

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

Jade Mound, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 1:21-cv-00081-DLH-CRH
)	
The United States of America,)	
)	
Defendant.)	
)	
)	

**PLAINTIFFS' POST-HEARING MEMORANDUM
IN FURTHER OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Per this Court's allowance for the Parties to submit additional briefing addressing issues that surfaced during the hearing held on January 19, 2022, Plaintiffs respectfully submit the following.

I. THE NORTH DAKOTA BRIDGE INSPECTION PROCEDURES ARE AN INTEGRAL COMPONENT OF NDDOT'S ROAD MAINTENANCE SCHEME AND DEFENDANT'S 638 CONTRACT

Defendant denigrates the North Dakota Bridge Inspection Procedures as a mere "coding guide" and argues that the RMP Contract did not adopt *any* standards pertaining to the inspection or maintenance of bridges or culverts. Defendant's extreme position is facially unreasonable, as it implies that bridges and culverts on the BIA System are the "wild west" not subject to any inspection or maintenance standards whatsoever. It is also untenable on the record before this Court. A careful review of the

638 Contract and the maintenance standards that Defendant concedes *do* apply shows that the Bridge Inspection Procedures are an integral component of the road maintenance standards established by the North Dakota Department of Transportation and adopted via the 638 Contract.

According to Defendant, as used in the 638 Contract, “the most current Road Maintenance Standards of the State of North Dakota Department of Transportation” refers to two (and only two) documents: (1) the NDDOT Maintenance Operations Manual and (2) the NDDOT Snow and Ice Control Manual. *See* Def. Reply Mem. (Dkt. 23) at 4. However, Defendant’s own cited NDDOT Maintenance Operations Manual contains multiple references to the “Bridge Inspection” process and indicates that the Bridge Inspection Procedures are a critical element of the overall road maintenance system established by the North Dakota Department of Transportation.

For example, in discussing “Bridge Preservation” the NDDOT Maintenance Operations Manual states that condition-based preventative maintenance is to be performed as needed “when identified through *the bridge inspection process. . .*”:

Bridge Preservation

Bridge preservation is defined as actions or strategies that reduce deterioration of bridges or bridge elements, restore the function of existing bridges, keep bridges in good condition, and extend their life. The goal of both bridge preservation and pavement preservation is to efficiently and effectively preserve the condition and enhance the performance of our transportation infrastructure.

Preventative maintenance is a planned strategy of applying cost-effective treatments to our transportation system that preserve the system, retard deterioration, and maintain or improve the condition of the system.

Cyclical preventative maintenance activities are performed on a pre-determined, or scheduled, interval and are aimed at preserving or delaying deterioration to existing bridge elements or components.

Condition-based preventative maintenance activities are performed as needed when identified through the bridge inspection process or by maintenance workers. The main goal of condition-based maintenance is to fix minor problems before they become major problems.

Redwing Decl., Ex. 3 (Dkt. 12-03) at 43 (emphasis added). Similarly, in discussing “Desired Service Levels for Safety Appurtenances,” the NDDOT Maintenance Operations Manual contains a directive to inspect “Lighting/Highmast Standard Foundations” and “Sign Bridges” *“every 2 years with Bridge Inspection”*:

CHAPTER 4 - TRAFFIC OPERATIONS					
<i>Desired Service Levels for Safety Appurtenances</i>					
	Yearly	Spring	Summer	Fall	Winter
Cable Guardrail		1		1	
W Beam Guardrail	2				
Attenuators		1		1	
Barrels		1	1	1	1
Signing	3				
Delineators		1		1	
Pavement Markings	8	4	4	4	
Light Standards	2				
Span Wire Traffic Signals/flashing beacons		1	1	1	1
Highmast Standards Electrical		5	5	5	5
Lighting/Highmast Standard Foundations	6				
Sign Bridges	6				
Clear Zone		5	5	5	5
Snow Gates				1	
Advance Warning Rumble Strip				7	

1. Inspect and Adjust
2. Inspect
3. Perform night inspection, including all stop signs. Poor warning and regulatory signs must be replaced. All warning and regulatory signs will be replaced on a 10 year cycle.
4. Re-stripe maintenance repair areas at the end of each work-week
5. On-going
6. Inspect every 2 years with Bridge Inspection
7. Re-install at patched areas if warranted
8. See Pavement Marking – Striping Section, in this manual, for Striping Schedule

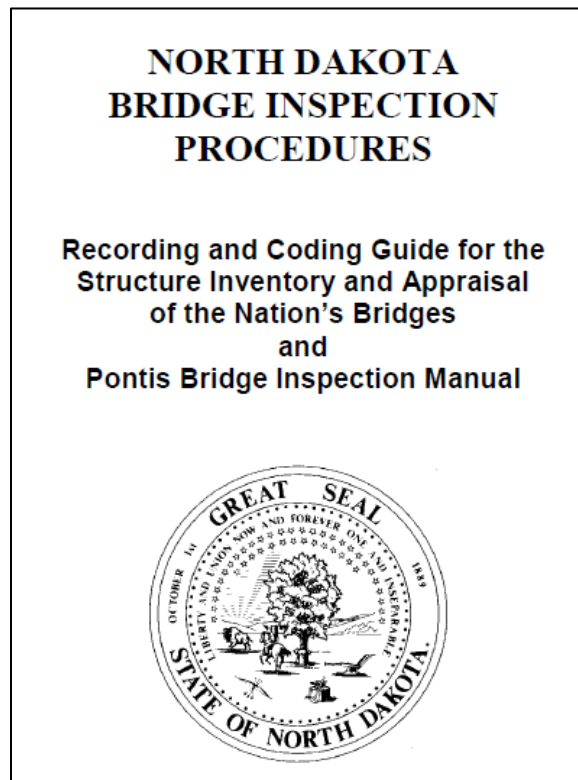
Id. at 26 (emphasis added). Clearly, the applicable road maintenance standards established by the NDDOT encompasses the biennial Pontis inspections prescribed in exacting detail in NDDOT’s Bridge Inspection Procedures.

By arguing that the North Dakota Bridge Inspection Procedures are *not* applicable “Road Maintenance Standards” under the 638 Contract, Defendant is effectively arguing that the 638 Contract failed to adopt any maintenance standards for the bridges and culverts on the Standing Rock Reservation. Defendant’s argument is a contorted and internally inconsistent reading of the 638 Contract and the scope of the phrase “Road Maintenance Standards of the State of North Dakota Department of

Transportation.” However, it is instructive in one regard: by conceding that it was obligated to follow the NDDOT Maintenance Operations Manual while adamantly arguing that it *did not* and *was not* under any obligation to follow the North Dakota Bridge Inspection Procedures, Defendant has effectively admitted that it ignored the key maintenance standards at issue in this case. As this Court’s precedents make clear, whatever the contours of the discretionary function exception, it does not apply to cases such as this where a government agency simply “failed to follow the process that was adopted.” *North Dakota v. United States*, 480 F. Supp.3d 917, 931 (D.N.D. 2020).

II. THE NORTH DAKOTA BRIDGE INSPECTION PROCEDURES ARE NOT JUST A “CODING GUIDE”

The North Dakota Bridge Inspection Procedures are not just a “coding guide” as Defendant would have it. The title page alone seems to make that clear:



See Purdon Decl., Ex. 1 (Dkt. 20-1) at 2. As the subtitle makes clear, this is a coding guide “*and Pontis Bridge Inspection Manual.*” *Id.* (emphasis added). Consistent with its title, the document contains numerous sections detailing inspection requirements and procedures. For example, under “Scope of Work” it says: “The work shall consist of the on-site inspection and recording of structure related items for bridges.” *Id.* at 16. It goes on to delineate “Inspection Requirements By System,” which expressly include “All Metal Pipe Culverts having a nominal diameter of eight (8) feet or more”:

<u>SCOPE OF WORK</u>	
The work shall consist of the on-site inspection and recording of structure related items for bridges on:	
	State Highway System
	Urban Highway System
	County On-System
	County Off-System
<u>INSPECTION REQUIREMENTS BY SYSTEM</u>	
State System -	<u>ALL REINFORCED BOX CULVERTS</u> , except for cattle passes.
	<u>ALL METAL PIPE CULVERTS</u> having a nominal diameter of eight (8) feet or more
	<u>BRIDGES AND MULTIPLE PIPE</u> where the total span length is twenty (20) feet or greater.

Id. It goes on to list 27 kinds of “bridge inspection equipment” that “each team should have for inspection”:

BRIDGE INSPECTION EQUIPMENT LIST

Following is a list of equipment each team should have for inspection.

1. 16 ft. to 20 ft. extension ladder
2. Graduated telescoping sounding rod - 10 ft.
3. 10' pocket tape
4. Chipping hammer (geologist type)
5. 2 inch putty knife
6. Inspection mirror on 3' extension arm - 4" to 6" mirror
7. Scriber
8. Vernier calipers
9. Plumb bob and line
10. Carpenter's level - 4'
11. 100' tape
12. Camera
13. Screwdriver
14. Plier
15. Protractor
16. Flashlight or Miner's helmet with light
17. Pocket knife
18. Wire Brush
19. Ice pick
20. Clipboard
21. 10X loupe or magnifying glass
22. Box with lock for inspection equipment
23. Chest waders
24. Thermometer
25. Life vests (if needed)
26. 7x35 binoculars
27. Boat with oars (if needed)

Id. at 24.

The document also contains inspection requirements and procedures with respect to culverts in particular. For example, under “Culvert and Retaining Walls (Item 62),” teams are directed to “evaluate the alignment settlement, joints, structural condition, scour, and other items associated with culverts.” *Id.* at 148. Teams are then directed to consult the FHWA Culvert Inspection Manual “[f]or a detailed discussion regarding the inspection and rating of culverts.” *Id.* The inspection requirements set forth in the FHWA Culvert Inspection Manual are discussed at length in Plaintiffs’ preceding brief.

III. THE PRESENT CASE IS DISTINGUISHABLE FROM *DEMERY*

The matter before the Court is dissimilar to *Demery v. U.S. Dep't of Interior* in two important ways. 246 F. Supp. 2d 1060, 1065 (D.N.D. 2003), *aff'd*, 357 F.3d 830 (8th Cir.

2004). First, the 8th Circuit reasoned that *Demery* involved “obvious issues of policy” of aerating a lake in order to protect the lake’s environment and aquatic habitats. 357 F.3d at 833 (reasoning “the BIA's decisions about how it would go about aerating the lake and maintaining the open water were part of its original decision to aerate the lake.”) Here in contrast, there is no “obvious issue of policy” implicated by the Government’s failure to inspect the Kenel Road Culvert.

Second, the district Court reasoned that the discretionary exemption applied in *Demery* because there were no “statutes, rules, regulations, or policies requiring the BIA to warn the public of the open waters created by the aeration system” and “[t]he record also reveals that there were no established policies to guide BIA personnel responsible for marking the open water on Belcourt Lake or to dictate whether any warning signs were needed or the types of warnings required.” 246 F. Supp. 2d at 1065. Here in contrast, the record viewed in a light most favorable to the non-movant shows that there *are* established rules requiring the BIA to warn the public per the Federal Highway Administration’s Culvert Inspection Manual.

<u>Maintenance Urgency Index</u>	<u>Maintenance Immediacy of Action</u>	<u>Inspection Course of Action</u>
9	No repairs needed.	Note in inspection report only.
8	No repairs needed. List specific items for special inspection during next regular in- spection.	
7	No immediate plans for repair. Examine possibility of increased level of inspection.	
6	By end of next season - add to scheduled work.	
5	Place in current schedule - current season - first reasonable opportunity.	Special notification to superior is warranted.
4	Priority - current season - review work plan for relative priority - adjust schedule if possible.	
3	High priority - current season as soon as can be scheduled.	
2	Highest priority - discontinue other work if required - emergency basis or emergency sub- sidiary actions if needed (post, one lane traffic, no trucks, reduced speed, etc.)	Notify superiors verbally as soon as possible and confirm in writing.
1	Emergency actions required - reroute traffic and close.	
0	Facility is closed for repairs.	

See Purdon Decl., Ex. 2 (Dkt. 20-02) at 62 (instructing that culverts with a maintenance urgency score of one or two warranted verbal notification to superiors “as soon as possible,” discontinuation of other work, and emergency actions such as rerouting traffic, posting warning signage and implementing traffic and speed reductions). Thus, *Demery* is inapplicable to this case because clear and specific rules to warn exist.

IV. ON THE RECORD BEFORE THIS COURT, DEFENDANT’S MOTION CANNOT BE GRANTED

Because Defendant has brought a factual attack on this Court’s jurisdiction and the jurisdictional issue is “bound up” with the merits, the evidence before the Court should be evaluated under the summary judgment standard. *Moss v. United States*, 895 F.3d 1091, 1097 (8th Cir. 2018) (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 203 n.19 (1974)). To survive dismissal, Plaintiffs are not required to prove that Defendant’s

tortious conduct caused Plaintiffs injuries. To the contrary, the burden is on Defendant as the movant to demonstrate the absence of any genuine issues of material fact.

Zimmerli v. City of Kansas City, 996 F.3d 857, 863 (8th Cir. 2021) (citing *Grage v. N. States Power Co.*, 813 F.3d 1051, 1054 (8th Cir. 2015)). In evaluating whether Defendant carried its burden, all inferences must be drawn in Plaintiffs' favor. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion" (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962))).

On the record before it, this Court cannot conclude that Defendant has met its burden. Drawing all inferences in Plaintiffs' favor concerning the interpretation of the 638 Contract and the North Dakota Bridge Inspection Procedures, it is plain there is a genuine issue of material fact as to whether the discretionary function exception applies in this case. This matter is ripe for further discovery concerning the inspection and maintenance activities Defendant undertook with respect to the Kenel Road Culvert. It is also ripe for discovery as to how those activities, and the arguments Defendant has made in support of them in this case, comport with the actions Defendant has taken when faced with similar factual circumstances in other jurisdictions, such as South Dakota. *See, e.g., Kevin Wright, et al. v. United States*, Case No. 12-civ-3034 (D.S.D. Dec 28, 2012) (after heavy rains caused an allegedly inadequately maintained culvert underlying BIA Highway 10 in the Lower Brule Reservation in South Dakota washed out, on information and belief, Defendant did not seek dismissal under Rule 12(b)(1)).

V. CONCLUSION

For the reasons articulated by Plaintiffs in their briefing and at oral argument, Plaintiffs again respectfully submit that Defendant's motion should be denied.

Dated: January 26, 2022

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