

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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THE GOVERNMENT OF THE	)		
PROVINCE OF MANITOBA,	)		
	)		
Plaintiff,	)		
	)		
v.	)	Case No. 1:02 CV 02057 (RMC)	
	)	(consolidated with 09-373)	
	)		
KEN SALAZAR, <i>et al.</i> ,	)		
	)		
Defendants,	)		
	)		
and	)		
	)		
STATE OF NORTH DAKOTA,	)		
	)		
Defendant-Intervener.	)		
	)		
_____	)		

**AMICUS BRIEF**

**INTEREST OF AMICUS CURIAE**

The Great Lakes Environmental Law Center (“GLELC”) was founded to protect the world’s greatest freshwater resource and the communities that depend on it. Based in Detroit, the Great Lakes Environmental Law Center has a board and staff of dedicated and innovative environmental attorneys to address our most pressing environmental challenges. The Great Lakes Environmental Law Center was also founded on the idea that law students can and must play a significant role in shaping the future of environmental law. The Great Lakes Environmental Law Center is opposed to transbasin diversions of water that set a dangerous precedent for the management of finite natural resources.

**The National Wildlife Federation** (“NWF”) is America’s Conservation Organization. Focused on educating the public and finding answers to the challenging questions regarding global warming, habitat loss, and disconnection with nature, the Federation is interested in activities to preserve as well as protect the environment from additional harm, particularly harm to water quality and the effect upon wildlife, habitat, and human health. The Federation seeks to inspire Americans to protect wildlife, for our children’s future.

**The Minnesota Conservation Federation** (“MCF”) is a non-profit corporation with its offices located in St. Paul, Minnesota. It is Minnesota’s oldest conservation organization and is governed by an all-volunteer board of directors. MCF is dedicated to preserving Minnesota’s natural resources - its air, soil and minerals, forests, waters and wildlife - on behalf of its more than 1,500 individual members.

**The South Dakota Wildlife Federation** (“SDWF”) is a South Dakota-based non-profit corporation with more than 3,400 individual members. SDWF represents the interests of all South Dakotans in wildlife, outdoor recreation, natural resources and a quality environment.

These organizations are concerned about water levels, water quality, invasive species, and associated impacts on critical riparian habitat and recreational opportunities resulting from the diversion project. Additionally, they are concerned with the precedent that this water diversion project would set for future management of water resources.

## INTRODUCTION

The National Environmental Policy Act (“NEPA”) was enacted to ensure that the federal government would consider the effects of its actions upon the environment. NEPA requires an agency to follow a particular procedure to avoid unknowingly damaging the environment and to allow the public an opportunity to participate in a proposed project. NEPA requires an analysis of the proposed project, including the risks, and a comparison of the proposed action to other reasonable alternatives. In the Northwest Area Water Supply Project (“NAWS”) Environmental Impact Statement (“EIS”), the United State Department of Interior, Bureau of Reclamation (“Reclamation”) failed to provide a real examination of reasonable alternatives, rather, it engaged in a narrow analysis that resulted in a Hobson’s choice, avoiding the requirements of NEPA and ultimately failing to meet the project’s purpose.

The proposed diversion of water from the Missouri River basin to the Hudson Bay basin is concerning for a multitude of reasons. Of greatest concern is the precedent that this project will set. The proposed diversion of water from one basin to another has resulted from improper water management techniques, issues related to the quality of local groundwater, and changing weather patterns reducing the amount of fresh water available. The needs of North Dakota mimic the needs of many areas across the country. If communities do not take action now to preserve their water resources, they will need to seek water supplies elsewhere. Wasteful water management practices pose a significant threat to the Great Lakes. As the nation’s largest supply of fresh water, the Great Lakes face multiple threats from invasive species to pollution to wasteful consumptive uses. When communities destroy their existing watershed through pollution or waste, by

“necessity” they soon begin looking for an alternative source of water. As a result, many communities outside the Great Lakes basin have long coveted the Great Lakes as an alternative source of fresh water, and the NAWS project sets a dangerous water management precedent.

Reclamation has failed to address another significant risk associated with the proposed water diversion: the danger of transferring plants, animals, and viruses to an environment ill equipped to address the incoming species. The transfer of even minute amounts of biota, over time, could lead to drastic consequences including the destruction of aquatic habitats, loss of native species, decline in recreation and commercial enterprises, and increased costs to downstream communities for treatment.

The diversion of water from the Missouri River basin to the Hudson Bay basin poses a risk to the human and aquatic environment of Lake Sakakawea and areas downstream in the Missouri River watershed. The diversion project will draw massive amounts of water out of Lake Sakakawea, reducing the amount of water available for local consumption and recreation. The reduction in water levels also poses a threat to wetland areas currently threatened by human sprawl. Wetlands are nature’s water filter and flood control. Destroying wetlands by construction, or by eliminating the source of water flowing into them, leads to dangerous problems beyond habitat destruction. The effects of removing water from Lake Sakakawea will be exacerbated by climate change. Increased temperatures and changes in precipitation patterns may greatly reduce the water levels in Lake Sakakawea and downstream, further impacting local inhabitants, commerce and the ecosystem. Despite the severe threats, Reclamation refused to address

climate change and the impacts on the Missouri River basin should the NAWS project proceed.

*Amicus Curiae* do not go into great detail regarding the risks of the NAWS project, as a properly prepared EIS would have done. Rather, we will demonstrate that Reclamation and the State of North Dakota failed to comply with the mandates of NEPA. Reclamation and the State of North Dakota commenced construction without engaging in a thorough and reasoned review of the negative effects of the NAWS project.

NEPA requires Reclamation to take a “hard look” at the risks associated with the NAWS project prior to making a decision to proceed with construction.<sup>1</sup> Reclamation failed to satisfy the requirements of NEPA when it prepared both an inadequate Environmental Assessment (EA) in 2001, and by improperly and narrowly tailoring the Environmental Impact Statement (EIS) to include only the subject of biota treatment. At all stages of its review, Reclamation has attempted to evade the requirements of NEPA. This Court ordered Reclamation to revisit its Finding of No Significant Impact (FONSI) to address issues related to biota transfer. Reclamation failed to conduct a review consistent with the Court’s directives. Reclamation narrowly tailored the EIS so as to limit it to water treatment alternatives rather than addressing the NAWS project as a whole. Additionally, the EIS fails to provide alternatives to the diversion project. NEPA requires alternatives to be provided in the EIS to enable public participation in the commenting and planning of a project. Reasonable alternatives must be provided so as to present the deciding agency with enough information to make a rationally informed decision of whether or not to proceed with the project.<sup>2</sup> The EIS fails to provide

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<sup>1</sup> *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (U.S. 1976).

<sup>2</sup> 42 U.S.C. § 4321 *et seq.*

objective information related to the risks and alternatives of the entire NAWS project. It only provides one choice: proceeding with the project.

Reclamation failed to address the risks to the Missouri River basin and the Hudson Bay basin, to the human and aquatic environment, and it failed to provide reasonable alternatives. The EIS also failed to consider water conservation practices and the impacts of climate change. *Amicus Curiae* object to an EIS that fails to provide an accurate portrayal of the proposed project, fails to take into consideration reasonable and foreseeable impacts, fails to propose reasonable alternatives, and in place of such alternatives, recommends an action which will decrease water quality and quantity.

NEPA does not require a specific decision to be made, but it does require specific steps to be taken prior to the making of a decision. This Court ordered Reclamation to address the inadequate EA when the issue was last presented. In order to comply with NEPA, we respectfully request that this Court order Reclamation to address the inadequacies found within the final EIS.

### **ARGUMENT**

The National Environmental Policy Act of 1969 (“NEPA”) requires federal agencies to consider the environmental consequences of all major federal actions prior to commencing work upon a project or proposal:

“all agencies of the Federal Government *shall—include* in every recommendation or report on proposals for legislation and *other major Federal actions* significantly affecting the quality of the human environment, a detailed statement by the responsible official on: (i) the environmental impact of the proposed action; (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and

irretrievable commitments of resources which would be involved in the proposed action should it be implemented.”<sup>3</sup>

NEPA is an “action-forcing device” designed to ensure “full and fair discussion of significant environmental impacts...[and] reasonable alternatives which would avoid or minimize adverse impacts” are made available to government bodies entrusted with balancing environmental risks with social gain prior to providing approval for a potentially harmful project.<sup>4</sup> A properly prepared EIS must include a statement of all reasonable “rigorously explore[d] and objectively evaluate[d]” alternatives to the project, providing sufficient information about the alternatives to allow independent evaluation of the alternatives.<sup>5</sup> Additionally, alternatives beyond the scope of the lead agency shall be included if they are reasonable. Among the alternatives to be included, is the “no-action” alternative. Furthermore, mitigation measures not addressed in the alternatives should be explored in ample detail to provide the reader with information sufficient to make a reasoned and informed decision as to the merits of the proposal.<sup>6</sup> More aptly stated, “an environmental impact statement is more than a disclosure statement. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.”<sup>7</sup> NEPA does not require a specific decision to be made, but it does require specific steps to be taken prior to the making of a decision. A properly prepared EIS incorporates all of these steps.

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<sup>3</sup> See 42 U.S.C. 4332(2)(C) (emphasis added).

<sup>4</sup> See 40 C.F.R. § 1502.1

<sup>5</sup> See 40 C.F.R. § 1502.14(a)-(f)

<sup>6</sup> *Id.*

<sup>7</sup> See 40 C.F.R. § 1502.1

In *Gov't of the Province of Manitoba v. Norton*, this Court determined the NAWS project was a “major federal action,” subject to the requirements of NEPA.<sup>8</sup> The Court acknowledged that the determination of whether a project will have a *significant* effect upon the environment and thus require the creation of an EIS is left to the discretion of the governmental agency proposing the action.<sup>9</sup> Initially, Reclamation determined that NAWS would not have a significant impact upon the environment and issued a FONSI.<sup>10</sup> Manitoba brought suit to prevent the construction of the pipeline which would divert water from the Missouri River basin to the Hudson Bay basin.<sup>11</sup> This Court held that the EA prepared by Reclamation was inadequate in that Reclamation could not have taken a “hard look” at the proposed project as all the risks and alternatives had not been addressed.<sup>12</sup> Reclamation was ordered to revisit the FONSI upon the completion of an EA that adequately addressed the issues and risks associated with the NAWS project.<sup>13</sup> Reclamation, in reliance upon its own calculations as to the severity of effects posed by the project upon the environment, created an EIS in lieu of revisiting the FONSI. Reclamation provided a Notice of Intent to prepare an EIS, sought comments through scoping mechanisms as well as following the completion of the Draft EIS (“DEIS”).<sup>14</sup>

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<sup>8</sup> *Gov't of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41 at 54 (D.D.C. 2005)

<sup>9</sup> *Id.* at 55, though the decision of the agency can be overturned if it is arbitrary, capricious, or an abuse of discretion.

<sup>10</sup> See Finding of No Significant Impact for the Northwest Area Water Supply Project in North Dakota, September 10, 2001, FONSI No. DK-600-07-03.

<sup>11</sup> *Gov't of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41 (D.D.C. 2005)

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See Reclamation's Notice of Intent to Prepare an Environmental Impact Statement, March 06, 2006 available at <http://edocket.access.gpo.gov/2006/E6-3102.htm>; Summary of Public Scoping, Northwest Area Water Supply Project Environmental Impact Statement, August 2006 available at [http://www.usbr.gov/gp/dkao/news/summary\\_scoping\\_naws.pdf](http://www.usbr.gov/gp/dkao/news/summary_scoping_naws.pdf); and Northwest Area Water Supply Project Draft Environmental Impact Statement on Water Treatment available at <http://www.usbr.gov/gp/dkao/news/DEIS/DEIS%20Reports/NAWS%20DEIS.pdf>.

The Final EIS (“FEIS”) and the resulting Record of Decision (“ROD”) are at issue. As explained below, Reclamation failed to meet the basic requirements of NEPA because: (1) the purpose and needs section is too narrowly tailored and; (2) the project has been improperly segmented and; (3) alternatives were not considered.

### **FAILURE TO PROPERLY SCOPE THE PURPOSE AND NEEDS**

The FEIS for the NAWS project addressed the issue of biota treatment prior to water crossing the continental divide.<sup>15</sup> The FEIS provided information pertaining to the environmental impact, adverse effects, commitments, relations between use of the environment, and, provided alternatives, *solely* as they pertained to a biota treatment facility.<sup>16</sup> The FEIS for the NAWS project failed to provide a thorough analysis of (i) environmental impacts of the diversion project, (ii) unavoidable effects of the diversion project, (iii) alternatives to the diversion project, (iv) the relation between short-term use of the environment and long-term productivity, and (v) irretrievable commitments of resources associated with the diversion project as a whole. Reclamation avoided addressing pertinent issues related to the NAWS project by narrowly tailoring the EIS to the issue of biota treatment. Reclamation considered the risks associated with biota transfer, and determined that there was such a *significant* risk to the environment that an EIS was necessary.<sup>17</sup> However, an EIS for the entire diversion project was not prepared.

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<sup>15</sup> See Northwest Area Water Supply Project Final Environmental Impact Statement on Water Treatment, December 2008 (“FEIS”) available at <http://www.usbr.gov/gp/dkao/news/FEIS/Reports/NAWS%20FEIS.pdf>.

<sup>16</sup> *Id.*

<sup>17</sup> Reclamation stated that it “determined that an EIS was appropriate for this action; to take a hard look at the concerns raised by the Court and to assure maximum public involvement in an issue that has high public interest.” See Northwest Area Water Supply Project Final Environmental Impact Statement on Water Treatment, December 2008 (“FEIS”) available at <http://www.usbr.gov/gp/dkao/news/FEIS/Reports/NAWS%20FEIS.pdf> at 1-8.

Reclamation tailored the scope of the EIS to the methods of biota treatment, thereby excluding from consideration the alternative of no diversion. By limiting the scope to biota treatment, Reclamation was able to avoid addressing a reasonable, feasible and cost effective alternative: water conservation and re-use. Reclamation also avoided addressing the serious risks posed to the Missouri River basin caused by the massive withdrawal of water from a water body already supporting other communities and the risks posed by the ever present and increasing effects of climate change. Reclamation cited uncertainties in climate change predictions as a reason for not addressing the issue, yet in prior NAWS proceedings, this Court has held that difficult issues can not be avoided simply because they are difficult.<sup>18</sup> In an attempt to side-step NEPA analysis, Reclamation narrowly tailored the EIS to preclude outstanding and relevant issues related to the NAWS project.

An improperly tailored EIS can be used to defeat the purpose of NEPA analysis.

Council on Environmental Quality (“CEQ”) regulations state:

“the primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the act are infused into the ongoing programs and actions of the Federal Government. [An EIS] shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”<sup>19</sup>

An EIS that is narrowly tailored to exclude reasonable alternatives well within the purview of the lead agency violates NEPA.<sup>20</sup> An EIS that fails to provide a no-action alternative sufficient to deliver information to the lead agency of the effects of

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<sup>18</sup> *Gov't of Province of Manitoba v. Norton et al*, 398 F. Supp. 2d. 41 at 66 (D.D.C. 2005)

<sup>19</sup> See 40 C.F.R. § 1502.1

<sup>20</sup> *Westlands Water Dist. v. United States DOI*, 376 F. 3d 853, 865 (9<sup>th</sup> Cir. Cal. 2004).

proceeding with the project, as compared with not proceeding, violates NEPA. Lastly, an EIS that does not address significant risks associated with the proposed project fails to meet the purpose of NEPA. The NAWS FEIS fails on all three levels.

The scope of an EIS should be based upon the purpose and need of the project proposed.<sup>21</sup> Initially, Reclamation stated that the purpose of the NAWS project was “to provide a reliable source of high quality water to northwestern North Dakota for municipal, rural and industrial uses.”<sup>22</sup> A narrowly scoped “Purpose and Needs Statement” that “reasonably define[s] the objectives of the project” is not inconsistent with NEPA.<sup>23</sup> Reclamation’s Statement of Purpose and Needs in the FEIS, however, was so narrowly scoped that the purpose of NAWS was lost. The FEIS states: “the purpose of the proposed action is to adequately treat Project water from the Missouri River basin (Lake Sakakawea) to further reduce the risk of a Project-related biological invasion into the Hudson Bay basin.”<sup>24</sup> The Purpose and Needs statement mentions, but does not reflect, the scope and nature of the NAWS project. It merely addresses the biota treatment options. The reasonableness of the scope of an EIS should be viewed in accordance with the purpose of an Act that precedes the proposed action.<sup>25</sup> NAWS was authorized by the Garrison Diversion Unit Reformulation Act of 1986, the purpose of which was to supply

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<sup>21</sup> *Westlands Water Dist. v. United States DOI*, 376 F. 3d 853, 865 (9<sup>th</sup> Cir. Cal. 2004).

<sup>22</sup> See Northwest Area Water Supply Project Final Environmental Assessment, April 30, 2001 at 1, available at <http://www.usbr.gov/gp/dkao/naws/FEIS/Supporting%20Reports/NAWS%20Final%20Environmental%20Assessment%202001.pdf>.

<sup>23</sup> *Westlands Water Dist. v. United States* at 868.

<sup>24</sup> See Northwest Area Water Supply Project Final Environmental Impact Statement on Water Treatment, December 2008 at 1-5, 1-6, available at <http://www.usbr.gov/gp/dkao/naws/FEIS/Reports/NAWS%20FEIS.pdf>.

<sup>25</sup> *Westland Water District v. United States* at 866.

quality water to North Dakota residents.<sup>26</sup> While the EA was tailored to address the project as a whole, the EIS was not.<sup>27</sup>

Due to Reclamation's improper and narrow focus, many comments were submitted regarding the scope of the EIS, biota transfer, Missouri River water depletions, impact upon Lake Sakakawea, treatment options, range of alternatives, including but not limited to conservation as well as a "no-project" alternative, the necessity of the NAWS project, global warming, and capability of the Minot Treatment Plant to sustain projected use.<sup>28</sup> Aware of the issues presented by the public, Reclamation continued to prepare an EIS void of the requested information. The DEIS released in December of 2007 failed to provide a detailed analysis regarding the depletion of Missouri River basin water, the effects upon Lake Sakakawea, alternatives including no-project and conservation efforts, and the compounding effects of climate change.<sup>29</sup>

## **ILLEGAL SEGMENTATION**

Reclamation illegally segmented the project by separately examining: (1) the pipeline, retention basins, and distribution facilities, and (2) the biota treatment facility. This Court has addressed the issue of segmentation by stating: "when the segmented project has *no* independent justification, no life of its own, or is simply illogical when viewed in isolation, the segmentation will be held invalid."<sup>30</sup> *In Macht v. Skinner*, this Court expressed that a "highway lead[ing] to nowhere" would be a "good sign that [the]

<sup>26</sup> See Northwest Area Water Supply Project Final Environmental Impact Statement on Water Treatment, December 2008 available at <http://www.usbr.gov/gp/dkao/news/FEIS/Reports/NAWS%20FEIS.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> See Reclamation-Managing Water in the West. Summary of Public Scoping, Northwest Area Water Supply Project Environmental Impact Statement, August 2006, available at [http://www.usbr.gov/gp/dkao/news/summary\\_scoping\\_naws.pdf](http://www.usbr.gov/gp/dkao/news/summary_scoping_naws.pdf). Please note, this list is not exhaustive of the comments made and concerns expressed during the scoping period.

<sup>29</sup> See Northwest Area Water Supply Project-Draft Environmental Impact Statement on Water Treatment, available at <http://www.usbr.gov/gp/dkao/news/DEIS/DEIS%20Reports/NAWS%20DEIS.pdf>.

<sup>30</sup> *Macht v. Skinner*, 715 F. Supp. 1131, 1135 (D.D.C. 1989)

segmentation is utterly pretextual.”<sup>31</sup> Here, without the entire diversion project, the biota treatment plant would be treating water *to nowhere*. The only need for the treatment plant is the proposed NAWS diversion project discussed in the EA, and funded by the Federal Government. Outside of the NAWS project, there is no *substantial independent utility* for the biota treatment plant proposed in the FEIS. The communities within the Missouri River watershed utilizing water from Lake Sakakawea have no need for a biota treatment plant. Without a pipeline transferring water from Lake Sakakawea across the continental divide, there is no need to remove the biota from Lake Sakakawea water.

Great amounts of funding have been irretrievably committed for the “closely related project” of pipeline construction. Once the biota treatment plant has been built (and ultimately connected to the pipeline), the biota treatment plant and resulting connection, for financial reasons, would foreclose the opportunity to consider other project alternatives, such as conservation. However, the previously constructed sections of pipeline may well be used for in-basin water supply.

The biota treatment plant cannot be logically separated from the rest of the project. It cannot stand on its own. Viewed without the pipeline and the project as a whole, it is illogical to consider building the biota treatment plant. Thus, the segmenting and narrowly tailored scope of the EIS should be held invalid. The NAWS project is a diversion proposed to supply water to North Dakota residents and then flow across the continental divide. The FEIS prepared by Reclamation does not reflect the scope and purpose of NAWS. The scope of the FEIS is misleading and improperly tailored to avoid complying with a full NEPA analysis of the NAWS project.

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<sup>31</sup> *Macht v. Skinner*, 715 F. Supp. 1131, 1135 (D.D.C. 1989) emphasis added.

## **AVOIDANCE OF APPLICABLE ALTERNATIVES**

### ***ABSENCE OF A TRUE NO-ACTION ALTERNATIVE***

Reclamation failed to address reasonable alternatives within and outside their jurisdiction. Such alternatives would include revising the no-action alternative to incorporate “no-build” as well as providing a greater emphasis on other alternatives geared at providing the water resources needed by northwestern North Dakota through conservation and better utilization of existing resources. The “No-Action Alternative” in the EA compared the effects of the proposed NAWS project with the state of the environment without the project. The No-Action Alternative took into consideration the construction of future water treatment facilities as well as activities to utilize existing water resources if the diversion project did not materialize.<sup>32</sup> As a result, and contrary to the arguments of proponents of the NAWS project, a determination not to proceed with the NAWS project would not preclude communities from receiving high quality water, nor would it prevent job creation.<sup>33</sup> The Act authorizing additional funding for projects similar to NAWS also authorizes funding for the implementation of conservation efforts, the use of which can create jobs and increase water quality and quantity to the areas in need.<sup>34 35</sup>

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<sup>32</sup> See Northwest Area Water Supply Project Final Environmental Assessment, April 30, 2001 p 24, available at <http://www.usbr.gov/gp/dkao/naws/FEIS/Supporting%20Reports/NAWS%20Final%20Environmental%20Assessment%202001.pdf>.

<sup>33</sup> *Id* at 103.

<sup>34</sup> Dakota Water Resources Act of 2000, Section 7 of Public Law 89 108 (100 Stat. 422), § 607 (2)(b), “The State of North Dakota may use funds provided under subsections (a) and (b)(1)(A) of section 10 to develop and implement a water conservation program...”

<sup>35</sup> The Dakota Water Resources Act of 2000 does not limit funding to the NAWS program, but allows for the state to use “Federal and non-Federal funds to provide grants or loans for municipal, rural, and industrial water systems.” at § 607(1)(A)(iii).

The No-Action Alternative in the DEIS, and ultimately the FEIS, does not mirror the No-Action Alternative presented in the EA. Having already begun construction of the pipeline and associated basins and holding facilities, Reclamation tailored the No-Action Alternative to fit the needs of the partially completed project. The FEIS alternatives, including the No-Action Alternative, solely address alternatives for the biota treatment facility, the next segment of the NAWS project.<sup>36</sup> The failure to properly scope the EIS led to inadequate and inappropriate alternative options and No-Action Alternatives. The alternatives Reclamation provided manipulate the analysis of the proposed project from “whether the project should commence” to “in continuing with this project, what course of action should be taken?”

The No-Action Alternative falsely represented the building of the biota treatment facility as a continued action of the current management direction instead of a proposed project.<sup>37</sup> Reclamation should have presented an alternative which reflected the “effects of not approving the action under consideration.”<sup>38</sup> Reclamation correctly notes two interpretations of what a No-Action Alternative could entail, however, the interpretation utilized by Reclamation was incorrect. Whereas the NAWS project never had an adequate EA prepared, and the FONSI was never redressed per an updated EA, the project could not have been authorized to proceed based upon a review of the risks and alternatives, required by NEPA. Therefore, the “No-Action Alternative” definition

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<sup>36</sup> See Northwest Area Water Supply Project Draft Environmental Impact Statement on Water Treatment, December 2007 available at <http://www.usbr.gov/gp/dkao/naws/DEIS/DEIS%20Reports/NAWS%20DEIS.pdf>, and Northwest Area Water Supply Project Final Environmental Impact Statement on Water Treatment, December 2008, available at <http://www.usbr.gov/gp/dkao/naws/FEIS/Reports/NAWS%20FEIS.pdf>.

<sup>37</sup> See Executive Summary of Northwest Area Water Supply Project Final Environmental Impact Statement on Water Treatment, available at <http://www.usbr.gov/gp/dkao/naws/FEIS/Reports/NAWS%20FEIS%20Executive%20Summary.pdf>.

<sup>38</sup> CEQ regulations require that the *Responsible Official* look at the “effects of not approving the action under consideration”. See 43 C.F.R. § 46.30(2).

advocated by Reclamation as “‘no-change’ from a current management direction or level of management intensity” was improperly applied because any policy or practice alleged to be in effect is based upon actions of Reclamation in violation of the procedure required by NEPA. Reclamation refers to the FONSI as if it was based upon a properly documented and analyzed EA, when in fact it is based upon an EA that this Court found to be inadequate in 2005.<sup>39</sup> The EA was inadequately prepared so as to render an informed decision impossible. The FEIS, too, is inadequately prepared. It fails to provide information regarding the risks associated with the NAWs project and all of the reasonable alternatives. Based upon the FEIS, governing bodies could not have made an informed decision on the record, and therefore, any decision based upon the EA or FEIS is invalid.

#### ***ABSENCE OF REASONABLE ALTERNATIVES***

Reclamation failed to adequately address reasonable alternatives to the transbasin diversion of water. A NEPA compliant EIS would include reasonable alternatives rigorously explored and objectively evaluated, including alternatives not within the jurisdiction of Reclamation.<sup>40</sup> As Reclamation has asserted itself as an authority in water conservation and has instituted the Water Conservation Field Services Program “to encourage water conservation and efficient use of water supplies on Reclamation’s projects,” it cannot reasonably be argued that water conservation is beyond the scope of Reclamation’s jurisdiction.<sup>41</sup> Reclamation provides a water conservation handbook for those involved in Reclamation projects or otherwise interested in conservation

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<sup>39</sup> See *Gov’t of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41 (D.D.C. 2005).

<sup>40</sup> 40 C.F.R. § 1502.14 (a)-(f)

<sup>41</sup> See <http://www.usbr.gov/pn/programs/wat/index.html> for more information regarding Reclamation’s water conservation program.

practices.<sup>42</sup> Ironically, the NAWS FEIS fails to discuss or incorporate water conservation techniques *as an alternative or component of the NAWS Project* beyond pipeline leak mitigation.<sup>43</sup>

The FEIS fails to address any efforts at water conservation that are or will be utilized by the recipients of NAWS water. The FEIS also fails to address the full risks associated with water withdrawal from the Missouri basin, a water body that is already significantly depleted by existing consumptive uses.<sup>44</sup> As a finite resource, careful consideration of water use and conservation practices should be made.

Water conservation efforts are a reasonable and viable alternative to water diversion as a means of providing water supplies to northwest North Dakota. The Dakota Water Resources Act of 2000,<sup>45</sup> which amended the Garrison Diversion Unit Reformation Act of 1986,<sup>46</sup> offers financial incentives for the establishment of water conservation programs.<sup>47</sup> Incentives include funding for the programs as well as reductions in non-federal cost-share of municipal, rural, and industrial water supply systems should conservation goals be met.<sup>48</sup>

Reclamation was aware of the potential for conservation techniques to protect resources while supplying the water. The summary of NAWS public scoping indicates that commenting parties suggested “if water conservation measures were implemented

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<sup>42</sup> See <http://www.usbr.gov/pn/programs/wat/index.html> for more information regarding Reclamation’s water conservation program..

<sup>43</sup> Northwest Area Water Supply Project Final Environmental Impact Statement on Water Treatment, available at <http://www.usbr.gov/gp/dkao/naaws/FEIS/Reports/NAWS%20FEIS%20Executive%20Summary.pdf>.

<sup>44</sup> See Letter from the State of Missouri Department of Natural Resources to Alicia Waters, Bureau of Reclamation regarding the NAWS DEIS, dated February 29, 2008 and available at [http://www.usbr.gov/gp/dkao/naaws/DEIS/comments\\_deis/missouri\\_dept\\_nat\\_resources.pdf](http://www.usbr.gov/gp/dkao/naaws/DEIS/comments_deis/missouri_dept_nat_resources.pdf).

<sup>45</sup> Enacted in 2000 under Consolidation Act: 106 P.L. 554, 114 Stat. 2763

<sup>46</sup> Pub. L. 99-294; 100 Stat. 433

<sup>47</sup> Garrison Diversion Issues: Background Memorandum, North Dakota Legislative Council, October 2001 available at <http://www.legis.nd.gov/assembly/57-2001/docs/pdf/39152.pdf>.

<sup>48</sup> *Id.* at 6. Should conservation goals be met, state share of costs would be reduced from 25% to 24.5%.

throughout the service area there may not be a need for additional water supply.”<sup>49</sup>

Unlike the EIS prepared in *Oklahoma Wildlife Federation v. U.S.A.C.E.*, where there was evidence that the Corps considered water conservation as an alternative to the water diversion project, there is no evidence that Reclamation afforded adequate consideration to water conservation as a reasonable alternative to the proposed diversion project.<sup>50</sup>

Reclamation was aware of the potential use of conservation as a reasonable alternative, yet there is no indication that Reclamation sought to incorporate conservation practices and techniques into the project.

An EIS should consider and address the direct and indirect effects, alternatives, conservation potential of the various alternatives, and mitigation measures with regards to natural and depletable resources.<sup>51</sup> CEQ regulations place great emphasis on the reuse and conservation measures available for a proposed action.<sup>52</sup> Reclamation’s commitment to conservation practices was limited to mitigation efforts for conserving endangered or threatened species or critical habitats like wetlands. Despite the physical and financial availability of conservation measures available to North Dakota residents, the NAWS FEIS was void of any water conservation measures.

Without a conservation plan in place, the communities seeking Missouri River basin water will likely continue to draw and waste massive amounts of water, continuing the practices that led them to seek an alternative source of water in the first place. A

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<sup>49</sup> Reclamation-Managing Water in the West. Summary of Public Scoping, Northwest Area Water Supply Project Environmental Impact Statement, August 2006, p 5, available at [http://www.usbr.gov/gp/dkao/naws/summary\\_scoping\\_naws.pdf](http://www.usbr.gov/gp/dkao/naws/summary_scoping_naws.pdf).

<sup>50</sup> 681 F. Supp. 1470, 1485 (D. Okla. 1988)

<sup>51</sup> 40 C.F.R. § 1502.16(a)-(h)

<sup>52</sup> *Id.*

proper EIS should include mitigation efforts as well as conservation potential,<sup>53</sup> and the NAWS FEIS fails to comply.

The use of conservation practices rather than water diversion was recommended in the DEIS comment letter submitted by the Government of Canada.<sup>54</sup> The effects of failing to properly conserve water resources cannot be solved by importing water from another source. Such a practice only enables further irresponsible use of depletable natural resources and injury to aquatic ecosystems. Without a program in place to *require* water conservation efforts, future droughts intensified by climate change will pose a great threat to the water available within the Missouri River basin.

The Bureau of Reclamation has stated that water conservation measures can:

“(1) improve reliability of existing water supplies; (2) reduce overall operating costs for water users; (3) postpone the need for new or expanded water supplies, storage capacity, treatment works, or drainage remedies; (4) result in higher crop yields; (5) reduce soil erosion and drainage problems; (6) reduce the impacts of drought; and (7) under some circumstances, yield conserved water for additional agricultural, urban, or environmental need.”<sup>55</sup>

The NAWS project was proposed due to the unreliability of existing water supplies, to reduce the impact of drought, and to avoid the drilling of new wells and building of water treatment plants across the Hudson Bay basin.<sup>56</sup> Whereas Reclamation has stated that conservation measures can improve the reliability of water supplies, reduce impact of

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<sup>53</sup> 40 C.F.R. § 1502.16(a)-(h)

<sup>54</sup> See Letter to Mr. Brietzman, U.S. Bureau of Reclamation addressing comments and concerns relating to the NAWS DEIS, available at:

[http://www.usbr.gov/gp/dkao/naws/DEIS/comments\\_deis/government\\_canada.pdf](http://www.usbr.gov/gp/dkao/naws/DEIS/comments_deis/government_canada.pdf).

<sup>55</sup> Bureau of Reclamation Water Conservation Field Services Program, available at: <http://www.usbr.gov/waterconservation>.

<sup>56</sup> See Northwest Area Water Supply Project Final Environmental Assessment, April 30, 2001 p 45, available at <http://www.usbr.gov/gp/dkao/naws/FEIS/Supporting%20Reports/NAWS%20Final%20Environmental%20Assessment%202001.pdf>.

drought, and at the very least postpone the need for new or expanded water supplies, it is unreasonable for Reclamation to have avoided using water conservation as an alternative to the NAWS diversion project.

An additional alternative not addressed by Reclamation is water recycling. Examples of water recycling include non-potable uses like re-using cooling water, utilizing treated waste water for irrigation and aesthetic purposes, and using treated waste water for other uses like flushing toilets.<sup>57</sup> Water recycling is an important method for water management. Reuse of water, whether it is treated waste water or storm water collected via rain barrels, conserves water resources pulled from the ground or local lakes and rivers. In this case, it is unclear if Reclamation addressed whether this alternative could eliminate the need to divert Missouri River basin water.

The U.S. EPA states that “recycled water can satisfy most water demands, as long as it is adequately treated to ensure water quality appropriate for the use.”<sup>58</sup> Although not commonly utilized in the United States, recycled water can even be used for potable purposes.<sup>59</sup> Direct potable water reuse research in Denver, Colorado has shown that water reclamation treatment plants have the potential to provide water with quality greater than many potable water resources in the area.<sup>60</sup> Indirect potable use is more common in the United States. Examples of indirect use include recharging ground water aquifers and augmenting surface water reservoirs.<sup>61</sup> Utilizing water recycling has been shown to decrease the need for diversion of water from sensitive ecosystems, reduce

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<sup>57</sup> See Water Recycling and Reuse: The Environmental Benefits. U.S. EPA, Region 9: Water Program. Available at: <http://www.epa.gov/region09/water/recycling/index.html>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Guidelines for Water Reuse, U.S. EPA, EPA/625/R-04/108, September 2004, available at: <http://www.epa.gov/ord/NRMRL/pubs/625r04108/625r04108.pdf> at 46.

<sup>61</sup> See Water Recycling and Reuse: The Environmental Benefits. U.S. EPA, Region 9: Water Program. Available at: <http://www.epa.gov/region09/water/recycling/index.html>.

water pollution, and allow for the replenishment and repair of riparian habitats depleted from water diversion practices.<sup>62</sup> In Altamonte Springs, Florida, it is estimated that up to 102 gallons of water per person per day of potable water are saved by utilizing a reclaimed water system.<sup>63</sup> Phoenix, Arizona encourages the use of reclaimed water for irrigation purposes, offering a financial incentive where reclaimed water for irrigation purposes is sold at a rate of 80 percent of potable resources.<sup>64</sup> The NAWS EIS was essentially silent as to the potential use of water recycling as an alternative to diversion or as mitigation efforts to reduce the waste of a depletable resource.<sup>65</sup>

Conservation and water management techniques are becoming more common. Water conservation presents a viable and reasonable alternative to the NAWS water diversion project. The failure to consider such an alternative is indicative of the unreasonably narrow scope of the NAWS EIS. In *Environmental Defense Fund, Inc. v. U.S. ACE*, the Eighth Circuit reiterated the importance and necessity of an EIS to include the exploration of alternatives “that might avoid some or all of the adverse environmental effects” of the proposed project.<sup>66</sup> Conservation efforts possess the potential to supply quality water without the harmful effects associated with water diversion, yet, this alternative was not addressed in the EIS.

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<sup>62</sup> See Water Recycling and Reuse: The Environmental Benefits. U.S. EPA, Region 9: Water Program. Available at: <http://www.epa.gov/region09/water/recycling/index.html>.

<sup>63</sup> Guidelines for Water Reuse, U.S. EPA, EPA/625/R-04/108, September 2004, available at: <http://www.epa.gov/ord/NRMRL/pubs/625r04108/625r04108.pdf>, at 50.

<sup>64</sup> Guidelines for Water Reuse, U.S. EPA, EPA/625/R-04/108, September 2004, available at: <http://www.epa.gov/ord/NRMRL/pubs/625r04108/625r04108.pdf> at 54.

<sup>65</sup> The only mention of water recycling mentioned in the FEIS was the discharge of treated waste water into the Souris River, and, even that was not addressed as mitigation or conservation, rather just stating the logistics of the proposed plan. No other beneficial uses for the waste water were mentioned. Recycled use of existing water sources was not discussed. See Northwest Area Water Supply Project Final Environmental Assessment, April 30, 2001, available at: <http://www.usbr.gov/gp/dkao/naws/FEIS/Supporting%20Reports/NAWS%20Final%20Environmental%20Assessment%202001.pdf>.

<sup>66</sup> 470 F. 2d. 289, 295-96 (8<sup>th</sup> Cir. Ark. 1972)

## **RISKS OF DIVERSION COMPOUNDED BY CLIMATE CHANGE: WATER LEVELS, QUALITY OF WATER, AND INVASIVE SPECIES**

Foreseeable impacts, whether directly or indirectly associated with the project must be addressed in an EIS.<sup>67</sup> The NAWS project poses a threat to water quality, water levels and of increased risk of the invasion of non-native species. Increased temperatures and decreased precipitation will exacerbate the threats posed by the project, but these risks were not addressed in the EIS. Temperatures have risen 5 degrees Fahrenheit in Montana, North Dakota, and South Dakota during the 20<sup>th</sup> century.<sup>68</sup> The EPA anticipates temperatures in the Great Plains region to rise up to 3 degrees Fahrenheit during the summer months and 4 degrees Fahrenheit during the winter months, by the year 2030.<sup>69</sup> There is no doubt that temperatures are on the rise.<sup>70</sup> Reclamation acknowledged rising temperatures as a threat to the aquatic environments in the FEIS.<sup>71</sup>

Precipitation is expected to decline 5-10% during this time period.<sup>72</sup> When rains do occur, they are expected to happen with less frequency but with greater intensity, causing flooding and other issues.<sup>73</sup> Where nature's flood protections (wetlands) are

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<sup>67</sup> 42 U.S.C. § 4321 *et seq.*

<sup>68</sup> Potential Consequences of Climate Variability and Change for the Great Plains, available at: <http://www.usgcrp.gov/usgcrp/Library/nationalassessment/07GP.pdf>.

<sup>69</sup> U.S. Environmental Protection Agency ("EPA"). (2008) Effects of climate change for aquatic invasive species and implications for management research. National Center for Environmental Assessment, Washington, D.C. EPA/600/R-08/014. Available from the National Technical Information Service, Springfield, VA and online at [http://oaspub.epa.gov/eims/eimscomm.getfile?p\\_download\\_id=472114](http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=472114).

<sup>70</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration: Global Warming. Available at: <http://lwf.ncdc.noaa.gov/oa/climate/globtemp.html>.

<sup>71</sup> See Northwest Area Water Supply Project Final Environmental Assessment, April 30, 2001 at 1-10, available at: <http://www.usbr.gov/gp/dkao/naWS/FEIS/Supporting%20Reports/NAWS%20Final%20Environmental%20Assessment%202001.pdf>

<sup>72</sup> U.S. Environmental Protection Agency ("EPA"). (2008) Effects of climate change for aquatic invasive species and implications for management research. National Center for Environmental Assessment, Washington, D.C. EPA/600/R-08/014. Available from the National Technical Information Service, Springfield, VA and online at [http://oaspub.epa.gov/eims/eimscomm.getfile?p\\_download\\_id=472114](http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=472114).

<sup>73</sup> *Id.*

impacted by construction or natural flow manipulation, flooding will become a greater problem.

Together, such changes are expected to have “significant effects on water quality, particularly salinity, and groundwater availability.”<sup>74</sup> Climate change is also expected to affect water levels, potentially causing lower levels in the summer with “higher stream flows in the winter and spring.”<sup>75</sup> Reclamation failed to address the potential impact changing water levels could have on the intake of water from Lake Sakakawea as well as the compounded effect further downstream from the diversion of water across the continental divide. Reclamation also failed to address changes to water quality resulting from decreased water levels.

Climate change will lead to increases in invasive species (non-native species into aquatic environments, species which cause or are likely to cause harm to the economy, environment, or human health.)<sup>76</sup> Changing water levels, temperatures, and increased salinity place stress upon native species. The stressed environment provides a breeding ground for the proliferation of more adaptable species, allowing a greater potential for them to become established.<sup>77</sup>

North Dakota waters have been infested with foreign species, many detrimental to the aquatic environment. In lakes nearby Lake Sakakawea, populations of invasive species such as the zebra mussel have caused concern to North Dakota natural resource

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<sup>74</sup> U.S. Environmental Protection Agency (“EPA”). (2008) Effects of climate change for aquatic invasive species and implications for management research. National Center for Environmental Assessment, Washington, D.C. EPA/600/R-08/014. Available from the National Technical Information Service, Springfield, VA and online at [http://oaspub.epa.gov/eims/eimscomm.getfile?p\\_download\\_id=472114..](http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=472114..)

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

managers.<sup>78 79</sup> The NAWS project will transport invasive species to Lake Sakakawea, and ultimately further downstream, infecting other water bodies where zebra mussels have not been detected. Lake Sakakawea is currently plagued with the problematic invasive species Curly Leaf Pondweed.<sup>80</sup> Changing water levels associated with the diversion and compounded by climate change could lead to the increased spread of existing invasive species as well as provide breeding grounds within Lake Sakakawea of future invasions. Because the NAWS pipeline would be a direct transmission line of Lake Sakakawea water to a distinctly separate water basin (Hudson Bay basin), any change in the ecosystem and species within Lake Sakakawea also would pose a threat to the ecosystem of the Hudson Bay basin. The risk of biota transfer from Lake Sakakawea across the continental divide has been addressed by Reclamation. However, the risk to Lake Sakakawea from future invasion spurred by declining water levels has not been studied.

The EPA suggests that climate change be considered in the monitoring and study of aquatic invasive species, as “changing water levels and temperatures and precipitation patterns” have an effect upon invasive species habitat range.<sup>81</sup> Climate change and the diversion project go hand in hand with creating a destabilized aquatic ecosystem.

Decreased levels of water caused by the diversion allow for water temperatures to

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<sup>78</sup> Aquatic Nuisance Species, available at: <http://gf.nd.gov/fishing/ans.html>.

<sup>79</sup> The common and destructive invasive species, the zebra mussel has “been found in Minnesota lakes which are less than 100 miles from North Dakota’s border. Juvenile zebra mussels have been found in the Missouri River below Gavins Point Dam and Big Bend Dam in South Dakota...[within a short drive from Lake Sakakawea].” <http://www.gf.nd.gov/fishing/docs/nd-ans-plan.pdf> at 143.

<sup>80</sup> Prohibited or Restricted Aquatic Nuisance Species, Infested Waters in North Dakota, January 2008, available at: <http://gf.nd.gov/fishing/ans-infest-waters.html>.

<sup>81</sup> U.S. Environmental Protection Agency (“EPA”). (2008) Effects of climate change for aquatic invasive species and implications for management research. National Center for Environmental Assessment, Washington, D.C. EPA/600/R-08/014. Available from the National Technical Information Service, Springfield, VA and online at [http://oaspub.epa.gov/eims/eimscomm.getfile?p\\_download\\_id=472114](http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=472114)

increase. Increased water temperatures allow for increased evaporation, again causing a further decrease in water levels.<sup>82</sup> This decrease in water levels may also cause problems from the concentration of toxins within the water, and the salinity level and clarity of water.<sup>83</sup> Increased temperatures and decreased precipitation resulting from climate change further exacerbates the temperature change in the lakes and rivers, rate of evaporation, and decrease in water levels. Together, climate change and the NAWS diversion will create an immense risk of invasion by foreign species.

### ***RISKS TO LAKE SAKAKAWEA AND THE MISSOURI RIVER BASIN***

The native ecosystem of Lake Sakakawea will be vulnerable to invasive species as it struggles to adapt to lower water levels from NAWS withdrawals which will be compounded by rising temperatures (increased evaporation) and decreased precipitation (decreased surface water replenishment) associated with climate change. Studies on invasive species have concluded that increased water temperatures have resulted in the decline of native species while at the same time, enabled the proliferation of invasive species.<sup>84</sup>

Reclamation asserts that the withdrawal of water from Lake Sakakawea will not have a *great* effect upon the Missouri River basin, despite the fact that it projects the

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<sup>82</sup> See National Water Program Strategy: Response to Climate Change. U.S. Environmental Protection Agency, Office of Water (4101M), EPA 800-R-08-001, September 2008 available at <http://www.EPA.gov/water/climatechange/>

<sup>83</sup> See National Water Program Strategy: Response to Climate Change. U.S. Environmental Protection Agency, Office of Water (4101M), EPA 800-R-08-001, September 2008 available at <http://www.EPA.gov/water/climatechange/>

<sup>84</sup> See U.S. EPA. Climate Change and Aquatic Invasive Species (Final Report). U.S. Environmental Protection Agency, Washington, D.C. EPA/600/R-08/014, 2008. Article references concerns within various states regarding increased temperatures as a risk of increased invasion due to distress of the native environment, creation of an expanded territory for invasive species, longer growing seasons, and adaptability.

withdrawal of over 3.5 billion gallons of water each year.<sup>85</sup> The NAWS project will have an effect upon the Missouri River basin ecosystem. Climate change will further impact the Missouri River basin.<sup>86</sup> The effects of the withdrawal and climate change are reasonably foreseeable, yet are not addressed in the EIS.<sup>87</sup>

The depletion of water from the Missouri River basin via the NAWS project is a foreseeable direct effect. “Direct effects...are caused by the action and occur at the same time and place.”<sup>88</sup> Upon the completion of the NAWS project, massive amounts of water will immediately be removed from Lake Sakakawea, causing a drop in water levels. The withdrawal also poses indirect effects. “Indirect effects...are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable” and may include “effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”<sup>89</sup> Over an extended period, continual withdrawal of water from Lake Sakakawea compounded by decreased water levels associated with climate change pose threats to water quality, quantity, and the ecosystems of the related water bodies.

Furthermore, scientists anticipate that climate change will result in an increased demand for water during a period in which water resources are projected to decline,

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<sup>85</sup> See Northwest Area Water Supply Project Final Environmental Assessment, April 30, 2001 at 1-10, available at: <http://www.usbr.gov/gp/dkao/naws/FEIS/Supporting%20Reports/NAWS%20Final%20Environmental%20Assessment%202001.pdf>; and *Gov't of the Province of Manitoba v. Norton*, (2005).

<sup>86</sup> U.S. Environmental Protection Agency (“EPA”). (2008) Effects of climate change for aquatic invasive species and implications for management research. National Center for Environmental Assessment, Washington, D.C. EPA/600/R-08/014. Available from the National Technical Information Service, Springfield, VA and online at [http://oaspub.epa.gov/eims/eimscomm.getfile?p\\_download\\_id=472114](http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=472114).

<sup>87</sup> See U.S. EPA’s August 15, 2007 comment to the NAWS DEIS reiterating the availability of data relating to climate change and the Missouri River system.

<sup>88</sup> 40 C.F.R. § 1508.8(a)

<sup>89</sup> 40 C.F.R. § 1508.8(b)

especially water levels in smaller lakes and rivers.<sup>90</sup> Lower water levels, increased water temperatures, increased demand, severity of droughts, and impact upon native and invasive species are therefore reasonably foreseeable effects of the project. Similar to increased traffic or population growth, increased demand of water resources is a reasonably foreseeable impact which Reclamation should have addressed in the EIS. These effects are not adequately addressed in Reclamation's NEPA analysis of the NAWS project.

Lower water levels and increased temperatures cause a higher risk of invasive species; increased risk of detriment to native species; risks to wetland areas surrounding Lake Sakakawea and water bodies downstream affected by decreasing water levels; threaten commercial and recreational fishing, tourism and other forms of water based recreation due to changing shorelines and decreases in water quality. Additionally, the amount of water made available to existing communities utilizing the water for drinking purposes will be decreased. Water quality will likely be decreased by higher concentrations of pollutants, minerals, and biota.

Decreases in water levels from NAWS, compounded by climate change, and the serious threats to the Missouri River Basin's aquatic environment are foreseeable direct and indirect risks. Such risks must be addressed in the EIS to form an adequate appraisal of potential environmental impacts of the proposal. Reclamation acknowledged the public concern about the project and climate change induced impacts upon the environment, yet cited contradictions in climate modeling scenarios as a valid reason for

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<sup>90</sup> Climate Change Impacts on the United States *The Potential Consequences of Climate Variability and Change*, 2000, available at: <http://www.usgcrp.gov/usgcrp/Library/nationalassessment/overviewmidwest.htm>.

not including rising temperatures in the NEPA analysis.<sup>91</sup> This Court has found that uncertainties or unknown risks can not prevent a party from engaging in thorough analysis of an issue.<sup>92</sup> The difficulty of interpreting climate change models can not justify the avoidance of the issue. Other agencies have shown that it is entirely possible to include the effects of climate change in the review of a proposed federal action.<sup>93</sup>

***DIRECT AND INDIRECT EFFECTS UPON THE HUDSON BAY BASIN***

Although Reclamation has attempted to address the risks associated with biota transfer to the Hudson Bay basin, without adequate treatment the pipeline from Lake Sakakawea to Minot would act as a direct route for “viruses, bacteria, protozoans and other invertebrates, fish, fish eggs and other aquatic organisms, as well as macrophytic plants and algae” to the Hudson Bay basin.<sup>94</sup> Species introduced could include the paddlefish, shortnose gar, gizzard shad, Utah chub, smallmouth buffalo, and river carpsucker, resulting in the possible elimination of native species and destruction of the existing ecosystem.<sup>95</sup> The EIS discussed aquatic invasive species including but not limited to whirling disease, tubifox, polyp odium hydriforme, *Yesinia Ruckeri*, INHN, as well as e-coli, salmonella and legionelle. The “effects of the introduction of a disease pathogen or parasite could be catastrophic to wild or cultured fish” and “most often, the damage is not reversible.”<sup>96</sup> Because a small percentage of biota transferred across

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<sup>91</sup> See Northwest Area Water Supply Project Final Environmental Impact Statement on Water Treatment, available at <http://www.usbr.gov/gp/dkao/naws/FEIS/Reports/NAWS%20FEIS%20Executive%20Summary.pdf>.

<sup>92</sup> *Gov't of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 68-9 (2005).

<sup>93</sup> See 73 FR 18984, comment 16 and response. NEPA analysis discussed the effects of dredging upon sea turtles. Comments suggested that other cumulative impacts upon the population of sea turtles, such as climate change, should be addressed. The EA addressed climate change and the effects upon sea turtles, rather than skirting the issue as too difficult to partake in analysis.

<sup>94</sup> *Gov't of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 47.

basins could have catastrophic effects, the level of study associated with the transfer of biota and the increased risk of invasion due to climate change is highly important.<sup>97</sup> In *Natural Resources Defense Council v. United States Nuclear Regulatory Commission et al.*, this Court acknowledged the propensity for damage even where exposure is limited or near minute levels when it stated:

“an environmental risk can be high if the probability is high that damage will occur, even if the damage itself would not be terribly severe. Alternatively, an environmental risk can be significant if the probability is low that damage will occur, but the possible damage, should it occur, would be severe. Thus, even if the probability that environmental damage will occur is very low, the risk is nonetheless significant if the potential damage is sufficiently severe.”<sup>98</sup>

Later, in *Gov't of the Province of Manitoba v. Norton*, this Court acknowledged the potential for catastrophic consequences should an event occur, even where the risk of occurrence is low.<sup>99</sup> The risk of biota invasion, such as whirling disease may be very low, but in an area like Lake Sakakawea which hosts roughly 13,000 salmon anglers annually, the introduction of whirling disease would pose a great threat to the salmon population and the \$1.8 million associated with salmon fishing.<sup>100</sup> Introduction of non-native biota into Lake Sakakawea can occur through natural means (transfer by migrating birds/animals), transfer from upstream sources, as well as transfer from human activities. As discussed above, the draining of water from Lake Sakakawea will leave the water body and aquatic life more susceptible to invasion of non-native specimens. The NAWS pipeline is a direct route from the Missouri River Basin to the Hudson Bay Basin, and

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<sup>97</sup> See U.S. EPA's August 15, 2007 comment to the NAWS DEIS reiterating the dangers of biota invasion and the need to fully analyze the risks associated with the transfer of even minute amounts of biota.

<sup>98</sup> *Natural Resources Defense Council v. United States Nuclear Regulatory Commission*, 685 F. 2d. 459.

<sup>99</sup> 398 F. Supp. 2d 41 at 65.

<sup>100</sup> See <http://www.gf.nd.gov/fishing/docs/nd-ans-plan.pdf> at 2.

therefore any new species entering Lake Sakakawea also poses a threat to the waters of Hudson Bay Basin.

Although Reclamation asserts that the risk of a breach of the pipeline is low, it is estimated that 24,590 cubic feet of water could be released during a breach, even with mitigation factors including shut off valves.<sup>101</sup> A low risk is still a risk, and even the minute transfer of biota to a distressed environment can result in the invasion of non-native species. Once an invasive population is established, “controlling or eliminating the established population is impractical.”<sup>102</sup> From the FEIS, it is not possible to adequately compare the risk of invasion from the project if built versus no-project because Reclamation failed to provide a means of comparison. As it relates to parasites in the Missouri River basin that are not present in the Red River basin or other Manitoba waters, Reclamation failed to address which parasites would pose a risk of becoming invasive and the effects upon non-Missouri waters should transfer occur. Without awareness of what organisms can be transferred and the risks associated, it cannot be said that Reclamation has taken a “hard look” at the risks associated with NAWS.

### **CONCLUSION**

America’s waters, including the Great Lakes, all face the threat of decreasing water levels compounded by increased water temperatures, similar to the waters at issue in North Dakota. The proposed NAWS project, which enables a policy of irresponsible water use, is of significant concern. If the NAWS project is allowed to proceed as presently constituted, it will set a dangerous precedent for transferring water across

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<sup>101</sup> North Dakota State Water Commission and the Garrison Diversion Conservancy District, Northwest Area Water Supply Project Biota Transfer Control Measures \*UPDATE\* April, 2001 at 9.

<sup>102</sup> North Dakota Statewide Aquatic Nuisance Species (ANS) Management Plan, available at <http://www.gf.nd.gov/fishing/docs/nd-ans-plan.pdf> at 10.

distinct basins when a transfer is not necessary. Without conservation efforts utilized to reduce the amount of water consumed and wasted, and a thorough exploration of in-basin sources, the demand for water will continue to rise as it is made available, all during a time in which water availability continues to decline. Piping water across the continental divide will not solve the water crisis allegedly in existence in North Dakota. The transbasin diversion will simply create a new environmental crisis.

For the reasons stated above, Reclamation's EIS violates NEPA and this court should require Reclamation to comply with NEPA before proceeding with the project.

Respectfully submitted,

Nicholas Schroeck  
Great Lakes Environmental Law Center  
MI Bar # 70888  
440 Burroughs Street  
Suite 120, Box 70.  
Detroit, MI 48202  
(313) 820-7797

Janice Goldman-Carter  
National Wildlife Federation  
DC Bar # 415773  
901 E Street N.W., Suite 400  
Washington DC 20004  
Phone: 202-797-6800  
Fax: 202-797-6646

s/Nicholas Schroeck \_\_\_\_\_

s/Janice Goldman-Carter \_\_\_\_\_

James G. Murphy  
National Wildlife Federation  
VT Bar # 000-62-8938  
149 State Street, Suite 1  
Montpelier VT 05602  
Phone: 802-229-0650  
Fax: 802-229-4532

s/James G. Murphy \_\_\_\_\_