



Highway Department

Telephone: 701-298-2370

Fax: 701-298-2395

SMB-HWY@casscountynd.gov

MEMORANDUM

TO: Cass County Commission

FROM: Jason Benson, County Engineer

DATE: August 25, 2023

SUBJECT: Agenda Item for September 5th, 2023 Cass County Commission. Upstream Mitigation Area (UMA) Memorandum of Understanding (MOU)

The UMA MOU as submitted covers impacts to interests held by the County prior to, during, and following Comprehensive Project Operation. These impacts cover closures and openings of County Roads, Flowage Easements for Cass County held properties and reimbursements caused by operations. Exhibit A covers the area of the UMA, Exhibit B is the list of properties held by Cass County with an included map, Exhibit C shows the Flowage Easement Document to be completed after the MOU is signed, and Exhibit D has the possible locations Cass County would be closing roads.

SUGGESTED MOTION:

Move to approve the Cass County and Metro Flood Diversion Authority Upstream Mitigation Area Memorandum of Understanding.



CONTRACT APPROVAL

REQUIRED BY DEPARTMENT:

DEPARTMENT: Highway Department DATE OF REQUEST: 08-29-2023

COMPANY REQUESTING CONTRACT: Metro Flood Diversion Authority

BRIEF PROJECT DESCRIPTION: MOU for Upstream Mitigation Area

NEW CONTRACT OR CONTRACT RENEWAL

REQUIRED BY STATE'S ATTORNEY OFFICE:

STATE'S ATTORNEY SIGNATURE: *Matthew Naumann* DATE 8/31/2023

STATE'S ATTORNEY COMMENTS:

Approved as to form.

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 of the Parties for the Upstream Mitigation Area of the Fargo-Moorhead Metropolitan Area Flood Risk Management Project.

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

TABLE OF CONTENTS

ARTICLE I. DEFINITIONS AND INTERPRETATION	2
SECTION 1.01 DEFINITIONS.....	2
SECTION 1.02 TERMS GENERALLY	4
ARTICLE II. INTENT.....	5
SECTION 2.01 INTENT.....	5
ARTICLE III. COUNTY PROPERTY INTERESTS	5
SECTION 3.01 REAL PROPERTY PARCELS	5
SECTION 3.02 ROADWAYS	5
ARTICLE IV. COMPREHENSIVE PROJECT OPERATION	6
SECTION 4.01 POINT OF CONTACT.....	6
SECTION 4.02 NOTICE OF COMPREHENSIVE PROJECT OPERATION.....	6
SECTION 4.03 CLOSING COUNTY ROADS.....	6
ARTICLE V. POST-COMPREHENSIVE PROJECT OPERATION	6
SECTION 5.01 CESSATION OF COMPREHENSIVE PROJECT OPERATION.....	6
SECTION 5.02 ROAD REOPENING	7
SECTION 5.03 ROAD AND PARCEL REPAIRS AND CLEAN-UPS	7
ARTICLE VI. TERM AND TERMINATION.....	7
SECTION 6.01 TERM	7
SECTION 6.02 TERMINATION.....	7
ARTICLE VII. DISPUTE RESOLUTION	7
SECTION 7.01 INTENT AND PROCEDURE	7
SECTION 7.02 MEDIATION	7
SECTION 7.03 LITIGATION IF DISPUTE NOT RESOLVED	8
SECTION 7.04 VENUE.....	8
SECTION 7.05 WAIVER OF JURY TRIAL.....	8
ARTICLE VIII. MISCELLANEOUS.....	8
SECTION 8.01 COMPLETE AGREEMENT	8
SECTION 8.02 COUNTERPARTS.....	8
SECTION 8.03 AMENDMENTS	8
SECTION 8.04 SEVERABILITY AND SAVINGS CLAUSE.....	8
SECTION 8.05 FORCE MAJEURE	9
SECTION 8.06 AUTHORIZED REPRESENTATIVES.....	9
SECTION 8.07 NOTICE	9
SECTION 8.08 GOVERNING LAW	9
SECTION 8.09 CONFLICT WITH MOU REGARDING OTHER COMPREHENSIVE PROJECT WORK.....	10
SECTION 8.10 CONFLICT WITH JOINT POWERS AGREEMENT.....	10
SECTION 8.11 ELECTRONIC SIGNATURES	10
SIGNATURE PAGES	S-1 THROUGH S-2

EXHIBIT A – UMA MAP

EXHIBIT B – LIST AND MAP OF COUNTY-OWNED UMA PARCELS

EXHIBIT C – TEMPLATE FLOWAGE EASEMENT

EXHIBIT D – POTENTIAL COUNTY ROAD CLOSURE POINTS

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING (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, and CASS COUNTY, NORTH DAKOTA, a political subdivision and home rule county of the State of North Dakota.

WHEREAS, construction of the locally preferred plan for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project (the “Comprehensive Project”) at the Fargo, North Dakota, and Moorhead, Minnesota, metropolitan area was authorized by Section 7002(2) of the Water Resources Reform and Development Act of 2014, Public Law 113-121; and

WHEREAS, the Authority, the City of Fargo, North Dakota, and the City of Moorhead, Minnesota, are the Non-Federal Sponsors for the Comprehensive Project and entered into a Project Partnership Agreement (the “PPA”) on July 11, 2016, with the United States Army Corps of Engineers (“USACE”) for the construction, operation, and maintenance of the Comprehensive Project; and

WHEREAS, the PPA sets forth a split delivery method for the Comprehensive Project, establishing the respective responsibilities of both the Non-Federal Sponsors and USACE; and

WHEREAS, pursuant to the PPA, USACE will be responsible for completing the Diversion Inlet Structure; the connecting channel; the Red River Structure and the Wild Rice River Structure; an earthen embankment; the western tie-back levee (collectively, the “Southern Embankment and Associated Infrastructure” or “SEAI”); construction of road raises associated with the UMA; and all mitigation features that are not the responsibility of the Non-Federal Sponsors; and

WHEREAS, pursuant to the PPA, the Non-Federal Sponsors will be responsible for an approximately 30-mile 20,000 cubic feet per second storm water diversion channel and associated features; the channel outlet; the Rush and Lower Rush hydraulic structures; the Maple River aqueduct; the Sheyenne River aqueduct; the inflow design flood levee; associated railroad bridges (collectively, the “Storm Water Diversion Channel and Associated Infrastructure” or “SWDCAI”); the in-town levees and the Oxbow-Hickson-Bakke levee; recreation features; environmental mitigation features located within the SWDCAI; and applicable pre- and post-monitoring and adaptive management for the Comprehensive Project; and

WHEREAS, when functional, the Comprehensive Project will cause the inundation of property south of the SEAI in the UMA; and

WHEREAS, the County is a fee owner and/or holder of certain rights-of-way which may be impacted by the inundation caused by Comprehensive Project Operation; and

WHEREAS, as a result, the Authority and the County desire to enter into this MOU to set forth their respective roles and responsibilities regarding Comprehensive Project Operation and for the County to grant necessary property interests to allow for Comprehensive Project Operation.

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 in this MOU will have the meanings given to them in this MOU and as defined in this section unless a different meaning clearly applies from the context.

“Applicable Law” means, collectively, the Constitutions of the United States and of 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, the County, or the UMA.

“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.

“Authority Representative” means the individual identified in Section 8.06.

“Best Efforts” means that a Party 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 MOU, in accordance with Applicable Law.

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

“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 Structure or the Wild Rice River Structure to restrict flow into the Fargo-Moorhead Metropolitan Area.

“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 8.06.

“Diversion Inlet Structure” means the hydraulic control structure that controls the flow of water entering the SWDCAI north of the SEAI.

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

“Flood Forecast” means a forecast published by the National Weather Service showing future estimated water heights of the Red River at the Red River Gage or of the Wild Rice River.

“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, 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.

“Original Term” means the original term of this MOU as described in Section 6.01.

“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.

“Point of Contact” means the individual described in Section 4.01.

“PPA” means the Project Partnership Agreement, dated June 11, 2016, by and between the Department of the Army and the City of Fargo, North Dakota, the City of Moorhead, Minnesota, and the Metro Flood Diversion Authority for construction of the Comprehensive Project, and any amendments thereto.

“PRAM” means the Property Rights Acquisition and Mitigation Plan of the Authority.

“Protected Area” means, generally, the area north of the SEAI and east of the SWDCAI, including the communities of Moorhead, Minnesota; Frontier, North Dakota; Horace, North Dakota; Fargo, North Dakota; West Fargo, North Dakota; Reile’s Acres, North Dakota; and Harwood, North Dakota.

“Red River” means the Red River of the North.

“Red River Gage” means U.S. Geological Study Gage 05054000 located on the Red River of the North at Fargo, North Dakota.

“Red River Structure” means the hydraulic control structure to be procured by USACE designed to control and/or meter the flow of the Red River through the Protected Area.

“Southern Embankment and Associated Infrastructure” or **“SEAI”** means the SEAI portion of the Comprehensive Project, consisting of the Diversion Inlet Structure, Wild Rice River Structure, Red River Structure, associated road raises, an earthen embankment, and western tie-back levee.

“State” means the State of North Dakota.

“Storm Water Diversion Channel and Associated Infrastructure” or **“SWDCAI”** means the diversion channel and associated infrastructure located on the North Dakota side of the Red River, which conveys flows of twenty thousand (20,000) cubic feet per second during a one hundred (100) year flood event. The diversion channel consists of six (6) channel segments up to three hundred (300) feet wide, approximately thirty (30) feet deep, thirty (30) miles in length, with three (3) railroad bridges, four (4) two-lane interstate bridges, and up to eleven (11) county highway bridges crossing the diversion channel and two (2) aqueduct hydraulic structures to convey the normal flow of the Sheyenne and Maple Rivers over the diversion channel to preserve fish crossings, in addition to ten (10) local stormwater drain inlets.

“Subsequent Renewal Term” means a renewal of the term of this MOU as described in Section 6.01.

“Upstream Mitigation Area” or **“UMA”** means the area where the Authority is required to obtain property rights for the temporary storage of floodwaters during Comprehensive Project Operation.

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

“Wild Rice River” means the river so called and located in North Dakota.

“Wild Rice River Structure” means the control structure for the Wild Rice River located southeast of the City of Horace, North Dakota.

Section 1.02 TERMS GENERALLY. The definition of terms in this MOU will apply equally to the singular and plural forms of the terms defined. Whenever the context may require,

any pronoun will include the corresponding masculine, feminine, and neuter forms. The words “include,” “includes,” and “including” will be deemed to be followed by the phrase “without limitation.” Unless the context requires otherwise (a) any definition of or reference to any agreement, instrument, or other document in the MOU will be construed as referring to the agreement, instrument, or other document as amended, supplemented, or otherwise modified (subject to any restrictions on amendments, supplements, or modifications in the MOU); (b) any reference in the MOU to any person will be construed to include the person’s permitted successors and assigns; (c) all references in the MOU to articles, sections, exhibits, and schedules will be construed to refer to articles and sections of, and exhibits and schedules to, this MOU; and (e) the words “asset” and “property” will 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. Pursuant to the terms of the PPA and the Joint Powers Agreement, the Authority is responsible for obtaining the real property interests and authorizations necessary for the construction, operation, and maintenance of the Comprehensive Project, including those in the UMA. The County is the owner of real property interests in the UMA that may be impacted by Comprehensive Project Operation. Accordingly, the Parties desire to enter this MOU to address impacts to interests held by the County prior to, during, and following Comprehensive Project Operation. The Parties agree and acknowledge that if an item is not addressed in this MOU, then the Parties will follow the provisions of the PRAM.

ARTICLE III. COUNTY PROPERTY INTERESTS

Section 3.01 REAL PROPERTY PARCELS. The County owns real property parcels in the UMA that may be subject to temporary and periodic flooding in the event of Comprehensive Project Operation. A list of the parcels owned by the County in the UMA is included on Exhibit B. For each of those parcels, the County will grant a flowage easement, substantially in the form attached hereto as Exhibit C, to the Authority.

Section 3.02 ROADWAYS. The County additionally holds property interests in the UMA that authorize them to operate and maintain County roads. The following County roads may be subject to temporary and periodic flooding in the event of Comprehensive Project Operation:

- (a) County Road 16
- (b) County Road 17
- (c) County Road 18
- (d) County Road 36
- (e) County Road 81

The County authorizes the Authority to flood its roads temporarily and periodically in accordance with the terms and conditions of this MOU.

ARTICLE IV. COMPREHENSIVE PROJECT OPERATION

Section 4.01 POINT OF CONTACT. Prior to substantial completion of the Comprehensive Project, the Authority will designate a Point of Contact for the County and inform the County Representative. The intended purpose of the Point of Contact is to facilitate the flow of information between the County and the Authority both prior to and following Comprehensive Project Operation.

Section 4.02 NOTICE OF COMPREHENSIVE PROJECT OPERATION.

(a) The Point of Contact will be responsible for continually monitoring Flood Forecasts. When a Flood Forecast includes a prediction of a ten percent (10%) or greater chance of the Red River reaching at least thirty-seven (37) feet at the Red River Gage, the Point of Contact will contact the County Representative and let him know of the potential of Comprehensive Project Operation.

(b) Once the Authority makes the decision that Comprehensive Project Operation will occur, the Point of Contact will inform the County Engineer as soon as possible. As part of this communication, the Point of Contact will communicate the County roads that are anticipated to be affected by Comprehensive Project Operation. The Point of Contact and the County Engineer will then arrive at a plan on which County roads to close when and where. Following the discussion with the County Engineer, the Point of Contact will advise the County Representative, the County Sheriff, and the County Emergency Manager on the plan for County road closures. The Point of Contact will continue to engage with the County Engineer, the County Representative, the County Sheriff, and the County Emergency Manager on road closures throughout Comprehensive Project Operation to ensure there is clear communication on which County roads may be impacted.

(c) The Point of Contact will post the anticipated County road closures on the Authority website and will update the post as necessary.

Section 4.03 CLOSING COUNTY ROADS. The County will be responsible for placing barriers and appropriate signage on County roads closed for Comprehensive Project Operation. An Authority representative may accompany the County while placing the barriers and signage. The County will notify the Point of Contact once a County road has been closed, and the Point of Contact will update the Authority website to show the closure.

ARTICLE V. POST-COMPREHENSIVE PROJECT OPERATION

Section 5.01 CESSATION OF COMPREHENSIVE PROJECT OPERATION. Once the Authority has an estimated date of Comprehensive Project Operation cessation, the Point of Contact will notify the County Engineer, the County Representative, the County Sheriff, and the County

Emergency Manager. The Point of Contact will again notify these individuals when cessation of Comprehensive Project Operation occurs.

Section 5.02 ROAD REOPENING. As floodwaters recede out of the UMA, the Point of Contact and the County Engineer will work together to identify when County roads can reopen. Prior to reopening, the Point of Contact and the County Engineer will complete an inspection of each County road to identify and document any damage that may have been caused by Comprehensive Project Operation. If an emergency repair or clean-up is identified, the Point of Contact and the County Engineer will work together as quickly as possible to have the County complete the work and to be reimbursed for such work. The County will be responsible for removing all barriers and signage placed to reopen roads when appropriate.

Section 5.03 ROAD AND PARCEL REPAIRS AND CLEAN-UPS. Following the identification of non-emergency repairs or clean-up work for County roads and repairs or clean-up work on other parcels owned by the County, the County Engineer will put together a quote for the County to complete such repairs or clean-up work or will solicit bids from third parties, in conformance with Applicable Law, to complete the repairs or clean-up work. The County Engineer will submit the County quote or third-party bid results to the Point of Contact for review by the Authority for reasonableness. The Authority will approve the quote, request additional information from the County, or deny the quote. If a quote is denied, the County may recreate or resolicit a quote, as applicable, and resubmit the quote for Authority review. The County will notify the Point of Contact when repair or clean-up work commences and is complete. The Point of Contact will then confirm the work was completed in accordance with the quote and submit a request to the Authority to reimburse the County. The Authority will use its Best Efforts to reimburse the County within thirty (30) calendar days of receiving the request.

ARTICLE VI. TERM AND TERMINATION

Section 6.01 TERM. This MOU will have an original term of ten (10) years from the Effective Date (the “Original Term”) and shall automatically renew for subsequent renewal terms of ten (10) years (a “Subsequent Renewal Term”) unless terminated in accordance with this MOU.

Section 6.02 TERMINATION. The Parties may mutually agree to terminate this MOU prior to the expiration of the Original Term or a Subsequent Renewal Term.

ARTICLE VII. DISPUTE RESOLUTION

Section 7.01 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 7.02 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 7.03 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 7.04 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 7.05 WAIVER OF JURY TRIAL. THE PARTIES HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY, AND INTENTIONALLY WAIVE ANY RIGHTS THAT EITHER 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 VIII. MISCELLANEOUS

Section 8.01 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 8.02 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 8.03 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 8.04 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 of competent 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 8.05 FORCE MAJEURE. No Party will be liable to another Party during any period in which its performance is delayed or prevented, in whole or in part, by circumstances beyond its reasonable control. Circumstances include, but are not limited to, the following: act of God (e.g., flood, earthquake, wind), fire, war, act of a public enemy or terrorist, act of sabotage, strike or other labor dispute, riot, misadventure of the sea, inability to secure materials and/or transportation, or a restriction imposed by legislation, an order, or a rule or regulation of a governmental entity. If such a circumstance occurs, the Party claiming the delay must undertake reasonable action to notify the other Parties of the same.

Section 8.06 AUTHORIZED REPRESENTATIVES. The Authority and the County hereby designate the following individuals as their initial authorized representatives, respectively, to administer this MOU on their respective behalf:

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

Section 8.07 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 receipt 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 UMA 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 UMA 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 8.08 GOVERNING LAW. This MOU will be governed by and construed in accordance with the laws of the State of North Dakota.

Section 8.09 CONFLICT WITH MOU REGARDING OTHER COMPREHENSIVE PROJECT WORK. 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 8.10 CONFLICT WITH JOINT POWERS AGREEMENT. Nothing in this MOU is intended to conflict with the provisions of the Joint Powers Agreement. In the event there is a conflict, the provisions of the Joint Powers Agreement will control.

Section 8.11 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 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:

By: _____
Dawn Lindblom, Secretary

Signature Page for Cass County, North Dakota

The governing body of Cass County, North Dakota, approved this MOU on the ____ day of _____, 2023.

CASS COUNTY, NORTH DAKOTA

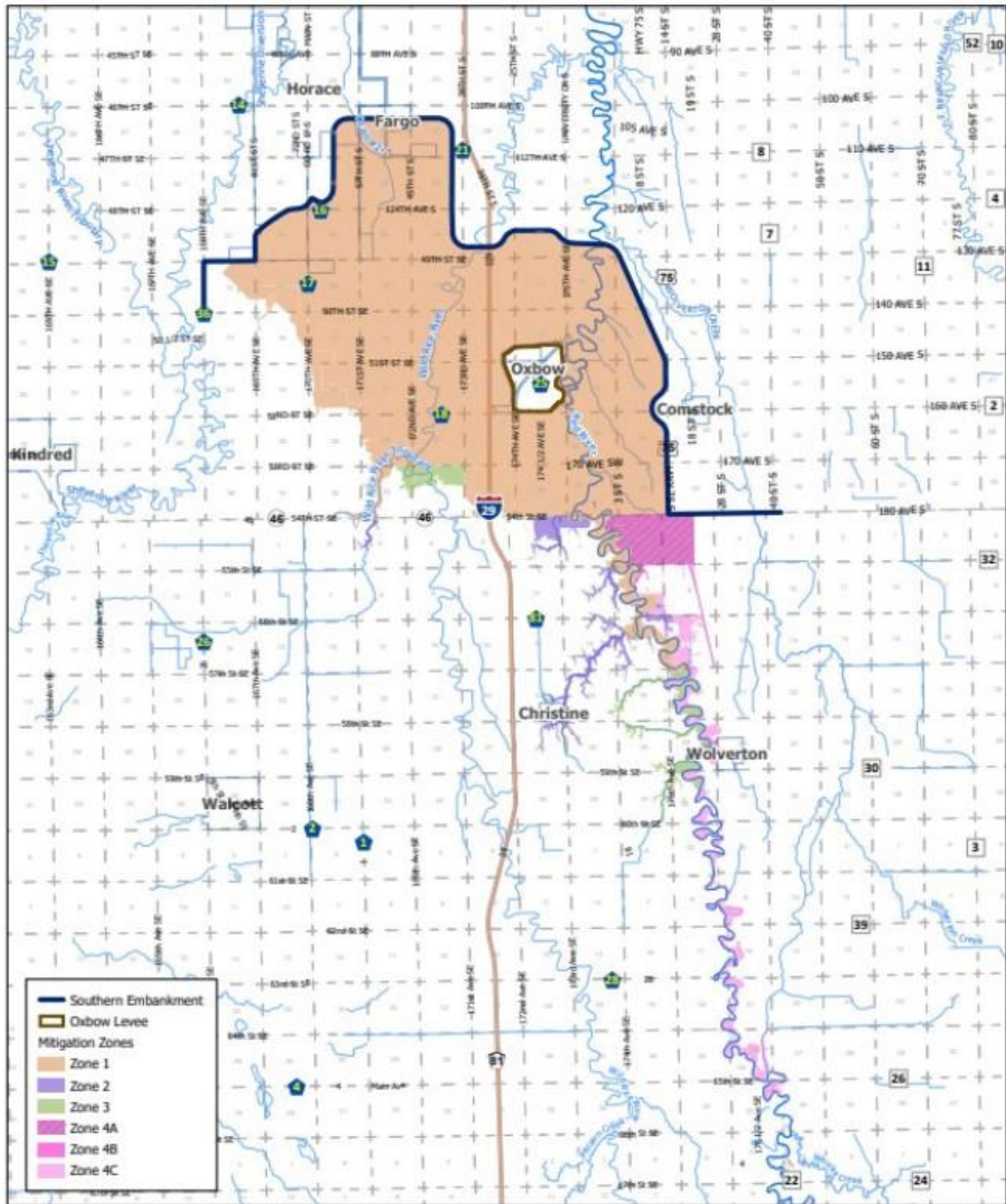
By: _____
Chad Peterson, Chair of the Board of
County Commissioners

ATTEST:

By: _____
Brandy Madrigga, Finance Director

Exhibit A

UMA MAP



Information depicted may include data furnished by A2Z. Any reliance upon such data is at the user's own risk. A2Z does not warrant the map or its features are either complete or temporally accurate. Produced by: Hexagon, A2Z, Inc. 1 C:\Data\Projects\005\Projects\04 Area Division\04 UMA\04 UMA.aprx 10/8/2022 with Filepage Extension Zones 8 x 11

Upstream Mitigation Area

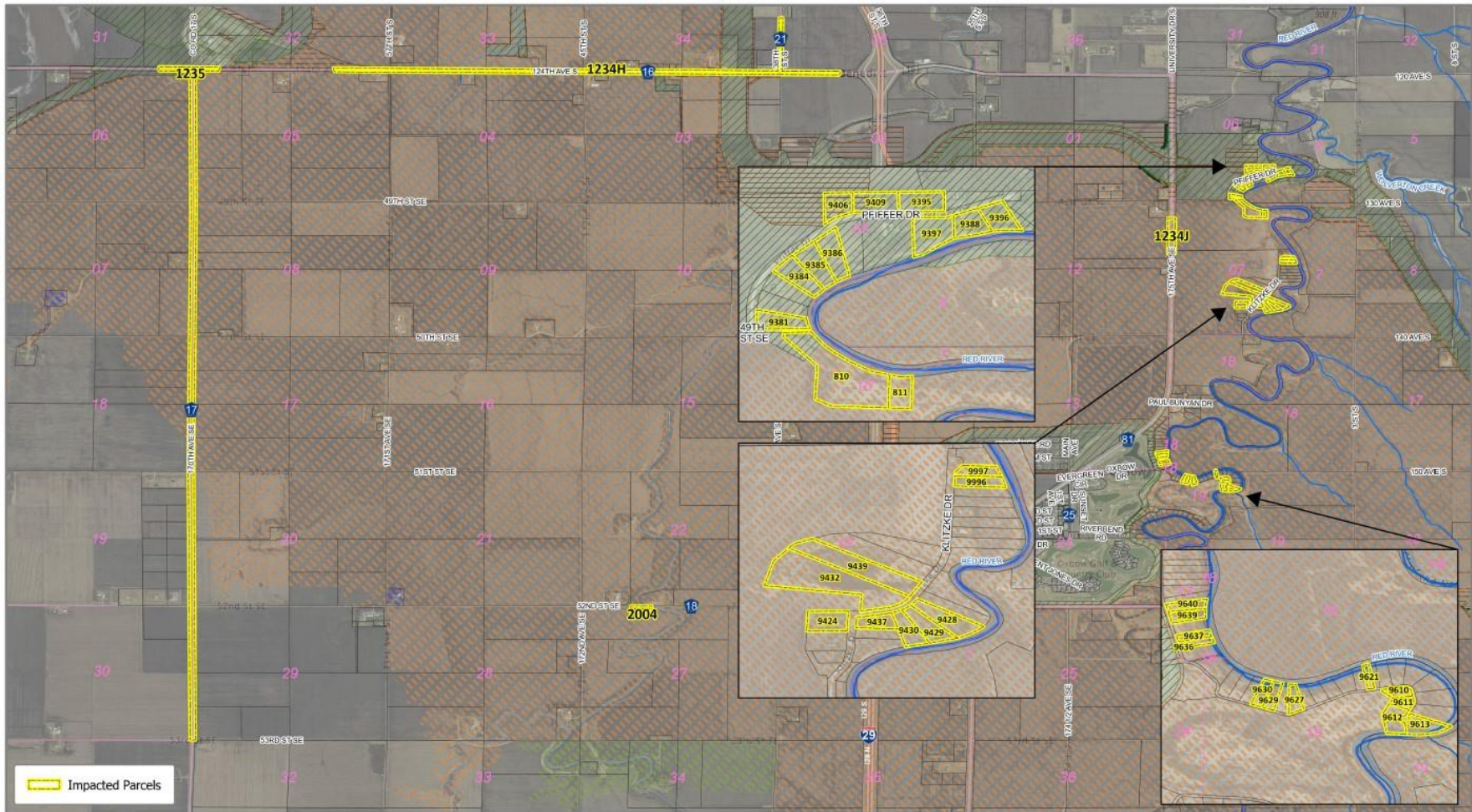
FM AREA DIVERSION PROJECT
Map Date: 2/8/2022



Exhibit B

LIST AND MAP OF COUNTY-OWNED UMA PARCELS

OIN	Parcel No.
810	57-0000-10208-010
811	57-0000-10208-020
1234H	Deeded ROW
1234J	Deeded ROW
1235	Deeded ROW
2004	57-0000-10371-010
9381	57-0500-00010-000
9384	57-0500-00040-000
9385	57-0500-00050-000
9386	57-0500-00060-000
9388	57-0000-10206-080
9395	57-0000-10206-060
9396	57-0000-10206-050
9397	57-0000-10206-090
9406	57-0000-10207-020
9409	57-0000-10206-020
9424	57-0600-00060-000
9428	57-0400-00170-000
9429	57-0400-00180-000
9430	57-0400-00190-000
9432	57-0400-00010-000
9437	57-0400-00200-000
9439	57-0400-00020-000
9610	78-0010-00750-000
9611	78-0010-00740-000
9612	78-0010-00720-010
9613	78-0010-00710-000
9621	78-0010-00640-010
9627	78-0010-00580-000
9629	78-0010-00560-000
9630	78-0010-00550-000
9636	78-0010-00500-000
9637	78-0010-00501-000
9639	78-0010-00480-000
9640	78-0010-00475-000
9996	57-0400-00070-000
9997	57-0400-00060-000



CASS COUNTY OWNED PARCELS IMPACTED BY COMPREHENSIVE PROJECT OPERATION
 Cass County, ND
 Map Date: 8/15/2023



Exhibit C

TEMPLATE FLOWAGE EASEMENT

FLOWAGE EASEMENT

THIS EASEMENT is made this ____ day of _____, 20__, by the **Cass County, North Dakota**, a North Dakota political subdivision, whose post office address is **211 9th Street South, Fargo, North Dakota 58103** (“Grantor”); and **Cass County Joint Water Resource District**, a North Dakota political subdivision, whose post office address is **1201 Main Avenue West, West Fargo, North Dakota 58078**, and its successors and assigns (“Grantee”).

RECITALS

A. Grantee is a member of the METRO FLOOD DIVERSION BOARD OF AUTHORITY, a joint powers entity consisting of Clay County, Minnesota; City of Moorhead, Minnesota; Cass County, North Dakota; City of Fargo, North Dakota; and the Cass County Joint Water Resource District (the “Metro Flood Diversion Authority”).

B. The FARGO-MOORHEAD METROPOLITAN AREA FLOOD RISK MANAGEMENT PROJECT is a federally authorized project pursuant to Section 7002(2) of the Water Resources Reform and Development Act of 2014 (the “Project”) and is a flood risk management project, sponsored by the United States Army Corps of Engineers (the “Corps”) and the Metro Flood Diversion Authority, which includes a diversion channel and appurtenant staging and storage areas to reduce flood damages and risks in the region and to provide permanent flood protection in and around the Fargo-Moorhead metropolitan area.

C. Grantor owns certain real property in the vicinity of the Project, more specifically described below, in an area that may be subject to temporary and periodic flooding as a result of the Project.

D. Grantor has agreed to convey to Grantee a permanent easement, as more specifically described below, to permit Grantee to periodically flood portions of Grantor’s property as well as granting certain access, and compliance inspection rights to Grantee subject to the terms and conditions contained in this Easement.

In consideration of \$10.00, the 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

The Easement Property. Grantor grants and conveys to Grantee a permanent easement in, on, over, through, and across the following real property in **Cass County, North Dakota**:

See legal description in Exhibit “A”

The property described above is the “Easement Property.”

Under this Easement, Grantor grants to Grantee, its officers, employees, agents, representatives, contractors, and subcontractors the perpetual right, power, privilege and easement to occasionally overflow, flood, and submerge the Easement Property in connection with the Project as well as actions necessary to enforce compliance with this Easement. Additionally, Grantor hereby grants to Grantee all right, title, and interest in and to the structures and improvements now situated on the Easement Property:

excepting fencing, drain tile, and drain tile related appurtenances;

and that no excavation shall be conducted, and no fill placed on land within Mitigation Zone 1, and the established FEMA floodway without approval by Grantee as to the location and method of excavation and/or placement of fill and verification that the fill will not impact Project operation.

The easement rights in and to the Easement Property are taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the property owners, their heirs and assigns, all such rights and privileges as may be used and enjoyed without interfering with the Project for the purposes authorized by Congress or abridging the rights and easement hereby acquired; provided further that any use of the land shall be subject to Federal and State laws with respect to pollution.

Additionally under this Easement, Grantor grants to Grantee, its officers, employees, agents, representatives, contractors, and subcontractors, and the United States, the following rights related to the Project regarding the Easement Property: ingress and egress in, on, over, across, and through the Easement Property; removing flood-related debris deposited on the Easement Property due to operation of the Project upon Grantor’s request; removing structures, obstructions, and any other obstacles from the Easement Property; conducting compliance inspections; conducting environmental assessments, including habitat and fish and wildlife studies and surveys as required by the State of North Dakota; and necessary and reasonable rights of ingress and egress to and from the Easement Property subject to the provisions regarding crop damages in Section 6(B) below. Grantee shall notify Grantor prior to exercising the access provisions associated with this Agreement.

Easement Runs with the Easement Property. This Easement, and all covenants, terms, conditions, provisions, and undertakings created under this Easement, are permanent and perpetual (or the longest period allowed by law, now or at any time in the future), and will run with the Easement Property, and will be binding upon Grantor’s heirs, successors, and assigns.

Removal of Unapproved Structures. Grantor must remove all unapproved structures on the Easement Property on or before this date. Any unapproved structures remaining on the Easement Property after this date, will automatically become Grantee’s property, without the need for any bill of sale or any other written instrument or agreement; Grantee may then remove any unapproved structures from the Easement Property, at its sole discretion and at its sole cost. All approved existing structures that need not be removed are shown on attached Exhibit “B.”

Grantor Covenants. Grantor warrants that Grantor is the fee simple owner of the Easement Property; that Grantor has the right to execute this Easement and to make the promises, covenants, and representations contained in this Easement; that this Easement does not violate any mortgage or other interest held by any third party regarding the Easement Property, or any portion of the Easement Property; that there are no outstanding unpaid bills incurred for labor, materials, or services regarding the Easement Property, or any portion of the Easement Property; and that there are no recorded or unrecorded liens, security interests, or any outstanding, pending, or threatened suits, judgments, executions, bankruptcies, or other proceedings pending or of record that would in any manner impact title to the Easement Property, or any portion of the Easement Property. Grantor will release, hold harmless, defend, and indemnify Grantee and its officers, agents, representatives, employees, and contractors from and against any and all claims, damages, injuries, or costs arising out of or in any way related to any title defects regarding the Easement Property.

Taxes. Grantor is solely responsible for all taxes and special assessments or assessments for special improvements due, levied, or assessed regarding the Easement Property for all past, present, and future years. Grantee will not be responsible for payment of any real estate taxes or special assessments regarding the Easement Property.

Use of the Easement Property.

Grantor’s Use. Subject to the provisions of this Easement, Grantor has the right and privilege to use the Easement Property at any time, in any manner, and for production of growing crops, pasture, and other farm/agricultural-related activities and hunting, including the right to post the Easement Property at Grantor’s sole discretion to restrict public hunting rights. Notwithstanding the foregoing or any provision of this Easement to the contrary, the parties expressly agree, the construction, operation, and/or maintenance of any concentrated animal feeding operation, confined animal feeding operation, or feedlot (collectively “CAFO”), as defined under applicable local, State and/or Federal laws, rules, and regulations, is prohibited in and upon the Easement Property. Grantor will promptly cease any activities and remove any structures or obstructions that interfere with Grantee’s use of the Easement Property, Grantee’s rights and privileges under this Easement, or with the Project, when directed by Grantee. Grantor understands and recognizes any use of the Easement Property is at Grantor’s sole risk, and with the exception of payments Grantor or Grantor’s tenant (if applicable) may be eligible for under the Growing Season Supplemental Crop Loss Program or the Prevent Plant Crop Insurance Program established and implemented by the Metro Flood Diversion

Authority, that Grantee is not responsible for any damages to growing crops or for interference with any other of Grantor's uses of the Easement Property as a result of any inundation or any of Grantee's other rights and privileges regarding the Easement Property. The parties further agree that with respect to any portion of the Easement Property not currently certified for agricultural production in the certified organic marketplace as of the date of this Easement, neither the Growing Season Supplemental Crop Loss Program nor the Prevent Plant Crop Insurance Program established and implemented by the Metro Flood Diversion Authority, shall provide coverage for lost organic certification of all or any portion of the Easement Property or loss in premium payments of certified organic agricultural products over similar conventionally produced agricultural products, as a result of any inundation or any of Grantee's other rights and privileges regarding the Easement Property.

Grantee's Entry. If Grantee enters upon the Easement Property for purposes of conducting compliance inspections or removal of flood related debris deposited on the Easement Property permitted under this Agreement, following the conclusion of any such activities, Grantee will return the Easement Property as nearly as practicable to its previous condition, taking into consideration the nature of the work being performed; for example, Grantee will remove any dirt piles or equipment from the Easement Property that might unreasonably interfere with Grantor's permitted uses of the Easement Property. Grantee's ingress and egress rights to the Easement Property will be by the least intrusive means reasonable. Additionally, Grantee will reimburse Grantor for reasonable crop damages resulting from Grantee's physical entrance upon the Easement Property for purposes of conducting such activities. Such reasonable crop damages shall be calculated based on the area disturbed, actual production history, Grantor's yields the year of the damages, and current crop prices at the time of the crop damages. The crop damage payments under this Section 6(B) shall not be duplicative of the payments described in Section 6(A) above. For purposes of illustration, if Grantee enters onto the Easement Property to conduct a survey on June 1 and damages a portion of the crop growing on the Easement Property, and subsequently on July 15 a major rain event necessitates operation of the Project inundating and damaging the crop growing on the entire Easement Property, the payments Grantor would be eligible for under the Growing Season Supplemental Crop Loss Program described above, would be reduced by the amount Grantor receives as payment for crop damages caused by the survey.

Encumbrances. Subject to the provisions below regarding the leasing or mortgaging of the Easement Property, Grantor will not encumber the Easement Property or any portion of the Easement Property or enroll the Easement Property or any portion of the Easement Property in any farm or other federal program that would be contrary to, or would in any way disrupt or interfere with, Grantee's use of the Easement Property, Grantee's rights and privileges under this Easement, or with the Project without first obtaining Grantee's consent. However, Grantor may rent or lease the Easement Property, at Grantor's sole discretion without first obtaining Grantee's consent. If

Grantor rents or leases the Easement Property, any lessee's rights and uses are subject to this Easement, including the use restrictions described above; Grantor will be fully responsible to Grantee for Grantor's obligations under this Easement, including for any violations by any lessee. Additionally, Grantor may mortgage the Easement Property, at Grantor's sole discretion without first obtaining Grantee's consent so long as any mortgage is subordinate to this Easement.

Waiver of Warranties. Except as set forth in this Easement, the parties specifically agree neither Grantee nor any of its agents or representatives have made any representations or warranties in any way regarding the Project; Grantor's ability to use the Easement Property following construction of the Project; the potential frequency of inundation of the Easement Property; Grantor's ability to enroll the Easement Property in any federal program; or Grantor's ability to obtain any farm insurance regarding the Easement Property other than the Growing Season Supplemental Crop Loss Program or the Prevent Plant Crop Insurance Program which Grantor may be eligible for as set forth in Section 6(A) above.

Maintenance. Grantee's easement rights include the right, at its discretion and if necessary for purposes of proper operation and maintenance of the Project, to remove trees, underbrush, obstructions, and any other vegetation, structures, or obstacles from the Easement Property. However, Grantor is solely responsible, at Grantor's sole expense and discretion, for maintaining the Easement Property, including grass cutting and weed control. Neither Grantor nor Grantee will store, cause, or permit any spillage, leakage, or discharge of fertilizers, herbicides, fungicides, and pesticides on the Easement Property (in excess of normal applications for farming purposes). Further, in no event will either party cause or permit any spillage, leakage, or discharge of any hazardous substance onto the Easement Property including, but not limited to, spillage of petroleum products or vehicle fuels, gasoline, kerosene, or other products used for the purpose of generating power, lubrication, illumination, heating, or cleaning. If either party causes or permits any spillage, leakage, or discharge of any such hazardous substance onto the Easement Property, that party shall be solely responsible for any damages arising out of such spillage, leakage, or discharge of any such hazardous substance onto the Easement Property to the extent required by law.

Alternative Dispute Resolution Board. The Metro Flood Diversion Authority has created an Alternative Dispute Resolution Board to provide property owners an informal, administrative forum to bring claims related to Project operation for damages occurring outside the scope of the terms, conditions, obligations, and rights provided for under this Easement. Without limiting the easement rights granted herein, the parties agree that by executing this Easement, Grantor is not waiving claims for actual damages due to flooding caused by operation of the Project to any other real property owned by Grantor, and any improvements thereon. However, in the event of such damages, the parties agree to attempt in good faith to resolve such damages through the Alternative Dispute Resolution Board, as provided in the Project Property Rights Acquisition and Mitigation Plan, prior to commencing litigation with respect to such damages. A copy of the Project Property Rights Acquisition and Mitigation Plan is available from Grantee. Nothing herein shall prevent Grantor from bringing such claims in District Court.

Forbearance or Waiver. The failure or delay of Grantee to insist on the timely performance of any of the terms of this Easement, or the waiver of any particular breach of any of the terms of this Easement, 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.

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

Severability. If any court of competent jurisdiction finds any provision or part of this Easement is invalid, illegal, or unenforceable, that portion will be deemed severed from this Easement, and all remaining terms and provisions of this Easement will remain binding and enforceable.

Entire Agreement. This Easement constitutes the entire agreement between the parties regarding the matters described in this Easement, and this Easement supersedes all other previous oral or written agreements between the parties.

Modifications. Any modifications or amendments of this Easement must be in writing and signed by Grantor and Grantee and must be recorded with the Cass County Recorder's office.

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

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

(Signatures to appear on the following pages.)

IN WITNESS WHEREOF, Grantor executed this Easement on the date written above.

**GRANTOR:
CASS COUNTY, NORTH DAKOTA**

_____, Chair of the Board of
County Commissioners

ATTEST:

_____, Finance Director

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

On this ____ day of _____, 20__, before me, a Notary Public, in and for said County and State, personally appeared _____ and _____, to me known to be the Chair of the Board of County Commissioners and Finance Director of Cass County, a North Dakota political subdivision, and that they executed the foregoing instrument, and acknowledged to me that they executed the same on behalf of said corporation.

Notary Public, State of _____
My Commission Expires:

(SEAL)

GRANTEE:

CASS COUNTY JOINT WATER
RESOURCE DISTRICT

By: _____
_____, Chair

ATTEST:

_____, Secretary-Treasurer

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

On this ____ day of _____, 20__, before me, a Notary Public, in and for said County and State, personally appeared _____ and _____, known to me to be the Chair and Secretary-Treasurer, respectively, of the Cass County Joint Water Resource District and who executed the within and foregoing instrument, and acknowledged to me that they executed the same on behalf of the Cass County Joint Water Resource District.

Notary Public, Cass County, North Dakota
My Commission Expires:

(SEAL)

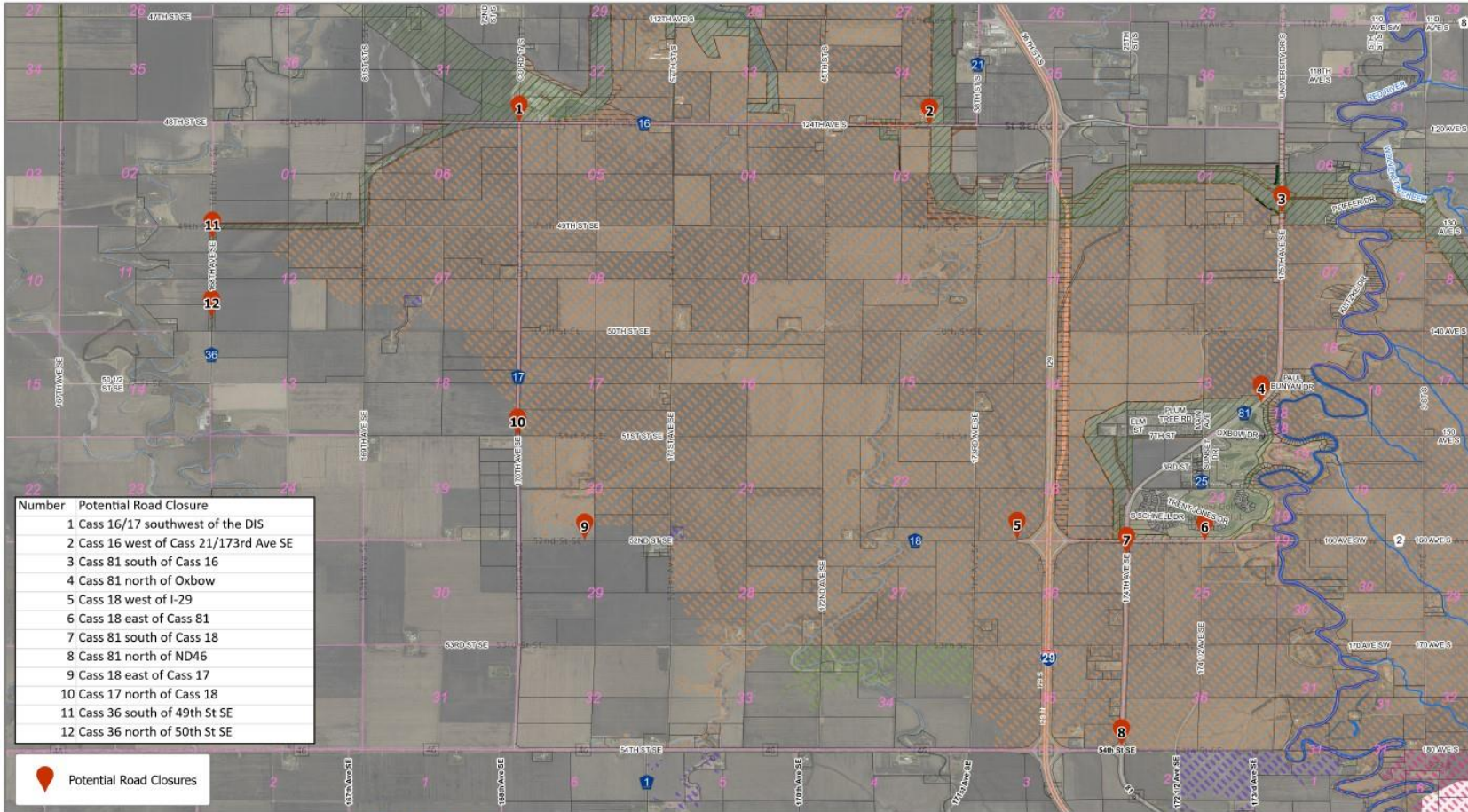
The legal description contained in this document was obtained from previously recorded instruments.

EXHIBIT "A"
LEGAL DESCRIPTION OF PROPERTY

EXHIBIT "B"
APPROVED EXISTING STRUCTURES

Exhibit D

POTENTIAL COUNTY ROAD CLOSURE POINTS



POTENTIAL COUNTY ROAD CLOSURES

Cass County, ND
Map Date: 8/16/2023

