

“Letter of Conditions”



Jasper Schneider
State Director

United States Department of Agriculture
Rural Development
North Dakota State Office

July 1, 2010

MS GENEVA KAISER
STUTSMAN RURAL WATER DISTRICT
1812 HWY 281 NORTH
JAMESTOWN ND 58401-2104

Letter of Conditions

Dear Ms. Kaiser:

This letter establishes conditions which must be understood and agreed to by you before further consideration may be given to your application. The loan will be administered on behalf of the Rural Utilities Service (RUS) by the State and Area staff of USDA, Rural Development. Any changes in project cost, source of funds, scope of services or any other significant changes in the project or applicant, must be reported to and approved by USDA, Rural Development, by written amendment to this letter. If significant changes are made without obtaining such approval, Rural Development may discontinue processing of the application.

This letter does not constitute loan approval, nor does it ensure that funds are or will be available for the project.

The interest rate will be the lower of the rate in effect at the time of loan approval or the time of loan closing. The loan will be considered approved on the date a signed copy of Form RD 1940-1, "Request for Obligation of Funds", is mailed to you.

Please complete and return the following forms if you agree to meet these conditions and desire that further consideration be given to your application:

Form RD 1942-46, "Letter of Intent to Meet Conditions"
Form RD 1940-1, "Request for Obligation of Funds"

By December 30, 2010, you must meet all of the conditions set forth which can be met prior to calling for construction bids. If you have not done so, Rural Development reserves the right to discontinue the processing of your application.

Extra copies of this letter are being provided for use by your engineer, attorney, bond counsel and accountant. All parties may access information and regulations referenced in the letter at our web-site located at www.usda.gov/rus/water/ for the following:

- a. Title 7 Code of Federal Regulation, Part 1780, (7 CFR 1780) – Sections A-D and RUS Bulletins are the regulations for the program.



- b. RUS Bulletin 1780-26, "Guidance for the Use of Engineers Joint Contract Documents Committee (EJCDC) Documents on Water and Waste Projects with RUS Financial Assistance"

The conditions referred to above are as follows:

1. **Project Budget** – Funding from all sources has been budgeted for the estimated expenditures as follows:

<u>Project Costs:</u>	<u>Total Budgeted:</u>
Construction	\$ 990,000
Administration & Legal	\$ 20,000
Engineering Fees:	
Basic (includes PER)	\$ 85,500
Inspection	\$ 75,000
Additional	\$ 2,000
Land & rights-of-way	\$ 7,500
Project Contingency	\$ 50,000
TOTALS	\$1,230,000

Your funding needs will be reassessed if there is a significant reduction in project costs after bids are received. Obligated loan funds not needed to complete the proposed project will be deobligated. An "Amended Letter of Conditions" will be issued for any revised project budget.

2. **Project Funds** - Project funding is planned from the following sources:

<u>Project Funding Source</u>	<u>Funding Amount:</u>
USDA RUS Loan	\$ 814,000
EPA Grant	\$ 388,000
Connection/Hook-up Fees	<u>\$ 28,000</u>
<i>Total Project Funding (All Sources):</i>	<i>\$1,230,000</i>

Any changes in funding sources following obligation of RUS funds must be reported to the processing official. Prior to advertisement for construction bids, you must provide evidence of other funding sources. This evidence should include a copy of the commitment letter.

3. **Disbursement of Funds** – For all loans exceeding \$500,000, where loan funds can be borrowed at reasonable interest rates on an interim basis from commercial sources for the construction period, such interim financing will be used to preclude the necessity for multiple advances of Agency loan funds. You must provide the Agency with a copy of the interim loan financing agreement for review prior to bid authorization. The Agency approval official may make an exception when interim financing is cost prohibitive or unavailable. Please take SF 3881, "ACH Vendor/Miscellaneous Payment Enrollment Form" to the bank of your choice for completion of the "Financial Institution Information" section and return the completed form to our office.

Any applicant contribution and connection/hook-up fees shall be considered as the first funds expended. An agreement should be reached with all other funding sources on how funds are to be disbursed before the start of construction.

You must establish a separate construction account, with an acceptable financial institution or depository that meets the requirements of 31 CFR Part 202. All project funds will be deposited into this account. Financial institutions or depositories accepting deposits of public funds and providing other financial agency services to the Federal Government are required to pledge adequate, acceptable securities as collateral. All funds in the account will be secured by a collateral pledge equaling at least 100% of the highest amount of funds expected to be deposited in the construction account at any one time. Additional guidance on collateral acceptability and valuation are available at Treasury's Bureau of the public debt website at www.publicdebt.treas.gov.

4. **Security** – (Revenue Bonds - Public Body) The loan will be secured by a revenue bond in the amount of \$814,000.00. The bond will be fully registered as to both principal and interest in the name of the “United States of America Acting through the Department of Agriculture”.

The Revenue Bond will be issued pursuant to Section 61-35 of the North Dakota Century Code.

The bond and any ordinance or resolution relating thereto must not contain any provision in conflict with the RD Loan Resolution, applicable regulations, and law. In particular, there must be no defeasance or refinancing clause in conflict with the graduation requirements of 7 USC 1983 (c).

Additional security requirements are contained in RUS Bulletin 1780-27, “Loan Resolution (Public Bodies)”.

5. **Loan Repayment** – (Annual Installments) Your loan will be scheduled for repayment over a period of 40 years. The payments due the first two years will consist of interest only. Payments for the remaining 38 years will be equal amortized annual installments. For planning purposes use a 4.000% interest rate and an annual amortization factor of .05164, which provides for an annual payment of \$42,035.

The interest rate will be the lower of the rate in effect at the time of loan approval or the time of loan closing, whichever is less, unless you choose otherwise. Should the interest rate be reduced, the payment will be recalculated to the lower amount. The payment due date will be established as the day that the loan closes (the 28th is the due date when loans are closed on the 29th, 30th or 31st). Interest only payments during the two year deferral period will be made utilizing your funds on an annual basis.

You will be required to complete RD-3550-28, “Authorization Agreement for Preauthorized Payments” for all new and existing indebtedness to the Agency. It will allow for your payment to be electronically debited from your account on the day your payment is due. We will mail this form to you closer to the time the SRWD is scheduled to begin making annual principal and interest payments.

6. **Reserves** – Reserves must be properly budgeted to maintain the financial viability and sustainability of any operation. Reserves are important to fund unanticipated emergency maintenance and repairs, and assist with debt service through a debt service reserve should the need arise. Reserves can also be established and maintained for the anticipated and expected expenses including but not limited to operation and maintenance, customer deposits, deferred interest during the construction period, and an asset management program.

As a part of this Agency loan proposal you must establish a debt service reserve fund equal to at least one annual loan installment that accumulates at the rate of 10% of one annual payment per year for ten years or until the balance is equal to one annual loan payment (\$42,000). The monthly transfer to this reserve is \$350, which is \$4,200 per year.

7. **Users** – This letter of conditions is based upon you providing evidence or a certification that there will be at least 51 new residential users and 1,212 existing residential users and 5 existing commercial users on the existing/proposed system when construction has been completed. The Agency loan commitment is based on providing service to one new large volume users and two existing large volume users.

Before the Agency can agree to the project being advertised for construction bids, you must provide evidence or a certification that the total required number of users are currently using the system or signed up to use the system and that the monthly water usage projected for each by the engineer is reasonable. In the event any of the large volume users discontinue the offered service, you must obtain enough additional revenue (i.e., increase in user rates, sign up of an adequate number of other users, reduction in project scope to reduce debt service and O&M, etc.) to make up the projected income that would be lost by not having those users on the system.

You must provide a positive program to encourage connection by all users as soon as service is available. The program will be reviewed by the Agency prior to advertisement for bids. A guide for developing your "Positive Program to Encourage Connections" is available if needed.

Water User Agreements: Users will be required to execute, RUS Bulletin 1780-9, "Water Users Agreement" or similar agreement approved by the Agency prior to advertisement for construction bids. The amount of cash contributions required will be set by the applicant and concurred in by the Agency. Contributions should be an amount high enough to indicate sincere interest on the part of the potential user, but not so high as to preclude service to low income families, and have a deadline for the contribution to be used or forfeited.

Each potential user who is located along planned lines and declines the offered service will be provided an opportunity to sign a "Service Declination Statement."

8. **Effective Collection Policy** - The facility needs to be operated on a sound business plan. You will be required to develop an "Effective Collection Policy" or "Ordinance" for accounts not paid in full within a specified number of days after the date of billing. The plan should include appropriate late fees, specified timeframes for disconnection of service, and reconnection fees.
9. **Proposed Operating Budget and User Rate Analysis** - You must maintain a rate schedule that provides adequate income to meet the minimum requirements for operation and maintenance, debt service, and reserves. You will be required to submit a copy of your proposed annual operating budget and rate analysis to the Agency which supports the proposed loan repayment prior to the Agency giving you written authorization to proceed with the bidding phase. The operating budget should be based on a typical year cash flow after completion of the construction phase. Form RD 442-7 - "Operating Budget" attached or similar form may be utilized for this purpose. The rate analysis will be required to show the number of users, their average consumption based on a twelve month consecutive average, and rate structure to support the necessary revenue to make the operating budget cash flow. It is expected that O&M will change over each successive year and user rates will need to be adjusted on a regular basis.

Assistance is available from technical assistance resources to help you evaluate and complete a rate analysis on your system. This assistance is available free to your organization. If you are interested, please contact our office for phone numbers and contacts of these organizations.

10. **Insurance and Bonding Requirements** - Prior to loan closing or start of construction, whichever occurs first, you must acquire the types of insurance and bond coverage shown below. The use of deductibles may be allowed providing you have the financial resources to cover potential claims requiring payment of the deductible. The Agency strongly recommends that you have your engineer, attorney, and insurance provider(s) review proposed types and amounts of coverage, including any exclusions and deductible provisions. It is your responsibility and not that of the Agency to assure that adequate insurance and fidelity or employee dishonesty bond coverage is maintained.
 - a. **General Liability Insurance** - Include vehicular coverage.
 - b. **Workers' Compensation** - In accordance with appropriate State laws.
 - c. **Position Fidelity Bond(s)** - All positions occupied by persons entrusted with the receipt and/or disbursement of funds must be bonded. You should have each position bonded in an amount equal to the maximum amount of funds to be under the control of that position at any one time. The coverage may be increased during construction of this project based on the anticipated monthly advances. The minimum coverage acceptable to the Agency will be for each position to be bonded for an amount at least equal to one annual installment on your Agency loan(s). The amount of coverage should be discussed and approved by the Agency.

- d. National Flood Insurance – If the project involves acquisition or construction in designated special flood or mudslide prone areas, you must purchase a flood insurance policy at the time of loan closing.
- e. Real Property Insurance – Fire and extended coverage will normally be maintained on all structures except reservoirs, pipelines and other structures if such structures are not normally insured and subsurface lift stations except for the value of electrical and pumping equipment. Prior to the acceptance of the facility from the contractor(s), you must obtain real property insurance (fire and extended coverage) on all facilities identified above.

11. Water Purchase Contract - You propose to purchase treated water from the City of Jamestown; therefore, you must enter into a Water Purchase Contract. Form RD 442-30 must be used unless you receive a written exception from the Agency.

12. Accounting Services - You may be required to obtain the services of an independent licensed Certified Public Accountant (CPA). When permitted by state statutes or with the approval of the Agency, a state or Federal auditor may perform the audit in lieu of a CPA.

Audit Agreement - You must enter into a written audit agreement with the auditor and submit a copy to the Agency prior to advertisement of bids. The audit agreement may include terms and conditions that the borrower and auditor deem appropriate; however, the agreement should include the type of audit or financial statements to be completed, the time frame in which the audit or financial statements will be completed, what type of reports will be generated from the services provided and how irregularities will be reported. Prior to the advertisement for bids, your accountant must certify to you and the Agency that the accounts and records as required by your bond resolution have been established and are operational.

Audit Requirements - The following management data will be required from you on an annual basis and be submitted to the Agency as specified below:

- a. A borrower that expends \$500,000 or more in federal financial assistance per fiscal year shall submit an audit performed in accordance with the requirements of OMB Circular A-133. As described above, the total federal funds expended from all sources shall be used to determine federal financial assistance expended. Projects financed with interim financing are considered federal expenditures.
- b. A borrower that expends less than \$500,000 in Federal financial assistance per fiscal year and has an outstanding Agency loan balance of \$1,000,000 or more shall submit an audit performed in accordance with Generally Accepted Government Auditing Standards (GAGAS).
- c. A borrower that expends less than \$500,000 in Federal financial assistance per fiscal year and has an outstanding Agency loan balance of less than \$1,000,000 may submit a management report, which includes at a minimum a balance sheet and an income and expense statement.

Annual Budget and Projected Cash Flow - Thirty days prior to the beginning of each fiscal year, you will be required to submit an annual budget and projected cash flow to this office. With the submission of the annual budget, you will be required to provide a current rate schedule, a current listing of the board members and their terms. Our Agency will mail the budget form to SRWD 60 days prior to the beginning of their fiscal year.

Quarterly Reports – Quarterly management reports will be required until the processing office waives the required reports. Our office will furnish you with a supply of the quarterly reporting forms. Quarterly reports are due 30 days after the end of each quarter.

13. **Legal Services** – You will be required to obtain a “Legal Services Agreement.” This agreement will address the fees necessary for the services outlined in this agreement. At closing the owner’s attorney will certify that the executed contract documents, including performance and payment bonds on contracts over \$100,000 are adequate and that the persons executing these documents have been properly authorized to do so in accordance with RUS Instruction 1780.61(b).

14. **Property Rights** - Prior to advertisement for construction bids, you must furnish satisfactory evidence that you have or can obtain adequate continuous and valid control over the lands and rights-of-ways needed for the project. Acquisitions of necessary land and rights must be accomplished in accordance with the Uniform Relocation and Real Property Acquisition Act. Such evidence of control over the lands and rights must be in the following form:

a. **Right-of-Ways** - A right-of-way map will be required showing clearly the location of all lands and right-of-ways needed for the project. The map must designate public and private lands and rights and the appropriate legal ownership thereof.

A certification and legal opinion relative to title to right-of-ways and easements is required. Form RD 442-22, “Opinion of Counsel Relative to Rights-of-Way”, and Form RD 442-21, “Right-of-Way Certificate” may be used. These forms may contain a few exceptions such as properties that must be condemned; however, prior to the start of construction or loan closing, whichever occurs first, new forms must be provided which do not provide for any exceptions.

b. **Preliminary Title Work** - (Title Opinions) A separate Form RD 1927-9, “Preliminary Title Opinion” along with copies of deeds, contracts or options for any lands needed other than rights-of-way, may be used for each property currently owned or to be acquired.

c. **Final Title Work** - After loan closing, your attorney must furnish a separate final title opinion on all existing land(s) and those to be acquired on the day of loan closing. Form RD 1927-10, “Final Title Opinion” may be used.

15. **Engineering Services** – The Agency must approve any agreements and modifications to agreements for professional engineering services. The agreement for engineering services should consist of the Engineers Joint Contract Documents Committee (EJCDC) documents as indicated in RUS Bulletin 1780-26, "Guidance for the Use of EJCDC Documents on Water and Waste Projects with RUS Financial Assistance" or other approved form of agreement.

16. **Resident Inspector(s)** – Full-time inspection is required unless a written exception is made by the Agency upon your written request. This service is to be provided by the consulting engineer or other arrangements as approved by the Agency. Prior to the pre-construction conference, a resume of qualifications of the resident inspector(s) will be submitted to the owner and Agency for review and approval. The owner will provide a letter of acceptance for all proposed observers to the engineer and Agency. The resident inspector(s) must attend the pre-construction conference.

17. **Restrictions on Lobbying**

In order to comply with Section 319 of Public Law 101-121 which prohibits applicants and recipients of Federal contracts, grants and loans from using Federal appropriated funds for lobbying, the Federal Government in connection with the award of a specific contract, grant or loan, the **Applicant**, and all contractors and subcontractors must:

- a. Execute the attached Certification for Contracts, Grants, and Loans—RD Instruction 1940-Q, Exhibit A-1.
- b. Complete Standard Form LLL, "Disclosure of Lobbying Activities", if they have made, or agreed to make payment, using funds other than Federal appropriated funds, to influence or attempt to influence a decision in connection with the contract.

The Certification (and, if appropriate, the Disclosure) must be provided to USDA, Rural Development.

18. **Environmental Requirements** -

- a. **Mitigation** – A scoping letter that described the proposed action and requested comments on the proposed project was sent to all identified interested entities. Responses were received from North Dakota Department of Health, Natural Resources Conservation Service, U.S. Fish and Wildlife Service, State Historical Society of North Dakota, North Dakota Game and Fish Department, North Dakota Parks and Recreation, North Dakota State Water Commission, North Dakota Department of Transportation, U.S. Army Corps of Engineers, Bureau of Indian Affairs, Bureau of Land Management, and the North Dakota Department of Commerce. There were no required mitigation measures shown in Section 4.0, Summary of Mitigation, Environmental Report.

b. Project Modifications – The project as proposed has been evaluated to be consistent with all applicable environmental requirements. If the project or any project element deviates from or is modified from the original approved project, additional environmental review may be required.

19. Vulnerability Assessments (VA) and Emergency Response Plans (ERP) – The Agency requires all financed water and wastewater systems to have a vulnerability assessment (VA) and an emergency response plan (ERP) in place. New water or wastewater systems must provide a certification that an ERP is complete prior to the start of operations. A certification that a VA is complete must be submitted within one year of the start of operations. Borrowers with existing systems must provide a certification that a VA and ERP are completed prior to bid authorization. Technical assistance is available in preparing these documents at no cost to you.

20. Permits – The owner, contractor or responsible party will be required to obtain all required permits for the project prior to advertisement for construction bids. A narrative opinion from your attorney concerning all permits, certificates, licenses and other items necessary to show that all legal requirements can be met and stating how they will be met.

21. Contract Documents, Final Plans and Specifications -

- a. The contract documents should consist of the EJCDC Construction Contract Documents as indicated in RUS Bulletin 1780-26 or other approved form of agreement.
- b. The contract documents, final plans, and specifications must comply with RUS Instruction 1780, Subpart C – Planning, Designing, Bidding, Contracting, Construction and Inspections and be submitted to the Agency for approval prior to advertisement for bids.
- c. The use of any procurement method other than competitive bidding must be requested in writing and approved by the Agency.
- d. The Agency requires a pre-construction conference, pre-final, final, and warranty inspection.
- e. The Agency requires prior agency concurrence with all Change Orders, Invoices, and Payment Estimates.

22. Graduation - By accepting this loan, you are also agreeing to refinance (graduate) the unpaid loan balance in whole, or in part, upon request of the Government. If at any time the Agency determines your entity is able to obtain a loan for such purposes from responsible cooperative or private sources at reasonable rates and terms, you will be requested to refinance.

23. Applicable State Statutes and Requirements – Evidence must also be provided indicating your system has a licensed operator, meeting State requirements, will be available prior to the system becoming operational or a suitable supervisory agreement with a licensed operator is in effect.

The proposed action will comply with the Protection of Human Burial Sites, Human Remains and Burial Goods (North Dakota Century Code 23-06-27).

24. Civil Rights & Equal Opportunity - You should be aware of and will be required to comply with other federal statute requirements including but not limited to:

Section 504 of the Rehabilitation Act of 1973 – Under section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), no handicapped individual in the United States shall, solely by reason of their handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Agency financial assistance.

Civil Rights Act of 1964 – All borrowers are subject to, and facilities must be operated in accordance with, title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) and subpart E of part 1901 of this title, particularly as it relates to conducting and reporting of compliance reviews. Instruments of conveyance for loans and/or grants subject to the Act must contain the covenant required by paragraph 1901.202(e) of this title.

The Americans with Disabilities Act (ADA) of 1990 – This Act (42 U.S.C. 12101 *et seq.*) prohibits discrimination on the basis of disability in employment, State and local government services, public transportation, public accommodations, facilities, and telecommunications. Title II of the Act applies to facilities operated by State and local public entities which provides services, programs and activities. Title III of the Act applies to facilities owned, leased, or operated by private entities which accommodate the public.

Age Discrimination Act of 1975 – This Act (42 U.S.C. 6101 *et seq.*) provides that no person in the United States shall on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Agency financial programs must be extended without regard to race, color, religion, sex, national origin, marital status, age, or physical or mental handicap.

25. Bid Authorization - Once all the conditions outlined in this letter have been met, the Agency may authorize you to advertise the project for construction bids. Such advertisement must be in accordance with appropriate State statutes. Immediately after bid opening you must provide the Agency with (a) bid tabulation; (b) your engineer's evaluation of bids; and (c) your recommendations for contract awards. If the Agency agrees that the construction bids received are acceptable, adequate funds are available to cover the total project costs, and all the administrative conditions of loan approval have been satisfied, loan closing instructions will be issued to you setting forth any further requirements that must be met before a Notice of Award may be issued.

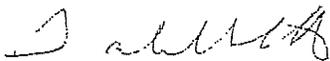
26. **Cost Overruns** – Cost overruns exceeding 20% of the development cost at time of loan approval or where the scope of the original purpose has changed will compete for funds with all other applications on hand as of that date. Cost overruns must be due to high bids or unexpected construction problems that cannot be reduced by negotiations, redesign, use of bid alternatives, rebidding or other means prior to consideration by the Agency for subsequent funding. Such requests will be contingent on the availability of funds.
27. **Use of Remaining Funds** – Applicant contributions and connection or tap fees will be the first funds expended in the project. Remaining funds may be considered in direct proportion to the amounts obtained from each source and handled as follows:
- Remaining funds may be used for eligible loan purposes, provided the use will not result in major changes to the original scope of work and the purpose of the loan remains the same.
 - Agency loan funds that are not needed will be applied as an extra payment on the Agency indebtedness unless other disposition is required by the bond ordinance, resolution, or State statute.

The attachments listed below are attached to your copy of this letter as noted. Enclosed are the following:

- RUS Bulletin 1780-27, "Loan Resolution (Public Bodies)"
- RUS Bulletin 1780-9, "Water or Sewer Users Agreement"
- Service Declination Statement
- "Positive Program to Encourage Connections"
- Form RD 442-7, "Operating Budget"
- Form RD 442-30, "Water Purchase Contract"
- Form RD 442-3, "Balance Sheet"
- Form RD 442-22, "Opinion of Counsel Relative to Rights-of-Way"
- Form RD 442-21, "Right-of-Way Certificate"
- Form RD 1927-9, "Preliminary Title Opinion"
- Form RD 1927-10, "Final Title Opinion"

We look forward to continue working with you to complete this project and if you have any questions please contact Jane Tesch, Community Programs Specialist at 1-800-582-7584, Ext. 2066 or by e-mail at jane.tesch@nd.usda.gov.

Sincerely,



DALE VAN ECKHOUT
Business & Community Program Director

Enclosures

cc: Terry Nieland, President
Bob Keller, Bartlett & West
Attorney Scott Richard Sandness, Sandness Law
Scott Wegner, Bond Counsel Attorney - Cook Wegner, PC
Duane Dunn, CPA - Schauer & Associates
Office of the General Counsel (OGC)
Valley City RD Office