

FLOOD DIVERSION JOINT POWERS AGREEMENT
DISCUSSION

(John Shockley, Keith Berndt)

JOINT POWERS AGREEMENT

BY AND BETWEEN
CITY OF MOORHEAD, MINNESOTA
AND
CITY OF FARGO, NORTH DAKOTA
AND
CLAY COUNTY, MINNESOTA
AND
CASS COUNTY, NORTH DAKOTA
AND
BUFFALO-RED RIVER WATERSHED DISTRICT
AND
CASS COUNTY JOINT WATER RESOURCE DISTRICT

Dated as of June 1, 2016

Relating to:

An Agreement establishing and continuing a permanent joint powers entity called the Metro Flood Diversion Authority to provide the Fargo-Moorhead Metropolitan Area with permanent and comprehensive flood protection.

This instrument was drafted by:
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PREAMBLE

The leaders and representatives of the Member Entities to this Agreement, in order to secure long term and comprehensive flood risk reduction for the Fargo-Moorhead Metropolitan Area and to promote accountable governance, provide for the construction of the Fargo-Moorhead Diversion Project, encourage Member Entities' participation, and to foster a sense of community, do hereby adopt this Agreement and establish the following procedures and governing structure.

JOINT POWERS AGREEMENT

THIS JOINT POWERS AGREEMENT (the “Agreement”) is made and entered into this 1st of June, 2016 (the “Effective Date”), between the City of Moorhead, a political subdivision of the state of Minnesota; the City of Fargo, a political subdivision of the state of North Dakota; Clay County, a political subdivision of the state of Minnesota; Cass County, a political subdivision of the State of North Dakota; the Buffalo-Red River Watershed District, a political subdivision of the State of Minnesota; and Cass County Joint Water Resource District, a political subdivision of the State of North Dakota.

WHEREAS, the Fargo-Moorhead Metropolitan Area is located within the Red River of the North Basin; and

WHEREAS, the Fargo-Moorhead Metropolitan Area is a major health, educational, cultural and commercial center serving southeastern North Dakota and west-central Minnesota; and

WHEREAS, the Red River of the North (the “Red River”) and its tributaries, including the Sheyenne River, the Wild Rice River in North Dakota, the Maple River, the Rush River and the Buffalo River, frequently flood during spring runoff and substantial summer rain events (hereinafter “Flood Events”); and

WHEREAS, as a result of the frequent flooding, communities in Cass County, North Dakota, and Clay County, Minnesota, suffer damages to their public infrastructure; and

WHEREAS, residents within Cass County and Clay County, including, but not limited to, the cities of Fargo, Moorhead, Horace, and Harwood, and within the jurisdictions of the Cass County Joint Water Resource District in North Dakota and the Buffalo-Red River Joint Watershed District in Minnesota, suffer damages to their properties, homes, businesses, and other structures; and

WHEREAS, the Red River has exceeded the National Weather Service flood stage of 18 feet at the United States Geological Survey (USGS) gage in Fargo (Fargo gage) in 50 of the past 114 years (1902 through 2015), and recently every year except 2012 from 1993 through 2013; the record-setting Red River flood stage in 2009 at Fargo was 40.82 feet on the Fargo gage; and, the hydrologic record of the Red River shows a trend of increasing magnitude and frequency of flooding in recent decades; and

WHEREAS, a five hundred (500) year event would flood nearly the entire City of Fargo and a large portion of the City of Moorhead, as well as several smaller communities surrounding the Fargo-Moorhead Metropolitan Area; and

WHEREAS, public infrastructure, health and emergency services within the Fargo-Moorhead Metropolitan Area are threatened and hindered by Flood Events; and

WHEREAS, the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and the Cass County Joint Water Resource District participated in the Fargo-Moorhead Metropolitan Area Flood Risk Management Study conducted by the United States Army Corps of Engineers (USACE) and requested a Locally Preferred Plan developed by the USACE; and

WHEREAS, the USACE Chief of Engineers provided the Chief's report to Congress dated December 19, 2011, recommending a Locally Preferred Plan to Congress; and

WHEREAS, the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and the Cass County Joint Water Resource District previously entered into a Limited Joint Powers Agreement (the "LJPA") in order to cooperate in the planning and design phase of the Locally Preferred Plan; and

WHEREAS, the LJPA established the duties, responsibilities and obligations of each of the Member Entities regarding the planning and design phase of the Locally Preferred Plan and set forth a budget for Federal fiscal years 2011 and 2012; and

WHEREAS, the Member Entities executed and approved a First Amendment to the LJPA which, among other things, set forth a budget for Federal fiscal year 2013; and

WHEREAS, the Member Entities executed and approved a Second Amendment to the LJPA which, among other things, set forth a budget for Federal fiscal year 2014; and

WHEREAS, in order for the Project to be constructed, the Metro Flood Diversion Authority will likely need to enter into a Project Participation Agreement with USACE (the "PPA"); and

WHEREAS, the LJPA specifically provides that "[i]t is the intent of the members that this agreement [the LJPA] will terminate on or before the execution of the PPA"; and

WHEREAS, the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District, and the Cass County Joint Water Resource District have investigated the facts and determined that it is in the best interests of their constituents to establish a permanent joint powers entity to provide permanent flood protection for the Fargo-Moorhead metropolitan community; and

WHEREAS, Cass County enacted Ordinance No. 2010-2 establishing and regulating a County sales tax under Cass County's home rule charter (the "County 2010-2 Sales Tax," as herein defined); and

WHEREAS, the County 2010-2 Sales Tax imposes a one-half of one percent (.5%) sales and use tax upon the gross receipts of retailers from all sales at retail, including the leasing or rental of tangible personal property, within the corporate limits of the County; and

WHEREAS, the proceeds of the County 2010-2 Sales Tax are dedicated for payment of expenses incurred for the planning, engineering, land purchase, construction, and maintenance of

a Red River Diversion and other flood control measures or the payment of special assessments, or debt incurred for a Red River Diversion and other flood control measures as authorized by the Board of Cass County Commissioners, which may also include Milestone Payments, Availability Payments, and P3 Payments; and

WHEREAS, the City of Fargo has enacted Article 3-21 of the City of Fargo Municipal Code establishing and regulating a City Sales Tax for Flood Risk Mitigation and Reduction Improvements (the “City 3-21 Sales Tax,” and collectively with the County 2010-2 Sales Tax, the “Pledged Sales Taxes,” as such terms are herein defined); and

WHEREAS, the proceeds of the City 3-21 Sales Tax are dedicated for acquiring property, making, installing, designing, financing, making P3 Payments, constructing or building improvements, and to engage in projects that are necessary for the goal of achieving risk reduction and the ability to defend the community against a five hundred (500) year flood event, and such proceeds may be pledged to amortize bonds or other debt instruments, Milestone Payments, Availability Payments, and P3 Payments, which may be sold to finance such costs; and

WHEREAS, Cass County and the City of Fargo intend that County 2010-2 Sales Tax and the City 3-21 Sales Tax, or a substantially similar future sales and use tax ordinance, in addition to applicable federal funds, State of North Dakota funds, and State of Minnesota funds, will provide sufficient funds to finance the local share of the costs of constructing, maintaining, and operating the Project; and

WHEREAS, the Metro Flood Diversion Authority, in consultation with the City of Fargo and Cass County, have determined that it is in the best interests of the Member Entities that the Cass County Joint Water Resource District (the “CCJWRD”) issue improvement bonds to fund a portion of the construction costs associated with the Project and allow the City of Fargo and Cass County to achieve debt service savings by reducing overall interest costs and allowing the City of Fargo and Cass County to use the entire amount of the proceeds generated from the City 3-21 Sales Tax and the County 2010-2 Sales Tax and any successor ordinances; and

WHEREAS, CCJWRD has agreed to issue a refunding improvement bond or a series of refunding improvement bonds to provide a portion of the funds for the construction of the Project, including Milestone Payments, Availability Payments, and P3 Payments; and

WHEREAS, Cass County and the City of Fargo desire to cooperatively pledge their respective sales and use taxes as security for and payment of the debt service on Debt Obligations or for Availability Payments, Milestone Payments, and/or P3 Payments to finance costs and expenses related to the Project; and

WHEREAS, Cass County has determined that it will pledge its County 2010-2 Sales Tax, and the City of Fargo has determined that it will pledge one-hundred percent (100%) of its City 3-21 Sales Tax, toward payment of the debt service on the Debt Obligations, Availability Payments, Milestone Payments, or P3 Payments issued or made by CCJWRD; and

WHEREAS, a portion of the Debt Obligation proceeds (as herein defined) will be used to refund the County Loan and City Loan (as such Loans are herein defined) obtained by Cass County and the City of Fargo to secure construction financing for the Project prior to the issuance of the Debt Obligations; and

WHEREAS, Section 54-40.3-01 of the North Dakota Century Code gives Cass County, the Cass County Joint Water Resource District, and the City of Fargo the authority to enter into this Agreement to provide for the cooperative administration of a project and the creation and ongoing operation of the Metro Flood Diversion Authority; Section 471.59 of the Minnesota Statutes Annotated gives Clay County, the Buffalo-Red River Watershed District and the City of Moorhead the authority to enter into this Agreement to provide for the cooperative administration of a project and the creation and ongoing operation of the Metro Flood Diversion Authority; the Member Entities wish to enter this Joint Powers Agreement to establish the duties, responsibilities and obligations of each party regarding the Project.

NOW THEREFORE, in consideration of the mutual covenants made herein and for other valuable consideration, the receipt of which is hereby acknowledged, the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and the Cass County Joint Water Resource District agree as follows:

ARTICLE I. AMENDMENT

Section 1.01 LIMITED JOINT POWERS AGREEMENT. The **Member Entities** previously entered into a **Limited Joint Powers Agreement**, dated as of July 11, 2011, which was subsequently amended in September 2012 by a First Amendment to Limited Joint Powers Agreement and by a Second Amendment to Limited Joint Powers Agreement dated September 9, 2013 (collectively the "**Limited Joint Powers Agreement**").

Section 1.02 REPEAL, REPLACE AND AMEND IN ENTIRETY. The **Member Entities** hereby acknowledge and agree that the **Limited Joint Powers Agreement** is hereby repealed, replaced, and amended in its entirety with the terms and conditions of this **Agreement**. The terms and conditions of this **Agreement** shall be in full force and effect as of the **Effective Date**.

Section 1.03 CONTINUITY OF AGREEMENTS, OBLIGATIONS, ENTITY. The **Member Entities** agree and acknowledge and as more fully set forth in Section 18.02 of this **Agreement** that the **Prior Obligations** of the **Metro Flood Diversion Authority** created under the **Limited Joint Powers Agreement** shall continue and be in full force and effect under this **Agreement**. The **Prior Obligations** are attached as Exhibit A to this **Agreement**.

Section 1.04 PRIOR UNDERSTANDINGS. This **Agreement**, when executed by the **Member Entities**, shall be effective as of the **Effective Date**. All prior understandings and agreements heretofore as among the **Member Entities** with respect to the **Project**, except as specifically set forth in Sections 22.02 and 22.03 of this **Agreement**, are hereby superseded and replaced in their entirety by this **Agreement**. This **Agreement** fully and completely expresses the agreement of the **Member Entities** with respect to the **Project** and shall not be modified or amended except as set forth in Section 23.03 of this **Agreement**.

Section 1.05 FAILURE TO APPROVE. The failure of a **Member Entity** to approve this **Agreement** by or before the effective date of the PPA shall result in the **Member Entity** being deemed a non-party to this **Agreement** and all of such **Member Entity's** and the **Metro Flood Diversion Authority's** obligations and responsibilities with respect to the **Limited Joint Powers Agreement** and the **Project** shall terminate and be of no further force or effect. Further, the **Metro Flood Diversion Authority** shall have no obligation to indemnify, defend, or hold harmless the **Member Entity** for liability arising out of or related to the **Project** if the **Member Entity** fails to approve this **Agreement**.

Section 1.06 BOARD MEMBERSHIP UPON FAILURE TO APPROVE. In the event a **Member Entity** is no longer a party to this **Agreement** due to its failure to approve this **Agreement**, that **Member Entity** shall be known as a **Former Member Entity**. The **Former Member Entity's Diversion Authority Board Member** positions as assigned by Section 5.01 of this **Agreement** shall be redistributed to the remaining **Member Entities** residing in the same state as the **Former Member Entity**. The redistribution of **Diversion Authority Board Member** positions to the **Member Entities** residing in the same state shall be in proportion to the **Diversion Authority Board Member** positions that the remaining **Member Entities** in the same state had prior to the **Former Member Entity's** failure to approve this **Agreement**. The **Member Entities** agree and acknowledge that the intent of this Section 1.06 is to maintain the size and composition of the **Diversion Authority Board** with respect to the number of **Diversion Authority Board Member** positions from North Dakota and Minnesota in the event that a **Member Entity** fails to approve this **Agreement**.

Section 1.07 NON-MEMBER ENTITIES. Nothing in this **Agreement** shall be construed so as to give **Richland County, Wilkin County, or the City of West Fargo** the status of a **Member Entity**. The **Member Entities** agree and acknowledge that, while the **Wilkin County Commission** and the **Richland County Commission** cooperate to appoint a member to the **Diversion Authority Board**, and the **West Fargo City Commission** are able to appoint a member to the **Diversion Authority Board, Richland County, Wilkin County, and the City of West Fargo** are not **Member Entities** or parties to this **Agreement**.

ARTICLE II. DEFINITIONS AND INTERPRETATION

Section 2.01 DEFINITIONS. All capitalized and bolded terms used and not otherwise defined herein shall have the meanings given to them in this **Agreement** and as defined in this Section unless a different meaning clearly applies from the context.

“Additional Sales and Use Tax” means any sales and use tax enacted by either the City of Fargo or Cass County to extend or replace the City 3-21 Sales Tax and/or the County 2010-2 Sales Tax, or a similar sales and use tax imposed by either Cass County or the City of Fargo.

“Adjusted for Inflation” shall mean adjusted for inflation consistent with Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280).

“Agreement” means this Joint Powers Agreement by and between the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and Cass County Joint Water Resource District.

“Amendment Number 1 to the Design Agreement” means Amendment Number 1 to the Design Agreement between the Department of the Army, the City of Fargo, North Dakota and the City of Moorhead, Minnesota for design for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project dated December 19, 2013.

“Annual Meeting” means a properly noticed meeting of the Diversion Authority Board held on the second Thursday at 3:30 p.m. each and every January that this Agreement is in effect or held at such other time as may be determined by the Metro Flood Diversion Authority.

“Approved Budget” means the annual budget approved by the Diversion Authority Board for each and every calendar year of this Agreement.

“Assessment District” means the FM Flood Risk Management District No. 1, as created by Resolution of CCJWRD dated May 14, 2015, or any future assessment district created by a resolution of CCJWRD for the Project after the Effective Date of this Agreement.

“Availability Payment Sub-Account” means the Availability Payment Sub-Account created by Section 10.04 of this Agreement.

“Availability Payments” shall mean the periodic performance payments to the P3 Developer for the term of the Project Agreement for the design, construction, financing, operation, and maintenance of the Project in accordance with the agreed technical requirements.

“BRRWD” means the Buffalo-Red River Watershed District.

“BRRWD Managers” means the Buffalo-Red River Board of Managers, which is the Governing Body of the BRRWD.

“BRRWD Member” means the one (1) individual member of the BRRWD Managers appointed by the Buffalo-Red River Watershed District to serve on the Metro Flood Diversion Authority.

“Best Efforts” means that a Member Entity and its Governing Body will act in Good Faith, act in accordance with generally accepted commercial practices, and use reasonable due diligence to undertake all action contemplated by this Agreement, in accordance with applicable federal and state laws, regulations, and rules; however, the obligation to use Best Efforts does not mean a duty to take action that would be in violation of applicable federal or state law.

“Bondholder” or “Holder” means the purchaser, holder, or owner of Debt Obligations.

“Buffalo-Red River Watershed District” means the Buffalo-Red River Watershed District, a political subdivision of the State of Minnesota.

“CCJWRD” means the Cass County Joint Water Resource District, a political subdivision of the State of North Dakota, its successors and assigns.

“CCJWRD Board” means the Cass County Joint Water Resource District’s Board of Managers, which is the Governing Body of CCJWRD.

“CCJWRD Member” means the one (1) individual member of the CCJWRD Board appointed by the CCJWRD Board to serve on the Diversion Authority Board.

“Cass County” means Cass County, a North Dakota Home Rule County and political subdivision of the State of North Dakota.

“Cass County Commission” means the Cass County Commission, which is the Governing Body of Cass County.

“Cass County Joint Water Resource District” means the Cass County Joint Water Resource District, a political subdivision of the State of North Dakota, its successors and assigns.

“Cass County Members” means the three (3) individuals appointed by the Cass County Commission to serve on the Diversion Authority Board. All members appointed by Cass County must be members of the Cass County Commission, except for the current Chair and as provided in Section 5.02 of this Agreement.

“Chair” means a voting member of the Diversion Authority Board who presides over meetings pursuant to Section 5.06 of this Agreement.

“City 3-21 Sales Tax” means the sales and use tax of the City of Fargo, as defined in Article 3-21 of the Fargo City Code, that is pledged by the City of Fargo, pursuant to this Agreement, as security for and for payment of the debt service on the Debt Obligations and/or Availability Payments, Milestone Payments, and P3 Payments pursuant to this Agreement.

“City 3-21 Sales Tax Sunset Date” means December 31, 2029.

“City Loan” means a loan entered into in calendar year 2015 in the maximum aggregate principal amount of \$50,000,000 to either the City of Fargo or Cass County, which is in addition to the County Loan and for which County 2010-2 Sales Tax and City 3-21 Sales Tax were previously pledged.

“City of Fargo” means the City of Fargo, a North Dakota Home Rule City and political subdivision of the State of North Dakota.

“City of Fargo Members” means the three (3) individual members of the Fargo City Commission representing the City of Fargo on the Diversion Authority Board, consisting of two (2) individuals appointed by the Fargo City Commission and the Mayor of the City of Fargo.

“City of Moorhead” means the City of Moorhead, a Minnesota Home Rule City and political subdivision of the State of Minnesota.

“City of Moorhead Members” means the two (2) individual members of the Moorhead City Council representing the City of Moorhead on the Diversion Authority Board, consisting of one (1) individual appointed by the Moorhead City Council and the Mayor of the City of Moorhead.

“City of West Fargo” means the City of West Fargo, a North Dakota Home Rule City and political subdivision of the State of North Dakota.

“Clay County” means Clay County, a Minnesota County and political subdivision of the State of Minnesota.

“Clay County Commission” means the Clay County Commission, which is the Governing Body of Clay County.

“Clay County Member” means the two (2) individual members of the Clay County Commission appointed by the Clay County Commission to serve on the Diversion Authority Board, provided, the Clay County Commission can appoint up to one (1) member, which may be appointed by the Governing Body of a city located within Clay County, as determined by the Clay County Commission.

“Code” means the Internal Revenue Code of 1986, as amended from time to time, and all rules and regulations from time to time promulgated thereunder.

“Congress” means the Congress of the United States of America.

“County 2010-2 Sales Tax” means a sales and use tax under Cass County’s home rule charter enacted by Ordinance No. 2010-2, of which the proceeds are dedicated for payment of expenses incurred for the engineering, land purchase, construction, and maintenance of the Project and other flood control measures or the payment of special assessments or debt incurred for the Project and other flood control measures as authorized by the Cass County Commission and that is pledged by Cass County pursuant to this Agreement, as security for and for payment of debt service on the Debt Obligations and/or Availability Payments, Milestone Payments, and P3 Payments pursuant to this Agreement.

“County 2010-2 Sales Tax Sunset Date” means March 31, 2031.

“County Loan” means a loan entered into in the calendar year 2014 from U.S. Bank National Association to Cass County in the maximum aggregate amount of \$50,000,000, pursuant to the terms and conditions of the Loan Agreement.

“Current Chair” means Darrell Vanyo, the chairman of the Metro Flood Diversion Authority that was created by the LJPA, who is serving as Chair as of the Effective Date of this Agreement, and will continue to serve as the Chair of the Diversion Authority Board that is created under this Agreement until December 31, 2016.

“Current Program Management Consultant” means CH2M, whose address is Bank of the West Building, 520 Main Avenue, Suite 601, Fargo, North Dakota 58103.

“DCAI” means the Diversion Channel and Associated Infrastructure.

“Debt Obligation” means any loan, note, bond, or other security instrument issued by one or more of the Member Entities to provide either temporary or permanent financing of the Project.

“Debt Obligation Fund” means the Debt Obligation Fund created by Section 10.04 of this Agreement.

“Defaulting Member Entity” means any Member Entity that is deemed to be in Default pursuant to Section 21.04 of this Agreement because such Member Entity did not have a Rational Basis for refusing to undertake and complete a Diversion Authority Board’s Requested Project Action.

“Diversion Authority Board” means the Governing Body of the Metro Flood Diversion Authority.

“Diversion Authority Board Member” means an individual duly appointed pursuant to Section 5.01 of this Agreement and who is a voting member of the Diversion Authority Board.

“Diversion Authority Board Member Alternate” means a person selected by a Member Entity’s Governing Body to serve on the Diversion Authority Board in the event that the Member Entity’s Diversion Authority Board Member(s) is/are unable to serve.

“Effective Date” means June 1, 2016.

“Engineering Consultant” means any engineering firm hired by a Member Entity to serve as that Member Entity’s engineer of record.

“Engineering Staff” means a Member Entity employee who has been designated as the Member Entity’s engineer.

“Event of Default” means the occurrence of any event or the existence of any condition that, with the giving of notice, the passage of time, or both, would constitute an event of default under the terms of this Agreement.

“Excess Pledged Revenues” means any Pledged Revenues received by the Metro Flood Diversion Authority in a calendar year which exceed amounts required to meet the annual debt service on the Debt Obligation, Availability Payments, P3 Payments and/or to make Milestone Payments in that calendar year.

“Executive Director” means the Chief Administrative Officer of the Metro Flood Diversion Authority.

“Extraordinary Maintenance” means repair, rehabilitation, or replacement of a Project Element. Extraordinary does not include regular maintenance.

“Extraordinary Maintenance Costs” means any expense in excess of \$5,000,000, in 2015 dollars as adjusted for inflation, for Extraordinary Maintenance.

“FM Diversion Project Fund” means the FM Diversion Project Fund created by Section 10.04 of this Agreement.

“Fargo-Moorhead Metropolitan Area” means Fargo, ND, Moorhead, MN, and surrounding communities; it is further defined by the United States Census Bureau as comprising all of Cass County, North Dakota, and Clay County, Minnesota, which includes the cities of Dilworth, MN, West Fargo, ND, and numerous other towns and developments from which commuters travel daily for work, education, and regular activities.

“Fargo-Moorhead Metropolitan Area Flood Risk Management Project” has the same definition as “Project” in this Agreement and is the name given to the Project by the USACE.

“Fargo City Commission” means the City of Fargo’s City Commission, which is the Governing Body of the City of Fargo.

“Final Feasibility Report and Environmental Impact Statement” or **“FEIS”** means the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management, dated July 2011 and approved by the Chief of Engineers on December 19, 2011 (the “FEIS”), as amended by the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013 (the “SEA”), and which may be further amended by future supplemental Environmental Assessments.

“Finance Committee” means a committee of the Metro Flood Diversion Authority created for the purpose of providing policy recommendations regarding the management of the financial aspects of the Metro Flood Diversion Authority and financial expenditures for the Project.

“Fiscal Agent” means a third party private financial entity or the Bank of North Dakota or a Member Entity appointed by the Diversion Authority Board pursuant to Section 10.09 of this Agreement to act as Fiscal Agent.

“Fiscal Year” means one year beginning on January 1 and ending December 31 of each and every year of this Agreement.

“Former Member Entity” means any Member Entity that did not approve this Agreement or a Member Entity that withdraws or is removed pursuant to Article XXI of this Agreement.

“Functional Portion of the Project” means a portion of the Project for which construction has been completed and that can function independently, as determined by the Program Management Consultant in writing, although the remainder of the Project is not complete.

“Future City Sales Tax” means either (i) the approval by the voters of the City of Fargo and enactment by the Fargo City Commission of a renewal of the City 3-21 Sales Tax by the voters of the City of Fargo or (ii) the approval by the voters of the City of Fargo and enactment by the Fargo City Commission of a sales and use tax that is substantially similar to the City 3-21 Sales Tax with respect to taxable sales and percentage of sales and use tax imposed.

“Future County Sales Tax” means either (i) the approval by the voters of Cass County and enactment by the Cass County Commission of a renewal of County 2010-2 Sales Tax by the voters of Cass County or (ii) the approval by the voters of Cass County and enactment by the Cass County Commission of a sales and use tax that is substantially similar to the County 2010-2 Sales Tax with respect to taxable sales and percentage of sales and use tax imposed.

“GAAP” means accounting principles generally accepted in the United States as set forth in the opinions and pronouncements of the Accounting Principles Board, the American Institute of Certified Public Accountants, and the Financial Accounting Standards Board, or in such other statements by such other entity as may be in general use by significant segments of the accounting profession as in effect on the date hereof.

“Good Faith” means observance of reasonable commercial standards of fair dealing in a given trade of business.

“Governing Body” means the body which performs the legislative and governmental functions of a political subdivision, including but not limited to, a board, council, or commission. For example, the Cass County Commission, the Clay County Commission, the Moorhead City Council and the Fargo City Commission are the Governing Body of each of said entities as the boards for the CCJWRD and the BRRWD are the Governing Bodies for those entities.

“Governmental Authority” means any national, supra-national, state or local government (whether domestic or foreign), any political subdivision thereof or any other governmental, quasi-governmental, judicial, administrative, public or statutory instrumentality, authority, body, board, agency, department, county, bureau, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory, fiscal, monetary or administrative powers or functions of or pertaining to government, or any arbitrator, mediator or other person with authority to bind a party at law.

“Government” means the United States of America.

“Government Separable Element” means the part of the Project that the Government is responsible for designing and constructing, including the In-Kind Contributions, and consists of the southern embankment, the diversion inlet structure, the connecting channel, the control structures on the Red River and Wild Rice River, the tie-back levee, the overflow embankment, all mitigation not incorporated into the diversion channel (including the in-town levees and the

Oxbow-Hickson-Bakke levee), and all other features *not included* in the NFS Separable Element.

“Highway” means any highway, roadway, street, or way, including any bridge thereof, which is owned by a public entity.

“In-Kind Contributions” means work that was performed or provided by the Member Entities without reimbursement from the Metro Flood Diversion Authority prior to the effective date of the PPA, or performed pursuant to the Memorandum of Understanding for Work Provided or Performed Prior to Execution of a Project Partnership Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project dated March 31, 2014, and that are integral or necessary to the Project.

“In-Kind Work Element” means an element of the Project that is assigned to a Member Entity by the Diversion Authority Board to undertake.

“In-Town Flood Protection Infrastructure” means In-Kind Work Elements constructed within the geographic limits of the City of Moorhead or the City of Fargo.

“In-Town Levee” means a levee constructed within the City of Fargo or the City of Moorhead, which will be used as part of the Project and for which the Member Entity has been reimbursed by the Metro Flood Diversion Authority for planning, design, engineering, and all other related costs.

“Increased Sales and Use Tax” means any unanticipated increased revenue from either the City 3-21 Sales Tax or the County 2010-2 Sales Tax.

“Interim Fiscal Agent” means the City of Fargo, North Dakota.

“Joint Powers Agreement” means this Agreement dated as of the Effective Date, by and between the Member Entities, as amended from time to time to the extent permitted hereunder.

“LJPA” or “Limited Joint Powers Agreement” means the agreement dated July 11, 2011, and subsequently amended, which was entered into between the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and the Cass County Joint Water Resource District in order to cooperate in the planning and design phase of the Locally Preferred Plan.

“LPP Flood Risk Management Features” means construction of a diversion channel through North Dakota that conveys 20,000 cubic feet per second at the one percent (1%) chance or 100 year event and is approximately 30 miles long, tie-back embankments, a staging area, a diversion inlet structure, a 6-mile connecting channel, a control structure on each of the Red and Wild Rice Rivers, an aqueduct hydraulic structure on each of the Maple and Sheyenne Rivers, a drop structure of each of the Rush and Lower Rush Rivers, four railroad bridges, in-town levees, community ring levees, and environmental mitigation, as generally described in the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management, dated July 2011 and approved by the Chief of Engineers on December

19, 2011, as amended by the Supplemental Environment Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013.

“Land Management Committee” means a committee of the Metro Flood Diversion Authority Board formed and defined by ARTICLE VI of this Agreement.

“Limited Joint Powers Entity” means the entity that was created by the LJPA.

“Lobbyist” means an individual who promotes and lobbies for funding and other decisions of the federal government and state governments, including the United States Congress, and the legislative branches of the State of North Dakota and State of Minnesota.

“Locally Preferred Plan” has the same meaning as **“LPP Flood Risk Management Features.”**

“Maintenance” means all normal maintenance activity associated with maintaining or preserving the Project or a Project Element. This term generally includes mowing, repair or placement of items scheduled for regular or routine maintenance, and other incidental maintenance activities.

“Maintenance Costs” means normal maintenance costs associated with a Project Element; however, Maintenance Costs do not include costs for Extraordinary Maintenance.

“Member Entities” shall mean the City of Moorhead, the City of Fargo, Clay County, Cass County, Buffalo-Red River Watershed District and Cass County Joint Water Resource District.

“Metro Flood Diversion Authority” means the political subdivision created by the LJPA and continued with and through this Agreement, and vested with the powers herein.

“Milestone Payment Sub-Account” means the Milestone Payment Sub-Account created by Section 10.04 of this Agreement.

“Milestone Payments” means payments to the P3 Developer for achievement of agreed upon construction or progress milestones, in accordance with the Project Agreement.

“Minnesota Board Members” includes the Buffalo-Red River Board Member, the Clay County Board Member, and the City of Moorhead Members.

“Minnesota Member Entity” means the City of Moorhead, Clay County and BRRWD.

“Moorhead City Council” means the City Council of the City of Moorhead, the Governing Body of the City of Moorhead.

“NFS Separable Element” means the part of the Project that the Non-Federal Sponsors are responsible for designing and constructing, not including In-Kind Contributions, for the

Government Separable Element, and consists of the DCAI, the channel outlet, the Rush and Lower Rush River hydraulic structures, the Maple River aqueduct, the Sheyenne River aqueduct, the inflow design flood levee, associated railroad bridges, mitigation incorporated into the diversion channel and associated structures, and recreation structures/features associated with the diversion channel.

“Non-Federal Project Costs” means the local cost share of the total cost of the Project not provided by the Federal Government.

“Non-Federal Sponsors” means the entities providing the Non-Federal Project Costs for the Project, which include the City of Fargo, the City of Moorhead, and the Metro Flood Diversion Authority created pursuant to this Agreement.

“Non-Federal Work” means that portion of the Project consisting of an approximately 30 mile, 20,000 cubic feet per second (cfs) diversion channel and associated features; the channel outlet; the Rush and Lower Rush River hydraulic structures; the Maple River aqueduct; the Sheyenne River aqueduct; the inflow design flood levee; associated railroad bridges; the in-town levees and the Oxbow-Hickson-Bakke levee; recreation features; environmental mitigation features located within the diversion channel and associated structures for the diversion channel; and applicable pre- and post-monitoring and adaptive management for the Project.

“North Dakota Member Entity” means the City of Fargo, Cass County and CCJWRD.

“O&M Revenues” means, collectively, all revenues pledged by the Member Entities to fund or finance operations and maintenance of the Project.

“OMRR&R” means Operation, Maintenance, Repair, Rehabilitation, and Replacement.

“Operations and Maintenance Fund” means a fund created pursuant to Section 10.04 of this Agreement.

“P3 Developer” or “Developer” means the private party or entity which enters into the Project Agreement, whereby that party agrees to design, build, finance, operate and maintain the NFS Separable Element.

“P3 Fund” means the P3 Fund created by Section 10.04 of this Agreement, which contains the sub-accounts called Milestone Payment Sub-Account, Availability Payment Sub-Account, and P3 Payment Sub-Account.

“P3 Payment Sub-Account” means the P3 Payment Sub-Account created by Section 10.04 of this Agreement.

“P3 Payments” means all payments made to a P3 Developer pursuant to and arising out of the Project Agreement, which include, but are not limited to, termination payments, special allowances, compensation payments for supervening events, and interest on late payments. P3 Payments do not include Milestone or Availability Payments.

“PPA” means Project Partnership Agreement.

“Person” means any natural or legal person, county, city, municipality, political subdivision, public benefit corporation, corporation, limited liability company, trust, joint venture, association, company, partnership, Governmental Authority, or other entity.

“Pledged Revenues” means, collectively, all revenues pledged by the Member Entities to finance the planning, design, and construction of the Project and to pay the debt service on Debt Obligations and/or make Availability and/or Milestone Payments and/or P3 Payments.

“Prior Obligations” means all commitments previously entered into by the Limited Joint Powers Entity, and which are set forth in Exhibit A to this Agreement.

“Prior Temporary Sales Tax Revenue Notes” means the United States of America, Cass County, North Dakota, Promissory Note dated July 31, 2014, by and between Cass County, and U.S. Bank National Association, as Lender, related to the County Loan, and the United States of America, City of Fargo, North Dakota, Promissory Note dated July 31, 2015, by and between the City of Fargo, and U.S. Bank National Association, as Lender, related to the City Loan.

“Program Management Consultant” means an individual or firm responsible for planning and implementing the Project. The Program Management Consultant shall be under the direct supervision of the Executive Director and the Diversion Authority Board, and will consult with Member Entity staff.

“Project” means the LPP Flood Risk Management Features and the Recreation Features as generally described in the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated July 2011 and approved by the Chief of Engineers on December 19, 2011, as amended by the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013.

“Project Agreement” means a Public-Private Partnership Agreement as authorized by Chapter 48-02.1 of the North Dakota Century Code, by and between the Metro Flood Diversion Authority, or a Member Entity authorized by the Diversion Authority Board, and a P3 Developer for design, construction, financing, operation and maintenance of the DCAI, the channel outlet, the Rush and Lower Rush River hydraulic structures, the Maple River aqueduct, the Sheyenne River aqueduct, the inflow design flood levee, associated railroad bridges, mitigation incorporated into the diversion channel and associated structures, and recreation structures/features associated with the diversion channel and located entirely within North Dakota.

“Project Element” means a component or part of the Project.

“Project Management Plan” shall mean a living document that describes how the Government and the Non-Federal Sponsors intend to fulfill their obligations under this

Agreement, including the procurement process for the NFS Separable Element and the Government Separable Element and timelines for the Technical Requirements and procurement processes.

“Project Partnership Agreement” means an agreement between the Government and the Non-Federal Sponsors for the construction of the Project, which includes a description of the Project and the responsibilities of the Government and the Non-Federal Sponsors in the cost sharing and execution of work.

“Project Property” means real property acquired for the Project, including, but not limited to, land, rights-of-way, easements, licenses, and leases.

“Rational Basis” means making a decision that is determined by the Diversion Authority Board to be fair, moderate, suitable under the circumstances, and governed by reason.

“Red River Control Structure” means the water-flow control structure located south of the Cities of Fargo and Moorhead, which will be used to control the flow of the Red River through the Cities of Fargo and Moorhead during flood events.

“Recreation Features” means construction of multipurpose trails, restrooms, potable water, picnic facilities, parking areas, landscaping, and tree plantings as generally described in the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated July 2011, and approved by the Chief of Engineers on December 19, 2011, as amended by the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013.

“Relocation” means providing a functionally equivalent facility to the owner of a utility, cemetery, Highway, railroad (excluding railroad bridges and approaches thereto required for construction of the LPP Flood Risk Management Features), or public facility when such action is authorized in accordance with applicable legal principles of just compensation; or providing a functionally equivalent facility when such action is specifically provided for, and is identified as a relocation, in the authorizing legislation for the Project or any report referenced therein. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

“Requested Project Action” means a written request, approved by the Diversion Authority Board, in which the Diversion Authority Board requests a Member Entity perform an action or actions related to the Project pursuant to Section 21.03 of this Agreement.

“Reserve Fund” means the Reserve Fund created by Section 10.04 of this Agreement.

“Revenue Fund” means the Revenue Fund created by Section 10.04 of this Agreement.

“Richland County” means Richland County, a North Dakota Home Rule County and political subdivision of the State of North Dakota.

“Richland County Commission” means the Richland County Commission, which is the Governing Body of Richland County.

“Sales Tax Revenues” means the total gross revenues received by Cass County and the City of Fargo from the Pledged Sales Taxes.

“Southern Embankment” means the tie-back levee located on both the east and west side of the Red River.

“Southern Embankment and Retention Area” means the tie-back levee on both the east and west side of the Red River and south of the Cities of Fargo and Moorhead, which will be used to retain flood waters during flood events.

“Storm Water Maintenance Fee” means a monthly fee imposed, levied and collected by a Member Entity for costs associated with the Project.

“Supplemental Environmental Assessment” or **“SEA”** means the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013.

“Technical Requirements” means the requirements that the Non-Federal Sponsors shall develop in consultation with the Government including performance standards and specifications for the design, construction, operation and maintenance of the NFS Separable Element.

“Total LPP Flood Risk Management Costs” means that portion of Total Project Costs allocated to the LPP Flood Risk Management Features. As specified in Table 27 of the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management, dated July 2011, the Total LPP Flood Risk Management Costs, for purposes of the PPA and cost-sharing, are designated as being \$1,745,033,000.00 in 2011 dollars, and will be Adjusted for Inflation consistent with Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280).

“Total Project Costs” means the sum of all costs incurred by the Non-Federal Sponsors and the Government for the LPP Flood Risk Management Features and Recreation Features directly related to construction of the Project. Total Project Costs includes, *inter alia*, the Government’s share of Preconstruction Engineering and Design costs pursuant to the terms of the Design Agreement; the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement; the Government’s engineering and design costs during construction; the Non-Federal Sponsors’ and the Government’s costs of investigations to identify the existence and extent of hazardous substances in accordance with the PPA; the Government’s costs of historic preservation activities in accordance with the PPA; the Government’s actual construction costs, including the costs of alteration, lowering, raising, or replacement and attendant removal of railroad bridges and approaches thereto required for construction of the LPP Flood Risk Management Features; the Government’s supervision and administration costs; the costs of In-Kind Contributions determined to be eligible in accordance with the PPA that do not exceed the amount of credit to be afforded the Non-Federal Sponsors under the PPA; the

Non-Federal Sponsors' design and construction costs for the NFS Separable Element determined to be eligible in accordance with the PPA including the costs of alteration, lowering, raising, or replacement and attendance removal of railroad bridges and approaches thereto required for construction of the LPP Flood Risk Management Features; the Government's costs of technical assistance for the NFS Separable Element required by the Non-Federal Sponsors; the Government's costs of monitoring the NFS Separable Element; the Government's costs of contract dispute settlements or awards; and the value of lands and easements; rights-of-way, Relocations, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated materials for which the Government affords credit in accordance with the PPA or for which reimbursement by the Government is required pursuant to of the PPA. The term does not include any costs for operation, maintenance, repair, rehabilitation, or replacement of the Project; any costs of dispute resolution under the PPA; or the Government's costs for data recovery activities associated with historic preservation in accordance with the PPA.

"Total Recreation Costs" means that portion of Total Project Costs allocated to the Recreation Features.

"USACE" means the United States Army Corps of Engineers.

"Upstream Member" means the one (1) individual appointed jointly by the Governing Bodies of Wilkin County and Richland County to serve on the Diversion Authority Board and who is a current member of either the Wilkin County Commission or Richland County Commission.

"Vice Chair" means the member of the Diversion Authority Board who was elected to the Vice Chair position by the Diversion Authority Board pursuant to Section 5.07 of this Agreement.

"Water Management District Fee" means a fee imposed and collected by the BRRWD for maintenance or Project Elements.

"West Fargo City Commission" means the City of West Fargo City Commission, which is the Governing Body of the City of West Fargo.

"West Fargo Member" means the one (1) individual member of the West Fargo City Commission appointed by the West Fargo City Commission to serve on the Diversion Authority Board.

"Wild Rice Inlet and Control Structure" means the control structure for the Wild Rice River located southeast of Horace, North Dakota.

"Wilkin County" means Wilkin County, a Minnesota County and political subdivision of the State of Minnesota.

"Wilkin County Commission" means the Wilkin County Commission, which is the Governing Body of Wilkin County.

Section 2.02 TERMS GENERALLY. The definition of terms herein shall apply equally to the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words “include,” “includes” and “including” shall be deemed to be followed by the phrase “without limitation.” The word “will” shall be construed to have the same meaning and effect as the word “shall.” Unless the context requires otherwise (a) any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein), (b) any reference herein to any Person shall be construed to include such Person’s permitted successors and assigns, (c) the words “herein,” “hereof” and “hereunder,” and words of similar import, shall be construed to refer to this **Agreement** in its entirety and not to any particular provision hereof, (d) all references herein to Articles, Sections, Exhibits and Schedules shall be construed to refer to Articles and Sections of, and Exhibits and Schedules to, this **Agreement**, and (e) the words “asset” and “property” shall be construed to have the same meaning and effect and to refer to any and all tangible and intangible assets and properties, including cash, securities, accounts and contract rights.

Section 2.03 ACCOUNTING TERMS; GAAP. Except as otherwise expressly provided herein, all terms of an accounting or financial nature shall be construed in accordance with GAAP, as in effect from time to time.

Section 2.04 ADDITIONAL PROVISIONS AS TO INTERPRETATION. All references herein to “Articles,” “Sections,” and other subdivisions are to the corresponding Articles, Sections or subdivisions of this **Agreement**; and the words “herein,” “hereof,” “hereunder,” and other words of similar import refer to this **Agreement** as a whole and not any particular Article, Section, or subdivision hereof.

ARTICLE III. PURPOSE

Section 3.01 GENERAL PURPOSE. This **Agreement** is made pursuant to N.D.C.C. § 54-40.3-01 and Minn. Stat. § 471.59, which authorize the joint and cooperative exercise of power common to the contracting parties. The purpose of this **Agreement** is to allow the **Member Entities** to work collaboratively to avoid the duplication of required approvals and actions with respect to the **Project**, to maximize efficiencies of the **Member Entities** with respect to flood control projects, to have the **Member Entities**’ employees, engineers, attorneys and professional consultants cooperate in the design, financing, construction, operation and maintenance of the **Project**. The **Member Entities** desire to establish and continue a joint powers structure to design, finance, construct, operate and maintain the **Project** consistent with the provisions of this **Agreement**, N.D.C.C. § 54-40.3-01, and Minn. Stat. § 471.59.

Section 3.02 INTENT. The **Member Entities** to this **Agreement** have extensive jurisdiction over the management of water resources within their respective geographic jurisdictions. Each **Member Entity** to this **Agreement** has the power to adopt rules and

regulations governing water management. Nonetheless, the **Member Entities** recognize there is mutual benefit to the **Member Entities** working in a cooperative manner with respect to the **Project**. The intent of this **Agreement** is to increase efficiencies with respect to designing, constructing, financing, operating and maintaining the **Project** by allowing the **Member Entities** to cooperate in the bidding and letting of contracts, by cross-pledging sales taxes, special assessment levies, by entering into development agreements with a **P3 Developer**, cooperating in the administration of the **Project** and to reimburse the **Member Entities** for expenses incurred in connection with the **Project**.

Section 3.03 SEPARATE POLITICAL SUBDIVISION. This **Agreement** is expressly intended to confirm the ongoing existence and operation of a separate political subdivision named the **Metro Flood Diversion Authority**. The **Member Entities** recognize that pursuant to and in conformance with N.D.C.C. § 54-40.3-01 and Minn. Stat. § 471.59, the **Metro Flood Diversion Authority** may not exercise a power unless that power is expressly granted by this **Agreement**. As a result, the **Metro Flood Diversion Authority** will from time to time request that one or several of the **Member Entities** use their **Best Efforts** to exercise their respective powers in furtherance of the **Project**.

ARTICLE IV. SPLIT DELIVERY OF PROJECT

Section 4.01 INTENT. The **Member Entities** intend to design and construct the **Project** in coordination with **USACE**. Pursuant to the **PPA**, **Project** design and construction responsibility is allocated between the **Non-Federal Sponsors** and **USACE**. The intent of this Article is to allocate the responsibility for the design and construction of **Project Elements**. The cost allocation associated with the design and construction of **Project Elements** constructed by the **Member Entities** is set forth in Section 12.11 of this **Agreement**.

Section 4.02 USACE CONSTRUCTION RESPONSIBILITY. **USACE** will be responsible for the design and construction of the following elements of the **Project**:

- (a) **Project Elements** within the State of North Dakota: **USACE** will construct that portion of the **Project** consisting of the Diversion Inlet, the approximately six (6) mile, connecting channel, the **Wild Rice Inlet and Control Structure**, the overflow embankment and **Southern Embankment** located in North Dakota; and
- (b) **Project Elements** within the State of Minnesota: **USACE** will construct the **Red River Control Structure** and the **Southern Embankment** located in Minnesota.

Section 4.03 NORTH DAKOTA MEMBER ENTITIES' RESPONSIBILITY. The **North Dakota Member Entities**, in accordance with the terms and conditions of this **Agreement**, will be responsible for the design and construction of the following elements of the **Project** located in North Dakota:

- (a) **DCAI** consisting of an approximately thirty (30) mile, 20,000 cubic feet per second (cfs) diversion channel and associated features;

- (b) The channel outlet;
- (c) The Rush and Lower Rush River hydraulic structures;
- (d) The Maple River aqueduct;
- (e) The Sheyenne River aqueduct;
- (f) The inflow design flood levee;
- (g) Railroad bridges;
- (h) In-town levees located in the **City of Fargo**;
- (i) The Oxbow-Hickson-Bakke levee;
- (j) Recreation features located in North Dakota;
- (k) Environmental mitigation features and associated structures for the diversion channel located in North Dakota; and
- (l) Lands, easements, and rights-of-way located in North Dakota.

Section 4.04 MINNESOTA MEMBER ENTITIES' RESPONSIBILITY. The **Minnesota Member Entities**, in accordance with the terms and conditions of this **Agreement**, will be responsible for the design and construction of the following elements of the **Project** located in Minnesota:

- (a) In-town levees located in the **City of Moorhead** and including those in the City of Comstock, Minnesota;
- (b) Recreation features located in Minnesota, if any;
- (c) Lands, easements, and rights-of-way located in Minnesota; and
- (d) Mitigation features for **Project Elements** located in Minnesota.

Section 4.05 COOPERATION WITH USACE. The **Metro Flood Diversion Authority** may request that **USACE** undertake and/or complete construction of items (h) and (i) set forth in Section 4.03 of this **Agreement**.

Section 4.06 NON-FEDERAL SPONSORS RESPONSIBLE FOR OPERATIONS AND MAINTENANCE OF PROJECT. The **Non-Federal Sponsors** shall be responsible for the operations and maintenance of the **Project**. The specific obligations of the **Member Entities** with respect to operations and maintenance of the **Project** are more fully set forth herein.

**ARTICLE V.
METRO FLOOD DIVERSION AUTHORITY**

Section 5.01 COMPOSITION OF BOARD. There is hereby established and continued a joint powers board to be known as the “**Diversion Authority Board.**” The **Diversion Authority Board** is the **Governing Body** of the **Metro Flood Diversion Authority** and shall consist of:

- (a) Three (3) members of the **Fargo City Commission**, provided, one of the three (3) members shall be the current Mayor of the **City of Fargo**, and the other two (2) members shall be current members of the **Fargo City Commission** appointed by the **Fargo City Commission**;
- (b) Two (2) members of the **Moorhead City Council**, provided, one of the two (2) members shall be the current mayor of the **City of Moorhead**, and the other member shall be appointed by the **Moorhead City Council**;
- (c) Three (3) members appointed by **Cass County Commission**, provided, all appointments made by the **Cass County Commission** must be current **Cass County Commissioners**, except that the **Current Chair** may complete his term as **Chair** through December 31, 2016, and as further provided in Section 5.02 of this Agreement;
- (d) Two (2) members appointed by the **Clay County Commission**, provided, the **Clay County Commission** is authorized to allow the **Governing Body** of a city located within **Clay County** to appoint up to one (1) current member of that city’s **Governing Body** to the **Diversion Authority Board**;
- (e) One (1) member of the **CCJWRD Board** appointed by the **CCJWRD Board**;
- (f) One (1) member of the **BRRWD Managers** appointed by the **BRRWD Managers**;
- (g) One (1) member of the **West Fargo City Commission** appointed by the **West Fargo City Commission**; and
- (h) One (1) **Upstream Member** appointed jointly by the **Wilkin County Commission** and the **Richland County Commission**; however, if the **Wilkin County Commission** and the **Richland County Commission** fail to appoint the **Upstream Member** by or before December 31, 2020, this member position shall terminate.

The **Governing Body** of each **Member Entity** is authorized to designate a **Diversion Authority Board Member Alternate** to sit in place of an appointed **Diversion Authority Board Member** when the appointed **Diversion Authority Board Member** is unable to attend a meeting of the **Diversion Authority Board**. The **Governing Bodies** of **Wilkin County**, **Richland County**, and the **City of West Fargo** are authorized to designate a **Diversion Authority Board Member Alternate** to the **Diversion Authority Board** to sit in place of the

appointed **Upstream Member** when the **Upstream Member** is unable to attend a meeting of the **Diversion Authority Board**. Any **Diversion Authority Board Member Alternates** must be either elected or appointed to a **Member Entity's Governing Body**, the **Wilkin County Commission**, the **Richland County Commission**, or the **West Fargo City Commission**.

Section 5.02 DIVERSION AUTHORITY BOARD MEMBERSHIP REQUIREMENTS. The following are the membership requirements of the **Diversion Authority Board**:

- (a) A **Diversion Authority Board Member** must be a member of a **Member Entity's Governing Body**, except for the **Current Chair**, the **Upstream Member**, the **West Fargo Member**, and except for those appointed by the **Clay County Commission** who are not current **Clay County Commission** members;
- (b) The **Cass County Commission** may appoint members to the **Diversion Authority Board** who are not current members of the **Cass County Commission** to serve on the **Diversion Authority Board** until no later than December 31, 2017. After December 31, 2017, all members appointed by the **Cass County Commission** shall either be a current member of the **Cass County Commission** or the **West Fargo City Commission**;
- (c) The **Upstream Member** must be a current member of either the **Wilkin County Commission** or **Richland County Commission**; and
- (d) The **West Fargo Member** must be a current member of the **West Fargo City Commission**.

Section 5.03 NOT EMPLOYEES. **Diversion Authority Board Members** shall not be deemed employees of the **Metro Flood Diversion Authority**. The **Member Entities** acknowledge that it is their sole responsibility to provide all compensation and fringe benefits to their respective employees, elected or appointed officials. **Diversion Authority Board Members** shall not be allowed to be party to any contract with the **Metro Flood Diversion Authority**.

Section 5.04 INCOMPATIBLE OFFICES. **Diversion Authority Board Members** may not be appointed to any paid office at the **Metro Flood Diversion Authority** nor shall they be employed by the **Metro Flood Diversion Authority**.

Section 5.05 TERMS OF DIVERSION AUTHORITY BOARD MEMBERS. There are no set terms of members of the **Diversion Authority Board**. The **City of Fargo Members**, the **City of Moorhead Members**, the **Cass County Members**, the **Clay County Members**, the **CCJWRD Members**, and the **BRRWD Members**, the **West Fargo Member**, and the **Upstream Group Member**, shall serve at the discretion of the **Governing Body** of their respective organization from which they were appointed.

Section 5.06 THE CHAIR. The **Chair** is a member of the **Diversion Authority Board** for purposes of presiding at its meeting. The **Chair** may vote on all matters before the **Diversion Authority Board**, but may not cast an additional vote in the event of a tie vote of the **Diversion**

Authority Board. The **Chair** does not have the authority to veto decisions of the **Diversion Authority Board**. The **Chair** is the head of the **Diversion Authority Board** for ceremonial purposes and for the purpose of service of civil process. The **Chair** may execute all contracts, **Project Agreements**, notes, indentures, warrants, and other instruments on behalf of the **Metro Flood Diversion Authority** and perform any other duties assigned by the **Diversion Authority Board**. No contract, **Project Agreement**, note, indenture, warrant, or other instrument executed by the **Chair**, or **Vice Chair** acting as **Chair** pursuant to Section 5.07 of this **Agreement**, shall become valid and binding upon the **Metro Flood Diversion Authority** until countersigned by the **Executive Director** or the **Deputy Executive Director** acting as **Executive Director** pursuant to Section 14.03 of this **Agreement**.

The **Chair** position shall rotate between the Mayor of the **City of Fargo**, the Mayor of the **City of Moorhead**, and a member of the **Cass County Commission**, respectively. Each **Chair** shall serve a one (1) year term, beginning January 1 and ending December 31. Provided that from the **Effective Date** of this **Agreement**, until December 31, 2016, the **Chair** position shall be held by the **Current Chair**. Thereafter, the rotation of the **Chair** shall commence with the Mayor of the **City of Fargo** serving the first term, the Mayor of the **City of Moorhead** serving the second term, and a member of the **Cass County Commission**, selected by the **Cass County Commission**, serving the third term. This rotational schedule shall continue for the remainder of the term of this **Agreement**. Individuals may serve as **Chair** multiple times if they remain in their respective elected or appointed positions. Provided, the **Chair** must not be from a **Member Entity** from the same state as the **Vice Chair's Member Entity** (i.e. if the **Chair** is from a Minnesota **Member Entity**, the **Vice Chair** shall be from a North Dakota **Member Entity**). The term of the **Chair** shall cease if his or her position as mayor or as a **Cass County Commission** member has ceased for any reason provided, however, that the **Member Entity** is permitted to replace the **Chair** with the individual filling the vacancy of the outgoing **Chair** position within the **Governing Body** of the **Member Entity** (i.e. if a new mayor is elected in the **City of Fargo** while the **City of Fargo's** Mayor is serving as **Chair**, then the newly elected mayor of the **City of Fargo** will serve the remainder of the **Chair's** term). The **Metro Flood Diversion Authority** is authorized to elect an acting **Chair** under such circumstances when a vacancy occurs in a manner not contemplated by this section.

Section 5.07 VICE CHAIR. A **Vice Chair** must be elected at the **Annual Meeting** of the **Diversion Authority Board** by a majority vote of all members of the **Diversion Authority Board**. The **Vice Chair** must be a **Diversion Authority Board Member** and must not be a member from the same state as the **Chair**. The **Vice Chair** serves as the **Chair** in the **Chair's** disability or absence from the **Diversion Authority Board** or when a vacancy in the office of **Chair** exists. When presiding over a meeting in the absence of the **Chair**, the **Vice Chair** may vote on all matters before the **Diversion Authority Board**, but may not cast an additional vote in the event of a tie vote of the **Diversion Authority Board**. The **Diversion Authority Board** must elect a **Vice Chair** at the organizational meeting. Each **Vice Chair** shall serve a one (1) year term beginning the second Thursday in January and ending the day prior to the second Thursday in January of the following year, or until a successor **Vice Chair** is appointed.

Section 5.08 SECRETARY. At the **Annual Meeting** of the **Metro Flood Diversion Authority**, the **Diversion Authority Board Members** shall appoint a **Secretary**. An employee of one of the **Member Entities**, an individual or contractor, may be appointed as the **Secretary**

for the **Metro Flood Diversion Authority**. The **Secretary** shall be responsible for ensuring that minutes are prepared for all **Metro Flood Diversion Authority** meetings. The **Secretary** shall also keep all books and records of the **Metro Flood Diversion Authority** and shall give all notices required by law, and may have other duties assigned from time to time by the **Metro Flood Diversion Authority**. The secretary shall also be responsible for compliance with North Dakota's Open Records Law requirements.

Section 5.09 VOTING BY THE BOARD. Each **Diversion Authority Board Member** shall have one (1) vote on matters before the **Metro Flood Diversion Authority**. All decisions before the **Metro Flood Diversion Authority** shall be determined by a simple majority vote of the **Diversion Authority Board Members** present except as set forth in this Section. **Diversion Authority Board Members** are not permitted to vote by proxy. A **Diversion Authority Board Member Alternate** will be seated as a **Diversion Authority Board Member** when the **Member Entity's Diversion Authority Board Member** is absent from a **Diversion Authority Board** meeting. When seated pursuant to this Section, **Diversion Authority Board Member Alternates** will have the same voting rights as regular **Diversion Authority Board Members**. The following decisions require that at least one vote each must be cast by a **Minnesota Board Member**, a **City of Fargo Member** and a **Cass County Board Member**:

- (a) **Project** alignment and crossing (bridge) locations, to the extent that the **Locally Preferred Plan** is capable of being modified by any person, firm or governmental entity. It is understood and agreed that minor revisions to the **Project** alignment or to crossing locations will not require approval by one vote, each, from the **City of Fargo, Cass County, and Minnesota Board Members**. A minor revision is one that alters the location of the alignment or crossing by less than one thousand (1,000) feet.
- (b) Engagement of a **Program Management Consultant**.
- (c) Engagement of a **Lobbyist**.
- (d) Engagement of an **Executive Director**.
- (e) Engagement of a **Fiscal Agent**.
- (f) Termination of a **Program Management Consultant, Lobbyist, Fiscal Agent, or the Executive Director**.
- (g) Resolutions setting forth the procedures, protocols, and standard operating procedures for the **Project**.
- (h) Approval or modification of the methodology and finance plan developed pursuant to Section 12.11 of this **Agreement** to allocate the costs associated with operating the **Project**.

Section 5.10 MEETINGS OF THE BOARD. The **Metro Flood Diversion Authority** shall hold meetings as follows:

- (a) Organizational Meeting. An organizational meeting shall be held within thirty (30) days of the **Effective Date** of this **Agreement** and shall be called at a time to be determined by the City Administrator for the **City of Fargo** and the City Manager for the **City of Moorhead**. The City Administrator for the **City of Fargo** and the City Manager for the **City of Moorhead** shall ensure that proper notice of this meeting is given.
- (b) Regular Meetings. Thereafter, the **Diversion Authority Board** shall meet at 3:30 p.m. local time on the second Thursday of each and every month that this **Agreement** is in effect, and a schedule of regular meetings, which may include multiple regular meetings each month, shall be adopted at the organizational meeting and thereafter each and every year at the **Annual Meeting**. The **Diversion Authority Board** may determine alternative times and dates for regular monthly meetings.
- (c) Annual Meeting. The **Diversion Authority Board** shall hold its **Annual Meeting** at 3:30 p.m. local time on the second Thursday of January.
- (d) Special Meetings. Special meetings of the **Diversion Authority Board** may be called by the **Chair** and must be called by the **Chair** upon written request of three (3) **Diversion Authority Board Members**, who must identify the business matters to be discussed at such special meeting. Business at a special meeting is limited to matters contained in the notice of the special meeting. A special meeting may also be called at the request of the **Governing Body** of a **Member Entity**, who must identify the business matters to be discussed at such special meeting.
- (e) Emergency Meetings. In accordance with applicable law, an emergency meeting may be called by the **Diversion Authority Board** due to circumstances that in the judgment of the **Chair** and/or **Vice Chair** require immediate **Diversion Authority Board** consideration. Prior to calling an emergency meeting, the **Diversion Authority Board** shall contact appropriate media.
- (f) Meeting Location. **Diversion Authority Board** meetings will be held at Fargo City Hall, unless the **Diversion Authority Board**, or the **Executive Director** with the consent of the **Chair**, determines that a meeting should be held at an alternative location.
- (g) Parliamentary Rules. All meetings of the **Diversion Authority Board** shall comply with parliamentary rules and procedures outlined in the most recent edition of ROBERT'S RULES OF ORDER for small boards, except to the extent those rules are inconsistent with any rules adopted by the **Diversion Authority Board** or are inconsistent with the provisions of this **Agreement** or applicable North Dakota law.

- (h) Notice of Meetings to Alternate Board Members. Each **Diversion Authority Board Member Alternate**, whether or not a voting member, shall be entitled to receive notices of and attend all meetings of the **Diversion Authority Board** to receive all reports, and to participate in **Diversion Authority Board** discussions in the same manner as the **Diversion Authority Board Members**. Provided, however, that a **Diversion Authority Board Member Alternate** will not be seated unless the **Member Entity's** appointed **Diversion Authority Board Member** is unable to attend the meeting and, during closed sessions of the **Diversion Authority Board**, the meeting shall be attended only by the **Chair** and **Diversion Authority Board Members** or seated **Diversion Authority Board Member Alternates**.
- (i) Executive Sessions. The **Diversion Authority Board** may hold an executive session to consider or discuss confidential records or other matters as authorized by Chapter 44-04 of the N.D.C.C. **Diversion Authority Board Members** may be excluded from an executive session in the event that the **Member Entity** or organization from which they are appointed is an adverse party to the **Metro Flood Diversion Authority** in ongoing or pending litigation, which is the subject of the executive session.

Section 5.11 OPEN MEETING LAW. All meetings of the **Metro Flood Diversion Authority** shall be held in compliance the North Dakota Open Meetings Law. The **Minnesota Member Entities** shall, to the extent required by the Minnesota Open Meeting Law, publish all notices and conduct all meetings held by a **Minnesota Member Entity** concerning the **Project**, in accordance with the Minnesota Open Meeting Law.

Section 5.12 RECORDS RETENTION POLICY. The **Metro Flood Diversion Authority** shall adopt a records retention policy establishing minimum retention periods for its records in compliance with the North Dakota Open Records Law. The **Minnesota Member Entities** shall adopt a records retention policy establishing a minimum retention period for any records held by a **Minnesota Member Entity** related to the **Project** in compliance with the Minnesota Government Data Practices Act.

Section 5.13 OPEN RECORDS LAW. The **Metro Flood Diversion Authority** shall comply with the North Dakota Open Records Law in regard to all data collected, created, received and maintained or disseminated. The **Minnesota Member Entities** shall maintain all data collected, created, received, maintained, or disseminated in conformance with the Minnesota Government Data Practices Act.

Section 5.14 QUORUM. A quorum of the **Metro Flood Diversion Authority** necessary for the transaction of any business shall consist of seven (7) **Diversion Authority Board Members** who may transact business. If vacancies cause the membership of the **Metro Flood Diversion Authority** to be fewer than seven (7) members, the **Metro Flood Diversion Authority** may not conduct any business until such time that there are at least seven (7) **Diversion Authority Board Members**, provided, however, that if a quorum of **Diversion Authority Board Members** is not present, the **Members** who are present shall be authorized to

adjourn the meeting to such date, time and place as they shall determine and announce at the time of adjournment.

Section 5.15 BYLAWS. The **Diversion Authority Board** may adopt bylaws governing its operations that are not inconsistent with this **Agreement** and may amend said bylaws as necessary. The bylaws may provide for sub-committees of the **Diversion Authority Board** as necessary. Any bylaw or modification thereof shall not be effective until approved by a majority vote of the **Diversion Authority Board**. Bylaws shall be reviewed and updated annually by the **Diversion Authority Board**.

Section 5.16 OFFICIAL NEWSPAPER. The **Diversion Authority Board** may designate one or more legal newspapers of general circulation in the **Fargo-Moorhead Metropolitan Area** as its official newspaper for whatever purposes as may be required by statute to be published in an official newspaper.

ARTICLE VI. COMMITTEES

Section 6.01 BOARDS AND COMMISSIONS. Except as otherwise provided by law, or Sections 6.02, 6.08 or 6.13 of this **Agreement**, there are no separate administrative boards or commissions. The **Diversion Authority Board** performs the duties and exercises the powers of administrative boards or commissions. The **Diversion Authority Board** may establish boards or committees to advise the **Diversion Authority Board** with respect to a **Project** function or activity, to investigate a subject of interest to the **Metro Flood Diversion Authority**, to perform quasi-judicial functions, or to perform any other task.

Section 6.02 LAND MANAGEMENT COMMITTEE. There is hereby created and continued a **Land Management Committee** of the **Metro Flood Diversion Authority** with the powers and duties set forth in this Article.

Section 6.03 LAND MANAGEMENT COMMITTEE JURISDICTION. The **Land Management Committee** is responsible for making recommendations to the **Diversion Authority Board** regarding the acquisition and management of **Project Property**.

Section 6.04 LAND MANAGEMENT COMMITTEE MEMBERSHIP. The **Land Management Committee** shall consist of:

- (a) Two (2) Members of the **Diversion Authority Board** appointed by the **Diversion Authority Board**;
- (b) Two (2) Members recommended by the **Fargo City Commission** and appointed by the **Diversion Authority Board**;
- (c) Two (2) Members recommended by the **Moorhead City Council** and appointed by the **Diversion Authority Board**;

- (d) Two (2) Members recommended by the **Cass County Commission** and appointed by the **Diversion Authority Board**;
- (e) One (1) Member recommended by the **Clay County Commission** and appointed by the **Diversion Authority Board**;
- (f) One (1) Member recommended by the **CCJWRD Board** and appointed by the **Diversion Authority Board**;
- (g) One (1) Member recommended by the **BRRWD Managers** and appointed by the **Diversion Authority Board**.

Section 6.05 LAND MANAGEMENT COMMITTEE CHAIR. The **Land Management Committee** shall select a chair by majority vote of its members. The chair must also be a member of the **Diversion Authority Board**.

Section 6.06 MEMBER ENTITY STAFF. **Member Entities** may provide support staff and services for the **Land Management Committee**, but **Member Entity** staff may not serve as members of the **Land Management Committee**. However, the **City of Fargo** City Administrator, the **City of Fargo** City Engineer, the **City of Moorhead** City Engineer, the **Cass County** Administrator, and the **Cass County** Engineer may serve as members of the **Land Management Committee** upon appointment, pursuant to Section 6.04 of this **Agreement** and upon approval by the **Diversion Authority Board**.

Section 6.07 SUNSET ON LAND MANAGEMENT COMMITTEE. In the event that the **Diversion Authority Board** determines by a majority of all **Diversion Authority Board Members** that all land, easements, and right-of-way have been acquired for the **Project**, the **Diversion Authority Board** may vote to suspend regular meetings of the **Land Management Committee** and allow the committee to meet only on an as needed basis.

Section 6.08 DISSOLUTION OF LAND MANAGEMENT COMMITTEE. In the event that the **Diversion Authority Board** determines that the **Land Management Committee** is no longer needed, the **Diversion Authority Board** may dissolve the **Land Management Committee**.

Section 6.09 FINANCE COMMITTEE. There is hereby created and continued a **Finance Committee** of the **Metro Flood Diversion Authority** with the powers and duties set forth in this Article.

Section 6.10 FINANCE COMMITTEE JURISDICTION. The **Finance Committee** is responsible for making recommendations to the **Diversion Authority Board** regarding the budgets, expenses, funds and all other finance matters related to the **Project**.

Section 6.11 FINANCE COMMITTEE MEMBERSHIP. The **Land Management Committee** shall consist of:

- (a) Two (2) Members of the **Diversion Authority Board** appointed by the **Diversion Authority Board**;

- (b) Two (2) Members recommended by the **Fargo City Commission** and appointed by the **Diversion Authority Board**;
- (c) Two (2) Members recommended by the **Moorhead City Council** and appointed by the **Diversion Authority Board**;
- (d) Two (2) Members recommended by the **Cass County Commission** and appointed by the **Diversion Authority Board**;
- (e) One (1) Member recommended by the **Clay County Commission** and appointed by the **Diversion Authority Board**;
- (f) One (1) Member recommended by the **CCJWRD Board** and appointed by the **Diversion Authority Board**;
- (g) One (1) Member recommended by the **BRRWD Managers** and appointed by the **Diversion Authority Board**.

Section 6.12 FINANCE COMMITTEE CHAIR. The **Finance Committee** shall select a chair by majority vote of its members. The chair must also be a member of the **Diversion Authority Board**.

Section 6.13 SUNSET ON FINANCE COMMITTEE. In the event that the **Diversion Authority Board** determines that the **Finance Committee** is no longer needed, the **Diversion Authority Board** may vote to suspend regular meetings of the **Finance Committee** and allow the committee to meet only on an as needed basis.

Section 6.14 DISSOLUTION OF FINANCE COMMITTEE. In the event that the **Diversion Authority Board** determines by a majority of all **Diversion Authority Board Members** that the **Finance Committee** is no longer needed, the **Diversion Authority Board** may dissolve the **Finance Committee**.

Section 6.15 MEMBER ENTITY STAFF. **Member Entities** may provide support staff and services for the **Finance Committee**, but **Member Entity** staff may not serve as members of the **Finance Committee**. However, the **Cass County Auditor**, the **Cass County Administrator**, the **City of Fargo City Administrator**, the **City of Fargo Finance Director**, the **Clay County Auditor**, and the **City of Moorhead Finance Director** may serve as members of the **Finance Committee** upon appointment, pursuant to Section 6.04 of this **Agreement** and upon approval by the **Diversion Authority Board**.

Section 6.16 PRIOR COMMITTEES. The **Member Entities** agree and acknowledge that the **LJPA** previously created several temporary sub-committees, which include the **Ag Committee**, **Cemetery Committee**, and **Public Outreach Committee**. These committees and their membership shall be continued until such time as the **Diversion Authority Board** determines that such committees are no longer necessary for the **Project**.

ARTICLE VII.
METRO FLOOD DIVERSION AUTHORITY POWERS

Section 7.01 POWERS. This **Agreement** shall in no way limit or restrict the powers and duties of each **Member Entity**, except as provided herein. The **Metro Flood Diversion Authority** shall have the following duties and powers.

- (a) Receipt of Funds. To apply for and receive grants and **Debt Obligation** proceeds and to accept donations, bequests and contributions from the **Member Entities**.
- (b) To Enter Into Contracts. To enter into contracts related to the **Project** and to perform all of its obligations pursuant to the terms and conditions of those contracts.
- (c) Executive Director. To hire and terminate an **Executive Director**.
- (d) Purchasing. To purchase or otherwise acquire real and personal property and to purchase capital equipment and equipment and items necessary for the operations and maintenance of the **Project**.
- (e) Expenses. To incur expenses necessary and incidental to effectuation of its purposes and consistent with its powers.
- (f) Sales. To convey, sell, dispose of, or lease any of its equipment or its real or personal property as deemed necessary for the **Project**.
- (g) Sue and Be Sued. To commence litigation as deemed necessary and to defend against any claims brought against the **Metro Flood Diversion Authority**.
- (h) Conduct or Arrange for Public Information Meetings. To conduct and arrange for public information meetings.
- (i) Appoint Ex-Officio Board Members. Ex-Officio **Diversion Authority Board Members** may attend **Diversion Authority Board** meetings but may not vote unless they are seated as a member of the **Diversion Authority Board**.
- (j) Appoint and Terminate Project Consultants. To employ a **Program Management Consultant**, a **Lobbyist**, and other professional services support personnel and to provide necessary office space, supplies, equipment and other support.
- (k) Employees. To employ personnel to carry out the purposes of this **Agreement**.
- (l) Management of Project. To assist in the planning, design, development and management of the **Project**, including **Project Property** acquisition and construction of the **Project**.

- (m) Finance the Project. To provide for the financing of the **Project**, including coordination of the issuance of **Debt Obligations** by the **Member Entities** or to provide for **Availability Payments** and/or **Milestone Payments** by a **Member Entity**. This power includes the power to request that a **Member Entity** issue **Debt Obligations** or to provide for **Availability Payments, Milestone Payments, and/or P3 Payments**.
- (n) Operations and Maintenance of Project. To provide for the operations and maintenance of the **Project**. This authority includes the authority to hire, retain and terminate private contractors or **P3 Developers** to provide for the operations and maintenance of the **Project**. This power includes the power to request that a **Member Entity** operate and/or maintain **Project Elements**. In the event that a **Member Entity** is requested to maintain a portion of the **Project**, the **Member Entity** will be reimbursed for such costs in accordance with Section 12.11 of this **Agreement**.
- (o) Budget. To establish an annual operating budget and to submit the budget for review by October 1 of each year of this **Agreement** to the **Governing Bodies** of the **Member Entities**. The **Member Entities** are not required to formally adopt the budget, but may provide advice, comments, and input to the **Metro Flood Diversion Authority**. The budget submitted to the **Member Entities** is intended to provide **Member Entities** with information regarding the financial condition of the **Metro Flood Diversion Authority** and does not require formal approval by the **Member Entities' Governing Bodies**.
- (p) Insurance. To enter into contracts for the purposes of securing insurance coverage regarding the **Project** or the operation of the **Metro Flood Diversion Authority**, including general liability, automobiles, property, and worker's compensation coverage.
- (q) Economization. To recommend to the **Member Entities** ways to economize the construction, management, operations, financing and maintenance of the **Project**.
- (r) Land Acquisition Requests. To request that **Member Entities** and/or **USACE** obtain access to and title to lands, easements, and rights-of-way necessary for the **Project**. This will include requests for a **Member Entity** to exercise its eminent domain authority.
- (s) Amendments. To recommend amendments to this **Agreement** to the **Member Entities**.
- (t) Enforce this Agreement. To enforce the terms of this **Agreement**, including requiring one or more of the **Member Entities** to this **Agreement** to use its **Best Efforts** to fulfill its obligations as defined herein.
- (u) Delegate Tasks. To delegate tasks to one or more of the **Member Entities** to this **Agreement**, unless prohibited by statute or otherwise.

- (v) Committees and Sub-committees. Pursuant to ARTICLE VI of this **Agreement**, to create committees to provide technical, financial and legal assistance, or other assistance to the **Metro Flood Diversion Authority**.
- (w) Provide for Professional Services. To procure the services of engineers, attorneys, contractors, consultants, and other persons or entities for the planning, design, development, financing, construction, operation and management of the **Project**.
- (x) Hire Accountants. Procure the services of a public accountant to make an annual audit of the accounts and records of the **Metro Flood Diversion Authority**.
- (y) Contract with Public Entities. To enter into contracts or other arrangements with the United States Government or any department thereof, municipalities, counties, water resource or watershed districts, states or any agency thereof, persons, railroads, companies or corporations, for cooperation or assistance in designing, developing and constructing the **Project** and acquiring and maintaining the necessary lands, easements and rights-of-way for the **Project**, including contracts, joint powers agreements or other arrangements for advancing funds for **Project** purposes and for recouping some or all of such funds including, without limitation, entering into such contract(s), joint powers agreement(s) or other arrangements with North Dakota Department of Transportation, **Cass County**, **CCJWRD**, the City of Oxbow, North Dakota, the City of Comstock, Minnesota, and other Minnesota or North Dakota political subdivisions, for purposes of constructing and installing a ring-levee, providing for replacement property and the infrastructure supporting such replacement property and any other purposes as may be necessary and appropriate for the furtherance of the **Project**. This power includes the power to perform all its obligations under such contracts and the power to carry out and implement such contracts. To enter into joint powers agreements with other public entities.
- (z) Contracts with Private Third Parties. To enter into contracts or other arrangements with cemetery associations or non-profit entities operating cemeteries, BNSF, private utility companies or cooperatives, or other private parties, for cooperation or assistance in the design and construction of the **Project**, including but not limited to, reconstruction of railroad bridges, tunnels, temporary relocation of railroad tracks, utility relocation, and any other purposes as may be necessary and appropriate for the furtherance of the **Project**. This power includes the power to perform all its obligations under such contracts and the power to carry out and implement such contracts.
- (aa) Provide for P3 Procurement Process for Project Elements Located in North Dakota. To develop and implement a P3 procurement process for **Project Elements** located in North Dakota in accordance with applicable law, including Chapter 48-02.1 of the N.D.C.C. This power includes the authority to authorize

and make stipend payments as deemed necessary and appropriate by the **Diversion Authority Board**.

- (bb) Permits. To apply for any permits for the **Project**, whether from the Government, the State of North Dakota, or the State of Minnesota.
- (cc) Enter into a Project Partnership Agreement (PPA). To enter into a **PPA** with the **Government**. This power includes the power to enter into all ancillary documents connected with or arising out of the PPA, including but not limited to, third party agreements, agreements with contractors and subcontractors, any leases, and licenses.
- (dd) Lobbying. Lobby for state (in either North Dakota or Minnesota) and/or federal funds for the **Project** including lobbying for federal or state (in either North Dakota or Minnesota) authorization or other approvals as may be requested by the **Metro Flood Diversion Authority**.
- (ee) Indemnification. To indemnify and hold harmless the **Non-Federal Sponsors**, which are the **City of Fargo** and the **City of Moorhead**, the **Member Entities**, and the **Government**.
- (ff) Purchase Insurance Policies. To purchase insurance policies or products that provide coverage for the **P3 Developer**, subcontractors to the **P3 Developer** of any tier, financiers of a **P3 Developer**, and contractors, including their consultants, agents, advisors, lobbyists, and employees for work performed in connection with, arising out of, or related to the **Project**.
- (gg) Purchase Private Insurance Policies or Create Individual Insurance Reserve Funds. To purchase private insurance policies or create individual insurance reserve funds for crop insurance, agricultural production revenue insurance, and liability insurance in the amounts and under the terms and conditions deemed necessary by the **Metro Flood Diversion Authority** related to construction, operation, and maintenance of the **Project** including such policies, funds, or programs intended to benefit third parties such as property areas affected by the **Project**.
- (hh) Project Agreements. To enter into a **Project Agreement**, which will provide for the design, construction, financing, operation, and maintenance of the **DCAI** and/or **NFS Separable Element** located in North Dakota, in accordance with Chapter 48-02.1 of the N.D.C.C. This power includes the power to enter into all ancillary documents connected with or arising out of the **Project Agreement**, including but not limited to, direct agreements with financiers, third parties, and subcontractors, any leases and licenses granting access to the **P3 Developer** and its subcontractors, and any escrow arrangements for equity partnerships. Alternatively, to authorize one or more **Member Entities** to enter into a **Project Agreement**, and ancillary documents, as set forth in the preceding sentence, with a **P3 Developer**. The **Member Entities** agree and acknowledge that this power is

granted pursuant to N.D.C.C. § 48-02.1-11. The **Metro Flood Diversion Authority** may enter into ancillary agreements related to and arising out of or related to **Project Agreements** to give full force and effect to the **Project Agreements**. The **Metro Flood Diversion Authority** is authorized to perform all its obligations under the terms and conditions of such ancillary agreements and the **Project Agreement**, or to carry out the transaction contemplated by such ancillary agreement and **Project Agreement**. The **Metro Flood Diversion Authority** is authorized to provide such representations and warranties as may be needed to give effect to such agreements.

- (ii) Implicit Powers. In addition to the above specified powers, the **Metro Flood Diversion Authority** shall have those powers implicitly necessary to carry out its duties.
- (jj) Uncertain Powers. If it is not clear whether the **Metro Flood Diversion Authority** has a power to perform a certain action or to make a certain decision, the **Metro Flood Diversion Authority** shall refrain from acting until such times as it receives authority in writing from a majority of **Member Entities**.

ARTICLE VIII. FINANCE/BUDGET

Section 8.01 DIVERSION AUTHORITY BOARD TO CONTROL FINANCES. The **Diversion Authority Board** is responsible for the financial affairs of the **Metro Flood Diversion Authority**. The **Diversion Authority Board** must provide for the collection of revenues, the safekeeping of assets, the auditing and settlement of accounts, and the safekeeping and disbursements of public monies.

Section 8.02 FISCAL YEAR. The fiscal year of the **Metro Flood Diversion Authority** is the calendar year.

Section 8.03 SUBMISSION OF THE BUDGET. The **Finance Committee**, with the assistance of the **Executive Director**, must have an annual budget prepared and submitted to the **Diversion Authority Board** by or before October 1 of each and every year of this **Agreement**. The budget must provide a complete financial plan for **Metro Flood Diversion Authority** funds and activities for the ensuing fiscal year. The budget is in a form recommended by the **Executive Director** or specified by the **Diversion Authority Board** with necessary modifications required by law. The budget must show estimated income and proposed expenditures, including debt service and comparative figures for the current fiscal year, actual and estimated, and for the preceding fiscal year. The budget must show proposed expenditures for current operations. The budget must show proposed capital expenditures for the ensuing year and the proposed method of financing those capital expenditures. The annual budget will include expenditures for debt service payments, **Milestone Payments**, **Availability Payments**, and **P3 Payments**; however, expenditures for debt service payments, **Milestone Payments**, **Availability Payments**, and **P3 Payments** are not subject to annual appropriations of the **Metro Flood Diversion Authority**.

Section 8.04 DIVERSION AUTHORITY BOARD ACTION ON THE ANNUAL BUDGET. The budget must be considered by the **Diversion Authority Board** no later than the first regular meeting of the **Diversion Authority Board** in November. The **Diversion Authority Board** must consider the budget at subsequent meetings until an **Approved Budget** is adopted. The failure of the **Diversion Authority Board** to approve an annual budget shall not impair, excuse, revoke, negate, or terminate the continuing obligation of the **Metro Flood Diversion Authority** to provide for and make **Milestone Payments, Availability Payments, and/or P3 Payments** under the terms and conditions of a **Project Agreement**. Further, the failure of the **Diversion Authority Board** to approve an annual budget shall not impair, excuse, revoke, negate, or terminate the obligation of a **Member Entity** to provide for and make a debt service payment on a **Debt Obligation, Milestone Payment, Availability Payment, and/or P3 Payment**. The sums appropriated by the budget may not exceed the estimated revenues and reserves available to fund the expenditures in the budget. The **Diversion Authority Board** must adopt the budget by resolution not later than December 1 of each and every year of this **Agreement**. The budget resolution must state the total amount of each budgeted fund, with segregation of objects and purposes of expenditures as deemed necessary by the **Diversion Authority Board**. The sums fixed in the budget resolution are appropriated for the purposes identified in the budget resolution. The failure of the **Metro Flood Diversion Authority** or the **Diversion Authority Board** to timely approve an annual budget shall not be construed so as to invalidate the authority of the **Metro Flood Diversion Authority** to continue making payments for continuing obligations, including **Milestone Payments, Availability Payments, and/or P3 Payments**, or contracts previously approved by the **Metro Flood Diversion Authority**.

Section 8.05 ENFORCEMENT OF THE BUDGET. The **Executive Director** must enforce the budget. The **Executive Director** may not approve a payment or the incurring of an obligation by the **Metro Flood Diversion Authority** unless funds for the payment or obligation are appropriated by the budget and there is a sufficient unexpended balance in the appropriation after deducting prior expenditures and encumbrances against the appropriation; provided, that **Debt Obligations, Milestone Payments, Availability Payments, and P3 Payments** are not subject to this requirement. An officer, employee, agent or designee of the **Metro Flood Diversion Authority** may not place an order or make a purchase for the **Metro Flood Diversion Authority** unless the order or purchase is authorized in the budget. A **Metro Flood Diversion Authority** check drawn on **Metro Flood Diversion Authority** funds to a person or entity other than the **Metro Flood Diversion Authority** may not be issued or paid until the claim to which the payment relates has been documented by an invoice, payroll timesheet, or other document approved and signed by a person authorized by the **Diversion Authority Board** to execute documents on behalf of the **Metro Flood Diversion Authority**, who vouches for its correctness and reasonableness. The **Executive Director** must report to the **Diversion Authority Board** from time to time on the status of the budget and the expenditures from and balances in the budget accounts and funds.

Section 8.06 ALTERATIONS IN THE BUDGET. The **Diversion Authority Board** may not increase the amounts appropriated in the budget resolution beyond the estimated revenues except to the extent that actual receipts exceed the estimated revenues. The **Diversion Authority Board** may by resolution reduce an appropriation for any purpose in the budget or authorize the transfer of sums from unencumbered appropriations in the budget to other purposes. The **Diversion Authority Board** may make budget adjustments as needed and from time to time.

Section 8.07 FUNDS TO BE KEPT. There must be maintained in the **Metro Flood Diversion Authority** treasury the funds required by ARTICLE X of this **Agreement** and other funds as may be required by law, the budget resolution or other resolution. The **Diversion Authority Board** may by resolution make inter-fund loans except from trust or agency funds.

Section 8.08 FINANCIAL MANAGEMENT POLICY. The **Diversion Authority Board** will adopt a financial management policy upon the recommendation of the **Finance Committee**. The financial management policy should include reference to the annual audit process and the **Diversion Authority Board** may, at its discretion, create an audit subcommittee or task the **Finance Committee** to initiate the process.

ARTICLE IX. SOURCES OF REVENUES

Section 9.01 MUTUAL COOPERATION. The **Member Entities** agree and acknowledge that in order to finance the design, construction, operation and maintenance of the **Project** that the **Metro Flood Diversion Authority** through its **Member Entities** will have to draw upon multiple streams of revenue from which **Member Entities** have jurisdiction to levy, impose and collect. The purpose of this Article is to authorize the **Member Entities** to work collaboratively to maximize the efficiency of the **Member Entities** with respect to financing the **Project**.

Section 9.02 PARTY CONTRIBUTIONS FOR TOTAL PROJECT COSTS. The **Project** shall be financed from **Sales Tax Revenues**, special assessment revenues, grants, donations and any other funds contributed by the **Members Entities** (the "**Pledged Revenues**"). The **Member Entities** shall contribute the following funds:

- (a) **City of Fargo.** Subject to any required vote of the voters and the approval of ordinances implementing such a sales tax, the **City of Fargo** will impose, levy, and collect a sales and use tax upon all taxable retail sales within the **City of Fargo**. The **Member Entities** acknowledge and agree that the sales and use tax rate, duration and terms may need to be modified and adjusted during the term of this **Agreement**. The **City of Fargo** will also contribute any State of North Dakota grants, funds or cost-share allocations made available for the **Project**.
- (b) **City of Moorhead.** The **City of Moorhead**, in accordance with the cost share allocation formula set forth in Section 12.11 of this **Agreement**, will use its **Best Efforts** to actively request in **Good Faith** an amount not to exceed \$100,000,000, in 2015 dollars as **Adjusted for Inflation**, from the State of Minnesota consisting of appropriations, grants or cost share allocations made available for the **Project**.
- (c) **Cass County.** Subject to any required vote of the voters and the approval of ordinances implementing such a sales tax, **Cass County** will impose, levy, and collect a sales and use tax upon all taxable retail sales within **Cass County**. The **Member Entities** acknowledge and agree that the sales and use tax rate, duration and terms may need to be modified and adjusted during the term of this

Agreement. Cass County will also contribute any State of North Dakota grants, funds or cost-share allocations made available for the **Project**.

- (d) **Clay County.** Clay County will use its **Best Efforts** to actively request in **Good Faith** any and all State of Minnesota appropriations, grants or cost share allocations made available for the **Project**. Clay County will actively support the **City of Moorhead's** efforts to request State of Minnesota funds from the Minnesota Legislature.
- (e) **CCJWRD.** CCJWRD will use its **Best Efforts** to create and establish the **Assessment District** for the **Project** pursuant to Chapter 61-16.1 of the N.D.C.C. and apportion and levy a special assessment for the **Project**. The **Member Entities** agree and acknowledge that the annual installments of special assessments contemplated in this Article shall be certified in the event that the **Sales Tax Revenues** generated by the **City of Fargo** and **Cass County's** sales tax ordinances are ever insufficient to pay the debt service on any **Debt Obligations** issued for the **Project** and any **Milestone Payments, Availability Payments, and P3 Payments**.
- (f) **BRRWD.** BRRWD will use its **Best Efforts** to actively request in **Good Faith** any and all State of Minnesota appropriations, grants or cost share allocations made available for the **Project**. BRRWD will actively support the **City of Moorhead's** efforts to request State of Minnesota funds from the Minnesota Legislature.

The **Member Entities** agree and acknowledge that the **City of Fargo** and **Cass County** may extend only one of the respective sales taxes beyond the **County 2010-2 Sales Tax Sunset Date** or the **City 3-21 Sales Tax Sunset Date** pursuant to Section 9.11 of this **Agreement**. In the event that the **City of Fargo** or **Cass County** determines to voluntarily allow its respective sales tax to sunset without submitting a request to the voters to extend said sales tax, then that party's obligations under this Section shall terminate upon the sunset of said sales tax. The termination set forth in this section shall only apply to either the **City of Fargo's** or **Cass County's obligations** to collect, impose, levy, and collect a sales tax.

Section 9.03 PARTY CONTRIBUTIONS FOR OPERATIONS AND MAINTENANCE COSTS. The operations and maintenance of the **Project** shall be financed from special assessments for maintenance of the **Project, Storm Water Maintenance Fees, Water Management District Fees**, grants, donations, excess sales tax revenues and any other funds contributed by the **Member Entities** (the "**O&M Revenues**"). The **Member Entities** shall contribute the following:

- (a) **CCJWRD.** CCJWRD will use its **Best Efforts** to create and establish maintenance assessment districts for the maintenance of the project pursuant to Chapter 16-16.1 of the N.D.C.C. and apportion and levy maintenance assessments for the **Project** in accordance with the cost share allocation formulas set forth in Sections 12.11 and 12.12 of this **Agreement**.

- (b) **Cass County.** Cass County will impose, levy, and collect a sales and use tax upon all retail sales within Cass County, which after the payment of the **Debt Obligations, Milestone Payments, Availability Payments, and P3 Payments** may be used for operations and maintenance of the **Project** in accordance with the cost share allocation formulas set forth in Sections 12.11 and 12.12 of this **Agreement**.
- (c) **City of Fargo.** The City of Fargo will impose, levy, and collect a sales and use tax upon all retail sales within the City of Fargo, which after the payment of the **Debt Obligations, Milestone Payments, Availability Payments, and P3 Payments** may be used for operations and maintenance of the **Project** in accordance with the cost share allocation formulas set forth in Sections 12.11 and 12.12 of this **Agreement**.
- (d) **City of Moorhead.** The City of Moorhead will use its **Best Efforts** to impose, levy, and collect a **Storm Water Maintenance Fee** for operations and maintenance of the Project in accordance with the cost share allocation formulas set forth in Sections 12.11 and 12.12 of this **Agreement**.
- (e) **BRRWD.** BRRWD will use its **Best Efforts** to impose, levy, and collect a **Water Management District Fee** for operations and maintenance of the Project in accordance with the cost share allocation formulas set forth in Sections 12.11 and 12.12 of this **Agreement**.

The **Member Entities** agree and acknowledge that the **City of Fargo** and **Cass County** may extend only one of these respective sales taxes beyond the **County 2010-2 Sales Tax Sunset Date** or the **City 3-21 Sales Tax Sunset Date** pursuant to Section 9.11 of this **Agreement**. In the event that the **City of Fargo** or **Cass County** determines to voluntarily allow its respective sales tax to sunset without submitting a request to the voters to extend said sales tax, then that party's obligations under this Section shall terminate upon the sunset of said sales tax. The termination set forth in this section shall only apply to either the **City of Fargo's** or **Cass County's** obligations to collect, impose, levy, and collect a sales tax.

Section 9.04 IN-KIND CONTRIBUTIONS. The **City of Fargo**, the **City of Moorhead**, **Clay County**, and **BRRWD** have made **In-Kind Contributions**, designed, financed and constructed **In-Town Flood Protection Infrastructure** and other **Project Elements** that are located along the east and west banks of the Red River of the North. The **In-Town Flood Protection Infrastructure** is considered to be a component of the **Project** and the financial contributions of the **City of Fargo**, the **City of Moorhead**, **Clay County**, and **BRRWD** with respect to **In-Town Flood Protection Infrastructure** shall be credited against the **North Dakota Member Entities'** and **Minnesota Member Entities'** respective **Project** cost share as more fully set forth in Section 12.11 of this **Agreement**, provided, that the **Member Entity** was not reimbursed for the **In-Kind Contributions** by the **Metro Flood Diversion Authority**.

Section 9.05 DEBT SERVICE, MILESTONE, AND AVAILABILITY AND P3 PAYMENTS. Debt service for the **Debt Obligations**, including refunding the **Prior Temporary Sales Tax Revenue Notes**, **Milestone Payments** and **Availability Payments** and **P3 Payments** will be

paid from the **Pledged Revenues** and any other funds that the **Member Entity** may make available for the **Project** from time to time. If the **Pledged Revenues** and proceeds of any reserve funds established pursuant to Section 10.04 of this **Agreement** should become insufficient to pay the annual debt service payments on the **Debt Obligations, Milestone Payments** and to make **Availability Payments** and **P3 Payments**, the **Metro Flood Diversion Authority** and **Member Entities** may use any other legally available funds available to the **Metro Flood Diversion Authority** and/or the **Member Entities** as sources of repayment of the debt service on the **Debt Obligations, Milestone Payments** and to make scheduled **Availability Payments** and **P3 Payments**.

Section 9.06 UNANTICIPATED SALES TAX REVENUES. In the event the **Pledged Revenues** and proceeds of any reserve funds established pursuant to Section 10.04 of this **Agreement** become insufficient to pay the annual debt service payments for the **Debt Obligations, Milestone Payments** or to make scheduled **Availability Payments** and **P3 Payments**, the **Governing Bodies** of the **City of Fargo** and **Cass County** shall use their **Best Efforts** to introduce proposed sales and use tax increases to their respective voters at an election in order to secure such **Additional Sales and Use Tax** revenues as may be necessary to pay the debt service on the **Debt Obligations, make Milestone Payments** or to make scheduled **Availability Payments** and **P3 Payments**.

Section 9.07 FINANCIAL REPORTS. In June and December of each and every year of this **Agreement**, the **Fiscal Agent** shall report to the **Diversion Authority Board** in writing the amount of money in the **Revenue Fund, Debt Obligation Fund, Milestone Payment Fund, Availability Payment Fund, P3 Payment Fund, and Reserve Fund**, if any, in the preceding period and the amount and items of expenditure during that period. A verified copy of the report shall be filed in the office of the **Cass County Auditor** and shall be open to inspection.

During the month of January of each year, the **Fiscal Agent** shall prepare a complete statement of the condition of the **Revenue Fund, Debt Obligation Fund, Milestone Payment Fund, Availability Payment Fund, P3 Payment Fund, and Reserve Fund** for the past year and shall cause the same to be filed with the **Executive Director**. Such statement shall show separately, and in detail, the conditions and resources of the **Revenue Fund, Debt Obligation Fund, Milestone Payment Fund, Availability Payment Fund, P3 Payment Fund, and Reserve Fund**, including the amount of any anticipated deficit and the apportionment thereof. At the **Metro Flood Diversion Authority's** regular February meeting next following the filing of the statement, the **Diversion Authority Board** shall examine the statement and make inquiry regarding the same to determine whether or not the sales and use tax receipts from the **City 3-21 Sales Tax, County 2010-2 Sales Tax, Future City Sales Tax or Future County Sales Tax** are projected to meet the debt service on the **Debt Obligations**, and are sufficient to meet **Milestone Payments, Availability Payments** and/or **P3 Payments**. Whenever all sales and use tax receipts from the **City of Fargo** and **Cass County** are insufficient to pay the debt service on the **Debt Obligations, Milestone Payments, Availability Payments, and/or P3 Payments** coming due within the following thirteen (13) months, **CCJWRD** will levy special assessments pursuant to Section 9.08 of this **Agreement**.

Section 9.08 LEVY OF SPECIAL ASSESSMENTS. In the event the **City 3-21 Sales Tax, County 2010-2 Sales Tax, Future City Sales Tax or Future County Sales Tax** and proceeds

of any reserve funds established pursuant to Section 10.04 of this **Agreement** are ever projected to be insufficient to pay the annual debt service payments on the **Debt Obligations**, make **Milestone Payments**, **Availability Payments**, or **P3 Payments**, and/or the voters of the **City of Fargo** and/or **Cass County** fail to approve an **Additional Sales and Use Tax** sufficient to pay the annual debt service payments on the **Debt Obligations**, make **Milestone Payments**, **Availability Payments**, and/or **P3 Payments**, then **CCJWRD** shall direct that the special assessments previously apportioned and levied against the benefitted real property and benefitting entities within the **Assessment District** be certified in such amounts as may be necessary to pay the debt service on the **Debt Obligations**, make **Milestone Payments** or **Availability Payments** and/or **P3 Payments**. In such an event, the **Finance Committee**, in consultation with **CCJWRD**, **City of Fargo**, and **Cass County**, shall determine the principal amount of special assessments that will need to be certified in any given year after the **Pledged Revenues** and reserve funds (if any) are first applied to the annual debt service payment on **Debt Obligations**, **Milestone Payments**, **Availability Payments** and/or **P3 Payments**. The **Diversion Authority Board**, upon a recommendation from the **Finance Committee**, shall then provide the estimated total principal amount to be certified as a special assessment to **CCJWRD** at least sixty (60) days prior to the date the special assessments installments need to be provided to the **Cass County Auditor** in order that they will be levied in the subsequent year. **CCJWRD** shall retain the final authority to levy and collect the special assessments in accordance with North Dakota law, but **CCJWRD** hereby agrees to use its **Best Efforts** to cooperate with the **City of Fargo**, **Cass County**, and **Metro Flood Diversion Authority** in certifying any necessary special assessments in accordance with this **Agreement**.

Section 9.09 SPECIAL ASSESSMENTS. Real property located in **Cass County** that is subject to the lien of special assessments for the **Project** shall be identified on the **Cass County** website along with the amount to be specially assessed against that real property. Any special assessments listed on the **Cass County** website in this regard should be identified as “work in progress,” or uncertified special assessments, until such time (if ever) the **City 3-21 Sales Tax**, **County 2010-2 Sales Tax**, **Future City Sales Tax** or **Future County Sales Tax** and proceeds of any reserve funds established pursuant to Section 10.04 of this **Agreement** are ever projected to be insufficient and **CCJWRD** must levy special assessment to pay the annual debt service payment on the **Debt Obligations**, make **Milestone Payments**, **Availability Payments**, and/or **P3 Payments** and **CCJWRD** certifies assessments to the **Cass County Auditor**.

Section 9.10 EXCESS SALES TAX REVENUES. In the event the **Pledged Revenues** exceed the amount required to pay the annual debt service on the **Debt Obligations**, **Milestone Payments**, **Availability Payments**, and/or **P3 Payments** in any given year, the **Excess Pledged Revenues** will be deposited into a **Reserve Fund** established under Section 10.04 of this **Agreement**, until monies in the **Reserve Fund** equal 100% of the total principal and interest payments due on the **Debt Obligations**, **Milestone Payments**, **Availability Payments**, and **P3 Payments** due in the fiscal year. After deposits into the **Reserve Fund** equal 100% of the total principal and interest payments due on the **Debt Obligations**, **Milestone Payments**, **Availability Payments**, and **P3 Payments** due in the current fiscal year, the **Fiscal Agent** shall then deposit the funds in accordance with Section 10.04 and the applicable bond resolutions that are issued at the same time bonds are issued. Funds in the **Reserve Fund** may be used in the event that **Pledged Revenues** become insufficient to meet the annual debt service on the **Debt Obligations**, make **Milestone Payments** or **Availability Payments**.

Section 9.11 SUNSETS ON PLEDGED SALES TAXES.

- (a) **Cass County Sunset.** Prior to the expiration of the **County 2010-2 Sales Tax** on the **County 2010-2 Sales Tax Sunset Date**, **Cass County** shall use its **Best Efforts** to submit to the voters of **Cass County** a ballot question asking whether **Cass County** should impose a new or renewed sales tax similar to or greater than the **County 2010-2 Sales Tax** in order to ensure continued sources of sales tax revenue necessary to meet the annual debt service payments on the **Debt Obligations, Milestone Payments, Availability Payments, and/or P3 Payments**.
- (b) **City of Fargo Sunset.** Prior to the expiration of the **City 3-21 Sales Tax** on the **City 3-21 Sales Tax Sunset Date**, the **City of Fargo** shall use its **Best Efforts** to submit to the voters of the **City of Fargo** a ballot question asking whether the **City of Fargo** should impose a new or renewed sales tax similar to or greater than the **City 3-21 Sales Tax** in order to ensure continued sources of sales tax revenue necessary to meet the annual debt service payments on the **Debt Obligations, Milestone Payments, Availability Payments, and/or P3 Payments**.
- (c) The **City of Fargo** and **Cass County** shall coordinate their efforts to extend their respective sales taxes. The **City of Fargo** and **Cass County** agree and acknowledge that either the **City of Fargo** or **Cass County** could substitute a full, one percent (1%) sales and use tax for its respective current one-half percent (.5%) sales and use tax, with the intent that the total sales and use tax imposed by both the **City of Fargo** and **Cass County** would be equal to or greater than one percent (1%) at any time that **Debt Obligations, Milestone Payments, Availability Payments, and P3 Payments** for the **Project** remain outstanding and/or unsatisfied.

ARTICLE X.
FINANCIAL OVERSIGHT/ FISCAL AGENT

Section 10.01 FINANCIAL OVERSIGHT. Under the oversight of the **Diversions Authority Board** and the **Finance Committee**, the **Cass County Auditor**, the **City of Fargo Finance Director**, and the **City of Moorhead Finance Director** and **CCJWRD's Secretary-Treasurer** shall work cooperatively to develop written administrative procedures and establish funds for the management of **Project funds, Debt Obligation proceeds, the payment of Milestone Payments, Availability Payments, and P3 Payments** for the **Project Agreement**, the repayment of the debt service on the **Debt Obligations**, including, but not limited to procedures for handling **Project** payment requests, ensuring tax and arbitrage compliance, and all other financial records for the **Project** and the **Metro Flood Diversion Authority**. Said written administrative procedures must be kept on file with the **Secretary** and made available for public inspection.

Section 10.02 INTERIM FISCAL AGENT. The **City of Fargo** shall serve as the **Interim Fiscal Agent** for the **Project** on a temporary, interim basis and until such time as the **Metro**

Flood Diversion Authority shall appoint a **Fiscal Agent**. The **Interim Fiscal Agent** shall have the same powers, obligations, and duties as the **Fiscal Agent**.

Section 10.03 APPOINTMENT OF FISCAL AGENT. Pursuant to Section 5.09 of this **Agreement**, the **Diversion Authority Board** may appoint a **Fiscal Agent**. The **Fiscal Agent** is chosen by the **Diversion Authority Board** solely on the basis of cost, experience, and fiscal management qualifications. The **Fiscal Agent** is appointed by the **Diversion Authority Board** for an indefinite term and may be removed at any time by the **Diversion Authority Board**.

Section 10.04 FISCAL AGENT. The **Fiscal Agent** shall be responsible for the administration of financial and accounting functions for the **Metro Flood Diversion Authority**. The **Fiscal Agent** may be compensated by the **Metro Flood Diversion Authority** at a rate mutually agreed upon by the **Metro Flood Diversion Authority** and the **Fiscal Agent**. The **Fiscal Agent** shall establish and maintain for the management of **Project** funds including but not limited, to annual budgets, revenues, proceeds of **Debt Obligations** and the repayment of the debt service on the **Debt Obligations**, the payment of **Milestone Payments**, **Availability Payments**, and **P3 Payments**. The funds shall include, but are not limited to the following funds:

- (a) Budget Funds. The **Fiscal Agent** under the direction of the **Executive Director** shall establish and maintain an annual budget indicating anticipated annual revenues and expenditures in accordance with **GAAP** procedures.
- (b) Revenue Fund. The **Fiscal Agent** shall establish and maintain a **Project Revenue Fund**. All **Pledged Revenues** and any other source of revenue pledged by a **Member Entity** for the **Project** shall be deposited by the **Member Entities** into the **Revenue Fund** held by the **Fiscal Agent**. The **Fiscal Agent** shall, pursuant to and in accordance with this **Agreement** and any resolution approved by the **Diversion Authority Board** and the **Member Entity** issuing a **Debt Obligation** approved in accordance with ARTICLE XI of this **Agreement** and/or **Project Agreement**, withdraw **Pledged Revenue** from the **Revenue Fund** for a debt service payment on a **Debt Obligation** and/or to make **Milestone Payments** and/or **Availability Payments** and/or **P3 Payments**, funds sufficient to pay when due the debt service on the **Debt Obligation** or the **Milestone Payment** or the **Availability Payment**. The priority and specific flow of the deposit of **Pledge Revenues** shall be more fully set forth in the appropriate **Debt Obligation** documents and **Project Agreement**.
- (c) FM Diversion Project Fund. The **Fiscal Agent** shall establish and maintain a **FM Diversion Project Fund**. The **FM Diversion Project Fund** shall be a separate fund used only to pay costs and expenses that, under accepted accounting practices, constitute costs necessarily incurred to construct the **Project**, including but not limited to land, easements, buildings, structures, **Milestone Payments**, **Availability Payments**, **P3 Payments**, administration costs, office space, vehicle costs, and all other costs related to **Project** implementation, along with machinery and equipment, and the cost of all architectural, engineering, legal and other professional services, printing and publication and other costs reasonable, necessary and incidental thereto, including issuance costs. All proceeds of the

Debt Obligations sold in accordance with ARTICLE XI shall be credited to this **FM Diversion Project Fund**. Only costs and expenses of the **Project** as herein defined shall be paid from time to time as incurred and allowed under the **FM Diversion Project Fund**, and the monies in the **FM Diversion Project Fund** should be used for no other purposes.

- (d) Debt Obligation Fund. So long as any of the **Debt Obligations** remain outstanding, the **Fiscal Agent**, in accordance with the **Debt Obligation** documents and **Project Agreement**, shall establish and maintain a **Debt Obligation Fund**. The **Fiscal Agent** shall deposit the **Pledged Revenue** into the **Debt Obligation Fund** necessary to meet the annual principal and interest coming due on the **Debt Obligation** within the calendar year. The **Debt Obligation Fund** shall be a separate and special bookkeeping account on the official books and records of **Fiscal Agent** to be used for no other purpose than the payment of the principal of and interest on the **Debt Obligations**.
- (e) P3 Fund. During the term of the **Project Agreement**, the **Fiscal Agent** shall establish and maintain a **P3 Fund**. The **Fiscal Agent**, in accordance with the **Debt Obligation** documents and **Project Agreement**, shall deposit the **Pledged Revenue** into the **P3 Fund** necessary to meet the payments coming due on the **Milestone Payments** and/or **Availability Payments** and/or **P3 Payments** within the calendar year. The **P3 Fund** shall be a separate and special bookkeeping account on the official books and records of **Fiscal Agent** to be used for no other purpose than the payment of the **Milestone Payments** and/or **Availability Payments** and/or **P3 Payments**.
- (f) Reserve Fund. The **Fiscal Agent** shall establish and maintain a **Reserve Fund** into which the **Fiscal Agent** shall deposit funds from the **Revenue Fund**, which are not needed for the annual budget, the **Debt Obligation Fund**, the **Milestone Payment Fund**, the **Availability Payment Fund**, or the **P3 Payment Fund** into the **Reserve Fund**. The money held in the **Reserve Fund** shall be used to pay the debt service on the **Debt Obligations** whenever the amount on hand in the **Debt Obligation Fund** is insufficient to meet a debt service payment on the **Debt Obligations**. The **Reserve Fund** shall be maintained for the term of this **Agreement**. The money held in the **Reserve Fund** may be used to pay **Availability Payments** whenever the amount on hand in the **Availability Payment Fund** is insufficient to pay the annual **Availability Payments** coming due in a calendar year. Provided, this obligation is subordinate to the obligation to use **Reserve Fund** monies for the payment of **Debt Obligations**. Any interest earned in the **Reserve Fund** shall be deposited into the **Reserve Fund**. In the event that this **Agreement** is terminated, any monies remaining in the **Reserve Fund** shall first be applied to any outstanding **Debt Obligations**, remaining **Availability Payments**, and **Milestone Payments**. If any monies remain in the fund after the payment of the above items, it shall be returned to the **Member Entities** in proportion to their actual, respective financial contributions.

- (g) Operations and Maintenance Fund. After the **Program Management Consultant** determines that the **Project** or a **Project Element** is functionally operational, the **Fiscal Agent** shall establish and maintain an **Operations and Maintenance Fund**, into which the **Fiscal Agent** shall deposit any revenue pledged for operations and maintenance by the **Member Entities** pursuant to Section 9.03 of this **Agreement**. The **Operations and Maintenance Fund** shall be a separate and special bookkeeping account of the official books and records of the **Fiscal Agent** to be used for no other purpose than payment of operations and maintenance costs. The allocation of operations and maintenance costs for the project shall be in accordance with Sections 12.11 and 12.12 of this **Agreement**.
- (h) Miscellaneous Fund Accounts. The **Fiscal Agent** is hereby authorized to establish and maintain such other fund accounts or sub-fund accounts as may be required by the terms of the **Debt Obligations** or agreed upon by the **Member Entities** or as required by the **Project Agreement**.

Section 10.05 FISCAL AGENT TO ACT AS TRUSTEE OF FUNDS. The **Fiscal Agent**, acting as a trustee with a fiduciary duty to the other **Member Entities**, shall manage **Project** funds outlined in Section 10.04 of this **Agreement**. If for any reason the **Fiscal Agent** shall neglect or fail to perform said fiduciary duties, the **Diversion Authority Board** and the **Member Entities** may intervene and take any action necessary to avoid a default in payment of the debt service on the **Debt Obligations** or the payment of **Milestone Payments**, **Availability Payments**, and/or **P3 Payments** and ensure the proper management of the various funds described in Section 10.04 of this **Agreement**.

Section 10.06 FUNDS OPEN TO INSPECTION. At all times during the term of this **Agreement**, the **Fiscal Agent** shall make available for inspection its financial records with respect to the funds described in Section 10.04 of this **Agreement**. The **Member Entities** agree that **GAAP** procedures shall govern.

Section 10.07 NO COMINGLING OF FUNDS. All funds of the **Metro Flood Diversion Authority** shall be held in separate accounts in the name of the **Metro Flood Diversion Authority** and not commingled with funds of any **Member Entity** or any other person or entity. All funds of the **Metro Flood Diversion Authority** shall be strictly and separately accounted for, and regular reports shall be rendered of all receipts and disbursements, at least quarterly during the calendar year. The **Metro Flood Diversion Authority** shall contract with a public accountant to make an annual audit of the accounts and records of the **Metro Flood Diversion Authority**. All expenditures shall be made in accordance with the **Approved Budget**. Notwithstanding the foregoing, so long as the **City of Fargo** is acting as **Fiscal Agent**, the obligation to hold **Metro Flood Diversion Authority** funds in separate accounts shall not be applicable, as the **City of Fargo** is unable to comply with such requirements. The **City of Fargo** shall, however, endeavor to account separately for such **Metro Flood Diversion Authority** funds, deposits, and expenditures.

Section 10.08 REPORTS AND AUDITS. The **Fiscal Agent** shall submit a quarterly report to the **Diversion Authority Board Members** and the **Member Entities** showing any activity related to the funds described in Section 10.04 of this **Agreement**. The **Fiscal Agent** shall

provide the **Diversion Authority Board** with annual audit reports and other financial records as needed for the **Diversion Authority Board** to monitor its funds.

Section 10.09 ASSIGNMENT OR DELEGATION OF DUTIES. In the event that the **Fiscal Agent** is unable or unwilling to perform the duties of the **Fiscal Agent**, the **Diversion Authority Board** may assign the duties of the **Fiscal Agent** to a different third party private entity or a **Member Entity**. Prior to assigning the duties to either a private entity or a **Member Entity**, the **Metro Flood Diversion Authority** shall provide written notice of its intent to assign the duties of **Fiscal Agent** at least thirty (30) days prior to undertaking such action to the **Governing Body** of each of the **Member Entities**.

Section 10.10 FINANCE COMMITTEE. The **Fiscal Agent** shall provide reports and make recommendations regarding the management of **Project** funds and financing to the **Finance Committee** prior to submitting those recommendations to the **Diversion Authority Board**. The **Finance Committee** may make recommendations regarding the reports and recommendations of the **Fiscal Agent** and submit those reports and recommendations to the **Diversion Authority Board**.

Section 10.11 INSPECTION. The books and records of the **Diversion Board of Authority** shall be open to inspection by the **Diversion Authority Board Members** and **Member Entities** at all reasonable times.

ARTICLE XI. ISSUANCE OF DEBT FOR THE PROJECT

Section 11.01 INTENT. The **Member Entities** agree and acknowledge that the **Project** will require the issuance of **Debt Obligations** by one or more of the **North Dakota Member Entities** which may be used to pay costs directly associated with the **Project**, to fund the **Non-Federal Project Costs**, to refund prior **Debt Obligations**, both temporary and permanent, issued by one or more of the **North Dakota Member Entities**, or to make **Milestone Payments**, **Availability Payments** and/or **P3 Payments** in accordance with the **Project Agreement**.

Section 11.02 ISSUANCE OF DEBT FOR PROJECT PERMITTED. The **Member Entities** agree and acknowledge that N.D.C.C. § 54-40.3-01, and Minn. Stat. § 471.59 allow two or more Minnesota and North Dakota political subdivisions having in common any portion of their territory to cooperatively exercise their respective powers to issue **Debt Obligations** for the purpose of constructing and acquiring the **Project** that will be owned or operated jointly or cooperatively by and through a joint powers agreement.

Section 11.03 PROCEDURE TO ISSUE DEBT OBLIGATIONS. The **Member Entities** agree and acknowledge that the precise terms and conditions of the **Debt Obligations** are unknown as of the **Effective Date**. The specific terms of the **Debt Obligations** will be set forth by written resolution adopted by the **Metro Flood Diversion Authority** and the **Member Entity**, and/or **Member Entities**, issuing the **Debt Obligation**.

Section 11.04 REFUNDING OF TEMPORARY DEBT. The **Member Entities** agree and acknowledge that the **City of Fargo** and **Cass County** have previously issued the **Prior**

Temporary Sales Tax Revenue Notes, which will be refunded by the issuance of additional temporary or long-term **Debt Obligations** issued by one or more of the **Member Entities** pursuant to this **Agreement**. The **Member Entities** agree and acknowledge that the **Prior Temporary Sales Tax Revenue Notes** are hereby authorized to be refunded pursuant to a finance plan developed by the **Metro Flood Diversion Authority**. The **Member Entities** agree and acknowledge that **Pledged Revenues** may be used to refund the **Prior Temporary Sales Tax Revenue Notes**.

Section 11.05 DEBT OBLIGATION HELD/ISSUED BY MEMBER ENTITIES. The **Debt Obligations** will be issued by one or more of the **Member Entities**. The **Metro Flood Diversion Authority** shall not be deemed to be the issuer of **Debt Obligations** and the **Metro Flood Diversion Authority** shall not have the authority to pledge the full faith, credit and/or taxing power of a **Member Entity** without concurrent approval of the **Member Entity** issuing the **Debt Obligation**.

Section 11.06 COVENANTS TO LEVY AND COLLECT SALES TAX AND ASSESSMENTS, IF NEEDED. Until the **Debt Obligations** have been fully paid and redeemed as provided in the terms of the **Debt Obligations** or any extensions thereof, and the **Milestone Payments**, **Availability Payments** and **P3 Payments** have been fully satisfied in accordance with the **Project Agreement**, the **Member Entities** hereby covenant and agree that they will use their **Best Efforts** to fully and properly perform each and all of the covenants contained and referred to in this **Agreement** and in the **Debt Obligations** or any extensions thereof, and each and all of the duties prescribed in the **County 2010-2 Sale Tax Ordinance** and the **City 3-21 Sales Tax Ordinance** and/or any additional sales and use tax. The **City of Fargo** and **Cass County** also covenant that they shall use their **Best Efforts** to levy and collect the **County 2010-2 Sales Tax** and **City 3-21 Sales Tax** and/or any additional sales and use tax herein necessary for the payment of all debt service on the **Debt Obligations**. **CCJWRD** covenants that it will use **CCJWRD's Best Efforts** to levy and collect special assessments for the **Project** if required pursuant to the terms and conditions of this **Agreement**.

Section 11.07 CASS COUNTY TO MAINTAIN TAX EXEMPT STATUS. **Cass County** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be treated as private activity bonds. **Cass County** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

Section 11.08 CLAY COUNTY TO MAINTAIN TAX EXEMPT STATUS. **Clay County** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be treated as private activity bonds. **Clay County** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

Section 11.09 CITY OF FARGO TO MAINTAIN TAX EXEMPT STATUS. The **City of Fargo** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be treated as private activity bonds. The **City of Fargo** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

Section 11.10 CITY OF MOORHEAD TO MAINTAIN TAX EXEMPT STATUS. The **City of Moorhead** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be treated as private activity bonds. The **City of Moorhead** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

Section 11.11 CCJWRD TO MAINTAIN TAX EXEMPT STATUS. **CCJWRD** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be treated as private activity bonds. **CCJWRD** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

Section 11.12 BRRWD TO MAINTAIN TAX EXEMPT STATUS. **BRRWD** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be treated as private activity bonds. **BRRWD** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

ARTICLE XII. PROJECT PROCEDURES AND COST SHARE

Section 12.01 INTENT. The **Member Entities** agree and acknowledge that the following general procedures will govern the bidding, contracting and payment procedures for the **Project**.

Section 12.02 NORTH DAKOTA AND MINNESOTA MEMBER ENTITY ALLOCATION. The **Member Entities** agree and acknowledge that this **Agreement** allocates the costs of the **Project** to the **North Dakota Member Entities** and **Minnesota Member Entities** as lump sums. The

North Dakota Member Entities are authorized to enter into a separate, subordinate agreement as between the **North Dakota Member Entities** to allocate the **Project** and operations costs here allocated to the **North Dakota Member Entities** pursuant to Section 12.11 of this **Agreement**. The **Minnesota Member Entities** are authorized to enter into a separate, subordinate agreement as between the **Minnesota Member Entities** to allocate the **Project** and operations costs here allocated to the **Minnesota Member Entities** pursuant to Section 12.11 of this **Agreement**. Any agreements and the rights of the **Member Entities** thereunder, entered into by the **Member Entities** pursuant to this Section, shall be subordinate to the rights created under this **Agreement**.

Section 12.03 RELATIONSHIP OF COST SHARE TO PPA. The **Member Entities** acknowledge and agree that this **Agreement** is intended to allocate the **Non-Federal Work** under the **PPA** and expressly agree and acknowledge that this **Agreement's** cost share provisions shall govern the allocation of costs for the **Non-Federal Work** set forth in the **PPA**.

Section 12.04 MINNESOTA COST-ALLOCATION. The **Members Entities** agree and acknowledge that the Minnesota Department of Natural Resources has prepared a draft Environmental Impact Statement, which may be relied upon by the State of Minnesota's Legislature as it determines the level of funding available for the **Project** from the State of Minnesota. See Minn. Dep't of Nat. Res., Draft Environmental Impact Statement, Fargo-Moorhead Flood Risk Mgmt. Project 375, 381, 397, 399 (Sept. 2015). The **Member Entities** agree and acknowledge that the **City of Moorhead, Clay County, and/or BRRWD** cannot obligate the State of Minnesota with respect to the State of Minnesota's contribution of funds for the **Project**.

Section 12.05 AUTHORIZATION TO ADOPT SPECIFIC PROJECT CONSTRUCTION PROCEDURES. The **Member Entities** recognize that the size and complexity of the **Project** may require the adoption of additional operating procedures regarding the bidding, contracting and payment procedures for the **Project**. As a result, the **Diversion Authority Board** is authorized to adopt by written resolution specific written operating procedures regarding the bidding, contracting and payment procedures for the **Project**. The **Member Entities** recognize that, to the extent the **Metro Flood Diversion Authority** or any of the **Member Entities** will utilize funds generated by special assessments levied and collected by **CCJWRD** to fund or finance any engineering services, construction contracts, or other contracts or improvements, **CCJWRD** must approve the contracts, as required under N.D.C.C. § 61-16.1-24. While **CCJWRD** approval of such a contract is required, the contract may be held in the name of the **Metro Flood Diversion Authority**. The **Metro Flood Diversion Authority** shall reimburse **Member Entities** for all reasonable costs incurred by the **Member Entity** arising from or directly related to any **Project In-Kind Work**.

Section 12.06 NFS SEPARABLE ELEMENT PROCUREMENT. The **DCAI/NFS Separable Element**, which is located in North Dakota, may be designed, procured and constructed in accordance with Chapter 48-02.1 of the N.D.C.C. In the event that the **Diversion Authority Board** determines to construct the **DCAI/NFS Separable Element** in accordance with Chapter 48-02.1 of the N.D.C.C., the **NFS Separable Element** procurement process is exempt from the requirements of Chapter 48-01.2 and any additional restrictions regarding the construction, improvement, rehabilitation, operation and maintenance of the **DCAI/NFS Separable Element**

shall be set forth in the P3 procurement documents. If such an election is made by the **Diversion Authority Board**, Sections 12.07, 12.09, 12.10, 12.13, 12.14, and 12.15 of this **Agreement** shall not apply to the **DCAI/NFS Separable Element**.

Section 12.07 ENGINEERING SERVICES. The **Diversion Authority Board** may assign to a **Member Entity** the responsibility for planning and designing **Project In-Kind Work Elements**. The **Member Entities** agree that design of **Project In-Kind Work Elements** must be coordinated between the **Engineering Consultants** and **Engineering Staff** of the **Member Entities**. **Member Entities** may use their own **Engineering Consultants** or **Engineering Staff** for the design of **Project In Kind Work Elements** within their respective geographic jurisdiction. Provided that if a **Member Entity** utilizes its own **Engineering Consultants** or **Engineering Staff** it shall cooperate in **Good Faith** with the other **Member Entities'** **Engineering Consultants** or **Engineering Staff**. All engineering services procured by the **Metro Flood Diversion Authority** and/or **Member Entities** for **Project In-Kind Work** shall be provided by a professional engineer licensed within the state in which the **Project In-Kind Work** is to be constructed. The **Diversion Authority Board** shall reimburse **Member Entities** for all reasonable engineering costs incurred by the **Member Entity** arising from or directly related to the **Project In-Kind Work**.

Section 12.08 PROGRAM MANAGEMENT CONSULTANT SERVICES. The **Metro Flood Diversion Authority** shall hire a **Program Management Consultant** who will oversee the design and construction of the **Project**. The **Program Management Consultant** shall be under the direct supervision, control, and direction of the **Executive Director**. The **Executive Director** shall consult with the **Member Entities'** staff as needed and approve the **Diversion Authority Board's** removal and termination of the services of the **Program Management Consultant** in accordance with Section 5.09 of this **Agreement**.

Section 12.09 BIDDING FOR IN-KIND WORK ELEMENTS. **In-Kind Work Elements** shall be let for bids by either the **Metro Flood Diversion Authority** or a **Member Entity** requested to perform **In-Kind Work Elements** pursuant to this Section. All bidding of **In-Kind Work Elements** whether undertaken by the **Metro Flood Diversion Authority** or a **Member Entity** shall be held in accordance with this section, applicable **USACE** bidding laws and rules, and either Chapter 48-01.2 of the N.D.C.C., Minn. Stat. § 471.345 (The Uniform Municipal Contracting Law), or other applicable state procurement and/or bidding laws, depending upon the state in which the **Member Entity** is located. The **Member Entities'** local bidding rules or procedures shall not apply to the bidding procedure for **In-Kind Work Elements**.

In the event that the **Metro Flood Diversion Authority** requests that a **Member Entity** undertake construction of an **In-Kind Work Element**, the **Metro Flood Diversion Authority** will provide a written request to the **Member Entity** and an estimated budget for the requested **In-Kind Work Element**. The **Member Entity** shall proceed with designing, letting bids, accepting the bidder deemed to be the winning bidder under applicable laws, rules, and regulations, awarding the contract for the **In-Kind Work Element**, and proceeding with the requested **In-Kind Work Element** if the cost of the requested **In-Kind Work Element** is within the budget provided by the **Metro Flood Diversion Authority**. Provided that if the cost of the requested **In-Kind Work Element** exceeds the budget set forth by the **Metro Flood Diversion Authority**, the **Member Entity** shall request authorization from the **Metro Flood Diversion**

Authority to proceed with the **In-Kind Work Element** and shall not proceed with awarding the bid or commencing construction of the **In-Kind Work Element** until the **Member Entity** receives approval from the **Metro Flood Diversion Authority**. Copies of all public documents held by **Member Entities** reflecting actions undertaken by the **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 12.10 CONTRACT. Contracts for **In-Kind Work Elements** shall identify the **Member Entity** undertaking the **In-Kind Work Element** or the **Metro Flood Diversion Authority** as the owner under the contract. The form of the contract shall be approved by the **Program Management Consultant**, the **Executive Director**, and **CCJWRD** if the **Metro Flood Diversion Authority** or any of the **Member Entities** will utilize funds generated by special assessment levied and collected by **CCJWRD**, as required under N.D.C.C. § 61-16.1-24. All contracts for **In-Kind Work Elements** shall be approved at a public meeting and by resolution of either the **Member Entity's Governing Body** or the **Diversion Authority Board**. Copies of all contracts held by a **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 12.11 COST SHARE. The **Total Project Costs** and **Maintenance Costs** shall be split and apportioned between the **Member Entities** in the following manner:

	Minnesota Member Entities	North Dakota Member Entities	USACE
Total Project Costs (Capital Costs)	Consistent with the final cost allocation determined by the Minnesota DNR EIS, but not to exceed \$100,000,000**	All remaining amounts	Not to exceed \$450,000,000*
Maintenance Costs***	Consistent with the final cost allocation between Minnesota & North Dakota as determined by the Minnesota DNR EIS	All remaining amounts	None

* Or such amount as is agreed to in the **PPA**, as the same may be amended from time to time. Dollar amount is stated as 2015 dollars, as **Adjusted for Inflation**, as provided in the **PPA**.

** As **Adjusted for Inflation**.

*** Costs associated with **Extraordinary Maintenance** of the **Project** shall be split and apportioned among and between the **Member Entities** in accordance with the cost share percentage for the **Total Project Costs** set forth in this Section 12.11 of this **Agreement**.

Section 12.12 OPERATIONS COSTS ALLOCATION. The **Member Entities** agree and acknowledge that the costs to operate the **Project** will depend upon the frequency and severity of flood events. Upon substantial completion of the **Project**, the **Diversion Authority Board** will develop a methodology and finance plan to allocate the costs of operating the **Project** and the **Member Entities'** share of the costs of operating the **Project**. The methodology and finance plan for allocating the costs of operating the **Project** must be approved by a two-thirds (2/3) vote of all **Diversion Authority Board Members** and is subject to the requirements of Section 5.09 of this **Agreement**.

Section 12.13 MINNESOTA MEMBER ENTITIES' SHARE OF TOTAL PROJECT COSTS. The **Member Entities** agree and acknowledge that the Minnesota Share of the **Total Project Costs** will be funded solely and exclusively by the Minnesota Legislature and that the **Metro Flood Diversion Authority** is expressly assuming the risk that the Minnesota Legislature may not fully fund or make any appropriations for the **Minnesota Member Entities'** share of **Total Project Costs**. It is expressly understood by the **Member Entities** that the **City of Moorhead, Clay County**, and/or **BRRWD** cannot obligate the State of Minnesota and under no circumstances shall a **Minnesota Member Entity** be held liable for non-appropriations by the Minnesota Legislature. This restriction shall not apply to maintenance costs or operations costs.

Section 12.14 CONSTRUCTION OVERSIGHT/INSPECTIONS. Construction oversight and inspection of work performed pursuant to contracts for **In-Kind Work Elements** shall be undertaken by either the **Member Entity** or the **Metro Flood Diversion Authority**, whichever entity is identified as the owner under the contract. Construction oversight and inspection techniques, procedures and records of the **Member Entity** relating to construction oversight and inspection of the **In-Kind Work Elements** shall be approved by the **Program Management**

Consultant and the **Executive Director**. Copies of all construction oversight and inspection documents held by a **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 12.15 PROCESSING OF PAY REQUESTS AND CHANGE ORDERS. Pay request and change orders relating to contracts for **In-Kind Work Elements** shall be reviewed and approved by either the **Member Entity** or the **Metro Flood Diversion Authority**, whichever entity is identified as the owner under the contract. Provided that, whether a **Member Entity** or the **Metro Flood Diversion Authority** is identified as the owner under the contract, change orders exceeding ten percent (10%) or one hundred thousand dollars (\$100,000), whichever amount is smaller, of the original contract amount for the **In-Kind Work Element** shall be approved by the **Program Management Consultant** and the **Executive Director**. Copies of all pay requests and change orders held by a **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 12.16 FINAL PUNCH LIST. Prior to a **Member Entity** approving the final punch list and the final pay request for **In-Kind Work Elements** requested by the **Metro Flood Diversion Authority**, the **Program Management Consultant** and the **Executive Director** shall review and approve the final punch list and pay request to assure that the **In-Kind Work Element** is completed in accordance with the overall plan and design of the **Project**. The **Member Entities** agree that an **In-Kind Work Element** must be a **Functional Portion of the Project** and constructed to work with other **Project Elements** in order to ensure a functional **Project**.

Section 12.17 DISPUTES WITH CONTRACTORS. The **Member Entities** and the **Metro Flood Diversion Authority** shall coordinate with respect to any disputes with contractors regarding contracts let for the **Project**. Such coordination shall include any potential or ongoing litigation with the contractor. If a **Member Entity** has a claim made against it for a contract for construction of an element of the **Project**, the **Metro Flood Diversion Authority** shall reimburse the **Member Entity** for any and all legal fees or other costs or damages the **Member Entity** incurs arising from or related to the contract dispute. Claims made or brought against a **Member Entity** arising out of contracts let for the **Project** shall be venued in accordance with the applicable construction contract venue selection language and/or applicable federal or state rules, regulations, or laws.

Section 12.18 RICHLAND COUNTY, WILKIN COUNTY, AND THE CITY OF WEST FARGO NOT RESPONSIBLE FOR PROJECT COSTS. The participation of a member of a **Governing Body** of **Richland County, Wilkin County**, and/or the **City of West Fargo** shall in no way be construed as creating a financial obligation of **Richland County, Wilkin County**, or the **City of West Fargo** to contribute funds to the **Project**.

ARTICLE XIII. OPERATIONS AND MAINTENANCE

Section 13.01 PROJECT MAINTENANCE. The **Member Entities** agree and acknowledge that the **Project** will require long-term management, operations and maintenance. The **Member Entities** agree and acknowledge that because of the diversity of **Project Property** ownership and the overlapping jurisdiction of the **Member Entities**, that the **Diversion Authority Board**

will oversee the long-term management, operations, and maintenance of the **Project**. The **Metro Flood Diversion Authority** shall reimburse **Member Entities** for all reasonable costs incurred by the **Member Entity** arising from or directly related to management, operation, improvement, modification, or maintenance of the **Project**.

Section 13.02 OPERATIONS. The **Executive Director** and the **Diversion Authority Board** are authorized to provide amounts within the annual budget for the annual administration and operations of the **Project**. The **Diversion Authority Board** shall by written resolution enact specific procedures and policies to govern the operation of the **Project**, including but not limited to, operations of the control structure, channel and other elements of the **Project**. These procedures shall be in accordance with any applicable **USACE** operations requirements and federal and state laws.

Section 13.03 P3 DEVELOPER. Pursuant to 6.01(hh) of this **Agreement**, the **Metro Flood Diversion Authority** or a **Member Entity** may enter into a **Project Agreement** to provide for the design, construction, financing, operations, and maintenance of the **DCAI/NFS Separable Element** and may contract with the **P3 Developer** to provide operations and maintenance for the **Project** as a whole.

Section 13.04 MAINTENANCE. The **Diversion Authority Board** may request one or more **Member Entities** to perform snagging, clearing and maintaining of the **Project**. The **Metro Flood Diversion Authority** may finance or directly fund maintenance costs in whole or part with funds raised through the collection of sales and use tax receipts, a maintenance levy special assessment imposed by **CCJWRD**, storm water fees or other charges imposed and collected by **Member Entities**. Revenue raised pursuant to a maintenance levy special assessment may not be used for construction of the **Project**. The **Diversion Authority Board** may also annually draw funds from the **Operations and Maintenance Fund** created pursuant to Section 10.04 of this **Agreement**.

Section 13.05 OPERATIONS AND MAINTENANCE EMPLOYEES. The **Metro Flood Diversion Authority** may hire employees or contract with private entities, including the **P3 Developer**, to provide for the annual maintenance of the **Project**, including, mowing, general maintenance, clearing and all other maintenance activities. The **Executive Director** shall provide the **Diversion Authority Board** with regular updates regarding operations and maintenance of the **Project**.

Section 13.06 ADOPT PROCEDURES. The **Diversion Authority Board** may adopt procedures, protocols, and standard operating procedures for the **Project** by written resolution. The procedures, protocols, and standard operating procedures shall be developed in cooperation by the administrative staffs of the **Member Entities** and the **Program Management Consultant**. The resolution or resolutions approving the procedures, protocols, and standard operating procedures shall be submitted to the **Member Entities** a minimum of forty-five (45) days prior to consideration by the **Diversion Authority Board**. The **Member Entities** may comment upon the draft resolution by submitting written comments to the **Diversion Authority Board**. The **Diversion Authority Board** may then approve the resolution establishing the procedures, protocols, and standard operating procedures in accordance with the voting requirements of Section 5.09 of this **Agreement**. Provided, that cost allocations for **Project**

operations costs shall be adopted in accordance with Section 12.11 of this **Agreement**. The **Diversion Authority Board** will have authority to operate the **Project**, and the **Member Entities** shall cooperate with the operations policies of the **Diversion Authority Board**.

Section 13.07 REQUESTS TO PERFORM MAINTENANCE. The **Metro Flood Diversion Authority** may request that a **Member Entity** undertake maintenance of a **Project Element**.

Section 13.08 CONTRACTS FOR MAINTENANCE OF PROJECT ELEMENTS. Contracts for maintenance of **Project Elements** shall identify the **Member Entity** undertaking the maintenance or the **Metro Flood Diversion Authority** as the owner under the contract. The form of the Contract shall be approved by the **Program Management Consultant** and the **Executive Director**. All contracts for maintenance of **Project Elements** shall be approved at a public meeting and by resolution of either the **Member Entity's Governing Body** or the **Diversion Authority Board**. Copies of all contracts held by a **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 13.09 PROCESSING OF PAY REQUESTS AND CHANGE ORDERS FOR MAINTENANCE CONTRACTS. Pay request and change orders relating to contracts for maintenance of **Project Elements** shall be reviewed and approved by either **Member Entity** or the **Metro Flood Diversion Authority** which ever entity is identified as the owner under the contract. Provided that whether a **Member Entity** or the **Metro Flood Diversion Authority** is identified as the owner under the contract, change orders exceeding ten percent (10%) or one hundred thousand dollars (\$100,000), whichever amount is smaller, of the original contract amount for the maintenance of **Project Elements** shall be approved by the **Executive Director**. Copies of all pay requests and change orders held by a **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 13.10 FINAL PUNCH LIST FOR MAINTENANCE CONTRACTS. Prior to a **Member Entity** approving the final punch list and the final pay request for maintenance of **Project Elements** requested by the **Metro Flood Diversion Authority**, the **Executive Director** shall review and approve the final punch list and pay request to assure that the maintenance of the **Project Element** is completed in accordance with the overall operations and maintenance plan for the **Project**.

Section 13.11 DISPUTES WITH CONTRACTORS REGARDING MAINTENANCE CONTRACTS. The **Member Entities** and the **Metro Flood Diversion Authority** shall coordinate with respect to any disputes with contractors regarding contracts let for the maintenance of a **Project Element**. Such coordination shall include any potential or ongoing litigation with the contractor. If a **Member Entity** has a claim made against it for a contract for maintenance of a **Project Element**, the **Metro Flood Diversion Authority** shall reimburse the **Member Entity** for any and all legal fees or other costs or damages the **Member Entity** incurs arising from or related to the contract dispute. Claims made or brought against a **Member Entity** arising out of a contract for maintenance of a **Project Element** shall be venued in accordance with the applicable maintenance contract venue selection language and/or applicable federal or state rules, regulations, or laws.

**ARTICLE XIV.
EXECUTIVE DIRECTOR**

Section 14.01 THE EXECUTIVE DIRECTOR. The **Executive Director** is the chief administrative officer of the **Metro Flood Diversion Authority**. The **Executive Director** is chosen by the **Metro Flood Diversion Authority** solely on the basis of training, experience, executive and administrative qualifications. The **Executive Director** is appointed by the **Diversion Authority Board** for an indefinite term and may be removed at any time by the **Diversion Authority Board**; however, the **Diversion Authority Board** is authorized to enter into an employment agreement with the **Executive Director** containing provisions that address termination for cause, termination without cause, or both.

Section 14.02 POWERS AND DUTIES OF THE EXECUTIVE DIRECTOR.

- (a) The **Executive Director** is the head of the administrative branch of the **Metro Flood Diversion Authority** and is responsible to the **Diversion Authority Board** for the administration of the **Metro Flood Diversion Authority's** affairs.
- (b) The **Executive Director** will be responsible for compliance of, and enforcement of, this **Agreement** and the resolutions of the **Metro Flood Diversion Authority**.
- (c) The **Executive Director** appoints employees on the basis of merit and fitness and subject to the applicable personnel policies or rules of the **Metro Flood Diversion Authority** and the **Approved Budget**. The **Executive Director** may remove or suspend appointed employees subject to applicable personnel policies or rules. The **Executive Director** shall maintain authorized Full Time Equivalent (FTE) position for the organization consistent with **Diversion Authority Board** approvals and budgetary constraints. The **Executive Director** may delegate task and projects to **Metro Flood Diversion Authority** employees or **Member Entity** staff.
- (d) The **Executive Director** must attend meetings of the **Diversion Authority Board**. The **Executive Director** may take part in discussion at **Diversion Authority Board** meetings but may not vote.
- (e) The **Executive Director** may recommend to the **Diversion Authority Board** for adoption measures necessary for the efficient administration of the **Metro Flood Diversion Authority's** affairs.
- (f) The **Executive Director** must keep the **Diversion Authority Board** fully advised of the financial condition of the **Metro Flood Diversion Authority**. The **Executive Director** must prepare and submit the annual budget.
- (g) The **Executive Director** will implement the **Diversion Authority Board's** policies regarding operation and maintenance of the **Project**.

- (h) The **Executive Director** performs other duties prescribed by this **Agreement** or the **Diversion Authority Board**.
- (i) The **Executive Director** shall be employed by the **Metro Flood Diversion Authority** pursuant to a written employment agreement.
- (j) The **Executive Director** may make recommendations regarding the **Fiscal Agent**, but does not have the power to suspend and/or remove the **Fiscal Agent**.
- (k) The **Executive Director** must keep the **Member Entities'** administrative staff fully advised of the activities of the **Metro Flood Diversion Authority**.

Section 14.03 DEPUTY EXECUTIVE DIRECTOR. The **Cass County** Administrator and the **City of Fargo** City Administrator shall serve jointly as the **Deputy Executive Director** to the **Metro Flood Diversion Authority**. The **Deputy Executive Director** shall serve as the **Executive Director**, when the office of **Executive Director** is vacant and unfilled.

Section 14.04 EXECUTIVE DIRECTOR TO CONSULT WITH MEMBER ENTITIES' ADMINISTRATIVE STAFF. The **Executive Director** shall consult with staff members of the **Member Entities** and hold and conduct staff meetings as the **Executive Director** deems necessary. At least two (2) times per year, the **Executive Director** shall call and hold a meeting with all of the **Member Entities'** chief administrative officers.

Section 14.05 ADMINISTRATIVE ORGANIZATION. The **Diversion Authority Board** may by resolution establish **Metro Flood Diversion Authority** departments, offices and agencies and prescribe their functions. A power or duty conferred by this **Agreement** on an office or agency may not be transferred by the **Diversion Authority Board** to a different office or agency.

Section 14.06 PURCHASES AND CONTRACTS. The **Executive Director** is the chief purchasing agent of the **Metro Flood Diversion Authority**. Purchases and contracts are made by the **Executive Director** in accordance with procedures specified by **Diversion Authority Board** resolution. The **Executive Director** may not enter into a purchase or contract in an amount more than ten thousand dollars (\$10,000) on behalf of the **Metro Flood Diversion Authority** without the approval by the **Diversion Authority Board**. Other contracts and bonds, instruments and documents to which the **Metro Flood Diversion Authority** is a party must be signed by the **Chair** and the **Executive Director** on behalf of the **Metro Flood Diversion Authority**. Except as set forth in Section 12.04 of this **Agreement**, the **Diversion Authority Board** may by resolution adopt additional regulations for making **Metro Flood Diversion Authority** contracts. **Metro Flood Diversion Authority** contracts must be made in accordance with law.

ARTICLE XV. INSURANCE AND LIABILITY

Section 15.01 LIABILITY COVERAGE. To the fullest extent permitted by law, actions by the **Member Entities** pursuant to this **Agreement** are intended to be and shall be construed as a "cooperative activity" and it is the intent of the **Member Entities** that they shall be deemed a "single governmental unit" for the purpose of liability. The **Metro Flood Diversion Authority**

shall maintain liability coverage with the North Dakota Insurance Reserve Fund with a minimum limit equal to the maximum liability limit in N.D.C.C. § 32-12.1-03 and/or Minn. Stat. § 466.04, Subdivision 1, whichever amount is greater. Alternatively, the **Metro Flood Diversion Authority** may maintain equivalent private liability coverage. Such policy may be provided through a commercial general limited liability (“CGL”) policy. Such private liability policies must comply with the following requirements:

- (a) Minimum Limits. Each policy shall have a limit at least equal to the maximum municipal liability limits in N.D.C.C. § 32-12.1-03 and/or Minn. Stat. § 466.04, Subdivision 1, whichever amount is greater. If the policy contains a general aggregate limit, the general aggregate limit shall not be less than \$10,000,000.
- (b) Type of Coverage. The CGL insurance shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury and advertising industry, and contractually assumed liability.
- (c) Additional Covered Parties. Each **Member Entity**, and each **Member Entities’** officers, employees, and volunteers, shall be named as additional covered parties on each policy for all claims arising from **Project** activities or operations.

Section 15.02 ADDITIONAL POLICIES AUTHORIZED. The **Metro Flood Diversion Authority** may, in its discretion, procure coverage for the **P3 Developer**, its subcontractors, financiers, successors or assigns, pursuant to the terms and conditions of a **Project Agreement**, or other parties as needed and deemed necessary by the **Diversion Authority Board**.

Section 15.03 AUTO LIABILITY AND PROPERTY DAMAGE. The **Metro Flood Diversion Authority** may in its discretion procure coverage for auto liability and damage or loss of property. Each party shall be responsible for damages to or loss of its own equipment that is used for **Metro Flood Diversion Authority** activities. Each **Member Entity** waives the right to, and agrees that it will not, bring any claim or suit against the **Metro Flood Diversion Authority** or any other **Member Entity** for damages to or loss of its equipment arising out of participation in or assistance with the **Metro Flood Diversion Authority** operations or activities, even if the damages or losses were caused wholly or partially by the negligence of the other **Member Entities** or their officers, employees or volunteers.

Section 15.04 WORKERS' COMPENSATION COVERAGE. In the event that the **Metro Flood Diversion Authority** hires employees, it shall maintain worker's compensation coverage of its employees. Each **Member Entity** shall be responsible for injuries or death of its own personnel. Each **Member Entity** will maintain worker's compensation insurance or self-insurance coverage, covering its own personnel if they participate in or assist **Metro Flood Diversion Authority** operations or activities. Each **Member Entity** waives the right to, and agrees that it will not, bring any claim or suit against the **Metro Flood Diversion Authority** or any other **Member Entity** for any workers' compensation benefits paid to its own employee or dependents, that arise out of participation in or assistance with **Metro Flood Diversion Authority** operations or activities, even if the injuries were caused wholly or partially by the negligence of any other **Member Entity** or its officers, employees, or volunteers.

Section 15.05 DEFENSE AND INDEMNIFICATION. The **Metro Flood Diversion Authority** agrees to defend and indemnify the **Member Entities** and the individual **Diversion Authority Board Members** for any liability claims arising from the **Metro Flood Diversion Authority** activities or operations, decisions of the **Metro Flood Diversion Authority**, or arising out of or regarding the **Project**. Nothing in this **Agreement** shall constitute a waiver of the statutory limits of liability set forth in N.D.C.C. § 32-12.1-03 and/or Minn. Stat. § 466.04 or a waiver of any available immunities or defenses. Nothing herein shall be construed to provide insurance coverage or indemnification to an officer, employee, or volunteer of any **Member Entity** for any act or omission for which the officer, employee, or volunteer is guilty of malfeasance in office, willful neglect of duty or bad faith.

Section 15.06 INDEMNITY OF NON-FEDERAL SPONSORS. The **Metro Flood Diversion Authority** shall, to the fullest extent authorized by law, at all times hereafter, indemnify and hold the **City of Moorhead** and the **City of Fargo**, and each of them, harmless against any and all claims, suits, actions, debts, damages, costs, charges and expenses, including court costs and attorney's fees, and legal fees or disbursements paid or incurred, and against all liability, losses, and damages of any nature whatsoever, to any person who makes or asserts a claim against the **Non-Federal Sponsors**, or any of them, for any reason related to the **Project** including, without limitation, any obligation owed to the **USACE** as a result of the relationship, contractual or otherwise, between the **USACE** and the **Non-Federal Sponsors**; said indemnity and hold-harmless obligation applying to any act or failure to act on the part of one or more of the **Non-Federal Sponsors** occurring prior to or after the **Effective Date** of this **Agreement**. Should a **Member Entity** be prohibited by law from indemnifying another party to this **Agreement** the party so prohibited agrees to pay to the **Metro Flood Diversion Authority** the **Member Entity's** proportionate share, as determined by the cost share allocation formula set forth in Section 12.11 of this **Agreement** and as limited by Section 12.13 of this **Agreement** (relating to the appropriations of the Minnesota Legislature), of any monetary amount paid to any person who successfully makes or asserts a claim against the **Non-Federal Sponsors**, or any of them. This Indemnity and hold harmless obligation shall survive the termination of this **Agreement**. Nothing herein shall be deemed a waiver by the **Metro Flood Diversion Authority** of the limits on liability set forth in N.D.C.C. § 32-12.1-03 and/or Minn. Stat. § 466.04 or a waiver of any available immunities or defenses. The **Metro Flood Diversion Authority's** obligation to hold and save the **City of Fargo** and the **City of Moorhead** harmless shall be limited by the limitations on liability set forth in N.D.C.C. § 32-12.1-03 and/or Minn. Stat. § 466.04, as amended from time to time. Further, the limitations on liability for each of the **Member Entities** shall not be added together or stacked to increase the maximum amount of liability.

Section 15.07 INDEMNIFICATION. In the event that a claim is made against a **Member Entity** arising out of or related to the **Project**, and the **Member Entity** seeks defense and indemnification from the **Metro Flood Diversion Authority** pursuant to Sections 15.05 and 15.06 of this **Agreement**, the **Metro Flood Diversion Authority** shall first apply any and all available and/or applicable insurance proceeds against said claim. In the event that such insurance proceeds are insufficient to satisfy the costs associated with such claim, and only after the application of insurance proceeds, said costs shall then be paid by funds made available to the **Metro Flood Diversion Authority** by the **Member Entities**. Any amounts remaining to be paid shall then be allocated to the **Member Entities** in proportion to the cost allocation for **Total**

Project Costs set forth in Section 12.11 of this **Agreement** and as limited by Section 12.13 (relating to the appropriations of the Minnesota Legislature) of this **Agreement**.

Section 15.08 UNINSURED LIABILITY. Any excess or uninsured liability shall be borne in accordance with the cost-share formula for maintenance set forth in Section 12.11 of this **Agreement**, and as limited by Section 12.13 of this **Agreement** (relating to the appropriations of the Minnesota Legislature), by all **Member Entities**; however, this does not include the liability of any individual officer, employee, or volunteer which arises from his or her own malfeasance, willful neglect of duty or bad faith.

Section 15.09 CERTIFICATE OF INSURANCE. All insurance policies and certificates required under this **Agreement** shall be open to inspection by any **Member Entity** and copies of the policies or certificates shall be submitted to a **Member Entity** upon written request.

ARTICLE XVI. OWNERSHIP OF PROPERTY ACQUIRED FOR THE PROJECT

Section 16.01 INTENT OF THE MEMBER ENTITIES. The **Member Entities** agree and acknowledge that the **Project** requires the acquisition of easements, rights-of-way, and lands within the various jurisdictions of the **Member Entities**. The **Member Entities** desire to set forth the responsibilities for each of the **Member Entities** with respect to the ownership of easements, rights-of-way and lands related to and/or connected with the **Project**. The **Member Entities** intend that easements, rights-of-way and lands related to the **Project** will be titled in the names of the various **Member Entities**.

Section 16.02 PUBLIC PURPOSE. The **Member Entities** acknowledge, agree and declare that the acquisition of easements, rights-of-way and land for the **Project** is for a public need and purpose.

Section 16.03 USACE ACCESS TO PROJECT PROPERTY. The **Member Entities** agree to give the **USACE** a right to enter, at reasonable times, upon reasonable notice, and in a reasonable manner, upon **Project Property**.

Section 16.04 OWNERSHIP OF PROJECT PROPERTY. The **Member Entities** agree and acknowledge that the title to easements, rights-of-way and land necessary and related to the **Project Property** will be as follows:

- (a) Diversion Channel and Associated Infrastructure (DCAI). Title to easements, rights-of-way, and land necessary and related to the **DCAI** will be held in the name of **CCJWRD**, both during construction of the **Project** and following completion of the **Project**. **CCJWRD** will provide access, ingress, egress, and use of the **DCAI** rights-of-way and land to the **P3 Developer** in accordance with and pursuant to the terms of the **Project Agreement**, in order to enable the **P3 Developer** to fulfill its obligations under the **Project Agreement**.
- (b) In-Town Levees Located Within the City of Fargo. Title to easements, rights-of-way, and land necessary related to the **In-Town Levees** located within the **City of**

Fargo the will be held in the name of the **City of Fargo**, following completion of construction of each individual levee. During construction, title to easements, rights-of-way, and land necessary related to the **In-Town Levees** may be held in the name of **CCJWRD**. If **CCJWRD** holds title during construction of the **Project**, it will convey the property to the **City of Fargo** upon completion of the **Project Element**.

- (c) In-Town Levees Located within the City of Moorhead. Title to easements, rights-of-way, and land necessary and related to the **In-Town Levees** located within the **City of Moorhead** will be held in the name of the **City of Moorhead**.
- (d) Wild Rice Inlet and Control Structure. Title to easements, rights-of-way, and land necessary and related to the **Wild Rice Inlet and Control Structure** will be held in the name of **CCJWRD**.
- (e) Red River Control Structure. Title to easements, rights-of-way, and land necessary and related to the **Red River Control Structure** will be held in the name of the **BRRWD**.*
- (f) Southern Embankment and Retention Area Located in North Dakota. Title to easements, rights-of-way, and land necessary and related to the **Southern Embankment and Retention Area** located in North Dakota will be held in the name of **CCJWRD**.
- (g) Oxbow-Hickson-Bakke Levee. Title to easements, rights-of-way, and land necessary and related to the Oxbow-Hickson-Bakke levee will be held in the name of **CCJWRD**.
- (h) Southern Embankment and Retention Area Located in Minnesota. Title to easements, rights-of-way, and land necessary and related to the **Southern Embankment and Retention Area** located in Minnesota will be held in the name of the **BRRWD**.*
- (i) Comstock Levees. Title to easements, rights-of-way, and land necessary to the Comstock levees will be held in the name of **BRRWD**.*
- (j) Mitigation Projects. **Project** mitigation elements such as the Drayton Dam Project shall be held in the name of the **Metro Flood Diversion Authority** or another political subdivision or **Member Entity** pursuant to an agreement. In the event that the **Metro Flood Diversion Authority** is dissolved, **Project** mitigation elements shall be transferred to either the **City of Fargo** or the **City of Moorhead** as the two, permanent **Non-Federal Sponsors**.
- (k) Future City Annexations. To the extent that the **City of Fargo** or the **City of Moorhead** annexes land in the future, title to levees that would then qualify as "In-Town Levees" will be transferred, accordingly, to the **City of Fargo** or the **City of Moorhead**, whichever is the annexing city. The right to acquire title to

Project Property shall not extend to cities or entities that are not **Member Entities** to this **Agreement**.

* BRRWD is authorized to enter into an agreement with other **Minnesota Member Entities** or the **Metro Flood Diversion Authority** to transfer ownership of **Project Property** it acquires to **Clay County**, the **City of Moorhead**, and/or the **Metro Flood Diversion Authority**.

Section 16.05 VARIANCES IN OWNERSHIP. The **Member Entities** acknowledge and agree that the scale of the **Project** may, from time to time, require variances from the identified ownership of easements, rights-of-way and land set forth in Section 16.03 of this **Agreement**. To the extent that a variance in ownership of **Project Property** is necessary such variance will be consistent with the policies of the **Metro Flood Diversion Authority** and the **Member Entities** will work cooperatively to acquire **Project Property**. The **Metro Flood Diversion Authority** shall approve variances in the ownership of property from Section 16.03 by written resolution.

Section 16.06 NATURE OF OWNERSHIP. The **Member Entities** acknowledge, agree and covenant that they shall hold **Project Property** for the benefit of the **Project** and the **Metro Flood Diversion Authority** and they shall at all times control and maintain ownership of the **Project Property** to ensure that the **Project Property** is available for the **Project**. The **Member Entities** acknowledge, agree and covenant that they shall not take any action with respect to the **Project Property** which would undermine the financing, construction, operation and maintenance of the **Project**.

Section 16.07 REQUEST FOR ACQUISITION OF PROJECT PROPERTY. In the event that the **Metro Flood Diversion Authority** requests that a **Member Entity** undertake the acquisition of **Project Property**, the **Metro Flood Diversion Authority** will provide a written request to the **Member Entity** and an estimated budget for the requested land acquisition. The **Member Entity** shall proceed with acquiring the **Project Property** by either voluntary action or eminent domain if the cost of the requested purchase or the eminent domain litigation is within the budget provided by the **Metro Flood Diversion Authority**. Provided that if the cost of the **Project Property** acquisition exceeds the budget set forth by the **Metro Flood Diversion Authority**, the **Member Entity** shall request authorization from the **Metro Flood Diversion Authority** to proceed with the **Project Property** acquisition and shall not proceed with acquiring the **Project Property** until the **Member Entity** receives approval from the **Metro Flood Diversion Authority**. Copies of all public documents held by **Member Entities** reflecting actions undertaken by the **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 16.08 EMINENT DOMAIN ACTIONS. In the event that a **Member Entity** is required to commence an eminent domain action to acquire **Project Property**, the eminent domain action will be venued in a court having jurisdiction over such action, and as determined by the **Member Entity** commencing the eminent domain action.

Section 16.09 REIMBURSEMENT FOR PROJECT PROPERTY ACQUIRED AFTER EFFECTIVE DATE. The **Member Entities** agree and acknowledge that each **Member Entity** will be reimbursed for **Project Property** that it acquires after the **Effective Date** of this **Agreement** pursuant to requests of the **Metro Flood Diversion Authority**. Reimbursement to **Member**

Entities will include, but not be limited to, the purchase price of the **Project Property**, appraisal costs, negotiation costs, title preparation and examination costs, relocation and re-establishment costs, legal fees associated with the acquisition, court costs, closing costs arising from and related to the acquisition of **Project Property**, environmental remediation, cultural mitigation, and any other costs required by the Uniform Act. Each **Member Entity** that acquires **Project Property** shall submit its request for reimbursement to the **Program Management Consultant** and to the **Fiscal Agent** for payment. The **Metro Flood Diversion Authority** will review and determine if such costs are eligible for reimbursement and then shall reimburse the **Member Entity** for the allowable costs incurred in connection with **Project Property** acquisition.

Section 16.10 SALE OF EXCESS PROJECT PROPERTY. The **Member Entities** agree and acknowledge that excess real property may be acquired in connection with real property needed for the **Project**. In the event that excess real property is acquired, the **Member Entity** shall coordinate the sale, conveyance, or lease of such property with the **Executive Director** and that **Member Entity's** chief administrative staff. **Member Entities** shall not sell, trade, and/or exchange excess **Project Property** without prior written approval from the **Diversion Authority Board**. All monies generated, less reasonable administrative expenses incurred by the **Member Entity**, from the sale, conveyance, or lease of excess **Project Property** by a **Member Entity**, shall be remitted to the **Metro Flood Diversion Authority**.

Section 16.11 PROJECT PROPERTY OWNERSHIP UPON WITHDRAWAL AND OR REMOVAL OF A MEMBER ENTITY. In the event that a **Member Entity** withdraws or is removed from the **Metro Flood Diversion Authority** pursuant to Sections 21.05 and/or 21.06 of this **Agreement** that **Member Entity** shall convey, transfer and assign any and all **Project Property** which has been titled in the name of the **Former Member Entity** to the **Metro Flood Diversion Authority** within forty-five (45) days of withdrawing or being removed from the **Metro Flood Diversion Authority** and this **Agreement**.

ARTICLE XVII. THIRD PARTY BENEFICIARIES

Section 17.01 P3 DEVELOPER. The **Member Entities** specifically agree, acknowledge and covenant that portions of the **Project Property** located in North Dakota will be used by the **P3 Developer** in order to construct, operate, and maintain the **DCAI** portion of the **Project** located in North Dakota. As a result, the **Member Entities** agree and acknowledge that, at any time during which one or more of the **Member Entities** is in breach or default of its respective obligations arising out of or related to the **Project Agreement**, the **P3 Developer** may enforce the terms and conditions of this **Agreement** including, without limitation, by securing a court order directing the **Member Entity** to perform its obligations under the **Project Agreement** or the terms and conditions of this **Agreement** relating to the **Project Agreement**. In addition to the foregoing, the **P3 Developer** shall have all other rights available to it at law or in equity, and all of the rights and remedies provided hereunder are deemed cumulative and not exclusive of any rights or remedies provided by law or otherwise available to the **P3 Developer**.

Section 17.02 BONDHOLDERS. The **Member Entities** agree and acknowledge that this **Agreement** is made for the benefit of the **Holder**s of the **Debt Obligations** to which the **Pledged Revenues** are pledged as a source of repayment. At any time during which one or more

of the **Member Entities** is in breach or default of its respective obligations hereunder, the **Holder**s of the **Debt Obligations** may enforce the terms and conditions of this **Agreement** including, without limitation, by securing a court order directing the **Member Entity** to disburse the **Pledged Revenues** to the **Metro Flood Diversion Authority**. In addition to the foregoing, the **Holder**s of the **Debt Obligations** shall have all other rights available to it at law or in equity, and all of the rights and remedies provided hereunder are deemed cumulative and not exclusive of any rights or remedies provided by law or otherwise available to the **Holder**s of the **Debt Obligations**.

ARTICLE XVIII. EFFECT OF AMENDMENT

Section 18.01 INTENT. This **Agreement** is intended to be an amendment to, and a replacement of, the **Limited Joint Powers Agreement** dated as of July 11, 2011, and that this **Agreement** shall serve as the amended and reconstituted joint powers agreement between the **Member Entities**.

Section 18.02 EFFECT. This **Agreement** is effective on the **Effective Date** and is a revision and comprehensive amendment to the **Limited Joint Powers Agreement** as it existed on July 11, 2011, as amended. Nothing in this **Agreement** is to be construed to modify, abrogate or abridge (a) the rights, duties, liabilities, privileges, or immunities of the **Metro Flood Diversion Authority**, (b) the **Prior Obligations**, (c) pending or contemplated litigation, including the case of Richland/Wilkin Joint Powers Authority v. U.S. Army Corps of Engineers, Civil No. 13-2262 (JRT/LIB) (D. Minn.), or (d) the current Bylaws and Resolutions of the **Metro Flood Diversion Authority**. This amendment is not to be construed to affect, modify, or repeal any law of the State of North Dakota or the State of Minnesota applicable to the **Metro Flood Diversion Authority**.

Section 18.03 PRIOR OBLIGATIONS. The **Prior Obligations** have been fully disclosed to the **Member Entities**.

ARTICLE XIX. TERM AND TERMINATION OF THE AGREEMENT

Section 19.01 TERM. This **Agreement** shall be for an indefinite term and shall continue until terminated or rescinded in accordance with the terms and conditions of this **Agreement**.

Section 19.02 TERMINATION. This **Agreement** may only be terminated by the mutual consent of all the **Member Entities**, but not including any **Former Member Entities**, evidenced by identical resolutions adopted by the **Governing Bodies** of each **Member Entity**. Provided that this **Agreement** may not be terminated prior to the retirement of any **Debt Obligation** issued to finance the **Project**, **Milestone Payments**, or **Availability Payments** and/or until all obligations and liabilities under the **Project Agreement** have been irrevocably discharged in full. Any termination will be without prejudice to any obligations or liabilities of any parties already accrued prior to termination.

Section 19.03 DISTRIBUTION OF FUNDS AND PROPERTY. Upon the termination of this **Agreement**, and only after all obligations and liabilities under the **Project Agreement** have been irrevocably discharged in full, the **Metro Flood Diversion Authority** shall provide for the distribution of all **Metro Flood Diversion Authority** assets in the following manner: (a) **Project Property** contributed by a **Member Entity** shall be returned to that **Member Entity**, provided, all **Project Property** shall be retained by a public entity; (b) any remaining **Project Property**, which is determined to be unnecessary for the **Project**, may be sold or liquidated prior to distribution; and (c) any remaining assets shall be divided in proportion to the contributions of the **Member Entities** in and conformance with the cost allocation formula set forth in Section 12.11 of this **Agreement**. If the **Member Entities** do not agree on the fair market value of a non-liquid asset, the **Metro Flood Diversion Authority** may submit the item to a professional appraiser, whose written opinion of the fair market value shall be conclusive.

ARTICLE XX. DISPUTE RESOLUTION

Section 20.01 INTENT AND PROCEDURE. The **Member Entities** shall cooperate and use their **Best Efforts** to ensure that the various provisions of this **Agreement** are fulfilled. The **Member Entities** agree to act in **Good Faith** to undertake resolution of disputes in an equitable and timely manner and in accordance with the provisions of this **Agreement**. If disputes cannot be resolved informally by the **Member Entities**, the following procedure shall be used.

Section 20.02 MEDIATION. If there is a failure between the **Member Entities** to resolve a dispute on their own, the **Member Entities** shall first attempt to mediate the dispute. The **Member Entities** shall agree upon a single mediator, or if they cannot agree, shall obtain a list of court appointed mediators from the **Cass County** District Court Administrator and select a mediator by alternatively striking names until one remains. The **City of Fargo** shall strike the first name, followed by the **City of Moorhead**, followed by **Cass County**, followed by **Clay County**, followed by the **Cass County Joint Water Resource District**, followed by the **Buffalo-Red River Watershed District**, this process shall continue in that recurring order until one name remains.

Section 20.03 LITIGATION IF DISPUTE NOT RESOLVED. If the dispute is not resolved within forty-five (45) days after the end of mediation proceedings, the **Member Entities** may litigate the matter.

Section 20.04 WAIVER OF JURY TRIAL. THE **MEMBER ENTITIES** HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THAT ANY MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY ACTION, PROCEEDING, COUNTERCLAIM OR DEFENSE BASED ON THIS **AGREEMENT**, OR ARISING OUT OF, UNDER OR IN ANY CONNECTION WITH THIS **AGREEMENT**, OR WITH RESPECT TO ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO RELATING TO THIS **AGREEMENT**. THIS PROVISION IS A MATERIAL INDUCEMENT FOR ALL **MEMBER ENTITIES** ENTERING INTO THIS **AGREEMENT**. THIS PROVISION APPLIES ONLY TO SUITS BETWEEN THE **MEMBER ENTITIES** AND DOES NOT APPLY TO THIRD PARTY CLAIMS OR SUITS BY OR ON BEHALF OF THE

MEMBER ENTITIES FOR PROJECT PROPERTY ACQUISITION AND/OR CONSTRUCTION CONTRACT CLAIMS AND DEFENSES.

**ARTICLE XXI.
RIGHTS UPON REFUSAL AND WITHDRAWAL**

Section 21.01 INTENT. The **Member Entities** recognize and agree that in order to work collaboratively and in an integrated manner and within the legal constraints of the N.D.C.C. § 54-40.3-01, and Minn. Stat. § 471.59, the **Metro Flood Diversion Authority** will request that individual **Member Entity** will take appropriate and necessary actions to acquire property, lobby and obtain grants, impose and collect sales and use taxes, levy and collect special assessments and other incidental actions that the **Metro Flood Diversion Authority** cannot undertake pursuant to the authorities granted to it by N.D.C.C. § 54-40.3-01, and Minn. Stat. § 471.59 and in this **Agreement**. The **Member Entities** also recognize and agree that, in order to successfully complete the **Project**, individual **Member Entities** will have to issue **Debt Obligations** and are relying upon the other **Member Entities** to be long-term partners who will act in **Good Faith** and in a reasonable manner and will undertake whatever actions, within the scope of their respective legal authorities are necessary to expedite completion of the **Project**. The **Member Entities** recognize and agree that they may be requested to make politically unpopular decisions and that it would not be fair or reasonable to withhold taking necessary action absent a **Rational Basis** for said inaction. As a result, the **Member Entities** desire to create a procedure by which a **Member Entity** may be removed from this **Agreement** for failing to take necessary and reasonable action without a **Rational Basis** for making such non-action.

Section 21.02 DEFAULT. Upon the occurrence of any non-performance of a **Member Entity's** obligations under this **Agreement** which has not been cured within thirty (30) days after notice to the breaching **Member Entity**, a majority of the non-breaching **Member Entities**, in accordance with Section 21.05 of this **Agreement**, if applicable, may take any one or more of the following remedial steps: (a) terminate this **Agreement** with respect to the **Member Entity's** ongoing involvement; and/or (b) suspend the non-breaching **Member Entities'** performance under this **Agreement** until they receive assurances from the breaching **Member Entity** satisfactory to the non-breaching **Member Entities** that the breaching **Member Entity** will cure such **Event of Default** and perform its obligations under this **Agreement**. During any period of non-performance by a **Member Entity**, its obligations and liabilities under this **Agreement** shall remain in full force and effect.

Section 21.03 DIVERSION AUTHORITY BOARD REQUEST. The **Diversion Authority Board** may from time to time and in its discretion request that a **Member Entity** perform the following actions, which include but are not limited to: (a) acquiring rights of entry, either voluntarily or through court action; (b) acquiring easements, rights-of-way, land, disposal areas and relocations of property areas, either voluntarily or through court action; (c) actively participating in requesting, obtaining and providing grant and state legislative appropriations for the **Project**; (d) imposing, collecting and remitting sales and use taxes for the **Project** and/or in connection with the issuance of **Debt Obligations** by another **Member Entity**; (e) creating improvement districts, levying and collecting special assessments; (f) issuing **Debt Obligations** either individually and/or in cooperation with another **Member Entity**; (g) levying and

collecting storm water fees and charges; and, (h) levying and collecting maintenance tax levies, charges and fees (collectively referred to as the “**Requested Project Actions**”).

Requested Project Actions shall be in writing and approved by motion of the **Diversion Authority Board**, signed by the **Chair**, and countersigned by the **Executive Director**. **Requested Project Actions** shall be delivered to the **Governing Body** of the **Member Entity**. The **Member Entity** will have thirty (30) days to respond in writing to the **Diversion Authority Board** whether it intends to undertake and complete the **Requested Project Actions**.

Section 21.04 REFUSAL TO UNDERTAKE AND COMPLETE REQUESTED PROJECT ACTIONS. If the **Member Entity** does not intend to undertake and complete the **Requested Project Action**, it must evidence such refusal by a motion of the **Member Entity’s Governing Body**. Such motion must specifically state in writing and on the record the reason(s) that the **Member Entity** is refusing to undertake and complete the **Requested Project Action**. The **Member Entity** must within ten (10) business days of its **Governing Body’s** decision submit its written reasons for not undertaking and completing the **Requested Project Actions** to the **Diversion Authority Board**. The **Diversion Authority Board** shall then have thirty (30) days to determine if the written reasons given by the **Member Entity** for not undertaking and completing the **Requested Project Actions** have a **Rational Basis**. The decision regarding whether the failure to undertake a **Requested Project Action** had a **Rational Basis** shall be made by an affirmative vote of not less than seven (7) members of the **Diversion Authority Board**. The **Diversion Authority Board’s** determination that a **Member Entity** did not have a **Rational Basis** for refusing to undertake and complete the **Requested Project Action** shall be deemed a **Default** by that **Member Entity**. If the **Diversion Authority Board** determines that a **Member Entity** is in **Default** pursuant to this Section, the **Diversion Authority Board** may institute proceedings in accordance with Section 21.05 of this **Agreement** to remove the **Defaulting Member Entity** from the **Metro Flood Diversion Authority**.

Section 21.05 REMOVAL OF MEMBER ENTITY. In the event that a **Member Entity** is deemed to be in **Default** pursuant to Section 21.04 of this **Agreement**, The **Diversion Authority Board** may vote to remove the **Defaulting Member Entity** from **Metro Flood Diversion Authority** and this **Agreement** by a two-thirds (2/3) vote of the members of the **Diversion Authority Board**. The decision to remove a **Defaulting Member Entity** shall be in writing and signed by the **Chair** and attested to by the **Executive Director**. The decision of the **Diversion Authority Board** shall then be submitted to all of the **Member Entities’ Governing Bodies** within ten (10) business days of the decision by the **Diversion Authority Board** determining that a **Member Entity** is in **Default**. The **Governing Bodies** of the **Member Entities** shall then have thirty (30) days to determine whether the **Defaulting Member Entity** shall be removed from the **Diversion Authority Board** and this **Agreement**. A **Defaulting Member Entity** can only be removed from the **Metro Flood Diversion Authority** and this **Agreement** pursuant to this Section by an affirmative vote of a simple majority of all the **Member Entities**. The **Defaulting Member Entity** will be counted for purposes of determining the number of **Member Entities**, and the **Defaulting Member Entity** will be included to determine whether a majority of all **Member Entities** voted. Upon the affirmative vote of a majority of all the **Member Entities** the **Defaulting Member Entity** shall be removed from the **Metro Flood Diversion Authority** and this **Agreement**. The removal of a **Member Entity** pursuant to this provision

shall not be deemed as construed to alter any of the obligations of the **Member Entity** established, created, or accrued prior to its removal.

Section 21.06 VOLUNTARY WITHDRAWAL. A **Defaulting Member Entity** may petition the **Diversion Authority Board** to voluntarily withdraw from the **Metro Flood Diversion Authority**. The **Diversion Authority Board** may grant the request of the **Defaulting Member Entity** if the **Diversion Authority Board** determines by simple majority of all of the **Diversion Authority Board Members** that the request *would not* prejudice the other **Member Entities** with respect to the financing, constructing, operating or maintaining the **Project**. The decision to grant the request of a **Defaulting Member Entity** to voluntarily withdraw from the **Metro Flood Diversion Authority** and this **Agreement** shall be in writing, signed by the **Chair**, and attested by the **Executive Director**. The decision of the **Diversion Authority Board** shall then be submitted to all of the **Member Entities' Governing Bodies** within ten (10) business days of the decision by the **Diversion Authority Board** determining that a **Defaulting Member Entity** may voluntarily withdraw from the **Metro Flood Diversion Authority** and this **Agreement**. The **Governing Bodies** of the **Member Entities** shall then have thirty (30) days to determine whether the **Member Entity** shall be removed from the **Diversion Authority Board** and this **Agreement**. A **Defaulting Member Entity** can only be removed from the **Metro Flood Diversion Authority** and this **Agreement** pursuant to this Section by an affirmative vote of a simple majority of all the **Member Entities**. Upon the affirmative vote of a majority of all the **Member Entities** the **Defaulting Member Entity** shall be removed from the **Diversion Board of Authority** and this **Agreement**.

Section 21.07 MEMBERSHIP OF THE BOARD UPON REMOVAL OR WITHDRAWAL. In the event a **Defaulting Member Entity** is removed from the **Metro Flood Diversion Authority** and this **Agreement** pursuant to Section 21.05 of this **Agreement**, and/or a **Defaulting Member Entity** voluntarily withdraws from the **Metro Flood Diversion Authority** and this **Agreement** pursuant to Section 21.06 of this **Agreement**, that **Defaulting Member Entity** shall be known as a **Former Member Entity** and its **Diversion Authority Board Member** positions, as assigned in Section 5.01, shall be redistributed to the remaining **Member Entities** residing in the same state as the **Former Member Entity**. The redistribution of **Diversion Authority Board Member** positions shall be in proportion to the **Diversion Authority Board Member** position that the remaining **Member Entities** in the same state as the **Former Member Entity** had prior to such removal or withdrawal. The **Member Entities** agree and acknowledge that the intent of this Section is to maintain the size and composition of the **Diversion Authority Board** with respect to the number of **Diversion Authority Board Member** positions from North Dakota and Minnesota in the event that a **Defaulting Member Entity** is removed or withdraws from the **Metro Flood Diversion Authority** and this **Agreement**.

The **Member Entities** agree and acknowledge that they will maintain the applicable percentage of **Diversion Authority Board** membership allocated among the **Member Entities**. In the event that a **Member Entity** withdraws or is removed pursuant to this **Agreement**, the remaining **Member Entities' membership** on the **Diversion Authority Board** will be allocated the **Defaulting Member Entity's** percentage of **Diversion Authority Board** position so as to prevent a **Member Entity's** percentage of **Diversion Authority Board** membership from being diluted.

**ARTICLE XXII.
MISCELLANEOUS COVENANTS**

Section 22.01 SUB-JOINT POWERS AGREEMENTS. The **Member Entities** acknowledge and agree that because the **Project** benefits property located in both the states of Minnesota and North Dakota, the **Member Entities** may enter into sub-agreements with non-member or **Member Entities** for the purpose of fulfilling their obligations, allocating total costs of the **Project**, and/or exercising the authority defined therein.

Section 22.02 PRIOR CITY AND COUNTY LOAN. Nothing contained in this **Agreement** shall have the effect to modify, amend, or supplement the terms or provisions of the **City Loan**, the **County Loan**, or any related Intergovernmental Agreements, Supplemental Intergovernmental Agreements, Loan Agreements, or Promissory Notes.

Section 22.03 PRIOR AGREEMENTS BETWEEN NORTH DAKOTA MEMBER ENTITIES. Nothing contained in this **Agreement** shall have the effect to modify, amend, or supplement the terms or provisions of the following agreements entered into by the **Member Entities**:

- (a) Cass County/Fargo/Cass County Joint Water Resource District Flood Protection Cooperation Agreement dated July 1, 2010, by and between **Cass County**, **CCJWRD**, and the **City of Fargo**;
- (b) Joint Powers Agreement dated June 7, 2010, by and between **Cass County**, **CCJWRD**, and the **City of Fargo**;
- (c) First Amendment to Joint Powers Agreement dated August 2, 2010, by and between **Cass County**, **CCJWRD**, and the **City of Fargo**;
- (d) Second Amendment to Joint Powers Agreement dated July 7, 2014, by and between **Cass County**, **CCJWRD**, and the **City of Fargo**;
- (e) Third Amendment to Joint Powers Agreement dated June 1, 2015, by and between **Cass County**, **CCJWRD**, and the **City of Fargo**; and
- (f) Agreement dated June 11, 2015, which is an indemnity agreement by and between the Fargo Moorhead Metro Flood Diversion Authority and **CCJWRD**.

**ARTICLE XXIII.
GENERAL PROVISIONS**

Section 23.01 COMPLETE AGREEMENT. Except as more fully set forth in Sections 22.01, 22.02, and 22.03 of this **Agreement**, this **Agreement** contains all negotiations and agreements between the **Member Entities**. No other understanding regarding this **Agreement**, whether written or oral, may be used to bind any **Member Entity**.

Section 23.02 SUPPLEMENTAL AGREEMENTS. The **Member Entities** may enter into supplemental and/or additional agreement(s) that may be necessary for fulfilling the purpose and

objectives of the **Metro Flood Diversion Authority**. Copies of those supplemental agreements will be provided to the Secretary.

Section 23.03 WRITTEN AMENDMENT REQUIRED. No amendment, modification, or waiver of any condition, provision or term will be valid or of any effect unless made in writing signed by the **Member Entity** or **Member Entities** to be bound, or a duly authorized representative, and specifying with particularity the extent and nature of such amendment, modification or waiver. Any waiver by any **Member Entity** of any default of another **Member Entity** will not affect or impair any right arising from any subsequent default. Except as expressly and specifically stated otherwise, nothing herein will limit the remedies and rights of the **Member Entities** thereto under and pursuant to this **Agreement**. Any amendment to this **Agreement** will be in accordance with the terms and conditions of a **Project Agreement**.

Section 23.04 INTERPRETATION. This **Agreement** will be construed as if it had been prepared by all **Member Entities**.

Section 23.05 GRAMMATICAL CONSTRUCTION. Whenever the singular noun is used herein, the same includes the plural where appropriate, and the words of any gender include any other gender where appropriate.

Section 23.06 ASSIGNMENT. No **Member Entity** may transfer or assign this **Agreement** or any of its rights or obligations under this **Agreement** without the express written consent of all the other **Member Entities**.

Section 23.07 SEVERABILITY AND SAVINGS CLAUSE. Each provision, section, sentence, clause, phrase, and word of this **Agreement** is intended to be severable. If any provision, section, sentence, clause, phrase, and word hereof is held by a court with jurisdiction to be illegal or invalid for any reason whatsoever, such illegality or invalidity will not affect the validity of the remainder of this **Agreement**. Deadlines for certain meetings and other actions, such as the annual meeting, as set forth in this **Agreement** are intended to establish a schedule for routine governance of the **Metro Flood Diversion Authority**; however, the failure of the **Metro Flood Diversion Authority**, its appointed officers, or the **Diversion Authority Board Members** to strictly adhere to such deadlines shall not be construed so as to invalidate the subsequent legal authority of the **Metro Flood Diversion Authority**, or its appointed officers, the **Diversion Authority Board**, or the **Diversion Authority Board Members**, nor shall the same support any claim that actions taken by the same are *ultra vires* or invalid in any way, so long as such actions are otherwise authorized. Further, the **Metro Flood Diversion Authority** is authorized, by motion or resolution, to vary from such deadlines or schedule as may be necessary or appropriate.

Section 23.08 FORCE MAJEURE. No **Member Entity** will be liable to another **Member Entity** during any period in which its performance is delayed or prevented, in whole or in part, by circumstance beyond its reasonable control. Circumstances include, but are not limited to, the following: act of God (e.g., flood, earthquake, wind), fire, war, act of a public enemy or terrorist, act of sabotage, strike or other labor dispute, riot, misadventure of the sea, inability to secure materials and/or transportation, or a restriction imposed by legislation, an order or a rule or

regulation of a governmental entity. If such a circumstance occurs, the **Member Entity** claiming the delay must undertake reasonable action to notify the other **Member Entity** of the same.

Section 23.09 NEW MEMBERS. Another **Governmental Authority** may be added to this **Agreement** upon the approval of all **Member Entities**. Once approved, the rights and obligations of the new member shall be set forth in a written amendment to this **Agreement** and the new member shall be fully obligated and bound by the terms of this **Agreement**, as amended.

Section 23.10 NOTICE. All notices, certificates or other communications required under this **Agreement** will be deemed sufficiently given when delivered or deposited in the United States mail in certified form with postage fully prepaid and addressed as follows:

- | | |
|----------------------------------|---|
| If to City of Fargo: | City Auditor
City of Fargo
200 N 3 rd St
Fargo, ND 58102 |
| If to Cass County: | County Auditor
Cass County
P.O. Box 2806
Fargo, ND 58108 |
| If to CCJWRD: | Secretary
Cass County Joint Water Resource District
1201 West Main Avenue
West Fargo, ND 58078 |
| If to City of Moorhead: | City Manager
City of Moorhead
P.O. Box 779
Moorhead, MN 56561-0779 |
| If to Clay County: | County Administrator
Clay County
807 11 th Street N
Moorhead, MN 56560 |
| If to BRRWD: | BRRWD Administrator
1303 4 th Avenue NE
P.O. Box 341
Barnesville, MN 56514 |
| If to City of West Fargo: | City Administrator
City of West Fargo
800 4 th Avenue E, Suite 1
West Fargo, ND 58078 |

If to **Richland County**: County Auditor
Richland County
418 2nd Avenue N
Wahpeton, ND 58075

If to **Wilkin County**: County Auditor
Wilkin County
P.O. Box 409
Breckenridge, MN 56520-0409

Section 23.11 AGREEMENT BINDING ON SUCCESSORS. This **Agreement** will be binding upon and inure to the benefit of the **Member Entities** hereto and their respective personal representatives, successors and assigns.

Section 23.12 NORTH DAKOTA LAW APPLIES. This **Agreement** will be controlled by the laws of the State of North Dakota.

Section 23.13 MEMBER ENTITY PERMITTING AUTHORITY. Nothing in this **Agreement** shall be construed as limiting the right or ability of a **Member Entity** to approve or disapprove of a permit, including but not limited to a building permit, zoning permit, flood plain development permit, or other similar permit required for construction or maintenance of the **Project** within that **Member Entity's** jurisdiction.

Section 23.14 MEMBER ENTITIES' COMPLIANCE WITH APPLICABLE STATE LAW. This **Agreement** shall not be construed or interpreted so as to relieve a **Member Entity** from complying with any state law applicable to the **Member Entity**. The **Member Entities** specifically agree and acknowledge that this **Agreement** does not except a **Member Entity** from the applicable state law governing that **Member Entity** (for example, the **City of Fargo** must still comply with North Dakota law).

Section 23.15 WAIVER OF VENUE/SELECTION. The **Member Entities** stipulate and agree that the District Court of **Cass County**, North Dakota, will be the sole and exclusive venue for any lawsuit pertaining to this **Agreement**, and the **Member Entities** consent to the personal jurisdiction in said court in the event of any such lawsuit. This provision shall not be construed to apply to litigation commenced by a **Member Entity** for acquisition of **Project Property** or defense of a contract claim. This choice of law section applies exclusively to lawsuits pertinent to the terms and conditions of this **Agreement**.

Section 23.16 EXECUTION IN COUNTERPARTS. This **Agreement** may be executed in several counterparts, each of which shall be an original, all which shall constitute but one and the same instrument. All **Member Entities** shall receive a fully-executed counterpart.

IN WITNESS WHEREOF, the **Member Entities**, by action of their **Governing Bodies**, caused this **Agreement** to be executed in accordance with the authority granted in N.D.C.C. § 54-40.3-01, and Minn. Stat. § 471.59.

EXHIBIT A – PRIOR OBLIGATIONS

[See Following Pages]

Signature Page for the City of Fargo

The Governing Body of the City of Fargo approved this Agreement on the ____ of _____, 2016.

THE CITY OF FARGO, NORTH
DAKOTA, a municipal corporation

By: _____
Timothy Mahoney, Mayor

ATTEST:

Steve Sprague, City Auditor

Signature Page for the City of Moorhead

The Governing Body of the City of Moorhead approved this Agreement on the ____ of _____, 2016.

THE CITY OF MOORHEAD,
MINNESOTA, a municipal corporation

By: _____
Del Rae Williams, Mayor

ATTEST:

_____, City Manager

Signature Page for Cass County

The Governing Body of Cass County approved this Agreement on the ___ of _____, 2016.

THE COUNTY OF CASS, NORTH
DAKOTA, a corporate body

By the CASS COUNTY BOARD OF
COMMISSIONERS

By: _____
Mary Scherling, Chair

ATTEST:

Michael Montplaisir, County Auditor

Signature Page for Clay County

The Governing Body of Clay County approved this Agreement on the ___ of _____, 2016.

CLAY COUNTY, MINNESOTA, a
corporate body

By the CLAY COUNTY BOARD OF
COMMISSIONERS

By: _____
Frank Gross, Chairman

ATTEST:

Brian C. Berg, Clay County Administrator

Signature Page for Cass County Joint Water Resource District

The Governing Body of the Cass County Joint Water Resource District approved this Agreement on the ___ of _____, 2016.

CASS COUNTY JOINT WATER
RESOURCE DISTRICT

By: _____
Mark Brodshaug, Chairman

Date of Approval: _____

Signature Page for Buffalo-Red River Watershed District

The Governing Body of the Buffalo-Red River Watershed District approved this Agreement on the ___ of _____, 2016.

BUFFALO-RED RIVER
WATERSHED DISTRICT

By: _____
Gerald L. Van Amburg, Chair

Date of Approval: _____