CASE STUDY #10

CHANGE IN USE:

Change in crop type

Note information contained on the Sacramento District's website, http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section404Exemptions.aspx which eviscerates the section 404(f) exemption by stating:

"if a property has been used for cattle grazing, the exemption does not apply if future activities would involve planting crops for food; similarly, if the current use of a property is for growing corn, the exemption does not apply if future activities would involve conversion to an orchard or vineyards."

At the same website, the Sacramento District takes it upon itself to determine how long a field may lay fallow to be subject to the exemption:

"An operation is not[sic] longer established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrologic regime are necessary to resume operations."

Unfortunately for farmers, according to the Corps, as demonstrated in the Duarte case, described below, plowing is a change to the hydrologic regime necessary to resume operations, the need to plow takes away the exemption, giving the Corps control over what crops can be grown when, and where.

JOHN DUARTE and Duarte Nursey

California farmer John Duarte owns and operates a farm near Sacramento. In 2012 he purchased a 450-acre parcel of land. After John plowed the land to plant wheat, in February 2013, the Army Corps sent him a letter instructing him to "cease and desist" his operation. The letter instructed him to stop his wheat operation because his plowing had resulted in the discharge of pollutants to WOTUS found on the parcel in violation of the Clean Water Act. What followed was an enforcement action brought by the Corps against not only John's company, but him personally. The federal district court recently ruled against John and this litigation is expected to play out in federal courts for years.

Aside from the precedent this litigation will make, this litigation is important because the briefs filed by the Department of Justice reveal just how narrow the government (here the Corps) interprets the so-called "normal farming" exemptions from 404 permit requirements. Just as important is the 173-page (without attachments) expert report prepared by the government, explaining how plowing that disturbs the soil and hydrology is not the kind of "plowing" the government intends to allow, and how the waters and soils in land are so interconnected that any

disturbance of land and water in a field, not matter how small, will impair the flow or reach of a WOTUS and trigger the statutory recapture provision. The result is that few, if any, plowing and farming activities will ever qualify for the regulatory permit exemptions for so-called "normal" farming operations.

The Corps interprets its own regulation narrowly, establishing that the permit exemption for "established and on-going" operations is limited only to "land already under active cultivation." None of the permit exemptions, whether for plowing or planting in a WOTUS, will ever apply to land that a farmers decides to not cultivate for a time and for any reason, including adverse market conditions, or new land brought into cultivation. For John, his land's history of agricultural production (grazing) and tillage (wheat) failed the government's test of an "established and on-going" operation because the wheat production was fallowed for many years, and plowing was necessary to reestablish cultivation. How many years land can lay fallow is up to the discretion of the Corps, as is whether the plowing caused enough alteration in the soils and hydrology to trigger the recapture provision.