

No. 117, Original

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MISSISSIPPI,

v.

Plaintiff,

THE UNITED STATES OF AMERICA; THE STATE OF LOUISIANA; UNITED STATES ARMY CORPS OF ENGINEERS; JOHN O. MARSH, in his official capacity as SECRETARY OF THE ARMY; ROBERT W. PAGE, in his official capacity as ASSISTANT SECRETARY OF THE ARMY, CIVIL WORKS; LTG. E. R. HEIBERG, III, in his official capacity as CHIEF OF ENGINEERS, DEPARTMENT OF THE ARMY; and COL. STEPHENSON W. PAGE, in his official capacity as DISTRICT ENGINEER, VICKSBURG DISTRICT, U.S. ARMY CORPS OF ENGINEERS,

Defendants.

On Motion for Leave to File Bill of Complaint

PETITION FOR REHEARING

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Defendants.

On Motion for Leave to File Bill of Complaint

PETITION FOR REHEARING

The State of Mississippi, by and through its Attorney General, Mike Moore, respectfully petitions for a rehearing of this Court's decision to deny Mississippi leave to file its Bill of Complaint against the United States of America, the State of Louisiana, and other parties. The United States government has taken completely inconsistent positions regarding the proper forum for resolution of this dispute, and Mississippi is now faced with the prospect of having no forum in which to argue its case.

The federal defendants assert that "the availability of alternative forums" is a criteria for consideration by this Court in determining whether to exercise its original jurisdiction and argue that "these claims are . . . more appropriately heard . . . in federal district court." [Brief For The United States at pages 5-7].

In fact, as the United States government well knows, Mississippi has already attempted to litigate the issues raised in its complaint in federal district court. However, its prior attempt was aborted after the State of Louisiana intervened, and the federal defendants and Louisiana obtained a dismissal on grounds *the suit properly belonged before the United States Supreme Court*.

The federal defendants blithely, repeatedly, and wrongly, assert that Mississippi seeks "judicial recission of Congress's decision to authorize the navigation projects at issue." [Brief for the United States at page 7]. To the contrary, Mississippi specifically asserts in paragraph 16 of its Bill of Complaint that many of the acts and omissions leading to the problematic diversions occurred *without* the requisite Congressional authorization. Furthermore, they forge new legal ground in suggesting that Mississippi may not avail itself of the judicial doctrine of equitable apportionment due to the levels of our humidity. [Brief for the United States at pages 8-9], As to the fact that Mississippi does not allege that *Louisiana* actually diverted any water from the Pearl River, this does not alter the fact that Louisiana now has the water, Louisiana will lose part of the water if Mississippi succeeds in its claim for relief, and Louisiana therefore has a cognizable interest which will enable it to intervene in any future litigation brought in lower court.

The doctrine of judicial estoppel, or "preclusion by inconsistent positions," precludes parties from changing position in successive judicial proceedings. *See generally* 1B *Moore's Federal Practice* § 0.405[8] (2d ed. 1965). The significance of this doctrine was summarized by one Federal Court of Appeals:

[J]udicial estoppel focuses on the integrity of the judicial process. To the extent prior sworn statements are involved, the doctrine upholds the "public policy which exalts the sanctity of the oath. The object is to safeguard the administration of justice" Furthermore, even when the prior statements were not made under oath, the doctrine may be invoked to prevent a party from playing "fast and loose with the courts." (citation omitted).

Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980).

Unlike equitable estoppel, judicial estoppel does not require a showing of privity, reliance, or prejudice. However, when these elements are present, inconsistent positions may also be barred under equitable estoppel. "Virtually all courts agree that equitable estoppel may be applied to preclude a party from contradicting testimony or pleadings successfully maintained in a prior judicial proceeding." *Id.* (citing *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S. Ct. 555, 558, 39 L.Ed. 578 (1895)).

"Privity" is not even an issue—the parties, with the exception of the federal officials in their individual capacities, are the same. "Reliance" may be found in the fact that Mississippi filed the instant litigation before the United States Supreme Court specifically because the federal defendants successfully argued in lower court that this was where the suit belongs. "Prejudice" is equally apparent; if the federal defendants succeed in this tactic, Mississippi will be caught between the Scylla of this Court's refusal to hear its case, and the certain Charybdis of Louisiana intervention in federal district court if Mississippi attempts once again to assert its rights there.

The inclusion of the State of Louisiana as a defendant should have disposed of the question of original jurisdiction. Louisiana has previously asserted in federal court that it has a vital interest in the issues which Mississippi seeks resolved (a position endorsed and supported by the sworn affidavits of federal officials). Assuming the doc-

trines of equitable and judicial estoppel retain any vitality before this Court, Louisiana would also have been estopped from asserting a contradictory position in its reply to Mississippi's Complaint. Unfortunately, this Court ruled against Mississippi before Louisiana even filed a response.

It is critically important to note the posture in which this tactical maneuver leaves Louisiana; that State is now poised to intervene in Federal District Court in the event Mississippi seeks to obtain relief there, and once again Mississippi will face the jurisdictional bar posed by 28 U.S.C. 1251(a). The federal defendants suggest that Mississippi can avoid this jurisdictional bar by simply pleading a "valid APA claim that challenges only the lawfulness of a specific federal action under federal law." [Brief for the United States at page 11, footnote 14]. Of course, as the federal defendants are well aware, this was precisely the procedure which Mississippi followed in its prior suit (*see* Appendix "B"). However, the fact that Mississippi asserted a valid claim under the APA did not, and will not, bar Louisiana from intervening as a matter of right when its interests will be affected by the outcome of the litigation. And the jurisdictional bar which has once thwarted Mississippi will surely be raised again.

In order to demonstrate the inconsistency of the positions taken in federal court by the federal defendants, a brief review of the proceedings in lower court follows:

1. On January 15, 1980, Mississippi filed a Complaint in the United States Federal District Court for the Southern District of Mississippi, seeking declaratory and injunctive relief against the United States of America and numerous official representatives of the United States Army Corps of Engineers. Louisiana was not named as a defendant. Mississippi sought to compel these federal defendants to restore the lower Pearl River between the States of Mississippi and Louisiana to a viable and navigable waterway, as it existed prior to its diversion

and obstruction caused by the federal defendants' acts and omissions. A true and accurate copy of this Complaint is attached as Appendix "A". The District Court later granted Mississippi leave to file an amended complaint seeking substantially the same relief and specifically incorporating the Administrative Procedures Act, 5 U.S.C. § 702, as a basis for relief. A true and accurate copy of this amended complaint is attached as Appendix "B".

2. Litigation ensued for the next four years until, on July 30, 1984, the State of Louisiana filed its Motion for Intervention, claiming that Mississippi's attempt to divert flows of the Pearl River back into the State of Mississippi would have an adverse economic and environmental impact on the State of Louisiana, giving Louisiana an interest in the subject matter of the lawsuit which would not be adequately represented by any of the existing parties in the litigation. A true and accurate copy of Louisiana's Motion for Intervention is attached as Appendix "C".

3. On August 15, 1984, the federal defendants filed their reply to Louisiana's Motion for Intervention, requesting the Federal District Court to grant the motion. A true and accurate copy of the federal defendants' reply is attached as Appendix "D".

4. On September 17, 1984, the federal defendants filed a Supplemental Response to Louisiana's Motion to Intervene, consisting of sworn affidavits of various federal officials asserting that the relief requested by Mississippi would have a significant environmental impact in the State of Louisiana, and supporting Louisiana's contention that it had a vital interest in the ongoing litigation. A true and accurate copy of the federal defendants' Supplemental Response is attached as Appendix "E".

5. On October 2, 1984, the Federal District Court ordered that the State of Louisiana should be permitted to

intervene as a party defendant in the litigation. A true and accurate copy of the Court's order is attached as Appendix "F".

6. On October 23, 1984, the federal defendants filed a Motion to Dismiss, and a supporting memorandum, asserting that the intervention of the State of Louisiana deprived the Federal District Court of jurisdiction under 28 U.S.C. 1251(a), which vests "original and exclusive jurisdiction of all controversies between two or more States" in the United States Supreme Court. True and accurate copies of the federal defendants Motion to Dismiss and Memorandum In Support of Motion To Dismiss are attached as Appendices "G" and "H".

7. On October 31, 1984, Louisiana filed its Motion to Dismiss, adopting and incorporating by reference the arguments previously made by the federal defendants. A true and accurate copy of Louisiana's motion is attached as Appendix "I".

8. On November 5, 1984, Mississippi filed its Motion and Memorandum opposing the motion to dismiss. True and accurate copies of these pleadings are attached as Appendices "J" and "K".

9. On November 9, 1984, the federal defendants filed their Reply to Plaintiff's Opposition to Motion to Dismiss, asserting that,

"the power of refusal by the Supreme Court . . . depends on 'the availability of another forum.' There is no other available forum here because under 28 U.S.C. 1251(a), this action is within the 'exclusive' jurisdiction of the Supreme Court."

A true and accurate copy of the federal defendants' Opposition to Motion to Dismiss is attached as Appendix "L".

10. On December 7, 1984, the Federal District Court dismissed Mississippi's lawsuit based on lack of jurisdiction. A true and accurate copy of the Court's order is attached as Appendix "M".

On November 21, 1990, Mississippi filed its Motion for Leave to File Bill of Complaint and Bill of Complaint with this Court, seeking the same relief which was previously sought in Federal District Court. In light of the outcome of the previous litigation, Mississippi specifically made Louisiana a party defendant.

The federal defendants have unconscionably whipsawed the State of Mississippi, arguing first in District Court that Mississippi's suit can only be heard in the Supreme Court, and next arguing to this Court that Mississippi's case ought properly be brought in District Court. The remainder of the federal defendants' arguments are simply conclusory allegations and misrepresentations regarding the nature of Mississippi's request for relief.

The issues which Mississippi seeks resolved involve critical environmental and economic interests of both the States of Louisiana and Mississippi. Mississippi is entitled, at the very least, to a forum in which to assert and protect its interests.

We respectfully submit that this petition for rehearing should be granted and that a rehearing of the question whether Mississippi should be granted leave to file its complaint should be held at the earliest possible time.

Respectfully submitted,

MIKE MOORE *

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State of Mississippi

WILSON H. CARROLL
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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

WILSON H. CARROLL

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0286 (R)

STATE OF MISSISSIPPI, *ex rel.*
A. F. SUMMER, ATTORNEY GENERAL,
Plaintiff,

v.

UNITED STATES OF AMERICA; CLIFFORD L. ALEXANDER,
JR., SECRETARY OF THE ARMY; MICHAEL BLUMENFELD,
ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS;
LIEUTENANT GENERAL J. W. MORRIS, CHIEF OF EN-
GINEERS OF THE UNITED STATES ARMY; MAJOR GEN-
ERAL JOSEPH K. BRATTON, DIVISION ENGINEER OF THE
SOUTH ATLANTIC DIVISION OF THE UNITED STATES
ARMY CORPS OF ENGINEERS; COLONEL ROBERT H.
RYAN, DISTRICT ENGINEER OF THE MOBILE DISTRICT
CORPS OF ENGINEERS OF THE UNITED STATES ARMY
CORPS OF ENGINEERS; INDIVIDUALLY AND IN THEIR OF-
FICIAL CAPACITIES,
Defendants.

COMPLAINT

[Filed Jan. 15, 1980]

INTRODUCTION

1.

This is an action for declaratory and injunctive re-
lief against defendants herein, requiring said defendants
to restore the lower Pearl River between the States of

Mississippi and Louisiana to a viable and navigable waterway in the lower Pearl River Basin as it existed prior to its diversion and obstruction caused by the acts and omissions of defendants and the United States Army, Corps of Engineers.

JURISDICTION AND VENUE

2.

This Court has jurisdiction under the provisions of 28 U.S.C. 1331, 1337, 1346 and 1361. Venue in this district and division is proper under 28 U.S.C. 1391. Declaratory relief is sought under 28 U.S.C. 2201.

THE PARTIES

3.

This action is brought by the Attorney General on behalf of the State of Mississippi under the statutory authority as chief legal officer of the State, charged with managing all litigation on behalf of the State, under the provisions of Section 7-5-1, Mississippi Code of 1972. This action is also brought on behalf of the citizens of the State of Mississippi.

4.

Defendant, United States of America, may be served with process upon Benjamin R. Civiletti, Attorney General of the United States, Washington, D.C., and Robert Hauberg, United States Attorney, Southern District of Mississippi, Federal Building, Jackson, Mississippi, 39201.

5.

Defendant, Clifford L. Alexander, Jr., is the Secretary of the Army and maintains his official residence at the Pentagon, Washington, D.C., 20310, and is ultimately responsible for all actions taken by the Department of the Army and the United States Corps of Engineers. Defend-

ant Alexander is sued in both his official and individual capacities.

6.

Defendant Michael Blumenfeld, is the Assistant Secretary of the Army for Civil Works, United States Army Corps of Engineers, and maintains his official residence at The Pentagon, Room 2E570, Washington, D.C., 20310, and is charged with the responsibility for maintaining navigable waterways within the United States of America, including the Pearl River between the States of Mississippi and Louisiana. Defendant, Michael Blumenfeld is sued in both his individual and official capacities.

7.

Defendant Lieutenant General J. W. Morris is Chief of Engineers of the United States Army and maintains his official residence at 20 Massachusetts Avenue, Washington, D.C. Defendant, Lieutenant General J. W. Morris, is sued in both his individual and official capacities.

8.

Defendant, Major General Joseph K. Bratton, is the Division Engineer of the South Atlantic Division of the United States Army Corps of Engineers and maintains his official residence at 510 Title Building, 30 Pryor Street, S.W., Atlanta, Georgia, 30303, and is responsible for projects and activities of the United States Army Corps of Engineers within the South Atlantic Division. Defendant, Major General Joseph K. Bratton, is sued in both his individual and official capacities.

9.

Defendant, Colonel Robert H. Ryan, is the District Engineer of the Mobile District Corps of Engineers, South Atlantic Division of the United States Army Corps of Engineers, and maintains his official residence at 109

St. Joseph, Mobile, Alabama, 36628, and is responsible for projects, duties and activities of the United States Army Corps of Engineers within said district, and, in particular, the activities of the Corps of Engineers on the Pearl River. Defendant, Colonel Robert H. Ryan, is sued in both his individual and official capacities.

FACTUAL BACKGROUND

10.

The lower Pearl River is a part of the recognized boundary between the States of Mississippi and Louisiana. Historically, the boundary followed the main channel of the Pearl River which began at its easternmost junction with Lake Borgne and extended northward to the thirty-first degree of north latitude.

11.

The Pearl River is a "navigable" river within the meaning of the Rivers and Harbors Act of 1899 (30 Stat. 1151) and within the meaning of Title 33, United States Code.

12.

Historically, the lower Pearl River has been a viable, navigable waterway supporting commerce, industry, agriculture, shipping, recreation and transportation for the citizens of the State of Mississippi and the United States.

13.

The State of Mississippi is interested in the restoration of the natural flow of waters of the Pearl to its historic channel in that the State owns property abutting the river; operates public recreation areas on the lower river; is interested in protecting and encouraging shipping, commerce, and industry and protecting the ecology of the area; and has made plans for the construction of a boatway connecting the Pearl River to the Bogue Chitto.

5a

14.

The defendants have the duty to protect and maintain the navigability of the lower Pearl River under the Rivers and Harbors Act.

15.

Defendants have over the past several years, without authority required by law, obstructed and failed to maintain the channel of the lower portions of the Pearl River.

16.

As a direct and proximate result of said acts and omissions of defendants, the waters of the lower Pearl River have been diverted from their usual, natural and historic flow and channel into the State of Louisiana.

17.

As a direct and proximate result of defendants' acts and omissions, the lower portions of the Pearl River are presently incapable of supporting shipping, commerce, industry and recreation.

18.

The Army Corps of Engineers at the direction of defendants erected obstructions and improvements in and along the Pearl River, and, in particular, they placed earthen dams across the channel of the lower Pearl River.

19.

Such action was taken without the consent or affirmative authorizations of the Congress of the United States.

20.

As a direct result of the said continuing obstructions, the waters of the lower Pearl River have been diverted into Louisiana to such an extent the recognized channel

of the river has been reduced from a navigable stream to a dry river bed of several miles.

21.

Defendants have failed to direct the Army Corps of Engineers to maintain improvements along the west bank of the lower Pearl.

22.

That such acts and omissions have caused a drastic diversion of the waters of the river. The flow of water in the lower Pearl has been reduced to the extent that it has little or no value as a navigable waterway, or for industry, commerce, agriculture and recreation.

23.

As a result of the diversions and obstructions what little water remains in the lower Pearl River is continually being diminished and will in the near and foreseeable future become a dead river, with a ruined ecology, incapable of supporting the habitat and useless for commerce, industry, navigation, agriculture and recreation.

COUNT I.

24.

Plaintiff realleges the facts stated in paragraphs 10 through 23 above.

25.

The Department of Army has jurisdiction and responsibility for federal investigations and improvements of navigable rivers, harbors and waters (33 U.S.C. 504 et seq.). Defendant officials are charged with compliance with federal law, development and implementation of department policies and supervision of the activities of the Department and Army Corps of Engineers.

7a

26.

Defendants are responsible for protecting and maintaining the navigability of the lower Pearl River.

27.

Defendants have, contrary to the provisions of the Rivers and Harbors Act, 33 U.S.C. 541 et seq., wholly failed and defaulted in the performance of their lawful duties to protect the navigability of the lower Pearl River and to maintain the integrity of the river. (33 U.S.C. 549, 33 U.S.C. 603a, 33 U.S.C. 701g.)

28.

That as a direct and proximate cause of said acts and omissions of defendants the course and flow of the Pearl River has been so changed, altered and diverted so as to destroy a large section of the river and render it useless for navigation or other beneficial purpose to the great damage and detriment of the State of Mississippi, its citizens and citizens of the United States, causing irreparable harm and injury to navigation, commerce, recreation and ecology

COUNT II.

29.

Plaintiff realleges the facts stated in paragraphs 10 through 23 above.

30.

Defendants caused obstructions to be built and allowed such to remain in the channel of Pearl River in violation of the River and Harbors Act of 1899 and 33 U.S.C. 401 et seq.

31.

In so doing, defendants have failed to fully comply with the Rivers and Harbors Act, 33 U.S.C. 401, which provides:

“It shall be lawful to construct or commence the construction of any dam, dike or causeway over or in any . . . navigable river, . . . of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers by the Secretary of the Army. . .”

32.

Defendants have violated the Rivers and Harbors Act, 33 U.S.C. 403, by erecting said obstructions in the Pearl River, 33 U.S.C. 403 states:

“The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.”

33.

Defendants have unlawfully constructed the obstructions in the Pearl River and unlawfully allowed them to remain to the detriment of plaintiff.

9a

34.

As a direct and proximate result of said acts and continuing omission by defendants, the course and flow of the lower Pearl River have been so changed, altered and diverted to destroy a large section of the river and render it useless for navigation or other beneficial purpose to the great damage and detriment of the State of Mississippi, its citizens and the citizens of the United States, causing irreparable harm and injury to commerce, recreation and ecology.

COUNT III.

35.

Plaintiff realleges the facts contained in paragraphs 10 through 23 above.

36.

Defendants have unlawfully deprived plaintiff of vested rights as riparian owners in and to the natural flow, use and benefits of the waters of the Pearl River by their acts.

37.

Plaintiff and its inhabitants possess the right to and have enjoyed the use and benefits of the waters of the lower Pearl River from its entry into the Union in 1817 until the interruption of the flow of the river by the wrongful diversion of the waters of the river from their natural and historic channel.

38.

Defendants have refused to remedy diversion of the waters of the Pearl River and will, unless enjoined by this Court, and continue and permit such diversions by their acts, their omissions and the natural and foreseeable consequences of such acts and omissions and will perpetuate such wrongful acts thereby depriving plaintiff of its rights to use and enjoy the benefits of the waters of the Pearl River.

39.

As a direct and proximate result of said acts and omissions of defendants, the course and flow of the lower Pearl River has been so changed, altered and diverted to destroy a large section of the river and render it useless for navigation or other beneficial purpose to the great damage and detriment of the State of Mississippi, its citizens and the citizens of the United States, causing irreparable harm and injury to its industry, shipping, agriculture, commerce, recreation and ecology.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, plaintiff prays:

40.

That the Court declare that defendants have failed to perform their duties in maintaining the navigability of the Pearl River.

41.

That the Court declare defendants have unlawfully obstructed the Pearl River by constructing dams across the channel of the river.

42.

That the Court declare that as a direct and proximate result of the obstruction of the waters of the Pearl River, said waters have been diverted from the natural channel of the river into the State of Louisiana and the channel has and continues to be silted up with sand, gravel and debris to the extent that the flow in the river channel is seriously impeded.

43.

That the Court declare that defendants' failure to maintain other improvements along the lower Pearl River which have further contributed to the diversion of the waters of the river.

11a

44.

That the Court declare that as a result of the acts and omissions of defendants the Pearl River is no longer "navigable in fact."

45.

That the Court declare that plaintiff has vested rights in and to the natural flow, use and benefit of the waters of the Pearl River.

46.

That the Court declare that the acts and omissions of the defendants constitute a continuous and ongoing violation of the Rivers and Harbors Act of 1899 and the rights of plaintiff.

47.

That the Court will enter a mandatory injunction enjoining defendants to forthwith take such actions as are necessary to fully restore the natural flow, current and channel of the Pearl River as such existed prior to the aforementioned unlawful diversions and obstructions.

48.

That the Court award plaintiff reasonable attorney fees and cost for the prosecution of this action.

49.

Plaintiff prays for any other general and equitable relief as the nature of the case may require.

12a

Respectfully submitted,

STATE OF MISSISSIPPI

By: /s/ A. F. Summer
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Attorney General

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Dated January 15, 1980

Please serve:

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Colonel Robert H. Ryan
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Mobile District Corps of Engineers
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109 St. Joseph
Mobile, Alabama 36628

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0286 (R)

STATE OF MISSISSIPPI, *ex rel.*
A. F. SUMMER, ATTORNEY GENERAL,
Plaintiff

v.

UNITED STATES OF AMERICA; CLIFFORD L. ALEXANDER, JR., SECRETARY OF THE ARMY; MICHAEL BLUMENFELD, ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS; LIEUTENANT GENERAL J. W. MORRIS, CHIEF OF ENGINEERS OF THE UNITED STATES ARMY; MAJOR GENERAL JOSEPH K. BRATTON, DIVISION ENGINEER OF THE SOUTH ATLANTIC DIVISION OF THE UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL ROBERT H. RYAN, DISTRICT ENGINEER OF THE MOBILE DISTRICT CORPS OF ENGINEERS OF THE UNITED STATES ARMY CORPS OF ENGINEERS; INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

AMENDED COMPLAINT

Introduction

1.

This is an action for declaratory and injunctive relief against defendants herein and is brought pursuant to 5 U.S.C. § 702 to require said defendants to restore the lower Pearl River between the States of Mississippi and

Louisiana to a viable and navigable waterway as it existed prior to its diversion and obstruction caused by the continuing acts and omissions of defendants and their agents, especially those of the United States Army Corps of Engineers.

Jurisdiction and Venue

2.

This Court has jurisdiction under the provisions of 28 U.S.C. § 1331, 1346, and 1361. Venue in this district and division is proper under 28 U.S.C. § 1391. Declaratory relief is sought under 28 U.S.C. § 2201.

The Parties

3.

This action is brought by the Attorney General on behalf of the State of Mississippi under the statutory authority as chief legal officer of the state, charged with managing all litigation on behalf of the state, under the provisions of Section 7-5-1, Mississippi Code of 1972. This action is also brought on behalf of the citizens of the State of Mississippi affected by the actions of defendants.

4.

Defendant United States of America may be served with process upon William French Smith, Attorney General of the United States, Washington, D.C., and George H. Phillips, United States Attorney, Southern District of Mississippi, Federal Building, Jackson, Mississippi 39201.

5.

Defendant Clifford L. Alexander, Jr., is the Secretary of the Army and maintains his official residence at The Pentagon, Washington, D.C. 20310, and is ultimately responsible for all actions taken by the Department of the Army and the United States Corps of Engineers.

6.

Defendant Michael Blumenfeld is the Assistant Secretary of the Army for Civil Works, United States Army Corps of Engineers, and maintains his official residence at The Pentagon, Room 2E570, Washington, D.C. 20310, and is charged with the responsibility for maintaining navigable waterways within the United States of America, including the Pearl River between the States of Mississippi and Louisiana.

7.

Defendant Lieutenant General J. W. Morris is Chief of Engineers of the United States Army and maintains his official residence at 20 Massachusetts Avenue, Washington, D.C. Defendant Lieutenant General J. W. Morris is sued in both his individual and official capacities.

8.

Defendant Major General Joseph K. Bratton is the Division Engineer of the South Atlantic Division of the United States Army Corps of Engineers and maintains his official residence at 510 Title Building, 30 Pryor Street, S.W., Atlanta, Georgia 30303, and is responsible for projects and activities of the United States Army Corps of Engineers within the South Atlantic Division.

9.

Defendant Colonel Robert H. Ryan is the District Engineer of the Mobile District Corps of Engineers, South Atlantic Division of the United States Army Corps of Engineers, and maintains his official residence at 109 St. Joseph, Mobile, Alabama 36628, and is responsible for projects, duties, and activities of the United States Army Corps of Engineers within said district and, in particular, the activities of the Corps of Engineers on the Pearl River.

Factual Background

10.

The lower Pearl River is a part of the recognized boundary between the States of Mississippi and Louisiana. Historically, the boundary followed the main channel of the Pearl River which began at its junction with Lake Borgne and extended northward to the thirty-first degree of north latitude.

11.

The Pearl River has been at all relevant times a "navigable" river within the meaning of Rivers and Harbors Act of 1899 (30 Stat. 1151) and within the meaning of Title 33, United States Code.

12.

Historically, the lower Pearl River has been a viable, navigable waterway supporting commerce, industry, agriculture, shipping, recreation and transportation for the citizens of the State of Mississippi and the United States.

13.

The State of Mississippi has important interests in protecting and encouraging agriculture, industry, shipping, and commerce and in conserving and maintaining the wildlife, ecology, recreational use, and unspoiled natural beauty of the lower Pearl River for the use of its citizens and the citizens of the United States. In addition, the State of Mississippi has constructed public parks, boat ramps, and recreational facilities which depend upon the viability of the Pearl River. The state owns other property along the lower Pearl River. In addition, the state has made plans for the construction of a boatway connecting the Pearl River to the Bogue Chitto.

18a

14.

The Army Corps of Engineers by its agents has erected obstructions, diversions, and improvements in and along the Pearl River and, in particular, they have placed earthen dams across the channel of the lower Pearl River.

15.

Since the erection of certain of these diversions and obstructions, defendants have continually maintained, encouraged, and assisted the continuance of such to the present.

16.

Such actions were taken without the prior consent or affirmative authorization of the Congress of the United States and without recommendation by the Chief of Engineers and approval by the Secretary of the Army.

17.

As a result of defendants' actions, the waters of the lower Pearl River have been diverted from their usual, natural, and historic flow and channel into the State of Louisiana.

18.

As a result of defendants' actions, the waters of the lower Pearl River have been diverted to such an extent that several miles of the channel of the river have been reduced from a navigable stream to a dry river bed.

19.

As a result of defendants' diversions and obstructions, what little water remains in the lower Pearl River is continually being diminished, the lower Pearl River will, in the near and foreseeable future, become a dead river, with a ruined ecology, incapable of supporting the habitat and useless for commerce, industry, navigation, agricul-

ture, and recreation with the resulting injury to Mississippi's navigation, economy, revenues, proprietary interests, recreational facilities, tourism, and natural and unspoiled beauty of the state. In addition, the citizens of Mississippi have been denied use of the river for recreation, agriculture, commerce, and navigation and as a source of community water supply.

20.

Over the past several years, Congress has appropriated funds to erect and maintain improvements to navigation of the Pearl River, and defendants and their agents have made improvements along the river to maintain water-flow and navigable capacity of the river. However, defendants have not maintained those structures, but have instead abandoned those projects and permitted them to fall into disuse and ruin, thereby reducing the flow of water in the lower Pearl River.

Standing to Maintain Action

21.

Plaintiff has standing to bring this action pursuant to 28 U.S.C. § 2201 which authorizes the courts of the United States to entertain any case involving a case of actual controversy and to declare the rights of any interested party bringing such action.

22.

5 U.S.C. § 702 grants standing to any party "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to secure judicial review of such agency action.

23.

Defendants have refused to remedy diversion of the waters of the Pearl River and will, unless enjoined by

this Court, continue and permit such diversions by their acts, their omissions, and the natural and foreseeable consequences of such acts and omissions and will perpetuate such wrongful acts thereby depriving plaintiff of its rights to use and enjoy the benefits of the waters of the Pearl River.

Count I

24.

Plaintiff realleges the facts stated in paragraphs 10 through 23 above.

25.

The defendants have jurisdiction and responsibility for Federal investigations and improvements of navigable rivers, harbors, and waters (33 U.S.C. 504 *et seq.*). Defendant officials are charged with compliance with federal law, development, and implementation of department policies and supervision of the activities of the Department and Army Corps of Engineers.

26.

Defendants are responsible for protecting and maintaining the navigability of the lower Pearl River.

27.

Defendants have, contrary to the provisions of 33 U.S. 541, *et seq.*, wholly failed and defaulted in the performance of their lawful duties to protect the navigability of the lower Pearl River and to maintain the integrity of the river, and defendants have abused any discretion which they may have under the Acts. (33 U.S.C. 549, 33 U.S.C. 603a, 3 U.S.C. 701g).

Count II

28.

Plaintiff realleges the facts stated in paragraphs 10 through 23 above.

29.

Defendants caused obstructions and diversions to be built and have maintained and allowed such to remain in the channel of the Pearl River in violation of the Rivers and Harbors Act of 1899 and 33 U.S.C. 401 *et seq.*

30.

In so doing, defendants have failed to fully comply with the Rivers and Harbors Act, 33 U.S.C. 401, which provides:

“It shall be unlawful to construct or commence the construction of any dam, dike or causeway over or in any . . . navigable river, . . . of the United States *until* the consent of Congress to the building of such structure shall have been obtained and *until* the plans for the same shall have been submitted to and approved by the Chief of Engineers by the Secretary of the Army”

31.

Defendants have violated the Rivers and Harbors Act, 33 U.S.C. 403 by erecting said obstruction and diversions in the Pearl River. 33 U.S.C. 403 states:

“The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or

modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, *unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.*"

32.

Defendants have unlawfully constructed the obstructions and diversions in the Pearl River and unlawfully maintained them to the present time to the detriment and injury of plaintiff and its citizens. As a result of such action, the citizens of Mississippi who use the lower Pearl River for navigation, commerce, camping, boating, fishing, sightseeing, and relaxation have been denied such uses or have had their use distributed by the actions of defendants.

Count III

33.

Plaintiff realleges the facts contained in paragraphs 10 through 23 above.

34.

Defendants by their actions have unlawfully deprived plaintiff of vested rights as riparian owners in and to the natural flow, use, and benefits of the waters of the Pearl River.

35.

Plaintiff and its citizens possess the right to and have enjoyed the use and benefits of the waters of the lower Pearl River from its entry into the Union in 1817 until the interruption of the flow of the river by the wrongful diversion of the waters of the river from their natural and historic channel.

23a

Count IV

36.

Plaintiff realleges the facts contained in paragraphs 10 through 23 above.

37.

Congress has on several occasions appropriated funds to improve navigation of the lower Pearl River.

38.

Defendants have abused any discretion which they may have had in refusing to use such funds to maintain the character, navigability, and integrity of the lower Pearl River.

Count V

39.

Plaintiff realleges the facts contained in paragraph 10 through 23 above.

40.

Such obstructions and diversions constitute a public nuisance at common law for which the State of Mississippi is authorized to enjoin on behalf of its citizens.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, plaintiff prays:

41.

That the Court declare that defendants have failed to perform their duties in maintaining the navigability of the Pearl River.

42.

That the Court declare defendants have unlawfully obstructed the ePearl River by constructing dams across the channel of the river into Louisiana.

24a

43.

That the Court declare that as a result of the obstructions and diversion, that the waters of the Pearl River have been diverted from the natural channel of the river into the State of Louisiana and the channel has and continues to be silted up with sand, gravel, and debris to the extent that the flow in the river channel is seriously impeded.

44.

That the Court declare that defendants' failure to maintain other improvements along the lower Pearl River have further contributed to the diversion of the waters of the river.

45.

That the Court declare that plaintiff has vested common law rights in and to the natural flow, use and benefit of the waters of the lower Pearl River.

46.

That the Court declare that the actions of the defendants constitute a continuous and ongoing violation of the Rivers and Harbors Act of 1899 and the rights of plaintiff and the citizens.

47.

That the Court will enjoin defendants to take such actions as are necessary to fully restore the natural flow, current and channel of the Pearl River as such existed prior to the aforementioned unlawful diversions and obstructions.

48.

That the Court award plaintiff reasonable attorney fees and costs for the prosecution of this action.

25a

49.

Plaintiffs prays for any other general and equitable relief as the nature of the case may require.

Respectfully submitted,

BILL ALLAIN
Attorney General
State of Mississippi

OSCAR P. MACKEY
Assistant Attorney General

JIM R. BRUCE
Special Assistant Attorney General
Post Office Box 220
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(601) 354-7130

By: /s/ Jim R. Bruce
JIM R. BRUCE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

No. J-79-0286 (L)

STATE OF MISSISSIPPI,
Plaintiff

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

STATE OF LOUISIANA
MOTION FOR INTERVENTION

The State of Louisiana, ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana, and other undersigned counsel, moves for leave of this Court to intervene as a defendant in this action, and to assert the defense set forth in its proposed answer attached hereto. In support of its motion to intervene, applicant avers that:

1.

The plaintiff, State of Mississippi, in this action seeks to enjoin the defendant, United States of America, et al., to, among other things, take such actions as are necessary to fully restore the alleged natural flow, current and channel of the Pearl River as such existed prior to alleged unlawful diversions and obstructions of the said river by the defendants.

27a

2.

To accomplish the above demand, plaintiff seeks to have defendants, through artificial means or otherwise, divert water from the West Pearl River and other waterways located in the State of Louisiana into the East Pearl River.

3.

Said diversions of water will cause economic harm to agricultural, industrial, shipping and commercial interests in the State of Louisiana.

4.

Said diversions of water will cause environmental harm to the wildlife, fishery, recreational use and beauty of the natural resources of the State of Louisiana.

5.

The State of Louisiana owns and operates the Pearl River Wildlife Management Area in the lower Pearl River Basin. Said diversions of water will cause environmental harm to the wildlife, fishery, recreational use and beauty of the natural resources of the Pearl River Wildlife Management Area.

6.

Channelization, clearing and snagging, channel realignment of reservoir construction to accomplish said diversions of water in the Bogue Chitto River, the West Pearl River, Holmes Bayou, Bradley Slough (Bayou) and Wilson Slough (Bayou) will violate the Louisiana Natural and Scenic Rivers Act. (La. R.S. 56:1841 et seq.).

7.

The State of Louisiana is a riparian owner of land adjacent to the Pearl River and its tributaries in Louisiana, and is entitled to the use and enjoyment of the waters of said waterways.

8.

The State of Louisiana, and its citizens, have other navigational, agricultural, commercial, industrial, economic, revenue, proprietary, recreational and natural re-of water.

9.

By reason of the above and foregoing, the applicant claims an interest in the property or transaction that is the subject matter of this action, and is so situated that the disposition of the action may as a practical matter impair or impede the applicants ability to protect those interests.

10.

The applicant's interest will not be adequately represented by the existing parties in the action.

WHEREFORE, applicant prays that:

1. This court issue a rule requiring plaintiff to show cause why applicant should not be made a party defendant in this action.

2. Applicant be, by proper order, named a party defendant and granted leave to defend this action as such.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

DAVID C. KIMMEL
Assistant Attorney General

By: /s/ David C. Kimmel
DAVID C. KIMMEL
Assistant Attorney General
7434 Perkins Road, Suite C
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Mr. Edwin Pittman
Attorney General
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Mr. Leonard A. Blackwell, II
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Mr. Kenneth Pells
Lands & Natural Resources
Division
Department of Justice
Room 2629
Main Justice Building
Washington, D.C. 20530
Mr. Glen Goodspell
Lands & Natural Resources
Division
Department of Justice
Room 2614
Main Justice Building
Washington, D.C. 20530

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record this 30th day of July, 1984, by placing same in the United States Mail, postage prepaid.

/s/ David C. Kimmel
DAVID C. KIMMEL
7434 Perkins Road, Suite C
Baton Rouge, Louisiana 70808
(504) 922-0187

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0286 (L)

STATE OF MISSISSIPPI, *ex rel.*,
Plaintiff

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants

FEDERAL DEFENDANTS' REPLY TO MOTION OF
THE STATE OF LOUISIANA TO INTERVENE AS
A PARTY DEFENDANT

Come now the federal defendants herein and respectfully advise the Court that they have no objection to the motion of the State of Louisiana to intervene herein as a party defendant, and accordingly request the Court to grant said motion.

Respectfully Submitted,

GEORGE PHILLIPS
United States Attorney

/s/ Glen R. Goodsell
GLEN R. GOODSELL
Attorney for Federal Defendants
Room 2614
Land & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2763

CERTIFICATE OF SERVICE

I, Glen R. Goodsell, hereby certify that I have this 13th day of August, 1984, mailed, postage prepaid, true copies of Federal Defendants' Reply to Motion of the State of Louisiana to Intervene as a Party Defendant to the following:

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Calon Blackburn, Esquire
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Henry H. Black, Esquire
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Vicksburg, Mississippi 39180

Honorable William J. Guste, Jr.

Attorney General

Attn: David C. Kimmel

Assistant Attorney General

State of Louisiana

Department of Justice

7434 Perkins Road

Baton Rouge, Louisiana 70808

/s/ Glen R. Goodsell

GLEN R. GOODSELL

Attorney for Federal Defendants

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0286 (L)

STATE OF MISSISSIPPI, *ex rel.*,
Plaintiff

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants

FEDERAL DEFENDANTS'
SUPPLEMENTAL RESPONSE TO MOTION TO
INTERVENE OF THE STATE OF LOUISIANA

Come now the federal defendants and submit the attached affidavits of federal officials in support of the Motion to Intervene filed in this action by the State of Louisiana.

Respectfully Submitted,

GEORGE PHILLIPS
United States Attorney

/s/ Glen R. Goodsell
GLEN R. GOODSELL
Attorney for Federal Defendants
Room 2614
Land & Natural Resource Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2763

STATE OF ALABAMA

COUNTY OF MOBILE

AFFIDAVIT OF BENTON WAYNE ODOM

BENTON WAYNE ODOM, JR., being duly sworn, deposes and says:

1. I reside at 413 McQueen Avenue, Mobile, Alabama 36609. I am a registered professional engineer and the Chief of the Coastal Engineering and Hydraulic Design Section with the Mobile District Corps of Engineers. I have 27 years of engineering experience in the area of hydraulic investigations of streams and the hydraulic design of water resource projects. I am thoroughly familiar with the general characteristics of that stream, through experience with other projects on the Pearl River since the early 1960's from the mouth to reaches upstream of Jackson, Mississippi. I am also familiar with the area in question as a result of field inspections in connection with this litigation and other investigations in the immediate vicinity.

2. DATA AVAILABLE. There are generalized historical descriptions of the area, and somewhat detailed studies of specific areas such as in the vicinity of the entrance to Wilson's Slough and the West Pearl Barge Canal. However, there is a great lack of detailed technical data on channel characteristics such as slope, roughness, conveyance, and stage-discharge relationships. Also, to my knowledge, there are no detailed data on surface and groundwater interchange characteristics with the streams in this area. I have reviewed the available historical data which includes the Collins Report of 1879. I have also reviewed depositions taken of local citizens, the GE Report, the Whittle Report, the Hains Reports, the Cultural Resource Inventory of the Pearl River Basin, recent flow data collected by USGS, and the design data developed for the West Pearl Barge Canal.

3. PRESENT PRIMARY RIVER COURSES, AND TWO HYPOTHETICAL DIVERSION SCENARIOS.

a. Attached is a diagram of the lower Pearl River to illustrate the principal river channels discussed below. At present the Pearl River splits at Wilson's Slough. Recent flow data collected by the USGS indicate that approximately 71 per cent of the low and moderate flows which arrive at that point are presently flowing westerly into Louisiana through Wilson's Slough, deviating from the channel marking the state boundary which turns eastward and then proceeds on southward generally. Downstream along the boundary channel approximately 14 miles, at a point known today as head of the Shoals, the remaining water flowing along the boundary departs from the boundary and follows a channel known as Holmes Bayou. No flows proceed at low water through the more easterly boundary channel known as the Shoals. This channel is essentially dry for several miles except during high water stages.

b. It is my understanding that the State of Mississippi seeks to have the Shoals channel reopened. It is further understood that all or substantial portions of the water flowing through Wilson's Slough are sought to be re-distributed by a weir or dam redirecting those flows downstream along the boundary channel. To accomplish this, a weir or dam would also be required at the head of Holmes Bayou to divert all or a substantial portion of the river flows from the Holmes Bayou channel into and along the reopened Shoals channel. The Shoals would have to be cleared and excavated for several miles to accommodate the flows sought to be diverted therethrough.

c. Two flow diversion scenarios will be hypothesized for purposes of further discussion. The first (called *Scenario 1*) will be based on an assumption that low river flows are to be split in the ratio of 2:1 at the en-

trance to Wilson's Slough channel, with two thirds being directed along the boundary channel downstream to the junction of the Shoals and Holmes Bayou. At the junction of the Shoals and Holmes Bayou the river's flow would be allocated equally between the Holmes Bayou channel and the reopened Shoals channel along the Louisiana-Mississippi boundary. Under this *Scenario 1* assumption Wilson's Slough, Holmes Bayou, and the Shoals would each have approximately equal flows at low or moderate river states.

d. A second, *Scenario 2*, would be to close Wilson's Slough to any within bank river flows by erection of a bank level dam or structure of similar effect. This would more than double the flows presently proceeding down the boundary channel below Wilson's Slough. A similar structure would also be erected at the head of Holmes Bayou, thereby routing essentially all the within bank flows through the presently dry Shoals channel. The Shoals channel would have to be excavated to a depth and width sufficient to accommodate that flow of the river. Under *Scenario 2*, those flows presently passing into Louisiana through Wilson's Slough and Holmes Bayou would cease during river flow stages which exist during most of the year.

4. ESTIMATE OF IMPACTS.

a. *Scenario 1* would result in reduced river levels and flows in Wilson's Slough, Holmes Bayou, and in the West Pearl River. To achieve this flow diversion, construction activities and the resultant structures would be necessary within the State of Louisiana. Achievement of flow through the Shoals would require significant excavation along the old remnant channel which is the State boundary. Flow diversions under *Scenario 1* would reduce the flow and concomitant stream levels in Holmes Bayou, Wilson's Slough and the West Pearl River most of the year, and especially during the low water season. The

reduced stream flows in those Louisiana channels would tend to drain the surrounding swamp and lower groundwater levels adjacent to those streams. My observations indicate that stage reductions would be more severe in the Wilson's Slough section than in Holmes Bayou.

b. Any altered flow distribution between the East Pearl and the West Pearl would, in turn, alter the salinity levels at the mouths of the two rivers during the low water season. The extent of the salt water intrusion up the two rivers would also be affected.

c. Under *Scenario 2*, groundwater levels, surrounding swamp levels, and main steam stream stages in Holmes Bayou, Wilson's Slough and the West Pearl would be even more drastically affected. Wilson's Slough, due to its steep slope, could conceivably dry up completely for much of the year during the seasons of low and intermediate flows. Dissolved oxygen levels in the reaches with no inflow could also be dramatically reduced.

5. CONCLUSIONS. In view of the above estimated changes in stream characteristics due to the assumed flow diversions, it is my professional opinion that there would be significant hydrologic impacts to the area under *Scenario 1* or *Scenario 2*. Practically all of these impacts would occur in the State of Louisiana.

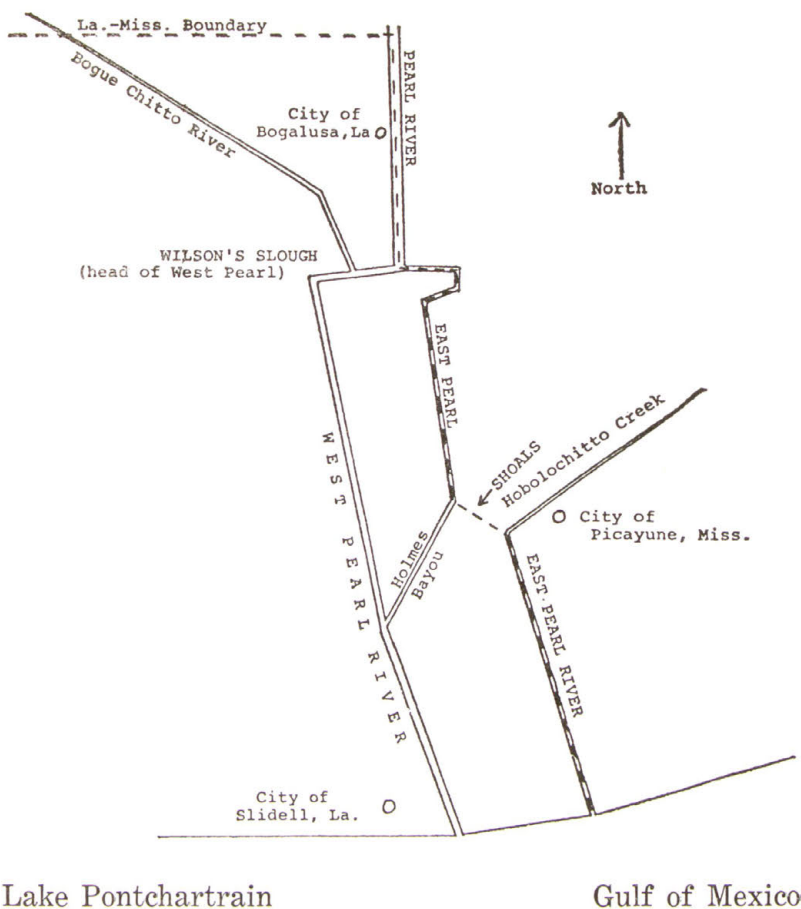
/s/ Benton Wayne Odom, Jr.
BENTON WAYNE ODOM, JR.

STATE OF ALABAMA
COUNTY OF MOBILE

Sworn to and subscribed to before me this 10th day of September 1984.

/s/ Alfred P. Holmes, Jr.
ALFRED P. HOLMES, JR.
Notary Public, State of Alabama
at Large

My commission expires: December 15, 1987



*Illustrative Diagram of lower
Pearl River, La. & Miss.*
(attachment to affidavit of Benton Wayne Odom)

STATE OF ALABAMA

COUNTY OF MOBILE

AFFIDAVIT OF NATHANIEL D. MCCLURE IV

NATHANIEL D. MCCLURE IV, being duly sworn, deposes and says:

1. I reside at 308 Brawood Drive, Mobile, Alabama 36608. I am a registered Professional Engineer in the State of Alabama and have been employed by the U.S. Army Corps of Engineers (Corps) for over 25 years. Presently, I serve as Chief of the Environmental Studies and Evaluation Section of the Mobile District. This Section, with its interdisciplinary staff, is responsible for evaluating environmental impacts associated with Corps Civil Works projects and for preparing Environmental Impact Statements (EIS). In my duties with the Corps I have participated in the preparation of a large number of EIS's including projects which involve flow diversion such as the Tennessee-Tombigbee Waterway.

2. I am familiar with the lower Pearl River including the areas which are the subject of this litigation. I have participated in two field investigations, during June and November 1983. The June inspection represented a moderately high flow condition and the November inspection represented a moderately low flow condition. As part of these investigations I observed certain areas of controversy in this litigation including Wilson's Slough, Holmes Bayou, and the "Shoals." I have also studied maps, reports, and other documents which describe the area in question. I have also reviewed the affidavit of Benton Wayne Odom which presents two hypothetical diversion schemes. The diversion scheme described in Mr. Odom's affidavit as *Scenario 1* approximates what I understand would be the minimum level of relief sought by the State of Mississippi. It would involve low water diversions at Wilson's Slough and the Shoals. With this background

and my professional experience, I am prepared to offer an evaluation of the potential environmental impacts that would be associated with flow diversions in the lower Pearl River and to render a professional opinion as to the significance of these potential impacts on the State of Louisiana.

3. It is my professional opinion that the impacts on the natural resources and environmental attributes within the State of Louisiana would be significant under the criteria set forth in the "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act" issued by the Council on Environmental Quality (40 CFR Parts 1500-1508). Briefly stated, these regulations provide that a detailed statement shall be prepared by any Federal agency to evaluate the effects of any undertaking which the agency proposes that would result in significant environmental impacts. My opinion is based on the following factors or considerations relevant to this determination:

a. Any diversion and/or split of the low flows in the vicinity of Wilson's Slough and/or the Holmes Bayou and "Shoals" area would require construction of weirs or some other type control structure. These structures would involve fill in the navigable waters of the United States within Louisiana. Such structures would therefore necessarily impact upon water bottoms and land surface within the State of Louisiana.

b. In order to provide some amount of flow through the remnant channel known as the "Shoals," a considerable quantity of excavation, and subsequent disposal, of material would be required. Since the "Shoals" is located along the State boundary between Mississippi and Louisiana, some of the disturbance would have to occur within Louisiana. Because of the vegetative growth in the area, the forest resources and its associated wildlife habitat would be affected,

c. Low flow amounts and characteristics are critical to water quality conditions. State water quality standards are established based on the 7-day Q10 flow of a stream. This is a statistical flow which represents the low flow condition that can be expected to occur once every 10 years for 7 consecutive days. Obviously, any diversion of low flow would reduce the 7-day Q10 in the water body from which the water is transferred. For example, if water were diverted from the Pearl River through the "Shoals" it would necessarily reduce the low flow down Holmes Bayou by the amount diverted through the "Shoals."

d. The assimilative capacity of a stream (ability of a stream to accommodate organic material and still maintain a sufficient concentration of dissolved oxygen (D.O.)) is dependent upon the amount of flow available and other related factors such as depth, velocity, surface area, and turbulence. Reductions in the amount of flow available during the critical low flow periods produce a corresponding reduction in the assimilative capacity of the water body. Loss of assimilative capacity manifests itself by a reduction in D.O., a critical factor in the life and health of the aquatic system.

e. Holmes Bayou and Wilson's Slough have been designated by the State of Louisiana as components of the Natural and Scenic River System. The documentation and relevance of this designation are presented in "Louisiana's Natural and Scenic Streams System," October 1973. The proposed flow diversions and associated flow control structures would not be in concert with the purposes and objectives of Chapter 8, Natural and Scenic River System, of Title 56 of the Louisiana Revised Statutes of 1950.

f. The biota of the area is highly dependent upon the water regimen that exists. The biota includes the vegetative and animal communities, both aquatic and terres-

trial. Changes in flow characteristics influence the water regimen and soil moisture conditions, and thus can influence the biota. Although these relationships can be very complex, it can be stated with certainty that certain conditions such as droughts would be aggravated by the permanent diversion of water. Droughts create stress conditions for the biota. Other associated adverse impacts such as drying of wetlands, conversion of aquatic habitat to terrestrial, changes in the salinity patterns in the estuary, changes in limits of salt water intrusions, stranding of organisms, and loss of vegetative nursery grounds would also accrue due to changes in the low flow characteristics. All of the above considerations take on particular significance in the areas where the proposed diversions would occur because of the existence of the Bogue Chitto National Wildlife Refuge, which is operated by the U.S. Fish and Wildlife Service, and the Pearl River Wildlife Management Area, which is operated by the State of Louisiana. Both of these areas contain significant acreages of bottomland hardwoods and wetland areas which are highly dependent upon the water regimen. Both of these wildlife areas are within the area of Louisiana which would be impacted by such diversions.

g. Diversion of water from one water course to another naturally denies the riparian owners use of the water for various purposes such as water supply, navigation, irrigation, waste assimilation, and recreational pursuits. In this instance, riparian owners in the State of Louisiana would be denied the use of water diverted to Mississippi.

4. To adequately evaluate the severity of the environmental consequences that would accompany any diversion of low flow in the Pearl River, substantial studies would be required. The studies would have to be initiated on a broad scale and would involve many areas of expertise. Preliminary study designs indicate that a study of this type would encompass at least 4 years and would cost

about 1.4 million dollars, based on 1978 dollars. This estimate was prepared in response to a Congressional inquiry (attached); however, the subject study was never undertaken. Even though the level of knowledge available does not allow quantification or complete delineation of the impacts that would result from flow diversion, it can be stated that if the diversion were to be considered as a proposed Federal action through the normal public works process it would require the preparation of an Environmental Impact Statement under the provisions of the National Environmental Policy Act. It can further be stated that significant impacts would occur within the State of Louisiana, and would accrue to both public and private lands and waters of that State.

/s/ Nathaniel D. McClure IV
NATHANIEL D. MCCLURE IV

STATE OF ALABAMA

COUNTY OF MOBILE

Sworn to and subscribed to before me this 10th day of September 1984.

/s/ Alfred P. Holmes, Jr.
ALFRED P. HOLMES, JR.
Notary Public, State of Alabama
at Large

My commission expires: December 15, 1987

CERTIFICATE OF SERVICE

I, Glen R. Goodsell, hereby certify that I have this 11th day of September, 1984, mailed, postage prepaid, true copies of Federal Defendants' Supplemental Response To Motion To Intervene of The State of Louisiana to the following:

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Daniel E. Lynn, Esquire
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Calon Blackburn, Esquire
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Henry H. Black, Esquire
Corps of Engineers
United States Army
P.O. Box 60
Vicksburg, Mississippi 39180

Honorable William J. Guste, Jr.
Attorney General
Attn: Kai Midbowe, Esquire
David C. Kimmel, Esquire
State of Louisiana
Department of Justice
7434 Perkins Road
Baton, Rouge, Louisiana 70808

/s/ Glen R. Goodsell
GLEN R. GOODSELL
Attorney for Federal Defendants

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

No. J-79-0286 (L)

STATE OF MISSISSIPPI,

Plaintiff

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants

ORDER

[Filed Oct. 2, 1984]

The Motion for Intervention of the applicant, State of Louisiana, as a defendant in this action, and Motion to file Answer to Amended Complaint of the plaintiff, State of Mississippi, herein having been submitted and heard, and good cause appearing therefore,

IT IS ORDERED, that the applicant, State of Louisiana, be permitted to intervene as a party defendant in this action; and

IT IS FURTHER ORDERED that the Answer to Amended Complaint attached to the Motion for Intervention of the applicant, State of Louisiana, shall stand as the answer of record of the applicant, State of Louisiana, to the Amended Complaint of the plaintiff, State of Mississippi.

Jackson, Mississippi, this 2nd day of October, 1984.

/s/ [Illegible]

United States District Judge

CERTIFICATE

I hereby certify that I have this date mailed a copy of the above and foregoing to all counsel of record, postage prepaid.

Baton Rouge, Louisiana this 24th day of September, 1984.

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

DAVID C. KIMMEL
Assistant Attorney General

By: /s/ Kai David Midboe
KAI DAVID MIDBOE
Assistant Attorney General
7434 Perkins Road, Suite C
Baton Rouge, Louisiana 70808
(504) 922-0187

agreed to and approved by:

/s/ Glen R. Goodsell
Counsel for Federal Defendants

/s/ Len Blackwell
Counsel for State of Mississippi

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0286 (L)

STATE OF MISSISSIPPI, *ex rel.*,
Plaintiff

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants

FEDERAL DEFENDANTS' MOTION TO DISMISS

Come now the federal defendants herein and move this Court to dismiss this action for lack of jurisdiction for the reasons set forth in the attached memorandum in support of the motion.

Respectfully Submitted,

GEORGE PHILLIPS
United States Attorney

/s/ Glen R. Goodsell
GLEN R. GOODSELL
Attorney for Federal Defendants
Room 2614
Land & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2763

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0286 (L)

STATE OF MISSISSIPPI, *ex rel.*,
Plaintiff

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants

MEMORANDUM IN SUPPORT OF MOTION
TO DISMISS

Come now the federal defendants and state the following in support of their motion to dismiss this action for lack of jurisdiction.

1. This action was brought by the State of Mississippi to compel the diversion of water from the Pearl River, which presently flows into the State of Louisiana through the West Pearl River, to flow to the State of Mississippi through the East Pearl River.

2. On October 2, 1984, this Court entered an order permitting the State of Louisiana to intervene as a party defendant in this action and further allowing that State's answer to the amended complaint in this action to stand as its answer or record on the above date.

3. The State of Mississippi is the plaintiff in this action and the answer of the State of Louisiana as defendant clearly provides that the issues joined present a controversy between the two States.

4. 28 U.S.C. 1251 (a) provides:

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

5. It is clear from the above statute that this Court does not have jurisdiction of this action since the Supreme Court of the United States has original and exclusive jurisdiction of the same.

6. Wherefore, the federal defendants respectfully request that their motion to dismiss be granted.

Respectfully Submitted,

GEORGE PHILLIPS
United States Attorney

/s/ Glen R. Goodsell
GLEN R. GOODSELL
Attorney for Federal Defendants
Room 2614
Land & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2763

CERTIFICATE OF SERVICE

I, Glen R. Goodsell, hereby certify that I have this 23rd day of October, 1984, mailed, postage prepaid, true copies of Federal Defendants' Motion to Dismiss and Memorandum in Support thereof to the following:

Honorable Ed Pittman
Attorney General
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Jackson, Mississippi 39205

Leonard A. Blackwell, II, Esquire
Blackwell and White
P.O. Drawer 430
Gulfport, Mississippi 39502

Daniel E. Lynn, Esquire
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Vickburg, Mississippi 39180

Honorable William J. Guste, Jr.

Attorney General

Attn: Kai David Midboe

Assistant Attorney General

State of Louisiana

Department of Justice

7434 Perkins Road

Baton Rouge, Louisiana 70808

/s/ Glen R. Goodsell

GLEN R. GOODSELL

Attorney for Federal Defendants

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0286 (L)

STATE OF MISSISSIPPI, *ex rel.*,
v. *Plaintiff*

THE UNITED STATES OF AMERICA, *et al.*,
Defendants

MOTION TO DISMISS

Now comes the Defendant, State of Louisiana, appearing herein through the Honorable William J. Guste, Jr., Attorney General, State of Louisiana, and other undersigned Assistant Attorneys General, and joins the defendant, United States of America, in its Motion to Dismiss this action for lack of jurisdiction and sets forth as its reasons the reasons set forth by the defendant, United States of America, in its Memorandum in Support of Motion to Dismiss, which is specifically adopted and incorporated by reference by defendant, State of Louisiana, as if herein set forth and attached as its Memorandum in Support of Motion to Dismiss.

Respectfully submitted

WILLIAM J. GUSTE, JR.
Attorney General

DAVID C. KIMMEL
Assistant Attorney General

By: /s/ Kai David Midboe
KAI DAVID MIDBOE
Assistant Attorney General
7434 Perkins Road, Suite C
Baton Rouge, Louisiana 70808
(504) 922-0187

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0286 (L)

STATE OF MISSISSIPPI, *ex rel.*,
Plaintiff,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants

CERTIFICATE

I certify that on this 31st day of October, 1984, a copy of the above and foregoing Motion to Dismiss has been served upon the following counsel, postage prepaid and properly addressed:

Glen R. Goodsell
Attorney for Federal
Defendants
Room 2614
Land and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

Honorable Ed Pittman
Attorney General
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Henry H. Black, Esq.
Corps of Engineers
United States Army
Post Office Box 60
Vicksburg, Mississippi 39180

Baton Rouge, Louisiana this 31st day of October, 1984.

/s/ Kai David Midboe
KAI DAVID MIDBOE
Assistant Attorney General

APPENDIX J

ORAL ARGUMENT REQUESTED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79--0286 (L)

STATE OF MISSISSIPPI, *ex rel.*,
Plaintiff

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants

MOTION IN OPPOSITION TO THE
UNITED STATES' MOTION TO DISMISS

Comes now the plaintiff, the State of Mississippi, in the above-styled Civil Action by and through its undersigned attorneys, and files its Motion In Opposition To The United States' Motion To Dismiss and as grounds therefor says that a "genuine controversy" does not exist between the States of Mississippi and Louisiana; that even if this Honorable Court concludes that a "genuine controversy" does exist between said States that jurisdiction of this matter is properly before the Court; therefore, this case should not be disclosed for the reasons more particularly expressed in the Plaintiff's concurrently filed Memorandum in support thereof,

58a

Respectfully Submitted,

EDWIN LLOYD PITTMAN
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 39205

By /s/ George Williamson
GEORGE WILLIAMSON
Special Assistant Attorney General
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Jackson, MS 39205

By /s/ Leonard A. Blackwell, II
LEONARD A. BLACKWELL, II, Esquire
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Gulfport, MS 39501

CERTIFICATE OF SERVICE

I, George Williamson and Leonard A. Blackwell, II, do hereby certify that we have this 5th day of November, 1984, mailed, postage prepaid, true copies of Motion in Opposition to the United States' Motion To Dismiss to the following:

Honorable Glen R. Goodsell
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Washington, D.C. 30530

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First Assistant United States Attorney
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Honorable William J. Guste, Jr.
Attorney General

Attn: Kai David Midboe

Assistant Attorney General

State of Louisiana

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7434 Perkins Road

Baton Rouge, LA 70808

/s/ George Williamson

GEORGE WILLIAMSON

Special Assistant Attorney General

/s/ Leonard A. Blackwell, II

LEONARD A. BLACKWELL, II

Attorneys for Plaintiff

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0286 (L)

STATE OF MISSISSIPPI, *ex rel.*,
Plaintiff

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants

MEMORANDUM IN OPPOSITION
TO THE UNITED STATES' MOTION TO DISMISS

COMES NOW the Plaintiff, the State of Mississippi, in the above styled Civil Action and files this its Memorandum in Opposition to the United States' Motion to Dismiss and says as follows:

FACTS

On October 2, 1984, the District Court in the above styled case permitted the State of Louisiana to intervene as a party defendant. On October 23, 1984, the federal defendants moved to dismiss the action for lack of jurisdiction. Defendants base their motion upon 28 U.S.C. § 1251(a) which provides:

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more states.

Arguments of Law

The first issue addressed in this brief is whether a "controversy" exists between the States of Mississippi and Louisiana in the instant case under 28 U.S.C. § 1251 (a). The United States Supreme Court has held that a controversy under 28 U.S.C. § 1251 (a) occurs when a actions of another state or is asserting a right against the other state which is "susceptible to judicial enforcement according to the accepted principles of the common law." *Massachusetts v. Missouri*, 60 S. Ct. 39, 308 U.S. 1, 84 L.Ed. 3 (1939). The original jurisdiction of 28 U.S.C. § 1251(a) may only be invoked in civil suits where damage has been inflicted or is threatened by one state against another. *Georgia v. Pennsylvania Railroad Company*, 324 U.S. 439, 446, 89 L.Ed. 1051 (1944).

There has been no showing in this case that the State of Louisiana is threatened with any damage. No relief was sought by the State of Mississippi in the original or amended complaint against the State of Louisiana. While the State of Louisiana was allowed to intervene in this action as a party because this suit affects a border stream between Missisissippi and Louisiana and will thus necessarily affect the rights of both States, the fact remains that Mississippi has not asked for relief against Louisiana and Mississippi has taken no action that has damaged Louisiana. It is submitted that a genuine "controversy" does not exist and has not been shown to exist between the two States.

The second issue presented is the circumstances under which the Supreme Court will invoke its jurisdiction under 28 U.S.C. § 1251 (a). Even in situations where a controversy is found to exist, the Supreme Court is reluctant to invoke its exclusive and original jurisdiction. The Court possesses discretionary power to refuse cases concededly within its jurisdiction. In *Massachusetts v. Missouri*, 60 S. Ct. at 43, 44 the Court stated:.

We have observed that the broad statement that a Court having jurisdiction must exercise it . . . is not universally true but has been qualified at certain cases where the federal courts may, in their discretion properly withhold the exercise of the jurisdiction conferred upon them where there is not want of another suitable forum.

Unlike other federal courts, the Supreme Court is allowed much more "leeway" in refusing acceptance of original jurisdiction. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 522 (10th Cir. 1979).

In determining whether a controversy is appropriate for review under 28 U.S.C. § 1251(a), a number of factors are considered by the Court. These elements include the seriousness and dignity of the claim, the availability of another forum and finally, the competing demands of appellate review. *Maryland v. Louisiana*, 451 U.S. 725, 68 L.Ed. 2d 576, 101 S.Ct. 2144 (1981); *United States v. Nevada*, 412 U.S. 534, 37 L.Ed. 2d 132, 93 S.Ct. 2763 (1973); *Illinois v. City of Milwaukee*, 406 U.S. 91, 31 L.Ed. 2d 712, 92 S.Ct. 1385 (1972); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 28 L.Ed. 2d 256, 91 S.Ct. 1005 (1971). It is undisputed in the instant case that Plaintiff's claim is not against the State of Louisiana and that another forum other than the U.S. Supreme Court is available.

It is uniformly held that original jurisdiction must be exercised discretely and sparingly and the applications of such jurisdiction must be made on a case-by-case basis. *California v. Texas*, 457, U.S. 164, 72 L.Ed. 2d 755, 102 S.Ct. 2335 (1982); *Maryland v. Louisiana*, 451 U.S. at 739; *Illinois v. City of Milwaukee*, 406 U.S. at 93; *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 498.

In *Wyandotte*, 401 U.S. at 498, the Court admitted the existence of a genuine controversy. However, it declined to invoke its original jurisdiction because a lower federal

court was equally qualified to adjudicate the state claims involved. In *Wyandotte* the Court stated:

“Nevertheless, although it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so, it seems evident to us that changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another, even though the dispute may be one over which this Court does have original jurisdiction.

* * * *

... Thus, we think it apparent that we must recognize ‘the need (for) the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States.’ ”

401 U.S. at 497, 498.

Recently the Supreme Court has reiterated its belief that although exclusive jurisdiction may be available, application is not required until the Court has weighed the seriousness and dignity of each claim in addition to examining the availability of another forum which could litigate matters involved. *California v. Texas*, 102 S.Ct. 2335, 457 U.S. 164, 72 L.Ed. 2d 755 (1982); *Texas v. New Mexico*, 462 U.S. 554, 103 S.Ct. 2558, 77 L. Ed. 2d 1 (1983). In *California v. Texas*, the Court stated “A determination that this Court has original jurisdiction over a case, of course, does not require us to exercise that jurisdiction. We have imposed prudential and equitable limitations upon the exercise of our original jurisdiction.” The Court in *Texas v. New Mexico* stated:

In recent years we have consistently interpreted 28 U.S.C. § 1251 (a) as providing us with substantial discretion to make a case-by-case judgment as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction. . . . We exercise that discretion with an eye to promoting the most effective functioning of this Court and the overall federal system.

Id. at 2569.

Conclusion:

If this case is filed in the Supreme Court, the cases cited above indicate that it will probably ultimately be remanded to this Court for disposition. This Court has already ruled on several preliminary motions and the groundwork for a trial has been substantially cleared. It would not make sense to require a further delay when this case has already been delayed four years.

Before invoking its original jurisdiction under 28 U.S.C. § 1251 (a), the Supreme Court considers a variety of factors on a case-by-case basis. Initially, claims must be serious and dignified. The primary element considered, however, is the availability of another forum to adjudicate the claims of the parties involved. If such forum is available and is equipped to completely examine the issues put forth, the Supreme Court will decline to invoke its original jurisdiction.

The present controversy can be adequately and competently adjudicated in the Southern District of Mississippi. This would provide for the most "effective functioning" of the federal system and would allow the Supreme Court to focus, as it apparently desires, on its appellate responsibilities. The Supreme Court has distinctly stated that it is *not* the function of its original jurisdiction to decide controversie between two states when another forum is available. *Texas v. New Mexico*, 103 S.Ct. at 2568, 2569.

For reasons of judicial economy, this case should not be dismissed, even without prejudice. If there is any question in this Honorable Court's mind about jurisdiction, it should, in the interest of saving the time and expense of the Dismissal, refiling, remand, and refiling again of this case, keep it on this Court's docket for prompt disposition.

Respectfully submitted,

EDWIN LLOYD PITTMAN
Attorney General
State of Mississippi
P. O. Box 220
Jackson, MS 39205

By: /s/ George J. Williamson
GEORGE WILLIAMSON
Special Assistant Attorney General
State of Mississippi
P. O. Box 220
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By: /s/ Leonard A. Blackwell
LEONARD A. BLACKWELL, II, ESQUIRE
Blackwell & White
P. O. Drawer 430
Gulfport, MS 39502

CERTIFICATE OF SERVICE

I George Williamson and Leonard A. Blackwell, II, do hereby certify that I have this 5th day of November, 1984, mailed, postage prepaid, true copies of Memorandum in Opposition To The United States' Motion to Dismiss to the following:

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Washington, D. C. 20530

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Honorable William J. Guste, Jr.
Attorney General
Attn: Kai David Midboe
Assistant Attorney General
State of Louisiana
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7434 Perkins Road
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/s/ George L. Williamson
GEORGE WILLIAMSON
Special Assistant Attorney General

/s/ Leonard A. Blackwell
LEONARD A. BLACKWELL, II
Blackwell & White
Attorneys for Plaintiff

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79--0286 (L)

STATE OF MISSISSIPPI, *ex rel.*,
Plaintiff

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants

FEDERAL DEFENDANTS' REPLY TO PLAINTIFF'S
OPPOSITION TO MOTION TO DISMISS

It is obvious that a "genuine controversy" does exist between the States of Mississippi and Louisiana in this action because the former is plaintiff and the latter is defendant. However, in order to clarify the matter the federal defendants will demonstrate below the alleged facts in issue which set forth the controversy between the two States and the law which mandates that this action be dismissed for lack of jurisdiction.

The Facts

To show a controversy between the two States we first turn to plaintiff's Amended Complaint. Paragraph one alleges that the action is brought to compel the restoration of "the lower Pearl River between the States of Mississippi and Louisiana to a viable and navigable waterway." Paragraph 17 alleges that the waters of "the lower Pearl River have been diverted from their usual, natural, and

historic flow and channel into the State of Louisiana." Paragraphs 42 and 43 request this Court to declare that the federal defendants have unlawfully diverted the waters of the Pearl River into the State of Louisiana. Paragraph 47 requests this Court to compel the federal defendants to stop the flow of water now flowing into the State of Louisiana and divert it into the State of Mississippi.

In its Answer to that Amended Complaint, the State of Louisiana prays that the action be dismissed without limitation as to the relief requested.

In its Motion to Intervene, the State of Louisiana, in paragraphs two through eight, alleges that the relief requested in plaintiff's Amended Complaint will cause economic and environmental harm to the State of Louisiana, that such requested relief will harm that State's Pearl River Wildlife Management Area, that such requested relief will violate the Louisiana Natural and Scenic Rivers Act (La. R.S. 56: 1841 et seq.), and that requested relief will damage the navigational, agricultural, commercial, industrial, economic, revenue, proprietary, recreational and natural resource interests of that State and its citizens.

In Plaintiff's Answer To Federal Defendants' Second Set Of Interrogatories dated July 23, 1982, plaintiff's response number two states that the relief requested in this action seeks to reduce and change water flows in Wilson's Slough and Holmes Bayou, both of which are in the State of Louisiana.

In this Court's order dated May 20, 1983, it was directed that the plaintiff and the federal defendants explore the feasibility of controlling the diversion of Wilson's Slough and Holmes Bayou, which as indicated are in the State of Louisiana.

In the affidavit of Benton Wayne Odom, Jr. attached to Federal Defendants' Supplemental Response To Mo-

tion To Intervene Of The State Of Louisiana, filed September 14, 1984, it states that with respect to the water diversion plaintiff seeks in this action, practically all of the impacts would occur in the State of Louisiana.¹ In the Resolution of the Committee on Public Works of the House of Representatives attached to the affidavit of Nathaniel D. McClure, IV, which is part of that Supplemental Response, it states that the Pearl River Basin, which is the area in issue here, involves the States of Mississippi and Louisiana.

It is clear from the facts outlined above, that a decree granting the State of Mississippi the relief it seeks would operate against and to the damage of the State of Louisiana and be an intrusion of its sovereignty by altering the flow of water within its boundaries to satisfy the State of Mississippi's desire for that water. In essence, the State of Mississippi is asking this Court to exercise control over the waterways of the State of Louisiana to the benefit of the former State.

For plaintiff to assert in its Memorandum in Opposition that "[T]here has been no showing in this case that the State of Louisiana is threatened with any damage" defines its own Amended Complaint. Moreover, if no "genuine controversy" exists between the States as plaintiff now argues, then this action should be dismissed as frivolous.²

The Law

We first address the arguments raised in plaintiff's Memorandum in Opposition. Plaintiff cites *Georgia v. Pennsylvania Railroad Company*, 324 U.S. 439 (1944) for the proposition that the original jurisdiction of the

¹ See Illustrative Diagram of Lower Pearl River, La. and Miss. attached to affidavit of Benton Wayne Odom.

² It must be remembered that plaintiff did not oppose the Motion to Intervene filed by the State of Louisiana which clearly demonstrated it would be damaged.

Supreme Court is involved when there is threatened damage by one State against another. Although that case did not involve a controversy between two or more States within the exclusive jurisdiction of the Supreme Court, there is a clear threatened injury to the State of Louisiana in this action. Moreover, plaintiff admits this action "will thus necessarily affect the rights of both States."

Plaintiff cites *Massachusetts v. Missouri*, 308 U.S. 1 (1939) and *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979) for the proposition that the Supreme Court has power to refuse original jurisdiction. We submit such power rests with that Court and not this Court. Moreover, that power of refusal by the Supreme Court, as plaintiff concedes, depends on "the availability of another forum." There is no other available forum here because under 28 U.S.C. 1251(a), this action is within the "exclusive" jurisdiction of the Supreme Court.

Further, plaintiff states that this action "is not against the State of Louisiana," yet they concede that that State is a party defendant in this action and that "this suit—will thus necessarily affect the rights of both States."

Plaintiff cites *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971) for the proposition that the Supreme Court declined original jurisdiction because of the availability of lower courts to adjudicate the claim. However, that case did not involve a controversy between two or more States and was filed under 28 U.S.C. 1251(b) which involved concurrent and discretionary original jurisdiction of the Supreme Court.

Plaintiff cites *Texas v. New Mexico*, 462 U.S. 554 (1983), to no avail. That case involved a dispute between States over the flow of a river in which the Supreme Court held that it had original jurisdiction over the action.

Plaintiff further asserts that when the Supreme Court considers the invoking of its original jurisdiction the

“clams must be serious and dignified.” We consider this to be an admission that plaintiff’s claims in this action are neither serious nor dignified.

Turning now to other points of law, we invite this Court’s attention to *Colorado v. New Mexico*, 459 U.S. 176 (1982), wherein the Supreme Court held it had original jurisdiction of an action between two States over apportionment of water in a river. A similar issue is involved in the case at bar. In *California v. Texas*, 457 U.S. 164, 165-166 (1982), the Supreme Court held that where two States are asserting inconsistent claims they are undeniably adversaries and although the allegations have not been proved, the case was characterized as a controversy within the original and exclusive jurisdiction of that Court under 28 U.S.C. 1251(a). We submit, such is the case here.

In *Maryland v. Louisiana*, 451 U.S. 725 (1981), several States, joined by the United States, brought an action against the State of Louisiana challenging the taxing power of that State. The Supreme Court held that it had original and exclusive jurisdiction of the action because one State will suffer a wrong or damage because of the action of another State.

It is clear that the State of Louisiana is an indispensable party to this action because of the harm it will suffer under the relief requested. We submit that *California v. Arizona*, 440 U.S. 59 (1979), has direct application here wherein it held at 61:

Yet this is the only federal court in which California can sue Arizona, because Congress has conferred upon it “original and *exclusive* jurisdiction.” (Emphasis supplied by Court.)

Conclusion

For the foregoing reasons the motions of both the federal defendants and the State of Louisiana to dismiss this action should be granted.³

Respectfully Submitted,

GEORGE PHILLIPS
United States Attorney

/s/ Glen R. Goodsell
GLEN R. GOODSELL
Attorney for Federal Defendants
Room 2614
Land & Natural Resource Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2763

³ Should this Court deny the motions, the federal defendants request that this Court certify the jurisdictional issue as a controlling question of law for appellate review pursuant to 28 U.S.C. 1292(b).

CERTIFICATE OF SERVICE

I, Glen R. Goodsell, hereby certify that I have this 9th day of November, 1984, mailed, postage prepaid, true copies of Federal Defendants' Reply To Plaintiff's Opposition To Motion To Dismiss to the following:

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Honorable William J. Guste, Jr.

Attorney General

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/s/ Glen R. Goodsell

GLEN R. GOODSELL

Attorney for Federal Defendants

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0286 (L)

STATE OF MISSISSIPPI, *ex rel.*,
Plaintiff

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants

ORDER OF DISMISSAL

This matter came on to be heard upon the joint motions of the federal defendants and the State of Louisiana to dismiss this action for lack of jurisdiction in this Court.

The Court having duly considered the matter, it is hereby,

ORDERED that motions of the federal defendants and the State of Louisiana are granted, and it is further,

ORDERED that this action be and is hereby dismissed.

ORDERED this 6th day of December, 1984.

/s/ Tom S. Lee
United States District Judge

