

# WESTERN WATER LAW™

## & POLICY REPORTER

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## FEATURE ARTICLE

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

By Jason Groves and Lisa Claxton

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

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

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

In 2005 during prior litigation, the State of Mississippi sued the City of Memphis and its public utility

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

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

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

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

### The Special Master's Report

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

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

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

Second, under the Pumping Effects Theory, the Special Master found that the cone of depression caused by Tennessee's wells within Tennessee affected the groundwater underneath Mississippi and created a drawdown that could be seen across the region. The pumping effects from Tennessee's wells demonstrated the Middle Claiborne Aquifer's interconnectedness

as a single hydrogeological unit that spans across state boundaries. In fact, Mississippi's complaint acknowledged some degree of hydrogeologic connection based on its well-to-well interference claims against Tennessee, underscoring the interstate character of the aquifer.

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

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

### Equitable Apportionment is Mississippi's Exclusive Remedy

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

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

## Equitable Apportionment under the Supreme Court’s Original Jurisdiction

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

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

### The Supreme Court’s Decision

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

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

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

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

### Transboundary Resources

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

### Transboundary Natural Flow

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

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

### **Interstate Pumping Effects on the Aquifer**

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

### **State Sovereignty Does Not Mandate a Different Result**

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

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

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

### **Mississippi Disavows Equitable Apportionment of the Middle Claiborne Aquifer**

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

### **Burden of Proof**

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

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

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

### **Conclusion and Implications**

The Court's decision in *Mississippi v. Tennessee* marks a new era in interstate water jurisprudence. For the first time ever, the Court determined that certain groundwater can be classified as interstate water and allocated by the Court using the equitable apportionment doctrine. As prolonged western droughts continue creeping eastward and the demand for water increases across the county, the likelihood of new and intensifying disputes between states over interstate groundwater will likely follow. The Supreme Court showed its willingness to extend the equitable appor-

tionment doctrine to assist states in allocating rights to disputed interstate groundwater. However, the Court also appears to warn states seeking equitable apportionment as their chosen remedy to be careful of what they ask for. Such cases will undoubtedly require extensive technical expert analysis of the hydrogeology of the interstate aquifer and the feasibility of alternatives, and the economic costs and benefits to all affected states.

As other equitable apportionment cases have shown, the fundamental premise of equitable apportionment is the states' equality of right to the resource, and not necessarily equality of the amount apportioned. The Court's opinion therefore begs the question: to what extent will this case motivate Mississippi, Tennessee, and other similarly situated states to attempt to negotiate an interstate compact addressing previously unallocated interstate groundwater? The Supreme Court's opinion is available online at: [https://www.supremecourt.gov/opinions/21pdf/143orig\\_1qm1.pdf](https://www.supremecourt.gov/opinions/21pdf/143orig_1qm1.pdf).

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**WESTERN 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)

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

New Mexico is at the forefront of supporting initiatives that both protect and maximize the critical connection between treatment and re-injection of groundwater and the use of aquifers as underground reservoirs. In 1999, New Mexico passed the Ground Water Storage and Recovery Act authorizing the underground storage and recovery of water. NMSA 1978, §§ 72-5A-1 to 72-5A-17 (1999). The salient value of this concept is that depleted aquifers can be treated as underground reservoirs that do not bear the cost of surface evaporation. Likewise, treated water

can be injected to achieve water conservation. Creative use of re-injection can be used to alter effects of wells on stream systems, mound groundwater for future use and utilize the filtration of New Mexico's aquifers to further improve their quality.

### Water-Use Leasing Act

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

### Conclusion and Implications

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

(Christina J. Bruff)

## REGULATORY DEVELOPMENTS

### CALIFORNIA DEPARTMENT OF WATER RESOURCES IDENTIFIES PREFERRED DELTA TUNNEL ALIGNMENT IN AMENDED CLEAN WATER ACT SECTION 404 PERMIT APPLICATION

On November 22, 2021, the California Department of Water Resources (DWR) submitted an amended federal Clean Water Act, Section 404 permit application to the U.S. Army Corps of Engineers (Corps), indicating it has chosen a new preferred alignment alternative for its proposed 6,000 cubic feet per second (cfs) Delta Conveyance Project. As described in the amended application, the selected “Bethany Alternative” could result in fewer surface water impacts because water would be transported directly to the existing Bethany Reservoir rather than a newly constructed forebay at Clifton Court near the City of Tracy.

#### Background

The Delta Conveyance Project is a 6,000 cubic-foot per second (cfs) water infrastructure project and the latest iteration of a long-proposed plan to upgrade the conveyance systems used to move water from the Sacramento-San Joaquin River Delta to southern California and other regions throughout the state. In its operation of the State Water Project, DWR conveys water that originates in the Sierra Nevada Mountains through the Delta, and distributes it via an array of natural and manmade waterways to meet California’s agricultural, industrial, and domestic demands.

A successor to past large-scale proposals like California WaterFix and the Bay Delta Conservation Plan, the Delta Conveyance Project aims to modernize the Delta’s aging water infrastructure to protect the State Water Project’s water supply reliability amid the threats of climate change, seismic activity, and sea level rise.

#### DWR’s Revised Section 404 Application

Under the federal Clean Water Act, a Section 404 permit is required for construction activities that could result in the discharge of dredged or fill material into “waters of the United States” as defined under

the act. The Corps is responsible for administering permit applications and enforcing Section 404 permit provisions. At its core, Section 404 prohibits the discharge of dredged or fill material if a practical alternative exists that is less damaging to the aquatic environment or if the nation’s waters would be significantly degraded. As such, the DWR must obtain a Section 404 permit before it may begin construction of the proposed project facilities.

On January 15, 2020, DWR submitted its original permit application at the same time it issued a Notice of Preparation of an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA). By its application, DWR initiated talks with the Corps to coordinate environmental review of the project under the parallel National Environmental Policy Act (NEPA) process. The original application presented the project as two potential corridor options—a central or an eastern tunnel alignment—which the Corps found to be incomplete. Six months later, DWR amended the application at the Corps’ direction to identify the eastern alignment as its proposed project, while cautioning that the change was preliminary and not a final decision as to DWR’s preferred project. DWR’s adoption of a preferred alternative in this recent application amendment signifies further development of the project.

The proposed alternative known as the “Bethany Alternative” would utilize the same pair of 3,000 cfs water intake facilities constructed in the north Delta, and tunnel corridor running along the Interstate-5 Highway that were envisioned for the eastern alignment alternative. However, a new tunnel would move the water further south to a pumping plant at the existing Bethany Reservoir, rather than to a new forebay at Clifton Court. Without need for a forebay to regulate flows between two pumping plants to get water to the California Aqueduct, DWR estimates that the Bethany Alternative has the potential to significantly reduce certain impacts of the Delta Conveyance Project. Noting the importance of reducing

fill activities in “waters of the United States” for Section 404 permit approval, DWR has thus selected the Bethany Alternative as its preferred project.

### Conclusion and Implications

Although it has chosen the Bethany Alternative as its preferred alignment for the Delta Conveyance Project, DWR has stated that the selection will not alter its evaluation of the full range of feasible tunnel alignments and construction options, and their potential environmental impacts under CEQA. The Draft EIR for the project is expected to be released in the summer of 2022 for public review and comment.

In turn, the Corps’ approval of the amended permit application will depend on a number of ongoing processes, including DWR’s final project approval under CEQA, compliance with the federal Endangered Species Act and the National Historic Preservation Act, and a water quality certification by the State Water Resources Control Board under Section 401 of the Clean Water Act.

Additional information regarding the environmental planning and Section 404 permit application status for the Delta Conveyance Project can be found at <https://water.ca.gov/Programs/State-Water-Project/Delta-Conveyance/Environmental-Planning>.  
(Austin Cho, Meredith Nikkel)

## 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 emer-

gency regulation. As of the date of this writing, the SWRCB was scheduled to vote upon a resolution adopting the emergency regulation on January 4, 2022.

### California Drought Conditions

The SWRCB observes that drought is a recurring element of California’s hydrology, but that drought conditions are reaching to further extremes. The western states experienced some of the hottest temperatures on record throughout the summer of 2021. As of early December 2021, approximately 92 percent of the State was experiencing severe, extreme, or exceptional drought, up from approximately 74 percent one year prior, according to the U.S. Drought Monitor. In addition, as represented more fully by the chart below, many of California’s key lakes and reservoirs were falling well below their historical average seasonal capacity when the SWRCB issued the proposed regulation:

- Shasta Lake Reservoir—46 Percent [of Early December Percentage of Average]
- Lake Oroville Reservoir—63 Percent
- Trinity Lake Reservoir—49 Percent

- San Luis Reservoir—45 Percent
- New Melones Reservoir—67 Percent
- Don Pedro Reservoir—76 Percent
- Lake McClure Reservoir—48 Percent

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

### The Proposed Emergency Regulation

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

- Incidental runoff of outdoor irrigation water.
- Vehicle washing with a hose that is not equipped with a shot-off nozzle.
- Washing hardscapes such as driveways, sidewalks, and asphalt with potable water.
- Using potable water for street cleaning or construction purposes.
- Using potable water to fill fountains and other decorative water fixtures (including lakes and ponds) except where recirculation pumps are used and refilling only replaces evaporative losses.
- Watering lawns and ornamental landscapes during and within 48 hours after measurable rainfall of at least a quarter-inch of rain.
- Using potable water for watering lawns on public street medians or landscaped areas between the street and sidewalk.

The regulation also prohibits homeowner associations, cities, and counties from impeding drought

response actions taken by homeowners. Notably, violation of the regulation is punishable by a fine of up to \$500 per day. If approved, the regulation will apply to all Californians and remain in effect for one year unless rescinded earlier or extended by the SWRCB.

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

### SWRCB Anticipated Outcomes

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

### Conclusion and Implications

Despite significant forecasted revenue reductions for water suppliers, the proposed emergency regulation seeks to preserve California's water supplies in anticipation of continued, potentially multi-year, drought conditions. Due to more frequent and severe drought conditions over the past several decades, and the commensurately increased responsive regulations, the SWRCB likely perceives that Californians are more accustomed now than ever to statewide permanent or periodic water restrictions. If enforcement is robust, and implemented in combination with public education and outreach, the regulation has the potential to successfully reduce statewide water use to stretch out currently available supplies. At the same time, many Californians may be understandably frustrated by a perceived inconsistent, "emergency-based" management approach from year to year. (Byrin Romney, Derek Hoffman)

**Editor's Note:** December brought significant rainfall and snowpack to California, greatly improving drought conditions.

## NEVADA STATE ENGINEER ESTABLISHES PROCEDURES FOR MANAGING GROUNDWATER APPROPRIATIONS TO PREVENT CAPTURE OF HUMBOLDT RIVER WATER AND CONFLICTS WITH SURFACE WATER USERS

In two previous issues of *Western Water Law & Policy Reporter*, I described ongoing conflicts between surface and groundwater users in Nevada’s Humboldt River Basin and the State Engineer’s efforts to conjunctively manage the resource. The State Engineer was sued by surface water appropriators in 2015 who contended that groundwater pumping by those with junior rights was capturing river water. That lawsuit resulted in a settlement, which required the State Engineer to issue an administrative order that creates clear procedures and standards – informed by the groundwater model being developed for the basin— for considering future groundwater applications.

On December 7, 2021, the State Engineer issued Order #1329, which establishes interim procedures for managing groundwater appropriations to prevent the increase of capture and conflicts with vested surface water rights decreed in the Humboldt River adjudication.

### Surface-Groundwater Conflicts in the Humboldt River Basin

Nevada’s Humboldt River Basin has a long history of conflicts between surface water users who hold decreed, pre-statutory rights and groundwater users who hold post-statutory, junior permits. Although, historically, there was not a lot of technical information to demonstrate the precise impact of groundwater pumping on river flows, it was clear that river capture was occurring.

From 2012-2015, the Humboldt River region experienced one of the worst droughts since 1902, with annual flows during that period being just 30 percent of average. By the end of the irrigation seasons in 2014 and 2015, the Humboldt River was dry in lower reaches, resulting in no water deliveries to downstream surface water users. This situation gave rise to litigation against the State Engineer, which was ultimately settled.

In 2016, the State Engineer assembled the Humboldt River Working Group, which consists of representatives from key stakeholder and water user groups

with the common purpose to propose, negotiate, and provide feedback on conjunctive use management regulations. The following year, the Nevada Legislature adopted a policy declaration:

. . . [t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water. Nev. Rev. Stat. § 533.024(1)(e).

To facilitate the conjunctive management of groundwater and surface water in the Humboldt River Basin and alleviate future conflicts, the State Engineer contracted with the United States Geologic Survey (USGS) and Desert Research Institute (DRI) to build a capture model to quantify the amount of river depletion caused by groundwater withdrawals.

According to the State Engineer, preliminary findings from the modeling effort indicate that there may be important non-linear, climate-driven behaviors that influence interactions between surface water and groundwater. For example, it appears that pumping-related capture of surface water tends to increase during wet years when excess water is available and decrease during dry years when the potential for conflict is greater. While the modeling process is being completed, and particularly because the region is again experiencing severe drought, the State Engineer wished to establish an interim management framework to avoid additional harm to water rights. That is the purpose of Order #1329.

### Order #1329

Order #1329 commits the State Engineer to follow certain procedures and consider certain criteria for future groundwater applications in the hydrographic basins through which the Humboldt River flows. In the Order, the State Engineer expressed a preference to avoid the “draconian measure” of strict curtailment by priority, noting that water pumped from wells includes sources other than surface water capture, and curtailment would have “significant and lasting economic harm” to the region.

Rather than curtailment, the State Engineer seeks, through Order #1329, to implement:

. . . a management framework based on the quantifiable impact of each groundwater well's capture of streamflow. . . [to]. . . more precisely address harm from any conflict with Humboldt decreed rights.

Order #1329 contemplates using the capture model as "an important tool" to evaluate the effectiveness of different management strategies and guide possible administrative actions.

These management measures include additional criteria the State Engineer will evaluate when considering groundwater applications in the Humboldt River region, above and beyond those expressly required by statute. Specifically, groundwater applications will be reviewed for increases in stream capture and cannot exacerbate conflicts with existing rights to the Humboldt River or its tributaries. The State Engineer will determine capture:

. . . using established analytical or numerical methods along with any available knowledge of aquifer properties associated with the points of diversion.

The Order limits its applicability to three categories of applications:

- New groundwater appropriations where annual capture is predicted to exceed 10 percent of duty for any year during 50 years of continual pumping, which is defined as the annualized duty amount requested under the application. Where there is a non-consumptive return flow component of the application, the annualized duty amount will only apply to the consumptive portion.
- Applications to change the point of diversion (POD) of existing rights that are predicted to result in an increase in net capture and where annual capture at the proposed POD is predicted to exceed 10 percent of the permitted duty in any year during 50 years of continual pumping.
- Temporary one-year applications to change the point of diversion of an existing groundwater right

and applications for new finite-term groundwater appropriations.

Where capture is anticipated, it must be offset by one of two methods. First, the applicant can forego diverting an existing surface water decreed right, known as "in-stream replacement water." Alternatively, the applicant can withdraw an existing groundwater permit in whole or in part, rendering it no longer active. The goal of these mitigation measures is to ensure that streamflow is not depleted by the application.

The existing place of use of the replacement water will be stripped of the water rights that are being used for replacement purposes. Where a change application moves an existing POD that is already capturing surface water to either an upstream reach or to a different tributary, offset will be required for capture impacts on the new reach or tributary as well as for net capture on the Humboldt River.

The Order lists certain types of applications to which its procedures do not apply:

- Any application where pumping at the proposed POD results in capture less than 10 percent of the permitted duty every year during 50 years of continual pumping.
- Change applications where capture at the proposed POD is less than or equal to capture at the existing POD.
- Any groundwater application where annual capture associated with pumping at the proposed place of use does not exceed five acre-feet during a 50-year period of use.
- Temporary applications to change PODs within an area designated by the State Engineer to allow for multiple PODs from a single representative POD for mining, milling, and dewatering operations.

### **Conclusion and Implications**

Nevada State Engineer Order 1329 strikes a collaborative tone, with the State Engineer articulating the desire to work with stakeholders to develop long-term management strategies while the interim rules remain



in place. The State Engineer anticipates such strategies would include: 1) active water replacement plans implemented by groundwater right holders; 2) water resource plans developed by local governing bodies pursuant to the state's land use planning laws; 3) implementation of water conservation plans by local water purveyors; 4) identification of preferred water uses in the interest of public welfare; and 5) domestic well protections.

Given past stakeholder involvement, including through the established Humboldt River Working Group, continued collaboration will likely be the path forward to evaluate the effectiveness of these interim rules, develop long-term strategies, and address future surface-groundwater conflicts. The State Engineer's December Order is available online at: <http://images.water.nv.gov/images/orders/1329o.pdf>. (Debbie Leonard)

## 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 recreational uses along the Texas coast.

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

•December 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)

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## LAWSUITS FILED OR PENDING

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### MADERA COUNTY, CALIFORNIA GROUNDWATER SUSTAINABILITY AGENCY GROUNDWATER ALLOCATION ORDINANCE COMES UNDER FIRE IN LAWSUIT

Landowners in Madera County have filed a lawsuit against the Madera County Groundwater Sustainability Agency (Madera County GSA) after the GSA adopted a new groundwater allocation ordinance which aims at limiting the ability of overlying landowners in the region to pump groundwater. The writ petition, filed November 11, 2021, seeks to have the Madera County GSA vacate two resolutions adopted in 2021 which established the groundwater allocation ordinance at issue and to have the court declare these resolutions as violations of several Water Code provisions as well as the Takings provisions of both the federal and state Constitutions, among other remedies sought.

#### The Groundwater Allocation Resolutions

Pursuant to the provisions of California's Sustainable Groundwater Management Act (SGMA), the Madera County GSA, along with the Madera Irrigation District GSA, the Madera Water District GSA, and the City of Madera GSA, adopted a Joint Groundwater Sustainability Plan (Joint Plan) on December 17, 2019 to govern all of their jurisdictions. Under this Joint Plan, the Madera County GSA would implement actions to gradually reduce groundwater pumping from 2020 to 2040, including a reduction in consumptive water use within the GSA area. The Joint Plan did not, however, specify what these actions might look like.

Come December of 2020, the GSA passed a resolution adopting an "allocation approach" for providing access to groundwater for users within the Subbasin. Under this allocation approach, demand would be split into two categories: sustainable yield and transitional water. Sustainable yield would refer to the amount of water that can safely be extracted from the subbasin without causing undesirable results under SGMA while transitional water would refer to water extracted in excess of the sustainable yield. The focus of this approach was to allocate the sustainable yield

and transitional water and reduce transitional water use until 2040 when it would be entirely eliminated.

In determining how sustainable yield and transitional water would be allocated, the GSA considered three main options. Option A sought to allocate sustainable yield on a pro-rata basis to all non-urban acres. Transitional water would then be allocated amongst landowners with actively irrigated lands in the Subbasin. Option B was mostly the same as Option A but provided an increased starting point for setting transitional water allocations.

The Madera County GSA ultimately went with the last option, Option C. This option differed vastly from Options A and B and allocated sustainable yield *only* to those who were allocated transitional water. This meant that a landowner would only receive a sustainable yield allocation if they had actively irrigated lands—*i.e.* if they had extracted groundwater for use on their lands within the last five years—subject to a few exceptions. If a landowner owned acreage that had no history of groundwater use, for example, they could include that land in their sustainable yield determination only if it was deemed by the GSA to be a part of a "farm unit." If it was not deemed a farm unit, any land without historical groundwater use was not allocated any portion of the sustainable yield. Landowners not allocated a portion of the sustainable yield could submit a request to the GSA, but even if approved the landowner could only use their requested allocation on their existing land. These allocation rules were further tailored by the GSA in a later resolution, adopted August 17, 2021.

#### The Writ Petition

After detailing the resolutions at issue, the plaintiff landowners fire away their complaints with Madera County GSA's groundwater allocation scheme.

With the exception of land considered to be a part of a permitted farm animal operation or a farm unit, any other land not irrigated within the last five

years would be allocated *zero* sustainable yield under the allocation scheme. Even if an owner of such land owned some land that was irrigated in addition to unirrigated land, that landowner would be prohibited from transferring extracted water to the non-irrigated parcel—or anywhere else for that matter.

As for landowners with dormant overlying rights, they would be required to apply to the Madera County GSA for specific approval of the landowner's proposed extraction source, volume, purpose, and use location. Moreover, if such extractions were approved prior to 2040 the landowner would be excluded from the benefit of obtaining any portion of the transitional water.

In total, the landowner group has alleged six causes of action against the Madera County GSA. Among these, the landowner group has sought a writ of mandate ordering the GSA to vacate its Resolutions No. 2021-069 and 2021-113 establishing the groundwater allocation scheme. The landowner group is further seeking, in the form of declaratory relief, a declaration from the court that the Resolutions violate §§ 10720.5(b) and 10726.4(a)(2) of the Water Code and a declaration that the GSA must implement all aspects of its demand management strategy as outline in the Joint Plan.

In addition to the writ of mandate and declaratory relief being sought, the landowner group has also brought two more actions alleging that the GSA has violated Article 10 § 2 of the California Constitution by perpetuating continued unreasonable uses of groundwater and that the allocation scheme constitutes a taking under both the California and federal constitutions.

### Conclusion and Implications

With agencies across the state rushing to submit their Groundwater Sustainability Plans by SGMA's deadline at the end of January, 2022, this case will certainly present issues relevant to many of the plans submitted this round. SGMA has tasked agencies with crafting a solution that balances the continued health of the state's groundwater resources with the property rights of landowners throughout California. While perhaps not the most ideal method of establishing the outer boundaries forming such a balance, this case does provide the court with an opportunity to provide added guidance on what may or may not go too far in establishing a groundwater allocation scheme. The lawsuit is *Cardoza v. Madera County Groundwater Sustainability Agency*, Case No. MCV086218 Madera County Super. Ct. (Wesley A. Miliband, Kristopher T. Strouse)

## JUDICIAL DEVELOPMENTS

### 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) 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 sidestep 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 com-

mercial 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 necessar-



ily 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](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).

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