

**COMMENTS BY
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ON THE

REVISED DRAFT MEMORANDUM OF UNDERSTANDING
RED RIVER VALLEY WATER SUPPLY PROJECT EIS

RED RIVER VALLEY WATER SUPPLY PROJECT
ENVIRONMENTAL IMPACT STATEMENT OPERATING PRINCIPLES

AND

RED RIVER VALLEY WATER SUPPLY PROJECT
REPORT ON RED RIVER VALLEY WATER NEEDS AND OPTIONS
OPERATING PRINCIPLES**

MEMORANDUM OF UNDERSTANDING

I. AUTHORITY

The Memorandum of Understanding (MOU) notes that Section 8(b)(1) of the Dakota Water Resources Act of 2000 (DWRA) states that:

“The Secretary of the Interior shall conduct a comprehensive study of the water quality and quantity needs of the **Red River Valley in North Dakota** and possible options for meeting those needs.” (Emphasis added)

but Section 8(c)(2)(A) states that:

“Pursuant to an agreement between the Secretary and the State of North Dakota as authorized under section 1(g), not later than 1 year after the date of enactment of the Dakota Water Resources Act of 2000, the Secretary and the State of North Dakota shall jointly prepare and complete a draft environmental impact statement concerning all feasible options to meet the comprehensive water quality and quantity needs of the **Red River Valley** and the options for meeting those needs.” (Emphasis added)

Thus, under the DWRA, the Secretary is directed to conduct a study of the comprehensive water quality and quantity needs of the Red River Valley in North Dakota and options for meeting those needs, but the Secretary and the State are directed to prepare an environmental impact statement (EIS) on all feasible options to meet the comprehensive water quality and quantity needs of the entire Red River Valley. This indicates that the scope of the EIS to be prepared by the Secretary and the State is much broader than the scope of the study to be conducted by the Secretary through an open and public process involving other stakeholders. This also means that the Secretary could be presented with alternatives, including a preferred alternative, in the EIS that have not been considered by the other stakeholders.

The Bureau needs to obtain clarification of the scope of the Red River Valley Water Supply Study and the scope of the Red River Valley Water Supply Project EIS before the revised MOU is finalized.

II. PURPOSE

Because the Purpose of the revised MOU “establishes the Secretary of the Interior and the State of North Dakota as a co-lead agencies relative to joint preparation of the Red River Valley Water Supply Project environmental impact statement (EIS),” it is necessary for the Bureau to resolve the disparity between the scope of the EIS and the scope of the Red River Valley Water Supply Study before the MOU is finalized.

It should also be noted that Section 8(a)(2) states that the Red River Valley Water Supply Project:

“... shall be designed and constructed to meet only the following water supply requirements as identified in the report prepared pursuant to subsection (b) of this section: Municipal, rural, and industrial water supply needs; ground water recharge; and streamflow augmentation.”

But subsection (b) states:

“NEEDS-The needs addressed in the report shall include such needs as—
(A) municipal, rural, and industrial water supplies;
(B) water quality;
(C) aquatic environment
(D) recreation, and
(E) water conservation measures.”

Thus, subsection (a)(2) includes groundwater recharge and streamflow augmentation, as well as municipal, rural and industrial water supply among the needs to be met by the Red River Valley Water Supply **Project**, but subsection (b) simply lists examples of the some of the needs to be addressed by the Red River Valley Water Supply **Study**.

It is necessary, therefore, for the Bureau also to define the specific needs to be addressed in the EIS for the Red River Valley Water Supply Project and in the Red River Valley Water Supply Study before the MOU is finalized.

III. BACKGROUND

It should also be noted that:

“The 2002 Memorandum of Understanding (MOU) is intended to implement the provisions of the DWRA as specifically outlined under Sections 5 and 8.” (p. 1)

and:

“That 2000 MOU is terminated and replaced with this 2002 MOU and related agreements intended to implement the provisions of the DWRA as specifically outlined under Sections 5 and 8.” (p. 2)

Section 5 deals with “IRRIGATION FACILITIES” including the Oakes Test Area, the Turtle Lake service area, the McClusky Canal service area, 28,000 acres of unspecified irrigation development, eligibility to receive Pick-Sloan Missouri Basin Program pumping power and the

Principal Supply Works. Section 8 deals with “SPECIFIC FEATURES,” including the Red River Valley Water Supply Project, the Sheyenne River Water Supply and Release or Alternative Features, and Devils Lake. However, the DWRA provides for the Secretary and the State to prepare jointly only the EIS on options to meet the comprehensive water quality and quantity needs of the Red River Valley, not an EIS on the irrigation facilities authorized under Section 5. Therefore, the MOU should be modified explicitly to exclude reference to all parts of Section 5 except use of the Principal Supply Works in conjunction with a Red River Valley Water Supply Project.

IV. ORGANIZATION

The MOU states that:

“The State of North Dakota designates the GDCD to represent its interests in this agreement.”

and the signature page of the MOU indicates that the Governor will sign the MOU for the State of North Dakota. The MOU should, therefore, cite the specific statutory language which authorizes the Governor unilaterally to designate the Garrison Diversion Conservancy District to represent the State of North Dakota’s interests in the preparation of the EIS for the Red River Valley Water Supply Project “concerning all feasible options to meet the comprehensive water quality and quantity needs of the Red River Valley.” Before the MOU is finalized, it clearly is necessary for the Bureau to identify the specific measures it will employ to assure that an EIS on the Red River Valley Water Supply Project prepared with the GDCD as the co-lead agency will provide the objective and rigorous examination of alternatives required by law when the GDCD is charged under North Dakota Century Code Chapter 61-24 to promote the construction of the Garrison Diversion Unit, to provide for irrigation of lands within the Conservancy District, to replenish the waters of the Red and Sheyenne rivers, to restore Devils Lake, and to make available within the Conservancy District waters diverted from the Missouri River for irrigation, domestic, municipal and industrial needs. Those measures should be incorporated explicitly in the MOU.

According to the MOU:

“The Cooperating Agency Team will be composed of representatives of agencies invited to participate in accordance with NEPA on the Red River EIS. Agencies are invited to be a cooperating agency by the co-lead agencies based on regulatory authority or special expertise. Agencies may be Federal, State, tribal, or local government.” (p. 3)

The MOU should identify the specific Federal, State, Tribal and local government agencies that will be invited to be cooperating agencies by the co-lead agencies, including agencies from other affected states such as Minnesota and Missouri. For example, Minnesota has offered to consider Red River Valley water supply alternatives involving sources in Minnesota, so Minnesota agencies, such as the Department of Natural Resources and Department of Health certainly should be invited to be cooperating agencies.

V. OPERATING PRINCIPLES

The MOU states that:

“The public will be appropriately notified of open meetings.”

The MOU should explain what meetings will be open and what meetings will be closed, and why.

VI. PRIMARY CONTACTS

The MOU states that:

“The Governor of the State of North Dakota has authorized the GDCD to be the State’s primary contact to serve as co-lead for North Dakota on the EIS.”

As noted above, the MOU should cite the specific statutory language that authorizes the Governor to designate the Conservancy District to serve as co-lead for the State of North Dakota on the EIS.

VII. DECISIONMAKING PROCESS

The MOU states:

“Regarding the selection of the preferred alternative, ‘after reviewing the final report required by subsection (b)(1) and complying with subsection (c), the Secretary, in consultation and coordination with the State of North Dakota in coordination with affected local communities, shall select 1 or more project features described in subsection (a) that will meet the comprehensive water quality and quantity needs of the Red River Valley” (Section 8(d)(1)). The Secretary’s decision will be final and binding on the parties.” (p. 4)

Subsection 8(a) deals with the Red River Water Supply Project and states:

“Subject to the requirements of this section, the Secretary shall construct a feature or features to provide water to the Sheyenne River water supply and release facility or such other features as are selected under subsection (d).”

Thus, the only features described in subsection (a) are a feature or features to provide water to the Sheyenne River water supply and release facility or other features selected under subsection (d).

However, Subsection 8(d)(1), which is quoted in the MOU, states only that the Secretary shall select 1 or more project features described in Subsection 8(a), but the only features described in Subsection 8(a) are “a feature or features to provide water to the Sheyenne River water supply and release facility.”

Before the MOU is finalized, it is essential for the Bureau of seek clarification regarding the range of alternatives from which the Secretary may select to meet the comprehensive water quality and quantity needs of the Red River Valley and to determine whether they are limited to a feature or features to provide water to the Sheyenne River water supply and release facility, or whether they include the full range of alternatives identified in the Red River Valley Water Supply Study.

VIII. ROLES AND RESPONSIBILITIES

The MOU states that:

“The co-lead agencies will work under the 2002 cooperative agreement for the Red River Valley Water Supply Project.” (p. 4)

The 2002 cooperative agreement for the Red River Valley Water Supply Project should be made available to for review and comment to all stakeholders in the Red River Valley Water Supply Study before the MOU is finalized.

The MOU goes on to state that:

“This will be the vehicle for Federal funding of North Dakota or GDCD activities, as appropriate, that sets forth the responsibilities of the State of North Dakota.” (p. 4)

Section 8(c)(2)(A) provides that the Secretary and the State of North Dakota “as authorized under section 1(g)” shall jointly prepare and complete a draft EIS on all feasible options for meeting the comprehensive water quality and quantity needs of the Red River Valley. Section 1(g), however, provides only that:

“The Secretary shall enter into one or more agreements with the State of North Dakota to carry out this Act, including operation and maintenance of the completed unit facilities and the design and construction of authorized new unit facilities by the State.”

Section 1(g) deals explicitly with the operation and maintenance of completed Garrison Diversion Unit facilities and the design and construction of authorized new unit facilities by the State, and it contains no provisions for “Federal funding of North Dakota or GDCD activities” in conjunction with the preparation of an EIS on a Red River Valley Water Supply Project. Therefore, the MOU should outline the authority for providing Federal funding of North Dakota or GDCD activities on the EIS for the Red River Valley Water Supply Project under Section 8(c) of the Act.

It also is important to recognize that Federal funding of North Dakota or GDCD activities under Section 8(c) creates a disproportionate advantage for the State and the GDCD in the Red River Valley Water Supply Study where their activities in developing and analyzing information will be supported by Federal funding under preparation of the EIS, while other stakeholders will be required to bear the full funding burden for their activities in the Red River Valley Water Supply Project. Although the Bureau now states that, “Reclamation is the sole lead agency in conducting the Needs and Options Report,” providing Federal funding for State and GDCD activities without providing comparable Federal support for the activities of other stakeholders gives the State and the GDCD an inappropriate advantage and provides for a greater level of participation in the Red River Valley Water Supply Study than afforded other stakeholders. The Bureau should address the disparity in the roles of the stakeholders in the Red River Valley Water Supply Study created by the provision of the MOU for Federal funding of North Dakota and GDCD activities.

VIII. TERM

No comment.

IX. EFFECTIVE DATE

The effective date should not be until after all stakeholders in the Red River Valley Water Supply Study have concurred on the provisions and language of the MOU.

RED RIVER VALLEY WATER SUPPLY PROJECT ENVIRONMENTAL IMPACT
STATEMENT OPERATING PRINCIPLES

Introduction

See comments on draft MOU.

Purpose Of The Operating Principles

See comments on Section V of the draft MOU.

Organization

No comment.

Term Definitions

No comment.

Steps in the EIS Process

No comment.

EIS 1 (Initiate the NWPA Process)

No comment.

EIS 2 (Issue Notice of Intent)

No comment.

EIS 3 (Agency Coordination and Public Scoping)

According to the EIS Operating Principles:

“GDCD will develop a public involvement plan to be reviewed by Reclamation.”

However, because public involvement is the cornerstone of the Federal NEPA EIS process and because the State of North Dakota does not have any statutory provisions for an EIS process, responsibility for development of the public involvement plan should rest primarily with Reclamation, not with the local project sponsor.

EIS 4 (Identify Purpose and Need for Action)

The Operating Principles state that:

“The co-leads will agree to a Statement of Purpose and Need consistent with DWRA. These water quality and quantity needs will be identified in the Needs and Options Report prepared by Reclamation with assistance from the State.”

It is important to note that, under Section 8(b) of the DWRA, the Needs and Options Report is to be prepared by the Secretary, not simply “with assistance from the State,” but “through an open and public process [which] shall solicit input from the gubernatorial designees from states that may be affected by possible options to meet such needs as well as designees from other federal agencies with relevant expertise.” The fact that the Operating Principles for the EIS state that the Needs and Options Report will be prepared by Reclamation with assistance from the State indicates that the State continues to assume an inappropriate level of participation and authority in the Red River Valley Water Supply Study.

As noted above in comments on the draft MOU, the Bureau must clarify the specific water quality and quantity needs that will be addressed in the EIS and the extent of the geographic area to be included.

EIS 5 (Develop Alternatives)

The Operating Principles state:

“Screening criteria will be established by the co-leads. All appraisal-level alternatives will be jointly screened based upon these criteria (i.e., ability to meet identified needs, cost, and environmental factors. The screening process will identify a full range of reasonable alternatives to be studied in detail, and alternatives that were considered but eliminated from detailed study. Alternatives failing to meet the minimum projected needs may be revised to meet the needs or will be dropped from consideration...”

In the appraisal level study, only alternatives that would meet all identified municipal, rural and industrial water needs in the Red River Valley of North Dakota and Breckenridge, Moorhead and East Grand Forks, Minnesota, were considered. However, under NEPA the EIS is required to consider a full range of alternatives that will meet various levels of needs, and not just those that meet all identified needs. The Operating Principles should be modified to make that clear.

EIS 6 (Describe Affected Environment)

No comment.

EIS 7 (Environmental Consequences of Alternatives)

No comment.

EIS 8 (DEIS Preparation and Distribution)

The Operating Principles state that:

“The DEIS may identify a preferred alternative agreed to by the co-leads or two preferred alternatives if there is no agreement.”

If two preferred alternatives are identified, the DEIS should identify which co-lead identified each alternative.

EIS 9 (FEIS Preparation and Distribution)

See comment on EIS 8.

EIS 10 (Selection of the Preferred Alternative)

The Operating Principles state that:

“After reviewing the final report required by subsection (b)(1) [the Report on Red River Valley Water Needs and Options] and complying with subsection c [preparation of a FEIS], the Secretary, in consultation and coordination with the State of North Dakota in coordination with affected local communities, shall select 1 or more project features described in subsection (a) [Red River Valley Water Supply Study Project] that will meet the comprehensive water quality and quantity needs of the Red River Valley.”

See comments on draft MOU Decisionmaking Process

EIS 11 (Record of Decision)

No comment.

RED RIVER VALLEY WATER SUPPLY PROJECT REPORT ON RED RIVER VALLEY WATER NEEDS AND OPTIONS OPERATING PRINCIPLES

Introduction

The Operating Principles state that:

“The Dakota Water Resources Act (DWRA) of 2000 authorized the Secretary of the Interior to conduct a comprehensive study of the water quality and quantity needs of the Red River Valley in North Dakota and possible options for meeting those needs.”

See comments above on draft MOU Authority and Background.

Purpose of The Operating Principles

The Operating Principles state:

“... The *Operating Principles* for the Needs and Options Report describes how this ‘open and public’ process will be conducted during the course of the study. The *Operating Principles* will also outline the roles and responsibilities of study participants.”

See comments above on draft MOU Roles and Responsibilities.

Organization

The Operating Principles state that:

“The role of the Technical Team is to provide Reclamation with objective, scientifically valid input that will be used to develop plans of study and study products... Meetings are forums where members receive plans and products for review and can provide information or make recommendations.”

Thus, the role of the Technical Team appears to be limited to providing input to develop plans of study and “study products” and to reviewing plans and products. The Operating Principles should outline more specifically who will be responsible for the development and analysis of the actual data and information upon which the study will be based. Will this be done by Reclamation?, or by the GDCD and its consultants?, or will the Technical Team participate in data and information development and analysis, as well?

See in this context the comment on Draft MOU Roles and Responsibilities.

Needs and Options Report Study Process and Schedule

No comment.