

No. 11-1937

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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STATE OF MISSOURI,	)	Appeal from the United States
	)	District Court for the Eastern
Plaintiff-Appellant,	)	District of Missouri, Southeastern
	)	Division.
v.	)	
	)	
UNITED STATES ARMY CORPS OF	)	
ENGINEERS, MAJOR GENERAL	)	
MICHAEL WALSH, COLONEL VERNIE L.	)	
REICHLING, JR.,	)	
	)	No. 11-CV-00067
Defendants-Appellees,	)	
	)	
and	)	
	)	
STATE OF ILLINOIS and	)	
COMMONWEALTH OF KENTUCKY,	)	
	)	The Honorable
Intervenors-Defendants-	)	STEPHEN N. LIMBAUGH, JR.,
Appellees.	)	Judge Presiding.

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**RESPONSE OF STATE OF ILLINOIS TO  
STATE OF MISSOURI'S MOTION FOR INJUNCTION PENDING APPEAL**

Intervenor-Defendant-Appellee State of Illinois, by its attorney, Lisa Madigan, Attorney General of Illinois, respectfully requests that this Court deny Plaintiff-Appellant State of Missouri's Federal Rule of Appellate Procedure 8 motion for injunction pending appeal. In support of this response, Illinois states as follows.

## **Background**

Missouri filed this action seeking to enjoin the United States Army Corps of Engineers from exercising its discretion in implementing the Birds Point-New Madrid Floodway Operations Plan. Doc. 26 at 2. Pursuant to the Operations Plan, under certain extreme flooding conditions, the Corps has the discretion to breach a levee at Birds Point, Missouri to alleviate flooding along the Mississippi and Ohio Rivers. *Id.* at 1. The breach will divert floodwater onto approximately 130,000 acres of private and public land in Mississippi and New Madrid Counties in Missouri. *Id.* Illinois and the Commonwealth of Kentucky were permitted to intervene as defendants in the district court. *Id.* at 2. After a hearing with testimony from witnesses, the district court denied Missouri's motion for a temporary injunction prohibiting the Corps from putting the Operations Plan into effect. *Id.* at 11.

### **Harm to Illinois in the Event of a Temporary Injunction**

The Corps developed the Birds Point-New Madrid Floodway, a part of the Mississippi River & Tributaries Project ("MR & T Project"), to control flooding from the Mississippi River in several States, including Illinois. *See* Juhl Aff. (4/28/11) ¶ 4 (attached as Exh. 1); Doc. 1, Exh. 1 (Vicinity Map). Specifically, the Corps' release of flood waters into the Floodway helps to alleviate flooding conditions in southern Illinois. *See* Juhl Aff. (4/28/11) ¶ 4. If the Corps cannot efficiently operate the Floodway, areas in the Floodway's vicinity are at risk of significant damage, including the Illinois municipalities of Cairo, Golconda, Grand Tower, and Reevesville. *See*

Walsh Aff. ¶ 13 (Doc. 8, Exh. 1). Each of these localities relied on the Floodway's operation in constructing its community. *See id.*

In 1986, the Corps issued the Operations Plan, which provides for the demolition of a portion of the Birds Point levee if flood water levels reach a specified height. *See Doc. 1, Exh. 1, at I.B.2.a.* If the Corps is not permitted to use the Floodway as planned, the stress on other parts of the MR & T Project may result in the breaching or overtopping of an adjacent levee, risking the death of substantial numbers of humans and animals; the introduction of contaminants (from agricultural, industrial, and residential sources) into the natural environment, potentially with long-term, adverse effects; and the propagation of diseases associated with the decay of organic material. *See Walsh Aff. ¶ 10.*

Indeed, a number of Illinois communities are currently experiencing flooding conditions as a result of water backing up at the confluence of the Mississippi and Ohio Rivers—a result of flooding at the very juncture the Floodway was designed to address. *See Juhl Aff. (4/28/11) ¶¶ 5-6.* Any delay in implementing the demolition called for by the Corps' Operations Plan threatens additional flooding and damage in these areas. *See id. at ¶¶ 6-8.* There are no other engineered means of addressing this flood emergency. *See id. at ¶ 11.*

Meanwhile, conditions are deteriorating rapidly in Cairo. By 3:00 Thursday afternoon, the Cairo Floodwall in Alexander County had developed a 30-foot “sand boil,” a symptom of “substantial degradation of the Cairo Floodwall in the past 24

hours” and proof that “hydrostatic pressure from the high water elevations in the Ohio River is so great that large amounts of water are getting underneath the Floodwall” and “threatening Cairo.” Juhl Aff. (4/29/11) ¶ 6 (attached as Exh. 2). The situation was even more dire by Friday. Not only was “the sand boil . . . still present and percolating muddy water” despite repair efforts, but “the Ohio River ha[d] risen to fifty-nine feet,” “[t]he land surrounding the sand boil [was] completely saturated” with most of it underwater, sink holes had developed within the town of Cairo itself, and a second sand boil had formed. *Id.* at ¶¶ 7, 9. In short, “hydrostatic pressure is producing so much water behind the Cairo Floodwall . . . that the Floodwall is at risk of failure.” *Id.* at 10. As floodwaters rise, they create “hydrostatic pressure” on the levees, which can lead first to seepage, and ultimately to the levee’s failure. *Id.* at ¶¶ 10-11. That process of degradation is now well underway in Cairo.

**Missouri’s motion for an injunction pending appeal should be denied.**

To be eligible for an injunction pending appeal, Missouri must meet the elements outlined in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F. 2d 109, 114 (8th Cir. 1981). See *Shrink Mo. Gov’t PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998). Under *Dataphase*, Missouri must show (1) a likelihood of success on the merits; (2) likelihood of irreparable injury in the absence of an injunction; (3) the absence of substantial harm to the other interested parties if an injunction is granted; and (4) the absence of harm to the public interest if an injunction is granted. 640 F.2d at 114. The party seeking injunctive relief bears the burden of establishing

these factors, *CDI Energy Servs. v. West River Pumps, Inc.*, 567 F.3d 398, 401 (8th Cir. 2006), and that burden is especially heavy where, as here, the requested injunction will give the movant substantially all of the relief it would obtain after a trial on the merits, *see United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998).

The district court correctly concluded that Missouri has no likelihood of success on the merits of the claims that formed the basis for its injunction motion. Doc. 26 at 6-11. Illinois adopts that holding and the Army Corps' argument on this element. Doc. 8 at 8-15. In the alternative, and for the reasons discussed below, Missouri's motion fails on the independent ground that it cannot satisfy the remaining three *Dataphase* elements.

**I. Missouri residents do not face a likelihood of irreparable injury if the injunction does not issue.**

Missouri did not establish that its residents face a likelihood of irreparable injury if the injunction does not issue. To satisfy this element, the movant must show that “the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.” *Iowa Utils. Bd. v. Fed. Commc’ns Comm’n*, 109 F.3d 418, 425 (8th Cir. 1996). Irreparable harm occurs where there is no adequate remedy at law, generally because a party’s injuries may not be fully compensated by money damages. *General Motors Corp. v. Harry Brown’s, LLC*, 563 F.3d 312, 318-19 (8th Cir. 2009). As this Court held in a case materially indistinguishable from this one, and as the district court correctly held, the proper

remedy is not to enjoin operation of the Floodway, but rather for landholders to pursue claims under the Tucker Act. *Story v. Marsh*, 732 F.2d 1375, 1384 (8th Cir. 1984); Doc. 26 at 4 n.2.

## **II. The balance of the harms favors denying the injunction.**

Enjoining the exercise of the Army Corps' discretion under the Operations Plan puts many people and communities in significant danger. *Dataphase* requires Missouri to establish that there will not be substantial harm to other parties if the injunction is granted. 640 F.2d at 114. If the Operations Plan is enjoined, Missouri claims that 130,000 acres of farmland will be spared from damage, and that approximately 200 people will avoid the flooding. Motion at 1-2, 5, 21-23. But Missouri fails to consider that this land is in an area that for decades has been designated a Floodway, a vital design element in a flood control system spanning several States. As the district court explained, the Floodway is the MR & T Project's safety valve, and “[a]ll of the [Project] system's 3,787 miles of levees are designed on the assumption that the Floodway will be efficiently and timely utilized.” Doc. 26 at 4. Nor should this fact come as a surprise to the Floodway's 200 occupants, most of whose land is subject to easements that the federal government purchased. *See id.* at 4-5 & n. 2. Moreover, and significantly, 60% of the Floodway is already flooded, independent of any Corps action. *Id.* at 5.

In contrast, if the Operations Plan is enjoined, even temporarily, the town of Cairo will be in imminent danger, and the conditions there are growing more urgent.

*See supra* pp. 3-4. Many other communities also will be at risk due to the extraordinary flooding conditions. The expected duration of the extreme flood levels jeopardizes not only the Cairo levee, but many other levees along the Mississippi and Ohio Rivers. Juhl Aff. (4/28/11) ¶¶ 6-9. Failure to use the Floodway in the manner long-intended will put thousands of people and many communities in peril. Walsh Aff. ¶ 13.

Missouri attempts to trivialize these harms, claiming that the Cairo levee is “not currently overtopping” and that the flood level has “only” reached 58 feet there (flood stage is 40 feet). Motion at 23. But this argument is doubly flawed. First, it proceeds from the false premise that the only way for flood water to breach a levee is for that water to “overtop” the levee—*i.e.*, to rise to a level in excess of the levee’s own height. See Motion at 21, 23, 25. That is not true. As floodwaters rise, they create “hydrostatic pressure” on the levees, which can lead first to seepage, and then to the levee’s ultimate failure, Juhl Aff. (4/29/11) ¶¶ 10-11, a process of degradation already well underway in Cairo, *see supra* pp. 3-4. Nor must water start flowing into Cairo to justify use of the Floodway, as Missouri appears to presume. *See id.* at 23. The Operations Plan does not require the Corps to wait until the levees at Cairo or elsewhere fail. The purpose of the Plan is to *prevent* those occurrences, not wait for them to happen and then take action when it may be too late.

Second, and even more fundamentally, Missouri does not seek to enjoin the Corps from breaching the Birds Point levee under current conditions, but rather to

enjoin the Corps from exercising its discretion to breach the levee under *any* conditions. Motion at 1 (“Missouri requests an injunction pending appeal to bar the defendant U.S. Army Corps of Engineers from breaching the Front Line Levee, thus flooding 130,000 acres of Missouri land.”). Even assuming *arguendo* that conditions did not justify a breach at the time of the April 28 hearing, or even when Missouri filed its motion in this Court—both sound assumptions given that the Corps has yet to order the breach—Missouri’s focus on those conditions is irrelevant. The Corps needs the discretion that Congress gave it to act if conditions worsen, and Missouri’s requested injunction would remove that discretion entirely.

In short, contrary to Missouri’s contention, the balance of harms do not favor an injunction merely because the levee at Cairo has yet to fail. The Corps will open the Floodway only if, and when, it is “absolutely essential” to do so “to provide the authorized protection to all citizens.” Doc. 26 at 11. The injunction that Missouri requests would strip the Corps of its ability to breach the levee even under such extreme conditions, and thus the relevant balance-of-harms inquiry must assume that those conditions are met—*i.e.*, that the only choice is between opening the Floodway and letting levees at Cairo and elsewhere fail. Missouri does not, and cannot, claim that such a balancing would favor its proposed injunction.

### **III. The public interest requires denial of the injunction.**

Finally, the public interest also requires that the Corps retain its discretion to use the Floodway as the Operations Plan provides. In analyzing this final *Dataphase* factor, courts are particularly reluctant to disturb decisions entrusted to the discretion of the military. *See Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 377-78 (2008).

Very little needs to be said on this score. Missouri asserts its interest in farmland occupied by 200 people in a known Floodway as more significant than the safety of communities across at least three States. Congress' decision to give the Corps the discretion to determine when to operate the Floodway is tantamount to a pronouncement that the public interest disfavors Missouri's requested injunctive relief. Missouri's only response is that pollutants on Floodway land may be washed into the waterways, and that it would be difficult to gauge the environmental impact of that event. Motion at 25. But if the Corps does not have discretion to breach the Birds Point levee, the failure of levees elsewhere and the accompanying destruction of communities risks the introduction of many more pollutants into the waterways. See Walsh Aff. ¶ 10. Missouri's public interest argument fails.

For each of the forgoing, independent reasons, this Court should deny Missouri's motion for an injunction pending appeal.

Respectfully submitted,

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