

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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

Court File No. 13-cv-2262 (JRT/LIB)

Plaintiff,

and

Minnesota Department of Natural Resources,

Intervenor Plaintiff,

v.

**ORDER**

United States Army Corp of Engineers, et al.,

Defendants,

and

City of Oxbow,

Intervenor Defendant,

and

Fargo-Moorhead Flood Diversion Board of  
Authority, a Minnesota-North Dakota Joint  
Powers Authority,

Intervenor Defendant.

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On March 30, 2017, Plaintiff Richland/Wilkin Joint Powers Authority (“JPA”) filed a Motion for Preliminary Injunction. ([Docket No. 412]). At an April 4, 2017, status conference, the parties informed the Undersigned that there were ongoing discussions between the Intervenor Defendant Fargo-Moorhead Flood Diversion Board of Authority (“Diversion Authority”) and Intervenor Plaintiff Minnesota Department of Natural Resources (“MNDNR”)

regarding possible expedited but limited discovery by the Diversion Authority of information in the control of the MNDNR for the Diversion Authority's use in responding to the JPA's Motion for Preliminary Injunction as well as an anticipated motion for preliminary injunction by MNDNR. (See, Briefing Schedule, [Docket No. 421], 2). The Court instructed the MNDNR and the Diversion Authority to engage in additional meet and confer discussions regarding any such limited discovery issues, and if any dispute remained regarding the expedited but limited discovery sought for purposes of responding to the motions for preliminary injunction, to file letter briefs with the Court by April 28, 2017, in preparation for a telephone hearing on May 2, 2017. (Id. at 3-4).

On April 21, 2017, as anticipated, the MNDNR filed its Motion for Preliminary Injunction, [Docket No. 425]). On April 28, 2017, the MNDNR and the Diversion Authority both filed with this Court letter briefs identifying the remaining disputes on the issue of discovery sought by the Diversion Authority from the MNDNR for purposes of responding to the Motions for Preliminary Injunction. ([Docket Nos. 431, 432]). On May 2, 2017, the Undersigned conducted a telephone hearing on this limited issue.

A district court's decision to issue a preliminary injunction "depends on a 'flexible' consideration of (1) the threat of irreparable harm to the moving party; (2) balancing this harm with any injury an injunction would inflict on other interested parties; (3) the probability that the moving party would succeed on the merits; and (4) the effect on the public interest."

Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers, 826 F.3d 1030, 1036 (8th Cir. 2016). "The burden is on the movant to establish the need for a preliminary injunction." Chlorine Institute, Inc. v. Soo Line R.R., 792 F.3d 903, 914 (8th Cir. 2015) (quoting DISH Network Serv. L.L.C. v. Laducer, 725 F.3d 877, 881 (8th Cir. 2015) (internal quotation marks omitted)).

In its Memorandum in Support of its Motion for Preliminary Injunction, the MNDNR argues that federal law requires the Diversion Authority and the United States Army Corps of Engineers (“Corps”) to obtain any permit or approval required under federal or state law prior to commencing any work on the Project at issue in this litigation. (Mem. in Supp., [Docket No. 426], 2). The MNDNR further argues that Minnesota law similarly requires the Diversion Authority and the Corps to obtain a permit from the MNDNR prior to beginning any work on the Project. (Id. at 4). The MNDNR asks the Court to enjoin any continued construction on the Project because in an October 3, 2016, Order (“Permit Denial Order”), the MNDNR denied the Diversion Authority’s application for the required permits. (Id. at 7). The JPA also bases its request for a preliminary injunction on statute and the failure by the Diversion Authority to obtain the permits which the JPA argues are a prerequisite for any construction work on the Project. (Mem. in Supp., [Docket No. 414], 6).

With regards to the expedited discovery the Diversion Authority now seeks, the Diversion Authority generally asserts that the MNDNR’s Motion for Preliminary Injunction “relies heavily on agency findings [in the Permit Denial Order] which in turn rely on undisclosed documents.” (Letter, [Docket No. 431], 1). Specifically, the Diversion Authority contends that the MNDNR’s Memorandum in Support of its Motion for Preliminary Injunction, [Docket No. 426], relies on the Permit Denial Order to argue that the preliminary injunction sought is warranted because (1) the MNDNR is likely to prevail on the merits of the underlying claims; (2) the MNDNR will suffer irreparable harm if the preliminary injunction is not granted; and (3) the balance of harms and public interest favors injunctive relief. (Letter, [Docket No. 431], 1-2). The Diversion Authority further argues that because the Permit Denial Order contradicts earlier findings in the MNDNR’s State Environmental Impact Statement (“SFEIS”), the Diversion

Authority needs the documents and information underlying the findings of the Permit Denial Order in order to respond to the MNDNR's Motion for Preliminary Injunction. (Id. at 2-4). The Diversion Authority seeks the following documents: (1) "[T]he Alexander Aaron report"; (2) "[T]he August 25, 2016, letter from [MNDNR] Fisheries"; (3) "[A]ll documents identified as a result of the [MNDNR] April 28, 2017[,] meeting"; and (4) "For the 9 specific, targeted document categories identified by the [Diversion] Authority any memoranda or substantive analyses relied upon by the [MNDNR] in issuing the Denial Order, other than those contained in the SFEIS Administrative Record." (Id. at 5). In addition, the Diversion Authority seeks to depose two individuals it will identify within 3 business days of receipt of all the aforementioned requested documents. (Id. at 4-5).

For its part, the MNDNR argues that its Motion for Preliminary Injunction presents only questions of law, which require no discovery. (Letter, [Docket No. 432], 1). Therefore, the MNDNR asserts the Diversion Authority does not need discovery in order to respond to the Motion for Preliminary Injunction. (Id.). The MNDNR contends that all the expedited discovery the Diversion Authority now seeks is related to the merits of whether the underlying Permit Denial Order was properly decided, which is not at issue in the Motion for Preliminary Injunction. (Id. at 2). The MNDNR states that the determinative issue in the Motion for Preliminary Injunction is "whether the Diversion Authority requires a Minnesota permit and whether the Project can be constructed without that permit." (Id. at 1). According to the MNDNR, resolution of this issue for purposes of seeking preliminary injunction requires no fact discovery. (Id.).

The granting of expedited discovery prior to consideration of a motion for preliminary injunction is the exception, not the rule, and it is a matter entirely within a district court's

discretion. See, Leone v. King Pharmaceuticals, Inc., No. 10-cv-230, 2010 WL 4736217, \*2 (E.D. Tenn. Nov. 16, 2010) (stating that expedited discovery is not the norm); Calleros v. FIS Intern, Inc., 12-cv2120(RHK/AJB), 2012 WL 10918867, \* (D. Minn. Sept. 12, 2012) (citing Leone and finding no grounds for expedited discovery in anticipation of a motion for preliminary injunction); see, also, Dimension Data North America, Inc. v. NetStar-1, Inc., 226 F.R.D. 528, 531 (E.D. N.C. 2005) (stating that the decision whether to grant a request for expedited discovery in preparation for a preliminary injunction determination is within the court's discretion and ultimately denying the request in that case).

The Court agrees with the position taken by the MNDNR. Although the MNDNR and the JPA do refer to the Permit Denial Order in their Memoranda in Support of their respective Motions for Preliminary Injunction, they do so in the first instance simply to establish the context that the Diversion Authority's application for those permits were denied. (See, Mem. in Supp., [Docket No. 414], 14-15; Mem. in Supp., [Docket No. 426], 7). The MNDNR alternatively cites findings in the Permit Denial Order to support its additional argument that if contrary to the statutes at issue the work is allowed to commence in the absence of the permits, and if the permit denials are ultimately upheld, then there will be a negative effect by the Project on the public interest, and that there will be a threat of irreparable harm if the Motion for Preliminary Injunction is not granted. [Mem. in Supp., [Docket No. 426], 15-16, 19-22).

The clear dispute at the core of the Motions for Preliminary Injunction is whether the Corps may initiate work and proceed with the Project despite the MNDNR's denial of certain permits. The parties principally dispute the propriety of a preliminary injunction on the grounds of competing interpretations of the statutes at issue: the MNDNR argues that the relevant statutes prevent the Diversion Authority from proceeding with any work whatsoever on the

Project without the permits that have been denied, while the Diversion Authority argues that the relevant statutes do not prevent initial work without them. This is a pure question of law, one which depends on the plain language of the implicated federal and state statutes at issue; it does not depend on the facts or merits of the MNDNR's underlying the permit denial itself. See, Kaufmann v. Siemens Medical Solutions USA, Inc., 638 F.3d 840, 846 (8th Cir. 2011) (“A question of statutory interpretation is always a question of law.”); DRB No. 24, LLC v. City of Minneapolis, 976 F. Supp. 1079, 1101 (D. Minn. 2013) (stating that statutory construction is based upon the language of the statute and is a question of law); see, also, gen., Allstate Ins. Co. v. Steele, 74 F.3d 878, 880 (8th Cir. 1996) (noting that no amount of discovery particular to that case could alter the analysis of a case that presents only questions of law).

The validity or invalidity of the factual findings underlying the Permit Denial Order in this particular case is not relevant to the interpretation of the statutes presently at issue. The MNDNR and the Diversion Authority both acknowledge that the Permit Denial Order is currently under review in the Minnesota Office of Administrative Hearings (“OAH”). Moreover, the facts underlying the merits of the Permit Denial Order will be subject to full discovery during the merits portion of this present case, and currently, there is no need to order expedited merits discovery to be completed prior to the completion of briefing on the pending Motions for Preliminary Injunction.

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove [its] case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

(Citations omitted.) Univ. of Texas v. Camenisch, 451 U.S. 390, 394 (1981); see, also, Heartland Academy Community Church v. Waddle, 335 F.3d 684, 690 (8th Cir. 2003).

At this stage, the burden is not on the Diversion Authority to successfully and definitively refute the findings underlying the Permit Denial Order. The burden, rather, is on the MNDNR and the JPA to show the necessity of a preliminary injunction; the Diversion Authority bears no burden of proof. See, Chlorine Institute, Inc., 792 F.3d at 914. Accordingly, there is no need for expedited merits discovery regarding the documents and information underlying the merits of the findings set forth in the Permit Denial Order. The primary focus of the Motions for Preliminary Injunction and the apparent opposition thereto appears to be whether the statutes at issue preclude even the initiation of work on the Project until after permits are obtained.

Nevertheless, it appears from the Letters submitted to this Court prior to the May 2, 2017, Telephone Hearing, [Docket Nos. 431-32], that the MNDNR did informally agree during meet and confers to produce certain documents to the Diversion Authority, as some expedited but limited discovery, for the purposes of the Diversion Authority responding to the pending Motions for Preliminary Injunction. To the extent that MNDNR has so agreed, such production shall be completed on or before May 15, 2017, in accordance with this Court's April 7, 2017, Order. (See, [Docket No. 421]).

Therefore, **IT IS HEREBY ORDERED THAT:**

1. Whatever expedited but limited discovery was agreed to informally as a result of prior meet and confer discussions between the MNDNR and the Diversion Authority shall be completed on or before May 15, 2017; and

2. The Diversion Authority's request to compel production of discovery related to the documents and information underlying the fact findings made in the October 3, 2016, Permit Denial Order is **denied**, for the reasons set forth above.

Dated: May 4, 2017

s/Leo I. Brisbois  
Leo I. Brisbois  
U.S. MAGISTRATE JUDGE