

1993

Joseph C. Jensen v. Davis County Commission : Brief of Appellant

Utah Court of Appeals

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Gerald Hess; Davis County Commission.

Joseph C. Jensen, Pro Se.

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BRIEF OF THE APPELLANT

Joseph C. Jensen
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Pro' se

930180

UTAH COURT OF APPEALS

JOSEPH C. JENSEN)	Ruling of Second District
Court)	Court
Plaintiff and)	
Appellant)	
)	
)	
vs.)	
)	
Davis County Commission)	Case nr. 910749203 CV
Defendant and)	
Appellee)	Appellate Court Case
)	Nr. 930180CA

Appeal for the Second District Court, Davis County,
Judge, Jon Memmott.

Gerald Hess

Joseph C. Jensen

Davis County Commission

Pro se'

Argument Priority Classification - - 15

FILED
Utah Court of Appeals

JUL 8 1993



TABLE OF CONTENTS

<u>Subject Matter</u>	<u>Page nrs.</u>
Parties to Appeal - - - - -	1
Table of Contents - - - - -	2
Table of Authorities - - - - -	3
Statement of Facts - - - - -	4
Statement of Issues - - - - -	7
Issue #1, Violation of Rights - - - - -	7
Issue #2, Violation of Legal Process - - - - -	8
Issue #3, Violation of U. S. CONST. Article 10 -	8
Issue #4, Violation of Contract Law - - - - -	8
Issue #5, Executive Orders Ignored - - - - -	9
Issue #6, Lack of Judicial Dilligence - - - - -	9
Issue #7, Failure to note Utah Precedence - - -	9
Jurisdiction - - - - -	10
Summary of Argument - - - - -	10
Detail of argument- - - - -	14
Violation of rights - - - - -	14
Legal Process - - - - -	16
Article 10, U. S. Constitution - - - - -	34
Contract Law - - - - -	37
Executive Orders - - - - -	40
Judicial Diligence - - - - -	42
Utah Precedence - - - - -	46
Conclusions - - - - -	49

TABLE OF AUTHORITIES

	PG. NO.
FIFTH AMENDMENT TO U. S. CONSTITUTION - - - - -	5
TENTH AMENDMENT TO U. S. CONSTITUTION - - - - -	6
ART. 1, SEC. 22, UTAH STATE CONSTITUTION - - - - -	6
CLEAN WATER ACT, 92-500, (EXCERPTS)- - - - -	Add. 3
PRESIDENT REAGAN'S EXEC. ORDER #12630 - - - - -	Add. 4
PRESIDENT CARTER'S EXEC. ORDER #11990 - - - - -	Add. 5
UTAH COURT RULES, PG. 480, (AGRICULTURE) - - - - -	8
SOIL EXPERTS FOR PLAINTIFF - - - - -	Add. 12
CHARLES ROBBINS, PHD. UTAH STATE UNIV.	
TERRY TINDALL PHD. UNIV. OF IDAHO	
R. J. HANKS, PROF. UTAH STATE UNIV.	
United States Claims Court - - - - -	5
Florida Rock Ind. vs. United States	Add. 17
Loveladies Harbor Inc. vs. United States.	Add 17

STATEMENT OF FACTS

The farm purchased by the Plaintiff/Appellant, Mr. Jensen, was among some of the original farms settled in Davis County. They were originally settled in the eighteen hundreds by the early Mormon pioneers.

The first priority was to dig a canal from the Weber River to their farms in order to supply irrigation water to their farms. These were all dug with hand labor and horses. The land on Plaintiff's farm and upland farms were all dry polluted with salt or alkali.

One of the first priorities was to dig leaching drains to remove the salts from the soil. This practice of leaching salts is two to four thousand years old in Israel and the Middle East.

When the Davis/Weber canal was established to irrigate the upland farms, they had to install leaching drains to remove the salt and alkali from their farms. This was necessary to make their farms productive and economically successful. Since that time, the farms have been broken up into 5 and 10 acre parcels through estates. All of the people that own the uplands farms have of necessity searched for employment off from the farms in order to survive. The farms would not support their families.

During the 1940's and 1950's the bureau of Reclamation promoted the Weber Basin project by having farmers support the Willard Bay Reservoir, Layton Canal and other Dams on the

Weber river. The Bureau of Reclamation started planning and construction of Willard Bay, canals, and drains for leaching purposes.

During the 1940's, Weber Basin Water Conservancy District was established to provide conservation and development of water resources and leaching drainage in June 1950. After completion of the project, farmers were issued a 10 year development period by the U.S. Government to level, drain, irrigate and provide productive farms by reclaiming their farms to meet the demands of the modern economy.

Properties within the district, were approved for reclamation, and repayments to the United States Bureau of Reclamation have been paid by farmers for the project. Plaintiff's yearly assessment is almost \$6000 for water. The water from the Bureau of Reclamation through the Weber Basin Conservancy District is the main source of water for our farms.

Plaintiff/Appellant sold his Davis/Weber Canal stock when he purchased the Layton Canal stock. The water sold is probably being used in the Park City area now.

Water from the Bureau of Reclamation through the Layton Canal is the main source of water in Plaintiff's area. Water was delivered in 1983 with a ten (10) year development period. Prior to 1983, Plaintiff used Davis and Weber Canal water. The 10 year development period by the Bureau of Reclamation was to install drains, level land, develop irrigation systems, leach the salts or alkali from the soils, etc.

This was all approved by the Bureau of Reclamation and the State of Utah.

The subject property was specifically identified in the Bureau of Reclamation plan used to justify the Willard Bay Project. At the project initiation it was established that other governmental involvement would not be permitted to alter the project.

The United States Soil Conservation Service, Utah State, Utah State University extension service all recommended that Plaintiff place 1200 tons of gypsum on his property. The State of Utah, Agriculture Department, loaned Plaintiff the money to buy the 1200 tons of gypsum. One of the requirements was to insure adequate drainage as specified in Davis County's contract design.

Dr. Robbins, United States Soil Research Agency; Dr. Terry Tindall, soil scientist, Utah State University; Dr. Christenson, soil scientist, State of Utah Agriculture Department, all recommended the spreading of gypsum as long as Plaintiff had drains designed in the Davis County contract drawings. If the drains are not installed, it would be useless to spread the gypsum.

It is a well known fact that 93 million people are being added to this world each year. The World Wide Organizations project that by the year 2011, the world will consume all of the food that farmers can produce. Forty years ago the U. S. Government was trying to get property owners to improve their farm lands to meet the food requirements in the year

2000. With the present starvation in the world, it appears their assumptions were correct.

STATEMENT OF ISSUES

ISSUE #1. Violation of Constitutional Rights. Article V of the United States Constitution states: . . . nor shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. The Federal Register Vol. 53, nr. 53, Mar. 18, 1988, Presidential Documents reaffirms the just compensation clause of the Fifth Amendment. Property owners have prevailed when Federal Government has tried to dictate private property use. (Florida Rock Industries Inc. vs. United States, #26682L, in United States Claims Court remanded Court of Appeals for Federal Circuit, Oct. 2, 1982. \$1,029,000 plus interest and attorneys fees was awarded for 98 acres that were taken by the government. (Add. # 17)

The U. S. Claims Court awarded Loveladies Harbor Inc. a takings judgement and awarded just compensation as mandated by the fifth amendment. The Court awarded the Plaintiff \$2, 668,000 plus interest, attorney's fees and costs. (Add. # 17)

Violation of the Utah State Constitution, Article 1, Section 22, Private property for public use: Private property shall not be taken or damaged for public use without just

compensation. The Army is also violating Utah State's rights in accordance with the U. S. Constitution.

ISSUE #2. Violation of Legal Process.

Plaintiff/Appellant's attorney filed suit against the county while at the same time he was engaged in Public Defender work for the county and was receiving compensation for such legal work. (Conflict of Interest) The Plaintiff/Appellant was not informed of this Conflict of Interest as required by ABA Ethics Rule 1.7, Model Rules of Professional Conduct, 1992.

ISSUE #3. Violation of United States Constitution, Article 10.

The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Constitution never delegated to the United States Army the power to dictate the use of farmers, private property. Our forfathers were specific in the Constitution about the rights of private property owners and the functions of the Military.

ISSUE #4. The Second District Court of Utah permitted Davis County to violate a contract that is legal and should be completed as agreed upon. The County's defense of "impossibility to perform" is based on lies, deceit, and misinformation.

The Second District Court of Utah confirmed that a breach of contract had taken place, and the Plaintiff/Appellant was damaged. The Court, however, failed to assess impact, to properly assess damages, award attorney fees, loss of property value and income.

ISSUE #5. The Second District Court of Utah totally ignored President Reagan's Executive Order, 12630 and President Carter's Executive Order, 11990. The Court also ignored Vice President Quayle's Council on Competitiveness in support of President Bush's support for policies and proposed legislation concerning the protection of property rights. (Add. # 4 & # 5)

Property rights must be protected to preserve our freedoms from the military and Federal agencies for the citizens of the United States. These issues are considered critical to the future generations in providing for democracy and an abundant supply of food, shelter, and clothing.

ISSUE #6. Evidence in the form of personal observation of the farm was denied by the District Court Judge who refused to visit the actual property site, so that erroneous testimony and false information could be corrected. This demonstrated a lack of Judicial diligence. (Tr. 88)

ISSUE #7. The Second District Court of Utah failed to take judicial notice of fact that it is common knowledge in

Utah that much of the valley land was practically worthless for agriculture without drainage. (Article II, Rule 201, Judicial notice of adjudicative facts). Agriculture is specifically mentioned on page 480 of Utah Court Rules Annotated, Cottrell v. Millard County Drainage Dist., 58 Utah 375, 199 P. 166, (1921).

JURISDICTION

The Utah Appellate Court has jurisdiction for review of all Utah District Court decisions.

SUMMARY OF ARGUMENT

Plaintiff/Appellant's civil rights were violated because his counsel did not represent him effectively. His counsel had a conflict of interest by also being paid by the County for whom the Plaintiff/Appellant's law suit was filed against.

On the second day of the trial, Plaintiff/Appellant asked the Judge to take a 30 minute visit to the property in order to correct the false statements that had been made. But the Judge refused, and it appeared to the Plaintiff/Appellant that the Judge, and the attorneys for both sides had already decided what the verdict would be.

The Army Corps of Engineer's violates the constitution by being involved in farmers private property. The County is using the Army as an excuse to change the policy of past County Commissioners. If the Wetlands Regulations were constitutional, Plaintiff/Appellant's property would still not qualify for the wetlands program for the following reasons:

- a. Irrigation of uplands causing wetland are not included in the Army's permit process.
- b. Land that has been farmed prior to 1985 is not included. Subject land has been farmed for years before 1985.
- c. Farms that were included in a program funded by Congress are not included. Congress passed the Bureau of Reclamation project over 40 years ago. This included the Plaintiff/Appellant's farm and that of his neighbors.
- d. The water to be dumped on the Plaintiff/Appellant's property is non-point source water which is polluted water from storm runoff. The water does not flow into navigable water, but is distributed by an irrigation ditch over several acres of weeds.

The U.S. Supreme Court has ruled that the Army's wetland program must comply with the Constitution's Fifth Amendment. The Supreme Court considered it was a taking unless private property owners were duly compensated.

A contract is binding, and because the County is inefficient or changes its mind is no reason to breach a contract. Residential properties are transferred by contract,

money is borrowed by contract, buildings are constructed by contract, and all types of assets are transferred by contract. These contracts are enforced by the law. Subject contract must also be enforced.

No laws, Federal or State, were referenced by Defendant (Davis County). In the Court's Findings of Fact, and Conclusion of Law and Order, and Memorandum of Decision, no laws are referenced. How can anyone refute an interpretation of the law, if no law is identified. The Court's decision was based on opinions and hearsay evidence that should not have been permitted. When the Army's Corp of Engineering representative refused to testify, all letters, documents, etc that were based on hearsay should have been disallowed by the Court.

Professor Hanks, Professor James, Terry Tindall Phd, and Dr. Robins, all used different parameters than Professor Willardson. They never would agree with his testimony. For example, Dr. Robins is considered one of the two top soils and drainage experts in the world. After reviewing the contract drainage design drawings, he stated it was a good design; but don't settle for anything less. Your field drains should be over six feet deep with the water dumping down into the top of the water in the drain." He commented that the large volume of water that flowed into the storm drain was considerable.

The County, and allegedly the Army, totally disregarded President Regan's and President Carter's executive order #12630 and #11770. President Regan's Executive Order on

Governmental Actions and Interference With Constitutionally Protected Property Rights was written to stop the Army from taking private property for public use without just compensation. If the Army wanted Plaintiff/Appellant's property for public use by considering it wetlands, the Army should purchase the land.

President Carter's Executive Order was for Federal lands only. President Carter was addressing the responsibility of acquiring, managing, and disposing of federal lands and facilities. (Add. # 4 & #5)

The violation of the Utah Constitution that protects property rights for its citizens also took place. President Brigham Young was also dedicated to developing farms, constructing homes, and promoting an environment for protecting families and their property. (Art. 1 Sec. 22, Utah State Constitution)

Since the present County Officials have taken over responsibility for County services to county property, we have more weeds, insects, mosquitoes, rats, etc that are a hazard to our farms and health. Farmers do not like to use herbicides and insecticides, as they are a hazard to health if not very carefully handled. Wetlands, multiply the problem for the farmers several times over.

The Federal Government solicited farmers to support the project and reclaim the land to return it to productive farms. Plaintiff/Appellant purchased the land at their recommendation in order to return it to GOD for production of

food for our grandkids and earn a few brownie points for when he goes through the Pearly Gates.

ARGUMENTS

VIOLATION OF CONSTITUTIONAL RIGHTS, UNITED STATES, ARTICLE V; AND UTAH CONSTITUTION, ARTICLE 1.

Point #1.

Article 5 of the U.S. Constitution has been upheld by the Supreme Court, Claims Court, Court of Appeals and lower Courts. It is one of the few things in this world that has been the guiding light to keep our free enterprise system functioning with some degree of honesty. The free enterprise system and protection of private property rights are why our nation has been the greatest nation in the world.

Point #2.

Presidents Reagan, Carter and Bush have upheld the Article V, Fifth Amendment, takings law in their actions. President Reagan directed his employees to follow his 12630 Executive Order requiring them to cease and desist from taking the use of private property without due compensation for the property owners. (Add. # 4). President Carter restricted his Executive Order to Federally owned property. Private property was not included in his 11990 Executive Order. (Add. # 5)).

Point #3. President Bush discontinued the use of the Army's proposed use of the Federal Manual for Delineating Wetlands written by the Army and dated August 14, 1991. This manual was submitted three times and turned down as a result of 30,000 letters of complaint mainly by farmers. The original Army publication only received 100 to 300 comments depending on the year submitted for public comment.

Point #4.

Congress passed a law requiring the National Academy of Science to write a new manual. The Army's manuals never took into consideration the differences between southeast states with several inches of rainfall in one day compared to the Rocky Mountain states that are desert with little rain and, in addition, have an alkali soil problem. (Add. #16)

Point #5

During the summer months, the subject farm area may receive four to five inches of rainfall in an average summer season. Florida receives that much rain in one day. For these reasons Utah farmers have been handicapped due to the lack of rain and lack of alkali leaching abilities. Farmers have paid for the canals and reservoirs in order to properly irrigate their farms. If farmers are denied the proper use of their drainage, leaching, and irrigation techniques, their private property is being confiscated by the taking of their properties use without just compensation. (Add. # 21)

VIOLATION OF LEGAL PROCESS

Point #1.

Plaintiff/Appellant was denied effective assistance or counsel by his attorney. His attorney wrote false statements which were then signed by the Court Judge, Jon Memmott's Memorandum of Decision. Plaintiff/Appellant's attorney was

also on the payroll of the Defendant, County, at the time of the adjudication. The attorney's statements benefitted the Defendant, Davis County and not his client, the Plaintiff/Appellant. (ABA Model Rules, 1.7, 1992.)

The following response is made in reference to the Memorandum Decision signed by Second District Court Judge, Jon Memmott. Comments are made in reference to pages in the Court document.

Page #1

After telephone calls and a visit to his office, Plaintiff/ Appellant's attorney was not available to discuss the results of the trial. The trial had been over almost two months without advice from my attorney. He sent a letter, but would not discuss the trial.

Page #2, #3

The Plaintiff/Appellant should be allowed all legal fees due to the County breaching the contract. The Plaintiff/Appellant complied with all legal responsibilities therefore the County should pay legal fees, damages, etc.

Page #4. (Findings of Fact)

(1) The flood control channel varied from 8 to 11 feet not the 11 feet the Court ruled on. The Plaintiff/Appellant insisted that the drain go under the North Davis sewer trunk line that has been leaking for decades.

(2) The Wetlands Act has been foreseeable since the 1970's. Section 404 has been applicable to Utah since 1977. If Mr. Sid Smith, Public Works Director, did not know

about Wetlands it was due to lack of performance in his position. Mr. Smith has never submitted a completed 404 permit applicaion. Due to private property owners challenging the Constitutional right of the Army taking use of private property for the Army's use makes the County's excuse void. The hearsay evidence the County used in the trial did not officially turn down the contract, engineered drain. All the letter stated was that there was a less damaging alternative.

(3) Mr. Oliver Graw's testimony could be potential wetlands from an aerial photograph showed a picture of Plaintiff/Appellant's plowing experiment. The comment that the wetlands issue was unforeseeable further justifies the dishonesty of the trial. It was never proved that the property was a natural wetlands or it was legal to violate the contract for that excuse.

(4) The prior experience with field drains was true due to the 10 field drains maintained in the field. The drains were a result of several soil scientists and engineers over the past 35 years.

(5) True

(6) a. The backhoe sat idle all summer, plus experienced neighbors volunteered to operate the equipment. With their \$17 million budget, the County could have rented a backhoe so the trench could be dug. As usual, public works in this county takes longer than necessary. Six years and no drain that should have been completed in one

year. Again, the defense of "impossibility" is invalid as stated by the Judge and throughout this Appeal Brief.

(6) b. Plaintiff/Appellant also had several meetings with the Army and State of Utah Environmentalists, and they all agreed that the storm water would benefit the Nature Conservancy Districts property if the drain was dug as designed. Their letters should have been hearsay due to the fact the County never completed the 404 permit and Plaintiff/Appellant was not allowed the privilege of cross examining the writers of the letters. The 23 June 1989 letter states that the 2 to 3 feet depth was a less damaging alternative. This destroys the productive capability of Plaintiff/Appellant's farm and does not meet the requirements of the wetlands data on private property. Plaintiff/Appellant asks, "less damaging to whom"?

(6) iii. The October 6, 1989 letter reaffirms the 404 application was not complete and uses the words less damaging alternative. It also states that they {County} would haul the excess material away. They could also do this for the 8 to 11 foot deep drain. This never did establish that the 8 to 11 foot deep channel was not acceptable. No completed 404 permit was ever submitted to be turned down. The farmers on the west side of the drain had installed a fifteen inch pipe from the Bluff Road to Gentile to carry the water from the upland drains. The 6 foot drain on Plaintiff/Appellant's side was for leaching purposes. The 200 to 300 second feet is new

water that the drain will be constructed to transport from the Cities and subdivisions.

(6) iv. The Army's hearsay letter refers to a new executive order that will be issued in the near future. The President will not issue an executive order. President Carter's executive order never intended to take the use of private property. It was for the use of Federal Agencies for their federal properties. When Congress passed the 1977 Clean Water Act, they were very specific in the States assuming the responsibility for the management of wetlands - - not the Army. Plaintiff/Appellant does not consider his property as waters of the United States. Also, the new drain would not impair the flow of water into the Great Salt Lake (Property of Utah). The drain would put the new water closer to the lake. The present water never flowed directly into the Great Salt Lake.

(6) iv. 3. The Corp of Engineers statement, " The Corps thinks that it is a laudable and prudent use of the storm drain water flowing into the Nature Conservancy District property for the improvement of their property and purification of the water."

(6) iv. 4. Again, the Army violates the Constitution and Congressional laws by including Utah Lake, Great Salt Lake, Mud Flats, sand flats, etc. The Attorney General for the State of Utah settled the ownership of Utah Lake thru several years of litigation. The Courts decided that Utah Lake and the Great Salt Lake were waters of Utah.

(6) iv. 5. The Army Corp is correct in stating it has taken no enforcement action or permit issuance or denial with Plaintiff/Appellant, Mr. Jensen, or the Defendant, Davis County. Mr. Brooks Carter, Army representative, has been helpful in furnishing information to use when Plaintiff/Appellant made calls to Washington D.C. or when trips were taken to see Congressmen and National Academy of Science in Washington D.C.

(6) iv. 6. President Reagan's Executive Order 12630 on the taking of private property for government use stating that it is still unconstitutional. Congress has supported Executive Order 12630 by submitting several bills supporting the Constitution. The Army Corps office in Washington stated that the regulation was unfair due to the fact that Utah is a desert State with alkali problems and Florida is a State with acid and water problems.

(6)iv. 7. The 404 section is only a small part of the 1977 Clean Water Act. It is involved with non point sources, pollution, State water rights, etc. Since these letters were written, there has been hundreds of court cases that the governments have paid millions of dollars in settlements for violating the U.S. Constitution.

The drains Plaintiff/Appellant has on his property have been maintained for 30 years; therefore, he has not violated any laws on his farm.

(6) iv. 8. Plaintiff/Appellant is still of the opinion that the County should live by the law and complete the

construction according to the contract which was prepared by a professional Engineering firm. It should have been completed in 1988. This is 1993 and the project is still not completed.

(7) The Court is guilty of allowing the false statements, and total disregard of private property owners and using the legal system to promote dishonesty and inefficiency. In six years, the County has not met its obligation. Syracuse City still intends to complete their drain. The County bonded for \$13 million to accomplish storm drain projects. Syracuse, West Point and Clinton, have proceeded on their own to correct their storm water problems. The primary factor for not proceeding is personnel interests and inefficiency in our County government. Each issue was not a legal excuse for not completing the project for six years.

(8) The County has been aware of the Syracuse block grant for two years. Again, they {County} are spending tax payers dollars to Ekitone when the original engineers provided a design that effectively used the storm water.

(9) True. After three and one half years, the County is now going to do its paper work?

(10) After visiting with Mr. Willardson twice at Utah State University, Plaintiff/Appellant decided he had better things to do than visit with him. Mr. Willardson's visit to Plaintiff/Appellant's farm to evaluate it was a joke. Professor Miller was very knowledgable about the farm for two reasons: He was raised on a farm in Corrinne with the

same problems that Plaintiff/Appellant has corrected. Professor Miller is presently on the study of the soil and salt problems of the Colorado River. Mexico's water problems of the Colorado River receive more support than United States farmers receive.

(8) a. Plaintiff/Appellant's farm does not have a significant water problem. It has a salt problem. Plaintiff/Appellant has always been able to drive his truck or plow with a tractor on his farm. Before the farm was leveled, it had natural drains that were dry all summer unless irrigation water was added. The leaching drains increased crop production by reducing the salt in the soil. The hard pan is not a major problem as was explained to Judge Memmott. There has been no data presented to back it up as a significant problem.

(9) b. Presently, there is an extensive field drain system that produces over one hundred bushels to the acre in most of the farm. Ripping the hard pan would be a nice thing to do but it is not critical with drains. Hard pan only covers less than 20% of the farm.

(10) c. Ten percent damage to the crop is a joke. One third of the north field is in weeds due to the County not allowing for cleaning of the drain.

(10) d. Once again, Mr. Willardson told a lie. He was not aware of the 200 to 300 second feet of storm water was coming down the west side of the property. There is two interceptor drains on the north east side. The one leaching

drain has been there for 30 years. Mr. Willardson never core drilled the property so how would he know what was under the six foot of soil. I have dug several miles of drains in the field six foot deep so I know what is under there. It is not as Mr. Willardson described.

(10) e. Judge Memmott would have a hard time convincing all of the experts that the Plaintiff/Appellant has consulted with exception of Mr. Willardson. These experts never would agree that a five or six foot deep storm drain channel would be less damaging. Plus, from past performance, Mr Sid Smith would not clean the drain and it would silt in and only be two or three feet deep.

(10) f. These damages are ridiculous and don't deserve comment.

Conclusions of Law

Statements (1), (2), and (3). If Mr. Smith had been working for a private company or other government agencies, he would have been fired. The Law was passed in 1977 and he should have known the hazards of the law. Plaintiff/Appellant agrees that it is not a natural wetland; but if it were a wetland, it would be a man made one. The County never did follow the requirements of the law. The Engineers that designed the drain were very knowledgeable and wouldn't design a drain that was impracticable or impossible. They received excellent compensation for the drain design and drawing. The feature on the end of the drain should have been adequate for mitigation purposes if it had been required.

The 404 permit should not have been an unforeseen event. The first clean water act applicable to Utah was in 1972 the referred to section 404. Several guide lines have been issued during the past 20 years. The major change was in 1977. Once again what are the taxpayers paying the Public Works Director for, or the County Commissioners ? True, the defendants did not clean or maintain the drain or control the weeds, insects, or rats. The defendants expert was paid well and recommended their desires without full knowledge of the storm drain. The Plaintiff/Appellant's experts all verified that the original design was a good design; "but don't settle for anything less in depth with the 200 to 300 second feet of water coming down."

True. The defendant did not meet the defense of impossibility requirements. Plaintiff/Appellant is not interested in the Court's five or six foot drain because it would destroy the ability to grow crops on his property. Plaintiff/Appellant is interested in the Court living up to the Constitution and an honest settlement.

- - - - -

The false statments in the Findings Of Fact and, Conclusions of Law and Order are as follows:

a. The document was signed by the Judge on 20 January 1993. The trial date was on the 28th and 29th days of October 1992. Although the document was prepared by the Plaintiff/Appellant's attorney, it was never discussed with the Plaintiff/Appellant.

b. Ref. para.1A of Findings The statement that the flood control channel was to be 11 feet deep is not precise. The engineer designed the drain to have a self cleaning ability without silting in. The depth of the drain varied from 8 feet to 11 feet deep and was designed to go under the North Davis Sewer Trunk line.

c. Ref. para 1B of Flindings The statement that the flood control channel was to be completed on or before December 1988 is true.

d. Ref. Para 2 of Findings The project director for the Defendant, Davis County, was aware of the Clean Water Act of 1977. Public Law 92-500, October 1972 started the action and approximately 11 amendments have received Congressional approval. The engineer who designed the drain was aware of efficient control of water. The storm drain runs into an irrigation ditch at the end of the drain. The irrigation ditch is several hundred feet long to spread the water over the Nature Conservancy Districts land as a form mitigation. If necessary this could be used for mitigation purposes as stated by the Army Corp of Engineers as a viable alternative.

e. Ref. para. 3 of Findings The aerial photograph and Mr. Graws testimony present a false impression. After closer inspection of the photograph Mr. Graw used, it revealed a picture of a plowed field by a five bottom plow with two plows that had been removed in an effort to improve the top soil distribution as a result of the extensive land leveling that had taken place since 1983 when

the first Layton Canal water became available. Mr. Graw testified ,that a person had to be an environmental expert to determine wetlands. This statement refers to "potential wetlands" based on an aerial photograph and not on actual wetlands.

f. Ref. para 4 of Findings This statement is true with exception that the Plaintiff/Appellant did not "negotiate" for the sale of his land. He merely signed a contract that had been prepared and presented by the Defendant/Davis County.

g. Ref. para 5 of Findings It is true that Davis County did not complete the channel on or before December 1988 as required by the contract.

h. Ref. para. 6A of Findings The equipment (backhoe) was observed by the Plaintiff/Appellant and other witnesses almost all summer long parked by the Jail. Several farmers attended a Commission meeting and volunteered to dig the basic part of the drain if the hackhoe could be used. The Defendant, Davis County, could have rented another backhoe if necessary to begin construction of the contracted storm drain. Plaintiff/Appellant and other witnesses came to the conclusion that the problem was Commissioner Stevenson and the Public Works Director's family that owns the property by the section of the drain. Contracts should not be breached just because the County decides they don't want to complete it. They never completed a 404 permit in order to receive a legal answer.

In Congressman Hansen's meeting, the Corp of Engineers stated that the Nature Conservancy's property was a viable option for mitigation purposes to support the drain. This option was never submitted to the Army Corp of Engineers.

If the Army was the problem, then the Army should have bid for the taking of the property in accordance with the Fifth Amendment (due compensation clause) of the U.S. Constitution. The U.S. Supreme Court has ruled on this issue and millions of dollars have been paid to property owners due to the taking of private property for government use.

(Add.#17)

i. Ref. para. 6B i & ii of Findings . . . This is another example of the Plaintiff/Appellant's attorney representing the County rather than his own client. The drain through the property was engineered to be 8 to 11 feet deep. All of the letter writing did not establish that the Defendant, Davis County, never did submit a completed 404 permit application as required by the Army. Plaintiff/Appellant's attorney's statement, signed by Judge Memmott, infers that the 11 foot deep channel was not acceptable to the Army which was never established and only further confirmed that the attorney was representing the opposing party to his client's law suit.

j. Ref. para. 6b iii of Findings All of this information is based on hearsay evidence since the Army's official representative, although in attendance, refused to testify. This information should have been disallowed as inadmissible hearsay evidence. Letters and hearsay evidence should not

be permitted to supersede a written contract. Completion of the required 404 forms and paperwork is what establishes the criteria; and without the forms completed, the related questions cannot be answered. For example, Less damaging to what or whom - - the ducks, mosquitoes, weeds, etc. or the property owners ? Did the County determine if it was irrigation induced from uplands, non-point source generated, etc. ? Was it farmed before 1985 ?

k. Ref. para 6b iv of Findings Statement is true.

l. Ref. para 7 of Findings Once more Plaintiff/Appellant's attorney spent more time worrying about problems the Defendant, County, had that was primarily due to lack of management to accomplish its governmental responsibilities. The attorney consistently used Plaintiff/Appellant's law suit case to discuss Syracuse City, Clinton Town, Westpoint Town, and his own family's property concerns. For example, when did our Judicial System base its law on less damaging alternatives when their are laws that protect private property rights.

m. Ref. para. 8 of Findings The statement is true; but why should a City have to obtain a 404 permit when it does not have wetlands in the area to be used for the drain ?

n. Ref. para. 9 of Findings This statement makes no sense. Why should the Defendant, Davis County, develop "less damaging alternative plans" when after three and one half (3&1/2) years it has not completed the 404 application permit forms ?

o. Ref. para 10 of Findings Again, Plaintiff/Appellants attorney makes the false statement of an 11 foot deep drain. Professor Gilbert Miller, PHD, never agreed with the court findings. To challenge his credibility when he is working for the Federal government as a saline soil and water expert for the Colorado river salt problem with Mexico is tantamount to sheer disrespect.

p. Ref. para 10A of Findings Professor Willardson's testimony that the land has ground water and alkali is the reason Plaintiff/Appellant dug approximately six and one half (6 & 1/2) miles of drains six feet deep as recommended by the Soil Conservation Service. He has hauled two pickup loads of hardpan from these 6 & 1/2 miles of drains. This is not considered a significant problem.

q. Ref. para 10B of Findings This false statement shows the injustice of the trial. The Plaintiff/Appellant has 6 & 1/2 miles of drains designed by Dr. Christenson a soils engineer and reviewed by other engineers and soils experts. The farm has been subsoiled several times to improve the soil.

r. Ref. para. 10C of Findings Where is the backup data to justify such a percentage figure ? There are no soil sample data; the production figures are wrong; and the 1991 crop loss was due to the Russian Wheat Aphid that lives in the weeds the County and Army wants to maintain. The Professor at Utah State University stated that the Russian Wheat Aphid winters over in the weeds and grass. It is new to this area.

This year, the lack of a good drain can be observed. One third of the north field is growing weeds due to the salt buildup. This means that over 20 years of work is being ruined by the Defendant, Davis County.

s. Ref. para. 10D of Findings These statements are a joke. There has been an interceptor drain on the north east side next to the Bluff Road for 30 years, plus, the four drains running the length of the field. Mr. Willardson doesn't know what is inderneath the soil. He had a hand probe approximately four (4) foot long that he stuck in the ground a few times. There are several types of soil and conditions, plus the leaking sewer trunk line. Two days after the trial, Plaintiff/Appellant visited Mr. Willardson, and he stated that the County had not told him about the 200 to 300 second feet of new water that would be coming down the drain on the west side through the middle of Plaintiff/Appellant's property.

t. Ref. para. 10 E, of Findings As mentioned before, these damages are an insult. From previous communications initiated by the Defendant, Davis County, these damages nowhere come near the damages suffered. Besides, what happens for the next 1000 years; or perhaps when the property may be sold.

u. Ref. Conclusions of Law, para. (1). . . . The 404 permit policy was not an unforeseen event; plus the fact that Defendant, Davis County, has never submitted a complete 404 permit application to this day.

v. Ref. Conclusions of Law, Para. (2) This statement is true in part. The Defendants did breach the contract. Their own expert is wrong on the six (6) foot drain. This storm water is an accumulation of several other drains and its volume of polluted water is the size of a normal canal (200-300 second feet)

w. Ref. Conclusions of Law Para (3) An 11 foot drain is minimum for a master drain. The Bureau fo Reclamation's drain one and one half (1 & 1/2) miles west of the contracted drain is over fifteen (15) feet deep and thirty (30) to forty feet (40) wide. It was constructed for the same purpose as the contracted drain. The drains in Millard County, referenced in the Utah Court Rules are deeper than eleven (11) feet. They are maintained by Millard County.

Plaintiff/Appellant agrees that the Defendant, Davis County, did not meet the defense of "impossibility of performance". The Court should have allowed Court costs, attorney's fees, and reasonable damages. The damages awarded does not cover half of the legal costs alone, and far less than previous Defendant's communications have indicated.

Point #2.

During the taking of deposition from the County Public Works Director, Plaintiff/Appellant's attorney repeatedly made reference to the legal problems his family, Syracuse City, and Davis County had been engaged in. He was using his

client's case as a negotiating type weapon against the Director in relation to the desire for County paid installation of piped or closed drains rather than open drains in the City.

Point #3.

Plaintiff/Appellant's attorney refused to permit testimony by a retired Soils Conservation Service Technician that had worked with, and had provided Plaintiff/Appellant advice for a number of years. The attorney refused to read laws and data related to the case, or to use the data in making his case.

VIOLATION OF U.S. CONSTITUTION, ARTICLE 10

Point #1.

Article X of the Constitution specifically reserved management of private property or state property to the state or private property owners. The authors of the Constitution were tired of the Kings, Queens, Churches, and heads of countries dictating what property owners could do on their property.

Congress reaffirmed this when they amended P.L. 100-4 on 4 February 1987. They were very specific in stating the following quoted: section 101 (b) of the Clean Water Act. "It is the policy of Congress that states manage the construction grant program under this act and implement the permit programs under section 402 and 404 of this act." (Add #3, pg. 11)

Davis County ignored the constitution and used "impossibility of performance": to violate Plaintiff/Appellant's Constitutional rights. Davis County never submitted a completed 404 application to the Army. Therefore the Army was not required to approve or disapprove the drain design. Davis County never challenged the Army on States Rights of the Constitution or Congress' policies. Davis County officials totally disregarded the legal process because they knew the drain could be installed as designed by their Engineering Firm. They misleadingly used the Army as a reason for non performance of the contract.

Point #2.

At Congressman Jim Hansen's meeting in the Federal Building, June 10, 1991, the personnel from Sacramento District Office and Brooks Carter, Utah's Federal representative for the Army, verified that the 1500 acres owned by the Nature Conservancy District could utilize water coming down the storm drain. The water would spread over several acres and develop new plant growth in the area south of Plaintiff/Appellant's farm. The water would not run into the Great Salt Lake from the storm drain. (Add. #19)

The writers of the Constitution never intended that the United States Army dictate to farmers, private property owners, or County Officials on how they handled their storm water. They believed in the free enterprise system that has produced an abundance of food without interference from the Military. Russia is an example of military rule. United States maintained the cold war with Russia trying to eliminate the military control of Russian citizens.

Control of water and water rights have always been the function of the states. The Constitution and Congress is very specific on this point that effects the Wasatch Front. All of the water along the Wasatch Front is the water of the State of Utah. It originates in the State of Utah and ends in the Great Salt Lake or Utah Lake.

Public Law 100-4 (B) states: "It is the policy of Congress that the authority of each state to allocate quantities of wa-

ter within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this act". (Add. #3, pg. 12)

Section 402 (1) page 104 of the Clean Water Act General Rule - Prior to Oct 1, 1992 shall not require a permit under this section for discharges composed entirely of storm water. (Add. #3. pg. 104)

Point #3.

Plaintiff/Appellant fails to see where the Army had the responsibility to determine the drain design. They violate the Constitution and the policy of Congress. The Army delineation manual treats the states like a bunch of sheep without taking into consideration the wide variances in weather and climate. Florida receives more rain in one day than Plaintiff/Appellant's farm receives all summer. Florida's soil is acid saturated with water. Plaintiff/Appellant's farm soil in Utah is alkaline and naturally a desert without irrigation water. (Add. # 21)

Davis County never submitted completed 404 application forms during the six (6) years since the contract was initiated. Therefore, Davis County should be held responsible for breach of contract, and pay damages , legal fees, etc. Plus install the drain as designed. (Add. # 23)

VIOLATION OF CONTRACT LAW

Point #1.

There is no justification for a defense of “impossibility of performance” for the following reasons:

Impossibility is based on the premise that the Army Corp of Engineers would disapprove the contract requirements called out in the design drawings and specifications as they pertained to depth of drainage ditches. The fact is, Davis County never completed the application 404 permit for the drainage system. As of 19 June 1993, a representative of the Army Corp of Engineers verified that Davis County never submitted a completed form submission to the Army. This was also confirmed a few days earlier by the Director for the Corp of Engineers in Utah.

Point #2.

The law on contract performance requires the parties to act ethically and cannot arrange events in order to make performance impossible. In this case, the Davis County Works Director used his family's property to prevent completion of the contract thus improving the saleability of his family's property. The failure to submit the completed 404 forms to the Army was used in the same preventing manner. The present Davis County Commissioners, with the Public Works Director, willfully and knowingly breached the contract.

Point #3.

Contract law reaffirms the strict compliance of the contract. There was no doubt in either party's mind that the drain had to be installed in accordance with the design requirements developed by Davis County itself. Therefore, the breach of contract has been willful and violates basic contract law.

Point #4.

Impossibility in the legal sense of the word means "it cannot be done" rather than "we cannot do it" as claimed by Davis County. The County is too lazy or obstinate to get the job done, not that "it cannot be done". Drains have been dug all over the world to eliminate the pollution problem of salt or alkali. The question is not to get rid of the water, but get rid of the pollution in the soils in order for desirable plants to grow. In 1988, prior to the breach of contract, neighboring farmers offered to dig the subject drain if the County would furnish the equipment, but the County refused the offer.

Point #5.

Statutes or regulations that merely make performance more difficult or less profitable do not, however, excuse non-performance. In this case, the Nature Conservancy District volunteered 1500 acres because they needed it to improve the plant growth on their property. Not only was difficulty

removed, but the contracted task for the County was made even easier than would be normally required.

Point #6.

Davis County representatives knew of the 1977 Clean Water Act requirements long before they negotiated and signed the contract they initiated and executed. The County Public Works Director admitted that he knew about Army Corp of Engineer regulations concerning wetlands prior to the contract being signed through knowledge he had gained in other community projects involving Clinton and West Point towns. The County Commissioners, at the time of the contract execution, realized that the water could be used to benefit the Nature Conservancy District and included this feature at the end of the drain line through the Plaintiff's (Appellant) property.

PRESIDENTIAL EXECUTIVE ORDERS IGNORED

Point #1.

President Reagan issued Executive Order 12630 due to many violations of Constitutionally Protected property rights by the Army and other government agencies. The Fifth Amendment provides that private property shall not be taken for public's use without just compensation. After spending 30 years and a few hundred thousand dollars re-claiming Plaintiff/Appellant's farm, it is totally unjust to have the Army destroy it. President Reagan received thousands of complaints from farmers and private property owners due to the Army violating the Constitution, as a result he issued Executive Order 12630. (Add. # 4)

Point #2.

The higher courts were issuing decisions that were in the millions of dollars for violating the private property rights guaranteed by the Constitution. (Add. # 17 & #25) Private property rights are fundamental to this nation and are considered the basic building blocks of the free enterprize system and the high standard of living that citizens living in this nation enjoy.

Point #3.

President Carter's Executive Order 11990, on protection of Wetlands applied to federal property only. The President

was very specific that it was for acquiring, managing and disposing only of federal lands. In Sec. 1 (b), the President was specific that the Executive Order does not apply to wetlands on non federal property. (Add. #5)

Point #4.

President Bush's Council letter from the President's Council on Competiveness supported Executive Order 12630 by protecting private property rights. The Vice President applauded Senator Syms and other sponsors of legislation to further support private property rights. (Add. # 6)

Point #5.

The Utah State Constitution is very specific in Article 1, Section 22. "Private property shall not be taken or damaged for public use without just compensation.

Point #6.

Assistant Attorney General, Mr. Stewart from the U. S. Department of Justice for the Environmental Division letter to Senator Symms also supported the Constitution. He complimented the Senator for seeking statutory endorsement for Executive Order 12630 which seeks to insure that Federal Agencies consider the impact on private property rights. The Fifth Amendment requires the Federal Government to pay just compensation for taking of private property.

Point #7.

Senator Symms package to our Farmers Board, Farmers Union and other legislative data supporting private property rights is part of the effort to maintain our Constitutional Rights. Senator Symms opening statement of what is in most demand in Eastern Europe, the Soviet Union, etc. is not American technology. They are demanding what American farmers are guaranteed by our Constitutional rights, in regard to private property. The Senator comments that the United States is now regulating private property in a rush to preserve wetlands for the ducks, weeds, and insects in his backup data confirming his reason for submitting legislation. (Add. # 7)

LACK OF JUDICIAL DILLIGENCE

Point #1.

During the 1970's, the Bureau of Reclamation and Weber Basin Conservancy District recommended that Plaintiff/Appellant purchase 325 shares of water for the subject property that District Court Judge Jon Memmott was asked to visit. Presently, Plaintiff/Appellant is scheduled over three and one half days of Layton Canal water to irrigate this farm. Totally, Plaintiff/Appellant owns 600 shares of water for his farm.

The Bureau of Reclamation development period began in 1983 to improve leaching drains, irrigation systems, leveling

and other soil conservation requirements. The development period ended in 1992. Presently, Plaintiff/Appellant is paying \$6000 annually for the use of irrigation water for his farm. Had Judge Memmott honored Plaintiff/Appellant's request to visit the property, the Judge would have understood the application of 1200 tons of gypsum to aid in the leaching process. Deep drains are needed to leach the salts from the soil. (Tr. 88)

The U.S. Soil Conservation Service, Utah State University soil scientist, and a private soils engineer were part of the decision to apply the gypsum to the soil. To repair the damage Davis County's breach of contract created will now require additional tons of gypsum at \$60 to \$70 dollars a ton plus the cost of delivery and spreading.

By observing the land, Judge Memmott could have seen the weeds and damage to the soil by not maintaining and constructing the contracted drain. If Judge Memmott would have just taken the time, he would have observed the 20 to 30 years of improvements that Plaintiff/Appellant has made at a cost of several hundred thousand dollars. Most of the improvements were recommended by the U.S. Soil Conservation Services, Utah State University and private engineering services. (Tr. 88)

It should be noted, that Mr. Willardson, a County witness, recommends not irrigating saline soils after 1 August of the year. Mr. Willardson claimed after his court appearance that he was unaware of the 200 to 300 second feet of water would

be carried to the farm by a storm drain being installed in the area. His false, or uninformed, testimony shows what money can do to the Judicial System. Mr. Willardson's description of proper leaching supports precisely what the Plaintiff/Appellant has been trying to accomplish on his farm (Add. # 11)

An aerial photograph, used by the so-called experts, was supposed to show wetlands vegetation. The map photograph showed an excellent example of Plaintiff/Appellant's experiment. He had removed two plow shares from a five bottom plow trying to correct a problem caused by leveling the farm. It was different than anything the expert had seen before, but he maintained he was the expert and we were not qualified to judge the photo. Mr. Graw may be called an expert, but the Plaintiff/Appellant knew absolutely, that the land was not "wetlands" after driving the tractor for hours trailing the modified plow over the farm. The wetlands views indicated by Mr. Graw certainly do not agree with the views of Terry A. Tyndall, Phd, Soils Specialist (Add.# 12)

Point #2.

The Court violated the Constitution; but in addition, it also violated the Wetlands regulations that states: " If the farm was harvesting crops before 1985, it is exempt. As a part of a reclamation project passed by congress, this property was exempt from a 404 permit. The Bureau of

Reclamation project that serves Plaintiff/Appellant's farm was created to supply water and construct drains for the project.

Plaintiff/Appellant's farm drains would be considered minor drains due to the fact that they are enclosed drains and only run leached water from one end into the master drain. Any wetland created would result by irrigation from the two canals and leaching drains constructed by government are exempt. The purpose of the leaching drains is to remove salt and is not clean water for farming purposes. This condition is exempt from the 404 permit program as well.

Point #3.

The reason the Bureau of Reclamation sold Plaintiff/Appellant 600 shares of Weber Basin water was to provide adequate water to his land. Plaintiff/Appellant does not need or want the 200 to 300 second feet of storm drain water that will be new polluted water to damage the farm.

Point #4.

This is desert country here in Utah resulting in 3 to 5 inches of rain throughout the summer months on Plaintiff/Appellant's farm, and can be certified by a rain guage monitoring device that has been placed within 50 feet of the storm drain right of way. An article from the Standard Examiner (add. #21) further points out that Utah is the second dryist state in the country. When the Army Corp of

Engineers tried to rewrite their Wetlands manual, they had to extend the period for comments three times and still could not get a consensus of opinion. Therefore, Congress would not agree to the Army using the manuals. If the Army wants to use private property, they should compensate property owners in accordance with the Fifth Amendment to the Constitution.

Point #5.

One of the main North Davis Sewer lines that crosses the property is around 60 years old and is leaking. The contracted deep drain line was designed to go beneath the sewer line to prevent serious damage of farm land caused by the leakage. Not only would farm land damage occur if the drain line runs above the sewer line, but serious overflow of storm water into the sanitary sewer system will also occur. This is an undesirable situation for the sewer system as well.

FAILURE TO NOTE UTAH PRECEDENCE

Point #1.

Drainage referred to in the Utah Court Rules is: deep drains used for leaching alkali out of soil in order to make the farms productive. Millard County Drainage District has several miles of drains 12 feet deep and 20 to 30 feet wide. They are maintained by the County on a yearly basis. Farmers construct their leaching drains that flow into the main Millard

County drains. They have the same conditions that are present in Davis County - - the original land was desert.

In order to make their farms productive they had to dig the drains in order to leach the alkali out of the soil. Irrigation canals were constructed in order to obtain irrigation water for their farms.

Point #2.

The Bureau of Reclamation and Soil Conservation designed Davis County's irrigation and drainage system similar to the Millard County Utah drains referenced in the Utah Court Rules, page 480, (Agriculture) 1993 Utah Court Rules.

Point #3.

Israel and the middle east have used these designs for 2000 to 4000 years in their deserts in order to produce food for their people. Plaintiff/Appellant is confident that the Mormon Pioneers copied their practices in the Salt Lake Valley in order to make the alkali desert productive. The constructed drains on all of the mile roads utilized the natural drains for the past 100 years. Davis County Commissioners have always maintained several miles of the leaching drains until the present Commissioners assumed their offices.

The control of weeds, insects, road maintenance, construction and maintenance of drains have almost come to a halt in the Syracuse, West Point areas in Davis County.

Point #4

Mr. Willardson, who testified for Davis County, published a bulletin (add. # 11) from Utah State University stating that areas with an alkaline problem in the soil should not be irrigated after 1 August of each year. After the trial, he stated that he was unaware of the 200 to 300 second feet of new drain water that the new master drain being constructed will carry. Mr. Willardson's recommendations were based on false and incomplete data. His trial recommendations were contrary to the several soil engineers and technicians that Plaintiff/Appellant has conferred with over the past 35 years.

With the 200 to 300 second feet of storm water to be dumped on Plaintiff/Appellant's property all through the winter months (after 1 Aug.), it will destroy the farm soil by completely inundating it with runoff water filled with highway salts, and soil leaching salts from uplands, in addition to other destructive, soil, polluting materials.

CONCLUSIONS

Based upon the above discussion and arguments, Plaintiff/Appellant respectfully asks this Court to amend the Trial Court and remand with instructions to enter judgement as shown below. A new trial is not desired if the existing decision can be properly amended.

Option #1. (\$156,614)

- a. Require Defendant, Davis County, to dig the drain as per the original contract agreement; and,
- b. award Plaintiff/Appellant cost damages as follows:

- (1) Court costs and attorney fees - \$7,394.00
- (2) Travel costs incurred in search of legal information and documents (Washington D.C.) - - \$1,560.00
- (3) Clerical and Administrative tasks required in the preparation of Appeal Brief. - - - - - \$660.00
- (4) Lost Crop production - - - - - \$47,000.00
- (5) Personal Damages - - - - - \$100,000.00

Option #2. (\$696,000 + leaky sewer repair)

- a. Require Defendant, Davis County, with possible participation by the Corp of Army Engineers to purchase subject property in accordance with Fifth Amendment, due compensation requirements, with property value set at \$4000 per acre or a total for 174 acres or - - - - - \$696,000

b. Replace the leaky sewer line owned by the North Davis Sewer District at an engineered estimate cost, so that future owners or citizens will not suffer from the lack of adequate drainage of polluted runoff, and sewer contaminated drainage.

Respectfully submitted this ____day of July, 1993

Joseph Jensen
Acting Pro se'

Addendum #1

MEMORANDUM DECISION

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

JOSEPH CHARLES JENSEN
AND BESSY T. JENSEN
Plaintiffs,

vs.

DAVIS COUNTY,
a body politic of
the State of Utah,
Defendant.

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MEMORANDUM DECISION

Civil No. 910749203 CV

The above entitled matter came regularly before the court on October 28 & 29, 1992 for trial. The Plaintiff was represented by his counsel Scott Holt. The Defendants were represented by their counsel Gerald Hess. The court heard witnesses and testimony of the parties, the arguments of counsel, evidence presented and legal memorandums filed. At the end of the trial the court granted both parties the opportunity to present and asked for counsel's assistance in providing to the Court further legal authority on the issue of both a breach of contract on certain grounds and impossibility of performance on other grounds as effecting performance and damages pursuant to this contract. Neither Plaintiff nor Defendant has within thirty days provided the court with additional authority. Therefore, being fully advised in the premise, the court hereby rules as follows:

CAUSE OF ACTION

The Plaintiff is suing the Defendant for specific performance and damages for breach of contract. The plaintiff is also asking for costs and attorney fees. The defendant has admitted that the parties entered into the contract (Plaintiffs exhibit # 1). The defendant raised as an affirmative defense impossibility of performance of the contract. The issues, therefore, presented at trial were (1) whether the defendant has met the standard to establish impossibility of performance of the contract as an affirmative defense for their non-performance and (2) if plaintiff is entitled to damages for non performance of the contract, what is the amount of those damages.

IMPOSSIBILITY OF PERFORMANCE

The standard that the court applied in determining the standard that the Defendant must meet in establishing its defense of impossibility of performance was set forth in recent decisions.

(1) Bitzes vs. Sunset Oaks, Inc. 649 P.2d 66 (1975)

"A more recent formulation of the doctrine by this Court can be found in Holmgren v. Utah-Idaho Sugar Co., Utah 582 P.2d 856, 861 (1978):

The doctrine of impossibility of performance is one by which a party may be relieved of performing an obligation under a contract where supervening events, unforeseeable at the time the contract is made, render the performance of the contract impossible.

Contemporary formulations of the doctrine of "impossibility of performance" are often identified by the phrases "impracticality of performance," Restatement (Second) of Contracts 261 (1979).

(2) Western Properties vs. Southern Utah Aviation, Inc.
776 P.2d 656 Utah (1989)

"Under the contractual defense of impossibility, an obligation is deemed discharged if an unforeseen event occurs after formation of the contract³ and without fault of the obligated party, which event makes performance of the obligation impossible or highly impracticable.

There appears to be no factual basis for implicating the defendants in the failure of the City to approve, and the defendants seem to have made every effort that could reasonably be required in order to induce the City to give its approval. In the absence of facts which could indicate fault or a lack of diligence on the part of the defendants, we rely on the trial court's findings in concluding that performance of the defendants' obligations was indeed impossible through no fault of their own.⁴

FOOTNOTES:

3. The requirement that the event occur after formation of the contract distinguishes a case of supervening impossibility, such as this, from a case in which the contract cannot be performed because of a mistake, an unknown legal requirement, or other fact in existence at the time the contract is made. See *Quagliana v. Exquisite Home Builders, Inc.*, 538 P.2d 301, 305-08 (Utah 1975); *Sine v. Rudy*, 27 Utah 2d 67, 493 P.2d 299 (1972); *Mooney v. GR and Assoc.*, 746 P.2d 1174, 1176 (Utah App. 1987).

4. See *Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856, 861 (Utah 1978) ("[A] party may be relieved of performing an obligation under a contract where supervening events, unforeseeable at the time the contract is made, render performance of the contract impossible"; the defense did not prevail because evidence was insufficient); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C.Cir. 1966); *Restatement (Second) of Contracts* sections 261; *J. Calimari & J. Perillo, Contracts*, 476 et seq. (2d ed. 1977); *Utah Code Ann.* 70A-2-615(a) (1980) establishes the impossibility defense in contracts for sale of goods.

FINDINGS OF FACT

As to the issue of whether Defendant has established an impossibility of performance the Court makes the following findings of fact:

(1) Plaintiff and Defendant entered a contract (plaintiffs exhibit #1) under which Plaintiff sold a portion of his farm ground to Davis County for the construction of a flood control channel. The pertinent parts of the contract provided: 1. The flood control channel was to be 11 feet deep 2. The flood control channel was to be completed on or before December 1988.

(2) At the time the contract was entered that it was not foreseeable that Plaintiffs' property would be subject to "Wetlands Act." Both parties to the contract, Mr. Jensen and the project director for the county, Mr. Sid Smith, indicated that at the time of the contract they had no idea or previous indication that the Plaintiffs' irrigated farmland would be considered wetlands.

(3) The fact that an environmental expert, Mr. Oliver Graw, testified at trial that from looking at a 1987 or 1988 photograph of the Plaintiffs' property that certain areas could be potential "wetlands" does not establish that the issue of "wetlands" was foreseeable by the parties at the time of contract.

(4) That the Plaintiff negotiated for the sale of his land based upon the construction of the 11 foot deep drainage channel. The plaintiff sold his land at a lower price than he believed was the fair market value. Plaintiff believed the flood control channel would act as a field drain which would benefit Plaintiffs' land substantially by leaching the ground and removing an alkali problem. He believed crop production would double. This was based on Plaintiffs' extensive research, prior experience with field drains, other properties in the area and discussions with Utah State University Professors.

(5) That Davis County did not complete the 11 foot flood control channel on or before December 1988 as required by the contract.

(6) That the court found two separate reasons why Davis County did not complete the 11 foot flood control channel on or before December 1988 as required by the contract and have not presently completed the project .

a) In the summer of 1988 the Davis County Commission directed Mr. Sid Smith that all the equipment and personnel of Davis County be assigned to the completion of the fill project for construction of the Davis County Jail and Court Complex. This project turned out to be larger than anticipated and as a result there

were no County resources available to complete the flood control channel as originally planned. The County Commission and Mr. Smith were aware that the contract with the Plaintiff could not be completed if personnel and resources were diverted to the other project. Despite the contract agreement the County knowingly decided to assign resources to another project. Thus, the Court finds upon the facts that the County breached the terms of the contract by not completing the project on or before December 1988, for a reason separate than set forth in their defense of impossibility. The Court finds that the decision to transfer resources was prior to any knowledge of "wetland" issues, and that the County could not have completed the project on or before December 1988 because of the decision to transfer the resources.

b) Following the decision to divert the equipment and resources from the flood control channel project to the Jail Complex project the County learned in November of 1988 that there were "wetland" issues being raised on the related flood control project in Clinton.

Following this discovery the County had several meetings and correspondence with Army Corps of Engineers concerning the property involved in this lawsuit. The pertinent information the County received was as follows:

i) April 10, 1989 - Letter from Army Corps of Engineers to Sid Smith, Davis County Flood Control.
(Defendants Exhibit #4)

"This is in response to your request for a wetland determination on some property in Syracuse. The project is located at Gentile Road and ends at Syracuse Road on 1500 West within Sections 16, 21 and 28, Township 4 North, Range 2 West, Davis County, Utah.

"Your project has been reviewed in accordance with Section 404 of the Clean Water Act under which the U.S. Army Corps of Engineers regulates the discharge of dredged and fill material onto waters of the United States including wetlands. Based on the onsite inspection of the property mentioned in your plans by Mr. Anthony Vigil of this office, the parcels do contain wetland areas. Therefore a Department of the Army Permit to place fill in these wetlands would be required. We have enclosed a copy of a map showing the wetland areas and our permit application for your use."

This letter established that the County must obtain a 404 permit before they could proceed any further with the flood control channel.

ii) June 23, 1989 - Letter from Army Corps of Engineers to Mr. Sid Smith (Defendants Exhibit #5)

"This letter concerns the Syracuse South 1500 Storm Drain. The project is located from Bluff road, to the Great Salt Lake approximately 1500 West, Davis County, Utah.

"Based on a June 5, 1989 meeting including Anthony Vigil of our Salt Lake City Regulatory Office and yourself, the proposed construction of an 11 foot deep canal from Bluff Road to Gentile Road would not be the least damaging alternative. Construction of a canal with a depth of 11 feet would drain adjacent wetlands. The least damaging alternative in this area would be to construct a wider canal 2 to 3 feet in depth with small dikes on both sides of the canal. The proposed construction of the remainder of the canal from Gentile Road to the Great Salt Lake is also not the least damaging alternative in this area. The construction of a canal from Gentile Road to the Great Salt Lake would also drain adjacent wetlands. The least damaging alternative would be to construct the canal approximately 200 feet south. This would let runoff water spread through the wetlands and uplands. Runoff water would filter through the wetlands, enhance and create new wetlands before entering the Great Salt Lake.

"We would appreciate your consideration of a less damaging alternative. If you need further information, please contact Mr. Anthony Vigil of our Salt Lake City Regulatory Office, 125 South State Street, Room 8402, Salt Lake City, Utah 84138-1102, Telephone 524-6015."

This letter established the notice to the county that the Army Corps of Engineers considered that the proposed 11 foot channel would drain adjacent wetlands. As such, this was not the "less damaging alternative" as required to obtain the required permit. The Army Corps of Engineers recommended consideration of a wider canal only two to three feet deep.

iii) October 6, 1989 - letter from Army Corps of Engineers to Mr. Sid Smith (Defendants Exhibit #7)

"This letter concerns the Syracuse South 1500 West Storm Drain. The project is located from Bluff road, to the Great Salt Lake approximately 1500 West, Davis County, Utah.

"Your Application is not complete. The amount of wetlands that would be impacted adjacent to the proposed canal is not shown on your application. There are wetlands on both sides of the proposed canal from Bluff road to the Great Salt Lake. The number of acres of wetland directly and indirectly impacted by your project must be shown on your application.

"Based on a September 20, 1989 telephone conversation with Anthony Vigil of our Salt Lake City Regulatory Office and yourself, the proposed construction of an 11 foot deep canal from Bluff Road to Gentile Road would not be the least damaging alternative. Construction of a canal with a depth of 11 feet would drain adjacent wetlands. One possible less damaging alternative in this area would be to construct a wider canal 2 to 3 feet deep with small dikes on both sides of the canal. The freeboard in the canal from Gentile to Bluff road is approximately 6 feet. In a telephone conversation with Don Olsen on September 25, 1989 he stated that only a 1 to 2 foot freeboard was needed for this drainage canal. That would raise the bottom elevation of the canal by 4 to 5 feet. Your plans show a 15 foot wide road and the excess excavated material would be placed parallel to the road in the wetlands on both sides of the canal. A less damaging alternative would be to construct a 10-12 foot wide road on one side of the canal and remove

excess material to an upland site. The proposed construction of the remainder of the canal from Gentile Road to the Great Salt Lake is also not the least damaging alternative in this area. The construction of a canal from Gentile Road to the Great Salt would also drain adjacent wetlands. A less damaging alternative would be to end the canal approximately 200 feet south of Gentile road and let runoff water spread through the wetlands and uplands. Runoff water would filter through the wetlands, enhance and create new wetlands before entering the Great Salt Lake.

"We would appreciate your consideration of a less damaging alternative. By raising the elevation of the Canal there will be less excavation and fill material that would have to be trucked to an upland site. This would lessen the costs for construction of the canal. If you feel these alternatives are not practicable, we would need a study clearly showing why. If there is a less damaging alternative to your proposed project, a Department of the Army permit can not be issued.

"If you need further information, please contact Mr. Anthony Vigil of our Salt Lake City Regulatory Office, 125 South State Street, Room 8402, Salt Lake City, Utah 84138-1102, Telephone 524-6015."

This established again that the 11 foot deep channel as required under the contract was not acceptable to the Army Corps of Engineers. The letter also established that the permit application from the County was not complete and if the County provided a study the Corps would consider less damaging alternatives.

iv. January 26, 1990 - Letter from Army Corps of Engineers (Defendants exhibit #8). This letter responded to several issues raised by the Plaintiff in which he indicated that the Lands were not subject to the Wetlands Act and the County should therefore proceed on the project without a permit.

The following responses affirms the Army Corps of Engineers position.

January 26, 1990 - Letter from Army Corps of Engineers
(Defendants Exhibit #8)

"This is in response to your letter of January 19, 1990 requesting a response to items in a letter from Mr. Joe Jensen and that I make a presentation to the Davis County Commission concerning the Regulatory program of the Corps of Engineers with emphasis on wetlands.

"I will respond to the sections of Mr. Jensen's letter which relate to the Corps of Engineers, using his reference numbers:

1. Item 2 states that Executive Order 11990 applies only to Federal land. The wording actually is "This Order does not apply to the issuance by Federal agencies of permits, licenses, or allocation to private parties for activities involving wetlands on non-Federal property." If a Federal agency proposes a project or Federal money will be used to finance a project on non-Federal land, they still must abide by the order. A new executive order which will change this one is being prepared for signature in the near future.

Additionally, this exclusion in the executive order in no way prevents this Corps from regulating the discharge of dredged or fill material by private parties on private property.

2. Item 3 makes the claim that the Clean Water Act is not applicable, and refers to an enclosure. The enclosure is a copy of a portion of part 323.4 from our regulations. He underlined in ink the portion which states, "If an activity takes place outside the waters of the United States, it does not need a section 404 permit." As will be discussed in greater detail later, the wetlands in question are waters of the United States. Furthermore, this section of the regulations concerns activities which are exempt from regulations. Paragraph (c) of this section states that a project is not exempt "if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced" (my emphasis). This paragraph would apply to your project.

3. Item 4 indicates that the water from the proposed 1500 West Syracuse drain is intended for restoration of wetlands owned by the Nature Conservancy. The Corps thinks that this is a laudable and prudent use of the storm drain water which will provide wildlife habitat and purification of the water.

4. The assumption is made in Item 5 that since the State of Utah owns the Great Salt Lake, wetlands adjacent to it are not waters of

the United States. Even though the State owns the lake, it is still considered waters of the United States under Section 404 of the Clean Water Act. An excerpt from the pertinent section of our regulations states "The term 'waters of the United States' means. . . all interstate waters including interestate wetlands; all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . ." As you can see, there is no mention of ownership being a condition for considering something a water of the United States. I can provide you with a complete copy of Part 328 of our regulations if you are interested. In State of Utah-vs-Marsh, 740F.2D 799, it was argued that Utah Lake and its associated waters were not waters of the United States, but based on our regulations, the court ruled that they were.

5. The sixth point was that the Corps' action was unconstitutional. First let me point out that the Corps has taken no action (such as an enforcement action, or permit issuance or denial) with regard to either Mr. Jensen or the County's 1500 West Syracuse drain. Any action that we do take will be in accordance with the law, and precedent set by the many suits that have been brought against the Corps for carrying out the law is that we are acting within the constitution.

6. Item 7 mentions Executive Order 12630. The Corps has developed directives and policies to comply with that order, and those will be followed completely. The order does not diminish our ability to carry out the regulatory program which includes the issuance or denial of permits.

7. It is indicated in item 8 that the Army has not stated which law is being violating [sic], and that the Army has not been required to follow the Administrative Procedures Act. Section 404 of the Clean Water Act is the law in question, and it states ". . . Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States." The County has not violated this law in conjunction with the 1500 West Syracuse drain, but Mr. Jensen mayhave violated the law on his property. Additionally, the Corps has followed rule making procedures in the development of its regulations, and the processing of permits invloves full and open public participation as required by the Administrative Procedures Act.

8. In the summary it is stated that the County should begin construction immediately. The suggestion here appears to be that the County should begin without the required Corps of Engineers permit. This would be a violation of the law, and would expose the county to all penalties associated with the enforcement provisions of our regulations.

Our office has reviewed the original proposal for the 1500 West Syracuse drain, and responded to you with a letter dated October 6, 1989 in which

we stated that an alternative of digging a much shallower ditch had been identified which would provide all the conveyance of storm water required by the project. It appears at this time that a permit could be issued for that design. It also appears that the sole purpose for proposing the original deep ditch was to drain wetlands at the request of the property owners along the right-of-way.

(7) Based upon testimony of the witnesses and minutes of various Syracuse City and Davis County meetings the Court found that the facts establish that in addition to the problem with the 404 permits and wetland issue the County had difficulties with Syracuse City in obtaining approval for the flood control project as designed. As a result the County did not have sufficient funds to complete the closed pipe option approved by Syracuse. The Court specifically finds that it was a combination of the "wetlands" issues and permits, the lack of approval from Syracuse City and lack of adequate funding to complete the project that caused the County to not proceed to finish the project or proceed to begin the necessary studies to get permit approval for "less damaging alternatives." The Court is not able, based upon the evidence, to determine which was the primary factor for not proceeding with the permit application (for any alternative) and construction of the flood control channel. The Court does find that each issue was a significant factor in not proceeding with the permit application and project.

(8) In 1992 Syracuse City obtained Community block grant funds which are being applied to this flood control project. With these additional funds and approval of Syracuse City, the County has retained consultants from Ekitone to complete the necessary environmental studies in order to submit a complete 404 application to receive the permit in order to complete the flood control channel.

(9) The County is now developing 'less damaging alternative plans' for the flood control channel. This is approximately 3 1/2 years after they received notice of an incomplete application from the Army Corps of Engineers.

(10) As to damages that have resulted because the County has not constructed the 11' foot deep flood control channel the court received conflicting testimony from the Plaintiff, Mr. Jensen, Plaintiff's expert - Prof. Gilbert Miller, PHD., and Defendant's expert - Prof. Lyman Willardson, PHD. Based upon the credibility and weight of the testimony the court makes the following findings relating to the damages suffered by the Plaintiffs.

a) That the plaintiff's farm land is in an area with significant ground water, alkali and hard pan problems.

b) That only by developing an extensive field drain system and ripping the hard pan would the plaintiff be able to increase production beyond current levels.

c) That the County by not cleaning the current drains that plaintiffs had dug on the land he conveyed to the County caused some limited damage to crop production. The Court finds that damage to be 10% of production per year.

d) That as established by Prof. Lyman Willardson a deep drain on the west side of the property would have very little impact for two reasons: (1) The ground water comes from the Northeast and therefore an interceptor drain is needed on the Northeast side of the property rather than the west. (2) Below a depth of six feet on Plaintiffs' property is clay soil which does not allow for permeability. Therefore, there would be very little difference in productivity between an eleven foot channel or a six foot channel.

e) The Court finds therefore, that the Plaintiff would not suffer damage in crop production for failure of the county in building an eleven foot deep channel if they build as a 'less damaging alternative' a five to six foot flood control channel.

f) The court finds the damage to Plaintiff for Defendants failure to clean the current drains and proceed to build 'less damagaing alternative drains' at 5'-6' for the last 3 1/2 years is

1989 - 4.5 bushels (10% of production) x 123	
acres x \$2.21 =	\$1,223.24
1990 - 3.78 bushels (10% of production) x 123	
acres x \$2.16 =	\$1,004.27
1991 - no damage - crop lost	
1992 - 6.97 bushels (10% of production) x 123	
acres x \$2.26 =	<u>\$1,937.52</u>
Total	\$4,165.03

CONCLUSIONS OF LAW

In this case the Court finds that in order for the Defendant to establish the contractual defense of impossibility and for the obligation to be deemed discharged, they must establish (1) an unforeseen event occuring after formation of the contract, (2) that they are without fault in relation to the plaintiff under the contract and (3) the unforeseen event makes performance of the contract impossible or highly impracticable.

In the facts established at trial: (1) The requirement of a 404 permit was an unforeseen even occuring after the formation of the contract. (2) The defendants are not without fault in relation to the contract. The defendants breached the contract

for other reasons prior to learning of the 404 permit requirement. The defendants did not clean and maintain the drain on the property they acquired while this dispute continued. The defendants did not proceed to complete the permit application because of other reasons, in addition, to the normal 404 permit process. Defendant's own expert said a six foot drain would benefit Plaintiff as much as an 11 foot drain, but they did not proceed for 3 1/2 years on that permit process. (3) The performance of the 11 foot drain is highly impracticable or impossible if there is a less damaging alternative. However, the performance of a permit for a six foot channel or providing other drains on the Northeast of the property or other reasonable alternatives were not pursued by the Defendant because of other problems with the project with Syracuse City.

Because of these findings the court concludes that the Defendant has not met its burden in establishing the defense of impossibility.

The Court would, therefore, grant Plaintiff damages in the amount of \$4,165.03.

The Court would grant Plaintiff specific performance limited to the County proceeding to build the flood control channel utilizing a 'less damaging alternative' of five to six foot depth if approved by the Army Corps of Engineers. The Court would grant Plaintiff specific performance as to the installation of three field drains and the barbed wire fence along the west boundary of the property after the construction

is completed.

Because the contract has no provision which allows at least one party to recover attorney's fees as required in Section 78-27-56.5 and because the Court finds the defense was with merit and brought in good faith the Court does not award any costs or attorney's fees.

Based upon this ruling counsel for the Plaintiff is to prepare an order for signature of the Court.

Dated this 4th day of Decemeber, 1992.

BY THE COURT

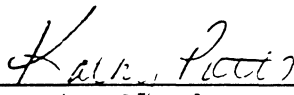
Jon M. Memmott
JUDGE JON M. MEMMOTT

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling on the 4th day of December, 1992, postage prepaid, to the following:

Scott W. Holt
44 North Main
Layton, Utah 84041

Gerald Hess
Davis County Attorney's Office
Farmington, Utah 84025



Deputy Clerk

ADDENDUM # 2

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

SCOTT W. HOLT, #1532
Attorney at Law
44 North Main
Layton, Utah 84041
Telephone: (801) 546-1264

FILED IN COURT

JUL 21 12 30 PM '93

CLERK

FILED
JUL 21 1993

DAVIS COUNTY ATTORNEY

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

JOSEPH CHARLES JENSEN and BESSY T. JENSEN)	
Plaintiff,)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
vs.)	
DAVIS COUNTY,)	
Defendant.)	Civil No. 9107 49203 CV

THIS MATTER having come on regularly for Trial on the 28th and 29th day of October, 1992 before the Honorable Jon M. Memmott, one of the Judges of the above entitled Court, Plaintiff was present and represented by SCOTT W. HOLT and Defendants were represented by Counsel GERALD HESS.

THE COURT, after having heard testimony of the parties and the witnesses and the arguments of Counsel, after review of the evidence presented and legal memorandums filed and being further advised, does hereby makes the following Findings of Fact, and Conclusions of Law:

FINDINGS OF FACT

1. The parties entered a contract under which Plaintiff sold a portion of his farm ground to Davis County for the construction of a flood control channel. The pertinent parts of the contract provided:

- A. The flood control channel was to be 11 feet deep; and
- B. The flood control channel was to be completed on or before

December, 1988.

JUDGMENT ENTERED

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FILMED

2. At the time the contract was entered that it was not foreseeable that Plaintiffs' property would be subject to "Wetlands Act." Both parties to the contract, Plaintiff and the project director for the County, Mr. Sid Smith, indicated that at the time of the contract they had no idea or previous indication that the Plaintiffs' irrigated farmland would be considered wetlands.

3. The fact that an environmental expert, Mr. Oliver Graw, testified at Trial that from looking at a 1987 or 1988 photograph of the Plaintiffs' property that certain areas could be potential "wetlands" does not establish that the issue of "wetlands" was foreseeable by the parties at the time of contract.

4. That Plaintiff negotiated for the sale of his land based upon the construction of the 11 foot deep drainage channel. The Plaintiff sold his land at a lower price than he believed was the fair market value. Plaintiff believed the flood control channel would act as a field drain which would benefit Plaintiffs' land substantially by leaching the ground and removing an alkali problem. He believed crop production would double. This was based on Plaintiffs' extensive research, prior experience with field drains, other properties in the area and discussions with Utah State University Professors.

5. That Davis County did not complete the 11 foot flood control channel on or before December 1988 as required by the Contract.

6. That the Court found two separate reasons why Davis County did not complete the 11 foot flood control channel on or before December 1988 as required by the Contract and have not presently completed the project.

A. In the summer of 1988 the Davis County Commission directed Mr. Sid Smith that all the equipment and personnel of Davis County be assigned to the completion of the fill project for construction of the Davis

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County Jail and Court Complex. This project turned out to be larger than anticipated and as a result there were no County resources available to complete the flood control channel as originally planned. The County Commission and Mr. Smith were aware that the contract with the Plaintiff could not be completed if personnel and resources were diverted to the other project. Despite the contract agreement the County knowingly decided to assign resources to another project. Thus, the Court finds upon the facts that the County breached the terms of the contract by not completing the project on or before December 1988, for a reason separate than set forth in their defense of impossibility. The Court finds that the decision to transfer resources was prior to any knowledge of "wetland" issues, and that the County could not have completed the project on or before December 1988 because of the decision to transfer the resources.

B. Following the decision to divert the equipment and resources from the flood control channel project to the Jail Complex project the County learned in November of 1988 that there were "wetland" issues being raised on the related flood control project in Clinton. Following this discovery the County had several meetings and correspondence with the Army Corps of Engineers concerning the property involved in this lawsuit. The pertinent information the County received was as follows:

i. April 10, 1989 - Letter from Army Corps of Engineers to Sid Smith, Davis County Flood Control. This letter established that the County must obtain a 404 permit before they could proceed any further with the flood control channel.

ii. June 23, 1989 - Letter from Army Corps of Engineers to Mr. Sid Smith. This letter established the notice to the County that the Army Corps of Engineers considered that the proposed 11 foot channel would drain

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adjacent wetlands. As such, this was not the "less damaging alternative" as required to obtain the required permit. The Army Corps of Engineers recommended consideration of a wider canal only two to three feet deep.

iii. October 6, 1989 - Letter from Army Corps of Engineers to Mr. Sid Smith. This letter established again that the 11 foot deep channel as required under the contract was not acceptable to the Army Corps of Engineers. The letter also established that the permit application from the County was not complete and if the County provided a study the Corps would consider less damaging alternatives.

iv. January 26, 1990 - Letter from Army Corps of Engineers. This letter responded to several issues raised by the Plaintiff in which he indicated that the lands were not subject to the Wetlands Act and the County should therefore proceed on the project without a permit.

7. Based upon testimony of the witnesses and minutes of various Syracuse City and Davis County meetings the Court found that the facts establish that in addition to the problem with the 404 permits and wetland issue the County had difficulties with Syracuse City in obtaining approval for the flood control project as designed. As a result the County did not have sufficient funds to complete the closed pipe option approved by Syracuse. The Court specifically finds that it was a combination of the "wetlands" issues and permits, the lack of approval from Syracuse City and lack of adequate funding to complete the project that caused the County to not proceed to finish the project or proceed to begin the necessary studies to get permit approval for "less damaging alternatives." The Court is not able, based upon the evidence, to determine which was the primary factor for not proceeding with the permit application (for any alternative) and construction of the flood control channel. The Court does find that each issue was a significant factor in not

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proceeding with the permit application and project.

8. In 1992 Syracuse City obtained Community block grant funds which are being applied to this flood control project. With these additional funds and approval of Syracuse City, the County has retained consultants from Ekitone to complete the necessary environmental studies in order to submit a complete 404 application to receive the permit in order to complete the flood control channel.

9. The County is now developing "less damaging alternative plans" for the flood control channel. This is approximately 3-1/2 years after they received notice of an incomplete application from the Army Corps of Engineers.

10. As to damages that have resulted because the County has not constructed the 11 foot deep flood control channel the Court received conflicting testimony from the Plaintiff, Mr. Jensen, Plaintiff's expert - Prof. Gilbert Miller, PHD., and Defendant's expert - Prof. Lyman Willardson, PHD. Based upon the credibility and weight of the testimony the Court makes the following findings relating to the damages suffered by the Plaintiffs.

A. That the Plaintiff's farm land is in an area with significant ground water, alkali and hard pan problems.

B. That only by developing an extensive field drain system and ripping the hard pan would the Plaintiff be able to increase production beyond current levels.

C. That the County by not cleaning the current drains that Plaintiffs had dug on the land he conveyed that the County caused some limited damage to crop production. The Court finds that damage to be 10% of production per year.

D. That as established by Prof. Lyman Willardson a deep drain

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on the west side of the property would have very little impact for two reasons.

(1) The ground water comes from the Northeast and therefore an interceptor drain is needed on the Northeast side of the property rather than the West; and

(2) Below a depth of six feet on Plaintiffs' property is clay soil which does not allow for permeability. Therefore, there would be very little difference in productivity between an 11 foot channel or a six foot channel.

E. The Court finds therefore, that the Plaintiff would not suffer damage in crop production for failure of the County in building an 11 foot deep channel if they build as a "less damaging alternative" a five to six foot flood control channel.

F. The Court finds the damage to Plaintiff for Defendants' failure to clean the current drains and proceed to build "less damaging alternative drains" at 5'-6' for the last 3-1/2 years is:

1989 - 4.5 bushels (10% of production) x 123 acres x \$2.21 =

\$ 1,223.24

1990 - 3.78 bushels (10% of production) x 123 acres x \$2.16 =

\$ 1,004.27

1991 - No damage - crop lost

1992 - 6.97 bushels (10% of production) x 123 acres x \$2.26 =

\$ 1,937.52

TOTAL: \$4,165.03

CONCLUSIONS OF LAW

In this case, the Court finds that in order for the Defendant to establish the contractual defense of impossibility and for the obligation to be deemed discharged, they must establish (1) an unforeseen event occurring after formation of the contract, (2) that they are without fault in relation to the Plaintiff under the contract; and (3) the unforeseen event makes performance

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of the contract impossible or highly impracticable.

In the facts established at trial:

1. The requirement of a 404 permit was an unforeseen event occurring after the formation of the contract.

2. The Defendants are not without fault in relation to the contract. The Defendants breached the contract for other reasons prior to learning of the 404 permit requirement. The Defendants did not clean and maintain the drain on the property they acquired while this dispute continued. The Defendants did not proceed to complete the permit application because of other reasons, in addition, to the normal 404 permit process. Defendants' own expert said a six foot drain would benefit Plaintiff as much as an 11 foot drain, but they did not proceed for 3-1/2 years on that permit process.

3. The performance of the 11 foot drain is highly impracticable or impossible if there is a less damaging alternative. However, the performance of a permit for a six foot channel or providing other drains on the Northeast of the property or other reasonable alternatives were not pursued by the Defendant because of other problems with the project with Syracuse City.

Because of these findings the Court concludes that the Defendant has not met its burden in establishing the defense of impossibility.

The Court would, therefore, grant Plaintiff specific performance limited to the County proceeding to build the flood control channel utilizing a "less damaging alternative" of five to six foot depth if approved by the Army Corps of Engineers. The Court would grant Plaintiff specific performance as to the installation of three field drains and the barbed wire fence along the west boundary of the property after the construction is completed.

Because the contract has no provision which allows at least one party to recover attorney's fees as required in Section 78-27-56.5 and because the Court

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finds the defense was with merit and brought in good faith the Court does not award any costs or attorney's fees


ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law the Court hereby

ORDERS:

1. That Plaintiff be awarded damages in the amount of \$4,165.03.
2. That Plaintiff be awarded specific performance limited to the County proceeding to build the flood control channel utilizing a "less damaging alternative" of five to six foot depth if approved by the Army Corps of Engineers.
3. That Plaintiff be awarded specific performance as to the installation of three field drains and the barbed wire fence along the west boundary of the property after the construction is completed.
4. Each party should assume and pay their own attorney's fees and costs incurred herein.

DATED this 20th day of January, 1993.



JON M. MEMMOTT
District Judge

APPROVED AS TO FORM AND CONTENT:



GERALD HESS, Attorney for Defendant

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER was mailed to the Attorney for Defendant, GERALD HESS, at the Davis County Attorney's Office, at P O Box 769, Farmington, Utah 84025 this 2 day of January, 1993 by depositing same in the U.S. Mail, postage prepaid.

Gerald Hess

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ADDENDUM #3

FEDERAL WATER POLLUTION CONTROL ACT, OF 1977

from
Tom B.

RECEIVED

MAR 11 1991

AIR CIRC 117

**FEDERAL WATER POLLUTION CONTROL ACT,
AS AMENDED BY THE CLEAN WATER ACT OF 1977
(Commonly Referred to as Clean Water Act)**

(Enacted by Public Law 92-500, October 18, 1972, 86 Stat. 816; 33 U.S.C. 1251 et seq.; Amended by PL 93-207, December 28, 1973, and PL-243, January 2, 1974; PL 93-592, January 2, 1975; PL 94-238, March 23, 1976; PL 94-273, April 21, 1976; PL 94-558, October 19, 1976; PL 95-217, December 28, 1977; PL 95-576, November 2, 1978; PL 96-148, December 16, 1979; PL 96-478, PL 96-483, October 21, 1980; PL 96-510, December 11, 1980; PL 96-561, December 22, 1980; PL 97-35, August 13, 1981; PL 97-117, December 29, 1981; PL 97-164, April 2, 1982; PL 97-440, January 8, 1983; Amended by PL 100-4, February 4, 1987)

[Editor's note: The Federal Water Pollution Control Act Amendments of 1972, PL 92-500, replaced the previous language of the Act entirely, including the Water Quality Act of 1965, the Clean Water Restoration Act of 1966, and the Water Quality Improvement Act of 1970, all of which had been amendments of the Federal Water Pollution Control Act first passed in 1956. The 1977 amendments, PL 95-217, further amended PL 92-500, as did PL 95-576.]

**TITLE I RESEARCH AND RELATED
PROGRAMS**

DECLARATION OF GOALS AND POLICY

Sec. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into

the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.

[101(a)(7) added by PL 100-4]

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of

pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this Act, the Administrator of the Environmental Protection Agency (hereinafter in this Act called "Administrator") shall administer this Act.

(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

COMPREHENSIVE PROGRAMS FOR WATER POLLUTION CONTROL

Sec. 102. (a) The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes. For the purpose of this section, the Administrator is authorized to make joint

investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.

(b) (1) In the survey of planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a substitute for adequate treatment or other methods of controlling waste at the source.

(2) The need for and the value of storage or regulation of streamflow (other than for water quality) including but not limited to navigation, salt water intrusion, recreation, esthetics, and fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal agencies.

(3) The need for, the value of, and the impact of, storage for water quality control shall be determined by the Administrator, and his views on these matters shall be set forth in any report or presentation to Congress proposing authorization or construction of any reservoir including such storage.

(4) The value of such storage shall be taken into account in determining the economic value of the entire project of which it is a part, and costs shall be allocated to the purpose of regulation of streamflow in a manner which will insure that all project purposes, share equitably in the benefits of multiple-purpose construction.

(5) Costs of regulation of streamflow features incorporated in any Federal reservoir or other impoundment under the provisions of this Act shall be determined and the beneficiaries identified and if the benefits are widespread or national in scope, the costs of such features shall be nonreimbursable.

(6) No license granted by the Federal Power Commission for a hydroelectric power project shall include storage for regulation of streamflow for the purpose of water quality control unless the Administrator shall recommend its inclusion and such reservoir storage capacity shall not exceed such proportion of the total storage required for the water quality control plan as the drainage area of such reservoir bears to the drainage area of the river basin or basins involved in such water quality control plan.

(c) (1) The Administrator shall, at the request of the Governor of a State, or a majority of the Governors when more than one State is involved, make a grant to pay not to exceed 50 per centum of the administrative expenses of a planning agency for a period not to exceed three years, which period shall begin after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, if such agency provides for ade-

source applies for a permit for discharge pursuant to this section within such 180-day period.

(1) Limitation on Permit Requirement.—

(1) Agricultural Return Flows. — The Administrator shall not require a permit under this section, for discharge composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

[402(l)(1) designated by PL 100-4]

[Editor's note: Sec. 54(c)(2) of the Clean Water Act of 1977 says:

"Any State permit program approved under section 402 of the Federal Water Pollution Control Act before the date of enactment of the Clean Water Act of 1977, which requires modification to conform to the amendment made by paragraph (1) of this subsection, shall not be required to be modified before the end of the one year period which begins on the date of enactment of the Clean Water Act of 1977 unless in order to make the required modification a State must amend or enact a law in which case such modification shall not be required for such State before the end of the two year period which begins on such date of enactment."]

(2) Stormwater Runoff From Oil, Gas, and Mining Operations. — The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

[Sec. 402(l)(2) added by PL 100-4]

(m) Additional Pretreatment of Conventional Pollutants Not Required. — To the extent a treatment works (as defined in section 212 of this Act) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 304(a)(4) of this Act into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act, affect State and

local authority under sections 307(b)(4) and 510 of this Act, relieve such treatment works of its obligations to meet requirements established under this Act, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

[Sec. 402(m)—(p) added by PL 100-4]

(n) Partial Permit Program.—

(1) State Submission. — The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum Coverage. — A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b)

(3) Approval of Major Category Partial Permit Programs. — The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if—

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of Major Component Partial Permit Programs. — The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if—

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-Backsliding.—

(1) General Prohibition. — In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e), a permit may not be renewed, reissued, or modified to contain effluent

imitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4).

(2) Exceptions. — A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if—

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act or for reasons otherwise unrelated to water quality.

(3) Limitations. — In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water

quality standard under section 303 applicable to such waters.

(p) Municipal and Industrial Stormwater Discharges.—

(1) General Rule. — Prior to October 1, 1992, the Administrator or the State (in the case of a permit program approved under section 402 of this Act) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. — Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit Requirements.—

(A) Industrial Discharges. — Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301.

(B) Municipal Discharge. — Permits for discharges from municipal storm sewers—

(i) may be issued on a system — or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit Application Requirements.—

(A) Industrial and Large Municipal Discharges.— Not later than 2 years after the date of the enactment of this subsection, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment. Not later than 4 years after such date of enactment, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(m) Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act.

(o) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 307, and 403

(q) Not later than the one-hundred-eightieth day after the date of enactment of this subsection, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice of such application is published under subsection (a) of this section.

(r) The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after the date of enactment of this subsection, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 301(a) or 402 of the Act (except for effluent standards or prohibitions under section 307), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b) (1) of this section, is included in an environmental impact statement for such project pursuant to

the National Environmental Policy Act of 1969 and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for each construction.

(s) (1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such persons to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may

require.

[Sec. 404(s)(4) deleted and (5) amended and redesignated as (4) by PL 100-4]

(t) Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

DISPOSAL OF SEWAGE SLUDGE

Sec. 405. (a) Notwithstanding any other provision of this Act or of any other law, in the case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 212 of this Act (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 402 of this Act.

(b) The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 402 of this Act. Such regulations shall require the application to such disposal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 402 of this title.

(c) Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 402 of this Act.

(d) Regulations.—

(1) Regulations. — The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after the date of enactment of this subsection and from time to time thereafter, regulations providing

guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall—

(A) identify uses for sludge, including disposal;

(B) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(C) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

(2) Identification and Regulation of Toxic Pollutants.—

(A) On Basis of Available Information.—

(i) Proposed Regulations. — Not later than November 30, 1986, the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

(ii) Final Regulations. — Not later than August 31, 1987, and after opportunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

(B) Others.—

(i) Proposed Regulations. — Not later than July 31, 1987, the Administrator shall identify those toxic pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each pollutant for each such use identified under paragraph (1)(A).

(ii) Final Regulations. — Not later than June 15, 1988, the Administrator shall promulgate the regulations required by subparagraph (B)(i).

(C) Review. — From time to time, but not less often than every 2 years, the Administrator shall review the regulations promulgated under this paragraph for the purpose of identifying additional toxic pollutants and promulgating regulations for such pollutants consistent with the requirements of this paragraph.

ADDENDUM # 4

PRESIDENT REAGAN'S EXECUTIVE ORDER 312630

Executive Order #12630

Issued by President Ronald Reagan March 15, 1988, follows. This Executive Order appeared in the March 18, 1988, **Federal Register**, at Vol. 53, No. 53, pages 8859-8862. The Executive Order follows in reproducible form for your convenience.

Federal Register

Vol. 53, No. 53

Friday, March 18, 1988

Presidential Documents

Title 3—

Executive order 12630 of March 15, 1988

The President

Governmental Actions and Interference With Constitutionally Protected Property Rights

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. Purpose. (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Section 2. Definitions For the purpose of this Order (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include

(1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property.

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations.

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings.

(4) Studies or similar efforts or planning activities.

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority.

(6) The placement of military facilities or military activities involving the use of Federal property alone, or

(7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U S Army Corps of Engineers civil works program

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include

(1) Actions in which the power of eminent domain is formally exercised

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations.

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings.

(4) Studies or similar efforts or planning activities.

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority.

(6) The placement of military facilities or military activities involving the use of Federal property alone, or

(7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U S Army Corps of Engineers civil works program

Section 3. General Principles In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles,

(a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.

(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Section 4. *Department and Agency Action.* In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purpose that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

(2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Section 5. Executive Department and Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

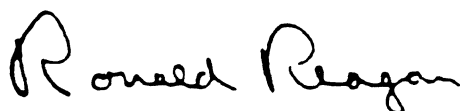
(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Section 6. Judicial Review. This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.



THE WHITE HOUSE.

March 5, 1988

ADDENDUM # 5

PRESIDENT CARTER'S EXECUTIVE ORDER # 11990

Protection of Wetlands

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), in order to avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative, it is hereby ordered as follows:

SECTION 1. (a) Each agency shall provide leadership and shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; and (2) providing Federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.

(b) This Order does not apply to the issuance by Federal agencies of permits, licenses, or allocations to private parties for activities involving wetlands on non-Federal property.

SEC. 2. (a) In furtherance of Section 101(b)(3) of the National Environmental Policy Act of 1969 (42 U.S.C. 4331(b)(3)) to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may attain the widest range of beneficial uses of the environment without degradation and risk to health or safety, each agency, to the extent permitted by law, shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. In making this finding the head of the agency may take into account economic, environmental and other pertinent factors.

(b) Each agency shall also provide opportunity for early public review of any plans or proposals for new construction in wetlands, in accordance with Section 2(b) of Executive Order No. 11514, as amended, including the development of procedures to accomplish this objective for Federal actions whose impact is not significant enough to require the preparation of an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969, as amended.

SEC. 3. Any requests for new authorizations or appropriations transmitted to the Office of Management and Budget shall indicate, if an action to be proposed will be located in wetlands, whether the proposed action is in accord with this Order.

SEC. 4. When Federally-owned wetlands or portions of wetlands are proposed for lease, easement, right-of-way or disposal to non-Federal public or private parties, the Federal agency shall (a) reference in the conveyance those uses that are restricted under identified Federal, State or local wetlands regulations; and (b) attach other appropriate restrictions to the uses of properties by the grantee or purchaser and any successor, except where prohibited by law; or (c) withhold such properties from disposal.

SEC. 5. In carrying out the activities described in Section 1 of this Order, each agency shall consider factors relevant to a proposal's effect on the survival and quality of the wetlands. Among these factors are:

(a) public health, safety, and welfare, including water supply, quality, recharge and discharge; pollution; flood and storm hazards; and sediment and erosion;

(b) maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber, and food and fiber resources; and

(c) other uses of wetlands in the public interest, including recreational, scientific, and cultural uses.

SEC. 6. As allowed by law, agencies shall issue or amend their existing procedures in order to comply with this Order. To the extent possible, existing processes, such as those of the Council on Environmental Quality and the Water Resources Council, shall be utilized to fulfill the requirements of this Order.

SEC. 7. As used in this Order:

(a) The term "agency" shall have the same meaning as the term "Executive agency" in Section 105 of Title 5 of the United States Code and shall include the military departments; the directives contained in this Order, however, are meant to apply only to those agencies which perform the activities described in Section 1 which are located in or affecting wetlands.

(b) The term "new construction" shall include draining, dredging, channelizing, filling, diking, impounding, and related activities and any structures or facilities begun or authorized after the effective date of this Order.

(c) The term "wetlands" means those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.

SEC. 8. This Order does not apply to projects presently under construction, or to projects for which all of the funds have been appropriated through Fiscal Year 1977, or to projects and programs for which a draft or final environmental impact statement will be filed prior to October 1, 1977. The provisions of Section 2 of this Order shall be implemented by each agency not later than October 1, 1977.

SEC. 9. Nothing in this Order shall apply to assistance provided for emergency work, essential to save lives and protect property and public health and safety, performed pursuant to Sections 305 and 306 of the Disaster Relief Act of 1974 (88 Stat. 148, 42 U.S.C. 5145 and 5146).

SEC. 10. To the extent the provisions of Sections 2 and 5 of this Order are applicable to projects covered by Section 104(h) of the Housing and Community Development Act of 1974, as amended (88 Stat. 640, 42 U.S.C. 5304(h)), the responsibilities under those provisions may be assumed by the appropriate applicant, if the applicant has also assumed, with respect to such projects, all of the responsibilities for environmental review, decisionmaking, and action pursuant to the National Environmental Policy Act of 1969, as amended.

JIMMY CARTER

THE WHITE HOUSE,
May 24, 1977.

EDITORIAL NOTE: The President's statement of May 24, 1977, accompanying Executive Order 11990, is printed in the Weekly Compilation of Presidential Documents (vol. 13, p. 808).

Executive Order 11991

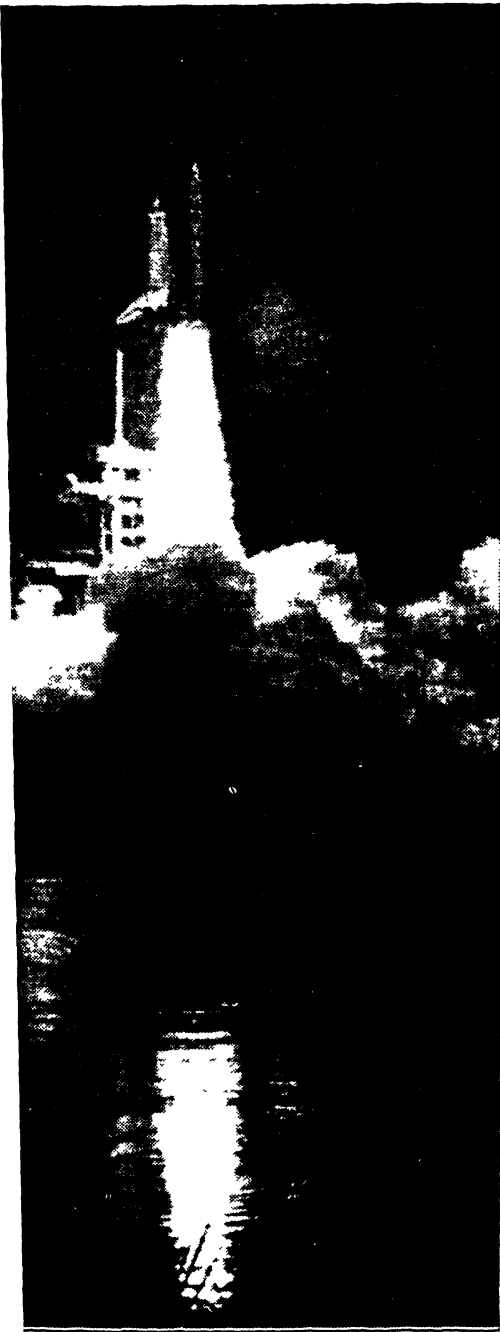
May 24, 1977

Relating to Protection and Enhancement of Environmental Quality

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in fur-

ADDENDUM # 6

PRESIDENT BUSH'S COUNCIL ON COMPETITIVENESS



The Associated Press

2nd shuttle mission for NASA in a day voyage 184 miles above Earth.

New Rules to Reduce Protected Wetlands

THE ASSOCIATED PRESS

WASHINGTON — After months of interagency squabbling, the Bush administration has agreed on new rules defining "wetlands" that would drop millions of disputed acres from federal protection, officials said Friday.

Vice President Dan Quayle worked out the compromise with William K. Reilly, the Environmental Protection Agency administrator, who had wanted less extensive changes in the current guidelines, an administration official said.

The new criteria were described as "strict and fair" in a memorandum drawn up by Quayle's staff and dated Wednesday. It said they will "prevent non-wetlands from falling into the regulatory net."

Wetlands refers to swamps, bogs, marshes, prairie potholes and the like — land once considered worthless unless drained for farming or development. Environmentalists say wetlands are now recognized as vital for water quality, wildlife habitat and protection from flood damage.

The new criteria have been debated between the EPA and officials from several other agencies for months, with the dispute eventually referred to Quayle's Council on Competitiveness.

Linda Winter, a wetlands expert at the National Wildlife Federation, accused the Bush administration of sacrificing environmental protection under political pressure.

"I think it's outrageous. Clearly, people who don't know anything about the science of how to define wetlands are making these deci-

sions for political reasons," she said. "They're bowing to pressure from special-interest groups, like the oil and gas industry, real-estate agents and the farm bureau."

The National Wetlands Coalition, which represents developers, oil companies, municipalities and other landowners affected by the rules, said the administration "is moving in the direction we would advocate" but urged more action to make wetlands regulation less burdensome.

EPA officials said Reilly was pushing for limited changes in the wetlands definition process, partly in hopes of taking the steam out of the more sweeping changes proposed in Congress.

About half of the 200 million acres of wetlands that originally existed in the continental United States have been lost in 200 years, according to a Fish and Wildlife Service estimate.

The service says about 290,000 acres a year have been lost in recent years, down from about 450,000 acres a year from the 1950s to 1970s.

But the estimates depend on much-disputed criteria for what is and what isn't a wetland.

In 1989, the EPA and three other agencies adopted a delineation manual, intended to eliminate cases in which government agencies disagreed about whether a landowner's property was a wetland.

Critics of the 1989 manual said it greatly expanded the government's definition of a wetland, reducing the value of many people's land by making development difficult or impossible.

Bring More Than 6,000 to Town Reunion

were sent out.

He said his campaign will still pay for today's music and commemorative posters and for printing and mailing the invitations

The first Broussards to settle in southern Louisiana apparently were Alexandre and Joseph Broussard, who came in 1765 with their families from New France.

"He's the one that donated the properties for City Hall and our school and our churches. That's how Broussard came about," said



OFFICE OF THE VICE PRESIDENT
WASHINGTON

PRESIDENT'S COUNCIL ON COMPETITIVENESS

THE VICE PRESIDENT'S OFFICE

Office of the Vice President

FOR IMMEDIATE RELEASE

OCTOBER 2, 1990

Too often government regulations can harm American farmers and others by taking away the value of their land. Farmers, for example, complain that their property rights can be taken away without just compensation or due process when they are denied a wetlands permit. I am pleased to announce that the Council on Competitiveness has agreed that the Bush Administration will strongly support legislation introduced by Senator Steven Symms to require Executive agencies to protect property rights and follow procedures like the "Takings" Executive Order No. 12630. This legislation will give private citizens a chance to be heard in court, if they believe the government has not properly followed its procedures to make sure it does not take private property without just compensation. I applaud Senator Symms and the other sponsors of the bill and hope it will be enacted into law.

#

ADDENDUM # 7

SENATOR SYMMS, LTR. AND PROPOSED BILL

MAX BAUCUS MONTANA
FRANK R. LAUTENBERG NEW JERSEY
HARRY REID NEVADA
BOB GRAHAM FLORIDA
JOSEPH I. LIEBERMAN CONNECTICUT
HOWARD M. METZENBAUM OHIO

STEVE SYMMS IDAHO
DAVE DURENBERGER MINNESOTA
JOHN W. WARNER VIRGINIA
JAMES M. JEFFORDS VERMONT
GORDON J. HUMPHREY NEW HAMPSHIRE

DAVID M. STRAUSS STAFF DIRECTOR
ROBERT F. HURLEY MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

October 29, 1990

Mr. Randy Parker
Utah-Idaho Farmers Union
5284 S. 320 W., STE C-144
Murray, Utah 84107

Dear Randy:

Ask yourself, "What aspect of U.S. agriculture is most in demand right now in Eastern Europe and the Soviet Union?" Our mechanical or chemical technology? Our plant varieties or genetic research? No. They're demanding what American farmers are guaranteed by Constitutional right: private property.

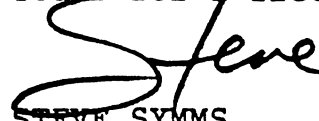
The U.S. is now regulating private property in a rush to preserve wetlands, contain urban sprawl, and limit erosion. These goals go beyond merely preventing pollution, to the point of actually controlling property for society's wants and demands, overriding the owner's interests. Farmers, who tend to be good stewards of their property, are particularly harmed by such regulatory controls.

The U.S. Constitution does allow the federal government to "take property for public use," but only if the owner is justly compensated. Farmers could, theoretically, defend their property by suing the government under the Constitution for each regulation. Because this isn't practical, however, the Private Property Rights Act has been drafted to require the government to be more careful how it regulates, to avoid "taking property" where possible, and to be "up-front" with compensation when the courts will likely require it.

Any help the Utah-Idaho Farmers Union can lend to this legislation would be greatly appreciated.

With best regards, I am

Yours for a free society.



STEVE SYMMS
United States Senator

SS:tlc

enclosures

101ST CONGRESS
2D SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. _____ introduced the following bill; which was read twice and referred
to the Committee on _____

A BILL

To ensure that agencies establish the appropriate procedures
for assessing whether or not regulation may result in the
taking of private property, so as to avoid such where
possible.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assem-*
3 *bled,*

4 SECTION 1. SHORT TITLE.

5 This Act may be cited as the “Private Property Rights
6 Act of 1990”.

7 SEC. 2. DEFINITIONS.

8 As used in this Act:

(1) The term “agency” means all executive branch agencies which engage in activity with the potential for taking private property, including any military department of the United States Government, any United States Government corporation, United States Government controlled corporation, or other establishment in the Executive Branch of the United States Government.

(2) The term “taking of private property” means an activity wherein private property is taken such that compensation to the owner of that property is required by the Fifth Amendment to the Constitution of the United States.

SEC. 3. PROTECTION OF PRIVATE PROPERTY.

No regulation promulgated after the date of enactment of this Act by any agency shall become effective until the issuing agency is certified by the Attorney General to be in compliance with Executive Order 12630 or similar procedures to assess the potential for the taking of private property in the course of Federal regulatory activity, with the goal of minimizing such where possible.

SEC. 4. JUDICIAL REVIEW.

(a) Judicial review of actions taken pursuant to this Act shall be limited to whether the Attorney General has certified the issuing agency as in compliance with Execu-

1 tive Order 12630 or similar procedures, such review to be
2 permitted in the same forum and at the same time as the
3 issued regulations are otherwise subject to judicial review.
4 Only persons adversely affected or grieved by agency
5 action shall have standing to challenge that action as con-
6 trary to this Act. In no event shall such review include any
7 issue for which the United States Claims Court has juris-
8 diction.

9 (b) Nothing in this section shall affect any otherwise
10 available judicial review of agency action.

THE PRIVATE PROPERTY RIGHTS ACT OF 1990

INTRODUCTION

PRIVATE PROPERTY AT RISK

Many Constitutional scholars believe it was inevitable: as American industry expands, natural resources are developed, and population grows, government will attempt to control this growth with increasing levels of regulation. Almost every day the federal government issues a new ream of regulations that place more demands on individuals and businesses, in hopes of addressing society's problems. Congress's budget crisis only speeds this trend, since it is far less expensive to simply mandate public benefits (open space, low-income housing, medical care, etc.), rather than budget taxpayer dollars to achieve those same goals. The mounting burden of this regulation may conflict with basic private property rights guaranteed by the Constitution.

The Constitution provides that "private property [shall not] be taken for public use without just compensation." The Courts have determined that regulations which "go to far" [i.e. deny economic use of one's property without provocation or cause], amount to a "taking of property" and require compensation be paid to the owner. The U.S. Government is currently facing well over a BILLION dollars in outstanding "takings" claims of this type. Just in 1990, several of the largest "takings" judgements in the history of the United States were handed down by the U.S. Claims Court. And in California, property owners who can afford legal costs are winning about 50% of their "takings" claims before the intermediate appeals courts.

NEEDED: REGULATION WHICH RESPECTS PRIVATE PROPERTY

The need for the federal government to be more careful in how it regulates has been recognized since 1987, when a series of landmark Supreme Court cases clarified the rights of property owners against excessive regulation. A year later, President Reagan signed an executive order (E.O. 12630) which required agencies to "look before they leap" at what the private property impact of their regulations might be. At the current time, however, there is no statutory requirement that agencies even consider the impact on private property when issuing regulations.

That is why a bipartisan group of Senators, supported by small business, farm and civil rights groups, as well as free-market environmentalists, have proposed the Private Property Rights Act of 1990. The Act requires that federal agencies adopt administrative procedures to "assess the potential for taking private property in the course of regulatory activity, with the goal of minimizing such where possible." These procedures may be similar to those required by E.O. 12630, but must reflect the Court's current interpretation of what constitutes a "taking of private property." This assessment will allow agencies to draft regulations that impose on property rights as little as possible, while still achieving their regulatory goals. As a result, the public interest is served, individual property rights are protected without costly court battles, and taxpayers need not pay compensation for "takings" that could have been avoided.

VOTE "YES" ON THE PRIVATE PROPERTY ACT

Once again the Senate will have an opportunity to show its support for fundamental private property rights: The Private Property Rights Act of 1990, sponsored by Senator Symms. The legislation has been reviewed and endorsed by the Attorney General, the Departments of Interior and Agriculture, and the Environmental Protection Agency. ***We urge you to support the Private Property Rights Act of 1990*** for the following reasons:

- * **The Private Property Act is essential** to better secure the basic civil right of private property ownership, to ensure that regulatory goals are pursued in the manner that least invades such Constitutional rights, and to reduce the fiscal impact of "takings" judgements against the U.S.
- * **The Private Property Act will expedite important environmental health and safety programs.** Several existing regulatory programs involving the use of land, wetland protections among them, have been slowed by questions about the need for "just compensation" to landowners. The Private Property Act requires agencies to (1) make the case for land use restrictions where they are necessary and compensation not warranted, (2) avoid costly takings judgements where protections can be achieved otherwise, or (3) budget and prioritize those restrictions for which a court would likely find "just compensation" necessary.
- * **The Private Property Act is needed now more than ever.** The U.S. Government has over a billion dollars in outstanding "takings" claims, judgements in just three of which added up to over \$160 million this year. Meanwhile, the Supreme Court is showing what one CRS analyst calls a "trend supporting increased protection of private property against government controls." As another CRS American Law Division attorney noted, "it was inevitable that the 'taking issue' should have emerged from the constitutional wings and moved to center stage, as it has now done."
- * **The Private Property Act will not increase delay or paperwork.** The Department of Justice has refuted this charge, pointing out that most federal agencies already comply with its intent, and that while it has been "suggested that this proposal would add a bureaucratic roadblock to executive enforcement of some laws, this is incorrect." Justice added that the Act merely "*reflects an important commitment to private property, which agencies should heed,*" without codifying any specific procedures.

October 12, 1990

For more information:
Trent Clark, 224-6142

WHY SMALL BUSINESS SUPPORTS THE PRIVATE PROPERTY RIGHTS ACT OF 1990

PRIVATE PROPERTY IS ESSENTIAL FOR A SOUND ECONOMY. Private property is a critical part of the free enterprise system. The early English Economist Adam Smith, hailed by James Madison as the "author of the American system of commerce and trade," explained that *"the property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable."*

PRIVATE PROPERTY OWNERSHIP IS A FUNDAMENTAL RIGHT. The ability to own, use, and transfer private property is guaranteed by the Fifth Amendment to the Constitution as a civil right, not a benefit or privilege granted by government. As such, it deserves protection just as other civil rights, such as freedom of speech, assembly, worship, etc.

OVER-REGULATION CAN DENY PRIVATE PROPERTY RIGHTS. Small businesses must comply with occupational health, safety, sanitation, urban zoning, environmental and many other regulations imposed by government. Many of these regulations, issued to fix problems more often associated with large corporate industries, pose unique burdens on small businesses. The Supreme Court has placed limits, however, on how burdensome and arbitrary regulation can be. If the regulation "goes too far," (Justice Holmes in *Pennsylvania Coal v. Mahon*), then the Constitution requires that the property owner be paid "just compensation".

SMALL BUSINESSES OFTEN BEAR DISPROPORTIONATE REGULATORY COSTS. The Attorney General, citing Supreme Court opinion, has stated that regulations "must not be disproportionate to the degree to which the individual's property use is contributing to the overall problem." Yet, the cost of permits, record-keeping and reporting demanded of small businesses is often equivalent to that required of larger firms. This inequity potentially infringes on the property rights of small business.

SMALL BUSINESS CANNOT AFFORD EXPENSIVE LEGAL FEES. The traditional remedy to protect property rights from "regulatory taking" is to file an "inverse condemnation" suit in Claims Court, usually requiring up front attorney's fees of \$40,000 to \$50,000. While large corporations can afford this cost, small businesses cannot. That is why the Private Property Rights Act of 1990, which requires agencies to assess whether their regulations will impact private property, with the goal of reducing that impact where possible, is needed to protect the rights of small business.

REGULATIONS THAT MAY BE FOUND TO "TAKE PRIVATE PROPERTY" AND POSSIBLY REQUIRE COMPENSATION TO THE OWNER

Government Activity

Denial of building permit, where denial does not "substantially advance a government purpose."

Restricting ability to sell property.

Permanent physical occupation by government on private property.

Allowing other people to "take" your property.

Certain low and frequent flights overhead.

Denying economic use of property where no broad public interest is served.

Periodically flooding property.

Denying owner access to property.

Denial of water rights.

Serious interference with common and necessary use of property.

Forced disclosure of trade secrets.

Destruction of the value of liens on property.

Temporary seizure of property to avert strike.

Erroneous seizure of property.

Denial of mineral rights.

Denial of oil and gas leases.

Court Case Where a Taking Found

Nollan v. California Coastal Commission

Hodel v. Irving

Loretto v. Teleprompter CATV

U.S. v. Sioux Nation of Indians

U.S. v. Causby

Pennsylvania Coal v. Mahon

U.S. v. Cress

U.S. v. Welch

U.S. v. Great Falls Manufacturing

Pumpelly V. Green Bay Co.

Ruckelshaus v. Monsanto

Armstrong v. U.S.

U.S. v. Pewee Coal

Disbrok Trading Co. v. William P. Clark

Foster v. U.S.

Won-Door Corp. v. U.S.



America Needs Parity!

American Agriculture Movement, Inc.

100 Maryland Ave., N.E., Suite 500A, Box 69, Washington, D.C. 20002
(202) 544-5750

July 27, 1990

Dear Senator:

The American Agriculture Movement, Inc. (AAM) vigorously supports Senator Steve Symms' amendment to S.3820 on Executive Order #12630 concerning "takings" of private property by the Federal Government.

The decade of the 80's saw American's farmers loss 25 to 50% of their net equity do to low commodity prices, inadequate government programs, falling land and equipment prices, and many other factors beyond their control. It now appears that the decade of the 90's may see America's farmers loss another 25 to 50% of their net equity due to the outright taking of their land by the federal government. Most of this "taking" is due to an attempt by some agencies of the government to preserve our wetlands and enforcement of the federal clean water act. The problem as we see it is that these agencies are using wetlands delineation, clean water, and other laws as a way to take control of vast areas of farmland, much of which has been farmed for decades and has nothing to do with permanent wetlands.

Executive order #12630 requires agencies to assess the possibility that private property is being taken in the course of regulating it. It would be very beneficial to America's farmers and private property owners if this order was enforced by law.

AAM therefore proclaims its full support for the Symms amendment to force compliance of executive order #12630.

Sincerely,

David Senter
National Director

October 4, 1990

The Honorable David Boren
Russell 453
United States Senate
Washington, D.C. 20510

Dear Senator Boren:

We write to urge you to join Senators Symms as an original cosponsors of legislation extremely important to our members and to your constituents: The Private Property Rights Act of 1990.

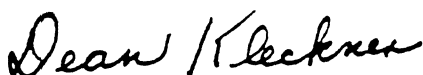
This bill would ensure that impact on private property rights are duly considered in the federal agencies' regulatory activities. It in no way limits federal agencies' authority to regulate or to fulfill any legislative mandate. However, the bill would require federal decision makers to assess the potential impact of their regulatory actions on private property rights and to minimize transgression of private rights whenever possible. Compliance with this act would help avoid inadvertent "takings" of constitutionally guaranteed rights and thus reduce the federal government's financial liability for such compensable "takings."

This Private Property Rights Act of 1990 would give statutory endorsement to procedures like those stipulated in Executive Order #12630. After a careful review by the Department of Justice, the administration now fully supports the objectives of this amendment, including the Vice President's Council on Competitiveness and affected agencies such as EPA, U.S. Army Corps of Engineers, and USDA.

Our organizations have long been staunch defenders of private property rights without which U.S. agricultural production and the individual liberties that all U.S. citizens enjoy would have no foundation. Your past leadership in protecting those rights is greatly appreciated. The Private Property Rights Act of 1990 provides a strategic method for balancing government's necessary action and protection of private rights.

We hope you will communicate your support by acting as an original co sponsor and by signing a letter to your colleagues in the Senate asking for their support of this important legislation.

Sincerely,



Dean Kleckner, President
American Farm Bureau Federation



John Lacey, President
National Cattlemen's
Association

PRIVATE PROPERTY INITIATIVE

LEGISLATIVE STATUS

- | | | |
|---------------------------|---|---|
| 1987 | - | A series of Supreme Court cases begins what the Congressional Research Service later called a "trend supporting increased protection of private property against government controls." |
| March 15, 1988 | - | President Reagan issues Executive Order 12630 to foster "due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc." |
| July 23, 1990 | - | Interpreting the 1987 Supreme Court decisions, the Claims Court finds for the plaintiffs in two "wetland" related takings cases producing multi-million dollar judgements. |
| July 27, 1990 | - | Senator Symms offers amendment no. 2399 to the pending Farm Bill, requiring agencies to comply with E.O. 12630 or "similar procedures." Forty-eight senators express support. |
| July 30, 1990 | - | Senator Symms asks Department of Justice to respond to arguments against amendment. |
| September 27, 1990 | - | A majority of Senate Republicans write to President Bush asking his support for "legislation ensuring that private property rights. . .are duly considered in the course of federal regulatory activity." |
| October 1, 1990 | - | The Department of Justice, in a detailed 12-page letter, outlines the need for Private Property legislation, states the Administration's support, and refutes contrary arguments. |
| October 2, 1990 | - | The President's Council on Competitiveness, chaired by Vice President Quayle, announces that Private Property legislation will be one of the Council's top priorities. |
| October 9, 1990 | - | Senator Symms announces plans to pursue a Private Property Rights Act of 1990, re-drafted to reflect Administration suggestions, and requests support of various organizations and individuals. |

ADDENDUM # 8

ASST. ATTORNEY GENERAL, STEWART TO SENATOR SYMMS



Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

October 1, 1990

The Honorable Steve Symms
United States Senate
Washington, D.C. 20510

Dear Senator Symms:

I am writing in response to your letter of July 30, 1990, regarding your amendment to S. 2830. The Vice President's Council on Competitiveness and the affected agencies, including the Department of Agriculture, the Department of the Interior, the U.S. Army Corps of Engineers, and the Environmental Protection Agency, have reviewed this issue and fully support the objectives of your amendment.

We applaud your initiative in seeking statutory endorsement for Executive Order 12630, which seeks to ensure that federal agencies consider the impacts which their policies might have on private property rights. The Fifth Amendment to the United States Constitution requires that the federal government pay just compensation for taking private property. This requirement reflects an important commitment to private property, which agencies should heed.

The Administration is prepared fully to support your amendment, provided that two changes are made. First, we believe that the amendment should be extended to include all federal agencies subject to the Executive Order. Second, the availability and scope of judicial review pursuant to the amendment should be clarified in order to avoid potentially creating extensive, burdensome new litigation that would clog the courts. These changes are explained more fully in the attached letter, which sets forth our views in greater detail.

Sincerely,

Richard B. Stewart
Assistant Attorney General

101

With two modifications

ADMINISTRATION BACKS PLAN REQUIRING REG REVIEW FOR TAKING OF PRIVATE LAND

The Administration has agreed to strongly support a modified version of controversial legislation proposed earlier this year by Sen. Steve Symms (R-ID) that would require federal regulations to be reviewed to see if they constitute the taking of property subject to compensation. Symms' proposal, which was narrowly defeated in July (Inside EPA, Aug. 3, p5), roused intense opposition from the environmental community as likely to cause a "chilling effect" on environmental regulations and enforcement, particularly those designed to protect wetlands. Critics say that by requiring EPA and other agencies to review their regulations and policies to assess whether the rules would either take or reduce the value of private property, mandatory "takings analyses" would inhibit agency actions. Some in EPA share that concern. Following the proposal's defeat, Symms and the Administration spent two months negotiating changes. The Administration this month finally consented to support the plan, provided that it was broadened to include all relevant federal agencies and that some provisions are clarified to avoid burdensome litigation.

In an Oct. 1 letter to Symms, Richard Stewart, assistant attorney general in the Justice Dept.'s environment & natural resources division, writes that the Vice President's council on competitiveness and the affected agencies, including EPA, have reviewed the legislation, S. 2830, "and fully support the objectives of your amendment." The amendment would make Executive Order 12630, issued under the Reagan Administration, statutorily binding. The executive order's goal is to ensure that federal agencies consider the potential impacts of their policies and regulations on private property rights. "The Fifth Amendment to the United States Constitution requires that the federal government pay just compensation for taking private property. This requirement reflects an important commitment to private property, which agencies should heed," the letter says.

In a separate ten-page analysis, Stewart explains two changes the Administration wants to see made before it can fully support S. 12630. DOJ says that in its view the amendment does not codify all of the provisions contained in the Executive Order and would only affect regulations promulgated after enactment of the bill. Symms' plan also only affects four executive branch agencies, but the Administration believes it must be expanded to cover all agencies "which engage in activity with potential 'takings' implications," Stewart says.

Stewart's letter also says that it is inaccurate to suggest that Symms' plan "would require that each regulatory action must be reviewed by the Attorney General for compliance" with "takings" review guidelines. Only the agency issuing its own guidelines, not each specific regulation, must be "certified" by the Attorney General for compliance with the Executive Order. Stewart also defends the proposal against a number of criticisms. For instance, he says, it would not give the Office of Management & Budget "yet another basis" for challenging agency actions and creating an "additional bureaucratic roadblock," as critics have charged. Although agencies would have to have "takings" review guidelines in place to issue regulations after enactment of the Symms amendment, "the simple solution" is "to secure approved . . . guidelines," Stewart says.

Because questions have been raised about whether the amendment makes certain agency actions "judicially reviewable," the Administration asks that provisions addressing "the availability and extent of judicial review" be clarified. The bill should clarify that the Attorney General's decision whether to certify an agency's guidelines should not be subject to review in court, nor should an agency's compliance with its guidelines. Specific agency decisions about "takings" impacts would be reviewable under "generally applicable principles of administrative review."

"We're less comfortable with the Symms amendment than anyone else, even as modified," says an EPA source. "But a lot [of others] in the Administration feel differently." The source says EPA's concern is "whether or not this thing could have a chilling effect on environmental regulations." A congressional aide says, however, that of all the agencies Symms negotiated with, he gave the largest concessions to EPA. For instance, the strict definition of judicial review would ensure that there would not be a huge increase of lawsuits against agencies for "taking" land, the source says.

Symms is revising his amendment to meet the requirements of the Administration and will reintroduce it this Congress, hoping to build upon what seems to be a groundswell of support to get a strong Senate endorsement to bring into the next session, according to a staffer. The source also says that Symms' office is talking to environmentalists to point out that the amendment could promote cleanup of federal facilities because in the past when a federal facility has contaminated private property the action has been considered a "taking." Environmentalists could not be reached to comment on that view of Symms' bill.



OFFICE OF THE VICE PRESIDENT
WASHINGTON

PRESIDENT'S COUNCIL ON COMPETITIVENESS

THE VICE PRESIDENT'S OFFICE

Office of the Vice President

FOR IMMEDIATE RELEASE

OCTOBER 2, 1990

Too often government regulations can harm American farmers and others by taking away the value of their land. Farmers, for example, complain that their property rights can be taken away without just compensation or due process when they are denied a wetlands permit. I am pleased to announce that the Council on Competitiveness has agreed that the Bush Administration will strongly support legislation introduced by Senator Steven Symms to require Executive agencies to protect property rights and follow procedures like the "Takings" Executive Order No. 12630. This legislation will give private citizens a chance to be heard in court, if they believe the government has not properly followed its procedures to make sure it does not take private property without just compensation. I applaud Senator Symms and the other sponsors of the bill and hope it will be enacted into law.

#

ADDENDUM # 9

SUBJECT PROPERTY HISTORY

BRIEF HISTORY

1. THE OLD IMMIGRANT ROAD RAN THROUGH THE MIDDLE OF MY PROPERTY. 22,500 GOLD SEEKERS DRIVING IRON WHEEL WAGONS USED THIS ROUTE TO THE CALIFORNIA GOLDFIELDS DURING 1849 AND 1850.
2. ORIGINAL PIONEER FARMS WERE DEVELOPED BELOW THE BLUFF ROAD. ALSO CONSTRUCTED BELOW THE BLUFF ROAD WAS A RESORT AREA, SCHOOL, STORE, CANNING FACTORY, ETC. THE ORIGINAL PIONEERS DUG A CANAL FROM THE WEBER RIVER TO WEST OF SYRACUSE TO OBTAIN WATER. THERE WERE NOT ANY STREAMS OF WATER IN THE AREA OF MY FARM.
3. WHEN THE DAVIS AND WEBER CANALS WERE BUILT TO IRRIGATE FARMS ABOVE THE BLUFF ROAD, TAIL WATER FROM THE IRRIGATION BROUGHT SALT WITH IT AND POLLUTED THE LAND BELOW. WITH THE HELP OF THE DEPT. OF AGRICULTURE, THE FARMERS INSTALLED LEACHING DRAINS THAT ARE THE PRIMERY CAUSE OF SOIL POLLUTION BELOW THE BLUFF. THE IRRIGATION SYSTEMS, RUNNING WELLS AND CITY WATER SYSTEMS FEED INTO THESE DRAINS AND HAVE RAISED THE LEVEL OF THE FORMER WATER TABLE BY MANY FEET.
4. PIONEERS BUILT DRAINS ALONG THE MILE ROADS TO TAKE CARE OF THE SALTY WATER. BEFORE WE LEVELED THE LAND SEVERAL LARGE NATURAL DRAINS WERE IN THE AREA.
5. IN THE LATE FORTIES THE BUREAU OF RECLAMATION, DEPT OF AGRICULTURE, AND WEBER BASIN WORKED TOGETHER TO CONSTRUCT WILLARD BAY, LAYTON CANAL, AND LEACHING DRAINS FOR THE PURPOSE OF RECLAIMING LAND WITH FRESH WATER. DURING THE 1950s AND THE 1960s, I STARTED LAND IMPROVEMENT AT THE DIRECTION OF THE U.S. SOIL CONSERVATION SERVICE. I HAVE FOLLOWED THEIR ENGINEERING DATA FOR LAND LEVELING, DRAINING AND DITCHING ON A PROGRESSIVE BASIS.
6. IN 1983, I STARTED USING WEBER BASIN WATER. THE WATER HAS BEEN PROVIDED TO FARMERS AT A REDUCED COST FOR A PERIOD OF EIGHT YEARS AS AN INCENTIVE TO LEVEL THE LAND, CONSTRUCT DITCHES, LEACHING CHANNELS ETC. 1991, WILL BE THE LAST YEAR WE WILL RECEIVE THIS BENEFIT.
7. LEACHING CHANNELS HAVE BEEN UTILIZED FOR THOUSANDS OF YEARS AND IS STILL BEING USED AS A STANDARD FARMING PRACTICE. ISREAL USED THE LEACHING METHOD BEFORE THE TIME OF CHRIST. OTHER MIDDLE EASTERN COUNTRIES USED THIS PRACTICE OVER FOUR THOUSAND YEARS AGO. THE U.S. DEPT. OF AGRICULTURE PRESENTLY TEACHES THE LEACHING METHOD TO STOP SALTS FROM DESTROYING THE SOIL ENVIRONMENT.
8. THE COUNTY IS NO LONGER MAINTAINING THE MILE ROAD DRAINS. THEY AGREED TO CONSTRUCT MASTER DRAINS RATHER THAN MAINTAIN THE 6 1/2 MILES OF MILE DRAINS IN OUR AREA.

(9)

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GENERAL

1. SENATOR SYMMS PROPERTY RIGHTS BILL HAS 35 SENATORS AND 142 US REPRESENTATIVES AS COSPONSORS TO THE BILL. OTHER BILLS HAVE BEEN SUBMITTED TO DELETE WETLAND POLICIES.

I HAVE HAD DISCUSSIONS WITH THE FIVE MEMBERS OF THE UTAH CONGRESSIONAL DELEGATION, 4 NEVADA CONGRESSIONAL OFFICES AND SENATOR SYMMS AND THE CHIEF OF STAFF FOR CONGRESSMAN STALLINGS OF IDAHO. THEY WERE ALL OF THE OPINION THAT THE WETLANDS POLICIES OF THE ARMY ARE DETRIMENTAL TO THE THREE STATES. THE STATES ARE MAINLY DESERT AND THE FEDERAL GOVERNMENT OWNS THE MAJOR PORTION OF THE STATES.

2. OUR LOCAL AREA RECEIVES FROM 9-13 INCHES OF RAIN ANNUALLY. SOME STATES IN THE EAST RECEIVE THAT AMOUNT OF RAIN WITHIN ONE WEEK. IT REQUIRES OVER 20 INCHES OF QUALITY RAIN ANNUALLY WITH ADEQUATE DRAINAGE TO REDUCE SALTS IN THE SOIL.

3. UTAH WATER QUALITY STANDARDS REQUIRE THE TOTAL DISSOLVED SOLIDS FOR AGRICULTURE TO BE BELOW 1200. THE SAMPLES SENT TO THE LAB IN APRIL 91, WAS 3 TO 4 TIMES THIS AMOUNT. THE LOWEST TDS WE RECORDED OVER THE PAST YEARS WAS ABOVE 1400. THE REASON FOR SAMPLING WAS TO EVALUATE THE COST OF WEBER BASIN WATER.

DUE TO THE POOR QUALITY OF WATER COMING FROM EAST OF THE LAYTON CANAL, WE DECIDED TO PURCHASE WEBER BASIN WATER AND TO PIPE THE CANAL. THIS WOULD KEEP THE POLLUTED WATER OUT OF OUR IRRIGATION WATER.

4. THE MASTER DRAIN IS DESIGNED TO ELIMINATE THE WATER FLOWING INTO THE GREAT SALT LAKE. THE NATURE CONSERVANCY WAS PLEASED TO UTILIZE THE DRAIN WATER ON THEIR 1500 ACRES OF LAND LOCATED AT THE END OF THE DRAIN. WE INSTALLED 3/4 OF A MILE OF PIPE TO ELIMINATE THE POLLUTED WATER FROM ENTERING OUR IRRIGATION WATER. THIS PIPE PARALLELS THE 1 1/4 MILES OF THE COUNTY DRAIN BELOW THE BLUFF.

5. A SOIL CONSERVATION SERVICE HAS A SPECIAL CLASS AT UTAH STATE FOR A WEEK. I WAS INVITED TO ATTEND THE DRAINAGE AND WATER QUALITY SESSIONS. DR JAMES AND DR RICHARDSON FOR UTAH STATE UNIVERSITY CONDUCTED THE CLASS. THEY COMMENTED ON VISITING MY FARM 15 TO 20 YEARS AGO TO ASSIST IN THE COMPLETION OF A SOIL CONSERVATION PLAN FOR DRAINING, LEVELING AND IRRIGATION MY FARM. THE SUBJECTS DISCUSSED IN THE CLASS WITH THE SOIL CONSERVATIONS SERVICE STAFFS FROM THROUGHOUT UTAH.

(A) DRAINAGE DESIGN AND EFFECTIVENESS.

(B) DEPTH OF LEACHING CHANNELS SHOULD BE A MINIMUM OF 6 FEET TO BE EFFECTIVE.

(C) THE NECESSITY OF DRAINAGE FOR PLANT GROWTH. A FLOWER IN A POT WAS USED AS AN EXAMPLE. WITHOUT A HOLE IN THE BOTTOM OF THE POT THE FLOWER WILL DIE.

(D) DO NOT IRRIGATE SALINE SOILS AFTER 1 AUGUST.

(E) GOVERNMENT ASSISTANCE TO INSTALL SPRINKLER SYSTEMS ON SALINE SOILS IN DUCHESNE COUNTY. THE GOVERNMENT ALLOCATES UP TO 100,000 TO INSTALL THESE SYSTEMS ON FARMS. THIS PROGRAM REDUCES SALTS IN THE COLORADO RIVER AND INCREASES CROP PRODUCTION.

IN JANUARY OF 91, I VISITED WITH TWO SCIENTISTS AT THE U.S. SNAKE RIVER SOIL CONSERVATION RESEARCH CENTER. THEY ENCOURAGE FARMERS TO INSTALL DRAINS DEEPER THAN SIX FEET. FARMERS SHOULD NOT IRRIGATE SALINE SOILS AFTER 20 AUGUST. IRRIGATE PLANTS AT THE RECOMMENDED AMOUNT OF WATER TO REDUCE THE SALT PROBLEM.

THE AVERAGE ACRE FOOT OF WATER IN UTAH CARRIES TWO TONS OF SALT WITH IN IT.

6. THE STATE OF UTAH OWNS THE GREAT SALT LAKE AND UTAH LAKE. WHAT JUSTIFIES THE ARMY CONTROLLING COUNTY DRAINS?

SUMMARY

REQUEST THE ARMY CORPS OF ENGINEERS SUPPORT THE COUNTY ENGINEERS DESIGN OF COUNTY DRAIN. THE SOIL CONSERVATION SERVICE, U.S. RESEARCH CENTER, ENVIRONMENTAL PERSONNEL, WEBER BASIN ETC., ALL SUPPORT THE ORIGINAL DESIGN AND PROGRAM. EACH STATE HAS DIFFERENT ENVIRONMENTAL PROBLEMS. UTAH HAS A SEVERE ALKALI PROBLEM AND A SHORTAGE OF GOOD QUALITY WATER. FARMERS COMMITTED TO PAY MILLIONS OF DOLLARS TO OBTAIN CLEAN WATER AND PRESERVE OUR PRECIOUS SOIL. WE WERE THE CITIZENS THAT WERE TRYING TO GET SUPPORT FOR THE ORIGINAL CLEAN WATER ACT. WE NEVER INTENDED TO SUPPORT THE PRESENT MICKEY MOUSE WETLAND POLICIES THAT DESTROY THE SOIL, CITIZENS CONSTITUTIONAL RIGHTS AND THE PRODUCTION OF FOOD.

I PURCHASED THIS LAND WITH A COMMITMENT TO RETURN IT TO GOD AS A PRODUCER OF FOOD FOR FUTURE GENERATIONS. THE FEDERAL GOVERNMENT RECOMMENDED THE PROJECT AND SUPPORTED ME BOTH FINANCIALLY AND WITH TECHNICAL ADVICE. THE ONLY PEOPLE WHO HAVE TRIED TO DESTROY THIS DREAM IS THE ARMY CORP OF ENGINEERS. MAYBE SOMEDAY WE WILL HAVE UTAHS' NATURAL RESOURCE DIVISION IN CHARGE OF WETLANDS IN UTAH. THE GOVERNOR TOOK THE FIRST STEP TO ACCOMPLISH THIS IN THE LAST SESSION OF THE STATE LEGISLATURE.

PRE QUESTIONS

1. WHAT AUTHORITY ARE YOU USING THAT WAS PASSED BY CONGRESS CONCERNING WETLANDS?

2. WHAT AUTHORITY DID EXECUTIVE ORDER 11990 SIGNED BY PRESIDENT CARTER GIVE TO THE ARMY CORP OF ENGINEERS?

3. WHY DOES THE ARMY IGNORE EXECUTIVE ORDER 12630 SIGNED BY PRESIDENT REAGON?

4. WHAT EXECUTIVE ORDER OR LAW HAS PRESIDENT BUSH SPONSORED GIVING THE ARMY AUTHORITY TO ENFORCE THEIR WETLANDS POLICY OR DEFINED THE POLICY?

5. WHAT IS THE QUALITY OF WATER RUNNING FROM THE BLUFF ROAD, BEAR RIVER, RAIN AND STORM FRONTS?

6. WHEN DID THE ARMY CONDUCT A WETLANDS HEARING IN DAVIS COUNTY?

7. PUBLICALLY ELECTED COUNTY COMMISSIONERS ARE DELEGATED THE RESPONSIBILITY BY LAW AND REGULATION TO CONTROL POLICIES AND PLANNING FOR THEIR COUNTY.

BY WHAT AUTHORITY CAN THE ARMY SUPERCEDE AND VIOLATE THOSE RIGHTS?

8. THE UNITED STATES CONSTITUTION STATES; THE FEDERAL GOVERNMENT WILL NOT TAKE THE USE OF PRIVATE LAND WITHOUT JUST COMPENSATION, IT ALSO STATES, THE PURPOSE OF THE ARMY IS TO DEFEND AND PROTECT THIS NATION AGAINST ALL ENEMIES FOREIGN AND DOMESTIC. OUR FOUNDING FATHERS WERE VERY SPECIFIC THAT MAINTAINING AND SUPPORTING AN ARMY WAS NOT AND SHOULD NOT BE USED FOR THE PURPOSE OF HARASSING OR TAKING AWAY THE CONSTITUTIONAL PROTECTIONS OF THE CITIZENS OF THE UNITED STATES OF AMERICA.

WHEN DID WE RECIND THOSE ARITICLES OF THE CONSTITUTION AND BECOME A TOTALITARIAN FORM OF GOVERNMENT?

HISTORY

1. Mormon pioneers homesteaded this area for farming. They built a canal 20 miles long from the Weber River to furnish water for this area for farming.
2. In 1939 Utah Senators- submitted the Weber Basin Project to Congress. The purpose was to utilize the water flowing into the Great Salt Lake by placing it to beneficial use for farming and city water supplies. The project built reservoirs, canals, irrigation systems and drains to be used by the property owners. Congress realized that future generations would require the use of this water.
3. From 1940 to 1949 Congress approved the project and construction was started on the first phase of the project.
4. From 1950 to 1959 Congress approved additional funding to continue the project. The Bureau of Reclamation identified the areas to be served with canals and drains. The Bureau included our farms to be served by the project. The U.S. Department of Agriculture provided the technical assistance for irrigation, draining and leveling of our farms. They also provided partial funding to accomplish this reclamation through approved farm programs.
5. From 1960 to 1969 Willard Bay Reservoir was under construction to supply water to our farms. Farmers were leveling the land plus installing drains and irrigation systems on their land.
6. From 1970 to 1979 Willard Bay Reservoir was completed and part of the Layton Canal was built by the Bureau of Reclamation. They also built underground drains through our farms. The U.S. Department of Agriculture, Bureau of Reclamation, Utah State University and Soil Conservation continued helping the farmers reclaim their property.
7. From 1980 to 1989 the Layton Canal was finished. Farmers formed irrigation companies, sold stock and paid yearly assessments to the Weber Basin Conservancy District for the irrigation water.

The Army is destroying all of the investment and work accomplished by the people for the past 140 years. They are peddling the myth about clean water when they are actually polluting the water. Plus they are providing a haven for insects, weeds and stagnant water.

ADDENDUM # 10

SOIL AND WATER MANAGEMENT RESEARCH



Davis Soil Conservation District

Layton, Utah

Farmer-District Cooperative Agreement

This agreement is entered into by the Davis Soil Conservation District, referred to hereinafter as the "District", and

Joseph C. Jensen

referred to hereinafter as the "Farmer".

THE DISTRICT AGREES TO:

Assist in carrying out a conservation plan by furnishing to the Farmer such (1) information, (2) technical assistance and supervision, and (3) other assistance as it may have available at the time the work is to be done.

THE FARMER AGREES TO:

1. Use his land within its capabilities.
2. Treat his land in keeping with its needs.
3. Develop as rapidly as feasible a conservation plan for his entire farm.
4. Start applying one or more conservation practices in keeping with these objectives and the technical standards of the District.
5. Maintain all structures established in an effective condition, and to continue the use of all other conservation measures put into effect.
6. Use any materials or equipment made available to him by the District for the purpose and in the manner provided for it.

IT IS FURTHER AGREED THAT.

1. This agreement will become effective on the date of the last signature and may be terminated or modified by mutual agreement of parties hereto.
2. The provisions of this agreement are understood by the Farmer and the District and neither shall be liable for damage to the other's property resulting from carrying out this agreement unless such damage is caused by negligence or misconduct.

WITNESS THE FOLLOWING SIGNATURES:

(Witness) 6/8/60 (Date) _____ (Owner)

By Richard L. Evans DAVIS SOIL CONSERVATION DISTRICT

Date July 26 - 1960



**United States
Department of
Agriculture**

**Agricultural
Research
Service**

Pacific West Area

**Soil and Water
Management Research
3793 N. 3600 E.
Kimberly, ID 83341
Tel. (208) 423-6530
FAX (208) 423-6555**

SALINITY AND SHALLOW WATER TABLES

As soils form from rocks and minerals by natural weathering processes, soluble salts are released into the soil solution. This is a continuous process wherever rocks and minerals are found near the earth's surface. In high-rainfall humid and tropical areas, rainwater naturally leaches the salts from the soil as the salts are released. In arid and semi-arid areas, the evaporation and transpiration (water used by plants) is greater than the natural precipitation. Under these conditions, the salts are not always leached from the soil. With time, they accumulate in the root zone at levels that affect plant growth. It is also under these arid and semi-arid climate zones that some of the highest crop yields are obtained with the development of irrigation.

Salts often accumulate in soils above shallow water tables. The water table may be naturally occurring or may have been induced by irrigation project development in poorly drained areas, by irrigating lands upslope from the salt-affected areas or by construction that blocked natural subsurface lateral drainage. Water moves from the water table to the soil surface by capillary rise or "wicking" and evaporates from the soil surface, leaving the salts on or near the surface. Over time, the salts become sufficiently concentrated to inhibit plant growth. This kind of salt problem is often found in low lying, flat areas and along slow moving streams, drains and marshes.

All irrigation waters contain at least some dissolved salts. In many areas, good quality (low salt and low sodium) water is not available for irrigation; consequently, water containing higher than desirable levels of salt or sodium is often used. When this water is used and too little water moves through the soil to carry the salts below the root zone, salts or sodium will accumulate in or near the soil surface.

In order for irrigation agriculture to be a permanent food producing system, native salts and salts from irrigation water must be leached below the root zone. In many areas, this occurs by natural internal drainage.

In many other areas, natural shallow water tables exist or they result from irrigating areas with naturally poor internal drainage and shallow water tables are formed. Under extreme conditions, the water table may be raised to the soil surface and man-made wetlands may develop during some seasons of the year.

Tens of thousands of acres are lost annually worldwide to agriculture because of insufficient internal drainage of irrigated cropland. These were not initially wetlands but became waterlogged because of irrigation of geological "bowls." In order to remain productive, these "bowls" need artificial drainage.

Summary

To remove soluble salts from the soil, three things have to happen: (1) less salt must be added to the soil than is removed; (2) salts have to be leached downward through the soil and; (3) water moving upward from shallow water tables must be removed or intercepted to avoid additional salts moving back to the soil surface.

Chemical amendments will not cure salinity problems. Internal soil profile drainage is required to leach salts from the soil.

References

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ADDENDUM # 11

UTAH AGRICULTURAL EXPERIMENT STATION, LOGAN

could blossom — with care, researchers say

LOGAN — About 300,000 acres of saline, water-logged soils in the state could blossom with proper drainage, fertilization and irrigation, say researchers from the Utah Agricultural Experiment Station in Logan.

They have proof.

The researchers recently conducted a public tour of a 110-acre research farm near Logan that now sports a lush growth of hay — a marked contrast to its appearance 30 years ago, when Cache County donated the marshy ground to Utah State University for research.

At the time scientists thought that by removing water that came from artesian wells, they would solve the problem. But water from adjacent fields proved to be the source of flooding. Springs also laced the field, where the layer of clay under the thin layer of topsoil had been broken.

USU irrigation professor Lyman Willardson said research into drainage and other subjects continued until 1978, when researchers decided to manage the land for top forage production. In 1957, average forage production was less than a third of a ton per acre. In recent years, nearly 2.2 tons of grass and clover hay per acre have been harvested annually, in addition to one ton per acre removed by grazing every year.

Willardson said that since the area is underlain by a layer of clay and artesian wells, salt can't be leached from topsoil by irrigation. Enough water is applied for plant growth, but not enough to saturate the soil, which would raise the water table and bring salts to the root zone.

Grass roots remove water to a depth of about nine feet and thus help control salinity in the upper layers of the soil. Soil moisture levels are monitored with neutron probes. By making sure the soil is dry in the fall, winter rainfall then leaches salts from the topsoil. To keep soil dry for proper leaching, USU researchers recommend that the field not be irrigated after Aug. 1.

The professor said fertilization is also important. About a third of the land is fertilized with manure from the university farms. The rest receives ammonium nitrate. Part of the field is laced with plastic-lined drains, although researchers say these drains aren't essential.

The transformation of the farm involved leveling fields to remove low spots, constructing surface drains to prevent flooding from adjacent areas, capping experimental wells and sealing springs. Although the Cache Drainage Farm is used for forage production, the techniques should also make it possible to raise grain on similar types of land, he explained.

USU researchers became interested in the techniques after noticing that farmers in Iran sometimes let weeds grow on similar types of cropland. The weeds depleted moisture from soil so salt was leached by rainfall. Crops could then be grown the following year.

"However, our goal here is continuous production, not production every other year or so," Willardson said.

ADDENDUM # 12

UTAH STATE UNIVERSITY, TERRY TINDALL, PHD. TO JENSEN



United States
Department of
Agriculture

Agricultural
Research
Service

Pacific West Area

Soil and Water
Management Research
3793 N. 3600 E.
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August 2, 1991

Mr. Joe Jensen
3242 South 100 West
Syracuse, Utah 84041

Dear Joe:

Enclosed is some information you requested on drainage of irrigated lands; also, two publications that are written on a very basic level that you could send with the other information.

I hope this will be helpful.

Sincerely,

CHARLES W. ROBBINS
Soil Scientist



CSIRO
AUSTRALIA

Division of Water
Resources

Seeking
Solutions

Water Resources
Series No. 4



Understanding Salt and Sodium in Soils, Irrigation Water and Shallow Groundwaters

A companion to the software program,
SWAGMAN[®] - Whatif

C W Robbins, W S Meyer, S A Prathapar and
R J G White

UNDERSTANDING SALT AND SODIUM IN SOILS, IRRIGATION WATER AND SHALLOW GROUNDWATERS

**A companion to the software program,
SWAGMAN[®]-Whatif**

by

**C.W. Robbins
United States Department of Agriculture**

and

**W.S. Meyer, S.A. Prathapar and R.J.G White
Division of Water Resources, Griffith Laboratory**

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Cover

How do we sustain irrigated agriculture?
Where do we go from here?
Peter Fawcett, farmer, Griffith.

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Dr Wayne Meyer (BAgrSc, PhD) is Assistant Chief of the Griffith Laboratory† of the CSIRO Division of Water Resources. Dr Meyer is leader of the research program 'Water and Salinity Management in Irrigated Areas'.

Dr Sanmugam Prathapar (BSc(Hons), MS(AgEng), PhD) is a Senior Research Scientist, working on groundwater modelling, with CSIRO at Griffith†.

Mr Robert White, (BAppSci, GDCompApp) is an Experimental Scientist at the Griffith Laboratory†.

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FEBRUARY 1991

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C O O P E R A T I V E E X T E N S I O N S E R V I C E



UTAH STATE UNIVERSITY

SOIL SCIENCE & BIOMETEOROLOGY

Logan, Utah 84322-4840

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November 30, 1989

Mr. Joe Jensen
P.O. Box 73
Clearfield, UT 84015

Dear Joe:

I am writing this letter in regards to our cooperative efforts in managing your farm in Western Davis, Co. I have worked with you for several years and have visited with you on a professional basis at your farm and in many farm meetings. Most of our conversations over the past six years have centered on your concerns in reclaiming your soils from salt and sodium problems.

One thing to consider is the area in which you are farming has been worked for several years. From early records it would appear that that area has been farmed since the 1880's. There have been a lot of changes over the past 100 hundred years that have impacted the soils and their subsequent productivity. The primary concern that I have now is the presence of a high water table. Much of this water which is affecting drainage, salt and sodium increases, appears to be strongly connected with poor irrigation management from upstream. There are mottlings in the soil profile, but these are neither high enough in the profile or bright and clear enough to indicated a historical "wetlands" condition.

The suggestions which I have made in regards should be carried out. These include the application of a soil amendment (which I understand you have already applied) like gypsum. The initial application of gypsum should be in the range of 4 t/ac. The material should be incorporated into the top 2-3 inches of soil. The next step in the reclamation processes should be the enhancement of a leaching system. Your idea of leaching channels are a good idea. However, I do think you need to have contact with an irrigation engineer to make sure they are close enough. The final step to reclamation is adding good quality water to leach the salts and sodium below the root zone and thereby overcoming the problems of germination and plant development.

I hope these ideas can be continued as part of your normal farming practices. It's been my pleasure to work with you on this project and if I can be of future assistance, please feel free to contact me. My new address is Univ. of Idaho, 1330 Filer Ave. E., Twin Falls, ID 83301, (208) 734-3600.

Sincerely,

Terry A. Tindall, Ph.D.
State Extension Soils Specialist



UTAH STATE UNIVERSITY • LOGAN, UTAH 84322-4820

Department of Plants, Soils, and Biometeorology
Telephone (801) 750-2233
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August 8, 1991

Congressman Hayes
Regarding HR 1330

Congressman Thomas
Regarding HR 2400

This is to express our concern, which has been brought to our attention by local farmers, with HR 1330 and HR 2400. From our understanding, the bill could do serious harm to irrigated farmers in our area. This seems to be caused by a lack of understanding of the problems of irrigation in a semi-arid area where salinity is a problem. The history of the world tells of many civilizations, based on irrigation, that have been seriously curtailed by salinization of lands and salting up of the area. It appears that this bill will foster this salinization.

Since we believe there is a lack of understanding of the processes involved, we suggest that if the bills are to be sensible they should include provisions as follows.

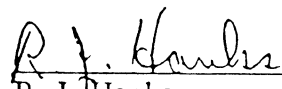
1. The salinity of the irrigation water available for farmers' use should not be increased. Water that is suitable for irrigation should be low in salinity (EC_e less than 1000 mmhos/cm or 1 dS/m) electrical conductivity of saturated extract, and low in sodium (Sodium adsorption ratio less than 10).

2. Drainage of soils that are irrigated with saline water must be provided for and irrigation managed so some drainage occurs. This is necessary to prevent salt build-up in the soil. Some leaching of water to the drains must occur to keep the salt in the soil in balance. Water in the drains will be much more saline than the irrigation water and should not be reused except if the hazards are provided for.

3. This needed leaching may cause water tables to build up, especially in low areas. Drains need to be maintained at such a depth that water tables closer than 6-8 feet to the surface do not occur on agricultural lands. High water tables may contribute water for plant use but also contribute salts.

I would like to emphasize that this rather delicate balance of water and salts in regions such as the Great Salt Lake have evolved over many years of trial and error. Many problems on low-lying farms have been caused by conditions "up-stream" that are out of his control.

To impose more control on the farmer, especially by government agencies that are not aware of the delicate balance of the agricultural ecosystem could cause untold damage and hardship to agriculture, which is already in a tight financial condition.


R. J. Hanks
Professor of Soil Science

ADDENDUM # 13

CLAUDE MC BRIDE LTR. TO ARMY CORP OF ENGINEERS

From: Claude E. McBride
3446 West 1700 South
Syracuse, Utah 84075

February 14, 1990

COPY

Army Corps of Engineers
Regulatory Office, Att'n Brooks Carter
125 South State
Salt Lake City, Utah 84111

Gentlemen:

I am a long time resident of the area west of Syracuse that is under study for wetland designation. Except for one developed sub-division, the large majority of the landowners in this area are descendents of the original pioneer settlers. Many of them are able to produce documented family histories showing that this area is not a natural wetland. The original settlers found this area with vegetation the same as is now found on Antelope and Fremont Islands. The water table was low. The soil was salt free and permitted the growing of non-irrigated grain crops. The area was laced with natural swayles(channels) that acted as natural drains.

Changes in the soil came about when the land was levelled and prepared for irrigation. Water from surface ditches, artesian wells, and the beginning of irrigation on the benchlands above brought about the raising of the water table at or near the surface. The sad fact that the ground water contains the salts found in the Great Salt Lake became apparent. The toxic effects of this salty water in the root zone has made possible only the growth of salt tolerant plants of low nutritional value, little or no crops, and much surface of salty crust due to evaporation from the high water table. The natural drains that existed have long since been obliterated, and there are not adequate drainage outlets to handle the increasing amounts of storm and drain waters coming from developing areas above.

Federal legislation passed some fifteen to twenty years prior to the Clean Water Act established the Weber Basin Conservancy District, part of whose mandate was to construct the Layton Canal and install a drainage system in the area in question. Pilot drains were installed under the direction of the Bureau of Reclamation. Additional easements were acquired and surveys were done but no additional drain installation has been done as yet. Some feeder drains have been installed by individual landowners. The Layton Canal was completed due to the efforts and heavy investment of landowners in the area and sponsorship of Weber Basin Conservancy District. Although this project is not complete, niether has it been abandoned.

I firmly believe that the concept of the groundwaters under this area acting as a filter and purification medium is totally inapplicable, because any storm or drain waters entering this area will not only carry pollutants including dissolved salts to mix with the salts already there, but due to the semi-desert climate and poor drainage, the bulk of the water will escape due to evaporation, leaving the salts on the surface. The result will be not a wetland but a wasteland.

I am aware of the wetland restoration activities being carried out in the Dakotas and surrounding area, and taking a leaf from their book, I strongly urge that you search your regulations for the authority to seek a cooperative effort from the landowners in our area thru incentives; that you embrace the concept that the only practical approach in this area to achieve a "clean water" situation is to allow for drainage that will LOWER the water table, permitting the salt-laden waters to drain directly to the Lake, allowing the leaching of salts; that you negotiate with landowners adjacent to the Lake shoreline for designated wetlands to which irrigation water of suitable quality can be applied to sustain them as wetlands and allowing leaching to take place. This would establish plant life of quality to support wildlife in far greater abundance than in the present saline condition.

Respectfully Yours

Claude E. McBride

cc: Syracuse Mayor DeLore Thurgood
Davis County Planning Commission
Congressman James Hansen
Senator Jake Garn
Weber Basin Conservancy District

ADDENDUM # 14

WEBER BASIN PROJECT HISTORY

DEVELOPMENT

Early History

The early history of the Weber Basin Project is very similar to the history of the Ogden and Weber River projects. Weber River water was first used by new settlers for irrigation about 1848. The development was reasonably rapid, and by 1896 more than 100 canal companies had begun to divert water from the river or its tributaries and had established rights to all of the normal summer flow. Storage of spring floodflows was undertaken to overcome shortages during the late irrigation season or drought periods. The 3,850-acre-foot East Canyon Reservoir, constructed by private interests on a tributary of Weber River in 1896, was one of the first large developments. It was enlarged to a capacity of 10,000 acre-feet in 1916. Numerous small reservoirs, ranging up to 1,900-acre-foot capacity, also were constructed by irrigation companies.

Investigations

Two Bureau of Reclamation reservoirs were constructed on the Weber River system before authorization of the Weber Basin Project. The 74,000-acre-foot Echo Reservoir on Weber River was completed in 1931 as the principal feature of the Weber River Project. The 44,000-acre-foot Pineview Reservoir on the Ogden River was completed in 1936 as a part of the Ogden River Project. Additional canals and conduits were built under the Ogden River Project. Some water from Weber River watershed is diverted to the Provo River Project through the Weber-Provo Diversion Canal, constructed as a part of the Weber River Project and enlarged by the Provo River Project.

Planning for the Weber Basin Project started in 1942, was discontinued during the war years, and was resumed in 1946 when it became apparent that the marked population growth in the project area during World War II was permanent. Newcomers, attracted mainly by war callations, remained after the war ended, creating an intense demand for municipal water and accentuating the need for additional irrigation supplies. A status report on investigations was made in January 1948. A project report issued July 1949 led to congressional authorization of the project in 1949. The first appropriation of construction funds was made July 9, 1952. The definite plan report was prepared in 1952. This initial report was revised in 1955 and 1959.

Authorization

Construction of the Weber Basin Project was authorized by the Congress on August 29, 1949 (63 Stat. 677).

Construction

First contracts for construction of project features were awarded in 1956. All were completed in 1969.

Operating Agency

Operation and maintenance of the project was turned over to the Weber Basin Water Conservancy District on October 1, 1968.

BENEFITS

Irrigation

The new land developed by the project is practically all in private ownership. Development of this acreage will permit the formation of new farms and the expansion of many existing units. Principal crops are fruits, vegetables, sugarbeets, potatoes, alfalfa, and cereals.

Municipal and Industrial Water

Benefits to communities and cities are extensive throughout the project area.

Flood Control

Flood control is a major contribution of the thorough development of the resources of the Weber and Ogden Rivers.

Recreation and Fish and Wildlife

Minimum storage pools for game fish are maintained at Rockport Lake, East Canyon, Lost Creek, Causey, and Pineview Reservoirs. Recreation is administered by the Forest Service at Pineview and Causey Reservoirs. The Utah Division of Parks and Recreation administers Arthur V. Watkins, East Canyon, Lost Creek, and Rockport Reservoirs. Facilities for picnicking, camping, swimming, boating, water skiing, fishing, and hunting, as well as sanitation facilities, are available for the increasing number of visitors. Substantial improvements of recreation facilities have been completed. Recreational use is increasing correspondingly, with a total of 1,364,838 visitor days reported for the reservoir areas during 1977.

PROJECT DATA

Land Areas (1977)

Irrigable areas:	
Available for service	32,319 acres
Not for service	57,632 acres
Total	90,501 acres
Number of farms, tracts served	1,153

Slaterville Diversion Dam

Slaterville Diversion Dam is on the Weber River about 2 miles west of Ogden. It is a reinforced concrete structure with a river regulating section controlled by six 25-foot-wide radial gates. It diverts water into Willard Canal, Slaterville Canal, and the Layton Pumping Plant intake channel.

Layton Canal, Pumping Plant, and Laterals

The Layton Canal conveys Weber River water southward about 9 miles from the Slaterville Diversion Dam. The canal has an initial headgate capacity of 180 cubic feet per second. The Layton Pumping Plant, located at the foot of a bench to the south of Slaterville Diversion Dam, pumps project water into Layton Canal. With four units and an installed horsepower capacity of 1,050, it lifts water an average height of 25 feet at the rate of 250 cubic feet per second.

Pineview Dam and Reservoir Enlargement

Pineview Dam, on the Ogden River about 7 miles east of Ogden, was constructed by the Bureau of Reclamation as part of the Ogden River Project in 1937. The original structure, 103 feet high, created a 44,000-acre-foot reservoir. Under the Weber Basin Project, the dam was enlarged to a height of 137 feet, increasing the reservoir capacity to 110,150 acre-feet. The 10,000-cubic-foot-per-second-capacity spillway is controlled by two radial gates. The maximum discharge capacity of the outlet works is 2,300 cubic feet per second. The increased storage capacity in Pineview Reservoir provides supplemental irrigation and municipal water within the Ogden River Project area and, together with Arthur V. Watkins Reservoir storage, provides water to irrigate new land in the Willard and Layton Canal areas, and to replace natural flows of Weber River that are diverted at Stoddard Diversion Dam into Gateway Canal.

Causey Dam and Reservoir

Causey Dam is on the South Fork of the Ogden River about 11 miles upstream from Pineview Dam. A zoned earthfill structure, it has a height of 218 feet and a crest length of 845 feet. Causey Reservoir has a total capacity of 7,870 acre-feet with a surface area of 136 acres.

Weber Aqueduct

Weber Aqueduct, extending about 4 miles northward from the outlet of Gateway Tunnel, has a capacity of 80 cubic feet per second. It carries an average of 9,900 acre-feet of irrigation water annually to the Uintah Bench and about 19,000 acre-feet of municipal and industrial water

annually to Ogden and adjacent cities. A complete pressure pipe lateral system distributes project water to the Uintah Bench lands.

Davis Aqueduct

Davis Aqueduct, extending 21.6 miles southward from the outlet of Gateway Tunnel, has an initial capacity of 355 cubic feet per second. It conveys an average of 51,000 acre-feet annually for irrigation of foothill lands between Weber Canyon and North Salt Lake, and approximately 21,000 acre-feet annually for municipal and industrial use in 15 communities. Several lateral systems, mostly pressure pipe, serve approximately 16,000 acres in the Davis Aqueduct service area.

Stoddard Diversion Dam

The Stoddard Diversion Dam is a concrete gate structure on the Weber River 4 miles northwest of Morgan. It has a river regulating section 110 feet wide, controlled by four 25-foot-wide radial gates. This structure diverts up to 700 cubic feet per second of water supplied from the upper Weber River storage and natural flow into Gateway Canal.

Gateway Canal System

Gateway Canal extends from Stoddard Diversion Dam westward about 8.5 miles on the south side of the Weber Canyon. Its initial capacity is 700 cubic feet per second. At the end of the canal, a portion of the water may be diverted through the Gateway Powerplant to the Weber River. The remaining water is conveyed through the 3.25-mile Gateway Tunnel to the west face of the Wasatch Mountains, where the water is divided between the Weber and Davis Aqueducts.



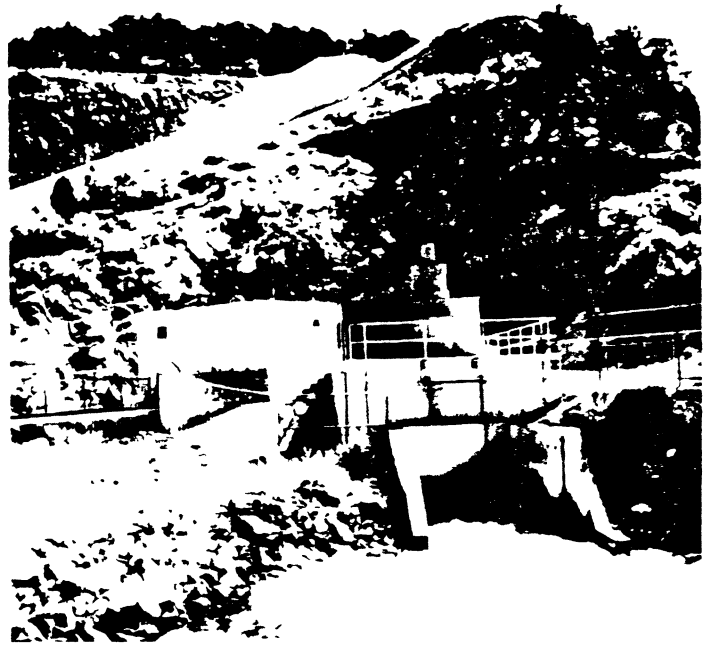
Stoddard Diversion Dam

East Canyon Dam and Reservoir Enlargement

East Canyon Dam is a concrete thin-arch structure, 10 miles southeast of Morgan on East Canyon Creek. The new dam, with a height of 260 feet, a top thickness of 7 feet, crest length of 436 feet, and a volume of 35,716 cubic yards, replaces an old concrete arch dam and increases the reservoir capacity from 29,000 to 51,200 acre-feet, covering a surface area of 684 acres. The uncontrolled spillway is on the left end of the dam and has a 1,000-cubic-foot-per-second capacity; the outlet through the dam has a capacity of 100 cubic feet per second.

Lost Creek Dam and Reservoir

Lost Creek Dam is on Lost Creek, 12 miles upstream from its confluence with Weber River. It impounds a reservoir with a total capacity of 22,510 acre-feet covering a surface area of 365 acres. A zoned earthfill structure 248 feet high with a crest length of 1,078 feet, the dam has a volume of 1,831,820 cubic yards. The uncontrolled spillway on the right abutment has a concrete-lined chute with a capacity of 2,455 cubic feet per second. The outlet works, with a capacity of 805 cubic feet per second, consists of an intake structure at the right abutment, a concrete-lined tunnel, a gate chamber for two 2.25-foot-square high-pressure gates, a concrete tunnel, and stilling basin.



Wanship Powerplant

Wanship Dam and Rockport Lake

Located 1.5 miles south of Wanship on the Weber River, the Wanship Dam impounds Rockport Lake. The lake has 62,120 acre-feet total capacity, and a surface area of 1,077 acres. The dam, a zoned earthfill structure, is 175 feet high, has a crest length of 2,015 feet, and contains 3,183,000 cubic yards of material. The spillway is an uncontrolled open concrete chute with a capacity of 10,800 cubic feet per second. The outlet works tunnel provides for releases to the powerplant or to the river. The outlet works has a capacity of 1,000 cubic feet per second.

Powerplants

The Gateway Powerplant is at the lower end of Gateway Canal, 10 miles southeast of Ogden. The plant is driven by water returning to the river from Gateway Canal. Its two units develop 4,275 kilowatts under a head of 147 feet.

Wanship Powerplant is at Wanship Dam 1.5 miles south of Wanship. With one unit, it develops 1,425 kilowatts of energy under a maximum head of 152 feet.

The two plants provide power for the operation of project works including pumping of irrigation, drainage, and municipal water. Energy produced in the nonirrigation season, as well as surplus energy produced during the irrigation season, is available to preferential customers.

Drainage System

A system of 34.5 miles of drains has been constructed to improve and reclaim project land.

ADDENDUM # 15

LEGISLATIVE HISTORY, P.L. 95-217

(excerpts)

CLEAN WATER ACT OF 1977

P.L. 95-217

[page 76]

whether permits are required for certain "gray area" types of activities, and the inappropriate use of the permit mechanism for regulating certain discharges of dredged or fill material.

The committee amendment addresses those concerns. The amendment clearly assigns responsibility to the section 208 program for earth-moving activities that do not involve discharge of dredged or fill material into navigable waters. Thus, no permits are required for seeding, cultivating, and harvesting, or for upland construction of soil and water conservation measures, or certain minor drainage; including sediment basins and terraces to prevent pollutants from entering the Nation's waters. These exemptions must be defined in regulations. Minor drainage is intended to deal with situations such as drainage in Northwestern forests or other upland areas. The exemption for minor drainage does not apply to the drainage of swampland or other wetlands.

Similarly, no permits are required for other such "gray area" practices involving those agriculture, mining and construction activities listed in section 208(b)(2) (F) through (I) that more are properly controlled by State and local agencies under section 208(b)(4) and for which there are approved best management practice programs. For example, section 208(b)(4) regulatory programs are responsible for controlling pollution that may result from sheet flow across a site prepared for construction or from the placement of pilings in water to support structures such as highways, railroad tracks, and docking facilities. Under the committee amendment, no permits are required for such activities when regulated under section 208.

The committee amendment also addresses the recognition that certain activities that involve the addition of dredged or fill material into water can meet the objectives of the act if conducted in accordance with performance standards and best management practices established under the section 208 program, and thus do not require the detailed scrutiny of a Federal permit program.

The amendment exempts from permit requirements the maintenance and emergency reconstruction of existing fills such as highways, bridge abutments, dikes, dams, levees, and other currently serviceable structures. This does not include maintenance that changes the character, scope, or size of the original fill. Emergency reconstruction must occur within a reasonable period of time after destruction of the previously serviceable structure to qualify for this exemption.

The committee amendment specifically exempts construction or maintenance of farm or stock ponds, as well as construction and maintenance of agricultural irrigation ditches and the maintenance of drainage ditches, from the permit requirements.

The construction of farm and forest roads is exempted from section 404 permits. The committee feels that permit issuances for such activities would delay and interfere with timely construction of access for cultivation and harvesting of crops and trees with no countervailing environmental benefit. The prescribed management practices for construction of exempt roads require that the construction, use, and maintenance of the roads not significantly alter the biological character or flow, reach, and circulation of affected waters.

During the committee oversight of the corps program last year, testimony was received regarding potential disruptions of mining

CLEAN WATER ACT OF 1977

P.L. 95-217

[page 9]

the section 208 program, with a specific view as to the way water pollution programs related to agriculture.

Agriculture was demonstrated to be a major source of pollution. The current strategy in the act to divide agriculture into point and nonpoint sources is effective with regard to feedlots, but ineffective with regard to irrigation return flows. Yet the threat of direct regulation by permit has moved farmers and the farm-service community into a willingness to work with the section 208 areawide process, recognizing the advantage of locally initiated regulatory programs.

In most instances, the section 208 "best management practices" are not actual abatement programs, and interim strategies need to be developed. Section 208 offers the potential for abatement programs to control both irrigation return flows and nonpoint source agricultural runoff, and the committee considered several proposals to pursue this proposal.

For these reasons, the committee adopted several amendments which generally concern section 208 and specifically relate to agriculture. First, the committee renewed funding for section 208 planning and plan implementation. This is necessary to continue the work that has begun. Unfortunately, like other Public Law 92-500 programs, initial implementation of section 208 was slow. Few plans are completed, and accordingly the committee also extended completion deadlines.

Second, the committee exempted irrigated agriculture, defined under the act as a point source, from the 402 permit program and included it within the 208 program.

Third, the committee examined a variety of ways to strengthen the implementation of the 208 program, so that it would become a meaningful nonpoint source abatement mechanism. The committee provided an opportunity in its consideration of the section 404 issues for States to develop an approvable 208 regulatory program for specified activities. Approval through this process would remove those activities from direct Federal control.

Between requiring regulatory authority for nonpoint sources, or continuing the section 208 experiment, the committee chose the latter course, judging that these matters were appropriately left to the level of government closest to the sources of the problem.

But that should not be interpreted as a lack of concern of the committee. The committee clearly intends 208 to produce specific nonpoint source abatement programs and will review the program as more plans are completed.

The \$150 million authorization for section 208 for fiscal year 1978, 1979, and 1980 will be used to support the continuing development of water quality management plans and programs that are needed to attain the national goals for 1983. The committee recognizes that the requirements of section 208 provide the primary means for the control of nonpoint sources of pollution, and expects EPA to direct the funds authorized under this section towards assisting in the development of effective nonpoint source control programs.

In addition, the planning and development of regulatory mechanisms can be used for a large number of problems categories—urban-industrial problems such as municipal facility planning, pretreatment,



LEGISLATIVE HISTORY

P.L. 95-217

[page 10]

sludge disposal, and urban runoff; and for efforts in the area of water conservation and reuse.

The States and EPA should carefully evaluate the success of initial work by designated areawide agencies. The committee expects that continuing funding of any 208 agency will be given to those agencies which have demonstrated the ability to carry out their plans, and have the capability to deal with future priorities and problems.

Proper and effective use of these 208 funds has the potential for identifying significant cost savings in municipal and industrial facility investment.

There has been considerable discussion of the provisions of section 404 of the act, much of which has been related to the suspicions and fears with respect to that section, and little of which has been related to substantive solutions to real problems while providing an adequate regulatory effort to assure some degree of wetlands protection. There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve. The upland farming, forestry and normal development activity carried out primarily by individuals and as a part of family business or family farming activity need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters. At the same time, these activities cannot be fully ignored. Without question, they should not and cannot be regulated by the Federal Government. Equally without question, there should be a degree of discipline over the extent to which these activities destroy wetlands or pollute navigable waters. The committee bill addresses the institutional method for reducing the impacts of this program.

Section 208, the 1972 act's laboratory for new institutional control mechanisms for vexing nonpoint source problems, is undoubtedly the logical element for dealing with this and other similar problems. It may not be adequate. It may be that the States will be reluctant to develop the control measures and management practices which protect upland wetlands and navigable waters, and it may be that some time in the future a Federal presence can be justified and afforded.

But for the moment, it is both necessary and appropriate to make a distinction as to the kinds of activities that are to be regulated by the Federal Government and the kinds of activities which are to be subject to some measure of local control. The distinction does not necessarily need to be limited to the waters into which the discharge occurs so much as the kind of discharge which occurs, whether or not it is point source or nonpoint, whether or not it is major or minor, whether or not it is a conventional activity or a major change in the use of an area.

The committee bill includes a provision which utilizes existing legislative mechanisms, and maintains the primary thrust of section 404 with respect to protection of wetlands from spoil and fill dis-

ADDENDUM # 16

NATIONAL ACADEMY OF SCIENCES, WETLANDS STUDY

NATIONAL ACADEMY OF SCIENCES WETLANDS STUDY

A provision in the FY93 VA, HUD and Independent Agencies Appropriations bill (H.R. 5679, P.L. 102-389) directs the Environmental Protection Agency to contract with the National Academy of Sciences for a \$400,000 study of wetlands which is to be completed within 12 months of the date of enactment of the legislation. H.R. 5679 was signed into law by President Bush on October 6, 1992. The NAS is directed to "prepare a scientific analysis of wetlands delineation and to evaluate and make recommendations on the following:

- 1) methods for identifying and delineating seasonally dry wetlands, wetlands in areas subject to drought, wetlands in disturbed areas and other factors that can make accurate wetlands identification difficult;
- 2) the utility of field indicators, individually and cumulatively, and better defining the relationship between field indicators and the hydro-period required for wetlands to exist;
- 3) regionalizing the identification and delineation process to reflect different wetland vegetation and hydro-periods in various parts of the country;
- 4) the inclusion of the "growing season" to accurately identify and delineate wetlands and the appropriate length of the growing season; and
- 5) whether the vegetation tests are valid indicators for differentiating wetlands from non-wetlands in all parts of the country.

Further, the NAS should evaluate the scientific validity and practicability of existing wetlands manuals for the purposes of delineating wetlands under Section 404 of the Clean Water Act." Additional language added to this provision during the conference on H.R. 5679 also directs the NAS to "investigate methodologies to identify, measure, and compare wetlands functions and values."

According to a spokesperson at the National Academy of Sciences, 15 scientists will be appointed to the panel to conduct the wetlands delineation study from among a group of scientists recommended to the agency. There are no restrictions regarding who can submit recommendations to the NAS for the panel. EPA's Board of Environmental Studies and NAS's Water and Science Technology Board will make their own recommendations as well and will evaluate the qualifications of all scientists recommended to the NAS.

EPA has yet to contract with the NAS for the study. However, NAS and EPA officials are meeting on November 24th to discuss the study and to set an action timeline. The NAS spokesperson suggested that they would not be ready to begin selecting panelists until March or April of 1993.

To submit a recommendation to the NAS, send a biography of the scientist, including his/her phone number and address, to Sheila David at the National Research Council, 2101 Constitution Avenue, N.W., Room HA462, Washington, D.C. 20418. Ms. David's phone number is (202) 334-3422 should you have any questions.

NATIONAL ACADEMY OF SCIENCES
NATIONAL RESEARCH COUNCIL
COMMISSION ON GEOSCIENCES, ENVIRONMENT, AND RESOURCES

BOARD ON ENVIRONMENTAL STUDIES AND TOXICOLOGY
WATER SCIENCE AND TECHNOLOGY BOARD

Study of Wetlands Characterization

SUMMARY: The National Research Council (NRC) proposes to undertake a study of scientific approaches to the understanding and characterization of wetlands. Wetlands were long regarded as having little value. In the last century, U.S. federal policies actively encouraged landowners to convert wetlands to what were considered more useful purposes. However, in the past few decades, the benefits of the hydrological, biological, and other functions of wetlands have become increasingly understood and appreciated even as our remaining wetlands come under increasing development pressure. Recently, proposed changes in the way wetlands are defined has heightened the focus of attention on scientific and economic factors associated with the management of wetlands. This heightened focus has made clear the need to understand the spatial patterns of wetland structure and functioning and the need to apply such understanding in delineating (mapping) wetlands. The proposed study would be carried out by a committee overseen jointly by the Water Science and Technology Board (WSTB) and the Board on Environmental Studies and Toxicology (BEST), with input from other relevant NRC units (such as the Marine Board and Board on Agriculture, who would likely be asked for suggestions of study participants and to play a role in review of the report). The study would review and evaluate the consequences of alternative wetlands delineation approaches based on an understanding of the functioning of wetlands. It is expected to require 18 months at a cost of \$550,000, of which the Environmental Protection Agency is being asked to contribute \$400,000.

BACKGROUND: The landscape of America, particularly adjacent to surface water bodies, is covered with swamps, bogs, potholes, swales, marshes, and other features characterized by the presence of standing water or soil moisture. Historically, these transitional areas were regarded as providing little economic or social value in their natural states, and their ecological value and benefits to society were rarely considered. Indeed, the words "swamp," "bog," and "fen" have conveyed clear negative connotations.

Thus, wetlands have been exploited throughout U.S. history, and, until quite recently, government incentives have been provided to encourage landowners to convert these areas to what were considered more useful purposes. Certainly there have been economic benefits in doing so. The filling and draining of wetlands have provided land for many of the cities and homes in which we live, as well as the agricultural fields and crops necessary to support human society. But the result has been a staggering reduction in wetlands; it is estimated that since the 1780s approximately 117 million acres of wetlands have been lost. This

represents over half of the estimated original acreage of wetlands in the United States. The state of California alone has lost over 90% of its wetlands in the past 200 years, going from 5 million acres in the 1780s to under 500,000 acres in the 1980s.

The services that wetlands provide to society have now been recognized as important to people, wildlife, and ecosystems. Wetlands buffer the impact of land use on rivers, lakes, and coastal environment. Wetlands have capacities to attenuate floods, augment low flows, assimilate wastes, and provide wildlife habitats and other functions.

The first significant federal legislation that focused on protection of wetlands resources was the Federal Water Pollution Control Act of 1972. This act, through its Section 404, provided the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA) authority to regulate the discharge of dredged or fill material into wetland areas. In the 1989-90 session, Congress and the Bush administration took several actions designed to protect and achieve physical restoration of wetlands and other aquatic systems. Congress appropriated large amounts of money to support restoration of the Everglades ecosystem. In 1990, the Coastal Wetlands Planning, Protection, and Restoration Act established a joint federal-state task force to identify and implement wetland restoration projects in Louisiana and a joint planning group to devise an overall plan for the restoration of coastal Louisiana. The largest commitment to wetlands restoration made by Congress in 1990 was the adoption of the Agricultural Wetland Reserve Program as part of the 1990 Food, Agriculture, Conservation, and Trade Act of 1990 (P.L. 101-624). This program could help to reconvert one million acres of cropland to wetlands.

Thus, while a significant percentage of the nation's wetlands has disappeared, there is now widespread desire to understand the role that wetlands play and to assure that important wetlands are protected and in some instances restored. President Bush has espoused the concept of "no-net-loss" of wetland acreage and functioning. However, implementation of that policy is difficult because preservation and restoration are often at odds with development and current uses. Therefore, the identification and delineation of wetlands, based on an understanding of the way that they function, should be established using the best scientific information.

In 1989, four federal agencies (EPA, the Army Corps of Engineers, the Soil Conservation Service, and the Fish and Wildlife Service) issued a manual to identify and delineate wetlands that are under Section 404 jurisdiction. The Federal Manual for Identifying and Delineating Jurisdictional Wetlands, adopted in 1989, was the culmination of a multi-year effort to develop consistent and technically sound methods of identifying—and hence delineating—wetlands by the four federal agencies. Current criteria work well for the many wetlands that are obviously wet or that have relatively discrete boundaries (e.g., wetlands with consistent water levels or highly predictable flooding regimes). Controversies have arisen, however, concerning the many areas that have variable water levels, have broad wetland-to-upland transitions, or are only occasionally wet.

In 1990, extensively revised regulations to guide the delineation of wetlands were proposed. The revisions have been criticized for lacking a sound scientific basis and for being harder to implement than the 1989 manual. In addition, changing the way wetlands are defined would change the area subject to regulation; the economic and environmental consequences of such changes are likely to be large.

The study would thoroughly evaluate the existing federal regulatory definition of wetlands and its translation into practical national or regional approaches for consistent identification and delineation of wetlands, including a review of existing federal wetlands delineation methods. In addition, this study would identify the diverse hydrological, ecological, and other aspects of wetlands functioning. Irregularly flooded sites would receive particular attention.

PROPOSED PLAN OF ACTION: To carry out this study, the NRC would appoint a committee of about 15 experts in ecology, hydrology, soil science, economics, and other relevant disciplines. The committee would include members from academe, industry, and government. Committee members would be subject to the usual NRC bias procedures. The study would have oversight by and be staffed jointly by the Water Science and Technology Board and the Board on Environmental Studies and Toxicology, operating under the Commission on Geosciences, Environment, and Resources.

The committee would consider what scientific information is needed to assist in the evaluation and management of wetlands and would evaluate scientific questions in at least the following areas:

- **Definition** - Does the existing federal regulatory wetland definition provide an adequate conceptual basis for translation into practical, scientifically valid methods to efficiently and consistently identify wetlands for the purposes such as the Clean Water Act Section 404 program? What are the consequences of various operational definitions of wetlands? How might such definitions be related to knowledge of wetlands structure and functioning?
- **Structure and Functioning** - Is the science adequate for evaluating the hydrological, biological, and other ways that wetlands function? How do regularly-flooded wetlands function as compared to wetlands that are flooded less often or less predictably? For example, how do the hydrological and ecological relationships of wetlands that retain water only during unusually wet years compare with those that are wet every year or throughout every year?
- **Regional Variation** - How much do wetland structure and function differ among regions and what are the consequences of using nationwide delineation criteria?

The committee would also consider how the answers to the scientific questions could be usefully applied to the development of a wetlands-delineation manual. Examples of such questions of application might include (but are not necessarily limited to) the following:

- How might variations in each of several major parameters (e.g., hydrology, soils, vegetation, growing season) affect the application of a manual? In other words, how would changes in those parameters change the way wetlands are characterized?
- What is the relationship between field indicators and the conditions necessary for the existence of wetlands? What indicators (singly or in combination) are good evidence for the conditions of various attributes of wetlands?
- Can indicators relating to the various major parameters, or the parameters themselves (e.g., soils, hydrology, vegetation), be independently assessed? Or are the interactions among them such that in some cases, only one or two of the parameters need be assessed?
- To what degree should or can wetlands delineation manuals be regional as opposed to national?
- How might a manual accommodate the practical need to identify and delineate wetlands where accurate wetlands determinations can be difficult due to dry seasons, droughts, disturbances, and other factors?

Furthermore, the committee would evaluate the scientific validity and practicability of existing wetlands delineation manuals, including the Soil Conservation Service *National Food Security Act Manual* (part 512), the 1987 *Corps of Engineers Wetlands Delineation Manual*, the 1989 *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, and the 1991 *Proposed Revisions to the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, for purposes such as delineating wetlands under section 404 of the Clean Water Act.

During the 18-month study period the committee would meet approximately six times to acquire information, deliberate on issues, and write its report. It is likely that, during the course of the study, the committee would review a number of sites in the field where wetlands have been managed, restored, eliminated, or where some other relevant action of interest has occurred.

The committee would receive technical and administrative support from the staffs of the WSTB and BEST, who would also assure that all NRC procedures are followed. Owing to the breadth of the issues, some involvement of the Marine Board and Board on Agriculture (help with nominations and report review) is anticipated. Additionally, liaisons with

appropriate agencies and entities would be established to assure coordination and communication with those having an interest and stake in the study.

ANTICIPATED RESULTS: The study will result in a report that will provide the basis for rational technical and regulatory approaches to wetlands identification and characterization for management. The report will provide useful information to scientists, policy-makers, regulators, developers, and conservationists addressing a broad range of issues from definition methodology to scientific research needs. The report would be made available to the public without restriction and would be prepared in sufficient quantity to ensure distribution to sponsors, the public, and other interested parties. The report development process would conform fully with review procedures of the NRC Report Review Committee.

ESTIMATED COSTS: Total estimated costs of this 18-month activity are \$550,000, of which EPA is being asked to contribute \$400,000.

ADDENDUM # 17

LOVELADIES HARBOR INC. VS. THE UNITED STATES

In the United States Claims Court

No. 243-83L

Filed: July 23, 1990

.....
LOVELADIES HARBOR, INC., and
LOVELADIES HARBOR, UNIT D, INC.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.
.....

▪ Taking; Regulatory
▪ taking; Property interest
▪ or right subject
▪ to taking;
▪ Valuation; Fed. R. Evid. 301
▪
▪
▪

Kevin J. Coakley, with whom was *Stephen D. Kinnard*, Roseland, New Jersey,
for plaintiffs.

Gary S. Guzy, with whom was *Fred R. Disheroon*, Washington, D.C., for
defendant.

OPINION

SMITH, Chief Judge.

This regulatory taking claim is before the court after a one-week trial, which followed the denial of cross-motions for summary judgment. After considering evidence presented at trial and having examined the site with the aid of counsel and expert witnesses, the court finds that the Army Corps of Engineers' denial of a permit to fill plaintiff's property resulted in a taking, and accordingly awards just compensation as mandated by the fifth amendment.

FACTS

The majority of the facts underlying this case previously were set forth in *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988), and are recited briefly below for the reader's convenience.

ADDENDUM # 18

REGULATION AND CASES ON TAKE PRIVATE PROPERTY

REGULATIONS THAT MAY BE FOUND TO "TAKE PRIVATE PROPERTY" AND POSSIBLY REQUIRE COMPENSATION TO THE OWNER

<u>Government Activity</u>	<u>Court Case Where a Taking Found</u>
Denial of building permit, where denial does not "substantially advance a government purpose."	Nollan v. California Coastal Commission
Restricting ability to sell property.	Hodel v. Irving
Permanent physical occupation by government on private property.	Loretto v. Teleprompter CATV
Allowing other people to "take" your property.	U.S. v. Sioux Nation of Indians
Certain low and frequent flights overhead.	U.S. v. Causby
Denying economic use of property where no broad public interest is served.	Pennsylvania Coal v. Mahon
Periodically flooding property.	U.S. v. Cress
Denying owner access to property.	U.S. v. Welch
Denial of water rights.	U.S. v. Great Falls Manufacturing
Serious interference with common and necessary use of property.	Pumpelly V. Green Bay Co.
Forced disclosure of trade secrets.	Ruckelshaus v. Monsanto
Destruction of the value of liens on property.	Armstrong v. U.S.
Temporary seizure of property to avert strike.	U.S. v. Pewee Coal
Erroneous seizure of property.	Disbrok Trading Co. v. William P. Clark
Denial of mineral rights.	Foster v. U.S.
Denial of oil and gas leases.	Won-Door Corp. v. U.S.

ADDENDUM # 19

CONGRESSMAN HANSEN'S WETLANDS FORUM

COMMITTEES:
ARMED SERVICES
INTERIOR AND
INSULAR AFFAIRS
STANDARDS OF OFFICIAL
CONDUCT
WASHINGTON OFFICE
ROOM 2421
BURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-0453

Congress of the United States
House of Representatives
Washington, DC 20515
September 4, 1990

OGDEN, UT 84401
(801) 628-6677
(801) 461-6822
439 EAST TABERNACLE
ST. GEORGE, UT 84770
(801) 628-1071

Lt. General Henry Hatch
Chief of Engineers
U.S. Army Corps of Engineers
20 Mass. Ave., N.W.
Washington, D.C. 20314-1000

*See - For your
information*

Dear Lt. General Hatch:

I am writing you today to seek your agency's response to the following questions relating to wetlands policy. I would appreciate receiving these answers in written form and presented by you personally in a briefing at my Washington Office before we adjourn in October.

1. In light of the U.S. Constitution's protections against government "takings" without just compensation, could you please state your agency's position regarding its actions which extremely limit the ability of a landowner to use his land?

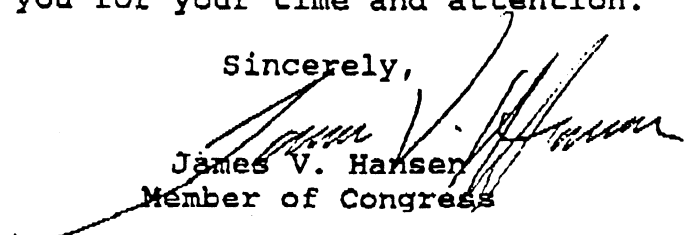
2. If an irrigation ditch develops a leak, is the area surrounding the leak considered wetlands and subject to corps regulations? Can the leak be fixed without corps approval?

3. Corps enforcement employees continually use Executive Order 11990 as their authority for enforcement on private lands, however this EO states that it does not apply on non federal property, can you please explain this apparent inconsistency?

4. At a recent public meeting in Utah, a corps employee was asked about provisions in the law and stated: "We don't care about the law, we go by the regulations!" Could you please explain this statement?

Should you have any questions regarding this request, please feel free to call Jim Barker, Interior Committee Counsel, phone 226-2311. Thank you for your time and attention.

Sincerely,


James V. Hansen
Member of Congress

WETLANDS FORUM

**Congressman James V. Hansen
and
The Army Corps of Engineers**

**Monday, June 10, 1991
324 25th Street, Suite 4118
Ogden, Utah**

INVITEES

Congressman James V. Hansen

Colonel Laurence Sadoff	District Engineer, Sacramento
Lt. Col. Mason	Corps, Sacramento Office
Art Champs	Chief of Regulatory, Sacramento
Brooks Carter	Corps, Bountiful Office
Commissioners	Box Elder County
Denton Beecher	Box Elder County Surveyor
Commissioners	Weber County
Commissioners	Davis County
Sidney Smith	Davis County Public Works
Doug Sonntag	Utah Power and Light
Alan Nieves	BioMass
Joe Jensen	Private Landowner
Paul Taylor	Private Landowner
Bert Smith	Private Landowner
Jim Grammoll	Grammoll Construction
Stewart Smith	Private Landowner
Wayne Martinson	Audubon Society
John Bellmon	Audubon Society
Clark John	U.S. Fish & Wildlife
Robert Dibblee	Senator Garn's Office
Ron Madsen	Senator Hatch's Office

REGULATORY PROGRAM IN UTAH

Proactive Actions

- ✓ State Program General Permit
Allow fill in waterways where
State Engineer has issued permit
- ✓ Advanced Identification of Wetlands
Jordan River - 1988
Synderville Area - 1991
E. Shore Great Salt Lake - Future
- ✓ Special Area Management Plan
City of Logan, 10th West

REGULATORY PROGRAM IN UTAH

Evolution of Wetland Regulation

- 1899 - River & Harbor Act**
- 1972 - Section 404 Added to CWA**
- 1975 - NRDC V Calloway**
- 1977 - Sec 404 Applicable to Utah**
- 1979 - Attorney General Opinion on
Jurisdiction Determinations**
- 1984 - Sec 404(b)(1) Guidelines
Mandatory**
- 1984 - Regulation of Isolated Waters**
- 1989 - Federal Wetland Manual**
- 1989 - Mitigation Sequencing Req'd**

ADDENDUM # 20

HOW TO TAKE SOMETHING THAT ISN'T YOURS

CHUCK ASAY

HOW TO TAKE SOMETHING THAT ISN'T YOURS:



Reprinted with Permission



ADDENDUM # 21

UTAH, SECOND DRIEST STATE

ST. D. EXAMINER

Utah guzzles more water 28 JUN 93

SALT LAKE CITY (AP) — Utahns have a love affair with things green — and apparently little regard for how much water it takes to keep them that way.

The upshot is that residents of the Beehive State use more water per capita than anyone else in America.

A U.S. Geological Survey study of 1990 water use in the United States estimated each Utahn uses 218 gallons daily for domestic purposes, which include outside watering as well as drinking, bathing, cooking and cleaning.

That's double the national aver-

age and four times the consumption rate for residents of Ohio and Wisconsin.

Wayne Solley, a USGS water-use specialist who conducted the study, said he's not sure why Utah leads the list. He speculates the desert state's warm climate and long growing season probably have something to do with it.

The six states with the largest water use are in the West, and all but California receive sparse precipitation.

Utah is the country's second driest state, averaging about 13 inches of moisture a year.

ADDENDUM # 22

TRANSCRIPT, AND DEPOSITION EXCERPTS, SMITH TESTIMONY

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privilege in that it existed “without regard to the nature or source of information or the fact that others share the knowledge.” Rule 1.6 imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental.

Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer was not permitted to reveal “confidences” unless the client first consented after disclosure.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and**
- (2) each client consents after consultation.**

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and**
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.**

Comment

Loyalty to a Client

Loyalty is an essential element in the lawyer’s relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the

ADDENDUM # 23

FLORIDA ROCK INDUSTRIES, VS. UNITED STATES

Filed: July 23, 1990

.....
FLORIDA ROCK INDUSTRIES, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

.....
Taking; Regulatory
taking; Property interest
or right subject
to taking; Nuisance exception;
Valuation; RUSCC 52(a);
Review of evidence on
remand
.....

*John A. DeVault, III, with whom were C. Warren Tripp, Jr., Jane A. Lester,
and John Tolson, Jacksonville, Florida, for plaintiff.*

*Fred R. Disheroon, with whom was David Kaplan, Washington, D.C., for
defendant.*

OPINION

SMITH, Chief Judge.

This regulatory taking claim is before the court on remand from the United States Court of Appeals for the Federal Circuit, which affirmed in part and vacated in part the opinion of the first trial court.¹ After considering evidence presented at the original trial and additional evidence presented after remand, the court finds that the Army Corps of Engineers' denial of a permit to fill plaintiff's property resulted in a taking, and accordingly awards just compensation as mandated by the fifth amendment.

CONCLUSION

Based on the foregoing, the court concludes that the denial of plaintiff's § 404 permit application effected a taking of 98 acres of plaintiff's property. The parties have agreed that the date of any taking was October 2, 1980. To fulfill the mandate of the fifth amendment, therefore, the court awards plaintiff \$1,029,000 plus interest from October 2, 1980. Plaintiff will tender the deed to the 98 acres upon the satisfaction of the judgment.

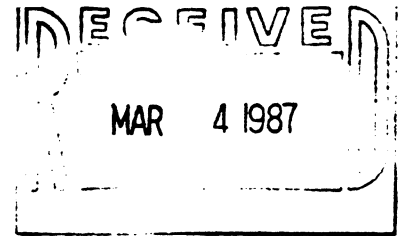
The entry of judgment will be stayed pending the determination of attorneys fees and costs to which plaintiff is entitled pursuant to 42 U.S.C. § 4654 (1988). Plaintiff is to file any such claim within 60 days from the filing of this opinion.

IT IS SO ORDERED.



ADDENDUM #24

ORIGINAL REQUEST FOR 10-12 FT. DEEP DRAINS



MR SID SMITH
FLOOD CONTROL DIRECTOR
DAVIS COUNTY

MARCH 4, 1987

DEAR SID:

WE REQUEST YOUR SUPPORT IN EXPEDITING THE STORM DRAINS BELOW THE BLUFF, WEST OF LAYTON AND SYRACUSE. THIS FACILITY IS NEEDED TO MAKE THE LAYTON CANAL COMPANY SUCCESSFUL. THE DRAINS WILL COLLECT THE EXCESS WATER GENERATED ABOVE THE BLUFF. THEN WE CAN EFFECTIVELY UTILIZE THE WATER DISTRIBUTED BY OUR CANAL COMPANY.

BELOW THE BLUFF ROAD THE DRAINS SHOULD BE 10 TO 12 FEET DEEP IN ORDER TO PROVIDE A DRAIN FOR THE FARMERS AND WOULD BE UTILIZED FOR FUTURE DEVELOPMENT WHEN THE TIME COMES.

THE PROPOSED 1500 WEST DRAIN SHOULD BE CONSTRUCTED TO THE EAST SIDE OF THE FENCE FROM THE BLUFF ROAD TO GENTILE. THIS WOULD ELIMINATE INTERFERENCE WITH THE EXISTING PIPELINE INSTALLED LAST YEAR FOR IRRIGATION WATER. THEN DIAGONALLY ACROSS GENTILE STREET TO THE WEST SIDE OF 1500 WEST FENCE TO THE LARGE PARCEL OF LAND THAT EXTENDS TO THE LAKE. THIS WOULD ELIMINATE INSTALLING THE DRAIN IN SEVERAL 5 ACRE LOTS BELOW GENTILE.

WHEN THE FINAL LOCATION OF THE DRAIN NORTH OF ANTELOPE ROAD IS DECIDED, WE WOULD LIKE TO PARTICIPATE IN THIS DECISION. THESE DRAINS ARE VITAL TO THE FARMERS IN THIS AREA. THE SALTS IN THE DRAIN WATER ARE EXCESSIVE AND CONTAMINATE THE FARM GROUND.

IF OUR BOARD OF DIRECTORS CAN BE OF HELP TO YOU ON THIS PROJECT, PLEASE FEEL FREE TO CONTACT THEM.

A handwritten signature in cursive script, appearing to read "Charles Black".

CHARLES BLACK
PRESIDENT LAYTON CANAL COMPANY

FILED

JUL 12 1993

COURT OF APPEALS


930180-CA

09 July 93

I certify that I delivered two copies of the brief
case number: 910749203CU on 09 July 93. The document

was delivered to: Gerald Hess

Davis County Attorney's Office
Farmington, Utah 84025



Joseph C. Jensen

RECEIVED

JUL - 9 1993

DAVIS COUNTY ATTORNEY

dd