

# **6-Entity Informational Meeting Draft Joint Powers Agreement (JPA)**

**An Amendment of the Current Limited  
Joint Powers Agreement**

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# WHAT IS IT?

- 💧 An amendment to the existing Limited Joint Powers Agreement
- 💧 A permanent agreement between “Member Entities”
  - *City of Moorhead*
  - *City of Fargo*
  - *Clay County*
  - *Cass County*
  - *Buffalo-Red River Watershed District*
  - *Cass County Joint Water Resource District*
- 💧 Establishes duties, responsibilities, obligations regarding the Flood Diversion Project

# WHY DO WE NEED IT?

💧 Limited Joint Powers Agreement (LJPA) – 2011  
– *Key word is “Limited”*

## *Article XIII*

*“It is the intent of the members that this agreement will terminate on or before the execution of the PPA.”*

*(PPA = Project Partnership Agreement with the U.S. Army Corps of Engineers)*

# WHY DO WE NEED IT? (cont'd.)

## 💧 ANALOGY:

Limited Joint Powers Agreement =  
*Articles of Confederation*

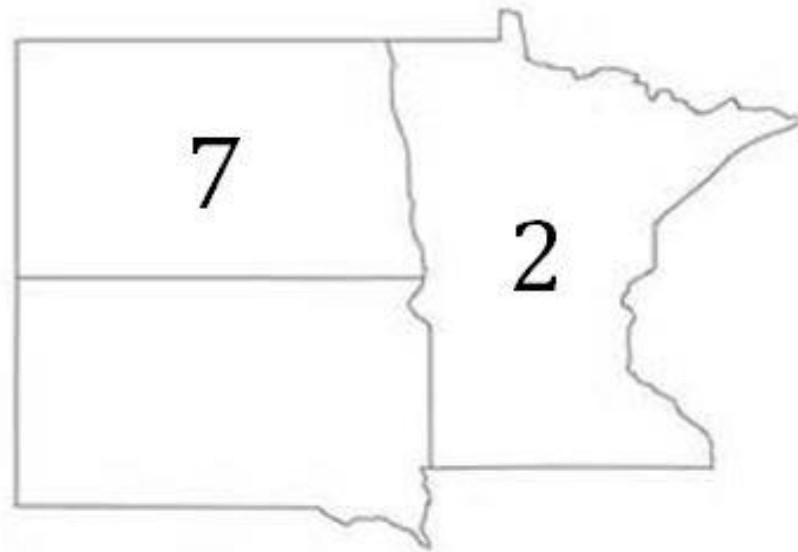
Joint Powers Agreement =  
*United States Constitution*

# SUBSTANTIVE GOALS OF THE JPA

1. Establish authority to enter into PPA
2. DA becomes policymaking & financial clearing house
3. Provide roadmap for construction of Project, including planning for P3 financing
4. Create greater participation
  - *Adds 2 Minnesota Members*
  - *Rotating Chair*
  - *Vice Chair from different state as Chair*
  - *Adds a seat for Upstream Group*
5. Provide clear procedures for governance
6. Resolve technical issues (financial, bidding, cost share, land acquisition, etc.)
7. Add Executive Director

# CURRENT BOARD MEMBERSHIP - LJPA

Under the Limited Joint Powers Agreement



# PROPOSED BOARD MEMBERSHIP - JPA

Under the Joint Powers Agreement



**The Member Entities of the Diversion Authority will need to approve an amendment to the existing Joint Powers Agreement (JPA) to enable implementation of the FM Area Diversion Project. The JPA will need to be fully approved prior to signing a Project Partnership Agreement (PPA) with USACE. The PPA will need to be signed in May 2016 to meet the USACE schedule for utilizing 2016 federal construction funds. As such, the JPA should be signed by late April 2016.**



## Proposed Schedule of Events:

Event	Date	Action
Draft Development		Develop Draft
6-Entity Informational Meeting	February 25	Informational
Review & Comment Period	March 14	Comments Due
Diversion Authority Board Meeting	March 24	Endorse the JPA Amendment
Cass County Commission Meeting	April 4 or 18	Approve JPA Amendment
City of Fargo Commission Meeting	April 11 or 25	Approve JPA Amendment
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# SUMMARY: JOINT POWERS AGREEMENT

# ARTICLE I - AMENDMENT

- 💧 JPA repeals and replaces the LJPA in entirety
- 💧 If a Member Entity fails to approve JPA
  - *Deemed a non-party to JPA*
  - *No longer Member Entity of Flood Diversion Board of Authority (DA), becomes “Former Member Entity”*
  - *Former Member Entity’s positions on Board redistributed to Member Entities in same state*

# ARTICLE II – DEFINITIONS & INTERPRETATION

- Contains definitions of terms used throughout the JPA
  - **“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
  - **“PPA”** means Project Partnership Agreement
  - **“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

# ARTICLE III - PURPOSE

- 💧 To allow Member Entities to work together, avoid duplication, maximize efficiencies
  - *Per N.D.C.C. § 54-40-1 & Minn. Stat. § 471.59*
- 💧 Section 3.03
  - *Creates separate political subdivision “Flood Diversion Board of Authority” (Diversion Authority or DA)*
  - *DA may not exercise a power unless expressly granted by the JPA*

# ARTICLE IV – DIVERSION AUTHORITY - BOARD

## 💧 Composition of Board (Section 4.01)

- 12 Members from 6 Member Entities & Upstream Group
- Increases # of MN Members, ND has majority of Members



- 3 Members appointed by Fargo City Commission (Mayor of Fargo & 2 City Commissioners)



- 2 Members appointed by Moorhead City Council (Mayor of Moorhead & 1 City Council member)

# ARTICLE IV – DIVERSION AUTHORITY - BOARD (cont'd)

## 💧 Composition of Board (cont'd)



- 3 Members appointed by Cass County Commission  
(up to 2 may be from CCJWRD or WF City Commission,  
remainder must be current Cass County Commissioners)



- 1 Member appointed by Clay County Commission  
(1 Clay County Commissioner)



- 1 Member appointed by CCJWRD Board  
(1 CCJWRD Board member)

# ARTICLE IV – DIVERSION AUTHORITY - BOARD (cont'd)

## 💧 Composition of Board (cont'd)



- 1 Member appointed by BRRWD Managers  
(1 BRRWD Manager)



- 1 Member appointed by Upstream Group  
(1 Upstream Group member)



# ARTICLE IV – DIVERSION AUTHORITY - BOARD (cont'd)

- 💧 Chair: voting member, no veto power, 1-year terms rotate between Fargo Mayor, Moorhead Mayor, & a Cass County Commissioner, Current Chair remains until 12/31/16
- 💧 Vice Chair: must be from different state as Chair
- 💧 Board Members not paid or employed by DA
- 💧 No set terms, at discretion of appointing Gov. Body

# ARTICLE IV – DIVERSION AUTHORITY - BOARD (cont'd)

## 💧 Voting (Section 4.08)

- *Each Board Member gets 1 vote*
- *Simple majority of those present, no proxy votes*

## 💧 Meetings (Section 4.09)

- *Regular Meeting, 2<sup>nd</sup> Thursday every month 3:30 p.m.*
- *Annual Meeting, 2<sup>nd</sup> Thursday of January 3:30 p.m.*
- *Special Meetings can be called*
- *Location, Fargo City Hall*

## 💧 Quorum (Section 4.13)

- *6 Board Members*
- *At least 6 Board Members needed to conduct business*

# ARTICLE V – COMMITTEES

- 💧 Land Management Committee (Section 5.02)
  - *Acquisition, financing, management of Project Property*
- 💧 Finance Committee (Section 5.06)
  - *Budgets, expenses, funds, finance matters of Project*
- 💧 Members of these committees make recommendations to the DA Board
- 💧 DA Board may establish other boards or committees to advise, investigate, or perform quasi-judicial functions (Section 5.01)

# ARTICLE VI – DIVERSION AUTHORITY POWERS

- 💧 Receipt of Funds – Hire/fire Executive Director – Purchasing, Expenses, Sales – Sue & Be Sued – Public Information Meetings – Appoint & Terminate Project Consultants – Hire Employees – Manage, Finance, Maintain Project – Budget – Insurance – Land Acquisition – Amend & Enforce JPA – Hire engineers, contractors, consultants, accountants – Contract with Public Entities – Enter into PPA – Hire/fire Lobbyist – P3 Agreements
- 💧 If unclear on power to act, refrain from acting until written authority received from a majority of Member Entities

# ARTICLE VII – FINANCE/BUDGET

- 💧 The DA Board is responsible for financial affairs of Diversion Authority
- 💧 Finance Committee recommends, with assistance of Executive Director, the annual budget, approved no later than 1<sup>st</sup> regular meeting of the DA Board in November
- 💧 Executive Director prepares & enforces the budget

# ARTICLE VIII – SOURCES OF REVENUE

- 💧 Project financed from sales & use taxes, special assessments, grants, donations, and any other funds from Member Entities (“Pledged Revenues”)
- 💧 Section 8.02 – lists Member Entities and details of Pledged Revenues
- 💧 Debt Obligations, Milestone Payments & Availability Payments: paid from Pledged Revenues
- 💧 If Pledged Revenues insufficient: propose sales and use tax increase to voters (Fargo/Cass County); and/or special assessments (Cass County)
- 💧 Sunsets on Pledged Revenues (Section 8.09)

# ARTICLE IX – FINANCIAL OVERSIGHT/FISCAL AGENT

- 💧 Under oversight of DA and Finance Committee:
  - *City of Fargo will act as Fiscal Agent*
  - *Cass County Auditor, City of Fargo Finance Director, City of Moorhead Finance Director, & CCJWRD Secretary-Treasurer*
    - will develop written administrative procedures & establish funds for the management of Project funds, payments, payment requests, tax & arbitrage compliance, handling financial records

# ARTICLE IX – FINANCIAL OVERSIGHT/FISCAL AGENT (cont'd)

- 💧 Fiscal Agent = City of Fargo (or other Member Entity appointed under Section 9.07)
  - *Acting as Trustee, manages Project funds, fiduciary duty to other Member Entities*
  - *Funds open to inspection, no comingling of funds, quarterly reports to DA & Member Entities, annual audit by public accountant*
- 💧 Fiscal Agent provides reports & recommendations re: management of financial matters to Finance Committee
- 💧 Finance Committee makes recommendations to DA from Fiscal Agent's reports



# ARTICLE X – ISSUANCE OF DEBT FOR THE PROJECT

- 💧 Project requires issuance of Debt Obligations by 1 or more Member Entities to:
  - *Pay direct costs of Project, fund Non-Federal Project Costs, refund prior temporary debt, or make Availability and/or Milestone Payments*
- 💧 Allowed by ND and MN statutes
- 💧 Specific terms of Debt Obligations will be set by resolution of DA & Member Entity issuing Debt Obligation
- 💧 Member Entities agree to maintain tax exempt status

# ARTICLE XI – PROJECT PROCEDURES & COST SHARE

- Governs the bidding, contracting, and payment procedures for the Project
  - *DA authorized to adopt additional procedures if needed*
  - *NFS Separable Element Procurement*
  - *Design of Project In-Kind Work Elements must be coordinated between Engineering Consultants & Engineering Staff of Member Entities*
  - *Program Management Consultant to oversee design & construction of Project*
  - *In-Kind Work Element bidding, contract provisions*

# ARTICLE XI – PROJECT PROCEDURES & COST SHARE (cont'd)

## 💧 Cost Share for Total Project Costs (Section 11.09)

	<b>Minnesota Member Entities</b>	<b>North Dakota Member Entities</b>	<b>USACE</b>
<b>Total Project Costs (Capital Costs)</b>	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
<b>Maintenance Costs</b>	Minnesota <b>Member Entities</b> 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 <b>Member Entities</b> 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 ½ of maintenance costs of the Red River Control Structure.	None

\*In 2015 dollars, as **Adjusted for Inflation**.

# ARTICLE XI – PROJECT PROCEDURES & COST SHARE (cont'd)

- 💧 DA is expressly assuming risk that Minnesota may not fully fund or provide appropriations for the Minnesota Member Entities' share of Total Project Costs
  - *City of Moorhead cannot obligate State of Minnesota to provide funds*
  - *No Minnesota Member Entity will be held liable for non-appropriations by MN Legislature*
  
- 💧 This Article also addresses the following for In-Kind Work Elements:
  - *Construction oversight and inspections; Processing pay requests and change orders; Final punch list; Disputes with contractors*

# ARTICLE XII – OPERATIONS AND MAINTENANCE

- 💧 DA will oversee long-term management, operations & maintenance of Project
  - *Enact procedures for operation of Project in accordance with USACE requirements, federal laws, state laws*
  - *May contract with P3 Developer for operations & maintenance of Project*

# ARTICLE XIII – EXECUTIVE DIRECTOR

- 💧 The chief administrative officer of DA
- 💧 The chief purchasing agent of DA
- 💧 Appointed by DA
  - *Chosen on basis of training, experience, executive and administrative qualifications*
  - *Indefinite term, may be removed at any time*
  - *Powers and duties in Section 13.02*
  - *Employed pursuant to written employment agreement*

# ARTICLE XIII – EXECUTIVE DIRECTOR (cont'd)

## 💧 Deputy Executive Director

- *Cass County Administrator or Fargo's City Administrator*
  - they will meet and decide which one will serve, and if they can't decide, DA will decide
- *Deputy Executive Director shall serve as the Executive Director when Executive Director office vacant, unfilled*
- *Able to step in & know the Project*
- *No additional powers*

# ARTICLE XIV – INSURANCE & LIABILITY

## 💧 For liability purposes:

- *Member Entities actions under JPA construed as “cooperative activity”*
- *Member Entities shall be deemed “single governmental unit”*

💧 DA shall maintain liability coverage with ND Insurance Trust Fund

💧 Or, may obtain equivalent private liability coverage

💧 DA may procure coverage for P3 Developer



# ARTICLE XV – OWNERSHIP OF PROPERTY ACQUIRED FOR THE PROJECT

- 💧 Acquisition of easements, rights of way, and land for the Project is for public need and purpose
- 💧 Diversion Channel & Associated Infrastructure (DCAI): held in name of CCJWRD, during & after construction
- 💧 In-Town Levees in Fargo: during construction held by CCJWRD, City of Fargo after construction
- 💧 In-Town Levee in Moorhead: held in name of City of Moorhead

# ARTICLE XV – OWNERSHIP OF PROPERTY ACQUIRED FOR THE PROJECT (cont'd)

- 💧 Wild Rice Inlet & Control Structure: held in name of CCJWRD
- 💧 Red River Control Structure: held in name of BRRWD
- 💧 Southern Embankment & Retention Area in ND: held in name of CCJWRD
- 💧 Oxbow-Hickson-Bakke Levee: held in name of CCJWRD
- 💧 Southern Embankment & Retention Area in MN: held in the name of BRRWD
- 💧 Mitigation Projects: in name of DA, another political subdivision or Member Entity per an agreement

# ARTICLE XV – OWNERSHIP OF PROPERTY ACQUIRED FOR THE PROJECT (cont'd)

- 💧 Member Entities will hold Project Property for benefit of Project and DA, ensure availability for Project
- 💧 This Article also addresses
  - *Requests by DA to a Member Entity to acquire property*
  - *Reimbursement to Member Entity*
  - *Sale of Excess Project Property*
  - *Property ownership upon withdrawal from JPA*

# ARTICLE XVI – THIRD PARTY BENEFICIARIES

- 💧 P3 Developer may enforce terms of JPA if 1 or more Member Entities are in breach or default
- 💧 Debt Obligation Holders may enforce terms of JPA if 1 or more Member Entities are in breach or default

# ARTICLE XVII – ASSIGNMENT & CONTINUANCE OF OBLIGATIONS

- 💧 Political subdivision created by JPA is the successor to the Limited Joint Powers Entity
- 💧 Following are assigned to new entity in this Article:
  - *Prior Obligations*
  - *Contractual obligations*
  - *On-going litigation*
  - *Current budget*
  - *Bylaws and Resolutions*

# ARTICLE XVIII –TERM & TERMINATION OF THE AGREEMENT

- 💧 Term is indefinite, shall continue until terminated or rescinded
- 💧 May only be terminated by mutual consent of all Member Entities

# ARTICLE XIX – DISPUTE RESOLUTION

- 💧 Member Entities use best efforts to ensure various provisions of JPA are fulfilled & act in good faith to resolve disputes in equitable & timely manner
- 💧 If unable to resolve disputes, Member Entities agree to mediate first
- 💧 If not resolved 30 days after end of mediation proceedings, then litigation
- 💧 Waiver of Jury Trial provision

# ARTICLE XX – RIGHTS UPON REFUSAL & WITHDRAWAL

- 💧 DA may make Requested Project Actions to Member Entities
- 💧 A Member Entity could be removed from DA & JPA for not having “Rational Basis” for a non-action
- 💧 Provision for Voluntary Withdrawal
- 💧 Membership of DA upon removal or withdrawal of a Member Entity, positions redistributed



# ARTICLE XXI – MISCELLANEOUS COVENANTS

- 💧 Member Entities may enter into sub-agreements, sub-joint powers agreements
- 💧 JPA has no effect on the City Loan, County Loan, or related Intergovernmental Agreements, Supplemental Intergovernmental Agreements, Loan Agreements or Promissory Notes, or the Sub-Agreements entered into by the 3 ND Entities

# ARTICLE XXII – GENERAL PROVISIONS

## 💧 Standard clauses

- *Complete agreement*
- *Written amendment required*
- *No assignment, transfer without written consent*
- *Severability*
- *Force majeure*
- *New members, with approval of all Member Entities*
- *Notices by certified mail*
- *North Dakota law*

# WHAT HAPPENS NEXT?

# Approval of JPA by Member Entities

- 💧 Take JPA back for review & comment to each Member Entity
  - *Send comments to John Shockley*
- 💧 Last Thursday in March, DA will make recommendations re: JPA
- 💧 Then, Member Entities vote & approve JPA by formal resolution

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# Following Approval of JPA

## 💧 Recommended actions

- *DA will hold organizational meeting*
- *Begin hiring process for Executive Director*
- *Formalize resolution for bidding, construction, financing of Project by DA*
- *Formalize PPP procurement process*

# QUESTIONS & COMMENTS