

## AGREEMENT

This Agreement, made and effective as of the date subscribed below, by and between Sylvia A. Miiller, Darwin J. Miiller, Shirley A. Hendrix, Gerald L. Miiller, and Cheryl F. Miiller, collectively as “Miillers”, Merlin Bechen and Diane Bechen, collectively as “Bechens”, City of Mitchell, hereafter “Mitchell”, MCPM, LLP, hereafter “MCPM”, and Davison County, hereafter “Davison”.

WHEREAS there is a pending civil action with Miillers and Bechens as plaintiffs and Mitchell and MCPM as defendants in Davison County, 17CIV13-276.

WHEREAS Davison is not a party to said action but is desirous of having the parties settle this matter and will have an active role in the remediation efforts provided herein.

WHEREAS the relevant facts giving rise to the need for this Agreement are as follows:

(I) Sylvia A. Miiller is the owner of real property described as:

**NE1/4 of NW1/4 Section 32, T103N, R60W, Davison County, South Dakota.**

(II) Darwin J. Miiller, Shirley A. Hendrix, Gerald L. Miiller, and Cheryl F. Miiller are owners of real property described as:

**NW1/4 NW1/4 S1/2 NW1/4 and NE1/4 ex. Lot H-2 of Section 32, T103N, R60W, Davison County, South Dakota**

(III) Bechens are owners of real property described as:

**East 1513.27’ of SW1/4 lying south of I-90 except Lot A of Bechen Addition in Section 32, T103N, R60W, Davison County, South Dakota.**

(IV) The above referenced properties experience water drainage across portions of said properties which flows from upstream lands including portions owned or controlled by Mitchell and MCPM and through paths subject to the authority of Davison.

(V) Miillers’ properties have been the subject of prior legal action relating to drainage (see 17CIV87-120). An Amended Order was signed by Judge Boyd L. McMurchie on August 17, 1990, following a South Dakota Supreme Court decision (Miiller v. County of Davison, 452 NW2d 119) which affected the drainage rights of Miillers’ properties. Attached and incorporated by reference are the Amended Order and SD Supreme Court decision.

(VI) Miillers’ properties were also the subject of another Davison County legal action concerning drainage (see 17CIV07-294) which resulted in an agreement with Miillers and TMS Partnership which is attached hereto and incorporated by reference.

THEREFORE, in an effort to conclusively resolve the drainage matters relating to the above referenced properties, the parties hereby agree to the following:

(1) Davison shall coordinate construction of an open drainage ditch, hereinafter “Ditch”, across Miillers’ and Bechens’ properties pursuant to the plans and specifications prepared by SPN in its study dated April 19, 2016, which is incorporated by reference. All construction shall be undertaken as further agreed by and between Mitchell and Davison. In relation to dirt and earthen material removed from Miillers’ property as a result of the Ditch construction, Miillers shall retain said dirt and earthen material except that which may be necessary to repair the portion of Kibbee Ditch on Miillers’ property. In relation to dirt and earthen material removed from Bechens’ property as a result of the Ditch construction, Bechens’ shall retain said dirt and earthen material except that which may be necessary to construct the culvert access discussed under Section 17 below. Davison shall stockpile dirt and earthen material removed through the construction process at designated areas adjacent to the Ditch. Miillers and Bechens, and not City nor Davison, shall be responsible for dispersing, to the extent they deem appropriate, their respective retained dirt and earthen materials from such stockpiles after the completion of the project. Davison will seed the Ditch after completion of construction as time, soil conditions, and weather allow.

(2) Davison and Miillers shall consult, confer, and cooperate in maintaining the portion of Kibbee Ditch which crosses Miillers’ property to its original design standard, to include such dam removal and embankment reinforcement which may be necessary.

(3) Miillers and Bechens shall execute appropriate easements to Davison for construction and maintenance of the Ditch.

(4) Davison shall maintain the Ditch as part of the Davison County Drainage System and follow its standard practices for ditch maintenance consisting of grading and re-grading to the original design depth and other maintenance activities as deemed appropriate in the sole discretion of Davison. Davison shall also maintain the northeast to southwest ditch connecting to the main Ditch through Miillers’ and Bechens’ properties but said northeast to southwest ditch shall not be improved in the same manner as the Ditch as part of this Agreement.

(5) Davison shall also provide one access cable concrete ford for Bechen’s and one access cable concrete ford for Miillers’ properties across the Ditch at a location agreeable to the applicable landowner, the specifications of each to be determined by SPN. Fence anchors, specifications to be determined, shall be installed on each side of the Ditch at points where the Ditch crosses the existing fence line.

(6) Bechens may install two (2) cattle bridges/suspended cattle crossings above the Ditch crossing Bechens' property without application or permitting by Davison so long as such cattle bridges/suspended cattle crossings conform to (a) the design as described by Bechens to Davison drainage officials on August 3, 2017, and (b) are built so as to not interfere with the free passage of water through the Ditch. Bechens acknowledge and agree that all construction, repair, and maintenance of such crossings will be Bechen's sole responsibility and at Bechens' sole cost. Bechens further acknowledge and agree that should such crossings be damaged in any

manner, including by the passage of water, debris, or any other cause whatsoever, neither Mitchell nor Davison will be liable or responsible for such damage.

(7) Nothing in this Agreement shall prevent Bechens and Miillers from draining their respective properties into said Ditch so long as Bechens and Miillers conform to all Davison County drainage permitting requirements.

(8) Miillers and Bechens shall execute drainage easements to Mitchell and Davison, permitting runoff/storm water drainage up to the engineered capacity of the Ditch, regardless of the source of drainage.

(9) It is the City's intention to propose Ordinance revisions that will address drainage within and leaving the City of Mitchell. The changes, if enacted into law, are meant to:

- expand the ability to require drainage plans for new developments;
- allow stoppage of projects which cannot sufficiently demonstrate that the nature and quantity of drainage will not be significantly altered;
- prohibit improper alteration of existing drainage system components (such as detention ponds); and
- provide public notice and an opportunity to appeal the issuance of a building permit when a drainage plan was required.

The Parties understand that ordinance changes require multiple public meetings and are subject to referral. Given this uncertainty, the City commits to diligently pursuing such ordinance revisions. However, the failure to pass ordinance revisions meeting substantially all of these goals within a reasonable time shall be deemed a material breach of this Agreement. The parties agree that the draft ordinances provided to Plaintiffs' council during negotiations, and which were presented to the Mitchell City Council for first reading on July 17th, 2017, meet substantially all of these goals.

(10) To the extent practicable, it is the City's intention to coordinate the amount of runoff/storm water drainage entering the Ditch. The City recognizes that the development standard is to require the detention capacity to handle the 100 year rain event and release the water at a five year rate. The City intends to enforce that standard with new developments and the repair/replacement of existing drainage systems.

(11) In relation to the Morris Pond and the two detention ponds north of Loma Linda Drive, the City will not decrease the storage capacity of said ponds without providing for alternate storage, detention, or retention of such waters as would have otherwise been held. Any proposed modifications to said ponds must go through the public notice and hearing process prior to making an alteration. The City will survey, take aerial photos, or keep construction specifics as to each of said ponds. In addition, the City will attempt to keep drainage in the Ditch at reasonable levels by holding and releasing water from said drainage ponds as may be appropriate in order to prevent exceeding the capacity of either said ponds or the Ditch.

(12) Miillers and Bechens hereby covenant not to sue, or otherwise seek remedy against, any upstream property owners, including Davison, Mitchell, and MCPM, for any matter relating to the amount or levels of water present in the Ditch pursuant to the above referenced drainage easements, so long as the same remains within the engineered capacity of the Ditch, and hereby release and waive any and all rights to pursue the same. Such waiver shall not apply to actions for any matter except those arising from the amount or level of water in the Ditch where the engineered capacity has not been exceeded nor shall such waiver apply to any material breach of any provision of this Agreement by the City or Davison.

(13) It is specifically contemplated by the parties that upstream lands may continue to be developed and that said development may increase the amount of drainage entering the Ditch due to a decrease in surface permeability. The above release and waiver shall extend to such drainage variations provided the engineered capacity of the ditch has not been exceeded. Developments shall all be subject to Davison County drainage permitting requirements or City approval as to drainage requirements.

(14) All prior agreements, Court Orders, or Court Decisions relating to the above properties and parties shall remain in effect except as further provided by this section. To the extent that Miiller v. County of Davison may prevent Mitchell or Davison from replacing existing drain pipe from drainage ponds discharging into the Ditch with larger diameter drain pipe, the Miiller v. County of Davison decision is hereby abrogated and/or waived by the parties so long as the amount or levels of water remains within the engineered capacity of the Ditch.

(15) This Agreement shall be binding on the heirs, personal representatives, assigns, or other successors in interest of the respective parties.

(16) This Agreement shall be filed with the Davison County Register of Deeds and shall be deemed a covenant running with the land as to the properties herein described.

(17) Miillers and Bechens shall dismiss the lawsuit against Mitchell and MCPM (17CIV13-276) expediently upon the execution of this Agreement. Thereafter, Miillers and Bechens exclusive remediation option relating to the subject matter of that suit shall be for specific performance of this Agreement.

(18) Davison will provide Bechens with a culvert thirty (30') feet wide and at least eighteen (18") inches in diameter to be used for an access north off of Spruce into the south area of Bechens' property east of the Ditch.

(19) The City and Davison shall begin construction on or before September 1, 2017 and complete the portion of the project on the Parties' lands, including the ditch, fords, anchors, and repair of the portion of Kibbee Ditch on Miiller's property, no later than November 22, 2017. The established start and completion dates shall be subject to reasonable delay if unforeseen, atypical, or impracticable soil, weather, or other conditions outside of the City or Davison's control are encountered. Grass seeding shall be exempt from such timeline.

(20) The parties acknowledge that this Agreement relates to a pending legal action and no admissions of any kind are being made nor implied by the parties as to the disputed subject matter.

(21) This Agreement is not intended nor shall it be construed to create any rights with respect to the subject matter of this Agreement in any third party. No third party shall have any right to enforce any provision of this Agreement, even if indirectly benefited by it.

(22) This Agreement, and any exhibits and attachments, set forth all the promises, agreements, conditions, and understandings, either oral or written, between the parties and no subsequent alteration, amendment, change, or addition to this Agreement or any exhibit or attachment hereto shall be binding unless in writing and signed by the parties.

(23) This Lease shall be governed by and construed in accordance with the laws of the State of South Dakota as to all matters, including but not limited to matters of validity, construction, effect, performance, and remedies. Any legal proceedings which may be necessary shall be heard in the circuit court of the State of South Dakota in Davison County, South Dakota, which court shall have exclusive jurisdiction for all such purposes.

(24) If any provision or portion of a provision of these agreement is held to be unenforceable, such provision or portion of a provision shall be severed and the remaining terms of the agreement shall remain in effect to the fullest extent permitted by law.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
**Sylvia A. Miiller**

Subscribed and sworn before me this \_\_\_\_ day of \_\_\_\_\_, 2017.

(seal)

\_\_\_\_\_  
Notary Public  
My commission expires: \_\_\_\_\_

\_\_\_\_\_  
**Darwin J. Miiller**

Subscribed and sworn before me this \_\_\_\_ day of \_\_\_\_\_, 2017.

(seal)

\_\_\_\_\_  
Notary Public  
My commission expires: \_\_\_\_\_

\_\_\_\_\_  
**Shirley A. Hendrix**

Subscribed and sworn before me this \_\_\_\_ day of \_\_\_\_\_, 2017.

(seal)

\_\_\_\_\_  
Notary Public  
My commission expires:\_\_\_\_\_

\_\_\_\_\_  
**Gerald L. Miller**

Subscribed and sworn before me this \_\_\_\_ day of \_\_\_\_\_, 2017.

(seal)

\_\_\_\_\_  
Notary Public  
My commission expires:\_\_\_\_\_

\_\_\_\_\_  
**Cheryl F. Miller**

Subscribed and sworn before me this \_\_\_\_ day of \_\_\_\_\_, 2017.

(seal)

\_\_\_\_\_  
Notary Public  
My commission expires:\_\_\_\_\_

\_\_\_\_\_  
**Merlin Bechen**

Subscribed and sworn before me this \_\_\_\_ day of \_\_\_\_\_, 2017.

(seal)

\_\_\_\_\_  
Notary Public  
My commission expires:\_\_\_\_\_

\_\_\_\_\_  
**Diane Bechen**

Subscribed and sworn before me this \_\_\_\_ day of \_\_\_\_\_, 2017.

(seal)

\_\_\_\_\_  
Notary Public  
My commission expires:\_\_\_\_\_

CITY OF MITCHELL, SD

(seal)

\_\_\_\_\_  
**Jerry Toomey, Mayor**

Attest:\_\_\_\_\_  
**Michelle Bathke, Finance Officer**

STATE OF SOUTH DAKOTA     )  
  :SS  
COUNTY OF DAVISON         )

Jerry Toomey and Michelle Bathke, being first duly sworn on oath, depose and say that each is the Mayor and Finance Officer respectively of the City of Mitchell, South Dakota, a South Dakota municipal corporation, and, being duly authorized to do so, have hereto executed this Agreement on behalf of the City of Mitchell, SD in their official capacity.

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 2017.

(seal)

\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_

MCPM, LLP

By: \_\_\_\_\_

Its: \_\_\_\_\_

STATE OF SOUTH DAKOTA )

:SS

COUNTY OF DAVISON )

\_\_\_\_\_, being first duly sworn on oath, deposes and says

that he is the \_\_\_\_\_ of MCPM, LLP, a South Dakota limited liability partnership, and, being duly authorized to do so, has hereto executed this Agreement on behalf of MCPM, LLC in his official capacity.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

(seal)

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

DAVISON COUNTY

By: \_\_\_\_\_

Its: \_\_\_\_\_

STATE OF SOUTH DAKOTA )

:SS

COUNTY OF DAVISON )

\_\_\_\_\_, being first duly sworn on oath, deposes and says

that he is the \_\_\_\_\_ of Davison County, South Dakota, and, being duly authorized to do so, has hereto executed this Agreement on behalf of Davison County in his official capacity.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

(seal)

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_