

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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**DOCKETING STATEMENT**

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Appeal Number	21-4059
Case Name	United States of America <i>ex rel.</i> Mark Christopher Tracy v. Emigration Improvement District <i>et al.</i>
Party or Parties Filing Notice of Appeal Or Petition	Mark Christopher Tracy
Appellee(s) or Respondent(s)	Appellant
List all prior or related appeals in this court with appropriate citation(s).	<p><i>United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.</i>, United States Court of Appeals for the Tenth Circuit, Case No.: 0:17-cv-04062, filed April 24, 2017. <i>United States ex rel. Tracy v. Emigration Improvement Dist.</i>, 717 F. App'x 778 (10th Cir. 2017).</p> <p><i>United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.</i>, United States Court of Appeals for the Tenth Circuit, Case No.: 0:18-cv-04109, filed July 25, 2018. <i>United States ex rel. Tracy v. Emigration Improvement Dist.</i>, 804 F. App'x 905 (10th Cir. 2020).</p> <p><i>United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.</i>, United States Court of Appeals for the Tenth Circuit, Case No.: 0:19-cv-04021, filed March 8, 2019. <i>United States ex rel. Tracy v. Emigration Improvement Dist.</i>, 804 F. App'x 905 (10th Cir. 2020).</p>

	<p><i>United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.</i>, United States Court of Appeals for the Tenth Circuit, Case No.: 0:19-cv-04022, filed March 8, 2019. <i>United States ex rel. Tracy v. Emigration Improvement Dist.</i>, 804 F. App'x 905 (10th Cir. 2020)</p>
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**I. JURISDICTION OVER APPEAL OR PETITION FOR REVIEW**

**A. APPEAL FROM DISTRICT COURT**

1. Date final judgment or order to be reviewed was **entered** on the district court docket: April 14, 2021.
2. Date notice of appeal was **filed**: April 30, 2021
3. State the time limit for filing the notice of appeal (cite the specific provision of Fed. R. App. P. 4 or other statutory authority): Fed. R. App. P. 4(a)(1)(A).
  - a. Was the United States or an officer or an agency of the United States a party below? This case was brought on behalf of the United States, but the government did not intervene.
  - b. Was a motion filed for an extension of time to file the notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing the notice of appeal: No.

4. Tolling Motions. *See* Fed. R. App. P. 4(a)(4)(A); 4(b)(3)(A).
- a. Give the filing date of any motion that tolls the time to appeal pursuant to Fed. R. App. P. 4(a)(4)(A) or 4(b)(3)(A):  
Not applicable.
- b. Has an order been entered by the district court disposing of any such motion, and, if so, when?  
Not applicable.

5. Is the order or judgment final (i.e. does it dispose of **all** claims by and against **all** parties)? *See* 28 U.S.C. § 1291. Yes.

**(If your answer to Question 5 is no, please answer the following questions in this section.)**

- a. If not, did the district court direct entry of judgment in accordance with Fed. R. Civ. P. 54(b)? When was this done?  
\_\_\_\_\_

- b. If the judgment or order is not a final disposition, is it appealable under 28 U.S.C. ' 1292(a)? \_\_\_\_\_

- c. If none of the above applies, what is the **specific** legal authority for determining that the judgment or order is appealable? \_\_\_\_\_

6. Cross Appeals.

- a. If this is a cross appeal, what relief do you seek beyond preserving the judgment below? *See United Fire & Cas. Co. v. Boulder Plaza Residential, LLC*, 633 F.3d 951, 958 (10th Cir. 2011) (addressing jurisdictional validity of conditional cross appeals).

Not applicable.

- b. If you do not seek relief beyond an alternative basis for affirmance, what is the jurisdictional basis for your appeal? *See Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1196-98 and n.18 (10th Cir. 2010) (discussing protective or conditional cross appeals). Not applicable.

**B. REVIEW OF AGENCY ORDER** (To be completed only in connection with petitions for review or applications for enforcement filed directly with the court of appeals.)

1. Date of the order to be reviewed: \_\_\_\_\_
2. Date petition for review was filed: \_\_\_\_\_
3. Specify the statute or other authority granting the Tenth Circuit Court of Appeals jurisdiction to review the order: \_\_\_\_\_
4. Specify the time limit for filing the petition (cite specific statutory section or other authority): \_\_\_\_\_

**C. APPEAL OF TAX COURT DECISION**

1. Date of entry of decision appealed: \_\_\_\_\_
2. Date notice of appeal was filed: \_\_\_\_\_  
(If notice was filed by mail, attach proof of postmark.)
3. State the time limit for filing notice of appeal (cite specific statutory section or other authority): \_\_\_\_\_
4. Was a timely motion to vacate or revise a decision made under the Tax Court's Rules of Practice, and if so, when? *See* Fed. R. App. P. 13(a) \_\_\_\_\_

**II. ADDITIONAL INFORMATION IN CRIMINAL APPEALS.**

- A.** Does this appeal involve review under 18 U.S.C. ' 3742(a) or (b) of the sentence imposed? \_\_\_\_\_
- B.** If the answer to A (immediately above) is yes, does the defendant also challenge the judgment of conviction? \_\_\_\_\_
- C.** Describe the sentence imposed. \_\_\_\_\_  
\_\_\_\_\_
- D.** Was the sentence imposed after a plea of guilty? \_\_\_\_\_
- E.** If the answer to D (immediately above) is yes, did the plea agreement include a waiver of appeal and/or collateral challenges? \_\_\_\_\_
- F.** Is the defendant on probation or at liberty pending appeal? \_\_\_\_\_
- G.** If the defendant is incarcerated, what is the anticipated release date if the judgment of conviction is fully executed? \_\_\_\_\_

**NOTE:** In the event expedited review is requested and a motion to that effect is filed, the defendant shall consider whether a transcript of any portion of the trial court proceedings is necessary for the appeal. Necessary transcripts must be ordered by completing and delivering the transcript order form to the Clerk of the district court with a copy filed in the court of appeals.

### **III. GIVE A BRIEF DESCRIPTION OF THE NATURE OF THE UNDERLYING CASE AND RESULT BELOW.**

This lawsuit seeks to use the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* to recover federal funds intended for economically disadvantaged communities suffering from unsafe drinking water that Emigration Improvement District (“EID”), a special service district created under Utah law, and other conspirators fraudulently acquired to build an oversized water system for the benefit and of private land developers for future development.

In 1996, Congress created the Drinking Water State Revolving Fund program via amendments to the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* (“DWSRS”). The purpose of the SDWA is to protect the quality of drinking water in the United States through the creation and enforcement of minimum standards for culinary or drinking water. DWSRS further this purpose by providing low-interest financing or grants for infrastructure projects that address a current violation or will prevent a future violation of health-based drinking water standards.

Under guidelines from the United States Environmental Protection Agency, states administering federal funds under the DWSRF program must give priority to projects that will ameliorate the most serious risk to public health, enable compliance with the SDWA, and make access to clean water more affordable. Federal and state regulations governing the use of DWSRF funds prohibit their use for projects intended primarily to serve future population growth. The funds are not for subsidizing wealthy land developers and speculators for private profit and unjust enrichment.

On or about September 29, 2004 – a date within ten years of when Mr. Tracy initiated this litigation – EID received the final disbursement of a \$1.846 million loan for the construction of water infrastructure in Emigration Canyon, Utah, including a large-diameter well, a reservoir and multiple water-service lines.

EID did not use the \$1.846 million loan to build water infrastructure for disadvantaged communities or to address or prevent a violation of drinking water standards. Rather, it used the \$1.846 million loan to build water infrastructure for future development, servicing vacant land or partially developed parcels owned by developers.

To induce disbursement of the federal funds, EID made several misrepresentations. For instance, it misrepresented that it intended to use the funds to ameliorate bacteria contamination within several private wells located in Emigration Canyon, when in fact it intended to use the funds to build infrastructure on servicing land-developers’ lands. It also misrepresented that it owned water rights sufficient to operate the water infrastructure, when in fact it did not. These misrepresentations give rise to claims for statutory and actual damages under 31 U.S.C. § 3729.

Notwithstanding the foregoing, the district court dismissed Mr. Tracy's direct *qui-tam* claims on grounds that they were barred by the ten-year limitations period set forth in 31 U.S.C. § 3731(b)(2). The district court held that the ten-year limitations period began to run on September 13, 2004, when EID made its final claim for payment under the terms of the preferential loan from escrow account maintained by the Utah Division of Drinking Water ("DDW"), rather than on September 29, 2004, when EID received the final disbursement and DDW falsely certified project completion on May 3, 2005. In an earlier judgment, the district court had stated that the September 29, 2004 date was the applicable date. Mr. Tracy filed the case on September 26, 2014.

Unlike most claims brought under the False Claims Act, which involve government payment for goods or services, this case involves disbursement of a loan and frustration of governmental purpose, which EID has an obligation to pay back. This raises an interesting question. If EID pays back the loan in full and on time, does the government suffer damages? Moreover, must Emigration Canyon residents pay for an inoperable and unsafe water system? Mr. Tracy's position is that, yes, the government does. So long as EID has funds tied up in its project, the government cannot use the funds for other projects that further the purposes of the SDWA or the DWSRF program to provide safe drinking water to economically disadvantaged communities.

There is a cost for tying up another's funds – interest. As discussed above, the EID's \$1.846 million loan came with a below-market, preferential interest rate. Mr. Tracy's position is that the measure of the government's damages is the difference between the rate of return on EID's below-market loan and the rate of return that the government would have obtained had the government issued an at-market loan.

Under this theory of damages, the government has suffered and will continue to suffer ongoing damages until EID pays off the loan in full. This is the case because interest accrues on an ongoing basis. Each day and every day that passes while some balance on the loan's principal is outstanding represents a day in which the government incurs a new, never-before-incurred damage. The difference between the interest actually earned and the interest that the government's revolving fund could have earned had EID paid an at-market rate or invested the funds elsewhere augments with each passing day. Such interest accrued within the six-year § 3731(b)(1)'s limitations period as well as the ten-year limitations period under § 3731(b)(2).

**IV. IDENTIFY TO THE BEST OF YOUR ABILITY AT THIS STAGE OF THE PROCEEDINGS, THE ISSUES TO BE RAISED IN THIS APPEAL. You must attempt to identify the issues even if you were not counsel below. See 10th Cir. R. 3.4(B).**

Whether the district court erred in applying the ten-year limitations period set forth in 31 U.S.C. § 3731(b)(2) to begin to run on September 13, 2004 when EID submitted its final

claim for payment or whether September 29, 2004, or a later date, should be the appropriate date for the ten-year limitations period to begin to run.

Whether the district court erred in holding that the statute of limitations on Mr. Tracy's claims for actual damages accrued when EID and the Utah Division of Drinking Water made false statements to the government and not when every element of the government's claim – including the element of damages – had accrued.

**V. ATTORNEY FILING DOCKETING STATEMENT:**

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/s/ Jason M. Kerr  
Signature

May 17, 2021  
Date



**CERTIFICATE OF SERVICE**

I, Jason M. Kerr, attorney for appellant, hereby certify that on

May 17, 2021, I served a copy of the foregoing **Docketing Statement**, to:

All counsel of record in this matter via this Court's Electronic Case Filing System, at the last known email address in the Court's Electronic Case Filing System.

/s/ Jason M. Kerr

Signature

May 17, 2021

Date

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