

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

In re: <b>Operation of the Missouri River</b>	)	No. 03-MD-1555 (PAM)
<b>System Litigation</b>	)	
	)	
STATE OF MISSOURI, ex rel. Jeremiah W.	)	
(Jay) Nixon,	)	
	)	
vs.	)	<b>Civil No. 0:06-cv-01616-PAM</b>
	)	
UNITED STATES ARMY CORPS OF	)	
ENGINEERS, FRANCIS J. HARVEY,	)	
SECRETARY OF THE ARMY, UNITED	)	
STATES DEPARTMENT OF DEFENSE,	)	
and BRIGADIER GENERAL	)	
GREGG F. MARTIN	)	
	)	
Defendants.	)	
	)	

**MISSOURI’S MOTION FOR SUMMARY JUDGMENT**

Missouri moves for summary judgment pursuant to Federal Rule of Civil Procedure 56.

There is no genuine issue as to any material fact and Missouri is entitled to judgment as a matter of law.

1. The Corps’ decision to adopt the “spring pulse” provisions of the Master Manual<sup>1</sup> on or about March 1, 2006 is arbitrary, capricious, and not in accordance with law because the Corps failed to complete a supplemental or revised environmental impact statement in advance, and because the Revision is not “within the range of alternatives” studied in the final environmental impact statement before this court in 2004. Furthermore, the Corps has not complied with the National Environmental Policy Act (“NEPA”), even if the Revision is “within

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<sup>1</sup>Missouri River Master Water Control Manual, Revision 1, Incorporation of Technical Criteria for Bimodal Spring Pulse Releases from Gavins Point Dam (“Revision”)

the range of alternatives” studied in the 2004 final environmental impact statement, because Congress never authorized such a shortcut to NEPA’s fundamental procedural mandate.

2. The Corps did not provide a meaningful opportunity for public comment on the environmental assessment<sup>2</sup> or the Revision.

3. All of the spring rise alternatives considered in the 2004 final environmental impact statement differed from the Revision in a number of significant ways:

- A. All of the alternatives were for a single release during the spring. The Revision includes two spring releases a month or more apart.
- B. None of the alternatives considered a rise in March. The Revision includes a March rise.
- C. All of the alternatives were for longer duration rises than the Revision.
- D. None of the alternatives based the amount of the spring rise on the amount of water in the reservoir system. The rises in the Revision are expressly limited by the level of the reservoir system storage.
- E. None of the alternatives based the amount of the spring rise on forecasted upstream runoff. The Revision does: As upstream runoff increases, so does the amount of the spring rise.

Ex. 3088, 091323.

4. The Revision presents an increased risk of flooding over the Master Manual. *Id.* at 091332, 091345. The Revision substantially reduces the water supply benefits to those who

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<sup>2</sup>Environmental Assessment for the Inclusion of Technical Criteria for Spring Pulse Releases from Gavins Point Dam (February 2006) (“EA”).

rely on the upstream reservoirs and the river for water due to the reduction in reservoir levels as a result of the spring rise. *Id.* at 091333-34. In fact, compared to the current Master Manual, according to the EA, the Revision would have a negative impact on 8 of the 15 categories the Corps examined in its abbreviated study. *Id.* at 091332-39.

5. The Corps also acknowledges the existence of a new factor raised for the first time in the course of preparing the EA. *Id.* at 091346. The United States Department of Agriculture has stated that federal crop insurance will not cover any losses from flooding as a result of the spring rise. The impact of flooding farm land along the river as a result of the Revision, therefore, presents a substantially increased risk of uncompensated loss, which would be devastating to farmers along the River. Despite this new information, the EA did not include any additional analysis of the impact of the rises on the drainage of prime farmland and increased risk of flooding and loss. *Id.*

6. The Corps did not conclude in the EA that the Revision would not have a significant adverse impact on the natural or human environment. Rather, it stated that there were “no significant adverse impacts to the natural or human environment *beyond those previously presented in the FEIS for the spring rise alternatives.*” *Id.* at 091351 (emphasis added). That is not the standard under NEPA for when an agency may forego an EIS, i.e., when it makes a finding of no significant impact.

WHEREFORE, plaintiff prays for this court’s order and judgment granting summary judgment for plaintiff and against defendant, finding and declaring that the Corps has not complied with the NEPA in connection with the adoption of the Revision, enjoining the Corps’ from operating the Missouri River system in accordance with the changes made in the Revision

or any other spring rise plan including the so-called Amended Bi-Op default plan pending the completion of a new or supplemental EIS, awarding plaintiff its reasonable costs and expenses herein, and for such other relief this court deems just and proper.

Respectfully submitted,

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