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Memorandum

To: Colin O'Donovan, colin.odonovan@ag.state.mn.us (DNR)
Robert Cattanach, cattanach.robert@dorsey.com (Diversion Authority)
Brent J. Edison bedison@vogellaw.com (BRRWD)

Re: Proposed Mediation

Date: May 8, 2019

Our File No. 24082-0003

From: *Gerald Von Korff*

On behalf of Joint Powers Authority and its members Comstock and Wolverton, we propose that OAH be requested to convene an early mediation as provided under the rules for contested cases. The mediation should seek to resolve (a) all procedural issues faced in multiple administrative, state and federal cases, and (b) substantive issues presented in the contested case and the federal litigation.

We should try mediation because the public interest demands it. With the help of Magistrate Brisbois, we were able to resolve what seemed to be an insurmountable disagreement over Oxbow. We are all now spending public and private resources on litigation in the 8th Circuit Court of Appeals, in the Minnesota Court of Appeals, in Federal District Court and in two Minnesota permit proceedings. There is a permit proceeding that is pending before Buffalo Red, as well. Common sense tells us that we should try to arrive at an agreement on how we are going to get all of these matters resolved.

BRRWD's participation in the administrative process offers as well an opportunity to bring the parties together. Because BRRWD is only recently embroiled, its participation offers the possibility that its perspective can help those of us who have been litigating since 2013 to find a solution.

JPA is prepared to come to the mediation table without pre-condition. Everything should be on the table. Our list of unresolved issues is set out below. We should do our best to simplify and expedite the proceedings that remain to be resolved. We should engage in serious listening and bargaining around a comprehensive resolution of all cases. We'd be happy to discuss how mediation might be configured to have the greatest possible chances of success.

Pending Disputes Left to Be Resolved

The list below is provided from JPA's perspective. There may well be other items that ought to be considered

- Whether the parties can find an all-case ending agreement regarding all flood control issues?
- Related to this, can the parties find a resolution of the second contested case?
- Can the two pending appeals (8th Circuit and Court of Appeals be dismissed)?
- Will Diversion Authority dismiss the contested case regarding the Commissioner's first order?
- Whether an agreement can resolve any and all disputes regarding a project that is permissible by BRRWD?
- Resolution of remaining issues in the Federal litigation
 - The Minnesota Environmental Rights Act suit remains at issue. At Diversion Authorities request, the state suit was transferred to federal court, but that suit remains unresolved and unaddressed.
 - The District Court has not yet issued a final order disposing of all claims. When final, JPA has a right to appeal the District Court's summary judgment order regarding the FEIS. In addition, the District Court's approach to EO 11988 differs from the approach taken by other federal circuits. There are procedural issues involved, and a comprehensive agreement would avoid further litigation in federal court.
- What economic and hydrological mitigation is required to reduce the impacts of any ultimately approved project to upstream and downstream communities?