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COURT URGED TO OVERTURN CONVICTION FOR STORING IRRIGATION WATER

(United States v. King)

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the Ninth Circuit to overturn the federal felony conviction of a farmer in Idaho for alleged technical violations of an Idaho statute. The farmer each spring took melting snow and injected it into his irrigation wells, to ensure that he had adequate water supplies during the summer to irrigate his crops. Although there was no evidence that the practice endangered any drinking water supplies, federal officials obtained felony convictions based on evidence that the farmer did not obtain all necessary state permits for his well injections.

WLF argued that the prosecution exceeded the federal government's powers under the Commerce Clause. WLF noted that the evidence at trial demonstrated that the water at issue was intrastate in nature and contained no contaminants.

“The Framers of the Constitution sought to maintain a balance of power between federal and state government as a means of reducing the risks of tyranny and abuse by governments at any level. We are concerned that the federal government is upsetting that balance by seeking to impose criminal sanctions based on activities far afield from the powers assigned to it by Constitution,” said WLF Chief Counsel Richard Samp after filing WLF's brief. “We are particularly concerned that federal prosecutors reached out to make this a criminal matter when the Idaho rules the defendant is alleged to have violated are normally deemed regulatory matters that are most appropriately addressed in civil proceedings,” Samp said.

The defendant is Cory L. King, who manages a large farm in a semi-desert area of southern Idaho. His Double C Farms makes use of an extensive system of irrigation wells to irrigate its crops. Like many other farms in Idaho, Double C has a long history (a history that pre-dates King's arrival at the farm) of ensuring an adequate supply of irrigation water by injecting surface runoff water into an aquifer that feeds its irrigation wells. An Idaho statute adopted in 1971 provided that anyone wishing to continue to use injections wells was required to obtain a permit. But the statute was poorly administered, and many farmers did not obtain the required permits.

Congress later adopted the Safe Drinking Water Act, an environmental statute designed to ensure the safety of drinking water. Because Congress feared that businesses might choose to inject some of their industrial wastes underground, it included in the SDWA a section that addressed underground injection of fluids. That section of the SDWA provided, among other things, that every State must establish an underground injection control (UIC) program, and it provided severe criminal penalties for anyone who willfully violates a State's UIC program that had been approved by the federal Environmental Protection Agency (EPA). EPA subsequently approved Idaho's existing UIC program, including Idaho's statute requiring a permit for any use of injection wells.

When Idaho officials became aware in 2005 that Double C Farms was using injection wells without a permit, it informed King of the violation, and Double C has been in full compliance with Idaho's requirements since that date. Idaho chose to address Double C's violations administratively, and Double C entered into a consent order that required it to pay a substantial fine.

That resolution was insufficient for federal officials, however. In 2008, they indicted King for multiple felony violations of the SDWA. They charged him under 42 U.S.C. § 200h-2(b)(2) (a felony punishable by three years in prison) with violating the Idaho UIC program by injecting surface runoff water into an irrigation well without a permit. Following King's conviction, he appealed to the U.S. Court of Appeals for the Ninth Circuit.

In its brief urging that the conviction be overturned, WLF argued that the SDWA is unconstitutional as applied to King because it exceeds Congress's authority under the Constitution's Commerce Clause. The Supreme Court has held that Congress may regulate local activity under the Commerce Clause so long as it has a "substantial" effect on interstate commerce. WLF argued that King's conduct could not possibly have any effect on interstate commerce, given that: (1) the water injected into Double C's irrigation wells was intrastate water; (2) those wells were unconnected to interstate aquifers or any source of drinking water; and (3) the trial court determined that the water was uncontaminated.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared in numerous federal and state courts in cases raising claims that prosecutors are unfairly seeking to criminalize business practices that, even if

technically a violation of some regulatory rule, are more appropriately addressed in a civil proceeding. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

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For further information, contact WLF Chief Counsel Richard Samp, 202-588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.