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November 7, 2011

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RE: Fargo Flood Diversion Project

On behalf of Kindred School District #2 (“District”), the following comments are respectfully submitted to the Fargo-Moorhead Metropolitan Area Flood Risk Management Supplemental Draft Feasibility Report and Environmental Impact Statement (“SDEIS”), dated April 2010, prepared by the U.S. Army Corps of Engineers (“USACE”). To be clear, the District supports plans to protect the metro area of the Red River Valley from flooding. The District, however, cannot support the locally preferred flood retention plan that is being recommended by USACE. To do so would cause the District severe financial hardships and extreme student population loss that would threaten the very purpose of the District. The District calls on USACE to re-evaluate its plans to uproot entire communities in North Dakota and to consider viable alternatives.

#### **Extreme Adverse Economic Effect**

Under USACE’s recommended Locally Preferred Plan (“LPP”), the District will suffer. There are currently 125 students who live in communities that are likely to be bought out—about 20% of the District’s student population. The District stands to lose about \$475,000 in state student aid per year. As if that were not bad enough, the District stands to lose about 25% of its taxable valuation through proposed buy-outs of homes and businesses within the District—primarily Oxbow, Hickson/Bakke’s Addition, and Pleasant Township. These proposed buy-outs will reduce the taxable valuations of the District by a total of \$3,538,427 based on current valuations. Finally, the District’s patrons approved in the Spring of 2010 a new \$14,700,000 school to be funded through bond sales and increased mill levies. The District has serious concerns about its ability to burden the financial realities that now appear to be upon it as a result of USACE’s recommended LPP.

The District's 398 square miles are within Cass, Richland, and Ransom Counties, just south of the Fargo metropolitan area. It serves the communities of Davenport, Hickson/Bakke Addition, Kindred, Leonard, Oxbow, and Walcott. 672 students were enrolled for the 2010-11 school year. Nearly 100 individuals, including 58 teachers, work for the District. It is the largest employer by far within the District.

The District estimates in order to cover predicted lost valuations as a result of proposed buy-outs, the District's mill rate for Sinking and Interest will have to increase from 70.56 mills to about 92 mills. The District currently levies 105 mills for the general fund and it could increase to as much as 135 mills if the LPP project goes forward. Even if the District wanted to increase the general fund mills to 135, state law sets a maximum of 110 mills. The District will have little choice but to potentially default on its obligations as a result of USACE's recommended LPP and associated buy-outs. Even if the District could increase its mills to these extreme levels, the citizens of the District should not be responsible to bear the burden of increased property taxes because of the unilateral decision making of USACE and its local sponsors. This is especially true of patrons residing in Richland and Ransom counties. The District, if this plan is adopted, will suffer extreme and long-term hardships.

The District needs mitigation if USACE's recommended LPP is approved. The District appreciates the leadership of its local state legislators who attempted to provide some mitigation to the District in the last legislative session. While this effort to attach an amendment to SB 2020 was unsuccessful, it is this type of action and leadership that the District expects and needs to receive from officials representing patrons within the District. The District also appreciated the March 30, 2011, letter from the Metro Flood Study Committee stating a willingness to support the District in mitigation efforts for excessive revenue losses. While appreciated, the District looks forward to a more definitive plan to adequately mitigate extreme revenue losses in the event USACE's recommended LPP project proceeds. The District needs a concrete mitigation plan from state, local, and federal leaders if the LPP project is approved.

As for USACE, it has conveniently washed its hands of this issue by concluding it has no obligation to do anything about the problem it is directly causing. The time has come for USACE and federal officials to realize that they cannot sit back, cross their arms, and nod to local and state governments to provide the sole source of mitigation to the District as a result of this proposed federal, state, and local project.

### **Prudent Management, Stable Growth**

The District did its homework before committing to build a new school. The District took the prudent course of retaining a consulting firm to analyze the District's needs and status in 2008. The consultants prepared an Organizational Analysis Study ("Study") for the District. The District was deemed a "financially well-managed educational organization." *See* Organizational Analysis Study, Dr. Kay T. Worner and Dr. Roger B. Worner, June 2008, Exhibit 1, p. 34. The taxable valuations for the District have grown every year since at least 2004. *See* Taxable Valuations Spreadsheet, attached as Exhibit 2; *see also* Ex. 1, pp. 40-50. The Study concluded

that the District has a stable student enrollment and would realize “substantial student enrollment growth over the course of the next two decades.” Ex. 1, p. 17. A new facility was recommended because the District has experienced over-crowding at its facilities that were projected to continue. Ex. 1, p. 9. The Study further recommended that the District “begin—in earnest—preparing for the certain general population and student population growth which will substantially impact the organization’s programs, services, staffing, and facilities.” Ex. 1, pp. 25, 30. The patrons of the District prudently approved the funding of their new school based on detailed and competent information.

The District has “demonstrated prudent, conservative, sound fiscal management of taxpayer dollars entrusted to the organization.” Ex. 1, p. 45. This fiscal discipline is now at risk, not by actions of the District, but by the actions of USACE. This taking of a large portion of the District’s student population and tax base, without any compensation, cannot stand.

The Study noted that a District the size of Kindred has less “flexibility or capability of recovering from unanticipated down turns, unplanned events, or conditions that could jeopardize the organization’s long-term survival . . . .” Ex. 1, p. 13. The Study was somewhat prophetic: “an enrollment drop of 100 students in two school districts—one with 5,000 students and the other 500 students—presents a problem of the same numerical magnitude . . . but one of dramatically different proportionate magnitude (2.0% versus 20% loss of students).” Ex. 1, p. 13. This scenario, from a Study prepared in June 2008, is exactly the scenario the District now faces as a result of USACE’s decision to recommend the LPP. USACE will directly cause the District to experience a steep and long-term enrollment and taxable valuation decline. Now, at the bidding of complete strangers to the District, and without any formal participation in formulating a flood control plan, USACE is prepared to effectively gut a large portion of the District without providing the District anything in return.

USACE’s brief, and only, reference concerning the District in the SDEIS is as follows: “plans for a new school in Kindred would be impacted in the short term due to a potential loss of tax base and diminished student body.” SDEIS, § 5.2.3.1.7. The District has already committed to construct and finance the new school—these are not “plans.” USACE proffers nothing to support its cursory conclusion that the District would only be impacted in the short term. The District’s obligation to repay its obligations on the new school will continue for over a decade. It is unlikely the District will regain the level of taxable valuation it currently has in the “short term” as USACE’s concludes. And, finally, a drop in student population caused by buy-outs would impact the District for decades. USACE has failed to adequately address the impact the recommended LPP will have on the District.

### **Federal Grant Funds Lost**

If USACE’s recommended LPP goes forward, USACE will cause the District to lose thousands of dollars in federal educational grants. Nearly \$150,000 in federal funds in the form of Title I, Title IIA, and Perkins grants were provided to the District in 2010-11. It would seem that USACE would have a responsibility to allow political subdivisions that receive federal funds to have formal input and decision-making authority before unilateral decisions are made by those

with little connection to the areas that will be adversely affected. It would also seem USACE does not even consider federal educational grants provided directly to school districts that will be significantly harmed by its actions. USACE will directly cause the District to lose future federal educational grants by its action of reducing the student population of the District. USACE must compensate the District for this direct loss.

### **Locked Out**

The District—along with local Townships (who independently maintain zoning control) and other cities in Cass and Richland Counties—were locked out of having any formal place at the table while USACE and local sponsors formulated and planned the flood protection plan. The District is so far off of USACE's radar screen that it is not even included on USACE's lengthy mailing list. The District and other local governmental entities must be given a formal voice by USACE.

The beneficiaries, the local sponsors of the recommended LPP project, made decisions diametrically opposed to the District. It is this local committee recommendation that USACE uses to support its recommendation of the LPP. It is true District officials have corresponded with local committee members informally, and have received written responses. The District appreciates the willingness of these local committee members to listen to its concerns. But the District should have been formally involved in the planning process and given a right to vote as an official committee member. Because the District was denied any formal right to be involved in the decision making processes, the District requests that it be given a formal role in this process. Further, the District requests that USACE strike reference in the SDEIS that the proposed plan was recommended by a "local" committee. The local committee was "local" only in the sense that those benefitting from the proposed flood protection plan were formally represented.

### **Local Funding Erroneous Information**

USACE should be aware that the local Cass County funding apparatus that was recently approved by voters was based on erroneous information. Cass County Resolution #2010-26 authorized a ballot question to increase sales taxes. *See* Resolution, Exhibit 3. The Resolution is premised on the locally preferred option for flood control adopted by the Metro Flood Group at the time of the Resolution. The Resolution was adopted in August 2010; the locally preferred plan at that time was different from the current locally preferred plan. A county-wide vote took place in November 2010 on a ballot question based on Resolution #2010-26. At the time the vote occurred, the electorate understood that the proposed flood project would not impact upstream communities and would not severely impact downstream communities. One week after the county-wide vote, it was announced that the DEIS was defective because of miscalculations on the effect of downstream flow.

USACE is cautioned that the vote to approve local funding of the LPP was not presented to Cass County citizens properly. Indeed, it would seem that notions of fair play and justice, alone, should convince Cass County Commissioners to present to their constituents a measure that is

fairly and adequately explained prior to voting on it. It is disingenuous for USACE to ignore the reality that the local Cass County funding mechanism for the proposed project was obtained based on incorrect information presented to an ill-informed electorate.

Finally, it is difficult to state how much local funding for USACE's recommended LPP will be required when USACE has not provided an updated cost analysis in the SDEIS. It would seem the costs will far exceed the \$1.7 billion currently estimated.

### **Alternative Plans Disregarded**

USACE definition of the project ignores the rest of the Red River Valley. The purpose of the SDEIS is only "to reduce flood risk, flood damages and flood protection costs related to the flooding in the Fargo-Moorhead Metropolitan Area." SDEIS, § 2.5. The National Environmental Policy Act requires USACE to cast a wider net—to include the upstream and downstream communities outside of the Fargo-Moorhead. The entire SDEIS is unduly narrow, fails to address cooperation between the metro and rural communities, and fails to adequately consider alternatives to the proposed LPP retention project.

While USACE gives lip service to the need for a "regional system to reduce flood risk," the SDEIS ignores the harm that will befall entire upstream communities within the District. SDEIS, § 1.2. USACE fails to comply with NEPA and CEQ regulations requiring it to adequately appraise and give in-depth analysis to alternatives and compare these alternatives. Specifically, a plan proposed by Minnesota Congressman Collin Peterson merits a long and hard look—as it would potentially save millions of taxpayer dollars and provide protection to upstream communities within the District. USACE responded to a direct question at the Kindred public meeting on May 24<sup>th</sup> that it "hasn't studied" this plan.

The Alternatives Screening Document included the "waffle plan." But the SDEIS does not even mention it. USACE should consider the "waffle plan" as an alternative, and possibly to be used in tandem with the recommended LPP. The elimination of the "waffle plan" was unreasonable, arbitrary, and capricious and violates NEPA and CEQ requirements.

### **“Minor” Controversy**

USACE devoted less than one page of its nearly 500 page SDEIS report to controversies. SDEIS, § 5.3. In of itself, this shows that USACE does not take alternatives to the proposed project, or mitigation for the District, seriously. USACE seems to chalk the controversy up to a “not in my backyard” resistance to the LPP. This reasoning is inexcusable and insulting to the upstream communities within the District. The District stands to lose a large portion of its student population and taxable valuation. As a political subdivision that has to balance its budget, the District will potentially lose its ability to pay its bond indebtedness back on its new school, will likely have to lay-off employees, and consider other extreme measures to account for USACE’s recommended LPP project. To conclude that the “controversy” of USACE’s project merits a one page discussion is further proof that USACE does not consider alternatives or community concerns from areas that actually will be impacted by the recommended LPP project.

### **Executive Order 11988 Doublespeak**

USACE states that one goal of Executive Order 11988 is to “avoid direct or indirect support of floodplain development wherever there is a practicable alternative.” If avoiding the floodplain altogether is not practicable, EO 11988 requires federal agencies to “minimize potential harm to or within the floodplain.” SDEIS, § 3.7.3.6. What USACE should have said is it has determined the upstream communities are expendable and their interests are inexplicably less than other communities in the Red River basin according to EO 11988.

USACE uses EO 11988 as both a sword and a shield. On one hand USACE states that it cannot impact downstream communities because of EO 11988. On the other hand, USACE’s position is it can effectively uproot entire upstream communities within the District because of EO 11988. Further proof of USACE’s bizarre position on EO 11988 is its conclusion that moving the alignment of the diversion to the south would be incompatible with EO 11988. SDEIS, § 3.7.4. The District fails to comprehend how USACE can take diametrically opposed positions on this project and point to EO 11988 as justification for both positions at the same time.<sup>1</sup> It is in the name of EO 11988 that USACE justifies destruction of entire communities. And, at the same time, it is in the name of EO 11988 that USACE unilaterally determines to save entire communities. Such application is an egregious abuse of power by USACE.

### **County Road 17 Tieback**

The District does not believe USACE has addressed the integrity of Cass County Highway 17—which will be incorporated into a tieback levee if the LPP is approved. USACE should address the costs and level of protection that this particular road will provide to the city of Kindred—

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<sup>1</sup> To be clear, the District does not advocate for a southern realignment of the recommended LPP. To do so would essentially push the problem USACE will potentially cause to other established communities. Unlike USACE, the District does not advocate intentionally flooding entire communities without critical analysis.

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where the District's facilities are primarily located. In questioning at public meetings, USACE has admitted it has not calculated any cost involved with this.

### **Conclusion**

The District is opposed to USACE's recommended LPP diversion project. The preservation of the integrity of the District must be its priority. There are viable alternatives that USACE is either dismissing without proper analysis, or has ignored in the name of expediency and ease. In the event the recommended LPP proceeds, the District must receive mitigation in order to stay viable—both in an educational and financial sense. If the homes and businesses within the District are bought out because of USACE's recommended LPP, the District will likely default on its financial obligations for its new school and suffer long-term hardships as a direct result.

The District, and other upstream communities, are being unjustifiably and inexplicably sacrificed with absolutely no formal right to intervene. It is true, generally speaking, that all communities must sacrifice in this endeavor to attempt to prevent future flooding in the Red River Valley. But the communities of the District will receive absolutely no benefit from USACE's diversion project. As it stands, the District will receive no mitigation from the federal, state, or local governments. As a result, the District is left with no alternative but to fight the USACE and local sponsors on the recommended LPP project. The District urges USACE to reconsider its recommendation of the LPP.

Sincerely,

PEARCE & DURICK

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