

SWC Project No. 1638

November 2009

**Agreement for Cost Participation**

1. **PARTIES.** This agreement is between the State of North Dakota (State), by and through the State Water Commission (Commission), and the North Cass Water Resource District (District).

2. **PROJECT DESCRIPTION AND LOCATION.** This Project consists of constructing one ring dike around a rural residence for protection from potential floods – Troy Hall ring dike to be constructed in Section 2, Wiser Township, Cass County, North Dakota (Project). Project will not be completed in conjunction with the Natural Resource Conservation Service's Ring Dike Program. Application/notification to construct or modify a ring dike is on file.

3. **COMMISSION'S RESPONSIBILITIES.** Commission shall provide District with an amount, not to exceed \$40,000, which District shall use to pay eligible costs incurred in Project.

4. **DISTRICT'S RESPONSIBILITIES.**

- a. District is solely responsible for ensuring that Project, including all construction related to Project, complies with the following criteria:
  - (1) Height of the dike is 2 ft. above the 1997 flood or 2 ft. above the 100-year flood, whichever is the greater height.
  - (2) Top width of the dike is constructed as follows:
    - (i) If dike height is 5 ft. or less, 4 ft. top width.
    - (ii) If dike height is between 5 ft. and 14 ft., 6 ft. top width.
    - (iii) If dike height is greater than 14 ft., 8 ft. top width.
  - (3) Side slopes of dike are constructed at 3H:1V or better, adequate compaction with passes of equipment is required.
  - (4) Culverts are installed where applicable.
  - (5) Dike is seeded.
- b. District is also solely responsible for:
  - (1) Maintaining Project for the entire life of Project.
  - (2) Ensuring that all applicable permits (federal, state, and local) are obtained for Project.
  - (3) Ensuring that Project complies with all North Dakota laws governing the requirements for competitive bids, advertising, and awarding of contracts for construction of Project.
  - (4) Maintaining a Project file containing documents relevant to Project for the lifetime of Project including all permits, preliminary, and as-built plans, correspondence, and all other

documents generated during the course of Project. State is not responsible for maintaining a Project file.

5. **COST.** The estimated total cost of Project is \$80,000, of which \$73,000 is considered eligible for State cost-share participation. Commission shall pay District 60% of the actual eligible costs incurred in Project, not to exceed \$40,000 contingent upon availability of Commission funds and any other conditions in this agreement. Commission has sole discretion to determine eligible costs and availability of Commission funds. Ineligible costs include, but are not limited to, costs for technical assistance and in-kind services; administrative, insurance, legal, and finance/bonding costs; maintenance and repair costs; District employee salaries; work outside of the ring dike construction criteria; as set forth in Paragraph 4(a) of this agreement; engineering services; and construction costs incurred prior to July 1, 2009.

6. **PAYMENT.** Commission shall make one payment upon receipt and approval of District's written request. District shall provide Commission verification of actual costs. A Commission representative may inspect Project before Commission makes payment to District. District shall provide Commission a copy of the final Project specifications upon Project completion. The final Project specifications are required with the request for payment.

7. **INDEMNIFICATION.** Commission and District 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.

8. **INSURANCE.**

a. District shall secure and keep in force during the term of this agreement and District shall require all contractors, subcontractors, and vendors prior to commencement of an agreement between District and the contractor, subcontractor, or vendor 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 agreement.

- b. 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 District. The amount of any deductible or self-retention is subject to approval by State.
  - (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 State. The policies shall be in form and terms approved by State.
  - (3) The insurance required in this agreement, through a policy or endorsement, shall include:
    - (a) A "Waiver of Subrogation" waiving any right to recovery the insurance company may have against State.
    - (b) A provision that the policy and endorsements may not be canceled or modified without 30 days prior written notice to Commission.
    - (c) The insolvency or bankruptcy of the insured District shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured District from meeting the retention limit under the policy.
  - (4) District shall furnish a certificate of insurance and all endorsements to Commission before commencement of this agreement.
  - (5) Failure to obtain and maintain insurance as required throughout the term of this agreement is a material breach of contract entitling State to terminate this agreement immediately.

**9. BREACH.** Violation of any provision of this agreement by District constitutes breach of this agreement. A breach obligates District to reimburse Commission for all funds paid to District and relieves Commission of all obligations under this agreement.

**10. AGREEMENT BECOMES VOID.** This agreement is void if not signed and returned by District within 60 days of Commission's signature.

**11. TERMINATION.**

- a. The parties may terminate this agreement by mutual consent or any party may terminate this agreement upon 30 days written notice delivered to the other party by certified mail, or in person.
- b. Commission may terminate this agreement effective upon delivery of written notice to District, or a later date as may be stated in the notice, under any of the following conditions:
  - (1) If, as determined by Commission, an emergency exists.
  - (2) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to provide the funds agreed upon for the services or supplies in the indicated quantities or term. The parties may modify this agreement to accommodate a reduction in funds.
  - (3) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this agreement or are no longer eligible for the funding proposed for payments authorized by this agreement.
  - (4) If any license, permit, or certificate required by law, rule, or this agreement is denied, revoked, suspended, or not renewed.
- c. Any termination of this agreement shall be without prejudice to any obligations or liabilities of either party already accrued prior to termination.
- d. The rights and remedies of any party provided in this agreement are not exclusive.

**12. APPLICABLE LAW AND VENUE.** This agreement is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this agreement must be brought in the District Court of Burleigh County, North Dakota.

**13. SEVERABILITY.** If any term of this agreement is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms must not be affected, and, if possible, the rights and obligations of the parties are to be construed and enforced as if the agreement did not contain that term.

**14. SPOILIATION – NOTICE OF POTENTIAL CLAIMS.** District agrees to promptly notify Commission of all potential claims that arise or result from this agreement. District shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to Commission the opportunity to review and inspect the evidence, including the scene of an accident.

15. **MERGER.** This agreement constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this agreement. This agreement may not be modified, supplemented or amended, in any manner, except by written agreement signed by both parties.

**NORTH DAKOTA STATE WATER  
COMMISSION**

By:

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DALE L. FRINK  
Secretary

DATE: \_\_\_\_\_

**NORTH CASS WATER  
RESOURCE DISTRICT**

By:

\_\_\_\_\_  
MICHAEL BURINGRUD  
Chairman

DATE: \_\_\_\_\_