

Appendix C – Real Estate

Mortar Creek Quitman, Faulkner County, Arkansas Section 14

April 2024



**US Army Corps
of Engineers**

Little Rock District

**Real Estate Plan
Mortar Creek
Quitman, Faulkner County, Arkansas
Section 14 Project**

5 April 2024

**Prepared For
US Army Corps of Engineers
Southwestern Division
Little Rock District**

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List of Acronyms

ACA	Arkansas Code Annotated
BPE	Bank Protection Easement
DI	Design and Implementation
LER	Lands, easements, and rights-of-way
NFS	Non-Federal Sponsor
REP	Real Estate Plan
TWAE	Temporary Work Area Easement

Mortar Creek, Faulkner County, AR Section 14

1. Purpose of the Real Estate Plan

The purpose of this Real Estate Plan (REP) is to outline the real estate acquisition requirements necessary for the completion of the Section 14, Mortar Creek Project, at Mortar Creek Rd., near the city of Quitman and within Faulkner County, Arkansas, authorized under Section 14 of the Flood Control Act of 1946, as amended by Section 27 of the Water Resources Development Act of 1974. The Non-Federal Sponsor (NFS) for this project is the County of Faulkner, State of Arkansas, and under the authority for this Section 14 Project, the NFS is required to provide all lands, easements, and rights-of-way (LER) required to construct the project.

The use of federal funds is not authorized for the acquisition of any LER.

This plan also identifies any known real estate risks to the Federal Government and the NFS in completing LER acquisition activities, as well as how to mitigate as much risk as possible. The analysis presented in this plan is based on preliminary design assumptions commensurate with the level of study required for this report. All estimates of numbers of ownerships, acreage, and real estate costs may change in the Design and Implementation (DI) phase of the proposed project.

2. Description of lands, easements, and rights-of-way (LER)

The proposed project will provide emergency repairs to reinforce and prevent streambank erosion from damaging an existing county roadway and bridge, increasing public safety by increasing stream bank stability. The preliminary design aims to open the channel and stabilize the streambank by removing flow restrictions and reinforcing the streambank with bedding and riprap. Access to the project area will utilize existing public roads, with primary access from Mortar Creek Rd.

Bank Protection Easement (BPE) and Temporary Work Area Easement (TWAE) are the LER standard estates required for this project, for the purpose of stabilizing the stream bank, removing flow restrictions, and staging and laydown. An estimated 0.08 acres of BPE, and 0.38 acres of TWAE are required to support the project. Estate language for all referenced estates is shown in Figure 1, while a map of the LER required is shown in Figure 2.

However, it's not anticipated that LER will need to be acquired for the project, due to the NFS holding the necessary rights to complete the project through the statutory scheme provided in Arkansas Code Annotated (ACA) §§ 14-298-101 to -125; which provides the sponsor with the authority to make necessary repairs to roads and their environs that have been established as a public thoroughfare; which includes the county-maintained Mortar Creek Rd. and bridge; where the project is located.

3. Description of LER already owned by Non-Federal Sponsor

The statutory scheme, ACA §§ 14-298-101 to -125, gives the sponsor broad rights to maintain and repair county roads that have been designated as such and properly recorded.

Designating a public thoroughfare as a county road and entering it into the NFS county-maintained road system is made possible through ACA § 27-66-207, which allows for a county judge, in his discretion, to “designate as a county road any street or road dedicated to the public as a public thoroughfare, provided that a bill of assurance making the dedication is properly recorded.”

Mortar Creek Rd. was designated a public thoroughfare and entered the county-maintained road system through Order 92-24 on March 3rd, 1993, by County Judge Jesse Ferrel. Since then, the road has been continually maintained by the NFS, which includes the removal, realignment, and replacement of the previous Mortar Creek Rd. bridge in 2010 at the site of the current project.

While there is no legal instrument defining the extent of the NFS's interest directly, there are currently standard minimums that the NFS has established for additional roads to be dedicated as a county road and entered into the NFS' county-maintained roads system. Established minimums can be found in the NFS Road Improvement guide found shown in Figure 3.

Currently, one of the minimum requirements to be entered into the county road system includes a fifty-foot right of way (ROW) calculated from the center of the road. An estimated road ROW based on combining the minimum required ROW for the previous and current path of Mortar Creek Rd.'s centerline is shown in Figure 2-2.

While there are small portions of the current project footprint outside of the estimated road ROW based on the minimum standards required to be entered into the county road system today, varying ROW widths are common, and Mortar Creek Rd.'s designation allows for road construction and reconstruction, including extensive drainage structures and similar developments that may result in permanent construction.

4. Copies of proposed non-standard estates

There are no proposed non-standard estates in support of this project.

5. Existing federal project that lies fully or partially with the LER required for the project

There is no existing federal project.

6. Any federally owned land included within the LER required for the project

There is no federally owned land required.

7. Extent to which LER lies below the ordinary high-water mark

This project is not along a navigable stream, so there is no definable ordinary high-water mark.

8. Map depicting project area

Maps depicting the locations of the proposed project and the required LER are shown in Figure 2-1.

9. Discussion of whether there will be flooding induced by construction or Operation and Maintenance (O&M) of the project

There is no anticipated induced flooding as the result of any phase of this project.

10. Baseline cost estimate for real estate

As it is anticipated that the NFS has the LER required to support the project already, associated real estate costs for the project are only related to administrative costs, which include planning, federal oversight, and review activities. Also, LER credit is only available for tracts that do NOT include the public facility to be protected. Thus, there is little to no LER credit likely to be approved for this project. LER Table C-1 shows estimated costs of \$4,780, including a 20% contingency.

TABLE 1 – BASELINE COST ESTIMATE FOR REAL ESTATE

1	Lands & Damages		Federal	Sponsor	20% Cont	Total Cost
	1.2	Construction Contract Documents				
		1.23.03 Real Estate Analysis Documents				
		01.23.03.01 Real Estate Planning Documents				
		USACE Real Estate Plan	\$2,000	\$0	\$0	\$2,000
		Planning - Sponsor	\$0	\$0	\$0	\$0
		USACE Assistance/Review of Sponsor	\$1,500	\$0	\$300	\$1,800
		01.23.03.17 Real Estate LERRD Certification/Crediting Documents				
		Crediting/LERRD Certification Packages - Sponsor	\$0	\$400	\$80	\$480
		USACE Assistance/Review of Sponsor	\$1,700	\$0	\$340	\$2,040
		Estimated Cost	\$5,200	\$400	\$720	\$6,320
		Estimated Contingency	\$340	\$80		
		Total Estimated Cost	\$5,540	\$480		

11. Relocation assistance benefits

There are no known PL 91-464 relocations associated with this project.

12. Mineral activity

The preliminary assessment identified no mineral activity. However, mineral activity and any associated land rights may be identified during the land acquisition process. If so, the sponsor will acquire or subordinate as needed to ensure sufficient rights exist to construct the project. No acquisition of mineral rights is required to construct or maintain this project.

13. Assessment of Non-Federal Sponsor's legal and professional capability

The sponsor's capability assessment is shown in Figure 4 of this plan and indicates that the sponsor is anticipated to be fully capable of supporting the project's real estate requirements.

14. Application of Zoning Ordinances

There are no identified zoning ordinances found to be applicable to the lands required for this project.

15. Real estate acquisition schedule

General elements contributing to acquisition timelines are landowner attitude, funding, manpower resources, and title issues. Due to the unique nature of how the sponsor holds the necessary real estate rights to complete this project, the most likely of those issues to affect the project would be landowner attitude. The presumed course of action by the sponsor would then be to enforce their rights through Arkansas Code Annotated (A.C.A.) §§ 14-298-101 to -125, which includes eminent domain.

It is of note that the NFS does not have quick-take authority for this project. However, being that the road has already been established as a public road, it is unlikely that eminent domain would be utilized or would be necessary. As Arkansas Attorney General Opinion No. 93-115 explains, property that is already being used for a public purpose is not usually subject to eminent domain.

16. Description of facility or utility relocations

Currently, a single utility has been identified, a buried Windstream Holdings, Inc. communications line, as being potentially impacted by the project. However, a final Opinion of Compensability provided by SWL Office of Counsel determined the utility holds no real property interest in the area and is non-compensable. Thus, the utility owner must remove or relocate the communications line away from the project area at their own expense. The opinion can be found as Figure 7 of this plan.

The real estate cost and schedule will be updated accordingly if additional utilities are discovered during the DI phase of the project. Any facility or utility found while implementing this project that is deemed compensable will add significant cost and schedule risk to the project.

17. Known Contaminants

Referencing paragraph 2.3 HTRW in Section 2 of the “Detailed Project Report and Environment Assessment” for the project, “Preliminary investigation found no indication of potential HTRW sources in the area that would impact the project. There are no recognized environmental conditions within a mile of the project area. There would be no changes or impacts to the environmental condition of the area in the future without the project.”

18. Support or opposition to the project

The sponsor has indicated that they have full support of the project from the public, and that the two landowners directly adjacent to the project area, who would benefit the most from the project, are also in full support of the project.

19. Statement that Non-Federal Sponsor has been notified in writing about the risks associated with acquiring land

The NFS was notified in writing of the risks of acquiring land for this project, outside the direction of USACE Real Estate. Risks include uncreditable sponsor RE costs and negative impacts on the project schedule.

20. Other real estate issues

There are no other issues needing to be addressed relevant to this project.

FIGURE 1 – ESTATES

BANK PROTECTION EASEMENT

A perpetual and assignable easement and right-of-way in, on, over and across the land hereinafter described for the location, construction, operation, maintenance, alteration, repair, rehabilitation and replacement of a bank protection works, and for the placement of stone, riprap and other materials for the protection of the bank against erosion; together with the continuing right to trim, cut, fell, remove and dispose therefrom all trees, underbrush, obstructions, and other vegetation; and to remove and dispose of structures or obstructions within the limits of the right-of-way; and to place thereon dredged, excavated or other fill material, to shape and grade said land to desired slopes and contour, and to prevent erosion by structural and vegetative methods and to do any other work necessary and incident to the project; together with the right of ingress and egress for such work; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however to existing easements for public roads and highways, public utilities, railroads and pipelines.

TEMPORARY WORK AREA EASEMENT

A temporary easement and right-of-way in, on, over and across (the land described in Schedule A) (Tract Nos. _____, _____ and _____), for a period not to exceed _____, beginning with date possession of the land is granted to the United States, for use by the United States, its representatives, agents, and contractors as a (borrow area) (work area), including the right to (borrow and/or deposit fill, spoil and waste material thereon) (move, store and remove equipment and supplies, and erect and remove temporary structures on the land and to perform any other work necessary and incident to the construction of the _____ Project, together with the right to trim, cut, fell and remove therefrom all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right-of-way; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

FIGURE 2 – LER REQUIRED

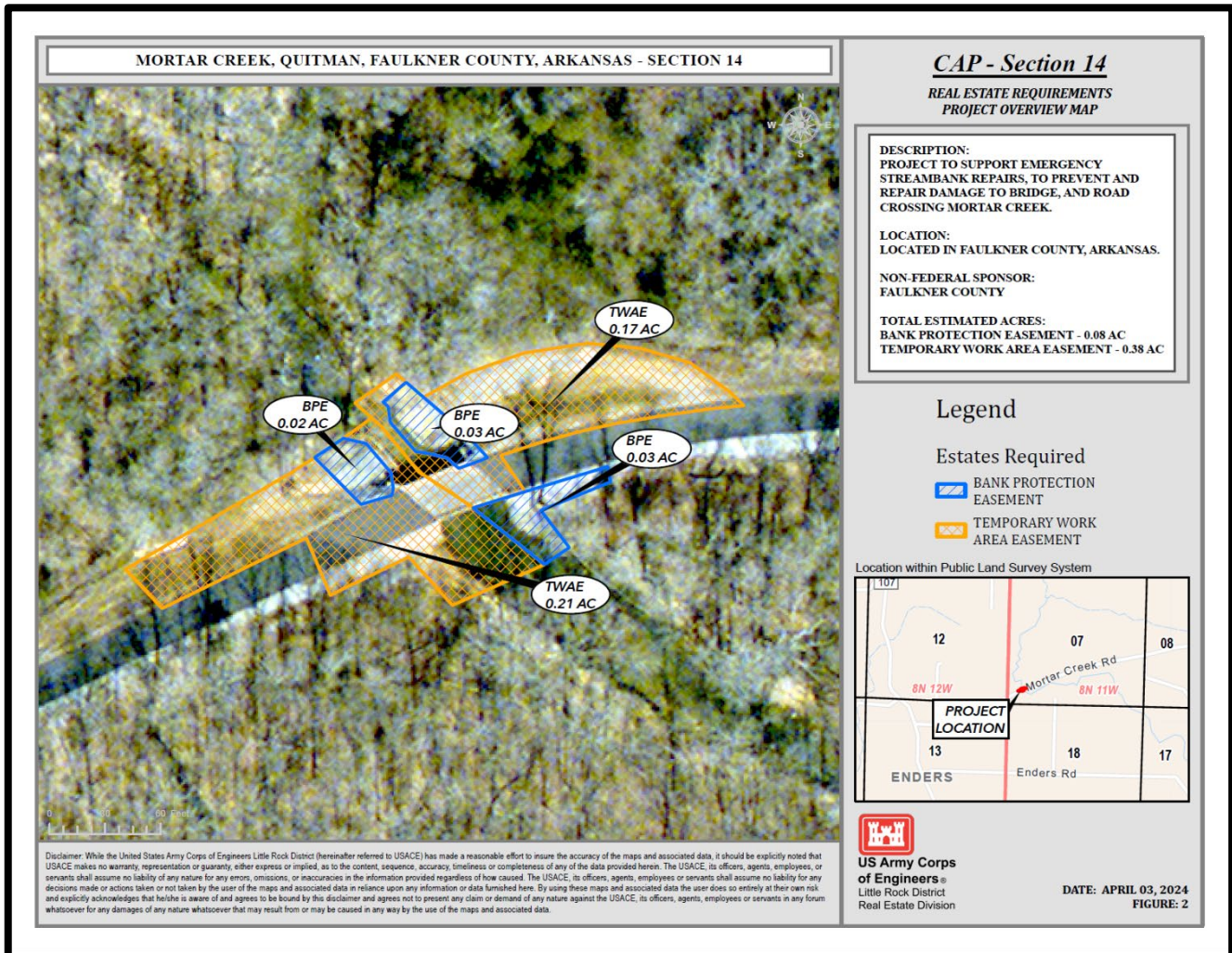


FIGURE 3 – NFS RIGHT-OF-WAY

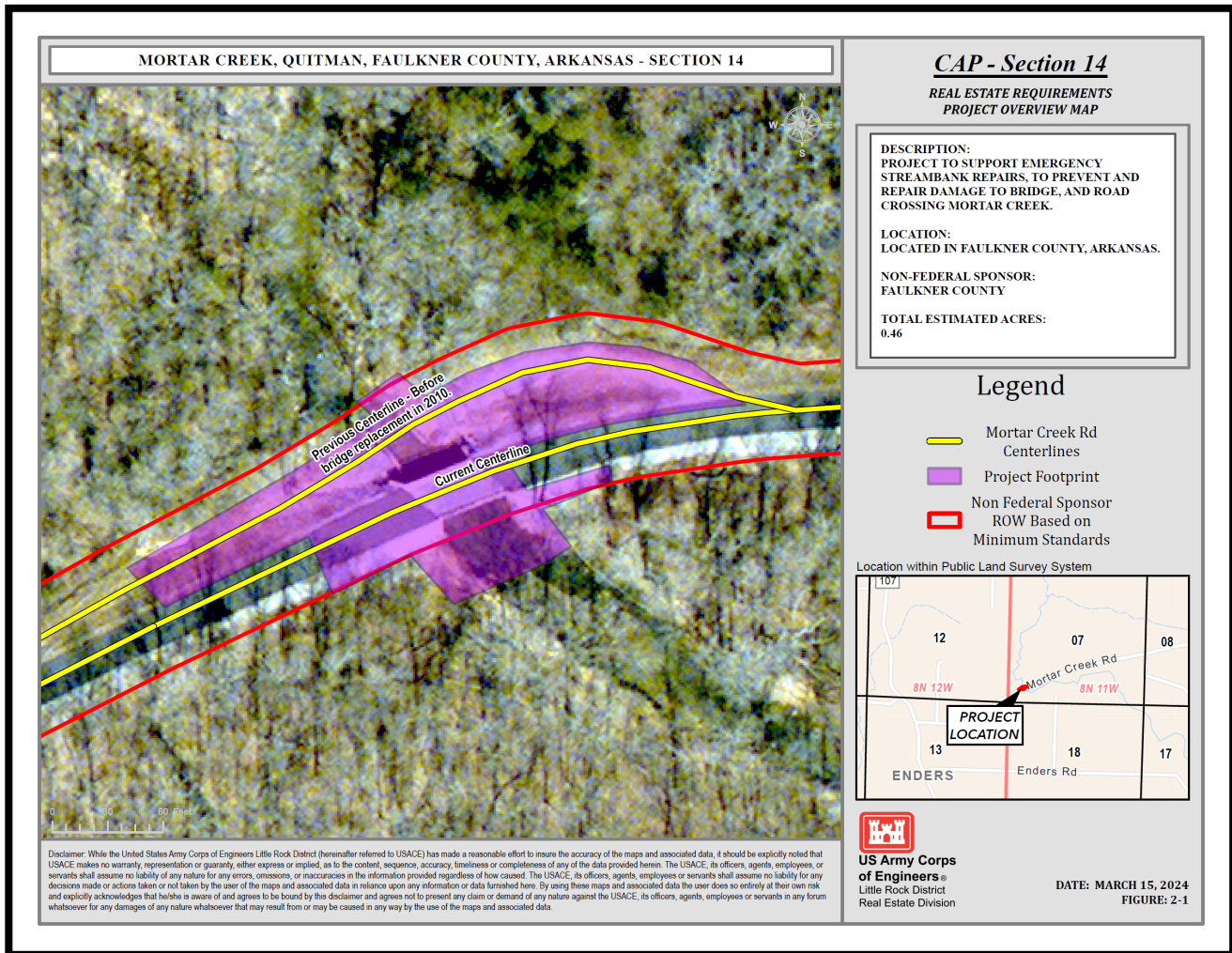


FIGURE 4 – PROJECT AREA UTILITIES MAP

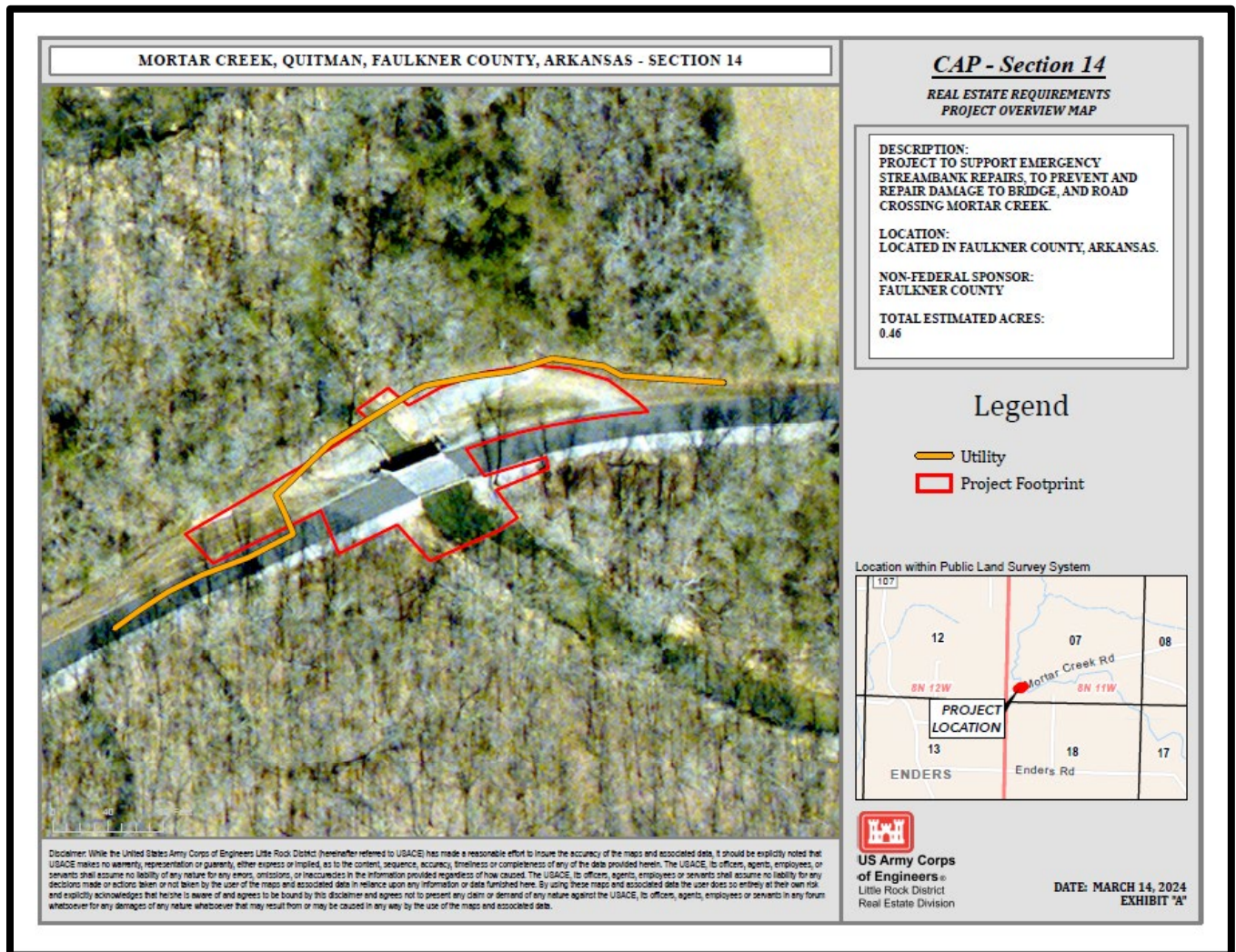


FIGURE 5 – NFS ROAD IMPROVEMENT GUIDE

Faulkner County Road Improvement Guide

Ark. Code Ann. 27-66-207 provides that the county judge, in his discretion, may designate as a county road any street or road dedicated to the public as a public thoroughfare, provided that a bill of assurance making the dedication is properly recorded. Road construction or reconstruction includes street widening, street alignment, and realignment drainage structures and piping, excavation cuts or fill sections, extensive drain structures and similar development that result in permanent construction. No person or entity shall construct, reconstruct, alter, remove, or replace any portion of a road, curb, gutter, drainage structure, or driveway abutting a dedicated street within the County without first having obtained a permit from the Faulkner County Judge. All construction, reconstruction, alterations, removal or replacement required by this ordinance shall conform to the approved standards of the Faulkner County road ordinances. Any person or entity subdividing land are required to file a subdivision plat with the County Judge, and shall indicate the right-of-way to be dedicated to the public as well as the location of water lines, and fire hydrants. The plat for the said subdivision shall be approved by the County Judge before the constructions of roads are implemented.

County Road Construction Requirements:

1. File a plat with for the approval of the County Judge.
2. Apply for a permit from the County Judges Office.
3. Get the first inspection on the new road.
4. After a (1) one year Period the road will be inspected again to be taken into the County Maintenance System.

Roads must be a minimum of:

1. A minimum of six (6) inches of (Class 7) Gravel compacted upon the road bed is required
2. A dead-end road shall have a minimum of a fifty (50) foot turning radius at the termination point of the road
3. All roads constructed shall have a minimum Forty (40) foot entrance onto any other road. This will allow for turning onto and off of said roads.
4. The road bed must be a minimum of twenty four (24) feet wide with a minimum driving surface of (20) feet wide.
5. A 50 Fifty foot right of way calculated from the center of the road is required.
6. All drainage must be concrete or galvanized tile. The dimensions will be (15) inches in diameter (24) Twenty four feet long
7. Sloped drainage ditches are required for each side of the road.

All roads built, altered or replaced in Faulkner County shall meet Arkansas and Faulkner County Code. These sheets along with the attached Ordinances are the guidelines for this process

FIGURE 6 – SPONSOR CAPABILITY ASSESSMENT

ASSESSMENT OF NON-FEDERAL SPONSOR'S REAL ESTATE ACQUISITION CAPABILITY

I. Legal Authority:

- a. Does the sponsor have legal authority to acquire and hold title to real property for project purposes?
- Yes. Ark. Code Ann. § 14-16-103 authorizes counties to hold title to real property in fee simple. It provides that "[a]ll deeds, grants, and conveyances which are made and duly acknowledged and recorded as are other deeds of conveyance to any county, or to the commissioners of any county, or to any other person, by whatever form of conveyance, for the use and benefit of any county, for all intents and purposes shall be good and valid instruments for vesting in the county, in fee simple or otherwise, all such right, title, interest, and estate as the grantor in any such deed or conveyance had in the lands conveyed at the time of the execution of the instrument and was intended by that means to be conveyed."
- b. Does the sponsor have the power of eminent domain for this project?
- Yes. The county has the power of eminent domain through utilizing the statutory scheme provided in A.C.A. §§ 14-298-101 to -125, of which the opening section of the subchapter speaks to the nature of the sponsor's authority: "All public roads and highways shall be laid out, opened, and repaired agreeably to the provisions of this chapter. The county court of each county in this state shall have full power and authority to make and enforce all orders necessary as well for establishing and opening new roads as for changing and vacating any public road or part thereof."
- c. Does the sponsor have "quick-take" authority for this project?
- No. the sponsor does not hold "quick-take" authority for this project and would have to adhere to A.C.A. §§ 14-298-101 to -125, which would most likely take several months to complete, barring no issues arising during the process.
- d. Are any of the lands/interests in land required for the project located outside the sponsor's political boundary?
- No. all lands/interests required for the project are located within the sponsor's political boundary, which is the Faulkner County boundary.
- e. Are any of the lands/interests in land required for the project owned by an entity whose property the sponsor cannot condemn?
- No. none of the owners of land/interests required for the project have been identified as entities which the sponsor couldn't condemn, if necessary.

II. Human Resource Requirements:

- a. Will the sponsor's in-house staff require training to become familiar with the real estate requirements of Federal projects including P.L. 91-646, as amended?
 - Not applicable. Due to the size of the project and the assertion that the county already holds the required lands/interests to complete the project utilizing interests conveyed to the sponsor through state code, the sponsor will not require training regarding the real estate requirements of Federal projects.
- b. If the answer to II.a. is "yes," has a reasonable plan been developed to provide such training?
 - Not applicable.
- c. Does the sponsor's in-house staff have sufficient real estate acquisition experience to meet its responsibilities for the project?
 - Yes. The sponsor has indicated they have in-house staff with sufficient real estate acquisition experience to meet the responsibilities of the project.
- d. Is the sponsor's projected in-house staffing level sufficient considering its other work load, if any, and the project schedule? (yes/no)
 - Yes. The sponsor has indicated they have in-house staff to support the project and meet the requirements of the project schedule related to real estate.
- e. Can the sponsor obtain contractor support, if required in a timely fashion?
 - Yes. the sponsor has indicated they would be able to obtain contractor support in a timely fashion.
- f. Will the sponsor likely request USACE assistance in acquiring real estate? (yes/no) (If "yes," provide description)
 - No.

III. Other Project Variables:

- a. Will the sponsor's staff be located within reasonable proximity to the project site?
 - Yes. the project site is within the boundaries of the county and approximately 40 minutes away from where the sponsor's staff are located.
- b. Has the sponsor approved the project/real estate schedule/milestones?
 - No. due to the small size of the project and the lack of real estate acquisition, the real estate schedule will include no milestones for the sponsor to approve.

IV. Overall Assessment:

- a. Has the sponsor performed satisfactorily on other USACE projects?
 - Not applicable.
- b. With regard to this project, the sponsor is anticipated to be highly capable/fully capable/moderately capable/marginally capable/insufficiently capable. (If sponsor is believed to be "insufficiently capable," provide explanation)
 - The sponsor is anticipated to be fully capable to support this project.

V. Coordination:

- a. Has this assessment been coordinated with the sponsor?(yes/no)
 - Yes. The assessment was coordinated with the sponsor.
- b. Does the sponsor concur with this assessment? (yes/no) (If "no," provide explanation)

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FIGURE 7 – ATTORNEY OPINION OF COMPENSABILITY

Mortar Creek
Faulkner County, Arkansas
Section 14 Project

CESWL

23 February 2024

ATTORNEY OPINION OF COMPENSABILITY¹ RELOCATION OF WINDSTREAM HOLDINGS, INC. FACILITIES

I, M. Todd Elder, am an attorney employed by the Department of the Army, Little Rock District, Corps of Engineers and am authorized to pass on the sufficiency of title to land under the delegation of authority issued by the Attorney General of the United States on 2 October 1970, as amended, and implemented by the Department of the Army. I have reviewed the evidence presented concerning a phone line located within the Mortar Creek project area described below and report on whether the government is legally obligated to pay for the relocation thereof as follows:

I. THE PROJECT

The proposed Section 14 Project² for Mortar Creek³ at Mortar Creek Road⁴ in Faulkner County, Arkansas is designed for the purpose of providing emergency repairs to reinforce and prevent streambank erosion from damaging existing county roadway, increasing public safety and streambank stability. The preliminary design aims to open channel and stabilize the streambank by removing flow restrictions and reinforcing the streambank with bedding and riprap. Faulkner County is also the non-federal sponsor on the project.

II. FACILITIES AFFECTED

Relying on information provided by the Little Rock District, it appears the only facility affected is a phone line purportedly owned by Windstream Holdings, Inc. (“Windstream”). The line runs across private property and through Mortar Creek on the northside of Mortar Creek Road. It must be relocated, if still in use, to facilitate project construction.

¹ A “Final Attorney’s Opinion of Compensability” is required by Engineer Regulation 405-1-12 Change 31, 1 May 98, Section 12-22; Memorandum, CEMP-CR, 11 Jan 2019, Real Estate Policy Guidance Letter No. 31-Real Estate Support to Civil Works Planning; April 22, 2016 Memorandum from Robert E. Slockbower, Director, Programs Directorate at Southwest Division, to the Little Rock District Commander. (“The District will complete the Final Attorney Opinions of Compensability required for those facility relocations costing greater than \$250,000, ...”).

² This refers to the Emergency Streambank and Shoreline Protection in Section 14 of the Flood Control Act of 1946, as codified and amended by 33 U.S.C. § 701r.

³ Because Mortar Creek is a non-navigable tributary, we need not consider the application of the navigable servitude, as might otherwise be required by ER 1165-2-131.

⁴ By County Court Order No. 92-24 filed of record on March 4, 1992, Mortar Creek Road was designated as a county maintained road.

III. NECESSITY FOR RELOCATION

From the data, maps, satellite imagery, and overlays prepared internally by Little Rock District personnel, and as a result of my investigation, the construction required to solve the streambank erosion from damaging Mortar Creek Road necessitates the relocation of an existing telephone line owned by Windstream.

IV. COMPENSABILITY OF OWNERSHIP

Compensability turns on the question of whether a facility is incident to property rights protected by the Fifth Amendment to the U.S. Constitution. If a utility is associated with an interest in real property, requiring its relocation constitutes a compensable event because the government “takes” the utility owner’s right to occupy land. Conversely, if there is no real property interest associated with a facility, there is no taking if the government requires it to be moved – the owner has no enforceable right to occupy the land, so the government does not take a protected property right by requiring the facility to move.

The Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 USC §§ 4601, et seq, is designed to establish uniform policy for fair and equitable treatment of persons displaced by federal or federally assisted programs so that such persons will not suffer disproportionate injuries as result of programs designed for the benefit of public as a whole. *United States v. 19.7 Acres of Land*, 103 Wash.2d 296, 692 P.2d 809 (1984). 42 USC § 4622(d) provides certain relief for utility relocations in the event there is an “extraordinary cost” resulting from the relocation.

The threshold issue is whether the utility has any property rights protected by the Fifth Amendment. As an example, if a utility is operating within a public right of way, it is usually under a license. If so, the utility must relocate at its own expense because it has lost no property rights even though it incurs costs as a result of the forced relocation. *Consumers Power Co. v. Costle*, 615 F2d 1147 (6th Cir 1980). In this case, the utility does not have a real property interest in the form of either a permit issued by Faulkner County or a recorded easement from a private landowner in favor of Windstream. Accordingly, the relocation is not compensable.

V. SOURCE OF TITLE

The evidence presented indicates that Windstream owns the telephone line identified within the project area. However, there is no indicia of ownership that Windstream is vested with a real property interest in connection with the telephone line located within the project area. Thus, Windstream does not stand to lose a property right if its facility is displaced by the project.

VI. GOVERNMENT’S LIABILITY

Any costs associated with the relocation of Windstream’s telephone line will not be borne by the federal government because there is no taking of a protected property right under the Fifth Amended to the U.S. Constitution.

Respectfully submitted,

M. Todd Elder

M. Todd Elder
Senior Assistant District Counsel
Little Rock District
U.S. Army Corps of Engineers

Dated: 23 February 2024