

No. 05-611

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**In the Supreme Court of the United States**

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STATE OF NORTH DAKOTA AND  
STATE OF SOUTH DAKOTA, PETITIONERS

*v.*

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the Flood Control Act of 1944, ch. 665, 58 Stat. 887, requires the Army Corps of Engineers to give priority to navigation over other functions in managing the waters of the Missouri River Basin.

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-34) is reported at 421 F.3d 618. The memorandum and order of the district court (Pet. App. 35-89) is reported at 363 F. Supp. 2d 1145.

## **JURISDICTION**

The judgment of the court of appeals was entered on August 16, 2005. The petition for a writ of certiorari was filed on November 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

This case involves a series of lawsuits filed by various States and other entities concerning the operation of

dams and reservoirs along the Missouri River by the United States Army Corps of Engineers (the Corps). The Judicial Panel on Multidistrict Litigation consolidated those lawsuits for pretrial proceedings. In the consolidated action, Nebraska, Missouri, and other downstream parties alleged that a new plan adopted by the Corps in 2004 to govern its management of the Missouri River dam system violated various statutes. In addition, environmental groups alleged that the actions of the Corps and the Fish and Wildlife Service in the Department of the Interior violated the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* The district court granted summary judgment to the federal defendants on all of those claims. Pet. App. 35-89. The court of appeals affirmed in relevant part. *Id.* at 1-34. Petitioners participated as appellees in the court of appeals, and supported the Corps against the claims of the downstream parties.<sup>1</sup>

1. Congress enacted the Flood Control Act of 1944 (Flood Control Act or the Act), ch. 665, 58 Stat. 887, to provide for the comprehensive management of the waters of the Missouri River Basin. Along with other legis-

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<sup>1</sup> The environmental groups have filed their own petition for a writ of certiorari, challenging the court of appeals' disposition of their ESA and NEPA claims. See *Environmental Defense v. United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-631 (filed Nov. 14, 2005). In addition, petitioner North Dakota, together with various state agencies and officials, has filed a petition for a writ of certiorari, seeking review of a separate decision in which the court of appeals rejected its claim that the Corps' operations violated state-law water-quality standards. See *North Dakota v. United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-628 (filed Nov. 14, 2005). The federal respondents are filing separate briefs in opposition to those petitions for writs of certiorari.

lation, the Act authorized the Corps to build and operate a series of six dams and associated reservoirs, known as the Main Stem System, along the upstream portion of the river in Montana, North Dakota, South Dakota, and Nebraska.<sup>2</sup> The Act authorizes the Corps to contract for the use of surplus water available at the reservoirs, 33 U.S.C. 708, and to “prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs,” provided that “the operation of any such project shall be in accordance with such regulations,” 33 U.S.C. 709. The Act and its legislative history identify various purposes that the Corps is to serve in operating the Main Stem System, including flood control, provision of hydroelectric power, irrigation, recreation, navigation, protection of the water supply and water quality, and preservation of fish and wildlife. See, *e.g.*, *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 499-502 (1988).

The Corps has developed a water-control plan for operation of the Main Stem System, which is embodied in the Missouri River Main Stem Reservoir System Master Water Control Manual (commonly known as the Master Manual). Pet. App. 35. The Master Manual was first published in 1960 and was revised in 1973, 1975, and 1979. *Ibid.* The Master Manual sets forth general

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<sup>2</sup> The six Main Stem System dams are as follows (with the associated reservoirs identified in parentheses): Garrison Dam (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case), Gavins Point Dam (Lewis and Clark Lake), and Fort Peck Dam (Fort Peck Lake). Congress authorized construction of the Fort Peck Dam in Montana in the earlier River and Harbor Act of 1935, ch. 831, 49 Stat. 1028, for the purpose of flood control and navigation; in 1938, Congress amended that statute to add the purpose of providing hydroelectric power, see Act of May 18, 1938, ch. 250, 52 Stat. 403.

guidelines for operation of the Main Stem System; in addition, each year, the Corps promulgates an Annual Operating Plan, which details its plans for the coming year. *Id.* at 7.

2. For several years beginning in the late 1990s, the Missouri River Basin experienced prolonged drought conditions, which forced the Corps to make decisions about the allocation of water among competing interests. Pet. App. 36. In 2002, petitioners sought and obtained preliminary injunctions in federal district court requiring the Corps to limit discharges from, and maintain water levels in, reservoirs within their respective States, in order to protect stocks for recreational fishing in those reservoirs. In the underlying lawsuits, petitioners claimed, *inter alia*, that the Corps' actions violated the Flood Control Act and the then-applicable 1979 version of the Master Manual.

The court of appeals vacated the preliminary injunctions. *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003). The court of appeals rejected the Corps' arguments that determinations about the operation of the Main Stem System were committed to agency discretion and therefore unreviewable. *Id.* at 1027-1030. Although the court recognized that "[t]he Flood Control Act clearly gives a good deal of discretion to the Corps in the management of the River," the court held that "[the Corps'] discretion is not unconstrained" because "the Act lays out purposes that the Corps is to consider in managing the River." *Id.* at 1027. The court noted that "[t]he Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system—flood control and navigation." *Ibid.* (citing *ETSI Pipeline*, 484 U.S. at 512). The court added, however, that "the Act also recognizes recreation and other inter-



ests and secondary uses that should be provided for” and that “[the Act] calls on the Corps to balance these various interests.” *Ibid.* “What the text of the Act does not provide,” the court concluded, “is a method of deciding whether the balance actually struck by the Corps in a given case is correct or not.” *Ibid.* Although the court of appeals held that the Corps’ actions were reviewable, it vacated the preliminary injunctions on the ground that petitioners were unlikely to succeed on the merits. *Id.* at 1030-1032. The court specifically rejected South Dakota’s contention that, under the Flood Control Act, the Corps was required to “maximize[] the benefits to all interests.” *Id.* at 1030. The court reasoned that the practical implication of that position would be to accord the Corps’ decisions no deference at all. *Ibid.* The court remanded for proceedings on the merits of petitioners’ claims. *Id.* at 1033. This Court denied review. 541 U.S. 987 (2004).

3. While the court of appeals was considering the Corps’ appeal, other parties filed lawsuits in various district courts, also seeking to compel the Corps to alter its operation of the Main Stem System. The Judicial Panel on Multidistrict Litigation consolidated all of the lawsuits for pretrial proceedings before a single court in the District of Minnesota. *In re Operation of the Missouri River Sys. Litig.*, 277 F. Supp. 2d 1378, 1379 (2003).

The Minnesota district court ordered the Corps to issue a revised version of the Master Manual by March 19, 2004. Pet. App. 35 n.1. The Corps complied with that order and issued the revised version, which it had been preparing for many years. *Id.* at 35. Once the Corps formally adopted the 2004 version of the Master Manual, the plaintiffs filed amended complaints, and the

parties filed cross-motions for summary judgment. As is relevant here, Nebraska, Missouri, and other downstream parties claimed that the 2004 Master Manual violated various statutes, including the Flood Control Act of 1944. Although petitioners themselves brought other claims,<sup>3</sup> they defended the Corps' promulgation of the 2004 Master Manual as a proper exercise of the Corps' discretion under the Flood Control Act.

The district court granted the federal defendants' motion for summary judgment on all of the pending claims. Pet. App. 35-89. As is relevant here, the district court rejected the downstream parties' Flood Control Act claims. *Id.* at 39-44, 46. The court explained that, under the court of appeals' earlier decision in *Ubbelohde*, it "may only review the Corps' actions to ensure that the Corps considered all river interests when formulating a given plan." *Id.* at 41. The court reasoned that "the [Act] does not impose a non-discretionary duty to maintain minimum navigation flows or season lengths," *ibid.*, and concluded that "prioritization of river interests is discretionary," *id.* at 42. The court further recognized that the Corps had reserved the authority to deviate from the Master Manual in the event of changed

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<sup>3</sup> North Dakota claimed that the Corps' operations violated state-law water-quality standards. In a separate set of opinions, the district court granted the federal defendants' motion to dismiss that claim, *In re Operation of the Missouri River Sys. Litig.*, 320 F. Supp. 2d 873 (D. Minn. 2004), and the court of appeals affirmed, 418 F.3d 915 (8th Cir. 2005). South Dakota claimed that the Corps' operations violated the O'Mahoney-Millikin Amendment, 33 U.S.C. 701-1(b), which prohibits any use of Missouri River waters in States west of the 98th meridian for certain navigation purposes where that use conflicts with a beneficial consumptive use for certain other purposes. The district court granted the federal defendants' motion for summary judgment on that claim, Pet. App. 44-46, and South Dakota did not appeal.

circumstances, but it concluded that any such deviation would be subject to judicial review. *Id.* at 43-44.

4. On appeal, North Dakota and South Dakota participated solely as appellees, again defending the Corps' promulgation of the 2004 Master Manual as a proper exercise of the Corps' discretion under the Flood Control Act. See, *e.g.*, North Dakota C.A. Br. 1 (noting that, while "North Dakota \* \* \* is deeply displeased with the new Manual," "we acknowledge that Congress has given the Corps some discretion in managing the river," and adding that "[a]ll of the decisions challenged by the downstream interests \* \* \* were well within the governing statutory framework"); South Dakota C.A. Br. 12 (contending that the prior version of the Master Manual was "in contravention of the [Act]," but conceding that the new version "will provide some relief if the Corps manages the reservoirs as stated").

The court of appeals affirmed in relevant part. Pet. App. 1-34. On the downstream parties' Flood Control Act claim, the court of appeals agreed with the district court that "the [Act] imposes no duty to maintain a minimum level of downstream navigation independent of consideration of other interests." *Id.* at 15. The court noted, as it had in its earlier decision in *Ubbelohde*, that flood control and navigation were the "dominant functions" of the Flood Control Act, but it added that the Act "does not set forth what level of river flow or length of navigation season is required to make navigation 'dominant' over a 'secondary' interest such as recreation." *Ibid.* The court therefore concluded that the Corps was required merely to consider all of the relevant interests, not to strike a particular balance among those interests, before making its management decisions. *Ibid.*

The court of appeals then held that the 2004 Master Manual complied with that requirement. Pet. App. 16. The court recognized that, under the 2004 Master Manual, navigation support would be reduced or eliminated if the amount of water stored in the reservoir system fell below the amount necessary to “meet authorized purposes during significant multi-year drought periods.” *Ibid.* The court noted, however, that, according to the Corps’ estimates, that provision of the Master Manual would lead to the elimination of the entire navigation season in only four out of every 100 years, and the shortening of the navigation season in another eight. *Ibid.* “Under these circumstances,” the court concluded, “we cannot say that the Corps failed to consider downstream navigation before making its decision.” *Ibid.*

In a footnote, the court of appeals reiterated that the Flood Control Act treated flood control and navigation as dominant functions. Pet. App. 16 n.7. The court then stated that, “[i]f, due to extreme conditions, the Corps is faced in the future with the unhappy choice of abandoning flood control or navigation on the one hand or recreation, fish and wildlife on the other, the priorities established by the [Act] would forbid the abandonment of flood control or navigation.” *Ibid.* “[W]e do not rule out the possibility,” the court added, “that some more limited degree of support for flood control or navigation in the future could be held to constitute ‘abandonment’ of these dominant functions.” *Ibid.*

#### ARGUMENT

Petitioners contend (Pet. 13-24) that the Flood Control Act of 1944 does not require the Army Corps of Engineers to give priority to navigation over other functions in managing the waters of the Missouri River Ba-

sin. The court of appeals, however, held only that the 2004 Master Manual, which balances navigation with other interests, did not violate the Flood Control Act. To the extent that language in the court of appeals' opinion suggests that the "abandonment" of navigation would violate the Flood Control Act, that language is essentially dictum addressing a situation that may never occur. Further review is therefore unwarranted.

1. Petitioners assert (Pet. 15) that the court of appeals held that the Act requires the Corps to give priority to navigation over other functions. That assertion is erroneous. Although the court of appeals did note that navigation was a "dominant function" of the Act, Pet. App. 15 (citing *ETSI Pipeline*, 484 U.S. at 512),<sup>4</sup> it did not hold that the Corps was required to give priority to navigation at the expense of other functions in the ordinary operation of the Main Stem System; instead, it stated only that Corps was required to "consider[]" each of the statutory functions, and strike a balance among those functions, in its management decisions, *ibid.* Because the Corps had considered all of the statutory functions, including navigation, in devising the 2004 Master Manual, the court ultimately held that the 2004 Master Manual did not violate the Act—even though it contemplated the possibility of reducing water flows to an ex-

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<sup>4</sup> As petitioners note (Pet. 17-19), in *ETSI Pipeline*, the Court stated that one of the plans proposed before passage of the Flood Control Act "recognized that the 'dominant function' of Lake Oahe and the other main-stem reservoir projects would be flood control and navigation." 484 U.S. at 512. The Court's description of the "dominant function" of the reservoirs was relevant in determining whether operation of the Main Stem System would come within the jurisdiction of the Corps or the Department of the Interior. See *ibid.* The Court, however, did not address any issue pertaining to the Corps' own balancing of competing uses of water.

tent that would restrict or eliminate navigation under certain conditions. *Id.* at 16.

To be sure, in a footnote, the court of appeals suggested that the Corps would be forbidden from abandoning navigation *altogether* (and left open the question whether support for navigation that fell short of what was provided for in the Master Manual could constitute abandonment of navigation). Pet. App. 16 n.7. Like the language in the text of the opinion stating that navigation was a “dominant function” of the Act, however, that language was not essential to the holding of the case. It is a long-established principle that this Court “reviews judgments, not opinions.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); accord *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945); *J.E. Riley Inv. Co. v. Commissioner*, 311 U.S. 55, 59 (1940); *Williams v. Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827); *M’Clung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821). Moreover, to the extent that the court of appeals suggested that the Corps would be forbidden from abandoning navigation altogether, petitioners do not suggest that the Corps intends, or is likely, to abandon navigation altogether in the future. Because any harm to petitioners from the court of appeals’ decision is thus entirely speculative, and because petitioners obtained the *holding* that they sought from the court of appeals (*i.e.*, a holding that the 2004 Master Manual did not violate the Flood Control Act), further review is not warranted at this time.

2. Petitioners correctly note (Pet. 11) that, in the brief in opposition to petitioners’ petition for a writ of certiorari from the court of appeals’ earlier decision in *Ubbelohde*, the federal respondents argued that this

Court should deny review on the ground, *inter alia*, that the court of appeals' decision was interlocutory. See Br. in Opp. at 16, *North Dakota v. Ubbelohde*, cert. denied, 541 U.S. 987 (2004) (No. 03-935). Unlike the decision below, however, the court of appeals' earlier decision in *Ubbelohde* involved a holding that was actually adverse to petitioners: *viz.*, that they were not entitled to preliminary injunctions on their underlying claims that the Corps' actions violated the Flood Control Act and the then-applicable 1979 version of the Master Manual. See 330 F.3d at 1027-1032. Those claims were effectively superseded when the Corps promulgated the 2004 version of the Master Manual, which, unlike the 1979 version, did not expressly provide that navigation had priority over recreation. See *id.* at 1020. And in the brief in opposition in *Ubbelohde*, the federal respondents also argued that the Court should deny review because the court of appeals reasoned that the Flood Control Act required the Corps only to *consider* all of the enumerated statutory functions, not to give *priority* to navigation over other functions in the ordinary operation of the Main Stem System. See Br. in Opp. at 15, *Ubbelohde*, *supra*. If further review was unwarranted in *Ubbelohde*, therefore, it is *a fortiori* unwarranted here, where the reasoning below was similar but where the holding below was affirmatively in petitioners' favor.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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