

Testimony Provided to Water Topics Overview Committee
Thursday, April 10, 2014
Minot, ND

Provided by Ken Royse on behalf of:

- a) Three Affiliated Tribes of ND
- b) Standing Rock Sioux Tribe of ND
- c) Turtle Mountain Tribe of ND
- d) Spirit Lake Tribe of ND

Mr. Chairman and Members of the Committee.

My name is Ken Royse. I am a consulting civil engineer with the firm of Bartlett and West in Bismarck, ND. I am here today at request of the water managers and directors from the four tribes of ND: the Three Affiliated Tribes, the Standing Rock Sioux Tribe, the Turtle Mountain Tribe, and the Spirit Lake Tribe. As the consulting engineer for projects for these tribes (not including the Turtle Mountain Tribe, but speaking for their interests in this issue) they have asked if I would speak to concerns they have on the pending cost share policy currently being considered by the ND State Water commission.

However first, several representatives of these tribes are also here and I will introduce them.

The most significant concern of the tribes concerns part G of the proposed language which defines 'local sponsor'. That language is shown in Attachment A. As can be noted, as currently written the definition of local sponsor does not include 'tribal entity'. As written the policy effectively prohibits any tribal entity, or tribal water project, from applying for or receiving any state funds for any type of tribal water project.

The tribes believes this is language which needs to be changed to affirmatively reflect that tribes are considered as a 'local sponsor' and should be eligible to make application, just as any other system in the State has the right to do so, for State water development funds. The tribes are not suggesting that any preference be given to their project nor any additional funding concessions or advantages be given them but only that they have the ability to apply and be judged according to the same criteria as any other applicant water project in the State.

Their position on this issue of specifically allowing a tribal entity to be included as a 'local sponsor' is joined by much of the water community of the State of North Dakota. The North Dakota Water Users, as well as the North Dakota Water Resources Association, and the North Dakota Rural Water Systems Association, have all embraced this position and passed resolutions of support for the tribes inclusion as a 'local sponsor'.

Additionally when the ND Rural Water Association prepared their water project priority listing for State funds for this biennium, it is noteworthy that the Association priority list --- reviewed and accepted by the rural water systems of our State---- recognized the need for clean and safe drinking water for residents of the various reservations and they agreed to include four (4) separate tribal projects as priority projects for funding to the State Water Commission.

Attachment B to this testimony shows the ranking of water delivery projects by the ND Rural Water Association in which you can note all four tribes have ranked projects.

The four (4) tribal projects which have received the support of the ND Water Rural Water Association are shown graphically in Attachment C. You will note that each tribe has submitted on projects which are intended to deliver a clean and safe supply of water to area users; both tribal and non-tribal alike. Those projects include:

- a). For the Three Affiliated Tribes; a Twin Buttes project intended to use the existing tribal water treatment plant and distribution water to users in the South Segment of the Reservation. The total cost of this project is approximately \$4.4M of which the tribe has requested a 50% state cost share.
- b). For the Standing Rock Tribe; a Selfridge area project which utilizes the exiting tribal water treatment plant for water delivery to the central and west part of the reservation. The total cost of this project is approximately \$11.6M of which the tribe has requested a 50% cost share.
- c). For the Spirit Lake Tribe; a Warwick Service Area project which will utilize the existing tribal water treatment plant and provide water to users in the east portion of the reservation. The total cost of the project is approximately \$3M of which the tribe has requested a 50% cost share.
- d). For the Turtle Mountain Tribe; a Highway 43 Corridor Project which seeks to provide water service to users north of the reservation. The total cost of Phase 1 of this project is approximately \$1.9M of which the tribe has requested a 50% cost share.

A general map of each project is attached. All these projects have similarities:

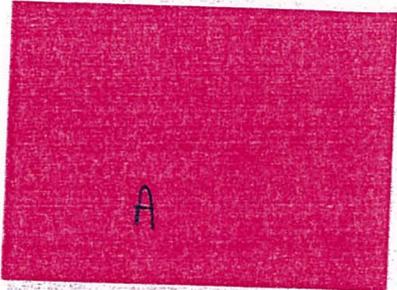
1. They were all submitted for funding to the SWC under a policy which we believe, unless otherwise changed, would allow a state participation for funding.
2. They are all reviewed and ranked high by the ND Rural Water Association as priority projects for water delivery in the State of ND.
3. Three of the projects are shovel ready; with the easements, rights of way, and permits substantially completed. One project is in a final engineering study phase.
4. They all serve ND residents who currently have no good or safe supply of water.
5. They all serve both tribal and non-tribal users, without discrimination.

Thank you for your time on this matter. Attached also as Attachment D for your review is a letter on this issue provided to the State Water Commission dated Jan. 15, 2014 in which Chairman Hall of the Three Affiliated Tribes provides the official request and position of the Three Affiliated Tribes in this issue.

Thank you for your time and I will answer any questions you may have.

Ken Royse

Notes: Language in blue reflects commission discussion from March 17, 2014 and earlier meetings. Language in green reflects additional language that the staff is suggesting be addressed. There are other minor changes to have consistent use of terms that are not highlighted; one example is "Local Sponsor" is now used in place of "Sponsoring Entity", "Project Sponsor", "Eligible Applicant", and "Applicant". "Cost-Share" is defined as the state water commission funding, and "local cost-share" is changed to "local share." Also if portions of a paragraph were moved within the same paragraph, that change in location is not noted.



NORTH DAKOTA STATE WATER COMMISSION

COST-SHARE POLICY, PROCEDURE, AND GENERAL REQUIREMENTS

The State Water Commission has adopted this policy to support local sponsors in development of sustainable water related projects in North Dakota. This policy reflects the State Water Commission's cost-share priorities and provides basic requirements for all projects considered for prioritization during the agency's budgeting process. Projects and studies that receive cost-share funding from the agency's appropriated funds are consistent with the public interest. The State Water Commission values and relies on local sponsors and their participation to assure on-the-ground support for projects and prudent expenditure of funding for evaluations and project construction. It is the policy of the State Water Commission that only the items described in this document will be eligible for cost-share upon approval by the State Water Commission, unless specifically authorized by State Water Commission action.

I. DEFINITIONS AND ELIGIBILITY

- A. **CONSTRUCTION COSTS** include earthwork, concrete, mobilization and demobilization, dewatering, materials, seeding, rip-rap, re-routing electrical transmission lines, moving storm and sanitary sewer system and other underground utilities and conveyance systems affected by construction, **mitigation required by law related to the construction contract**, irrigation supply works, and other items and services provided by the contractor. Construction costs are only eligible for cost-share if incurred after State Water Commission approval and if the local sponsor has complied with North Dakota Century Code (N.D.C.C.) in soliciting and awarding bids and contracts, and complied with all applicable federal, state, and local laws.
- B. **COST-SHARE** is grant or loan funds provided through the State Water Commission.
- C. **ENGINEERING SERVICES** include pre-construction and construction engineering. Pre-construction engineering is the engineering necessary to develop plans and specifications for permitting and construction of a project including

preliminary and final ~~design~~, material testing, flood insurance studies, hydraulic models, and geotechnical investigations. Construction engineering is the engineering necessary to build the project designed in the pre-construction phase including construction contract management, and project inspection. Administrative services and support services performed and charged by engineering companies are not engineering services. Engineering services are eligible costs if incurred after State Water Commission approval. If cost-share is expected to be greater than \$25,000, the local sponsor must follow the engineering selection process in NDCC 54-44.7 and provide a copy of the selection committee report to the Chief Engineer. **The local sponsor will be considered to have complied with this requirement if they have completed this selection process for a general engineering services agreement at least once every three years and have formally assigned work to a firm or firms under an agreement. The local sponsor must inform the Chief Engineer of any change in the provider of general engineering services.**

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Comment [1]: Moved cultural and archeological studies to page 5 under pre-construction activities.

- D. **IMPROVEMENTS** are construction related projects that upgrade a facility to provide increased efficiency or capacity. Improvements do not include any activities that are maintenance, replacement, or reconstruction.
- E. **INELIGIBLE ITEMS** excluded from cost-share include:
- 1 Administrative, easement, and permit related costs;
 - 2 Property acquisitions, property surveys, and legal expenses unless specifically identified as eligible within the Flood Recovery Property Acquisition Program, the Flood Protection Program, or the Water Retention Projects;
 - 3 Work and costs incurred prior to a cost-share approval date, except for emergencies as determined by the Chief Engineer;
 - 4 Project related operation, maintenance, replacement, and reconstruction costs;
 - 5 Funding contributions provided by federal, other state, or other North Dakota state entities that supplant costs;
 - 6 Work incurred outside the scope of the approved study or project.
- F. **EXPANSIONS** are construction related projects that increase the project area or users served. Expansions do not include maintenance, replacement, or reconstruction activities.
- G. **LOCAL SPONSOR** is the entity submitting a cost-share application and must be a political subdivision, state entity, or commission legislatively granted North Dakota recognition that applies the necessary local share of funding to match State Water Commission cost-share. They provide direction for studies and projects, public point of contact for communication on public benefits and local concerns, and acquire necessary permits and rights-of-way.
- H. **MAINTENANCE COSTS** include repairs, deferred repairs, and general upkeep of facilities to allow facilities to continue proper operation and function.

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- I. PROGRAM is a subcategory of cost-share that is typically associated with a federal initiative and may cover all phases of a study or implementation of a project.
- J. PROJECT is the water-related construction activity.
- K. REPLACEMENT AND RECONSTRUCTION COSTS include the removal of portions of facilities or components that have completed their useful life and substitution with different components to obtain the same or similar function of the original facilities or components.
- L. SUSTAINABLE OPERATION, MAINTENANCE, AND REPLACEMENT PLAN is a description of the anticipated operation, maintenance, and replacement costs with a statement that the operation, maintenance, and replacement of the project will be sustainable by the local sponsor.

II. **COST-SHARE APPLICATION AND APPROVAL PROCEDURES.** The State Water Commission will not consider any cost-share applications for water related projects or studies unless the local sponsor first makes an application to the Chief Engineer. No funds will be used in violation of Article X, § 18 of the North Dakota Constitution (Anti-Gift Clause).

- A. **APPLICATION REQUIRED.** An application for cost-share is required in all cases and must be submitted by the local sponsor on the State Water Commission Cost-Share Application form. Applications for cost-share are accepted at any time. Applications received less than 30 days before a State Water Commission meeting will not be considered at that meeting and will be held for consideration at a future meeting. The application form is maintained and updated by the Chief Engineer and must include the following:

- 1 Category of cost-share activity
- 2 Location of the proposed project or study area
- 3 Description, purpose, goal, objective, narrative of the proposed activities
- 4 Delineation of costs
- 5 Potential federal, other state, or other North Dakota state entity participation
- 6 **Engineering plans**, if applicable
- 7 Status of required permitting
- 8 Potential territorial service area conflicts **or service area agreements**, if applicable
- 9 Sustainable operation, maintenance, and replacement plan for projects
- 10 Additional information as deemed appropriate by the Chief Engineer

Applications for cost-share are separate and distinct from the State Water Commission biennial project information collection effort that is part of the budgeting process. All local sponsors are encouraged to submit project and study financial needs during the budgeting process. Projects and studies not submitted as part of the project information collection effort may be held until action can be taken on those that were included during budgeting, unless determined to be an emergency that directly impacts human health and safety or that are a direct result of a natural disaster.

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- B. **PRE-APPLICATION.** A pre-application process is allowed for cost-share of assessment projects. This process will require the local sponsor to submit a brief narrative of the project, preliminary designs, and a delineation of costs. The Chief Engineer will then review the material presented, make a determination of project eligibility, and estimate the cost-share funding the project may anticipate receiving. A project eligibility letter will then be sent to the local sponsor noting the percent of cost-share assistance that may be expected on eligible items as well as listing those items that are not considered to be eligible costs. In addition, the project eligibility letter will state that the Chief Engineer will recommend approval when all cost-share requirements are addressed. The local sponsor may use the project eligibility letter to develop a project budget for use in the assessment voting process. Upon completion of the assessment vote and all other requirements an application for cost-share can be submitted.
- C. **REVIEW.** Upon receiving an application for cost-share, the Chief Engineer will review the application and accompanying information. If the Chief Engineer is satisfied that the proposal meets all requirements, the Chief Engineer will present the application along with a recommendation to the State Water Commission for its action. The Chief Engineer's review of the application will include the following items and any other considerations that the Chief Engineer deems necessary and appropriate. ~~For cost-share applications over \$100 million, additional information requested by the State Water Commission will be used to determine cost-share.~~
- 1 Applicable engineering plans;
 - 2 Field inspection, if deemed necessary by the Chief Engineer;
 - 3 The percent and limit of proposed cost-share determined by category of cost-share activity and eligible expenses;
 - 4 Assurance of sustainable operation, maintenance, and replacement of project facilities by the local sponsor;
 - 5 Status of permitting and service area agreements;
 - 6 Available funding in the State Water Commission budget and budget priorities.

The Chief Engineer is authorized to approve cost-share up to **\$75,000 in state funds** and also approve cost overruns up to **\$75,000 in state funds** without State Water Commission action.

- D. **NOTICE.** The Chief Engineer will give notice to local sponsors when their application for cost-share is placed on the tentative agenda of the State Water Commission's next meeting.
- E. **AGREEMENT AND DISTRIBUTION OF FUNDS.** No funds will be disbursed until the State Water Commission and local sponsor have entered into an agreement for cost-share participation. No agreement will be entered until all required State Engineer permits have been acquired.

For construction projects, the agreement will ~~address indemnification and vicarious liability language.~~ The local sponsor must require that the local sponsor and the state be made an additional insured on the contractor's commercial general liability policy including any excess policies, to the extent applicable. The levels and types of

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Deleted: require all project contractors and service providers to agree to defend, indemnify and hold harmless the local sponsor and state from any and all vicarious and other derivative claims that arise out of the contractor's performance under the agreement, except for claims based upon the local sponsor or state's own direct active acts of negligence or intentional misconduct. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions.

insurance required in any contract must be reviewed and agreed to by the Chief Engineer. The local sponsor may not agree to any provision that indemnifies or limits the liability of a contractor.

For any property acquisition, the agreement will specify that if the property is later sold, the local sponsor is required to reimburse the Commission the percent of sale price equal to the percent of original cost-share.

The Chief Engineer may make partial payment of cost-sharing funds as deemed appropriate. Upon notice by the local sponsor that all work or construction has been completed, the Chief Engineer may conduct a final field inspection. If the Chief Engineer is satisfied that the work has been completed in accordance with the agreement, the final payment will be disbursed to the local sponsor, less any partial payment previously made.

- F. LITIGATION.** If a project submitted for cost-share is the subject of litigation, the application may be deferred until the litigation is resolved. If a project approved for cost-share becomes the subject of litigation before all funds have been disbursed, the Chief Engineer may withhold funds until the litigation is resolved. **Litigation for this policy is defined as legal action that would materially affect the ability of the local sponsor to construct the project; that would delay construction such that the authorized funds could not be spent; or is between political subdivisions related to the project.**

III. COST-SHARE CATEGORIES. The State Water Commission supports the following categories of projects and studies for cost-share. **Generally, engineering expenses are cost-shared as follows: Pre-construction engineering and other expenses approved by the State Water Commission are cost-shared up to 35 percent. Engineering expenses related to construction are cost-shared at the same percent as the construction costs when approved by the State Water Commission.**

- A. PRE-CONSTRUCTION EXPENSES.** The State Water Commission supports local sponsor development of feasibility studies, mapping, and engineering designs as part of pre-construction activities to develop support for projects within this cost-share policy including:
- 1 Feasibility studies to identify water related problems, evaluate options to solve or alleviate the problems based on technical and financial feasibility, and provide recommendation and cost estimate, of the best option to pursue.
 - 2 Engineering design to develop plans and specifications for permitting and construction of a project, including associated cultural resource and archeological studies.
 - 3 Mapping and surveying to gather data for a specific task such as flood insurance studies and flood plain mapping, LiDAR acquisition, and flood imagery attainment, which are valuable to managing water resources.

Copies of the deliverables must be provided to the Chief Engineer upon completion. The Chief Engineer will determine the payment schedule and interim progress report requirements.

B. WATER SUPPLY

- 1 **WATER SUPPLY PROJECT.** The State Water Commission supports water supply efforts and will use a grant and loan program. The local sponsor may apply for water supply funding, and the application will be reviewed to determine project **priority**. Projects **will be prioritized** within categories (1) thru (5) below. Projects within categories (1) and (2) may be considered for grant funding of up to 60 percent cost-share. **Grant funding within category (3) will be on a case-by-case basis.** Projects within categories (1) through (5) may be considered for loan funding. **After cost-share for grant funding has been determined, the local sponsor may be considered for loan funding in addition to the grant funding.** The combination of grant and loan funding will not exceed **80 percent from the State Water Commission.**

- (1) Addresses a lack of water supply for domestic use or upgrades a water supply to primary safe drinking water act standards.
- (2) Supports **improvements and expansions** of a water supply system serving an area that has a 3-year average population growth in excess of 3% per year, as determined by the Chief Engineer
- (3) Water treatment improvements that address impacts from other State Water Commission projects. Grant funding to be determined based on level of impact by State Water Commission project.
- (4) Assists with improvements in service areas where the anticipated cost per user each year (based on 5,000 gallons per month) divided by the average annual median income per user is in the top quartile of **its peer group** water systems in the state (**large city, small city, and regional**) as determined by the Chief Engineer.
- (5) Addresses extraordinary repairs or replacement needs of a water supply system due to damages from a recent natural disaster.

Debt per capita, either actual or anticipated, may be used as an additional determinant of financial need.

The State Water Commission will periodically set the interest rate on the loan program, taking into consideration other loan programs. If ability to pay for the local share is a concern, the Chief Engineer may provide a recommendation for public finance options **or loan funding.**

Water Depots for industrial use receiving water from facilities constructed using State Water Commission funding or loans have the following additional requirements:

- a) Domestic water supply has priority over industrial water supply in times of shortage. This must be explicit in the water service contracts with industrial users.

- b) If water service will be contracted, public notice of availability of water service contracts is required when the depot becomes operational.
- c) A portion of the water supply at any depot must be available on a non-contracted basis for public access.

- 2 **MUNICIPAL, RURAL, AND INDUSTRIAL WATER SUPPLY PROGRAM.** The Municipal, Rural, and Industrial Water Supply Program, which uses federal funds, is administered according to North Dakota Administrative Code Article 89-12.
- 3 **DROUGHT DISASTER LIVESTOCK WATER SUPPLY PROJECT ASSISTANCE PROGRAM.** This program is to provide assistance with water supply for livestock impacted during drought declarations and is administered according to North Dakota Administrative Code Article 89-11.

C. **FLOOD CONTROL.** The State Water Commission may provide cost-share for eligible items of flood control projects protecting communities from flooding and may include the repair of dams that provide a flood control benefit.

- 1 **FLOOD RECOVERY PROPERTY ACQUISITION GRANT PROGRAM.** This program is used to assist local sponsors with flood recovery expenses that provide long term flood damage reduction benefits through purchase and removal of structures in areas where flood damage has occurred. All contracted costs directly associated with the acquisition will be considered eligible for cost-share. Contracted costs may include: appraisals, legal fees (title and abstract search or update, etc.), property survey, closing costs, hazardous materials abatement needs (asbestos, lead paint, etc.), and site restoration.

The State Water Commission may provide cost-share of the eligible costs of approved flood recovery expenses that provide long term flood reduction benefits based on the following criteria and priority order:

- a) Local Sponsor has flood damage and property may be needed for construction of temporary or long-term flood control projects, may be cost-shared up to 75 percent.
- b) Local Sponsor has flood damage and property would increase conveyance or provide other flood control benefits, may be cost-shared up to 60 percent.

Prior to applying for assistance, the local sponsor must adopt and provide to the Chief Engineer an acquisition plan (similar to plans required by Hazard Mitigation Grant Program (HMGP)) that includes the description and map of properties to be acquired, the estimated cost of property acquisition including contract costs, removal of structures, the benefit of acquiring the properties, and information regarding the ineligibility for HMGP funding. Property eligible for HMGP funding is not eligible for this program. The acquisition plan must also include a description of how the local sponsor will insure there is not a duplication of benefits.

Over the long-term development of a flood control project following a voluntary acquisition program, the local sponsor's governing body must officially adopt a flood risk reduction plan or proposal including the flow to be mitigated. The flow used to develop the flood risk reduction plan must be included in zoning discussions to limit new development on other flood-prone property. An excerpt of the meeting minutes documenting the local sponsor's official action must be provided to the Chief Engineer.

Local sponsor must fund the local share for acquisitions; this requirement will not be waived. Federal funds are considered "local" for this program if they are entirely under the authority and control of the local sponsor.

The local sponsor must include a perpetual restrictive covenant similar to the restrictions required by the federal HMGP funding with the additional exceptions being that the property may be utilized for flood control structures and related infrastructure, paved surfaces, and bridges. These covenants must be recorded either in the deed or in a restrictive covenant that would apply to multiple deeds.

The local sponsor must provide justification, acceptable to the Chief Engineer, describing the property's ineligibility to receive federal HMGP funding. This is not meant to require submission and rejection by the federal government, but rather an explanation of why the property would not be eligible for federal funding. Example explanations include: permanent flood control structures may be built on the property; project will not achieve required benefit-cost analysis to support HMGP eligibility; or lack of available HMGP funding. If inability to receive federal funding is not shown to the satisfaction of the Chief Engineer, following consultation with the North Dakota Department of Emergency Services, the cost-share application will be returned to the local sponsor for submittal for federal funding prior to use of these funds.

- 2 **FLOOD PROTECTION PROGRAM.** This program supports local sponsor efforts to prevent future property damage due to flood events. The State Water Commission may provide cost-share grants for up to **60 percent of eligible costs.** **For projects with federal participation, the cost-share may be up to 50 percent of eligible costs.**

Engineering design suitable for permitting by the State Engineer must be completed before any construction cost-share is approved. The cost-share application must include the return interval or design flow for which the structure will provide protection. Local share must be provided on a timely basis. **The State Water Commission may lend a portion of the local share based on demonstrated financial need.**

Property acquisition costs not eligible for HMGP funding, within the footprint of a project and that only include the purchase price of the property may be eligible under this program. The local sponsor must include a perpetual restrictive covenant on any properties purchased under this program similar to the restrictions required by the federal HMGP funding with the additional exceptions being that the property may be utilized for flood control structures

and related infrastructure, paved surfaces, and bridges. These covenants must be recorded either in the deed or in a restrictive covenant that would apply to multiple deeds.

- 3 **FEMA LEVEE SYSTEM ACCREDITATION PROGRAM.** The State Water Commission may provide cost-share up to 60 percent for eligible services for FEMA 44 CFR 65.10 flood control or reduction levee system certification analysis. The analysis is required for FEMA to accredit the levee system for flood insurance mapping purposes. Typical eligible costs include site visits and field surveys to include travel expenses, hydraulic evaluations, closure evaluations, geotechnical evaluations, embankment protection, soils investigations, interior drainage evaluations, internal drainage hydrology and hydraulic reports, system modifications, break-out flows and all other engineering services required by FEMA. The analysis will result in a comprehensive report to be submitted to FEMA and the Chief Engineer.

Administrative costs to gather existing information or to recreate required documents, maintenance and operations plans and updates, and emergency warning systems implementation are not eligible.

- 4 **DAM SAFETY AND EMERGENCY ACTION PLANS.** The State Water Commission supports dam safety including repairs and removals, as well as emergency action plans. The State Water Commission may provide cost-share for up to **75 percent** of the eligible items for dam safety repair projects and dam breach or removal projects. Dam safety repair projects that are funded with federal or other agency funds may be cost-shared up to **75 percent** of the eligible non-matched costs. The intent of these projects is to return the dam to a state of being safe from the condition of failure, damage, error, accidents, harm or other events that are considered non-desirable. **The State Water Commission may lend a portion of the local share based on demonstrated financial need.**

The State Water Commission may provide cost-share up to 80 percent, for emergency action plans (EAPs) of each dam classified as high or medium significant hazard. The cost of a dam break model is only eligible for reimbursement for dams classified as a high hazard.

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- 5 **WATER RETENTION PROJECTS.** The goal of water retention projects is to reduce flood damages by storing floodwater upstream of areas prone to flood damage. The State Water Commission may provide cost-share up to 60 percent of eligible costs for flood retention projects **including purchase price of the property.** For projects with federal participation, the cost-share may be up to 50 percent. Water retention structures constructed with State Water Commission cost-share must meet state dam safety requirements, including the potential of cascade failure. A hydrologic analysis including the operation plan, quantifying the flood reduction benefits for 25, 50, and 100-year events must be submitted with the cost-share application.
- 6 **SNAGGING AND CLEARING PROJECTS.** Snagging and clearing projects consist of the removal and disposal of fallen trees and associated debris encountered within or along the channel. Snagging and clearing projects are intended to

prevent damage to structures such as bridges, and maintain the hydraulic capacity of the channel during flood flows. The State Water Commission may provide cost-share for up to 50 percent of the eligible items for snagging and clearing as well as any sediment that has accumulated in the immediate vicinity of snags and any trees in imminent danger of falling in the channel on watercourses as defined in N.D.A.C. § 61-01-06. Items that are not eligible include snagging and clearing of man-made channels; the dredging of watercourses for sediment removal; the clearing and grubbing of cattails and other plant vegetation; or the removal of any other unwanted materials.

D. **RURAL FLOOD CONTROL.** The primary purpose of rural flood control projects is to manage runoff or drainage from agricultural sources or to provide flood control in a rural setting. Typically, rural flood control projects consist of drains, channels, diversion ditches, or ring dikes. Items that are not eligible include projects that are managing runoff or drainage from residential or urban sources.

1 **DRAINS, CHANNELS, OR DIVERSION PROJECTS.** These projects are intended to improve the drainage and management of runoff from agricultural sources. The State Water Commission may provide cost-share up to 45 percent of the ~~eligible items~~ for the construction of drains, channels, or diversion ditches. Expansions and improvements may be cost-shared on the basis of increased drainage capacity achieved or increased area served. ~~Construction costs for public road and railroad crossings that are integral to the project are eligible for cost-share.~~ ~~If an assessment-based rural flood control project involves multiple districts, each district involved must join in the cost-share application.~~

Cost-share applications for rural assessment drains will only be processed after the assessment vote has passed, the final design is complete, and a drain permit has been obtained. If the local sponsor wishes to submit a cost-share application prior to completion of the aforementioned steps, a pre-application process will be followed.

2 **RING DIKE PROGRAM.** This program is intended to protect individual rural homes and farmsteads. All ring dikes within the program are subject to the Commission's Individual Rural and Farmstead Ring Dike Criteria provided in Attachment A. Protection of a city, community or development area does not fall under this program, but may be eligible for the flood control program. The State Water Commission may provide up to 60 percent cost-share of eligible items for ring dikes. ~~Landowners enrolled in the Natural Resource Conservation Service's (NRCS) Environmental Quality Incentive Program (EQIP) who intend to construct rural or farmstead ring dikes that meet the State Water Commission's elevation design criteria are eligible for a cost-share reimbursement of 20 percent of the NRCS construction payment, limited to a combined NRCS and State Water Commission contribution of 80 percent of eligible project costs. Cost share is limited to \$40,000 per ring dike.~~

E. **RECREATION.** The State Water Commission may provide cost-share up to 40 percent for projects intended to provide water-based recreation. ~~Typical projects provide or complement water-based recreation associated with dams.~~

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Comment [3]: Deleted \$500,000 cap per biennium

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- F. **IRRIGATION.** The State Water Commission may provide cost-share for up to 50 percent of the eligible items for irrigation projects. The items eligible for cost-share are those associated with new central supply works, including water storage facilities, intake structures, wells, pumps, power units, primary water conveyance facilities, and electrical transmission and control facilities.
- G. **BANK STABILIZATION.** The State Water Commission may provide cost-share up to 50 percent of eligible items for bank stabilization projects on public lands or those lands under easement by federal, state, or political subdivisions. Bank stabilization projects are intended to stabilize the banks of lakes or watercourses, as defined in N.D.C.C § 61-01-06, with the purpose of protecting public facilities. Drop structures and outlets are not considered for funding as bank stabilization projects, but may be eligible under other cost-share program categories. Bank stabilization projects typically consist of a rock or vegetative design and are intended to prevent damage to public facilities including utilities, roads, or buildings adjacent to a lake or watercourse.

ATTACHMENT A
INDIVIDUAL RURAL AND FARMSTEAD RING DIKE CRITERIA

MINIMUM DESIGN CRITERIA

- **HEIGHT:** The dike must be built to an elevation 2 ft above either the 100-year flood or the documented high water mark of a flood event of greater magnitude, whichever is greater.
- **TOP WIDTH:** If dike height is 5 ft or less: 4 ft top width
If dike height is between 5 ft and 14 ft: 6 ft top width
If dike height is greater than 14 ft: 8 ft top width
- **SIDE SLOPES:** 3 horizontal to 1 vertical
- **STRIP TOPSOIL AND VEGETATION:** 1 ft
- **ADEQUATE EMBANKMENT COMPACTION:** Fill in 6-8 inch layers, compact with passes of equipment
- **SPREAD TOPSOIL AND SEED ON RING DIKE**

LANDOWNER RESPONSIBILITY

Landowners are responsible to address internal drainage on ring dikes. If culverts and flap gates are installed, these costs are eligible for cost-share. The landowner has the option of completing the work himself or hiring a contractor to complete the work.

If contractor does the work, payment is for actual costs with documented receipts.

If landowner does the work, payment is based on the following unit prices:

- **STRIPPING, SPREADING TOPSOIL, AND EMBANKMENT FILL:** Chief Engineer will determine rate schedule based on current local rates
- **SEEDING:** Cost of seed times 200%
- **CULVERTS:** Cost of culverts times 150%
- **FLAP GATES:** Cost of flap gates times 150%

OTHER FACTS AND CRITERIA

- The topsoil and embankment quantities will be estimated based on dike dimensions. Construction costs in excess of the 3:1 side slope standard will be the responsibility of the landowner. Invoices will be used for the cost of seed, culverts, and flap gates.
- Height can be determined by existing FIRM data or known elevations available at county floodplain management offices. Engineers or surveyors may also assist in establishing height elevations.
- The projects will not require extensive engineering design or extensive cross sections.
- A dike permit is required if the interior volume of the dike consists of 50 acre-feet, or more.

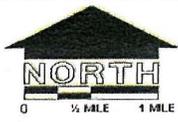
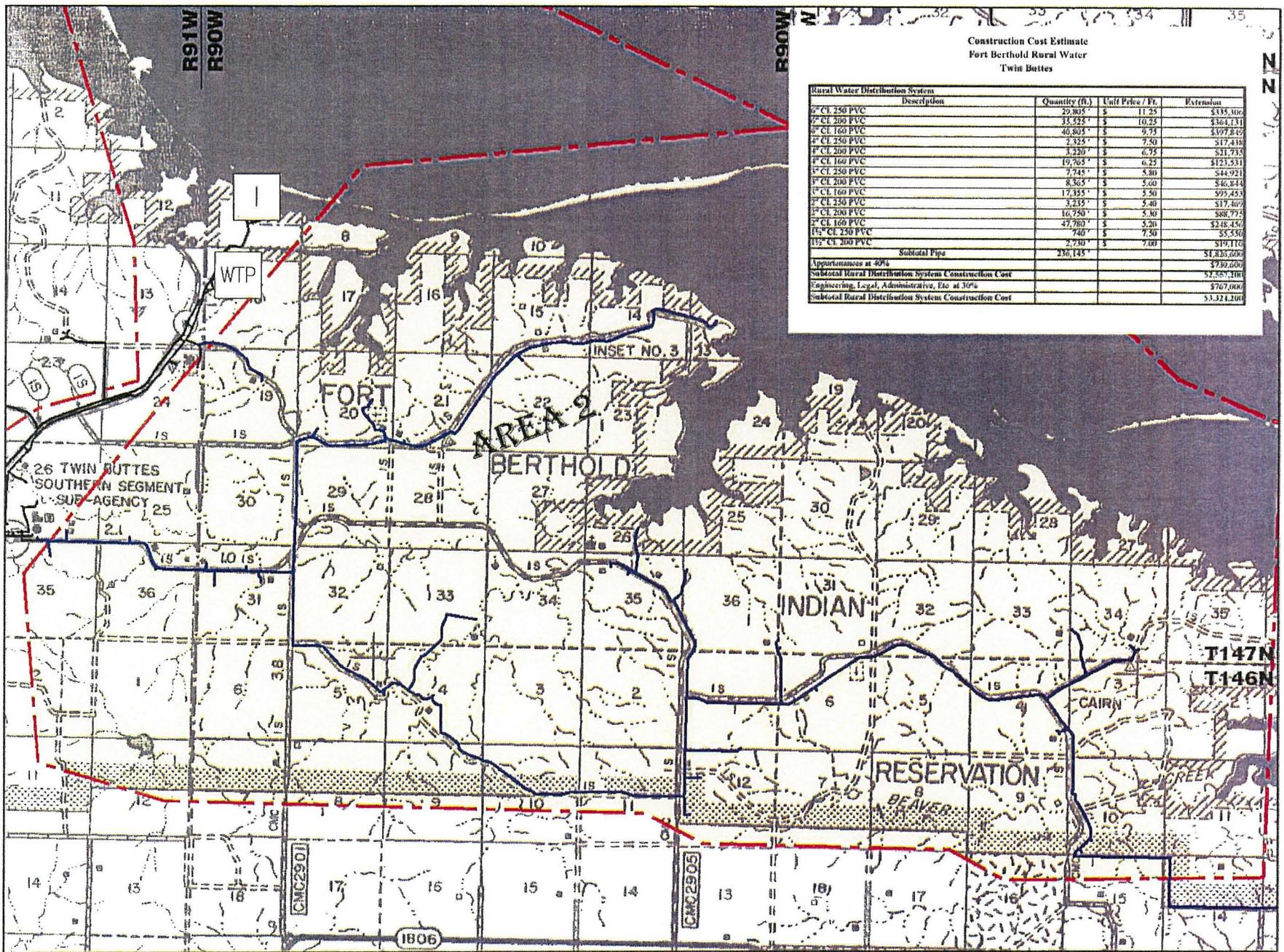
Rank	Regional/Rural Water System Projects	Estimated Cost	State Funding Request	%	Project Description
11	All Seasons Rural Water District	\$500,000	\$375,000	75	Bottineau County Expansion Project (1200 potential new users, 2015-17)
14	Barnes Rural Water District	\$3,000,000	\$8,000,000	75	Water Treatment Plant Expansion for future expansion project (2015-17)
10	Cass Rural Water District	\$500,000	\$250,000	50	Phase 2 Treatment Plant and Well Field Expansion
9	Central Plains Water District	\$5,000,000	\$2,500,000	50	Treatment Plant Improvements to correct capacity issues
6	Fort Berthold Rural Water	\$4,400,000	\$2,200,000	50	Twin Buttes Expansion Phase 1 (50 tribal and 150-200 non-tribal)
5	Grand Forks-Traill Water District	\$5,785,000	\$4,338,750	75	Phase 2 Improvements - correction of capacity deficiencies
3	Greater Ramsey Water District*	\$4,000,000	\$3,000,000	75	System Expansion (80 new users & the city of Pekin) & existing system improvements to correct issues caused by the high levels of Devils Lake.
7	Langdon Rural Water District	\$2,082,800	\$1,562,100	75	ABM Pipeline Replacement - Phase I
7		\$1,600,000	\$1,200,000	75	N.Valley System modifications to supply Langdon Rural Water (Nekoma)
17	McLean-Sheridan Water District	\$560,000	\$280,000	50	Wolf Creek Area Expansion (40-60 new users)
17		\$500,000	\$250,000	50	Mine Reclamation Repopulation Project
4	Missouri West Water System	\$800,000	\$600,000	75	South Mandan System Improvements for adequate capacity
2	North Central Rural Water Consortium*	\$4,400,000	\$3,300,000	75	Deering/Granville Phase (135 new users)
7	North Valley Water District	\$2,575,000	\$1,931,250	75	93rd Street pipeline improvements (Includes city of St. Thomas facility Improvements)
7		\$1,125,272	\$843,954	75	ABM Pipeline Replacement Project - Phase I
1	South Central Regional Water District*	\$5,000,000	\$3,750,000	75	Kidder County Expansion Project (Early sign-up has 188 new users, more to come)
16	Spirit Lake Rural Water	\$3,500,000	\$1,750,000	50	Tokio Service Area Expansion (30 new users)
15	Standing Rock MR&I	\$8,100,000	\$4,050,000	50	Saltridge Service Area (service population of 412 including the city of Saltridge)
8	Turtle Mountain Band of Chippewa	\$2,700,000	\$1,350,000	50	Phase 1 of the Hwy 43 Expansion (175 users, tribal and non-tribal)
13	Tri-County Rural Water District	\$1,040,000	\$520,000	50	Water Treatment Plant Improvements to correct deficient quantity issues
12	Walsh Rural Water District	\$1,368,300	\$900,000	66	New Ground Water Storage Reservoir to ensure current users have an adequate supply of water
	TOTAL	\$63,536,372	\$40,951,054	64%	



2013-15 Regional and Rural Water Funding Needs

Construction Cost Estimate
Fort Berthold Rural Water
Twin Buttes

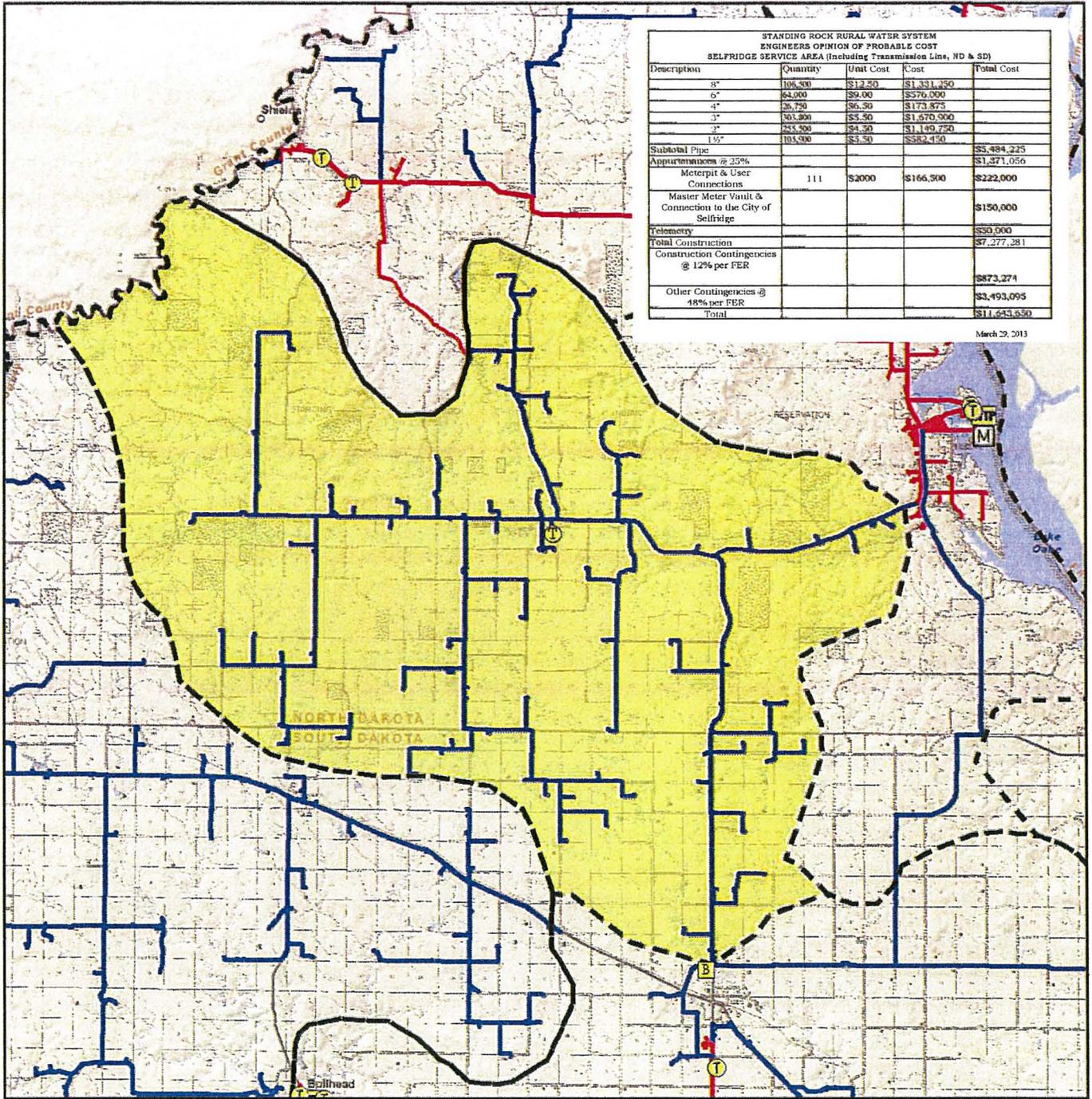
Rural Water Distribution System			
Description	Quantity (ft.)	Unit Price / Ft.	Extension
6" CI 250 PVC	29,805'	\$ 11.25	\$335,306
8" CI 200 PVC	35,532'	\$ 10.25	\$364,131
10" CI 160 PVC	40,805'	\$ 9.75	\$397,849
12" CI 250 PVC	2,325'	\$ 7.50	\$17,438
12" CI 200 PVC	3,220'	\$ 6.75	\$21,735
12" CI 160 PVC	19,785'	\$ 6.25	\$123,531
12" CI 250 PVC	2,745'	\$ 5.80	\$15,821
12" CI 200 PVC	8,305'	\$ 5.60	\$46,424
12" CI 160 PVC	17,355'	\$ 5.50	\$95,453
12" CI 250 PVC	3,235'	\$ 5.40	\$17,469
12" CI 200 PVC	16,750'	\$ 5.30	\$88,725
12" CI 160 PVC	47,780'	\$ 5.20	\$248,456
15" CI 250 PVC	740'	\$ 7.50	\$5,550
15" CI 200 PVC	2,730'	\$ 7.00	\$19,110
15" CI 160 PVC	256,135'	\$	\$1,323,600
Subtotal Pipe			\$1,323,600
Appurtenances at 40%			\$530,640
Subtotal Rural Distribution System Construction Cost			\$1,854,240
Engineering, Legal, Administrative, Etc at 30%			\$556,272
Subtotal Rural Distribution System Construction Cost			\$2,410,512



SOUTH SEGMENT AREA 2
USDA 2010 APPLICATION

— PROPOSED PIPELINE
— EXISTING PIPELINE

SELFRIDGE SERVICE AREA



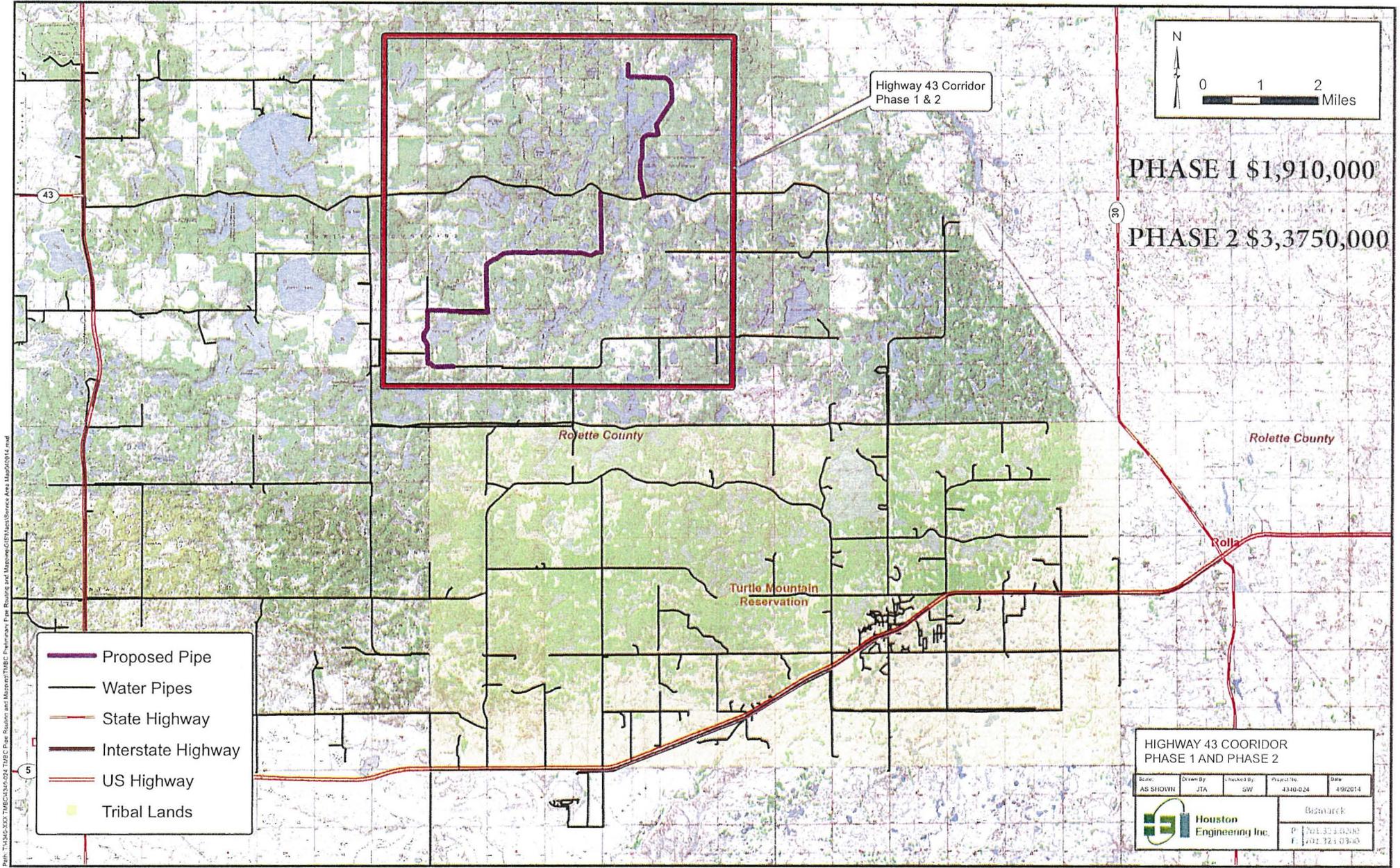
NETWORK STRUCTURE

- BOOSTER STATION
- TANK/RESERVOIR
- WATER TREATMENT PLANT
- Master Meter
- SERVICE AREA BOUNDARY
- PHASE 2 PIPELINES & FACILITIES (PROPOSED)
- PHASE 1 PIPELINES & FACILITIES (EXISTING)
- PIPELINE & FACILITIES CONSTRUCTION (IHS)
- CONSTRUCTION PRIORITY



1 in = 25,574 feet





Path: T:\10440\2014\TMEC\04-024_TMEC Pipe Routing and Mapping\GIS\Map\Service Area_Map\040914.mxd

- Proposed Pipe
- Water Pipes
- State Highway
- Interstate Highway
- US Highway
- Tribal Lands

N

0
1
2

Miles

PHASE 1 \$1,910,000

PHASE 2 \$3,3750,000

**HIGHWAY 43 COORIDOR
PHASE 1 AND PHASE 2**

Scale:	Drawn By:	Checked By:	Project No.:	Date:
AS SHOWN	JTA	SW	4340-024	4/9/2014

**Houston
Engineering Inc.**

P | 704.323.0300
F | 704.723.0300



MANDAN, HIDATSA & ARIKARA NATION

Three Affiliated Tribes * Fort Berthold Indian Reservation
Tribal Business Council

Office of the Chairman
Tex "Red Tipped Arrow" Hall

January 15, 2014

Mr. Todd Sando
State Engineer
North Dakota State Water Commission
900 East Boulevard
Bismarck, ND 58505

Re: Proposed Cost Share Policy for State Water Projects

Dear Mr. Sando,

This letter is in reference to the proposed Cost Share Policy, Procedure and General Requirements being considered by the ND State Water Commission for the funding of water related projects in North Dakota. We note that the preamble to the proposed policy specifically contains the words 'water related projects in North Dakota'. As the Fort Berthold Indian Reservation is certainly an important part of our State we appreciate this opportunity to provide input into this process.

As you are aware our tribe has successfully obtained funds through the State Water Commission in the past for water related efforts. In those instances we asked for no special treatment or consideration but only to be judged on the merits of our requests and in accordance with the policies in place and as being applied to any other system in the State. We appreciate that the SWC did in fact consider our requests in that light, and did in fact fund some water related efforts for us.

You are also aware that we have a current application for cost share funds pending with you. That application involves a request for a 50% cost share for the construction of a water distribution system in the Twin Buttes portion of our reservation. In this area we have residents who are still, in this day and age, hauling their drinking water for their basic household needs. We made this application to your office in approximately December of 2012. We believe that the application is in full compliance with the funding policies now in place and, in fact, is supported by the North Dakota Rural Water Systems Association for funding. For their own list of critical projects we understand we are number 6 on that list. From that referenced list we understand all of the other top 24 projects (except 2 which were not ready for funds) have now received approval for funding--- all except our project. We are also aware that many of those funded projects were at or near a 75% grant level, while our project, as noted, is at a 50% grant level request (as an aside, we originally submitted for the normal 75% level but were advised that the state would not consider that level for us). However, notwithstanding the fact that all these other projects were funded, under existing funding policy criteria, we are advised that our project is being held at this time pending a possible implementation of the new requirements for funding as referenced by this letter.

Obviously we believe this is not the appropriate course of action to take with our pending application. As noted, our application fully complies with the state funding policy now in place, it has received the support of the rural water community at large, and it will provide a desperately needed solution to the drinking water needs of citizens of our State. Additionally the request we made was only for a 50% cost share even though other comparably non-reservation projects have routinely made and received costs shares much greater. We believe our application should be reviewed under the current funding policy, the same as is being done with other similar applications. Please review this request and provide us with a timeline for consideration.

Relative to the new policy being proposed we take no significant exceptions to the changes being proposed except for language contained in Part I. Definitions and Eligibility, subpart L. Local Sponsor, which states in part as follows:

“Local Sponsor must be a federal or state entity, a political subdivision, or a commission legislatively granted North Dakota recognition....”

This specifically does not mention tribal governments, and when we have questioned the intent of this language we are advised that tribal governments are specifically not considered to be a local sponsor. If we are not considered adequate to be a local sponsor we are then expressly not permitted to apply or receive any state funds for our project.

As we discussed this issue with your staff we were advised that tribal projects may still receive state funds if we were a part of a ‘regional system’. However this explanation concerns us. The term ‘regional system’ is not defined in the proposed policy. It has been implied that a ‘regional system’ may be a mix of tribal and non-tribal users (which we are), may also be some mix of urban and rural users (which we are), or may be some mix of reservation lands and non-reservation lands, which we are not. Without knowing the definition of ‘regional system’ and how that definition is applied to our system we cannot support that item being a metric for possible funding for us. Moreover we are concerned that this creates criteria which appears to only apply to us (and other tribal projects); we are not aware that any other water in the State is being requested to become part of a ‘regional system’ in order to be considered for funding. We believe that any effort to tie tribal funding to a regional system arrangement is not proper.

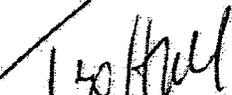
We further believe that the definition of ‘local sponsor’ should be very clearly written to expressly include tribal governments; if the policy anticipates that a federal agency can be a local sponsor, which it does, then certainly a tribal government can and should be a local sponsor. We propose that the local sponsor be defined as follows:

“Local Sponsor must be a federal or state entity, a political subdivision, a federally recognized Indian Tribe located in part or wholly within the State of North Dakota, or a commission legislatively granted North Dakota recognition”. (Recommended change in italics).

This proposed language change is consistent with actions taken by the North Dakota Rural Water Systems Association (relative to their recommendation and support for our aforementioned Twin Buttes Project) and both the North Dakota Water Users (NDWU) and the North Dakota Water Resources Districts (NDWRD). Both the NDWU and the NDWRD, in a joint meeting, have supported a change in the language of ‘local sponsor’ to expressly include the tribal projects of North Dakota. Clearly the water leadership in our State understands our concern in this issue and supports our right to make application for and receive State funds for the needed water development projects of our reservation.

We believe this recommendation from us, as supported by the major water groups of our State, should have significant bearing and weight on your discussions and determinations on this issue. We certainly would welcome an opportunity to meet personally with you for more discussion as may be needed.

Sincerely,



Tex. 'Red Tipped Arrow' Hall
Chairman
Three Affiliated Tribes
Fort Berthold Indian Reservation

C.C. Mark Fox
Maynard Demaray
Ken Royse
John Fredericks