Volume 8 | Issue 1 Article 8

1997

Leslie Salt Co. v. United States: Have Migratory Birds Carried the Commerce Clause across the Borders of Reason

Marni A. Gelb

LESLIE SALT CO. v. UNITED STATES: HAVE MIGRATORY BIRDS CARRIED THE COMMERCE CLAUSE ACROSS THE BORDERS OF REASON?

I. INTRODUCTION

In 1972, Congress promulgated the Clean Water Act (CWA), intending to further restore the purity of the nation's waters.[1] Since its inception, the CWA has sought to achieve this purpose by facilitating the regulation of water integrity. Unfortunately, controversy concerning which "waters" the Act is specifically meant to apply continues to plague any interpretation of the CWA.[2]

The majority of courts give the term "waters" the most expansive definition permissible under the Commerce Clause.[3] As a result, the administrative agencies vested with the power to enforce the CWA,[4] such as the Army Corps of Engineers (Corps), have been granted broad jurisdictional powers.[5] This, in turn, has created animosity between private property owners and those agencies responsible for enforcing the CWA.[6]

Leslie Salt Co. v. United States (*Leslie Salt IV*)[7] exemplifies the controversy concerning the proper scope of the CWA's jurisdiction. In *Leslie Salt IV*, the Ninth Circuit expanded the CWA's jurisdiction when it held that migratory birds' use of an isolated, man-made pond affected interstate commerce, thus bringing it within the

1. Federal Water Pollution Control Act Amendments of 1972 (CWA), Pub. L. No. 92-500, §§ 101-15, 201-12, 301-18, 401-05, 501-17, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1972) (amended 1994)).

2. *See* Leslie Salt Co. v. United States, 55 F.3d 1388, 1390 (9th Cir. 1995), *cert. denied sub nom.* Cargill Inc. v. United States, 116 S. Ct. 407 (1995) (*Leslie Salt IV*). For a discussion of the controversy over the definition of "waters" in the CWA, see *infra* notes 52-55 and accompanying text.

3. For a discussion of the expansive definition courts have given the term "waters," see *infra* notes 56-58 and accompanying text.

4. For a discussion of the jurisdiction granted to administrative agencies, see *infra* note 5 and accompanying text.

5. Hope Babcock, *Federal Wetlands Regulatory Policy, Up to Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307, 318 (1991). The Corps is a branch of the Defense Department involved with projects affecting the nation's waterways. *Id.* The United States Environmental Protection Agency (EPA) is another such agency vested with the power to enforce the CWA. 33 U.S.C. § 1222(b) (1994).

6. Babcock, *supra* note 5, at 312.

7. *Leslie Salt IV*, 55 F.3d 1388 (9th Cir. 1995), *cert. denied sub nom.* Cargill, Inc. v. United States, 116 S. Ct. 407 (1995).

scope of the Commerce Clause.[8] In reaching this conclusion, the Ninth Circuit addressed whether the petitioner, Cargill Inc., sufficiently proved that the first panel of the Ninth Circuit (*Leslie Salt II*), as well as the court's corresponding factual findings, were "clearly erroneous."[9] In determining whether Cargill's claims satisfied this standard of review, the second panel of the Ninth Circuit addressed three issues: (1) whether the preamble to the Corps' regulations concerning the CWA were substantive rules or merely interpretive rules;[10] (2) whether the Corps' interpretation of the Act, extending its jurisdiction to habitats used only by migratory birds, was reasonable; and (3) if the Corps' interpretation was reasonable, whether the CWA's broad grant of jurisdictional powers exceeded Congress's powers under the Commerce Clause.[11] In *Leslie Salt IV*, the Ninth Circuit, pursuant to the law of the case doctrine, held that the regulations were interpretive and, therefore, not subject to notice and comment requirements.[12] Additionally, the court found it reasonable for the Corps to extend its jurisdiction to habitats used only by migratory birds and, therefore, the CWA did not exceed Congress's power under the Commerce Clause.[13]

This Note asserts that the Ninth Circuit correctly held that the migratory bird rule was a reasonable interpretation of the CWA.[14] Nevertheless, in finding the CWA's regulations to be interpretive rather than substantive, the court overlooked the essence of the CWA regulations.[15] Further, the court unconstitutionally extended Congress's Commerce Clause powers when it permitted the CWA's

---

8. *See id.*

9. *See id.* at 1394. According to the Ninth Circuit, the district court will only review clearly erroneous factual findings. Leslie Salt Co. v. United States, 896 F.2d 354, 357 (9th Cir. 1990) (*Leslie Salt II*). The decision of a previous panel of the circuit court remains intact, unless the appellant can prove the earlier findings of fact were clearly erroneous. *Id.*

10. *Leslie Salt IV*, 55 F.3d at 1393. This issue required resolution because substantive rules, unlike interpretive rules, are subject to notice and comment requirements. Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

11. *Leslie Salt IV*, 55 F.3d at 1394-95.

12. *Id.* at 1394.

13. *Id.* at 1395; *see* U.S. CONST. art. I, § 8, cls. 1-18. For a discussion of the court's determination that the Corps' jurisdiction can be extended to habitats used only by migratory birds, see *infra* notes 135-45 and accompanying text.

14. For a discussion of the reasonableness of the Ninth Circuit's migratory bird rule, see *infra* notes 132-46 and accompanying text.

15. For a discussion of the substantive nature of the Corps' regulations, see *infra* notes 159-77 and accompanying text.

jurisdiction to extend into an activity having little, if any, effect on interstate commerce.[16]

Section II discusses the pertinent rules and doctrines the Ninth Circuit employed in its analysis.[17] Additionally, Section II gives a synopsis of Congress's powers pursuant to the Commerce Clause and the CWA.[18] Section III discusses the facts surrounding *Leslie Salt IV*.[19] Section IV explains the Ninth Circuit's reasoning in holding that an isolated, man-made wetland falls within the ambit of the CWA's jurisdiction.[20] Section V critiques the Ninth Circuit's holding, concluding that the Ninth Circuit overextended Congress's enumerated powers under the Commerce Clause.[21] Section VI concludes by discussing the inherent dangers of granting Congress seemingly unlimited Commerce Clause powers.[22]

II. BACKGROUND

A. The Law of the Case Doctrine

Under the law of the case doctrine, a second panel of an appellate court generally will not reconsider questions already considered by the first panel.[23] In *Christianson v. Colt Industries Operating Corp.*,[24] the United States Supreme Court commented that "[a]s most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same

16. For a discussion of why the migratory bird rule overextends Congress's Commerce Clause powers, see *infra* notes 188-205 and accompanying text.

17. For a discussion of the pertinent doctrines and rules which the Ninth Circuit used in its analysis, see *infra* notes 23-75 and accompanying text.

18. For a discussion of Congress's powers under the Commerce Clause and its powers under the CWA, see *infra* notes 32-61 and accompanying text.

19. For a discussion of the facts of *Leslie Salt IV*, see *infra* notes 76-103 and accompanying text.

20. For a discussion of the Ninth Circuit's holding regarding the scope of the CWA's jurisdiction, see *infra* notes 132-46 and accompanying text.

21. For a discussion of why the Ninth Circuit's holding overextends Congress's Commerce Clause powers, see *infra* notes 188-205 and accompanying text.

22. For a discussion of the inherent dangers in granting Congress seemingly unlimited powers, see *infra* notes 207-14 and accompanying text.

23. Kimball v. Callahan, 590 F.2d 768, 771 (9th Cir. 1979). In commenting on the law of the case doctrine, the *Kimball* court noted:

> [t]his laudable and self-imposed restriction is grounded upon the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all "if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal."

Id. (footnote omitted) (quoting White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967)).

24. 486 U.S. 800 (1987).

case."[25] The purpose of this doctrine is to promote court efficiency and judgment finality.[26]

The law of the case doctrine, however, is not a jurisdictional limitation.[27] Rather, it merely expresses the accepted practice of courts in refusing to reconsider issues which have already been resolved.[28] Despite this accepted practice, the Supreme Court has held that courts possess the power to revisit their own prior decisions, or those of any lower court, under any circumstances.[29] The Court has stressed, however, that a reviewing court should limit itself to revisiting decisions only where: (1) an intervening change in controlling law has occurred; (2) new or substantially different evidence has surfaced; or (3) the previous disposition has resulted in clear error and manifest injustice.[30] Thus, in the absence of extraordinary circumstances, or where injustice would result, the law of the case doctrine should be followed.[31]

B. The Plenary Power of Congress Under the Commerce Clause

Pursuant to the Commerce Clause,[32] Congress alone possesses the power to regulate interstate commerce.[33] While Congress's Commerce Clause powers are plenary, controversy has surfaced concerning the extent to which Congress may act, under the Com-

25. *Id.* at 815-16 (quoting Arizona v. California, 460 U.S. 605, 618 (1983)).

26. *Id.* at 816. As the Court in *Christianson* stated, "[t]his rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Id.* (quoting 1B JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE ¶ 0.404[1], 118 (1984)).

27. Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1134 (D.C. Cir. 1994); Messenger v. Anderson, 225 U.S. 436, 444 (1912).

28. *See Messenger*, 225 U.S. at 444.

29. *Id.*

30. Merritt v. Mackey, 932 F.2d 1317, 1320 (9th Cir. 1991); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1987). "[A]s a rule courts should be loathe to . . . [revisit prior decisions] in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson*, 486 U.S. at 817.

31. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1987). The Ninth Circuit has held that a district court's factual finding is subject to review only when it is clearly erroneous. *Leslie Salt II*, 896 F.2d 354, 357 (9th Cir. 1990). The law of the case remains, therefore, unless the appellant can prove that previous findings of facts are clearly erroneous. *Id.* In *Christianson*, the Court determined that a circuit court did not act improperly in revisiting a jurisdictional issue because the prior decision was "clearly wrong" and would result in manifest injustice. *Christianson*, 486 U.S. at 817.

32. *Id.* U.S. CONST. art. I, § 8, cls. 1-18.

33. *Id.* cl. 3. Clause 3 states "Congress shall have [p]ower [t]o . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". *Id.*

merce Clause, when promulgating laws.[34] Conflict arises when Congress asserts jurisdiction over activities not directly involving interstate commerce but rather, merely affecting it.[35]

During the course of this century, courts have granted broad, expansive powers to Congress when it promulgates legislation under the Commerce Clause.[36] In granting these powers, courts have permitted Congress not only to regulate interstate commerce but also to regulate those activities affecting it as well.[37] *Wickard v. Filburn*[38] is the seminal case construing the scope of the Commerce Clause. In *Wickard*, the United States Supreme Court held that Congress may regulate a local activity so long as the activity exerts a substantial economic effect on interstate commerce.[39] Similarly, in *Heart of Atlanta Motel, Inc. v. United States*,[40] the Court held that even those activities which are local in origin and destination may be regulated under the Commerce Clause if they substantially affect interstate commerce.[41]

---

34. For a discussion of Congress's plenary power, see *infra* notes 36-47 and accompanying text.

35. For further discussion of activities that do not directly involve interstate commerce, see *infra* notes 36-47 and accompanying text.

Three types of Commerce Clause issues can arise from congressional legislation. John A. Leman, Comment, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. DAVIS L. REV. 1237, 1248 (1995). The issues surface when: (1) legislation involves broadly phrased laws that Congress restricts by stating it will only extend them to the limits of the Commerce Clause; (2) laws that purport to regulate an activity are silent on the Commerce Clause issue; and (3) there is a congressional finding that a given activity affects interstate commerce. *Id.*

36. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294, 302 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

Nevertheless, the Supreme Court has placed limitations on these powers. Activities which fall outside of the Commerce Clause's scope include those activities that take place entirely within a state. Leman, *supra* note 35, at nn.175-82. Because they do not have any effect on other states and generally do not interfere with governmental power, they fall outside the scope of the Comerce Clause.

37. For a discussion of activities that so not involve interstate commerce but affect it, see *infra* notes 38-45 and accompanying text.

38. 217 U.S. 111 (1942).

39. *Id.* In *Wickard*, the Supreme Court considered the issue of whether a farmer who had grown crops for his own consumption interfered with interstate commerce. *Id.* at 124-25. The Court held that a farmer's growing of his own wheat did affect the interstate market when taken in the aggregate with other such decisions. *Id.* at 128-29.

40. 379 U.S. 241 (1964).

41. *Id.* In *Heart of Atlanta*, the Supreme Court addressed a challenge to the Civil Rights Act of 1964 (Title II). *Id.* The Court determined that the discrimination of patrons in private hotels had a substantial burden on interstate commerce and, therefore, was subject to federal jurisdiction. *Id.* at 258.

Despite the Commerce Clause's broad grant of power, limitations on Congress's jurisdiction exist.[42] In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[43] the Supreme Court found that in order to exercise its Commerce Clause power, Congress must show that the regulated activity has a "substantial effect" on interstate commerce.[44] Without this substantial limitation, Justice Rehnquist commented, the reach of the Commerce Clause would be limitless.[45] Nevertheless, congressional regulations are rarely invalidated under the substantial effects test.[46] As a result, Congress successfully uses its plenary power to regulate numerous activities, effectively stretching the scope of its Commerce Clause powers.[47]

C. The Clean Water Act

In 1972, pursuant to its Commerce Clause powers, Congress promulgated the CWA.[48] The CWA is a comprehensive statute designed to "restore and maintain the chemical, physical, and bio-

42. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

43. 452 U.S. 264 (1981). *See also* Hodel v. Indiana, 452 U.S. 314 (1981) (discussing scope of Commerce Clause).

44. *Hodel*, 452 U.S. at 275-83. In the two *Hodel* cases, the Supreme Court faced the issue of whether the Surface Mining Act of 1977 (SMA) exceeded the scope of the Commerce Clause. *Hodel*, 452 U.S. at 314. In the SMA, Congress specifically stated that the activities and areas the act was intended to regulate directly affected interstate commerce. *Id.* In reality, the activity only affected a minor portion of interstate commerce. *Id.* at 322. However, because the Supreme Court defers to congressional findings and, because Congress explicitly found a substantial effect on interstate commerce, the Supreme Court held that the activity passed the test and, thus, was valid. *Id.* at 324.

The Court later reaffirmed the "substantial effect" test in United States v. Lopez, 115 S. Ct. 1624 (1995). The plaintiffs in *Lopez* challenged the validity of the Gun-Free School Zone Act of 1990 (GFSZA). *Id.* at 1626. Under the GFSZA, the possession of firearms in a designated school zone is deemed a federal crime. *Id.* The Supreme Court concluded that in order to determine whether an activity can be regulated requires an analysis of whether the regulated activity "substantially affects" interstate commerce. *Id.* at 1630.

45. *Virginia Surface Mining*, 452 U.S. at 310 (Rehnquist, J., concurring). Justice Rehnquist further acknowledged "there may be activities that are so local or private in nature that they simply may not be in commerce." *Id.*

46. For further discussion on how the test does not invalidate all activities not substantially affecting interstate commerce, see *infra* notes 193-203 and accompanying text.

47. *See, e.g., Leslie Salt IV*, 55 F.3d 1388, 1395 (9th Cir. 1995), *cert. denied sub nom.* Cargill, Inc. v. United States, 116 S. Ct. 407 (1995) (holding Congress can regulate seasonal, man-made, isolated ponds because migratory birds using them potentially had effect on interstate commerce).

48. Federal Water Pollution Control Act Amendments of 1972 (CWA), Pub. L. No. 92-500, §§ 101-15, 201-12, 301-18, 401-05, 501-17, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1972) (amended 1994)).

logical integrity of the nation's waters."[49] To achieve this goal, Congress expressly prohibits or limits certain activities such as the discharge of pollutants into a body of water.[50] For example, persons who wish to discharge, fill or dredge materials into any body of water must first obtain a permit from the Corps.[51] Although such restrictions apply to any "navigable water of the United States," the term "navigable water" is plagued with ambiguity and is a source of controversy.

The CWA defines "navigable waters" as "waters of the United States."[52] Although Congress has yet to define the term "waters of the United States," the Corps continues to use the term in its regulations.[53] Adding to the confusion is the question of the proper

49. CWA § 101(a), 33 U.S.C. § 1251(a).

50. *Id.* Congress defined "pollutant" to include the dumping of any fill. CWA § 502(6), 33 U.S.C. § 1362(6). Section 1362(6) states that the term "pollutant" means "dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* Congress, however, was only concerned with the pollution of the nation's water, rather than with all forms of pollution. Leslie Salt Co. v. United States, 700 F. Supp. 476, 482 (N.D. Cal. 1988), *rev'd*, 896 F.2d 354 (9th Cir. 1990) (*Leslie Salt I*).

51. Navigation and Navigable Waters, 33 C.F.R. § 326.3(c) (1996). The Corps' regulations require individuals to obtain a permit before discharging dredged or fill materials into wetlands or any waters subject to the Corps' jurisdiction. *See id.* Once the Corps' district engineer determines that a CWA violation exists, the responsible party must be notified. *Id.* If the violation involves a project that is not complete, a cease and desist order may be issued prohibiting any future work until the matter is resolved. *Id.* at § 326.3(c)(1). If the project is complete, however, the engineer must notify the responsible party, obtain additional information if needed, and determine after consultation with different agencies whether corrective measures are necessary. *Id.* at §§ 326.3(c)(2), 326.3(c)(3). Once corrective measures have been completed, the district engineer must accept an after-the-fact permit application, unless granting the application would be inappropriate. *Id.* at 326.3(e).

52. CWA § 502(7), 33 U.S.C. § 1362(7). The Supreme Court stated that the CWA's definition of navigable waters as "waters of the United States" proves the term "navigable," as used in the act, is of little import. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985).

53. *See* 33 C.F.R. § 328. Section 328.3 provides, in pertinent part, as follows:

> (a) The term *waters of the United States* means
>
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide . . .
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairies potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

scope of the term "navigable waters."[54] The prevailing opinion is that "Congress intended the CWA to assert 'federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution.'"[55] Moreover, courts have held that in order to give the federal government the maximum amount of jurisdiction permitted, the term "navigable waters"

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce . . .

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section. . . .

(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

Id.

54. H.R. REP. No. 92-911 (1972); S. CONF. REP. No. 92-1236 (1972) *reprinted in* 1972 U.S.C.C.A.N. 3776.

55. *See, e.g.*, Quivira Mining Co. v. EPA, 765 F.2d 126, 129-30 (10th Cir. 1985) (holding dry ditch, which sometimes became flooded and ran into a navigable stream, subject to CWA jurisdiction because Congress intended CWA to cover as many waters as possible). *See also* United States v. Tull, 769 F.2d 182, 184 (4th Cir. 1985) (holding legislative history shows Congress intended CWA to reach very limits of Commerce Clause); United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979) (holding Congress intended CWA to be given broadest meaning permissible under Constitution); United States v. Akers, 651 F. Supp. 320 (E.D. Cal. 1987) (finding Congress intended definition of "waters of the United States" to cover maximum area possible under Commerce Clause); Leslie Salt Co. v. Froehlke, 403 F. Supp. 1292 (N.D. Cal. 1974), *rev'd on other grounds*, 578 F.2d 742 (9th Cir. 1978) (holding jurisdictional terms of Act are to be given broadest interpretation under Commerce Clause).

The definition of "water" further supports this proposition. *See* Stoeco Dev., Ltd. v. Department of the Army Corps of Eng'rs, 701 F. Supp. 1075 (D.N.J. 1988). The court in *Stoeco Development* rationalized that in adopting such a broad definition, Congress evidently intended to repudiate limits that had been placed on earlier federal regulations by other water pollution control statutes. *Id.* at 1078. Additionally, the court concluded that Congress intended to exercise its powers under the Commerce Clause in order to regulate some waters that would not be deemed navigable under classic notions of the term. *Id.* at 1079.

should be given the broadest interpretation possible.[56] Recently, courts have employed this broad definition, holding "waters" can now be man-made, seasonal and a result of government activity.[57] Furthermore, the Supreme Court has held that the Corps can invoke jurisdiction over wetlands that are merely adjacent to other waters.[58]

One issue on which the courts do not agree, however, is whether the Corps has jurisdiction over isolated wetlands—those wetlands not adjacent to other waters.[59] Despite this disagreement, the Supreme Court has yet to address the issue.[60] Because isolated wetlands have no connection to other waters and, thus, are intrastate, in order for the Corps to assert jurisdiction over the property, some other connection to interstate commerce must be asserted.[61]

---

56. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (holding "Congress chose to define the waters covered by the act broadly").

57. *See Leslie Salt I*, 700 F. Supp. 476 (N.D. Cal. 1988), *rev'd*, 896 F.2d 354 (9th Cir. 1990); Leslie Salt Co. v. United States, 820 F. Supp. 478 (N.D. Cal. 1992) (*Leslie Salt III*).

58. *Riverside*, 474 U.S. at 134. In *Riverside*, the Supreme Court held that while the Corps' jurisdiction should not extend to wetland areas possessing some abnormal wetland vegetation, it would not be unreasonable, given the extent of congressional concern for protection of water quality and aquatic ecosystems, for the Corps to exercise jurisdiction over these wetlands if they are adjacent to other waters. *Id.* The Court rationalized that because wetlands which are adjacent to navigable waters "do as a general matter play a key role in protecting and enhancing water quality," wetlands should be subject to the Corps' jurisdiction. *Id. See* Protection of Environment, 40 C.F.R. § 230.3(t)(7) (1996) (stating adjacent wetlands come within scope of commerce power by virtue of their connection with other waters which are either interstate or connected to interstate commerce).

59. Leman, *supra* note 35, at n.163. Isolated wetlands are wetlands not associated with another body of water. 40 C.F.R. § 230.3(t)(7). The Corps defines isolated wetlands as wetlands that are intrastate and that when used or damaged could affect interstate commerce. Navigation and Navigable Waters, 33 C.F.R. § 328.3(t)(7) (1996).

60. In *Riverside*, the Supreme Court expressly declined to address whether the federal government may regulate isolated wetlands. *Riverside*, 474 U.S. at 131. The Court commented: "[w]e are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, . . . and we do not express any opinion on that question." *Id.* at n.8.

61. *See* 40 C.F.R. § 230.3(s)(3). In *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 260 (7th Cir. 1993), the Seventh Circuit was presented with the issue of whether wetlands must have an actual effect on interstate commerce, or whether showing a potential effect would suffice to connect waters to interstate commerce in order for the Corps to assert jurisdiction. *Id.* The Seventh Circuit analyzed the regulations stating that the CWA explicitly forbids "degradation or destruction" of intrastate wetlands when such actions "*could* affect" interstate commerce. *Id.* (emphasis added). In so doing, the court concluded that the word "could" is crucial. *Id.* at 260-61. Because the Corps used the word "could," the court in *Hoffman Homes* found that the regulation covers waters whose connection to interstate commerce

One such method suggested for creating a nexus between isolated wetlands and interstate commerce is to apply the migratory bird rule.

D. The Migratory Bird Rule

The migratory bird rule was first advanced in 1985.[62] In that year, the Corps wrote a memorandum listing seven standards by which to judge whether a connection to interstate commerce warranted exercising the Corps' jurisdiction under the CWA.[63] One standard permits the Corps to assert jurisdiction over "[w]aters which are used or could be used as habitat by other migratory birds crossing state lines."[64] A second memorandum was later issued stating that "all waterbodies which are or reasonably could be used by migratory birds are waters of the United States and should be regulated as such."[65] Subsequent to including the language "all water-

---

may be potential rather than actual, as well as minimal as opposed to substantial. *Id.* at 261.

62. Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

63. *Id.* The memorandum was issued by Brigadier General Patrick J. Kelly, Deputy Director of Civil Works for the U.S. Army Corps of Engineers, Washington, D.C.

64. *Id.*

65. *Id.* Much of the controversy surrounding these regulations exists because the rules were not subject to notice and public comment. *Id.* Before a rule is promulgated, section 553 of the Administrative Procedure Act (APA) requires an agency to give notice to the public regarding the proposed rule and to give the public an opportunity to respond. *Id.* An exception to the notice and comment requirements applies, however, to interpretive rules. *See* 5 U.S.C. § 553(b)(3)(A) (1994). Section 553 provides, in pertinent part, as follows:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through

bodies which could be used by migratory birds" in its regulations, the Corps began asserting jurisdiction over waters which were, or could be, a habitat for migratory birds.[66] Consequently, because the CWA is applied to isolated wetlands whose only connection to interstate commerce is its use by migratory birds, when cases involving the migratory bird rule come before a court, the issue addressed usually revolves around whether application of the CWA exceeds Congress's Commerce Clause powers.[67]

The majority of courts find the Commerce Clause powers, and thus the CWA, broad enough to permit extension of the Corps' jurisdiction to isolated waters which may prove to be a habitat for migratory birds.[68] For example, in *Hoffman Homes, Inc. v. EPA*,[69] the United States Court of Appeals for the Seventh Circuit held that it was reasonable to allow migratory birds to be the crucial connec-

---

submission of written data, views, or arguments with or without opportunity for oral presentation . . .

Id.

The question that arises is whether the migratory bird rule is interpretive, in which case the Corps is not required to comply with the notice and comment requirements, or whether the rule is substantive, in which case the Corps must comply with the requirements. *Tabb Lakes*, 715 F. Supp. at 728. Substantive rules are those "which grant rights, impose obligations, or produce other significant effects on public interests, or which effect a change in existing law or policy." *Id.* at 728. *See also* Alcaraz v. Block, 746 F.2d 593, 613 (9th Cir. 1984) (defining "substantive rules"). Interpretive rules, on the other hand, "are those which merely clarify or explain existing law or regulations, are essentially . . . instructional, and do not have the full force and effect of a substantive rule but are in the form of an explanation of particular terms." *Tabb Lakes*, 715 F. Supp. at 728. *See also Alcaraz*, 746 F.2d at 613 (emphasizing importance of making distinction between substantive and interpretive rules). The task of determining whether a regulation is a substantive or an interpretive rule must be very fact specific. *Tabb Lakes*, 715 F. Supp. at 728.

66. *See Leslie Salt II*, 896 F.2d 354, 360 (9th Cir. 1990), *aff'd in part*, 55 F.3d 1388 (9th Cir. 1995), *cert. denied sub nom.* Cargill, Inc. v. United States, 116 S. Ct. 407 (1995) (finding Commerce Clause power, and thus the CWA, broad enough to extend Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species).

67. *See id.* (remanding to district court for determination of whether it is reasonable for Corps' jurisdiction to rest on fact that migratory birds and endangered species may use the waters as a habitat).

68. *See* Brown v. Anderson, 202 F. Supp. 96, 103 (D. Alaska 1962). This case was the first to hold that congressional power over wildlife stems from the interstate movement of persons utilizing or studying wildlife. *See id. See also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282 n.21 (1981) (commenting, "we agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effect in more than one State"). *Id.* at 282.

69. 999 F.2d 256 (7th Cir. 1993).

tion between isolated wetlands and interstate commerce.[70] In rationalizing its holding, the court correlated the presence of migratory birds with the people who come to observe them in their natural habitat, finding a connection with interstate commerce.[71] The court noted that millions of people throughout America spend billions of dollars trapping, hunting and observing these birds.[72] From this, the Seventh Circuit concluded that the destruction of the migratory birds' habitat would adversely affect interstate commerce because fewer people would travel across state lines to observe these birds.[73] Thus, the cumulative loss caused by the destruction of wetlands could potentially prove to be a significant burden on interstate travelers.[74] Until the Supreme Court addresses the scope of the migratory bird rule, however, the controversy will continue to plague circuit courts.[75]

III. FACTS

A. The Property

The dispute in *Leslie Salt* centered around the Newark Coyote property, an undeveloped, 153 acre tract of land.[76] When the case first came before the courts, Leslie Salt, a salt manufacturer, owned the property; Cargill, Inc. subsequently acquired the property.[77]

70. *Id.* at 261. *See also* Reuth v. EPA, 13 F.3d 227, 231 (7th Cir. 1993) (holding "one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland").

71. *Hoffman Homes*, 999 F.2d at 261.

72. *Id. See also* Palila v. Hawaii Dep't of Land & Natural Resources, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (commenting that national program to protect wildlife "preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species").

73. *Hoffman Homes*, 999 F.2d at 261.

74. *Id.*

75. The Tenth Circuit has also addressed the migratory bird rule. Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984). The Tenth Circuit determined that the Commerce Clause reached a lake located entirely within a state which was used as a flyaway for migratory birds. *Id.* at 804. The lake in *Marsh*, however, was used not only by migratory birds, but also by a commercial fishery which sold its products out of state. *Id.* at 803. It is unclear, therefore, whether the Tenth Circuit would have reached the same conclusion in the absence of the transportation of fish from out of state. *See id.* at 804-05.

76. *Leslie Salt II*, 896 F.2d 354, 355 (9th Cir. 1990). This land lies south of San Francisco and approximately one quarter mile from Newark Slough, a tidal arm of the San Francisco Bay. *Id.* Additionally, the Newark Coyote land lies adjacent to San Francisco National Wildlife Refuge. *Id.*

77. *Leslie Salt IV*, 55 F.3d 1388, 1390 (9th Cir.), *cert. denied sub nom.* Cargill, Inc. v. United States, 116 S. Ct. 407 (1995).

Although originally a pastureland,[78] Leslie Salt's predecessors built salt manufacturing facilities on the property in order to crystallize salt.[79] While constructing the facilities, the previous owners excavated pits on one parcel of the property and created large, shallow, water-tight basins on the other parcels.[80]

In 1959, Leslie Salt discontinued its manufacturing of salt.[81] Nevertheless, the pits and basins remained.[82] Each year thereafter, during California's annual rainy season, the pits and crystallizers temporarily filled with water, becoming ponds.[83] Although the water accumulation occurred seasonally, the ponds remained long enough to support aquatic life.[84] This situation continued until 1983 when the EPA ordered Leslie Salt to plow the property in order to remedy an air pollution problem.[85] The plowing loosened the soil, creating furrows.[86] In turn, these furrows created an environment hospitable to the growth of plant life.[87]

In addition to the plowing, the government substantially altered the physical configuration of the property.[88] Along with the ditches, road beds and culverts leading to a nearby water source, the government constructed roads and sewers on the property.[89]

---

78. *Leslie Salt I*, 700 F. Supp. 476, 479 (N.D. Cal. 1988), *rev'd*, 896 F.2d 354 (9th Cir. 1990). The land in question had been used as grazing and pastureland for livestock. *Id.*

79. *Id.* The salt manufacturing facilities included a railroad spur, salt refining plant and other related buildings. *Id.* at 479-80.

80. *Id.* at 480. The process for crystallizing salt on the Newark Coyote property began by pumping saturated salt brine into crystalizers. *Id.* The salt then precipitated and settled to the bottom of the pits, and the remaining liquid was drawn off. *Id.* After the liquid was drawn off, large mechanical harvesters ran across the floor of crystalizers. *Id.* After the salt was removed, the crystalizers were then drained, releveled and recompacted. *Id.*

81. *Id.* Leslie Salt discontinued its manufacturing of salt because the process proved uneconomical. *Id.*

82. *Leslie Salt IV*, 55 F.3d at 1390.

83. *Id.* at 1391.

84. *Leslie Salt II*, 896 F.2d 354, 355 (9th Cir. 1990).

85. *Leslie Salt I*, 700 F. Supp. 476, 480 (N.D. Cal. 1988), *rev'd*, 896 F.2d 354 (9th Cir. 1990). Leslie Salt had to plow the property because barren crystalizers were producing dust. *Id.* Leslie Salt was cited for air pollution violations, and in an attempt to solve the dust problem, it plowed the property in 1983 and 1985. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* In the early 1980's, the Eastbay Dischargers Authority constructed a large sewer line across the property. *Id.* As a result of the construction, the natural conditions of the land were disturbed and fill and inundations were left. *Id.* Moreover, the California highway authority (Caltran) constructed Highway 84 across the northern section of the property, further disrupting the natural environment. *Id.*

The government then breached a levy and destroyed a tidegate which had prevented the tidal backflow from reaching the property.[90]

As a result of this human intervention, the property began to foster natural developments.[91] Specifically, the tidewater reached the edges of the property, creating an environment very similar to those of wetlands.[92] Furthermore, the ponding of the crystallizers and the pits attracted migratory birds, as well as some endangered species, to this man-made habitat.[93]

B. Intervention By the Army Corps of Engineers

In 1985, Leslie Salt intended to drain the land by building a feeder ditch and siltation pond on a parcel of its land.[94] In response to this anticipated action, the Corps issued a cease and desist order pursuant to its CWA jurisdiction.[95] The Corps claimed Leslie Salt violated the CWA by discharging fill, a pollutant, into the waters of the United States.[96] In 1987, the Corps issued a second cease and desist order to prevent Leslie Salt from placing fill in another parcel of land.[97]

Leslie Salt subsequently filed a lawsuit challenging the Corps' assertion of jurisdiction.[98] The Corps countersued, contending that it had jurisdiction over a majority of the property.[99] The District Court for the Northern District of California found in favor of Leslie Salt, and the United States appealed for a determination of whether the Corps had jurisdiction over the property.[100] The Court

90. *Leslie Salt II*, 896 F.2d 354, 356 (9th Cir. 1990).

91. *Id.*

92. *Id.*

93. *Leslie Salt IV*, 55 F.3d 1388, 1390 (9th Cir. 1995), *cert. denied sub nom.* Cargill, Inc. v. United States, 116 S. Ct. 407 (1995). The evidence summarized in the United States' Memorandum on Remand states that some 55 species of migratory birds use seasonally ponded areas as habitat. *Id.*

94. *Leslie Salt II*, 896 F.2d at 356.

95. *Id.* For further discussion of the Corps' procedures, see *supra* note 52.

96. *Leslie Salt II*, 896 F.2d at 356. The Corps claimed that Leslie violated section 301(a) of the CWA which provides "'[e]xcept as in compliance with this section and section[ ] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.'" *Id.* at 356 n.3.

97. *Id.* at 356. The Corps issued the second cease and desist order in response to Leslie Salt's attempt to block a culvert connecting its property to the Newark Slough. *Id.*

98. *Leslie Salt I*, 700 F. Supp. 476, 481 (N.D. Cal. 1988), *rev'd*, 896 F.2d 354 (9th Cir. 1990).

99. *Id.*

100. *Leslie Salt II*, 896 F.2d at 355. The district court held that the Corps did not have jurisdiction over the property under the CWA, as it was not "water of the

of Appeals for the Ninth Circuit reversed and remanded, finding the Corps did have jurisdiction over the land pursuant to the CWA.[101] On remand, the district court entered judgment against Leslie Salt but stipulated that Cargill could file an appeal.[102] The Ninth Circuit affirmed the district court's judgment on appeal.[103]

IV. *LESLIE SALT CO. V. UNITED STATES*

A. The Law of the Case Doctrine

On appeal, Cargill began by attacking the law of the case doctrine on the ground that the rule did not apply.[104] Cargill sought reversal of the first panel of the Ninth Circuit's determination (*Leslie Salt II*) which held that the Corps' jurisdiction was sufficiently broad to encompass isolated waters used only by migratory birds.[105] Furthermore, Cargill contended that the Ninth Circuit should not apply the law of the case doctrine because the *Leslie Salt II* court upheld the migratory bird rule with a "bare conclusion" and little discussion.[106]

In rejecting this first argument, the Ninth Circuit analyzed the law of the case doctrine and its application to the facts.[107] In *Leslie Salt IV,* the Ninth Circuit noted that in *Leslie Salt II* the first panel of the Ninth Circuit determined that "'[t]he [C]ommerce [C]lause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species.'"[108] In *Leslie Salt II,* the

United States" within the meaning of the CWA or corresponding regulations. *Leslie Salt I,* 700 F. Supp. at 484-89. The district court found that the property was neither "tidal water," "other waters," or "wetland." *Id.* For a discussion of these terms, see *supra* note 53.

101. *Leslie Salt II,* 896 F.2d at 361. The court held that contrary to the holding in *Leslie Salt I,* the Corps did have jurisdiction under the CWA. *Id.* The court further determined that such jurisdiction extends to property which becomes aquatic as a result of government action and that "other waters" within the Corps' CWA jurisdiction includes both artificial and natural formations. *Id.* at 354. The court remanded the case, however, for a determination of what portions of the property correctly fell within the Corps' jurisdiction. *Id.* at 361.

102. *Leslie Salt I,* 700 F. Supp. at 482. The court held that the former crystalizers and pits on property have sufficient ties to interstate commerce so as to fall under the CWA's jurisdiction as "other waters of the United States." *Id.* at 480.

103. *Leslie Salt IV,* 55 F.3d 1388, 1389 (9th Cir. 1995), *cert. denied sub nom.* Cargill, Inc. v. United States, 116 S. Ct. 407 (1995).

104. *Id.* at 1392. For a discussion of the law of the case doctrine, see *supra* notes 23-31 and accompanying text.

105. *Leslie Salt IV,* 55 F.3d at 1392.

106. *Id.*

107. *Id.*

108. *Id.*

Ninth Circuit remanded the case to the district court solely to determine whether the property in question had sufficient ties to interstate commerce, and *not* to determine the validity of the migratory bird rule.[109] Therefore, the appellate court stated it would review only those factual issues decided upon remand; specifically, whether the Cargill property was sufficiently connected to interstate commerce so as to fall within the CWA's jurisdictional powers.[110]

The Ninth Circuit rejected Cargill's argument that the court should not apply the law of the case doctrine.[111] First, the court found that although the *Leslie Salt II* court's discussion of the migratory bird rule was minimal, it nevertheless addressed the issue.[112] In fact, the *Leslie Salt II* court addressed the migratory bird rule in a distinct part of the opinion and supported its holding with citations and references to pertinent case law.[113] In further support of its holding on this issue, the *Leslie Salt IV* court cited the Supreme Court's dicta in *Christianson v. Colt Industries Operating Corp.*,[114] stating "the law of the case turns on whether a court previously 'decide[d] upon a rule of law' . . . not on whether, or how well, it explained the decision."[115]

Notwithstanding the fact that most courts usually apply the law of the case as a rule, the Ninth Circuit stated it would reconsider decided questions if: (1) an intervening change of controlling authority exists; (2) new evidence has surfaced; or (3) the previous disposition was clearly erroneous and upholding it would result in

---

109. *Id.* The court noted that "this court's review should generally be limited to the issues decided on remand - the property's specific connections to interstate commerce due to migratory bird use." *Id.*

110. *Leslie Salt IV*, 55 F.3d at 1392.

111. *Id.*

112. *Id.* The court admits that "a more detailed explanation for such a significant holding might have been more illuminating." *Id.*.

113. *Id.* In *Leslie Salt II*, Judge Rymer, in a dissenting opinion, challenged the holding of the majority on the basis of its analysis of the migratory bird rule. *Leslie Salt II*, 896 F.2d 354, 356 (9th Cir. 1990). The *Leslie Salt IV* court stated that the existence of Judge Rymer's dissent proves the court adequately considered the validity of the migratory bird rule. *Leslie Salt IV*, 55 F.3d at 1392.

114. 486 U.S. 800 (1987). For a discussion of *Christianson*, see *supra* notes 24-26, 30-31.

115. *Id.* at 817. Additionally, the Ninth Circuit further rejected the adequacy argument, stating that "even summarily treated issues become the law of the case." *Leslie Salt IV*, 55 F.3d at 1392 (citing Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1135 (D.C. Cir. 1994)). Furthermore, the court has followed the law of the case even when the prior court's holding has been "cryptic and somewhat ambiguous." *Id.* (citing Hanna Boys Ctr. v. Miller, 853 F.2d 682, 687 (9th Cir. 1988)).

manifest injustice.[116] Cargill premised its arguments on the third prong of the court's test.[117] They asserted that the *Leslie Salt II* court's decision was clearly erroneous and resulted in manifest injustice.[118] The second panel of the Ninth Circuit responded by stating it would revisit the issues addressed in *Leslie Salt II* only to the extent necessary to determine whether the matters resolved in the earlier case should be reconsidered.[119] Additionally, because the law of the case applied to these claims, the second panel ruled that in order to find the migratory bird rule invalid, Cargill must show that the *Leslie Salt II* court was clearly erroneous in approving the migratory bird rule.[120]

B. Cargill's Challenge to the Validity of the Corps' Regulations

Cargill also contended that the Corps' regulations should not be used as a predicate for jurisdiction because the preamble to its 1986 CWA regulations promulgated a rule that was not subject to notice and comment.[121] Cargill noted that the Corps cited the regulation's preamble stating "waters of the United States" also includes waters which "are or would be used as habitat by other migratory birds [crossing] state lines."[122] The Corps asserted jurisdiction over Cargill's property based on this proclamation.[123]

---

116. *Leslie Salt IV*, 55 F.3d at 1393. For further discussion of the law of the case doctrine, see *supra* notes 23-31 and accompanying text.

117. *Leslie Salt IV*, 55 F.3d at 1393. For a discussion of the third prong of the court's test, see *supra* note 30 and accompanying text.

118. *Leslie Salt IV*, 55 F.3d at 1393.

119. *Id.* The Ninth Circuit will only reconsider matters if it finds that the first panel's holding was clearly erroneous. *Id.*

120. *Id.* The court noted that Cargill must not only show that the decision in *Leslie Salt II* was wrong, but rather, that the court was clearly wrong. *Id.* For further discussion of the Ninth Circuit's standard of review in *Leslie Salt II*, see *supra* note 9 and accompanying text.

121. *Leslie Salt IV*, 55 F.3d at 1393. Although the *Leslie Salt II* court did not expressly address this claim in its opinion, the second panel of the Ninth Circuit noted that the *Leslie Salt II* court was aware of this argument and the cases on which Cargill relied. *Id.* The court then pointed out that the " 'law of the case applies to 'issues decided explicitly or by necessary implication in this court's previous disposition.' " *Id.* (quoting Hanna Boys Ctr. v. Miller, 853 F.2d 682, 685 (9th Cir. 1988)). The court reasoned that the *Leslie Salt II* court's holding that migratory bird use could form a sufficient connection to interstate commerce, impliedly rejects Cargill's argument that the rule was invalid because it was not subject to notice and comment as required by the APA. *Id.*

122. *Id.* at 1394 (quoting Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,217 (1986)).

123. *Id.* The Corps applied the regulations when concluding Cargill's property fell within "waters of the United States" and thus provided jurisdiction under the CWA. *Id.*

The merit of Cargill's claim depended upon whether the migratory bird example in the preamble was an interpretive or substantive rule.[124] The Ninth Circuit stated that an interpretive rule "is one that merely explains 'what the administrative officer thinks the statute or regulation means,'" whereas a substantive rule is one imposing "'general, extra-statutory obligations pursuant to authority properly delegated by the legislature.'"[125] The second panel of the Ninth Circuit agreed with the United States, finding the rule merely interpretive and, thus, not subject to notice and comment.[126] The court agreed with the appellee's contention, and the *Leslie Salt II* court's finding that the migratory bird example's purpose was to set forth the Corps' understanding of the term "waters of the United States."[127] In support of this finding, the Court cited *Hoffman Homes, Inc. v. EPA*,[128] in which the Seventh Circuit interpreted the term "other waters" to include waters used by migratory birds.[129] The Ninth Circuit analogized *Hoffman Homes* to the instant case, concluding the migratory bird example could also be viewed as an interpretive tool.[130] Based on this analysis, and in light of the "clearly erroneous" standard of review, the court found the regulation's preamble to be merely interpretive and, therefore, declined to revisit the issue.[131]

C. Cargill's Challenge to the Reasonableness of the Migratory Bird Rule

Cargill also challenged the reasonableness of the *Leslie Salt II* court's holding that "the CWA is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds."[132] Cargill's argument rested upon the issue of whether the regulation's example of waters "'[w]hich are or would be used as habitat by other migratory birds which cross state lines'"

---

124. *Id.* at 1393.

125. *Id.* For a further discussion of substantive and interpretive rules, see *infra* notes 159-77 and accompanying text.

126. *Leslie Salt IV*, 55 F.3d at 1394. The court noted that since it is plausible to find that the preamble is an interpretive rule, *Leslie Salt II* cannot be deemed clearly erroneous on this point. *Id.*

127. *Id.* at 1393.

128. 99 F.2d 256 (7th Cir. 1993). For a discussion of *Hoffman Homes*, see *supra* notes 69-74 and accompanying text.

129. *Leslie Salt IV*, 55 F.3d at 1393-94.

130. *Id.*

131. *Id.*

132. *Id.* Cargill attempted to relitigate the *Leslie Salt II* court's holding on the migratory bird rule. *Id.*

is a reasonable interpretation of the phrase "waters of the United States."[133] The court determined that the reasonableness of the Corps' interpretation must be judged in light of the CWA's plain language, policies and legislative history.[134]

The CWA's plain language led the Ninth Circuit to conclude that Congress intended the CWA to have a broad purpose and effect.[135] The court pointed to CWA sections 1251(a)(2) and 1343(c)(1), which note that one of Congress's goals is to protect and consider "the effect of disposal of pollutants on . . . fish, shellfish and wildlife."[136] While the court acknowledged that the language never mentions isolated waters used by migratory birds,[137] it nevertheless concluded that the policy set forth in the legislative history offsets the lack of specific language.[138] The court stated that the legislative history revealed Congress's intent to "extend [the Clean Water] Act jurisdiction over waters of the United States to the maximum extent possible under the Commerce Clause."[139] The court bolstered support for its finding by citing a similar holding in a recent Seventh Circuit decision.[140]

Additionally, the court found support in the Supreme Court's analysis of the CWA.[141] In *United States v. Riverside Bayview Homes, Inc.*,[142] the Supreme Court held that it was reasonable for the Corps to exercise jurisdiction over wetlands adjacent to other waters.[143]

133. *Id.* Commenting on this issue, the court noted that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *Id.* (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985)).

134. *Leslie Salt IV*, 55 F.3d at 1394.

135. *Id.*

136. *Id.*

137. *Id.*

138. *See id.* The court concluded that since the policy of the CWA is to protect wildlife, it could plausibly be read to cover isolated waters used by migratory birds. *Id.*

139. *Leslie Salt IV*, 55 F.3d 1388, 1395 (9th Cir. 1995), *cert. denied sub nom.* Cargill, Inc. v. United States, 116 S. Ct. 407 (1995) (citing S. REP. No. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776).

140. *Id.* (quoting Rueth v. EPA, 13 F.3d 227, 231 (7th Cir. 1993)).

141. *Id.*

142. 474 U.S. 121 (1985). For further discussion of *Riverside*, see *supra* notes 56, 58, 60.

143. *Riverside*, 474 U.S. at 121; *Leslie Salt IV*, 55 F.3d at 1395. In *Riverside*, the court held that "wetlands . . . may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water." *Riverside*, 474 U.S. at 135. Further, "adjacent wetlands may 'serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing, and resting sites for aquatic . . . species'") *Id.* at 134-35 (quoting Navigation and Navigable Waters, 33 C.F.R. § 320.4(b)(2)(i) (1996)).

Although the Supreme Court never mentioned isolated, seasonal ponds in *Riverside*, the Ninth Circuit analogized the wetlands in *Riverside* to the isolated ponds in the present case.[144] The court held that, like wetlands, seasonal ponds "may have a connection to the aquatic ecosystem in their role as habitat for migratory birds."[145] In light of the broad purposes of the CWA, its legislative history and relevant case law, the court held that the *Leslie Salt II* court's holding regarding the reasonableness of the migratory bird rule was not clearly erroneous.[146] Thus, the court refused to revisit the issue.

D. Cargill's Challenge to the Constitutionality of the Migratory Bird Rule

Lastly, Cargill claimed that even if the migratory bird rule was reasonable, it exceeded Congress's Commerce Clause powers.[147] Cargill argued that the Ninth Circuit should reverse the *Leslie Salt II* court's holding that "[t]he Commerce Clause power . . . is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species."[148] The court reached its decision by referencing *Hoffman Homes*, in which the Seventh Circuit set forth the correlation between interstate commerce and the regulation of wetlands.[149] Relying on *Hoffman Homes*, the court rejected Cargill's claim, finding instead that the regulation of migratory bird habitats falls within interstate commerce.[150] The court in *Hoffman Homes* noted that "[t]hroughout North America, millions of people spend more than a billion dol-

144. *Leslie Salt IV*, 55 F.3d at 1395. The Ninth Circuit explained its analogy to the *Riverside* case, noting that "the Corps' rationale for regulating adjacent wetlands may have some application to isolated waters as well." *Id.*

145. *Id.*

146. *Id.* The court acknowledged, however, that if it were considering this issue for first time, it would delve further into the merits of Cargill's claim. *Id.* Further analysis was not proper, however, given the standard of review. *Id.* For a discussion of the standard of review, see *supra* note 9.

147. *Leslie Salt IV*, 55 F.3d at 1395. For further discussion of the migratory bird rule, see *supra* notes 62-75 and accompanying text.

148. *Leslie Salt IV*, 55 F.3d at 1395 (quoting *Leslie Salt II*, 896 F.2d 354, 360 (9th Cir. 1990)). Furthermore, the court stated that when reviewing congressional acts under the Commerce Clause, a court should be highly deferential to Congress. *Id.* (citing United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991)). Additionally, the court asserted that "[a]ctivity that is seemingly insignificant may be regulated [under the Commerce Clause] where one individual's 'contribution, taken together with that of many others similarly situated, is far from trivial.'" *Id.* (quoting Wickard v. Filburn, 317 U.S. 111, 127-28 (1942)).

149. For further discussion of *Hoffman Homes*, see *supra* notes 69-74 and accompanying text.

150. *Leslie Salt IV*, 55 F.3d at 1395-96.

lars annually on hunting, trapping and observing migratory birds. The cumulative loss of wetlands, however, has reduced populations of many bird species, limiting the ability of people to hunt, trap and observe these birds."[151]

The Ninth Circuit continued, citing the Supreme Court's holding in *Hughes v. Oklahoma*.[152] In *Hughes*, the Court asserted that state regulation of intrastate wildlife fell within the scope of the dormant Commerce Clause.[153] The Ninth Circuit interpreted the *Hughes* decision as extending Congress's Commerce Clause powers to the regulation of migratory birds.[154]

On the basis of the above analysis, the second panel of the Ninth Circuit conceded that the migratory bird rule does test the limits of the Commerce Clause and, arguably, the bounds of reason.[155] In light of the broad sweep of the Commerce Clause, however, the court held that the first panel's holding was not clearly erroneous and, thus, would not be revisited.[156]

V. Critical Analysis

The second panel of the Ninth Circuit correctly found that the migratory bird rule was reasonably within the meaning of the CWA. Nonetheless, it was clearly erroneous for the *Leslie Salt II* court to qualify the regulations as merely interpretive.[157] The migratory bird rule exceeds Congress's Commerce Clause power. While a

151. *Id.* (quoting Hoffman Homes, Inc. v. EPA, 999 F.2d 256, 261 (7th Cir. 1993)).

152. 441 U.S. 322 (1979).

153. *Leslie Salt IV*, 55 F.3d at 1396 (citing Hughes v. Oklahoma, 441 U.S. 322, 329-36 (1979)).

154. *Id.* Additionally, the court used other cases to support its contention that the Commerce Clause extends to the migratory bird rule. *Id.* In *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981), the Ninth Circuit found that a national program to protect wildlife preserves the possibility of interstate commerce in observing these animals. *Id.* at 995.

155. *Leslie Salt IV*, 55 F.3d at 1390. Specifically, the court noted that there is no evidence of any human contact with the ponds on Cargill's property. *Id.*

156. *Id.* After the Ninth Circuit determined that these past issues would not be revisited, there was a concurrence on non-related issues. *Id.* at 1396-97. The two concurring judges affirmed the holding in *Leslie Salt II* that civil penalties are mandatory under CWA section 309(d). *Id.*

157. Because the *Leslie Salt II* court was clearly erroneous in determining that regulations were interpretive, the *Leslie Salt IV* court should have revisited the issue. For a discussion of why the rules were interpretive, see *infra* notes 159-77.

nexus exists between migratory birds and interstate commerce, it is not close enough to justify a grant of jurisdiction.[158]

A. The Corps' Regulations Constitute Substantive Rules

Substantive rules are intended to "grant rights, impose obligations, or produce other significant effects on public interests . . . ."[159] Admittedly, determining whether a rule is interpretive or substantive is often a difficult task.[160] In *Tabb Lakes*, the court noted "courts generally differentiate cases 'in which an agency is merely explicating Congress'[s] desires from those cases in which the agency is adding substantive content of its own.'"[161] Furthermore, interpretive rules should be "only [narrowly and] reluctantly countenanced."[162]

The migratory bird rule[163] has a "substantial effect on the public interest" because its content creates a nexus with interstate commerce, facilitating the Corps' jurisdiction over isolated waters.[164] The Corps asserted jurisdiction over Cargill's private property on the basis of its regulations.[165] The ponds on the property were considered "waters of the United States" in that they were "water[s] which [are] used or could be used as habitat for other migratory birds."[166] Because the property does not fall within any definition contained in the CWA, without this distinction in its regulations the Corps has no basis for concluding the property qualifies as a "water

158. For a discussion of how an action must substantially affect interstate commerce in order to be regulated under the Commerce Clause, see *infra* notes 189-205 and accompanying text.

159. Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

160. *Id.* (citing American Hosp. Ass'n v. Bowen, 640 F. Supp. 453 (D.D.C. 1986), *rev'd*, 834 F.2d 1037, 1045 (D.C. Cir. 1987)) (stating distinction between substantive and interpretive rules is gray).

161. *Id.* at 728 (quoting *American Hosp. Ass'n*, 834 F.2d at 1045).

162. *Id.* at 728. For further discussion of *Tabb Lakes*, see *supra* notes 62-65 and accompanying text.

163. *See Tabb Lakes*, 715 F. Supp. at 728 (concluding memorandum "affected a change in Corps policy intended to have the full force and effect of a substantive rule").

164. *Id.* Substantive content is a standard which indicates a sufficient nexus to interstate commerce to warrant exercise of jurisdiction by Corps over isolated waters. *See Leslie Salt I*, 700 F. Supp. 476, 481-82 (N.D. Cal. 1988), *rev'd*, 896 F.2d 354 (9th Cir. 1990) (illustrating how regulations have effect on public interest).

165. *Leslie Salt I*, 700 F. Supp. at 482. The court stated that the Corps asserted jurisdiction under several subsections of its regulations. *Id.*

166. *Id.* The Ninth Circuit found that the water was used as habitat for migratory birds, and this alone would be sufficient to establish jurisdiction. *Id.*

of the United States."[167] If these regulations are interpretive, the Corps could use the preamble only as an aid, and not as a *basis* for asserting jurisdiction.[168] In the present case, however, the preamble was the sole basis used for asserting jurisdiction.[169] Because the Corps relies on the preamble as its source of power for asserting jurisdiction over private property, the language of the preamble has a substantial effect on the public interest.

Additionally, the Corps promulgated this rule in order to add substantive content to the CWA.[170] In a memorandum, the Deputy Director of the Corps stated that the migratory bird regulation "clarified for the first time the factors which are indicative of a connection to interstate commerce for purposes of the CWA."[171] The memorandum further stated that "effective immediately, all waterbodies which are or reasonably could be used by migratory birds *are* waters of the United States . . . ."[172] The affirmative statement in the memorandum asserting that these waterbodies "*are* 'waters of the United States'" accentuates the fact that this rule was substantive, and not merely interpretive.[173] The migratory bird rule did not intend to "explain existing law" like an interpretive rule, rather, it intended to "effect a change in existing law" like a substantive rule.[174] The rule, therefore, provided another means

167. For a list of types of waters over which Corps can assert jurisdiction, see *supra* note 53. The only definition which Cargill's property falls under is found in 33 C.F.R. § 328.3(a)(3)(i) which states that waters can be those "[w]hich are or could be used by interstate or foreign travelers for recreational or other purposes." Navigation and Navigable Waters, 33 C.F.R. § 328.3(a)(3)(i) (1996). The Corps set forth the migratory bird rule pursuant to this subsection. *See Leslie Salt IV*, 55 F.3d 1388, 1394 (9th Cir. 1995), *cert. denied sub nom.* Cargill, Inc., v. United States, 116 S. Ct. 407 (1995) (explaining Corps' rationale for interpreting Act as granting jurisdiction). Cargill's property does not meet the terms of any other definition. *Id.*

168. *See Tabb Lakes*, 715 F. Supp. at 728. If these rules were merely interpretive, they would be "instructional" rather than determinative. *Id.*

169. *See Leslie Salt IV*, 55 F.3d at 1388. In *Tabb Lakes*, the United States District Court for the Eastern District of Virginia stated that in a situation identical to Cargill's, "the Corps relied on the memorandum [regulations] in reaching its jurisdiction determination." *Tabb Lakes*, 715 F. Supp. at 728.

170. *See Tabb Lakes*, 715 F. Supp. at 728 (stating memorandum affected a change in Corps policy intending to have full force and effect of substantive rule).

171. *Id.*

172. *Id.* (emphasis added).

173. *See Tabb Lakes*, 715 F. Supp. at 728. The use of the terminology "*are* waters of the United States" as opposed to "*may be* waters of the United States" shows the Corps' intent that the rule be determinative, not just instructional. *Id.* (emphasis added.) As the *Tabb Lakes* court stated, the change in the Corps policy was "intended to have the full force and effect of a substantive rule." *Id.*

174. *See id. See also* American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (holding that typical example of substantive rule was use by parole

by which the Corps could assert jurisdiction.[175] Consequently, the migratory bird rule should be considered a substantive rule and deemed void for failing to comply with the notice and comment requirements of the Administrative Procedure Act.[176] This would effectively strip the Corps' basis for asserting jurisdiction over the Cargill property.[177] The Ninth Circuit erred in finding the regulation merely interpretive. Rather, the court should have found the *Leslie Salt II* court's determination clearly erroneous and revisited the issue.

B. The *Leslie Salt IV* Court was Reasonable in Upholding the Migratory Bird Rule

Contrary to Cargill's contention in *Leslie Salt II*, the court properly upheld the reasonableness of the migratory bird rule.[178] In its analysis, the Ninth Circuit looked to the CWA's policy objectives and legislative history in determining whether Congress intended the CWA to have a scope broad enough to encompass the migratory bird rule.[179]

The CWA's legislative history expresses Congressional intent that the term "navigable waters" be given the broadest meaning constitutionally permissible.[180] Case law further supports this contention.[181] In *Stoeco Development, Ltd. v. Department of the Army Corps*

board of guidelines that established crucial factors in determining parole eligibility and thus were critical to parole decision). The Corps regulations can be analogized to the parole guidelines in that both are crucial in determining whether a certain standard has been met. *See id.*

175. *See Tabb Lakes*, 715 F. Supp. at 729 (stating memorandum intended to be binding and to take effect immediately).

176. *See id.* In *Tabb Lakes* the court determined that because the regulations were substantive, yet not subject to notice and comment, it must "set aside any agency action found to be without observance of procedure required by law." *Id.* (citing 5 U.S.C. § 706(2)(D) (1994)).

177. *See id.* (setting aside agency action because memorandum not excepted from notice and comment requirement).

178. *See Leslie Salt IV*, 55 F.3d 1388, 1394 (9th Cir. 1990), *cert. denied sub nom.* Cargill, Inc. v. United States, 116 S. Ct. 407 (1995) (stating fact that CWA evinces broad congressional purpose supports Corps' interpretation).

179. *Id.* For a discussion of the court's analysis of the CWA's policy objectives and legislative history, see *supra* notes 134-46 and accompanying text.

180. H.R. REP. NO. 92-911 (1972); S. REP. NO. 92-1236 (1972) *reprinted in* 1972 U.S.C.C.A.N. 3776, 3833. For a discussion on the interpretation of "navigable waters," see *supra* notes 52-58 and accompanying text.

181. *See* United States v. Akers, 651 F. Supp. 320, 322 (E.D. Cal. 1987) (stating Congress intended waters to be defined as broadly as possible in order to provide the environment with maximum degree of protection possible); United States v. Ciampitti, 583 F. Supp. 483, 491 (D.N.J. 1984) (stating term "navigable waters" not limited to traditional tests of navigability); National Resources Defense Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975) (stating broad definition of "water

of Engineers,[182] the District Court for the District of New Jersey interpreted the CWA's legislative history as indicating that "Congress intended the CWA to assert 'federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution.'"[183]

Additionally, Congress specifically set forth a statement of legislative purpose, within the CWA, supporting a broad interpretation of its jurisdictional scope.[184] Congress stated that its goals were not only to protect the nation's waters but also its wildlife.[185] These broad, encompassing purposes support the conclusion that Congress intended a capacious reading of the Act's scope.[186] Thus, in considering both the legislative history and the statutory language of the CWA, the Ninth Circuit correctly determined that the *Leslie Salt II* court was not erroneous in finding the migratory bird rule consistent with the CWA's direction and purpose.[187]

C. The Migratory Bird Rule Exceeds Congress's Commerce Clause Powers

The *Leslie Salt IV* court improperly reaffirmed the first panel of the Ninth Circuit's holding that "[t]he Commerce Clause power . . .

---

of the United States" intends assertion of jurisdiction to maximum extent of Commerce Clause); Quivera Mining Co. v. EPA, 765 F.2d 126, 129-30 (10th Cir. 1985) (noting Congress intended to regulate discharges affecting interstate commerce in any way); United States v. Tull, 769 F.2d 182, 184 (4th Cir. 1985), *rev'd in part*, 481 U.S. 412 (1987) (stating Congress intended broadest possible constitutional interpretation). For a discussion of case law supporting the contention that the scope of the CWA should be broad, see *supra* notes 141-45 and accompanying text.

182. 701 F. Supp. 1075 (D.N.J. 1988). For a discussion of *Stoeco*, see *supra* note 55.

183. *Id.* (quoting United States v. Ciampitti, 583 F. Supp. 483, 491 (D.N.J. 1984) (quoting National Resources Defense Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975))).

184. *See infra* text accompanying notes 185-86.

185. CWA § 101(a)(2), 33 U.S.C. § 1251(a)(2) (1994). In its entirety, the subsection states that "it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." *Id.*

186. For support that Congress intended a broad scope for the CWA, see *supra* notes 55-56 and accompanying text. The Supreme Court also seems to have adopted this viewpoint. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-35 (1985), the Court determined that it was reasonable for the Corps to assert jurisdiction over adjacent wetlands. *Id.* By determining that adjacent wetlands may be considered "waters," the Court embraced a very broad interpretation of the term "waters." *See id.* It reasonably follows that the Court has determined that the scope of the CWA should be broad. *See id.*

187. For an analysis of why the *Leslie Salt II* court was not erroneous in holding that the migratory bird rule is reasonable under the CWA, see *supra* notes 178-87 and accompanying text.

is broad enough to extend the Corps['] jurisdiction to local waters which may provide habitat to migratory birds and endangered species."[188] In so holding, the Ninth Circuit overextended the reach of Congress's Commerce Clause powers. In order for the Corps to assert jurisdiction it must show the subject property either involves or substantially affects interstate commerce.[189] As the second panel of the Ninth Circuit noted, the *Leslie Salt II* court used the migratory bird rule to satisfy this requirement, thus creating a nexus between the Newark Coyote property and interstate commerce.[190] Noting people cross state lines to observe, watch and hunt these birds, the Ninth Circuit concluded that the destruction of wetlands could hinder interstate travel.[191] Thus, the Ninth Circuit ruled that the protection of the migratory birds' habitat is within Congress's domain.[192] This holding, however, was erroneous because while migratory birds may have some incidental effect on interstate commerce, they do not have the "substantial effect" required by the Supreme Court's decisions in *Wickard*[193] and *Hodel*.[194]

In the present case, the Corps presented only a tenuous argument that the potential use by migratory birds can substantially affect interstate commerce.[195] Realistically, the effects on interstate commerce would be minimal.[196] The *Leslie Salt II* and *Leslie Salt IV* courts never actually addressed how migratory birds would substan-

188. *Leslie Salt IV*, 55 F.3d 1388, 1395 (9th Cir. 1995), *cert. denied sub nom.* Cargill, Inc. v. United States, 116 S. Ct. 407 (1995) (quoting *Leslie Salt II*, 896 F.2d 354, 360 (9th Cir. 1990)).

189. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (holding that activity must substantially affect interstate commerce for Congress to regulate activity). For a discussion of *Hodel*, see *supra* notes 42-45 and accompanying text.

190. *See Leslie Salt IV*, 55 F.3d at 1392 (discussing how first panel of Ninth Circuit created nexus between isolated ponds and interstate commerce where waters may provide habitat for migratory birds).

191. *Id.* (citing Hoffman Homes, Inc. v. EPA, 999 F.2d 256, 261 (7th Cir. 1993)).

192. *Id.* at 1394. The court noted "the Act's policy of protecting wildlife could plausibly be read to stretch this far." *Id.*

193. For a discussion of *Wickard*, see *supra* notes 38-39 and accompanying text.

194. For a discussion of *Hodel*, see *supra* notes 42-45 and accompanying text. For a discussion of the "substantial effect" test, see *supra* notes 44-47 and accompanying text.

195. *See Leslie Salt IV*, 55 F.3d at 1394-96. Nothing in the CWA or its legislative history demonstrates a correlation between migratory birds and interstate commerce. *See* CWA § 101, 33 U.S.C. § 1251; H.R. REP. NO. 911, 92d Cong., 2d sess. 131 (1972); S. REP. NO. 1236, 92d Cong., 2d sess. 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3833.

196. *See* Leman, *supra* note 35, at nn. 175-82. Even if the effects of migratory birds were shown to be more than minimal, no documentation exists which raises it to the level of "substantially affecting" it. *See* Hoffman Homes, Inc. v. EPA, 999

tially affect interstate commerce.[197] Rather, the courts merely offered the possibility that interstate travelers could be affected.[198] This remote possibility, however, should not be determinative of whether migratory birds substantially affect interstate commerce.[199]

The Supreme Court must set a limit on the amount of power Congress has to invade individual rights and infringe on personal property.[200] If the Court determines that the migratory bird rule "substantially affects" interstate commerce, where will the limit be?[201] In *Wickard* and *Hodel*, the Court found substantiality as the crucial factor in limiting Congress's Commerce Clause power.[202]

F.2d 256, 259 (7th Cir. 1993) (stating mere possibility of migratory bird use insufficient to rely on Commerce Clause in applying CWA).

197. *See Leslie Salt IV*, 55 F.3d at 1394-96.

198. For a description of the possibility of migratory bird use, see *supra* text accompanying note 151.

199. The court in *Tabb Lakes* commented that it had "grave doubts that a property now so used, or seen as an expectant habitat for some migratory birds, can be declared to be such a nexus to interstate commerce as to warrant . . . Corps jurisdiction." Tabb Lakes Ltd. v. United States, 715 F. Supp. 726, 729 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

200. Leman, *supra* note 35, at 1266 (citing NLRB v. Jones & McLaughlin Steel Corp., 301 U.S. 1, 37 (1937)). Matters would be different if isolated wetlands were mentioned in the language of the CWA or in the legislative history. In *Hodel*, the Supreme Court found that the effect on interstate commerce was minuscule. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277-80 (1981). The court, however, deferred to congressional findings which showed Congress explicitly found the activity to have a substantial effect on interstate commerce. *Id.* In *Leslie Salt IV*, however, the court never mentioned congressional findings regarding the migratory bird rule and its potential effect on interstate commerce. *See Leslie Salt IV*, 55 F.3d at 1395. *See also* S. REP. No. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822 (evidencing lack of discussion of migratory bird rule's impact on interstate commerce).

The difference between rules and statutes where Congress has made formal or informal findings of an activity's substantial effect on interstate commerce and those which have no congressional findings is large. *See* Katzenbach v. McClung, 379 U.S. 314, 299-300 (1964). When congressional findings explain how an activity substantially affects interstate commerce, the Supreme Court has never invalidated legislation on the basis that it extends beyond the scope of Congress's commerce powers. Leman, *supra* note 35, at n.163. Without these congressional findings, the Supreme Court has stated that "in cases where the substantial effect is tenuous or difficult to perceive, the absence of such findings could result in the invalidation of a law ." Lopez v. United States, 2 F.3d 1342, 1363-64 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

201. The Ninth Circuit recognized as much when it stated: "[t]he migratory bird rule certainly tests the limits of Congress['s] commerce powers and, some would argue, the bounds of reason." *Leslie Salt IV*, 55 F.3d at 1396.

202. For a discussion of *Hodel*, see *supra* notes 42-45 and accompanying text. For a discussion of *Wickard*, see *supra* notes 38-39 and accompanying text. In *Lopez*, the Court determined that the Commerce Clause basis for legislating must be limited to activities that "substantially affect" interstate commerce. *See Lopez*, 2 F.3d at 1362. The Court argued that without this threshold, the existence of intrastate commerce would be threatened. *Id.*

By finding that migratory birds substantially affect interstate commerce, the Ninth Circuit failed the Supreme Court's test, thus, transcending the limits of reason.[203]

Because the court never addressed the dispositive issue of whether the activity substantially affected interstate commerce, the *Leslie Salt IV* court's decision to validate the migratory bird rule under the Commerce Clause was clearly erroneous.[204] By finding the migratory bird rule permissible under the Constitution without any proof that migratory birds could substantially affect interstate commerce, the court disregarded the restraints of the Commerce Clause.[205]

VI. IMPACT: THE CWA'S SEEMINGLY LIMITLESS BOUNDARIES

The impact of *Leslie Salt IV* is potentially great. *Leslie Salt IV* was the first federal decision to specifically address the CWA, the Commerce Clause and isolated waters.[206] Effectively, the Ninth Circuit's decision gives Congress and the Corps unlimited jurisdiction under the CWA.[207] By granting jurisdiction to the Corps over man-made, isolated, seasonal waters, the Ninth Circuit gives a broad interpretation to the Commerce Clause.[208] As a result, the *Leslie Salt IV* court strips state-given and personal property rights in the name of the environment.[209]

While the outcome may be virtuous in that it benefits the environment, granting such power to the federal government so freely

203. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (setting forth test for finding whether action substantially affects interstate commerce). For a discussion on why it is doubtful that migratory birds "substantially affect" interstate commerce, see *supra* notes 188-99 and accompanying text.

204. *See Leslie Salt IV*, 55 F.3d at 1395-96.

205. For a discussion on why the migratory bird rule is not constitutionally permissible, see *supra* notes 188-205 and accompanying text.

206. Leman, *supra* note 35, at 1256.

207. For a discussion of why this holding gives the Corps virtually unlimited jurisdiction in the Ninth Circuit, see *supra* notes 200-03 and accompanying text.

208. The Ninth Circuit could have required a human activity component in order for the activity to fall under the Commerce Clause. *See* Hoffman Homes, Inc. v. EPA, 99 F.2d 256, 259 (7th Cir. 1993). This option would have required that federal regulations could only apply to those "waters" that have an actual economic connection to interstate commerce. *Id.* A second option would have been to limit the applicability of the migratory bird rule to those "waters" which are actually used by migratory birds, not just potentially used. *Id.*

209. *See Hoffman Homes*, 99 F.2d at 262 (stating there is no need to "interfere with private ownership based on what appears to be no more than a well intentioned effort . . . to expand government control beyond reasonable or practical limits").

is disturbing.[210] The Commerce Clause has been stretched beyond the bounds of reason in order to create the crucial nexus between interstate commerce and the regulated activity needed to acquire CWA jurisdiction.[211] The purpose of the CWA is to protect and restore the purity of our nation's waters, but this purpose should not be achieved at the expense of the Commerce Clause's integrity.[212]

Courts must begin to limit the federal government's power over the regulation of privately owned waters.[213] Hopefully, other courts will realize the repercussions of granting virtually unlimited power to the federal government, disregard precedent and rule accordingly. If the danger is not realized and other circuit courts follow the Ninth Circuit's lead, our nation could be headed to a time when the Commerce Clause has little meaning and the powers of the federal government are seemingly limitless.[214]

Marni A. Gelb

210. The regulation of wildlife is a function traditionally allocated to the state. Jack R. Nelson, *Palila v. Hawaii Department Of Land and Natural Resources: State Governments Fall Prey to the Endangered Species Act of 1973*, 10 ECOLOGY L.Q. 2 (1982). However, in its allowance of Corps jurisdiction over an activity which arguably does not affect interstate commerce, "the *Leslie Salt* approach [did] not allow for judicial limits on the use of the Commerce Clause [and] expand[ed] federal power at the expense of the states." Leman, *supra* note 35, at 1205.

211. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., U.S. 264 (1981) (Rehnquist, J. concurring) (contending Court's upholding of federal relation of surface mining practices stretched Commerce Clause to "nth degree"). All activities have at least a theoretical effect on interstate commerce. Leman, *supra* note 35, at 1265 (citing United States v. Lopez, 2 F.2d 1342 (5th Cir. 1993) *aff'd*, 115 S. Ct. 1624 (1995)). Nevertheless, it is the task of the courts to enforce and apply limitations on what constitutes actual interstate commerce. *Id.* at 1265.

212. *See* CWA § 101, U.S.C. § 1251 (1994) (providing no language regarding man-made, isolated wetlands). For a discussion of ways to protect the environment without disrupting the distinction between local and federal government and Commerce Clause integrity, see *supra* note 208.

213. The effects of the *Leslie Salt* holdings on private landowners are also far-reaching and invasive. Larry R. Bianucci & Rew R. Goodenow, *The Impact of Section 404 of the Clean Water Act on Agricultural Land Use*, 10 U.C.L.A. J. ENVTL. L. & POL'Y 41, 65 (1991). After *Leslie Salt*, the productive activities of a land owner on his own land can potentially be chilled by an activity which has a negligible effect on both interstate commerce and water quality. *Id.* at 51. As one commentator notes, "the varying interpretations of the CWA could create nightmares for landowners." *Id.* at 65.

214. The breadth of *Leslie Salt* is illustrated in the "Glancing Duck" theory. Bianucci, *supra* note 213, at 65. The theory is as follows: A duck, while flying over land, looks down to the ground and notices stagnant water, or even saturated ground. *Id.* The duck then contemplates landing in that area. *Id.* According to *Leslie Salt*, the duck's glance at these isolated waters would affect interstate commerce substantially enough to warrant Corps jurisdiction under the Commerce Clause. *Id.* If this scenario seems unlikely in its Commerce Clause implications, it is not. Indeed, it has become the practice of the Corps to not even "consider

interstate commerce as a possible restriction to regulation." William L. Want, LAW OF WETLANDS REGULATION § 4.05[1] 4-14 (1990). Lawsuits have been instituted on the grounds that the Corps' practice of restricting jurisdiction over certain wetlands due to a lack of effect on interstate commerce was illegal. *See* National Wildlife Fed'n v. Laubscher, 662 F. Supp. 548 (S.D. Tex. 1987). The issue of whether the Corps rightfully exercises jurisdiction over isolated wetlands having little or no effect on interstate commerce is merely a "dead letter." Bianucci, *supra* note 213, at 47.