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Stefan Olafson  
HDR, Inc.  
51 N Broadway, Suite 550  
Fargo, ND 58102

Re:

Dear Mr. Olafson:

I have reviewed your December 2, 2020 letter and the attached proposed Environmental Monitoring Easement. I have not discussed the proposed easement with XXXXX and will do so in the near future. However, there are some issues that I have concerns about, that will need to be resolved before I can fully advise XXXXXXXX concerning the proposed easement.

#1. Your letter states: "They will travel by boat along the Red River and only enter XXXXXX property off the boat, there will be no vehicle traffic and only foot traffic on her property along the river." Your statement is inconsistent with the proposed easement.

The Easement states: "Access to the Easement Property will be by river and street." The Easement does not restrict access to "foot traffic." The Easement provides for access "upon, over, in, under, across, and through" and also "ingress and egress in, on, over, across, and through the Easement Property."

We both know that your statements are of no value in determining the rights that XXXXXX loses if she agrees to an easement. Your misrepresentation of the terms of the easement is problematic.

#2. The easement is granted to "the Cass County Joint Water Resource District" but is for the benefit and use of the "Grantee, its officers, employees, agents, representatives, contractors, and subcontractors, and the United States" with only the Cass County Joint Water Resource District being responsible for any damage caused to XXXXXX as a result of the use of the easement.

This is troublesome because it appears that the Cass County Joint Water Resource District was created to obtain the property rights from XXXXXX and others for the benefit of the "Project." For all intents and purposes the Cass County Joint Water Resource District is like a shell corporation established for the sole purpose of shielding other entities from liability. The easement is for a period of 50 years, there is no reasonable expectation that the Cass County Joint Water Resource District will remain in existence for 50 years. Even if it remains in existence, I do not believe the Cass County Joint Water Resource District will have the resources to answer any

damage claims that may arise out of the easements it seeks from XXXXXXXX and others. To resolve the liability issue, I would suggest two possible alternatives. One the Cass County Joint Water Resource District obtain a bond from an appropriate commercial insurance company or that suitable beneficiaries of the easement such as the City of Fargo, the City of Moorhead and Cass County agree to be responsible and pay for any damage that XXXXXXXX suffers as a result of the easement.

I believe it much more likely that the City of Fargo, the City of Moorhead and Cass County will be in existence for the next 50 years and have the resources to pay any damages that XXXXXXXX or subsequent owners will incur, than the Cass County Joint Water Resource District will be a credible insurer for XXXXXXXX potential damages.

#3. The easement itself is incomprehensively vague. It allows “performing any other testing, surveys, and analysis” which means that Grantees can do anything they want to the property in the name of environmental testing. The activity could be destructive, as collecting soil samples is allowed without any limitation or restrictions to the area or volume of the sample being removed.

The Easement is defectively indefinite because it incorporates terms and conditions contained in “the Adaptive Management Plan” and “revisions thereto.” The AMP is controlled by the beneficiaries of the diversion project and allows terms and conditions of the easement to be fundamentally changed without the consent of XXXXXXXX. It is impossible for XXXXXXXX to know and understand what she is agreeing to give up when the Grantee can unilaterally change the terms and conditions of the agreement.

#4. The proposed easement creates unreasonable and uncertain potential liabilities for XXXXX. The easement allows Cass County Joint Water Resource District to place semi-permanent survey monuments on the property to remain in place for 50 years. There are no limits as to the number of the monuments. The monuments are not described. The location of the monuments is not determined. However, XXXXXXXX is liable for any damage she may cause to the monuments and also liable for any damage anyone entering her property with her permission may cause to the monuments.

How can XXXXXXXX be expected to agree to be liable for damage or replacement of the monuments when she is not provided with any information concerning the number, location of cost of the monuments?

#5. While the proposed easement subjects XXXXXXXX to unlimited liability it limits the liability of the Cass County Joint Water Resource District to the amount paid to XXXXXXXX for the easement: “Grantor specifically acknowledges the consideration paid represents **full and final** consideration to Grantor as **compensation or damages regarding the Easement Property**, any of Grantor's remaining property, or the Project, and that Grantor is not entitled to any further payments, tax reductions, or damages under any state or federal statute, constitutional provision, rule or regulation, or other legal authority related to this Environmental Monitoring Easement.”

Regardless of how much damage the Cass County Joint Water Resource District or its agents cause XXXXXXXX property under the pretext of environmental monitoring the only responsibility of the Cass County Joint Water Resource District is the illusory promise to repair the damage “as

best as practical.” Even the illusory promise is contingent on the existence and resources available to the Cass County Joint Water Resource District during the next 50 years as discussed above.

#6. The language used in Paragraph 3 of the proposed easement is overly broad and unclear and could be used to deny XXXXXXXX for damages caused by diversion project flooding on other parts of her property: “the consideration paid represents **full and final** consideration to Grantor as **compensation or damages** regarding the Easement Property, **any of Grantor's remaining property**, or the Project.” The easement property and other property owned by XXXXXXXX are subject to flowage easements caused by diversion project flooding and the proposed Environmental Monitoring Easement must make it clear that it does not include any flowage easement or flooding rights.

#7. The limitations of use of the easement property substantially impacts the use and value of all of XXXXXXXX property. As shown by the previously provided FM Area Diversion, Property Owner: XXXXXXXX map it is clear that the value of XXXXXXXX property is substantially enhanced and dependent on the fact that her property includes direct access to the Red River. For the next 50 years XXXXXXXX use of the easement property will be severely restricted to the point of her losing all access to the river: “Grantor **will not use**, or permit use of, the Easement Property **in any manner that disrupts or interferes** with Grantee’s use of the Easement Property, Grantee’s rights and privileges under this Easement, or with the Project. Grantor may plant or farm on the Easement Property at Grantor’s sole risk (subject to the provisions of Section 4 above), but only to the extent **Grantor’s use does not disrupt or interfere with Grantee’s use** of the Easement Property, Grantee’s rights and privileges under this Easement, or with the Project. Grantor shall not remove or destroy any survey markers placed in accordance with this Environmental Monitoring Easement. **Grantor will promptly cease any activities and remove any structures or obstructions that interfere with Grantee’s use of the Easement Property**, Grantee’s rights and privileges under this Easement, or with the Project, when directed by Grantee, at Grantor’s sole cost.”

The easement admits that it may result in XXXXXXXX total loss of access and use of the easement property: “The parties specifically agree neither Grantee nor any of its agents or representatives have made any representations or warranties in any way regarding the Project; Grantor’s ability to use the Easement Property following construction of the Project.”

#8. I cannot recommend that XXXXXXXX agree to paragraph 7 of the proposed easement. The Cass County Joint Water Resource District is requesting the easement from XXXXXXXX It is the Cass County Joint Water Resource District’s obligation to determine the owner of the easement property and not XXXXXXXXXX obligation to warrant her ownership.

#9. I cannot recommend that XXXXXXXXXX agree to paragraph 15. Paragraph 15 is antagonistic to the purpose of paragraph 16. All parts of the proposed easement are critical to the whole and would be relied on by XXXXXXXXXX in giving up her valuable property rights. If any part of the contract is invalid, then the whole agreement is invalid.

Finally, as written the proposed easement is unconscionable and unenforceable. The proposed easement unfairly protects the Cass County Joint Water Resource District by transferring all risk to XXXXXXXXXX. The Cass County Joint Water Resource District obtains all the benefits of the easement by giving it unlimited power to use the easement property in any manner it wants while severely limiting XXXXXXXXXX use of the easement property.

I look forward to discussing the proposed easement and appropriate compensation for the easement in the near future.

Sincerely

Al Baker