Volume 16, Number 11
January 2022

EASTERN WATER LAW™

& POLICY REPORTER

CONTENTS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222; schuster@argentco.com.

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California Corporation: President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster.

EWL

FEATURE ARTICLE

MISSISSIPPI V. TENNESSEE: U.S. SUPREME COURT HOLDS THAT GROUNDWATER IN INTERSTATE AQUIFER IS NOT OWNED BY STATES BUT IS EQUITABLY APPORTIONED AMONG THEM

By Roderick E. Walston

In *Mississippi v. Tennessee*, ___U.S.___, Case No. 143 Original (Nov. 22, 2021), the U.S. Supreme Court unanimously held that in a dispute among states over groundwater in an interstate aquifer, the U.S. Supreme Court must apportion the groundwater between the states under the Court's doctrine of equitable apportionment, and one state cannot claim an ownership interest in the groundwater that would impair the rights of other states. Therefore, Mississippi cannot sue Tennessee under a tort theory for damages and prospective relief for Tennessee's pumping of groundwater from an aquifer underlying both states, but must pursue its claim in an original Supreme Court action seeking equitable apportionment of the groundwater. The Supreme Court's decision is the first to hold that the doctrine of equitable apportionment that has often been applied to interstate disputes over surface waters also applies to interstate disputes over groundwater.

This article will describe the facts of *Mississippi v. Tennessee*; the Supreme Court's original jurisdiction over interstate water disputes; the doctrine of equitable apportionment that the Supreme Court has fashioned in resolving such disputes; the Court's decision and analysis in *Mississippi*; and will then provide a brief comment on state ownership of water.

Facts of the Case

In *Mississippi v. Tennessee*, the City of Memphis, a city in Tennessee located near Tennessee's border with Mississippi, pumped groundwater from a vast interstate aquifer, the Middle Claiborne Aquifer, that underlies both states. The aquifer underlies many other states in the Mississippi River Basin as well—Alabama, Arkansas, Illinois, Kentucky, Louisiana and Missouri. Although Memphis pumped the groundwater from wells located in Memphis, the pumping of the groundwater creates a "cone of depression," which is reduced water pressure at the site of the wells, and which has the effect of drawing groundwater from other locations, including from Mississippi. Thus, Memphis' pumping of groundwater from its wells causes groundwater in Mississippi to migrate to Memphis, reducing groundwater in Mississippi.

Mississippi filed a motion in the Supreme Court for leave to file a complaint against Tennessee and Memphis under the Court's original jurisdiction. Mississippi based its complaint on a tort theory. Specifically, Mississippi claimed that it "owned" the groundwater beneath its surface, and that Memphis' pumping of groundwater caused migration of Mississippi's groundwater to Tennessee, as a result of which Memphis was extracting hundreds of billions of groundwater "owned" by Mississippi. Mississippi sought at least $615 million in damages as well as declaratory and injunctive relief. Mississippi argued that the doctrine of equitable apportionment—which the Supreme Court traditionally applies in resolving interstate water disputes—did not apply because Mississippi "owned" the groundwater that was being taken by Memphis.

The Supreme Court's Original Jurisdiction

Under Article III of the U.S. Constitution, the Supreme Court has original jurisdiction over certain types of actions, meaning that such actions can be brought directly in the Supreme Court and need not be brought in the lower courts. U.S. Const., Art. III, § 2, Cl. 2. The Judiciary Act of 1789 (Act) imple-

ments Article III by specifically defining the Supreme Court's original jurisdiction. Under the Act, the Supreme Court has original jurisdiction over actions brought by the United States and a state against each other, and actions brought by a state against the citizen of another state. 28 U.S.C. § 1251(b).

In one important class of cases, however, the Supreme Court's jurisdiction is not only original but also exclusive, meaning that the Supreme Court alone can hear the dispute. Under the Judiciary Act of 1789, the Supreme Court has original and exclusive jurisdiction over disputes between states. 28 U.S.C. § 1251(a). Thus, a state can only bring an action against another state in the Supreme Court, and no other court has jurisdiction to hear the case. The Supreme Court's original and exclusive jurisdiction applies only to disputes between states, and not where a subdivision of a state, such as a city or county, attempts to bring an action on behalf of the state. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Although the Supreme Court has original and exclusive jurisdiction over interstate disputes, the Court does not necessarily hear a dispute simply because it is between states. Instead, the Court exercises its exclusive jurisdiction only if the states are asserting truly sovereign interests, and are not attempting to litigate private interests that might be litigated through the normal judicial process. *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976). The Court's exclusive jurisdiction is reserved for disputes of "seriousness and dignity," and that might be a *casus belli* if the states were truly sovereign. *Texas v. New Mexico*, 462 U.S. 554, 571 n. 18 (1983); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). The Court exercises its exclusive jurisdiction only if it is "appropriate" to do so. *Ohio v. Wyandotte Corp.*, 401 U.S. 493 (1971). The Court's original jurisdiction does not allow it to be become enmeshed in "intramural disputes" between private citizens within the states, and is not a substitute for a class action, in which members of a class collectively join to protect their common interests. *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

Since the Supreme Court has discretion in deciding whether to hear an original jurisdiction action, the plaintiff—whether the United States or a state—cannot simply file a complaint in the Court, as in a District Court proceeding. Instead, the plaintiff must file a motion in the Supreme Court for leave to file a bill of complaint, and the Court then decides whether to grant the motion and hear the case. The Court may decline to hear a case if it does not truly involve a dispute between the states.

For example, in *United States v. Nevada and California*, 412 U.S. 534 (1973), the United States sought to file a complaint under the Supreme Court's original jurisdiction in what the United States described as a dispute among the United States, Nevada and California over water rights in the Truckee River, an interstate river that flows from California to Nevada and terminates at Pyramid Lake in Nevada. The United States' sought additional water rights for the Pyramid Lake Indian Tribe beyond those awarded to the Tribe in a 1944 judicial decree. The Supreme Court denied the United State' motion to file the complaint, ruling that the dispute was between the United States and Nevada over water rights in Nevada and did not involve California, and that the United States could bring an action against Nevada in a Nevada federal District Court in the normal judicial process. The United States then brought its action in the District Court, and the action ultimately reached the Supreme Court, which ruled that the United States was barred by *res judicata* from seeking additional water rights for the Tribe. *Nevada v. United States*, 463 U.S. 110 (1983).

The Supreme Court has great flexibility in fashioning rules governing original jurisdiction actions. The Court may consider the Federal Rules of Civil Procedure as a guide, but is not bound by the federal rules. Supreme Court Rule 17.2. In one notable case, California brought an original action in the Supreme Court against Texas and other states that had imposed an embargo on fruits and vegetables grown in California. (The states had imposed the embargo because of the Mediterranean fruit fly infestation in California.) California argued that the states' embargo imposed an unreasonable burden on interstate commerce and thus violated the Constitution's Commerce Clause. The Supreme Court issued a temporary restraining order (TRO) prohibiting the states from imposing their embargo, even though the Court does not have specific authority to issue a TRO and apparently had never issued a TRO before. *California v. Texas, et al.*, 450 U.S. 977 (1981).

The Supreme Court's original jurisdiction to resolve disagreements among states was considered one of the most innovative concepts of the American Constitution. Benjamin Franklin was the first to

propose—in 1775, before the Declaration of Independence was signed—that the federal government should have the power to resolve disputes among the colonies. Indeed, the Articles of Confederation, which preceded the Constitution, provided for the creation of a special court with power to resolve interstate disputes, and a special court resolved a boundary dispute between Pennsylvania and Connecticut, as a result of which the City of Scranton is located in Pennsylvania today.

The Doctrine of Equitable Apportionment

The Supreme Court reviews many kinds of interstate disputes under its original jurisdiction, such as disputes over interstate boundaries, *Oklahoma v. Texas*, 258 U.S. 574, 581, 598 (1922), interstate air and water pollution, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), and state tax or regulatory schemes that allegedly discriminate against citizens of other states, *Maryland v. Louisiana*, 451 U.S. 725 (1981). Probably the most significant interstate disputes that the Court reviews, however, are those over water rights in interstate waters. Under its original jurisdiction, the Supreme Court has resolved several interstate water rights disputes. *E.g., Colorado v. Kansas*, 320 U.S. 383 (1943) (Arkansas River); *New Jersey v. New York*, 283 U.S. 336 (1931) (Delaware River); *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (North Platte River).

In resolving interstate water rights disputes, the Supreme Court necessarily fashions federal common law, because federal statutes generally do not apply and the Court cannot properly apply the law of any state. Although the Supreme Court has expressed reluctance to fashion federal common law—stating that federal courts, unlike state courts, are not general common law courts—the Court has nonetheless held that federal courts may develop federal common law where "Congress has not spoken" or there is "significant conflict between some federal policy or interest and the use of state law." *Milwaukee v. Illinois*, 451 U.S. 304, 312-313 (1981).

The federal common law that the Supreme Court has fashioned in resolving interstate water rights disputes is the doctrine of equitable apportionment. Under this doctrine, the Court considers all relevant facts and attempts to reach a result that is fair and equitable to all states. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *New Jersey v. New York*, 283 U.S. at 342-343; *Kansas v. Colorado*, 206 U.S. 46 (1907). The Court is not bound by the priority of water rights in the different states, although the Court may consider such priority of rights if the states recognize the same principles of water law, such as the doctrine of prior appropriation. *Nebraska*, 325 U.S. at 618. But the Court must consider other equitable factors as well, such as physical and climatic conditions, the extent of established uses, water uses and efficiencies, the availability of alternatives, return flows, availability of storage water, and the costs and benefits to the states. *Id.* at 618; *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922).

The Supreme Court's equitable apportionment of interstate waters limits the amount of water available to water users within each state. The Court has held that the rights of all water users in a state cannot exceed the state's equitable apportionment. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938). Thus, even though a water user may have a right to use water under state law, the water user may not have the right to use the water if this causes the state to exceed its equitable apportionment. As the Supreme Court has stated, equitable apportionment is not dependent on or bound by existing legal rights to the resource being apportioned. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983).

One of the most important interstate water dispute that the Supreme Court has addressed under its original jurisdiction—and certainly the most important to California—was the dispute between Arizona and California over the Colorado River. *Arizona v. California*, 373 U.S. 546 (1963). In the early twentieth century, southern California was taking increasing amounts of water from the Colorado River to meet its growing needs, and Arizona claimed that California was taking more than its fair share and depriving Arizona of water necessary to meet its anticipated future needs. Arizona brought an original action against California in the Supreme Court, and the Court, after a lengthy adjudication, issued a decree that apportioned Colorado River water among the Lower Basin states of Arizona, California and Nevada. More precisely, the Court did not apportion the water itself, but instead held that Congress—in passing the Boulder Canyon Project Act of 1928, which authorized construction of the Hoover Dam on the Colorado River—had effectively apportioned the water among

the states. Under the congressional apportionment, the Court ruled, California was entitled to 4.4 million acre-feet of Colorado River water each year, Arizona 2.8 million acre-feet, and Nevada 300,000 acre-feet. Although California received the largest share of water, California's share was less than it claimed, and the Supreme Court decree has generally been regarded as limiting California's right to take Colorado River water to meet its growth needs.

The Supreme Court's Decision in *Mississippi v. Tennessee*

In *Mississippi v. Tennessee*, the Supreme Court, in a unanimous decision written by Chief Justice John Roberts, rejected Mississippi's claim that it owned the groundwater in the portion of the interstate aquifer lying within its borders, and therefore could assert a tort claim against Tennessee for pumping groundwater from the aquifer, and held instead that the states' shares of the groundwater must be apportioned between the states under equitable apportionment principles established by the Court in resolving interstate water disputes.

As the Court noted, the Court first established the equitable apportionment doctrine in an interstate dispute between Kansas and Colorado over water rights in the Arkansas River. *Kansas v. Colorado*, 206 U.S. 46 (1907). In *Kansas*, the Court held that all states have equal sovereignty over their waters, with the right to determine their water laws. The Court also held, however, that when one state attempts to allocate an interstate water resource for its own benefit but to the detriment of other states, the laws of neither state can properly apply to the controversy, nor can the courts of either state properly adjudicate the controversy. Rather, the Court held, the Supreme Court has sole jurisdiction to adjudicate the controversy, and has fashioned a federal common law doctrine—the doctrine of equitable apportionment—that allocates a fair and equitable share of the waters to each state. The Court in *Mississippi* noted that it had applied equitable apportionment in resolving many interstate water disputes, such as *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Colorado v. New Mexico*, 459 U.S. 176 (1982), and *Wyoming v. Colorado*, 259 U.S. 419 (1922).

The *Mississippi* Court also noted that it applied equitable apportionment in resolving a dispute between Oregon and Idaho over anadromous fish in the Columbia-Snake River system. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1018-1019, 1024 (1983). Thus, while equitable apportionment generally applies to interstate disputes over water, the same principle also applies to interstate disputes over fishery resources in the water. And while equitable apportionment generally protects the right of a *downstream* state to a fair share of interstate waters, *Evans* held that equitable apportionment also protects the right of an *upstream* state to a fair share of a fishery resource in the waters (although *Evans* rejected Idaho's claim that it had been denied a fair share of the fishery resource under the facts of the case). Thus, equitable apportionment is a flexible doctrine that applies to any interstate water dispute, whether the dispute is over water rights or fish and whether the beneficiary is an upstream state or downstream state.

Applying Equitable Apportionment Doctrine to an Interstate Dispute over Groundwater

The *Mississippi* Court acknowledged, however, that the Court had never applied the equitable apportionment doctrine in resolving an interstate dispute over groundwater. Thus, the issue raised in *Mississippi* was one of first impression.

Resolving the dispute, the Court held that equitable apportionment applies to the Middle Claiborne Aquifer because the dispute over the aquifer is "sufficiently similar" to past interstate water disputes in which equitable apportionment has been applied. Slip Op. 7. The Court held that the Middle Claiborne Aquifer was of a "multistate character," in that the aquifer underlies both Mississippi and Tennessee and thus groundwater pumping in both states is from the "same aquifer." *Id.* at 8. The Court also held that water in the Middle Claiborne Aquifer "flows naturally" between the states, and that the Court's equitable apportionment decisions have concerned water that flows between the states. *Id.* Although acknowledging that the flow of the water within the aquifer may be "extremely slow"—as much as an inch or two per day—the Court held that the speed of the flow does not place the aquifer beyond equitable apportionment. *Id.* Most importantly, the Court held that pumping of groundwater from the aquifer in Tennessee affects groundwater in the aquifer in Mississippi, in that pumping in Tennessee creates a cone

of depression that reduces groundwater storage and pressure in Mississippi. *Id.* The Court concluded that the doctrine of equitable apportionment applies to the interstate aquifer.

The Court rejected Mississippi's claim that equitable apportionment does not apply because it owns all groundwater beneath its surface. *Id.* at 9. Although the Court acknowledged that a state has "full jurisdiction over the lands within its borders, including the beds of streams and other waters," the Court held that such jurisdiction does not confer "unfettered ownership or control of flowing interstate waters themselves." *Id.* (citations and internal quote marks omitted). When a water resource is shared between different states, the Court held, each state has "an interest which should be respected by the other." *Id.* at 9-10. As the Court stated, Mississippi's argument would allow an upstream state to completely cut off the flow of groundwater to a downstream state, contrary to the Court's equitable apportionment jurisprudence. *Id.* at 10.

The Court also rejected the Special Master's recommendation that the Court should allow Mississippi to amend its complaint to seek equitable apportionment, because, the Court stated, Mississippi has not sought to amend its complaint to seek equitable apportionment and the Court cannot assume that Mississippi would do so. Slip Op. 11. As the Court stated, Mississippi sought relief under tort principles, and it cannot be assumed that Mississippi would seek equitable apportionment, which would be based on a broader range of evidence and might require joinder of the other states that rely on the Middle Claiborne Aquifer. *Id.* The Court did not, however, specifically preclude Mississippi from filing a motion for leave to file a complaint seeking equitable apportionment. If Mississippi were to file such a motion, the Court presumably would consider the motion based on the Court's established equitable apportionment principles.

It is telling that the Court spoke unanimously in holding that Mississippi could not pursue its tort claim against Tennessee under the Court's original jurisdiction, and that there were no dissenting or even concurring opinions. Not a single justice supported Mississippi's ownership claim as applied to the interstate aquifer. Although the Court's decisions in the modern era are often fragmented and divided, it is salutary that at least with respect to an interstate dispute over an aquifer, the Court has spoken with one voice.

Conclusion and Implications: State Ownership of Water

Mississippi's claim that it "owns" the groundwater in its portion of the interstate aquifer—which was the predicate for its claim that Tennessee was liable in tort for taking groundwater from the aquifer—is not without foundation. The Supreme Court has long held that under the equal footing doctrine—which holds that all states are admitted to statehood on an equal footing with other states—the states acquire sovereign title and ownership of navigable waters and underlying lands upon their admission to statehood. *PPL Montana v. Montana*, 565 U.S. 576, 589-593 (2012); *Shively v. Bowlby*, 152 U.S. 1, 13, 14 (1894); *Martin v. Waddell*, 41 U.S. 367, 410 (1842). The Court relied on this principle in its seminal decision establishing the public trust doctrine, which held that the states, having acquired title and ownership of navigable waters and lands, hold the water and lands in trust for the public's common use. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892). The Court has also held that, under the Tenth Amendment of the Constitution, the states have the right to adopt laws governing water rights—such as the appropriation doctrine and the riparian doctrine—and that Congress cannot enforce either rule upon any state. *Kansas v. Colorado*, 206 U.S. 46, 93 (1907). Additionally, the Court has held that Congress has generally deferred to state water laws by enactments such as the Desert Land Act of 1877, which provides for disposition of the public lands in the western states, *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-164 (1935), and the Reclamation Act of 1902, which authorizes federal water projects in the western states, *California v. United States*, 438 U.S. 645 (1978).

Thus, the states have sovereign ownership interests in their waters under both constitutional and statutory principles, with authority to regulate and control water rights in the waters. The states' sovereignty over water is a bedrock principle of the federalism that underlies our constitutional order. *PPL Montana*, 565 U.S. at 551. Since the states have ownership interests in their surface waters, they logically have the same interests in groundwater beneath the surface.

Under the Supremacy Clause of the Constitution, the states' sovereignty over water, however broad, is subject to Congress' paramount powers under the Constitution, particularly Congress' power to regulate navigable waters under the Commerce Clause. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 703 (1899); *Martin*, 41 U.S. at 410. Indeed, the states' sovereignty over water is subject is subject to Commerce Clause limitations even when Congress does not act; under the dormant Commerce Clause, a state cannot impose an unreasonable burden on interstate commerce even absent congressional action. *United States Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 337 (2007). In *Sporhase v. Nebraska*, 458 U.S. 941, 953-954 (1982), the Supreme Court applied the dormant Commerce Clause in holding that groundwater is an article of interstate commerce, and thus Nebraska could not impose an unreasonable burden on interstate commerce by preventing the transfer of groundwater from Nebraska to another state.

The states' sovereignty over water is also subject to a principle of federal common law—the doctrine of equitable apportionment—that applies to interstate disputes over interstate waters. As the Supreme Court has held, interstate waters are a common resource that must be shared equally by the states, and the states' shares of the waters must be apportioned under the Court's equitable principles. *Kansas v. Colorado*, 206 U.S. 46, 85-96 (1907); *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). Plainly the laws of a single state cannot properly apply to the controversy; otherwise, one state, such as an upstream state, could wholly allocate interstate waters for its own use and deprive other states, such as downstream states, of their own rights to use the waters. This equitable principle limits the state's authority to allocate interstate water to its own users, because the amount of water that the state allocates among its users cannot exceed the amount of the state's equitable share of the waters. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938).

The Supreme Court in *Mississippi* held that the doctrine of equitable apportionment that applies to interstate disputes over surface waters also applies to interstate disputes over groundwater. The states have common rights and interests in both types of waters, and thus the same principle of equity that applies to surface waters logically applies to groundwater. A contrary result would create an anomaly in federal law, in that a different rule would apply to disputes over surface water and groundwater, even though the states have common rights and interests in both types of water; federal law frowns on anomalies, particularly those created by the Supreme Court's own common law, which the Court itself can correct. Mississippi should have recognized the logic and force of equitable apportionment at the outset rather than pursuing an ill-conceived claim that it could assert a tort claim against Tennessee because it wholly owned the portion of an interstate aquifer located beneath its surface. Even so, the Supreme Court did not preclude Mississippi from pursuing equitable apportionment under the Court's original jurisdiction, and thus Mississippi presumably has the right to pursue such a claim if it decides to do so.

It is significant that the Supreme Court in *Mississippi* did not suggest that the states do *not* have ownership of water within their borders, and held instead that the states do not have "unfettered" and "exclusive" ownership of interstate waters that would preclude other states from having equitable shares of the waters. Slip Op. 9. Thus, the Court did not adopt the view, expressed in its earlier decision in *Sporhase v. Nebraska*, that the theory of state "ownership" of water is a "fiction." *Sporhase*, 458 U.S. at 951. Contrary to the *Sporhase* statement, the Supreme Court has long held that under the equal footing doctrine the states acquire sovereign "title" and "ownership" of navigable waters and lands upon their admission to statehood, a principle established under the Constitution itself and not Congress' statutes. *E.g., PPL Montana*, 565 U.S. at 589-593, 603. The Court applied this principle in establishing the public trust principle that the states hold the waters and lands in trust for the public's common use. *Illinois Central*, 146 U.S. at 435, 452. Thus, state ownership of water is not a "fiction." Rather, the states acquire an ownership interest in water under the equal footing doctrine, but, under the principle of federal supremacy, the states' ownership interest is subject to Congress' paramount power to regulate navigable waters under the Commerce Clause, and subject to the federal common law rule that interstate waters must be equitably apportioned among the states.

In sum, while *Mississippi* rejected Mississippi's claim that it owned the groundwater in an interstate aquifer and could assert a tort claim against Tennessee

for pumping groundwater from the aquifer, *Mississippi* did not suggest that states do not have an ownership interest in groundwater, or other waters, within their borders. Rather, *Mississippi* held that regardless of a state's ownership interest in groundwater, an interstate dispute over groundwater must be resolved under the principle of equitable apportionment that applies to other interstate disputes over water.

Roderick E. Walston, Esq has litigated—and is litigating—many of the nation's most significant water rights cases, and has garnered impactful, precedent-setting victories at both the U.S. Supreme Court and the California Supreme Court. Rod is now of counsel in Best Best & Krieger, LLP's Environmental & Natural Resources practice group. During his career, Rod has litigated many of California's most important natural resources and environmental cases, particularly at the appellate level.

Rod has argued original jurisdiction cases in the Supreme Court, including some mentioned in this article. He has served as Deputy Solicitor and Acting Solicitor of the U.S. Department of the Interior, and as Chief Assistant Attorney General (and head of the Public Rights Division) and Deputy Attorney General of the State of California.

EASTERN WATER 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)

NEWS FROM THE WEST

Drought in the West has been years in the making. Snowfall in the mountains has led to the Colorado River being critically low affecting many states. Rainfall has been far off the needs of the farming communities throughout the West. Even Washington State has experienced drought in the eastern growing regions. And most recently, drought on the Front Range in Colorado has led to the unprecedented wildfire in December 2021 that burned hundreds of homes. Somewhat surprisingly, California has come out the lucky state with unprecedented rain and snowfall compared to the past several years—nevertheless, regulators in the state remain concerned about effects of drought. This month in News from the West, we cover plans being considered by California's regulators to impose mandatory statewide water use restrictions, which so far this year, have been most voluntary. New Mexico has not experienced the "miracle" rain and snowfall of California and regulators there are making plans for the worst.

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 sea-

sonal 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)

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/drought-plan.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 mak-

ing 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 into law 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 on November 15, 2021, to guide how the bill is implemented. The Executive Order 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)

PENALTIES & SANCTIONS

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—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 recre-

ational 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 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 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)

JUDICIAL DEVELOPMENTS

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)

Eastern Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108