

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Dam Safety and Public
Water Work Permit Application 2016-
0386 for the Fargo-Moorhead Flood Risk
Management Project, Clay and Wilkin
Counties, Minnesota, and Cass and
Richland Counties, North Dakota

DECLARATION OF TIM FOX

Introduction and Summary

1. I am a member of the leadership team of the Richland/Wilkin Joint Powers Authority (JPA). The JPA has constituent governmental members in all four counties, Cass, Clay, Richland and Wilkin Counties and non-governmental members in those areas as well. I am providing this declaration to explain why the JPA decided that it was important for the sound, effective, and efficient management of the Minnesota permitting process to seek summary disposition in this case.
2. I was a practicing attorney for four decades in the Breckenridge area from 1976 until 2016 and continue to maintain my attorney license. I started as a general practice attorney with Keith, Robertson and Fritz Clemmsen in Breckenridge, after I finished law school at University of North Dakota in 1976. In 1980, I became the Breckenridge City and Wilkin County Attorney. I was elected and served as Wilkin County Attorney for 36 years. For many years, I served on the Board of Directors of the Minnesota County Attorneys Association including being elected President of the Association.
3. I have been actively involved in the JPA's efforts in all of the pending litigations.

4. The purpose of this declaration is to explain why Joint Powers Authority (JPA) decided after considerable deliberation to seek summary disposition of this contested case. JPA is a joint powers organization, a Minnesota-North Dakota joint powers entity, as is the Diversion Authority. We have two attorneys on our steering committee, and the members of the steering committee made this decision after long and careful consideration.
5. In this declaration, I've sought to describe the relevant procedural history that led us to this point. Since 2014, JPA has been actively advocating that the parties meet for genuine settlement negotiations. The environmental review and permitting format has been implemented in a way that creates unending serial litigations, but never focuses on the central core issues, and I'll explain that more later in the declaration. JPA contends, and the Commissioner has found, that Minnesota law cannot issue a public waters permit for this project unless it complies with the least impact provisions of MEPA section 116D.04 and the permitting laws and regulations.
6. However, in both the federal and state environmental reviews under NEPA and MEPA respectively, the applicant has been allowed to rule out consideration of alternatives that have a lesser impact. USACE allowed Diversion Authority to select the Locally Preferred Project, deferring the least impact permitting decision to the Minnesota vetting process. When Diversion Authority began construction on the LPP, the federal court issued an injunction until the Minnesota environmental and permitting review was complete.

7. However, DNR administers the Minnesota environmental review in a way that allows an applicant to defer the least impact analysis to the permitting process. This approach had unfortunate and costly consequences for all parties and has made the vetting required by Minnesota law protracted and costly.
8. The LPP that is now under consideration in this contested case is clearly not the least impact solution. The NED project (the Minnesota Diversion) provides outstanding protection to developed Fargo and Moorhead, as the USACE found, and produces vastly less impacts. However, in the Minnesota environmental review, Diversion Authority was allowed to rule out the Minnesota Diversion, because DNR takes the position that it need not consider superior alternatives in the environmental review, if the applicant unilaterally rules them out. Under this approach, the Minnesota environmental review did not study the NED project, even though the NED project was selected by USACE as the project that best meets national flood control objectives and produces the least impact.
9. When the Minnesota environmental review was deemed adequate, the DNR explicitly warned the Diversion Authority – in the environmental review document—that an adequate environmental review was not equivalent to permitting clearance. However, the DNR’s environmental review left the permitting process without a record of examination of the least impact solution. As a result, Diversion Authority was required to launch a costly and protected permit procedure, and JPA, along with citizens and impacted governmental entities likewise were embroiled in that proceeding.

10. The ultimate result of the permitting process was that the Commissioner rejected the LPP but lacked a record on which he could find which permissible project configuration constituted a least impact solution.
11. As described below, JPA strongly supported commencement of settlement negotiations, because it was represented that the negotiations would involve a mutual attempt to find an agreed permissible least impact solution. It was on that basis that we signed joint motions to stay all proceedings and a section 408 agreement protecting the deliberations from later use in litigation.
12. During the deliberation process, however, once again, viable least impact solutions were summarily taken off the table. As discussed below, Diversion Authority unilaterally chose a new project design: there were no settlement negotiations, and no attempt to arrive at an agreement. Moreover, persons who live in the impacted areas are now faced with two simultaneous application processes, and neither of the applications involve a least impact solution. We face the prospect of serial applications, and serial litigations, without any forum to arrive at the least impact solution. Now, my declaration turns to a more detailed procedural history which is designed to explain our concern about managing two permit applications simultaneously.

JPA Participation in State, Federal and Administrative Proceedings

13. In compliance with the Minnesota Environmental Rights Act (MERA) JPA commenced an action to protect the environment against what we saw as an unwise and environmentally damaging flood control project. Our MERA claim was commenced in the name of the State to protect the environment. Minn. Stat. §116B.03 subdivision 1. Our constituent members are damaged individually, but our understanding of our status

as a MERA plaintiff is that we have a quasi-fiduciary obligation to prevent environmental damage, and we have taken that obligation quite seriously.

14. Our MERA action was commenced in Minnesota State District Court just as Diversion Authority commenced construction on the Locally Preferred project before completion of the Minnesota environmental review and before a Minnesota permit was obtained. We alleged that the Diversion Authority is a Minnesota political subdivision subject to MERA and MEPA, and there sought enforcement of the requirements of both of those statutes as to this project.
15. As representative of Wilkin County and of the JPA, I attended numerous meetings and presentations by USACE representatives and DA representatives. Throughout that process, representatives of the USACE and DA consistently took the position that this project was exempt from Minnesota permitting. As of the date we commenced our MERA action in state court, the representatives of both DA and USACE indicated that the design of the project need not take Minnesota permit requirements into account.
16. After we commenced our MERA and MEPA state court suit, the Diversion Authority sought an injunction in federal court to prevent us from litigating these issues in a separate venue. We advised the Federal Court that we would consent to moving those claims into the federal court, provided that Diversion Authority recognized that the federal court had supplemental jurisdiction over our state law claims. As a result, the State MERA action was stayed, and we amended our federal complaint to include our MERA claims. During subsequent proceedings, the Diversion Authority moved the court to remit our MERA claims to state administrative proceedings, but the Federal Court retained jurisdiction over our MERA claims.

17. We are currently active participants in multiple litigations. The litigation and status of the litigation is listed here.

- a. Richland/Wilkin Joint Powers Authority et al vs. United States Army Corps of Engineers, US District Court 13-cv-2262 JRT/LIB (preliminary injunction prohibiting construction granted pending outcome of Minnesota permit proceedings; proceedings stayed by consent of the parties)
- b. Fargo-Moorhead Diversion Board of Authority v Richland/Wilkin Joint Powers Authority 8th Circuit Court of Appeals No. 17-3429, stayed by consent of the parties pending outcome of Minnesota permit proceedings
- c. In the Matter of the Final Environmental Impact Statement for the Fargo-
- d. Moorhead Flood Risk Management Project, Clay and Wilkin Counties, Minnesota
- e. and Cass and Richland Counties, North Dakota, Pursuant to Minnesota Rules Parts 4410.0200 to 4410.6500, Minnesota Court of Appeals (writ of certiorari challenging adequacy of Minnesota environmental review) (stayed by consent of parties)
- f. Richland/Wilkin Joint Powers Authority v. Fargo-Moorhead Diversion Board of Authority, Wilkin County District Court, 84-CV-14-181 (stayed by federal court anti-suit injunction).

My Role in JPA and Background—1997 Flood

18. The Ottertail and Bois de Sioux rivers converge in the Wahpeton/Breckenridge downtown area and forming the Red River of the North.
19. The flood of 1997 overwhelmed Breckenridge and its cross-border neighbor Wahpeton, North Dakota. The 1997 flood was a flood of record that produced the highest historic peak flows on the Red River throughout the Red River Basin. As Breckenridge City Attorney, I worked in a collaborative effort with the US Army Corps of Engineers to address future flood protection for the City of Breckenridge. The efforts began before the 2001 Federal authorization of the Breckenridge Flood Protection plan and continued up to my retirement in 2016.
20. Following the 1997 flood numerous communities throughout the Red River Basin sought federal and state assistance for permanent flood protection. Communities and their elected officials were mutually supportive of efforts to obtain permanent flood protection.
21. Because Breckenridge and Wilkin County did not conceive of the possibility that Fargo and Moorhead's efforts might shift floodwaters onto our communities, we were not actively involved in the feasibility study efforts focused on Fargo and Moorhead.

2010 USACE NED Recommendation—Minnesota Diversion

22. After many years of federally funded feasibility studies, in the Spring of 2010, the US Army Corps of Engineers (USACE) completed its feasibility and environmental reviews for the Fargo and Moorhead communities. The USACE selected a Minnesota diversion as the National Economic Development (NED) project, that is, the project that best meets national economic development and environmental objectives. Once again, our communities upstream were supportive of that project. The USACE public

communications indicated that the NED project could be constructed for about \$1 billion without causing unacceptable downstream flooding.

23. The USACE's 2010 environmental review and feasibility study also reviewed a second project alternative, a North Dakota diversion, which was ultimately designated by the Diversion Authority as the "Locally Preferred Project," (LPP). The LPP alternative is at least two times more expensive and would provide flood protection to the rural undeveloped 20 square miles south of Fargo, and to about 30 square miles northwest of Fargo.

24. Originally, the Diversion Authority's leadership publicly supported the Minnesota Diversion. In the February 2010 presentation, the Fargo Forum reported,

"Project managers from the U.S. Army Corps of Engineers said in no uncertain terms Thursday that Fargo-Moorhead's best shot at getting federal funds for a Red River diversion channel is to choose a Minnesota diversion¹."

The Fargo Forum continues, quoting Commissioner Mahoney:

... to get the project approved, and to have it affordable for taxpayers, it looks like a Minnesota diversion should be the local choice. "The time frame is extremely critical. ... We have to pick a plan, it has to be an NED plan," he said.

25. The advantage of the Minnesota Diversion was that Diversion Authority could receive the maximum cost sharing from the federal government. At this time, the public was being told that either project could be built without causing unacceptable downstream flooding.

¹ Fargo Forum February 5, 2010.

26. Because the LPP did not meet national objectives, the Diversion Authority -- and its constituent governmental entities -- would have to pay not only the statutory local share but would also have to pay the entirety of the difference between the cost of the NED and LPP, which is currently estimated at about \$1 billion.
27. In April of 2010, members of the Diversion Authority designated the more expensive North Dakota Diversion as their preferred option. That decision was made without a Minnesota environmental or permitting review.
28. Importantly, at the time of the LPP designation the USACE advised that the North Dakota diversion could be operated without unacceptable downstream impacts.

Downstream Communities Challenge USACE Acceptance of LPP

29. At this point, a consortium of downstream communities became deeply concerned that the LPP would cause massive downstream flooding, notwithstanding the USACE's assertion that it would not do so. Downstream communities were concerned that the LPP was eliminating 50 square miles of existing floodplain storage. As the pictures in our motion indicate, during major flood events, huge volumes of water at significant depths flow across the floodplain. Downstream communities challenged USACE's contention that 50 square miles of floodplain storage could be eliminated without significant negative consequences for the communities downstream. Downstream communities hired a highly respected flood engineer, Charlie Anderson, of the Widseth-Nolting engineering firm, and the national environmental law department of Stoel-Rivas to challenge the environmental review.

30. Shortly before the federal environmental review comment period expired, USACE conceded that its hydrological analysis of the LPP was seriously flawed, thus vindicating Anderson's opinion that elimination of 50 square miles of floodplain storage would produce flooding. USACE announced that it would conduct a supplemental hydrological review followed by a supplemental environmental review. Once the supplemental review was completed, USACE advised that in order to deal with the enormous volume of water diverted off of the floodplains, Diversion Authority was proposing to store the supplanted water on southern Cass and Clay Counties and Northern Richland and Wilkin Counties.
31. At this point, upstream communities and citizens formed two entities to speak on behalf of the governmental subdivisions and citizens. One was called MnDak, the Minnesota North Dakota coalition; the other, the Richland-Wilkin Joint Powers Authority. Both organizations urged that USACE's recognition that the LPP would cause flooding undermined the original choice of the LPP over the NED. Now that it was clear that the LPP's expansion of Fargo's development into the floodplain would occur at the expense of other communities, the project should return to its original concept, and the Minnesota diversion choice should be restored.
32. The new version of the LPP proposed to move water upstream by damming the Red River south of the rural area that Fargo wants to develop. When a flood is predicted, the floodgates would be closed and water would be backed up flooding all the way south into Richland and Wilkin Counties. The Cities of Oxbow and Comstock, communities of Hickson, Bakke would be under water. In presentations to the public representatives of the Diversion Authority and USACE explicitly stated that the project design did not

contemplate meeting Minnesota permit requirements, because the federal nature of the project superseded Minnesota's regulatory requirements. No effort was made to comply with watershed regulatory requirements, or other local and regional requirements. Work on portions of the project was commenced despite Minnesota's warnings about the environmental review and permitting process. JPA sought a preliminary injunction against that work in federal district court and a federal injunction issued. See *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, 826 F.3d 1030 (8th Cir. 2016).

Governors Propose Settlement Process and Request Stay of All Litigation

33. After four years of litigation, the federal District Court issued an order which again confirmed the obligation of the Diversion Authority to comply with Minnesota permitting requirements. Judge Tunheim's September 7, 2017 Order

“encourage[d] all parties to work together to agree on a flood protection project that can serve the interests of both states and the afflicted communicates.” (emphasis added)

34. During the month of September, the two Governors of Minnesota and North Dakota engaged in discussions on a process which they described as fulfilling the Judge Tunheim's September 7 order. JPA enthusiastically supported the concept of working together **to agree**. We expected that this process would involve give and take, but the concept envisioned, and the basis upon which JPA supported the ensuing stays was that the process would lead to an attempt by *“the parties”* to negotiate a settlement. We anticipated that an important part of the process would be examining alternatives against

the permitting criteria established by the Commissioner, and that would include examining the least impact solutions.

35. The DNR conditioned its participation in a settlement process upon an agreement by all parties (a) to stay all litigations, including the federal appeal, the state appeal, the district court litigation, and the contested case and (b) to sign a 408 agreement that would bar the use of the settlement process in future proceedings. Our understanding of the process, then, is that dialog would be conducted in which the parties would ultimately receive information about a range of alternatives and we would then attempt to settle in the traditional sense.

36. October 30, 2017, parties sign 408 agreement as follows:

The Parties agree that they shall not inquire in any fashion or make any representation whatsoever about settlement information in any legal or administrative proceedings pertaining to the Project. The Parties agree that they shall not disclose or use any settlement information at any point in the course of any federal or state legal or administrative proceedings ("Legal Proceedings") pertaining to the Project.

37. The two Governors appointed members to a Joint Task Force. While many of the members were active in the JPA or the Diversion Authority, the members were not designated as representing parties. The Governors also appointed a Technical Advisory Group (TAG), which was dominated by engineering firms representing the USACE and Diversion Authority. DNR also had representation on the TAG.

**Elimination of NED Project from Consideration
JPA Efforts to Study Least Impact Alternatives**

38. Early on in the Joint Task Force process the two governors summarily eliminated the Minnesota Diversion from discussion or consideration. As previously stated, the NED

project, the Minnesota Diversion has a price tag of about \$1 billion less than any North Dakota alternative. JPA's position that elimination of the Minnesota Diversion is contrary to MEPA, the Minnesota Environmental Policy Act, and Minnesota permitting criteria.

39. Eliminating the Minnesota diversion also makes the project vastly more complicated from an engineering perspective and eliminates the least costly least impact alternative selected by the USACE. Since all of the engineers on the TAG, other than DNR representatives were working for the Diversion Authority, it was extremely difficult to obtain engineering information to analyze alternatives not favored by the Diversion Authority. During the task force deliberations, we urged the governors' representatives to allow engineer Charles Anderson to present information on other alternatives.

Anderson was given time to make a presentation, the substance of which is in his affidavit also submitted with our filings.

40. Mr. Anderson advised JPA and the Joint Task Force that the key to reducing impacts is to reduce the area of floodplain that is protected for development. He pointed out that the LPP opens 50 square miles of floodplain because the diversion channel was intentionally run through floodplains and across Red River tributaries.

41. All of the alternatives proposed for study by Diversion Authority representatives on the Joint Task Force and TAG contained a major floodplain development component. When JPA members urged that the Joint Task Force should study alternatives that minimized floodplain development, as the Commissioner's Order required, we encountered resistance.

42. Facing the possibility that the Task Force process was going to eliminate all options unless they contained a floodplain development component, we asked Charles Anderson to model a North Dakota diversion alternative that would minimize floodplain development. We wanted to see if such an option might be feasible and might realize significant reductions in impacts. Mr. Anderson advised us that he had the capability to use USACE software to provide preliminary results. However, he indicated that a full hydrological analysis takes time and requires more resources than he could marshal on his own in the allotted time. He advised that he could provide meaningful preliminary results that could assist the Task Force to consider whether further refinements would pay dividends. He advised that if those preliminary results were favorable, further refinement would be required, and he would need to work with USACE engineers to carry the analysis to completion.
43. Our purpose in commissioning Anderson's modelling was to see if a compromise could be found that dealt with the summary elimination of the Minnesota diversion. We reasoned that if we were going to be forced to consider a North Dakota Diversion, it should be designed to solve the feature that caused the original problem: the unwise development of the 50 square miles of rural undeveloped floodplain.
44. In consultation with engineer Anderson the JPA initially provided a rough outline of a proposal alignment based the handout and presentations made by Charlie Anderson during the Task Force meetings. Charlie Anderson took on the task of examining his theories using Corps modeling and confirmed an alternative location of the northern alignment would provide significant benefits, while retaining floodplain otherwise removed by the DA alignment. Charlie Anderson further confirmed that these benefits

would transfer to significant modification of the staging area reducing its elevation and even greater benefits with the staging area moved north by preserving additional floodplain.

45. Increasingly, JPA became concerned that the Joint Task Force deliberations were not going to lead to settlement negotiations amongst the parties as had been represented when we agreed to the stay motions. We had expected that least impact alternatives would be modelled and that a genuine inter-party negotiation would examine the alternatives using Minnesota permitting criteria. Through our attorney, we began to complain that the Task Force deliberations seemed to be ignoring Minnesota permitting criteria and that there was no forum for parties actually to attempt to arrive at a settlement. The Task Force Report that was ultimately issued did not reflect a consensus or agreement nor did it produce a permissible project alternative.
46. As a result of our concerns, DNR agreed to create a “leadership team” with party representatives, but litigation counsel for the parties were prohibited from attending. After weeks of complaining about the restrictions on alternatives, we were able to create an agreement that would allow Anderson to complete his modelling with the cooperation of project engineers. The driving principle of the alternative proposed by JPA was to capture the benefits of the Minnesota diversion, but put the diversion on the North Dakota side, because the Governors had ruled out a Minnesota diversion. Anderson pointed out that the major reason why the Minnesota diversion produced dramatically less floodwaters than the North Dakota diversion was that the Minnesota diversion did not remove undeveloped (rural) floodplain storage. Anderson pointed out that if the


North Dakota side diversion were routed so as to avoid pulling water off of the floodplains, it could duplicate much of the benefits of the Minnesota diversion.

47. As Anderson was conducting his modelling, DA representatives to Joint Task Force remained adamant that the project should accommodate the development of tens of thousands of rural undeveloped acres of Floodplain that extend 10 miles downstream and also north of Fargo. (In fact, the project they identified as a candidate for the second permit application reclaims only a relatively small amount of floodplain by increasing the elevation of flow through town to 37' through town and accepting different "Period of Record" 100-year flood event.)
48. The results of the Anderson modelling were ready before the last meeting of the four-party leadership team (JPA, USACE, DA, and DNR), and they were to be submitted at that meeting. The results showed that a North Dakota diversion designed to avoid floodplain development – one that maximized the preservation of existing floodplain – would dramatically reduce impacts. It would remove the communities of Oxbow, Bakke and Hickson from the staging area or substantially reducing needed protection.
49. However, when the leadership team was convened, the Diversion Authority and USACE arrived at the meeting having already decided to submit a permit application that develops massive amounts of floodplain. They came with a press release announcing the

new application. The new application is not the result of negotiations and it certainly does not constitute the product of a consensus process.

50. That brings me back to our concern. We agreed to a stay of these proceedings to facilitate an effort to conduct settlement negotiations. The Commissioner's order was issued on October 3, 2016. Citizens all over Wilkin, Richland, Cass and Clay counties have been held in suspense as to whether their lands will be subject to up to 8 feet and more of intentional flooding, or whether the permit will be denied. If the Commissioner applies the same "least impact" principles to the second permit application it must also be denied. If that occurs, or even if the permit is granted, there will likely be two contested cases, and still, the DNR's process will not have even considered the two least impact solutions, the NED (Minnesota Diversion), and the Anderson alternative.

Executed this 31st day of May, 2018, in the County of Wilkin, State of Minnesota.



Timothy Fox