UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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

Plaintiff,

Minnesota Department of Natural Resources,

Plaintiff-Intervenor,

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),

Defendants,

and

Fargo-Moorhead Flood Diversion Board of Authority,

Defendant-Intervenor,

and

City of Oxbow,

Defendant-Intervenor.

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

DNR'S PROPOSED SUR-REPLY BRIEF

INTRODUCTION

After the July 18, 2017 hearing on the motion for a preliminary injunction and motion to dismiss ("Hearing"), the Fargo-Moorhead Flood Diversion Board of Authority ("Diversion Authority") and Corps of Engineers ("Corps" and collectively "Defendants") began producing documents. These recently-produced documents directly contradict the Defendants' arguments, answer questions the Court asked at the Hearing, and support the Minnesota Department of Natural Resources' ("DNR") arguments. These documents also show the Defendants admitted both Minnesota and North Dakota permits were required, reveal the Defendants attempted to strip the DNR of its permitting authority, and should be considered by the Court in rendering its decision on the pending motions.

I. The Newly Produced Documents Show The Corps Agreed State Permits Were Required, Congress Approved Funding Subject To That Requirement, And Enforcing That Requirement Does Not Waive Sovereign Immunity.

The Corps' own documents show the Corps agreed state permits were required for this Project. These documents contradict the Corps' argument that requiring compliance with state environmental laws would result in a broad waiver of sovereign immunity. (Declaration of Colin O'Donovan dated August 17, 2017 ("O'Donovan Decl.") at Ex. A, 35:19-22.)

On December 18, 2015, Congress passed the Consolidated Appropriations Act of 2016, which permitted the Corps to identify up to six new construction projects, required the Corps to enter into project cost sharing agreements no later than August 31, 2016 for those projects, and prohibited any "deviat[ion] from the new starts proposed in the work plan, once the plan has been submitted to the Committees on Appropriations of the House

of Representatives and the Senate." (*Id.* at Ex. B, p. 4.) In February 2016, the State of Minnesota raised its concern to the Office of Management and Budget ("OMB") that the Corps' seeking funding and moving forward with construction of this Project before Minnesota completed its environmental impact statement ("EIS") and permitting process would undermine the state's regulatory authority. (*Id.* at Ex. C., pp. 2-3.) In direct response to that concern, OMB placed a requirement in the Corp's work plan, the only such requirement of its kind in the 2016 work plans, that prohibited the Corp from entering into the Project Partnership Agreement ("PPA") and initiating construction until the Corps determined it was likely to resolve any outstanding state environmental reviews and state regulatory issues that could affect the prospects of completing construction of the project ("the Requirement"). (*Id.* at Ex. D, p. 5.) The Requirement, in full, states:

> 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.[1] 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.*)

[1] Notably, the Corps eliminated this first part of the Requirement in all its briefs to this Court on the pending motions. (*See* Dkt. No. 447 at p. 4 and Dkt. No. 465 at 6.) The newly produced documents reveal that the reason this requirement was inserted into the Corps' work plan was because Minnesota had concerns the Corps would not respect its EIS and permitting process.

In other words, OMB required that to submit a funding request to Congress for this Project, the Corps must agree to a requirement: the Corps had to ensure all state environmental reviews and state regulatory requirements would be met so federal funds would not be wasted. Congress ratified the Requirement, approved funding for the Project, and the Corps was not permitted to deviate from that Requirement in the work plan.[2] (*Id.* at Ex. B.) The Corps, however, failed to meet the Requirement, executed the PPA anyways, and is in direct violation of Congress' funding approval. The DNR is challenging the Corps' determination to enter into the PPA, and the APA provides a waiver of sovereign immunity to challenge that decision.

Defendants' documents also show that what the Corps has consistently glossed over as a minor footnote has incredible significance and was subject to review at the highest levels within the Corps. (*Id.* at Ex. E – Email to Asst. Secretary Jo-Ellen Darcy dated January 15, 2016.) Indeed, the Corps argued with OMB over the language to submit to Congress for weeks, and, in the end, the Corps questioned whether "it is reasonable for us to asses [sic] that this won't be a problem." (*Id.* at Exs. F & G – Email from Deputy Asst. Secretary Eric Hansen dated Feb. 3, 2016 and email to Principal Deputy Asst. Secretary of the Army, Lowry Crook dated Feb. 7, 2016.) Although many of the Corps' documents are heavily redacted, these newly produced documents show OMB was concerned with the Corps' compliance with Minnesota's EIS and permitting

[2] Notably, Section 7002 of WRRDA 2014 prohibits any work to "be undertaken until funds are appropriated for these projects" and requires the projects "to be carried out by the Secretary substantially in accordance with the plan, and subject to the conditions, described in the respective Reports of the Chief of Engineers."

regulations since at least November 2015. (*Id.* at Ex. H.) In November 2015, OMB required the Corps to "clarify status and outlook of the Minnesota EIS Action and associate final permitting action for the southern embankment." (*Id.* at p. 7.) The Corps did not state Minnesota permits would not be required as it now claims to this Court. To the contrary, the Corps repeatedly admitted Minnesota environmental laws related to environmental review and permitting would be obtained and even told OMB that obtaining that DNR permit would not delay the Project:

> There is currently no foreseeable risk that ***the Minnesota EIS and state permitting*** would interfere with starting Federal construction in FY16…. The State of Minnesota has not stated they won't ***permit*** a high-hazard dam.

(*Id.*)

The newly produced documents also show the Corps understood congressional funding was conditioned on meeting the Requirement which mandated analyzing Minnesota's EIS and permits. On February 5, 2016, an unnamed Corps Executive Officer was demanding more information "on the status of the MN Permit; when it is required; [and] when will it be complete" because "Dayton talked to Ali [at OMB] this morning and wanted to add language to the effect that [the Corps] cannot sign a PPA until the state's regulatory process was complete." (*Id.* at Ex. C, p. 3.) That is the very condition that was memorialized in the Requirement and agreed to by the Corps. These documents also show that the Corps was trying to evade the Requirement: "Saw some rider language from OMB, but we are trying to avoid that." (*Id.* at p.4.) The Corps' Chief Project Manager, Aaron Snyder, however, determined that the Corps "would rather

have more $ and language than less $ and no language." (*Id.*) Mr. Snyder also admitted the Requirement related both to the Minnesota EIS and its permits:

> ***We have already agreed*** that the Corps will not initiate construction until ongoing regulatory reviews ***and permitting actions*** have been addressed to the satisfaction of the ASA(CW)....

(*Id.*)

An April 27, 2016 Corps' Memorandum similarly shows that the Corps understood the PPA could not be signed unless the Corps provided assurances that the congressionally-approved Requirement was met. (*Id.* at Ex. I, at p. 14.) The PPA Checklist attached to Col. Daniel Koprowski's Memorandum identifies the OMB footnote language, i.e. the Requirement, as "issues/controversies that must be resolved to enable the PPA to be signed." (*Id.*)

Ultimately, the Corps agreed to the Requirement limiting the Corps' ability to enter into the PPA, took the money, and then abdicated its responsibility to assess the state regulatory and permitting issues affecting the project. The Corps simply ignored the state regulatory issues. On July 5, 2017, before either Minnesota or North Dakota had ruled on the pending permit applications submitted by the Diversion Authority, the Corps claimed in its memorandum justifying execution of the PPA that no state permits were required to construct the Project. (*Id.* at Ex. J.)

At the Hearing, the Court asked several questions regarding the Corps' obligations and its entering into the PPA, including:

- What about all the language that suggests that relevant state and local permits are to be obtained as part of the process, which is seen in a number of different provisions?

- But you would be subject to a requirement if the final agency action is what is being challenged, correct?

- If the final agency action is being challenged, then the Corps can be challenged on any aspect of that final agency action under the APA, right?

- The Complaint says, alleges its arbitrary and capricious to have entered into the PPA before obtaining the necessary permits, correct?

(*Id.* at Ex. A, 36:11-14; 37:8-15; 48:16-18.)

Because these new documents were not available to the Court, the Corps dodged the Court's questions at oral argument. But the answer to these questions are highly relevant to the issues before the Court and the newly produced documents help answer those questions. The Court should therefore consider these documents which are relevant to the Corps' entering the PPA and the requirements the Corps had to meet to fulfil the obligations Congress ratified in the Corps' work plan.

In short, the Corps agreed to limit its ability to enter into the PPA and begin construction in order to obtain funds from Congress. The receipt of those funds was conditioned on state permitting. Once the Corps received the money, however, it ignored its obligation, entered into the PPA despite significant regulatory hurdles, and proceeded with construction. Requiring the Corps to comply with its agreed-to obligations which Congress approved would not result in any waiver of sovereign immunity.

II. The Documents Show The Defendants Knew State Permits Were Required From Both North Dakota And Minnesota And Manipulated The PPA To Silence Objectors By Allowing The Corps To Buy Real Property.

The Diversion Authority also argued in its brief that requiring the Diversion Authority to obtain state permits would be inappropriate and a waiver of sovereign

immunity. (Dkt. No. 459 at p. 27.) At oral argument, the Diversion Authority claimed that requiring a state actor to follow state law in this matter was preempted and it was an "immutable truth" that "Where federal and State Provisions Conflict, the Federal Must Prevail." (O'Donovan Decl. at Ex. K.) In other words, the Diversion Authority argued that the Corps can empower local units of government, which are themselves created by state law, to violate the very laws of the state that created them.

Documents exchanged between the Diversion Authority and the Corps, however, show there is no conflict and that the Diversion Authority understood it was required to obtain state permits to build this Project. In a memorandum sent to the Corps dated April 13, 2016, the Diversion Authority admitted "as part of the permitting process, the Non-Federal Sponsors will need to obtain a permit from ***both states***." (*Id.* at Ex. L, p. 4, bates labeled DivAuth_2219 (emphasis added).)

The memorandum also shows that the Diversion Authority and Corps drafted the PPA in an attempt to get around certain state permitting obligations related to land acquisition and specifically to avoid "foresee[able] objections from Project opponents, some of which ***can be silenced or preempted by merely giving the Government the authority*** to use its own power." (*Id.* (emphasis added).) The Corps agreed and included a provision in the PPA allowing the Corps to "obtain, on behalf of the Non-Federal Sponsors, real property, interests, relocations, or disposal area improvements" instead of

the Diversion Authority.[3] (*Id.* at M, p. 7, Art. II, Sec. H.) This contradicts the Corps' argument to this Court that "acquiring the land" is "required by federal law" and therefore a major waiver of sovereign immunity because "that is going to happen in every single case." (*Id.* at Ex. A, 89:3-10.) Clearly, when drafting this PPA, the Corps understood it had the authority to acquire land or the Corps would not have re-incorporated that language into the final PPA permitting the Corps to do so. This document also shows that the Diversion Authority understood owning land in a state subjects it to state law.

The Corps documents similarly show the Corps understood state permits would be required for this Project. This contradicts the Corps' sovereign immunity argument and the Corps' statement at oral argument that "[t]his is the Corps' project. The Corps is carrying out the project." (*Id.* at Ex. A, 40:21-22.) If those statements were true, however, no state permits would be required for any part of the Project in either state. But the Corps' own Assistant for Water Resources Policy & Legislation at Corps' headquarters stated the Diversion Authority is ***required*** to obtain several North Dakota permits because of actions taken by the Diversion Authority in that state.[4] (*Id.* at Ex. N.)

The same is true for the Diversion Authority's actions in Minnesota. The Diversion Authority is required to obtain several Minnesota permits because of actions

[3] The documents show that before receiving the Diversion Authority's memorandum on land rights, the Corps had struck language removing "the ability of the government to purchase land." (*Id.* at Ex. L, p. 16, bates labeled DivAuth_2232.)

[4] It is unclear what other else was required as this document and others are significantly redacted.

taken by the Diversion Authority in this state. Minnesota law requires that the owner of a dam apply for a dam safety permit. The owner of a dam is defined as the "the owner or lessee of the property to which the dam is attached, unless the dam is sponsored by a governmental agency which will be responsible for operation and maintenance of the dam, in which case that sponsoring agency shall be considered the owner." Minn. R. 6115.0320, subp. 10. Here, it is undisputed that the Diversion Authority owns or is buying the land to which the dam is attached and will be operating and maintaining the dam. (*Id.* at Ex. M., p. 8, Art. II, Secs. F & G.) Moreover, the Corps' own model PPA with standard approved language requires the Corps and the non-federal sponsors comply with state laws: "Article XI – Federal and State Laws. In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsors and the Government shall comply with all applicable Federal and State laws and regulations." (*Id.* at Ex. O at p.4, DivAuth_664.) This same language appears in the original drafts of the PPA. (*Id.* at Ex. P, p. 42, bates labeled DivAuth_1325.)

This admission that state laws must be complied with is especially important in flood control projects, which, unlike navigational projects, are not "Corps projects" but are local projects where the Corps is providing construction and design assistance. In fact, in this case the federal government is only providing 20% of the necessary funding and is looking to the local sponsors and the states to fund 80% of the Project's construction related costs. In short, the Diversion Authority's and Corps' documents show Minnesota permits are needed just like North Dakota permits.

III. The Documents Make Clear 33 U.S.C. § 2232 Applies. The Corps Simply Changed "Separable Element" In The PPA To "Non-Federal Work," But That is Insufficient To Make Section 221 Apply To All The In-Kind Work.

The Defendants told this Court that 33 U.S.C. § 2232 was "irrelevant" to this Project. (Dkt. No. 447 at p. 3.) At no point in the briefing did the Corps or the Diversion Authority even suggest to the Court that Section 2232 had ever been contemplated as an authority for this Project. Instead, they bolstered their arguments suggesting that Section 221 of the Flood Control Act had always been the authority on which the Corps intended to rely for authority to construct this Project: "The FEIS and the Chief's Report both state that the local sponsors will do work on the Project and refer to Section 221, not 33 U.S.C. § 2232." (*Id.* at p. 31.) The newly produced documents contradict this argument. The documents reveal that the parties' relationship and determination to provide apportion the construction work as a split delivery, with the Corps building the Southern Embankment and the Diversion Authority building the diversion channel, was based on the parties' understanding that 33 U.S.C. § 2232 would be the authority used for the Project. (*Id.* at Ex. P, p. 4-5 & 8-9, DivAuth_1286-87 &-1291-92; *see also* Ex. Q: "Diversion Channel: WRRDA 1014.") Following the Corps' amending the PPA in March 2016 to delete references to Section 2232, however, the parties are still constructing the exact same parts of the Project. (*Id.* at Ex. L, p. 16, DivAuth_2232; Ex. M at p. 2.)

Now that the documents have been revealed, the Corps has back-pedaled from its previously unconditional statements about 33 U.S.C. § 2232 and admitted in their recent brief that Section 2232 was part of structuring the parties' relationship. (Dkt. No. 517.)

But Section 2232 was more than just considered, it was the basis for the apportionment of work for this Project and the foundation for how the parties structured their obligations in the PPA. (O'Donovan Decl. at Ex. O.)[5]

In a December 3, 2015 memorandum, the Corps and the Diversion Authority outlined their relationship and how they were structuring Project delivery. The memorandum makes clear that the work done by the Diversion Authority is the Diversion Authority's responsibility. For example, the Corps stated that it would have to modify the PPA "to reflect that the NFS separable element would not be 'turned over' to the sponsors for O&M since it [Project ownership] would remain with the sponsors the entire time." (*Id.* at Ex. R, p. 3, DivAuth_1949.) The Corps also acknowledged its monitoring and auditing responsibilities under Section 2232, noting that "the Government will need to ensure that the NFS separable element meets the performance standards, prescriptive specifications, and regulatory requirements." (*Id.* at p. 6, DivAuth_1952.)

For months the Defendants negotiated and worked on the PPA based on Section 2232's framework to allow for the apportionment of the work. The Corps' own memorandum states that Section 2232 would be the source for crediting the work the Diversion Authority did on the diversion channel and Section 221 would permit crediting for in-kind work on the southern embankment: "[I]t is intended that the Fargo project be constructed using a 'split delivery' concept relying on Section 1014(b) of the Water Resources Development Act of 1986"…*The NFS will also provide* ***in-kind contributions***

[5] WRRDA 1014(b) is codified as 33 U.S.C. § 2232(b).

for portions of the Government separable element. (*Id.* at Ex. S, p. 2, Div.Auth_254.) The Corps now claims that "the draft documents recommending a different approach are not relevant because they did not contribute to the final PPA which ultimately did not embrace the designation of portions of the Project as separable elements." (Dkt. No. 517 at p. 2.) In reality, the documents show that up until a unilateral decision by the Corps' Headquarters to simply change the language from "separable element" to "Non-Federal work" and change the term "credit" to "in-kind" work, both the Corps and Diversion Authority understood 33 U.S.C. § 2232 applied and this PPA was being structured based on the requirements of 33 U.S.C. § 2232. (*Id.* at Ex. L, at p. 17, DivAuth_2232 ("[T]he major changes I see are that the project no longer includes any crediting for work, the term separable element has been removed the work is either Federal or non-Federal."); *c.f.* draft PPA at Ex. P with final PPA at Ex. M.)

Moreover, the Diversion Authority's Memorandum of Record regarding the "Role of USACE" dated July 11, 2016 similarly reveals the parties are still treating the diversion channel just as it did when 33 U.S.C. § 2232 applied. (*Id.* at Ex. T.) The Memorandum makes clear the very limited role the Corps is permitted to have over the Diversion Authority and the procurement of the P3 portion of the project.[6] For example, the Diversion Authority has full control of all content in the Request for Quote ("RFQ"),

[6] One of the principal reasons for limiting the information the Corps can review is to shield that information from the public: "Coming to agreement regarding USACE's role is of particular importance given the applicability of the Freedom of Information Act ("FOIA") to information in USACE's possession and control and the need to protect the integrity and confidentiality of information provided by Proposers." (*Id.* at p. 1.)

which will be determined in the Diversion Authority's "sole discretion," and even over the technical requirements, the Corps has only limited "Observer Status" excluded from participating in any discussions. (*Id.* at Ex. T, p. 3-4, DivAuth1929-30.) Nor will the Corps "be provided with any hard or electronic copy of materials or be permitted to take minutes or record the meetings in any fashion." (*Id.*) In sum, the Diversion Authority is responsible for the diversion channel from start to finish.

These same documents reveal that Section 221 cannot be the only authority used for this Project because the Corps' own guidance prohibits in-kind contributions for "features or obligations that are a 100 percent non-federal responsibility." (*Id.* at Ex. U, p. 17 Sec. B-3(c).) The newly produced documents make clear that the Diversion Authority has all the responsibility for the diversion channel, and this is confirmed by the description of what is now being called the non-federal work in the final PPA. (*Id.* at M, p. 3.) Moreover, as discussed above, the original drafts of the PPA show in-kind contributions would only be allowed for work the Diversion Authority completed on the Southern Embankment: (*Id.* at Ex. S, p. 2, Div.Auth_254.)

The documents show that following the Corps' March 30, 2016 revisions, the Corps attempted to expand the in-kind work allowed to be reimbursed under the PPA to apply to all project work, not just that work on the Southern Embankment as before. (*Id.* at Ex. L, p. 17, DivAuth_2232; Ex. M.) This is prohibited by the Corps' own guidance. As shown by a comparison of the draft PPA to the final PPA, the Corps' changing what it calls the separable element did not change how the parties structured their relationship. (*C.f.* Ex. P and Ex. M.) The Diversion Authority is still doing the "non-federal work"

and has near absolute autonomy to do so. (*See, id.* at Ex. M, p. 3.) So while the parties claimed at oral argument that they are simply providing in-kind work and not seeking credit under 33 U.S.C. § 2232, their documents show the Defendants cannot expand Section 221 to encompass the work they now seek to include as work in-kind. The DNR argued that Section 2232 had to apply and these documents supports the DNR's position.

IV. The Documents Show The Corps' Entering Into The PPA Is Final Agency Action And That Questions Of Fact Require Denial Of Its Motion To Dismiss.

The Corps argued that the PPA "does not mark the consummation of the agency's decision making process" and that "the PPA does not even address the state permit issue." (Dkt. No. 447 at pp. 13-14.) At the Hearing, the Corps even claimed "the PPA doesn't reflect a separate decision to move forward." (O'Donovan Decl. at Ex. A, 47:13-15.) The documents show these statements are not accurate. The Corps admitted in a memorandum dated April 27, 2016 that it was prohibited from entering into the PPA unless and until it could be assured that all regulatory hurdles would be overcome to assure that federal dollars were not wasted. (*Id.* at Ex. I, p. 14, DivAuth _1664.) Moreover, the newly produced documents reveal that up until at least March 30, 2017, the Corps understood that 33 U.S.C. § 2232 was the authority that would permit the parties to deliver the Project. (*Id.* at Ex. L, p. 17, DivAuth_2232.) In sum, all these newly produced documents show the PPA is the culmination of the Corps' decision making, established the legal obligations of the parties, and support the DNR's argument that entering into this PPA was arbitrary and capricious.

Moreover, the actions by the Corps following the DNR's denial of the permit confirm the Corps' actions are arbitrary and capricious. Even assuming the Corps believed it was likely Minnesota was going to issue a permit for the Project, there can be no doubt once the DNR denied the permit that a regulatory issue affecting the prospects for completing construction of the project existed. Although the Corps told this Court at the Hearing that the Court could not review agency action after the execution of the PPA, case law shows this is incorrect. Courts permit an administrative record to be supplemented to include documents following a final agency action when, as here, "agency action is not adequately explained in the record before the court; when the agency failed to consider factors which are relevant to its final decision;…[or] in cases where evidence arising after the agency action shows whether the decision was correct or not." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.D.C. Cir. 1989) ("[S]upplementation of the record was proper"); *Voyageurs Nat. Park Ass'n v. Norton*, 361 F.3d 759, 766 (8th Cir. 2004) (acknowledging "certain exceptions have been carved from the general rule limiting APA review to the administrative record."). Here, the Corps failed to adequately explain the basis for its executing the PPA given the outstanding state permitting issues and the DNR's permit denial arising after the execution of the PPA shows the Corps' decision to enter into the PPA was not proper.

CONCLUSION

The newly produced documents discussed in this proposed sur-reply and attached to the proposed O'Donovan Declaration contradict the arguments made by the Corps and Diversion Authority in their briefs and at the Hearing. In addition, these documents

provide information in response to questions the Court asked at the Hearing and likewise support DNR's past arguments. The DNR respectfully requests the Court consider these documents in ruling on the pending motions.

Date: August 17, 2017

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

/s/ COLIN O'DONOVAN

MAX KIELEY
Assistant Attorney General
Atty. Reg. No. 0389363

COLIN P. O'DONOVAN
Assistant Attorney General
Atty. Reg. No. 0396349

445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
Telephone: (651) 757-1244
Fax: (651) 297-4139
max.kieley@ag.state.mn.us
colin.odonovan@ag.state.mn.us

ATTORNEYS FOR THE MINNESOTA
DEPARTMENT OF NATURAL RESOURCES