Ninth Circuit Takes Another Look at WOTUS

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WOTUS litigation will keep the legal community in the black for years. The latest iteration, *California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.*, 2017 WL 3868398 (E.D. Cal. 2017), is a good example of the endless litigation spurred by the uncertainty over what waters are covered by the CWA. In *Chico Scrap*, the court has delayed trial pending the outcome of the Ninth Circuit appeal in *United States v. Robertson*, appeal no. 16-30178. The defendant in *Chico* is challenging the WOTUS determination, and he wants the court to consider the outcome of *Robertson* before proceeding to trial.

The *Robertson* appeal arises out of a 2015 criminal conviction related to unauthorized discharges to WOTUS in connection with a small mining operation in Montana. See *United States v. Robertson*, 2015 WL 7720480 (D. Mt. 2015) The primary issue in the case was significant nexus.

The *Robertson* appeal was argued August 29 in Seattle. The video of the argument is worth watching if you follow WOTUS issues. Appellant’s attorney got only one question from the panel, and the panel appeared uninterested in his evidentiary arguments. But Judge Gould was very interested in the issue of fair notice when the government’s lawyer argued. (The panel consisted of M. Margaret Mckeown, Ronal M. Gould and Barbara Jacobs Rothstein.) Both Gould and McKeown asked whether we can send a man to jail when the standard for what is a WOTUS is so confusing. If the courts struggle with the *Marks* analysis of *Rapanos*, the panel wanted to know, how is a person working in a creek supposed to know what test applies to determine what is covered by the CWA.

The oral argument revolved around the Ninth Circuit's *en banc* ruling addressing *Marks* in *United States v. Davis*, 825 F.3d 1014 (2016). In *Davis* (a non-CWA case), the *en banc* panel held that “a fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other.” *Id.* at 1021-22. Otherwise, “only the specific result is binding on lower federal courts,” *id.* at 1022, and they should “consider which of the rationales set forth in the varying opinions is most persuasive.” *Id.* at 1026.

This is an issue because the current WOTUS standard in the 9th Cir. is found in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), cert. denied, 552 U.S. 1180 (2008). In *Healdsburg*, the Court adopted the Kennedy significant nexus test from *Rapanos* with little *Marks* analysis. Is *Healdsburg* still good law post *Davis*? The evidence against Mr. Robertson is pretty compelling, and I suspect the Court will uphold the conviction. It will nevertheless be interesting to see what they do with *Healdsburg*. The Circuit Courts are divided over whether the Kennedy concurring decision in *Rapanos* alone applies or whether one can use either Kennedy or Scalia’s plurality opinion from *Rapanos*.

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