



MEMORANDUM

**Highway
Department**

Jason Benson, P.E.
County Engineer

Thomas B. Soucy, P.E.
Deputy County Engineer

Blaine Laaveg
Superintendent

TO: Cass County Commission

FROM: Jason Benson, County Engineer *JB*

DATE: December 29, 2022

SUBJECT: Agenda topic for January 3rd, 2023 Commission Meeting:
Agreement for 36th Street between Cass County Government, the
Maple River Water Resource District, and North Dakota Soybean
Processors, LLC

Cass County Highway Department, the Maple River Water Resource District, and North Dakota Soybean Processors, LLC have developed Memorandum of Understandings (MOU) for 36th St. The MOU outlines the ownership, maintenance, and control of 36th St. 36th St is the primary road that will be used to access the North Dakota Soybean Processors (NDSP) plant site. This allows Cass County to take over access, right of way control, and utility control, along with general maintenance such as snow plowing, striping, signs.

Access to and from the NDSP Property will require road improvements to portions of 36th Street in Section 33 of Everest Township and in Section 34 of Casselton Township to accommodate construction of NDSP's soybean processing plant as well as future plant operations; 36th Street is adjacent to the Drain.

The County will pay for up to \$3,000,000 of the design, engineering, installation, construction, and other costs associated with the road improvement project through County, State and/or federal funding or grant monies. NDSP will reimburse the County for all design, engineering, installation and construction costs associated with the Projects in excess of \$3,000,000,

SUGGESTED MOTION:

Authorize the Commission Chair to sign the Memorandum of Understanding for 36th Street between Cass County Government, the Maple River Water Resource District, and North Dakota Soybean Processors, LLC.

1201 Main Avenue West
West Fargo, North Dakota
58078-1301

701-298-2370
Fax: 701-298-2395



CONTRACT APPROVAL

REQUIRED BY DEPARTMENT:

DEPARTMENT: Highway DATE OF REQUEST: 12-28-2022
Maple River Water Resource District and North
COMPANY REQUESTING CONTRACT: Dakota Soybean Processors, LLC
BRIEF PROJECT DESCRIPTION: Drain 62 Relocation
X NEW CONTRACT OR CONTRACT RENEWAL

REQUIRED BY STATE'S ATTORNEY OFFICE:

STATE'S ATTORNEY SIGNATURE: *Martin Newman*

STATE'S ATTORNEY COMMENTS:

Approved as to form.

AGREEMENT

THIS AGREEMENT is made as of _____, 2023, by and among the Maple River Water Resource District, a North Dakota political subdivision (the “**District**”) with a post office address of 1201 Main Avenue West, West Fargo, North Dakota 58078-1301; the County of Cass, North Dakota, a North Dakota political subdivision (the “**County**”) with a post office address of 211 - 9th Street South, Fargo, North Dakota 58103; and North Dakota Soybean Processors, LLC, a Delaware limited liability company, with a post office address of 2701 Bluff Road, Mount Vernon, Indiana 47620-8521 (“**NDSP**”).

RECITALS

A. The District owns, operates, and maintains the CASSELTON TOWNSHIP IMPROVEMENT DISTRICT NO. 62 PROJECT (the “**Drain**”), a legal assessment drain, on, over, under and across the real property legally described on **Exhibit A** (the “**District Property**”).

B. NDSP is in the process of developing a soybean processing plant in Section 34 of Casselton Township, Cass County, North Dakota, adjacent to portions of the Drain and the District Property, on the real property legally described on **Exhibit B** (the “**NDSP Property**”).

C. Access to and from the NDSP Property will require road improvements to portions of 36th Street in Section 33 of Everest Township and in Section 34 of Casselton Township to accommodate construction of NDSP’s soybean processing plant as well as future plant operations; 36th Street is adjacent to the Drain.

D. The road improvements to 36th Street required removal and replacement of existing intercept culverts and installation of three 24” RCPs and a single 58” x 36” RCPA (“**NDSP’s Utilities**”), on the District’s Drain right of way, as depicted on the plans attached as **Exhibit C**; the road improvements will also require modifications to the Drain.

E. In coordination with the Board of Township Supervisors of Casselton Township and Everest Township, the County is taking over responsibility and jurisdiction of that portion of 36th Street in Section 33 of Everest Township and Section 34 of Casselton Township beginning

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at Cass County Road Hwy 23 to a point 1100' feet east of 154th street (the "County Road"), which will include taking over responsibility and jurisdiction of NDSP's Utilities.

F. In addition, NDSP has requested the District's permission to install, construct, maintain, repair and replace (as necessary) certain permanent driveway improvements (the "**NDSP Driveway Improvements**") for ingress and egress purposes on, over, and across a portion of the Drain and the District Property to accommodate NDSP's access to and from the County Road for the benefit of the NDSP Property, which NDSP Driveway Improvements are depicted in the map attached as **Exhibit D**.

G. The District, the County and NDSP wish to enter into this Agreement to identify the parties' various rights and obligations regarding the improvements to the County Road, NDSP's Utilities, modifications to the Drain, and the NDSP Driveway Improvements, to accommodate the construction of NDSP's soybean processing plant as well as future plant operations, subject to the terms and conditions contained in this Agreement.

In consideration of the parties' mutual covenants contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which the parties acknowledge, the parties agree as follows:

AGREEMENT

1. **The Projects.** In connection with taking over responsibility and jurisdiction of the County Road, the County agrees that (i) the County will design, engineer, install and construct the improvements to the County Road, as depicted in the map attached as **Exhibit E** (the "**County Road Project**"), and the NDSP Driveway Improvements, to accommodate NDSP's access to and from the County Road for the benefit of the NDSP Property, and (ii) the County will pay for up to \$3,000,000 of the design, engineering, installation, construction and other costs associated with the Projects (as such term is defined below) through County, State and/or federal funding or grant monies. NDSP will reimburse the County for all design, engineering, installation and construction costs associated with the Projects in excess of \$3,000,000, as further provided in Section 4 of this Agreement. For the avoidance of doubt, all costs and expenses associated with the ownership, operation, maintenance and repair, or replacement of the road improvements, the NDSP Driveway Improvements or the modification and partial relocation of the Drain following construction of the Projects are excluded from NDSP's reimbursement obligations under Section 4 and are not subject to reimbursement by NDSP. The installation, construction, operation, and maintenance and repair of both the County Road Project and the NDSP Driveway Improvements will also require certain modifications and a partial relocation of the Drain, as depicted in the map attached as **Exhibit F** (the "**Drain Project**"). The County Road Project, the NDSP Driveway Improvements, and the Drain Project are, collectively, the "**Projects**." The parties agree the County could more efficiently construct the Projects and, with that in mind, the County will be responsible for all requisite

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engineering, design, bidding, contract administration, and construction of the Projects. The County, the District, and NDSP will cooperate regarding the design of the Projects to accommodate construction of NDSP's soybean processing plant as well as future plant operations, and to accommodate the efficient operation of the Drain; the District and NDSP will have the opportunity to review and make comments on the design of the Projects prior to final design approval. The County will not proceed with construction until the District approves the final design of each of the Projects. With regard to the County Road Project and the NDSP Driveway Improvements, the County will acquire all rights of way necessary and will acquire all permits and approvals necessary to construct the County Road Project and the NDSP Driveway Improvements.

Following construction of the County Road Project and the NDSP Driveway Improvements, the County will own, operate, maintain, repair and replace such improvements, at the County's sole cost and expense, subject to, with respect to the NDSP Driveway Improvements only, NDSP's right to maintain, repair and replace the NDSP Driveway Improvements, including snow and debris removal and driveway patching, at NDSP's cost and expense, in the event the County's operation, maintenance, repair or replacement of the NDSP Driveway Improvements is unreasonably delayed or withheld, and such delay in or withholding of the performance of the County's obligations with respect thereto is preventing the normal operation of NDSP's soybean processing plant.

Notwithstanding the County's ownership of and assumption of full responsibility and obligation to operate, maintain, repair and replace the NDSP Driveway Improvements, the County hereby consents to, and the District will grant to NDSP and its successors and assigns a perpetual easement to own, operate, utilize, maintain, repair and replace the NDSP Driveway Improvements for the purposes of ingress to and egress from, and for the benefit of, the NDSP Property, provided NDSP's use of the NDSP Driveway Improvements and the easement property may not unreasonably interfere with or adversely affect the District's operation or maintenance and repair of the Drain; as set forth in, and upon recordation of, that certain Access Easement between the District and NDSP, the form of which is attached hereto as **Exhibit G**, and which the District and NDSP hereby agree to execute promptly after completion of the Projects by the County and record in the real property records of Cass County, North Dakota.

With regard to the Drain Project, the District will acquire all rights of way necessary, will acquire all permits and approvals necessary, and, following construction, will own, maintain, and operate such improvements to the Drain.

With respect to all of the Projects, the County shall ensure that its bid specifications and contracts with its engineers, contractors, subcontractors, sub-subcontractors, suppliers, or any other parties to design, procure, construct, install, perform, or provide any portions of the Projects, inclusive of the bid specifications and contracts for the Projects: (1) are in compliance with the requirements, terms and conditions of this Agreement; (2) contain representations, warranties, "make-right"

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obligations, indemnities granted to the County, and remedies for breach of contract to complete the work and deliver the Projects in compliance with the contract; (3) contain firm deadlines in order for the Projects to meet the proposed construction timeline attached as **Exhibit H**, with commercially reasonable liquidated damages for unexcused delays, set-off rights, etc. and obligations to proceed with the work on a time is of the essence basis and in a diligent and expeditious manner, provided, for clarity, the County does not warrant or guarantee completion of construction of the Projects by a date certain; and (4) contain customary and commercially reasonable change order provisions for construction contracts of this type, including a requirement that all parties to the contract must sign any change order for it to be effective and disputed change order procedures; and the County shall be responsible for exercising all rights and pursuing all remedies available to the County under such contracts, including without limitation the pursuit of available liquidated damages and disputing any change order in good-faith if there is a good-faith basis to dispute the change order. For purposes of the foregoing provisions, the County agrees to consult with the District and NDSP in good faith on the final form of any construction contracts for the Projects for review and comment by the District and NDSP, prior to entering into any construction contracts for the Projects. The County will require its contractors and consultants to secure Commercial General Liability, Auto, and Excess or Umbrella Policies in connection with the Projects, and will require that those policies name the County, the District and NDSP as additional insured parties; the policies must be primary and noncontributory regarding any other insurance available to the County, the District and NDSP, and the policies must each contain a “waiver of subrogation” that waives any right to recovery any of those contractors’ or consultants’ insurance companies might have against the County, the District or NDSP.

2. **Rights of Way.** To the extent any of the Projects require any additional rights of way from NDSP, NDSP will convey the requisite right of way or easements on, over, under and across the NDSP Property as necessary and reasonably determined by NDSP, the County and the District, at no cost to the County or the District.

3. **Installation, Operation, Maintenance, Repair and Replacement of NDSP’s Utilities.** The parties acknowledge that the road improvements to portions of 36th Street in Section 33 of Everest Township to accommodate construction of NDSP’s soybean processing plant as well as future plant operations required removal and replacement of existing intercept culverts and installation of three 24” RCPs and a single 58” x 36” RCPA, on the District’s Drain right of way, in the late Summer and Fall of 2022 by NDSP, as depicted on the plans attached as **Exhibit C** (“**NDSP’s Utilities**”); NDSP constructed the NDSP Utilities in accordance with a Utility Permit approved by the District on August 4, 2022 (the “**Utility Permit**”). In connection with taking over responsibility and jurisdiction of the County Road, the County hereby agrees to take over full responsibility and jurisdiction of NDSP’s Utilities and agrees to operate, maintain, repair and replace NDSP’s Utilities at the County’s sole cost and expense. Upon completion of the installation and construction of NDSP’s Utilities in accordance the Utility Permit, (i) the County will own, operate, maintain, repair and replace NDSP’s Utilities and assume full responsibility therefor, at the County’s sole cost and expense, and (ii) NDSP and the District will

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proceed with customary and ordinary procedures to terminate the Utility Permit and all of NDSP's responsibilities and obligations with respect to NDSP's Utilities thereunder. The County's operation, maintenance, repair, and replacement of NDSP's Utilities may not unreasonably interfere with or adversely affect the District's operation or maintenance and repair of the Drain.

4. **County Reimbursements.** In connection with taking over responsibility and jurisdiction of the County Road, the County will pay for up to \$3,000,000 of the design, engineering, installation, construction and other costs associated with the Projects, including all third party engineering and consultant costs and fees, and all third party costs for design, bidding, equipment, materials, environmental services, permit acquisition, right of way acquisition, surveying, construction, construction inspection, interim financing costs, temporary maintenance costs prior to completion of construction, and labor costs associated with construction of the Projects, and other such related costs of the Projects, prior to and through completion of construction of the Projects. NDSP will reimburse the County for all such costs and expenses associated with and regarding the Projects prior to and through completion of construction of the Projects in excess of \$3,000,000, and the County shall direct invoice NDSP for any and all such excess costs associated with and regarding the Projects prior to and through completion of construction of the Projects. Reimbursable expenses include reasonable attorneys' costs and fees, engineering and consultant costs and fees, and costs for design, bidding, equipment, materials, environmental services, permit acquisition, right of way acquisition, surveying, construction, construction inspection, interim financing costs, and labor costs associated with construction of the Projects, and other such related costs of the Projects, prior to and through completion of construction of the Projects.

No more frequently than monthly and no less frequently than quarterly prior to completion of construction of the Projects, the County will provide NDSP with written notice of all design, engineering, installation, construction and other costs associated with the Projects, along with all supporting documentation and copies of all bills and invoices received for the costs and expenses related to the Projects. When payment by the County of such costs exceeds \$3,000,000, the County shall direct bill and invoice NDSP for such excess costs, with supporting documentation of such excess costs. For the avoidance of doubt, all costs and expenses associated with the ownership, operation, maintenance and repair, or replacement of the road improvements, NDSP's Utilities, the NDSP Driveway Improvements or the modification and partial relocation of the Drain, following construction of the Projects and NDSP's Utilities, are excluded from NDSP's reimbursement obligations under this Section 4 and are not subject to reimbursement by NDSP. NDSP will provide full payment to the County of all such reimbursable excess costs and expenses within sixty (60) days from the date of each direct bill invoice. If NDSP fails to provide payment within sixty (60) days, interest will accrue in the amount of one and one-half percent (1.50%) per month on all outstanding principal until paid in full.

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5. **District Reimbursements.** NDSP will reimburse the District for all costs and expenses associated with and regarding the Projects, regarding any Utility Permits issued by the District to accommodate NDSP's improvements on the NDSP Property, and regarding any easements or access agreements the District will convey to NDSP. Reimbursable expenses include attorneys' costs and fees, engineering and consultant costs and fees, litigation costs incurred regarding any of the Projects, design, right of way acquisition, permit acquisition, surveying, construction inspection, interim financing costs, and labor costs incurred by the District associated with the Projects, and other project-related costs. No more than monthly, the District and the County will provide NDSP with written notice of all costs and expenses, along with copies of all bills and invoices received for those Project costs. NDSP will provide full payment to the District and to the County of all costs and expenses within sixty (60) days from the date of each written notice. If NDSP fails to provide payment within sixty (60) days, interest will accrue in the amount of one and one-half percent (1.50%) per month on all outstanding principal until paid in full.

6. **Default; Remedies.** If NDSP fails to perform any of its obligations under this Agreement and such failure continues for a period of thirty (30) days following written request or demand or notice from the District and/or the County, then NDSP will be in default and the District and the County shall have the right to suspend the performance of their obligations under this Agreement until such time as NDSP cures such default; provided, however, that if NDSP's failure to perform is non-monetary in nature and cannot be cured within such thirty (30) day period and NDSP commences to cure such failure within such thirty (30) day period and thereafter diligently pursues such cure to completion, then the District and the County shall not be entitled to suspend their performance under this Agreement for such default, unless the cure of such default is required for the commencement of their performance (e.g., NDSP must grant a right of way or easement to the District and/or the County). Any suspension of performance of obligations by the County and the District under this Agreement will be without prejudice to any obligations or liabilities accrued prior to such suspension. Upon the occurrence of any default by NDSP beyond any applicable periods, the District and the County may, in addition to suspending performance hereunder, but upon at least ten (10) days prior written notice to NDSP, enforce the provisions of this Agreement and may take any and all other actions necessary, in law or in equity, to collect all amounts due under this Agreement or to enforce any of NDSP's other obligations under this Agreement. If NDSP fails to make timely payment as required under this Agreement, the District and the County may recover their respective costs incurred by assessing the costs against the NDSP Property, including any reasonable attorneys' fees incurred in attempting to collect the amounts due, or by other legal means of collection. The remedies provided for in this Agreement are cumulative and not exclusive, and are in addition to any and all other remedies available to the District and the County under North Dakota law. NDSP will be responsible for all of the District's and the County's costs and expenses, including reasonable attorneys' fees, incurred in collecting, or attempting to collect from NDSP for monies owing by NDSP under this Agreement. In connection with any litigation arising out of this Agreement, the prevailing party shall be awarded all costs incurred in relation to such litigation, including reasonable attorneys' fees and expenses.

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7. **Access; Indemnity.** The County, and the County's employees, contractors, consultants, agents and representatives, may enter upon and access the NDSP Property and the District Property for purposes of the Projects. The County, and the County's employees, contractors, consultants, agents, and representatives, accept any and all risk regarding entry upon the NDSP Property and the District Property. The County will release, defend, indemnify, protect, and hold harmless NDSP, the District and their respective officers, agents, representatives, employees, consultants, and contractors from and against any and all claims, actions, administrative proceedings, judgments, damages, penalties, fines, costs, liabilities, interests, or losses, including costs, expenses, and reasonable attorneys' fees, to the extent arising out of or resulting from its installation, construction, operation, maintenance, repair and replacement of the Projects, including any entry upon, use of, or access in, on, over, across, and through the NDSP Property or the District Property, respectively, by the County or any of its employees, contractors, agents and representatives, including any failure to perform under this Agreement.

8. **Forbearance and Remedies.** The failure or delay of the parties hereto to insist on the timely performance of any of the terms of this Agreement, or the waiver of any particular breach of any of the terms of this Agreement, at any time, will not be construed as a continuing waiver of those terms or any subsequent breach, and all terms will continue and remain in full force and effect as if no forbearance or waiver had occurred. .

9. **Compliance with Laws.** The County will comply and will cause its contractors to comply with all applicable laws, ordinances, rules, and regulations of all federal, state, county, and municipal governments, and any other applicable governmental entities or political subdivisions, and their appropriate departments, commissions, boards, and officers, which may be applicable to the Projects. In addition, the County and its contractors will obtain all other necessary and requisite licenses, permits, registrations, and/or approvals from all applicable federal, state, county, and municipal governments, and any other applicable governmental entities.

10. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties regarding the Projects and all other matters described in this Agreement; this Agreement supersedes any previous oral or written agreements between the parties.

11. **Modifications.** Any modifications or amendments of this Agreement must be in writing and signed by both parties to this Agreement.

12. **Binding Effect.** The covenants, terms, conditions, provisions, and undertakings in this Agreement, or in any amendment, will be binding upon the parties' successors and assigns.

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13. **Representation.** The parties, having been represented by counsel or having waived the right to counsel, have carefully read and understand the contents of this Agreement, and agree they have not been influenced by any representations or statements made by any other parties.

14. **Survival of Agreement.** If any court of competent jurisdiction finds any provision or part of this Agreement is invalid, illegal, or unenforceable, that portion will be deemed severed from this Agreement, and all remaining terms and provisions of this Agreement will remain binding and enforceable; the parties will reconvene negotiations to arrive, in good faith, at an agreement as to matters remaining undetermined as a result of any finding by a court of competent jurisdiction that any provision or part of this Agreement is invalid, illegal, or unenforceable.

15. **Governing Law.** This Agreement will be construed and enforced in accordance with North Dakota law. The parties agree the venue for any litigation arising out of this Agreement will be in District Court in Cass County, North Dakota, and the parties waive any objection to personal jurisdiction.

16. **Assignment.** None of the parties will transfer or assign this Agreement, nor any rights or obligations under this Agreement, without the express written consent of the other parties.

17. **Headings.** Headings in this Agreement are for convenience only and will not be used to interpret or construe its provisions.

18. **Effective Date.** This Agreement will become effective as of the date first set forth above.

19. **Notices.** All notices or other communications required or permitted by this Agreement shall be in writing and shall be deemed given when personally delivered to the other party, or in lieu of such personal service, five (5) days after deposit in the United States mail, first class, postage prepaid, certified; or the next business day if sent by reputable overnight courier, provided receipt is obtained and charges are prepaid by the delivering party. Any notice shall be addressed as follows:

If to NDSP: North Dakota Soybean Processors, LLC
2701 Bluff Rd.
Mount Vernon, IN 47620-8521
Attn.: President

With Copy to: Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
Attn.: Michael Weaver

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If to the District: Maple River Water Resource District
Cass County Highway Dept.
1201 Main Ave. W.
West Fargo, ND 58708
Attn: Carol Harbeke Lewis

With Copy to: Ohnstad Twichell, P.C.
444 Sheyenne Street
P.O. Box 458
West Fargo, ND 58078-0458
Attn.: Sean M. Fredricks

If to County: _____

Attn.: _____

With Copy to: _____

Attn.: _____

Any Party may change its address for purposes of this Section by giving written notice of such change to the other party in the manner provided in this Section.

[Signature Pages Follow]

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EXHIBIT A

Map of the Projects

(1 Page)

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EXHIBIT B

Legal Description of NDSP Property

Lot 1, Block 1;
Lot 1, Block 2; and
Lot 1, Block 3;
all in NDSP FIRST SUBDIVISION, according to the recorded plat thereof, in Section 34,
Township 140, Range 52 West of the Fifth Principal Meridian, Extra Territorial District of the
City of Casselton, Cass County, North Dakota.

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EXHIBIT C

NDSP's Utilities

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EXHIBIT D

Depiction of NDSP Driveway Improvements

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EXHIBIT E

Depiction of the County Road Project

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EXHIBIT F

Depiction of Drain Project

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EXHIBIT G

Form of Access Easement

EXHIBIT H

Project Timeline Summary

<u>Milestone</u>	<u>Completion Date</u>	<u>Comments</u>
Phase I – Culvert Replacements	Completed	
Phase II – Permanent Crossing	August 1, 2023	NDSP Driveway Improvements
Phase III – Concrete Installed	July 1, 2024	All Projects completed including Concrete work