NOTES

LESLIE SALT CO. v. UNITED STATES: THE NINTH CIRCUIT REVISITS FEDERAL JURISDICTION OVER ISOLATED WETLANDS

Cargill, Inc. (Cargill), corporate successor to the Leslie Salt Co. (Leslie Salt), owns a 153-acre property bordering the San Francisco Bay National Wildlife Refuge and lying approximately one-fourth of a mile from the Newark Slough, a tidal arm of San Francisco Bay.[1] Although the land is no longer used for manufacturing salt, it still contains numerous crystallizers[2] and calcium chloride pits.[3] Each winter, rainwater fills these crystallizers and pits,[4] forming small ponds that become habitats for a variety of migratory birds.[5] In 1985 Leslie Salt initiated the excavation of a ditch on one parcel of the property, discharging the resulting landfill into these seasonal ponds.[6] The Army Corps of Engineers (Corps) classified these ponds as "wetlands" under

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1. Leslie Salt Co. v. United States, 55 F.3d 1388, 1390 (9th Cir. 1995) [hereinafter *Leslie Salt IV*], *cert. denied,* 64 U.S.L.W. 3069 (U.S. Oct. 13, 1995) (No. 95-73).

2. Crystallizers are shallow basins that are used for crystallizing salt. *Leslie Salt IV*, 55 F.3d at 1390.

3. *Id*. Leslie Salt used the property to manufacture salt from 1919 until 1959, when use of the property for manufacturing salt became uneconomical. Leslie Salt Co. v. United States, 700 F. Supp. 476, 479-80 (N.D. Cal. 1988) [hereinafter *Leslie Salt I*], *rev'd,* 896 F.2d 354, (9th Cir. 1990) [hereinafter *Leslie Salt II*], *cert. denied,* 498 U.S. 1126 (1991).

4. *Leslie Salt II*, 896 F.2d. Winter is the wet season in Northern California; the area receives little rain during the summer. *Id.* at 356 n.1.

5. *Leslie Salt IV*, 55 F.3d at 1391. This phenomenon began in 1983. *Leslie Salt I*, 700 F. Supp. at 480. Until that time, the high salinity levels of the seasonal ponds permitted few life forms to survive in them. *Id.* In 1983, Leslie Salt was cited for air pollution caused by winds kicking up dust from the dry pits and crystallizers during the summer and blowing it over neighboring residential property. *Id.* To alleviate the problem, Leslie Salt plowed the property. *Id.* The loosening of the soil reduced salinity levels of the pits, allowing for the growth of plants and the presence of fish. *Leslie Salt II*, 896 F.2d at 356.

During the early 1980s Caltrans, the California state highway authority, constructed roads and sewers on and around the property. *Id.* The ditches and culverts resulting from the construction had the effect of hydrologically connecting the Leslie Salt property to the Newark Slough. *Id.* Caltrans also broke through a levee on the San Francisco Wildlife Refuge, allowing tidal waters to reach the property. *Id*. The consequence of this human activity was to create wetland features on the southern edge of the property, adjacent to these tidal waters. *Id*. These features attracted migratory birds to the general area. *Id.*

6. *Leslie Salt IV*, 55 F.3d at 1391.

the Clean Water Act due to their use by migratory birds[7] and issued Leslie Salt a cease and desist order for filling wetlands without a proper permit.[8] Leslie Salt challenged the Corps' jurisdiction over the property, contending that the seasonal ponds are only "isolated wetlands" that the Clean Water Act does not protect.[9]

The trial court in the original action (*Leslie Salt I*) held that the Corps had no jurisdiction to regulate such isolated wetlands.[10] On appeal (*Leslie Salt II*), the Ninth Circuit reversed.[11] On remand (*Leslie Salt III*), the trial court, implementing the decision of the Ninth Circuit, found that fifty-five species of migratory birds use seasonally ponded areas on the property, and therefore, that the Corps may establish jurisdiction over those areas.[12] The trial court also held that penalties are mandatory for discharging fill into those areas without a permit.[13] Upon a second appeal by Cargill (*Leslie Salt IV*), the Ninth Circuit held (1) that its conclusion in the first appeal, which extended the Corps' jurisdiction to include isolated wetlands used by migratory birds, was not clearly erroneous and (2) that penalties for unlawfully discharging fill material into the waters of the United States are mandatory, not issued at the discretion of the trial court. *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995).

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7. *See* 51 Fed. Reg. 41217 (1986), *infra* note 22.

8. *Leslie Salt IV*, 55 F.3d at 1391. The Corps found Leslie Salt to be in violation of 33 U.S.C. §§ 1311(a) and 1344(a) (1986), which make discharging pollutants into the waters of the United States unlawful unless authorized by a permit issued by the Corps. *Id.* The Corps also found Leslie Salt to be violating 33 U.S.C. § 403 (The Rivers and Harbors Appropriation Act of 1899), which states that

> it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to the beginning the same.

Id.

9. *Leslie Salt II*, 896 F.2d at 356.

10. 700 F. Supp. at 490.

11. 896 F.2d at 355. The court held that the Commerce Clause Power, and thus the Clean Water Act, is "broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds," and remanded to the district court for a factual determination of the sufficiency of the property's connections to interstate commerce. *Id.* at 361.

12. Leslie Salt v. United States, 820 F. Supp. 478 (N.D. Cal. 1992) [hereinafter *Leslie Salt III*], *aff'd*, *Leslie Salt IV*, 55 F.3d 1388. *See infra* notes 24-27 and accompanying text.

13. *Leslie Salt III*, 820 F. Supp. at 483-84. For text of the section of the Clean Water Act imposing penalties, see *infra* note 43.

Under the Clean Water Act, the Environmental Protection Agency (EPA) retains primary authority to regulate the discharge of pollutants.[14] Congress, however, also conferred authority on the Corps in the Rivers and Harbors Act of 1899 to regulate dredged and fill materials.[15] Recognizing the Corps' long-standing role in the dredging and maintaining of navigable channels and ports, Congress provided the Corps with authority to regulate dredged and fill material under the Clean Water Act.[16]

The Clean Water Act regulates the discharge of such material into "navigable waters,"[17] which the Act defines as "waters of the United States, including the territorial seas."[18] The Corps, in its regulations, has promulgated a more detailed definition of "waters of the United States," interpreting it to encompass a variety of water bodies, including wetlands and natural ponds.[19] Comments to those regulations reserve the right to determine on a "case-by-case basis" which waters fall under the Corps' jurisdiction.[20] Even if a body of water is not normally considered to be a "water of the United States," the Corps allows itself to determine otherwise if it finds regulation is needed under the circumstances.[21] In its

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14. 33 U.S.C. § 1342(a).

15. 33 U.S.C. § 403. For relevant text of statute, see *supra* note 8.

16. 33 U.S.C. § 1344(e). The statute states that "[t]he term 'Secretary' as used in this section [of the Clean Water Act] means the Secretary of the Army, acting through the Chief of Engineers." *Id*. at § 1344(d). *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4.6, at 318-19 (2d ed. 1994).

17. 33 U.S.C. § 1344(a).

18. *Id.* § 1362(7). In federal efforts to fight pollution, Congress gave "navigable waters" a broader definition in order to eliminate traditional limits of navigability. RODGERS, *supra* note 16, at 332-33.

19. 33 C.F.R. § 328.3(a)(3) (1993). The regulations include in waters of the United States "all . . . waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ." *Id.* The regulations define "wetlands" as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id*. § 328.3(b). Even though this definition is a legal one, it is "obviously fact-responsive," leading courts to "defer to administrative choices." RODGERS, *supra* note 16, at 335.

20. 51 Fed. Reg. 41217.

21. *Id.* The comments include the following as examples of what may be regulated even if not normally considered waters of the United States: "artificial lakes or ponds" and "[w]aterfilled depressions created in dry land ... for the purpose of obtaining fill, sand or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definitions of waters of the United States." *Id.*

comments, the Corps also expands the scope of United States waters to include waters inhabited by migratory birds.[22]

Although generally acknowledged that waters of the United States may incorporate wetlands, the question of what constitutes wetlands has been the subject of much debate. The Supreme Court has held that the definition of waters of the United States may include "adjacent wetlands,"[23] but the Court has yet to rule on the controversial issue of whether they include isolated wetlands. The Ninth Circuit confronted the issue of jurisdiction over isolated wetlands in *Leslie Salt II*.[24] The *Leslie Salt II* court acknowledged the Corps' broad definition of waters of the United States.[25] In particular, the court approved of the Corps' "migratory bird rule,"[26] holding that "the Commerce Clause power . . . is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species."[27]

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22. *Id*. The comments state, in relevant part, that waters of the United States include waters: "(a) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or (b) Which are or would be used as habitat by other migratory birds which cross state lines; or (c) Which are or would be used as habitat for endangered species." 51 Fed. Reg. 41217.

23. In 1985, the question concerning the breadth of the Corps' authority over "adjacent" wetlands (adjacent to navigable bodies of water) came before the Supreme Court in United States v. Riverside-Bayview Homes, Inc., 474 U.S. 121 (1985). In broadening the definition of "navigable waters" to encompass adjacent wetlands, the court considered the "language, policies, and legislative history" of the Clean Water Act. *Id.* at 131. The court noted that Congress, in drafting the 1972 amendments to the Clean Water Act, recognized that protection of aquatic ecosystems "demanded broad federal authority to control pollution." *Id.* at 132-33. Congress's decision to define "navigable waters" as "waters of the United States" signified congressional desire to reduce limits on federal regulation. *Id.* at 133. The court also noted that the Corps in its expertise had made a decision that adjacent wetlands were an indispensable part of the aquatic environment and felt it was reasonable to defer to the Corps' judgment. *Id.* at 135. The court was careful, however, to point out that it was not deciding whether *isolated* wetlands also fall under the auspices of the Corps. *Riverside-Bayview Homes*, 474 U.S. at 131-32 n.8.

24. 896 F.2d 354.

25. *See id.* at 359-60.

26. *See supra* note 22 for text of migratory bird rule.

27. *Leslie Salt II*, 896 F.2d at 360. The *Leslie Salt II* decision, however, provided no explanation as to why migratory birds are an article of interstate commerce. *See id.*

The court dismissed the argument that only natural and not artificial waters could be regulated under the Clean Water Act. *Id.* at 360. The court also pointed out that the fact that a body of water exists only for part of the year does not prevent federal jurisdiction: the regulations specifically include as waters of the United States intermittent streams and playa lakes, both of which are seasonal. *Id.* (citing Quivira Mining Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1187 (D. Ariz. 1975)).

The Seventh Circuit in *Hoffman Homes, Inc. v. EPA* (*Hoffman Homes II*) followed the Ninth Circuit in applying the migratory bird rule to isolated wetlands.[28] In vacating its previous opinion,[29] it held that migratory birds constitute a reasonable connection between isolated wetlands and interstate commerce.[30] This court, unlike *Leslie Salt II*, provided some justification as to why migratory birds are within the scope of the Commerce Clause.[31] The court, noting that observing, hunting, and trapping birds in the United States is a billion dollar industry, reasoned that the cumulative loss of wetlands has reduced the population of birds, decreasing the ability of citizens to participate in that industry.[32] The court narrowed its holding by asserting that the Corps must produce "substantial evidence" that a particular area of wetlands is a potential or actual migratory bird habitat for it to be subject to federal jurisdiction.[33] The *Hoffman Homes II* decision was recognized by the *Rueth v. U.S.E.P.A.* court, which held that the *Hoffman Homes II* decision gave "full effect to Congress's intent to make the Clean Water Act as far-reaching as the Commerce Clause permits."[34]

The Fourth Circuit, however, has not looked upon the migratory bird rule so favorably. The court in *Tabb Lakes, Ltd. v. United States* took exception to the rule on a procedural basis, holding that the Corps did not satisfy the requirements of the Administrative Procedure Act (APA) when promulgating the rule.[35] According to section 553 of the APA, an agency must provide a period for notice and comment before any substantive rule is promulgated.[36] The APA, however, does not require notice and comment for interpretive rules or general statements of policy.[37] The court determined that the rule was substantive rather than

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28. 999 F.2d 256 (7th Cir. 1993) [hereinafter *Hoffman Homes II*].

29. Hoffman Homes, Inc. v. EPA, 961 F.2d. 1310, 1321-23 (7th Cir. 1992), *vacated*, *Hoffman Homes II*, 999 F.2d 256. In this original appeal of an EPA order imposing a penalty for discharging dredged or fill material into interstate wetlands, the court dismissed the notion that the existence of migratory birds could give the Corps jurisdiction over isolated wetlands under the Commerce Clause. *Id.* at 1321-23.

30. *Hoffman Homes II*, 999 F.2d 256 at 261. In holding that migratory birds satisfied the requisite connection to interstate commerce, the court pointed out that the interstate commerce connection "may be potential rather than actual, [or] minimal rather than substantial." *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. 13 F.3d 227, 231 (7th Cir. 1993).

35. 715 F. Supp. 726, 729 (E.D. Va. 1989), *aff'd per curiam,* 885 F.2d 866 (4th Cir. 1989).

36. 5 U.S.C. § 553(b)-(c) (1977).

37. *Id.* § 553(b)(3)(A).

interpretive because it delineated the required connection to interstate commerce and bound all Corps personnel.[38] The rule, however, originated in a memorandum of the Deputy Director of the Corps and not in the actual regulations defining waters of the United States; thus, the public never received notice of it or the opportunity to comment on it.[39] As a result, the court held that the Corps could not legally administer it without violating the APA.[40] The court did not reach the issue of whether a properly promulgated migratory bird rule would be within the Commerce Clause power.[41]

In a separate issue discussed in *Leslie Salt III* and in the noted case, there is controversy as to whether civil penalties are mandatory or discretionary when the Corps finds an entity to have violated the provisions of the Clean Water Act regulating dredged and fill material.[42] The Clean Water Act provides that violators "shall be subject to" civil penalties in the event of a violation.[43] Only two circuits, the Fourth and Eleventh, have definitively decided that civil penalties under the Clean Water Act's language are mandatory,[44] while several District Courts

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38. *Tabb Lakes*, 715 F. Supp. at 728 (citing American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) ("Substantive rules are ones which grant rights, impose obligations, or produce other significant effects on public interests, or which effect a change in existing law or policy. Interpretive rules, by contrast, are those which merely clarify or explain existing law or regulations, are essentially . . . instructional, and do not have the full force and effect of a substantive rule but are in the form of an explanation of particular terms.")).

39. *Tabb Lakes*, 715 F. Supp. at 728-29. The memo stated that "waters which are used or could be used as habitat by other migratory birds which cross state lines" provide a sufficient connection to interstate commerce to allow regulation. *Id.* at 728. This language is similar to the comments to the actual regulations. 51 Fed. Reg. 41217 (for relevant text of comments, see *supra* note 22).

40. *Tabb Lakes*, 715 F. Supp. at 729.

41. *Id.*

42. *Leslie Salt III*, 820 F. Supp. at 483.

43. 33 U.S.C. 1319(d) (1995). The Act, in relevant part, states:

> Any person who violates [one of the enumerated sections] shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty, the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

Id.

44. Atlantic States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990); Stoddard v. W. Carolina Regional Sewer Auth., 784 F.2d 1200, 1208 (4th Cir. 1986).

have held to the contrary.[45] Prior to the noted case, the Ninth Circuit had not addressed this question.

In the noted case, the Ninth Circuit explained why it chose to reconsider this case, which it had previously decided in *Leslie Salt II*.[46] The court acknowledged that while the "law of the case" doctrine pronounces that one panel of an appellate court normally does not reconsider matters decided in a prior appeal to another matter in the same case, it does not absolutely bar reconsideration.[47] Courts may still consider a previously resolved question in cases where there has been an intervening change of controlling authority, where new evidence has surfaced, or where the previous disposition was clearly erroneous and would work a manifest injustice.[48] Cargill argued that the prior ruling was clearly erroneous because it upheld the migratory bird rule in a "bare conclusion" without sufficient discussion.[49] On that basis, the court accepted Cargill's appeal for reconsideration of the case.[50]

Cargill, making an argument based on the Fourth Circuit's *Tabb Lakes* ruling, claimed that the Corps' comments to its 1986 regulations defining waters of the United States are substantive rules, promulgated without notice and comment as required by the APA.[51] The United States, relying on the Seventh Circuit's *Hoffman Homes II* decision, maintained that the comments are interpretive because they simply establish the Corps' understanding of the statutory term "waters of the United States."[52] The court, sidestepping this issue, held that since the

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45. Hawaii's Thousand Friends v. Honolulu, 149 F.R.D. 614, 617 (D. Haw. 1993); United States v. Bradshaw, 541 F. Supp. 880, 883 (D. Md. 1981).

46. *Leslie Salt IV*, 55 F.3d at 1392-93. The court admitted that the opinion in *Leslie Salt II* upholding the migratory bird rule was "succinct," but held that even if a decision is not well explained, it still becomes "law of the case." *Id.* at 1392.

47. *Id.* at 1392-93 (citing Kimball v. Callahan, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979); Messenger v. Anderson, 225 U.S. 436, 444 (1912)). The law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided" and is "not a limit to their power." *Id.* at 1393 (quoting *Messenger*, 225 U.S. at 444).

48. *Leslie Salt IV*, 55 F.3d at 1393 (citing Merritt v. Mackey, 932 F.2d 1317, 1320 (9th Cir. 1991)).

49. *Leslie Salt IV,* 55 F.3d at 1392.

50. *Id.* at 1393. Cargill did not appeal the factual findings of the court in *Leslie Salt III*. *Id.* at 1392.

51. *Leslie Salt IV*, 55 F.3d at 1393. For relevant text of comments, see 51 Fed. Reg. 41217, *supra* note 22.

52. *Id.* at 1393-94 (citing *Hoffman Homes II*, 999 F.2d at 261). The Ninth Circuit has held that a substantive rule is one that compels "general extra-statutory obligations pursuant to authority properly delegated by the legislature," while an interpretive rule is one which illustrates "what the administrative officer thinks the statute or regulation means." Alcaraz v. Block, 746 F.2d 593, 613

comments could plausibly be seen as either interpretive or substantive. The distinction could not be a basis for showing that the decision in *Leslie Salt II* was clearly erroneous.[53]

Cargill contended, however, that even if the rule were interpretive, an interpretation of the Clean Water Act that extends jurisdiction to isolated wetlands occupied by migratory birds is unreasonable.[54] According to the Ninth Circuit, the reasonableness of an act must be judged against its language, policy, and legislative history.[55] The court acknowledged that the language of the Clean Water Act is silent as to whether isolated waters used by migratory birds fall under its scope.[56] The court held, however, that the Clean Water Act's policy of protecting wildlife supports the inclusion of isolated wetlands.[57] Legislative history since 1972 demonstrates that Congress intended to extend jurisdiction over waters of the United States to the maximum extent possible under the Commerce Clause.[58] The court cited the Seventh Circuit's ruling in *Hoffman Homes II* for the proposition that one may reasonably consider migratory birds to be the link between isolated wetlands and interstate commerce.[59] The court, also suggesting that the Supreme Court would approve of the extension of jurisdiction, quoted the Supreme Court's explanation that "wetlands . . . may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water."[60] The court admitted that it might have given Cargill's reasonability arguments closer consideration if it were reflecting on the issue for the first time.[61]

(9th Cir. 1984). These definitions are slightly different from the definitions applied in *Tabb Lakes.* (For the *Tabb Lakes* definitions, see *supra* note 38.)

53. *Leslie Salt IV*, 55 F.3d at 1394.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Leslie Salt IV*, 55 F.3d at 1394 (citing 33 U.S.C. 1251(a)(2) ("[I]t is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983. . . .")).

58. *Leslie Salt IV*, 55 F.3d at 1394-95 (citing S. REP. No. 1236, 92d Cong., 2d Sess. 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3776).

59. *Leslie Salt IV*, 55 F.3d at 1393-94 (citing *Hoffman Homes II*, 999 F.2d at 261.)

60. *Id.* at 1395 (citing *Riverside-Bayview Homes*, 474 U.S. 121, 131). The *Riverside* court also stated that "wetlands may serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic ... species." *Riverside-Bayview Homes*, 474 U.S. at 134-35.

61. *Leslie Salt IV*, 55 F.3d at 1395.

It held, however, that since the policy of the Clean Water Act, its legislative history, and at least one other circuit have shown it reasonable to interpret the Clean Water Act as encompassing isolated wetlands, the court in *Leslie Salt II* did not clearly err.[62]

Cargill made the further claim that even if the court considered the migratory bird rule a reasonable interpretation of the Clean Water Act, the rule's insubstantial connection to interstate commerce still puts it outside the bounds of congressional power under the Commerce Clause.[63] The court stated that *Leslie Salt II* had resolved this issue.[64] Unlike the *Leslie Salt II* court, however, the court proceeded to explain why migratory birds are within the scope of the Commerce Clause power.[65] In doing so, it held that any review of congressional enactments under the Commerce Clause should be extremely deferential.[66] Moreover, the court emphasized that the Commerce Clause has historically regulated activities that individually seem insignificant, but that in the aggregate may actually have a "far from trivial" impact on interstate commerce.[67]

The court pointed to two Supreme Court cases that lend support to the inclusion of migratory birds in interstate commerce.[68] One of those cases, *Hughes v. Oklahoma*, held that state regulations of intrastate wildlife fall within the ambit of the dormant Commerce Clause.[69] The other, *Palila v. Hawaii Dept. of Land and Natural Resources*, upheld the Endangered Species Act against a Commerce Clause challenge.[70] In justifying the connection to interstate commerce, the *Palila* court found that protecting and improving the habitats of endangered species allow scientists and students to travel between states to observe a variety of

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62. *Id.*

63. *Id.*

64. *Id.* (citing *Leslie Salt II*, 896 F.2d at 360). Even Judge Rymer, in her dissent in *Leslie Salt II*, admitted that the commerce power can reach regulation of migratory bird habitat. *Leslie Salt II*, 896 F.2d at 361 n.1 (Rymer, J., dissenting). The basis of her argument against finding isolated wetlands to be protected by the Clean Water Act was that Congress did not intend the Act to include such a wide jurisdiction. *Id.*

65. *Leslie Salt IV*, 55 F.3d at 1395-96.

66. *Id* at 1395.

67. *Id.* (citing Columbia River Gorge United v. Yeutter, 960 F.2d 110, 113 (9th Cir. 1992) (quoting Wickard v. Filburn, 317 U.S. 111, 127-128 (1942)), *cert. denied*, 113 S. Ct. 184 (1992)).

68. *Leslie Salt IV*, 55 F.3d at 1396.

69. 441 U.S. 322, 329-36 (1979).

70. 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

species.[71] Because of these cases and the "broad sweep of the Commerce Clause," the court in *Leslie Salt IV* held that it is within the bounds of reason to find a valid connection between migratory birds and interstate commerce under the Commerce Clause.[72]

In a final attempt to evade the Corps' jurisdiction, Cargill argued that Congress unconstitutionally delegated its legislative powers to the Corps.[73] Cargill contended that by allowing the Corps to define the term "waters of the United States," Congress violated the nondelegation doctrine, which makes it unconstitutional to delegate important choices of social policy to other branches of government.[74] The court, summarily dismissing this argument in a footnote, held that in the underlying policies of the Clean Water Act, Congress provided more than the necessary "intelligible principle" required to uphold delegation of legislative power.[75]

In a separate issue not addressed in *Leslie Salt II*, Cargill claimed that the district court in *Leslie Salt III* was mistaken in holding that civil penalties under section 309(d) of the Clean Water Act are mandatory rather than discretionary.[76] The court admitted that the statute's language, which states that a violator "shall be subject to" rather than "shall pay" penalties, is ambiguous.[77] The court even acknowledged that the language at first glance appears to make penalties discretionary.[78]

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71. *Id.* at 995.

72. *See Leslie Salt IV*, 55 F.3d at 1396.

73. *Leslie Salt IV*, 55 F.3d at 1396 n.3.

74. *Id.* The nondelegation doctrine

> ensures that important choices of social policy are made by Congress, . . . guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion, . . . [and] ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).

75. *Leslie Salt IV*, 55 F.3d at 1396 n.3 (citing Mistretta v. United States, 488 U.S. 361 (1989)). *See also supra* note 74.

76. *Leslie Salt IV*, 55 F.3d at 1396.

77. *Id.* at 1396-97. The dissenting opinion argued that the words "subject to" make the imposition of penalties discretionary. *Id.* at 1397-98 (O'Scannlain, J., dissenting).

78. *Id.* at 1397.

The court, however, chose not to break with the Fourth and Eleventh Circuits' interpretations that penalties are mandatory.[79]

The court provided two justifications for this holding.[80] First, it cited an opinion of Justice Cardozo that stated that in statutory interpretation, "shall" has always been a word of command rather than guidance when the purpose of the statute is to protect private or public rights, a primary purpose of the Clean Water Act.[81] Second, the court held that if Congress had truly intended such penalties to be discretionary, it would have used the word "may" rather than "shall" as it did in section 309(g)(1) of the Clean Water Act.[82] The court was careful to note that the Act alleviates the harshness of a mandatory penalty in that it does not limit a district court's discretion as to the amount of the penalty.[83] Even though some penalty must be imposed, the district court is free to set the penalty in an amount commensurate with the defendant's culpability.[84]

The *Leslie Salt IV* court, although generally in accord with the Seventh Circuit's ruling in *Hoffman Homes II*, failed to emphasize that the Corps must find "substantial evidence" that migratory birds use a particular isolated wetland before asserting jurisdiction.[85] Evidence that migratory birds do, indeed, utilize a particular isolated wetland is central to regulating that wetland under the Commerce Clause since, according to the court, migratory birds are the *only* connection between isolated wetlands and interstate commerce.[86] In the same vein, since hunting and observing the birds are the only identified factors linking them to interstate commerce, a showing by the Corps that migratory birds that make habitat out of isolated wetlands are birds that hunters actually track and observers actually watch also would seem necessary.

During recent debates over the 1995 Clean Water Act Amendments, Congress used the same logic as the *Leslie Salt IV* court in

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79. *Leslie Salt IV*, 55 F.3d at 1397 (citing Atlantic States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990); Stoddard v. W. Carolina Regional Sewer Auth., 784 F.2d 1200, 1208 (4th Cir. 1986)).

80. *Leslie Salt IV*, 55 F.3d at 1397.

81. *Id.* (citing Escoe v. Zerbst, 295 U.S. 490, 494 (1935)).

82. *Leslie Salt IV*, 55 F.3d at 1397 (citing 33 U.S.C. § 1319(g)(1)).

83. *Leslie Salt IV,* 55 F.3d at 1397

84. *Id.*; *see* 33 U.S.C. § 1319(d). For relevant text of statute, see *supra* note 43.

85. The court held that any wetlands which "may have a connection to the aquatic ecosystem in [its] role as habitat for migratory birds" should be under the Corps' jurisdiction. *Leslie Salt IV*, 55 F.3d at 1395.

86. *Id.*

approving of the migratory bird rule. On May 16, 1995, only six days before the *Leslie Salt IV* decision,[87] the House of Representatives agreed to an amendment to the 1995 Amendments that eliminated language prohibiting property from being categorized as wetlands based solely on migratory birds' use of them as habitats.[88] Supporters of the amendment were rightly concerned that without such an amendment, the federal government would lose jurisdiction over virtually all isolated wetlands.[89] Supporters also worried that without federal protection of isolated wetlands, the migratory bird population, which has been dropping yearly, would decline even further.[90] They pointed out that the United States' wildlife refuges alone are not adequate to support the millions of waterfowl that migrate across America.[91]

Furthermore, Congress, noting that the sport of hunting migratory birds contributes almost $20 billion a year to the nation's economy, had no qualms that the power to regulate isolated wetlands was within their authority to regulate interstate commerce.[92] To counter opponents' fear that the Corps would be able to run roughshod over private landowners, Congressman Weldon pointed out that the Corps would still be required to prove that a specific isolated wetland is essential to migratory bird populations before assuming regulatory jurisdiction over it.[93] Thus, the recent congressional record provides support for and supplements the *Leslie Salt IV* decision.

In all its attention to the connection between migratory birds and interstate commerce, the *Leslie Salt IV* court overlooked possible alternative arguments for linking wetlands to interstate commerce.[94]

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87. *Leslie Salt IV* was decided on May 22, 1995. *Id.* at 1388.

88. 141 CONG. REC. H4987 (daily ed. May 16, 1995). The amendment was written by Congressmen Dingell, Weldon, and Gilchrest who are all House members of the Migratory Bird Commission. *Id*. at 4987.

89. *Id.* (statement of Cong. Mineta). Congressman Mineta stated that "the mere fact that a wetland is isolated should not make it automatically less protected than one which is directly linked to the otherwise navigable waters of the United States." *Id* at 4988.

90. 141 CONG. REC. at 4987.

91. *Id.*

92. *Id.* at 4987-88. Congressman Luther postulated that if Congress failed to protect isolated wetlands, "future generations may not be able to experience the recreational opportunities so many of us have had, and the gains we have made in replenishing our wildlife population over the past several years [under the Clean Water Act] could be lost forever." (statement of Cong. Luther) *Id.* at 4988

93. 141 CONG. REC. at 4987.

94. The court stated: "The seasonally ponded areas on Cargill's property have no hydrological connection to any other body of water." *Leslie Salt IV*, 55 F.3d at 1395.

Even though an isolated body of water might not be physically attached or adjacent to another larger body of water, it does not mean that no hydrological connection exists between them.[95] All water on earth is hydrologically linked.[96] The pollution of small, isolated wetlands in the aggregate could have the effect of polluting other larger bodies of water that are well within the "waters of the United States" as defined by the Clean Water Act. If the court had demonstrated this other possible connection to interstate commerce, it would not have had to rest the entire burden on hunters and observers of migratory birds.

In the Supreme Court's denial of certiorari to Cargill, Justice Thomas wrote a lengthy dissent in which he expressed "serious doubts about . . . the Corps' assertion of jurisdiction over" Cargill's property.[97] He cited the recent case of *United States v. Lopez* in which the Supreme Court, for the first time in many years, limited congressional power under the Commerce Clause.[98] The Court in *Lopez* held that the connection between the possession of a gun on school grounds and interstate commerce was too tenuous to allow federal regulation.[99] In *Cargill*, Justice Thomas stated that "the basis asserted to create federal jurisdiction over petitioner's land," that a possible reduction in migratory bird populations would interfere with interstate commerce, is "even more far-fetched" than the notion rejected in *Lopez*.[100]

The *Lopez* court concluded that the proper test to determine whether an activity is within Congress's commerce power is whether the activity "substantially affects" interstate commerce.[101] In *Cargill*, Justice Thomas argued that the Corps' extension of its powers to regulate any

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95. Robert D. Icsman, Comment, Hoffman Homes, Inc. v. Administrator, U.S. EPA*: The Seventh Circuit Gets Bogged Down In Wetlands*, 54 OHIO ST. L.J. 809, 833 (1993).

96. *Id*. at 833 n.133 (citing Jerry Jackson, *Wetlands and the Commerce Clause: The Constitutionality of Current Wetland Regulation Under Section 404 of the Clean Water Act*, 7 VA. J. NAT. RESOURCES L. 307, 322 (1988) ("Whether a water molecule exists as water vapor in the atmosphere, precipitation, ice, surface or ground water, it is all the same water, and it is all interchangeable.")).

97. Cargill, Inc., v. United States, 1995 WL 437040 at *2 (U.S. Oct. 30, 1995). Justice Thomas would have granted certiorari "to resolve whether the potential or occasional existence of migratory birds on petitioner's property creates a sufficient nexus with interstate commerce to permit Corps regulation of these lands." *Id*. at *1.

98. *Id.* at *2 (citing United States v. Lopez, 115 S. Ct. 1624 (1995)).

99. *Lopez*, 115 S. Ct. at 1634.

100. *Cargill*, 1995 WL 437040 at *2. Justice Thomas also had difficulty reconciling the fact that Leslie Salt could have filled the ponds if it was still using them for salt production while it could not do so after salt production ceased. *Id.* at *3 n.2.

101. *Lopez*, 115 S. Ct. at 1630.

activity which "could affect" interstate commerce "stretches Congress's Commerce Clause powers beyond the breaking point" and does not satisfy the *Lopez* standard.[102] For Justice Thomas, evidence that migratory birds potentially or actually visit a body of water does not alone satisfy the requisite connection to interstate commerce.[103] He would require a showing that humans actually "hunt, trap, or observe migratory birds" on the property in question.[104]

Although Justice Thomas' concerns are understandable in light of the *Lopez* decision, his reading of "substantially affects" may be misguided, tightening the noose on the commerce power a bit more than the *Lopez* court intended. It would suffice for the Corps to show that the migratory birds that could or do visit a pond are those that humans hunt, trap, or observe. Little good would be achieved by protecting some habitats but not others. It is the nature of migratory birds to move from place to place. Protecting only the habitats in which they are hunted, trapped, or observed is insufficient to maintain the birds' existence; all of their habitats must be protected equally. If one pond is not protected simply because humans do not hunt, trap, or observe the birds near that pond, a reduction in the migratory bird population could occur, hindering these activities in other areas.

Although after *Leslie Salt IV* the Corps retains the freedom to regulate isolated wetlands at its discretion, the Corps may not be so fortunate in the future. Justice Thomas' dissent should serve as a warning signal to the Corps that the Supreme Court may declare open season on this freedom should a similar case arise. To protect its regulatory powers under the Clean Water Act, the Corps would be well advised not to push the limits of jurisdiction over isolated wetlands any further than it did over the seasonal ponds on Cargill's property.

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102. *Cargill*, 1995 WL 437040 at *2 (citing 33 C.F.R. § 328.3(a)(3)).
103. *See Cargill*, 1995 WL 437040.
104. *Id.* at *2.