

260

From: OST Natural/Water Resources <ostwrd@gwtc.net>
To: <ssnortland@gp.usbr.gov>
Date: 4/25/2007 6:59:20 PM
Subject: Comment to RRWSP

Sent on behalf of the Oglala Sioux Tribe President John Yellow Bird Steele.
OST NRRRA Water Resources Department.

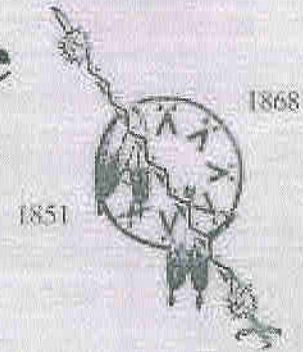
CC: <donna_salomon@yahoo.com>, <ostnrra@gwtc.net>



Oglala Sioux Tribe

Office of the President

PO Box 2070
Pine Ridge, SD 57770
Phone: 605.867.5821
Fax: 605.867.6076
E-mail: johns@oglala.org



John Yellow Bird Steele

April 25, 2007

U.S. Bureau of Reclamation
Post Office Box 1017
Bismarck, North Dakota 58502-1017

RE: Comments on Supplemental Draft Environmental Impact Statement
Red River Valley Water Supply Project

To the Bureau of Reclamation:

I serve as President of the Oglala Sioux Tribe. This letter comprises my comments to the Supplemental Draft Environmental Impact Statement for the Red River Valley Water Supply Project.

The Oglala Sioux Tribe has serious concerns with the proposed project as described in the SDEIS. I am concerned with the impact of the proposed project on the availability of funds for construction and operation and maintenance of the Oglala Sioux Rural Water supply system. I am also very concerned with the impact of this project on the Treaty rights and the Winters Doctrine reserved water rights of the Oglala Sioux Tribe.

The reserved water rights of the Oglala Sioux Tribe are very important to render our reservation a permanent homeland, as guaranteed in the Treaty of Fort Laramie of April 29, 1868 (15 Stat. 635.) The Oglala Sioux Tribe retains unresolved off-Reservation claims under the Fort Laramie Treaty of April 29, 1868. Article II of the 1868 Treaty defines the boundaries of the Great Sioux Reservation, as follows -

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River, where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth

parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the (Sioux Nation)... (15 Stat. 635-636).

The Sioux Nation rejected the judgment award that was affirmed by the United States Supreme Court in *United States v. Sioux Nation of Indians*. (448 U.S. 371, 100 S. Ct. 2716 (1980)). Consequently, we retain our claims under the 1868 and 1851 Fort Laramie Treaties.

Article II of the 1868 Treaty makes clear that our land claims extend from the 104th parallel to "the east bank of the Missouri River." (15 Stat. 636). Clearly, the Missouri River and the river bed of the Missouri are defined in the 1868 Fort Laramie Treaty as Sioux Country.

Nevertheless, this is not reflected in the SDEIS. Our treaty rights are completely ignored by the Bureau of Reclamation. By establishing long-term plans for the diversion of Missouri River waters to the Red River Valley, the Bureau of Reclamation proposes to establish *de facto* abrogation of our rights. That is unacceptable to the Oglala Sioux Tribe.

Our Treaty rights are not an historical anomaly. They exist today. In the case of *Worcester v. Georgia*, the United States Supreme Court stated—

The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They are all applied in the same sense.

31 U.S. (6 Pet.) 515, 559-60 (1832).

Thus, our Treaties remain in effect, today. In the SDEIS, the Bureau of Reclamation ignores our rights, however, and proposes long-term water allocations from the Missouri River that divert Indian water to non-Indian water uses, in violation of our treaty right to the use of water.

Reclamation has a long history of this. The National Water Commission stated in 1973.

Following *Winters*, more than 50 years elapsed before the Supreme Court again discussed significant aspects of Indian water rights. During most of this 50-year period, the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the Winters Doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior - the very office entrusted with protection of all Indian rights - many large irrigation projects were developed on streams that flowed through or bordered Indian reservations, some times above and more often below the reservations. With few exceptions, the projects were planned and built without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects... In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights is one of its sorrier chapters...

That is exactly what is happening with the Red River project. The eastern bank of the Missouri River is the boundary of the Great Sioux Reservation as defined in Article 2 of the 1868 Fort Laramie Treaty. The Missouri River is a primary water source to fulfill the Tribe's reserved water rights under the Winters Doctrine.

Yet, the SDEIS proposes development for additional water diversions from the Missouri River, upstream from the Great Sioux Reservation, to contribute to existing permitted diversions of up to 1.2 million acre-feet. A substantial amount of additional water shall be diverted under the Preferred Alternative. Meanwhile, the SDEIS includes an estimate for future water depletions of only 155,300 acre-feet. That would ostensibly include the Oglala Sioux Tribe and Great Sioux Nation, as well as all other water depletions.

That estimate is far too low. The United Sioux Tribes, Inc. estimated the irrigation water requirements of 11 Sioux Tribes in North Dakota and South Dakota at 13.4 million acre-feet annually. (*Missouri River Basin Water Supply and Water Requirements of United Sioux Indian Reservations*, February 1979, p. 3-2). Yet the SDEIS estimates that future depletions for Tribal and non-Tribal uses shall total merely 155,300 acre-feet. I object to this serious understatement of future water depletions to be made by the Oglala Sioux and other Indian Tribes.

The SDEIS bases its estimates of future depletions on historic depletions. As described above, historically the Department of the Interior favored non-Indian water users and shortchanged the Indian Tribes, when it came to funding water projects. This has only recently begun to change, as with the Mni Wicconi Water Project. As the Tribes begin to receive our share of federal water development funds, future depletions of Missouri River waters for consumptive uses on Indian lands will increase exponentially.

The EIS should reflect this, by including the more realistic water diversion estimates of the United Sioux Tribes. Instead, the SDEIS promotes non-Indian water development and under-states the magnitude of Tribal water claims and potential future water withdrawals of the Tribes.

Professor Charles Wilkinson stated, "the reclamation program proceeded on the backs of the Indian people." (56 Univ. of Colo. L. Rev. 317, 323 (Spring 1985). That is what is happening with the proposed Red River Valley project. The SDEIS over-states the benefits to Red River Valley, by using the drought of the 1930's as a baseline. It under-states the costs to the Tribes, by using skewed estimates of present and future water depletions by the Tribes. It also utilizes storage capacity of the Missouri River reservoirs as the baseline for impacts to the Missouri, rather than existing water in storage as the measure for impacts. Accordingly, the SDEIS under-states the impacts on the Missouri River, and on the Tribes. Table 2.24 in the SDEIS should be revised, and the impacts on the Tribes should be deemed "adverse."

The section in the SDEIS on Indian reserved water rights is weak and misleading. It mis-states nature of Indian water rights. For example, the SDEIS states, "Indian water rights, when quantified, constitutes an ITA." SDEIS, p. 3-102. The SDEIS implies that Indian reserved water rights which have not been quantified are not protected property rights of the Tribes. That is false.

"Indian reserved water rights are property rights that are predicated on federal law." F. Cohen, Handbook of Federal Indian Law (1982 ed.), p. 576. In the SDEIS, the BOR suggests that the obligation of the United States to protect waters subject to the Winters Doctrine claims of the Tribes is somehow diminished for Tribes whose water rights have not been quantified through adjudication or compact. This suggestion appears designed to suppress our rights. It is false. The section on Indian reserved water rights must be completely re-drafted to more accurately reflect the status and magnitude of Indian reserved water rights to the Missouri River.

The Corps of Engineers Master Manual Review and Update should not be utilized in the Red River EIS. The CEQ regulations require the BOR to use the best available scientific data. The Corps of Engineers' planning documents have been severely criticized by the National Academy of Sciences, and others.

Finally, the additional construction and operation and maintenance requirements of all of the alternatives would create pressure on the Bureau of Reclamation budget. The existing BOR budget is utilized for construction, and operation, maintenance and repair of the Oglala Sioux Rural Water Supply System, as authorized by Congress in the Mni Wiconi Project Act of 1988, as amended. (102 Stat. 2566). The authorization for the Mni Wiconi project has had to have been extended twice already, due to shortfalls in appropriations to the BOR budget.

The Mni Wiconi Project Act states, "there are insufficient water supplies available to resident of the Pine Ridge Indian Reservation in South Dakota, and the water supplies

that are available do not meet the minimum health and safety standards, thereby posing a threat to public health and safety." (102 Stat. 2566). Yet BOR proposes that Congress adopt its preferred alternative, adding \$700 million to its construction budget and \$7.5 million in annual O & M costs, while the Mni Wiconi project on the Pine Ridge Reservation remains under-funded and behind schedule. There should be no further authorization for construction in the BOR budget until the Mni Wiconi Project is completed and OM & R fully funded.

In conclusion, I support the no action alternative in the SDEIS. The proposed Red River Valley Water Supply Project would divert waters from the Missouri River, which is within the Great Sioux Reservation as defined in Article 2 of the 1868 Fort Laramie Treaty. The project would utilize waters to which the Oglala Sioux Tribe has prior and superior claims under the Winters Doctrine.

The SDEIS contains inaccurate information with respect to the present and future water requirements of the Tribes. It understates the significance of Indian water rights as a current management issue in the Missouri River basin. It contains very low estimates of future water depletions by Tribes and others. The SDEIS does not reflect the manner in which a fiduciary should act in carrying out its trust responsibility.

The inter-basin transfer of water is an idea whose time has come and gone. (Reisner, *Cadillac Desert, The American West and Its Disappearing Water*, pp. 276-280). This is especially true when Indian water claims are jeopardized by non-Indian water projects. As stated above, the BOR should adopt the No Action alternative and abandon its plan for the Red River Valley Water Supply Project.

Sincerely,

VP William Brewer JCB:
John Yellow Bird Steele
Tribal President