

1-1-2014

## United States v. Hamilton, 952 F.Supp. 2d 1271 (D. Wyo. 2013)

Lauren Hammond

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

---

### Custom Citation

Lauren Hammond, Court Report, United States v. Hamilton, 952 F.Supp. 2d 1271 (D. Wyo. 2013), 17 U. Denv. Water L. Rev. 418 (2014).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

United States v. Hamilton, 952 F.Supp. 2d 1271 (D. Wyo. 2013)

impairment. Because the Corps provided evidence from both the Virginia Department of Environmental Quality and its own experts that showed that the river is an impaired body of water, the district court found that the Corps satisfied the court of appeals' mandate to consider the condition of the relevant navigable water.

The district court next considered evidence regarding the flow of the river's tributaries. The district court interpreted Precon's next objection to be that the Corps relied upon hypothetical rather than actual flow rates and, thus, such data was meaningless. However, the district court found that the Corps' reliance on hypothetical flow rates was appropriate and rational. Due to the lack of flow gauges in the river, the Corps had no actual flow rates, making a direct comparison of the flows from the river and the ditch impossible. The district court found that the Corps appropriately analyzed the available data points on the wetland and the navigable waterway and properly incorporated this information into the significant nexus determination. As the court of appeals instructed, the district court applied *Skidmore* deference and agreed that the analysis possessed the power to persuade.

Finally, the district court considered the Corps' findings regarding the functions of the wetlands in relation to the tributaries and the river. Precon argued that the Corps' experts simply expressed their opinions rather than provided quantitative and qualitative evidence to support a finding of a significant nexus. The district court found this objection meritless. The district court found that the Corps properly engaged in a lengthy discussion about the scientific validity of Precon's expert's findings and the conclusions drawn therefrom. The district court determined that Precon fundamentally misunderstood the district court's role when faced with divergent expert opinions. The district court relied upon the reasoning in *Marsh v. Oregon Natural Resource Council*, which states that courts should defer to the informed discretion of the responsible federal agencies. The Corps' administrative record also emphasized the wetlands' ability to support wildlife and the role tributaries performed in regulating water flows and quality. The district court therefore found that the Corps provided ample persuasive support for its finding of a significant nexus between the relevant wetlands and the river. The district court found that the Corps' determination was not arbitrary and capricious and that the ultimate determination of a significant nexus was highly persuasive.

Accordingly, the court adopted the magistrate judge's R&R, granted the Corps' motion for summary judgment, and denied Precon's motion for summary judgment.

*Lillie Parker*

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

*United States v. Hamilton*, 952 F. Supp. 2d 1271 (D. Wyo. 2013) (finding on a motion for partial summary judgment that (i) no genuine dispute existed that Slick Creek is a water of the United States subject to the Clean Water Act; but (ii) a genuine dispute of material fact existed regarding whether Hamilton's

farming activities precluded application of the Clean Water Act's recapture provision).

This is a case of first instance before the United States District Court for the District of Wyoming ("court") regarding David Hamilton's activities when he filled part of Slick Creek ("Creek") and altered the course of the Creek's progression. The Government brought suit against Hamilton under the Clean Water Act ("CWA") because Hamilton filled the Creek without first obtaining a discharge permit from the Army Corps of Engineers ("Corps"). The Government filed for summary judgment on its prima facie case. Hamilton contested two major issues: (i) whether Slick Creek is a water of the United States subject to the CWA and (ii) whether his filling activities were subject to any of the exemptions to the CWA's permit requirements.

Slick Creek is a waterway sourced mainly by irrigation runoff but also from natural rainfall and melted snow. The Creek runs from Worland, Wyoming into the Big Horn River, which flows into the Yellowstone River and eventually the Missouri River. In 2005 Hamilton diverted the Creek so that it would run through a straight channel across his property. He then filled in the Creek's previous watercourse with dirt and rock material. This allowed him to plant new crops where the Creek used to flow. The EPA subsequently discovered that Hamilton filled the Creek without the discharge permit required under 33 U.S.C. § 1311(a). The EPA then sent a compliance order to Hamilton but he refused to return the Creek to its previous condition. Consequently, the Government filed suit and sought summary judgment to compel Hamilton to restore the Creek and pay civil fines.

The court first considered whether the Government was entitled to summary judgment on the determinative issue of whether the Creek was a navigable water of the United States. The court concluded that the Creek meets the requirements of a water of the United States under the *Rapanos v. United States* plurality test because, as the Government contended, it is a "relatively permanent, flowing body of water that connects to a traditional interstate navigable water."

The court agreed with the Government because the evidence showed that the Creek had been full every year since 1962 and lacked vegetation along the waterway, as is consistent with yearly water flow. The court also concluded the Creek connected to a navigable waterway because the Creek drains into the Big Horn River, which is navigable in fact. The court rejected Hamilton's argument that the Creek was manmade because farming irrigation providing most of its water. The court noted that prior precedent—namely, *Rapanos*—establishes that manmade water bodies can be waters of the United States. Additionally, the court rejected Hamilton's argument that the Creek is not permanent because it fluctuates with farmers' irrigation activities by noting that, regardless of the changing volume of flow, the Creek flowed continuously year-round. Consequently, the court granted the Government's request for summary judgment on this issue because the Creek is navigable and therefore subject to the CWA.

The court next considered whether Hamilton was liable under the "recapture" provision of the CWA. The CWA contains exceptions for farmers carrying out normal activities and for the maintenance of irrigation ditches. Hamilton

argued his actions fell under both of these exceptions. The Government, however, argued that the CWA's "recapture" provision trumps the exceptions in this case. The CWA recapture provision requires that, even if farmers' normal activities and irrigation maintenance are exempted, they must obtain a discharge permit if such activity brings an area of the navigable waters into a new use that impairs water flow. Hamilton presented testimony that prior landowners used the filled portions of the Creek for farming activities. The court concluded that, given this evidence, it was still disputable whether the land Hamilton filled was previously farmland and, therefore, whether the recapture provision applied.

Accordingly, the court granted the Government's request for summary judgment in part and found that the Creek is a water of the United States. However, the court denied the Government's request for summary judgment on the applicability of the CWA's recapture provision.

*Lauren Hammond*

## STATE COURTS

### COLORADO

**Pawnee Well Users, Inc. v. Wolfe, 320 P.3d 320 (Colo. 2013)** (holding the water court erred in invalidating the Fruitland Rule based on the Tribal Rule because the General Assembly granted the State Engineer the authority to adopt rules governing nontributary groundwater extracted during oil and gas production, and the State Engineer can neither establish nor divest himself of statutory authority).

This case was an appeal from a final judgment issued in Colorado District Court, Water Division 1 ("water court"), which found that the Tribal Rule stripped the Office of the State Engineer ("State Engineer") of the authority to enact the Fruitland Rule and, thus, the Fruitland Rule was invalid. The State Engineer, the Southern Ute Indian Tribe ("Tribe"), and several other intervenors appealed to the Supreme Court of Colorado ("Court").

In *Vance v. Wolfe*, the Court held that water extracted during the course of coalbed methane ("CBM") production was subject not only to Colorado Oil and Gas Conservation Commission ("COGCC") regulations, but also to both the Water Right Determination and Administration Act of 1969 and the Colorado Ground Water Management Act ("Ground Water Act"). The Court's holding in *Vance* required the State Engineer to evaluate and potentially issue permits for more than 40,000 existing oil and gas wells within sixty days of the decision.

To alleviate the situation, the General Assembly passed House Bill 09-1303 ("H.B. 1303"), which gave the State Engineer authority under the Ground Water Act to adopt rules to administer the "dewatering of geologic formations by withdrawing nontributary groundwater to facilitate or permit mining of minerals." H.B. 1303 also afforded the State Engineer additional time to evaluate the wells and issue permits.

The State Engineer held public meetings and then filed a notice of proposed rule making. The notice of proposed rules included the State Engineer's