# INTERIM MEMORANDUM OF UNDERSTANDING

**BY AND BETWEEN**

**CASS COUNTY, NORTH DAKOTA**

**AND**

**THE METRO FLOOD DIVERSION AUTHORITY**

**Dated as of August 22, 2019**

**Relating to:**

**An interim agreement outlining the relationship and responsibilities of Cass County and the Metro Flood Diversion Authority with regard to human resource related services**

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

# TABLE OF CONTENTS


**ARTICLE I. DEFINITIONS** ..... **1**

**SECTION 1.01** DEFINITIONS ..... 1
**SECTION 1.02** INTERPRETATION ..... 3

**ARTICLE II. INTENT** ..... **3**

**SECTION 2.01** INTENT ..... 3

**ARTICLE III. RIGHTS, DUTIES, AND OBLIGATIONS OF THE COUNTY** ..... **3**

**SECTION 3.01** RIGHTS, DUTIES, AND OBLIGATIONS OF THE COUNTY. ..... 3

**ARTICLE IV. RIGHTS, DUTIES, AND OBLIGATIONS OF THE AUTHORITY** ..... **4**

**SECTION 4.01** RIGHTS, DUTIES, AND OBLIGATIONS OF THE AUTHORITY. ..... 4

**ARTICLE V. TERM AND TERMINATION** ..... **5**

**SECTION 5.01** TERM ..... 5
**SECTION 5.02** TERMINATION ..... 5
**SECTION 5.03** NOTICE. ..... 5

**ARTICLE VI. DISPUTE RESOLUTION** ..... **5**

**SECTION 6.01** INTENT AND PROCEDURE. ..... 5
**SECTION 6.02** MEDIATION. ..... 6
**SECTION 6.03** LITIGATION ..... 6
**SECTION 6.04** VENUE ..... 6
**SECTION 6.05** WAIVER OF JURY TRIAL ..... 6

**ARTICLE VII. MISCELLANEOUS** ..... **6**

**SECTION 7.01** ASSIGNMENT. ..... 6
**SECTION 7.02** MODIFICATION. ..... 6
**SECTION 7.03** GOVERNING LAW. ..... 6
**SECTION 7.04** SEVERABILITY ..... 6
**SECTION 7.05** WAIVER. ..... 6
**SECTION 7.06** ACKNOWLEDGMENT ..... 7
**SECTION 7.07** THIRD PARTY BENEFICIARIES. ..... 7
**SECTION 7.08** ENTIRE AGREEMENT. ..... 7
**SECTION 7.09** COUNTERPARTS ..... 7
**SECTION 7.10** SURVIVAL ..... 7
**SECTION 7.11** FORCE MAJEURE. ..... 7

**SIGNATURE PAGES** ..... **S-1 THROUGH S-2**

**EXHIBIT A –** CASS COUNTY EMPLOYEE HANDBOOK

# INTERIM MEMORANDUM OF UNDERSTANDING

**THIS INTERIM MEMORANDUM OF UNDERSTANDING** (the "Agreement") is entered into as of the 22nd day of August, 2019, (the "Effective Date"), by and between Cass County, North Dakota, a North Dakota Home Rule County and political subdivision of the State of North Dakota (the "County") and the Metro Flood Diversion Authority, a political subdivision of the State of North Dakota (the "Authority").

**WHEREAS**, under the terms of the Joint Powers Agreement dated June 11, 2016, (the "JPA"), the Authority may enter contracts and employ personnel related to the Fargo-Moorhead Area Diversion Project (the "Project"); and

**WHEREAS**, under the terms of the JPA, the Authority intends to employ an Executive Director to function as the chief administrative officer of the Authority; and

**WHEREAS,** the County and the Authority intend to enter into a more complete agreement regarding the provision of personnel services by or before December 31, 2019; and

**WHEREAS**, the County's human resource department will provide human resource services related to payroll and benefits to the Authority's Executive Director and future employees at no cost to the Authority through December 31, 2019.

**NOW THEREFORE**, in consideration of the mutual covenants made herein and for valuable consideration, the receipt of which is hereby acknowledged, the Authority and the County agree as follows:

## ARTICLE I.
## DEFINITIONS

**Section 1.01** DEFINITIONS. All capitalized 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.

**"Agreement"** means this Interim Memorandum of Understanding dated August, 22, 2019.

**"Applicable Law"** means, collectively, the Constitutions of the United States and the State, all common law and principles of equity, and all federal, State, and local laws including, without limitation, all environmental laws, statutes, treaties, codes, acts, rules, regulations, guidelines, ordinances, resolutions, orders, judgments, decrees, injunctions, and administrative or judicial precedents or authorities, including the interpretation or administration thereof by any governmental authority charged with the enforcement, interpretation, or administration thereof, all governmental approvals, and all administrative orders, awards, directed duties, requests, licenses, certificates, authorizations and permits of, and agreements with, any governmental authority, and, with respect to any person, the articles of incorporation, bylaws, or other organizational or governing documents of such person, in each case whether or not having the force of law, that are applicable now or are applicable at any time hereafter to the Authority or the County.

**"Authority"** means the Metro Flood Diversion Authority, a political subdivision of the State of North Dakota and a permanent, joint powers entity formed through the Joint Powers Agreement to provide the Fargo-Moorhead metropolitan area with permanent and comprehensive flood protection.

**"Best Efforts"** means an entity will act in Good Faith, act in accordance with generally accepted commercial practices, and use reasonable due diligence to undertake all action contemplated by this Agreement, in accordance with Applicable Law.

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

**"Effective Date"** means August 22, 2019.

**"Employee Handbook"** means the Cass County Employee Handbook which describes workplace policies and employee guidelines for Cass County Employees.

**"Executive Director"** means the person hired by the Authority pursuant to an Employment Agreement dated September 1, 2019, to serve as the Executive Director of the Authority pursuant to the terms and conditions of the Joint Powers Agreement.

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

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

**"Metro Flood Diversion Authority"** or "**Authority**" means the political subdivision created by the Joint Powers Agreement consisting of the communities of Fargo, North Dakota and Moorhead, Minnesota, along with Cass County, North Dakota, Clay County, Minnesota, and the Cass County Joint Water Resources District.

**"Party"** means either the Authority or the County, as the context may require, and their respective legal representatives, successors, and permitted assigns, and wherever a reference in this Agreement is made to any Parties hereto, **"Parties"** means the Authority and the County, collectively, and their respective legal representatives, successors, and permitted assigns.

**"Professional Employer Agreement"** means the written contract between a client and professional employer organization which provides for the coemployment of a covered employee, for the allocation of employer rights and obligations between the client and the professional employer organization.

**"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 US Army Corps of Engineers, District Engineer, St. Paul District on September 19, 2013, and as amended by the Governors' Task Force and applicable permit requirements.

**Section 1.02** INTERPRETATION. The headings of Articles and Sections are provided for convenience of reference only and will not affect the construction, meaning, or interpretation of this Agreement. Any and all exhibits to this Agreement are hereby incorporated by reference. The definition of terms herein shall apply equally to the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine, and neuter forms. The words "include," "includes," and "including" shall be deemed to be followed by the phrase "without limitation." The word "will" shall be construed to have the same meaning and effect as the word "shall." Unless the context requires otherwise (a) any definition of or reference to any agreement, instrument, or other document herein shall be construed as referring to such agreement, instrument, or other document as from time to time amended, supplemented, or otherwise modified (subject to any restrictions on such amendments, supplements, or modifications as set forth herein), (b) any reference herein to any person shall be construed to include such person's permitted 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.

## ARTICLE II.
## INTENT

**Section 2.01** INTENT. The Authority intends to hire an Executive Director to begin work in September 2019, pursuant to and in accordance with an employment agreement between the Executive Director and the Authority. The Executive Director will perform a wide range of duties and tasks related to the Project. The Authority may hire a small number of additional staff in the future. Given the County's large human resource department and the small number of employees to be hired by the Authority, the County offered to provide human resource services related to benefits and payroll services to Authority employees through December 31, 2019. After December 31, 2019, the Parties intend to explore the possibility of continuing the relationship as co-employers pursuant to a Professional Services Agreement under Section 43-55 of the North Dakota Century Code and/or pursuant to a more defined agreement between the Authority and the County.

## ARTICLE III.
## RIGHTS, DUTIES, AND OBLIGATIONS OF THE COUNTY

**Section 3.01** RIGHTS, DUTIES, AND OBLIGATIONS OF THE COUNTY. It is hereby acknowledged and agreed upon between the Parties that the County will:

1) Provide human resource services related to payroll to the Executive Director and any future employee hired by the Authority. The County shall administer payroll to the Executive Director and any future employee hired by the Authority in

accordance with the provisions and guidelines set forth in the Cass County Employee Handbook ("Employee Handbook"), attached as Exhibit A;

2) Provide retirement and health benefits to the Executive Director and any future employees of the Authority through the County's sponsored plans, in compliance with applicable federal and state laws, and subject to eligibility requirements. The County shall provide benefit services in accordance with the Employee Handbook;

3) Conduct individual meetings with the Executive Director and any future employees hired by the Authority to address any questions, suggestions, or concerns in relation to County human resource policies;

4) Provide the Executive Director and any future employee hired by the Authority with a copy of the Employee Handbook. The County agrees that it will ensure the Employee Handbook and all employee-related policies are timely updated, as necessary, due to changes in federal and state law, or as might otherwise be deemed appropriate by the County;

5) Make Best Efforts and work cooperatively in Good Faith with the Executive Director, employees, and staff of the Authority;

6) Invoice the Authority for any and all employment related costs associated with the Executive Director or and other Authority employees, including salary, benefits and reimbursements provided in accordance with the Executive Director's Employment Agreement and in accordance with the salary and benefits schedule established by the Authority for other Authority employees at the end of each month; and

7) Provide the services to the Authority, at no cost.

## ARTICLE IV.
## RIGHTS, DUTIES, AND OBLIGATIONS OF THE AUTHORITY

**Section 4.01** RIGHTS, DUTIES, AND OBLIGATIONS OF THE AUTHORITY. It is hereby acknowledged and agreed upon between the Parties that the Authority will:

1) Retain the exclusive right to direct and control the day-to-day activity of the Executive Director and future employees hired by the Authority as is necessary to conduct business related to the construction of the Project;

2) Retain the right to hire, discipline, and terminate the Executive Director and any future employee hired by the Authority as may be necessary to fulfill the Authority's responsibilities;

3) Report to the County any Authority employees hired, promoted, or terminated;

4) Arrange for the Executive Director and any future employee hired by the Authority to meet with the County's human resource department; and

5) Provide any other pertinent information requested by the County's human resource department in a timely manner.

6) Promptly pay all County invoices for any and all Authority employment-related costs as prepared by the County in accordance with Section 3.01(6) of this Agreement.

## ARTICLE V.
## TERM AND TERMINATION

**Section 5.01** TERM. The term of this Agreement shall commence on the Effective Date and shall remain in effect until December 31, 2019 (the "Initial Term"). After the Initial Term, the parties intend to enter into a new or amended agreement.

**Section 5.02** TERMINATION. In addition to the provisions of Section 5.01, this Agreement may terminate for any of the following reasons:

1) Either Party may terminate this Agreement without termination fee, penalty, or liquidated damages if the other Party commits a breach of any material obligation under this Agreement; provided that if a Party shall by any act or omission, be in breach of any material obligation under this Agreement and such breach shall continue for a period of fourteen (14) days after written notice thereof has been given by the Party to the offending Party, the Party shall have the right to terminate this Agreement with immediate effect by notice to the offending Party.

2) The Parties may mutually agree in writing to terminate this Agreement, at any time, without termination fee, penalty, or liquidated damages.

**Section 5.03** NOTICE. Written notice shall be addressed to the following addresses:

Authority: Chair
Metro Flood Diversion Authority Board
P.O. Box 2806
Fargo, ND 58108-2806

County: Cass County Finance Director
P.O. Box 2806
Fargo, ND 58108-2806

## ARTICLE VI.
## DISPUTE RESOLUTION

**Section 6.01** INTENT AND PROCEDURE. The Parties will cooperate and use their Best Efforts to ensure that the various provisions of this Agreement are fulfilled. The Parties agree to act in Good Faith to undertake resolution of disputes in an equitable and timely manner and in accordance with the provisions of this Agreement. If disputes cannot be resolved informally by the Parties, the Parties will use the following procedure.

**Section 6.02** MEDIATION. If there is a failure between the Parties to resolve a dispute on their own, the Parties will first attempt to mediate the dispute. The Parties will agree upon a single mediator or, if an agreement cannot be reached within ten (10) calendar days, each Party will propose two (2) potential individuals to serve as mediator, for a total of four (4) individuals. The Parties will then select a mediator by alternatively striking the names of the proposed individuals, with the County striking first, followed by the Authority.

**Section 6.03** LITIGATION. If the dispute is not resolved within forty-five (45) calendar days after the selection of the mediator pursuant to the prior Section, the Parties may litigate the matter.

**Section 6.04** VENUE. All litigation between the Parties arising out of or pertaining to this Agreement or its breach will be filed, heard, and decided in the District Court of Cass County, North Dakota, which will have exclusive jurisdiction and venue.

**Section 6.05** WAIVER OF JURY TRIAL. THE PARTIES HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY, AND INTENTIONALLY WAIVE ANY RIGHTS THAT ANY MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY ACTION, PROCEEDING, COUNTERCLAIM, OR DEFENSE BASED UPON THIS AGREEMENT, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH THIS AGREEMENT, OR WITH RESPECT TO ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN), OR ACTIONS OF ANY PARTY HERETO RELATING TO THIS AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR ALL PARTIES ENTERING INTO THIS AGREEMENT. THIS PROVISION APPLIES ONLY TO SUITS BETWEEN THE PARTIES AND DOES NOT APPLY TO THIRD PARTY CLAIMS OR SUITS.

## ARTICLE VII.
## MISCELLANEOUS

**Section 7.01** ASSIGNMENT. Neither Party may assign this Agreement without the prior written consent of the other Party. The Parties' rights and obligations under this Agreement will be passed to the assignees to which those rights and obligations have been permissibly assigned.

**Section 7.02** MODIFICATION. This Agreement may be amended or modified only by mutual consent of both Parties, unless otherwise provided for herein.

**Section 7.03** GOVERNING LAW. This Agreement will be governed by and construed in accordance with the laws of the State of North Dakota.

**Section 7.04** SEVERABILITY. In case any one or more of the provisions of this Agreement shall be invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained in this Agreement will not in any way be affected or impaired thereby.

**Section 7.05** WAIVER. No waiver of any Party of any right or remedy pursuant to this Agreement will be deemed to be a waiver of any other or subsequent right or remedy pursuant to

this Agreement. The consent of one Party to any act by the other Party requiring such consent will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

**Section 7.06** ACKNOWLEDGMENT. Each of the Parties affirm and acknowledge that it has fully read and appreciates, and understands the words, terms, conditions and provisions of this Agreement and is fully satisfied with the same. Each Party affirms and acknowledges that it has been, or had the opportunity to be represented by legal counsel of its choice.

**Section 7.07** THIRD PARTY BENEFICIARIES. This Agreement was created for the benefit of the Executive Director and/or any employees hired by the Authority as third party beneficiaries.

**Section 7.08** ENTIRE AGREEMENT. This Agreement contains the entire and exclusive understanding of the Parties with respect to the subject matter thereof and supersedes all prior agreements, understandings, statements, representations, and negotiations, in each case oral or written, between the Parties with respect to their subject matter, except as otherwise provided herein.

**Section 7.09** COUNTERPARTS. This instrument may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

**Section 7.10** SURVIVAL. The indemnifications, limitations, releases, obligations, and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement will survive the expiration or earlier termination of this Agreement.

**Section 7.11** FORCE MAJEURE. Neither Party will be liable to the other during any period in which its performance is delayed or prevented, in whole or in part, by any of the following circumstances including, but are not limited to: act of God (e.g., flood, earthquake, wind), fire, war, act of a public enemy or terrorist, act of sabotage, strike or other labor dispute, riot, misadventure of the sea, inability to secure materials and/or transportation, or a restriction imposed by legislation, an order or a rule or regulation of a governmental entity. If such a circumstance occurs, the Party claiming the delay must undertake reasonable action to notify the other Party of the same.

**IN WITNESS WHEREOF**, the Parties caused this Agreement to be executed.

*(Remainder of page intentionally left blank)*

***Signature Page for Cass County***

The Governing Body of Cass County, North Dakota approved this Agreement on the _____ of _____, 2019.

Cass County, North Dakota
Board of Commissioners

By: _____
Mary Schering, Chair

ATTEST:

_____
Michael Montplaisir, County Finance Director

***Signature Page for the Metro Flood Diversion Authority***

The Governing Body of the Metro Flood Diversion Authority approved this Agreement on the _____ of _____, 2019.

Metro Flood Diversion Authority

By: _____
Kevin Campbell, Vice Chair

ATTEST:

_____
Heather Worden, Secretary