

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MISSISSIPPI, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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STATEMENT

The State of Mississippi requests leave from this Court to file a bill of complaint against the United States, the State of Louisiana, and various federal officers in their official capacity. The eight-count complaint is founded on allegations that the United States, and specifically the Army Corps of Engineers, through its acts and omissions, has diverted the waters of the Pearl River, which forms a portion of the boundary between Mississippi and Louisiana, from the natural, historic channel into the West Pearl River, a separate and distinct river system lying entirely within Louisiana.

1. The Pearl River rises in east central Mississippi and flows generally southward about 475 miles, discharging through several mouths into the coastal sounds of the Gulf of Mexico. The river passes through Jackson, Mississippi

and, from the thirty-first degree of north latitude southward, forms the border between Louisiana and Mississippi. See Mississippi Statehood Act of Mar. 1, 1817, ch. 23, § 2, 3 Stat. 348. The Army Corps of Engineers has prepared a hydrological study of the southern portion of that area, which is known as the Lower Pearl River Basin. See U.S. Army Corps of Engineers (Vicksburg District), *Lower Pearl River Basin Flow Distribution, Mississippi and Louisiana* (Nov. 1989) [hereinafter *Pearl River Report*].¹

As the *Pearl River Report* explains, the Pearl River divides between Bogalusa, Louisiana and Picayune, Mississippi into two main courses: (a) the East Pearl River (also known as the Pearl River) which forms the Louisiana-Mississippi border; and (b) the West Pearl River, which is located completely within Louisiana. The East Pearl River flows approximately 48 miles into Lake Borgne, Mississippi, which opens to the Gulf of Mexico. The West Pearl River flows approximately 44 miles into the Rigolets of Louisiana, which also opens into the Gulf of Mexico. The East Pearl and the West Pearl Rivers are two separate and hydrologically distinct systems during low-flow conditions. *Pearl River Report* Syllabus, 1-3.²

2. Congress has directed the Army Corps of Engineers to undertake three significant navigation improvement

¹ The House Committee on Public Works and Transportation requested the Corps to prepare the *Pearl River Report* through a 1979 resolution seeking a study of "the Pearl River Basin, Mississippi and Louisiana, with a view toward enhancing the ecological conditions of the study area and insuring adequate surface water supplies to the lower Pearl River Basin to meet future demands." See *Pearl River Report* 1. Congress ultimately funded the study through the Energy and Water Development Appropriations Act, 1988, Pub. L. No. 100-202, Tit. I, 101 Stat. 1329-104. See *Pearl River Report* 1.

² We have reproduced a map, obtained from the *Pearl River Report*, of the relevant features of this area. See App., *infra*.

projects in the Lower Pearl River Basin. First, in 1880, Congress authorized a project entitled "Improvement of the Pearl River Below Jackson, Mississippi," which was intended to provide a 5-foot navigation channel from Jackson to the Rigolets by way of the West Pearl River. See River and Harbor Act of June 14, 1880, ch. 211, 21 Stat. 190. Congress discontinued that project in 1922. See River and Harbor Act of Sept. 22, 1922, ch. 427, § 3, 42 Stat. 1041. *Pearl River Report* 9-10. Second, in 1910, Congress authorized dredging of the East Pearl River to provide a navigation channel from the mouth of the East Pearl River to Lake Borgne. See River and Harbor Act of June 25, 1910, ch. 382, 36 Stat. 647. That project, which is known as the East Pearl River Navigation Project, was completed in 1911, continues to experience some commercial traffic, and is maintained on an irregular basis. *Pearl River Report* 11, 12. Finally, in 1935, Congress authorized the West Pearl River Navigation Project, which provides a navigation channel from Bogalusa to the mouth of the West Pearl River. See River and Harbor Act of Aug. 30, 1935, ch. 831, 49 Stat. 1033. That project includes the Lateral Canal, consisting of three locks, from Pool's Bluff Sill, on the Pearl River, to the West Pearl River. The Corps placed the project in "caretaker" status in the 1970s because of a decline in commercial traffic on the West Pearl River. The Corps has performed "maintenance dredging" since December 1988. *Pearl River Report* 11, 13-14.³

³ The Corps also maintains a 20-mile long, 12-foot deep navigation channel in the East Pearl River for the National Aeronautics and Space Administration (NASA). That channel extends from a NASA test facility, located on the East Pearl River, southward to Lake Borgne. The Corps performs dredging for NASA on a cost-reimbursable basis. *Pearl River Project* 11.

3. Since the late 19th Century, most of the Pearl River's flow during low-flow periods has drained through the West Pearl River.⁴ Today, that flow reaches the West Pearl through three principal routes. First, a nominal portion of the water is diverted from the Pearl River to the Lateral Canal, which connects with the West Pearl River.⁵ Second, the majority of the remaining water (approximately 75% of the historical low flow in the Pearl River) passes through the Wilson Slough to the West Pearl River. And third, a minority of the remaining water (approximately 25% of the historical low flow in the Pearl River) passes through Holmes Bayou, south of the Wilson Slough, to the West Pearl River. During low flow, a nominal portion of the Pearl River passes into the East Pearl River. The East Pearl receives virtually all of its flow, however, from Mississippi tributaries (primarily East and West Hobolochitto Creeks). *Pearl River Report* 21-22.

4. The Corps' *Pearl River Report* explored the possibility of redistributing the water flows within the Lower Pearl River Basin to increase the flow into the East Pearl River. The Corps stated that the "area is hydrologically and

⁴ Assistant Engineer H.C. Collins reported this phenomenon to the Chief of Engineers in his August 1, 1879, survey of the Pearl River. See U.S. Army Corps of Engineers, *Annual Report of the Chief of Engineers, 1879*, at App. K, 886-900. Collins stated that, according to old inhabitants, the Pearl River (including the portion now known as the East Pearl River) originally was a slow-running, clear stream with a good navigational channel. *Id.* at 887, 895. However, local settlers made cut-offs and placed booms of sunken logs in the river. *Ibid.* Those actions and a massive flood in 1874 diverted most of the flow into a "new" channel, the West Pearl River, and effected a substantial reduction in the flow of what is now the East Pearl River. *Id.* at 887, 895-897.

⁵ "Only the flow necessary to operate the locks on the Lateral Canal is diverted from the Pearl River." *Pearl River Report* 3.

biologically complex,” that “opinions among lay people and professionals differ greatly as to the problems of the Lower Basin,” and that opinions “diverge even more on water management measures necessary for environmental preservation.” *Id.* at 56. The Corps found that a water resources development plan designed primarily to provide recreation benefits at Walkiah Bluff would be economically feasible, but would produce no navigation or flood control benefits. *Ibid.* It also observed that the low flow condition of the East Pearl River “has been in existence for decades and does not necessarily reflect an environmental problem requiring correction.” *Ibid.* In sum, the Corps “did not find any problems that could be solved by a Federal project, given the current policies and priorities of the Administration.” *Id.* at 57.

ARGUMENT

Mississippi seeks to invoke this Court’s original jurisdiction “to obtain the restoration of water flow to the Pearl River, which forms the boundary between the States of Mississippi and Louisiana, and to preserve and restore the surrounding ecosystems to a viable and navigable fresh waterway as it existed prior to the diversion and obstruction of its flow by the Defendants.” Motion 2. We submit that Mississippi’s proposed suit does not warrant the exercise of this Court’s original jurisdiction and that the Court should deny Mississippi’s motion for leave to file the complaint.

1. This Court has “substantial discretion” to deny a motion for leave to file a bill of complaint, even if the case technically falls within the Court’s original jurisdiction. *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).⁶ The Court

⁶ See, e.g., *California v. Texas*, 457 U.S. 164, 168 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 499 (1971).

exercises that discretion “with an eye to promoting the most effective functioning of this Court within the overall federal system.” *Ibid.* It considers prudential and equitable factors, including the seriousness and dignity of the claim and the availability of alternative forums. *California v. Texas*, 457 U.S. 164, 168 (1982). The Court has consistently stated that its original jurisdiction should be exercised sparingly. See *Ibid.*⁷ As a general matter, a party must clearly demonstrate that the Court’s exercise of its original jurisdiction is necessary to prevent or remedy serious injury. See *Alabama v. Arizona*, 291 U.S. 286, 292 (1934); *New York v. New Jersey*, 256 U.S. 296, 309 (1921).⁸

2. Mississippi’s proposed action fails to satisfy this Court’s standards for the exercise of original jurisdiction. The complaint, which contains eight indefinitely pleaded counts, is not a model of clarity.⁹ It basically seeks: (a) an equitable apportionment of the flow of the Pearl River; (b) a declaration that the Army Corps of Engineers’ navigation projects have unlawfully diverted water from the East

⁷ See also, e.g., *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976); *United States v. Nevada*, 412 U.S. 534, 538 (1973); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 497-499; *Utah v. United States*, 394 U.S. 89, 95 (1969); *Massachusetts v. Missouri*, 308 U.S. 1, 18-20 (1939).

⁸ See also *South Carolina v. Regan*, 465 U.S. 367, 400-401 (1984) (O’Connor, J., concurring) (“An original party establishes that a case is ‘appropriate’ for obligatory jurisdiction by demonstrating through ‘clear and convincing evidence,’ that it has suffered an injury of ‘serious magnitude’ and that it otherwise will be without an alternative forum.” (citations omitted)).

⁹ The complaint alleges claims under eight counts captioned as follows: Count I, Equitable Apportionment; Count II, National Environmental Policy Act; Count III, Fish and Wildlife Coordination Act; Count IV, Federal Water Pollution Control Act; Count IV [*sic*], Common Law Public Nuisance; Count V, Wrongful Taking; Count VI, Abuse Of Discretion; and Count VII, Quiet Title.

Pearl River to the West Pearl River; and (c) resolution of a vague miscellany of water pollution, common law nuisance, taking, and quiet title claims. Complaint 14-16. These claims are either not judicially cognizable or are more appropriately heard (if Mississippi is able to plead them properly) in federal district court.

First, Mississippi cannot obtain judicial rescission of Congress's decision to authorize the navigation projects at issue, nor can it obtain a judicial revision of Congress's decision by seeking an "equitable apportionment" of the affected waters that would require a change in the scope or the operation of those projects. Second, although Mississippi, in theory, might be able to bring an action alleging that the Corps' operation of its navigation projects is inconsistent with federal legislation, that claim could be heard in federal district court under Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Third, Mississippi's other allegations do not state cognizable claims because they fail to identify a cause of action or a legal basis for relief.

a. The Court has repeatedly held that Congress has plenary authority to control the Nation's waters to facilitate commerce. See, e.g., *United States v. Appalachian Power Co.*, 311 U.S. 377, 423 (1940). That authority includes "dominion over flowage." *Id.* at 424. It is "firmly settled" that "the authority and rights of a State in respect of such waters within its limits, and in respect of the lands under them, are subordinate to this power of Congress." *New Jersey v. Sargent*, 269 U.S. 328, 337 (1926). Thus, Mississippi cannot bring a legal action challenging the wisdom of Congress's decisions to construct, discontinue, or forgo navigation projects in the Lower Pearl River Basin, nor can it challenge the wisdom of Congress's decisions as to the scope or location of those projects, even though the projects affect the flow of the constituent rivers.

By the same token, a State cannot override Congress's judgment indirectly by seeking a judicial apportionment of the river's flow based on "equitable" principles. As this Court has explained, where Congress has provided a statutory allocation of water among the States, "courts have no power to substitute their own notion of an 'equitable apportionment' for the apportionment chosen by Congress." *Arizona v. California*, 373 U.S. 546, 565-566 (1963). The same result follows where Congress approves a navigation project that redistributes flows among several States. Congressional approval of the navigation project carries with it congressional approval of the resulting flow distribution. See *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 65-66 (1913). Courts are not empowered to revise the navigation project by imposing "equitable" constraints on the resulting flows. See *ibid.* Indeed, chaos would result if courts could require alteration of congressionally approved navigation projects to meet judicially-prescribed "equitable" flow requirements.¹⁰

Thus, Mississippi's request for an equitable apportionment of the Pearl River (Complaint 6-7 (Count I)) is entirely inappropriate. This Court has entertained equitable apportionment actions in the arid western States to prevent upstream States, diverting water for irrigation and other state-approved consumptive uses, from depriving downstream States of an equitable share of an overappropriated interstate stream's flow. See, e.g., *Nebraska v. Wyoming*, 325 U.S. 589 (1945). In this case, by contrast, there is no claim that the Pearl River, which passes through

¹⁰ Moreover, as we have noted (pp. 4-5, *supra*), the *Pearl River Report* indicates that the federal navigation projects in the Lower Pearl River Basin have a negligible effect in directing flow from the East Pearl to the West Pearl Rivers; rather the flow distribution is the result of private action and natural phenomena dating back more than a century.

one of the most humid areas of the country, is overappropriated. Compare *id.* at 610. Indeed, Mississippi does not allege that Louisiana has appropriated or diverted *any* water from the Pearl River. Rather, as the *Pearl River Report* documents, the Pearl River feeds into Louisiana's West Pearl River almost exclusively as a consequence of *unregulated* flow through Wilson Slough and Holmes Bayou. Thus, there is no precedent or warrant for equitable apportionment in this case.¹¹

b. Although a State may not challenge the wisdom of Congress's selection of a navigation project, it may be able to raise legal objections, under Section 10 of the APA, 5 U.S.C. 701 *et seq.*, to the Army Corps of Engineers' actions in implementing the project.¹² The State, however, must meet the requirements of the APA, which include a showing that the State is "suffering legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. 702, and that the agency action is "made reviewable by statute" or is "final agency action for which there is no adequate remedy in a court," 5 U.S.C. 704. We submit that Mississippi has failed to state properly an APA claim.

¹¹ Indeed, even if it were possible to devise a theoretical "apportionment" of the flow of the Pearl River, that judicial apportionment would not cure Mississippi's alleged injury. Rather, it would be necessary to devise some system for diverting the presently unregulated flow to the East Pearl River. Mississippi does not suggest how that would be done or who would pay for such a system. As we explain, p. 13, *infra*, what Mississippi really seems to want is a federally funded project that would accomplish that result.

¹² The courts have generally treated a State as a person for purposes of the APA. See, e.g., *Bowen v. Massachusetts*, 487 U.S. 879 (1988); *Maryland Dep't of Human Resources v. HHS*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985).

Three counts of Mississippi's Complaint might conceivably form the basis for an APA action: (i) Count II, which alleges that the Corps has violated the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.*; (ii) Count III, which alleges that the Corps has violated the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*; and (iii) Count IV, which alleges that the "Defendants have abused any discretion which they may have had in refusing to use * * * funds to maintain the character, navigability, and integrity of the Pearl River." Complaint 7-10, 10-11, 13. However, these counts do not cite the APA and are not pleaded with sufficient specificity to identify a cognizable APA claim.

Count II of the Complaint fails to identify any specific past or present agency action or omission that could violate NEPA.¹³ Similarly, Mississippi's vague and summary allegations in Counts III and VI that the Corps has violated the Fish and Wildlife Coordination Act and has "abused its

¹³ The Corps' navigation projects in the Lower Pearl River Basin were constructed prior to NEPA's enactment and thus were not subject to NEPA's requirement that federal agencies prepare an environmental impact statement for major federal actions significantly affecting the quality of the human environment. See 42 U.S.C. 4332(2)(C). Mississippi concedes (Complaint 7-8) that the Corps assessed the environmental consequences of its maintenance operations and found no significant impact requiring the preparation of an environmental impact statement. See 40 C.F.R. 1508.13. Additionally, the Corps' decision in the *Pearl River Report* against further study of flow redistribution (see Complaint 9) has resulted in agency "inaction," which does not require preparation of an environmental impact statement. See *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243-1244 (D.C. Cir. 1980); *Alaska v. Andrus*, 591 F.2d 537, 541-542 (9th Cir. 1979). Contrary to Mississippi's apparent belief (Complaint 8-10), NEPA does not impose substantive environmental obligations on an agency. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 346-353 (1989).

discretion” do not identify any particular agency action at issue, any provisions of federal law that the agency allegedly has violated, or the “legal wrong” that Mississippi has suffered. A party seeking leave to invoke this Court’s original jurisdiction bears the burden of identifying its claims far more clearly and precisely. See *Alabama v. Arizona*, 291 U.S. at 292, cited in *South Carolina v. Regan*, 465 U.S. at 401 (O’Connor, J., concurring). Even under a liberal reading of its pleading, Mississippi has failed to show any entitlement to legal relief. And even if we assume that Mississippi could allege facts sufficient to serve as a basis for an APA claim, that claim would fall within the routine jurisdiction of—and should be decided in the first instance by—a federal district court. See 28 U.S.C. 1331. See also *Califano v. Sanders*, 430 U.S. 99 (1977).¹⁴

c. Mississippi’s various remaining claims plainly do not qualify for resolution under the Court’s original jurisdiction. Mississippi alleges, in Count IV, that the United

¹⁴ In 1982, Mississippi filed a similar complaint against the United States claiming rights to and seeking redistribution of the flow of the Pearl River. *Mississippi v. United States*, Civ. Action No. J79-0286(R) (S.D. Miss.) (amended complaint filed Apr. 8, 1982). The district court granted the State of Louisiana leave to intervene in the action and, at the United States’ suggestion, subsequently dismissed the action for lack of jurisdiction based on the presence of two adverse States (see 28 U.S.C. 1251). *Mississippi v. United States*, *supra*, Order (Dec. 6, 1984). Although it is not our province or duty to suggest to Mississippi how to conduct its litigation, we observe that the State could avoid that jurisdictional difficulty if it could plead a valid APA claim that challenges only the lawfulness of specific federal action under federal law. See *Missouri v. Andrews*, 787 F.2d 270, 278 n.7 (8th Cir. 1986), *aff’d* on other grounds *sub nom. ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). Cf. *Freeport-McMoRan Inc. v. K N Energy, Inc.*, No. 90-655 (Feb. 19, 1991). Mississippi’s ultimate problem appears to be that it is unable to allege facts as to the conditions in the Lower Pearl River Basin that would give rise to a cognizable APA claim.

States has violated the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. 1251 *et seq.*, by “fail[ing] to act to restore water quality” and by “deplet[ing] the flow” of the Pearl River. Complaint 11-12. Mississippi does not identify the relevant “acts and omissions” (*id.* at 11), nor does it explain how they violate the Clean Water Act. Even if Mississippi could allege sufficient facts to bring a citizen suit under the Clean Water Act, jurisdiction over that suit would lie in federal district court. See 33 U.S.C. 1365.

Mississippi next seeks, in a second Count IV, to enjoin the Corps’ navigation works as a “common law public nuisance.” Complaint 12. Even if the Corps’ works could be characterized as a public nuisance, that claim is without merit. It has long been settled that, unless Congress specifies otherwise, congressionally authorized activities are immune from state law limitations that would impair performance of the federal function. See, *e.g.*, *Hancock v. Train*, 426 U.S. 167, 178-179 (1976); *Mayo v. United States*, 319 U.S. 441, 445-448 (1943); *Johnson v. Maryland*, 254 U.S. 51, 57 (1920).

Mississippi alleges in Count V that the Corps’ “acts and omissions” have resulted in a “wrongful taking” of property in the form of “water rights in and to the natural flow, use, and benefits of the waters of the Pearl River.” Complaint 13. It is well settled, however, that neither a State nor its citizens are entitled to compensation on account of federal navigational improvements that impair in-stream property or that diminish the flow of a navigable stream. See, *e.g.*, *United States v. Cherokee Nation*, 480 U.S. 700 (1987); *United States v. Rands*, 389 U.S. 121 (1967); *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960); *United States v. Chandler-Dunbar Water Power Co.*, *supra*. Even if Mississippi could assert a wrongful taking against the United States, the Claims Court would have jurisdiction over the dispute. See 28 U.S.C. 1491.

Finally, Mississippi seeks in Count VII to quiet title to portions of the bed of the Pearl River as against Louisiana. Complaint 13-14. Mississippi does not name the United States as a defendant in this count. We simply observe that this count, which does not identify the lands in dispute, is not pleaded with sufficient specificity to assure the Court that the claim has sufficient "seriousness and dignity" to warrant the exercise of the Court's original jurisdiction. *California v. Texas*, 457 U.S. at 168.

3. Mississippi's motion for leave to file an original action is the most recent manifestation of that State's ongoing attempts, on a variety of fronts, to obtain a redistribution of water in the Lower Pearl River Basin. The Army Corps of Engineers has determined that the current flow distribution is a longstanding phenomenon, is largely (if not entirely) the result of natural and private activities dating back to the 19th Century, and cannot be changed without substantial expenditures to redirect currently unregulated flows. The Corps of Engineers has studied the matter and has concluded that a federal project to redistribute water would provide no significant navigation or flood control benefits, would provide questionable environmental benefits, and could be justified only on the basis of enhancing certain recreation opportunities on a small stretch of the waterway. See *Pearl River Report* 55-57. If Mississippi nevertheless believes that Congress should authorize a federal project to direct water to the East Pearl River, it must convince Congress why that is so. We submit that litigation on this matter, whether in this Court or in federal district court, cannot change the realities of that situation or produce the remedy that Mississippi seeks.

CONCLUSION

The motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

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APPENDIX

LOWER PEARL RIVER BASIN



