



## Highway Department

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### MEMORANDUM

TO: Cass County Commission

FROM: Jason Benson, County Engineer

DATE: August 11, 2023

SUBJECT: Agenda Item for August 21<sup>st</sup>, 2023 Cass County Commission. Reimbursement MOU for 37 FT Road Improvements.

When the Diversion is operating, the Authority will allow a flow of thirty-seven (37) feet of floodwater to pass through the USGS gage at Fargo, between the cities of Fargo and Moorhead. This operation elevation has an effect at 4 locations along County Road 31. The locations are referenced in Exhibit A of the Memorandum of Understanding (MOU). This would normally cause water at those four locations to overtop. The 37 FT Road Improvements would increase the elevations for those low areas along the road to a point where they would still be passable for vehicles. Since these improvements will be happening to our roads, The County will be leading the construction but due to the fact this issue is caused by the operation of the Project, the Diversion Authority will be responsible for paying for the improvements. The Memorandum of Understanding (MOU) outlines the locations and reimbursement of such work.

#### **SUGGESTED MOTION:**

Move to approve the Cass County and Metro Flood Diversion Authority Memorandum of Understanding for the 37 FT Road Improvements.



**CONTRACT APPROVAL**

**REQUIRED BY DEPARTMENT:**

DEPARTMENT: Highway DATE OF REQUEST: 08-14-2023

COMPANY REQUESTING CONTRACT: Metro Flood Diversion Authority

BRIEF PROJECT DESCRIPTION: MOU for 37 FT Road Improvements

X NEW CONTRACT OR        CONTRACT RENEWAL

**REQUIRED BY STATE'S ATTORNEY OFFICE:**

STATE'S ATTORNEY SIGNATURE: \_\_\_\_\_ DATE \_\_\_\_\_

STATE'S ATTORNEY COMMENTS:

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**MEMORANDUM OF UNDERSTANDING**

**BY AND BETWEEN  
METRO FLOOD DIVERSION AUTHORITY  
AND  
CASS COUNTY, NORTH DAKOTA**

**Dated as of \_\_\_\_\_, 2023**

**Relating to:**

**A Memorandum of Understanding outlining respective roles and responsibilities for the design and construction of Road Raises in conjunction with the Fargo-Moorhead Metropolitan Area Flood Risk Management Project.**

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

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- EXHIBIT A – PROJECT IMPACTS MAP**
- EXHIBIT B – IMPACTED ROADS**
- EXHIBIT C – RECONSTRUCTION STANDARDS**
- EXHIBIT D – DEVELOPMENT PLAN SUMMARY SHEET**

## MEMORANDUM OF UNDERSTANDING

**THIS MEMORANDUM OF UNDERSTANDING** (hereinafter the “MOU”) is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2023 (the “Effective Date”), by and between METRO FLOOD DIVERSION AUTHORITY, a political subdivision of the State of North Dakota (the “Authority”), and CASS COUNTY, NORTH DAKOTA, a political subdivision and home rule county of the State of North Dakota (the “County”).

**WHEREAS**, the Authority is the local entity responsible for delivering the Fargo-Moorhead Metropolitan Area Flood Risk Management Project (the “Comprehensive Project”); and

**WHEREAS**, when the Comprehensive Project is operating, the Authority will allow a flow of thirty-seven (37) feet of floodwater to pass through the USGS gage at Fargo, between the Cities of Fargo and Moorhead (hereinafter the “In-town Water”); and

**WHEREAS**, the County has jurisdiction over roads north of Fargo that may be inundated by the In-town Water during operation of the Comprehensive Project; and

**WHEREAS**, due to potential impacts from operation of the Comprehensive Project, road raises need to be constructed on those segments of the County’s roads identified on Exhibit B that may be impacted (the “Impacted Roads”); and

**WHEREAS**, the Authority and the County now desire to enter into this MOU to set forth their respective roles and responsibilities for the Road Raises.

**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 County 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 MOU and as defined in this section unless a different meaning clearly applies from the context.

**“100-Year Flood Event”** means the flood event that has a one percent (1%) chance of being met or exceeded in any year. The 100-Year Flood Event is used to establish the regulatory floodplain boundary for the Comprehensive Project. The regulatory floodplain boundary will be updated when the Comprehensive Project is completed within an area referred to as the Revision Reach.

**“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 enforcement, interpretation, or administration, 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, in each case whether or not having the force of law, that are applicable now or are applicable at any time to the Authority, the County, or the work described herein.

**“Assignment”** means the transfer and acceptance of the roles and responsibilities of a Party under this MOU to a third party.

**“Authority”** means the Metro Flood Diversion Authority, a political subdivision of the State of North Dakota.

**“Authority Representative”** means the individual identified in Section 14.06.

**“Business Day”** means any day that is not a Saturday, a Sunday, or a federal public holiday.

**“Capital Improvement Plan”** means the plan of the County for capital infrastructure improvements, including any Road Raises, to be completed within the jurisdiction of the County during the County’s subsequent fiscal year.

**“Change Order”** means a document that is signed by a Contractor and the County and authorizes an addition, deletion, or revision in the work or an adjustment in the contract price or contract times, or other revisions to the contract, issued on or after the effective date of the contract.

**“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, and as amended by the Second Supplemental Environmental Assessment dated August 27, 2018 (2018 SEA), and the Engineering Documentation Report, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, ND and MN, Modifications Through February 2019.

**“Comprehensive Project Operation”** means operation by the Authority of the Red River Control Structure or the Wild Rice River Control Structure to restrict flow into the Fargo-Moorhead metropolitan area.

**“Contractor”** means the individual or entity with which the County has contracted for performance of the work.

**“County”** means Cass County, North Dakota, a political subdivision and home rule county of the State of North Dakota.

**“County Representative”** means the individual identified in Section 14.06.

**“Development Plan Summary Sheet”** means as defined in Section 2.02 hereof.

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

**“Effective Date”** means the date on which both Parties have executed this MOU.

**“Engineering Consultant”** means any engineering firm hired by the County to serve as the County’s engineer of record.

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

**“Estimated Total Project Cost”** means an estimate of all costs attributed to the design and construction of the Road Raise including surveying, geotechnical investigations, utility relocations, mapping, property acquisition, legal and administrative services, design, construction, construction management, and construction inspections.

**“Executive Director”** means the chief administrative officer of the Authority as set forth in the Joint Powers Agreement.

**“FEMA”** means the Federal Emergency Management Agency.

**“Final Design”** means the design has reached ninety-five percent (95%) completion as determined by the County.

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

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

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

**“Impacted Roads”** means those specific segments of roads under the jurisdiction of the County, as identified in Exhibit B, that will be raised in accordance with this MOU.

**“In-town Water”** means thirty-seven (37) feet of floodwater that will be allowed to pass through the USGS gage at Fargo, between the Cities of Fargo and Moorhead, while the Comprehensive Project operates.



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

**“Member Entities”** means the City of Fargo, North Dakota; Cass County, North Dakota; the City of Moorhead, Minnesota; Clay County, Minnesota; and the Cass County Joint Water Resource District.

**“Party”** means the Authority or the County, as the context may require, and its respective legal representatives, successors, and permitted assigns.

**“Person”** means an individual, a general or limited partnership, a joint venture, a corporation, a limited liability company, a trust, an unincorporated organization, or a governmental authority.

**“PMC”** means the Program Management Consultant.

**“Preliminary Design”** means a design that has reached thirty-five percent (35%) completion as determined by the County.

**“Reconstruction Standards”** means the standards set forth in Exhibit C attached to this MOU.

**“Revision Reach”** means the Revision Reach defined in the USACE/FEMA Coordination Plan as, “The extent of the revision is defined by an effective tie-in at the upstream and downstream limits for each flooding source. An effective tie-in is obtained when the revised base flood elevations from the post-project conditions are within 0.5 feet of the pre-project conditions model at both the upstream and downstream limits.”

**“Road Raises”** means the raising of the road profile of an Impacted Road in accordance with the technical specifications identified herein.

**“Road Raise Standard”** means the centerline of the Impacted Roadway is raised to be at least six (6) inches higher than the water surface elevation during a 100-Year Flood Event.

**“State”** means the State of North Dakota.

**“TAG”** means the Technical Advisory Group of the Authority.

**“Total Project Budget Amount”** means a budget of all costs attributed to the design and construction of a Road Raise including surveying, geotechnical investigations, utility relocations, mapping, property acquisition, legal and administrative services, design, construction, construction management, construction materials, and construction inspections, as set forth on a Development Plan Summary Sheet. The Total Project Budget Amount includes contingency.

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

“WIFIA” means the Water Infrastructure Finance and Innovation Act program, as administered by the U.S. Environmental Protection Agency.

**Section 1.02** 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 as 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 MOU 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 MOU, 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. INITIAL DEVELOPMENT**

**Section 2.01** ESTIMATED TOTAL PROJECT COST. Following the Effective Date, the County will develop an Estimated Total Project Cost for each of the Road Raises. The Estimated Total Project Cost will be developed through the completion of a Development Plan Summary Sheet, described in the following section. The County will present the Estimated Total Project Cost and the Development Plan Summary Sheet to the Executive Director for review. Following his/her review, the Executive Director will then seek review and approval of the Estimated Total Project Cost and Development Plan Summary Sheet from the Diversion Authority Board. Once this Estimated Total Project Cost is accepted by the Diversion Authority Board, unless specifically set forth herein, the County will not seek additional budget approvals from the Diversion Authority Board.

**Section 2.02** DEVELOPMENT PLAN SUMMARY SHEET.

(a) As set forth in the preceding section, the County will prepare, and update as described herein, a Development Plan Summary Sheet for each Road Raise. The Development Plan Summary Sheet, as included in Exhibit D, will include at least the following:

(1) The County’s approach for procuring professional services for the design of the Road Raise, e.g., competitive procurement or use of an existing professional services contract;

(2) The estimated cost and schedule for design professional services, including any surveying, geotechnical investigations, mapping, and legal and administration services required for the design (Line Item (A) from the Development Plan Summary Sheet);

(3) The estimated cost and schedule for property acquisition and property acquisition services (Line Items (B) + (C) from the Development Plan Summary Sheet);

(4) The estimated cost and schedule for construction (Line Item (D) from the Development Plan Summary Sheet);

(5) The estimated cost for construction professional services, including construction contract management, engineering, and inspection services, surveying, site inspections, and testing required during construction (Line Item (E) from the Development Plan Summary Sheet);

(6) Estimated Total Project Cost, which includes the total of the items in subsections (2), (3), (4), and (5);

(7) Identification and compliance with the County's adopted procurement and/or purchasing procedures;

(8) A mutually approved contingency (10%), which is based on the Estimated Total Project Cost, is applied to each Road Raise; and

(9) The Total Budget Amount, which includes the total of the items in subsections (6) and (8).

(b) Once the County has executed a professional services contract, including for construction management and inspections services; a construction contract; or amendments or Change Orders of the same, the County will update the Development Plan Summary Sheet with the name of the professional services or construction firm, the firms subcontracted to the professional services or construction firm, and the contracted values. The County will provide the updated Development Plan Summary Sheet to the Authority within fifteen (15) Business Days of the execution of the contract for professional services, of construction commencement, or of amendment or Change Order of the same, as applicable.

**Section 2.03** SCOPE. The scope of the Road Raises is set forth in this MOU, and any change in that scope must be approved by the Diversion Authority Board. The County will proceed with the development of the Road Raises in accordance with the Development Plan Summary Sheets and the Joint Powers Agreement. Approval for reimbursement to the County will not be delayed provided work on the Road Raises coincides with the approved scope of such projects. The County will exercise Good Faith to ensure scope consistency.

### **ARTICLE III. CAPITAL IMPROVEMENT PLAN**

**Section 3.01** ANNUAL ASSESSMENT. On an annual basis, prior to the County seeking official approval from its governing body of the annual Capital Improvement Plan, the County and the Authority's Director of Engineering or his/her designee will mutually review and update the plan for Road Raises to be developed in the new Fiscal Year. Updates for each Road Raise will be set forth on a revised Development Plan Summary Sheet.

**Section 3.02** BUDGET ADJUSTMENTS.

(a) Following the updates described in the preceding section, if the budget for the cost of a Road Raise exceeds the initial Estimated Total Project Cost determined in accordance with Section 2.01, then the County and the Authority's Director of Engineering or his/her designee will present the updates to the Road Raise to the Finance Committee and Diversion Authority Board for review and approval. Following approval of the updates to each Road Raise, the Authority will incorporate the updated Estimated Total Project Cost for the Road Raise into the annual Authority budget for the new Fiscal Year until all Road Raises have been constructed.

(b) Following the updates described in the preceding section, if the budget for the cost of a Road Raise does not exceed the initial Estimated Total Project Cost, then the Authority will incorporate the initial Estimated Total Project Cost for the Road Raise into the annual Authority budget for the new Fiscal Year for approval by the Diversion Authority Board. The Executive Director will present the updated plan for the Road Raise to the Diversion Authority Board in conjunction with the annual Authority budget until all Road Raises have been constructed.

**ARTICLE IV.  
DESIGN**

**Section 4.01** GENERALLY. The County is responsible for designing the Road Raises and may utilize its own Engineering Consultants or in-house Engineering Staff for the design of each Road Raise. The County will design the Road Raises in accordance with the Road Raise Standard and the Reconstruction Standards. The completed designs for any Road Raise will be the property of both the Authority and the County.

**Section 4.02** DESIGN REPORTS. The County will provide the Authority with a biannual progress report for each Road Raise, outlining the design status. The County will provide a copy of such biannual progress report to the PMC. The biannual progress report will also provide a cost to date and estimated completion costs. Any project costs that may be approaching the Estimated Total Project Cost plus contingency provided in the Development Plan Summary Sheet will be flagged for further discussion and possible budget amendment.

**Section 4.03** AUTHORITY REVIEW. The County will provide to the Authority, for concurrence, a Preliminary Design and a Final Design for each Road Raise, concurrent with when these plans are distributed by the Engineering Consultant, if applicable, for review and comment by the County. The County can proceed with the development of the Road Raise provided the Authority does not object to the plans and specifications within ten (10) Business Days of being provided the Final Design.

**Section 4.04** ENGINEERING SERVICES. All engineering services procured by the County for a Road Raise must be provided by a professional engineer licensed in the State of North Dakota.

## **ARTICLE V. BIDDING AND CONTRACTS**

**Section 5.01** BIDDING. The County will let bids for the Road Raises in accordance with the Joint Powers Agreement, WIFIA requirements, Chapter 48-01.2 of the North Dakota Century Code, and any other applicable state procurement and/or bidding laws.

**Section 5.02** REVIEW. General Counsel for the Authority will review all bid documents prior to release to ensure compliance with WIFIA and other laws and agreements applicable to the Road Raises.

**Section 5.03** CONTRACT FORM. Contracts for Road Raises will identify the County as the owner under the contract and will contain provisions as required by the Joint Powers Agreement, applicable WIFIA requirements, and applicable state law, as appropriate. The form of the contract must be approved by the Executive Director and the Cass County Joint Water Resource District if funds generated by special assessments levied and collected by the Cass County Joint Water Resource District will be utilized for payment on the contract or reimbursement to the County.

**Section 5.04** CONTRACT AWARD LIMITATION. The County will not proceed with the award of a construction contract if the Total Project Budget Amount, when considering the construction bids and updated costs for elements of the Estimated Total Project Cost, exceeds the approved Total Project Budget Amount unless the newly calculated Total Project Budget Amount is approved and the Development Plan Summary Sheet is amended. The Executive Director or his/her designee may approve an increase in the Total Project Budget Amount for a Road Raise of up to and including \$200,000. The Diversion Authority must approve an increase in the Total Project Budget Amount for a Road Raise greater than \$200,000. The Diversion Authority Board will make a Good Faith effort to approve or disapprove of the budget increase within forty-five (45) calendar days of notice from the County.

**Section 5.05** APPROVAL. The County will approve all contracts for Road Raises at a public meeting and by resolution of its governing body. Additionally, the County will supply electronic copies of all public bidding documents and contracts for Road Raises in accordance with the provisions of the Joint Powers Agreement.

**Section 5.06** DISPUTES. The County and the Authority will coordinate with respect to any disputes with contractors for Road Raises in accordance with the Joint Powers Agreement.

## **ARTICLE VI. CONSTRUCTION**

**Section 6.01** GENERALLY. The County will construct the Road Raises in accordance with the Joint Powers Agreement and all related documents.

**Section 6.02** CONSTRUCTION REPORTS. The County will provide the Authority with a biannual progress report for each Road Raise, outlining the construction status. The County will provide a copy of such biannual progress report to the PMC. The biannual progress report will also provide a cost to date and estimated completion costs. Any project costs that may be approaching the Estimated Total Project Cost plus contingency provided in the Development Plan Summary Sheet will be flagged for further discussion and possible budget amendment.

**Section 6.03** PAY REQUESTS AND CHANGE ORDERS. Pay requests and Change Orders relating to contracts for Road Raises will be reviewed and approved by the County provided the Total Project Budget Amount, when considering the amount of the proposed pay request or Change Order, exceeds the approved Total Project Budget Amount unless the newly calculated Total Project Budget Amount is approved. If the approved Total Project Budget Amount is exceeded by the proposed pay request or Change Order, the County will submit a request for the Executive Director's approval to exceed the approved Total Project Budget Amount. The request must state the amount by which the approved Total Project Budget Amount is exceeded and justification for the increase. The Authority will respond to the County within ten (10) Business Days of receipt of request. The Authority will not unreasonably withhold approval of a Change Order if the Authority determines that it is within the scope of the Road Raise.

**Section 6.04** CLOSE OUT. Close out of a Road Raise will occur in accordance with section 12.16 of the Joint Powers Agreement.

**Section 6.05** ACCESS. The County will permit and facilitate reasonable access to the PMC and TAG for reasonable inspection and monitoring of the Road Raises and will cooperate fully with the PMC and TAG. Inspections may only be made upon reasonable notice to the County, during business hours, and the PMC and TAG must comply with the County's site safety requirements. In an emergency, the PMC and TAG may access the site as needed and provide notice as soon as reasonably possible to the County.

**Section 6.06** AS-BUILT DRAWINGS. Within ninety (90) calendar days following the completion of construction of a Road Raise, the County will provide final as-built drawings in electronic format to the Secretary of the Authority and to the PMC.

## **ARTICLE VII. OWNERSHIP AND MAINTENANCE**

**Section 7.01** IMPACTED ROADS. The County will maintain ownership of County roads that are impacted and/or raised according to this MOU.

**Section 7.02** MAINTENANCE. The County will be responsible for maintaining County roads that have been improved with Road Raises. The Parties acknowledge and agree that maintenance and/or repairs necessary as a result of Comprehensive Project Operation will be handled in accordance with the Property Rights Acquisition and Mitigation Plan (PRAM) and any subsequent procedures adopted by the Authority or any agreements between the Authority and the County with respect to Comprehensive Project Operation.

**ARTICLE VIII.  
FUTURE CHANGES OR ADDITIONS**

**Section 8.01** FUTURE CHANGES. The County may make future changes to the Impacted Roads in its sole discretion, assuming all risks of how future Comprehensive Project operation may affect the Impacted Roads following alteration.

**ARTICLE IX.  
PROFESSIONAL SERVICES CONTRACTS**

**Section 9.01** WIFIA REQUIREMENTS. To comply with WIFIA requirements, all professional services contracts must require the Contractor to (i) complete and submit the certification and disclosure forms in Appendix A and Appendix B to 40 CFR Part 34 pertaining to federal lobbying restrictions; (ii) comply with the federal non-discrimination requirements set forth in Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act of 1972, 40 CFR Part 7, and Executive Order No. 11246; and (iii) certify the Contractor is not federally debarred. The County will provide copies of all executed certifications and/or documents received by the County in accordance with this subsection to the Authority unless the Authority already has these certifications on file from the Engineering Consultant.

**Section 9.02** ASSIGNMENT. All professional services contracts, subsequent to the Effective Date, will not preclude Assignment. Assignment may only occur, however, through written consent of the Contractor and the County. The County additionally agrees to seek consent of the Contractor for Assignment to the Authority, when necessary and appropriate.

**ARTICLE X.  
INSURANCE AND LIABILITY**

**Section 10.01** INSURANCE.

(a) The County will require its Contractor, prior to commencing construction, to secure and keep in force during the term of construction the following insurance coverages for not less than the following amounts:

(1) Commercial general liability insurance (including completed operations, contractual, and products coverage) with minimum liability limits of \$1,000,000 per person and \$2,000,000 per occurrence.

(2) Automobile liability (any auto, including owned, non-owned, and hired) with minimum liability limits of \$500,000 per person and \$2,000,000 per occurrence.

(3) Excess or umbrella liability insurance with minimum liability limits of \$1,000,000 and \$2,000,000 aggregate.

(4) Workers compensation insurance in compliance with all applicable statutory requirements.

(b) The above-listed insurance coverages will meet the following additional requirements:

(1) Any deductible or self-insured retention amount or other similar obligation under the policies will be the Contractor's sole responsibility.

(2) The policies must be from insurers rated "A-" or better by A.M. Best Company, Inc.

(3) All policies will name the Contractor as the insured and the Authority and the County as additional insured parties.

(4) The Contractor's policies will be primary and noncontributory regarding any other insurance available to the Authority and the County.

(5) The Contractor's policies must each contain a "waiver of subrogation" that waives any right to recover any of the Contractor's insurance companies might have against the Authority or the County.

(6) The Contractor's policies will contain a provision that the policies and any endorsements may not be cancelled or modified without thirty (30) calendar days' prior written notice to the Authority and the County.

(7) The Contractor's policies, either in the policies or in the endorsements, will each contain a provision that the Contractor's insolvency or bankruptcy will not release the insurer from payment under the policy, even when the Contractor's insolvency or bankruptcy prevents the Contractor from meeting the retention limit under the policy.

(8) The Contractor's policies, either in the policies or in the endorsements, will contain cross liability/severability of interests to ensure that all additional insured parties are covered as if they were all separately covered.

(9) The Contractor's policies, either in the policies or in the endorsements, must contain a provision that the legal defense provided to the Authority and the County will be free of any conflicts of interest, even if retention of separate legal counsel is necessary.

(10) The Contractor's policies will not limit in any way the Contractor's duties to defend, indemnify, and hold harmless the Authority and the County and those parties' officers, employees, agents, consultants, subcontractors, and representatives, as set forth herein.

(c) Before commencing work, the County will require the Contractor to deliver copies of the insurance policies and endorsements required under this MOU to the County, and the Contractor will provide all requisite evidence that the insurance required under this MOU is in full force and effect.



(d) The County will require the Contractor to release, defend, indemnify, protect, and hold harmless the Authority, the County, and their officers, agents, representatives, employees, or contractors, and such duties include anything in excess of the minimum insurance requirements described above and anything not otherwise covered or insured. The Authority's receipt of any certificates, policies, or endorsements required under this MOU will not in any way affect the Contractor's duties and obligations to maintain the insurance required under this MOU. The County must require all of the Contractor's subcontractors to purchase and maintain the same insurance with the same conditions and terms required of the Contractor under this MOU.

## **ARTICLE XI. REIMBURSEMENT**

**Section 11.01** REIMBURSABLE COSTS. The Authority will reimburse the County for all salaries, services, and/or related costs and expenses for surveying, land acquisition, design, construction, construction material, utilities, and inspections for the Road Raises highlighted in Exhibit A. The County will submit pay requests to the Authority to receive reimbursement throughout the course of development of the Road Raises. The Authority will reimburse the County within sixty (60) calendar days of the submission of a pay request.

**Section 11.02** OTHER PROJECT FUNDING. The County and the Authority will cooperate in Good Faith if either entity pursues additional funding sources for the Road Raises. If either entity is successful in securing alternative funding sources for the Road Raises, the Authority will pay one hundred percent (100%) of the local cost share.

## **ARTICLE XII. TERM AND TERMINATION**

**Section 12.01** TERM. This MOU will commence on the Effective Date and will terminate upon the completion of construction of the Comprehensive Project.

**Section 12.02** TERMINATION. The Parties may mutually agree in writing to terminate this MOU prior to the end of the term described in Section 12.01.

## **ARTICLE XIII. DISPUTE RESOLUTION**

**Section 13.01** INTENT AND PROCEDURE. The Parties will cooperate and use their best efforts to ensure that the various provisions of this MOU 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 MOU. If disputes cannot be resolved informally by the Parties, the following procedure will be used.

**Section 13.02** 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 13.03** 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 the preceding section, the Parties may litigate the matter.

**Section 13.04** LITIGATION; VENUE. All litigation between the Parties arising out of or pertaining to this MOU 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 13.05** 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 MOU, or arising out of, under, or in any connection with this MOU, 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 MOU. This provision is a material inducement for all Parties entering into this MOU. This provision applies only to suits between the Parties and does not apply to third party claims or suits.

#### **ARTICLE XIV. MISCELLANEOUS**

**Section 14.01** COMPLETE AGREEMENT. This MOU 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.

**Section 14.02** COUNTERPARTS. This instrument may be executed in one or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

**Section 14.03** AMENDMENTS. This MOU may be amended only by written instrument duly executed by the Parties or their respective successors or assigns, except to the extent expressly provided otherwise in this MOU.

**Section 14.04** SEVERABILITY AND SAVINGS CLAUSE. Each provision, section, sentence, clause, phrase, and word of this MOU is intended to be severable. If any provision, section, sentence, clause, phrase, or 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 MOU.

**Section 14.05** FORCE MAJEURE. Neither the Authority nor the County 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: war, civil war, invasion, violent act of foreign enemy, or

armed conflict; nuclear, chemical, or biological contamination; ionizing radiation; or any act of terrorism.

**Section 14.06 AUTHORIZED REPRESENTATIVES.** Each of the Authority and the County hereby designates the following individual as its initial authorized representative, respectively, to administer this MOU on its respective behalf:

- (a) Authority Representative: Kris Bakkegard, Director of Engineering
- (b) County Representative: Jason Benson, Cass County Engineer

**Section 14.07 NOTICE.**

(a) All notices under the MOU will be in writing and: (i) delivered personally; (ii) sent by certified mail, return receipt requested; (iii) sent by a recognized overnight mail or courier service, with delivery requested; or (iv) sent by email communication followed by a hard copy, to the following addresses.

(b) All notices to the Authority will be marked as regarding the Road Raises and will be delivered to the following address or as otherwise directed by the Authority Representative:

4784 Amber Valley Parkway South, Suite 100  
Fargo, North Dakota 58104

(c) All notices to the County will be marked as regarding the Road Raises and will be delivered to the following address or as otherwise directed by the County Representative:

1201 Main Avenue West  
West Fargo, North Dakota 58078

(d) Notices will be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U.S. Postal Service, private courier, or other person making the delivery. Notwithstanding the foregoing, notices received after 5:00 p.m. Central Time will be deemed received on the first Business Day following delivery.

**Section 14.08 GOVERNING LAW.** This MOU will be governed by and construed in accordance with the laws of the State of North Dakota.

**Section 14.09 CONFLICT WITH OTHER MOU.** Nothing in this MOU is intended to supersede, amend, or otherwise modify any other memorandum of understanding or agreement entered by and between the Authority and the County for work regarding other aspects of the Comprehensive Project.

**Section 14.10 JOINT POWERS AGREEMENT.** Nothing in this MOU is intended to conflict with the terms and conditions of the Joint Powers Agreement; rather, the terms and conditions set forth herein are intended to supplement the Joint Powers Agreement. In the event the terms and

conditions described in this MOU conflict with the Joint Powers Agreement, the Joint Powers Agreement will control.

**Section 14.11** ELECTRONIC SIGNATURES. The Authority and the County agree that an electronic signature to this MOU shall be valid as an original signature of the Authority or the County and shall be effective to bind the signatories of this MOU.

**IN WITNESS WHEREOF**, the Authority and the County caused this MOU 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 MOU on the \_\_\_\_ day of \_\_\_\_\_, 2023.

**METRO FLOOD DIVERSION  
AUTHORITY**

By: \_\_\_\_\_  
Dr. Timothy J. Mahoney, Chair

By: \_\_\_\_\_  
Joel Paulsen, Executive Director

ATTEST:

\_\_\_\_\_  
Dawn Lindblom, Secretary

*Signature Page for the Cass County, North Dakota*

The Governing Body of Cass County, North Dakota, approved this MOU on the \_\_\_\_ day of \_\_\_\_\_, 2023.

**CASS COUNTY, NORTH DAKOTA**

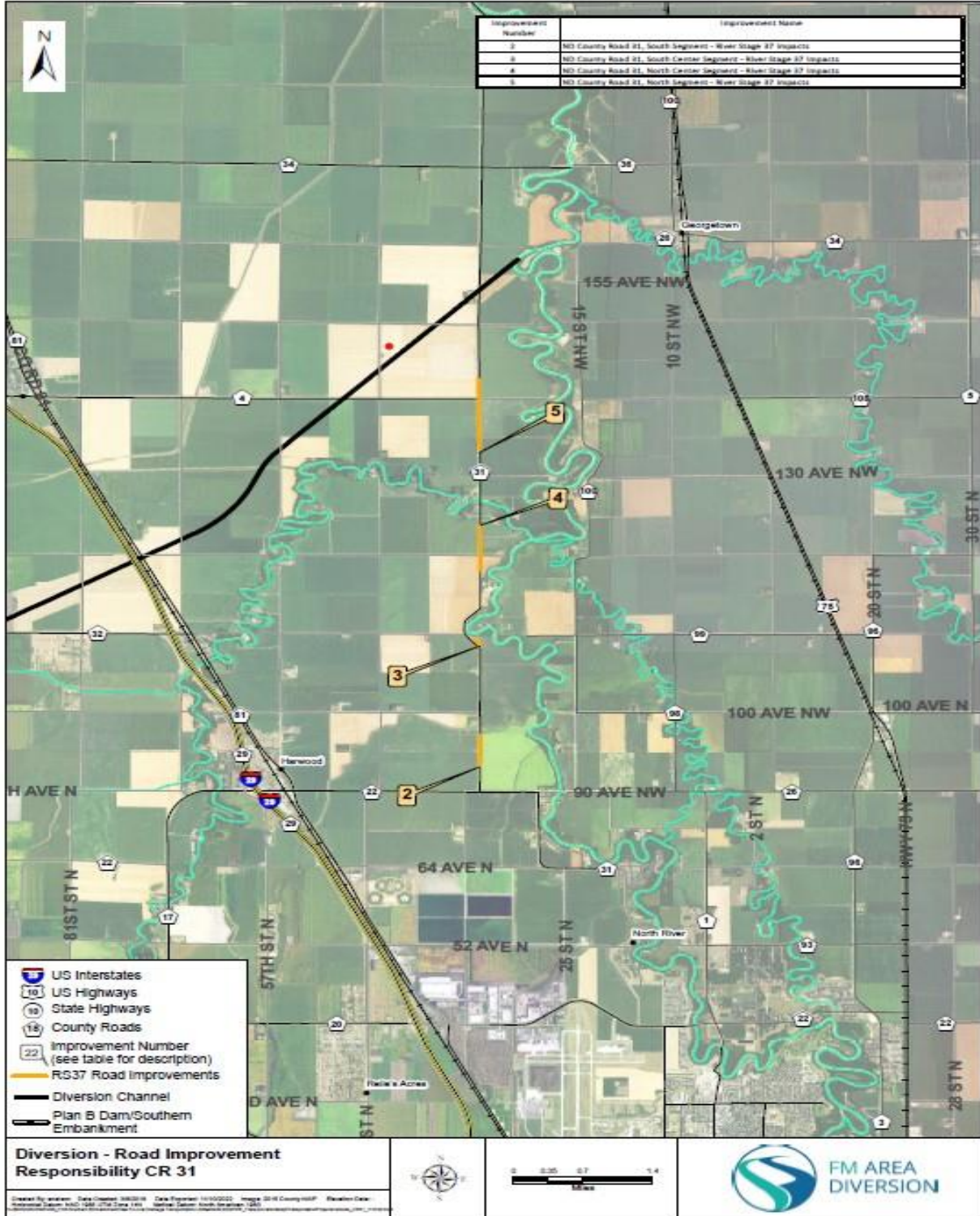
By: \_\_\_\_\_  
Chad Peterson, Chair of the Board of  
County Commissioners

ATTEST:

\_\_\_\_\_  
Brandy Madrigga, Finance Director

# Exhibit A

## Project Impacts Map



**Exhibit B**

**Impacted Roads**

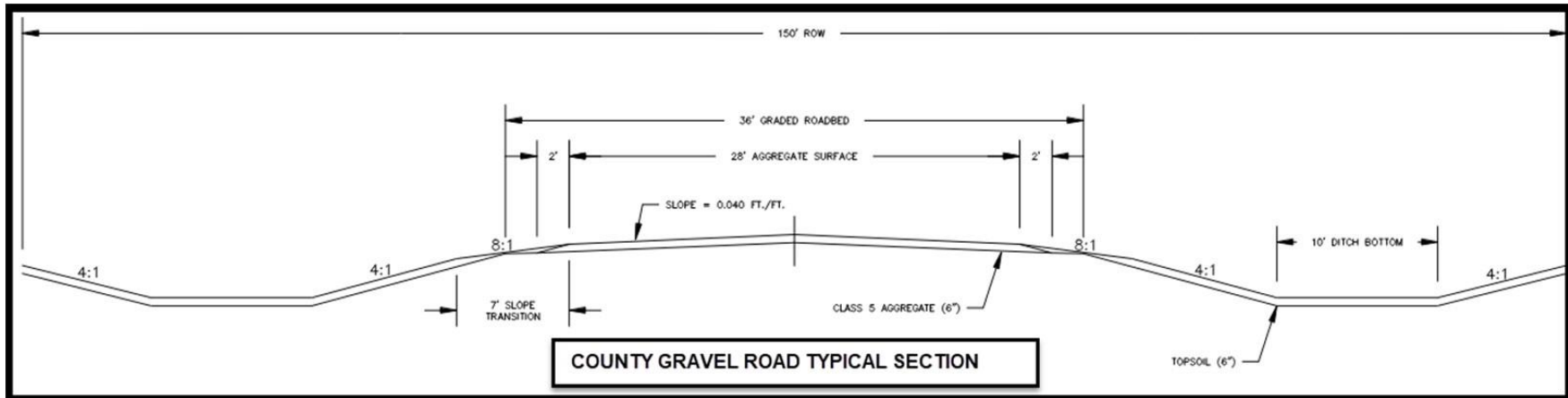
<b>County Road</b>	<b>Impacted Road Segment – Lat/Long Coordinates (Start)</b>	<b>Impacted Road Segment – Lat/Long Coordinates (End)</b>	<b>Linear Length (Miles)</b>
31 – South Segment (Imp. #2)	-96.837017; 46.9832667	-96.837069; 46.9892306	0.45
31 – South Central Segment (Imp. #3)	-96.837378; 47.003864	-96.840111; 47.005936	0.15
31 – North Central Segment (Imp. #4)	-96.837067; 47.017375	-96.8371; 47.0266306	0.6
31 – North Segment (Imp. #5)	-96.8370917; 47.03855	-96.8375111; 47.0636667	2.5



## Exhibit C

### Reconstruction Standards

Typical Section	Design Speed	Right of Way	Graded Roadbed	Gravel Surface	Turn Lanes	Minimum Section Thickness	Access Controls	Bike/Ped Facilities
County Gravel Cross Section	55 mph	150 feet	36 feet	28 feet	No	6 inches gravel	¼ mile spacing	Not applicable



**Exhibit D**

**Development Plan Summary Sheet**

*(Please see the following two (2) pages.)*



# Development Plan Summary Sheet

Contract Number \_\_\_\_\_

Project Name \_\_\_\_\_

Member Entity \_\_\_\_\_

Date Submitted: \_\_\_\_\_ Member Entity Contact \_\_\_\_\_

## Design Services

Approach:  Competitive  Existing Firm: \_\_\_\_\_ Contract value: \_\_\_\_\_

Subconsultants

Services

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Estimated Cost for Design Professional Services (A) \$ \_\_\_\_\_

Start of Design: \_\_\_\_\_ Design Completion: \_\_\_\_\_

## Property Acquisition

Estimated Cost for Property Acquisition (B) \$ \_\_\_\_\_

Estimated Cost for Property Acquisition Services (C) \$ \_\_\_\_\_

Start of Property Acquisition: \_\_\_\_\_ Acquisition Complete: \_\_\_\_\_

Property Acquisition Needed by: \_\_\_\_\_

## Construction

Estimated Cost for Construction (D) \$ \_\_\_\_\_

Start of Construction: \_\_\_\_\_ Construction Complete: \_\_\_\_\_

## Construction Services

Approach:  Competitive  Existing Firm: \_\_\_\_\_ Contract value: \_\_\_\_\_

Subconsultants

Services

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Estimated Cost for Construction Professional Services (E) \$ \_\_\_\_\_

ESTIMATED TOTAL PROJECT COST (A+B+C+D+E) \$ \_\_\_\_\_

CONTINGENCY (10%) \$ \_\_\_\_\_

FY20\_\_ TOTAL PROJECT BUDGET AMOUNT: \$ \_\_\_\_\_

- Compliant with (Member entity) \_\_\_\_\_ procurement and/or purchasing procedures.
- Compliant with WIFIA requirements.



## Development Plan Summary Sheet for Construction

Contract Number \_\_\_\_\_

Project Name \_\_\_\_\_

Member Entity \_\_\_\_\_

Date Submitted: \_\_\_\_\_ Member Entity Contact \_\_\_\_\_

### Construction

Contractor \_\_\_\_\_

Contract Value \$ \_\_\_\_\_

Change Order \_\_: \_\_\_\_\_

Change Order \_\_: \_\_\_\_\_

Change Order \_\_: \_\_\_\_\_

Change Order \_\_: \_\_\_\_\_

#### Subconsultants

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

#### Services

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Start of Construction: \_\_\_\_\_

Construction Complete: \_\_\_\_\_

FY20\_\_ TOTAL PROJECT BUDGET AMOUNT: \$ \_\_\_\_\_

\_\_\_\_ Compliant with (Member entity) \_\_\_\_\_ procurement and/or purchasing procedures.  
\_\_\_\_ Compliant with WIFIA requirements.