

## LEGAL IMPEDIMENTS TO STREAM WITHDRAWALS DURING DROUGHTS

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The topic of my talk was generated about four years ago when we had a severe drought. That was the year that the Department of Natural Resources, now the Department of Environmental Quality, had to tell some people to quit taking water out of some streams because they were going to get below the minimum stream flows. Our law requires a minimum amount of stream flow. There was a lot of conversation about what to do. Farmers were concerned, especially rice farmers. They needed the water. You have to have a certain amount of soil moisture to germinate seed. It looked like a desert down through the Delta. One of the things that was mentioned was the Mississippi River sitting over there with all that water in it. Why don't we pump some of it out of the river and just pump it out over the levee and put it into the streams and let it flow on down through the Delta? There would be plenty of water for everybody.

To digress a little bit, I used to go to some water conferences out west. When I told them where I was from, they wanted to know why I was there. I would say, "We have a water problem, and I am involved in doing some water research and am helping rewrite the water laws." They said, "You don't have any water problems. You have all kinds of water." I've forgotten what our annual rainfall is, but it is four or five times what most of their states have. Most of our water use, or a good part of it, is groundwater. They were appalled because they go to extreme measures to save the water that runs down from the mountains--mostly surface water. They use a lot of groundwater, but in some of these states, groundwater and stream water are hydrologically connected, and it is one and the same thing. They spend a lot of money and have highly structured laws. These people are just appalled that we are, in their view, wasting water. Obviously, we are going to have to make better use of our streams. At the same time, there is a certain limitation on what you can do.

This paper could have been entitled, "Legal Impediments to Withdrawals of Stream Water." I could have left off the drought except for maybe a couple of things that I am going to talk about, particularly the idea of pumping water out of the Mississippi River. At the time, that was a hot topic.

The Corp was out in the River dredging the channels out for barges. I think a barge channel is supposed to be about 9 to 10 feet and some of the channels were down to 8 feet. They were out there spending a lot of money

dredging to get another foot in the channels so that barges can travel. They are not going to sit here and let us pump a lot of water out of the river when they are having navigation problems. The first point of my topic is the navigation servitude which is predominant in a navigable stream. The Federal authority for that is based in the interstate commerce clause of the Constitution.

The amount of water that was discussed for this withdrawal was about 100 million gallons a day. Another method of getting the water would have been to put a well field along the edge of the river to pump the water out of the ground, but because of the hydrologic connection between the river and the alluvial aquifer, you are going to affect the amount of water in the river. Probably either way you went, this amount of water would affect the base flow in the river about 10 percent. You are talking about a ten foot channel, so when they are out there dredging to get one foot, they are not going to let you pump one foot out of the river. There are other questions that come up in this and I'm not going to get into them in depth. This same idea has, apparently, been discussed in Arkansas. We want to do it and Arkansas wants to do it--maybe they want to do it down in Louisiana. We take a foot out, Arkansas takes a foot out, somebody else says that Louisiana wants a foot out, or Mississippi wants to do something else with it. These states are going to complain. This leads to an interstate water conflict that would be resolved in the U.S. Supreme Court. These are extremely long-term litigations.

The genesis of my talk came because of the proposal that deals with the River. What about stream withdrawals, such as from the Sunflower, the Tallahatchie--all these that people take water out of and all the tributaries of these streams. The reach of the navigation power in the Federal Government extends to almost anything that has any effect at all on navigable water. The term is used in the Rivers and Harbors Act where the Corp gets a lot of its authority. You've got to get a section 10 permit to put anything in the stream to take water out, plus also they administer the 404 dredge and fill program. The Rivers and Harbors Act mentions "navigable waters of the United States." "Navigable waters" has been construed to mean the tributaries as long as it has some effect, eventually, on something that is navigable in fact. Anything that affects navigable water in the United States means you've got to deal with the Corp from those two stand-points. The Section 10 permit, besides dealing with navigation, has now been

expanded in the public interest review process to environmental factors. You are familiar with the permitting process, particularly the 404 permit. They usually do both of them at the same time. Sometimes you have to get both types of permits. In some cases, you just have to get the 404 permit. That's really the other part of the talk--the environmental factors which affect your ability to take water out of the streams.

One good example in dealing with the Rivers and Harbors Act is a case that came out in California. Part of California is water rich and part does not have any water. They have several water projects that transport water from an area around Oakland and San Francisco all the way down to the southern part of the state. A case several years ago that involved part of the project was Sierra Club versus Andrus. The issue there was the lowering of some levels of water in the area that they called the Delta. It is the same kind of situation that we have here because the state wanted to lower the water levels in this area. The Sierra Club sued them. The central issue in the case was whether or not the state had to get a section 10 permit to do this. The court held that it did and, in the process of so holding, enumerated certain environmental factors that had to be considered at the same time. Anything that adversely affects the environment would perhaps prohibit you from getting a section 10 permit. The same type of situation would be true of a 404 permit. For example, the Fish and Wildlife Coordination Act now requires coordination between the Corps and the Fish and Wildlife Service. The Endangered Species Act comes into play with all this, too. The Corps, on any of these permits, has to consult with the Fish and Wildlife Service. All of you are familiar with the Environmental Policy Act which says that when you have a major federal action, the Corps has to prepare an Environmental Impact Statement.

We have a couple of cases. The first case that came up under Section 10 was Zabel versus Tabb. It's a Fifth Circuit Court of Appeals case. The Fifth Circuit runs things as far as the federal court is concerned. We have District Courts, which are our trial courts levels, then you go up to the Circuit Court of Appeals level. This is almost like the final court. Very seldom ever does a case go past that point to the Supreme Court. For most lawyers' purposes, when they really look for something, they look for something on the Circuit Court level. In the District Court, they may make the mistake--whether you get one on the Circuit Court level, whether they make a mistake or not, they are close to God.

The expanded public interest review process of the Corp under Section 10 was upheld in this particular case. You have the same situation with the 404--it went to the Supreme Court. You have to ask permission to appeal to the Supreme Court. As it does a lot of times, in this particular case, the Supreme Court denied permission to

file an appeal. The name of the case as it was denied by the Supreme Court was Boteler. This is the case when Interstate 10 was built across the southern part of the state. We had the Mississippi sandhill crane habitat. A 404 review was required because of the environmental factors affected by the location of the highway.

The Tellico Dam in Tennessee was a case that went to the Supreme Court. In TVA versus Hill, the construction involved in a 100 million dollar dam was halted because of a two inch fish called the snail darter. The Supreme Court decided that Section VII of the Endangered Species Act prohibited any agency action that involved the probability that an endangered or threatened species might be wiped out. In that situation, the agency had to give its permission for the building of the dam. The argument was made that the agency was not actually funding the project, but the statute covers any agency authorization, including the permit process. So in that situation, the Endangered Species Act effectively stopped the building of the dam. You can go in and try to work around that, creating a situation in which you are not actually further endangering the species. In the Tellico Dam case, they ended up never building the dam.

There has been a recent case, in 1983, that involved the construction of a dam in Colorado that would have affected a tributary of a tributary of a navigable river--part of the tributary of the Platt River. They were going to build a dam on the river. The real issue in the case was whether or not the people building the dam could qualify under the Corps' nationwide permit program. This program covers activities that have minimal adverse impacts on the environment and minimal cumulative effects on a nationwide basis. What the Corp does is say that these types of things are okay, you just notify us of what you are doing. If you don't go through the public interest review process, you don't submit the full-fledged application. The court decided that the people building the dam were not entitled to proceed under the nationwide permit program, therefore, they had to go through the more formalized public notice process of an individual permit.

The environmental impact that was a concern was on the habitat of the whooping crane. In this case, what was actually happening was that they were going to divert some of the water and there would not be as much water in the stream reaching the habitat of the whooping crane 300 miles downstream. The concern was that there was not as much water, the flow wouldn't scour the banks and keep vegetation from growing along the banks' vegetation in which predators of the whooping crane could hide. The problem in this instance was not any kind of environmental effect on the water itself or the quality of the water, it was the quantity of the water. This is the point that I am trying to make. Sometimes the quantity of water has an environmental effect. In this case, the

environmental effect was 300 miles away and involved an endangered species. In effect, what the court said was that you've got to take into consideration and try to work around the environmental problems that we have here by going through the individual permit process. Because we are talking about what these people are required to do in acquiring a permit, not what they were required to do in the way of litigating any adverse impact on the whooping crane habitat, we never got to the point where the court had to say, "Well, now if you're going to have all of this adverse effect on the environment of the whooping crane, then you can't build this dam." But that, in a sense, was what they were saying. In this case, apparently it was worked out and went through the process. The eighth circuit court of appeals that covers that area up there told the people trying to build the dam that the district engineer was correct in requiring them to go through the individual permit process and, in that process, the public interest review would take care of trying to decide whether these effects were adverse. I read that they later decided that some mechanical means could keep vegetation off the sides of the streams, and, actually, the quantity of water didn't have anything to do with it. In other words, whether you had the normal flows or you had the lesser amount due to the dam going through that didn't really have anything to do with keeping vegetation off of the stream in the first place.

That case is a good example for our consideration. If you take an area in the Delta--let's say we're not even getting into a drought condition; we have almost normal conditions. At certain times of the year, if you want to take water out for one purpose or another, whether or not this is going to affect some habitat, and that being an endangered species--that is an example of an almost absolute roadblock if it is there. If there are other adverse environmental effects, this could also stop the project. There are a lot of questions that are raised. What is the adverse environmental effect? Could a project be halted because it lowered the assimilative waste capacity of the stream? For example, you take a stream in which someone wants to take out five cubic feet a second when the average flow is 50 cubic feet per second. Water quality standards have been set on a stream, and a municipality or industry downstream has certain guidelines on its effluent discharge permit. The water quality of the stream is set somewhere downstream. Somebody else's stream diversion--we're talking about when you get to drought conditions--may change the water quality downstream. What happens to the guy who has the permit to discharge something? Does that keep the person who is upstream from taking the water out of the stream? The issue changes somewhat. The polluter has a permit. He has a discharge permit that controls what he is supposed to use in the way of certain types of equipment. I'm not terribly familiar with pollution control mechanisms and discharge permits, but you are supposed to use a certain level of technology. There's

just so much that you can do. You get to a certain point, where you are trying to remove the last 10 percent--you spend ten times or twenty times more money than you spend to get the first 90 percent out. That person, though, does not have a permit and our law does not allow a permit to use a certain amount of water to dilute the pollution. In other words, you don't go get a permit as you would to divert water or take water out of a stream to put a certain amount of pollutants in the stream. You have a discharge permit and a stream has a water quality standard, but you don't have a right to use "x" amount of water to dilute whatever you are putting in there to maintain the water quality standards. The person upstream who acquires a permit has the legal right to use that amount of water. If the issue comes up, I'm not sure what the answer is. I would think that probably the answer is the person downstream may have to improve his technology to the point that he is still maintaining the stream's water quality standard, or if you prevent the person from taking the water out upstream, that the person has to be compensated for it. You are taking a legal right, a property right. Most of you are probably familiar with eminent domain condemnation proceedings. I own this piece of property right here and the highway wants to build a road through it--they take part of my property. They compensate me for what they take. It is called "a taking." The "taking" issue is a big issue right now in the law, not because somebody is physically taking something but because now we have a regulatory taking.

There is another issue that is a big issue also now. I'll just mention this--called the public trust doctrine. If you've read the papers recently, the Secretary of State is trying to determine the boundary line for the public trust tidelands in the southern part of the state. The public trust doctrine essentially says that the state owns certain land and can't get rid of it. There are some people who think that you may have a public trust in non-navigable waters. Public trust protects in-stream type of uses like recreation, fisheries, environmental values, and navigation. This is another evolving area of the law that can prevent a person who wants to divert water. Someone can sue, saying you are taking too much water out and hurting a fishery. There are cases on that point, too.