

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MINNESOTA**

Richland/Wilkin Joint Powers Authority, a  
Minnesota-North Dakota Joint Powers  
Authority,

Civil File No. 0:13-CV-02262-JRT-LIB

Plaintiff,

vs.

United States Army Corps of Engineers;  
John McHugh, Secretary of the U.S. Army  
Corps of Engineers (in his official  
capacity); Jo-Ellen Darcy, Assistant  
Secretary of the Army for Civil Works (in  
her official capacity); and Col. Dan  
Koprowski, District Commander, St. Paul  
District, U.S. Army Corps of Engineers (in  
his official capacity),

**AMICUS CURIAE MINNESOTA  
DEPARTMENT OF NATURAL  
RESOURCES' MEMORANDUM  
REGARDING MOTION FOR  
ANTI-SUIT INJUNCTION**

Defendants,

and

Fargo-Moorhead Flood Diversion Board of  
Authority,

Defendant-Intervenor.

**INTRODUCTION**

Pursuant to Rules 5 and 7 of the Federal Rules of Civil Procedure, the Minnesota Department of Natural Resources (“MDNR”) files this Memorandum regarding the sovereign immunity and preemption issues raised in the Fargo-Moorhead Flood Diversion Board of Authority’s (“Diversion Authority’s”) pending motion for an anti-suit

injunction. The Diversion Authority asserts that the proposed Fargo-Moorhead flood diversion project (“Project”) is not subject to State regulation. The Project would flood thousands of acres of Minnesota farmland in order to expand development opportunities in the Fargo-Moorhead Metropolitan Area. The Project also would require construction of a high-hazard dam on the Red River, upstream of Minnesota communities. This high-hazard dam requires MDNR dam safety and work in public waters permits, and triggered a mandatory Environmental Impact Statement (EIS) under Minnesota law.

Though several Minnesota local governments are members of the Diversion Authority and the Diversion Authority would own and operate the Project, the Diversion Authority argues that the Project is not subject to State regulation because it would be primarily constructed by the U.S. Army Corps of Engineers (“Corps”). This Court should reject the Diversion Authority’s efforts to expand the doctrines of sovereign immunity and preemption. The Corps’ participation in a project does not invest Minnesota local governments with immunity from Minnesota state regulation or environmental review.

## **BACKGROUND**

### **A. State’s Regulation of the Red River**

The State, dating back to its admission into the Union holds “the absolute right to all their navigable waters and the soils under them for their common use, subject only to the rights since surrendered by the constitution to the general government.” *St. Anthony Falls Water-Power Co. v. Bd. of Water Comm’rs*, 168 U.S. 349, 359 (1897). The Red River is a navigable river bordering the State of Minnesota. Minnesota has a substantial interest in the Red River subject only to the constitutional servitude imposed by the

Commerce Clause, a servitude that is limited to that required for navigation. *Id.* at 363. Contrary to the Diversion Authority's arguments, the State's paramount interest in its waters is not destroyed by either Congress' or the Corps' flood control management activities. *Id.* at 363; *Pike Rapids Power Co. v. Minneapolis, St. Paul & Sault St. Marie Railway Co.*, 99 F. 2d 902, 909-911 (8th Cir. 1938).

Concomitant with the State's interest in its navigable water is the State's obligation to manage and regulate its waters for the benefit of its citizens. *Herschman v. State Dept. of Natural Res.*, 303 Minn. 50, 54, 225 N.W.2d 841, 844 (1975); *Lamprey v. Metcalf*, 52 Minn. 181, 198, 53 N.W. 1139, 1143 (1893). The Minnesota Legislature has developed an extensive permitting system to regulate the State's interests in its public waters for the benefit of its citizens and has directed MDNR to implement that permitting system. Minn. Stat. ch. 103G (2012). This permitting and regulatory authority includes the permitting and regulation of dams constructed on the Red River. The Project includes the construction of a dam that would be maintained and operated not by the Corps but by the Diversion Authority, which includes Minnesota local governments subject to State regulation. Minn. Stat. §§ 103G.501-.561 (2012); Minn. R. 6115.0300-.0520 (2013) (statutes and regulations governing the construction and maintenance of dams).

This dam would be a high-hazard dam which means the failure of the dam could cause the loss of human life as well as economic or environmental losses. U.S. Department of Homeland Security Federal Emergency Management Agency, *Federal Guidelines for Dam Safety: Hazard Potential Classification System of Dams* 5-7 (reprint 2004) (1998). Minnesota defines a high-hazard or Class I dam as a "dam[ ] where failure, misoperation or other occurrences or conditions would probably result

in . . . any loss of life or serious hazard, or damage to health, main highways, high-value industrial or commercial properties, major public utilities, or serious direct or indirect, economic loss to the public.” Minn. R. 6115.0340 (2013). High-hazard dams constructed in Minnesota’s public waters require environmental review, a state permit, and ongoing state oversight to ensure their safety.<sup>1</sup> *See generally*, Minn. R. 6115.0300 to 6115.0520 (2013) (dam safety permitting rules); Minn. R. 4410.4400, subp. 18 (2013) (requiring the preparation of a state environmental impact statement for a high-hazard dam).

### **B. The Project and Federal Environmental Review**

The Fargo-Moorhead metropolitan area (“Fargo-Moorhead”) is located on the Red River approximately 160 miles south of the Canadian border. The City of Fargo is in Cass County, North Dakota, and the City of Moorhead is located in Clay County, Minnesota. Significant portions of Fargo-Moorhead are located in the regulatory floodplain of the Red River. (Declaration of Gerald Von Korff dated July 15, 2014 (“2nd Von Korff Decl.”), Ex. A at ES-4.

The topography along the Red River is flat, and the Red River has a long history of flooding communities along its banks. (Declaration of Kent Lokkesmoe (“Lokkesmoe Decl.”), ¶ 5.) The Red River has reached or exceeded the natural eighteen foot flood

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<sup>1</sup> There are also a number of other State permitting requirements applicable to this project including a public waters work permit for dredging and filling. (Declaration of Randall Doneen, ¶ 38.) Minn. R. 6115.0190, .0200 (2013).

stage in 48 of the past 109 years.<sup>2</sup> (2nd Von Korff Decl., Ex. A at ES-4.) In response to these flooding events, Minnesota has taken numerous steps to reduce flooding impacts in Minnesota communities along the Red River, including in Moorhead and the surrounding area. (Lokkesmoe Decl., ¶¶ 7-8, 16, and 18-19.) These efforts have included but are not limited to relocating homes and businesses historically located in the flood plain by purchasing recurrently flooded properties, protecting the flood plain from further development through local controls, constructing permanent flood levees, and encouraging the purchase of flood insurance.<sup>3</sup> (*Id.*) As a result of flood-control measures taken in the Fargo-Moorhead community, the community is currently protected from damage until the river reaches 40 feet. (Lokkesmoe Decl., ¶ 6.)

In September 1974 a Resolution of the Senate Committee to Public Works authorized the Corps to work with local sponsors on the Fargo-Moorhead Metro Feasibility Study. (2nd Von Korff Decl., Ex. A at ES-1; Declaration of Nathan Hartshorn (“Hartshorn Decl.”), Ex. A [page 1 of EIS].) Thirty-four years later, in 2008, the Corps and the Cities of Fargo and Moorhead began work on the Fargo-Moorhead Metro Feasibility Study and entered into a Feasibility Cost Share Agreement in which the cities

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<sup>2</sup> The National Weather Service flood stage for the Red River is eighteen feet. (2nd Von Korff Decl., Ex. A at ES-4.) The moderate flood stage level is twenty-five feet and a flood is classified as major at thirty feet. Moorhead is currently protected to forty feet. (Lokkesmoe Decl., ¶ 6). As a result of work unrelated to the Project Moorhead will soon have protection to the 42.5-foot flood stage. (Lokkesmoe Decl., ¶¶ 18-19.)

<sup>3</sup> Fargo and the other North Dakota communities have invested in fewer non-structural mechanisms to limit flood damage, relying instead on the larger infrastructure solution envisioned in the present flood-control project proposal. (Lokkesmoe Decl., ¶20.)

of Fargo and Moorhead agreed to share the cost of the feasibility study with the Corps on a 50-50 basis. (Hartshorn Decl., Ex. 1.)

Unlike some projects in which the State and the Corps have agreed to prepare a joint EIS for a proposed project, in this case, however, it was not immediately apparent that state environmental review would be required because the Corps itself was unsure of the scope of the project. (Declaration of Randall Doneen (“Doneen Decl.”), ¶ 8-12.) The need for state environmental review did not become apparent until after release of the federal draft EIS. Several of the alternatives analyzed in the federal environmental review process required the construction of a control structure anchored on the Minnesota side of the Red River, a structure that both the Corps and the State classified as a high-hazard dam. (Doneen Decl., ¶ 11-14.) Construction of a high hazard dam in public waters requires both a DNR permit and the preparation of a state EIS. *See generally*, Minn. R. 6115.0300 to 6115.0520 (2013) (dam safety permitting rules); Minn. R. 4410.4400, subp. 18 (2013) and (Doneen Decl., ¶ 12.)

The Corps recognized the need for the State’s environmental review and permits in its *Final Fargo-Moorhead Metro Feasibility Report and Environmental Impact Statement* (FR/EIS). (Doneen Decl., Ex. 2 [FEIS at 137].) The federal FR/EIS provides:

As part of implementing this project, the non-federal sponsors will be required to obtain a Minnesota Department of Natural Resources protected waters permit . . . In order to obtain the necessary permits from the State of Minnesota, the non-federal sponsors must complete the scoping and review process required by the Minnesota Environmental Policy Act.

*Id.* During the public comment periods on the federal environmental review documents, the State raised a number of concerns with the documents and the federal preferred

alternative. (Doneen Decl., ¶ 20-24; 2nd Von Korff Decl., Ex. B.) While the Corps responded to some of these comments in the FR/EIS, the Corps verbally informed MDNR that there was no need to reply to all of the State's comments because the requested analysis would be included in the State's own environmental review process. (Doneen Decl., ¶ 25.) The Corps completed the FR/EIS in July 2011. (2nd Von Korff Decl., Ex. A.)

The "Locally Preferred Plan" ("LPP") set forth in the FR/EIS requires the construction of a diversion channel four miles south of the confluence of the Red and Wild Rice Rivers and south of Fargo-Moorhead. (2nd Von Korff Decl., Ex. A at ES-12; Ex. D. at 2-9.) The diversion channel would extend west and north on the North Dakota side of the Red River around the cities of Horace, Fargo, West Fargo, and Harwood, re-entering the Red River north of the confluence of the Red and Sheyenne Rivers near Georgetown, Minnesota. *Id.* As proposed, the Project involves the construction of a thirty-six mile diversion channel on the North Dakota side of the Fargo-Moorhead Metropolitan area and connecting channel between the Red River and the diversion inlet control structure. *Id.* Two dams would be constructed, one on the Wild Rice River in North Dakota and the other on the Red River, to regulate the northern flow of water through the Red River in the case of a flood of 35 feet at the U.S. Geological Survey gage in Fargo (Fargo gage). (Doneen Decl., ¶ 27.) At this point the control structures on the Red River and Wild Rice River would be partially closed and would inundate the staging area. *Id.* and (2nd Von Korff Decl., Ex. A at ES-12-13; Ex. D at 2-9.) Tie-back

levees and over twelve miles of embankments on the Minnesota and North Dakota sides of the Red River would be used to keep staged water from crossing overland to rejoin the Red River or enter the Sheyenne River. (2nd Von Korff Decl., Ex. A at ES-12-13; Ex. D at 2-9.) The staging area consists of property sufficient to contain approximately 200,000 acre-feet of water immediately south of the Red River and Wild Rice River dams. (*Id.*) The proposed staging area is located in Clay and Wilkin County, Minnesota and in Richland and Cass County, North Dakota. (*Id.*; *see also* Doneen Decl. ¶¶ 27–30 (containing a detailed description of the Project and its operation at flood stages in excess of 35 feet at the Fargo gage).)

On December 19, 2011, the Corps issued the Chief’s Report for the Project. (Second Declaration of Bruce Spiller (“Spiller Decl.”), Ex. A.) The Chief’s Report, which was transmitted to Congress, recommends construction of the LPP as the preferred alternative. (Spiller Decl., Ex. A at 1-2). The Chief’s Report requires the cities of Fargo and Moorhead to pay a share of the design and construction of the project as well as to undertake responsibility for “the operation, maintenance, repair, replacement and rehabilitation . . . of the project after construction” in accordance with state and federal law and to acquire all lands, easements and rights-of-way required for the Project. (Spiller Decl., Ex. A at 3, 5-7.) Further, the Chief’s Report indicates that Fargo and Moorhead, and not the Corps, will be responsible for the design and construction of some portions of the Project. (*Id.* at 4.)



Congress authorized, but did not appropriate funding for, the design and construction of the Project in the Water Resources Reform and Development Act of 2014 (“2014 WRRDA”). Water Resources Reform and Development Act of 2014, P.L. 113-121, § 7002(2)(4). Congress indicated that the Project should be carried out “substantially in accordance with the plan, and subject to the conditions, described in the [final feasibility study].” *Id.* The conditions included in the FR/EIS require local project sponsors to obtain State and local permits and undertake State environmental review. Funding for the Project is not included in the President’s 2015 budget. (Lokkesmoe Decl. ¶ 17.)

### **C. The State Environmental Review Process**

MDNR commenced the state environmental review process in 2013, shortly after entering into a cost share agreement with the Diversion Authority.<sup>4</sup> (Doneen Decl. ¶ 33.) In September 2013, MDNR issued the Scoping Environmental Assessment Worksheet and Scoping Decision Document (Scoping EAW) for the state EIS. (*Id.* at ¶ 40.) The purpose of the scoping process is to set out the scope of the issues to be evaluated in the state’s EIS. (*Id.* at ¶ 36.) The Scoping EAW identifies twenty-eight state and local permits or approvals required for construction and operation of the Project including the Dam Safety permit for the dam on the Red River. (*Id.* at ¶ 39; 2nd Von Korff Decl.,

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<sup>4</sup> The Diversion Authority is an organization formed by the local sponsors Fargo and Moorhead and Cass County, North Dakota, Clay County, Minnesota, the Cass County Joint Water Resources District and the Buffalo-Red River District. (Doneen Decl. ¶ 35; Declaration of Gerald Von Korff dated November 1, 2013, Ex. A.) The purpose of the Diversion authority is to build and operate the Project. (*Id.*)

Ex. D at 10-12.) The DNR anticipates issuing the state Draft EIS in the spring of 2015. (Doneen Decl. ¶ 42.)

## ARGUMENT

### I. SOVEREIGN IMMUNITY DOES NOT BAR THE STATE’S REGULATION OF THE PROJECT.

In its motion for an injunction to stop Plaintiff Richland/Wilkin Joint Powers Authority (“JPA”) from proceeding with its action in Minnesota District Court in Wilkin County, the Diversion Authority creatively argues that MDNR cannot regulate the *Diversion Authority’s* actions with respect to the Project unless the U.S. Congress waives the *Corps’* sovereign immunity from suit. (Diversion Authority’s Mem. in Supp. of Mot. for Anti-Suit Inj. at 10 (“To the extent that a state court would attempt to prevent the Corps, or in this case its Project partner the Diversion Authority, from undertaking an activity expressly authorized by Congress, any such attempt must fail under the Supremacy Clause.”) While federal agencies are generally not subject to State regulation unless Congress has waived their immunity from suit, this Court need not decide whether Congress has waived the Corps’ sovereign immunity with respect to flood-control projects in general or this Project in particular. *See, e.g., In Re Operation of the Missouri River Sys. Litig.*, 418 F.3d 915, 917 (8th Cir. 2005). The issue here is not whether the Corps is subject to state regulation. Rather, the issue is whether the Corps’ involvement in this project somehow cloaks the Diversion Authority and its members with federal sovereign immunity. And none of the cases cited by the Diversion Authority in their legal memorandum stand for the proposition that local sponsors of a congressionally

authorized flood control project enjoy federal sovereign immunity and are not required to comply with state law and regulation.

Indeed, the court should reject this specious argument in this case given the degree of local control the Diversion Authority and its members exercise over the Project. The project selected for construction is not the Corps preferred alternative but the “locally preferred alternative.” Additionally, the Diversion Authority and its members intend to finance part of the Project with state funds and will construct part of the Project, issue construction contracts for the Project, acquire land for the Project using the state’s condemnation authority, and own and operate the Project following construction.<sup>5</sup> (Diversion Authority’s Mem. in Supp. of its Mot. to Intervene at 6-7; Diversion Authority’s Mem. in Supp. of its Mot. for Anti-Suit Inj. at 11; Spill Decl., Ex. A at 3.) The Diversion Authority’s members include three Minnesota local governments: the City of Moorhead, Clay County, and the Buffalo-Red River Watershed District. (Declaration of Gerald Von Korff dated November 1, 2013, Ex. A.) The Diversion Authority’s Limited Joint Powers Agreement specifically recognizes that the Diversion Authority is subject to both Minnesota and North Dakota law. (*Id.* at 17.) Given the extensive degree

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<sup>5</sup> Improbably, the Diversion Authority relies on the Corps’ construction of the Project to argue that the Diversion Authority is not required to obtain permits for the Project’s ongoing operations, which will be conducted by the Diversion Authority. The State conducts periodic inspections of dams under its dam-safety permitting authority to ensure their continued safe operation. (Doneen Decl. ¶ 11.) The Diversion Authority’s ongoing dam operations should not be free from State regulation simply because the Corps constructed the dam.

of local involvement and control over this project the Diversion Authority's argument that this is a federal project cloaked with federal sovereign immunity is meritless.

Not even the Corps agrees with the Diversion Authority's view of reality. The Corps has taken the position that the local sponsors – the Cities of Fargo and Moorhead and the Diversion Authority – are required to obtain State and local permits. The FR/EIS indicates specifically that “the non-federal sponsors will be required to obtain a Minnesota Department of Natural Resources protected waters permit.” (Doneen Decl., Ex. 2.)

## **II. THE CORPS' FLOOD CONTROL PROJECTS ARE TYPICALLY UNDERTAKEN IN PARTNERSHIP WITH STATE AND LOCAL GOVERNMENTS.**

A review of the history of Corps' flood control projects supports the conclusion that the Project is not solely a federal undertaking but represents a partnership between the federal government and local governments. The Corps has jurisdiction over numerous types of projects involving the nation's water systems; two specific types are navigation projects and flood-control projects.<sup>6</sup> The Corps began working on general navigational projects in the early 1800s to maintain navigation on the navigational waters. Oliver Houck, *Can We Save New Orleans?*, 19 Tul. Env. L. J. 1, 8 (2006). This work was undertaken as navigation was deemed central to interstate commerce. *Id.* Interstate commerce benefited the nation. The federal government has historically paid the majority

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<sup>6</sup> More recently, Congress has authorized the Corps to undertake a number of ecosystem restoration projects. *See e.g.* Water Resources Development Act of 2000, P.L. 106-541, Title VI Comprehensive Everglades Restoration (2000) (authorizing the Corps to undertake Comprehensive Everglades Restoration).

of the costs of the design and construction and all maintenance costs of navigational projects. *See e.g.* 33 U.S.C. § 2211 (2012) (discussing the payment of costs for the design, construction and maintenance of harbors); Nicole T. Carter and Charles V. Stern, Cong. Research Service R-41243, *Army Corps of Engineers: Water Resource Authorizations, Appropriations and Activities* 8 (July 1, 2014).

Flood control, on the other hand, was deemed to be “a form of land use, a local affair.” Oliver Houck, *Can We Save New Orleans?*, 19 Tul. Env. L. J. 1, 8 (2006). This is consistent with the congressional view that the management of the nation’s waters rested primarily with the individual states. N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform* 4-11 (University of Iowa Legal Studies, Research Paper No. 12-12, 2012). The Corps did not actively venture into the flood-control business until early in the Twentieth Century; even then, Congress continued to recognize the significant role of the States in the development and implementation of flood-control projects. This is evidenced by the purpose statement of the 1936 Flood Control Act, which characterizes the development of flood-control projects as a joint federal and state endeavor and recognizes the States’ substantial interest in the navigable waters within their borders. The 1936 Flood Control Act provides:

It is recognized that destructive floods upon the rivers of the United States. . . constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters on their tributaries is a proper activity of the Federal Government *in cooperation with State*, their political subdivisions, and localities thereof. . . that the Federal Government should improve *or participate in* the improvement of navigable

water or their tributaries for flood control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected.

33 U.S.C. § 701a (2006) (emphasis added). And in the Flood Control Act of 1944, Congress again recognized the substantial “interests and rights of the States” in determining the development of watersheds within their borders and therefore the need to “facilitate the consideration of [federal flood control] projects on a basis of comprehensive and coordinated development . . .” 33 U.S.C. § 701-1 (2006).

The fact that Congress views the federal state partnership as central to the development, construction and management of flood-control projects as a federal-state partnership evidenced by the requirement for non-federal sponsors for flood-control projects. A “non-federal sponsor” is a “legally constituted public body” that has the legal authority to enter a “project cooperation agreement” with the Corps. 33 C.F.R. 385.3 (2013). Non-federal sponsors are required to enter into a partnership agreement with the Corps prior to commencing the evaluation, design, or construction of a flood-control project. 42 U.S.C. § 1962d-5b(a)(2006). The Congressional reliance on this partnership evidences a Congressional intent that Congress did not intend the Corps or the federal government to exercise exclusive jurisdiction over flood control projects.

In this instance, Fargo-Moorhead agreed to serve as the non-federal sponsor for the Project and agreed to pay fifty percent of the cost of FR/EIS. (Hartshorn Decl., Ex. A.) A review of the FR/EIS and the Project authorization in the 2014 WRRDA provides further evidence that Congress did not intend exclusive federal jurisdiction or preemption.

For example, the alternative selected in the Chief's Report is not the Corps' preferred alternative; rather, it is the alternative preferred by the local communities. (Spiller Decl., Ex. A at 2.) And the federal authorization for the Project in WRRDA 2014 conditions development and construction of the project on a non-federal cost share of \$1.077 billion, which is over fifty percent of the \$1.924 billion of the cost of the Project. Water Resources Reform and Development Act of 2014, P.L. 113-121, § 7002 (2)(4). Additionally, the City of Moorhead had already requested an appropriation from the Minnesota Legislature to cover a portion of the non-federal cost share. (Lokkesmoe Decl. ¶ 21.) Finally, construction of the project is premised on the condition that is the local non-federal sponsors that will operate and maintain the project, not the Corps. (Spiller Decl., Ex. A at 3, 5-7.) Given the extensive involvement of non-federal entities in the design, construction, operation and maintenance of federal flood control projects is not rational to conclude that Congress intended to "preempt *any state interference* with the federal project". *Diversion Authority Legal Memorandum* at 9. Indeed using the Diversion Authority's rationale, the Minnesota Legislature would be precluded from refusing to fund the proposed project for certainly such a refusal constitutes interference with the federal project.

### **III. MANY CORPS PROJECTS AUTHORIZED BY CONGRESS ARE NEVER CONSTRUCTED.**

The Diversion Authority cites to federal authorization of the Project in support of its argument that sovereign immunity bars State regulation of the Project, but federal authorization is not the final word on the Project. Authorization alone is insufficient for a

Corps project to proceed. Nicole T. Carter and Charles V. Stern, Cong. Research Service R-41243, *Army Corps of Engineers: Water Resource Authorizations, Appropriations and Activities* 1 (July 1, 2014). To proceed with a project, the Corps must receive a Congressional appropriation. And simply because Congress has authorized a project does not mean that federal funding will be forthcoming. In 2011, for example, there was a \$62 billion backlog of unfunded authorized Corps water resource projects. Nicole T. Carter and Charles V. Stern, Cong. Research Service R-41961 *Army Corps' Fiscal Challenges: Frequently Asked Questions* (August 18, 2011). The Corps typically receives about \$2 billion in construction funding each year. *Id.*

Further, Corps projects can change following Congressional authorization. The Truckee Meadows Flood Control Project, for example, was authorized in the 1988 Water Resources Development Act and re-scoped in 2012 to “assess the feasibility of modifying the Congressionally-authorized project. . .” U.S. Army Corps of Engineers, Sacramento District, *Truckee Meadows Flood Control Project, Nevada – Draft Federal Reevaluation Report S-2* (May 2013). Indeed, the Corps’ own Planning Guidance sets out procedural requirements for modifying projects after Congressional authorization, including changes to a project’s purpose. U.S. Army Corps of Engineers, Department of Army, Engineer Regulation 1105-2-100, *Planning Guidance Notebook* 4-10 (April 22, 2000). Moreover, the Corps’ *Digest of Water Resources Policies and Authorities* provides a mechanism for “opposition by a state” “[d]uring the period from project conception through construction.” U.S. Army Corps of Engineers, Department of Army, Engineer Pamphlet



1165-2-1, *Digest of Water Resources Policies and Authorities*, 3-3 (July 30, 1999). Pursuant to the Corps own policy, a governor can propose a project for de-authorization or propose that a project be deactivated after authorization and prior to funding. *Id.* Even after funding has been appropriated for preconstruction engineering and design, a governor may request that the Corps suspend the project. *Id.*

The history of Corps' flood control projects, the effect of Congressional authorization of a Corps' project, and the significant role the Diversion Authority and its members would have in the construction and operation of this Project all support the conclusion that neither the doctrines of sovereign immunity or preemption, as outlined below bar State regulation of the Project.

**IV. FEDERAL AUTHORIZATION OF THE PROJECT DOES NOT PREEMPT STATE REGULATION.**

Just as the Diversion Authority's argument that it is cloaked with the Corps' sovereign immunity falls short, the Diversion Authority fails to make a compelling preemption argument. (Diversion Authority's Supplemental Mem. Regarding Anti-Suit Inj. at 13.) The Diversion Authority asserts that MDNR's regulation of the Red River is preempted to the extent that it conflicts with the Project. (Diversion Authority's Supplemental Mem. Regarding Anti-Suit Inj. at 13.) The Diversion Authority seems to suggest the MDNR may exercise its authority to *grant* a permit for the Red River dam, but any decision to deny a permit would conflict with federal law. (*Id.*)

Implied conflict preemption arises "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *In Re*

*Operation of the Missouri River Sys. Litig.*, 418 F.3d at 919 (quoting *Nordgren v. Burlington N. R.R. Co.*, 101 F.3d 1246, 1248 (8th Cir. 1996)). “Where a state statute conflicts with, or frustrates, federal law, the former must give way.” *Forest Park II v. Hadley*, 336 F.3d 724, 733 (8th Cir. 2003) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993)). Federal courts are reluctant to find implied conflict preemption. *Cangemi v. U.S.*, 939 F. Supp. 2d 188, 197 (E.D.N.Y. 2013). “Where a defendant could comply with state and federal law by following the stricter state law requirements, there is no conflict preemption.” *Id.* at 198.

The Diversion Authority cites the case *In Re Operation of the Missouri River System Litigation*, but it is easily distinguishable. In that case the State of North Dakota sought to prevent the release of water from a dam on the Missouri River, arguing that the release would violate state water quality regulations. 418 F.3d at 916. The Eighth Circuit concluded State water quality regulations were impliedly preempted by federal legislation requiring the Corps to maintain downstream navigation on the Missouri River. *Id.* at 919-20.

In contrast, here the purposes and objectives of Congress include working in cooperation with state and local partners to provide a flood control project. The Corps has required the local project sponsors to comply with State and local law. The legislation authorizing the Project indicates that the listed “final feasibility studies for water resources development and conservation and other purposes are authorized to be carried out by the [Secretary of the Army] substantially in accord with the plan, and

subject to the conditions, described in the respective reports. . . .” Water Resources Reform and Development Act of 2014, P.L. 113-121, § 7002 (2)(4). The FR/EIS indicates that the local sponsors, such as the Diversion Authority, are required to obtain a DNR public waters permit, and that Minnesota law requires environmental review of the Project. (Doneen Decl., Ex. 2.) The Chief’s Report recommending the Project also indicates that local sponsors are required to comply with State law. (Spiller Decl., Ex. A at 6-7 (requiring local sponsors to operate and maintain the Project “in accordance with applicable Federal and State laws and regulations”).) The purposes and objectives of Congress include compliance with State law and therefore DNR’s permitting processes do not stand as an obstacle to Congressional goals – to work “in cooperation with States, their local political subdivisions, and localities . . . , for flood control purposes.” 33 U.S.C. § 701a (2006).

**CONCLUSION**

For the above reasons, MDNR respectfully requests that this Court conclude that State regulation of the Project is not barred by sovereign immunity or preempted by the Water Resources Reform and Development Act of 2014.

Dated: July 22, 2014

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL  
State of Minnesota

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ATTORNEY FOR MINNESOTA  
DEPARTMENT OF NATURAL  
RESOURCES

## McKenzie, Lois

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**U.S. District of Minnesota**

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#### Docket Text:

**MEMORANDUM by Minnesota Department of Natural Resources re [76] MOTION to Appear as Amicus Curiae Regarding Motion for Anti-Suit Injunction filed by Minnesota Department of Natural Resources. (Hartshorn, Nathan)**

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