

## FLOWAGE EASEMENT

THIS EASEMENT is made this \_\_\_\_ day of \_\_\_\_\_, 202\_\_, by «Current\_Owner» and «Grantor\_2», «Marital\_Status\_1», whose post office address is «Owner\_Mailing\_Address» «Owner\_City», «Owner\_State» «Owner\_Zip»; «Grantor\_2», «Marital\_Status\_2», whose post office address is \_\_\_\_\_; «Grantor\_3», «Marital\_Status\_3», whose post office address is \_\_\_\_\_ (“Grantor”); and **Cass County Joint Water Resource District**, a North Dakota political subdivision, whose post office address is **1201 Main Avenue West, West Fargo, North Dakota 58078**, and its successors and assigns (“Grantee”).

## RECITALS

A. Grantee is a member of the METRO FLOOD DIVERSION BOARD OF AUTHORITY, a joint powers entity consisting of Clay County, Minnesota; City of Moorhead, Minnesota; Cass County, North Dakota; City of Fargo, North Dakota; and the Cass County Joint Water Resource District (the “Metro Flood Diversion Authority”).

B. The FARGO-MOORHEAD METROPOLITAN AREA FLOOD RISK MANAGEMENT PROJECT is a federally authorized project pursuant to Section 7002(2) of the Water Resources Reform and Development Act of 2014 (the “Project”) and is a flood risk management project, sponsored by the United States Army Corps of Engineers (the “Corps”) and the Metro Flood Diversion Authority, which includes a diversion channel and appurtenant staging and storage areas to reduce flood damages and risks in the region and to provide permanent flood protection in and around the Fargo-Moorhead metropolitan area.

C. Grantor owns certain real property in the vicinity of the Project, more specifically described below, in an area that may be subject to temporary and periodic flooding as a result of the Project.

D. Grantor has agreed to convey to Grantee a permanent easement, as more specifically described below, to permit Grantee to periodically flood portions of Grantor’s property as well as granting certain access, and compliance inspection rights to Grantee subject to the terms and conditions contained in this Easement.

In consideration of \$10.00, the mutual covenants contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which the parties acknowledge, the parties agree as follows:

### AGREEMENT

1. **The Easement Property.** Grantor grants and conveys to Grantee a permanent easement in, on, over, through, and across the following real property in «**Property\_County**», «**Property\_State**»:

**See legal description in Exhibit “A”**

The property described above is the “Easement Property.” A true and accurate copy of a Certificate of Survey of the Easement Property including the Mitigation Zones with respect to the Easement Property, is attached hereto as Exhibit “B” (the “Survey”).

A. Under this Easement, Grantor grants to Grantee, its officers, employees, agents, representatives, contractors, and subcontractors the following perpetual right, power, privilege and easement to occasionally overflow, flood, and submerge the Easement Property in connection with the Project as well as actions necessary to enforce compliance with this Easement. Additionally, Grantor hereby grants to Grantee all right, title, and interest in and to the structures and improvements now situated on the Easement Property:

i. excepting fencing, drain tile, and drain tile related appurtenances;

NOTE: Paragraphs for Easements in ND outside of Zone 1:

ii. **[Paragraph for Existing Residential Structures within Zone 2]** and further excepting any existing residential structures within Mitigation Zone 2, as shown on the Survey, that are on this date and at all times have a lowest opening elevation that is at least one-foot above the one-percent annual chance event water surface elevation, as defined on the Survey, and that are protected using Flood Protection Measures, as defined below, to an elevation at or above the 0.2-percent annual chance event water surface elevation, as defined on the Survey, as follows:

a. Flood Protection Measures for residential structures are limited to (1) elevating the structure, (2) a combination of elevating the structure and dry-floodproofing in accordance with FEMA requirements, or (3) use of levees constructed in accordance with applicable federal or state criteria;

iii. **[Paragraph for Existing Non-Residential Structures within Zone 2]** and further excepting any existing non-residential structures within Mitigation Zone 2, as shown on the Survey, that are on this date and at all times remain protected using Flood Protection Measures, as defined below, to an

elevation at or above the 0.2-percent annual chance event water surface elevation, as defined on the Survey, as follows:

- a. Flood Protection Measures for non-residential structures are limited to (1) elevating the structure, (2) dry or wet flood-proofing in accordance with FEMA requirements, or (3) use of levees constructed in accordance with applicable federal or state criteria (note that levees alone cannot be used to remove the structure from the one-percent annual chance event);
- iv. **[Paragraph for Existing Residential Structures in Zone 3]** and further excepting any existing structures within Mitigation Zone 3, as shown on the Survey, that are on this date and at all times have a lowest opening elevation that is at least one-foot above the one-percent annual chance event water surface elevation, as defined on the Survey;
  - v. **[Paragraph for Existing Non-Residential Structures within Zone 3]** and further excepting any existing non-residential structures within Mitigation Zone 3, as shown on the Survey, that are on this date and at all times remain protected using Flood Protection Measures, as defined below, so that the lowest opening elevation is at least one-foot above the one-percent annual chance event water surface elevation, as defined on the Survey, as follows:
    - a. Flood Protection Measures for non-residential structures are limited to (1) elevating the structure, (2) dry or wet flood-proofing in accordance with FEMA requirements, or (3) use of levees constructed in accordance with applicable federal or state criteria (note that levees alone cannot be used to remove the structure from the one-percent annual chance event);
  - vi. **[Paragraph for New Development within Zone 2]** and also excepting any structures on the Easement Property completed after the date of this Easement within Mitigation Zone 2 on the Easement Property, as shown on the Survey, that are and remain elevated at all times so that the lowest opening elevation is at least 2-feet above the one-percent annual chance event water surface elevation, and with a ground elevation 15 feet from any such structure of at least one-foot above the one-percent annual chance event water surface elevation, as defined on the Survey, and protected using Flood Protection Measures, as defined below, to an elevation at least one-foot above the 0.2-percent annual chance event water surface elevation, as defined on the Survey, as follows:
    - a. Flood Protection Measures for residential structures are limited to (1) elevating the structure, (2) a combination of elevating the structure to the above-described lowest opening elevation and dry-floodproofing in accordance with FEMA requirements, or (3) use of

levees constructed in accordance with applicable federal or state criteria;

b. Flood Protection Measures for non-residential structures shall include (1) elevating the structure, (2) dry or wet flood-proofing in accordance with FEMA requirements, or (3) use of levees constructed in accordance with applicable federal or state criteria;

vii. **[Paragraph for New Development in Zone 3]** and further excepting any structures on the Easement Property completed after this date within Mitigation Zone 3, as shown on the Survey, that are and at all times remain elevated so that the lowest opening elevation at least 2-feet above the one-percent chance event water surface elevation, and also with a ground elevation 15 feet from any such structure of at least one-foot above the one-percent chance event water surface elevation;

viii. and that no excavation shall be conducted, and no fill placed on land within Mitigation Zone 1, as shown on the Survey, and the established FEMA floodway without approval by Grantee as to the location and method of excavation and/or placement of fill and verification that the fill will not impact Project operation.

B. The easement rights in and to the Easement Property are taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the property owners, their heirs and assigns, all such rights and privileges as may be used and enjoyed without interfering with the Project for the purposes authorized by Congress or abridging the rights and easement hereby acquired; provided further that any use of the land shall be subject to Federal and State laws with respect to pollution.

C. Additionally under this Easement, Grantor grants to Grantee, its officers, employees, agents, representatives, contractors, and subcontractors, and the United States, the following rights related to the Project regarding the Easement Property: ingress and egress in, on, over, across, and through the Easement Property; removing flood-related debris deposited on the Easement Property due to operation of the Project upon Grantor's request; removing structures, obstructions, and any other obstacles from the Easement Property; conducting compliance inspections; conducting environmental assessments, including habitat and fish and wildlife studies and surveys as required by the State of North Dakota; and necessary and reasonable rights of ingress and egress to and from the Easement Property subject to the provisions regarding crop damages in Section 6(B) below. Grantee shall notify Grantor prior to exercising the access provisions associated with this Agreement.

2. **Easement Runs with the Easement Property.** This Easement, and all covenants, terms, conditions, provisions, and undertakings created under this Easement, are permanent and

perpetual (or the longest period allowed by law, now or at any time in the future), and will run with the Easement Property, and will be binding upon Grantor's heirs, successors, and assigns.

3. **Removal of Unapproved Structures.** Grantor must remove all unapproved structures on the Easement Property on or before this date. Any unapproved structures remaining on the Easement Property after this date, will automatically become Grantee's property, without the need for any bill of sale or any other written instrument or agreement; Grantee may then remove any unapproved structures from the Easement Property, at its sole discretion and at its sole cost. All approved existing structures that need not be removed are shown on attached Exhibit "C."

4. **Grantor Covenants.** Grantor warrants that Grantor is the fee simple owner of the Easement Property; that Grantor has the right to execute this Easement and to make the promises, covenants, and representations contained in this Easement; that this Easement does not violate any mortgage or other interest held by any third party regarding the Easement Property, or any portion of the Easement Property; that there are no outstanding unpaid bills incurred for labor, materials, or services regarding the Easement Property, or any portion of the Easement Property; and that there are no recorded or unrecorded liens, security interests, or any outstanding, pending, or threatened suits, judgments, executions, bankruptcies, or other proceedings pending or of record that would in any manner impact title to the Easement Property, or any portion of the Easement Property. Grantor will release, hold harmless, defend, and indemnify Grantee and its officers, agents, representatives, employees, and contractors from and against any and all claims, damages, injuries, or costs arising out of or in any way related to any title defects regarding the Easement Property.

5. **Taxes.** Grantor is solely responsible for all taxes and special assessments or assessments for special improvements due, levied, or assessed regarding the Easement Property for all past, present, and future years. Grantee will not be responsible for payment of any real estate taxes or special assessments regarding the Easement Property.

6. **Use of the Easement Property.**

A. **Grantor's Use.** Subject to the provisions of this Easement, Grantor has the right and privilege to use the Easement Property at any time, in any manner, and for production of growing crops, pasture, and other farm/agricultural-related activities and hunting, including the right to post the Easement Property at Grantor's sole discretion to restrict public hunting rights. Notwithstanding the foregoing or any provision of this Easement to the contrary, the parties expressly agree, the construction, operation, and/or maintenance of any concentrated animal feeding operation, confined animal feeding operation, or feedlot (collectively "CAFO"), as defined under applicable local, State and/or Federal laws, rules, and regulations, is prohibited in and upon the Easement Property. Grantor will promptly cease any activities and remove any structures or obstructions that interfere with Grantee's use of the Easement Property, Grantee's rights and privileges under this Easement, or with the Project, when directed by Grantee. Grantor understands and recognizes any use of the Easement Property is at Grantor's sole risk, and with the exception of payments Grantor or Grantor's tenant (if applicable) may be eligible for under

the Growing Season Supplemental Crop Loss Program or the Prevent Plant Crop Insurance Program established and implemented by the Metro Flood Diversion Authority, that Grantee is not responsible for any damages to growing crops or for interference with any other of Grantor's uses of the Easement Property as a result of any inundation or any of Grantee's other rights and privileges regarding the Easement Property. The parties further agree that with respect to any portion of the Easement Property not currently certified for agricultural production in the certified organic marketplace as of the date of this Easement, neither the Growing Season Supplemental Crop Loss Program nor the Prevent Plant Crop Insurance Program established and implemented by the Metro Flood Diversion Authority, shall provide coverage for lost organic certification of all or any portion of the Easement Property or loss in premium payments of certified organic agricultural products over similar conventionally produced agricultural products, as a result of any inundation or any of Grantee's other rights and privileges regarding the Easement Property.

- B. **Grantee's Entry.** If Grantee enters upon the Easement Property for purposes of conducting compliance inspections or removal of flood related debris deposited on the Easement Property permitted under this Agreement, following the conclusion of any such activities, Grantee will return the Easement Property as nearly as practicable to its previous condition, taking into consideration the nature of the work being performed; for example, Grantee will remove any dirt piles or equipment from the Easement Property that might unreasonably interfere with Grantor's permitted uses of the Easement Property. Grantee's ingress and egress rights to the Easement Property will be by the least intrusive means reasonable. Additionally, Grantee will reimburse Grantor for reasonable crop damages resulting from Grantee's physical entrance upon the Easement Property for purposes of conducting such activities. Such reasonable crop damages shall be calculated based on the area disturbed, actual production history, Grantor's yields the year of the damages, and current crop prices at the time of the crop damages. The crop damage payments under this Section 6(B) shall not be duplicative of the payments described in Section 6(A) above. For purposes of illustration, if Grantee enters onto the Easement Property to conduct a survey on June 1 and damages a portion of the crop growing on the Easement Property, and subsequently on July 15 a major rain event necessitates operation of the Project inundating and damaging the crop growing on the entire Easement Property, the payments Grantor would be eligible for under the Growing Season Supplemental Crop Loss Program described above, would be reduced by the amount Grantor receives as payment for crop damages caused by the survey.

7. **Encumbrances.** Subject to the provisions below regarding the leasing or mortgaging of the Easement Property, Grantor will not encumber the Easement Property or any portion of the Easement Property or enroll the Easement Property or any portion of the Easement Property in any farm or other federal program that would be contrary to, or would in any way disrupt or interfere with, Grantee's use of the Easement Property, Grantee's rights and privileges

under this Easement, or with the Project without first obtaining Grantee's consent. However, Grantor may rent or lease the Easement Property, at Grantor's sole discretion without first obtaining Grantee's consent. If Grantor rents or leases the Easement Property, any lessee's rights and uses are subject to this Easement, including the use restrictions described above; Grantor will be fully responsible to Grantee for Grantor's obligations under this Easement, including for any violations by any lessee. Additionally, Grantor may mortgage the Easement Property, at Grantor's sole discretion without first obtaining Grantee's consent so long as any mortgage is subordinate to this Easement.

8. **Waiver of Warranties.** Except as set forth in this Easement, the parties specifically agree neither Grantee nor any of its agents or representatives have made any representations or warranties in any way regarding the Project; Grantor's ability to use the Easement Property following construction of Project; the potential frequency of inundation of the Easement Property; Grantor's ability to enroll the Easement Property in any federal program; or Grantor's ability to obtain any farm insurance regarding the Easement Property other than the Growing Season Supplemental Crop Loss Program or the Prevent Plant Crop Insurance Program which Grantor may be eligible for as set forth in Section 6(A) above.

9. **Maintenance.** Grantee's easement rights include the right, at its discretion and if necessary for purposes of proper operation and maintenance of the Project, to remove trees, underbrush, obstructions, and any other vegetation, structures, or obstacles from the Easement Property. However, Grantor is solely responsible, at Grantor's sole expense and discretion, for maintaining the Easement Property, including grass cutting and weed control. Neither Grantor nor Grantee will store, cause, or permit any spillage, leakage, or discharge of fertilizers, herbicides, fungicides, and pesticides on the Easement Property (in excess of normal applications for farming purposes). Further, in no event will either party cause or permit any spillage, leakage, or discharge of any hazardous substance onto the Easement Property including, but not limited to, spillage of petroleum products or vehicle fuels, gasoline, kerosene, or other products used for the purpose of generating power, lubrication, illumination, heating, or cleaning. If either party causes or permits any spillage, leakage, or discharge of any such hazardous substance onto the Easement Property, that party shall be solely responsible for any damages arising out of such spillage, leakage, or discharge of any such hazardous substance onto the Easement Property to the extent required by law.

10. **Alternative Dispute Resolution Board.** The Metro Flood Diversion Authority has created an Alternative Dispute Resolution Board to provide property owners an informal, administrative forum to bring claims related to Project operation for damages occurring outside the scope of the terms, conditions, obligations, and rights provided for under this Easement. Without limiting the easement rights granted herein, the parties agree that by executing this Easement, Grantor is not waiving claims for actual damages due to flooding caused by operation of the Project to any other real property owned by Grantor, and any improvements thereon. However, in the event of such damages, the parties agree to attempt in good faith to resolve such damages through the Alternative Dispute Resolution Board, as provided in the Project Property Rights Acquisition and Mitigation Plan, prior to commencing litigation with respect to such

damages. A copy of the Project Property Rights Acquisition and Mitigation Plan is available from Grantee. Nothing herein shall prevent Grantor from bringing such claims in District Court.

11. **Forbearance or Waiver.** The failure or delay of Grantee to insist on the timely performance of any of the terms of this Easement, or the waiver of any particular breach of any of the terms of this Easement, at any time, will not be construed as a continuing waiver of those terms or any subsequent breach, and all terms will continue and remain in full force and effect as if no forbearance or waiver had occurred.

12. **Governing Law.** This Agreement will be construed and enforced in accordance with North Dakota law. The parties agree any litigation arising out of this Agreement will be venued in State District Court in «Property\_County», North Dakota, and the parties waive any objection to venue or personal jurisdiction.

13. **Severability.** If any court of competent jurisdiction finds any provision or part of this Easement is invalid, illegal, or unenforceable, that portion will be deemed severed from this Easement, and all remaining terms and provisions of this Easement will remain binding and enforceable.

14. **Entire Agreement.** This Easement constitutes the entire agreement between the parties regarding the matters described in this Easement, and this Easement supersedes all other previous oral or written agreements between the parties.

15. **Modifications.** Any modifications or amendments of this Easement must be in writing and signed by Grantor and Grantee and must be recorded with the «Property\_County» County Recorder's office.

16. **Representation.** The parties, having been represented by counsel or having waived the right to counsel, have carefully read and understand the contents of this Easement, and agree they have not been influenced by any representations or statements made by any other parties.

17. **Headings.** Headings in this Easement are for convenience only and will not be used to interpret or construe its provisions.

(Signatures appear on the following pages.)



IN WITNESS WHEREOF, Grantor executed this Easement on the date written above.

**GRANTOR:**

\_\_\_\_\_  
«Current\_Owner»

\_\_\_\_\_  
«Grantor\_2»

STATE OF \_\_\_\_\_ )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_ day of \_\_\_\_\_, 202\_\_, before me, a Notary Public, in and for said County and State, personally appeared «Current\_Owner» and «Grantor\_2», «Marital\_Status\_1», known to me to be the persons described in and who executed the within and foregoing instrument, and acknowledged to me that they executed the same.

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_  
My Commission Expires: \_\_\_\_\_

(SEAL)

**GRANTOR:**

\_\_\_\_\_  
«Grantor\_2»

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 202\_\_, before me, a Notary Public, in and for said County and State, personally appeared «Current\_Owner»«Grantor\_2», «Marital\_Status\_2», known to me to be the person(s) described in and who executed the within and foregoing instrument, and acknowledged to me that he/she executed the same.

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_  
My Commission Expires:

(SEAL)

**GRANTOR:**

\_\_\_\_\_  
«Grantor\_3»

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 202\_\_, before me, a Notary Public, in and for said County and State, personally appeared «Current\_Owner»«Grantor\_3», «Marital\_Status\_3», known to me to be the person(s) described in and who executed the within and foregoing instrument, and acknowledged to me that he/she executed the same.

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_  
My Commission Expires: \_\_\_\_\_

(SEAL)

**GRANTEE:**

CASS COUNTY JOINT WATER  
RESOURCE DISTRICT

By: \_\_\_\_\_  
Dan Jacobson, Chair

**ATTEST:**

\_\_\_\_\_  
Carol Harbeke Lewis  
Secretary-Treasurer

STATE OF NORTH DAKOTA            )  
  ) ss.  
COUNTY OF CASS                    )

On this \_\_\_\_ day of \_\_\_\_\_, 202\_\_, before me, a Notary Public, in and for said County and State, personally appeared Dan Jacobson and Carol Harbeke Lewis, known to me to be the Chairman and Secretary-Treasurer, respectively, of the Cass County Joint Water Resource District and who executed the within and foregoing instrument, and acknowledged to me that they executed the same on behalf of the Cass County Joint Water Resource District.

\_\_\_\_\_  
Notary Public, Cass County, North Dakota  
My Commission Expires:

(SEAL)

The legal description contained in this document was prepared by:

**[Insert Info of Surveyor]**

**EXHIBIT “A”**

**(LEGAL DESCRIPTION OF PROPERTY)**

***Cass County Joint Water Resource District  
Flowage Easement - «Last\_Name»  
OIN «OIN\_Number» – Parcel No. «PIN»***

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«Legal\_Description»

**EXHIBIT “B”**

**(COPY OF CERTIFICATE OF SURVEY OF THE EASEMENT PROPERTY)**

**EXHIBIT “C”**

**APPROVED EXISTING STRUCTURES**