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THE PLATTE RIVER, ISSUE OF NAVIGABILITY

by

Deon D. Axthelm and Ron J. Gaddis

The U. S. Army Corps of Engineers is considering recommending to the Secretary of the Army that the Platte River be declared a "navigable" water from its mouth to North Platte. This is being done under the Congressional Rivers and Harbors Act of 1899, Section 10.

The Corps definition of navigable means any stream that was, is, or may be used as an instrument of interstate commerce. Searches of historical records are being made to determine if traders ever boated furs or other commodities on certain streams. If so, the stream can be declared navigable.

The Platte River is one of many streams in the U. S. being studied for historical evidence of navigability, but so far, is the only Nebraska water for which the issue has been raised. The Chief of Engineers makes the final ruling in declaring a body of water navigable. An Act of the Congress is required to remove that designation. In the past, Congress has taken such action in regard to some stream segments throughout the country. Another possible option would be a challenge through the courts.

The Omaha District of the Corps encompasses 513,000 square miles (1/9 of the contiguous 48 states) and contains 128,250 miles of watercourses. Since 1934, when a Corps District was established at Omaha, 1,638 miles of watercourses have been declared navigable. The Corps expects the mileage to increase eventually to about 12,000 miles.

The Federal Code of Regulations, Title 33, Section 209.260, "Navigation and Navigable Waters," says: "A determination of navigability once made applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity."

The jurisdiction of a navigable body of water extends laterally to ordinary high water marks - the line of demarcation between aquatic plant life and terrestrial plant life.

Under the Nebraska law, ownership extends to the center line of a river. However, one paragraph of the Federal Code reads: "A 'navigable' designation of a body of water is not precluded by private ownership of land under that body." It states that a privately owned and constructed canal not used for interstate commerce nor used by the public is not considered to be navigable.
The navigable designation, however, may affect streams and canals related to that water body. The Code states: "However, a private body, even though itself not navigable, may so affect the navigable capacity of nearby waters as to, nevertheless, be subject to certain regulatory authorities." What those may be are not stated, but presumably would be developed under Corps jurisdiction. It thus appears that new irrigation works and canals could be regulated by this section of the Code.

**Navigable, the Key Word**

Why so much emphasis on the term navigable? Once a body of water has been designated as navigable, certain responsibilities and authorities extend into the future so long as the navigable designation remains.

Section 209.260 of the Code, in addition to defining the term navigable also states the authorities, policies, procedures, and practices of the Corps of Engineers in regard to navigable waters: "It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States, as in his judgment, the public necessity may require for the protection of the life and property, or of the operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department."

The Act of 1899, cited in the Code, speaks about construction, dredging and alteration in a navigable body of water. The Code says: "The creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structure in any port, roadstead, haven, harbor, canal, in a navigable river (underline added by author) or other water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. And it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, or refuge, or enclosure within the breakwater, or of any channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

As a result of this Act, a permit system for construction within a navigable water evolved. No permanent construction or material intrusion of any type can be installed in a body of water designated navigable without a permit from the Corps.

Briefly summarized, the designation of navigable applied to any Nebraska river would give the Corps of Engineers wide latitude in prescribing regulations and use of the river. If any canal or canal structure, public or private, is considered to affect a navigable river by the Corps, that canal or structure apparently would be regulated by the Corps, if it involved construction or intrusion into the river.
If the Platte River is declared navigable, the permit system will be retroactive. According to a recent Corps statement, all applicable activities constructed on newly determined navigable watercourses as yet of undetermined date, will require some degree of permit processing.

Observations on the Permit Procedure for a Navigable River

The permit system provides some further understanding as to why a declaration as navigable is being sought for the Platte River. The Corps' regulations, published in the Federal Register on April 3, 1974, states that no permit will be issued unless its issuance is found to be in the public interest.

Beginning in the mid-1960's, the basis for issuing permits changed. Environmental concerns were added to the navigational aspects of permit issuance. The 1899 Act was seen as a means to regulate construction of fossil fuel, hydro-electric and nuclear power plants, waterfront residential communities, transcontinental pipelines and transmission lines. Applications for permits were no longer evaluated solely upon the effects on navigation, but also the general welfare. The National Environmental Policy Act (NEPA) of 1969 gave more definite environmental guidance and the Corps included the concepts of need, possible alternatives, benefits and detriments and cumulative effects in their evaluation of the general welfare.

According to a Corps statement, public interest factors considered in the issuance are "conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use classification, navigation, recreation, water supply, water quality, and, in general, the needs and welfare of the people."

In the procedure to assess the public interest, comments and information on permit applications are sought from interested parties. Interested parties include agencies, organizations and citizens who receive public notice of pending permits.

The Corps has stated: "The Corps will normally not issue a permit over an unresolved valid objection." What constitutes a valid objection is not defined.

One agency involved in review of permits is the Fish and Wildlife Service, U.S. Department of Interior. The Federal Register, Volume 39, Number 159, August 15, 1974, contains the "Guidelines for Review of Fish and Wildlife Aspects of Proposals in or Affecting Navigable Waters." It states that a handbook of guidelines is being prepared and that "the central focus of the handbook is on the navigation permit program of the Corps."

The proposed guidelines will be used by all Fish and Wildlife Service employees reviewing proposals for federally permitted work and activities to be conducted in navigable waters as stated in the guidelines. The Fish and Wildlife Service is dedicated to "encourage all efforts to preserve,
restore and improve fish, wildlife and naturally functioning aquatic and wetland ecosystems and assists in the preservation of other environmental resources of the Nation for the benefit of Man."

Several selected items under the category of the Fish and Wildlife Service policy, as stated in the guidelines, may be of interest in the declaration of a body of water in Nebraska as navigable.

One item is the issue of wetlands. The guidelines state: "The Service considers the ordinary high water line on inland waters to be the proper waterward limit of encroachment on navigable waters for nonwater-dependent works (where biologically productive high-marsh wetlands are involved, a more landward limit may be appropriate)." Where nonwater-dependent works would impinge on wetland areas "the Service usually recommends denial of a permit." The same policy apparently prevails for water-dependent works in regard to involvement of wetlands in issuance of a permit in navigable waters.

Another guideline of interest to Nebraskans involves shoreline activities. "The Service discourages exclusionary occupation of navigable waters and their shorelines by riparian owners or anchored boats ... and other cumulatively harmful uses of such water and shorelines."

A third guideline states: "The Service conducts and urges surveillance of unauthorized activities and developments in navigable waters; identifies and investigates illegal dredging, filling, other work and installations in such waters; reports the illegal works to the Corps or Coast Guard ..."

A guideline for pollutant discharges says: "The Service assists and promotes surveillance of navigable waters for unauthorized discharges of harmful pollutants, escape of harmful pollutants from non-point, fixed and deposited sources on upland, spills of oil and hazardous substances, ... and other water pollution sources endangering fish and wildlife or their uses in cooperation with the Environmental Protection Agency, Corps, and Coast Guard; reports water pollution situations harmful to environmental and human-use values to the responsible regulatory agency; ...".

One section of the guidelines deals with field investigations for non-federal proposals requiring a permit; "The Service position of the burden of proof being on the applicant to demonstrate the environmental soundness and public interest merit of his proposal implies that the applicant must arrange for any needed detailed field investigations ..." However, the Service guidelines indicate that it will need to conduct certain investigative procedures to assure environmental compatibility.

Briefly summarized, if waters in Nebraska are declared navigable, the request for a permit to construct works of any kind within the jurisdictional limits will be subject to review by many governmental agencies and other interested groups, organizations and individuals. The waters will be put under surveillance for activities not permitted. Construction activities proposed by private companies or individuals may require field investigations to prove environmental soundness before the Fish and Wildlife Service would approve the activity.
ISSUES

Is there a need for further regulations of construction and development activities in, along and over the Platte River?

Proponents say:

That state and local regulation is either non-existent or ineffective and is resulting in degradation of the river.

That unregulated developments can alter the natural stream channel and flood patterns.

That development activities need to be controlled to assure a minimum or base flow to protect fish, wildlife, recreation and aesthetic values.

Opponents say:

That the present state and federal laws are sufficient to regulate developments along the river.

That standards and ethics of corporation and individuals coupled with existing regulations are sufficient to prevent degradation of the river.

That added regulations will restrict the potential development of the river resources.

If there is a need for further regulation, should it be accomplished through the Federal government by declaring the Platte River as a navigable stream or through strengthening of state and local laws and regulations?

Proponents of federal control say:

This approach would resolve developmental and environmental problems on which action in the public interest is long overdue.

Existing federal organizations have the manpower and the budget needed for administration and enforcement of regulations.

The Missouri River is an example of a navigable stream where development has not been inhibited by federal control.

A Federal Agency is not as susceptible to local pressures and can therefore be more objective in developing and administering regulations.
While recognizing the need for strengthening state and local regulation the opponents to federal control say:

Nebraskans historically and currently prefer state and local action on public problems whenever possible.

Federal programs often fail to recognize state and local conditions and may be insensitive to the needs and desires of the local people.

Programs can be administered more efficiently at the state and local level than by the federal government.

Under the permit system, economically important projects could be blocked for long periods of time because all valid objections may not be resolved; thus, one party could thwart the will of the majority.

The Platte River lies entirely within the state and is not an interstate boundary.

The permit system gives nearly absolute control to the Corps of Engineers in decisions on construction and development.

The review procedure for issuing permits and the valid objection clause, in effect, subject the stream to regulation by other federal agencies in addition to the Corps of Engineers.

Designation of navigability would furnish a legal basis for depriving riparian owners and other residents of their water and property rights.

What Can You Do?

Study the alternatives carefully. Use facts to discuss the issues with your neighbors and knowledgeable people, and then make up your mind.

You can express your views to your Congressional Senators and Representatives and to your State Legislators. You can also encourage the organizations to which you belong to present their views as a group to these elected officials.

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