IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Richland/Wilkin Joint Powers Authority, a Minnesota-North Dakota Joint Powers Authority, Plaintiff, v. 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. and Fargo-Moorhead Flood Diversion Board of Authority, a Minnesota-North Dakota Joint Powers Authority, Defendant-Intervenor.	)	Civil Action No. 0:13-cv-02262-JRT-LIB

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REINSTATE UNITED STATES ARMY CORPS OF ENGINEERS AS AN ACTIVE DEFENDANT AND TO SUPPLEMENT PLEADINGS

I. Introduction

In the final federal environmental impact statement (FFEIS) and in the Chief's Report, the Corps of Engineers stated definitively that the Fargo-Moorhead Flood Control Project would be governed by Minnesota's environmental review and permitting powers.

See Declaration Exhibit 1. That commitment was incorporated into the Water Reform and Resource Development Act of 2014 (WRRDA-2014) by Section 7002(2), representing a lawfully binding commitment of that legislation. On October 3, 2016, the DNR Commissioner denied USACE and Diversion Authority's application for public waters and dam safety permits, an action that we have long predicted was required by Minnesota law and policy. Shortly thereafter, the Diversion Authority leadership and then local USACE representatives began to assert that they could move full speed ahead, in violation of those legal conditions and begin to carry out the project, despite provisions of section 204 of the WRRDA-2014 which specifically requires permits and authorizations to be obtained before the project is carried out. 33 USC § 2232(b)(2).

The motion supported by this memorandum seeks supplemental amending authority pursuant to Federal Rules of Civil Procedure rule 15(d) to reflect the changes in events that happened after the date of the third amended complaint. In addition, the motion seeks reinstatement of the USACE as an active defendant, an action that does not require a Rule 15 amendment, because the dismissal of counts and parties under Rule 54(b) is interlocutory and subject to revision at any time, especially where the circumstances have changed radically, as they have here. We have also filed a companion motion and supporting memorandum seeking summary judgment granting declaratory and permanent injunctive relief against the Diversion Authority and USACE barring actions to carry out Fargo-Moorhead project in defiance of Minnesota's permit denial.

As discussed in the companion motion and memorandum, the Federal Final Environmental Impact Statement contains the following express condition at Section 3.14.4:

> *As part of implementing this project, t**he non-federal sponsors will be required to obtain a Minnesota Department of Natural Resources protected waters permit,** a water quality permit from the North Dakota Department of Health, a Sovereign Lands Permit and construction permit from the North Dakota Office of the State Engineer. I**n 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.*

See Declaration Exhibit 1. Additionally, the Chief's Report explicitly requires this project to be constructed and operated in compliance with state law, and Section 204 of WRRDA-2014 prohibits this project from being carried out before state authority and permits have been first obtained. 33 USC § 2232(b)(2). Also as discussed in the other motion and memorandum, section 7002(2) of the Water Resources Reform and Development Act of 2014 (WRRDA-2014) authorizes the Fargo-Moorhead flood control project, but only to be carried out "substantially in accordance with the plan, and **subject to the conditions, described in the respective reports** designated in this section…." (emphasis added). The reports referred to in that authorization are the Chief's Report and the federal feasibility report and environmental impact statement, both of which contain conditions subjecting the project to Minnesota's permitting powers.

As described in the procedural history section of the memorandum seeking partial summary judgment, three major post-complaint developments have occurred which require amendment to the pleadings:

(1) **Permit Denial:** On October 3, 2016, Minnesota Department of Natural Resources (DNR) denied USACE and Diversion Authority's application for permits in a 50 page detailed set of findings. While Diversion Authority may seek a revised order, the order so issued remains in effect until that time, and so it is no longer speculative that the project has failed to receive a Minnesota public waters and dam safety permits. See Declaration Exhibit 3.

(2) **Project Partnership Agreement:** The USACE and Diversion Authority signed a project partnership agreement (PPA) under which the Diversion Authority would carry out the project and provide local funds, locally acquired properties, and commit to operating the project in compliance with the above statutory authorization. This PPA was executed in July of 2016 based upon the Assistant Secretary's erroneous belief, somehow conceived, that Minnesota was likely to issue the required public waters and dam safety permits. See Declaration Exhibit 8. This belief was formed without consultation with the State of Minnesota, and despite clear indications (described in our Summary Judgment motion) that there were major unresolved permitting issues.

(3) **Intent to Defy State and Federal Law:** After the permit denial, the USACE and Diversion Authority publicly announced that the project was going to be constructed with full speed, notwithstanding the permit denial and the terms of 33 U.S.C. § 2232(b)(2), or the terms of the Congressional authorization and the conditions

incorporated from the reports.[1]

When plaintiff filed its third amended complaint, the possibility that USACE and Diversion Authority might jointly attempt to violate Minnesota public waters laws was speculative and, as the court ruled, not ripe for adjudication. While there was a theoretical possibility that Diversion Authority might dishonor or disregard Minnesota's permitting power, we had no reasonable expectation that they would actually do so. The FFEIS at section 3.14.4 clearly stated that Minnesota permits were required. This statement was an authoritative statement by the USACE itself that Minnesota permitting was required and that permitting required a Minnesota environmental review. This statement was not merely contained in the FFEIS in section 3.14.4, but it was echoed in various statements in the FFEIS appendices as well. See D-81 Doneen Declaration para. 16, FFEIS Appendix U, p67 AR0040797 (MnDNR recommends that that permit-level analysis be compiled and provided concurrently with the state EIS process); AR0056154; Federal EIS Appendix S page 46. These statements by the USACE represent interpretations of federal law by the agency responsible for executing the Water Resources Development Act and its various enactments, including 33 U.S.C. § 2232(b)(2), but they are more than that. They are echoed by the Chief's Report's requirement of state law compliance. They are conditions included by the project authorization in WRRDA-2014 Section 7002(2). Plaintiff's obstacle in 2014 was

[1] See *FM Leaders, Corps: We are committed to building the Diversion*, published October 6, 2016, accessed November 16, 2016 at http://www.fmdiversion.com/fm-leaders-corps-we-are-committed-to-building-this-project/

defendants' propensity to treat the environmental review process as so perfunctory and so pre-ordained that they could commence construction in anticipation that the permits would ultimately be delivered.

When we served our third amended complaint, a state environmental review leading to the permit decision was in process. The scoping environmental assessment worksheet listed Diversion Authority as the proposing sponsor. The worksheet listed Minnesota public waters and dam safety permits as required by the project. The Diversion Authority had signed an incomes agreement and was paying the DNR with project funds to conduct the Minnesota environmental review with the assistance of an independent consulting engineering firm. Doneen Declaration D81 ¶ 33. All of this had happened *before* Congress passed the 2014 authorization. The authorization incorporating the permitting conditions contained in the Reports seemed clearly to confirm, legally and practically, that eventually this project would require Minnesota permits.

For this reason, all of the parties, and the Court as well, either conceded or acquiesced to the proposition that Diversion Authority's possible refusal to comply with Minnesota permitting was speculative at best, and that when push came to shove, USACE would be compelled to enforce the provisions of the EIS and support Minnesota's sovereign permitting power. Counts III, IV, and V were dismissed without prejudice as to both federal and state defendants. Those dismissals were not only without prejudice, but under Rule 54(b) they were interlocutory orders subject to revision at any

time.

In order to be transformed into a clear and present case and controversy, Minnesota would have to deny the permit and Diversion authority would have to defy that denial. In addition, it seemed inconceivable that the USACE would actually assist the Diversion Authority in undermining the requirements of the WRDA and what is now 33 U.S.C. § 2232. Said another way, it would take two shoes to drop to transform this speculative dispute and make it ripe for adjudication: 1) Minnesota would have to deny the permit applications, and 2) Diversion Authority would have to disclaim the permitting and attempt to commence construction and defiance of federal and state law—and USACE would have to acquiesce or conspire in that defiance.

In July, with permit applications still under review, the USACE signed a project partnership agreement with Diversion Authority. The first shoe began to drop, because this was a technical violation of the prohibition against carrying out a water resources development project until State authorizations and permits are obtained. However, when the PPA was signed, it was based upon the Assistant Secretary's belief (evidently unsupported by any due diligence) that Minnesota would grant permits in the near future. Consequently, the signing of the PPA in July, while technically a defiance of the prohibition against carrying out a WRDA project before state permits are obtained, still was based upon the a facial attempt to comply with section 2232(b)(2)'s requirement. The first shoe hadn't yet struck the ground.

It would take both permit denial and actual disregard of that permit denial to

make the issue of the state permits ripe for adjudication. On October 3, the second shoe dropped and hit the ground when the DNR denied both permits. Then local officials began to announce that, potentially, either USACE or Diversion Authority would disregard that denial and begin work on portions of the project in direct violation Minnesota law. We then sought reassurance from both parties that they would comply with Minnesota's decision, and if not, the basis for their defiance. The first shoe now hit the ground. To be frank, while those responses suggest intent to defy, we are at a loss to understand the rationale that they intend to use.

II. Only Minor Amendments to the Complaint are Required to Accommodate post-Complaint Transactions, Occurrences and Events.

Federal Rules of Civil Procedure rule 15(d) provides that:

> *On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.*

One of the basic policies of the rules, as indicated in rule 18(a) is that a party should be given every opportunity to join in one lawsuit all grievances against another party regardless of when they arose. 6A Wright, Miller, Kane. Federal Practice and Procedure § 1506. The standard advocated by the treatise and the one that is consistent with this Court's injunction designed to resolve all of the issues into one central judicial proceeding is the same liberal standard as in rule 15(a), which states that "the court should freely give leave when justice so requires." Rule 15(d) is tailor-made for this

circumstance.

Yet, we don't need to add parties or perform major surgery on the complaint. The third amended complaint contains virtually all of the legal and factual allegations required to address these issues[2], except for the DNR's permit denial and the defendants' acts to carry out the project in defiance of that permit denial. The first 87 paragraphs of plaintiff's third amended complaint, incorporated my reference in all the counts, alleged that that federal and state law both require the Fargo-Moorhead project to obtain state approval and permits before commencing construction. In the absence of state approval and permits, any action to carry out the project would violate federal law, including the terms of authorization in WRRDA-2014, and state law.[3] Paragraph 5 alleges that:

> *A critical step in the approval process for a locally sponsored flood control project is obtaining the approval of the State or States in which the project is located. 33 USC § 701b-13 (WRDA-2007); 33 USCA § 2232 (WRRDA-2014); 33 USC § 701-1 (Flood Control Act of 1944).*

Paragraph 6 alleges:

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[2] Paragraph 123 of the complaint states: "Each Count of this complaint incorporates by reference the previous allegations of the Complaint. Defendant-Intervenor is named a defendant respecting Counts III-V, because it has commenced construction on mitigation for the as yet unpermitted Red River Dam, because it has asserted that it may disregard Minnesota environmental and permitting law in connection with future construction, and because it is the local sponsor directly responsible the project. The Federal Defendants are named as Defendants in Counts III-V because they may claim an interest relating to the subject of Counts III-V and may be so situated that disposing of the action in the person's absence may be regarded as impacting agency interests."

[3] The complaint consists of introductory allegations (¶¶ 1-18); allegations of general applicability to all counts regarding the project development (¶¶ 31-82); allegations that the defendants may take actions prejudicial to Minnesota's environmental review and permit authority (¶¶ 82-87), including allegations that both state and federal law combine to require compliance with state permitting, all of which are incorporated by reference into all of the following counts.

During the Federal Environmental Review, the State Department of Natural Resources raised a series of major concerns which called into question the legal and environmental viability of the proposed locally proposed plan. The narrative of the federal EIS asserted generally that the local sponsor would resolve the State's concerns in the State environmental review and permitting process, but failed to address Minnesota's concerns in a way that complies with NEPA. The EIS that was submitted to Congress directly represented that the Minnesota environmental and permitting process would be respected and that the local sponsor would cooperate with that process. The Chief's Report specifically made the project subject to state permitting. However, following authorization of the project by Congress, Defendant-Intervenor Diversion Authority has now taken the position that the Local Sponsor need not comply with State law and that the project, or portions of the project, can be constructed without completion of the State environmental review and without issuance of state and local governmental permits. The Defendant-Intervenor (Diversion Authority) has already commenced project construction, and on information and belief intends to commence further construction, before completing the State environmental review and without obtaining Minnesota permits.

Paragraph 8(h) alleges:

The State of Minnesota has officially warned the USACE that EIS fails to sustain the conclusion that the project is ecologically sustainable, the least impact solution, one in which adverse effects can and will be mitigated, and consistent with other standards, ordinances, and resource plans of local and regional governments. These are requirements for authorization and permitting under Minnesota state law. The EIS itself and the ultimate selection of the Locally Preferred Plan ignored these requirements, resulting in an EIS that fails in its essential function, to consider potential conflicts with state and local law.

At the time of filing of the third amended complaint, only the Oxbow-Hickson-Bakke ring dike was scheduled for construction. Accordingly Paragraph 9 states:

Commencing construction of the Ring Dike before the Minnesota environmental review is completed and before issuance of permits is unlawful, would inflict irreparable harm on residents of the subject areas, and would prejudice a fair review of options. Plaintiff is seeking declaratory and injunctive relief based on the state law

> *violations and the Diversion Authority's commencement of construction before review is completed and permits issued.*

Paragraph 12 clarified plaintiff's allegation that constructing the project before permits are granted is not a matter of state law alone, but that federal law also requires state law compliance.

> *These state assisted projects are authorized subject to all State and local law, including state water policy, state environmental law, and state regulation of public waters. 33 USC § 701b-13 (WRDA-2007); 33 USCA § 2232 (WRRDA-2014); 33 USC § 701-1 (Flood Control Act of 1944). State assisted projects may be constructed, and the construction managed, by agreement with private entities or with the USACE, or some combination of the two.*

See also Complaint ¶68 (The proposed Red River dam and consequent flooding of Wilkin County cannot lawfully be constructed without a number of permits by the State of Minnesota described by subsequent paragraphs in this Complaint.")

Paragraphs 100-104 of the complaint argued the importance under the National Environmental Policy Act (NEPA) of using the federal environmental review in conjunction with the Minnesota to deal with the potential state-law problems. Because the complaint alleges the law, facts, and circumstances that underlie the present situation, the complaint needs only minor alterations to accommodate the new developments.

III. Scope and Effect of Amendments Requested.

In addition to Rule 15, the following rules and principles apply to these circumstances: Federal Rules of Civil Procedure Rule 54(b) provides that in the absence of a (b)(2) certificate, "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not

end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). *See U.S. v. State of Ark.*, 791 F.2d 1573 (1986) (state defendant dismissed seven years before could be reinstated because dismissal involved fewer than all parties or claims). This Court retains jurisdiction to address its equitable relief to "other persons who are in active concert or participation" with the primary party. Fed. R. Civ. P. 65(d)(2)(C). If federal defendants were not already parties, addressing an injunction to a non-party acting in concert would be accomplished by an amendment to the complaint or motion to add them as addressees of an injunction. But here, federal defendants are already parties, and they have repeatedly announced their intention to defy Minnesota's permit denial. For that reason, we gave Federal Defendants reasonable notice of our intent to reactivate their participation by motion.

Although this case is not yet concluded, even under Rule 60(b)(5),(6) the court can modify its final judgment on the grounds that applying the judgment prospectively is no longer equitable, or for any other reason that justifies relief. The equitable powers of this Court are broad enough to prevent parties from conspiring to circumvent equitable relief. We seek the right to advocate the following principles now that we are faced with a declared intention to proceed with construction without state approval and state permits.

(A) Reinstatement of NEPA count against all defendants.

Plaintiff seeks reinstatement of its count under NEPA for the limited purpose of challenging USACE's attempt to disclaim environmental conditions and protections

incorporated in the FFEIS without a supplemental environmental impact statement and reauthorization.

The accompanying memorandum supporting summary judgment describes our rationale for this relief. We face really a shell game in which the hidden marker-pea is the location at which Minnesota's environmental protection and sovereign rights are going to be accommodated. When the summary judgment motion was argued, the Federal EIS dealt with Minnesota's sovereign concerns regarding protection of its lands and waters by committing that Minnesota's sovereign permitting powers would be respected and obeyed. A key element of our NEPA claim was that the FFEIS should have integrated the Minnesota review and permitting requirements directly, instead of resolving them merely by referral to a future process. The violation of NEPA was temporarily mitigated by the USACE's assertion that serial environmental and permitting reviews occur all the time, and that there was nothing unfair or unreasonable about the process because the Minnesota environmental and permitting review was specifically incorporated by reference in section 3.14.4. But now, when we lift the shell, the marker-pea has disappeared under another shell, or has been pocketed altogether. Now, we are told, that USACE had its fingers crossed when it promised to address the state policy and sovereign concerns, and that the authorization wipes that out completely.

There are three possible forms of relief that may be appropriate for this circumstance. The first is to require USACE and Diversion Authority to comply with the terms of the authorization. That is the most logical course, because that is what they

committed to do, and that is what the authorization and the law requires. The second is to declare the original FFEIS unlawful, because, contrary to USACE's representations, section 3.14.4 was actually a form of prevarication. The third is to hold, as suggested in the memorandum for summary judgment, that the removal of the condition requires both a supplemental environmental review and a reauthorization.

(B) Relief against the Diversion Authority.

Plaintiff seeks reinstatement of counts III, IV, and V against the Diversion Authority, which the Court previously dismissed without prejudice. The dismissal was predicated upon the determination that at time of dismissal, the possibility of adjudicating these issues was speculative. Plaintiff now moves the Court to provide permanent relief establishing Minnesota's right to enforce its permitting authority against a project that would harm its lands and citizens.

(C) Against USACE.

Finally, plaintiff seeks reinstatement of the USACE as an active defendant in relation to the request for injunctive and declaratory relief.

Dated: November 30, 2016

RINKE NOONAN

/s/ Gerald W. Von Korff

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