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# Environmental Damage Claims Under the Federal Tort Claims Act: Examining *Nanouk v. United States*

Litigating the Discretionary Function Exception

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THURSDAY, FEBRUARY 25, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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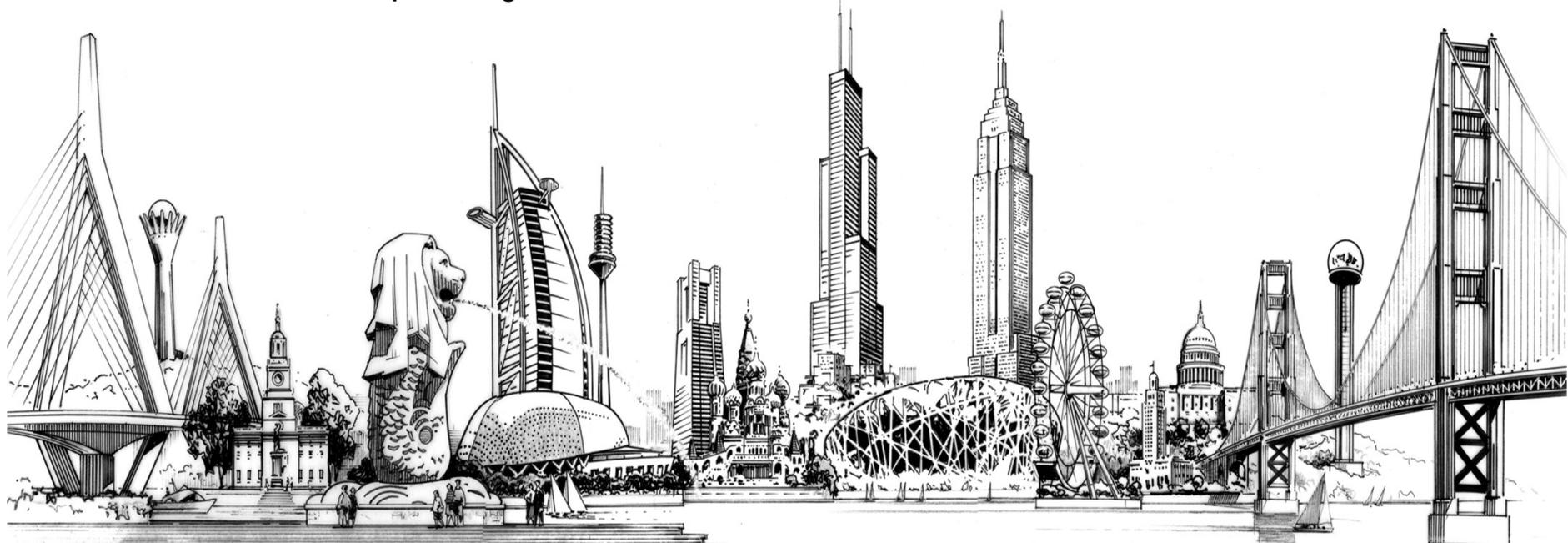
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# ENVIRONMENTAL DAMAGE CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT: EXAMINING NANOUK V. UNITED STATES

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# Environmental Damage Claims Under the Federal Tort Claims Act: Examining *Nanouk v. United States*

## Overview of Presentation

- Background and Purpose of the Federal Tort Claims Act
- The Discretionary Function Exception
- The Exception's Application in the Context of Military Cases
- The Exception's Application in the Context of the Flint Water Crisis
- The Exception's Application in the Context of the Gold King Mine Spill
- Practice Pointers
- Q&A

# The Federal Tort Claims Act (FTCA) – An Overview

## Purpose of the Federal Torts Claims Act (FTCA)

The FTCA sets forth procedures for presenting and resolving administrative monetary claims for personal injury, property damage, or death arising from the alleged negligence of officers and employees of the federal government acting in the scope of their official duties.

# The Federal Tort Claims Act (FTCA) – An Overview

## Historical Background of Statute

- For a substantial portion of this nation's history, plaintiffs injured by the tortious acts of a federal officer or employee were barred from filing lawsuits against the United States by "sovereign immunity"—a legal doctrine that ordinarily prohibits private citizens from haling a sovereign state into court without its consent.
- Until the mid-20th century, a tort victim could obtain compensation from the United States only by persuading Congress to pass a private bill compensating him for his loss.
- Congress, deeming this state of affairs unacceptable, enacted the FTCA, which authorizes plaintiffs to obtain compensation from the United States for the torts of its employees
- The FTCA does not itself create a new federal cause of action against the United States; rather, the FTCA waives the United States's sovereign immunity from certain types of claims that exist under state tort law.

# The Federal Tort Claims Act (FTCA) – An Overview

## Historical Background of Statute (continued)

- However, subjecting the federal government to tort liability not only creates a financial cost to the United States, it also creates a risk that government officials may inappropriately base their decisions not on socially desirable policy objectives, but rather on the desire to reduce the government's exposure to monetary damages.
- In an attempt to mitigate these potential effects of abrogating the government's immunity from liability and litigation, the FTCA limits the circumstances in which a plaintiff may pursue a tort lawsuit against the United States.
  - For example, the FTCA contains several exceptions that categorically bar plaintiffs from recovering tort damages in certain categories of cases.
  - Federal law also restricts the types and amount of damages a victorious plaintiff may recover in an FTCA suit.
  - Additionally, a plaintiff may not initiate an FTCA lawsuit unless he has timely complied with a series of procedural requirements, such as providing the government an initial opportunity to evaluate the plaintiff's claim and decide whether to settle it before the case proceeds to federal court.

# The Federal Tort Claims Act (FTCA) – An Overview

## Summary of Statute

- **Statute:** 28 U.S.C. §§ 2671-2680

- **Summary:**

Individuals who are injured or whose property is damaged by the wrongful or negligent act of a federal employee acting within his or her official duties may file a claim with the government for reimbursement for that injury or damage. To state a valid claim, the claimant must demonstrate that:

1. he or she was injured, or his or her property was damaged by a federal government employee;
2. the employee was acting within the scope of his or her official duties;
3. the employee was acting negligently or wrongfully; and
4. the negligent or wrongful act proximately caused the injury or damage of which he or she complains.

The claimant must also provide documentation establishing that his claim satisfies all the elements of the FTCA. The procedures laid out apply only to claims arising from alleged conduct of officers and employees of the federal judiciary.

# The Federal Tort Claims Act - Discretionary Function Exception

## Exception - Text

The provisions of this chapter [FTCA] and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care,

in the **execution of a statute or regulation**, whether or not such statute or regulation be valid, or

based upon the exercise or performance or the failure to exercise or perform a **discretionary function** or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. §§ 2680

## Principles

- (1) Separation of powers
- (2) Respecting day-to-day functions of government
- (3) This is a jurisdictional issue

# The Federal Tort Claims Act - Discretionary Function Exception

## Two-part Test

Is the conduct mandated by regulation, statute, or written policy?

- If yes, and employee followed it . . .
- If yes, and employee did not follow it . . .
- Must be mandatory
- Must be specific

If not, was the conduct susceptible to a policy analysis?

- Or just ordinary negligence?
- “Funding” alone not sufficient justification
- Nature of conduct - not status of actor
- No objective test

# The Federal Tort Claims Act - Discretionary Function Exception

## Hypo

Plaintiff is exploring a national park. At 10 am, Plaintiff crashes into a fallen tree in the road.

Plaintiff sues National Park Service for negligence.

Three scenarios:

1. NPS has no written policy
  - a. Checks for trees regularly
  - b. Never checks for trees
2. NPS has written policy: "Check for fallen trees at 1 pm every day."
  - a. Did it
  - b. Did not do it
3. NPS has written policy: "Ensure the park is safe for visitors."

# The Federal Tort Claims Act - Discretionary Function Exception

## The Discretionary Function Exception and Military Cases



# Discretionary Function Exception – Military Cases

*Nanouk v. United States*, 974 F.3d 941 (9<sup>th</sup> Cir. 2020)

## Facts

- Plaintiff held Native Allotment in remote Alaska
- Old military station nearby part of satellite communications system
- Plaintiff's property was PCB hotspot
- Three claims:
  - Oversight
  - Remediation
  - Cleanup



# Discretionary Function Exception – Military Cases

*Nanouk v. United States*, 974 F.3d 941 (9<sup>th</sup> Cir. 2020)

## Analysis

- Air Force oversight of station's contractors
  - Step 1 - "Make all practical efforts" to "dispose of or discharge pollutants in a manner that will not . . . expose people to concentrations of any agent . . . hazardous to health."
  - Step 2 – Reliance on contractors, lack of manpower
  
- Failure to remediate property at time of abandonment
  - Step 1 – Holding agency "shall perform physical care, handling, protection . . . of such property pending its transfer to another Federal agency"
  - Step 2 – Simultaneous closure of various sites; "worst first" policy; triage
  
- Insufficient cleanup in 1990s
  - Step 1 – No directive on when and how to remediate a site
  - Step 2 – No competing policy considerations; just ordinary negligence

# Discretionary Function Exception – Military Cases

*Jones v. U.S.*, 691 F.Supp.2d 639 (E.D.N.C. 2010)

## Facts

- Residents of military base in early 80s
- Toxic substances in water supply
- Negligence



# Discretionary Function Exception – Military Cases

*Jones v. U.S.*, 691 F.Supp.2d 639 (E.D.N.C. 2010)

## Analysis

- Failure to keep drinking water
  - **Step 1** – BUMEDs – “Drinking water shall not contain impurities in concentrations which may be hazardous to the health of the consumers”; specific limits on chlorinated hydrocarbons
  - **Step 2** – Not needed because government regulations controls, failure to comply
- “[B]ecause conduct with respect to such contamination was not the subject of discretion susceptible to policy analysis, the conduct alleged . . . does not fall within the discretionary function exception.”
- Claim dismissed on basis of judicial estoppel

# Discretionary Function Exception – Military Cases

*In re Camp Lejeune North Carolina Water Contamination Litigation*, 263 F.Supp.3d 1318 (N.D. Ga. 2016)

## Facts

- MDL brought by base residents
- Jones – law of the case
- Toxic substances in water supply
- Negligence and failure to warn

### Top 10 states with Camp Lejeune contaminated water registrants

The Marine Corps has been asking anyone who lived in or worked at its training base at Camp Lejeune in North Carolina prior to 1988 to register to receive information on the contamination. To date, 259,300 people have registered. Here are the top 10 states with the most registrants.



Source: U.S. Marine Corps

James Hilston/Post-Gazette

# Discretionary Function Exception – Military Cases

*In re Camp Lejeune North Carolina Water Contamination Litigation*, 263 F.Supp.3d 1318 (N.D. Ga. 2016)

## Analysis

- Jones holding – “hydrocarbons” referred to certain pesticides, so that regulation inapplicable
  
- Failure to protect water supply from contamination
  - **Step 1** - “The water supply should be obtained from the most desirable source which is feasible, and effort should be made to control pollution of the source”; regulatory thresholds of chemicals applied later
  - **Step 2** – Provide adequate water supply; maintaining military readiness; limited financial resources
  
- Failure to investigate
  - **Step 1** – Commanders will “cause periodic inspections to be made of contaminants and hazardous materials in stock to determine serviceability”; “frequent sanitary surveys shall be made of the water supply system”
  - **Step 2** – No evidence of individual negligence, carelessness, etc.; military did not do nothing
  
- Failure to warn of contamination
  - **Step 1** – “Take appropriate action” to locate and notify
  - **Step 2** – Secrecy and safety; national security and public health

# The Federal Tort Claims Act (FTCA)

## The Discretionary Function Exception and the Flint Water Crisis



# The Federal Tort Claims Act (FTCA) as Applicable to the Flint Water Crisis

*Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019)

## **Facts & Procedural Posture**

- Plaintiffs allege that EPA officials and employees negligently responded to the water crisis, including by failing to utilize the agency's enforcement authority under the Safe Drinking Water Act ("SDWA") to intervene, investigate, obtain compliance, and warn Flint residents of the health risks posed by the water.
- The United States filed motions to dismiss Plaintiffs' lawsuits for lack of subject matter jurisdiction.
- The United States contended that it has not waived its immunity from Plaintiffs' claims because Michigan law would not impose liability on private individuals in similar circumstances—the extent to which the FTCA only waives Government immunity—and because the alleged misconduct by the EPA is excepted from liability under the FTCA's discretionary function exception.

# The Federal Tort Claims Act (FTCA) as Applicable to the Flint Water Crisis

*Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019)

## Holding

The discretionary function exception **does not bar Plaintiffs' claims** that the EPA was negligent in failing to timely act in response to the Flint Water Crisis.

Considering the two-prong test to determine if the discretionary function exception applies, the Court determined that while the first prong had been met, **the second prong had not been met.**

# The Federal Tort Claims Act (FTCA) as Applicable to the Flint Water Crisis

*Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019)

## Analysis Under First Prong

### Plaintiffs' Argument:

- Sections 1414 and 1431 of the Safe Drinking Water Act mandated EPA action in response to Flint's contaminated water system.
- **Section 1414 requires that**, whenever EPA finds that a public water system in a state with primary enforcement authority does not comply with regulations, the **agency must notify the state and the system and provide assistance** to bring the system into compliance.
- If the state fails to commence enforcement action within 30 days after the notification, EPA is authorized to issue an administrative order or commence a civil action. In a nonprimacy state, EPA must notify an elected local official (if any has jurisdiction over the water system) before commencing an enforcement action against the system.

# The Federal Tort Claims Act (FTCA) as Applicable to the Flint Water Crisis

*Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019)

## Analysis Under First Prong (continued)

### Plaintiffs' Argument:

- **Under Section 1431**, the Administrator has emergency powers to issue orders and commence civil action if (1) a contaminant likely to enter a public drinking water supply system poses a substantial threat to public health, and (2) state or local officials have not taken adequate action.

# The Federal Tort Claims Act (FTCA) as Applicable to the Flint Water Crisis

*Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019)

## Analysis Under First Prong (continued)

### **Court's Holding: First Prong Met**

- Sixth Circuit precedent led this Court to conclude that these statutory provisions grant the EPA discretion to act
- "Even assuming that there was a finding of noncompliance for Flint, the SDWA grants the EPA a significant "element of judgment or choice" in its response."
- Under Section 1414, the federal agency is granted discretion to decide what "advice and technical assistance ... may be appropriate to bring the system into compliance" and what "the earliest feasible time is to reach compliance."
- In addition to finding "information that a contaminant ... is present in or is likely to enter a public water system," Section 1431 requires the EPA to also find "that appropriate State and local authorities have not acted to protect the health of such persons" before responding.

# The Federal Tort Claims Act (FTCA) as Applicable to the Flint Water Crisis

*Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019)

## Analysis Under First Prong (continued)

### Court's Holding: First Prong Met

- "Assessing what State and local authorities have done, whether those actions will protect public health, and whether those actions are sufficient certainly involve an element of choice and judgment."
- **Section 1431 grants the EPA further discretion** by stating that, prior to issuing an order or commencing a civil action, it may determine whether it would "be practicable in light of such imminent endangerment" to "consult with State and local authorities to confirm the correctness of the information on which action is proposed to be taken . . . is based and to ascertain the action which such authorities are or will be taking."
- Addressing specifically Plaintiffs' assertion that the EPA was negligent in failing to warn Flint residents of the health risks posed by the water, **neither Section 1414 nor Section 1431 set forth a mandatory obligation** for the EPA to issue warnings. Plaintiffs identify no other statute or regulation imposing this duty on the EPA.

# The Federal Tort Claims Act (FTCA) as Applicable to the Flint Water Crisis

*Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019)

## Analysis Under Second Prong

### **Plaintiffs' Argument:**

- Plaintiff argue that the EPA's decision whether to intervene in the face of the "blatant safety hazard" posed by the Flint Water Crisis was a matter of objective scientific and professional standards rather than public policy.

# The Federal Tort Claims Act (FTCA) as Applicable to the Flint Water Crisis

*Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019)

## Analysis Under Second Prong (continued)

### **Court's Holding: Second Prong Not Met**

- "In passing the SDWA, Congress intended to leave the primary responsibility for overseeing public water systems with the States."
- However, Congress sought to set national standards for compliance "to assure that water supply systems serving the public meet minimum national standards for protection of public health" and to empower the federal government to intervene if States fail in their primary responsibilities.
- Congress expressly directed the EPA to intervene under specified conditions.

# The Federal Tort Claims Act (FTCA) as Applicable to the Flint Water Crisis

*Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019)

## Analysis Under Second Prong (continued)

### **Court's Holding: Second Prong Not Met**

- In other words, having weighed varying policy interests, Congress decided when federal intervention is necessary.
- The assessment of whether those conditions have been satisfied are informed by **objective scientific standards, scientific knowledge, and the professional judgment of experts in the field.**
- For example, determining whether Flint's water system complied with EPA regulations and, when it did not, whether the State's response was sufficient to rectify the **violations involved only the performance of professional and scientific analysis and reasoning.**

# The Federal Tort Claims Act (FTCA) as Applicable to the Flint Water Crisis

*Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019)

## Analysis Under Second Prong (continued)

### **Court's Holding: Second Prong Not Met**

- Moreover, the EPA's failure to warn Flint residents of the severe health risks the City's water supply posed to them **cannot be justified by any permissible exercise of policy judgment.**
- **The EPA was well aware** that the Flint River was highly corrosive and posed a significant danger of lead leaching out of the City's lead-based service lines at alarming rates into residents' homes.
- **The EPA was well aware** of the health risks posed by lead exposure, particularly to children and pregnant women.
- **The EPA knew that Flint officials were not warning** Flint's residents that they were being supplied lead-laced water. Quite to the contrary, the EPA learned that State and local officials were misleading residents to believe that there was nothing wrong with the water supply and that the lead levels in some homes resulted from the interior plumbing. These lies went on for months while the people of Flint continued to be poisoned.

# The Federal Tort Claims Act (FTCA) as Applicable to the Flint Water Crisis

*Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019)

## Analysis Under Second Prong (continued)

### **Court's Holding: Second Prong Not Met**

- The Court decided **that it cannot conceive of a public policy consideration** that could be legitimately balanced against the need to warn and protect an entire community from involuntary and continued poisoning.

# The Federal Tort Claims Act (FTCA)

## The Discretionary Function Exception and the Gold King Mine Spill



# The Federal Tort Claims Act (FTCA) as Applicable to the Gold King Mine Spill

*In re Gold King Mine Release in San Juan Cnty., No. 1:18-md-02824-WJ*

*(D.N.M. Feb. 28, 2019)*

## **Facts**

- The Gold King Mine spill occurred at the Gold King Mine (an abandoned mine Silverton, Colorado) in August 2015
- EPA personnel and a company under EPA contract triggered the release of toxic wastewater in an attempt to remove such wastewater from the mine
- More than 3 million gallons of mine wastewater, including heavy metals and other toxic materials like arsenic, emptied into the Animas River
- The spill affected waterways in Colorado, New Mexico, and Utah, as well as waters used by the Navajo Nation

# The Federal Tort Claims Act (FTCA) as Applicable to the Gold King Mine Spill

*In re Gold King Mine Release in San Juan Cnty., No. 1:18-md-02824-WJ*

*(D.N.M. Feb. 28, 2019)*

## **Facts (continued)**

- Plaintiffs in the case include the State of New Mexico, the Navajo Nation, the State of Utah and the McDaniel Plaintiffs, and Allen Plaintiffs
- In addition to claims under CERCLA, the **Plaintiffs asserted causes of action against the United States for various torts including negligence, nuisance, and trespass**
- As to these claims, the United States filed a motion to dismiss for lack of subject matter jurisdiction, arguing that Plaintiffs' torts claims were barred under the discretionary exception function of the FTCA

# The Federal Tort Claims Act (FTCA) as Applicable to the Gold King Mine Spill

*In re Gold King Mine Release in San Juan Cnty., No. 1:18-md-02824-WJ*

*(D.N.M. Feb. 28, 2019)*

## **Holding**

- The District Court of New Mexico did not dismiss Plaintiffs' claims for lack of subject-matter discretionary
- The Court held that further discovery was necessary to determine if the discretionary function exception applied

# The Federal Tort Claims Act (FTCA) as Applicable to the Gold King Mine Spill

*In re Gold King Mine Release in San Juan Cnty., No. 1:18-md-02824-WJ*

*(D.N.M. Feb. 28, 2019)*

## **Plaintiffs' Arguments**

- The discretionary function exception does not apply here because EPA violated applicable mandatory EPA and OSHA regulations regarding
  - (1) excavation stability,
  - (2) working in excavations in which there is accumulated water,
  - (3) prevention of accidental collapse of excavations,
  - (4) inspections of excavations,
  - **(5) training workers to deal with expected emergencies,**
  - (6) health and safety plans, and
  - (7) the protection of workers from uncontrolled releases of impounded water in abandoned mine workings

# The Federal Tort Claims Act (FTCA) as Applicable to the Gold King Mine Spill

*In re Gold King Mine Release in San Juan Cnty., No. 1:18-md-02824-WJ*

*(D.N.M. Feb. 28, 2019)*

## **The United States' Arguments**

- Plaintiffs have not identified any specific and mandatory obligations that removed EPA's discretion.
- The regulations "do not prescribe a specific course of conduct, through a fixed or readily ascertainable standard, for any EPA employee at the site."

# The Federal Tort Claims Act (FTCA) as Applicable to the Gold King Mine Spill

*In re Gold King Mine Release in San Juan Cnty., No. 1:18-md-02824-WJ*

*(D.N.M. Feb. 28, 2019)*

## The Court's Analysis

- "EPA failed to adequately train workers on site to deal with 'expected emergencies' like the blowout of hazardous acid mine drainage that occurred on August 5, 2015, as required by 29 C.F.R. § 1910.120(e)(7) (OSHA)."
- That regulation provides: "Employees who are engaged in responding to hazardous emergency situations at hazardous waste clean-up sites that may expose them to hazardous substances **shall be trained in how to respond to such expected emergencies.**" 29 C.F.R. § 1910.120(e)(7).
- The Sovereign Plaintiffs also state "**it is not clear that EPA performed any training at all,**" that "[n]o one disputes that § 1910.120(e)(7) specifically mandates at least some training, and Sovereign Plaintiffs are entitled to discover whether EPA conducted any training whatsoever."

# The Federal Tort Claims Act (FTCA) as Applicable to the Gold King Mine Spill

*In re Gold King Mine Release in San Juan Cnty., No. 1:18-md-02824-WJ*

*(D.N.M. Feb. 28, 2019)*

## **Further Developments**

- Discovery opened up August 5, 2019
- Eight days later, the EPA filed a motion for partial summary judgement on Plaintiffs' FTCA claims
- The District Court of New Mexico denied the motion as premature, finding that Plaintiffs have not had enough time for discovery
- The case is scheduled for trial in early 2022

# Practice Pointers

- This is a fact-intensive inquiry
- The inquiry concerns the Court's subject matter jurisdiction
  - Important issue for the Court
  - Could be raised at any time
- The scales are tilted to the government, especially in environmental cases
  - Subject policy intent irrelevant; question is whether capable of policy analysis
  - In environmental cases, there always at least two policies at play
- Some state statutes have this exception as well

# Thank You

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