

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

STATE OF MISSOURI, ex rel.)
 Chris Koster, and the)
 MISSOURI DEPARTMENT OF)
 NATURAL RESOURCES,)
 MISSOURI STATE EMERGENCY)
 MANAGEMENT AGENCY,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES ARMY CORPS)
 OF ENGINEERS, MAJOR)
 GENERAL MICHAEL J. WALSH,)
 COLONEL VERNIE L. REICHLING,)
 JR.,)
 Defendants.)

No. 11-CV-00067-SNLJ

MEMORANDUM IN SUPPORT OF THE COMMONWEALTH OF KENTUCKY’S
UNOPPOSED MOTION TO INTERVENE

Pursuant to a plan of operation developed by the United States government to address flooding of the Mississippi River, the United States Army Corps of Engineers is considering plans to breach a portion of a levee of the Birds Point-New Madrid Floodway project. The State of Missouri has filed a complaint and a motion for a temporary restraining order seeking to enjoin the Corps’ planned action. Because Missouri’s requested relief, if granted, threatens to injure residents and property within the Commonwealth of Kentucky (the “Commonwealth”), the Commonwealth respectfully asks this Court to grant it leave to intervene in this litigation. No party to the case opposes the Commonwealth’s proposed intervention.

Statement of Facts

The Corps developed the Birds Point-New Madrid Floodway project to control flooding from the Mississippi River in several States, including Kentucky. *See* Birds Point-New Madrid Floodway Operations Plan, Vicinity Map (attached as Exhibit A to Missouri's complaint). Specifically, the Corps' release of flood waters into the Floodway helps to alleviate flooding conditions in southern Kentucky. *See* Gallagher Aff. ¶¶ 5-9. In 1986, the Corps issued an Operations Plan providing for the breach of a portion of a levee located near Cairo, Illinois if water levels reach a specified height. *See* Operations Plan, I.B.2.a.

A number of Kentucky communities are currently experiencing flooding conditions as a result of water backing up at the confluence of the Mississippi and Ohio Rivers—as a result of flooding at the very juncture the Floodway was designed to address. *See* Joe Barrett, *Flood Hits 74-Year High*, *The Wall Street Journal*, April 28, 2011. Any delay in implementing the demolition called for by the Corps' 1986 Operations Plan threatens additional flood risk and damage to these parts of Illinois. *See* Gallagher Aff. ¶ 5, 7-9.

Moreover, residents of and property in Hickman, Kentucky and Fulton County, Kentucky, (which sits on the eastern bank of the Mississippi River) will be at substantial risk of harm if the Corps' Operations Plan is not implemented. *See* Gallagher Aff. ¶¶ 4, 9-10. If the levees at Cairo are breached and the Floodway is not operated, water levels in Hickman are projected to rise 3.9 feet over the flood wall. *See* Gallagher Aff. ¶ 7. This will put the health and safety of Fulton County's roughly 8,000 residents at grave risk. *See* Gallagher Aff. ¶ 4. If Fulton County floods, many of its residents will be homeless and without recourse.

Argument

A party seeking to intervene in an action as of right must establish both that it has standing to complain, and that the requirements of Federal Rule of Civil Procedure 24(a) are met. *See South Dakota v. Ubbelohde*, 330 F.3d 1014, 1023 (8th Cir. 2003). Rule 24(a), in turn, requires that the proposed intervenor establish that it claims an interest in the property or transaction that is the subject of the litigation, that disposing of the litigation in the party's absence may impair or impede its ability to protect its interest, and that the interest is not adequately represented by the current parties to the suit. *See Fed. R. Civ. Pl. 24(a)(2); accord Ubbelohde*, 330 F.3d at 1023. The Commonwealth satisfies each of these requirements.

First, the Commonwealth has standing to intervene because there is substantial evidence that the relief sought by Missouri threatens the Commonwealth, its citizens and its property with serious injury. As the attached affidavit of Mr. Gallagher demonstrates, any delay in implementing the Corps' Operations Plan will put Kentucky communities and the health and safety of the nearly 8000 residents of Fulton County, Kentucky at serious risk. *Cf. Ubbelohde*, 330 F.3d at 1024 (evidence that State's request to preliminarily enjoin Corps from releasing water to maintain river flow, if granted, would threaten injury to sister State gave sister State standing to intervene).

Kentucky has a significant interest in this litigation and thus satisfies the first criteria necessary for intervention as of right under Rule 24(a). If Missouri succeeds in enjoining the implementation of the Floodway, the flooding that will certainly result will injure Kentucky residents and property. *Cf. Ubbelohde*, 330 F.3d at 1025 (because success by plaintiff "in the whole litigation would impair the proposed intervenors' interests in the operation of the River," intervenors have interest in litigation).

Furthermore, adjudication of this action without allowing Kentucky to represent itself will impair or impede the Commonwealth's ability to protect its interests, because the Corps is not expressly tasked with the duty to represent the Commonwealth. Rather, "the [federal] government must represent the interests of all of its citizens, which often requires the government to weigh competing interests and favor one interest over another." *Ubbelohde*, 330 F.3d at 1025. Here, "[t]he Corps is charged with managing the [Mississippi] River system as a whole—a charge that requires it to balance the interests of" Missouri, Illinois, Kentucky and Tennessee and other downstream states. *Id.* at 1025. This charge is reflected in the Operations Plan, which provides that the challenged operation should "occur only as absolutely essential to provide the authorized protection to *all citizens*." Birds Point-New Madrid Floodway Operations Plan, Part I.A. (emphasis added).

Because the Corps represents *all* interests affected by the Mississippi River's operations, the Corps cannot exclusively represent the interests of any one State's residents and property owners. Indeed, Missouri's lawsuit—which is predicated on allegations that the Corps has not adequately protected the interests of Missouri citizens and waterways—"indicates a fear that the Corps cannot adequately represent the interests of all parties." *Ubbelohde*, 330 F.3d at 1025. Just as Missouri is entitled to exclusively represent the interests of its residents and property owners, so, too, is the Commonwealth. The final requirement for intervention under Rule 24(a) is therefore satisfied. *Cf. id.* ("Given that the Corps is asked to balance multiple interests, we conclude that it cannot adequately represent the interests of downstream users in this case.").

Conclusion

For the foregoing reasons, the Commonwealth requests that this Court grant it leave to intervene as of right or, in the alternative, permissively.

Respectfully submitted,

JACK CONWAY

Attorney General of the Commonwealth of
Kentucky

/s/ Dana C. Nickles

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STATE OF MISSOURI)	
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Plaintiff,)	
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vs.)	No. 11-CV-00067-SNLJ
)	
UNITED STATES ARMY CORPS)	
OF ENGINEERS,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2011, I electronically filed the foregoing Memorandum in Support of the Commonwealth of Kentucky’s Unopposed Motion To Intervene with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Respectfully submitted,

By: /s/ Dana C. Nickles
Dana C. Nickles
Assistant Deputy Attorney General
Office of the Attorney General
Commonwealth of Kentucky
700 Capital Avenue, Suite 118
Frankfort, KY 40601

AFFIDAVIT

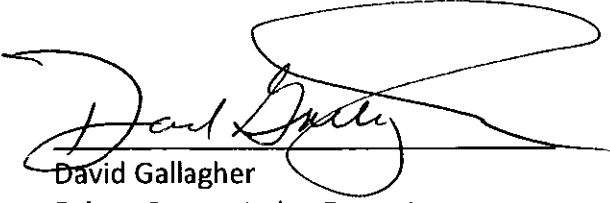
Comes the Affiant, David Gallagher, after being duly sworn, and states as follows:

1. I am the County Judge Executive for Fulton County, Kentucky.
2. The City of Hickman is located in Fulton County, Kentucky.
3. I am very familiar with the City of Hickman and Fulton County, Kentucky. I am also familiar with the levees protecting the residents of the Fulton County, Kentucky.
4. In 2000 the county population was 7,752 in a land area of 208.95 square miles.
5. Areas of Fulton County, including the City of Hickman, are protected by the levee at Hickman, Kentucky and south from Fulton County, Kentucky into Lake County, Tennessee. The highest that the water has ever gotten (on the Cairo gauge) was 59.5 feet in the 1937 flood. The integrity of the levee has never been tested for a river level in Cairo, Illinois in excess of 59.5 feet. The projected 7:00 am stage for April 28, 2011, was 58.9. The project crest is 60.5 for May 1, 2011.
6. The City of Hickman, Kentucky is also protected by an earthen and concrete floodwall that is attached to the levee system. The floodwall is approximately $\frac{3}{4}$ mile long and is leaking in multiple locations. The floodwall faces overflow with approximately 4.5 feet of additional water.
7. If the floodway is operated as designed and planned, by the US Army Corp of Engineers it will reduce the stage at Hickman by approximately 3.9 feet of water.
8. The greatest current risk to the mainline levee system is the under seepage of the mainline levee at various locations in Fulton County, Kentucky. Of greatest concern to both local and Corps officials are the increased number and size of under seepage sand

boils located at or near mile 7. National Weather Service predicts that the river will remain at these extended high levels for in excess of ten days. The risk of mainline levee failure is imminent under these circumstances. The greatest danger is continued river levels in excess of 55 feet.

9. If the levee fails, lives will be in danger in Fulton County, Kentucky as well as in Lake and Dyer Counties in Tennessee.
10. If the levee fails, the US Army Corp of Engineers projects that property damages in Fulton County alone will be over \$32 million.
11. Fulton County is now monitoring the levee with armed law enforcement 24 hours a day to prevent levee damage, including vandalism and sabotage.
12. I have known of the Bird Point-New Madrid Floodway for at least 20 years. The floodway is common knowledge in Fulton County. People have resided, developed property and built homes in Fulton County relying on the existence of this floodway as an alleviation of flooding problems in Fulton County.

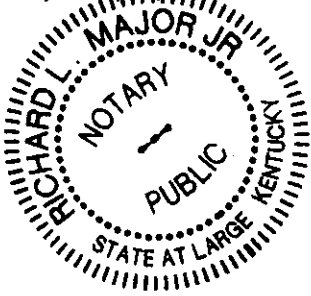
Further, the Affiant sayeth not.


David Gallagher
Fulton County Judge Executive

COMMONWEALTH OF KENTUCKY

COUNTY OF FULTON

Subscribed, acknowledged, and sworn to before me by David Gallagher on this the 28th
day of April, 2011.



Richard L. Major Jr.

Notary Public, State at Large

My Commission Expires: 5-11-2011