

From: Stockdale, Earl H HQ02
Sent: Friday, November 09, 2012 1:59 PM
To: Stockton, Steven L HQ02
Cc: Walsh, Michael MG @ HQ; Hannon, James R HQ02
Subject: Follow up on your inquiry regarding operation of the MO River mainstem reservoirs for the benefit of navigation on the Mississippi

Steve-

I understand that navigation industry representatives recently have expressed interest in obtaining a copy of a 1990 memorandum issued by former Chief Counsel Lester Edelman to GAO related to the Corps' authority to operate the Missouri River mainstem reservoirs for the benefit of navigation on the Mississippi River. I am aware of at least three additional informal requests for the opinion made to our NWD and MVD offices of counsel as well. My office has recommended, with Army OGC concurrence, that the opinion not be released. My concern is that because the opinion was issued some time ago and does not take into account more recent court decisions, its release could cause confusion about the Corps' current authority and discretion to operate the Missouri reservoirs.

Given my recommendation against releasing the 1990 memorandum, you asked me to provide a general statement regarding the Corps' discretionary authority to operate the Missouri mainstem reservoirs, and in particular our ability to operate this system for the benefit of downstream navigation on the Mississippi.

As with all our projects, the Corps' operation of the Missouri River mainstem reservoir system is governed by its statutory authorization, approved by Congress in Section 9 of the Flood Control Act of 1944. Section 9 referenced the Corps' plan of improvements for the Missouri River basin, which recommended a series of dams and reservoirs serving multiple authorized purposes within the basin, including flood control, navigation, irrigation, hydropower, domestic and industrial water supply, water quality, wildlife, and recreation. House Document 78-475, at 28-29 ; Senate Documents 78-191 and 78-247. The plan also acknowledged that operation of the reservoir system for purposes within the basin would supplement flows downstream, incidentally benefiting navigation interests along the Mississippi. House Document 78-475, at 18.

In short, the Corps is statutorily bound to operate the Missouri mainstem reservoirs for the multiple purposes for which Congress authorized them. While the Corps' plan referenced in Congress' authorization recognized that operation of those reservoirs for their authorized purposes within the Missouri River basin would incidentally benefit downstream navigation on the Mississippi River, nothing in the Corps' recommended plan, Congress' statutory authorization, or the Eighth Circuit's subsequent interpretation of that authorization ever indicated an expectation that the system would be operated to provide anything other than incidental benefits to navigation on the Mississippi. Indeed, absent an explicit statutory grant of authority, any attempt by the Corps to alter the operation of the Missouri mainstem reservoirs for the central purpose of benefiting navigation on the Mississippi would constitute a substantial change to the purposes for which the reservoir system was authorized. As Federal court decisions have made clear, the Corps has long recognized that it cannot make any post-authorization changes to projects that would materially alter a purpose or function for which the project was authorized. See, e.g., Environmental Defense

Fund, Inc. v. Alexander, D.C.Miss.1979, 467 F. Supp. 885, 908-909; affirmed 614 F.2d 474, rehearing denied, 616 F.2d 568, cert. denied, 449 U.S. 919.

Even if one were to assert that modifying operation of the Missouri reservoirs for downstream navigation on the Mississippi did not amount to a material change to the purposes of the Missouri River mainstem reservoirs, the Eighth Circuit also has expressly ruled that the Corps cannot make operational changes to the Missouri mainstem reservoirs if they conflict with established guidelines for operating the system as delineated in the Missouri River Mainstem Reservoir Master Water Control Manual. See *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027 (8th Cir. 2003). While the Corps has discretion in issuing and revising the Manual if it follows applicable procedural, environmental, and other laws, after the Manual is issued the Corps is legally bound to operate the reservoir system consistent with the Manual.

As reflected in its language, and as interpreted by Federal courts, the Master Manual provides detailed language on how the mainstem reservoirs are to be operated. The Manual's language is binding on the Corps, and the Corps' compliance with the Manual's guidelines is subject to judicial review. See *Ubbelohde*, 330 F.3d at 1020, 1028-9. Consistent with the system's statutory authorization in accordance with the Corps' plan for the system, the Manual does not impose, or even mention, any specific obligation to operate the mainstem reservoirs for the benefit of Mississippi River navigation. Moreover, provisions in the Manual whose use would most likely affect any incidental benefits to the Mississippi, including provisions related to navigation and winter season releases, as well as provisions governing implementation of deviations from the Manual, all contain particularly prescriptive language. See Master Manual, Table VII-3, Para. 7-03 (directing procedures for determining length of navigation season based on March 15 and July 1 storage check); Table VII-4, Para. 7-03.5.1 (directing procedures for determining water releases during winter months based on September 1 storage check); Para. 1-01 (addressing deviations from Manual subject to applicable engineering regulations); Para. 1-02.5 and 7-18 (addressing short-term deviations based on changed or unforeseen circumstances, including requirement for modeling and presenting significant deviations to public through proper coordination procedures).

The Eighth Circuit has upheld the Corps' issuance of and reliance on the Manual as a valid exercise of its delegated authority from Congress to develop detailed standards for operating the reservoir system in a way that appropriately balances all authorized Missouri river mainstem project purposes. The Eighth Circuit has further upheld the Corps' adherence to the Manual's standards in its actual operational activities, even in cases where extreme weather conditions place the Corps in the challenging position of having few practical options to fully attend to all the system's authorized purposes. See *In re Operation of Missouri River System Litigation*, 421 F.3d 618, 629 (8th Cir. 2005); *Ubbelohde*, 330 F.3d at 1032.

In short, the current law applicable to the Missouri mainstem reservoir system offers limited flexibility to the Corps in making operational changes for the benefit of downstream navigation on the Mississippi. The system's statutory authorization recognizes the system's benefits to Mississippi River navigation as merely incidental to the Corps' operation for authorized purposes within the Missouri River basin. Moreover, the Eighth Circuit has made clear that - notwithstanding any incidental benefits that operation of the system might or might not afford to the Mississippi - the Corps is further bound to operate the system consistent with the Master Manual. To depart from the Manual's guidelines, the Corps would be legally bound to follow proper coordination procedures, which depending on the significance of the change, might require having to undertake a formal update to the Manual. As the Eighth Circuit litigation made clear, this is a significant undertaking, and would entail all of the attendant procedural hurdles which the Corps was obligated to follow during prior updates to the Manual, including advising the public, complying with NEPA and other environmental laws, and addressing any and all administrative and judicial challenges by affected interests.

The above is intended to respond to your request for a general discussion of our authority to operate the Missouri mainstem reservoir system for the benefit of Mississippi River navigation. It is not intended to address any specific proposal, which would have to be considered in the context of its own facts. Nor does it address the question of whether the Missouri mainstem system can as a technical matter provide enough water currently to benefit navigation on the Mississippi. This is an issue beyond our legal expertise, although we understand from discussions involving the Corps' water control managers that the Corps has few practical options to significantly mitigate the impacts of current drought conditions, including both on authorized uses on the Missouri reservoirs as well as on navigation depths along the Mississippi.

As always, please let me know if you have any questions, or if my office can be of any further assistance to you.

Sincerely,

Earl