

**IN THE UNITED STATES DISTRICT COURT
FOR THE 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,

DEFENDANT'S STATUS REPORT

vs.

United States Army Corps of Engineers;
John McHugh, Secretary of the US 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, US Army Corps of Engineers (in
his official capacity),

Defendants,

Fargo-Moorhead Flood Diversion Board of
Authority,

Defendant and
Defendant-Intervenor,

and

City of Oxbow,

Defendant-Intervenor

I. INTRODUCTION

This Status Report will provide the Court and the Parties with a brief summary of a number of recent developments and preview upcoming events as this matter draws

closer toward a conclusion. Following the Court's entry of summary judgment on Counts I-II of the Third Amended Complaint (ECF #320), the key remaining predicate to concluding the litigation was the completion of environmental review by the Minnesota Department of Natural Resources ("MDNR"). As discussed below, the MDNR has now completed its Final Environmental Impact Statement ("FEIS"). The Corps also has received the necessary appropriations to commence the first Corps-constructed portion of the project. Pursuant to federal law, the Diversion Authority as a local sponsor must secure the property necessary for the Corps to commence that construction and is about to initiate the process of acquiring that property.

II. BACKGROUND

The Court previously noted that although the Project had been authorized in WRRDA 2014, the Corps had not received any construction funding. (ECF #193 at 7-8). Until recently, commencement of construction by the Corps thus was on hold pending the Executive Department's allocation of previously appropriated funds. The Administration has now designated appropriated funds for the Corps to commence construction on the Fargo-Moorhead Metropolitan Area Flood Risk Management Project ("F-M Project" or "Project"). On February 9, 2016, the Corps received approval from the Administration for "new start" construction on the F-M Project in Fiscal Year 2016. Declaration of Eric Dodds ("Dodds Decl.") ¶ 3. Five million dollars of FY 2016 appropriations was allocated to construction of the Project. *Id.*

Funding included the following conditions:

The Minnesota Department of Natural Resources began its environmental review of the Fargo-Moorhead Metro project in January 2012, and is currently scheduled to publish a final Environmental Impact Statement in May 2016. No earlier than July 2016, the ASA(CW) will assess the progress of all state environmental reviews and regulatory requirements needed to complete construction of the project as authorized. The Corps will not execute a PPA for construction of the project, or use Federal funds for its construction, until the Assistant Secretary of the Army, Civil Works determines that the Corps is likely to resolve any outstanding regulatory issues that could affect the prospects for completing construction of the project.

Id. Thus, the Assistant Secretary of the Army for Civil Works will soon evaluate whether the Corps is *likely to resolve* any outstanding regulatory issues, after which determination the Corps may execute the required Project Partnership (“PPA”) Agreement to proceed with construction. The MDNR’s completion of the FEIS certainly will assist the ASA(CW) in considering the likelihood that all outstanding regulatory issues that could affect the project have now been resolved.¹

III. IMMINENT DEVELOPMENTS

A. Commencement of Eminent Domain Proceedings

In order for the Corps to enter into contracts that obligate construction funds, the Diversion Authority as a local sponsor² must actually possess title to the real estate where

¹ While this is a federal flood control project, and the Court has held that the Federal Defendants enjoy sovereign immunity from state and local permitting and environmental review requirements, obviously the MDNR’s completion of the FEIS, which for all practical purposes confirms the Corps’ own environmental review, should remove any remaining environmental concerns about the project.

² More precisely, the entity actually acquiring the property on behalf of the Diversion Authority is the Cass County Joint Water Resources District (“CCJWRD”)

the construction will take place; the North Dakota regulatory process imposes a similar requirement in order to obtain the necessary permits.³

For the initial phase of Corps construction, the Diversion Authority must secure title to three properties in North Dakota. *Id.* ¶ 5. Some of the owners of those properties are opposed to the Project, and have stated through their counsel that they intend to force the Diversion Authority to use eminent domain to obtain title, a process that will take at least several weeks. *Id.* ¶¶ 6-7. As a result, in order to obtain the necessary title by the time it is needed, under both Corps and North Dakota regulation the Diversion Authority will have to commence the eminent domain process immediately. *Id.* Commencement of eminent domain thus follows immediately the MDNR's completion of environmental review. The MDNR has completed the last step in the FEIS process, and on May 16th the FEIS was formally published in Minnesota's Environmental Quality Board ("EQB") Monitor.⁴ Pursuant to Minn. R. 4410.2800 Subp. 2 the MDNR must wait at least 10 days after publication before it can make its formal determination of adequacy. MDNR has established a May 31, 2016 comment deadline for the FM-Project. While the public can comment during that period, unlike the process for the Draft EIS the MDNR is not

funded by Cass County and the City of Fargo. The CCJWRD essentially is acting as the property agent of the Diversion Authority.

³ On May 5th the Office of the Attorney General of North Dakota advised counsel for the Diversion Authority, Erik Johnson, that the State Engineer has accepted the Diversion Authority's proposal for the property acquisition process, and determined that the process complied with North Dakota Code §89-08-02-02, to establish "evidence of a property right" for the purpose of commencement of the process. The permit for the inlet structure itself will not be granted until the required property rights for the footprint of the inlet project structure have actually been acquired.

⁴ See, <https://www.eqb.state.mn.us/eqb-monitor> (last visited May 16, 2016).

required to respond to public comments on the FEIS. Minn. R. 4410.2800 Subp. 4B. If the Corps for some reason does not proceed with the Project, the Diversion Authority is committed to offering to return title to the property owners at no net cost to the owners; or, if the owners do not wish to retake title, offer those properties for sale on the open market.⁵ *Id.* ¶ 8.

The Diversion Authority respectfully submits that any preliminary steps in the acquisition process that will allow the Corps to commence construction as soon as possible once all preconditions have been met, or for that matter even the actual acquisition of title by the Diversion Authority with the qualifications noted above, should not, and it believes will not, prejudice the MDNR's determination of adequacy or the discretion of the ASA(CW). While the acquisition of title as discussed herein therefore is entirely proper under Minn. R. 4410.3100 Subp. 2, the Diversion Authority nevertheless provides this status report to be as transparent as possible about the anticipated acquisition schedule and the reasons therefor.

IV. CONCLUSION

The Diversion Authority respectfully submits that the anticipated actions outlined in this status report comply with both the letter and spirit of Minnesota's environmental review requirements. To the extent any questions exist, or further clarification would be

⁵ The Diversion Authority has committed that any acquisition of property will expressly include a commitment that such property acquired would be divested in the event that the Project does not go forward. If the ASA(CW) has made the required determination and a PPA has been executed prior to the acquisition of a property parcel, that condition would no longer be required and the Diversion Authority anticipates that it will be removed from the purchase documents.

helpful, the Diversion Authority would be available at any time for a Status Conference to discuss further the matters described in this Status Report, or any other matters that the Court may consider relevant.

Dated: May 16, 2016

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ATTORNEYS FOR FARGO-
MOORHEAD FLOOD DIVERSION
BOARD OF AUTHORITY