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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ROGER J. LAPANT, JR., *et al.*, Defendants.	Case No.: 2:16-cv-01498-KJM-DB **BRIEF IN SUPPORT OF LAPANT MOTION FOR SUMMARY JUDGMENT** Hearing Date: March 6, 2020 Time: 10:00 a.m. Location: Courtroom 3

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Borden Ranch, 261 F.3d at 820 (describing the discharge as "soil [that] was wrenched up, moved around, and redeposited somewhere else," and concluding that there was "no meaningful distinction between this activity and the activities at issue in *Rybachek,*" *id.* at 815); *Moses*, 496 F.3d at 991 (describing the discharge as "disturbed and moved materials as well as log structures"). Here, however, Mr. LaPant's normal farming activities neither removed material from any regulated feature[5] nor processed any material prior to its placement in any regulated feature.[6] Because these activities did not result in the "addition" of any material to any waters, the Clean Water Act does not regulate them.

III. MR. LAPANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE HIS NORMAL FARMING ACTIVITIES WERE EXEMPT FROM ARMY PERMITTING AND NOT "RECAPTURED."

33 U.S.C. § 1344(f)(1)(A) exempts "normal farming [] and ranching activities such as plowing, seeding, [and] cultivating, . . . for the production of food" from the Act's dredge and fill permitting requirements, unless these actions fall under the "recapture" provision of 33 U.S.C. § 1344(f)(2). Mr. LaPant bears the burden of showing both that the normal farming and ranching exemption applies, and that the recapture provision does not. *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986).

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[5] Even the complete removal of material from a regulated feature prior to its redeposit does not necessarily result in the addition of a pollutant to that feature. *Nat'l Mining Ass'n*, 145 F.3d at 1404 ("[T]he straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back.").

[6] *Borden Ranch* is also distinguishable because it concerned four-to-seven-foot deep ripping, *Borden Ranch*, 261 F.3d at 812, 815, whereas Mr. LaPant never penetrated the site's soil to a depth greater than six inches. Should, however, the Court determine that *Rybacheck*, *Borden Ranch*, and *Moses* are not distinguishable, Mr. LaPant hereby reserves the right to seek reversal of those decisions before the en banc Ninth Circuit or the Supreme Court. *Cf. Borden Ranch*, 261 F.3d at 819 (Gould, J., dissenting) ("I would follow and extend *National Mining Association* . . . and hold that the return of soil in place after deep plowing is not a 'discharge of a pollutant.'"); *United States v. Wilson*, 133 F.3d 251, 259-60 (4th Cir. 1997) (opinion of Niemeyer, J.) (adoption of the "mere movement" rule "would . . . flaunt the given definition of 'discharge,' [and] would . . . criminaliz[e] every artificial disturbance of the bottom of any polluted [waterbody] because the disturbance moved polluted material about," a result that should only obtain if "Congress . . . redefine[s] the term 'discharge'").

A. The provision for normal farming and ranching activities applies to Mr. LaPant's wheat crop.

1. The plain text of the Clean Water Act clearly exempts Mr. LaPant's plowing, seeding, and other normal farming and ranching activities from permitting, without regard to whether they took place on an established farm or ranch.

The text of subdivision (f)(1)(A) lists a number of normal farming and ranching activities: "plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products[.]" 33 U.S.C. § 1344(f)(1)(A). As described above in the Summary of Facts, Mr. LaPant's actions on the property in 2011 clearly comprised plowing (with the two-shank tool and the disc), cultivating (with the fertilizer rig and the harrow), and seeding (with the seed drill). And he did these actions to produce food for his livestock (which in turn he produces to provide food for people). There are no other criteria in subdivision (f)(1)(A). On this basis, the exemption applies.

The United States will argue that its regulations add a requirement to the statute that limits the statute's applicability in this case. Specifically, that 33 C.F.R. § 323.4(a)(1)(ii) imposes the additional criterion that normal farming and ranching activities are only exempt if they are "part of an ongoing (*i.e.* established) farming . . . or ranching operation[.]" This regulation violates the Clean Water Act, and is not eligible for *Chevron* deference.

Subdivision (f)(1)(A) has no temporal, spatial, or other qualifications in it. However, various other exemptions listed in subdivision (f)(1) do have such qualifications. Subdivision (f)(1)(B) exempts two categories of flood control activities: maintenance and reconstruction. 33 U.S.C. § 1344(f)(1)(B). Both of these categories have explicit conditions. Only "currently serviceable structures" can be maintained without a permit. *Id.* And only "recently damaged parts" of "currently serviceable structures" can be reconstructed. *Id.* These criteria are temporal ("recently") and conditional ("damaged" and "serviceable"). Subdivision (f)(1)(D) exempts construction of temporary sedimentation basins. 33 U.S.C. § 1344(f)(1)(D). This exemption has a location criterion (on construction sites) and an operational criterion: the construction may "not include placement of fill material into the navigable waters." *Id.* Subdivision (f)(1)(E) exempts construction and maintenance of certain types of roads. 33 U.S.C. § 1344(f)(1)(E). This exemption

has several limiting criteria in it. Construction and maintenance are only exempt if done in accordance an operational criterion: best management practices. *Id*. And then, the construction and maintenance must avoid multiple environmental consequences. *Id*. (no impairment of flow and circulation patterns or chemical and biological characteristics of navigable waters; no reduction of reach of waters, minimize "any adverse effect on the aquatic environment.").

Exemptions B (flood control), D (sedimentation ponds), and E (roads) impose several kinds of conditions: temporal, conditional, operational, locational, and consequential. The farming and ranching exemption has none of these types of limitations. Its only requirements are (1) a normal farming or ranching activity, and (2) for the purpose of producing the goods listed in the exemption. Where Congress uses limiting conditions in one portion of the Clean Water Act and omits them from others that are nearby, the Supreme Court has recently concluded that the omission is deliberate. *Nat'l Assoc. of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). So, the Act is clear that the normal farming and ranching exemption does not have temporal, locational, or operational limits.

The Army's regulation improperly imposes exactly those limits. Refusing the exemption unless farming and ranching activities are part of an established farming or ranching operation improperly imports temporal and locational criteria into the statute that Congress deliberately excluded. *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 631. Further, the regulation qualifies the meaning of "established" in terms of the effect of the otherwise exempt normal farming and ranching activity on the "hydrological regime" of the farm or ranch. 33 C.F.R. § 323.4(a)(1)(ii). This adds either an operational criterion or consequential criterion (or both). All of these additional regulatory limits on Congress' clear exemption for normal farming and ranching activities violate the statute and the Supreme Court's holding in *National Association of Manufactures*.

Because the text of the statute clearly excludes the types of temporal, locational, operational, and consequential criteria that the Army's regulation adds, the regulation is not

entitled to deference. Under *Chevron*, a court may only grant deference to an agency interpretation of a statute *if* the court first finds that the statute is ambiguous. *Chevron*, 467 U.S. at 837. In determining whether a statute is ambiguous, the court must first look to the text of the statute itself. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (stating that when engaging in statutory analysis, "we start, of course, with the statutory text."). Where the text is clear, as here, the analysis starts and ends with this step. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

Akers is not to the contrary on this point. While the Ninth Circuit gave effect to the limiting regulation in *Akers*, it never examined the text of the Act itself, whether the regulation was consistent with the statute, or whether the regulation was entitled to deference under the then-recent *Chevron* decision. *See Akers*, 785 F.2d at 819-823 (discussing regulations without *Chevron* analysis). Where a case does not address a legal issue raised in a lower court, that case is not precedent for that legal issue. *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") quoted in *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007)).

Nor are *Akers* or *Borden Ranch* applicable to the facts of Mr. LaPant's case. Each of those cases involved massive activity that radically altered the hydrology of the land involved. *Akers*, 785 F.2d at 816 ("extensive grading, levelling, drainage, and water diversion"); *id.* at 816-17 (miles of diking, 50-foot-wide ditch, roads blocking "several overflow channels of the Pit River."); *Borden Ranch*, 261 F.3d at 815-816 (four-seven foot deep ripping penetrated restrictive layers and "radically altered the hydrological regime of the protected wetlands."). Mr. LaPant did no such thing in this case. He kept to the existing contour of the land as he found it, avoided using the two-shank tool and disc in seasonal drainages, and tilled as shallowly as possible to still plant a wheat crop. His normal farming and ranching activities were exempt under 33 U.S.C. § 1344(f)(1)(A).

2. Mr. LaPant's property was an established farm and/or ranch in 2011.

If the Court concludes that the Army's limiting regulation applies, Mr. LaPant is still entitled to judgment because his property was an established farm and/or ranch in 2011.

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The regulation defines "ongoing" to mean "established" and then qualifies "established" in terms of the location's "hydrological regime." 33 C.F.R. § 323.4(a)(1)(ii). A farming and/or ranching operation remains established unless "modifications to the hydrological regime are necessary to resume operations." *Id.* the regulations do not define "hydrologic regime." The ordinary dictionary definition of "regime" is "a system of rules or regulations." Black's Law Dictionary, at 1448 (Rev. 4th Ed. 1968).

The proper interpretation of the regulation is thus that it addresses the systemic or high level hydrology of a given location, as opposed to minor or even micro effects that occur only in specific places. *See In re Carsten*, 211 B.R. 719, 734 (D. Mont. 1997) (citing *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 35 (1992)) (interpreting "hydrological regime" to include minor impacts on wetlands would render farm pond exemption "nugatory" and was therefore impermissible reading of regulation); *id*. at 735 (applying *Akers* and concluding that "minor conversions of tiny areas of wetlands to marginal drylands unequivocally did not alter the hydrological regime of the slough, and cannot therefore be considered legally significant.")

This is consistent with the deposition testimony of the government's experts in this case, who conceded that any time soil is plowed, there is at least some hydrological result. The tilth is improved, which changes the amount of water that the soil will absorb and the amount and timing of water that will run off. There is no way to plow without causing these effects, and in fact these effects are one of the purposes of plowing. Cannata Decl., Exhibit A (transcript of deposition of Gregory House) at 5:11-6:17. Reading "hydrological regime" to include such micro effects is not only inconsistent with the dictionary definition of "regime" but it would make it impossible to ever "resume operations" without "modifications to the hydrologic regime."

Akers and *Borden Ranches* support this interpretation. As discussed above, those cases involved a massive scale of earth movement, well beyond plowing, in the case of *Akers*, and deep ripping to four to seven feet in *Borden Ranches*, resulting in the complete penetration of the restrictive layers that establish the hydrology of vernal pools. It is this restrictive layer soil profile that is the correct interpretation of "hydrologic regime" in this case, because it is what creates and sustains the vernal pools. Plowing the surface does not modify this regime; only penetrating the

restrictive layers does.

This can be seen from the fact that the property was tilled and farmed a number of times in the recent past, without ever preventing the re-emergence of the vernal pools. They can even be seen through Mr. LaPant's growing or recently harvested wheat crop in July of 2012 (prior to Goose Pond's actions on the property). LaPant Decl., Exhibit R. The vernal pools' obvious presence in the July 2012 aerial photograph shows that Mr. LaPant did not modify the hydrologic regime in order to grow his wheat crop. Mr. LaPant also kept to the existing contour of the land, and did not use either of the plowing implements in any seasonal drainages, further establishing that no modification to the hydrologic regime of the property was necessary to grow a winter wheat crop.

B. Mr. LaPant's wheat crop was not a new use and therefore did not trigger the recapture provision.

The recapture provision only applies where the exempt use is a "new use." 33 U.S.C. § 1344(f)(2) ("bringing an area of the navigable waters into a use to which it was not previously subject"); *see Akers*, 785 F.2d at 819-20 (property was previously disced and seeded for crops that grew in wetlands, but new uses involved diking, draining, and levelling property to grow exclusively upland crops); *Borden Ranch*, 261 F.3d at 815 (orchards and vineyards were a new use of land previously used for ranching). A prior use need not have been of the same intensity as the exempt activity, and need not have been routinely performed. *In re Carsten*, 211 B.R. at 735-36 (previous "occasional" use of wetland area by horses and llamas for watering did not render exempt stockpond, which livestock used for longer period of the year, a new use); *id*. at 736 (citing *Nordic Village*, 503 U.S. at 35) (requiring close match between prior use and exempt activity would render the exemption meaningless).

It is undisputed that Mr. LaPant's property had been previously used many times to grow wheat. The Farm Services Agency told him so, based on their records. Payments were made to the prior owner based on historical wheat growing. Mr. LaPant limited the crop he grew to the one that had been grown in the past. And, the government's experts in this case conceded that growing wheat and grazing cattle were uses to which the property had previously been put. The recapture

provision does not apply. Cannata Decl., Exhibit A (House trans.) at 2:22-3:16, 4:5-8.

Mr. LaPant's wheat crop was not incidental to any action that Goose Pond took on the property. Mr. LaPant had his crop in motion for months before he realized he would not be able to get permanent financing for the property and thus would not be able to retain it. He had no knowledge of or communications with Goose Pond while he was farming the property in 2011, and no coordination of any kind with them after selling the property in March of 2012.

Mr. LaPant is entitled to judgment as a matter of law because his normal farming activities were exempt, were part of an established farming and/or ranching operation, and were not a new use and therefore not recaptured.

CONCLUSION

The Court should grant Defendant LaPant's motion and award judgment in his favor.

DATED: December 20, 2019.

Respectfully submitted,
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