

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

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U.S. Fifth Circuit Weighs in on Texas Open Beaches Act

Severance v. Patterson, 566 F.3d 490 (5th Cir. 2009).

*Brian Fredieu, J.D.*¹

In this appeal to the U.S. Fifth Circuit from the U.S. District Court for the Southern District of Texas, the “rolling easement doctrine” of the Texas Open Beaches Act was under scrutiny. A divided Fifth Circuit Court of Appeals panel affirmed the dismissal of the landowner’s takings claim, but asked the Texas Supreme Court to answer three questions on the “rolling easement doctrine” that could settle the dispute.

Background

Carol Severance, a California resident, purchased two beachfront properties along Bermuda Beach Drive and Kennedy Drive on West Galveston Island, Texas in April 2005. Each parcel was improved with a single-family home that Severance used as rental properties. After the purchase, erosion caused by Hurricane Rita in September 2005 shifted the vegetation line farther landward, causing a large segment of Severance’s properties, including both homes, to be located on the dry beach.

On June 7, 2006, a temporary moratorium on the removal of houses located on the public beach expired, and the State Commissioner informed Severance her houses were subject to a removal order at any time. The State offered Severance approximately \$40,000 in assistance to relocate or remove the two houses. She refused the offer. Severance promptly filed suit for declaratory and injunctive relief. She alleged that removing her house and enforcing the rolling easement pursuant to the Texas Open Beaches Act (OBA)² would be an illegal seizure under the *Fourth Amendment* and an impermissible taking without just compensation under the *Fifth Amendment*.

A rolling easement’s physical nature is tied to some geographic characteristic that may change over time, most often the vegetation line on coastal property. As the vegetation line changes, the easement “rolls” to allow expanded public beach access over private land. Although the OBA is silent about the effect of erosion on the boundaries of public beachfront easements, Texas courts have held that, once an easement is established, its boundaries shift with the vegetation line and the line of mean low tide, a phenomenon referred to as the “rolling easement doctrine.”

To enforce the OBA, various state and local officials may seek declaratory or injunctive relief, including orders to remove any improvement, maintenance, obstruction, barrier, or other encroachment on a public beach.³ A landowner

may not exclude the public from a beach covered by the OBA.⁴

Federal District Court Decision

Severance sued Texas officials to prevent them from enforcing a public easement under the OBA.⁵ The district court dismissed the suit, finding that Severance's house-removal claims were unripe and her other claims were "substantively deficient."⁶ In law, "ripeness" refers to the readiness of a case for litigation and, in disputes involving decisions by administrative agencies, deals with whether the agency has formalized its decision and the challenging parties have felt its effects.

Severance claimed a public beach easement that rolls with natural boundaries violated her constitutional due process rights by allowing the State to appropriate her property interest without providing due process. The lower court rejected this contention, finding that Severance's property interests, under Texas law, were "subject to the public's superior interest in its pre-existing easement."⁷ The lower court reasoned that the easement existed over the dry beach before Severance's property purchases, and its natural expansion and contraction with the natural boundaries of the beach was not unconstitutional. Severance suffered no taking because her right to exclude the public, as a property owner, never extended beyond the rolling, natural boundary of the beach.

Fifth Circuit Decision

On appeal, the defendants argued Severance's Fifth Amendment takings claim and Fourth Amendment seizure claim were unripe. The Fifth Circuit affirmed dismissal of the takings claim because she did not first seek relief in state court. But, whether a "reasonable" seizure occurred depended on a definitive construction of Texas law on which the Fifth Circuit asserted that there was no Texas Supreme Court precedent. In regard to the claim of unreasonable seizure, the court certified state law issues to the Texas Supreme Court.

Fourth Amendment Search & Seizure Claim

The court's decision on Severance's Fourth Amendment claim hinged upon whether it was 1) ripe for review and 2) a "reasonable" seizure. The Fourth Amendment is typically used in criminal law and "unreasonable" seizure claims in property law are rare. The elements of a Fourth Amendment claim are (a) a meaningful interference with the plaintiff's possessory interests in her property, which is (b) unreasonable because the inter-

ference is unjustified by state law or, if justified, then uncompensated. Relying on the *Abbott Laboratories v. Gardner* factors, the majority opinion found Severance's Fourth Amendment seizure claim was ripe because: the issues are purely legal; the defendants have adopted a final agency position that the landward movement of the vegetation line burdens Severance's property with a public access easement; the controversy has a direct and immediate impact on Severance because she cannot lawfully keep the public off her land; and resolving the issue would facilitate OBA enforcement and eliminate uncertainty about the constitutionality of the rolling easement doctrine for numerous Texas landowners.⁸

Texas contended that, according to OBA, Severance may not repair her damaged houses, rebuild on that segment of her property, nor exclude the public from using the new dry beach. Severance asserted that this state interference was unjustified by state law and therefore, unreasonable. But the majority found it impossible to reach "a clearcut resolution" of

Photograph courtesy of ©Nova Development Corp.



Severance's and the state's respective property rights until the Texas Supreme Court addresses whether state law recognizes the rolling easement doctrine. The court stated that Texas case law fails to provide a consistent rationale for the creation or sustaining of a rolling beachfront easement. Therefore, a definitive state court ruling could result in many different possibilities including that "rolling easements" are not recognized in Texas. Because of this potential inconsistency, the court certified three questions to the Texas Supreme Court on this issue:

1. Does Texas recognize a "rolling" easement that gives the public access to and use of beaches on the Gulf of Mexico without proof of "prescription, dedication or customary rights" in the property?
2. If so, does it come from common-law doctrines or the construction of the Texas Open Beaches Act?
3. To what extent, if any, is a landowner entitled to compensation under Texas statutory law or the Texas Constitution when an easement rolls over his or her property, when no easement has been found by dedication, prescription or custom?

Judge Jacques Wiener Jr., the third Fifth Circuit panel member, viewed the property rights issues differently, arguing that Severance lacked standing to bring her Fourth Amendment seizure claim. According to Wiener, the U.S. Supreme Court defined a "seizure" for purposes of a Fourth Amendment claim as a "meaningful interference with an individual's possessory interests in his property."⁹ The dissent argued that this definition alone is sufficient to defeat Severance's seizure claim, for there was no meaningful interference with a property right that never belonged to Severance.¹⁰ Thus, Severance experienced no injury to her property rights and therefore has no standing to bring the case.

Fifth Amendment Takings Claim

The difference between a Fifth Amendment Taking Claim and a Fourth Amendment Seizure Claim is that the essential element of a takings claim is lack of "just compensation" and that of a seizure claim is "unreasonableness." As noted by the Supreme Court, "[t]he Takings Clause largely operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge"¹¹ but makes no mention of

reasonableness. If just compensation is paid and the purpose of the taking is public use, then the taking is reasonable per se.¹²

Texas officials argued that Severance's takings claims were unripe, and the court agreed. The U.S. Supreme Court has adopted a special, two-prong test (*Williamson County* test) for evaluating ripeness under the Takings Clause.¹³ A takings claim is not ripe until (1) the relevant governmental unit has reached a final decision as to how the regulation will be applied to the landowner, and (2) the plaintiff has sought compensation for the alleged taking through whatever adequate procedures the state provides. At issue here is the second prong.

Severance asserted that state procedures were unavailable and her claims were ripe. Under the *Williamson County* test, a property owner need not avail himself of state procedures before pursuing a takings claim in federal court if he can demonstrate that the state's procedures for seeking compensation are "unavailable or inadequate."¹⁴ The court reasoned that inadequate procedures are those that almost certainly will not justly compensate the claimant. Severance asserted that Texas courts have uniformly held that no taking results when state officials conclude that an OBA

*. . . the Texas Supreme Court
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the rolling easement is
consistent with state law . . .*

beach access easement has rolled over private property, and therefore Texas's procedures will almost certainly not justly compensate her. But, the court noted, the Texas Supreme Court has not yet addressed whether imposition of the rolling easement is consistent with state law or whether compensation must be awarded when the easement moves onto previously unencumbered property. Given this ambiguity, the court reasoned the Texas Supreme Court might award relief under the facts Severance has alleged. Because of this uncertainty, her takings claim was ruled unripe.

NPDES Permit Not Required to Transfer Pollutants Through Pumps

Friends of the Everglades v. South Florida Water Management District, No. 07-13829, 2009 WL 1545551 (11th Cir. June 4, 2009).

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The Eleventh Circuit Court of Appeals ruled that the South Florida Water Management District (Water District) did not require a permit under the Clean Water Act (CWA) for the transfer of water, via pumping stations, from agricultural canals into Lake Okeechobee. The decision focused on the validity of a newly enacted Environmental Protection Agency (EPA) regulation, the Water Transfers Rule.

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should be interpreted.*

Background

To control flooding, the U.S. Army Corps of Engineers constructed Hoover Dike around Lake Okeechobee and implemented a system of pumps and canals. The canals drained the Everglades Agricultural Area and eventually became polluted with agricultural runoff including phosphorous, nitrogen, and un-ionized ammonia. The S-2, S-3, and S-4 pump stations (S pumps) were built into the dike and pump water from the lower level canals into Lake Okeechobee. The S pumps took water from polluted canals “uphill into Lake Okeechobee, a distance of some sixty feet.” The pumps added nothing to the canal water; but without the pumps, the polluted canal water would not naturally flow into the lake, a drinking water supply.¹ The Water District operated the pumps.

In 2006, Friends of the Everglades brought suit against the Water District for operating the S pumps

without a National Pollution Discharge Elimination System (NPDES) permit under the CWA. Enacted in 1972, the CWA bans the “discharge of any pollutant” without a permit and defines “discharge” as “any addition of any pollutant to navigable waters from any point source.”² Friends of the Everglades alleged the transfer of water from the canals to the lake through pumps was an “addition” requiring a NPDES permit. The Water District argued the unitary waters theory applied to operation of the S pumps.

The unitary waters theory states that connected bodies of water in their aggregate constitute a whole. Under this theory, the canals and the lake are part of the same whole and the S pumps transfer water within the whole, causing no “addition.”³ Rejecting the unitary waters theory, the district court found that when the S pumps transferred polluted canal water into the lake, an addition occurred resulting in a discharge. Accordingly, the district court ordered the Water District to obtain a NPDES permit for the S pumps’ transfer of pollutants into the lake.

During the course of the litigation, EPA issued the Water Transfers Rule. The rule adopted the unitary waters theory advanced by the Water District and stated that “water transfers are not subject to regulation under the NPDES permitting program.”⁴ The Water District appealed the district court’s ruling arguing the new rule applied to operation of the S pumps. In response, Friends of the Everglades argued that the Water Transfers Rule was an impermissible construction of the CWA.⁵

Ambiguity of the Clean Water Act

If a statute is ambiguous, agencies may adopt regulations to clarify how the statute should be interpreted.⁶ However, courts defer to agency regulations only when the statutory language is ambiguous and the agency’s interpretation is reasonable. Therefore, before applying the regulation, the court first determined the ambiguity of the CWA and the reasonableness of the Water Transfers Rule. On first glance, the court found the interpretations of both parties to be reasonable.

Prior decisions rejected the unitary waters theory but lacked precedential value because the regulation

was not available then. Likewise, the court found decisions interpreting “addition to navigable waters” were factually distinguishable and provided no precedent. To resolve the ambiguity, the court looked to language, context, and purpose of the CWA. The court found the language “addition . . . to navigable waters” lacked clarity because “addition” could (1) mean only an addition from something not constituting navigable waters to navigable waters, or (2) include a transfer from one distinct body of water to another.

Turning next to context, the Water District pointed to the absence of “any” before “navigable waters” as support for the unitary waters theory “because it implies that Congress was not talking about *any* navigable water, but about *all* navigable waters as a whole.”⁷ However, the court noted instances where Congress used “navigable waters” and “any navigable waters” interchangeably and concluded the context failed to resolve the ambiguity.

Finally, the court examined the statutory purpose of the CWA which includes eliminating “the discharge of pollutants into navigable waters.”⁸ Friends of the Everglades claimed that the Water Transfers Rule was “an unreasonably narrow reading of the [a]ct” that would create a substantial exception to the NPDES program and contradict the CWA’s anti-pollution goals by allowing unpermitted pumping of dirty canal water into the lake (a drinking water reservoir).⁹ However, the court noted that the CWA exempts non-point sources of pollution from regulation under this program even where those sources may have “substantially harmful impact[s] on water quality.”¹⁰ The court therefore reasoned that compromises were written into the statute.

As such, the statutory purpose also failed to resolve the ambiguity. The language “any addition of any pollutant to navigable waters from any point source” remained ambiguous.

The court next considered whether the Waters Transfer Rule was a “permissible construction” of the statutory language.¹¹ The court determined there were two reasonable readings, one of which was the EPA’s Water Transfers Rule. Accordingly, the rule was a permissible construction of the statute and binding.

Conclusion

Finding the statutory language ambiguous and the EPA’s interpretation reasonable, the court upheld the new regulation and reversed the lower court’s decision. The court found that, under the new Waters Transfer Rule, the executive director did not need an NPDES permit for operation of the S pumps.✶

Endnotes

1. *Friends of the Everglades v. South Florida Water Management District*, No. 07-13829, 2009 WL 1545551, at *2 (11th Cir. June 4, 2009).
2. 33 U.S.C. §§ 1311, 1342(a)(1), 1362(12).
3. *See National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).
4. 40 C.F.R. § 122.3(i) (2008).
5. *Friends of the Everglades*, 2009 WL 1545551, at *7.
6. *See Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).
7. *Friend of the Everglades*, 2009 WL 1545551, at *12.
8. 33 U.S.C. § 1251 (a).
9. *Friends of the Everglades*, 2009 WL 1545551, at *14.
10. *Id.* at *15.
11. *Id.* at *16.



Photographs of Lake Okeechobee courtesy of the USACE.



Fifth Circuit Dismisses Mississippi's Groundwater Claim



Hood v. City of Memphis, Tennessee, No. 08-60152, 2009 WL 1564160 (5th Cir. June 5, 2009).

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In June, the Fifth Circuit Court of Appeals affirmed the dismissal of Mississippi's groundwater claim against the City of Memphis and its municipal utility company, Memphis Light, Gas and Water Division (MLGW) (collectively "Memphis") for failure to join an indispensable party. Mississippi sought damages for Memphis's alleged misappropriation of Mississippi's groundwater from the Memphis Sands Aquifer. Finding the water resource was subject to equitable allocation, the Fifth Circuit held that the State of Tennessee had a sovereign interest in the dispute, making Tennessee an indispensable party to the action.

Background

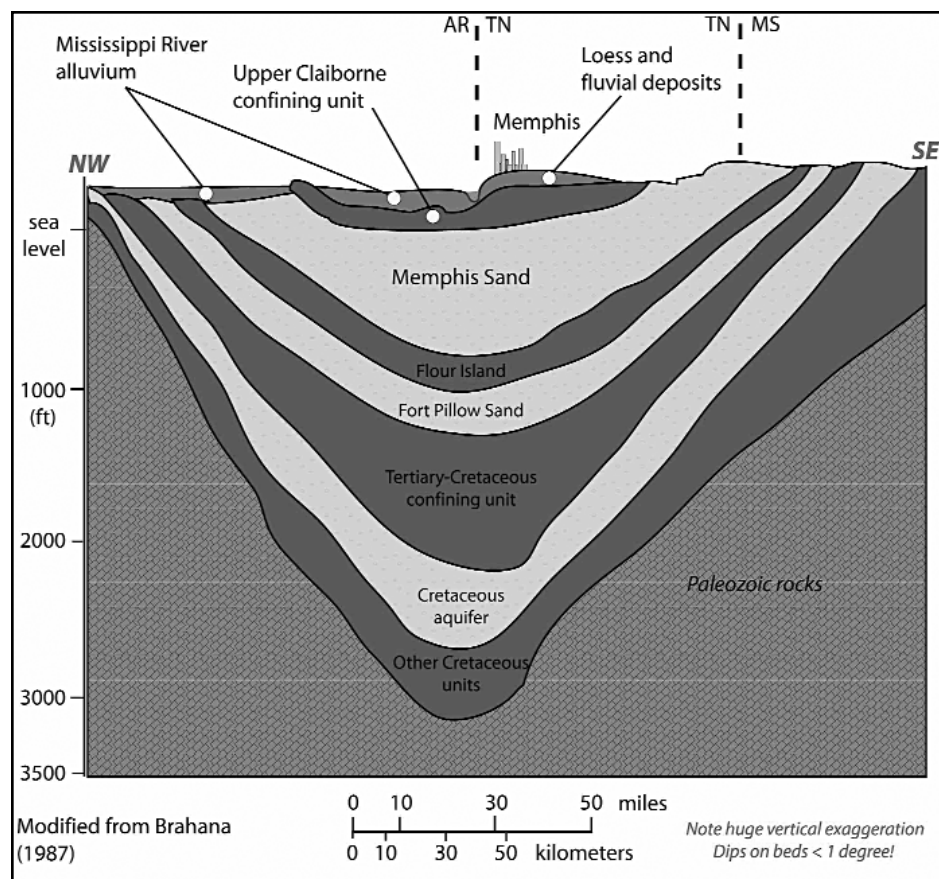
The controversy centered around the Memphis Sands Aquifer (the Aquifer), a water reservoir underlying portions of Tennessee, Mississippi, and Arkansas. Although the three states shared the water source, specific volumes of groundwater were not allocated between the states. Mississippi claimed that MLGW's groundwater pumping created a "cone of depression" under Memphis which caused groundwater that would normally lie under Mississippi to flow across the border into Tennessee. Mississippi also argued that Memphis withdrew water from the Aquifer at a faster rate than it was replenished, which has caused the Aquifer's water level to drop.

Indispensable Parties

Memphis sought dismissal of the case for failure to join Tennessee. Memphis claimed Tennessee was an indispensable party. Whether a party is indispensable is a

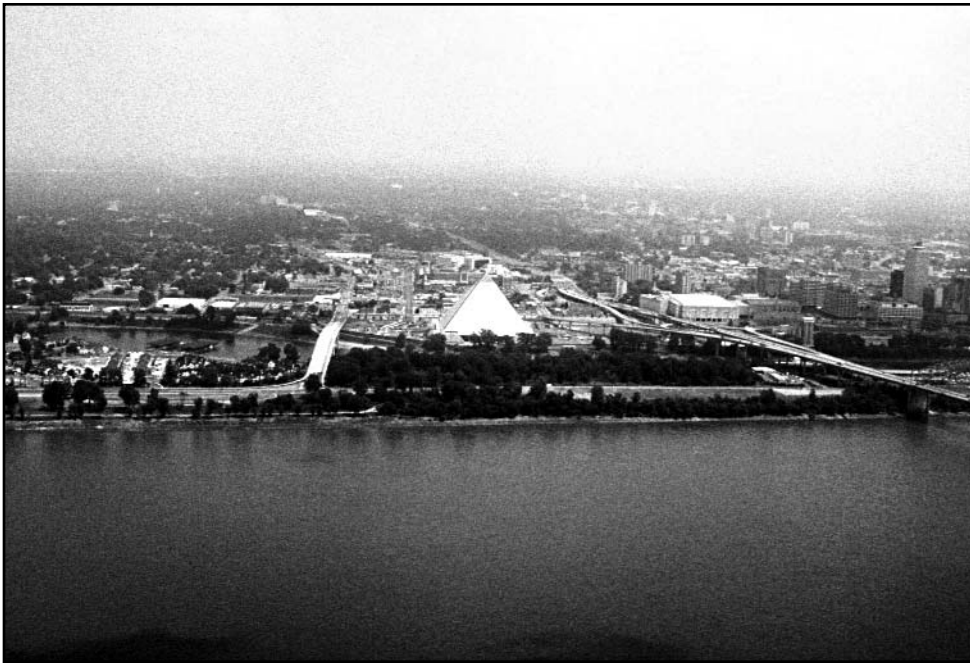
fact-based decision for the court. If joinder of a party would deprive the court of jurisdiction, Rule 19(b) dictates that the court must decide whether that party is indispensable by examining several factors. The court examines the extent to which a judgment rendered in the party's absence would prejudice that party or the existing parties; the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, shaping the relief, or other measures; whether a judgment rendered in the party's absence would be adequate; and whether the plaintiff would have an adequate remedy if the action were dismissed. The district court held that Tennessee was an indispensable party because

Graphic of Memphis Sand Aquifer courtesy of Mississippi State University.



the court could not determine whether Memphis had misappropriated water from the Aquifer until it first determined what portion of the water belonged to Mississippi and Tennessee.

On appeal, Mississippi argued that Tennessee had no sovereign interest in the dispute because the Aquifer was not an interstate water source subject to equitable apportionment. Mississippi maintained that it owned the groundwater resources in the state and so equitable apportionment of the Aquifer's water was not necessary.



Aerial photograph of Memphis, TN courtesy of the USGS.

Equitable Apportionment

At issue was the federal common law doctrine of equitable apportionment, which governs disputes between states concerning the right to use water from an interstate stream.¹ Under this doctrine, the volume of water to which each state is entitled must be equitably apportioned before one state may sue an entity for misappropriation of its share.

The Fifth Circuit agreed with the district court's finding that the Aquifer was an interstate water source and subject to equitable apportionment. Recognizing that Supreme Court caselaw did not speak directly on the issue, the court found that the relevant decisions supported treating aquifers as "any other part of the interstate water supply."² The court explained that the underground location of the water source lacked analytical significance.³ Mississippi argued that it owned the fixed share of the Aquifer that was located within its

boundaries. The Fifth Circuit disagreed, noting that the Aquifer is not a fixed resource since it migrates across state boundaries.

Supreme Court caselaw explained that a state's boundaries did not determine the amount of an interstate water source to which that state was entitled. Because the Aquifer was an interstate water source in which Tennessee had a sovereign interest, the court held that Tennessee was a necessary party to any resolution of Mississippi's claims in this lawsuit.

Subject-Matter Jurisdiction

After determining that Tennessee was an indispensable party, the district court found that it did not have subject-matter jurisdiction over the case because the Supreme Court has original and exclusive jurisdiction over disputes between two or more states.⁴

Mississippi argued that the district court had subject-matter jurisdiction over the case because the suit was against Memphis, not Tennessee. The Fifth Circuit noted that Mississippi's argument ignored

the fact that the suit required allocation of water rights between the states before the court could determine whether Mississippi's water rights had been violated.

Conclusion

The court found that Tennessee was an indispensable party to the suit but could not be joined without destroying the subject-matter jurisdiction of the district and appellate courts. The court held that Mississippi must file an original action with the U.S. Supreme Court if it wishes to further pursue this claim.✎

Endnotes

1. Hood v. City of Memphis, Tennessee, No. 08-60152, 2009 WL 1564160 (5th Cir. June 5, 2009).
2. *Id.* at *8.
3. *Id.* at *4.
4. 28 U.S.C. § 1251(a).

Federal Court Rules Against Treasure Hunter

Smith v. The Abandoned Vessel, 610 F. Supp. 2d 739 (S.D.Tex. 2009).

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A U.S. District Court recently ruled against a treasure hunter claiming to have located the remains of a 19th century ship. Before reaching Smith's claim, the court analyzed the navigability of the alleged vessel's location to determine if admiralty jurisdiction was properly invoked. After resolving jurisdiction, the court held Smith was not entitled to a declaration of ownership of the vessel under the law of finds nor to an award under the law of salvage.

The court summarily rejected Sorenson's argument that the tributary must be navigable at all times.

Background

After coming across the tale in a book about lost treasure and inspired by the film *National Treasure*, Nathan Smith began researching the legend of a Spanish vessel, laden with gold and silver, allegedly submerged in the waters of Refugio County, Texas. According to legend, a ship sailed inland from the Gulf of Mexico around 1822 to escape a hurricane, but eventually ran aground. The crew abandoned its treasures only to meet "a tribe of native cannibals known as the Karankawas."¹ Despite subsequent "discoveries" of the ship, its bounty allegedly remained buried in a creek off the Mission River.

The lost barkentine (or barquentine), a type of sailing vessel with three or more masts, ran aground in the

aply named Barkentine Creek. Smith studied satellite images of Barkentine Creek and the surrounding area, concluding that the ship must have traveled a different route because Barkentine Creek does not connect to Mission River. Comparing an 1851 map of Refugio County with recent satellite images, Smith focused on Melon Creek, which connects Mission River and Melon Lake, and its change in direction over the past 150 years.²

According to Smith, Google Earth images showed a "shoe-print" shape to the south of Melon Lake, between the Lake and Mission River. He believed this shape to be the lost barkentine. During several trips to the site, Smith took photographs, video, and a piece of wood from the alleged vessel; however, all were lost and no tangible evidence of the "discovery" was presented at trial.³

Smith filed suit seeking title to the vessel under the law of finds and, if title was not awarded, the right to salvage the vessel and obtain a reward for doing so under the law of salvage. Marie Sorenson (and later her estate), owner of the property where the vessel allegedly lies, intervened in the suit and contested Smith's claims.

Admiralty Jurisdiction: Navigability

Sorenson first argued the court lacked jurisdiction to hear the case, claiming the alleged vessel's location fell outside navigable waters. Smith brought his claims under the court's admiralty jurisdiction, historically defined in terms of navigability.⁴ In its decision, the court reviewed various definitions of navigability before the analysis of federal subject-matter jurisdiction.

In the context of admiralty jurisdiction, the court defined the test for navigability as whether a waterway is capable of being used in interstate commerce. For jurisdictional purposes, the absence of current or historical commercial use of a waterway does not matter; only its capability to support commerce will be considered.⁵ Here, the court looked to whether the alleged vessel was located within the reaches of a navigable waterway.

While most of the route from Melon Lake to the Gulf of Mexico is clearly navigable, Sorenson challenged the navigability of a tributary connecting Melon Lake to Melon Creek. Sorenson argued the tributary was often too shallow for a vessel to pass from Melon Lake to Melon Creek. The court summarily rejected Sorenson's argument that the tributary must be navigable at all

times. Instead, Smith needed only to prove that the tributary was navigable “at some point in time.”⁶

As evidence of navigability, Smith offered the expert testimony of Commander Cole who traveled to Melon Lake via water and opined that the tributary was navigable. Smith also introduced testimony of a local resident that had traveled the route in a twenty-foot skiff and video footage of Smith traveling to Melon Lake via airboat. In reaching its decision, the court also considered a U.S. Army Corps of Engineers determination that, under the Clean Water Act, the area was adjacent to a navigable waterway. Although not controlling, the court considered the determination significant from an evidentiary standpoint.⁷

Ultimately, based on expert and layman testimony, the court found the tributary to be navigable, making the entire route from the Gulf of Mexico to Melon Lake navigable. The area identified by Smith includes portions of Melon Lake, therefore the alleged vessel lay within navigable waters. As such, the court had the authority to hear this admiralty case.

Law of Finds

Smith next sought, under the law of finds, a declaration of title and ownership of the alleged barkentine. Generally, the court required a law of finds claimant to show: “(1) intent to reduce property to possession; (2) actual or constructive possession of the property; and (3) that the property is either unowned or abandoned.”⁸ Though Smith offered no proof of the alleged vessel, the court found that the last requirement, abandonment, may be satisfied when the claim involves “an ancient and longlost [sic] shipwreck.”⁹ Additionally, Smith clearly met the first requirement, intent to reduce property to possession, given his numerous trips to the site and other factors. However, Smith failed to meet the determinative requirement in this case, actual or constructive possession. The actual discovery of the vessel was not proven, nor was any possession of the vessel by Smith. Accordingly, Smith’s claim for title was denied.

Law of Salvage

Under admiralty law, the court was more likely to award salvage rights than to grant title under the law of finds. To prevail on his salvage claim, Smith was required to prove: “(1) a marine peril; (2) voluntary service rendered when not required as an existing duty or from a special contract; and (3) success in whole or in part, or contribution to, the success of the operation.”¹⁰

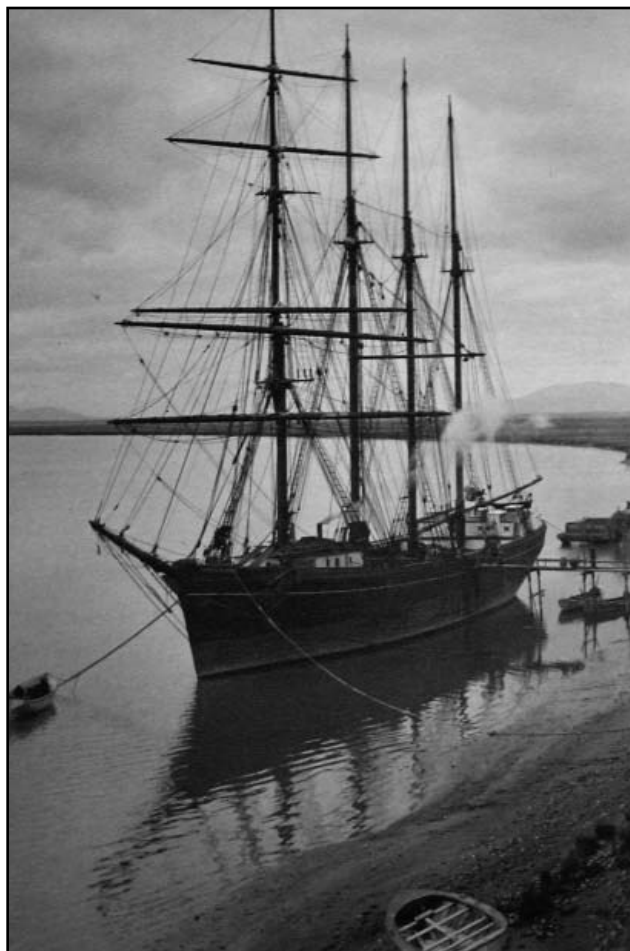
Smith claimed he met the requirements and was entitled to a salvage award.

The court defined marine peril as not only imminent danger, but also potential danger that may be reasonably expected, such as the destruction of a shipwreck by the elements.¹¹ Without accepting Smith’s claims regarding the alleged vessel’s location, the court found that, should Smith’s claims prove correct, the alleged vessel was in marine peril. Since Smith’s actions were undisputedly voluntary, the court next examined whether he contributed to the successful salvage of the alleged ship.

To earn a salvage award, Smith was required to offer proof that he saved property from marine peril.¹² Despite his claims and satellite images, Smith never presented any reliable proof of the alleged vessel’s location, much less produced any tangible evidence of its discovery. Though Smith voluntarily took efforts to salvage what he claimed to be an abandoned vessel, he failed to successfully salvage any property. As a result, Smith’s salvage award claim was denied.

See Treasure Hunter, Page 11

Photograph of a barkentine, circa 1900, courtesy of NOAA’s National Marine Sanctuaries, Photographer Stefan Claesson.



Appellate Court Affirms Tugboat's Liability in Katrina Barge Case

In re Ingram Barge Co., No. 08-30502, 2009 WL 1577687 (5th Cir. June 5, 2009).

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The Fifth Circuit affirmed a district court's ruling denying exoneration to a towing company after its transportation broker was found negligent in failing to properly moor an unmanned barge they were contracted to tow.

Background

On August 29, 2005, Hurricane Katrina ripped an Ingram Company barge free from its moorings. The barge ultimately came to rest in the Lower Ninth Ward of New Orleans, Louisiana and became a symbol of the destructive power of the hurricane.

Domino, Inc. had contracted with Unique Towing, Inc. to move the barge as part of Ingram's hurricane preparations. Domino served as Ingram's transportation broker, managing all aspects the freight's shipment. Approximately forty hours before Katrina made land-

fall, Unique, Inc. "flipped" two barges, one full and one empty, switching their positions to better protect them from the storm surge.¹ After rotating the barges, Unique did not use extra rigging to reinforce the moorings between the barges as Domino's policy dictated doing so only at the customer's request.

Residents of the Lower Ninth Ward filed suit against the barge owners alleging the barge ruptured the flood wall, causing the area to flood. Along with the barge owners (Ingram), Domino and Unique were sued for negligently mooring the barge. The district court noted that tugs share a duty "to inspect tie-offs and insure that they are fast and secure after barges in a fleet are shifted."² The district court determined that Unique and Domino had a duty and opportunity to further secure the barge but did not act, nor report the deficiency. While exonerating the barge owner (Ingram), the district court held Unique and Domino liable for negligence.

Towing Company Not Exonerated

On appeal, Unique and Domino argued that they had no duty to reinforce mooring lines after moving the

Photograph of a grounded barge after Hurricane Katrina courtesy of NOAA's Center for Coastal Monitoring and Assessment.



barges. The Fifth Circuit rejected their argument, citing a common-law duty of vessels to adequately moor any unmanned barge they tow and noting that breach of this duty constitutes negligence.³

The duty to adequately moor an unmanned barge also creates a presumption of fault for any drifting that occurs shortly after the mooring.⁴ The court ruled the forty hour interval between rotation of the barges and arrival of the hurricane was insufficient to destroy a presumption of fault for the empty barge breakaway. In support, the court pointed to prior cases where intervals as long as two months were insufficient to rebut a presumption of negligence.

Finally, the court denied transportation broker Domino's claim for exoneration even though it was not the owner of the tugboat. Stating a non-owner is liable for its own negligence, the court pointed to Domino's policy prohibiting use of extra rigging without a customer's request, which precipitated the negligent conduct of Unique. The court ruled that because Domino's

policy caused Unique's crew to inadequately moor the vessel, the district court correctly refused to exonerate the Domino from the suit.

Conclusion

The court's refusal to exonerate the towing company or transportation broker placed the common-law duty of care squarely on companies in direct control of barges. The decision will undoubtedly put Gulf Coast towing companies on notice regarding their liability. ⚡

Endnotes

1. In re Ingram Barge Co., No. 05-4419, 2008 U.S. Dist. LEXIS 33421, at *6 (E.D. La. Mar. 31, 2008).
2. *Id.* at *34.
3. In re Ingram Barge Co., No. 08-30502, 2009 WL 1577687, at *1 (5th Cir. June 5, 2009).
4. Pasco Marketing, Inc. v. Taylor Towing Service, Inc., 554 F.2d 808, 811 (8th Cir. 1977).

Treasure Hunter, from page 9

Conclusion

The legend of long lost gold and Smith's associated claims overshadow what is perhaps the most legally important aspect of this case: the tributary's navigability. Though in many places and for much of the year the water's depth is only a few inches, the court found the

. . . the court found the tributary capable of supporting commerce due to its frequent flooding

tributary capable of supporting commerce due to its frequent flooding. This conclusion could influence future determinations of the navigability of wetlands.

For different reasons, both Smith and Sorenson asked the court not to reveal the exact location of the alleged vessel.¹³ Should a future treasure hunter take up Smith's quest, however, he would do well to obtain physical evidence of the vanished ship and its purported loot before petitioning the courts for title or award. ⚡

Endnotes

1. Smith v. The Abandoned Vessel, 610 F. Supp. 2d 739, 743 (S.D.Tex. Apr. 27, 2009).
2. *Id.* at 744.
3. *Id.* at 745.
4. *Id.* at 748.
5. *Id.* at 750 (citing Richardson v. Foremost Ins., Co., 641 F.2d 314, 316 (5th Cir. 1981)).
6. *Id.* at 751.
7. *Id.* at 751-52.
8. *Id.* at 753 (quoting Odyssey Marine Exploration, Inc. v. The Unidentified, Shipwrecked Vessel, No. 8:06-CV-1685-T-23TBM, 2006 WL 3091531, *3 (M.D.Fla. Oct. 30, 2006)).
9. *Id.* at 754 (quoting Columbus-America Discovery Group v. Atl. Mut. Ins. Co., 974 F.2d 450, 464-65 (4th Cir. 1992)).
10. *Id.* at 756 (citing The SABINE, 101 U.S. 384, 384, 25 L.Ed. 982 (1879)).
11. *Id.* (citing Cobb Coin Co. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F.Supp. 540, 557 (S.D.Fla. 1982)).
12. *Id.* at 757 (citing *The SABINE*, 101 U.S. at 384).
13. Mary Flood, *Fortune Hunter Believes He Has Googled Gold; Californian is Fighting Heirs in Texas Over the Right to Dig for It*, HOUSTON CHRONICLE, Dec 30, 2008, at A1.

Open Beach, from page 3

In his dissent, Wiener wrote that the majority incorrectly held that Severance had standing to assert her takings claim if it became ripe because any taking occurred before she ever owned the land. “At bottom, there is but one easement, albeit one whose boundaries could shift and have shifted. Thus, if there ever was a taking, there was but one — and it occurred long before Severance acquired title to the properties,”¹⁵ Wiener wrote. He also noted that shifts in the vegetation line do not create new easements but instead “expand the size and reach of that one dynamic easement.” The easement encumbered the entirety of Severance’s land at the time she bought it and she did not acquire any right to exclude the public from any portion that is dry beach. The dissent cautioned that the majority’s approach would open the state up to endless takings litigation every time the line shifted inward or outward by any measurable amount.

Conclusion

Though bemoaned by the dissent, the majority upheld the dismissal of the takings claims as unripe and certified back to the Texas Supreme Court state law issues with regard to the claim of unreasonable seizure. What happens next regarding the status of rolling easements in Texas is now in the hands of the Texas Supreme Court. Stay tuned to future editions of Water Log for updates on the status of this lawsuit. 🐾

Endnotes

1. Fredieu is an Analyst and Presidential Management Fellow with the NOAA Aquaculture Program on developmental assignment with the National Sea Grant Law Center.
2. Tex. Nat. Res. Code Ann. § 61.018(a).
3. *Id.*
4. *Id.* § 61.014(b).
5. *Id.* § 61.011 et seq.
6. *Severance v. Patterson*, 485 F. Supp. 2d 793 (S. D. Tex. 2007).
7. 485 F. Supp. 2d at 803.
8. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-55 (1967) (outlining the factors necessary to be ripe).
9. *United States v. Jacobsen*, 466 U.S. 109, 113, (1984).
10. *Severance v. Patterson*, 566 F.3d 490, 509 (5th Cir. 2009).
11. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 487 n.19 (2005).
12. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 314 (1987).
13. *See Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186 (1985).
14. *Id.* at 197.
15. *Severance v. Patterson*, 566 F. 3d at 505 (Wiener, J., dissenting).

Photograph courtesy of ©Nova Development Corp.



Pearl River Flood Control Measures Ignite Controversy

Niki L. Pace, J.D., LL.M.

In April of 1979, the Pearl River overflowed its banks inundating the Jackson, Mississippi metro area with costly floodwaters. The event, later dubbed the Easter Flood, caused roughly \$200 million in damages. Thirty years later, the Rankin-Hinds Pearl River Flood and Drainage Control District (Levee Board) is debating new flood control measures, including developer John McGowan's controversial flood control and development plan, dubbed the "Two Lakes" plan.

Background

The Pearl River originates in east-central Mississippi, flowing southeasterly through Jackson and southward to form the southern boundary between Louisiana and Mississippi before emptying into the Gulf of Mexico.¹ The stretch of the Pearl River flowing through Jackson lacks charm. Shrubbery and undergrowth replace its original hardwoods and an abandoned landfill lies along its banks.² However, the area hosts an array of natural and cultural resources. The river corridor consists of wetlands and forests which are home to a wide variety of birds, the threatened Gulf surgeon, and the rare sawback turtle.³ The region includes Choctaw settlement and burial grounds⁴ and Lefleur's Bluff State Park (including Mayes Lake).

The Pearl River also has a history of flooding the Jackson area. A 1961 flood caused about \$100 million in damages and prompted the U.S. Army Corps of Engineers (Corps) to channelize the river and build new levees in an attempt to limit future flooding. Sadly, the 1979 Easter Flood proved twice as costly partially because developers, citing the safety of the new levees, built in the flood plain.⁵

Now the Levee Board is again weighing the benefits of new flood control proposals. The Corps has approved a "levees only" option and will contribute \$133 million to the final plan costs.⁶ Two other options before the Levee Board propose damming the Pearl River to create a lake, or lakes. Last year, the Levee Board voted initially for the levees-only proposal and then later in favor of a small lake plan (the Lower Lake plan). But this spring, the Levee Board reconsidered its decision, hearing presentations from Lower Lake devel-

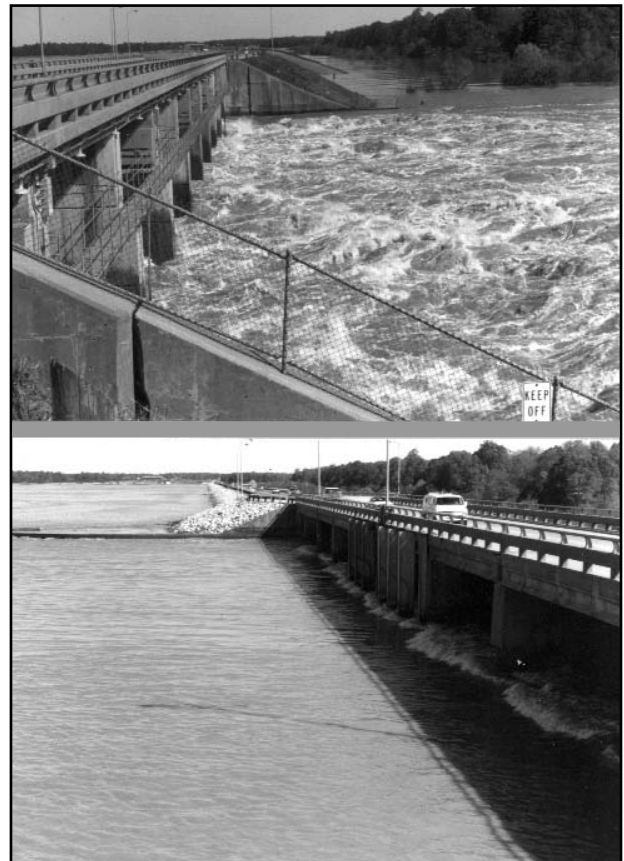
opers as well as a revamped Two Lakes proposal from John McGowan. Prior versions of Two Lakes have been rejected by the Levee Board, most recently after a Corps economic feasibility study estimated the cost at \$1.4 billion in 2007.⁷

Proposed Plans

Both plans would dam the Pearl River and flood wetlands to create a lake for floodwater retention but the projects differ significantly in scale. The Lower Lake plan, previously designated by the Levee Board as the "locally-preferred" option, would create a 1,500 acre lake. Engineers for the Lower Lake plan estimate an eighty percent reduction in flooding for a projected cost of \$605 million.⁸

By contrast, the Two Lakes plan would encompass 12,000 acres (approximately 5,500 acres of wetlands and 3,400 of forest) to create a 4,133 acre lake with islands by flooding wetlands upstream to the Ross

Photographs of Pearl River at Ross Barnett Spillway near Jackson, MS during 1979 flood courtesy of USGS.



Barnett Reservoir spillway. Project developer John McGowan estimates the cost at \$336 million.⁹ Unlike the levees-only plan, both lake plans promise economic development along the newly created lakefront property. However, the plans require substantial public funding that will likely result in significant property tax increases to area residents.

Even with reduced costs, Two Lakes faces opposition. Although both plans would partially flood campgrounds and hiking trails at Mayes Lake, Two Lakes would also require: the costly removal of a landfill; acquisition of large tracts of land through eminent domain; greater loss of wetlands and habitat; potentially working around an airport tollway; and cooperation of local Choctaws if burial grounds are involved. Additionally, downstream parties have concerns over increased erosion and flooding during rainy seasons and water shortages during dry periods.¹⁰ The oyster industry fears any new dam on the Pearl River will negatively impact oysters in the Mississippi Sound by reducing the flow of freshwater.¹¹

Regulatory Issues

Regardless of the plan chosen, the project requires both federal funds and permits thereby triggering the National Environmental Policy Act (NEPA). NEPA imposes procedural requirements including preparation of environmental impact statements (EIS) and provides for public involvement.¹² Due to the range of issues raised by this project, NEPA compliance may very well become a litigious process, slowing the project for years and adding untold costs to the project's final tally. Already, oyster industry representatives have voiced their intent to sue, if need be, over any plan adversely impacting their livelihood.¹³ Developers could find themselves embroiled in litigation, further delaying construction of flood control measures.

Because the project is still in the preliminary stage, the full regulatory requirements are unknown. However, the project will certainly require Clean Water Act permits for dredge and fill activities in wetlands and may require consultation with the U.S. Fish and Wildlife Service under the Endangered Species Act. Other potential regulatory issues may include compliance with the Resource Conservation and Recovery Act for the removal of the abandoned landfill. Depending upon the location of the final project, presence of Choctaw settlements and burial grounds may require compliance with state and federal cultural preservation laws as well.

Conclusion

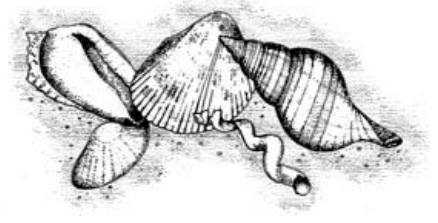
At this point, the full impact of the various proposals is difficult to foresee with certainty. But one thing is clear. The Levee Board has an important decision to make and until it does, no new flood control measures can move forward.✎

Endnotes

1. Eric W. Strom, *The Rivers of Mississippi: The Pearl River Basin*, available at http://ms.water.usgs.gov/ms_proj/eric/pearl.html.
2. Adam Lynch, *Pearl Wetlands Worth Saving?*, JACKSON FREE PRESS (Jackson, Miss.), June 17, 2009, available at http://www.jacksonfreepress.com/index.php/site/comments/pearl_wetlands_worth_saving_061709/.
3. *Id.*
4. Adam Lynch, *Do Lake Plans Endanger Indian Mounds?*, JACKSON FREE PRESS (Jackson, Miss.), June 2, 2009, available at http://www.jacksonfreepress.com/index.php/site/comments/do_lake_plans_endanger_indian_mounds_060209/.
5. Adam Lynch, *Pearl Wetlands Worth Saving?*, *supra* note 2.
6. Todd Stauffer, Publisher's Note, *The Changing Saga of 'Two Lakes,'* JACKSON FREE PRESS (Jackson, Miss.), May 27, 2009, available at http://www.jacksonfreepress.com/index.php/site/comments/publishers_note_the_changing_saga_of_two_lakes_052709/.
7. Adam Lynch, *Saving Two Lakes: Is it Worth it?*, JACKSON FREE PRESS (Jackson, Miss.), May 27, 2009, available at http://www.jacksonfreepress.com/index.php/site/comments/saving_two_lakes_is_it_worth_it_052709/.
8. Elizabeth Crisp, *Flood Board Weighs Reports*, CLARION-LEDGER (Jackson, Miss.), May 1, 2009, at 1B.
9. Adam Lynch, *Saving Two Lakes: Is it Worth It?*, *supra* note 7.
10. *Id.*
11. Adam Lynch, *Muscle Meets Bivalve*, JACKSON FREE PRESS (Jackson, Miss.), June 24, 2009, available at http://www.jacksonfreepress.com/index.php/site/comments/muscle_meets_bivalve_062409/.
12. 42 U.S.C. § 4321 et seq.
13. *Muscle Meets Bivalve*, *supra* note 11.

Interesting Items

Around the Gulf...



Photograph of Lake Lanier in 2007 courtesy of NOAA.

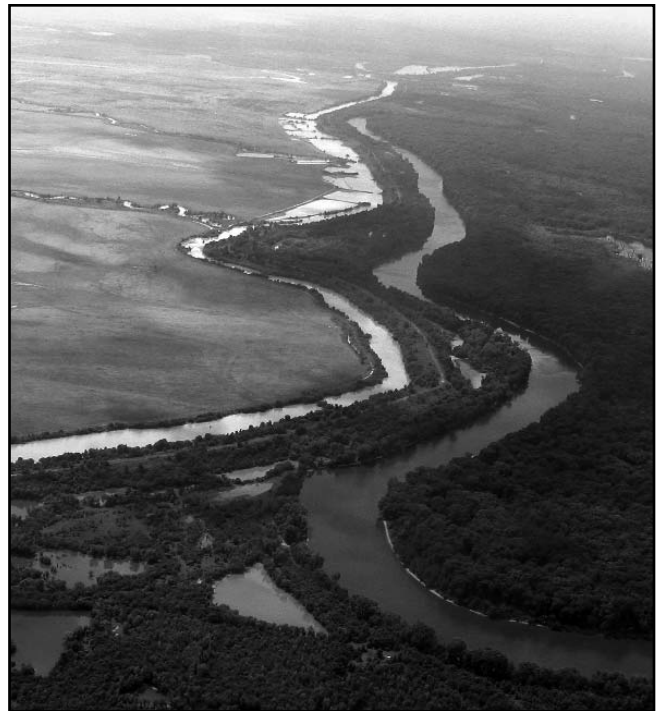
on Atlanta's water supply, the court stayed the proceedings for three years allowing time to seek congressional approval or some other resolution of the matter.

This summer, the U.S. Fish and Wildlife Service, in conjunction with the Nature Conservancy, will permanently breach a seventeen mile levee along the Ouachita River in northern Louisiana in an effort to restore the original floodplain to twenty-five square miles of the Upper Ouachita National Wildlife Refuge. In addition to restoring valuable fish and wildlife habitat, the project will reduce non-point source pollution to area waters by converting cropland to wetlands, a small but noteworthy step towards eventually reducing the Gulf of Mexico hypoxic zone. The project represents the largest floodplain reconnection plan in the Mississippi River Basin and perhaps the entire United States.

On July 9, 2009, the U.S. Army Corps of Engineers (Corps) completed construction of the Mississippi River Gulf Outlet (MRGO) closure structure and will now shift focus to ecosystem restoration projects. The Corps is currently involved in ongoing litigation over the MRGO's role in Hurricane Katrina flooding. Trial testimony before U.S. District Judge Stanford Duvall concluded in May but post trial briefing is anticipated to continue into August. 🐦

In the ongoing tri-state dispute over water withdrawals from Lake Lanier, a Florida district court ruled that the U.S. Army Corps of Engineers violated the Water Supply Act (WSA) by allocating roughly nineteen percent of the reservoir for water supply without first seeking congressional authorization. The WSA requires congressional approval for actions that seriously affect the purposes of a project or require major operational changes. The court determined that water supply was an incidental, but not authorized, purpose of the reservoir and that the Corps's support of water supply seriously affected the project's purpose of hydropower generation and downstream navigation. Recognizing the serious impacts this decision has

Photograph courtesy of USFWS.



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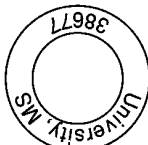
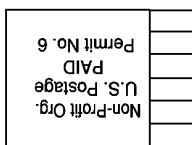
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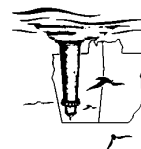
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