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United States v. King

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United States v. King, ___ F.3d ___, 2011 WL 4537801 (9th Cir. Oct. 3, 2011).

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I. INTRODUCTION

In *U.S. v. King*,¹ the government brought criminal charges against Idaho farmer Cory King for violating the Safe Drinking Water Act (SDWA)² by injecting fluids into deep wells without a permit.³ A jury in the U.S. District Court for the District of Idaho convicted King on four counts of injecting fluids into deep wells without a permit and one count of making materially false statements in a matter within the jurisdiction of the United States.⁴ The United States Court of Appeals for the Ninth Circuit affirmed the conviction on all five counts.⁵ The court held that the SDWA did not exceed Congress' authority under the U.S. Constitution's Commerce Clause.⁶ Additionally, the court held that in order to obtain a criminal conviction under the SDWA, the government was not required to demonstrate that an injection of water would have an adverse effect on an underground source of drinking water.⁷ The government need only demonstrate that an injection took place in a well more than eighteen feet deep and no permit was obtained.⁸

II. STATUTORY AND FACTUAL BACKGROUND

The Clean Air Act and Clean Water Act increased the cost of atmospheric and surface waste disposal, such as burning and dumping.⁹ The increased cost created an incentive for

¹ *U.S. v. King*, ___ F.3d ___, 2011 WL 4537801 (9th Cir. Oct. 3, 2011).

² 42 U.S.C. §§ 300 et seq. (2006).

³ *King*, 2011 WL 4537801 at *2 (citing 42 U.S.C. § 300(h) (2006).)

⁴ *Id.*

⁵ *Id.* at *10.

⁶ *Id.* at *8.

⁷ *Id.* at *3.

⁸ *King*, 2011 WL 4537801 at **3–4.

⁹ *Id.* at *5.

alternative, illegal means of waste disposal such as underground injections of wastewater.¹⁰ In 1968, 79% of water systems in the United States were not inspected by county or state authorities and 19% of water systems did not meet the bacteriological limits of drinking water standards.¹¹ Furthermore, between 1961 and 1970, there were 130 outbreaks of disease or poisoning attributable to drinking water that caused over 46,000 illnesses and 20 deaths.¹² In light of these facts, Congress believed that existing federal and state laws were inadequate to ensure the safety of drinking water across the country. In response to these concerns, Congress passed the SDWA in 1974.¹³ The SDWA has two parts. The first part sets national minimum standards for drinking water.¹⁴ The second part regulates underground injections that may adversely affect current and potential underground sources of drinking water.¹⁵ The SDWA provides for a cooperative federal-state program that allows a state to be exempt from direct, federal regulations if the state administers an Underground Injection Control (UIC) program.¹⁶ The state may regulate underground injections through either permitting or rulemaking.¹⁷ If the state opts for a permitting program, the SDWA disallows any underground injection without a permit.¹⁸ Through this regulation, Congress attempted to establish a preventative measure that would ensure clean drinking water instead of having to mitigate damage after the fact.¹⁹

The defendant King was the manager of a large farming and cattle operation in southern Idaho.²⁰ The farm included 11,500 acres of cropland and a feedlot of between 15,000 and 20,000

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *King*, 2011 WL 4537801 at *6.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *King*, 2011 WL 4537801 at *1.

head of cattle.²¹ In January 1987, King applied for a permit to inject water from a creek into a 500-foot well.²² His application was denied in 2000.²³ Five years later an Idaho Department of Agriculture investigator visited the property.²⁴ During this visit, the investigator observed water from a waste containment pond flowing into wells due to anti-backflow valves that had been installed in the wrong direction.²⁵ Based on these observations, King was charged with four counts of willfully injecting water into a well without a permit issued by the state of Idaho.²⁶ The government alleged that King committed this violation with knowledge of the requirement to obtain a permit.²⁷

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at *2.

²⁶ *King*, 2011 WL 4537801 at *2.

²⁷ *Id.*

III. ANALYSIS

A. The government was not required to prove under the SDWA that injection of water would have an adverse impact on an underground source of drinking water.

King argued that the government failed to prove he violated the provision of the SDWA that criminalizes “willful” violations of an “applicable underground injection program.”²⁸ King conceded that the government proved he willfully injected water into the wells despite not having a permit.²⁹ However, he argued that a violation required the government to prove the injection of fluid implicated an underground source of drinking water.³⁰

The SDWA provides that an applicant for a permit to inject fluids has the burden to show that the injection will not endanger underground sources of drinking water.³¹ The law is not concerned with whether or not the injection itself is contaminated but whether the injection will cause a source of drinking water to be contaminated.³² For example, an existing contaminant residing in the ground could be moved into a source of drinking water via the injection of clean water. Therefore, a permit application must show that injection will not allow “the movement of fluid containing a contaminant.”³³

Based on this rationale, the court concluded that the government was not required to prove that King’s injection of water would have an adverse impact of an underground source of drinking water.³⁴ The only requirement for the government to meet was that King willfully failed to comply with the injection program by not obtaining a permit when he knew he was required to do so.³⁵ King knew of the permitting process, and despite the denial of his

²⁸ *Id.* at *3.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *King*, 2011 WL 4537801 at *3.

³³ *Id.* at *4.

³⁴ *Id.*

³⁵ *Id.*

application, he chose to continue with the underground injections in violation of the provisions of the SDWA.

B. The SDWA is a constitutional exercise of Congress' power under the Commerce Clause.

King challenged the constitutionality of the SDWA, alleging that the regulatory scheme exceeded Congress' power under the Commerce Clause.³⁶ When the SDWA was enacted, Congress was responding to the widespread national problem of contaminated sources of drinking water.³⁷ The House Report on the SDWA acknowledged that water in the hydrologic cycle does not respect the traditional political boundaries of state lines.³⁸ Groundwater has the ability to flow over large areas, enter into aquifer systems, and reemerge as surface water. Furthermore, the report stated the nation had an important fiscal interest in minimizing disease from contaminated drinking water sources as it could contribute to a drain on Medicare and Medicaid funds.³⁹ The report noted that this financial drain could continue until the nation's drinking water supplies are protected.⁴⁰

Under the Commerce Clause, Congress may regulate the channels and instrumentalities of interstate commerce, persons or things in interstate commerce, and may regulate activities that have a substantial relation to interstate commerce.⁴¹ The Supreme Court has previously held that drinking water is an economic commodity and an article of commerce.⁴² Water is not always consumed directly at the source. Drinking water may be withdrawn in one state, then transported and sold in another.⁴³ For example, a bottled water manufacturing plant may draw water from

³⁶ *Id.* at *2.

³⁷ *Id.* at *6.

³⁸ *King*, 2011 WL 4537801 at *6.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at *7 (citing *U.S. v. Lopez*, 514 U.S. 459, 585 (1995)).

⁴² *Id.* (citing *Sporhase v. Neb.*, 458 U.S. 941, 954 (1982)).

⁴³ *Id.*

one aquifer and transport that water around the country.⁴⁴ Thus, a contaminant entering a supply of water at any one location can have widespread health consequences.⁴⁵ Water from a contaminated source may be transported to another state.⁴⁶ Alternately, a contaminated source of water may flow as groundwater across state lines.⁴⁷ The court determined that a regulatory scheme that protects the safety of a single drinking water source has an effect on the overall supply across the nation.⁴⁸ A permitting process that ensures an intrusion will not contaminate a water source is within the scope of Congress' authority under the Commerce Clause, as it regulates articles of interstate commerce.⁴⁹

The court recognized that the permitting process may deny injections that would not contaminate drinking water sources.⁵⁰ However, in the interest of caution, the government has broad authority to regulate injections as a means to protect the nation's drinking water.⁵¹

IV. CONCLUSION

The Ninth Circuit upheld the criminal conviction of King for injecting wastewater into groundwater wells without a permit.⁵² Under the SDWA, each state has the ability to develop a regulatory scheme to protect drinking water sources. Idaho adopted a permitting system that ensured no injections could be made that would threaten contamination of water sources. The court held that in order for the government to obtain criminal convictions under the SDWA, the government only has the burden to show a defendant violated the permitting process. The government does not have the burden to demonstrate the injection contaminated a drinking water

⁴⁴ *King*, 2011 WL 4537801 at *7.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at *7.

⁴⁹ *Id.* at *8.

⁵⁰ *King*, 2011 WL 4537801 at *8.

⁵¹ *Id.*

⁵² *Id.* at *10.

supply. Furthermore, the court held that groundwater is a dynamic and a valuable commodity.

The Constitution provides Congress the necessary powers to pass the SDWA and create incentive systems to encourage compliance.