

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI, ATTORNEY GENERAL CHRIS KOSTER,
MISSOURI DEPARTMENT OF NATURAL RESOURCES, AND
MISSOURI STATE EMERGENCY RESPONSE AGENCY,
PETITIONERS,

v.

U.S. ARMY CORPS OF ENGINEERS, MAJOR GENERAL MICHAEL J. WALSH,
COLONEL VERNIE L. REICHLING JR., THE STATE OF ILLINOIS, and THE
STATE OF KENTUCKY, RESPONDENTS.

ON APPLICATION FOR TEMPORARY INJUNCTION
PENDING CERTIORARI

MEMORANDUM OF THE STATE OF ILLINOIS IN OPPOSITION

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Introduction

The Application should be denied. Not only are the Applicants (hereafter “Missouri”) unable to show the clear entitlement to success on the merits that this Court’s jurisprudence requires (jurisprudence that Missouri omits from the Application), but Missouri cannot show irreparable harm, and the balance of harms overwhelmingly disfavors the award of injunctive relief.

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. 4/29/11 Mem. & Order at 1 (attached as Exhibit A to the Application). Pursuant to the 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. *Ibid.* The breach will divert floodwater onto approximately 130,000 acres of private and public land in Mississippi and New Madrid Counties in Missouri. *Ibid.* The State of 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. On April 30, 2011, the Eighth Circuit denied Missouri’s ensuing motion for an injunction pending appeal. (The

order denying the motion appears as Exhibit B to the Application.) Missouri now brings this Application for Temporary Injunction Pending Certiorari.

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 (submitted as Exhibit A to this Response); Operations Plan, Vicinity Map (the Operations Plan is attached as Exhibit C to the Application). 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. ¶ 13.¹ Each of these localities relied on the Floodway’s operation in constructing its community. See *ibid.*

In 1986, the Corps issued the Operations Plan, which provides for the demolition of a portion of the Birds Point levee if flood levels reach a specified height. See Operations Plan 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,

¹ It is counsel’s understanding that Major General Walsh’s affidavit will be filed in connection with the U.S. Army Corps’ Response to Missouri’s Application. The affidavit is also available as Doc. 8-1 in the district court’s docket.

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, by Thursday, April 28, 2011, a number of Illinois communities were already 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. As floodwaters rise, they create “hydrostatic pressure” on the levees, which can lead first to seepage, and ultimately to the levee’s failure. Juhl Aff. (4/29/11) ¶¶ 10-11 (submitted as Exhibit B to this Response). By 3:00 Thursday afternoon, April 28, 2011, the Cairo Floodwall in Alexander County had developed a 30-foot “sand boil,” a symptom of “substantial degradation of the Cairo Floodwall in the [preceding] 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.” *Id.* at ¶ 6. The situation was even more dire by Friday, April 29. 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. That process of degradation has continued in Cairo, where the water has risen even since the Application’s filing, reaching 60.1 feet by 5:00 CDT.²

Analysis

To qualify for the extraordinary remedy of “injunctive relief from a Circuit Justice, an applicant must demonstrate that the legal rights at issue are indisputably clear.” *Lux v. Rodrigues*, 131 S. Ct. 5, 6 (2010) (Roberts, *C.J.*, in chambers) (internal quotation marks omitted). This is because “[a] Circuit Justice’s issuance of an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts, and therefore demands a significantly higher justification than that required for a stay.” *Ibid.* (internal quotation marks omitted). And even for a stay, the applicant also must show that it will suffer an irreparable injury without relief, and that the balance of the equities favors an injunction. See, e.g., *Indiana State Police Pension Trust v. Chrysler, LLC*, 129 S. Ct. 2275 (2009) (*per curiam*). The Application fails to identify these standards for the Court, and it fails to satisfy any of them.

² See <http://water.weather.gov/ahps2/hydrograph.php?wfo=pag&gag=ciri2>.

I. Missouri Cannot Show Anything Approaching An “Indisputably Clear” Entitlement To Relief On The Merits.

Far from “indisputably clear” grounds for relief, Missouri’s arguments are meritless. For the reasons set forth in its Memorandum and Order, the district court properly rejected Missouri’s contention that the Corps is subject to suit for alleged violations of Missouri’s Clean Water Act. 4/29/11 Mem. & Order at 6-10. Nor is there any merit to Missouri’s new claim that the Corps must wait until water overtops the fuseplug section before acting to save Cairo and other communities. See Application at 2, 10-11. Missouri does not dispute that Congress granted the Corps vast discretion to manage flooding on the Mississippi and Ohio Rivers, and even if the Operations Plan could employ mandatory language what would limit this discretion, the single sentence from the Plan on which Missouri hangs its new argument does not purport to do so. The sentence reads: “It is expected that natural overtopping of the fuseplug section will be allowed to occur prior to determining the necessity to artificially crevasse the frontline levee.” Operations Plan at II.A. This sentence describes the Corps’ “expect[ation],” but it does not purport to bind the Corps to forbear from breaching the frontline section—if the Corps determines that doing so is essential to preserve levees and communities elsewhere in the system—until flood waters reach 60.5 feet at the fuseplug section.

And even if there were any merit to this claim, it would still fail, for Missouri did not raise it before the district court. See Eugene Gressman *et al.*, Supreme Court Practice, ch. 17.13(d)(8), at 882 (9th ed. 2007) (including “[t]he proper raising in the

courts below of the issues sought to be presented in the Supreme Court” among requirements for seeking equitable relief from a Member of the Supreme Court). Missouri did not argue in their district court papers that the Plan binds the Corps to wait until flood waters reach 60.5 feet at the fuseplug section, and the district court found “no credible evidence” that the Corps was not abiding by the Plan. 4/29/11 Mem. & Order at 11.

II. Missouri Cannot Show A Likelihood Of Irreparable Harm.

The Application also fails because Missouri cannot show that its residents face a likelihood of irreparable injury if the injunction does not issue. As the Eighth Circuit 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 for landholders to pursue claims under the Tucker Act. See *Story v. Marsh*, 732 F.2d 1375, 1384 (8th Cir. 1984); 4/29/11 Mem. & Order at 4 n.2. Missouri’s Application does not address the fact, much less dispute, that the Tucker Act would provide landholders in the Floodway with monetary relief.

III. The Balance Of The Equities Strongly Disfavors Entry Of The Injunction.

Enjoining the exercise of the Corps’ discretion under the Operations Plan puts many people and communities in significant danger. 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. Application at 3-4. 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." 4/29/11 Mem. & Order 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, see *id.* at 5, a fact that Missouri withholds from the Court in its Application.

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. See Juhl Aff. (4/28/11) ¶¶ 6-9. 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 that was already well underway in Cairo by last Friday, April 29, see *supra* pp. 3-4. Failure to use the Floodway in the manner long-intended will put thousands of people and many communities in peril. Walsh Aff. ¶ 13. And while Missouri complains that use of the Floodway will wash pollutants into the waterways, see Application at 6-7, 12-15,

failure of levees elsewhere and the destruction of communities risks the introduction of many more pollutants, see Walsh Aff. ¶ 10. The Corps needs the discretion that Congress gave it to act if conditions continue to worsen, and Missouri’s requested injunction would remove that discretion entirely. It would remove it, moreover, pending this Court’s disposition of a certiorari petition that Missouri does not even commit to filing. See Application at 19. Rather, having waited more than 24 hours since the Eighth Circuit denied its motion for an injunction, and without even seeking expedited review of its appeal in that court or providing this Court with a certiorari petition under Supreme Court Rule 11, Missouri asks for an injunction depriving the Corps of its discretion to manage a flood emergency, while Missouri proceeds without dispatch in the Eighth Circuit. See generally *Conforte v. Comm’n of Internal Revenue*, 459 U.S. 1309, 1311 (1983) (Rehnquist, *J.*, in chambers) (denying stay application because, *inter alia*, “an applicant detracts from the urgency of his situation where he makes a last minute claim and offers no explanation for his procrastination”).

* * *

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.” 4/29/11 Mem. & Order 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 any 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. Indeed, 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.

CONCLUSION

For all of these reasons, the Application should be denied.

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