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An Analysis of the Scope of the Final Environmental Impact Statement on the Garrison Diversion Unit Project: Applying a Totality of Circumstances Test

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NOTES

AN ANALYSIS OF THE SCOPE OF THE FINAL ENVIRONMENTAL IMPACT STATEMENT ON THE GARRISON DIVERSION UNIT PROJECT: APPLYING A TOTALITY OF CIRCUMSTANCES TEST

I. INTRODUCTION

In compliance with the National Environmental Policy Act of 1969¹ (NEPA), the Bureau of Reclamation² issued a final Environmental Impact Statement (EIS) on the North Dakota Garrison Diversion Unit Project in January 1974.³ Although the adequacy of this EIS has not yet been determined by the courts,⁴ it has been criticized by various federal agencies and public interest groups as insufficient for failing to analyze the full scope of the project's environmental impacts.⁵ In fact, the National Audubon Society has filed a motion for summary judgment in federal district court in Washington, D.C., seeking to halt construction of the project.⁶ The Audubon Society has alleged that the Bureau of Reclamation failed to prepare an EIS whose scope is broad enough to assess the full impact of a series of interrelated, proposed "major federal actions" as required by NEPA.⁷

1. Pub. L. No. 91-190, 83 Stat. 852 (codified in 42 U.S.C. §§ 4321-4347 (1970), *as amended*, (Supp. V 1975)).

2. The United States Bureau of Reclamation, in the Department of the Interior, is responsible for developing the Garrison Diversion Unit Project. Flood Control Act of 1944, Pub. L. No. 78-534, ch. 665, § 9, 58 Stat. 887, 891. *See generally* F. ANDERSON, *NEPA IN THE COURTS* (1973): "When the federal agencies provide services and carry out direct construction programs, they must prepare impact statements. Thus the activities of federal agencies such as the . . . Bureau of Reclamation . . . are covered [by NEPA]." *Id.* at 57-58.

3. U.S. BUREAU OF RECLAMATION, *INITIAL STAGE GARRISON DIVERSION UNIT FINAL ENVIRONMENTAL STATEMENT* (Jan. 10, 1974) [hereinafter cited as FES].

4. HOUSE COMM. ON GOV'T OPERATIONS, *A REVIEW OF THE ENVIRONMENTAL, ECONOMIC & INTERNATIONAL ASPECTS OF THE GARRISON DIVERSION UNIT, NORTH DAKOTA*, H.R. REP. NO. 94-1335, 94th Cong., 2d Sess. 18 (1976) [hereinafter cited as *GOVERNMENT OPERATIONS*].

5. *Id.* at 20. The Institute of Ecology, the Environmental Protection Agency, the Council on Environmental Quality, the National Audubon Society and the Minnesota Pollution Control Agency have criticized the final EIS. *See generally* FES, *supra* note 3, at Appendix B.

6. The Minot (N.D.) Daily News, Aug. 7, 1976, at 6, col. 1. The State of North Dakota has been allowed to intervene in the suit brought by the National Audubon Society. The Grand Forks (N.D.) Herald, Mar. 8, 1977, at 1. Also the 1977 North Dakota Legislature has set aside \$250,000 to sue the federal government if the funding for the Garrison Diversion Unit Project is cancelled. The Grand Forks (N.D.) Herald, Mar. 25, 1977, at 1, col. 1.

7. *Id.* NEPA, Pub. L. No. 91-190, § 102(2)(C)(i)-(v), 83 Stat. 852, 853 (codified in 42 U.S.C. § 4332(2)(C)(i)-(v) (1970) states that all agencies of the Federal Government shall:

....
(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

The Bureau of Reclamation, as the federal agency responsible for constructing diversion/irrigation projects within the Missouri River Basin,⁸ is faced with the task of environmentally assessing its major federal actions in the area. In shaping an EIS for one "major federal action"⁹ within the Missouri River Basin Program, the Garrison Diversion Unit Project, the Bureau of Reclamation chose to limit the scope of review to an environmental assessment of the individual project. The Bureau decided not to issue a programmatic EIS assessing the environmental impacts of Garrison Diversion on its South Dakota counterpart, the Oahe Irrigation Project,¹⁰ or on other diversion/irrigation projects contemplated by the Missouri River Basin Program.¹¹ Also, in the case of the Garrison Diversion Unit Project, the Bureau of Reclamation further segmented the environmental review by deciding to assess individually, in separate EIS's, three proposed irrigation sections of the Garrison Diversion Project—the LaMoure and Oakes Section, the Central North Dakota Section, and the Souris Section.¹²

Claims that the scope of an EIS is inappropriate are becoming frequent allegations in complaints filed under NEPA.¹³ The final EIS on the Garrison Diversion Unit Project perhaps exemplifies some of the difficulties that federal agencies face when defining the scope of a project for purposes of environmental assessment. The purpose of this note is to analyze whether the narrowing of the scope of environmental review for the Garrison Diversion Unit Project by the Bu-

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . .

(emphasis added).

8. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS: AN ANALYSIS OF SIX YEARS' EXPERIENCE BY SEVENTY FEDERAL AGENCIES 50 (Mar. 1976) [hereinafter cited as CEQ REPORT].

9. 40 C.F.R. § 1500.6(a) (1976) provides:

The statutory clause "major federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area and further actions contemplated. . . . In considering what constitutes major actions significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable.

See generally F. ANDERSON, NEPA IN THE COURTS 73-89 (1973).

10. Williams, *The Oahe Irrigation Controversy*, 40 THE PROGRESSIVE, Aug. 1976, at 32, describes the Oahe Project:

The massive Bureau of Reclamation project for which construction has already started on a pumping station near Pierre, calls for irrigating 190,000 acres of land. Some 110,000 other acres would be torn up for construction. The project now carries a price tag of \$382 million—a figure that increases each time an estimate is made—and would require seventeen years from the start of construction to the finish.

11. U.S. BUREAU OF RECLAMATION, RECLAMATION PROJECT FEASIBILITIES AND AUTHORIZATIONS 381 (Supp. 1968) [hereinafter cited as RECLAMATION PROJECT].

12. FES, *supra* note 3, at I-2.

13. See generally Note, *Appropriate Scope of an Environmental: The Interrelationship of*

reau of Reclamation is appropriate. This note will examine first the Bureau of Reclamation's segmented approach to the environmental assessment of the Garrison Diversion Unit Project, and second, the feasibility of assessing the Garrison Diversion Unit Project as a unit within the context of the Missouri River Basin Program.

II. DESCRIPTION OF THE GARRISON DIVERSION PROJECT

The concept of diversion for irrigation in North Dakota emerged after the devastating drought experienced in the 1930's.¹⁴ North Dakota's Legislative Assembly passed a resolution in 1937, asking Congress to legislate and appropriate funds for a Missouri River diversion.¹⁵ Ironically, it was not until 1944, after the destructive Missouri River flood, that Congress enacted the Pick-Sloan Missouri River Basin Program, authorizing the construction of dams and reservoirs for both flood control and irrigation.¹⁶ In 1955, even before the Garrison Dam and Reservoir Project was fully completed, the North Dakota Legislature had created the Garrison Diversion Conservancy District to aid in managing the anticipated Garrison Diversion Unit Project.¹⁷

Initially authorized as a part of the Flood Control Act of 1944,¹⁸ the Garrison Diversion Unit Project is but one, small unit of a continuing Missouri River Basin Program designed to develop the water resources of the Missouri River Basin.¹⁹ As proposed and adopted by Congress, the original Missouri River Basin Program, because of its magnitude, was divided into six subdivisions for "purposes of discussion":²⁰ the Upper Missouri River Basin; the Yellowstone River Basin; the Missouri River-Fort Peck to Sioux City subdivision; the Minor Western Tributaries; the Niobrara, Platte and Kansas Rivers; and the Lower Missouri Basin. The Garrison Dam and Reservoir Project, as well as Garrison Diversion, was proposed as a development within the Missouri River-Fort Peck to Sioux City subdivision,²¹ which contemplated the construction of five, multiple-purpose reservoirs on the Missouri River for "flood control, navigation, irrigation, power, domestic and sanitary purposes, wildlife, and recreation."²² Other proposed, multiple-purpose developments within

Impacts, 1976 DUKE L.J. 623.

14. GOVERNMENT OPERATIONS, *supra* note 4, at 6.

15. *Id.* at 7.

16. Flood Control Act of 1944, Pub. L. No. 78-534, ch. 665, § 9, 58 Stat. 887, 891.

17. Ch. 348 [1955] N.D. Sess. Laws 606 (codified in N.D. CENT. CODE ch. 61, § 24 (1960), as amended, (Supp. 1975)).

18. Pub. L. No. 78-534, ch. 665, § 9, 58 Stat. 887, 891.

19. RECLAMATION PROJECT, *supra* note 11. Present development of the Missouri River Basin Program follows the original plan as authorized by the Flood Control Act of 1944, but it also includes modifications and additions "essential to full development of the basin resources." *Id.* at 381.

20. S. DOC. NO. 247, 78th Cong., 2d Sess. 5 (1944).

21. *Id.* at 2.

22. *Id.*

this subdivision, in addition to Garrison, included the Oahe, Fort Randall, Big Bend and Gavins Point Units.²³

Although the Garrison Dam and Reservoir Project was fully completed by 1960,²⁴ it was 1965 before Congress approved construction of and appropriated funds for the initial stage of the Garrison Diversion Unit Project.²⁵ At that time the project was thoroughly reviewed and reauthorized.²⁶ As finally adopted, the initial stage of development of the Garrison Diversion Unit Project was to provide irrigation for 250,000 acres, a municipal and industrial water supply for fourteen cities, development of the fish and wildlife and recreation potential in the area, and improvement of flood control.²⁷

Public Law 89-108,²⁸ which reauthorized the Garrison Diversion Unit Project in 1965, outlines a plan consisting of 1,800 miles of canals, four reservoirs, 141 pumping plants, 2,800 miles of drains and laterals, 67,000 acres for rights-of-way and 146,000 acres for thirty-six major fish and wildlife areas and nine recreational areas.²⁹ The actual diversion of water from the Garrison Reservoir will operate as follows:³⁰ First, the Snake Creek Pumping Plant will pump water from Lake Sakakawea to Audubon Lake, from which the McClusky Canal will convey water to the Lonetree Reservoir. From the Lonetree Reservoir, the Velva Canal will convey water northward to irrigate 116,000 acres in the Karlsruhe and Souris areas, and the New Rockford Canal will move water eastward to irrigate 134,000 acres in the central and southern sections of the project. Irrigation return-flows from the Velva Canal will flow through the project drainage system into the Souris River, and return-flows from the New Rockford Canal will flow into the Red River and the Devils Lake Basin. The actual irrigation of land will be accomplished by sprinkler methods.³¹

III. NEPA REVIEW OF GARRISON DIVERSION

The Bureau of Reclamation early conceded the application of

23. *Id.* at 3.

24. See E. ROBINSON, HISTORY OF NORTH DAKOTA 462 (1966), which describes the work on the Garrison Dam and Reservoir:

In the spring of 1953, round-the-clock shifts of workmen dropped load after load of boulders into the channel, closed the dam and diverted the river. . . .

In January, 1956, they put the first three of the five 80,000-kilowatt generators into service. By 1960, with \$294,000,000 spent, the great dam was virtually complete. . . .

25. Act of August 5, 1965, Pub. L. No. 89-108, 79 Stat. 433.

26. See Beck & Newgren, *Irrigation in North Dakota through Garrison Diversion*, 44 N.D.L. REV. 465 (1968).

27. H.R. Doc. No. 282, 89th Cong., 1st Sess. 5 (1965).

28. Act of August 5, 1965, Pub. L. No. 89-108, 79 Stat. 433.

29. See generally H.R. Doc. No. 282, 89th Cong., 1st Sess. (1965).

30. See maps reprinted in the text for illustrations of the operation of the Garrison Diversion Unit.

31. CONSERVATION, ENERGY & NATURAL RESOURCES SUBCOMM., THE GARRISON DIVERSION UNIT PROJECT: ITS POTENTIAL AND PROBLEMS, H.R. REP. NO. 401-29, 94th Cong., 1st Sess. 13 (1975).

NEPA to the Garrison Diversion Unit Project³² although NEPA was enacted in 1969,³³ after construction on the project's principal supply works consisting of the Snake Creek Pumping Plant, the McClusky Canal and the Lonetree Reservoir had already begun.³⁴ Construction on the Garrison Diversion Unit Project was begun in 1967, but by 1976, the project was only nineteen per cent complete, with no final completion date in sight.³⁵ Generally, the courts have interpreted NEPA as being retroactive in application³⁶ and have applied it to on-going programs instituted prior to NEPA that have no readily apparent completion dates.³⁷

In 1971, the Bureau of Reclamation issued the first of its four environmental impact statements on the Garrison Diversion Unit Project.³⁸ The first environmental assessment, an eleven-page statement, was found to be too cursory to meet the requirements of NEPA.³⁹ But after suit was filed in 1972, charging the Bureau of Reclamation with violating NEPA by continuing to develop the project without preparing an adequate EIS,⁴⁰ the Bureau of Reclamation hastily submitted a second EIS.⁴¹ This preliminary EIS was withdrawn when the court denied the plaintiff's motion for a preliminary injunction and ruled that development of the Garrison Diversion Unit Project could continue while the adequacy of the statement was being determined.⁴² The Bureau of Reclamation then released its third environmental assessment, a draft statement, in 1973,⁴³ and submitted its fourth and final EIS on Garrison Diversion in January 1974.⁴⁴

The final EIS purports to be an "overall project environmental statement"⁴⁵ of the Garrison Diversion Unit. The scope of the statement is described on the first page of the final EIS:

32. INSTITUTE OF ECOLOGY, ENVIRONMENTAL IMPACT ASSESSMENT PROJECT, 1 A SCIENTIFIC AND POLICY REVIEW OF THE FINAL ENVIRONMENTAL STATEMENT FOR THE INITIAL STAGE, GARRISON DIVERSION UNIT 5 (Jan. 1975).

33. Pub. L. No. 91-190, 83 Stat. 852 (codified in 42 U.S.C. §§ 4321-4347 (1970), as amended, (Supp. V 1975)).

34. FES, *supra* note 3, at I-3. "Construction of the main supply works was initiated in July 1967 with the award of equipment contracts for the Snake Creek Pumping Plant." *Id.*

35. GOVERNMENT OPERATIONS, *supra* note 4, at 13.

36. *See, e.g.*, Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1329 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972); Lathan v. Volpe, 455 F.2d 1111, 1116 (9th Cir. 1971).

37. Natural Resources Defense Council, Inc. v. Morton, 388 F. Supp. 829 (D.D.C. 1974).

38. U.S. BUREAU OF RECLAMATION, STATEMENT ON ENVIRONMENTAL IMPACT OF GARRISON DIVERSION UNIT—MISSOURI RIVER BASIN PROJECT—NORTH DAKOTA (Jan. 8, 1971).

39. INSTITUTE OF ECOLOGY, *supra* note 32, at 5.

40. Committee to Save N.D., Inc. v. Morton, No. 1198 (D.N.D., filed Dec. 11, 1972).

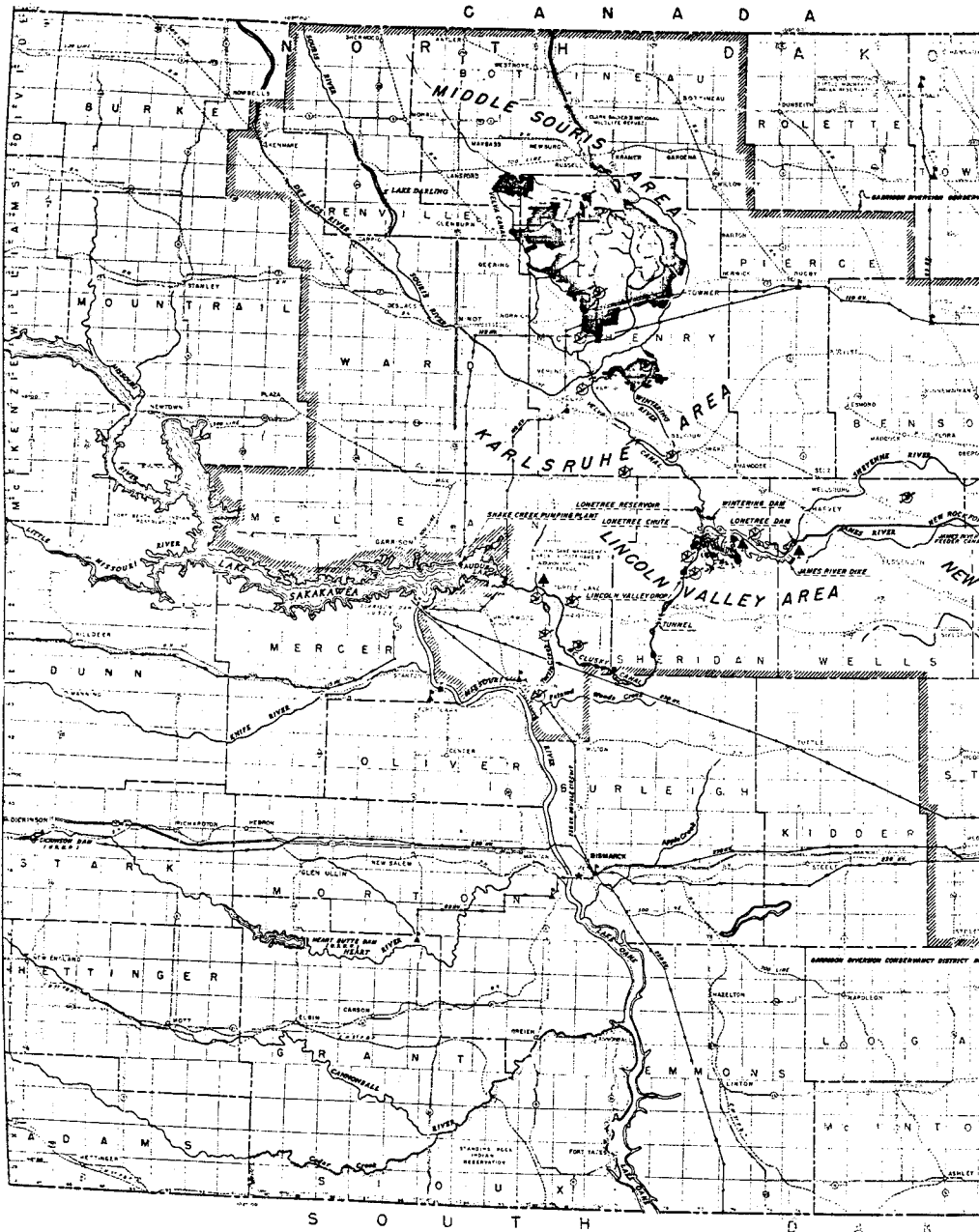
41. U.S. BUREAU OF RECLAMATION, PRELIMINARY FINAL ENVIRONMENTAL STATEMENT (Jan. 1973).

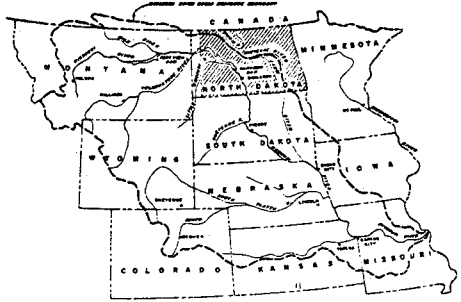
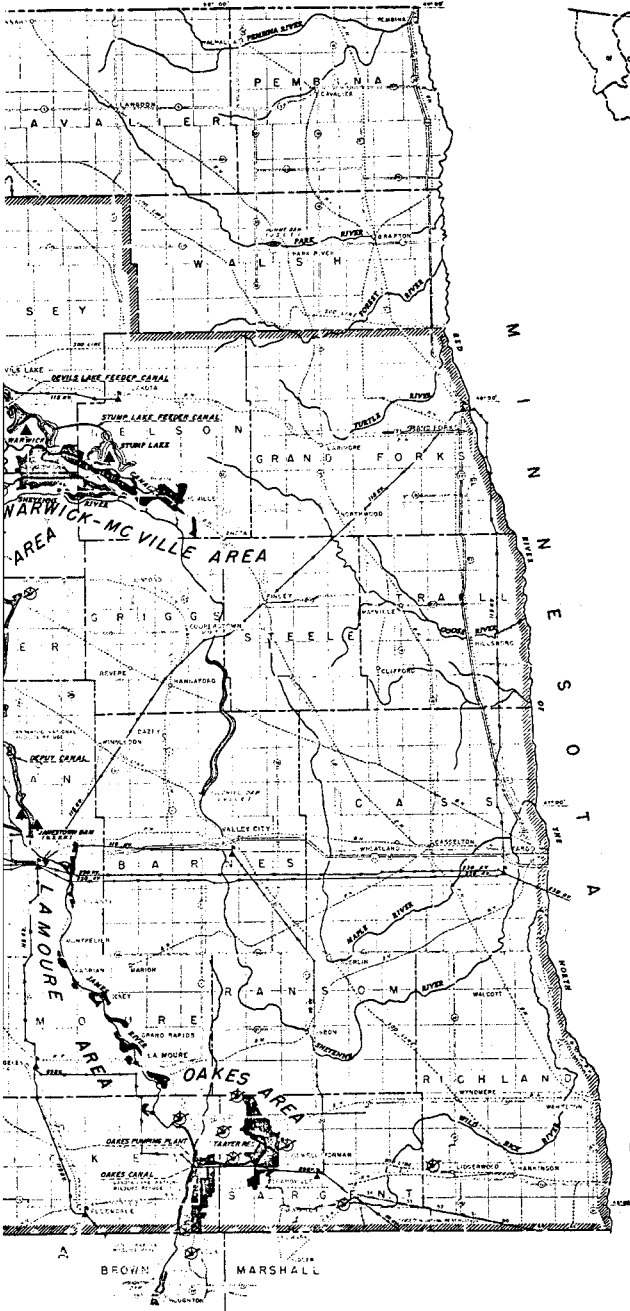
42. Committee to Save N.D., Inc. v. Morton, No. 1198 (D.N.D., order of Feb. 12, 1973). The Eighth Circuit Court of Appeals upheld the denial of the motion for a preliminary injunction. 476 F.2d 1284 (8th Cir. 1973).

43. U.S. BUREAU OF RECLAMATION, INITIAL STAGE GARRISON DIVERSION UNIT DRAFT ENVIRONMENTAL STATEMENT (Apr. 5, 1973).

44. FES, *supra* note 3.

45. FES, *supra* note 3, at I-1. *See also* 37 Fed. Reg. 24,910 (Nov. 23, 1972), wherein the





INDEX MAP

EXPLANATION

AUTHORIZED FEATURES

- AREA BENEFITED BY PROJECT WORKS
- CANAL OR LATERAL
- PUMPING PLANT
- SIPHON
- PROJECT DRAIN
- DAM AND RESERVOIR
- FISH AND WILDLIFE DEVELOPMENT AREA
- NATIONAL PARK SERVICE RECREATION DEVELOPMENT AREA

EXISTING FEATURES

- DAM AND RESERVOIR
- TRANSMISSION LINE (USBR)
- SUBSTATION (USBR)
- PUBLIC POWER PLANT (STEAM NON-FEDERAL)
- U.S. GOVERNMENT HYDRO POWER PLANT (USCE)
- GARRISON CONSERVANCY DISTRICT BOUNDARY
- NATIONAL PARK SERVICE RECREATION DEVELOPMENT AREA

UNITED STATES
DEPARTMENT OF THE INTERIOR
ROBERTS C.B. MORTON SECRETARY

BUREAU OF RECLAMATION
GILBERT G. STANN COMMISSIONER

BUREAU OF SPORT FISHERIES & WILDLIFE
SPENCER H. SMITH DIRECTOR

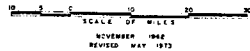
NATIONAL PARK SERVICE
RONALD H. WALKER DIRECTOR

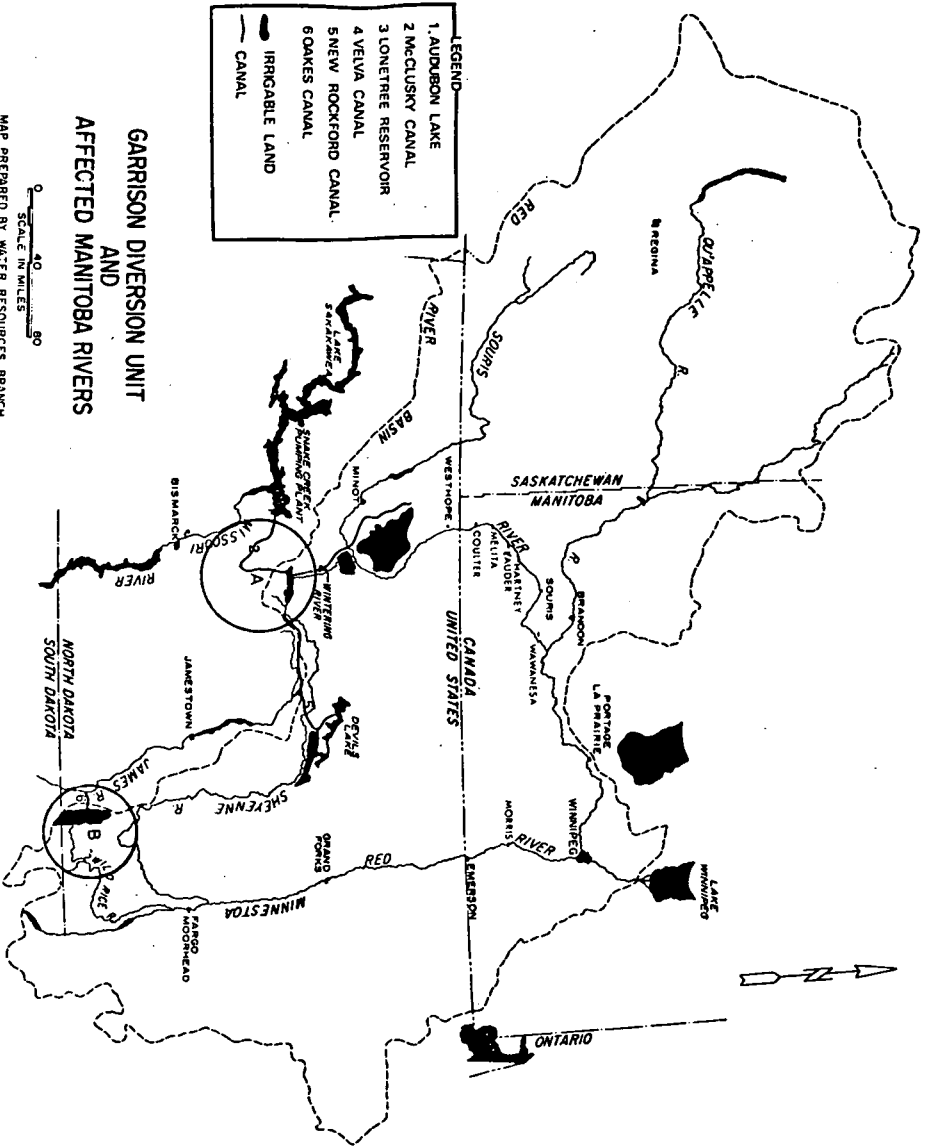
PICK-SLOAN MISSOURI BASIN PROGRAM

**GARRISON DIVERSION
UNIT**

INITIAL STAGE- 250,000 ACRES
NORTH DAKOTA

(REG-24-C)
MAP NO. 769-603-5700





Reprinted from CONSERVATION, ENERGY AND NATURAL RESOURCES SUBCOMMITTEE, THE GARRISON DIVERSION UNIT PROJECT: ITS POTENTIAL AND PROBLEMS, H.R. REP. NO. 401-29, 94th Cong., 1st Sess. (1975).

This Environmental Statement assesses the overall cumulative impacts of the Garrison Diversion Unit. In addition, final coverage is given the impacts related to the principal supply works and associated recreation and fish and wildlife development areas. These features include the Snake Creek Pumping Plant, McClusky Canal and Lonetree Reservoir as well as the Lonetree Reservoir and Lake Brekken-Lake Holmes recreation areas and the Turtle Lake, Turtle Creek, Brush Lake-Lake Williams (fish and wildlife), Koenig, Lost Lake, Kinschi Lake, Lincoln Valley, Johnson Lake, and several small wildlife development areas. In the event of plan changes for these features supplements will be prepared.⁴⁶

In addition to its fourth and final "overall project environmental statement"⁴⁷ on Garrison Diversion, the Bureau of Reclamation anticipated preparing supplemental EIS's for at least three irrigation sections of the Garrison Diversion Unit Project: the LaMoure and Oakes Section, the Central North Dakota Section, and the Souris Section.⁴⁸

The Bureau of Reclamation, then, has acted to prepare a separate EIS on the Garrison Diversion Unit, a project included within the scope of the Missouri River Basin Program. But the Bureau has also segmented its environmental assessment of the Garrison Diversion Unit Project by deciding to assess three proposed irrigation sections of the unit individually, in separate EIS's. At a minimum, NEPA requires a detailed statement of the environmental impacts of the Garrison Diversion Unit Project and the development of appropriate alternatives to the proposed course of action.⁴⁹ When reviewing the final EIS for Garrison Diversion, the crux of the problem becomes whether the scope of the statement, although segmented and of a local-scope, is adequate to meet the requirements of NEPA.

IV. SEGMENTING ENVIRONMENTAL REVIEW OF THE GARRISON DIVERSION UNIT

The Garrison Dam and Reservoir Unit was completed before the enactment of NEPA and therefore was not subject to the preparation

Bureau of Reclamation's "Environmental Statement Instructions for Preparation" provide: "In deciding between an overall project environmental statement or an individual feature environmental statement, the rule to apply is that the overall project environmental statement is preferred."

46. FES, *supra* note 3, at I-1.

47. *Id.*

48. *Id.* at I-2.

49. See, e.g., Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. 1971). See also NEPA, Pub. L. No. 91-190, § 102(2)(C), 83 Stat. 852, 853 (codified in 42 U.S.C. § 4332(2)(C) (1970)).

of an EIS.⁵⁰ However, its completion has put pressure on the State of North Dakota for the realization of the Garrison Diversion Unit, the second phase of the reservoir-dam, irrigation project.⁵¹ A critic of the entire development has observed that "one boondoggle"⁵² is being used to justify another. Such criticism is magnified when a unit such as the Garrison Diversion Project is further segmented for environmental review. The Bureau of Reclamation's decision to fully assess the project's principal supply works, but to postpone final environmental assessment of the project's three major irrigation sections in the final EIS, has been criticized by the House Committee on Government Operations⁵³ as impeding any evaluation of the cumulative environmental impacts of each segment on the entire project.⁵⁴

The strategy of the Bureau of Reclamation is to continue construction on the project's principal supply works while preparing supplementary EIS's detailing development of the irrigation segments to follow.⁵⁵ The danger exists that completion of the project's principal supply works will be used to justify completion of the three irrigation sections and the entire Garrison Diversion Unit Project without a final assessment of the project's cumulative environmental impacts. This specific result has been challenged in numerous highway segmentation cases.⁵⁶

A. USING SEGMENTATION TO JUSTIFY A PROJECT'S COMPLETION

In several instances segments of an interstate highway system have been completed and analyzed in separate EIS's until the bulk of the system is finished, thus justifying completion of the final link in what has become a total interstate highway project.⁵⁷ A letter written by Sheldon Meyers, Director of the Office of Federal Activities for the Environmental Protection Agency, analyzed this tactic:

By proposing uncontroversial segments of the highway, one per EIS, and leaving the most controversial segment for the last, the Federal Highway Administration is able to "build" a case, by constructing the bulk of an interstate sys-

50. See *supra* note 24. The Garrison Dam and Reservoir Project was completed by 1960. NEPA was enacted in 1969.

51. G. SHERWOOD, *NEW WOUNDS FOR OLD PRAIRIES* 15 (1972).

52. *Id.*

53. The House Comm. on Gov't Operations, chaired by Jack Brooks, adopted the report cited at *supra* note 4, on June 30, 1976.

54. GOVERNMENT OPERATIONS, *supra* note 4, at 18.

55. *Id.* at 19.

56. *E.g.*, *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973); *Conservation Soc'y v. Secretary of Transp.*, 362 F. Supp. 627 (D. Vt. 1973); *Committee to Stop Rte. 7 v. Volpe*, 346 F. Supp. 731 (D. Conn. 1972).

57. *E.g.*, *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 403 U.S. 932 (1971).

tem, for the completion of construction of the final segment of the system. In this case, that last segment will be Franconia Notch, which is a major environmental issue in New England. . . . In my opinion, to proceed with the construction of the northern segments, before a comprehensive EIS discussing all alternatives is prepared, would be contrary to the clearly expressed intent of the National Environmental Policy Act. . . .⁵⁸

The Committee on Government Operations, in reviewing the final EIS for the Garrison Diversion Unit project, noted that the supplemental EIS for "the most controversial portion of the project, the Souris Section, is scheduled for release as late as November, 1978."⁵⁹ A supplementary statement on the less controversial Oakes-LaMoure Section has already been released.⁶⁰

It is difficult to analyze the motive behind the Bureau of Reclamation's decision to segment its environmental assessment of the Garrison Diversion Unit Project. The Bureau of Reclamation purports to assess the cumulative environmental impacts of the total project in the final EIS, which it describes as "an overall statement"⁶¹ on the Garrison Diversion Unit Project. Yet it also anticipates the need for supplementary statements in order to allow for changes in proposed segments of the project as development progresses. The Bureau of Reclamation, in its final EIS on Garrison Diversion, states:

Procedures of the Bureau of Reclamation allow for changes in segments of a project as development progresses. Studies of the quality of irrigation return flow water and its effects on streams, fish and wildlife resources, and changing needs of the area are continuing. In addition, there may be some minor changes in engineering and construction techniques, and changes in costs of types of construction. Therefore, additional detailed statements on portions of the Unit are believed to be desirable.⁶²

Although the Bureau of Reclamation's proposal to issue supplementary EIS's on individual segments of the Garrison Diversion Unit Project does not appear to conflict with the Council on Environmental Quality's (CEQ) regulations for the preparation of an impact statement,⁶³ the question of whether or not segmentation prevents the

58. Letter of Sheldon Meyers, Director of the Office of Fed. Activities for the Env'tl Protection Agency, cited by the court in *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105, 115 (D.N.H. 1975).

59. GOVERNMENT OPERATIONS, *supra* note 4, at 2.

60. The Minot (N.D.) Daily News, Aug. 7, 1976, at 6, col. 1.

61. FES, *supra* note 3, at I-1.

62. *Id.* at I-1 to 2.

63. 40 C.F.R. § 1500.6(d)(1) (1976), provides:

Agencies should give careful attention to identifying and defining the purpose

environmental assessment of the cumulative impacts of the proposed segments as well as alternatives to development of the Garrison Diversion Unit Project is still a legitimate one.

B. TESTING THE ADEQUACY OF A SEGMENTED REVIEW

The courts generally apply a "totality of circumstances"⁶⁴ test to determine what should be covered in an EIS, and whether segmentation is proper in a particular case. Frequently, the criteria that form the basis of this test, formulated from federal highway segmentation cases,⁶⁵ include an analysis of the independent utility of a segment,⁶⁶ the irretrievable commitment of resources to a segment,⁶⁷ and the foreclosure of alternatives to a project caused by segmentation.⁶⁸

1. Independent Utility

The independent utility test is used to determine whether a particular segment of a project has a use apart from and independent of the project.⁶⁹ When a segment of a project is found to have independent utility, the courts will not interfere with a federal agency's decision to prepare an EIS that is limited to assessing that segment of the project, rather than the project as a whole.⁷⁰ In reviewing several major federal actions, the question asked is whether they are dependent on and indivisible from an integrated program, or whether they are single, self-contained projects in themselves.⁷¹

The Garrison Diversion Unit Project is actually the second phase of the Garrison Dam and Reservoir Project, completed by the Corps

and scope of the action which would most appropriately serve as the subject of the statement. In many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases), or environmental impacts that are generic or common to a series of agency actions (e.g., maintenance or waste handling practices), or the overall impact of a large-scale program or chain of contemplated projects (e.g., major lengths of highway as opposed to small segments). Subsequent statements on major individual actions will be necessary where such actions have significant environmental impacts not adequately evaluated in the program statement.

64. *E.g.*, Prince George's County, Md. v. Holloway, 404 Supp. 1181, 1186 (D.D.C. 1975).

65. *E.g.*, Movement Against Destruction v. Volpe, 361 F. Supp. 1360 (D. Md. 1973).

66. Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973).

67. Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973).

68. No East-West Highway Comm. v. Whitaker, 403 F. Supp. 260 (D.N.H. 1975).

69. The Dep't of Transp., which regularly employs the independent utility test in preparing an EIS, has interpreted the test at *Hearings Before the Subcomm. on Fisheries & Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 54 (1975):

First, we always insist that environmental impact statements cover projects that have independent utility. That is, we will not accept the statement unless the project in connection with which it is submitted would make sense by itself and would be a sound transportation investment without any addition of another segment or another piece.

70. See Daly v. Volpe, 514 F.2d 1106 (9th Cir. 1975), where the court found that the segment reviewed had independent utility, although its selection for review was arbitrary. *Id.* at 1111.

71. *E.g.*, Natural Resources Defense Council, Inc. v. Callaway, 389 F. Supp. 1263, 1279 (D. Conn. 1974).

of Engineers.⁷² But Congress and the Bureau of Reclamation have always treated both projects as divisible, self-contained projects.⁷³ Practically speaking, federal and state investment in the Garrison Dam and Reservoir Project did not necessarily mandate future investment in the Garrison Diversion Unit, although from the very first, one of the stated purposes of the dam and reservoir project was irrigation.⁷⁴ Thus, the Garrison Dam and Reservoir Project had independent utility from the proposed Garrison Diversion Project. Also, as previously noted, the Garrison Dam and Reservoir Project was completed before NEPA was enacted⁷⁵ and before environmental impact statements were a concern.

In reviewing the individual segments of the Garrison Diversion Unit, it is not as easy to find an independent utility for these segments apart from completion of the entire diversion project. Certainly Congress, in authorizing the Garrison Diversion Unit, did not intend construction of a pumping plant, a canal and a reservoir to be independent from its primary purpose—to divert water from the Missouri River for irrigation in selected areas of North Dakota.⁷⁶ But by segmenting the final environmental review of the project's principal supply works from the projected irrigation of the LaMoire and Oakes Section, the Central North Dakota Section and the Souris Section, the Bureau of Reclamation is severing an integrated relationship. The Bureau's proposed issuance of separate EIS's for these three irrigation sections has the effect of treating them as self-contained and separate from the whole.⁷⁷

As in *Trout Unlimited v. Morton*,⁷⁸ the issue is whether these segments or phases are so dependent on each other that it would be unreasonable "to undertake the first phase if subsequent phases were not also undertaken."⁷⁹ The House Committee on Government Operations has criticized the Bureau of Reclamation for continuing construction of the Snake Creek Pumping Plant, the McClusky Canal and the Lonetree Reservoir without fully assessing the environmental impacts of irrigation development in the LaMoire and Oakes Section, the Central North Dakota Section and the Souris Section.⁸⁰ The Committee has determined that the Bureau of Rec-

72. Note, *Selected Environmental Law Aspects of the Garrison Diversion Project*, 50 N.D.L. REV. 329, 330 (1974).

73. Flood Control Act of 1944, Pub. L. No. 78-534, ch. 665, § 9, 58 Stat. 887, 891. Congress authorized the Corps of Engineers to build the Garrison Dam and Reservoir Project, and the Bureau of Reclamation to construct the Garrison Diversion Unit.

74. S. Doc. No. 247, 78th Cong., 2d Sess. 5 (1944).

75. See E. ROBINSON, *supra* note 24, at 462.

76. GOVERNMENT OPERATIONS, *supra* note 4, at 14.

77. See, e.g., *Natural Resources Defense Council, Inc. v. Callaway*, 389 F. Supp. 1263 (D. Conn. 1974). The federal district court held that the major federal action in this case was a "single project, almost entirely self-contained." *Id.* at 1279.

78. 509 F.2d 1276 (9th Cir. 1974).

79. *Id.* at 1285.

80. GOVERNMENT OPERATIONS, *supra* note 4, at 18.

lamation's segmented approach to environmental assessment has resulted in a lack of information concerning the environmental impacts of the Garrison Diversion Unit Project on Canada, Minnesota, South Dakota and the National Wildlife refuge system.⁸¹ This information is considered necessary for informed decision making and minimizing environmental and economic impacts.⁸² Therefore, the Committee has recommended that land acquisition and construction on the three proposed irrigation sections be halted until the supplemental EIS's have been published, and that construction of the Lonetree Reservoir be deferred.⁸³

One circumstance mitigating the Bureau of Reclamation's segmented approach is the fact that construction on the principal supply works began in 1967, before NEPA was enacted.⁸⁴ Faced with NEPA requirements, the Bureau of Reclamation had to environmentally assess segments of a project already under construction, as well as proposed segments.⁸⁵ Still, the Bureau of Reclamation's regulations for preparing an EIS provide:

[I]f an ongoing project entails individual major features or separable operating entities not yet authorized or not yet funded for start of construction, an environmental statement is necessary if it is determined that any of the incremental features have a significant environmental impact.⁸⁶

Because the construction of the Garrison Diversion Unit's principal supply works compels subsequent development of the irrigation segments, there is only minimal independent utility for any particular segment standing by itself.⁸⁷

2. Irretrievable Commitment

In addition to the independent utility test, another inquiry is whether completion of the first segments or phase of a project constitutes an irreversible and irretrievable commitment of resources that requires further investment.⁸⁸ NEPA mandates preparation of an EIS for "any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented."⁸⁹

81. *Id.* at 2.

82. *Id.*

83. *Id.* at 3.

84. NEPA was enacted in 1969. Pub. L. No. 91-190, 83 Stat. 852 (codified in 42 U.S.C. §§ 4321-4347 (1970), as amended, (Supp. V 1975)).

85. FES, *supra* note 3, at I-1.

86. 37 Fed. Reg. 24,910 (Nov. 23, 1972).

87. FES, *supra* note 3, at VIII-40 to 41, curtailed development.

88. *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973).

89. NEPA, Pub. L. No. 91-190, § 102(2)(C)(v), 83 Stat. 852, 853 (codified in 42 U.S.C. § 4332(2)(C)(v) (1970)).

In *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*,⁹⁰ the Circuit Court of Appeals for the District of Columbia stated that a comprehensive EIS is required when irretrievable expenditures result in an irreversible commitment to a long-term project.⁹¹ At least one court has found that an irretrievable commitment of resources to a project necessitated a comprehensive EIS even when there was a possibility of no irreversible commitment to the project. The federal district court in *Atchison, Topeka & Santa Fe Railway Co. v. Callaway*⁹² stated:

Although it is conceivable that no further improvements of the Upper Missouri River System may occur, the fact that improvements are expected requires a present evaluation of their future impact. This Court cannot allow the Defendants on the one hand to segment the project and ignore the systematic impact and on the other cite as the justification for the increased capacity of the proposed structure the need for expansion of the capacity of the entire system.⁹³

The construction of the first few segments of the Garrison Diversion Project, the pumping plant, the canal and the reservoir, constitutes an irreversible and irretrievable commitment of resources if the Garrison Diversion Unit Project is to be implemented as proposed.⁹⁴ Although it is not certain whether there will be an irreversible commitment to full development of the Garrison Diversion Unit Project,⁹⁵ the segmented approach to environmental assessment often has the effect of foreclosing certain alternatives to a project, notably the alternative of no action.⁹⁶

3. Foreclosure of Alternatives

NEPA requires that an EIS contain a discussion of alternatives to the proposed action.⁹⁷ Courts can be very pragmatic when reviewing whether an EIS of limited scope can adequately assess alternatives to the proposed action. If it becomes evident that all the alternatives to the action are not being adequately assessed when the project is segmented and separate EIS's are issued, a court will require complete assessment of these segments in one, comprehensive EIS.⁹⁸

90. 481 F.2d 1079 (D.C. Cir. 1973).

91. *Id.* at 1092.

92. 382 F. Supp. 610 (D.D.C. 1974).

93. *Cf. Id.* at 622.

94. *Id.* at 622.

95. See generally *supra* note 4.

96. FES, *supra* note 3 at VIII-40.

97. NEPA, Pub. L. No. 91-190, § 102(2)(C)(iii), 83 Stat. 852, 853 (codified in 42 U.S.C. § 4332(2)(C)(iii) (1970)).

98. See, e.g., *Natural Resources Defense Council, Inc. v. Callaway*, 389 F. Supp. 1263, 1279 (D. Conn. 1974).

In *Appalachian Mountain Club v. Brinegar*,⁹⁹ a federal district court enjoined construction of a segment of a super highway until a comprehensive EIS discussing all the alternatives could be prepared.¹⁰⁰ Similarly, the Committee on Government Operations has recommended that development of the Oakes-LaMoure, Central North Dakota and Souris Sections of the Garrison Diversion Unit be halted until the proposed supplemental EIS's are issued.¹⁰¹ The Committee has specifically made a finding that "[t]he Bureau's schedule for preparation of supplemental environmental impact statements for segments of the project does not provide for an adequate or timely assessment of the project's environmental impacts or alternatives."¹⁰² Likewise critical in its report, the Institute of Ecology has noted that segmenting first, and preparing EIS's later, precludes alternatives to the first segments which might mitigate adverse environmental impacts.¹⁰³

The final EIS on the Garrison Diversion Unit Project recommends curtailed development rather than no action:

Because construction of principal supply features of the unit is now underway as directed and funded by the Congress, and because impacts of these features either have been or will be fully mitigated, curtailed development is considered to be the remaining alternative rather than nondevelopment.¹⁰⁴

Since the principal supply works are being constructed to divert water to irrigate the Oakes-LaMoure, Central North Dakota and Souris Sections, the cumulative environmental impacts of all these segments form the most appropriate scope of review for the Garrison Diversion Unit's final EIS.

In *Ecology Center of Louisiana, Inc. v. Coleman*,¹⁰⁵ the Fifth Circuit Court of Appeals, upon remand, sought a finding of whether two road segments were so interrelated as to demand assessment in a single, comprehensive EIS. Similarly, the close relationship of one segment of the Garrison Diversion Unit Project to another makes it difficult to review one segment independently of another.¹⁰⁶ At some point in development, the building block construction of the Garrison Diversion Unit segments may result in an irretrievable commitment of resources to an expansive irrigation system, foreclosing lesser development proposals.¹⁰⁷

99. 394 F. Supp. 105 (D.N.H. 1975).

100. *Id.* at 123.

101. GOVERNMENT OPERATIONS, *supra* note 4, at 3.

102. *Id.* at 18.

103. INSTITUTE OF ECOLOGY, *supra* note 32, at 86.

104. FES, *supra* note 3, at VIII-40.

105. 515 F.2d 860 (5th Cir. 1975).

106. For an interpretation of the independent utility test, see *supra* note 69.

107. See generally Act of August 5, 1965, Pub. L. No. 89-108, 79 Stat. 433.

Although there is no hard and fast rule against segmentation,¹⁰⁸ such an approach by the Bureau of Reclamation in assessing the environmental impact of the Garrison Diversion Unit Project appears to conflict with the spirit of NEPA.¹⁰⁹ The existence of a project plan¹¹⁰ and the interrelatedness of the project's segments merit a single, comprehensive EIS assessing the cumulative environmental impacts of the segments. By unduly segmenting its environmental review of the Garrison Diversion Unit Project, the Bureau of Reclamation appears to have abused its administrative discretion in defining its scope of review of the project. However, a different analysis is required to assess the Bureau of Reclamation's decision to limit its scope of review to the Garrison Diversion Unit Project and its determination not to issue a programmatic EIS on all diversion/irrigation development within the Missouri River Basin.

V. ASSESSING A BROAD-SCOPE REVIEW OF MISSOURI RIVER BASIN DIVERSION AND IRRIGATION

The Institute of Ecology¹¹¹ has criticized the Bureau of Reclamation for failing to address the broad-scope interrelationships of the Garrison Diversion Unit Project to the Missouri River Basin Program¹¹² as a whole. Because a plan of broad-scope development exists in the Missouri River Basin Program, the Institute of Ecology has supported the position that the final EIS on the Garrison Diversion Unit Project, a statement of local-scope, should at least address the reasons for the Bureau of Reclamation's decision not to issue a programmatic EIS on all development in the Missouri River Basin, or on a national system of irrigation, or even on regional irrigation in North and South Dakota.¹¹³ Nevertheless, the Bureau of Reclama-

108. The court in *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974) stated: "The rule against segmentation for Environmental Impact Statement purposes is not an imperative to be applied in every case. Its application vel non may depend on the scope of the project." *Id.* at 987.

109. The Bureau of Reclamation's segmented approach to environmental assessment has engendered a great deal of public criticism, since "a primary purpose of the bill is to restore public confidence in the Federal Government's capacity to achieve important public purposes and objectives and at the same time to maintain and enhance the quality of the environment." S. REP. NO. 91-296, 91st Cong., 1st Sess. 8 (1969). See also *supra* note 5.

110. Act of August 5, 1965, Pub. L. No. 89-108, 79 Stat. 433.

111. The Institute of Ecology has criticized the Bureau of Reclamation in a 1975 report, *supra* note 32, prepared by the Institute's Environmental Impact Assessment Project staff and the scientific team participating in the review. The report was edited by Gary L. Pearson, Walter L. Pomery, Glen A. Sherwood and John S. Winder, Jr.

112. INSTITUTE OF ECOLOGY, *supra* note 32, at 83-84.

113. The Institute of Ecology supports its position as follows:

The Garrison Diversion Unit in North Dakota and the Oahe Diversion Unit in South Dakota together are the major irrigation components of the Pick-Sloan plan. They are similar in design and scope, and they are being developed in the same time period. Both will transfer Missouri River water eastward and deposit it in other watersheds. Both will discharge return flows to the James River. Both will have profound effects on Central flyway migratory waterfowl. Both have tenuous economic bases. Both will impact already productive land and initiate changes in the same agricultural marketing system. Both are located in the same geographic region. More similarities

tion, which is responsible for developing irrigation within the Missouri River Basin Program,¹¹⁴ has never issued a programmatic EIS assessing the impacts of irrigation within the entire Missouri River Basin Program.¹¹⁵ The Bureau has discarded a broad-scope approach to an EIS based on the Missouri River Basin Program, choosing instead to issue only local-scope EIS's for such program developments as the Garrison Diversion Unit Project. But, as one federal court has observed:

There is no litmus test to determine what should or should not be covered in an impact statement. It is for a court to resolve that question in light of the totality of all the facts and circumstances in each case.¹¹⁶

The issue, then, is whether the Bureau of Reclamation abused its administrative discretion by failing to issue a programmatic EIS on the Missouri River Basin Program, in which the impact of the Garrison Diversion Unit Project on the entire program would be assessed. When more than one major federal action is contemplated for the same geographical area, such as the Missouri River Basin, the responsible federal agency or agencies must examine the scope of the individual projects to determine whether these actions demand a programmatic EIS.¹¹⁷ One can challenge an agency's failure to prepare a broad-scope EIS without first receiving a ruling on the substantive adequacy of the prepared EIS.¹¹⁸

A. CHALLENGING THE SCOPE OF AN EIS

To successfully attack the scope of an EIS, a plaintiff must show "arbitrary action"¹¹⁹ on the part of the federal decisionmaker in limiting the scope of environmental assessment. The United States Supreme Court, in *Kleppe v. Sierra Club*,¹²⁰ recently held that absent a showing that the decisionmakers acted arbitrarily in limiting the scope of an EIS, there is a presumption that the federal agencies have properly exercised their discretion to resolve the technical issues involved in determining the region, if any, for which a compre-

can be listed at some length. If there are differences, they are that a political boundary separates the projects, Congress authorized them separately, and BuRec [Bureau of Reclamation] has divided them for administrative convenience.

Id. at 84.

114. Flood Control Act of 1944, Pub. L. No. 78-534, ch. 665, § 9, 58 Stat. 887, 891.

115. INSTITUTE OF ECOLOGY, *supra* note 32, at 83-84.

116. Prince George's County, Md. v. Holloway, 404 F. Supp. 1181, 1186 (D.D.C. 1975).

117. 40 C.F.R. § 1500.6(d)(1) (1975) quoted at *supra* note 63.

118. See No East-West Highway Comm., Inc. v. Whitaker, 403 F. Supp. 260, 279 (D.N.H. 1975). See also *Sierra Club v. Morton*, 514 F.2d 856, 868-70 (D.C. Cir. 1975).

119. *Kleppe v. Sierra Club*, 96 S. Ct. 2718, 2731 (1976).

120. 96 S. Ct. 2718 (1976).

hensive EIS is mandated.¹²¹ The Court in *Kleppe* acknowledged that cumulative environmental impacts resulting from federal actions may trigger the need for a programmatic EIS, but also stated:

[D]etermination of the extent and effect of these factors, and, particularly, identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies. . . . Even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements.¹²²

In *Kleppe*, the Court could find no formal agency proposal regarding coal development of the Northern Great Plains Region on which to base a programmatic EIS, and stated that "all proposals are for actions of either local or national scope."¹²³

NEPA was designed to insure overall project assessment, rather than assessment "in small but steady increments which perpetuate rather than avoid the recognizable mistakes of prior decades."¹²⁴ However, the maximum scope of review needed to assess these impacts is not set out in the Act. Therefore, NEPA does not mandate that the Bureau of Reclamation first prepare a programmatic EIS on the Missouri River Basin Program in order to adequately assess the environmental impacts of the Garrison Diversion Unit Project in a subsequent project EIS. Section 102 (2) (C)¹²⁵ of NEPA sets the minimum requirements for an EIS; but the impact of the environmental analysis depends on the scope of the action the EIS purports to assess. In the instant case, the Bureau of Reclamation chose to assess the Garrison Diversion Unit Project apart from its role in regional diversion/irrigation and the Missouri River Basin Program.

B. LIMITING THE SCOPE OF REVIEW

Factors which weigh in favor of limiting the scope of review to a narrower unit of a program include the element of time¹²⁶ and the size of the program.¹²⁷ Any time-table set for completion of all the projects contemplated by the Missouri River Basin Program would be speculative and indefinite, although the final EIS for the Garri-

121. *Id.* at 2731.

122. *Id.* at 2732.

123. *Id.* at 2725.

124. *Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp.*, 362 F. Supp. 627, 637 (D. Vt. 1973), quoting S. REP. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

125. Pub. L. No. 91-190, 83 Stat. 852, 853 (codified in 42 U.S.C. § 4332(2)(C)(i)-(v) (1970)) quoted at *supra* note 7.

126. *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974).

127. *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

son Diversion Unit Project estimates a twenty-five year period of construction for that unit.¹²⁸

In a similar situation, the Wallisville Dam in Texas was found in *Sierra Club v. Callaway*¹²⁹ to be a severable unit from the comprehensive Trinity Project.¹³⁰ The court stated:

The element of time is materially important and cannot be ignored in determining the issue as to whether the projects are separate. Pursuant to the 1958 restudy resolution the Corps recommended the development of the Trinity Project over a period of from 40 to 50 years. Its ultimate completion is not a certainty, but depends on wisdom and judgment . . . of Congress. . . .¹³¹

In the case of the Missouri River Basin Program, each unit must also be reauthorized by Congress, and appropriations for initial construction must be separately approved.¹³²

The Missouri River Basin Program is a federal proposal for an action of regional scope.¹³³ However, because of the separate reauthorizations,¹³⁴ the size of the program, and the indefinite time-table for completing the different units of the program, it appears that the Bureau of Reclamation has not unreasonably exercised its discretion in preparing a local-scope EIS on the Garrison Diversion Unit Project, without first completing a programmatic EIS on the entire Missouri River Basin Program.

The CEQ has acknowledged the difficulty a federal agency faces in preparing an EIS for a federal program that involves a multiplicity of individual actions, as in the case of the Missouri River Basin Program:

In part, the problem requires careful agency attention to the definition of the "action" that the agency is undertaking. If the definition is too broad and the program too far removed from actual implementation, the resulting analysis is likely to be too general to prove useful. On the other hand, an excessively narrow definition is likely to result in impact statements that ignore the cumulative efforts of a number of individually small actions, or that come so late in the process that basic program decisions are no longer open for review.¹³⁵

128. FES, *supra* note 3, at I-3. "Project costs of over \$340 million will take place during a 25-year construction period with the largest expenditures expected in the first 17 years." *Id.*

129. *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974).

130. *Id.* at 990.

131. *Id.* at 988.

132. Act of July 19, 1966, Pub. L. No. 89-515, 80 Stat. 322.

133. RECLAMATION PROJECT, *supra* note 11.

134. Act of July 19, 1966, Pub. L. No. 89-515, 80 Stat. 322.

135. 3 ENVIR. REP. (BNA) 87 (May 19, 1972) (memorandum to federal agencies from the Council on Environmental Quality).

Although the EIS process can apply to both individual project¹³⁶ and program¹³⁷ actions, such as the Garrison Diversion Unit Project and the Missouri River Basin Program respectively, it is difficult for agencies to define the programs for which EIS's are appropriate and useful.¹³⁸ The courts are inclined to leave this determination to the federal agencies, citing agency expertise as the rationale.¹³⁹

VI. CONCLUSION

Ideally, the Bureau of Reclamation should have issued two EIS's involving the Garrison Diversion Unit Project: one programmatic statement assessing diversion/irrigation development within the Missouri River Basin Program, in which the Garrison Diversion Unit's impact on the entire program would have been evaluated; followed by a second statement on the individual project, detailing the environmental consequences of the Garrison Diversion Unit. However, it does not seem unreasonable that the Bureau of Reclamation has declined to issue a programmatic EIS on the Missouri River Basin Program when one considers the size of this project and the indefinite time-table involved. Yet the Bureau of Reclamation could have easily stated its reasons for not preparing such a programmatic statement in the final EIS issued on the Garrison Diversion Unit Project. At the same time, the Bureau could have briefly detailed how the Garrison Diversion Unit Project fits environmentally into the total scheme of the Missouri River Basin Program. The Bureau's failure to do so is an oversight which leaves the record incomplete on the question of the agency's exercise of its administrative discretion in limiting the scope of review.

The individual EIS assessing the Garrison Diversion Unit Project, however, seems unduly segmented. The initial segments of the project—the pumping plant, the canal and the reservoir, and the proposed irrigation segments; the Oakes-LaMoure, North Central and Souris Sections—are related geographically, environmentally and programmatically.¹⁴⁰ The Bureau of Reclamation has recognized this fact and has attempted to issue an overall EIS¹⁴¹ assessing the project as a whole. However, its intent to do so has been defeated by the segmentation of the EIS into what is essentially a final environ-

136. CEQ REPORT, *supra* note 8, at 12. "Individual actions account for most EIS's to date. Examples are nuclear powerplant licenses, water resource projects, and highway or housing project funding." *Id.*

137. *Id.* "Repetitive actions or actions that affect a clearly delineated, meaningful geographic area are often defined as programs and are grouped into program EIS's. *Id.*

138. *Id.*

139. *E.g.*, *Kleppe v. Sierra Club*, 96 S. Ct. 2718, 2731 (1976).

140. 3 ENVIR. REP. (BNA) 87 (May 19, 1972) (memorandum to federal agencies from the Council on Environmental Quality). "Individual actions that are related either geographically, or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single, program statement." *Id.*

141. FES, *supra* note 3, at I-1.

mental review of the project's initial segments, with only a statement of intent to review the detailed, environmental impacts of the proposed irrigation segments. This segmented approach fails to assess the cumulative environmental effects which the project as a whole will generate. By assessing the Garrison Diversion Unit Project segmentally rather than comprehensively, the Bureau of Reclamation has handicapped federal and state interests involved in any environmental decision making concerning the project.

ADDENDUM

The suit by the National Audubon Society challenging the adequacy of the Garrison Diversion Unit Project EIS was settled out of court on May 11, 1977.¹⁴² The settlement allows completion of the McClusky Canal, but no other construction or land acquisition will be resumed until a comprehensive EIS on the Garrison Diversion Unit Project, or alternatives, has been completed. The State of North Dakota is planning to challenge the validity of this settlement.

PATRICIA BOSSERT

142. The Grand Forks (N.D.) Herald, May 11, 1977, at 1.