Item 7D.
BCWMC
12-20-18

Minnesota Wetland Conservation Act
Notice of Decision

Local Government Unit (LGU)	Address
City of Plymouth	**3400 Plymouth Blvd** **Plymotuh, MN 554477**

1. PROJECT INFORMATION

Applicant Name	Project Name	Date of Application	Application Number
Jim Touve	**Touve Parcel**	**10/15/2018**	**N/A**

☒ Attach site locator map.

Type of Decision:

☒ Wetland Boundary or Type Sequencing ☐ No-Loss ☐ Exemption ☐

☐ Replacement Plan ☐ Banking Plan

Technical Evaluation Panel Findings and Recommendation (if any):

☒ Approve ☐ Approve with conditions ☐ Deny

Summary (or attach): The TEP completed a site review of the delineated boundaries on 11/1/2018. Additional information was provided by the DNR including the surveyed OHWL, previous permit applications, and a restoration and replacement order issued in 2017.

2. LOCAL GOVERNMENT UNIT DECISION

Date of Decision: **12-06-2018**

☒ Approved ☐ Approved with conditions (include below) ☐ Denied

LGU Findings and Conclusions (attach additional sheets as necessary):

Kjolhaug Environmental investigated and delineation the 8.03 acre Touve Parcel located along Medicine Lake, City of Plymouth, MN. The site was located in Section 26, TWP 118N, and Range 22W. During the delineation on August 25th, 2018, one wetland was delineated.

A TEP review was completed on 11-1-2018 with the wetland boundaries and types approved as delineated. for all wetlands above the DNR established OHWL. All wetland areas below the OHWL are regulated by the MnDNR.

For Replacement Plans using credits from the State Wetland Bank:

Bank Account #	Bank Service Area	County	Credits Approved for Withdrawal (sq. ft. or nearest .01 acre)
N/A			

Replacement Plan Approval Conditions. In addition to any conditions specified by the LGU, the approval of a Wetland Replacement Plan is conditional upon the following:

☐ **Financial Assurance:** For project-specific replacement that is not in-advance, a financial assurance specified by the LGU must be submitted to the LGU in accordance with MN Rule 8420.0522, Subp. 9 (List amount and type in LGU Findings).

☐ **Deed Recording:** For project-specific replacement, evidence must be provided to the LGU that the BWSR "Declaration of Restrictions and Covenants" and "Consent to Replacement Wetland" forms have been filed with the county recorder's office in which the replacement wetland is located.

☐ **Credit Withdrawal:** For replacement consisting of wetland bank credits, confirmation that BWSR has withdrawn the credits from the state wetland bank as specified in the approved replacement plan.

Wetlands may not be impacted until all applicable conditions have been met!

LGU Authorized Signature:

Signing and mailing of this completed form to the appropriate recipients in accordance with 8420.0255, Subp. 5 provides notice that a decision was made by the LGU under the Wetland Conservation Act as specified above. If additional details on the decision exist, they have been provided to the landowner and are available from the LGU upon request.

Name	Title	
Michael Thompson **City of Plymouth**	**Public Works Director**	
Signature	Date	Phone Number and E-mail
	12/06/2018	**763-509-5501** **mthompson@plymouth.gov**

THIS DECISION ONLY APPLIES TO THE MINNESOTA WETLAND CONSERVATION ACT. Additional approvals or permits from local, state, and federal agencies may be required. Check with all appropriate authorities before commencing work in or near wetlands.

Applicants proceed at their own risk if work authorized by this decision is started before the time period for appeal (30 days) has expired. If this decision is reversed or revised under appeal, the applicant may be responsible for restoring or replacing all wetland impacts.

This decision is valid for three years from the date of decision unless a longer period is advised by the TEP and specified in this notice of decision.

3. APPEAL OF THIS DECISION

Pursuant to MN Rule 8420.0905, any appeal of this decision can only be commenced by mailing a petition for appeal, including applicable fee, within thirty (30) calendar days of the date of the mailing of this Notice to the following as indicated:

Check one:

☒ Appeal of an LGU staff decision. Send petition and $0 fee (if applicable) to: **Michael Thompson, Public Works Director** **City of Plymouth** **3400 Plymouth Blvd.** **Plymouth, MN**	☐ Appeal of LGU governing body decision. Send petition and $500 filing fee to: Executive Director Minnesota Board of Water and Soil Resources 520 Lafayette Road North St. Paul, MN 55155

4. LIST OF ADDRESSEES

☒ SWCD TEP member: **Ms. Stacey Lijewski, HCD, 701 Fourth Avenue South, Suite 700, Minneapolis, MN 55415-1600 (sent electronically)**
☐ BWSR TEP member: **Ben Carlson, BWSR 520 Lafayette Road North, St. Paul, MN 55401 (sent electronically)**
☒ LGU TEP member (if different than LGU Contact): **Ben Scharenbroich, City of Plymouth, 3400 Plymouth Blvd, Plymouth, MN 55447 (sent electronically)**
☒ DNR TEP member: **Becky Horton, MnDNR, 1200 Warner Road, St. Paul, MN 55106 (sent electronically)**
☐ DNR Regional Office (if different than DNR TEP member)
☒ WD or WMO (if applicable): **BCWMC, c/o Laura Jester, Keystone Waters, LLC, 16145 Hillcrest Lane, Eden Prairie, MN 55346 (sent electronically)**
☒ Applicant and Landowner (if different)
☒ Members of the public who requested notice:
Melissa Barrett, Kjolhaug Environmental Services, Inc. 2500 Shadywood Road, Suite 130, Orono, MN 55331
James Touve, 4300 Toledo Avenue N, Robbinsdale, MN 55422

☒ Corps of Engineers Project Manager
☐ BWSR Wetland Bank Coordinator (wetland bank plan decisions only)

5. MAILING INFORMATION

➢ For a list of BWSR TEP representatives: www.bwsr.state.mn.us/aboutbwsr/workareas/WCA_areas.pdf

➢ For a list of DNR TEP representatives: www.bwsr.state.mn.us/wetlands/wca/DNR_TEP_contacts.pdf

➢ Department of Natural Resources Regional Offices:

NW Region:	NE Region:	Central Region:	Southern Region:
Reg. Env. Assess. Ecol. Div. Ecol. Resources 2115 Birchmont Beach Rd. NE Bemidji, MN 56601	Reg. Env. Assess. Ecol. Div. Ecol. Resources 1201 E. Hwy. 2 Grand Rapids, MN 55744	Reg. Env. Assess. Ecol. Div. Ecol. Resources 1200 Warner Road St. Paul, MN 55106	Reg. Env. Assess. Ecol. Div. Ecol. Resources 261 Hwy. 15 South New Ulm, MN 56073

For a map of DNR Administrative Regions, see: http://files.dnr.state.mn.us/aboutdnr/dnr_regions.pdf

- For a list of Corps of Project Managers: www.mvp.usace.army.mil/regulatory/default.asp?pageid=687 or send to:

  US Army Corps of Engineers
  St. Paul District, ATTN: OP-R
  180 Fifth St. East, Suite 700
  St. Paul, MN 55101-1678

- For Wetland Bank Plan applications, also send a copy of the application to:

  Minnesota Board of Water and Soil Resources
  Wetland Bank Coordinator
  520 Lafayette Road North
  St. Paul, MN 55155

6. ATTACHMENTS

In addition to the site locator map, list any other attachments:

- ☒ **Figure showing Delineated Boundaries**
- ☒ **Photo of water elevation in July 2018**
- ☒ **Additional information from the DNR (Previous permit application and permit denial letter)**
- ☒ **Restoration and Replacement Order from DNR (July 2017)**
- ☒

Touve Parcel

Plymouth, Hennepin County, Minnesota

Wetland Delineation Report

Prepared for

Jim Touve

by

Kjolhaug Environmental Services Company, Inc.
(KES Project No. 2018-111)

October 1, 2018

Touve Parcel

Plymouth, Hennepin County, Minnesota

Wetland Delineation Report

TABLE OF CONTENTS

TABLES

FIGURES

APPENDICES

Touve Parcel

Plymouth, Hennepin County, Minnesota

Wetland Delineation Report

1. WETLAND DELINEATION SUMMARY

- The 8.03-acre Touve Parcel was inspected on August 14, 2018 for the presence and extent of wetland.
- The National Wetlands Inventory (NWI) map showed one PFO1A wetland within site boundaries.
- The soil survey showed the hydric soil type within site boundaries included Medo soils.
- The DNR Public Waters Inventory showed DNR Public Water 27-104P (Medicine Lake) within and along site boundaries.
- The National Hydrography Dataset showed one Lake/Pond surface waters feature within and along site boundaries.
- One wetland was delineated within the review area as summarized below.

Table 1. Wetlands delineated on the Touve Parcel site

Wetland ID	Wetland Type			Dominant Vegetation
	Circular 39	Cowardin	Eggers and Reed	
1 (~4.5 acres)	1/3	PFO1A/PEMC	Deciduous forested, seasonally flooded basin and shallow marsh	Green ash, common buckthorn, glossy buckthorn, willow, wood nettle, boxelder, cottonwood, cattail, reed canary grass

2. OVERVIEW

The 8.03-acre Touve Parcel was inspected on August 14, 2018 for the presence and extent of wetland. The site was located in Section 26, Township 118 North, Range 22 West, City of Plymouth, Hennepin County, Minnesota. The review area was located immediately north of Sunrise Bay Condominiums which are located northeast of the intersection of West Medicine Lake Drive and 12th Avenue North and the Luce Line Trail (**Figure 1**). The site corresponded to Hennepin County PID 2611822440006 (address unassigned).

The site consisted of an upland peninsula surrounded by Medicine Lake. In order to access the peninsula a narrow span of water was crossed via a rudimentary bridge. A gravel road extended through the site and ended in the north portion of the site which appeared to be a former home/homes site. Upland woodland vegetation observed included: cottonwood, basswood, American elm, green ash, European aspen, common buckthorn (trees and shrubs), glossy buckthorn, lady fern, enchanter's nightshade, Virginia creeper, baneberry, catnip, upright carrion plant, rue anemone, false Solomon's seal, Jack-in-the-pulpit, Solomon's seal, chokecherry, sumac, boxelder, hog peanut, white snakeroot, annual ragweed, burdock, and motherwort.

One (1) wetland was delineated within the review area boundaries. Delineated wetland boundaries and existing conditions are shown on **Figure 2**.

Appendix A of this report includes a Joint Application Form for Activities Affecting Water Resources in Minnesota, which is submitted in request for: (1) a wetland boundary and type determination under the Minnesota Wetland Conservation Act (WCA), and (2) delineation concurrence from the U.S. Army Corps of Engineers (USACE) for Section 404 of the Federal Clean Water Act.

3. METHODS

3.1 Wetland Delineation

Wetlands were identified using the Routine Determination method described in the Corps of Engineers Wetlands Delineation Manual (Waterways Experiment Station, 1987) and the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest Region (Version 2.0) as required under Section 404 of the Clean Water Act and the Minnesota Wetland Conservation Act.

Wetland boundaries were identified as the upper-most extent of wetland that met criteria for hydric soils, hydrophytic vegetation, and wetland hydrology. Wetland-upland boundaries were marked with pin flags that were located by Lot Surveys Company. Boundaries shown on Figure 2 do not represent an official survey.

Soils, vegetation, and hydrology were documented at a representative location along the wetland-upland boundary. Plant species dominance was estimated based on the percent aerial or basal

coverage visually estimated within a 30-foot radius for trees and vines, a 15-foot radius for the shrub layer, and a 5-foot radius for the herbaceous layer within the community type sampled.

Soils were characterized to a minimum depth of 24 inches (unless otherwise noted) using a Munsell Soil Color Book and standard soil texturing methodology. Hydric soil indicators used are from Field Indicators of Hydric Soils in the United States (USDA Natural Resources Conservation Service (NRCS) in cooperation with the National Technical Committee for Hydric Soils, Version 8.1, 2017).

Mapped soils are separated into five classes based on the composition of hydric components and the Hydric Rating by Map Unit color classes utilized on Web Soil Survey. The five classes include Hydric (100 percent hydric components), Predominantly Hydric (66 to 99 percent hydric components), Partially Hydric (33 to 65 percent hydric components), Predominantly Non-Hydric (1 to 32 percent hydric components), and Non-Hydric (less than one percent hydric components).

Plants were identified using standard regional plant keys. Taxonomy and indicator status of plant species was taken from the 2016 National Wetland Plant List (U.S. Army Corps of Engineers 2016. National Wetland Plant List, version 3.3, Engineer Research and Development Center, Cold Regions Research and Engineering Laboratory, Hanover, NH).

4. RESULTS

4.1 Review of NWI, Soils, Public Waters and NHD Information

The National Wetlands Inventory (NWI) (Minnesota Geospatial Commons 2009-2014 and U.S. Fish and Wildlife Service) showed one PFO1A wetland within site boundaries (**Figure 3**).

The Soil Survey (USDA NRCS 2015) showed the hydric soil type within site boundaries included Medo soils. Soil types mapped on or adjacent to the property are listed in **Table 2** and a map showing soil types is included in **Figure 4**.

Table 2. Soil types mapped on the Touve Parcel site

Symbol	Soil Name	Acres	% of Area	% Hydric	Hydric Category
L2D	Malardi-Hawick complex, 12 to 18 percent slopes	3	7.50%	0	Non-hydric
L30A	Medo soils, depressional, 0 to 1 percent slopes	14.6	36.00%	100	Hydric
U2A	Udorthents, wet substratum, 0 to 2 percent slopes	0.6	1.50%	0	Non-hydric
W	Water	22.3	55.00%	0	Non-Hydric

The Minnesota DNR Public Waters Inventory (Minnesota Department of Natural Resources 2015) showed DNR Public Water 27-104P (Medicine Lake) within and along site boundaries.

The National Hydrography Dataset (U.S. Geological Survey 2015) showed one Lake/Pond surface waters feature within and along site boundaries (**Figure 6**).

4.2 Wetland Determinations and Delineations

Potential wetlands were evaluated during field observations on August 14, 2018. One (1) wetland was identified and delineated on the property (**Figure 2**). Corresponding data forms are included in **Appendix B**. The following description of the wetland and the adjacent upland reflects conditions observed at the time of the field visit. Tree and shrubs had leaves, and herbaceous vegetation was actively growing. Climatic conditions were typical (normal) based on the gridded database method (3-month antecedent precipitation) (**Appendix C**) and field observations. A copy of the wetland boundary survey is included as **Appendix D**.

Wetland 1 was a Type 1/3 (PFO1A/PEMC) deciduous forested, seasonally flooded basin and shallow marsh wetland dominated in forested portions by green ash, cottonwood, glossy buckthorn, common buckthorn, and wood nettle and in shallow marsh areas by cattail, reed canary grass, purple loosestrife, willow, red osier dogwood, and sedge with lesser amounts of smartweed, green bulrush, Joe-Pye weed, giant goldenrod, and Canada bluejoint. The sample transect was taken within a very flat, forested portion of the site in soils that were difficult to sample due to their loose soil texture. Wetland hydrology and the delineated boundary was based on vegetation and slight changes in topogrpahy.

Adjacent upland consisted of upland dominated by green ash and common buckthorn with an understory of enchanter's nightshade. No primary or secondary hydrology indicators were observed on the upland.

The delineated boundary followed a change in vegetation from wetland to upland plant communities, and a generally slight in topography. Wetland 1 was shown as a PFO1A wetland on the NWI map and was located within an area mapped as Medo soils (Hydric) on the soil survey. Wetland 1 transitioned to the edge of Medicine Lake which surrounds the site.

4.3 Other Areas

No other depressional areas with hydrophytic vegetation or wetland hydrology were observed within site boundaries. No other areas were shown as hydric soil on the soil survey or as wetland on the NWI map.

4.5 Request for Wetland Boundary and Jurisdictional Determination

Appendix A of this report includes a Joint Application Form for Activities Affecting Water Resources in Minnesota, which is submitted in request for: (1) a wetland boundary and type determination under the Minnesota Wetland Conservation Act (WCA), and (2) delineation concurrence from the U.S. Army Corps of Engineers (USACE) for Section 404 of the Federal Clean Water Act.

5. CERTIFICATION OF DELINEATION

The procedures utilized in the described delineation are based on the U.S. Army Corps of Engineers 1987 Wetlands Delineation Manual as required under Section 404 of the Clean Water Act and the Minnesota Wetland Conservation Act. This wetland delineation and report were prepared in compliance with the regulatory standards in place at the time the work was performed.

Site boundaries indicated on figures within this report are approximate and do not constitute an official survey product.

Delineation completed by: Melissa Lauterbach-Barrett, Wetland Specialist
Minnesota Certified Wetland Delineator No. 1085

Mark Kjolhaug, Professional Wetland Scientist

Report prepared by: Melissa Lauterbach-Barrett, Wetland Specialist
Minnesota Certified Wetland Delineator No. 1085

Report reviewed by: _____ Date: October 1, 2018
Mark Kjolhaug, Professional Wetland Scientist No. 000845

Touve Parcel

Wetland Delineation Report

FIGURES

1. Site Location
2. Existing Conditions
3. National Wetlands Inventory
4. Soil Survey
5. DNR Protected Waters Inventory
6. National Hydrography Dataset

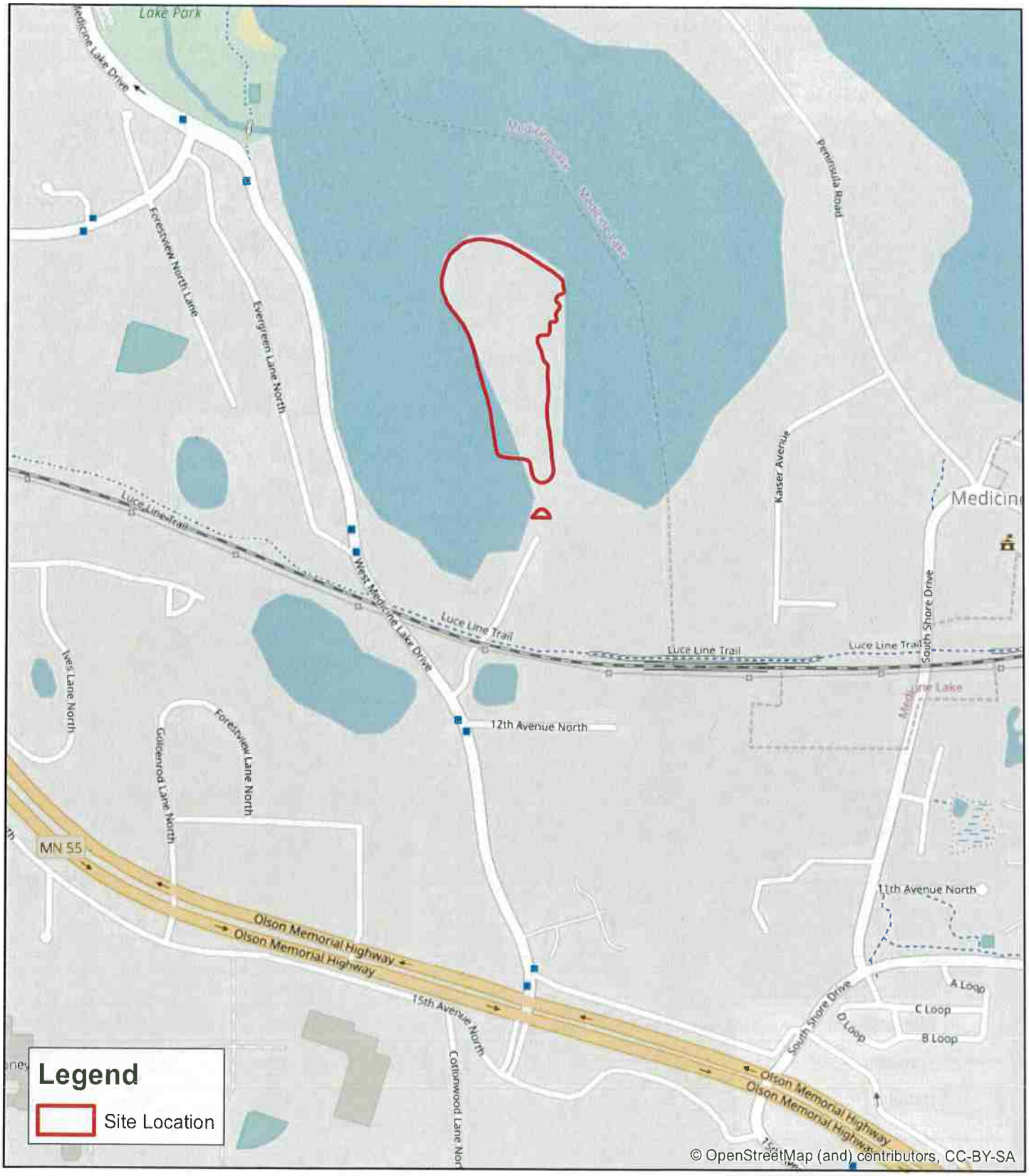

Figure 1 - Site Location

N

0 500 Feet

KJOLHAUG ENVIRONMENTAL SERVICES COMPANY

Source: ESRI Streets Basemap

Touve Parcel (KES 2018-111)
Plymouth, Minnesota

Note: Boundaries indicated on this figure are approximate and do not constitute an official survey product.

Figure 2 - Existing Conditions (2017 FSA Photo)

N

0 250 Feet

KJOLHAUG ENVIRONMENTAL SERVICES COMPANY

Source: MnGeo, ESRI Imagery Basemap

Touve Parcel (KES 2018-111)
Plymouth, Minnesota

Note: Boundaries indicated on this figure are approximate and do not constitute an official survey product.

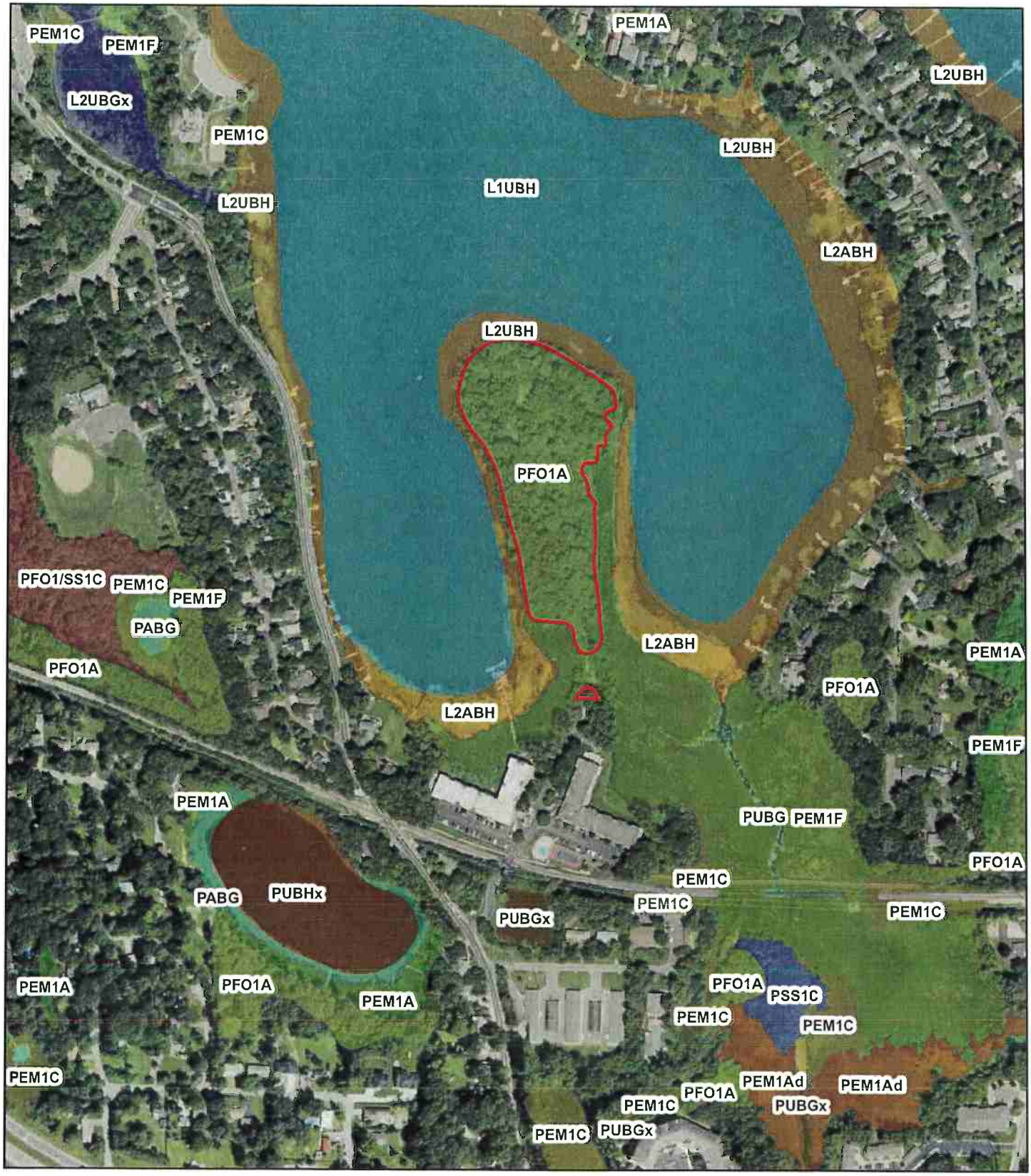

Figure 3 - National Wetlands Inventory

N

0 500 Feet

KJOLHAUG ENVIRONMENTAL SERVICES COMPANY

Source: Minnesota DNR (2013), USFWS

Touve Parcel (KES 2018-111)
Plymouth, Minnesota

Note: Boundaries indicated on this figure are approximate and do not constitute an official survey product.

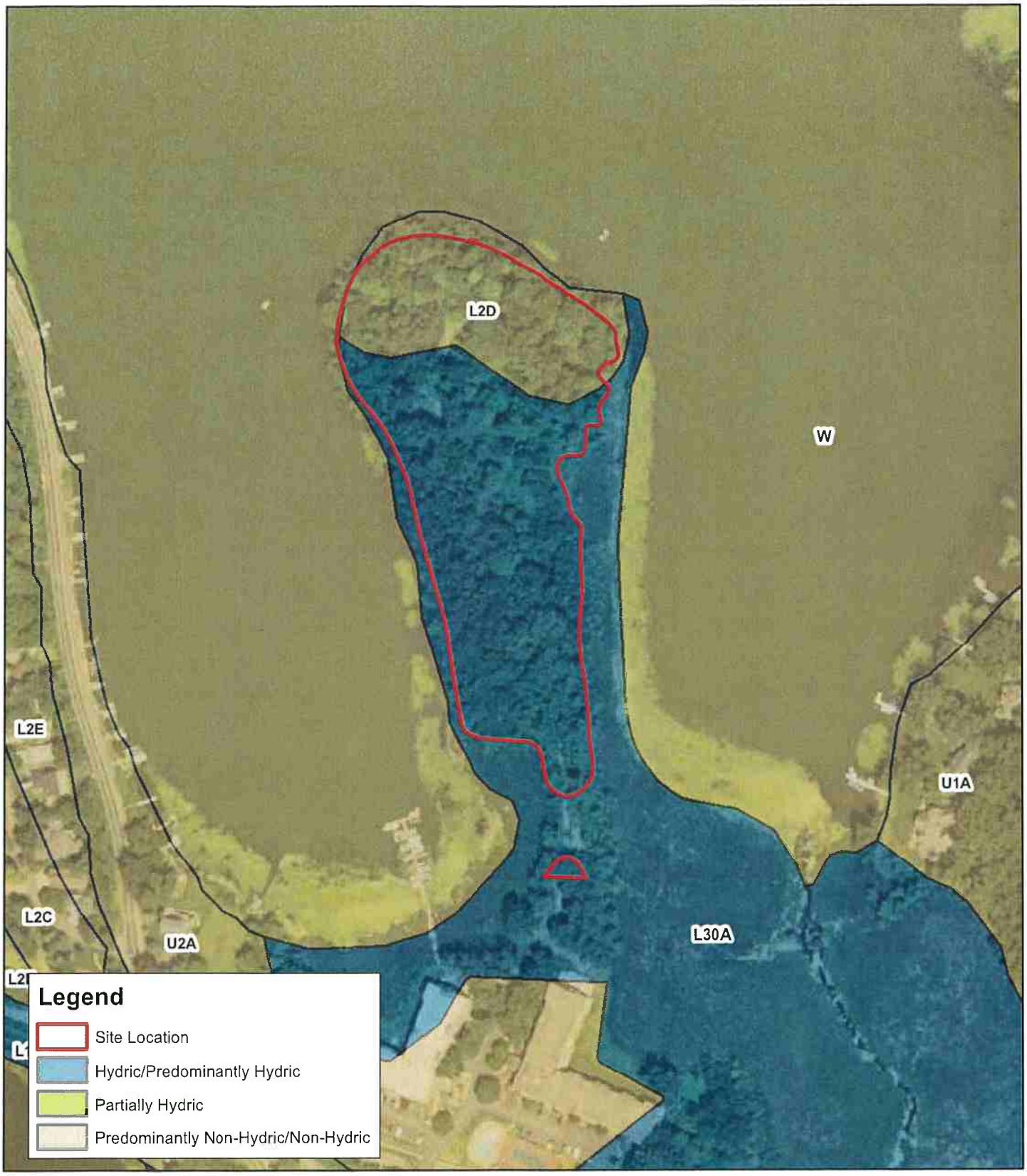

Figure 4 - Soil Survey

N

0 500 Feet

KJOLHAUG ENVIRONMENTAL SERVICES COMPANY

Source: USDA, NRCS

Touve Parcel (KES 2018-111)
Plymouth, Minnesota

Note: Boundaries indicated on this figure are approximate and do not constitute an official survey product.

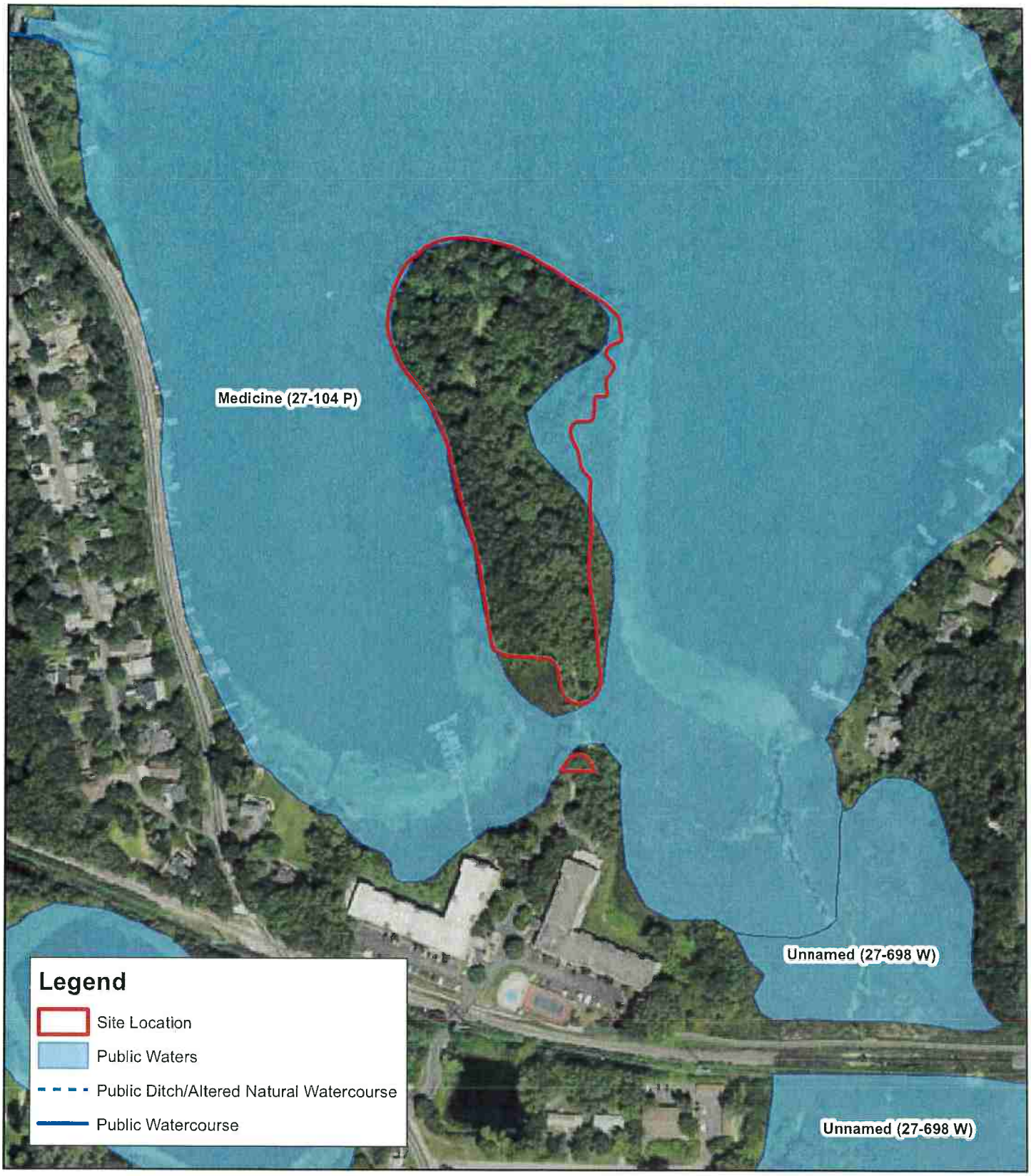

Figure 5 - DNR Public Waters Inventory

N

0 500 Feet

KJOLHAUG ENVIRONMENTAL SERVICES COMPANY

Source: Minnesota DNR

Touve Parcel (KES 2018-111)
Plymouth, Minnesota

Note: Boundaries indicated on this figure are approximate and do not constitute an official survey product.

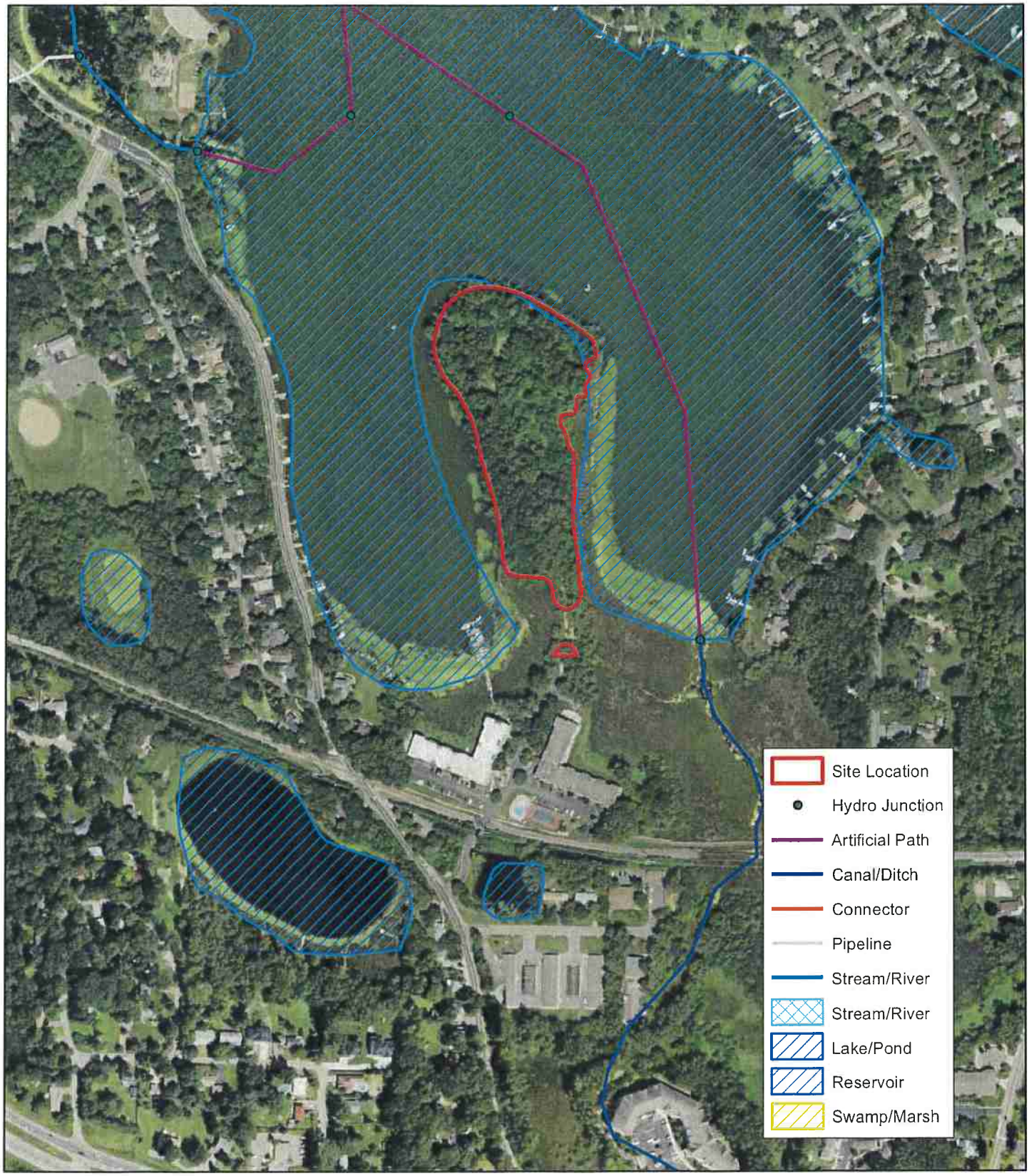

Figure 6 - National Hydrography Dataset

N

0 1,000 Feet

KJOLHAUG ENVIRONMENTAL SERVICES COMPANY

Source: USGS

Touve Parcel (KES 2018-111)
Plymouth, Minnesota

Note: Boundaries indicated on this figure are approximate and do not constitute an official survey product.

Touve Parcel

Wetland Delineation Report

APPENDIX A

Joint Application Form for Activities Affecting Water Resources in Minnesota

PART ONE: Applicant Information

If applicant is an entity (company, government entity, partnership, etc.), an authorized contact person must be identified. If the applicant is using an agent (consultant, lawyer, or other third party) and has authorized them to act on their behalf, the agent's contact information must also be provided.

Applicant/Landowner Name: Jim Touve
Mailing Address: 4300 Toledo Avenue, Robbinsdale, MN 55422
Phone: 763-533-1703
E-mail Address: juneT@goldengate.net

Authorized Contact (do not complete if same as above):
Mailing Address:
Phone:
E-mail Address:

Agent Name: Melissa Barrett, Kjolhaug Environmental
Mailing Address: 2500 Shadywood Road, Suite 130, Orono, MN 55331
Phone: 952-401-8757
E-mail Address: melissa@kjolhaugenv.com

PART TWO: Site Location Information

County: Hennepin **City/Township: Plymouth**
Parcel ID and/or Address: 2611822440006
Legal Description (Section, Township, Range): Sec 26, T118, R22
Lat/Long (decimal degrees): 44°59'48.64N, 93°25'26.58"W
Attach a map showing the location of the site in relation to local streets, roads, highways.
Approximate size of site (acres) or if a linear project, length (feet): 8.03-acres

If you know that your proposal will require an individual Permit from the U.S. Army Corps of Engineers, you must provide the names and addresses of all property owners adjacent to the project site. This information may be provided by attaching a list to your application or by using block 25 of the Application for Department of the Army permit which can be obtained at:

http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RegulatoryDocs/engform_4345_2012oct.pdf

PART THREE: General Project/Site Information

If this application is related to a delineation approval, exemption determination, jurisdictional determination, or other correspondence submitted ***prior to*** this application then describe that here and provide the Corps of Engineers project number.

Describe the project that is being proposed, the project purpose and need, and schedule for implementation and completion. The project description must fully describe the nature and scope of the proposed activity including a description of all project elements that effect aquatic resources (wetland, lake, tributary, etc.) and must also include plans and cross section or profile drawings showing the location, character, and dimensions of all proposed activities and aquatic resource impacts.

Application is for delineation review and concurrence.

PART FOUR: Aquatic Resource Impact[1] Summary

If your proposed project involves a direct or indirect impact to an aquatic resource (wetland, lake, tributary, etc.) identify each impact in the table below. Include all anticipated impacts, including those expected to be temporary. Attach an overhead view map, aerial photo, and/or drawing showing all of the aquatic resources in the project area and the location(s) of the proposed impacts. Label each aquatic resource on the map with a reference number or letter and identify the impacts in the following table.

Aquatic Resource ID (as noted on overhead view)	**Aquatic Resource Type** (wetland, lake, tributary etc.)	**Type of Impact** (fill, excavate, drain, or remove vegetation)	**Duration of Impact** Permanent (P) or Temporary (T)[1]	**Size of Impact**[2]	**Overall Size of Aquatic Resource** [3]	**Existing Plant Community Type(s)** in Impact Area[4]	**County, Major Watershed #, and Bank Service Area #** of Impact Area[5]

[1]If impacts are temporary; enter the duration of the impacts in days next to the "T". For example, a project with a temporary access fill that would be removed after 220 days would be entered "T (220)".
[2]Impacts less than 0.01 acre should be reported in square feet. Impacts 0.01 acre or greater should be reported as acres and rounded to the nearest 0.01 acre. Tributary impacts must be reported in linear feet of impact and an area of impact by indicating first the linear feet of impact along the flowline of the stream followed by the area impact in parentheses). For example, a project that impacts 50 feet of a stream that is 6 feet wide would be reported as 50 ft (300 square feet).
[3]This is generally only applicable if you are applying for a de minimis exemption under MN Rules 8420.0420 Subp. 8, otherwise enter "N/A".
[4]Use *Wetland Plants and Plant Community Types of Minnesota and Wisconsin* 3rd Ed. as modified in MN Rules 8420.0405 Subp. 2.
[5]Refer to Major Watershed and Bank Service Area maps in MN Rules 8420.0522 Subp. 7.

If any of the above identified impacts have already occurred, identify which impacts they are and the circumstances associated with each:

PART FIVE: Applicant Signature

☐ Check here if you are requesting a pre-application consultation with the Corps and LGU based on the information you have provided. Regulatory entities will not initiate a formal application review if this box is checked.

By signature below, I attest that the information in this application is complete and accurate. I further attest that I possess the authority to undertake the work described herein.

Signature: _____ Date: 9-28-18

I hereby authorize _____ to act on my behalf as my agent in the processing of this application and to furnish, upon request, supplemental information in support of this application.

[1] **The term "impact" as used in this joint application form is a generic term used for disclosure purposes to identify activities that may require approval from one or more regulatory agencies. For purposes of this form it is not meant to indicate whether or not those activities may require mitigation/replacement.**

Attachment A
Request for Delineation Review, Wetland Type Determination, or Jurisdictional Determination

By submission of the enclosed wetland delineation report, I am requesting that the U.S. Army Corps of Engineers, St. Paul District (Corps) and/or the Wetland Conservation Act Local Government Unit (LGU) provide me with the following (check all that apply):

☒ **Wetland Type Confirmation**

☒ **Delineation Concurrence**. Concurrence with a delineation is a written notification from the Corps and a decision from the LGU concurring, not concurring, or commenting on the boundaries of the aquatic resources delineated on the property. Delineation concurrences are generally valid for five years unless site conditions change. Under this request alone, the Corps will not address the jurisdictional status of the aquatic resources on the property, only the boundaries of the resources within the review area (including wetlands, tributaries, lakes, etc.).

☐ **Preliminary Jurisdictional Determination**. A preliminary jurisdictional determination (PJD) is a non-binding written indication from the Corps that waters, including wetlands, identified on a parcel may be waters of the United States. For purposes of computation of impacts and compensatory mitigation requirements, a permit decision made on the basis of a PJD will treat all waters and wetlands in the review area as if they are jurisdictional waters of the U.S. PJDs are advisory in nature and may not be appealed.

☐ **Approved Jurisdictional Determination**. An approved jurisdictional determination (AJD) is an official Corps determination that jurisdictional waters of the United States are either present or absent on the property. AJDs can generally be relied upon by the affected party for five years. An AJD may be appealed through the Corps administrative appeal process.

In order for the Corps and LGU to process your request, the wetland delineation must be prepared in accordance with the 1987 Corps of Engineers Wetland Delineation Manual, any approved Regional Supplements to the 1987 Manual, and the *Guidelines for Submitting Wetland Delineations in Minnesota* (2013).
http://www.mvp.usace.army.mil/Missions/Regulatory/DelineationJDGuidance.aspx

Touve Parcel

Wetland Delineation Report

APPENDIX B

Wetland Delineation Data Forms

WETLAND DETERMINATION DATA FORM - Midwest Region

Project/Site: Touve Parcel | City/County: Plymouth/Hennepin | Sampling Date: 8-14-2018

Applicant/Owner: Jim Touve | State: MN | Sampling Point: SP1-upl

Investigator(s): M. Barrett | Section, Township, Range: Sec 26, T118, R22

Landform (hillslope, terrace, etc.): flat land | Local relief (concave, convex, none): linear/none

Slope (%): 0-1 | Lat: | Long: | Datum:

Soil Map Unit Name: Medo soils | NWI Classification: PFO1A

Are climatic/hydrologic conditions of the site typical for this time of the year? Y (If no, explain in remarks)

Are vegetation ____, soil ____, or hydrology ____ significantly disturbed? Are "normal circumstances" present? Yes

Are vegetation ____, soil ____, or hydrology ____ naturally problematic? (If needed, explain any answers in remarks.)

SUMMARY OF FINDINGS

Hydrophytic vegetation present? Y	**Is the sampled area within a wetland?** N
Hydric soil present? N	f yes, optional wetland site ID:
Indicators of wetland hydrology present? N	

Remarks: (Explain alternative procedures here or in a separate report.)

Climatic conditions typical (normal) based on gridded database method.

VEGETATION -- Use scientific names of plants.

Tree Stratum (Plot size: 30)	Absolute % Cover	Dominant Species	Indicator Status
1 *Fraxinus pennsylvanica*	40	Y	FACW
2 *Rhamnus cathartica*	15	Y	FAC
3			
4			
5			
	55	= Total Cover	

Sapling/Shrub stratur (Plot size: 15)			
1 *Rhamnus cathartica*	20	Y	FAC
2			
3			
4			
5			
	20	= Total Cover	

Herb stratum (Plot size: 5)			
1 *Circaea lutetiana*	15	Y	UPL
2 *Maianthemum racemosum*	5	Y	FACU
3			
4			
5			
6			
7			
8			
9			
10			
	20	= Total Cover	

Woody vine stratum (Plot size: 30)			
1			
2			
	0	= Total Cover	

Dominance Test Worksheet

Number of Dominant Species that are OBL, FACW, or FAC: 3 (A)

Total Number of Dominant Species Across all Strata: 5 (B)

Percent of Dominant Species that are OBL, FACW, or FAC: 60.00% (A/B)

Prevalence Index Worksheet

Total % Cover of:

OBL species	0	x 1 =	0
FACW species	40	x 2 =	80
FAC species	35	x 3 =	105
FACU species	5	x 4 =	20
UPL species	15	x 5 =	75
Column totals	95 (A)		280 (B)

Prevalence Index = B/A = 2.95

Hydrophytic Vegetation Indicators:

- ___ Rapid test for hydrophytic vegetation
- X Dominance test is >50%
- X Prevalence index is ≤3.0*
- ___ Morphological adaptations* (provide supporting data in Remarks or on a separate sheet)
- ___ Problematic hydrophytic vegetation* (explain)

*Indicators of hydric soil and wetland hydrology must be present, unless disturbed or problematic

Hydrophytic vegetation present? Y

Remarks: (Include photo numbers here or on a separate sheet)

SOIL

Sampling Point: SP1-upl

Profile Description: (Describe to the depth needed to document the indicator or confirm the absence of indicators.)

Depth (Inches)	Matrix Color (moist)	%	Redox Features Color (moist)	%	Type*	Loc**	Texture	Remarks
0-6	10YR 2/1	100					loamy sand	
6-12	5Y 4/2	100					corse sand	gravelly loamy, CaCO3

*Type: C = Concentration, D = Depletion, RM = Reduced Matrix, MS = Masked Sand Grains. **Location: PL = Pore Lining, M = Matrix

Hydric Soil Indicators:

- ___ Histosol (A1)
- ___ Histic Epipedon (A2)
- ___ Black Histic (A3)
- ___ Hydrogen Sulfide (A4)
- ___ Stratified Layers (A5)
- ___ 2 cm Muck (A10)
- ___ Depleted Below Dark Surface (A11)
- ___ Thick Dark Surface (A12)
- ___ Sandy Mucky Mineral (S1)
- ___ 5 cm Mucky Peat or Peat (S3)
- ___ Sandy Gleyed Matrix (S4)
- ___ Sandy Redox (S5)
- ___ Stripped Matrix (S6)
- ___ Loamy Mucky Mineral (F1)
- ___ Loamy Gleyed Matrix (F2)
- ___ Depleted Matrix (F3)
- ___ Redox Dark Surface (F6)
- ___ Depleted Dark Surface (F7)
- ___ Redox Depressions (F8)

Indicators for Problematic Hydric Soils:

- ___ Coast Prairie Redox (A16) (**LRR K, L, R**)
- ___ Dark Surface (S7) (**LRR K, L**)
- ___ Iron-Manganese Masses (F12) (**LRR K, L, R**)
- ___ Very Shallow Dark Surface (TF12)
- ___ Other (explain in remarks)

*Indicators of hydrophytic vegetation and weltand hydrology must be present, unless disturbed or problematic

Restrictive Layer (if observed):

Type: _____

Depth (inches): _____

Hydric soil present? N

Remarks:

Too dry and loose texture to sample further.

HYDROLOGY

Wetland Hydrology Indicators:

Primary Indicators (minimum of one is required; check all that apply)

- ___ Surface Water (A1)
- ___ High Water Table (A2)
- ___ Saturation (A3)
- ___ Water Marks (B1)
- ___ Sediment Deposits (B2)
- ___ Drift Deposits (B3)
- ___ Algal Mat or Crust (B4)
- ___ Iron Deposits (B5)
- ___ Inundation Visible on Aerial Imagery (B7)
- ___ Sparsely Vegetated Concave Surface (B8)
- ___ Water-Stained Leaves (B9)
- ___ Aquatic Fauna (B13)
- ___ True Aquatic Plants (B14)
- ___ Hydrogen Sulfide Odor (C1)
- ___ Oxidized Rhizospheres on Living Roots (C3)
- ___ Presence of Reduced Iron (C4)
- ___ Recent Iron Reduction in Tilled Soils (C6)
- ___ Thin Muck Surface (C7)
- ___ Gauge or Well Data (D9)
- ___ Other (Explain in Remarks)

Secondary Indicators (minimum of two required)

- ___ Surface Soil Cracks (B6)
- ___ Drainage Patterns (B10)
- ___ Dry-Season Water Table (C2)
- ___ Crayfish Burrows (C8)
- ___ Saturation Visible on Aerial Imagery (C9)
- ___ Stunted or Stressed Plants (D1)
- ___ Geomorphic Position (D2)
- ___ FAC-Neutral Test (D5)

Field Observations:

Surface water present?	Yes ___	No	X	Depth (inches):	___
Water table present?	Yes ___	No	X	Depth (inches):	___
Saturation present? (includes capillary fringe)	Yes ___	No	X	Depth (inches):	___

Indicators of wetland hydrology present? N

Describe recorded data (stream gauge, monitoring well, aerial photos, previous inspections), if available:

Remarks:

At least 2 feet in elevation above the lake water level - which would be local groundwater level.

WETLAND DETERMINATION DATA FORM - Midwest Region

Project/Site: Touve Parcel | City/County: Plymouth/Hennepin | Sampling Date: 8-14-2018

Applicant/Owner: Jim Touve | State: MN | Sampling Point: SP1-wet

Investigator(s): M. Barrett | Section, Township, Range: Sec 26, T118, R22

Landform (hillslope, terrace, etc.): flat land | Local relief (concave, convex, none): linear/none

Slope (%): 0-1 | Lat: | Long: | Datum:

Soil Map Unit Name: Medo soils | NWI Classification: PFO1A

Are climatic/hydrologic conditions of the site typical for this time of the year? Y (If no, explain in remarks)

Are vegetation ____, soil ____, or hydrology ____ significantly disturbed? Are "normal circumstances" present? Yes

Are vegetation ____, soil ____, or hydrology ____ naturally problematic? (If needed, explain any answers in remarks.)

SUMMARY OF FINDINGS

Hydrophytic vegetation present? Y	**Is the sampled area within a wetland?** Y
Hydric soil present? Y	f yes, optional wetland site ID: Wetland 1
Indicators of wetland hydrology present? Y	

Remarks: (Explain alternative procedures here or in a separate report.)

Climatic conditions typical (normal) based on gridded database method.

VEGETATION -- Use scientific names of plants.

Tree Stratum (Plot size: 30)	Absolute % Cover	Dominant Species	Indicator Status
1 *Fraxinus pennsylvanica*	40	Y	FACW
2			
3			
4			
5			
	40 = Total Cover		
Sapling/Shrub stratur (Plot size: 15)			
1 *Frangula alnus*	15	Y	FACW
2			
3			
4			
5			
	15 = Total Cover		
Herb stratum (Plot size: 5)			
1 *Laportea canadensis*	5	Y	FACW
2			
3			
4			
5			
6			
7			
8			
9			
10			
	5 = Total Cover		
Woody vine stratum (Plot size: 30)			
1			
2			
	0 = Total Cover		

Dominance Test Worksheet

Number of Dominant Species that are OBL, FACW, or FAC: 3 (A)

Total Number of Dominant Species Across all Strata: 3 (B)

Percent of Dominant Species that are OBL, FACW, or FAC: 100.00% (A/B)

Prevalence Index Worksheet

Total % Cover of:

OBL species	0	x 1 =	0
FACW species	60	x 2 =	120
FAC species	0	x 3 =	0
FACU species	0	x 4 =	0
UPL species	0	x 5 =	0
Column totals	60 (A)		120 (B)

Prevalence Index = B/A = 2.00

Hydrophytic Vegetation Indicators:

- ____ Rapid test for hydrophytic vegetation
- X Dominance test is >50%
- X Prevalence index is ≤3.0*
- ____ Morphological adaptations* (provide supporting data in Remarks or on a separate sheet)
- ____ Problematic hydrophytic vegetation* (explain)

*Indicators of hydric soil and wetland hydrology must be present, unless disturbed or problematic

Hydrophytic vegetation present? Y

Remarks: (Include photo numbers here or on a separate sheet)

SOIL

Sampling Point: SP1-wet

Profile Description: (Describe to the depth needed to document the indicator or confirm the absence of indicators.)

Depth (Inches)	Matrix Color (moist)	%	Redox Features Color (moist)	%	Type*	Loc**	Texture	Remarks
0-6	10YR 2/1	100					loamy sand	
6-12	10YR 5/1	100					coarse sand	gravelly loamy

*Type: C = Concentration, D = Depletion, RM = Reduced Matrix, MS = Masked Sand Grains. **Location: PL = Pore Lining, M = Matrix

Hydric Soil Indicators:

- ___ Histosol (A1)
- ___ Histic Epipedon (A2)
- ___ Black Histic (A3)
- ___ Hydrogen Sulfide (A4)
- ___ Stratified Layers (A5)
- ___ 2 cm Muck (A10)
- X Depleted Below Dark Surface (A11)
- ___ Thick Dark Surface (A12)
- ___ Sandy Mucky Mineral (S1)
- ___ 5 cm Mucky Peat or Peat (S3)
- ___ Sandy Gleyed Matrix (S4)
- ___ Sandy Redox (S5)
- ___ Stripped Matrix (S6)
- ___ Loamy Mucky Mineral (F1)
- ___ Loamy Gleyed Matrix (F2)
- ___ Depleted Matrix (F3)
- ___ Redox Dark Surface (F6)
- ___ Depleted Dark Surface (F7)
- ___ Redox Depressions (F8)

Indicators for Problematic Hydric Soils:

- ___ Coast Prairie Redox (A16) (**LRR K, L, R**)
- ___ Dark Surface (S7) (**LRR K, L**)
- ___ Iron-Manganese Masses (F12) (**LRR K, L, R**)
- ___ Very Shallow Dark Surface (TF12)
- ___ Other (explain in remarks)

*Indicators of hydrophytic vegetation and weltand hydrology must be present, unless disturbed or problematic

Restrictive Layer (if observed):

Type: _____

Depth (inches): _____

Hydric soil present? Y

Remarks:

HYDROLOGY

Wetland Hydrology Indicators:

Primary Indicators (minimum of one is required; check all that apply)

- ___ Surface Water (A1)
- ___ High Water Table (A2)
- ___ Saturation (A3)
- ___ Water Marks (B1)
- ___ Sediment Deposits (B2)
- ___ Drift Deposits (B3)
- ___ Algal Mat or Crust (B4)
- ___ Iron Deposits (B5)
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- ___ Hydrogen Sulfide Odor (C1)
- ___ Oxidized Rhizospheres on Living Roots (C3)
- ___ Presence of Reduced Iron (C4)
- ___ Recent Iron Reduction in Tilled Soils (C6)
- ___ Thin Muck Surface (C7)
- ___ Gauge or Well Data (D9)
- X Other (Explain in Remarks)

Secondary Indicators (minimum of two required)

- ___ Surface Soil Cracks (B6)
- ___ Drainage Patterns (B10)
- ___ Dry-Season Water Table (C2)
- ___ Crayfish Burrows (C8)
- ___ Saturation Visible on Aerial Imagery (C9)
- ___ Stunted or Stressed Plants (D1)
- X Geomorphic Position (D2)
- X FAC-Neutral Test (D5)

Field Observations:

Surface water present?	Yes ___	No	X	Depth (inches):	___
Water table present?	Yes ___	No	X	Depth (inches):	___
Saturation present? (includes capillary fringe)	Yes ___	No	X	Depth (inches):	___

Indicators of wetland hydrology present? Y

Describe recorded data (stream gauge, monitoring well, aerial photos, previous inspections), if available:

Remarks:

Slighly lower in topogrpahy than upland sample point. Depleted soil indicates saturation at some time.

Touve Parcel

Wetland Delineation Report

APPENDIX C

Precipitation Data

Minnesota State Climatology Office

Precipitation Worksheet Using Gridded Database

Precipitation data for target wetland location:

county: **Hennepin**
township name: **Plymouth**
nearest community: **Medicine Lake**
township number: **118N**
range number: **22W**
section number: **26**

Aerial photograph or site visit date:
Tuesday, August 14, 2018

Score using 1981-2010 normal period

values are in inches A 'R' following a monthly total indicates a provisional value derived from radar-based estimates.	first prior month: July 2018	second prior month: June 2018	third prior month: May 2018
estimated precipitation total for this location:	3.68R	4.22R	2.45
there is a 30% chance this location will have less than:	2.63	3.28	2.82
there is a 30% chance this location will have more than:	4.13	5.18	4.00
type of month: dry normal wet	normal	normal	dry
monthly score	3 * 2 = 6	2 * 2 = 4	1 * 1 = 1
multi-month score: 6 to 9 (dry) 10 to 14 (normal) 15 to 18 (wet)	11 (Normal)		

Other Resources:

- retrieve daily precipitation data
- view radar-based precipitation estimates
- view weekly precipitation maps
- *Evaluating Antecedent Precipitation Conditions* (BWSR)

Touve Parcel, Plymouth, MN: Precipitation Summary
Source: Minnesota Climatology Working Group

Monthly Totals: 2018

Target: T118 R22 S26 (latitude: 45.00039 longitude: 93.43099)

mon	year	cc	tttN	rrW	ss	nnnn	oooooooo	pre (inches)
Jan	2018	27	118N	21W	20	NWS	NEW HOPE	1.30
Feb	2018	27	118N	21W	20	NWS	NEW HOPE	1.50
Mar	2018	27	118N	21W	20	NWS	NEW HOPE	1.46
Apr	2018	27	118N	22W	24	MOSQ	GREEN R	2.10
May	2018	27	118N	22W	24	MOSQ	GREEN R	1.79
Jun	2018	27	118N	22W	24	MOSQ	GREEN R	4.31
Jul	2018	27	118N	21W	20	NWS	NEW HOPE	4.15
Aug	2018	27	118N	21W	20	NWS	NEW HOPE	3.55

June/July/August Daily Records

Jun	1, 2018	0
Jun	2, 2018	0
Jun	3, 2018	.21
Jun	4, 2018	0
Jun	5, 2018	0
Jun	6, 2018	.20
Jun	7, 2018	0
Jun	8, 2018	-
Jun	9, 2018	-
Jun	10, 2018	.33
Jun	11, 2018	0
Jun	12, 2018	-
Jun	13, 2018	.12
Jun	14, 2018	0
Jun	15, 2018	-
Jun	16, 2018	.50
Jun	17, 2018	.17
Jun	18, 2018	.86
Jun	19, 2018	.30
Jun	20, 2018	.27
Jun	21, 2018	0
Jun	22, 2018	-
Jun	23, 2018	-
Jun	24, 2018	-
Jun	25, 2018	-
Jun	26, 2018	1.30
Jun	27, 2018	.03
Jun	28, 2018	0
Jun	29, 2018	0
Jun	30, 2018	.02

Jul	1, 2018	1.37
Jul	2, 2018	0
Jul	3, 2018	.09
Jul	4, 2018	.13
Jul	5, 2018	0
Jul	6, 2018	0
Jul	7, 2018	0
Jul	8, 2018	0
Jul	9, 2018	T
Jul	10, 2018	T
Jul	11, 2018	.12
Jul	12, 2018	1.13
Jul	13, 2018	.17
Jul	14, 2018	0
Jul	15, 2018	0
Jul	16, 2018	m
Jul	17, 2018	0
Jul	18, 2018	0
Jul	19, 2018	.16
Jul	20, 2018	.23
Jul	21, 2018	0
Jul	22, 2018	0
Jul	23, 2018	0
Jul	24, 2018	0
Jul	25, 2018	.48
Jul	26, 2018	.15
Jul	27, 2018	0
Jul	28, 2018	.11
Jul	29, 2018	.01
Jul	30, 2018	T
Jul	31, 2018	0

Aug	1, 2018	.13
Aug	2, 2018	0
Aug	3, 2018	1.40
Aug	4, 2018	.09
Aug	5, 2018	0
Aug	6, 2018	0
Aug	7, 2018	0
Aug	8, 2018	0
Aug	9, 2018	0
Aug	10, 2018	0
Aug	11, 2018	0
Aug	12, 2018	0
Aug	13, 2018	0
Aug	14, 2018	0
Aug	15, 2018	0
Aug	16, 2018	0
Aug	17, 2018	0
Aug	18, 2018	0
Aug	19, 2018	0
Aug	20, 2018	.06
Aug	21, 2018	0
Aug	22, 2018	0
Aug	23, 2018	0
Aug	24, 2018	1.53
Aug	25, 2018	0
Aug	26, 2018	0
Aug	27, 2018	.07
Aug	28, 2018	.27
Aug	29, 2018	0
Aug	30, 2018	0
Aug	31, 2018	0

1981-2010 Summary Statistics

	Jan	*Feb*	*Mar*	*Apr*	*May*	*Jun*	*Jul*	*Aug*	*Sep*	*Oct*	*Nov*	*Dec*	*WARM*	*ANN*	*WAT*
30%	0.52	0.39	1.30	2.16	2.82	3.28	2.63	3.27	2.35	1.26	1.08	0.73	17.89	29.16	27.63
70%	1.18	0.97	2.09	2.90	4.00	5.18	4.13	5.06	3.86	3.54	2.03	1.42	21.77	34.13	35.05
mean	0.86	0.82	1.89	2.71	3.61	4.51	4.22	4.16	3.41	2.49	1.79	1.22	19.90	31.67	31.48

Touve Parcel

Wetland Delineation Report

APPENDIX D

Wetland Boundary Survey

The Gregory Group, Inc.
d.b.a.
LOT SURVEYS COMPANY
Established in 1962
LAND SURVEYORS
REGISTERED UNDER THE LAWS OF STATE OF MINNESOTA
7601 73rd Avenue North (763) 560-3093
Minneapolis, Minnesota 55428 Fax No. 560-3522

Surveyors Certificate

"Delineated Wetland Survey"

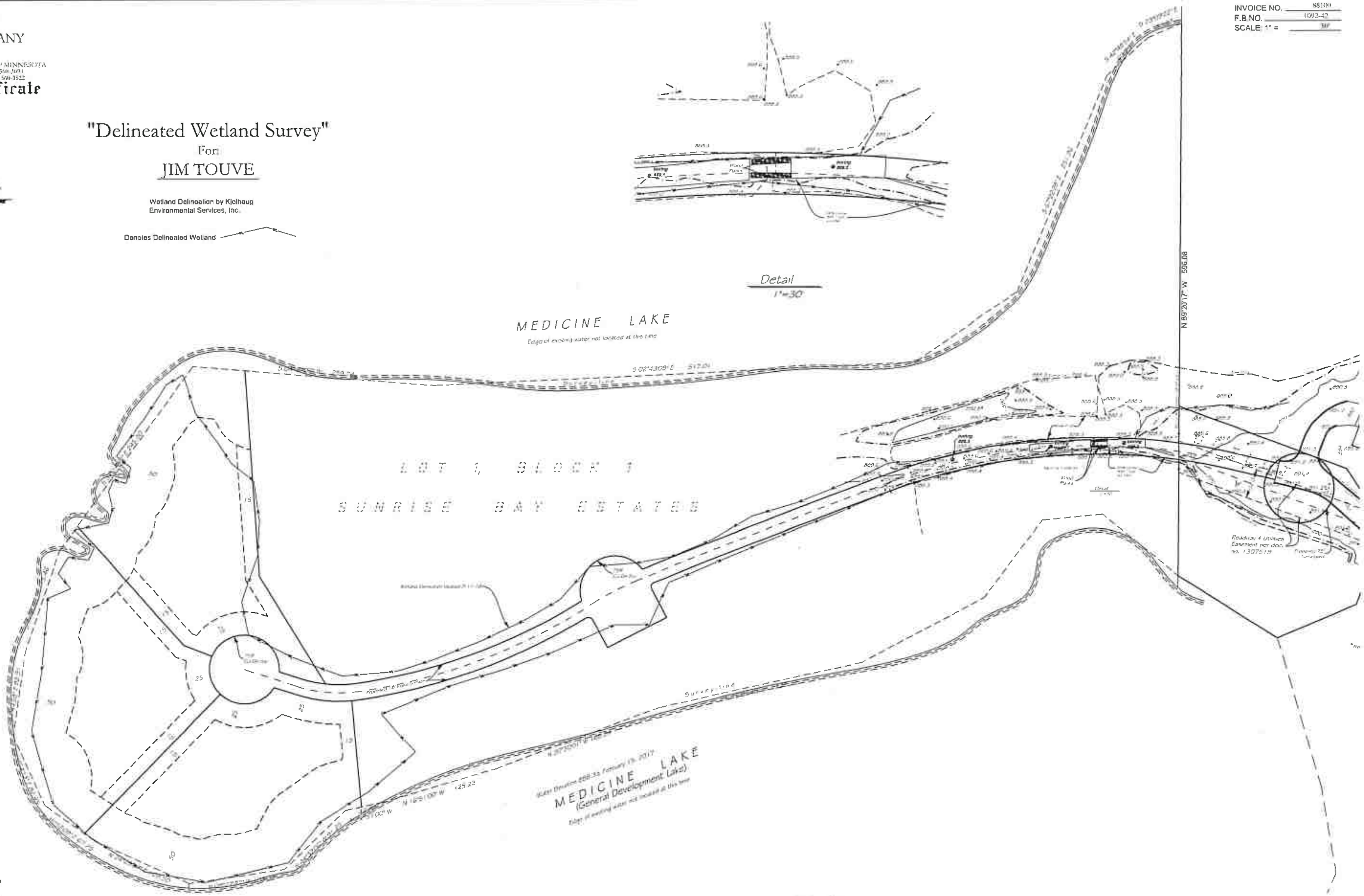
For:

JIM TOUVE

Wetland Delineation by Kjolhaug Environmental Services, Inc.

Denotes Delineated Wetland

INVOICE NO. 88100
F.B.NO. 1092-42
SCALE: 1" = 30'



The only easements shown are from plats of record or information provided by client.

I certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed land Surveyor under the laws of the State of Minnesota
Surveyed by us this 11th day of September 2018.

Lot 1, Block 1, SUNRISE BAY ESTATES
Hennepin County, Minnesota

Drawn By: J. Munson

Signed

Gregory R. Prasch, Minn. Reg. No. 24992

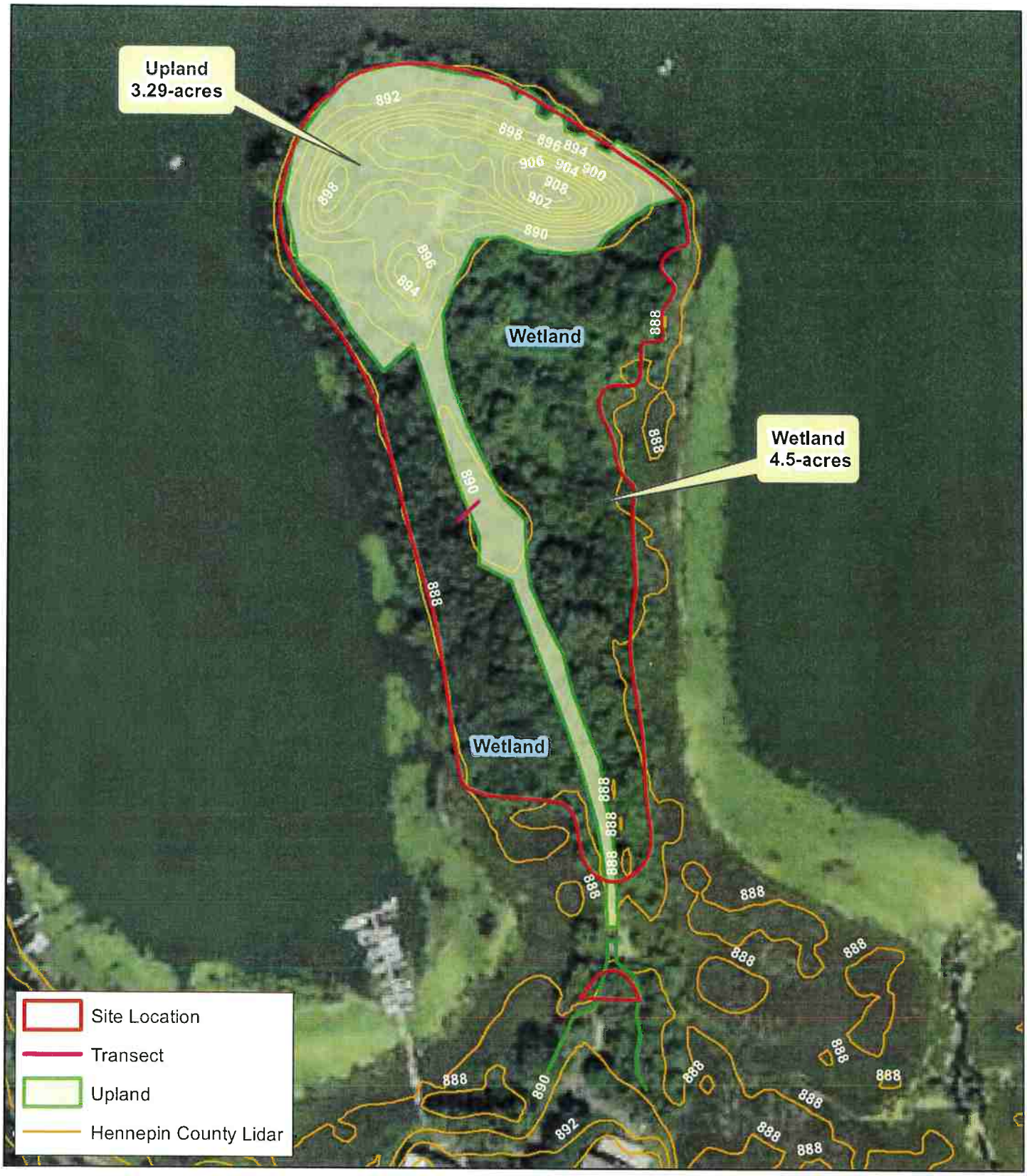


Figure 2 - Existing Conditions (2017 FSA Photo)

N

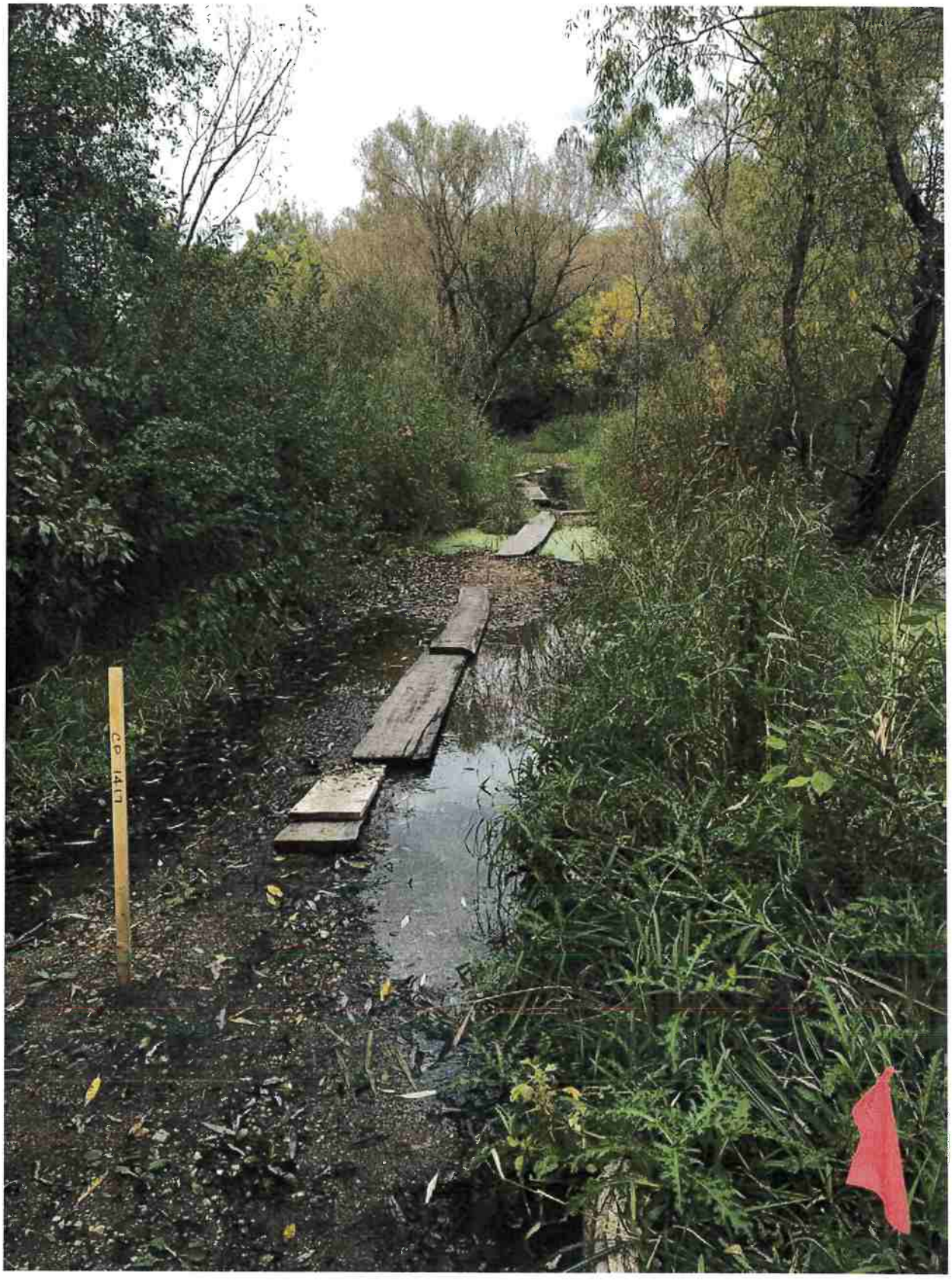
0 250 Feet

KJOLHAUG ENVIRONMENTAL SERVICES COMPANY

Source: MnGeo, ESRI Imagery Basemap

Touve Parcel (KES 2018-111)
Plymouth, Minnesota

Note: Boundaries indicated on this figure are approximate and do not constitute an official survey product.


CP 1417

STATE OF
MINNESOTA
DEPARTMENT OF NATURAL RESOURCES
Third Floor Space Center, 444 Lafayette Rd., St. Paul, MN 55101
PHONE: 612/296-4810

File No. ____ ____ ____

October 8, 1980

CERTIFIED

Calhoun Investment Company
Mr. Bill Barbush
3140 Chowen Avenue South
Minneapolis, Minnesota 55416

Dear Mr. Barbush:

ORDER OF THE COMMISSIONER, APPLICATION 78-6186, MEDICINE LAKE

The Department of Natural Resources (DNR) has reviewed the above application for a permit to work in the public waters of Medicine Lake (27-104), Hennepin County, in the SW¼ of Section 26, Township 118 North, Range 22 West.

It has been determined that your application to fill 0.72 acres below the ordinary high water level (OHW) of Medicine Lake must be denied. DNR policy 6 MCAR 1.5021 discourages the placement of fill into public waters in order to preserve their natural character. Further, 6 MCAR 1.5021 (2)(b) specifically prohibits placement of fill to create upland areas for development or subdivision.

Permit application 78-6186 is for 0.72 acres of filling below the OHW of Medicine Lake to allow for the construction of a two story 81 unit apartment building on a 6.23 acre peninsula located in the southwest corner of Medicine Lake. The peninsula size is based on information submitted by the applicant that showed the 12.11 acre total size contained 6.23 acres above the OHW elevation of 889.3 and 5.88 acres below the OHW. The proposed 0.72 acres of filling will occur at two areas:

1) 0.34 acres for the firelane around the building. This includes filling portions of the man-made slips on the northeast side of the peninsula.

2) 0.38 acres for the access road to the building site.

6 MCAR 1.5020 provides that, "The proposed development must also be consistent with the goals and objectives of applicable federal, state, and local governmental quality programs and policies including but not limited to shoreland management, flood plain management, water surface use management, boat and water safety, wild and scenic rivers management, water quality management, recreational or wilderness management, critical areas management, scientific and natural areas management, and protected vegetative species management."

Medicine Lake is a 924 acre meandered lake and is classified as a general development lake. The minimum development standards for a general development lake in a sewered area of a municipality are:

Riparian-lot area	15,000 square feet
Water frontage and lot width at building line	75 feet
Building setback from OHW	50 feet

The City of Plymouth has not adopted a municipal shoreland ordinance to date.

The proposed structure does not meet the 50 foot setback requirements of NR 83 (C)(2)(aa)(iii).

NR 83 (C)(4), "Placement of Roads and Parking Areas", requires that no impervious surface shall be placed within 50 feet of the ordinary high water mark. The proposed project will have the access road and portions of the building within the 50 foot setback line.

The allowable density for a conventional subdivision on 6.3 acres would be 18 units and for a cluster or Planned Unit Development, the density may be allowed to increase from two to three times the normally allowed density. The maximum multiplier would be allowed only if other resource protection standards are exceeded (i.e., setback, impervious coverage, open space, etc.). If the significantly increased resource standards were applied as previously mentioned, then and only then could the maximum of 54 units be allowed.

Minnesota Statutes, Chapter 105.45 states in part as follows: "In all permit applications, the applicant has the burden of proving that the proposed project is reasonable, practical, and will promote the public welfare." In view of our observations, we cannot conclude that your proposal in indeed reasonable, practical, and will promote the public welfare; therefore, the application is in all respects denied.

You are advised of your right to demand a hearing. This demand must be received within thirty (30) days of the receipt of this Order, and must be accompanied with a bond or equivalent security in the amount of $500.00. If you desire bond forms, notify our office and the appropriate forms will be transmitted.

If you do not demand the hearing and file the bond within thirty days of the receipt of this Order, the Order becomes <u>final</u> and no appeal of it may be taken to district court.

If you need further assistance, please contact Mr. Kent Lokkesmoe of our Metro Region office at 296-7523.

COMMISSIONER OF NATURAL RESOURCES

By: _____
Larry Seymour, Director
Division of Waters

LS/KL/ch/TFB:jel
cc: Bassett Creek Flood Control Commission
Hennepin County Soil & Water Conservation District
Linda Fisher, Larkin & Hoffman
U.S. Corps of Engineers
City of Plymouth
St. Paul Waters
Gordon Gust, Wildlife Manager
Ed Feiler, Fisheries Supervisor
Tom Fink, Conservation Officer
Medicine Lake file

DEPARTMENT NATURAL RESOURCES

Office Memorandum

TO: Ken Reed, Supervisor-Hydrographic Services
Division of Waters

DATE: Feb. 3, 1984

FROM: Kent Lokkesmoe, Regional Hydrologist
Metro Region Division of Waters

PHONE: 6-7523

SUBJECT: MEDICINE LAKE (27-104) SUNRISE POINT DEVELOPMENT

Due to the never-ending saga of the Little Peninsula (which I call an island), it would appear necessary to do a topographic survey of the isthmus. Specific location of our OHW elevation of 889.3 and the developer's proposed OHW elevation of 888.3 should be accomplished to allow an answer to the question, "Will the one-foot difference in OHW change the DNR position under existing rules?" I would imagine that this must be open water work and I can provide more specifics and/or accompany the crew as necessary.

ch

August 2, 1985

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Administrative Law Judge
Administrative Hearings Office
4th Floor Summit Bank Buiding
310 4th Avenue South
Minneapolis, MN 55415

Richard A. Gunn
Bradley J. Gunn
Attorneys at Law
315 Peavey Building
Minneapolis, MN 55402

RE: In the Matter of the Application for a Permit by Calhoun Investment Company to Place Earthen Fill into Medicine Lake, Hennepin County, to Aid in the Development of a Housing Project

Enclosed and served upon you by mail is the Order of the Commissioner of Natural Resources in the above referenced matter.

Very truly yours,

BEVERLY CONERTON
Special Assistant
Attorney General

Counsel for Commissioner of
Natural Resources

BC:dt
Enc.

bcc: Larry Seymour

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Application for a Permit by Calhoun Investment Company to Place Earthen Fill into Medicine Lake, Hennepin County, to Aid in the Development of a Housing Project

COMMISSIONER'S ORDER

The purpose of this proceeding was to determine the natural ordinary high water level of Medicine Lake, Hennepin County. A hearing on the matter was held between September 12-20, 1984 before Administrative Law Judge Phyllis Reha from the Office of Administrative Hearings.

Calhoun Investment Company, Inc. was represented by Josiah E. Brill and Katherine A. Kersten of the law firm of Grossman, Karlins, Siegel and Brill, 100 Washington Square, Suite 1350, Minneapolis, Minnesota 55401. The Department of Natural Resources was represented by Donald A. Kannas, Special Assistant Attorney General, 2nd Floor Space Center, St. Paul, Minnesota 55101. The City of Medicine Lake was represented by Richard A. Gunn and Bradley J. Gunn of the law firm of Olson, Gunn and Seran, Ltd., 315 Peavey Building, Minneapolis, Minnesota 55402. The Association of Medicine Lake Area Citizens was represented by Shirley A. Maxwell, Attorney at Law, 5901 Brooklyn Boulevard, Suite 200, Minneapolis, Minnesota 55429.

The Findings of Fact, Conclusions and Recommendation of the Administrative Law Judge was signed on February 14, 1985.

Exceptions to the Administrative Law Judge's report were received by April 8, 1985.

Based on the entire record in this case, the Commissioner of Natural Resources makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

The Commissioner adopts as his own the Administrative Law Judge's Findings of Fact, including her Memoranda, with modifications in the following Findings:

25. Dr. Potter's second model converted rainfall into runoff for the period June and July 1953. It assumed the lake level at the 50% duration level from Mr. Weidenbacher's stage duration curve - 887.8. Dr. Potter's model computed the highest level attained by Medicine Lake during the wet period (June - July 1953) to have been 889.23. This is less than the first suggested OHWL by the DNR - 889.3, but is greater than the DNR's revised suggested OHWL of Medicine Lake - 889.1. Set at 889.3, the model indicated Medicine Lake would exceed that level only four-tenths of one day during the two-month period. The data fed into the computer model is not reliable to the extent it reflects the sporadic and brief period of Mr. Weidenbacher's record. These statistics are also inconsistent with DNR and City of Medicine Lake pictorial and testimonial evidence of Medicine Lake at levels over 889.3 even during periods that were not as wet as June - July, 1953. (See DNR Ex. D, photos 3, 4, 5; City of Medicine Lake Ex. 11 through 13.)

26. In developing his models, Dr. Potter accounted for outflow (the outlet channel, evaporation, ground water) and for inflow (direct precipitation, watershed, important streams). He did not consider other significant features of Medicine Lake (its storage capacity and ground water inflow). Medicine Lake's ability to maintain its levels over winter months indicates that Medicine Lake's storage capacity must also be taken into account. For example, an evaluation of Barr Engineering data for the Bassett Creek Flood Commission found that for more winter months than not, the lake levels of Medicine Lake have remained above the crest of the dam. Winter is usually the period of lowest lake levels because of reduced inflow. It is apparent from this analysis that Medicine Lake receives additional inflow from ground water from both the system around the lake and from base flow tributary streams. In contrast, Lake Minnetonka's levels dip below the crest of the weir during winter months.

In assessing the water budget for Medicine Lake, Dr. Potter's analogy was based on similarities between Lake Minnetonka and Medicine Lake. The watershed to surface area ratio of Lake Minnetonka is 5.3 to 1; whereas that ratio for Medicine Lake is 11.5 to 1. The watershed for Medicine Lake is nearly twice that of Lake Minnetonka. This difference is significant. For example, in any rainstorm nearly twice the water enters Medicine Lake on a comparative basis considering the lake's size and contributing watersheds. The more water, the greater the fluctuations and the more frequent the fluctuations. Based on

this analysis, Dr. Potter's assessment of Medicine Lake's water budget is flawed.

27. In its ordinary high water determination of Medicine Lake, DNR has compiled all available water level data from its own files and water levels received from the Bassett Creek Watershed engineer, Barr Engineering Company. The first recorded water level for Medicine Lake is from the 1901 U.S.G.S. 15-minute quadrangle map. This and other level data are summarized in the appendixes to the DNR report (DNR Ex. D). According to these data, the highest level reached by the lake was 890.7 in July of 1951 and the lowest was 885.6 occurring in February of 1977. These data show that levels of 889.1 or greater were recorded six times during 1948 to 1984. Although these recorded data are useful in providing some indication of lake level fluctuations, they were not taken at frequent enough intervals, especially during the period from 1948-1975, to provide reliable data on the frequency and duration of high levels on the lake.

29. A tree growing near a lake serves as an indicator plant because its appearance reflects the ability of roots to find sufficient soil to breathe. After roots encounter water, the tree manifests its struggle against adverse effects of saturation. In general, most trees require a layer of unsaturated soil equal to their diameter in order to support themselves and breathe. Depending upon the water tolerance of the tree, a seedling grown in six inches of soil above a plane subject to

saturation 25% or more of its growing season will likely achieve a maximum diameter of six inches.

Based upon the foregoing Findings of Fact, the Commissioner makes the following:

CONCLUSIONS OF LAW

The Commissioner adopts as his own the Administrative Law Judge's Conclusions of Law.

Based upon the foregoing Conclusions, the Commissioner makes the following:

ORDER

The natural ordinary high water level of Medicine Lake is 889.1 feet above mean sea level, National Geodetic Vertical Datum of 1929.

Dated: 2 Aug 85

Joseph N. Alexander, Commissioner
Department of Natural Resources

MEMORANDUM

The modifications in four of the Administrative Law Judge's Findings of Fact were made to correct factual errors. The substance of these Findings were not otherwise changed.

Finding 25 of the Administrative Law Judge's (ALJ) Findings referred to DNR Ex. C. The correct reference is DNR Ex. D.

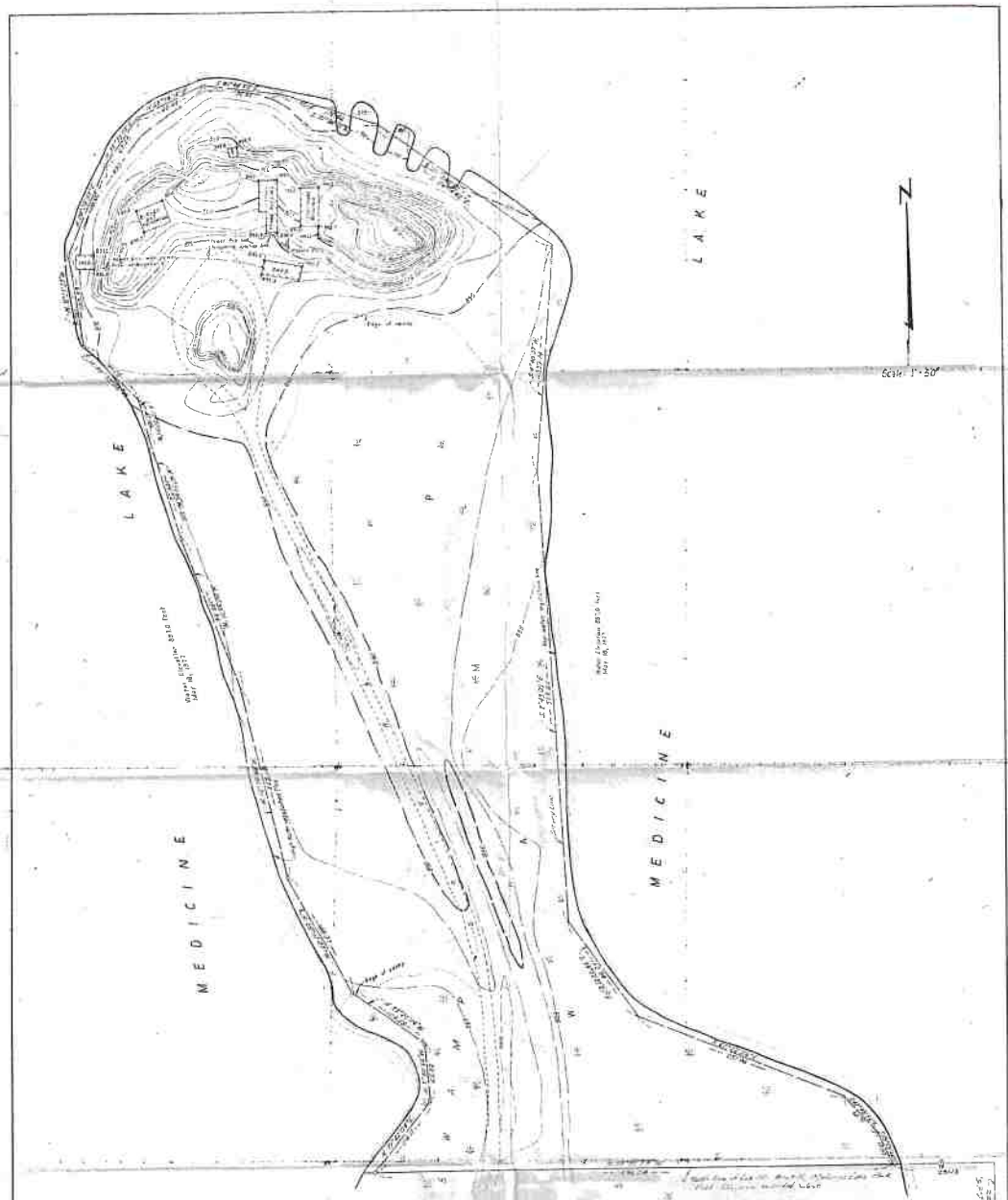
Finding 26, paragraph 2 stated that twice as much water enters Medicine Lake as Lake Minnetonka. That statement is correct on a comparative rather than absolute basis considering the sizes and contributing watersheds of the two lakes. Thus, this finding was adopted with that qualification.

Finding 27 addresses the recorded water level data on Medicine Lake. This finding was qualified to state that although the data reflects recorded water levels above 889.1, it cannot be used to show the frequency and duration of these high levels.

Finding 29 contains a factual inaccuracy. The last sentence of the Administrative Law Judge's Finding 29 cites a figure of 70%. As the petitioner pointed out in his exceptions, the ALJ apparently obtained this figure from an article by Ken Reed, a DNR hydrologist, which was attached to petitioner's post hearing brief. Mr. Reed was not asked about this article during petitioner's cross-examination of Mr. Reed. The article uses the figure of 75%, which apparently was typed 70% in the ALJ's findings. Based on other ordinary high water level hearings, the Commissioner is aware that the 75% number in the article by Mr. Reed is a typographical error and should have been 25%. The

correct 25% figure is contained in several places in the hearing record in this case. See DNR Exhibit D, page 5; Petitioner's Exhibit 5, page 2; Mr. Reed's testimony, T. II. 113.

J.N.A.



Survey for: CHOWEN CONSTRUCTION CO.

DESCRIPTION: All that part of Government Lot 5 in Section 29, Township 118, Range 22 lying North of the South line of Lot 20, Block 11, Medicine Lake Park First Division, extended West.

We hereby certify that this is a true and correct representation of a survey of the boundaries of the land above described and of the location of all buildings, if any, thereon, and all visible encroachments, if any, from or on said land.

Dated this 18th day of May, 1977.

EGAN, FIELD & NOWAK, INC.
Surveyors

By _____
Minnesota Registration No. 9053

NOTE: Total Area is 12.11± acres.

NOTE: Bearings shown are assumed.

Lakefile

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DEPUTY
COURT ADMINISTRATOR

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

Calhoun Investment Company,

Petitioner,

vs.

Minnesota Department of Natural Resources; and Joseph P. Alexander, its Commissioner.

Respondent,

City of Medicine Lake, a Minnesota corporation,

and

Association of Medicine Lake Area Citizens,

Intervenors.

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

File No. 792364

The above-entitled matter came on for trial before the Honorable John W. Borg, one of the judges of the above named Court on May 8, 1989.

Josiah E. Brill, Jr., Esquire, of the law firm of Siegel, Brill, Greupner & Duffy, 100 Washington Square, Suite 1350, Minneapolis, MN 55401, appeared on behalf of Petitioner Calhoun Investment Co., Inc.

Donald A. Kannas, Esquire and Stephen B. Masten, Esquire, Special Assistant Attorneys General, Suite 200, 520 Lafayette Road, St. Paul, MN 55155, appeared on behalf of Respondents State of Minnesota Department of Natural Resources and its Commissioner, Joseph P. Alexander.

Bradley J. Gunn, Esquire, of the law firm or Olson, Gunn & Suran, 315 Peavey Building, 730 Second Avenue South, Minneapolis, MN 55402, appeared on behalf of Intervenor City of Medicine Lake.

Shirley A. Maxwell, Esquire, 7022 Brooklyn Boulevard, Minneapolis, MN 55429, appeared on behalf of Intervenor Association of Medicine Lake Area Citizens.

Intervenors were represented by counsel in pretrial discussion in chambers but did not otherwise participate in the trial.

Based upon all of the files, records and pleadings herein, and upon the arguments of counsel, the Court makes the following:

FINDINGS OF FACT

1. Petitioner, Calhoun Investment Company, is a real estate partnership consisting of Alan Herman and William Barbush, and owning certain real property located in the City of Medicine Lake, State of Minnesota.

2. Respondent, The Minnesota Department of Natural Resources, is an agency of the State of Minnesota organized and existing pursuant to statute.

3. Petitioner Calhoun Investment Company's original complaint contained four causes of action. All but Count Two were dismissed prior to trial. In Count Two Petitioner seeks inverse condemnation of its property pursuant to a Writ of Mandamus. The trial of the inverse condemnation claim is intended to determine whether or not the Respondent Department of Natural Resources' permit denial constitutes a "regulatory taking" under the Fifth Amendment to the United States Constitution.

4. Petitioner's predecessor in interest, Capital Mortgage and Investment Company ("Capital"), entered into an option agreement with Howard Hanifl and his wife in 1968 to purchase the property which is the subject of this case and located on the south end of Medicine Lake in the City of Plymouth, Minnesota.

5. The entire property at issue here consists of a mainland parcel approximately 17 acres in size and an adjoining 12 acre parcel that extends into the lake. The mainland portion of the property has consistently been referred to throughout city zoning proceedings and agency hearings as Phase One of the development. The adjoining parcel which extends into the lake has been referred to as Phase Two. Petitioner, however, has referred throughout this case to the mainland property as Sunrise Bay Estates and to the adjoining extended parcel as Sunrise Point. For purposes of consistency and clarity, the portions of the property will herein be referred to as Phase One and Phase Two or alternatively as the inland portion and the peninsula.

6. At the time that the Petitioner's predecessor in interest, Capital, originally received its option to purchase the property in 1968, the entire property was zoned "single family dwelling".

7. Petitioner's intention was to develop all of its Medicine Lake property for residential use. However, a study done for Capital demonstrated that it was not economically feasible to build single family homes so they began to consider developing multiple unit dwellings.

8. On June 2, 1969, Petitioner approached the Plymouth City Council requesting that the entire site be rezoned. The entire property was rezoned to R-4, multi-family dwelling, with the inland portion established at a density of twelve apartment units per acre and the peninsula established at a density of nine apartment units per acre. It also established that there should be a five acre park between the two.

9. Capital transferred its interest in the two parcels to Allen Herman and William Barbush, partners in Petitioner Calhoun Investment Company. On September 23, 1971, having achieved the rezoning of the property to multi-family dwelling, Petitioner exercised its option and purchased the property from the Hanifls for $180,000.00

10. Petitioner did not proceed with development of the property immediately. Rather, it gave an option to purchase to one Daniel Ralicki. Daniel Ralicki took several steps in preparation for developing the property:

a. In August of 1974 he applied to the City of Plymouth for a site plan approval for the entire property. Petitioner's exhibit 7.

b. In August of 1975 he obtained an Environmental Assessment of the property which was required by and from the Minnesota Environmental Quality Council because the proposed development was in a shoreland area. Petitioner's exhibit 8.

c. On September 9, 1975 he was notified by the Environmental Quality Council that the above referred to Environmental

Assessment was adequate and therefore no Environmental Impact Statement would be required. Petitioner's exhibit 9.

d. On October 2, 1975, the Plymouth Planning Department issued a memo to the Plymouth Planning Commission regarding the site plan approval for the property. They refer to "Phase One [as] the south portion of the site" and to "Phase Two of the ... project [as that] anticipated to be developed at a future date." From this point forward the construction on the inland portion, approximately 17 acres in size, was referred to as Phase One and the anticipated construction on the peninsula, approximately 12 acres in size, as Phase Two. The entire property was at times referred to as the "Little Peninsula" on Medicine Lake. Petitioner's exhibit 10.

e. On December 1, 1975, the Plymouth City Council approved a conditional use permit and site plan for the entire "Little Peninsula Project." Petitioner's exhibit 11. The entire piece of property, approximately 29.33 acres, began to be referred to as "Little Peninsula Project" as early as 1968 when Petitioner's predecessor in interest, Capital Mortgage Investment Company, was exploring the idea of developing the property into residential lots. Petitioner's exhibit 2.

11. Ralicki was unable to secure financing for his project and the properties reverted back to Allen Herman and William Barbush of Petitioner Calhoun Investment Company. Petitioner took

several steps in the preparation for and development of the inland portion of the property.

a. Petitioner prepared a revised site plan for the inland portion of the property. On October 5, 1976, the Plymouth City Council, by Resolution Number 76-584, approved the amended site plan for Phase One of the construction. The Resolution approved the site plan for 162 units to be built on Phase One (a reduction from the 224 approved in the conditional site plan) and required that building permits be issued, Development Contract fees be paid to the City of Plymouth and construction begin by December 3, 1976. Petitioner's exhibit 12.

b. Respondent Minnesota Department of Natural Resources is charged with the Management of Municipal Shoreland Areas of Minnesota. The Commissioner of Natural Resources is granted such authority by Minnesota Statute Chapters 105, 115, 116, 379 and 462. The Department of Natural Resources rules and regulations provide

> standards and criteria for the subdivision, use and development of the shoreland of public waters located in municipalities in order to preserve and enhance the quality of surface waters, conserve the economic and natural environmental values of shorelands, and provide for the wise utilization of water and related land resources of the State.
> (See Respondent's exhibit A).

Respondent Department of Natural Resources had established the ordinary high water mark ("OHW") for the inland portion of the property to be 889.3 feet. On January

18, 1977 the Respondent Department of Natural Resources granted Petitioner a permit to work in public waters, as required by Minnesota Statute §105.42, in order that they could add the necessary fill to begin construction on Phase One. Petitioner's exhibit 14.

12. Petitioner, having received the permit to fill and the necessary zoning permit from the City of Plymouth, commenced construction on this inland portion of the property in May of 1977. The construction of the two three-story apartment buildings, each containing 81 units, was completed in June of 1978.

13. While construction of Phase One was underway, Petitioner began plans to develop the peninsula portion of the property.

a. On November 4, 1977, Petitioner applied to the Plymouth City Council for site plan approval for 109 units on the peninsula. Petitioner's exhibit 16.

b. In November of 1977 an Environmental Assessment Worksheet was obtained from the State of Minnesota Environmental Quality Council for the peninsula property. Petitioner's exhibit 17.

c. On January 9, 1978, the Plymouth City Council, by Resolution Number 78-2, approved the site plan for 81 units to be built on "the tip of the little peninsula", Phase Two of the construction. Under the Resolution, work was to commence by July 1, 1978. Petitioner's exhibit 19.

d. On January 26, 1978, Petitioner applied to Respondent Department of Natural Resources for a permit to work in public waters so that they necessary fill could be added to the

peninsula before construction began. Petitioner's exhibit 20.

e. On February 1, 1978, the Environmental Quality Board notified the City of Plymouth that they had received the Environmental Assessment Worksheet and as in the case of Phase One of the development no Environmental Impact Statement was necessary. Petitioner's exhibit 21.

f. On March 7, 1978, a Notice of Objections, Challenge and Petition was filed with the Minnesota Environmental Quality Board and the City of Plymouth by a group of individual neighbors who opposed the proposed development on the peninsula and requested that an Environmental Impact Statement be prepared. Petitioner's Exhibit 22.

g. On June 26, 1978, the Plymouth City Council, by Resolution Number 78-386, extended the deadline for commencement of construction of Phase Two to January 14, 1979. Petitioner's exhibit 25.

h. A hearing was held from June 29, 1978 through July 20, 1978 before Hearing Examiner William Seltzer to determine the need for an Environmental Impact Statement. The Hearing Examiner's recommendation that an Environmental Impact Statement not be required was issued on February 28, 1979. Petitioner's exhibit 27.

i. On March 29, 1979, the Environmental Quality Board accepted the Hearing Examiner's Recommendation that no

Environmental Impact Statement would be required for Phase Two. Petitioner's exhibit 29.

j. Following the Minnesota Environmental Quality Board's final decision, the group who had been challenging the development, (who had now formed the Association of Medicine Lake Area Citizens (AMLAC)), petitioned the Hennepin County District Court for judicial review of the Environmental Quality Board's finding that an Environmental Impact Statement for Phase Two was not needed. Petitioner's exhibit 32. On February 6, 1980, the Honorable Delila F. Pierce, one of the judges of the above named Court, ordered that the case be remanded to the Minnesota Environmental Quality Board for reconsideration of its August 16,1979 decision not to order an Environmental Impact Statement for Phase Two. Petitioner's exhibit 33.

k. On May 1, 1980, the Minnesota Environmental Quality Board readopted its original Findings of Facts and Conclusions of August 16, 1979 and upheld its decision that an Environmental Impact Statement was not needed. Petitioner's exhibit 35. AMLAC has not pursued the above mentioned District Court action since this final action of the Environmental Quality Board although the Court retained jurisdiction of the matter for any further proceedings following the Environmental Quality Board's reconsideration of its decision.

14. Respondent Department of Natural Resources formally denied Petitioner's January 26, 1978 application for a permit to

(1) DNR Denied permit to fill for access to "peninsula"

work in public waters by Order of October 8, 1980. The order explained that

> DNR policy 6MCAR1.5021 discourages the placement of fill into public waters in order to preserve their natural character. Further, 6MCAR1.5021(2)(b) specifically prohibits placement of fill to create upland areas for development or subdivision.

Respondent found that of the total 12.11 acre peninsula 6.23 acres was above the OHW mark of 889.3 and 5.88 acres was below the OHW mark. The permit application sought 0.72 acres of filling below the OHW mark to allow for construction of the two 81 unit apartment buildings. The order explained the Commissioner's decision and stated that "we cannot conclude that your proposal is (sic) indeed reasonable, practical, and will promote the public welfare, therefore, the application is in all respects denied." Petitioner was also advised of their right to demand a hearing regarding the permit denial. Petitioner's exhibit 36.

2) Contested Case Hearing held on permit denial

15. Harold C. Evarts, Hearing Examiner for the State of Minnesota Office of Administrative Hearings for the Department of Natural Resources conducted a hearing on the permit denial from February 26, 1981 through March 10, 1981 on the Respondent Department of Natural Resources' permit denial. On November 13, 1981 Mr. Evarts "ordered that the application of Calhoun Investment Inc. for a permit to place earthen fill upon the bed of the public waters in Medicine Lake in Hennepin County to aid in the development of a housing project be, and hereby is, denied." Petitioner's exhibit 39.

16. Hearing Examiner Harold Evarts Findings of Fact included the following:

> 114. The Sunrise Development, consisting of Phase I and Phase II, was conceived and planned as a single housing development and has been so regarded by the Developer, the DNR and the City of Plymouth. It was divided into phases as a staged development and approvals, permits and licenses have been obtained or applied for on that basis. Phase I construction is complete and normal occupancy has been achieved...
>
> 115. Preliminary site plan approval was granted by the City for Phase II (CIC Ex. 2) in June, 1978, for construction of 81 dwelling units when the site was zoned R-4 (high density residential). Presumably the approved density was within the allowed density permitted by the effective City ordinance at that time. The approval assumed that the upland area of Sunrise Point contained 8.9 acres. It has since been found, however, that the upland contains only 6.23 acres above the ordinary high water mark.
>
> 116. The density permitted under the State's shoreland management plan for subdivided lots is 2.9 units per acre on the shoreland of a General Development lake. Altered zoning standards may be allowed as exceptions provided preliminary plans have been approved by the Commissioner, the planned unit development will be connected to a municipal sanitary sewer system and open space is preserved. Before approval, enumerated factors must be evaluated to ensure that the increased density of the development is consistent with the resource limitations of the public water, including, among other factors, (1) the suitability of the [illegible] for the proposed use, (2) the physical and aesthetic impact of the increased density, (3) the level of current development, (4) the amount and ownership of undeveloped shoreland, (5) the level and types of water surface use and public uses, and (6) the possible effect on overall public use. 6MCAR Sec. 1.0083(e)(4).
>
> 117. As an informational aid for the guidance of the DNR staff and the public, DNR has published an explanation and guidelines to be considered in evaluating a cluster-type residential development (DNR Ex. 6). While it has not been elevated to the binding status of a rule or regulation by having been subjected to the rule-making procedure, it does nevertheless serve as a guide in evaluating proposals for a planned unit development or cluster-type development. A later Supplementary Report explaining the municipal shoreland rules and regulations (CIC Ex. 49) points out that the DNR has not adopted specific standards of evaluation of planned unit development proposals. It concludes that each proposal should be evaluated on an individual basis taking into account local conditions.

118. Density standards under the policy may be relaxed to increase the density of development if after evaluation of the environmental factors above it is determined that the increased level is consistent with the resource limitations of the public water. Under the most advantageous conditions, three times the density could be allowed, or 8.4 units per acre. On the 6.23 acres of the Phase II site above the ordinary high water mark, 54 units could be permitted, far below the proposed 81. If Phases I and II are to be considered as a single planned unit development, 109 units could be allowed, already exceeded by the 162 units contained in Phase I.

17. On May 18, 1982, the Commissioner of Respondent Department of Natural Resources issued an order adopting the Findings of Fact, Conclusions and Recommendations of the Hearing Examiner denying the permit application. Petitioner's exhibit 40.

18. On June 16, 1982 Petitioner commenced this action by filing a petition for judicial review of Respondents' denial of Petitioner's permit application or in the alternative for a Writ of Mandamus directing Respondent to condemn the peninsula and for damages.

19. In October of 1983 Petitioner requested that the case be referred to an Administrative Law Judge for a hearing to again determine the ordinary high water mark of the little peninsula. A change in the OHW of the peninsula may have affected the DNR's authority to refuse to issue a permit for Petitioner's project. Previous hearings had established the OHW to be 889.3 feet. If it were now found that the OHW was 888.3 feet or lower the issuance of a permit would be removed from Respondent's subject matter jurisdiction. Petitioner's exhibit 41.

20. On May 7, 1984, the Honorable Eugene Farrell, one of the judges of the above named Court, remanded the matter to Respondent DNR for the taking of evidence pursuant to Minn. Stat. §14.67 on the issue of the OHW mark of Medicine Lake. Such hearings were held before an Administrative Law Judge Phyllis Reha from September 12, 1984 through September 19, 1984.

1) DNR orders OHW = 889.1

21. On February 15, 1984, the Administrative Law Judge Phyllis Reha issued Findings of Facts, Conclusions of Law and Recommendation in which she recommended that "the Commissioner established the natural ordinary high water level of Medicine Lake at 889.1 feet above mean sea level". Petitioner's exhibit 41.

regional finding was 889.3 - so OHW was lowered by 0.2 ft.

22. On August 2, 1985, Joseph N. Alexander, Commissioner of the Department of Natural Resources issued an Order adopting the Administrative Law Judge's Order that the "natural ordinary high water level of Medicine Lake is 889.1 feet". Petitioner's exhibit 42.

23. The parties entered into a stipulation following the trial in which they agreed that the following finding is deemed to be undisputed and is a true and correct statement of fact:

> Had the Department of Natural Resources granted [petitioner's] request for a permit to work in public waters, [petitioner] would need no other approvals or permits from any other governmental authority (other than the usual building permits from the City of Plymouth) in order to proceed with the proposed 81-unit apartment project at issue in this case.

3) DNR & applicant stipulate certain facts

CONCLUSIONS OF LAW

1. Petitioner's Writ of Mandamus seeking damages under the doctrine of converse condemnation is properly before this Court.

2. Petitioner's Writ is not prohibited by Minn. Stat. §586.02 as Petitioner's alternative of appealing the permit denial is not a "plain, speedy and adequate remedy in the ordinary cause of Law". Extensive Administrative Hearings have already been held regarding the permit denial and the Hearing Examiner's Findings, Conclusions and Recommendations were reviewed and adopted by the Commission of Respondent Department of Natural Resources. Accordingly, this court need not reach the question of whether Petitioner must appeal Respondents' permit denial to the Minnesota Court of Appeals or whether such an appeal is necessary in order to constitute an exhaustion of its administrative remedies.

3. Respondents' regulations prohibiting fill of Petitioner's property does not on its face effect a regulatory taking of the peninsula portion of Petitioner's property, nor were they improperly applied to Petitioner's land.

4. Petitioner's development of its Medicine Lake property has been considered as one development, in two phases, by all parties concerned ever since Petitioner began to plan the development of the property. The Administrative Hearing Officer also made a specific finding that Petitioner's development consists of Phase One and Phase Two and not of two separate projects.

Accordingly, Petitioner is now estopped from arguing that its development is two separate projects.

5. Even if this Court were to find that Petitioner is not so estopped from arguing that its development is two separate projects, this Court does now conclude that Petitioner's development of its Medicine Lake property is all one project in two phases.

6. The Fifth Amendment to the United States Constitution provides in part that "private property [shall not] be taken for public use, without just compensation". The test for determining whether or not such a taking has occurred is the "no reasonable use" test. Even a substantial diminution in value does not necessarily mean that no reasonable use remains or that a taking has occurred.

7. The no reasonable use test must be applied to Petitioner's property and the development thereof in their entirety, not to different portions at different points in time.

8. Applying the no reasonable use test to Petitioner's

proposed 81 unit multi-family structure, significant value nevertheless remains. Even if the reasonable use test were to be applied to the peninsula alone, Petitioner has failed to show that it is left with no reasonable use and that a regulatory taking has occurred.

ORDER

1. Intervenor City of Medicine Lake's motion to dismiss Petitioner's petitioner for an Alternative Writ of Mandamus is hereby DENIED.

2. Petitioner's claim of a regulatory taking is hereby in all respects DENIED.

3. The attached Memorandum of Law is hereby incorporated by reference.

BY THE COURT:

Dated: October 20, 1989

John W. Borg
Judge of District Court

MEMORANDUM OF LAW

I. Petition for Judicial Review

The Minnesota Administrative Procedure Act provides that

> [a]ny person aggrieved by a final decision in a contested case is entitled to judicial review of the decision under the provisions of [the APA], but nothing in [the APA] shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo provided by law. A petition for a writ of certiorari by an aggrieved person for judicial review under [the APA] must be filed with the court of appeals...

MN Stat. § 14.63 (1983). Such appeals under the APA are to be heard by the Court of Appeals, not the district court. County of Hennepin v. Civil Rights Commission of the City of Minneapolis, 355 N.W.2d 458 (Minn. App. 1984).

Respondent Department of Natural Resources' order denying Petitioner's permit application was a final agency decision. Prior to 1983 the APA provided that a petition for judicial review of such a decision be filed with the district court. However, the above statutory provision, effective August 1, 1983, requires Petitioner to appeal Respondent's permit denial to the court of appeals. Count One of Petitioner's original petitioner before this Court sought judicial review of Respondents' permit denial. The Court notes that the complaint was filed with this Court in June of 1982 when the district court was the proper forum for review of the agency decision. Petitioner, however, dismissed Count One (their petition for judicial review of the agency decision) prior to trial and the Court must now deal only with the appropriateness of Count Two of Petitioner's complaint, a Writ of Mandamus in which

they ask the Court to find that Respondents' permit denial constituted a "taking" of Petitioner's property for which they are entitled to be compensated.

II. Writ of Mandamus

Petitioner seeks an Alternative Writ of Mandamus for inverse condemnation of the property. Intervenor, The City of Medicine Lake, brought a motion to dismiss Petitioner's petition for a Writ of Mandamus. Arguments on this motion were made by all parties prior to commencement of the trial but the Court reserved ruling on this motion and heard the parties' testimony and evidence.

It is well settled that mandamus is an extraordinary remedy, McShane v. The City of Faribault, 292 N.W.2d 253 (1980); Victor Company v. State, 290 Minn. 40, 186 N.W.2d 168 (1971), and that a writ "shall not issue in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law." MN Stat. § 586.02.

This Court acknowledges that the Minnesota Administrative Procedure Act, Minn. Stat. §14.63, requires that judicial review of a final agency decision be directed to the Minnesota Court of Appeals. However, it also recognizes that the relief now sought by Petitioner is not a further review of Respondents' permit denial but rather they ask the Court to find that such permit denial constitutes a "taking" of property under the Fifth Amendment to the United States Constitution for which they are entitled to compensation.

Petitioner supports their argument that their Writ of Mandamus is proper by first asserting that they have no other adequate remedy at law, i.e. they have exhausted their administrative remedies, and second by virtue of two recent Supreme Court decisions, First English Evangelical Lutheran Church v. County of Los Angeles, __U.S.__, 107 S.Ct. 2378, 96 L. Ed. 2d 250 (1987) and Nollan v. California Coastal Commission, __U.S.__, 107 S.Ct. 3141, 97 L. Ed. 2d 677 (1987).

In First English, the landowner sought to recover in inverse condemnation alleging that a Los Angeles County ordinance prohibiting construction on its land denied it all reasonable use of its land and therefore constituted a taking under the Just Compensation Clause. The Supreme Court allowed the landowner's challenge to the regulatory action notwithstanding the fact that they failed to challenge the validity of the regulation first.

Similarly, in the Nollan case, the property owner filed a Petition for a Writ of Mandamus claiming a violation of the taking clause of the Fifth Amendment. The Court again allowed the property owner to proceed with the mandamus action even though they had not challenged the offending regulation.

Petitioner argues that the procedural Minnesota rule set forth in McShane, 292 N.W.2d 253, favoring the non-monetary relief of injunction against an offending ordinance over the monetary relief of inverse condemnation, is overruled by the holding of First English. Petitioner further asserts that First English is now the "rule of the land - i.e., that an owner is entitled to challenge

a regulatory action as a taking if it meets the required test, and there is no obligation upon the owner to challenge the validity of the regulation first".

This Court finds that Petitioner's Petition for a Writ of Mandamus which is now before it is proper. It does so without adopting Petitioner's broad reading of the rule set forth in First English. Rather, this Court finds that in light of the extensive administrative proceedings which have already taken place in this case, the Writ of Mandamus is proper and consistent with the Minnesota Statutory requirements as set forth in Minn. Stat. §586.02.

III. Remedy for a Regulatory Taking

The Fifth Amendment to the United States Constitution provides in relevant part that "private property [shall not] be taken for public use, without just compensation." "The [Just Compensation] Clause is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." First English, 107 S. Ct. at 2381.

A. Inverse Condemnation

Generally a "taking" occurs when the government condemns certain property in the exercise of its power of eminent domain. "The doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings." Id. at 2381.

B. Regulatory Taking Test

The parties briefs demonstrate the several tests which have been applied by the Supreme Court in taking cases. However, these tests have been concisely stated and set forth in the recent Minnesota Court of Appeals decision, Parranto Brothers, Inc. v. City of New Brighton, 425 N.W.2d 585 (Minn. App. 1988).

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land. Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); Nollan v. California Coastal Commission, 483 U.S. ___, ___, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987). The Agins court went on to note that "[a]lthough no precise rule determines when property has been taken, the question necessarily involves a weighing of private and public interests." Agins, 447 U.S. at 260-61, 100 S. Ct at 2141 (citation omitted).
>
> The United States Supreme Court has recently analyzed the question whether a taking has occurred by considering several nonexclusive factors. Rather than using a rigid analytical framework, the court has:
>
> > relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have "particular significance:" (1)"the economic impact of the regulation on the claimant"; (2)"the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3)"the character of the governmental action."
>
> Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986); accord, Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, ___, 107 S.Ct. 1232, 1242-48, 94 L.Ed.2d 472 (1987)(conducting similar analysis).
>
> While both the Agins test and the 3-part Connolly test were applied by the Supreme Court last term, it is

unclear which circumstances dictate the use of one test or the other.

Id. at 590-91. Petitioner argues that the "deprivation of economically viable use" prong under Agins is essentially the same as the "economic impact of the regulation on the claimant" prong under Connolly. The second prong of the Connolly test, "the extent to which the regulation has interfered with distinct investment-backed expectations" of the Petitioner, must also be addressed.

Petitioner also argues that the third prong of the Connolly test, "the character of the governmental action," may be viewed as identical to the alternate prong under Agins, i.e., the question of whether the ordinance "does not substantially advance legitimate state interests." Since the Petitioner no longer challenges the legitimacy of the regulatory action (Respondent DNR's denial of Petitioner's application to work in public waters) neither of these analyses needs to be made.

The test that needs to be applied in the instant case, then, is a two part test. First, it must be determined whether the Petitioner has been deprived of all economically viable use of its property and, second, it must be determined the extent to which the regulation has interfered with Petitioner's distinct investment-backed expectations.

IV. Application of the Taking Test

Prior to applying the taking test as set forth above the Court will examine the Minnesota case law and the taking test that has been applied in the case of water regulation.

A. The No Reasonable Use Test for Determination of Whether Water Regulation is a Taking

It is fundamental water law doctrine in Minnesota that state regulation of the use of public waters does not of itself constitute a taking of a riparian owner's private land. The Minnesota Supreme Court long ago said:

> It is fundamental, in this state and elsewhere, that the state in its sovereign capacity possesses a proprietary interest in the public waters of the state. Riparian rights are subordinate to the rights of the public and subject to reasonable control and regulation by the state ... Section 105.42 regulates the property rights of a riparian owner only to the extent of prohibiting any interference with the waters adjoining if such waters are public waters and if the interference is detrimental to public use. Such regulation cannot be regarded as unreasonable and certainly not as taking property without compensation.

State v. Kuluvar, 266 Minn. 408, 418, 123 N.W.2d 699, 706 (1963) (emphasis added).

Water use regulation does not of itself constitute a taking of riparian land. In order to determine whether such regulation might result in a taking as it applies to a particular parcel of riparian land, the test is an inquiry into whether or not the regulation deprives the land of all reasonable use. The Minnesota Supreme Court addressed this

issue in Crookston Cattle Company v. Minnesota Department of Natural Resources, 300 N.W.2d 769 (Minn. 1980):

> Like zoning legislation, legislation which limits or regulates the right to use underlying water is permissible. In McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980), where plaintiff property owners argued that an airport approach zoning ordinance resulted in a "taking," we noted a distinction between interference with private property by regulation of property use, as through zoning, and interference by the government's physical intrusion. In the former category, we held that regulation which operated for the sole benefit of a governmental enterprise, a municipal airport, disproportionately burdened a few landowners, who were entitled to compensation. Where regulation operates to arbitrate between competing public and private land uses, however, as does the water priority statute in this case, such regulation is upheld even where the value of the property declines significantly as a result.

300 N.W.2d at 774 (emphasis added).

B. Petitioner has not been deprived of all economically viable use of its land.

The "no reasonable use" test as set forth above serves to make the same inquiry as is being made in this "economically viable use" part of the taking test. This rule of law was first established by the United States Supreme Court in Penn Central v. City of New York, 438 U.S. 104, 98 S. Ct. 2646 (1978). Penn Central wished to build a high rise atop its Grand Central Station property in New York City. After the city refused permission Penn Central brought an action in mandamus contending that its air space had been taken. The Supreme Court ruled that Penn Central had already put its land to use and that the fact that the remaining air

space was wholly unusable did not constitute a taking. The Court set forth the general rule:

> 'Taking' jurisprudence does not divide a single parcel into discreet segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government action has affected a taking, this Court focuses rather both on the character of the action and on the nature of the extent of the interference with the rights of the parcel as a whole ... (emphasis added) 438 U.S. at 130-31.

Since the Court has found that the Petitioner's development in the instant case is all one project, and the inland portion of the project (Phase I) has been completed, it follows that the proper inquiry is whether Petitioner has made economically viable use of the entire 29 acre parcel.

1. The entire development is all one project.

In the initial permit hearing in connection with Petitioner's proposed development of Phases I and II, Petitioner was clear that it was proposing a single, two-phase project on a single parcel of land. In fact, Petitioner has considered the property to be all one development until the inception of this District Court case in which they began to refer to the property as two separate developments, Sunrise Bay Estates and Sunrise Point.

Hearing Examiner Harold Evarts' Findings of Fact numbers 114 through 118 as set forth above make it clear that he found that the project was planned as a single

development consisting of two phases. Petitioner is now collaterally estopped from relitigating this issue as they had an opportunity to fully litigate the issue at the administrative hearing. Hauser v. Mealey, 263 N.W.2d 803, 808 (Minn. 1978).

Absent the application of the doctrine of collateral estoppel this Court makes an independent finding that the entire parcel is all one project. Petitioner bought all of the land at the same time and initially intended to develop it as residential. If they had followed through with their plan for a single family development the Phase I and II distinction would never had arisen. Petitioner's intentions were demonstrated by the testimony of Mr. Herman when he stated that when they "acquired the development...it was the intent of ours to proceed to develop the two stages as one". (Transcript of the EIS hearing, p.1440).

2. Petitioner has not been deprived of all reasonable use of its property.

On Phase I of the project Petitioner constructed two buildings containing a total of 163 units. The DNR density guidelines (see Respondents' exhibit B), even if liberally applied, would have allowed only 109. So under the standard Department of Natural Resources policy that has been used statewide to evaluate the density of proposed multi-family housing developments, Petitioner

already has nearly 150 percent as many housing units on its entire Medicine Lake parcel as any other developer would get on a similar sized site. Petitioner has already received substantial use of the land which they purchased at a very small cost.

C. The Petitioner's investment-backed expectations were not so flawed as to constitute a taking.

The principle of investment-backed expectations has been most recently explained by the Supreme Court in Penn Central, 438 U.S. at 123-31. The essence of the principle is that the landowner has the right to reasonable financial expectations for the use of his property.

NA-02684-02
Rev. 4/86

Department of Natural Resources
Division of Waters

REQUISITION FOR HYDROGRAPHIC SERVICES

Project			Lake No.
Medicine Lake			27-104
City	County		Req. No.
Plymouth	Hennepin		90-52
Sec.	Twp.	Rng.	Quad No.
26	118	22	S-16b

Statement of Problem/Situation (Provide detailed information)

Negotiations continue with the developer concerning the peninsula/island area that was surveyed in 1984. Additional topography is necessary to properly evaluate the situation.

Services Requested (Attach map as necessary)

Please extend the existing topog. to the north. Specifically, locate the 889 contour and obtain sufficient detail above this contour to measure a 30' setback. See drawing 0-1425 for initial survey.

Landowner(s):
Permission obtained for access: ☒ Yes ☐ No

Requested By	Date	Phone No.
Kent Lokkesmoe	1-12-90	6-0510
Approved by (Regional or Unit Supervisor)		Date
Approved		Date 1-16-90

NA-02650-01
(W-84)

MINNESOTA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATERS

PROJECT: Medicine Lake LAKE NO. 27-104

AT ~~XXXXXX~~ Plymouth - Hennepin COUNTY REQ. NO. 90-52

PURPOSE: SURVEY [X] INVESTIGATION [ ] MAINTENANCE [ ]

TYPE: LEVELS [X] TOPOGRAPHY [X] NOHW/OHW [ ] RECONNAISSANCE [ ]

HYDROGRAPHIC WORK REPORT

Survey date: 2/14/90
Survey crew: Scherek, Moll
Datum: NGVD 1929
Vertical control: From our July 1984 survey - the average elevation of the tops at the end of the curbing along the east and west sides of the blacktop;
Top end of curbing (west side) = 890.89
Top end of curbing (east side) = 891.28

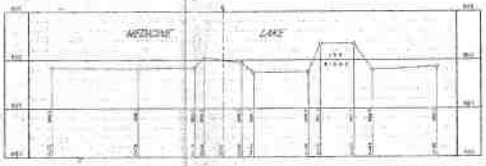
In conjunction with continuing negotiations with the developer of the island/peninsula in the SE¼ of Sec. 26, T118, R22, we obtained 5 additional cross sections which extended our July 1984 topographic survey of this area 510' northerly. This was done in order to locate the 889 contour on either side of the existing road. The water surface of Medicine Lake on 2/14/90 was 886.99.

TOPOGRAPHY TO BE PLOTTED.

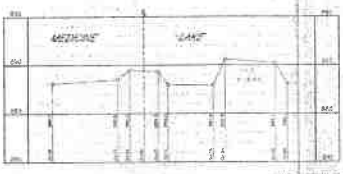
2-26-90
DATE

John M. Scherek
SIGNED

Survey Crew Supervisor
TITLE

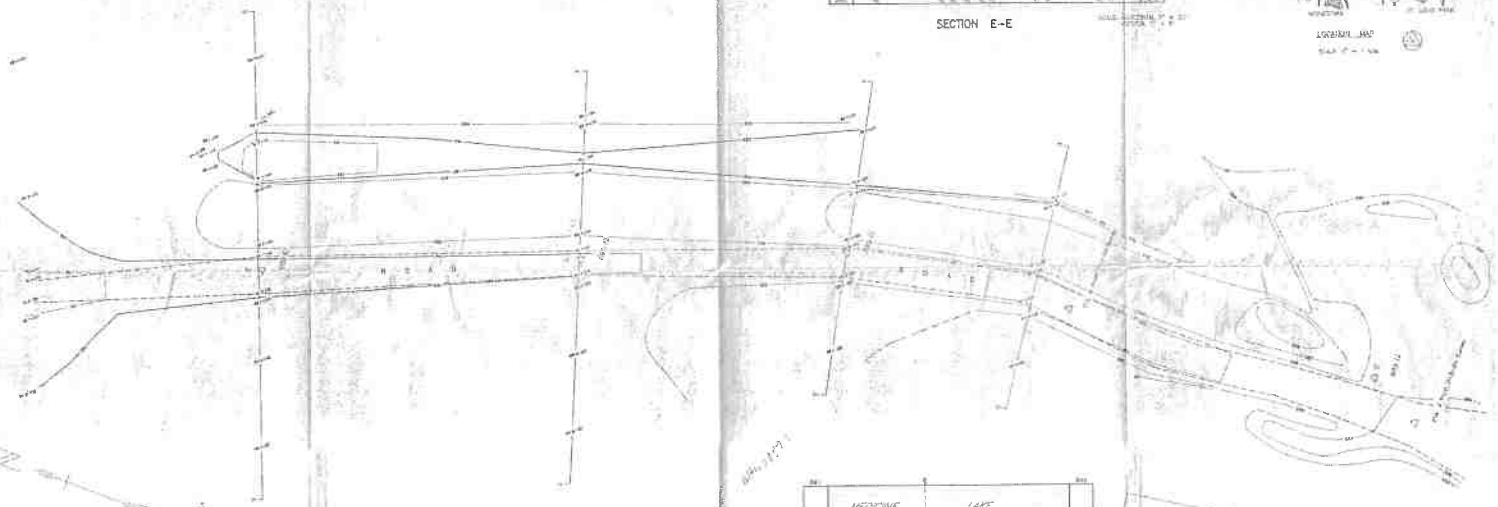


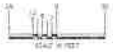
SECTION G-G

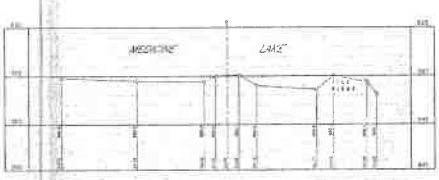


SECTION E-E

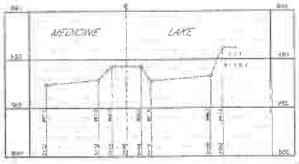
LOCATION MAP







SECTION F-F



SECTION D-D

NOTE: For cross-sections A-B see DOW Drawing D-1425.

MINNESOTA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATERS

TOPOGRAPHY & CROSS-SECTIONS

27-104
MEDICINE LAKE

90-52 | 1 of 1 | D-1510

DEPARTMENT OF NATURAL RESOURCES

PUBLIC WATERS RESTORATION AND REPLACEMENT ORDER

CDO: F890563717201

Pursuant to Minnesota Statutes, Section 103G.2372, and Minnesota Rules, part 6115.0255, the Commissioner of Natural Resources hereby orders, *James Isadore Touve, 4300 Toledo Ave N, Robbinsdale, MN 55422* to repair unauthorized work in Medicine Lake (Public Water 27010400) on the lot (*PID: 2611822440006*) in Plymouth, MN 55441.

Findings of Fact:

1. On June 15, 2017 DNR Area Hydrologist Kate Drewry, received information about fill that had been placed in Medicine Lake, Plymouth, MN on lot PID: 2611822440006 (Hennepin County, Township 118, Range 22, Section 26).

2. On June 21, 2017 Support Hydrologist (now Area Hydrologist) Jason Spiegel inspected the site along with DNR Conservation Officer Brent Grewe. The inspection confirmed that fill consisting of timbers, gravel and soil, had recently been placed in an area approximately 40 feet long and 8 feet wide that is below the Ordinary High Water (OHW) elevation (889.1 ft NVGD29 datum) of Medicine Lake (area identified on attached maps). The areas of fill below the OHW were reviewed from Lidar Data, a former DNR survey and survey information that was collected by a survey firm hired by the landowner in May 2017.

3. No permit application was made with DNR for work in public waters for these activities. A permit is required under Minnesota Rules, Part 6115.0200 to place fill in public waters.

Order: You shall accomplish restoration by doing the following:

1. Remove all fill (timbers, gravel and soil) placed below the OHW. See attached maps for boundaries.

2. Move fill materials away from Medicine Lake to an appropriate upland location outside of the floodplain.

3. The restoration work described in 1 - 2 above must be completed by August 15, 2017. If the work is delayed by weather you must contact the Area Hydrologist (contact information below) and request an extension.

4. Contact Area Hydrologist Jason Spiegel (jason.spiegel@state.mn.us (651-259-5822)) for a site inspection within seven days of completing the work described in Items 1-2 of this Order.

5. The culmination of successful restoration is the issuance of a *Certificate of Satisfactory Restoration.*

This Order is final and binding on you, unless within 30 days of the date on which it was served on you, you appeal the terms and conditions of this restoration order to the commissioner by filing a written request for review. Please mail any such request to: DNR Ecological and Water Resources, Violations Coordinator, 500 Lafayette Rd., St. Paul, MN 55155-4032

Violation of this order is a misdemeanor.

Order Created by:

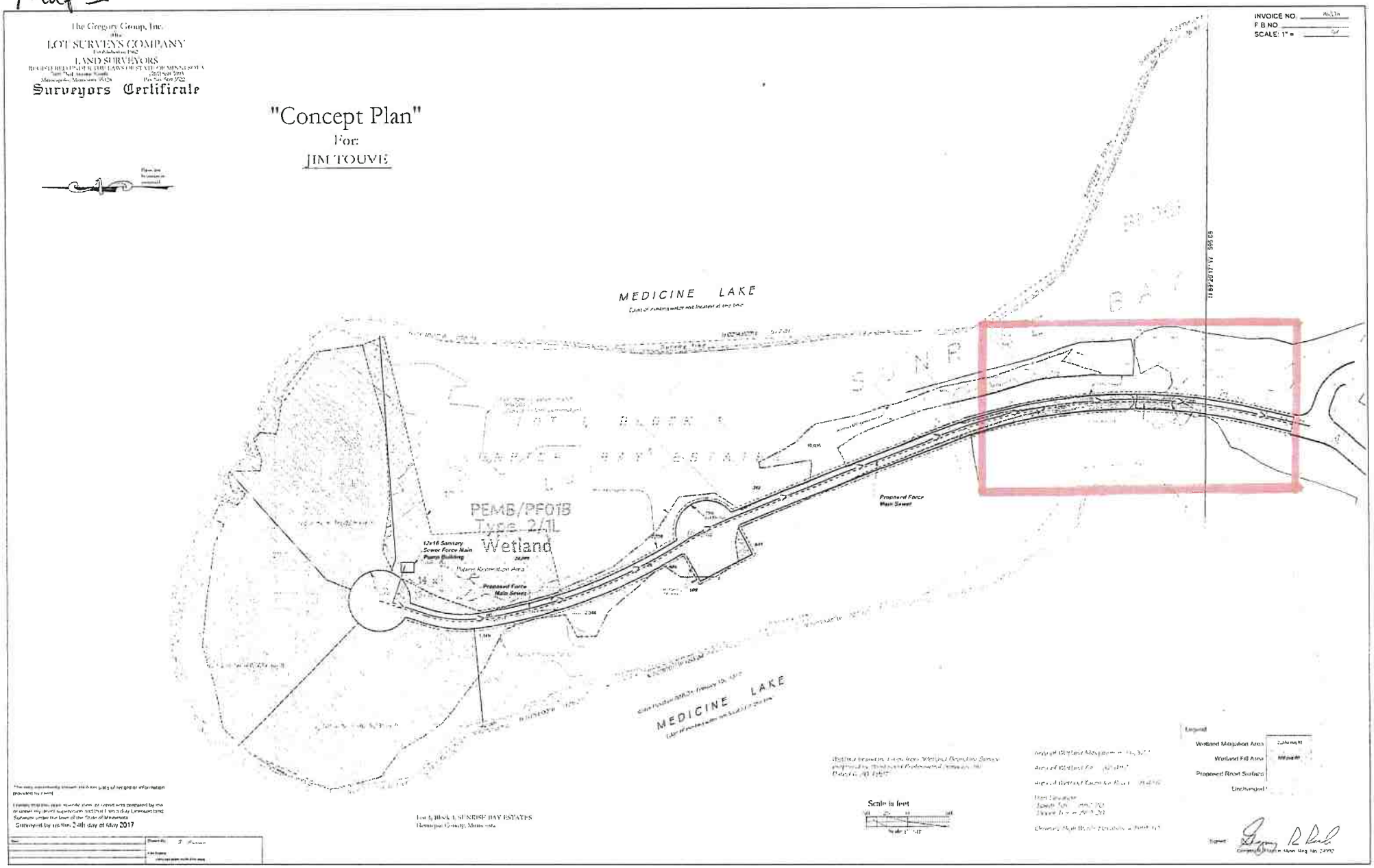
Jason Spiegel — Jason Spiegel — 07/06/2017

DNR Hydrologist Signature — Printed Name — Date

Order Served by:

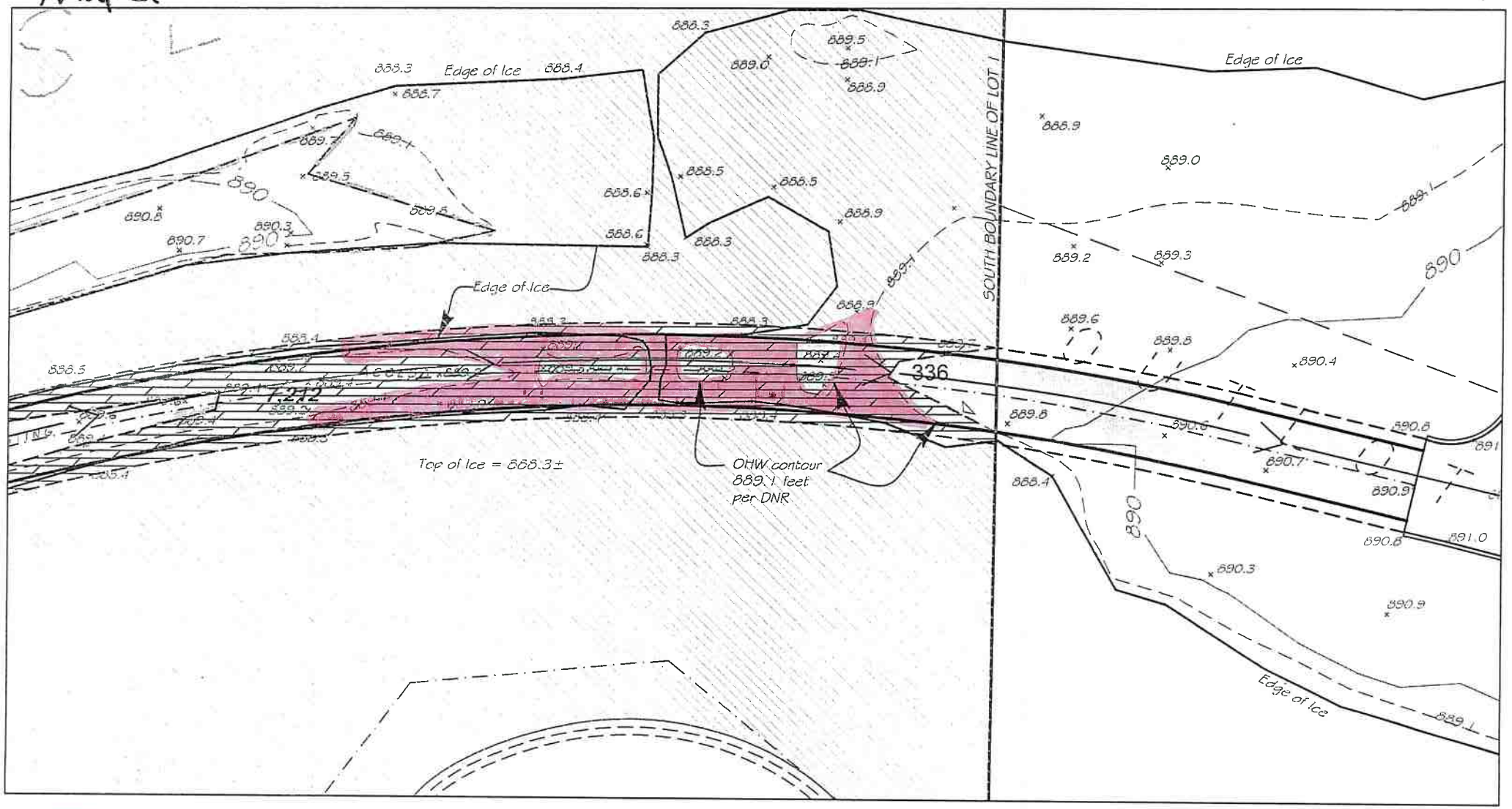
Conservation Officer Signature — Badge # — Printed Name — Date

Map 1



Inlet Area (Map 2)

Map 2



Removal Area for placed fill (below OHW of Medicine Lake).