

# Moffatt Thomas

WATER, ENVIRONMENTAL, AND NATURAL RESOURCES LAW NEWSLETTER  
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## LANDMARK U.S. SUPREME COURT DECISION RADICALLY ALTERS SUPERFUND LIABILITY

The U.S. Supreme Court recently issued an opinion that radically alters two aspects of contamination cleanup liability under the federal Comprehensive Environmental Response, Compensation and Liability Act, commonly referred to as the Superfund law. The name of the case is *Burlington Northern & Santa Fe Railway Co. v. United States*, and it involves an appeal of a Ninth Circuit decision regarding the allocation of liability at a Superfund site in California. In order to appreciate the implications of the Supreme Court's holdings, it will be helpful to briefly summarize some relevant aspects of the Superfund liability scheme and its history.

### Superfund: General Liability Scheme

When Congress enacted the original Superfund law in 1980, it identified four broad categories of potentially responsible parties, or "PRPs," who would be liable for the cleanup of facilities experiencing releases of hazardous substances: (1) the current owners and operators of the contaminated facility; (2) any past owners and operators of the facility that experienced a release during their period of ownership or operation; (3) those who arranged for the disposal of hazardous substances at the contaminated site (*e.g.*, businesses who sent their hazardous wastes to a commercial treatment and disposal facility experiencing a release); and (4) those who actually transported the hazardous substances to the contaminated site.

Since the enactment of the Superfund law, all four of these categories of PRPs have been the subject of extensive litigation. Because of the remedial nature of Superfund and its efforts to avoid federal taxpayers paying for the cleanup of contaminated sites, the courts have expanded and broadly applied those four PRP categories, imposing liability on parties with relatively attenuated connections to the contamination. Through that litigation, an extensive body of court-made law has been created regarding what types of activities can subject a

party to Superfund liability. The Supreme Court's recent decision in *Burlington Northern* radically changes two particular aspects of Superfund liability under this framework.

### Apportionment of Liability Among PRPs

Based upon tort principles, liability at Superfund sites has always been understood to be "joint and several," meaning that *any one PRP* could be liable for the cleanup of *all* of the contamination at a particular site, even contamination caused by other PRPs. The courts have allowed apportionment of liability among multiple PRPs, but PRPs seeking to reduce their liability have faced a high burden to establish a basis for apportioning liability.

The Supreme Court's recent decision in *Burlington Northern* essentially reduces the burden for a PRP to establish a basis for apportioning liability among multiple PRPs (and thereby reducing its own liability). According to the Supreme Court, there simply must be facts in the record "reasonably support[ing]" apportionment. On that basis, the Supreme Court upheld the district court's apportionment of liability, reversing the Ninth Circuit's rejection of apportionment.

### Restriction of "Arranger" Liability

Courts have traditionally imposed liability on PRPs regardless of any intent or other "state of mind." In other words, a party would be liable as long as it fell into one of the four PRP categories, and regardless of whether that party was in any way at fault for the contamination. In *Burlington Northern*, however, the Supreme Court held that some form of "intent" is required to impose liability on a party under the third PRP category, *i.e.*, one who "arranges" for the disposal of hazardous substances.

### Conclusion

*Burlington Northern* significantly restricts Superfund liability in two respects. While the principles in *Burlington Northern* do seem fair as to

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an individual PRP, the tradeoff is that this will likely result in larger “orphan shares” at contaminated sites that are ultimately paid for by federal taxpayers. As has historically been the case with the Superfund law, further refinement of the principles espoused in *Burlington Northern* will likely occur through further litigation and judicial decisions.

## **STATE OF IDAHO AND IDAHO POWER COMPANY SETTLE SWAN FALLS LITIGATION . . . AGAIN**

Idaho Power Company (“Idaho Power”) and the state of Idaho have resolved a 2007 lawsuit filed by Idaho Power regarding the interpretation and application of the 1984 Swan Falls Agreement. The 2007 suit sought determinations regarding the ultimate ownership of Snake River-based water rights; the effect of the trust provisions of the Swan Falls Agreement; and a determination as to whether the agreement operated to subordinate Idaho Power hydropower water rights to upstream aquifer recharge efforts on the Eastern Snake Plain Aquifer (“ESPA”).

The original Swan Falls Agreement was borne out of a 1983 Idaho Supreme Court decision affirming the prior appropriation seniority of various Idaho Power Snake River hydropower generation rights. The decision put Idaho Power in control (by virtue of its senior priority rights) of vast quantities of water that had also been allocated by the State of Idaho to hundreds of irrigators in the Snake River Basin. Strict administration of Idaho Power’s senior water rights would have: (1) severely curtailed existing uses of water within the basin, and (2) effectively handcuffed future development within the basin. Rather than seek the strict administration of its senior hydropower rights, Idaho Power and the state of Idaho negotiated the Swan Falls Agreement. The Agreement provided Idaho Power with guaranteed minimum Snake River flows for hydropower generation (3,900 cfs from April 1 through October 31, and minimum flows of 5,600 cfs from November 1 through March 31 of every year). In return for the guaranteed minimum stream flows, Idaho Power agreed to subordinate the remainder of its senior hydropower generation water rights to future beneficial use appropriations allocated by the state. The Agreement also initiated the comprehensive, and ongoing, Snake River Basin Adjudication (“SRBA”).

Over time, Idaho Power grew increasingly concerned over the state’s continuing application and interpretation of the Swan Falls Agreement. Idaho Power was concerned that the legal landscape had changed considerably since 1984 when the Agreement was first negotiated and executed. Idaho Power was also concerned that certain assumptions regarding the predicted annual yield of water flowing through the Snake River Basin were inflated, and that the basin does not reliably yield as much water as once thought. Idaho Power took particular exception to legislation proposed in 2006 which would have further subordinated Idaho Power’s senior hydropower generation rights to upstream aquifer recharge efforts on the ESPA. Idaho Power felt that the state was improperly attempting to use the Swan Falls Agreement trust water as a savings account to bail itself out of the over appropriation of the resource that it mistakenly facilitated. For these reasons, and others, Idaho Power filed suit against the state regarding the interpretation and application of the Agreement.

In the latest settlement, Idaho Power expressly agreed to subordinate its trust-held hydropower generation rights to upstream aquifer recharge efforts. In exchange, Idaho Power hopes that upstream aquifer recharge efforts will: (1) resurface and feed Idaho Power’s hydropower generation flows downstream, and (2) cool river flows overall—which will benefit Idaho Power in its FERC/Hells Canyon Complex proceedings where river temperatures are a point of contention among the various proceeding participants. The latest Agreement also provides Idaho Power with state support and backing should it seek rate increases designed to offset lost hydropower generation potential, if any, related to upstream aquifer recharge efforts.

If you would like additional information regarding the topics covered, or if there are additional topics that you would like us to cover in upcoming newsletters, please contact Lela Wood at (208) 345-2000 or llw@moffatt.com, and she will connect you with the appropriate contact. In addition, please contact Ms. Wood if you would prefer to receive the newsletter electronically, or if you would like to be removed from our mailing list altogether.