

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE GOVERNMENT OF
PROVINCE OF MANITOBA,

Plaintiff,

v.

GALE A. NORTON, et al

Defendants.

No. 1:02CV02057-RMC

**PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND PERMANENT INJUNCTION**

Plaintiff respectfully moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment on the claims set forth in its Complaint for Declaratory and Injunctive Relief, and for (a) a declaratory judgment that (1) Defendants' Environmental Assessment, dated April 30, 2001, for the Northwest Area Water Supply ("NAWS") Project is inadequate and Defendants' Finding of No Significant Impact, dated May 18, 2001, as revised September 10, 2001, and their actions based thereon, are therefore arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law within the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C. §706(2)(A), and (2) Defendants are required to prepare, make available for public comment and consider in their decision-making process an environmental impact statement on the Project in accordance with Section 102(2)(C) of National Environmental Policy Act of 1969, 42 U.S.C. §4332(2)(C) ("NEPA"), and its implementing regulations and (b) a permanent injunction prohibiting Defendants, their agents, officers, servants, employees, attorneys and successors, and any persons in active concert or participation with them, from authorizing or expending any further Federal funds for the NAWS Project and from undertaking any further actions related to planning, design or construction of such Project, unless and until they have taken all

actions necessary to comply fully with the requirements of NEPA and its implementing regulations, including preparing, circulating for comment and considering an environmental impact statement on the NAWS Project.

Plaintiff's motion is based on the grounds that (a) there is no genuine issue as to any material fact, (b) Plaintiff is entitled to judgment as a matter of law, and (c) an injunction is necessary to avoid irreparable injury to Plaintiff and serve the public interest. In support of its motion, Plaintiff relies upon the pleadings; the Administrative Record as filed with the Court by Defendants; the material, undisputed facts set out in Plaintiff's statement filed pursuant to Rule 7.1(h) of the Rules of this Court; the declaration of Norman Brandson; and the supporting memorandum of points and authorities filed herewith, in which the grounds for this motion are fully set forth.

Plaintiff requests a hearing on its motion.

Respectfully submitted,

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Dated: March 8, 2004
Washington, D.C.

**IN THE UNITED STATES DISTRICT COURT
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THE GOVERNMENT OF
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Defendants.

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PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Rule 7.1(h) of the Rules of this Court, Plaintiff submits the following statement of material facts as to which there is no genuine issue in connection with its motion for summary judgment.

Plaintiff's motion challenges the Federal Defendants' compliance with the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.*, in connection with their consideration and approval of the Northwest Area Water Supply Project. More particularly, Plaintiff contends that the Federal Defendants' Environmental Assessment, dated April 30, 2001, for the Project is inadequate and their Finding of No Significant Impact, dated May 18, 2001, as revised September 10, 2001, together with the actions based thereon, are therefore arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law within the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

This is a record review case. Plaintiff believes that this matter can be resolved on the basis of the full Administrative Record being submitted by the Federal Defendants simultaneously with Plaintiff's motion. Plaintiff relies particularly on the following documents in the Administrative

Record: 1, 254, 453, 672, 751, 846, 1023, 1199, 1859, 1959, 1983, 1988, 2006, 2067, 2079, 2178, 2306, 2470, 2841, 2845, 3054, 3168, 3249, 3755, 4546, 5420, 5585, 5696, 5782, 5833, 5848, 5944, 7058, 7134, 7299, 7601, 7735, 7804, 7851, 8583, 8627, 8628, 8632, 8778, 8780, 8786, 8789, 8837, 8858, 8910, 9157, 9174, 9311, 9487, 9532, 9618, 9711, 9757, 9759, 9775, 9795, 9812, 10003, 10019, 10054, 10064, 10074, 10191, 10194, 10265, 10270, 10340, 10368, 10372, 10473 and 10592.

The issues as they relate to Plaintiff's motion are appropriate for summary judgment. There is no genuine issue as to any material fact insofar as the facts relate to the motion before the Court.

Respectfully submitted,

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Defendants.)
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PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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THE GOVERNMENT OF THE
PROVINCE OF MANITOBA,

V.

Defendants.

**PLAINTIFF'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT AND PERMANENT INJUNCTION**

At issue in this case is the compliance by the Bureau of Reclamation (the “Bureau”), a sub-agency of the U.S. Department of the Interior (the “Department”), with the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* (“NEPA”), in connection with its review and approval of the Northwest Area Water Supply (“NAWS”) Project. The NAWS Project involves the construction of a \$150 million bulk water distribution system in North Dakota. It will transfer water from the Missouri River Basin, which drains south to the Gulf of Mexico, to the Hudson Bay Basin, which drains north to the Hudson Bay. It is the first-ever Federal project to transfer Missouri River water across the basin divide, breaching the barrier between and artificially connecting these two individually unique and ecologically distinct watersheds. It is unquestionably important as a precedent for future inter-basin transfers and how their risks and consequences will be assessed. It threatens to introduce non-native and potentially

destructive organisms into the Hudson Bay Basin, a region that includes both the environment of North Dakota north of the basin divide and the environment of Manitoba, with potential long-term and irreversible adverse consequences for the Hudson Bay watershed.

Despite these considerations, the Bureau spent literally more than a decade seeking to discount the environmental significance of the Project in every way possible, often over the vociferous objections of both the Province of Manitoba and the Government of Canada, and occasionally over strong doubts expressed by the U.S. Environmental Protection Agency ("EPA"). The Bureau thus only prepared a limited environment assessment ("EA"), followed by a "Finding of No Significant Impact" ("FONSI"), rather than a comprehensive environmental impact statement ("EIS"), for the Project.

On November 14, 2003, this Court denied Defendants' motions for judgment on the pleadings and ruled that the case could proceed to the merits. Plaintiff now moves for summary judgment and a permanent injunction. Plaintiff will demonstrate below that (a) the Bureau's EA is inadequate, its FONSI is arbitrary and capricious and its failure to prepare a comprehensive EIS for the Project is fundamentally inconsistent with the requirements of NEPA and cannot stand, and (b) an injunction should be issued to halt further work on the Project, pending full compliance with NEPA.

STATEMENT OF FACTS

A. THE NAWS PROJECT.

The NAWS project is a municipal, rural and industrial ("MR&I") bulk water distribution system designed to supply communities and rural water systems in ten North Dakota counties using an inter-basin transfer of water from the Missouri River Basin to the Hudson Bay Basin. The project, which is part of the larger Garrison Diversion Unit's MR&I Water Supply Program,

is authorized under the Garrison Diversion Unit Reformulation Act of 1986, Pub. L. No. 99-294, § 5 (the “Act”) (AR 1983),¹ as amended by the Dakota Water Resources Act of 2000, Pub. L. No. 106-554, App. D., Title VI (the “DWRA”) (AR 1988). As described by the Bureau in its Final Environmental Assessment, dated April 2001 (DK-600-97-03) (the “EA”) (AR 453), its purpose is primarily to supply drinking water that satisfies the “secondary” standards of the Safe Drinking Water Act, 42 U.S.C. § 300f. EA at 2 (AR 466).²

The Project would take Missouri River water from Lake Audubon/Lake Sakakawea south of the basin divide. The water would be “pre-treated” with ozone or with chlorine followed by ammonia addition to form chloramine. It would then be piped across the divide into the Hudson Bay Basin, a distance of approximately 45 miles, to Minot, North Dakota.³ More than one-half of the route along which the partially-treated water would pass would be north of the basin divide. This partially-treated water would not meet current Federal drinking water standards. Thus, in Minot, a final treatment plant would bring the water up to such standards. Finished water would be delivered to 11 communities and 5 rural water systems north of the divide in North Dakota. EA at viii (AR 460). In addition to the facilities just described, the Project would have “eight storage reservoirs, 13 pumping plants, 304 miles of distribution pipelines, two new treatment plants with drain ponds . . . , and one upgraded treatment plant” EA at 24 (AR

¹ References to “AR __” in parentheses are to the Administrative Record filed with the Court in this matter on March 8, 2004.

² These standard are related to taste, odor, color and other aesthetic qualities. See EA at 2 n. 1 (AR 466).

³ Minot itself is approximately 50 miles south of the Canadian border.

495). The cost of the entire project is estimated to be approximately \$145 million, the Federal share of which is 65%, or about \$98 million. EA at ix (AR 462).

The Project would withdraw about 3.6 billion gallons (10,500 acre feet) of water from the Missouri River per year, EA at 114 (AR 588); would provide on average 10 million gallons per day to users north of the basin divide, EA, Tables 4 and 5 (AR 474, 475); and would have a capacity to meet peak demand of up to 26 million gallons per day. *See* FONSI, Response to Manitoba, at 8 (AR 737) (May 18, 2001) (the "May 18 FONSI"). Water from the system would drain into rivers and streams, most notably the Souris River, flowing north into Manitoba. *See* EA at 71 (AR 545). The Project would link two ecologically distinct watersheds, the Missouri River Basin and the Hudson Bay Basin (which includes large areas of North Dakota, as well as Manitoba). These two distinct watersheds are notable for their different species compositions, including pathogenic species such as bacteria, viruses, protozoa, fungi and other microscopic plant and animal parasites.

In roughly its current form, the Project has been under consideration by the Bureau, in collaboration with the North Dakota State Water Commission (the "SWC") and the Garrison Diversion Conservancy District (the "District"),⁴ since the 1980s. *See* EA at 8, 9 (AR 473, 474). From the outset, it was understood that the potential of the Project to transfer Missouri River Basin biota to the Hudson Bay Basin was a matter of major concern (*e.g.*, AR 1023, 1199, 3054). As the NAWIS Engineering-Biology Task Group, a joint U.S.-Canada working group, concluded in its May 1994 Report on the Project, "The concerns expressed are real and legitimate" (AR

⁴ The District is a consortium of 28 North Dakota counties organized to provide Missouri River water to users within the State. *See generally* Garrison Diversion Conservancy District web site, www.garrisondiv.org, last visited Mar. 3, 2004.

1200), because “[t]he effects of the introduction of a disease pathogen or parasite could be catastrophic to wild or cultured fish” (AR 1201).

In 1994, the Garrison U.S./Canada Consultative Group, a group made up of senior U.S. and Canadian Federal, State and Provincial representatives, considered what standards should apply to treatment of water south of the basin divide. At that time, the Group focused particularly on the disinfection standard embodied in the then-extant EPA “Surface Water Treatment Rule” (providing for 99.9% (“3-log”) inactivation for *Giardia* (as a surrogate for any protozoan pathogens) and 99.99% (“4-log”) inactivation for viruses), 54 *Fed. Reg.* 27486 (June 29, 1989) (AR 10473) (the “SWTR”). *See, e.g.*, Minutes of the September 23, 1994 Garrison Consultative Group and Garrison Joint Technical Committee (AR 3755, 3769). Just what was agreed, however, has been at issue virtually since that time. The Bureau takes the position that its obligations are satisfied if the design of the Project meets the EPA standards *current in 1994*. *E.g.*, May 18 FONSI, Response to Canadian Section, Garrison Joint Technical Committee, at 2, 13, 17 (AR 700, 711, 715). The SWC shares these views. *See, e.g.*, Memorandum from James Lennington to David A. Sprynczynatyk (Aug. 6, 1999) (AR 7851). However, the Canadian side has long had a different view, contending that the Project should meet the EPA standards in effect *at the time of construction* (*e.g.*, AR 7299-7300, 7804). As the Canadian Section of the Canada-U.S. Garrison Consultative Group stated in July, 1999, “It is not reasonable that the NAWS project would be built to an outdated standard” (AR 7807).

In fact, as explained in the August 20, 2001 technical submission to the Bureau prepared by TetRES Consultants Inc. for the Province (AR 9812) (the “TetRES Report”), EPA has revised its standards since 1994 to require control of the more treatment-resistant organism *Cryptosporidium*, as well as *Giardia*, and substantial improvements have been made in

disinfection technology. TetrES Report at 18 (AR 9831). *Compare* 54 *Fed. Reg.* 27486 (June 29, 1989) (1989 EPA rule) (AR 10473) with 63 *Fed. Reg.* 69478 (Dec. 16, 1998) (1998 EPA rule) (AR 10372). Thus, the effectiveness of the 1994 standard is necessarily open to question today. In any event, whatever may have been “agreed upon” in 1994 is ultimately of little or no relevance to the Bureau’s NEPA review obligations: the Bureau must examine the real world, not the world as governed by standards that are long out of date.

The design choices ultimately made by the Bureau only involve partial “pre-treatment” of Missouri River water south of the divide, rather than full treatment of such water before transfer into the Hudson Bay Basin. The Bureau rejected, without fully analyzing, complete treatment of Missouri River water at the source. Yet, full treatment south of the divide would provide much more complete protection against biota transfer risks, and the cost difference of adopting such an approach is estimated by the Bureau to add an increment of less than 10% of the total capital cost, *i.e.*, about \$12.3 million. *See* EA at 36 (AR 509). It was for such reasons that both the Province of Manitoba and the Government of Canada consistently advocated full treatment south of the divide as the best way to address the biota transfer problem (*e.g.*, AR 2845-2846, 5585, 7134-7136, 8632).

Manitoba and Canada were not alone in contending that full treatment was the best option. EPA took a similar position. Thus, in August 8, 1997 comments to the Bureau, EPA noted, “We are concerned that the discussions . . . [in the draft EA do] not provide sufficient information regarding the elimination from consideration of the alternative of full treatment at the raw water intake location” (AR 5849). As late as December 2000, EPA continued to maintain that the “optimal method” for dealing with the pathogen problem was “conventional treatment of raw water in compliance with all applicable EPA drinking water requirements . . .

prior to transport of the finished drinking water into the Hudson Bay drainage” (AR 9175)

(emphasis in original).

B. THE SIGNIFICANT ENVIRONMENTAL IMPACTS OF THE PROJECT.

It has been well established by the scientific community that non-indigenous species pose a significant threat to ecological integrity, species diversity, rare and endangered species, and the composition and abundance of natural communities, with severe environmental, economic and social consequences. *See, e.g.*, EA at 70 (AR 544). Because of the different ecosystems, plant and animal species in the Hudson Bay Basin, including important recreational and commercial species of fish, may not be resistant to non-native, disease-causing organisms. Human and livestock drinking the water can also be placed at risk for the same reason. Moreover, once introduced to a new aquatic system, non-native species can often expand their populations rapidly because of the absence of natural predators and thereby significantly reduce or eliminate populations of native species (*e.g.*, AR 8910).⁵ As one report in the record states, even if the risks of transfer may be low, the results, if it does occur, “can be permanent and ecologically problematic” (AR 3055). All these risks are manifest in the case of the NAWS Project. It is for such reasons that the International Joint Commission (the “IJC”), a U.S.-Canada intergovernmental body,⁶ concluded in 1977 that construction of elements of the Garrison

⁵ The introduction and proliferation of a species such as the zebra mussel in new freshwater habitats illustrate these ecologically and economically destructive phenomena (*e.g.*, AR 7601).

⁶ The IJC is established under the Treaty Between the Government of the United States of America and the Government of the United Kingdom for the Dominion of Canada Concerning Boundary Waters, Jan. 11, 1909, 36 Stat. 2448, T.S. 548 (the “BWT”) (AR 1959). The BWT, among other things, also imposes an obligation on the parties to avoid pollution of “boundary waters and waters flowing across the boundary.” BWT, Art. IV.

Diversion Unit 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* at 121 (AR 969) (the “1977 IJC Report”).⁷ However, because the Bureau and State officials have consistently opposed modifications of the Project to ensure more complete pre-transfer treatment of NAWS water, there is no agreement today between the United States and Canada on methods “to eliminate the risks of biota transfer” as recommended by the IJC. See Letter from Canadian Ambassador Michael Kergin to Secretary of the Interior Gale Norton (May 25, 2001) (AR 9487).

As set out in detail in the TetrES Report, there are numerous organisms found in the Missouri River Basin and not found in the Hudson Bay Basin, including viruses, bacteria, rickettsias, protozoa, fungi, and microscopic eggs or larvae of macrobiotic invertebrates, that could cause substantial harm should they be introduced from one Basin to the other. TetrES Report at 2-5 (AR 9815-9818).⁸ Some of these organisms may be more resistant to disinfectants than those analyzed by the Bureau. For example, while the Bureau has analyzed *Giardia* as a surrogate for protozoa that might be transferred between basins, it has not examined more treatment-resistant organisms such as *Cryptosporidium*, nor has it analyzed the treatment susceptibility of a variety of other disease agents that are representative of aquatic pathogens in

⁷ Subsequently, the Garrison Diversion Unit Commission, in its December 20, 1984, final report, reached similar conclusions, underscoring that MR&I systems should provide treatment “to avoid biota transfer to Canada” (AR 2187), and stating that any “Missouri River waters conveyed into the Hudson Bay drainage . . . shall be treated in a manner determined acceptable pursuant to United States-Canadian consultations” (AR 2194).

⁸ These are also documented elsewhere in the record (e.g., AR 2307 (expressing concern that introduction of rainbow smelt “would cause major impacts to Manitoba walleye and whitefish fisheries”)).

the Missouri River Basin. TetrES Report at 18-19 (AR 9831-9832). As a result, there is no assurance that the design and intended operation of the U.S. treatment plan are adequate or that such organisms will not be introduced by NAWS into the Hudson Bay Basin.

The potential introduction of invasive and alien species might be adequately controlled through filtration and treatment of water at its source in the Missouri River Basin, supported by continuous performance monitoring and a standard operating procedure requiring plant shutdown during periods of non-compliance. However, not only is there uncertainty about the disinfectant-resistance of the organisms discussed above, but there is also substantial uncertainty about the effectiveness of the Bureau's control measures. For example, as stated in the TetrES Report at 8 (AR 9821), treatment with ozone or chlorine/chloramine has been shown to be ineffective for inactivating viruses, bacteria and protozoa in the presence of turbidity and for controlling disinfectant-resistant protozoa such as *Cryptosporidium*. It is also known that turbidities at Lake Sakakawea and Lake Audubon exceed the levels at which disinfection is effective, yet there is no commitment to incorporate additional safeguards to respond to this problem. TetrES Report at 8 (AR 9821). Indeed, EPA, in its 1997 comments on the Bureau's draft EA, expressed concern that, with pre-treatment only, "turbidity becomes an important factor for achieving desired disinfection results" (AR 5848).

As water passes through the NAWS pipeline north of the basin divide, alien species may be introduced to the Hudson Bay Basin through a variety of mechanisms. These include, among others: catastrophic system failures; normal and expected leakage from line joints and connectors; and discharges to the environment of backwash water and residue or sludge from treatment processes at Minot. TetrES Report at 9, 21-24 (AR 9822, 9834-9837). Human error in both operation and response to system failures adds to the risks. As long ago as 1994, the