



**MEMORANDUM**

**Highway  
Department**

Jason Benson, P.E.  
County Engineer

Thomas B. Soucy, P.E.  
Deputy County Engineer

Blaine Laaveg  
Superintendent

TO: Cass County Commission

FROM: Jason Benson, County Engineer *JB*

DATE: September 28, 2020

SUBJECT: Agenda topic for October 5, 2020 Commission Meeting:  
Agreement with FEMA and NDDDES on Deed Restricted  
Lots and FM Diversion Construction

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Following the floods of 2009-2011, Cass County acquired flood properties using Federal Emergency Management Agency (FEMA) funding. These properties now have deed restrictions limiting future development to maintain the land as open space and to protect the flood plain.

The FM Diversion Project's Red River Structure will control flows on the Red River during major flood events. This gated structure will be constructed across 15 deed restricted parcels owned by the County. Several years ago, the FM Diversion Authority worked with ND Senators to include Section 1321 of America's Water Infrastructure Act of 2018. This bill was passed into law providing FEMA to allow the County to constructing, operating, and maintaining a flood control diversion project on these properties.

This request is for the Commission to approve the agreement of Clarification with North Dakota Department of Emergency Services and the FEMA.

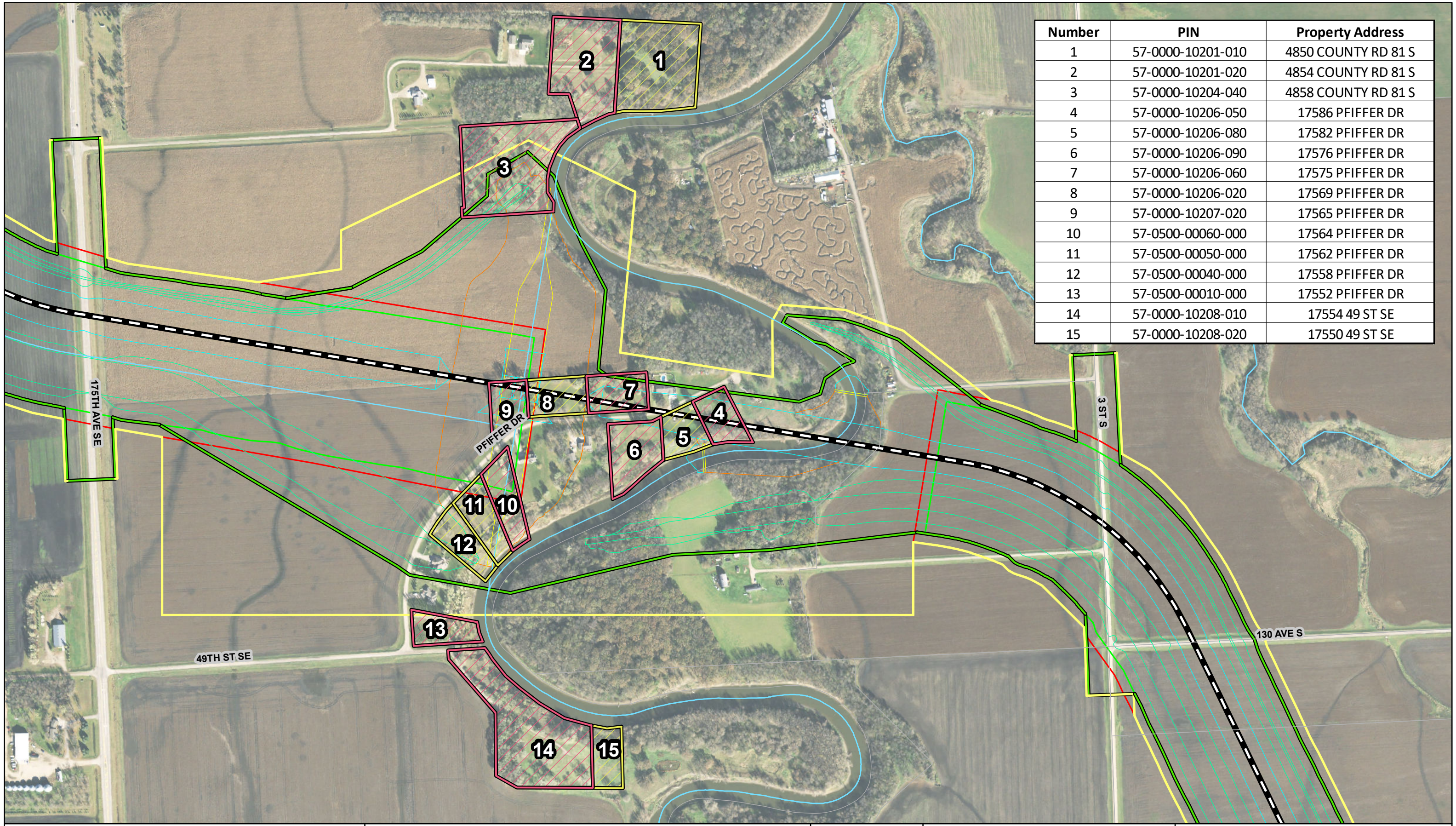
**SUGGESTED MOTION:**

Authorize the Commission Chair to sign the Agreement of Clarification with North Dakota Department of Emergency Services and the Federal Emergency Management Agency regarding deed restricted parcels owned by the County to allow the County to construct, operate, and maintain a flood control diversion project on these properties.

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West Fargo, North Dakota  
58078-1301

701-298-2370  
Fax: 701-298-2395





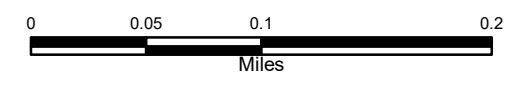
Number	PIN	Property Address
1	57-0000-10201-010	4850 COUNTY RD 81 S
2	57-0000-10201-020	4854 COUNTY RD 81 S
3	57-0000-10204-040	4858 COUNTY RD 81 S
4	57-0000-10206-050	17586 PFIFFER DR
5	57-0000-10206-080	17582 PFIFFER DR
6	57-0000-10206-090	17576 PFIFFER DR
7	57-0000-10206-060	17575 PFIFFER DR
8	57-0000-10206-020	17569 PFIFFER DR
9	57-0000-10207-020	17565 PFIFFER DR
10	57-0500-00060-000	17564 PFIFFER DR
11	57-0500-00050-000	17562 PFIFFER DR
12	57-0500-00040-000	17558 PFIFFER DR
13	57-0500-00010-000	17552 PFIFFER DR
14	57-0000-10208-010	17554 49 ST SE
15	57-0000-10208-020	17550 49 ST SE

## DEED RESTRICTED PARCELS RED RIVER CONTROL STRUCTURE

**Legend**

**Deed Restricted Parcels**

- FMA
- HMGP
- Protection Centerline
- River Centerline with project
- Property Easement Boundary
- Project Limits



Created By: nirby Date Created: 3/12/2019 Date Exported: 5/28/2019 Image: 2018 County NAIP Elevation Data: N/A  
 Horizontal Datum: NAD 1983 StatePlane North Dakota South FIPS 3302 Feet Vertical Datum: North American 1983  
 H:\Fargo\JBN\7400\7438\13\_7438\_015\Phase 3 CLOMR\GIS\Deed\_Restrictions.mxd



## Agreement of Clarification

THIS AGREEMENT OF CLARIFICATION to land use restrictions and exceptions made in accordance with Federal and State requirements is made among the Cass County, ND, (“the County”), the State of North Dakota (“the State”), and the United States of America, acting through the Department of Homeland Security’s (DHS) Federal Emergency Management Agency, (“FEMA”) in reference to the real property situated in the Cass County, North Dakota identified and described in Attachment A “(Property)” which has been acquired and is owned by the County.

WHEREAS, The Robert T. Stafford Disaster Relief and Emergency Assistance Act, ("The Stafford Act"), 42 USC § 5121 et seq., identifies the use of disaster relief funds under § 5170c, the Hazard Mitigation Grant Program ("HMGP"), to provide a process for a community, through the State, to apply for federal funds to be used to acquire interests in property, including the purchase of structures in the floodplain, to demolish and/or remove the buildings, and to convert and maintain the land use of the Property as open space in perpetuity;

WHEREAS, the State submitted such application and entered into an agreements with the United States of America, through FEMA, for multiple disasters via FEMA-State Agreements (FSA) and herein incorporated by reference, and the County was awarded such Federal funds pursuant to agreements with State of North Dakota Department of Emergency Services and herein incorporated by reference, which it used to acquire the Property;

WHEREAS, the terms of the Stafford Act, its implementing regulations (44 C.F.R. Part 80), the FEMA- State Agreement, and the State-local Agreement require that the County agree to terms that are intended to restrict the use of the land to open space in perpetuity in order to protect and preserve natural floodplain values, referenced in restrictive covenants recorded as noted in Attachment A.

WHEREAS, Sec. 1321 Fargo-Moorhead Metropolitan Area Diversion Project, North Dakota of “America’s Water Infrastructure Act of 2018” allows an exemption from section 404(b)(2)(B)(ii) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act ([42 U.S.C. 5170c\(b\)\(2\)\(B\)\(ii\)](#)), and 44 CFR, Part 80 regulations promulgated to carry out that section, to the extent necessary to complete the Fargo-Moorhead Metropolitan Area Diversion Project authorized by section 7002(2) of the Water Resources Reform and Development Act of 2014 (128 Stat. 1366).;

WHEREAS, USACE funded a pre-identified diversion project to protect developed areas of the County for which there is no practicable alternative but for the alignment to impede upon said parcels;

WHEREAS, FEMA, pursuant to 44 C.F.R. § 80.19(a)(1)(ii), allowed the U.S. Army Corps of Engineers (USACE) to utilize the twenty- one (21) parcels listed in Attachment A for the purpose of constructing a flood control levee/floodwall and/or control structure consistent with Section 1321 of America’s Water Infrastructure Act of 2018.

WHEREAS, FEMA allowed the County to utilize the 15 parcels listed in Attachment A for the purposes of constructing, operating and maintaining a flood control diversion project consistent with Section 1321 of America's Water Infrastructure Act of 2018.

WHEREAS, FEMA which has authority to implement the Stafford Act, in coordination with USACE, is required to meet the federal interest in mitigating flood risk in this community. This determination is with respect to only the portion of said parcels directly under the footprint of the diversion project and/or necessary for the operation and maintenance of the project; the parcels otherwise remain subject to the Terms and Conditions of the grant award and property conveyance.

NOW, FEMA, the State, and the County, including its successors and assigns, incorporate and amend the

restrictive covenants with respect to the Property to clarify the following Terms and Conditions, which run with the land in perpetuity:

1. Terms. Pursuant to the terms of the Stafford Act, 42 USC § 5170c, the regulations promulgated thereunder (44

C.F.R. Part 80), the FEMA-State Agreement, and the State-local Agreement, the following conditions and restrictions apply in perpetuity to the Property:

- a. Compatible uses. The Property shall be used only for purposes compatible with open space, recreational, or wetlands management practices; in general, such uses include parks for outdoor recreational activities, nature reserves, unimproved permeable parking lots and other uses described in 44 C.F.R. Part 80, and related program guidance for open space acquisition.
- b. Structures. No new structures or improvements shall be erected on the Property other than:
  - i. A public facility that is open on all sides and functionally related to the open space use;
  - ii. A public rest room; or
  - iii. A structure that is compatible with open space and conserves the natural function of the floodplain, which the Administrator approves in writing before the construction of the structure begins.
  - iv. Any structures built on the Property according to this paragraph shall be floodproofed or elevated to the Base Flood Elevation plus freeboard, as required by ordinance.
- c. Special Federal Interests. FEMA, the State, and the County accede to and agree that the use of the Property for the USACE constructed diversion project, owned, operated and maintained by the Metro Flood Diversion Authority, in this unique situation, is not inconsistent with these Terms and, to the extent that all or a portion of said Property is part of the footprint of the diversion project and necessary for the

operation and maintenance of said diversion project, shall be allowed to be used for such purposes; the Property otherwise shall remain subject to the terms and conditions of the grant award and Property acquisition consistent with Section 1321 of America's Water Infrastructure Act of 2018.

- d. Disaster Assistance. No future disaster assistance from any Federal source for any purpose related to the Property may be sought, nor will such assistance be provided;
- e. Transfer. No interest in the Property shall be transferred unless and until the Regional Administrator of FEMA gives prior approval of the transferee in accordance with this paragraph. An interest in the Property may be conveyed only to another public entity or to an organization established for conservation purposes qualified under Section 170(h) of the Internal Revenue Code of 1954, as amended, and applicable implementing regulations. Notwithstanding the foregoing, however, the Property may be leased, or an easement in the Property granted, to a private individual or entity for purposes compatible with the uses described in Paragraph 1(a), above, including agriculture, with the prior approval of the Regional Administrator.

If title to the Property is transferred to a public entity other than a qualified state or federal agency with a conservation mission, it must be conveyed subject to a Conservation Easement that shall be recorded with the deed and shall incorporate all terms and conditions set forth herein, including the easement holder's responsibility to enforce the easement. The conservation easement holder shall be the County, the State, or another public entity or conservation organization approved by the Regional Administrator.

2. Inspection. FEMA, the State, the County and their respective representatives, successors and assigns, shall have the right to enter upon the Property, at reasonable times and with reasonable notice, for the purpose of inspecting the Property to ensure compliance with the terms of this Agreement of Clarification, the FEMA-State Agreement, and the State-Local Agreement.

3. Monitoring and Reporting. Every three years, the County, through the State, shall submit to the FEMA Regional Administrator a report certifying that the County has inspected the subject Property within the month preceding the report, and that the Property continues to be maintained consistent with the provisions of this Agreement of Clarification, the FEMA-State Agreement, and the State-Local Agreement.

Enforcement. If the Property is not maintained according to the terms of this Agreement of Clarification, the FEMA-State Agreement, and the State-Local Agreement, the County, the State, FEMA, and their respective representatives, successors and assigns shall each have the right to access the Property and take all measures necessary to bring the Property back into compliance. In this regard, the relative rights and responsibilities of FEMA, the State, and the County, which in this section includes successors in the property interest, shall include, without limitation, the following:

- a. The State will notify the County, or successors in property interest, in writing regarding the nature of the violation and advise the County that it has 60 days to correct the violation.
  - b. If the County, or successors in property interest, fail to demonstrate a good faith effort to correct the violation within the 60-day period, the State shall enforce the terms of the FEMA-State Agreement, State-Local Agreement, and this Agreement of Clarification, by taking any measures it deems appropriate, including but not limited to bringing an action at law or in equity in a court of competent jurisdiction.
  - c. FEMA, including its representatives and assigns, may enforce the terms of the FEMA-State Agreement and this Agreement of Clarification by taking any measures it deems appropriate, including but not limited to the following:
    - i. Requiring transfer of title in accordance with Paragraph 1(e). The County shall bear the costs of bringing the Property back into compliance with the terms of the FEMA-State Agreement and this Agreement of Clarification; or
    - ii. Bringing an action at law or in equity in a court of competent jurisdiction against the State, the County or titleholder of the Property to compel correction of the violation.
4. Severability. Should any provision of this Agreement of Clarification or the application thereof to any person or circumstance be found to be invalid or unenforceable, the rest and remainder of the provisions of this Agreement of Clarification and their application shall not be affected and shall remain valid and enforceable.
5. Enforceability: The restrictions and other requirements described in this Agreement of Clarification shall run with the land and shall be binding on the County, its successors, assigns and lessees or their authorized agents, employees or persons acting under their direction and control.
6. Amendment or Termination: This Agreement of Clarification shall not be amended, modified or terminated except by a written instrument executed by and between the titleholder of the Property at the time of the proposed amendment, modification or termination, the County, the State and FEMA, which written instrument shall be recorded with the Cass County Recorder's office.

[Signed, with witnesses and notarization in accordance with local law.]

By:  
 XXXXXXXX, Chairperson  
 County Commission  
 Cass County, ND

Date

Notary:

Cody Schulz, Director  
North Dakota Department of Emergency Services

Date

Notary:

Kayed Lakhia, Director  
Hazard Mitigation Division  
Federal Emergency Management Agency  
Department of Homeland Security

Date

Notary: