eNEWS
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Letter from Chair

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I wanted to take this opportunity to thank our dedicated TBA Environmental Law Section Executive Council for all of the work that they have done to make this bar year so successful. It has certainly made my job easier as Chair, but more importantly, outstanding things are being done for Environmental law practitioners.

First, the annual Solid & Hazardous Waste Conference in Gatlinburg continues to be a huge success each year, but the legal track of this conference has developed into a first-rate program thanks to the efforts of Max Fleischer (our new Chair) and other members of the Executive Council. If you have never attended this program, please consider joining us in Gatlinburg in the Spring of 2009 for this outstanding conference.

Second, the Section's Jon Hastings Writing Competition for law students has given law students a rare opportunity to become involved in the work of this Section while still in law school. This year the Section awarded Vanderbilt Law graduate Justin Leck the full $1,200 cash prize - his article will be featured in the next section newsletter. The Section is proud to honor one of the founding members of this Section by hosting this competition.

The Section is also pleased to bring you this quarterly newsletter that we hope you will find includes articles that are helpful to your practice. Thanks to this year's editor David Higney for all of his good work in securing sponsors and content for the newsletter. If you would like to contribute any news items for future newsletters, please contact our new editor Rebecca Tolene at rctolene@tva.gov.

I would like to thank all the members of this Section for your dedication to the profession. It has been an honor to serve you as Chair of the TBA Environmental Law Section.

Finally, I would like to thank Lynn Pointer at the TBA for her cheerleading, organizational skills, and dedication to the success of our Section. It's easy to forget that she supports sections other than ours. Thanks Lynn for all that you did for us over the past year.

Regards, LeAnn

Breakfast with the Commissioner
Solid/Hazardous Waste Conference
Gatlinburg

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TBA Environmental Law Section Executive Council 2007 - 2008

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Managing Inevitable
Environmental
Conflict
Solid/Hazardous
Waste Conference
Gatlinburg

Left to Right:
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Joe Sanders
Ed Calloway
Dan McDougal

Jurisdictional Clarity:
Not One of the Highlights of the *Rapanos* Decision

by Paul G. Buchmann

By now, most of us have had time to digest the Rapanos [1] decision and to read some of the many articles theorizing about the post-Rapanos future of wetlands regulation. Now that the Rapanos decision has been on the books for twenty-one months, what impact have we seen in the lower courts? As you will recall, Rapanos appears to have reigned in the Army Corps of Engineers' (the "Corps") broad definition of "waters of the United States." However, the lack of an authoritative showing of solidarity among the Supreme Court Justices has left doubt as to the direction Rapanos will take us.

The Rapanos plurality opinion written by Justice Scalia instructs that the meaning of "waters of the United States" is that "waters" include "only relatively permanent, standing or flowing bodies of water."[2] The Court further clarified this definition by acknowledging that "[a]ll of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows"[3] and requires a continuous surface connection to navigable-in-fact waters.[4] Justice Kennedy's concurring opinion takes the position that there must be a "significant nexus" between a body of water the Corps is trying to regulate as "waters of the United States" and "navigable" water as traditionally understood.[5] Not only must there be a "significant nexus", but that nexus must be such that the water sought to be regulated "significantly affect[s] the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense."[6]

What we have seen of late is some split between the Circuits on the application of Rapanos. In Northern California River Watch v. City of Healdsburg, the Ninth Circuit Court of Appeals, following Kennedy's concurring opinion, concluded that Basalt Pond, which was being filled with the city's wastewater, had a "significant nexus" to the Russian River, a navigable water in the traditional sense.[7] The court held that Basalt Pond was a "water of the United States" because it was hydrologically connected to the river and the wastewater discharges significantly affected the chemical, physical and biological integrity of the Russian River.

In another opinion, the Seventh Circuit Court of Appeals stated that it will follow only the Kennedy concurrence when analyzing cases under Rapanos. In United States v. Gerke Excavating, Inc., the suit charged that the defendant discharged

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pollutants from a point source into "navigable waters of the United States" without the proper permits.[8] The district court granted summary judgment to the government and the defendant appealed. Eventually, the Gerke court of appeals determined that it would follow the Kennedy concurrence, and remanded the case to the district court. The defendant appealed again, ultimately to the United States Supreme Court, but was denied certiorari. In a decision out of the First Circuit, a panel of that court determined that the Corps or the government can prove jurisdiction by meeting either the Scalia standard or the Kennedy standard.[9] The United States Supreme Court, however, also denied certiorari for this case.

Considering the uncertainty resulting from Rapanos, the EPA and the Corps of Engineers issued a joint guidance memorandum on how the agencies intend to implement the Rapanos decision.[10] The memorandum sets out how the Corps will evaluate future questions regarding jurisdiction over "waters of the United States." It appears that both Scalia's plurality opinion and Kennedy's concurring opinion will be followed when making jurisdictional determinations, depending on the question presented to the Corps. The following is the Summary of Key Points from the joint guidance memorandum.

Summary of Key Points [11]

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters.
- Wetlands adjacent to traditional navigable water.
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).
- Wetlands that directly abut such tributaries.

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent.
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent.
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors

Unfortunately, Rapanos leaves us with some question as to the standard to apply. Only by the Supreme Court's further analysis or reconsideration of the issue will we see some greater clarity as to the standard in determining what constitutes "waters of the United States."

Endnotes:

1. Rapanos v. United States, 547 U.S. 715, 126 S.Ct. 2208 (2006).

2. Id. at 2221.

3. Id.
4. Id. at 2227.
5. See id. at 2244.
6. Id. at 2213.
7. See Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007).
8. See United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006) (cert. denied).
9. See United States v. Johnson, 467 F.3d 56 (1st Cir. 2006) (cert. denied).
10. See http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/rapanos_guide_memo.pdf
11. Id.

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Is it Chattanooga, Georgia or Chattanooga, Tennessee? When Boundaries and Water Supply Collide

by Rebecca Tolene

For a more robust discussion concerning the Georgia Tennessee boundary dispute, see the May 2008 issue of the Tennessee Bar Journal.

With great media interest and political fanfare, the State of Georgia is asserting that the boundary between Georgia and Tennessee shown on existing maps is not the true boundary and should be reset. Georgia asserts that the true boundary is the 35th parallel which runs about one mile north of where the boundary is depicted on maps today. If the boundary is reset, folks living in southern parts of Chattanooga could suddenly find themselves to be citizens of Georgia, not Tennessee. Resetting the boundary could also provide the answer to Atlanta's water problems. Coincidentally, the 35th parallel also happens to run through the middle of Nickajack Reservoir and would provide Georgia potential access to the waters of the Tennessee River. This article briefly discusses some of the historical facts surrounding the Georgia and Tennessee boundary and how the Supreme Court might analyze this state boundary issue.

Discerning a plain language description of the boundary requires a complex trip through the history of several states. In June 1796, the U.S. Congress created the state of Tennessee as the sixteenth state of the Union describing the state boundaries as, ". . . the whole of the territory ceded to the United States by the state of North Carolina. . . ." *An Act for the Admission of the State of Tennessee into the Union*, 1. STAT. 491 (1796). The cession from North Carolina provides a somewhat vague property description but ends with "to the southern boundary of this state." *An Act to Accept a Cession of the Claims of the State of North Carolina to a Certain District of Western Territory*, 1 Stat. 106 (1790)(ratified Dec. 1789). Prior to ceding the Tennessee territory, the 1776 North Carolina Constitution indicates that North Carolina's southern boundary ran along the thirty-five degrees north latitude.

In 1802, Georgia surrendered all possession of what was then known as the Mississippi Territory (currently the states of Alabama and Mississippi). The 1802 Articles of Agreement and Cession described the new western boundary of Georgia to be, in part, ". . . thence in a direct line to Nickajack, on the Tennessee River; thence crossing the said last-mentioned river, and thence . . . along the western bank thereof to the Southern Boundary of the State of Tennessee" (emphasis added). This description would include a portion of the original Tennessee River bed and part of what is now Nickajack Reservoir. Consistent with this history, a Georgia statute recites that the boundary is the 35th parallel. *See* O.C.G.A. § 50-2-3 (2007). Of course, no matter how clear boundary documents may be, neighbors with a common boundary seem to find it reassuring to have it physically marked. And that is when the situation quickly became unclear.

Tennessee and Georgia created boundary commissions in 1817 to jointly survey and mark their common state border. It is apparent from field notes that the Tennessee and Georgia commissions were attempting to mark the 35th parallel as the state boundary during the 1818 survey. George Spies, *History Corner: The Mystery of the Camak Stone (2004)*. A Georgia

mathematician named James Camak headed up the survey team. On June 1, 1818, the surveyors placed the corner stone "one mile and 7 chains [about 5,700 feet] from the Tennessee River and about one quarter of a mile south of Nickajack Cave." That happens to be approximately one mile south of the 35th parallel, and it became the basis for the border between Georgia and Tennessee identified on modern-day maps. This mistake happened, according to Mr. Camak, because he had to use inadequate astronomical tables and surveying instruments. Mr. Camak discovered and reported his earlier mistake in 1826 when he surveyed the Alabama-Georgia border, presumably with better instruments this time.

Perhaps being distracted by the events of the day, such as the Civil War, no one in Georgia seemed to care about the location of the border for more than 70 years. Starting in 1887, the Georgia legislature began raising the issue in the form of resolutions, the first being adopted in 1887 and the last in 1971, calling for discussions between Tennessee and Georgia to resolve boundary issues. Georgia chose not to take the next step and sue Tennessee, however, and this could prove important.

If Georgia chooses to take legal action now, the forum would be in the United States Supreme Court under its original jurisdiction authority. *See U.S. CONS. art. III, § 2, cl. 2* and 28 U.S.C. § 1251(1)(1); *see also, Georgia v. South Carolina*, 497 U.S. 376, 379 (1990). Surprisingly, there have been quite a few boundary dispute cases, including recent ones decided by the Court. The decisions regarding state boundary disputes are fact specific. To determine the facts, the Court has appointed a special master who prepares a report after conducting a fact-finding trial. The Court independently reviews the special master's report and evidence received.

As suggested by its investigation into the facts, the Court has historically looked at more than just the plain language of underlying boundary documents in resolving a boundary dispute. Most interstate boundary dispute cases hinge on either water boundary issues or the doctrine of prescription and acquiescence, or both. Since the present boundary in dispute does not exist wholly on or in water, I have not included a discussion of the Court's water boundary decisions and the rules that could be gleaned from those decisions. Resolution of a Georgia-Tennessee boundary dispute will likely come down the application of the doctrine of prescription and acquiescence which is similar to the more familiar rule of adverse possession in property law.

Under Supreme Court case law, Georgia has at least two bases for asserting its jurisdiction over the disputed area and supporting its argument that the boundary should be reset. First, the documents creating or acknowledging the border indicate that it was intended to be the 35th parallel and that the boundary was to touch or cross the Tennessee River. So the facts start off supporting Georgia. Second, Georgia has questioned or disputed the boundary several times in the past. In a 1914 case, the Court notes "acquiescence is not compatible with a century of conflict." *See New Jersey v. Delaware*, 291 U.S. 361 at 377 (1934). However, the evidence the Court cites as "conflict" were the number of court cases brought by New Jersey, something Georgia has yet to do.

Relying on the doctrine of prescription and acquiescence, Tennessee will try to show that Tennessee possessed the disputed area and in doing so Georgia acquiesced in this. Tennessee would have the burden of proof in doing this. *See New Jersey v. NewYork*, 523 U.S. 767, 768 (1998); *see also, Illinois v. Kentucky*, 500 U.S. 380, 384 (1991). In *Ohio v. Kentucky*, the Court recognized the importance of prescription and acquiescence in boundary disputes:

The rule long settled and never doubted by this court is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority.

410 U.S. 641, 651 (1973); citing *Michigan v. Wisconsin*, 270 U.S. 295 (1926); *Vermont v. New Hampshire*, 289 U.S. 593, 613 (1933); *Maryland v. West Virginia*, 217 U.S. 1 (1910); *Louisiana v. Mississippi*, 202 U.S. 1 (1906); *Virginia v. Tennessee* 148 U.S. 503 (1893); *Indiana v. Kentucky*, 136 U.S. 479, 509 (1980); *Rhode Island v. Massachusetts, 45 U.S.* 591 (1846).

There are facts that Tennessee could rely on to meet this burden to show acquiescence. In 1819, the Georgia legislature authorized and requested the Governor to record a survey of the dividing lines between Georgia and Tennessee in the surveyor general's office with the certificates. Because of the timing this likely refers to the Camak survey and additional investigation may be able to confirm this. In 1830, Georgia divided the lands along its northern boundary into land lots, and the 1818 Camak survey was used do this. The absence of any expression of concern about the border by Georgia for more than 70 years will be a helpful fact for Tennessee. And, finally, the absence of legal action by Georgia, in light of its apparent recognition of the issue, from 1887 to now arguably weighs against Georgia.

To demonstrate prescription, Tennessee has a large number of fact that will prove helpful, including a number of activities illustrating its sovereignty over the disputed area since the border was set in 1818. This includes generally engaging in all of those activities typically associated with sovereign control of an area including policing it, taxing residents and businesses, and the participation of residents in Tennessee elections. In contrast, Georgia has not engaged in similar acts of sovereignty, nor has Georgia taken any action to prevent such sovereign acts on the part of Tennessee. Perhaps one of the more compelling facts is that every map shows the border to be one mile south of the 35th parallel, including, undoubtedly, official maps issued by Georgia itself.

Ultimately, politics rather than the law may resolve this boundary dispute. However, the dispute emphasizes the fact that the water wars have come to the Eastern United States and that we will likely see more actions motivated by the search for water.

Rebecca Tolene is an attorney with the Tennessee Valley Authority, where she practices in the areas of environmental and property law.
Any opinions and views expressed herein are those solely those of the author and are not necessarily those of the Tennessee Valley Authority.
