

APPENDIX E

USACE Jurisdictional Determinations



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
NORTH DAKOTA REGULATORY OFFICE
1513 SOUTH 12TH STREET
BISMARCK ND 58504-6640
May 10, 2011

North Dakota Regulatory Office

[NWO-2011-00734-BIS]

Kadrmass, Lee and Jackson, Inc
ATTN: Mr. Erik Gilbertson, P.E.
1010 4th Avenue SW
P.O. Box 937
Valley City, North Dakota 58072-0937

Dear Mr. Gilbertson:

This is in reference to your April 18, 2011, solicitation of view (SOV) letter concerning the proposed relocation of the Minnewaukan Public School and Benson County Social Services buildings. The project is located in Section 9, Township 153 North, Range 67 West, in Benson County, North Dakota.

Based upon the information provided in your letter, we have determined that the identified relocation area, consists entirely of isolated, nonjurisdictional waters; therefore, the project is not regulated under Section 404 of the Clean Water Act and **no permit is required**.

An Approved JD has been completed for the project area as identified in your request (enclosed). Copies of supporting materials used in making these determinations are available upon request. Within 30 days from issuance, JDs are posted on our website at <https://www.nwo.usace.army.mil/html/od-rnd/jur/jur.htm>. **Each approved JD is valid for a period of five (5) years.**

If you do not agree with our JD, you may request an administrative appeal under US Army Corps of Engineers regulations found at 33 CFR 331. A *Notification of Administrative Appeal Options and Process and Request for Appeal (RFA)* is enclosed. The RFA must be received in the Office specified on the second page within 60 days from the date of this letter. **It is not necessary to submit the RFA if you do not object to the determination made in the JD.** If you would like more information on the appeal process, please contact this Office.

Should your project plans change, or require the discharge of dredged or fill material into other waters of the United States, including wetlands, you should contact this office for a new permit determination. The fact that a Section 404 permit is not required does not relieve you of the obligation to obtain required approvals from other agencies that may have regulatory jurisdiction over this project.

Should you have any questions regarding this determination, please do not hesitate to contact Matthew J. Mikulecky of my staff by letter or telephone (701) 255-0015 and reference Project Number **NWO-2011-00734-BIS**.

Sincerely,



Daniel E. Cimarosti
Regulatory Program Manager
North Dakota

Enclosures:

- Approved JD
- RFA Form

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 10 May 2011

B. DISTRICT OFFICE, FILE NAME, AND NUMBER:

Omaha District – City of Minnewaukan, ND - NWO-2011-00734-BIS Form 1 of 1

<u>WETLAND NO:</u>	<u>ESTIMATED SIZE (acres):</u>	<u>LOCATION</u>
1	0.2	48.08632/-99.28142
2	0.2	48.08629/-99.28534
3	0.3	48.08826/-99.28474
4	0.85	48.09133/-99.28576
5	0.33	48.09133/-99.28576
6	0.1	48.08935/-99.28531
7	0.1	48.08656/-99.28480

C. PROJECT LOCATION AND BACKGROUND INFORMATION: Isolated pothole & depressional wetlands

Central Legal Description: S2, T153N, R67W

State: North Dakota County/parish/borough: Benson City: Minnewaukan
Center coordinates of site (lat/long in degree decimal format): Lat. 48.08826° N, Long. -99.28474° W.
Universal Transverse Mercator: 14

Name of nearest waterbody: Devils Lake

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: None (hydrologically isolated)

Name of watershed or Hydrologic Unit Code (HUC): Devils Lake (9020201)

- Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
 Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

- Office (Desk) Determination. Date: 26 April 2011
 Field Determination. Date(s): _____

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **Are no** "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

- Waters subject to the ebb and flow of the tide.
 Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
Explain: _____

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There **Are no** "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

I. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

- TNWs, including territorial seas
 Wetlands adjacent to TNWs
 Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs
 Non-RPWs that flow directly or indirectly into TNWs
 Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
 Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
 Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
 Impoundments of jurisdictional waters
 Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: _____ linear feet: _____ width (ft) and/or _____ acres.
Wetlands: _____ acres.

c. Limits (boundaries) of jurisdiction based on: Pick List

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

Elevation of established OHWM (if known): _____.

2. **Non-regulated waters/wetlands (check if applicable):³**

Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain: The JD is for seven (7) isolated depressional and pothole wetlands ranging from approximately 0.1 to 0.85 acre in size, for a total of 2.08 acres within the project review area. All of these waters are located within the Drift Plains region of North Dakota, and consist of pothole and small farmed depressional wetland features. For the most part, all of these wetlands are very shallow depressions and may occasionally flow over natural and manmade dryland swales. All identified wetlands lack contiguous surface connectivity to Devils Lake (the nearest waters of the United States / TNW). It is possible that wetland No. 2 could drain out through a manmade upland drainage swale or ditch, but this feature does not exhibit any contiguous connectivity to any WOUS. See the attached map/photos to review how this wetland may flow across an upland drainage swale, that may have intermittent areas of wetlands within low-lying areas. This intermittent and ephemeral overland regime is determined to be an "adjacent to adjacent" situation. This constitutes an isolated, nonnavigable, and nonjurisdictional determination for wetland No. 2. All remaining wetlands are also isolated, intrastate, and nonnavigable. USGS Topographic maps indicate the presence of closed basins and slight upland swales.

It is also determined that these waters: 1) are not documented to have substantial use by interstate or foreign travelers for recreational or other purposes; 2) do not support fish or shellfish that could be taken and sold in interstate or foreign commerce; and 3) are not used for industrial purposes by industries in interstate commerce. Lastly, ecological connectivity between these wetlands and WOUS is inconclusive.

Based upon these principle considerations, it is determined that the subject waters are *isolated and nonjurisdictional* under the auspices of Section 404 of the Clean Water Act.

SECTION III: CWA ANALYSIS

- A. **TNWs AND WETLANDS ADJACENT TO TNWs:** N/A
- B. **CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):** N/A
- C. **SIGNIFICANT NEXUS DETERMINATION:** N/A
- D. **DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):** N/A
- E. **ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):⁴** N/A

³ Supporting documentation is presented in Section III.F.

⁴ Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA *Memorandum Regarding CWA Act Jurisdiction Following Rapanos*.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 - Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain: _____.
- Other: (explain, if not covered above): _____.

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- Non-wetland waters (i.e., rivers, streams): _____ linear feet _____ width (ft).
- Lakes/ponds: _____ acres.
- Other non-wetland waters: _____ acres. List type of aquatic resource: _____.
- Wetlands: APPROXIMATELY : 2.08 acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- Non-wetland waters (i.e., rivers, streams): _____ linear feet, _____ width (ft).
- Lakes/ponds: _____ acres.
- Other non-wetland waters: _____ acres. List type of aquatic resource: _____.
- Wetlands: _____ acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: TOWNSITE & PROJECT LOCATION MAP.
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 - Office concurs with data sheets/delineation report.
 - Office does not concur with data sheets/delineation report.
- Data sheets prepared by the Corps: _____.
- Corps navigable waters' study: _____.
- U.S. Geological Survey Hydrologic Atlas: _____.
 - USGS NHD data.
 - USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: 1 : 24,000 -- Minnewaukan West, NORTH DAKOTA.
- USDA Natural Resources Conservation Service Soil Survey. Citation: _____.
- National wetlands inventory map(s). Cite name: USFWS NWI.
- State/Local wetland inventory map(s): _____.
- FEMA/FIRM maps: _____.
- 100-year Floodplain Elevation is: _____ (National Geodetic Vertical Datum of 1929)
- Photographs: Aerial (Name & Date): Google Earth Pro 1995, 2005, 2009.
or Other (Name & Date): _____.
- Previous determination(s). File no. and date of response letter: _____.
- Applicable/supporting case law: _____.
- Applicable/supporting scientific literature: _____.
- Other information (please specify): _____.

B. ADDITIONAL COMMENTS TO SUPPORT JD: See attached map & photos.



Sep 1, 2009 4:28 PM SMT

Wetland Types	
[Dark Green]	Estuarine and Marine Deepwater
[Medium Green]	Estuarine and Marine Wetland
[Light Green]	Freshwater Emergent Wetland
[Lighter Green]	Freshwater Forested/Shrub Wetland
[Lightest Green]	Freshwater Pond
[Blue-Green]	Lake
[Blue]	Other
[Dark Blue]	Riverine

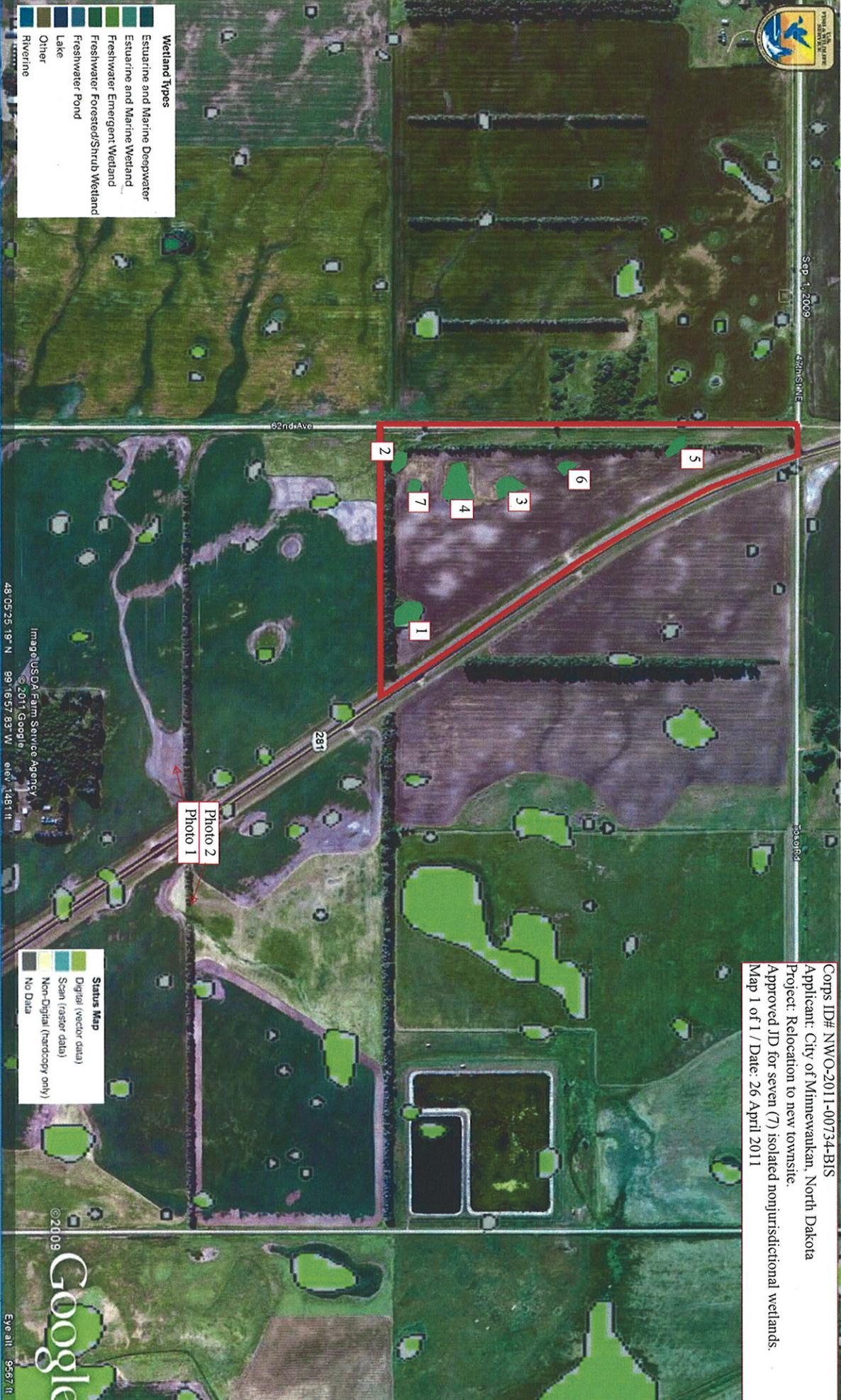


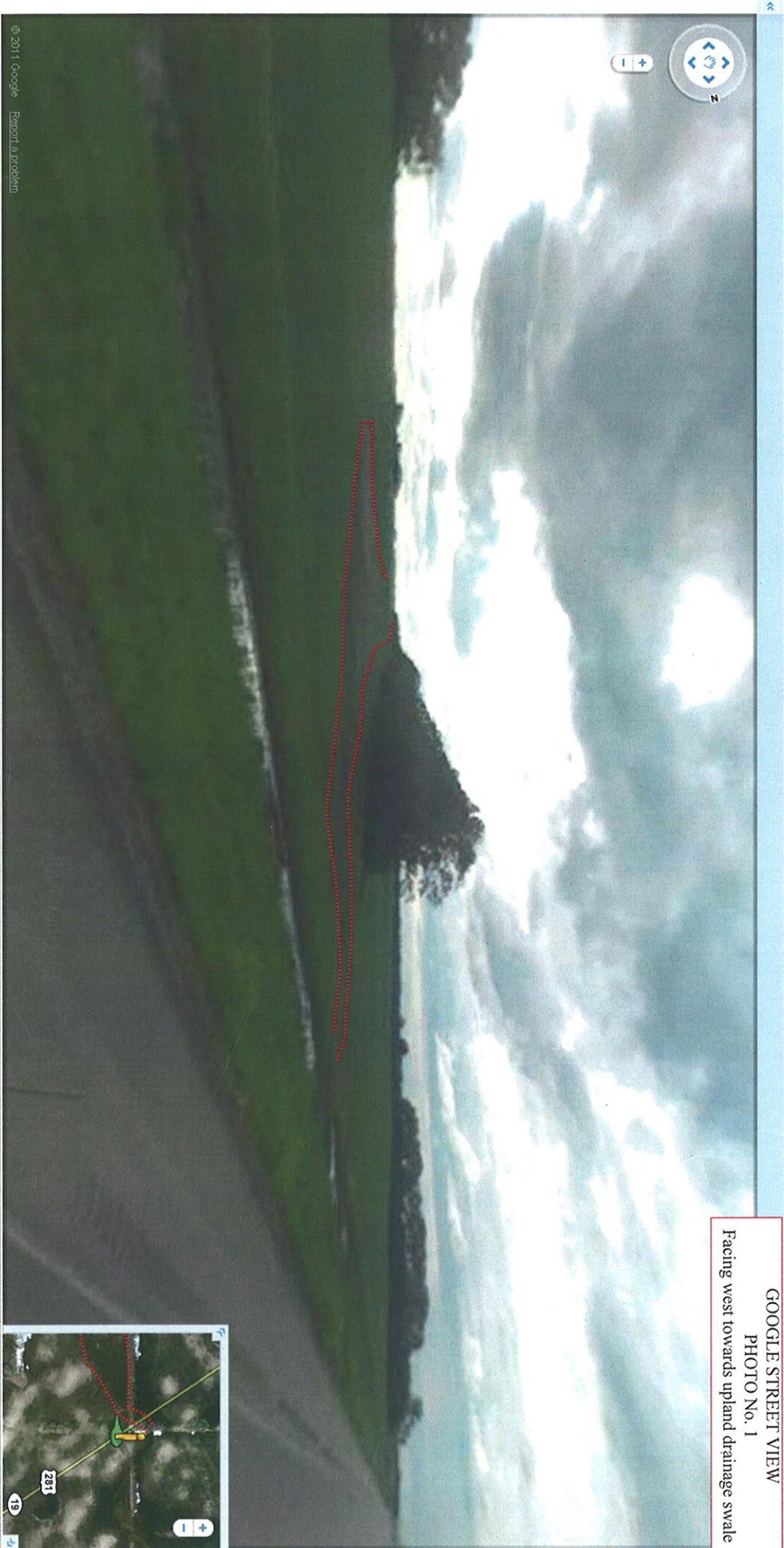
Photo 1
Photo 2

Image © 2011 Google
USDA Farm Service Agency
48°05'25" 19" N 99°16'57" 83" W elev 1461 ft

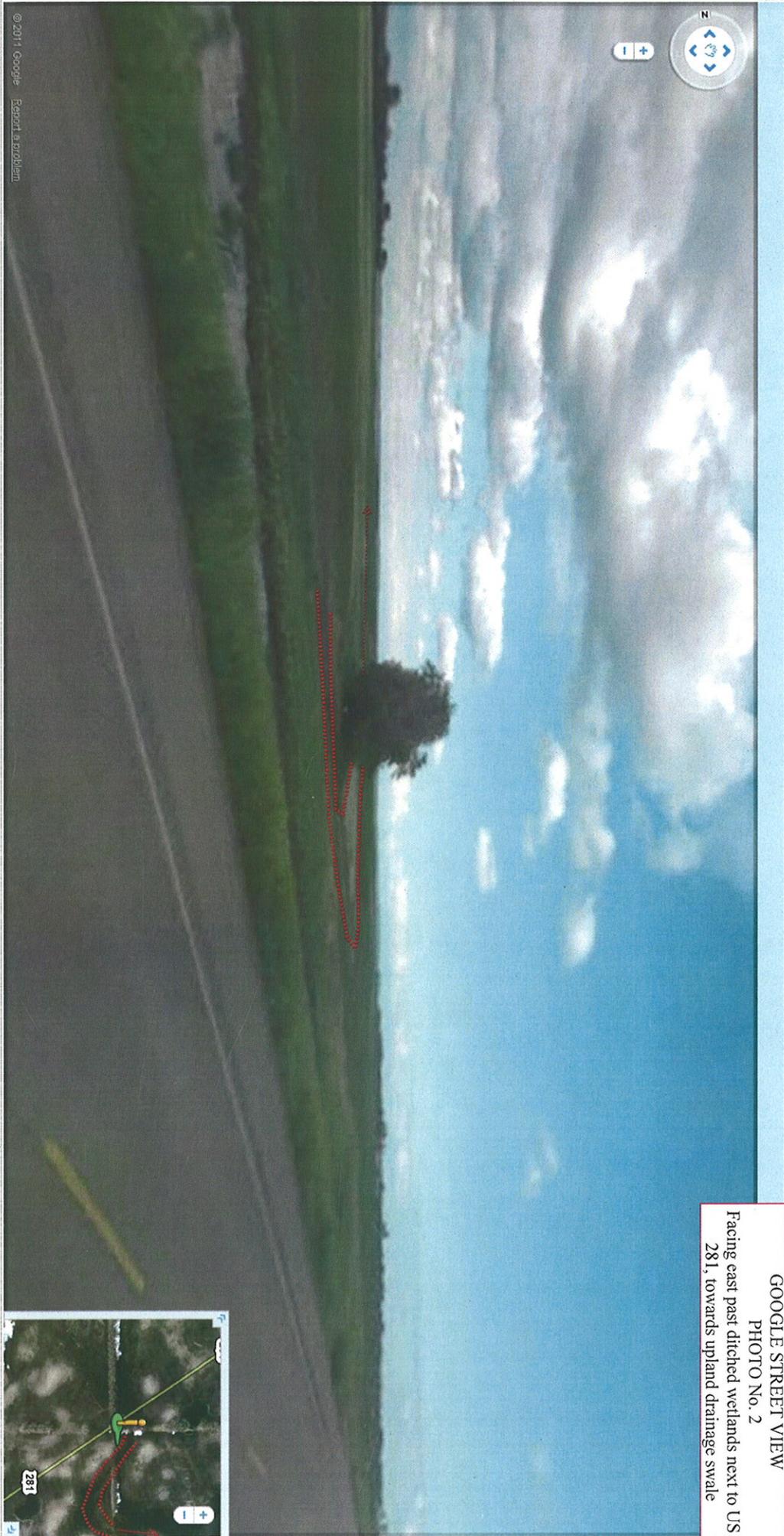
Status Map	
[Green]	Digital (vector data)
[Light Green]	Scan (raster data)
[Dark Green]	Non-Digital (hardcopy only)
[Grey]	No Data

© 2009 Google
Eye alt 9567 ft

Corps ID# NWO-2011-00734-BIS
 Applicant: City of Minnewaukan, North Dakota
 Project: Relocation to new townsite.
 Approved JD for seven (7) isolated nonjurisdictional wetlands.
 Map 1 of 1 / Date: 26 April 2011



GOOGLE STREET VIEW
PHOTO No. 1
Facing west towards upland drainage swale



GOOGLE STREET VIEW
PHOTO No. 2
Facing east past ditched wetlands next to US
281, towards upland drainage swale

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: City of Minnewaukan, ND	File No: NWO-2011-00734-BIS	Date: May 10, 2010
Attached is:		See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A
	PROFFERED PERMIT (Standard Permit or Letter of permission)	B
	PERMIT DENIAL	C
X	APPROVED JURISDICTIONAL DETERMINATION	D
	PRELIMINARY JURISDICTIONAL DETERMINATION	E

SECTION I - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <http://usace.army.mil/inet/functions/cw/cecwo/reg> or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the District Engineer. Your objections must be received by the District Engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the District Engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the District Engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer. This form must be received by the Division Engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer. This form must be received by the Division Engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer. This form must be received by the Division Engineer within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact: District Engineer
US Army Corps of Engineers
North Dakota Regulatory Office
ATTN: Mr. Daniel Cimarosti
1513 South 12th Street
Bismarck, North Dakota 58504
ph. (701) 255-0015

If you only have questions regarding the appeal process you may also contact:
US Army Corps of Engineers, Northwestern Division
Attn: David Gesl, Regulatory Program Manager
PO Box 2870
Portland, OR 97208-2870 Telephone (503) 808-3825

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

Signature of appellant or agent.

Date:

Telephone number:



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
NORTH DAKOTA REGULATORY OFFICE
1513 SOUTH 12TH STREET
BISMARCK ND 58504-6640

August 19, 2011

North Dakota Regulatory Office

[NWO-2011-734-BIS]

Kadrmass, Lee and Jackson
Attn: Ms. Becky Rude
128 Soo Line Drive
P.O. Box 1157
Bismarck, North Dakota 58502-1157

Dear Ms. Rude:

This is in reference to your July 8, 2011, request for a jurisdictional determination (JD) on behalf of the City of Minnewaukan, for the proposed townsite relocation. The project is located in Sections 3, 4, 9, 10, and 15, Township 153 North, Range 67 West and Sections 33 and 34, Township 154 North, Range 67 West, all in Benson County, North Dakota.

We have reviewed the information furnished and have determined that the review area contains both, **jurisdictional** waters of the United States (WOUS) and **nonjurisdictional** waters. Jurisdictional waters are regulated by the Corps under the auspices of Section 404 of the Clean Water Act (33 USC 1344); therefore, the discharge of dredged or fill material into those waters, **requires prior authorization** from the Corps. The implementing regulation for this Act is found at 33 CFR Parts 320-332.

We prepared a Preliminary JD (PJD) for all identified waters that may be jurisdictional WOUS. Such waters will be treated as jurisdictional WOUS for purposes of computation of impacts and compensatory mitigation requirements. If you concur with the findings of the enclosed preliminary JD, please sign it and return it to the letterhead address.

If you believe the preliminary JD is inaccurate, you may request this office complete an approved JD prior to your commencement of any work in a WOUS. An approved JD is an official determination regarding the presence or absence of WOUS. Completion of an approved JD may require coordination with the U.S. Environmental Protection Agency.

In addition, we have determined that the remaining waters identified in your request, are isolated and nonjurisdictional. An Approved JD (enclosed) was prepared for all identified nonjurisdictional waters. The discharge of dredged or fill material into nonjurisdictional waters **does not** require Department of the Army (DA) authorization. Copies of supporting materials used in making these determinations are available upon request. Within 30 days from issuance, JDs are posted on our website at <https://www.nwo.usace.army.mil/html/od-rnd/jur/jur.htm>. **Approved JDs are valid for a period of five (5) years.**

If you do not agree with our JD, you may request an administrative appeal under US Army Corps of Engineers regulations found at 33 CFR 331. A *Notification of Administrative Appeal Options and Process and Request for Appeal (NAO-RFA)* is enclosed. The NAO-RFA must be received in the Office specified on the second page within 60 days from the date of this letter. **It is not necessary to submit the NAO-RFA if you do not object to the determination made in the JD.** If you would like more information on the appeal process, please contact this Office.

For your convenience, we have enclosed your wetland table with our jurisdictional findings added to the margins.

Should you have any questions regarding this determination, please do not hesitate to contact Matthew Mikulecky of my staff by letter or telephone (701)-255-0015 and reference Project Number **NWO-2011-734-BIS**.

The Omaha District, North Dakota Regulatory Office is committed to providing quality and timely service to our customers. In an effort to improve customer service, please take a moment to complete our Customer Service Survey found on our website at <http://per2.nwp.usace.army.mil/survey.html>. If you do not have Internet access, you may call and request a paper copy of the survey that you can complete and return to us by mail or fax.

Sincerely,

Daniel E. Cimarosti
Regulatory Program Manager
North Dakota

Enclosures

- Preliminary JD
- Approved JD
- NOA-RFA Form
- Wetland Table

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 19 August 2011

B. DISTRICT OFFICE, FILE NAME, AND NUMBER:

Omaha District – NDDOT - NWO-2011-00734-BIS Form 2

<u>WETLAND NO:</u>	<u>ESTIMATED SIZE (acres):</u>	<u>LOCATION</u>
5A	0.32	See attached map
7A	0.14	See attached map
8A	0.88	See attached map
9A	0.15	See attached map
10A	0.12	See attached map
16A	0.24	See attached map
17A	0.19	See attached map
19A	0.50	See attached map
20A	0.09	See attached map
21A	0.09	See attached map
22A	0.10	See attached map
23A	1.32	See attached map
24A	0.60	See attached map

C. PROJECT LOCATION AND BACKGROUND INFORMATION: Isolated pothole, depressional and ditch wetlands
Central Legal Description: S9, T153N, R67W

State: North Dakota County/parish/borough: Benson City: Minnewaukan
Center coordinates of site (lat/long in degree decimal format): Lat. 48.08735° N, Long. -99.28486° W.
Universal Transverse Mercator: 14

Name of nearest waterbody: Devils Lake

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: None (hydrologically isolated)

Name of watershed or Hydrologic Unit Code (HUC): Devils Lake (9020201)

- Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
 Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

- Office (Desk) Determination. Date: 2 August 2011
 Field Determination. Date(s): 22 July 2011

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **Are no** "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

- Waters subject to the ebb and flow of the tide.
 Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
Explain: _____.

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There **Are no** "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

- TNWs, including territorial seas
- Wetlands adjacent to TNWs
- Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs
- Non-RPWs that flow directly or indirectly into TNWs
- Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
- Impoundments of jurisdictional waters
- Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: _____ linear feet: _____ width (ft) and/or _____ acres.
Wetlands: _____ acres.

c. Limits (boundaries) of jurisdiction based on: Pick List

Elevation of established OHWM (if known): _____.

2. Non-regulated waters/wetlands (check if applicable):³

Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain: *The JD is for thirteen (13) isolated pothole, depression and ditch wetlands*

ranging from approximately 0.09 to 1.32 acres in size (within the study area only). All of these waters lack a discernable surface connection to waters of the United States. These wetlands were observed in the field by Corps staff and the presence of upland topographic breaks, closed basins and/or dryland swales or ditch features lacking a contiguous aquatic connection to Devils Lake, were confirmed. The physical proximity of these wetlands with other wetlands could possibly constitute an "adjacent to adjacent" relationship; which is not a basis for claiming jurisdiction under current guidance and instruction. Additionally, a number of the identified wetlands were evaluated and coordinated with the EPA under a 10 May 2011 approved Jurisdictional Determination (NWO-2011-00734-BIS Form 1) and were determined to be isolated, and nonjurisdictional.

Lastly, these waters: 1) are not used by interstate or foreign travelers for waterborne recreational or other documented purposes; 2) do not support fish or shellfish that could be taken and sold in interstate or foreign commerce; and 3) are not used for industrial purposes by industries in interstate commerce. Lastly, the waters do not exhibit sufficient proximity and/or connectivity to jurisdictional other waters; whereby, nonspeculative ecological connection(s) could be made that would constitute adjacency.

*Based upon these principle considerations, it is determined that the subject waters are **isolated and nonjurisdictional** under the auspices of Section 404 of the Clean Water Act.*

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs: N/A

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY): N/A

C. SIGNIFICANT NEXUS DETERMINATION: N/A

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY): N/A

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

³ Supporting documentation is presented in Section III.F.

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):⁴ N/A

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 - Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain: _____.
- Other: (explain, if not covered above): _____.

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- Non-wetland waters (i.e., rivers, streams): _____ linear feet _____ width (ft).
- Lakes/ponds: _____ acres.
- Other non-wetland waters: _____ acres. List type of aquatic resource: _____.
- Wetlands: APPROXIMATELY : 4.74 acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- Non-wetland waters (i.e., rivers, streams): _____ linear feet, _____ width (ft).
- Lakes/ponds: _____ acres.
- Other non-wetland waters: _____ acres. List type of aquatic resource: _____.
- Wetlands: _____ acres.

SECTION IV: DATA SOURCES.

A. **SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):**

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Consultant provided wetland delineation maps.
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 - Office concurs with data sheets/delineation report.
 - Office does not concur with data sheets/delineation report.
- Data sheets prepared by the Corps: _____.
- Corps navigable waters' study: _____.
- U.S. Geological Survey Hydrologic Atlas: _____.
 - USGS NHD data.
 - USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: 1 : 24,000 – Minnewaukan West, NORTH DAKOTA.
- USDA Natural Resources Conservation Service Soil Survey. Citation: Hydric Soils Mapping.
- National wetlands inventory map(s). Cite name: USFWS NWI.
- State/Local wetland inventory map(s): _____.
- FEMA/FIRM maps: _____.
- 100-year Floodplain Elevation is: _____ (National Geodetic Vertical Datum of 1929)
- Photographs: Aerial (Name & Date): Google Earth 2009; Wetland Delineation Map Aerials provided by consultant.
or Other (Name & Date): May 2011 & July 2011.
- Previous determination(s). File no. and date of response letter: NWO-2011-00734-BIS (Form 1).
- Applicable/supporting case law: _____.
- Applicable/supporting scientific literature: _____.
- Other information (please specify): _____.

B. **ADDITIONAL COMMENTS TO SUPPORT JD:** See attached delineation map.

⁴ Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.



11A; 12A & 13A (identified on Preliminary JD Form)

6A (identified on Preliminary JD Form)

18A (PJD)

Northern photo point

Southern photo point

Wetlands 20A, 22A, 23A & 24A were previously determined isolated and nonjurisdictional on NWO-2011-00734-BIS Form 1.

Wetlands 6A, 11A, 12A, 13A & 18A were determined jurisdictional and are identified on a separate Preliminary Jurisdictional Determination Form

NOTES:

Southern most segment of Wetland 19A
Facing South up-gradient
Upland break within the road ditch



Northernmost segment of Wetland 19A
Facing south down gradient
Upland break within road ditch



PRELIMINARY JURISDICTIONAL DETERMINATION FORM

This preliminary JD finds that there “*may be*” waters of the United States on the subject project site, and identifies all aquatic features on the site that could be affected by the proposed activity, based on the following information:

A. Report Completion Date for Preliminary Jurisdictional Determination (JD):

19 August 2011

B. Name and Address of Person Requesting Preliminary JD:

*Kadmas, Lee & Jackson
Attn: Ms. Becky Rude
c/o: City of Minnewaukan, ND
128 Soo Line Drive
P.O. Box 1157
Bismarck, North Dakota 58502*

C. District Office, File Name, and Number:

CENWO, City of Minnewaukan, ND, NWO-2011-00734-BIS

D. PROJECT LOCATION(S), BACKGROUND INFORMATION, AND WATERS:

City of Minnewaukan Relocation Townsite

State: *North Dakota*

City: *Minnewaukan*

County: *Benson*

Name of nearest waterbody: *Devils Lake*

Identify amount of waters in the review area: *14.5 acre*

Name of any water bodies on the site that have been identified as Section 10 waters:

Tidal: *Not Applicable to this Region*

Non-Tidal: *None*

Table 1 - Waters of the U.S.

Site #	Longitude/ Latitude	Stream Flow	Cowardin Class	Estimated amount of aquatic resources in review area (acres)	Estimated amount of aquatic resource impact
1A	-99.257247 48.0708021	Not Applicable (Wetland)	PEM	1.57	TBD
2A	-99.25745 48.07110	Not Applicable (Wetland)	PEM	2.52	TBD
3A	-99.26151 48.07134	Not Applicable (Wetland)	PEM	2.6	TBD
4A	-99.26429 48.07177	Not Applicable (Wetland)	PEM	1.2	TBD
6A	-99.27526 48.08280	Not Applicable (Wetland)	PEM	.57	TBD
11A	-99.27553 48.09336	Not Applicable (Wetland)	PEM	.12	TBD
12A	-99.27538 48.09356	Not Applicable (Wetland)	PEM	.08	TBD

13A	-99.27552 48.09410	Not Applicable (Wetland)	PEM	.16	TBD
14A	-99.27577 48.10244	Not Applicable (Wetland)	PEMC	1.29	TBD
15A	-99.26791 48.10812	Not Applicable (Wetland)	PEMC	2.57	TBD
18A	-99.28546 48.09316	I Not Applicable (Wetland)	PEMC	1.3	TBD

E. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

- Office (Desk) Determination. Date: 19 August 2011
 Field Determination. Date(s): _____

F. SUPPORTING DATA: See below:

Data reviewed for preliminary JD (check all that apply - checked items should be included in case file and, where checked and requested, appropriately reference sources below):

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:
Applicant provided maps & Delineation Map
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 Office concurs with data sheets/delineation report.
 Office does not concur with data sheets/delineation report.
- Data sheets prepared by the Corps: _____.
- Corps navigable waters' study: _____.
- U.S. Geological Survey Hydrologic Atlas: _____.
 USGS NHD data.
 USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite quad name: Minnewaukan West.
- USDA Natural Resources Conservation Service Soil Survey. Citation: _____.
- National wetlands inventory map(s). Cite name: USFWS
- State/Local wetland inventory map(s):.
- FEMA/FIRM maps: _____.
- 100-year Floodplain Elevation is: _____ (National Geodetic Vertical Datum of 1929)
- Photographs: Aerial (Name & Date): NAIP 2009 / Google Earth 2009.
or Other (Name & Date): Onsite (May 2011).
- Previous determination(s). File no. and date of response letter: NWO-2011-734-BIS (April 2011).
- Other information (please specify): See attached maps.

IMPORTANT NOTE: The information recorded on this form has not necessarily been verified by the Corps and should not be relied upon for later jurisdictional determinations.

Signature and date of
Regulatory Project Manager
(REQUIRED)

Signature and date of
person requesting preliminary JD
(REQUIRED, unless obtaining the
signature is impracticable)

G. EXPLANATION OF PRELIMINARY AND APPROVED JURISDICTIONAL DETERMINATIONS:

1. The Corps of Engineers believes that there may be jurisdictional waters of the United States on the subject site, and the permit applicant or other affected party who requested this preliminary JD is hereby advised of his or her option to request and obtain an approved jurisdictional determination (JD) for that site. Nevertheless, the permit applicant or other person who requested this preliminary JD has declined to exercise the option to obtain an approved JD in this instance and at this time.

2. In any circumstance where a permit applicant obtains an individual permit, or a Nationwide General Permit (NWP) or other general permit verification requiring “pre-construction notification” (PCN), or requests verification for a non-reporting NWP or other general permit, and the permit applicant has not requested an approved JD for the activity, the permit applicant is hereby made aware of the following: (1) the permit applicant has elected to seek a permit authorization based on a preliminary JD, which does not make an official determination of jurisdictional waters; (2) that the applicant has the option to request an approved JD before accepting the terms and conditions of the permit authorization, and that basing a permit authorization on an approved JD could possibly result in less compensatory mitigation being required or different special conditions; (3) that the applicant has the right to request an individual permit rather than accepting the terms and conditions of the NWP or other general permit authorization; (4) that the applicant can accept a permit authorization and thereby agree to comply with all the terms and conditions of that permit, including whatever mitigation requirements the Corps has determined to be necessary; (5) that undertaking any activity in reliance upon the subject permit authorization without requesting an approved JD constitutes the applicant’s acceptance of the use of the preliminary JD, but that either form of JD will be processed as soon as is practicable; (6) accepting a permit authorization (e.g., signing a proffered individual permit) or undertaking any activity in reliance on any form of Corps permit authorization based on a preliminary JD constitutes agreement that all wetlands and other water bodies on the site affected in any way by that activity are jurisdictional waters of the United States, and precludes any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court; and (7) whether the applicant elects to use either an approved JD or a preliminary JD, that JD will be processed as soon as is practicable. Further, an approved JD, a proffered individual permit (and all terms and conditions contained therein), or individual permit denial can be administratively appealed pursuant to 33 C.F.R. Part 331, and that in any administrative appeal, jurisdictional issues can be raised (see 33 C.F.R. 331.5(a)(2)). If, during that administrative appeal, it becomes necessary to make an official determination whether CWA jurisdiction exists over a site, or to provide an official delineation of jurisdictional waters on the site, the Corps will provide an approved JD to accomplish that result, as soon as is practicable.

Corps ID# NWO-2011-00734-BIS
Applicant: City of Minnewaukan, ND
Preliminary Jurisdictional Determination Form
Jurisdictional Wetlands
Map 1 of 2 / Dated 19 August 2011





Wetlands 20A, 22A, 23A & 24A were previously determined isolated and nonjurisdictional on NWO-2011-00734-BIS Form 1.

Wetlands 6A, 11A, 12A, 13A & 18A were determined jurisdictional and are identified on a separate Preliminary Jurisdictional Determination Form

NOTES:

APPENDIX F

USFWS Concurrence



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
3425 Miriam Avenue
Bismarck, North Dakota 58501

JAN 26 2012



Mr. Richard Myers
Deputy Environmental Office
U.S. Department of Homeland Security
FEMA – Region VIII
Denver Federal Center, Building 710
P.O. Box 25267
Denver, Colorado 80225-0267

Re: Minnewaukan, ND Relocation
(FWS TAILS # 2012-CPA-0300)

Dear Mr. Myers:

This letter is in response to your letter dated January 18, 2012, requesting U.S. Fish and Wildlife Service (Service) concurrence with the Federal Emergency Management Agency's (FEMA) "may affect, not likely to adversely affect" determination of effects to the endangered whooping crane (*Grus ammericana*,) and "no affect" for the gray wolf (*Canis lupus*) and threatened piping plover (*Charadrius melodus*) for a proposed mitigation project for the City of Minnewaukan, North Dakota. The proposed project includes development of a new town site and construction of a new municipal utility system. We offer the following comments under the authority of and in accordance with the Endangered Species Act (ESA) (16 U.S.C. 1531 et seq.).

Due to the location of the proposed project area outside of the 95 percent whooping crane migration corridor, the highly disturbed nature of the area due to vehicle traffic on US Highway 281 adjacent to the site, and proximity to the town of Minnewaukan, the Service believes the use of the site by whooping cranes during migration is unlikely and therefore we concur with FEMA's determination of "may affect, not likely to adversely affect" for the endangered whooping crane.

The Service acknowledges FEMA's "no effect" determinations for the gray wolf and piping plover.

If further information is required, please contact me or Terry Ellsworth of my staff at 701-250-4402, or at the letterhead address. Please reference the FWS TAILS number above in any future correspondence for this project.

Sincerely,

Jeffrey K. Towner

Jeffrey K. Towner
Field Supervisor
North Dakota Field Office

cc: Project Leader, Devils Lake WMD

APPENDIX G

SHPO Coordination



FEMA

R8-EHP

September 26, 2011

Mr. Merlan E. Paaverud, Jr
State Historic Preservation Officer
State Historical Society of North Dakota
612 East Boulevard Avenue
Bismarck, North Dakota 58505
Attn: Susan Quinnell

RE: Downtown Minnewaukan Sewer Upgrades, ND SHPO reference 11-1045

Dear Mr. Paaverud,

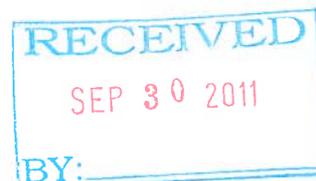
The City of Minnewaukan has applied for funding under the Federal Emergency Management Agency's (FEMA) Hazard Mitigation Grant Program (HMGP). The HMGP program provides funds for the planning and the implementing mitigation projects prior to a disaster event. Funding these plans and projects reduces overall risks to the population and structures, while also reducing reliance on funding from future disaster declarations.

The purpose of this letter is to initiate and complete Section 106 Consultation pursuant to the National Historic Preservation Act (NHPA) as implemented by 36 CFR Part 800. The goal of the proposed HMGP project is to flood-proof the downtown sanitary sewer system. This action will be carried out concurrently with other related, but not inter-dependant, flood protection initiatives funded by other federal, state and local authorities. These other actions will be addressed in separate consultation.

In order to complete the proposed project the sub-grantee will:

1. Relocate the Northeast lift station from the existing location (48.03422, -99.24878) to an undisturbed site at the intersection of 'B' Avenue and 'B' Street (48.072720, -99.250431)
2. Elevate the existing Northwest lift station at its current location at the intersection of West Avenue and 'B' Street (48.07250, -99.25244),
3. Relocate the South lift station from the existing location at the intersection of 'B' Avenue and 6th Street (48.06374, -99.24873) to a previously disturbed site the intersection of 'B' Avenue and 4th Street (48.068697, -99.249609).

Ancillary actions include installing 6 inch force main to connect lift stations to existing mains, sealing MH covers, installing new 8 inch main to reroute service that will be inundated and installing gate valves to allow closure of sections under threat of inundation. All ancillary actions will take place in previously disturbed utility or roadway corridors.



As noted, the infrastructure improvements would be located within previously disturbed areas with the exception of the relocation of the Northeast lift station to an undisturbed 50 foot by 50 foot vacant lot at the corner of 'B' Avenue and 'B' Street. The relocation of the South lift station to the corner of 4th Street and B Avenue would occur primarily within existing right-of-way, with approximately 20 feet of the lift station occurring on the SE corner of the Benson County courthouse property. The courthouse is listed on the NRHP (78001988), but the project location is between the existing parking area and the street. The site was disturbed during construction and has been landscaped with trees and shrubs, which will also act to shield the new lift station and prevent any visual intrusion on the courthouse. Upgraded and relocated sewer lines would be placed within the footprint of existing utility right-of-way or roadways.

The attached assessment report was prepared by Kadramas, Lee & Jackson (KL&J), to research and document a Class III (pedestrian) cultural resource survey as requested by your office on April 11, 2011. Through coordination between your office and KL&J, it was determined that a Class III survey was not required for improvements in the existing town site that are on previously disturbed ground. Therefore, the report only evaluates the relocation of the Northeast lift station to the new site at the corner of 'B' Avenue and 'B' Street. Based on their evaluation KL&J found that there would be no historic properties affected by the proposed project.

FEMA believes that the background research and pedestrian survey represent a reasonable and good faith effort to carry out appropriate identification efforts as stated in §800.4(b)(1). Failure to complete flood proofing could impact the health and safety of the public by limiting the ability of the sanitary sewer system to function as designed. If previously unknown cultural resources are discovered during construction, work will be stopped and FEMA and SHPO notified as soon as possible.

Therefore, in accordance with Section 106 Review Procedures for Federal Undertakings, under the National Historic Preservation Act and its implementing regulation, 36 CFR Part § 800.4(d)(1), FEMA has determined that there will be 'No Historic Properties Affected' as a result of the proposed action.

FEMA respectfully requests your concurrence with this determination and has included concurrence and non concurrence lines below to expedite the review process. If you have any questions or comments, please do not hesitate to contact me by telephone at (303) 235-4926 or by email at richard.myers@dhs.gov.

Sincerely,



Richard Myers
Deputy Regional Environmental Officer
FEMA Region VIII

Attachments:

I concur that there will be 'no adverse effect to historic properties' as a result of the proposed action, pursuant to Section 106 of the National Historic Preservation Act.

I do not concur with your findings for the following reason:

Signed: Michael E. Pannan Date: 9-26-11



FEMA

R8-EHP

December 15, 2011

Mr. Merlan E. Paaverud, Jr
State Historic Preservation Officer
State Historical Society of North Dakota
612 East Boulevard Avenue
Bismarck, North Dakota 58505
Attn: Susan Quinnell

RE: Minnewaukan Acquisition/ Demolition/ Relocation, Benson County ND
FEMA 1829-DR-ND Project #46, #47, #48; ND SHPO Reference 11-1026, 11-0977

Dear Mr. Paaverud,

The City of Minnewaukan, Benson County, ND has applied for funding under the Federal Emergency Management Agency's (FEMA) Hazard Mitigation Grant Program (HMGP). The HMGP program provides funds for the planning and the implementing mitigation projects prior to a disaster event. Funding these plans and projects reduces overall risks to the population and structures, while also reducing reliance on funding from future disaster declarations..

The City of Minnewaukan is an incorporated city located on the western shores of Devils Lake and is the county seat for Benson County, North Dakota. Over the last 18 years, the lake has tripled in size and has risen over 30 feet in elevation. Multiple structures are in danger of being inundated as the lake elevation continues to rise, which would leave large portions of the city virtually uninhabitable. Grant applications have also been submitted to several other federal, state and local agencies to fund development of infrastructure to and within a new town site needed to maintain Minnewaukan's status as an incorporated city and county seat. An Environmental Assessment (EA) will be prepared for related actions that will be carried out concurrently as part of flood protection initiatives.

The purpose of this letter is to initiate and complete Section 106 Consultation pursuant to the National Historic Preservation Act (NHPA) as implemented by 36 CFR Part 800. The goal of the proposed undertaking is to acquire property and remove flood-prone buildings from the existing downtown area by acquiring and either demolishing or relocating participating structures to the new town site.

Three (3) FEMA HMGP projects contribute to this undertaking:

1. Acquire & Demolish 69 existing homes (Project #46)
2. Acquire & Relocate 19 existing homes to new town-site (Project #47)
3. Acquire & Relocate 3 existing (school-owned) homes to new town-site (Project #48)

Related actions not funded by FEMA, but addressed in this consultation include:

4. Demolition of Minnewaukan School (US Dept. of Ed.)
5. Demolition of the existing water tower (USACE)
6. Relocation of six residential structures (BCHA/HUD)

The attached cultural resource assessment report (August 2011) was prepared by Kadramas, Lee & Jackson (KL&J) to research and document a Class III architectural survey as requested by your office on April 11, 2011 (ND SHPO Ref. 11-1026). The attached survey (with addendum) was prepared by KL&J to assess and document specific properties (selected in coordination with ND SHPO). The survey identified 33 properties within the project area listed or eligible for listing on the National Register of Historic Places (NRHP). Of these, 11 are proposed for acquisition and demolition or relocation to the new town site and are discussed in more detail in the attached addendum to the survey. In addition, the addendum discusses the possible eligibility of downtown Minnewaukan as a historic district.

Due to the nature of the proposed undertaking, it is anticipated that there is the potential for adverse impacts to historic properties. As part of the on-going coordination with ND SHPO, a number of mitigation measures were discussed.

After evaluating the alternatives, FEMA believes the best (most widely accessible and cost-effective) approach is a web-based history that captures the tangible and intangible essence of the community by combining existing documentation (and newly produced documents) with a Social Media platform (such as YouTube) that allows individuals to contribute personal recollections of the city's cultural heritage and the relocation process.

The easily-updated website could include items such as:

- A photographic survey capturing the impact of the government, railroads, agriculture, etc. on the development and evolution of Minnewaukan and other similar communities in ND and the Great Plains
- An annotated mapping project that would show the development of the town and adjacent area from initial settlement up to the take-over of the lake
- A summation on the Native American history of the land that the city now occupies and an analysis of tribal land acquisition and boundary changes over time
- A simple (PowerPoint) presentation on the overall relocation project that could also be presented by locals or put up on other local websites

The web-site could also be supplemented with interpretive signage at the old town to provide permanent historic information to the local population and visitors.

Representatives of the North Dakota Department of Emergency Services and the City of Minnewaukan have reviewed and agreed to the proposed mitigation measures. It is important to note that the cost of implementing Sec. 106 mitigation measures is the responsibility of the sub-grantee, the City of Minnewaukan.

As a condition of FEMA funding, the applicant and their contractors will be required to implement the agreed to mitigation measure(s). All areas of ground disturbance will be replaced with clean earthen, rock or concrete fill material. If previously unknown cultural resources are discovered during construction, work will be stopped and FEMA and SHPO notified as soon as possible.

FEMA believes that the background research and survey represents a reasonable and good faith effort to carry out appropriate identification efforts as stated in §800.4(b)(1). While the proposed project has the potential for adverse impacts, FEMA believes that they will be mitigated with implementation of the measure(s) described above. Failure to complete the project could impact the health and safety of the public by exposure to an increased risk of flooding.

Therefore, in accordance with Section 106 Review Procedures for Federal Undertakings, under the National Historic Preservation Act and its implementing regulation 36 CFR Part § 800.4(d)(1) FEMA has determined that there will be 'no adverse effect to historic properties' as a result of the proposed action.

FEMA respectfully requests your concurrence with this determination, along with any additional recommendations related to the project. If you have any questions or comments, please do not hesitate to contact me by telephone at (303) 235-4926 or by email at richard.myers@dhs.gov.

Sincerely,

Signed 12/15/2011

Richard Myers

Deputy Regional Environmental Officer
FEMA Region VIII

Attachments:

Survey with addendum



**STATE
HISTORICAL
SOCIETY
OF NORTH DAKOTA**

Jack Dalrymple
Governor of North Dakota

December 20, 2011

North Dakota
State Historical Board

Mr Richard Meyers
Deputy Regional Environmental Officer
FEMA Region VIII
Denver Federal Center, Building 710
PO Box 25267
Denver, CO 80225-0267

Gereld Gerntholz
Valley City - President

Calvin Grinnell
New Town - Vice President

A. Ruric Todd III
Jamestown - Secretary

Albert I. Berger
Grand Forks

Richard Kloubec
Fargo

Diane K. Larson
Bismarck

Chester E Nelson, Jr.
Bismarck

Sara Otte Coleman
*Director
Tourism Division*

Kelly Schmidt
State Treasurer

Alvin A. Jaeger
Secretary of State

Mark Zimmerman
*Director
Parks and Recreation
Department*

Francis Ziegler
*Director
Department of Transportation*

Merlan E. Paaverud, Jr.
Director

Accredited by the
American Association
of Museums since 1989

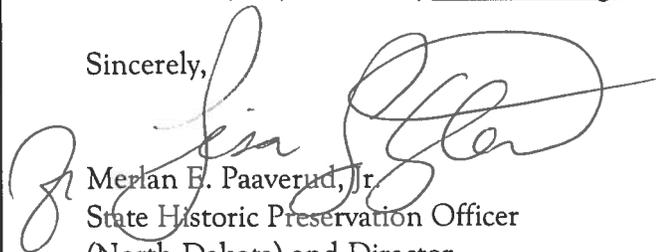
**ND SHPO REF.:11-1026 Minnewaukan Acquisition/Demolition/
Relocation, " Mitigative Recording and History of Minnewaukan, North
Dakota: An Intensive Class III Architectural Survey of Thirty-three Sites in
Benson County, Sept 2011", "Addendum November 2011", FEMA
1829-DR-ND Project #46, #47, #48, Benson County, North Dakota**

Dear Mr. Meyers,

We reviewed ND SHPO REF.:11-1026 Minnewaukan Acquisition/Demolition/
Relocation, " Mitigative Recording and History of Minnewaukan, North
Dakota: An Intensive Class III Architectural Survey of Thirty-three Sites in
Benson County, Sept 2011", "Addendum November 2011", FEMA
1829-DR-ND Project #46, #47, #48, Benson County, North Dakota and find
the report by Aaron Barth acceptable. We concur with a "No Adverse Effect"
determination provided the project is of the nature specified, and takes place at
the location specified, and provided that all mitigative measures indicated in the
correspondence of December 15, 2011 are followed.

Thank you for the opportunity to review this project. Please include the ND
SHPO Reference number listed above in further correspondence for this specific
project. If you have any questions please contact Lisa Steckler, Preservation
Planner at (701) 328-3577, lsteckler@nd.gov

Sincerely,



Merlan E. Paaverud, Jr.
State Historic Preservation Officer
(North Dakota) and Director
State Historical Society of North Dakota



Jack Dalrymple
Governor of North Dakota

January 26, 2012

**North Dakota
State Historical Board**

Gereld Gerntholz
Valley City - President

Calvin Grinnell
*New Town - Vice
President*

A. Ruric Todd III
Jamestown - Secretary

Albert I. Berger
Grand Forks

Richard Kloubec
Fargo

Diane K. Larson
Bismarck

Chester E Nelson, Jr.
Bismarck

Sara Otte Coleman
*Director
Tourism Division*

Kelly Schmidt
State Treasurer

Alvin A. Jaeger
Secretary of State

Mark Zimmerman
*Director
Parks and Recreation
Department*

Francis Ziegler
*Director
Department of
Transportation*

Merlan E. Paaverud, Jr.
Director

*Accredited by the
American Association
of Museums since 1986*

Mr. Richard Myers
Deputy Regional Environmental Officer
FEMA Region VIII
Denver Federal Center, Building 710
PO Box 25267
Denver, CO 80225-0267

ND SHPO Ref.:11-0310 "Minnewaukan Town Relocation: A Class III Cultural Resource Inventory, Benson County, North Dakota" in portions of [T153N R67W Sections 4, 9, 10, 15, 16 & 35] & [T154N R67W Sections 33 & 34], Benson County, North Dakota

Dear Mr. Myers,

We reviewed ND SHPO Ref.:11-1026 "Minnewaukan Town Relocation: A Class III Cultural Resource Inventory, Benson County, North Dakota" in portions of [T153N R67W Sections 4, 9, 10, 15, 16 & 35] & [T154N R67W Sections 33 & 34], Benson County, North Dakota and find the report by Rigden A Glaab acceptable. We concur with a "No Historic Properties Affected" determination, provided the project is of the nature specified, and takes place at the location specified and provided that any borrow material used comes from an approved source. We further concur that 32BE197 and 32BE116 are not significant and are therefore Not Eligible for the NRHP.

Thank you for the opportunity to review this project. Please include the ND SHPO Reference number listed above in further correspondence for this specific project. If you have any questions please contact Lisa Steckler, Preservation Planner at (701) 328-3577 or lsteckler@nd.gov

Sincerely,



Merlan E. Paaverud, Jr.
State Historic Preservation Officer
(North Dakota) and
Director
State Historical Society of North Dakota

MEMORANDUM OF AGREEMENT

**Between the Federal Emergency Management Agency,
The North Dakota State Historic Preservation Officer,
The North Dakota Department of Emergency Services
And the City of Minnewaukan**

**Submitted to the Advisory Council on Historic Preservation
Regarding Resolution of Adverse Effects to Historic Properties in the City of
Minnewaukan resulting from their Acquisition and Demolition or Relocation**

WHEREAS, the Federal Emergency Management Agency (FEMA) of the Department of Homeland Security proposes to administer Federal disaster assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 93-288, as amended, to the City of Minnewaukan (Applicant) through the North Dakota Department of Emergency Services (DES), under the Hazard Mitigation Grant Program (HMGP), for the acquisition and demolition or relocation of flood-damaged structures in Minnewaukan, ND (Undertaking), as a result of Disaster No. 1829 – ND, and;

WHEREAS, FEMA and the North Dakota State Historic Preservation Officer (SHPO), pursuant to the regulations found in 36 CFR Part 800 implementing Section 106 of the National Historic Preservation Act (NHPA) 16 U.S.C. § 470f, have concurred that the Minnewaukan properties listed in Attachment A to this Agreement are eligible for listing in the National Register of Historic Places and have determined this Undertaking will adversely affect those properties; and

WHEREAS, FEMA has consulted with the DES and the Applicant regarding the effects of the Undertaking on the historic properties listed in Attachment A; and

WHEREAS, in accordance with 36 CFR § 800.6(a)(1), FEMA has notified the Advisory Council on Historic Preservation (ACHP) of its adverse effect determination with specified documentation and the ACHP has chosen not to participate on the consultation pursuant to 36 CFR Section 800.6(a)(1)(iii);

NOW, THEREFORE, FEMA, the SHPO, DES, and the Applicant agree that resolution of the Undertaking's adverse effects will be achieved through implementation of the following stipulations.

STIPULATIONS

To the extent of its authority and in coordination with the SHPO, DES, and the Applicant, FEMA will ensure that the following measures are implemented:

I. Relocation

The Applicant will place a public notice in the official newspaper of Benson County advertising the availability of the properties identified in Attachment A as Acquisition/Demolition (A/D) to the highest bidder. The public notice is to be run once per week for a 30-day period. The Applicant will provide FEMA copies of the appropriate Affidavits of Publication to document that this advertising requirement has been fulfilled. The cost of advertising these structures shall be an eligible HMGP project cost.

In the event that a historic property is purchased, the buyer shall be required to secure any required permits and fund moving the structure within 60 days after the close of the offering period. Actions integral to relocating a structure to a new site, such as utility connections, foundation preparations, or siting are the buyer's responsibility and expense. The applicant will make every reasonable effort to secure these properties from physical alteration, illegal entry, and damage during the above process.

II. Demolition

If a purchase agreement with an interested party is not entered into within the agreed upon time period mentioned above, the structure will be scheduled for demolition, to occur after the salvage requirements described below have been met. To ensure the protection of any prehistoric or historic archaeological resources that might be located in the project area, FEMA will require that the demolition of the structures be performed in a manner that minimizes ground disturbance. FEMA will require that any fill used for grading or ground restoration will be obtained from a previously approved off-site source, and that no on-site grading of previously undisturbed soil shall take place.

It is further understood that these measures shall be carried out in conformance with the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Archaeological Documentation (Federal Register, Vol. 48, No. 190.)

III. Salvage

If an historic property is scheduled for demolition, the Applicant shall notify the SHPO and other interested local historic organizations at least ten (10) calendar days prior to the proposed demolition. During this time, the SHPO or local organizations (or their designees) may inspect the acquired property, including interiors, if safe to enter, and may prepare a list of significant features they would like to salvage. The SHPO or other interested local historical organizations will be responsible for transportation off-site and the future management of the removed items.

IV. Web-site Creation

The Applicant shall create, or have created on its behalf, an easily updateable web-site within 12 months that will include at a minimum:

- A. Captioned or annotated photographic images that explore and reveal the impact that government, all common modes of transportation (waterways, railroads, roads and highways), agriculture, sports, tourism, and other leisure-time activities, etc., have had on the history and development of Minnewaukan, and comparing those impacts to those occurring in communities of similar size in North Dakota and elsewhere on the Great Plains;
- B. Annotated maps showing the development of the community and surrounding area from initial settlement to present;
- C. A summation of the Native American history of the land now occupied by the city, with particular reference to an analysis of the acquisition of tribal lands and the changes occurring thereby to the boundaries of the Spirit Lake Indian Reservation;
- D. A simple, easily accessed and downloadable presentation (e.g., PowerPoint or similar) on the overall City of Minnewaukan relocation project.
- E. FEMA and the SHPO will be given an opportunity to review and approve the product at the completion of each of steps A through D above. Written approval to

the Applicant from FEMA and the SHPO of the completed product (A. – D. above) before opening the web-site to public access and usage is required.

V. Duration

This agreement will be null and void if its terms are not carried out within one year from the date of its execution. Requests for reasonable extension will be considered. Prior to such time, FEMA may consult with the other signatories to reconsider the terms of the agreement and amend it in accordance with Stipulation VIII below.

VI. Post-Review Discoveries

If previously unidentified historic properties or archaeological resources are discovered, or unanticipated effects on historic properties are found, during ground-disturbing work related to the Undertaking, the Applicant will stop that portion of the project immediately, contact FEMA, the DES, and the SHPO, and satisfy the requirements of 36 CFR § 800.13.

VII. Dispute Resolution

- A. If any objection or dispute should arise within the time frame provided by this MOA to any plans, specifications, or actions provided for review pursuant to this MOA, FEMA will consult further with the objecting party to seek resolution.
- B. If FEMA determines that the dispute cannot be resolved, FEMA shall forward all documentation relevant to the dispute to the ACHP in accordance with 36 CFR § 800.2(b)(2), including FEMA's proposed resolution of the dispute. Within thirty (30) calendar days after receipt of all pertinent documentation, the ACHP will either:
 - i. Advise FEMA that it concurs with FEMA's resolution to the dispute.
 - ii. Provide FEMA with recommendations, which FEMA will take consider in reaching a final decision regarding the dispute; or

- iii. Notify FEMA that it will comment pursuant to 36 CFR § 800.7(c). Any comment provided will be taken into consideration by FEMA in accordance with 36 CFR § 800.7(c)(4) with reference to the subject of the dispute.
- C. Any recommendation or comment provided by the ACHP will be understood to pertain only to the subject of the dispute, and FEMA's responsibility to fulfill all actions that are not subject of the dispute will remain unchanged.
- D. If the ACHP does not provide comments regarding the dispute within 30 days after receipt of adequate documentation, FEMA may render a decision regarding the dispute. In reaching its decision, FEMA will take into account all comments regarding the dispute from the parties to the MOA.
- E. Failure to fulfill the terms of this MOA requires that FEMA again request the ACHP's comments in accordance with 36 CFR § 800.6(c)(8). If FEMA cannot fulfill the terms of this MOA, it shall not take or sanction any action or make any irreversible commitment that would result in an adverse effect with respect to eligible or listed historic properties covered by this MOA or that would foreclose the ACHP's consideration of modifications or alternatives to the Undertaking that could avoid or mitigate the adverse effect until the comment process has been completed.

VIII. Amendments and Non-compliance

If any of the signatories to this MOA believe that the terms of the MOA cannot be adhered to, or that an amendment to the terms of this MOA must be made, that signatory shall immediately consult with the other signatories to develop amendments to this MOA. The process of amending this MOA shall be the same as that exercised in creating the original MOA. If an amendment cannot be agreed upon, the dispute resolution process set forth in Stipulation VII will be followed.

IX. Anticipatory Actions

- A. FEMA shall not grant assistance to the Applicant should it, or those acting on its behalf, engage in anticipatory actions with the intent to avoid the requirements of this MOA or Section 106 of NHPA that significantly adversely effects an historic

property to which the assistance would relate or, having legal power to prevent it, allow such significant adverse effect to occur.

- B. After consultation with the SHPO and ACHP, however, FEMA may determine that circumstances justify granting such assistance despite the adverse effect created or permitted by the Applicant and shall complete consultation for the Undertaking.

X. Termination of Agreement

- A. If any signatory or invited signatory to this MOA determines that its terms will not or cannot be carried out, that party shall immediately consult with the other parties to attempt to develop an amendment per Stipulation VII above.
- B. If within thirty (30) days an amendment cannot be reached, any signatory may terminate the MOA upon written notification to the other signatories. Once the MOA is terminated, and prior to work continuing on the Undertaking, FEMA must either (a) execute an MOA pursuant to 36 CFR § 800.6 or (b) request, take into account, and respond to the comments of the Council under 36 CFR § 800.7. FEMA shall notify the signatories as to the course of action it will pursue.

XI. Execution of the Memorandum of Agreement

Execution of this MOA by FEMA and implementation of its terms are evidence that FEMA has taken into account the effects of the Undertaking on historic properties, and that FEMA has satisfied its responsibilities under the NHPA and its implementing regulations.

This MOA may be executed in parts, with a separate page for each signatory, and FEMA will ensure that each party is provided with a copy of the fully executed MOA. This MOA will become effective on the date that the signed MOA is received by the ACHP.

MEMORANDUM OF AGREEMENT

Regarding Mitigation of Adverse Effect to Historic Properties in the City of Minnewaukan
resulting from Acquisition and Demolition or Relocation

Attachment A – List of NRHP eligible properties within the APE.

***NIP = Not Included in Project; A/D = Acquisition/Demolition; A/R = Acquisition/Relocation**

**Location information taken from North Dakota Cultural Resources Site Files

SITS #	Status*	Site Name	Location**
32BE12	NIP	Benson County Courthouse	311 B Ave. South
32BE32	NIP	Grace Episcopal Church	210 C Ave. South
32BE33	NIP	St. Peter Lutheran Church	121 C Ave. North
32BE35	A/D	Cubbison House	240 Main Street
32BE152	NIP	American Legion	Main Street (Platted Block 55)
32BE165	A/D	Prairie Style House	451 B. Ave South
32BE168	NIP	Minnewaukan Motor Company	Main Street (Platted Block 44)
32BE169	NIP	Minnewaukan Post Office	Main Street (Platted Block 44)
32BE170	NIP	Benson County Farmers Press	B Ave. North (Platted Block 43)
32BE171	NIP	The Cottage	B Avenue North (Platted Block 43)
32BE173	A/R	Bungalow Style House	330 B Ave. South
32BE174	NIP	City Hall and Fire Hall	Main Street (Platted Block 55)
32BE175	NIP	Bank	NE corner, at Main St./East Ave.
32BE179	A/R	Gable T Farm House	221 B Street West
32BE180	NIP	White House	331 Main Street
32BE181	A/D	Gabled Front House	310 Main Street
32BE182	NIP	House	221 C Ave. South
32BE184	A/D	Water Tower	Main Street (Platted Block 5)
32BE185	A/D	Minnewaukan School	200 D Ave. South
32BE186	NIP	William Plummer Company Bld	Main Street (Platted Block 44)
32BE187	A/D	National Folk House	211 Main Street East
32BE188	A/R	Craftsman House	211 C Avenue South
32BE189	A/D	Mallard Inn	130 C Street East
32BE190	NIP	Helberg Lodge Spirit Water Inn	Main Street
32BE191	A/D	Prairie Style Bungalow	441 B Ave. South
32BE192	NIP	Hiassen Law Office	Main Street
32BE209	NIP	Pat Stensby	600 Block, West Avenue South
32BE210	NIP	Lavern Butts	100 Block, 4 th Street East
32BE211	NIP	Grain Elevator	West 2 nd Street, at East & West Ave. South
32BE213	NIP	School House	South Hwy 19, at West Ave. & B Ave. South

