

1 *Evidence and argument based on illegal 2008 Rapanos guidance.* The Government’s
2 experts rely on an illegal 2008 rule based on the *Rapanos* case to assert jurisdiction here. The
3 Government’s experts’ application of that rule is also patently unreliable. Evidence or argument
4 based on an illegal rule, patently unreliably applied, should be excluded.

5 Duarte proposes that this issue be resolved by a motion in limine, and Duarte is filing such
6 a motion in limine concurrently with this statement.

7 *Evidence and argument based on illegal manual redefining ordinary-high-water mark.*
8 The Government’s experts apply another illegal 2008 rule aggressively redefining the ordinary-
9 high-water mark in ways that conflict with the long-standing legal definition. Evidence or
10 argument based on that illegal and unreliable rule should be excluded.

11 Duarte proposes that this issue be resolved by a motion in limine, and Duarte is filing such
12 a motion in limine concurrently with this statement.

13 *Evidence or argument about liability derived from non-tillage activities.* The Government
14 intends to offer evidence and argument that Duarte should be penalized for non-tillage activities.
15 But the Government’s motion for summary judgment, and the Court’s order on summary
16 judgment, dealt only with Duarte’s tillage. The Government should not now be allowed to argue
17 that Duarte should be punished for activities the Government’s motion did not argue, and the
18 Court’s order did not find, give rise to liability.

19 Duarte proposes that this issue be resolved by a motion in limine, and Duarte is filing such
20 a motion in limine concurrently with this statement.

21 *EPA Administrator Pruitt testimony.* EPA Administrator Pruitt directly injected himself
22 into this case by testifying about it in his Senate confirmation hearing. When, during his Senate
23 confirmation hearing, he was shown a photograph from the Government’s expert report in this case
24 and asked about whether he would work with the Department of Justice to stop this and other
25 similar prosecutions, he testified that he would.⁶ Because Administrator Pruitt has injected himself
26

27 ⁶ Senator Ernst, in her questioning of now-Administrator Pruitt during his confirmation hearing,
28 had the photo of Duarte’s tillage that is featured on the cover of the Government’s rebuttal expert
report in this case enlarged and displayed. She defined “ordinary farming practices” to include

1 into this case, his testimony is relevant, including to the Court’s analysis of the seriousness of the
2 alleged violation. There would also be no real burden, because Administrator Pruitt has pledged to
3 work with the Department of Justice to resolve this case and others like it; indeed, his testimony to
4 the Senate was that part of his job would be to work with the Department of Justice on this case.
5 He should be allowed to testify here. (*See United States v. Miracle Recreation Equipment Co.*, 118
6 F.R.D. 100, 106 (S.D.Iowa 1987) (testimony of high-ranking government official allowed in
7 enforcement action where need outweighed burden).)

8 Duarte proposes that this issue be resolved by an appropriate procedure closer to trial, once
9 he and the Department of Justice have had a chance to discuss this case. Administrator Pruitt has
10 clearly not yet had the opportunity to talk with the Department of Justice about this case, because
11 the Department of Justice’s settlement posture remains unchanged. (See section XVI, below.)
12 Administrator Pruitt and the Department of Justice should be ordered to report on their discussions
13 so that an appropriate method for resolving this issue can be pursued.

14 *The Government’s motions in limine.* Duarte does not object to resolving by way of
15 motions in limine the evidentiary issues the Government proposes to be resolved by motions in
16 limine, and Duarte has filed oppositions to the Government’s motions. If the Government wishes
17 to augment its motions, Duarte reserves the right to augment its oppositions.

18 **VII. RELIEF SOUGHT**

19 **A. United States’ Requests for Relief.** The United States seeks injunctive relief

20
21 Duarte’s tillage. She then had the following exchange with Mr. Pruitt:, in which he pledged to
22 work with the Department of Justice to end cases like this one:

23 SENATOR ERNST: According to a brief filed by the United States [in
24 the *Duarte* case], in quotes, “The furrow tops now serve as small mountain
25 ranges.” Right there folks. Small mountain ranges. “These furrow tops
26 now provide conditions that are not conducive to growth and development
27 of wetland plant species. They are ‘mini uplands.’”

28 This is a picture of the “small mountain ranges” from the government’s
expert report. Mr. Pruitt, will you commit to me that if confirmed, EPA
will work with the Corps and DOJ to make sure that federal agencies stop
trying to regulate ordinary farming practices?

NOMINEE PRUIT: Yes Senator.

EPA Administrator Pruitt’s testimony to Senate Environment and Public Works,
<https://www.youtube.com/watch?v=oCtu7MInvmM&feature=youtu.be> at 3:53-5:25.