Panel: Section 404 of the Clean Water Act and Section 7 of the Endangered Species Act: Potential Impacts on Water Supplies [supplemental materials]

Wendy C. Weiss

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PANEL

SECTION 404 OF THE CLEAN WATER ACT
AND

SECTION 7 OF THE ENDANGERED SPECIES ACT:
POTENTIAL IMPACTS ON WATER SUPPLIES

materials submitted by

WENDY C. WEISS
ASSISTANT ATTORNEY GENERAL
NATURAL RESOURCES SECTION
STATE OF COLORADO

THE FEDERAL IMPACT
ON STATE WATER RIGHTS

Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado
June 11-13, 1984

Civ. A. No. 80-K-624.
United States District Court, D. Colorado.
July 31, 1983.

Interlocutory appeal was taken from judgment entered by the United States District Court for the District of Colorado, Kane, J., denying federal government's motion to dismiss for lack of jurisdiction proceedings challenging decision of Army Corps of Engineers that dam developers were not entitled to nationwide temporary permit to discharge sand and gravel during course of dam construction. The Court of Appeals, Seth, Chief Judge, 658 F.2d 762, affirmed. On remand, the United States District Court for the District of Colorado, Kane, J., held that: (1) Army Corps district engineer properly exercised his federal police power under the Clean Water Act and the Endangered Species Act in denying dam developers a nationwide temporary permit to discharge sand and gravel during course of construction of dam, based upon perceived adverse impact of dam's operation on whooping crane critical habitat; (2) policy statement in the Clean Water Act did not evince congressional intent to limit scope of section of the Act relating to issuance of permits for discharge of dredged or fill material into navigable waters; and (3) mere fact of Congress' approval of interstate compact relating to certain navigable waterway did not limit congressional authority to thereafter enact the Clean Water Act, even though the Act affected state water rights in manner inconsistent with the compact.

Complaint dismissed; judgment for defendant.

1. Navigable Waters =2

Waters and Water Courses =2

There are only two classes of special federal water rights: reserved rights and navigation-servitude rights.

2. Game =3½

Army Corps district engineer properly exercised his federal police power under the Clean Water Act and the Endangered Spec-
cies Act in denying earth-fill dam developers a nationwide temporary permit to discharge sand and gravel during course of construction of dam on tributary of navigable river, based upon perceived adverse impact of dam’s operation on whooping crane critical habitat some 250 to 300 miles downstream; engineer’s decision was not limited to consideration of water quality, but extended to changes in water quantity as well. Federal Water Pollution Control Act Amendments of 1972, § 404, 33 U.S.C.A. § 1344; Endangered Species Act of 1973, §§ 2 et seq., 7(a)(2), as amended, 16 U.S.C.A. §§ 1531 et seq., 1536(a)(2).

3. Health and Environment ➞ 25.7(4)

Notwithstanding congressional policy statement in the Clean Water Act, to effect that, inter alia, authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by the Act, there was no intent to limit scope of section of the Act relating to issuance of permits for discharge of dredged or fill material into navigable waters. Federal Water Pollution Control Act Amendments of 1972, §§ 101(g), 404, 510(2), 33 U.S.C.A. §§ 1251(g), 1344, 1370(2).

4. States ➞ 6

While it is true that Congress cannot unilaterally reserve right to amend or repeal an interstate compact, approving of a compact does not limit Congress’ authority later to enact federal laws.

5. States ➞ 6

Mere fact of Congress’ approval of interstate compact relating to certain navigable waterway did not limit congressional authority to thereafter enact the Clean Water Act, even though the Act affected state water rights in manner inconsistent with the compact. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.


Ward H. Fischer, James Ringenberg, Fort Collins, Colo., for Cache La Poudre Water Users Ass’n.

Kirk B. Holleyman, Aspen, Colo., for Lower South Platte Water Conservancy Dist.


MEMORANDUM OPINION AND ORDER

KANE, District Judge.

This case involves the plaintiffs’ construction of an earth-fill dam on Wildcat Creek in Colorado. Wildcat Creek is a tributary of the South Platte River, which is a tributary of the Missouri River, a navigable water of the United States. Because the construction of the dam involves the placement of fill material into a tributary of navigable waters of the United States, § 404 of the Clean Water Act, 33 U.S.C. § 1344, applies.

An interlocutory appeal was taken from my decision denying the government's motion to dismiss for lack of jurisdiction. These proceedings challenge the decision of the Army Corps' Engineer that the dam developers are not entitled to a nationwide temporary permit to discharge sand and gravel during the course of dam construction on a tributary of the South Platte River in Morgan County, Colorado. The Court of Appeals held that the decision of the Army Corps of Engineers that the dam developers were not entitled to the nationwide permit to discharge sand and gravel during the course of construction under nationwide permit regulations was reviewable. A nationwide permit is one covering a category of activities occurring throughout the country which involve discharges of dredged or fill material which will cause only minimal adverse effects on the environment when performed separately and which will have only minimal cumulative effects. Such a permit is automatic in that if one qualifies, no application is needed nor must notice be given before beginning the discharge activity.

As the Court of Appeals stated:

The basic consideration is Section 404 of the Clean Water Act (33 U.S.C. § 1344) and the regulations issued under its authority. The regulations concerned, 33 C.F.R. § 323.4–2, relate to work on the site during the course of construction of the dam, and more particularly to the placement of fill material (discharge of fill material) during construction. As indicated above, the regulations provide for automatic authority to place fill material if certain conditions are met. The regulations do not expressly provide that the Engineer is the one to decide whether the conditions are met and that automatic (nationwide) authority thereby exists. In any event, the Engineer did make such a determination. He decided and advised the plaintiffs that they did not qualify for an automatic permit. He reached a decision and officially advised the plaintiffs. His letter to the parties was as follows:

"Dear Mr. Douglas:

Reference is made to our previous meetings and discussions regarding the Nationwide Section 404 permit for the Wildcat Creek Dam project.

Since operation of the proposed reservoir could have an adverse impact on an endangered species (whooping crane), by letter dated 15 September 1978 my predecessor, Colonel James W. Ray, entered into consultation with the US Fish and Wildlife Service.

"Inclosed is a copy of the biological opinion for the project which indicates that the operation of the reservoir is likely to jeopardize continued existence of the whooping crane and adversely modify a 53-mile reach of the Platte River which is critical habitat for the crane. Accordingly, construction of the proposed dam does not qualify for 'Nationwide' authorization within the meaning of 33 C.F.R. 323.4–2(a)(1) unless you exercise one of the two alternatives outlined in the biological opinion.

"Should you elect to proceed with construction of the dam, an individual permit processed through the full public interest review will be required." Riverside Irrigation District v. Stipo, 658 F.2d 762 at 765–66.

It is thus clear that the Engineer did not base his decision on the issue of whether the placement of fill material during the construction of the dam would have an adverse effect on the environment but rather on whether the operation of the dam and the altered water flow would have an adverse impact on an endangered species whose critical habitat exists some 250 to 300 miles downstream. Both the Court of Appeals and the parties before me have assumed without contest that no problems would arise during construction. Virtually no one asserts that the construction work itself will in any way effect the crane habitat. Thus, the issue is whether the Engineer has exceeded his statutory authority. The Court of Appeals remanded the case to me "... for a determination whether the Engineer acted within his authority and to resolve whatever issues may remain."
A new twist has been added to this case since the opinion of the Court of Appeals. The Corps of Engineers, through Colonel Andrews who is Colonel Stipo's successor in office and in this litigation, has now attempted to require plaintiffs to apply for an individual permit pursuant to 33 C.F.R. § 323.4-4. A new and more detailed biological opinion was received in April 1982. Relying on that opinion and this other regulation, Colonel Andrews sent a letter in June 1982 ordering the plaintiffs to file for the individual permit. Moreover, Andrews contends that this act cannot be reviewed by the courts because 5 U.S.C. § 701(a)(2) precludes review when “agency action is committed to agency discretion by law.”

Andrews acknowledges that this is a very narrow exception, but argues that in this instance he acted affirmatively to carry out his obligation under a clear mandate of the Endangered Species Act. He asserts that the only limit on his authority under 33 C.F.R. § 323.4-4 is that exercise of authority must be based on the concerns of the aquatic environment. Therefore, he urges, there is no legal standard for the court to apply. He further asserts that the case is now moot.

The plaintiffs argue that the issue was, and still is, whether defendant has exceeded his authority under § 404 of the Clean Water Act by considering the downstream effects of the reduced flow on the whooping crane habitat in Nebraska. The case still boils down, they say, to a question of whether the defendant can consider quantity or just quality of the water and, consequently, whether the investigation can include the effects of continuing operation within the ambit of the statutory mandate to consider the construction itself. Plaintiffs contend, and I agree, that when Congress enacted the Clean Water Act, it did not intend to cut off judicial review.

Plaintiffs urge that even if their analysis is restricted to the issues as characterized by the defendant, the decision is still subject to review. The defendant states in his brief that 33 C.F.R. § 323.4-2 embodies “Congressional limitations on his discretion-

Neither of these is involved in this case. The plaintiffs attempt to characterize the defendant's actions as an attempt to create a third class of federal water rights, superseding Colorado water law and the South Platte Compact, 44 Stat. 195 (1928). The Tenth Circuit also apparently viewed the issue in this manner in its opinion:

No one in these proceedings asserts that the construction work on the dam nor the placement of fill material will in any way affect the crane habitat.

Thus again the issue is reduced to the Engineer's statutory authority to control of the quantity of water released. Thus there is for all practical purposes nothing else.

Following this characterization, the plaintiffs correctly point out that congress has had a long-standing deference to state water law, see, e.g., California v. United States, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978), and that the Clean Water Act does not evidence a contrary intent in this case. Basically, they make these arguments:

1. Section 404 of the Clean Water Act is only directed at water-quality changes caused by the discharge of fill materials, and therefore does not apply to changes in water quantity caused by such discharge;

2. Section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g), demonstrates congress's intent not to affect in any substantial manner state water rights;

3. Congress could not affect state water rights in any manner inconsistent with the South Platte Compact.

Although these arguments have a superficial appeal, a more-careful analysis reveals that all are without merit. The first is clearly contrary to all of the applicable case law. The second is contrary to § 101(2) of the Clean Water Act, 33 U.S.C. § 1370(2). Finally, the third is refuted by Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1856).

Rather than characterize the defendant's actions as the creation of a new class of federal water rights, a better approach is to determine whether his actions were a proper exercise of a federal police power.

Because the plaintiffs do not dispute that the Clean Water Act was a proper exercise of congress's constitutional authority, the only question in this case is whether the defendant's actions were proper under the Clean Water Act. Analysis should therefore focus on the scope of the defendant's authority under the Clean Water Act, rather than on an emotional flummery of states' rights. Although the defendant's actions may have a substantial effect on state water rights, such is the case with many federal laws which particularly preempt state water laws. For example, a congressional designation of a river as wild or scenic under the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287, will bar most dams and other diversion works from being constructed on the designated section, often limiting the exercise of state water rights. Yet this act has not been successfully challenged as an improper intrusion on state water rights.

1. Scope of defendant's authority and obligations under § 404

[2] Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), provides, in relevant part:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, ... by such agency ... is not likely to jeopardize the continued existence of any endangered species ... or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, ... , to be critical.

In TVA v. Hill, 437 U.S. 153, 173, 98 S.Ct. 2279, 2291, 57 L.Ed.2d 117 (1978), the court stated:

One would be hard pressed to find a statutory provision whose terms were any
plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of an endangered species ..." [Emphasis added.]
This language admits of no exception.

While the Endangered Species Act does not expand the scope of federal agencies' authority, its clear language "shall insure" directs them to exercise their authority under other statutes to the fullest extent possible to carry out its aims. The question in this case is therefore whether the defendant's actions here, denial of plaintiffs' use of the nationwide permit because of potential deleterious downstream effects, was permissible under the Clean Water Act. If defendant's action was permissible under the Clean Water Act, then it was required under the Endangered Species Act.

Both parties spend considerable effort trying to distinguish between "direct" and "indirect" and between "primary" and "secondary" effects caused by the plaintiffs' project. Obviously it is usually not possible to draw a definite line between these different types of efforts. The case law, however, is clear that federal agencies are to consider many potential effects from a project on an endangered species. For example, in TVA v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), the court held that the defendant federal agency had to consider the effects caused by water that would back up from its dam, not just the direct physical impacts of the dam. In NWF v. Coleman, 529 F.2d 359, 373 (5th Cir.1976), cert. denied under Boteler v. NWF, 429 U.S. 979, 97 S.Ct. 489, 50 L.Ed.2d 587 (1976), the court reversed a trial court dismissal of an environmental group's complaint that a proposed highway would damage an endangered species' habitat:

Although it is clear that the crane can survive the direct loss of 300 acres of habitat, the evidence, ... shows that it is questionable whether the crane can survive the additional loss of habitat caused by the indirect effects of the highway, coupled with the excavation of and drainage caused by borrow pits.

Principal among the indirect effects of the highway on the crane is the residential and commercial development that can be expected to result from the construction of the highway.

This is consistent with North Slope Borough v. Andrus, 642 F.2d 589, 608 (D.C.Cir.1980), where the appellate court adopted the district court's holding that, under the Endangered Species Act, caution can only be exercised if the agency takes a look at all the possible ramifications of the agency action. To the extent authorized by the Clean Water Act, the defendant therefore is required to consider indirect effects of the dams on the whoopers and their habitat.

Several courts have held that the Clean Water Act should be construed broadly to encompass deleterious environmental effects of projects. For example, in MInnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 625-26 (8th Cir.1979), the court held that § 404 extended beyond adverse water-quality effects of projects to include potential physical effects on navigable waters caused by the discharge of chemically benign fill material.

Two district courts have held that the depletion of water, off of the project's site, is an effect that must be considered in determining whether to allow the project under § 404 of the Clean Water Act. In United States v. Fleming Plantations, 12 ERC 1705, 1709 (E.D.La.1978), the court granted the plaintiff's application for an injunction barring the defendants' construction of a levee that would have caused a tract of wetlands to dry up. In Nebraska v. are in dispute. If there is actually a dispute on the actual effect that the dam will cause on the whooper habitat, that will have to be resolved through the individual permit process under § 404(a); the nationwide permit does not provide for such a factual inquiry.
First, congressional policy statements "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly stated purpose." Connecticut Light & Power Co. v. Federal Power Commission, 324 U.S. 515, 527, 65 S.Ct. 749, 754, 89 L.Ed. 1150 (1945). Here § 510(2) of the Act, 33 U.S.C. § 1370(2), which is not a policy statement, provides,

Except as expressly provided in this chapter, nothing shall . . . be construed as impairing or in any manner affecting any right of jurisdiction of the States with respect to the waters . . . of such States. [Emphasis added.]

Because both the statements of § 101(g)'s sponsor and the relevant committee report state that § 101(g) was not intended to change existing law, including § 510(2), congress did not intend to limit § 404's scope where it might affect state water-rights law when it enacted § 101(g).

The plaintiffs' argument is further diminished because the defendant's actions did not abrogate or supersede any state water rights. As discussed above, the defendant only placed conditions on the construction of the dam that might affect the plaintiffs' water rights. While the defendant is barring the plaintiffs from exercising their water rights in a manner inconsistent with federal law, he is not taking away the rights. They may still be utilized, so long as in a manner consistent with federal law.

3. Applicability of the South Platte Compact

[4, 5] The plaintiffs' final argument is that the defendant's action was improper because of the South Platte Compact, 44 Stat. 195 (1928). They argue that congress could not pass a clean water act that would impair this previously approved compact. This argument should be rejected. It is true that congress cannot unilaterally reserve the right to amend or repeal an interstate compact. Tobin v. United States, 306 F.2d 270, 273 (D.C.Cir.1962). This does not
mean, however, that approving a compact limits congress’s authority later to enact federal laws. In Pennsylvania v. Wheeling, supra, the court held:

The question here is, whether or not the compact can operate as a restriction upon the power of congress under the constitution to regulate commerce among the several states? Clearly not. Otherwise congress and two States would possess the power to modify and alter the constitution itself.

A subsequent federal law of nationwide applicability will therefore be enforceable even if it affects a prior compact. Congress therefore did not limit its authority to enact the Clean Water Act when it approved the South Platte Compact.

CONCLUSION

Resolution of this case depends largely on its characterization. If the case is characterized as an attempt by the defendant to condemn the plaintiffs’ Colorado water rights, then the plaintiffs’ should obviously prevail. On the other hand, if the case is characterized as an attempt by the defendant to exercise federal police power in a manner required by federal statutes, then the defendant should prevail, even if his actions affect the plaintiffs’ exercise of their water rights. For the reasons set out above, I believe that the latter characterization is preferable, and that the defendant’s actions were a proper exercise of federal police power, even though they will clearly affect the plaintiffs’ exercise of their water rights. I must limit my decision to the propriety of the exercise of such power. Whether it is prudent to vest such power is a political question which must be addressed to congress not the courts.

In accordance with the mandate of the Court of Appeals, I hold that the Engineer acted within his authority.

IT IS ORDERED that plaintiffs complaint is hereby dismissed. Judgment shall enter for defendant. Each party to bear his own costs.

Thomas A. FISKE, Alison Beckley, Roshaanda Blackwell, Garrett D. Brown, Milton T. Chee, Judith A. Coren, Christopher P. Hoeppner, Andree S. Kahlmorgen, Robert R. Lutton, Jeffrey L. Martin, Michael Pennock, Jeffrey E. Rogers, Jean R. Savage, Sally L. Thorsen and Gregory J. Zensen, Plaintiffs,
v.


Civ. A. No. C82-2061A.

United States District Court,
N.D. Georgia,
Atlanta Division.
Aug. 1, 1983.

Former employees brought action against employer alleging that their discharge was due to their political activities. Employer moved for summary judgment. The District Court, Robert H. Hall, J., held that: (1) civil rights statute prohibiting conspiracies to deprive persons of rights or privileges did not reach politically-motivated conspiracies, and (2) claim that employer breached collective bargaining agreement by discharging employees was barred by six-month period of limitations.

Motion granted.

1. Conspiracy ⇔ 7.7

Under civil rights statute prohibiting conspiracies to deprive persons of rights or privileges, requirement that accused act under color of law does not mean that he must be officer of the state. 42 U.S.C.A. § 1985(3).

2. Conspiracy ⇔ 7.7

Complaint alleging that employer violated civil rights statute prohibiting con-
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Cases No. 83-2114, 83-2115, 83-2119, 83-2230

HOWARD K. PHILLIPS
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JOHN KANE

OPENING BRIEF OF PLAINTIFF-INTERVENOR-APPELLANTS
STATE OF COLORADO, NORTHERN COLORADO WATER CONSERVANCY
DISTRICT, COLORADO RIVER WATER CONSERVATION DISTRICT,
SOUTHWESTERN WATER CONSERVATION DISTRICT, AND
LOWER SOUTH PLATTE WATER CONSERVANCY DISTRICT

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Conservancy District
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INTEREST OF PLAINTIFF-INTERVENOR-APPELLANTS

The State of Colorado is a prior-appropriation water law state which, since Statehood in 1876, has developed and fostered a complex system for the allocation and administration of water rights for beneficial use. See, e.g., C.R.S., Title 37, Articles 40 through 92. The Colorado Water Conservation Board, a state agency, is authorized to appropriate unappropriated waters for instream flow purposes, to preserve the natural environment to a reasonable degree. C.R.S. § 37-92-102(3); Colorado River Water Conservation District v. Colorado Water Conservation Board, 197 Colo. 469, 594 P.2d 570 (1979). The State also maintains an active water quality control program for the protection of beneficial uses. C.R.S. § 25-8-101, et seq. The State's Water Quality Control Act provides that the State's water quality control laws shall not be interpreted "so as to supersede, abrogate, or impair rights to divert water and apply water to beneficial uses . . ." C.R.S. § 25-8-104.

The Northern Colorado Water Conservancy District, established in 1937, was the first district to be organized under the provisions of Colorado's Water Conservancy Act, C.R.S. § 37-45-101 et seq. Conservancy districts are political subdivisions and quasi-municipal entities of the State of Colorado created for the development of water supplies for beneficial use. See People ex. rel. Rogers v. Letford, 102 Colo. 284, 79 P.2d 274 (1938). The boundaries of the Northern Colorado Water Conservancy District in seven counties of northeastern Colorado include Colorado's front range from Boulder to Fort Collins out to Greeley and down the South Platte River from Platteville to the State line.

The Lower South Platte Water Conservancy District is, likewise, a water conservancy district originally organized under Colorado's Water Conservancy Act. The Lower South Platte District overlaps the boundaries of the Northern Colorado Water Conservancy District along the South Platte River east of Fort Morgan to the State
line. There are now forty-six water conservancy districts in the State of Colorado. See C.R.S. § 37-45-153.

The Colorado River Water Conservation District is a public body corporate created in 1937 by an Act of the Colorado Legislature, C.R.S. § 37-46-101 et seq. The River District covers all of twelve and parts of three other counties on the western slope of the Continental Divide. The River District, the first of the water conservation districts established by the Colorado legislature, was created for the purpose of developing, using, and conserving the water resources of the Colorado River and its principal tributaries, and safeguarding for Colorado all water to which the State of Colorado is equitably entitled under the Colorado River Compact.

The Southwestern Water Conservation District is a public body corporate created under the laws of Colorado by the state legislature in 1941 (C.R.S. § 37-47-101 et seq.) and comprises all of six and parts of three other counties in southwestern Colorado. This District was formed for the purpose of conservation, use and development of the water resources of the San Juan and Dolores Rivers and their tributaries in southwestern Colorado.

All of these plaintiff-intervenor-appellants are governmental entities and have a direct and substantial stake in the outcome of this lawsuit with regard to water projects which they intend to pursue under their statutory authorities, or which water users within their boundaries intend to pursue, in the future. Each of these projects will undoubtedly require a 404 permit from the Corps of Engineers. ..

STATEMENT OF ISSUES

1. Did Congress intend, in section 404 of the Clean Water Act, to authorize the United States Army Corps of Engineers to regulate the beneficial consumptive use of water under a state-created water right?
2. Does section 7 of the Endangered Species Act empower the Corps to regulate the exercise of a state-created water right solely because the water to be put to beneficial consumptive use will be stored behind a dam, the construction of which requires a permit under section 404?

STATEMENT OF FACTS

We adopt the statement of facts contained in the opening brief of Riverside Irrigation District and Public Service Company ("plaintiffs").

SUMMARY OF ARGUMENT

This case involves the proper construction of section 404 of the Clean Water Act, 33 U.S.C. § 1344, and section 7 of the Endangered Species Act, 16 U.S.C. § 1536. The issue is simply this: in determining whether the plaintiffs were entitled to rely on a nationwide 404 permit to discharge dredged or fill material in connection with the construction of the Wildcat Dam and Reservoir, did the Army Corps of Engineers have authority to impose conditions, or require the plaintiffs to obtain an individual permit, solely because of depletion effects that will allegedly occur downstream as a result of the exercise of plaintiffs' water right, i.e., the placing of water to beneficial consumptive use?

In recent years, heated controversy has arisen between the western states and various federal agencies over the extent to which Congress has intended to defer to state authority with respect to the allocation and use of water. This controversy erupted over the proper interpretation of section 8 of the Reclamation Act of 1902, California v. United States, 438 U.S. 645 (1978), and again over whether water was reserved from appropriation under state law to maintain instream flows for recreation, aesthetic, and wildlife preservation purposes when the national forests were created, United States v. New Mexico, 438 U.S. 696 (1978). In both cases, the Supreme Court gave careful
consideration to "the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." United States v. New Mexico, supra, 438 U.S. at 701-702. That history was extensively reviewed in California v. United States, in which the court concluded that "through it runs the consistent thread of purposeful and continued deference to state water law by Congress." 438 U.S. at 653.

Now this controversy has again arisen, because the Corps asserts that Congress, in the Clean Water Act, intended to have the Corps consider and place conditions upon the exercise of water rights, in order to "mitigate" downstream impacts of water depletions.

In section 101 of the Clean Water Act (commonly known as the "Wallop Amendment") Congress stated that nothing in the Act shall be construed to "supersede," "abrogate," or "impair" the "authority of each state to allocate quantities of water within its jurisdiction", or "to supersede or abrogate rights to quantities of water which have been established by any state," 33 U.S.C. § 1251(g). In light of this legislative declaration, which reaffirmed Congress' historical policy of "cooperative federalism" in the area of water allocation, the District Court was wrong to conclude that Congress intended to grant the Corps authority in section 404 to regulate all "deleterious downstream environmental effects from a project," including effects wholly attributable to beneficial consumptive use of water, Riverside Irrigation District v. Andrews, 568 F. Supp. 583, 589 (D. Colo. 1983).

The district court's complete disregard for Congressional deference to state water allocation systems is reminiscent of a recent decision by the Ninth Circuit Court of Appeals holding that water was a "valuable mineral" and, therefore, locatable under federal mining laws. The United States Supreme Court promptly reversed, stating:

... the court below decided that "it would be incongruous ... to hazard that Congress was not aware of the necessary glove of water for the hand of mining." 553 F.2d
at 1216. Congress was indeed aware of this, so much aware that it expressly provided a water rights policy in the mining laws. But the policy is a "passive" one. . . . Congress three times (in 1866, 1870, and 1872) affirmed the view that private water rights on federal lands were to be governed by stated and local law and custom. It defies common sense to assume that Congress, when it adopted this policy, meant at the same time to establish a parallel federal system for acquiring private water rights, and that it did so sub silentio through laws designed to regulate mining. In light of the 1866 and 1870 provisions, the history out of which they arose, and the decisions construing them in the context of the 1872 law, the notion that water is a "valuable mineral" under the law is simply untenable.


The district court recognized that the Endangered Species Act does not expand the scope of the Corps' authority under section 404 of the Clean Water Act. But the court erred when it determined that the Corps may regulate the effects of stream depletions. The 404 permit program is not a water quantity regulatory program. Section 7 of the Endangered Species Act is triggered only by "actions" which are "authorized," "funded," or "carried out" by federal agencies. Here the only federal nexus is the requirement that a water quality permit be obtained. Since the Corps had no authority to regulate the exercise of privately held water rights, the Endangered Species Act simply does not reach the alleged depletive effects of the beneficial consumptive use of water. In such circumstances, the proper way for the federal government to provide for the conservation of an endangered species, including its water needs, is through sections 4 and 5 of the Endangered Species Act.

I. THE ESSENCE OF RIVERSIDE'S WATER RIGHT IS TO PUT WATER TO A BENEFICIAL CONSUMPTIVE USE, THEREBY DEPLETING STREAM FLOW

Colorado is typical of the states of the semi-arid west, in which unique water supply problems compelled the rejection of the riparian doctrine of water rights, in
favor of a water allocation system better suited to regional needs. See, e.g., Clark v. Nash, 198 U.S. 361, 370 (1905).

Water law in Colorado is based upon the principal of prior appropriation under which:

the first person who acts toward the diversion of water from a natural stream and the application of such water to a beneficial use has the first right, provided he diligently continues his enterprise to completion and beneficially applies the water. The rights of subsequent appropriations are subject to rights already held in the stream.

Hinderlider v. La Plata River and Cherry Creek Ditch Company, 304 U.S. 92, 98 (1938); see also Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

All waters in and tributary to natural surface streams are available for appropriation for beneficial uses in Colorado, subject only to the prior rights of other appropriators and compact allocations. Id.; Colo. Const. Art. XVI, Secs. 5 and 6. As the Colorado Supreme Court has said: "The value of a water right is its priority and the expectations which that right provides." Navajo Development Company v. Sanderson, 655 P.2d 1374, 1380 (Colo. 1982). The very essence of a water right under Colorado law is to deplete the available supply of the stream in accordance with one's priority.

It is fundamental to the prior appropriation doctrine that one who appropriates water in priority may consumptively use water and is not required to provide replacement water for junior water users. See, e.g., Weibert v. Rothe Brothers, 200 Colo. 310, 618 P.2d 1367 (1980). In contrast, one who wishes to divert water out of priority must provide replacement water necessary to meet the lawful requirements of senior appropriators. See C.R.S. §§ 37-92-103(9), 37-92-305(5), 73-92-305(8); Cache La Poudre Water Users Assoc. v. Glacier View Meadows, 191 Colo. 53, 550 P.2d 288 (1976); Kelly Ranch v. Southeastern Colorado Water Conservancy District, 191 Colo. 65, 550 P.2d 297 (1976).
Water may be impounded behind a dam only under a water right which is in
priority.1/ See C.R.S. § 37-87-101. At all other times, a dam must allow the stream to
flow undiminished to satisfy senior water rights downstream. See C.R.S. § 37-84-117,
§ 37-87-119. Furthermore, the division engineer has the authority to order the release
from storage of any water that he finds has been illegally stored, and also to make such
orders as are necessary to insure that such released waters are delivered to the
appropriators who are entitled to them. C.R.S. § 37-92-502(3). The state engineer and
division engineer have authority to order the removal of any dam which restricts or
impedes the flow of water to water users of the state. C.R.S. § 37-92-502(7).

Riverside has obtained a decreed water right under state law which entitles
it to store water in priority and put the water to beneficial consumptive use, thereby
reducing downstream flow.2/ But the United States seeks to place conditions on the
exercise of this water right — conditions which are based on the consumptive use of
water quantities, not on the impacts of the discharge of dredged or fill material.

The position of the United States in this case undermines the efforts of
Congress and the courts to resolve interstate disputes over the allocation of water. The
scarcity of water in the west has led to conflicts between the states, sometimes
culminating in litigation, over the allocation of interstate surface waters. Colorado has
been a party to several equitable apportionment adjudications. See, e.g., Kansas v.

1/ An exception to this rule is that Colorado law allows water to be stored out-of-
priority where the water stored can be made promptly available to downstream senior
storage appropriators in case they are unable to obtain their entire appropriative water
supply. C.R.S. § 37-80-120(1). This maximizes the beneficial use of runoff waters that
otherwise might be lost to the State.

2/ Riverside holds a valid, vested water right under Colorado law. See C.R.S.
§ 37-92-103(6); C.R.S. § 37-92-301 through 306; Rocky Mountain Power Company v.
White River Electric Association, 151 Colo. 45, 376 P.2d 138 (1962); Mooney v. Kuiper,
Congress has been willing to let the states settle their differences over water rights through mutual agreement, and the Supreme Court has encouraged them to do so. See Sporhase v. Nebraska, 458 U.S. 941, 102 S. Ct. 3456, 3466 (1981). Accordingly, Colorado has entered into nine Congressionally-approved interstate compacts to apportion the waters of interstate streams.3/ 

The states of Colorado and Nebraska entered into the South Platte River compact to apportion between themselves the right to use the full flow of the South Platte River and its tributaries. See C.R.S. § 37-65-101. Congress ratified the compact without qualification, 44 Stat. 195 (1926).

The South Platte River compact provides, in Article IV, that, between October 15 of any year and the first day of April of the following year, Colorado shall have the full and uninterrupted use and benefit of the water of the river flowing within the boundaries of Colorado. Between April 1 and October 15 of each year, Colorado appropriators having adjudicated dates of priority subsequent to June 14, 1897, may not be supplied with water to an extent that will diminish the flow of the river at the interstate station below a mean flow of 120 cubic feet of water per second of time; Colorado water users may appropriate and use all flows in excess of this amount.

3/ The South Platte River Compact (44 Stat. 195), the Colorado River Compact (42 Stat. 171), the Upper Colorado River Basin Compact (63 Stat. 31), the Amended Costilla Creek Compact (77 Stat. 350), the Arkansas River Compact (63 Stat. 145), the Republican River Compact (57 Stat. 86), the Rio Grande River Compact (53 Stat. 785), the La Plata River Compact (43 Stat. 796), and the Animas-La Plata Project Compact (82 Stat. 885). C.R.S., Title 37, articles 61 through 69.
Although the South Platte River is over-appropriated during most times of the year, see Wadsworth v. Kuiper, 193 Colo. 95, 562 P.2d 1114 (1977), Colorado still allows more water to flow across its border into Nebraska than is required by the compact, mainly during spring high water conditions. This situation continues because adequate facilities do not presently exist in Colorado to capture and store excess water, within the compact allocation, particularly in the spring and early summer months when flow can exceed the exercise of current rights. See Wyoming v. Colorado, supra, 259 U.S. at 458 (where the Court observed that the Cache la Poudre River, an important tributary of the South Platte along Colorado's north front range, produces the bulk of its water yield in the months of May, June, and July); Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 722 (1973) (for a general discussion of the problem).

As the Colorado Supreme Court has said, it is "a basic principle of western irrigation that conservation and maximum usage demand the storage of water in times of plenty for use in times of drought." A-B Cattle Company v. United States, 196 Colo. 539, 545, 589 P.2d 57, 61 (1978). The project proposed by Riverside and Public Service Company will serve just this purpose; the reservoir will capture excess flows from snowmelt or precipitation for application to beneficial consumptive uses in Colorado, within Colorado's allocation under the South Platte River Compact. Now the United States claims that it may prevent Colorado from making full use of its compact allocation if the Fish and Wildlife Service ("FWS") perceives that Colorado water users upstream will deplete the stream in Nebraska in a way which that agency deems unacceptable.

The Corps and National Wildlife Federation may argue that Colorado's ability to make use of its compact allocation is not impaired. However, the first biological opinion prepared by FWS and adopted by the Corps, which gave rise to this lawsuit, required that certain amounts of water stored under the Wildcat Reservoir water
right must not be stored or must be released from storage into Nebraska as a condition to utilization of the nationwide 404 permit. Administrative Record (Vol. VIII) p. 248. The bypass or release of water was required during the spring and early summer months when the plaintiffs would exercise the Wildcat Reservoir water right. FWS said the water was needed to "scrub" out vegetation in the river channel, so predators would not sneak up and prey on the whooping cranes.

During proceedings in the district court, a new biological opinion appeared, which the Corps also adopted. Administrative Record (Vol. III), p. 329. In the second opinion, FWS concluded that it is unlikely that the Wildcat Project "could contribute in a meaningful way" to providing "scouring flows" at the whooping crane habitat. Instead, FWS proposed conditions involving the mechanical clearing of vegetation in Nebraska. Administrative Record (Vol. VIII), p. 349.

Under either opinion, construction of the Wildcat Project could not proceed under the nationwide permit unless Riverside acceded to certain conditions which are required solely because of the alleged depletive effects of putting a water right to beneficial consumptive use. Thus, the scope of the Corps' jurisdiction under section 404 is still the central issue of this case.

Moreover, the second biological opinion makes it clear that the Corps intends to continue regulating the amount of consumptive use of water in the South Platte Basin:

As we stated earlier, the size of the project and its location relative to the crane habitat makes [sic] it unlikely that the project could contribute in any meaningful way to help accomplish a reorientation of the timing of the flows in the basin. Flow releases and other compensating measures may be recommended in future projects on a case by case basis as more information becomes available.

Administrative Record (Vol. VIII), p. 350 (emphasis added).
Every acre foot of water which a water user must bypass or release from storage for some other use is an acre foot lost to beneficial use under his water right. Simply put, the Corps, at the urging of FWS, intends to limit or condition the beneficial consumptive use of water which can be made by Colorado water users and to reallocate water uses between the states of Colorad and Nebraska.

II. CONGRESS DID NOT INTEND, IN SECTION 404 OF THE CLEAN WATER ACT, TO AUTHORIZE THE CORPS TO REGULATE THE CONSUMPTIVE USE OF WATER DUE TO THE EXERCISE OF STATE-CREATED WATER RIGHTS.

The issue here is congressional intent. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 316 n.11 (1982); E.I. Du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138 (1977). The history of federal-state water relations has been marked by deference to the states. The two most prominent instances where Congress has not deferred to the states are the navigation servitude and the reserved rights doctrine, neither of which is involved here. See California v. United States, supra, 438 U.S. at 662; United States v. New Mexico, supra, 438 U.S. at 698. In enacting section 404 of the Clean Water Act, Congress intended to defer to the states' traditional authority to allocate quantities of water and to make consumptive use of water within their boundaries.

A. The plain language of section 404 limits the Corps' jurisdiction to effects of discharging dredged or fill material into the aquatic environment; this does not include the effects of making beneficial consumptive use of water under a water right.

The starting point in every case of statutory construction must be the language of the statute itself. Watt v. Alaska, 451 U.S. 259, 265 (1981). Section 404 of the Clean Water Act provides, in relevant part:

(a) The Secretary [of the Army] may issue permits, after notice and opportunity for public hearing for the discharge of dredged or fill material into the navigable waters at specified disposal sites...
(c) The Administrator [of the Environmental Protection Agency] is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

(e)(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.


While the plain-meaning rule may be better described as "an axiom of experience than as a rule of law," Watt v. Alaska, supra, 451 U.S. at 266, except in "rare and exceptional circumstances," judicial inquiry is complete when the terms of a statute are unambiguous. Rubin v. United States, 449 U.S. 424, 430 (1981). No rare and exceptional circumstances are present in this case which would justify departing from the plain meaning of the statute.
The clear and unambiguous language of each pertinent subsection of section 404 focuses on the adverse effects of the discharge of dredged or fill material at a specified disposal site. For example, section 404(a) gives the Secretary of the Army authority to issue permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." And section 404(c) authorizes the administrator of the Environmental Protection Agency, upon complying with certain conditions, to withdraw any defined area as a disposal site if "the discharge of such materials into such area will have an unacceptable adverse effect" on the aquatic environment.

Nothing in section 404 purports to authorize the Secretary of the Army or the EPA administrator to determine that a project does not qualify for a nationwide permit where the discharge per se will have no adverse environmental impact. Here, the United States has conceded that the discharge will not create any problem; rather, the alleged adverse effects occur when Riverside stores and makes beneficial use of water under its water right.

B. The legislative history of section 404 shows that Congress intended to regulate only the adverse effects of discharges of pollutants and degradation of disposal sites.

The legislative history of the 1972 Federal Water Pollution Control Act Amendments and the 1977 Clean Water Act demonstrates that Congress did not intend the Corps to use section 404 to regulate the exercise of water rights.

Senator Muskie, a prime sponsor of the 1972 and 1977 federal water quality control legislation, summarized the scope of the 404 program as follows:

Third, prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.
The Conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed. At the same time, the Committee did not believe there could be any justification for permitting the Secretary of the Army to make determination as to the environmental implications of either the site to be selected or the specific spoil to be disposed of in a site. Thus, the Conferees agreed that the Administrator of the Environmental Protection Agency should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.


Plainly, Congress was concerned about site-specific, pollution-related impacts of the placement or disposal of dredged or fill material. The 1977 Clean Water Act Amendments did not change the scope of section 404. During the 1977 debate, Senator Muskie read with approval a letter from Senator Bumpers which described section 404 as a program whereby the EPA Administrator could "prohibit or restrict the use of any disposal site for dredged or fill material if he determines that the discharge of such materials at that site will have an unacceptable adverse effect on municipal water supplies" and similar values. Senate Debate on Conference Committee Report on H.R. 3199 (December 15, 1977), Vol. 3, A Legislative History of the Clean Water Act of 1977 at 472 (emphasis added) (hereinafter, 1977 Legislative History).

Senators Muskie, Hart, and Stafford emphasized that dredging up materials already placed in the waters could release embedded toxic pollutants into the waterways and that control of such releases falls within section 404. Vol. 4, 1977 Legislative History at 908-909, 911, 928.

In the very recent case of Reid v. Marsh, 20 E.R.C. 1337 (N.D. Ohio 1984), the court considered whether section 404 was intended to regulate dredging per se, or...
was intended to regulate dredging "only to the extent that it constitutes a 'discharge of
dredged material'." Id. at 1342. Based upon the language of section 404, the legislative
history, and the remarks of commentators, the court concluded that the Corps' jurisdiction is limited under section 404 to discharges of dredged or fill material, and that "the Corps should evaluate only the effect of discharges resulting from dredging activities and not the ultimate effect of proposed channel modification." Id. (emphasis added). While the court found that the dredging activities involved were subject to the Corps' jurisdiction under section 404, it stated that "[t]his jurisdiction . . . does not give the Corps authority to regulate the actual deepening and widening of the channel (i.e. the dredging per se)." Id.

It is no longer subject to reasonable debate that section 404 was also intended to protect wetlands:

Section 404 of the Federal Water Pollution Control Act Amendments of 1972 required a permit program to control the adverse effects caused by point source discharges of dredged or fill material into the navigable waters including: (1) the destruction and degradation of aquatic resources that results from replacing water with dredged material; and (2) the contamination of water resources with dredged or fill material that contains toxic substances.

The committee amendment is designed to reaffirm this intent and dispel the wide-spread fears that the program is regulating activities that were not intended to be regulated.


The cases that have construed the Corps' authority to protect wetlands have all involved the discharge of dredged or fill material into wetlands and consequent environmental degradation in the vicinity of the disposal site. See United States v. Fleming Plantations, 12 E.R.C. 1705 (E.D. La. 1978); Deltona Corp. v. United States, 657
In Save Our Wetlands v. Sands, 711 F.2d 634 (5th Cir. 1983), however, the Fifth Circuit upheld the Corps' decision not to require a 404 permit for the clearing of trees and other vegetation in a wetland. The court distinguished Avoyelles on the ground that the work contemplated in that case was more extensive and would have destroyed the wetland, whereas the wetland in Save Our Wetlands was not going to be converted to dryland.

As the Eighth Circuit recognized in a case which held that Congress intended the construction of dams and the placement of riprap to come within the purview of section 404, this permit program is also "intended to control the degradation of aquatic resources that results from any replacement of water with fill material." Minnehaha Creek Watershed District v. Hoffman, 597 F.2d 617, 627 (8th Cir. 1979) (emphasis added).

This is not a wetlands case. Here the Corps asserts that section 404 can be expanded into a general mandate to prevent or restrict downstream flow depletions caused by the exercise of state created water rights. The language and legislative history of section 404 refute that assertion.

C. Long-standing Congressional deference to state water law should not be disregarded absent a clear expression of legislative intent.

In construing section 404 of the Clean Water Act, this Court should give effect to the long history of federal-state relations involving the allocation of water in the arid western states. As observed by the Supreme Court, "Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." United States v. New Mexico, supra, 438 U.S. at 702; See also Andrus v. Charlestone Stone Products Co., supra. The
basis for this deference is the unique water law which developed in the West. Clark v. Nash, supra; see also United States v. Gerlach Live Stock Company, 339 U.S. 725, 745-748 (1950).

This federal deference to state water law began with the Mining Act of 1866, 14 Stat. 251, by which Congress recognized and acknowledged the doctrine of prior appropriation on the western public lands. United States v. Gerlach Live Stock Company, supra, 339 U.S. at 747-748. The Desert Land Act of 1877 similarly protected locally recognized appropriative rights. 19 Stat. 377. In the case of Broder v. Natoma Water and Mining Company, 101 U.S. 274, 276 (1879), the Supreme Court pointed out that local appropriation rights were "rights which the government had, by its conduct, recognized and encouraged and was bound to protect." See generally California v. United States, supra, and United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982), for a recent survey of federal-state relations pertaining to water law in the west.

Further evidence of Congress' deference to state water law is to be found in the numerous interstate compacts dealing with water that have been approved by Congress. See Sporhase v. Nebraska, supra, 102 S. Ct. at 3466. A cornerstone of the appropriation system is the certainty and reliability afforded by interstate compact water allocations, upon which the states and individual water users reasonably rely.

Nothing in the Clean Water Act suggests that Congress intended to reverse its long-standing policy of deference to state water laws systems. The Act is posited on the commerce clause. See United States v. Earth Sciences, Inc., 599 F.2d 368, 375 (10th Cir. 1979). It is a well-established rule of statutory construction that federal statutes enacted under the commerce clause should not be interpreted to inject federal authority into an area of traditional state control absent a "clear statement" of congressional intent. As the United States Supreme Court stated in Jones v. Rath Packing Company, 430 U.S. 519, 525 (1977):
Where, as here, the field which Congress is said to have preempted has been traditionally occupied by the States... "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." ... This assumption provides assurance that "the federal state balance" ... will not be disturbed unintentionally by Congress or unnecessarily by the courts.


This rule of deference is explained by Professor Tribe in American Constitutional Law, § 5-8 (1978):

The Supreme Court pays particularly close heed to statutory language and legislative history in judging the reach of laws enacted under the commerce clauses. A law will not be held to affect all the activities Congress can control unless statutory language or legislative history constitutes a clear statement that Congress intended to exercise its commerce clause power in full.

The Supreme Court has invoked the clear statement requirement most notably where a judgment that a federal statute reached to the outer limits of the commerce power would be obviously inconsistent with state institutional interests.

(Emphasis in original.) See also Frankfurter, Some Reflections On The Reading Of Statutes, 47 Colum. L. Rev. 527, 539-540 (1947).

Congress has historically deferred to the authority of the states to control the waters within their boundaries and to equitably apportion interstate waters by entering into interstate compacts. This deference has been explicit and continuing. Congress approved the South Platte River Compact, allocating the waters of that stream between uses in Colorado and Nebraska. Congress has not clearly stated an intent to reverse its long-standing policy and assert federal authority over a matter traditionally subject to state regulation. Therefore, this Court should not construe section 404 of the Clean Water Act to supplant state authority to allocate and make beneficial consumptive
use of water resources under state law. Congress did not make a clear statement in the Clean Water Act that the Corps should regulate the consumptive beneficial use of water quantities; rather, Congress intended to limit the scope of the Corps’ authority to the adverse effects of discharging dredged or fill material into the aquatic environment.

D. Congress enacted section 101(g) of the Clean Water Act to ensure that the Act would not be used to supersede or abrogate state water right systems or state-created water rights.

As part of the 1977 amendments to the Clean Water Act, Congress enacted section 101(g) to expressly prohibit that Act from being interpreted or applied in a manner which would impair state authority to allocate water under state law or which would supersede the exercise of water rights for beneficial use under state law. Section 101(g) provides, in relevant part:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state....

33 U.S.C. § 1251(g).

This amendment was co-sponsored by Senators Wallop of Wyoming and Hart of Colorado, with the express intention of preventing the very misuse of the Clean Water Act which has occurred here. Referring to section 101(g), the D.C. Circuit has stated, "[W]e find specific indication in the Act that Congress did not want to interfere any more than necessary with state water management...." National Wildlife Federation v. Gorsuch, 693 F.2d 156, 178 (D.C. Cir. 1982).

In particular, Senators Wallop and Hart were reacting to a document entitled “Issue and Option Papers” published by the Water Resources Council shortly after President Carter took office. Senator Wallop explained the Congressional response to
that study, which recommended, in part, use of water quality laws as a means to require maintenance of instream flows:

The conferees accepted an amendment which will reassure the State that it is the policy of Congress that the Clean Water Act will not be used for the purpose of interfering with State water rights systems. I sponsored this amendment with Senator Hart on the floor of the Senate. This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. Several of the options contained in that paper called for the use of Federal water quality legislation to effect Federal purposes that were not strictly related to water quality. Those purposes might include, but were not limited to, Federal land use planning, plant siting and production planning purposes. This "State's jurisdiction" amendment reaffirms that it is to be used for water quality purposes only.


The Issue and Option Papers which triggered section 101(g) appeared in the Federal Register of July 15, 1977, and read, in part, as follows:

Problem 2. Water related laws and management practices that may impair the recognition of environmental values include: (1) Concepts of "beneficial use" and "diversion" in water law systems frequently have not evolved to include instream flow needs or certain offstream environmental uses; (2) Water laws in many riparian oriented States may not provide for effective allocation of water to achieve and protect instream flow needs;...

Options...

4. State and local governments could be required to adopt strategies providing for instream flow needs through State law. Federal sanctions, through contracting, licensing and permit approval could be used to implement this alternative.


Thus, the Water Resources Council expressly proposed to utilize existing federal permit authority in order to require maintenance of streamflows. Through 101(g), Congress specifically rejected such use of the Clean Water Act. Rather,
Congress emphasized "its intent to minimize federal control over state decisions on water quantity . . ." National Wildlife Federation v. Gorsuch, supra, 693 F.2d at 179 (emphasis in original).

Section 101(g) did not change the law, but rather, reasserted the tradition of deference to state water law. As Senator Wallop explained,

This amendment is not intended to create a new cause of action. It is not intended to change present law, for a similar prohibition is contained in section 510 of the Act.4/ This amendment does seek to clarify the policy of Congress concerning the proper role of Federal water quality legislation in relation to State water law. Legitimate water quality measures authorized by this Act may at times have some effect on the method of water usage. Water quality standards and their upgrading are legitimate and necessary under this Act. The requirements of section 402 and 404 permits may incidentally effect individual water rights. Management practices developed through state or local 208 planning units may also incidentally affect the use of water under an individual water right. It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.

This amendment is an attempt to recognize the historic allocation rights contained in State constitutions.

It is designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other purposes. It does not interfere with the legitimate purposes for which the Act was designed.

Water quality and interstate movement is an acceptable federal role and influence. But the States historic rights to allocate quantity, and establish priority of usage remains in violation because of this amendment. The Water Pollution Control Act was designed to protect the quality of water and to protect critical wetlands in concert with the various states. In short a responsible federal role.


Congress recognized that measures carrying out the legitimate purposes of the Clean Water Act — protection of water quality and wetlands — could "incidentally" affect the use of water under an individual water right. Section 101(g) was not intended to prohibit such "incidental" effects, but to protect state water allocation systems from "mischievous abrogation" by those who would use the Clean Water Act for purposes other than the protection of water quality and wetlands. The Corps seeks to do exactly what section 101 forbids — to impair the authority of the State of Colorado to allocate quantities of water within its jurisdiction and to supersede the consumptive use which Riverside may make under its water right.

Since federal statutes enacted under the commerce clause are not interpreted to inject federal authority into an area of traditional state control absent a "clear statement" of congressional intent, it follows a fortiori that the reach of a federal statute must be limited where, as here, the statutory language clearly suggests that Congress stopped short of exercising what might be its full constitutional power. L. Tribe, American Constitutional Law, supra, 5-8.

As stated by the United States Supreme Court, "Where a Federal agency is authorized to invoke an overriding Federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of Federal
authority to act should appear affirmatively and not rest on inference alone."

Connecticut Light and Power Company v. Federal Power Commission, 324 U.S. 515, 532 (1945). Moreover, a declaration of policy in favor of state authority is "relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness in the specific provisions which purport to carry out its intent." Id. at 527.

The D.C. Circuit looked to the Wallop Amendment as a guide to Congressional intent in National Wildlife Federation v. Gorsuch, supra, 693 F.2d at 178-179. This Court should do likewise.

III. THE ENDANGERED SPECIES ACT DOES NOT EMPOWER THE CORPS TO REGULATE THE EXERCISE OF RIVERSIDE'S WATER RIGHT.

A. Section 7 of the Endangered Species Act does not expand the Corps' jurisdiction under the Clean Water Act.

Section 7 of the Endangered Species Act is not an independent grant of authority to federal agencies; this section applies only to agency actions which are within the agency's jurisdiction.

Section 7 of the Endangered Species Act provides, in relevant part:

(a)(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Interior], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . .


By its terms, section 7 applies only to actions "authorized, funded, or carried out" by a federal agency. See T.V.A. v. Hill, 437 U.S. 153, 173 (1978). To determine whether the federal defendant properly relied upon section 7 of the Endangered Species
Act in refusing to allow the plaintiffs to proceed under a nationwide permit, it is necessary to determine, as a threshold matter, what action, if any, was to be "authorized, funded, or carried out" by the Corps. The court below recognized this. Riverside Irrigation District v. Andrews, supra, 568 F. Supp. at 588. Its error lay in misconstruing the scope of the Corps' authority under section 404.

As the Third Circuit stated in United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975), when considering the effect of the Fish and Wildlife Coordination Act and the National Environmental Policy Act on the Corps' jurisdiction under the Rivers and Harbors Appropriation Act of 1899:

It is clear that Congress intended that the Army Corps of Engineers and the Secretary of the Army would consult with the Fish and Wildlife Service before issuing a permit for a private dredge and fill operation.... The federal environmental protection statutes did not, however, by their terms enlarge the jurisdiction of the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899. If there is no such jurisdiction environmental protection is still a matter primarily of state concern.

498 F.2d at 607 (emphasis added).

Unlike the Tellico Dam, T.V.A. v. Hill, supra, the Grayrocks Dam, Nebraska v. Rural Electrification Administration, 12 E.R.C. 1156 (D. Neb. 1978), or Interstate Highway Route 10, National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976), the Wildcat Project will not be funded or carried out by the federal government; it is a wholly private project. Therefore, section 7 applies only to the extent that the "action authorized" by the Corps could jeopardize the whooping crane or adversely modify its critical habitat.

Clearly, the Corps, under a nationwide permit, authorizes the discharge of dredged or fill material. Yet the Corps concedes that the discharge of dredged or fill materials in connection with constructing the Wildcat Project will not have any adverse effect on the whooping crane or its habitat. The only possible adverse effect stems from
the exercise of Riverside's water right once the dam and reservoir are built and placed into operation.

Section 7 of the Endangered Species Act does not apply to private activities of this sort. In the words of Congressman Dingell (House Manager of the 1973 amendments): "[Section 7] substantially amplify[s] the obligation of [federal agencies] to take steps within their power to carry out the purposes of this Act . . . ." 42913 (December 20, 1973) (emphasis added).

In T.V.A. v. Hill the Court discussed Congressman Dingell's comments regarding the types of agency practices which would be subject to section 7:

Congressman Dingell's discussion of Air Force practice bombing, for instance, obviously pinpoints a particular activity intimately related to the national defense—which a major federal department would be obliged to alter in deference to the strictures of § 7. A similar example is provided by the House Committee Report:

"Under the authority of [§ 7], the Director of the Park Service would be required to conform the practices of his agency to the need for protecting the rapidly dwindling stock of grizzly bears within Yellowstone Park . . . ." HR Rep. No. 93-412, p. 14 (1973). (Emphasis added.)

437 U.S. at 186-187 (court's own emphasis).

Congress simply did not intend to control every private action which is touched, however indirectly, by some federal connection. Most particularly, Congress did not intend to alter the state-federal relationship concerning the allocation of water.

B. The fact that Riverside cannot exercise its water right without constructing the Wildcat Dam does not empower the Corps to regulate consumptive use under the Wildcat water right.

Riverside cannot exercise its water right until the Wildcat dam and reservoir are constructed, since the Wildcat water right is a storage right which necessarily requires a dam and reservoir for its exercise. But the Corps cannot rely on its regulatory
authority over one phase of a project to dictate how the project, once built, must be
operated as to consumptive use of water.

While this is not a NEPA case, the logic of certain NEPA cases is
instructive. In Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir.), cert.
denied, 449 U.S. 836 (1980), the court held that the Corps' issuance of a permit to private
entities for the construction of a powerline segment did not constitute a major federal
action subject to NEPA. Despite the fact that, as a practical matter, the powerline
could not be built without the permit, the court ruled that "[f]actual or veto control,
however, must be distinguished from legal control or 'enablement'." Id. at 272 (citations
omitted, emphasis added). Without legal, or statutorily-based, authority over a private
activity, an agency cannot control the activity, even though some stage of the private
project requires federal permission. As the court stated in Winnebago Tribe, an agency's
"discretion must be exercised within the scope of the agency's authority." Id.

Of particular relevance is Save the Bay, Inc. v. United States Army Corps of
Engineers, 610 F.2d 322 (5th Cir.), cert denied, 449 U.S. 900 (1980), in which a chemical
company wished to construct a plant requiring a discharge pipeline to carry industrial
waste into a bay. The Corps granted the company a permit to construct the pipeline,
having determined that only its construction was subject to Corps jurisdiction. The
plaintiffs argued that the Corps' environmental assessment concerning pipeline construc-
tion was inadequate because it failed to consider other environmental consequences of
the pipeline, the effluent it would carry, and the proposed plant. The Court
characterized the plaintiffs' position thusly:

[plaintiffs'] argument is that but for the permit there
would be no pipeline; without the pipeline there would
be no excretion; without the ability to excrete the plant
would suffocate in its own waste. They argue that the
permit "enables" the plant to exist and therefore the
entire plant should be taken into consideration in whether or not the pipeline construction permit should be issued.

Id. at 327. The court refused to find that the Corps' 404 permit process extended so far, or that NEPA expanded the scope of the Corps' jurisdiction:

"NEPA must be read in context of other language in the Federal Water Pollution Control Act ..., which places control of water pollution caused by discharges of effluent in the hands of the states and the EPA .... [T]he issuance of the Corps' permit was not a sufficient nexus between the Corps and construction of the DuPont plant to make the Corps a partner in such construction and thereby 'federalize' the construction of the DuPont plant."

Id. at 326 (citations omitted). See also Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission, 599 F.2d 1333, 1346 (5th Cir. 1979); NAACP v. Medical Center, Inc., 584 F.2d 619 (3d Cir. 1978); Edwards v. Bank of Dundee, 534 F.2d 1242, 1246 (7th Cir. 1976); Weintraub v. Rural Electrification Association 457 F. Supp. 78, (M.D. Pa. 1978).

In Weintraub, an Historic Preservation Act case, the court said that:

Congress ... only intended to control direct federal spending for actions or projects which would otherwise destroy buildings on the National Register. Congress did not intend to reach every effect of federal spending.

457 F. Supp. at 91. The court specifically rejected a statutory interpretation which would have required a "detailed and elaborate tracing of the effects" of the federal action which was "remotely caused three or four stages down the line" by federal funding or a federal loan. Id.

In contrast, the urban renewal project requiring the demolition of a Register property in Save the Courthouse Committee v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975), involved both federal funding and ongoing federal supervision. The court found that since the agency had ongoing responsibility for the project, Preservation Act requirements
applied. Accord, Hart v. Denver Urban Renewal Authority, 551 F.2d 1178, 1181-1182 (10th Cir. 1977) ("continuing responsibility of the federal agency" constituted agency action).

NEPA and Historic Preservation Act cases indicate the importance of analyzing an agency's statutory authority in determining precisely the boundaries of a federal "action." The phrase "action authorized" in section 7 of the Endangered Species Act should be interpreted to refer solely to that which the Corps is authorized by section 404 of the Clean Water Act to regulate; it should not be construed to encompass activities beyond the Corps' jurisdiction.

Most recently, in Reid v. Marsh, supra, 20 E.R.C. at 1344, the district court stated that "NEPA does not require that the Corps consider areas of the project which are not subject to its regulatory jurisdiction in its determination of whether to issue an E.I.S.... On remand the Corps should consider all aspects of the project falling under its jurisdiction in its environmental assessment."

Since the exercise of Riverside's water right does not require authorization by any federal agency, and since the activity to be authorized by the Corps — the discharge of dredged or fill material in connection with construction of the Wildcat Project — is not alleged to jeopardize the whooping crane or adversely modify its critical habitat, section 7 of the Endangered Species Act does not empower Colonel Andrews to prevent construction of the Wildcat Project under the nationwide 404 permit.

C. Prior Endangered Species Act cases all involved federal agency action that potentially affected an endangered species or its critical habitat.

All of the Endangered Species Act cases decided to date have involved substantial action by a federal agency; none has construed section 7 to apply to private conduct. T.V.A. v. Hill, supra, concerned the Tellico Dam and Reservoir Project which was being built by T.V.A., a wholly owned public corporation of the United States. Not
only was the project federally authorized and funded, it was to be operated by T.V.A., which itself stood ready to close the gates of Tellico Dam and thereby "carry out" the action that would inundate the critical habitat of the snail darter, located behind the dam. 437 U.S. at 173.

Similarly, in National Wildlife Federation v. Coleman, supra, Interstate Highway Route 10 (I-10), a section of which was to transect the critical habitat of an endangered subspecies of Sandhill Crane, was 90 percent federally financed and was being built by a state highway department "in conjunction with and pursuant to authorization by the Federal Highway Administration." 529 F.2d at 362. The Fifth Circuit, in reversing the trial court's dismissal of NWF's lawsuit, stated, "The relevant consideration is the total impact of the highway on the crane." Id. at 373. The "total impact of the highway" included both the "direct" effects of construction of the highway and excavation of borrow pits and the "indirect" effects of residential and commercial development that could be expected to result from the construction of the highway. Id. The court found that the federal agency controlled the private development "to the extent that they control the placement of the highway and interchanges." Id. at 374. In the Coleman case, unlike this one, the federal agency controlled the purse strings, and with them the placement of the highway and interchanges; agency decisions that were clearly within its jurisdiction would, therefore, also control the accompanying private development.

In North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980), the issue was not direct versus indirect effects. The issue was whether, in evaluating outer continental shelf lease sales under section 7, the Secretary of Interior could use a "segmented approach," in which he considered the effects of the lease sale itself, rather than the entire project. Id. at 608. Noting that "the lease sale itself is only a preliminary and relatively self-contained stage within an overall oil and gas development
program which requires substantial approval and review prior to implementation of each of the major stages: leasing, exploring, producing," the court determined that the segmented approach complied with the Endangered Species Act. Id. at 593. The lesson of North Slope is that when a federal agency retains control of a multi-stage project for its duration, the agency can limit section 7 consultation to the particular stage under consideration, since it will be required to evaluate future stages when they are proposed. See also Conservation Law Foundation of New England v. Andrus, 623 F.2d 712 (1st Cir. 1979). Unlike North Slope, this case does not involve a project over which the federal government will exercise continuing supervision. Riverside requires a single 404 permit to discharge dredged or fill material; the future diversion, storage, and consumptive use of water under the Wildcat water right will not require federal authorization.

Nebraska v. Rural Electrification Admin., supra, another case involving the impact of a dam and reservoir on the whooping crane's critical habitat in Nebraska, was vacated upon stipulation of the parties. That case differed from this one in several important respects. First, the plaintiffs challenged both the REA's decision to make certain commitments and loan guarantees to the project sponsors and the Corps' issuance of a 404 permit for construction of the Grayrocks Dam. REA's financial commitment to the project appears to have been sufficient to "federalize" the entire project for purposes of the Endangered Species Act. Second, the Corps simply never questioned that, because construction of the Grayrocks Dam required a 404 permit, it was required to consider the effects of downstream depletions on the whooping crane and its habitat; instead the Corps argued that it had fulfilled its duty under section 7. Therefore, the district court never considered the question whether the Corps has jurisdiction to regulate the beneficial consumptive use of water under a water right established by state law. Moreover, the decision will not set any precedents, since it was vacated.
D. Although section 7 of the Endangered Species Act cannot be used to regulate the exercise of Riverside's water right, Congress provided other mechanisms by which federal agencies can and should protect the whooping crane's habitat, as necessary.

The defendants seek to use section 7 of the Endangered Species Act to compel holders of water rights to forego, bypass, or release quantities of water to which they are entitled under state law, or to perform or pay for other conservation measures to "offset" impacts of beneficial consumptive use, solely because the construction of a dam and water storage structure initially requires a 404 permit. The defendants have created a needless and destructive conflict between the water laws of Colorado and the South Platte River Compact, on the one hand, and the Clean Water Act and Endangered Species Act, on the other.

The conflict is needless because, while Congress did not intend that section 404 of the Clean Water Act, in combination with section 7 of the Endangered Species Act, would be utilized to regulate consumptive use of water by non-federal entities, Congress created other statutory mechanisms by which federal agencies can protect an endangered species and its habitat.

Under section 4(f) of the Endangered Species Act, as amended, 16 U.S.C. § 1533(f), the Secretary "shall develop and implement plans ... for the conservation and survival of endangered species." The term "conservation" is defined in 16 U.S.C. § 1532(3), to include "all activities associated with scientific resources management," including "habitat acquisition and maintenance."

Section 5(a) of the Act, 16 U.S.C. § 1534(a), again states that the Secretary "shall establish and implement a program to conserve fish, wildlife, and plants." See also Section 7(a)(1) of the Act, as amended, 16 U.S.C. § 1536(a)(1). To carry out such a conservation program, the Secretary is authorized by section 5 to "acquire by purchase."
donation, or otherwise, lands, waters, or interests therein," 16 U.S.C. § 1534(a)(2) (emphasis added). Thus, for example, the federal condemnation power can be used to acquire water to maintain the critical habitat of an endangered species:

Even in those cases in which state cooperation is not forthcoming the federal government is not powerless to protect a species, as the Act authorizes the federal government to exercise its powers of condemnation for the purpose of acquiring whatever land or water is reasonably necessary to protect the endangered species and its habitat.

Comment, "Federal Protection of Instream Values," 57 Nebraska Law Review 368, 390 (1978).§/ While section 7 cannot be used to regulate the exercise of Riverside's state-created water right, the Endangered Species Act provides other means to protect the whooping crane and its habitat, means that the federal government has thus far failed to employ. What is missing for the whooping crane is a conservation program by which, if water quantities are truly needed, the Secretary utilizes his authority under section 5 to acquire water for the benefit of the habitat, as Congress intended. If the responsible federal agencies were required to quantify and acquire that amount of water that is truly needed for conservation of the whooping crane, through appropriation, purchase, condemnation, or creation of a federal reserved water right for protection of an endangered species, as in Cappaert v. United States, 426 U.S. 128 (1976) (involving the "Desert Pupfish"), surely all non-flow alternatives, such as habitat clearing, would be

§/ The District Court misconstrued and misapplied the Wild and Scenic Rivers Act with regard to regulation of water rights. Contrary to the District Court's suggestion that "federal police power" prevents the development and exercise of water rights in a stream segment which is designated under the Wild and Scenic Rivers Act, the Act provides that water rights "which are vested under state law at the time of designation under the Act" shall be compensated for, to the extent they cannot be exercised because of the designation. See 16 U.S.C. § 1284(b).
employed by the agencies first, since the true value of the water resource in the marketplace of water rights would become apparent.

Designation of the whooping crane habitat occurred in 1978. 43 Federal Register 20938 (Monday, May 15, 1978). In this Federal Register notice, FWS disclaimed that that designation would have any effect on private rights, yet the agency proceeded not long thereafter to commence the regulation of private water rights for the benefit of the crane’s habitat. FWS and the Corps looked at habitat clearance as the sole measure to be required of Riverside only after this lawsuit had arisen and after this Court had issued its opinion in Riverside Irrigation District v. Stipo, 658 F.2d 762 (1981). Meanwhile, the Wildcat Project has been held hostage to the Corps’ expanded view of its jurisdiction.

The current attempt to rely on section 7 consultations, triggered solely by section 404 of the Clean Water Act, masks the federal government’s failure to use wildlife management tools which are compatible with state water law systems, as contemplated by sections 4 and 5 of the Endangered Species Act.

The question is not whether the whooping crane should be protected, but whether Congress intended that state systems of water allocation, and individual water rights arising under those systems, should be superseded in order to do so, and whether water users can be required to assume the federal agencies’ responsibility to carry out or fund wildlife conservation programs.

**CONCLUSION**

The law of this case is simple and straightforward. Section 404 of the Clean Water Act does not authorize Col. Andrews to regulate the consumptive use of water to be made under a privately held water right. Since the only "action" properly subject to federal "authorization," as contemplated under section 7 of the Endangered Species Act,
is the approval of discharges of dredged or fill material, and since the Corps and FWS have conceded that these discharges will not jeopardize the whooping crane or adversely modify its critical habitat, Col. Andrews was not empowered to prevent the plaintiffs from proceeding to construct Wildcat Dam and Reservoir under the nationwide 404 permit.

The Clean Water Act, the Endangered Species Act, and the South Platte River Compact must all be given effect and construed harmoniously, if possible. Such harmony can be achieved, but only by concluding that the Corps may not impose conditions, restrictions, or limitations on the exercise of Riverside’s water right, so as to prevent its full beneficial consumptive use of water or to extract some payment or offsetting measures in view of that consumptive use.

The judgment of the district court should be reversed and judgment entered for the plaintiffs.
Respectfully submitted,

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