No. 02-626

In The
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF IDAHO GOVERNOR DIRK KEMPTHORNE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This case raises important federalism issues. It presents the Court with an opportunity to preserve the ability of States to maintain their water quality responsibilities under the express design of the federal Clean Water Act and reaffirm their sovereign rights to manage water as they believe is appropriate. The decision below has far reaching impacts for water management throughout the country, particularly in Idaho and the West. As a matter of the fundamental construct between the state and federal government, the decision below must be reversed.

The question presented for review is:

> Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.

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BRIEF OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Amicus Curiae Governor Dirk Kempthorne submits this brief in support of Petitioner South Florida Water Management District, having obtained the written consent of the Petitioner and Respondents. The letters of consent have been filed with the Clerk of this Court.[1]

IDENTITY OF AMICUS CURIAE

Amicus Curiae is Idaho's chief executive with responsibility, through the State's executive branch agencies, over Idaho's water quality and water management.

Dirk Kempthorne is the duly elected Governor of the State of Idaho and a former United States Senator. As Idaho's Governor, he is required to see that the laws are "faithfully executed." IDAHO CONST. art. IV, § 5.

In 2001, Governor Kempthorne signed into law House Bill 164, legislation which was necessitated after Idaho's primary agency charged with protecting environmental quality was elevated to department status. The legislation furthered the laudable goal of advancing "the expressed intent of congress to control pollution" by defining the responsibilities of public agencies in "the control, and monitoring of water pollution, and through implementation of

[1] Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party in this case authored this brief in whole or in part and that furthermore, no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

this chapter, enhance the state's economic well-being." H.B. 164, 56th Leg. 1st Sess., 2001 Idaho Sess. Laws 253 (codified as amended as IDAHO CODE § 39-3601 (Michie 2002)).

The Idaho Department of Environmental Quality (IDEQ), a state department, is responsible for leading efforts to preserve the quality of Idaho's air, land and water for use and enjoyment today and in the future. The Director of IDEQ serves at the pleasure of Governor Kempthorne on a number of state commissions, including the Western States Water Council,[2] the Basin Environmental Improvement Project Commission, the Pesticide Management Commission, and the Idaho Rural Partnership. The Idaho Department of Water Resources (IDWR), another executive branch agency, is responsible for water administration in the State.

INTEREST OF AMICUS CURIAE

Amicus is mindful of the sensitive setting of this particular application of the federal Clean Water Act. The

[2] The Western States Water Council recently resolved, *inter alia*:

> [T]hat the transport of water through ditches, canals, tunnels, pipelines and other constructed water conveyances in order to supply municipal, agricultural, industrial and other beneficial uses, as opposed to waste disposal purposes, in compliance with state law, should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents.

Resolution of the Western States Water Council Regarding Water Transfers and National Pollutant Discharge Elimination System Discharge Permits (August 1, 2003) (*See* App. at 1).

Florida Everglades is a natural resource treasure, not only to the State of Florida but also the United States. Just as Amicus is dedicated to preserving the great natural resources in the State of Idaho, so too does he strongly support all efforts to protect the environmental values of the Everglades.

However, section 101 of the Clean Water Act (CWA) declares that "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities *and rights of states* to prevent, reduce, and eliminate pollution [and] to plan the development and use of land and water resources." 33 U.S.C. § 1251(b) (2003) (emphasis added). *See also Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps. of Eng'rs*, 531 U.S. 159, 175 (2001) (acknowledging "the States' traditional and primary power over land and water use.")

Governor Kempthorne and Idaho's executive branch agencies responsible for protecting water quality are also interested in maintaining the responsibility of the States – as recognized by Congress in the *clear text* of the Clean Water Act – to regulate water quality and management activity through the State-oriented statutory infrastructure Idaho has appropriately developed.

Amicus has responsibility for overseeing the State's regulatory infrastructure protecting water quality without weakening Idaho's ability to balance the essential components of water quality and water management. As a public official who resides in the West, he can offer the Court an informed case study on an application of the decision below which better illuminates an unwise intrusion of federal law into the affairs of the States.

The essential holding of the Eleventh Circuit below, that the CWA is expansive enough to require a National Pollutant Discharge Elimination System (NPDES) permit upon the mere movement of water between state transport systems, has undermined state authority in an area where cooperative federalism has proven to be an optimum method to protect the environment. Encroachment of federal power through interpretation of an act of Congress undermining settled expectations of the States must be accomplished, if necessary in the first instance, with exacting precision. In the present case, that has not occurred.

SUMMARY OF ARGUMENT

The State of Idaho has an extensive and well-developed body of state law aimed squarely at protecting water quality. The Idaho Department of Environmental Quality is responsible for developing water quality standards under an infrastructure sanctioned by the Clean Water Act.

Similarly, the Idaho Department of Water Resources, through newly-amended legislation, considers water quality in its management of transfers of water between basins. Each of these schemes is protective of the environmental values embodied in a National Pollutant Discharge Elimination System (NPDES) permitting process.

The holding of the Eleventh Circuit will disrupt the careful balance between the appropriate role of the states and the federal government proscribed by Congress under the Clean Water Act. The Idaho Department of Environmental Quality and Department of Water Resources must

now administer the remainder of its water quality infrastructure mindful of the shift in authority back to a federal command-and-control structure. Such interference and disruption with appropriate State functions cannot be the state of the law under the Clean Water Act.

ARGUMENT

I. INTRODUCTION: IDAHO'S ADMINISTRATION OF WATER QUALITY AND WATER MANAGEMENT

In Idaho, the use and management of water is protected within the framework of the state constitution. For example, appropriated water in Idaho is declared subject to regulation by the state as a public use, IDAHO CONST. art. XV, § 1; the right to divert and appropriate unappropriated waters "shall never be denied," IDAHO CONST. art. XV, § 3; and the state water resource agency has its organic genesis in the state constitution. IDAHO CONST. art. XV, § 7.

The Idaho Departments of Environmental Quality and Water Resources jointly govern water quality and management through IDEQ's development and implementation of State water quality standards and Total Maximum Daily Load allowances (TMDLs) and IDWR's water transfer authority, each of which is further described below.

A. Idaho's Water Quality Enforcement Authority Under State Law

Idaho's commitment to controlling water pollution is embodied in the following legislative prose from the State's water quality control statute:

> The legislature, recognizing that *surface water is one of the state's most valuable natural resources*, has approved the adoption of water quality standards and authorized the director of the department of environmental quality . . . to implement these standards. . . . [I]t is the purpose of this chapter to *enhance and preserve the quality and value of the surface water resources of the state of Idaho*. . . . In consequence of *the benefits to the public health, welfare, and economy*, it is hereby declared to be the policy of the state of Idaho to protect this natural resource by monitoring and controlling water pollution.

IDAHO CODE § 39-3601 (Michie 2002) (emphasis added).

The Idaho Legislature has provided to the Idaho Department of Environmental Quality broad authority to develop a system to safeguard the quality of the waters of the state, including authority to adopt and enforce rules relating to the discharge of effluent into the waters of the state, and to adopt and enforce state water quality standards that designate uses and provide criteria to protect those uses. *See generally* IDAHO CODE § 39-105(e) (Michie 2002); §§ 39-3601-39-3624 (Michie 2002 and Supp. 2003).

In providing this authority to the IDEQ, the state legislature very broadly defined "waters or water body" to mean "all accumulations of surface water, natural and artificial, public and private, or parts thereof which are wholly or partially within, flow through or border upon

this state." IDAHO CODE § 39-3602(28) (Michie 2002). *See also* IDAHO CODE § 39-103(16) (Michie 2002) (defining "water" almost identically).

While providing IDEQ authority to regulate water quality with respect to a very broad definition of waters of the state, the Idaho Legislature also intended "that the state of Idaho fully meet the goals and requirements of the federal clean water act and that rules promulgated under this chapter not impose requirements beyond those of the federal clean water act." IDAHO CODE § 39-3601 (Michie 2002).

As authorized by Congress through the Clean Water Act, Idaho has developed water quality standards and Total Maximum Daily Loads (TMDL). *See* IDAHO CODE §§ 39-3601-3612 (Michie 2002 and Supp. 2003).

Under state law, "*and as required by the federal Clean Water Act*," the Idaho Department of Environmental Quality is required to develop a total maximum daily load to control point source and non-point sources of pollution. IDAHO CODE § 39-3611 (Michie 2003) (emphasis added). Inherent within this authority is the power to identify pollutants impacting the water body; IDAHO CODE §39-3611(1) (Michie 2003); to inventory all point and non-point sources of the identified pollutant, IDAHO CODE § 39-3611(2) (Michie 2003); and to develop pollution control strategies for both point sources and non-point sources for reducing those sources of pollution, IDAHO CODE § 39-3611(5) (Michie 2003). After the TMDL process provided by state law is completed, the Director of IDEQ shall "integrate such processes into the state's water quality management plan developed pursuant to the federal clean water act." IDAHO CODE § 39-3612 (Michie Supp. 2003).

Accordingly, Idaho's authority to analyze, adopt, and implement water quality standards and TMDLs – activities which complement the goals of the federal Clean Water Act – are vigorously pursued within *the State's* statutory construct.

B. Idaho's Water Management Authority Under State Law

Due to the scarcity of the resource, it is not uncommon in Idaho for water users to change certain attributes of their water uses. State law provides a transfer procedure to change one or more of the following elements: the point of diversion, the place of use, the period of use, and the nature of use. IDAHO CODE § 42-222 (Michie 2003).

During the 2003 legislative session, Idaho enacted House Bill 284, which was signed into law by Governor Kempthorne. H.B. 284, 57th Leg. 1st Sess., 2003 Idaho Sess. Laws 806. The legislation amended the definition of the "local public interest" criterion used to evaluate certain administrative decisions, including basin water transfers, within Idaho's statutory water management infrastructure. The "local public interest" is "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." IDAHO CODE § 42-202B(3) (Michie 2003).

House Bill 284 also added a new separate "economic effects" criterion intended to apply in the event of an out-of-basin transfer of water from one watershed or local area to another. Under Idaho law, such movement of water may not "adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is

outside of the watershed or local area where the source of water originates." IDAHO CODE § 42-202B (Michie 2003).

The Director of IDWR may consider trans-basin transfers if it will not adversely affect the local economy of the original source of the transfer, which is a new element enacted as a part of House Bill 284.[3]

II. IDAHO'S SOVEREIGNTY OVER ITS WATER QUALITY AND WATER MANAGEMENT IS DEGRADED BY THE DECISION BELOW

The essential holding of the case at bar is that the CWA requires NPDES treatment for outside contributions to impacted point sources. "[B]ecause the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs." *Miccosukee Tribe of*

[3] That part of the statute provides in pertinent part that:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and *is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use*, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

IDAHO CODE § 42-222(1) (Michie 2003) (emphasis added).

Indians v. S. Fla. Water Mgmt. Dist., 280 F.3d 1364, 1369 (11th Cir. 2002) (emphasis in original).

However Congress, through the Clean Water Act, spoke directly to the authority of States to continue responsibility over its water management.[4] Each of the previously described organic missions of IDEQ and IDWR under state law, specifically, protection of water quality through development of TMDLs and consideration of the public interest in water transfers, is severely undermined if the fundamental premise of such administration is now enveloped by an artificial emphasis on preventing the cause of pollution at its source through an NPDES context.

At present, Idaho does not maintain and administer an approved NPDES program under the Clean Water Act. *See* 33 U.S.C. § 1342(b) (2003) (providing for state program approval by the United States Environmental Protection Agency). But, as previously discussed, the State already aggressively protects water quality through its TMDL

[4] The Clean Water Act states clearly that:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g) (2003).

processing and "local public interest" review in administering water management.[5]

The dichotomy presented by the instant case is that the delicately calculated equipoise of state-federal cooperation under the Clean Water Act – as fully represented by the State of Idaho through its state programs protecting the same environmental values served by direct NPDES permitting – has been destabilized by the holding below.

For example, it is now possible that the simple act of requesting a transfer of a water right under Idaho Code section 42-222 will involve some level of consultation with the federal government as a process step in the State's undertaking to complete the transfer.

Similarly, it is now likely that the careful development of certain TMDLs aimed at improving water quality in impaired stream segments in Idaho – heretofore a perfectly

[5] The Idaho Supreme Court has spoken to the differing functions of IDEQ and IDWR and came to the conclusion that water quality cannot be undermined or degraded by the administration of separate statutory schemes:

> [We] add a word of caution regarding the differing functions of [IDWR] and the [IDEQ]. [IDWR] must oversee the water resources of the state, insuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and the limits of the law. It is not the primary job of [IDWR] to protect the health and welfare of Idaho's citizens and visitors – that role is vested in the [IDEQ]. . . . Nevertheless, although these agencies may have separate functions, [IDWR] is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the [IDEQ].

Shokal v. Dunn, 707 P.2d 441, 451-452 (Idaho 1985).

lawful and appropriate State function focused on assessing the tolerable impact of human activities on the environment – could now be unduly marginalized in favor of direct action by the United States Environmental Protection Agency.

Without the Congress "expressing a desire to readjust the federal-state balance in this manner," *SWANCC*, 531 U.S. at 174, the Idaho Department of Environmental Quality and Idaho Department of Water Resources must now administer the remnants of its water quality infrastructure mindful of the shift of authority back to a federal command-and-control structure. Such interference and disruption with appropriate State water quality functions cannot be the state of the law under the Clean Water Act.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision below by the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

RESOLUTION of the WESTERN STATES WATER COUNCIL regarding WATER TRANSFERS and NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM DISCHARGE PERMITS

August 1, 2003

WHEREAS, certain courts have ruled that the movement of water containing pollutants from one distinct body of navigable water to another can constitute a point source discharge subject to National Pollutant Discharge Elimination System (NPDES) permitting under the Clean Water Act; and

WHEREAS, in June 2003, the United States Supreme Court granted certiorari to review *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002); and

WHEREAS, there are numerous interstate, interbasin and intrabasin water transfers westwide that are essential to the social, economic and environmental well-being of the region; and

WHEREAS requiring NPDES permits for water right holders to transfer water to a location of need, in the exercise of their water rights, though no pollutant is added to the water and the transfer is not for waste disposal purposes, would inappropriately encumber necessary water transfers and the enjoyment of private property rights; and

WHEREAS the federal government has long recognized the right to use water as determined under the laws of the various states; and

WHEREAS Sections 101(g) and 510 of the Clean Water Act clearly leave water decisions to the states; and

WHEREAS Congress did not intend to regulate the mere movement of water from one basin or sub-basin to another in the legitimate exercise of water rights as point source discharges of pollutants.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council declares that the transport of water through ditches, canals, tunnels, pipelines and other constructed water conveyances in order to supply municipal, agricultural, industrial and other beneficial uses, as opposed to waste disposal purposes, in compliance with state law, should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents.

BE IT FURTHER RESOLVED that each Western State shall retain its discretion to use any available authorities to place appropriate conditions on transfers of water for water supply purposes so as to implement its water quality protection requirements.