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# Surface Waters and Farmers: Sharing Land Management with the Federal Government

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## **SURFACE WATERS AND FARMERS: SHARING LAND MANAGEMENT WITH THE FEDERAL GOVERNMENT**

Charles M. Carvell<sup>†</sup> and Jennifer L. Verleger<sup>††</sup>

I.	INTRODUCTION.....	1069
II.	PRAIRIE POTHoles: PROMINENCE, PURPOSE, AND PROBLEMS.....	1071
III.	FEDERAL WETLAND EASEMENTS: A FEDERAL PROPERTY INTEREST IN PRIVATE LAND .....	1075
IV.	THE MIGRATORY BIRD TREATY ACT AND ITS REACH INTO FARMLAND MANAGEMENT .....	1083
V.	ALL PATHS LEAD TO “WATERS OF THE UNITED STATES” .....	1086
	A. Sackett v. EPA.....	1087
	B. United States Army Corps of Engineers v. Hawkes Co.....	1089
	C. <i>The New (Pending) WOTUS Rule</i> .....	1091
	D. <i>Controversies and Courtrooms</i> .....	1093
VI.	THE RACCOON RIVER LITIGATION: A NEW CHALLENGE FOR FARMLAND DRAINAGE.....	1100
VII.	CONCLUSION .....	1104

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## I. INTRODUCTION

*Often bound up in controversy, wetlands are argued and fought over, coveted or loathed, depending on your perspective of what is 'appropriate' land use. Any way you look at it, the topic is attracting lots of attention.*<sup>1</sup>

Farmers are accustomed to being buffeted by forces beyond their control, such as pests, drought, floods, tornados, rainfall that comes too early or too late, or frost that makes a surprise encore appearance in the spring or a too-early arrival in autumn. But, as farmers, they have signed up for what nature provides and accept it as part of rural life. They can be troubled by diesel prices, commodity prices, interest rates, and trade policy, but absorb such challenges with stoicism. Some farmers face additional challenges because their land is saturated and poorly drained or because it contains wetlands that interfere with farming, yet the land provides a rich ecosystem, primarily for waterfowl.<sup>2</sup> The tension between environmental interests and improving agricultural productivity by drainage has existed for decades.<sup>3</sup> This tension is examined in this article by providing an overview of wetlands and their importance<sup>4</sup> and then discussing four issues in which federal environmental law can play a pronounced role in a farmer's land management decisions.<sup>5</sup>

The first issue concerns the federal government's acquisition of thousands of easements to preserve wetlands as waterfowl habitat.<sup>6</sup> While the number of easements managed by the U.S. Fish & Wildlife Service is known, the acreage covered is less certain, leading to disputes with farmers over the geographic scope of the

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1. PAUL REZENDES & PAULETTE ROY, WETLANDS: THE WEB OF LIFE 8 (1996).

2. *See infra* Part II.

3. *See infra* Part II.

4. *See infra* Part II. The federal government defines wetlands as: "[A]reas that are inundated or saturated by surface or groundwater 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." 33 C.F.R. § 328.3 (2015).

5. *See infra* Parts III–VI.

6. *See infra* Part III.

easements.<sup>7</sup> Further, wetland easements issued by landowners supply the Fish & Wildlife Service with “bootstrapping” opportunities, allowing it to assert regulatory interests over not only the protected wetland, but also over the landowner’s activities on land adjacent to the wetland as well as activities on a neighbor’s land the Fish & Wildlife Service believe adversely affect its wetland easement.<sup>8</sup>

The second issue is the reach of the Migratory Bird Treaty Act of 1918, which is clearly directed at hunters and poachers and prohibits killing, taking, and capturing migratory birds.<sup>9</sup> However, what is less clear is the 1918 Act’s application to indirect adverse effects on migratory birds, specifically actions by farmers that may affect bird habitat.<sup>10</sup> While courts have not specifically addressed this issue, some commentators believe federal officials could rely on the 1918 Act to prohibit draining or filling wetlands.<sup>11</sup>

The third issue concerns the “waters of the United States” (WOTUS) rule. What a farmer does with water on his or her land can affect others because water travels, and to ensure the effects are largely benign, the U.S. Environmental Protection Agency (EPA) and the U.S. Corps of Engineers (Corps) recently adopted the WOTUS rule that grants these agencies greater authority to regulate private property.<sup>12</sup> Depending on who you ask, the rule is a huge land grab, does not go far enough, or merely clarifies the scope of Clean Water Act and U.S. Supreme Court decisions interpreting the Act. Arguments of those filing suits challenging the EPA’s and the Corps’ authority to enact the rule had enough

7. *E.g.*, *United States v. Johansen*, 93 F.3d 459 (8th Cir. 1996).

8. *E.g.*, *Montero v. Babbitt*, 921 F. Supp. 134, 139 (E.D.N.Y. 1996); Murray G. Sagsveen & Matthew A. Sagsveen, *Waterfowl Production Areas: An Updated State Perspective*, 76 N.D. L. REV. 861, 868, 872–78 (2000).

9. *See infra* Part IV; Migratory Bird Treaty Act, ch. 128, § 2, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–12).

10. *See infra* Part IV.

11. Collette L. Adkins Giese, *Spreading Its Wings: Using the Migratory Treaty Bird Act to Protect Habitat*, 36 WM. MITCHELL L. REV. 1157, 1170 (2010); Erin R. Flanagan, *It’s the “Supreme Law of the Land”: Using the Migratory Bird Treaty Act to Protect Isolated Wetlands Left High and Dry* by SWANCC, 22 PACE ENVTL. L. REV. 175, 179 (2005).

12. *See* Clean Water Rule: Definition of “Waters of the United States,” 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116–17, 122, 230, 232, 300, 302, 401; *see also* CLAUDIA COPELAND, CONG. RESEARCH SERV., R43455, EPA AND THE ARMY CORPS’ RULE TO DEFINE “WATERS OF THE UNITED STATES” 6 (2016), <https://www.fas.org/sgp/crs/misc/R43455.pdf>.

merit to cause the Sixth Circuit Court of Appeals and a district court in North Dakota to enjoin the rule's implementation pending resolution of those challenges.<sup>13</sup> This issue is currently taking form, and if the form sought by the federal government is attained, farmers will be subject to even greater federal agency involvement in land management decisions.<sup>14</sup>

The fourth issue deals with potential liability farmers may owe downstream interests for moving water off poorly drained land.<sup>15</sup> In a lawsuit filed in 2015, the city of Des Moines claims that agricultural drainage of land many miles from Des Moines increases nitrate levels in the river that supplies some of the city's drinking water.<sup>16</sup> Nitrate removal to purify water can be expensive, and Des Moines does not believe it should have to pay the entire cost when high nitrate levels, according to the city, are caused by agricultural drainage.<sup>17</sup> The city relies on the Federal Clean Water Act, which regulates point sources of pollution, to seek a court order requiring substantial reductions in nitrate discharges by Iowa farmers.<sup>18</sup>

As these four issues reveal, landowners, particularly farmers, with surface water or saturated lands face ongoing challenges in maintaining control over how their land is managed and used, and depending on how these issues are ultimately resolved, could face a burdensome regulatory regime.

## II. PRAIRIE POTHOLES: PROMINENCE, PURPOSE, AND PROBLEMS

During the last Ice Age, glaciers carved and sculpted their way across what is now the upper Midwest. When those glaciers retreated over 10,000 years ago, they left behind myriad isolated shallow depressions in the landscape called glacial potholes.<sup>19</sup>

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13. See *infra* Section V.D.

14. See *infra* Part V.

15. See *infra* Part VI.

16. Complaint, Bd. of Water Works Trs. v. Sac Cty. Bd. of Supervisors, No. 5:15-cv-04020 (N.D. Iowa Mar. 16, 2015), 2015 WL 1191173 [hereinafter Des Moines Complaint]; see *infra* notes 232–48, 257–58 and accompanying text.

17. See Des Moines Complaint, *supra* note 16, ¶¶ 8, 10.

18. *Id.* ¶¶ 159–86.

19. See, e.g., T.E. DAHL, U.S. FISH & WILDLIFE SERV., STATUS AND TRENDS OF PRAIRIE WETLANDS IN THE UNITED STATES 1997 TO 2009, at 6 (2014), <http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Prairie-Wetlands-in-the-United-States-1997-to-2009.pdf>.

Shaped like shallow pots, they are also known as kettles, kettle lakes, or, here on the prairie, prairie potholes.<sup>20</sup> Prairie potholes stretch across a wide swath, pockmarking the land in North Dakota, South Dakota, and Minnesota, but also stretching into central Iowa and northern Montana.<sup>21</sup> A single square mile in this region can often have as many as seventy or eighty potholes, small depressions three to four feet deep.<sup>22</sup> This area is the country's "principal waterfowl breeding grounds . . ."<sup>23</sup> These areas are preferred by some migratory birds as ideal habitat to raise offspring because the potholes are isolated and produce aquatic food, the essential food for breeding ducks and their offspring.<sup>24</sup>

Due to the area's geology, prairie potholes are rarely connected to natural surface drains.<sup>25</sup> Instead, the potholes receive water from snowmelt, groundwater connectivity, and precipitation.<sup>26</sup> Because their water sources are typically limited, the length of time a prairie pothole holds water can range from temporary to semi-permanent.<sup>27</sup> This causes the potholes and the region's landscape to be highly variable depending on climatic conditions.<sup>28</sup> Wet summers and winters with an abundance of snow leave the spring landscape full of water. Continued wet weather may cause prairie potholes to "fill-and-spill," causing them to interconnect with one another or spill to larger water bodies.<sup>29</sup> Conversely, continued drought may cause prairie potholes to dry up, leaving the countryside covered in literal dustbowls.

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20. *Kettles*, BRITANICA.COM (last updated Oct. 27, 2014), <http://www.britannica.com/science/kettle>.

21. See U.S. FISH & WILDLIFE SERV., ANNUAL REPORT OF LANDS 12 (2014) [hereinafter ANNUAL REPORT OF LANDS], [http://www.fws.gov/refuges/land/PDF/2014\\_AnnualReport.pdf](http://www.fws.gov/refuges/land/PDF/2014_AnnualReport.pdf).

22. *North Dakota v. United States*, 460 U.S. 300, 304 n.4 (1983) (quoting *United States v. Albrecht*, 496 F.2d 906, 908–09 (8th Cir. 1974)).

23. *Id.* at 304.

24. *United States v. Johansen*, 93 F.3d 459, 461 n.1 (8th Cir. 1996).

25. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054-01, 37071 (June 29, 2015); see also 33 C.F.R. § 328.3(b)(7)(i).

26. See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37076; see also 33 C.F.R. § 328.3(b)(7)(i).

27. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37076; DAHL, *supra* note 19, at 8.

28. Clean Water Rule: Definition of "Waters of the United States" 80 Fed. Reg. at 37071; see also 33 C.F.R. § 328.3(b)(7)(i).

29. Clean Water Rule: Definition of "Waters of the United States" 80 Fed. Reg. at 37071–72; see also 33 C.F.R. § 328.3(b)(7)(i).

These “regional treasures”<sup>30</sup> have several areas of functional importance. They provide a home and breeding ground for eighteen species and over fifty percent of North America’s migratory waterfowl,<sup>31</sup> ninety-six species of songbirds, thirty-six species of water birds, seventeen species of raptors, and five species of upland game birds.<sup>32</sup> They also provide water and forage for livestock.<sup>33</sup>

In addition to the wildlife benefits, the prairie potholes’ impact on hydrology is generally of even greater impact on human life—both positive and negative. On the positive side, potholes “serve as natural sponges,” holding excess water on the landscape and reducing downstream flooding.<sup>34</sup> They provide important sources of groundwater to recharge aquifers.<sup>35</sup> On the negative side—at least to farmers—wet areas are not only an inconvenience in operating farm machinery, but also an economic “sponge.” Landowners often have expenses related to the presence of wetlands on their lands in the form of taxes or drainage costs, but this is without offsetting income production. Additionally, if a spring is dry and crops are planted to the edge of the pothole, a wet summer or fall will expand the pothole, drowning the crop.

Consequently, farmers have constructed diversion ditches to deprive wetlands of water, dug ditches to drain wetlands, and installed drain tiles to reduce the water table.<sup>36</sup> When the United States was founded, it had about 215 million acres of wetlands, which included not just prairie potholes, but also coastal, lacustrine, and riverine wetlands, as well as bogs and fens.<sup>37</sup> But fewer than 99 million acres of wetlands remain today.<sup>38</sup> Of course,

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30. Gina McCarthy, Adm’r, U.S. Evtl. Prot. Agency, Remarks to the National Farmers Union: As Prepared (Mar. 16, 2015), <http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/1a067fd006d60d4585257e0a005ed14e!OpenDocument>.

31. *Prairie Potholes*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/wetlands/prairie-potholes> (last visited May 28, 2016).

32. *Prairie Potholes*, NAT’L WILDLIFE FED’N, <http://www.nwf.org/Wildlife/Wild-Places/Prairie-Potholes.aspx> (last visited May 28, 2016).

33. *Id.*

34. *Id.*

35. *Id.*

36. *See, e.g.*, DAHL, *supra* note 19, at 10.

37. WILLIAM A. NIERING, WETLANDS OF NORTH AMERICA 15 (1991).

38. *Id.* There is uncertainty about wetland acreage. For example, a 1976 congressional report stated there were originally about 127 million wetland acres

not all wetland losses are due to farmers, but in the prairie pothole region where originally there were about 17 million acres of wetlands,<sup>39</sup> about fifty percent have been drained since the turn of the twentieth century,<sup>40</sup> and it is likely that most of these former wetlands are now agricultural land.<sup>41</sup>

For many years, draining wetlands was federal policy<sup>42</sup> and encouraged and facilitated by state law.<sup>43</sup> An Iowa statute states that draining wetlands is “presumed to be a public benefit,”<sup>44</sup> and the state’s drainage laws—like many other state laws—were enacted “mainly to render wetlands tillable for agricultural purposes.”<sup>45</sup> If Iowa’s “low and swampy lands” could not “be reclaimed,” that would, according to the Iowa Supreme Court, produce “incalculable mischief.”<sup>46</sup> The national policy to drain rather than

in the lower forty-eight states, and by 1955, this amount had been reduced to about 74 million acres, and only 22.5 million were of “significant value in the conservation of migratory waterfowl.” S. REP. NO. 94-594 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 271. However, a 1997 U.S. Fish & Wildlife Service report states “the conterminous United States has lost approximately 53% of its estimated original 221 million acres of wetlands . . . .” Flanagan, *supra* note 11, at 206 n.18 (citing THOMAS DAHL, STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES 1986 TO 1997 (1997)).

39. See DAHL, *supra* note 19, at 32.

40. U.S. Fish & Wildlife Serv., *New Report on Prairie Potholes Announced*, OPEN SPACES BLOG (July 1, 2014), <http://usfws.tumblr.com/post/90475376839/new-report-on-prairie-potholes-announced>. According to the Fish & Wildlife Service, about 6200 acres of prairie potholes are lost annually. *Id.*

41. See THOMAS E. DAHL, U.S. FISH & WILDLIFE SERV., STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES 1986 TO 1997, at 45 (1997), <http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-1986-to-1997.pdf>.

42. The Swamp and Overflowed Lands Act, ch. 84, 9 Stat. 519 (1850), required the Secretary of the Interior to convey swamp and overflowed lands to states requesting title to such lands. The purpose of the Act was “to enable the several states . . . to construct the necessary levees and drains to reclaim the lands . . . .” *Wright v. Roseberry*, 121 U.S. 488, 496 (1887).

43. For example, a Missouri statute states landowners may, for “sanitary or agricultural purposes,” “drain[] or protect[]” land covered by a wetland, and in doing so may construct a ditch or levy “through or across any tract or parcel of land situate[d] between such land to be drained and protected” and any body of water or depression or other kind of outlet. MO. ANN. STAT. § 244.010 (West, Westlaw through Feb. 18, 2016).

44. IOWA CODE ANN. § 468.2(1) (West, Westlaw through 2015 Reg. Sess.).

45. *Polk Cty. Drainage Dist. Four v. Iowa Nat. Res. Council*, 377 N.W.2d 236, 241 (Iowa 1985).

46. *Dorr v. Simmerson*, 103 N.W. 806, 807 (Iowa 1905).



preserve wetlands is exemplified by a 1922 Oregon Supreme Court opinion: “The law of this state favors the drainage of land . . . . The interest of the people . . . demands that as far as possible all the swamps, marshes, swales, and wet land that can be successfully and conveniently drained and reclaimed should be permitted so to be treated . . . .”<sup>47</sup>

As with many land use issues, the benefits and drawbacks of prairie potholes cause tension between the competing interests of conservation and agricultural productivity.<sup>48</sup> In efforts to preserve waterfowl habitat, the Fish & Wildlife Service has acquired thousands of easements.<sup>49</sup> This has led to problems interpreting the geographic scope of those easements, and may give—to the surprise of landowners—the federal government some regulatory control over land adjacent to or near wetlands protected by federal easements.<sup>50</sup> Though not all wetlands are protected by a federal property interest, nonetheless, efforts to drain or fill wetlands may fall within federal oversight under the Migratory Bird Treaty Act of 1918 or the EPA and Corps’ new WOTUS rule.<sup>51</sup> Additionally, if Des Moines’ lawsuit against drainage districts succeeds, this could have a chilling effect on efforts to improve agricultural productivity through drainage.<sup>52</sup> These issues are explored in the following sections.

### III. FEDERAL WETLAND EASEMENTS: A FEDERAL PROPERTY INTEREST IN PRIVATE LAND

In 1995, the Johansen farm in Steele County, North Dakota had a wet spring.<sup>53</sup> The spring was wetter than usual anyway, and the Johansen’s land is in the heart of the nation’s “duck factory,” an area that stretches from central Iowa through Minnesota, South Dakota, North Dakota, Montana, and then into Canada and what was “once the largest expanse of grasslands and small wetlands on earth.”<sup>54</sup>

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47. Harbison v. City of Hillsboro, 204 P. 613, 618 (Or. 1922).

48. See DAHL, *supra* note 19, at 2.

49. ANNUAL REPORT OF LANDS, *supra* note 21, at 7.

50. See *infra* Part III.

51. See *infra* Parts IV–V.

52. See *infra* Part VI.

53. United States v. Johansen, 93 F.3d 459, 462 (8th Cir. 1996).

54. ANNUAL REPORT OF LANDS, *supra* note 21, at 12; see also U.S. Fish & Wildlife Serv., *supra* note 40 (“The prairie pothole region is known as the ‘duck

Mike Johansen and his brother, Kerry, were accustomed to farming around wetlands, but the wet spring of 1995 followed a wet 1994, which created new wetlands in lower areas of their land and expanded wetlands that had typically been part of their farm.<sup>55</sup> The land that was not covered by water was saturated and unable to support machinery.<sup>56</sup> The Johansens knew they did not have time to let inundated land dry naturally, for the Dakota growing season is short, with narrow windows during which crops must be planted, fertilized, and harvested. They needed to act to give themselves a chance to get their crop in the ground; they needed to dig ditches and drain wetlands, and so they dug several ditches to reduce the size of some wetlands.<sup>57</sup> As a result, they were arraigned before a federal magistrate on criminal charges, accused of damaging federal property.<sup>58</sup>

The Johansen's entry into the federal criminal system had its origin in one of America's first federal laws seeking to protect the environment: the 1916 Migratory Bird Treaty between the United States and Great Britain, with the latter acting on behalf of Canada.<sup>59</sup> It arose out of growing concern for the health and future of America's wildlife.<sup>60</sup> By the end of the nineteenth century, the passenger pigeon was extinct, and other bird species were nearly

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factory' of North America because it is the primary breeding area for all species of waterfowl.").

55. *Johansen*, 93 F.3d at 462.

56. *Id.*

57. *Id.*

58. *Id.* at 461 (citing 16 U.S.C. § 668dd (1994)).

59. Convention Between the United States and Great Britain for the Protection of Migratory Birds in the United States and Canada, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702. The United States later entered into treaties with Mexico, Japan, and the Soviet Union. Convention Between the United States and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647; Convention Between the Government of the United States and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, Mar. 4, 1972, 25 U.S.T. 3329; Convention Between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311. These treaties obligate the United States "to preserve and protect migratory birds through the regulation of hunting, the establishment of refuges, and the protection of bird habitats." *North Dakota v. United States*, 460 U.S. 300, 309-10 (1983).

60. See generally Robert E. Beck, *The Movement in the United States to Restoration and Creation of Wetlands*, 34 NAT. RESOURCES J. 781 (1994).

extinct.<sup>61</sup> Hunters and shooters caused most of the damage looking for meat and sport, but hunting birds for feathers to adorn women's hats and decorate restaurant cuisine also contributed to the alarm over the rapid decline of migratory species and to a bird protection movement.<sup>62</sup> The most important result of this was the 1916 Migratory Bird Treaty.

The treaty called upon the signatories to enact implementing legislation. The United States did so by enacting the Migratory Bird Treaty Act of 1918,<sup>63</sup> which makes it unlawful—unless permitted by regulation—to “at any time,” and “by any means,” and “in any manner” take, capture, or kill “any migratory bird.”<sup>64</sup> The 1918 Act has been described by the Supreme Court as “comprehensive,” “exhaustive,” and “expansive,”<sup>65</sup> implementing a national interest—protecting migratory birds—“of very nearly the first magnitude,” which can be accomplished “only by national action.”<sup>66</sup>

But prohibiting the killing of waterfowl insufficiently protects the birds if their habitat is lost. As a congressman stated when the Migratory Bird Treaty Act was enacted: “If we are going to have a treaty about migratory birds, let us have some place where they can come and remain safely and be a pleasure and companions.”<sup>67</sup> To protect habitat, in 1929 Congress enacted the Migratory Bird Conservation Act,<sup>68</sup> which authorizes the government to acquire

61. Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, 1178 (2008).

62. *Id.* There was also an opinion that farmland drainage contributed to the population declines in migratory birds. In a letter to President Wilson urging his approval of the 1916 treaty, Secretary of State Robert Lansing stated: “[T]he extension of agriculture, and particularly the draining on a large scale of swamps and meadows, together with improved firearms and a vast increase in the number of sportsmen, have so altered conditions that comparatively few migratory game birds nest within our limits.” *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070, 1080–81 (D. Colo. 1999) (citing H.R. NO. 65-243, at 2 (1918)).

63. Migratory Bird Treaty Act, ch. 128, § 2, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–712).

64. 16 U.S.C. § 703(a) (2012).

65. *Andrus v. Allard*, 444 U.S. 51, 56, 59–60 (1979).

66. *Missouri v. Holland*, 252 U.S. 416, 435 (1920); *see also* *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978) (“Congress recognized the important public policy behind protecting migratory birds.”).

67. *Moon Lake Elec. Ass’n*, 45 F. Supp. 2d at 1081 (quoting 56 CONG. REC. 7458 (1918) (statement of Rep. Smith)).

68. Pub. L. No. 70-770, ch. 257, 45 Stat. 1222 (codified as amended at 16 U.S.C. § 715 (1929)).

and protect waterfowl habitat.<sup>69</sup> Funding was provided under the 1934 Migratory Bird Hunting and Conservation Stamp Act (Stamp Act), requiring bird hunters to buy “duck stamps.”<sup>70</sup> Since 1934, the government has spent more than one billion dollars to protect more than five million acres of habitat, including more than three million acres in the prairie pothole region.<sup>71</sup>

In 1958, Congress amended the Stamp Act to hasten land acquisitions for habitat protection and to shift conservation efforts from establishing large bird sanctuaries to preserving wetlands on private property.<sup>72</sup> The Stamp Act authorized the Department of the Interior to acquire “small wetland and pothole areas” on private property, “to be designated ‘Waterfowl Protection Areas.’”<sup>73</sup>

In the 1960s, the Department of the Interior, through its Fish & Wildlife Service, began acquiring fee interests in wetlands and also acquiring wetland easements.<sup>74</sup> By 2014, the Department had purchased title to more than 712,000 acres, acquired easements over more than 2.6 million acres, received gift interests in over 300,000 acres, and received another 45,000 acres from federal sources, for a total of about 3.8 million acres classified as “waterfowl production areas.”<sup>75</sup> Most of this acreage is in Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wisconsin.<sup>76</sup>

69. 38 C.J.S. *Game* § 30 (2015).

70. Pub. L. No. 73-124, 48 Stat. 452 (1934), *repealed by* Electronic Duck Stamp Act of 2005, Pub. L. No. 109-266, 120 Stat. 677 (codified as amended at 16 U.S.C. § 718 (2006)).

71. U.S. FISH & WILDLIFE SERV., 2014 ANNUAL REPORT: MIGRATORY BIRD CONSERVATION COMMISSION 2 (2014) [hereinafter MIGRATORY BIRD CONSERVATION COMMISSION], [http://www.fws.gov/refuges/realty/pdf/MBCC\\_2014.pdf](http://www.fws.gov/refuges/realty/pdf/MBCC_2014.pdf).

72. Act of Aug. 1, 1958, Pub. L. No. 85-585, 72 Stat. 486 (1958) (codified as amended at 16 U.S.C. § 718d(b)(3) (2014)).

73. *Id.* See generally Murray G. Sagsveen, *Waterfowl Production Areas: A State Perspective*, 60 N.D. L. REV. 659 (1980).

74. *North Dakota v. United States*, 460 U.S. 300, 303–05 (1983); see, e.g., Steven D. Schultz & Duane Pool, *The Impact of Combined Grass and Wetland Easements on Agricultural Land Values in South Dakota*, J. AM. SOC'Y FARM MANAGERS & RURAL APPRAISERS 111 (2005), <http://ageconsearch.umn.edu/bitstream/190719/2/236.pdf>.

75. ANNUAL REPORT OF LANDS, *supra* note 21, at 6; see also MIGRATORY BIRD CONSERVATION COMMISSION, *supra* note 71, at 35 (stating that about 3.7 million acres comprise “waterfowl production areas”).

76. MIGRATORY BIRD CONSERVATION COMMISSION, *supra* note 71, at 30–35. The Department of the Interior manages an additional 2.4 million acres throughout the country as part of its national migratory bird refuge system. *Id.* at 28. In

However, because North Dakota in particular is “rich in wetlands suitable for waterfowl breeding,”<sup>77</sup> the Fish & Wildlife Service concentrated habitat protection efforts there.

Three easements were acquired from the Johansens’ predecessors in title.<sup>78</sup> The easements burdened three separate tracts, comprising 318 acres, 320 acres, and 396 acres.<sup>79</sup> The easements required the Johansens to maintain the land as wetlands and granted the government the right to maintain the easements as waterfowl production areas in perpetuity.<sup>80</sup>

When the Fish & Wildlife Service acquired the three easements, it prepared an internal document called an “Easement Summary” that included particular information about the wetlands on each tract.<sup>81</sup> The Easement Summary for the Johansen easements stated that the wetlands on each of the two smaller tracts covered thirty-three acres and the wetlands on the larger tract covered thirty-five acres.<sup>82</sup> The Fish & Wildlife Service also published reports reiterating that this was the amount of acreage it controlled on the three tracts.<sup>83</sup>

Before Mike and Kerry Johansen did any ditching in the spring of 1995, they contacted the Fish & Wildlife Service and asked what they could do to cut ditches to reduce the size of the wetlands<sup>84</sup> while leaving them large enough to exceed the size set forth in the Easement Summaries, that is, larger than the thirty-three acres, thirty-three acres, and thirty-five acres the Johansens believed the easements protected and what they thought they were obligated to preserve.<sup>85</sup> The Fish & Wildlife Service, however, stated its easements covered the entire tracts of 318, 320, and 396 acres, and therefore it controlled water anywhere on those 1034 acres, no matter how large the wetlands may expand.<sup>86</sup> The trial court, relying on its understanding of Eighth Circuit Court of Appeals

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addition to the 2.4 million acres, the Commission states the Department of the Interior controls as “Other Acres” 7.7 million acres for migratory bird refuges. *Id.*

77. *North Dakota*, 460 U.S. at 304.

78. *United States v. Johansen*, 93 F.3d 459, 461–62 (8th Cir. 1996).

79. *Id.*

80. *Id.*

81. *Id.* at 462.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

case law, did not allow the Johansens to introduce the Easement Summaries into evidence or otherwise present their “acreage defense,” and so they entered conditional guilty pleas and appealed.<sup>87</sup>

The Johansen easements were acquired prior to 1976.<sup>88</sup> Pre-1976 easements lacked specificity and often referred to the entire tract of land on which the wetland was located.<sup>89</sup> This practice, coupled with the fluctuating nature of wetlands, created what the appellate court described as, “a considerable amount of confusion” over what the easements covered.<sup>90</sup> The court found the Fish & Wildlife Service’s interpretation of its easements was “stringent” and inconsistent with the good relationship the federal government needs with states, farmers, and political subdivisions, a relationship that is “fundamental to the success of conservation programs.”<sup>91</sup>

The appellate court ruled that the easements covering Johansen land were limited to the acreage set out in the Easement Summaries: thirty-three acres, thirty-three acres, and thirty-five acres.<sup>92</sup> It stated there must be room in the waterfowl conservation program for “normal farming practices” and the Service cannot ignore the “significant economic impediment” its interpretation

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87. *Id.* For discussions of the *Johansen* case and other court opinions interpreting federal wetland easements, see Sagsveen & Sagsveen, *supra* note 8; Laura Krasser, Note, *The Eighth Circuit Declares New Law for Owners of Land Encumbered by FWS Easements: Drain Those After-Expanded Wetlands, But Ask Nicely First*, 4 MO. ENVTL. L. & POL’Y REV. 158 (1997); Paul D. Odegaard, Comment, *Waters and Water Course—Game: What Does the Future Hold for Eleven Thousand Federal Wetland Easements in North Dakota?* *United States v. Johansen*, 93 F.3d 459 (8th Cir. 1996), 73 N.D. L. REV. 345 (1997).

88. *Johansen*, 93 F.3d at 461.

89. *Id.* at 463.

90. *Id.* After 1976, the Fish & Wildlife Service changed its easement acquisition practice; that is, the Service recorded a map depicting where the wetland was located. *Id.* The maps may bring more certainty to the geographic extent of the government’s property rights, although it remains unclear whether the Fish & Wildlife Service believes the maps define the boundaries of its easement, or whether the map is merely illustrative of the wetland at the time of easement acquisition and does not preclude the Service from asserting its easement covers a broader area should the wetland expand under wet conditions.

91. *Id.*; *see also* Krasser, *supra* note 87, at 168–69 (describing the Fish & Wildlife Service’s conduct in *Johansen* as “troubling” and suggesting it act more as a partner with landowners, rather than “an inflexible bureaucracy”).

92. *Johansen*, 93 F.3d at 468.

would cause farmers.<sup>93</sup> Thus, the court rejected the argument that all 1034 acres of Johansen land were under federal control and limited the Service's easements to 101 acres.<sup>94</sup>

Some commentators question whether the Eighth Circuit's decision limiting federal wetland easements to the acreage set out in Easement Summaries is consistent with the Supreme Court's decision in *North Dakota v. United States*,<sup>95</sup> in which the Court invalidated certain state actions as hostile to federal interests in protecting habitat.<sup>96</sup> The Supreme Court described wetlands as "inherently fluctuating" and implied that federal wetland easements can, or perhaps do, cover "after-expanded wetlands as well as those described in the easement itself."<sup>97</sup> The Court also stated that easement "restrictions apply only to wetlands areas and not to the entire parcels,"<sup>98</sup> but whether it meant that "wetlands areas" were those existing or contemplated when the easement was acquired, or cover "after-expanded" wetlands, is uncertain.

What is important is how the Fish & Wildlife Service interprets *Johansen*. In communications among the Fish & Wildlife Service, U.S. Department of Justice, and the North Dakota Attorney General after *Johansen* was issued, the federal government appeared disinclined to acknowledge limitations on its easements.<sup>99</sup>

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93. *Id.*

94. *Id.* at 463, 465.

95. 460 U.S. 300 (1983). Under federal law, wetland easement acquisitions require state approval, and in the 1960s and 1970s, North Dakota governors consented to acquisitions up to a certain acreage amount per county. *Id.* at 304. But then cooperation between the state and the Fish & Wildlife Service broke down, and the 1977 state legislature enacted laws revoking the gubernatorial consent, restricting the Service's ability to acquire easement, and limiting any easements acquired to ninety-nine years. *Id.* at 306–08.

96. Odegaard, *supra* note 87, at 357.

97. *North Dakota*, 460 U.S. at 319.

98. *Id.* at 311 n.14.

99. See Sagsveen & Sagsveen, *supra* note 8, at 869–71 (discussing post-*Johansen* correspondence among the North Dakota Attorney General, the Fish & Wildlife Service, and the U.S. Department of Justice). The Attorney General asked the Fish & Wildlife Service to confirm that its pre-1976 easements were confined to the acreage in Easement Summaries and that farmers could drain to reduce wetlands to that acreage. *Id.* at 869. The Service declined to confirm this. *Id.* at 870. The Service stated that the Attorney General may have misunderstood *Johansen*, and also stated "no one may do any draining . . . without prior consultation and the approval of the Service." *Id.* at 870 n.54 (quoting Letter from Ralph Morgenweck, Reg'l Dir., U.S. Fish & Wildlife Serv., to Heidi Heitkamp, N.D. Att'y Gen. (Nov. 19,

Besides the amount of wetland acreage covered by a federal wetland easement, other issues exist for farmers who own land burdened by these easements. For example, the Fish & Wildlife Service asserts that its easements give it the right to prohibit farmers from using groundwater to irrigate if doing so draws down the water table and reduces water in wetlands under easement.<sup>100</sup> The Fish & Wildlife Service has written landowners who contemplated groundwater irrigation, stating that if they proceed, “the United States may take you to court for violating the terms of the waterfowl protection easement on your property.”<sup>101</sup> Taking someone to court for violating an easement usually means civil proceedings, but after waterfowl production areas were included in the National Wildlife Refuge System in 1966, easement violations “are no longer merely contractual transgressions; they are crimes” and can be punished accordingly.<sup>102</sup>

The Fish & Wildlife Service has also asserted that its easements give it the right to control activities on the land surrounding the wetland if those activities adversely impact the easement.<sup>103</sup> For example, the Fish & Wildlife Service has objected to groundwater appropriation permits being issued to farmers who do not have a federal wetland easement on their land but where the Service believes the appropriation will damage easements on neighboring land.<sup>104</sup>

A government toehold on private property opens the door to assertions of authority over nearby land. While the government may not have a property interest in adjacent or nearby land, the toehold acquired through a wetland easement gives the government the opportunity to assert an expanded regulatory

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1999)). The Department of Justice stated *Johansen* is confined to its facts, implying the decision does not provide general guidance for understanding and administering the government’s easements. *Id.* at 879.

100. *Id.* at 872–78; see Sagsveen, *supra* note 73, at 673–74.

101. Sagsveen & Sagsveen, *supra* note 8, at 873 (quoting Letter from Cheryl C. Williss, Chief, Div. of Water Res., Mountain-Prairie Region, U.S. Fish & Wildlife Serv., to Lorenz and Opal Rohde (Nov. 4, 1996)).

102. Sagsveen, *supra* note 73, at 667.

103. *Id.* at 668.

104. *E.g.*, Letter from Megan A. Estep, Chief, Div. of Water Res., Mountain-Prairie Region, U.S. Fish & Wildlife Serv., to Todd Sando, N.D. State Eng’r (July 27, 2015); Letter from Cheryl C. Williss, Chief, Div. of Water Res., Mountain-Prairie Region, U.S. Fish & Wildlife Serv., to David A. Spryncynatyk, N.D. State Eng’r (Jan. 19, 2000).



interest. One court views federal authority over federal lands to include the power to regulate activities on non-federal land “in order to protect wildlife and visitors on the [federal] lands.”<sup>105</sup> Also, the government’s regulatory authority under the Migratory Bird Treaty Act “has been liberally construed.”<sup>106</sup> The United States prosecuted a Minnesota farmer for damaging an easement, even though it appears he did nothing directly to the wetland; rather, he installed drain tiles and dug two large pits on his land to store water for irrigation pumping.<sup>107</sup> These actions “interfered with the natural state of the land” and “altered the flow of natural waters,” which was a “clear violation of the easement.”<sup>108</sup>

How the Fish & Wildlife Service and the criminal division at the Department of Justice interpret *Johansen* and the scope of authority acquired over adjacent land has significant ramifications. By 2007, the Fish & Wildlife Service had acquired more than 29,000 waterfowl production easements,<sup>109</sup> and each year it acquires more. In 2014, it acquired easements over 74,000 acres.<sup>110</sup> Even if the federal government does not own an easement over wetlands on a farmer’s land, the Migratory Bird Treaty Act, discussed in the next section, may authorize the federal government to regulate the wetlands.<sup>111</sup>

#### IV. THE MIGRATORY BIRD TREATY ACT AND ITS REACH INTO FARMLAND MANAGEMENT

As stated above, the Migratory Bird Treaty Act of 1918 implements migratory bird treaties entered into by the United States and prohibits killing or taking migratory birds.<sup>112</sup> The 1918

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105. *United States v. Brown*, 552 F.2d 817, 822 (8th Cir. 1977); *see also* *Montero v. Babbitt*, 921 F. Supp. 134, 139 (E.D.N.Y. 1996) (“[G]overnmental restrictions may even be placed on private land which abuts public land when such restrictions are reasonably necessary to protect the federal interest . . .”).

106. *Bailey v. Holland*, 126 F.2d 317, 322 (4th Cir. 1942) (prohibiting hunting migratory birds on land and water not owned by the United States but on land adjacent to a federal bird refuge).

107. *United States v. Seest*, 631 F.2d 107, 109 (8th Cir. 1980).

108. *Id.*

109. U.S. FISH & WILDLIFE SERV., WATERFOWL PRODUCTION AREAS: PRAIRIE JEWELS OF THE NATIONAL WILDLIFE REFUGE SYSTEM 2 (2007), <http://www.fws.gov/refuges/smallwetlands/WPAs/FactSheetWPA-june2007.pdf>.

110. ANNUAL REPORT OF LANDS, *supra* note 21, at 7.

111. *See infra* Part IV.

112. *Supra* notes 59–66 and accompanying text.

Act is generally considered to focus on hunters and poachers. However, there have been efforts to extend the 1918 Act to activities not intended to have any effect on protected species, but that indirectly kill protected species or destroy their habitats.

For example, *United States v. Corbin Farm Service* involved criminal actions after a pesticide was applied to an alfalfa field and caused the deaths of a number of American widgeons, a protected migratory bird.<sup>113</sup> The defendants asserted the 1918 Act is confined to hunting and does not cover farming activities resulting in unintended harm to birds.<sup>114</sup> The court ruled that while Congress was primarily concerned with hunting, that was not its sole concern, and if protected birds are killed, at least under the circumstances in *Corbin Farm*, the 1918 Act applies.<sup>115</sup> Other courts, however, confine the 1918 Act to hunting and hunting-related activities and refuse to extend it to acts that indirectly, or unintentionally, kill protected birds.<sup>116</sup>

Courts have also addressed whether damaging or destroying wildlife habitat can amount to a “taking” under the 1918 Act. Some courts reject the argument, stating, for example, that the 1918 Act’s prohibitions address the conduct of hunters and poachers, and neither the 1918 Act nor its implementing regulations mention habitat modification or destruction.<sup>117</sup> But a court has found that where logging would occur during nesting and young migratory birds would be killed as a result of this logging, the 1918 Act applies.<sup>118</sup>

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113. 444 F. Supp. 510, 514–15 (E.D. Cal. 1978). The case also involved criminal counts under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1996). *Id.*

114. *Id.* at 531–32.

115. *Id.*; see also *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d Cir. 1978) (providing that Migratory Bird Treaty Act applies where birds died after ingesting a chemical allowed to reach a pond through a waste water discharge).

116. *E.g.*, *United States v. Brigham Oil & Gas L.P.*, 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012) (stating that the use of reserve pits at oil wells “is [a] legal, commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act”).

117. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302–03 (9th Cir. 1991) (clarifying that the Act is unlike the Endangered Species Act, which does protect habitat). The court distinguished *Corbin Farm* by stating it does not suggest that habitat destruction amounts to a “taking” within the terms of the Act. *Id.* at 303.

118. *Sierra Club v. Martin*, 933 F. Supp. 1559, 1564–65 (N.D. Ga. 1996). The court relied on *Corbin Farm* for the proposition that hunting is not the Act’s sole concern. *Id.* at 1565; see also *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d

The scope of the 1918 Act is unsettled. One court, after stating a number of courts limit the 1918 Act to hunting-related activities, added: “An almost equal number of courts . . . have explicitly rejected the argument that the [Act] is limited to activities such as hunting, trapping, and poaching, but instead reaches other conduct that results in the taking and killing of migratory birds.”<sup>119</sup> If wetlands unprotected by a federal easement cannot be protected under other regulatory authority—the subject of the next section on the new WOTUS rule—efforts will be made to use the 1918 Act to stop farmers from draining or filling wetlands,<sup>120</sup> and a court will at some point consider the merits of the argument that the 1918 Act protects not only migratory birds, “but also their environments,” including “isolated wetlands.”<sup>121</sup> Such an effort, if successful, will be additionally disconcerting for landowners because most violations under the 1918 Act are not only criminal violations, but strict liability misdemeanors, meaning a conviction can be obtained “without proof of guilty knowledge or of evil or wrongful purpose—the defendant may not even know the facts that subject him or her to criminal liability.”<sup>122</sup>

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1070, 1080 (D. Colo. 1999) (applying the Act to the operation of electrical power lines and stating Congress intended the Act “to regulate more than just hunting and poaching”).

119. *United States v. CITGO Petro. Corp.*, 893 F. Supp. 2d 841, 843 (S.D. Tex. 2012), *rev'd on other grounds*, 801 F.3d 477, 488 (5th Cir. 2015) (noting that “with significant nuances in reasoning, cases can be found to support either position”); *see also* Adkins Giese, *supra* note 11, at 1169 (2010) (“Environmental plaintiffs wishing to use the [Act] to protect migratory bird habitat have been largely unsuccessful.”). *See generally* Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1 (1996); Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 1 (2013).

120. Adkins Giese, *supra* note 11, at 1176 (“[E]nvironmental groups test legal theories and try to find new ways to use the [Act] to shape land management.”). Such efforts might not be confined to environmental groups. The federal government may be equally interested in testing the scope of the Act to shape land management.

121. Flanagan, *supra* note 11, at 179.

122. Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting, Human Caused Bird Deaths*, 77 DENV. U. L. REV. 315, 318–20 (1999).

## V. ALL PATHS LEAD TO “WATERS OF THE UNITED STATES”

*[T]he Clean Water Act is . . . arguably unconstitutionally vague.*<sup>123</sup>

– Justice Kennedy

*The reach of the Clean Water Act is notoriously unclear.*<sup>124</sup>

– Justice Alito

*The reader will be curious . . . to know what all the fuss is about.*<sup>125</sup>

– Justice Scalia

Congress passed the Federal Water Pollution Control Act Amendments of 1972, better known as the Clean Water Act, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>126</sup> Through various sections of the Clean Water Act, the EPA and Corps have regulatory authority over “navigable waters,” which is defined as “the waters of the United States, including the territorial seas.”<sup>127</sup> Congress left “waters of the United States” undefined, “and the words themselves are hopelessly indeterminate.”<sup>128</sup> As one might imagine, this nebulous definition spawned conflict and confusion. “Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority”<sup>129</sup>—the logical result of which became litigation.

Though not discussed here, the three main cases addressing which waters are and are not “navigable waters” are: (1) *United States v. Riverside Bayview Homes, Inc.*, holding that given the “language, policies, and history of the Clean Water Act,” the Corps acted reasonably in requiring permits for the discharge of “material into wetlands adjacent to the ‘waters of the United States’”;<sup>130</sup> (2) *Solid Waste Agency of Northern Cook County v. United States Army Corps*

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123. Transcript of Oral Argument at 18, *U.S. Army Corps of Eng’rs v. Hawkes Co.*, No. 15-290 (U.S. Mar. 30, 2016).

124. *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

125. *Id.* at 1370 (Scalia, J., majority).

126. 33 U.S.C. § 1251(a) (2012).

127. *Id.* § 1362.

128. *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring).

129. *Id.*

130. 474 U.S. 121, 139 (1985).

of *Engineers*, holding that the Corps exceeded its authority under the Clean Water Act by extending “navigable waters” to include intrastate waters used as habitat by migratory birds;<sup>131</sup> and (3) *Rapanos v. United States*, a plurality decision in which Justice Kennedy recognized that a water or wetland constitutes “‘navigable waters’ under the [Clean Water] Act if it possesses a ‘significant nexus’” to what are traditionally considered navigable waters.<sup>132</sup>

A near-decade of confusion reigned after *Rapanos*,<sup>133</sup> during which time the courts, agencies, and, most importantly, landowners, especially farmers, did not have a clear understanding of what waters were federally regulated, and were left “to feel their way on a case-by-case basis.”<sup>134</sup> This results in two paths for unsuspecting landowners who own a “piece of land that is wet at least part of the year . . . .”<sup>135</sup> They can either proceed with developing their land under the cloud of a potential Clean Water Act violation and risk both civil and criminal penalties, including jail time, or, before development, ask for a Jurisdictional Determination (JD) and seek a permit if jurisdiction is found.<sup>136</sup> Michael and Chantell Sackett of Idaho unwittingly chose the first path—proceeding as if the water on their land was not WOTUS; while Kevin Pierce of North Dakota chose the second path—asking for a JD of whether the water was WOTUS.<sup>137</sup> Both ended up at the U.S. Supreme Court.

#### A. Sackett v. EPA

The Sacketts purchased a 0.63-acre lot near Priest Lake, Idaho, on which to build their home.<sup>138</sup> The lot was located within a built-out subdivision, with roads on two sides and other homes on two sides.<sup>139</sup> The Sacketts completed typical due diligence before

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131. 531 U.S. 159, 173–74 (2001).

132. 547 U.S. 715, 717 (2006).

133. See, e.g., Christopher Brooks, *Clean Water Act Confusion: Federal Courts Split on Application of the Rapanos Decision*, 18 SEC. ENV'T ENERGY & RES. 3, 9 (2014).

134. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

135. *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

136. *Id.*

137. *Id.* at 1369 (Scalia, J., majority); *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 996 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 615 (2015).

138. Petitioners' Brief on the Merits at 5, *Sackett*, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 4500687, at \*6.

139. *Id.*

purchasing the lot and obtained no information giving them reason to believe their property contained Clean Water Act regulated wetlands.<sup>140</sup> After obtaining what they believed to be all required permits, they filled part of their lot with dirt and rock to prepare for construction.<sup>141</sup> But the site's wetlands were adjacent to Priest Lake, which the EPA considered WOTUS.<sup>142</sup> The EPA issued the Sacketts an administrative compliance order under § 309 of the Clean Water Act, asserting they placed fill material in a jurisdictional wetland and ordered them to restore the property as the EPA directed.<sup>143</sup> The compliance order subjected the Sacketts to a \$37,500 per day civil penalty for the alleged violation, and an additional \$37,500 per day penalty for violating the compliance order.<sup>144</sup> The Sacketts, who did not believe their property was subject to the Clean Water Act, asked for a hearing, which was denied, and eventually brought a case in federal district court.<sup>145</sup>

When the case reached the Supreme Court, the questions presented were twofold: (1) whether the Sacketts could seek pre-enforcement judicial review of the compliance order under the Administrative Procedure Act (APA);<sup>146</sup> and (2) if not, whether such inability violates the Due Process Clause.<sup>147</sup> In a unanimous opinion, Justice Scalia stated that “there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review.”<sup>148</sup> To hold otherwise “would have put the property rights of ordinary Americans entirely at the mercy of [EPA] employees.”<sup>149</sup> Thus, landowners who do not believe their waters are WOTUS could choose to proceed at their own risk, and if challenged by the EPA or the Corps, at least now have the opportunity to ask a court to intercede.<sup>150</sup>

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140. *Id.*

141. *Id.*

142. *Sackett*, 132 S. Ct. at 1370–71.

143. *Id.* at 1369.

144. *Id.* at 1370.

145. *Id.* at 1371.

146. Petitioners' Brief on the Merits, *supra* note 138, at i.

147. *Id.*

148. *Sackett*, 132 S. Ct. at 1374.

149. *Id.* at 1375 (Alito, J., concurring).

150. *See id.*

B. United States Army Corps of Engineers v. Hawkes Co.

Conversely, the Kevin Pierces of the world may choose the other path: ask for a JD prior to development. Mr. Pierce is an officer in businesses, including the Hawkes Company, which owns approximately 530 acres in Marshall County, Minnesota, on which peat mining is contemplated.<sup>151</sup> Peat mining necessarily occurs in wetlands because peat is only found in such environments.<sup>152</sup> The mining would occur over 120 miles from the Red River of the North, the nearest traditional navigable water.<sup>153</sup>

As part of his due diligence in purchasing the property, Mr. Pierce met several times with the Corps to determine what actions would be necessary to mine peat on the land, which would provide approximately seven to ten years of future operations, extending its overall operations between ten and fifteen years.<sup>154</sup> Mr. Pierce's initial meeting with the Corps took place on March 20, 2007, and an Initial JD was finally approved on February 7, 2012.<sup>155</sup> During this time, a Corps employee allegedly suggested to a Hawkes Company representative that "he should start looking for another job."<sup>156</sup> The Initial JD concluded there was a significant relationship between the property and the Red River, and thus the property was a WOTUS subject to the Clean Water Act.<sup>157</sup> After an administrative appeal, a Revised JD was issued on December 31, 2012, containing no new information and still asserting the property was WOTUS subject to the Act.<sup>158</sup>

Hawkes sued in the U.S. District Court for the District of Minnesota, asserting the court had jurisdiction under the APA, but the court dismissed the suit, concluding a JD was not a "final agency action" within the APA.<sup>159</sup> Hawkes appealed to the Eighth

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151. Amended Complaint for Declaratory and Injunctive Relief ¶¶ 7, 27, Hawkes Co. v. U.S. Army Corps of Eng'rs, 963 F. Supp. 2d 868 (D. Minn. 2013) (No. 13-107), 2013 WL 11263183.

152. *Id.* ¶ 27.

153. *Id.* For discussion on traditional navigable waters, see *infra* note 175 and accompanying text.

154. Amended Complaint for Declaratory and Injunctive Relief, *supra* note 151, ¶¶ 35–37.

155. *Id.*

156. *Id.* ¶ 43.

157. *Id.* ¶ 50.

158. *Id.* ¶¶ 52–54.

159. Hawkes Co. v. U.S. Army Corps of Eng'rs, 963 F. Supp. 2d 868, 877 (D.

Circuit, and while its appeal was pending, the Fifth Circuit Court of Appeals, in a similar case originating in Louisiana, reached the same conclusion about jurisdiction as did the Minnesota district court.<sup>160</sup> But the Eighth Circuit Court of Appeals concluded that both those courts misapplied *Sackett*.<sup>161</sup> The Corps sought certiorari, presenting the U.S. Supreme Court with a circuit split, and the question of whether the Corps' determination that the property contains WOTUS constitutes final agency action and is subject to judicial review under the APA.<sup>162</sup> The Supreme Court granted certiorari and oral argument was held on March 30, 2016.<sup>163</sup>

In answering Justice Scalia's question of "what all the fuss is about," Justice Alito stated, "[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed . . . leaves most property owners with little practical alternative but to dance to the EPA's tune."<sup>164</sup> The dance down the path of presumption that land does not contain WOTUS may subject the landowner up to \$75,000 per day in penalties.<sup>165</sup> The alternative dance in asking for a JD and permit triggers a process that lasts on average approximately 788 days and costs an average of \$271,596,<sup>166</sup> a relative bargain in comparison to \$75,000 per day in penalties.

In his *Sackett* concurrence, Justice Alito stated that "[a]llowing aggrieved property owners to sue under the [APA] is better than nothing, but only clarification of the reach of the Clean Water Act can rectify the underlying problem."<sup>167</sup> He further stated that "[r]eal relief requires Congress to do what it should have done in

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Minn. 2013).

160. *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 394 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1548 (Mar. 23, 2015).

161. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 996 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 615 (Dec. 11, 2015).

162. *Hawkes Co.*, 136 S. Ct. 615.

163. *See* Transcript of Oral Argument at 1, *Hawkes Co.*, 136 S. Ct. 615 (Mar. 30, 2016) (No. 15-290).

164. *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

165. *Id.* at 1370 ("[W]hen the EPA prevails against any person who has been issued a compliance order but has failed to comply, that amount is increased to \$75,000—up to \$37,500 for the statutory violation and up to an additional \$37,500 for violating the compliance order.").

166. *Rapanos v. United States*, 547 U.S. 715, 721 (2006).

167. *Sackett*, 132 S. Ct. at 1375–76 (Alito, J., concurring).



the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.”<sup>168</sup>

Sufficiently criticized by Justice Alito’s admonition that “the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of [WOTUS],”<sup>169</sup> the EPA and Corps (collectively, the Agencies) did just that.

*C. The New (Pending)<sup>170</sup> WOTUS Rule*

In April 2014, the Agencies released a draft rule defining WOTUS, several related terms, and listing various exemptions.<sup>171</sup> After comments and revisions, the final rule was published on June 29, 2015.<sup>172</sup> According to the Agencies, “The rule will ensure protection for the nation’s public health and aquatic resources, and increase [Clean Water Act] program predictability and consistency by clarifying the scope of ‘waters of the United States’ protected under the Act.”<sup>173</sup>

Under the new rule, WOTUS includes eight categories of waters:<sup>174</sup> (1) traditional navigable waters,<sup>175</sup> (2) interstate waters,<sup>176</sup> (3) territorial seas,<sup>177</sup> (4) impoundments,<sup>178</sup> (5) tributaries,<sup>179</sup> (6) adjacent waters,<sup>180</sup> (7) non-adjacent case specific waters,<sup>181</sup> and (8)

168. *Id.* at 1375.

169. *Id.*

170. *See infra* Part V.D.

171. Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37054-01, 37075 (June 29, 2015) (“The agencies proposed a rule clarifying the scope of waters of the United States . . . and solicited comments for over 200 days.”).

172. *Id.*

173. *Id.*

174. The first three categories of waters (traditional navigable waters, interstate waters, and territorial seas) will be collectively referred to as “Primary Waters,” also known as “listed waters.” The terms “listed water” and “primary water” are the terms used by the EPA in discussion.

175. Traditional navigable waters, in this context, means “[a]ll 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.” 33 C.F.R. § 328.3 (2015).

176. This category includes interstate wetlands. *Id.*

177. *Id.*

178. This category includes the “impoundments of waters otherwise identified as [WOTUS].” *Id.*

179. This category includes all tributaries of Primary Waters. *Id.*

180. This category includes all waters adjacent to Primary Waters,

non-adjacent floodplain/ordinary high water mark waters.<sup>182</sup> The eight categories are sometimes referred to as “listed waters” because they are the waters covered by the list, and the first three categories on the list will be collectively referred to as “Primary Waters.”<sup>183</sup> The new rule also defines seven new terms that are used to explain the new categories in further detail. The new terms are: (1) adjacent,<sup>184</sup> (2) neighboring,<sup>185</sup> (3) tributary/tributaries,<sup>186</sup> (4) wetlands,<sup>187</sup> (5) significant nexus,<sup>188</sup> (6) ordinary high water mark,<sup>189</sup>

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impoundments, or tributaries. *Id.*

181. This category includes all: (i) prairie potholes; (ii) Carolina bays and Delmarva bays; (iii) pocosins; (iv) western vernal pools; and (v) Texas coastal prairie wetlands with a significant nexus to a Primary Water. *Id.*

182. This category includes all waters located within the one-hundred-year floodplain of a Primary Water, and waters that are within 4000 feet of the high tide line or ordinary high water mark of a Primary Water, impoundment, or tributary where they have a significant nexus to a Primary Water. *Id.*

183. See *Murray Energy Corp. v. EPA*, No. 1:15CV110, 2015 WL 5062506, at \*2 (N.D. W. Va. Aug. 26, 2015) (“According to Murray, the Clean Water Rule greatly extends the Agencies’ reach by “declar[ing] that expansive new categories of non-primary waters are ‘waters of the United States.’” (citation omitted)).

184. “[A] *adjacent* means bordering, contiguous, or neighboring” a Primary Water, impoundment, or tributary, including waters separated by constructed “dikes or barriers, natural river berms, beach dunes and the like. . . .” 33 C.F.R. § 328.3(c)(1).

185. “[N] *neighboring* means: (i) All waters located within 100 feet of the ordinary high water mark of a” Primary Water, impoundment, or tributary. “The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark; (ii) All waters located within the 100-year floodplain of a” Primary Water, impoundment, or tributary “and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain; (iii) All waters located within 1,500 feet of the high tide line of a” Primary Water, and “all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.” *Id.* § 328.3(c)(2).

186. *Tributary* means “a water that contributes flow, either directly or through another water (including an impoundment . . .),” to a Primary Water “that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.” *Id.* § 328.3(c)(3).

187. *Wetlands* “means those areas that are inundated or saturated by surface or groundwater 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.” *Id.* § 328.3(c)(4).

188. *Significant nexus* “means that a water, including wetlands, either alone or

and (7) high tide line.<sup>190</sup> Finally, the new rule lists several categories that will not be considered WOTUS even where they otherwise meet the definition.<sup>191</sup> Exemptions of interest to farmers include: prior converted cropland;<sup>192</sup> some ditches;<sup>193</sup> artificially irrigated areas;<sup>194</sup> artificial ponds such as farm, stock watering, or irrigation ponds; and groundwater,<sup>195</sup> including groundwater drained through subsurface drainage systems.<sup>196</sup>

#### D. Controversies and Courtrooms

As expected, there has been no shortage of controversy or litigation since the WOTUS rule was enacted. Those criticizing the rule as government overreach include “pesticide manufacturers, mining companies, home builders, governors, local governments, water utilities, flood control districts, the timber industry, railroads, real estate developers, golf course operators, food and beverage companies, more than forty energy companies, and two dozen

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in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a” Primary Water. “The term ‘in the region’ means the watershed that drains to the nearest” Primary Water. *Id.* § 328.3(c)(5).

189. *Ordinary high water mark* means “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” *Id.* § 328.3(c)(6).

190. “[H]igh tide line means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide.” *Id.* § 328.3(c)(7).

191. *Id.* § 328.3(b).

192. “Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency . . . the final authority regarding Clean Water Act jurisdiction remains with EPA.” *Id.* § 328.3(b)(2).

193. Ditches: (i) “with ephemeral flow that are not a relocated tributary or excavated in a tributary”; (ii) “with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands”; (iii) “that do not flow, either directly or through another water,” into a Primary Water. *Id.* § 328.3(b)(3).

194. *Id.* § 328.3(b)(4)(i).

195. *Id.* § 328.3(b)(4)(ii)–(vii). The definition of “adjacent” indicates that “[a]djacency is not limited to waters located laterally . . . .” *Id.* § 328.3(c)(1). Though not explicit, this necessarily implicates groundwater. Thus, while there is an exemption for groundwater, questions remain about the extent of the exemption.

196. *Id.* § 328.3(b)(5).

electric power companies.”<sup>197</sup> Farmers are distraught because their interpretation of the rule indicates nearly all waters will now be considered WOTUS.<sup>198</sup> The American Farm Bureau has prepared a series of interactive maps for several states to illustrate the expansive federal jurisdiction over land use.<sup>199</sup> Environmental advocacy groups are upset that the rule “inadequately protect[s] or exclud[es] certain waters that otherwise meet the legal and scientific standards that the Agencies have identified as prerequisites for protection.”<sup>200</sup> Among other complaints, states feel their sovereignty is challenged and are struggling with how the rule impacts infrastructure development and regulatory authority.<sup>201</sup> Congress, no doubt responding to constituent complaints, passed a joint resolution under the Congressional Review Act that provides for congressional disapproval of the WOTUS rule.<sup>202</sup> Though vetoed by President Obama, Senate Joint Resolution 22 serves as an opportunity to show where lawmakers stand on the hotly contested issue during an election year.<sup>203</sup>

Controversy has also plagued the rule’s passage. Senator James Inhofe, Chairman of the Committee on Environment and Public Works, is widely credited with bringing to light “the Peabody Memos,”<sup>204</sup> documents illustrating disagreement between the

197. Timothy Benson, *Sixth Circuit Provides Bridge over Troubled WOTUS*, THE HILL (Oct. 28, 2015, 2:30 PM), <http://thehill.com/blogs/congress-blog/energy-environment/258287-sixth-circuit-provides-bridge-over-troubled-wotus>.

198. See, e.g., CLAUDIA COPELAND, CONG. RESEARCH SERV., RL43455, EPA AND THE ARMY CORPS’ RULE TO DEFINE “WATERS OF THE UNITED STATES” 12–13 (2016), <https://www.fas.org/sgp/crs/misc/R43455.pdf>; EPA/Corps “Waters of the U.S.” Rule, MINN. FARM BUREAU, <http://www.fbmn.org/pages/clean-water-act> (last visited May 28, 2016).

199. *Completed Maps Showing WOTUS Jurisdiction*, AM. FARM BUREAU FED’N, <http://www.fb.org/issues/wotus/resources/> (last visited May 28, 2016).

200. Complaint for Declaratory and Injunctive Relief ¶ 4, Nat. Res. Def. Council, Inc., v. EPA, No. 1:15-cv-01324 (D.D.C. Aug. 14, 2015), BL-1 (Bloomberg).

201. States’ Memorandum in Support of Motion for Preliminary Injunction at 8–9, North Dakota v. EPA, No. 3:15-cv-00059-RRE-ARS (D.N.D. Aug. 10, 2015), 2015 WL 5307554.

202. S.J. Res. 22, 114th Cong. (2016).

203. Press Release, Office of the Press Sec’y, Veto Message from the President—S.J. Res. 22 (Jan. 19, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/19/president-obama-vetoes-sj-22>.

204. Letter from James M. Inhofe, Chairman, Comm. on Envtl. & Pub. Works, to the Honorable Jo Ellen Darcy, Assistant Sec’y of the Army (Civil Works) (July

Agencies in the rule's development and questioning its legality, which he characterizes as documents the EPA "wish[es] to keep confidential and hidden from the American public."<sup>205</sup> In the memos, Corps staff argued the EPA's economic analysis and technical support documents "are flawed in multiple respects" and "[i]n the Corps' judgment, the documents contain numerous inappropriate assumptions with no connection to the data provided, misapplied data, analytical deficiencies and logical inconsistencies."<sup>206</sup> Additionally, on December 14, 2015, the Government Accountability Office issued an opinion that the EPA's role in the rulemaking violated publicity or propaganda and anti-lobbying provisions.<sup>207</sup>

Meanwhile, the WOTUS rule is caught up in jurisdictional determinations of its own. Immediately upon the rule's passage, litigation challenging the rule was filed in district courts throughout the country.<sup>208</sup> However, due to the Agencies' claim

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27, 2015), [http://www.epw.senate.gov/public/\\_cache/files/0b3784b6-a338-4b23-9afe-7f1a4428f1ab/07.27.2015-dear-secretary-darcy-re-facts-in-peabody-memos.pdf](http://www.epw.senate.gov/public/_cache/files/0b3784b6-a338-4b23-9afe-7f1a4428f1ab/07.27.2015-dear-secretary-darcy-re-facts-in-peabody-memos.pdf); see Press Release, Congressman Kevin Cramer, Cramer Concerned After Corps Memos Question EPA's Implementation of WOTUS (Aug. 3, 2015), <https://cramer.house.gov/media-center/press-releases/cramer-concerned-after-corps-memos-question-epa-s-implementation-of>.

205. Letter from James M. Inhofe, *supra* note 204.

206. Press Release, Congressman Kevin Cramer, *supra* note 204.

207. Letter from Susan A. Poling, Gen. Counsel, to James M. Inhofe, Chairman, Comm. on Envtl. & Pub. Works (Dec. 14, 2015), <http://www.gao.gov/assets/680/674163.pdf>.

208. Expedited Complaint for Declaratory and Injunctive Relief, Se. Stormwater Ass'n, Inc. v. EPA, No. 4:15-cv-00579 (N.D. Fla. Nov. 30, 2015) (Bloomberg); Complaint for Declaratory and Injunctive Relief, Texas All. for Responsible Growth v. EPA, No. 3:15-cv-00322 (S.D. Tex. Nov. 13, 2015) (Bloomberg); Complaint for Declaratory and Injunctive Relief, Ariz. Mining Ass'n v. EPA, No. 2:15-cv-01752 (D. Ariz. Sept. 1, 2015) (Bloomberg); Complaint for Declaratory and Injunctive Relief, Waterkeeper All., Inc., v. EPA, No. 3:15-cv-03927 (N.D. Cal. Aug. 27, 2015) (Bloomberg); Georgia v. McCarthy, No. 2:15-cv-00079 (S.D. Ga. Aug. 27, 2015), 2015 WL 5092568; Complaint for Declaratory and Injunctive Relief, Puget Soundkeeper All. v. McCarthy, No. 2:15-cv-01342 (W.D. Wash. Aug. 20, 2015) (Bloomberg); Complaint, Am. Expl. & Mining Ass'n v. EPA, No. 1:15-cv-01323 (D.D.C. Aug. 14, 2015) (Bloomberg); Complaint for Declaratory and Injunctive Relief, Nat. Res. Def. Council, Inc. v. EPA, No. 1:15-cv-01324 (D.D.C. Aug. 14, 2015) (Bloomberg); Complaint, Wash. Cattlemen's Ass'n v. EPA, No. 0:15-cv-03058 (D. Minn. July 15, 2015) (Bloomberg); Complaint, Se. Legal Found. Inc. v. EPA, No. 1:15-cv-02488 (N.D. Ga. July 13, 2015) (Bloomberg); Complaint, Chamber of Commerce v. EPA, No. 4:15-cv-00386 (N.D. Okla. July 10,

that the rule was subject to direct judicial review in the circuit courts of appeals under 33 U.S.C. § 1369(b),<sup>209</sup> an abundance of protective petitions for review were filed in the various circuit courts. These were consolidated in the Sixth Circuit under *Murray Energy Corp. v. EPA*.<sup>210</sup> Oral argument was held on December 8,

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2015) (Bloomberg); Complaint for Declaratory and Injunctive Relief, *Oklahoma v. EPA*, No. 15-cv-0381 (N.D. Okla. July 8, 2015), 2015 WL 4462248; Complaint for Declaratory and Injunctive Relief, *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-00165 (S.D. Tex. July 2, 2015) (Bloomberg); Complaint, *North Dakota v. EPA*, No. 3:15-cv-00059 (D.N.D. June 29, 2015), 2015 WL 3955508; Complaint, *Ohio v. EPA*, No. 2:15-cv-02467 (S.D. Ohio June 29, 2015), 2015 WL 9269459; Complaint and Petition for Review, *Texas v. EPA*, No. 3:15-cv-00162 (S.D. Tex. June 29, 2015), 2015 WL 3952929; Complaint, *Murray Energy Corp. v. EPA*, No. 1:15-cv-00110 (N.D. W. Va. June 29, 2015), 2015 WL 7259552.

209. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37054-01 (June 29, 2015). 33 U.S.C. § 1369(b) sets out seven specific items under the Clean Water Act that must be appealed directly to the circuit courts. Two of the items are “approving or promulgating any effluent limitation or other limitation” and “issuing or denying any permit. . . .” The EPA argues the WOTUS rule falls within these exceptions that must be appealed at the circuit court level. 33 U.S.C. § 1369 (2015).

210. Order of Stay, *Murray Energy Corp. v. EPA*, No. 15-3751 (6th Cir. Oct. 9, 2015) (Bloomberg). The cases consolidated and most were stayed at the district court level. See *Ass'n of Am. R.Rs. v. EPA*, No. 15-04211 (6th Cir. Dec. 1, 2015) (Bloomberg); *Mich. Farm Bureau v. U.S. Army Corps of Eng'rs*, No. 15-04162 (6th Cir. Dec. 1, 2015) (Bloomberg); *Georgia v. EPA*, No. 15-3887 (6th Cir. Oct. 9, 2015) (Bloomberg); *Nat'l Wildlife Fed'n v. EPA*, No. 15-03817 (6th Cir. Oct. 9, 2015) (Bloomberg); *Nat. Res. Def. Council, Inc. v. EPA*, No. 15-03820 (6th Cir. Oct. 9, 2015) (Bloomberg); *Ohio v. U.S. Army Corps of Eng'rs*, No. 15-03799 (6th Cir. Oct. 9, 2015) (Bloomberg); *One Hundred Miles v. EPA*, No. 15-03948 (6th Cir. Oct. 9, 2015) (Bloomberg); *Puget SoundKeeper v. EPA*, No. 15-03839 (6th Cir. Oct. 9, 2015) (Bloomberg); *Util. Water Act Grp. v. EPA*, No. 15-03858 (6th Cir. Oct. 9, 2015) (Bloomberg); Order Staying Case, *Se. Stormwater Ass'n, Inc. v. EPA*, No. 4:15-cv-00579 (N.D. Fla. Feb. 9, 2016), BL-29 (Bloomberg); Complaint for Declaratory and Injunctive Relief, *Texas All. for Responsible Growth v. EPA*, No. 3:15-cv-00322 (S.D. Tex. Nov. 13, 2015) (Bloomberg) (case pending since Jan. 2016); Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction, *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D. Aug. 27, 2015), 2015 WL 5060744; Memorandum Opinion and Order Dismissing Without Prejudice Plaintiffs Complaint for Lack of Jurisdiction, *Murray Energy Corp. v. EPA*, No. 1:15-cv-00110 (N.D. W. Va. Aug. 26, 2015), 2015 WL 5062506 (case status closed); Order Granting Motion to Stay, *Texas v. EPA*, No. 3:15-cv-00162 (S.D. Tex. Aug. 14, 2015), BL-14 (Bloomberg); Order Granting Motion to Stay, *Wash. Cattlemen's Ass'n*, No. 0:15-cv-03058, BL-14 (Bloomberg); Order to Stay, *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-00165 (S.D. Tex. Aug. 3, 2015), BL-22 (Bloomberg); Opinion and Order Staying Case, *Chamber of Commerce*, No.

2015, to address motions to dismiss for lack of jurisdiction.<sup>211</sup> The Sixth Circuit Court of Appeals also issued an order on October 9, 2015, staying the WOTUS rule nationwide, pending further order of the court.<sup>212</sup>

On February 22, 2016, the Sixth Circuit held it had jurisdiction and denied the motions to dismiss.<sup>213</sup> However, eerily reminiscent of *Rapanos*, the court's opinion was fractured.

Judge McKeague wrote the main opinion and stated that although “[o]n its face, the Agencies’ argument is not compelling,”<sup>214</sup> “‘plain meaning, like beauty, is sometimes in the eye of the beholder.’”<sup>215</sup> He concluded that courts reviewing jurisdictional questions under the Clean Water Act have gradually expanded direct circuit court review, and reasoned that since Congress has not “otherwise taken ‘corrective’ action,” direct circuit court review must further Congress’ purposes.<sup>216</sup>

Judge Griffin wrote an opinion concurring in the judgment: “only because I am required to follow our precedentially-binding decision, *National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009). Were it not for *National Cotton*, I would grant the motions to dismiss.”<sup>217</sup> His concurrence goes on to state that “*National Cotton*’s jurisdictional reach . . . has no end. . . . It is a broad authorization to the courts of appeals to review *anything* related to permitting notwithstanding the statutory language to the contrary.”<sup>218</sup> Finally, perhaps in an invitation for en banc review, Judge Griffin stated that “[a]lthough . . . the holding in *National Cotton* is incorrect, this panel is without authority to overrule it.”<sup>219</sup>

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4:15-cv-00386, BL-32 (Bloomberg); Opinion and Order, *Oklahoma v. EPA*, No. 15-cv-038 (N.D. Okla. July 31, 2015), 2015 WL 4607903 (staying case); Order Granting Motion to Stay, *Se. Legal Found., Inc., v. EPA*, No. 1:15-cv-02488 (N.D. Ga. July 30, 2015), BL-5 (Bloomberg).

211. Order of Stay, *Murray Energy Corp. v. EPA*, No. 15-3751 (6th Cir. Oct. 9, 2015), BL-49 (Bloomberg).

212. *Id.*

213. *Murray Energy Corp. v. EPA*, No. 15-3751, 2016 WL 723241 (6th Cir. Feb. 22, 2016).

214. *Id.* at \*4.

215. *Id.* at \*3 (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985)).

216. *Id.* at \*11.

217. *Id.* at \*12.

218. *Id.* at \*19.

219. *Id.* (citing *Bennett v. MIS Corp.*, 607 F.3d 1076, 1095 (6th Cir. 2010) (“It is a well-established rule in this Circuit that a panel of this court may not overrule a

Judge Keith in a brief dissent agreed with Judge Griffin's reasoning, but disagreed with Griffin's broad reading of *National Cotton*.<sup>220</sup>

In response to the Sixth Circuit ruling, several parties quickly filed en banc petitions;<sup>221</sup> however, those petitions were denied.<sup>222</sup>

At the district court level, all cases have either been stayed or dismissed for lack of jurisdiction<sup>223</sup>—except one. In *North Dakota v. EPA*, Judge Ralph Erickson issued an order the day before the WOTUS rule was to take effect, finding jurisdiction and granting the thirteen states<sup>224</sup> in the case a preliminary injunction.<sup>225</sup> Judge Erickson found “[o]riginal jurisdiction is vested in [the district]

prior published opinion of our court absent en banc review or an intervening and binding change in the state of the law.”).

220. *Id.* at \*20–21.

221. *E.g.*, Petition for Pan Rehearing and Petition for Rehearing En Banc for Petitioner Texas Alliance for Responsible Growth, Environment and Transportation, Murray Energy Corp. v. EPA, No. 15-3751 (Mar. 23, 2016), BL-83 (Bloomberg); Petition for Rehearing En Banc By Petitioners Washington Cattlemen's Ass'n. et al., Murray Energy Corp. v. EPA, No. 15-3751 (6th Cir. Mar. 23, 2016), BL-82 (Bloomberg); Petition for Rehearing En Banc for Petitioners Southeastern Legal Foundation, Inc., et al., Murray Energy Corp. v. EPA (6th Cir. Mar. 22, 2016), BL-80 (Bloomberg); State Petitioners' Petition for Rehearing En Banc, Murray Energy Corp. v. EPA, No. 15-3751 (6th Cir. Mar. 22, 2016), ECF No. 90 (Bloomberg); Petition for Rehearing En Banc of Intervenor Utility Water Act Group, Murray Energy Corp. v. EPA, No. 15-3751 (6th Cir. Mar. 11, 2016), BL-76 (Bloomberg); North Dakota et al.'s Petition for Rehearing En Banc, Murray Energy Corp. v. EPA, No. 15-3751 (6th Cir. Mar. 4, 2016), BL-74 (Bloomberg); Petition for Rehearing En Banc of Intervenors The National Ass'n of Manufacturers & American Farm Bureau Federation, et al., Murray Energy Corp. v. EPA, No. 15-3751 (6th Cir. Feb. 29, 2016), BL-73 (Bloomberg).

222. Order Denying Petitions for En Banc Rehearing, No. 15-3751 (6th Cir. Apr. 21, 2016), ECF 92-1 (Bloomberg).

223. *See supra* note 210. One of these cases, *Georgia v. McCarthy*, No. 2:15-cv-00079, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015), is on appeal to the Eleventh Circuit Court of Appeals regarding dismissal for lack of jurisdiction. Oral argument was scheduled for February 23, 2016, but on its own motion, the court cancelled argument and held the case in abeyance pending the Sixth Circuit decision. *See* Order, *Georgia v. McCarthy*, No. 15-14035 (11th Cir. Feb. 18, 2016), BL-98 (Bloomberg).

224. The states are North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, South Dakota, and Wyoming. *See* Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction, *North Dakota v. EPA*, No. 3:15-cv-00059 (D.N.D. Aug. 27, 2015) (Bloomberg).

225. *Id.*



court and not the court of appeals because the [rule], jointly promulgated by the [Agencies], has at best only an attenuated connection to any permitting process.”<sup>226</sup> To find otherwise would “encompass virtually all EPA actions under the Clean Water Act.”<sup>227</sup> Additionally, Judge Erickson stated “the States are likely to succeed on their claim because (1) it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule at issue, and (2) it appears likely the EPA failed to comply with APA requirements when promulgating the Rule.”<sup>228</sup> Notably, the Agencies did not appeal Judge Erickson’s ruling. The parties are currently quarreling over completion of the administrative record.<sup>229</sup> Additionally, since the Sixth Circuit has ruled that it has jurisdiction, the Agencies filed a motion to dissolve the preliminary injunction and dismiss the case, which the Plaintiff states oppose.<sup>230</sup>

The claims in the North Dakota case are generally representative of claims made in the majority of the other cases, and they are that the final rule: (1) exceeds the Agencies’ authority under the Clean Water Act; (2) extends the Agencies’ authority beyond the limits of the Commerce Clause; (3) violates state sovereignty reserved under the Tenth Amendment; (4) violates the procedural mandates of the National Environmental Protection Act;<sup>231</sup> (5) arbitrarily and capriciously violates the APA; (6) procedurally violates the APA; and (7) violates the Due Process Clause.<sup>232</sup>

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226. *Id.* at \*1.

227. *Id.* at \*2.

228. *Id.* at \*1.

229. See Plaintiff State’s Reply in Support of their Motion to Complete the Administrative Record, North Dakota v. EPA, No. 3:15-cv-00059 (D.N.D. Dec. 31, 2015), 2015 WL 9875165; Federal Defendant’s Opposition to Motion to Complete the Admin. Record, North Dakota v. EPA, No. 3:15-cv-00059 (D.N.D. Dec. 21, 2015), BL-110 (Bloomberg); State’s Memorandum in Support of Their Motion to Complete the Admin. Record, North Dakota v. EPA, No. 3:15-cv-00059 (D.N.D. Dec. 4, 2015), BL-105 (Bloomberg).

230. Federal Defendants’ Motion to Dissolve Preliminary Injunction & Dismiss Amended Complaint, North Dakota v. EPA, No. 3:15-cv-00059-RRE-ARS (D.N.D. Mar. 3, 2016), BL-140 (Bloomberg); Plaintiff States’ Response in Opposition to Motion to Dissolve Preliminary Injunction & Dismiss Amended Complaint, North Dakota v. EPA, No. 3:15-cv-00059 (D.N.D. Mar. 24, 2016), ECF No. 145 (Bloomberg).

231. Only the *North Dakota v. EPA* case makes this claim.

232. First Amended Complaint at 10–18, North Dakota v. EPA, No. 3:15-cv-00059 (D.N.D. Aug. 14, 2015), 2015 WL 5996796.

The impacts of this rule will be unknown until the cases challenging it undoubtedly reach the U.S. Supreme Court. However, the widespread scope of waters covered under the rule should be of concern to landowners, who may find themselves entangled in a web of federal jurisdiction.

#### VI. THE RACCOON RIVER LITIGATION: A NEW CHALLENGE FOR FARMLAND DRAINAGE

About a half million people in Des Moines, Iowa and neighboring areas rely on the city's water utility to provide them with clean water.<sup>233</sup> A primary source for the city's water is the Raccoon River, but the river is polluted with nutrients, including nitrate.<sup>234</sup> Record peaks of nitrate levels occurred in the river during the past three years and will continue to occur, which in turn "threaten the security of the [city's] water supply" and its ability "to deliver safe water in reliable quantities at reasonable cost."<sup>235</sup> Most of the river's nitrate contamination, the city believes, comes from farmland,<sup>236</sup> and to obtain relief, the city's water utility filed a federal lawsuit against three counties in northwest Iowa that manage drainage districts.

The water utility has built infrastructure and developed strategies to test and clean its drinking water to ensure it complies with water quality standards.<sup>237</sup> These efforts are expensive and have become more expensive over the past several years during which the Raccoon River's nitrate load has spiked and become more persistent.<sup>238</sup> Due to the age and limited capacity of its nitrate removal facility, Des Moines anticipates that by 2020 it will need to design and construct a new facility at an anticipated cost of between \$76 million and \$183.5 million.<sup>239</sup> Operational and maintenance costs will further increase the facility's price tag.<sup>240</sup>

Located over one hundred miles from Des Moines are the farms the city has in its legal crosshairs.<sup>241</sup> These farms are in the

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233. Des Moines Complaint, *supra* note 16.

234. *Id.* ¶¶ 8, 32, 38.

235. *Id.* ¶ 9.

236. *Id.* ¶¶ 10, 38–40.

237. *Id.* ¶¶ 5, 70–73, 75, 81, 84–93.

238. *Id.* ¶¶ 98–106.

239. *Id.* ¶ 106.

240. *Id.*

241. *See id.* ¶ 74.

Raccoon River watershed, where land use is primarily agricultural, consisting largely of corn and soybean farms.<sup>242</sup> The city states that in territorial days much of this watershed was uninhabitable due to a “swampy landscape” filled with potholes.<sup>243</sup> But subsurface drain tiles were installed to lower the water table, removing water from the root zone of crops.<sup>244</sup> Networks of drain tiles have been installed, turning native wetlands into not only a “terrain suitable for farmland,” but into “one of the most agriculturally productive areas in the world.”<sup>245</sup> While the tiles may be privately owned, they are connected with pipes, drains, collection pipes, surface ditches, culverts, and other water conveyance facilities controlled by the three drainage districts that Des Moines named as defendants.<sup>246</sup>

Nitrate is an ion of nitrogen found in the soil that moves only with water, which allows it to be readily absorbed by plants, but also easily leached through groundwater.<sup>247</sup> While under natural conditions little nitrate is discharged from groundwater to streams, artificial drainage, according to the city, accelerates the entry of nitrates into streams and rivers.<sup>248</sup>

The city of Des Moines’ water utility states that the Clean Water Act gives it a cause of action against the drainage districts.<sup>249</sup> The Clean Water Act establishes the National Pollution Discharge Elimination System (NPDES), which requires EPA-issued permits for certain discharges of pollution into waters protected by the Clean Water Act,<sup>250</sup> that is, “waters of the United States.” While the Clean Water Act defines “pollutant” to include “agricultural waste discharged into water,”<sup>251</sup> pollution from agricultural sources is nonetheless largely beyond the scope of the Clean Water Act.<sup>252</sup> In summary, the Clean Water Act exempts all “agricultural stormwater discharges and return flows from irrigated agriculture” from its

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242. *Id.* ¶ 59.

243. *Id.* ¶ 109.

244. *Id.* ¶¶ 112–13.

245. *Id.* ¶¶ 110, 117, 128.

246. *Id.* ¶¶ 128–34.

247. *Id.* ¶ 144.

248. *Id.* ¶¶ 145–48.

249. *Id.* ¶¶ 159–86.

250. 33 U.S.C. § 1342(a) (2014).

251. *Id.* § 1362(6).

252. See generally Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033 (2013).

permitting requirements.<sup>253</sup> More significantly, the Clean Water Act limits regulated “discharge[s]” to pollutants from a “point source,”<sup>254</sup> that is, a “discernible, confined and discrete conveyance.”<sup>255</sup> The point source requirement excludes many sources of agricultural pollution, which are typically diffuse and therefore nonpoint sources.<sup>256</sup>

But the Des Moines water utility contends that because the drainage districts allow water contaminated with nitrate to enter Raccoon River through pipes and ditches, they are discharging a pollutant from point sources, and therefore, its activities fall under the Clean Water Act,<sup>257</sup> which requires a permit and compliance with the effluent limitations that a permit would impose.<sup>258</sup>

The defendant drainage districts filed a motion for partial summary judgment on all counts that do not pertain to the Clean Water Act claim: counts dealing with nuisance, trespass, negligence, as well as constitutional claims dealing with taking, due process, and equal protection.<sup>259</sup> The motion raises a number of

253. 33 U.S.C. § 1362(14). Des Moines seeks to remove its lawsuit from these Clean Water Act exemptions by alleging that the drainage districts transport “little or no irrigation return flow.” Des Moines Complaint, *supra* note 16, ¶¶ 135, 154. While they do transport storm-water, “the conveyance of nitrate is almost entirely by groundwater transport.” *Id.*

254. 33 U.S.C. § 1362(14).

255. *Id.*

256. Laitos & Ruckeridge, *supra* note 252, at 1058. The argument has been made that the Act’s agricultural exemptions are broad, covering not just “agricultural stormwater discharges” and “return flows from irrigated agriculture,” but all discharges related to crop production. Pac. Coast Fed’n of Fishermen’s Ass’ns v. Glaser, No. CIV S-2:11-2980, 2013 WL 5230266, at \*2 (E.D. Cal. Sept. 16, 2013). The court, however, dismissed the suit without addressing this argument. *Id.* at \*16.

257. *E.g.*, Des Moines Complaint, *supra* note 16, ¶ 178. In *Northwest Environmental Defense Center v. Brown*, the court stated that runoff is not inherently a point or nonpoint source of pollution; rather, its status depends on whether it runs off in a natural and unimpeded manner or “is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances . . .” 640 F.3d 1063, 1070–71 (9th Cir. 2011), *rev’d on other grounds sub nom.* Decker v. Nw. Env’tl. Def. Ctr., 133 S. Ct. 1326 (2013).

258. Des Moines Complaint, *supra* note 16, ¶¶ 168–69. The utility asserts other claims against the drainage districts, including a cause of action under Iowa state environmental law and claims of nuisance, trespass, negligence, taking without just compensation, and due process and equal protection claims. *Id.* ¶¶ 187–282.

259. Defendants’ Memorandum in Support of Motion for Partial Summary

defenses based on state law, essentially asserting that drainage districts have immunity, or, as the court put it, whether Iowa law recognizes drainage districts as proper parties to adversarial proceedings.<sup>260</sup> Believing that the interests of the parties and the public are best served by a definitive adjudication of the state law issues, and in light of the “novelty” of Des Moines’ state law arguments, the fact that the case is one of first impression, and the case’s “public importance,” the federal court certified four questions to the Iowa Supreme Court.<sup>261</sup>

The federal court described the Raccoon River case as one about determining which Iowa political subdivisions will be required to “cover the costs of complying with federal and state clean water regulations due to increased nitrate levels,”<sup>262</sup> but it is much more than this for farmers whose livelihoods depend on the amount of land they can plant and harvest.

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Judgment, *Bd. of Water Works Trs. v. Sac Cty. Bd. of Supervisors*, No. 5:15-cv-4020 (N.D. Iowa Sept. 24, 2015), 2015 WL 5950503.

260. Order Certifying Questions to the Iowa Supreme Court at 12, *Bd. of Water Works Trs. v. Sac Cty. Bd. of Supervisors*, No. 5:15-cv-4020 (N.D. Iowa Jan. 11, 2016), BL-50 (Bloomberg).

261. *Id.* at 25. The four questions are:

Question 1:

As a matter of Iowa law, does the doctrine of implied immunity of drainage districts . . . grant drainage districts unqualified immunity from all of the damage claims set forth in the Complaint . . . ?

Question 2:

As a matter of Iowa law, does the doctrine of implied immunity grant drainage districts unqualified immunity from equitable remedies and claims, other than mandamus?

Question 3:

As a matter of Iowa law, can the plaintiff assert protections afforded by the Iowa Constitution’s Inalienable Rights, Due Process, Equal Protection, and Takings Clauses against drainage districts as alleged in the Complaint?

Question 4:

As a matter of Iowa law, does the plaintiff have a property interest that may be the subject of a claim under the Iowa Constitution’s Takings Clause as alleged in the Complaint?

*Id.* at 3.

262. *Id.* at 4.

## VII. CONCLUSION

The culture of the American farmer has many characteristics, with independence and self-reliance at the forefront. Decisions on the farm are usually made in the pickup on the drive to a field or to town, or around the kitchen table with a spouse and grown children. These decisions are typically made without much concern regarding what others might think, but, like a lot of things in farming, this is less true today than it once was, particularly for farmers who must deal with wetlands.

Today federal law and policies have a role in, or, depending upon one's perspective, intrude upon decisions farmers make about managing their land to make it productive and useful in a way that allows them to remain sons of the soil. Some farmers must honor easements to the government granted by their predecessors, but exactly what it is the government acquired and what authority the easements give over land adjacent to the wetland will be answered over time. Farmers will be looking over their shoulders at efforts to expand the reach of the Migratory Bird Treaty Act of 1918 beyond hunters to landowners whose activities effect bird habitat, at the fate of the new "waters of the United States" rule, and at the result of Des Moines' lawsuit against drainage districts. They may have to make room around the kitchen table for federal officials.