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## Corps Found Liable for Missouri River Floods

In a potentially landmark opinion filed on March 13, 2018, the U.S. Court of Federal Claims ruled that the U.S. Army Corps of Engineers is liable to hundreds of landowners on the Missouri River for “foreseeable” damages caused by river management decisions to benefit fish and wildlife, but not flood control. The plaintiff landowners in *Ideker Farms, Inc. et al. v. United States* (Fed. Claims Court No. 14-183L) contended that they had suffered uncompensated takings from flooding in various years since 2007. The area in question extends from Bismarck, North Dakota to Leavenworth, Kansas. The opinion was the culmination of a more than two-month trial on the issue of liability only. The second phase of the case will be a trial to determine the amount of damages.

The landowners contended, and Judge Nancy Firestone agreed in a sweeping 259-page opinion, that management decisions designed to mitigate the impacts on fish and wildlife from the mainstem dams and bank stabilization projects have in some years made the Missouri River more prone to flooding. The opinion includes contains a detailed discussion of the history of the river itself, federal laws directing river management decisions, the requirements of Biological Opinions issued by the U.S. Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Act (ESA) for various threatened and endangered species, environmental lawsuits filed by environmental groups in the 1990s, and a Federal Multi-District Panel consolidated case that changed the operation of the mainstem reservoirs and dams after 2004. *See In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp.2d 1145 (D. Minn. 2004). The net effect of these changes was the heart of the Plaintiffs’ case.

The Court focused in particular on post-2004 operational changes for ESA compliance, falling into two broad categories – holding more water in system reservoirs to benefit fish and wildlife, and operational decisions designed to provide more varied river stages reduced or eliminated by dams and bank stabilization. These changes meant that in years where runoff happened early enough that there was insufficient storage to hold it, “the Corps may have to choose between making higher early releases, even if that would likely wash away nesting birds and contribute to early flooding downstream, or holding more water in the reservoirs and hope that spring rains are below normal.” The operations plan also included authority to release water as may be needed to keep endangered birds from nesting in low-lying areas that become flooded later, and pulses to cue spawning for the endangered pallid sturgeon. These demands became problematic in some years, as the Corps released water “during periods of high river flows with the knowledge that flooding was taking place or likely to soon occur.” The Corps also made many physical changes to structures and former

channels in an effort to restore the river to a more natural state, which included inundating the flood plain.

Plaintiffs argued that they proved the government actions constituted a “taking” for which compensation is owed if they could show that flooding on their land was the “direct, natural and probable result” of the Corps’ changes to river operations and infrastructure. Specifically, they focused on actions that caused or exacerbated flooding in 2007, 2008, 2010, 2011, 2013 and 2014. The Court endorsed that burden of proof, finding it was not necessary to tie each change individually to flooding, but it was sufficient to show that “direct and natural consequence of the cumulative and combined effects” of the many changes caused flooding or more severe flooding.

The lengthy opinion contains further analysis and rationale covering both tort theory and the law of condemnation. The case will move to the damage phase at a trial in October 2018, where it is believed that claims will total more than \$300 million. Furthermore, if it stands up on appeal (assuming that occurs), *Ideker Farms* may have dramatic impact on how the Corps manages the complex and conflicting demands on the Missouri River system. This case illustrates the irony pervading Missouri River management: the more the Corps pursues its Congressionally – mandated flood control mission, potentially the more fish and wildlife impacts occur, which in turn cause the imposition of mitigating measures that in some years may cause or exacerbate flooding. The full opinion has been published at 2015 WL 2330302.

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