



M E M O

**Board of County
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West Fargo, North Dakota

Mary Scherling
Stanley Township,
North Dakota

TO: Cass County Commissioners
FROM: Heather Worden 
DATE: August 27, 2019
SUBJECT: Diversion MOU and Employment Agreement

Attorney John Shockley will provide an update on the interim Memorandum of Understanding (MOU) between Cass County and the Metro Flood Diversion Authority for human resource related services. Some minor changes were made to the MOU during a review by the Diversion Finance Committee to section 3.01 6) stating that the other Authority employees would be paid in accordance with a schedule of pay and benefits adopted by the Authority; and section 4.01 6) to include a requirement that the Authority pay invoices prepared by Cass County.

He will also briefly discuss the Employment Agreement with Executive Director Joel Paulsen, which was approved by the Diversion Authority at their meeting on August 22nd. The MOU refers to the Employment Agreement and was not available for review at the last County Commission meeting when the MOU was approved.

This is an informational item only and will not require any action.

Heather Worden
Commission Assistant

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Fargo, North Dakota 58108
701-241-5609
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INTERIM MEMORANDUM OF UNDERSTANDING

BY AND BETWEEN

CASS COUNTY, NORTH DAKOTA

AND

THE METRO FLOOD DIVERSION AUTHORITY

Dated as of August 22, 2019

Relating to:

An interim agreement outlining the relationship and responsibilities of Cass County and the Metro Flood Diversion Authority with regard to human resource related services

This instrument was drafted by:
Ohnstad Twichell, P.C. (JTS)
P.O. Box 458
West Fargo, North Dakota 58078

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INTERIM MEMORANDUM OF UNDERSTANDING

THIS INTERIM MEMORANDUM OF UNDERSTANDING (the “Agreement”) is entered into as of the 22nd day of August, 2019, (the “Effective Date”), by and between Cass County, North Dakota, a North Dakota Home Rule County and political subdivision of the State of North Dakota (the “County”) and the Metro Flood Diversion Authority, a political subdivision of the State of North Dakota (the “Authority”).

WHEREAS, under the terms of the Joint Powers Agreement dated June 11, 2016, (the “JPA”), the Authority may enter contracts and employ personnel related to the Fargo-Moorhead Area Diversion Project (the “Project”); and

WHEREAS, under the terms of the JPA, the Authority intends to employ an Executive Director to function as the chief administrative officer of the Authority; and

WHEREAS, the County and the Authority intend to enter into a more complete agreement regarding the provision of personnel services by or before December 31, 2019; and

WHEREAS, the County’s human resource department will provide human resource services related to payroll and benefits to the Authority’s Executive Director and future employees at no cost to the Authority through December 31, 2019.

NOW THEREFORE, in consideration of the mutual covenants made herein and for valuable consideration, the receipt of which is hereby acknowledged, the Authority and the County agree as follows:

ARTICLE I. DEFINITIONS

Section 1.01 DEFINITIONS. All capitalized 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.

“**Agreement**” means this Interim Memorandum of Understanding dated August, 22, 2019.

“**Applicable Law**” means, collectively, the Constitutions of the United States and the State, all common law and principles of equity, and all federal, State, and local laws including, without limitation, all environmental laws, statutes, treaties, codes, acts, rules, regulations, guidelines, ordinances, resolutions, orders, judgments, decrees, injunctions, and administrative or judicial precedents or authorities, including the interpretation or administration thereof by any governmental authority charged with the enforcement, interpretation, or administration thereof, all governmental approvals, and all administrative orders, awards, directed duties, requests, licenses, certificates, authorizations and permits of, and agreements with, any governmental authority, and, with respect to any person, the articles of incorporation, bylaws, or other organizational or governing documents of such person, in each case whether or not having the force of law, that are applicable now or are applicable at any time hereafter to the Authority or the County.

“Authority” means the Metro Flood Diversion Authority, a political subdivision of the State of North Dakota and a permanent, joint powers entity formed through the Joint Powers Agreement to provide the Fargo-Moorhead metropolitan area with permanent and comprehensive flood protection.

“Best Efforts” means an entity 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 Law.

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

“Effective Date” means August 22, 2019.

“Employee Handbook” means the Cass County Employee Handbook which describes workplace policies and employee guidelines for Cass County Employees.

“Executive Director” means the person hired by the Authority pursuant to an Employment Agreement dated September 1, 2019, to serve as the Executive Director of the Authority pursuant to the terms and conditions of the Joint Powers Agreement.

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

“Joint Powers Agreement” means the agreement entered into by and between the City of Moorhead, the City of Fargo, Clay County, Cass County, and the Cass County Joint Water Resource District, dated as of June 1, 2016, to create the Authority.

“Metro Flood Diversion Authority” or **“Authority”** means the political subdivision created by the Joint Powers Agreement consisting of the communities of Fargo, North Dakota and Moorhead, Minnesota, along with Cass County, North Dakota, Clay County, Minnesota, and the Cass County Joint Water Resources District.

“Party” means either the Authority or the County, as the context may require, and their respective legal representatives, successors, and permitted assigns, and wherever a reference in this Agreement is made to any Parties hereto, **“Parties”** means the Authority and the County, collectively, and their respective legal representatives, successors, and permitted assigns.

“Professional Employer Agreement” means the written contract between a client and professional employer organization which provides for the coemployment of a covered employee, for the allocation of employer rights and obligations between the client and the professional employer organization.

“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 US Army Corps of Engineers, District Engineer, St. Paul District on September 19, 2013, and as amended by the Governors' Task Force and applicable permit requirements.

Section 1.02 INTERPRETATION. The headings of Articles and Sections are provided for convenience of reference only and will not affect the construction, meaning, or interpretation of this Agreement. Any and all exhibits to this Agreement are hereby incorporated by reference. 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 as set forth herein), (b) any reference herein to any person shall be construed to include such person's permitted 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.

ARTICLE II. INTENT

Section 2.01 INTENT. The Authority intends to hire an Executive Director to begin work in September 2019, pursuant to and in accordance with an employment agreement between the Executive Director and the Authority. The Executive Director will perform a wide range of duties and tasks related to the Project. The Authority may hire a small number of additional staff in the future. Given the County's large human resource department and the small number of employees to be hired by the Authority, the County offered to provide human resource services related to benefits and payroll services to Authority employees through December 31, 2019. After December 31, 2019, the Parties intend to explore the possibility of continuing the relationship as co-employers pursuant to a Professional Services Agreement under Section 43-55 of the North Dakota Century Code and/or pursuant to a more defined agreement between the Authority and the County.

ARTICLE III. RIGHTS, DUTIES, AND OBLIGATIONS OF THE COUNTY

Section 3.01 RIGHTS, DUTIES, AND OBLIGATIONS OF THE COUNTY. It is hereby acknowledged and agreed upon between the Parties that the County will:

- 1) Provide human resource services related to payroll to the Executive Director and any future employee hired by the Authority. The County shall administer payroll to the Executive Director and any future employee hired by the Authority in

accordance with the provisions and guidelines set forth in the Cass County Employee Handbook (“Employee Handbook”), attached as Exhibit A;

- 2) Provide retirement and health benefits to the Executive Director and any future employees of the Authority through the County’s sponsored plans, in compliance with applicable federal and state laws, and subject to eligibility requirements. The County shall provide benefit services in accordance with the Employee Handbook;
- 3) Conduct individual meetings with the Executive Director and any future employees hired by the Authority to address any questions, suggestions, or concerns in relation to County human resource policies;
- 4) Provide the Executive Director and any future employee hired by the Authority with a copy of the Employee Handbook. The County agrees that it will ensure the Employee Handbook and all employee-related policies are timely updated, as necessary, due to changes in federal and state law, or as might otherwise be deemed appropriate by the County;
- 5) Make Best Efforts and work cooperatively in Good Faith with the Executive Director, employees, and staff of the Authority;
- 6) Invoice the Authority for any and all employment related costs associated with the Executive Director or and other Authority employees, including salary, benefits and reimbursements provided in accordance with the Executive Director’s Employment Agreement and in accordance with the salary and benefits schedule established by the Authority for other Authority employees at the end of each month; and
- 7) Provide the services to the Authority, at no cost.

**ARTICLE IV.
RIGHTS, DUTIES, AND OBLIGATIONS OF THE AUTHORITY**

Section 4.01 RIGHTS, DUTIES, AND OBLIGATIONS OF THE AUTHORITY. It is hereby acknowledged and agreed upon between the Parties that the Authority will:

- 1) Retain the exclusive right to direct and control the day-to-day activity of the Executive Director and future employees hired by the Authority as is necessary to conduct business related to the construction of the Project;
- 2) Retain the right to hire, discipline, and terminate the Executive Director and any future employee hired by the Authority as may be necessary to fulfill the Authority’s responsibilities;
- 3) Report to the County any Authority employees hired, promoted, or terminated;
- 4) Arrange for the Executive Director and any future employee hired by the Authority to meet with the County’s human resource department; and

- 5) Provide any other pertinent information requested by the County's human resource department in a timely manner.
- 6) Promptly pay all County invoices for any and all Authority employment-related costs as prepared by the County in accordance with Section 3.01(6) of this Agreement.

**ARTICLE V.
TERM AND TERMINATION**

Section 5.01 TERM. The term of this Agreement shall commence on the Effective Date and shall remain in effect until December 31, 2019 (the "Initial Term"). After the Initial Term, the parties intend to enter into a new or amended agreement.

Section 5.02 TERMINATION. In addition to the provisions of Section 5.01, this Agreement may terminate for any of the following reasons:

- 1) Either Party may terminate this Agreement without termination fee, penalty, or liquidated damages if the other Party commits a breach of any material obligation under this Agreement; provided that if a Party shall by any act or omission, be in breach of any material obligation under this Agreement and such breach shall continue for a period of fourteen (14) days after written notice thereof has been given by the Party to the offending Party, the Party shall have the right to terminate this Agreement with immediate effect by notice to the offending Party.
- 2) The Parties may mutually agree in writing to terminate this Agreement, at any time, without termination fee, penalty, or liquidated damages.

Section 5.03 NOTICE. Written notice shall be addressed to the following addresses:

Authority: Chair
 Metro Flood Diversion Authority Board
 P.O. Box 2806
 Fargo, ND 58108-2806

County: Cass County Finance Director
 P.O. Box 2806
 Fargo, ND 58108-2806

**ARTICLE VI.
DISPUTE RESOLUTION**

Section 6.01 INTENT AND PROCEDURE. The Parties will cooperate and use their Best Efforts to ensure that the various provisions of this Agreement are fulfilled. The Parties 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 Parties, the Parties will use the following procedure.

Section 6.02 MEDIATION. If there is a failure between the Parties to resolve a dispute on their own, the Parties will first attempt to mediate the dispute. The Parties will agree upon a single mediator or, if an agreement cannot be reached within ten (10) calendar days, each Party will propose two (2) potential individuals to serve as mediator, for a total of four (4) individuals. The Parties will then select a mediator by alternatively striking the names of the proposed individuals, with the County striking first, followed by the Authority.

Section 6.03 LITIGATION. If the dispute is not resolved within forty-five (45) calendar days after the selection of the mediator pursuant to the prior Section, the Parties may litigate the matter.

Section 6.04 VENUE. All litigation between the Parties arising out of or pertaining to this Agreement or its breach will be filed, heard, and decided in the District Court of Cass County, North Dakota, which will have exclusive jurisdiction and venue.

Section 6.05 WAIVER OF JURY TRIAL. THE PARTIES 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 UPON THIS AGREEMENT, OR ARISING OUT OF, UNDER, OR IN 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 PARTIES ENTERING INTO THIS AGREEMENT. THIS PROVISION APPLIES ONLY TO SUITS BETWEEN THE PARTIES AND DOES NOT APPLY TO THIRD PARTY CLAIMS OR SUITS.

ARTICLE VII. MISCELLANEOUS

Section 7.01 ASSIGNMENT. Neither Party may assign this Agreement without the prior written consent of the other Party. The Parties' rights and obligations under this Agreement will be passed to the assignees to which those rights and obligations have been permissibly assigned.

Section 7.02 MODIFICATION. This Agreement may be amended or modified only by mutual consent of both Parties, unless otherwise provided for herein.

Section 7.03 GOVERNING LAW. This Agreement will be governed by and construed in accordance with the laws of the State of North Dakota.

Section 7.04 SEVERABILITY. In case any one or more of the provisions of this Agreement shall be invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained in this Agreement will not in any way be affected or impaired thereby.

Section 7.05 WAIVER. No waiver of any Party of any right or remedy pursuant to this Agreement will be deemed to be a waiver of any other or subsequent right or remedy pursuant to

this Agreement. The consent of one Party to any act by the other Party requiring such consent will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

Section 7.06 ACKNOWLEDGMENT. Each of the Parties affirm and acknowledge that it has fully read and appreciates, and understands the words, terms, conditions and provisions of this Agreement and is fully satisfied with the same. Each Party affirms and acknowledges that it has been, or had the opportunity to be represented by legal counsel of its choice.

Section 7.07 THIRD PARTY BENEFICIARIES. This Agreement was created for the benefit of the Executive Director and/or any employees hired by the Authority as third party beneficiaries.

Section 7.08 ENTIRE AGREEMENT. This Agreement contains the entire and exclusive understanding of the Parties with respect to the subject matter thereof and supersedes all prior agreements, understandings, statements, representations, and negotiations, in each case oral or written, between the Parties with respect to their subject matter, except as otherwise provided herein.

Section 7.09 COUNTERPARTS. This instrument may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

Section 7.10 SURVIVAL. The indemnifications, limitations, releases, obligations, and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement will survive the expiration or earlier termination of this Agreement.

Section 7.11 FORCE MAJEURE. Neither Party will be liable to the other during any period in which its performance is delayed or prevented, in whole or in part, by any of the following circumstances including, but are not limited to: 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 Party claiming the delay must undertake reasonable action to notify the other Party of the same.

IN WITNESS WHEREOF, the Parties caused this Agreement to be executed.

(Remainder of page intentionally left blank)

Signature Page for Cass County

The Governing Body of Cass County, North Dakota approved this Agreement on the _____ of _____, 2019.

Cass County, North Dakota
Board of Commissioners

By: _____
Mary Schering, Chair

ATTEST:

Michael Montplaisir, County Finance Director

Signature Page for the Metro Flood Diversion Authority

The Governing Body of the Metro Flood Diversion Authority approved this Agreement on the _____ of _____, 2019.

Metro Flood Diversion Authority

By: _____
Kevin Campbell, Vice Chair

ATTEST:

Heather Worden, Secretary

EMPLOYMENT AGREEMENT

BY AND BETWEEN

METRO FLOOD DIVERSION AUTHORITY

AND

JOEL PAULSEN

Dated as of September 1, 2019

Relating to:

**An Agreement outlining the respective roles and responsibilities to serve as the
Executive Director of the Metro Flood Diversion Authority.**

This instrument was drafted by:
Ohnstad Twichell, P.C.
John T. Shockley
P.O. Box 458
West Fargo, North Dakota 58078

INITIAL DRAFT – 8.10.19
V2 – 8.16.19
V3 – 8.19.19
FINAL VERSION – 8.20.19

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EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT (the “Agreement”) is made effective as of September 1, 2019 (the “Effective Date”), by and between METRO FLOOD DIVERSION AUTHORITY, a political subdivision of the State of North Dakota (hereinafter the “Authority”) and JOEL PAULSEN, an individual (hereinafter “Employee”).

WHEREAS, due to the frequent flooding in the Fargo-Moorhead metropolitan area, and the extensive damages caused thereby, the City of Fargo, the City of Moorhead, Cass County, Clay County, and the Cass County Joint Water Resource District joined together to execute the Joint Powers Agreement and form the Authority; and

WHEREAS, under the terms of the Joint Powers Agreement, the Authority may employ an Executive Director to function as the chief administrative officer of the Authority; and

WHEREAS, the role of the Executive Director will be to report directly and be responsible to the Diversion Authority Board for the efficient and effective day-to-day administration and leadership of the Comprehensive Project; and

WHEREAS, after consideration of the Employee’s application and an interview process, the Diversion Authority Board selected the Employee as the most qualified applicant to fill the Executive Director position and extended him an offer of employment; and

WHEREAS, following negotiation of contract terms, the Authority and the Employee desire to memorialize the terms and conditions of the Employee’s employment as the Executive Director in this Agreement.

NOW THEREFORE, in consideration of the mutual covenants made herein and for other valuable consideration, the receipt of which is hereby acknowledged, the Authority and the Employee agree as follows:

ARTICLE I. DEFINITIONS AND INTERPRETATION

Section 1.01 DEFINITIONS. All capitalized 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.

“**Agreement**” means this Employment Agreement by and between the Authority and the Employee.

“**Applicable Law**” means, collectively, the Constitutions of the United States and of the State of North Dakota, all common law and principles of equity, and all Federal, State, and local laws including, without limitation, all environmental laws, statutes, treaties, codes, acts, rules, regulations, guidelines, ordinances, resolutions, orders, judgments, decrees, injunctions, and administrative or judicial precedents or authorities, including the interpretation or administration thereof by any governmental authority charged with the enforcement, interpretation, or administration thereof, all governmental approvals, and all administrative orders, awards,

directed duties, requests, licenses, certificates, authorizations, and permits of, and agreements with, any governmental authority, and, with respect to any person, the articles of incorporation, bylaws, or other organizational or governing documents of such person, in each case whether or not having the force of law, that are applicable now or are applicable at any time hereafter to the Authority or the Employee.

“Authority” means the Metro Flood Diversion Authority, a political subdivision of the State of North Dakota and a permanent, joint powers entity formed through the Joint Powers Agreement to provide the Fargo-Moorhead metropolitan area with permanent and comprehensive flood protection.

“Business Day” means a day in which normal business is conducted and excludes weekends and North Dakota holidays.

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

“Cass County Commission” means 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.

“Cause” has the meaning set forth in Section 7.02 hereof.

“Chair” means the individual of the Diversion Authority Board who is selected pursuant to the Joint Powers Agreement to preside over meetings of the Diversion Authority Board.

“City of Fargo” means the City of Fargo, North Dakota, 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, Minnesota, 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.

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

“Clay County Commission” means the governing body of Clay County.

“Clay County Members” means the two (2) individual members of the Clay County Commission appointed by the Clay County Commission to serve on the Diversion Authority Board.

“Co-Deputy Executive Director” means the individual(s) selected pursuant to the Joint Powers Agreement who are designated to act as the Executive Director in the event a vacancy exists in the office of the Executive Director.

“Commencement Date” means September 3, 2019.

“Comprehensive Project” means the Fargo-Moorhead Metropolitan Area Flood Risk Management Project authorized by Section 7002(2) of the Water Resources Reform and Development Act of 2014, as generally described in the Final Feasibility Report and Environmental Impact Statement, Fargo Moorhead Metropolitan Area Flood Risk Management, dated July 2011 and approved in accordance with the Chief’s Report, as amended by the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the U.S. Army Engineer, St. Paul, on September 19, 2013.

“Contract Year” means the 12-month period commencing on the Commencement Date and ending on the date preceding the first anniversary of the Commencement Date and each 12-month period thereafter during the Term commencing on the anniversary of the Commencement Date and ending on the date preceding the next anniversary of the Commencement Date.

“Diversion Authority Board” means the governing body of the Authority.

“Effective Date” means September 1, 2019.

“Employee” means Joel Paulsen, an individual.

“Executive Director” means the chief administrative officer of the Authority.

“Fargo City Commission” means the governing body of the City of Fargo.

“Finance Committee” means a committee of the Authority created by the Joint Powers Agreement for the purpose of providing policy recommendations regarding the management of the financial aspects of the Authority and financial expenditures for the Comprehensive 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 sections 5.09 and 10.03 of the Joint Powers Agreement. The interim Fiscal Agent is the City of Fargo.

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

“Joint Powers Agreement” means the agreement entered into by and between the City of Moorhead, the City of Fargo, Clay County, Cass County, and the Cass County Joint Water Resource District, dated as of June 1, 2016, to create the Authority.

“Member Entity” means the City of Moorhead, the City of Fargo, Clay County, Cass County, or the Cass County Joint Water Resource District, or their successors and assigns, as the context may require; references to **“Member Entities”** means the City of Moorhead, the City of Fargo, Clay County, Cass County, and the Cass County Joint Water Resource District, and their successors or assigns, collectively.

“Minnesota Board Member” includes the Clay County Members and the City of Moorhead Members.

“Moorhead City Council” means the governing body of the City of Moorhead.

“Non-Federal Sponsors” means the City of Fargo, the City of Moorhead, and the Authority.

“Party” means either the Authority or the Employee, as the context may require, and their respective legal representatives, successors, and permitted assigns, and wherever a reference in this Agreement is made to any Parties hereto, **“Parties”** means the Authority and the Employee, collectively, and their respective legal representatives, successors, and permitted assigns.

“Program Management Consultant” means the Authority’s management consultant that will coordinate the planning and implementation of the Comprehensive Project.

“State” means the State of North Dakota.

“Term” means the term of this Agreement as defined by Section 4.01 hereof.

“USACE” means the United States Army Corps of Engineers.

“Work Plan Goals” means those goals established by the Diversion Authority Board on an annual basis in accordance with Section 6.01 hereof.

ARTICLE II. POSITION

Section 2.01 POSITION. The Authority agrees to employ Employee as its Executive Director, and the Employee agrees to serve as the Executive Director in accordance with the terms and conditions of this Agreement, the Joint Powers Agreement, and Applicable Law, and to perform such other legally permissible and proper duties and functions as the Authority from time to time assigns.

Section 2.02 HOURS OF WORK. The Employee’s normal working hours shall be 8 a.m. until 5 p.m., and the Authority requires that the Employee attend all meetings of the Diversion Authority Board and of the Authority’s committees even if such meetings occur outside of the

Employee's normal working hours. The Employee may request approval from the Diversion Authority Board to be absent from a meeting.

Section 2.03 EMPLOYMENT RELATIONSHIP. It is specifically agreed that the Employee, as Executive Director, is an employee of the Authority, and the Authority shall have the right to deduct or withhold from the compensation due to the Employee any and all sums required by law to be deducted or withheld, including without limitation, federal income and Social Security taxes and all state or local taxes now applicable or that may be enacted and become applicable in the future.

Section 2.04 AT-WILL EMPLOYMENT. Subject to the notice provisions set forth in section 7.03 of this Agreement, the Employee is employed by the Authority on an at-will basis. Nothing in this Agreement, except as otherwise provided, shall limit the right to terminate the at-will employment.

Section 2.05 COMMENCEMENT DATE. Employee shall commence work on September 3, 2019 (the "Commencement Date").

ARTICLE III. DUTIES

Section 3.01 JOB DUTIES. The Authority will employ the Employee as Executive Director to perform a wide range of duties and tasks as described in the Joint Powers Agreement, including, but not limited to, the following:

(a) Overseeing the overall management of all administrative affairs and functions under the jurisdiction of the Diversion Authority Board;

(b) Ensuring compliance and enforcement of the Joint Powers Agreement and resolutions of the Diversion Authority Board;

(c) Hiring qualified staff to assist the Executive Director in the performance of duties as approved by the Diversion Authority Board;

(d) Supervising all Authority administration and related functions as directed by the Diversion Authority Board, including:

- (1) Personnel systems;
- (2) Budget systems;
- (3) Purchasing systems;
- (4) Management information systems;
- (5) Communications systems; and
- (6) Planning;

(e) Supervising all Authority purchases including procurement of services as directed by the Diversion Authority Board and pursuant to purchasing regulations established by the Diversion Authority Board;

(f) Administering various agreements and contracts entered into by the Diversion Authority Board;

(g) Attending Diversion Authority Board meetings, making recommendations to the Diversion Authority Board for the adoption of measures necessary for the efficient administration of the Authority's affairs, and keeping the Diversion Authority Board fully informed of the Comprehensive Project;

(h) Identifying expertise and innovative solutions necessary to administer project tasks, leading a diverse team of consultants, contractors, entity staff, and implementing the Comprehensive Project;

(i) In cooperation with the Finance Committee and the Fiscal Agent, preparing and submitting to the Diversion Authority Board a proposed annual budget and long-range capital expenditure program for such period as the Diversion Authority Board may direct, each of which shall include detailed estimates of revenues and expenditures, and enforcing the provisions of the budget when adopted by the Diversion Authority Board;

(j) Examining the books and papers of officers and departments of the Authority as directed by the Diversion Authority Board and reporting the findings to the Diversion Authority Board, keeping the Diversion Authority Board fully advised as to the financial condition and needs of the Authority, and making other reports from time to time as required by the Diversion Authority Board or as the Executive Director deems advisable;

(k) Developing and implementing administrative procedures for the Authority as directed by the Diversion Authority Board;

(l) Representing the Authority in public and at stakeholder meetings and events;

(m) Serving as the Authority's ambassador;

(n) Organizing and directing all aspects of government relations;

(o) Advocating for the Comprehensive Project with local, state, and federal staff and elected officials;

(p) Serving as the Authority's legislative liaison with local, state, and federal officials;

(q) Serving as public information officer for the Authority;

(r) Performing such other management and administrative duties as directed from time to time by the Diversion Authority Board; and

(s) Managing and directing the Program Management Consultant.

Section 3.02 POLICY DECISIONS. All policy decisions regarding the Authority shall be made by the Diversion Authority Board, not by the Employee.

Section 3.03 SCOPE OF EMPLOYMENT. The Employee will faithfully and diligently perform all of the duties, responsibilities, and powers so vested, delegated, or assigned, and will uphold and enforce all laws of the United States and of the State. The Employee will perform his duties as Executive Director with integrity and engage in activities and conduct that reflect positively on the Authority. The Employee will devote full time to his duties and responsibilities to the Authority and will utilize his skills and ability to promote the interests of the Authority. The Employee will not hold any other employment or perform any services for any other entity or person, other than a member of his family, and will not accept any remuneration therefor, without the prior approval of the Authority, except as set forth below:

(a) Employee may continue his position as President of the North Dakota State University Chapter of Engineers Without Borders, USA. Employee shall not devote more than 3 hours per week to this position, without the prior approval of the Authority.

(b) Employee may continue to serve as City Engineer for the City of Middle River, Minnesota. Employee shall not devote more than 4 hours per week to this position without the prior approval of the Authority. Employee is responsible for procuring and maintaining all required professional and/or errors and omissions insurance policies and/or coverages necessary for serving as the City Engineer of the City of Middle River and currently has insurance coverage through State Farm Insurance for his duties as the City Engineer for the City of Middle River. The Authority shall not be responsible for securing any insurance policies associated with serving as the City Engineer for the City of Middle River, Minnesota and the indemnification provisions set forth in Section 9.02 of this Agreement shall not apply to Employee's service as the City Engineer for Middle River.

ARTICLE IV. TERM

Section 4.01 TERM. The Term of this Agreement shall be for a period of three (3) calendar years, beginning on September 3, 2019 (the "Commencement Date"). At least six (6) months prior to the third anniversary of the Commencement Date, the Authority and the Employee shall, in Good Faith, enter into negotiations for the extension of the term of this Agreement. If the Authority and the Employee are unable to come to mutually agreed upon terms for the extension of this Agreement by the third anniversary of the Commencement Date, then this Agreement will automatically terminate upon the third anniversary of the Commencement Date. The Employee's tenure, service, and authority as Executive Director may additionally be terminated by the Authority, or through resignation, in accordance with Article VII hereof.

ARTICLE V. SALARY AND BENEFITS

Section 5.01 SALARY. The Authority shall pay the Employee a base salary of one hundred ninety five thousand dollars (\$195,000.00) per annum, payable once a month.

Section 5.02 COST OF LIVING ADJUSTMENTS. At the end of each Contract Year, the Employee's base salary shall be adjusted upward by three percent (3%) to account for a cost of living adjustment.

Section 5.03 DISCRETIONARY ADJUSTMENTS. At the end of each Contract Year, the Diversion Authority Board has the discretion to provide the Employee additional salary adjustments, outside of cost of living adjustments. Additional salary adjustments will be merit-based and will be awarded by the Diversion Authority Board for satisfactory performance and the achievement of Work Plan Goals. The effective date for any additional salary adjustment will be the anniversary of the Commencement Date.

Section 5.04 BENEFIT AND RETIREMENT PLANS. The Employee will receive benefit and retirement packages through Cass County pursuant to an agreement entered between Cass County and the Diversion Authority. Such benefit and retirement packages will be the same as those offered to other Cass County employees.

Section 5.05 AUTOMOBILE USAGE. The Employee will be allowed to utilize any automobiles that are a part of Cass County's automobile fleet to carry out the job duties described herein. In the event such an automobile is unavailable to the Employee and the Employee must utilize another vehicle, the Diversion Authority will reimburse the Employee for mileage pursuant to the applicable calendar year's standard mileage rate as set by the Internal Revenue Service.

Section 5.06 VACATION LEAVE. Effective upon the Commencement Date, the Employee shall be credited with eighty (80) hours of accrued vacation leave. On the first of each month following the Commencement Date, the Employee shall be credited with an additional twelve (12) hours of accrued vacation leave. The Employee may carry over a maximum of two hundred forty (240) hours of accrued vacation leave at the end of each calendar year. Accrued vacation leave upon the termination or resignation of the Employee will be paid out to the Employee only as required by State law.

Section 5.07 SICK LEAVE. Effective upon the Commencement Date, the Employee shall be credited with twelve (12) hours of accrued sick leave. On the first of each month following the Commencement Date, the Employee shall be credited with an additional eight (8) hours of accrued sick leave. Accrued sick leave upon the termination or resignation of the Employee will be paid out to the Employee only as required by State law.

Section 5.08 HOLIDAY LEAVE. The Employee shall be allowed to observe the following holidays: New Year's Day, Martin Luther King Jr. Day, Presidents' Day, Good Friday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving, and Christmas Day.

Section 5.09 EXPENSES. The Authority agrees to pay or to reimburse the Employee for all reasonable, ordinary, necessary, and documented business expenses incurred during the Term in the performance of his services. The Employee, as a condition precedent to obtaining such payment or reimbursement, shall provide the Authority any and all statements, bills, or receipts evidencing the travel or out-of-pocket expenses for which the Employee seeks payment or reimbursement and any other information as the Authority may from time to time reasonably require.

Section 5.10 CELL PHONE. The Authority will provide, at no cost to Employee, a cell/smart phone with an unlimited data plan, to be used for employment-related activities.

**ARTICLE VI.
PERFORMANCE STANDARDS/REVIEWS**

Section 6.01 WORK PLAN GOALS. Ninety (90) days after the Commencement Date, and thereafter at the end of each Contract Year, the Diversion Authority Board shall establish Work Plan Goals for the Employee. The Work Plan Goals will generally be attainable within the time limitations as specified and within the annual operating and capital budgets and appropriations provided.

Section 6.02 EVALUATION. The Employee shall be given an initial performance review six (6) months following the Commencement Date. The Employee shall have a yearly performance review one (1) year after the Commencement Date each year on the anniversary of the Commencement Date thereafter. The process of evaluation shall be as follows:

(a) The Employee shall prepare a written self-appraisal in which he discusses his performance toward meeting Work Plan Goals, assesses his skills in management of the Diversion Authority Board, and proposes a set of personal performance objectives, considering Work Plan Goals, for the next appraisal period.

(b) The Chair and/or General Counsel for the Diversion Authority shall provide each member of the Diversion Authority Board a form to evaluate the Employee's performance. The Chair and/or General Counsel shall collect the evaluation forms from each board member and shall draft a single comprehensive performance evaluation based upon this information. The Employee and the Chair and/or General Counsel shall meet together to discuss and consolidate the two (2) appraisal documents, including the personal performance objectives for the coming period.

(c) The Chair shall present the completed appraisal to the Diversion Authority Board for discussion (as needed) with the Employee regarding performance review.

**ARTICLE VII.
TERMINATION/RESIGNATION**

Section 7.01 TERMINATION. Pursuant to section 5.09 of the Joint Powers Agreement, the decision whether to terminate this Agreement shall be determined by a simple majority vote of the members of the Diversion Authority Board present; provided, however, that at least one (1) affirmative vote to terminate must be cast by a Minnesota Board Member, a City of Fargo Member, and a Cass County Member. Termination may occur with or without Cause and at any time.

Section 7.02 TERMINATION FOR CAUSE. The Authority, by direction of the Diversion Authority Board, shall be entitled to terminate the Agreement and to discharge the Employee for Cause effective upon the giving of written notice. The term "Cause" shall include the following grounds:

(a) the Employee's failure or refusal to perform his duties and responsibilities as set forth in Article III to the satisfaction of the Authority or to abide by the directives of the Diversion Authority Board or the Employee's failure to devote all of his time and attention exclusively to the business and affairs of the Authority in accordance with the terms hereof;

(b) the misappropriation of the funds or property of the Authority;

(c) the use of illegal drugs or the abuse of alcohol;

(d) the commission of any act that constitutes a felony or any crime involving moral turpitude, dishonesty, or theft;

(e) the commission in bad faith by the Employee of any act that materially injures or could reasonably be expected to materially injure the reputation, business, or business relationships of the Authority;

(f) any misconduct or negligence by the Employee in the performance of his duties;
and

(g) any breach (not covered by any of the causes (a) through (f) above) of any material provision of this Agreement.

Section 7.03 TERMINATION WITHOUT CAUSE. Notwithstanding anything contained in Section 7.02 to the contrary, the Authority, by direction of the Diversion Authority Board, shall have the right at any time during the Term to terminate the employment of the Employee without Cause by giving ninety (90) days' written notice to the Employee setting forth a date of termination. In the event that the Authority exercises its rights under this section, Employee and Authority will develop a transition employment plan covering the Employee's job duties during the final ninety (90) days of his employment.

Section 7.04 TERMINATION FOR DEATH OR DISABILITY. In the event of the Employee's death, the date of termination of this Agreement shall be the date of the Employee's death. In the event the Employee shall be unable to perform his duties hereunder by virtue of illness or physical or mental incapacity or disability (from any cause or causes whatsoever) in substantially the manner and to the extent required hereunder prior to the commencement of such disability (all such causes being herein referred to as "disability") for periods aggregating forty five (45) days, whether or not continuous, in any continuous period of three hundred sixty (360) days, the Authority shall have the right to terminate the Employee's employment hereunder at the end of any calendar month during the continuance of such disability upon written notice to him.

Section 7.05 RESIGNATION. The Employee may resign from his position as Executive Director at any time by providing ninety (90) calendar days advanced written notice to the Co-Deputy Executive Directors.

**ARTICLE VIII.
DISPUTE RESOLUTION**

Section 8.01 INTENT AND PROCEDURE. The Parties will cooperate and use their best efforts to ensure that the various provisions of this Agreement are fulfilled. The Parties 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 Parties, the following procedure will be used.

Section 8.02 MEDIATION. If there is a failure between the Parties to resolve a dispute on their own, the Parties will first attempt to mediate the dispute. The Parties will agree upon a single mediator or, if an agreement cannot be reached within ten (10) calendar days, the mediator shall be selected by the American Arbitration Association (“AAA”) in accordance with its Commercial Industry Mediation Rules and Procedures then in effect. Any mediator selected by mutual agreement of the Parties or through the AAA selection process must have no current or on-going relationship with either Party. The Parties agree that only one (1) mediator shall be selected as the AAA mediator, and the Parties will each pay fifty percent (50%) of any costs for mediation services.

Section 8.03 LITIGATION IF DISPUTE NOT RESOLVED. If the dispute is not resolved within forty-five (45) calendar days after the selection of the mediator pursuant to Section 8.02, the Parties may litigate the matter.

Section 8.04 LITIGATION; VENUE. Any litigation arising out of this Agreement shall be heard in the state or federal courts located in Cass County, North Dakota, and all Parties to this Agreement waive any objection to the jurisdiction of these courts, whether based on convenience or otherwise.

Section 8.05 WAIVER OF JURY TRIAL. The Parties 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 Parties entering into this Agreement. This provision applies only to suits between the Parties and does not apply to third party claims or suits.

**ARTICLE IX.
MISCELLANEOUS**

Section 9.01 CONFLICTS OF INTEREST. The Employee shall avoid conflicts, potential or real, between his own personal and financial interests and that of the Authority, and the Employee shall notify the Diversion Authority Board as soon as possible of any potential conflict of interest that may arise.

Section 9.02 INDEMNIFICATION. The Authority shall, to the fullest extent authorized by law, and subject to the qualifications set forth herein, indemnify and hold Employee 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 Employee for acts occurring within the scope of his employment as set forth in this Agreement. Nothing herein shall be deemed a waiver by the Authority of the limits on liability set forth in N.D.C.C. § 32-12.1-03 or a waiver of any available immunities or defenses. The Authority's obligation to hold and save Employee harmless shall be limited by the limitations on liability set forth in N.D.C.C. § 32-12.1-03, as amended from time to time. This indemnification and hold harmless obligation shall not apply to any act or omission of Employee for which the Employee is guilty of malfeasance in office, willful neglect of duty, or bad faith. This indemnity and hold harmless obligation shall survive the termination of this Agreement for a period of six (6) years after this Agreement has been terminated.

Section 9.03 GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of North Dakota. Employee agrees and acknowledges that employment with a public agency in North Dakota requires his compliance with North Dakota Open Records requirements and that, as permitted under North Dakota law, his personnel file may be subject to release or inspection pursuant to a North Dakota open records request.

Section 9.04 AMENDMENTS. This Agreement shall be amended or modified only by mutual consent of both Parties, unless otherwise provided for herein.

Section 9.05 COUNTERPARTS. This Agreement may be executed simultaneously in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

Section 9.06 MERGER. This Agreement supersedes all prior oral or written communications between the Parties.

Section 9.07 ENTIRE AGREEMENT. This Agreement constitutes the entire agreement between the Parties with respect to the employment relationship between the Authority and the Employee and replaces all prior agreements or understandings.

Section 9.08 SEVERABILITY. In case any one or more of the provisions of this Agreement shall be invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained in this Agreement will not in any way be affected or impaired thereby.

Section 9.09 BINDING EFFECT. The terms and conditions of this Agreement are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective Parties.

IN WITNESS WHEREOF, the Authority and the Employee caused this Agreement to be executed.

(Remainder of page intentionally left blank.)


Signature Page for the Metro Flood Diversion Authority

The Governing Body of the Metro Flood Diversion Authority approved this Agreement on the 22nd of August, 2019.

AUTHORITY:

**METRO FLOOD DIVERSION
AUTHORITY**

By: 
MARY SCHERLING, Chair

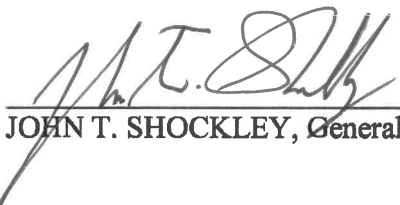
By: 
MICHAEL J. REDLINGER, Co-
Deputy Executive Director

By: 
ROBERT W. WILSON, Co-Deputy
Executive Director

ATTEST:


HEATHER WORDEN, Secretary

APPROVED AS TO FORM AND CONTENT


JOHN T. SHOCKLEY, General Counsel

Signature Page for Employee

By signing below, I agree and acknowledge that: I have been provided a copy of this Employment Agreement more than twenty-one (21) days prior to its Effective Date; I have had ample time to review the terms and conditions of this Agreement; and, I have had an opportunity to have it reviewed by my attorney.

The initial draft of the Employment Agreement was provided to me on 8-10-2019.

Version 2 of the Employment Agreement was provided to me on 8-16-2019.

Version 3 of the Employment Agreement was provided to me on 8-19-2019.

The final version of the Employment Agreement was provided to me on 8-20-2019.

EMPLOYEE:



Joel Paulsen

Dated: August 20th, 2019