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NEWS & ANALYSIS

The Tenth U.S. Supreme Court Justice (Crazy Horse, J.) and Dissents Not Written—The Environmental Term of 2003-2004

by William H. Rodgers Jr.

I. Introduction

My nomination and appointment to the U.S. Supreme Court were not widely publicized. My collegiality was never held in high regard. My experience is limited but I think I understand the ways of nature and the use of language in treaty writings.

I have listened for a sympathetic voice on this Court but I have not heard one. I will limit my dissents to seven. I will include one case from the 2002-2003 Term but will hold my tongue on many others.

—Crazy Horse, J.

II. The Decisions

A. Norton v. Southern Utah Wilderness Alliance*, __U.S.__, 124 S. Ct. 2373, 159 L. Ed. 2d 137, 34 ELR 20034 (June 14, 2004) (9 to 0)*

The Court holds that the nonimpairment mandate of the Federal Land Policy and Management Act (FLPMA) of 1976 ("the Secretary shall continue to manage [wilderness study areas] so as to not impair the[ir] suitability . . . for preservation as wilderness") is unenforceable under the Administrative Procedure Act (APA).

I dissent.

This Court opens wild and fragile lands to invasion by machinery operated by people whose chief motivation is their own pleasure. This Court will next assure us that the land under railroad tracks remains available for multiple use.

Environmental lawyers stole the "hard look" doctrine from the administrative lawyers and strengthened it. Today, the administrative lawyers steal it back and weaken it.

I know of few treaties with directives more specific than this one. The Secretary "shall continue to manage." Manage what? Wilderness study areas. To what ends? So as "not to impair the suitability of such areas for preservation as wilderness."

Under the Court's unanimous ruling, this mandate is as shredded and torn as the land will be. This is done without so much as a nod to the people in Congress and others who put this law in place. My brother Justice Antonin Scalia knows in his heart what these promises mean and he knows they mean nothing.

The abandonment of law this Court counsels today does a grave disservice to those within the government who wish to give meaning and life to this nonimpairment clause. Relinquishment of the field to untrammeled administrative choice means there will be no law. I have crossed a few lines myself to see if enforcement follows law.[1] When it does not, there is no law. There is only discretion.

Further, the Court says no "supplementation" of the Bureau of Land Management (BLM) impact statement is called for. It says the recent and dramatic increase of off-road vehicle (ORV) use in protected areas of the public lands—which the Court readily concedes—is not a new circumstance requiring another look by the agency.

The government has not before hesitated to make a new treaty when the old one is deformed and abandoned and modified by events. I do not understand why the BLM should be allowed to continue its business under a document that is now conceded to be deceptive and incomplete.

The Court says no supplementation is ever required unless there is some detectable "major Federal action" at hand.

This confuses the whole with a part of the whole. "Major Federal action" is the measure of whether an environmental impact statement (EIS) is required. If "supplementation" is called for only when a "major Federal action" appears, then there can be no room for supplementation. There will only be a series of "major Federal actions" punctuated by empty space.

The Court has left this paradox to thousands of practicing lawyers.

Thrice the Court uses the term "hard look" and thrice it perceives the term as inviting judicial review of statutory directives such as deadlines. Limiting the courts to the role of advising agencies on the meaning of "two years" while excusing them from overseeing the definition of "preservation as wilderness" is a trivialization of the judicial function.

This "hard look" is taken by a blind Court and I will have no part of it.

I will close with a photographic image of what this Court cannot see. Different place, different law, different manager. But the same ORV footprints:

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1. *See* Larry McMurtry, Crazy Horse 8 (Viking Penguin 1999) ("even then, he camped six miles from the fort, rather than the prescribed three, and saw whites only when he could not avoid them"); *see also* Mari Sandoz, Crazy Horse: The Strange Man of the Oglalas (University of Nebraska Press 1992) (50th anniversary edition) (leading biography) and Joseph M. Marshall III, The Journey of Crazy Horse: A Lakota History (Viking Penguin 2004).

Source: Aerial photo of ORV damage in Big Cypress National Preserve, adjacent to Everglades National Park, on April 16, 2001. Photograph by Karl Forsgaard, Seattle, Washington.

—Crazy Horse, J.

B. U.S. Department of Transportation v. Public Citizen*, __U.S.__, 124 S. Ct. 2204, 159 L. Ed. 2d 60, 34 ELR 20033 (June 7, 2004) (9 to 0)*

The Court holds that neither the National Environmental Policy Act (NEPA) nor the Clean Air Act (CAA) requires the Federal Motor Carrier Safety Administration (FMCSA) to evaluate environmental effects when it approves cross-border operations of Mexican-domiciled trucks.

I dissent.

NEPA is called the "Magna Carta" of environmental law but it is dishonored by this Court today. Not a hand is raised to stop a domestic invasion by 40,000 polluting trucks that would not be approved for operation were they made in Akron.

NEPA is a short statute but the Court does not stop to read it. It says that authority to pass on environmental issues is "supplementary" to existing agency powers and that "all possible planning" must be done to carry out the environmental mission.[2] This "comply-unless-impossible" test is embraced by several rulings of this Court that are not cited or acknowledged by my brother Justice Clarence Thomas.[3]

With no appreciation for what it has done, this Court discards 34 years of precedent that is settled practice among the thousands of attorneys who work daily with NEPA. The precedent is the *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*[4] opinion, and while it carries no weight here, the accumulation of sentiment validating it should not be so easily overthrown. All the arguments the Court unbundles today have been rejected repeatedly since the Atomic Energy Commission (AEC) argued 34 years ago that it could not possibly consider the environmental effects of the nuclear power plant it was licensing because Congress had limited it to the domain of health and safety. The AEC then, the FMSCA now, insisted it had "limited discretion," "no ability to countermand," "no statutory authority" to fix the problem, and no "causal connection" between its license and the pollution that follows.

The Court adds two other NEPA errors to its basic misunderstanding of the supplementary role of the NEPA directives. It says that if an agency can't control the effects, it doesn't cause them and need not discuss them.[5] This is at odds with the well-established NEPA duties to consider indirect effects, cumulative effects, mitigation, and alternatives—all of which require analyses of consequences that reach the domain of other decisionmakers. It is a sad pre-NEPA day when the tunnel authorities can say that the air pollution that comes from the trucks that will be drawn to their tunnel is none of their business.

The Court also misstates the audiences to which the EIS is addressed—not mentioning Congress at all and dismissing the "larger audience" of the public on the spurious ground that they "can have no impact on FMCSA's decisioning."[6] This convenient assumption of "no impact" would justify the instant repeal of countless public participation measures that populate the environmental and other public laws. I have been at many hearings and have been told often that my comments would not matter. Nowhere has the cynicism been so deep as to declare: "Because your comments will not be heard, they cannot be said. Our ears are closed."

To this day my government tells me about the unwelcome railroads that will enter my beloved Black Hills.[7] I want to hear about the trucks too.

I do not understand either why the Court so eagerly demolishes the "conformity" provisions of the CAA—one of the few measures in this stifling law that is actually enforceable. This Court should join me in taking a special interest in any law that holds officials to prior commitments. This "conformity" law says that officials should do nothing to undermine their pledges of clean air that were written down in the state implementation plans *but a few years before*.

The FMCSA betrays these promises and the Court approves it. The Court says the agency didn't cause this pollution to happen.[8] The agency, after all, was only standing by,

2. NEPA §§105, 102, 42 U.S.C. §§4335, 4332.

3. Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 778, 6 ELR 20528 (1976); Weinberger v. Catholic Action of Haw., 454 U.S. 139, 145-46, 12 ELR 20098 (1981); Andrus v. Sierra Club, 442 U.S. 347, 362-63, 9 ELR 20390 (1979).

4. 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

5. Department of Transp. v. Public Citizen, 124 S. Ct. 2204, 2215, 34 ELR 20033 (2004).

> In these circumstances, the underlying policies behind NEPA and Congress' intent, as informed by the "rule of reason," make clear that the causal connection between FMCSA's issuance of the proposed regulations and the entry of the Mexican trucks is insufficient to make FMCSA responsible under NEPA to consider the environmental effects of the entry.

See id. at 2216 ("Since FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impacts of cross-border operations would have no effect on FMCSA's decisionmaking—FMCSA simply lacks the power to act on whatever information might be contained in the EIS.").

6. *Id.* at 2216 ("But here, the 'larger audience' can have no impact on FMCSA's decisionmaking, since, as just noted, FMCSA simply could not act on whatever input this 'larger audience' could provide.") (footnote omitted).

7. Mid States Coalition for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003).

8. 124 S. Ct. at 2218 ("The emissions from the Mexican trucks are neither 'direct' nor 'indirect' emissions caused by the issuance of FMCSA's proposed regulations. Thus, FMCSA did not violate the CAA or the applicable regulations by failing to consider them when it evaluated whether it needed to perform a full 'conformity' determination.").

like an umpire, calling balls and strikes, while the world turned ugly around it.[9]

I remember when the Lakota were promised that they would be free of trespassers. But then the miners came, and Gen. George Custer let them come, and the United States didn't have anything to do with it.

I refuse to join the Court in its decision to allow Mexican trucks to run roughshod over the Magna Carta of environmental law.

—Crazy Horse, J.

C. Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, __U.S.__, 124 S. Ct. 1756, 158 L. Ed. 2d 529, 34 ELR 20028 (Apr. 28, 2004) (8 to 1, Souter, J., dissenting)*

The Court holds that six fleet rules adopted by the South Coast Air Quality Management District that would forbid car rental companies and others from buying highly polluting automobiles are preempted by CAA §209(a) and thus inoperative.

I join the dissent of my brother Justice David H. Souter but add a few words because he stops short of saying what should be said.

Where is the law that makes it illegal for people to defend their lives and property against invasions by vehicles that hurt them? What is the force that strips our brothers and sisters in southern California of this basic right of self-defense? The Court finds it in §209(a) of the CAA, which says that no state or local entity "shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions" from new motor vehicles.[10]

To my untutored mind, a "standard . . . relating to the control of emissions" is an "emissions standard," which happens to be defined in the Act (though it is not mentioned by the Court):

> The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis . . . .[11]

By no stretch of the imagination does a fleet rule that restricts purchase of high-polluting vehicles control the "quantity, rate, or concentration" of the pollutants coming out of the tailpipes of these vehicles.

What is amazing to me is how my colleagues can sit here passively and accept the complete distortion of this preemption story. The history of the CAA tells us that state prerogatives to protect their people are strongly encouraged.[12] Scholars tell us that states must have room to defend themselves against a compromise federal automobile emissions scheme that does not even assure that individual automobiles coming off the assembly line will meet the standards.[13] Legislators tell us that extravagant "preemption" should be withheld from an industry that for many years conspired to retard advances in pollution control technology.[14] Precedent tells us that local communities are free to protect their own children from being driven from their schoolyards by pollution.[15]

I understand that my brother Justice Scalia has little interest in the words of the statute, and no interest in its structure, in scholarly opinion, in legislative history or in precedent. He prefers the enlightenment of his own mind. What he imagines there in §209(a) is some extravagant difference between the emission standards that a state might "adopt" and those they might "enforce,"[16] although both these words are qualified by the same language "*relating to the control of emissions from any new motor vehicle or new motor vehicle engine*."

I believe these "emissions" are ethereal things that cloud the judgment of my colleagues. This Court has forbade the public from enforcing work-practice rules against the owners of crumbling asbestos because they are not really "emission standards."[17] Now it prevents the public from enforcing buy-safe rules on automobile fleets because they look too much like "emission standards."

Justice Scalia says that the manufacturers' right to sell federally approved vehicles "is meaningless" in the absence of the purchaser's right to buy them.[18] But this overlooks the fact that there is no right to *use* them. The crisis the automobile has brought to urban America has yielded any number of restrictions that forbid driving on odd-numbered days, close certain areas, require particular fuels, etc.[19] The South Coast Air Quality Management District knows every varia-

9. Two of our elders, Judge Paul Hays of the U.S. Court of Appeals for the Second Circuit, and Federal Power Commission Commissioner Charles Ross, buried this "balls and strikes" doctrine 40 years ago. It should stay buried. *See* William H. Rodgers Jr., *A Hard Look at* Vermont Yankee*: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699, 718-24 (1979).

10. CAA §209(a), 42 U.S.C. §7543(a).

11. CAA §302(k), 42 U.S.C. §7602(k); CAA §304(f), 42 U.S.C. §7604(f).

12. CAA §116, 42 U.S.C. §7416 (1970 provision, with earlier roots, protecting state and local authority to adopt "any standard or limitation" respecting emissions); CAA §131, 42 U.S.C. §7413 (1990 measure protecting authority of cities or counties "to plan or control land use"); CAA §209(d), 42 U.S.C. §7543(d) (states and localities may "control, regulate, or restrict . . . the use, operation, or movement" of motor vehicles).

13. *See* David Currie, *Motor Vehicle Air Pollution: State Authority and Federal Preemption*, 68 MICH. L. REV. 1083, 1102 (1970) (preemption under 1967 Act is a "disgrace"; discusses a variety of state options).

14. *Compare* 113 CONG. REC. 30957 (1967) (Rep. Craig Hosmer (R-Cal.) speaking in favor of the Moss Amendment now found in Subsection 208(b)):

> The issue is whether California can act responsibly, as it has in the past, to protect its people and their lives and their health, or whether California is going to have to go, as somebody said, hat in hand, alongside these three corporations [Ford, GM, and American Motors], up to a Department in Washington and beg and plead for the opportunity to try to protect its citizens.

with H.R. REP. NO. 91-349, at 2 (1969) (committee does not agree with auto industry spokesmen who say that "industry has won the main air pollution battle").

15. Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 111 S. Ct. 2476, 115 L. Ed. 2d 532, 21 ELR 21127 (1991) (holding unanimously that Federal Insecticide, Fungicide, and Rodenticide Act registration does not preempt the regulation of pesticides by local government).

16. *See* __U.S. at __, 124 S. Ct. at 1762: "While standards target vehicles or engines, standard-enforcement efforts that are proscribed by §209 can be directed at manufacturers or purchasers."

17. Adamo Wrecking Co. v. United States, 434 U.S. 275, 985 S. Ct. 566, 54 L. Ed. 2d 538, 8 ELR 20171 (1978).

18. __U.S. at __, 124 S. Ct. at 1763.

19. For background, see 1 WILLIAM H. RODGERS JR., ENVIRONMENTAL LAW: AIR & WATER §3.29 (1986) (with updates) (vehicle free zones, gas rationing, vehicle use prohibitions, management of parking supply); Craig M. Oren, *Detail and Implementation: The Example of Employee Trip Reduction*, 17 VA. ENVTL. L.J. 123 (1998).

tion of these themes. It has acted, quite reasonably in my view, to say that vehicles that should not be used there cannot be bought there.

Justice Scalia takes obvious pride in the peroration of his opinion, which I will quote here by adding the critical word "use" in place of the critical word "buy." The change shows the majority opinion to be sheer sophistry that applauds an extravagant ideology of preemption that would leave Californians helpless before the automobile makers:

> A command, accompanied by sanctions, that certain purchasers may buy [*use*] only vehicles with particular emissions characteristics is as much an "attempt to enforce" a "standard" as a command, accompanied by sanctions, that a certain percentage of a manufacturers' sales volumes must consist of such vehicles.[20]

I do not believe that the authorities in southern California are prevented by the CAA from forbidding sports utility vehicle owners from driving recklessly in schoolyards, and I do not believe they are prevented by this law from forbidding the purchase of vehicles that cannot be used without causing harm.

—Crazy Horse, J.

D. Cheney v. U.S. Court for the District of Columbia Circuit*, __U.S.__, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (June 24, 2004) (4 to 1 to 2 to 2, Stevens, J. concurring, Thomas, J., joined by Scalia, J., concurring in part and dissenting in part, Ginsburg, J., joined by Souter, J., dissenting)*

The Court holds (with seven Justices concurring in the disposition) that this case should be sent back to the court of appeals to consider whether a writ of mandamus should issue to restrict discovery in the district court.

I dissent. This Court misapplies mandamus and blots out the history of the Federal Advisory Committee Act (FACA).

Not a single Justice objects to the dreadful transaction costs that will attend opening the door to the extension of this "extraordinary" mandamus remedy to discovery disputes. If one succeeds, one hundred must try, and lawsuits become ever more technical, expensive, and doubtful.

Not a single Justice discusses the origins of FACA, acknowledges it, or explores from whence it came. How short memories are on this high court of law. The *piece de resistance* that inspired FACA was the National Industrial Pollution Control Council, chaired by Secretary of Commerce Maurice Stans in the Administration of President Richard M. Nixon.[21] There, as here, it was said that polluting industries with titles such as the Primary Nonferrous Smelting Industry Liaison Committee met with government officials, wrote government reports, and prescribed government policy. There, as here, disputes arose over access to these documents that left a trail of influence on how environmental rules are made.

The singular difference is that there, unlike here, the government freely made these documents available under the Freedom of Information Act (FOIA). I know this is so because I read them. So this Court now presides over the amazing irony that access to government documents of the Stans/Cheney variety was broader *before* Congress required disclosure under FACA than it was *after* Congress required disclosure.

Not a single Justice mentions the evils that FACA was aimed at or the disclosure policy it endorses. My personal opinion on advisory committees is well known[22] and I would not mention it except that it was shared by Sen. Lee Metcalf (D-Mont.), who is responsible for FACA. Committees are formed to move groups and groups are formed to move governments. My Lakota people learned long ago that what the miners wanted the soldiers would do.

Not a single Justice mentions that what FACA requires is disclosure and therefore what this case is about is access to documents that Congress has declared to be public under the rules of FOIA. Not a single Justice has read the final report of the Cheney committee.[23] But I have. It is a treaty that says where the oil wells should be drilled in Indian Country, why the caribou don't matter, and why NEPA should be extended to forbid encroachments on energy projects and not just the birds and the fish and the trees. Even the pretty pictures of this report have oil in them.

FACA says I should be allowed to read the proceedings behind this treaty and learn the names of these modern miners who wish to enter my country.

I concur with my colleague Justice Ruth Bader Ginsburg (joined by Justice Souter) who points out that the Court here rewards government stonewalling and royalist insistence that it is immune from the rules. All this talk about "overbreadth" and "42 boxes" of documents and "vexatious litigation" is heard by district courts in discovery disputes every day. The district judge here gives all evidence that he can settle this matter and he should be allowed to do so.

Neither theory advanced to take the case from his hands has weight or credibility.

My brother Justice John Paul Stevens expresses doubt that FACA can apply to "de facto" committees that are not called "advisory committees." Senator Metcalf knew about this problem and anticipated it. The Act applies to "advisory committees" that are "utilized" by the government.[24] Escape from disclosure cannot be guaranteed by the simple expedient of saying "we are not an advisory committee." We are only the "group that meets on Tuesday afternoons to tell the government whether the pipelines in western Texas are in good working order." The district judge is fully able to tell us whether this beast that barks like a dog, and sniffs like one, is actually a dog.

The driver of this case is a mysterious essence known as executive privilege. "Were the Vice President not a party in this," Justice Anthony M. Kennedy says, "the argument that the Court of Appeals should have entertained an action in mandamus, notwithstanding the District Court's denial of the motion for certification, might present different considerations."[25] This is wrong. It is no more important that the

20. __U.S. at __, 124 S. Ct. at 1763 (emphasis added).

21. William H. Rodgers Jr., *The National Industrial Pollution Control Council: Advise or Collude?*, 13 B.C. Indus. & Commercial L. Rev. 719 (1972).

22. *See* McMurtry, *supra* note 1, at 8 ("For almost the whole of his life he did avoid all parleys, councils, Treaty sessions, and any meeting of an administrative or political nature, not merely with whites but with his own people as well.").

23. Report to the President of the National Energy Policy Development Group, Reliable, Affordable, and Environmentally Sound Energy for America's Future (2001).

24. FACA §3(2)(B), (C), 5 U.S.C.A. app. I.

25. *Cheney*, 542 U.S. at __, 124 S. Ct. at 2587.

vice president is a party in this case than it is when the Secretary of Defense is party to a case over the U.S. Navy's treatment of marine mammals. No one has noted the deposition of the vice president, and the district court would not allow it.

There are three branches of the government, not four. Congress has said that the executive branch that makes use of an advisory committee must give chapter and verse on who they are and what they do. All of government acts in the name of the president. Isaac I. Stevens did and Col. John Chivington did.[26] The district judge can protect the name of the president and his functions. This Court goes wrong to bring down the veil of secrecy to prevent disclosure on the vaguest of say-sos that low privilege seeking is actually high policy deliberation.

I dissent from this Court's disassembly of the formal legal system to obscure the tracks of another executive branch cover-up.

—Crazy Horse, J.

E. South Florida Water Management District v. Miccosukee Tribe of Indians*, __U.S.__, 124 S. Ct. 1537, 158 L. Ed. 2d 264, 34 ELR 20021 (Mar. 23, 2004) (8 to 1, with Scalia, J., concurring in part and dissenting in part)*

The Court holds that fact-finding is necessary to answer the question of whether the Clean Water Act (CWA) requires a permit for the massive discharge of pollutants through four huge pipes (at volumes of up to 900 cubic feet per second) from the polluted waters of the C-11 canal in Broward County to the pristine waters of the Everglades.

I dissent.[27]

Out of an excess of judicial caution and an inappropriate sensitivity to political factors, this Court adds a 10-year sentence to the tribe's efforts to stop this pollution that began with the dump-it-in-the-wilderness mentality of the 1950s.

The Court's first error was to grant certiorari to review a question a child could answer:

> Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes the "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System Permit under the Clean Water Act.[28]

The reason a child could answer this question is that thousands of "point sources"—perhaps most of them—present discharges of pollutants by sources adding nothing to the water. I appreciate that rudimentary familiarity with the operation of sewage treatment plants is not a condition for appointment to this Court but literate adults should understand that trains move, planes fly, and publicly owned treatment works put wastes originating elsewhere into the waters.

Because a child could answer this question, no adult would argue it. In a turn-around without precedent in the history of this Court, the petitioner South Florida Water Management District (District) actually ceased to press this nonsensical proposition in the middle of the case. As my brother Justice Scalia points out,[29] with even a trivial question properly answered, the correct disposition is to affirm the court of appeals and call an end to a bad day.

But, no, another strange theory had crept into the case. In an amicus brief, without support or familiarity with the record, the Solicitor General opined that because the CWA forbids putting pollutants *into* navigable waters,[30] it must *not* forbid taking pollutants from one part of navigable waters and dumping them elsewhere in navigable waters. Mixing, stirring, and blending is not really "adding" pollutants under this strange view.

I understand that this Court must maintain a respectful and delicate relationship with the Solicitor General. He must be given every presumption of good faith. But strong alliances are not built on craven response to caprice. Contrivances by the Solicitor General show this Court no respect, and they should be rejected summarily.

The majority's error here is to credit this cockamamie argument and give it a name—the "unitary waters" theory. The majority takes comfort in the ample skepticism it extends this theory. Its review of the CWA emphasizes that several of the national pollutant discharge elimination system (NPDES) provisions "might be read to suggest a view contrary to the unitary waters approach," that this legal argument "could also conflict with current NPDES regulations," and that a number of nonpoint source look alikes must get NPDES permits if they meet the expansive statutory definition of "point source."[31] But the Court doesn't step forth and dismiss this theory. It gives it life while it purports to consign it to death.

This case underscores a disturbing trend by this Court to attract and to heed a flood of amicus briefs. This case is sustained and expanded by amicus briefs. When my people faced the Treaty of Fort Laramie, the United States was against us but nobody was there to say that all the mayors of the towns were against us and that all county executives of all the counties were against us. But this is exactly what the Miccosukee Tribe faced in this case.[32]

26. The references are to the work of Stevens, who negotiated the Indian treaties in the Pacific Northwest, and Chivington, whose best efforts are described by George Bent (Cheyenne), *An Eye Witness Report of the Sand Creek Massacre, Nov. 28, 1964*, in Great Documents in American Indian History 191 (Wayne Moquin ed., Da Capo Press 1995).

27. I worked on this case and have met the chairman of the Miccosukee Tribe. But I understand that disqualification is a discretionary matter for the individual justice. I do not choose to disqualify myself.

28. *South Fla.*, __U.S. at __, 124 S. Ct. at 1543.

29. *Id*. at __, 124 S. Ct. at 1537, concurring in part and dissenting in part.

30. *See id.*, __U.S. at __, 124 S. Ct. at 1543-44, summarizing the Solicitor General's hyper-technical argument that twists the definition of "pollutant" in 33 U.S.C. §1362(12) that reads "*any* addition of *any* pollutant to navigable waters by *any* point source" to mean

> *any* addition of *any* pollutant by *any* point source to navigable waters, *except that any dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged anywhere in navigable waters may be discharged anywhere else in navigable waters because it is not considered an "addition."*

31. So, according to the majority opinion.

32. Twenty-five amicus briefs were filed in this case, many with multiple parties, including one joined by the National League of Cities, the National Association of Counties, and the U.S. Conference of Mayors, supporting petitioner and undermining the CWA. My advice to the mayors and the county executives is to pay attention to who speaks for them against the CWA.

I would not choose to answer this "unitary waters" theory because it has been inserted in the case by strangers. But because the Court sees it properly here, I think it should be answered decisively. There is nothing to it, and the tribe should be spared the transaction costs of responding to a sheer fabrication. The short answer is that "pollutants" are expansively defined in the Act.[33] Navigable waters themselves can be "pollutants" and they can contain the constituents of "pollutants." The Act clearly would apply to dredgings from Florida Bay dumped into the waters of Buzzards Bay. It would apply to nonindigenous clams taken from the shores of New Jersey and dumped into Padilla Bay on the other side of the continent. It would apply to dirty ballast water picked up in the Houston Ship Canal and released into California's Santa Monica Bay. And it should apply to the filth from the C-11 canal (every imaginable pollutant ("you name it") including "Christmas trees" and such)[34] back-pumped into the Everglades in this case.

I reject this ukase by the Solicitor General who would impose a creeping, degraded sameness on all waters of the United States.

There are no further facts to be found other than the fact that the petitioner District should proceed forthwith to get its permit.

I know what the chairman of the Miccosukee Tribe would say about this case and I therefore will say it for him today:

> The Tribe, whose members have lived in the Everglades for generations, does not need a factual record to understand the difference between a polluted manmade canal and the pristine Everglades. We do understand, however, why the Supreme Court whose members do not live in the Everglades might think such a record is necessary. We have no doubt that once its request to further develop the record is accomplished that the court will see the Everglades clearly as we do, and rule in our favor once again. What the Tribe will never understand is why the District, which is supposed to be restoring the Everglades, continues to waste taxpayer money fighting against a CWA permit for its S-9 pump, so that the polluted water it discharges into the Everglades can be cleaned up.[35]

The chairman sent me a picture of the S-9 pump. He called it an amicus brief. I will therefore put it into the U.S. Reports so the world can see the facility whose qualifications for an NPDES permit are doubted by this Court.

Source: The S-9 structure that back-pumps contaminated water from the C-11 canal in Broward County into the Everglades. Photo by author, September 2003.

I dissent.
—Crazy Horse, J.

F. Virginia v. Maryland*, 540 U.S. 56, 124 S. Ct. 598, 157 L. Ed. 2d 461, 34 ELR 20005 (Dec. 9, 2003) (7 to 2, Stevens, J., with whom Kennedy, J., joins, dissenting, and Kennedy, J., with whom Stevens, J., joins, dissenting)*

The Court holds that Virginia and its citizens may withdraw water from the Potomac River for its entire length free of regulation by Maryland.

I dissent.

History will not forget that in the 2003-2004 Term this Court chose to impose a "tragedy of the commons" inviting a completely unregulated "race for water" in one of the nation's most-polluted rivers (the Potomac) with its worst-operated sewage treatment plant (Blue Plains) discharging into its most-threatened inland estuary—the Chesapeake Bay.

What is so sad about this ruling is that it is so utterly unnecessary and so completely bereft of legal justification. This Court could not have done more damage to Maryland and its great Potomac River if it sat down to write an opinion out of spite.

My brother Justice Stevens is correct in pointing out that there is no such thing as an "absolute and unregulable" riparian right to use water in another state.[36] My brother Justice Kennedy is correct in showing that the legal regime that governs this case starts with the premise that "as of 1794, the year before the Compact, the Governor of Virginia could not enter the waters of the Potomac to cool himself by virtue of any title Virginia then had in the riverbed."[37] None deny that today Maryland owns the riverbed. That should be the end of the case. Viewed as a territorial matter, Virginia is allowed to enter Maryland only on terms set by the owner.

33. 33 U.S.C. §§1362(5), (12); *see also supra* note 30.

34. So, in the record.

35. Press Release, Counsel for the Miccosukee Tribe Dexter Lehtinen, Supreme Court Rules: S-9 Saga to Continue (Mar. 23, 2004) *available at* http://exchange.law.miami.edu/library/everglades/news/save/2004/03/032304%20press%20Supreme%20Court%20Rules%20vs.htm (last visited Oct. 7, 2004).

36. 540 U.S. at __, 124 S. Ct. at 612, 613 (dissenting opinion, joined by Kennedy, J.).

37. *Id.* at __, 124 S. Ct. at 613, 614 (dissenting opinion joined by Stevens, J.).

In earlier times the Indians owned the riverbeds. When this Court wishes to constrain tribal regulatory authority over the use of the waters, it is careful to justify the ruling by saying there is no ownership of the riverbed.[38] Indian owners, like other owners, believe they control access to their territories. That is why they resent so deeply occasions such as the U.S. conduct in allowing miners to enter the Black Hills after promising to keep them out.

This Court goes farther here. It concedes Maryland's ownership of the riverbed while it sanctions Virginia's invasion of it. Here the Court detects a subtle difference between the Seventh Article of the 1785 Compact that specifies Virginia's property right in the shorelands:

> The citizens of each state respectively shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river.[39]

and the Eighth Article, which reads:

> [T]he right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states . . . . *Eighth*. All laws and regulations which may be necessary for the preservation of fish . . . shall be made with the mutual consent and approbation of both states.[40]

The Court says these words that were written down in 1785 mean that

> while the Article Seventh right to build improvements was not explicitly subjected to any sovereign regulatory authority, the fishing right in the same article was subjected to mutually agreed-upon regulation. We agree with Virginia that these differing approaches to rights contained in the same article of the 1785 Compact indicate that the drafters carefully delineated the instances in which the citizens in one State would be subject to the regulatory authority of the other.[41]

I have a different understanding of these words. The "full property" reference in the Seventh Article is constrained by the duty "not to obstruct or injure the navigation of the river." This duty to protect navigation is bound by a web of rules that control filling, building, and polluting in rivers.[42] A better reading of Article Seventh and Article Eighth is to ask whether the water withdrawals at issue here are more like the fishing the Court concedes to be regulated or more like the building of wharfs the Court says is unregulated. The water and the fish are part and parcel of the commons. Had the technology existed in 1785 to suck the river dry, it would have been seen in the same light as the fishing weirs and gillnets where individual ownership presented obvious threats to the commons.

There is another reason to reject the extreme ideology of "free from regulation" the Court embraces here. Virginia describes its dewatering enterprise as an endeavor to "improve water quality" while Maryland derides it as a subsidization of "sprawl." Both states could be right—water always is of service wherever it is taken.

But until today, there was no known version of riparian rights that approved withdrawals without inquiry as to impact on the source. No common-law court would sanction withdrawals that cause pollution at the source,[43] and many would not sanction withdrawals for use out-of-watershed, for consumptive and nonriparian uses, or for nonmunicipal purposes. These questions were not explored by the Special Master and they should have been.

The Court's decision allocates Potomac River water not under a rule of riparian rights but of prior appropriation and not under a rule of prior appropriation in the western states today but of prior appropriation as it existed in the 19th century. Virginia citizens are today declared free to take as much water as they wish from any part of the Potomac and use it, waste it, or sell it to China.

My great-grandfather Crazy Horse is dead. General Custer is supposed to be dead. But he lives on in the heart of Chief Justice William H. Rehnquist and he is heard in the pages of this opinion.

I would sustain Maryland's objections to the Report of the Special Master and enter judgment dismissing Virginia's complaint.

—Crazy Horse, J.

G. United States v. Navajo Nation*, 537 U.S. 488, 123 S. Ct. 1079, 155 L. Ed. 2d 60 (Mar. 4, 2003) (6 to 3, Souter, J., with whom Stevens, J., and O'Connor, J., join, dissenting)*

The Court holds that the Navajo Nation failed to state a claim for breach of trust because there is no "liability-imposing provision"[44] in the Indian Mineral Leasing Act (IMLA) of 1938 that condemned the particular genre of misbehavior invented by Secretary of the Interior Don Hodel when he intervened in a proceeding to insist upon lower royalties on Navajo Coal leased to the Peabody Coal Company.

I join in the dissent of Justice Souter who shows that a duty to refrain from deception is easily implied from the statute and regulation at issue.

I write independently because more should be said.

The Court starts with a small and skeptical version of the Indian trust doctrine that must be understood on the contrary as confirming the highest expectations of the United States in its dealings with the Indian tribes. The trust doctrine promises the "most exacting fiduciary standards."[45] It incorporates a pledge to act as friend and protector to the tribes.[46] It demands "moral obligations of the highest responsibility

38. Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

39. Quoted in the majority opinion, 540 U.S. at __, 124 S. Ct. at 605.

40. *Id.*

41. *Id.*

42. *See* Jerry L. Mashaw & Richard Merrill, Introduction to the American Public Law System (1975).

43. For some expressions of water pollution as a disfavored riparian use, see Rodgers, *supra* note 19, §2.19; Waters & Water Rights ch. 7, especially §7.03(c) ("Pollution as a Use") (R.E. Beck ed. 2001 Replacement Volume).

44. 537 U.S. at 493, 123 S. Ct. at __.

45. *E.g.*, Seminole Nation v. United States, 316 U.S. 286, 296 (1942) ("strictest fiduciary standards"); Morton v. Ruiz, 415 U.S. 199, 236 (1974) ("overriding duty of our Federal Government to deal fairly with Indians"); Cheyenne-Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583, 589 (10th Cir. 1992) ("governed by fiduciary standards and limited by fiduciary duties").

46. *E.g.*, Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1383 (10th Cir. 1999) ("more than a mere contracting party"); Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 U. Tulsa L. Rev. 355 (2003).

and trust."[47] One way to look at the trust doctrine is as a nuisance law for Indian Country—promising protection for the tribal land and security for the economy and sovereignty of the tribe.

Missing from the majority opinion is the slightest disapprobation of one of the sleaziest exercises of back-door authority ever seen in the halls of the U.S. Department of the Interior. This agency has a rich history of the forgettable, but I do not understand why this Court tries so hard to spread presumptions of professionalism over behavior that is morally reprehensible and legally inappropriate.

What Secretary Hodel did was to fix an administrative proceeding on royalty rates for Navajo coal that was going badly for the Peabody Coal Company. Seeing the writing on the wall, at the 11th hour the company jumped outside the process and went to visit the Secretary to ask for his help. The Secretary and the coal company had their meeting without the troubling presence of the Navajo Indian Tribe. Then the Secretary did exactly as he was bid in this closed and secret session. He wrote to the Deputy Assistant Secretary who was handling the appeal and told him to say that a decision on the appeal was "not imminent" and that the parties should continue to try to resolve this matter "in a mutually agreeable fashion."[48] The effect was to tell the tribe that it would not get the 20% of gross proceeds it expected. Back at the bargaining table, the tribe scaled down its demands and settled for 12.5%. This new and more reasonable figure was substantially below fair market value and about one-half that recommended by all federal studies.[49] It was approved by the Secretary of the Interior.

Justice Ginsburg's opinion for the Court reduces the trust question to whether a tribal plaintiff can point to "a rights-creating or duty-imposing" source of substantive law that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."[50] Deception at large would not do. The Court did not see the "control" that *United States v. Mitchell*[51] required because there were no regulations spelling out how coal royalties should be calculated,[52] because the IMLA was meant both to "enhance tribal self-determination" as well as "maximize tribal revenues,"[53] and because secretarial "approval" was "more limited" than it might otherwise be.[54]

This quest for codification of the Indian trust doctrine is misguided. There will be times when the tribes' assumption of responsibility over their own affairs will lead to a relaxation of the government's fiduciary responsibilities. But this is not the occasion—for the simple reason that Secretary Hodel had the *last word* on the royalty rate. There is no difference whatsoever between a code that says "do A, B, C, and D" and a veto that says "do A, B, C, and D or I will not approve the rate." When the Secretary announces "continue to negotiate," what he means is "agree to a lower rate or I will not approve the contract."

The Court's insistence upon codification cheapens the Secretary's trust duties into legalistic corner-cutting. No code of moral conduct on earth would meet the stingy precision the majority demands. There are only Ten Commandments and none of them contain any specific "liability-imposing provision." This Court should expect more of a Secretary who understands "Thou Shalt Not Steal" to mean "But You Can Take Economic Advantage by Deception, by Secret Consultation With Adversaries, and by Secret Veiled Threat."

The Navajo people understand full well that this battle over price is simultaneously a struggle over the economy and the environment. The underpricing of this coal—that the Court today sanctions—has had lasting and irreparable effects on the environment in Navajo country. Secretary Hodel did not say: "Pay less for the coal, take more than you should in a fair market, and pollute the groundwater." These are the things that "just happen" when administrators cut corners and courts allow them to do it.

—Crazy Horse, J.

III. Conclusion

If I survive impeachment and other calamities, I hope to be back at this post next year. Earth is the mother of life and she needs a voice on this Court. These Justices do not provide it.

—Crazy Horse, J.

47. *Seminole Nation*, 316 U.S. at 297 ("Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs . . . was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.").

48. 537 U.S. at 497.

49. *Id.* at 514, 519 (Souter, J., dissenting) ("No federal study ever recommended a royalty rate under 20 percent, and yet the Secretary approved a rate a little more than half that.").

50. *Id.* at 506 (quoting *United States v. Mitchell*, 463 U.S. 206 (1983)).

51. 463 U.S. 206 (1983).

52. 537 U.S. at 507 (no "full responsibility" for management and no "comprehensive managerial role").

53. *Id.* at 508. For background on the IMLA, see Judith Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L. REV. 541, 558-80 (1994); Robert Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981); Reid P. Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974). All three of these articles are cited in Justice Souter's dissent.

54. 537 U.S. at 510-11, especially 510.