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

Kate Brewer

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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-

ion (“Opinion”) describing the impact using the “best scientific and commercial data available.” If the Opinion concludes that the agency action would harm a protected species, the Opinion must include an alternative plan for the agency.

The FWS issued an Opinion in 2000, finding that continued operation of the river system would threaten the existence of three protected species: the pallid sturgeon, the least tern, and the piping plover. As a reasonable and prudent alternative, the FWS mandated flow changes and habitat restoration for the species. In 2003, the FWS issued a Supplemental Opinion allowing the Corps to avoid the flows mandated in the 2000 Opinion for the period of May 1, 2003 through August 15, 2003, but after this time the Corps must comply with the 2000 Opinion. Litigation ensued in various federal district courts with respect to the Corps’ planned operation of the Missouri River System, so the Federal Judicial Panel on Multi-District Litigation consolidated all litigation concerning the Missouri River main stem river system operation in the United States District Court for the District of Minnesota.

In 2003, the FWS issued an Amended Opinion permitting the Corps to avoid the summer low flow requirement of the 2000 Opinion if the Corps constructed a habitat for one of the protected species. Finally, in 2004, the Corps issued its 2004 Master Manual and 2004 Operating Plan. Thereafter, various parties brought suit against both the Corps and FWS based on the Corps’ anticipated operation of the Missouri River system. The court granted summary judgment to the Corps and FWS on all claims. The parties appealed to the U.S. Court of Appeals for the Eighth Circuit.

The court rejected Missouri, Nebraska, and Nebraska Public Power District’s (“NPPD”) argument that the 2004 Master Manual was invalid because it allowed cancellation of navigation under certain drought conditions to allow for upstream recreation. The court first noted that the functions of the river are set forth in the FCA as primarily allowing for navigation and preventing flooding, and secondarily to allow for irrigation, recreation, and supporting fish and wildlife. Further, the FCA does not specify a minimum maintenance level of downstream navigation before the Corps can consider a secondary interest such as recreation. The Corps must, however, consider each interest. Therefore, the court held that the Corps properly considered downstream navigation.

The court also rejected North Dakota and South Dakota’s argument that recreation deserves higher priority than navigation because damage to recreation would cause a greater economic impact. The FCA does not mention considering the economic impact of each interest when balancing the competing interests, and therefore the court held that economic impact cannot be considered. Therefore, the court upheld the Corps’ 2004 Master Manual as properly balancing water-use interests, affirming the decision of the district court.

Secondly, Nebraska and NPPD argued that the ESA does not apply to operation of the river system because the Corps must allow for downstream navigation and compliance with the ESA would defeat this requirement. The court noted that environmental or wildlife statutes do not apply if, by application, they would result in an agency, such as the Corps, being unable to comply with its non-discretionary statutory purpose. However, here 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. Therefore, the court held that the Corps was subject to the ESA because it can exercise discretion in fulfilling the reservoir system's purpose, and that the Corps properly consulted with the FWS.

NPPD and American Rivers set forth various arguments challenging the validity of the 2003 Amended Opinion. NPPD challenged the 2003 Amended Opinion as allegedly not using the best scientific data as required by the ESA. The court found that, based on the administrative record, 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, affirming the decision of the district court.

The court also rejected American Rivers' allegations that the FWS's decision to replace the flow requirements in the 2000 Opinion with the habitat restoration in the 2003 Amended Opinion was arbitrary and capricious. The court found the FWS properly concluded that the habitat restoration was a rational alternative. Further, the court noted that an agency does not have to expressly state every detail of its decision in the Biological Opinions, and that the rationale can be found instead in the administrative record. Therefore, the court held 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, again affirming the decision of the district court.

Finally, American Rivers argued that the Corps' selection of the preferred alternative was in error because the Corps failed to properly explain its reasoning for choosing it. NEPA requires that alternatives be set forth by "sharply defining the issues and providing a clear basis for choosing among options by the decision-maker and the public." The court held that the information presented by the Corps was sufficient, by presenting the alternatives in a series of tables, including a comparison of effects on downstream navigation and floodplain crop damages. Therefore, the court affirmed district court's order of summary judgment.

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