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The SandBar

Legal Reporter for the National Sea Grant College Program

NPDES Permit Issued for Aquaculture Facility in the Gulf of Mexico

Also in this issue

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Cover page photograph of an almaco jack, courtesy of Abel Valdivia/Center for Biological Diversity.

Contents page photograph of a bumble bee, courtesy of Pepperberry Farms.

The SandBar

Contents

NPDES Permit Issued for Aquaculture Facility in the Gulf of Mexico

Betsy Randolph[1]

School of Almaco jacks, courtesy of Texas Sea Grant.

On June 8, 2022, the U.S. Environmental Protection Agency (EPA) issued its decision to authorize a final National Pollutant Discharge Elimination System (NPDES) Permit under the Clean Water Act (CWA) for the first first finfish aquaculture facility in federal waters in the Gulf of Mexico.[2] The permit issuance to Ocean Era for the Velella Epsilon project follows several years of assessment on the potential impacts of the facility, as well as a challenge to the EPA's initial approval of the permit.

Background

In 2017, Ocean Era received funding from the National Oceanic and Atmospheric Administration (NOAA), awarded through Florida Sea Grant, to test its aquaculture net pen in the Gulf of Mexico.[3] Ocean Era, formerly Kampachi Farms, is a Hawaii-based aquaculture company. The proposed Velella Epsilon project is a net-pen aquaculture facility, with a single pen holding 20,000 Longfin Yellowtail, also known as Almaco jack. The facility will discharge waste, such as

excess fish feed and fecal material, during a year-long production cycle. The pen will be deployed approximately forty-five miles east of Sarasota, Florida in federal waters at a depth of around 130 feet. The cage is designed to self-adjust to changes in wave patterns and currents. During storm events, the cage is designed to flood the floatation device and sink the pen where it can operate as it would on the surface.[4]

The CWA prohibits the discharge of pollutants from a point source into navigable waters of the United States without a permit. Aquaculture net pens are point sources under the CWA. Because Ocean Era would discharge pollutants (excess fish feed and fecal material) from a point source into navigable waters of the U.S. (the Gulf of Mexico) a CWA permit is required. The EPA issued a NPDES permit for the Vellela Epsilon project in September 2020.[5]

Environmental reviews were required under several environmental laws before the EPA could issue the permit. The National Environmental Policy Act (NEPA) requires that federal agencies conduct an Environmental Assessment (EA) if an action is likely to significantly affect the environment. If the EA suggests that there will be no significant impact on the environment, the agency may issue "Finding of No Significant Impact" (FONSI). If the agency finds the project will have a significant impact, it must prepare a more in-depth Environmental Impact Statement (EIS). For the Ocean Era permit, the EPA produced an EA and issued a FONSI based on its conclusion that the project would not have significant effects on the ecosystem of the Gulf.

EAB Challenge

Following the EPA's issuance of the permit, several environmental advocacy groups petitioned the Environmental Appeals Board (EAB) for review. The EAB is an administrative appeals tribunal that resolves disputes that parties have against the EPA under federal environmental laws. The EAB hears cases and decides whether the EPA was acting within its legal authority. The groups claimed the EPA had violated the CWA, Endangered Species Act (ESA), NEPA, and Marine Mammal Protection Act (MMPA) by issuing the permit without adequately considering the effects of the project.[6]

The petitioners first claimed that the EPA violated the CWA by using insufficient information to determine that the aquaculture facility would not cause unreasonable degradation of the marine environment and did not clearly conclude that there would be no unreasonable degradation of the marine environment. The petitioners also claimed that the EPA violated the ESA and MMPA by failing to fully consider the issues raised regarding the impact of the project on protected species and habitat. The final argument was that the EPA violated NEPA by not completing a full EIS for the aquaculture facility.

In May, the EAB issued a ruling that the petitioners had failed to present enough evidence to meet their burden of proving that the EPA had clearly erred when reaching conclusions in the various impact assessments they conducted. The EAB ordered the EPA to issue a clarification of their findings under the CWA. The EAB stated that it was unclear whether the EPA had found that there would be no unreasonable degradation of the environment or whether unreasonable degradation was unlikely. In response to the ruling, the EPA issued a statement clarifying that they concluded there would be no unreasonable degradation of the environment.[7]

NPDES Permit

Following the EAB ruling, the EPA re-issued the NPDES permit allowing Ocean Era to operate the facility in the Gulf of Mexico. The permit went into effect on July 8, 2022. The permit authorizes Ocean Era to discharge industrial wastewater from an aquaculture facility in the Gulf for a year-long production cycle of Longfin Yellowtail. The permit requires Ocean Era to conduct ongoing water quality monitoring, sediment monitoring, and benthic monitoring.

Conclusion

The project still needs approval from the U.S. Army Corps of Engineers before it can proceed and could potentially face additional legal challenges. However, once Ocean Era submits the four plans for approval, the process of obtaining the NPDES permit will be complete. The process they have gone through has demonstrated important regulatory lessons about permitting aquaculture facilities and will be useful for others trying to go through the same process in the future.

Endnotes

1 2024 J.D. Candidate at Lewis & Clark Law School; 2022 NSGLC Summer Research Associate.

2 U.S. Envtl. Prot. Agency, Authorization to Discharge Under the National Pollutant Discharge Elimination System Permit Number FL0A00001 (June 8, 2022).

3 Neil Sims, *Velella Epsilon: Pioneering Offshore Aquaculture in the Gulf of Mexico*, Ocean Era (Nov. 2, 2017).

4 U.S. Envtl. Prot. Agency, Fact sheet for NPDES Permit Fl0a00001 (2022).

5 U.S. Envtl. Prot. Agency, Final Environmental Assessment National Pollutant Discharge Elimination Permit for Ocean Era, Inc. (Sept. 2020).

6 Ocean Era, Inc., 18 E.A.D. 678 (EAB 2022).

7 Memorandum from the U.S. Envtl. Prot. Agency Region 4 to Ocean Era (June 8, 2022) (on file with the Environmental Appeals Board).

California Court Says Bees Fall Under Definition of Fish

Terra Bowling

Bumble bee, courtesy of Dmitry Grigoriev.

If it looks like a bee and flies like a bee, it might just be a fish if a recent California appellate court decision is any indication. In an opinion that led to headlines such as "California Court Rules Bees Are Now Fish"[1] the court ruled that terrestrial invertebrates fall under the definition of "fish" in the California Endangered Species Act (CESA).[2] The court's ruling means that the CESA may be used to protect a broader range of species than previously thought.

Background

Under CESA, the California Fish and Game Commission (Commission) may designate native species or subspecies of bird, mammal, fish, amphibian, reptile or plant as endangered or threatened.[3] Section 45 of CESA defines "fish" to mean a "wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals."[4]

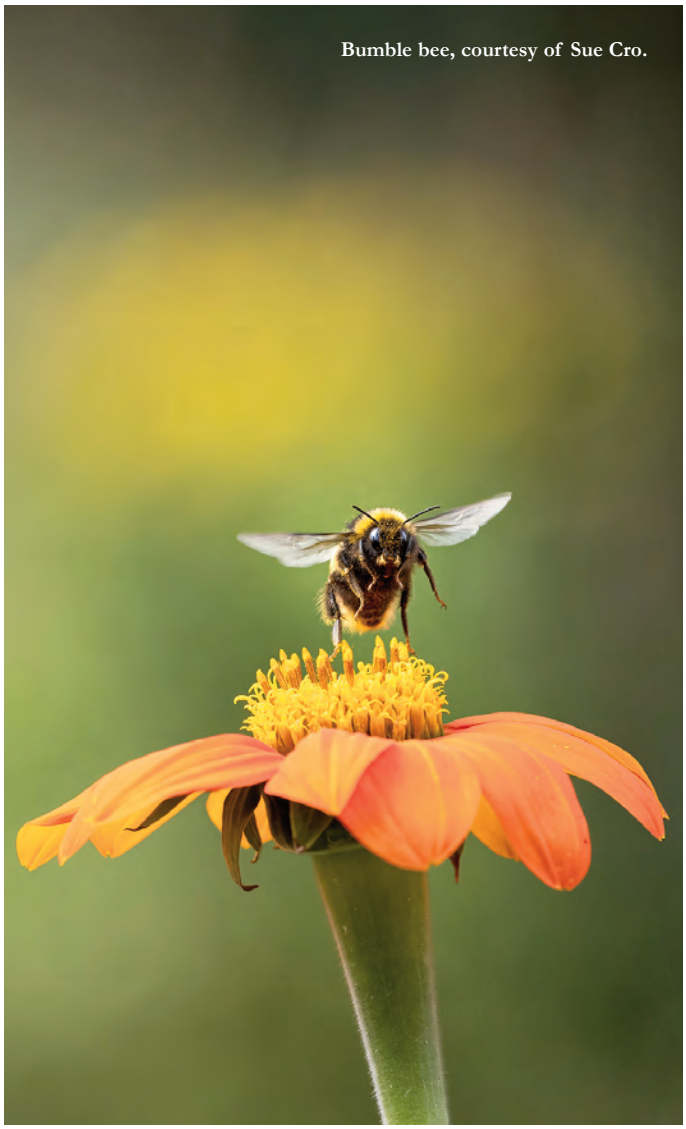
In 2018, four environmental groups petitioned the Commission to list four species of bumble bee—the Crotch, the Franklin, the Suckley cuckoo, and the Western—as endangered species under CESA. After an evaluation from the California Department of Fish and Wildlife (DFW), the Commission determined that the bumble bee species qualified as candidate species. This determination meant the species were formally under review for listing as endangered or threatened. Agriculture groups, including the Almond Alliance of California, filed a lawsuit to challenge the listing, arguing that the Commission had exceeded its legal authority in listing the species under the definition of "fish." The trial court ruled that the word invertebrates contained in CESA's definition of fish was limited to aquatic invertebrates and ordered the Commission to withdraw its decision.

Appeal

On appeal, the appellate court had a different take, ruling that the definition of "fish" should not be narrowly interpreted to include only aquatic invertebrates. "Although the term fish is colloquially and commonly understood to refer to aquatic species, the term of art employed by the Legislature in the definition of fish in section 45 is not so limited."[5]

In making its decision, the court looked to the legislative history of the Act, as well as what types of species had previously been listed. The court found sufficient support for interpreting the definition of fish to include both terrestrial and aquatic species. Under the original version of California's endangered species legislation enacted in 1970, several invertebrates were listed, including two crustaceans and the Trinity bristle snail, a terrestrial invertebrate.

The 1970 legislation was replaced in 1984 by CESA. The court noted that in enacting CESA, the Legislature knew that the Commission had applied the § 45 definition of fish to both terrestrial and aquatic invertebrates. The Legislature had the opportunity to remove "invertebrate" from the definition of fish at that time but chose not to do so. The court construed this to mean that the Legislature agreed with the agency's decision to include all invertebrates under the § 45 definition of fish. The Legislature also recognized that listings under the 1970 law would qualify as endangered or threatened under the 1984 CESA Act. The court stated that this was an "overt" indication that it approved of the agency's interpretation. The court noted the Act was once again amended by the Legislature in 2015, and § 45 remained intact. The court concluded that the Legislative history clearly supported the Commission's authority to list any invertebrate as endangered or threatened under the category of fish.



Bumble bee, courtesy of Sue Cro.

Conclusion

The court opinion issued on May 31, 2022 is not the final word, as the decision may still be appealed to the California Supreme Court. At some point, the California Legislature may choose to revisit the inclusion of "invertebrates" in the Act or to revise the definition of "fish." For now, the court's decision means that the bumblebees may remain on the candidate list in California. The ruling also opens up the possibility of other endangered or threatened terrestrial invertebrates to be added to the list.

Endnotes

1 Rich Calder, NY Post (June 4, 2022).

2 Almond Alliance of California v. Fish and Game Commission, No. C093542, 2022 WL 1742458 (Cal. Ct. App. May 31, 2022).

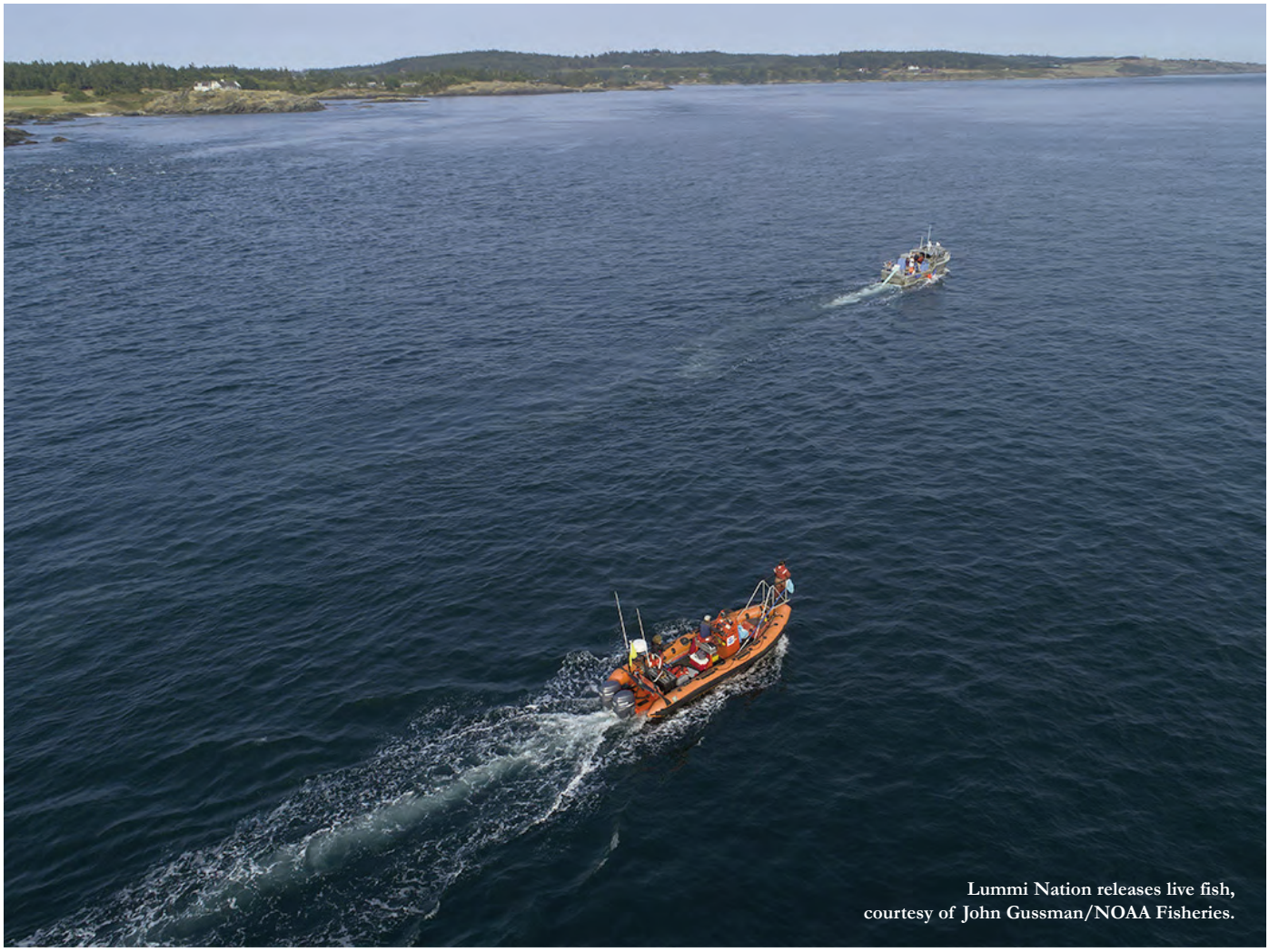
3 Cal. Fish & Game Code § 2050 et seq.

4 Cal. Fish & Game Code § 45.

5 *Almond All. of California*, 2022 WL 1742458 at *1.

NOAA Fisheries Developing Equity and Environmental Justice Strategy

Kennady Hertz[1]



Lummi Nation releases live fish, courtesy of John Gussman/NOAA Fisheries.

In early May, the National Marine Fisheries Service, or NOAA Fisheries, released the first draft of its new "Equity and Environmental Justice Strategy."[2] This strategy seeks to identify underserved communities and the equity and environmental barriers they face, how the agency can assist these communities in overcoming these barriers, and how the agency can incorporate equity into its programs, policies, and every day activities. NOAA Fisheries has invited the public to submit comments and suggestions on the draft through August 19.

Executive Orders

Recent actions by President Biden have affirmed the need for federal agencies to establish a comprehensive approach to advancing equity and addressing environmental justice for minorities and low-income populations. Both Executive Order 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government) and Executive Order 14008 (Tackling the Climate Crisis at Home and Abroad) require government agencies to reevaluate and improve upon their current policies and

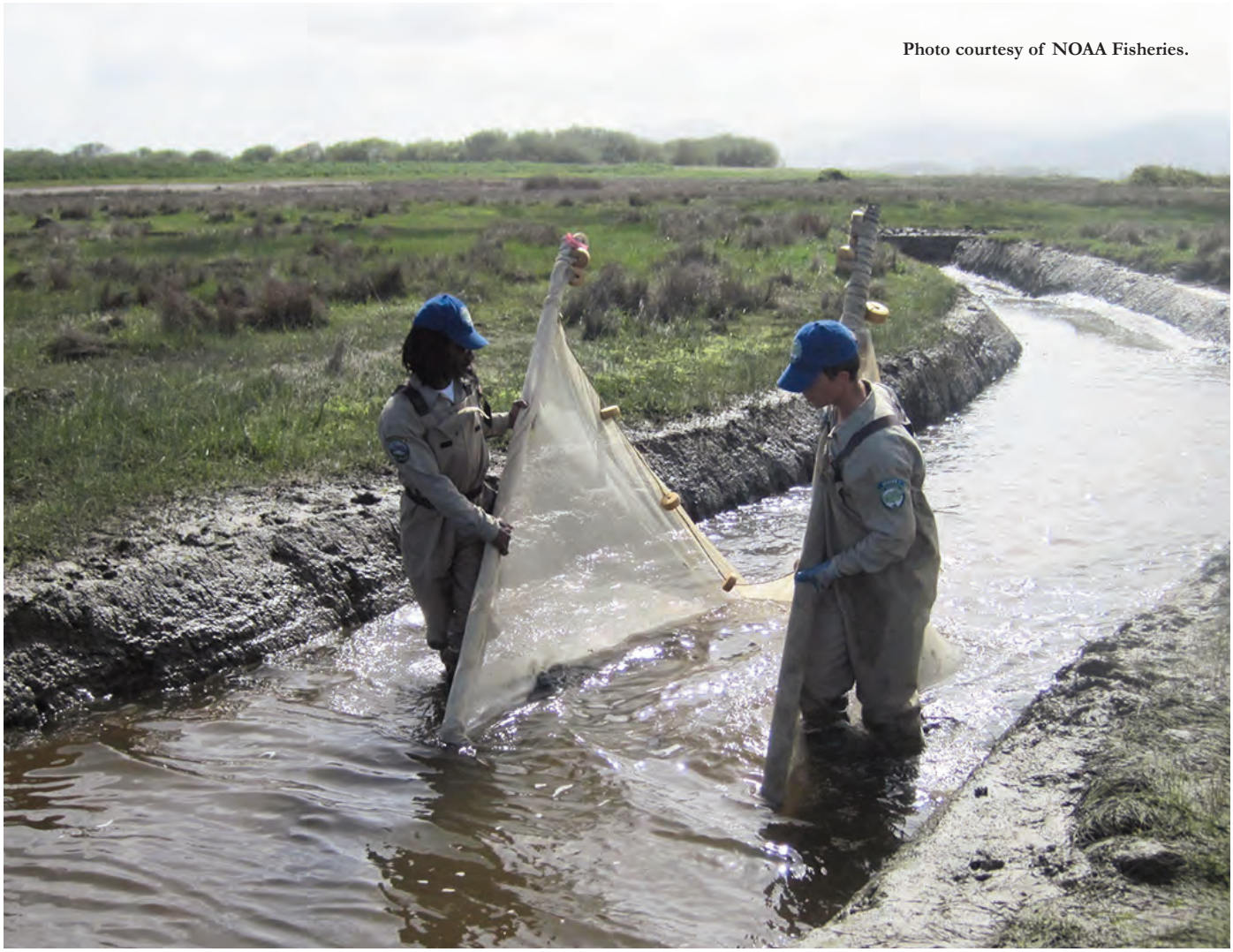


Photo courtesy of NOAA Fisheries.

programs and make Equity and Environmental Justice (EEJ) a core part of their mission.[3] These executive orders, as well as the recently formed White House Environmental Justice Advisory Council and the Department of Commerce's Equity Action Plan, helped build the framework for NOAA Fisheries' developing strategy.

Strategic Process

The development of this strategy has been a multi-year iterative process, which is projected to be complete in spring of 2023. EEJ working groups at NOAA Fisheries were formed in April 2021 that proposed six short-term objectives to measure progress towards three overarching goals. For the preliminary stage, the agency gathered input from federally and non-federally recognized tribes, territories, and indigenous peoples on NOAA Fisheries' role in promoting EEJ and what the agency can do to improve. The second stage of the process was an internal review by the agency's leadership and staff in every region. Currently, the process is in its third stage, during which communities and individuals are encouraged to submit public comments on the draft document and recommendations to ensure the strategy will equitably serve all.

Goals

There are three long term goals this strategy hopes to accomplish: "1) Prioritize identification, equitable treatment, and meaningful involvement of underserved communities, 2) Provide equitable delivery of service, 3) Prioritize equity and environmental justice in [NOAA Fisheries] mandated and mission work."[4] To achieve these goals each national program and geographic region within the agency will create a "step-down implementation plan" that will outline how to best address the specific needs of underserved communities that fall under their programs and regions. NOAA Fisheries will establish EEJ reports that monitor each program's plans, actions, and metrics annually. Then, these reports will be evaluated using an EEJ scorecard and will be published publicly to track the agency's progress. Six short-term objectives provide a framework for regional and programmatic EEJ plans, actions, and metrics as discussed below.

Barriers & Objectives

In its strategy, NOAA Fisheries outlined several barriers that prevent underserved communities from receiving fair treatment and participating in meaningful work with the agency. These barriers include the agency's lack of awareness of certain underserved communities, structural barriers such as laws, policies, and regulations that impedes access to the agency's resources/services, practical barriers to access (ex. language differences/travel costs), system complexity, and gaps in expertise and representation. The six objectives below are designed to overcome these barriers underserved communities face. For each objective, the agency identified specific actions it could take to address barriers.

1. Create an empowering environment within the agency. This objective can be accomplished by integrating EEJ at the workplace in day-to-day activities, encouraging and incentivizing staff to reflect and share lessons learned, and continuing the work of the national NOAA Fisheries' EEJ Working Group of discovering new methods of employing EEJ.
2. Incorporate equity and environmental justice in policy and plans. NOAA Fisheries can help accomplish this objective in many ways: by conducting a review of major agency regulatory processes to confirm they are consistent with the new EEJ strategy, "developing programs, policies, and activities that address the disproportionately high and adverse environmental impacts on underserved communities,"[5] and certifying that all of the agency's directives and policies include appropriate language with respect to EEJ.
3. Research and monitor equity. To fulfill this objective, the agency must work in tandem with underserved communities to confirm the information gathered from the agency's research is accessible and accurate. Specific actions the agency can take include developing surveys to measure the value underserved communities receive from their use of living marine resources, analyzing data to see what policy changes can be made to remove barriers to entry in fisheries and marine aquaculture programs, and communicating to the public the risks and benefits of their consumption habits in regards to populations that primarily rely on fish or wildlife for subsistence.
4. Outreach and engage equitably. Direct actions the agency can take to engage with underserved communities equitably is creating education programs with EEJ selection criteria for STEM programs and providing mentorship in navigating the agency's grant proposal program as well as the job/internship application process.
5. Equitably distribute benefits among stakeholders. This objective can be accomplished by ensuring funding and benefits aid underserved communities and institutionalizes equity. An example of "institutionalizing" equity can be seen under the Justice40 initiative outlined in Executive Order 14008, where NOAA Fisheries is required to distribute at least 40% of its overall benefits from federal investments in climate/clean energy to disadvantaged communities. Some direct actions that can be performed to accomplish this objective is to appropriately compensate underserved communities when natural resource damage occurs and "increase tribal and state capacity to receive additional funding under Species Recovery Grants to create jobs and improve populations of species that may have cultural/subsistence value for tribes."[6]
6. Enable inclusive governance. This objective aims to remove barriers that keep underserved communities out and increase engagement and representation.

In its strategy, NOAA Fisheries outlined several barriers that prevent underserved communities from receiving fair treatment and participating in meaningful work with the agency.

To improve upon its first released draft of the strategy, NOAA Fisheries has invited the public to submit comments and suggestions through August 19. The agency will be accepting written comments up until the deadline and will provide opportunities to comment via phone and in person meetings. There were three online webinars on the strategy spaced throughout the summer: June 24, June 30, and July 19. To comment online click here.

Endnotes

[1] Public policy major at the University of Mississippi Lott Leadership Institute; Sea Grant Community Engaged Intern at NSGLC.

[2] National Marine Fisheries Service, Draft Equity and Environmental Justice Strategy (2022). 1-39.

[3] *Id.* at 5.

[4] *Id.* at 8.

[5] *Id.* at 13.

[6] *Id.* at 22.

Indiana's Lake Michigan Shoreline Dispute Moves to Federal Court

Betsy Randolph[1]

Lake Michigan shoreline in Indiana, courtesy of David Wilson.

In 2018, the Indiana Supreme Court issued a landmark opinion, *Gunderson v. State*, ruling that state ownership of the Lake Michigan shoreline extended to the ordinary high water mark (OHWM).[2] The ruling in *Gunderson* was later codified by the Indiana Legislature in the House Enrolled Act (HEA) 1385.[3] In HEA 1385, the Indiana Legislature established that the State of Indiana owned all the boundaries of Lake Michigan in public trust and that beachfront landowners do not have the exclusive right to use or possess the land below the OHWM. Recently, the question of who owns the shoreline of Lake Michigan was once again before a court.[4] In this case, the Seventh Circuit Court of Appeals ultimately ruled that the plaintiffs lacked Article III standing to challenge the *Gunderson* ruling and HEA 1385.[5] Thus, the Lake Michigan shoreline in Indiana continues to be held in trust for the public.

Background

Randall Pavlock, Kimberly Pavlock, and Raymond Cahnman own beachfront property on Lake Michigan's shore in Indiana.[6] The Pavlocks and Cahnman filed suit against the Indiana Governor, Attorney General, and the Department of Natural Resources Director in 2020 seeking a declaratory judgment barring enforcement of the *Gunderson* decision and HEA 1385. The Indiana Supreme Court in *Gunderson* ruled, based on the history of the public trust doctrine and the Equal Footing Doctrine, that the State of Indiana had never relinquished title to the land below the OHWM. This ruling meant that the State of Indiana, not the Pavlocks and Cahnman, owned the Lake Michigan shoreline below the OHWM

The plaintiffs filed suit in federal court arguing that the ruling in *Gunderson* and the subsequent passing of HEA 1385 was an unconstitutional taking of their private property.

Unconstitutional takings occur when the government takes an individual's private property for public use without just compensation. The plaintiffs claimed that their property rights extend to the low water mark of Lake Michigan; therefore, the *Gunderson* ruling took property that was included in their deeds. The plaintiffs also argued that the subsequent passage of HEA 1385 extended the *Gunderson* holding because it explicitly recognized public recreational uses such as boating and swimming while the court in *Gunderson* did not explicitly mention the potential uses of the public land below the OHWM. The plaintiffs allege that the allowance of these uses further deprived them of their property.

The plaintiffs claimed that their property rights extend to the low water mark of Lake Michigan; therefore, the Gunderson ruling took property that was included in their deeds.

Lower Courts

The U. S. District Court for the Northern District of Indiana dismissed the case on the grounds that the plaintiffs did not state a valid legal claim.[7] The district court ruled that *Gunderson* did not create a new boundary between public and private land within the state, but rather provided clarity about what had always been the dividing line between the two since Indiana's statehood. Additionally, the district court ruled that it could not hear the case because the question of what was and was not state-owned land would infringe upon Indiana's sovereignty and was therefore not a question that federal courts could answer. State sovereignty is the authority of the state to govern itself. In the United States, property ownership is an issue of state law, so the states have the sovereign right to settle property ownership disputes within the borders of their state. Thus, since the plaintiffs sought to have a property ownership dispute settled, their claim fell within the jurisdiction of the state court system and not the federal courts.

Seventh Circuit Holding

The plaintiffs appealed to the Seventh Circuit Court of Appeals. Upon reviewing the district court's decision, the Seventh Circuit ruled that the plaintiffs lacked standing to bring the lawsuit and declined to rule on other matters.[8] A plaintiff must demonstrate three elements to establish standing: 1) an injury in fact that is concrete and particularized, 2) a causal link between the injury and the defendant's actions, and 3) that a favorable ruling from the court would redress the injury. The court held that the plaintiffs had established a sufficient cause in fact—that their property was allegedly taken without compensation—but they had failed to establish causation and redressability.

With regard to causation, the injury alleged must be fairly traceable to the defendants. The court held that the Indiana Governor, Attorney General, and the Natural Resource Director did not have a role in determining that the public trust lands extended to the OHWM in Indiana. The plaintiff's injury was only traceable to the actions of the Indiana Supreme Court and the legislature, not to the state officials being sued.

The court also found that the claimed injury could not be redressed by the court. None of the defendants being sued by the plaintiffs had the authority to grant title to the land below the OHWM. Additionally, the court held that if the injunction the plaintiffs sought was granted it would not change Indiana law regarding the title to the land below the OHWM and the plaintiffs' underlying injury would not be remedied by granting the requested injunction.

Conclusion

The ruling in this case and the codification of the public trust and private property boundary in Indiana's state law further solidified the holding in *Gunderson* that the shoreline of Lake Michigan belongs to all the citizens of Indiana.[9] This may not be the end of the road for the plaintiffs, however. The court ultimately modified the district court's ruling to a dismissal without prejudice, so there is a possibility that the plaintiffs could attempt to bring the case against different defendants in the future.

Endnotes

1 2024 J.D. Candidate, Lewis & Clark Law School; 2022 NSGLC Summer Research Associate.

2 Gunderson v. State, 90 N.E.3d 1171 (Ind. 2018).

3 H.B. 1385, 121st Gen. Assemb. 2nd Reg. Sess., (Ind. 2020).

4 Pavlock v. Holcomb, No. 21-1599, 2022 U.S. App. LEXIS 14196 (7th Cir. 2022).

5 *Id.* at 2.

6 Dan Carden, New Lawsuit Renews Fight to Limit Public Access to Lake Michigan Beaches, South Bend Tribune (Dec. 11, 2019).

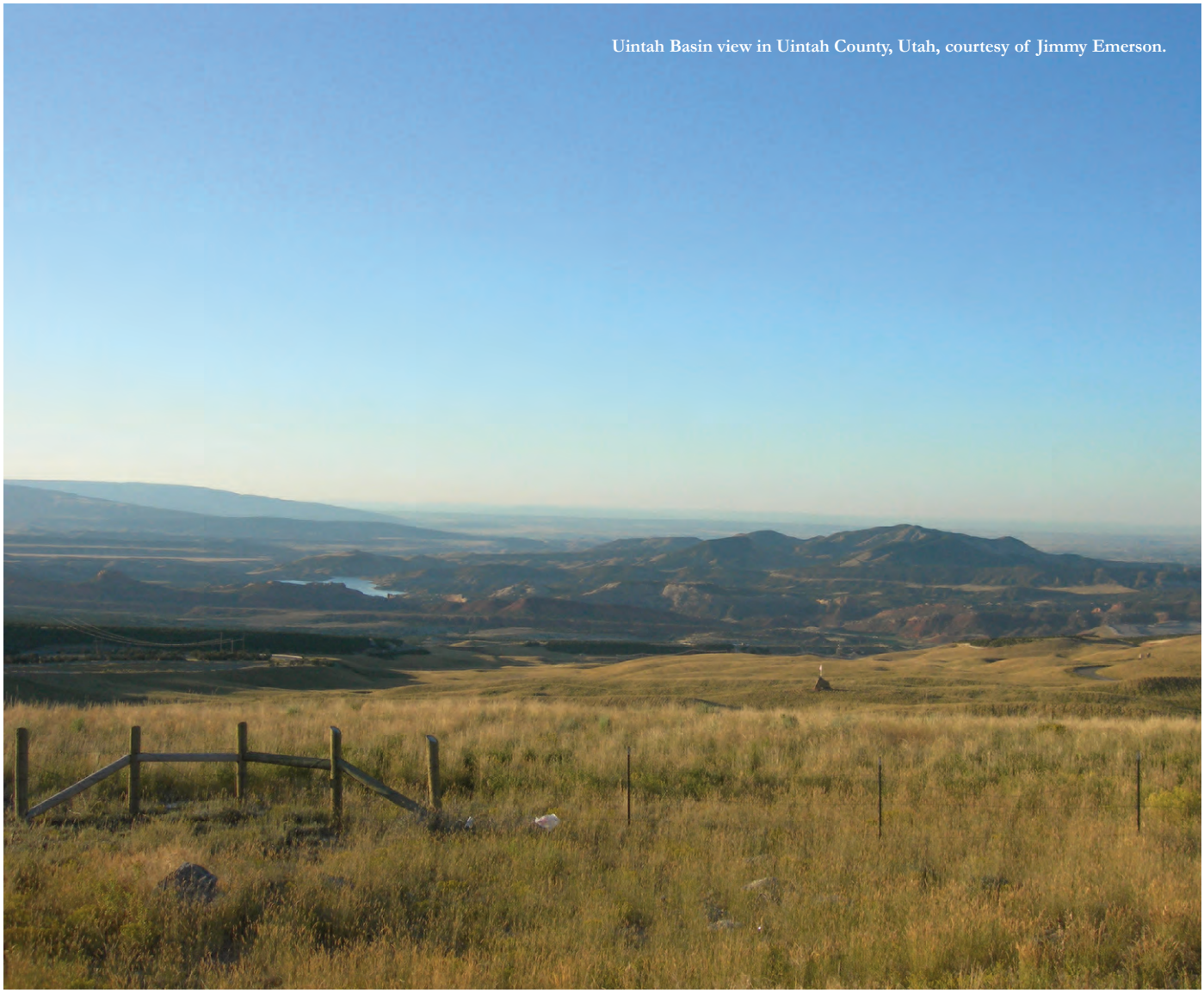
7 Pavlock v. Holcomb, 532 F. Supp. 3d 685 (N.D. Ind. 2021).

8 *Pavlock*, No. 21-1599 at 17.

9 Ind. Code § 14-26-2.1-3 (2022).

Court Rejects Basis of Ute Tribe's Water Theft Claim

Zachary R. Evans[1]



Uintah Basin view in Uintah County, Utah, courtesy of Jimmy Emerson.

It began with a letter. In the midst of divorcing her husband, Maggie McKee wrote to the Ute Indian Tribe. In it, she claimed her husband, rancher Gregory McKee, was committing "illegal, unethical, and harmful" practices, including the diversion of water from irrigation canals running across his property.[2] Following an investigation of Maggie McKee's allegations, the Tribe brought a suit against Gregory McKee in tribal court for the misappropriation of the water.

The tribal court ruled in favor of the Ute Tribe on the basis that "the Ute Tribe has sovereign authority to manage the use of its territory and natural resources by tribe members and non-members"—but McKee refused to comply with a temporary injunction.[3] The Ute Tribe then turned to the U.S. District Court of Utah, seeking enforcement of the tribal court's order of injunctive relief. Upon review of the parties' cross-motions for summary judgment, the district court—in finding for McKee—dismissed the tribal court's

judgment as unenforceable due to lack of subject matter jurisdiction.[4] In September 2022, the U.S. Court of Appeals for the Tenth Circuit affirmed the district court's ruling, agreeing that the tribal court lacked jurisdiction.[5]

From a bird's eye view, the decision may appear to turn on the pressing issue of water access. Instead, the issue before the Tenth Circuit was more jurisdictional in nature. As the court noted, "[t]his appeal boils down to whether a tribal court has jurisdiction over a dispute between the tribe and a non-Indian about rights to water within reservation boundaries but not on Indian land."[6] Notably, the court's consideration of the Ute Tribe's argument illustrates how a previous U.S. Supreme Court holding that allows for the extension of tribal jurisdiction is being applied. Although the court found the tribal court did not have jurisdiction in this case, the Ute Tribe's argument for an expansion of tribal jurisdiction is worthy of exploration.

Drought in Utah

Water access is a prominent issue on the reservation and throughout the state: 99.47% of Utah is in severe drought or worse.[7] The second driest state in the nation, Utah has a yearly precipitation of only 113.34 inches.[8] And the impacts on Utah's agriculture are clear: the state's Secretary of Agriculture reported that "[f]armers and ranchers in Utah have already experienced water cuts of 70-75%" from 2020 to 2021.[9] A recent study by Utah State University suggest that "[d]irect losses of drought affecting the cattle sector are $3.243 million, and total economic impacts due to cattle sector losses are $8.243 million on the Uintah and Ouray Reservation."[10] With the scarcity of water access, conflict arises and legal disputes over water rights are not uncommon at the local, state, or federal level.[11]

The Ute Tribe

Located in northeastern Utah, the Ute Indian Tribe of the Uintah and Oray reservation is currently the second largest Indian Reservation in the country, spanning over 4.5 million acres.[12] At the beginning of the 20th century, the United States divided up the Ute Indian Tribe's reservation and allotted individual parcels of land to tribal members. Soon after, the federal government took two actions that set the stage for this case: Congress approved the Uintah Indian Irrigation Project (UIIP) to build irrigation canals and ditches on the reservation, and afterwards allowed nonmembers of the Tribe to purchase available reservation land.

After federal legislation gave the U.S. Secretary of the Interior title to the UIIP in trust in the 1920s, the United States sued non-Indians over use of irrigation water. In finding for the federal government, the court—in what is known as the Cedarview Decree—"permanently enjoined 'all persons diverting or using water' from the UIIP from 'hindering, preventing, or interfering' with the Ute Indian's water rights."[13] Almost a decade later, the Ute Tribe adopted a constitution and bylaws, creating a tribal government for its territory in 1937.[14]

The fluctuation in policies is key to the case: McKee, a non-member of the Ute Tribe, owns land—across which two UIIP canals flow—that was once part of the Ute reservation. The original controversy stemmed from the Ute Tribe's lawsuit, claiming McKee was "unlawfully misappropriating tribal waters in violation of the Cedarview Decree."

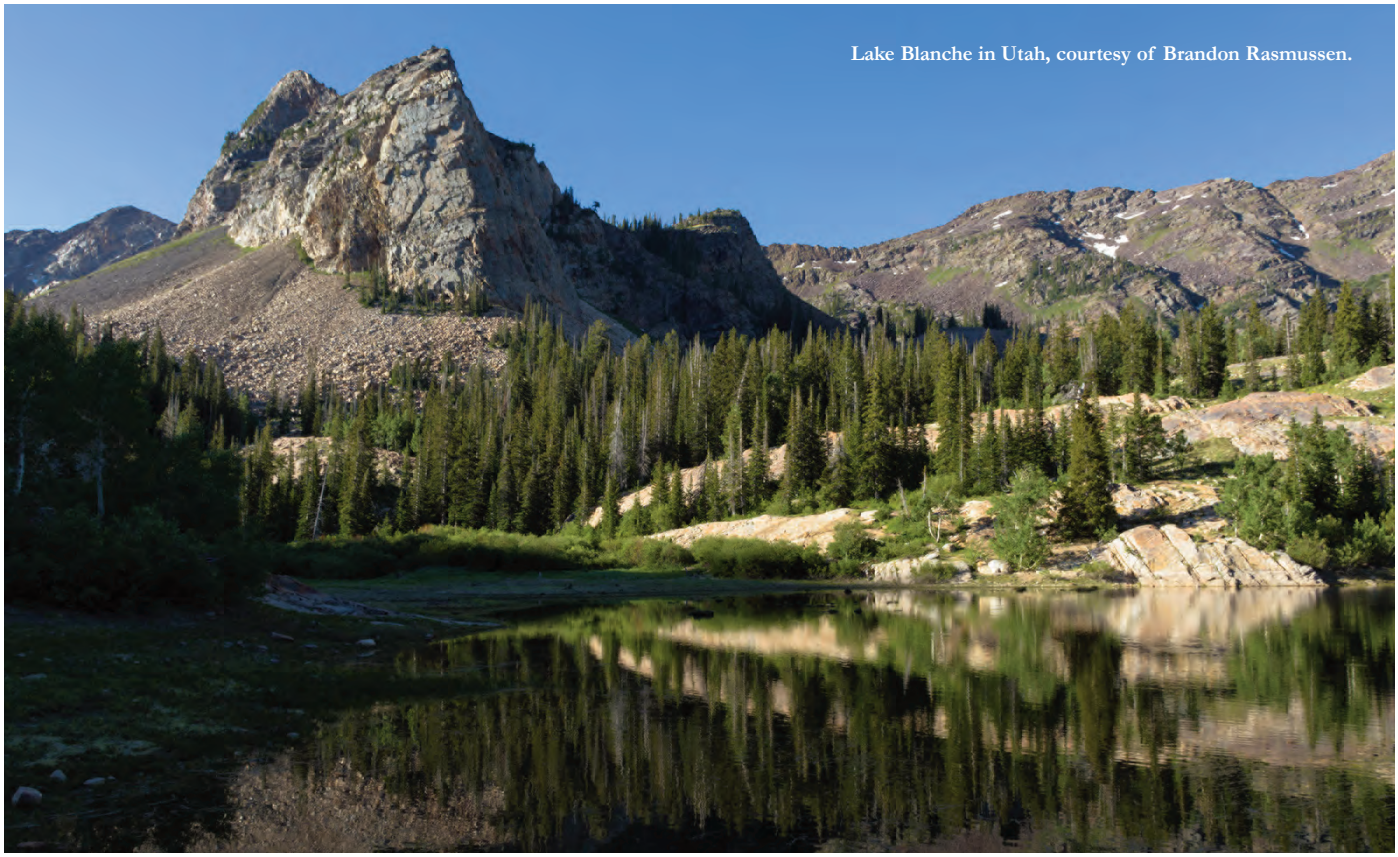
Montana v. United States

In 1981, the U.S. Supreme Court's decision in *Montana v. United States* carved out two exceptions "concern[ing] regulation of 'the . . . activities of nonmembers' or 'the conduct of non-Indians on fee land.'"[15] Referred to as the "*Montana* exceptions," tribes can regulate nonmember activity in only two scenarios. First, "[t]ribes can regulate the activity of nonmembers who enter consensual relationships with them or their members."[16] Second, Tribes "can regulate the activity of nonmembers on reservation land—even non-Indian fee land—if that activity threatens their political integrity, economic security, or health and welfare."[17]

In hearing the original case the Tribe filed against McKee, the tribal court found subject matter jurisdiction arising from the *Montana* exceptions. The Court of Appeals disagreed, however. The court found that the Tribe could not prove that McKee, by irrigating his land from the UIIP canals, consented to being subject to tribal court jurisdiction. Similarly, the Tribe could not prove its dispute with McKee "sufficiently jeopardized tribal self-government" to such a degree that tribal court jurisdiction would become justified.

A Third Exception?

Most interestingly, the Ute Tribe, in their appeal, advocated for the creation of a third, new exception. Under this proposed exception, a tribal court could claim jurisdiction "over a nonmember's use of a natural resource" if a tribe claimed, "an interest in a natural resource on nontribal land."[18] The court of appeals declined to create a third exception, stating there was "no case in which the Supreme Court or [the court of appeals] have held that an Indian tribe may regulate the use of natural resources outside the tribe's territory."[19] Further, the court emphasized that the "Supreme Court has upheld tribal authority to regulate nonmembers' use of natural resources" when "regulations were a condition of the nonmembers' presence on tribal territory."[20] For example, tribes may condition nonmembers' hunting and fishing on tribal lands on payment of a fee.[21] The facts of *Ute v. McKee* were plainly different: a tribal court's ruling on the water dispute could not be characterized as a condition of McKee's presence on tribal lands because McKee used the water on non-Indian land.



Lake Blanche in Utah, courtesy of Brandon Rasmussen.

Conclusion

In *Ute Indian Tribe of Uintah & Ouray Rsrv. v. McKee*, the Tenth Circuit Court of Appeals reaffirmed usage of the *Montana* exceptions by declining to broaden tribal jurisdiction. However, the court's dismissal with prejudice only bars the Tribe from seeking to enforce the tribal court's judgment. As the court did not consider the merits of the Tribe's claim, the dismissal does not prevent the Tribe from filing future claims stemming from the dispute with McKee over his water usage in other venues. The Ute Tribe's next legal maneuvers could provide a roadmap for similar parties who cannot meet the burdens of proof to trigger the *Montana* exceptions.

Endnotes

1 2L, Albany Law School; Sea Grant Law Diversity Internship Program intern.

2 Brian Maffly, *Ute Tribe Believes Rancher is 'Misappropriating' Its Water, But is Thwarted By Federal Courts*, Salt Lake Trib., (Apr. 28, 2022, 8:00 AM).

3 Ute Indian Tribe v. McKee, et al., Ute Indian Tribe of the Uintah & Ouray Rsrv. Tribal Ct. (Aug. 3, 2015) (Dkt. No. 55-1 at 49).

4 Ute Indian Tribe of the Uintah & Ouray Rsrv. v. McKee, 482 F. Supp. 3d 1190 (D. Utah 2020).

5 Ute Indian Tribe of the Uintah & Ouray Rsrv. v. McKee, 32 F.4th 1003, 1005-6 (U.S. 10th Cir. 2022).

6 *Ute Indian Tribe of the Uintah & Ouray Rsrv.* 32 F.4th at 1004.

7 The Deseret News Editorial Board, *Opinion: The Price of a Lawn Watered in a Season of Drought*, Deseret News, (June 1, 2022, 12:00 PM).

8 Tatiana Drugova, Kynda Curtis & Man-Keun Kim, *Economic Impacts of Drought in Utah: Uintah and Ouray Reservation*, Utah State Univ. (last visited, June 14, 2022).

9 Craig Buttars, *Farmers and Ranchers in Utah Have Cut Water Use 70-75% Compared to Last Year*, Deseret News, (July 17, 2021, 11:00 PM).

10 Drugova, *supra* note 8.

11 *See Ute Indian Tribe of the Uintah & Ouray Rsrv. v. United States DOI*, 560 F. Supp. 3d 247 (D.D.C. 2021).

12 *Ute Indian Tribe of the Uintah & Ouray Reservation*, Utah Div. Indian Aff. (last visited June 14, 2022).

13 *Ute Indian Tribe of the Uintah & Ouray Rsrv,* 32 F.4th at 1005.

14 *Id.*

15 Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 472 (2008).

16 *Ute Indian Tribe of the Uintah & Ouray Rsrv,* 32 F.4th at 1006.

17 *Id.* at 1007.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 1008.

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For more information, visit: https://hamptonroads22.oceansconference.org