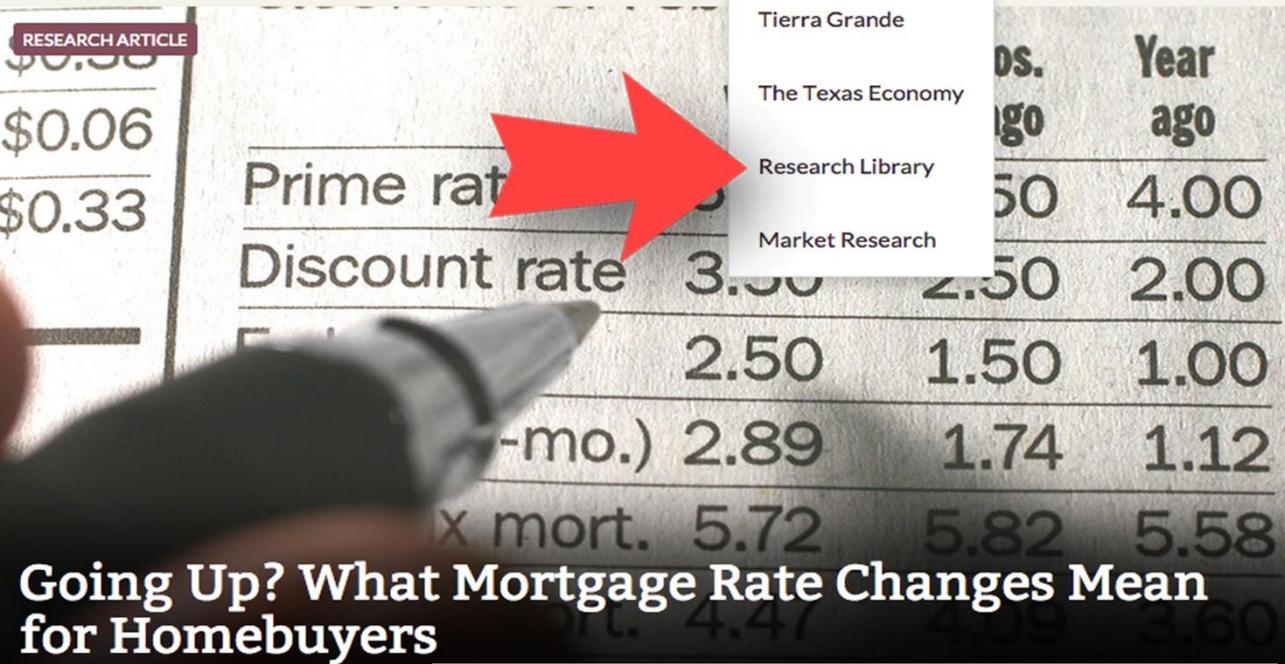




Welcome

NEW PUBLICATIONS OF INTEREST FROM THE REAL ESTATE CENTER

- The Texas Deer Lease(# 570) (New Laws on Agritourism, Chapter 75A of Tx Civil Prac. And Rem. Act) Allows parents to sign a valid waiver on behalf of kids for recreational purposes.
- Understanding and Nego. Title Policy (# 2111) for 250 acres are less.
- Finished updating Obtaining Your Real Estate License (#1149)
- Updated “Hints”(#229)



- Tierra Grande
- The Texas Economy
- Research Library
- Market Research

Going Up? What Mortgage Rate Changes Mean for Homebuyers

JAMES P. GAINES
Aug 31, 2015

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- NewsTalk Texas**
- Dallas' Victory Park wins another tower: 25-story Victory Place
 - Lockheed Martin loosens bolts on 87 jobs at Port San Antonio
 - Sequoia at Cable Ranch links to San Antonio sale
 - Lubbock 2015 Student Housing Market Coldwell Banker
 - Beep, beep! Traffic rolls into Houston along with commuters
 - Epic! Piping plant ramping up to 300 jobs in San Marcos
 - Palestine 60-room La Quinta Inn sold
 - Houston's commercial real estate market shaky, GHP



TECHNICAL REPORT

The Texas Deer Lease

Judon Fambrough
Sep 10, 2015

Declines in revenues from agriculture and petroleum give added importance to income generated by lease hunting. This



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Ali Anari
Aug 28, 2015

Texas homes are profitable investments, with yields exceeding the national average for homes in



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Charles E. Gilliland
Aug 28, 2015

A \$10,000 increase in the homestead exemption, appealing unequal appraisals and using an



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Modular Housing

Harold D. Hunt
Aug 25, 2015

Modular housing is not the same as manufactured housing. These homes are built to the same code as site-built homes in the area.



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Monthly Review of the Texas Economy

By Ali Anari No.1862, Technical Report
Sep 23, 2015

How does the Texas economy compare with the national one? This report looks at all the angles with a particular focus on employment and unemployment. It includes rankings of various industries by employment.

Topic: Texas Economy

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Outlook for the Texas Economy

Luis Torres, Wayne Day No.2046, Technical Report
Sep 23, 2015

This monthly report offers an overview of the various sectors of the Texas economy, including housing, manufacturing, energy, employment and trade.

Topic: Texas Economy

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Home Security: Understanding and Negotiating Title Insurance

Judon Fambrough No.2111, Tierra Grande
Sep 14, 2015

Acquiring a title insurance policy is a challenging task in the homebuying process. Most buyers are not aware of what the policy covers or the changes that can be made.

Topic: Legal Issues

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An aerial photograph of a large cargo barge on a wide river. The barge is loaded with numerous colorful shipping containers in shades of red, blue, and white. The river is a muddy brown color, and the surrounding landscape is a dense green forest. The sky is a pale blue. Two white text boxes are overlaid on the image: one at the top center and one at the bottom right.

WATERS OF THE U.S.

LANDS OF THE U.S.?

WATERS OF THE U.S.”

- The Clean Water Act’s (CWA) jurisdiction now extends beyond the Navigable Waters of the U.S. to practically all waters if implemented.

A photograph of President Barack Obama in profile, speaking at a podium. He is wearing a dark suit and a white shirt. His hands are raised in a gesture as he speaks. The background is dark, and the lighting is focused on him.

**“AND NO CHALLENGE
POSES A GREATER THREAT
TO FUTURE GENERATIONS
THAN CLIMATE CHANGE.”**

**PRESIDENT BARACK OBAMA
STATE OF THE UNION ADDRESS 2015**

Definitions

- “AGENCIES” - Environmental Protection Agency and Corps of Engineers
- “CENTRAL PLANNING COMMITTEE – (CPC) also known as the “Agencies” who now have control of 90% of all the Lands in the U.S. to preserve the status quo.
- “**SIGNIFICANT NEXUS**” – A standard totally w/i the subjective opinion of the CPC but used 463 times in the Rules. +/-

Outline

- What initiated the Changes?
- Overview of the Revised Rules by looking at each of the 8 categories of “Waters”. Formerly, there were 6, now 8.
- Exclusions
- Assessments and Criticisms
- Penalties
- Impact on AG LENDERS

Last Definition

“BOOTSTRAPPING”

- A self-starting process that proceeds without external input or oversight.
- Hereinafter, “Bootstrapping” will be referred to as “B.S.”

Reasons for the Change?

(Bootstrapping)

- Supreme Court Decisions.
- Goals, Objectives and Policies of the CWA.
- To apply Relevant and Available (Bogus/Liberal) Science They created the SAB (Scientific Advisory Bd.).
- Incorporate the Agencies' technical expertise and experience. We are **SO DAMN SMART!**

(1) The *RAPANOS* Decision (2006)

- A 4-4-1 Decision the CWA lost.
- Justice Scalia wrote for the 4 judges against expanding the CWA to non-navigable waters such as wetlands.
- Justice Kennedy wrote an opinion agreeing with Scalia's decision, but for different reasons. It's called a **Concurring Opinion**. It has no legal binding power. (The voice of one judge)

Scalia

- Limited CWA to relatively permanent, standing or continuously flowing bodies of water that were **continuously connected on the surface**.
- These entail the first four categories of water: (1) Traditional Navigable Waters, (2) Interstate Waters, (3) Territorial Seas and (4) Impoundments.
- These four basically remain unchanged.

Kennedy

- Using the Kennedy's Significant Nexus Test (**SNT**) found in his **Concurring Opinion**, the CWA modified 2 and expanded its jurisdiction to 2 additional categories of upstream waters, **whether they were connected or not**.
- The *Rapanos* case involved Isolated Wetlands.
- Here's his original test for isolated wetlands.

The “Significant Nexus Test”

(Original Wording)

- “Wetlands (not waters) possess the requisite *significant nexus* when the wetlands (not waters) either (1) *alone or in combination* with (2) *similarly situated* wetlands (not waters) (3) *in the region* (4) significantly affect the chemical, physical and biological integrity of other covered waters *more readily understand as navigable.*”
- The CPC altered this test because the law gave it ***generous leeway*** in interpreting the law.

(2) Goals and Objectives of CPC

- Our goals and objectives include *restoring* and *maintaining* the chemical, physical, and biological integrity of the Nation's Waters.
- However, Scalia wrote those objectives “incorporated a broad...goal of **maintaining and improving** water quality.”
- This goal was ignored by CPC.
- If the **SNT** shows a **significant nexus**, whether positive or negative, it is regulated by the CWA.

**Here are the First Four
Categories that Basically
Remained Unchained**

An aerial photograph of a wide river. In the foreground, a barge is moving towards the viewer, carrying a large load of logs. The barge is a long, narrow platform with a small cabin at the rear. The logs are stacked in several rows, showing their reddish-brown bark. In the middle ground, a large, white truss bridge spans the river. The bridge has a complex lattice of steel beams and is supported by several concrete piers. The river is dark blue-grey, and the surrounding landscape is green and hilly. The sky is a pale, hazy blue.

Navigable Waters

(1) Navigable Waters

- All waters currently used, or were used in the past, or may be susceptible to use in **interstate** or **foreign** commerce, including all waters which are subject to the ebb and flow of the tide.
- **Or**, were used or may be susceptible to use for commercial waterborne recreation such as boat rentals, guided fishing trips or water skiing tournaments. (Very Broad)



Interstate Waters

**State Hwy. 78 Bridge over
Red River**

(2) Interstate Waters

- These include all rivers, lakes and other waters that **flow across or form a part of a state boundary**. They need not be navigable for purposes of federal regulations and need not connect to navigable waters (Wetlands).
- Red River, Sabine River or Canadian River.

TERRITORIAL SEAS



(3) Territorial Seas

- These include the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters and extending seaward a distance of three miles.

IMPOUNDED WATERS



Dam on Canadian River

(4) Impounded Waters

- These include any dammed or impounded traditional navigable waters or interstate waters.

The Controversial Changes

Two Modified Categories

#5) Tributaries (... and the 4,000-foot rule)

#6) Adjacent Waters and Isolated Wetlands

- Before, case-by-case analysis (case-specific)
- Now, the CPC declared BOTH **JURISDICTIONAL BY RULE** having a Significant Nexus to downstream waters.

Why are they now Jurisdictional?

- The CPC declares these two categories of waters jurisdictional by rule based on its scientifically and technically informed judgments and concludes that a *significant nexus* exists “and no additional analysis is required.” (That settles it!!!)
- It is because we say it is! Now who can argue with that?

■ Two **New** Categories (Case-Specific Analysis)

#7) Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California and **Texas coastal prairie wetlands**.

#8) Waters within the 100-year floodplain of traditional navigable waters, interstate waters or territorial seas. **Waters (Lands) within 4,000 feet** of the high tide line or **ordinary high water mark** of traditional navigable waters, interstate waters, territorial seas, impoundments or **covered tributaries**. *(“The Corridor”)*

Our Focus

- What is a Tributary including Ditches? How are they defined?
- How the **SNT** applies to the land in the corridor...4,000 feet on either side of a tributary?
- How do they apply the Similarly-Situated Test (**SST**) to land in the corridor?



**What is a
Tributary?**

#5 TRIBUTARIES?

- Based on signs of *past* flow, not present or future flow.
- Any watercourse that possesses these three features is a tributary **whether natural or man-made**:
 - 1) Bed,
 - 2) Banks and
 - 3) Ordinary High Water Mark(s) (OHWM).

- These physical features demonstrate that there is (or was) sufficient volume and frequency of flow to establish a **significant nexus** to downstream jurisdictional waters.
- The new rules permit the use of remote sensing sources or mapping, aerial photographs, light detection and ranging (LIDAR) data and hydrologic estimations of discharge sufficient to create an **ordinary high water mark** such as regional regression analysis or hydrologic modeling to assist in the process. (**INFERRED**)

What about Breaks?

- Breaks do not cause a loss of the tributary's classification. A stream that flows underground, for example, and loses these physical features is still a tributary as long as the bed and banks and an ordinary high water mark can be identified both upstream and downstream. There is no limit on depth or distance. The breaks could be feet, yards or miles. (And these features can be inferred.) **No Surface Connections? (Scalia)**

What about Ditches?

- No definition, but a ditch with a bed, banks and OHWM is a tributary...a wheel rut could count.
- ❖ Ditches with intermittent flow are excluded as long as they (1) do not drain wetlands or (2) do not flow to traditional navigable waters, interstate waters or territorial seas, either directly or through another water. (They go no where.)
- What is an intermittent flow?

The Flow Chart

- Perennial streams are those that flow year-round during a typical year, with **groundwater** or contribution of from higher in the stream network as its primary source of water.
- Intermittent streams are those that have **groundwater** and precipitation providing part of the flow and the stream flows continuously only during certain times of the year.

Finally

- Ephemeral streams are those that flow only in response to precipitation in a typical year and are **always above the water table**. But, these are tributaries if they meet the physical qualifications of B, B and OHWM or **drain wetlands**. (24-hour flow rule in some definitions.
- So, what is a **Wetlands**?

“Wetlands” in a Ditch?



4 Conditions for Wetlands

- (1) The presence of standing, undrained water (creating saturated soils),
- (2) For a period long enough during the growing season,
- (3) To develop anerobic soils or hydric soils,
- (4) That support the growth and regenerations of hydrophytic vegetation such as cattails and water-lilies. But some woody plants qualify.

How Long Much The Water Stand?

- The surface water and/or the water table (when located within 12 inches from surface) must be present **for at least 14 consecutive days** during the growing season in a normal or dry year.
- So, the land may be dry for 11-and-a-half months of the year.
- No minimum size required!!

Bar Ditches?

- The final rule does not include an explicit exclusion for roadside ditches.
- CPC believes the exclusions included in the final rule address the vast majority of **roadside ditches and those that drain wetlands** during and immediately following the rain event (ephemeral flow).
- Nearly every Bar Ditch in Texas contains Wetlands and drains them.

**EVERY WETLANDS IN A BAR DITCH
IS DRAINED BY THAT BAR DITCH...**



**ACROSS THIS
LANDOWNER'S
PROPERTY**



Adjacent Waters

(And Floodplains)

- These are all isolated (disconnected) waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional **navigable water**, interstate water (can be wetlands), territorial seas, **an impoundment or a tributary**.

How's this Possible?

(To offset the Rapanos Decision)

- In summary, to justify declaring these waters jurisdictional, the CPC actually acknowledges that buffers can: (1) improve water quality; (2) be connected to downstream waters through subsurface flows; (3) involve **ecological** effects on downstream waters as well as chemical, physical and biological; or (4) have no hydrological connections at all.

#7 Prairie Potholes, Carolina and Delmarva Bays, Pocosins, Western Vernal Pools in California and Texas Coastal Prairie Wetlands

- Too isolated for discussion. But the **SNT** is applied to them on a case-by-case basis.

#8 Waters within 4,000 feet of the high tide line or ordinary high water mark of traditional navigable waters, interstate waters, territorial seas, impoundments or tributaries

- The largest, **BADEST** and most relevant one to farmers and ranchers. (The Corridor)

Subject to 2-Part Test for Corridor Lands

- 1) Is the (your) land located within $\frac{3}{4}$ mile of jurisdictional waters (a tributary) and
- 2) Does the use of the (your) land, combined with similar situated land in the watershed (not corridor), have a Significant Nexus on downstream waters according to Kennedy's (altered) **SNT**?

The Altered Test

- “*Waters* (**not wetlands**) possess the requisite (1) significant nexus if the *waters* (**not wetlands**) function either (2) alone or in combination with similarly situated *waters* (**not wetlands**) (4) in the region to significantly affect the (5) chemical, physical and biological integrity of traditional navigable waters, interstate waters and territorial seas.”
- The Devil is in the Definitions.

- “**The Region**” means in the entire watershed that has a **single point of entry** into the nearest traditional navigable waters, interstate waters or territorial seas.
- “Waters functioning **alone or together** with **similarly situated waters** or lands” means waters or lands that share any one of the following nine described functions.

The Shared Functions

(Only one required)

- Anything that retains the flow such as:
 - (1) Sediment Trapping, (2) Nutrient Recycling, (3) Pollutant Trapping, (4) Transformation, (5) Filtering and Transport, (5) Retention and Attenuation of Floodwaters and (6) Runoff Storage.
 - (2) **Or....**

Shared Functions

(Only one required)

- Or anything that accelerates or contributes to the flow such as:

(7) Export of organic matter, (8) Export of food resources. (9) **(Biological)** Provide habitat for the life cycle of plants or animals dependent on aquatic habitat (such as foraging, feeding, breeding, spawning or use as a nursery area) located in traditional navigable waters, interstate waters and territorial seas.

Questions

- What's left? And how big is the Watershed?
- Who makes the determination if the land is **similarly situated**? Remember, if you are in the corridor, the SNT applies. But the **similarly-situated test applies** to all land in the watershed.
- And if you land is used for the SST and it is located outside the corridor, you are bound if found jurisdictional, whether you are told or not.

The 3 Integrity Tests

(Only one required)

- ...If the shared functions, alone or lumped together, in the watershed have a significant nexus on the physical, chemical or biological integrity of the downstream waters.

(1) Physical Integrity mean evidence of flooding or sediment retention. Factors influencing it include soil permeability, distance of hydrologic connection, depth of water table and preferential flow paths.

The Chemical Test

This one truly affects farm and ranch operations.

(2) Chemical Integrity (not defined) Signs of it include retention, release, or transformation of nutrients or pollutants; the effect of landscape position, hydrologic connectivity, **surrounding land use and land cover**, the **landscape setting** and **deposition of chemical constituents**.

(These refer to farming and ranching)

The Biological Test

(3) Biological Integrity Its effect can be found by identifying resident aquatic or semi-aquatic species such as amphibians, aquatic and semi-aquatic reptiles, aquatic birds and whether those species show life-cycle dependency on the identified aquatic resources (foraging, feeding, nesting, breeding spawning use as a nursery area).

The Biological Test

- Factors influencing biological connectivity include species' life history traits, species' behavioral traits, dispersal range, population size, timing of dispersal, distance between the case-specific waters and the jurisdictional waters, the presence of habitat corridors, the number, area, and spatial distribution of habitats.

Note

- Only **one of the 9** functions is necessary to aggregate the similarly situated waters or lands.
- Only **one of the three** Integrity Tests must be met to satisfy the ***SNT***.
- Many of the Factors Influencing the **Integrity Tests** are the same Factors mentioned as being **shared functions**.

For Example

- Retention and attenuation of floodwaters and runoff storage serves as both a function and a factor in determining physical connectivity.
- So, both tests can be satisfied by one feature.

“Significant Nexus”

- The term is never defined. There is **no objective** threshold or level given in the regulations for measuring or meeting this test.
- Justice Kennedy said the effect must be **more than speculative or insubstantial**. That’s it.
- Here’s how the CPC respond to the question...

The Significant (Subjective) Nexus Test

- *“Significant Nexus” is not itself a scientific term, but rather a determination made by the agencies in light of the law, science and the agencies’ experience and expertise.*
- Apparently, the threshold is reached when the CPC says it is. You cannot get more subjective than that.

The Agri. Exclusion

- The most important exclusion for landowners is for normal, ongoing farming and ranching operations.
- This means those that have been **established and are ongoing** at the time the revisions were implemented on 8/15/15.
- No changes in the current land use can be made without obtaining a permit assuming SNT met.
(Preserving Status Quo)

From the Regulations...

- The agencies recognizes that waters (**lands**) in which normal farming, ranching and silviculture practices occur are often associated with **modifications and alternations** including drainage, changes to vegetation and other **disturbances** the CPC believes should be specifically **considered in making a significant nexus determination**. (Maintain the Status Quo)

Continued

- Normal farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean *established and ongoing activities* as distinguished from activities **needed to convert an area** to farming, silviculture or ranching activities and activities that convert water to non-water.
- Remember this rule includes any area within 4,000 of a tributary or other jurisdictional waters such as farm ponds (adjacent waters).

7 Specific Exclusions

(1) Artificially irrigated areas that would revert to *dry land* should application of irrigation water to the area cease.

(2) Artificial, constructed lakes or ponds created by excavating and/or diking *dry land* such as farm and stock watering ponds, irrigation ponds, settling basins, log cleaning pond, cooling pond or fields flooded for rice growing.

(3) Artificial reflecting pools or **swimming pools** created by excavating and/or diking ***dry land***.

(4) Small ornamental waters created by excavating and/or diking ***dry land*** for primarily aesthetic reasons.

(5) Water-filled depressions created in ***dry land*** incidental to mining or construction activity, including pits excavated for obtaining fill, sand or gravel that fill with water.

(6) Erosional features, including gullies, rills, and other ephemeral features **that do not meet the definition of a tributary**, non-wetland swales and lawfully constructed grassed waterways; and

(7) Puddles. (Thank Goodness!)

Big Problems

- The first five exclusions describe activities conducted on **Dry Land**. But how is it defined?
- The CPC never defines the term. Without the definition, the exclusions are meaningless. Here is how the CPC responded to the lack of a definition.
- The land has no water features such a “**streams**”, rivers, wetlands, lakes ponds and the like have.

- “It is not dry land simply because it lacks water at a given time. It may remain **dry land** even if it is wet after a rainfall event.”
- “There is no agreed upon definition given geographic and regional variability.”
- The Agency concluded that further clarity on this issue can be provided during implementation. The agency believes the term is ***well understood*** based on the more than 30 years of practice and implementation. **(By Whom?)**

Is this Dry Land?



In My Opinion

- **Dry Land** is any land more than 4,000 feet from any jurisdictional waters (primarily tributaries) and outside a watershed.

Biblical Reference

- Exodus 14: 21 and 22.

“And Moses stretched out his hand over the sea... and the waters were divided. And the children of Israel went in the midst of the sea upon “Dry Land.””

- Were there water features present? Yes
- Did Moses have a permit from the CPC? No.
- When did this happen? 3400 years ago.

Get the Checkbook

- The CPC can fine Moses \$37,500/day for this violation. How much does he owe the government after 3400 year?
- \$47.5 Billion. If the government could collect, what percent would this be of the National Debt?
- **0.0025**. Now you feel much better I'm sure.

Critiques of the Rules

- Heritage Foundation: The new rules are:
 - (1) Too broad,
 - (2) An attack on Property Rights,
 - (3) Exceed the broadest interpretation of the Supreme Court's decisions and
 - (4) Developed through a flawed process (Bootstrapping)

Heritage Continued

- Common activities from farming to home building could now require a permit as more waters are deemed jurisdictional. Property owners may simply choose not to engage in certain activities due to the cost and time of securing a permit. **This could cause the value of their property to decline.** Many property owners **may not even know** their property has been declared jurisdictional.

Heritage Continued

- For all practical purposes, the agency could be regulating land, not water.
- For all practical purposes, the agency will regulate land, not water.

More Critiques

Texas Deer Assn.

- The rules create more risks and uncertainty for farmers, ranchers and others who depend on their ability to work the land.
- The **features of a tributary** may be ascertained even when invisible to the human eye or even when nonexistent.
- The exclusion for **dry land** is too vague.

My Critique

- Important terms are not defined or used ambiguously: *dry land; ditches; significant nexus; and established, ongoing, normal farming operations.*
- **Groundwater** is excluded but shallow subsurface flow is okay as a “connection”. Groundwater that comes to the surface naturally is covered, but what if it is artificially lifted by irrigation?
- How are distances measured? Do they follow the surface terrain of surrounding hills and mountains or go as the crow flies?

Continued

- Why are **water improvement practices** condemned, not encouraged or excluded? Scalia said they fall within the CWA goals and objectives.
- Does the Rules infringe on State Rights? The 10th Amendment to the U.S. Constitution gives States the rights to protect their sovereign, intrastate interests. The Rules promotes Federalism (Obamaism).

Penalties

- Civil penalties for proceeding without the require permit range from \$16,000 to \$37,500 per day.
- Criminal penalties range from one year in prison and/or fines from \$2,500 to \$25,000 per day.
- For knowingly violating the act, penalties range from 3 years in prison and/or fines from \$5,000 to \$50,000 per day.
- Repeat violators can get up to 6 years in prison and/or fines of \$100,000 per day.

Get the Checkbook (Again)

- If the CPC could fine Moses, as a repeat offender, \$100,000 per day, how much could they collect?
- \$124 Billion.
- And, how much would that shrink the Nation Debt?
- By 0.7% or .007.

What Impact Will This Have on You?

- Your borrower will be inflexible in what he or she can do on the mortgaged property. Any change in the status quo will require a permit from the CWA.
- Estimates are between 2 to 3 years for a permit at a cost of \$250,000, not counting mitigation costs.
- The income from the property will diminish in the long run shrinking the borrower's collateral.

Let's Close with the Hymn “I Believe”

- I believe that somewhere in the darkest night, a candle glows.
- I believe that for every drop of rain that falls, a flower grows. (now a new verse)
- **I believe for every drop of rain that falls, the CPC (wants to) controls.**