

**FILED**  
U. S. DISTRICT COURT  
EASTERN DISTRICT ARKANSAS

AUG 23 2019

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

JAMES W. McCORMACK, CLERK  
By: [Signature] DEP CLERK

LUNDELL FARMING COMPANY, L.P. and  
LFCLP1, LLC

PLAINTIFFS

v.

No. 4:19-cv-594-BRW

UNITED STATES ARMY CORPS OF ENGINEERS;  
RYAN D. McCARTHY, in his official capacity as Secretary of the Army;  
LIEUTENANT GENERAL TODD T. SEMONITE, in his official  
capacity as Chief of Engineers and Commanding General of the  
United States Army Corps of Engineers; COLONEL ZACHARY L.  
MILLER, in his official capacity as Commander of the Memphis  
District of the United States Army Corps of Engineers, and  
CITY OF CLARENDON, ARKANSAS

DEFENDANTS

**COMPLAINT**

1. This is an action for declaratory and injunctive relief arising under a Project Partnership Agreement (the "Partnership Agreement") between Defendant United States Army Corps of Engineers ("Corps") and the City of Clarendon, Arkansas (the "City") to restore meanders in a seven-mile stretch of the Cache River in Eastern Arkansas (the "Restoration Project"), which was originally channelized as part of a project conducted by the Corps in the early 1970s (the "Existing Project").

2. Prior to entering into the Partnership Agreement, the Corps was required by its own regulations to determine whether the City was capable of performing the requirements of the Partnership Agreement. Among those requirements was an expenditure of several million dollars over a period of several decades in order to maintain and operate the Restoration Project. As the Corps was aware at the time it entered into the Partnership Agreement, failure to properly maintain and operate the Restoration Project would ultimately cause the Cache River to erode Plaintiffs' property and would also put the safety of the public, including Plaintiffs' guests, at risk.

This case assigned to District Judge Wilson  
and to Magistrate Judge Deere

3. Despite this knowledge, the Corps failed to determine whether the City was legally capable of performing the Partnership Agreement under Arkansas law. Under the Arkansas Constitution, because the costs of the Restoration Project exceeded the City's annual revenues, the City had no authority to enter into the Partnership Agreement. For this reason, an Arkansas court recently enjoined the City from expending any funds in connection with the Restoration Project.

4. Since the Restoration Project was completed in 2016, the City has not engaged in any inspections or maintenance of the Restoration Project, despite its awareness that a failure to do so would harm Plaintiffs' property and cause a substantial risk to public safety. Despite its failure to follow its own regulations to ensure that the City was legally capable of fulfilling its obligations under the Partnership Agreement, the Corps has now taken the position that it has no responsibility for the Restoration Project. The Corps has maintained this position even after the City's participation in the Restoration Project was enjoined.

5. Plaintiffs seek declaratory and injunctive relief against the Corps to ensure that the Restoration Project is properly inspected and maintained and to protect Plaintiffs and the public against the harm that the Corps admits will ensue should such inspections and maintenance not occur.

#### **Jurisdiction and Venue**

6. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1346(a)(2), as a civil action in which the United States is a party. Plaintiffs seeks a declaration of their rights in this case of actual controversy within this court's jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in the Eastern District of Arkansas.

### **PARTIES**

8. Plaintiff Lundell Farming Company L.P., is a limited partnership organized under the laws of the state of Arkansas, with its principal place of business located in the Eastern District of Arkansas.

9. Plaintiff LFCLP1, LLC, is a limited liability company organized under the laws of the state of Arkansas, with its principal place of business located in the Eastern District of Arkansas.

10. Plaintiffs own property that borders approximately four miles of the west bank of the Cache River, as channelized by the Existing Project (the "West Bank Private Lands").

11. Defendant United States Army Corps of Engineers is an agency of the United States of America.

12. Defendant Ryan D. McCarthy is the current Acting Secretary of the Army. Defendant McCarthy is sued in his official capacity only.

13. Defendant Lieutenant General Todd T. Semonite is the United States Army Chief of Engineers and Commanding General of the United States Army Corps of Engineers. Defendant Semonite is sued in his official capacity only.

14. Defendant Colonel Zachary L. Miller is the Commander of the Memphis District of the United States Army Corps of Engineers. Defendant Miller is sued in his official capacity only.

15. Defendant City of Clarendon is a city of the first class incorporated under and by virtue of the laws of the state of Arkansas, located in Monroe County, Arkansas. Defendants do not currently seek relief from the City, but name it as a potential necessary party to affording complete relief.

### **THE EXISTING PROJECT**

16. In its natural state, the Cache River consisted of numerous meanders and a wide flood plain, resulting in repeated, persistent flooding. As a result of such flooding, for many decades the Cache River basin was relatively unsuitable for agriculture or other economically-productive uses.

17. In order to increase economic activities, including agriculture, in Eastern Arkansas, Congress adopted the Flood Control Act of 1950. Section 204(d) of the Flood Control Act, in relevant part, authorized the construction of a “plan for flood protection and related purposes in the Cache River Basin ... substantially in accordance with the report of the Chief of Engineers in Senate Document Numbered 88, Eighty-first Congress, first session.”

18. The report of the Chief of Engineers described in the Flood Control Act of 1950 proposed “the improvement of the main channels of the Cache River and Bayou DeView by enlargement, realinement [sic], and the construction of new ditches, as required.” (Exhibit 1 at 4.)

19. Notwithstanding the congressional authorization for the Existing Project in 1950, the project was not constructed for a number of years. In 1969, the Corps issued a General Design Memorandum for the construction of the project. (Exhibit 2.) The Existing Project, as originally contemplated, was to consist of a series of new channels along the length of the Cache River designed to reduce flooding by straightening and widening the existing channels.

20. As designed, the Existing Project was intended to ensure that along the lower seven miles of the Cache River – the portion adjacent to the West Bank Private Lands – the Cache River would have a designed discharge rate of 30,800 cubic feet per second (the “Authorized Flow Capacity”), the amount deemed necessary to reduce flooding in that portion of the river. (Exhibit 2 at II-7.)

21. In reliance upon the work to be performed as part of the Existing Project, in 1970, Plaintiffs’ predecessor-in-interest sold the Cache River-Bayou DeView Improvement District (the state agency formed to acquire land for the Existing Project) the land over which the channelized portion of the Cache River adjacent to the West Bank Private Lands was to flow. In so doing, however, Plaintiffs’ predecessor-in-interest reserved to itself a right of access through the existing meanders of the Cache River and through the new channel of the Cache River in order to reach a boat dock and cabin located on the West Bank Private Lands. (Exhibit 3.)

22. Construction of the Existing Project began in the early 1970s. As a result of environmental litigation, however, the Existing Project was halted by a court injunction in 1973. At the time construction was halted, only the lower seven miles of the Cache River had been channelized, to a point just upstream of the confluence of the Cache River and Bayou DeView and just upstream of the northern end of the West Bank Private Lands. No further work was performed on the Existing Project until the Restoration Project was constructed more than four decades later.

**CONGRESS PERMITTED THE CORPS TO MAKE CHANGES  
TO FLOOD CONTROL PROJECTS FOR ENVIRONMENTAL PURPOSES**

23. In 1986, Congress enacted the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. § 2309(a)). Section 1135 of that Act permitted the Corps to make modifications to existing water resources projects “for the purpose of improving the quality

of the environment.” Nevertheless, in determining what projects could be pursued under this Section, the Secretary of the Army was required to determine whether such modifications were “consistent with the authorized project purposes.”

24. On April 22, 2000, the Corps issued regulations for the planning of its water resources projects, including projects to be implemented for environmental purposes pursuant to Section 1135. These regulations, as amended in 2006, governed the Restoration Project at issue in this case. (Exhibit 4 at F-1.)

25. The regulations at issue emphasized, as specifically stated in Section 1135, that projects performed under that statute “may be used to provide additional improvements to a completed portion of a specifically authorized project so long as they do not impair or substantially change the purposes or functions of the specifically authorized project.” (Exhibit 4 at F-5.) For present purposes, therefore, any change to the Existing Project had to maintain its original flood control benefits.

26. The Corps’ 2006 regulations also required that any project to be carried out pursuant to Section 1135, although ostensibly a partnership between the federal government and a “non-Federal sponsor,” was ultimately to become the responsibility of the non-Federal sponsor after completion. As the regulations explained, the non-Federal sponsor of the project was “responsible for operation, maintenance, repair, replacement, and rehabilitation costs for the project,” as to be set out in a manual to be given to the non-Federal sponsor upon completion of the project. (Exhibit 4 at 2-17, F-19.)

27. Because of the significant long-term expense that might be involved in the operation, maintenance, repair, replacement, and rehabilitation of a Section 1135 project, the governing regulations also placed limits upon the entities that could serve as the non-Federal

sponsors of such projects. Such non-Federal sponsors had to be either a “public body” or a non-profit entity. (Exhibit 4 at F-8.)

28. As the regulations further provided, however, even a “public body” was only eligible to serve as a non-Federal sponsor of a Section 1135 project if it was capable of satisfying its long-term operation, maintenance, repair, replacement, and rehabilitation obligations. As stated in the regulations, “the non-Federal sponsor must have the *full authority and capability* to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform.” (Exhibit 4 at F-8 (emphasis added).) Under those regulations, therefore, an Arkansas municipality could only serve as a non-Federal sponsor of a project under Section 1135 if it was both legally and financially capable of performing its obligations under Arkansas law.

#### **THE CREATION OF THE RESTORATION PROJECT**

29. On February 9, 2011, the Corps approved the Restoration Project, whereby the drainage channel created by the Existing Project would be modified in order to permit the Cache River to return to some of its original meanders.

30. On August 17, 2011, the City and the Corps entered into the Partnership Agreement, whereby the City agreed to become the non-Federal sponsor for the Restoration Project. (Exhibit 5.) Under the Partnership Agreement, the scope of the Restoration Project was to include the “removal of certain plugs installed as part of the Cache River Basin Project which channelized the River and to install closure structures which will allow the reopening of meanders 1, 2, and 3...” (Exhibit 5, Art. I.)

31. Once the District Engineer for the Corps determined the Restoration Project was complete, the District Engineer would provide the City with a final operation, maintenance, repair,

replacement, and rehabilitation manual (the “OMRR&R Manual”) setting forth the City’s responsibilities for future maintenance of the Restoration Project. (Exhibit 5, Art. II.D.)

32. Once the City received the OMRR&R Manual, the Partnership Agreement provided that the City would have full responsibility, financial and otherwise, for all operation, maintenance, repair, replacement, and rehabilitation on the Restoration Project, “at no cost to the [Federal] Government.” (Exhibit 5, Art. VIII.A.)

33. If the City did not perform its obligations, however, the Corps maintained the right to perform those obligations, or, alternatively, to terminate the Partnership Agreement. (Exhibit 5, Art. VIII.B, XIII.A.)

34. Finally, the Partnership Agreement also provided for an unconditional, unqualified, unlimited, and perpetual indemnification of the Federal Government by the City. Article IX of the Partnership Agreement states that the City “shall hold and save the Government free from all damages arising from design, construction, operation, repair, rehabilitation, and replacement of the project and any betterments.”

**THE CORPS KNEW OF SIGNIFICANT RISKS TO PLAINTIFFS AND THE PUBLIC  
IF THE NECESSARY MAINTENANCE AND REPAIRS ON THE RESTORATION  
PROJECT WAS NOT PERFORMED**

35. Prior to beginning the construction of the Restoration Project, the Corps prepared a number of documents describing the proposed project in great detail. Among the points repeatedly discussed in these documents were the significant harms to property and person that the Restoration Project posed to Plaintiffs and others if the operation, maintenance, repair, replacement, and rehabilitation described in the documents was not performed properly.

36. Among the documents produced by the Corps was the MicroModel Study, which was designed to “investigate potential sedimentation patterns, scour and deposition, that may be



expected to occur in the meander channels following construction of the restoration plan.” (Exhibit 6 at § 3.) The study concluded that while “[r]estoration could be done...flood capacity for the authorized Federal project [*i.e.*, the Existing Project] must be preserved. (Exhibit 6 at § 2.2.)

37. The MicroModel Study analyzed the effects of restoring one of the meanders by introducing a rock weir across the channel just below the unplugged first meander, thereby hydraulically forcing water from the existing channel into the former meander. The study made a number of important observations regarding those effects.

38. The study first recognized that as a result of the weir, a large “plunge pool” would be created. (Exhibit 6 at § 8.) Plunge pools are deep holes in the river floor caused by the force of falling water over the weir. Because such pools can undercut the existing banks and create downward forces under water, they can constitute a significant risk of physical injury, including drowning, to anyone that happens to use the Cache River near the weirs. That risk is exacerbated by the fact that the weirs, as designed, would often be underwater and not visible to boaters, thus requiring adequate warnings be posted and maintained.

39. The study also recognized that the “[f]low exiting the lower end of the restored meander channel and reentering the canal caused scour on the opposite canal bank.” (Exhibit 6 at § 8.) The opposite canal bank referenced in that section is adjacent to the West Bank Private Lands owned by Plaintiffs.

40. As a result of this potential adverse effect upon Plaintiffs’ property, the model recommended a substantial effort be undertaken to include large amounts of riprap “at all locations immediately across from the meander outlets.” (Exhibit 6 at § 10.) In other words, the Corps was

well-aware that the Restoration Project, if not done and maintained properly, would result in significant erosion to Plaintiffs' property near the outlets of the meanders.

41. The Corps also completed an Environmental Assessment before beginning the Restoration Project. (Exhibit 7.) Like the MicroModel Study, the Environmental Assessment recognized the potential risks to Plaintiffs and others from the Restoration Project. Most important, the Environmental Assessment reiterated that the Restoration Project could cause "no reduction in the flood control benefits provided by the original authorized project." (Exhibit 7 at 4.)

42. Despite the need for the Restoration Project to maintain the Cache River's existing flood control capacity, however, the Corps recognized that construction of one of the weirs, which would be located not at the opening of the meander, but a quarter mile downstream from the meander's opening, would back water up the main channel from that weir to the newly-reopened meander. (Exhibit 7 at 2.) That backup would necessarily reduce the ability of the Restoration Project to maintain the flood control benefits created by the Existing Project.

43. The Corps also recognized in its Environmental Assessment that construction of the Restoration Project would cause scouring along the banks of the adjacent landowners, and even recognized that land might need to be acquired from those landowners to accommodate future migration of the river banks. (Exhibit 7 at 2, 9.) A substantial part of the land affected, once again, would be the West Bank Private Lands.

44. The Environmental Assessment also recognized the need for "intermittent maintenance to replenish rock on the weirs that is lost over time, especially in high water events." (Exhibit 7 at 2.)

45. These severe risks were further exacerbated, however, by the City's known financial constraints. In order to save money, the Restoration Project was not built to "established USACE design criteria and guidelines," but instead, pursuant to a Locally Preferred Plan ("LPP") agreed upon between the Corps and the City to construct the Restoration Project on a shoestring budget. (Exhibit 8.)

46. As the most obvious result of these financial restrictions, the weirs were to be constructed with approach slopes that are steeper (containing less overall rock) than Corps guidelines. The Corps agreed to this while recognizing that doing so was increasing the risk of stone movement and ultimate failure of the weir over time. (Exhibit 8 at 7.) The LPP was thus approved notwithstanding that "[t]here would be an increased level of risk to the [City] for reduced factors of safety in structure design." (Exhibit 8 at 7.)

47. The safety risks posed by the weir design called for by the LPP were not limited to failure of the weir, however. Weirs with steeper slopes, as called for by the LPP, present an increased safety risk from what is known as a "hydrologic jump." In that situation, water moving down a steeper slope can create a downforce pinning anyone trapped within it under the surface. For this reason, proper markings and warnings of the weirs was even more important.

48. The Corps also recognized other issues that would result from not following established guidelines. Among them was the fact that as designed, sediment deposition from the Restoration Project would increase in certain areas. As the Corps explained to the City in the LPP, "[d]eposition may negatively impact diversion of flow to meander and will result in *accelerated accretion in the canal near the private boat ramp*" owned by Plaintiffs. (Exhibit 8 at 7 (emphasis added).)

49. The Corps warned the City that sediment removal required by the LPP could be significant and would fall “under their commitment to perform operation and maintenance as necessary to preserve project function and benefits.” (Exhibit 8 at 9.) If such sediment removal is not performed, Plaintiffs’ rights to use their property, including the easement to cross the river, will be negatively affected.

50. Even more significant than the likelihood that the LPP would harm Plaintiffs’ right to use their boat ramp, however, is that the failure to remove sediment could cause Plaintiffs’ property itself to become flooded. The Corps recognized that “[s]hould the deposition occur disproportionately in the meander entrance then flow may be diverted into downstream side channels that exit from the canal. Property along these channels is largely in private ownership.” (Exhibit 8 at 5.)

51. That warning, in lay terms, means that if sediment is not removed from the meanders, the river could be forced out of its existing channel and through other existing channels. One of the most notable side channels off the river is a slough that runs directly through Plaintiffs’ property just downstream from the opening of one of the meanders. The Restoration Project has thus created a significant risk that the river will ultimately change course directly across Plaintiffs’ property if proper operation, maintenance, repair, replacement, and rehabilitation is not performed.

52. Preventing these adverse effects, the Corps recognized, would not only require sediment removal, but ongoing and continuous maintenance of the weirs. The maintenance of the weirs, moreover, would be even more important due to their reduced size as a result of the LPP. Among other things, without this ongoing operation, maintenance, repair, replacement, and rehabilitation, the Corps noted that the river would constantly attack the sides of the weirs –

including by eroding the West Bank Private Lands – and ultimately undermine the weirs themselves. (Exhibit 8 at 9.)

**THE CORPS FAILED TO DETERMINE WHETHER THE CITY COULD LEGALLY  
PERFORM THE PARTNERSHIP AGREEMENT**

53. The Corps concluded that the City’s operation, maintenance, repair, replacement, and rehabilitation obligations over the life of the Restoration Project would be well in excess of \$2 million. (Exhibit 9.) As explained above, the Corps also knew that the failure to perform such operation, maintenance, repair, replacement, and rehabilitation would likely harm Plaintiff’s property and would also put the safety of the public at risk.

54. Despite this knowledge, and their own regulations requiring that a non-Federal sponsor for a Section 1135 project possess the legal capability to perform its obligations under the project agreement, the Corps apparently did nothing to determine whether the City was even legally authorized by Arkansas law to make such an undertaking, much less whether the City had the financial ability to satisfy such obligations, before entering into the Partnership Agreement with the City.

55. Had the Corps performed a proper legal analysis before entering into the Partnership Agreement, it would have learned that the Arkansas Constitution created significant limits upon the contracting ability of the City. Arkansas law was clear at the time of the entry into the Partnership Agreement that the City could not enter into the significant financial obligations required thereunder.

56. Article 12, Section 4 of the Arkansas Constitution states that “[t]he fiscal affairs of ... cities and incorporated towns shall be conducted on a sound financial basis,” nor shall a city “authorize the issuance of any contract ... in excess of the revenue for such city or town for the current fiscal year.”

57. Here, it was unquestioned that the City's operation, maintenance, repair, replacement, and rehabilitation obligations under the Partnership Agreement were expected to cost the City well over two million dollars and that the City's operation, maintenance, repair, replacement, and rehabilitation obligations were to last in *perpetuity*. The City's liabilities under the Partnership Agreement were far in excess of the City's revenue for the year it signed the agreement, or any other year for that matter, often by more than 300%. As such, the Partnership Agreement constituted a *prima facie* violation of the Arkansas Constitution.

58. Unlike the multi-year contracts approved by the Arkansas Supreme Court in cases such as *Town of Lead Hill v. Ozark Mountain Regional Pub. Water Auth.*, 2015 Ark. 360, the Partnership Agreement does not restrict the City's potential liability to a particular source of funds (such as from water sales), but instead pledges the full faith and credit of the City in an unlimited amount. As clearly held by the Arkansas Supreme Court in *Hink v. Board of Directors of Beaver Water Dist.*, 235 Ark. 107 (1962), a multi-year contract that imposes liability greater than the revenues of the City in one year violates the Arkansas Constitution.

59. Article 12, Section 5 of the Arkansas Constitution also states that no "city, town or other municipal corporation shall ... loan its credit to any corporation, association, institution, or individual." Here, the Partnership Agreement provides that the City has an unlimited indemnification obligation to the Corps for any issue arising under the Restoration Project. In so doing, the City has extended its credit to the Corps by ensuring that any obligation owed by the Corps would be funded by the City, in violation of the Arkansas Constitution.

60. The Partnership Agreement places the entire burden of the Restoration Project upon the City and its residents, notwithstanding that it provides no special benefit to the persons within the City that is not equally shared with all other residents in Arkansas. The Restoration

Project lies entirely outside the boundaries of the City, yet the City bears all financial burdens. The Restoration Project is simply a general environmental project that is outside the scope of the City's authority under Arkansas law because it does not constitute a legitimate public purpose benefitting the City's residents.

61. In its rush to approve the Restoration Project, however, the Corps never considered the City's legal capacity to enter into the Partnership Agreement. Instead, it allowed the City of Clarendon to shoulder a significant financial burden that it was never legally authorized to undertake, without considering the harm to Plaintiffs and others should the City not meet those obligations.

**THE CORPS TURNED THE RESTORATION PROJECT OVER TO THE CITY AND DID NOT CARE WHETHER THE CITY PERFORMED ITS OBLIGATIONS**

62. Upon information and belief, the Restoration Project was completed in the late summer of 2016. At that time the City received a copy of the OMRR&R Manual from the Corps. (Exhibit 10.)

63. In the OMRR&R Manual, the Corps reiterated that under the Restoration Project, the City would have the responsibility of "maintaining the flood control capacity of the channelized portion of the Cache." (Exhibit 10 at 4.) This responsibility is critical to the adjoining landowners, including Plaintiffs.

64. The OMRR&R Manual explained in great detail what the City's operation, maintenance, repair, replacement, and rehabilitation responsibilities would be with respect to the Restoration Project. The requirements set forth therein, however, merely "represent the minimum effort necessary to maintain the intended functionality of the Project." (Exhibit 10 at 5.) Among other things, the Corps informed the City of the need to establish a regular inspection program,

whereby the portions of the Restoration Project described in the following paragraphs were to be thoroughly inspected on an annual basis.

65. First, the Corps notified the City that the warning signs placed upstream of each weir should be inspected, with damaged signs replaced every year. The City was also notified of the need to install floating markers and solar-powered lights as additional warnings to boaters. (Exhibit 10 at 5-6.) These warnings were particularly important, given the recognized potential for harm from submerged weirs and plunge pools. As explained above, this risk was exacerbated as a result of the steeper slopes of the weirs called for by the LPP.

66. Despite this warning, and the significant risk to public safety (including Plaintiffs' guests) from improperly marked river obstructions, upon information and belief the City has never inspected the warning signs, nor has it installed the additional required warnings. Nor, despite its authority to do so, has the Corps performed these vital safety tasks, placing public safety at serious risk.

67. Second, the Corps notified the City of the need to inspect the openings to the meanders on an annual basis and insure that the meanders are not obstructed by debris or sedimentation. (Exhibit 10 at 6.)

68. Despite this warning, and the significant known harms to Plaintiffs' property that will occur if such inspections are not performed, upon information and belief the City has never performed such inspections. Indeed, as a result of this failure, the meanders have become clogged with fallen debris, none of which has been removed. Such debris has blocked the meanders and prevented Plaintiffs from exercising their rights under their easement.

69. Third, the Corps notified the City of the need to inspect the "Cross Ditch Closure," which closed off one of the meanders from the original channel, on an annual basis. Among other



things, the closure was to be checked to determine whether any of the stone was degrading and/or whether any of the banks near the closure were degrading or eroding. (Exhibit 10 at 6-7.)

70. Again, despite this warning, and the significant known harms to Plaintiffs' property that will occur if such inspections are not performed, upon information and belief the City has never performed such inspections.

71. Fourth, the Corps notified the City of the need to inspect the weirs on an annual basis for a number of potential issues: (1) loose or missing stones, (2) erosion on the banks upstream and downstream of the weirs, and (3) proper width, length, and elevation of the crowns of the weirs. (Exhibit 10 at 7-8.) Repairs were to be made if there were any issues with the weirs in order to prevent failure.

72. Yet again, despite this warning, and the significant known harms to Plaintiffs' property that will occur if such inspections are not performed, upon information and belief the City has never performed such inspections.

73. Upon information and belief, since the Restoration Project was completed nearly three years ago, no operation, maintenance, repair, replacement, or rehabilitation has been performed. The failure of the City and/or the Corps to perform such operation, maintenance, repair, replacement, and rehabilitation has, as the Corps knew it would before it ever constructed the Restoration Project, created a significant risk of physical injury to Plaintiffs and the public at large, and will also result in irreparable damage to Plaintiffs' property.

**THE CORPS HAS REFUSED TO ACCEPT RESPONSIBILITY FOR THE CITY'S  
FAILURE TO PERFORM OMRR&R**

74. Since 2018, representatives of Plaintiffs have met with the Corps on multiple occasions to discuss their concerns about the City's failure to perform the required operation, maintenance, repair, replacement, and rehabilitation on the Restoration Project and the risks to the

public and to Plaintiffs' property caused by that failure. Each time, Plaintiffs have been met with the same response: that in the Corps' opinion, the Restoration Project is now the sole responsibility of the City and the Corps will therefore not perform the operation, maintenance, repair, replacement, and rehabilitation.

75. The Corps has continued to take this position notwithstanding the fact that the City is now under a court order enjoining it from performing its operation, maintenance, repair, replacement, and rehabilitation responsibilities under the Partnership Agreement. On June 27, 2018, following an illegal exaction lawsuit filed by certain residents of the City, the Circuit Court of Monroe County, Arkansas, declared that the Partnership Agreement "was void *ab initio*" under the Arkansas Constitution for the reasons stated herein. (Exhibit 11 at ¶ 4.)

76. The court not only held that the Partnership Agreement was void *an initio*, it further held that any expenditure of funds for the Partnership Agreement would constitute an illegal exaction. As a result, the court enjoined the City "from expending any funds to perform the obligations of the Project Partnership Agreement or in connection with the Cache River Meander Restoration Project." (Exhibit 11 at ¶ 6.)

77. Even after the City was enjoined from performing its obligations under the Partnership Agreement, however, the Corps has refused to take any responsibility for preventing the harm to Plaintiff's property and to public safety that its own Restoration Project created. Apparently the Corps believes that it has no responsibility for the Restoration Project even though it failed to follow its own regulations in determining whether the City could perform its obligations under the Partnership Agreement.

78. Following a number of meetings between Plaintiffs' representatives and the Corps, Plaintiffs eventually sent the Department of the Army Assistant Secretary for Civil Works a letter,

dated February 5, 2019. (Exhibit 12.) In that letter, Plaintiffs demanded that the Corps take responsibility for the Restoration Project to prevent the known risks of the Project from manifesting themselves. (Exhibit 12.)

79. On July 29, 2019, the Army responded to Plaintiffs' February 5, 2019 letter. In that letter, the Army stated that the "Corps has no evidence that the non-federal sponsor has failed to comply with its operation, maintenance, repair, replacement, and rehabilitation obligations or with any other requirements reflect in the [Partnership Agreement]." (Exhibit 13.) The letter further stated that the Corps "cannot assume these obligations in lieu of the City." (Exhibit 13.)

80. The Corps' position in the July 29 letter is based upon willful blindness as to the City's failures to perform operation, maintenance, repair, replacement, and rehabilitation of the Project. Under the Partnership Agreement, the Corps has the right to inspect the Project at any time to determine whether the operation, maintenance, repair, replacement, and rehabilitation has been properly performed. (Exhibit 5 at 25.) Moreover, the Corps has the right to audit any expenses incurred by the City in performance of its obligations under the Partnership Agreement. (Exhibit 5 at 25-26.)

81. Upon information and belief, the Corps has never taken steps to audit the Project. To the extent the Corps has inspected the Project, if at all, such inspections fall far short of what the Corps itself understands would be required to ensure the Project is properly performing. Given Plaintiffs' warnings to the Corps that the OMRR&R has not been performed, the Corps' refusal to even investigate the matter constitutes an unconscionable abdication of its responsibilities to public safety and to Plaintiffs' property.

**COUNT I: REQUEST FOR DECLARATORY RELIEF**

82. Plaintiffs re-allege and incorporate by reference the allegations contained in all of the preceding paragraphs.

83. Plaintiffs are an interested party in the Partnership Agreement, given the acknowledgment of the Parties to the Partnership Agreement that Plaintiffs would be harmed if the operation, maintenance, repair, replacement, and rehabilitation obligations under the agreement were not performed.

84. Under the Declaratory Judgment Act, Plaintiffs are an “interested party” seeking a declaration of the rights and legal relations created by the Partnership Agreement.

85. Plaintiffs seek a declaration that because the Partnership Agreement was void *ab initio* under Arkansas law, the Corps is required to perform the obligations otherwise assigned to the City under the Partnership Agreement, including, but not limited to, the following:

- (a) conducting all required monitoring and inspection of the Restoration Project to prevent sedimentation from reducing the flood control capacity of the Cache River;
- (b) performing all obligations required under the Partnership Agreement and the OMRR&R Manual to prevent harm to the West Bank Private Lands, including any corrective steps necessary to remediate and repair any damages resulting therefrom;
- (c) maintaining all toe armoring on the West Bank Private Lands opposite each meander discharge;
- (d) maintaining the meanders and the original drainage channel free from debris, logs, and other obstructions; and

- (e) accepting the financial responsibility for these activities and the financial responsibility for any damages to property and/or person caused by the Restoration Project.

**COUNT II: REQUEST FOR INJUNCTIVE RELIEF**

86. Plaintiffs re-allege and incorporate by reference the allegations contained in all of the preceding paragraphs.

87. At the time it planned the Restoration Project, the Corps knew that if the operation, maintenance, repair, replacement, and rehabilitation of the Project was not performed, Plaintiffs' property would certainly be eroded and very possibly could become the new course of the Cache River.

88. At the time it planned the Restoration Project, the Corps also knew that if the operation, maintenance, repair, replacement, and rehabilitation of the Project was not performed, the safety of Plaintiffs' guests and the public at large would be put in serious risk.

89. Despite its knowledge of the importance of ongoing operation, maintenance, repair, replacement, and rehabilitation, the Corps failed to follow its own regulations to ensure that the required operation, maintenance, repair, replacement, and rehabilitation would be performed following the completion of the Restoration Project. The Corps failed to determine whether the City was legally capable of performing the Partnership Agreement. As a result of that failure, there is no entity, other than the Corps, who can perform the operation, maintenance, repair, replacement, and rehabilitation of the Restoration Project.

90. Since the Restoration Project was completed, the operation, maintenance, repair, replacement, and rehabilitation that the Corps knows is necessary to prevent harm to Plaintiffs' property and the public safety has not been performed. As a result of that failure, disproportionate

sediment disposition is likely occurring in the drainage channel as predicted. That disproportionate sediment disposition will only continue to increase as the operation, maintenance, repair, replacement, and rehabilitation remains undone and, if unchecked, could ultimately cause the Cache River to create a new channel across Plaintiffs' property.

91. As a further consequence of the failure to perform operation, maintenance, repair, replacement, and rehabilitation, the meanders of the Cache River created by the Restoration Project have become clogged with debris and are now impairing Plaintiffs from using their property rights in the easement crossing those meanders.

92. And as yet a further consequence of the failure to perform operation, maintenance, repair, replacement, and rehabilitation, the warnings that the Corps stated in the OMRR&R Manual were necessary to protect public safety have either never been put in place or have never been maintained. This failure creates an extreme risk to the public safety, including the potential for physical injury and/or death.

93. The harms that are already occurring as a result of the failure to perform the operation, maintenance, repair, replacement, and rehabilitation, as well as the harms that will occur if the operation, maintenance, repair, replacement, and rehabilitation remains unperformed, are irreparable and of the type that cannot be adequately remedied with monetary damages. Plaintiffs therefore also seek a preliminary and permanent injunction requiring the Corps to perform the obligations otherwise assigned to the City under the Partnership Agreement, including, but not limited to, the following:

- (a) conducting all required monitoring and inspection of the Restoration Project to prevent sedimentation from reducing the flood control capacity of the Cache River;


- (b) performing all obligations required under the Partnership Agreement and the OMRR&R Manual to prevent harm to the West Bank Private Lands, including any corrective steps necessary to remediate and repair any damages resulting therefrom;
- (c) maintaining all toe armoring on the West Bank Private Lands opposite each meander discharge;
- (d) maintaining the meanders and the original drainage channel free from debris, logs, and other obstructions; and
- (e) accepting the financial responsibility for these activities and the financial responsibility for any damages to property and/or person caused by the Restoration Project.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for the following relief:

1. A declaratory judgment that the Corps is required to perform the obligations set forth as the responsibility of the City in the Partnership Agreement;
2. A preliminary and permanent injunction enjoining the Corps from refusing to perform the obligations set forth as the responsibility of the City in the Partnership Agreement;  
and
3. Any other relief, including attorneys' fees and costs, that the Court deems just and appropriate.

QUATTLEBAUM, GROOMS & TULL PLLC  
111 Center Street, Suite 1900  
Little Rock, Arkansas 72201  
Telephone: (501) 379-1700  
Facsimile: (501) 379-1701  
jtull@qgtlaw.com  
cpekron@qgtlaw.com

By:   
\_\_\_\_\_  
John E. Tull III, Ark Bar No. 87150  
Chad W. Pekron, Ark. Bar No. 2008144

*Attorneys for Plaintiffs*