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To: John Winkler, General Manager
Gerry Bowen, Project Manager
Papio-Missouri River Natural Resources District

Date: April 8, 2011

Subject: MOPAC (Hwy 50 to Chalco) Trail Project; compliance with LB 1010

As requested, this reports on steps the District must take to satisfy the requirements of LB 1010, 2010 Session, in establishing the subject project.

All of the provisions of LB 1010 are attached hereto for convenient reference. My impression of this set of statutes is that, by imposing a series of confusing, redundant and onerous regulations, it seems to be intended to discourage natural resources districts from establishing further trails in Nebraska.

The first step is to “establish” the project by resolution of the Board of Directors. Following is a proposed resolution for that purpose.

Resolution

WHEREAS, in accordance with Section 2-3234.04, and prior to establishing the MOPAC (Hwy 50 to Chalco) Trail project, the District held a public hearing on April 14, 2011, and considered all of the following, to-wit:

- (1) The proposed route for the trail, including maps and illustrations, and the mode of travel to be permitted;
- (2) The areas adjacent to such route to be utilized by the district for scenic, historic, natural, cultural, or developmental purposes;
- (3) The characteristics that make the proposed route suitable as a trail;
- (4) The plans for developing, operating, and maintaining the proposed trail;
- (5) Any anticipated problems enforcing the proper use of the proposed trail or hazards to private real property adjacent to such trail;

(6) The current status of the real property ownership and current and potential use of the real property in and along the proposed route;

(7) The estimated cost of acquisition of the real property, or an interest therein, needed for the proposed route; and;

(8) The extent and type of private real property interest needed to establish the proposed trail, the right-of-way acquisition process to be followed, and the circumstances under which eminent domain may be utilized.

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the Papio-Missouri River that, having followed the procedure under Section 2-3234.04, Neb. Rev. Stat., the Board of Directors hereby determines that the District should establish, develop and maintain the MOPAC (Hwy 50 to Chalco) Trail project and, for that purpose, the District should acquire private real property and interests therein by attempting to negotiate with the private real property owners affected by the trail, and should proceed in good faith to negotiate agreements with such owners for the private real property, or interests therein, needed for such purposes.

BE IT FURTHER RESOLVED by the Board of Directors that, in accordance with Section 2-3252, Neb. Rev. Stat., the Board of Directors does hereby also and further determine that the MOPAC (Hwy 50 to Chalco) Trail Project will be of predominantly general benefit to the District, with only an incidental special benefit, and should be developed and executed using any available funds of the District, including but not limited to those from the tax levied pursuant to Section 2-3225, Neb. Rev. Stat.

Particular attention is directed to Sections 2-3234.04 and 2-3234.05, on the attached.

It is seen that after first establishing the project by a majority of the Board in accordance with Section 2-3234.04, and after attempts to negotiate with landowners have been made, Section 2-3234.05 requires a super-majority of the Board for approval of a resolution permitting the exercise of eminent domain. It is evident that by the time eminent domain is sought the District will already have invested substantial sums on the project. Thus, it will be a practical necessity that, barring changes in membership of the Board, there likely should be a super-majority of the Board in favor of the project in the first instance.

2-3234. Districts; eminent domain; powers. Except as provided in sections 2-3226.11 and 2-3234.02 to 2-3234.09, each district shall have the power and authority to exercise the power of eminent domain when necessary to carry out its authorized purposes within the limits of the district or outside its boundaries. Exercise of eminent domain shall be governed by the provisions of sections 76-704 to 76-724, except that whenever any district seeks to acquire the right to interfere with the use of any water being used for power purposes in accordance with sections 46-204, 70-668, 70-669, and 70-672 and is unable to agree with the user of such water upon the compensation to be paid for such interference, the procedure to condemn property shall be followed in the manner set forth in sections 76-704 to 76-724 and no other property shall be included in such condemnation. No district shall contract for delivery of water to persons within the corporate limits of any village, city, or metropolitan utilities district, nor in competition therewith outside such corporate limits, except by consent of and written agreement with the governing body of such political subdivision. A village, city, or metropolitan utilities district may negotiate and, if necessary, exercise the power of eminent domain for the acquisition of water supply facilities of the district which are within its boundaries.

Source: Laws 1969, c. 9, § 34, p. 122; Laws 1972, LB 543, § 12; Laws 1994, LB 480, § 13; Laws 1998, LB 896, § 8; Laws 1999, LB 436, § 8; Laws 2009, LB160, § 6; Laws 2010, LB1010, § 9. **Effective Date: April 14, 2010**

2-3234.02. Trails; procedures. Sections 2-3234.02 to 2-3234.09 are procedures for the use of eminent domain by a natural resources district to take private real property for a trail.

Source: Laws 2010, LB1010, § 1. **Effective Date:** April 14, 2010

2-3234.03. Trails; terms, defined. For purposes of sections 2-3234.02 to 2-3234.09:

- (1) District means a natural resources district;
- (2) Private real property does not include any public land such as real property under the general management of the Board of Educational Lands and Funds;
- (3) Supermajority means sixty-seven percent or more; and
- (4) Trail means a thoroughfare or track across real property used for recreational purposes.

Source: Laws 2010, LB1010, § 2. **Effective Date:** April 14, 2010

2-3234.04. Trails; public hearing; considerations. Before establishing a trail, the district shall consider, at a public hearing, all of the following:

- (1) The proposed route for the trail, including maps and illustrations, and the mode of travel to be permitted;
- (2) The areas adjacent to such route to be utilized by the district for scenic, historic, natural, cultural, or developmental purposes;
- (3) The characteristics that make the proposed route suitable as a trail;
- (4) The plans for developing, operating, and maintaining the proposed trail;
- (5) Any anticipated problems enforcing the proper use of the proposed trail or hazards to private real property adjacent to such trail;

(6) The current status of the real property ownership and current and potential use of the real property in and along the proposed route;

(7) The estimated cost of acquisition of the real property, or an interest therein, needed for the proposed route; and

(8) The extent and type of private real property interest needed to establish the proposed trail, the right-of-way acquisition process to be followed, and the circumstances under which eminent domain may be utilized.

Source: Laws 2010, LB1010, § 3. Effective Date: April 14, 2010

2-3234.05. Trails; establishment; district; powers; findings. If the district decides to establish the trail after following the procedure under section 2-3234.04, the district may acquire private real property, or an interest therein, to develop and maintain the trail by:

(1) Seeking to secure the written consent of the private real property owners affected by the trail to enter into negotiations and proceeding in good faith to reach negotiated agreements with such owners for the private real property, or an interest therein needed; or

(2) If all reasonable efforts to secure written consent and negotiated agreements to acquire private real property, or an interest therein, have failed, the district board may, by resolution adopted by a supermajority of the district board at a public meeting, elect to conduct a proceeding to determine whether to use the power of eminent domain to acquire such property. Such proceeding shall be a public hearing with general notice to the public and specific notice by registered mail to all private real property owners whose property would be subject to condemnation by eminent domain. The public hearing shall be held no sooner than forty-five days after the date the resolution is adopted. At the public hearing, the district board shall receive evidence on the question of whether to acquire private real property by eminent domain for the purpose of constructing the trail. The district board may, by vote of a supermajority of its members, elect to proceed with eminent domain to acquire such property if the district board finds, by clear and convincing evidence received at the public hearing, that all of the following criteria are met:

(a) Whether the trail has been publicized at a public hearing held in accordance with section 2-3234.04 in the area where the trail is planned and reasonable notice of the hearing was provided to affected private real property owners;

(b) Whether good faith attempts to negotiate agreements meeting the requirements of subdivision (1) of this section with the affected private real property owners have been made and have failed for some or all of the private real property that is determined by the district board to be necessary for the trail to be developed;

(c) Whether all other trail route alternatives have been considered, with an evaluation of the extent to which private real property may be involved and which may require the exercise of eminent domain for each alternate route;

(d) Whether in locating the proposed trail consideration was given to the directness of the route; potential benefit to communities and public facilities adjacent to the trail route; trail design and costs; safety to trail users, vehicle operators, and adjacent persons; and adverse impacts and intrusions upon private real property owners or persons using such property;

(e) Whether good faith attempts have been made to address the concerns of affected private real property owners regarding trail design, privacy, land protection, management, and maintenance; and

(f) Whether any development and management of the trail is designed to harmonize with and complement any established forest or agricultural plan for the affected private real property.

Source: Laws 2010, LB1010, § 4. Effective Date: April 14, 2010

2-3234.06. Trails; right of access. When the acquisition of a parcel of private real property, or an interest therein, for a trail divides the private real property in such a manner that the owner has no reasonable access to one part of the divided parcel, the district shall allow reasonable access across the trail at a location mutually agreed upon by the owner of such divided parcel and the district.

Source: Laws 2010, LB1010, § 5. Effective Date: April 14, 2010

2-3234.07. Trails; applicability of other law. Acquisition of private real property, or an interest therein, and any utilization of eminent domain approved under sections 2-3234.02 to 2-3234.09 to establish a proposed trail shall be conducted in the manner and subject to the requirements provided in sections 25-2501 to 25-2506 and 76-701 to 76-726.

Source: Laws 2010, LB1010, § 6. Effective Date: April 14, 2010

2-3234.08. Trails; owner or lessee; duties; negotiated written agreement; requirements. (1) A private real property owner or lessee of property adjoining a trail has no duty (a) to maintain or repair the trail or (b) to protect users of the trail from danger resulting from conditions on the trail unless such conditions are the result of an intentional or negligent act of such owner or lessee.

(2) A negotiated written agreement between a district and a private real property owner regarding the acquisition of real property, or an interest therein, by the district to establish and maintain a trail shall clearly express both parties' rights and obligations, including the obligation of the district to maintain the trail and the liability of the district for property damage or personal injury, or both, to users of the trail.

Source: Laws 2010, LB1010, § 7. Effective Date: April 14, 2010

2-3234.09. Trails; decision of district board; appeal. An affected private real property owner may appeal the decision of the district board to use eminent domain under sections 2-3234.02 to 2-3234.09 by petition in error to the district court of the county where the affected private real property is located. No petition to condemn private real property affected by the proposed trail shall be filed in county court until any error proceeding under this section is final.

Source: Laws 2010, LB1010, § 8. Effective Date: April 14, 2010