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November 7, 2013

Sharon Plecity  
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City of Fargo  
200 North Third Street  
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**Re: Metro Flood – Memorandum of Understanding between the City of  
Oxbow and Metro Flood Diversion Board of Authority**

Dear Sharon:

I am enclosing, for your files, a fully executed duplicate original of the above-referenced Memorandum of Understanding. If you have any questions, please feel free to contact our office.

Sincerely,

A handwritten signature in dark ink, appearing to read "Erik R. Johnson".

Erik R. Johnson

ERJ/jmf  
Enclosure



## **MEMORANDUM OF UNDERSTANDING**

### **CITY OF OXBOW, NORTH DAKOTA AND METRO FLOOD DIVERSION BOARD OF AUTHORITY**

This Memorandum of Understanding ["Oxbow MOU"] is made by and between the **METRO FLOOD DIVERSION BOARD OF AUTHORITY**, a joint powers entity established by the 2011 limited joint powers agreement between Clay County, Minnesota, Moorhead, Minnesota, Cass County, North Dakota, Fargo, North Dakota, Cass County Joint Water Resource District and the Buffalo-Red River Watershed District [hereinafter referred to as the "Diversion Authority"], the **CITY OF OXBOW, a North Dakota municipal corporation** [hereinafter referred to as the "City" or the "City of Oxbow"].

#### **RECITALS:**

**WHEREAS**, property within the City of Oxbow and other property has been identified as being impacted by the periodic staging of water upstream of the physical structure of the project known as the Fargo-Moorhead Metropolitan Area Flood Risk Management Project [hereinafter referred to as the "Metro Flood Project"] to the point where it has been determined that mitigation of the impact should be addressed; and

**WHEREAS**, the U.S. Army Corps of Engineers [hereinafter the "Corps"], which is the federal sponsor of the Metro Flood Project, is developing an alternative proposal by which a levee [hereinafter referred to as the "O-H-B Levee"] would be constructed to reduce the risk of flooding for many of the parcels located within the City of Oxbow and for the community of Hickson and the Bakke Subdivision; and

**WHEREAS**, the current preliminary routing of the proposed O-H-B Levee would require that approximately 42 homes lying within the City of Oxbow be acquired and either moved or destroyed and would require the acquisition of other unimproved lands to accommodate construction of the levee; and

**WHEREAS**, the City of Oxbow has requested that, as part of the project, the land within the city that is being acquired and used for construction of the levee be replaced by other land within the area protected by the levee that can be subdivided into residential, and other, lots (referred to herein as "Replacement Lots") so that loss of population and tax base to the city may be minimized; and,

**WHEREAS**, the City of Oxbow has requested that the proposed levee project include installation of public infrastructure (i.e. sanitary sewer, storm sewer, water, streets, curb and gutter and street lighting) at a level equivalent to existing development within the City of Oxbow to service the Replacement Lots the cost of such infrastructure to be borne by the Diversion Authority, that the Replacement Lots be of equivalent size as the lots being replaced, that three additional lots be provided for replacement of equipment and amenities to replace the Oxbow City Park, that the public infrastructure installed also include drainage/retention and pump stations appropriate to service the area within the O-H-B levee and that all of this be completed within forty (40) months from the date the Corps approves the O-H-B Levee project; and

**WHEREAS**, the Diversion Authority has requested that in addition to the Replacement Lots to be located within the area protected by the O-H-B Levee the City of Oxbow accommodate at least 38 additional lots that would be available to property owners in the current upstream staging area whose properties may need to be purchased as a requirement for the Diversion Project and who may wish to relocate within the area protected by the O-H-B Levee (for purposes of this MOU, said additional lots will be referred to as "Staging-area Replacement Lots"); and,

**WHEREAS**, construction of the proposed levee also will cross through the existing golf course of the Oxbow Golf and Country Club (a North Dakota nonprofit corporation) which would:

1. require the destruction of golf holes;
2. require the destruction or removal of the clubhouse and related facilities, as well as the loss of landscaping, mature trees, and certain views and vistas that are unique features of the golf course;
3. leave certain holes (presumably the existing holes 1 through 6 and 18) on the existing golf course unprotected by the O-H-B Levee;
4. cause other remaining golf holes to need some level of modification as a result of the O-H-B Levee project;
5. to the extent said "unprotected" golf course land is not needed for the location or footprint of the O-H-B Levee that the Diversion Authority allow the City of Oxbow to purchase or lease said surplus land for a purpose to be determined later;
6. that the replacement of the club house facility including the practice area, pool, parking lots, and other like kind amenities to be built to all applicable federal, state, and local building codes;
7. require funds to reimburse or compensate Oxbow G&CC for the losses recognized by the federal business acquisition process for interruption of business such as such interruption during the construction phase of the project.

and the City of Oxbow has requested that the Diversion Authority supply the funds for such requirements and that such arrangements be made so that the same may be completed within 40 months from the date the Corps approves the project; and

**WHEREAS**, the Corps, which is the federal sponsor of the Metro Flood Project, has indicated that, subject to the Corps' formal approval process, it will study and approve the O-H-B Levee alternative as part of the Metro Flood Project and, if it is approved, will participate in the design of the O-H-B Levee but the Corps has asked that the non-federal sponsors to approve the O-H-B Levee alternative and the non-federal sponsors (speaking through the Diversion Authority) have, in turn, asked the Oxbow City Council to approve the same; and

**WHEREAS**, the City of Oxbow has requested that, as part of the O-H-B Levee project, the construction cost associated with the appointment of an independent project manager or consulting firm to represent the City of Oxbow until the completion of the said project will be borne in full by the Diversion Authority; and,

**WHEREAS**, the City of Oxbow is willing to take responsibility for purchase and development of the replacement lands, annexation of such lands, platting and zoning thereof, and sale of such land; and,

**WHEREAS**, the Diversion Authority and the City of Oxbow have agreed to a mutual understanding as to the proposed O-H-B Levee, which they wish to put into a written memorandum;

**NOW, THEREFORE, IT IS AGREED:**

1.1. City of Oxbow—approval of O-H-B Levee alternative. Subject to the terms hereof, the City Council of the City of Oxbow agrees to and supports the construction of a flood protection levee as is being proposed by the U.S. Army Corps of Engineers. The parties recognize that the current proposal being considered is a preliminary route and design and that the Corps, with input from non-federal sponsors and others, will approve the route and design; but the parties agree to coordinate with each other to identify a suitable route and design and, in turn, the Diversion Authority will work with the Corps regarding obtaining the Corps' approval.

1.2 Diversion Authority – Obligations Binding on Successors. The representations, covenants, obligations and duties of the Diversion Authority contained herein shall not only be binding upon the Diversion Authority but also shall be binding upon its successors and assigns as well as the

various North Dakota entities which have entered into the Metro Flood Diversion Limited Joint Powers Agreement and the undersigned North Dakota member-entities of the Metro Flood Diversion Authority Limited Joint Powers Agreement do hereby agree to the terms hereof.

**2. DIVERSION AUTHORITY RESPONSIBILITIES.** The Diversion Authority agrees:

2.1. Acquisition of Property. The land, homes, buildings and other improvements needed for the levee to be built will be identified along with any needed permanent and temporary easements for construction. The Corps, the Diversion Authority, or both, will be responsible for the acquisition of such property in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and N.D.C.C. Chapter 54-01.1 and any other applicable law, rule or regulation. All costs for acquisition, relocation and any other expenses related thereto shall be borne by parties other than the City of Oxbow. The Diversion Authority agrees to indemnify and hold harmless the City of Oxbow for any costs, expenses, fees or charges of any kind related thereto. The Diversion Authority may delegate the task of acquisition to one or more of its member entities such as the County of Cass or the Cass County Joint Water Resource District.

2.2. The Diversion Authority shall be responsible for the actual design and construction of the O-H-B Levee, with involvement and assistance by the Corps as may be determined appropriate by the Corps with the intention that construction be complete within 36 months from the date of the approval of such construction by the Corps. At a minimum, the O-H-B levee shall include necessary design features to provide adequate flood protection, interior drainage protection, external drainage protection, and external drainage and shall include any necessary modifications to utility services to service the entire area within the O-H-B levee.

2.3 Funding for Acquisition of Replacement Lots. The Diversion Authority shall provide funds to the City of Oxbow for acquisition of real property necessary for development of Replacement Lots, Staging-area Replacement Lots, public infrastructure and public amenities. The Diversion Authority will also either purchase directly or provide funds to the City of Oxbow for the purchase of real property necessary or convenient for reconstruction and/or relocation of the Oxbow Golf & Country Club. The funds provided to the City of Oxbow will be advanced by the Diversion Authority with said advance to be repaid on a pro-rata basis as said replacement land is, in turn, platted and sold off as lots or, as to a portion of such replacement land, portions are sold to the Diversion Authority to be utilized for the O-H-B Levee or related facilities or to the Oxbow Golf & Country Club for use by the club for replacement golf holes, a replacement clubhouse and parking lot facility or related facilities of the club. Further, it

is recognized that certain portions or parcels of land purchased by the City of Oxbow will, in turn, be transferred and conveyed to the Diversion Authority for use for the O-H-B Levee, itself, or for other such facilities or amenities such as pumping stations, retention and detention ponds, et cetera, and to that extent the Diversion Authority will advance funds for the purchase of such land ultimately to be placed into title in the Diversion Authority. The advanced funds will be repaid on an annual basis based on the number of replacement lots sold each year; with the balance being paid in full by the City of Oxbow by the end of the fifteenth year from the time the funds have been advanced. It is agreed that any funds to be advanced to, and repaid by, the city of Oxbow will be repaid along with an administrative fee to be negotiated between the Diversion Authority and the city of Oxbow and that the effective date of the advance of funds, for purposes of determining the 15-year repayment deadline and the administrative fee will begin, only when the real property allocated to the City of Oxbow, as opposed to land allocated for use and ownership by the Diversion Authority or the Oxbow Golf & Country Club is determined. As part of the advance of funds transaction, the parties will establish a mechanism for the repayment of the advanced funds to be assured and so that it is secured against claims, judgments or other liens—such mechanism including the grant by the City of Oxbow of a mortgage against the replacement lands. Thus, the process for advancing of funds and repayment thereof shall occur as follows:

2.3.1 The City of Oxbow will enter into one or more purchase agreements for the purchase of said replacement real property. The City of Oxbow may establish one or more separate entities, such as a development corporation, to function as the entity that will buy, hold, maintain and sell said replacement real property, it being the intent that said separate entity would be wholly owned by the City of Oxbow. The said purchase agreement or agreements are intended to contain a contingency in which the obligation of the City of Oxbow (or its development corporation) to purchase the said real property is contingent upon approval and execution of this MOU and is contingent upon the approval and authorization of the construction of the O-H-B Levy by the Corps. To the extent that the City of Oxbow, or its development corporation, enter into any land purchase agreements or option agreements for such purpose, the Diversion Authority will advance-fund such agreements. It is the intent of the parties is to maximize the ability of the Diversion Authority to adhere to the requirements of federal and state relocation law.

2.3.2 Prior to execution of the said purchase agreement or agreements, the City of Oxbow will obtain approval of the terms, including the purchase price, by the Diversion Authority.

2.3.3 At the time all contingencies are removed and one or more purchase transactions are ready to be closed, the Diversion Authority will advance the funds to the City of Oxbow for the purchase of said real property. The repayment of the advanced funds will be secured by a mortgage. The repayment of the advanced funds will occur in accordance with terms that may be agreed upon between the parties, but which will include terms substantially similar to the following:

2.3.3.1. The advance of funds shall be repaid within fifteen years. In addition to repaying the advanced funds, the City of Oxbow will (a) recoup to the Diversion Authority lost investment revenue the Diversion Authority would have made elsewhere and (b) will compensate the Diversion Authority for costs of administration, both of which will be in such amounts as the parties agree after further negotiation. The City of Oxbow will repay that portion of the advanced funds to the Diversion Authority on a periodic basis of no greater than one year, said repayment amount to be based upon the number of replacement lots sold each year. The remaining amount balance of the advanced funds, along with any other amounts to be paid as described in this paragraph shall be paid to the Diversion Authority at the end of the said fifteen (15) years. It is the intention of the parties that the advance of funds and the grant of the mortgage is to be a mechanism for allowing the Diversion Authority, or one of its member entities, to advance funds for the purchase of the relocation property with said advances to be repaid to the Diversion Authority as the lots are acquired from the City of Oxbow by buyers of said lots. Also, with respect to any property that has been acquired and is located within the area protected by the O-H-B Levee that remains subject to the mortgage granted to the Diversion Authority, it is expected and intended that before the end of said 15 year period, any surplus land may be sold to a private developer so that the remaining balance of the advanced funds may be paid from such sales proceeds or that the City of Oxbow may elect to obtain financing to repay, in full, the advanced funds, and therefore remain in ownership of said land beyond said 15-year term.

2.3.3.2. As lots are sold by the City of Oxbow, or its development corporation, and as the balance of the advanced funds is reduced by payments made to the Diversion Authority, the Diversion Authority shall release such sold lots or parcels from the mortgage. In the event, however, that the advance of funds described herein are not fully repaid within the said fifteen-year period, then, the remaining unsold land must

be sold to a third party for at least the remaining balance due or, in the alternative, the City of Oxbow shall pay off the remaining balance due along with any other sums due as described in this paragraph 2.3 and its subparagraphs.

2.3.4 It is anticipated that the City of Oxbow and its development corporation will take such steps to prepare said replacement real property for development, including the zoning and platting of said property. City of Oxbow will annex any lands into the city prior to development. Sewer, water, streets and other public infrastructure, as described in this agreement, will be designed and prepared for installation. Replacement Lots and Staging-area Replacement Lots will be established and made available for sale by the City of Oxbow, or its development corporation. The City of Oxbow, agrees to work with the Diversion Authority to establish a protocol that will allow said Replacement Lots and Staging-area Replacement Lots to be made available for purchase by homeowners or other property owners who are relocating from within established city limits of Oxbow or who are relocating from within the staging area upstream from the intended diversion project, as described more fully below.

2.3.5 As portions of the replacement real property are sold payment shall be made to the Diversion Authority along with an additional ten percent (10%) amount, based upon the calculated purchase price per square foot paid by the City of Oxbow.

2.4 Reconstruction/Modification of Highway 81. The Diversion Authority or parties other than the City of Oxbow shall be responsible for all costs and expenses related to modification, reconstruction, redesign of Highway 81 related to the construction of the O-H-B Levee or the Metro Flood Project

2.5. Funding for Infrastructure for Replacement Lots. The Diversion Authority will provide funds to the City of Oxbow to fund construction of public infrastructure, as stated previously, for the Replacement Lots (based upon the approximate number of 42 lots in need of replacement) and any costs related to the removal, relocation, replacement or reconnection of existing infrastructure and for the 38 Staging-area Replacement Lots. The parties intend that the Diversion Authority's funding for the public infrastructure (such as sanitary sewer, storm sewer, water, streets, curb and gutter and street lighting at a level equivalent to existing development within the City of Oxbow) to serve the Replacement Lots and the Staging-area Replacement Lots will be based upon lots of approximately equivalent size and amount of street frontage as the existing lots being replaced as well as approximately the same proportion of single-loaded or double-loaded



lots as currently exist, recognizing; however, that it is the intent of the parties that reasonably efficient use of land be utilized in determining the platting of the Replacement Lots and the Staging-area Replacement Lots, some or all of which will be platted as "golf course lots". The platting of the Replacement Lots and the Staging-area Replacement Lots will conform to the subdivision requirements of the City of Oxbow and Cass County including the river setback requirements therein. The Diversion Authority will also fund the replacement of the Oxbow city park (comprised of the equivalent of three city lots) in addition to the 42 Replacement Lots and the 38 Staging-area Replacement Lots including costs needed to relocate equipment and other amenities of the existing park. The development of the land for the Replacement Lots and the Staging-area Replacement Lots will occur in a maximum of two phases.

2.6. Oxbow G & CC. The Diversion Authority will provide funds for the following:

- 2.6.1 For acquisition (and any related benefits or assistance available under either the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and/or *N.D.C.C.* Chapter 54-01.1) due the Oxbow Golf & Country Club for such land, buildings (i.e. clubhouse) and improvements as is necessary for the O-H-B Levee to be constructed.
- 2.6.2 For acquisition (and any related benefits or assistance available under either the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and/or *N.D.C.C.* Chapter 54-01.1) due the Oxbow Golf & Country Club for any land and improvements (including land used as golf holes) that would remain unprotected from flooding induced by the Metro Flood Project. For example, it is presumed that existing holes 1 through 6 and 18 at Oxbow Golf & Country Club would be left on the "wet side" of the O-H-B Levee and, therefore, would remain unprotected from induced flooding. As a result, the Diversion Authority will provide funds for purchase from Oxbow Golf & Country Club of the land on said "wet side" of the O-H-B Levee. To the extent such land is not needed for the location of the levee structure or clear zone, the Diversion Authority shall offer said land for sale or lease to the City of Oxbow at its then current market value (subject to no-build restrictions on said land) for a purpose yet to be determined; provided that such conveyance shall be subject to such use or other restriction or restrictions as may be required by federal or state law or by Corps policy or regulation.
- 2.6.3 To reimburse Oxbow Golf & Country Club for all reasonable costs incurred

in modifying existing golf holes that will remain within the protected area but which will need to be modified to adapt said holes to the re-routed golf course layout (re-routed because of the O-H-B Levee).

2.6.4 The Diversion Authority will follow the same federal guidelines and requirements as is required for acquisition of other lands, buildings and improvements under a project sponsored by the Corps, it being intended that said guidelines and requirements will allow for replacement of an equivalent (in terms of size, design, quality, and function) clubhouse, practice area, swimming pool, parking lot and provide for the replacement of the loss of landscaping, mature trees, and certain views and vistas that are unique features of the golf course.

2.6.5 Golf Course Designer. The funding provided by the Diversion Authority will include the cost of the engagement of Robert Trent Jones, Jr., and his firm, for golf course design work to be done on the Oxbow Golf and Country Club. The City of Oxbow may wish to incorporate arrangements for said engagement into an agreement with the Oxbow Golf & Country Club. The Diversion Authority will fund the construction of displaced golf holes within this design, subject to the terms of an agreement to be entered into with Oxbow Golf & Country Club.

2.6.6 Replacement Land. The Diversion Authority may obtain land from the City of Oxbow obtained as set forth under Section 2.3, or make arrangements with the City of Oxbow to provide land to Oxbow Golf & Country Club, to be used for replacement of existing golf holes obtained by the Diversion Authority under Sections 2.6.1 and 2.6.2 above, taking into consideration the unique nature of the existing holes, (including landscaping, mature trees, and certain views and vistas) to be taken and the value of land used for replacement.

2.6.7 Separate Agreements. The parties recognize that the federal business acquisition process provides and allows for the Diversion Authority to enter into a separate agreement or agreements with the Oxbow Golf & Country Club and/or the City of Oxbow to address the provisions in this Section 2.6, (or as otherwise set forth in this MOU), involving or impacting the Oxbow Golf & Country Club including such matters as compensation for interruption of business.

2.7. Sources of Funds. The Diversion Authority agrees that the cost of the construction of the levee will be a Metro Flood Project cost. The Diversion Authority

intends to use a combination of funding provided sales tax revenues of the city of Fargo and of the County of Cass and by appropriated funds of the state of North Dakota to finance the obligations described in this memorandum of understanding.

2.8 Special Assessments. While it is expected that sales tax receipts of the city of Fargo and the County of Cass will be used as the principal source of funds to repay bonds sold to finance the local share of the Metro Flood project costs, the financing structure for such loans or bonds will require the establishment of a special assessment district as a back-up for repayment of such loans or bonds and, therefore, it is expected that a special improvement district will be established and the boundaries of said district would include all lands that receive a benefit from the Metro Flood Project.

2.8.1. In the event that any property protected by the O-H-B levee or owned by the city of Oxbow is assessed for construction of the Metro Flood Project, the Diversion Authority agrees to pay all such assessments.

2.8.2. It is expected that the property within the area protected by the O-H-B Levee will be assessed for costs of maintenance and related administration of the Metro Flood Project once constructed in the same manner as other lands protected by the Diversion Project.

2.9 Timing of Design and Construction. It is the intent of the Diversion Authority that the O-H-B Levee be designed beginning in 2013 with acquisition of land, buildings (including houses) and improvements beginning as soon as the routing of the levee is finalized and the land for the project is identified and with construction to commence in 2014. Acquisition of said land, buildings (including houses) and improvements will be in accordance with applicable state and federal laws and regulations including, but not limited to, the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 and/or N.D.C.C. Chapter 54-01.1 and the timing thereof coordinated with the City of Oxbow.. It is further intended, therefore, that design and construction of the O-H-B Levee may commence before the Metro Flood Project, as a whole, receives authorization from the United States Congress. This will be contingent upon successful negotiation with the Corps of a memorandum of understanding that will allow the O-H-B Levee to be constructed prior to said authorization. The Diversion Authority intends that the sequence of construction will be staged so that construction of the new golf course holes, modification of existing golf holes that will remain within the protected area, and construction of the new clubhouse, practice area, swimming pool and parking lot shall be complete prior to the removal of the existing Oxbow Golf &Country Club buildings and land for purposes of building the O-B-H Levee.

2.10 Interim Rental by Homeowners. The acquisition program of the Diversion Authority will provide for existing home owners to have the opportunity to rent their

existing home at a monthly rate not to exceed the amount that the Diversion Authority must pay to maintain the property. This amount will include all required taxes and related property management expenses. This rental agreement will remain in affect until such time as a replacement home in the newly developed area is constructed or purchased. It is understood that such program may describe circumstances in which the timing of levee construction requires that the existing home be removed or destroyed before said replacement home may be obtained; in which the rental home must be evacuated or destroyed in order for emergency flood protection measures (such as an emergency levee) to be constructed to protect against an imminent flood danger; or for other appropriate reasons as related to the terms in the rental agreement. The same rental opportunity will be provided to Oxbow G & CC.

2.11 Purchase of Existing Levee Material. To the extent that the existing (and recently constructed) flood levee along Schnell Drive and elsewhere within the city will be no longer needed because of the construction of the O-H-B Levee, the Diversion Authority will purchase from the City of Oxbow the earth material from said existing levee at then-current market value, said funds to allow the City of Oxbow to either reduce the assessments for the prior levee or to use funds otherwise as it may deem appropriate.

2.12 Offset for Loss of Tax Base. The Diversion Authority will pay the City of Oxbow and the Kindred School District for loss of tax base caused by property being taken out of service for the O-H-B Levee project for a period of up to four (4) years. A baseline taxable valuable will be established for the 42 homes intended to be acquired for the O-H-B Levee routing. Annually, in or about December of each year (or before February 5<sup>th</sup> of the following year), the county assessor will determine the loss in taxable valuation suffered as to said properties—caused by the acquisition of said homes by the Diversion Authority, recognizing; however, that as replacement homes are constructed, the loss in tax base shall be proportionately diminished—at a ratio of 1/42<sup>nd</sup> of the total baseline amount applied to each replacement home as construction is completed and the homes come onto the tax rolls. The Diversion Authority will make said payment annually for a maximum of four years. The Diversion Authority will not offset any taxes adjusted as a result of any future State Board of Equalization actions.

2.13 City's Costs for Engineer and/or Consultant. The Diversion Authority will fund the City's engagement of an independent project manager or consulting firm to assist and represent the City for the development of the replacement land, the subdivision (platting) of said land and the installation of the said infrastructure subject to a maximum of 10% of the construction cost for administrative, legal and related services and expenses and 15% for engineering and project management services. The parties agree that the providers of

such services shall be engaged by the City at agreed-upon rates with overall compensation not to exceed said 10% and 15% amounts.

2.14 Timing. It is the wish and desire of the parties that the O-H-B Levee construction be completed within 40 months of the date of approval of the O-H-B Levee project by the Corps and the parties agree to use their best reasonable efforts to meet this deadline and the Diversion Authority agrees to provide adequate advance funding to allow the construction of the replacement golf holes, the modification of existing holes, the construction of the replacement clubhouse, the installation of the infrastructure for the Replacement Lots and Staging-area Replacement Lots and such other tasks as may be reasonably required by this memorandum within said 40-month period.

2.15 Construction MOU. The Diversion Authority will allow Oxbow to offer comments on the draft memorandum of understanding to be entered into between the Corps and the non-federal sponsors.

2.16 Indemnity and Hold Harmless. The Diversion Authority will indemnify and hold harmless the city of Oxbow from any claims, demands or lawsuits brought against the city of Oxbow for matters related to the Metro Flood Diversion Project, the O-H-B Levee Project, or both, provided; however, that this provision shall not apply to claims, demands or lawsuits that relate to the negligent or intentional acts of the city of Oxbow, its officers, agents or employees.

### **3. OXBOW RESPONSIBILITIES.**

3.1 The City of Oxbow will be responsible for making the arrangements for development of land necessary to accommodate the 42 Replacement Lots and the 38 Staging-area Replacement Lots and the replacement city park, including arrangements for annexation of such land or lands into the City of Oxbow as the City may deem appropriate; entry into a Development Agreement with one or more developers, or the like. The City of Oxbow will be responsible for making arrangements for actual construction and installation of the public infrastructure to service said Replacement Lots. It is recognized that said development may occur in phases as may be deemed appropriate by the City of Oxbow or others. The Diversion Authority and the City of Oxbow agree to coordinate with one another regarding payment of said infrastructure costs and, as may be necessary or appropriate, the public financing of such cost.

3.2. The City of Oxbow will cooperate with the Diversion Authority with respect to the arrangements to be made with the Oxbow Golf and Country Club for the acquisition of replacement land for golf holes and for the design and construction of such holes. It is further recognized that the construction of the levee may allow some existing golf holes to remain in place so long as certain modifications to the hole are made to mitigate

against the impact of construction. Such modifications are to be included within said design and construction cost paid by the Diversion Authority along with the holes to be completely replaced.

#### **4. OWNERSHIP AND MAINTENANCE.**

4.1 Ownership and Maintenance of Levee. It is the intent of the Diversion Authority that the Diversion Authority (or one or more of its member entities) will own and maintain the O-H-B Levee and any retention areas made necessary due to the presence of the Levee and any pump stations or other facilities related to said Levee for at least 50 years from the time the O-H-B Levee project is completed but after said 50 years, in the event the Diversion Authority or its successor is, or has been, dissolved or terminated then, subject to approval by the Corps, the ownership of the O-H-B Levee and such related facilities may be transferred to the city of Oxbow at the election of the Diversion Authority, or its lawful designee(s) or assignee(s), and the City of Oxbow agrees to accept such transfer and grant of ownership and agrees to accept the responsibility for the maintenance thereof. The parties recognize that the typical Project Partnership Agreement between the Corps and the non-federal sponsors requires the non-federal sponsors to retain responsibility for operation and maintenance of the federal project even if ownership is transferred; however, it also allows the non-federal sponsors to make contractual arrangements for such operation and maintenance.

4.2. Maintenance of Lands in Addition to Functional Area of Levee. It is the intent of the Diversion Authority to maintain only the functional area of the Levee and to the extent that any surplus lands remain under ownership of the Diversion Authority at the request of the City of Oxbow or the Oxbow Golf & Country Club, or both, the City of Oxbow, the golf club, or both, will either (a) take responsibility for maintenance of such lands or (b) the Diversion Authority will take responsibility for such maintenance and the City of Oxbow will accept an assessment from the Diversion Authority for the cost of such maintenance. It is intended that the Diversion Authority would grant an easement for use of said property, subject to the use limitations as required and appropriate to protect the Levee and to allow access to the Levee for inspection, maintenance, repair and reconstruction as may be required from time to time, and in return for the grantee being responsible for maintenance.

#### **GENERAL PROVISIONS.**

5. The Diversion Authority may need to utilize public financing (i.e. via sale of tax-exempt municipal bonds) to fund some of the obligations described in this memorandum and the proceeds of such public financing may need to be restricted to authorized public uses. Funds utilized for the acquisition of land for the project and construction of the replacement holes for

the golf course will not be transacted with funds available from public financing. The parties understand that certain restrictions on uses of funds and the operations of facilities related to the City of Oxbow financed by such funds may need to be established as part of the public financing process, and agree to cooperate and coordinate with one another for such purposes.

6. The Diversion Authority agrees that it shall not obstruct the Red River of the North or any of its tributaries nor to construct or install any structure that would affect the elevation or flow of flood waters in such a manner as to adversely impact the city of Oxbow prior to the completion of the O-H-B Levee. It is understood and agreed that part of the Diversion Project contemplates the installation or construction of levees that will allow floodwaters to flow through the normal river channel during flood events at levels higher than initially studied by the Corps and nothing herein is intended to limit the authority of the Diversion Authority to install or construct such levees or related facilities. It is further understood and agreed that nothing in this agreement is intended to prevent the city of Fargo or any other member-entity of the Diversion Authority from taking such emergency measures as may be necessary for such city or other entity to protect itself and its residents and their property from emergency flood events including, without limitation, spring flood events.

7. The parties recognize that this agreement, and the terms hereof, are contingent upon and subject to the authority and limitations thereof, if any, of the Corps to approve the design and construction of the O-H-B Levee being proposed.

9. The parties recognize and agree that this Memorandum of Understanding may need to be supplemented by more detailed arrangements in order for the concepts and agreements contained herein to be implemented and the parties agree to coordinate with each other and to work together to do so.

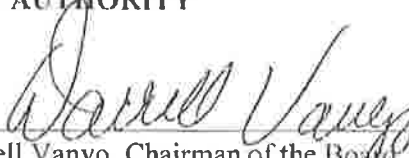
10. Effective Date. This Oxbow MOU will be deemed effective the date of the last signature of all the parties hereto, provided that to the extent any of the parties have taken action pursuant to this agreement prior to said effective date, the same shall be deemed to have been authorized by this memorandum of understanding..

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**METRO FLOOD DIVERSION BOARD  
OF AUTHORITY**

Dated: 10/19/2012

By:

  
Darrell Vanyo, Chairman of the Board



**CITY OF OXBOW**, a North Dakota  
municipal corporation

Dated: 9-15-13


By:   
James Nyhof, Mayor

ATTEST:

  
City Auditor

CITY OF FARGO, NORTH DAKOTA  
a municipal corporation

DATED: 8-19-13

By   
Dennis R. Walaker, Mayor

ATTEST:

  
Steven Sprague, City Auditor

Signature Page

CITY OF FARGO, NORTH DAKOTA  
a municipal corporation

DATED: \_\_\_\_\_

By \_\_\_\_\_  
Dennis R. Walaker, Mayor

ATTEST:

\_\_\_\_\_  
Steven Sprague, City Auditor

THE COUNTY OF CASS,  
NORTH DAKOTA  
a corporate body  
by the CASS COUNTY BOARD OF  
COMMISSIONERS

DATED: 8-19-2013

By   
Van Bennett, Chairman

CASS COUNTY JOINT WATER RESOURCE  
DISTRICT

DATED: 10/24/13

By Mark Gudshank, Chairman



February 20, 2014

Ms. Jill Townley  
Environmental Policy and Review Unit  
Division of Ecological and Water Resources  
MN Department of Natural Resources  
500 Lafayette Road, Box 25  
St. Paul, MN 55155

Re: Minnesota Department of Natural Resources Jurisdiction Over North Dakota's  
Construction of the Oxbow-Hickson-Bakke Ring Levee

Dear Ms. Townley:

Thank you for your January 14, 2014 request for information regarding the relationship between the Oxbow-Hickson-Bakke Ring Levee Project ("OHB Ring Levee") and the Fargo-Moorhead Flood Risk Management Project ("FM Project"). There has been a considerable amount of public commentary by third parties regarding the relationship between the two projects that does not reflect all of the facts, and we appreciate the opportunity to provide further clarification regarding the relationship between the two projects. The short response to your question as to whether the OHB Ring Levee should be considered to be a stand-alone project is "yes," and we are happy to provide some additional context to explain why that is.

At the outset let me further note that the Diversion Authority respects and supports the environmental review being conducted by the Minnesota Department of Natural Resources ("MDNR") of the FM Project under Minnesota law. We hope you will agree that our ongoing cooperation and funding demonstrates that support and we look forward to continuing to work collaboratively with the MDNR as it completes its environmental review of the project. As you know, the greater Fargo-Moorhead metropolitan area is at severe risk of seasonal flooding from the Red River of the North and its tributaries. This includes not only Fargo and Moorhead proper, but areas downstream – which will now be protected by the Locally Preferred Plan – as well as upstream, including the North Dakota communities of Oxbow, Hickson, and Bakke.

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Indeed, absent additional protective measures, these upstream communities would be substantially inundated when significant flood events occur, regardless of whether the FM Project is built. Like the communities that are members of the Diversion Authority, these upstream communities have historically had to fight floods with the kind of ad hoc, emergency measures that are inherently inefficient and subject to greater risk of failure. The OHB Ring Levee is intended to alleviate that threat in the future.

In 2008, the United States Army Corps of Engineers ("Corps") initiated a feasibility study to develop and design permanent flood solutions for the Fargo-Moorhead area. The feasibility study process, in which the MDNR has fully participated, ultimately led to the FM Project design now undergoing MDNR environmental review. The FM Project design incorporates a 20,000 cfs diversion channel running through North Dakota, coupled with a control structure on the Red River and tie-back levees that in high flow years would temporarily stage and store a portion of the flow of the Red until floodwaters recede enough to allow their release without precipitating further downstream flooding. Unlike other, lower-cost (but also lower-benefit) solutions evaluated in the feasibility study, including a diversion channel through Minnesota, the FM Project design would protect a group of communities downstream of Fargo and Moorhead from flooding by tributaries of the Red, including the Rush, Lower Rush, Maple, and Sheyenne Rivers. The control structure is also strategically located to avoid having to displace hundreds of current residents.

The diversion/control structure combination would not, however, protect Oxbow, Hickson, or Bakke. This prompted concern in those communities, and in the North Dakota Legislature, about their independent need for flood protection. These concerns led to development of the OHB Ring Levee.

The North Dakota Legislature has recognized the independent value of the OHB Ring Levee as quite distinct from the FM Project as a whole, which is reflected in how the two projects are being funded. As an interstate flood control project, the FM Project has been developed under the authority of the U.S. Army Corps of Engineers, and requires authorization by Congress in a Water Resources Development Act in order to proceed to full implementation. The Diversion Authority is confident that the FM Project meets all federal requirements and merits federal authorization and funding, but there are considerable uncertainties in predicting

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the precise timing and contours of any action by Congress. For that reason, the North Dakota Legislature has conditioned the expenditure of state construction funding for the FM Project on the receipt of federal authorization.

Most significantly, however, the North Dakota Legislature *exempted* the OHB Ring Levee from this condition, and expressly recognized that the OHB levees have independent value even if the FM Project is not authorized. These structures are located entirely in the State of North Dakota. Similar flood protection has already been provided to other Cass County cities such as Argusville, Mapleton, and Casselton that are at risk of flooding. In this respect, they are similar to the many flood control measures implemented up and down the Red River that are located wholly in Minnesota and were implemented without North Dakota review or approval.

In recognition of their independent utility and uniquely North Dakota focus, the OHB Ring Levee is being funded entirely by North Dakota entities. No Minnesota entity, including any Minnesota member of the Diversion Authority, will provide funding for the OHB Ring Levee. While the respective states have been discussing a 10% Minnesota share for the project cost in fairly general terms, these discussions remain ongoing as it is understood that the request for funding will ultimately be decided upon by the Minnesota State Legislature. There may have been some initial confusion as to whether the Minnesota share might include funding for the OHB Ring Levee, since it obviously complements the FM Project, but it was always the Diversion Authority's understanding that the entire funding for the OHB Ring Levee will be provided by North Dakota entities.

Likewise, as you will have noted from your review of the OHB Ring Levee Memorandum of Understanding, no Minnesota entity is a signatory to that Memorandum. The Minnesota members of the Diversion Authority – Moorhead, Clay County, and the Buffalo Red River Watershed District – were all keenly aware of the North Dakota-unique benefits of the OHB Ring Levee, as well as their limitations under Minnesota law with respect to the use of Minnesota funding for non-Minnesota projects. The Minnesota entities of the Diversion Authority reviewed the project details, and recognized that the purpose, beneficiaries, and funding were so exclusively focused on North Dakota interests that it was neither necessary nor appropriate for them to be signatories.

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With this factual clarification, the application of the law becomes quite straightforward. As you note in your letter, both the National Environmental Policy Act and Minn. Stat. Ch. 116D allow the construction of projects prior to the completion of environmental review for another, related project, where the project to be constructed has independent utility from the project under environmental review. As a further point of clarification, the Diversion Authority has never understood the Minnesota Legislature or MDNR to have intended Minn. Stat. Ch. 116D to have extraterritorial scope.

The Diversion Authority generally agrees with your characterization of how projects with independent utility are to be treated for purposes of environmental review. In this context, we think it is particularly important to keep in mind that an independent utility assessment is not a strictly either/or proposition. That is, a project can *both* have value in connection with another project *and* have independent utility distinct from that project. Projects have independent utility if "each could exist without the other, although each would benefit from the other's existence." *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9<sup>th</sup> Cir. 1989). Similarly, projects are "connected actions" only when "[t]he dependency [between the projects] is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken." *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9<sup>th</sup> Cir. 2000).

With this understanding of how dual-purpose projects are treated for purposes of environmental review, it becomes clear that the OHB Ring Levee plainly has independent utility, distinct and apart from the larger FM Project, even though it will be designed and constructed in a way that will allow it to be fully integrated with the FM Project if it is authorized and funded. Conversely, even if the FM Project is never authorized and never built, the OHB Ring Levee will protect the respective communities from the most serious future floods that will inevitably occur. If the MDNR has any concern that the construction of the OHB Ring Levee may later be argued to influence the outcome of the MDNR's environmental review, the Diversion Authority assures you that it will not at any point contend that the FM Project should or must be constructed as designed because of the OHB Ring Levee has been built, or that some other alternative should not be selected because of the existence of the OHB Ring Levee. In hindsight, had the Diversion Authority been aware of any concerns by the MDNR on this issue, we could have



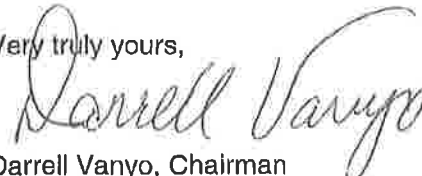
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explained the critical distinction between how the North Dakota Legislature has unconditionally funded the OHB Ring Levee versus how it has conditioned the funding of the FM Project as a whole and perhaps avoided the need for this more formal exchange of letters. Going forward, if there is anything that the Diversion Authority can do to improve the communications with the MDNR on questions like this, please let us know and we would be happy to respond.

Finally, I should note that the Diversion Authority does not presume to speak on behalf of the Corps, which has been the lead agency throughout. While North Dakota views the OHB Ring Levee as its responsibility, for its part the Corps obviously also has an interest in ensuring that the OHB Ring Levee is designed and constructed in a manner that is compatible with the FM Project as a whole – again, if it is ultimately authorized and funded.

I hope this information has helped clarify your understanding of the proper characterization of the OHB Ring Levee as an independent flood control element, and has addressed any concerns you may have had, recognizing that you may not have been fully aware of the additional facts we have provided. To the extent you have remaining questions, please do not hesitate to contact me.

Very truly yours,



Darrell Vanyo, Chairman  
FM Diversion Board of Authority

<u>City of Fargo</u>	<u>City of Moorhead</u>	<u>Cass County</u>	<u>Clay County</u>	<u>Cass County Joint Water Resource District</u>	<u>Buffalo-Red River Watershed District</u>
Dennis Walaker	Nancy Otto	Darrell Vanyo, <i>Chair</i>	Kevin Campbell	Rodger Olson	Gerald VanAmburg (ex-officio)
Tim Mahoney		Ken Pawluk			
Brad Wimmer		Mike Thorstad (City of West Fargo)			

FLOOD DIVERSION BOARD OF AUTHORITY

Thursday, March 13, 2014

3:30 PM

Fargo City Commission Room  
Fargo City Hall  
200 3<sup>rd</sup> Street North

1. Call to order
2. Approve minutes from previous meeting Item 2. Action
3. Approve order of agenda Action
4. Management Information
  - a. PMC report
  - b. Corps of Engineers report
5. Administrative/Legal Information/action
  - a. Lawsuit update
  - b. PMC (CH2MHill) Task Orders Item 5b.
6. Technical Information/action
  - a. Design Contracts/Task Orders/Authority Work Directives Item 6a.
    - i. Task Order No. 9 Amendment 10-Hydrology/Hydraulic Modeling Item 6a. (i)
    - ii. Task Order No. 13 Amendment 4-Levee Design and Support Item 6a. (ii)
7. Public Outreach Information
  - a. Committee report
  - b. Business Leaders Task Force update
8. Land Management Information/action
  - a. Committee report
  - b. CCJWRD update
9. Finance Information/action
  - a. Committee report
  - b. Voucher approval Item 9b.
10. Other Business
11. Next Meeting – April 10, 2014
12. Adjournment

cc: Local Media

**FLOOD DIVERSION BOARD OF AUTHORITY  
FEBRUARY 13, 2014—3:30 PM**

Item 2.

**1. MEETING TO ORDER**

A meeting of the Flood Diversion Board of Authority was held Thursday, February 13, 2014, at 3:30 PM in the Fargo City Commission Room with the following members present: Cass County Commissioner Vern Bennett; West Fargo City Commissioner Mike Thorstad; Fargo Mayor Dennis Walaker; Fargo City Commissioner Tim Mahoney; Fargo City Commissioner Brad Wimmer; Cass County Joint Water Resource District Manager Rodger Olson; Clay County Commissioner Kevin Campbell; and Moorhead City Council Member Nancy Otto. Also present was ex-officio member Gerald Van Amburg, Buffalo-Red River Watershed District.

Staff members and others present: Cass County Administrator Keith Berndt; Fargo City Administrator Pat Zavoral; Clay County Administrator Brian Berg; Moorhead City Engineer Bob Zimmerman; Cass County Engineer Jason Benson; Bruce Spiller, CH2MHill; Tom Dawson, Chairman, Chamber of Commerce Business Leader Task Force for Permanent Flood Protection; and Terry Williams, Project Manager, Corps of Engineers.

**2. MINUTES APPROVED**

***MOTION, passed***

**Mr. Mahoney moved and Mr. Walaker seconded to approve minutes from the January 21, 2014, meeting as presented. Motion carried.**

**3. AGENDA ORDER**

***MOTION, passed***

**Mr. Mahoney moved and Ms. Otto seconded to approve the order of the agenda. Motion carried.**

**4. MANAGEMENT UPDATE**

*Program management consultant (PMC) report*

Bruce Spiller provided an update on activities over the last month including ongoing geotechnical and survey work on the Oxbow/Hickson/Bakke (O/H/B) levee; continued work on land acquisition activities and policies; coordination with the new Fargo City Hall project regarding in-town levees; and monitoring of the WRDA/WRRDA bills, which are in conference committee.

*Corps of Engineers report*

Terry Williams provided an update of activities by Corps of Engineers staff including continued support for the Minnesota EIS (Environmental Impact Statement) process; continued design work associated with the O/H/B levee and participated in value engineering studies for the O/H/B levee and In-Town Levee projects; received approval to execute the Construction MOU; and presented at the Red River Basin Commission Conference in January. The project continues to await federal authorization.

**5. ADMINISTRATIVE/LEGAL UPDATE**

*Election of Chair and Vice Chair for 2014*

Erik Johnson reviewed the by-laws for electing a Chairman and Vice Chairman for the Board of Authority. The by-laws state the election should take place at the first regular meeting of each year.

***MOTION, passed***

Mr. Campbell moved and Mr. Thorstad seconded to elect Mr. Vanyo as Chairman of the Flood Diversion Board of Authority for 2014. Motion carried.

***MOTION, passed***

Mr. Campbell moved and Ms. Otto seconded to elect Mr. Mahoney as the Vice Chairman of the Flood Diversion Board of Authority for 2014. Motion carried.

Construction MOU

The Memorandum of Understanding (MOU) between the Department of the Army, the cities of Fargo and Moorhead and the Flood Diversion Board of Authority was presented and allows the construction process to move forward.

***MOTION, passed***

Mr. Campbell moved and Mr. Wimmer seconded enter into the Memorandum of Understanding with the Department of the Army, the cities of Fargo and Moorhead and the Flood Diversion Board of Authority. Discussion: Ms. Otto asked for clarification that at this time there are no set dollar amounts; rather the MOU is an understanding allowing the sponsoring entities to work with the Corps. It was clarified that the MOU is an understanding to work with the Corps. Motion carried.

**6. TECHNICAL UPDATE**Design Contracts / Task Orders / Authority Work Directives (AWD)

Mr. Spiller reviewed Task Orders with Houston Moore Group (HMG) as follows: Task Order No. 1 Amendment 4 for project management at a cost of \$65,000; Task Order No. 6 Amendment 4 for land management services for Minnesota right of way funding at no cost; Task Order No. 8 Amendment 6 for work-in-kind related to the Minnesota EIS preparation support at a cost of \$129,345; and Task Order No. 10 Amendment 4 for utilities design of sanitary sewer relocation associated with the O/H/B levee at no cost.

Mr. Spiller reviewed AWD-00035 with HMG for the 4<sup>th</sup> Street levee pump station replacement to begin preliminary work on soil borings and planning for the design at a cost not to exceed \$100,000.

***MOTION, passed***

Mr. Mahoney moved and Ms. Otto seconded to approve Task Order No. 1 Amendment 4, Task Order No. 6 Amendment 4, Task Order No. 8 Amendment 6, and Task Order No. 10 Amendment 4 for a total cost of \$194,345 and AWD-00035 for the 4<sup>th</sup> Street levee pump station replacement at a cost not to exceed \$100,000. On roll call vote, the motion carried unanimously.

Decision Paper for Utilities Relocation Compensation Policy

Mr. Spiller reviewed DP-00034 which is a policy for Utilities Relocation Compensation. The policy states that once the utilities to be relocated are identified by the technical team, the information on those utilities is given to the Corps for compensability determination.

***MOTION, passed***

Mr. Campbell moved and Mr. Mahoney seconded to approve a policy to compensate utility owners, public and private within reaches one through seven for costs associated with relocation of utilities due to the diversion project, whether or not such costs are determined to be “compensable” by the U.S. Army Corps of Engineers (USACE) for purposes of crediting. Discussion: Mr. Olson said it is important that utility owners understand that action taken today and that the lines of communication remain open. On roll call vote, the motion carried unanimously.

**Red River Basin Commission update**

Jeff Lewis from the Red River Basin Commission was present and gave an update which included the conference held in January. He has met with and briefed two of the Canadian Ministers within Manitoba, and an engineering group in St. Paul. Mr. Lewis said they are working with representatives of the federal farm bill in an effort to be identified within the bill which was recently passed.

Zach Herman, Houston Engineering, gave a presentation on the Halstad Upstream Retention Study. They are reviewing the models and will fine tune the process as needed.

**7. PUBLIC OUTREACH UPDATE****Committee report**

Rodger Olson said the Public Outreach Committee met on February 12<sup>th</sup>. He discussed numerous outreach activities including: attending the Upstream Coalition Meeting with Mr. Wimmer; continued communication with federal congressional offices regarding project authorization through the WRDA/WRRDA legislation; and developing an online and media presence through an E-Newsletter which is distributed to legislators from both North Dakota and Minnesota.

**Business Leaders Task Force update**

Tom Dawson from the Business Leaders Task Force said they plan to have information available at the next Diversion Board meeting.

**8. LAND MANAGEMENT UPDATE****Committee report**

Mr. Walaker said the Land Management Committee met earlier this afternoon. He said the committee is recommending hiring Pifer’s Land Management for farmland management services.

***MOTION, passed***

Mr. Campbell moved and Mr. Wimmer seconded to hire Pifer’s Land Management for Farmland Management Services. On roll call vote, the motion carried unanimously.

**CCJWRD update**

Mark Brodshaug said they have been acquiring farmland; most of it is in the four and five reaches. He distributed maps outlining the land which has been recommended for purchase and includes 1029.49 acres at a recommended purchase price of \$4,966,801.20.

***MOTION, passed***

**Mr. Wimmer moved and Mr. Olson seconded to proceed with the land acquisition for the recommended cost of \$4,966,801.20. On roll call vote, the motion carried unanimously.**

Mr. Brodshaug said the appraisers are scheduled to start at Oxbow, Hickson, and Bakke next week.

**9. FINANCE UPDATE**

**Committee report**

Michael Montplaisir, Cass County Auditor, said the Finance Committee met on February 12<sup>th</sup>. He said they had discussion on the special assessment process regarding laying out the expectations for people should special assessments be needed.

The state has not been reimbursing land purchases at Oxbow; however, they are continuing to work with the state and will do the same with the farmland purchases.

Local funds have been used as the funding source and to date about \$40 million has been spent on the diversion project.

**Voucher approval**

***MOTION, passed***

**Mr. Mahoney moved and Mr. Wimmer seconded to approve the vouchers for January, 2014. On roll call vote, the motion carried unanimously.**

**10. NEXT MEETING DATE**

The next meeting will be held on Thursday, March 13, 2014, at 3:30 PM.

**11. ADJOURNMENT**

***MOTION, passed***

**On motion by Mr. Walaker, seconded by Ms. Otto, and all voting in favor, the meeting was adjourned at 4:55 PM.**