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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 **DEFENDANT ROGER J. LAPANT, JR.'S OPPOSITION TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT**

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features have a significant nexus to navigable waters of the United States). *See also Foster v. EPA*, 2017 WL 3485049, *13-16, *17 (S.D. W.V., August 14, 2017) (conflicting expert declarations on significant nexus foreclose summary judgment and require trial).

3. Mr. LaPant has controverted the extent to which vernal pools on the Site meet the plurality standard for adjacent wetlands.

The United States concedes that LaPant has raised an issue of material fact as to which vernal pools on the site meet the requirements of the *Rapanos* plurality for adjacent wetlands. *See* United States Corrected MSJ Brief, at 24:13-17 (citing Mike Delmanowski evidence of isolated vernal pools). If the court concludes that the *Rapanos* plurality provides the applicable legal rule, then Mr. LaPant has raised an issue of material fact as to whether these wetlands are "navigable waters."

II. THE UNITED STATES FAILS TO ESTABLISH THAT MR. LAPANT CANNOT PROVE HIS AFFIRMATIVE DEFENSES

A. The United States is not entitled to summary judgment on Mr. LaPant's farming practices defense.

Mr. LaPant's Motion for Summary Judgment lays out his entitlement to judgment in his favor on his affirmative defense (*See* LaPant Answer, ECF 18, Tenth Affirmative Defense, at 8:12-18). The United States argues in its motion that Mr. LaPant cannot establish that the property was an established (i.e. ongoing) farming operation. To the contrary, Mr. LaPant's motion demonstrates (1) that this regulatory restriction of the statutory exemption for normal farming activities is invalid and unenforceable, and (2) that even it is applicable, the property met that requirement in 2011 when Mr. LaPant farmed it. And, Mr. LaPant also demonstration that the property was an ongoing ranching operation in 2011, and that his wheat crop was a normal ranching activity to feed his own livestock. See LaPant Memorandum in Support of Summary Judgment, at 23-29, ECF 113-1. See also February 5, 2020 LaPant Decl., at paragraph 8 (property

grazed for the two decades prior to his purchase); February 5, 2020 Declaration of Paul Squires (prior owner of property received payments on account of wheat farming most years from 1985-2006).

The key flaw in the government's argument is to misread the structure and text of the "ongoing" provision as imposing a "recency" requirement. That misreads a regulatory safe harbor for fallowing and rotation systems. 33 CFR section 323.4(a)(1)(ii) says that areas fallowed "as part of a conventional rotational cycle are part of an established operation." This provision serves as a safe harbor. The regulation cannot be read as saying that fallowing for extended periods of time are therefore not "ongoing." Instead, the regulation specifically states what causes an operation to cease to be ongoing: activities that bring an area into farming or ranching use (not applicable here, since the property had long been used for both farming and ranching), and the area "has been converted to another use" (also not applicable, since it has only been used for farming or ranching) or "lain idle *so long that modifications to the hydrological regime are necessary to resume operations*." *Id* (emphasis added). So the United States cannot negative this factor (even if it were an element of the farming activities defense) merely by arguing a lengthy period of time since it was cultivated. Instead, the government would have to show that modification of the hydrologic regime was necessary to resume cultivation.

Mr. LaPant demonstrates in his Motion for Summary Judgment that this factor is not merely a question of micro effects in individual vernal pools (the government only even alleges "smoothing" around the edges of vernal pools from Mr. LaPant's discing). Rather, "hydrologic regime" refers to the flow and circulation of water throughout the site. Mr. LaPant's experts opine that modifications to the hydrologic regime were not necessary for him to farm the land in 2011, and therefore at very least Mr. LaPant has raised an issue of material fact on this point.

In any event, the United States concedes Mr. LaPant's expert evidence of more recent and frequent farming use of the site in its own motion. See United States Corrected MSJ Brief, at 26:12-23. Further, Mr. LaPant's declaration that the property was grazed for the previous two decades shows that it was an established and ongoing ranching operation. Paul Squires' declaration that the prior owner received USDA payments almost every year from 1985 through 2006 through a program that did not require actual farming to receive the payment also raises an important question whether the Clean Water Act's exemption may be read narrowly, as the government tries to, to the point that one federal agency paying a prior owner not to farm results in a subsequent owner loosing the ability to farm the property without an onerous, expensive, and time consuming permit.

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B. There is a genuine dispute of material fact as to whether all or part of the United States' claim is time barred under 28 U.S.C. § 2462.

There is a genuine dispute of material fact as to Mr. LaPant's affirmative defense that each cause of action in the United States' complaint is barred in whole or in part by the applicable statute of limitations. The statute of limitations was raised as Defendant's Fourth Affirmative Defense. *See* Defendant's Answer at 6:24–28 (ECF No. 18).

The federal five-year statute of limitations set out in 28 U.S.C. § 2462 applies to penalty actions for discharge of dredge or fill materials into waters of the United States under the CWA. *See United States v. Telluride Co.*, 146 F.3d 1241, 1244 (10th Cir. 1998) ("The parties do not dispute that 28 U.S.C. § 2462 is the applicable federal statute of limitations to the Government's actions for civil penalties under the Act"); *United States v. Banks*, 115 F.3d 916, 918 (11th Cir. 1997) ("Because the CWA does not specify a limitations period for enforcement actions under §