

Agenda Item: 6.

MEMORANDUM

TO: Finance, Legal and Expenditure Subcommittee

FROM: Martin P. Cleveland, Construction Engineer

SUBJECT: Union Dike Indemnification and Hold Harmless Agreement with NEBCO, Inc.

DATE: January 18, 2017

The referenced flood reduction project is a 9.5 mile long Platte River dike located between Valley and Fremont, Nebraska and is operated and maintained by the District since mid-1970's. The project is located on private property and the District has permanent easements to operate and maintain Union Dike. There is very limited access to the Dike and the distance between the upstream end of the Dike at Western Sand and Gravel property (Aka NEBCO) and next downstream access point at Mercer is 3.8 miles.

Since the 1970's the District has had 2 access points (No. 1 and No. 2 on the enclosed location map) at Western Sand and Gravel (NEBCO) property. Access No. 1 is a grass surface road that is 3600 ft. long, prone to wet conditions due to location near Hormel ditch that drains Fremont, irregular in top shape/width and not elevated in a road section and isn't a good all-weather access to Union Dike. Access No. 2 is the Western Sand and Gravel plant entrance road and is level, well surfaced with gravel and an all-weather access to Union Dike. The District has used Access No. 2 for several decades. Recently, Western Sand and Gravel decided to reactivate their mining operation at this site and management changed the lock on the Access No. 2 entrance and will not provide keys to this gate unless the District executes Indemnification and Hold Harmless Agreement, a copy of which is enclosed. The District could upgrade the Access No. 1 road to make it an all-weather access to the Dike, but it will be relatively expensive to accomplish. The purchase of crushed rock surfacing materials and hauling of the rock will cost over \$25,000, plus there will be a need to haul in soil and grade area for making the access into a typical road section. It is reasonable to anticipate the access road improvement cost to be over \$40,000.

District Management recommends that the Union Dike Access No. 2 through the Western Sand and Gravel pit be utilized and that the District execute the Indemnification and Hold Harmless Agreement, as NEBCO requests in order to secure access through their locked entrance gate.

It is recommended by Management that the Subcommittee recommend to the Board of Directors that the General Manager be authorized to execute the proposed Indemnification and Hold Harmless Agreement for Union Dike Access with NEBCO, Inc., subject to terms and conditions deemed necessary by the General Manager and approval as to form by District Legal Counsel.

INDEMNIFICATION AND HOLD HARMLESS AGREEMENT

This agreement (“Agreement”) entered into this ___ day of February 2017, by and between NEBCO, Inc. (“Indemnitee”) and the Papio-Missouri River Natural Resources District, a subdivision of the State of Nebraska (“Indemnitor”).

WHEREAS, Indemnitee previously granted to Indemnitor an Easement (“Easement”), a true and correct copy of which is attached hereto as Exhibit A and incorporated by this reference as if fully set forth herein;

WHEREAS, Indemnitee recently installed a new lock (“Lock”) on a gate located on Indemnitee’s property that will interfere with Indemnitor’s right of ingress and egress to the Easement so long as Indemnitor is unable to open the Lock;

WHEREAS, Indemnitee has agreed to provide Indemnitor with keys to the Lock so that Indemnitor may continue to access to the Easement through the Locked Gate (“Locked Gate Access Route”) so long as Indemnitor agrees to indemnify and hold harmless Indemnitee for any damages to or caused by Indemnitor, of any kind, as a result of Indemnitor’s use of the Locked Gate Access Route, and Indemnitor has agreed to do so;

NOW THEREFORE, for good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Indemnitee will provide Indemnitor with keys to the Lock so that Indemnitor may continue to access the Easement and the lock will not interfere with Indemnitor’s use and enjoyment of the Easement.
2. In exchange and as consideration for Indemnitee providing Indemnitor with keys to the Lock, Indemnitor agrees that Indemnitor shall never claim any damages against NEBCO, Inc., its successors, affiliated entities, officers, directors, shareholders, and employees and/or agents of any of them or any entity affiliated with NEBCO (collectively referred to herein as the “Indemnitees”), for any injuries or damages suffered on account of the exercise of the rights to use the Locked Gate Access Route. Indemnitor shall indemnify Indemnitees and hold Indemnitees harmless from any and all claims for damages and expenses resulting from, arising out of, or in any way connected with, the exercise of the rights and/or privileges by Indemnitor or Indemnitor’s assignees, permittees or other persons entering and/or using the Locked Gate Access Route and/or accessing the Locked Gate Access Route at the invitation and/or permission of Indemnitor, and Indemnitor covenants not to file any lawsuit and to indemnify Indemnitee for any lawsuit filed by any person, organization, entity, or other users of the Locked Gate Access Route using the same with Indemnitor’s permission or knowledge. The obligations provided for in this indemnification provision shall survive termination of this Agreement, including but not -limited to the terms of Exhibit A attached hereto.

Dated and executed this ____ day of February 2017.

NEBCO, INC., a Nebraska Corporation,

Papio-Missouri River Natural Resources
District, State of Nebraska,

By: _____
Robert A. Nordquist, President

By: _____
John Winkler, General Manager

following-described reference line], such corridor shall be One Hundred Ninety feet in width and comprise all that land within Fifty-Five feet (55') on the Westerly (Platte River) side, and One Hundred Thirty-Five feet (135') on the Easterly side, of the following reference line:

(a) Prior the completion of initial dike repair or modification activities hereunder, the reference line shall be deemed to be the centerline of the existing Union Dike which now extends across the GRANTORS' Property or across property adjacent thereto.

(b) Within a reasonable time after completion of initial dike repair or modification activities hereunder, the GRANTEE shall describe the centerline of the modified dike in a recordable Notice referring to this Easement, and shall record such Notice in the office of the Register of Deeds of the county in which the GRANTORS' Property is located, whereupon the reference line for the description of the Levee Easement Area shall be the centerline described in such Notice, and this Easement shall be deemed to be amended, pro tanto, in accordance therewith.

Union Dike Stations 455+00 and 500+00, referred to hereinabove, are shown on the diagram attached hereto as Exhibit "A" and incorporated herein by reference.

1. By this Easement, GRANTORS hereby grant to the GRANTEE, and to its successors and assigns and their officers, agents, employees and contractors, the permanent right to enter the Levee Easement Area and therein to construct and reconstruct, modify, operate, patrol, maintain, repair, and replace the flood protection levee located therein, including underseepage berms, jetties and riverbank stabilization and protection measures, observation wells, relief wells, gravel drains, relief drains, outlet pipes, drainage structures, and other appurtenances, and including maintenance roads in 15 foot corridors beyond, adjacent to and paralleling the toes on both sides of such levee in the Levee Easement Area. Such easement shall also include the GRANTEE's right to clear trees and other vegetation from the Levee Easement Area; to borrow or deposit fill in the Levee Easement Area; to have the air space above the Levee Easement Area unobstructed to such height as will allow the passage and operation of levee construction and maintenance machinery; and, the right to lateral and subjacent support for the levee. Either GRANTORS or GRANTEE may construct and maintain fences along the outside boundaries of the aforesaid maintenance road corridors. GRANTORS may not construct other structures or excavate inside the Levee Easement Area. GRANTORS shall not excavate within 200 feet

on either side of the Levee Easement Area to any depth (measured below the natural ground plane) deeper than one-fourth the horizontal distance from the point of excavation to the nearest boundary of the Levee Easement Area. If the GRANTEE is pumping within the Levee Easement Area, which it has the right to do under this Easement, it must maintain the vertical depth restrictions established by the formula in the preceding sentence. GRANTORS may farm all portions of the Levee Easement Area not occupied by the reconstructed dike or included in the maintenance road corridors.

2. The consideration recited herein shall constitute payment in full for any and all damages sustained by the GRANTORS and their successors and assigns by reason of the exercise of any of the rights or privileges herein described or granted. The GRANTORS waive compliance by the GRANTEE with the notice and other provisions of the Uniform Procedure for Acquiring Private Property for Public Use (Sec. 25-2501, R.R.S. 1943, et seq. as amended).

3. This Easement includes the GRANTEE's right in ingress and egress at any time over other portions of the GRANTORS' Property not occupied by buildings or other improvements which would be damaged by the exercise of such right, for the purpose of carrying out activities authorized by this Easement.

4. There is reserved to the GRANTORS, their heirs and assigns, the right and privilege to use the above-described easement area at any time, in any manner and for any purposes not inconsistent with the full use and enjoyment by the GRANTEE, its successors and assigns, of the easement and the rights and privileges herein granted.

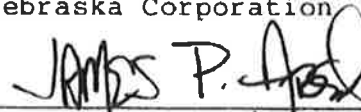
5. The GRANTORS shall not be responsible for operating or maintaining the Union Dike or any of the appurtenances thereto.

6. This Easement shall not pass, nor shall it be construed to pass, to the GRANTEE, any fee simple interest or title to the above-described lands.

IN WITNESS WHEREOF, this Easement is executed by the GRANTORS
this 18 day of AUGUST, 1988.

NEBCO, Inc.,
a Nebraska Corporation

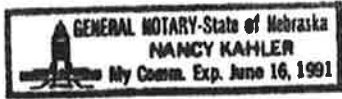
BY



President

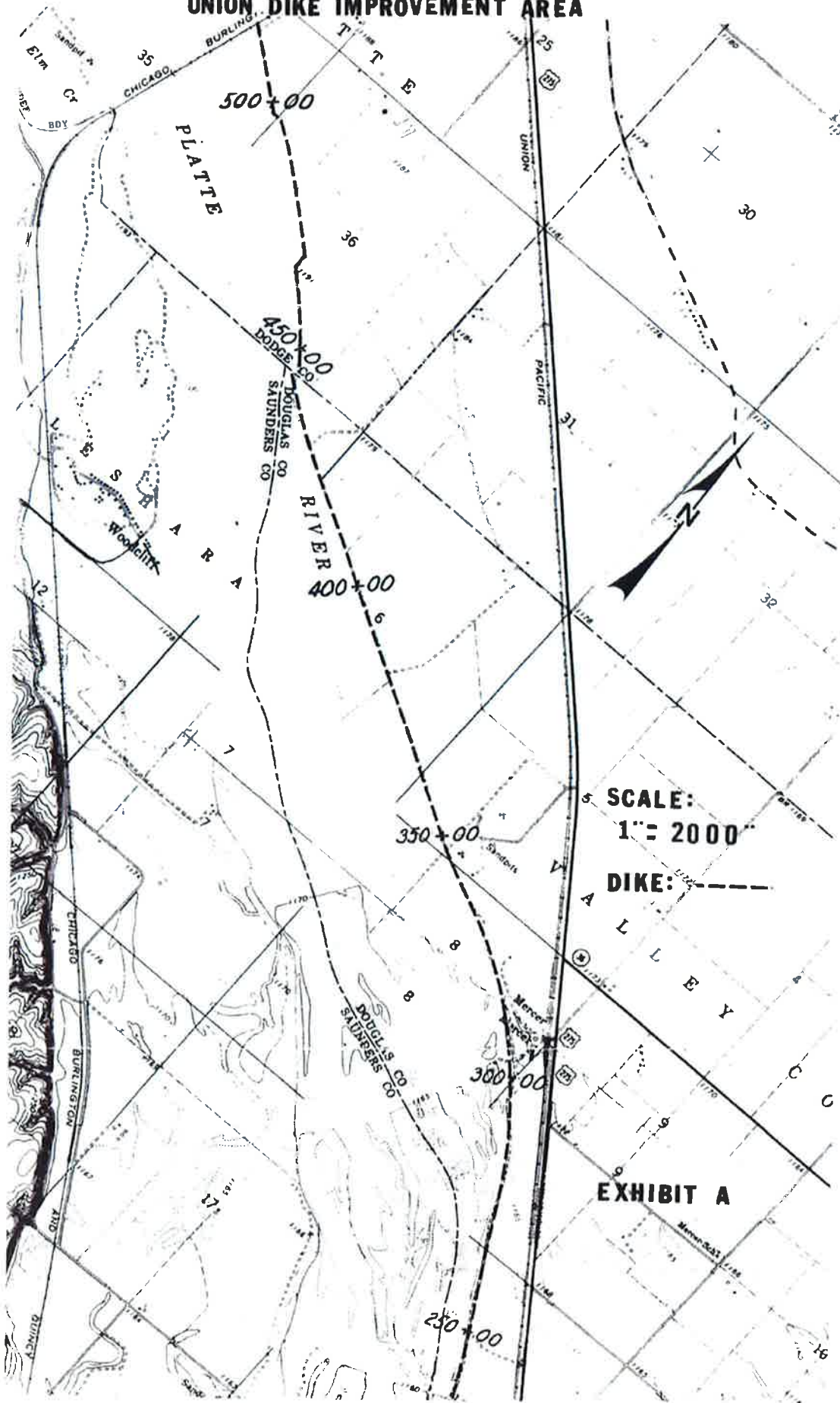
STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

The foregoing instrument was acknowledged before me this
18 day of August, 1988, by James P. Abel, President of
NEBCO, Inc., a Nebraska Corporation, on behalf of the corporation.



Nancy Kahler
Notary Public

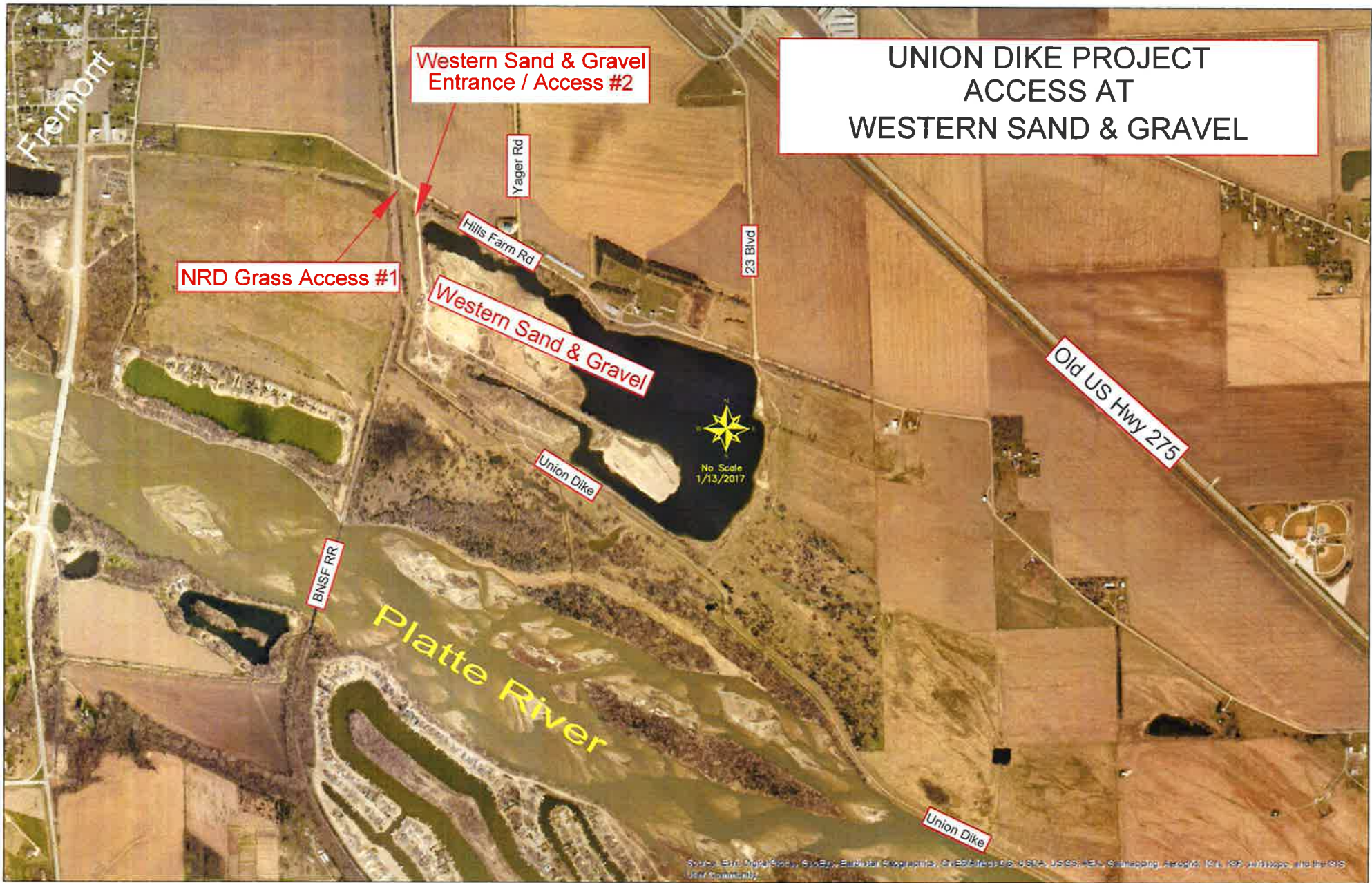
UNION DIKE IMPROVEMENT AREA



SCALE:
1" = 2000'

DIKE: 

EXHIBIT A



**UNION DIKE PROJECT
ACCESS AT
WESTERN SAND & GRAVEL**

**Western Sand & Gravel
Entrance / Access #2**

NRD Grass Access #1

Western Sand & Gravel



No Scale
1/13/2017

Union Dike

Platte River

Source: Esri, DigitalGlobe, GeoEye, Earthstar (Reality), CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, IGP, and the GIS User Community

UNION DIKE PROJECT ACCESS AT WESTERN SAND & GRAVEL



NRD Grass Access #1

Western Sand & Gravel
Entrance / Access #2

Western Sand & Gravel

Yager Rd.

Hills Farm Rd.

23B1W

Union Dike

Union Dike



Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, SPP, and the GIS User Community

**Union Dike Access at Western Sand and Gravel
Looking South towards Platte River
January 2017**

Access No. 2 (WSG Plant)



BNSF RR



Access No. 1



**Union Dike Access at Western Sand and Gravel
Access No. 1
Looking SE
January 2017**

Union Dike

