

**Temporary Construction Easement/
Permanent Maintenance Easement**

The State of North Dakota, by and through the **North Dakota Game and Fish Department ("State")**, for good and valuable consideration, the receipt of which is hereby acknowledged, does hereby grant and convey to **Nelson County Water Resource District, ("Grantee")**, whose address is 104 East B Ave., Lakota, North Dakota 58344, a temporary easement for construction which allows the right of ingress and egress on State owned property to place a culvert at the following predetermined invert elevations, Olsen Lake 1498.60, Berkland Lake 1494.74, and Knudson Lake 1492.25 and a permanent easement to be used for subsequent needed maintenance and upkeep, with said easement on land located in Nelson County, North Dakota, more specifically described as follows:

A fraction of an acre of land located on the north shore of Lake Berkland in Township 151N, Range 59W, SW ¼ Section 35.

GRANTOR AND GRANTEE FURTHER AGREE:

1. State shall retain ownership and use of the above-described property and grants and conveys the right of entry during the construction period, the right of ingress and egress over and across the land of the undersigned for the purpose of exercising the rights herein granted and as are necessary for the use and maintenance of the constructed facility.
2. State reserves the right to use the surface of the easement strip. But State, unless it receives prior approval from Grantee, will not construct, nor permit to be constructed, any building or structure that interferes with Grantee's exercise of the right conveyed by this easement.
3. If, prior to or during construction, archeological or paleontological items are discovered, or a deposit of such items are disturbed, Grantee shall cease construction activities immediately. Grantee will promptly notify State and will not resume construction until State gives written approval.
4. Grantee shall not do any excavation or drainage to the north or the south of the project site road to enhance water movement to the culvert.
5. Upon completion of construction and maintenance, any disturbed surface will be re-contoured to conform to the adjacent terrain and the reserved soil will be evenly respread on those areas from which it was removed.
6. Any disturbed vegetated surfaces will be re-vegetated with a mixture of native perennial grasses as shown on **Exhibit A**, sufficient to prevent accelerated erosion

and restore, as closely as possible, the original long-term productivity. Any tame grassland that is disturbed will be re-vegetated with a cover of tame grasses similar to the preconstruction composition.

7. Grantee shall not issue any additional drainage permits in the watershed above Lake Olsen unless approved by the State.
8. Grantee, or Grantee's agent, shall have a legible copy of this easement on site for reference during construction, reconstruction, or replacement.
9. Grantee shall control noxious weeds that are attributable to the construction and maintenance.
10. Grantee shall not erect buildings on the easement.
11. Grantee shall notify State prior to the abandonment of construction facility. Upon abandonment, Grantee will remove all surface structures and reclaim the disturbed areas.
12. Grantee agrees that this easement does not grant any subsurface interests, or any surface ownership interest that is incident to the presence of any subsurface interests within the easement area. Subsurface interests include, but are not limited to, coal, gravel, sand, scoria, clay, oil and gas, and related hydrocarbons. If, during the period of this easement, any subsurface interests are developed in accordance with a mining or development plan that includes the easement area, this easement will terminate. State will give Grantee not less than 60 days prior written notice of the termination of easement identified in this paragraph.
13. If, at any time during the existence of the easement, State at its sole discretion, determines that the easement interferes with or affects in any manner and to any extent the operation or management of State land, State may take any one of the following actions:
 - a) terminate this easement; or
 - b) require Grantee to compensate State, at the amount set by State, for the loss State incurs due to the easement.
14. If, at any time during the existence of the easement, Grantee issues a drainage permit in the watershed above Lake Olsen without prior approval of the State, State may terminate this easement and Grantee shall remove the culverts at its own expense.
15. This easement is subject to all existing rights, privileges, and conditions.
16. The State and Political Subdivision (Grantee) each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and

attorneys' fees which may in any manner result from or arise out of this agreement. In addition, Grantee shall require all Contractors, prior to commencement of an agreement between Grantee and the Contractor, to: defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from and against claims based on the vicarious liability of the State or its agents, but not against claims based on the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred if the State prevails in an action against Contractor in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

17. Grantee shall secure and keep in force during the term of this agreement, from an insurance company, government self-insurance pool or government self-retention fund authorized to do business in North Dakota, commercial general liability with minimum limits of liability of \$250,000 per person and \$1,000,000 per occurrence.

In addition, Grantee shall require all Contractors and Subcontractors, prior to commencement of an agreement between Grantee and any Contractor or Subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor.

- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- 3) The duty to defend, indemnify, and hold harmless the State under this agreement shall not be limited by the insurance required in this agreement.
- 4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies.
- 5) The insurance required in this agreement, through a policy or endorsement, shall include:
 - a) "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
 - b) a provision that the policy and endorsements may not be canceled or modified without thirty days' prior written notice to the undersigned State representative;
 - c) a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
 - d) a provision that Contractor's or Subcontractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;
 - e) cross liability/severability of interest for all policies and endorsements;
 - f) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
 - g) The insolvency or bankruptcy of the insured Contractor shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Contractor from meeting the retention limit under the policy.
- 6) The Contractor or Subcontractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.

- 7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.
18. This easement is not exclusive. State reserves the right to use and enjoy the premises or allow others to use any part of the right of way for purposes that are compatible with the easement.
19. State neither warrants nor agrees to defend title to the easement area.
20. The term of this easement will coincide with Grantee's use of this easement and until a release of this easement is recorded, but will not exceed ninety-nine years pursuant to N.D.C.C. § 47-05-02.1.
21. This easement is executed pursuant to N.D.C.C. § 54-01-17.1 by the Governor and attested to by the Secretary of State on this _____ day of _____, 2007.

STATE OF NORTH DAKOTA

John Hoeven
Governor

ATTEST:

State of North Dakota)
County of Burleigh) ss

The foregoing instrument was acknowledged before me this _____ day of _____, 2007, by John Hoeven, Governor of the State of North Dakota.

Alvin A. Jaegar
Secretary of State

EXHIBIT A

Native Grass Seeding Specifications

Species	Lbs./PLS*/Acres	% of Mixture
Western Wheatgrass	8	40%
Little Bluestem	5	25%
Green Needle Grass	3	15%
Switchgrass	2	10%
Side Oats Grama	2	10%
Total	20	100%

* PLS – Pure Live Seed (Based on 50 PLS/sq. feet).

1. The seed bed should be firmly packed (footprint left in the soil should be less than ½ inch deep).
2. Seeding must be accomplished before May 24th of a given year.
3. A cover crop of oats at 10 lbs. PLS/acre must be seeded on the disturbed site.
4. A drill designed specifically for native grass seeding will give the best seeding results. The seed should be planted at a depth of ½ to 1 inch. Precaution must be taken not to plant the seed too deeply in the soil or poor germination will result.
5. On areas where equipment cannot be used, broadcast seed and rake or drag to cover seed. Where seed is broadcast, double the seeding rate.
6. Use only North Dakota certified seed.

Compliance Issues

Environmental considerations for this project remain the same as when the original documentation was submitted. Since this amendment involves work that is B(3)-The construction of new, or the addition of, small structures or improvements for the restoration of wetland, riparian, in stream, or native habitats, which result in no or only minor changes in the use of the affected local area, it is excluded from NEPA documentation and an environmental assessment or impact statement is not required (Federal Register, Vol. 62, No. 11, Thursday, January 16, 1997).

The categorical exclusion limitations listed on p. 34 and 35 in the U.S. Department of Interior, USFWS publication entitled, "NEPA in Federal Aid Proposals, Guidance to the States, Sept. 1980", were considered for this amendment. No conflicts were seen.

Executive Order No. 11988, Floodplain Management. Executive Order 11988 is not deemed applicable as all work activities are categorical exclusions and will not have any adverse impact on existing structures or facilities nor will they disrupt floodplain values. This work will not change more than 10 percent of the floodplain area.

Executive Order No. 11990, Protection of Wetlands. The work activity is a categorical exclusion and will not have any adverse impact on wetlands. Although this work activity is scheduled for wetlands, it is considered beneficial in nature, minor or insignificant in scope. The effect of the project was reviewed by the USFWS Devils Lake Wetland Management District who determined the allowable invert elevations of the culverts which will lower the water levels of Olsen Lake, Lake Berkland, and Lake Knudson. (See attached letter.) The easement also states that, 'no additional drainage permits shall be issued in the watershed above Lake Olsen by the Grantee unless approved by the State'.

Public Law 97-98, Farmland Protection Policy Act. Unique farmlands are lands used for the production of specific high-value crops. No such lands occur on these Wildlife Management Areas. This work will not take place on prime farmlands.

Endangered Species Act of 1973. With the following exceptions, no federally listed threatened or endangered species or critical habitats occur within or adjacent to the areas affected by this project.

Exceptions:

1) Whooping crane (*Grus americana*). During migration whooping cranes have stopped for short periods on McKenzie Slough, Arena and Lake Sakakawea Wildlife Management Areas. These birds are monitored by State and Federal enforcement and biological staff. Disturbance of these birds is limited. To avoid impacts on whooping cranes, work being conducted on areas will cease while cranes are present. If warranted, after consultation with the Fish and Wildlife Service, areas with whooping cranes present will be temporarily closed to hunting and other activities.

2) Interior Least Tern and Piping Plover. These birds are known to occur

on the Department's Missouri River Wildlife Management Areas and on Lake Arena, McPhail, Horsehead, Ashley, Audubon, and Palermo Wildlife Management Areas. Work will not be done that will affect their habitat. The North Dakota Game and Fish Department's Endangered Species Program includes signing of nesting areas to keep the public away from nesting birds. The Department will not do project work in adjacent areas that will disturb nesting birds.

3) Western Prairie Fringed Orchid. These occur in Ransom and Richland counties. This project will not negatively impact these and may protect some land where they occur.

4) Pallid Sturgeon, Sicklefin Chub and Sturgeon Chub – These species occur in the Missouri River, but will not be negatively impacted by this program.

5) Black-footed Ferret, Gray Wolf and Prairie Dog – Black-footed ferret are not currently known to inhabit North Dakota. Gray Wolf are not established in North Dakota. Occasionally individual animals travel through North Dakota from nearby established populations in other states. Prairie dogs are at scattered locations in the western half of North Dakota. Project work will not affect areas where these species are known to occur.

Environmental Justice (Executive Order 12898): This project will not have disproportionately high and adverse human health or environmental effects on low income populations, minority populations, or Indian tribes.

Invasive Species (Executive Order 13112): This project will not promote the introduction or spread of invasive species.

State Historical Preservation Officer (SHPO) Review – This project was sent to SHPO for review. See SHPO letter.