

Judicial Challenges To Missouri River Mainstem Regulation

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I. INTRODUCTION

The Missouri River flows 2,500 miles from southwestern Montana to its confluence with the Mississippi River in St. Louis, Missouri. Pursuant to the 1944 Flood Control Act (“FCA”)¹ and other legislation, the U.S. Army Corps of Engineers (“Corps”) has constructed and operates and maintains a series of six large dams on the Mainstem Missouri River, whose benefits include flood control, navigation, irrigation, power, water supply, water quality, recreation and fish and wildlife.² Additional legislation authorized the creation of a commercial navigation channel on the Missouri River to a depth of 9-feet and a width of 300 feet.³ This channel, which is operated and maintained by the Corps, extends from just below Sioux City, Iowa, which is downstream of the last of the mainstem projects, Gavins Point, to the river’s mouth at St. Louis, Missouri, a distance of approximately 730 miles.⁴

¹ See Flood Control Act of 1944, ch. 665, 58 Stat. 887.

² See NORTHWESTERN DIVISION, U.S. ARMY CORPS OF ENGINEERS, MISSOURI RIVER MASTER WATER CONTROL MANUAL (March 1, 2006) [hereinafter 2006 MANUAL] at VII-1, available at <http://www.nwd-mr.usace.army.mil/rcc/reports/mmanual/MasterManual.pdf>. Unless otherwise note all other references in this article refer to the 2006 Manual which included changes from the 2004 version to incorporate spring rise technical criteria in Appendix I. However, the 2006 Manual also incorporated other minor additional corrections to the 2004 Manual.

³ Authorized by the Rivers and Harbors Act of 1945, ch. 19, 59 Stat. 10. This navigation project is commonly referred to as the Missouri River Bank Stabilization and Navigation Project. See U.S. Army Corps of Engineers, Northwestern Division, Kansas City District, Missouri River Mitigation Project, <http://www.nwk.usace.army.mil/projects/mitigation/bankstabilization.htm>.

⁴ 2006 MANUAL, *supra* note 2, at IV-23, 24.

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The Corps' operational criteria for the Missouri River Mainstem System are set forth in a Master Water Control Manual.⁵ This manual was first published in 1960 and revised in 1973, 1975, 1979, 2004 and 2006. The last two revisions of the Manual were the result of a comprehensive review of the 1979 Master Manual initiated in 1989, based upon basin-wide interest in changes to the way the Corps operated the system. This review culminated in March 2004, when the Corps, under court order, issued a record of decision ("ROD") approving a new manual. This manual, which was again revised in March 2006, establishes the Corps' current operational guidelines for the operation of the Missouri River System. In addition to the Manual, the Corps also issues annually in draft and final version, Annual Operating Plans ("AOPs"). These provide interested parties throughout the basin the Corps' expected operations for the Mainstem System applying the criteria set forth in the Master Manual, based upon water in storage and varying runoff water conditions.⁶

The purpose of this article is to provide a review of the multiple court decisions that both preceded and followed the 2004 Master Manual. This article also concludes with a brief summary of the Corps' current initiatives taking place within the basin which include the development with other federal, state, tribal and basin interests of plans to assist in recovering the Missouri River basin ecosystem.⁷

A. Background

Congress authorized the construction and operation of the Missouri River Mainstem System primarily in the FCA to provide for the comprehensive management of the waters of the Missouri River Basin. The projects authorized by the FCA, along with their reservoirs, are Garrison Dam in North Dakota (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), and Fort Randall Dam (Lake

⁵ 2006 MANUAL, *supra* note 2, at IV-24, 25.

⁶ *Id.* at I-2.

⁷ The Corps' Mainstem Projects, as well as the Bank Stabilization and Navigation Project, with other developments in the basin have resulted in significant physical and hydrological changes and transformed the Missouri River ecosystem. *See generally* NATIONAL RESEARCH COUNCIL, THE MISSOURI RIVER ECOSYSTEM, EXPLORING THE PROSPECTS FOR RECOVERY (2002) (describing these and other changes).

Francis Case) in South Dakota; and Gavins Point Dam (Lewis and Clarke Lake) in Nebraska. The Fort Peck Dam (Fort Peck Lake) in Montana was authorized in the earlier Rivers and Harbors Act of 1935⁸, for flood control and navigation to which Congress subsequently added hydroelectric power.⁹

Not only did the FCA provide for the construction and operation of these projects by the Corps, Section six of the Act authorized the Secretary of War (now Army) to make contracts for surplus water¹⁰ and Section seven required that the Secretary to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoir projects.¹¹ This latter section further prescribed that the operation of such projects were to be in accordance with such regulations.¹²

The six Mainstem projects provide approximately 75 million acre-feet of storage capacity.¹³ This storage is used to provide space for the control of flooding and storage of water during periods of high run-off and release for multiple project purposes during low flow periods. The system was also designed to carry over storage from year to year to ensure water availability during prolonged droughts in the basin.¹⁴ The 1979 Manual set out operational priorities for the Missouri River Mainstem System that were designed to serve the congressionally authorized project purposes set forth in the 1944 FCA.¹⁵ The general approach for operating the Mainstem System by the Corps was set forth in Section IX of the 1979 Manual which described a sequential approach for the consideration of the various interests. The first priority was flood control, followed by irrigation, water supply and water quality, navigation and power, then recreation and fish and wildlife.¹⁶ Regarding operations for recreation,

⁸ *Id.* at II-2. *See also* Rivers and Harbors Act of 1935, ch. 831, 49 Stat. 1028.

⁹ *See* Act of May 18, 1938, ch 250, 52 Stat. 403.

¹⁰ 33 U.S.C. § 708 (2006).

¹¹ 33 U.S.C. § 709 (2006).

¹² *Id.* The Corps' regulations for water control manuals are set forth in 33 C.F.R. § 222.5 (2008).

¹³ 2006 MANUAL, *supra* note 2, at IV-1.

¹⁴ *Id.* at VII-36.

¹⁵ MISSOURI RIVER DIVISION, U.S. ARMY CORPS OF ENGINEERS, MISSOURI RIVER MAINSTEM RESERVOIR SYSTEM REGULATION MANUAL (1979) [hereinafter 1979 MANUAL] at IX-1.

¹⁶ *Id.* at IX-1-2.

fish and wildlife, the Manual provided that, “insofar as possible without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefit to recreation, fish and wildlife.”¹⁷

The general plan of operation under the 1979 Manual was to increase releases from Gavins Point with the onset of the navigation season in March. These flows would support downstream navigation, water quality and water supply requirements as well as provide for recreation and other project purposes. After the end of navigation season, in the late fall or early winter, Gavins Point releases would be reduced to provide minimum levels to meet downstream water quality and water supply requirements until the following March, when the storage space evacuated over the past year for downstream flow support would be refilled. Flows would then be increased to support navigation and the cycle would repeat itself. For projects upstream of Gavins Point, the Manual did not provide specific rules for water releases. However, general water release criteria were presented for the other five dams to meet the needs for power generation. Since 1984, the Corps also attempted to implement a system to unbalance operations at the upper three lakes to provide benefits for the spawning of storage and sports fish.

Under the water control plan set forth in the 1979 Manual, the system was operated to provide for an eight month navigation season from April 1 through December 1 when the total water volume stored in the Mainstem reservoirs as measured on 1 July was forty-one million acre feet (“MAF”) or more.¹⁸ The navigation season length was reduced for storage less than this amount until system storage reached twenty-five MAF when navigation support would be suspended on September 7.¹⁹ In years where system storage was fifty-four and one-half MAF or more on March 15 or fifty-nine MAF on July 1 a full service level of 35,000 cubic feet per second (“cfs”) would be provided. Amounts were then added or deducted from this service level to determine actual releases to meet target discharges at four locations downstream of Gavins Point: Sioux City, Omaha, Nebraska City and Kansas City.²⁰ In low water years, flows to

¹⁷ *Id.* at IX-2.

¹⁸ *Id.* at IX-9, Table 9.

¹⁹ *Id.*

²⁰ *Id.* at IX-8, Tables 7, 8.

support navigation would be prorated to a minimum service level of 29,000 cfs with water in storage less than forty-six MAF on March 15 or fifty and one-half MAF on July 1.²¹

B. ETSI²² and the Dominant Purposes of the Flood Control Act

The earliest court case to define priorities for the Mainstem System was a Supreme Court case concerning the authority of the Department of the Interior to contract water out of one of the Mainstem reservoirs under the FCA.²³ In 1982, Energy Transportation Systems, Inc. (“ETSI”) entered into a contract with the Secretary of the Interior, after consultation with the Secretary of the Army, to withdraw up to 20,000 acre-feet of water per year for 40 years from the Corps’ Oahe Project.²⁴ In addition to the Interior contract, the State of South Dakota had also granted ETSI a permit to use this water in a coal slurry pipeline that would transport coal from Wyoming to the southeastern United States to be used in coal-fired steam generating plants.²⁵ The States of Missouri, Iowa, and Nebraska brought suit in District Court to enjoin the performance of the contract on the basis that Interior lacked statutory authority under the FCA to execute such a contract without approval from the Secretary of the Army. The District Court ruled for plaintiffs, a divided court of appeals affirmed, and the Supreme Court affirmed.²⁶

The importance of this case to the Corps’ regulation regime for the Mainstem System lies in language the Court used in describing the evolution of the two competing plans that eventually resulted in the FCA. To control flooding in the Missouri River Basin, both the Corps and the Bureau of Reclamation (“BOR”) prepared independent reports proposing comprehensive basin plans. The Pick plan was developed by the Army and included a total of twelve dams, five of which were located on the mainstem of the Missouri River, primarily for flood control and other

²¹ *Id.* at IX-9, Table 8.

²² ETSI Pipeline Project v. Missouri, 484 U.S. 495 (1988).

²³ *See id.* at 497-98.

²⁴ *Id.*

²⁵ *Id.* at 498.

²⁶ *Id.* at 498-99.

multiple purposes.²⁷ The Sloan Plan proposed by the BOR included irrigation development and provided for a system of ninety dams primarily on tributaries, but with three on the mainstem.²⁸ To reconcile the differences between these two reports which included issues related to the primary objectives of the development, number of dams, and expenditures, a Committee was appointed composed of two representatives from each agency to reconcile the two reports in a joint plan. The reconciliation plan provided for six main stem projects as well as the tributary projects set out in the Sloan Plan.²⁹ Congress enacted the FCA less than two months after the joint report.³⁰

The Supreme Court rejected arguments by the Department of the Interior that they were provided with authority from the FCA to contract surplus water in the Corps' Oahe Project. In deciding against Interior's argument that the FCA divided operational authority between the two agencies over the same reservoir projects, which would allow Interior to contract with ETSI, the Court noted that the Sloan Plan proposed by Interior basically agreed with the approach set out in the Pick Plan recognizing that each of the projects in the FCA be undertaken and controlled by the agency with the dominant interest. Since the dominant features of the mainstem projects were flood control and navigation, those projects were subject to the authority of the Army and the Corps of Engineers. In the words of the Court,

the agency 'with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature, giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests.' S.Doc., at 11. The Sloan Plan recognize that the 'dominant function' of Lake Oahe and the other main-stem reservoir projects would be flood control and navigation and therefore these project would

²⁷ *Id.* at 500.

²⁸ *Id.*

²⁹ *Id.* at 501-02.

³⁰ *Id.* at 502.

come under the jurisdiction of the Army and its Corps of Engineers. [*references omitted*]³¹

While the *ETSI* case did not specifically deal with operational priorities of the system, this case has been used to characterize the dominant purposes of the Mainstem System projects as flood control and navigation in comparison to other project purposes which are lesser in priority. In the words of the Eight Circuit, “[w]hile flood control and navigation are dominant functions, the Act also recognizes recreation and other interests and secondary uses that should be provided for.”³²

Not long after the *ETSI* case was decided, the General Accounting Office (“GAO”) issued two reports at the request of representatives of the upper basin states regarding operational priorities of the Missouri River System. The first report which examined the Corps’ 1988 operations concurred in the Corps’ view that it was not authorized to operate reservoirs on the Missouri River for the primary benefit of navigation on the Mississippi River and that to do so would require prior congressional authorization.³³ The second report reviewed the Corps’ management of the Missouri River from 1988 to 1990 to determine whether the Corps had followed its drought contingency plans and to identify how the Corps set operating priorities for this plan.³⁴ The GAO Report concluded that the Corps had followed its drought contingency plan during the drought years

³¹ *Id.* at 512.

³² *S.D. v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003) (citing Flood Control Act § 4, 58 Stat. at 889-90).

³³ United States General Accounting Office, GAO/RCED-91-3, Report to Congressional Requesters, Water Resources, Corps’ 1988 Missouri River Water Releases Met Guidelines, B-241422.1 (Nov. 7, 1990) at 9. The GAO found that the benefits to the Mississippi River were only incidental to Missouri River operations. Regarding the Corps’ operations during the drought conditions of 1988, the GAO found that the Corps had followed its manual in setting navigation season service levels and had not operated to specifically aid navigation on the Mississippi River. *Id.* at 6-7.

³⁴ United States General Accounting Office, GAO/RCED-92-4, Report to Congressional Requesters, Water Resources, Corps Management of Ongoing Drought in the Missouri River Basin, B-241794 (Jan. 27, 1992) at 16.

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1988-1990, conserving over 10 MAF of water in the upstream reservoirs over normal operations.³⁵

While GAO found that the Corps had followed its Manual, the GAO Report was critical of the Corps' operating plans which, it stated, were based on invalid assumptions and should be changed to reflect current conditions.³⁶ These operating plans provided priority for flood control, irrigation, navigation and hydroelectric power, while recreation and other uses were treated as lesser purposes resulting in lower operational priority.³⁷ The GAO found no basis for the Corps' position that without additional congressional authorization it was required by the 1944 FCA to treat recreation as lower in priority to other authorized uses.³⁸

The Corps' position with respect to the operational priorities of the Mainstem had been set forth in a statement provided by the Chief of Engineers in connection with congressional hearings on the Missouri River in 1957.³⁹ In that statement the Chief of Engineers set forth the general overall priorities that had been used in all of the basic long-range planning studies for the Mainstem System since 1943. These priorities provided first for flood control, then upstream beneficial consumptive uses⁴⁰, next downstream water requirements for domestic and municipal

³⁵ *Id.* at 3. GAO concluded that all uses except flood control had been adversely affected by the drought.

³⁶ *Id.* at 29-34. The Report noted that in 1944 the Corps anticipated over 12 million annual tons would be commercially transported on the river, while in 1988 there were only 2.2 million tons and that 2.2 million acres of land would be irrigated when there was only one project under development that would irrigate 130,940 acres. The GAO indicated that reservoir recreation in the upper basin reservoirs was generating about 65 million in spending and operations for ESA listed species, requiring the release of additional water from the upper reservoirs, were both not anticipated by the Corps in 1944.

³⁷ *Id.* at 4, 31-32.

³⁸ *Id.* at 33.

³⁹ Missouri River Basin Water Problems, Joint Hearings Before the Interior and Insular Affairs Committee and the Public Works Committee. 85th Cong. 419, 427 (1957) (statement of Major E.C. Itschner, Chief of Engineers, U.S. Army).

⁴⁰ Upstream beneficial consumptive uses are provided for in an amendment to the FCA, the O'Mahoney-Millikin Amendment, 33 U.S.C. § 701-1(b). This prohibits any use of Missouri River waters in States west of the 98th meridian for certain navigation purposes where that use conflicts with a beneficial consumptive use for certain purposes.

water supply and sanitation, then navigation and power. Regarding other uses the Chief stated, “[o]ther functions such as recreation and fish and wildlife, are also definite factors in the operation planning, but are necessarily lower in priority.”⁴¹

Based on the Corps’ position that recreation was secondary to flood control, irrigation, navigation and hydroelectric power generation and that the Corps was in the process of updating the Master Manual, the 1992 GAO recommended that Congress consider enacting legislation to require the Corps to establish operating priorities on the basis of economic, environmental, social, and other benefits to be derived from all authorized project purposes.⁴² The GAO Report concluded by noting that the upper basin states of Montana, North Dakota and South Dakota had filed suit in federal district court challenging the legality of the Corps position regarding system operational priorities and that this suit could ultimately settle the legal questions concerning the operational priorities of the system.⁴³ It is to this case and others challenging the Corps’ operational decisions for the Mainstem System that this review now turns.

C. The Corps’ 1990-2003 Operations, “Capable of Repetition Yet Evading Review”

The *ETSI* case and the GAO Reports set the stage for subsequent litigation in the basin which would continue over the next thirteen years concerning the reviewability of the Corps’ operational decisions, and the priorities and binding nature of the Master Manual. One of the first of these cases was brought in the spring of 1990 by the states of North Dakota, South Dakota and Montana seeking injunctive relief which would require the Corps to reduce releases from the Oahe project in South Dakota to protect the spawning of forage and sports fish in the reservoir.⁴⁴ The Corps claimed that if such a reduction in flows were ordered, downstream navigation, including commercial barges, would be halted disrupting the flow of fertilizers. In addition to other adverse impacts, the

⁴¹ Missouri River Basin Water Problems, *supra* note 39, at 427.

⁴² GAO/RCED-92-4, *supra* note 34, at 34.

⁴³ *Id.* at 34.

⁴⁴ *S.D. v. Hazen*, 914 F.2d 147 (8th Cir. 1990).

Corps also argued that the temporary reduction in flows would risk navigation over the entire summer, since birds listed under the Endangered Species Act (“ESA”) would nest lower, thereby preventing the Corps from increasing releases, even after the spawning period, until after the birds had nested and left the area.

The District Court for the District of North Dakota issued an injunction finding it arbitrary and capricious for the Corps to favor one use over the other.⁴⁵ This injunction was stayed by the Eighth Circuit on the basis that the Corps actions were not arbitrary or capricious.⁴⁶ In the stay order the Court also expressed its reservations that the actions of the Corps were judicially reviewable and requested additional briefing on that issue.⁴⁷

Before the Eighth Circuit, the Corps argued that its operational decisions were not reviewable except for bad faith or unconstitutionality, that there was no law to apply in either the statutes or the regulations.⁴⁸ Finding something to agree on, the Upper Basin appellee states and the Lower Basin amici curiae states all argued that the Master Manual was relied on by the Corps and the Corps should be bound by it. To this argument, the Corps responded that the Manual was intended only for internal use in meeting the goals set by Congress. Since its operational decisions were committed to agency discretion by law, it followed, the Corps argued, they were not subject to judicial review under the Administrative Procedures Act (“APA”).

As courts within the basin were to do repeatedly over the next decade, the Court sidestepped this issue and, agreeing with a suggestion by the downstream states, held the case moot since the fish spawn had already taken place.⁴⁹ With respect to the exception to the mootness doctrine, “capable of repetition yet evading review,” the Court found

⁴⁵ *Id.* at 149.

⁴⁶ *Id.*

⁴⁷ *Id.* at 148.

⁴⁸ *Id.* The Corps relied on *Story v. Marsh*, 732 F.2d 1375, 1379-81 (8th Cir.1984), a case in which the Eighth Circuit had held that Section 204 of the Flood Control Act of 1965 was so broad a delegation of authority to the Corps that there was no law to apply and therefore committed to agency discretion by law exempting the Corps from review under the Administrative Procedures Act.

⁴⁹ *Hazen*, 914 F.2d at 150.

neither factor present.⁵⁰ The Court found a physical or theoretical possibility of some future dispute insufficient particularly in light of the fact that the Corps was currently in the process of revising the 1979 Manual which could conceivably avoid the need for future litigation.⁵¹ As for the second part of the test, the Court said there was no apparent reason why similar future action could not be fully litigated before its cessation or expiration as the upper basin states would have sufficient notice to file suit and litigate the matter before the spawning season was past.⁵²

In February 1991, shortly after *Hazen* was decided, the States of South Dakota, North Dakota and Montana again filed suit, this time in the District Court for the District of Montana, mounting a broad attack against the 1979 Manual seeking a declaratory judgment that the Corps improperly assigned downstream uses higher priority than recreation and fish and wildlife.⁵³ After the action was filed, and based on assurances that the Corps, in its review of the 1979 Manual, would consider all existing uses of the system and that that all uses would receive equal consideration, the plaintiffs sought a stay pending completion of the Corps' review process. In lieu of granting a stay, on February 3, 1993, the District Court dismissed the case based on mootness.⁵⁴ The Court noted the plaintiffs obtained an acknowledgment by the defendants that all current Missouri River water uses will receive equal consideration during the review.⁵⁵ In addition, the Court noted that there was a reasonable expectation that the revised plan would reflect contemporary uses and

⁵⁰ *Id.*

⁵¹ *Id.* at 150-51

⁵² *Id.* In 1995, District Court Judge Patrick A. Conmy, District of North Dakota, who had issued the preliminary injunction in *Hazen*, again had another chance to review the Corps' operational decisions in a case involving the delayed release of flood waters due to ESA listed birds. Obviously expressing some frustrations at the operational decisions being made by the Corps in the upper basin, Judge Conmy describes the Corps' actions being challenged as "arbitrary, capricious, amounts to an unconstitutional taking . . . , has it priorities backwards and is just plain stupid to boot." In dismissing the action, the Court, in referring to possible other remedies, stated, "If the decision maker is a short sighted fool, then work through Congressional channels to get he or she fired." *Mork v. Thuss*, No. A1-95-114, slip op. at 1-3 (D. N.D., Aug. 16, 1995).

⁵³ *S.D. v. Bornhoft*, CV 91-26-BLG-JDS, slip op. (D. Mont., Feb. 3, 1993).

⁵⁴ *Id.*

⁵⁵ *Id.* .

needs of the basin.⁵⁶ The Court held the case both moot and not ripe for resolution in light of the pending revision to the Master Manual.⁵⁷

After South Dakota, North Dakota and Montana brought suit in Montana, the lower basin state of Missouri initiated litigation as a result of a Corps' decision to shorten the navigation season in 1992 in light of continuing drought conditions in the basin. In May of that year, the State of Missouri filed an action in District Court for the Western District of Missouri alleging that the Corps' shortening of the navigation season from November to October 1992 was inconsistent with the criteria set forth in Table 9 of the 1979 Master Manual which provided for a full eight month navigation period.⁵⁸ Missouri argued the decision to shorten the season was arbitrary and capricious because the Corps violated the Master Manual, which has the force and effect of law, as well as the National Environmental Policy Act ("NEPA") by failing to prepare an appropriate NEPA document in deviating from the Master Manual.

Because November 1992 had passed by the time of the District Court's decision, the District Court concluded that there was no apparent reason why a challenge to future action by the Corps limiting navigation could not be fully litigated before the issue became moot since notice of such shortening would be provided in the Corps' Annual Operating Plan, in effect providing over eight months to litigate the issue.⁵⁹ The Court also noted that it was unknown whether the drought would persist and what the Corps' future action would be.⁶⁰ Like the court in *Hazen*, the District Court referred to the fact that the Corps was presently in the process of revising the 1979 Manual and, therefore, it could not be said that there was a "concrete possibility" that the Corps would seek to limit the navigation season again or that the plaintiff would challenge the action based on the 1979 Manual.⁶¹

Following the decision in *Bornhoft*, the State of Missouri again sued the Corps over its decision to change the volume of storage used to determine the length of the navigation season under the Administrative

⁵⁶ *Id.* at 3.

⁵⁷ *Id.* at 3-4.

⁵⁸ *Mo. v. Bornhoft*, No. 92-4206-CV-9, slip op. (W.D. Mo., June 21, 1993).

⁵⁹ *Id.* at 10.

⁶⁰ *Id.* at 11.

⁶¹ *Id.*

Procedures Act (“APA”) and NEPA.⁶² In this case, the Corps’ AOPs for 1995-96 and 1996-97 changed the volume of water, which the Court referred to as the “trigger point,” as measured on July 1, from thirty-nine MAF set forth in the 1979 Master Manual to fifty-two MAF, to determine whether the navigation season should be reduced by two weeks.⁶³ The District Court held that the Corps did not violate NEPA by failing to prepare either an EA or EIS regarding the change to the trigger since the Corps actions in adjusting Mainstem water releases was not viewed as a major federal action significantly affecting the quality of the human environment.⁶⁴ In reaching this conclusion the District Court found *Upper Snake River v. Hodel*, 921 F.2d 232 (9thCir. 1990) instructive, which found that modifications to routine dam operations in response to changing environmental conditions did not warrant the preparation of new NEPA documents. The District Court then found that the Corps’ decision not to prepare either an EA or EIS reasonable⁶⁵

Missouri appealed. While the Eighth Circuit recognized that the issue of whether the Master Manual constitutes a binding rule or regulation was “lurking, but not directly involved in this appeal,” because the 1996-97 operating year was over, the Court held the challenge to the Corps decision deviating from the 1979 Manual provisions was moot.⁶⁶ In reaching this decision, the Court found the Corps’ AOP for the next operation year, 1997-98, no longer required a two-week reduction in the navigation season based on the 52 MAF trigger point.⁶⁷

⁶² *Mo. v. Craig*, 978 F.Supp. 902 (W.D. Mo. 1997).

⁶³ *Id.*

⁶⁴ *Id.* at 914.

⁶⁵ *Id.* at 915. Noteworthy in the District Court’s opinion is the reference to plaintiffs’ argument that the real reason for the change to the navigation season was not the drought conditions, but upstream political pressure regarding confirmation hearings for the new Assistant Secretary of the Army for Civil Works. Notwithstanding the merits of Missouri’s arguments, if the Master Manual has the binding effect of law, political pressure on the agency either by upstream or downstream interests in these and other similar circumstances is greatly reduced. *Id.*

⁶⁶ *Mo. v. Craig*, 163 F.3d 482 (8th Cir. 1998).

⁶⁷ *Id.*

II. SOUTH DAKOTA V. UBBELOHDE

Thus, after almost a decade of litigation, the Upper and Lower Basin States had been frustrated in their attempts to obtain APA review over the Corps' decisions, change the manual priorities, or to have the manual enforced as a binding rule. However, this was soon to change.

In the spring of 2002, and with the advent of another extended drought in the Missouri River Basin, the states of North Dakota, South Dakota, Montana, and Nebraska each brought sequential separate federal District Court proceedings in their respective states against the Corps seeking injunctions against the Corps' operations of the Missouri River Mainstem system of dams.⁶⁸ These suits alleged, among other things, that the Corps was or was not following the dictates of the 1944 Flood Control Act in the operation of the Mainstem Projects. In the proceedings in North Dakota, South Dakota,⁶⁹ and Montana, the district courts each ordered the Corps to restrict releases from the Mainstem projects located in their respective states to protect forage and sport fish spawning occurring in the large upstream reservoirs.⁷⁰ In Nebraska, the District Court ordered the Corps to operate in accordance with the 1979 Master Manual which mandated releases from these upstream projects to maintain downstream

⁶⁸ S.D. v. Ubbelohde, No. 02-3011 (D. S.D. 2002); N. D. v. Ubbelohde., No. A1-02-059 (D.N.D.2002); Neb. v. Ubbelohde, No. 8:02CV217 (D. Neb. 2002), 2002 WL 32851300; and Mont. v. Ubbelohde, No. 02-70 Blg-RFC (D.Mont. filed May 13, 2002). The Lower Brule and Crow Creek Sioux Tribes also filed suit against the Corps in the District of South Dakota to enjoin the Corps from lowering Lake Sharpe. Lower Brule Sioux Tribe v. Rumsfeld, No. 02-3014 (D.S.D., filed May 21, 2002).

⁶⁹ See Order to Show Cause, S. D. v. Corps of Eng'rs, Civ. No. 02-3011 (May 21, 2002). Judge Charles B. Kornmann, U.S. District Court for the District of South Dakota, not only enjoined the Corps, but also issued an order to show cause why the Corps should not be held in civil contempt for violating the terms of the preliminary injunction requiring them not to reduce the level of the reservoir. During the course of the injunction, high winds had blown water away from the gauge used to measure water elevation at Lake Oahe by several feet. The defendants were ordered to personally appear and be prepared to stay in Brown County for some period if the Court determined that its Order requiring status quo reservoir elevations had been violated S.D. v. Corps of Engr's, No. 02-3011, Memorandum (D.S.D., May 21, 2002). The show cause hearing was eventually cancelled based on a stay of all injunctions by the 8th Circuit.

⁷⁰ S.D. v. Ubbelohde, 330 F.3d 1014, 1021 (8th Cir. 2003).

navigation and other purposes.⁷¹ In light of the conflicting injunctions the Corps sought and received a stay of these injunctions on May 22, 2002, from the Eighth Circuit, pending a decision on the appeals of the preliminary injunctions.⁷²

A. Reviewability of the Corps' Operational Decisions – There Is Law to Apply

On June 4, 2003, the United States Court of Appeals for the Eighth Circuit issued its decision on the merits reversing the preliminary injunctions issued in North Dakota and South Dakota and affirming the judgment of the Nebraska District Court.⁷³ Judge Richard S. Arnold wrote the opinion for the Court. In reaching its decision, the Court finally departed from its decade long forbearance regarding Missouri River issues finding that the appeals were not moot.⁷⁴ While noting that none of the parties had moved to dismiss the appeal based on mootness, the Court found that repetition of similar litigation as occurred in *Hazen* and most recently in *Craig*, seemed quite likely because of continuing drought conditions in the basin.⁷⁵

The first issue the Court addressed on the merits was the Corps' contention that its operational decisions were not subject to judicial review as the FCA commits these decisions to the Corps' discretion. The Court, in rejecting this argument, recognized that the FCA clearly gives a good deal of discretion to the Corps, but it is not unconstrained.

⁷¹ Neb. v. Ubbelohde, No. 8:02CV217, 2002 WL 32851300, at 3 (D. Neb. May 13, 2002).

⁷² S.D. v. Ubbelohde, 330 F.3d at 1022. The Montana case was not involved with the 8th Circuit proceedings. The injunction in that case expired on May 23 and the case was subsequently dismissed by the parties. *Id.* at 11, footnote 2. In addition, the suit filed by the Lower Brule and Crow Creek Sioux Tribes in Federal District Court in South Dakota also seeking injunctive relief was subsequently dismissed based upon a settlement agreement between the parties which provided for notice to the Tribe during specified reductions in elevation of the Big Bend Reservoir, Lower Brule Sioux Tribe v. Rumsfeld, Civ. No. 02-3014, Order of Dismissal (D. S.D. Aug. 8, 2003).

⁷³ S.D. v. Ubbelohde, 330 F.3d 1014, 1033 (8th Cir.2003).

⁷⁴ *Id.* at 1019.

⁷⁵ *Id.* at 1022.

The Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system--flood control and navigation. *ETSI Pipeline Project v. Missouri*, While flood control and navigation are dominant functions, the Act also recognizes recreation and other interests and secondary uses that should be provided for.... The text of the Flood Control Act thus sets up a balance between flood control, navigation, recreation, and other interests. Because the Flood Control Act calls on the Corps to balance these interests, the courts can review the Corps's decisions to ensure that it considered each of these interests before making a decision. What the text of the Act does not provide is a method of deciding whether the balance actually struck by the Corps in a given case is correct or not. Nevertheless, The Flood Control Act clearly provides some law to apply, so the decisions of the Corps are subject to judicial review under the Act.⁷⁶

B. Limitations on the Corps' Discretion – The Master Manual

After holding that the Corps decisions were subject to review, the Court next turned its attention to the Corps' contention that the manual was not binding. In concluding that it was binding the Court found that the language of the Manual, the Corps' regulations and the Corps' personnel all treat the Manual as a constraint on its discretion in operating the River.⁷⁷

The Court then addressed the injunction issued by the South Dakota District Court. The State claimed it was entitled to this relief based on three grounds: first, that the FCA required the maximization of all interests; second, because the Corps was judicially estopped to favor navigation over recreation; and last, that the Corps was arbitrary and capricious in favoring navigation over recreation. The Court held that none of these arguments were likely to succeed on the merits.⁷⁸ In

⁷⁶ *Id.* at 1027.

⁷⁷ *Id.* at 1028-30.

⁷⁸ *Id.* at 1032.

rejecting the State of South Dakota's primary argument that the FCA requires the Corps to maximize the benefits of the River, including fish and wildlife benefits, the Circuit Court made it clear that the courts should defer to policy decisions of the Corps in connection with operation of the Missouri River Mainstem Projects:

Courts are simply not empowered to review every decision of the Corps to ensure that it maximizes the benefits of the River for all interests. Indeed, such a standard would be impossible to meet, anyway. In times of drought it is not possible for both navigation and fishery benefits to be maximized. Something has to give.⁷⁹

With respect to South Dakota's argument concerning judicial estoppel, the Court stated that giving equal consideration to all interests does not mean equal results, and that South Dakota presented no evidence that the Corps did not give equal consideration to recreation.⁸⁰ The Court also found that the Corps' decision not to hold the water level at every reservoir constant every year for fish spawning but to alternate the harm, thus allowing each reservoir to have a fruitful spawn five out of every six years was "...eminently rational."⁸¹

Next the Court addressed the argument raised by North Dakota supporting the injunction entered by the North Dakota District Court, that the FCA itself precludes the Corps from favoring navigation over recreation.

This argument is simply incorrect; the Flood Control Act does not require the Corps to give equal treatment to recreation. The Flood Control Act provides little guidance about what priority the Corps can or must give to different interests. The evidence that we do have, including the sequential listing of interests that uniformly lists navigation before recreation, indicates that the Corps' primary

⁷⁹ *Id.* at 1031.

⁸⁰ *Id.*

⁸¹ *Id.* at 1032.

concerns should be flood control and navigation. The Supreme Court appears to have accepted as much. *ETSI*, 484 U.S. at 512. The Corps has adopted this prioritization, as evidenced by the listing of interests in Section 9-3 of the Master Manual. The Corps's decision to adopt this prioritization was not impermissible.⁸²

The last issue addressed by the Circuit Court was the Corps' argument that it should not be bound by the Nebraska preliminary injunction when unforeseen circumstances arise. While the Court did not accept the Corps' argument, it did state:

The record before this Court does not allow us to assess the validity of this argument on this appeal. Probably the Corps should be accorded some flexibility if an unforeseen circumstance arises. We leave such questions to (Nebraska) District Court to decide on remand if necessary.⁸³

Thus after a decade of litigation, the question concerning the reviewability of the Corps' operational decisions as well as the binding nature of the Master Manual was finally decided. Because the Circuit Court also acknowledged the dominant functions of the FCA as flood control and downstream navigation and that other uses including recreation may be given lesser priority, the decision was supportive of the Corps' priorities set forth in the 1979 Manual.⁸⁴ However, what was not decided in *Ubbelohde*, was the extent to which the Corps could operate for other purposes at the expense of navigation and flood control. The next round of litigation was to provide some guidelines in answering this question.

⁸² *Id.*

⁸³ *Id.* at 1033.

⁸⁴ *Id.* at 1028. Rehearing and rehearing en banc was denied by the Eighth Circuit on September 30, 2003. A subsequent request for Supreme Court review of this case was denied on April 19, 2004. *N.D. v. Ubbelohde*, 541 U.S. 987, (2004) (No. 04-4260).

III. THE FLOOD CONTROL ACT MEETS THE CLEAN WATER ACT AND THE
ENDANGERED SPECIES ACT

In the spring of 2003, and while the appeals of the District Court preliminary injunction decisions in North Dakota, South Dakota and Nebraska were pending before the 8th Circuit Court of Appeals, two additional suits were filed challenging the Corps' operation of the Mainstem System. North Dakota filed a suit against the Corps in state court under its Clean Water Act water quality standards to prevent the Corps from discharging water from Lake Sakakawea at a greater rate than inflow into the reservoir.⁸⁵ The state court entered a temporary restraining order and required the Corps to show cause why further reductions should not be ordered.⁸⁶ Two days later, on April 30, 2003, this case was removed to federal District Court for the District of North Dakota.

In July 2003 the District Court denied North Dakota's motion for a preliminary injunction.⁸⁷ While the Court recognized that the CWA contains a general waiver of sovereign immunity providing that federal agencies shall be subject to, and comply with all federal, state, interstate, and local requirements respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity," it also acknowledged that under 33 U.S.C. § 1371, the CWA is not to be construed as "affecting or impairing the authority of the Secretary of the Army to maintain navigation."⁸⁸ In light of this provision and the recent decision of the Eighth Circuit in *Ubbelohde*, Chief Judge Daniel L. Hovland denied North Dakota's request for a preliminary injunction as the Corps would be able to successfully argue that it is immune from suit and that North Dakota was not likely to succeed on the merits.⁸⁹ However, the temporary restraining order had remained in effect until after that year's fish spawn.

The second suit involved a case against the Corps by a group of environmental plaintiffs filed in July 2003 in District Court in Washington

⁸⁵ N.D. v. U.S. Army Corps of Eng'rs, 270 F. Supp. 2d 1115 (D. N.D. 2003).

⁸⁶ *Id.*

⁸⁷ *Id.* at 1119.

⁸⁸ *Id.* at 1123.

⁸⁹ *Id.* at 1132.

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D.C. challenging the Corps' compliance in its 2003 operations with the requirements of the Endangered Species Act ("ESA").⁹⁰ The Corps' operation of the Missouri River Mainstem System affects several species listed under the ESA, the endangered pallid sturgeon, the endangered least tern and the threatened piping plover. Under the ESA, if a proposed action may "jeopardize the continued existence" of a listed species or adversely affect its critical habitat, the agency must prepare a biological assessment and consult with the U.S. Fish and Wildlife Service ("FWS").⁹¹ At the conclusions of the consultations the FWS issues a biological opinion which determines whether action is likely to result in "jeopardy" or "adverse modification" and, if so, whether there is a reasonable and prudent alternative ("RPA") which could avoid jeopardy.⁹²

A. The 2000 Biological Opinion

In 2000 FWS had issued a biological opinion which concluded that the Corps' operations were likely to jeopardize the existence of the three listed species.⁹³ This opinion proposed an RPA, which required the Corps to: establish an adaptive management program consisting of an interagency coordination team, monitoring program, and annual reports to document compliance with the RPA⁹⁴; implement flow changes at Gavins Point and Fort Peck to provide for a spring rise and low summer flows⁹⁵; unbalance the storage at the Corps upper three reservoirs on an annual

⁹⁰ *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F.Supp. 2d 230 (D.D.C. 2003).

⁹¹ 16 U.S.C. § 1536(a)(2) (1988).

⁹² *Id.*

⁹³ U.S. FISH AND WILDLIFE SERVICE, BIOLOGICAL OPINION ON THE OPERATION OF THE MISSOURI RIVER MAIN STEM RESERVOIR SYSTEM, OPERATION AND MAINTENANCE OF THE MISSOURI RIVER BANK STABILIZATION AND NAVIGATION PROJECT AND OPERATION OF THE KANSAS RIVER RESERVOIR SYSTEM (Nov. 30, 2000) [hereinafter 2000 BiOp], *available at*

http://www.moriverrecovery.org/mrrp/MRRP_PUB_DEV.download_documentation?p_file=375. A record of the somewhat contentious consultation history between the Corps and FWS leading to the 2000 BiOp can be found in the 2000 BiOp. *Id.* at 3-27. The FWS had issued the first BiOp on the Missouri River System on November 14, 1990. *Id.* at 5.

⁹⁴ *Id.* at 237.

⁹⁵ *Id.* at 241-45.

rotating to schedule⁹⁶; establish a habitat restoration, creation and acquisition program for shallow water and sandbar habitat.⁹⁷ The FWS opinion called for the establishment of 12,035 to 19,565 of shallow water habitat by 2020.⁹⁸

The RPA provided for a spring rise from Gavins Point Dam which was to occur once every three years and consist of increasing flows downstream of Gavins Point by 17,500 cfs over full service navigation flows (i.e. approximately 34,000 to 35,000 cfs) for a 30 day period between May 1 and June 15.⁹⁹ Summer flows would be decreased to an interim target of 25,000 cfs by June 21 until July 15 when flows would be further decreased until August 15.¹⁰⁰ On August 15 flows would then be increased to 25,000 cfs until September 1.¹⁰¹ These flow modifications were to occur by 2003.¹⁰² Restrictions were provided to defer the spring rise when system storage or runoff was projected to be less than upper decile, but above a lower quartile.¹⁰³

The 2000 BiOp was problematic for the Corps because of the spring rise and low summer flows. The spring rise called for the release of additional water from the upper basin reservoirs during the spring. This exacerbated the problems created with drought conditions including adverse impacts to recreation, upstream water intakes, Tribal cultural resources and historic sites and could impact flood events in the lower river. The low summer flows would not be high enough to support navigation on the Missouri River and would essentially create a “split-navigation season” as commercial navigation would not be able to return to the river until September when the Corps was able to increase flows to support downstream navigation.

⁹⁶ *Id.* at 245-46.

⁹⁷ *Id.* at 249-57.

⁹⁸ *Id.* at 243. Shallow water habitat was defined as riverine habitat of less than 5 feet in depth and slower than 2 feet per second in velocity. *Id.*

⁹⁹ *Id.* at 242.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 243.

¹⁰² *Id.*

¹⁰³ *Id.*

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B. The 2003 Supplemental Biological Opinion

Because of the problems associated with the spring rise and low summer flows, and in light of the continuing drought conditions within the basin, the Corps reinitiated consultation with the FWS and a supplemental BiOp was issued which suspended the low summer flows for the period from May 1 to August 15, 2003.¹⁰⁴ In June 2003 various environmental groups filed suit in District Court in the District of Columbia challenging the FWS's supplemental BiOp. On July 12, 2003, these plaintiffs received preliminary injunctive relief from Judge Glayds Kessler setting aside the newly issued supplement to the 2000 BiOp and requiring the Corps to operate the System at flows that would not support navigation and other downstream uses.¹⁰⁵

C. The Conflicting Injunctions

Because of a conflict between the Eighth Circuit's *Ubbelohde* decision issued on June 4, 2004, which left in place a preliminary injunction by the Nebraska District Court that required operations consistent with the 1979 Manual, the Corps initially failed to comply with the injunction order issued by the District Court of the District of Columbia and was held in conditional contempt. The Court's contempt order subjected the Corps to civil fines of \$500,000 per day if it did not comply with the provisions of the 2000 BiOp which required low summer flows, by lowering river levels by July 25, 2003.¹⁰⁶

Two days after this contempt ruling, on July 24 2003, the Federal Judicial Panel on Multi-District Litigation (MDL) consolidated and transferred this case as well as five other cases then pending before

¹⁰⁴ U.S. FISH AND WILDLIFE SERVICE, THE SUPPLEMENTAL BIOLOGICAL OPINION OF THE ANNUAL OPERATING PLAN FOR THE MISSOURI RIVER MAIN STEM RESERVOIR SYSTEM DURING THE PERIOD MAY 1- AUGUST 15, 2003 (not available on the Internet) (on file with Water Management Division, Missouri River Basin, U.S. Army Corps of Engineers, Omaha, Nebraska.[hereinafter 2003 SUPPLEMENTAL BIOP].

¹⁰⁵ See *Am. Rivers v. United States Army Corps of Eng'rs*, 271 F. Supp. 2d 230, (D.D.C. 2003).

¹⁰⁶ *Am. Rivers v. United States Army Corps of Eng'rs*, 274 F. Supp. 2d 62 (D.D.C. 2003).

various district courts in the basin to the District of Minnesota.¹⁰⁷ These cases consisted of the North Dakota Clean Water Act case, the three cases involved in the *Ubbelohde* decision, which had been remanded to their respective district courts, and a case filed by a group of downstream commercial interests against the Secretary of Interior, Secretary of the Army and officials of the wildlife departments of Montana, North Dakota and South Dakota.¹⁰⁸ The Lower Brule case was not transferred because of a pending settlement.¹⁰⁹ After the transfer, the Corps subsequently implemented the flow changes which had been ordered by the D.C. District Court for the brief remainder of the 2003 summer period.¹¹⁰

¹⁰⁷ *In re* Operation of the Mo. River Sys. Litig., 277 F.Supp. 2d 1378 (J.P.M.L. 2003).

¹⁰⁸ *Blaske Marine, Inc. v. Gale Norton*, No. 8:03 cv 142 (Neb. Dist. 2003). In this case, plaintiffs alleged that FWS in designating critical habitat violated the ESA, NEPA and APA. *Id.* They also alleged that the FWS, the Corps and three state agencies violated the FCA, 1945 Rivers and Harbors Act, the ESA and NEPA in stocking and propagation programs for non-native species. *Id.*

¹⁰⁹ *Lower Brule Sioux Tribe v. Rumsfeld*, No 02-3014, (D.S.D., filed May 21, 2002). The case was subsequently settled by the parties and dismissed by order dated Aug. 8, 2003.

¹¹⁰ After Judge Kessler issued the preliminary injunction order requiring low summer flows on July 12, 2003, the Corps unsuccessfully sought stays from the District Court and Court of Appeals for the District of Columbia. *See Am. Rivers*, 274 F. Supp. 2d at 65. On July 21, 2003 a hearing was held to determine whether the Corps should be held in contempt and sanctioned for failure to comply with the July 12, 2003 order. The Corps was found conditionally in contempt and ordered to pay fines of \$500,000 per day if they did not lower flows by July 25, 2003. *Id.* at 70-71. On July 24 the MDL Panel consolidated all cases in the District of Minnesota and that same day that latter court stayed all proceedings including the contempt sanctions for 14 days. *See In re* Operation of the Mo. River Sys. Litig., 2003 WL 22349385 (D. Minn. Aug. 4, 2003). Prior to the consolidation order, the Corps had requested the Eighth Circuit to re-impose the stay of the Nebraska court's injunction that had been affirmed by the Eighth Circuit on June 4, 2003. On July 25, 2003, the Eighth Circuit determined that the stay issued in May 2002 would be in effect until August 20, *S.D. v. Ubbelohde*, 337 F.3d 1022 (8th Cir. 2003). After the expiration of the 14 day stay order by Judge Magnuson, the Corps reduced releases from 26,000 cfs on August 10th to 21,000 cfs on August 12th. Releases were then increased from 21,000 cfs on August 14th to 25,000 cfs on August 15th and remained at that level through September 1. After September 1, releases were increased to the rate required to meet minimum service flows downstream.

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IV. IN RE: OPERATION OF THE MISSOURI RIVER SYSTEM LITIGATION – CONSOLIDATION OF THE DISTRICT COURT PROCEEDINGS

Following consolidation of the six pending cases in the District Court for the District of Minnesota, amended complaints were submitted to the Court.¹¹¹ These complaints asserted, among other things, that: the Corps must conform its operations to the 2000 BiOp; the Corps was prohibited from doing so based on the FCA or the Master Manual; no changes could be made to shorten the navigation season unless the Corps complied with NEPA and the APA; and, that the process and product of consultation between the Corps and the FWS was flawed. Judge Paul A. Magnuson, who presided over the MDL proceedings, issued a scheduling order on October 1, 2003, which set forth a process to deal with these claims. Among other things, the scheduling order required the Corps to “release to the public a decision document outlining its planned operations for 2004 on or before March 1, 2004. This document will be in accord with the new Master Manual, if completed; otherwise, it will be in accord with the existing Master Manual. The Corps will release to the public a draft of the 2004 Annual Operating Plan no later than November 26, 2003.”¹¹²

A. 2003 Amended Biological Opinion

On November 4, 2003, the Corps sent to the FWS a new biological assessment (BA)¹¹³ requesting the re-initiation of consultation on a new biological opinion.¹¹⁴ The basis for the re-initiation request was new

¹¹¹ *In re* Operation of the Mo. River Sys. Litig., 2003 WL 2230376 (D. Minn.).

¹¹² *Id.*

¹¹³ NORTHWESTERN DIVISION, U.S. ARMY CORPS OF ENGINEERS, FINAL BIOLOGICAL ASSESSMENT ON THE OPERATION OF THE MISSOURI RIVER MAINSTEM RESERVOIR SYSTEM, OPERATION AND MAINTENANCE OF THE MISSOURI RIVER BANK STABILIZATION AND NAVIGATION PROJECT, AND OPERATION OF THE KANSAS RIVER RESERVOIR SYSTEM (Nov. 4, 2003) *available at* <https://www.nwd.usace.army.mil/pa/docs/BAFinal-110403.pdf>, [hereinafter 2003 BIOLOGICAL ASSESSMENT].

¹¹⁴ 50 C.F.R. § 402.16 (2008) (providing for the re-initiation of consultations if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered).

information which indicated, in part, that the spring rise and summer flows below minimum service would not provide the intended physical attributes and biological effects intended by the FWS and that flows below minimum service may not allow the Corps to provide for navigation, one of the authorized project purposes.¹¹⁵ The BA included engineering studies which concluded that the flows sought by FWS would not be effective in building the habitat which the FWS had anticipated.¹¹⁶ The Corps also provided biological information questioning the biological effectiveness of the spring rise for pallid sturgeon. In addition to other actions set forth in the 2000 BiOp, the Corps proposed actions also included revised mainstem operations, acceleration of habitat creation, implementation of a robust research, monitoring and evaluation program, flow tests, and expanded pallid sturgeon propagation efforts.¹¹⁷

On November 16, 2003, the Service transmitted to the Corps the FWS's 2003 Amended BiOp.¹¹⁸ While the 2003 BiOp found that the Gavins Point flow changes were not necessary to avoid jeopardy to the least tern and piping plover, it did find that Gavins Point flow changes were necessary for the listed pallid sturgeon.¹¹⁹ Thus, the 2003 Amended BiOp required the Corps to develop a flow management plan with a spring rise and summer low flow which would provide for the life history needs of the pallid sturgeon. If the Corps was not able to develop such a plan,

¹¹⁵ 50 C.F.R. § 402.02 (2008) (providing that a reasonable and prudent alternative refers to actions that "can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.").

¹¹⁶ 2003 BIOLOGICAL ASSESSMENT, *supra* note 113 at 2-4.

¹¹⁷ *Id.*

¹¹⁸ GREAT PLAINS AND SOUTHWEST REGIONS, U.S. FISH AND WILDLIFE SERVICE, 2003 AMENDMENT TO THE 2000 BIOLOGICAL OPINION ON THE OPERATION OF THE MISSOURI RIVER MAIN STEM SYSTEM, OPERATION AND MAINTENANCE OF THE MISSOURI RIVER BANK STABILIZATION AND NAVIGATION PROJECT, AND OPERATION OF THE KANSAS RIVER RESERVOIR SYSTEM (Dec. 16, 2003) [hereinafter 2003 AMENDED BIOP], *available at* http://www.moriverrecovery.org/mrrp/MRRP_PUB_DEV.download_documentation?p_file=377.

¹¹⁹ *Id.* at 175, 178, 180-81.

the 2003 Amended BiOp provided a default plan that was to go into effect after March 1, 2006. This plan required two spring pulses, or bi-modal pulses, with increased flows in March and then again in May to more closely match the historic hydrograph, as well as low summer flows no greater than 25,000 cfs beginning no later than July 1, for a minimum of 30 days.¹²⁰ Not inconsequentially for the Corps, the Amended BiOp also provided that if the Corps could create 1,200 acres of new shallow water habitat “between Sioux City and Omaha (approximately the amount that would be developed through flow management) the Corps, in consultation with the Service, may modify flows to take advantage of that habitat and more fully meet project purposes.”¹²¹ Because the 25,000 cfs low summer flows would not support downstream navigation, the provision concerning the creation of 1,200 acres of shallow water habitat was important to the Corps in order to avoid a split in the navigation season during the low summer flow period.

Because the Corps could not complete the pending NEPA process regarding the Master Manual Review and Update prior to the March 1 date set forth in Judge Magnuson’s scheduling order, it requested a further amendment of that order. In a Memorandum and Order responding to the Corps’ request, Judge Magnuson took the Corps to task for the repeated false assurances it had provided over a period of thirteen years that the issuance of a revised Manual was imminent.¹²² The Court noted that these assurances had been provided to numerous courts within the basin and had led to dismissals based on mootness.¹²³ In light of this long history of

¹²⁰ *Id.* at 234-35.

¹²¹ *Id.* at 233. This was a key provision to the Corps, and if the habitat could be created, would dispense with the necessity to provide for the low summer flows and avoid interruption to the navigation season. Overall however, this was a small amount of habitat called for in the BiOp. For instance both the 2000 and 2003 BiOps provided for the development of 20 to 30 acres of shallow water habitat per river mile. *Id.* at 170, 190, 193-94.

¹²² *In re* Operation of the Mo. River Sys. Litig., 305 F.Supp. 2d 1096 *passim* (D.Minn. 2004).

¹²³ *Id.* at 1099. The Corps’ delays were not entirely without justification. A history of the Master Manual review process can be found in the Corps Final EIS. *See* U.S. ARMY CORPS OF ENGINEERS, MISSOURI MASTER MANUAL REVIEW AND UPDATE FEIS § 1.3 (2004), *available at* http://www.nwd-mr.usace.army.mil/mmanual/Volume I/Section_1.pdf.

delay, the Court found the Corps' attempt to raise the mootness doctrine offensive, which it had done in the initial pleadings responding to the revised complaints in the MDL cases.¹²⁴ While Judge Magnuson did allow the Corps a short extension of time to submit the revised Manual, he made it clear that he would not consider the mootness defense that the Corps had raised with respect to the motions already filed unless the Corps actually issued a new Manual.¹²⁵

B. Conclusion of the Master Manual Review and Update and the Corps' ROD

On February 27, 2004, one day after Judge Magnuson's amended scheduling order, the Corps issued for public comments the Final Environmental Impact Statement for the Master Manual Review and Update which had commenced in 1989. Attached were drafts of the revised Manual and the 2004 Annual Operating Plan.¹²⁶ On March 19, 2004, the Corps issued its ROD adopting the new Master Manual and the Final 2004 AOP.¹²⁷ The Corps' ROD selected a water control plan that increased upstream water conservation measures which in-turn reduced the navigation service level and the season length to conserve stored water during extended droughts.¹²⁸ The selected plan also called for the

¹²⁴ *In re* Operation of the Mo. River Sys. Litig., 305 F.Supp. 2d at 1099.

¹²⁵ *Id.* at 1099. The Corps had requested additional time to allow for a full 30 day review of the Master Manual FEIS. *Id.* However, Judge Magnuson's ordered stated that if the Corps did not submit a new manual by March 5th it was required to respond to all pending motions pending before the Court at that time. *Id.* As the time allowed by Judge Magnuson provided a shortened period of review of the NEPA documents before the ROD was issued, the Corps subsequently requested and received EPA's determination to shorten the notice period. *Id.*

¹²⁶ Press Release, Coalition to Protect Missouri River, Agriculture, Navigation and Utilities Receive major Setbacks Administration Delivers Spring Rise, Split Navigation Seasons and Transfer of Water to Upper Basin (Feb. 27, 2004), <http://www.protectthemissouri.com/releases2004.html#feb27>.

¹²⁷ NORTHWESTERN DIVISION, U.S. ARMY CORPS OF ENGINEERS, ROD MISSOURI RIVER MASTER WATER CONTROL MANUAL REVIEW AND UPDATE (Mar. 19, 2004) [hereinafter RECORD OF DECISION], available at <http://www.nwd-mr.usace.army.mil/rcc/reports/pdfs/recordofdecision.pdf>.

¹²⁸ *Id.* at 2.

suspension of navigation if system storage was at or below thirty-one MAF on March 15th of any year.¹²⁹ Under the 1979 Manual, there was no specific criterion for suspending the entire navigation season in periods of severe drought.¹³⁰ The Corps would also unbalance the upper three reservoirs on a three year cycle to provide for resident fishery production.¹³¹ This cycle would start by lowering one of the three reservoirs allowing vegetation to grow around the rim.¹³² The second year the reservoir is refilled inundating the vegetation which would be used for spawning and cover.¹³³ The third year the reservoir rises during the fish spawn and then slowly falls for the remainder to the year to be at low elevation the following year.¹³⁴ This would also provide more emergent sandbar and shoreline habitat for ESA listed birds.

The selected plan also included minimum flows for periods when navigation was not supported, to provide for downstream power plants, municipal and industrial intakes, water supply and water quality.¹³⁵ An adaptive management process was also selected, as well as a process for evaluation of a spring rise.¹³⁶ The ROD also documented the Corps' and FWS's process for documenting the construction of 1,200 acres of shallow water habitat which would allow for navigation during the summer months.¹³⁷ The establishment of a Missouri River Implementation Committee (MRRIC) to assist the Corps and the FWS in recovery implementation was also selected.¹³⁸

The ROD provided that the Corps, in conjunction with the FWS and Missouri River stakeholders, would further evaluate and study the controversial spring rise during a two-year re-evaluation process. The ROD provided:

¹²⁹ *Id.*

¹³⁰ 1979 MANUAL, *supra* note 15 at IX-9, Table 9.

¹³¹ RECORD OF DECISION, *supra* note 127, at 2.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 2-3.

¹³⁶ *Id.* at 3.

¹³⁷ *Id.* at 2.

¹³⁸ *Id.* at 5.

The evaluation of a spring rise described in the 2003 Amended BiOp will include a review of the status of the species, the scientific findings of a research, monitoring and evaluation program, the progress and success of measures implemented to date, and other relevant new information. Decisions concerning implementation of additional measures or modification of existing measures, including potential release changes out of Gavins Point Dam, will be made throughout the adaptive management process. The two-year re-evaluation will include input from Missouri River stakeholders to foster conservation of ESA-listed species and the broader ecosystem values of the Missouri River while providing other Congressionally authorized System project purposes. This process has been incorporated into the Selected Plan.¹³⁹

After issuance of the new Manual, the plaintiffs in the MDL litigation again amended their complaints to address the 2004 Master Manual and 2004 AOP, and the cases were submitted to the Court on multiple cross-motions for summary judgment.¹⁴⁰ In these proceedings, South Dakota, North Dakota, Nebraska, Missouri, MOARK, Blaske Marine, the Mandan, Hidatsu and Arikara Nation, and environmental groups including American Rivers, challenged the Corps' new Master Manual, the 2004 Annual Operating Plan (AOP), and the USFWS' Biological Opinion under, *inter alia*, the FCA, NEPA, ESA, and the APA. On June 21, 2004, the District Court entered judgment in favor of the Federal Defendants denying most of the challenges.¹⁴¹

1. The FCA Claims – Is Navigation Still Dominant?

¹³⁹ *Id.*

¹⁴⁰ *In re* Operation of the Mo. River Sys. Litig., 363 F.Supp. 2d 1145 (D. Minn. 2004).

¹⁴¹ *Id.* at 1175. Several of the claims were held not ripe for review and were dismissed without prejudice. *Id.* This included claims challenging summer low flows and a spring rise, neither of which had been adopted as part of the 2004 Master Manual. *Id.*

The District Court, categorized the various claims against the federal defendants into four categories: FCA, ESA, NEPA and collateral claims.¹⁴² With respect to FCA claims, and after recognizing the language in both *ETSI* and *Ubbelohde*, concerning the dominant functions of flood control and downstream navigation, the District Court found that under the FCA the Corps has been delegated discretion by Congress to balance and prioritize river interests.

There is no language in either case law or legislative history that dictates that the Corps must always maintain a particular water level or specific water season in its river operations. All river interests must be considered and evaluated to “secure the maximum benefits” to river interests. The Court finds that the FCA does not impose a non-discretionary duty to maintain minimum navigation flows or season lengths. The Corps’ prioritization of river interests is discretionary.¹⁴³

The Court then found that eliminating navigation in the event system storage falls below thirty-one MAF was within the Corps discretion as it assured upstream consumptive uses were given deference in an extended drought as required by 33 U.S.C. § 701-1(b).¹⁴⁴ Regarding the binding nature of the Manual, the Corps’ had attempted in the revised Manual to reserve the right to vary operations. However, the District Court ruled that the 2004 Manual was binding on the Corps and that any permanent amendment must go through procedures contained in the Corps regulations at 33 C.F.R. § 222.5.¹⁴⁵ While recognizing the Corps must be permitted to vary its operations for changed circumstances, judicial review would still be available to determine the lawfulness of the action.¹⁴⁶

The Court then addressed South Dakota’s argument that the new Manual violated the O’Mahoney-Millikin Amendment because the new Manual allowed for lower levels in the upstream reservoirs than existing intake structures.¹⁴⁷ The Court pointed out that the O’Mahoney-Millikin Amendment was not designed to protect against these difficulties, but to

¹⁴² *Id.* at 1151.

¹⁴³ *Id.* at 1153.

¹⁴⁴ The O’Mahoney-Millikin Amendment, *supra* note 40.

¹⁴⁵ *In re* Operation of the Mo. River Sys. Litig., 363 F.Supp. 2d at 1154.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; *see also* O’Mahoney-Millikin Amendment, *supra* note 40.

protect state-created water rights against the federal easement for navigation.¹⁴⁸ No violation of the FCA was found.¹⁴⁹

2. The ESA Claims – Did the FWS Get it Right?

The Court next considered a multitude of ESA claims by American Rivers against the Corps and FWS. These claims included allegations that the 2003 Amended BiOp and the new manual violated the ESA by eliminating flow changes for the terns and plovers, changing low summer flows from 21,000 cfs to 25,000 cfs, delaying implementation and reducing the magnitude of a spring rise, mechanically creating a habitat, and, by creating uncertainty that flow changes would take effect, be effective, or be congressionally funded. The District Court found there was no violation of the ESA and that the FWS had articulated a rational basis for its changes to the 2000 BiOp.¹⁵⁰

The Court next took under consideration challenges to the FWS's attempt to restore some semblance of the natural hydrograph which were raised by parties representing downstream interests. They argued that this hydrograph or baseline with its low summer flows was improper because it failed to include minimum flow levels to meet the Corps' non-discretionary navigation operations. The Court denied these claims by concluding that the Corps did not have a non-discretionary duty to maintain minimum navigation flows and that the Corps' operations were subject to the ESA.¹⁵¹

3. *The NEPA Claims – 1200 Acres and the Spring Rise*

¹⁴⁸ *In re* Operation of the Mo. River Sys. Litig., 363 F.Supp. 2d at 1154 (citing Turner v. Kings River Conservation Dist., 360 F.2d 184, 192 (9th Cir. 1966)).

¹⁴⁹ *Id.* at 1158 (citing Turner v. Kings River Conservation Dist., 360 F.2d 184, 192 (9th Cir. 1966)).

¹⁵⁰ *Id.* at 1156-61. “The law does not require that Federal Defendants provide extensive justification for the Corps' decision. Rather, the decision must be ‘rational,’ providing ‘permissible reasons’ for the change. [citation omitted].” *Id.* at 1156 n. 3.

¹⁵¹ *Id.* at 1161-62.

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The Court then turned its attention to the NEPA claims. Foremost among these were two claims challenging the adequacy of the Corps' NEPA compliance concerning the Corps creation of 1,200 acres of shallow water habitat that would allow summer flows to exceed 25,000 cfs and the bimodal spring pulse. Neither of these operations had been specifically addressed in the Corps' Master Manual EIS. With respect to the construction of 1,200 acres of shallow water habitat, the 2003 Amended BiOp provided that if this habitat was constructed between Sioux City and Omaha, then the Corps, in consultation with the Service, could modify flows to more fully meet project purposes.¹⁵² This was an important provision to the Corps since it would allow the Corps to operate Gavins Point during the summer months to provide flows necessary to maintain navigation. The Court found that the claimant had not demonstrated that the creation of the habitat was a major federal action significantly affecting the quality of the human environment or that a categorical exclusion did not apply.¹⁵³ The Court also pointed out that the issue was likely moot since the federal defendants had represented to the Court that the 1,200 acres had already been created.¹⁵⁴

With respect to the Plaintiff's arguments regarding the spring rise plan set forth in the 2003 Amended BiOp, the Court found that while this plan was not evaluated or considered in the EIS, it would become effective only if the Corps failed to develop an alternative approach over the next several years which provided for the life history needs of the pallid sturgeon.¹⁵⁵ Because the default spring rise plan or an alternate plan would not take effect until 2006, the Court found that the issue was not

¹⁵² 2003 AMENDED BIOP, *supra* note 118, at 233.

¹⁵³ *In re* Operation of the Mo. River Sys. Litig., 363 F.Supp. 2d at 1165.

¹⁵⁴ *Id.* at 1165 n.9. American Rivers subsequently filed suit in the District Court of Minnesota as part of the MDL proceedings also challenging the Corps creation of 1,200 acres. On December 10, 2005, Judge Magnuson granted the Corps' and FWS's Motion for Summary Judgment. The court found that American Rivers had failed to provide the appropriate sixty-day (60) notice against the Corps under the Endangered Species Act. *See* Am. Rivers, Inc., v. U.S. Army Corps of Eng'rs, Mem. & Order, 2004 WL 2905281 (D. Minn., Dec. 10, 2004). An appeal to the 8th Circuit of this decision was later withdrawn.

¹⁵⁵ *In re* Operation of the Mo. River Sys. Litig., 363 F. Supp. 2d at 1166.

ripe for review and it specifically declined to make any finding regarding the Corps' obligations under NEPA for this action.¹⁵⁶

In concluding his opinion, Judge Magnuson noted that the Corps and other agencies have an insurmountable task in regulating the Missouri River for all its competing purposes.¹⁵⁷ He further pointed out that while this may be possible in a perfect world, it was inevitable that the Corps' decisions, as shown by the present litigants, would not be perfect. However, the Court then pointed out that the standard for agency action is not one of perfection.¹⁵⁸ The multiple parties involved in this proceeding now appealed to the Eight Circuit.¹⁵⁹

C. The Clean Water Act Case

Several months prior to the issuance of the Master Manual and BiOp opinion, the District Court had also issued its decision on the merits of the North Dakota water quality case.¹⁶⁰ In that decision Judge Magnuson found that North Dakota's attempt to regulate the level of Lake Sakakawea by application of water quality standards left the Corps in "an either or situation."¹⁶¹ It could either comply with North Dakota's water quality standards or potentially violate its statutory obligation under the FCA to maintain navigation, or it could operate as required under the FCA and potentially violate North Dakota's water quality standards. It could not do both.

Here the Corps is faced with an either-or situation: it can either comply with North Dakota's water quality standards and potentially violate its statutory obligation under the

¹⁵⁶ *Id.* In this discussion, Judge Magnuson left the door opened for the Corps to subsequently show that while the bi-modal spring pulse was not specifically addressed in the EIS it was within the range of alternatives that were analyzed and considered in the Master Manual EIS process.

¹⁵⁷ *Id.* at 1175.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1151 (listing the parties involved in the action).

¹⁶⁰ *Id.* at 1145; *see also* N.D. v. U.S. Army Corps. of Eng'rs, 320 F. Supp. 2d 873 (D. Minn. 2004).

¹⁶¹ N.D. v. U.S. Army Corps. of Eng'rs, 320 F. Supp. 2d at 877.

FCA to maintain navigation, or it can operate as required under the FCA and potentially violate North Dakota's water quality standards . . . , the Court simply cannot require the Corps to always do both [footnote omitted] Therefore, in this instance, the Court finds that the CWA does not provide for a complete waiver of sovereign immunity. [footnote omitted]¹⁶²

The Court then found that the waiver of sovereign immunity in 33 U.S.C. § 1323 (a) does not provide for a complete waiver of sovereign immunity in light of the provisions of 33 U.S.C. § 1371, which limits the applicability of the CWA when it would affect or impair the authority of the Corps to maintain navigation.¹⁶³ The District Court also found that the doctrine of preemption applied since requiring the Corps to comply with the state standards would circumvent the intention of Congress in enacting the FCA and the CWA.¹⁶⁴ North Dakota appealed.

V. IN RE: OPERATION OF THE MISSOURI RIVER SYSTEM – THE EIGHTH
CIRCUIT COURT OF APPEALS

A. Navigation's Dominance over the CWA

The Eighth Circuit issued its opinions in both cases on August 16, 2005. Circuit Court Judge Raymond W. Gruender wrote both opinions for the Court. In the North Dakota water quality case¹⁶⁵ the Court adopted much of the reasoning of both the lower District Courts who ruled below. In viewing the language of 33 U.S.C. § 1371 (a) the Court stated, “[i]f we allow North Dakota to enforce its water-quality standards on this basis, there is no discernible limit to the new structures and new operational plans that other states with Mainstem reservoirs could demand to force the Corps to comply with their own water-quality standards.”¹⁶⁶ If each state

¹⁶² *Id.*

¹⁶³ *Id.* at 878.

¹⁶⁴ *Id.*

¹⁶⁵ *In re* Operation of the Mo. River Sys. Litig., 418 F.3d 915 (8th Cir. 2005).

¹⁶⁶ *Id.* at 919.

is allowed to use its reservoir water quality standards as a tool to control how the Corps must release water from the mainstem reservoirs, the “authority of the Secretary of the Army ... to maintain navigation” will obviously be affected, in violation of § 1371(a).¹⁶⁷ Similar to the District Court case, the Court also held that the doctrine of preemption applies, “[i]mplied conflict preemption arises ‘where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’ ”¹⁶⁸

*B. Navigation and the Corps’ Drought Conservation Measures –
Abandonment of the Dominant Functions?*

In the Master Manual case, the appeals court dismissed three claims as moot and affirmed the judgment of the District Court on all remaining claims.¹⁶⁹ The first issue addressed by the Court was the downstream parties’ challenge to the drought conservation measures selected by the Corps in the new water control plan. These drought conservation measures, referred to as “navigation precludes” in the Manual, shorten or eliminate the navigation season depending on water in storage as measured on March 15 and July 1 of every year.¹⁷⁰ Referring to studies conducted by the Corps that showed that the navigation precludes would eliminate navigation in only four years out of a 100 and shortened the navigation season to less than seven months in only eight years out of a 100 the Court stated that “[u]nder these circumstances, we cannot say that the Corps failed to consider downstream navigation before making its decision.”¹⁷¹ Following this statement was one of two footnotes pertaining to any future initiatives that could detract further from navigation or flood control operations. The first of these footnotes, footnote 7, states in part:

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (quoting *Nordgen v. Burlington N. R.R. Co.*, 101 F.3d 1246, 1248 (8th Cir. 1996)).

¹⁶⁹ *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 624 (8th Cir. 2005).

¹⁷⁰ *Id.* at 629; *see also* U.S. ARMY CORPS OF ENGINEERS, MISSOURI MASTER MANUAL REVIEW AND UPDATE FEIS § 7-03 (2004), *available at* http://www.nwd-mr.usace.army.mil/mmanual/Volume I/Section_1.pdf.

¹⁷¹ *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d at 629.

If, due to extreme conditions, the Corps is faced in the future with the unhappy choice of abandoning flood control or navigation on the one hand or recreation, fish and wildlife on the other, the priorities established by the FCA would forbid the abandonment of flood control or navigation. While we hold today that the 2004 Master Manual does not “abandon” navigation, we do not rule out the possibility that some more limited degree of support for flood control or navigation in the future could be held to constitute “abandonment” of these dominant functions.”¹⁷²

After the Court responded to arguments by North and South Dakota that recreation should have a higher priority than navigation based on economic impact, with the observation that nothing in the text or legislative history suggests that the priorities of the FCA should shift based on economic impact, and that arguments based on the wisdom of the FCA must be addressed to Congress¹⁷³, the second of the two relevant footnotes, footnote 9, appears.¹⁷⁴ This footnote is referenced in a discussion by the Court that addresses an argument by downstream interests that it was unlawful for the Corps to consult with FWS regarding operation of the reservoir system since ESA compliance would interfere with downstream navigation, a project purpose mandated by statute such that the Corps has no discretion meeting it.¹⁷⁵ The downstream parties argument was based on two cases, *National Wildlife Federation v. United States Army Corps of Engineers*, 384 F.3d 1163 (9th Cir.2004) and *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C.Cir.1992).

In the first of those two cases the Ninth Circuit held that the Corps’ non-compliance with water quality standards at the Corps’ project in the Columbia River Basin was caused not by a discretionary method of operations, but by the very existence of the dams in question and did not

¹⁷² *Id.* See also *infra* note 9.

¹⁷³ *Id.* at 629-30.

¹⁷⁴ See *id.* at 630 n.8.

¹⁷⁵ *Id.*

constitute violations of the CWA.¹⁷⁶ In the second case, an enabling statute required that Federal Energy Regulatory Commission (“FERC”) could not amend the terms of an annual license without the consent of the licensee.¹⁷⁷ The Court held that the ESA did not apply to the license because the ESA did not authorize FERC to override the statutory prohibition.¹⁷⁸

In rejecting the downstream parties’ arguments, the Court noted that the 2004 Manual shows that the Corps can comply with the elements of the 2003 Amended BiOp while continuing to operate the dams consistent with the FCA.¹⁷⁹ However, the text of footnote 9 then shows the Court’s willingness to accept the above argument that the FCA does contain non-discretionary obligations on the part of the Corps to provide for flood control and navigation if compliance with the ESA would require “abandonment” of these project purposes. Footnote 9 states, “[i]t follows that if future circumstances should arise in which ESA compliance would force the Corps to abandon the dominant FCA purposes of flood control or downstream navigation, the ESA would not apply.”¹⁸⁰

The two footnotes together with the Court’s response to North and South Dakotas’ argument that recreation should be provided a higher priority than navigation, should be addressed to Congress and not the courts, certainly provide a strong message that any further constraints to navigation might not be favorably considered by the court. Further amplifying this point, in the next section of the decision, the Court held that claims challenging the low summer flows which would not sustain navigation, and upon which the lower court had granted the federal defendants summary judgment, were moot.¹⁸¹ Thus, any future challenges to a river operation which would lower flows in the river to protect ESA listed species would not be *res judicata*.¹⁸²

¹⁷⁶ Nat’l Wildlife Fed’n v. U.S. Army Corps of Eng’rs, 384 F.3d 1163, 1179-80 (9th Cir. 2004)

¹⁷⁷ Platte River Whooping Crane Critical Habitat Maint. Trust v. F.E.R.C., 962 F.2d 27 (D.C. Cir. 1992).

¹⁷⁸ *Id.* at 34.

¹⁷⁹ *In re* Operation of the Mo. River Sys. Litig., 421 F.3d at 631.

¹⁸⁰ *Id.* at 631.

¹⁸¹ *Id.* at 631-32.

¹⁸² *Id.* at 632 (directing that the existing claims be dismissed without prejudice).

The appellate Court next considered and rejected multiple challenges to the 2003 Amended BiOp. In sustaining the environmental baseline used in the BiOp the Court affirmed the lower court's grant of summary judgment finding that because the FCA did give a good deal of discretion to the Corps in the management of the river, it was not arbitrary and capricious for the FWS not to include a specific operational profile for downstream flows in the environmental baseline.¹⁸³ Likewise the fact that the FWS used a hydrograph that did not exactly replicate the natural runoff was not a basis for overturning the judgment below.¹⁸⁴ Replacing the summer low flow of 21,000 cfs with the mechanical construction of 1,200 acres of artificial habitat was also found not to be arbitrary or capricious since the 1,200 acres represented the same amount of shallow water habitat that would have been created by the low flows and this was adequately explained in the record.¹⁸⁵

In concluding its opinion, the Circuit Court then vacated the District Court's grant of summary judgment on three claims with instructions to dismiss without prejudice, all of which concerned the low summer flows which the Corps was able to avoid by the construction of 1,200 acres of shallow water habitat. On all other claims the judgment of the lower court was affirmed.¹⁸⁶

On March 20, 2006, the Supreme Court denied a petition by the State of North Dakota for review in North Dakota's CWA case.¹⁸⁷ A petition by North Dakota and South Dakotas challenging the ruling of the Eighth Circuit Court of Appeals holding that the authorization for the Missouri River Mainstem System requires the Army to afford priority to navigation over other project purposes and that the Corps' balancing of water use interests was arbitrary and capricious was also denied.¹⁸⁸ Environmental Defense Fund's petition claiming that the Court of Appeals erred in affirming FWS's artificial habitat determination on grounds not

¹⁸³ *Id.* at 633.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 634-35.

¹⁸⁶ *Id.* at 638.

¹⁸⁷ N.D. ex rel. North Dakota Dep't of Health v. U.S. Army Corps of Eng'rs, 547 U.S. 1018 (2006).

¹⁸⁸ N.D. v. U.S. Army Corps of Eng'rs, 547 U.S. 1097 (2006).

made by the agency met with the same fate.¹⁸⁹ Nebraska Public Power District's cross petition for Supreme Court review claiming that the FWS used the wrong environmental baseline was also denied.¹⁹⁰

VI. COLLABORATING WITH THE BASIN - THE SPRING RISE PROCEEDINGS

After the Eighth Circuit's rulings in the CWA and Master Manual BiOp cases one might think that either the litigants would be too exhausted to litigate further, or that there were not too many more issues to litigate regarding the Corps' Mainstem operations. However, any hiatus due to these factors was to be relatively brief, as there was more litigation to come.

The 2003 Amended BiOp provided for a two-year window for the Corps to develop a spring pulse plan to be implemented in March 2006. While the Corps' 2004 ROD did not adopt a spring rise plan, it did commit the Corps to work with Missouri River stakeholders in developing these potential release changes from Gavins Point Dam.¹⁹¹ To develop the plan, the Corps and the FWS requested assistance from the United States Institute for Environmental Conflict Resolution (USEICR), a Federal agency specializing in dispute resolution.¹⁹² Basin states, Tribal representatives, and non-governmental basin stakeholders were invited to participate in a collaborative approach to assist in developing a spring pulse plan. This process led to the formation of a "Plenary Group" with over fifty members.¹⁹³ The group met between June and August of 2005. At the conclusion of the process in August of 2005, the "Plenary Group"

¹⁸⁹ *Envtl. Def. v. U.S. Army Corps of Eng'rs*, 547 U.S. 1097 (2006).

¹⁹⁰ *Neb. Pub. Power Dist. v. U.S. Fish & Wildlife Serv.*, 597 U.S. 1097 (2006).

¹⁹¹ 2006 MANUAL, *supra* note 2, at 8.

¹⁹² *Id.* at 279. The U.S. Institute is authorized by the Environmental Policy and Conflict Resolution Act of 1998 to provide a variety of conflict resolution services in connection with disputes related to the environment, public lands or natural resources. Other federal agencies are expressly authorized by the Act to enter into agreements with the Institute in connection with the provision of conflict resolution services. Environmental Policy and Conflict Resolution Act of 1998, Pub. L. No. 105-156, 112 Stat. 10 (codified as amended at 20 U.S.C. §§ 5601 -09).

¹⁹³ 2006 MANUAL, *supra* note 2, at 279; *see also* Missouri River Restoration and Recovery, Missouri River Implementation Committee (MRRIC), <http://missouririver.ecr.gov/spring.asp> (showing "Plenary Process" materials).

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was not able to forward a set of consensus recommendations to the Corps and the FWS.¹⁹⁴ However, information developed during this process was used in part by the Corps to develop the criteria for the spring rise. The draft criteria were included with the Corps' draft 2006 AOP for Tribal, state and public review and comment. Public meetings were also conducted within the basin.

During the NEPA process for the Master Manual Review and Update, the Corps had conducted an analysis of a broad range of spring pulse alternatives. The alternatives ranged from a 15,000 to 30,000 cfs increase over navigation flows over a duration of approximately four weeks. System storage requirements used to determine whether to implement a pulse ranged from 31 to 46 MAF. Criteria were also analyzed regarding downstream flows that would act to curtail spring pulse releases.¹⁹⁵ After receipt of comments on the draft 2006 AOP and spring rise technical criteria, the Corps completed an Environmental Assessment (EA) to determine whether a Supplemental EIS ("SEIS") should be conducted.¹⁹⁶ This EA was tiered to the Master Manual Review and Update EIS. The EA compared the environmental impacts of the proposed spring rise with alternatives analyzed in the EIS and historical flows from Gavins Point. This analysis indicated that the flows resulting from the spring pulse technical would be within the range of alternatives previously examined as well as historical flows from the Gavins Point project.¹⁹⁷ The Corps' Memorandum of Decision and EA concluded that there were no new significant environmental impacts that had not been

¹⁹⁴ 2006 MANUAL, *supra* note 2, at 279; *see also* Missouri River Restoration and Recovery, Missouri River Implementation Committee (MRRIC), <http://missouririver.ecr.gov/spring.asp> (showing "Plenary Process" materials).

¹⁹⁵ *See generally* NORTHWESTERN DIVISION, U.S. ARMY CORPS OF ENGINEERS, MISSOURI RIVER MASTER WATER CONTROL MANUAL REVIEW AND UPDATE FINAL ENVIRONMENTAL IMPACT STATEMENT, Vols 1-2, §§ 4-7 (Mar. 2004), <http://www.nwd-mr.usace.army.mil/mmanual/feis/Index.htm>. Two spring rise alternatives were analyzed in Chapter 5 and nine alternatives in Chapter 7. *Id.*

¹⁹⁶ NORTHWESTERN DIVISION, U.S. ARMY CORPS OF ENGINEERS, ENVIRONMENTAL ASSESSMENT FOR THE INCLUSION OF TECHNICAL CRITERIA FOR SPRING PULSE RELEASES FROM GAVINS POINT DAM, MISSOURI RIVER WATER MANAGEMENT DIVISION (Feb. 2006), *available at* <http://www.nwd-mr.usace.army.mil/rcc/reports/pdfs/MRMainstemSystemSpringPulseEAFINAL.pdf>.

¹⁹⁷ *Id.* at 1, 13-14.

previously considered and that would warrant the preparation of a new EIS.¹⁹⁸ The Corps signed a decision document on February 28, 2006 revising the manual to adopt the new technical criteria for the spring rise¹⁹⁹.

The technical criteria provides for a March pulse not to exceed 5,000 cfs and a May pulse not to exceed 20,000 cfs.²⁰⁰ Each pulse has a two-day peak duration.²⁰¹ To conserve water in times of severe drought, system storage (preclude level) is required to be over thirty-six and one-half MAF for the first pulse in both March and May.²⁰² Thereafter, the preclude level changes to forty MAF for both the March and May pulses.²⁰³ To avoid downstream flooding, releases are reduced should downstream flows exceed the most conservative flood control constraints or it is anticipated that these levels will be exceeded based on downstream forecasted precipitation.²⁰⁴

Because system storage was less than thirty-six and one-half MAF on March 1, 2006, there was no March release in 2006. However, by May 1, 2006 system storage exceeded thirty-six and one-half MAF. The Corps increased releases from Gavins Point over the 16,000 cfs then being provided for downstream navigation and other purposes for a total release of 25,000 cfs which was maintained for a period of two days.

A. Missouri's Challenges to the Spring Rise

The State of Missouri filed suit in the District of Minnesota challenging the Corps' implementation of the spring rise alleging violations of NEPA by not preparing a full blown EIS as well as not considering a full range of alternatives.²⁰⁵ On February 8, 2008, the

¹⁹⁸ *Id.* at 33.

¹⁹⁹ Memorandum from Gregg Martin, Brigadier General U.S. Army (Feb. 28, 2006), available at <http://www.nwd-mr.usace.army.mil/rcc/reports/pdfs/FinalMod.pdf>.

²⁰⁰ 2006 MANUAL, *supra* note 2, at App. I I-8, I-9.

²⁰¹ *Id.*

²⁰² *Id.* at App. I I-8.

²⁰³ *Id.* at App. I I-8, I-9.

²⁰⁴ *Id.* at App. I I-8.

²⁰⁵ *Mo. v. U.S. Army Corps of Eng'rs*, No. 06-1616 (PAM), 2006 WL 3147736, at *1 (D. Minn. Nov. 2, 2006) slip op.

District Court issued its decision finding that the Corps was not arbitrary and capricious in deciding not to supplement the FEIS.²⁰⁶ The Court found that Missouri's argument that the bimodal release plan was a substantial change from previously considered alternatives lacked merit as the bimodal pulse actually reduces the environmental impacts because the rises are smaller in magnitude and duration than a single rise.²⁰⁷ The Court also found that the Corps' use of an EA to determine that a SEIS was not needed was not arbitrary or capricious, nor was there significant new information bearing on the action that necessitated the preparation of a new EIS. The Court concluded that the Corps had also complied with NEPA in its consideration of a range of alternatives.²⁰⁸ Since the District of Minnesota's jurisdiction over the multidistrict litigation ended on December 31, 2006, this was the last case heard in that forum as part of the multi-district litigation challenging the Corps' operations.²⁰⁹

Missouri appealed. In response to Missouri's argument that an SEIS was required because it was a substantial change from the 2004 ROD that had no spring rise, the Eighth Circuit Court of Appeals observed that this contention was contrary to established law and that a substantial change is one that is not qualitatively within the spectrum of alternatives that were discussed in a prior EIS.²¹⁰ The Court noted that the EA comprehensively compared the impacts of the bimodal spring rise with the spring rise options studied in the FEIS and concluded that the plan was within the impacts previously studied.²¹¹ The Court also found that the plan was not a substantial change from the historical releases.²¹² As there was no tenable claim of new information, the Court agreed with the District Court that the Corps was not arbitrary or capricious in deciding to

²⁰⁶ *In re* Operation of the Mo. River Sys. Litig., Mo. v. U.S. Army Corps of Eng'rs, 516 F.3d 688, 690 (8th Cir. 2008).

²⁰⁷ Mo. v. U.S. Army Corps of Eng'rs, No. 06-1616 (PAM), 2006 WL 3147736, at *4 (D. Minn. Nov. 2, 2006) slip op.

²⁰⁸ *Id.*

²⁰⁹ *In re* Operation of the Mo. River Sys. Litig., No. MDL-1555-PAM (D. Minn. Nov. 29, 2008)

²¹⁰ *In re* Operation of the Mo. River Sys. Litig., Mo. v. U.S. Army Corps of Eng'rs, 516 F.3d 688, 693 (8th Cir.,2008).

²¹¹ *Id.* at 694.

²¹² *Id.* at 694 (citing Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 235 (9th Cir. 1990).

not to prepare a new SEIS.²¹³ With respect to Missouri's argument that the Corps should have issued an EIS or FONSI, the Court stated that neither the Corps' regulations²¹⁴ nor CEQ's regulations²¹⁵ prescribe a specific process to determine whether to prepare an SEIS in the circumstances faced by the Corps.²¹⁶ On March 17, 2008, the Eighth Circuit Court denied Missouri's request for rehearing and rehearing en banc.²¹⁷

There was one more challenge to the Corps' Mainstem operations which was filed in the Eastern District of Missouri.²¹⁸ In March 2008, during a period of downstream flooding, Missouri filed a complaint in the Eastern District of Missouri challenging the March spring pulse under the FCA and the APA seeking a temporary restraining order and preliminary injunction.²¹⁹ Missouri alleged that the spring pulse was a violation of the FCA as it makes flood control a lesser purpose than fish and wildlife. Missouri also claimed that because there is latitude in the Master Manual to change operations, the Corps' failure to do so when there is downstream flooding that endangers life and property is an abuse of discretion under the APA. Missouri's request for a TRO was denied.²²⁰ That same day the Eighth Circuit denied Missouri's request for a temporary restraining order without prejudice.²²¹ Subsequently, the Corps increased releases at Gavins Point to implement the March spring pulse. This pulse increased releases by 5,000 cfs for a two day period. Missouri subsequently withdrew from this litigation.

²¹³ *Id.* at 694-95.

²¹⁴ 33 C.F.R. §§ 231.1, 230.10(a), 230.11 (2008).

²¹⁵ 40 C.F.R. § 1501.3(b) (2008).

²¹⁶ *In re* Operation of the Mo. River Sys. Litig., Mo. v. U.S. Army Corps of Eng'rs, 516 F.3d 688, 693 (8th Cir.,2008).

²¹⁷ *In re* Operation of the Mo. River Sys. Litig., Mo. v. U.S. Army Corps of Eng'rs, No. 07-1149 (8th Cir. 2008).

²¹⁸ Mo. v. U.S. Army Corps of Eng'rs, No. 08CV00400, 2008 WL 1750803 (E.D. Mo. Mar. 24, 2008).

²¹⁹ *Id.*.

²²⁰ *Id.*

²²¹ Mo. v. U.S. Army Corps of Eng'rs, No. 08-1659 (8th Cir. Mar. 25, 2008).

VII. THE CORPS' CURRENT ACTIVITIES IN THE MISSOURI RIVER BASIN

Following the conclusion of the Plenary Process for the spring rise, the Corps and FWS initiated a process to assist in developing a regional committee to assist both these agencies with respect to recovery actions in the Missouri River basin. Such a committee had initially been recommended in a National Academies of Sciences study released in 2002.²²² Following the NAS study, the Corps in its 2003 Biological Assessment proposed the creation of such a committee by the Corps and the FWS. The FWS in the 2003 Amended BiOp provided its support for such a committee. Subsequently, the Corps committed to the formation of the committee in its 2004 ROD to assist in coordination of its recovery efforts and to ensure a comprehensive approach to recovery implementation.²²³

A. Formation of the Missouri River Recovery Implementation Committee

After the conclusion of the spring rise plenary process, the Corps and the FWS, working with the USIECR, developed a situational assessment on the feasibility of convening a Missouri River Recovery Implementation Committee.²²⁴ Based on the situational assessment the Corps, the FWS, and other regional federal agencies who participate in the Missouri River Basin Interagency Roundtable,²²⁵ formed a federal

²²² NATIONAL RESEARCH COUNCIL, THE MISSOURI RIVER ECOSYSTEM, EXPLORING THE PROSPECTS FOR RECOVERY 137-41 (2002).

²²³ RECORD OF DECISION, *supra* note 119, at 5.

²²⁴ CDR ASSOCIATES, SITUATIONAL ASSESSMENT REPORT ON THE FEASIBILITY AND CONVENING OF A MISSOURI RIVER IMPLEMENTATION COMMITTEE (Apr. 14, 2006), *available at* http://missouririver.ecr.gov/pdf/FINAL_SARTR.pdf.

²²⁵ Missouri River Basin Interagency Roundtable ("MRBIR") is a forum for federal agencies advocating a collaborative approach to solving issues within the Missouri River watershed. Participating agencies have entered into a charter which sets forth their roles, responsibilities and procedures in developing collaborative opportunities in the Missouri River watershed. *See* Missouri River Basin Interagency Roundtable Memorandum of Understanding, A Partnership for Missouri River Stewardship (2005) (on file at Missouri River Water Management Office, Northwestern Division, U.S. Army Corps of Engineers, Omaha, Nebraska).

working group (“FWG”) that produced a framework²²⁶ for establishing a recovery committee under the Secretary of the Interior’s authority provided in the ESA.²²⁷ The USIECR and the FWG then established the MRRIC Planning Group which was comprised of federal, state, tribal and non-governmental representatives to develop a recommended Charter for the Missouri River Recovery Implementation Committee by the end of December 2007.

However, after the establishment of the MRRIC Planning Group, the Water Resources Development Act (“WRDA”) of 2007, became law with both the House and Senate voting to override the President’s veto.²²⁸ Section 5018 of WRDA 2007 established a requirement that the Secretary of the Army establish a Missouri River Recovery Implementation Committee comprised of federal, state, tribal, and non-governmental stakeholders.²²⁹ The duties of this committee were primarily to provide guidance to the Corps and any affected Federal agency, State agency, or Indian tribe with respect to a study called for in Section 5018 as well as to provide guidance to the Corps with respect to the Corps’ ongoing recovery and mitigation actions in the basin.²³⁰ Using the authority provided in Section 5018, on July 1, 2008, the Assistant Secretary for the Army for Civil Works approved a Charter for MRRIC, based on the recommendations of the MRRIC Planning Group and at the same time issued implementation guidance for Section 5018.²³¹ The first meeting of the Committee was held in St. Louis on September 29 through October 1, 2008.

²²⁶ FEDERAL WORKING GROUP, FRAMEWORK FOR ESTABLISHING THE MISSOURI RIVER RECOVERY IMPLEMENTATION COMMITTEE 3 (2007), *available at* <http://www.nwd-mr.usace.army.mil/rcc/reports/mrric/FINALFrameworkforEstablishingtheMRRIC02-05-07.pdf>.

²²⁷ Endangered Species Act, § 4(f)(2), 16 U.S.C. § 1533(f)(2) (stating that “[t]he Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.”)

²²⁸ Water Resources Development Act of 2007, Pub. L. No. 110-114, §2031, 121 Stat. 1041, 1082 (to be codified at 42 U.S.C. §1962-3).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

B. The Missouri River Ecosystem Recovery Plan

As indicated above, under Section 5018, WRDA 2007, MRRIC has two primary duties. First, to consult and provide guidance to the Army concerning a study that is required to be undertaken under the authority of Section 5018 and secondly, to provide guidance on the Missouri River recovery and mitigation plan.²³² The study called for in Section 5018 is to determine actions required to mitigate losses of aquatic and terrestrial habitat, recover ESA listed species, and to restore the ecosystem to prevent further declines among other native species.²³³ The Corps' refers to this study as the Missouri River Ecosystem Recovery Plan ("MRERP"). The reference to the Missouri River recovery and mitigation plan in Section 5018, WRDA 2007, refers to Section 601(a) of the Water Resources Development Act of 1986, which provided mitigation authority for the Bank Stabilization and Navigation Project.²³⁴ This was modified by Section 334, WRDA 1999 which expanded the lands to be acquired for the project.²³⁵ This authority was again modified by Section 3176, WRDA 2007 to expand the scope of the mitigation program to include the states of Montana, North Dakota, South Dakota and Montana in the upper Missouri River Basin.²³⁶

C. Missouri River Recovery Program

Funds appropriated for the Missouri River recovery and mitigation plan are managed by the Corps under the Missouri River Recovery Program (MRRP), which provides funding for mitigation and recovery actions, including MRRIC and the MRERP in both the lower and upper Missouri River Basin.²³⁷ This work covers almost all actions called for in

²³² *Id.*

²³³ *See id.* § 5018(a)(1).

²³⁴ *Id.*; WRDA 1986, P.L. 99-662.

²³⁵ *Id.*; 113 Stat. 306, P.L. 106-53 (Aug. 17, 1999).

²³⁶ WRDA 2007, Section 3176, *supra* note 228.

²³⁷ Personal conversation with Mike George, Program Manager, Missouri River Recovery Program, Omaha District, U.S. Army Corps of Engineers. In fiscal year (FY) 2005 approximately \$20 million was funded for Missouri River Recovery work, in FY 06,

the 2003 Amended BiOp, including the construction of emergent sandbar and shallow water habitat, flow modifications, as well as research and development activities for the three listed species.²³⁸

VII. CONCLUSION

The system changes brought about by the Master Manual Review and Update as well as the technical criteria incorporated into the Manual for implementation of the Gavins Point bimodal spring pulse were not the changes to the status quo that many interests in the basin expected, or on the other hand, that others wanted. However, as the preceding description of the litigation over these changes indicates, the actual operational changes made to system operations have been sustained by the reviewing courts, and in this process the role of the Corps under the FCA, the legal status of the Master Manual, and the role of the courts in reviewing the operational decisions of the Corps has been clarified. What remains to be definitively addressed is the extent to which the Corps can make future operational decisions at the expense of flood control and navigation, characterized by *ETSI* as dominant purposes of the FCA. Certainly, the Eighth Circuit has crafted very deliberate language concerning future changes to the established priorities of the FCA, which, while not ruling out such changes, certainly portends against any major alteration to the current regulation regime without new legislation from Congress, a Supreme Court ruling, or a case originating outside the Circuit to unsettle the existing established legal landscape.

In 1989 the Corps embarked on a journey to change the 1979 Manual that came to conclusion in 2004 and 2006. With the advent of WRDA 2007, the Corps and other federal agencies along with basin tribes, states, and non-governmental stakeholders are now embarking together on another effort, not to change a Manual, but more importantly, to look at

approximately \$55 million, in FY 07, approximately \$85 million, and in FY 08, \$50 million. *Id.*

²³⁸ Information related to these and other current initiatives of the Corps are available at the following websites: <http://www.moriverrecovery.org> and <http://missouririver.ecr.gov>. Annual reports issued by the Corps from 2001 to 2007 are available at these websites and provide detailed descriptions of the recovery work taking place within the basin. *Id.*

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the Missouri River ecosystem and to determine, in a collaborative approach, what can be accomplished to mitigate losses of aquatic and terrestrial habitat, recover federally listed species, and restore the ecosystem to prevent further declines of native species. Given the geographic scale of the nation's longest and largest river basin and the diverse economic, cultural and political interests within its boundaries, this challenge posed by Congress to the basin to work collaboratively together to create a vision for the Missouri River and the Missouri River Basin for the next 200 years is as daunting in its complexity as the challenge faced over 200 years ago by the "Corps of Discovery."

