
JOINT POWERS AGREEMENT

BY AND BETWEEN

CITY OF MOORHEAD, MINNESOTA

AND

CITY OF FARGO, NORTH DAKOTA

AND

CLAY COUNTY, MINNESOTA

AND

CASS COUNTY, NORTH DAKOTA

AND

BUFFALO-RED RIVER WATERSHED DISTRICT

AND

CASS COUNTY JOINT WATER RESOURCE DISTRICT

Dated as of May____, 2016

Relating to:

An Agreement establishing and continuing a permanent joint powers entity called the Flood Diversion Board of Authority to provide the Fargo-Moorhead Metropolitan Area with permanent and comprehensive flood protection.

This instrument was drafted by:
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SIGNATURE PAGESS-1 THROUGH S-7

PREAMBLE

The leaders and representatives of the Member Entities to this Agreement, in order to secure long term and comprehensive flood risk reduction for the Fargo-Moorhead Metropolitan Area and to promote accountable governance, provide for the construction of the Fargo-Moorhead Diversion Project, encourage Member Entities' participation, and to foster a sense of community, do hereby adopt this Agreement and establish the following procedures and governing structure.

JOINT POWERS AGREEMENT

THIS JOINT POWERS AGREEMENT (the “Agreement”) is made and entered into this ___ of May, 2016 (the “Effective Date”), between the City of Moorhead, a political subdivision of the state of Minnesota; the City of Fargo, a political subdivision of the state of North Dakota; Clay County, a political subdivision of the state of Minnesota; Cass County, a political subdivision of the State of North Dakota; the Buffalo-Red River Watershed District, a political subdivision of the State of Minnesota; and Cass County Joint Water Resource District, a political subdivision of the State of North Dakota.

WHEREAS, the Fargo-Moorhead Metropolitan Area is located within the Red River of the North Basin; and

WHEREAS, the Fargo-Moorhead Metropolitan Area is a major health, educational, cultural and commercial center serving southeastern North Dakota and west-central Minnesota; and

WHEREAS, the Red River of the North (the “Red River”) and its tributaries, including the Sheyenne River, the Wild Rice River in North Dakota, the Maple River, the Rush River and the Buffalo River, frequently flood during spring runoff and substantial summer rain events (hereinafter “Flood Events”); and

WHEREAS, as a result of the frequent flooding, communities in Cass County, North Dakota, and Clay County, Minnesota, suffer damages to their public infrastructure; and

WHEREAS, residents within Cass County and Clay County, including, but not limited to, the cities of Fargo, Moorhead, Horace, and Harwood, and within the jurisdictions of the Cass County Joint Water Resource District in North Dakota and the Buffalo-Red River Joint Watershed District in Minnesota, suffer damages to their properties, homes, businesses, and other structures; and

WHEREAS, the Red River has exceeded the National Weather Service flood stage of 18 feet at the United States Geological Survey (USGS) gage in Fargo (Fargo gage) in 50 of the past 114 years (1902 through 2015), and recently every year except 2012 from 1993 through 2013; the record-setting Red River flood stage in 2009 at Fargo was 40.82 feet on the Fargo gage; and, the hydrologic record of the Red River shows a trend of increasing magnitude and frequency of flooding in recent decades; and

WHEREAS, a five hundred (500) year event would flood nearly the entire City of Fargo and a large portion of the City of Moorhead, as well as several smaller communities surrounding the Fargo-Moorhead Metropolitan Area; and

WHEREAS, public infrastructure, health and emergency services within the Fargo-Moorhead Metropolitan Area are threatened and hindered by Flood Events; and

WHEREAS, the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and the Cass County Joint Water Resource District participated in the Fargo-Moorhead Metropolitan Area Flood Risk Management Study conducted by the United States Army Corps of Engineers (USACE) and in cooperation with the USACE developed a Locally Preferred Plan; and

WHEREAS, the Office of the Chief of Engineers, Department, provided the Chief's report to Congress dated December 19, 2011, recommending a Locally Preferred Plan to Congress; and

WHEREAS, the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and the Cass County Joint Water Resource District previously entered into a Limited Joint Powers Agreement (the "LJPA") in order to cooperate in the planning and design phase of the Locally Preferred Plan; and

WHEREAS, the LJPA established the duties, responsibilities and obligations of each of the Member Entities regarding the planning and design phase of the Locally Preferred Plan and set forth a budget for Federal fiscal years 2011 and 2012; and

WHEREAS, the Member Entities executed and approved a First Amendment to the LJPA which, among other things, set forth a budget for Federal fiscal year 2013; and

WHEREAS, the Member Entities executed and approved a Second Amendment to the LJPA which, among other things, set forth a budget for Federal fiscal year 2014; and

WHEREAS, in order for the Project to be constructed, the Flood Diversion Board of Authority will likely need to enter into a Project Participation Agreement with USACE (the "PPA"); and

WHEREAS, the LJPA specifically provides that "[i]t is the intent of the members that this agreement [the LJPA] will terminate on or before the execution of the PPA"; and

WHEREAS, the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District, and the Cass County Joint Water Resource District have investigated the facts and determined that it is in the best interests of their constituents to establish a permanent joint powers entity to provide permanent flood protection for the Fargo-Moorhead metropolitan community; and

WHEREAS, Cass County enacted Ordinance No. 2010-2 establishing and regulating a County sales tax under Cass County's home rule charter (the "County 2010-2 Sales Tax," as herein defined); and

WHEREAS, the County 2010-2 Sales Tax imposes a one-half of one percent (½%) sales and use tax upon the gross receipts of retailers from all sales at retail, including the leasing or rental of tangible personal property, within the corporate limits of the County; and

WHEREAS, the proceeds of the County 2010-2 Sales Tax are dedicated for payment of expenses incurred for the planning, engineering, land purchase, construction, and maintenance of a Red River Diversion and other flood control measures or the payment of special assessments, or debt incurred for a Red River Diversion and other flood control measures as authorized by the Board of Cass County Commissioners, which may also include Milestone Payments, Availability Payments, and P3 Payments; and

WHEREAS, the City of Fargo has enacted Article 3-21 of the City of Fargo Municipal Code establishing and regulating a City Sales Tax for Flood Risk Mitigation and Reduction Improvements (the “City 3-21 Sales Tax,” and collectively with the County 2010-2 Sales Tax, the “Pledged Sales Taxes,” as such terms are herein defined); and

WHEREAS, the proceeds of the City 3-21 Sales Tax are dedicated for acquiring property, making, installing, designing, financing, making P3 Payments, constructing or building improvements, and to engage in projects that are necessary for the goal of achieving risk reduction and the ability to defend the community against a five hundred (500) year flood event, and such proceeds may be pledged to amortize bonds or other debt instruments, Milestone Payments, Availability Payments, and P3 Payments, which may be sold to finance such costs; and

WHEREAS, Cass County and the City of Fargo intend that County 2010-2 Sales Tax and the City 3-21 Sales Tax, or a substantially similar future sales and use tax ordinance, will provide sufficient funds to finance the North Dakota local share of the costs of constructing and maintaining the Project; and

WHEREAS, the Flood Diversion Board of Authority, in consultation with the City of Fargo and Cass County, have determined that it is in the best interests of the Member Entities that the Cass County Joint Water Resource District (the “CCJWRD”) issue improvement bonds to fund a portion of the construction costs associated with the Project and allow the City of Fargo and Cass County to achieve debt service savings by reducing overall interest costs and allowing the City of Fargo and Cass County to use the entire amount of the proceeds generated from the City 3-21 Sales Tax and the County 2010-2 Sales Tax and any successor ordinances; and

WHEREAS, CCJWRD has agreed to issue a refunding improvement bond or a series of refunding improvement bonds to provide a portion of the funds for the construction of the Project, including Milestone Payments, Availability Payments, and P3 Payments; and

WHEREAS, Cass County and the City of Fargo desire to cooperatively pledge their respective sales and use taxes as security for and payment of the debt service on Debt Obligations or for Availability Payments, Milestone Payments, and/or P3 Payments to finance costs and expenses related to the Project; and

WHEREAS, Cass County has determined that it will pledge ninety-one percent (91%) of its County 2010-2 Sales Tax, and the City of Fargo has determined that it will pledge one-hundred percent (100%) of its City 3-21 Sales Tax, toward payment of the debt service on the Debt Obligations, Availability Payments, Milestone Payments, or P3 Payments issued or made

by CCJWRD, and Cass County and the City of Fargo will also each pledge their respective sales taxes to the other on a subordinated basis; and

WHEREAS, a portion of the Debt Obligation proceeds (as herein defined) will be used to refund the County Loan and City Loan (as such Loans are herein defined) obtained by Cass County and the City of Fargo to secure construction financing for the Project prior to the issuance of the Debt Obligations; and

WHEREAS, Section 54-40.3-01 of the North Dakota Century Code gives Cass County, the Cass County Joint Water Resource District, and the City of Fargo the authority to enter into this Agreement to provide for the cooperative administration of a project and the creation and ongoing operation of the Flood Diversion Board of Authority; Section 471.59 of the Minnesota Statutes Annotated gives Clay County, the Buffalo-Red River Watershed District and the City of Moorhead the authority to enter into this Agreement to provide for the cooperative administration of a project and the creation and ongoing operation of the Flood Diversion Board of Authority; the Member Entities wish to enter this Joint Powers Agreement to establish the duties, responsibilities and obligations of each party regarding the Project.

NOW THEREFORE, in consideration of the mutual covenants made herein and for other valuable consideration, the receipt of which is hereby acknowledged, the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and the Cass County Joint Water Resource District agree as follows:

ARTICLE I. AMENDMENT

Section 1.01 LIMITED JOINT POWERS AGREEMENT. The **Member Entities** previously entered into a **Limited Joint Powers Agreement**, dated as of July 11, 2011, which was subsequently amended in September 2012 by a First Amendment to Limited Joint Powers Agreement and by a Second Amendment to Limited Joint Powers Agreement dated September 9, 2013 (collectively the “**Limited Joint Powers Agreement**”).

Section 1.02 REPEAL AND REPLACE IN ENTIRETY. The **Member Entities** hereby acknowledge and agree that the **Limited Joint Powers Agreement** is hereby repealed, replaced, and amended in its entirety with the terms and conditions of this **Agreement**. The terms and conditions of the **Agreement** shall be in full force and effect as of the **Effective Date**.

Section 1.03 CONTINUITY OF AGREEMENTS, OBLIGATIONS, ENTITY. The **Member Entities** agree and acknowledge and as more fully set forth in ARTICLE XVII of this **Agreement** that the **Prior Obligations** of the **Flood Diversion Board of Authority** created under the **Limited Joint Powers Agreement** shall continue and be of full force and effect under this **Agreement**. The **Prior Obligations** are attached as Exhibit A to this **Agreement**.

Section 1.04 PRIOR UNDERSTANDINGS. This **Agreement**, when executed by the **Member Entities**, shall be effective as of the **Effective Date**. All prior understandings and agreements heretofore as among the **Member Entities** with respect to the **Project**, except as specifically set forth in Section 21.02 and Section 21.03 of this **Agreement** are hereby

superseded and replaced in their entirety by this **Agreement**. This **Agreement** fully and completely expresses the agreement of the **Member Entities** with respect to the **Project** and shall not be modified or amended except as set forth in Section 22.03 of this **Agreement**.

Section 1.05 FAILURE TO APPROVE. The failure of a **Member Entity** to approve this **Agreement** shall result in the **Member Entity** being deemed a non-party to this **Agreement** and all of such **Member Entity**'s and the **Flood Diversion Board of Authority**'s obligations and responsibilities with respect to the **Limited Joint Powers Agreement** and the **Project** shall terminate and be of no further force or effect. Further, the **Flood Diversion Board of Authority** shall have no obligation to indemnify, defend, or hold harmless the **Member Entity** for liability arising out of or related to the **Project** if the **Member Entity** fails to approve this **Agreement**.

Section 1.06 BOARD MEMBERSHIP UPON FAILURE TO APPROVE. In the event a **Member Entity** is no longer a party to this **Agreement** due to its failure to approve this **Agreement**, that **Member Entity** shall be known as a **Former Member Entity**. The **Former Member Entity**'s **Flood Diversion Board Member** positions as assigned by Section 4.01 of this **Agreement** shall be redistributed to the remaining **Member Entities** residing in the same state as the **Former Member Entity**. The redistribution of **Flood Diversion Board Member** positions to the **Member Entities** residing in the same state shall be in proportion to the **Flood Diversion Board Member** positions that the remaining **Member Entities** in the same state had prior to the **Former Member Entity**'s failure to approve this **Agreement**. The **Member Entities** agree and acknowledge that the intent of this Section 1.06 is to maintain the size and composition of the **Flood Diversion Board** with respect to the number of **Flood Diversion Board Member** positions from North Dakota and Minnesota in the event that a **Member Entity** fails to approve this **Agreement**.

ARTICLE II. DEFINITIONS AND INTERPRETATION

Section 2.01 DEFINITIONS. All Capitalized and bolded terms used and not otherwise defined herein shall have the meanings given to them in this **Agreement** and as defined in this Section unless a different meaning clearly applies from the context.

“Additional Sales and Use Tax” means any sales and use tax enacted by either the City of Fargo or Cass County to extend or replace the City 3-21 Sales Tax and/or the County 2010-2 Sales Tax.

“Adjusted for Inflation” shall mean adjusted for inflation consistent with Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280).

“Agreement” means this Joint Powers Agreement by and between the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and Cass County Joint Water Resource District.

“Amendment Number 1 to the Design Agreement” means Amendment Number 1 to the Design Agreement between the Department of the Army, the City of Fargo, North Dakota

and the City of Moorhead, Minnesota for design for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project dated December 19, 2013.

“Annual Meeting” means a properly noticed meeting of the Flood Diversion Board held on the second Thursday at 3:30 p.m. each and every January that this Agreement is in effect.

“Approved Budget” means the annual budget approved by the Flood Diversion Board for each and every calendar year of this Agreement.

“Assessment District” means the FM Flood Risk Management District No. 1, as created by Resolution of CCJWRD dated May 14, 2015.

“Availability Payment Fund” means the Availability Payment Fund created by Section 9.04 of this Agreement.

“Availability Payments” shall mean the periodic performance payments to the P3 Developer for the term of the P3 Agreement for the design, construction, financing, operation, and maintenance of the Project in accordance with the agreed technical requirements.

“BRRWD” means the Buffalo-Red River Watershed District.

“BRRWD Managers” means the Buffalo-Red River Board of Managers, which is the Governing Body of the BRRWD.

“BRRWD Member” means the one (1) individual member of the BRRWD Managers appointed by the Buffalo-Red River Watershed District to serve on the Flood Diversion Board of Authority.

“Bondholder” or “Holder” means the purchaser, holder, or owner of Debt Obligations.

“Buffalo-Red River Watershed District” means the Buffalo-Red River Watershed District, a political subdivision of the State of Minnesota.

“CCJWRD” means the Cass County Joint Water Resource District, a political subdivision of the State of North Dakota, its successors and assigns.

“CCJWRD Board” means the Cass County Joint Water Resource District’s Board of Managers, which is the Governing Body of CCJWRD.

“CCJWRD Member” means the one (1) individual member of the CCJWRD Board appointed by the CCJWRD Board to serve on the Flood Diversion Board.

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

“Cass County Commission” means the Cass County Commission, which is the Governing Body of Cass County.

“Cass County Joint Water Resource District” means the Cass County Joint Water Resource District, a political subdivision of the State of North Dakota, its successors and assigns.

“Cass County Members” means the three (3) individuals appointed by Cass County Commission to serve on the Flood Diversion Board, including up to two (2) members, which the Cass County Commission may authorize to be appointed by either the CCJWRD Board or the West Fargo City Commission. All members appointed by Cass County must either be members of the Cass County Commission or members of the West Fargo City Commission or the CCJWRD Managers.

“Chair” means a voting member of the Flood Diversion Board who presides over meetings pursuant to Section 4.06 of this Agreement.

“City 3-21 Sales Tax” means the sales and use tax of the City of Fargo, as defined in Article 3-21 of the Fargo City Code, that is pledged by the City of Fargo, pursuant to this Agreement, as security for and for payment of the debt service on the Debt Obligations and/or Availability Payments, Milestone Payments, and P3 Payments pursuant to this Agreement.

“City 3-21 Sales Tax Sunset Date” means December 31, 2029.

“City Loan” means a loan entered into in calendar year 2015 in the maximum aggregate principal amount of \$50,000,000 to either the City of Fargo or Cass County, which is in addition to the County Loan and for which County 2010-2 Sales Tax and City 3-21 Sales Tax were previously pledged.

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

“City of Fargo Members” means the three (3) individual members of the Fargo City Commission representing the City of Fargo on the Flood Diversion Board, consisting of two (2) individuals appointed by the Fargo City Commission and the Mayor of the City of Fargo.

“City of Moorhead” means the City of Moorhead, a Minnesota Home Rule City and political subdivision of the State of Minnesota.

“City of Moorhead Members” means the two (2) individual members of the Moorhead City Council representing the City of Moorhead on the Flood Diversion Board, consisting of one (1) individual appointed by the Moorhead City Council and the Mayor of the City of Moorhead.

“City of West Fargo” means the City of West Fargo, a North Dakota Home Rule City and political subdivision of the State of North Dakota.

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

“Clay County Commission” means the Clay County Commission, which is the Governing Body of Clay County.

“Clay County Member” means the one (1) individual member of the Clay County Commission appointed by the Clay County Commission to serve on the Flood Diversion Board.

“Code” means the Internal Revenue Code of 1986, as amended from time to time, and all rules and regulations from time to time promulgated thereunder.

“Congress” means the Congress of the United States of America.

“County 2010-2 Sales Tax” means a sales and use tax under Cass County’s home rule charter enacted by Ordinance No. 2010-2, of which the proceeds are dedicated for payment of expenses incurred for the engineering, land purchase, construction, and maintenance of the Project and other flood control measures or the payment of special assessments or debt incurred for the Project and other flood control measures as authorized by the Cass County Commission and that is pledged by Cass County pursuant to this Agreement, as security for and for payment of debt service on the Debt Obligations and/or Availability Payments, Milestone Payments, and P3 Payments pursuant to this Agreement.

“County Loan” means a loan entered into in the calendar year 2014 from U.S. Bank National Association to Cass County in the maximum aggregate amount of \$50,000,000, pursuant to the terms and conditions of the Loan Agreement.

“Current Chair” means Darrell Vanyo, the chairman of the Flood Diversion Board of Authority that was created by the LJPA, who is serving as Chair as of the Effective Date of this Agreement, and will continue to serve as the Chair of the Flood Diversion Board of Authority that is created under this Agreement until December 31, 2016.

“Current Program Management Consultant” means CH2M, whose address is Bank of the West Building, 520 Main Avenue, Suite 601, Fargo, North Dakota 58103.

“DCAI” means the Diversion Channel and Associated Infrastructure.

“Debt Obligation” means any loan, note, bond, or other security instrument issued by one or more of the Member Entities to provide either temporary or permanent financing of the Project.

“Debt Obligation Fund” means the Debt Obligation Fund created by Section 9.04 of this Agreement.

“Defaulting Member Entity” means any Member Entity that is deemed to be in Default pursuant to Section 20.04 of this Agreement because such Member Entity did not have a Rational Basis for refusing to undertake and complete a Flood Diversion Board’s Requested Project Action.

“Development Agreement” means an agreement with a P3 Developer pursuant to Chapter 48-02.1 of the North Dakota Century Code.

“Effective Date” means May____, 2016.

“Engineering Consultant” means any engineering firm hired by a Member Entity to serve as that Member Entity’s engineer of record.

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

“Event of Default” means the occurrence of any event or the existence of any condition that, with the giving of notice, the passage of time, or both, would constitute an event of default under the terms of this Agreement.

“Excess Pledged Revenues” means any Pledged Revenues received by the Flood Diversion Board of Authority in a calendar year which exceed amounts required to meet the annual debt service on the Debt Obligation, Availability Payments, P3 Payments and/or to make Milestone Payments in that calendar year.

“Executive Director” means the Chief Administrative Officer of the Flood Diversion Board of Authority.

“FM Diversion Project Fund” means the FM Diversion Project Fund created by Section 9.04 of this Agreement.

“Fargo-Moorhead Metropolitan Area” means Fargo, ND, Moorhead, MN, and surrounding communities; it 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, MN, West Fargo, ND, and numerous other towns and developments from which commuters travel daily for work, education, and regular activities.

“Fargo-Moorhead Metropolitan Area Flood Risk Management Project” has the same definition as “Project” in this Agreement and is the name given to the Project by the USACE.

“Fargo City Commission” means the City of Fargo’s City Commission, which is the Governing Body of the City of Fargo.

“Final Feasibility Report and Environmental Impact Statement” or **“FEIS”** means the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management, dated July 2011 and approved by the Chief of Engineers on December 19, 2011 (the “FEIS”), as amended by the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013 (the “SEA”), and which may be further amended by future supplemental Environmental Assessments.

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

“Fiscal Agent” means a third party private financial entity or Bank of North Dakota or a Member Entity appointed by the Flood Diversion Board pursuant to Section 9.09 of this Agreement to act as Fiscal Agent.

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

“Flood Diversion Board of Authority” means the political subdivision created by the LJPA and continued with and through this Agreement, and vested with the powers herein.

“Flood Diversion Board” means the Governing Body of the Flood Diversion Board of Authority.

“Flood Diversion Board Member” means an individual duly appointed pursuant to Section 4.01 of this Agreement and who is a voting member of the Flood Diversion Board.

“Flood Diversion Board Member Alternate” means a person selected by a Member Entity’s Governing Body to serve on the Flood Diversion Board in the event that the Member Entity’s Flood Diversion Board Member(s) is/are unable to serve.

“Former Member Entity” means any Member Entity that did not approve this Agreement or a Member Entity that withdraws or is removed pursuant to ARTICLE XX of this Agreement.

“Functional Portion of the Project” means a portion of the Project for which construction has been completed and that can function independently, as determined by the Program Management Consultant in writing, although the remainder of the Project is not complete.

“Future City Sales Tax” means either (i) the approval by the voters of the City of Fargo and enactment by the Fargo City Commission of a renewal of the City 3-21 Sales Tax by the voters of the City of Fargo or (ii) the approval by the voters of the City of Fargo and enactment by the Fargo City Commission of a sales and use tax that is substantially similar to the City 3-21 Sales Tax with respect to taxable sales and percentage of sales and use tax imposed.

“Future County Sales Tax” means either (i) the approval by the voters of Cass County and enactment by the Cass County Commission of a renewal of County 2010-2 Sales Tax by the voters of Cass County or (ii) the approval by the voters of Cass County and enactment by the Cass County Commission of a sales and use tax that is substantially similar to the County 2010-2 Sales Tax with respect to taxable sales and percentage of sales and use tax imposed.

“GAAP” means accounting principles generally accepted in the United States as set forth in the opinions and pronouncements of the Accounting Principles Board, the American Institute of Certified Public Accountants, and the Financial Accounting Standards Board, or in such other statements by such other entity as may be in general use by significant segments of the accounting profession as in effect on the date hereof.

“Governing Body” means the body which performs the legislative functions of a political subdivision, including but not limited to, a board, council, or commission.

“Governmental Authority” means any national, supra-national, state or local government (whether domestic or foreign), any political subdivision thereof or any other governmental, quasi-governmental, judicial, administrative, public or statutory instrumentality, authority, body, board, agency, department, county, bureau, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory, fiscal, monetary or administrative powers or functions of or pertaining to government, or any arbitrator, mediator or other person with authority to bind a party at law.

“Government” means the United States of America.

“Government Separable Element” means the part of the Project that the Government is responsible for designing and constructing, including the In-Kind Contributions, and consists of the southern embankment, the diversion inlet structure, the connecting channel, the control structures on the Red River and Wild Rice River, the tie-back levee, the overflow embankment, all mitigation not incorporated into the diversion channel (including the in-town levees and the Oxbow-Hickson-Bakke levee), and all other features *not included* in the NFS Separable Element.

“Highway” means any highway, roadway, street, or way, including any bridge thereof, which is owned by a public entity.

“In-Kind Contributions” means work that will be performed or provided by the Non-Federal Sponsors after the effective date of the PPA, or pursuant to the Memorandum of Understanding for Work Provided or Performed Prior to Execution of a Project Partnership Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project dated March 31, 2014, and that are determined to be integral to the Project by the Assistant Secretary of the Army for Civil Works or his or her designee.

“In-Kind Work Element” means an element of the Project that consists of In-Kind Contributions and that is assigned to a Member Entity by the Flood Diversion Board to undertake.

“In-Town Flood Protection Infrastructure” means In-Kind Work Elements constructed within the geographic limits of the City of Moorhead or the City of Fargo.

“In-Town Levee” means a levee constructed within the City of Fargo or the City of Moorhead, which will be used as part of the Project and for which the Member Entity has been

reimbursed by the Flood Diversion Board of Authority for planning, design, engineering, and all other related costs.

“Increased Sales and Use Tax” means any unanticipated increased revenue from either the City 3-21 Sales Tax or the County 2010-2 Sales Tax.

“Interim Fiscal Agent” means the City of Fargo, North Dakota.

“Joint Powers Agreement” means this Agreement dated as of the Effective Date, by and between the Member Entities, as amended from time to time to the extent permitted hereunder.

“LJPA” or “Limited Joint Powers Agreement” means the agreement dated July 11, 2011, and subsequently amended, which was entered into between the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and the Cass County Joint Water Resource District in order to cooperate in the planning and design phase of the Locally Preferred Plan.

“LPP Flood Risk Management Features” means construction of a diversion channel through North Dakota that conveys 20,000 cubic feet per second at the one percent (1%) chance or 100 year event and is approximately 30 miles long, tie-back embankments, a staging area, a diversion inlet structure, a 6-mile connecting channel, a control structure on each of the Red and Wild Rice Rivers, an aqueduct hydraulic structure on each of the Maple and Sheyenne Rivers, a drop structure of each of the Rush and Lower Rush Rivers, four railroad bridges, in-town levees, community ring levees, and environmental mitigation, as generally described in the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management, dated July 2011 and approved by the Chief of Engineers on December 19, 2011, as amended by the Supplemental Environment Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013.

“Land Management Committee” means a committee of the Flood Diversion Board of Authority formed and defined by ARTICLE V of this Agreement.

“Limited Joint Powers Entity” means the entity that was created by the LJPA.

“Lobbyist” means an individual who promotes and lobbies for funding and other decisions of the federal government and state governments, including the United States Congress, and the legislative branches of the State of North Dakota and State of Minnesota.

“Locally Preferred Plan” has the same meaning as **“LPP Flood Risk Management Features.”**

“Member Entities” shall mean the City of Moorhead, the City of Fargo, Clay County, Cass County, Buffalo-Red River Watershed District and Cass County Joint Water Resource District.

“Milestone Payment Fund” means the Milestone Payment Fund created by Section 9.04 of this Agreement.

“Milestone Payments” means payments to the P3 Developer for achievement of agreed upon construction or progress milestones, in accordance with the P3 Agreement.

“Minnesota Board Members” includes the Buffalo-Red River Board Member, the Clay County Board Member, and the City of Moorhead Members.

“Moorhead City Council” means the City Council of the City of Moorhead, the Governing Body of the City of Moorhead.

“Minnesota Member Entity” means the City of Moorhead, Clay County and BRRWD.

“N.D.C.C.” means the North Dakota Century Code, as amended from time to time.

“NEPA” means the National Environmental Policy Act.

“NFS Separable Element” means the part of the Project that the Non-Federal Sponsors are responsible for designing and constructing, not including In-Kind Contributions, for the Government Separable Element, and consists of the DCAI, the channel outlet, the Rush and Lower Rush River hydraulic structures, the Maple River aqueduct, the Sheyenne River aqueduct, the inflow design flood levee, associated railroad bridges, mitigation incorporated into the diversion channel and associated structures, and recreation structures/features associated with the diversion channel.

“Non-Federal Project Costs” means the local cost share of the total cost of the Project not provided by the Federal Government.

“Non-Federal Sponsors” means the entities providing the Non-Federal Project Costs for the Project, which include the City of Fargo, the City of Moorhead, and the Flood Diversion Board of Authority created pursuant to this Agreement.

“North Dakota Member Entity” means the City of Fargo, Cass County and CCJWRD.

“OMRR&R” means Operation, Maintenance, Repair, Rehabilitation, and Replacement.

“P3 Agreement” means a Public-Private Partnership Agreement as authorized by Chapter 48-02.1 of the North Dakota Century Code, and referred to as a Development Agreement, by and between the Flood Diversion Board of Authority, or a Member Entity authorized by the Flood Diversion Board, and a P3 Developer for design, construction, financing, operation and maintenance of the NFS Separable Element.

“P3 Developer” or “Developer” means the private party or entity which enters into the P3 Agreement, also known as the Development Agreement, whereby that party agrees to design, build, finance, operate and maintain the NFS Separable Element.

“P3 Payments” means all payments made to a P3 Developer pursuant to and arising out of the P3 Agreement, which include, but are not limited to, termination payments, special allowances, compensation payments for supervening events, and interest on late payments. P3 Payments do not include Milestone or Availability Payments.

“P3 Payment Fund” means the P3 Payment Fund created by Section 9.04 of this Agreement.

“PPA” means Project Partnership Agreement.

“Person” means any natural or legal person, county, city, municipality, political subdivision, public benefit corporation, corporation, limited liability company, trust, joint venture, association, company, partnership, Governmental Authority, or other entity.

“Pledged Revenues” means, collectively, all revenues pledged by the Member Entities to finance the design, construction, operation and maintenance of the Project and to pay the debt service on Debt Obligations or make Availability or Milestone Payments.

“Prior Obligations” means all commitments previously entered into by the Limited Joint Powers Entity, and which are set forth in Exhibit A to this Agreement.

“Prior Temporary Sales Tax Revenue Notes” means the United States of America, Cass County, North Dakota, Promissory Note dated July 31, 2014, by and between Cass County, and U.S. Bank National Association, as Lender, related to the County Loan, and the United States of America, City of Fargo, North Dakota, Promissory Note dated July 31, 2015, by and between the City of Fargo, and U.S. Bank National Association, as Lender, related to the City Loan.

“Program Management Consultant” means an individual or firm responsible for planning and implementing the Project. The Program Management Consultant shall be under the direct supervision of the Executive Director and the Flood Diversion Board.

“Project” means the LPP Flood Risk Management Features and the Recreation Features as generally described in the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated July 2011 and approved by the Chief of Engineers on December 19, 2011, as amended by the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013.

“Project Management Plan” shall mean a living document that describes how the Government and the Non-Federal Sponsors intend to fulfill their obligations under this Agreement, including the procurement process for the NFS Separable Element and the Government Separable Element and timelines for the Technical Requirements and procurement processes.

“Project Partnership Agreement” means an agreement between the Government and the Non-Federal Sponsors for the construction of the Project, which includes a description of the Project and the responsibilities of the Government and the Non-Federal Sponsors in the cost sharing and execution of work.

“Project Property” means real property acquired for the Project, including, but not limited to, land, rights of way, easements, licenses, and leases.

“Rational Basis” means making a decision that is determined by the Flood Diversion Board to be fair, moderate, suitable under the circumstances, and governed by reason.

“Red River Control Structure” means the water-flow control structure located south of the Cities of Fargo and Moorhead, which will be used to control the flow of the Red River through the Cities of Fargo and Moorhead during flood events.

“Recreation Features” means construction of multipurpose trails, restrooms, potable water, picnic facilities, parking areas, landscaping, and tree plantings as generally described in the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated July 2011, and approved by the Chief of Engineers on December 19, 2011, as amended by the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013.

“Relocation” means providing a functionally equivalent facility to the owner of a utility, cemetery, Highway, railroad (excluding railroad bridges and approaches thereto required for construction of the LPP Flood Risk Management Features), or public facility when such action is authorized in accordance with applicable legal principles of just compensation; or providing a functionally equivalent facility when such action is specifically provided for, and is identified as a relocation, in the authorizing legislation for the Project or any report referenced therein. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

“Requested Project Action” means a written request, approved by the Flood Diversion Board, in which the Flood Diversion Board requests a Member Entity perform an action or actions related to the **Project** pursuant to Section 20.03 of this Agreement.

“Revenue Fund” means the Revenue Fund created by Section 9.02 of this Agreement.

“Sales Tax Revenues” means the total gross revenues received by Cass County and the City of Fargo from the Pledged Sales Taxes.

“Southern Embankment and Retention Area” means the tie-back levee on both the east and west side of the Red River and south of the Cities of Fargo and Moorhead, which will be used to retain flood waters during flood events.

“Storm Water Maintenance Fee” means a monthly fee imposed, levied and collected by a Member Entity for costs associated with the Project.

“Supplemental Environmental Assessment” or **“SEA”** means the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013.

“Technical Requirements” means the requirements that the Non-Federal Sponsors shall develop in consultation with the Government including performance standards and specifications for the design, construction, operation and maintenance of the NFS separable element.

“Total LPP Flood Risk Management Costs” means that portion of Total Project Costs allocated to the LPP Flood Risk Management Features. As specified in Table 27 of the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management, dated July 2011, the Total LPP Flood Risk Management Costs, for purposes of the PPA and cost-sharing, are designated as being \$1,745,033,000.00 in 2011 dollars, and will be Adjusted for Inflation consistent with Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280).

“Total Project Costs” means the sum of all costs incurred by the Non-Federal Sponsors and the Government for the LPP Flood Risk Management Features and Recreation Features directly related to construction of the Project. Total Project Costs includes, *inter alia*, the Government’s share of Preconstruction Engineering and Design costs pursuant to the terms of the Design Agreement; the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement; the Government’s engineering and design costs during construction; the Non-Federal Sponsors’ and the Government’s costs of investigations to identify the existence and extent of hazardous substances in accordance with the PPA; the Government’s costs of historic preservation activities in accordance with the PPA; the Government’s actual construction costs, including the costs of alteration, lowering, raising, or replacement and attendant removal of railroad bridges and approaches thereto required for construction of the LPP Flood Risk Management Features; the Government’s supervision and administration costs; the costs of In-Kind Contributions determined to be eligible in accordance with the PPA that do not exceed the amount of credit to be afforded the Non-Federal Sponsors under the PPA; the Non-Federal Sponsors’ design and construction costs for the NFS Separable Element determined to be eligible in accordance with the PPA including the costs of alteration, lowering, raising, or replacement and attendance removal of railroad bridges and approaches thereto required for construction of the LPP Flood Risk Management Features; the Government’s costs of technical assistance for the NFS Separable Element required by the Non-Federal Sponsors; the Government’s costs of monitoring the NFS Separable Element; the Government’s costs of contract dispute settlements or awards; and the value of lands and easements; rights-of-way, Relocations, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated materials for which the Government affords credit in accordance with the PPA or for which reimbursement by the Government is required pursuant to of the PPA. The term does not include any costs for operation, maintenance, repair, rehabilitation, or replacement of the Project; any costs of dispute resolution under the PPA; or the Government’s costs for data recovery activities associated with historic preservation in accordance with the PPA.

“Total Recreation Costs” means that portion of Total Project Costs allocated to the Recreation Features.

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

“Upstream Group” [need definition]

“Upstream Group Member” means the one (1) individual appointed by the Governing Body of the _____.

“Vice Chair” means the member of the Flood Diversion Board who was elected to the Vice Chair position by the Flood Diversion Board pursuant to Section 4.07 of this Agreement.

“West Fargo City Commission” means the City of West Fargo City Commission, which is the Governing Body of the City of West Fargo.

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

Section 2.02 TERMS GENERALLY. The definition of terms herein shall apply equally to the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words “include,” “includes” and “including” shall be deemed to be followed by the phrase “without limitation.” The word “will” shall be construed to have the same meaning and effect as the word “shall.” Unless the context requires otherwise (a) any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein), (b) any reference herein to any Person shall be construed to include such Person’s permitted successors and assigns, (c) the words “herein,” “hereof” and “hereunder,” and words of similar import, shall be construed to refer to this **Agreement** in its entirety and not to any particular provision hereof, (d) all references herein to Articles, Sections, Exhibits and Schedules shall be construed to refer to Articles and Sections of, and Exhibits and Schedules to, this **Agreement**, and (e) the words “asset” and “property” shall be construed to have the same meaning and effect and to refer to any and all tangible and intangible assets and properties, including cash, securities, accounts and contract rights.

Section 2.03 ACCOUNTING TERMS; GAAP. Except as otherwise expressly provided herein, all terms of an accounting or financial nature shall be construed in accordance with GAAP, as in effect from time to time.

Section 2.04 ADDITIONAL PROVISIONS AS TO INTERPRETATION. All references herein to “Articles,” “Sections,” and other subdivisions are to the corresponding Articles, Sections or subdivisions of this **Agreement**; and the words “herein,” “hereof,” “hereunder,” and other words of similar import refer to this **Agreement** as a whole and not any particular Article, Section, or subdivision hereof.

ARTICLE III. PURPOSE

Section 3.01 GENERAL PURPOSE. This **Agreement** is made pursuant to N.D.C.C. § 54-40-1 and Minn. Stat. § 471.59, which authorize the joint and cooperative exercise of power common to the contracting parties. The purpose of this **Agreement** is to allow the **Member Entities** to work collaboratively to avoid the duplication of required approvals and actions with respect to the **Project**, to maximize efficiencies of the **Member Entities** with respect to flood control projects, to have the **Member Entities'** employees, engineers, attorneys and professional consultants cooperate in the design, financing, construction, operation and maintenance of the **Project**. The **Member Entities** desire to establish and continue a joint powers structure to design, finance, construct, operate and maintain the **Project** consistent with the provisions of this **Agreement**, N.D.C.C. § 54-40.3-1, and Minn. Stat. § 471.59.

Section 3.02 INTENT. The **Member Entities** to this **Agreement** have extensive jurisdiction over the management of water resources within their respective geographic jurisdictions. Each **Member Entity** to this **Agreement** has the power to adopt rules and regulations governing water management. Nonetheless, the **Member Entities** recognize there is mutual benefit to the **Member Entities** working in a cooperative manner with respect to the **Project**. The intent of this **Agreement** is to increase efficiencies with respect to designing, constructing, financing, operating and maintaining the **Project** by allowing the **Member Entities** to cooperate in the bidding and letting of contracts, by cross-pledging sales taxes, special assessment levies, by entering into development agreements with a **P3 Developer**, cooperating in the administration of the **Project** and to reimburse the **Member Entities** for expenses incurred in connection with the **Project**.

Section 3.03 SEPARATE POLITICAL SUBDIVISION. This **Agreement** is expressly intended to confirm the ongoing existence and operation of a separate political subdivision named the **Flood Diversion Board of Authority**. The **Member Entities** recognize that pursuant to and in conformance with N.D.C.C. § 54-40.3-1 and Minn. Stat. § 471.59, the **Flood Diversion Board of Authority** may not exercise a power unless that power is expressly granted by this **Agreement**. As a result, the **Flood Diversion Board of Authority** will from time to time request that one or several of the **Member Entities** exercise their respective powers in furtherance of the **Project**.

ARTICLE IV. FLOOD DIVERSION BOARD OF AUTHORITY

Section 4.01 COMPOSITION OF BOARD. There is hereby established and continued a joint powers board to be known as the "**Flood Diversion Board**." The **Flood Diversion Board** is the **Governing Body** of the **Flood Diversion Board of Authority** and shall consist of:

1. Three (3) members of the **Fargo City Commission**, provided, that one of the three (3) members shall be the current Mayor of the **City of Fargo**, and the other two (2) members shall be current members of the **Fargo City Commission** appointed by the **Fargo City Commission**;

2. Two (2) members of the **Moorhead City Council**, provided, that one of the two (2) members shall be the current mayor of the **City of Moorhead**, and the other member shall be appointed by the **Moorhead City Council**;
3. Three (3) members appointed by **Cass County Commission**, provided, however, that the **Cass County Commission** is authorized to appoint either a current member of the **CCJWRD Board** or a current member of the **West Fargo City Commission** to be appointed as up to two of said three (3) members, provided further, that all other appointments made by the **Cass County Commission** must be current **Cass County Commissioners**, except that the **Current Chair** may complete his term as **Chair** through December 31, 2016;
4. One (1) member of the **Clay County Commission** appointed by **Clay County Commission**;
5. One (1) member of the **CCJWRD Board** appointed by the **CCJWRD Board**;
6. One (1) member of the **BRRWD Managers** appointed by the **BRRWD Managers**; and
7. One (1) member of the **Upstream Group** appointed by the_____.

The **Governing Body** of each **Member Entity** is authorized to designate alternate members of the **Flood Diversion Board** to sit in place of an appointed **Flood Diversion Board Member** when the appointed **Flood Diversion Board Member** is unable to attend a meeting of the **Flood Diversion Board**. Provided that any alternate members of the **Flood Diversion Board** must be either elected or appointed to the **Member Entity Governing Body**.

Section 4.02 FLOOD DIVERSION BOARD MEMBERSHIP REQUIREMENT. A **Flood Diversion Board Member** must be a member of a **Member Entity's Governing Body**, except for the **Current Chair**.

Section 4.03 NOT EMPLOYEES. **Flood Diversion Board Members** shall not be deemed employees of the **Flood Diversion Board of Authority**. The **Member Entities** acknowledge that it is their sole responsibility to provide all compensation and fringe benefits to their respective employees, elected or appointed officials. **Flood Diversion Board Members** shall not be allowed to be party to any contract with the **Flood Diversion Board of Authority**.

Section 4.04 INCOMPATIBLE OFFICES. **Flood Diversion Board Members** may not be appointed to any paid office at the **Flood Diversion Board of Authority** nor shall they be employed by the **Flood Diversion Board of Authority**.

Section 4.05 TERMS OF FLOOD DIVERSION BOARD MEMBERS. There are no set terms of members of the **Flood Diversion Board of Authority**. The **City of Fargo Members**, the **City of Moorhead Members**, the **Cass County Members**, the **Clay County Members**, the **CCJWRD Members**, and the **BRRWD Members**, and the **Upstream Group Member**, shall serve at the discretion of the **Governing Body** of their respective organization from which they were appointed.

Section 4.06 THE CHAIR. The **Chair** is a member of the **Flood Diversion Board** for purposes of presiding at its meeting. The **Chair** may vote on all matters before the **Flood Diversion Board**, but may not cast an additional vote in the event of a tie vote of the **Flood**

Diversion Board. The **Chair** does not have the authority to veto decisions of the **Flood Diversion Board Members**. The **Chair** is the head of the **Flood Diversion Board** for ceremonial purposes and for the purpose of service of civil process. The **Chair** may execute all contracts, **P3 Agreements**, notes, indentures, warrants, and other instruments on behalf of the **Flood Diversion Board of Authority** and perform any other duties assigned by the **Flood Diversion Board**. No contract, **P3 Agreement**, note, indenture, warrant, or other instrument executed by the **Chair**, or **Vice Chair** acting as **Chair** pursuant to Section 4.07 of this **Agreement**, shall become valid and binding upon the **Flood Diversion Board of Authority** until countersigned by the **Executive Director** or the **Deputy Executive Director** acting as **Executive Director** pursuant to Section 13.03 of this **Agreement**.

The **Chair** position shall rotate between the Mayor of the **City of Fargo**, the Mayor of the **City of Moorhead**, and a member of the **Cass County Commission**, respectively. Each **Chair** shall serve a one (1) year term, beginning January 1 and ending December 31. Provided that from the **Effective Date** of this **Agreement**, until December 31, 2016, the **Chair** position shall be held by the **Current Chair**. Thereafter, the rotation of the **Chair** shall commence with the Mayor of the **City of Fargo** serving the first term, the Mayor of the **City of Moorhead** serving the second term, and a member of the **Cass County Commission**, selected by the **Cass County Commission**, serving the third term. This rotational schedule shall continue for the remainder of the term of this **Agreement**. Individuals may serve as **Chair** multiple times if they remain in their respective elected or appointed positions. Provided, the **Chair** must not be from a **Member Entity** from the same state as the **Vice Chair's Member Entity** (i.e. if the **Chair** is from a Minnesota **Member Entity**, the **Vice Chair** shall be from a North Dakota **Member Entity**). The term of the **Chair** shall cease if he or she is no longer qualified to serve and hold office as a member of the **Cass County Commission**, the Mayor of the **City of Fargo** or the Mayor of the **City of Moorhead**. Provided, that the **Member Entity** is permitted to replace the **Chair** with the individual filling the vacancy of the outgoing **Chair** position within the **Governing Body** of the **Member Entity** (i.e. if a new Mayor is elected in the **City of Fargo** while the **City of Fargo's** Mayor is serving as **Chair**, then the newly elected Mayor of the **City of Fargo** will serve the remainder of the **Chair's** term).

Section 4.07 VICE CHAIR. A **Vice Chair** must be elected at the **Annual Meeting** of the **Flood Diversion Board** by a majority vote of all members of the **Flood Diversion Board**. The **Vice Chair** must be a **Flood Diversion Board Member** and must not be a member from the same state as the **Chair**. The **Vice Chair** serves as the **Chair** in the **Chair's** disability or absence from the **Flood Diversion Board** or when a vacancy in the office of **Chair** exists. When presiding over a meeting in the absence of the **Chair**, the **Vice Chair** may vote on all matters before the **Flood Diversion Board**, but may not cast an additional vote in the event of a tie vote of the **Flood Diversion Board**. The **Flood Diversion Board** must elect a **Vice Chair** at the organizational meeting. Each **Vice Chair** shall serve a one (1) year term beginning the second Thursday in January and ending the day prior to the second Thursday in January of the following year.

Section 4.08 SECRETARY. At the **Annual Meeting** of the **Flood Diversion Board of Authority**, the **Flood Diversion Board Members** shall appoint a **Secretary**. An employee of one of the **Member Entities**, an individual or contractor, may be appointed as the **Secretary** for the **Flood Diversion Board of Authority**. The **Secretary** shall be responsible for ensuring that

minutes are prepared for all **Flood Diversion Board of Authority** meetings. The **Secretary** shall also keep all books and records of the **Flood Diversion Board of Authority** and shall give all notices required by law, and may have other duties assigned from time to time by the **Flood Diversion Board of Authority**. The secretary shall also be responsible for compliance with North Dakota's Open Records Law requirements.

Section 4.09 VOTING BY THE BOARD. Each **Flood Diversion Board Member** shall have one (1) vote on matters before the **Flood Diversion Board of Authority**. All decisions before the **Flood Diversion Board of Authority** shall be determined by a simple majority vote of the **Flood Diversion Board Members** present except as set forth in this Section. **Flood Diversion Board Members** are not permitted to vote by proxy. A **Flood Diversion Board Member Alternate** will be seated as a **Flood Diversion Board Member** when the **Member Entity's Flood Diversion Board Member** is absent from a **Flood Diversion Board** meeting. When seated pursuant to this Section, **Flood Diversion Board Member Alternates** will have the same voting rights as regular **Flood Diversion Board Members**. The following decisions require that at least one vote each must be cast by a **Minnesota Board Member**, a **City of Fargo Member** and a **Cass County Board Member**:

- (a) **Project** alignment and crossing (bridge) locations, to the extent that the **Locally Preferred Plan** is capable of being modified by any person, firm or governmental entity. It is understood and agreed that minor revisions to the **Project** alignment or to crossing locations will not require approval by one vote, each, from the **City of Fargo, Cass County, and Minnesota Board Members**. A minor revision is one that alters the location of the alignment or crossing by less than one thousand (1,000) feet.
- (b) Engagement of a **Program Management Consultant**.
- (c) Engagement of a **Lobbyist**.
- (d) Engagement of an **Executive Director**.
- (e) Engagement of a **Fiscal Agent**.
- (f) Termination of a **Program Management Consultant, Lobbyist, Fiscal Agent, or the Executive Director**.
- (g) Approval or modification of the methodology and finance plan to allocate the costs associated with operating the **Project**.

Section 4.10 MEETINGS OF THE BOARD. The **Flood Diversion Board of Authority** shall hold meetings as follows:

- (a) Organizational Meeting. An organizational meeting shall be held within thirty (30) days of the **Effective Date** of this **Agreement** and shall be called at a time to be determined by the City Administrator for the **City of Fargo** and the City Manager for the **City of Moorhead**. The City Administrator for the **City of**

Fargo and the City Manager for the **City of Moorhead** shall ensure that proper notice of this meeting is given.

- (b) Regular Meetings. Thereafter, the **Flood Diversion Board** shall meet at 3:30 p.m. local time on the second Thursday of each and every month that this **Agreement** is in effect, and a schedule of regular meetings, which may include multiple regular meetings each month, shall be adopted at the organizational meeting and thereafter each and every year at the **Annual Meeting**.
- (c) Annual Meeting. The **Flood Diversion Board** shall hold its **Annual Meeting** at 3:30 p.m. local time on the second Thursday of January.
- (d) Special Meetings. Special meetings of the **Flood Diversion Board** may be called by the **Chair** and must be called by the **Chair** upon written request of three (3) **Flood Diversion Board Members**. Business at a special meeting is limited to matters contained in the notice of the special meeting. A special meeting may also be called at the request of the **Governing Body** of the **City of Fargo**, the **City of Moorhead**, or **Cass County**.
- (e) Meeting Location. **Flood Diversion Board** meetings will be held at Fargo City Hall, unless the **Flood Diversion Board**, or the **Executive Director** with the consent of the **Chair**, determines that a meeting should be held at an alternative location.
- (f) Parliamentary Rules. All meetings of the **Flood Diversion Board** shall comply with parliamentary rules and procedures outlined in the most recent edition of ROBERT'S RULES OF ORDER for small boards, except to the extent those rules are inconsistent with any rules adopted by the **Flood Diversion Board** or are inconsistent with the provisions of this **Agreement** or applicable North Dakota law.
- (g) Notice of Meetings to Alternate Board Members. Each **Flood Diversion Board Member Alternate**, whether or not a voting member, shall be entitled to receive notices of and attend all meetings of the **Flood Diversion Board** to receive all reports, and to participate in **Flood Diversion Board** discussions in the same manner as the **Flood Diversion Board Members**. Provided, however, that a **Flood Diversion Board Member Alternate** will not be seated unless the **Member Entity's** appointed **Flood Diversion Board Member** is unable to attend the meeting and, during closed sessions of the **Flood Diversion Board**, the meeting shall be attended only by the **Chair** and **Flood Diversion Board Members** or seated **Flood Diversion Board Member Alternates**.

Section 4.11 OPEN MEETING LAW. All meetings of the **Flood Diversion Board of Authority** shall be held in compliance the North Dakota Open Meetings Law.

Section 4.12 RECORDS RETENTION POLICY. The **Flood Diversion Board of Authority** shall adopt a records retention policy establishing minimum retention periods for its records in compliance with the North Dakota Open Records Law.

Section 4.13 OPEN RECORDS LAW. The **Flood Diversion Board of Authority** shall comply with the North Dakota Open Records Law in regard to all data collected, created, received and maintained or disseminated.

Section 4.14 QUORUM. A quorum of the **Flood Diversion Board of Authority** shall consist of six (6) **Flood Diversion Board Members** who may transact business. If vacancies cause the membership of the **Flood Diversion Board of Authority** to be less than six (6) members, the **Flood Diversion Board of Authority** shall not conduct any business until such time that there are at least six (6) **Flood Diversion Board Members**. Bylaws shall be reviewed and updated annually by the **Flood Diversion Board**.

Section 4.15 BYLAWS. The **Flood Diversion Board** may adopt bylaws governing its operations that are not inconsistent with this **Agreement** and may amend said bylaws as necessary. The bylaws may provide for sub-committees of the **Flood Diversion Board** as necessary. Any bylaw or modification thereof shall not be effective until approved by a majority vote of the **Flood Diversion Board Members**. Bylaws shall be reviewed and updated annually by the **Flood Diversion Board**.

Section 4.16 OFFICIAL NEWSPAPER. At its **Annual Meeting**, the **Flood Diversion Board** must designate one or more legal newspapers of general circulation in the **Fargo-Moorhead Metropolitan Area** as its official newspaper; the **Flood Diversion Board** will publish all matters required by law or this **Agreement** to be published, and other matters the **Flood Diversion Board** deems necessary in the official newspaper.

ARTICLE V. COMMITTEES

Section 5.01 BOARDS AND COMMISSIONS. Except as otherwise provided by law, Section 5.02, Section 5.08, or Section 5.14 of this **Agreement**, there are no separate administrative boards or commissions. The **Flood Diversion Board** performs the duties and exercises the powers of administrative boards or commissions. The **Flood Diversion Board** may establish boards or committees to advise the **Flood Diversion Board** with respect to a **Project** function or activity, to investigate a subject of interest to the **Flood Diversion Board of Authority**, or to perform quasi-judicial functions.

Section 5.02 LAND MANAGEMENT COMMITTEE. There is hereby created and continued a **Land Management Committee** of the **Flood Diversion Board of Authority** with the powers and duties set forth in this Article.

Section 5.03 LAND MANAGEMENT COMMITTEE JURISDICTION. The **Land Management Committee** is responsible for making recommendations to the **Flood Diversion Board** regarding the acquisition and management of **Project Property**.

Section 5.04 LAND MANAGEMENT COMMITTEE MEMBERSHIP. The **Land Management Committee** shall consist of:

- (a) Two (2) Members of the **Flood Diversion Board** appointed by the **Flood Diversion Board**;
- (b) Two (2) Members recommended by the **Fargo City Commission** and appointed by the **Flood Diversion Board**;
- (c) Two (2) Members recommended by the **Moorhead City Council** and appointed by the **Flood Diversion Board**;
- (d) Two (2) Members recommended by the **Cass County Commission** and appointed by the **Flood Diversion Board**;
- (e) One (1) Member recommended by the **Clay County Commission** and appointed by the **Flood Diversion Board**;
- (f) One (1) Member recommended by the **CCJWRD Board** and appointed by the **Flood Diversion Board**;
- (g) One (1) Member recommended by the **BRRWD Managers** and appointed by the **Flood Diversion Board**.

Section 5.05 LAND MANAGEMENT COMMITTEE CHAIR. The **Land Management Committee** shall select a chair by majority vote of its members. The chair must also be a member of the **Flood Diversion Board**.

Section 5.06 MEMBER ENTITY STAFF. **Member Entities** may provide support staff and services for the **Land Management Committee**, but **Member Entity** staff may not serve as members of the **Land Management Committee**.

Section 5.07 MEMBERSHIP ON LAND MANAGEMENT COMMITTEE. **Land Management Committee** members shall either be elected or appointed public officials.

Section 5.08 FINANCE COMMITTEE. There is hereby created and continued a **Finance Committee** of the **Flood Diversion Board of Authority** with the powers and duties set forth in this Article.

Section 5.09 FINANCE COMMITTEE JURISDICTION. The **Finance Committee** is responsible for making recommendations to the **Flood Diversion Board** regarding the budgets, expenses, funds and all other finance matters related to the **Project**.

Section 5.10 FINANCE COMMITTEE MEMBERSHIP. The **Land Management Committee** shall consist of:

- (a) Two (2) Members of the **Flood Diversion Board** appointed by the **Flood Diversion Board**;
- (b) Two (2) Members recommended by the **Fargo City Commission** and appointed by the **Flood Diversion Board**;
- (c) Two (2) Members recommended by the **Moorhead City Council** and appointed by the **Flood Diversion Board**;

- (d) Two (2) Members recommended by the **Cass County Commission** and appointed by the **Flood Diversion Board**;
- (e) One (1) Member recommended by the **Clay County Commission** and appointed by the **Flood Diversion Board**;
- (f) One (1) Member recommended by the **CCJWRD Board** and appointed by the **Flood Diversion Board**;
- (g) One (1) Member recommended by the **BRRWD Managers** and appointed by the **Flood Diversion Board**.

Section 5.11 FINANCE COMMITTEE CHAIR. The **Finance Committee** shall select a chair by majority vote of its members. The chair must also be a member of the **Flood Diversion Board**.

Section 5.12 MEMBER ENTITY STAFF. **Member Entities** may provide support staff and services for the **Finance Committee**, but **Member Entity** staff may not serve as members of the **Finance Committee**.

Section 5.13 MEMBERSHIP ON FINANCE COMMITTEE. **Finance Committee** members shall either be elected or appointed public officials.

Section 5.14 PRIOR ENTITY COMMITTEES. The **Member Entities** agree and acknowledge that the **LJPA** previously created several temporary sub-committees, which include the Ag Committee and Public Outreach Committee. These committees and their membership shall be continued until such time as the **Flood Diversion Board** determines that such committees are no longer necessary for the **Project**.

ARTICLE VI. FLOOD DIVERSION BOARD OF AUTHORITY POWERS

Section 6.01 POWERS. This **Agreement** shall in no way limit or restrict the powers and duties of each **Member Entity**, except as provided herein. The **Flood Diversion Board of Authority** shall have the following duties and powers.

- (a) Receipt of Funds. To apply for and receive grants and **Debt Obligation** proceeds and to accept donations, bequests and contributions from the **Member Entities**.
- (b) To Enter Into Contracts. To enter into contracts related to the **Project** and to perform all of its obligations pursuant to the terms and conditions of those contracts.
- (c) Executive Director. To hire and terminate an **Executive Director**.
- (d) Purchasing. To purchase or otherwise acquire real and personal property and to purchase capital equipment and equipment and items necessary for the operations and maintenance of the **Project**.

- (e) Expenses. To incur expenses necessary and incidental to effectuation of its purposes and consistent with its powers.
- (f) Sales. To convey, sell, dispose of, or lease any of its equipment or its real or personal property as deemed necessary for the **Project**.
- (g) Sue and Be Sued. To commence litigation as deemed necessary and to defend against any claims brought against the **Flood Diversion Board of Authority**.
- (h) Conduct or Arrange for Public Information Meetings.
- (i) Appoint Ex-Officio Board Members. Ex-Officio **Flood Diversion Board Members** may attend **Flood Diversion Board** meetings but may not vote unless they are seated as a member of the **Flood Diversion Board**.
- (j) Appoint and Terminate Project Consultants. To employ a **Program Management Consultant**, a **Lobbyist**, and other professional services support personnel and to provide necessary office space, supplies, equipment and other support.
- (k) Employees. To employ personnel to carry out the purposes of this **Agreement**.
- (l) Management of Project. To assist in the planning, design, development and management of the **Project**, including **Project Property** acquisition and construction of the **Project**.
- (m) Finance the Project. To provide for the financing of the **Project**, including coordination of the issuance of **Debt Obligations** by the **Member Entities** or to provide for **Availability Payments** and/or **Milestone Payments**.
- (n) Operations and Maintenance of Project. To provide for the operations and maintenance of the **Project**. This authority includes the authority to hire, retain and terminate private contractors or **P3 Developers** to provide for the operations and maintenance of the **Project**.
- (o) Budget. To establish an annual operating budget and to submit the budget for review by December 1 of each year of this **Agreement** to the **Governing Bodies** of the **Member Entities**. The **Member Entities** are not required to adopt the budget, but may provide comments and input to the **Flood Diversion Board of Authority**. The budget submitted to the **Member Entities** is intended to provide **Member Entities** with information regarding the financial condition of the **Flood Diversion Board of Authority** and does not require formal approval by the **Member Entities' Governing Bodies**.
- (p) Insurance. To enter into contracts for the purposes of securing insurance coverage regarding the **Project** or the operation of the **Flood Diversion Board of**

Authority, including general liability, automobiles, property, and worker's compensation coverage.

- (q) Economization. To recommend to the **Member Entities** ways to economize the construction, management, operations, financing and maintenance of the **Project**.
- (r) Land Acquisition Requests. To request that **Member Entities** obtain access to and title to lands, easements, and rights of way necessary for the **Project**. This will include requests for a **Member Entity** to exercise its eminent domain authority.
- (s) Amendments. To recommend amendments to this **Agreement** to the **Member Entities**.
- (t) Enforce this Agreement. To enforce the terms of this **Agreement**, including requiring one or more of the **Member Entities** to this **Agreement** to fulfill its obligations as defined herein.
- (u) Delegate Tasks. To delegate tasks to one or more of the **Member Entities** to this **Agreement**, unless prohibited by statute or otherwise.
- (v) Committees and Sub-committees. Pursuant to ARTICLE V of this **Agreement**, to create committees to provide technical, financial and legal assistance, or other assistance to the **Flood Diversion Board of Authority**.
- (w) Provide for Professional Services. To procure the services of engineers, attorneys, contractors, consultants, and other persons or entities for the planning, design, development, financing, construction, operation and management of the **Project**.
- (x) Hire Accountants. Procure the services of a public accountant to make an annual audit of the accounts and records of the **Flood Diversion Board of Authority**.
- (y) Contract with Public Entities. To enter into contracts or other arrangements with the United States Government or any department thereof, municipalities, counties, water resource or watershed districts, states or any agency thereof, persons, railroads, companies or corporations, for cooperation or assistance in designing, developing and constructing the **Project** and acquiring and maintaining the necessary lands, easements and rights of way for the **Project**, including contracts, joint powers agreements or other arrangements for advancing funds for **Project** purposes and for recouping some or all of such funds including, without limitation, entering into such contract(s), joint powers agreement(s) or other arrangements with North Dakota Department of Transportation, **Cass County**, **CCJWRD**, the City of Oxbow, North Dakota, the City of Comstock, Minnesota, and other Minnesota or North Dakota political subdivisions, for purposes of constructing and installing a ring-levee, providing for replacement property and the infrastructure supporting such replacement property and any other purposes as

may be necessary and appropriate for the furtherance of the **Project**. This power includes the power to perform all its obligations under such contracts and the power to carry out and implement such contracts.

- (z) Contracts with Private Third Parties. To enter into contracts or other arrangements with BNSF, private utility companies or cooperatives, or other private parties, for cooperation or assistance in the design and construction of the **Project**, including but not limited to, reconstruction of railroad bridges, tunnels, temporary relocation of railroad tracks, utility relocation, and any other purposes as may be necessary and appropriate for the furtherance of the **Project**. This power includes the power to perform all its obligations under such contracts and the power to carry out and implement such contracts.
- (aa) Provide for P3 Procurement Process. To develop and implement a P3 procurement process in accordance with Chapter 48-02.1 of the **N.D.C.C.** This power includes the authority to authorize and make stipend payments as deemed necessary and appropriate by the **Flood Diversion Board**.
- (bb) Permits. To apply for any permits for the **Project**, whether from the Government, the State of North Dakota, or the State of Minnesota.
- (cc) Enter into a Project Partnership Agreement (PPA). To enter into a **PPA** with the **Government**. This power includes the power to enter into all ancillary documents connected with or arising out of the PPA, including but not limited to, third party agreements, agreements with contractors and subcontractors, any leases, and licenses.
- (dd) Lobbying. Lobby for state (in either North Dakota or Minnesota) and/or federal funds for the **Project** including lobbying for federal or state (in either North Dakota or Minnesota) authorization or other approvals as may be directed by the **Flood Diversion Board of Authority**.
- (ee) Indemnification. To indemnify and hold harmless the **Non-Federal Sponsors**, the **Member Entities**, and the **Government**.
- (ff) Purchase Insurance Policies. To purchase insurance policies or products that provide coverage for the **P3 Developer**, subcontractors to the **P3 Developer** of any tier, financiers of a **P3 Developer**, and contractors, including their consultants, agents, advisors, lobbyists, and employees for work performed in connection with, arising out of, or related to the **Project**.
- (gg) Purchase Private Insurance Policies or Create Individual Insurance Reserve Funds. To purchase private insurance policies or create individual insurance reserve funds for crop insurance, agricultural production revenue insurance, and liability insurance in the amounts and under the terms and conditions deemed necessary by the **Flood Diversion Board of Authority** related to construction, operation, and maintenance of the **Project**.

- (hh) P3 Agreements. To enter into a **Development Agreement**, also known as **P3 Agreement**, which will provide for the design, construction, financing, operation, and maintenance of the **DCAI** and/or **NFS Separable Element**, in accordance with Chapter 48-02.1 of the **N.D.C.C.** This power includes the power to enter into all ancillary documents connected with or arising out of the **P3 Agreement**, including but not limited to, direct agreements with financiers, third parties, and subcontractors, any leases and licenses granting access to the **P3 Developer** and its subcontractors, and any escrow arrangements for equity partnerships. Alternatively, to authorize one or more **Member Entities** to enter into a **Development Agreement**, also known as a **P3 Agreement**, and ancillary documents, as set forth in the preceding sentence, with a **P3 Developer**. The **Member Entities** agree and acknowledge that this power is granted pursuant to **N.D.C.C. § 48-02.1-11**. The **Flood Diversion Board of Authority** may enter into ancillary agreements related to and arising out of or related to **P3 Agreements** to give full force and effect to the **P3 Agreements**. The **Flood Diversion Board of Authority** is authorized to perform all its obligations under the terms and conditions of such ancillary agreements and the **P3 Agreement**, or to carry out the transaction contemplated by such ancillary agreement and **P3 Agreement**. The **Flood Diversion Board of Authority** is authorized to provide such representations and warranties as may be needed to give effect to such agreements.
- (ii) Implicit Powers. In addition to the above specified powers, the **Flood Diversion Board of Authority** shall have those powers implicitly necessary to carry out its duties.
- (jj) Uncertain Powers. If it is not clear whether the **Flood Diversion Board of Authority** has a power to perform a certain action or to make a certain decision, the **Flood Diversion Board of Authority** shall refrain from acting until such times as it receives authority in writing from a majority of **Member Entities**.

ARTICLE VII. FINANCE/BUDGET

Section 7.01 FLOOD DIVERSION BOARD TO CONTROL FINANCES. The **Flood Diversion Board** is responsible for the financial affairs of the **Flood Diversion Board of Authority**. The **Flood Diversion Board** must provide for the collection of revenues, the safekeeping of assets, the auditing and settlement of accounts, and the safekeeping and disbursements of public monies.

Section 7.02 FISCAL YEAR. The fiscal year of the **Flood Diversion Board of Authority** is the calendar year.

Section 7.03 SUBMISSION OF THE BUDGET. The **Executive Director** upon the recommendation(s) of the **Finance Committee** must prepare an annual budget and submit it to the **Flood Diversion Board** by or before October 1 of each and every year of this **Agreement**. The budget must provide a complete financial plan for **Flood Diversion Board of Authority**

funds and activities for the ensuing fiscal year. The budget is in a form recommended by the **Executive Director** or specified by the **Flood Diversion Board** with necessary modifications required by law. The budget must show estimated income and proposed expenditures, including debt service and comparative figures for the current fiscal year, actual and estimated, and for the preceding fiscal year. The budget must show proposed expenditures for current operations. The budget must show proposed capital expenditures for the ensuing year and the proposed method of financing those capital expenditures. The annual budget will include expenditures for debt service payments, **Milestone Payments**, **Availability Payments**, and **P3 Payments**; however, expenditures for these amounts are not subject to annual appropriations of the **Flood Diversion Board of Authority**.

Section 7.04 FLOOD DIVERSION BOARD ACTION ON THE ANNUAL BUDGET. The budget must be considered by the **Flood Diversion Board** no later than the first regular meeting of the **Flood Diversion Board** in November. The **Flood Diversion Board** must consider the budget at subsequent meetings until an **Approved Budget** is adopted. The failure of the **Flood Diversion Board** to approve an annual budget shall not impair, excuse, revoke, negate, or terminate the continuing obligation of the **Flood Diversion Board of Authority** to provide for and make **Milestone Payments**, **Availability Payments**, and/or **P3 Payments** under the terms and conditions of a **P3 Agreement**. Further, the failure of the **Flood Diversion Board** to approve an annual budget shall not impair, excuse, revoke, negate, or terminate the obligation of a **Member Entity** to provide for and make a debt service payment on a **Debt Obligation**. The sums appropriated by the budget may not exceed the estimated revenues and reserves available to fund the expenditures in the budget. The **Flood Diversion Board** must adopt the budget by resolution not later than December 1 of each and every year of this **Agreement**. The budget resolution must state the total amount of each budgeted fund, with segregation of objects and purposes of expenditures as deemed necessary by the **Flood Diversion Board**. The sums fixed in the budget resolution are appropriated for the purposes identified in the budget resolution.

Section 7.05 ENFORCEMENT OF THE BUDGET. The **Executive Director** must enforce the budget. The **Executive Director** may not approve a payment or the incurring of an obligation by the **Flood Diversion Board of Authority** unless funds for the payment or obligation are appropriated by the budget and there is a sufficient unexpended balance in the appropriation after deducting prior expenditures and encumbrances against the appropriation; provided, that **Debt Obligations**, **Milestone Payments**, **Availability Payments**, and **P3 Payments** are not subject to this requirement. An officer, employee, agent or designee of the **Flood Diversion Board of Authority** may not place an order or make a purchase for the **Flood Diversion Board of Authority** unless the order or purchase is authorized in the budget. An obligation incurred by an officer, employee, agent or designee of the **Flood Diversion Board of Authority** for a purpose not authorized in the budget or for an amount in excess of the amount is the personal obligation of the person incurring the obligation. A **Flood Diversion Board of Authority** check drawn on **Flood Diversion Board of Authority** funds to a person or entity other than the **Flood Diversion Board of Authority** may not be issued or paid until the claim to which the payment relates has been documented by an invoice, payroll timesheet, or other document approved and signed by a person authorized by the **Flood Diversion Board** to execute documents on behalf of the **Flood Diversion Board of Authority**, who vouches for its correctness and reasonableness. The **Executive Director** must report to the **Flood Diversion Board** from time to time on the status of the budget and the expenditures from and balances in the budget accounts and funds.

Section 7.06 ALTERATIONS IN THE BUDGET. The **Flood Diversion Board** may not increase the amounts appropriated in the budget resolution beyond the estimated revenues except to the extent that actual receipts exceed the estimated revenues. The **Flood Diversion Board** may by resolution reduce an appropriation for any purpose in the budget or authorize the transfer of sums from unencumbered appropriations in the budget to other purposes. The **Flood Diversion Board** may make budget adjustments as needed and from time to time.

Section 7.07 FUNDS TO BE KEPT. There must be maintained in the **Flood Diversion Board of Authority** treasury the funds required by ARTICLE IX of this **Agreement** and other funds as may be required by law, the budget resolution or other resolution. The **Flood Diversion Board** may by resolution make inter-fund loans except from trust or agency funds.

Section 7.08 FINANCIAL MANAGEMENT POLICY. The **Flood Diversion Board** will adopt a financial management policy upon the recommendation of the **Finance Committee**. The financial management policy should include reference to the annual audit process and the **Flood Diversion Board** may, at its discretion, create an audit subcommittee or task the **Finance Committee** to initiate the process.

ARTICLE VIII. SOURCES OF REVENUES

Section 8.01 MUTUAL COOPERATION. The **Member Entities** agree and acknowledge that in order to finance the design, construction, operation and maintenance of the **Project** that the **Flood Diversion Board of Authority** through its **Member Entities** will have to draw upon multiple streams of revenue from which **Member Entities** have jurisdiction to levy, impose and collect. The purpose of this Article is to authorize the **Member Entities** to work collaboratively to maximize the efficiency of the **Member Entities** with respect to financing the **Project**.

Section 8.02 PARTY REVENUE CONTRIBUTIONS. The **Project** shall be financed from **Sales Tax Revenues**, special assessment revenues, grants, donations and any other funds contributed by the **Members Entities** (the “**Pledged Revenues**”). The **Member Entities** shall contribute the following funds:

- (a) **City of Fargo.** The **City of Fargo** will impose, levy, and collect a sales and use tax upon all taxable retail sales within the **City of Fargo**. The **Member Entities** acknowledge and agree that the sales and use tax rate, duration and terms may need to be modified and adjusted during the term of this **Agreement**. The **City of Fargo** will also contribute any State of North Dakota grants, funds or cost-share allocations made available for the **Project**.
- (b) **City of Moorhead.** The **City of Moorhead**, in accordance with the cost share allocation formula set forth in Section 11.09 of this **Agreement**, will actively request in good faith an amount not to exceed \$100,000,000, in 2015 dollars as **Adjusted for Inflation**, from the State of Minnesota consisting of appropriations, grants or cost share allocations made available for the **Project**. The **City of Moorhead** will also impose, levy and collect a **Storm Water Maintenance Fee**

for costs associated with maintaining and operating the **Project** in accordance with the **Project** cost share allocation formula set forth in Section 11.09 and Section 11.10 of this **Agreement**.

- (c) **Cass County**. **Cass County** will impose, levy, and collect a sales and use tax upon all taxable retail sales within **Cass County**. The **Member Entities** acknowledge and agree that the sales and use tax rate, duration and terms may need to be modified and adjusted during the term of this **Agreement**. **Cass County** will also contribute any State of North Dakota grants, funds or cost-share allocations made available for the **Project**.
- (d) **Clay County**. **Clay County** will actively request in good faith any and all State of Minnesota appropriations, grants or cost share allocations made available for the **Project**. **Clay County** will actively support the **City of Moorhead's** efforts to request State of Minnesota funds from the Minnesota Legislature.
- (e) **CCJWRD**. **CCJWRD** will create and establish an improvement district for the **Project** pursuant to Chapter 61-16.1 of the **N.D.C.C.** and apportion and levy a special assessment for the **Project**. The **Member Entities** agree and acknowledge that the annual installments of special assessments contemplated in this Article shall be certified in the event that the **Sales Tax Revenues** generated by the **City of Fargo** and **Cass County's** sales tax ordinances are ever insufficient to pay the debt service on any **Debt Obligations** issued for the **Project** and any **Milestone Payments** or **Availability Payments**.
- (f) **BRRWD**. **BRRWD** will actively request in good faith any and all State of Minnesota appropriations, grants or cost share allocations made available for the **Project**. **BRRWD** will also impose, levy and collect a **Storm Water Maintenance Fee** for costs associated with maintaining and operating the **Project** in accordance with the **Project** cost share allocation formula set forth in Section 11.09 and Section 11.10 of this **Agreement**. **BRRWD** will actively support the **City of Moorhead's** efforts to request State of Minnesota funds from the Minnesota Legislature.

Section 8.03 IN-KIND CONTRIBUTIONS. The **City of Fargo**, the **City of Moorhead**, **Clay County**, and **BRRWD** have designed, financed and constructed **In-Town Flood Protection Infrastructure** and other **Project** elements, which were determined to be integral to the **Project** on August 29, 2011, and October 5, 2012, pursuant to **Amendment Number 1 to the Design Agreement**, and that are located along the east and west banks of the Red River of the North. The **In-Town Flood Protection Infrastructure** is considered to be a component of the **Project** and the **City of Fargo** and the **City of Moorhead's** financial contributions with respect to **In-Town Flood Protection Infrastructure** shall be credited against the **North Dakota Member Entities'** and **Minnesota Member Entities'** respective **Project** cost share as more fully set forth in Section 11.09 of this **Agreement**.

Section 8.04 DEBT SERVICE, MILESTONE, AND SCHEDULED AVAILABILITY AND P3 PAYMENTS. Debt service for the **Debt Obligations**, **Milestone Payments** and scheduled

Availability Payments and **P3 Payments** will be paid from the **Pledged Revenues** and any other funds that the **Member Entity** may make available for the **Project** from time to time. If the **Pledged Revenues** and proceeds of any reserve funds established pursuant to Section 9.04 of this **Agreement** should become insufficient to pay the annual debt service payments on the **Debt Obligations**, **Milestone Payments** and to make scheduled **Availability Payments** and **P3 Payments**, the **Flood Diversion Board of Authority** and **Member Entities** may use any other legally available funds as sources of repayment of the debt service on the **Debt Obligations**, **Milestone Payments** and to make scheduled **Availability Payments** and **P3 Payments**.

Section 8.05 UNANTICIPATED SALES TAX REVENUES. In the event the **Pledged Revenues** and proceeds of any reserve funds established pursuant to Section 9.04 of this **Agreement** become insufficient to pay the annual debt service payments for the **Debt Obligations**, **Milestone Payments** or to make scheduled **Availability Payments** and **P3 Payments**, the **Governing Bodies** of the **City of Fargo** and **Cass County** shall use their best efforts to introduce proposed sales and use tax increases to their respective voters at an election in order to secure such **Additional Sales and Use Tax** revenues as may be necessary to pay the debt service on the **Debt Obligations**, make **Milestone Payments** or to make scheduled **Availability Payments** and **P3 Payments**.

Section 8.06 FINANCIAL REPORTS. In June and December of each and every year of this **Agreement**, the **Fiscal Agent** shall report to the **Flood Diversion Board** in writing the amount of money in the **Revenue Fund**, **Debt Obligation Fund**, **Milestone Payment Fund**, **Availability Payment Fund**, **P3 Payment Fund**, and **Reserve Fund**, if any, in the preceding period and the amount and items of expenditure during that period. A verified copy of the report shall be filed in the office of the **Cass County Auditor** and shall be open to inspection.

During the month of January of each year, the **Fiscal Agent** shall prepare a complete statement of the condition of the **Revenue Fund**, **Debt Obligation Fund**, **Milestone Payment Fund**, **Availability Payment Fund**, **P3 Payment Fund**, and **Reserve Fund** for the past year and shall cause the same to be filed with the **Executive Director**. Such statement shall show separately, and in detail, the conditions and resources of the **Revenue Fund**, **Debt Obligation Fund**, **Milestone Payment Fund**, **Availability Payment Fund**, **P3 Payment Fund**, and **Reserve Fund**, including the amount of any anticipated deficit and the apportionment thereof. At the **Flood Diversion Board of Authority's** regular February meeting next following the filing of the statement, the **Flood Diversion Board** shall examine the statement and make inquiry regarding the same to determine whether or not the sales and use tax receipts from the **City 3-21 Sales Tax**, **County 2010-2 Sales Tax**, **Future City Sales Tax** or **Future County Sales Tax** are projected to meet the debt service on the **Debt Obligations**, and are sufficient to meet **Availability Payments** and/or **P3 Payments**. Whenever all sales and use tax receipts from the **City of Fargo** and **Cass County** are insufficient to pay the debt service on the **Debt Obligations**, **Availability Payments**, and/or **P3 Payments** coming due within the following thirteen (13) months, **CCJWRD** will levy special assessments pursuant to Section 8.07 of this **Agreement**.

Section 8.07 LEVY OF SPECIAL ASSESSMENTS. In the event the **City 3-21 Sales Tax**, **County 2010-2 Sales Tax**, **Future City Sales Tax** or **Future County Sales Tax** and proceeds of any reserve funds established pursuant to Section 9.04 of this **Agreement** are ever projected to

be insufficient to pay the annual debt service payments on the **Debt Obligations**, make **Milestone Payments, Availability Payments, or P3 Payments**, and/or the voters of the **City of Fargo** and/or **Cass County** fail to approve an **Increased Sales and Use Tax** or **Additional Sales and Use Tax** sufficient to pay the annual debt service payments on the **Debt Obligations**, make **Milestone Payments, Availability Payments, and/or P3 Payments**, then **CCJWRD** shall direct that the special assessments previously apportioned and levied against the benefitted real property and benefitting entities within the **Assessment District** be certified in such amounts as may be necessary to pay the debt service on the **Debt Obligations**, make **Milestone Payments or Availability Payments and/or P3 Payments**. In such an event, the **Finance Committee**, in consultation with **CCJWRD, City of Fargo, and Cass County**, shall determine the principal amount of special assessments that will need to be certified in any given year after the **Pledged Revenues** and reserve funds (if any) are first applied to the annual debt service payment on **Debt Obligations, Milestone Payments, Availability Payments and/or P3 Payments**. The **Flood Diversion Board**, upon a recommendation from the **Finance Committee**, shall then provide the estimated total principal amount to be certified as a special assessment to **CCJWRD** at least sixty (60) days prior to the date the special assessments installments need to be provided to the **Cass County Auditor** in order that they will be levied in the subsequent year. **CCJWRD** shall retain the final authority to levy and collect the special assessments in accordance with North Dakota law, but **CCJWRD** hereby agrees to use its best efforts to cooperate with the **City of Fargo, Cass County, and Flood Diversion Board of Authority** in certifying any necessary special assessments in accordance with this **Agreement**.

Section 8.08 SPECIAL ASSESSMENTS. Real property located in **Cass County** that is subject to the lien of special assessments for the **Project** shall be identified on the **Cass County** website along with the amount to be specially assessed against that real property. Any special assessments listed on the **Cass County** website in this regard should be identified as “work in progress,” or uncertified special assessments, until such time (if ever) the **City 3-21 Sales Tax, County 2010-2 Sales Tax, Future City Sales Tax or Future County Sales Tax** and proceeds of any reserve funds established pursuant to Section 9.02 of this **Agreement** are ever projected to be insufficient and **CCJWRD** must levy special assessment to pay the annual debt service payment on the **Debt Obligations, make Milestone Payments, Availability Payments, and/or P3 Payments** and **CCJWRD** certifies assessments to the **Cass County Auditor**.

Section 8.09 EXCESS SALES TAX REVENUES. In the event the **Pledged Revenues** exceed the amount required to pay the annual debt service on the **Debt Obligations, Milestone Payments and/or Availability Payments** in any given year, the **Excess Pledged Revenues** will be deposited into a reserve fund established under Section 9.02 of this **Agreement**, which may be used in the event that **Pledged Revenues** become insufficient to meet the annual debt service on the **Debt Obligations, make Milestone Payments or Availability Payments**.

Section 8.10 SUNSETS ON PLEDGED SALES TAXES.

- (a) **Cass County Sunset.** Prior to the expiration of the **County 2010-2 Sales Tax** on the **County 2010-2 Sales Tax Sunset Date, Cass County** shall use its best efforts to submit to the voters of **Cass County** a ballot question asking whether **Cass County** should impose a new or renewed sales tax similar to or greater than the **County 2010-2 Sales Tax** in order to ensure continued sources of sales tax

revenue necessary to meet the annual debt service payments on the **Debt Obligations, Milestone Payments, Availability Payments, and/or P3 Payments.**

- (b) **City of Fargo Sunset.** Prior to the expiration of the **City 3-21 Sales Tax** on the **City 3-21 Sales Tax Sunset Date**, the **City of Fargo** shall use its best efforts to submit to the voters of the **City of Fargo** a ballot question asking whether the **City of Fargo** should impose a new or renewed sales tax similar to the **City 3-21 Sales Tax** in order to ensure continued sources of sales tax revenue necessary to meet the annual debt service payments on the **Debt Obligations, Milestone Payments, Availability Payments, and/or P3 Payments.**
- (c) The **City of Fargo** and **Cass County** shall coordinate their efforts to extend their respective sales taxes. The **City of Fargo** and **Cass County** agree and acknowledge that either the **City of Fargo** or **Cass County** could substitute a full, one percent (1%) sales and use tax, instead of both the **City of Fargo** and **Cass County** each having the current one-half percent (.5%) sales and use tax, with the intent that the total sales and use tax for the **City of Fargo** and **Cass County** will equal one percent (1%) or greater. If one entity listed in this section enacts a one percent (1%) or greater sales and use tax, the other entity would not enact a sales and use tax.

ARTICLE IX. FINANCIAL OVERSIGHT/ FISCAL AGENT

Section 9.01 FINANCIAL OVERSIGHT. Under the oversight of the **Flood Diversion Board** and the **Finance Committee**, the **Cass County Auditor**, the **City of Fargo Finance Director**, and the **City of Moorhead Finance Director** and **CCJWRD's Secretary-Treasurer** shall work cooperatively to develop written administrative procedures and establish funds for the management of **Project funds, Debt Obligation proceeds, the payment of Milestone Payments, Availability Payments, and P3 Payments** for the **P3 Agreement**, the repayment of the debt service on the **Debt Obligations**, including, but not limited to procedures for handling **Project** payment requests, ensuring tax and arbitrage compliance, and all other financial records for the **Project** and the **Flood Diversion Board of Authority**. Said written administrative procedures must be kept on file with the **Secretary** and made available for public inspection.

Section 9.02 INTERIM FISCAL AGENT. The **City of Fargo** shall serve as the **Interim Fiscal Agent** for the **Project** on a temporary, interim basis and until such time as the **Flood Diversion Board of Authority** shall appoint a **Fiscal Agent**. The **Interim Fiscal Agent** shall have the same powers, obligations, and duties as the **Fiscal Agent**.

Section 9.03 APPOINTMENT OF FISCAL AGENT. Pursuant to Section 4.09 of this **Agreement**, the **Flood Diversion Board** may appoint a **Fiscal Agent**. The **Fiscal Agent** is chosen by the **Flood Diversion Board** solely on the basis of cost, experience, and fiscal management qualifications. The **Fiscal Agent** is appointed by the **Flood Diversion Board** for an indefinite term and may be removed at any time by the **Flood Diversion Board**.

Section 9.04 FISCAL AGENT. The **Fiscal Agent** shall be responsible for the administration of financial and accounting functions for the **Flood Diversion Board of Authority**. The **Fiscal Agent** may be compensated by the **Flood Diversion Board of Authority** at a rate mutually agreed upon by the **Flood Diversion Board of Authority** and the **Fiscal Agent**. The **Fiscal Agent** shall establish and maintain for the management of **Project** funds including but not limited, to annual budgets, revenues, proceeds of **Debt Obligations** and the repayment of the debt service on the **Debt Obligations**, the payment of **Milestone Payments**, **Availability Payments**, and **P3 Payments**. The funds shall include, but are not limited to the following funds:

- (a) Budget Funds. The **Fiscal Agent** under the direction of the **Executive Director** shall establish and maintain an annual budget indicating anticipated annual revenues and expenditures in accordance with **GAAP** procedures.
- (b) Revenue Fund. The **Fiscal Agent** shall establish and maintain a **Project Revenue Fund**. All **Pledged Revenues** and any other source of revenue pledged by a **Member Entity** for the **Project** shall be deposited by the **Member Entities** into the **Revenue Fund** held by the **Fiscal Agent**. The **Fiscal Agent** shall, pursuant to and in accordance with this **Agreement** and any resolution approved by the **Flood Diversion Board** and the **Member Entity** issuing a **Debt Obligation** approved in accordance with ARTICLE X of this **Agreement** and/or **P3 Agreement**, withdraw **Pledged Revenue** from the **Revenue Fund** for a debt service payment on a **Debt Obligation** or to make **Milestone Payments**, **Availability Payments**, or **P3 Payments**, funds sufficient to pay when due the debt service on the **Debt Obligation** or the **Milestone Payment** or the **Availability Payment**. The priority and specific flow of the deposit of **Pledge Revenues** shall be more fully set forth in the appropriate **Debt Obligation** documents and **P3 Agreement**.
- (c) FM Diversion Project Fund. The **Fiscal Agent** shall establish and maintain a **FM Diversion Project Fund**. The **FM Diversion Project Fund** shall be a separate fund used only to pay costs and expenses that, under accepted accounting practices, constitute costs necessarily incurred to construct the **Project**, including but not limited to land, easements, buildings, structures, **Milestone Payments**, **Availability Payments**, administration costs, office space, vehicle costs, and all other costs related to **Project** implementation, along with machinery and equipment, and the cost of all architectural, engineering, legal and other professional services, printing and publication and other costs reasonable, necessary and incidental thereto, including issuance costs. All proceeds of the **Debt Obligations** sold in accordance with ARTICLE X shall be credited to this **FM Diversion Project Fund**. Only costs and expenses of the **Project** as herein defined shall be paid from time to time as incurred and allowed under the **FM Diversion Project Fund**, and the monies in the **FM Diversion Project Fund** should be used for no other purposes.
- (d) Debt Obligation Fund. So long as any of the **Debt Obligations** remain outstanding, the **Fiscal Agent**, in accordance with the **Debt Obligation** documents and **P3 Agreement**, shall establish and maintain a **Debt Obligation**

Fund. The **Fiscal Agent** shall deposit the **Pledged Revenue** into the **Debt Obligation Fund** necessary to meet the annual principal and interest coming due on the **Debt Obligation** within the calendar year. The **Debt Obligation Fund** shall be a separate and special bookkeeping account on the official books and records of **Fiscal Agent** to be used for no other purpose than the payment of the principal of and interest on the **Debt Obligations**.

- (e) Milestone Payment Fund. So long as any of the **Milestone Payments** remain outstanding, the **Fiscal Agent** shall establish and maintain a **Milestone Payment Fund**. The **Fiscal Agent**, in accordance with the **Debt Obligation** documents and **P3 Agreement**, shall deposit the **Pledged Revenue** into the **Milestone Payment Fund** necessary to meet the payments coming due on the **Milestone Payments** within the calendar year. The **Milestone Payment Fund** shall be a separate and special bookkeeping account on the official books and records of **Fiscal Agent** to be used for no other purpose than the payment of the **Milestone Payments**.
- (f) Availability Payment Fund. So long as any of the **Availability Payments** remain outstanding, the **Fiscal Agent** shall establish and maintain an **Availability Payment Fund**. The **Fiscal Agent**, in accordance with the **Debt Obligation** documents and **P3 Agreement**, shall deposit the **Pledged Revenue** into the **Availability Payment Fund** necessary to meet the payments coming due on the **Availability Payments** within the calendar year. The **Availability Payment Fund** shall be a separate and special bookkeeping account on the official books and records of **Fiscal Agent** to be used for no other purpose than the payment of the **Availability Payments**.
- (g) P3 Payment Fund. So long as any of the **P3 Payments** remain outstanding, the **Fiscal Agent** shall establish and maintain a **P3 Payment Fund**. The **Fiscal Agent**, in accordance with the **Debt Obligation** documents and **P3 Agreement**, shall deposit the **Pledged Revenue** into the **P3 Payment Fund** necessary to meet the payments coming due on the **P3 Payments** within the calendar year. The **P3 Payment Fund** shall be a separate and special bookkeeping account on the official books and records of **Fiscal Agent** to be used for no other purpose than the payment of the **P3 Payments**.
- (h) Reserve Fund. The **Fiscal Agent** shall establish and maintain a **Reserve Fund** into which the **Fiscal Agent** shall deposit funds from the **Revenue Fund**, which are not needed for the annual budget, the **Debt Obligation Fund**, the **Milestone Payment Fund**, the **Availability Payment Fund**, or the **P3 Payment Fund** into the **Reserve Fund**. The money held in the **Reserve Fund** shall be used to pay the debt service on the **Debt Obligations** whenever the amount on hand in the **Debt Obligation Fund** is insufficient to meet a debt service payment on the **Debt Obligations**. The **Reserve Fund** shall be maintained for the term of this **Agreement**. The money held in the **Reserve Fund** may be used to pay **Availability Payments** whenever the amount on hand in the **Availability Payment Fund** is insufficient to pay the annual **Availability Payments** coming due in a calendar year. Provided, this obligation is subordinate to the obligation to

use **Reserve Fund** monies for the payment of **Debt Obligations**. Any interest earned in the **Reserve Fund** shall be deposited into the **Reserve Fund**. In the event that this **Agreement** is terminated, any monies remaining in the **Reserve Fund** shall first be applied to any outstanding **Debt Obligations**, remaining **Availability Payments**, and **Milestone Payments**. If any monies remain in the fund after the payment of the above items, it shall be returned to the **Member Entities** in proportion to their actual, respective financial contributions.

- (i) Operations and Maintenance Fund. After the **Program Management Consultant** determines that the **Project** or a **Project** element is functionally operational, the **Fiscal Agent** shall establish and maintain an **Operations and Maintenance Fund**, into which the **Fiscal Agent** shall deposit any revenue pledged for operations and maintenance by the **Member Entities**. The **Operations and Maintenance Fund** shall be a separate and special bookkeeping account of the official books and records of the **Fiscal Agent** to be used for no other purpose than payment of operations and maintenance costs. The allocation of operations and maintenance costs for the project shall be in accordance with Section 11.09 and Section 11.10 of this **Agreement**.
- (j) Miscellaneous Fund Accounts. The **Fiscal Agent** is hereby authorized to establish and maintain such other fund accounts or sub-fund accounts as may be required by the terms of the **Debt Obligations** or agreed upon by the **Member Entities** or as required by the **P3 Agreement**.

Section 9.05 FISCAL AGENT TO ACT AS TRUSTEE OF FUNDS. The **Fiscal Agent**, acting as a trustee with a fiduciary duty to the other **Member Entities**, shall manage **Project** funds outlined in Section 9.04 of this **Agreement**. If for any reason the **Fiscal Agent** shall neglect or fail to perform said fiduciary duties, the **Flood Diversion Board** and the **Member Entities** may intervene and take any action necessary to avoid a default in payment of the debt service on the **Debt Obligations** or the payment of **Milestone Payments**, **Availability Payments**, and/or **P3 Payments** and ensure the proper management of the various funds described in Section 9.04 of this **Agreement**.

Section 9.06 FUNDS OPEN TO INSPECTION. At all times during the term of this **Agreement**, the **Fiscal Agent** shall make available for inspection its financial records with respect to the funds described in Section 9.04 of this **Agreement**. The **Member Entities** agree that **GAAP** procedures shall govern.

Section 9.07 NO COMINGLING OF FUNDS. All funds of the **Flood Diversion Board of Authority** shall be held in separate accounts in the name of the **Flood Diversion Board of Authority** and not commingled with funds of any **Member Entity** or any other person or entity. All funds of the **Flood Diversion Board of Authority** shall be strictly and separately accounted for, and regular reports shall be rendered of all receipts and disbursements, at least quarterly during the calendar year. The **Flood Diversion Board of Authority** shall contract with a public accountant to make an annual audit of the accounts and records of the **Flood Diversion Board of Authority**. All expenditures shall be made in accordance with the **Approved Budget**.

Section 9.08 REPORTS AND AUDITS. The **Fiscal Agent** shall submit a quarterly report to the **Flood Diversion Board Members** and the **Member Entities** showing any activity related to the funds described in Section 9.04 of this **Agreement**. The **Fiscal Agent** shall provide the **Flood Diversion Board** with annual audit reports and other financial records as needed for the **Flood Diversion Board** to monitor its funds.

Section 9.09 ASSIGNMENT OR DELEGATION OF DUTIES. In the event that the **Fiscal Agent** is unable or unwilling to perform the duties of the **Fiscal Agent**, the **Flood Diversion Board** may assign the duties of the **Fiscal Agent** to a different third party private entity or a **Member Entity**. Prior to assigning the duties to either a private entity or a **Member Entity**, the **Flood Diversion Board of Authority** shall provide written notice of its intent to assign the duties of **Fiscal Agent** at least thirty (30) days prior to undertaking such action to the **Governing Body** of each of the **Member Entities**.

Section 9.10 FINANCE COMMITTEE. The **Fiscal Agent** shall provide reports and make recommendations regarding the management of **Project** funds and financing to the **Finance Committee** prior to submitting those recommendations to the **Flood Diversion Board**. The **Finance Committee** may make recommendations regarding the reports and recommendations of the **Fiscal Agent** and submit those reports and recommendations to the **Flood Diversion Board**.

Section 9.11 INSPECTION. The books and records of the **Diversion Board of Authority** shall be open to inspection by the **Flood Diversion Board Members** and **Member Entities** at all reasonable times.

ARTICLE X. ISSUANCE OF DEBT FOR THE PROJECT

Section 10.01 INTENT. The **Member Entities** agree and acknowledge that the **Project** will require the issuance of **Debt Obligations** by one or more of the **Member Entities** which may be used to pay costs directly associated with the **Project**, to fund the **Non-Federal Project Costs**, to refund prior **Debt Obligations**, both temporary and permanent, issued by one or more of the **Member Entities**, or to make **Milestone Payments**, **Availability Payments** and/or **P3 Payments** in accordance with the **P3 Agreement**.

Section 10.02 ISSUANCE OF DEBT FOR PROJECT PERMITTED. The **Member Entities** agree and acknowledge that **N.D.C.C. § 54-40.3-1**, and **Minn. Stat. § 471.59** allow two or more Minnesota and North Dakota political subdivisions having in common any portion of their territory to cooperatively exercise their respective powers to issue **Debt Obligations** for the purpose of constructing and acquiring the **Project** that will be owned or operated jointly or cooperatively by and through a joint powers agreement.

Section 10.03 PROCEDURE TO ISSUE DEBT OBLIGATIONS. The **Member Entities** agree and acknowledge that the precise terms and conditions of the **Debt Obligations** are unknown as of the **Effective Date**. The specific terms of the **Debt Obligations** will be set forth by written resolution adopted by both the **Flood Diversion Board of Authority** and the **Member Entity** issuing the **Debt Obligation**. As a result, the **Flood Diversion Board** is authorized to adopt

written resolutions setting forth **Debt Obligation** terms, conditions, and covenants for the financing of the **Project**.

Section 10.04 REFUNDING OF TEMPORARY DEBT. The **Member Entities** agree and acknowledge that the **City of Fargo** and **Cass County** have previously issued the **Prior Temporary Sales Tax Revenue Notes**, which will be refunded by the issuance of additional temporary or long-term **Debt Obligations** issued by one or more of the **Member Entities** pursuant to this **Agreement**. The **Member Entities** agree and acknowledge that the **Prior Temporary Sales Tax Revenue Notes** are hereby authorized to be refunded pursuant to a finance plan developed by the **Flood Diversion Board of Authority**.

Section 10.05 COVENANTS TO LEVY AND COLLECT SALES TAX AND ASSESSMENTS, IF NEEDED. Until the **Debt Obligations** have been fully paid and redeemed as provided in the terms of the **Debt Obligations** or any extensions thereof, and the **Availability Payments** and **P3 Payments** have been fully satisfied in accordance with the **P3 Agreement**, the **Member Entities** hereby covenant and agree that they will fully and properly perform each and all of the covenants contained and referred to in this **Agreement** and in the **Debt Obligations** or any extensions thereof, and each and all of the duties prescribed in the **County 2010-2 Sale Tax Ordinance** and the **City 3-21 Sales Tax Ordinance**. The **City of Fargo** and **Cass County** also covenant that they shall levy and collect the **County 2010-2 Sales Tax** and **City 3-21 Sales Tax** herein necessary for the payment of all debt service on the **Debt Obligations**. **CCJWRD** covenants that it will do and take all action necessary to levy and collect special assessments for the **Project** if required pursuant to the terms and conditions of this **Agreement**.

Section 10.06 CASS COUNTY TO MAINTAIN TAX EXEMPT STATUS. **Cass County** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be treated as private activity bonds. **Cass County** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

Section 10.07 CLAY COUNTY TO MAINTAIN TAX EXEMPT STATUS. **Clay County** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be treated as private activity bonds. **Clay County** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

Section 10.08 CITY OF FARGO TO MAINTAIN TAX EXEMPT STATUS. The **City of Fargo** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be

treated as private activity bonds. The **City of Fargo** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

Section 10.09 CITY OF MOORHEAD TO MAINTAIN TAX EXEMPT STATUS. The **City of Moorhead** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be treated as private activity bonds. The **City of Moorhead** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

Section 10.10 CCJWRD TO MAINTAIN TAX EXEMPT STATUS. **CCJWRD** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be treated as private activity bonds. **CCJWRD** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

Section 10.11 BRRWD TO MAINTAIN TAX EXEMPT STATUS. **BRRWD** covenants and agrees that it will not take or permit any of its officers, employees, or agents to take any action which would cause the interest payable in connection with the **Debt Obligations** to become subject to taxation under the **Code**, as now existing or as hereinafter amended or proposed or in effect at the time of such action, or otherwise cause the **Debt Obligations** to be treated as private activity bonds. **BRRWD** agrees to monitor and take any action necessary to make rebate payments that may be required under the **Code** and related U.S. treasury regulations.

ARTICLE XI. PROJECT PROCEDURES AND COST SHARE

Section 11.01 INTENT. The **Member Entities** agree and acknowledge that the following general procedures will govern the bidding, contracting and payment procedures for the **Project**.

Section 11.02 MINNESOTA DNR COST-ALLOCATION. The **Members Entities** agree and acknowledge that the Minnesota Department of Natural Resources has prepared a draft Environmental Impact Statement, which may be relied upon by the State of Minnesota's Legislature as it determines the level of funding available for the **Project** from the State of Minnesota. See Minn. Dep't of Nat. Res., Draft Environmental Impact Statement, Fargo-Moorhead Flood Risk Mgmt. Project 375, 381, 397, 399 (Sept. 2015). The **Member Entities** agree and acknowledge that the **City of Moorhead, Clay County**, and/or **BRRWD** cannot obligate the State of Minnesota with respect to the State of Minnesota's contribution of funds for the **Project**.

Section 11.03 AUTHORIZATION TO ADOPT SPECIFIC PROJECT CONSTRUCTION PROCEDURES. The **Member Entities** recognize that the size and complexity of the **Project** may require the adoption of additional operating procedures regarding the bidding, contracting and payment procedures for the **Project**. As a result, the **Flood Diversion Board** is authorized to adopt by written resolution specific written operating procedures regarding the bidding, contracting and payment procedures for the **Project**.

Section 11.04 NFS SEPARABLE ELEMENT PROCUREMENT. The **DCAI/NFS Separable Element** may be designed, procured and constructed in accordance with Chapter 48-02.1 of the **N.D.C.C.** In the event that the **Flood Diversion Board** determines to construct the **DCAI/NFS Separable Element** in accordance with Chapter 48-02.1 of the **N.D.C.C.**, the **NFS Separable Element** procurement process is exempt from the requirements of Chapter 48-01.2 and any additional restrictions regarding the construction, improvement, rehabilitation, operation and maintenance of the **DCAI/NFS Separable Element** shall be set forth in the **P3** procurement documents. If such an election is made by the **Flood Diversion Board**, Section 11.05, Section 11.07, Section 11.08, Section 11.12, Section 11.13, and Section 11.14 of this **Agreement** shall not apply to the **DCAI/NFS Separable Element**.

Section 11.05 ENGINEERING SERVICES. The **Flood Diversion Board** may assign to a **Member Entity** the responsibility for planning and designing **Project In-Kind Work Elements**. The **Member Entities** agree that design of **Project In-Kind Work Elements** must be coordinated between the **Engineering Consultants** and **Engineering Staff** of the **Member Entities**. **Member Entities** may use their own **Engineering Consultants** or **Engineering Staff** for the design of **Project In Kind Work Elements** within their respective geographic jurisdiction. Provided that if a **Member Entity** utilizes its own **Engineering Consultants** or **Engineering Staff** it shall cooperate in good faith with the other **Member Entities'** **Engineering Consultants** or **Engineering Staff**. All engineering services procured by the **Flood Diversion Board of Authority** and/or **Member Entities** for **Project In-Kind Work** shall be provided by a professional engineer licensed within the state in which the **Project In-Kind Work** is to be constructed. The **Diversion Authority** shall reimburse **Member Entities** for all reasonable engineering costs incurred by the **Member Entity** arising from or directly related to the **Project In-Kind Work**.

Section 11.06 PROGRAM MANAGEMENT CONSULTANT SERVICES. The **Flood Diversion Board of Authority** shall hire a **Program Management Consultant** who will oversee the design and construction of the **Project**. The **Program Management Consultant** shall be under the direct supervision, control and direction of the **Executive Director**. The **Flood Diversion Board** may remove and terminate the services of the **Program Management Consultant** in accordance with Section 4.09 of this **Agreement**.

Section 11.07 BIDDING FOR IN-KIND WORK ELEMENTS. **In-Kind Work Elements** shall be let for bids by either the **Flood Diversion Board of Authority** or a **Member Entity** requested to perform **In-Kind Work Elements** pursuant to this Section. All bidding of **In-Kind Work Elements** whether undertaken by the **Flood Diversion Board of Authority** or a **Member Entity** shall be held in accordance with this section, applicable **USACE** bidding laws and rules, and either Chapter 48-01.2 of the **N.D.C.C.**, Minn. Stat. § 471.345 (The Uniform Municipal Contracting Law), or other applicable state procurement and/or bidding laws, depending upon

the state in which the **Member Entity** is located. The **Member Entities'** local bidding rules or procedures shall not apply to the bidding procedure for **In-Kind Work Elements**.

In the event that the **Flood Diversion Board of Authority** requests that a **Member Entity** undertake construction of an **In-Kind Work Element**, the **Flood Diversion Board of Authority** will provide a written request to the **Member Entity** and an estimated budget for the requested **In-Kind Work Element**. The **Member Entity** shall proceed with designing, letting bids, accepting the bidder deemed to be the winning bidder under applicable laws, rules, and regulations, awarding the contract for the **In-Kind Work Element**, and proceeding with the requested **In-Kind Work Element** if the cost of the requested **In-Kind Work Element** is within the budget provided by the **Flood Diversion Board of Authority**. Provided that if the cost of the requested **In-Kind Work Element** exceeds the budget set forth by the **Flood Diversion Board of Authority**, the **Member Entity** shall request authorization from the **Flood Diversion Board of Authority** to proceed with the **In-Kind Work Element** and shall not proceed with awarding the bid or commencing construction of the **In-Kind Work Element** until the **Member Entity** receives approval from the **Flood Diversion Board of Authority**. Copies of all public documents held by **Member Entities** reflecting actions undertaken by the **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 11.08 CONTRACT. Contracts for **In-Kind Work Elements** shall identify the **Member Entity** undertaking the **In-Kind Work Element** or the **Flood Diversion Board of Authority** as the owner under the contract. The form of the contract shall be approved by the **Program Management Consultant** and the **Executive Director**. All contracts for **In-Kind Work Elements** shall be approved at a public meeting and by resolution of either the **Member Entity's Governing Body** or the **Flood Diversion Board**. Copies of all contracts held by a **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 11.09 COST SHARE. The **Total Project Costs** shall be split and apportioned between the **Member Entities** in the following manner:

	Minnesota Member Entities	North Dakota Member Entities	USACE
Total Project Costs (Capital Costs)	Consistent with the final cost allocation determined by the Minnesota DNR, but not to exceed \$100,000,000*	All remaining amounts	Not to exceed \$450,000,000,* unless increased by Congressional Appropriations
Maintenance Costs	Minnesota Member Entities are responsible for maintenance costs of the tie-back levees and In-Town Levees located in Minnesota and ½ of maintenance costs of the Red River Control Structure.	North Dakota Member Entities are responsible for maintenance costs of the tie-back levees, In-Town Levees and ring levees located in North Dakota; the DCAI; the Wild Rice Inlet and Control Structure; and	None

		1/2 of maintenance costs of the Red River Control Structure.	
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*In 2015 dollars, as **Adjusted for Inflation**.

Section 11.10 OPERATIONS COSTS ALLOCATION. The **Member Entities** agree and acknowledge that the costs to operate the **Project** will depend upon the frequency and severity of flood events. Upon substantial completion of the **Project**, the **Flood Diversion Board** will develop a methodology and finance plan to allocate the costs of operating the **Project** and the **Member Entities'** share of the costs of operating the **Project**. The methodology and finance plan for allocating the costs of operating the **Project** must be approved by a 2/3 vote of all **Flood Diversion Board Members** and is subject to the requirements of Section 4.09 of this **Agreement**.

Section 11.11 MINNESOTA MEMBER ENTITIES' SHARE. The **Member Entities** agree and acknowledge that the Minnesota Share of the **Total Project Costs** will be funded solely and exclusively by the Minnesota Legislature and that the **Flood Diversion Board of Authority** is expressly assuming the risk that the Minnesota Legislature may not fully fund or make any appropriations for the **Minnesota Member Entities'** share of **Total Project Costs**. It is expressly understood by the **Member Entities** that the **City of Moorhead, Clay County, and/or BRRWD** cannot obligate the State of Minnesota and under no circumstances shall a **Minnesota Member Entity** be held liable for non-appropriations by the Minnesota Legislature.

Section 11.12 CONSTRUCTION OVERSIGHT/INSPECTIONS. Construction oversight and inspection of work performed pursuant to contracts for **In-Kind Work Elements** shall be undertaken by either the **Member Entity** or the **Flood Diversion Board of Authority**, whichever entity is identified as the owner under the contract. Construction oversight and inspection techniques, procedures and records of the **Member Entity** relating to construction oversight and inspection of the **In-Kind Work Elements** shall be approved by the **Program Management Consultant** and the **Executive Director**. Copies of all construction oversight and inspection documents held by a **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 11.13 PROCESSING OF PAY REQUESTS AND CHANGE ORDERS. Pay request and change orders relating to contracts for **In-Kind Work Elements** shall be reviewed and approved by either the **Member Entity** or the **Flood Diversion Board of Authority**, whichever entity is identified as the owner under the contract. Provided that, whether a **Member Entity** or the **Flood Diversion Board of Authority** is identified as the owner under the contract, change orders exceeding twenty percent (20%) of the original contract amount for the **In-Kind Work Element** shall be approved by the **Program Management Consultant** and the **Executive Director**. Copies of all pay requests and change orders held by a **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 11.14 FINAL PUNCH LIST. Prior to a **Member Entity** approving the final punch list and the final pay request for **In-Kind Work Elements** requested by the **Flood Diversion Board of Authority**, the **Program Management Consultant** and the **Executive Director** shall review and approve the final punch list and pay request to assure that the **In-Kind Work**

Element is completed in accordance with the overall plan and design of the **Project**. The **Member Entities** agree that an **In-Kind Work Element** must be a **Functional Portion of the Project** and constructed to work with other **Project** elements in order to ensure a functional **Project**.

Section 11.15 DISPUTES WITH CONTRACTORS. The **Member Entities** and the **Flood Diversion Board of Authority** shall coordinate with respect to any disputes with contractors regarding contracts let for the **Project**. Such coordination shall include any potential or ongoing litigation with the contractor. If a **Member Entity** has a claim made against it for a contract for construction of an element of the **Project**, the **Flood Diversion Board of Authority** shall reimburse the **Member Entity** for any and all legal fees or other costs or damages the **Member Entity** incurs arising from or related to the contract dispute.

ARTICLE XII. OPERATIONS AND MAINTENANCE

Section 12.01 PROJECT MAINTENANCE. The **Member Entities** agree and acknowledge that the **Project** will require long-term management, operations and maintenance. The **Member Entities** agree and acknowledge that because of the diversity of **Project Property** ownership and the overlapping jurisdiction of the **Member Entities**, that the **Flood Diversion Board** will oversee the long-term management, operations, and maintenance of the **Project**.

Section 12.02 OPERATIONS. The **Executive Director** and the **Flood Diversion Board** are authorized to provide amounts within the annual budget for the annual administration and operations of the **Project**. The **Flood Diversion Board** shall by written resolution enact specific procedures and policies to govern the operation of the **Project**, including but not limited to, operations of the control structure, channel and other elements of the **Project**. These procedures shall be in accordance with any applicable **USACE** operations requirements and federal and state laws.

Section 12.03 P3 DEVELOPER. Pursuant to Section 6.01(hh) of this **Agreement**, the **Flood Diversion Board of Authority** may enter into a **P3 Agreement** to provide for the design, construction, financing, operations, and maintenance of the **DCAI/NFS Separable Element** and may contract with the **P3 Developer** to provide operations and maintenance for the **Project** as a whole.

Section 12.04 MAINTENANCE. The **Flood Diversion Board** may designate one or more **Member Entities** to perform snagging, clearing and maintaining of the **DCAI**, tie-back levies, and control structure. The **Flood Diversion Board of Authority** may finance maintenance costs in whole or part with funds raised through the collection of sales and use tax receipts, a maintenance levy special assessment, storm water fees or other charges imposed and collected by **Member Entities**. Revenue raised pursuant to a maintenance levy special assessment may not be used for construction of the **Project**. The **Flood Diversion Board** may also annually draw funds from the **Operations and Maintenance Fund** created pursuant to Section 9.02 of this **Agreement**.

Section 12.05 OPERATIONS AND MAINTENANCE EMPLOYEES. The **Flood Diversion Board of Authority** may hire employees or contract with private entities, including the **P3 Developer**, to provide for the annual maintenance of the **Project**, including, mowing, general maintenance, clearing and all other maintenance activities. The **Executive Director** shall provide the **Flood Diversion Board** with regular updates regarding operations and maintenance of the **Project**.

Section 12.06 ADOPT PROCEDURES. The **Flood Diversion Board** may adopt procedures, protocols, and standard operating procedures for the **Project** by written resolution. Provided, that cost allocations for **Project** operations costs shall be adopted in accordance with Section 11.10 of this **Agreement**. The **Flood Diversion Board** will have authority to operate the **Project**, and the **Member Entities** shall cooperate with the operations policies of the **Flood Diversion Board**.

Section 12.07 REQUESTS TO PERFORM MAINTENANCE. The **Flood Diversion Board of Authority** may request that a **Member Entity** undertake maintenance of a **Project** element.

Section 12.08 CONTRACTS FOR MAINTENANCE OF PROJECT ELEMENTS. Contracts for maintenance of **Project** elements shall identify the **Member Entity** undertaking the maintenance or the **Flood Diversion Board of Authority** as the owner under the contract. The form of the Contract shall be approved by the **Program Management Consultant** and the **Executive Director**. All contracts for maintenance of **Project** elements shall be approved at a public meeting and by resolution of either the **Member Entity's Governing Body** or the **Flood Diversion Board**. Copies of all contracts held by a **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 12.09 PROCESSING OF PAY REQUESTS AND CHANGE ORDERS FOR MAINTENANCE CONTRACTS. Pay request and change orders relating to contracts for maintenance of **Project** elements shall be reviewed and approved by either **Member Entity** or the **Flood Diversion Board of Authority** which ever entity is identified as the owner under the contract. Provided that whether a **Member Entity** or the **Flood Diversion Board of Authority** is identified as the owner under the contract, change orders exceeding twenty percent (20%) of the original contract amount for the maintenance of **Project** elements shall be approved by the **Executive Director**. Copies of all pay requests and change orders held by a **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 12.10 FINAL PUNCH LIST FOR MAINTENANCE CONTRACTS. Prior to a **Member Entity** approving the final punch list and the final pay request for maintenance of **Project** elements requested by the **Flood Diversion Board of Authority**, the **Executive Director** shall review and approve the final punch list and pay request to assure that the maintenance of the **Project** element is completed in accordance with the overall operations and maintenance plan for the **Project**.

Section 12.11 DISPUTES WITH CONTRACTORS REGARDING MAINTENANCE CONTRACTS. The **Member Entities** and the **Flood Diversion Board of Authority** shall coordinate with respect to any disputes with contractors regarding contracts let for the maintenance of a **Project** element. Such coordination shall include any potential or ongoing litigation with the contractor.

If a **Member Entity** has a claim made against it for a contract for maintenance of a **Project** element, the **Flood Diversion Board of Authority** shall reimburse the **Member Entity** for any and all legal fees or other costs or damages the **Member Entity** incurs arising from or related to the contract dispute.

ARTICLE XIII. EXECUTIVE DIRECTOR

Section 13.01 THE EXECUTIVE DIRECTOR. The **Executive Director** is the chief administrative officer of the **Flood Diversion Board of Authority**. The **Executive Director** is chosen by the **Flood Diversion Board of Authority** solely on the basis of training, experience, executive and administrative qualifications. The **Executive Director** is appointed by the **Flood Diversion Board** for an indefinite term and may be removed at any time by the **Flood Diversion Board**; however, after serving as **Executive Director** for one year the **Executive Director** may demand written charges and a hearing on the charges before the **Flood Diversion Board** prior to the date when the final removal takes place. Pending the hearing and removal, the **Flood Diversion Board** may suspend the **Executive Director** from office. After the hearing, the **Flood Diversion Board** may reinstate the **Executive Director** or make the removal final. The **Deputy Executive Director** will perform the duties of the **Executive Director** during the **Executive Director's** absence or disability or while the office of the **Executive Director** is vacant.

Section 13.02 POWERS AND DUTIES OF THE EXECUTIVE DIRECTOR.

- (a) The **Executive Director** is the head of the administrative branch of the **Flood Diversion Board of Authority** and is responsible to the **Flood Diversion Board** for the administration of the **Flood Diversion Board of Authority's** affairs.
- (b) The **Executive Director** must ensure that this **Agreement** and the resolutions of the **Flood Diversion Board of Authority** are enforced.
- (c) The **Executive Director** appoints employees on the basis of merit and fitness and subject to the applicable personnel rules of the **Flood Diversion Board of Authority** and the **Approved Budget**. The **Executive Director** may remove or suspend appointed employees subject to applicable personnel rules. The **Executive Director** shall maintain authorized Full Time Equivalent (FTE) position for the organization consistent with **Flood Diversion Board** approvals and budgetary constraints.
- (d) The **Executive Director** must attend meetings of the **Flood Diversion Board**. The **Executive Director** may take part in discussion at **Flood Diversion Board** meetings but may not vote.
- (e) The **Executive Director** may recommend to the **Flood Diversion Board** for adoption measures necessary for the efficient administration of the **Flood Diversion Board of Authority's** affairs.

- (f) The **Executive Director** must keep the **Flood Diversion Board** fully advised of the financial condition of the **Flood Diversion Board of Authority**. The **Executive Director** must prepare and submit the annual budget.
- (g) The **Executive Director** will implement the **Flood Diversion Board's** policies regarding operation and maintenance of the **Project**.
- (h) The **Executive Director** performs other duties prescribed by this **Agreement** or the **Flood Diversion Board**.
- (i) The **Executive Director** shall be employed by the **Flood Diversion Board of Authority** pursuant to a written employment agreement.

Section 13.03 DEPUTY EXECUTIVE DIRECTOR. The **Cass County** Administrator and the **City of Fargo** City Administrator shall serve jointly as the **Deputy Executive Director** to the **Flood Diversion Board of Authority**. On the first Friday of January of each and every year of this **Agreement** the **Cass County** Administrator and the **City of Fargo** City Administrator shall meet and determine whether the **Cass County** Administrator or the **City of Fargo** City Administrator will serve as the **Deputy Executive Director** for that year. The **Cass County** Administrator and the **City of Fargo** City Administrator shall then report their selection to the **Flood Diversion Board** at the **Flood Diversion Board's** first meeting in January of each year of this **Agreement**. In the event that the **Cass County** Administrator and the **City of Fargo** City Administrator are unable to agree, then the **Flood Diversion Board** shall decide who shall serve as the **Deputy Executive Director**. The **Deputy Executive Director** shall serve as the **Executive Director**, when the office of **Executive Director** is vacant and unfilled.

Section 13.04 EXECUTIVE DIRECTOR TO CONSULT WITH MEMBER ENTITIES ADMINISTRATIVE STAFF. The **Executive Director** shall consult with staff members of the **Member Entities** and hold and conduct staff meetings as the **Executive Director** deems necessary. At least two (2) times per year, the **Executive Director** shall call and hold a meeting with all of the **Member Entities'** chief administrative officers.

Section 13.05 ADMINISTRATIVE ORGANIZATION. The **Flood Diversion Board** may by resolution establish **Flood Diversion Board of Authority** departments, offices and agencies and prescribe their functions. A power or duty conferred by this **Agreement** on an office or agency may not be transferred by the **Flood Diversion Board** to a different office or agency.

Section 13.06 PURCHASES AND CONTRACTS. The **Executive Director** is the chief purchasing agent of the **Flood Diversion Board of Authority**. Purchases and contracts are made by the **Executive Director** in accordance with procedures specified by **Flood Diversion Board** resolution. Other contracts and bonds, instruments and documents to which the **Flood Diversion Board of Authority** is a party must be signed by the **Chair** and the **Executive Director** on behalf of the **Flood Diversion Board of Authority**. Except as set forth in Section 11.04 of this **Agreement**, the **Flood Diversion Board** may by resolution adopt additional regulations for making **Flood Diversion Board of Authority** contracts. **Flood Diversion Board of Authority** contracts must be made in accordance with law.

**ARTICLE XIV.
INSURANCE AND LIABILITY**

Section 14.01 LIABILITY COVERAGE. To the fullest extent permitted by law, actions by the **Member Entities** pursuant to this **Agreement** are intended to be and shall be construed as a “cooperative activity” and it is the intent of the **Member Entities** that they shall be deemed a “single governmental unit” for the purpose of liability. The **Flood Diversion Board of Authority** shall maintain liability coverage with the North Dakota Insurance Reserve Fund with a minimum limit equal to the maximum liability limit in **N.D.C.C.** Section 32-12.1-03. Alternatively, the **Flood Diversion Board of Authority** may maintain equivalent private liability coverage. Such policy may be provided through a commercial general limited liability (“CGL”) policy. Such private liability policies must comply with the following requirements:

- (a) Minimum Limits. Each policy shall have a limit at least equal to the maximum municipal liability limits in **N.D.C.C.** Section 32-12.1-03. If the policy contains a general aggregate limit, the general aggregate limit shall not be less than \$3,000,000.
- (b) Type of Coverage. The CGL insurance shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury and advertising industry, and contractually assumed liability.
- (c) Additionally Insured. Each **Member Entity**, and each **Member Entities’** officers, employees, and volunteers, shall be named as additionally covered parties on each policy for all claims arising from **Project** activities or operations.

Section 14.02 ADDITIONAL POLICIES AUTHORIZED. The **Flood Diversion Board of Authority** may, in its discretion, procure coverage for the **P3 Developer**, its subcontractors, financiers, successors or assigns, pursuant to the terms and conditions of a **P3 Agreement**, or other parties as needed and deemed necessary by the **Flood Diversion Board**.

Section 14.03 AUTO LIABILITY AND PROPERTY DAMAGE. The **Flood Diversion Board of Authority** may in its discretion procure coverage for auto liability and damage or loss of property. Each party shall be responsible for damages to or loss of its own equipment that is used for **Flood Diversion Board of Authority** activities. Each **Member Entity** waives the right to, and agrees that it will not, bring any claim or suit against the **Flood Diversion Board of Authority** or any other **Member Entity** for damages to or loss of its equipment arising out of participation in or assistance with the **Flood Diversion Board of Authority** operations or activities, even if the damages or losses were caused wholly or partially by the negligence of the other **Member Entities** or their officers, employees or volunteers.

Section 14.04 WORKERS' COMPENSATION COVERAGE. In the event that the **Flood Diversion Board of Authority** hires employees, it shall maintain worker's compensation coverage of its employees. Each **Member Entity** shall be responsible for injuries or death of its own personnel. Each **Member Entity** will maintain worker's compensation insurance or self-insurance coverage, covering its own personnel if they participate in or assist **Flood Diversion**

Board of Authority operations or activities. Each **Member Entity** waives the right to, and agrees that it will not, bring any claim or suit against the **Flood Diversion Board of Authority** or any other **Member Entity** for any workers' compensation benefits paid to its own employee or dependents, that arise out of participation in or assistance with **Flood Diversion Board of Authority** operations or activities, even if the injuries were caused wholly or partially by the negligence of any other **Member Entity** or its officers, employees, or volunteers.

Section 14.05 DEFENSE AND INDEMNIFICATION. The **Flood Diversion Board of Authority** agrees to defend and indemnify the **Member Entities** for any liability claims arising from the **Flood Diversion Board of Authority** activities or operations, and decisions of the **Flood Diversion Board of Authority**. Nothing in this **Agreement** shall constitute a waiver of the statutory limits of liability set forth in N.D.C.C. § 32-12.1-03 or a waiver of any available immunities or defenses. Nothing herein shall be construed to provide insurance coverage or indemnification to an officer, employee, or volunteer of any **Member Entity** for any act or omission for which the officer, employee, or volunteer is guilty of malfeasance in office, willful neglect of duty or bad faith.

Section 14.06 INDEMNITY OF NON-FEDERAL SPONSORS. The **Flood Diversion Board of Authority** shall, to the fullest extent authorized by law, at all times hereafter, indemnify and hold the **City of Moorhead** and the **City of Fargo**, the two other **Non-Federal Sponsors**, and each of them, harmless against any and all claims, suits, actions, debts, damages, costs, charges and expenses, including court costs and attorney's fees, and legal fees or disbursements paid or incurred, and against all liability, losses, and damages of any nature whatsoever, to any person who makes or asserts a claim against the **Non-Federal Sponsors**, or any of them, for any reason related to the **Project** including, without limitation, any obligation owed to the **USACE** as a result of the relationship, contractual or otherwise, between the **USACE** and the **Non-Federal Sponsors**; said indemnity and hold-harmless obligation applying to any act or failure to act on the part of one or more of the **Non-Federal Sponsors** occurring prior to or after the **Effective Date** of this **Agreement**. Should a **Member Entity** be prohibited by law from indemnifying another party to this **Agreement** the party so prohibited agrees to pay to the **Flood Diversion Board of Authority** the **Member Entity's** proportionate share, as determined by the cost share allocation formula set forth in Section 11.09 of this **Agreement**, of any monetary amount paid to any person who successfully makes or asserts a claim against the **Non-Federal Sponsors**, or any of them. This Indemnity and hold harmless obligation shall survive the termination of this **Agreement**. Nothing herein shall be deemed a waiver by the **Flood Diversion Board of Authority** of the limits on liability set forth in N.D.C.C. § 32-12.1-03 or a waiver of any available immunities or defenses. The **Flood Diversion Board of Authority's** obligation to hold and save the **City of Fargo** and the **City of Moorhead** harmless shall be limited by the limitations on liability set forth in N.D.C.C. § 32-12.1-03, as amended from time to time. Further, the limitations on liability for each of the **Member Entities** shall not be added together or stacked to increase the maximum amount of liability.

Section 14.07 UNINSURED LIABILITY. Any excess or uninsured liability shall be borne in accordance with the cost-share formula for operations and maintenance set forth in Section 11.09 of this **Agreement** by all **Member Entities**, but this does not include the liability of any individual officer, employee, or volunteer which arises from his or her own malfeasance, willful neglect duty or bad faith.

Section 14.08 CERTIFICATE OF INSURANCE. All insurance policies and certificates required under this **Agreement** shall be open to inspection by any **Member Entity** and copies of the policies or certificates shall be submitted to a **Member Entity** upon written request.

ARTICLE XV.
OWNERSHIP OF PROPERTY ACQUIRED FOR THE PROJECT

Section 15.01 INTENT OF THE MEMBER ENTITIES. The **Member Entities** agree and acknowledge that the **Project** requires the acquisition of easements, rights of ways and lands within the various jurisdictions of the **Member Entities**. The **Member Entities** desire to set forth the responsibilities for each of the **Member Entities** with respect to the ownership of easements, rights of ways and lands related to and/or connected with the **Project**. The **Member Entities** intend that easements, rights of ways and lands related to the **Project** will be titled in the names of the various **Member Entities**.

Section 15.02 PUBLIC PURPOSE. The **Member Entities** acknowledge, agree and declare that the acquisition of easements, rights of way and land for the **Project** is for a public need and purpose.

Section 15.03 OWNERSHIP OF PROJECT PROPERTY. The **Member Entities** agree and acknowledge that the title to easements, rights of way and land necessary and related to the **Project Property** will be as follows:

- (a) Diversion Channel and Associated Infrastructure (DCAI). Title to easements, rights of way, and land necessary and related to the **DCAI** will be held in the name of **CCJWRD**, both during construction of the **Project** and following completion of the **Project**. **CCJWRD** will provide access, ingress, egress, and use of the **DCAI** rights of way and land to the **P3 Developer** in accordance with and pursuant to the terms of the **P3 Agreement**, in order to enable the **P3 Developer** to fulfill its obligations under the **P3 Agreement**.
- (b) In-Town Levees Located Within the City of Fargo. Title to easements, rights of way, and land necessary related to the **In-Town Levees** located within the **City of Fargo** the will be held in the name of the **City of Fargo**, following completion of construction of the **Project**. During construction, title to easements, rights of way, and land necessary related to the **In-Town Levees** may be held in the name of **CCJWRD**. If **CCJWRD** holds title during construction of the **Project**, it will convey the property to the **City of Fargo** upon completion of the **Project**.
- (c) In-Town Levees Located within the City of Moorhead. Title to easements, rights of way, and land necessary and related to the **In-Town Levees** located within the **City of Moorhead** will be held in the name of the **City of Moorhead**.
- (d) Wild Rice Inlet and Control Structure. Title to easements, rights of way, and land necessary and related to the **Wild Rice Inlet and Control Structure** will be held in the name of **CCJWRD**.

- (e) Red River Control Structure. Title to easements, rights of way, and land necessary and related to the **Red River Control Structure** will be held in the name of the **BRRWD**.
- (f) Southern Embankment and Retention Area Located in North Dakota. Title to easements, rights of way, and land necessary and related to the **Southern Embankment and Retention Area** located in North Dakota will be held in the name of **CCJWRD**.
- (g) Oxbow-Hickson-Bakke Levee. Title to easements, rights of way, and land necessary and related to the Oxbow-Hickson-Bakke levee will be held in the name of **CCJWRD**.
- (h) Southern Embankment and Retention Area Located in Minnesota. Title to easements, rights of way, and land necessary and related to the **Southern Embankment and Retention Area** located in Minnesota will be held in the name of the **BRRWD**.
- (i) Mitigation Projects. **Project** mitigation elements such as the Drayton Dam Project shall be held in the name of the **Flood Diversion Board of Authority** or another political subdivision or **Member Entity** pursuant to an agreement.

Section 15.04 VARIANCES IN OWNERSHIP. The **Member Entities** acknowledge and agree that the scale of the **Project** may, from time to time, require variances from the identified ownership of easements, rights of way and land set forth in Section 15.03 of this **Agreement**. To the extent that a variance in ownership of **Project Property** is necessary such variance will be consistent with the policies of the **Flood Diversion Board of Authority** and the **Member Entities** will work cooperatively to acquire **Project Property**. The **Flood Diversion Board of Authority** shall approve variances in the ownership of property from Section 15.03 by written resolution.

Section 15.05 NATURE OF OWNERSHIP. The **Member Entities** acknowledge, agree and covenant that they shall hold **Project Property** for the benefit of the **Project** and the **Flood Diversion Board of Authority** and they shall at all times control and maintain ownership of the **Project Property** to ensure that the **Project Property** is available for the **Project**. The **Member Entities** acknowledge, agree and covenant that they shall not take any action with respect to the **Project Property** which would undermine the financing, construct, operation and maintenance of the **Project**.

Section 15.06 REQUEST FOR ACQUISITION OF PROJECT PROPERTY. In the event that the **Flood Diversion Board of Authority** requests that a **Member Entity** undertake the acquisition of **Project Property**, the **Flood Diversion Board of Authority** will provide a written request to the **Member Entity** and an estimated budget for the requested land acquisition. The **Member Entity** shall proceed with acquiring the **Project Property** by either voluntary action or eminent domain if the cost of the requested purchase or the eminent domain litigation is within the budget provided by the **Flood Diversion Board of Authority**. Provided that if the cost of the **Project**

Property acquisition exceeds the budget set forth by the **Flood Diversion Board of Authority**, the **Member Entity** shall request authorization from the **Flood Diversion Board of Authority** to proceed with the **Project Property** acquisition and shall not proceed with acquiring the **Project Property** until the **Member Entity** receives approval from the **Flood Diversion Board of Authority**. Copies of all public documents held by **Member Entities** reflecting actions undertaken by the **Member Entity** pursuant to this section shall be provided to the **Secretary**.

Section 15.07 REIMBURSEMENT FOR PROJECT PROPERTY. The **Member Entities** agree and acknowledge that each **Member Entity** will be reimbursed for **Project Property** that it acquires pursuant to requests of the **Flood Diversion Board of Authority**. Reimbursement to **Member Entities** will include, but not be limited to, the purchase price of the **Project Property**, appraisal costs, negotiation costs, title preparation and examination costs, relocation and re-establishment costs, legal fees associated with the acquisition, court costs, closing costs arising from and related to the acquisition of **Project Property**, environmental remediation, cultural mitigation, and any other costs required by the Uniform Act. Each **Member Entity** that acquires **Project Property** shall submit its request for reimbursement to the **Program Management Consultant** and to the **Fiscal Agent** for payment. The **Flood Diversion Board of Authority** will review and determine if such costs are eligible for reimbursement and then shall reimburse the **Member Entity** for the allowable costs incurred in connection with **Project Property** acquisition.

Section 15.08 SALE OF EXCESS PROJECT PROPERTY. The **Member Entities** agree and acknowledge that excess real property may be acquired in connection with real property needed for the **Project**. In the event that excess real property is acquired, the **Member Entity** shall coordinate the sale, conveyance, or lease of such property with the **Executive Director**. **Member Entities** shall not sell, trade and/or exchange excess **Project Property** without prior written approval from the **Flood Diversion Board**. All monies generated, less reasonable administrative expenses, from the sale, conveyance, or lease of excess **Project Property** by a **Member Entity**, shall be remitted to the **Flood Diversion Board of Authority**.

Section 15.09 PROJECT PROPERTY OWNERSHIP UPON WITHDRAWAL AND OR REMOVAL OF A MEMBER ENTITY. In the event that a **Member Entity** withdraws or is removed from the **Flood Diversion Board of Authority** pursuant to Section 20.05 and/or Section 20.06 of this **Agreement** that **Member Entity** shall convey, transfer and assign any and all **Project Property** which has been titled in the name of the **Former Member Entity** to the **Flood Diversion Board of Authority** within thirty (30) days of withdrawing or being removed from the **Flood Diversion Board of Authority** and this **Agreement**.

ARTICLE XVI. THIRD PARTY BENEFICIARIES

Section 16.01 P3 DEVELOPER. The **Member Entities** specifically agree, acknowledge and covenant that portions of the **Project Property** will be used by the **P3 Developer** in order to construct, operate, and maintain the **DCAI** portion of the **Project**. As a result, the **Member Entities** agree and acknowledge that, at any time during which one or more of the **Member Entities** is in breach or default of its respective obligations hereunder, the **P3 Developer** may enforce the terms and conditions of this **Agreement** including, without limitation, by securing a

court order directing the **Member Entity** to perform its obligations under this **Agreement**. In addition to the foregoing, the **P3 Developer** shall have all other rights available to it at law or in equity, and all of the rights and remedies provided hereunder are deemed cumulative and not exclusive of any rights or remedies provided by law or otherwise available to the **P3 Developer**.

Section 16.02 BONDHOLDERS. The **Member Entities** agree and acknowledge that this **Agreement** is made for the benefit of the **Holders** of the **Debt Obligations** to which the **Pledged Revenues** are pledged as a source of repayment. At any time during which one or more of the **Member Entities** is in breach or default of its respective obligations hereunder, the **Holders** of the **Debt Obligations** may enforce the terms and conditions of this **Agreement** including, without limitation, by securing a court order directing the **Member Entity** to disburse the **Pledged Revenues** to the **Flood Diversion Board of Authority**. In addition to the foregoing, the **Holders** of the **Debt Obligations** shall have all other rights available to it at law or in equity, and all of the rights and remedies provided hereunder are deemed cumulative and not exclusive of any rights or remedies provided by law or otherwise available to the **Holders** of the **Debt Obligations**.

Section 16.03 INDEMNIFICATION OF FLOOD DIVERSION BOARD OF AUTHORITY BY DEFAULTING ENTITY. In the event that a **Member Entity** is determined to be in default pursuant to Section 16.01 and Section 16.02 of this **Agreement**, then such **Member Entity**, to the extent permitted by law, will indemnify the **Flood Diversion Board of Authority** from any and all damages arising out of or relating to its default under Section 16.01 and Section 16.02 of this **Agreement**.

ARTICLE XVII. ASSIGNMENT AND CONTINUANCE OF OBLIGATIONS

Section 17.01 INTENT. The **Member Entities** intend that the political subdivision created by this **Agreement** is and shall be the successor to the **Limited Joint Powers Entity**.

Section 17.02 ASSIGNMENT. The **Member Entities** hereby assign, transfer and set over to the **Flood Diversion Board of Authority** all rights, interests, title and interests held by the **Limited Joint Powers Entity** in the **Prior Obligations**.

Section 17.03 ASSIGNMENT BY LIMITED JOINT POWERS ENTITY. The **Limited Joint Powers Entity** agrees and acknowledges that:

- (a) All contractual obligations contained within the **Prior Obligations** are in full force and effect and may be assigned by the **Limited Joint Powers Entity** to the **Flood Diversion Board of Authority**.
- (b) That the **Flood Diversion Board of Authority** will assume and agree to perform all the remaining and executory obligations of the **Prior Obligations** and the **Flood Diversion Board of Authority** agrees to indemnify and hold harmless the **Limited Joint Powers Entity**.

- (c) The **Flood Diversion Board of Authority** shall be entitled to all monies remaining to be paid under the **Prior Obligations**, which rights are also assigned hereunder.
- (d) The **Limited Joint Powers Entity** warrants that it has fully disclosed all of the **Prior Obligations** to the **Flood Diversion Board of Authority**.
- (e) The **Limited Joint Powers Entity** warrants that it has full right and authority to transfer the **Prior Obligations** and that the **Prior Obligations** herein transferred are free from lien, encumbrance or adverse claim.
- (f) This assignment shall be binding upon the **Limited Joint Powers Entity**, the **Flood Diversion Board of Authority** and the **Member Entities** and their successors and assigns.

Section 17.04 ASSIGNMENT OF ON-GOING LITIGATION. The **Limited Joint Powers Entity** hereby transfers, assigns and sets over to the **Flood Diversion Board of Authority** all claims, demands, causes of action of whatsoever kind and nature, whether statutory or common law, that the **Limited Joint Powers Entity** now has arising from or related to the litigation in which it is a party and described as Richland/Wilkin Joint Powers Authority v. U.S. Army Corps of Engineers, Civil No. 13-2262 (JRT/LIB) (D. Minn.). The **Flood Diversion Board of Authority** shall be solely responsible for any costs, disbursements, attorney fees and other expenses arising from or related to the case of Richland/Wilkin Joint Powers Authority v. U.S. Army Corps of Engineers, Civil No. 13-2262 (JRT/LIB) (D. Minn.).

Section 17.05 CURRENT BUDGET. The current budget of the **Limited Joint Powers Entity** is hereby transferred, assigned and set over to the **Flood Diversion Board of Authority**.

Section 17.06 BYLAWS AND RESOLUTIONS. The current Bylaws and Resolutions of the **Limited Joint Powers Entity** are hereby transferred, assigned and set over to the **Flood Diversion Board of Authority**.

ARTICLE XVIII. TERM AND TERMINATION OF THE AGREEMENT

Section 18.01 TERM. This **Agreement** shall be for an indefinite term and shall continue until terminated or rescinded in accordance with the terms and conditions of this **Agreement**.

Section 18.02 TERMINATION. This **Agreement** may only be terminated by the mutual consent of all the **Member Entities**, but not including any **Former Member Entities**, evidenced by identical resolutions adopted by the **Governing Bodies** of each **Member Entity**. Provided that this **Agreement** may not be terminated prior to the retirement of any **Debt Obligation** issued to finance the **Project**, **Milestone Payments**, or **Availability Payments** and/or until all obligations and liabilities under the **P3 Agreement** have been irrevocably discharged in full. Any termination will be without prejudice to any obligations or liabilities of any parties already accrued prior to termination.

Section 18.03 DISTRIBUTION OF FUNDS AND PROPERTY. Upon the termination of this **Agreement**, and only after all obligations and liabilities under the **P3 Agreement** have been irrevocably discharged in full, the **Flood Diversion Board of Authority** shall provide for the distribution of all **Flood Diversion Board of Authority** assets in the following manner: (a) **Project Property** contributed by a **Member Entity** shall be returned to that **Member Entity**; (b) any remaining **Project Property** may be sold or liquidated prior to distribution; and (c) any remaining assets shall be divided in proportion to the contributions of the **Member Entities** in and conformance with the cost allocation formula set forth in Section 11.09 of this **Agreement**. If the **Member Entities** do not agree on the fair market value of a non-liquid asset, the **Flood Diversion Board of Authority** may submit the item to a professional appraiser, whose written opinion of the fair market value shall be conclusive.

ARTICLE XIX. DISPUTE RESOLUTION

Section 19.01 INTENT AND PROCEDURE. The **Member Entities** shall cooperate and use their best efforts to ensure that the various provisions of this **Agreement** are fulfilled. The **Member Entities** agree to act in good faith to undertake resolution of disputes in an equitable and timely manner and in accordance with the provisions of this **Agreement**. If disputes cannot be resolved informally by the **Member Entities**, the following procedure shall be used.

Section 19.02 MEDIATION. If there is a failure between the **Member Entities** to resolve a dispute on their own, the **Member Entities** shall first attempt to mediate the dispute. The **Member Entities** shall agree upon a single mediator, or if they cannot agree, shall obtain a list of court appointed mediators from the **Cass County** District Court Administrator and select a mediator by alternatively striking names until one remains. The **City of Fargo** shall strike the first name, followed by the **City of Moorhead**, followed by **Cass County**, followed by **Clay County**, followed by the **Cass County Joint Water Resource District**, followed by the **Buffalo-Red River Watershed District**, this process shall continue in that recurring order until one name remains.

Section 19.03 LITIGATION IF DISPUTE NOT RESOLVED. If the dispute is not resolved within thirty (30) days after the end of mediation proceedings, the **Member Entities** may litigate the matter.

Section 19.04 WAIVER OF JURY TRIAL. THE **MEMBER ENTITIES** HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THAT ANY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY ACTION, PROCEEDING, COUNTERCLAIM OR DEFENSE BASED ON THIS **AGREEMENT**, OR IN ARISING OUT OF, UNDER OR IN ANY CONNECTION WITH THIS **AGREEMENT**, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO RELATING TO THIS **AGREEMENT**. THIS PROVISION IS A MATERIAL INDUCEMENT FOR ALL **MEMBER ENTITIES** ENTERING INTO THIS **AGREEMENT**.

ARTICLE XX.
RIGHTS UPON REFUSAL AND WITHDRAWAL

Section 20.01 INTENT. The **Member Entities** recognize and agree that in order to work collaboratively and in an integrated manner and within the legal constraints of the N.D.C.C. § 54-40.3-1, and Minn. Stat. § 471.59, the **Flood Diversion Board of Authority** will request that individual **Member Entity** will take appropriate and necessary actions to acquire property, lobby and obtain grants, impose and collect sales and use taxes, levy and collect special assessments and other incidental actions that the **Flood Diversion Board of Authority** cannot undertake pursuant to the authorities granted to it by N.D.C.C. § 54-40-1, and Minn. Stat. § 471.59 and in this **Agreement**. The **Member Entities** also recognize and agree that, in order to successfully complete the **Project**, individual **Member Entities** will have to issue **Debt Obligations** and are relying upon the other **Member Entities** to be long-term partners who will act in good faith and in a reasonable manner and will undertake whatever actions, within the scope of their respective legal authorities are necessary to expedite completion of the **Project**. The **Member Entities** recognize and agree that they may be requested to make politically unpopular decisions and that it would not be fair or reasonable to withhold taking necessary action absent a **Rational Basis** for said inaction. As a result, the **Member Entities** desire to create a procedure by which a **Member Entity** may be removed from this **Agreement** for failing to take necessary and reasonable action without a **Rational Basis** for making such non-action.

Section 20.02 DEFAULT. Upon the occurrence of any non-performance of a **Member Entity's** obligations under this **Agreement** which has not been cured within thirty (30) days after notice to the breaching **Member Entity**, a majority of the non-breaching **Member Entities** may take any one or more of the following remedial steps: (a) terminate this **Agreement** with respect to the **Member Entities** ongoing involvement; (b) suspend the non-breaching **Member Entities'** performance under this **Agreement** until they receive assurances from the breaching **Member Entity** satisfactory to the non-breaching **Member Entities** that the breaching **Member Entity** will cure such **Event of Default** and perform its obligations under this **Agreement**. During any period of non-performance by a **Member Entity**, its obligations and liabilities under this **Agreement** shall remain in full force and effect.

Section 20.03 FLOOD DIVERSION BOARD REQUEST. The **Flood Diversion Board** may from time to time and in its discretion request that a **Member Entity** perform the following actions, which include but are not limited to: (a) acquiring rights of entry, either voluntarily or through court action; (b) acquiring easements, rights of ways, land, disposal areas and relocations of property areas, either voluntarily or through court action; (c) actively participating in requesting, obtaining and providing grant and state legislative appropriations for the **Project**; (d) imposing, collecting and remitting sales and use taxes for the **Project** and/or in connection with the issuance of **Debt Obligations** by another **Member Entity**; (e) creating improvement districts, levying and collecting special assessments; (f) issuing **Debt Obligations** either individually and/or in cooperation with another **Member Entity**; (g) levying and collecting storm water fees and charges; and, (h) levying and collecting maintenance tax levies, charges and fees (collectively referred to as the "**Requested Project Actions**").

Requested Project Actions shall be in writing and approved by motion of the **Flood Diversion Board**, signed by the **Chair**, and countersigned by the **Executive Director**.

Requested Project Actions shall be delivered to the **Governing Body** of the **Member Entity**. The **Member Entity** will have thirty (30) days to respond in writing to the **Flood Diversion Board** whether it intends to undertake and complete the **Requested Project Actions**.

Section 20.04 REFUSAL TO UNDERTAKE AND COMPLETE REQUESTED PROJECT ACTIONS. If the **Member Entity** does not intend to undertake and complete the **Requested Project Action**, it must evidence such refusal by a motion of the **Members Entity's Governing Body**. Such motion must specifically state in writing and on the record the reason(s) that the **Member Entity** is refusing to undertake and complete the **Requested Project Action**. The **Member Entity** must within ten (10) business days of its **Governing Body's** decision submit its written reasons for not undertaking and completing the **Requested Project Actions** to the **Flood Diversion Board**. The **Flood Diversion Board** shall then have thirty (30) days to determine if the written reasons given by the **Member Entity** for not undertaking and completing the **Requested Project Actions** have a **Rational Basis**. The decision regarding whether the failure to undertake a **Request Project Action** had a **Rational Basis** shall be made by an affirmative vote of not less than seven (7) members the **Flood Diversion Board**. The **Flood Diversion Board's** determination that a **Member Entity** did not have a **Rational Basis** for refusing to undertake and complete the **Requested Project Action** shall be deemed a **Default** by that **Member Entity**. If the **Flood Diversion Board** determines that a **Member Entity** is in **Default** pursuant to this Section 20.04, the **Flood Diversion Board** may institute proceedings in accordance with Section 20.05 of this **Agreement** to remove the **Defaulting Member Entity** from the **Flood Diversion Board of Authority**.

Section 20.05 REMOVAL OF MEMBER ENTITY. In the event that a **Member Entity** is deemed to be in **Default** pursuant to Section 20.04 of this **Agreement**, The **Flood Diversion Board** may vote to remove the **Defaulting Member Entity** from **Flood Diversion Board of Authority** and this **Agreement** by a two-thirds (2/3) vote of the members of the **Flood Diversion Board**. The decision to remove a **Defaulting Member Entity** shall be in writing and signed by the **Chair** and attested to by the **Executive Director**. The decision of the **Flood Diversion Board** shall then be submitted to all of the **Member Entities' Governing Bodies** within ten (10) business days of the decision by the **Flood Diversion Board** determining that a **Member Entity** is in **Default**. The **Governing Bodies** of the **Member Entities** shall then have thirty (30) days to determine whether the **Defaulting Member Entity** shall be removed from the **Diversion Authority** and this **Agreement**. A **Defaulting Member Entity** can only be removed from the **Flood Diversion Board of Authority** and this **Agreement** pursuant to this Section 20.05 by an affirmative vote of a simple majority of all the **Member Entities**. Upon the affirmative vote of a majority of all the **Member Entities** the **Defaulting Member Entity** shall be removed from the **Diversion Board of Authority** and this **Agreement**. Any removal of a **Member Entity** pursuant to this provision is without prejudice to any of the obligations of the **Member Entity** prior to its removal.

Section 20.06 VOLUNTARY WITHDRAWAL. A **Defaulting Member Entity** may petition the **Flood Diversion Board** to voluntarily withdraw from the **Flood Diversion Board of Authority**. The **Flood Diversion Board** may grant the request of the **Defaulting Member Entity** if the **Flood Diversion Board** determines by simple majority of all of the **Flood Diversion Board Members** that the request *would not* prejudice the other **Member Entities** with respect to the financing, constructing, operating or maintaining the **Project**. The decision to

grant the request of a **Defaulting Member Entity** to voluntarily withdraw from the **Flood Diversion Board of Authority** and this **Agreement** shall be in writing and signed by the **Chair** and attested to by the **Executive Director**. The decision of the **Flood Diversion Board** shall then be submitted to all of the **Member Entities' Governing Bodies** within ten (10) business days of the decision by the **Flood Diversion Board** determining that a **Defaulting Member Entity** may voluntarily withdraw from the **Flood Diversion Board of Authority** and this **Agreement**. The **Governing Bodies** of the **Member Entities** shall then have thirty (30) days to determine whether the **Member Entity** shall be removed from the **Diversion Authority** and this **Agreement**. A **Defaulting Member Entity** can only be removed from the **Flood Diversion Board of Authority** and this **Agreement** pursuant to this Section 20.06 by an affirmative vote of a simple majority of all the **Member Entities**. Upon the affirmative vote of a majority of all the **Member Entities** the **Defaulting Member Entity** shall be removed from the **Diversion Board of Authority** and this **Agreement**.

Section 20.07 MEMBERSHIP OF THE BOARD UPON REMOVAL OR WITHDRAWAL. In the event a **Defaulting Member Entity** is removed from the **Flood Diversion Board of Authority** and this **Agreement** pursuant to Section 20.05 of this **Agreement**, and/or a **Defaulting Member Entity** voluntarily withdraws from the **Flood Diversion Board of Authority** and this **Agreement** pursuant to Section 20.06 of this **Agreement**, that **Defaulting Member Entity** shall be known as a **Former Member Entity** and its **Flood Diversion Board Member** positions, as assigned in Section 4.01, shall be redistributed to the remaining **Member Entities** residing in the same state as the **Former Member Entity**. The redistribution of **Flood Diversion Board Member** positions shall be in proportion to the **Flood Diversion Board Member** position that the remaining **Member Entities** in the same state as the **Former Member Entity** had prior to such removal or withdrawal. The **Member Entities** agree and acknowledge that the intent of this Section 20.07 is to maintain the size and composition of the **Flood Diversion Board** with respect to the number of **Flood Diversion Board Member** positions from North Dakota and Minnesota in the event that a **Defaulting Member Entity** is removed or withdraws from the **Flood Diversion Board of Authority** and this **Agreement**.

ARTICLE XXI. MISCELLANEOUS COVENANTS

Section 21.01 SUB-JOINT POWERS AGREEMENTS. The **Member Entities** acknowledge and agree that because the **Project** benefits property located in both the states of Minnesota and North Dakota, the **Member Entities** may enter into sub-agreements with non-member or **Member Entities** for the purpose of fulfilling their obligations or exercising the authority defined therein.

Section 21.02 PRIOR CITY AND COUNTY LOAN. Nothing contained in this **Agreement** shall have the effect to modify, amend, or supplement the terms or provisions of the **City Loan**, the **County Loan**, or any related Intergovernmental Agreements, Supplemental Intergovernmental Agreements, Loan Agreements, or Promissory Notes.

Section 21.03 PRIOR AGREEMENTS BETWEEN NORTH DAKOTA MEMBER ENTITIES. Nothing contained in this **Agreement** shall have the effect to modify, amend, or supplement the terms or provisions of the following agreements entered into by the **Member Entities**:

- (a) Cass County/Fargo/Cass County Joint Water Resource District Flood Protection Cooperation Agreement dated July 1, 2010, by and between **Cass County, CCJWRD**, and the **City of Fargo**;
- (b) Joint Powers Agreement dated June 7, 2010, by and between **Cass County, CCJWRD**, and the **City of Fargo**;
- (c) First Amendment to Joint Powers Agreement dated August 2, 2010, by and between **Cass County, CCJWRD**, and the **City of Fargo**;
- (d) Second Amendment to Joint Powers Agreement dated July 7, 2014, by and between **Cass County, CCJWRD**, and the **City of Fargo**;
- (e) Third Amendment to Joint Powers Agreement dated June 1, 2015, by and between **Cass County, CCJWRD**, and the **City of Fargo**; and
- (f) Agreement dated ____, 2015, which is an indemnity agreement by and between the Fargo Moorhead Metro Flood Diversion Authority and **CCJWRD**.

**ARTICLE XXII.
GENERAL PROVISIONS**

Section 22.01 COMPLETE AGREEMENT. Except as more fully set forth in Sections 21.01, 21.02, and 21.03 of this **Agreement**, this **Agreement** contains all negotiations and agreements between the **Member Entities**. No other understanding regarding this **Agreement**, whether written or oral, may be used to bind any **Member Entity**.

Section 22.02 SUPPLEMENTAL AGREEMENTS. The **Member Entities** may enter into supplemental and/or additional agreement(s) that may be necessary for fulfilling the purpose and objectives of the **Flood Diversion Board of Authority**. Copies of those supplemental agreements will be provided to the Secretary.

Section 22.03 WRITTEN AMENDMENT REQUIRED. No amendment, modification, or waiver of any condition, provision or term will be valid or of any effect unless made in writing signed by the **Member Entity** or **Member Entities** to be bound, or a duly authorized representative, and specifying with particularity the extent and nature of such amendment, modification or waiver. Any waiver by any **Member Entity** of any default of another **Member Entity** will not affect or impair any right arising from any subsequent default. Except as expressly and specifically stated otherwise, nothing herein will limit the remedies and rights of the **Member Entities** thereto under and pursuant to this **Agreement**. Any amendment to this **Agreement** will be in accordance with the terms and conditions of a **P3 Agreement**.

Section 22.04 INTERPRETATION. This **Agreement** will be construed as if it had been prepared by all **Member Entities**.

Section 22.05 GRAMMATICAL CONSTRUCTION. Whenever the singular number is used herein, the same includes the plural where appropriate, and the words of any gender include any other genders where appropriate.

Section 22.06 ASSIGNMENT. No **Member Entity** may transfer or assign this **Agreement** or any of its rights or obligations under this **Agreement** without the express written consent of all the other **Member Entities**.

Section 22.07 SEVERABILITY CLAUSE. Each provision, section, sentence, clause, phrase, and word of this **Agreement** is intended to be severable. If any provision, section, sentence, clause, phrase, and word hereof is held by a court with jurisdiction to be illegal or invalid for any reason whatsoever, such illegality or invalidity will not affect the validity of the remainder of this **Agreement**.

Section 22.08 FORCE MAJEURE. No **Member Entity** will be liable to another **Member Entity** during any period in which its performance is delayed or prevented, in whole or in part, by circumstance 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 **Member Entity** claiming the delay must undertake reasonable action to notify the other **Member Entity** of the same.

Section 22.09 NEW MEMBERS. Another **Governmental Authority** may be added to this **Agreement** upon the approval of all **Member Entities**. Once approved, the rights and obligations of the new member shall be set forth in a written amendment to this **Agreement** and the new member shall be fully obligated and bound by the terms of this **Agreement**, as amended.

Section 22.10 NOTICE. All notices, certificates or other communications required under this **Agreement** will be deemed sufficiently given when delivered or deposited in the United States mail in certified form with postage fully prepaid and addressed as follows:

If to **City of Fargo**:
City Auditor
City of Fargo
200 N 3rd St
Fargo, ND 58102

If to **Cass County**:
County Auditor
Cass County
P.O. Box 2806
Fargo, ND 58108

If to **CCJWRD**:
Secretary
Cass County Joint Water Resource District
1201 West Main Avenue
West Fargo, ND 58078

If to **City of Moorhead**: City Manager
City of Moorhead
P.O. Box 779
Moorhead, MN 56561-0779

If to **Clay County**: County Administrator
Clay County
807 11th Street N
Moorhead, MN 56560

If to **BRRWD**: BRRWD Administrator
1303 4th Avenue NE
P.O. Box 341
Barnesville, MN 56514

Section 22.11 AGREEMENT BINDING ON SUCCESSORS. This **Agreement** will be binding upon and inure to the benefit of the **Member Entities** hereto and their respective personal representatives, successors and assigns.

Section 22.12 NORTH DAKOTA LAW APPLIES. This **Agreement** will be controlled by the laws of the State of North Dakota.

Section 22.13 WAIVER OF VENUE/SELECTION. The **Member Entities** stipulate and agree that the District Court of **Cass County**, North Dakota, will be the sole and exclusive venue for any lawsuit pertaining to this contract, and the **Member Entities** consent to the personal jurisdiction in said court in the event of any such lawsuit.

Section 22.14 EXECUTION IN COUNTERPARTS. This **Agreement** may be executed in several counterparts, each of which shall be an original, all which shall constitute but one and the same instrument. All **Member Entities** shall receive a fully-executed counterpart.

IN WITNESS WHEREOF, the **Member Entities**, by action of their **Governing Bodies**, caused this **Agreement** to be executed in accordance with the authority granted in **N.D.C.C. § 54-40-1**, and **Minn. Stat. § 471.59**.

(REMAINDER OF PAGE INTENTIONALLY LEFT BLANK)

EXHIBIT A – PRIOR OBLIGATIONS

[See Following Pages]

Signature Page for the City of Fargo

The Governing Body of the City of Fargo approved this Agreement on the ____ of May, 2016.

THE CITY OF FARGO, NORTH
DAKOTA, a municipal corporation

By: _____
Timothy Mahoney, Mayor

ATTEST:

Steve Sprague, City Auditor

Signature Page for the City of Moorhead

The Governing Body of the City of Moorhead approved this Agreement on the ____ of May, 2016.

THE CITY OF MOORHEAD,
MINNESOTA, a municipal corporation

By: _____
Del Rae Williams, Mayor

ATTEST:

Michael J. Redlinger, City Manager

Signature Page for Cass County

The Governing Body of Cass County approved this Agreement on the ____ of May, 2016.

THE COUNTY OF CASS, NORTH
DAKOTA, a corporate body

By the CASS COUNTY BOARD OF
COMMISSIONERS

By: _____
Chad M. Peterson, Chairman

ATTEST:

Michael Montplaisir, County Auditor

Signature Page for Clay County

The Governing Body of Clay County approved this Agreement on the ____ of May, 2016.

CLAY COUNTY, MINNESOTA, a
corporate body

By the CLAY COUNTY BOARD OF
COMMISSIONERS

By: _____
Grant Weyland, Chairman

ATTEST:

Brian C. Berg, Clay County Administrator

Signature Page for Cass County Joint Water Resource District

The Governing Body of the Cass County Joint Water Resource District approved this Agreement on the ____ of May, 2016.

CASS COUNTY JOINT WATER
RESOURCE DISTRICT

By: _____
Mark Brodshaug, Chairman

Date of Approval: _____

Signature Page for Buffalo-Red River Watershed District

The Governing Body of the Buffalo-Red River Watershed District approved this Agreement on the ____ of May, 2016.

BUFFALO-RED RIVER
WATERSHED DISTRICT

By: _____
Gerald L. Van Amburg, Chair

Date of Approval: _____

Signature Page for Flood Diversion Board of Authority

With respect to the termination provisions of Article XIII and the assignment provisions of Article XVII of the Limited Joint Powers Agreement, the Governing Body of the Flood Diversion Board of Authority approved this Agreement on the ___ of May, 2016.

FLOOD DIVERSION BOARD OF
AUTHORITY,
Formed by the LIMITED JOINT POWERS
AGREEMENT dated July 11, 2011, as
amended

By: _____
Darrell Vanyo, Chairman

Date of Approval: _____