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Recent Developments—Cases, Legislation, and Articles

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RECENT DEVELOPMENTS—CASES

WATER

Texas v. New Mexico, 51 U.S.L.W. 4805 (U.S. June 17, 1983) (No. 65 Original). The Pecos River Compact between New Mexico and Texas and approved by Congress was intended to govern the allocation of the waters of the Pecos River. The River rises in New Mexico and flows into Texas. The U.S. Supreme Court held that once Congress, under the Compact Clause, consents to an interstate compact, that agreement becomes federal law and must be adhered to unless unconstitutional. The case was remanded to the Special Master to determine whether New Mexico has violated Article III(A) of the compact that New Mexico "not deplete by man's activities" the flow of the Pecos River to Texas at amounts agreed upon in 1947.

Arizona v. San Carlos Apache Tribe, 51 U.S.L.W. 5095 (U.S. July 1, 1983) (No. 81-2147). Whatever limitation the Enabling Acts or federal policy may have originally placed on state-court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment. That Amendment was designed to deal with the general problem arising out of the limitations that federal sovereign immunity placed on the States' ability to adjudicate water rights, and nowhere in the Amendment's text or legislative history is there any indication that Congress intended the efficacy of the remedy to differ from one State to another. If state courts have jurisdiction over Indian water rights, then concurrent federal proceedings are likely to be duplicative and wasteful. Moreover, since a judgment by either court would ordinarily be res judicata in the other, the existence of the concurrent proceedings creates the potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first—a race contrary to the spirit of the McCarran Amendment and prejudicial to the possibility of reasoned decisionmaking in either forum.

LAND MANAGEMENT

United States v. Mitchell, 51 U.S.L.W. 4999 (U.S. June 27, 1983) (No. 81-1748). The United States is accountable in money damages for

alleged breaches of trust in connection with its mismanagement of forest resources on allotted lands of the Quinault Reservation. The Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that expressly or implicitly create substantive rights to money damages. The statutes and regulations relied upon clearly give the Government full responsibility to manage Indian resources and land for the Indians' benefit, thus establishing a fiduciary relationship. All the necessary elements of a common law trust are present: trustee (U.S.), beneficiary (Indian allottees) and trust corpus (Indian timber, land and funds). Given the existance of the trust relationship, it follows that the Government should be liable in damages for the breach of its fiduciary duties.

INDIAN SELF-GOVERNMENT

New Mexico v. Mescalero Apache Tribe, 51 U.S.L.W. 4741 (U.S. June 13, 1983) (No. 82-331). New Mexico's hunting and fishing laws are preempted by federal law and therefore do not apply to nonmembers of the tribe hunting on the reservation. Concurrent jurisdiction by the state would effectively nullify the tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, would interfere with the comprehensive tribal regulatory scheme, and would threaten Congress' overriding objective of encouraging tribal self-government and economic development. The state failed to identify any interests that would justify the assertion of concurrent regulatory authority. The loss of revenue to the state is insufficient justification, especially where the loss of such revenues is likely to be insubstantial.

NUCLEAR ENERGY

Metropolitan Edison Co. v. People Against Nuclear Energy, 51 U.S.L.W. 5371 (U.S. April 19, 1983) (No. 81-2399). After the accident at the Three Mile Island (TMI) nuclear power plant, the Nuclear Regulatory Commission (NRC) ordered TMI shut down until it could be determined whether the plant could be operated safely, and invited interested parties to submit briefs on "whether psychological harm or other indirect effects of the accident or of renewed operation of TMI should be considered." People Against Nuclear Energy (PANE) responded with briefs contending that severe psychological harm to individuals and serious damage to the well-being of the community would result from restarting TMI. The NRC decided not to take evidence of PANE's contentions, and PANE brought suit asserting that the National Environmental Policy Act (NEPA) required consideration of PANE's contentions. The Supreme Court held that NEPA does not require assessment of potential psychological harm arising from

perceptions of risk of nuclear accident; and that "environmental input" as used in NEPA refers to actual rather than potential effects on the physical environment.

PUBLIC LANDS

Block v. North Dakota, 51 U.S.L.W. 4511 (U.S. February 23, 1983) (No. 81-2337). North Dakota filed suit against several federal officials to resolve a dispute as to ownership of certain portions of a riverbed within the State. The US. claims title to most of the disputed area on the basis of its status as a riparian landowner on a non-navigable river, while the State asserts that the river was navigable when North Dakota was admitted to the Union in 1899 and thus it owns the riverbed under the equal-footing doctrine. The Supreme Court held that the Quiet Title Act of 1972, which waives the federal government's sovereign immunity with regard to title disputes involving real property in which the U.S. claims interest, provides exclusive means by which adverse claimants can challenge government's title to real property, and that the Act's 12-year statute of limitations does not apply when the plaintiff is a State.

Watt v. Western Nuclear, Inc., 51 U.S.L.W. 4664 (U.S. June 6, 1983) (No. 81-1686). The Stock-Raising Homestead Act of 1916 (SRHA) provided for the settlement of homesteads on lands with surfaces "chiefly valuable for grazing and raising crops." Section 9 of the SRHA reserved to the United States title to "all the coal and minerals" in lands patented under the Act. When respondent mining company acquired a fee interest in land covered by a patent under the Act, it proceeded to remove gravel from a pit located on the land to use in paving streets and sidewalks in a company town where its workers lived. The Bureau of Land Management then notified respondent, and later determined, after a hearing, that the removal of the gravel constituted a trespass in violation of a Department of the Interior regulation for which respondent was liable in damages to the United States. The U.S. Supreme Court held that gravel found on lands patented under the SRHA is a mineral reserved to the United States within the meaning of section 9. For a substance to be a mineral reserved under the SRHA, it must not only be a mineral within a familiar definition of that term, as is gravel, but must also be the type of mineral that Congress intended to reserve to the United States in lands patented under the Act. Congress' purpose in the SRHA of facilitating the concurrent development of both surface and subsurface resources supports construing the mineral reservation to encompass gravel. While Congress expected that homesteaders would use the surface of SRHA lands for stock-raising and raising crops, it sought to ensure that valuable subsurface resources

would remain subject to disposition by the United States, under the general mining laws or otherwise, to persons interested in exploiting them. Given Congress' understanding that the surface of SRHA lands would be used for ranching and farming, the mineral reservation in the Act is properly interpreted to include substances, such as gravel, that are mineral in character, can be removed from the soil, and can be used for commercial purposes, and there is no reason to suppose they were intended to be included in the surface estate.

RECENT DEVELOPMENTS—LEGISLATION

WILDERNESS AREAS

Proposed: Arizona Strip Wilderness Act of 1983 (S.1611) designating approximately 394,900 acres of Arizona BLM lands as components of the National Wilderness Preservation System. Any livestock grazing established prior to the Act will be allowed to continue, subject to reasonable regulations, policies and practices the Secretary of Interior finds necessary. The regulaions must conform with Congressional intent as expressed in the general Wilderness Act.

PALEONTOLOGICAL RESOURCES

Proposed: Paleontological Resources Conservation Act of 1983 (S.1569), to authorize the Secretary of Interior and other major federal land managers to provide for the conservation and scientific study of vertebrate paleontological resources on public and Indian lands.

The bill outlines the process for obtaining five year permits to excavate, remove, and collect fossil invertebrates for institutional and commercial purposes. The bill will allow the collection of fossil invertebrates for commercial purposes, but any unusual or rare specimen, particularly of an invertebrate not yet classified by taxonomists, will be deposited in the U.S. National Museum. The bill also provides for one year permits for amateur collectors as long as amateur activies do not interfere with those of professional vertebrate paleontologists. Violations of the act will result in civil penalties, determined by examining several factors, including the scientific value of the resources involved, the cost of restoring and repairing the paleontological material, and the locality involved. For a second violation, the penalty will be double that of the first violation.

RADIOACTIVE WASTE

Proposed: S.1581, a bill to give Congressional consent to the Central Interstate Low-Level Radioactive Waste Compact. Arkansas, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, North Dakota, and Oklahoma agreed to establish one or more regional facilties to manage all the low-level radioactive waste generated in those states. The Compact will be overseen by a commission, made up of one member from each state. The commission will also approve or disapprove the application of other states to become party to the Compact.

TAXES: OIL AND GAS

Proposed: S.1549, to amend the Internal Revenue Code of 1954 to permit individual retirement accounts, qualified retirement trusts, and certain educational organizations to invest in working interests in oil and gas properties without incurring business taxable income.

ACID RAIN

Proposed: H.R. 3251, to amend the Clean Air Act for the purpose of preventing any net increase of sulfur dioxide emissions in the already-established acid rain mitigation area, the source area of air pollution resulting in acid rain. Another purpose of the legislation is to attain, by 1990, a substantial and reasonably achievable reduction in annual emissions of sulfur dioxide from the area. The bill provides for the creation of an emission reduction credit program in which five credit regions will be assigned emission reduction credits for stationary sources. The credits may be "banked" by a credit region, and units within a region can buy, sell, and trade credits to achieve the desired emissions reduction.

NATURAL GAS

Proposed: S.1119, to amend the Natural Gas Policy Act of 1978 to establish natural gas pipelines as common carriers.

Proposed: S.1211, to repeal certain restrictions on natural gas and petroleum use and pricing in new or existing power plants for the purpose of reducing emissions.

ELECTRIC POWER

Proposed: S.1278, to provide for an accelerated program of research, development and demonstration with respect to the production of electricity from magnetohydrodynamics, leading to the construction and operation of at least one major proof-of-concept demonstration project in connection with an existing electric power plant.

HAZARDOUS WASTE

Minnesota: Minnesota has enacted a statute regulating, and imposing liability for, every aspect of hazardous substances. The Minnesota Environmental Response and Liability Act (MERLA) is similar to the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (the "Superfund" legislation) in that it regulates and funds clean-up projects. For an analysis of MERLA, see JOHNSON, *Minnesota's MERLA: Federal Superfund and Beyond,* summer 1983 A.B.A. SEC. NAT. RESOURCES ENVTL. LAW NEWSLETTER 4.

RECENT DEVELOPMENT—ARTICLES

Polders: For interesting studies on the polders of the world (areas of land reclaimed and protected from water by a series of dikes, dunes, pump stations and canals), see 8 WATER INTERNATIONAL (Summer 1983). The polders of the Netherlands, Bangladesh and other countries are included.

Contaminated Water: The world's second most widespread infectious disease is schistosomiasis, a parasitic disease afflicting an estimated 250 million persons in Africa, Asia and Latin America. Parasites lay eggs in fresh water snails, and infect humans when second-stage larvae emerge from the snails and penetrate the bodies of humans entering or ingesting infected water. TUCKER, *Schistosomiasis and Water Projects: Breaking the Link,* 25 ENVIRONMENT 17 (Summer 1983).

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