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## United States v. Michigan, 122 F. Supp. 2d 785 (E.D. Mich. 2000)

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the wells. The court determined the action did not trigger Chapter 93A because contamination occurred subsequent to the commercial transaction.

Finally, L.B. sought to impose strict liability against Kimberly for the subsidence of its buildings that resulted from the overpumping of Well No. 5. Kimberly contended the subsurface pumping could not result in strict liability. The court agreed and granted summary judgment in favor of Kimberly. The court explained that removal of lateral support by excavation might trigger strict liability, but in this case, the act was subsurface pumping and not excavation. In cases of subsurface pumping, the court stated negligence is the appropriate legal standard.

In conclusion, the court held the statute of limitations precluded two of the counts, decided three of the Chapter 93A counts in favor of Kimberly, and denied all others motions for partial summary judgment.

*Jon Hyman*

**United States v. Michigan, 122 F. Supp. 2d 785 (E.D. Mich. 2000)**

(ordering the Army Corps of Engineers to accept dredged materials from Conner Creek at its Pointe Mouillee Confined Disposal facility at Lake Erie).

The State of Michigan instigated an action after the Army Corps of Engineers ("Corps") refused to accept Conner Creek dredged material at the Corps' Pointe Mouillee Confined Disposal Facility ("Point Mouillee"). The court issued an order compelling the Corps to accept Conner Creek's dredged materials.

Pursuant to a 1974 agreement with the United States, Michigan constructed a confined disposal facility at Point Mouillee, Lake Erie. The disposal facility contained dredged materials from the Detroit and Rouge Rivers. In 1977, the United States Environmental Protection Agency ("EPA") sued Michigan, the Detroit Water and Sewerage Department ("DWSD"), and all communities and agencies under contract with DWSD for violating the Clean Water Act ("CWA"). The parties submitted and the court approved a Consent Judgment. Later, in 1997, DWSD reported violations of its National Pollutant Discharge Elimination System permit to the Michigan Department of Environmental Quality ("MDEQ"). As a result of the violation, MDEQ, DWSD, and other parties to the original Consent Judgment entered into a Second Amended Consent Judgment again approved by this court. The Second Amended Consent Judgment required DWSD to dredge sediment from Conner Creek. Point Mouillee was the only reasonable option for disposal of the dredged material. MDEQ, DWSD, and the Corps attempted negotiations concerning the deposition of the dredged materials into Point Mouillee, but were unable to agree. The issue were: (1) whether the disposal facility's acceptance of Conner Creek dredged material was a new use of Point

Mouillee; (2) whether the Corps required a new indemnification agreement for the project; and (3) whether immediate action was required.

On the first issue, the Corps argued the deposition of Conner Creek sediment was a new use of Pointe Mouillee because it constituted environmental dredging, while the Corps used Pointe Mouillee for navigational dredging. Since the original project did not contemplate environmental dredging, the Corps argued that EPA must complete a new Environmental Assessment (“EA”) for Pointe Mouillee. The court stated that the River and Harbor Act of 1970 (“Act”) and the 1974 agreement creating Point Mouillee governed its use. The court concluded neither the Act’s language nor the 1974 agreement precluded Pointe Mouillee’s use for non-navigational dredging. Accordingly, the court found disposal of Conner Creek material did not constitute a new use of Point Mouillee.

The second issue addressed whether the project required a new indemnification agreement. The Corps argued Michigan must sign a new indemnification agreement before the Corps could accept the material. The original agreement contained a “hold harmless” clause, which protected the federal government from damages caused by construction, operation, and facility maintenance. The court ruled the “hold harmless” clause sufficiently protected the United States government from any liability connected with the site’s operation, and no further assurances were necessary.

The third issue was whether the Corps must act immediately. The Corps argued no need existed for immediate action since dredging was not scheduled to begin until 2002. DWSD argued it must have the issue concerning the disposal site finalized by November 22, 2000, in order to qualify for the State Revolving Fund. DWSD argued that, in the absence of this funding, its ratepayers would incur an additional \$40,000,000 in additional interest charges. For this reason, DWSD asserted the Corps must act immediately. The court agreed and ruled the monetary deadline required immediate action.

The court ruled in favor of DWSD and MDEQ on all issues and ordered the Corps to act immediately and accept Conner Creek dredged material.

*Brian L. Martin*

**Madison v. Graham, 126 F. Supp. 2d 1320 (D. Mont. 2001)** (holding: (1) Madison’s Fourteenth Amendment substantive due process claim was improperly raised and failed under substantive due process review; (2) Madison failed to show the Montana Stream Access statute was irrational and arbitrary and had no conceivable public purpose relating to public welfare; and (3) both statute of limitations and res judicata violations ultimately barred all of Madison’s claims).

Harvey and Doris Madison, among others, (collectively “Madison”)