenty years, the Colorado River basin has suffered an extended drought and a warmer and drier climate, contributing to substantially reduced flows into the system." Western state water managers signed a Resolution to Protect the Sustainability of the Colorado River at the annual Colorado River Water Users Association meeting in Las Vegas, Nevada. As a Colorado Upper Basin State, New Mexico obtains its share of Colorado River water through the San Juan Chama Project, which carries water through tunnels beneath the Continental Divide to Albuquerque and other municipalities and water users.

Drought is generally defined as a long period of abnormally low rainfall, especially one that adversely affects growing or living conditions. It is marked by conditions of moisture deficit sufficient to have an adverse effect on vegetation, animals and humans over a sizable area. Dry, warm weather is also characterized by a *La Niña* weather pattern. La Niña is often associated with increasing drought conditions. A *La Niña* forecast reflects a periodic climate cycle marked by abnormally cooler sea surface temperatures building in the equatorial waters in the Pacific. Sea surface temperatures that run 3 - 5° cooler tend to result in dry regions becoming dryer and warmer and wet regions becoming wetter and cooler. In the Southwest, the weather effect is less snow and higher winter temperatures. New Mexico has mirrored the La Niña weather effect perfectly this year.

A year ago, on December 9, 2020, New Mexico's Governor formally declared a state emergency due to drought conditions statewide. For most areas, the drought has been an ongoing condition for several years and even many decades. The formal declaration of a drought emergency states:

> . . .according to the October 20, 2020 U.S. Drought Monitor, which reflects drought conditions, 100 percent of New Mexico has been classified as being in a drought condition with

approximately 85% of the State classified as severe drought or worse, with approximately 67% classified as extreme drought.

The Declaration noted that:

> New Mexico river basins . . . experienced Water Year 2020 precipitation ranging from 55% to 80% of normal with an estimated 50% of the basins receiving less than half of normal.

New Mexico remains in extenuated drought conditions to the present day. The U.S. Drought Monitor notes that:

> The most intense period of drought occurred the week of January 19, 2021, where [exceptional drought conditions] affected 54.27% of New Mexico. As of December 28, 2021, the snowpack in nearly all of New Mexico's mountain ranges is well below average. New Mexico relies heavily on above-average snowfall in its mountain ranges to replenish reservoirs and irrigation needs in the following year.

New Mexico's Drought Plan

According to New Mexico's Drought Plan:

> . . .extended periods of drought have devastated the State during 1900-1910, 1932-1937, 1945-1956, 1974-1977, 2002-2004 and 2011-2013, the last short duration drought that affected New Mexico occurred during 1996 and prompted the State to prepare a Drought Emergency Plan for New Mexico during that year. *See*, https://www.ose.state.nm.us/Drought/droughtplan.php.

The Plan was updated in 2018. Just as Alaska's Indian Tribes have many words for snow, so too, does New Mexico have many words to describe drought. New Mexico's Drought Plan includes meteorological drought, agricultural drought, hydrologic drought and socioeconomic drought. The purpose of New Mexico's Drought Plan is to minimize the impacts of drought conditions by providing an integrated approach to statewide drought monitoring, assessment and responses.

The Need for Adaptive Management Incentives

Tight water supplies underscore the need for adaptive water management initiatives. In New Mexico's Middle Rio Grande Valley, some irrigators are concerned that those who engage in water conservation practices and irrigation efficiencies may end up receiving less water for their efforts, which brings up operational equity in allocating water in water scarce times. New Mexico's water managers are already considering staggering the start of the 2022 irrigation season to prevent the irrigation delays irrigators experienced in 2021.

With predictions of more dry weather impacting water supplies, water managers, users and irrigators are evaluating their operations and efficiencies. In anticipation of the 2022 irrigation season, water curtailments, forbearance, fallowing, water right priority, crop substitutions, and increased groundwater pumping to augment less surface water availability are all renewed subjects of discussion along with the staples of water conservation and reuse. New Mexico has several mechanisms that address allocating water in scarce times while promoting operational equity. These mechanisms include statutory provisions in the Water Code and private initiatives such as water sharing agreements, lease agreements, and the conjunctive management of surface and groundwater supplies. Increasingly, water conservation is a way of life.

State Law and Water Conservation

The obligation to conserve water is found in three areas of the law. First, the New Mexico Constitution allows one to acquire a water right only if water is placed to beneficial use. Using more than one reasonably needs is not beneficial use, it is waste. N.M. Const., art. XVI; *see also, Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981). Second, one cannot achieve a new appropriation of water or transfer a water right without proving their use is consistent with the conservation of water. NMSA 1978, § 72-5-23 (1985). Local political subdivisions have extensive authority to require conservation of water under their delegated police power. *See,* NMSA 1978, § 3-53-2 (1965) ("In order to prevent waste and to conserve the supply of water, a municipality which owns and operates a water utility, or has granted a franchise for the operation of a public water system, may by ordinance regulate and restrict the use of water").

In addition, the New Mexico State Engineer is vested with the authority to seek injunctive relief to protect or conserve public waters of the State; such authority exists independently of any statute. *See, State ex rel. Reynolds v. Mears*, 86 N.M. 510, 525 P.2d 870 (1974). Finally, the New Mexico Interstate Stream Commission is charged with the authority to, among other things:

> . . .investigate water supply, to develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of this state, interstate or otherwise . . . . NMSA 1978, § 72-14-3 (1935).

Water Reuse

In response to drought and water scarcity, New Mexico law encourages the re-use of effluent by making it the private property of the entity developing the effluent. *Roswell v. Reynolds*, 99 N.M. 84, 654 P.2d 537 (1982). Furthermore, persons that shift to drip systems to conserve water have been allowed to spread their conserved water on adjoining land owned by them. *See, Sun Vineyards, Inc. v. Luna County Wine Dev. Corp.*, 107 N.M. 524, 760 P.2d 1290 (1988). Developers are required to comply with the latest conservation technology, and political subdivisions around the state have begun to place limits on the use of domestic wells by individuals. As discussed below, aquifer storage and recovery are encouraged by legislative enactments.

New Mexico is at the forefront of supporting initiatives that both protect and maximize the critical connection between treatment and re-injection of groundwater and the use of aquifers as underground reservoirs. In 1999, New Mexico passed the Ground Water Storage and Recovery Act authorizing the underground storage and recovery of water. NMSA 1978, §§ 72-5A-1 to 72-5A-17 (1999). The salient value of this concept is that depleted aquifers can be treated as underground reservoirs that do not bear the cost of surface evaporation. Likewise, treated water can be injected to achieve water conservation. Creative use of re-injection can be used to alter effects of wells on stream systems, mound groundwater for future use and utilize the filtration of New Mexico's aquifers to further improve their quality.

Water-Use Leasing Act

New Mexico's Water-Use Leasing Act also serves to allocate and conserve water in water-low times by allowing owners of valid water rights to lease all or any part of the water use due them for an initial term not to exceed ten years. NMSA 1978, § 72-6-1 *et seq*. The act aims to alleviate increasing pressure for reallocation of waters in New Mexico due to converging growth and environmental pressures. To participate in water leasing in New Mexico, a person must file an Application to Transfer Point of Diversion, Purpose and/or Place of Use with the Office of the State Engineer detailing the proposed lease. Such lease arrangements ensure water is put to beneficial use in areas of greatest need, thereby ensuring the efficient use of water in low-water situations around the state. This goal is supported by the act not requiring the lessee to show an absence of impairment and that the lease is consistent with conservation and public welfare as contrasted with applications to transfer water rights.

Conclusion and Implications

Drought is not a new phenomenon in the West in general or New Mexico in particular, but the severity and extent of the recent intensity of drought conditions fueled by climate change will continue to have long lasting ramifications. Rising global temperature could alter agricultural cropping patterns increasing growing seasons at higher elevations and ironically triggering greater agricultural demand for water. New Mexico will increasingly be obligated to conserve, adapt, and evaluate its future in light of these changes. Looking forward, New Mexico is in the position to combine its technological base to address many of the emerging issues associated with increasing drought conditions.
(Christina J. Bruff)

LEGISLATIVE DEVELOPMENTS

$1.2 TRILLION INFRASTRUCTURE LEGISLATION PROVIDES FUNDING AND NEPA STREAMLINING FOR KEY ENVIRONMENTAL AND INFRASTRUCTURE PROJECTS

On November 15, 2021, President Biden signed the landmark $1.2 trillion infrastructure legislation package, more commonly referred to as the Infrastructure Investment and Jobs Act (IIJA or Act). The 2,700+-page Act has been touted as providing key funding to rebuild and modernize the nation's roads, bridges, public transportation, broadband, energy and resource infrastructure needs. The Act also includes a significant amount of funding amount directed by the federal government towards cleaning up pollution and funding to protect the communities against the detrimental effects of climate change. The Act could help make significant strides towards the Biden administration's goal of reaching 100 percent clean energy by 2035. In addition to the more-discussed funding provisions, the Act also contains substantive provisions designed to streamline the environmental permitting processes, particularly for the National Environmental Policy Act (NEPA) environmental reviews for "major projects" under NEPA, which includes most infrastructure projects being funded by IIJA, and amends certain NEPA streamlining provisions for infrastructure projects covered under the Fixing America's Surface Transportation (FAST) Act of 2015 .

IIJA Background

In June 2021, President Biden signed off on an bipartisan agreement to allocate trillions of dollars in infrastructure improvements across the country. The agreement proposed to spend $973 billion over five years—totaling $1.2 trillion over eight years—on infrastructure projects. On August 10, 2021, the Senate passed the IIJA. After weeks of debate on amendments and tension along party lines, especially concerning what is considered "core infrastructure," on November 5, 2021, the House approved the Act. There are several environmental and climate-related investments in the Act.

Key Provisions of the Infrastructure Investment and Jobs Act

Climate Resilience and Ecosystem Restoration

The IIJA designates over $50 billion for climate resilience in order to help communities prepare for extreme fires, floods, storms and drought—in addition to a major investment in the weatherization of homes. This represents one of the largest investments in the resilience of physical and natural systems for the country. The Act provides financial resources for communities that are recovering from or are vulnerable to disasters, increases funding for the Federal Emergency Management Agency (FEMA) and the U.S. Army Corps of Engineers (Corps) programs that help reduce flood risk and damage, and provides additional funding to the National Oceanic and Atmospheric Administration for wildfire modelling and forecasting. The IIJA includes an assignment of over $2 billion in funding to the Departments of the Interior and Agriculture for ecosystem restoration and $1 billion for Great Lakes restoration. The Act also sets aside $350 million to build wildlife corridors, to ensure animals can get under, around or over roads to migrate, mate and maintain biodiversity

Physical Infrastructure Improvements

The IIJA allocates about $110 billion for roads, bridges, highways, and surface transportation projects, including $40 billion of new funding for bridge repair, replacement, and rehabilitation, and around $16 billion for major projects that are too large or complex for traditional funding programs. The investment aims to repair and rebuild the roads and bridges "with a focus on climate change mitigation, resilience, equity, and safety for all users, including cyclists and pedestrians."

The Act also provides a major investment, of about $39 billion, for repair of public transit, and

$66 billion allocation for passenger and freight rail. These transit funds are intended to be allocated to modernizing bus and rail fleets and increasing access to communities that currently lack public transportation options. The rail funds could eliminate Amtrak's maintenance backlog and increase railway service areas outside the Northeast and mid-Atlantic regions. The package includes $12 billion in partnership grants for intercity rail service, including high-speed rail. These public transit investments will help reduce greenhouse gas emissions by repairing, upgrading, and modernizing the nation's transit infrastructure.

Another $17 billion is allocated towards port improvements and $25 billion towards airport improvements. The intent is to allow for reduced congestion and emissions, and promoting electrification and utilizing other low-carbon technologies.

Clean Energy

The IIJA provides a roughly $73 billion investment in upgrading power infrastructure such as new transmission lines and the expansion of renewable energy. For example, the Act allocates $16.3 billion to the Department of Energy (DOE) for energy efficiency and renewable energy, with specific funds allocated for continued development of battery storage technology to provide backup for variable renewable generation. This allocation also includes $21.5 billion to establish a new Office of Clean Energy Demonstrations within the DOE to research carbon capture, hydrogen power, resilient and adaptable electric grids, and other technologies. The IIJA will distribute $3 billion over five years for demonstration projects on the processing of battery materials and the construction and retrofitting of processing facilities, as well as an additional $3 billion for grants for similar activities relating to manufacturing and recycling batteries to reduce the life cycle environmental impacts of battery components.

The Act further commits $7.5 billion funding to zero- and low-emissions buses, ferries, and vehicles, including investment towards zero- and low-emission school buses, and another $7.5 billion for building a nationwide network of plug-in electric vehicle chargers, including deployment of EV chargers along highway corridors to facilitate long-distance travel.

Clean Water

The IIJA invests over $50 billion in water infrastructure improvements to protect against droughts and floods, and weatherization technology aimed to increase resilience of water systems. Another $55 billion is invested in advancing clean drinking water—the Act allocates $15 billion to replace all of the nation's lead pipe,$200 million to address lead in school drinking waters, and contribute to addressing "forever" contaminants like per- and polyfluoroalkyl substances (PFAS). Earlier in October, Biden administration issued a PFAS Strategic Roadmap that outlined various actions that the U.S. Environmental Protection Agency will take between 2021 and 2024 regarding PFAS, including developing a Notice of Proposed Rulemaking to designate perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act. (*See:* https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024)

Environmental Remediation

The IIJA begins the process of reinstating the Superfund tax "polluter pays" principle, and also provides $21 billion in environmental remediation investment, including Superfund and brownfield sites, abandoned mines, and for the closure of orphan gas wells.

NEPA Streamlining Provisions

The IIJA also includes key NEPA streamlining provisions. In order to obtain bipartisan support, § 11301 of the Act amends § 139 of title 23 of the United States Code to provide permanent NEPA streamlining provisions to the federal permitting and environmental review process for "major projects" as defined under NEPA, called as the "One Federal Decision" or "OFD." The OFD streamlining provisions effectively decrease the federal permitting timeline for infrastructure projects by requiring, among other things: 1) federal agencies to coordinate immediately and create a joint project schedule; 2) one agency to lead the NEPA process; 3) the lead agency to invite other agencies to participate in the environmental review within 21 calendar days instead of the prior time limit of 45 calendar days; 4) agencies to work

at the same time and not wait in turn; 5) the NEPA review process to be completed within two years from the publication of the notice of intent, pursuant to a schedule developed by the lead agency; 6) the generation of a readable review document with a presumptive 200-page limit for the alternatives analysis portion of an Environmental impact Statement (EIS); and 7) the production of a timely "record of decision" within 90 days of the agencies' issuance of the final EIS. In fact, a number of these provisions reflect requirements and objectives set forth in Executive Order 13807, issued by President Trump in 2017.

In addition to reviving elements of Executive Order 13807, the IIJA also reauthorizes and amends those sections of the FAST Act of 2015 to streamline review of certain large infrastructure projects. For example, one provision of IIJA amends and permanently reauthorizes § 41002 (42 U.S.C. 4370m) of the FAST Act that pertain to environmental permitting. The federal permitting provisions of IIJA (Section 70801) amends the performance schedules for the Federal Permitting Improvement Steering Council formed under the FAST Act to have the most efficient possible processes, including alignment of federal reviews of projects, reduction of permitting and project delivery time, and consideration of the best practices for public participation. The federal agencies now have a recommended performance schedule of two years to permit the covered projects. The Act makes the permitting reforms established by the FAST Act, which were set to expire in 2022, permanent and extends them to projects sponsored by Indian tribes or located on tribal land. Another important amendment to the FAST Act provisions under the IIJA include requiring a single, joint interagency EIS for a project, where an EIS is required.

In addition, the IIJA includes several provisions related to NEPA processing that would apply only to the transportation projects, including several provisions with respect to categorical exclusions. The Act also establishes a new categorical exclusion under NEPA for certain oil and gas pipeline gathering lines, and expands the scope of the existing categorical exclusion for projects of limited federal assistance to include those that receive $6 million or less in federal funding and have overall implementation costs of $35 million or less.

Critics of the Act's streamlining provisions argue that the provisions would decrease the public's ability to participate in the permitting process, and make it easier for agencies to ignore impacts on communities most affected by permitting decisions. But industry groups have long argued that the current environmental permitting is needlessly lengthy and complicated, and has prevented badly needed infrastructure from reaching the intended communities.

Conclusion and Implications

The Infrastructure Investment and Jobs Act provides key funding opportunities for those with infrastructure projects across a wide variety of industries, including transportation, telecommunications, energy and water. The Act focuses and creates new opportunities in not just on traditional infrastructure projects such as roads, tunnels and bridges, but also focusses on new technologies such as electrification technology, broadband infrastructure and a new focus on water. However, how soon the Act leads to actual results will depend on how soon he federal agencies are able to implement programs and regulations to implement the Act provisions, and how soon the states and local agencies, as the owners and operators of most infrastructure, are able to mobilize their own resources to design and build or repair the infrastructure projects. The White House has recognized the importance of implementation by announcing a new Executive Order (EO) on November 15, 2021, to guide how the bill is implemented. The EO establishes an Infrastructure Implementation Task Force to support inter-agency coordination and directs agencies to follow the Biden administration's priorities in implementing the Act.

In spite of the magnitude of the funding provisions, some critics see the IIJA, by itself, to be insufficient to meet the investment needed to meet the climate change and clean energy goals. The proposed Build Back Better Bill, HR 5376, in comparison, is seen as a bigger tool for significant shift in climate change policy by including $555 billion in clean energy funding [*see:* https://www.congress.gov/bill/117th-congress/house-bill/5376?q=%7B%22search%22%3A%5B%22build+back+better%22%2C%22build%22%2C%22back%22%2C%22better%22%5D%7D&s=1&r=1] This includes $320 billion in tax credits for solar panels, building efficiency, and electric vehicles,

making it cheaper and easier to deploy clean renewable energy. But for now, the Build Back Better Bill's chances of passage in Senate appear to be very low.

For more informatation on the IIJA, *see:* https://www.congress.gov/bill/117th-congress/house-bill/3684. (Hina Gupta)

REGULATORY DEVELOPMENTS

DEPARTMENT OF THE INTERIOR APPROVES SOLAR PROJECTS ON BLM-MANAGED CALIFORNIA LANDS—SOLICITS INTEREST FOR SOLAR LEASING ON BLM-MANAGED LANDS IN COLORADO, NEW MEXICO AND NEVADA

Advancing the Biden administration's goal of substantially increasing the production of renewable energy from federally-owned lands, on December 21, 2021 the Department of the Interior's Bureau of Land Management (BLM) issued Decision Records approving the Arica and Victory solar energy projects on a combined 2,665 acres of federally-owned lands located in Riverside County, California. Together, the projects will generate 465 megawatts (MW) of electricity using photovoltaic technology, as well as provide 400 MW of battery storage. [*See:* BLM Rights of Way Case File Nos. CACA 56898 and CACA 56477, Decision Records dated December 2021; Call for Nominations or Expressions of Interest for Solar Leasing Areas on Public Lands in the States of Colorado, New Mexico, and Nevada, 86 Fed.Reg. 242, 72272 (Dec. 21, 2021)]

The projects were approved in conformance with the Desert Renewable Energy Conservation Plan (DRECP), a "collaborate, inter-agency landscape-scale planning effort covering 22.5 million acres in seven California counties." DRECP Record of Decision (2016), at ES-1. The DRECP seeks to "facilitate the timely and streamlined permitting of renewable energy projects" while advancing "federal and state conservation goals and other federal land management goals" while meeting "the requirements of the federal Endangered Species Act … and Federal Land Policy and Land Management Act." *Ibid.*

In addition, the Department of the Interior (DOI) issued a solicitation for "nominations or expressions of interest" in opportunities for utility-scale solar leases within identified solar energy zones (SEZ) on federally-owned lands in Colorado, New Mexico and Nevada. 86 Fed.Reg. 242, 72272. The SEZ were designated in the 2012 Western Solar Plan, which "amended BLM resource management plans (RMPs) to designate SEZs on public land determined to be suitable for utility-scale solar energy development" in six southwestern states. 86 Fed.Reg. 242, 72272.

Background

The process for adopting the DRECP began in 2008, with DOI and its partner federal and state agencies seeking to streamline the permitting process for utility-scale renewable energy projects in the California desert counties of Imperial, Inyo, Kern, Los Angeles, Riverside, San Bernardino, and San Diego, while advancing conservation of identified species and other natural and cultural resources, as well as fulfilling BLM's mandate to manage federal lands for multiple uses. A draft of the plan was released six years after the effort began, in 2014, and the DRECP was adopted in 2016.

The DRECP utilized two strategies that departed from prior BLM planning effort. Previously, BLM's decisions to allow specific private development activities on federally-owned lands were reactive, *i.e.*, BLM waited for private applications to identify specific areas proposed for development before engaging in any analysis of that land for suitability. The DRECP, however, implemented Land Use Plan Amendments to the California Desert Conservation Area Plan to identify "areas appropriate for renewable energy development." Second, the DRECP covers private, state, and federal land, enabling landscape-level planning.

Also in 2008, BLM initiated the Western Solar Plan (WSP), with similar goals to the DRECP:

> . . .to streamline permitting of utility-scale renewable energy development on federally-owned lands in the southwest, while advancing conservation and multiple-use goals.

The WSP was narrower in scope than the DRECP, however, in that it targeted only solar energy development, and covers only BLM-managed federal lands. Like the DRECP, the WSP used Land Use Plan Amendments, this time to designate SEZs as appro-

priate for utility-scale solar development. The WSP was adopted in 2012.

The Projects Approved and Nominations Solicited

The Arica and Victory projects are located on 2,665 acres of adjacent lands and will share access roads, transmission and interconnection infrastructure, and each project will install up to 200 MW of battery storage. BLM formally consulted with the U.S. Fish and Wildlife Service (FWS) pursuant to the Federal Endangered Species Act, with the FWS determining that the projects were consistent with its Biological Opinion for the DRECP, including that the projects are not likely to jeopardize the continued existence of the federally threatened Mojave population of the desert tortoise. The FWS concurred with BLM's determination that the projects are not likely to adversely affect various federally-endangered bird species. Likewise, BLM obtained concurrence with its finding of no effect for all historical properties located within the project's area of potential effect. BLM's consultation with six Indian tribes is ongoing.

BLM's solicitation of "nominations or expressions of interest" for solar leasing within the WSP seeks development proposals to be submitted up to and including January 20, 2022. 86 Fed.Reg. 242, 72272. In the event that multiple proposals are received for the same or overlapping lands, BLM "may hold a competitive leasing process." 86 Fed.Reg. 242, 72273. In the absence of multiple proposals, BLM "may accept and process non-competitive solar development applications" for lands identified in the notice. *Ibid.*

Conclusion and Implications

The Obama administration invested in a multiple-year effort to adopt landscape-level planning in support of utility-scale renewable energy development on a commercially-sustainable timeline and with greater certainty regarding mitigations. The fate of these efforts was unclear during the four years of the Trump administration. In just under a year, the Biden administration has begun in earnest the long-awaited implementation process.
(Deborah Quick)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD CONSIDERS IMPOSING MANDATORY WATER USE RESTRICTIONS STATEWIDE IN RESPONSE TO DROUGHT CONDITIONS

In response to worsening drought conditions, government officials and water suppliers in various places throughout California have begun taking emergency actions to reduce residential and commercial outdoor water use. Implementing Governor Newsom's executive orders, the State Water Resources Control Board (SWRCB) has now proposed statewide mandatory water use restrictions that will be considered for approval in early January.

Background

In April 2021, Governor Newsom issued the first of a series of drought emergency executive orders, starting with specific listed counties. In July 2021, Newsom signed Executive Order N10-21, calling on all Californians to voluntarily reduce water use by 15 percent as compared to 2020. Following reports that voluntary efforts achieved reductions of approximately just 5 percent, Newsom issued a proclamation in October 2021 declaring that drought conditions constituted a state of emergency throughout the entire state. The October proclamation authorized the SWRCB to use emergency regulations pursuant to Water Code § 1058.5 to restrict wasteful water practices. Accordingly, on November 30, 2021, the SWRCB published a Notice of Proposed Emergency Rulemaking along with proposed text for an emergency regulation. As of the date of this writing, the SWRCB was scheduled to vote upon a resolution adopting the emergency regulation on January 4, 2022.

California Drought Conditions

The SWRCB observes that drought is a recurring element of California's hydrology, but that drought conditions are reaching to further extremes. The

western states experienced some of the hottest temperatures on record throughout the summer of 2021. As of early December 2021, approximately 92 percent of the state was experiencing severe, extreme, or exceptional drought, up from approximately 74 percent one year prior, according to the U.S. Drought Monitor. In addition, as represented more fully by the chart below, many of California's key lakes and reservoirs were falling well below their historical average seasonal capacity when the SWRCB issued the proposed regulation:

- Shasta Lake Reservoir—46 Percent [of Early December Percentage of Average]

- Lake Oroville Reservoir—63 Percent

- Trinity Lake Reservoir—49 Percent

- San Luis Reservoir—45 Percent

- New Melones Reservoir—67 Percent

- Don Pedro Reservoir—76 Percent

- Lake McClure Reservoir—48 Percent

Though California has recently experienced substantial increases in snowpack and precipitation from significant atmospheric river events, many forecasts still predict that California's drought conditions are likely to continue into 2022 and beyond, especially if increased temperatures result in earlier-than-normal snowmelt and runoff.

The Proposed Emergency Regulation

Under the SWRCB proposed regulation, the following are deemed wasteful and unreasonable water uses, and are prohibited:

- Incidental runoff of outdoor irrigation water.

- Vehicle washing with a hose that is not equipped with a shot-off nozzle.

- Washing hardscapes such as driveways, sidewalks, and asphalt with potable water.

- Using potable water for street cleaning or construction purposes.

- Using potable water to fill fountains and other decorative water fixtures (including lakes and ponds) except where recirculation pumps are used and refilling only replaces evaporative losses.

- Watering lawns and ornamental landscapes during and within 48 hours after measurable rainfall of at least a quarter-inch of rain.

- Using potable water for watering lawns on public street medians or landscaped areas between the street and sidewalk.

The regulation also prohibits homeowner associations, cities, and counties from impeding drought response actions taken by homeowners. Notably, violation of the regulation is punishable by a fine of up to $500 per day. If approved, the regulation will apply to all Californians and remain in effect for one year unless rescinded earlier or extended by the SWRCB.

At the time of this writing, the public comment period on the proposed emergency regulation was scheduled to run through December 23, 2021. The proposed emergency regulation and related materials are located on the SWRCB website at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/emergency_regulation.html.

SWRCB Anticipated Outcomes

The SWRCB estimates that the mandatory restrictions will result in statewide reductions of Californians' outdoor water use of up to 20 percent compared to 2020. The regulation is largely predicated upon the 2014-2015 mandatory water use restrictions implemented by former Governor Brown and the SWRCB during the 2012-2016 drought, which resulted in an approximately 25 percent statewide water use reduction.

Conclusion and Implications

Despite significant forecasted revenue reductions for water suppliers, the proposed emergency regulation seeks to preserve California's water supplies in anticipation of continued, potentially multi-year, drought conditions. Due to more frequent and severe

drought conditions over the past several decades, and the commensurately increased responsive regulations, the SWRCB likely perceives that Californians are more accustomed now than ever to statewide permanent or periodic water restrictions. If enforcement is robust, and implemented in combination with public education and outreach, the regulation has the potential to successfully reduce statewide water use to stretch out currently available supplies. At the same time, many Californians may be understandably frustrated by a perceived inconsistent, "emergency-based" management approach from year to year.
(Byrin Romney, Derek Hoffman)

Editor's Note: Substantial rainfall and snowpack in December has greatly improved California's situation, but the state remained in some degree of drought.

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Air Quality

•November 19, 2021 - The U.S. Environmental Protection Agency (EPA) will collect a $197,500 penalty from Lehigh Cement Company LLC, a Mason City, Iowa, cement manufacturer, to resolve alleged violations of the Clean Air Act. According to EPA, the company is a "major air emission source" that failed to comply with state and federal regulations intended to limit harmful releases of air pollution. After reviewing Lehigh Cement Company's facility records in 2019 and 2020, EPA alleged that the company exceeded Clean Air Act emissions limits, failed to submit required reports to the state, and failed to conduct required testing of equipment. EPA also determined that air pollution from the facility may affect nearby overburdened communities. Under the terms of the settlement with EPA, Lehigh Cement Company is required to conduct additional air emissions testing to demonstrate ongoing compliance with the Clean Air Act.

•December 7, 2021—EPA announced a settlement with JCI Jones Chemicals, Inc. over Clean Air Act violations at its chemical facility in Torrance, California. JCI supplies chemicals to disinfect water systems and manufactures some chemicals on-site. JCI will pay a $200,000 penalty and restore its facility to compliance with the chemical accident prevention requirements of the Clean Air Act. In 2015 and 2017, EPA inspectors found violations of the Clean Air Act's Chemical Accident Prevention requirements at the JCI facility at 1401 W. Del Amo Blvd. Among other violations, EPA found that JCI failed to address corrosion deficiencies in pipes, replace chlorine hoses prior to the replacement date, translate operating procedures for its Spanish-speaking employees, and adequately address in its hazard analysis the previous derailment of a railcar carrying sulfur dioxide. In addition to paying the penalty, JCI has agreed to follow a schedule for translating its operating procedures and safe work practices into Spanish, to adopt a computerized maintenance management system, and to implement an accelerated schedule for emergency response exercises.

•December 14, 2021—EPA has reached an administrative settlement agreement with George Prepared Foods Corporation resolving allegations that the company violated the Clean Air Act at its facility located in Caryville, Tennessee. Non-compliance with the Chemical Accident Prevention Provisions (CAPP) and the Risk Management Program (RMP) was alleged after an inspection was conducted at the facility. George Prepared Foods Corporation produces poultry and prepared foods products. Anhydrous ammonia is used by the facility in its ammonia refrigeration process. EPA inspectors collected information leading to the allegations during an inspection of the facility in April 2019. EPA alleges the company failed to identify and address hazards associated with its ammonia refrigeration system and failed to design and maintain a safe facility as required by the RMP. The Consent Agreement and Final Order was filed on Nov. 30, 2021. Under the terms of the agreement, George Prepared Foods Corporation took steps to return the Caryville facility to compliance and will pay a civil penalty of $89,908.

•December 15, 2021 - The United States, on behalf of the EPA, has reached a proposed settlement with Synagro Northeast, LLC and the City of Woonsocket for alleged violations of the Clean Air Act. Under a proposed consent decree filed in the federal district court in Providence, Synagro, the operator, and Woonsocket, the owner, of the sewage

sludge incineration (SSI) unit in the Woonsocket Wastewater Treatment Facility will pay a civil penalty of $373,660 and take measures to bring the facility into compliance with Clean Air Act operating and emission limits designed to reduce the amount of air pollution emitted from the SSI unit. The Woonsocket Wastewater Treatment Facility processes sewage waste from the City of Woonsocket and the adjacent communities Bellingham, Blackstone, and North Smithfield. The facility's sewage sludge incineration unit reduces the volume of sewage sludge, but in doing so emits a variety of air pollutants. Under Clean Air Act rules implemented in 2016, an owner and operator of an SSI must meet emissions standards for air pollutants including mercury, lead, cadmium, dioxins and furans, carbon monoxide, particulate matter, and nitrogen oxides.

•December 16, 2021—EPA has filed a complaint against Diesel Ops LLC and Orion Diesel LLC in Waterford, Mich., for manufacturing, selling, and installing aftermarket parts known as "defeat devices" designed to defeat required vehicle emissions controls in violation of the federal Clean Air Act. EPA is seeking monetary civil penalties and injunctive relief in its CAA complaint to prevent Diesel Ops and Orion Diesel from manufacturing, selling or installing the defeat devices. The complaint also alleges that Nicholas Piccolo, an owner of the companies, failed to establish and maintain records and respond to requests for information, and that the companies transferred assets to him in violation of the Federal Debt Collection Procedures Act.

Civil Enforcement Actions and Settlements—Water Quality

•December 17, 2021 - BNSF Railway Corporation has agreed to pay $1,513,750 to resolve alleged violations of the federal Clean Water Act. According to the EPA, BNSF released approximately 117,500 gallons of heavy crude oil when one of its freight trains derailed outside of Doon, Iowa, in June 2018, resulting in discharges to the Rock River, Little Rock River, and Burr Oak Creek. EPA says the derailment occurred during heavy flooding in the area. Impacts from the oil spill included an evacuation order for nearby residents, elevated levels of hazardous substances within the affected site, closure of nearby drinking water wells, destruction of crops, and deaths of at least three animals.

•December 20, 2021—EPA has reached a settlement with Greenleaf Foods, SPC (also known as Lightlife Foods) to address alleged violations of the Clean Water Act pretreatment regulations by its soy-based food production facility in Montague, Massachusetts. As a result of EPA's settlement, Lightlife Foods has installed a wastewater pretreatment system that is now achieving compliance with the pretreatment regulations and has agreed to pay a $252,000 penalty to resolve claims that the company discharged low-pH wastewaters into the Town of Montague's sewer collection system. Lightlife Foods' new wastewater pretreatment system controls the pH of the wastewater that the facility discharges into the Montague municipal sewer system.

•December 20, 2021—EPA and the City of Fall River have signed an Administrative Order on Consent committing the City to continue implementing an agreed-upon five-year plan to reduce and treat combined sewer discharges coming from city wastewater pipes into the Taunton River and Mount Hope Bay. The order agreed upon requires the City to implement the first five years of its Integrated Plan. Overall, the City will spend $126.8 million implementing the first six years of its Integrated Plan. Fall River estimates it will spend about $20 million per year to implement corrective actions.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•December 1, 2021 - Houston, Texas-based Kirby Inland Marine LP has agreed to pay $15.3 million in damages and assessment costs under the Oil Pollution Act to resolve federal and state claims for injuries to natural resources resulting from an oil spill from a Kirby barge, after a collision Kirby caused. The United States and Texas concurrently filed a civil complaint along with a proposed consent decree. The complaint seeks money damages and costs under the Oil Pollution Act for injuries to natural resources resulting from Kirby's March 2014 discharge of approximately 4,000 barrels (168,000 gallons) of oil from one of its barges into the Houston Ship Channel at the Texas City "Y" crossing. The complaint alleges

that the spill resulted from a collision that occurred while a Kirby towboat, the *Miss Susan*, attempted to push two 300-foot-long oil barges across the Houston Ship Channel in front of the oncoming *M/V Summer Wind*.. The oil flowed from the Houston Ship Channel into Galveston Bay and the Gulf of Mexico, polluting waters and washing onshore from the collision site down to Padre Island National Seashore near Corpus Christi. Under the proposed consent decree, Kirby will pay $15.3 million as natural resource damages for the spill, which the federal and State trustees will jointly use to plan, design and perform projects to restore or ameliorate the impacts to dolphins and other aquatic life, birds, beaches, marshes, and recreational uses along the Texas coast.

•December 14, 2021 - Solutia Inc. and Pharmacia LLC, successors to Monsanto Company, will complete the cleanup of four former landfills and waste lagoons in Sauget, Illinois, across the Mississippi River from St. Louis. The settlement will require the companies to reimburse EPA $700,000 in past costs spent at the sites and take responsibility for implementing EPA's cleanup plan estimated to cost $17.9 million. Under the settlement, Solutia and Pharmacia will be required to implement the remedy selected by EPA for over 270 acres designated as Sauget Area 2 Sites O, Q, R and S. The sites were used by area industry to dispose of hazardous and other wastes throughout much of the 20th century. The hazardous waste includes toxic substances and known carcinogens, including PCBs, dioxin, lead, cadmium, benzene and chlorobenzene. Although the industrial area is not readily accessible to the public, the remedial actions required under this settlement will prevent exposure to these harmful contaminants for workers, anglers or others who gain access to the sites. The cleanup requires placing engineered caps over identified waste areas, conducting vapor intrusion mitigation and controlling access to the sites. This is only the latest in various lawsuits and settlements involving the cleanup of these former landfills dating back 15 years in which Solutia and Pharmacia have conducted extensive investigations, paid for the removal of hazardous wastes and installed a slurry wall to prevent contaminated groundwater from leaching into the nearby Mississippi River.

•December 17, 2021 - Alcoa Corporation and Howmet Aerospace, successors to Alcoa Incorporated, and the City of East St. Louis, Illinois, will clean up hazardous waste disposal sites surrounding Alcoa's former aluminum manufacturing plant in East St. Louis to resolve federal liability. The settlement will require the companies to clean up radium, arsenic, chromium, lead and other hazardous substances detected in soils at an estimated cost of $4.1 million and reimburse all future costs incurred by the United States in overseeing the cleanup. The complaint filed simultaneously with the proposed consent decree alleges that defendants are liable for the cleanup of hazardous wastes generated by and disposed of on and around the site of the Aluminum Company of America's aluminum manufacturing and production plant that operated from 1903 until 1957. Under the settlement, Alcoa Corporation and Howmet Aerospace, and the City of East St. Louis, which owns some of the property, will be required to implement the cleanup remedy selected by EPA for over 180 acres designated as Operable Unit 2, by excavating approximately 40,000 cubic yards of near-surface hazardous waste material to a depth of at least two feet, consolidating it with other waste from the former plant, and covering it with a minimum of two feet of clean soil that will be seeded to meet the requirements of applicable Illinois regulations. Stormwater controls also will be installed or reconfigured to protect local properties.

•December 20, 2021—EPA announced a settlement with Avantor Performance Materials, LLC (Avantor) to resolve alleged violations of Emergency Planning Community Right-to-Know Act (EPCRA) Toxics Release Inventory (TRI) reporting requirements at Avantor's Phillipsburg, New Jersey facility; Toxic Substances Control Act (TSCA) Chemical Data Reporting (CDR) violations at both its Phillipsburg, New Jersey and Paris, Kentucky facilities; and TSCA Mercury Export Ban Act (MEBA) (Mercury Export Prohibition) violations at its Paris, Kentucky facility. Under this settlement agreement, negotiated by EPA Region 2, Avantor has certified it is now in compliance with TSCA and EPCRA. It has submitted its required CDR and TRI reports for a variety of chemicals including acids, bases, salts, solvents and metals, and has ceased exporting elemental mercury. Avantor will also pay a $600,000 civil penalty. The

Consent Agreement and Final Order was approved by the EPA Environmental Appeals Board on December 15, 2021 and is effective immediately.

•December 20, 2021—EPA announced that it would recover $1.95 million in cleanup costs through a proposed settlement with H. Kramer & Co., BNSF Railway Company, and the City of Chicago. EPA incurred the costs while overseeing cleanup of lead-contaminated soil in the Pilsen neighborhood from 2015 to 2018. EPA will deposit the $1.95 million payment into a Pilsen Area Soil Site Special Account to be used to conduct or finance response actions at or in connection with the site, or to be transferred to the EPA Hazardous Substance Superfund.

Indictments, Sanctions, and Sentencing

•December 1, 2021 - Kristofer Landell and Stephanie Laskin were sentenced for conspiring to violate Clean Air Act regulations that control the safe removal, handling and disposal of asbestos. Judge McAvoy sentenced Landell and Laskin to eight months and ten months of incarceration respectively, as well as three years of supervised release, during which time defendants must surrender any asbestos-related licenses. Co-defendants Roger Osterhoudt, Gunay Yakup and Madeline Alonge were all sentenced to three years' probation in early November. All five defendants were further ordered to pay approximately $399,000 in restitution to the Environmental Protection Agency (EPA) for its costs related to cleaning up the now-contaminated site in Kingston, New York, known as the "Tech City property." The defendants may also be ordered to pay additional monies to members of the community who were potentially exposed to hazardous air pollutants as a result of the defendants' conspiracy. More specifically, between 2015 and 2016, Landell and Laskin both permitted, and in some cases directed, abatement workers to remove asbestos from the TechCity Property illegally by stripping regulated asbestos containing materials without properly containing the work area and removing the asbestos dry, thus allowing airborne fibers to escape into the surrounding environment. In an effort to conceal those crimes, Landell, acting in his capacity as an air- and project-monitor, concealed these violations by fabricating and falsifying paperwork required by EPA and the State of New York. The conspirators also engaged in other efforts to deceive authorities, such as by failing to conduct air-monitoring and falsifying at least one NYSDOL-required "final air clearance."

•December 6, 2021 - The pipeline company responsible for the discharge of 29 million gallons of oil-contaminated "produced water"—a waste product of hydraulic fracturing—was sentenced to pay a $15 million criminal fine and serve a three year period of probation. Summit Midstream Partners LLC pleaded guilty to criminal charges that it violated the Clean Water Act, as amended by the Oil Pollution Act of 1990, by negligently causing the discharge into U.S. waters in 2014, and deliberately failing to immediately report the spill to federal authorities as required. More than 700,000 barrels were discharged thereby contaminating Blacktail Creek and nearby land and groundwater. By law, the federal fines in this case will go to the Oil Spill Liability Trust Fund used to respond and clean up future oil spills. The criminal fine is in addition to a $20 million civil penalty imposed on Summit Midstream Partners LLC and a related company, Meadowlark Midstream Company LLC, to resolve civil violations of the Clean Water Act and North Dakota water pollution control laws. On Sept. 28, the civil consent decree was approved by the U.S. District Court for the District of North Dakota. (Andre Monette)

RECENT FEDERAL DECISIONS

D.C. CIRCUIT VACATES EPA'S TRUCK TRAILER GREENHOUSE GAS STANDARDS

Truck Trailer Manufacturers Association, Inc. v. U.S. Environmental Protection Agency, ___F.4th___, Case No. 16-1430 (D.C. Cir. Nov. 12, 2021).

On November 12, 2021, the D. C. Circuit Court of Appeals vacated a U.S. Environmental Protection Agency (EPA) and National Highway Traffic Safety Administration (NHTSA) rule that would have set fuel efficiency standards designed to reduce greenhouse gas emissions for trailers pulled by semi-trucks. The court in *Truck Trailer Manufacturers Association, Inc. v. EPA*, found that because trailers are not "motor vehicles" or "vehicles," the agencies lacked authority to set fuel efficiency standards for this equipment.

Background

In 2016, EPA and NHTSA jointly published a rule called *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles—Phase 2*, 81 Fed. Reg. 73478 (Oct 15, 2016). In addition to setting fuel efficiency standards to reduce greenhouse gas emissions from trucks, for the first time the agencies set fuel efficiency standards for heavy-duty trailers, pulled by tractors or semi-trucks. The rule was immediately challenged by the Truck Trailer Manufacturers Association and the court issued stays in 2017 to the EPA portion of the rule and in 2020 to the NHTSA portion of rule, before the requirements of the rule could take effect.

The D.C. Circuit's Decision

Review of the EPA Rule

The Court of Appeals first examined EPA's authority to regulate trailers under the Clean Air Act which requires EPA to develop "standards applicable to the emission of any air pollutant from … new motor vehicles or new motor vehicle engines." 42 U.S.C. 7521(a)(1). A "motor vehicle" is defined under the Clean Air Act as "any self-propelled vehicle designed for transporting persons or property." 42 U.S.C. 7550(2).

The court found that trailers are not motor vehicles under the federal Clean Air Act because they are not "self-propelled." EPA focused on the second part of the definition of motor vehicle arguing that the tractor-trailer as a whole should be considered a motor vehicle because the tractor alone cannot accomplish its intended purpose to transport goods without the trailer attached. The court, however, found that a tractor can carry people and things without the trailer attached, thus it is a motor vehicle without the trailer.

EPA next argued that the Clean Air Act provides it authority to regulate motor vehicles "whether such vehicles…are designed as complete systems or incorporate devices to prevent or control such pollution." 42 U.S.C. 7521(a)(1). EPA argued that under this provision Congress intended to provide EPA more expansive authority to regulate significant components of the complete vehicle system, of which a trailer is part of the tractor-trailer motor vehicle. The court was not convinced, however, finding that this section also requires the regulated equipment to be a motor vehicle and trailers are not motor vehicles.

EPA also attempted to argue that because the Clean Air Act provides it authority to regulate "motor vehicle manufacturers" it could reach trailer manufacturers because the act allows for regulating multiple manufacturers of the same motor vehicle. The court was not persuaded, finding that this approach still could not get around the fact that a trailer is not a self-propelled motor vehicle, thus a trailer manufacturer is not a motor vehicle manufacturer.

Review of the NHTSA Rule

The Court of Appeals next reviewed NHTSA's authority to enact trailer standards under the Ten-in-

Ten Fuel Economy Act, enacted as part of the Energy Independence and Security Act of 2007. Pub. L. No. 110-140, 121 Stat. 1492 (2007). The Ten-in-Ten Fuel Economy Act requires NHTSA to establish fuel economy standards for a range of vehicles, including "commercial medium-duty or heavy-duty on-highway vehicles." 49 U.S.C. 32902(b)(1). NHTSA argues that because Congress did not define the term "vehicles" in the Ten-in-Ten Fuel Economy Act, it could interpret the term to include trailers. The court disagreed with NHTSA, finding that although vehicle is not defined as "self-propelled" as it is under the Clean Air Act, here Congress was clear that it required fuel-efficiency standards and, thus, a vehicle must be limited to machines that use fuel.

NHTSA also argues that a definition of "motor vehicle" in another section of its governing statutes, 49 U.S.C. 32101, provides it authority to regulate trailers. Under this definition, "motor vehicle" includes vehicles "driven or drawn by mechanical power," indicating a trailer may be included in the definition because it is drawn by mechanical power. However, the court pointed out that the introductory phrase for this definition specifically excludes application of this definition to § 32902, where NHTSA would derive its authority to adopt the current trailer standards. By excluding § 32902, the court found that Congress intended to exclude trailers from the fuel efficiency standards.

Conclusion and Implications

While this ruling revokes the EPA and NHTSA trailer standards, which had been stayed from enactment, the long-term impacts on greenhouse gas standards for semi-trucks and trailers is unclear. EPA is soon expected to develop new emission standards for heavy duty tractors which may make up for the lack of its ability to enact trailer standards. It is also unclear what impact this ruling will have in California, and states that adopt California standards. California temporarily stayed its 2019 trailer rule, but has announced plans to move forward with a Phase 3 heavy-truck and trailer greenhouse gas rule. The court's opinion is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/233083B9809082A28525878B0053FE5B/$file/16-1430-1922005.pdf.
(Darrin Gambelin)

DISTRICT COURT GRANTS CIVIL PENALTIES, FEES, AND COSTS AGAINST DISCHARGER OF PESTICIDES IN VIOLATION OF ITS NPDES PERMIT

Cooper v. Toledo Area Sanitary Dist., ___F.Supp.4th___, Case No. 3:16-cv-1698 (N.D. Oh. Nov. 22, 2021).

The United States District Court for the Northern District of Ohio recently granted a motion for summary judgment against the Toledo Area Sanitary District (TASD) for violations of the federal Clean Water Act (CWA). The decision determined a public agency's liability for civil penalties for spraying pesticides contrary to a CWA National Pollutant Discharge Elimination System (NPDES) permit and for failing to prepare a Pesticide Discharge Management Plan (PDMP).

Fact and Procedural Background

TASD discharged pesticides to control the mosquito population by spraying and misting into communities and waterways throughout Lucas County. TASD's pesticide discharges are subject to permitting requirements under the federal CWA, and the Ohio Water Pollution Control Act. TASD operates pursuant to an NPDES General Permit issued by the Ohio EPA. The General Permit imposed additional obligations on applications greater than treatment area thresholds. For pesticides used for "Mosquitoes and Other Insect Pests," the conditions are triggered for any permittee who applies pesticide to 6,400 acres of treatment area or greater. The NPDES permit also requires that polluters who are subject to its conditions prepare a PDMP for the pest management area, which must document how the polluter will implement the permit's effluent limitations. TASD was required to create a PDMP under the General Permit

and it did not do so until after a lawsuit was filed.

On March 12, 2016, Cooper sent TASD a notice of intent to file a citizen suit for TASD's failure to comply with the requirements under the General Permit. The notice stated that TASD "routinely discharges hundreds of gallons of chemical pesticides each year into residential neighborhoods and waterways covering over 300,000 acres of land." The notice also stated that TASD must publish a detailed PDMP under the permit.

TASD responded by letter on March 28, 2016, denying any violation of the General Permit. Cooper filed the citizen suit on July 1, 2016. The complaint sought declaratory and injunctive relief, attorneys' fees and costs, and all other appropriate relief. TASD then prepared and submitted a PDMP following the commencement of the lawsuit. TASD moved to dismiss the complaint for lack of subject matter jurisdiction. TASD argued that the pre-suit notice was inadequate because Cooper failed to identify: 1) the date of TASD's alleged violation, and 2) the conduct constituting the violation. TASD also argued that, in light of its subsequent adoption of a PDMP, Cooper no longer had standing because the controversy was moot.

The District Court agreed the notice was deficient because it failed to identify a specific date of the violation but rejected the standing and moot arguments, and denied the motion to dismiss. TASD moved under Rule 59(e) to alter or amend the judgment, arguing the failure to dismiss was a clear error of law in light of the District Court's finding that the notice was deficient. The District Court granted the motion and dismissed the case.

The Sixth Circuit reversed the dismissal of the case, concluding Cooper's March 12, 2016 notice was sufficient and remanded the case for further proceedings.

The District Court's Decision

The main issue on remand was whether Cooper's civil penalties claim became moot after TASD adopted the PDMP. In a CWA citizen suit, a court may award costs of litigation, including reasonable attorney and expert witness fees, to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.

TASD conceded it was not in compliance with the General Permit's requirement to prepare a PDMP at the time Cooper filed suit and, therefore, TASD was in violation of the General Permit. TASD argued, however, that Cooper was only entitled to fees:

> . . .through the date on which TASD adopted the PDMP and TASD contends Cooper's claims become moot once the amount of fees to which he is entitled is determined.

The court determined that Cooper's request for injunctive relief was moot. TASD had remedied the activity alleged to constitute a violation of the General Permit by publishing a PDMP. But, the same was not true of Cooper's request for civil penalties. Under the CWA, a defendant's voluntary cessation of a challenged practice after the filing of suit, but before entry of judgment, does not deprive the court of the ability to impose civil penalties for violations of the CWA.

Under existing case law, subsequent events may moot a claim for civil penalties if it becomes absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. The court here determined that TASD repeatedly chose not to prepare a PDMP despite being notified that it was not in compliance with the plain terms of the General Permit. TASD also attempted to shift blame for its noncompliance to the Ohio EPA, asserting that from communications with the Ohio EPA, it was not required to produce a PDMP. The court reasoned, however, that the General Permit required TASD not only to prepare and adopt a PDMP, but also to "keep the plan-up-to-date thereafter for the duration of coverage under this general permit." The court stated that TASD's assurance it would not abandon its current PDMP addressed only part of its duties as identified in the General Permit and Cooper's pre-suit notice. The court thus concluded TASD's statement did not meet its "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again."

The court concluded that while Cooper's request for injunctive relief was moot, TASD failed to meet its heavy burden with respect Cooper's request for civil penalties and, therefore, TASD was liable for civil penalties.

Conclusion and Implications

This Clean Water Act citizen suit case highlights

the different standards for demonstrating an ongoing violation when seeking injunctive relief and civil penalties. The court's opinion is available online at: https://casetext.com/case/cooper-v-toledo-area-sanitary-dist-3.

DISTRICT COURT REJECTS TRIBAL CHALLENGE TO EXISTING LICENSED HYDROELECTRIC PROJECT

Sauk-Suiattle Indian Tribe v City of Seattle and Seattle City Light, ___F.Supp.4th___, Case No. 2:21-cv-1014 (W.D. Wash. Dec. 2, 2021).

U.S. District Court Judge, Barbara Rothstein has dismissed claims filed by the Sauk-Suiattle Indian Tribe seeking relief from continued operation of a Federal Energy Regulatory Commission (FERC) licensed hydroelectric project on the basis of laws in effect prior to the issuance of the FERC license.

Background

The Sauk-Suiattle Indian Tribe (Tribe) is a federally recognized Indian Tribe with territorial treaty claims to the Skagit River Basin. Under the Boldt Decree, the Sauk-Suiattle "usual and accustomed" fishing areas are tributary to the Skagit River. *US v Washington*, 384 F.Supp. 312, 376 (W.D. Wash. 1974). Which means, fish migrating to Sauk-Suiattle Usual and Accustomed fishing areas must travel up the Skagit River, giving the Sauk-Suiattle Indian Tribe a keen interest in the functioning hydrology of the Skagit River.

The City of Seattle (City)j owns and operates a series of 3 dams comprising the Skagit River Hydroelectric Project. The lowest of these three dams on the Skagit River is the Gorge Dam completed in the 1920s, which "as constructed 'blocks fish passage within the Skagit River from the area below to the area above suck dam." Order @ p.2. Despite the blockage, the Skagit Project received an operating license from the Federal Power Commission, predecessor to the Federal Energy Regulatory Commission (FERC), in 1927. The original 50-year license was renewed in 1995 after an extended relicensing review and settlement process, of which the Sauk-Suiattle Indian Tribe was a participant. The 1995 renewal is due to expire in 2025. Negotiations are currently underway to address permit terms in the re-licensure of the Skagit Project when this license expires

The Lawsuit

The Sauk-Suiattle Indian Tribe filed an action against the City of Seattle and its utility department, Seattle City Light, in State (Skagit County) Superior Court seeking declaratory and prospective injunctive relief under the U.S. and Washington State Constitutions, Territorial Acts of Congress, the Magna Carta, and related common laws, among others, that the City owned dam structure unlawfully blocks the passage of migrating fish notwithstanding its operation under its FERC license. The City of Seattle had the action removed to the U.S. District Court on the grounds of original jurisdiction and subsequently filed a Motion to Dismiss. The U.S. District Court denied the Sauk-Suiattle's Motion for Remand (November 9, 2021). The Court shortly thereafter granted the City of Seattle's Motion to Dismiss (December 2, 2021).

Whether FERC licensed hydroelectric projects are subject to existing state and federal laws prohibiting the blockage of stream.

The Federal Power Act, 16 USC 791a *et seq*, provides FERC "broad and exclusive jurisdiction" to license hydroelectric power facilities, which includes "constructing, operating, and maintain dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient … for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction." 16 USC. 797(e).

The Sauk-Suiattle assertions attempt to step back into the land before FERC jurisdiction, not to question the validity of the licensure, but argue that the construction and operation of the Gorge dam Is illegal as a matter of law notwithstanding the FERC license.

In support of pre-licensure legality, the Sauk-Suiattle argue that prohibitions against complete stream blockages found in Territorial acts, as incorporated into the state Constitution and the state's Enabling Act which was in place when the dam was originally constructed and licensed survive despite Congressional action to repeal certain territorial acts through adoption into state law prior to subsequently repeal. The Sauk-Suiattle further argue that violates the common law in that it unreasonably interferes with the Tribes enjoyment of its property constituting a nuisance.

The District Court's Decision

The court's ruling seems to sidestes the multiple Sauk-Suiattle arguments. Rather, the court implicitly found instead that FERC regulations prevail, notwithstanding whether there may be legal issues related to the construction and operation. Without reaching the question of whether it can legally exist in its current form, the Project has a license from FERC to operate in the manner that it operates—fish migration block and all. The U.S. Courts of Appeal have exclusive jurisdiction to review the operations of hydroelectric projects under its jurisdiction. Without jurisdiction to review the claim, the District Court ruled instead to dismiss.

Conclusion and Implications

We expect to see this case appealed to the Ninth Circuit Court of Appeals.

In a separate action pending in King County Superior Court, the Sauk-Suiattle Indian Tribe has filed an action against the City of Seattle for violations of the Consumer Protection Act, seeking Certification as a Class Action. This Tribe is alleging harm due to "unfair and deceptive practices associated with claims of superlative environmental responsibility" in connection with its Skagit Project and environmental performance. Case 21-2-12361-5 SEA. A notice for hearing on the City's motion to dismiss has been set for January 14, 2022.
(Jamie Morin)

DISTRICT COURT ADMITS EVIDENCE OVER OBJECTION IN CLEAN WATER ACT CRIMINAL PROSECUTION

United States v. Sanft, ___F.Supp.4th___, Case No. CR 19-00258 RAJ (W.D. Wash. Nov. 12, Nov. 16, 2021).

In a federal Clean Water Act criminal prosecution of a Seattle-based drum company, the U.S. District Court recently issued a series of evidentiary rulings. In these rulings, the court judicially noticed the fact that the U.S. Environmental Protection Agency (EPA) had approved a local pretreatment program regulating industrial waste discharges into the local sewer system. The court then determined that seven of nine statements made by a co-defendant were admissible, and did not raise Confrontation Clause issues.

Factual and Procedural Background

On December 17, 2019, a federal grand jury in Seattle, Washington charged the Seattle Barrel Company (Seattle Barrel), Louie Sanft, and John Sanft with conspiracy, violations of the federal Clean Water Act (CWA), and submission of false CWA certifications. Seattle Barrel is a Seattle-based company that collects, reconditions, and resells industrial and commercial drums. Louie Sanft owns and operates Seattle Barrel, and John Sanft is the plant manager. According to the indictment, the reconditioning process involves submerging the drums in a wash tank filled with a corrosive chemical solution. The tank was designed to discharge into the King County sewer system, which ultimately empties into the Puget Sound. The indictment alleged that the defendants carried out a ten-year scheme to illegally dump caustic waste into the King County sewer system.

The discharge of industrial waste to domestic sewer systems is regulated by the national pretreatment program under the CWA. The pretreatment program requires dischargers that introduce industrial and other nondomestic pollutants into a local sewer system to comply with pretreatment standards. Generally, local governments implement and enforce pretreatment

programs, as approved by EPA. According to the indictment, King County has an approved pretreatment program that prohibits industrial users from discharging industrial waste into the local sewer system without a discharge permit. The indictment alleged that from at least 2009 through 2019, defendants secretly and regularly discharged caustic solution in violation of the discharge permit issued to it by King County. Further, defendants agreed to conceal this practice from regulators.

The U.S. District Court for the Western District of Washington recently issued a series of evidentiary rulings in the case. On November 12, 2021, the court granted the government's motion for judicial notice to establish the jurisdictional fact that the EPA approved King County's pretreatment program under the CWA. On November 16, 2021, the court granted in part and denied in part defendant Louie Sanft's motion to exclude certain testimonial statements made by co-defendant John Sanft during an EPA investigation.

The District Court's Decision

November 12, 2021 Ruling

Under Federal Rule of Evidence 201(b)(2), a court may judicially notice a fact that is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." The government moved the court to take judicial notice of the fact that King County's pretreatment program was approved by the EPA. The government based its motion on the following evidence: 1) a letter from the EPA to the Municipality of Metropolitan Seattle, King County's predecessor, approving the pretreatment program; 2) a Federal Register notice referencing the pretreatment programs previously approved by the EPA; and 3) information on websites maintained by King County and the Washington Department of Ecology, a state administrative agency.

The court found that taking judicial notice of publicly available information provided by a government agency met the requirements for judicial notice under Rule 201(b)(2). The court cited to cases holding that facts contained in public records and government websites may be judicially noticed. The facts from these three sources of information could be accurately and readily determined, and the accuracy of the sources could not be reasonably questioned.

The court considered and rejected defendants' argument that the government may have failed to full its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), that is, to disclose materially exculpatory evidence. The court found defendants' *Brady* argument meritless, because there was no evidence or specific allegations showing the government failed to fulfill its *Brady* obligations.

The court then considered and denied defendants' request to attack the judicially noticed facts by offering substantive evidence and calling and cross-examining witnesses. The court observed the purpose of Rule 201(b) was to obviate the need for formal fact-finding for undisputed and easily verified facts. Because the publicly available information satisfied judicial notice requirements, there was no need to introduce substantive evidence and call witnesses.

Finally, as provided by Federal Rule of Evidence 201(f), the court acknowledged its obligation to instruct the jury that it may or may not accept noticed facts as conclusive.

November 16, 2021 Ruling

Defendant Louie Sanft moved the court to exclude nine potentially incriminating statements made by co-defendant John Sanft during interviews with EPA agents. Many of the statements related to Louie Sanft's responsibilities for and knowledge of tasks performed at Seattle Barrel. Defendant Louie Sanft argued that under *Crawford v. Washington*, 541 U.S. 36 (2004), introducing the statements would violate his rights under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, because Louie was unable to cross-examine John during the interrogation, and John would be absent during the trial for cross-examination. The government argued statements offered for their falsity were admissible, because *Crawford* does not exclude statements that are not offered for their truth. For statements offered for their truth, the government argued the statements were admissible under various other grounds.

The court held that John's false statements were admissible insofar as they are offered for their falsity. John's statements that were made against Seattle Barrel were admissible as party admissions. For the remaining statements, the court discussed whether the statements were sufficiently incriminating to be

excluded under existing case law, which has held that "mildly incriminating" statements are not necessarily excluded. Statements made against Louie that were not "facially incriminating" were admissible. For example, statements regarding Louie's management and duties at Seattle Barrel were not facially incriminating without further evidence. However, two statements raised incrimination concerns: 1) "Louie knows exactly what [Dennis Leiva] does," and 2) Louie was personally responsible for hiring a contractor to fill in the "hidden" drain. The court found these statements provided sufficiently incriminating impact, that the statements should be excluded.

Conclusion and Implications

This series of evidentiary rulings in a Clean Water Act criminal prosecution serves as a reminder that publicly and readily available information may be introduced by judicial notice and defendants' statements made during an EPA investigation may be introduced as evidence against defendants on various grounds. The opinions are available online at: https://casetext.com/case/united-states-v-sanft-13; https://casetext.com/case/united-states-v-sanft-10?q=United%20States%20v.%20Sanft&PHONE_NUMBER_GROUP=P&sort=relevance&p=1&type=case&resultsNav=false.
(Julia Li, Rebecca Andrews)

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