



August 23, 2024

## **Re: Mississippi River Commission 2024 Low Water Inspection Trip Public Meeting**

The Tulane Institute on Water Resources Law & Policy appreciates the opportunity to provide this testimony to the Mississippi River Commission. The long-accepted presumption that there will be sufficient water to meet agricultural and industrial demands, and importantly, domestic needs, in the Mississippi River Corridor can no longer serve as a basis for water resource planning, or a reason to overlook it. Persistent drought conditions and resultant low water events along the Mississippi River regularly disrupt navigation and commerce and compromise drinking water sources for communities near the mouth of the river. All of this is happening amidst a rollback in federal environmental protections and restrictions of federal administrative authority.

### **Recent judicial decisions will impact Army Corps authorities and regulatory programs.**

The Corps knows better than most that the way our laws and regulations are written often do not reflect the reality and interconnected nature of water resources. Nevertheless, as the courts weaken federal agencies' authority, the landscape the Corps operates in will look different. First, the Supreme Court's ruling in *Sackett v. Environmental Protection Agency* limited the scope of the Clean Water Act, holding that it only protects wetlands with a continuous surface connection to navigable waters, meaning a wetland should be "indistinguishable" from a waterbody traditionally protected under the Act.<sup>1</sup> Due to the language used by the *Sackett* majority, wetlands in the Mississippi River's floodplain face an uncertain future, one that could lead to increased development near levees and flood-prone areas.<sup>2</sup> In most cases, especially in the Mississippi River Valley, there will not be a state agency willing (or able) to pick up the work where federal authority has been restricted. Only two states in the Mississippi River main stem—Minnesota and Wisconsin—have additional wetland protections beyond the Clean Water Act.<sup>3</sup> Beyond jurisdictional changes, earlier this summer, the Supreme Court overturned the longstanding *Chevron* doctrine which had instructed federal courts to defer to agency interpretation of ambiguous areas of the law.<sup>4</sup> Now, federal judges will have the final say over an agency's understanding of the statute it implements, meaning that there could be differing interpretations of nationwide regulations and policies depending on what federal circuit you happen to find yourself.<sup>5</sup> In the main stem alone, there are four different federal circuit courts.<sup>6</sup>

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<sup>1</sup> See generally *Sackett v. EPA*, 598 U.S. 651, 684 (2023).

<sup>2</sup> *Sackett*, 598 U.S. at 726 (Kavanaugh, J., concurring).

<sup>3</sup> James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ENV'T L. REP. 10679, 10686 (2022), available at <https://www.eli.org/sites/default/files/files-pdf/52.10679.pdf>.

<sup>4</sup> *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024).

<sup>5</sup> Amy Howe, *Supreme Court Strikes Down Chevron, Curtailing Power of Federal Agencies*, SCOTUSBLOG (June 28, 2024), <https://www.scotusblog.com/2024/06/supreme-court-strikes-down-chevron-curtailling-power-of-federal-agencies/>.

<sup>6</sup> Geographic Boundaries of United States Courts of Appeals and United States District Courts, available at [https://www.uscourts.gov/sites/default/files/u.s.\\_federal\\_courts\\_circuit\\_map\\_1.pdf](https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf).

Given this new landscape, the Corps should be ready for post-*Chevron* challenges and related complications in maintaining programs following the loss of wetlands jurisdiction.

### **Army Corps should account for federal reserve water rights in the Mississippi River Corridor.**

The MRC must have a working understanding of Native American lands and water rights to equitably and efficiently manage the Mississippi River's resources. Federal reserved water rights arose in 1908 in the context of tribal reservations.<sup>7</sup> Essentially, when Congress reserves land for a specific purpose, it impliedly reserves a sufficient amount of water to fulfill the purpose of that reservation. Reserved rights claims require a showing of necessity, which is divided into two elements: 1) the hydrology and climate of the land in question must be such that reserved water rights are necessary; and 2) the corresponding state's water laws do not provide an adequate mechanism to ensure a sufficient amount of water to fulfill the purpose of the reservation.<sup>10</sup> In later decisions, the Supreme Court extended reserved water rights to other federally reserved lands under the U.S. Department of the Interior, like National Forests, Monuments, and Wildlife Refuges.<sup>8</sup> Ongoing federal initiatives have given reserved water rights for Native American tribes elevated consideration in federal planning processes. For example, recently proposed National Environmental Policy Act regulations direct federal agencies, including the Army Corps, to consider tribal water rights in federal projects.<sup>9</sup>

Tribes in the Western United States have asserted their reserved water rights, and many others have entered into water rights settlements with the federal government to ensure there is a sufficient water supply for their reservations economic and cultural needs.<sup>10</sup> While these rights have not yet played a meaningful role in the East, the growing impacts of climate change on freshwater availability will likely give rise to reserved rights claims on reservations in Eastern states. The ten main stem Mississippi River states alone are home to twenty-nine federal tribes, over 100 National Wildlife Refuges, nine National Forests, twelve National Parks and National Historic Parks, and several National Riverways and Trails.<sup>11</sup> These potential reserved rights claims, or potential future tribal water rights settlements, will undoubtedly shape water use and availability in the Mississippi River and its tributaries.

Despite growing water resource concerns, new water-intensive industrial operations are popping up across main stem states, whether it be data centers in Mississippi and Iowa or lithium mining

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<sup>7</sup> *Winters v. United States*, 207 U.S. 564 (1908).

<sup>8</sup> *Cappaert v. United States*, 426 U.S. 128 (1976).

<sup>9</sup> National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442 (2024) (codified at 40 C.F.R. § 1501.3(d)(2)(viii)).

<sup>10</sup> See Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. & MARY ENV'T L. & POL'Y REV. 169, 186-87 (2000), available at <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1233&context=wmelpr>.

<sup>11</sup> For a more in depth discussion on reserved water rights in the Mississippi River Corridor, see Haley Gentry and Navya Kolli, [Federal Lands in the Mississippi River Corridor: Planning for the Water Rights and Needs of Tribal and Non-Tribal Reservations](#). A white paper by the Tulane Institute on Water Resources Law & Policy. August 6, 2024.

in Arkansas.<sup>12</sup> While recognizing states' traditional authority over water supply and allocation, the national importance of this river and the myriad uses it supports warrants more coordinated management, especially when considering water needs on federal reservations. Concrete measures need to be taken to increase data sharing and coordination between the MRC, Corps districts, and the states.

There will undoubtedly be changes to the Corps' work in the Mississippi Valley, whether they come from judicial decisions reducing the scope of Corps authority or recommendations from the Lower Mississippi River Comprehensive Management Study. Either way, Mississippi Valley districts, with guidance from the MRC, must account for existing water rights and users to ensure the proper management frameworks are in place to withstand coming changes to federal administrative law. Thank you for the opportunity to provide the Commission with testimony and are happy to answer any questions.

Respectfully submitted,

Haley Gentry, Senior Research Fellow  
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<sup>12</sup> Erin Jordan, *With Data Centers and Drought, Iowa Studies Aquifers*, THE GAZETTE (May 31, 2024), <https://www.thegazette.com/environment-nature/with-data-centers-and-drought-iowa-studies-aquifers/>; Emily Wagster Pettus, *Mississippi Legislators Approve Incentives for 2 Large Data Centers by Amazon Web Services*, ASSOCIATED PRESS (Jan. 25, 2024), <https://apnews.com/article/mississippi-data-centers-a143ba6970a4e1ff401f5463f2cd80a8>.