

April 27, 2001

Mr. Kenneth Parr
U.S. Bureau of Reclamation
Rapid City Field Office
515 9th Street, Room 101
Rapid City, SD 57701

Dear Ken:

The following written comments on the Angostura Unit Contract Negotiation and Water Management Draft Environmental Impact Statement (DEIS) are submitted on behalf of the Angostura Irrigation District.

First, the Board of Directors of the Angostura Irrigation District would like to thank the members of U.S. Bureau of Reclamation for their assistance in this NEPA process. Additionally, the Board thanks the Oglala Sioux Tribe for their openness, frankness and willingness in meeting with the Board to discuss each parties concerns and interests. The Board believes that these discussions have been helpful and increased all of the parties understanding of the other parties concerns.

FLOOD CONTROL ACT OF 1944

Angostura was the first unit of the Pick-Sloan Missouri Basin Program. The Angostura Unit was re-authorized by the United State Congress by the Flood Control Act of 1944 in Senate Document Number 191, at 76. The Missouri River Project Plan, which included the Angostura Unit, included a Summary of Costs, Benefits, and Returns. Id. at 21. This summary describes the purposes of the Missouri Basin Program and states:

The releasing of water from upstream reservoirs will be governed generally by the requirements of irrigation and power generation, and from the lower reservoirs by navigation needs. Id. at 22.

As an "upstream reservoir", the Angostura Unit's release of water is obviously to be determined by the needs of the power generation facilities and the Angostura Irrigation District. Since the power generation facilities of the Angostura Unit ceased

1

operation years ago, and the actual generators were sold years ago, the water release priority, based on the Flood Control Act of 1944, is now solely for irrigation.

The Angostura Irrigation District Board is not suggesting that irrigation is the only viable use of the water; however, the Board finds it necessary to remind all of the interested parties that the enabling legislation of Congress, the Flood Control Act of 1944, specifically details that the requirements of irrigation are to be the overriding concern in the determination of releases of water stored in the Angostura Unit.

1 Additionally, the Board notes that in Senate Document Number 191, at 78, sets out in table form the authorized reservoirs, including Angostura. The purposes of the Angostura Reservoir that are listed are listed as: "Irrigation, pumping power, flood, and silt control." [The Board believes that other uses of the Angostura Unit are incidental, and therefore, secondary and subject to these specific purposes described by the act.]

The Flood Control Act of 1944 also discusses the Minor Western Tributaries on Pages 67 through 78 of Senate Document Number 191. The Cheyenne River is listed as one of these Minor Tributaries. In the first paragraph of this section, the Act states:

Run-off from the streams is sporadic, and subject to extreme fluctuation, following heavy local rains. Many of the streams are dry much of the time.

This statement is consistent with the recollections of individuals who lived along the Cheyenne River in the Oral and Buffalo Gap areas in the years prior to the Angostura Dam being built. During the public hearing of February 14, 2001, held at the Mueller Civic Center in Hot Springs, South Dakota, Tim Fitzner stated that "as my dad used to - when they worked in that area and traveled down through or even down below Fall River when you hit July and August into the dry months you didn't have to worry about crossing the river. You could hop across it and never get your feet wet." See also, President of the Angostura Irrigation District Board, Lyle Hartshorn's, letter to Ken Parr, U.S. Bureau of Reclamation, dated March, 2001.

The Flood Control Act and the recollections of these individuals who lived adjacent to the Cheyenne before the Angostura Dam was built are consistent, and in direct contradiction to a number of assertions made by members of the Oglala Sioux Tribe who have said that the Cheyenne River had much more water consistently in the river before the Dam was built. Members of the tribe have asserted as fact that the Cheyenne River used to contain a greater number of fish and much healthier fish before the Dam was built because, at that time, the river had much more water flowing continuously.

These statements made by members of the Oglala Sioux Tribe are simply contrary to the facts. Further evidence that these claims are contrary to the facts is located in the DEIS itself. The DEIS, on page 115, discusses the potential impacts of the Reestablishment of the Natural Flows Below the Dam Alternative by stating: "[t]he river

2

1. While recreation and fish and wildlife are considered benefits under the Pick-Sloan Missouri Basin Program, Reclamation realizes that changing priority allocations in the reservoir from irrigation and flood control to other purposes would require changes in the Flood Control Act of 1944 (see pp. 21, 24, and 25-26 of the EIS). Legislation would also be needed to reallocate Angostura Unit construction costs.

could occasionally dry up in the summer.” The Irrigation District Board believes this statement to be consistent with the documented historical facts of the Cheyenne River, and therefore, accurate in deducing that much less fish would be available under the Reestablishment of the Natural Flows Below the Dam Alternative.

The second paragraph of the Flood Control Act’s section on the Minor Western Tributaries concludes:

[I]rrigation development appears to be the major possibility in stabilizing the agriculture in the basin. It will furnish a reliable feed base for the maintenance of grazing herds, adapted in size and quality to the enormous range areas surrounding the necklaces of irrigated farms along the main streams. *Id.* at 68.

The Board finds it significant that the Flood Control Act of 1944, in the Foreword of the description of the plans for the Minor Western Tributaries, isolates irrigation as a means to stabilize agriculture in this area by providing a reliable feed base for grazing herds. The Angostura Unit has fulfilled the purpose of providing a feed base for grazing herds. This is recognized by the DEIS when it states:

Without irrigation, crop production would be reduced to nothing some years, which would severely affect livestock production in the area.

Several factors were considered when evaluating regional economic impacts of changes in irrigation deliveries to the District. One was [the] location of a feedlot in the District which depends heavily on irrigated corn and hay production from the District.

... [A]ccounting for the feedlot resulted in estimated regional impacts of \$2.32 million in total regional output, \$540,000 in employee income, and 47 jobs annually. The benefits of irrigation to the nation were estimated to be \$520,000 annually. DEIS at 91-92.

The Flood Control Act of 1944 also addressed the quality of water in the section on Minor Western Tributaries, of which the Cheyenne River is included. The section on the quality of water starts by stating:

Most low-water flows of all the streams carry high quantities of dissolved minerals, chiefly carbonates, sulfates, bicarbonate of soda, calcium, and magnesium. Occasionally these low flows have over 60 percent of their total salts in sodium ions, which is beyond a safe limit for irrigation. High-water discharges show much less concentration, and after a series of analyses of both high and low-water discharges, it has been concluded that over-all concentration

3

of salts does not preclude the use of the water for irrigation when diluted with water from storage. Sen. Doc. No. 191, at 70.

In the Surface Water Quality section, the DEIS discussed the measurement of Total Dissolved Solids (TDS) as a way of determining the quality of water. TDS was described by the DEIS as an equivalent to salts found in water, and described the same ions as discussed in the Flood Control Act making up the components of TDS. The DEIS made similar conclusions, based on Cheyenne River data taken since the building of the Dam.

TDS concentrations in return flows from the District were similar to concentrations measured upstream at the Edgemont gauge.

During low-flow years, upstream concentrations generally were higher, diluted by mixing in the reservoir, and then increasing again below the dam. DEIS at 43.

The District Board notes that the Flood Control Act of 1944’s purpose of reducing sodium ions in order to irrigate with water from the Cheyenne River has also been achieved. The Board is not implying that Cheyenne River water cannot be utilized without the Angostura Dam; however, the concentrations of sodium ions, after being diluted in the Dam, are less in concentration, and therefore, satisfies the Act’s purpose of providing usable water for irrigation.

The Surface Water Quality section of the DEIS addressed many other measurements of the Cheyenne River’s health. The DEIS discusses two U.S. Department of Interior studies conducted to determine the quality of water in the Cheyenne River Basin. The National Irrigation Water Quality Program (NIWQP) has conducted these studies. In discussing trace elements, the DEIS noted:

Results of the 1998 NIWQP sampling indicate that return flows had relatively low concentrations of trace elements. Green et al. (1990) concluded that “there appeared to be minor difference between concentration of trace elements in water of the Cheyenne River upstream of irrigated land and in water downstream from all irrigation return flows” (p. 55). DEIS at 49.

In regard to nitrogen in the Cheyenne River, the DEIS stated: “Concentrations are well below the toxic level.” *Id.* at 51. The DEIS in regard to pesticides: “Based on these analyses, pesticides in the Angostura area do not appear to exceed acceptable levels.” *Id.*

The District Board would like to call attention to the facts that the abovementioned Flood Control Act of 1944’s purposes and projections as to the quality of water have been realized. Additionally, the Board would like to point out that the DEIS’ review of the research dispels the notion that the Angostura Irrigation District is harming the quality of the Cheyenne River’s water.

4

The Board also notes in the Surface Water Quality section of the Environmental Impacts Chapter that the DEIS recognizes that the Improved Efficiencies Alternative will not improve the water quality versus the No Action Alternative. "Eutrophication potential would be similar to No Action, as would be TDS in the reservoir and river." DEIS at 132.

The Flood Control Act of 1944 includes a section on Fish and Wildlife in its discussion of the Minor Western Tributaries.

Certain of the upper tributaries of the Cheyenne which drain the Black Hills of South Dakota provide excellent environmental conditions for trout. The other western tributaries of the Missouri within this subdivision of the basin are shallow, frequently intermittent streams in their upper courses, and usually muddy throughout their entire length. They provide so unfavorable an environment for fish that fishing is practically an unknown recreational activity within the entire area, except on the part of those who can afford to travel to the Black Hills for trout fishing, or to the turbulent Missouri for coarse fish.

The construction of reservoirs within the area will provide impounded waters which can be managed so as to provide favorable conditions for fish. Investigations in the use of artificial lakes and ponds have pointed the way for the development of this wildlife resource, which under natural conditions is poorly provided through-out this subdivision of the Basin. Sen. Doc. No. 191, at 73.

The District notes that the Flood Control Act of 1944 found that only "[c]ertain of the upper tributaries of the Cheyenne which drain the Black Hills provide excellent" conditions for trout. The District surmises that the stretches of the Cheyenne which are adjacent to the Pine Ridge Indian Reservation were not considered one of the upper tributaries of the Cheyenne draining the Black Hills. The District Board, however, does speculate that the portion of the Cheyenne downstream of the Dam was, prior to the construction of the dam, more likely to be included in the description that the river "provide so unfavorable an environment for fish that fishing is practically an unknown recreational activity". See also, DEIS discussion of the 1896 Everman and Cox investigation of suitable sites on the Cheyenne for fisheries. DEIS at 66.

Again, the construction of the Angostura Unit has fulfilled the Congressional intent in that more favorable conditions, although not perfect conditions, exist and have been created at the reservoir for fish. It is the District Board's position that the Angostura Unit is not adversely affecting the environment in any way, but rather is benefiting the regional economy and environment through irrigation and flood control, increased wildlife, increased fish, increased wetlands derived from accretions and return flows.

5

- 2 [It is the District's position that the No Action Alternative is the only alternative under consideration that would not require Congressional legislation to change the Flood Control Act of 1944, as the No Action Alternative does not change the Unit's water uses, and thus, the Unit's purposes as delineated in the Flood Control Act.]

SOUTH DAKOTA WATER RIGHTS LAW

The United States secured a "U.S. Withdrawal" under South Dakota law. State of South Dakota, United State Withdrawl Water License No. 579-2. Under 43 U.S.C. Section 383, Section 8 of the Reclamation Act of 1902, Federal law defers to state law. South Dakota granted the limited use U.S. Withdrawl License US 579-2 to the Bureau of Reclamation for an annual one-time fill of 138, 761 acre-feet storage in Angostura Reservoir for irrigation of 12,218 acres of land and for fish, wildlife, recreation and other purposes.

- 3 The Angostura Irrigation District Board is concerned about the Bureau of Reclamation's (BOR) statement on page 22 of the DEIS, Improved Efficiencies Alternative, "Reclamation would establish a public process to determine how best to use the saved water". [The Board believes that the BOR's authority to unilaterally decide how any saved water will be used or allocated is limited by state and federal law, and the BOR's own operation criteria. In fact, the Board believes that the allocation or use of increased flows in the Cheyenne River would be governed by South Dakota law, and any changes to the U.S. Withdrawal License US579-2 may be needed depending on the nature of in-stream flow resulting from any proposed alternative, which the South Dakota Water Management Board would be required to approve changes in the water use or land irrigated within the Unit.]

OGLALA SIOUX TRIBE FISHING RIGHTS

On page 98 of the DEIS, implies that the OST has fishing rights based on the First treaty of Fort Laramie of 1851 (11 Stat 749). This treaty does not give any fishing rights to the OST. In *Montana v. United States*, 450 US 544, 553, the United States Supreme Court found "The 1851 treaty did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among the several tribes which recognized specific boundaries for their respective territories." Regarding fishing rights, "As the record in this case shows, at the time of the treaty the [Sioux] were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." Further, the Treaty of 1868, 15 Stat. 635 (1868), effectively extinguished Article 5 of the 1851 Treaty, where the Sioux were granted an off reservation right to hunt buffalo only for so long as they were sufficiently numerous as to "justify the chase."

- 4 [The Irrigation District Board does not concede that the OST has any existing fishing right, as the vast majority of the research and factual evidence contradicts the assertion that fish and fishing was an important part of the historical diet or culturally significant to the Sioux.]

6

2. Noted.

3. There are differing opinions on this issue. Reclamation's determination of how water saved in the Improved Efficiencies Alternative would be used is allowed under the *other beneficial use* provision of the withdrawal water license.

If this alternative were selected, Reclamation would work with interested parties on the best use of the saved water.

4. The Tribes considered fisheries to be an Indian Trust Asset (pp. 97-100 of the EIS), which Reclamation is required to analyze in the EIS. Reclamation made no judgement about the importance of fish in the Lakota diet; we merely acknowledged that fish were part of it.

OST'S WINTERS WATER RIGHTS CLAIM

5 [It is the opinion of the Irrigation District Board that a determination of the any OST water rights claim is outside the scope of this Environmental Impact Statement (EIS). Such issues should be resolved either compact negotiations with agreements approved by the U.S. Congress or a court adjudication.]

A Tribal water right is clearly not one of the purposes of the Flood Control Act of 1944. In Arizona v. California, 373 U.S. 600-601, (1963), concluded that "the only feasible and fair way by which reserved water for reservations can be measured is irrigable acreage." The Wyoming Supreme Court has further clarified Arizona v. California. This Court set forth a three-part test requiring a determination of the irrigability of lands, and determination of the engineering feasibility of irrigating those lands determined to be irrigable, and a cost benefit analysis to determine if the cost of irrigation was reasonable. In re Big Horn River System, 753 P.2d 76, 101 (Wyo. 1988).

The Board believes any quantification of an instream flow water right to the OST is beyond the scope of this EIS. Additionally, the Board believes that is unlikely that there is a substantial Winters water right connected with the Cheyenne River on either Sioux Reservation.

CONCLUSION

Nothing contained in this formal written comment or any omission of any particular information or issue may be construed in depriving the Angostura Irrigation District of any administrative, federal or constitutional remedy for any deprivation of the District's rights.

Thank you for the opportunity to comment on behalf of the Angostura Irrigation District.

Sincerely,

Lance S. Russell
Attorney for the Angostura Irrigation District

5. Reclamation agrees: the draft EIS doesn't try to resolve water rights, but it does acknowledge that the Tribes' reserved water rights exist and that resolution could affect water available for other uses (pp. 97-98 in the EIS).