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# WATER ISSUES DURING THE FIRST TERM OF THE BUSH-CHENEY ADMINISTRATION

*Thomas L. Sansonetti\**

My talk this evening will be about water litigation during the Bush-Cheney Administration. I had the opportunity to serve as the Assistant Attorney General for the Environment & Natural Resources Division at the Department of Justice during the first term.

I will discuss these topics tonight:

The federal litigation decision-making process. How do the decisions get made? Who makes them? I will mention some first-term settlements of truly complicated litigation involving the West. I also want to visit with you about some first-term litigation that did not necessarily end up so happily; that ended up having to go all the way through trial. There are also a couple of key cases that have just been decided this year including a Supreme Court case in 2005 that I'm going to touch on. I am going to talk about the very important legislative activities going on right now concerning water, back in Washington. I will then give a brief primer on the executive personnel changes that are going to tell you who is going to be making the key decisions on water for the remainder of the Bush-Cheney second term. Then there are, of course, always one or two new Supreme Court cases to keep an eye on, so I'll take a look into the crystal ball and see what's coming up in this term which began on the first Monday in October.

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Let's start with identifying the federal litigation decision makers. As Wally Johnson noted, he and I both had the honor of being an Assistant Attorney General at Justice. Some of you in the audience are attorneys, but many of you are not. So let me give you a very brief overview of the way things are put together at Justice. At the Department of Justice, you've got an Attorney General and a Deputy Attorney General; who are responsible for overseeing the FBI, the Drug Enforcement Agency, the budget and all things dealing with anti-terrorism. Next you have an Associate Attorney General that oversees all of the civil litigating divisions and then you have six Assistant Attorneys General that deal with litigation. Each of the six basically runs a large law firm. In my instance at ENRD, I had responsibilities for a \$115 million budget plus 650 folks in 7 cities, 425 of who are attorneys. The Division had 7135 open cases upon my departure in April 2005. Those cases were handled on behalf of eight cabinet secretaries.

The other five cases were handled on behalf of Assistant Attorneys General dealing with criminal cases, civil cases; civil rights, tax and anti-trust, and their divisions are all pretty much the same as far as size and responsibilities based on the law. The eight cabinet secretaries represented by ENRD include the Administrator of EPA, and the Secretaries of Agriculture, Energy, Commerce, Interior, Transportation, Defense and Homeland Security. All of whom have the means to touch on and effect water issues throughout the United States. Those 425 attorneys are divided up into ten sections. Each section has a legal specialty, for example, Indian lawyers, environmental enforcement lawyers, land acquisitions lawyers. There are two sections that are directly responsible for water rights litigation. One is the natural resources section. These 80 lawyers represent federal agencies whether they have to sue someone or whether they are in turn sued over the policies of that agency. There is also the Indian resources section. These attorneys represent tribal interests against states and private litigants.

Because so many of the ENRD water cases are located in the West, most of the division's water lawyers are actually based in the Denver office and the Sacramento office. But there are maybe another 15 attorneys that handle these cases in Washington as well.

What are the traditional types of water cases that are handled? Well, the first classification concerns general stream adjudications in state court. We do quiet title actions in Federal courts, and we also deal with water allocation disputes concerning Federal Reclamation projects and also claims by Indian tribes. Thus, when litigation arises, we work very closely either with Indian tribes if we're on the same side as the tribes (usually suing a state or some entity that is violating their rights) or with a federal agency to develop a federal position.

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This is the first real challenge that one gets when you sit in that Department of Justice chair for the first time. You may be a long time practi-

tioner of the law, but this time you are serving as an Assistant Attorney General. What is that difference? Well in the area of water, it's that your clients do not always want you to do the same thing. In private practice, somebody comes to see you because they have a problem. "I want this to happen, I want you to sue this guy, or I've just been sued, help me out." And you know what you're supposed to do, you know what the person's goal is, and you do your best to zealously represent your client. When, however, you're at Justice, you're at the hub of a wheel and the spokes that come into you are all your clients that could frankly be at loggerheads with one another even though all are part of the Federal family. The Fish and Wildlife Service has the responsibility for making sure that our endangered species, plants and animals, are taken care of. The Bureau of Reclamation folks want to make sure that their water projects deliver water to those that contracted for it. The Bureau of Land Management jurisdiction is in the lowlands, the Agriculture Department's Forest Service responsibilities are in the highlands. Different tribes go to the BIA and say, "Hey, there's a trust responsibility here. Where's our chunk of the water—or we don't want the water diversion built through our reservation." The EPA—has its own Clean Water Act responsibilities; the Department of Commerce has the National Marine Fisheries Service that has water delivery concerns. So you end up with competing federal interests sitting around your table.

So you could have five or six different federal entities sitting around your DOJ conference room table on the second floor at Constitution Avenue and Ninth Street and everyone's fighting. Yet, we're all in the same family, and you're suppose to be the lawyer who's going to send one of your folks out to Denver or Phoenix, or Seattle or wherever and the judge says, "And who is here to represent the United States of America?" And you say, "Well, it's me your honor." And you stand up there, and your several clients are thinking, "What's the SOB going to say?" And that's basically the nature of the job. I often felt that rather than the coat and tie that Attorney General Ashcroft requested us to wear everyday, I should have just been wearing a referee's black and white striped shirt and whistle to see if we could come to a consensus and avoid some time-consuming litigation.

Water litigation also takes the form of disputes about in-stream flows to protect fish and their habitat. That area, in particular, is growing the fastest in the federal government, and I'm going to talk about that more in a few minutes when we get to the topic of the silvery minnow. Of course, though, it's the Bureau of Reclamation that really is the key player among the client agencies. The water scarcity issues are just coming and coming, and the potential litigation is there for all to see. I thought the speakers today just did a wonderful job in pointing out the changes in the West, the amount of water that is needed for agricultural purposes, and the growing urbanization of the West. Additionally, there are concerns about the environmental impacts that are caused by old existing dams, the water that is needed for the endangered fish and the like. The end result is that the Bu-

reau of Reclamation (BOR) figures prominently in much of the water litigation all across the United States today that is handled by ENRD.

The other thing I would note for the non-lawyers in the audience concerns the fact that only the Department of Justice can appear in court on behalf of a client. So it's not like the Interior Solicitor goes out and argues for Secretary Gale Norton's positions in court. The analogy of ENRD and the Department of Justice being the hub of the wheel stands true for all cabinet departments, and it's only a person from the Department of Justice that can stand up and represent the government in court. Now, it is the folks at ENRD that not only do all of the trial work at the federal district court level, but also do the first set of appeals to the circuit courts. Given water and its importance, no matter who wins or loses in a federal district court case involving water, somebody is going to appeal. There are twenty-five attorneys at ENRD that do nothing but appeals in the circuit court. They write the briefs, review what happened in the court below, then argue before the D.C. Circuit, Ninth Circuit, wherever. Any cases that go beyond the Circuit Court have to go to the United States Supreme Court, and those appeals are the exclusive purview of the United States Solicitor General, formerly Ted Olsen in my era, now Paul Clement. So that gives you a picture of how federal litigation fits together with the role of the ENRD and how it fits within the Department of Justice.

Now, let's take a look at the important litigation developments that ended happily in the sense that a settlement was procured, rather than a long-term slug-out in court. One of the things I emphasized to all of my attorneys was if you can reach an accommodation where you can get the Indian tribes, the state, other interests, and the BOR together for mutually beneficial results without the need for expensive litigation then, by gosh, let's do it. And through the aid of Wyoming and Nebraska government officials, we were able to come to an agreement that settled the *Nebraska v. Wyoming & Colorado*<sup>1</sup> lawsuit about the North Platte. That suit had been going on for decades costing both states a lot of money. By putting the right folks together like that, we were able to come to a conclusion and get that case settled in the year 2002.

One of the biggest cases that really could have bogged down in the courts concerned the Colorado River. Of course Colorado is the mother of so much of the population needs for water throughout the West. The fact is that whatever water is not being used by upstream states, like Wyoming, ends up going on downstream, and is usurped by those states that are growing very fast like Arizona and California. California had agreed under the original Colorado River compact to use 4.4 million acre feet of water. Well, California was using much higher amounts than that, and so the Department

of Interior Secretary, Gale Norton, along with the Assistant Secretary for Water, Bennett Raley, went out and talked to the good folks of California and said, “you’ve got to come within your agreed upon limits here.” California was using 5.2 million acre feet instead of 4.4 million and was given a choice to return to the lower figure gradually over 15 years or to have a hard landing.

The Imperial Irrigation District (IID) decided to keep using the water to see if they could get away with it and filed suit in January 2003 against Interior. The IID sought a preliminary injunction and a federal court granted them that injunction.<sup>2</sup> But the judge, looking ahead, said, “If you are using 5.2 million acre feet versus 4.4 million acre feet, then let’s see what you are using the water for. Is it for beneficial use or are you wasting water somewhere?” The BOR then began undertaking the most detailed beneficial use inquiry of Imperial’s water use ever conducted in the lower Colorado River basin. Having filed the suit, Imperial District could not do much about it. BOR found waste. ENRD was poised to represent the BOR’s final determination in court. Imperial Irrigation District sought to settle this case. Intensive talks took place resulting in the Colorado River Water Delivery Agreement of 2003. The agreement is a major contribution to the law of the Colorado River. It does allow California to honor the promise made way back in 1929 to live within its means. California is returning to the 4.4 million acre feet allocation, and the Interior Secretary remains in her role as water master of the river. So that is one piece of good news that came out in regard to the Colorado River.

Another huge settlement concerned *Arizona v. California*—the longest, oldest original action case before the U.S. Supreme Court then in existence.<sup>3</sup> It was filed in 1952, during the last year of Truman’s administration, so it was great to have a role in finally bringing that case to an end. I note that almost all of the lawyers in the case hadn’t even been born in 1952. The case involved not only Arizona and California, but also all of the different Indian tribes in the area plus the Metropolitan Water District in the San Diego area.

Also in December 2004, President Bush signed into law the Arizona Water Rights Settlement Act.<sup>4</sup> That legislation settled the largest Indian water claim in U.S. history after 20 years. The agreement is very complex, but basically Central Arizona Project water, which is fairly expensive, ended up being utilized and banked in underground aquifers and certain portions of the water were then delegated to tribes, such as the Gila River Indian com-

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2. *Imperial Irrigation v. United States*, No. 03-CV-69 (U.S.D.C. So. Cal. Jan. 10, 2003).

Published by *Arizona v. California*, 450 U.S. 605 (1981).

4. *Arizona Water Settlements Act*, Pub. L. No. 108-451, 118 Stat. 3478 (2004).

munity, the Tohono O'odham Nation near Tucson, and about twenty cities and water companies in Arizona. The settlement was agreed to and approved by Congress and signed into law by the President. The legislation helped secure future water supplies for the included tribes and cities for some time to come.

Congress gave quite generously to fund the Arizona Water Rights Settlement Act. Indeed the state's debt for the construction of the Central Arizona Project was reduced from \$3.6 billion to \$1.6 billion. So Arizona was forgiven \$2 billion to make this settlement work. The Office of Management and Budget, part of the executive branch and that entity that decides what the administration puts forth for its budget recommendations, has now come up with a new policy that recommends for water settlements that the federal contribution be limited to the amount of the federal government's potential liability—i.e., the amount to be paid if the case went to court and the U.S. lost. Well, there is going to be some guesswork as to what the liability number might be, but the new policy certainly would prevent handing over \$2 billion checks to states like Arizona. So while there are still some fourteen to eighteen negotiations going on right now to settle federal Indian claims, the pot of money to settle those claims is diminished, and that fact pushes those cases back into active court litigation.

So what are the key cases that weren't able to be settled, and did have to be fought out in court during the first four years of the Bush Administration? Today's speakers David Freeman and Dan Luecke were talking about the Endangered Species Act and its impacts, and the North Platte River. Endangered Species Act problems are in all fifty states these days. One of the most contentious pieces of litigation happened in the state of New Mexico. Messrs. Freeman and Luecke both talked about the implications of dedicating water for ecosystem preservation. That continues to be an ongoing controversy, and in the Rio Grande silvery minnow case, we had some environmental groups that sued saying that the federal agencies, including the Bureau of Reclamation, were not complying with the ESA, and that they had obligations to protect this silvery minnow—which is four to six inches long and lives south of Albuquerque on the Rio Grande.<sup>5</sup>

As fate would have it, both Albuquerque and Santa Fe had purchased, or rented if you will, space behind dams in the Bureau of Reclamation areas in northern New Mexico so they could store water there in case a drought came and the cities could call on that water. The cities were paying to call on that water and have it sent down the Rio Grande. Albuquerque could then take what it needed; Santa Fe could take what it needed and so on. Well, it was that stored water that the environmentalists had their eye on. They claimed the stored water should just be let out, and then be made

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5. *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004).

to pass through Santa Fe and Albuquerque without being diverted so that the river, during the drought period, could be kept at a depth so that the silvery minnow could continue to exist. Well, the city of Albuquerque and the state of New Mexico intervened in the case. So the case pitted the environmental groups versus the Department of Interior and the state of New Mexico and the city of Albuquerque.

In September of 2002, the federal district court in New Mexico said,

“Hey, the Endangered Species Act says what it says. You are to recover all listed threatened and endangered species. Is the silvery minnow threatened or endangered?” “Yes.”

“Do we have a drought?”

“Yes.”

“Then give the silvery minnows the stored water. The Bureau of Reclamation has sufficient discretion and authority required under the ESA to release that project water to avoid jeopardy to the species.”

The federal district judge made this decision regardless of the fact that the Bureau of Reclamation had entered into contracts with those other entities to store and deliver water when the need arose. Unsurprisingly, the defendants appealed. So where do you go to appeal if you have a lawsuit in New Mexico? It’s part of the Tenth Circuit, the same circuit in which Wyoming, Colorado, Utah, Kansas, and Oklahoma happen to exist. In a controversial 2-1 opinion, the Tenth Circuit said, “We agree with the federal district judge. Give the stored water to the fish. That’s too bad Albuquerque; that’s too bad state of New Mexico.”

This case emphasizes one of the lessons we are learning today, and you’ve heard similar stories from different speakers. When water, which is the lifeblood not only of the West, but also of this country, comes at stake and people are unhappy with the way a particular branch of government is treating them, then they look elsewhere for relief. Because we have a tripartite branch of government, if folks are unhappy with the Bureau of Reclamation and the way things are going in the executive branch, they sue and the issue ends up in the judicial branch. When you end up in the judicial branch, and you end up with adverse decisions, then folks run to Capitol Hill and seek relief from the legislative branch.

That’s exactly what happened in this instance. When water is the subject matter, Senators of different parties will reach across the aisle to work together. Water concerns help eliminate partisan politics. You’ve got Republicans and Democrats working together to make sure their constituents



back home can take a shower, feed cattle, water crops or whatever it happens to be. In December 2003 Congress passed an appropriations rider prohibiting Interior from expending any of its funds to use project water from behind the New Mexico dam for benefit of the silvery minnow.<sup>6</sup> In addition, Congress stated that all environmental compliances that need to be done such as National Environmental Policy Act studies or Fish and Wildlife Service's biological opinions were to be considered satisfied for purposes of the ESA. So in January 2004, with the Department of Interior's petition for rehearing to the entire Tenth Circuit pending, the Tenth Circuit said, on its own motion, "Hey, it looks like the problem's solved. The water is staying behind the dam until Albuquerque needs it, besides it's raining. Climatologic conditions have changed. We declare the case is moot." The Tenth Circuit vacated the June 2003 opinion, so today there is no existing precedent. Consider though what might have happened if Congress hadn't intervened. That same scenario could have played out here in Wyoming if people had problems with the amount of water available for the black-footed ferret or any other plant or animal within Wyoming that is on the endangered species list.

As an interesting aside, Senators Pete Domenici and Jeff Bingaman, who happen to be ranking members on the Senate Energy Committee and who are both from New Mexico, in December 2004 extended that appropriations rider saying it was okay to keep that stored water for domestic consumption through March 2013. So the legislative branch of government handled that particular problem. But there is an ongoing saga there. The fish versus people conflict is not going away. Because there is no precedent, the next time that we have a drought and there's a conflict between man and beast, I think you will see the same arguments made yet again in another court.

In the last few years, we have also seen a series of cases filed by landowners and water districts alleging takings of private property when the government curtails water deliveries in order to comply with the ESA. One of the more controversial cases I had to deal with was called *Tulare Lake Basin Water Storage District v. United States*.<sup>7</sup> In that case a federal judge in the Court of Federal Claims found that withholding water from California farmers to protect the delta smelt and the winter run Chinook salmon constituted a physical taking. The water the farmers should have had was left in the river for the fish. In that particular instance, Judge Weiss ruled, "The federal government is certainly free to preserve the fish; it must simply pay for the water that it takes to do so." But paying is not so simple and it certainly is not inexpensive. That money comes out of the "judgment fund"

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6. Energy and Water Development Appropriations Act, Pub. L. No. 108-137, 117 Stat. 1827 (2004).

7. *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed. Cl. 246 (2003).  
<https://scholarship.law.wyo.edu/wlr/vol6/iss2/6>

which is a fund that Congress puts money into at the Department of Justice for payment of losses by the federal government in court. In this instance, the court ordered the government to pay \$24 million with interest at \$1,000 a day. Attorney fees in the case were over \$1.7 million because the case had been going on for some time, and faced with that adverse decision, the United States had to decide whether to appeal or not. Some elected officials and other interested parties urged us to go ahead and appeal, and others counseled to accept the decision and not make matters worse by risking an adverse circuit court opinion. In the end, I ended up taking an intermediate approach. By negotiating a settlement in which we did not concede liability for future cases, we did significantly reduce the trial court's monetary award. The settlement was pretty straightforward. In exchange for a payment of \$16.7 million, some \$11 million less than we would have had to pay under the court's award, the plaintiffs dismissed their case with language that states that it does not create a precedent for any other case.

But ENRD continues to have to defend similar lawsuits, and the underlying conflict between ESA and private property rights is not going to go away any time soon. In fact, one of the major lawsuits of this year is a U.S. Supreme Court case called *Orff v. United States*.<sup>8</sup> Its facts are very similar to Tulare. In this case the individual irrigators did not get the water promised to them by their irrigation district, which had contracted with the BOR for the water. Due to a drought situation, water was sent elsewhere and diverted from the contractees. So the non-delivery of water was the focus of the lawsuit. The United States Supreme Court ended up ruling that the *Orff* petitioners, that is the farmers, had no standing to sue. That only the water district itself could sue, even though the farmers were the ultimate beneficiaries of the water. The Supreme Court stated that the lawsuit could only be litigated between the irrigation district and the BOR and not otherwise. This decision will wipe out a lot of other potential cases that might have been brought by individual irrigators.

One of the cases mentioned by several of our speakers today dealt with the Klamath basin in Oregon and Northern California. The Klamath Irrigation District filed a lawsuit against the United States, very much paralleling the one in *Tulare*.<sup>9</sup> But even though the suit was also filed in the Court of Federal Claims, a different judge was assigned to the case. In a decision announced on August 31, 2005, the Federal Claims Judge Allegra rejected the same arguments that had been made in the *Tulare* case, holding that the plaintiff irrigators' interest in project water did not constitute a compensable property interest. So there was a conflict between the *Tulare* and *Klamath* cases, and we will see that legal tension play out over the next year or two as eventually this issue will go to the Federal Circuit Court of Appeal.

I would note at this point that the *Orff* case argued in February and decided in June 2005 may be one of the last water cases we see taken up by the Supreme Court for some time to come. Why is that? If you add up all cases nationwide that are handled in the thirteen circuit courts of appeal in a year, there are a little over 10,000 cases. And from there the next stop is the Supreme Court. How many of the 10,000 appellate cases get to the Supreme Court? Lawyers in the audience know it is a small and tiny fraction of the whole. In 2003, the Supreme Court handled only 81 cases. In 2004 it was seventy-six, and in 2005 around ninety. Only a small portion of litigation concerning natural resources in general, and water in particular, ever make it to the Supreme Court for hearing. So there has to be an interest on the court to take these cases up. Anyone can appeal and file a petition of certiorari to the Supreme Court, but it takes four of the nine justices to say, "I'm interested in having this case argued in front of me." We have just lost off the Supreme Court two Westerners: William Rehnquist from Arizona and Sandra Day O'Connor from Arizona, so that leaves only Anthony Kennedy from California. If you don't have justices interested in your subject matters, it is kind of tough to get those cases heard. I was lucky. Of the eighty-one cases in 2003, fifty-six of them involved the United States government, and eight of those originated from my ENRD. Thus, we may not see as many western cases argued before the Supreme Court.

Now on to very current matters such as the importance of underground water. The litigation on underground water is in its infancy compared to surface water litigation. But those fights are now starting, and in earnest. There is a case ongoing in Montana of import. The issue there is in drought times, if the senior water holders put a call on the river, who loses between junior surface water right holders and ground water pumpers granted more recent ground water permits? Juniors know they are not the same as seniors, but believe they have precedent over those with more recent groundwater well claims and that the groundwater pumps should shut down in drought conditions. That is a tough remedy placed on those homeowners who depend on groundwater pumps for their subdivision. The junior surface water holders have been around a long time and have more clout in the Montana Legislature, so this issue, depending on how the state judge comes out with his decision, may end up in the Montana Legislature.

In Gillette, Wyoming, on October 11, 2005, in the state court case of *Williams Co. v. Maycock*, the trial court ruled that water from coal bed methane extraction belongs to the state, not the landowner.<sup>10</sup> No right-of-way easement need be obtained by the company from the landowner so long as the water, once it comes out of the ground, goes down a natural channel across the rancher's property, even if the water quality is different from the

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<sup>10</sup>Decision by Judge Lawrence Williams, *Williams Co. v. Maycock*, Eighth Judicial District for the District of Wyoming, Civil Action No. 26099 (Oct. 11, 2005).

surface water that the cattle or sheep are consuming. No doubt that case will find its way to the Wyoming Supreme Court, so keep an eye on it.

So, now I am coming down the homestretch of my presentation. As to legislative activities in 2005, the Endangered Species Act (ESA) is now being reconsidered by Congress because of ESA pressure and impacts on landowners. The House passed, by a 222 to 210 vote, an ESA reform bill, which is now on its way to the Senate. The legislation will be assigned to the Fisheries, Wildlife and Water subcommittee of the Senate Environment and Public Works Committee chaired by Lincoln Chaffe of Rhode Island. Senator Chaffe is up for re-election in 2006 and depends on environmental support for success at the ballot box. Thus, I don't know that we will see the bill move very quickly through the EPW committee. But it does tell you that if people don't get what they want in the executive branch, and are having trouble succeeding in the judicial branch, that's when they go back to Capitol Hill, and that's where laws have the opportunity to be amended and reformed. Just like it took four separate Congresses to review the Clean Air Act before it finally got amended in 1990, that's what you are probably going to see in regard to the ESA. It will be amended some time between now and 2010.

There are also some big changes occurring with executive branch personnel. People are policy in Washington, D.C. Bad folks, bad policy. Good folks, good policy. Depending on your point of view. So on the executive branch front, who is in those positions to be making policy and litigation decisions over the next three and one half years? Mark Limbaugh has been confirmed as the new Interior Assistant Secretary for Water. Sue Ellen Wooldridge has been nominated as the Assistant Attorney General for the Environment and Natural Resources Division. Interior Secretary Gale Norton remains the key decision maker on all matters dealing with the discretion and use of water from the projects controlled by the BOR. Just as important is the head of the Office of Management and Budget, because if the administration isn't willing to put money on the table, it is hard to continue viable negotiations or reach settlements successfully. So Josh Bolton, OMB Director, and David Anderson, Assistant Director OMB, will play important roles as to the settlement versus litigation matrix.

Finally, I want to mention two cases you should keep an eye on. We did not have the opportunity to go into too much discourse about the Clean Water Act (CWA) today. The enforcement of the CWA falls to the EPA and the Army Corps of Engineers. Both refer cases to ENRD to prosecute when people pollute waters. On October 10, 2005, the Supreme Court decided to take two CWA cases that will be heard in February with decisions by June. Both cases are from Michigan out of the Sixth Circuit Court of Appeals, and

the shorthand names you will be hearing are *Rapanos* and *Carabell*.<sup>11</sup> The issue in these cases will impact all fifty states, but particularly the western states. Under the Clean Water Act, if a pollutant enters waters of the United States, then the entity causing the pollution must get a permit.<sup>12</sup> You can't just have a factory that produces a lot of toxins and let the toxics go on down the river without a permit. You need a Section 402 permit from the EPA. To do so you need to mitigate what you are putting in the river: eliminate it, filter it out, do whatever you need to do to lessen the impacts on the water quality concerned.

The issue comes down to the definition of "navigable waters of the United States." Are the oceans off our coasts navigable waters of the U.S.? Yes. What about our bays, the Gulf of Mexico, large lakes, big rivers—Colorado, Mississippi, Ohio—smaller rivers? Yes. Tributaries off of big rivers? Yes.

But the definition's scope depends on one's interpretation of the adjective "navigable." When you look at the CWA, it says the waters of the U.S. are those that are navigable waters.<sup>13</sup> Navigable taken literally means a ship, boat, canoe or kayak. But what if the water body is not a tributary? What if it's a stream? A creek? A rivulet? A trickle? What if it's the place where two raindrops kiss coming out of the sky landing on the mountain top before going on to the Columbia or Mississippi Rivers? No vessel could navigate those waters.

At what point should a line be drawn as to the federal regulatory reach, i.e., how far should the tentacle of the Army Corps of Engineers or the EPA be able to reach to regulate the way that an individual uses his or her land? The state, of course, would be responsible for regulating that which the federal government did not. And so the issue is, where do you draw that line through the definition of "navigable waters." Some say the federal government's reach should go all the way to the top of the mountain where the two raindrops kiss. For example, if you squeeze a dropper of arsenic into the trickle, and it can be traced all the way down to the Mississippi River and the Gulf of Mexico and so long as it can interfere with navigable waters and poison them, then you should be regulated goes the argument. Even if you are just trying to build a cabin on top of the mountain, you should have to obtain a CWA permit. Others say that is for the state to worry about. It's only where navigability occurs that the federal government should regulate.

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11. *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004); *Carabell v. U.S. Army Corp. of Eng'rs*, 391 F.3d 704 (6th Cir. 2004).

12. Federal Water Pollution Control Act, Pub. L. No. 107-303, 33 U.S.C. 1251

(2002) <http://scholarship.law.uwyo.edu/wlr/vol6/iss2/6>

13. *Id.*

In the *Rapanos* case, you have a well-known developer who wanted to build a shopping center on marsh lands twenty miles from the nearest navigable river where you could float a boat.<sup>14</sup> Rapanos thought the CWA could not apply to him with the twenty-mile distance from the river. But even though his lawyer and officials from the Army Corps of Engineers said to get a permit, he thought not. One weekend, he pushed sand down on to his property with a bulldozer, and then started construction.<sup>15</sup> The United States Attorney in Michigan pursued him both civilly and criminally.<sup>16</sup> Not only did he get tagged for \$15 million worth of fines for developing his property, but he was indicted criminally. He was acquitted after his first trial, but the Sixth Circuit reversed and remanded.<sup>17</sup> He was convicted at his second trial and was sentenced by the district judge. Mr. Rapanos, being unhappy about that, pursued his criminal conviction to the Supreme Court, but that petition for certiorari was denied last May. But his civil petition was accepted, and the Supreme Court will hear the case in February.

In the twin case of *Carabell*, owners of property wanted to build condominiums, and they went to the Army Corps and laid out their plans to do so.<sup>18</sup> They paid millions of dollars for this land that they wanted to build condominiums on, but the Army Corps said, "Sorry, this is a sensitive wetlands, birds land here, people use this area for recreational purposes. We are not going to give you a permit, and you can't build." The Carabells said, "What do you mean? We are stuck with a sandbar we just paid \$15 million for? Well, then give us the \$15 million. You are causing us harm since we are not able to use our land for the purpose intended." The Army Corps said, "We don't have \$15 million in our budget. We are just not going to give you the permit." So Carabell sued, lost in the Sixth Circuit, and appealed to the Supreme Court, and their case too was taken up and will also be argued in February.

So we will soon determine why the Supreme Court took this case. Is it because the Supreme Court wants to provide uniformity throughout the nation by clearly stating that the federal government does indeed have the right to move its tentacles all the way up a water system even if you are twenty miles from the nearest navigable river? Or will the Supreme Court Justices decide to draw a line of federal jurisdiction and thus inform us as to where and how the CWA may be enforced?

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14. United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004).

15. *Id.* at 633

16. United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004); United States v. Rapanos, 339 F.3d 447 (6th Cir. 2004).

17. *Rapanos*, 376 F.3d at 645.  
18. Carabell v. U.S. Army Corp. of Eng'rs, 391 F.3d 704, 706 (6th Cir. 2004).

My time is up. Thanks to the good folks of the Buffalo Bill Historical Center for putting this symposium together, and to the many people who traveled to Cody today to learn about the culture of water. Thank you for your time and attention.

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