

**MEETING DATE:** July 9, 2015

**TITLE:** Authorization to execute a Memorandum of Understanding with Marvin Johnson, Dean and Dawn Mooney and Hilltop Farm and to complete a Painter Creek Crossing Design

**RESOLUTION NUMBER:** 15-060

**PREPARED BY:** Renae Clark

**E-MAIL:** rclark@minnehahacreek.org

**TELEPHONE:** 952-641-4510

**REVIEWED BY:**  Administrator  Counsel  Program Director: James Wisker  
 Board Committee  Engineer  Other

**WORKSHOP ACTION:**

<input type="checkbox"/> Advance to Board mtg. Consent Agenda. action.	<input type="checkbox"/> Advance to Board meeting for discussion prior to
<input type="checkbox"/> Refer to a future workshop (date):_____ (date):_____	<input type="checkbox"/> Refer to taskforce or committee
<input type="checkbox"/> Return to staff for additional work.	<input type="checkbox"/> No further action requested.
<input checked="" type="checkbox"/> Other (specify): <b><u>Take Action on July 9, 2015</u></b>	

**PURPOSE or ACTION REQUESTED:**

1. Authorization to execute a Memorandum of Understanding with Marvin Johnson, Dean and Dawn Mooney and Hilltop Farm (together referred to below as "Owners") to perform conservation area planning and repair of a cattle crossing within an approximate 350 acre area over Painter Marsh within the City of Independence.
2. Authorization to contract with Wenck Associates for the design of a new cattle crossing on property subject to the proposed Memorandum of Understanding.

**PROJECT/PROGRAM LOCATION:**

Painter Creek Subwatershed – See attached map

**PAST BOARD ACTIONS:**

Resolution 06-025: Acting under MN Statute 103 E.701 as the public drainage authority, the MCWD Board of Managers authorized the District to undertake repair of a cattle crossing of Painter Creek on property owned by Dean and Dawn Mooney, leased by Marvin Johnson.

**SUMMARY:**

The Painter Creek Subwatershed is a developing area in the western portion of MCWD. Painter Creek, also known as county Ditch 10, an altered natural watercourse and a public drainage system constructed in 1908, drains from the headwaters at Lake Katrina (Baker Park Reserve), through Painter Marsh to Jennings Bay on Lake Minnetonka. Jennings Bay is currently on the State Impaired Waters List and has historically had water quality issues. In 2004, MCWD undertook a Painter Creek Feasibility Study to assess the methods available to

restore water quality to Jennings Bay and its tributary area, with primary emphasis on the Painter Creek Subwatershed and identified opportunities within Painter Marsh. The marsh in its current extent lies on portions of about 16 parcels. Four of these are owned by Marvin Johnson, one by Grace Johnson, one by Dean and Dawn Mooney, and three by Hilltop Farm. Three are owned by the District. The others are owned by private parties not signatory to the proposed MOU.

A cattle crossing over Painter Creek where it enters the northern edge of the marsh, on the property of Dean and Dawn Mooney, was repaired by the District in 2008, in its role as drainage authority. The crossing is primarily utilized by Marvin Johnson who leases the land. As part of discussions with members of the Johnson family regarding the disrepair of the crossing due in part to the 2014 high water, the District and members of the Johnson family have discussed and outlined in the draft memorandum of understanding mutual conservation goals for Painter Marsh and adjacent properties.

The attached memorandum of understanding outlines the following general areas of collaboration:

1. Physical assessment of the hydrologic, hydraulic and ecological conditions of Painter Marsh and the potential for a beneficial restoration and conservation plan.
2. Cooperation in review of Owners' intentions for maintenance, use and development of their properties and the compatibility of Owners' intentions with preservation and ecological improvement of Painter Marsh. At Owners' request, the District may assist in reviewing the regulatory context under WCA and District rules and in consulting with the City of Independence with respect to city land use plans, ordinances and controls.
3. The District, in consultation with and with cooperation of Owners, will prepare for a reconstructed crossing. For this purpose, the District would take steps to seek to secure FEMA funding and applicable permits and would authorize the District engineer to prepare a design in accordance with legal constraints. The MOU states that the warranty for the crossing design and responsibility for construction would be determined in a subsequent, legally binding agreement.
4. Cooperation in the development of the terms of easements that would protect the water quality, flood management and ecological features of Painter Marsh and allow the District to undertake projects to preserve and enhance those features. Owners will also facilitate contact with other property owners not signatory to this MOU and assist to gain those owners' cooperation in the goals of this MOU and in conveying easements necessary to support the District's work. Again, the MOU states that any actual obligation for an Owner to convey an easement would be established in a subsequent agreement.

The requested Board Action seeks authorization to enter into a Memorandum of Understanding with the identified parties on Painter Marsh for the purposes of conservation planning and authorization to contract with Wenck Associates for the design of a new cattle crossing across subject property. Because the existing crossing, which was repaired by the District in 2008, is in disrepair due in some measure to recent flooding, its repair or reconstruction may be eligible for Federal Emergency Management Agency (FEMA) funding which is being coordinated by the District. The crossing is of use to Owners for cattle access to pasture, woodlot access and other purposes. Project specific easements and binding agreements will be proposed in coordination with Board approval of design.

**ATTACHMENTS:**

1. Map
2. Draft Memorandum of Understanding

**RESOLUTION**

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**RESOLUTION NUMBER:** 15-060

**TITLE:** **Authorization to execute a Memorandum of Understanding with Marvin Johnson, Dean and Dawn Mooney and Hilltop Farm and to complete a Painter Creek Crossing Design**

WHEREAS, the Minnehaha Creek Watershed District has identified the Painter Creek subwatershed as a priority area for Capital Improvements in its 2007 watershed management plan (WMP);

WHEREAS, under the watershed law and its WMP, the District is responsible to manage wetland and related surface water resources within its boundaries for public flood management, water quality and ecological benefits;

WHEREAS, the District also serves as the drainage authority under Minnesota Statutes chapter 103E for public drainage systems within the watershed including Painter Creek (County Ditch 10);

WHEREAS, the U.S. Army Corps of Engineers (USACE) has performed feasibility work for wetland and related water resource restoration within the Painter Creek subwatershed including Painter Marsh, and the USACE and the District is exploring opportunities to implement identified restoration work through cooperation and cost-sharing;

WHEREAS, District staff has developed a proposed memorandum of understanding (MOU) with Marvin Johnson, Dean and Dawn Mooney, and Hilltop Farm, owners of land underlying Painter Marsh, to explore means to achieve preservation and ecological improvement of Painter Marsh consistent with these parties' intent as to the maintenance, use and development of their properties and to prepare for reconstruction of a cattle crossing over Painter Creek damaged by recent high water; and

WHEREAS, the MOU provides for close coordination with the City of Independence and for the parties to explore together the cooperation of other owners of land underlying Painter Marsh;

NOW, THEREFORE, BE IT RESOLVED that the District Board of Managers hereby authorizes the Board President to execute the proposed Memorandum of Understanding among the District, Marvin Johnson, Dean and Dawn Mooney, and Hilltop Farm, with non-substantive revisions and on advice of District counsel;

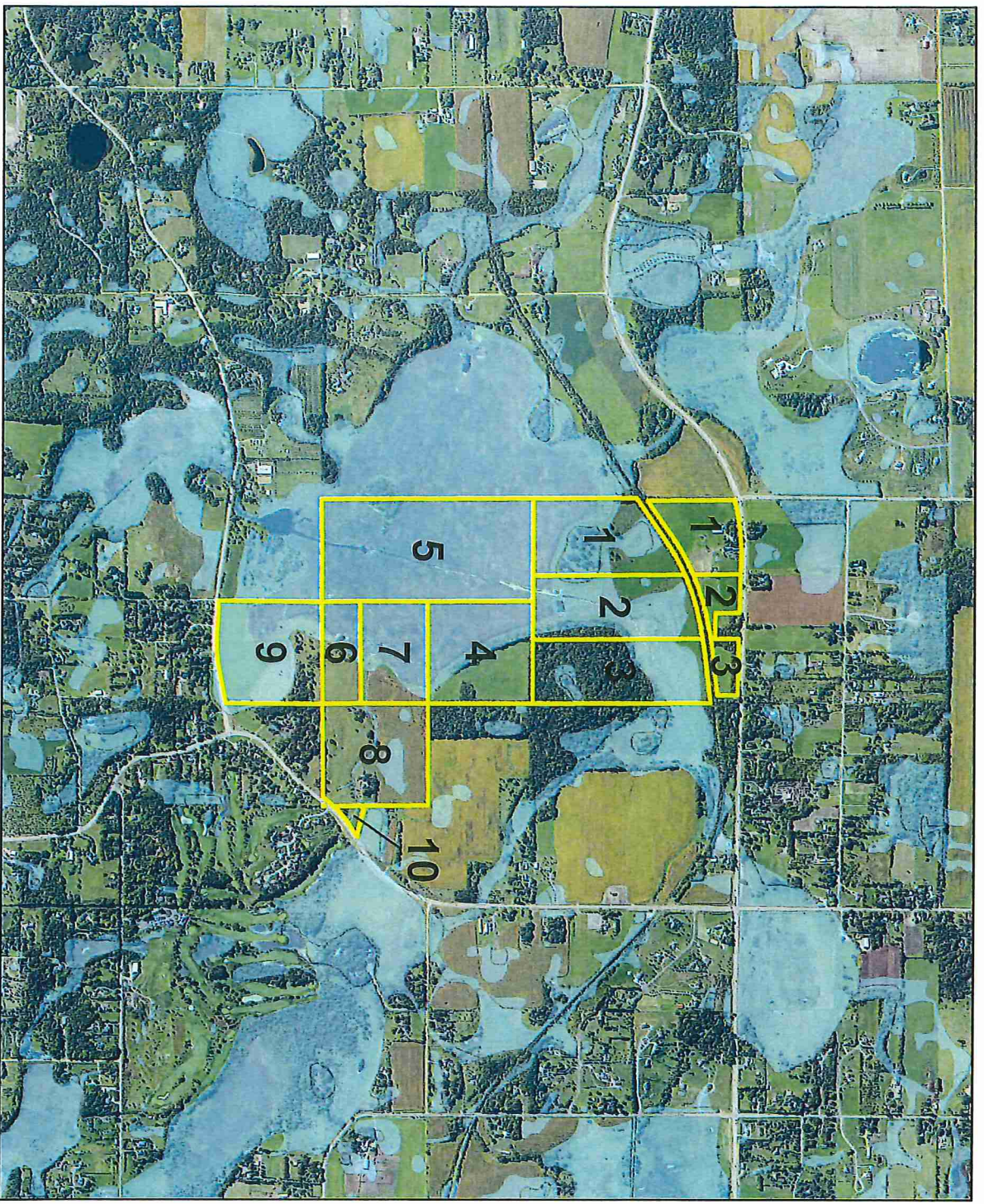
BE IT FURTHER RESOLVED that the District Board of Managers authorizes the District administrator to contract with Wenck Associates for the design of a new cattle crossing for the not to exceed amount of \$8,000 and directs the administrator to take appropriate steps for the purpose of securing Federal Emergency Management Agency funds for the crossing reconstruction; and

BE IT FINALLY RESOLVED that the District administrator is authorized to take all further steps necessary for the District to fulfill its responsibilities under the MOU.

Resolution Number 15-060 was moved by Manager \_\_\_\_\_, seconded by Manager \_\_\_\_\_.  
Motion to adopt the resolution \_\_\_ ayes, \_\_\_ nays, \_\_\_ abstentions. Date: \_\_\_\_\_.

\_\_\_\_\_  
Secretary Date: \_\_\_\_\_

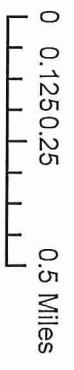
# Johnson MOU



## Legend

-  Parcels
-  Wetlands

- 1 Grace Johnson
- 2 Mooney
- 3 Hilltop Farm, Inc.
- 4 Marvin Johnson
- 5 Marvin Johnson
- 6 Hilltop Farm, Inc.
- 7 Marvin Johnson
- 8 Marvin Johnson
- 9 Hilltop Farm, Inc.
- 10 Marvin Johnson



1:24,452

## MEMORANDUM of UNDERSTANDING

Minnehaha Creek Watershed District, Marvin Johnson,  
Dean and Dawn Mooney and Hilltop Farms

Crossing Repair and Conservation Management  
Painter Marsh, City of Independence

This Memorandum of Understanding (MOU) is made among the Minnehaha Creek Watershed District ("District"), a political subdivision of the State of Minnesota, and Marvin Johnson; Dean and Dawn Mooney; and Hilltop Farm, a Johnson family trust, owners of land surrounding and including Painter Marsh within the City of Independence (together, "Owners").

### Statement of Purpose

A. Under governing law and its adopted watershed management plan, the District is responsible to manage wetland and related surface water resources within its boundaries for public flood management, water quality and ecological benefits. In addition, the District is the drainage authority under Minnesota Statutes chapter 103E for public drainage systems within the watershed and, within the City of Independence, implements the Minnesota Wetland Conservation Act (WCA) and District rules governing impacts to wetlands.

B. Painter Marsh occupies an area of about 350 acres and between County Roads 6 and 26. The marsh *[MCWD will describe features, values, condition]*.

C. The marsh in its current extent of ordinary flowage lies on portions of 16 parcels of record, more or less. Four of these are owned by Marvin Johnson, one by Grace Johnson, one by Dean and Dawn Mooney, and three by Hilltop Farm. Three are owned by the District. The others are owned by private parties not signatory to this MOU.

D. Owners' parcels presently are subject to non-intensive uses including large-lot single-family residential use, cattle pasture, woodlot, and maple syruping. Owners are interested in preserving and enhancing the ecological condition of the marsh while also preserving use and economic value of their lands.

E. Painter Creek is a natural watercourse and a public drainage system constructed in 1908 and named Hennepin County Ditch 10. The creek passes through the marsh. A cattle crossing over the creek where it enters the northern edge of the marsh, on the property of Dean and Dawn Mooney, was repaired by the District in 2008, in its role as drainage authority. The crossing is again in disrepair due in some measure to recent flooding. Its repair or reconstruction may be eligible for Federal Emergency Management Agency (FEMA) funding. The crossing is of use to Owners for cattle access to pasture, woodlot access and other purposes.

F. The District's purposes include managing and maintaining public drainage systems within its boundaries, assisting property owners to responsibly manage their wetland and stream resources, and acting to improve water quality and ecology. Federal funds, through the U.S. Army Corps of Engineers, may become available to the District for water resource enhancement work within Painter Marsh.

G. The parties wish to cooperate to provide for crossing reconstruction and to advance conservation objectives consistent with Owners' desired use of their properties. The parties acknowledge that achieving these objectives depends on their working cooperatively pursuant to the terms of this MOU.

**THEREFORE** this MOU does not state legally binding responsibilities or obligations but documents mutual goals and establishes a cooperative framework within which the potential for a beneficial collaboration may be explored.

### **Agreement**

1. The District, with Owners' cooperation, will assess the hydrologic, hydraulic and ecological conditions of Painter Marsh and the potential for a beneficial restoration and conservation plan. For this purpose the District and its technical advisors may enter Owners' lands at reasonable times to inspect and survey, and may engage in limited disturbance of those lands, but will restore any disturbance materially to its preexisting condition. This paragraph does not authorize the District to enter any building or structure. If the District finds that a potential action may require the cooperation of a neighboring landowner, the District and the Johnson's will consult as to the best way to engage the landowner.

2. Owners and the District will cooperate to review Owners' intentions for maintenance, use and development of their properties and the compatibility of Owners' intentions with preservation and ecological improvement of Painter Marsh. At Owners' request, the District may assist in reviewing the regulatory context under WCA and District rules and in consulting with the City of Independence with respect to city land use plans, ordinances and controls.

3. The District, in consultation with and with cooperation of Owners, will prepare for a reconstructed crossing. This will include taking steps to secure FEMA funding and applicable permits and preparing a design in accordance with legal constraints. The extent of warranty for the crossing design, and the responsibility for construction, are not determined by this MOU but will be established in a subsequent legally binding agreement.

4. The District and Owners will cooperate to develop the terms of easements that would protect the water quality, flood management and ecological features of Painter Marsh and allow the District to undertake projects to preserve and enhance those features. The parties recognize that the District's ability to undertake such work likely will require easements from Owners as well as other owners of lands underlying the marsh. Owners will facilitate contact with such other owners and efforts to gain those owners' cooperation in the goals of this MOU and in conveying easements necessary to support the District's work. This MOU does not create any obligation for an Owner to convey an easement. Any such obligation would be established in a subsequent legally binding agreement.

5. On request, each Owner will provide the District with any information about their property that may help the District in its work under this MOU, except for information that the Owner considers private. Owners recognize that information in the District's possession is subject to the Minnesota Data Practices Act. Where an Owner believes that certain information is sensitive, they will advise the District and the parties will cooperate to determine whether and how the information can be protected from public availability. On District request, an Owner will provide lease and title records for review as to third-party encumbrances or other interests in the property that might obstruct a conservation or enhancement activity.

6. The parties will work together in good faith and communicate in a timely fashion to advance the goals of this MOU. The District may assist Owners in understanding any potential tax, valuation or other financial or legal consequences of marsh/wetland resource work. Notwithstanding, Owners recognize that assistance provided by the District under this MOU is informal and without any warranty or duty of care whatsoever. Owners recognize that it will be appropriate and necessary at a certain time to engage their own technical and legal representatives.

7. Each party will bear the cost of carrying out its tasks and responsibilities under this MOU. Official contacts for all communications under this MOU are as follows:

*District*

[ ]  
MCWD  
15320 Minnetonka Boulevard  
Minnetonka MN 55345

Marvin Johnson  
[ ]

Dean and Dawn Mooney  
[ ]

Hilltop Farm, a family trust  
Marvin Johnson, President  
[ ]

A party may change its official contact by written notice to the other party.

8. This MOU is effective when fully executed by the parties and expires two years thereafter.

**MINNEHAHA CREEK WATERSHED DISTRICT**

\_\_\_\_\_  
Sherry White, President

Date:

*Approved for Form and Execution:*

\_\_\_\_\_  
MCWD Counsel

\_\_\_\_\_  
Marvin Johnson

Date:

\_\_\_\_\_  
Dean Mooney

Date:

\_\_\_\_\_  
Dawn Mooney

Date:

**HILLTOP FARM, a family trust**

\_\_\_\_\_  
Marvin Johnson, President

Date: