

**Water Topics Overview Committee**

**September 23, 2016**

**Testimony of David R. Bliss**

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# Water Topics Overview Committee Testimony

## September 23, 2016

### I. Introduction

Mr. Chairman, members of the committee and water commission members, my name is David Bliss. My law office represents the Richland County Water Resource District. With me here today are two of our board members, Vice Chairman Robert Rogstad and member Jim Haugland. We appreciate the opportunity to give an update on water-related matters from Richland County's perspective.

### II. Board Appeal of State Engineer Grant of DA Permit

- a. SE not sure "whether the DA has the power of eminent domain in Richland County." March 17, 2016 SE letter to the USACE.
- b. Admin Rule 89-08-02-02 says that DA must show "evidence of establishing a property right."
- c. DA quotes two statutes and a couple cases to show that they've established a property right. No direct evidence that DA had established ANY property right.
- d. SE not sure either, granted the DA's permit but said "the state takes no position regarding the legal viability of the DA's Authority's justification of eminent domain authority."
- e. That's like endorsing but not supporting.
- f. No legal notice to Richland County, only SE Cass. SE argues Richland County isn't a part of the project. That was news to the people who live in the 12 miles of Richland County who will be flooded with water that should have been routed through Cass County.
- g. Minnesota hasn't approved the DA's project.

### III. Board Comments on MN Permit Application

- a. Richland County commented on the DA's permit application for the Minnesota side of the project. August 23, 2016 letter to MDNR.
- b. A \$400 million project designed by the Corps became a \$2 billion project when the DA received an exemption from the Corps to add 50 square miles to the City of Fargo.
- c. No alternatives presented – just this project. Minnesota law requires an applicant to show alternatives.

- d. MN admin rules require a showing of “economic hardship.” From Richland County’s perspective, all the hardship is on Richland County’s side. Fargo gets the city, Richland County gets the water.
- e. No alternatives shown, no hardship shown. The hardship is all on Richland County’s side.

IV. Minnesota Correspondence

- a. Governor Dayton’s September 1, 2016 correspondence to the USACE disagreeing with a Utube video of Lt. Semonite’s “infomercial” which Lt. Semonite said was “an amazing project” and that the Corps was “racing with local sponsors to get it done as quickly as possible,” and that ND and MN had “come together” to advance the proposed project. Gov: “I’ve never seen such a complete disregard for the process of a co-regulator.”
- b. Gov. Dayton: The Corps “shows a federal disregard for state regulatory authority.”
- c. Gov. Dayton on Corp Secretary Darcy’s July 11, 2016 statement that the Corps is “likely to resolve any outstanding regulatory issues that could affect the prospects for completing the project.”
- d. Gov. “Secretary Darcy could not reasonably have concluded” that such was the case.

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September 22, 2016

Rep. Jim Schmidt, Chairman  
Water Topics Overview Committee  
North Dakota State Capitol  
Bismarck, North Dakota 58501

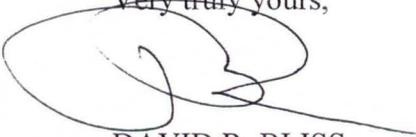
**Re: Water Topics Overview Committee Testimony  
September 23, 2016**

Dear Rep. Schmidt:

Thank you for the opportunity to present an update of water matters to the Committee. My law office represents the Richland County Water Resource District. Attached for the record are the following documents, from which I will address the Committee:

1. Richland County WRD comments to the Minnesota Dept. of Natural Resources on the Fargo-Moorhead Flood Risk Management Project ("Diversion Authority");
2. Richland County WRD's appeal of the State Engineer's July 8, 2016 grant of the DA's permit application.
3. Appeal-related correspondence of the State Engineer, City of Fargo and Office of the Attorney General;
4. Appeal-related correspondence from MN Governor Mark Dayton;
5. Appeal-related correspondence from the Minnesota Dept. of Natural Resources to the USCAE.

Very truly yours,



DAVID R. BLISS  
DRB

Enclosures

cc: Richland County Water Resource District w/o enclosures

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- (4) On March 17, 2016, State Engineer Todd Sando sent a letter to the Diversion Authority which acknowledged the State Engineer's receipt of a February 22, 2016 draft construction permit along with detailed plans and specifications for the diversion inlet structure from Terry Williams, United States Army Corps of Engineers ("USACE") by which the State Engineer noted that "...approximately 10,380 acres of the [permitted] area in North Dakota inundated by the FM Dam below 925 feet NAVD 88 are within Richland County."
- (5) Under N.D.C.C. 61-16.1-38, the State Engineer must complete the State Engineer's initial review of the application and forward the application, along with any changes, conditions, or modifications within 45 days to the water resource board of the district in which the contemplated project is located.
- (6) Neither the USACE's draft construction permit nor its detailed plans and specifications for the diversion inlet structure, together with the State Engineer's initial review of any changes or amendments to USACE's draft construction permits, were forwarded to the Richland County Water Resource District as required by N.D.C.C. 61-16.1-38.
- (7) In his March 17, 2016 letter to the USACE, State Engineer Sando stated that "[A]s Richland County is not a member of the Diversion Authority, it is uncertain whether the Diversion Authority has the power of eminent domain in Richland County" pursuant to the requirements of N.D.A.C 89-08-02-02.
- (8) In his March 17, 2016 letter to the USACE, State Engineer Sando stated that "the Diversion Authority must provide evidence establishing a property rights for the lands

inundated by the FM Dam below the elevation of 925 feet NAVD 8,” lands which include 10,380 acres of Richland County land.

(9) On April 21, 2016, the Diversion Authority replied to State Engineer Sando that N.D.C.C. 61-16.1, 61-16.1-09(2), (5) and (12) constituted evidence establishing its property right over lands subject to its Diversion project.

(10) The Diversion Authority offered no direct evidence that the Diversion Authority had actually established any property right to such property.

(11) On May 5, 2016, counsel for State Engineer Sando replied that the State Engineer accepted the Diversion Authority’s statutory references as “evidence of establishing a property right” but that “[T]he state takes no position regarding the legal viability of the Diversion Authority’s justification of eminent domain authority.”

(12) On May 25, 2016, the State Engineer gave notice to the Cass County Water Resource District that the State Engineer had received the Diversion Authority’s permit application, and that “[Y]our board, according to North Dakota Century Code Chapter 61-16.1-38, must consider the Application within 45 days and suggest any changes, conditions, or modifications to the State Engineer.”

(13) The Richland County Water Resource District, whose citizens will have 10,380 acres of land inundated by the Diversion Authority’s proposed project, received no such notice from the State Engineer of the Diversion Authority’s project application nor an opportunity to comment on the project.

(14) On July 8, 2016, State Engineer Garland Erbele granted the Diversion Authority’s application for a permit.

## II. SPECIFICATIONS OF ERROR

### COUNT I

- (15) The District restates and re-alleges the allegations set forth in Paragraphs 1 through 14 above as though fully set forth herein and further states and alleges as follows:
- (16) On March 17, 2016, State Engineer Todd Sando sent a letter to the Diversion Authority which acknowledged the State Engineer's receipt of a February 22, 2016 draft construction permit along with detailed plans and specifications for the diversion inlet structure from Terry Williams, USACE, by which the State Engineer noted that "...approximately 10,380 acres of the [permitted] area in North Dakota inundated by the FM Dam below 925 feet NAVD 88 *are within Richland County.*" Emphasis added.
- (17) As defined by N.D.C.C. 61-16.1-02(7), the term "project" means "any undertaking for....flood control...watershed improvement, drainage of surface... or any combination thereof, *including incidental features of any such undertaking.*" Emphasis added.
- (18) Under N.D.C.C. 61-16.1-38, the State Engineer must complete the State Engineer's initial review of the application and forward the application, along with any changes, conditions, or modifications, to the water resource board of the district *in which the contemplated project is located.* Emphasis added.
- (19) On May 25, 2016, the State Engineer gave notice to the Cass County Water Resource District that the State Engineer had received the Diversion Authority's permit application, and that "[Y]our board, according to North Dakota Century Code Chapter

61-16.1-38, must consider the Application within 45 days and suggest any changes, conditions, or modifications to the State Engineer.”

(20) Neither the USACE’s draft construction permit nor its detailed plans and specifications for the diversion inlet structure, together with the State Engineer’s initial review of any changes or amendments to USACE’s draft construction permits, were forwarded to the Richland County Water Resource District within forty-five days as required by N.D.C.C. 61-16.1-38.

(21) As a result of the State Engineer’s omission, the State Engineer violated the Richland County Water Resource District’s right to due process of law to which it is entitled under N.D.C.C. 61-16.1-38 by denying the District proper notice of the Diversion Authority’s permit application and the District’s opportunity for comment on the Diversion Authority’s application.

## **COUNT II**

(22) The District restates and re-alleges the allegations set forth in Paragraphs 1 through 21 above as though fully set forth herein and further states and alleges as follows:

(23) On March 17, 2016, State Engineer Todd Sando sent a letter to the Diversion Authority which acknowledged the State Engineer’s receipt of a February 22, 2016 draft construction permit along with detailed plans and specifications for the diversion inlet structure from Terry Williams, USACE, by which the State Engineer noted that “...approximately 10,380 acres of the [permitted] area in North Dakota inundated by the FM Dam below 925 feet NAVD 88 are within Richland County.”

- (24) In his March 17, 2016 letter to the USACE, State Engineer Sando stated that “[A]s Richland County is not a member of the Diversion Authority, it is uncertain whether the Diversion Authority has the power of eminent domain in Richland County” pursuant to the requirements of N.D.A.C 89-08-02-02.
- (25) In his March 17, 2016 letter to the USACE, State Engineer Sando stated that “the Diversion Authority must provide evidence establishing a property rights for the lands inundated by the FM Dam below the elevation of 925 feet NAVD 8,” lands which include 10,380 acres of Richland County land. See Paragraph (4) above.
- (26) On April 21, 2016, the Diversion Authority replied to State Engineer Sando that N.D.C.C. 61-16.1, 61-16.1-09(2), (5) and (12) constituted evidence establishing its property right over lands subject to its Diversion project.
- (27) The Diversion Authority offered no direct evidence that the Diversion Authority had actually established or obtained any property right to such property.
- (28) On May 5, 2016, counsel for State Engineer Sando replied that the State Engineer accepted the Diversion Authority’s statutory references as “evidence of establishing a property right” but that “[T]he state takes no position regarding the legal viability of the Diversion Authority’s justification of eminent domain authority.”
- (29) Under Section 2232 of Chapter 33 of the federal Water Resource Development Act, a “non-Federal interest” shall obtain any permit or approval required in connection with the project or separable element under Federal or State law before carrying out a water resources development project, or separable element thereof.
- (30) The State Engineer’s decision to accept the Diversion Authority’s bare reference to state statutes as constituting “evidence of establishing a property right” to landowners’

property in the path of the Diversion Authority's project does not itself constitute a "property right" and is in violation of the requirements of N.D.A.C 89-08-02 and Section 2232 of Chapter 33 of the federal Water Resource Development Act.

### COUNT III

(31) The District restates and re-alleges the allegations set forth in Paragraphs 1 through 30 above as though fully set forth herein and further states and alleges as follows:

(32) On March 17, 2016, State Engineer Todd Sando sent a letter to the Diversion Authority which acknowledged the State Engineer's receipt of a February 22, 2016 draft construction permit along with detailed plans and specifications for the diversion inlet structure from Terry Williams, USACE, by which the State Engineer noted that "...approximately 10,380 acres of the [permitted] area in North Dakota inundated by the FM Dam below 925 feet NAVD 88 *are within Richland County.*" Emphasis added.

(33) On May 25, 2016, the State Engineer gave notice to the Cass County Water Resource District that the State Engineer had received the Diversion Authority's permit application, and that "[Y]our board, according to North Dakota Century Code Chapter 61-16.1-38, must consider the Application within 45 days and suggest any changes, conditions, or modifications to the State Engineer."

(34) Under N.D.C.C. 61-16.1-38, the State Engineer must complete the State Engineer's initial review of the application and forward the application, along with any changes, conditions, or modifications, to the water resource board of the district *in which the contemplated project is located.* Emphasis added.

(35) Neither the USACE's draft construction permit nor its detailed plans and specifications for the diversion inlet structure, together with the State Engineer's initial review of any changes or amendments to USCOE's draft construction permits, were forwarded to the Richland County Water Resource District within forty-five days as required by N.D.C.C. 61-16.1-38.

(36) On July 8, 2016, the State Engineer granted the Diversion Authority's application for a permit.

(37) Under N.D.C.C. 61-16.1-38, the State Engineer shall refuse to allow the construction of any unsafe or improper dike, dam, or other device which would interfere with "the orderly control of the water resources of the district."

(38) Under N.D.C.C. 61-16.1-09(6), a water resource district has the power and authority to maintain and control the water levels and the flow of water and streams involved in flood control projects within the district and regulate streams, channels, or watercourses and the flow of water therein.

(39) The State Engineer failed to provide proper notice to the Richland County Water Resource District of the Diversion Authority's permit and permitted the Diversion Authority's project contrary to and in violation of the Richland County Water Resource District's statutory authority to regulate and control flood control projects in its own district as set forth above.

#### **COUNT IV**

(40) The District restates and re-alleges the allegations set forth in Paragraphs 1 through 39 above as though fully set forth herein and further states and alleges as follows:

- (41) The Diversion Authority consists of political subdivisions from both Minnesota and North Dakota, including the Cass County Joint Water Resource District.
- (42) On May 13, 2015, the court in *Richland/Wilkin Joint Powers Authority v. United States Corps of Engineers, John McHugh, Jo-Ellen Darcy and Dan Koprowski, Defendants, and Fargo-Moorhead Flood Diversion Board of Authority*, Civil No. 13-2262 (JRT/LIB), enjoined further construction of the Oxbow Hickson Bakke ring levee (“OHB”) until a Minnesota Environmental Impact Statement (EIS) had been completed, noting “the difficulty of stopping a bureaucratic steam roller, once started,” wherein a state “with more lenient environmental laws, or that has more political will behind a project, could run amok and wreak havoc on the environmental review regime of a state with more stringent regulations.”
- (43) On May 16, 2016, the Minnesota Department of Natural Resources (MDNR) issued its Final Environmental Impact Statement (FEIS) and despite “serious concerns,” declared the Diversion Authority’s project “adequate.” However, the Minnesota EIS is not a decision document, and the MDNR permitting process, which has decision-making authority, has just begun, amid clear statements from MDNR and Minnesota Governor Mark Dayton that the Diversion Authority’s project may or may not be permitted. Nonetheless, the Diversion Authority has indicated that it intends to pursue immediate construction and the taking of lands for the Diversion Authority project.
- (44) Under N.D.C.C. 61-16.1-38, the State Engineer shall refuse to allow the construction of any unsafe or *improper* dike, dam, or other device which would interfere with “the orderly control of the water resources of the district.” Emphasis added.

(45) Because the MDNR may permit an alternative project to the Diversion Authority's project, it is improper for the State Engineer to allow any immediate construction work done on the Diversion Authority's project prior to the conclusion of the Minnesota permitting process.

### **III. PRAYER FOR RELIEF**

(46) The Richland County Water Resource District respectfully requests the following relief:

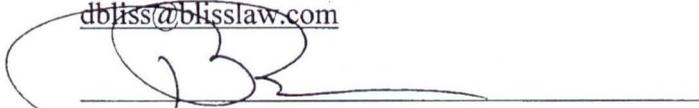
- a. For a determination that the State Engineer failed to provide notice to and opportunity for comment by the Richland County Water Resource District on the Diversion Authority's permit application in violation of N.D.C.C. 61-16.1-38;
- b. For a determination that the State Engineer must recognize the Richland County Water Resource District as a water resource district which is entitled by law to receive all notices and information required to be given by the State Engineer in regard to the Diversion Authority's permit application under NDCC 61-16.1-38, to provide comment on the same, and to be afforded the right to exercise all rights and privileges under this statute;
- c. For a determination that the State Engineer erred when the State Engineer determined that the Diversion Authority's statutory citations were sufficient evidence establishing a property right under N.D.A.R. 89-08-02-02;
- d. For a determination that the State Engineer violated the rights and legal authority of the Richland County Water Resource District to regulate and control flood control projects within its own district by permitting the Diversion Authority

project, and by allowing the immediate construction of the project's first phase despite the fact that Minnesota's permitting process has yet to be completed'.

- e. For all attorneys fees and costs incurred by the Richland County Water Resource District in the prosecution of this action pursuant to N.D.C.C 28-32-50; and
- f. For such other and further relief as the Court deems equitable and fair.

Dated this 3 day August, 2016.

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**By: David R. Bliss (#04729)**



*RICHLAND COUNTY  
WATER RESOURCE DISTRICT*

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Arv Burvee (Fairmount)  
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August 23, 2016

Mr. Rodger Hemphill  
Area Hydrologist  
Minnesota Department of Natural Resources  
14583 Cty Hwy 19  
Detroit Lakes, MN 56501

**Re: Permit Application 2016-0386  
Fargo-Moorhead Flood Risk Management Project  
Comment Letter – Richland County Water Resource District**

Dear Mr. Hemphill:

The Richland County Water Resource District (“the District”) has received notice of the filing of Permit Application 2016-0386, proposed by the Flood Diversion Board of Authority (“Diversion Authority”) and filed with the Minnesota Department of Natural Resources (“MNDNR”). The District hereby provides its comments to this proposed application.

The District is a political subdivision organized under the laws of North Dakota. The District has the statutory authority and responsibility to plan, locate, relocate, construct, reconstruct, modify, maintain, repair, and control all dams and water conservation and management devices of every nature and water channels, and to control and regulate the same and all reservoirs, artificial lakes, and other water storage devices within the district.

**The District and the Project**

Richland County is located immediately south of Cass County and the Fargo-Moorhead metropolitan area. Were the Fargo-Moorhead Flood Risk Management Project (“the Project”) to be approved, approximately 10,320 acres of Richland County land would be flooded by the Project.

The Project’s staging area, when in operation, has the potential to increase the flood water elevations over the northeast portion of Richland County. These increases in the floodwater elevations extend 12 miles into the county, stopping just short of the City of Abercrombie. As detailed in our comment letter for the MNDNR Environmental Impact Study (“EIS”), Richland County already has significant issues with flooding from the Sheyenne, Wild Rice, and Red Rivers and the F-M Diversion Staging Area would further exacerbate these issues.

The District joined with neighboring Wilkin County, Minnesota and other political subdivisions including Pleasant Township in Cass County, North Dakota and Comstock Township in Clay County, Minnesota to form the Joint Powers Authority (“JPA”) to represent the interests of both citizens and political subdivisions who will be affected by the Project. The JPA successfully obtained injunctive relief from the federal court by which all physical construction activities related to the Oxbow Hickson Bakke ring levee, a part of the larger Project, was halted. *Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers, John McHugh, Jo-Ellen Darcy, and Dan Koprowski, and Fargo-Moorhead Flood Diversion Board of Authority*, Civil Action No. 0:13-cv-02262-JRT-LIB.

On July 8, 2016, without notice to the District, the North Dakota State Engineer granted the Diversion Authority’s permit application to begin construction of the inlet structure portion of the Project. *ND Permit No. 2489*. The District then appealed the State Engineer’s granting of the permit. *OAH File No. 20160431*.

### **The Project and Public Policy**

Under North Dakota law, dams or other devices within a district automatically come under the jurisdiction and control of the water resource board for the district in which the dam is to be constructed. N.D.C.C. 61-16.1-39. More than 10,000 acres of the dam’s proposed staging area is located in Richland County. The Diversion Authority has ignored the District’s authority to regulate dams within its jurisdiction and failed to give notice to the District of the Project permit application.

The Project itself violates sound public policy. What was originally a \$400 million project designed to protect existing development in Fargo Moorhead became a \$2 billion project which enables the City of Fargo to nearly double its size by developing flood plain vital to natural drainage in the Red River basin. Under the Project, the City of Fargo grows at the expense of landowners in Richland County, who must give up their land to a single, massive staging area upstream of the Project’s high hazard dam.

Minnesota and North Dakota had agreed that any project would abide by certain sustainability principles which would not allow a flood control mechanism by which one region would pass on flood problems onto the other, upstream or downstream. Further, EO 11988 sets forth principles which are designed to protect existing flood plain from development. This Project passes on its flood waters onto Richland County and Wilkin County and in so doing violates the spirit and intent of EO 11988 by developing approximately 50 square miles of undeveloped floodplain south and northwest of Fargo.

All agree that Fargo-Moorhead needs flood protection, and as soon as possible. However, other alternatives exist which can protect Fargo-Moorhead at lower cost and with far less damage to the environment. These alternatives include but are not limited to the northern alignment proposed earlier, using floodplain which currently exists as floodplain, and flood storage distributed in multiple locations rather than in a single, massive staging area. Minnesota law requires “a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state’s paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment or destruction.” Minnesota Environmental Protection Act section 116D.04. As currently

designed, this Project foregoes environmental stewardship in favor of quick urban development. The Project dictates that the people of Richland and Wilkin Counties must take the water discarded by Fargo-Moorhead.

### **Other Alternatives Must be Shown**

Under Minnesota administrative rules, an applicant who desires to dam public waters must make “a showing of lack of other suitable feasible and practical alternative sites, and economic hardship which would have a major adverse effect on population and socioeconomic base of the area affected.” MnDNR Minn. Rules 6115.300-520 Subpart 8A. It is difficult to envision how Fargo-Moorhead, a bustling, prosperous metropolitan area, will suffer hardship if it is not allowed to turn 50 square miles of undeveloped floodplain into an urban landscape.

Hardship, on the other hand, is exactly what Richland County landowners, political subdivisions and rural communities face when their homes and their farms are inundated with flood waters so that Fargo-Moorhead can grow unimpeded. People who have lived and worked on the land for generations, neighbors and friends, all must be uprooted for the sake of quick development by a metropolitan area to the north. The term “mitigation,” which usually means getting money for one’s land in trade for an eviction from that land, does not do justice to the dislocation and permanent loss of family relationships and social fabric of rural communities which result from the Project as currently designed.

Under the MNDNR’s EIS analysis of the Project, distributed storage (DSA) would not and could not change the project. The analysis concluded that the footprint of the staging area would not change with the implementation of DSA. This analysis appears flawed. If 20% of the flow to the river is taken out of the equation, the size of the staging area would likely be reduced. We believe this alternative is feasible to reduce/eliminate the staging area impact in Richland County and should have proper study.

Corps documents also dismiss the feasible alternative of increasing the stage and flow through the Red River channel during times of flooding higher than the target 35 feet. We understand that the levee system through Fargo-Moorhead is being constructed to 42-44 feet. Typically, the Corps requires three feet of freeboard. In our view, the allowed stage could be raised to at least 37 feet in height. Corps documentation indicates that the raise to 37 feet was discounted because it would add 10 home buyouts and additional costs for the construction of a levee or levees through Fargo-Moorhead. Given the massive expense of the proposed project, this small increase in cost should be acceptable in order to reduce the staging area impacts. This elevation in stage should be considered as a mitigation measure for the upstream impacts this project will cause.

The MNDNR’s EIS declared the Project to be “adequate,” but also set forth two alternatives which the MNDNR may consider in its permitting phase. Minnesota’s permitting process is separate from Minnesota’s environmental review process. As MNDNR Commissioner Tom Landwehr stated, the fact that the Project’s EIS was deemed “adequate” by the MNDNR “should not, by any means, be interpreted as a project approval or as an indication that state permits are likely to be forthcoming.” July 8, 2016 letter to Jo-Ellen Darcy, USACE.

Commissioner Landwehr also noted that “[P]roject impacts of special concern under Minnesota regulations include construction of a high hazard dam upstream of a large population center, the increased flooding that the project would cause in upstream areas, and the potential for induced development in the floodplain.” Richland County takes heart from Commissioner Landwehr’s words, that feasible and practical alternatives to the Project must be presented and considered by the MNDNR before any permits are granted.

### **The Project Does Not Comport with Local and County Land Use Planning**

Under Minnesota law, a project must comply with local and county planning requirements. The project must be “consistent with water and related land management plans and programs of local and regional governments.” Additional flooding of land in Richland County by the Project and the loss of land for Richland County’s own development is certainly not included in any Richland County land use plans. Placing flood waters on land that has not previously flooded will limit the ability of the landowners to construct simple structures such as on-farm commodity storage, which is vital to the continued growth of a farm. Rural residential homeowners in the path of the Project’s staging area who counted on land use planning and zoning laws to protect them now face the loss of their homesteads regardless of any existing laws or ordinances. The Project’s taking of 10,380 acres of Richland County land was proposed without regard for any Richland County land use plans and ordinances.

### **MNDNR’s Comment Period Should Be Extended**

We respectfully request that the comment period be extended to allow comment on additional information to be provided by the Project sponsor. Recent correspondence between the MNDNR and Cass County Administrator Keith Berndt states that several of the items the MNDNR has requested will not be provided until September 9, 2016, which is after the comment period has closed. This lack of information, along with the other data that Project sponsors have yet to provide, makes it difficult to fully comment on all of the Project’s features until such information is made available.

### **Conclusion**

Feasible, cost effective alternatives to the Project exist and must be considered. Under the mediated settlement agreement between Minnesota and North Dakota as we understand it, one cannot transfer floodwaters from one part of the state to another just to promote development at the expense of the encumbered region. That scenario describes how the Diversion Authority’s Project is to function. Fargo-Moorhead’s gain of some 50 square miles of land taken out of the floodplain is Richland County’s loss – the Project simply deposits the floodwaters upon Richland and Wilkin Counties, to their detriment. Any “hardship” is on Richland County’s side, not on Fargo-Moorhead’s.

The USACE’s 2010 draft EIS recommended its “National Economic Development” project (NED), which was much less expensive, least harmful to the environment, and met national development objectives. However, the Diversion Authority opted for the present Project, the “Locally Preferred Project,” (LPP) and was allowed to change its project purpose despite objections from the State of Minnesota. The NED alternative is but one of several

alternatives to the present Project which could be considered by the MNDNR in its permitting process.

We respectfully request that the MNDNR reject the Diversion Authority's permit application based upon the reasons set forth above and to require that feasible and prudent alternatives be considered for Fargo-Moorhead flood protection. The District does not oppose a diversion project for Fargo-Moorhead but such a project must be fair and equitable to all parties.

Sincerely,

Richland County Water Resource District

*Robert L. Rostad*

Robert L. Rostad, Vice Chairman

S:\Richland County FM Diversion 16-10\Permitting Documents\MNDNR Ltr.docx





STATE OF NORTH DAKOTA  
**OFFICE OF ATTORNEY GENERAL**

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Wayne Stenehjem  
ATTORNEY GENERAL

**NATURAL RESOURCES**  
500 NORTH 9<sup>TH</sup> STREET  
BISMARCK, ND 58501-4509  
(701) 328-3640 FAX (701) 328-4300

May 5, 2016

Erik R. Johnson  
Fargo City Attorney  
City of Fargo  
505 Broadway Street North, Suite 206  
Fargo, ND 58102

Dear Mr. Johnson:

State Engineer Todd Sando's March 17, 2016, letter asked your client to provide "an explanation of how the Diversion Authority will secure land rights from unwilling owners in Richland County" as part of the Construction Permit application process. In response, you sent me a memorandum dated April 21, 2016, as well as documents titled "Inlet Land Acquisition Schedule" and "Typical Land Acquisition Process."

The State Engineer will accept these documents as "evidence establishing a property right" under N.D.A.C. § 89-08-02-02, and they must be submitted with the permit application as part of the plan for the procurement of the necessary property rights. The State takes no position regarding the legal viability of the Diversion Authority's justification of eminent domain authority. The plan must also include a commitment from the Cass County Joint Water Resource District to exercise the powers of eminent domain asserted in your memo.

As previously discussed, the permit for the overall project will be granted in stages. The permit for the inlet project structure itself will not be granted until the required property rights for the footprint of the inlet project structure have been secured. Similarly, the required property rights for the footprint of each additional stage will need to be secured before the additional stages of the permit are granted. The final permit will not be granted until all required property rights for property impacted by the overall project have been secured. Therefore, the plan must also include a schedule for property acquisition that will allow each stage, including the final permit, to be processed in a timely manner.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer L. Verleger".

Jennifer L. Verleger, P.E.  
Assistant Attorney General



Office of the City Attorney

City Attorney  
Erik R. Johnson

Assistant City Attorney  
Nancy J. Morris

MEMORANDUM

DATE: April 21, 2016

TO: Jennifer Verleger, Asst. Attorney General

FROM: Erik R. Johnson, Fargo City Attorney 

RE: Metro Flood Diversion Authority – authority to acquire property rights

This memo is intended to provide an explanation as to the legal authority of the Metro Flood Diversion Authority and the Cass County Joint Water Resource District, as a member entity of the Diversion Authority, to obtain property rights in land as needed for the Diversion Project. If you have any questions or comments please feel free to give me a call.

The Metro Flood Diversion Authority (Diversion Authority), as a joint powers entity,<sup>1</sup> consists of political subdivisions from both Minnesota and North Dakota, including the CCJWRD. In North Dakota, because political subdivisions are created by statute, their powers are limited to those that are either “expressly granted by the statute or reasonably implied from the powers granted.”<sup>2</sup> North Dakota courts have described implied powers as those actions which are a “manner and means of exercising” an express power.<sup>3</sup>

Chapter 61-16.1 of the North Dakota Century Code (“N.D.C.C.”) outlines the broad powers the Legislature has granted to water resource districts. These powers include such things as constructing dams and water conservation and management devices,<sup>4</sup> maintaining and controlling water levels and the flow of water for water conservation and flood control projects,<sup>5</sup> and regulating and controlling water for the prevention of floods and flood damages.<sup>6</sup> To accomplish these tasks, as well as other powers authorized pursuant to N.D.C.C. chapter 61-16.1, the Legislature authorized water resource districts to exercise eminent domain.<sup>7</sup> Section 61-16.1

<sup>1</sup>See Minn. Stat. Ann. § 471.59; N.D.C.C. chapter 54-40.3.

<sup>2</sup>Burlington N. and Santa Fe Ry. Co. v. Benson Cnty. Water Res. Dist., 2000 ND 182, ¶ 7, 618 N.W.2d 155 (internal quotation marks and citation omitted).

<sup>3</sup>Meyer v. City of Dickinson, 451 N.W.2d 113, 116 (N.D. 1990) (quoting Haugland v. City of Bismarck, 429 N.W.2d 449, 453-54 (N.D. 1988)).

<sup>4</sup>N.D.C.C. § 61-16.1-09(5).

<sup>5</sup>N.D.C.C. § 61-16.1-09(6).

<sup>6</sup>N.D.C.C. § 61-16.1-09(7).

<sup>7</sup>N.D.C.C. § 61-16.1-09(2) (“Each water resource board shall have the power and authority to . . . [e]xercise the power of eminent domain in the manner provided in title 32 for the



09(12), N.D.C.C., further provides water resource districts may utilize condemnation to acquire and to use and control “both real and personal property and easements and right of ways within or without the limits of the district for all purposes authorized by law or necessary to the exercise of any other stated power.”

Utilizing the powers granted by N.D.C.C. chapter 61-16.1, the CCJWRD has the authority to condemn property rights for the Project. For the Project structures themselves, which will not be located within Richland County, N.D.C.C. §§ 61-16.1-09(2), (5) and (12) provide the CCJWRD with the ability to construct the structures, and to effectuate that construction, condemn property. Both during and following construction, the Project structures will be under the jurisdiction of the CCJWRD.<sup>8</sup>

Once the Project is constructed and water levels are being regulated, a staging area for water pooled upstream from the Project will become operational. As a result of the proposed influx of water in this staging area, the CCJWRD will need to acquire flowage easements across affected properties,<sup>9</sup> including those in Richland County. Although the flowage easements sought in Richland County are outside of the CCJWRD’s district, N.D.C.C. § 61-16.1-09(12) specifically authorizes the CCJWRD to acquire easements through condemnation “without the limits of the district for all purposes . . . necessary to the exercise of any other stated power.” Here, the flowage easements in the staging area, and the need to condemn them in Richland County, are necessary and incidental to the construction of the Project, which derives from an express power of the CCJWRD. Moreover, N.D.C.C. § 61-16.1-09(12) provides the CCJWRD with the authority to control the extraterritorial flowage easements because they will not involve the construction of any “dams, dikes, [or] other water conservation and flood control works or devices” as provided in N.D.C.C. § 61-16.1-39. Condemnation of the flowage easements is therefore authorized by the North Dakota Century Code.

### III. Conclusion

By exercising its express powers granted in N.D.C.C. chapter 61-16.1, the CCJWRD, a member entity of the Diversion Authority, has the ability to condemn flowage easements in Richland County, North Dakota, for the operation of a staging area. The flowage easements are necessary as a result of the construction of the Project.

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purpose of acquiring and securing any rights, titles, interests, estates, or easements necessary or proper to carry out the duties imposed by this chapter . . .”).

<sup>8</sup>N.D.C.C. § 61-16.1-39 (“All dams, dikes, and other water conservation and flood control works or devices constructed within any district . . . shall . . . automatically come under the jurisdiction of the water resource board for the district within which the dam, dike, works, or device exists or is to be constructed.”).

<sup>9</sup>See N.D.C.C. § 47-05-01(9) (recognizing the “[t]he right of flooding land” as an easement attached to land).



# State of North Dakota

## Office of the State Engineer

900 EAST BOULEVARD AVE. • BISMARCK, ND 58505-0850  
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March 17, 2016

Darrell Vanyo, Chairman  
Flood Diversion Board of Authority  
P.O. Box 2806  
211 Ninth Street South  
Fargo, ND 58108

Dear Chairman Vanyo,

The Flood Diversion Board of Authority (Diversion Authority) is in the process of planning and permitting the large-scale flood control project known as the FM Diversion. The stated intent of the project is to reduce the 100-year flood event from 42.4 feet to 35 feet at the Red River Fargo gage. On March 8, 2016, members of the engineering staff at the Office of the State Engineer (OSE) and I met with representatives from Cass County, officials from the City of Fargo (City), and the Governor to discuss the permitting requirements of the OSE. This letter fulfills my commitment to explicitly describe what will be needed to obtain a construction permit from the OSE.

As part of the FM Diversion, a dam and staging area (FM Dam) are proposed to be located upstream of the City. The FM Dam will require a Permit to Construct or Modify a Dam, Dike, Ring Dike, or Other Water Resource Facility (Construction Permit) from the OSE.

On February 22, 2016, the OSE received a draft Construction Permit application (Draft) from Terry Williams, United States Army Corps of Engineers (USACE) St. Paul District Project Manager. The Draft included a cover letter along with detailed plans and specifications for the diversion inlet structure, as well as a substantial amount of supporting information for the FM Dam. The cover letter from Ms. Williams noted that "a dam permit is not a legal prerequisite to federal construction," but the USACE will, "be applying for the permit out of comity." The OSE disagrees with this portrayal and maintains that an approved OSE construction permit is a prerequisite to the construction of any portion of the FM Dam in North Dakota.

In addition to a completed Application/Notification to Construct or Modify a Dam, Dike, Ring Dike, or Other Water Resource Facility (SFN 51695), North Dakota Administrative Code section 89-08-02-02 requires the following information be submitted before any Construction Permit Application will be considered complete:

TODD SANDO, P.E.  
STATE ENGINEER

1. Plans and specifications for the proposed structure
2. Evidence establishing a property right for the property that will be affected by the construction of the dam, dike, or other device

### Plans and Specifications

The OSE received detailed plans and specifications on October 28, 2015, from the USACE, which included a set of Design Documentation Reports (DDR) for the various technical aspects of the project. In discussions with USACE technical staff regarding the project on March 3, 2016, the OSE became aware that a revision of the DDR set was underway and would be finalized by the beginning of April 2016. The OSE did receive a draft copy of the Hydraulics and Hydrology (H&H) DDR, and many outstanding questions were answered as a result. Due to the refined information the upcoming DDR set will contain, the OSE will withhold any comments on design or requests for additional information until the more detailed information is submitted.

### Property Rights

For the purpose of permitting dams in North Dakota, the top of the dam is typically used to determine the impacted properties where evidence establishing a property right would be required. What is meant by “evidence establishing a property right” is not defined in the governing North Dakota Century or Administrative Codes. Therefore, the Diversion Authority has the latitude to develop various methods as to how land rights will be obtained from both willing and unwilling owners.

For the FM Dam, the top of the dam is proposed to be at 930 feet North American Vertical Datum of 1988 (NAVD 88), which creates a reservoir that would cover approximately 45,390 acres in North Dakota alone. However, the USACE has stated that the FM Dam is not intended to be operated above the top of the limited service spillway at 925 feet NAVD 88. The State Engineer has agreed to only require evidence establishing a property right for the area below the top of the limited service spillway. At 925 feet NAVD 88, the FM Dam would inundate approximately 29,260 acres of land in North Dakota. Therefore, the Diversion Authority must provide evidence establishing a property right for the lands inundated by the FM Dam below the elevation of 925 feet NAVD 88. Again, the form of that evidence is flexible but must demonstrate a realistic plan for the procurement of the necessary property rights. If that plan relies on agreements other than traditional flood easements, the plan should address the various criteria used.

According to OSE staff analysis, approximately 10,380 acres of the area in North Dakota inundated by the FM Dam below 925 feet NAVD 88 are within Richland County. As Richland County is not a member of the Diversion Authority, it is uncertain whether the Diversion Authority has the power of eminent domain in Richland County. From a legal standpoint, an explanation of how the Diversion Authority will secure land rights from unwilling owners in Richland County is required by the OSE.

As stated previously, the OSE staff must have an opportunity to review the updated DDRs prepared for the FM Diversion in order to have a comprehensive understanding of how the structure will be constructed and how the project will operate. As such, the Diversion Authority must supply the OSE staff with the updated DDRs, when available. If the above referenced items required for a complete permit application are not received by the OSE, the construction permit application will be considered incomplete and the application will not be processed.

The State of North Dakota and the North Dakota State Engineer have a long established track record of supporting, both through policy and financially, North Dakota communities in their efforts to protect infrastructure and residents from potentially catastrophic flood events. To that end, it is also the duty of the OSE to ensure that any proposed project is held to the requirements outlined in the governing North Dakota Century Code and North Dakota Administrative Code.

If the Diversion Authority or their technical design team has any questions regarding the OSE permitting process, please contact Aaron Carranza at 701-328-4813 or by email at [acarranza@nd.gov](mailto:acarranza@nd.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Todd Sando", with a stylized flourish at the end.

Todd Sando  
State Engineer

cc: State of North Dakota Governor Jack Dalrymple  
City of Fargo Mayor Dr. Tim Mahoney  
City of Fargo Interim City Administrator Bruce Grubb  
Representative Al Carlson, District 41  
Senator Gary Lee, District 22





# STATE OF MINNESOTA

## Office of Governor Mark Dayton

116 Veterans Service Building ♦ 20 West 12th Street ♦ Saint Paul, MN 55155

September 1, 2016

The Honorable Shaun Donovan  
Director  
Office of Management and Budget  
725 17th Street NW  
Washington, DC 20503

The Honorable Jo-Ellen Darcy  
Assistant Secretary for Civil Works  
Department of the Army  
108 Army Pentagon  
Washington, DC 20310

Dear Director Donovan and Assistant Secretary Darcy:

I write you with regard to the proposed Fargo-Moorhead Flood Risk Management Diversion Project. I am dismayed and deeply disappointed that the U.S. Army Corps of Engineers is proceeding without any evident regard for the unresolved issues Minnesota has identified. As I have expressed on multiple occasions, it is essential that the Army Corps of Engineers respect Minnesota's permit decision-making process and not act prematurely to initiate construction before our process is complete.

The Chief of Engineers, Lieutenant General Semonite, toured the proposed project area on August 22 and met with the Diversion Authority on August 23. Given how clearly Minnesota has communicated the state permitting issues facing this project, it was inconceivable to me that General Semonite did not also request an opportunity to meet with Minnesota and learn more about these challenges during his visit. But then I viewed his five-minute infomercial for the project (<https://www.youtube.com/watch?v=IwdOeqWxaug>) and realized this was not a fact finding visit, but rather a promotional tour. In the video, Lieutenant General Semonite did not so much as acknowledge the unresolved permitting questions, while he sung the praises of the "amazing project" that he promised to deliver by 2023, apparently with or without the required Minnesota permits. As his project manager stated, "We are racing with local sponsors to get it done as quick[ly] as possible."

This is not how we do business in Minnesota. Despite Lieutenant General Semonite's unfounded representation to the contrary, Minnesota has not "come together" with the Army Corps of Engineers and the State of North Dakota to advance the proposed project. In all my years of public service at the state and federal levels, I have never seen such a complete disregard for the process of a co-regulator. You should understand that a favorable permit decision by Minnesota is by no means guaranteed, and I take exception to actions by the U.S. Army Corps of Engineers and its non-federal sponsors to suggest otherwise or attempt to advance project construction in the absence of the required Minnesota permits.

These most recent developments are a very disappointing extension of Assistant Secretary Darcy's premature decision to execute the Project Partnership Agreement (PPA) for this project on July 11. Given what Minnesota communicated prior to July 11 about the very significant and unresolved issues relative to our threshold permit requirements, Assistant Secretary Darcy could not have reasonably concluded that the Army Corps of Engineers "is likely to resolve any outstanding regulatory issues that could affect the prospects for completing construction of the project." (Previous correspondence enclosed.)

Statements and actions like those described above demonstrate a federal disregard for state regulatory authority, which is very concerning to me and confusing to members of the public. Such rhetoric clouds an already complicated process and is a source of significant stress for many citizens in the project area.

Finally, let me assure you that Minnesota Department of Natural Resources continues to carefully evaluate the Diversion Authority's permit application, and is currently awaiting required information that was not provided with the Diversion Authority's original application. Minnesota has no desire to take any more time than is necessary in reaching its permit decision.

Sincerely,



Mark Dayton  
Governor

Enclosures

cc: Lieutenant General Todd Semonite, USACE Chief of Engineers  
Major General Michael Wehr, USACE Mississippi Valley Division  
Commander  
Colonel Samuel Calkins, USACE St. Paul District Commander  
Mayor Timothy Mahoney, City of Fargo  
Mayor Del Rae Williams, City of Moorhead  
Darrell Vanyo, Chair, Flood Diversion Board of Authority  
U.S. Senator Amy Klobuchar  
U.S. Senator Al Franken  
U.S. Congressman Collin Peterson



# STATE OF MINNESOTA

## Office of Governor Mark Dayton

116 Veterans Service Building ♦ 20 West 12th Street ♦ Saint Paul, MN 55155

July 15, 2016

Shaun Donovan  
Director  
Office of Management and Budget  
725 17<sup>th</sup> Street NW  
Washington, DC 20503

Dear Director Donovan:

I want to convey my personal concern with the Department of the Army's decision to execute a Project Partnership Agreement (PPA) for the proposed Fargo-Moorhead Flood Risk Management Diversion Project. I view this action as premature and inconsistent with the guidance your office issued when allocating \$5 million in funding for FY 2016 to the project.

Specifically, your guidance required the Assistant Secretary of the Army for Civil Works to determine that the Army Corps of Engineers "is likely to resolve any outstanding regulatory issues that could affect the prospects for completing construction of the project" *before* signing the PPA or initiating construction. We've been told that Assistant Secretary Darcy's decision to sign the PPA represents her determination that regulatory issues are likely to be resolved.

Respectfully, I must take issue with her decision. Minnesota was not consulted prior to the Assistant Secretary's determination, nor have we been provided with any written explanation of the basis for her determination. Minnesota has been abundantly clear that the Fargo-Moorhead project as proposed presents very significant issues relative to our threshold permit regulations. Commissioner Landwehr summarized some of those issues in his July 8, 2016 letter to Assistant Secretary Darcy, which is attached.

We are in the process of carefully evaluating the proposed Fargo-Moorhead Diversion Project under our permitting rules. It is premature to conclude that outstanding regulatory issues are likely to be resolved.

Thank you for your consideration of my concerns.

Sincerely,

A handwritten signature in black ink that reads "Mark Dayton".

Mark Dayton  
Governor

Enclosure

Voice: (651) 201-3400 or (800) 657-3717  
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# Minnesota Department of Natural Resources

500 Lafayette Road · Saint Paul, Minnesota · 55155-4037

Office of the Commissioner

651-259-5555



July 8, 2016

The Honorable Jo-Ellen Darcy  
Office of the Assistant Secretary of the Army (Civil Works)  
108 Army Pentagon  
Washington, DC 20310-0108

Dear Assistant Secretary Darcy:

I understand that you are scheduled to sign the Project Partnership Agreement (PPA) for the proposed Flood Risk Management: Fargo-Moorhead Metro, North Dakota and Minnesota on Monday, July 11, 2016. Staff from your St. Paul District inform us that your July 5, 2016 approval of the project PPA represents your determination that "Corps is likely to resolve any outstanding regulatory issues that could affect the prospects for completing construction of the project," as required under the conditions accompanying the project's FY 2016 construction funding allocation. Given that your office did not directly consult with Minnesota prior to your making this determination, I want to ensure you are aware of Minnesota's perspectives regarding unresolved regulatory issues relevant to this project.

As Governor Mark Dayton shared with OMB Director Shaun Donovan in February 2016, the proposed Fargo-Moorhead Diversion presents significant issues under Minnesota's regulatory system. These are disclosed and discussed at length in the state's Final Environmental Impact Statement (FEIS) dated May 16, 2016. However, in Minnesota, the environmental review process is entirely separate from, and must precede, permitting decisions. Determination of whether these issues can be resolved is a matter for the state's permitting process, which is ongoing. Please understand, our June 29, 2016 decision that the state EIS is "adequate" and therefore that the environmental review process is complete should not, by any means, be interpreted as a project approval or as an indication that state permits are likely to be forthcoming.

Without prejudicing our ultimate decisions, we have attempted to be very clear in our FEIS and our adequacy determination, as well as in our communications surrounding these documents, that the project as proposed presents significant issues under Minnesota regulations that we will need to evaluate very carefully. Project impacts of special concern under Minnesota regulations include construction of a high hazard dam upstream of a large population center, the increased flooding that the project would cause in upstream areas, and the potential for induced development in the floodplain. These impacts raise issues with our regulatory standards including, but not limited to, sufficiency of mitigation; consistency with local, state, and federal plans; and our required determination whether the project represents a reasonable approach to flood risk reduction that is in the public interest. In addition, the level of engineering detail that has been provided thus far falls far short of what we need to complete our technical analysis of the pending permit application.

St. Paul District staff inform us that your determination regarding the likelihood of resolving outstanding regulatory issue was a process internal to your office. Given that we were not consulted as part of this process and further that we are not able to see the basis for your determination, I believe it is essential

Assistant Secretary Darcy

July 8, 2016

Page Two

to be on the record directly with you regarding the real and significant regulatory issues that are outstanding in Minnesota concerning the proposed Fargo-Moorhead Diversion Project. My staff are working diligently to review the pending project application and are giving priority to analyzing the threshold policy considerations that will determine whether this project is permissible in Minnesota. We appreciate the ongoing cooperation of your St. Paul District staff as we undertake this work.

Please be assured that Minnesota understands the very real flood risk management needs in Fargo-Moorhead, and in the Red River Valley more generally. Minnesota has invested \$234 million in state funds since 2008 to provide flood risk reduction for Moorhead and other communities in the Red River Valley. In this instance, as always, our goal is to find integrated approaches to flood risk management that meet the policy and technical standards in our regulations.

I appreciate your careful consideration of the issues I've raised here and would be pleased to discuss them further if that would be helpful.

Sincerely,



Tom Landwehr  
Commissioner

c: OMB Director Shaun Donovan  
USACE Chief of Engineers Lieutenant General Todd Semonite  
USACE Mississippi Valley Division Commander Major General Michael Wehr  
USACE St. Paul District Commander Colonel Samuel Calkins  
Governor Mark Dayton  
Mayor Timothy Mahoney, City of Fargo  
Mayor Del Rae Williams, City of Moorhead  
Darrell Vanyo, Chair, Metro Flood Diversion Authority  
US Senator Amy Klobuchar  
US Senator Al Franken  
US Congressman Collin Peterson