

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),

**SECOND DECLARATION OF
RANDALL DONEEN**

Defendants,

and

Fargo-Moorhead Flood Diversion Board
of Authority,

Defendant-Intervenor.

I, Randall Doneen, do upon personal knowledge declare as follows:

1. I have been actively involved in overseeing the DNR's environmental review of the Fargo-Moorhead Flood Risk Reduction Project ("Project") since July 2010. At that time, I was the Planning Director/Lead Worker for the Project. I coordinated with regional staff that were reviewing the federal documents, assigned Environmental

Review staff to the project, and oversaw federal/State interaction on the project. I regularly meet with the staff preparing the State Environmental Impact Statement (“EIS”) for the Project and with the personnel from the U.S. Army Corps of Engineers (“USACE”) charged with the federal environmental review of the Project.

2. The DNR is currently conducting the studies and compiling the information described in the Final Scoping Decision Document for the State environmental review of the Project. The State Draft EIS is anticipated to be released for public review in August of 2015. After a 30-day public review period the DNR will consider and respond to all substantive comments received. After considering all the comments the DNR may undertake additional analysis, consider additional alternatives, or describe additional mitigation measures for inclusion in the Final EIS. The timing of the publication for the Final EIS will be dependent on the number, nature and scope of public comments received. After publication of the Final EIS, the state will receive comments on the Final EIS and make an adequacy determination. The EIS is not considered complete until a final adequacy determination has been issued by the DNR.

3. Assuming a limited number of comments, the earliest the State environmental review process could be completed is the late fall of 2015. If there are substantive or more than minimal comments this schedule may be extended into early 2016.

4. The DNR has had regular communication with Diversion Authority representatives about the estimated schedule for EIS completion and the prohibition on governmental actions until the EIS process is complete. The DNR has advised the

Diversion Authority repeatedly and as early as at least April 2014 that the DNR could not possibly complete the state environmental review process by July 2015 and that the state would likely be issuing the State Draft EIS in July - August 2015.

5. The Final Scoping Decision Document for the State EIS identified a process by which the DNR would evaluate an alternative to the proposed project called the Distributed Storage Alternative (“DSA”). As part of this evaluation, the DNR was to determine if the DSA met the purpose (need) of the proposed project. Minn. R. 4410.2300 subp. G (2013). The project purpose is set out in the Final Scoping Decision Document. The reason for the evaluation was to determine if the DSA should be carried forward for full analysis in the Draft EIS. If the DSA is not carried forward for full analysis, the Draft EIS will include a brief description of the DSA and the reasons why it was eliminated from further review.

6. As part of this evaluation, the DNR prepared a DSA Screening Report that assessed how well the DSA met the project purpose. The DSA Screening Report also considered additional measures that would increase the effectiveness of the DSA. The DSA Screening Report concluded that although the DSA would reduce flood damages in the Fargo-Moorhead Metropolitan Area and would provide flood damage reductions throughout the basin, the DSA does not meet the project purpose of flood protection from catastrophic flood events.

7. Information from the DSA Screening Report will be included in the Draft EIS for public review and comment. Any comments received on the DSA will be considered by the DNR to determine if the DNR was correct in removing this alternative

from further analysis, or if there was an error in DNR's analysis that compels DNR to reconsider its determination and further evaluate the DSA as a project alternative. Although the DSA is not being fully evaluated as part of the Draft EIS, it is incorrect to say that the DSA has been dropped from consideration in the State environmental review process at this time because the process has not been completed.

8. In addition to the two alternatives referenced by the Diversion Authority, the State also continues to evaluate the no build alternative and will evaluate those alternatives which meet the project purpose which are advanced during the public comment period.

9. On December 5, 2013, during a regularly scheduled State EIS project management call between the DNR, USACE, and the Diversion Authority, the DNR was informed that the Diversion Authority had entered into a Memorandum of Understanding ("MOU") with the City of Oxbow relating to the Oxbow, Hickson, Bakke ("OHB") Levee. At DNR's request a copy of the MOU was provided to the DNR on December 6, 2013, by Mark Bittner of the City of Fargo. A copy of the MOU is attached to this Declaration as Exhibit A. The purpose of the MOU was to document the agreement between the Diversion Authority and the City of Oxbow to support construction of the USACE OHB Levee Alternative. The first recital of this MOU states:

WHEREAS, property within the City of Oxbow and other property has been identified as being impacted by the periodic staging of water upstream of the physical structure of the project known as the Fargo-Moorhead Metropolitan Area Flood Risk Management Project [hereinafter referred to as the "Metro Flood Project"] to the point where it has been determined that mitigation of the impact should be addressed.

Section 2.9 of the MOU provides for construction of the OHB Levee to begin in 2014.

Upon learning that the Diversion Authority intended to commence construction of the OHB Levee, the DNR requested information from the Diversion Authority about the relationship of the OHB Levee to the Project currently subject to Minnesota State environmental review. This information request was provided to the Diversion Authority in a January 14, 2014 letter from Jill Townley, the DNR Project Manager. A copy of Ms. Townley's letter is attached as Exhibit I to the Declaration of Gerald Von Korff dated July 15, 2014. This letter specifically addresses the concern about beginning construction of project components before environmental review is complete. In response to this request, Darrell Vanyo of the Diversion Authority provided a letter dated February 20, 2014, indicating that the OHB Levee was a stand-alone project. This letter is attached to this Declaration as Exhibit B. The letter indicated that the project was independent because the North Dakota Legislature approved funding of the OHB Levee before Congress had approved funding for the Project, no Minnesota entities are funding the OHB Levee, and no Minnesota entity on the Diversion Authority is a signatory to the MOU between the Diversion Authority and the City of Oxbow. The DNR evaluated this letter along with other pertinent information and concluded that the OHB Levee was indeed a component of the project and thus subject to the prohibition on final governmental approvals. The DNR's determination was provided to the Diversion Authority by a letter dated April 22, 2014, from Mike Carroll. This letter is Exhibit J to the Declaration of Gerald Von Korff dated July 15, 2014. The basis for DNR's determination is contained within the letter and includes the fact that:

- a. Consideration and development of the OHB Levee has always been in the context of the Project. It was not treated as a stand-alone project by the Diversion Authority until 2014.
- b. The USACE Supplemental Environmental Assessment and Finding of No Significant Impact for the Project refer to the OHB Levee as a Project modification.
- c. Local project sponsors are required to pay a matching share of the cost of flood control projects as a condition of receiving federal financing of said projects. The Diversion Authority is requesting that the cost of the OHB Levee be treated as part of the local match for the Project. At the February 13, 2014, Flood Diversion Board of Authority meeting, the Diversion Authority authorized its representatives to enter into a Construction MOU with the USACE, the City of Fargo, and the City of Moorhead that allows the non-federal sponsors (including the Diversion Authority) to seek credit for constructed features. The USACE website indicates that this MOU was executed on March 31, 2014.
- d. The proposed height of the OHB Levee was approximately seven feet above the USACE Expert Opinion Elicitation (EOE) panel 100 year flood protection to accommodate increased inundation from the Project. The EOE panel was used to elicit opinions on how climate change trends would affect hydrology. Its recommendation results in significantly higher flood

stages for the 100 year flood event than that proposed by FEMA for use in the National Flood Insurance Program.

Further information to support DNR's determination that the OHB Levee is a component of the Project is contained in the USACE approval of the OHB Levee Permit No. NOW-2014-0236-BIS, issued on June 20, 2014. This permit approval describes the OHB Levee project as: "Construction of the Oxbow, Hickson, Bakke ("OHB") Ring Levee element of the Fargo-Moorhead Flood Risk Management Project."

10. In addition to work on the OHB Levee, a review of the Diversion Authority Board meeting packets indicates that the Diversion Authority is actively purchasing property in anticipation of construction of the diversion channel. Illustrative of these activities are minutes from a February 13, 2014 Diversion Authority meeting, attached as Exhibit C, describing a recommendation that the Diversion Authority purchase 1029.49 acres of farmland. The minutes refer to this farmland as being located in Reaches Four and Five, which is part of the diversion channel. The purchase of this land was approved unanimously, including by Minnesota representatives on the board. The DNR has informed the Minnesota entities on the Diversion Authority about the prohibition against purchasing property necessary for a project for which environmental review is ongoing. Minn. R. 4410.3100, subp. 2 (2013).

11. On numerous occasions the Diversion Authority expressed interest in beginning construction on the diversion channel in the summer of 2015. The DNR has verbally informed representatives of the Diversion Authority that such an action is prohibited under Minnesota rules.

12. The DNR has an income contract with the Diversion Authority to cover the cost of the preparation of the State EIS. As part of the DNR's negotiations with the Diversion Authority for an amendment to that income contract, the Diversion proposed the amendment be contingent on the EIS being complete by July 2015. The DNR told the Diversion Authority that such a condition was unacceptable and that it was impossible for the DNR to complete the EIS by July 2015. The DNR advised the Diversion Authority that it would use its best efforts to complete the Draft EIS in May 2015. The DNR further advised the Diversion authority that the timing of completion of the environmental review process would depend upon a number of factors including the number, nature, and scope of comments received on the Draft EIS.

13. Construction of Project components in North Dakota has the potential for environmental effects in Minnesota. The Red River serves as the jurisdictional boundary between Minnesota and North Dakota. Although construction of the diversion channel itself is entirely in North Dakota, this channel crosses the Sheyenne River, Maple River, Rush, and Lower Rush Rivers before emptying into the Red River. Hydrologic changes to these rivers due to the intersection with the diversion channel could change the hydrology of portions of the Red River including flood staging. These changes in hydrology could impact sediment transport and erosion in the Red River. Depending on the magnitude of these changes, there could be additional impacts to Minnesota resources in the Red River including water quality and aquatic habitat.

14. The DNR reviewed and provided comments on the USACE Draft EIS, Supplemental Draft EIS, and Final EIS. Some of DNR's comments provided to the

USACE were never satisfactorily addressed in the federal EIS process. Rather than address these comments directly the USACE has communicated on several occasions that Minnesota's concerns would be addressed in the state environmental review process. The DNR is now addressing these deficiencies as part of the state EIS process. Below is brief description for each of these deficiencies:

- Compatibility with land use regulations. The federal EIS did not describe the degree to which the Project is compatible with local land use plans and regulations. Specifically, the federal EIS did not address the Project's potential to meet the Federal Emergency Management Administration ("FEMA") requirements necessary to increase flood stage through a Conditional Letter of Map Revision (CLOMR).
- Geomorphology. The federal EIS did not address DNR's comments on the potential impacts to river geomorphology from potential upstream sediment deposition and downstream changes in hydrology. Despite a body of science that describes changes in geomorphology that result from changes in hydrology and data regarding sediment deposition after flood events in the Red River, the federal EIS discounted the potential significance of these impacts. The proposed project would change the hydrology of the Red River in the staging area and downstream from the proposed dam to the location of the diversion outlet. The project would also change the hydrology of the Wild Rice River in the staging area and downstream to the confluence with the Red River. The project would also change the

hydrology of the Sheyenne River, Maple River, Rush River and Lower Rush River in the areas between where the diversion channel intersects these rivers and their confluence with the Red River.

- Indirect Wetland Impacts. The federal EIS did not provide any analysis of potential wetland impacts from increased sedimentation in the staging area. Increased inundation combined with potential changes in sediment deposition has the potential to impact floodplain wetlands in the project area.
- Fish Passage. The federal EIS did not address fish passage through the diversion channel. The USACE determined the impact to fish unable to pass through the channel was not worth the cost of a fish passage. It should be noted that since making that determination and dismissing Minnesota's concerns but after commencement of the state environmental review process, the USACE and the Diversion Authority have made several changes to the Project design and operation that affect the potential impact to fish passage. Notable changes include reduced operation of the Project and removal of fish passage structures from the proposed Red River Dam. These Project changes are being evaluated in the state EIS.
- Cold Weather Impacts. The federal EIS did not address the potential impacts and feasibility of Project operation due to freezing weather conditions. The USACE indicated a special study was being prepared to address this topic after completion of the federal environmental review.

The results of the cold weather study are being evaluated as part of the state EIS.

- Mitigation. The proposed Project relies on adaptive management techniques to monitor and address potential environmental impacts where there is some uncertainty about the degree or significance of the environmental impact. The DNR has maintained that there must be some financial assurance that if future monitoring identifies significant impacts, there will be a mechanism to fund additional mitigation measures. This topic was not addressed in the federal EIS and is being evaluated in the state EIS.

15. The December 19, 2011, Chief's Report that submitted the Project to Congress for consideration required the Project to comply with state laws and regulations. Specifically, item 11 of the Chief's report identified several conditions to which the non-Federal sponsors must agree to prior to project implementation. Most notable is condition "o" which requires the Diversion Authority to "[c]omply with all applicable Federal and State laws and regulations."

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, as provided by 28 U.S.C. § 1746.

Dated: March 12, 2015.

s/Randall Doneen
RANDALL DONEEN