



**DIVERSION AUTHORITY
Land Management Committee
City Commission Room
Fargo City Hall
Thursday, June 11, 2015
2:00 p.m.**

1. Agenda review
2. Approve May 14, 2015 minutes
3. CCJWRD Land Management Report
4. Liability Insurance on CCJWRD Owned Property
5. Cemetery Study Update
6. Right of Entry Status & Cultural Resources Easement Acquisition Update
7. Other business
8. Next meeting Thursday, July 9, 2015

**DIVERSION AUTHORITY
Land Management Committee
City Commission Room
Fargo City Hall
Thursday, May 14, 2015
2:00 p.m.**

Committee Members Present: Fargo Mayor Timothy Mahoney, Oxbow Mayor Jim Nyhof, Moorhead Council Representative Heidi Durand, Cass County Commission Representative Darrell Vanyo, Clay County Commission Representative Jenny Mongeau, Cass County Joint Water Resource District Representative Rodger Olson, Buffalo-Red River Watershed District Representative Gerald Van Amburg, Cass County Administrator Keith Berndt, Clay County Administrator Brian Berg, Fargo Director of Engineering Mark Bittner, Moorhead City Engineer Bob Zimmerman, Clay County Engineer David Overbo.

Others Present: Eric Dodds - AE2S, US Army Corps of Engineers Project Manager Terry Williams, Mark Brodshaug - Cass County Joint Water Resource District, Lyndon Pease - Moore Engineering.

The meeting was called to order by Chair Timothy Mahoney.

Agenda Review

There were no additions or amendments to the agenda.

Approve April 9, 2015 Minutes

Darrell Vanyo moved the minutes from the April 9, 2015 meeting be approved. Keith Berndt seconded the motion. All the members voted aye and the motion was declared carried.

Cass County Joint Water Resource District (CCJWRD) Land Acquisition Report

Mark Brodshaug said the CCJWRD Board met this morning and discussed the uncertainty of the May 13, 2015 injunction ordering that the work on the Oxbow/Hickson/Bakke Ring Levee project stop until the Minnesota DNR completes its environmental review of the FM Area Diversion Project. He said some construction activity is not allowed; however, clarification is needed because it is possible some acquisitions could continue. He reviewed the Land Management Summary, stating one opportunistic farmland purchase was completed. Initial offers have been presented for 36 of the 40 homes in Oxbow, with 4 appraisals remaining at the Corps for review. There are a number of appraisals awaiting review by the Corps, he said; Prosource has 4, Ultieg has 14, and HMG has 2. After receiving data from builders and homeowners in Oxbow, and in the interest of time, he said, it has been determined that a square foot approach, rather than the betterment approach, will be used. Park East relocations are moving ahead at a steady pace, he said, with the closing date set for on or before July 15th.

Cemetery Mitigation Report

Terry Williams gave an overview of the cemetery mitigation work done to date. She said a majority of 54 sites have been visited since September 2013 and interviews about flooding impacts were held with the people taking care of the sites. She said a "Cemetery Study" was issued in June 2014 outlining what was learned. She said potential impacts are access issues, debris, monument displacement and tree/grass damage during the growing season. Site visits were conducted in July and September with cemetery POC's, family members, church officials, caretakers, the Upstream Cemetery Authority and the MnDak Upstream Coalition, she said, and cultural surveys are being done on 8 of the 11 sites. Three sites, Roen, South Pleasant Church and Eagle Valley have not granted rights-of-entry. Three sites, Lower Wild Rice and Red River, Hemnes and Clara cemeteries, were determined to be eligible for listing in the National Register of Historic Places, she said. The reports that have been generated are very informative, she said, serving as a historic record of each site and are provided to each site and the State Historic Preservation Offices (SHPO). Alternative impacts and costs have been researched since September she said, and the Federal Mitigation Plan summary will be sent out for comments on June 8th.

In response to a question from Heidi Durand whether significant, unexpected damages would be repaired, Ms. Williams said those details have yet to be worked out. She said the damages expected are based on what has happened in the past.

Keith Berndt said repairs for significant damage need to be included as part of the cleanup plan when the Diversion Authority makes a decision on the cemetery plan. Input from the cemetery POC's about their preferences for mitigation will certainly be welcome, he stated.

In response to a question from Jenny Mongeau about whether certification is needed for the proposed cemetery protection, Ms. Williams said it is not as robust as protection would be for a city or farmstead. Proposed berm design is a foot or so above the staging elevation, she said, with some being wider to allow being driven on for access to a temporary pump station. Many cemeteries are located next to a slough, wetland or river, so a floodwall is necessary to set them back from the body of water, she said. Berms would be built off cemetery property and add to the expense, she said, and in some cases a road will need to be raised.

Brian Berg said the Diversion Authority is receptive to negotiating reasonable mitigation efforts, even if the Corps is not building anything permanent.

Terry Williams said the federal government looks at what the damages are. She said flooding is infrequent and of a relatively short duration and damages would be no different than without the project. She said a question to consider is, what are the impacts caused by additional water if it is already flooded?

Darrell Vanyo moved to approve the release of the Cemetery Mitigation Plan on June 8, 2015. Jim Nyhof seconded the motion. All the members voted aye and the motion was declared carried.

Rodger Olson said there has been discussion about adding a member or two to the team that is working on cemetery mitigation issues. He said this may be the best way to represent the interests of impacted cemeteries and he will bring names back to this committee after talking with possible participants.

Eric Dodds said some cemetery materials, studies and summaries will be posted online to the FM Diversion web site.

NDSU Ag Impacts Study Amendment No. 2

Eric Dodds said a previous amendment was approved due to the need to update data being supplied to NDSU. He said as the study has continued, and after some additional steps, it has been found that the modeling is more complex than envisioned and additional funding in the amount of \$43,950.00 is requested.

Keith Berndt moved the NDSU Ag Risk Study Amendment No. 2, in the amount of \$43,360.00, be approved. Mark Bittner seconded the motion. All the members voted aye and the motion was declared carried.

Right of Entry Status & Cultural Resources Easement Acquisition Update

Lyndon Pease said the current access work being done as part of the overall diversion project includes some Cultural Resource Phase 1 studies along the Maple River working south along the staging area. Hazardous/Toxic/Radioactive Waste (HTRW) Phase 1 surveys will be done primarily on the diversion channel itself, he stated, and will take about a week. He said these involve some database research, phoning landowners and visual site inspection of properties. Part of the Maple River aqueduct design process is to collect measurements of water surface elevations and ditch discharge throughout the year, he said. Access was granted for one additional cemetery, he said, and Phase 1 Cultural Resource Survey work will be done in a couple weeks.

Other Business

The next meeting will be Thursday, June 11, 2015 at 2:00 p.m.

Rodger Olson moved the meeting be adjourned. Darrell Vanyo seconded the motion. All the members voted aye and the motion was declared carried.

The meeting adjourned at 2:40 p.m.

AGREEMENT

THIS AGREEMENT is made this ____ day of _____, 2015, by the Fargo Moorhead Metro Flood Diversion Authority (the "Authority"), and the Cass County Joint Water Resource District, a North Dakota political subdivision (the "District").

RECITALS

A. Cass County, North Dakota; Clay County, Minnesota; the City of Fargo, North Dakota; the City of Moorhead, Minnesota; the District; and the Buffalo Red River Watershed District entered into a LIMITED JOINT POWERS AGREEMENT in 2011; a FIRST AMENDMENT TO LIMITED JOINT POWERS AGREEMENT in 2012; and a SECOND AMENDMENT TO LIMITED JOINT POWERS AGREEMENT in 2013 (the agreement and amendments are, collectively, the "Limited JPA").

B. Among other items addressed, the Limited JPA created the Diversion Authority; identified the Authority's powers and authorities; authorized the Authority to delegate tasks to member entities; and provided indemnity protection for its member entities.

C. For purposes of developing and proceeding with the FARGO-MOORHEAD METROPOLITAN AREA FLOOD RISK MANAGEMENT PROJECT (the "FM Project"), and for purposes of developing and constructing the Oxbow, Hickson, and Bakke levee project (the "OHB Levee Project"), the Diversion Authority directed the District to obtain the requisite Rights of Entry as necessary to develop the FM Project and the OHB Levee Project; to acquire, manage, and maintain right of way for the FM Project and the OHB Levee Project; to construct the OHB Levee Project; and other tasks related to development of the FM Project and development and construction of the OHB Levee Project.

D. The Diversion Authority and the District wish to enter into this Agreement to clarify and provide the specific indemnity protection for the District regarding the District's tasks delegated by the Diversion Authority regarding the FM Project and the OHB Levee Project.

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

AGREEMENT

1. **Intent.** The Diversion Authority directed and delegated authority to the District to obtain the requisite Rights of Entry as necessary to develop the FM Project and the OHB Levee Project; to acquire, manage, and maintain the requisite right of way for the FM Project and the OHB Levee Project; to construct the OHB Levee Project; other tasks related to development of the FM Project and development and construction of the OHB Levee Project; and the Diversion Authority may direct the District to perform other tasks in the future regarding either the FM Project or the OHB Levee Project (collectively, the "District Tasks"). The parties understand and recognize the District's performance of the District Tasks could result in liability exposure to

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Fargo Moorhead Metro Flood Diversion Authority
Cass County Joint Water Resource District

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the District. The parties wish to clarify the indemnity protection afforded the District under the Limited JPA.

2. **Reimbursement.** With regard to indemnity of its member entities, the Limited JPA provides, in relevant part:

. . . The Diversion Authority shall fully defend, indemnify and hold harmless the parties to this Agreement against all claims, losses, liability, suits, judgments, costs and expenses by reason of the action or inaction of the Diversion Authority, or the employees or the agents of the Diversion Authority. The Diversion Authority's agreement to indemnify and hold harmless does not constitute a waiver by any party to this Agreement of limitations on liability provided under relevant liability limitation statutes. . . .

The parties agree the District's performance of the District Tasks qualifies as "action of . . . agents of the Diversion Authority" and, as a result, the Diversion Authority will indemnify the District regarding "all claims, losses, liability, suits, judgments, costs and expenses" regarding or arising out of the District Tasks, not subject to the statutory limits of liability contained in state law.

3. **Assignment.** Neither party may transfer or assign this Agreement, or any rights or obligations under the Agreement, without the express written consent of the other party.

4. **Amendments.** Any modifications or amendments to this Agreement must be in writing and signed by all parties.

5. **Interpretation.** This First Amendment will be construed as if it had been prepared by all parties.

(Signatures appear on the following pages.)

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Fargo Moorhead Metro Flood Diversion Authority
Cass County Joint Water Resource District*

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IN WITNESS WHEREOF, the parties executed this First Amendment on the date written above.

CASS COUNTY JOINT WATER
RESOURCE DISTRICT

By: Mark Brodshaug
Mark Brodshaug, Chair

ATTEST:

Carol Harbeke Lewis
Carol Harbeke Lewis
Secretary-Treasurer

Agreement
Fargo Moorhead Metro Flood Diversion Authority
Cass County Joint Water Resource District

FARGO MOORHEAD METRO FLOOD
DIVERSION AUTHORITY

By:

Darrell Vanyo, Chair

ATTEST:

May 21, 2015

Mr. Dan Armbrust
Dawson Insurance
721 1st Avenue North
Fargo, ND 58102

Re: Cass County Joint Water Resource District (CCJWRD), an Additional Covered Party on the Southeast Cass Water Resource District (SECWRD) General Liability (GL) Memorandum of Coverage (MOC)

Dear Mr. Armbrust,

I am writing in response to your recent question regarding liability coverage for potential “premises liability incidents” resulting from property acquired for the purposes of the “Metro Flood Diversion Project” (Project). It is the understanding of The North Dakota Insurance Reserve Fund (we, our) that this property, while still serving a purpose for the project, may be used for habitat and “other purposes” by the CCJWRD. The habitat and “other purposes” will not be connected in any way to the Project. While being used for habitat and “other purposes”, the CCJWRD will be responsible for the maintenance and management of the property. Maintenance and management of the property could include both the upkeep and leasing of the property.

With that being said, an intent of coverage question arose due to the GL 40 36 exclusion endorsement being attached to the SECWRD GL MOC. The GL 40 36 is intended to exclude liability coverage for any activity connected with the Project. The exclusion, among other things, lists, “Liability....in any way connected with....(4.)The acquisition of any property for or to advance the completion of the “Metro Flood Diversion Project”...” as excluded from liability coverage. It is our intent to continue to enforce the GL 40 36. However, coverage could be provided for a “premises liability incident” resulting from property being maintained and managed by the CCJWRD, even though it had been acquired for the Project at one time. It is not our intent to exclude coverage for a “premises liability incident” solely because the “premises liability incident” arises from property previously acquired for the project. Each claim will be investigated in a manner similar to other liability claims. If, at any time, we determine the claim is connected with any of the excluded items listed on the GL 40 36, we reserve the right to deny coverage. Conversely, if the “premises liability incident” is not connected with any of the excluded items listed on the GL 40 36, the claim will be handled just like any other GL claim and the remaining coverage, limitations, exclusions, conditions, and definitions of the GL MOC would apply.

If there are any questions or further clarification of intent is needed, we would be happy to discuss.

Sincerely,



Brennan Quintus, CPCU
Risk Services Manager
North Dakota Insurance Reserve Fund

The following definitions apply to the above letter:

“Premises Liability Incident(s)” means bodily Injury or property damage, as defined in the SECWRD GL MOC, resulting from or arising out of the property being managed and/or maintained by the CCJWRD and in no way connected with the following:

- The elimination, stoppage, or delay of the “Metro Flood Diversion Project”
- Flooding, actually or allegedly, caused by or resulting from the existence of the “Metro Flood Diversion Project”
- Any operation of the principles of eminent domain, condemnation proceedings, or inverse condemnation, by whatever name called, in conjunction with the “Metro Flood Diversion Project”
- The acquisition of any property for or to advance the completion of the ‘Metro Flood Diversion Project”
- The failure to request or apply for governmental approval from any Federal, State, or local governmental entity, the approval of which is necessary for the “Metro Flood Diversion Project”

“Metro Flood Diversion Project” means the activities described in the limited joint powers agreement dated June 2011 as well as any additional or substitute agreements or amendments for this or any similar projects entered into between the City of Fargo, ND, City of Moorhead, MN, Cass County, ND, Clay County, MN, Buffalo Red River Watershed District, MN, and Cass County Joint Water Resource District, ND.

‘Other Purposes” means any other activity normally conducted by a Water Resource District in the State of ND. “Other Purposes” shall in no way mean any activity connected with the “Metro Flood Diversion Project.”