ADMINISTRATIVE APPEAL DECISION

Echubby Lake Hunting Club, L.L.C.
File No. 17530
Little Rock District
3 July 2003

Review Officer (RO): Janet Thomas Botello, US Army Corps of Engineers (USACE), Southwestern Division, Dallas, Texas

Appellant/Applicant: Echubby Lake Hunting Club L.L.C., Pine Bluff, Arkansas

Appellant Representative: Joseph A. Strode, Bridges, Young, Matthews & Drake PLC, Attorneys at Law, Pine Bluff, Arkansas

Authority: Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): 26 March 2003

Appeal Conference Date: 29 May 2003

Site Visit Date: None

Background Information: The Corps of Engineers (Corps), Little Rock District's (LRD) involvement with this action started in March 2001 as a reported unauthorized activity. By letter dated 4 October 2001, the Echubby Lake Hunting Club LLC (Hunt Club) submitted a Department of the Army (DA) permit application to LRD for nationwide permit authorization to construct a road crossing across Echubby Lake. The LRD conducted a site inspection on 1 November 2001, during which the LRD noted that the Hunt Club had completed additional work not included in its permit application. The LRD determined that the work completed by the Hunt Club was in violation of Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act (CWA). A Cease and Desist letter was issued to the Hunt Club on 9 January 2002, which stated that the existing work did not comply with the Nationwide Permit General Conditions, in particular, General Condition 1. General Condition 1 addresses adverse effects on navigation. The Hunt Club was informed that it either had to remove the unauthorized fill and restore the impacted areas or revise its permit application to include all proposed work. Through a series of communications, the Hunt Club stated that it disagreed with the Corps' claims of jurisdiction under Section 10 of the Rivers and Harbors Act. By letter dated 25 June 2002, the LRD again informed the Hunt Club that it had the option to remove the unauthorized structures/fill or apply for a permit to retain the structures/fill. The Hunt Club was also told that once a completed permit application had been received, it would have 60 days to appeal the District's approved jurisdictional determination.

On 21 August 2002 and 18 September 2002, respectively, the Hunt Club submitted a revised DA permit application and revised drawings in which the Hunt Club proposed to place dredged and fill material into 0.03 acre of waters of the United States (US) for the construction of two 60-

foot-long road crossings with 12-foot top widths, adjacent to the right descending bank of the Arkansas River. Crossing #1 was to be located at the entrance to Echubby Chute and Crossing #2 was to be located approximately 1,000 feet northeast of the proposed Crossing #1. Each crossing would be constructed of rock and dirt to a height of six feet above normal pool level and each would contain a 4-foot by 25-foot steel pipe for drainage and water exchange. Additionally, the applicant requested authorization to retain an existing 40-foot-long by 8-foot-wide railroad car bridge (Bridge Site), crossing a small channel that connects Echubby Chute to Echubby Lake. The only unauthorized fill material associated with this bridge occurs at the approaches to the bridge, which consists of approximately 40 cubic yards of earth placed above easement level. A Public Notice for the Hunt Club's application was issued by the LRD on 7 October 2002. The Hunt Club's stated purpose of this project is to construct three crossings at the above-referenced project sites to provide appropriate access to its property. Per project plans submitted for the public notice, the Hunt Club also indicated that the existing rebar and a 7-foot gate associated with the Bridge Site structure were constructed in a manner that would prevent public access. Echubby Chute and Echubby Lake are backwater areas lying below the ordinary high water mark of the Arkansas River, a navigable water of the US.

On 23 October 2002, the Hunt Club submitted a Request For Appeal (RFA) of the LRD's jurisdictional determination, stating that the Corps has no jurisdiction under Section 10 of the Rivers and Harbors Act because the waters referenced in the Hunt Club's DA permit application (Echubby Chute, Echubby Lake and the connecting ditch) are not navigable in fact and are not subject to navigational servitude of the United States and that Corps regulations are excessively broad. The Hunt Club also stated that the Corps has no jurisdiction under Section 404 of the CWA because the road crossings which the Hunt Club desires to construct are specifically excluded from the Corps' jurisdiction pursuant to 33 CFR 323.4. The Hunt Club stated that the Corps has no jurisdiction to condition a permit requiring a private landowner to grant public access to his property, or otherwise to adjudicate property rights issues between landowners and the public. The Hunt Club stated that there is no other basis for the Corps to exercise jurisdiction. The Corps subsequently found on 15 January 2003, that the reasons for appeal regarding the Corps' jurisdiction pursuant to Section 10 of the Rivers and Harbor's Act and Section 404 of the CWA, had no merit. The Corps found that the reason for appeal regarding the Corps' jurisdiction to require public access on private property was premature, and based on conjecture regarding action that may or may not be taken in response to the permit application. The Corps stated that the Hunt Club was limited to a review of the LRD's approved jurisdictional determination at that time. The Corps also stated that the Hunt Club would have an opportunity to appeal once the LRD made a final decision regarding the proffered or denied permit. (Refer to the Appeal Decision for Approved Jurisdiction Determination, File No. 17530, Echubby Lake Hunting Club for additional information regarding that appeal)

In a letter dated 7 March 2003, the LRD determined that issuance of a permit for the proposed action would be contrary to the public interest and therefore, denied the permit request. On 26 March 2003, Mr. Joseph A. Strode of Bridges, Young, Matthews & Drake PLC, Attorneys at Law, Pine Bluff, Arkansas, submitted a completed RFA on behalf of the Echubby Lake Hunting Club, L.L.C. The RFA was received within the requisite 60-day time period.

Information Received and Its Disposition During the Appeal Review:

The LRD provided a copy of the administrative record to the Appeal Review Officer (RO) and the Appellant. Pursuant to 33 CFR Section 331.7(f), the basis of a decision regarding a permit denial is limited to the information contained in the administrative record by the date of the Notice of Appeal Process (NAP). Neither the appellant nor the Corps may present new information not already contained in the administrative record. The NAP for the Echubby Lake Hunting Club, LLC was dated 7 March 2003.

The RO provided a list of questions to the LRD and the Appellant to be answered in the appeals conference. The list of questions is referred to as Exhibits 1 and 2 of the appeals conference.

During the appeals conference, the RO asked the Appellant to clarify each reason for appeal. The Appellant provided a written response to the questions to be answered in the appeals conference, as well as a position paper that clarified its reasons for appeal. These documents were considered as clarifying information and are referred to as Exhibits 3 and 4 of the appeals conference. The LRD responded by electronic mail dated 27 May 2003, and verbally, at the appeals conference, to the RO's questions. All verbal responses are found in the verbatim record of the administrative appeal conference dated 29 May 2003. The electronic mail response is referred to as Exhibit 5 of the appeals conference.

Appeal Decision and Instructions to the Little Rock District Engineer:

Appellant's Reason 1: The decision was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION:

Appellant's Clarification. The Appellant stated that the Corps is attempting to use the Section 404, CWA permit process as leverage to force private property owners to open their private property to public recreational use, which is arbitrary, capricious and an abuse of discretion.

It is the Appellant's position that the waters in question (Echubby Lake, Echubby Chute and the connecting channel), are private property under Arkansas and Federal law subject only to a flowage easement to the Corps in the areas that are covered by easements, that the Corps' flowage easements cover only the right to put water on the easement areas and timber rights on permanent easement areas and do not transfer any hunting or fishing rights or rights of public access for any purpose. There is no language in the easements that makes any mention of hunting or fishing rights or rights of public access. Additionally, the administrative record reflects statements from several similarly situated landowners who were expressly told Corps personnel at the time when the easements were acquired, that the landowner was not giving up any hunting or fishing rights or rights of public access.

Other than a 1966 opinion from the Corps' Chief Counsel, the Appellant stated that there is no evidence in the administrative record that the Corps ever intended to acquire such rights. In fact, 20 disclaimers were submitted to the administrative record signed by three different Secretaries of the Army that the Appellant asserts clearly established that the easements were never intended by either the landowners or the Corps to transfer any hunting, fishing, or recreation rights. The Corps' position that the disclaimers are merely intended to clarify that the landowner retains hunting and fishing rights only when the easement areas are dry land is, in the Appellant's opinion, ludicrous. According to the Appellant, the word "land" has antecedent basis earlier in the disclaimer that clearly references land which is or will be covered with water. The Appellant contends further that many other areas covered by these disclaimers (e.g. Flag Lake, Pecan Lake, and all other areas along Mill Bayou) were already covered with water before the easements were ever acquired or before there was ever a disclaimer.

Upon applying rules of contract interpretation, the Appellant stated that there is no reasonable way to interpret the easements as including the transfer of such rights. The administrative record reflects statements from a banker, a surveyor, real estate broker, appraisers, title companies, and attorneys, all professionals who deal with real estate issues everyday, all saying that these easements have never been understood to transfer hunting or fishing rights or rights of public access.

The Appellant stated that the Corps has obtained fee title, not mere easements, to areas that the Corps intended to be available for public use for recreation and navigation. Examples cited included the canal connecting the Arkansas River to the White River, the Merrisach Lake recreational areas, the post lake Moore's Bayou recreational areas and the numerous Corps parks obtained up and down the river. Finally, the Appellant stated that pursuant to Arkansas law, a property owner owns exclusive hunting and fishing rights on his property even when covered by water.

Corps Response. In contrast to the Appellant's stated clarification, the District's decision was based on the Appellant's request to place dirt and rock fill material into 0.03 acres of waters of the US for the construction of two road crossings with culverts, and to retain one rail car bridge structure with associated fill, steel support pipes and a bottom gate, all of which are located in navigable waters of the US. The purpose of the project as stated in permit applications dated 4 October 2001 and 21 August 2002, and as reiterated by the Appellant in a letter dated 18 September 2002, is to provide all weather access from one side of the Appellant's property to the other. The Appellant stated that the project was needed because it was having considerable difficulty accessing the lower part of the subject property for the purpose of timber land management, farming and recreational purposes. However, as shown on the project plans submitted with the application (and that were placed on public notice), and as stated by the Appellant in the revised permit application and letters within the administrative record, the project was submitted, designed and intended to prevent public access to the navigable waters flowing over the Appellant's property. Hence, the project at hand entailed an evaluation not only of the environmental impact resulting from the placement of structures and fill into navigable waters of the US, it also entailed an evaluation of the public interest relating to the "restriction of access", not the "opening up of" navigable waters of the US to the recreating public.

Specifically, 33 CFR Part 320.4(g)(1) states that an inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in navigable and other waters of the US, including the Federal navigation servitude and Federal regulation for environmental protection. Part 320.4(g)(3) states that a riparian landowner's general right of access to navigable waters of the US is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In cases of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied. Finally, Part 320.4(g)(5) states that proposed activities in the area of a Federal project which exists or is under construction will be evaluated to insure that they are compatible with the purposes of the project.

Congressionally authorized by the Rivers and Harbors Act (July 24, 1946), the McClellan-Kerr Navigation System project, of which the project area's Lock and Dam 2 is a unit, is a multiple purpose plan for the development of the Lower Arkansas River in Arkansas and Oklahoma. Because the construction and operation of this project would affect lands lying above the navigation pool, it was necessary for the Corps to acquire the right to overflow some of these lands permanently and some occasionally. Hence, the Corps obtained standard flowage easements from the riparian landowners having lands adjacent to the project. Two such easements were obtained from, and just compensation was paid to, the prior owners of the Hunt Club property. Besides the actual authorization for that specific project, other authorities show the intent of Congress to allow public recreation, which includes boating, on Federal projects. Section 4 of the Flood Control Act approved on 22 December 1994, as amended, (16 U.S.C. 460d) provides generally for the development of recreation at water resource development projects constructed by the Department of the Army (DA). In a letter dated 6 November 1966, Corps' General Counsel, E. Manning Seltzer stated:

> "...the section states that the water areas of all such projects shall be open to public use generally, for boating, swimming, bathing, fishing, and other recreational purposes... The DA considers that this section, expressive of a continuing intent of Congress, imposes an obligation on it when acquiring property interests for a water area of a project to acquire interests sufficient to insure the public use envisioned in this section. Accordingly, the standard form of flowage easements used in our projects contains language designed to acquire property interest which will provide for public use of the water areas. When the property to be taken is appraised, there is taken into consideration the right of public use which is acquired, and full compensation is paid for this feature of the taking....The estate taken consists generally of an easement to permanently or occasionally inundate the land, together with the right of free access over the water area for the use of the public generally for broad recreational purposes. What this means is that the public has a right to use of the water for these purposes, this right being coextensive with the physical limits of the water. When the land over which the flowage easement is acquired is not inundated, it follows that the public has no right to its use. The exclusive rights of the landowner to fish, hunt and enjoy general recreation on his land, to whatever extent such rights existed under State law, are unaffected, except insofar as the public may use, for recreational purposes, the water which from time to time, may lie over the land."

The District recognized this authorization in its decision document (Page 9). The District stated that the environmental impacts of the proposed fill projects were minimal, and it agreed with the Appellant's need to provide access to the lower portions of its property. However, the district was concerned with the project's impacts to navigable waters. The District asked the Appellant to consider other alternative project designs that would achieve the same project purpose without restricting access to navigable waters. However, the Appellant declined by letter dated 2 January 2003 and stated that it was not open to any alternative crossing design that would accommodate public access to Echubby Chute and Echubby Lake. Pursuant to Corps Regulatory Guidance Letter 84-17, titled "Interference With Federal Projects", proposed activities which may result in modifications of, or encroachment on, constructed Congressionally authorized Federal projects require careful and thorough review at all stages of the permitting process. Applications should be reviewed for the potential impact on the authorized purpose(s) for which the Federal project was constructed.... Limitations and/or restrictions identified that would limit the scope of the proposed permit activity or that would prohibit it entirely must be identified". "When the district engineer determines that the proposed activity would conflict with the project's Congressionally authorized purposes, established limitations or restrictions, or that it would limit an agency's ability to provide the necessary operation and maintenance functions, he will so notify the applicant and all interested parties of his determination".

The District evaluated the permit application in accordance with DA procedures outlined in 33 CFR parts 320.4 and 325, as well as other cited authorities and it gave the Appellant an opportunity to revise the project plans to achieve the same project purpose but exclude the point of contention. Subsequent to rejection of that opportunity by the Appellant, the District followed through with its public interest review decision in accordance with established guidance. Because the waters within the project area are navigable waters regulated under Section 10 of the Rivers and Harbors Act of 1899, and because two flowage easements legally provide for coverage of portions of the Appellant's property subject to this permit application with water levels resulting from the Federal navigation project, the District's decision that the Appellant's request for three road crossings, in the manner proposed, would create undue interference with access to, or use of, navigable waters of the US was substantive, and clearly neither arbitrary nor capricious. Neither is there any appearance that this decision represented an abuse of discretion as has been alleged by the Appellant, or that the decision by the District was not in accordance with law.

Appellant's Reason 2: The decision was contrary to constitutional rights and privileges of the applicant.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION:

Appellant's Clarification. The Appellant stated that this reason for appeal refers to private property right issues. The Appellant stated that the Corps has no jurisdiction to adjudicate private property rights. The Appellant also stated that the Corps' position that "this" (referring

to Echubby Lake, Echubby Chute and the connecting ditch) is Section 10 water would amount to confiscation of private property rights. The Appellant believes that the Corps has not acquired such rights through their flowage easements. The Appellant stated that the Corps' claim that these areas are now covered by Section 10 waters which the public is entitled to use for recreation and navigation, amounts to a claim that private property has been converted to public use by the mere act of the Corps placing dams on the Arkansas River and raising the river elevation several feet. All cases cited in the Appellant's brief, submitted for the administrative record, state that this cannot happen and would be unconstitutional. The Appellant maintained that it is unconstitutional taking if, in fact, the Corps can sustain its position that under any theory, that the public has the right to hunt and fish on these properties. The Appellant submitted several public letters which stated that various land owners agreeing to Corps flowage easements never intended to transfer hunting and fishing rights on these properties or open them to public access.

Corps Response. The Appellant is correct that the Corps has no jurisdiction to adjudicate private property rights. The Corps does not believe that such an action has occurred as a result of the District's actions. In accordance with 33 CFR Part 320.4(g)(6), a DA permit does not convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, a DA permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state or local laws or regulations. The Corps believes that the exclusive rights of the landowner to fish, hunt and enjoy general recreation on his land, to whatever extent such rights existed under State law, are unaffected, except insofar as the public may use, for recreational purposes, the water which from time to time, may lie over the land.

Pursuant to 33 CFR, Part 331.5(b)(4), the issue of whether a permit decision may be a "taking" under the Constitution is truly not an issue that can be appealed. Takings issues involve controlling factors that cannot be changed by the Corps decision maker, and are thus not available for administrative appeal. The Federal courts are available to address whether or not a permit decision results in a taking. Although the question is not one to be addressed in this appeal, neither does it appear that the Appellant is actually trying to assert a takings claim inasmuch as the Appellant was not the owner of the property at the relevant time of any action that might have resulted in a taking. However, the Appellant's concern that this permit decision may improperly infringe upon the full extent of its property rights is understood. To effectively address that concern, it would seem helpful when referencing the Appellant's property rights to point out that the reference is with respect to such private property rights as the Appellant may possess to the land, not the water, for the Appellant has not contended that it possesses a property right to the navigable water. Neither has the Corps contended that the right of public access to navigable water conveys a public right to hunt or fish on the Appellant's land. Bearing this in mind, that is the distinction between the rights that attend the "land" owned by the Appellant and the public rights that attend a navigable water of the US, there doesn't appear to be any real issue over constitutional rights or privileges raised by the District's decision on this permit.

Appellant's Reason 3: The decision was in excess of the jurisdiction and authority of the Corps of Engineers.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION:

Appellant's Clarification. The Appellant disagrees with the Corps' jurisdictional determination that these areas are in fact navigable waters subject to Section 10 of the Rivers and Harbors Act, especially pertaining to the Corps' position on navigability of Section 10 waters as a basis for public rights to use the areas in question. The Appellant stated that pursuant to Arkansas law, the 1953 Submerged Land Act passed by the United States Congress, numerous cases decided by the US Supreme Court, and various Federal courts, ownership of land covered by water is determined by the test of whether the water was regarded as navigable when Arkansas became a state in 1836, subject only to natural changes by processes of accretion, avulsion, et cetera, but unaffected by man-made changes. The Appellant noted that the administrative record clearly reflects that none of these areas in question were covered by navigable waters prior to 1968 when Pool 2 of the Arkansas River navigation project was flooded. The Circuit Court of Lincoln County, Arkansas, has expressly held that none of these areas were navigable and all of them are private property. The LRD did not rely upon or even refer to a single court case, Federal or state, in support of its decision. Under the test of navigability applied by the courts, the Appellant stated that none of the areas in question would be regarded as navigable today, even if today's water levels in the area were historically unchanged or resulted from natural changes. The Appellant maintained the following: That the Corps has misinterpreted its own regulation, Section 33 CFR 329.4, which states that navigability applies laterally over the entire surface of the water body. The navigable water body is the Arkansas River. None of the areas in question are part of the Arkansas River. They are separate and distinct water bodies known as Echubby Chute, the ditch, and Echubby Lake. The fact that they connect to, at least some times, the Arkansas River, does not make them part of the Arkansas River and does not make them navigable for Section 10 waters. Each of these water bodies has its own separate and distinct banks and channels. It is clear from pre-1968 maps in the administrative record that the areas in question were not connected to the Arkansas River prior to the Arkansas River navigation project.

The Appellant also stated that the Corps does not have jurisdiction to effectively adjudicate interpretations of contracts, property rights among landowners and the public or anyone else.

Corps Response. Evidence in the administrative record indicates that the District determined that the project area has been covered by Section 10 waters as early as 1950, prior to the construction of the Congressionally authorized Federal navigation project. Thus, the rights and interests of the public in the navigable and other waters of the US existed in the project area at least since that time. With the advent of the Federal navigation project, the area traditionally covered by navigable waters increased in extent. The former property owners of the proposed project site were compensated twice for the corresponding flowage easements obtained by the Corps. The District is required to follow the CWA, Rivers and Harbors Act and its implementing regulations and relevant judicial decisions in reaching a determination of whether a property is within the regulatory jurisdiction of the Department of the Army. The Appellant's

RFA dated 23 October 2002 challenged the District's approved jurisdiction determination that the project area's waterways are navigable pursuant to Section 10 of the Rivers and Harbors Act. That reason for appeal was judged by the Southwestern Division Engineer to not have merit on 15 January 2003. Hence, the District's jurisdiction determination was upheld. As such, this issue needs no further discussion at this time. Again, the Corps agrees that it does not have jurisdiction to adjudicate private property rights. The Corps believes that no such action has occurred as a result of the District's actions. The Appellant has always had, and continues to have, the right to hunt and fish on their lands. The disclaimers issued by the Corps support that position. The District's action only precludes the Hunt Club from preventing public access to public waters. As previously stated, pursuant to 33 CFR, Part 331.5(b)(4), the issue of whether a permit decision may be a "taking" under the Constitution is not an appealable action. Takings issues involve controlling factors that cannot be changed by the Corps decision maker, and are thus not available for administrative appeal. The Federal courts are available to address whether or not a permit decision results in a taking.

Appellant's Reason 4: The decision was made without observance of procedure required by law.

FINDING: This reason for appeal has no merit.

ACTION: No action is required.

DISCUSSION:

Appellant's Clarification. At the appeals conference, the Appellant maintained that this reason for appeal dealt with "due process" issues. The Appellant stated that the Corps' own "balancing test" (public interest review process) was misapplied and is unsupported by the factual content of the record. The Appellant stated that the Corps is wrong in its conclusion that public interest associated with opening Echubby Chute and Echubby Lake to the public outweighs public and private interest associated with keeping them private. The Appellant maintains that the Corps does not even appear to acknowledge that there are public interests associated with keeping these areas private. The administrative record reflects statements from property owners, a banker, a surveyor, real estate appraisers, real estate brokers and attorneys expressing the concern about the adverse economic impact, effect on property values, and complex legal issues that will result from the proposed Corps' action. The Appellant alleges that the Corps gave no weight to the fact that owners of the Hunt Club made sacrifices to purchase a dream property in expectation of private enjoyment, based on its rights under the laws as they existed. The monies paid for the property reflect a recreational premium, and such transactions are positive for the economy of rural areas. Who can say that private users of these areas would spend any less on food, gasoline, boats, motors, fishing gear, services, and so forth, than would public users. In addition to those resources located within a 50-mile radius of the subject property, areas also accessible to the public include the Arkansas River, the White River Refuge, hundreds of thousands of acres and more than 100 lakes. Finally, the owners bought the property principally for hunting quality deer. The Appellant stated that the Corps cannot begin to comprehend the trespass problems that will result from opening up nearly seven miles of interior shoreline in remote areas which can be quietly approached by boat, particularly where boundary lines between public access areas and

private areas are unidentified. The Appellant expressed concern about the potential revenues to be lost by the Hunt Club if the public can access the area for no fee, without fear of a trespassing conviction.

The Appellant stated that the Corps placed much emphasis on the fact that it received more than 100 comment letters. The Appellant noted that as many as six letters were from the same person, and that there were multiple letters and e-mails, each of which the Appellant assumed were counted. Although there were more than 100 letters from concerned members of the public who want free access to these prime recreational areas, there was no emphasis on the fact that nearly as many people would have the benefit of enjoying these areas even more under private management considering the 12 owners, their family members, and guests.

Regarding other "due process" issues, the Appellant stated that it had requested a copy of the administrative record weeks before a decision was made so that it could determine if there was anything else that it needed to respond to. However, a copy was not furnished until after the permit decision was made and the Hunt Club had filed an appeal. The Appellant claims that it was denied an opportunity to know what evidence was being used against it and to prepare a defense to reply to that evidence.

Some of the stated deficiencies in the administrative record that the Appellant stated were documents that were submitted during the evaluation period which weren't included in the record. These included two public comment letters from Mike Kline of Atkins Lake Properties and Dr. Mel Hegwood of Mosby Club Incorporated, a legal brief written by the Appellant and 15 (of 20 submitted) disclaimer documents signed by three different Secretaries of the Army, which were obtained from various landowners. Additionally, the Appellant stated that it was aware of additional comments made from Pat Sullivan of Chicago Mill, former landowner of the property in question, which were not recorded in a telephone conversation record listed in the administrative file. According to the Appellant, Mr. Sullivan had also stated during this conversation that Chicago Mill never intended to transfer hunting and fishing rights on these properties, and they never intended for these areas to be open to public access. If the Corps was taking this position, then Mr. Sullivan stated that he could assure the project manger evaluating this application that the Corps would never again get an easement from Chicago Mill without going through the condemnation process. The Appellant stated that Mr. Sullivan assured them that the Corps stated that this was indeed its position. The Appellant also cited an initial meeting during which the Corps stated that these areas were open to the public. In a letter written by the Corps to the Hunt Club prior to the submittal of a permit application, the Corps objected to the pre-permit activity of the Hunt Club because it was blocking areas open to the public. Because this occurred before the issues were fully considered and resolved, and prior to the decision on this application, the Appellant believes that the Corps' decision was pre-conceived from day one. In other words, the Corps decided the issue that is involved in this application process before the application process ever began. The Appellant stated that an administrative agency cannot take a legal position before an administrative process has been completed.

The Appellant stated that the Corps held a private meeting with the Arkansas River Rights Committee and a state representative on 8 April 2003, and did not allow the Hunt Club to attend. It also maintains that the Corps continued to contact people and add to the administrative record

after the Hunt Club had responded to the initial comments in the administrative record collected by the end of the public comment period. The Appellant stated that it had no opportunity to respond to the added information and it believes that effective rebuttals could have been prepared.

The Appellant contends that a decision was made on the jurisdictional appeal without holding an appeal conference, although the Hunt Club received a letter stating that there would be a conference. The Appellant stated that the Corps has excluded much relevant information that would be prejudicial to its position. The Appellant noted the absence in the administrative record of numerous pre-1968 maps, and guidelines or policies utilized regarding easement acquisition.

Finally, the Appellant stated that the administrative process employed by the Corps is not conducive to reaching an informed decision in cases involving complex legal issues and significant amounts of factual documentation, particularly where some of that factual information may be controversial.

Corps Response. Corps public interest review procedures are found in 33 CFR Parts 325 and 326. In accordance with Part 325.1(c) and Part 326.3(e)(1), the District accepted a permit application from the Hunt Club to consider a proposal for two new road crossings and one existing bridge crossing that would in effect restrict existing public access to Section 10, navigable, public waters, not private waters. The Corps stated its concern about restricting public access to public waters to the Appellant in a letter dated 9 January 2002 and in a meeting held on 21 February 2002 to discuss the unauthorized activities that had occurred on the subject property to inform the Appellant of existing Corps policy and guidance that would have to be successfully rebutted, rather than indicate that the decision on Hunt Club's application had already been made. By letters dated 20 December 2001 and 25 June 2002, the Corps notified the Appellant of information that it required in order to make the application complete. When that information was received, the Corps placed the proposal on public notice, to solicit comments from the public, special interest groups, state and Federal resource agencies, the State Section 401 water quality certifying agency and others, in accordance with procedures established in Part 325.2 and 325.3. The District considered all comments received during the public notice comment period and included them in the administrative record. Generally, more emphasis is placed on the substantive issues that are raised, rather than the number of similar comments received. Part 325.2(a)(3) states that:

> "Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition."

With regard to comments that the Appellant stated had been submitted during the evaluation process but were left out of the administrative record, the District responded during and after the appeals conference that the two letters and legal brief documents were in the existing file at the time of reproduction for this appeal. The remaining disclaimers have been located in the 's Office of Counsel. The Corps project manager stated during the appeals conference that several documents had been incorrectly sent to that office during the permit evaluation time frame, instead of to him. The District has since ensured that all of the documents mentioned by the

Appellant during the appeals conference, are in the administrative record for this permit application.

With regard to the Appellant's concern that a 8 April 2002 meeting was held without the Appellant present, according to a memo to the administrative record for the permit application dated 27 March 2002, the meeting of concern was requested by a special interest group that may or may not have wished the Appellant to be present. Meetings with and without the applicant present to discuss proposed projects are common to the public interest review process conducted by the Corps. National Environmental Policy Act (NEPA) regulations (40 CFR 1506.6) also state in part that agencies shall:

> "...make diligent efforts to involve the public in preparing and implementing their NEPA procedures."

However, nothing in the public interest review process regulations mandates that an applicant has to be present at every meeting held to discuss its application.

Pursuant to Part 325.2(a)(3), in a letter dated 3 December 2002 the District solicited the Appellant's views on the substantive issues that were raised during and after the public notice comment period. Per 33 CFR Part 320.4(a)(2)(ii), the District was required to consider the practicability of the use of alternative locations and methods to fulfill the project purpose. The Section 404(b)(1) Guidelines state at 40 CFR Part 230.10(a)(2) state:

> "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics, in light of the overall project purpose."

In that same letter, the District asked the Appellant to explain why existing access at the property was inadequate. The District asked the Appellant to consider an alternative road crossing design that would not obstruct existing Section 10 navigation within waters of the US, in particular at crossing #1 and the Bridge site" (page 9, District decision document). The District agreed that the Appellant sufficiently justified the need for additional access roads in its letter dated 2 January 2003 provided associated impacts were minimized to the greatest extent practicable. The Appellant responded by letter dated 2 January 2003 that:

> "...construction of bridges at these sites would be far more expensive than the project proposal and would be very difficult to stabilize and maintain, as these sites are on lower ground and are more subject to flooding than the site where the applicant has used a railroad flatcar (page 10 – District decision document)."

The District evaluated the probable impact, including the cumulative impacts, of the proposed activity on the public interest. Considering again, that the proposal at hand would in effect prevent public access to Section 10, navigable, public waters, not private waters, the District evaluated the national concern for the protection and utilization of important resources, weighing the benefits of keeping public access to the project area waterways open versus the detriments of

accepting the applicant's proposal to restrict access. Regulations at 33 CFR Part 320.4(a) dictate what factors are to be included in the public interest review. These regulations also state that:

> "Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits, which reasonably may be expected to accrue from the proposal, must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome if this general balancing process."

Except for the word "careful", the regulations do not state how such weighing and balancing is to be accomplished.

Part 320.4(a)(3) states that:

> "The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another. However, full consideration and appropriate weight will be given to all comments, including those of Federal, state and local agencies, and other experts on matters within their expertise."

Determining the extent to which each factor will impact the environment is a difficult task; one performed through the use of education, experience and best professional judgment of the Corps project manager. All relevant public interest factors were considered during the evaluation of this application. These included fish and wildlife values, historic properties, floodplain values, economics, land use, navigation, cumulative impacts and more. With respect to economics, the District stated that:

> "Backwater areas such as Echubby Chute and Echubby Lake are vital elements to the local economy of the area, particularly as it relates to tourism and commercial fishing. With respect to tourism, popular fishing spots such as Echubby Chute, Echubby Lake and the nearby Coal Pile Lake presumably bring in both intrastate and interstate monies to the local economy of the area via expenditures in local businesses such as bait and tackle shops, restaurants, hotels, fishing tournament fees, and boat hardware stores (page 23, District decision document)."

The District acknowledged that there are public interests associated with keeping these areas private.

> "Generally speaking, the applicant identified their need with respect to restricting navigation within the waters of Echubby Chute and Echubby Lake. The Corps, however, does not recognize any navigable water consistent with the Arkansas River that may, from time to time, inundate the Hunt Club's property as being private waters under

exclusive control of the applicant". Considering the high fees normally associated with both acquiring and maintaining such large portions of land as well as maintaining the vitality of associated wildlife, the Corps assumes that the applicant's need to protect their private property is of great importance. However, the Corps does not feel, in this case, that placing navigation obstructions below the Ordinary High Water Mark (OHWM) of the Arkansas River to include its associated backwaters is an appropriate means of protecting either their adjacent or underlying property. Such a solution to trespassing would permanently obstruct approximately 147.7 acres of naturally accessible navigable waters widely utilized by the public. Instead, the Corps feels that the applicant should consider less intrusive means to accomplish the same objective, such as installing fencing above the OHWM of all navigable waters, or by soliciting patrols of their private property by legally authorized personnel (Page 31 of the District's decision document)".

The District was concerned with cumulative impacts that could result from granting this permit.

> "The Corps recognizes that previous permit decisions can have associated precedent setting effects and, thus, affect the manner of review of similarly related, future proposals. Specifically, a decision that would effectively allow the backwater areas of Echubby Lake and Echubby Chute to no longer be accessible to the public could set in motion future requests by private landowners to close off other natural backwater areas of the Arkansas River" (Page 23 of District decision document).

Once the District concluded pursuant to Part 325.2(d)(4), that it had sufficient information to make the public interest determination, the District finalized its permit decision. Nothing in Part 235.2 mandates a District to solicit the applicant's views on each piece of information that it has either gathered or received and used to make this determination. However, the Appeal Process does provide an opportunity for the Appellant to review the file and rebut evidence gathered as well as the Corps' conclusions.

In finalizing its decision, the District followed Appendix B of 33 CFR Part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969, and prepared an environmental assessment. The District determined in fact, that the environmental impacts associated with the project would be minimal. The proposal also obtained Section 401 water quality certification from the State of Arkansas. The District prepared a Statement of Findings (decision document) which included the District Engineer's views on the probable effect of the proposed work on the public interest, including conformity with guidelines published for the discharge of dredged or fill material into waters of the US (40 CFR Part 230). The District acknowledged that:

> "...every project has its own unique elements, including associated benefits as well as varying degrees of impact(s) to the general public and/or navigable waters. Thus it may be appropriate in some instances to allow certain impacts to navigable waters whereas in other cases the associated impacts may be too great" (Page 18 of District decision document).

After considering the overall need for additional access roads, the District determined that properly designed road crossings providing boater access could have been permittable. However, pursuant to 33 CFR Part 320.4(j)(2), the District determined that there were significant issues of overriding national importance. Specifically, the proposal would have excluded public access to Section 10, navigable waters and waters for which flowage easements were obtained for a Congressionally authorized navigation project.

The District concluded by stating:

> "In short, the intent to improve protection of trespass on the applicant's property via a restriction of access to approximately 147.7 acres of widely used Arkansas River backwaters is not reasonably justified by this permit request"(Page 32 of District decision document).

Pursuant to Parts 325.2(a)(7) and 326.3(e)(2) and Regulatory Guidance Letter 84-17, the District determined that a denial was warranted, advised the Appellant in writing by letter dated 7 March 2003, of its final decision, listed the reasons for denial and prescribed final corrective measure actions required, which in this case, was the removal of the navigational barrier (gate) associated with the "bridge site" structure within 30 days of the date of the denial letter. This constituted the final action on the application.

In conclusion, I find through my review of existing Corps guidance and regulation, that the District followed the appropriate procedures during its public interest review process for this project. The fact that the Appellant disagreed with the Corps' decision does not alter the fact that the decision was in accordance with procedure required by law.

Appellant's Reason 5: The decision is not supported by substantial evidence.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION:

Appellant's Clarification. The Appellant stated that there is no evidence to support the Corps' determination of Section 10 waters. There is no evidence to support the Corps' determination that these easements transferred any right of public access. There is insufficient evidence to support the Corps' conclusion on the weighing and balancing test that the public interest, associated with allowing the public access through these areas, outweighs the public and private interest associated with keeping them private.

Corps Response. In reviewing evidence stated in previous sections of this document referring to each of the points stated in the Appellant's clarification, I find that the District clearly has provided substantial evidence for the Corps' claim of jurisdiction. The Southwestern Division Commander in a subsequent appeal filed by the Appellant supported the District's jurisdictional determination. I also find that substantial evidence exists that demonstrates the right of public

access, as well as supports the public interest review conclusions that served as the basis for denial of this permit application.

Appellant's Reason 6: The decision is unwarranted by the facts to the extent that the facts are subject to trial de novo.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION:

Appellant's Clarification. The Appellant stated that in addition to the aforementioned statements, the whole Corps administrative process in connection with a permit application is just not designed to collect the kinds of reliable, under oath, factual information that should be used to adjudicate property rights and adjudicate contract issues such as the easements and disclaimers. Additionally, it states there is no evidence in the record of any kind of negative impacts on the environment or aquatic life et cetera. Indeed, this was not the basis of the Corps' decision.

Corps Response. As previously stated, the Corps agrees that the public interest review process associated with the DA Regulatory Program does not provide a forum for adjudication of property rights or contract issues. Corps regulations specify that a DA Permit does not convey property rights. Part 325.2(g)(6) states that:

> "A DA permit does not convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, a DA permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state, or local laws or regulations.....The district engineer will not enter into disputes but will remind the applicant of the above. The dispute over property ownership will not be a factor in the Corps public interest decision.

Additionally, Part 325.10(a) – Permit Form, Special Conditions 2(b) and (c) state:

> "A permit does not grant any property rights or exclusive privileges. The permit does not authorize any injury to the property or rights of others."

The administrative appeal process associated with the Regulatory Program is designed to evaluate a permit requirement and determine if actions taken by the district engineer were consistent with Corps Federal projects requirements, regulations and guidance.

The Corps agrees with the Appellant that minimal negative impacts on the environment or aquatic life will result from the proposed project and that the decision to deny the permit was based on other substantive concerns regarding restriction of access to public, navigable waters, including those covered by Corps, Federal project flowage easements.

Appellant's Reason 7: The decision is based on regulations which are either contrary to law or have been misinterpreted by the Corps.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION:

Appellant's Clarification. The appellant stated that this refers to one of the specific points dealt with thus far regarding the Corps' regulation at Section 33 CFR 329.4, which states that navigability applies laterally over the entire surface of the water body.

Corps Response. There is no evidence that our regulations are illegal. Corps guidance is a compilation of regulations, court case rulings and other subject material that is scrutinized through constitutional rulemaking procedures. The District correctly interpreted these regulations throughout the evaluation of the Appellant's permit application. Whether or not the Corps' regulations are contrary to law is indeed a legal matter that is outside the purview of the appeal process.

CONCLUSION: For the reasons stated above, I conclude that none of the Appellant's Reasons For Appeal have merit.

MICHAEL L. SCHULTZ
Colonel, EN
Acting Commander