

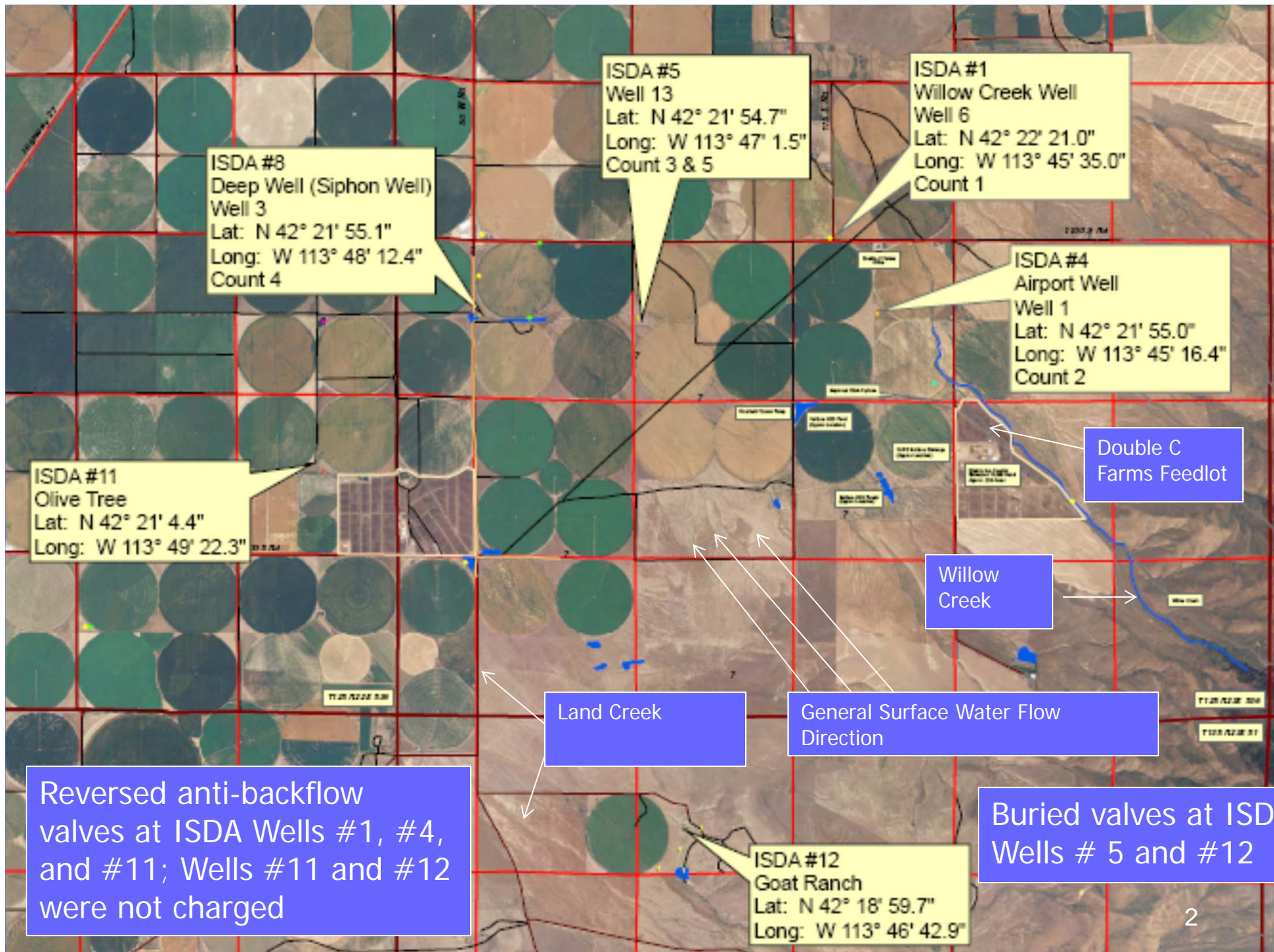


Anatomy of an Environmental Crimes Trial

U.S. v. Cory Ledean King,

*CR No. 08-002-E-BLW, D. Idaho (2009);
660 F.3d 1071 (9th Cir. 2011); cert. denied
(2012)*

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#457

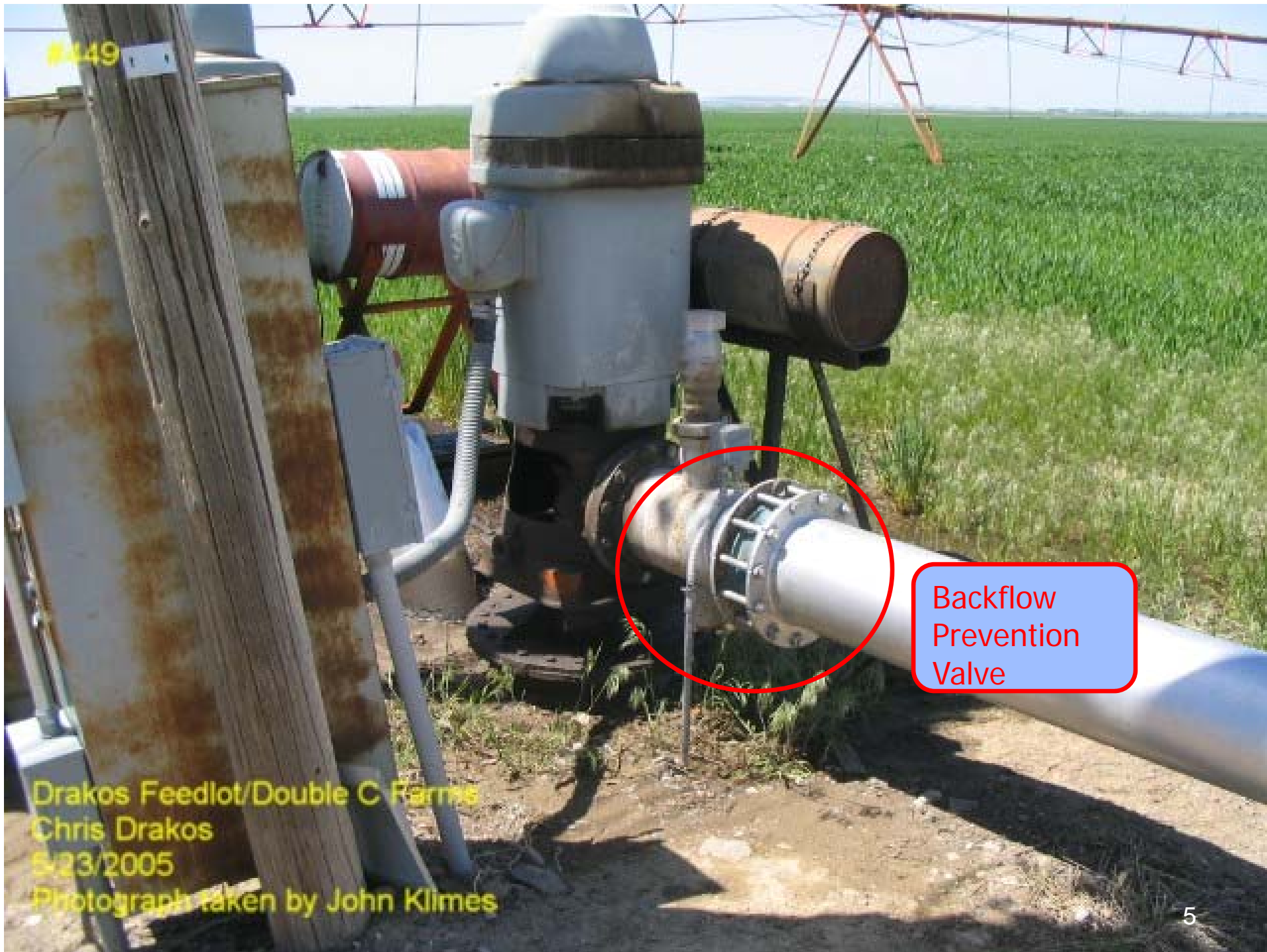


Drakos Feedlot/Double C Farms
Chris Drakos
5/23/2005
Photograph taken by John Klimes

#538



Drakos Feedlot/Double C Farms
Chris Drakos
5/23/2005
Photograph taken by John Klimes



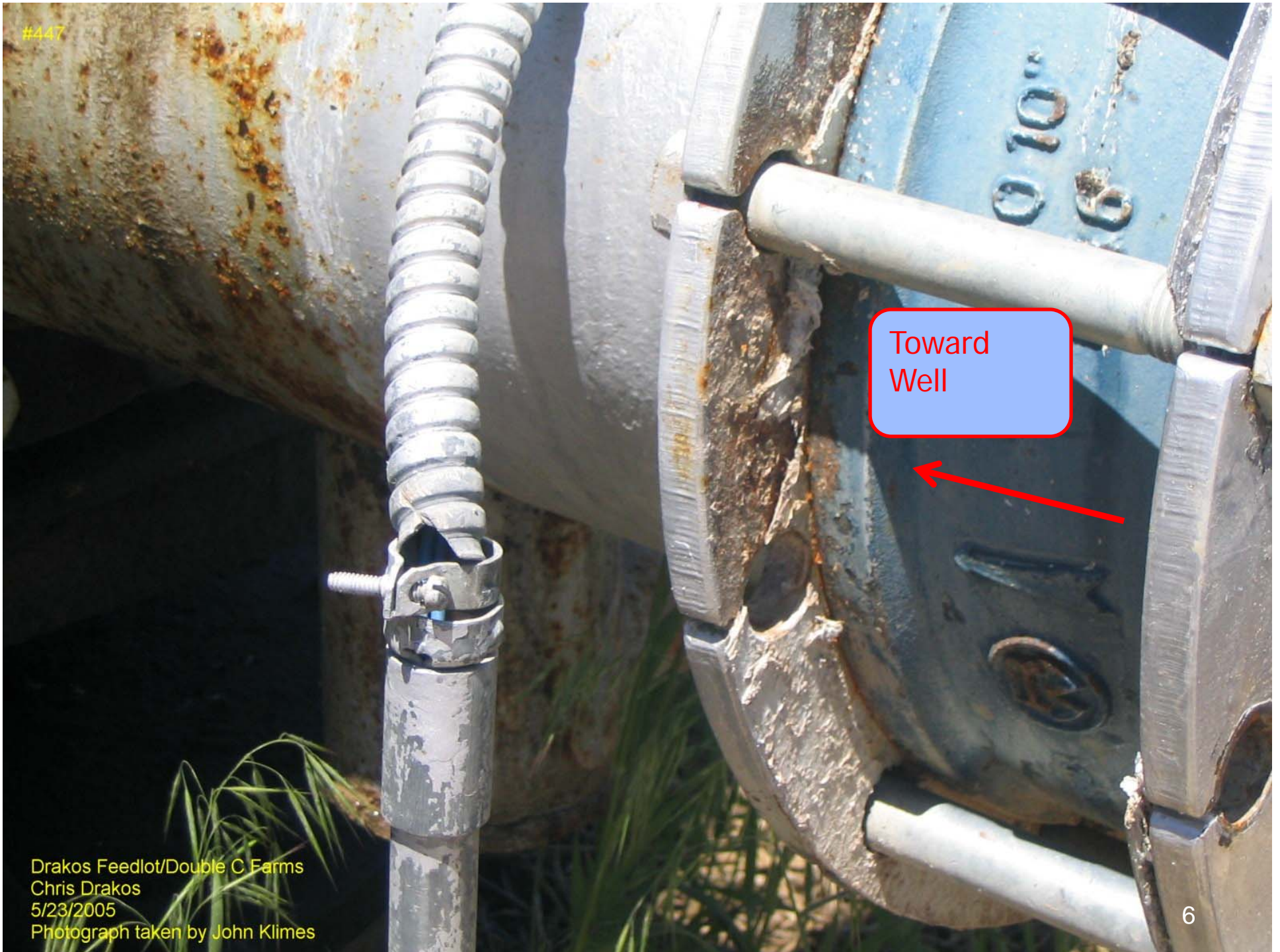
Backflow
Prevention
Valve

Drakos Feedlot/Double C Farms
Chris Drakos
5/23/2005
Photograph taken by John Klimes

#447

Toward
Well

Drakos Feedlot/Double C Farms
Chris Drakos
5/23/2005
Photograph taken by John Klimes



#573



Drakos Feedlot/Double C Farms
Chris Drakos
6/2/2005
Photograph taken by John Klimes

June 2, 2005 ISDA, IDWR, IDEQ inspection

Handle to
Underground
Valve

Drakos Feedlot/Double C Farms
Chris Drakos
6/2/2005
Photograph taken by John Klimes

Klimes Audio Recording



K=Klimes
C=Cory King

- K: On this well up here.
- C: uh huh
- K: What is the valve off to the side?
- C: It is up here?
- K: Yeah
- C: I don't know. I was just headed over there so we can look at it.
- K: Okay, I'll follow you.
- C: Which valve is it?
- K: The valve that he buried right there. Want me to dig it up for ya. It's right there, where does that valve go?
- C: It goes to that pivot.
- K: To which pivot, that one right there? It's not running. Is it off? It goes to that pivot?
- C: uh huh, well there's like I said we can put Willow Creek water, It's going throughout the whole farm so when we run this well if we need Willow Creek on that end of the farm then this well goes to that pivot.
- K: Okay, and this pivot is hooked to all of the other pivots as well?
- C: Yeah, I got a map back there we can put Willow Creek Water clear down there beyond the cellars or clear on that end. Or we can use those wells clear back over here. Every mainline, every pivot is tied together. 9

Carson Audio Recording

Cory: Lets cover the valve up, he asked, he asked me, he wanted to know what that valve was.

Jose: Its uncovered Cory

Cory: Was it uncovered before?

Jose: It was uncovered before, yes.

Cory: Thats the valve he was asking about. Just make sure its shut off

Jose: I didn't hear that.

Cory: Are you headed for the Goat Ranch?

Jose: No Cory everything is fine over there.

Cory: Cover that hole up

Jose: Ya but I uh everything is everything is fine over there.

Cory: Olive Tree ah well Jose did ah we change that valve around?

Jose: Ya we have a new valve over there Cory its ready to go.

Cory: Where are you at now?

Jose: Ah I'm at the lower shop right now but I'm gonna get get the right way now

Cory: Meet me down here at the hmmm where we spill the water into the ditch.

Jose: OK

Where Does EPA Get Its Cases?

- Referrals from State Regulatory Agencies
- Referrals from Other Federal Agencies
- Tips and Complaints from Citizens
- Current and/or Former Employees

EPA Investigative Discretion

In General:

- 1. Target the Most Significant and Egregious Violators**
- 2. Investigate Culpable Employees and Corporations**
- 3. Less Flagrant or Lesser Environmental Violations Should be Addressed by:**
 - Administrative Actions and Penalties**
 - Civil Actions and Monetary Penalties**
 - Remedial Actions**

Criminal Case Characteristics:

- Death or actual serious injury
- Hazardous or toxic releases
- Ongoing, repetitive or multiple releases
- Serious documented exposure to pollutants
- Significant remediation required
- Significant repeat or chronic noncompliance or prior criminal conviction
- Substantial violators (e.g., size, revenue)

How Does EPA Select a Criminal Case?

- Devaney Memorandum- Jan. 12, 1994
- EPA to Use Its Investigative Discretion
 - Memo Emphasized Two Case Selection Criteria:
 - Significant Environmental Harm
 - Culpable Conduct

Devaney Memo- Significant Environmental Harm

Factor 1. Actual Harm

Factor 2. Threat of Significant Harm

Factor 3. Failure to Report

Factor 4. Illegal Conduct –
Represents a Trend or
Attitude

Devaney Memo- Culpable Conduct

- Factor 1.** History of Repeated Violations
- Factor 2.** Deliberate Misconduct/
Falsification
- Factor 3.** Concealment of Misconduct or
Records
- Factor 4.** Tampering with Monitoring
Equipment
- Factor 5.** Operating without Required
Documentation

General Criteria for Pursuing Criminal Prosecution

- All Elements of the Crime Are Present
- Lying, Cheating, Stealing
- Prior History of Non-compliance (if applicable)
- Civil Sanctions (if applicable) failed to correct behavior/wrongdoing
- State or Local Prosecution Not Available or Applicable
- Significant Actual or Potential Harm to the Environment
- Culpable Conduct

How did the *King* case become a criminal case?

- Threat of Environmental Harm
- Unpermitted Activity
- “Knowledge”: King had applied for a SDWA UIC permit in 1987 and therefore “knew” he had to have a UIC permit prior to injection
- “Concealment”: King lied to state Ag inspector about purpose of buried valve and used covert methods to inject

Related Civil Litigation Started Before Indictment

- Consent Decree entered with IDWR within 9 months from when violations occurred;
- State Department of Agriculture and DEQ civil penalty litigation;
- Defendant and employer civil rights action against state for illegal search;
- Defendant action against “whistleblower” for defamation with wrongful termination counterclaim.

Indictment

Safe Drinking Water Act & False Statement to Government agent (injected water and/or processes wastewater)

26. On or about May 23, 2005, which date being approximate, in the District of Idaho, the defendant, CORY LEDEAL KING, willfully injected water and/or process wastewater from the Facility into a waste disposal and injection well (ISDA well No. 1) on the Facility, which is more than eighteen feet in vertical depth below land surface, without a permit issued by the State of Idaho, despite having knowledge of the requirement to first obtain such a permit prior to such injection. By doing so, the defendant willfully violated the laws contained in Chapter 300h, Title 42, United States Code, and the regulations contained in 40 C.F.R. Part 144, et seq., as well as Title 42, Chapter 39 of the Idaho Code and regulations promulgated thereunder, all of which set forth the proper procedures and requirements for subsurface injections of fluids, all of which is in violation of Title 42, United States Code, Section 300h-2, and Title 42, Chapter 39, Idaho Code, Sections 42-3903 and 42-3911 (Bobbs-Merrill 1977).

Superseding Indictment

Safe Drinking Water Act and False Statement (injected water from the facility)

26. On or about May 23, 2005, which date being approximate, in the District of Idaho, the defendant, CORY LEDEAL KING, willfully injected water from the Facility into a waste disposal and injection well (ISDA well No. 4) on the Facility, which is more than eighteen feet in vertical depth below land surface, without a permit issued by the State of Idaho, despite having knowledge of the requirement to first obtain such a permit prior to such injection. By doing so, the defendant willfully violated the laws contained in Chapter 300h, Title 42, United States Code, and the regulations contained in 40 C.F.R. Part 144, et seq., as well as Title 42, Chapter 39 of the Idaho Code and regulations promulgated thereunder, all of which set forth the proper procedures and requirements for subsurface injections of fluids, all of which is in violation of Title 42, United States Code, Section 300h-2, and Title 42, Chapter 39, Idaho Code, Sections 42-3903 and 42-3911 (Bobbs-Merrill 1977).

Judge Winmill Pre-Trial SDWA Decision

- Gov't must prove (1) a person (2) willfully violated (3) a requirement of Idaho's UIC program, to wit: prohibiting the injection of a fluid down a well, more than 18 feet deep without a permit.
- A violation occurs whether or not the fluid is a contaminant and whether or not the injection actually endangers or contaminates an underground source of drinking water.

This is analogous to erecting a fence at the cliff's edge rather than merely parking an ambulance at the bottom. The SDWA was designed as a "fence", i.e., designed to prevent contamination by requiring all underground injections to be vetted in the permit process before the injections take place.

rather than assessing damage after an injection, the SDWA seeks to prevent the damage in the first place. This is analogous to erecting a fence at the cliff's edge rather than merely parking an ambulance at the bottom. The SDWA was designed as a "fence", *i.e.*, designed to prevent contamination by requiring all underground injections to be vetted in the permit process before the injections take place.

If a person could escape responsibility for his injection by proving that it did not threaten drinking water sources, the SDWA's prophylactic approach would be

Tale of Two “Trials”

- Because the SDWA prohibits unpermitted injection without regard to what was injected, the Gov’t changed the indictment to unpermitted injection of “fluid” and trial in essence became bifurcated:
 - First “phase” (the trial) was whether King was guilty of injections without a UIC permit
 - Second “phase” (sentencing hearing) involved what was injected and environmental harm.Evidentiary and Legal Issues in both phases

Witness Issues

- Defense used affirmative civil litigation in state court to obtain deposition testimony of state employees the federal gov't used at criminal trial
- Effective method for finding strengths and weaknesses in criminal case

Witness Preparation Issues

- State employee memory regarding permit history
- State agencies' witnesses:
 - The agencies have their own viewpoints on issues and political sensitivities
 - Prosecutors must be aware of these and work to ensure state agency cooperation
 - Prosecutors must deal with the realities and logistics of obtaining and maintaining access to these crucial state agency witnesses

Attorneys for Defendant Cory King

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CORY LEDEAL KING,

Defendant.

CR 08-002-E-BLW

STATEMENT OF ADMITTED

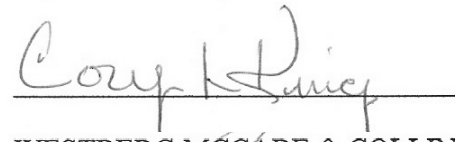
FACTS BY CORY KING

CORY LEDEAL KING admits the following facts in response to the Superseding Indictment (Docket 7):

1. Cory King injected water from Willow Creek into ISDA Well Nos. 1 and 4 on May 23, 2005.
2. Cory King injected water from Land Creek into ISDA Well No. 8 in the Spring of 2005.
3. Cory King injected water from Willow Creek into ISDA Well No. 5 on June 2, 2005.

DATED This 26th day of June, 2009.

CORY LEDEAL KING



WESTERN MCGUIRE & COLLINS

"Old Chief" Strategy:

- *Old Chief v. U.S.*, 519 U.S. 172 (1997) (5-4 decision)- Felon in possession conviction-U.S. Supreme Court overturned conviction and held that District Court should not have rejected defendant's offer to stipulate that defendant had committed a previous felony
- Court, applying FRE 403, held that allowing gov't to introduce evidence of prior conviction was more prejudicial than probative, where the offered stipulation would have met the element of the crime sought to be proven by the gov't

"*Old Chief*" Strategy

- King attempted to use *Old Chief* to prevent gov't from presenting most of its evidence regarding the illegal injections at trial by offering to stipulate that the injections occurred, thereby preventing gov't from, *inter alia*, showing photos and presenting recordings. King argued the evidence would be more prejudicial than probative
- Gov't argued that it ought to be able to present its case the way it chooses, and argued that the evidence to be offered goes toward proof of both willfulness and that the injections occurred
- Judge Winmill denied King's motion in part, but stated it was a "close call". Judge Winmill did require the gov't to substantially reduce the number of photographs it hoped to use, and only use those that tended to show King's willfulness with respect to the injections

Trial

- 3 day trial
- Gov't put on 9 witnesses- 5 state gov't witnesses, 3 lay witnesses, 1 fed gov't witness
- Primary fact witness was State Ag Inspector John Klimes
- Defense did not present evidence or put on witnesses
- Jury deliberated for about one day

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 CORY LEDEAL KING)
)
 Defendant.)
 _____)

Case. No. CR-08-002-E
SPECIAL VERDICT

We the jury, find unanimously as follows:

Question 1. As to Count 1 in Superseding Indictment, charging Cory Ledéal King with willfully injecting fluids into Idaho State Department of Agriculture well number 1 at the facility located at the Double C Farm Produce facility near Burley, Idaho, on or about May 23, 2005, the de

RW

Guilty

Not Guilty

Question 2. As to Count 2 in Superseding Indictment, charging Cory Ledéal King with willfully injecting fluids into Idaho State Department of Agriculture well number 4 at the facility located at the Double C Farm Produce facility near Burley, Idaho, on or about May 23, 2005, the de

RW

Guilty

Not Guilty

Question 3. As to Count 3 in Superseding Indictment, charging defendant Cory Ledéal King with willfully injecting fluids into Idaho State Department of Agriculture well number 5 at the facility located at the Double C Farms/Lambert Produce facility near Burley, Idaho, on or about June 2, 2005, the defendant is:

RW

Guilty

Not Guilty

Question 4: As to Count 4 in Superseding Indictment, charging defendant Cory Ledéal King with willfully injecting fluids into Idaho State Department of Agriculture well number 8 at the facility located at the Double C Farms/Lambert Produce facility near Burley, Idaho, during the Spring of 2005, the defendant is:

RW

Guilty

Not Guilty

Question 5: As to Count 5 in Superseding Indictment, charging defendant Cory Ledéal King with making a false statement of material fact on a matter within the jurisdiction of an agency of the Government of the United States on June 2, 2005, the defendant is:

RW

Guilty

Not Guilty

Dated 4/30/09

FOREPERSON

Sentencing Evidentiary Hearing

- According to the trial court, the United States Sentencing Guidelines assign points for sentencing enhancement based on:
 - 1) Whether there was a hazardous or toxic substance or a pollutant injected into the groundwater, and
 - 2) Whether the substance contaminated the environment;
- A court trial was held concerning whether the injected fluid contained E. coli and was therefore was toxic and whether the environment was harmed.

Sentencing Evidentiary Hearing

- Two full days- 9 gov't witnesses; 1 defense expert
- Issues surrounding reliability of deep well samples:
 - Sample collection methods and holding times;
 - Preparation of samples for analysis;
 - Lab certification and analytical procedures;
 - Other reasons for “positive” E. coli test results
- Issues surrounding reliability and relevance of surface water samples from Willow Creek:
 - Colilert® not EPA approved for surface water E. coli counts;
 - Relevance of samples taken June 28 to prove content of injected fluid on June 2 questioned.

Sentencing Evidentiary Hearing

- Defense microbiology expert, Dr. Gerba, was well-known expert
- Gov't expert, Dr. Harris, while qualified regarding E. coli, was not fully prepared to rebut Dr. Gerba and admitted she was not qualified to testify concerning hydrogeology
- Dr. Gerba was allowed to testify as to E. coli groundwater aquifer movement based on study and experience, despite not being a hydro geologist
- Gov't was not able to secure a hydrologist to testify at the hearing
- Dr. Gerba opined that the positive E. Coli results could be due to Aeromonas bacteria instead of E. Coli
- Dr. Gerba opined, based on chemical analysis, that there was no injection of manure and no harm to the aquifer.

Sentencing Evidentiary Hearing

- Judge Winmill ruled that the gov't had to show manure or bacteria (E. coli – a toxic substance) had been injected by King; not just sand or sediment
- Judge Winmill ruled that the gov't did not show by clear and convincing evidence that fecal coliform or E. Coli bacteria were injected
 - The June 28 surface water sample was too far removed from the dates of injection to be probative of the existence of E. coli four weeks before

Sentencing Hearing

- Judge Winmill sentenced King to 4 months home confinement, 3 years probation, and a \$5,000 fine
- Judge Winmill stated that had the gov't been able to prove manure or process wastewater was injected, he would have not hesitated to impose a prison sentence

Post-Conviction Collateral Consequences

- Suspension and Debarment- EPA
- A civil proceeding, not criminal. It is a business judgment on the part of EPA
- If debarred, cannot enter into gov't contracts or receive gov't payments or subsidies
- King, Double C Farms, and their other affiliates were debarred by the EPA Debarring Official in Washington, D.C., for a period of 3 years, ending in 2013

Ninth Circuit Appeal

- With respect to the four counts under the SDWA, King made two statutory arguments.
 - The government was required to allege and prove that the injected water was made into an underground source of drinking water (USDW)
 - Second, he contended that Idaho's permitting requirement for injection wells is not part of Idaho's "applicable underground injection program," so that his failure to obtain a permit did not violate the SDWA.

He also made a constitutional argument. He contended that if his unpermitted injections are held to violate the SDWA, the Act exceeds Congress' authority under the Commerce Clause.

With respect to the fifth count under 18 U.S.C. § 1001(a)(2), King contended that his "materially false" statement was not made in a "matter within the jurisdiction" of the United States because it was made to a state agricultural inspector.

Finally, King challenged the district court's denial of his post-verdict motion for a new trial because of violations of a pre-trial order and alleged prosecutorial misconduct.

Ninth Circuit Rejected King's Arguments

- Government does not have to “plead and prove” injection into a USDW:
 - “King misunderstands the allocation of the burden of proof under the SDWA. King had the burden to show, during Idaho’s permitting process [which began when King submitted a permit application to inject in 1987], that his proposed injection would not adversely affect an USDW. To prove a violation of § 300h-2(b)(2), the government does not need to show that an injection will have such an effect on an USDW. The government need only show the absence of a permit under Idaho’s UIC program.”
 - The Court also stated that the burden of proof regarding injections into potential sources of drinking water rests with the permit applicant, not the government
- The Court also reviewed Idaho’s EPA-delegated SDWA program regulations and concluded that nothing in those regulations would require the government to prove that the injections had an adverse effect, stating that “the government was required to prove only that King willfully injected water into a well more than eighteen feet deep without a permit, knowing that a permit was required under Idaho law.”
- Rejected King’s argument that Idaho’s SDWA UIC program was “broader in scope” than the federal UIC program and therefore unenforceable by EPA

Ninth Circuit Decision, cont'd.

- Rejected King's argument that Congress exceeded its authority under the Commerce Clause. The Ninth Circuit reviewed the Congressional history behind the enactment of the SDWA, finding that Congress intended to broadly protect actual and potential USDWs, and that water is an article in commerce
- Rejected King's arguments that his false statement to ISDA inspector Klimes was not made to someone acting "within the jurisdiction of the United States," and held that since King knew Klimes was inspecting allegations of illegal injections, and that Klimes had the authority to conduct such an inspection, and that such injections without a permit are illegal under state and federal law, Klimes was acting within the jurisdiction of the U.S.

U.S. Supreme Court

- Denied King's Petition for Certiorari

