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Supreme Court to hear suits on dry-river laws

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The U.S. Supreme Court will hear arguments Tuesday in two cases that ask the question on the lips of most Arizona newcomers: If there's no water in a riverbed, is it still a river?

The cases aren't quite that simple, of course, but what the justices will attempt to decide is whether federal regulators overstep their constitutional bounds by enforcing clean-water laws in areas where there's barely any water to protect.

For Arizona, a ruling either way could carry far-reaching consequences because of the maze of small riverbeds, washes, dry lakebeds, stock tanks and seasonal riparian areas that get wet only a few times a year, often only after a heavy rainstorm.

Under the Clean Water Act, many of those waterways are regulated and require land users to seek permits and submit plans to protect the water from pollution. Environmental groups, in rare alignment with the Bush administration, say the law works fine, keeping sewage, toxic chemicals and other pollutants from seeping into the nation's water supply.

But two developers in Michigan believe the law goes too far, forcing landowners to spend time and money safeguarding isolated marshes that may never connect to a flowing river or a lake. They want the court to narrow the scope of the law, a position backed by a coalition of home builders, farmers and Western water providers, including the Central Arizona Project.

"The court, in our view, needs to set some reasonable limits," said Doug Miller, general counsel for the CAP, which delivers Colorado River water to Phoenix and Tucson. "It would not weaken the act's protection of genuine wetlands or bodies of water that we all agree deserve environmental protection."

The CAP finds itself at odds with Arizona Attorney General Terry Goddard, who signed onto a friend of the court brief with 33 other states that want the law enforced as it has been, with uniform standards that allow states to protect waterways. The states and environmental groups warn that reversing the law's reach is like reversing a river's flow.

"Even a 6-year-old can tell you that water flows downhill and if someone is allowed to pollute a small headwaters stream, the folks below are going to know it," said Andrew Fahlund, vice president of protection and restoration for the advocacy group American Rivers.

The court will consider two cases that are similar enough they have been combined into one hearing:

- In *Rapanos vs. the United States*, the federal government accused a Michigan developer of filling in 54 acres of wetlands without a clean-water permit. The Army Corps of Engineers ruled that the wetlands connected to waterways that flow into Lake Huron.

- In *Carabell vs. the Army Corps of Engineers*, another Michigan builder wanted to build 112 condominiums by filling in about 15 acres of wetlands. The plan was rejected by the Corps because the wetlands were next to a creek that empties into a lake that is part of the Great Lakes drainage system.

Navigable waters

At issue in both cases is whether the wetlands were linked close enough to what federal laws refer to as "waters of the United States," or "navigable waters," a long-used legal term based on whether a river or lake could be used to move people or goods.

Under the strictest definition, only the largest waterways are considered navigable. In Arizona, for example, only the Colorado River is formally designated navigable.

But regulators have expanded the reach of clean-water laws to include tributaries and wetlands next to the primary waterways. That means the law applies to almost all of Arizona's rivers, even those that sit dry most of the year, because most of the state drains into the Colorado.

Regulators say the law is interpreted this way to protect people from contaminants that might enter a system upstream and make their way into a river or lake miles from the source.

"A ruling against the government could remove all federal limits on pollution flowing into our waterways," said David Bookbinder, senior attorney for the Sierra Club.

Environmental groups point to the unusual alliance urging the court to affirm the law as enforced, a group that includes four former administrators of the Environmental Protection Agency, scientists and sports organizations including Ducks Unlimited and the American Fisheries Society.

The states argue that a well-defined federal standard is critical because so many rivers and streams flow across state lines and that even if pollution is isolated, the cumulative effects over the length of a river could hurt downstream users.

"We were interested in ensuring that there are uniform regulations of water that affects navigable streams," said Andrea Esquer, a spokeswoman for Goddard's office.

By monitoring wetlands that are not right next to a river or a lake, the states can step in to protect local riparian areas that eventually drain into a larger body of water, the states argue.

Drawing that line from a remote wash or creek bed makes it too expensive to comply with the law, according to home builders and others that want the regulations re-interpreted.

Confusing law

In arguments filed with the U.S. Supreme Court, the Homebuilders Association of Central Arizona said the law, as enforced, threatens to drive up home costs by forcing developers to seek permits for every wash or dusty drainage ditch that crosses a plot of ground.

The group cites a case in Tucson where the Army Corps of Engineers demanded that a land owner seek permits to use a desert wash that would, if filled with water, flow into a series of other unnamed washes, which drained into the Santa Cruz River, which empties into the Gila River, which flows into the navigable Colorado River 200 miles away.

For the CAP, which operates several groundwater recharge facilities, the law is so difficult to figure out sometimes that the water provider applies for permits even if one might not be required, counsel Miller said, "because it's easier and cheaper than trying to challenge the government."

"I don't think anyone questions the application of the law to wetlands with a meaningful connection (to a river)," Miller said. "But the agencies have pushed the act so far . . . well beyond the limits that Congress intended."

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