
PUBLIC UTILITIES - ALABAMA

Otwell v. Alabama Power Co.

United States District Court, N.D. Alabama, Jasper Division - May 9, 2013 - F.Supp.2d - 2013 WL 1966115

Owners of land adjacent to Smith Lake sought declaratory and injunctive relief due to Alabama Power's alleged misuse of waters and property surrounding the Lewis Smith development at Smith Lake. Plaintiffs alleged generally that they have riparian rights in the waters of Smith Lake and that these rights are violated, and other torts result, when Alabama Power "unreasonably releases large flows of water from Smith Lake to cool the Gorgas discharge," resulting in a water level too far below the 510 msl shoreline contour. Plaintiffs also alleged that Alabama Power is unreasonably lowering lake levels in order to avoid building cooling towers at a downstream power plant.

The court deemed it unnecessary to issue an abstract ruling on whether plaintiffs have riparian rights in Smith Lake because such a ruling will not resolve the dispute that was squarely before the court on Alabama Power's motion for summary judgment; i.e., whether Alabama Power's operation of Smith Dam under its 1957 and 2010 FERC Licenses and the Corps Manual is a reasonable use of its own riparian rights such that Plaintiffs' state-law tort causes of action cannot be maintained.

Alabama Power argues that all of Plaintiffs' claims fail because this lawsuit is an impermissible collateral attack on the FERC License, which was issued to Alabama Power after the FERC considered and rejected the same substantive arguments Plaintiffs made to the Court. In sum, Alabama Power's motion for summary judgment is due to be granted because Plaintiffs' claims constitute an impermissible attack on a FERC licensing decision and thus belong only in a federal court of appeals.

All of Plaintiffs' claims nonetheless fail for an entirely independent reason as well. Alabama Power argued that Plaintiffs' riparian rights, assuming they have them, are subject to the right of reasonable use of the waters by other riparian owners, including Alabama Power, and the use of riparian rights on a FERC-licensed project is considered "reasonable" as a matter of law when the FERC licensee is acting in compliance with its FERC license. The district court agreed, granting summary judgment to Alabama Power.

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