

MINUTES

North Dakota State Water Commission
Bismarck, North Dakota

September 20, 1983

The North Dakota State Water Commission held a meeting on September 20, 1983, at the Old State Office Building, Bismarck, North Dakota. Governor-Chairman, Allen I. Olson, called the meeting to order at 11:00 a.m., and requested Secretary, Vernon Fahy, to present the agenda.

MEMBERS PRESENT:

Allen I. Olson, Governor-Chairman
Kent Jones, Commissioner, Department of Agriculture, Bismarck
Florenz Bjornson, Member from West Fargo
Ray Hutton, Member from Oslo, Minnesota
Alvin Kramer, Member from Minot
Guy Larson, Member from Bismarck
Henry Schank, Member from Dickinson
Vernon Fahy, State Engineer and Secretary, North Dakota
State Water Commission, Bismarck

MEMBERS ABSENT:

Garvin Jacobson, Member from Alexander
Bernard Vculek, Member from Crete

OTHERS PRESENT:

State Water Commission Staff
Approximately 25 persons interested in agenda items

The attendance register is on file in the State Water Commission offices (filed with official minutes).

The proceedings of the meeting were recorded to assist in compilation of the minutes.

CONSIDERATION OF MINUTES
OF JULY 12 AND 13, 1983 -
AMENDED AND APPROVED

The minutes of the July 12 and 13, 1983 meeting were not reviewed, although Secretary Fahy called the Commission's attention to a typographical error under the Presentation of Devils Lake Situation on page 15, in the second paragraph. The minutes now read 1248.1 msl, and it should have read 1428.1 msl.

It was moved by Commissioner Larson,
seconded by Commissioner Hutton, and

unanimously carried, that the minutes be corrected to reflect the change as indicated by Secretary Fahy.

It was moved by Commissioner Kramer, seconded by Commissioner Schank, and unanimously carried, that the minutes of July 12 and 13, 1983 be approved as amended.

REPORT ON SOUTHWEST
PIPELINE PROJECT
(SWC Project No. 1736)

The following statement was made by
Secretary Fahy:

'As you know we have been working for sometime on the Southwest Pipeline Project and today, in just a very short period of time because of your schedule, we are going to try to bring you up to date on where we are. We have designed the entire program to serve the southwest part of the State on a three-point foundation: 1) engineering; 2) legal; and 3) financial. Each of those has its own sphere of importance and one is, perhaps, no more important than the other. Although, I guess you could say if you can't finance the project, you might as well forget everything else. But at any rate, we spent a good deal of time on the subject of the location of the intake structure. We have had a number of meetings with the Three Affiliated Tribes representatives, working towards the kinds of assurances necessary for the State to build this project on that three-point foundation.

Keep in mind that the engineering becomes extremely important because we must complete a certain amount of field work this fall if we are to have a report ready for the next Legislative session. I fully intend to have the engineering people in the field next Monday working on the layout survey for the installation of the facilities for the Southwest Pipeline Project.

Problems to date have dealt with not finding the assurances that we feel are necessary in order to accomplish the location of the intake structure on the Indian Reservation. We set forth the 3rd of June, 1983, in writing, many of the things we had talked about previously - those things that we felt were absolutely essential to be accomplished by the 15th of September, 1983 to permit us to move ahead with confidence in laying out the intake structure and the accompanying pipeline.

We had a requirement for an opinion to be furnished us on the 1st of August, 1983 - that was not provided. So we moved to the 15th of September, 1983 deadline. We do not have the assurances that we need to make us feel comfortable in awarding this contract in the light

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of the fact that we have to meet all the legal requirements, but also the fact that we need to sell bonds for this project. Bond buyers are going to be extremely reluctant to invest large sums of money in a project in which the procedures and the requirements are not firmly fixed, legally sound, acceptable to the State Water Commission, and in accordance with the legislation adopted by the Legislature during its last session.

Any delay will preclude our ability to keep this project on schedule. If we can't get the field work done, we certainly can't wait until next spring to do it. If we can't get the assurances necessary to sell the paper for this project, then there is no point moving forward at all with the phase of the project that would locate the intake structure on the Indian Reservation.

Governor, I feel that we have demonstrated amply the fact that we wanted to take advantage of the savings that could accrue from construction on the Indian Reservation - right-of-way would be somewhat less - and it had advantages that merited our serious consideration of that location for an intake structure. I am sorry to report that in my opinion, the opinion of the staff that advises me both legally and financially that we don't have the assurances necessary to allow me to make a recommendation to you today that we proceed to locate on the Indian Reservation. Rather, it is my recommendation that in view of the lack of assurances that we asked for, and that with the time element as it is, that we move forward on the alternate location for the intake structure and accompanying pipeline.'

Mr. Bruce McCollom presented and discussed, through the use of network time charts, the complicated procedure that goes into the final design of a project such as the Southwest Pipeline Project. He stressed that it is very important and essential at this point in time in the design that the location of an intake structure be determined. He said it is necessary to do field work this fall in order to complete this final design on the time table that has been laid out and that the work needs to begin immediately.

Mr. Michael Dwyer, Legal Consultant for the Southwest Pipeline Project, explained that throughout the course of negotiations with the Three Affiliated Tribes, the State Water Commission has consistently and plainly stated that the following conditions would have to be met in order for the State Water Commission to even consider locating the intake structure for the Southwest Pipeline Project within the exterior boundaries of the Fort Berthold Indian Reservation:

- 1) An agreement would have to be executed among the Three Affiliated Tribes, the State of North Dakota, and the Department of the Interior. This agreement would include an agreement by the Three Affiliated Tribes not to exercise any authority or power over

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the Southwest Pipeline Project, relating to water rights, fees and taxes, and other issues, to ensure that total control of the Southwest Pipeline Project would be under the State Water Commission. This agreement would be designed to protect the stability and dependability of the project.

- 2) An Opinion from the Solicitor of the Department of the Interior, Solicitor William H. Coldiron, stating that the agreement is valid and does not violate the trust responsibilities of the Secretary of the Interior.
- 3) A Solicitor's Opinion on the legality of the right-of-way conveyance process and authority for those conveyances for the Southwest Pipeline Project.

Mr. Dwyer indicated that on June 3, 1983, the State Water Commission set forth these conditions in clear detail to the Three Affiliated Tribes, and stated to the Tribes that in order to meet the legislative and final design deadlines for the project, the Indian intake issue would have to be resolved no later than September 15, 1983. Mr. Dwyer's statement is attached hereto as APPENDIX "A".

Mr. Ronald Hodge said his responsibility in this project was to analyze from a legal perspective the instruments of rights-of-way and the conveyance that the State of North Dakota would receive from the United States and the Three Affiliated Tribes. He noted that there are generally two types of property on an Indian Reservation: 1) trust property belonging generally to the tribal entity; and 2) allotted property belonging to and held by individuals (allottees as they are defined). Mr. Hodge stated that in this project the ultimate instrument, or the easement, would come from the Secretary of the Department of the Interior; however, at the present time the allottees are conveying an assignment of an instrument to the tribal bodies and the Tribal Council is making the assignment to the State of North Dakota.

Mr. Hodge referred to 25 United States Code Section 324 which provides that the Tribe can make a conveyance of a right-of-way crossing any property, and Section 325 provides an allottee can make a conveyance of a right-of-way to a political entity such as the State of North Dakota. He said there is no provision whereby the allottee can make an assignment to the Tribe and the Tribe thereby makes an assignment to the State of North Dakota. He stated that he questions the legality of doing that and he stated he feels that the State of North Dakota needs a legal opinion from the Solicitor to state: 1) the validity of such a procedure; 2) that it does not breach the trust responsibility of the Department of the Interior; and 3) that the instrument that the State of North Dakota will receive is a valid legally binding instrument. He stated there have been legal decisions in the past two or three years stating that unless the trustee, in the form of the Department of the Interior, issues Opinions there is no way to ascertain the important fact that we are getting a valid legal conveyance.

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Mr. Duane Breitling, representing the Bond Counsel for the Industrial Commission, indicated that it is absolutely essential that the ground work and the foundation for this project be done in a manner to assure that there is going to be a marketable bond issue in the final analysis. Mr. Breitling said that if we do not have a marketable bond issue, we don't have a project because we don't have any way to finance the project. Investor confidence in the issue is extremely imperative.

Mr. Breitling said that from a Bond Counsel's point of view, he believes it is absolutely imperative that at a minimum, the three requirements as outlined by Mr. Dwyer must be met. If not, the Bond Counsel has serious reservations, concerns and questions about the basic foundation on which this bond issue is to be built. Mr. Breitling said that if the Bond Counsel has reservations, it is certain that the underwriters will have more than reservations - they will be concerned about involving themselves in an issue of this nature that has some underlying questions that remain to be answered, and Mr. Breitling said that simply cannot be if we are going to have a viable means to fund this project.

Ms. Alyce Spotted Bear, Chairman of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, presented the statement attached hereto as APPENDIX "B". She also included with her testimony a letter from the Secretary's Office of the Department of the Interior, attached hereto as APPENDIX "C", stating that the Department of the Interior is willing to participate in this agreement assuring, as a matter of federal law, the rights of the State Water Commission for the purposes of this project.

Ms. Spotted Bear made reference to September 23, 1983 as a tentative date for a meeting with the United States for final approval of the agreement. This date was tentative, depending on action taken by the State Water Commission at this meeting. She stated she felt it appropriate for representatives of the Three Tribes and the State Water Commission to meet in Washington, DC on September 23 with the United States to finalize the agreement.

She said in negotiations with the Department of the Interior it appears they do not have any problems with the provisions in the agreement, but said it appears as though staff for the State Water Commission was having some problems. She said if the State Water Commission will look at the facts of the case in terms of savings on cost construction, she is hopeful that the Commission can act favorably to locate the intake structure for the Southwest Pipeline Project on the Fort Berthold Indian Reservation.

Mr. Ray Cross pointed out that the State has a number of easement interests across the Reservation, both State routes and individual ownerships, which include railroads, pipelines, etc. These easement interests have security based on a federal conveyance and would be exactly the same sort of interests that would be given from the United States Government under their governing statutes and the federal regulations.

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Mr. Cross indicated that in his conversations with the Solicitor's staff, particularly the Associate Solicitor for Indian Affairs, that he would prepare a letter or a memorandum of Opinion that would be suitable for the State Water Commission's purpose which is that the proprietary interests of the State Water Commission for the uses of the project would be protected as a matter of federal law from any sort of regulation by the Tribes. Aside from the federal conveyance that will protect the proprietary interests, the Tribe is also prepared to relinquish for the period of the contract certain of its regulatory authorities that the State may be concerned about. This is already embodied in the proposed contract.

Mr. Cross indicated that he feels quite confident that the Solicitor's Department will confirm this as a matter of federal law that the State Water Commission will be legally protected in almost every conceivable way, both proprietarily and in matters of regulation.

He said that basically what the motivating factor should be is the consideration of the economy and based on published records of the State Water Commission, a substantial savings could accrue to the State Water Commission and then, of course, to the people of the State of North Dakota, Indian and non-Indian alike, if the project is located on the Reservation. He briefly discussed an analysis completed by the Tribe relative to the construction cost savings.

Mr. Ron Bilstein, HKM, Billings, Montana, stated that he had appeared before the Commission previously to discuss the engineering and financial merits of placing the pipeline on the Reservation and proceeded to update the Commission members relative to these aspects.

Governor Olson reiterated the Bond Counsel's statement that the three absolute conditions as stated in the agreement must be met if the intake structure and pipeline are to be located on the Fort Berthold Indian Reservation and that the State cannot proceed until these conditions are met. He said that it appears as though the Assistant Secretary for Indian Affairs in his letter is supportive and could help facilitate the Solicitor's Opinions and the signature of the Secretary of the Department of the Interior. The Governor indicated that the State cannot accept anything else.

Mr. Cross responded that they have met with the Solicitor's office and staff including the Associate Solicitor for Indian Affairs, and they have indicated no concern with issuing the Opinions. He noted they have a copy of the draft agreement which has been discussed and are willing to participate in the meeting on September 23, 1983. Mr. Cross indicated he thinks they will be willing to write formal opinions dealing with the issues that have been outlined both in respect to the formalities involved in assuring the underlying legality for rights-of-way conveyance and in respect to the protection of the proprietary interests.

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He also indicated that if the underwriters who sell and discount the bonds are concerned about their securities, he believes that the Opinions from the Solicitor's Office as well as the federal conveyance should insure those minimal legal conditions.

Mr. Cross indicated he believes the conditions can be met at the September 23, 1983 meeting in Washington, DC, although this is his opinion and is only based on conversations with the Assistant Secretary of the Solicitor's office. He also suggested that the State Water Commission representatives participate in the September 23 meeting in Washington, DC to work out the details at that point.

The Commission members expressed concern about sending State Water Commission staff people to Washington, DC since the matter of concern is between the United States and the Three Affiliated Tribes. After discussion, it was the consensus of the Commission members that up to two staff people be authorized to participate in the Washington, DC meeting on September 23, 1983 only to facilitate, not negotiate.

Michael Dwyer pointed out that the consistent position has been that the agreement be executed by the Secretary of the Department of the Interior as trustee, and the Opinion would have to be a formal Opinion from the Solicitor of the Department of the Interior.

The Commission recessed their meeting at 12:00 noon; reconvened at 1:15 p.m. with Commissioner Kent Jones presiding as Chairman.

CONSIDERATION OF REQUEST FOR
COST PARTICIPATION IN GRAFTON
FLOOD CONTROL
(SWC Project No. 1771)

Secretary Fahy presented a request from the City of Grafton for the Commission's consideration to financially participate in the construction of the fourth phase of

the City's plan for reducing flood damages. The estimated cost for this phase of the project is \$107,000.

Mayor Warner Taylor of Grafton stated that in 1979 there was flooding from the Park River that caused considerable damage in the area. The Corps of Engineers has been making studies of the river for some time. A committee of four council members were appointed from the areas that were most affected by the flooding and developed a four-phase flood control plan. Phase One consisted of snagging and clearing a portion of the Park River downstream from the city which was accomplished during the winter of 1980 in cooperation with the Walsh County Resource Board and the State Water Commission. Phase Two consisted of the replacement of the Wakeman Avenue Bridge. This phase of the project is currently being done and will help to prevent flood damages from backwater. Phase Three is the alteration of the Burlington Northern Railroad Bridge which also results in backwater flooding. The alterations to the railroad bridge are now underway. Phase Four, which is a flood bypass channel, was studied by the State Water Commission and presented to

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the city in February, 1983. Located on the northeastern edge of the city, the bypass channel would carry flows across the neck of an oxbow on the Park River.

Mayor Taylor thanked the Commission for allowing his appearance and requested favorable consideration of the request.

It was the recommendation of the State Engineer that the Commission consider approval of 40 percent of the funding not to exceed \$42,800 contingent upon the availability of funds. He noted that the city has also requested that the Water Commission do the engineering for the project, therefore, a portion of the funds granted towards the project would be in the form of technical assistance.

It was moved by Commissioner Hutton, seconded by Commissioner Schank, and unanimously carried, that the State Water Commission approve financial participation in 40 percent of the funding, not to exceed \$42,800, in the construction of the Fourth Phase of the City of Grafton Flood Control project. This motion is contingent upon the availability of funds, and a portion of the approved funds shall be in the form of technical assistance.

APPEARANCE OF MCLEAN
COUNTY WATER DEVELOPMENT
GROUP TO REQUEST FINANCIAL
AID IN A WATER SUPPLY STUDY
(SWC Project No. 1541)

Secretary Fahy presented a proposal for the State Water Commission's consideration requesting financial participation for a water supply and delivery system study in southern McLean and

western Sheridan Counties. The study will evaluate all the potential water source alternatives and analyze the concept of a domestic water supply and delivery system to the area's municipalities, farms and ranches.

Senator Shirley Lee, District 8, stated this is a very beneficial project and what started out to be just a rural water association proposal has now expanded. The study will not only be a benefit to the farmers and ranchers and the municipalities of southern McLean and western Sheridan Counties, but it would be an exciting way to use the water that is encountered behind the Garrison Dam or possibly water from the McClusky Canal. She requested the Commission's favorable support for the study.

Mr. Mike Miller, Chairman of the South McLean County Rural Water Steering Committee, stated that a number of meetings were held in McLean County last winter for the purpose of forming a rural water district. He said that it appeared from the meetings there was enough interest generated in the study, therefore, a Steering

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Committee was formed. Houston Engineering, Inc. and Michael Dwyer have been hired to work on the project. The Steering Committee has signed an agreement with the McLean County Water Resource District to sponsor the study.

Mr. Miller indicated that membership has been obtained from approximately 100 farmers and ranchers in this area at a fee of \$75.00 per individual. He said meetings have been held with the cities of Underwood, Coleharbor, Washburn, Turtle Lake, Mercer and McClusky and have received a resolution of support for the project from each of these cities.

Mr. Don Peterson, a member of the Extension Service, said the Service is participating in this study and have assisted the group in involving various state agencies.

Mr. Hank Trangsrud, Houston Engineering, Inc., reiterated that the proposal that has been developed is not just a proposed rural water system by itself. It is much broader in scope as it has the potential of involving several cities. He discussed the specific study activities which include three parts: 1) technical aspects which will cover the engineering and construction of the proposed project; 2) probable costs involved, reducing those costs down to costs per thousand gallons; and 3) organizational and legal aspects of a system that would provide this water to the communities and to the rural water area.

Mr. Mark Johnson, Houston Engineering, Inc., discussed the funding that has been proposed for this project. Mr. Johnson said this is a multi-facet study in the sense the proposal involves looking at a number of alternative water sources, a number of alternatives for treatment, and a number of corresponding delivery systems that would relate to those types of alternatives. Mr. Johnson said as this project is developed in working through the Water Resource District, there are a number of agencies and corporations that have an interest in this particular sort of a multi-agency-corporation approach in the sense of securing funding. To date, meetings have been held with the Garrison Diversion Conservancy District, the North Dakota Energy Office, Falkirk Mining Company, all individual cities in the area, the McLean County Commission and Water Resource Board, Bureau of Reclamation and the State Water Commission.

Regarding the funding of the proposed water supply and delivery study, the McLean County Water Resource District has estimated the total cost at \$24,000. The District has requested 30 percent funding, amounting to \$7,250, from the State Water Commission. Funding participants thus far are: Garrison Diversion Conservancy District - \$5,000 - 21%; Falkirk Mining Company - \$2,500 - 11%; North Dakota Energy Impact Office - \$7,250 - 30%; and local contributions (cities and rural) - \$2,000 - 8%. Mr. Johnson requested the Commission's favorable consideration of this request.

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Commissioner Kramer indicated this is an excellent proposal and said he assumed that the study will be in direction of funding requirements that will be needed as far as the total project is concerned.

Secretary Fahy explained that it is not the policy of the State Water Commission to become involved in rural water projects. Therefore, he recommended that the State Water Commission consider approving financial participation of \$7,250 in the water supply aspect of this project, not in the distribution-delivery system.

Mr. Faye Waxler, Executive Program Director of the North Dakota Rural Water Systems Association, commented that this project is different and one of the reasons his Association is supportive of the efforts is because the water supplies for the shallow wells are being interfered with by the possibility of coal mining and appreciates the coordination of everyone making the study. He said the Water Commission's duty is in the supply aspect and it is important that the study cover the supply, the distribution, and the source of water to obtain the knowledge to put together a viable water system for that area. He said the need for water supply of good quality water is there and the local people should be involved in the distribution of water once they have a supply. Mr. Waxler indicated the Association supports the proposal and urged favorable consideration by the Water Commission.

It was moved by Commissioner Kramer and seconded by Commissioner Bjornson that the State Water Commission approve cost participation in an amount not to exceed \$7,250 for the water supply aspects of the proposal for a water supply and delivery system study in southern McLean and western Sheridan Counties. This motion shall be subject to the availability of funds, and contingent upon securing the required funds for a total water resource project.

In discussion of the motion, Commissioner Larson suggested that the various recreational interests be contacted and that the proposal include an assessment of the lakes in the areas to determine the environmental aspects of moving water to where there is a plentiful source available.

All members voted aye on the motion; motion declared unanimously passed.

CONSIDERATION OF AGENCY FINANCIAL STATEMENT

It was moved by Commissioner Kramer, seconded by Commissioner Larson, and unanimously carried, that the agency's financial statement be approved as prepared and presented.

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Governor Olson returned to the meeting and the discussion of the Southwest Pipeline Project was resumed.

CONTINUED DISCUSSION
OF REPORT ON SOUTHWEST
PIPELINE PROJECT
(SWC Project No. 1736)

Governor Olson indicated that it is the general consensus of the Commission members that the State wants to work with the Three Affiliated Tribes in trying to resolve the matters that were previously discussed to locate the intake structure and pipeline on the Fort Berthold Indian Reservation. The Governor suggested that the Commission give consideration to extending the deadline for meeting the three conditions until Tuesday, September 27, 1983, at 8:00 a.m.; to authorize the State Engineer to send up to two State Water Commission representatives to Washington, DC on September 23, 1983, to participate in a meeting with the Department of the Interior and the Three Affiliated Tribes for the purpose of facilitating, not negotiating the discussions; that the State Engineer review the actions after the meeting in Washington, DC to determine if the necessary assurances to the three conditions have been met; and if those necessary assurances have not been met in the State Engineer's judgment, a special meeting of the State Water Commission could be called.

It was agreed to by the Commission members that based on the State Engineer's judgment if any of the three conditions that have been established are adjusted in any manner a special meeting will be called of the State Water Commission through its Chairman.

It was moved by Commissioner Jones and seconded by Commissioner Schank that the State Water Commission extend the deadline to Tuesday, September 27, 1983, at 8:00 a.m. for the United States and the Three Affiliated Tribes to meet the necessary assurances of the three conditions as set forth by the State of North Dakota; and that the State Engineer be authorized to exercise his judgment in determining whether such assurances have been met or if the situation would require the request of a special State Water Commission meeting to act thereon.

In discussion of the motion, Secretary Fahy clarified his understanding of the motion that if the three conditions as stated specifically are met then there would be no need for a special State Water Commission meeting. If the necessary conditions as stated are not met, the language is deviated in any way, or if any attempt is made to delegate responsibilities for the kinds of decisions required, the State Engineer, through its Chairman, will then call a special meeting of the Commission as he feels the Commission members should be involved in making the final decision relative to the location of the intake structure.

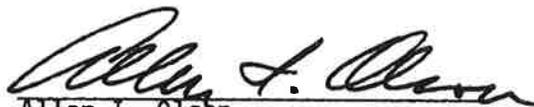
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Commissioner Schank questioned the need to send two State Water Commission representatives to Washington, DC on September 23, 1983 to facilitate in the meeting with the Three Affiliated Tribes and the United States, since the State's requirements are very clear.

Governor Olson responded suggesting this matter be left to the State Engineer's judgment.

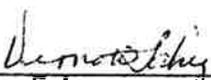
All members voted aye on the motion; the motion was declared unanimously passed.

Commissioner Kramer moved, seconded by Commissioner Hutton, and unanimously carried, that the meeting adjourn at 2:30 p.m.



Allen I. Olson
Governor-Chairman

ATTEST:



Vernon Fahy
State Engineer and Secretary

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NORTH DAKOTA STATE WATER COMMISSION

REGISTER

ATTENDANCE AT State Water Commission Meeting

DATE September 30, 1983 PLACE Bismarck, N. Dak.

CB

PROJECT NO. _____

Your Name	Your Address	Who do you Represent? (Or Occupation)
<u>Al Wapler</u>	<u>Harwood ND</u>	<u>ND Rural Water Systems</u>
<u>Alyce Spotted Bear</u>	<u>New Town, ND</u>	<u>Chairman</u> <u>Three Affiliated Tribes</u>
<u>Roranna Schiff</u>	<u>New Town, N.D.</u>	<u>Environmental Consultant</u> <u>Three Affiliated Tribes</u>
<u>Leo Brockie Jr</u>	<u>New Town, N.D.</u>	<u>BFA Supt.</u> <u>Ft Berthold Agency</u>
<u>Rich Schiff</u>	<u>New Town, N.D.</u>	<u>Geologist/Env. Qual. Coord.</u> <u>Three Affiliated Tribes</u>
<u>Quam R. Belling</u>	<u>West Fargo</u>	<u>Industrial Comm.</u>
<u>Tom Tuor</u>	<u>Bismarck</u>	<u>The Bd. of North Dakota</u>
<u>Shirley Lee</u>	<u>Turtle Lake</u>	<u>Senator - Dist 8 (McLean)</u>
<u>Lesley Hassler</u>	<u>Underwood</u>	<u>South McLean Rural water users</u>
<u>Mike Miller</u>	<u>Underwood</u>	<u>South 20-Year Rural Water</u>
<u>FRANK HEINZEL</u>	<u>EMMET</u>	<u>McLEAN CO WATER MANAGEMENT BOARD</u>
<u>Randy Gjestvang</u>	<u>Bismarck</u>	<u>NDSWC</u>
<u>Warner K Taylor</u>	<u>Grafton</u>	<u>Mayor</u>
<u>Math C Emerson</u>	<u>Bismarck</u>	<u>St water</u>
<u>Leah Inaugrand</u>	<u>Fargo</u>	<u>Houston Engineering, Inc</u>

NORTH DAKOTA STATE WATER COMMISSION

REGISTER

ATTENDANCE AT _____

DATE 9-20-83 PLACE _____

PROJECT NO. _____

Your Name	Your Address	Who do you Represent? (Or Occupation)
Mark Johnson	Bis	Houston Eng. Inc.
Don Peterson	Worsham	N.D.S.U. Extension Service
Jim Foght	Bismarck	Grand Forks Herald
Larry Jacobson	Bis.	Basin Electric Power Cooperative
Bob Denaby	Bismarck	SWC
David Spryway	Bismarck	SWC
Mark Roubidoux	Bismarck	Associated Press
Donnie Heuler	Halleiday	Three Affiliated Tribes
Ann Jackson - Lewin	New Town	Three ^{Legal representatives} affiliated Tribes

APPENDIX "A"

September 20, 1983

PRESENTATION OF MICHAEL DWYER
TO STATE WATER COMMISSION CONCERNING
LOCATION OF INTAKE STRUCTURE
FOR THE SOUTHWEST PIPELINE PROJECT WITHIN
THE FORT BERTHOLD INDIAN RESERVATION

I. Introduction

Throughout the course of our negotiations with the Three Affiliated Tribes (Three Tribes), the State Water Commission has consistently and plainly stated that two conditions would have to be met in order for the State Water Commission to even consider locating the intake structure for the Southwest Pipeline Project within the exterior boundaries of the Fort Berthold Indian Reservation.

1. First, an agreement would have to be agreed to and executed among the Three Tribes, North Dakota, and the Department of the Interior. This agreement would include an agreement by the Three Tribes not to exercise any authority or power over the Southwest Pipeline Project, relating to water rights, fees and taxes, and other issues, to ensure that total control of the Southwest Pipeline Project would be under the State Water Commission. This agreement would be designed to protect the stability and dependability of the project.
2. Second, right-of-way would have to be secured for the pipeline across the reservation. Necessary right-of-way provisions would be included in the agreement.

On June 3, 1983, the State Water Commission set forth these conditions in clear detail to the Three Tribes, and stated to the Three Tribes that in order to meet the legislative and final design deadlines for the project, the Indian intake issue would have to be resolved no later than September 15, 1983. Specifically, the following deadlines were set forth:

1. Agreement. To be executed by the Three Tribes, North Dakota, and the Secretary of Interior no later than September 15, 1983. The required terms of the agreement were also set forth on June 3, 1983, and included:
 - a. Fifty percent of cost savings, not to exceed \$3 million.

- b. Three Tribes would not claim water for Southwest Pipeline Project was Indian water under Winters Doctrine, unless by subsequent agreement or subsequent court decision it was determined that there was not sufficient water for Southwest Pipeline Project above and beyond Indian water rights.
- c. Three Tribes would agree not to exercise or attempt to exercise any authority or power over Southwest Pipeline Project.

2. Right-of-Way

- a. Solicitor's Opinion on technical requirements of conveyance of right-of-way across Fort Berthold Indian Reservation was to be provided by August 1, 1983. By subsequent letter this deadline was extended until September 15, 1983.
- b. Actual conveyance of right-of-way to be made no later than February 15, 1984, if Three Tribes or Department of Interior would agree to use condemnation against holdout allottees. Condemnation was not acceptable, because the Department of Interior would or could not exercise it, so the deadline for conveyance of right-of-way was also pegged at September 15, 1983.

My purpose today is to give you a status report on the agreement for the Indian intake structure location. Ron Hodge will be addressing the right-of-way portion of the agreement.

Before I review the agreement, I will comment on where it appears we are at with that effort. The basic terms of the agreement appear to be settled. However, as late as Wednesday, September 14, the Three Tribes proposed some substantive counter terms. Since we do not have an executed document, I cannot unequivocally state that the agreement is finalized as between the Three Tribes and North Dakota. Up to this point, we have negotiated general terms. Several specific details must still be finalized. In addition, the Department of the Interior has not been involved in negotiations concerning the agreement. Thus, terms agreed to between the Three Tribes and North Dakota may not be acceptable to the Secretary of the Interior. Thus, while we may be close in some respects, in other respects we are a long ways away from a final, executed agreement. It is my opinion that to negotiate and finalize the specific details of the agreement, to obtain the approval of the agreement by the Secretary of the Interior (and the Solicitor by opinion stating the

agreement is legal and valid) and to obtain final approval of the agreement by the Three Tribes and North Dakota, we are looking at a minimum of three months. Anything sooner would, in my opinion, be virtually impossible.

II. Agreement

The terms of the draft agreement are summarized as follows:

- a. Parties. The agreement would be a three-party agreement, between the Three Tribes, North Dakota, and the Department of the Interior (executed by the Secretary of the Interior).
- b. Future Demand. The agreement will not limit the authority of the State Water Commission to expand or enlarge the capacity of the Southwest Pipeline Project.
- c. Term. The term of the agreement is 99 years or the life of the project, whichever is longer.
- d. Right-of-Way. Responsibility of the Three Tribes. To be addressed by Ron Hodge.
- e. Water Rights. Three Tribes and United States agree surplus water exists over and above Indian water rights, that water for Southwest Pipeline Project does not constitute and is not a part of any Indian water rights, and that the Three Tribes will make no claim to Southwest Pipeline Project water unless established by mutual agreement or by a court of law that sufficient water in the Missouri River system does not exist to satisfy both Indian water rights and Southwest Pipeline Project. Use of water, i.e., type, kind, amount, or location shall not be limited in any way by agreement.
- f. Waiver of Authority and Power. United States, in its capacity as trustee, and Three Tribes agree not to exercise any power or authority over Southwest Pipeline Project.
- g. Payment
 1. Amount. Fifty percent of construction cost savings, not to exceed \$3 million. To be paid in two equal installments, at the beginning and end of construction.

2. Determination. Determined at time construction begins by State Water Commission. Includes only equipment, labor, and materials for intake structure, pump stations, reservoirs, pipelines and appurtenances for two alternatives.

III. Conclusion

Since we have not officially met with the Department of the Interior concerning the proposed agreement for the Indian intake location, I am unable to state with complete certainty that we will be able to reach final agreement on this matter. As between the Three Tribes and the North Dakota State Water Commission, it does appear that a satisfactory, binding agreement can be reached (right-of-way will be addressed by Ron Hodge, and is not limited in this statement). However, even on a fast-track basis, final agreement, if it can be reached, appears to be a minimum of three months away.

TESTIMONY OF MS. ALYCE SPOTTED BEAR,
CHAIRMAN OF THE THREE AFFILIATED TRIBES
OF THE FORT BERTHOLD INDIAN RESERVATION,
BEFORE THE NORTH DAKOTA STATE WATER COMMISSION
ON SEPTEMBER 20, 1983, IN BISMARCK, NORTH DAKOTA

Governor Olsen, members of the State Water Commission, my name is Alyce Spotted Bear, Madam Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation. It is my pleasure to appear before you to testify regarding the Tribes' offer for the location of the intake structure of the Southwest Pipeline Project on the Fort Berthold Reservation. As you know, this Commission authorized, on December 6, 1982, negotiations between the Three Tribes and the staff of the State Water Commission for the purpose of securing an agreement enabling the State Water Commission to locate a portion of the Southwest Pipeline Project and some of the related facilities on the Fort Berthold Reservation.

I am pleased to report that the Three Affiliated Tribes Business Council has voted to support the proposed agreement that has been presented by the staff of the State Water Commission to the Tribes. This proposed agreement calls for the Three Tribes to tender to the State Water Commission the rights-of-way and easements necessary for the location of the pipeline on-Reservation. I am pleased to report that this process has been completed and that the Department of the Interior stands ready to convey those rights-of-way for that purpose, subject to a final agreement between the Tribes and State on this matter.

Additionally- the Tribes and the State have reached substantial agreement on matters regarding compensation, water rights, and the issue of Tribal regulatory authority so that the State can proceed whenever it feels would be appropriate with the survey and related work to determine the definite location of the Project's route

on-Reservation. Additionally, I have also included, with my testimony, a letter from the Secretary's office of the Department of the Interior under the signature of the Assistant Secretary of Indian Affairs, Mr. Ken Smith, stating that the Department of the Interior is willing to participate in this agreement assuring, as a matter of federal law, the rights of the State Water Commission for the purposes of this Project. Therefore, we feel it would be appropriate for representatives of the Three Tribes and the State Water Commission to meet, on September 23, 1983, with the United States for final approval of this agreement so that the negotiations will be completed in sufficient time for the State Water Commission and its staff to do any necessary work this fall.

We look forward to working with you on the final completion of the Southwest Pipeline Project. I would be happy to answer any questions you may have regarding this matter.



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

SEP 9 1983

Honorable Allen I. Olsen
Governor, State of North Dakota
State Capitol
Bismarck, North Dakota 58505

Re: Southwest Pipeline Project

Dear Governor Olsen:

The Three Affiliated Tribes have advised me that the State of North Dakota has proposed to run part of the Southwest Water Pipeline Project through the Fort Berthold Reservation. The Tribes say they are in favor of this, and have approved granting a right-of-way and easement across the Reservation. The Tribes have requested the Secretary of the Interior to approve this right-of-way, as required by 25 U.S.C. §§ 323-328 and 25 CFR Part 169.

The location of the project on reservation lands would appear to benefit the Tribes, individual Indian landowners, and the State, and in order to facilitate construction of the project it is our intent to issue the right-of-way subject to the following conditions:

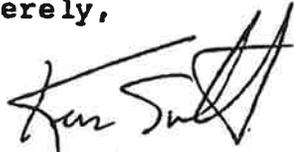
- 1) consents of all the landowners have been obtained;
- 2) the provisions of the National Environmental Protection Act (NEPA) have been complied with; and
- 3) the applicable regulations at 25 CFR Part 169 have been complied with.

I am informed that most of the consents have been obtained, and that the rest are expected to be obtained by September 15. In the case of non-consenting minority interest holders, minors, and in the other circumstances listed in 25 CFR § 169.3(c), the right-of-way can be granted without obtaining those consents. I have also been advised that an Environmental Assessment has been completed and that the requirements of NEPA have been or will be met shortly. I am also prepared, if necessary, to waive certain provisions of 25 CFR Part 169, if the waiver of the provisions would be in the best interest of the Indians, e.g., the survey requirement of 25 CFR 169.4 could be waived and the survey completed after the right-of-way is granted, if the proposed right-of-way is adequately described in the right-of-way application.

Finally, it is my understanding that the right-of-way over the individually owned lands will be granted to the Tribes, and then the Tribes will assign the right-of-way to the State. This can be accommodated by placing language in the conveyancing instrument authorizing the assignment to the State and thereby negate the need for any further approval action by the Department of the Interior. The grant of the right-of-way for the tribal lands will be made directly from the Department to the State.

I am confident that the State's needs can be accommodated, and we stand ready to assist the Tribes and the State in reaching a mutually satisfactory agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "John S. [unclear]", written in a cursive style.

Assistant Secretary - Indian Affairs