

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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WILLIAM F. HOLDNER,  
An Individual, dba HOLDNER FARMS,

*Petitioner,*

v.

KATY COBA, Director of the Department of  
Agriculture, in her individual and official capacity;  
DICK PEDERSON, Director of the Oregon  
Department of Environmental Quality,  
in his individual and official capacity,

*Respondents.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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Petitioner

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## **QUESTIONS PRESENTED**

1. Whether a person engaged in an agricultural operation can be charged and convicted for failure to possess a stormwater permit under Oregon State Statute ORS 468B-025 for "Likely" to Pollute the public waters.
2. Whether a stormwater permit is required where the operator has constructed an animal waste control system to protect the public waters from a 24 hour 25 year rainfall event under Federal Environmental Protection Agency (EPA) Regulations.
3. Whether a permit for stormwater discharges can be enforced by any government agency on property that has a patent granted by congress as a condition of the establishment of an agricultural farm operation in 1862 that provided the owner with absolute title including the water, creeks and water use rights.
4. Whether the application of Habeas Corpus is appropriate, after all state and federal court relief is exhausted, to protect petitioner's due process and federally protected rights.

## **LIST OF PARTIES**

William F. Holdner, an individual, dba Holdner Farms, Petitioner, Katy Coba, Director of the Oregon Department of Agriculture, in her individual and official capacity. Dick Pederson, Director of the Oregon Department of Environmental Quality, in his individual and official capacity. Both respondents are state employees and are represented by the Oregon Attorney General Office.

## **RELATED CASES**

On October 29, 2015 Petitioner's Complaint Case No. D.C. 3:15-CV-02039-AC was filed in Federal District Court to vacate Oregon Circuit Court Judgment for being charged and prosecuted under ORS 468B-025 for "Likely" to pollute the public waters.

1. Ninth Circuit, Memorandum, 04/24/19
2. District Court, Opinion and Order, 07/02/18
3. District Court, Judgment, 07/02/18
4. Ninth Circuit, Mandate, 01/22/18
5. Ninth Circuit, Memorandum, 07/06/17
6. District Court, Opinion and Order, 06/01/16

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**OPINIONS BELOW**

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**JURISDICTION**

For a review of a decision of the Federal District Court Case No. 3:15CV-2039-AC the judgment was affirmed by the United States Court of Appeals, for the Ninth Circuit in a memorandum decision on April 24, 2019. The Writ of Certiorari is filed within 90 days of that date pursuant to United States Supreme Court Rule 13(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

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## **CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE**

Petitioner believes the decision constitutes, under 42 U.S.C. § 1983 and 28 U.S.C. § 2254, a violation of due process, a federally protected right under the Fifth and Fourteenth Amendments of the United States Constitution.

42 U.S.C. § 1983 provides in relevant part:

Every person who, under color or statute, ordinance, regulation, Custom, or usage, or any State . . . subjects, or caused to be subjected, any Citizen of the United States or other person within the jurisdiction thereof To the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at Law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 2254 provides in relevant part:

(1)(b) An application for a Writ of Habeas Corpus on behalf of a person in Custody pursuant to the judgment of a state court shall not be granted Unless it appears that –

(A) The applicant has exhausted the remedies available in the courts of The state; or

(B)(i) There is an absence of available state corrective process; or

(ii) Circumstances exist that render such process ineffective to protect the rights of the applicant.

The Fifth Amendment of the United States Constitution provides:

no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution provides In relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without process of law, nor deny to any person within its Jurisdiction the equal protection of the laws.

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### **STATEMENT OF THE CASE**

The District Court was asked to vacate State Circuit Judgment for failure to possess State NPDES Stormwater Permits. The Petitioner exhausted everything within his power to achieve a favorable result before the judgment became final.

The District Court ruled the Petitioner lacked standing based on the Eleventh Amendment Immunity that barred a Section 1983 claim under the United States Constitution.

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### **STATEMENT OF FACTS**

In 1968, the appellant began a purebred Polled Hereford cattle operation, raising breeding stock for sale.

In the mid 1970's, the Petitioner, in cooperation with United States Department of Agriculture, designed and constructed an animal waste control system to protect the environment and provide clean water for the cattle to drink from an adjacent creek. The system in place provided a 40,000 gallon concrete holding tank to collect any waste water that can be pumped to the pasture area some distance (up to one-half mile) from the animal feeding facility and clean water from the creek could be pumped in water tanks for the cattle. The system was designed, constructed and operated to handle stormwater discharges from 25 year 24 hour rainfall event. It was determined that

shortly after purchase of the property that the only good source of water had to come from the creek near the facility. The sub-surface water contained high concentrations of salt and iron and the property had no wells.

In about 2007, the Oregon Department of Agriculture (ODA) insisted that a National Pollutant Discharge Elimination System (NPDES) permit was required under state law. As part of the permit PROCESS and PLAN of CORRECTION the ODA demanded that the appellant immediately stop pumping the waste water from facility to the pasture area. With a permit the ODA would allow an authorized discharge of the waste water into the waters of the state under unspecified special and general conditions. This conflicted with the system developed to provide during stormwater events to protect the environment and have clean water for the cattle.

At trial the ODA program manager, Mr. Matthews testified that the Petitioner was not charged for being a significant contributor of Pollution to the public waters but for failure to possess a (NPDES) state permit. He also admitted on cross examination that the Oregon Department of Agriculture (ODA) was not approved by the EPA to operate an independent NPDES program.

The Petitioner was convicted of two counts of unlawful water pollution in the first degree under ORS 468B-025 for "likely" to pollute and 28 counts of unlawful pollution in the second degree for not

actually polluting but for days pumping the water away from the feeding facility. Sentencing provided for a \$300,000.00 fine, supervised probation for 3 years, remediation of \$50,000.00 as the Petitioner divest himself of all his cattle within 90 days. Petitioner was not allowed cattle on any property he managed or owned or has an interest in and 5 days in jail. Approximately 50 head cows with calves were located on the 100 plus acres where the Animal Feeding Facility was located.

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### **ARGUMENT**

The Petitioner was charged and convicted of criminal violations for failure to possess a stormwater permit under ORS 468B-025. Quote "States no person shall cause pollution of waters of the state or place or cause wastes that are "likely" to escape or be carried into the waters of the state by any means." This Oregon statute under Federal EPA regulations and Federal Supporting Case Law as applied to Petitioners farm operation is "on its face" unconstitutional.

Oregon has a special statute ANIMAL WASTE CONTROL ORS 468B-200 to ORS 468B-230 that applies to Animal Feeding Operations. ORS 468B-203 Quotes, "States enforcement must be consistent with federal law, regulations and guidelines issued pursuant to the Federal Water Pollution Control Act, P.L. 92-500."

United States Environmental Protection Agency (EPA) IMPLEMENTATION GUIDANCE ON CAFO REGULATIONS DATED May 28, 2010, "States in 40 CFR § 122.23(e), a discharge from a land application area under the control of a CAFO is subject to NPDES permit requirements, except where it is an agricultural stormwater discharge." The CLEAN WATER ACT definition of point source excludes discharges of agricultural stormwater and such discharges are therefore not subject to permit requirements.

Two United States Courts of Appeals and United States Supreme Court cases have ruled on federal EPA regulations as they apply to stormwater discharge permit. Waterkeeper Alliance, Inc. v. Environmental Protection Agency, 399 F.3d 486 (2nd Cir. 2005) ruled no statutory obligation to seek or obtain a NPDES permit is required. In National Pork Producers Council, et al. v. EPA Case No. 08-61093 (5th Cir. March 15, 2011) upheld the Waterkeeper decision that no NPDES permits are required for potential discharges. United States Supreme Court Case No. 11-338 and 11-347, Doug Decker in the capacity as Oregon State Forester, et al. v. Northwest Environmental Defense Center (March 20, 2013), ruled stormwater discharges from logging roads were exempt from the NPDES permit regulations. See 33 U.S.C. § 1342(p)(1). The terms potential or likely are synonymous as they relate to stormwater discharges are exempt from a permit under federal law.

The property on which the cattle feeding facility is located has a patent granted by CONGRESS as a

condition of the establishment, an agricultural farm operation in 1862 provided the owner with absolute title including the water, creeks and water use rights. United States Supreme Court Decision, Summa Corp. v. Cal. State Lands Commission, 466 U.S. 198 (1984) Federal rights are protected.

Oregon has a statute ORS 537-120 states, Quote "Nothing in the Water Rights Act shall be construed to take away or impair the vested rights under the patent."

The Eleventh Amendment Immunity is not applicable when public officials are acting out of or exceeding their authority. Cited United States Supreme Court Ex Parte Young Case No. 209 U.S. 123, 285.CT. 441; 526 Ed. 714; 1908 U.S. Lexus 1726 that allows suits in Federal Courts against officers acting on behalf of States of the Union to proceed despite the state's sovereign immunity, when the state acted unconstitutionally.

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## CONCLUSION

The subject matter in this dispute involves stormwater discharges that have been addressed through federal legislation and case law under the Federal Water Pollution Control Act. For this reason, while this suit implicates a state interest, the Petitioner believes the federal government has a strong interest in enforcing federal constitutional rights and remedies.

No court has ruled on the constitutionality of the state statute under which the petitioner was charged and convicted. The state court decision clearly contravenes the state and federal law and petitioner as a result has been irreparably injured. The petitioner has been denied equitable relief and adequate vindication of his Due Process and federally protected rights, granted under the United States Constitution.

For the foregoing reasons the petitioner pray the Writ of Certiorari will be granted.

Respectfully submitted,

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