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## **Cry Me a River: The Eighth Circuit Says Navigation, not Recreation, is the Predominant Goal of the Army Corps of Engineers in Managing the Flow of the Missouri River. South Dakota v. Ubbelohde**

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## CASENOTE

### **CRY ME A RIVER: THE EIGHTH CIRCUIT SAYS NAVIGATION, NOT RECREATION, IS THE PREDOMINANT GOAL OF THE ARMY CORPS OF ENGINEERS IN MANAGING THE FLOW OF THE MISSOURI RIVER**

*South Dakota v. Ubbelohde*<sup>1</sup>

#### I. INTRODUCTION

The Missouri River is the nation's longest waterway.<sup>2</sup> The Missouri River's lake and dam system has the capacity to store 73.4 million acre-feet of water, making it the largest reservoir system in North America.<sup>3</sup> The River begins in Montana, flows through the Dakotas, along the borders of Iowa, Nebraska, and Kansas to Kansas City, where it cuts east-to-west through the middle of Missouri to Saint Louis and finally empties into the Mississippi River.<sup>4</sup> Besides supporting recreational and environmental needs, the Missouri River provides a number of essential functions for Missouri, including providing half of the state's drinking water, two-thirds of flow support to the middle Mississippi River, efficient transportation costs for farmers and manufacturers, and cooling capacity for energy providers.<sup>5</sup>

The Army Corps of Engineers (the Corps) manages the Missouri River and the six dams that release water into it.<sup>6</sup> The Corps has the task of balancing the many interests of the River's neighboring states, including flood control, navigation, and recreation.<sup>7</sup> When the River is flowing smoothly, the Corps can generally accommodate all of the interests, but in the midst of a drought, the Corps must make some difficult choices.<sup>8</sup> The divergent interests of the several states that border the Missouri River that are affected by the operational decisions of the Army Corps of Engineers during this current drought condition have resulted in a plethora of lawsuits filed in federal district courts throughout the Eighth Circuit.<sup>9</sup>

#### II. FACTS AND HOLDING

The State of South Dakota initiated a preliminary injunction action against the Army Corps of Engineers (the Corps) in the United States Federal District Court for South Dakota.<sup>10</sup> The motion for injunction sought to prevent the Corps from releasing water from Lake Oane in South Dakota into the drought-ridden Missouri River until after the fish spawning season.<sup>11</sup> South Dakota was trying to protect the water level of Lake Oane to allow for a bountiful spawn of fish, whose population had been reduced greatly in size, partly due to a similar water release from the lake in 1997.<sup>12</sup>

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<sup>1</sup> 330 F.3d 1014 (8th Cir. 2003).

<sup>2</sup> *North Dakota v. The U.S. Army Corps of Engineers*, 264 F. Supp. 2d 871, 875 (D.N.D. 2003).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Bond Calls for a Balanced Approach to River Management* <<http://bond.senate.gov/river.cfm>> (last updated Oct. 10, 2003).

<sup>6</sup> *Ubbelohde*, 330 F.3d at 1014.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* The Missouri River has been in a drought state for the past several years. *Id.*

<sup>9</sup> *North Dakota*, 264 F. Supp. 2d at 880.

<sup>10</sup> *Ubbelohde*, 330 F.3d. at 1019.

<sup>11</sup> *Id.* at 1021.

<sup>12</sup> *Id.*

Congress enacted the Flood Control Act of 1944 to ensure orderly management of the Missouri River and entrusted the Corps with this task.<sup>13</sup> The dominant functions of the Act are to maintain downstream navigation and to avoid flooding, although the Act also recognizes secondary functions, including irrigation, recreation, fish, and wildlife.<sup>14</sup> Pursuant to the Act, the Corps designed a management plan, commonly known as the Master Manual, which provides specific guidelines on how the Corps will manage the River system.<sup>15</sup> The Master Plan specifies that the Corps will determine and publish a specific Annual Operating Plan each year, which will provide notice of the course of action the Corps will take in the upcoming year, if necessary, to offset adverse conditions.<sup>16</sup> Consistent with its 2002 Annual Operating Plan, the Corps chose to release water from South Dakota's Lake Oane in order to maintain suitable navigation conditions on the Missouri River, which was slowed by the effects of prolonged drought.<sup>17</sup>

The Corps' decision to release water from the South Dakota lake troubled the state because it wanted to maintain the water level of Lake Oane to assist in the development of a bountiful spawn of trophy walleye during that period.<sup>18</sup> In recent years, South Dakota had noticed a decline in the reduction in the quality of these fish in the lake which has in turn reduced recreational activities at the lake.<sup>19</sup> South Dakota felt that the decline in walleye was partially attributed to a massive release of water from Lake Oane in 1997, again to support the downward navigational flow of the Missouri River.<sup>20</sup>

After a failed attempt to convince the Corps to change its course of action, South Dakota filed suit on April 25, 2002.<sup>21</sup> The State claimed that the Corps acted arbitrarily and capriciously by prioritizing downstream navigation of the River over maximizing recreation at the River's upstream reservoirs.<sup>22</sup> The District Court issued a temporary restraining order to keep the Corps from releasing water from Lake Oane until a preliminary-injunction hearing could be held.<sup>23</sup>

In response to the restraining order, the Corps looked to Lake Francis Case in South Dakota to release water to promote the downstream interests of the Missouri River.<sup>24</sup> At the State's request, the District Court also considered this case at the Lake Oane preliminary injunction hearing.<sup>25</sup> The District Court entered a preliminary injunction ordering the Corps not to release water from either lake until May 25, 2003, the end of the spawning season.<sup>26</sup>

Still attempting to promote the flow of the Missouri River, the Corps looked to Lake Sakakawea in North Dakota for its reservoir release.<sup>27</sup> However, North Dakota was also successful in its pursuit of a preliminary injunction to keep the Corps from releasing water from its lake reservoir.<sup>28</sup>

<sup>13</sup> 16 U.S.C. § 460(d) (2000); 33 U.S.C. § 709 (2000).

<sup>14</sup> *Ubbelohde*, 330 F.3d at 1019-20.

<sup>15</sup> *Id.* at 1020. The Master Plan is published in the *Missouri River Main Stem Reservoir System Reservoir Regulation Manual*. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1020-21.

<sup>18</sup> *Id.* at 1020.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* South Dakota concluded that the fruitful spawn they anticipated would not be successful if Lake Oane's water level was reduced by even six inches. *Id.*

<sup>21</sup> *Id.* at 1021.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1021-22.

<sup>28</sup> *Id.* at 1022.

Prior to the issuance of the Lake Francis Case preliminary injunction, the South Dakota District Court denied motions from several parties to intervene.<sup>29</sup> These parties, which included the State of Nebraska and several private entities, then filed for a preliminary injunction in the United States Federal District Court for Nebraska.<sup>30</sup> The injunction would require the Corps to operate in the manner directed by the Master Manual and 2002 Annual Operating Plan, which supported the Corps' original decision to release water from Lake Oane, South Dakota.<sup>31</sup> The preliminary injunction was sustained on May 13, although the District Court was "reluctant to interfere with the discretion of the Corps."<sup>32</sup>

The Corps appealed all injunctions against it to the United States Court of Appeals.<sup>33</sup> The Corps asserted that its decisions were not subject to judicial review, as the Flood Control Act is so broad that there is no law for the courts to apply.<sup>34</sup> The Eighth Circuit stayed all of the injunctions.<sup>35</sup> Nebraska and the other potential interveners also appealed the South Dakota District Court decision denying their motions to intervene.<sup>36</sup> The Eighth Circuit reversed the Dakota courts and affirmed the Nebraska court, holding that the Corps of Engineers is bound by its Master Manual and Annual Operating Plan.<sup>37</sup> Essentially, the Eighth Circuit held that the Corps must comply with its own formally adopted procedures.<sup>38</sup>

### III. LEGAL BACKGROUND

#### A. *The Flood Control Act*

The Commerce Clause gives Congress complete authority to regulate the navigation of United States waters.<sup>39</sup> Using its constitutional authority, Congress promulgated the Flood Control Act of 1944 to attempt to efficiently manage the flow of the Missouri River.<sup>40</sup> In addition, Congress has the power to delegate its authority to a federal executive agency, which it has done pursuant to the Flood Control Act of 1944.<sup>41</sup> The Act authorized the Corps to manage various water projects on the River, including the construction and maintenance of dams.<sup>42</sup> Congress intended the water projects to be limited to those having significant benefits for navigation and those which are consistent with other uses of the Missouri River.<sup>43</sup>

<sup>29</sup> *Id.* at 1021.

<sup>30</sup> *Id.* at 1022.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* With conflicting injunctions, the Corps turned to two other small reservoirs for the water releases, which resulted in reduced downstream flows leaving navigation and other downstream interests adversely affected. *Id.*

<sup>33</sup> *Id.* at 1022.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1022-23. Although both preliminary injunctions of the Dakotas expired when the case was heard, the court held that the expiration of the injunctions did not render the appeals moot, as many, if not all, of the substantive issues would have been decided in the Nebraska case, in which the injunction was still in effect, and the Dakota cases fall within the well-known category of cases that are "capable of repetition, yet evading review." *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> U.S. Const. art. I, § 8, cl. 3; *See U.S. v. Rands*, 389 U.S. 121 (1967).

<sup>40</sup> *Ubbelohde*, 330 F.3d at 1019.

<sup>41</sup> *North Dakota*, 264 F. Supp. 2d at 874.

<sup>42</sup> 16 U.S.C. 460(d) (2000), U.S. Fish and Wildlife Services, *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, <<http://laws.fws.gov/lawsdigest/flood.html>> (accessed Jan. 12, 2004).

<sup>43</sup> *Id.*

The Flood Control Act provided the Corps with broad goals and a wide array of interests it should consider in regulating the flow of the Missouri River.<sup>44</sup> The predominant function of the Act was to maintain a consistent flow on the Missouri River by avoiding flooding and maintaining downstream navigation.<sup>45</sup> The Act was later amended to recognize secondary river uses such as recreation, fish, wildlife, and irrigation.<sup>46</sup> In order to manage the River in conjunction with the various interests laid out by the Act, the Corps designed a detailed management plan which it published in the *Missouri River Main Stem Reservoir System Reservoir Regulation Manual*.<sup>47</sup> This manual is commonly referred to as the Master Manual and was most recently updated in the late 1980's.<sup>48</sup>

The Master Manual lays out a general approach used in planning which details by priority the various interests at stake.<sup>49</sup> The Master Manual places a higher priority on navigation than recreation.<sup>50</sup> The Corps has consistently declared that it lacks authority to change the goals set by the Flood Control Act to focus on recreation over navigation and power.<sup>51</sup> Generally, the Master Manual indicates that flood control will be the Corps' top priority followed by "irrigation, water supply and water-quality requirements, navigation and power, and finally recreation, fish, and wildlife."<sup>52</sup> In addition to its general approach, the Master Manual details specific guidelines to be used in River management.<sup>53</sup> The Corps notifies the public of its intended River management plan for the upcoming year by the publishing of Annual Operating Plans.<sup>54</sup>

### B. Annual Operating Plan

The Annual Operating Plan provides very detailed monthly, weekly, and daily regulation schedules for six dams in the Missouri River Mainstem Reservoir System for the upcoming year.<sup>55</sup> The Annual Operating Plan also provides a 5-year outlook for longer term planning.<sup>56</sup> The schedules are developed by applying the water management guidelines established in the Missouri River Master Water Control Manual to a computer simulator loaded with assumptions based on the past 100 years of Missouri River data.<sup>57</sup> These simulations provide a range of water management simulations for the possible conditions: dry, average, or wet.<sup>58</sup> The Corps may adjust the Plan if significant departures from expectations occur, in emergency situation, or to comply with other laws.<sup>59</sup>

<sup>44</sup> *Ubbelohde*, 330 F.3d at 1020.

<sup>45</sup> *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512 (1988).

<sup>46</sup> *Ubbelohde*, 330 F.3d at 1020.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* The Corps is currently working on a revised Master Manual.

<sup>49</sup> *Id.*

<sup>50</sup> Brian Morris, *Unanswered Prayers: The Missouri River Basin States Take on the U.S. Army Corps of Engineers*, 68 N.D. L. Rev. 897, 900 (1992).

<sup>51</sup> *Id.* The upper basin states have lobbied unsuccessfully to change the priorities established by the Master Manual. *Id.*

<sup>52</sup> *Ubbelohde*, 330 F.3d at 1020.

<sup>53</sup> *Id.* The specific guidelines include the minimum flow requirements and methods for determining the length of the navigation season based upon flow at various times of the year. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Missouri River Mainstem System 2002-2003 Annual Operating Plan*, U.S. Army Corps of Engineers, Jan. 2003 <<http://www.nwd-mr.usace.army.mil/rcc/reports/pdfs/finalaop02.pdf>> (accessed Jan. 12, 2004). Annual Operating Plans have been prepared for the System for fifty years. *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

The Annual Operating Plan explains in great detail the statistical basis for its conclusions and at what point a release from one or more of the six dams will be triggered.<sup>60</sup> The Plan also provides charts showing the triggers for release from each dam and the expected time and amount released for the upcoming year.<sup>61</sup> The Annual Operating Plan also summarizes its expected results for the upcoming year in each of its six categories of focus: (1) Flood Control, (2) Water Supply and Water Quality Control, (3) Irrigation, (4) Navigation, (5) Power, and (6) Recreation and Wildlife.<sup>62</sup>

### C. Judicial Review under the Flood Control Act

Agency actions are presumed to be subject to judicial review unless such review is specifically precluded by Congress.<sup>63</sup> However, the Administrative Procedure Act provides that agency actions that are "committed to agency discretion by law" are nonreviewable.<sup>64</sup> This narrow exception only applies in a situation where a statute has been drafted so broadly that there is no law to apply to a given set of facts.<sup>65</sup> Even in situations where an agency action has absolute discretion, the courts have review over such decisions when an agency has exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations.<sup>66</sup> However, the courts are precluded from reviewing agency action where the only challenge is to the decision itself.<sup>67</sup>

In an earlier case, very similar to the case at hand, the Eighth Circuit chose not to review an Army Corps of Engineers' decision to release water from Lake Oane, South Dakota into the Missouri River to maintain proper navigational flow.<sup>68</sup> In *South Dakota v. Hazen*, the Eighth Circuit first stayed a district court's decision to issue a preliminary injunction to stop the release of water from Lake Oane, saving its opinion until after briefs were filed with the court.<sup>69</sup> When the Eighth Circuit later issued its decision, it concluded that the case was then moot and declined to issue an advisory opinion which may have included a ruling on whether the Master Manual was an applicable source of law to use in reviewing the Corps' decisions.<sup>70</sup> In holding the case moot, the court relied on the unlikelihood of repeatability before an injunction would expire in future litigation.<sup>71</sup> The court also relied on the fact that the Corps was in the process of revising its Master Manual which the court hoped would resolve the conflicting issues by using "political channels" to discuss the needs of all of the parties of the Missouri River basin.<sup>72</sup>

In another case, the Eighth Circuit found no judicial review of an Army Corps of Engineer's decision made pursuant to the Flood Control Act.<sup>73</sup> In 1983, the Eighth Circuit rejected a Sioux Indian tribe's contention

<sup>60</sup> *Id.* at 3-4.

<sup>61</sup> *Id.* (See Plates 1-10).

<sup>62</sup> *Id.* at 18-19.

<sup>63</sup> *Electricities of North Carolina v. The Southeastern Power Administration*, 774 F.2d 1262, 1266 (4th Cir. 1985).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Ness Investment Corp. v. U.S. Dept. of Agriculture*, 512 F.2d 706, 714 (9th Cir. 1975)., *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970).

<sup>67</sup> *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981).

<sup>68</sup> *South Dakota v. Hazen*, 914 F.2d 147, 148 (8th Cir. 1990). Again, South Dakota argued that its fish spawn would not be bountiful if the water was released into the Missouri River. *Id.*

<sup>69</sup> *Id.* at 149. In the court's order to stay the District Court's injunction, the court held that the Corps' actions "were neither arbitrary nor capricious, if in fact those actions were reviewable at all." *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 150.

<sup>72</sup> *Id.* at 151.

<sup>73</sup> *Lower Brule Sioux Tribe of S.D. v. U.S.*, 712 F.2d 349 (8th Cir. 1983).

that the acts of the Army Corps of Engineers pursuant to the Flood Control Act of 1944 were subject to judicial review.<sup>74</sup> In *Sioux*, the tribe brought a declaratory action under the Big Bend Project, a part of the Flood Control Act that provided for the taking and payment for tribal lands required for the building of dams and reservoirs under the Act.<sup>75</sup> Congress contemplated multiple uses of land taken under the Act, and the court found that the tribal land that the Corps took pursuant to the Act was done in good faith.<sup>76</sup> The Corps specified what land would be taken and for what purposes in a plan submitted to Congress, and the court found the plan not subject to judicial review.<sup>77</sup> The Eighth Circuit court held that the statute in question was not ambiguous and Congress' legislative intent was clearly expressed.<sup>78</sup> Thus, it was not the court's role to question either the Congressional policy or the administration of the policy by the Army Corps of Engineers.<sup>79</sup>

The Fourth Circuit also found no judicial review of an administrator's decision made pursuant to the Flood Control Act. The Fourth Circuit held that there was no judicial review of a power administrator's published marketing policy stating which areas it would buy and sell power.<sup>80</sup> The power administrator was delegated by the Secretary of Energy under the authority of the Flood Control Act of 1944 to disperse power in the most efficient way to benefit customers.<sup>81</sup> The court held that the Act's language to dispose power in a way that encourages "the most widespread use" was too vague to confer a standard of review for the courts to apply.<sup>82</sup>

The Seventh Circuit has considered the issue of judicial review of the Corps' decisions pursuant to the Flood Control Act as well. The Seventh Circuit held that there was no judicial review of an internal report of the Army Corps of Engineers that recommended deauthorization of a flood control project authorized pursuant to the Flood Control Act of 1961.<sup>83</sup> The court held that the agency's good faith plan in response to the project's authorization under the Act was initiated by Congress and was not subject to judicial review.<sup>84</sup>

In a North Dakota district court case similar to *Ubbelohde* (decided while the *Ubbelohde* appeal was being heard by the Eighth Circuit), the court dissolved a temporary restraining order finding that the state did not establish that there was an "immediate and irreparable" damage.<sup>85</sup> The court noted the "endless stream of lawsuits will continue" until there is a better resolution and a better forum to resolve the many competing interest than the federal courts.<sup>86</sup>

#### IV. INSTANT DECISION

In its appeal of the various injunctions, the Army Corps of Engineers first made two general arguments to the Eighth Circuit: (1) its actions are not subject to judicial review<sup>87</sup> and (2) the Master Manual is not binding because it is a policy statement and not a rule.<sup>88</sup> In arguing specifically against the Nebraska preliminary

<sup>74</sup> *Id.* at 354.

<sup>75</sup> *Id.* at 350.

<sup>76</sup> *Id.* at 354.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 355.

<sup>79</sup> *Id.*

<sup>80</sup> *Electricities of North Carolina*, 774 F.2d at 1266.

<sup>81</sup> *Id.* at 1264.

<sup>82</sup> *Id.* at 1266.

<sup>83</sup> *County of Vernon v. U.S.*, 933 F.2d 532,535 (7th Cir. 1991).

<sup>84</sup> *Id.* at 536.

<sup>85</sup> *North Dakota*, 264 F. Supp. 2d at 880.

<sup>86</sup> *Id.* at 882.

<sup>87</sup> *Ubbelohde*, 330 F.3d at 1027.

<sup>88</sup> *Id.* at 1028.

injunction, the Corps stated that the Master Manual is not binding.<sup>89</sup> Alternatively, if the Corps is held to be bound by the Master Manual, the Corps argued that it should not be so bound when unforeseen circumstances arise.<sup>90</sup>

South Dakota argues three issues on appeal: (1) that the Corps is required to maximize the River's fish and wildlife benefits,<sup>91</sup> (2) the Corps is required by judicial estoppel to give recreation and navigation interests equal consideration,<sup>92</sup> and (3) the Corps' decision to lower its lakes were arbitrary and capricious.<sup>93</sup> North Dakota argues three issues on appeal: (1) judicial estoppel, (2) the Corps' decision was arbitrary and capricious, and (3) the Corps is precluded from favoring navigation over recreation according to the Flood Control Act.<sup>94</sup>

Before reaching its decision on the merits, the court also considered two procedural issues: (1) whether the North Dakota and South Dakota cases were moot because their temporary restraining orders had expired<sup>95</sup> and (2) whether the South Dakota district court should have let the various parties, including Nebraska, intervene.<sup>96</sup>

### A. Procedural Issues

The court held that the North and South Dakota cases are not moot.<sup>97</sup> In holding that the cases were not moot, the court first noted that the Nebraska injunction was still in effect and all of the substantive issues from the North and South Dakota cases would probably be raised and decided in the Nebraska appeal.<sup>98</sup> The court also noted that the Dakota cases "fall within the well-known 'capable of repetition, yet evading review' exception to the mootness doctrine."<sup>99</sup>

The court found that Nebraska and the other parties should have been allowed to intervene in the South Dakota case pursuant to Federal Rule of Civil Procedure 24(a)(2).<sup>100</sup> The court stated that substantial evidence was presented by each of the potential intervenors that their interests were threatened by South Dakota's position in the case, which satisfies the first element of Rule 24(a)(2).<sup>101</sup> The court then stated that the potential intervenors satisfied the second element of Rule 24(a)(2), that the outcome of the litigation could impair them.<sup>102</sup> In satisfaction of the final element of Rule 24(a)(2), the potential intervenors demonstrated that their interest was not represented by the government agency.<sup>103</sup>

<sup>89</sup> *Id.* at 1033.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1030.

<sup>92</sup> *Id.* at 1031.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1032.

<sup>95</sup> *Id.* at 1022.

<sup>96</sup> *Id.* at 1024.

<sup>97</sup> *Id.* at 1022. Although the parties did not raise the mootness issue, the court addressed it *sua sponte*. *Id.*

<sup>98</sup> *Id.* at 1022-23.

<sup>99</sup> *Id.* at 1023. The court held that the expiration of the injunctions did not render the present appeals moot because (1) the preliminary injunctions issued would never last long enough to be challenged, and (2) upon reoccurrence, which was likely, the actions would continue to evade judicial review. *Id.*

<sup>100</sup> *Id.* at 1026. Pursuant to Rule 24(a)(2), a proposed intervenor must establish it has an interest in the subject matter of the litigation, that its interest may be impaired if the case is disposed in its absence, and the current parties to the suit do not represent its interest. *Id.* at 1023.

<sup>101</sup> *Id.* at 1024.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

The court also found that the intervenors did not lack standing to intervene in the current lawsuit.<sup>104</sup> The Eighth Circuit rejected the district court's argument to the contrary, noting that the potential intervenors sought to intervene in the entire case, not just in the injunction.<sup>105</sup> Additionally, South Dakota sought more than a temporary injunction, but rather a permanent declaration that would affect the future of Missouri River management.<sup>106</sup> The court determined that the Corps is required to balance several competing interests and therefore cannot concurrently represent the interests of the intervenors and downstream users in this case.<sup>107</sup> For the foregoing reasons, the court determined that the potential intervenors met all of the necessary requirements to intervene under the Federal Rules.<sup>108</sup>

The district court proposed another argument for not allowing the intervention of the downstream parties: that doing so would strip the jurisdiction of the court by creating a controversy among states that is subject to the Supreme Court's exclusive jurisdiction.<sup>109</sup> The Eighth Circuit rejected this argument stating that although various states have adverse interests, the states are all seeking relief against the Corps and not against each other.<sup>110</sup>

### B. Substantive Issues

Before the court considered whether the Corps acted arbitrarily or capriciously, it first examined whether the actions of the Corps were subject to judicial review.<sup>111</sup>

#### 1. The Master Manual Supplies the Applicable Law

In determining what law to apply, the Eighth Circuit first noted the general rule that "Congress intended agency action to be subject to judicial review."<sup>112</sup> An exception to the rule occurs in the rare circumstances where the statutes are drawn in broad terms in which no law applies.<sup>113</sup> The court rejected the Corps' argument that the Flood Control Act was defined so broadly for the rule not to apply.<sup>114</sup> In reaching its conclusion, the court noted that although the Flood Control Act gives great discretion to the Corps in River management, the Act recognizes what the Supreme Court has labeled "the dominant functions of the River's reservoir system" which are flood control and navigation.<sup>115</sup> Because the Act clearly establishes law to apply, the Corps' decisions are subject to judicial review.<sup>116</sup>

<sup>104</sup> *Id.* at 1025. Besides rejecting on Rule 24 grounds, the district court also found that the potential intervenors lacked standing because it did not believe that the injunction would result in a reduction in downstream water flow. *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* The appellate court ruled that potential intervenors presented sufficient evidence of a potential injury which gave them standing in the suit. *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1026.

<sup>111</sup> *Id.* at 1027. As each of these cases involved the challenge of an administrative agency, the court reviewed them according to the standards of the Administrative Procedure Act (APA).<sup>111</sup> *Id.* Agency actions are reviewed by the courts, which determine if the acts of the agency were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

The court next noted that the Corps' Master Manual, which sets out substantive requirements, limits the discretion of the Corps.<sup>117</sup> Accordingly, the Corps is not free to ignore the provisions established in the Master Manual.<sup>118</sup> The court further noted that the Code of Federal Regulations includes a section that makes the Manual binding on the Corps.<sup>119</sup> Further, the court relied on the Corps' own treatment of the Manual to further show that it is binding and is sufficient law to apply in deciding the cases.<sup>120</sup>

## 2. *The South Dakota Cases*

The Eighth Circuit rejected South Dakota's first argument: that the Flood Control Act mandates that the Corps maximize the fish and wildlife benefits of the River.<sup>121</sup> Specifically, the court stated that the language in the Act regarding fish and wildlife constituted general policy statements and did not serve as limitations on the Corps' discretion.<sup>122</sup> The court recognized its limitation in reviewing the Corps' decisions to release water from the lakes according to South Dakota's interpretation of the Act by stating that the court is not empowered to review all decisions of the Corps.<sup>123</sup>

The court also rejected South Dakota's promissory estoppel argument because the Corps only agreed to give consideration to all interests, not to give equal results to all interests.<sup>124</sup> In deciding to lower the South Dakota lakes, the Corps did in fact evaluate the spawn sufficient to maintain the fisheries.<sup>125</sup>

The court also rejected South Dakota's final argument: that the Corps' decision to lower the lake to maintain downstream navigation was arbitrary and capricious.<sup>126</sup> Because the standard of review on this issue was a narrow one, the court could not substitute its own judgment for that of the Corps' but could only determine if the agency made a rational and articulate connection between the facts found and the decision made.<sup>127</sup> Because the Corps contemplated both a short and long term plan for the river navigation, which itself contemplated the fish spawn, the Corps' policy was neither arbitrary nor capricious.<sup>128</sup>

## 3. *The North Dakota Case*

The court did not address North Dakota's first two arguments, the applicability of judicial estoppel and that the Corps' decision was arbitrary and capricious, because it fully addressed them in the South Dakota opinion.<sup>129</sup> The also court rejected North Dakota's final argument: that the Act precludes the Corps from favoring navigation over recreation.<sup>130</sup> In doing so, the court cited authority established by the Supreme Court

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<sup>117</sup> *Id.* at 1028.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* See also *Missouri v. Craig*, 163 F.3d 482, 483 (8th Cir. 1998).

<sup>121</sup> *Ubbelohde*, 330 F.3d. at 1030.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1031. Ensuring that all benefits of the River are maximized is an impossible standard to meet. as evidenced by this case. *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1032.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

and said that the Act lists navigation and flood control before recreation, indicating that navigation and flood control are of more concern than recreation.<sup>131</sup>

#### 4. The Nebraska Case

Finally, the court upheld the Nebraska district court's decision that the Corps is bound by its Master Manual and affirmed the court's granting of a preliminary injunction requiring the Corps to comply with its decision to release water pursuant to its published Annual Operating Plan.<sup>132</sup> The court did not address the Corps' argument that it should not be restricted to the Manual when unforeseen circumstances arise, because the facts in the case at hand did not allow it to consider the issue.<sup>133</sup>

### V. COMMENT

The Missouri River has long been a battlefield that has divided lawmakers upriver from their downstream colleagues.<sup>134</sup> The upstream focus of improving wildlife and recreation is backed by the Fish and Wildlife Service, which oversees implementation of the Endangered Species Act.<sup>135</sup> Senate Minority Leader Tom Daschele (D-SD) leads the fight to protect the upstream region's \$85 million fishing and recreational industry that is damaged when water is diverted from upstream lakes and reservoirs into the Missouri River.<sup>136</sup> The downstream focus on commerce and transportation is backed by Missouri farmers and businesses and is led by U.S. Senator Kit Bond (R-MO) and other Missouri legislators from both sides of the political aisle.<sup>137</sup> The downstream states argue that changing the flow of the River would harm the barge industry, saturate farm lands to the point that they could no longer be used for planting, and increase the flood risk to the downstream states.<sup>138</sup> The cost of river closings downstream due to lack of navigational flows is estimated at \$1 million to \$2 million per day.<sup>139</sup> The states generally perceive that the management practices of the Army Corps of Engineers that benefit other states or regions within the Missouri River basin "necessarily translate into reduced benefits" for their states or regions.<sup>140</sup>

<sup>131</sup> *Id.* See *ETSI Pipeline Project*, 484 U.S. at 512.

<sup>132</sup> *Ubbelohde*, 330 F.3d. at 1033.

<sup>133</sup> *Id.*

<sup>134</sup> Associated Press, *Flow of Missouri River won't change: Army Corps backs away from a plan to change Missouri River Flow* <<http://espn.go.com/outdoors/fishing/news/2001/0910/1250259.html>> (Sept. 10, 2001).

<sup>135</sup> *Id.*

<sup>136</sup> Jon Sawyer, *Bond will challenge ruling to reduce water flow on Missouri River* <[http://www.citizenreviewonline.org/july\\_2003/opponents.htm](http://www.citizenreviewonline.org/july_2003/opponents.htm)> (Jul. 14, 2003).

<sup>137</sup> *Id.* Kit Bond (R-MO) is a member of the Senate Appropriations Subcommittee that authorizes funding to the Army Corps of Engineers and is the Chairman of the Senate Environment and Public Works Subcommittee that authorizes the activities of the Corps. *Bond Calls for a Balanced Approach to River Management* <<http://bond.senate.gov/river.cfm>> (last updated Oct. 10, 2003).

<sup>138</sup> Associated Press, *supra* n. 134. The downstream states include Missouri, Nebraska, Kansas, and Iowa. Associated Press, *Opponents criticize Missouri River ruling* <[http://www.citizenreviewonline.org/july\\_2003/opponents.htm](http://www.citizenreviewonline.org/july_2003/opponents.htm)> (Jul. 14, 2003).

<sup>139</sup> *Closure of Rivers—For What Gain?*, 29 Special Low Water Edition (Aug. 2003) <[http://www.marc2000.org/River\\_Alert\\_Archive/0703Newsletter.pdf](http://www.marc2000.org/River_Alert_Archive/0703Newsletter.pdf)>.

<sup>140</sup> Craig A. Street, *Addressing Missouri's Domestic Conflict of Interests in the Missouri River: A Suggested Approach for Resolution*, 5 Mo. Env'tl. L. & Policy Rev. 117, 136 (1998).

The Eighth Circuit's decision in *Ubbelohde* to review the actions of the Army Corps of Engineers was strongly premised on the detailed nature of the Master Manual and its corresponding Annual Operating Plan.<sup>141</sup> This was the first opinion the court had issued that specifically applied the Master Manual as the governing law applicable to decisions of the Army Corps of Engineers.<sup>142</sup> Although the Corps relied on precedent to argue that the court did not have judicial review over its decisions the Corps had made pursuant to the Flood Control Act, the court's decision to the contrary was not a stretch. In fact, on multiple occasions, the Corps itself said that it used the Master Manual as direction on management of the Missouri River's reservoir system and did not deviate from the Annual Operating Plan that detailed River management for each season.<sup>143</sup> The Corps' use of the Manual, combined with the intricate detail of the Plan, provided the court with all it needed to determine that the Master Manual is applicable law to use in reviewing decisions of the Corps.<sup>144</sup> The Corps' agenda for managing the Missouri River is made clear by the Flood Control Act and has been interpreted by the Supreme Court—Flood control and navigational needs take priority over all others.<sup>145</sup>

Upstream and downstream interests are not the only competing interests on the Missouri River.<sup>146</sup> Other courts have found the Endangered Species Act controlling in setting the Corps' agenda.<sup>147</sup> In a case that was decided a month after *Ubbelohde*, various environmental groups sued the Army Corps of Engineers, alleging that the manner in which the Corps operated the Missouri River and its dam and reservoir system had adversely affected three species protected by the Endangered Species Act.<sup>148</sup> In contravention of the Eighth Circuit, the District of Columbia District Court required the Corps to refrain from releasing water from the Dakota lakes in any way that conflicted with Endangered Species Act's goal of preserving the three endangered species.<sup>149</sup> The court required the Corps to manage the Missouri River pursuant to a 2000 Biological Opinion, issued pursuant to the Endangered Species Act, which outlined the measures the Corps must take to insure that the three endangered species survive.<sup>150</sup> In contradicting the Eighth Circuit, the District of Columbia court focused primarily on the Endangered Species Act in reaching its decision and noted that "[t]he Endangered Species Act was never considered, nor even mentioned, in the [*Ubbelohde*] opinion."<sup>151</sup> The Corps relied on *Ubbelohde* and argued, to no avail, that the Master Manual was the controlling law for managing the Missouri River and that the Manual focused primarily on flood control and navigation, not on recreation or the environment.<sup>152</sup>

Completion of the new Master Manual could be the biggest snag for the Missouri River, its managers, and the courts in the upcoming months. The Master Manual was first written in 1979 and has not since been

<sup>141</sup> *Ubbelohde*, 330 F.3d at 1028-29.

<sup>142</sup> *North Dakota v. The U.S. Army Corps of Engineers*, 2003 WL 21704402 at \*2 (D.N.D. July 14, 2003).

<sup>143</sup> *Craig*, 163 F.3d at 483. The *Craig* Court had no occasion to rule on the binding nature of the Master Manual as the case was found moot. *Id.* at 486.

<sup>144</sup> *Ubbelohde*, 330 F.3d at 1028-29.

<sup>145</sup> *Id.* at 1014. See also *ETSI*, 484 U.S. at 512.

<sup>146</sup> *Missouri Corn Online* <<http://www.mocorn.org/updates/2003/WeeklyUpdate07-30-03.htm>> (Jul. 30, 2003).

<sup>147</sup> *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230 (D.D.C. 2003). In fact, some have argued that the Endangered Species Act is the root cause of recent problems in the Missouri River battles. *Missouri Corn Online*, *supra* n. 146.

<sup>148</sup> *American Rivers*, 271 F. Supp. 2d at 237.

<sup>149</sup> *Id.* at 262.

<sup>150</sup> *Id.* The court found an updated 2003 Biological Opinion that reversed the 2000 Biological Opinion's position arbitrary and capricious in holding that the Corps must follow the 2000 opinion. *Id.* at 238. The Corps was later held in contempt for not complying with the court's order with a penalty of \$500,000 per day for non-compliance. *American Rivers v. U.S. Army Corps of Engineers*, 274 F. Supp. 2d 62, 71 (D.D.C. 2003).

<sup>151</sup> *Id.* at 67.

<sup>152</sup> *Id.* at 68-69.

revised, although revisions have been in the works since the late 1980s.<sup>153</sup> After over twelve years of revisions, the Corps claims to be making finishing touches on the revised Master Manual.<sup>154</sup> Needless to say, the task of revising the Master Manual has become even more daunting since the *Ubbelohde* decision that the Manual is binding law on the Army Corps of Engineers.

Without a revised Master Manual that aims to successfully deal with all of the River's competing interests, disputes have led to a flood of litigation.<sup>155</sup> To date, judicial intervention has only resulted in wide swings in the management of the River, which has resulted in high costs in power and agriculture production, lost jobs, and reduced transportation opportunities.<sup>156</sup> Now, a third competing interest enters the playing field: the Endangered Species Act. With another strong, conflicting interest in the mix, revising the Master Manual in a way that will satisfy all interests is a colossal challenge at the very least. Further, revising the Master Manual in a way that will reduce litigation is equally as challenging, if not more.

## VI. CONCLUSION

For over a century, states in the Missouri River basin have been battling over the utilization and management of the River.<sup>157</sup> The debate over the River continues today and shows little signs of resolution.<sup>158</sup> Negotiation and litigation have proven unsuccessful at resolving the disputes.<sup>159</sup> One thing is certain: the discussion and litigation over the Missouri River are far from over.

By deciding the case under a mootness exception and determining that the Master Manual is legally binding upon the Corps, *Ubbelohde* attempts to get us closer to deciding these slippery cases using established law. Also, the various district courts in the Eighth Circuit seem to be putting a lot of stock in the day the Corps issues its new Master Manual. But with the competing interests of the federal acts themselves, including the Flood Control Act and the Endangered Species Act, nothing short of a new Congressional Act or a Supreme Court ruling will decide once and for all what interest receives ultimate deference in River management decisions.

LORRAINE C. BUCK

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<sup>153</sup> *Ubbelohde*, 330 F.3d at 1020.

<sup>154</sup> *Bond Calls for a Balanced Approach to River Management*, <<http://bond.senate.gov/river.cfm>> (Oct. 10, 2003). The Corps is in the process of gathering public comments regarding its revised Master Manual. *Corps Public Meetings Slated for October!* <[http://www.marc2000.org/River\\_Alert\\_Archive/1003Newsletter.pdf](http://www.marc2000.org/River_Alert_Archive/1003Newsletter.pdf)> (last modified Oct. 15, 2003). The Corp intends to integrate the public comments into the final stages of its study and expects to issue a draft report early next year and a final report in August 2004. *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Street, *supra* n. 140, at 117.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 118.