

**THE GOVERNMENT OF THE
PROVINCE OF MANITOBA,**

v.

Defendants.

BRIEF OF AMICI CURIAE

The National Wildlife Federation, the Minnesota Center for Environmental Advocacy, the Missouri Coalition for the Environment, the Minnesota Conservation Federation, and the South Dakota Wildlife Federation (collectively the “conservation organizations”) respectfully submit this *amicus curiae* brief in support of the motion for summary judgment of the Plaintiff Government of the Province of Manitoba.

Conservation organizations contend that the Bureau of Reclamation's (the "Bureau's") Final Environmental Assessment, dated April 2001 (Administrative Record 453) (the "EA"), and the Finding of No Significant Impact, dated May 18, 2001 (AR 672), as revised September 10, 2001 (AR 751) (the "FONSI"), for the Northwest Area Water Supply project ("NAWS") are

arbitrary and capricious and the decision of the Bureau should be reversed. The NAWS project should be subject to a comprehensive environmental impact statement ("EIS") in accordance with Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) ("NEPA"), the regulations of the Council on Environmental Quality (the "CEQ"), 40 C.F.R. Part 1500 (the "CEQ regulations"), and the implementing NEPA regulations and guidance documents of the Bureau of Reclamation.

Conservation organizations further support the Plaintiff's request that the Bureau undertake no further action on the NAWS project, including the transfer of Federal funds, entry into contracts related to the NAWS project, or the initiation of any construction on this project, until such NEPA review is complete. The NAWS project is the subject of real and longstanding concerns by conservationists in the United States. These concerns have been shared publicly by numerous governments and agencies, including the U.S. Environmental Protection Agency, the States of Missouri and Minnesota, the Province of Manitoba, and the federal Government of Canada. The concerns arise, in part, because NAWS represents the first Federal project to transfer Missouri River water across the basin divide. Its precedent-setting importance must be acknowledged. Its potential to introduce alien species poses a serious risk to downstream waters in the U.S. and Canada. The project has truly global environmental ramifications requiring the utmost attention of the federal government.

The conservation organizations believe that the Bureau must fully review the diversions of water between major drainage basins because of the potentially costly, unpredictable and irreversible economic and environmental damage that may occur. The potential for irreversible harm to waters and ecosystems will not be fully understood and susceptible to reduction or elimination unless an EIS is completed.

I. THE EA FAILS TO PROPERLY ANALYZE THE SIGNIFICANT RISK OF INTRODUCING INVASIVE SPECIES INTO RECEIVING WATERSHEDS IN BOTH THE UNITED STATES AND CANADA.

Conservation organizations believe that the NAWS project poses real threats to the North Dakotan environment as the result of the potential introduction of non-native, invasive species. The potential spread of invasive species is the central concern for conservation organizations and underlies the numerous legal issues regarding the Bureau's arbitrary and capricious EA and FONSI.

Introduction of invasive species is a risk inherent in the interbasin transfer of water. An increased recognition of and concern about the environmental and economic impacts of invasive species has been incorporated into federal environmental policy during the past several years. Executive Order 13112, 64 *Fed. Reg.* 6183 (Feb. 3, 1999) (EA 2079), requires that a federal agency "not authorize, fund, or carry out actions that it believes are likely to cause the introduction of invasive species in the United States or elsewhere" unless "all feasible and prudent measures to minimize risk of harm will be taken." An "invasive species" is defined in the Executive Order as a species not native to a particular ecosystem "whose introduction [into such ecosystem] does or is likely to cause economic or environmental harm or harm to human health." Executive Order 13112, secs. 1 (a), (f).¹

There are a large number of invasive species in the Missouri River Basin that could be spread into downstream waters as a result of the NAWS project. Examples include the zebra mussel, exotic fish such as the zander, pallid sturgeon, paddlefish, shovelnose sturgeon,

¹ It is notable that several federal agencies (including the Department of Interior) have formed a National Invasive Species Council that concerns itself with potential harm from invasive species. *See, generally*, the U.S. National Invasive Species Council website at <http://www.invasivespecies.gov>

shortnose gar, gizzard shad, Utah chub, smallmouth buffalo, and river carpsucker, as well as diseases and parasites such as five helminth fish parasites (*Icelanionchophaptor microcotyle*, *Corallotaenia minutia*, *Darnitoides robusta*, *Newhinobynchus prolixus*, and *Octospinifer macilentus*), two crustacean parasites (*Achtheres ambloplitis* and *Ergasilus cyprinaceus*), and the agent (*Yersinia ruckeri*) for redmouth bacterial disease that is at present rarely found in Hudson Bay fish. Therefore, at a minimum, the implications of Executive Order 13112 must be fully assessed under NEPA.

Because the NAWS project involves the inter-basin transfer of water from the Missouri River to the Hudson Bay Basin, carrying with it inherent risks of transferring invasive species from one basin to another, it has long been controversial. Indeed, as long ago as 1977, the International Joint Commission (the "IJC") concluded that construction of elements of the Garrison Diversion Unit (including projects such as NAWS) should not take place until "the Governments of Canada and the United States agree that methods have been proven that will eliminate the risk of biota transfer, or if the question of biota transfer is agreed to be no longer a matter of concern." IJC, Report on the Transboundary Implications of the Garrison Diversion Unit, p. 121 (1977) (AR 846) (the "IJC Report").

Specifically for the NEPA determination at issue in this litigation, the introduction of invasive species presents precisely the type of "unique or unknown risks" for which the CEQ regulations suggest an EIS is necessary. 40 C.F.R. § 1508.27(b)(5). To avoid preparation of an EIS, the Bureau relies upon measures that may be taken by several North Dakota agencies in connection with the NAWS project that could mitigate the potential impacts of invasive species. However, the Bureau has failed to provide the requisite analysis to justify reliance on these measures.

When an agency relies on mitigation measures to justify a FONSI, it must perform a much more in-depth analysis of those measures than the brief discussion provided in the EA. *See National Audubon Society v. Hoffman*, 132 F.3d 7, 17 (2nd Cir. 1997) (“We emphasize the requirement that mitigation measures be supported by substantial evidence in order to avoid creating a temptation for federal agencies to rely on mitigation proposals as a way to avoid preparation of an EIS”); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1997). The Bureau “must analyze mitigation measures in detail and explain how effective the measures would be,” *Oregon Natural Desert Ass’n v. Singleton*, 47 F. Supp. 2d 1182, 1193 (D. Or. 1998), as well as analyze the impact that will occur if the mitigation measures are not successful.

The Bureau itself acknowledged that, while the proposed mitigation measures may reduce the risk of biota transfer, they do not eliminate the risk. As acknowledged by the Bureau, one such measure – isolation valves – will only “reduce” volumes of water released in the event of pipeline failure, and even those reduced volumes will pose a threat of transferring harmful, non-indigenous species to the Hudson Bay Basin. At a minimum, an EIS is needed to disclose and discuss in detail the project’s compliance with Executive Order 13112 and the potential impacts of invasive species not captured by the proposed mitigation measures.

II. THE BUREAU’S FAILURE TO PREPARE AN EIS IS INCONSISTENT WITH PRIOR AGENCY PRACTICE AND PRECEDENT.

The Bureau’s NAWS decision-making is inconsistent with actual NEPA precedents set by the Bureau and other federal agencies involving water projects. Two examples of federal water projects for which an EIS has been deemed necessary are:

- **Devils Lake Outlet Project, North Dakota** – This project involves the proposed construction of a drainage outlet to transport water from Devils Lake to the Sheyenne

River. Like the NAWS project, the Devils Lake project entails the risk of biota transfer and the introduction of invasive species into the Hudson Bay Basin. The Corps of Engineers has recently released a final EIS on the project. *See* 68 *Fed. Reg.* 19206 (Apr. 18, 2003).

- **Navajo-Gallup Water Supply Project (“NGWSP”), New Mexico** – The Bureau published a Notice of Intent to Prepare a Draft EIS for the NGWSP on March 27, 2000. *See* 65 *Fed. Reg.* 16219 (Mar. 27, 2000). Both of the water-diversion alternatives under consideration for the NGWSP, which is planned to supply 40,000 acre-feet of water annually for municipal and industrial use, contemplate the construction of treatment plants, pumping stations, and water delivery systems (canals or pipelines) similar to the sorts of facilities planned for the NAWS project. *See, generally*, Upper Colorado Region, U.S. Bureau of Reclamation, Navajo Dam and Reservoir web site, http://www.uc.usbr.gov/ea_eis/dro/navajo_site/.

These and similar precedents suggest an EIS is appropriate in this case. Indeed, the conservation organizations believe that there is no justification for the Bureau to deviate from the precedent established by the Bureau and other federal agencies on similar water diversion projects.

III. THE PRECEDENT FOR FUTURE ACTION IS IMPORTANT.

In addition to being inconsistent with prior agency practice and precedent, the Bureau’s decision not to require an EIS also disregards the potential precedent that the NAWS project itself might set. *See* 40 C.F.R. § 1508.27(b)(6). For instance, the Dakota Water Resources Act authorizes a study to identify future water needs and options in the Red River Valley of North Dakota and authorizes the Secretary of the Interior to select an option from both in-basin and

Missouri River Basin alternatives. Proponents of the NAWS project have publicly contemplated similar water treatment as a mechanism to mitigate biota transfer impacts if a Missouri River Basin option is selected to meet future needs in the Red River Valley. The Bureau has expressly acknowledged that “[a]pproval of NAWS would likely set a precedent in North Dakota for any other interbasin transfers into the Hudson Bay drainage.” Briefing memorandum for the Secretary of the Interior (October 20, 2000) (AR 9157).

Other interbasin transfers might be considered for a variety of other purposes such as streamflow augmentation, groundwater recharge, and recreational needs. The thorough scientific and technical analysis of the NAWS project afforded by an EIS is necessary because the water treatment mechanism used for the NAWS project could set precedent for water treatment in future projects. Moreover, an EIS is needed to fully assess other major environmental and policy considerations attendant to Missouri River water diversions, including the downstream impacts on the river's ecosystem from reduced or altered flows.

Further, an interbasin transfer of water of the scale proposed in the NAWS project could set a dangerous precedent for management of other water resources. As fresh water becomes more valuable and scarce, diversion projects affecting such treasured water resources as the Great Lakes are being discussed. The Bureau must not set a precedent of ignoring potential environmental impacts and short-cutting the public and scientific review of such major federal projects. Instead, it should continue to follow agency practice and prepare a complete EIS to analyze and inform its decision. These vitally important questions are fully fit for judicial resolution in the context of this case.

CONCLUSION

For the reasons stated above, the conservation organizations respectfully submit that the NAWS EA and FONSI are arbitrary and capricious and should be reversed. The NAWS project should be subject to a comprehensive EIS, with special attention to potential impacts of invasive species, in accordance with NEPA, CEQ regulations, and the implementing NEPA regulations and guidance documents of the Bureau of Reclamation.

Respectfully submitted,

/s/

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