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## In This Edition

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### **Cover Page Footnote**

5 Golden Gate U. Envtl. L. J. 253 (2012)

## IN THIS EDITION

*SOFIYA (FURMAN) FEERER\** & *LUTHIEN L. NILAND\*\**

It is with great honor and pleasure that we introduce the Golden Gate University Environmental Law Journal's fifth Pacific Region Edition. This edition continues to cover environmental articles written by working professionals and law students affecting the Pacific Rim, and this issue has a special focus on recent United States Supreme Court decisions.

The edition begins with an introduction to a controversy between Montana, Wyoming, and North Dakota that raised issues of first impression with the U.S. Supreme Court. In *A Water Story With Original Jurisdiction and a Doctrine for Changing Uses*, Golden Gate University law student Melosa Granda provides an overview of the legal framework governing water allocation and the Yellowstone River Compact in the region. This introduction sets the stage for two complementary articles that discuss the U.S. Supreme Court's first ruling in *Montana v. Wyoming* and its implications.<sup>1</sup>

In the first of these articles, *Montana v. Wyoming: Sprinklers, Irrigation Water Use Efficiency and the Doctrine of Recapture*, Professor Lawrence J. MacDonnell from the University of Wyoming analyzes the *Montana v. Wyoming* decision, which arose from Wyoming's increased use of water due to the increased efficiency of sprinklers and its participation in the Yellowstone River Compact. Professor MacDonnell discusses the Special Master's and Court's decisions regarding Wyoming's irrigation improvements and their effects on water availability in the region. Furthermore, he describes the implications of

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<sup>1</sup> *Montana v. Wyoming*, 131 S. Ct. 1765, 1773 (2011).

## 254 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 5]

this holding on irrigation practices outside of the states affected by the Compact.

Next, Professor Michelle Bryan Mudd from the University of Montana School of Law discusses additional future impacts of the dispute in *Montana v. Wyoming: An Opportunity to Right the Course for Coalbed Methane Development and Prior Appropriation*. Professor Mudd focuses on the development of coalbed methane, an issue that was not discussed by the Court. She explains that because the Special Master concluded that hydrologically-connected water is within the scope of the Compact, the Special Master may still need to address whether coalbed methane groundwater withdrawals violate the senior water users' rights under the Compact.

Cecilia O'Connell Miller of Latham & Watkins LLP covers another U.S. Supreme Court decision in *Climate Change Litigation in the Wake of AEP v. Connecticut<sup>2</sup> and AES v. Steadfast<sup>3</sup> Out to Pasture, But Not Out of Steam*. Ms. Miller incorporates the U.S. Supreme Court's decision in *AEP v. Connecticut*, which refused plaintiffs the right to prosecute climate change cases under federal tort law, with the Virginia Supreme Court's decision in *AES v. Steadfast Insurance*. This Virginia case concerned the ability of defendants in climate change cases to obtain insurance coverage benefits, including an insurer-funded defense and monies toward any settlement or verdict. The article explains why these cases will lead both plaintiffs and defendants to litigate and seek answers to questions that arise from climate change cases in state courts.

This edition also features several articles from Golden Gate University School of Law alumni and current students. In *A Wolf in Sheep's Clothing: The Plastics Industry's "Public Interest" Role in Legislation and Litigation of Plastic Bag Laws in California*, Jennie R. Romer, associate attorney at Lexington Law Group and founder of plasticbaglaws.org, and Shanna Foley, graduate fellow at the Golden Gate University Environmental Law & Justice Clinic, author a follow-up article to Ms. Romer's 2010 student comment, *The Evolution of San Francisco's Plastic-Bag Ban*.<sup>4</sup> In this most recent article, the plastic ban is discussed in light of the California Supreme Court's decision in *Save the Plastic Bag Coalition v. City of Manhattan Beach*,<sup>5</sup> in which the Court reversed an appellate decision and upheld the validity of the plastic

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<sup>2</sup> Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).

<sup>3</sup> AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28 (Va. 2011).

<sup>4</sup> Jennie Reilly Romer, *The Evolution of San Francisco's Plastic-Bag Ban*, 1 Golden Gate U. Envtl. L.J. 439 (2010).

<sup>5</sup> Save the Plastic Bag Coal. v. City of Manhattan Beach, 254 P.3d 1005 (Cal. 2011).

bag ban. The case touched on two key issues: whether the Coalition had standing to challenge the ordinance and whether the lower courts erred in finding the ordinance invalid due to the county's failure to prepare an Environmental Impact Report.

In the first student comment of this edition, *A Tale of Two Water Districts: The Future of Agriculture in California's San Joaquin Valley Lies in Compromise over Drainage*, Kathleen Nitta compares how two water districts, Westlands Water District and the Grassland Area Farmers (GAF), deal with agricultural drainage in an area of the Western San Joaquin Valley that is rife with drainage problems. The GAF have implemented innovative technologies to deal with the drainage, but they haven't been able to complete their projects in time, while Westlands has done very little and is currently inundating its water table with selenium-laden drainage water. Ms. Nitta discusses proposed solutions to this decades-old problem, including amending the Basin Plan for the lower San Joaquin and Sacramento Rivers and using the GAF's drainage plan as a model to amend the San Luis Act to require Westlands to provide their own drainage.

Next, in *Green Beer: Incentivizing Sustainability in California's Brewing Industry*, Timothy R. Sloane discusses the environmental impacts of making beer, and asks how California can promote increased sustainability in that industry. Mr. Sloane's argument is founded on the hypothesis that alcoholic beverages have stoked human ingenuity throughout history, and thusly catalyzed large-scale social changes. This same ingenuity should be employed to reduce greenhouse gas emissions from brewing and combat global climate change. The comment examines several procedural and technological changes to the brewing process that can increase a brewery's energy efficiency. It then turns to a discussion of how the state government could design a legislative scheme to incentivize those changes, in keeping with California's broad policy of reducing greenhouse gas emissions.

Then, in *Farallon Poison Paradox: The U.S. Fish and Wildlife Service's Attempt at Saving One Species While Subjecting Others to Probable Death*, Vadim Sidelnikov discusses the impacts of the Fish and Wildlife Service's (FWS) rodent eradication projects aimed at preserving ecological diversity on islands. Particularly, the comment focuses on the FWS's recent proposal to use a highly toxic poison, brodifacoum, to eradicate mice from the Farallon Islands. The proposed approach would subject approximately thirty percent of California's seabirds, in addition to other birds, to primary and secondary poisoning, yet the EPA refuses

## 256 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 5]

to regulate the FWS's use of poisons under FIFRA.<sup>6</sup> Mr. Sidelnikov concludes by suggesting alternatives and mitigation measures to reduce the risk of poisonings resulting from the FWS's implementation of the eradication plan on the Farallon Islands.

Finally, a comment by Rachel Hawkins divulges the pressing need for the implementation of a national lead ammunition ban. In *EPA Shoots Down Lead Shot Regulation: Lead Ammo's Unreasonable Risk to Human Health and the Environment, and the Special Situation of the California Condor*, Ms. Hawkins argues that the Toxic Substances Control Act (TSCA) affords the United States Environmental Protection Agency (EPA) broad authority to impose a national ban of lead ammunition.<sup>7</sup> Through a cost-benefit analysis Ms. Hawkins establishes that the advantages of a national lead ammunition ban heavily outweigh any associated burdens and urges EPA to prevent the exposure of millions of humans and animals to lead.

We sincerely hope that you find this issue of the Golden Gate University Environmental Law Journal informational and inspiring. We would like to thank our faculty editor, Professor Paul Kibel, for his support in publishing this edition and also Professor Ed Baskauskas for his thorough and tireless commitment to improving the Environmental Law Journal. Additionally, this edition could not have happened without the hard work of our student editors and devoted authors. Finally, thank you to the faculty and staff of Golden Gate University School of Law, especially Dean Drucilla Ramey, for their dedication and support of legal scholarship within the environmental law community and among our students.

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<sup>6</sup> 7 U.S.C.A. §§ 136-136y (Westlaw 2012).

<sup>7</sup> 15 U.S.C.A. § 2602(2)(B)(v) (Westlaw 2012).