

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. )

No. 11-CV-00067-SNLJ

UNITED STATES ARMY CORPS )  
OF ENGINEERS, MAJOR )  
GENERAL MICHAEL J. WALSH, )  
COLONEL VERNIE L. REICHLING, )  
JR., )

Defendants. )

MEMORANDUM IN SUPPORT OF ILLINOIS'  
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. 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 Illinois residents and property, this court should grant Illinois leave to intervene in this litigation. No party to the case opposes Illinois' 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 Illinois. See Juhl Aff. ¶ 4 (attached as Exh. A); Birds Point-New Madrid Floodway Operations Plan, Vicinity Map (attached as Exh. A to Missouri's complaint). Specifically, the Corps' release of flood waters into the Floodway helps to alleviate flooding conditions in southern Illinois. See Juhl Aff. ¶ 4. 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 Illinois 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 Juhl Aff. ¶¶ 5-6. 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 Juhl Aff. ¶ 6-8. There are no other engineered means of addressing this flood emergency. See Juhl Aff. ¶ 11.

Moreover, residents of and property in Cairo, Illinois (which sits at the confluence of the Mississippi and Ohio Rivers) will be at substantial risk of harm if the Corps' Operations Plan is not implemented. See Wilson Aff. ¶¶ 6, 8. If the levees protecting Cairo are breached, water levels in the City will rise 18 to 20 feet, more than the height of a two-story building. Wilson Aff. ¶ 5. This will put the health and safety of Cairo's 2831 residents (17.9% of whom are over the age of 65

and 33.3% of whom live below the poverty line, according to the 2000 census) at grave risk. Wilson Aff. ¶¶ 3, 6. In addition, Cairo is located in one of Illinois' poorest counties and has a per capita rate of residency in housing projects that exceeds any city in the United States. Wilson Aff. ¶¶ 6, 9. If Cairo floods, many of its residents will be homeless and without recourse. Wilson Aff. ¶ 6.

### 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. Illinois satisfies each of these requirements.

First, Illinois has standing to intervene because there is substantial evidence that the relief sought by Missouri threatens Illinois and its citizens with serious injury. As the attached affidavits of Mr. Juhl and Mr. Wilson demonstrate, many Illinois communities are already experiencing flooding as a result of high water levels on the Ohio and Mississippi Rivers. Any delay in implementing the Corps' Operations Plan will put these communities and, most immediately, the health and safety of the nearly 3000 residents of Cairo, Illinois 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).

Second, and with regard to the first Rule 24(a) requirement, Illinois has an interest in this litigation. Success by Missouri will injure Illinois residents and property due to the flooding that likely will result if the Corps is enjoined, even for a short time, from implementing the Operations Plan. 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).

Finally, disposing of this action may as a practical matter impair or impede Illinois’ ability to protect its interests, because the Corps is not tasked with the duty to represent Illinois. 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” both Missouri and Illinois residents and property owners, as well as the residents and property owners of other, adjoining 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 Illinois. The final requirement for intervention thus is 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, Illinois requests that this Court grant it leave to intervene as of right or, in the alternative, permissively.

Respectfully submitted,

LISA MADIGAN  
Attorney General of Illinois

MATTHEW J. DUNN, Chief  
THOMAS E. DAVIS  
Environmental Enforcement/ Asbestos  
Litigation Division

BY: s/ Rex L. Gradeless  
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IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF MISSOURI

STATE OF MISSOURI	)		
	)		
Plaintiff,	)		
	)		
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 Illinois' Unopposed Motion To Intervene with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Jessica L. Blome  
[Jessica.blome@ago.mo.gov](mailto:Jessica.blome@ago.mo.gov)

John K. McManus  
[Jack.McManus@ago.mo.gov](mailto:Jack.McManus@ago.mo.gov)

Nicholas P. Llewellyn  
[Nicholas.llewellyn@usdoj.gov](mailto:Nicholas.llewellyn@usdoj.gov)

and I hereby certify that on April 28, 2011, I mailed by United States Postal Service, the document to the following nonregistered participant:

None

Respectfully submitted,

By:           /s/Rex L. Gradeless            
Rex L. Gradeless  
Assistant Attorney General  
Attorney for Defendant(s)  
500 South Second Street  
Springfield, IL 62706  
[Rgradeless@atg.state.il.us](mailto:Rgradeless@atg.state.il.us)

STATE OF ILLINOIS        )  
  ) ss  
COUNTY OF SANGAMON )

AFFIDAVIT

I, Arlan Juhl, having been duly sworn upon oath, do hereby depose and state:

1. I am of legal age and would be competent to testify to the matters and things set forth herein if called as a witness in this case.

2. I am a licensed professional engineer with over 37 years experience in water resource engineering in Illinois and am the Acting Director of the Office of Water Resources at the Illinois Department of Natural Resources.

3. I have previously toured and am familiar with the levees and communities affected by the current emergency flooding situation in southern Illinois related to the Ohio and Mississippi Rivers, and their tributaries.

4. I am also familiar with the U.S. Army Corps of Engineers Birds Point-New Madrid Floodway Project and how it impacts flood control in Illinois. Releasing flood waters into the Birds Point-New Madrid Floodway helps reduce flood conditions in southern Illinois.

5. I have staff inspecting and reporting to me on current flooding conditions of levees and communities in southern Illinois. They have already reported existing flood problems along the Mississippi River, the Ohio River, and the Cache River.

6. These conditions exist because elevated stage of flood water is backing up from the confluence of the Ohio and Mississippi Rivers. The Birds Point-New Madrid Floodway Operations Plan ("Plan") is designed to reduce the flood stage at that juncture when water elevation reaches approximately sixty (60) feet at the Ohio River stream gage at Cairo. Any delay or failure in implementing the U.S. Army Corps of Engineers' Plan will cause elevated



flood stages inconsistent with the Plan thereby increasing flooding, stress on the levees, property damage, and risk of loss of lives in Illinois. (Missouri would also realize similar benefits near the Village of Commerce on the Mississippi River from implementing the Plan.)

7. The levees that will be impacted by the inconsistent elevated flood stage are Len Small Levee on the Mississippi, Cairo Levee on the Mississippi and Ohio Rivers, the Mound City Levee on the Ohio River, the Brookport Levee on the Ohio, the Golconda Levee on the Ohio, the Rosiclaire Levee on the Ohio, and the Old Shawneetown Levee on the Ohio. Other affected levees not directly on the Mississippi or Ohio Rivers, but impacted by the inconsistent elevated flood stages include the Karnak Levee on the Cache River and the Reevesville Levee separating the Cache River from Bay Creek.

8. In conjunction with the levees listed, there will be areas in at least five Illinois counties (Alexander, Pulaski, Massic, Pope, and Hardin) severely impacted by inconsistent elevated flood stages. All of these counties include communities, some that are protected by an existing levee and some that are not. For example, Cairo, population 2831, has a levee protecting it; so does Mound City, population 692, Brookport, population 1054, and others. On the other hand, Metropolis, population 6490, Olive Branch, population 864, and Tamms, population 619, do not have any levee protection.

9. At present flood stages, the Ohio River flood waters are now flowing north instead of west through the breached Karnak Levee and into the Lower Cache River flooding the communities of Karnak, Ullin, Sandusky, Unity, Tamms, and Cache. This flooding will worsen as flood stages increase. Delay, or failure to implement the Plan would cause continued elevated flood stages along with associated hardship and damage along the Lower Cache River.

10. Likewise, delay, or failure to implement the Plan, as flood stages increase, will cause additional hardship and damage in southern Illinois.

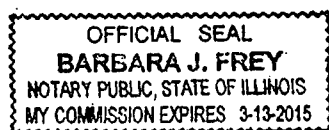
11. Nowhere in Illinois does the U.S. Army Corps of Engineers have floodway projects like they do in Missouri at the Birds Point-New Madrid Floodway. Therefore, the Plan is the only engineered method to address this flood emergency.

FURTHER AFFIANT SAYETH NOT.

s/Arlan Juhl  
Arlan Juhl

Subscribed and sworn to before me  
this 28<sup>th</sup> day of April, 2011.

s/Barbara J. Frey  
Notary Public



AFFIDAVIT

STATE OF ILLINOIS            )  
  ) ss  
COUNTY OF ALEXANDER        )

I, James Wilson, being duly sworn, on oath, state as follows:

1. At all times during the past 22 years I have been the Housing Director of the Alexander County Housing Authority which has over 400 units in the City of Cairo. I was Mayor of the City of Cairo from 1991 to 2003. I am 60 years of age. I am a lifetime resident of the City of Cairo. I have been involved in government in the City of Cairo and Alexander County, Illinois at all times during the past 22 years continually.

2. I am very familiar with the City of Cairo and Alexander County. I am also familiar with the levees protecting the residents of the City of Cairo.

3. As of the 2010 census, there were 2,831 residents in the City of Cairo.

4. The height of the levy at Cairo is 64 feet. The highest that the water has ever gotten in Cairo is 59.5 feet in the 1937 flood. The integrity of the levy has never been tested for a river level in excess of 59.5 feet. At 59.5 feet, there would be tremendous pressure on the levy.

5. If water goes over the levy or the levy is breached, the water level in the City of Cairo will fill to 18-20 feet. This would be in excess of a second story building.

6. The number of households in the City of Cairo according to the 2000 census is 1,561 out of which 30.4 have children under the age of 18. The City of Cairo has the highest per capita of residents in public housing of any city in the United States. Most of these residents have no place to go and no way to get there. If the levy is breached with the City of Cairo filling to 18-20 feet, there will be several hundred lives at

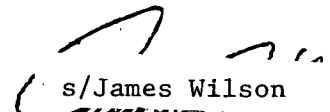
risk. The City of Cairo has, according to the 2000 census, 17.9% of its citizens over the age of 65.

6. 61.7% of Cairo is black, 33.3% of the Cairo population, according to the 2000 census, lived below the poverty line.

7. I have known of the Bird Point-New Madrid Floodway all of my adult life. The floodway is common knowledge in the City of Cairo. People have stayed in the City of Cairo and built in the City of Cairo relying on the existence of this floodway as an alleviation of flooding problems in the City of Cairo. It is also well known across the river in Missouri that the floodway exists. Everyone knows that the floodway could be flooded in cases of high water on the Mississippi and Ohio Rivers.

8. The City of Cairo is at the confluence of the Ohio and Mississippi Rivers. For the whole length of the City of Cairo there are levies on both the Ohio and Mississippi Rivers.

9. Alexander County and Pulaski County are among the poorest counties of Illinois. The median income for a household in Alexander County is \$26,042. The median income for a household in Pulaski County, the county to the east of Alexander County is \$25,361.

  
s/James Wilson  
James Wilson

Subscribed and sworn to before me this 27 day of April, 2011.

OFFICIAL SEAL  
LORRIE HESSELRODE  
Notary Public - State of Illinois  
My Commission Expires Feb 29, 2012

s/Lorrie Hesselraode  
Notary Public

OFFICIAL SEAL  
LORRIE HESSELRODE  
Notary Public - State of Illinois  
My Commission Expires Feb 23, 2012