

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3680

October 29, 1986

Mr. Jeffrey F. Havel
Water Resources Commission
Post Office Box 4440
Columbia, South Carolina 29240

Dear Mr. Havel:

You have requested an opinion as to whether the Budget & Control Board, whose permit program is administered by the Water Resources Commission pursuant to R19-450, may authorize (permit) the blockage of a natural, navigable watercourse under the facts set forth below.

The proposal to block the watercourse in question (Biggin Creek) has been made by Santee Cooper and the Department of Parks, Recreation & Tourism. These agencies are apparently co-sponsors of a state park which would be built in Berkeley County, and whose theme would center on the old Santee Canal, a pre-1850 navigation project. The damming of Biggin Creek is apparently necessary to permit the maintenance of an adequate flow of water in the creek and the adjacent canal. The recent redirection of water from this area into the Santee River basin has caused water levels in Biggin Creek and the Canal to become very low. The water level therefore needs to be raised in order to make the Canal attractive enough to serve as the park's focus. PRT has stated that the stabilization of the water level in Biggin Creek "can make or break the park."

There is no question that the obstruction under consideration would serve a public purpose. The only questions presented are whether the creek can lawfully be blocked at all, and if so, whether the blockage can be authorized by permit, or whether specific legislative authorization is necessary.

Article XIV, Section 1 of the Constitution of South Carolina provides that "all navigable waters within the limits of the State shall be common highways and forever free...." § 49-1-10 is a similar statutory provision.

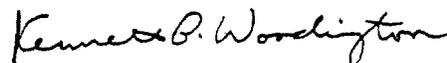
Mr. Jeffrey F. Havel
Page 2
October 29, 1986

Although there is no South Carolina case on the subject, the United States Supreme Court, in a federal case which arose in South Carolina, has held that statutes authorizing the damming of streams for public purposes do not violate constitutional provisions to the effect that navigable streams are "common highways and forever free." Manigault v. Springs, 199 U.S. 473 (1905). This case would not bind the Supreme Court of South Carolina on this question of state law, but the authorities cited therein are so exhaustive that it is unlikely that our Supreme Court would follow any other rule.

This leaves the question of what form the authorization by the State must take, i.e., whether authorization must be by statute or whether it can be done through administrative action. The General Assembly has often authorized specific blockages of navigable waters; see, e.g., § 58-31-30(5) and (6) (Public Service Authority may build dams). However, there is no general statutory authorization for the construction of dams across navigable waters. Likewise, there is no express statutory authorization for the Budget and Control Board or Water Resources Commission to permit the blockage of navigation.

"The right to obstruct navigation must ordinarily be explicitly granted and cannot well rest on implication." 78 Am.Jur.2d Waters, § 99. See also, e.g., People ex. rel. Lehigh Valley R. Co. v. State Tax Commission, 159 N.E. 703 (N.Y. 1928) (interference with navigation is not a matter of common right, but requires governmental authorization); 65 C.J.S. Navigable Waters, § 37(1). Accordingly, in the absence of a statute which expressly authorizes the permitting agency or agencies to authorize obstructions to navigation, such authority cannot be fairly said to exist. This is so even though the particular project at hand is unquestionably one which serves a valid public purpose. In order for this obstruction to be constructed, it will be necessary to obtain express legislative authorization, probably through general legislation.

Sincerely yours,



Kenneth P. Woodington
Senior Assistant Attorney General

KPW:jca

Reviewed and approved:



Robert D. Cook, Executive
Assistant for Opinions

cc: Buddy Jennings