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In re Operation of the Mo. River Sys. Litig., 418 F.3d 915; 421 F.3d 618 (8th Cir. 2005)

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ton's Illinois facilities. On most days, Bunch spent about twenty minutes aboard the Sir Joseph.

Although the cleaning barge was originally built for navigation, Canton generally kept it secured in position. Strong currents would shift the position of barge slightly. During Bunch's tenure, Canton moved the cleaning barge only once from the Illinois side of the river to the Missouri side. The cleaning barge did not have propellers and did not move by itself. On April 20, 2001, as Bunch traveled from the cleaning barge to the Illinois facilities aboard the Sir Joseph, Bunch stopped the tug to inspect other barges. After inspecting the other barges, Bunch fell climbing back aboard the Sir Joseph and sustained injuries.

Bunch sued Canton and the Sir Joseph under the Jones Act ("Act"), section 33 of the Merchant Marine Act of 1920, 46 U.S.C. app. § 688. The United States Supreme Court established a two-part test for determining seaman status under the Act in *Chandris, Inc. v. Latsis*: (1) the "employee's duties must contribute to the function of the vessel or to the accomplishment of its mission," and (2) the employee "must have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature." Applying this test, the United States District Court for the Eastern District of Missouri granted summary judgment to Canton, concluding Bunch was not a "seaman" covered by the Jones Act because Bunch "simply did not have a substantial connection to a vessel in navigation."

On appeal, the United States Court of Appeals for the Eighth Circuit needed only to consider whether the cleaning barge, upon which Bunch spent the majority of his work time, qualified as a "vessel in navigation." The court applied the recent United States Supreme Court decision in *Stewart v. Dutra Construction Co.*, wherein the Supreme Court clarified the definition of "vessel" under the Act. Based on *Stewart*, the court focused on Canton's use of the cleaning barge, questioning whether the cleaning barge could operate "as a means of transportation on water." The court concluded the cleaning barge was a "vessel in navigation" because Canton had not permanently moored or anchored the cleaning barge to the river bed, and Canton had moved the barge from its mooring to travel across the river during the time Bunch worked for Canton. The fact that currents would move the barge also demonstrated the mooring was not permanent. Lastly, there was no evidence showing that Canton had taken the barge out of service or rendered the barge incapable of maritime transportation. The court remanded the case to the district court for proceedings consistent with its decision.

Kevin Kennedy

***In re Operation of the Mo. River Sys. Litig.*, 418 F.3d 915; 421 F.3d 618 (8th Cir. 2005)** (multiple states and conservation organizations initi-

ated litigation seeking declaration that federal management of the Missouri River violated state and environmental standards, and sought injunctive relief requiring that the agencies comply with the standards).

Background

The Missouri River begins in Montana, runs through North Dakota, South Dakota, Nebraska, Iowa, Kansas, and Missouri, then flows into the Mississippi River. To try to control spring flooding of the river, Congress enacted the Flood Control Act of 1944 ("FCA"), which authorized the U.S. Army Corps of Engineers ("Corps") to construct a dam and reservoir system on the upper part of the river. Congress also authorized the Corps to manage the main stem reservoir system by using the reservoirs as a water source for irrigation projects, slowly releasing water from the reservoirs during the summer to facilitate downstream navigation, providing hydroelectric power, and generally providing a site for water recreation. In balancing these competing interests, the U.S. Supreme Court, in *South Dakota v. Ubbelohde*, held "the Corps's primary concerns should be flood control and navigation." The Corps published its general operational guidelines for the Missouri River reservoir system in a Master Manual, the most recent version being the 2004 Master Manual. The Corps' overall operation of the river system included capturing water upstream using dams and reservoirs, thereby eliminating flooding, then slowly releasing water from the reservoirs during the summer and fall to enable downstream navigation.

***In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618 (8th Cir. 2005)** (affirming summary judgment for the Corps and U.S. Fish and Wildlife Service because (1) the Master Manual was not invalid because the Corps properly considered downstream navigation; (2) the Corps could comply with the ESA and still meet its statutory duty under the FCA, because the Corps had discretion in balancing navigation with the other interests; (3) the FWS considered the best scientific data with respect to the summer low flow and met the required rational connection between the decision and the facts; (4) the FWS and Corps demonstrated a proper rational connection between the scientific evidence and the decision to use habitat restoration for the flow requirements mandated by the 2000 Opinion; and (5) the information presented by the Corps for the preferred alternative was sufficient.)

In addition to balancing competing goals of the river system, the Corps must operate in accordance with the Endangered Species Act ("ESA"). If the Corps' operation of the river threatens the existence of a species protected under the ESA, or hurts its critical habitat, the FWS must analyze the degree of impact. The FWS issues a Biological Opin-