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Impacts of the Army Corps of Engineers' Pick-Sloan Program on the Indian Tribes of the Missouri River Basin

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“Every time the Corps of Engineers thinks of something, they create another problem for us Indians.”¹

The Late Rueben Snake
Chairman, Winnebago Indian Tribe

INTRODUCTION

“Rivers are nature’s landscape painters.”² And nature may have no better landscape artist than the Missouri River.

Society, however, has tried to harness the power of this great river. In response to catastrophic flooding in the lower Missouri basin, Congress enacted the Flood Control Act of Dec 1944.³ This statute

¹ DANIEL MCCOOL, COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT AND INDIAN WATER 178–79 (1987).

² DANIEL B. BOTKIN, PASSAGE OF DISCOVERY: THE AMERICAN RIVERS GUIDE TO THE MISSOURI RIVER OF LEWIS AND CLARK 7 (1999).

³ Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (codified in scattered Sections of 16, 33, and 43 U.S.C.), available at <http://www.usbr.gov/power/legislation/fldcntra.pdf>.

authorized the Army Corps of Engineers to construct and operate five massive earthen dams on the main stem of the Missouri River for flood control, navigation and hydropower.⁴ The Bureau of Reclamation was authorized to build numerous smaller dams on the tributaries to the Missouri River, primarily for irrigation and recreation.⁵ The projects authorized in the 1944 Flood Control Act are collectively referred to as the “Pick-Sloan Plan.”⁶

The Pick-Sloan Plan devastated the Indian Reservations along the Missouri River.⁷ The large dams on the Missouri River main stem inundated over 356,000 acres of Tribal land in the late 1950s and early 1960s.⁸ The wooded Missouri River riparian bottomlands—the aboriginal homeland of the region’s tribes—were completely destroyed.⁹ Entire tribal communities were relocated to new town sites, situated on the barren plains above the river valley.¹⁰ These areas lacked the rich riparian resources of the tribes’ aboriginal homelands.¹¹

The new town sites lacked infrastructure, such as roads, water systems, schools and community facilities. The statutes authorizing the taking of Reservation lands required the Corps of Engineers to replace the infrastructure,¹² but the Corps failed to do so.¹³ This exacerbated the long term adverse effects on the tribes.¹⁴

⁴ § 9, 58 Stat. at 891 (noting that a preexisting dam on the Missouri River, the Fort Peck Dam in northeastern Montana, was integrated into the Flood Control Act projects). The Fort Peck project was originally authorized in the Rivers and Harbors Act of 1938. Rivers and Harbors Act of 1938, Pub. L. No. 75-685, 52 Stat. 802 (codified in scattered Sections of 16, 33, and 43 U.S.C.), *available at* <http://planning.usace.army.mil/toolbox/library/compilation/1790-1939-V3.pdf>.

⁵ § 9, 58 Stat. at 891.

⁶ ETSI Pipeline Project v. Missouri, 484 U.S. 495, 500–02 (1988).

⁷ MICHAEL L. LAWSON, DAMMED INDIANS: THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX, 1944–1980, at 57–58 (1982).

⁸ S. REP. NO. 111-357, at 1–2 (2010), *available at* <http://www.gpo.gov/fdsys/pkg/CRPT-111srpt357/html/CRPT-111srpt357.htm>.

⁹ Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 484–87 (1998) (describing the land and natural resources of the Fort Berthold Reservation that were inundated by Garrison Dam).

¹⁰ *Id.*

¹¹ *Id.*

¹² The Secretary of the Army . . . is authorized and directed . . . to locate and construct on tribal land selected by the Crow Creek Tribal Council and with the approval of the Secretary of the Interior, a townsite adequate for fifty homes,

This Article provides an overview of the historic and ongoing impacts of the Pick-Sloan project on the affected Indian tribes. There is a discussion of the Flood Control Act of 1944 and subsequent federal legislation authorizing the acquisition of tribal lands for the site of the reservoirs. The resulting relocation of entire Reservation communities disrupted the socioeconomic and cultural life of these Tribes.¹⁵ This paper will assess the adequacy of compensation authorized by Congress, along with the need for additional federal action.

Many tribes have expressed concern with the ongoing impacts of the operation of the dams on the remaining tribal land and water.¹⁶ Accordingly, there is a discussion of the disproportionate impacts on the Reservation environment, and on the impacts to Native American cultural resources. The future challenges posed by water demands for Mississippi River navigation and hydraulic fracturing are also discussed.

I

OVERVIEW OF THE MISSOURI RIVER BASIN PICK-SLOAN PROGRAM

A. The Natural Missouri River and its Vast Watershed

The vast Missouri River watershed has been described as follows:

The Missouri [River] Basin thus presents us with a world of striking contrasts.

including streets, utilities, including water, sewage, and electricity . . . a community center containing space and facilities for community gatherings, tribal offices, tribal council chamber, Bureau of Indian Affairs and Public Health Service offices and quarters and a combination gymnasium and auditorium.

Act of Oct. 3, 1962, Pub. L. No. 87-734, § 6, 76 Stat. 698, 700, available at <http://www.gpo.gov/fdsys/pkg/STATUTE-76/pdf/STATUTE-76-Pg698.pdf>.

¹³ “Our community was never rebuilt.” *Crow Creek Infrastructure Trust Fund Development Act: Joint Hearing Before the S. Comm. on Indian Affairs and the Subcomm. on Native American and Insular Affairs of the H. Comm. on Res.*, 104th Cong. 66 (Statement of Ambrose McBride, Tribal Elder, Crow Creek Indian Reservation), available at <http://babel.hathitrust.org/cgi/pt?id=pur1.32754066677075;view=1up;seq=60>.

¹⁴ *Id.* at 65–66.

¹⁵ See *Final Report and Recommendations of the Garrison Unit Joint Tribal Advisory Committee: Joint Hearing Before the S. Comm. on Indian Affairs, the S. Comm. on Energy and Natural Res., and the H. Comm. on Interior and Insular Affairs*, 100th Cong. 49–52, 54, 56 (1987), available at <http://babel.hathitrust.org/cgi/pt?id=pur1.32754074491261;view=1up;seq=1>.

¹⁶ *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 637 (8th Cir. 2005) *cert. denied*, *North Dakota v. U.S. Army Corps of Eng’rs*, 547 U.S. 1097 (2006).

The upper basin, which is usually thought of as that area north of Sioux City, Iowa, has no major city. It is in the upper basin, however, that we find the Great Sioux nation, the northern great plains, and large Sections of the Rocky Mountains. The lower basin includes such cities as Omaha, St. Louis and Kansas City. If the upper basin finds its history in the old west, range life, and the agricultural settlements generated by the homestead movement, the lower basin finds its history in the Mark Twain world of river commerce Whereas the economy of the upper basin remains agricultural that of the lower basin has risen with the tide of post-World War II investment and industrial growth.¹⁷

The rushing waters of three alpine rivers, the Jefferson, Madison, and Gallatin, converge on the central Montana prairie to form the Missouri River.¹⁸ The Missouri flows north and then east into North Dakota.¹⁹ Engulfing minor sloughs, as well as major tributaries such as the Yellowstone River, the Missouri widens as it caroms across the plains.²⁰ One boat runner at the turn of the century described the Missouri River this way:

The river runs crooked through the valley; and just the same way the channel runs crooked through the river The crookedness you see ain’t half the crookedness there is.²¹

The Sioux called the river *Mni Sose*, referring to the dark, murky color of the sediment-laden waters.²² For their part, “farmers joked that the river’s water was, ‘too thick to drink and a mite too thin to plow.’”²³

The river veers southward on the central plains, bisecting the Dakotas, and meandering to the east, where it flows through farm lands, and eventually drains into the Mississippi River at St. Louis. By the time it reaches its confluence with the Mississippi, the waters

¹⁷ John H. Davidson & Thomas Earl Geu, *The Missouri River and Adaptive Management: Protecting Ecological Function and Legal Process*, 80 NEB. L. REV. 816, 822 (2001).

¹⁸ LAWSON, *supra* note 7, at 4.

¹⁹ *Id.* at 8–9.

²⁰ *Id.*

²¹ BOTKIN, *supra* note 2, at 8.

²² See Mni Sose Intertribal Water Rights Coalition, *Testimony to the Western Water Policy Review Commission* (Mar. 26, 1996).

²³ LAWSON, *supra* note 7, at 4.

of the Missouri River will have traveled nearly twenty-five hundred miles, and drained one-sixth of the United States.²⁴

One court described the Missouri Basin as “one of the largest and most beautiful in our country.”²⁵ Lewis and Clark described “dozens of species previously unknown to science, ranging from coyotes to prairie dogs to cutthroat trout.”²⁶ The river they encountered, “featured thousands of islands and sandbars separated by two constantly shifting channels.”²⁷ “Dense forests, shallow wetlands, and endless prairie bordered the river. . . . [It was] a land filled with thousands of buffalo, elk, antelope, and grizzly bears.”²⁸ And of course, there were Indians.

The tribes of the upper plains wintered along the Missouri River and its tributaries, for thousands of years.

Indian Tribes in the Upper Missouri River Basin were fierce, warlike, and willing to defend their homelands against the intruding non-Indian population. That fact forced the United States to invoke the most basic power of a sovereign—to wage wars and to effectuate peace by Treaties resolving the differences between nations.²⁹

Accordingly, the United States entered a number of treaties with the Indian Nations of the Missouri Basin.³⁰ The Fort Laramie Treaty of September 17, 1851, outlined the territory of several Missouri Basin tribes, including the Sioux Nation, and the Mandan and Arikara Tribes.³¹ The Mandans and their sister Tribes were renowned for their agriculture in the lush Missouri bottomlands of the upper plains.³² The Sioux Nation, which developed the great horse culture of the plains, established the Great Sioux Reservation in the 1868 Fort Laramie

²⁴ BOTKIN, *supra* note 2, at 8.

²⁵ *Am. Rivers v. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 236 (D.D.C. 2003).

²⁶ Stephen E. Ambrose, *Forward* to DANIEL B. BOTKIN, *PASSAGE OF DISCOVERY: THE AMERICAN RIVERS GUIDE TO THE MISSOURI RIVER OF LEWIS AND CLARK*, at xv (1999).

²⁷ *Id.*

²⁸ *Id.*

²⁹ William H. Veeder, *Indian Prior and Paramount Rights Versus States Rights to the Use of Water*, 51 N.D. L. REV. 107, 121 (1974).

³⁰ See generally Charles J. Kappler, *Indian Affairs: Laws and Treaties Volume II*, INDIAN AFFAIRS: LAWS AND TREATIES, <http://digital.library.okstate.edu/kappler/Vol2/Toc.htm> (last visited Feb. 22, 2015).

³¹ Charles J. Kappler, *Treaty of Fort Laramie With Sioux, Etc., 1851*, INDIAN AFFAIRS: LAWS AND TREATIES, <http://digital.library.okstate.edu/kappler/Vol2/treaties/sio0594.htm> (last visited Feb. 22, 2015).

³² See Roy W. Meyer, *Fort Berthold and Garrison Dam*, 35 NORTH DAKOTA HISTORY 220 (1968).

Treaty.³³ The vast reservation comprised all of present-day South Dakota west of the Missouri River, with the river's east bank delineating the reservation boundary.³⁴ The Missouri River Basin truly was Indian Country.³⁵

B. Enactment and Implementation of the 1944 Flood Control Act

The dust bowl drought on the plains during the 1930s gave way to successive wet years.³⁶ Severe floods in the early 1940s led to a clamor in the lower Missouri Basin for more federal assistance for flood control.³⁷ The federal water management agencies, the Army Corps of Engineers and Bureau of Reclamation, developed competing plans for the impoundment of water in the upper basin.³⁸

The Chief of Engineers for the Corps was Colonel Lewis A. Pick.³⁹ Under Pick's leadership, the Corps developed a plan for five massive dams on the main stem of the Missouri River to hold back floodwaters in huge reservoirs in the Dakotas.⁴⁰

The plan called for five dams and reservoirs, all of them of monstrous. Garrison Dam, in western North Dakota, was the largest . . . Two and one-half miles long, 210 feet high, the dam would be the second biggest structure on earth . . . The other dams, Oahe, Gavins Point, Big Bend, Fort Randall—would be smaller, but large enough to dwarf anything else around.⁴¹

The Bureau of Reclamation planned a different approach. Established under the Reclamation Act of 1902, the agency's mission

³³ Charles J. Kappler, *Treaty with the Sioux—Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee—and Arapaho, 1868*, INDIAN AFFAIRS: LAWS AND TREATIES, <http://digital.library.okstate.edu/kappler/Vol2/treaties/sio0998.htm> (last visited Feb. 22, 2015).

³⁴ *Id.*

³⁵ Davidson & Geu, *supra* note 17, at 824–25 (describing the Indian Reservations in the upper Missouri Basin).

³⁶ *Id.* at 827–28; LAWSON, *supra* note 7, at 10–11.

³⁷ Davidson & Geu, *supra* note 17, at 829.

³⁸ Davidson & Geu, *supra* note 17, at 828–30; LAWSON, *supra*, note 7, at 11–17; MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 189–94* (1986).

³⁹ Davidson & Geu, *supra* note 17, at 829.

⁴⁰ H.R. REP. NO. 78-475 (1944) (“Pick Plan”).

⁴¹ REISNER, *supra* note 38, at 191.

involved water supplies for irrigation in the semiarid west.⁴² Accordingly, the agency proposed numerous small dams on the tributaries to the Missouri River in the upper basin.⁴³ The Reclamation projects would utilize the impounded waters for flood control, hydropower, and irrigation, thereby providing economic benefit to the smaller, rural communities in the Dakotas and Montana.⁴⁴ This proposal became known as the “Sloan Plan,” named after Glenn Sloan, the director of the agency’s Billings, Montana Regional office.⁴⁵

The two agencies pitched their respective plans.⁴⁶ The Corps appealed to urban communities in the lower basin, which suffered the loss of life and property in the recent flooding.⁴⁷ The Corps’ plan also fit neatly with the Roosevelt administration’s vision of large projects, and comprehensive planning.⁴⁸ But, the governors of Wyoming, Montana, and North Dakota came out for the Sloan plan.⁴⁹ Like the Pick Plan, the estimated costs and proposed benefits of the irrigation projects appeared dubious.⁵⁰ However, the Sloan Plan was presented with greater engineering detail, while the Corps’ plan seemed oversold by the blustery Colonel Pick.⁵¹ As historian Michael Lawson explained, “Congress now had to consider two plans representing the contending claims, goals, and ambitions of two powerful federal agencies with fundamentally different interests.”⁵²

It would take the emergence of a third proposal for the development of the Missouri River, to break the logjam. On August 18, 1944, Montana Senator James Murray introduced legislation to establish a Missouri Valley Authority, based upon the independent

⁴² Reclamation Act of 1902, 43 U.S.C. §§ 372, 383 (1902), *available at* <https://www.wapa.gov/ugp/powermarketing/2021PMI/HistoricalDocs/ReclamationAct.1902.pdf>.

⁴³ S. DOC. NO. 78-191(1944) (“Sloan Plan”).

⁴⁴ *Id.*

⁴⁵ LAWSON, *supra* note 7, at 15.

⁴⁶ *Id.*

⁴⁷ *Id.* at 16; *see also* MCCOOL, *supra* note 1, at 95–96.

⁴⁸ LAWSON, *supra* note 7, at 13.

⁴⁹ *Id.* at 14.

⁵⁰ “From the outset irrigation was a dream without foundation in fact, science, or economic demand.” Davidson & Geu, *supra* note 17, at 836. “The General Accounting Office reviewed six reclamation projects and found that repayments cover less than 10 percent of actual costs.” MCCOOL, *supra* note 1.

⁵¹ LAWSON, *supra* note 7, at 13.

⁵² *Id.* at 16.

public corporation model of the Tennessee Valley Authority.⁵³ The prospect of a decentralized and independent agency empowered with the comprehensive planning and development of the Missouri Basin prompted the Corps of Engineers and Bureau of Reclamation to join forces.⁵⁴ In what a critic called, “a shameless, loveless shotgun wedding,” the two agencies agreed simply to combine their two plans.⁵⁵ Thus, the “Pick-Sloan Program” came about.⁵⁶

The resulting compromise was enacted as the Flood Control Act of 1944.⁵⁷ Section 9(a) of the act contains the operative language.⁵⁸ This Section reads as follows:

The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.⁵⁹

The act authorized “channel and major drainage improvements” in the lower Missouri Basin.⁶⁰ Along with work conducted under the authority of the River and Harbors Act,⁶¹ this resulted in the construction by the Corps of a 9-foot-wide and 300-foot-deep artificial channel from Sioux City, Iowa, to the mouth of the Missouri, at St. Louis.⁶² The large dams and reservoirs in the upper basin remain the cornerstone of Pick-Sloan. However, it is the fledging navigation in the lower Missouri basin, enabled by the channelization

⁵³ S. 2089, 78th Cong. (1944).

⁵⁴ LAWSON, *supra* note 7, at 18.

⁵⁵ *Id.* at 19.

⁵⁶ ETSI Pipeline Project v. Missouri, 484 U.S. 495, 500–02 (1988) (describing the legislative history of the Pick-Sloan Program).

⁵⁷ Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887–908 (codified in scattered Sections of 16, 33, and 43 U.S.C.).

⁵⁸ *Id.* at 891.

⁵⁹ *Id.* at 806. The House Document 475 contains the Pick Plan, H.R. DOC. NO. 475, 78th (1944); and the Senate Document 191 prescribes the Sloan Plan, S. DOC. NO. 191, 79th Cong. (1944). The two plans were combined and reconciled in the joint engineering report printed in S. DOC. NO. 247, 78th Cong. (1944).

⁶⁰ 58 Stat. at 798.

⁶¹ 33 U.S.C. § 540 (2012).

⁶² U.S. ARMY CORPS OF ENG'RS, NORTHWESTERN DIV., FINAL ENVIRONMENTAL IMPACT STATEMENT: MISSOURI RIVER MASTER WATER CONTROL MANUAL REVIEW AND UPDATE, at 1-1 (2004), available at <http://www.nwd-mr.usace.army.mil/mmanual/feis/Index.htm>.

and water flows supplied by the dams, that became the source of controversy over water management under the Pick-Sloan program.⁶³

The Flood Control Act authorized the Bureau of Reclamation's Sloan Plan, which included numerous irrigation projects in the more arid upper basin.⁶⁴ The 1944 Flood Control Act also authorized the development of dams, diversion works and irrigation for 2,927,100 acres of land in the Dakotas and Montana.⁶⁵ However, only a small portion of the irrigation authorized under the Pick-Sloan program was actually developed.⁶⁶ The economic infeasibility of most of the projects, along with environmental concerns, stifled most of the irrigation projects authorized in the 1944 Flood Control Act.⁶⁷

Yet these projects remain congressionally authorized components of Pick-Sloan. This had the effect of easing the repayment of the federal debt for the overall program. Section 9 of the Flood Control Act provided that those project functions more able to pay (e.g., hydropower) were to repay to the U.S. Treasury the federal investment for those project functions less able to repay their cost (e.g., irrigation).⁶⁸ This Section also provided that the federal cost of Pick-Sloan irrigation was to be reimbursed on the same terms as those prescribed under the Reclamation Act of 1902.⁶⁹ The highly subsidized repayment structure under the Reclamation Act included principal payment deferment and zero percent interest on the federal cost of the project.⁷⁰ Consequently, the favorable repayment terms for these nonexistent projects was applied to the repayment of the debt for the entire Pick-Sloan program.⁷¹

⁶³ *In re* Operation of the Mo. River Sys. Litig., 421 F.3d 618, 629–30 (8th Cir. 2005) (“Nothing in the text or legislative history of the FCA suggests that Congress intended the priority of interests under the FCA to shift according to their relative economic value. Arguments based on the wisdom of the priorities established by the FCA must be addressed to Congress.” *Id.*).

⁶⁴ 58 Stat. at 891.

⁶⁵ *Id.*

⁶⁶ DORIS OSTRANDER DAWDY, CONGRESS IN ITS WISDOM: THE BUREAU OF RECLAMATION AND THE PUBLIC INTEREST 57–58 (1989).

⁶⁷ See, e.g., H.R. REP. NO. 99-525, at 9–11 (1986).

⁶⁸ 58 Stat. at 807.

⁶⁹ *Id.*

⁷⁰ U.S. BUREAU OF RECLAMATION, 88TH CONG., REP. ON FINANCIAL POSITION OF THE MISSOURI RIVER BASIN PROJECT (1963).

⁷¹ See WESTERN AREA POWER ADMINISTRATION, PICK-SLOAN MISSOURI BASIN PROGRAM POWER RATE ADJUSTMENT (1987).

Thus, the Congress established extremely generous principles for the repayment of the federal investment for the Pick-Sloan program.⁷² This enabled the federal government to market the hydropower produced at the Pick-Sloan dams at very low rates.⁷³ In fact, Pick-Sloan's hydropower benefit became its most economically valuable project function.⁷⁴

Section 6 of the Flood Control Act authorized "contracts with States, municipalities, private concerns, or individuals . . . for domestic and industrial use for surplus water that may be available at any reservoir."⁷⁵ This Section contemplated that after all of the dams and irrigation works authorized in Section 9 were completed and water supplied accordingly, the Corps of Engineers could market surplus waters remaining in the reservoirs. However, little of the irrigation authorized was developed.⁷⁶ Recent determinations by the Corps for the amount of surplus water available in the Missouri River main stem reservoirs led to considerable controversy.⁷⁷

The Flood Control Act lacked any mitigation provisions for the affected Indian Tribes. The only mention of Indians in the act itself is in Section 9(c), which provides that the few Indian irrigation projects authorized in the Sloan Plan would be operated "in accordance with the laws relating to Indian lands."⁷⁸

C. A River Transformed

"Today, Lewis and Clark (as well as the Indians who helped them) would hardly recognize much of the Missouri River."⁷⁹ The river "would simply be *unrecognizable* to them."⁸⁰ "This historic river is

⁷² Section 5 of the Flood Control Act requires the sale of Pick-Sloan hydropower "at the lowest possible rates to consumers consistent with sound business principles." 58 Stat. at 801.

⁷³ *Id.* at 804.

⁷⁴ U.S. ARMY CORPS OF ENG'RS, NORTHWESTERN DIV., *supra* note 62, at 7-197.

⁷⁵ 58 Stat. at 804.

⁷⁶ ETSI Pipeline Project v. Missouri, 484 U.S. 495, 504-07 (1988).

⁷⁷ *See infra* Part III.

⁷⁸ 58 Stat. at 807.

⁷⁹ Ambrose, *supra* note 26.

⁸⁰ Robert Redford, *Afterword* to DANIEL B. BOTKIN, *PASSAGE OF DISCOVERY: THE AMERICAN RIVERS GUIDE TO THE MISSOURI RIVER OF LEWIS AND CLARK*, at 211 (1999).

now one-third reservoirs, one-third dredged channels, and only one-third ecologically vulnerable free-flowing water.”⁸¹

The Corps of Engineers’ dams on the Missouri River are huge. When full, they impound 73.4 million acre-feet of water in the Dakotas and Montana.⁸² This constitutes “the largest amount of water stored on any United States river system.”⁸³ These dams transformed the free-flowing Missouri River into a chain of very large reservoirs in the upper basin.⁸⁴ The reservoirs inundated vast riparian forests of the Missouri River bottomlands, resulting in a dramatically altered landscape.⁸⁵ Damming permanent disrupted patterns of flooding and sedimentation and altered the geomorphology of a river spanning twenty-five miles.⁸⁶

The river channel was dammed, the riparian habitat inundated, and huge reservoirs replaced the braided, rolling river.⁸⁷ “The worst natural damage was the flooding of some of the best riparian waterfowl habitat in the world.”⁸⁸ The wooded river bottomlands on numerous Indian Reservations were destroyed.⁸⁹ The Indians relied on this land for fish, game, timber, and agriculture.⁹⁰ It was their aboriginal—and treaty protected—homeland.

The Corps of Engineers channelized the lower Missouri, and constructed levees for the retention of flood waters.⁹¹ This enabled the Corps to alter the natural hydrograph pattern of spring flooding, and stabilize water flows for navigation.⁹² The Corps of Engineers provided lower Missouri basin residents everything one would want from a river—a perfect artificial channel, steady stream flows, flood protection—everything except a natural river.

⁸¹ John E. Thorson, *Voyage of Rediscovery: Lessons from Lewis & Clark for Missouri River Managers*, 6 GREAT PLAINS NAT. RESOURCES J. 121, 123 (2002).

⁸² U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., *supra* note 62, at 2–3.

⁸³ A. Dan Tarlock, *The Missouri River: The Paradox of Conflict Without Scarcity*, 2 GREAT PLAINS NAT. RESOURCES J. 1, 2 (1997).

⁸⁴ REISNER, *supra* note 38, at 191–92.

⁸⁵ LAWSON, *supra* note 7, at 56.

⁸⁶ See NATURAL RESOURCES CONSERVATION SERVICE, PHASE II SEDIMENTATION ASSESSMENT FOR THE UPPER MISSOURI RIVER BASIN (2009), *available at* <http://msaconline.com/wp-content/uploads/2015/01/Missouri-River-Phase-II-Report.pdf>.

⁸⁷ REISNER, *supra* note 38, at 199.

⁸⁸ *Id.*

⁸⁹ S. REP. NO. 111-357, at 1-2 (2010).

⁹⁰ *Id.*

⁹¹ *Am. Rivers v. Army Corps of Eng’rs*, 271 F. Supp. 2d 230, 238–39 (D.D.C. 2003).

⁹² *Id.*

There is nothing natural about the Missouri River today. As Professor John Davidson explained,

The continuing story of the Missouri Basin is the story of river development. To understand the history of this river's development, one must recognize that it is the result of the constant playing-out of the tensions and conflicts inherent in the basin. Today's river is intensively developed. In the upper basin there are six massive main stem reservoirs which convert the river north from Yankton, South Dakota into one large flat-water lake. South from there the river is channeled in order to support navigation and guide the river to its mouth near St. Louis. Flows from the Missouri are, in turn, an essential component of Mississippi River navigation.⁹³

II

IMPACTS OF DAM CONSTRUCTION ON THE INDIAN RESERVATIONS ALONG THE MISSOURI RIVER

A. Inundation of Land and Relocation of Tribal Communities

The Fort Laramie Treaty of 1851 established the upper Missouri Basin as Indian Country.⁹⁴ Article 5 of the treaty delineated the "respective territories" of the Sioux Nation, Gros Ventre, Mandan, and Arikara Nations, the Assiniboine, Blackfoot, Crow, and other Tribes, stretching south from the headwaters of the Yellowstone River to the Arkansas River.⁹⁵ Subsequent treaties and agreements established reservations for the Tribes within their 1851 Treaty-recognized territory, with some Tribes forced to relinquish claims to larger land areas.⁹⁶

The Missouri River main stem flows through the Fort Berthold Reservation in North Dakota, established by Executive Order on April 12, 1870, for the Mandan, Hidatsa, and Arikara Nations.⁹⁷

⁹³ John H. Davidson, *Indian Water Rights, the Missouri River, and the Administrative Process: What Are the Questions?*, 24 AM. INDIAN L. REV. 1, 7 (2000).

⁹⁴ Charles J. Kappler, *Treaty of Fort Laramie With Sioux, etc.*, 1851, INDIAN AFFAIRS: LAWS AND TREATIES, http://digital.library.okstate.edu/kappler/Vol1/HTML_files/NOR0881.html#p881 (last visited Feb. 22, 2015).

⁹⁵ *Id.*

⁹⁶ *E.g.*, Treaty Crow Tribe of Indians, proclaimed Aug. 12, 1868, 15 Stat. 649–653, available at <http://digital.library.okstate.edu/kappler/Vol2/treaties/cro1008.htm>.

⁹⁷ Charles J. Kappler, *Part III.—Executive Orders Relating to Indian Reserves: North Dakota Fort Berthold Reserve*, INDIAN AFFAIRS: LAWS AND TREATIES, http://digital.library.okstate.edu/kappler/Vol1/HTML_files/NOR0881.html#p881 (last visited Feb. 22, 2015).

Downstream, the Missouri's main channel is the eastern boundary of the Standing Rock Sioux, Cheyenne River Sioux, Crow Creek Sioux, and Lower Brule Sioux Indian Reservations, as established in the Act of March 2, 1889.⁹⁸ These Tribes, along with the Yankton Sioux Tribe and the Nebraska Tribes downstream, were directly and severely impacted by the Pick-Sloan program.⁹⁹

Numerous Tribal communities were established on these reservations in the Missouri River riparian bottomlands.¹⁰⁰ The thick, wooded lands of the Missouri River corridor in the upper basin became the Treaty-protected Reservation homelands of numerous Tribes.¹⁰¹ There was plenty of timber and natural cover for livestock and the soil was fertile.¹⁰² Wildlife was abundant and the water supplies were plentiful.¹⁰³ As the U.S. Senate Committee on Indian Affairs recently explained,

From 1851 to 1889, the United States entered into treaties and agreements with the tribes and bands of the Three Affiliated Tribes of the Fort Berthold Reservation and the Sioux Nation. In these treaties and agreements, the United States recognized the Indians' territories, and the tribes and bands reserved lands for their permanent homelands. Seven of these reservations are along the Missouri River in the states of North Dakota, South Dakota and Nebraska: the Fort Berthold Reservation, the Standing Rock Sioux Reservation, Cheyenne River Sioux Reservation, Lower Brule Sioux Reservation, Crow Creek Sioux Reservation, Yankton Sioux Reservation, and the Santee Sioux reservation.

Although these reservations were significantly smaller than the tribes' former territories, the seven reservations were strategically located along the resource rich Missouri River. The Missouri River's wooded bottomlands provided the tribes' reservation economies with fertile agricultural lands, timber for lumber and fuel, coal deposits, seasonal fruits, habitat for wild game, medicines, shelter for domestic animals, and plentiful supplies of clean water. These lands were also an important part of the tribes' social,

⁹⁸ Sioux Bill, ch. 405, 25 Stat. 888–899 (1889), available at http://digital.library.okstate.edu/kappler/Vol1/HTML_files/SES0328.html#p336.

⁹⁹ Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 261 (1989). The Corps of Engineers' projects on the Columbia River have had a similar adverse effect on Tribal communities in Oregon. Gosia Wozniacka, *Columbia River Tribes Displaced by Dams Live in Squalor, Seek Help*, THE SEATTLE TIMES, Nov. 9, 2014, available at <http://www.seattletimes.com/seattle-news/columbia-river-tribes-displaced-by-dams-live-in-squalor-seek-help/>.

¹⁰⁰ Davidson & Geu, *supra* note 17, at 824–25.

¹⁰¹ LAWSON, *supra* note 7, at 56–57.

¹⁰² *Id.*

¹⁰³ *Id.*

cultural, and spiritual lives. Much of the tribes' community infrastructure was located along the river, including, tribal homes, schools, hospitals, government buildings, churches, graveyards, and roads.¹⁰⁴

The Corps of Engineers' dams on the Missouri River main stem would decimate these lands.¹⁰⁵ The Corps located the dams so as to minimize the impact of the reservoirs on the cities along the river in North and South Dakota.¹⁰⁶ The Corps targeted Tribal lands, which were inundated as the sites of the reservoirs.¹⁰⁷ Two dams, Fort Randall at Yankton¹⁰⁸ and Big Bend at Lower Brule and Crow Creek, were built on Indian Reservations.¹⁰⁹ The largest reservoirs, Sakakawea at Fort Berthold and Oahe at Standing Rock and Cheyenne River, largely overlaid lands taken from the Tribes.¹¹⁰

The scholar Vine Deloria, Jr., an enrolled member of the Standing Rock Sioux Tribe, described Pick-Sloan as "the single most

¹⁰⁴ S. REP. NO. 111-357, at 1-2 (2010), available at <http://www.gpo.gov/fdsys/pkg/CRPT-111srpt357/html/CRPT-111srpt357.htm>.

¹⁰⁵ This Article focuses on Pick-Sloan's impacts on those upper Missouri Basin Tribes most directly affected by the main stem dams and reservoirs. Some Tribes in the upper basin are located on major tributaries to the Missouri River, and have suffered the degradation of riparian lands and water resources due to reclamation projects authorized under Pick-Sloan. For example, the Bureau of Reclamation's Yellowtail project impounded the Big Horn River on the Crow Indian Reservation. *United States v. Crow Reservation*, 162 F. Supp. 108 (D. Mont. 1958); see also S. 2489, 110th Cong. (2008) (a bill to establish a trust fund in the amount of \$90.5 million for the mitigation of damage on the Pine Ridge Indian Reservation, resulting from Reclamation's Angostura Unit). Additionally, lower basin Tribes, such as the Omaha Tribe and Winnebago Tribe, suffer the loss of Reservation wetlands, cultural sites, and other resources associated with the natural free-flowing river, which no longer exist. See U.S. ARMY CORPS OF ENG'RS, NORTHWEST DIV., *supra* note 62, at 3-8. Yet the massive upper basin reservoirs on the Missouri main stem, which have generated region-wide and national benefits, caused very extreme hardship on the Indian Reservations on which they are located.

¹⁰⁶ See LAWSON, *supra* note 7, at 59, 75.

¹⁰⁷ Mni Sose Intertribal Water Rights Coalition, *supra* note 22.

¹⁰⁸ See *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 83 F. Supp. 2d 1047, 1057 (D.S.D. 2000) (finding the impact of the operation of the Fort Randall Dam on Tribal cemetery actionable under the Native American Graves Protection and Repatriation Act).

¹⁰⁹ See *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017, 1023-24 (8th Cir. 1997) (finding that lower Brule Tribe lacks jurisdiction over non-Indian hunting on Corps of Engineers' Fort Randall and Big Bend project land within the Reservation).

¹¹⁰ See *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (finding that Cheyenne River Sioux tribe lacks jurisdiction over non-Indian hunting on Corps of Engineers' Oahe project land within the Cheyenne River Reservation).

destructive act ever perpetuated on any tribe by the United States.”¹¹¹ The Army Corps of Engineers relocated entire Tribal communities against their wishes in the late 1950s and early 1960s, to make way for the reservoirs created on the Missouri River under the Pick-Sloan Plan.¹¹² The replacement housing was located on the plains above the river valley, which was less fertile with scarce groundwater or vegetation making it a much less hospitable environment.¹¹³ Community infrastructure was destroyed and not replaced by the Army Corps of Engineers.¹¹⁴ Although Congress authorized the Corps to relocate Tribal cemeteries from the taken area, the Corps failed to do so.¹¹⁵

The Indian livestock economy on the Fort Berthold, Standing Rock, Cheyenne River, and Lower Brule Reservations never fully recovered.¹¹⁶ Jobs in timber, livestock, and agriculture disappeared; subsistence hunting and gardening became much less productive. The replacement housing was inadequate.¹¹⁷ The historian Michael Lawson described the plight of the affected Sioux Tribes as follows,

Damages caused by the Pick-Sloan projects touched every aspect of Sioux life. Abruptly the tribes were transformed from a subsistence to a cash economy and forced to develop new ways of making a living. The uprooting of long-standing Indian communities disrupted and disorganized the social, economic, political, and religious life of well-integrated tribal groups and had a serious effect on the entire reservation population. It was an onerous imposition for tribal members to be forced to move their community halls, churches, and religious shrines. It was even harder for them to disturb the graves of their ancestors. Yet . . . the largest cemeteries and most of the private burial grounds had to be excavated and moved elsewhere. (footnote omitted).

¹¹¹ Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 83, n.206 (1996).

¹¹² See Cross, *supra* note 9, at 484–87.

¹¹³ LAWSON, *supra* note 7, at 57.

¹¹⁴ Section 2(a)(6) of the Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996 contains a Congressional finding that, “the requirements . . . with respect to mitigation of the effects of the Fort Randall and Big Bend projects on the Crow Creek Indian Reservation have not been fulfilled.” Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996, Pub. L. No. 104-223, 102 Stat. 3027 (1996), available at <http://babel.hathitrust.org/cgi/pt?id=purl.32754066677075;view=1up;seq=1>.

¹¹⁵ *Yankton Sioux Tribe v. U.S. Army Corps of Eng’rs*, 83 F. Supp. 2d 1047, 1048 (D.S.D. 2000) (“The Corps failed to effect the removal and reburial of all of the bodies in the cemetery.” *Id.*).

¹¹⁶ LAWSON, *supra* note 7, at 57.

¹¹⁷ *Id.* at 145.

. . . Psychological and aesthetic damages were more difficult to measure. . . . Because of their close relationship with nature, the Sioux had a sacred attachment to their land. The areas along the river had afforded them a comfortable and relatively scenic environment with resources enough to sustain their way of life. The loss of this land and livelihood had a strong emotional impact on them. . . . Unlike others affected by public works projects, they were not able to duplicate their old way of life by moving to a similar environment. No Indian lands like the ones vacated existed after inundation.¹¹⁸

The Three Affiliated Tribes of Fort Berthold objected strenuously to the construction of the Garrison Dam.¹¹⁹ The Tribal Council passed a resolution opposing the sale of Tribal land for the reservoir site. The resolution explained,

The lands which will be flooded are practically all the lands which are of any use or value to produce feed for stock or winter shelter. We are stockmen and our living depends on our production of cattle All of our people have lived where we now are for more than 100 years. Our people have lived on and cultivated the bottomlands along the Missouri River for many hundreds of years. We were here before the first white man set foot on this land. We have always kept the peace. We have kept our side of all treaties. We have been, and now are, as nearly self-supporting as the average white community [W]e cannot agree that we should be destroyed, drowned out, removed, and divided for the public benefit¹²⁰

The Tribal Council Resolution was prophetic.

B. Pick-Sloan as an Exercise of Plenary Power in the Termination Era

Nevertheless, “[t]he Pick-Sloan Plan was presented . . . as a fait accompli.”¹²¹ Pursuant to the 1903 Supreme Court decision in *Lone Wolf v. Hitchcock* the federal courts deferred to Congressional authority in the taking of Tribal lands for most of the twentieth century.¹²² This is the case even if the Tribe’s title to forcibly acquired land was guaranteed by Treaty.¹²³

¹¹⁸ *Id.* at 57–58.

¹¹⁹ Cross, *supra* note 9, at 484–87.

¹²⁰ REISNER, *supra* note 38, at 196.

¹²¹ *Id.* at 46.

¹²² *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

¹²³ *Id.*

The so-called “plenary power” doctrine stemmed from developments in the southern plains. The 1867 Treaty of Medicine Lodge Creek established a Reservation for the Kiowas, Comanches, and Apaches in what is now Oklahoma.¹²⁴ Article XII of the treaty provided that any further cession of land would require the signatures of “at least three-fourths of all adult male Indians occupying the same.”¹²⁵ In a scene to be repeated throughout the west, a government commission approached the Tribes in 1892, proposing to divide the Reservation land into allotments for individual Indian heads-of-households, and to purchase the remaining tracts for use by non-Indian homesteaders.¹²⁶ The Indian resisted, but an agreement was ultimately reached.

The Commissioners drafted a document and obtained signatures of approval by the Tribe, per Article XII of the Medicine Lodge Creek Treaty.¹²⁷ However, the document presented contained different terms than the agreement the parties had reached.¹²⁸ The altered terms were presented and approved by Congress.

Lone Wolf, a Kiowa Chief, initiated a legal action to enjoin implementation of the act, contending that it violated Article XII of the Treaty.¹²⁹ Ultimately, the Supreme Court would not stand in the way of the taking of Treaty-protected Tribal land. It held that, “Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”¹³⁰ Moreover, “[T]he power exists to abrogate the provisions of an Indian treaty.”¹³¹

With respect to fraud, the Court in Lone Wolf stated, “these matters, in any event, were solely within the domain of its legislative authority, and its action, conclusive upon the courts.”¹³² In a

¹²⁴ *Id.* at 554.

¹²⁵ *Id.* at 564.

¹²⁶ *Id.* at 563.

¹²⁷ *Id.* at 567–68.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 565.

¹³¹ *Id.* at 566.

¹³² *Id.* at 568.

concurring opinion, the fraud perpetuated on the Kiowas was described as “the usual process.”¹³³

Under the “plenary power” doctrine of the *Lone Wolf* case, the courts have largely deferred to Congress on the disposition of Indian land.¹³⁴ This left the upper Missouri Basin Tribes with no remedy to the Pick-Sloan plan.¹³⁵

Nevertheless, a taking of Indian land must be authorized by Congress.¹³⁶ Executive branch agencies lack the authority to exercise eminent domain over these lands.¹³⁷ This is because the United States generally has recognized the Tribes’ title to their lands by Treaty or statute.¹³⁸ The Secretary of the Interior holds trust title to Indian lands for the purpose of maintaining the Indian land base through

¹³³ DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 181 (4th ed. 1998).

¹³⁴ See *United States v. John*, 437 U.S. 634 (1978).

¹³⁵ The “Plenary Power” doctrine established in *Lone Wolf* was severely curtailed in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (“*Lone Wolf*’s presumption of congressional good faith has little to commend it as an enduring principle . . .” *Id.* at 414.). The Court will review acts of Congress affecting Tribes to ensure they pass constitutional muster under the Fifth Amendment due process clause; *Delaware Tribal Bus. Comm. v. Weeks*, 420 U.S. 73 (1977), as well as the takings clause; *Sioux Nation of Indians*, 448 U.S. at 390–95; see also *Babbitt v. Youpee*, 519 U.S. 234 (1997) (finding that Escheat provisions of the Indian Land Consolidation Amendments for small fractionated interests to Indian allotments violate takings clause). The plenary power doctrine has been discredited as a source of federal power over Indians. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 228–33 (1984) (providing an overview of Congressional acts providing for judicial review for Tribes); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 263. Nevertheless, the Congress continues to exercise very broad authority over Indian affairs. See, e.g., Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261–2301 (codified as amended at 25 U.S.C. §§ 2801–2815 (2012)); Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001–4061 (2012); 25 U.S.C. §§ 151–162a (2012); Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701–2721 (2012). This is often to the chagrin of Tribes and Tribal leaders. See *Red Lake Band of Chippewa Indians v. Swimmer*, 740 F. Supp. 9, 11–12 (D.D.C. 1990) (rejecting Tribe’s contention that IGRA’s requirement that Tribes compact with states for Class III Gaming unconstitutionally infringes on Tribal sovereignty).

¹³⁶ *United States v. Winnebago Tribe*, 542 F.2d 1002, 1006 (8th Cir. 1976).

¹³⁷ *United States v. Dion*, 476 U.S. 734, 740–43 (1986) (finding that Endangered Species Act abrogated Indians right to hunt protected species, even for feathers needed for religious and ceremonial uses).

¹³⁸ See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

restrictions on alienation.¹³⁹ The Court treated reservations established by Executive Order no differently than those established in treaties.¹⁴⁰

The Standing Rock Sioux Tribe resisted the condemnation of its land by the Army Corps of Engineers for the site of Oahe Reservoir. The Corps initiated eminent domain proceedings for Tribal land in the Oahe Reservoir site.¹⁴¹ The district court for South Dakota ruled in favor of the Tribe, enjoining the taking, for lack of prior authorization by Congress.¹⁴²

The Flood Control Act authorized the project, but did not provide for the acquisition of the Indian lands where the Corps proposed to build the dams and reservoirs.¹⁴³ Consequently, it was necessary for Congress to enact additional legislation to authorize the acquisition of Reservation lands along the Missouri River for the construction of the Fort Randall, Oahe, and Garrison Dams.¹⁴⁴ In 1950, Congress passed a bill that directed the Army Corps of Engineers and Bureau of Indian Affairs to coordinate their efforts in appraising Indian land along the Missouri River, and negotiated for the acquisition of the lands needed by the Corps for the main stem reservoirs.¹⁴⁵

The Corps of Engineers began construction before the Indian land being utilized for the dams and reservoirs was even acquired.¹⁴⁶ This resulted in hurried and inadequate appraisals of the value of Tribal land.¹⁴⁷ It also intensified the pressure on the Tribes to agree to a sale price for their rich, fertile Missouri River bottomland forests.¹⁴⁸ Meanwhile, the Bureau of Indian Affairs used its authority for the approval of Tribal Attorney contracts to pressure Tribes into accepting unfavorable settlements.¹⁴⁹

¹³⁹ 25 U.S.C. § 177 (2012); 25 C.F.R. § 152.22 (1996).

¹⁴⁰ *Arizona v. California*, 377 U.S. 546, 598 (1963).

¹⁴¹ *U.S. v. 2005.32 Acres of Land*, 160 F. Supp. 193, 202 (D.S.D. 1958).

¹⁴² *Id.*

¹⁴³ Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, 891 (codified in scattered Sections of 16, 33, and 43 U.S.C.).

¹⁴⁴ *2005.32 Acres of Land*, 160 F. Supp. at 202.

¹⁴⁵ Act of Sept. 30, 1950, Pub. L. 870, 64 Stat. 1093, *available at* http://digital.library.okstate.edu/kappler/Vol6/html_files/v6p0523.html.

¹⁴⁶ LAWSON, *supra* note 7, at 59.

¹⁴⁷ *Id.* at 47.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 70–71.

Moreover, the 1950s saw the onset of the “termination era” of Indian policy.¹⁵⁰ The cold war was underway.¹⁵¹ Free markets and individual freedoms buttressed notions of Soviet collectivism.¹⁵² Yet on Indian Reservations, there remained considerable amounts of Tribally-owned land and community-based microenterprises, such as the vast community gardens in the Missouri River bottomlands.¹⁵³ Certain policy-makers in Congress sought to impose the individualist American ethic on Tribal communities by terminating Tribal status and disestablishing Reservations.¹⁵⁴ This would relieve the budget of federal program outlays on the Reservations, though the programs to be eliminated were Treaty obligations.¹⁵⁵ There was an obvious element of racism to the “termination” policy.¹⁵⁶

On August 1, 1953, Congress adopted House Concurrent Resolution 108, declaring the federal policy “to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens . . . [and] to end their status as wards.”¹⁵⁷ The following year, Congress passed legislation terminating seventy Tribes, most notably Oregon’s Klamath Tribe and Wisconsin’s Menominee Tribe.¹⁵⁸

¹⁵⁰ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 (Nell Jessup Newton ed., 2012) [hereinafter, COHEN’S HANDBOOK].

¹⁵¹ See HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 429–42 (2003 ed.).

¹⁵² *Id.* at 436 (“The whole culture was permeated with anti-Communism.” *Id.*).

¹⁵³ See *United States v. Jim*, 409 U.S. 80, 81 (1972) (“Whatever title the Indians have is in the tribe, and not in the individuals” (quoting *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902)) *Id.*).

¹⁵⁴ *Termination of the Federal Supervision over Certain Tribes of Indians: Joint Hearings on S. 2670 and H.R. 7674 Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 83d Cong. 42 (1954).

¹⁵⁵ COHEN’S HANDBOOK, *supra* note 150, §1.06. “Federal programs for both tribes and individual members were discontinued, so that education, health, welfare, and housing assistance, as well as other social programs, were no longer available.” *Id.*

¹⁵⁶ See Williams, *supra* note 135.

¹⁵⁷ *Concurrent Resolution of the Eighty-Third Congress, First Session, 1953 Indians*, INDIAN AFFAIRS: LAWS AND TREATIES, http://digital.library.okstate.edu/kappler/Vol6/html_files/Images/v6p0614.jpg (last visited Feb. 22, 2015).

¹⁵⁸ COHEN’S HANDBOOK, *supra* note 150, at § 1.06; see also *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied* 419 U.S. 1019 (1974) (finding that Treaty fishing rights survive termination of Klamath Tribe); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (Treaty hunting and fishing rights of Menominee Tribe survive termination). President Nixon formally repudiated the termination policy, in a 1979 Message to Congress. H.R. DOC. 91-363, 91st Cong. (1970). The Tribal status of the

In contrast, none of the upper Missouri Basin Tribes affected by the Pick-Sloan plan were terminated.¹⁵⁹ However, termination was the underlying policy environment in which these Tribes were forced to negotiate Congressional legislation for the sale of their best land. It proved to be an extraordinarily difficult task.¹⁶⁰

C. Overview of Legislation Authorizing the Taking of Reservation Land

The Three Affiliated Tribes of Fort Berthold were the first Tribe to agree with the proposed legislation.¹⁶¹ This resulted in the enactment of Public Law 81-437, which provided for the acquisition by the United States of 152,360 acres of the Missouri River riparian lands meandering across the middle of the Fort Berthold Reservation.¹⁶² The Army Corps of Engineers had set aside \$5.1 million from prior-year appropriations to acquire the Fort Berthold lands.¹⁶³ Public Law 81-437 authorized an additional \$7.5 million payment for total compensation of \$12.6 million.¹⁶⁴ Section 3 of the statute established a multi-agency appraisal board to appraise allotments and determine payments for individual landowners, who retained the right to appeal the appraisal.¹⁶⁵

Under Section 14 of Public Law 81-437, Congress recognized the Three Affiliated Tribes as a public entity, eligible to acquire the low cost power generated at Garrison Dam under the Rural Electrification Act of 1936.¹⁶⁶ Although this merely codified the Tribes' preexisting status, it was an important recognition that the Indian Tribes should share in its hydropower benefits, in common with the rural electrical

Klamath Tribe was restored by Congress in 1986. 25 U.S.C. § 566 (2012). The Menominee Tribe regained its status as a federally recognized Tribe in the Menominee Restoration Act of December 22, 1973, 25 U.S.C. §§ 903-903f (2012).

¹⁵⁹ See *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990) (finding South Dakota did not obtain civil jurisdiction over Indian Reservations in the state under Publ. L. 280, a termination-era statute authorizing state jurisdiction in Indian Country for certain states).

¹⁶⁰ LAWSON, *supra* note 7, at 94-107.

¹⁶¹ *Id.* at 59.

¹⁶² Act of Oct. 29, 1949, Pub. L. No. 81-437, 63 Stat. 1026, available at http://digital.library.okstate.edu/kappler/Vol6/html_files/v6p0463b.html.

¹⁶³ War Department Civil Appropriations Act of 1948, Pub. L. No. 295, 61 Stat. 690 (1948).

¹⁶⁴ 63 Stat. at 1027.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1028. The Rural Electrification Act is codified at 7 U.S.C. §§ 901-950bb-1 (2012).

cooperatives serving predominantly non-Indian communities. However, the U.S. Western Area Power Administration, which markets Pick-Sloan hydropower, refused to enter firm power contacts with the Three Affiliated and other Missouri Basin Tribes until January 1, 2000—over fifty years after Congress enacted this provision.¹⁶⁷

Legislation approving the acquisition of Fort Berthold Reservation lands paved the way for the construction of Garrison Dam, the largest earthen dam in the United States.¹⁶⁸ The creation of Lake Sakakawea on the Reservation was devastating to the Three Affiliated Tribes; the lake forced relocation of eighty percent of the Tribal members and inundated one-fourth of all Reservation land, including all of the timber, agricultural and grazing land, and government agency facilities.¹⁶⁹ And so it would be for the Sioux Tribes downstream.

“The Oahe Dam destroyed more Indian land than any other public works project in America.”¹⁷⁰ Separate acts of Congress provided for the acquisition of Indian land for the Oahe Reservoir from the Cheyenne River and Standing Rock Sioux Tribes.¹⁷¹ The Cheyenne River Sioux Tribe obtained a settlement of \$5.4 million as appraised taken land value plus \$5.2 million for economic and social rehabilitation, for a total settlement of \$10.6 million.¹⁷² The Tribe lost 104,420 acres of Missouri River bottomlands, crippling the Reservation’s livestock industry and causing the relocation of government facilities over sixty miles to Eagle Butte.¹⁷³

Nevertheless, Cheyenne River’s legislation contained important provisions. The rehabilitation funding was sorely needed by all affected Tribes. The rehabilitation provision in the Cheyenne River act represented the first time that Congress recognized the tremendous socioeconomic hardship the dams were causing on the

¹⁶⁷ Final Power Allocations of the Post-2000 Resource Pool—Pick-Sloan Missouri Basin Program, Eastern Division, 62 Fed. Reg. 11174 (Mar. 11, 1997), available at <http://www.gpo.gov/fdsys/pkg/FR-1997-03-11/pdf/97-5996.pdf>.

¹⁶⁸ See U.S. ARMY CORPS OF ENG’RS, NORTHWESTERN DIV., *supra* note 62, at 3-5 to 3-6.

¹⁶⁹ LAWSON, *supra* note 7, at 59.

¹⁷⁰ *Id.* at 50.

¹⁷¹ *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993).

¹⁷² Act of Sept. 3, 1954, Pub. L. No. 83-776, 68 Stat. 1191, available at <http://www.gpo.gov/fdsys/pkg/STATUTE-68/pdf/STATUTE-68-Pg1191.pdf>.

¹⁷³ LAWSON, *supra* note 7, at 50.

Reservations.¹⁷⁴ It was an important precedent that benefitted the other affected Tribes.

Section 10 of act also guaranteed Tribal members hunting, fishing, and grazing rights on the taken land—as well as access to the Oahe Reservoir—subject to Corps' regulations.¹⁷⁵ The Tribe also retained mineral rights subsurface to the taken land.¹⁷⁶ Significantly, the relocation and reconstruction of Tribal and federal facilities were to be paid out of Oahe project funds, not the Tribal compensation fund.¹⁷⁷ Tribal members retained the right to challenge Corps' appraisals in federal court,¹⁷⁸ although as a practical matter, few possessed the resources to do so.¹⁷⁹

After the Standing Rock Sioux Tribe defeated the Corps' attempt to condemn Tribal lands, Congress acted. Under Public Law 85-915, the United States acquired 55,993.82 acres of Standing Rock Reservation bottomlands for payment of \$5.3 million plus approximately \$7 million in rehabilitation funds for a total settlement of \$12.3 million.¹⁸⁰ Standing Rock—like Cheyenne River—retained hunting, fishing, and grazing rights on the taken lands, subsurface mineral rights, and guaranteed access to the reservoir.¹⁸¹

Significantly, Congress omitted payment to Standing Rock of compensation for the bed of the Missouri River within the Reservation.¹⁸² Consequently, at least one Tribe affected by Pick-Sloan retained its claim to the title to the bed of the Missouri River.¹⁸³

¹⁷⁴ 68 Stat. at 1192.

¹⁷⁵ See *Bourland*, 508 U.S. at 691.

¹⁷⁶ 68 Stat. at 1192.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ LAWSON, *supra* note 7, at 100.

¹⁸⁰ Act of Sept. 2, 1958, Pub. L. No. 85-915, 72 Stat. 1762, available at http://interior.gov/ost/tribal_doc_archive/upload/T-20350.pdf.

¹⁸¹ *Id.* at 1763–64.

¹⁸² See H.R. REP. NO. 58-1888, at 29 (1958) (“The Corps of Engineers elected not to acquire the bed of the Missouri River The bed of the Missouri River continues to be part of the reservation, and marks the eastern boundary of the reservation.” *Id.*).

¹⁸³ See Russel Lawrence Barsh & James Youngblood Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States*, 56 WASH. L. REV. 627, 681–83 (1981) (express Treaty language is needed to rebut presumption of state ownership of riverbed); *cf.* *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 705–06 (1986) (finding a clear congressional intent to compensate Tribe is needed to overcome navigation servitude).

The Fort Randall and Big Bend Dams are the other Missouri River main stem dams that impacted the Sioux Tribes.¹⁸⁴ Both projects affected the Lower Brule and Crow Creek Sioux Tribes.¹⁸⁵ Congress enacted separate bills on September 2, 1958 (the same day as the Standing Rock taking act), authorizing the acquisition of 7,997.67 acres of on the Lower Brule Reservation for \$976,503¹⁸⁶ and 9,418.69 acres at Crow Creek for \$1.4 million.¹⁸⁷ This land was inundated by Lake Francis Case, created by Fort Randall Dam.¹⁸⁸ These Tribes did not receive rehabilitation funds.

In a final blow, the last dam built on the Missouri River main stem, Big Bend, was installed at Fort Thompson, the largest community on the Crow Creek Reservation east of the river and the community of Lower Brule on that Reservation on the western shore.¹⁸⁹ Like at Fort Berthold, Standing Rock, and Cheyenne River, the entire communities of Fort Thompson and Lower Brule had to be relocated.¹⁹⁰

Congress passed a second round of legislation taking more land from the Lower Brule and Crow Creek Tribes for the Big Bend Dam and Lake Sharpe. Public Law 87-735 provided for the acquisition of an additional 6,179 acres of the Crow Creek Reservation Missouri River bottomlands for \$564,302 plus rehabilitation funding of \$3.8 million.¹⁹¹ Lower Brule was forced to cede an additional 14,299 acres for payment of \$1.25 million plus approximately \$2 million for rehabilitation.¹⁹² The Big Bend legislation directed the Corps to replace cemeteries, schools, hospitals, and other community facilities at Fort Thompson and Lower Brule to be paid by project funds, not Tribal compensation or rehabilitation funds.¹⁹³ The Tribes retained

¹⁸⁴ See LAWSON, *supra* note 7, at 125–34.

¹⁸⁵ *Id.*

¹⁸⁶ Pub. L. No. 85-923, 72 Stat. 1773 (1958).

¹⁸⁷ Pub. L. No. 85-916, 72 Stat. 1766 (1958).

¹⁸⁸ LAWSON, *supra* note 7, at 130–34.

¹⁸⁹ *Id.*

¹⁹⁰ See Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996, Pub. L. No. 104-223, 110 Stat. 3026; Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act of 1997, Pub. L. No. 105-132, 111 Stat. 2563.

¹⁹¹ Big Bend Act of 1962, Pub. L. No. 87-735, 76 Stat. 704, available at http://digital.library.okstate.edu/kappler/Vol6/html_files/v6p0977.html.

¹⁹² Pub. L. No. 87-734, 76 Stat. 698 (1962).

¹⁹³ 76 Stat. at 702–706.

grazing, hunting, and fishing rights subject to the Corps of Engineers' regulations.¹⁹⁴

Overall, Pick-Sloan caused more damage to Indian land and resources than any public works project in American history.¹⁹⁵ Approximately 356,000 acres of Indian Reservation lands were taken for Pick-Sloan, representing twenty-three percent of the 1,499,759 acres impacted by the main stem dams, reservoirs, and transmission lines.¹⁹⁶

The upper Missouri River basin Indian Tribes were negatively and disproportionately affected by the Pick-Sloan program.¹⁹⁷ The payments authorized, often belatedly, were based on hasty appraisals, and were clearly inadequate in light of the harm that was suffered.¹⁹⁸ Congressionally-directed mitigation measures, such as the reconstruction of hospitals and government offices as well as the relocation of cemeteries, were often ignored by the Corps of Engineers.¹⁹⁹ The forced relocation of Tribal communities for the Pick-Sloan program caused socioeconomic depression which has lingered for decades.²⁰⁰ For these reasons, Congress revisited the question of compensation to the Tribes a generation later.

¹⁹⁴ See *United States v. Big Eagle*, 881 F.2d 539, 540 (8th Cir. 1989) (finding a Federal Lacey Act Amendment violation by Crow Creek Tribal member, who violated Lower Brule Tribal law when fishing west of the main channel, outside of the Crow Creek Reservation boundary but within the Lower Brule Reservation).

¹⁹⁵ See LAWSON, *supra* note 7, at 134.

¹⁹⁶ Mni Sose Intertribal Water Rights Coalition, *supra* note 22.

¹⁹⁷ S. 3648, 111th Cong., § 2(6) (1965).

¹⁹⁸ Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act of 1992, Pub. L. No. 102-575, 108 Stat. 4732.

The Congress declares that the Three Affiliated Tribes are entitled to additional financial compensation for the taking of one hundred and fifty-six thousand acres of their reservation lands . . . [and] the Standing Rock Sioux Tribe is entitled to additional financial compensation for the taking of over fifty-six thousand acres of its reservation lands, as the site for the Garrison Dam and Reservoir.

§ 3503(a), (b), 108 Stat. 4732.

¹⁹⁹ *Final Report and Recommendations of the Garrison Unit Joint Tribal Advisory Committee: Joint Hearing Before the S. Comm. on Indian Affairs, the S. Comm. on Energy and Natural Res., and the H. Comm. on Interior and Insular Affairs*, 100th Cong. 64-69 (1987).

²⁰⁰ *Id.*

D. Subsequent Compensatory Legislation for the Missouri Basin Tribes

1. Background—The Garrison Diversion

Efforts to properly compensate the Tribes for their tremendous injury resulting from the Pick-Sloan program arose in the context of non-Indian irrigation projects. The Sloan Plan had provided for the development of irrigation by the Bureau of Reclamation for approximately three million acres in the upper Missouri Basin.²⁰¹ A main component of this was the Missouri-Souris Project, a plan to irrigate 1,275,000 acres in North Dakota.²⁰² After the construction of Garrison Dam, the Bureau of Reclamation redesigned the project, using Lake Sakakawea as the point of diversion for the irrigation of one million acres in central and eastern North Dakota. The new plan, known as the Garrison Diversion, engendered national and even international controversy.²⁰³

Soon after the main stem dams and hydropower facilities were completed, concerns arose about the over-runs and cost-benefit ratio of Pick-Sloan, especially irrigation.²⁰⁴ The Appropriations Act of August 14, 1964, required Congressional reauthorization of the irrigation projects approved as part of the Sloan Plan in the 1944 Flood Control Act.²⁰⁵ Consequently, those irrigation projects authorized in the 1944 Act, but which had not received Congressional appropriations and had not been built, needed to be reapproved by Congress. Congress approved the first phase of the Garrison Diversion in 1965, authorizing construction of 250,000 acres of irrigation.²⁰⁶

²⁰¹ S. DOC. NO. 79-191 (1935).

²⁰² *Id.*

²⁰³ H. REP. NO. 99-525, at 9–11 (1986) (summarizing the problems facing the Garrison Diversion Unit).

²⁰⁴ *United Family Farmers v. Kleppe*, 418 F. Supp. 591, 600 (D.S.D. 1976) (upholding NEPA study on Bureau of Reclamation's controversial Oahe project, notwithstanding unresolved issues relating to engineering feasibility).

²⁰⁵ Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (codified in scattered Sections of 16, 33, and 43 U.S.C.).

²⁰⁶ Pub. L. No. 89-108, 79 Stat. 433–435 (1965).

The project as authorized was still a huge and inefficient inter-basin transfer of water.²⁰⁷ Numerous large canals would crisscross the plains in North Dakota with drain irrigation run-off directed into Canada's pristine Hudson Bay basin.²⁰⁸ The canals and other project facilities would remove thousands of acres of productive dry-land farms out of production, and destroy valuable prairie pothole wetlands.²⁰⁹ The project's estimated cost at \$334 million, to be repaid mostly by Pick-Sloan power revenues under the generous repayment provisions of Section 9 of the Flood Control Act, rendered it economically infeasible.²¹⁰

Thus, Garrison prompted strong opposition among many North Dakota farmers and landowners, national environmental groups, and the Canadian government.²¹¹ This opposition stifled Congressional appropriations in the years after the project was authorized.²¹²

But many North Dakotans rallied around Garrison. The delay in its completion was perceived by some as a broken promise made by the federal government to the state. Consequently, Congress established the Garrison Diversion Unit Commission to make recommendations to scale down and reformulate the project. The statute recognized "the entitlement of the State of North Dakota to a federally-funded water development program as compensation for North Dakota's contribution to the Pick-Sloan program."²¹³

Thus, the effort to build the Garrison Diversion was framed in terms of the loss of land in North Dakota for the site of the Garrison Dam, Lake Sakakawea, and the Oahe Reservoir.²¹⁴ On December 20, 1984, the Garrison Diversion Unit Commission issued its report with recommendations to significantly scale back the irrigation project and reformulate Garrison for municipal, rural, and industrial water supplies in North Dakota.²¹⁵ The Garrison Commission acknowledged that, of all North Dakotans, the Three Affiliated Tribes of Fort Berthold and the Standing Rock Sioux Tribe were perhaps most

²⁰⁷ See REISNER, *supra* note 38, at 200-01 (discussing the economic infeasibility of the Garrison Diversion Unit).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ H. REP. NO. 99-525, at 9-11 (1986).

²¹¹ Nat'l Audubon Soc'y v. Watt, 678 F.2d 299, 301 (D.C. Cir. 1982).

²¹² *Id.*

²¹³ Pub. L. No. 98-360, § 207(a)(1), 98 Stat. 411 (1984).

²¹⁴ *Id.*

²¹⁵ H. REP. NO. 99-525, at 14.

affected by Pick-Sloan.²¹⁶ It recommended that the Secretary of the Interior appoint a second commission for the sole purpose of evaluating the impacts on the affected North Dakota Tribes.²¹⁷

Congress generally accepted the Commission's recommendations and enacted the Garrison Diversion Unit Reformulation Act of 1986.²¹⁸ The Act de-authorized 876,180 acres of irrigation development, which Congress previously approved in the 1944 Flood Control Act and 1965 Garrison Act.²¹⁹ Funding was reauthorized for irrigation projects for 130,940 acres with the requirement of wetlands development equal in acreage to those wetlands impacted by the project.²²⁰

The thrust of the act was the significant authorization of funding for the development of municipal water supplies in North Dakota.²²¹ The sum of \$200 million was authorized for "municipal, rural, and industrial" water development, to be matched with a twenty-five percent cost-share by the state of North Dakota.²²² Additionally, the act extended Pick-Sloan subsidized power rates to the new water systems.²²³ This reflected a new political reality in which Pick-Sloan repayment resources shifted from inefficient irrigation projects to municipal water supplies.

The Congressionally-declared purpose of the act was "to offset the loss of farmland within the State of North Dakota resulting from the construction of major features of the Pick-Sloan Missouri Basin Program."²²⁴ As stated above, in issuing its recommendations to

²¹⁶ "[T]he construction of the mainstem reservoirs . . . had a devastating effect on the Fort Berthold and Standing Rock Indian Reservations. . . . The Commission expressed concern about these impacts and made a series of important recommendations to correct some longstanding problems." *Id.* at 25.

²¹⁷ *Id.*

²¹⁸ Pub. L. 99-294, 100 Stat. 418 (1986).

²¹⁹ H. REP. NO. 99-525, at 18-19. The fact that Congress de-authorized such a large-scale project reflects the level of overkill in the reclamation program, in North Dakota and throughout the United States. "The federal government for many years has appropriated and spent billions of taxpayer dollars to fund massive irrigation projects, taking Indian water and delivering it to non-Indian farmers." MCCOOL, *supra* note 1, at 171 (quoting John Nacho, Papago (Tohono O'odham) Water Commission).

²²⁰ H. REP. NO. 99-525, at 18-19.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

reformulate the project, the Garrison Diversion Unit Commission recognized that the Tribes suffered a tremendous loss of land that should be redressed.²²⁵ Consequently, the Garrison Unit Reformulation Act contained \$67 million for irrigation at Fort Berthold and Standing Rock and MR&I funding in the amount of \$20 million for the two Tribes and the Spirit Lake Sioux Tribe.²²⁶

2. *The Joint Tribal Advisory Committee for Standing Rock and the Three Affiliated Tribes of Fort Berthold*

Meanwhile, former Secretary of the Interior Donald Hodel implemented the recommendation of the Garrison Commission by appointing another blue-ribbon committee of North Dakotan and national leaders, known as the Joint Tribal Advisory Committee (“JTAC”), to evaluate compensation for the two Tribes.²²⁷ The JTAC issued its Final Report on May 23, 1986.²²⁸ The committee recommended additional compensation to the Three Affiliated Tribes in a range of \$178-411 million and to Standing Rock in a range of \$181-350 million.²²⁹ It also recommended full funding for Tribal municipal water and irrigation development, federal protection of reserved water rights, and the return to the Tribes of taken lands that were not inundated by the reservoirs.²³⁰

Congress acted on the JTAC Report with the passage of the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act of 1992.²³¹ The act included a finding that “Congress concurs in the Advisory Committee’s findings and conclusions that the United States Government did not justly compensate such Tribes when it acquired those lands.”²³²

Trust funds were established as equitable compensation in the amount of \$149.2 million for the Three Affiliated Tribe of Fort

²²⁵ *Id.* at 83.

²²⁶ Garrison Diversion Unit Reformulation Act of 1986, Pub. L. 99-294, 100 Stat. 418, available at <http://www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg418.pdf>.

²²⁷ *Final Report and Recommendations of the Garrison Unit Joint Tribal Advisory Comm.: Joint Hearing Before the S. Comm. on Indian Affairs, the S. Comm. on Energy and Natural Res., and the H. Comm. on Interior and Insular Affairs*, 100th Cong. 100-249 (1987).

²²⁸ *Id.*

²²⁹ *Id.* at 50–52, 55, 57.

²³⁰ *Id.* at 49–52.

²³¹ Pub. L. No. 102-575, 106 Stat. 4731 (1992).

²³² *Id.* at 4732.

Berthold and \$90.6 million for Standing Rock, each to be capitalized at a schedule equal to twenty-five percent of the gross revenues of the Western Area Power Administration.²³³ An additional \$60 million was added to the Fort Berthold fund from appropriations previously approved for irrigation at Fort Berthold in the 1986 Garrison Reformulation Act.²³⁴ The principal of the trust funds were to remain untouched with interest to be transferred to the Tribes on an annual basis after the funds had been fully capitalized.²³⁵ The funds were to be used by the Tribes for “educational, social welfare, economic development, and other programs,” and could not be distributed on a per capita basis.²³⁶

Rather than compensate the Tribes at the level recommended by the JTAC, Congress based its figures on estimates provided by the Congressional General Accounting Office (GAO).²³⁷ The JTAC had recommended higher levels of compensation based upon economic analysis of direct and indirect damages that were not accounted for in the land appraisals in addition to foregone capitalized resources to present-day values.²³⁸ The GAO urged a different approach. It researched the legislative history and negotiations surrounding the acquisition of land from the Tribes in the 1940s and 50s and attempted to glean what an equitable deal would have been at that time, accounted for inflation.²³⁹ Congress adopted the GAO approach and reduced the level of compensation to the Three Affiliated Tribes and Standing Rock Sioux Tribe from the level recommended by the JTAC.

The JTAC also recommended the return to the Tribes of surplus taken lands.²⁴⁰ The Army Corps of Engineers acquired much more

²³³ *Id.* at 4732–4733.

²³⁴ *Id.* at 4732.

²³⁵ *Id.* at 4732–4733.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Final Report and Recommendations of the Garrison Unit Joint Tribal Advisory Committee: Joint Hearing Before the S. Comm. on Indian Affairs, the S. Comm. on Energy and Natural Res., and the H. Comm. on Interior and Insular Affairs*, 100th Cong. 54–57, 100–249 (1987).

²³⁹ §§ 3503–3506, 106 Stat. at 4732–4733.

²⁴⁰ S. Hrg. 100-249 at 53–56. The JTAC Report also recommended “development of shoreline recreation potential” at Fort Berthold and Standing Rock, the protection of the Tribes’ reserved water rights, and full funding for water projects. *Id.*

land for the Pick-Sloan reservoirs than is used for the site of the reservoirs.²⁴¹ As a result, large tracts of federal lands enclosed the reservoirs.²⁴² Indeed, Section 1(b) of the Public Law 85-915, which authorized the taking of Standing Rock Reservation lands for Oahe Reservoir, provided that,

Upon a determination by the Secretary of the Army . . . within two years from the date of this Act, that any of the [taken] lands . . . are not required for Oahe project purposes, title to such land shall be revested in the former owner²⁴³

Clearly, Congress contemplated the possibility that the amount of land which it authorized the Army Corps of Engineers to acquire from Standing Rock may exceed the amount of land actually required.²⁴⁴ Nevertheless, the statutory provision vests discretionary authority with the Army Secretary to determine whether to return land to the Tribe.²⁴⁵ It was not a mandate.²⁴⁶ The Secretary did not exercise this authority during the two-year time period referenced in the statute and since has avoided calls for administrative action to transfer land back to the affected Tribes.²⁴⁷

The Equitable Compensation Act addressed this by requiring the Secretary of the Army to transfer title to the Pick-Sloan project land within the Fort Berthold and Standing Rock Reservation boundaries to the Secretary of the Interior.²⁴⁸ The lands to be transferred were those tracts acquired from the Tribes or Tribal members but that lay above the reservoirs' maximum pool level.²⁴⁹ The transfer was subjected to a flowage easement for reservoir operations, although by

²⁴¹ See *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (finding the Tribe lacks jurisdiction over non-Indians hunting and fishing on Corps of Engineers lands adjoining Lake Oahe within the boundaries of the Cheyenne River Indian Reservation); see also *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017, 1019–20 (8th Cir. 1997).

²⁴² *Id.*

²⁴³ Pub. L. 85-915, § 1(b), 72 Stat. 1752 (1958), available at http://digital.library.okstate.edu/kappler/Vol6/html_files/v6p0861.html.

²⁴⁴ See *Lower Brule Sioux Tribe v. United States*, 712 F.2d 349, 353 (8th Cir. 1983) (finding land reversion provision in taking act is discretionary).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ See, e.g., 60 Fed. Reg. 18070 (Apr. 10, 1995) (no final rule was ever published) (Army Corps of Engineers' proposed rule to transfer certain Pick-Sloan project lands, prescribing restrictive criteria for a land transfer to Standing Rock and the Three Affiliated Tribes).

²⁴⁸ Pub. L. No. 102-575, 106 Stat. 4731–4739 (1992).

²⁴⁹ *Id.* at 4732, 4736.

definition they were above the reservoir pool elevation.²⁵⁰ The Secretary of the Interior was then obligated to administer the former Tribal tracts and offered a right of first refusal to former owners or their heirs of former family-owned allotments to reacquire the land at present-day market value.²⁵¹ If the right was not exercised, then Secretary administered the land as Tribal land.²⁵²

The process prescribed by Congress to transfer surplus Pick-Sloan project lands to Standing Rock and the Three Affiliated Tribes of Fort Berthold was needlessly convoluted. It required the Secretaries of the Interior and Army to coordinate the offer of first refusal and title transfer to literally thousands of allottees.²⁵³ The statute obligated the Interior Secretary to make the offer of first refusal to the Tribes and former landowners within one year.²⁵⁴ The agencies failed to implement the act in a timely manner, and instead informed Congress that the cost of transferring the land would be \$21 million—four times the estimated value of the land.²⁵⁵

Citing the controversy, North Dakota Senator Kent Conrad sponsored an amendment to the Emergency Supplemental Appropriations Act of 1994 to repeal the land transfer provisions of the Equitable Compensation Act.²⁵⁶ Enacted as Section 407 of the statute, the Conrad amendment authorized the Corps of Engineers to transfer surplus Pick-Sloan project lands under its general land disposal authority for Tribes, rather than the procedure prescribed in

²⁵⁰ *Id.* at 4735–4738.

²⁵¹ *Id.* at 4735, 4737.

²⁵² *Id.*

²⁵³ See *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) (affirming breach of trust by Interior Secretary in mismanaging lease royalties due allottees, and requiring historical accounting of the landowners' interests). *Cobell* demonstrates the recordkeeping problems at the Department of the Interior and their effect on Indian allotments.

²⁵⁴ 106 Stat. 4735, 4737.

²⁵⁵ 140 Cong. Rec. 1779 (1994) (statement of Sen. Kent Conrad).

²⁵⁶ *Id.*

the Equitable Compensation Act.²⁵⁷ The Corps conveyed only small tracts, however.²⁵⁸

Subsequently, Congress authorized the transfer of some Pick-Sloan project land above the main stem reservoirs in South Dakota.²⁵⁹ The Water Resources Development Act of 1999 directed the Secretary of the Army to transfer the Corps of Engineers' land.²⁶⁰ The Corps' land above the reservoir pools within the Cheyenne River and Lower Brule Sioux Reservations was to be transferred to the Secretary of the Interior to be held in trust for the respective Tribes.²⁶¹ And the project land in South Dakota outside of the Indian Reservations was to be transferred to the state.²⁶² The Water Resources Development Act of 1999 authorized \$108 million for wildlife mitigation trust funds in South Dakota and \$38 million for the two Tribes to share.²⁶³ The Act also required that federal protections for historic properties under the National Historic Preservation Act²⁶⁴ and Native American Graves Protection and Repatriation Act²⁶⁵ were to remain in effect on transferred lands. Environmental statutes, such as the National Environmental Policy Act,²⁶⁶ Clean Water Act²⁶⁷ and Endangered Species Act²⁶⁸ were also to remain in effect on transferred lands.

The Standing Rock and Crow Creek Sioux Tribes, like Cheyenne River and Lower Brule, had Pick-Sloan riverine lands on their Reservations acquired from the Tribe and laid fallow above the reservoirs.²⁶⁹ But Standing Rock and Crow Creek chose not to be

²⁵⁷ “[S]ections 3508 and 3509 of the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act are repealed *Provided*, That the U.S. Army Corps of Engineers should proceed with the Secretary of the Interior to designate excess lands and transfer them pursuant to Public Law 93-599.” Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act of 1992, Pub. L. No. 103-211, 108 Stat. 41 (1992).

²⁵⁸ See *infra* note 294, at E-9.

²⁵⁹ Act of Aug. 17, 1999, Pub. L. No. 106-53, 113 Stat. 385, available at <http://www.gpo.gov/fdsys/pkg/PLAW-106publ53/pdf/PLAW-106publ53.pdf>.

²⁶⁰ *Id.* at 391–94.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 389–90.

²⁶⁴ 16 U.S.C. §§ 470–470a-1 (2012).

²⁶⁵ 25 U.S.C. §§ 3001–3013 (2012).

²⁶⁶ 42 U.S.C. §§ 4321–4370f (2012).

²⁶⁷ 33 U.S.C. §§ 1251–1387 (2012).

²⁶⁸ 16 U.S.C. §§ 1531–1544 (2012).

²⁶⁹ 143 Cong. Rec. S11354 (1997) (statement of Sen. Tom Daschle).

included in the Water Resources Development Act.²⁷⁰ There was concern amongst some Tribes and Tribal members with the transfer of the Corps of Engineers' land outside of Indian Reservation boundaries to the state of South Dakota because some of these lands were once part of the Great Sioux Reservation as established in the 1868 Fort Laramie Treaty.²⁷¹ The patchwork land management jurisdiction resulting from the transfer of federal riverine lands to the state and the potential impacts on historic preservation became a Tribal concern as well.²⁷²

3. Compensatory Legislation for the Sioux Tribes in South Dakota

Although Congress repealed the land transfer provisions of the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act, the establishment of trust funds for these Tribes served as precedent for the South Dakota Tribes. Congress enacted compensatory legislation for the Crow Creek Sioux Tribe in 1996,²⁷³ the Lower Brule Sioux in 1998,²⁷⁴ and the Cheyenne River Sioux in 2002.²⁷⁵

As with the original land-taking acts in the 1950s, the statutes for each of the Tribes have some similarities and some differences. The statutes for Crow Creek and Lower Brule authorized trust finds of \$27.5 million and \$39 million, respectively, to be financed according to the schedule of Pick-Sloan hydropower receipts as in the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act. The trust funds were deemed adequate by the Clinton administration because they were proportionate to those authorized for the North Dakota Tribes.²⁷⁶ The authorized use of the

²⁷⁰ *Id.*

²⁷¹ William Kindle, President, Rosebud Sioux, Guest Columnist, *Land Transfer Bill Misleading*, RAPID CITY J., July 12, 1997. The Supreme Court detailed the history of the Sioux Nation land claim under the 1868 treaty in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

²⁷² *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 915 (D.C. Cir. 2003).

²⁷³ Act of Oct. 1, 1996, Pub. L. No. 104-223, 110 Stat. 3026, available at <http://www.gpo.gov/fdsys/pkg/STATUTE-110/pdf/STATUTE-110-Pg3026.pdf>.

²⁷⁴ Act of Dec. 2, 1997, Pub. L. No. 105-132, 111 Stat. 2563, available at <http://www.gpo.gov/fdsys/pkg/PLAW-105publ132/pdf/PLAW-105publ132.pdf>.

²⁷⁵ Act of Nov. 13, 2000, Pub. L. No. 106-511, 114 Stat. 2365, available at <http://www.gpo.gov/fdsys/pkg/PLAW-106publ511/pdf/PLAW-106publ511.pdf>.

²⁷⁶ *Crow Creek Infrastructure Trust Fund Development Act: Joint Hearing Before the H. Comm. on Indian Affairs and the Subcomm. on Native Am. and Insular Affairs of the H.*

funds for Crow Creek and Lower Brule was targeted for facilities such as schools, hospitals, and government buildings—with an emphasis on infrastructure.²⁷⁷ In the 1962 Big Bend Act, Congress directed the Corps of Engineers to replace these facilities out of the project budget when the communities of Fort Thompson and Lower Brule were relocated.²⁷⁸ In the late 1990s, Congress' stated purpose in legislation for these Tribes was to finance the new community facilities promised to the Tribes when Big Bend Dam was built thirty years earlier.²⁷⁹

The Cheyenne River Sioux Tribe Equitable Compensation Act of 2002 established a \$290 million trust fund reflective of the Tribe's larger land base and the sum of Reservation lands inundated by the Oahe Dam.²⁸⁰ Unlike Crow Creek and Lower Brule, the schedule for capitalization of the Cheyenne River trust fund was unrelated to the receipts from the sale of Pick-Sloan hydropower. Deposits to the fund were made from appropriations to the general fund of the treasury.²⁸¹

The compensatory legislation for all of the Missouri River Tribes required that they develop plans for the expenditure of funds for common developmental needs, such as “economic development,” “infrastructure,” and “educational, health, recreational, and social welfare objectives.”²⁸² Every statute prohibits the distribution of funds to Tribal members on a per capita basis—with an emphasis on community-wide development.²⁸³ All of the acts contained language prohibiting reductions in federal services or impacts on Treaty rights. The Cheyenne River Equitable Compensation Act contained additional language extinguishing any future damage claims relating to Oahe Dam.²⁸⁴

Unlike the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act, the settlements for the Sioux Tribes in

Comm. on Res., 104th Cong. 38 (statement of Catherine Vandemoer, Special Assistant for Water and Natural Res., Dep't of the Interior).

²⁷⁷ § 104, 114 Stat. at 2366–2368.

²⁷⁸ Big Bend Act of 1962, Pub. L. No. 87-735, 76 Stat. 704 (1962), available at http://digital.library.okstate.edu/kappler/Vol6/html_files/v6p0977.html.

²⁷⁹ Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996, Pub. L. No. 104-223, 102 Stat. 3027 (1996).

²⁸⁰ § 104, 114 Stat. at 2366.

²⁸¹ *Id.*

²⁸² *Id.* at 2367.

²⁸³ *Id.* at 2368.

²⁸⁴ *Id.*

South Dakota contained no provisions for the return of Pick-Sloan project lands.²⁸⁵ Congress dealt with this issue for the Cheyenne River and Lower Brule Sioux Tribes, along with the state of South Dakota, in the 1999 Water Resources Development Act.²⁸⁶ As of the present, the issue of the transfer of surplus Pick-Sloan project taken lands on the Fort Berthold, Standing Rock, and Crow Creek Reservations remains unresolved.

Ultimately, the process by which the Missouri River Tribes obtained additional compensation for the taking of their valuable riparian land was as piecemeal and problematic as the legislative process for the original taking acts during the termination era of the 1950s. Consequently, some Tribes have continued to petition the Congress for land restoration or additional compensation.²⁸⁷ On November 1, 2007, the Senate Committee on Indian Affairs conducted a hearing on unresolved Tribal claims under Pick-Sloan.²⁸⁸ In testimony to the committee, the General Accounting Office (GAO) presented its established ranges of recommended compensation for each of the Missouri River Tribes.²⁸⁹ The GAO testimony suggests that at least one Tribe, the Standing Rock Sioux, may be entitled to additional compensation, relative to the other Tribes.²⁹⁰

In the following Congress, North Dakota Senator Byron L. Dorgan introduced the Pick-Sloan Tribal Commission Act, to establish an expert commission to study the unresolved claims of the Indian Tribes directly affected by Pick-Sloan.²⁹¹ The bill was reported by the Committee on Indian Affairs,²⁹² but was not acted upon by the Senate. Its future remains uncertain.

²⁸⁵ *Crow Creek Infrastructure Trust Fund Development Act: Joint Hearing Before the S. Comm. on Indian Affairs and the Subcomm. on Native Am. and Insular Affairs of the H. Comm. on Res.*, *supra* note 276, at 34 (statement of Sen. Tim Johnson).

²⁸⁶ Act of Aug. 17, 1999, Pub. L. No. 106-53, 113 Stat. 385, available at <http://www.gpo.gov/fdsys/pkg/PLAW-106publ53/pdf/PLAW-106publ53.pdf>.

²⁸⁷ *Impact of the Flood Control Act of 1944 on the Indian Tribes Along the Missouri River: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. (2007).

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 5–19 (statement of Robin Nazarro, Director Natural Res. Div., Gov't Accountability Office).

²⁹⁰ *Id.* at 11–12.

²⁹¹ S. 3648, 111th Cong. (2010).

²⁹² S. REP. NO. 111-357 (2010).

III

ONGOING IMPACTS OF THE CORPS OF ENGINEERS' MISSOURI RIVER OPERATIONS ON THE INDIAN RESERVATIONS ALONG THE MISSOURI RIVER

A. The Corps' Operations Under the Missouri River Master Water Control Manual

The Corps of Engineers operates the dams on the Missouri River pursuant to the *Missouri River Mainstem Reservoir System, Master Water Control Manual*, (hereinafter "Master Manual").²⁹³ The Master Manual prescribes the criteria to be followed by the Corps for water releases for navigation, flood control storage space, and other Pick-Sloan authorized uses.²⁹⁴ Each year, the Corps publishes an Annual Operating Plan ("AOP"), which estimates the precipitation and runoff and applies the criteria prescribed in the Master Manual to establish flow rates at the dams.²⁹⁵

On the Missouri River main stem, six dams and reservoirs comprise the Pick-Sloan program.²⁹⁶ Four of these projects—Gavins Point Dam, Fort Randall, Big Bend, and Oahe—are located in South Dakota.²⁹⁷ The largest dam, Garrison, is located in North Dakota, and the upstream-most project, Fort Peck, is located in northeastern Montana.²⁹⁸

The upstream reservoirs—Oahe, Garrison, and Fort Peck, are used to store snow melt in the spring, and are drawn upon to provide water for downstream navigation, and storage space for flood control.²⁹⁹ The vast reservoirs contain storage space for millions of acre-feet of water.³⁰⁰ The three downstream projects—Gavins, Point Dam, Fort

²⁹³ *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1020 (8th Cir. 2003) (explaining the U.S. Army Corps of Engineers' publication of the Master Manual to implement the broad goals behind the Flood Control Act).

²⁹⁴ U.S. ARMY CORPS OF ENG'RS, NORTHWESTERN DIV., MISSOURI RIVER MAINSTEM RESERVOIR SYSTEM MASTER WATER CONTROL MANUAL VII-1 to VII-45 (2006), available at <http://www.nwd-mr.usace.army.mil/rcc/reports/mmanual/MasterManual.pdf>.

²⁹⁵ *Missouri ex rel. Nixon v. Craig*, 163 F.3d 482, 485–86 (8th Cir. 1998).

²⁹⁶ U.S. ARMY CORPS OF ENG'RS, NORTHWESTERN DIV., *supra* note 294, at IV-1 to IV-2.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at VII-2.

³⁰⁰ *Id.*

Randall, and Big Bend—are smaller dams, whose reservoirs have less storage space.³⁰¹

The water releases for navigation on the lower Missouri River are the central feature of the Missouri River system operation.³⁰² The Corps of Engineers generally releases 35,000 cubic feet per second daily from the Gavins Point Dam to the lower reach of the Missouri River, from March 15 to November 15 of each year.³⁰³ That is a significant, steady flow of water for the lower Missouri basin. Gone are the spring flood waters, the deposit of sediments for sandbars, and the lower flows of late summer when the murky, braided river rolled slowly across the plains.³⁰⁴ As a result of the operation of the Pick-Sloan program by the Corps of Engineers, the Missouri River below Gavins Point Dam (near Sioux City, Iowa) is now a steady chute of a significant quantity of water, from mid-March to mid-November.³⁰⁵

In the springtime, the large upstream reservoirs—South Dakota's Lake Oahe, North Dakota's Lake Sakakawea, and Lake Fort Peck in Montana—receive recharge from snow melt in the Rocky Mountains.³⁰⁶ Beginning with the water releases for navigation on March 15 of each year, the waters stored in these large reservoirs are drawn down by the Corps.³⁰⁷ The navigation releases cause the water levels in the reservoirs to decline precipitously during the course of the navigation season.³⁰⁸

The Corps also releases water from the dams periodically, for other Pick-Sloan program functions.³⁰⁹ There are releases to generate hydropower during the off-navigation season, which are at their highest level when demand peaks in the winter.³¹⁰ During the off-

³⁰¹ U.S. ARMY CORPS OF ENG'RS, NORTHWEST DIV., *supra* note 62, at 2-4.

³⁰² U.S. ARMY CORPS OF ENG'RS, NORTHWEST DIV., *supra* note 294, at VII-50 to VII-54.

³⁰³ *Id.* at VII-10, VII-25. The navigation full-service target established in the Master Manual is 35,000 cfs. *Id.*

³⁰⁴ *In re* Operation of the Mo. River Sys. Litig., 421 F.3d 618, 625–26 (8th Cir. 2005).

³⁰⁵ Sandra B. Zellmer, *A New Corps of Discovery for Missouri River Management*, 83 NEB. L. REV. 305, 319 (2004).

³⁰⁶ U.S. ARMY CORPS OF ENG'RS, NORTHWEST DIV., *supra* note 62, at 3-111.

³⁰⁷ U.S. ARMY CORPS OF ENG'RS, NORTHWEST DIV., *supra* note 294, at VII-23.

³⁰⁸ *South Dakota v. Hazen*, 914 F.2d 147, 148–49 (8th Cir. 1990) (request for injunction against navigation releases deemed moot, because fish spawning season and navigation season had concluded).

³⁰⁹ U.S. ARMY CORPS OF ENG'RS, NORTHWEST DIV., *supra* note 294, at VII-2.

³¹⁰ *Id.*

navigation season, the Corps maintains sufficient river levels below Gavins Point Dam, for municipal intakes and nuclear plants along the lower Missouri.³¹¹ The Corps also releases water as needed to break up winter ice jams in the river reaches between the reservoirs to prevent flooding.³¹² Some years, the Corps of Engineers will release water from Gavins Point to the lower basin, to create a spring rise—an artificial “flood” for the purpose of depositing silt for sand bars for the nesting of endangered least terns and piping plovers species.³¹³

The Corps of Engineers first issued the Missouri River Master Manual in 1960.³¹⁴ The extent of the Corps’ authority to manage the Missouri River main stem reservoirs, as well as its operational priorities under the Master Manual, have engendered controversy since that time.

In *ETSI Pipeline Project v. Missouri*, the Court held that the Flood Control Act vested authority to enter contracts for the industrial use of water from the Missouri River main stem reservoirs with the Corps of Engineers, and not the Bureau of Reclamation.³¹⁵ The state of South Dakota had granted a water permit to Energy Transfer Solutions, Inc. (ETSI) to use water for an interstate coal slurry.³¹⁶ The U.S. Bureau of Reclamation then contracted with ETSI for the withdrawal from the Missouri River’s Oahe Reservoir of 20,000 acre-feet of water annually for forty years, for use by the coal slurry.³¹⁷ The states of Missouri, Iowa, and Nebraska successfully challenged the contract, as exceeding the Bureau of Reclamation’s authority under the 1944 Flood Control Act.³¹⁸

Significantly, Justice White’s opinion stated, “The Sloan Plan recognized that the ‘dominant function’ of Lake Oahe and the other main-stem reservoirs would be flood control and navigation, and therefore these projects would come under the jurisdiction of the Army and its Corps of Engineers.”³¹⁹ That language may go too far,

³¹¹ *Id.*

³¹² *Id.*

³¹³ *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 634–35 (8th Cir. 2005) (finding spring rise not mandated under Endangered Species Act).

³¹⁴ *Missouri ex rel. Nixon v. Craig*, 163 F.3d 482, 483 (8th Cir. 1998).

³¹⁵ *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 499 (1988).

³¹⁶ *Id.* at 497–98.

³¹⁷ *Id.*

³¹⁸ *Id.* at 498.

³¹⁹ *Id.* at 512.

however. Section 1(b) of the 1944 Flood Control Act, known as the O'Mahoney-Millikin Amendment, provides that,

The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.³²⁰

Justice White cited part of the legislative history of Section 9 of the Flood Control Act, in support of his dicta that navigation is a “dominant” purpose of Pick-Sloan.³²¹ S. Doc. 191 contains the Sloan Plan originally contemplated by the Bureau of Reclamation.³²² The pronouncement that navigation is the primary Pick-Sloan function was based on language in S. Doc. 191 that the “dominant functions” of the main stem reservoirs would be navigation and flood control.³²³

The legislative history to Section 1(b) of the Flood Control Act conflicts with that. The intent of the O'Mahoney-Millikin Amendment was explained by North Dakota Representative William Lemke:

We are not going to take the water from the people in the states where it originated so that some fellow may float a yacht down the lower Mississippi Valley, while the people and their cattle in the

³²⁰ Flood Control Act of 1944, Pub. L. No. 78-534, § 1(b), 58 Stat. 887 (codified in scattered Sections of 16, 33, and 43 U.S.C.), available at <http://www.usbr.gov/power/legislation/fldcntra.pdf>.

³²¹ *ETSI Pipeline Project*, 484 U.S. at 512 (citing S. DOC. NO. 78-191 (1994)).

³²² S. DOC. NO. 78-191.

³²³ *ETSI Pipeline Project*, 484 U.S. at 512; see also Dep't of the Army, Mo. River Div., Corps of Eng'rs Office of Legal Counsel, *The Role of Recreation in the Regulation of the Corps of Engineers Constructed and Operated Main Stem Reservoirs of the Missouri River*, 4 GREAT PLAINS NAT. RESOURCES J. 26, 33 (1999). The Corps' Office of Legal Counsel relies on the Joint Engineering Report in S. Doc. 247 to support the contention that navigation and flood control are the Pick-Sloan primary purposes, with other purposes secondary. “It seems a rational conclusion that the reconciled plan produced in Senate Document 247 intended the phrase ‘and other uses’ following its recitation of the above primary purposes to encompass the purposes of domestic and sanitary purposes, wildlife, and recreation, which the reconciled report identified in its closing paragraph.” *Id.* The Corps believes that the mere fact that the legislative history references “navigation, flood control . . . and other purposes” means that the two specified functions take precedence over other Pick-Sloan authorized purposes. *Id.* at 30–31.

upper regions go hungry on account of the lack of food and water.³²⁴

Indeed, the opinion in *ETSI Pipeline* actually acknowledged that the legislative history is inconclusive.³²⁵ Footnote 7 reads in part, “The self-styled ‘joint engineering report’ contained in the final Senate Document that effected a reconciliation of the Pick and Sloan Plans did not shed any further light on how the administrative jurisdictions of the two Departments were to be circumscribed”³²⁶

Nevertheless, Justice White’s dicta in *ETSI Pipeline* was cited by the Eighth Circuit Court of Appeals in *South Dakota v. Ubbelohde*, which upheld the level of navigation water service provided by the Corps, as a reasonable balance of competing water uses during severe drought.³²⁷ South Dakota had argued that the continued water releases at the main stem dams during the drought violated the Flood Control Act, which includes numerous project purposes, including fish and wildlife.³²⁸ The Eighth Circuit ruled that, “The dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation.”³²⁹

This issue affects the Tribes in the upper Missouri basin, such as the Three Affiliated Tribes of Fort Berthold, and the Standing Rock and Cheyenne River Sioux Tribes, whose water supplies and Reservation environment are impacted by the levels of the Sakakawea and Oahe Reservoirs.³³⁰ The priority afforded to navigation in the management of Missouri River stream flows by the Corps of Engineers reduces reservoir levels on these Indian Reservations and impedes the ability of the Tribes to utilize and perfect their reserved water rights.³³¹

Due to the severity of drought conditions in the Upper Missouri River Basin during the late 1980s, the Corps of Engineers reviewed

³²⁴ *Missouri River Basin: Hearings on Amendments to the Missouri River Provision in H.R. 3961 Before the House Comm. on River and Harbors*, 78th Cong. 4213 (1944) (statement of Rep. William Lemke, Member, House Comm. on River and Harbors).

³²⁵ *ETSI Pipeline Project*, 484 U.S. at 512.

³²⁶ *Id.* at 512 n.7.

³²⁷ *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1020 (8th Cir. 2003).

³²⁸ *Id.* at 1030.

³²⁹ *Id.* at 1019–20 (citing *ETSI Pipeline Project*, 484 U.S. at 512).

³³⁰ U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., *supra* note 62, at 3–6.

³³¹ *See infra* Part IV.

the operational priorities of the Master Manual.³³² Tribal issues seemed cast aside in the regional conflict pitting upper basin reservoir water users and against lower basin municipal water users and the navigation industry.³³³ The Supreme Court explained the respective water needs of the upper and lower basin, in *ETSI Pipeline Project v. Missouri*,

The topography of this area, however, reveals two distinct regions that experience very different water problems. The upper part of the Basin, which includes large Sections of Montana, Wyoming, North Dakota, and South Dakota, is mostly arid or semiarid; there, the Missouri River and its tributaries are important because they represent a major resource for developing the agricultural and industrial potential of the area. The lower part of the Basin, which includes territory in Nebraska, Kansas, Iowa, and Missouri, is more humid, and there the rivers are used chiefly for navigation, though the critical problem in this region is to control flooding.³³⁴

Meanwhile, the *Missouri River Master Water Control Manual Review and Update* took nearly fifteen years to complete, and then only by court order.³³⁵ On March 19, 2004, the Corps released the *Final Environmental Impact Statement: Missouri River Master Water Control Manual, Review and Update* (hereinafter “Final EIS”) and the updated 2004 Master Manual.³³⁶ They established “drought conservation measures,” to enhance flexibility to reduce navigation releases from the dams during drought.³³⁷ Under the 2004 revision to the Master Manual, the Corps will check the amount of water in storage in the Pick-Sloan reservoirs on March 15 and July 15 of each

³³² *South Dakota v. Hazen*, 914 F.2d 147, 150–51 (8th Cir. 1990).

³³³ *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 637 (8th Cir. 2005). Professor Tarlock wrote,

For the past fifty years, the basin states have persistently, if quietly, fought among themselves and with the federal agencies, primarily the U.S. Army Corps of Engineers . . . that run the Pick-Sloan project reservoirs about the use and management of the river. . . . A secondary theme [is] the injustice done to the Native American Tribes by the federal government

Tarlock, *supra* note 83, at 1–2; *see also* JOHN E. THORSON, *RIVER OF PROMISE, RIVER OF PERIL: THE POLITICS OF MANAGING THE MISSOURI RIVER* (1994).

³³⁴ *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 499–500 (1988).

³³⁵ *In re Operation of the Mo. River Sys. Litig.*, 305 F.Supp. 2d 1096, 1096–99 (D. Minn. 2004).

³³⁶ *Id.* at 1099.

³³⁷ U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., *supra* note 62, at 8-5.

year.³³⁸ If the amount of stored water declines to identified “target” levels due to drought, the Corps reduces or eliminates navigation service.³³⁹

Essentially, in the Final EIS and 2004 Master Manual, the Corps maintained the status quo with respect to its operational priorities under its 1979 Master Manual.³⁴⁰ The release of a high volume of water for navigation continues, but with the prospect of reduced streamflows during drought.³⁴¹ The *2004 Master Manual* provides administrative authority to the Corps to reduce the water releases for navigation during periods of extreme drought.³⁴² The Corps also committed to utilize its new adaptive management authority to experiment with water releases for a spring rise, and to develop new habitat for affected species.³⁴³

A series of lawsuits against the Corps of Engineers over the 2004 Master Manual by upper Missouri basin states,³⁴⁴ lower basin states,³⁴⁵ and environmental groups,³⁴⁶ was consolidated in the District Court of Minnesota.³⁴⁷ In *In re Operation of the Missouri River System Litigation*, the court evaluated the adequacy of the Final EIS under the National Environmental Policy Act and Endangered Species

³³⁸ *Id.* at 8-7.

³³⁹ *Id.* Navigation service is to be reduced if total storage falls below 57 million acre-feet on July 1, and reduced further if storage has fallen below 50.5 million acre-feet. There is a “navigation preclude,” which eliminates navigation releases if there is less than 31 million acre-feet in total storage on March 15. *Id.* at Figures 8.2-1 and 8.2-2. *See also* U.S. ARMY CORPS OF ENG’RS, NORTHWESTERN DIV., *supra* note 294, at VII-50 to VII-53.

³⁴⁰ U.S. ARMY CORPS OF ENG’RS, *supra* note 62, at 8-9 to 8-32 (comparing effects of water management plan under 1979 Master Manual with the preferred alternative in the 2003 Final EIS, and the 2006 Master Manual).

³⁴¹ *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 629 (8th Cir. 2005).

³⁴² *Id.*

³⁴³ U.S. ARMY CORPS OF ENG’RS, NORTHWESTERN DIV., *supra* note 62, at 8-2 to 8-3. The Corps committed to establishing a “Missouri River Recovery Implementation Committee,” comprised of, “representatives of Tribal and State governments and of other governmental and non-governmental organizations that have an interest in the management of the river and the recovery of the listed species and their habitat.” *Id.*

³⁴⁴ *North Dakota v. U.S. Army Corps of Eng’rs*, 270 F. Supp. 2d 1115, 1128 (D.N.D. 2003) (finding North Dakota unlikely to succeed on merits of claim that operation of main stem dams violates state water quality standards).

³⁴⁵ *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003).

³⁴⁶ *Am. Rivers v. Army Corps of Eng’rs*, 271 F. Supp. 2d 230 (D.D.C. 2003).

³⁴⁷ *In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1154-55 (D. Minn. 2005); *see* J.R. Seeronen, *Judicial Challenges to Missouri River Mainstem Regulation*, 16 MO. ENVT’L. L. & POL’Y REV. 60 (2003).

Act.³⁴⁸ The district court entered summary judgment for the Corps of Engineers and other named federal defendants,³⁴⁹ and the Eighth Circuit affirmed.³⁵⁰

The Eighth Circuit explained that, under NEPA, “When the resolution of the dispute involves primarily issues of fact and analysis of the relevant information ‘requires a high level of expertise, we must defer to the informed discretion of the federal agencies.’”³⁵¹ It held that, “The FCA ‘clearly gives a good deal of discretion to the Corps in the management of the River.’”³⁵² The court also reiterated that under the *ETSI Pipeline* and *Ubbelohde* cases, flood control and navigation were deemed the “dominant functions” of the Pick-Sloan program.³⁵³

In *In re Operation of Missouri River System Litigation*, the Eighth Circuit did not address the potential conflict between the portion of the Flood Control Act’s legislative history which may express a preference for navigation, and Section 1(b) of the Act (the O’Mahoney-Millikin Amendment), which prohibits navigation water use from conflicting with agricultural and industrial uses in the upper basin.³⁵⁴ The court held that, “The Corps’ balancing of water-use interests in the 2004 Master Manual is in accordance (with the Flood Control Act).”³⁵⁵ Having upheld the Corps, the court stated, “we need not address appellee South Dakota’s argument,” that the O’Mahoney-Millikin Amendment expresses preference for upstream water uses.³⁵⁶ Thus, the Eighth Circuit invoked its prior dicta that navigation is the

³⁴⁸ *In re Operation of the Mo. River Sys. Litig.*, 363 F.Supp. 2d at 1155.

³⁴⁹ *Id.*

³⁵⁰ *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 638 (8th Cir. 2005).

³⁵¹ *Id.* at 628 (quoting *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999) and *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989)); *see also* *Mo. Coal. for the Env. v. Corps of Eng’rs*, 866 F.2d 1025, 1033 (8th Cir. 1989) (upholding Corps of Engineers’ Environmental Impact Statement citing “[t]he sheer volume of the administrative record in this case” to constitute adequate consideration of environmental effects. *Id.*).

³⁵² *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d at 633.

³⁵³ *Id.* at 629.

³⁵⁴ Flood Control Act of 1944, Pub. L. No. 78-534, § 1(b), 58 Stat. 887 (codified in scattered sections of 16, 33, and 43 U.S.C.), *available at* <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title33/pdf/USCODE-2013-title33-chap15.pdf>.

³⁵⁵ *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d at 630.

³⁵⁶ *Id.* at 630 n.8.

“dominant purpose” of the Flood Control Act, without addressing the fact that Section 1(b) of the act suggests otherwise.³⁵⁷

The Three Affiliated Tribes of the Fort Berthold Reservation intervened in the Missouri River litigation.³⁵⁸ The circuit court upheld the finding that the Tribes did not suffer an adequately particularized “injury-in-fact” from the 2004 Master Manual, to justify standing under Article III.³⁵⁹ The Missouri River Tribes have suffered and continue to be affected by the Pick-Sloan program. The treatment of the Three Affiliated Tribes’ claims in *In re Operation of Missouri River System Litigation* demonstrates that, in litigation relating to the Missouri River, Tribes may need to show injury specific to their Reservation in order to have Article III standing.

As a result of the Corps’ Missouri River operations under the Master Manual, the Oahe Reservoir, and Lakes Sakakawea and Fort Peck experience huge fluctuations in their water levels.³⁶⁰ This has significant impacts on the water supply, aesthetics and natural environment in the Tribal communities along the upper Missouri River, including Fort Berthold.³⁶¹ Moreover, the ability of the Tribes to perfect and utilize their reserved water rights is jeopardized by the Corps’ operations under the Master Manual.³⁶²

³⁵⁷ *Id.* at 629–30. The district court had addressed this directly,

South Dakota maintains that the FCA subordinates navigation to upstream uses of irrigation and domestic water supply [under the O’Mahoney-Millikin Amendment] . . . South Dakota argues that the 2004 Master Manual is in “conflict” with South Dakota’s consumptive beneficial uses, because the 2004 Master Manual allows for lower levels in reservoirs such that South Dakota may be required to build extensions to irrigation lines or extend intake structures . . . South Dakota’s argument lacks merit. . . . [R]equiring South Dakota to build extensions for irrigation lines or drinking water is not in ‘conflict’ with South Dakota’s consumptive beneficial uses, because there is no destruction or denial of South Dakota’s water rights.

In re Operation of the Mo. River Sys. Litig., 363 F. Supp. 2d 1145, 1154–55 (D. Minn. 2005) (citations omitted). On appeal, the Eighth Circuit explicitly left this issue for another day. *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d at 630 n.8.

³⁵⁸ *In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp. 2d at 1168.

³⁵⁹ *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d at 637.

³⁶⁰ U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., *supra* note 294, at E-9.

³⁶¹ *Id.*

³⁶² Davidson, *supra* note 93, at 7.

B. Indian Reserved Water Rights to the Missouri River

Many Indian Tribes in the upper Great Plains possess reserved water rights to the Missouri River main stem.³⁶³ Indeed, “Upper Missouri Basin Indians were the first to successfully assert prior and paramount rights to provide water for Reservation lands that would otherwise be uninhabitable.”³⁶⁴ In *Winters v. United States*, the Supreme Court established that when Montana’s Fort Belknap Tribe reserved rights to land, they also reserved water rights as needed to survive on the Reservation.³⁶⁵

The prior appropriation doctrine of water law applies in most western states, including Montana.³⁶⁶ Under a prior appropriation scheme, a state water engineer or other official issues permits to water users, authorizing them to divert an established quantity of water and put it to a beneficial use, as defined by state law.³⁶⁷ The date in which water is first diverted and put to beneficial use is generally the priority date for that water use.³⁶⁸ During periods of shortage, the holder of an earlier (senior) priority date to a source of water will retain the right to use their full permitted quantity.³⁶⁹ Permittees with later priority dates obtain water only after more senior holders fulfill their water right.³⁷⁰ Shortages are not pro-rated. Prior appropriation water law favors “first in time, first in right.”³⁷¹

In the *Winters* case, an irrigator on the Milk River, a tributary to the Missouri River, diverted water upstream from the Fort Belknap Indian Reservation.³⁷² The upstream diversion diminished water

³⁶³ William H. Veeder, *Indian Water Rights in the Upper Missouri Basin*, 48 N.D. L. REV. 617, 631–32 (1972).

³⁶⁴ *Id.* at 625.

³⁶⁵ *Winters v. United States*, 207 U.S. 564, 575–76 (1908).

³⁶⁶ See A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES, § 5:42 (2000) (stating elements for appropriative water rights); *In re Adjudication of Existing Rights to Use Water*, 55 P.3d 396, 399 (Mont. 2002) (discussing prior appropriation water rights under Montana law).

³⁶⁷ TARLOCK, *supra* note 366, at §§ 5:65 to 5:66.

³⁶⁸ *Id.* at § 5:29.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *E.g.*, *State ex rel. Cary v. Cochran*, 292 N.W. 239 (Neb. 1940) (finding senior holder fulfills right during water shortage even if water is subject to excessive loss).

³⁷² *Winters*, 207 U.S. at 566–69.

needed on the Reservation for a Tribal irrigation project.³⁷³ Under principles of prior appropriation, the upstream water user whose diversion of water predated the Indian project was safe. However, the Court noted that “the power of the Government to reserve the waters [for the Indian Reservation] and exempt them from appropriation under the state laws is not denied, and could not be. . . . [T]he Government did reserve them . . . and for a use which would be necessarily continued through years [sic].”³⁷⁴

The Court held that the prior 1888 Agreement between the United States and the Tribes, which established Fort Belknap Indian Reservation, implicitly reserved water for the Reservation lands.³⁷⁵ Even though Winters’ water use predated the Tribal irrigation project, the Indian water right prevailed because the Reservation was established before Winters began irrigating.³⁷⁶ Federal law reserves Indian water rights,³⁷⁷ regardless of whether state or local law requires an actual diversion or appropriation.

Indian water rights have been characterized as “prior and superior” to state-granted water rights.³⁷⁸ “prior” because the reservations were established before most western states and are thus senior during periods of shortage, and “superior” because Indian reserved water rights exist pursuant to federal law, rather than state law. As explained in *Cohen’s Handbook of Federal Indian Law*,

The *Winters* decision established that the creation of an Indian reservation impliedly reserves water rights to the tribe or tribes occupying the territory; that those water rights are reserved in order to carry out the purposes for which the lands were set aside; and that the rights are paramount to water rights later perfected under state law.³⁷⁹

³⁷³ *Id.*

³⁷⁴ *Id.* at 577 (citations omitted).

³⁷⁵ *Id.* at 575–76.

³⁷⁶ *Id.*

³⁷⁷ See Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61, 63 (1994).

³⁷⁸ *Arizona v. California*, 460 U.S. 605, 610 (1983) (holding Indian water rights are “entitled to priority”); *Conrad Investment Co. v. United States*, 161 F. 829, 831 (1908) (describing the “paramount” water rights of the tribes on the Blackfeet Indian reservation); William H. Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 RKY. MT. MIN. L. INST. 631, 641–42, 653–54 (1971).

³⁷⁹ COHEN’S HANDBOOK, *supra* note 150, at § 19.03(1).

Many Indian Reservations were established with an agricultural purpose.³⁸⁰ In *Arizona v. California*, the Court held that “when the United States created these reservations or added to them, it reserved not only the land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands.”³⁸¹ The Court recognized a reservation of a quantity of water “to satisfy the future as well as the present needs of the Indian Reservations and [] that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations.”³⁸² Ultimately, the over-arching purpose of most Indian Reservations is to provide a permanent homeland for that Tribe,³⁸³ which encompasses water for all beneficial uses, including livestock,³⁸⁴ fish and wildlife,³⁸⁵ and ceremonial uses.³⁸⁶

The precise quantity of a Tribe’s reserved water right may be determined in an adjudication or by compact.³⁸⁷ In the Missouri Basin, the Shoshone-Arapaho Tribes of the Wind River Reservation

³⁸⁰ *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988) *aff’d submitted by an equally divided court in Wyoming v. United States*, 492 U.S. 406 (1989).

³⁸¹ *Arizona v. California*, 373 U.S. 546, 596 (1963).

³⁸² *Id.* at 600.

³⁸³ *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *In re Gen. Adjudication of All Rights to Use Water in the Gila R. Sys. & Source*, 35 P.3d 68, 74 (Ariz. 2001).

³⁸⁴ *See, e.g.*, Water Rights Compact, Mont.-Northern Cheyenne Tribe-U.S., May 20, 1991, Mont. Code Ann. § 85-20-301. For an assessment of the water rights settlements of three Oregon Tribes see also Rebecca Cruz Guiao, *How Water Rights Are Won in the West: Three Case Studies from the Northwest*, 37 AM. INDIAN L. REV. 283 (2012–2013).

³⁸⁵ *United States v. Adair*, 723 F.2d 1394, 1413–15 (9th Cir. 1983) (finding reserved water right for fishery with priority date of time immemorial); *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (affirming minimum streamflow for fishery); *see also* Michael C. Blumm et al., *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, 36 ENVTL. L. 1157, 1171–91 (2006) (detailing difficulties Tribes encounter obtaining and enforcing instream flow rights in state court adjudications); Amy Choyce Allison, Note & Comment, *Extending Winters to Water Quality: Allowing Groundwater for Hatcheries*, 77 WASH. L. REV. 1193, 1121–26 (2002) (contending that *Winters* rights should extend to groundwater of good quality for fisheries).

³⁸⁶ *See, e.g.*, Water Rights Compact, Mont.-Northern Cheyenne Tribe-U.S., May 20, 1991, Mont. Code Ann. § 85-20-301.

³⁸⁷ Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 TULSA L. REV. 23 (2006); “[J]udicial determinations of reserved rights are being replaced increasingly with settlement agreements” COHEN’S HANDBOOK, *supra* note 150, at § 19.03.

in Wyoming had their water rights quantified by state court decree,³⁸⁸ and several Montana Tribes have entered reserved water rights compacts with the State of Montana.³⁸⁹ Neither the Three Affiliated Tribes of Fort Berthold in North Dakota, nor the Tribes of the Sioux Nation downstream on the Missouri River, have quantified their water rights.³⁹⁰

Under *Winters*, the priority date of the water right is the date which the Reservation was established,³⁹¹ or earlier.³⁹² Consequently, “the exercise of tribal water rights has the potential to disrupt non-Indian water uses.”³⁹³ That is the gravamen of the controversy involving Indian reserved water rights to the main stem of the Missouri River.

³⁸⁸ *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988) *aff'd submitted by an equally divided court in Wyoming v. United States*, 492 U.S. 406 (1989). In the exercise of state prior appropriation systems, the state courts or administrative agencies may be called upon to adjudicate the rights of all users to a stream system in a general stream adjudication. See A. Lynne Krogh, *Water Rights Adjudications in the Western States: Procedures, Constitutionality, Problems & Solutions*, 30 LAND AND WATER L. REV. 9, 18–31 (1995). Congress enacted the McCarran Amendment waiving the sovereign immunity of the United States in state court general stream adjudications, to permit the joinder of the United States when it possesses water rights to a stream under adjudication. McCarran Amendment, 43 U.S.C. § 666 (2012). The Supreme Court has interpreted this waiver of sovereign immunity as granting the state courts jurisdiction to adjudicate Indian water rights. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 810 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). This has proven to be very controversial. Harold S. Shepherd, *State Court Jurisdiction Over Tribal Water Rights: A Call for Rational Thinking*, 17 J. ENVTL. L. & LITIG. 343 (2002); Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights*, 18 HARV. ENVTL. L. REV. 433, 444–46 (1994). The Wind River Tribes experience in *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.* illustrates this. See Susan M. Williams, *Indian Winters Water Administration: Averting New War*, 11 PUB. LAND & RESOURCES L. REV. 53 (1991); see also *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. Source*, 35 P.3d 68, 79 (Ariz. 2001) (“[W]e decline to approve the use of [Practicably Irrigable Acreage (PIA)] as the exclusive quantification measure for determining water rights on Indian lands,” thereby ignoring precedent and jeopardizing future agricultural water uses by the Apache Tribes. *Id.*); *Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1331–32 (Wash. 1993) (affirming the quantification of the water rights of the Confederated Tribes of the Yakima Nation even though the Tribe was not a party to the litigation).

³⁸⁹ See *supra* notes 384, 386.

³⁹⁰ Charles Carvell, *Indian Reserved Water Rights: Impending Conflict or Coming Rapprochement Between the State of North Dakota and North Dakota Indian Tribes*, 85 N.D. L. REV. 1, 3 (2009).

³⁹¹ *Winters v. United States*, 207 U.S. 564, 574–76 (1908).

³⁹² *United States v. Adair*, 723 F.2d 1394, 1413–15 (9th Cir. 1983).

³⁹³ COHEN'S HANDBOOK, *supra* note 150, at § 19.03(1).

C. Impacts of the Master Manual on Indian Water Rights

As described above, the Army Corps of Engineers operates the main stem dams primarily for flood control storage, water supply for downstream navigation, and to generate hydropower.³⁹⁴ The Fort Berthold Reservation, and the Standing Rock, Cheyenne River, Crow Creek, Lower Brule, Yankton, and Santee Sioux Reservations all border the Missouri River.³⁹⁵ “Reserved rights presumably should attach to all water sources—groundwater, streams, lakes, and springs—that arise on, border, traverse, underlie, or are encompassed within Indian reservations.”³⁹⁶ Thus, the Missouri Basin Tribes possess *Winters* Doctrine claims for the right to use the water of the Missouri River for beneficial use on the Reservations.³⁹⁷

As of the present, those claims remain unadjudicated.³⁹⁸ Accordingly, the Corps does not know how much of the stored water in the main stem reservoirs for flood control and released for navigation and water supply in the lower Missouri is subject to upstream depletions for presently unadjudicated Indian water rights.³⁹⁹

Indian water rights are property rights stemming from the Treaties and other agreements between the Tribes and United States.⁴⁰⁰ The United States has assumed a trust responsibility to protect Indian property,⁴⁰¹ including water rights.⁴⁰² The trust responsibility has been

³⁹⁴ See *supra* Part IV.A.

³⁹⁵ Davidson & Geu, *supra* note 17, at 824–25.

³⁹⁶ COHEN’S HANDBOOK, *supra* note 150, at § 19.03(2)(a).

³⁹⁷ Veeder, *supra* note 363, at 631–32.

³⁹⁸ Carvell, *supra* note 390, at 3.

³⁹⁹ Cf. *Turner v. Kings River Conservation Dist.*, 360 F.2d 184, 187 (9th Cir. 1966) (refusing to enjoin water impoundments by the Corps of Engineers and water delivery contracts by the Bureau of Reclamation alleged to impair state law water rights).

⁴⁰⁰ *Arizona v. California*, 373 U.S. 546, 600 (1963) (describing Indian water rights as “present perfected rights”).

⁴⁰¹ *Johnson v. M’Intosh*, 21 U.S. 543, 573 (1823) (conveyance of land by Tribe invalid, for lack of fee simple title by Tribe; adjudged to be held by the United States due to much criticized “doctrine of discovery”); 25 U.S.C. § 462 (2012) (trust title retained by United States under Indian Reorganization Act of 1934).

⁴⁰² Section 2 of the Western Water Policy Review Act of 1992 provides that, “the Federal government recognizes its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of these resources.” Western Water Policy Review Act of 1992, Pub. L. No. 102-575, § 3002(9), 106 Stat. 4694, available at file:///C:/Users/Law Student/Downloads/STATUTE-106-Pg4600%20(3).pdf; see also Robert T. Anderson,

compromised by conflicts of interest⁴⁰³ and politics.⁴⁰⁴ Nevertheless, it imposes responsibilities on agencies managing waters subject to the reserved rights claims of Indian Tribes.⁴⁰⁵

In *Northwest Sea Farms v. U.S. Army Corps of Engineers*, the district court explained the nature of the Corps' obligation to an Indian Tribe affected by its programs.⁴⁰⁶ The court upheld the denial by the Corps of a permit for sea bed farming, due to the potential impact on Treaty fishing rights.⁴⁰⁷ The court stated,

The Supreme Court has recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." This obligation has been interpreted to impose a fiduciary duty owed in conducting "any Federal government action" which relates to Indian Tribes. . . . [T]he duty extends to the Corps

In carrying out its fiduciary duty, it is the government's, and subsequently the Corps', responsibility to ensure that Indian treaty rights are given full effect. . . . [T]he Corps owes a fiduciary duty to ensure that the [Indian] Nation's treaty rights are not abrogated or impinged

. . . .
 . . . It is this fiduciary duty, rather than any express regulatory provision, which mandates that the Corps take treaty rights into consideration.⁴⁰⁸

Thus, "the courts have recognized the obligation of the United States, as trustee of the Indian tribes and people, to preserve and

Indian Water Rights and the Federal Trust Responsibility, 46 NAT. RESOURCES J. 399 (2006).

⁴⁰³ *Nevada v. United States*, 463 U.S. 110, 135 (1983) (finding the United States is not held to a strict fiduciary standard when asserting Indian reserved water rights and reclamation water rights in same litigation); *Message From the President of the United States Transmitting Recommendations for Indian Policy*, 116 Cong. Rec. 10894, 10896 (July 9, 1970) ("No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; but the Federal Government has frequently found itself exactly in that position." *Id.*); Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307 (2003).

⁴⁰⁴ *United States v. Navajo Nation*, 537 U.S. 488, 511 (2003) (finding high-level DOI officials' *ex parte* meetings with coal companies, designed to minimize lease payments to the Navajo Nation, did not give rise to liability for breach of trust).

⁴⁰⁵ *See Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995) ("[T]he Tribe's federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights." *Id.*).

⁴⁰⁶ *Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1519-20 (D. Wash. 1996).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* (citations omitted).

protect the Indian rights to the use of water.”⁴⁰⁹ For example, in *Pyramid Lake Paiute Tribe v. Morton*, a water allocation regulation issued by the Secretary of the Interior was struck down as arbitrary and capricious under the Administrative Procedures Act because the Secretary failed to demonstrate how the allocation fulfilled his obligation to protect the water rights of the affected Tribe.⁴¹⁰ The court held that,

In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract goes to [the Pyramid Lake Reservation].

. . . .
The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe.⁴¹¹

Under this principle, the Missouri River Master Manual must contain “a closely developed regulation” to preserve water to fulfill the Tribes’ water rights.⁴¹² Nevertheless, with respect to water releases at Oahe Dam, which directly affect the Standing Rock and Cheyenne River Sioux Reservations, the Master Manual states,

Oahe’s primary water management functions are (1) to capture plains snowmelt and localized rainfall runoffs . . . that are then metered out at controlled release rates to meet System requirements . . . (2) to serve as a primary storage location . . . [for] major downstream flood control regulation . . . and (3) to provide the extra water needed to meet project purposes that draft storage during low-water years, particularly downstream water supply and navigation.⁴¹³

The Corps of Engineers’ manual for the operation of the Oahe Dam establishes priorities of “downstream flood control” and “downstream water supply and navigation.”⁴¹⁴ There are no provisions demonstrating how “all water not obligated by court decree or

⁴⁰⁹ William H. Veeder, *Water Rights in the Coal Fields of the Yellowstone River Basin*, 40 L. & CONTEMP. PROBS. 77, 88 (1976).

⁴¹⁰ *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972).

⁴¹¹ *Id.*; see also *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1213–14 (9th Cir. 1999) (upholding water allocation by Bureau of Reclamation to fulfill senior Indian water rights); cf. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005) (upholding dismissal of action for injunctive relief against operation of dam affecting Tribal waters due to defective pleading).

⁴¹² *Pyramid Lake Paiute Tribe*, 354 F. Supp. at 256.

⁴¹³ U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., *supra* note 294, at VII-1.

⁴¹⁴ *Id.*

contract with the District goes to [the Tribes]" as required in the *Pyramid Lake* case.⁴¹⁵ The Master Manual lacks any operational criteria to ensure that Tribal waters are protected, in light of the stream flow management for downstream flood control and navigation. In this respect, it fails to meet the requirements described in *Northwest Sea Farms* case.⁴¹⁶

The Corps' historian, John R. Ferrel, explained, "Indian rights regarding water management were not clarified nor considered in operational plans."⁴¹⁷ Actually, the Master Manual purports to divest the Corps of its responsibilities to the Tribes, because Indian reserved water rights to the Missouri River main stem have not been quantified and put to consumptive use.⁴¹⁸ The Master Manual states in relevant part:

Currently, Tribal Reservation-reserved water rights have not been quantified in an appropriate legal forum or by compact

. . . .

. . . When a Tribe exercises its water rights, these consumptive uses will then be incorporated as an existing depletion. Unless specifically provided for by law, these rights do not entail an allocation of storage. Accordingly, water must actually be diverted to have an impact on the operation of the System. Further modifications to System operation, in accordance with pertinent legal requirements, will be considered as Tribal water rights are exercised⁴¹⁹

In operating the main stem dams, the Corps concerns itself only with water depletions— not reserved rights. The Tribes' water rights are reserved for both present and future uses.⁴²⁰ The reserved water rights to the Missouri River for future Indian uses are not "existing depletions," and are not taken into account by the Corps.

In operating the Missouri River main stem dams under the Pick-Sloan program, the Corps of Engineers possesses an obligation to

⁴¹⁵ *Pyramid Lake Paiute Tribe*, 354 F. Supp. at 256.

⁴¹⁶ *Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1519–20 (D. Wash. 1996).

⁴¹⁷ JOHN R. FERREL, U.S. ARMY CORPS OF ENGINEERS, BIG DAM ERA 123 (1993).

⁴¹⁸ See Carvell, *supra* note 390, at 3.

⁴¹⁹ U.S. ARMY CORPS OF ENG'RS, NORTHWEST DIV., *supra* note 294, at E-10.

⁴²⁰ *Arizona v. California*, 373 U.S. 546, 596 (1963). The Court in *Winters* made clear that the reservation of water stemmed from the agreement between the United States and Fort Belknap Tribes. *Winters v. United States*, 207 U.S. 564, 576 (1908). Unlike state law prior appropriation water rights systems, Indian reserved water rights are not forfeited by nonuse. *Id.*

protect Tribal water supplies.⁴²¹ Instead, the Corps' Missouri River operations under the Master Manual focus exclusively on downstream navigation and water intakes, to the detriment of water uses on the Indian Reservations.⁴²²

In 2003, water releases at Oahe Dam for downstream navigation, in combination with drought conditions, caused low water levels in the Oahe Reservoir.⁴²³ Excessive silt deposits resulted in the breakdown of the intake for the Fort Yates public water system on the Standing Rock Reservation.⁴²⁴ On November 23, 2003, three Tribal communities lost their drinking water supplies for ten days.⁴²⁵ The Corps of Engineers' water releases contributed to adverse environmental conditions, which led to a public health crisis on the Standing Rock Reservation.⁴²⁶

In its Missouri River operations, the Corps of Engineers ignores the detrimental impact of the impoundment and management of the Missouri River stream flows on the Tribes' ability to put their water

⁴²¹ See *supra* notes 402–09 and accompanying text.

⁴²² See Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 368 (2003) (“Courts should invoke their equitable authority to restrain the majority of society and its industry from bringing to ruin the natural systems sustaining Native America.” *Id.*); see also Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RESOURCES J. 375, 375–81 (2006).

⁴²³ *Water Problems on the Standing Rock Indian Reservation, Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. 1–4 (2004) (statement of Charles W. Murphy, Chairman, Standing Rock Sioux Tribe) (“It’s very said right now that we don’t know if we’re going to have water next week or not . . . they’re letting too much water downstream.” *Id.*), available at <http://babel.hathitrust.org/cgi/pt?id=pur1.32754077962433;view=1up;seq=6>; cf. *In re Operation of Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1155 (D. Minn. 2004) (“requiring South Dakota to build extensions for irrigation lines or drinking water is not in ‘conflict’ with South Dakota’s consumptive beneficial uses, because there is no destruction or denial of South Dakota’s water rights The statute is not designed to protect against these difficulties” *Id.*).

⁴²⁴ *Water Problems on the Standing Rock Indian Reservation, Hearing Before the S. Comm. on Indian Affairs*, *supra* note 423, at 1–4 (statement of Charles W. Murphy, Chairman, Standing Rock Sioux Tribe).

⁴²⁵ *Id.* at 2.

⁴²⁶ See Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 139–40 (1995) (“The fiduciary duty to protect the land base of the tribe should naturally extend to protecting it from environmental degradation.” *Id.*).

to beneficial use.⁴²⁷ The resulting uncertainty complicates the Tribes' ability to perfect their *Winters* Doctrine claims through an adjudication or negotiated settlement.⁴²⁸

The quantification of Indian reserved water rights involves economic feasibility determinations for future water development projects.⁴²⁹ In *Arizona v. California*, the Court recognized the Tribal reservation of agricultural water for the "practicably irrigable acreage" on the Reservations.⁴³⁰ This has led some state courts, when adjudicating Indian water rights, to delve into the minutiae of irrigation engineering and agricultural economics.⁴³¹ The Secretary of the Interior's *Criteria and Procedures for the Negotiation of Indian Water Settlements* include feasibility criteria for future water projects in settlement agreements quantifying Indian water rights.⁴³²

Moreover, the Supreme Court has determined that the quantity of water reserved by the United States when it established a national forest must be determined narrowly with sensitivity to the impact on existing water users.⁴³³ The management by the Corps of Missouri River streamflows under the Master Manual guarantees water supplies for downstream navigation and consumptive uses, in all but the most serious of drought conditions.⁴³⁴ The Court's "sensitivity

⁴²⁷ See *United States v. Oregon*, 44 F.3d 758, 771 (9th Cir. 1994) (admonishing state not to prejudice reserved water rights of Tribe in administrative proceeding to which neither Tribe nor United States were a party).

⁴²⁸ *State ex rel. Martinez v. Lewis*, 861 P.2d 235, 246 (N.M. Ct. App. 1993) (identifying "water quantity" as part of the criteria for feasibility); *In re General Adjudication of All Rights to Use Water in Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988) ("water availability" as an aspect of project feasibility).

⁴²⁹ *In re General Adjudication of All Rights to Use Water in Big Horn River Sys.*, 753 P.2d at 101.

⁴³⁰ *Arizona v. California*, 373 U.S. 546, 600 (1963).

⁴³¹ *In re General Adjudication of All Rights to Use Water in Big Horn River Sys.*, 753 P.2d at 101 ("The determination of irrigable acres involves a two-part analysis, i.e., the [Practicably Irrigable Acreage (PIA)] must be susceptible of sustained irrigation (not only proof of the arability but also of the engineering feasibility of irrigating the land) and irrigable 'at reasonable cost.'" *Id.*); see also *Martinez*, 861 P.2d at 246.

⁴³² 55 Fed. Reg. 9223 (Mar. 12, 1990) ("Settlements should not generally include . . . participation in an economically unjustified irrigation investment . . ."); Joseph M. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 LAND AND WATER L. REV. 1, 6-12 (1992) ("Practicable irrigability analyses for Indian lands are subject to more strict economic review than those for reclamation projects.").

⁴³³ *United States v. New Mexico*, 438 U.S. 696, 705 (1978). The term "sensitivity doctrine" is derived from Justice Powell's opinion partially concurring and dissenting. *Id.* at 718.

⁴³⁴ See *supra* notes 320, 321 and accompanying text.

doctrine” applies to federal reserved water rights for national forests and parks, not Indian reserved water rights.⁴³⁵ Nevertheless, the economy in the lower Missouri basin has come to rely on the steady flow of Corps-managed water.⁴³⁶ The reliance by the lower Missouri basin on the status quo imposes burdens on the Tribes, as they perfect and implement their reserved water rights, upstream on the Missouri River.⁴³⁷

Professor John Davidson has described the impact of the Corps’ operations on Indian water rights, as follows:

[T]he final Master Manual may lock in the status of the specific river uses with a firmness that is every bit as solid as many Supreme Court equitable apportionments. Any given process is as important as the finality and enforceability of the final decision, be it judicial, legislative or administrative. For Missouri River water users, the Master Manual process may be as important as the litigation in *Arizona v. California* was to Colorado River water users.⁴³⁸

D. Effect on Cultural and Environmental Resources

1. Cultural Resources

As discussed above, the Three Affiliated Tribes of Fort Berthold and the Sioux Tribes along the Missouri River had established traditional communities in the Missouri bottomlands, which were uprooted by the main stem dams.⁴³⁹ Not all of the Tribal cemeteries were properly relocated.⁴⁴⁰ The operation of the dams has resulted in the erosion of grave sites and other historical sites.⁴⁴¹ Native American human remains, and artifacts and cultural objects routinely wash up on the shores of the Missouri River.⁴⁴²

⁴³⁵ Sylvia F. Liu, *American Indian Reserved Water Rights: The Federal Obligation to Protect Tribal Water Resources and Tribal Autonomy*, 25 ENVTL. L. 425, 459–61 (1995).

⁴³⁶ Tarlock, *supra* note 83, at 2.

⁴³⁷ Davidson, *supra* note 93, at 18.

⁴³⁸ *Id.*

⁴³⁹ *See supra* Part III.

⁴⁴⁰ *Yankton Sioux Tribe v. U.S. Army Corps of Eng’rs*, 83 F. Supp. 2d 1047, 1048 (D.S.D. 2000) (“The Corps failed to effect the removal and reburial of all of the bodies in the cemetery.” *Id.*).

⁴⁴¹ *Id.* at 1056–57.

⁴⁴² *See U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., supra* note 62, at 3-167 to 3-168, available at http://www.nwd-mr.usace.army.mil/mmanual/Volume%20I/Section_3.pdf.

The Corps of Engineers has found,

The lakes, shoreline zones, and adjacent uplands of the Mainstem Reservoir System contain a variety of archaeological site classes, including prehistoric sites of all periods

. . . .

The Fort Peck survey recorded 49 archaeological sites, including 12 historic and 37 prehistoric sites. These sites ranged from historic-era homesteads to scatters of stone tool waste, tipi rings, and rock cairn sites to a large communal bison kill and processing site.

. . . .

Archaeological surveys have resulted in the discovery of 1,402 archaeological sites in and adjacent to Lake Sakakawea.

. . . .

Surveys at Lake Oahe recorded 1,114 archaeological sites

. . . .

Archaeological surveys have recorded 165 other archaeological sites [at the remaining Pick-Sloan reservoirs].⁴⁴³

Two federal statutes, the Native American Graves Protection and Repatriation Act (NAGPRA),⁴⁴⁴ and the National Historic Preservation Act (NHPA)⁴⁴⁵ provide substantive protections and procedural rights to the affected Tribes. NAGPRA is designed to protect Native American human remains, funerary objects, and objects of cultural patrimony from disturbance on Federal and Tribal land.⁴⁴⁶ Section 3(d) of NAGPRA governs the inadvertent discoveries of these objects.⁴⁴⁷ Upon an unintended unearthing, the agency must cease the activity that caused the disturbance, protect the human remains and cultural objects *in situ*, and provide notice to the appropriate Tribe, with a right of repatriation.⁴⁴⁸

⁴⁴³ *Id.* at 3-167.

⁴⁴⁴ Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001–3013 (2012).

⁴⁴⁵ National Historic Preservation Act of 1966, 16 U.S.C. §§ 470 to 470x-6 (2012).

⁴⁴⁶ Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 59 (1992). Other important statutory provisions require museums to repatriate human remains and cultural objects with the affiliated Tribe, including civil and criminal penalties for violations. 25 U.S.C. §§ 3003–3005; 18 U.S.C. § 1170 (2012).

⁴⁴⁷ 25 U.S.C. § 3002(d).

⁴⁴⁸ *Id.*; see *Bonnichsen v. United States*, 357 F.2d 962, 996–67 (9th Cir. 2004) (reversing agency decision on Tribal affiliation of prehistoric remains); *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1025–26 (D. Nev. 2006) (requiring agency to consider Tribal data on issue of Tribal affiliation of remains).

Water releases at the main stem dams cause wave action and erosion along the Missouri River.⁴⁴⁹ This results in the unearthing of Native American human remains and cultural objects on the Corps of Engineers’ Pick-Sloan project lands.⁴⁵⁰ When this occurs, it constitutes an inadvertent discovery under Section 3(d) of NAGPRA, triggering the mitigation and repatriation requirements.⁴⁵¹ The federal court in the *Yankton Sioux Tribe v. U.S. Army Corps of Engineers* case explained the Corps’ legal duties under NAGPRA, upon an unearthing of human remains due to reservoir fluctuations caused by water releases at the Missouri River dams.⁴⁵² The court stated,

As the inadvertent discoverer of remains protected by §3002(d) and the federal agency with primary management authority over the land on which they were discovered, the Corps has three duties. First, the Corps must meet certain notification and certification requirements [for repatriation]. Second, the Corps must refrain from raising and lowering the water levels of the Lake over the cemetery for at least thirty days from the date of certification. . . . Finally, the Corps must take steps to protect the remains. As the discoverer of the remains, the Corps has a statutory duty to make “a reasonable effort to protect them”; as the federal agency responsible for managing the site, it must “further secure and protect inadvertently discovered human remains . . . including, where necessary, stabilization and covering.”⁴⁵³

The NHPA is a procedural statute designed to ensure consideration of the impacts of federally-funded activities on historically-significant sites or objects.⁴⁵⁴ Under Section 106 of the NHPA, federal agencies must, “prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any district, site . . . or object that is included in or eligible for inclusion in the National Register [of Historic Places].”⁴⁵⁵ The agency

⁴⁴⁹ See U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., *supra* note 62, at 3-167 to 3-168.

⁴⁵⁰ *Yankton Sioux Tribe v. U.S. Army Corps of Eng’rs*, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000).

⁴⁵¹ *Id.*

⁴⁵² *Id.* at 1056–57.

⁴⁵³ *Id.* at 1057.

⁴⁵⁴ *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 278–79 (3d Cir. 1983).

⁴⁵⁵ National Historic Preservation Act of 1966, 16 U.S.C. § 470f (2012), *available at* <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title16/pdf/USCODE-2013-title16-chap1A-subchapII.pdf>.

engaged in the undertaking must consult with the Advisory Council on Historic Preservation in making this determination.⁴⁵⁶

A finding that a federal undertaking shall have an adverse impact on covered sites or objects will trigger mitigation requirements, as prescribed in the Advisory Council regulations.⁴⁵⁷

The regulations define “adverse effects,” as including the “physical destruction of or damage to all or part of the property.”⁴⁵⁸ As the Corps of Engineers explained, “Of 380 Plains Village earthlodge villages . . . 43 are immediately threatened with destruction due to lake action”⁴⁵⁹ Consequently, NHPA Section 106 applies when water releases by the Corps affect cultural sites along the Missouri River, and the Corps should comply with the requirements of Section 106 and the applicable regulations.

This includes consulting with the affected tribe, “to develop and evaluate alternatives to the undertaking that could avoid, minimize or mitigate adverse effects”⁴⁶⁰ The Corps must attempt to reach a memorandum of agreement with the affected tribe.⁴⁶¹ If it is unable to do so, it must consult further with the Advisory Council.⁴⁶²

The Corps of Engineers purports to comply with these requirements with its *Final Programmatic Agreement for the Operation of the Missouri River Main Stem System for Compliance with the National Historic Preservation Act* (hereinafter PA).⁴⁶³ The PA is an agreement between the Corps of Engineers, Bureau of Indian Affairs, State Historic Preservation Officers of Montana, North and South Dakota, stakeholders such as the National Trust for Historic Preservation, and a number of Missouri Basin Tribes.⁴⁶⁴ Numerous tribes that are affected by the Pick-Sloan program, such as the

⁴⁵⁶ Nat'l Trust for Historic Preservation v. Blanck, 938 F. Supp. 908, 920 (D.D.C. 1996) (finding consultation mandatory for federally funded or permitted undertaking).

⁴⁵⁷ Muckleshoot Indian Tribe v. Forest Service, 177 F.3d 800, 808–09 (9th Cir. 1999) (finding inadequate mitigation for land transfer under prior regulations).

⁴⁵⁸ 36 C.F.R. § 800.5(a)(2)(i) (2004), available at <http://www.achp.gov/regs-rev04.pdf>.

⁴⁵⁹ U.S. ARMY CORPS OF ENG'RS, NORTHWEST DIV., *supra* note 62, at 3-168.

⁴⁶⁰ 36 C.F.R. § 800.6(a) (2004).

⁴⁶¹ *Id.* at § 800.6(a), (c).

⁴⁶² *Id.* at § 800.6(b).

⁴⁶³ PROGRAMMATIC AGREEMENT FOR THE OPERATION AND MANAGEMENT OF THE MISSOURI RIVER MAIN STEM SYSTEM FOR COMPLIANCE WITH THE NATIONAL HISTORIC PRESERVATION ACT *passim* (2004), available at http://www.usace.army.mil/Portals/2/docs/civilworks/tribal/mou_moa_pa/fina_1mor_pa_signed.pdf.

⁴⁶⁴ *Id.* at P-2.

Standing Rock Sioux Tribe and Yankton Sioux Tribe, are not signatories to the agreement.⁴⁶⁵

The PA establishes consultation protocols under NHPA Section 106, and commits the Corps to conducting cultural resource management and enforcement plans.⁴⁶⁶ The extent that the PA's consultation schedule and mitigation requirements are more beneficial than those outlined in the statute and regulations is debatable. Additionally, the level of NHPA compliance by the Corps with respect to the non-signatory tribes may be an ongoing issue.⁴⁶⁷ Ultimately, the damage to Native American cultural resources from the operation of the Missouri River dams is extensive and ongoing—time is not on the Tribes' side.⁴⁶⁸

2. Environmental Justice Considerations

On February 11, 1994, President Clinton issued Executive Order 12,898 on *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.⁴⁶⁹ It provides that, “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities,” on minority and poor communities.⁴⁷⁰ An interagency task force was established to coordinate its implementation.⁴⁷¹ There is an emphasis

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ See Melissa Lorentz, Note, *Engineering Exceptions to Historic Preservation Law: Why the Army Corps of Engineers' Section 106 Regulations Are Invalid*, 40 WILLIAM MITCHELL L. REV. 1580, 1582–83 (2014) (arguing that regulations issued by the Corps of Engineers implementing NHPA Section 106, 33 C.F.R. 325 pt. app. C (2013), fail to comply with the Act and the Advisory Council on Historic Preservation requirements).

⁴⁶⁸ See U.S. ARMY CORPS OF ENG'RS, NORTHWEST DIV., *supra* note 62, at 3-168.

⁴⁶⁹ Exec. Order No. 12,898, 59 Fed. Reg. 9061 (Feb. 16, 1994), available at <http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf>; see also White House Memorandum from William Clinton, U.S. President, to the Heads of All U.S. Dep'ts and Agencies, Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1994), available at http://www.epa.gov/environmentaljustice/resources/policy/clinton_memo_12898.pdf.

⁴⁷⁰ Exec. Order No. 12,898 § 1-1; see Richard J. Lazarus, *Pursuing 'Environmental Justice': the Distributional Effects of Environmental Protection*, 87 NW. L. REV. 787, 850–52 (1993) (discussing “reforming the structure of environmental policymaking to promote minority interests”).

⁴⁷¹ Exec. Order No. 12,898 § 1-102.

on enhanced research and analysis of the impacts of agency actions on affected minority and low income communities, as well as public participation.⁴⁷² The Executive Order specifies that programs affecting Native Americans are to be included in the Environmental Justice mission of all federal agencies.⁴⁷³

Many of the functions contemplated in the Executive Order and its implementing memorandum are conducted in accordance with the National Environmental Policy Act (NEPA).⁴⁷⁴ The Council on Environmental Quality (CEQ), which advises the President on NEPA implementation, has issued Guidance for complying with the Executive Order when conducting NEPA environmental reviews.⁴⁷⁵ The Guidance provides for “tribal representation [in the NEPA process] in a manner that is consistent with . . . treaty rights.”⁴⁷⁶

Major decisions or actions by the Corps of Engineers affecting the operation of the Missouri River main stem dams trigger NEPA.⁴⁷⁷ Since the CEQ Guidance on Environmental Justice prescribe respect for Tribal Treaty rights in NEPA decision making,⁴⁷⁸ the Corps of Engineers should be obligated to explain in some detail how its Missouri River operations affect Tribal Treaty rights, and describe

⁴⁷² § 3-3.

⁴⁷³ § 6-606; Jana L. Walker et al., *A Closer Look at Environmental Injustice in Indian Country*, 1 SEATTLE J. FOR SOC. JUST. 379, 381 (2002) (“What distinguishes the situation of Tribes from all other environmental justice groups, however, is the fact that environmental justice issues affecting Tribes must be viewed against the backdrop of tribal sovereignty, the federal trust responsibility owed by the United States to the Tribes, the government-to-government relationship, treaty rights, and the special jurisdictional rules applicable to Indian Country.” *Id.*); see also Michael S. Houdyshell, *Environmental Injustice: The Need for a New Vision of Indian Environmental Justice*, 10 GREAT PLAINS NAT. RESOURCES J. 1 (2006).

⁴⁷⁴ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4231–4370f (2012); see Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601 (2006); Johnson, *NEPA and SEPA in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 579–604 (1997) (discussing environmental justice considerations in NEPA review process).

⁴⁷⁵ See 42 U.S.C. §§ 4342–4344 for the CEQ’s statutory authorization under NEPA. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), available at http://www.epa.gov/environmentaljustice/resources/policy/ej_guidance_nepa_ceq1297.pdf.

⁴⁷⁶ COUNCIL ON ENVTL. QUALITY, *supra* note 475, at 9.

⁴⁷⁷ *In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1152 (D. Minn. 2004); see *Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972) (Environmental Impact Statement for river channelization project contained inadequate alternatives analysis).

⁴⁷⁸ COUNCIL ON ENVTL. QUALITY, *supra* note 475, at 9.

alternatives and mitigation measures.⁴⁷⁹ Instead, the Corps’ Missouri River Master Water Control Manual provides detailed criteria for water flow management for navigation and flood control in non-Indian communities downstream.⁴⁸⁰

Executive Order 12,898 states that it does not create a right of judicial review.⁴⁸¹ Consequently, some courts have refused to entertain environmental justice claims.⁴⁸² However, other courts have determined that if an agency undertakes an environmental justice analysis, then its findings are reviewable on appeal.⁴⁸³ This includes the Eighth Circuit, in which most of the Missouri River basin is located.⁴⁸⁴

In *Mid States Coalition for Progress v. Surface Transp. Bd.*, the court explained that “an agency must compare the demographics of an affected population with demographics of a more general character (for instance, those of an entire state).”⁴⁸⁵ That analysis, applied to the communities affected by the Missouri River operations of the Corps of Engineers, establishes disproportionate impact on Native Americans. For example, the 2010 U.S. Census reveals that the percentage of the population of Native Americans in the counties abutting the Oahe Reservoir in North Dakota and South Dakota is thirteen percent, or nearly twice the percentage for the two states as a whole.⁴⁸⁶ The percentage of Indians in Sioux, Corson, Dewey, and Ziebach Counties—the area most directly affected by the Oahe Dam—is seventy-five percent, or ten times the percentage for the two states.⁴⁸⁷

⁴⁷⁹ *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972).

⁴⁸⁰ *See supra* Part IV.A.

⁴⁸¹ Executive Order 12898 § 6-609.

⁴⁸² *Sur Contra la Contaminacion v. EPA*, 202 F.3d 443, 449 (1st Cir. 2000).

⁴⁸³ *Communities Against Runway Expansion, Inc. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999) (review under arbitrary and capricious standard of the Administrative Procedures Act of 1946, 5 U.S.C. § 706(2)(A) (2012)).

⁴⁸⁴ *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003).

⁴⁸⁵ *Id.*

⁴⁸⁶ U.S. Census Bureau, *United States Census 2010: Interactive Population Map*, CENSUS.GOV, <http://www.census.gov/2010census/popmap/index.php> (last visited Nov. 11, 2014).

⁴⁸⁷ *Id.*

Yet the Corps of Engineers has found that its stream flow management of the Missouri River has no disproportionate impacts on the affected Tribes.⁴⁸⁸ It appears inevitable that tribes shall continue to be concerned with the Corps of Engineers' level of compliance with Executive Order 12898 on Environmental Justice, in its operation of the Pick-Sloan program.⁴⁸⁹

IV

NEW CHALLENGES FACING THE MISSOURI BASIN TRIBES

A. New Demands for a Limited Resource

1. Mississippi River Navigation

In recent years, the Midwest has suffered a repeating cycle of drought and heavy rain and run-off, causing flooding.⁴⁹⁰ Reputable experts associate this with man-made climate change.⁴⁹¹ They predict that this pattern will continue, and perhaps intensify.⁴⁹²

The drought from 2012 to 2013 threatened to ground navigation in the lower Mississippi River.⁴⁹³ This prompted a renewed call among Mississippi River states to release stored water in the Missouri River main stem reservoirs to augment Mississippi River flows for navigation. On November 16, 2012, Illinois Senator Richard Durban and fourteen other senators sent a letter to President Obama, the Army Corps of Engineers, and the Federal Emergency Management

⁴⁸⁸ U.S. ARMY CORPS OF ENG'RS, NORTHWEST DIV., *supra* note 62, at 9–6 (“The Corps . . . has concluded that there are no disproportionate impacts to American Indian Tribes” from the operation of the Missouri River main stem dams, pursuant to revisions in the Missouri River Master Manual. *Id.*).

⁴⁸⁹ *In re* Operation of the Mo. River Sys. Litig., 421 F.3d 618, 637 (8th Cir. 2005) (Three Affiliated Tribes of Fort Berthold seeking operational alternative to “protect[] the Nation’s cultural resources.”).

⁴⁹⁰ Doyle Rice, *Flooding Descends on the Midwest Mere Months After Drought Disrupted River Traffic*, USA TODAY, Apr. 22, 2013.

⁴⁹¹ James Hansen, *Game Over for the Climate*, N.Y. TIMES, May 9, 2012 (“Over the next several decades, the Western United States and the semiarid region from North Dakota to Texas will develop semipermanent drought, with rain, when it does come, occurring in extreme events with heavy flooding.”).

⁴⁹² *Id.*

⁴⁹³ Johnna Rizzo, *How Drought on the Mississippi River Impacts You*, NATIONAL GEOGRAPHIC NEWS, Jan. 31, 2013 (\$7 billion in commodities at risk of not reaching destination).

Agency, requesting the immediate release of Missouri River stored water.⁴⁹⁴

The Corps of Engineers' has taken the position that its authority to supply water for navigation under the 1944 Flood Control Act was limited to Missouri River navigation.⁴⁹⁵ The Corps' Missouri River Master Water Control Manual, which prescribes the criteria governing water releases at the main stem dams, contains no provisions for the release of water stored in the Missouri River reservoirs, for Mississippi River navigation.⁴⁹⁶

Nevertheless, the quantity of water released by the Corps of Engineers for lower Missouri River navigation and water supply intakes is significant, and much of it augments the flows of the Mississippi River at St. Louis.⁴⁹⁷ Mississippi River navigation benefits significantly from the Corps' operations under the Missouri River Master Manual.⁴⁹⁸ But during periods of drought, which may be increasing due to climate change, there have been proposals and political pressure to release water stored in the Missouri River main stem reservoirs for Mississippi River navigation flows.⁴⁹⁹

The navigation on the lower Mississippi River greatly exceeds that on the lower Missouri River. By substituting targeted releases of water for Mississippi River navigation in late summer for the eight-month long Missouri River navigation season, the Corps could enhance the value of Pick-Sloan navigation. Targeted releases would also allow the Corps to store more water in the upper basin reservoirs for tribal uses as well as fish and wildlife. The Congress should consider reforming the Corps' Missouri River operations to ensure adequate water supplies for the upper basin Tribes. More efficient use of water for navigation is one option for reform.

This intensifies the demands on the waters of the Missouri River main stem, claimed by the tribes under the *Winters Doctrine*.⁵⁰⁰ It

⁴⁹⁴ Press Release from U.S. Senator Richard Durbin, Army Corps Will Expedite Process to Demolish Rock Pinnacles (Nov. 29, 2012).

⁴⁹⁵ U.S. GEN. ACCOUNTING OFFICE, WATER RESOURCES CORPS' 1988 MISSOURI RIVER WATER RELEASES MET GUIDELINES 9 (1990), available at <http://www.gao.gov/assets/220/213275.pdf>.

⁴⁹⁶ See *supra* Part IV.A.

⁴⁹⁷ *Id.*

⁴⁹⁸ Davidson, *supra* note 93, at 7.

⁴⁹⁹ Durban, *supra* note 494.

⁵⁰⁰ Tarlock, *supra* note 83, at 1-2.

further complicates the ability of the Missouri Basin Tribes to perfect their water rights.⁵⁰¹

2. *Hydraulic Fracturing in the Williston Basin and the Corps of Engineers' Surplus Water Reports*

Since 2008, there has been a significant increase in oil and gas production in the Williston Basin of western North Dakota and eastern Montana.⁵⁰² The widespread technique of hydraulic fracturing is water-intensive in the construction and operation of production wells.⁵⁰³ The Corps of Engineers received nine requests for easements at Lake Sakakawea, for the diversion of 34,150 acre-feet of water for energy development.⁵⁰⁴

The Corps responded by issuing the *Garrison Dam/Lake Sakakawea Project North Dakota Surplus Water Report*.⁵⁰⁵ In this report, the Corps concluded that the demand for stored water at Lake Sakakawea for hydraulic fracturing necessitated identifying a specific quantity of “surplus water” for future municipal and industrial use.⁵⁰⁶ It identified 100,000 acre-feet as surplus water in Lake Sakakawea, with easements to be granted upon entering five-year water supply contracts, with a recommended fee of \$20.91.⁵⁰⁷

In 2012, the Corps released draft “Surplus Water Reports” for the other Missouri River main stem reservoirs, identifying a total of 282,917 acre-feet of stored water in the six reservoirs as surplus, to be available for municipal and industrial use over a ten-year period.⁵⁰⁸

⁵⁰¹ Davidson, *supra* note 93, at 6–7.

⁵⁰² U.S. GEOLOGICAL SURVEY, ASSESSMENT OF UNDISCOVERED OIL RESOURCES IN THE DEVONIAN-MISSISSIPPIAN BAKKEN FORMATION, WILLISTON BASIN PROVINCE, MONTANA AND NORTH DAKOTA, 2008 (2008), available at http://pubs.usgs.gov/fs/2008/3021/pdf/FS08-3021_508.pdf (estimated undiscovered volumes of 3.65 billion barrels of oil). The recent updated assessment increased this estimate to 7.4 billion barrels. U.S. GEOLOGICAL SURVEY, ASSESSMENT OF UNDISCOVERED OIL RESOURCES IN THE BAKKEN AND THREE FORKS FORMATION, WILLISTON BASIN PROVINCE, MONTANA, NORTH DAKOTA, AND SOUTH DAKOTA, 2013 (2013), available at <http://pubs.usgs.gov/fs/2013/3013/fs2013-3013.pdf>.

⁵⁰³ U.S. ARMY CORPS OF ENG'RS, OMAHA DIST., GARRISON DAM/LAKE SAKAKAWEA PROJECT NORTH DAKOTA SURPLUS WATER REPORT 2-17 to 2-18 (2011).

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ See generally U.S. Army Corps of Eng'rs, Omaha Dist., *Planning Projects*, U.S. ARMY CORPS OF ENGINEERS, <http://www.nwo.usace.army.mil/missions/civilworks/planning/planningprojects.aspx> (last visited Mar. 2, 2015) for draft Surplus Water Reports

The imposition of fees was delayed pending a formal rulemaking establishing a nationwide policy for storage fees.⁵⁰⁹

The draft surplus water reports outline the proposed requirements for future water uses of the Missouri River, from Gavins Point to Fort Peck. They include limiting future water use in the reservoirs to water identified as surplus, entering water supply agreements with the Corps of Engineers, and ultimately the payment of storage fees.⁵¹⁰ The reports explain that a prospective water user will be denied an easement over Corps project lands surrounding the reservoir, absent compliance with these requirements.⁵¹¹

Congress prohibited the Corps of Engineers from imposing water storage fees at the Missouri River main stem reservoirs, in Section 1046 of the Water Resources Reform and Development Act of 2014.⁵¹² This prohibition expires ten years from the date of the act, and the Corps may attempt to impose water fees at that time.⁵¹³ Meanwhile, the prospect for enhanced federal regulation of stored water causes concern among Tribal and non-Indian water users in the upper Missouri River Basin.⁵¹⁴

In issuing the proposed surplus water requirements, the Corps of Engineers relied on Section 6 of the Flood Control Act, which authorizes surplus water contracts for municipal and industrial uses by public and private entities.⁵¹⁵ Section 6 does not include tribes as among the water users to whom the surplus contracting authority applies. The plain language of the statute does not include Tribes.⁵¹⁶

for Fort Peck, Garrison, Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Projects.

⁵⁰⁹ U.S. ARMY CORPS OF ENG'RS, *supra* note 503, Addendum No. 1 at 2.

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² Water Resources Reform and Development Act of 2014, Pub. L. 113-121, 128 Stat. 1254 (2014).

⁵¹³ *Id.*

⁵¹⁴ John H. Davidson, *Marketing Missouri River Water: Competing Plans for Commoditizing a Natural Resource*, 89 N.D. L. REV. 1, 25-26 (2013).

⁵¹⁵ John H. Davidson, *Missouri Reservoirs in a Century of Climate Change: National or Local Resource?*, 20 J. ENVTL. & SUSTAINABILITY L. 1, 13-15 (2014) (describing the Corps of Engineers' authority to market water under Section 6 of the 1944 Flood Control Act).

⁵¹⁶ *See, e.g.,* Caminetti v. United States, 242 U.S. 470, 485 (1917) (“[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it.” *Id.*).

The prominent Indian water rights attorney and scholar, William Veeder, evaluated the Corps' authority under Section 6 of the Flood Control Act, as well as the Water Supply Act of 1958,⁵¹⁷ as it relates to Indian water rights to the Missouri River. Veeder wrote,

These statutes, however, leave crucial issues unresolved. They do not propose to authorize the seizure of Indian water rights pursuant to the national power of eminent domain. There is no suggestion in any of the acts that the rights of the Indians would be subject to infringement Clearly the trust responsibility of the federal government to the Indian tribes involved is not to be abrogated or diminished without specific congressional authorization to that effect and provision for just compensation for any taking of Indian rights.⁵¹⁸

Nevertheless, the Corps suggests that the surplus water requirements shall be imposed on the tribes as well as other prospective water users. The surplus water reports indicate that the proposed regulations apply to all water uses except those "specifically authorized by Congress to use Missouri River water."⁵¹⁹ According to the Corps of Engineers, "Tribes are not considered differently in this respect than a State or private water user."⁵²⁰ This could subject non-federally funded Tribal water projects, and irrigation or other intakes sought by Indian allottees, to the proposed surplus water requirements. Thus, the Corps seeks to impose the surplus water requirements on the future water use by tribes and tribal members, even though the statute does not apply to Indians.

The Missouri River main stem reservoirs constitute the source for water supplies on North Dakota's Fort Berthold and Standing Rock Reservations, and to at least six Sioux Indian Reservations in South Dakota.⁵²¹ These Tribes possess reserved water rights for future municipal and industrial uses.⁵²² The specific quantity of water reserved by the Tribes for these purposes has not been established by court decree or compact.⁵²³ The amount of water that is ultimately required to fulfill the reserved water rights for municipal and

⁵¹⁷ Water Supply Act of 1958, 43 U.S.C. § 390(b) (2012).

⁵¹⁸ Veeder, *supra* note 409, at 92–93.

⁵¹⁹ *E.g.*, U.S. ARMY CORPS OF ENG'RS, OMAHA DIST., DRAFT OAHE DAM/LAKE OAHE PROJECT SOUTH DAKOTA SURPLUS WATER REPORT 4-10 (2012), *available at* <http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/50>.

⁵²⁰ *Id.*

⁵²¹ *See supra* Part IV.C.

⁵²² *See supra* Part IV.B.

⁵²³ Carvell, *supra* note 390, at 3.

industrial uses by the Fort Berthold and South Dakota Sioux Tribes may exceed 282,917 acre-feet, the amount identified by the Corps of Engineers as current surplus water in the Missouri River main stem reservoirs.⁵²⁴ Consequently, the surplus water determinations by the Corps may conflict with Indian reserved water rights to the Missouri River.

The amount of water deemed surplus in each of the Missouri River main stem reservoirs and available for future municipal and industrial water use is small, as compared to the amount of water in storage, and the amount of water that flows naturally in the Missouri River. For example, the Corps identified 57,317 acre-feet as surplus water in Lake Oahe.⁵²⁵ Yet the Corps' own Missouri River Master Manual indicates that Lake Oahe contains approximately 12 million acre-feet in multiple-use storage and 27.1 million acre-feet in total storage.⁵²⁶ Moreover, the unregulated flow of the Missouri in the river reach between reservoirs near Bismarck, North Dakota, averaged 16.4 million acre-feet annually, from 1968 to 2010.⁵²⁷ Thus, the water flow that would be available without any Pick-Sloan storage far exceeds the amount of water deemed surplus in the large reservoirs.

Indian reserved water rights stem from the natural flow of the waters of their reservations and aboriginal areas.⁵²⁸ The Corps of Engineers' assertion of storage control over the waters of the natural flow of the Missouri, to which the Tribes have prior and superior water rights under the *Winters* Doctrine, suggests a Fifth Amendment taking of the Tribes' water rights.⁵²⁹

⁵²⁴ See generally U.S. Army Corps of Eng'rs, Omaha Dist., *Planning Projects*, U.S. ARMY CORPS OF ENGINEERS, <http://www.nwo.usace.army.mil/missions/civilworks/planning/planningprojects.aspx> (last visited Mar. 2, 2015) for draft Surplus Water Reports for Fort Peck, Garrison, Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Projects.

⁵²⁵ *Id.*; U.S. ARMY CORPS OF ENG'RS, OMAHA DIST., *supra* note 519, at 1.

⁵²⁶ U.S. ARMY CORPS OF ENG'RS, NORTHWEST DIV., *supra* note 294, at Plate II-38.

⁵²⁷ See generally U.S. Geological Survey, *USGS Surface-Water Data for North Dakota*, U.S. GEOLOGICAL SURV. <http://waterdata.usgs.gov/nd/nwis/sw/> (last modified Mar. 2, 2015) using key search terms "Missouri River at Bismarck, Station No. 06342500" as a reference.

⁵²⁸ *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1440-41 (9th Cir 1994).

⁵²⁹ See *United States v. 5,677.94 Acres of Land, etc.*, 162 F. Supp. 108 (D. Mont. 1958) (Flood Control Act authorization of Yellowtail Dam on the Big Horn River not to infringe upon Crow irrigation water rights); *Pyramid Lake Paiute Tribe v. United States*, 36 Indian Cl. Comm'n 256 (1975); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d

Significantly, the construction of the main stem dams and reservoirs did not diminish the Reservation boundaries of the affected Tribes—the reservoirs and portions of the bed of the Missouri River remain with the boundaries of the Fort Berthold and numerous Sioux Reservations.⁵³⁰ The Tribes retain reserved water rights to the Missouri River, whose natural river bed borders or traverses their Reservations.⁵³¹

In the surplus water reports, the Corps of Engineers leverages its land management authority over the project lands adjacent to the Pick-Sloan reservoirs, to control the right to divert water from the reservoirs. The reports explain,

Easements are required for water pipelines and water intake structures on Corps project lands. No easement that supports a water supply agreement will be issued prior to the water supply agreement being executed by all parties.⁵³²

However, the Tribes retained certain rights in the Congressional acts which authorized acquisition of Tribal land for the reservoir sites. For example, Section 10 of Public Law 85-915, states that the Standing Rock Sioux Tribe and tribal members “shall be permitted to have, without cost, access to the shoreline of the reservoir”⁵³³

The legislative history evidences recognition by Congress that the Tribe used the Missouri River for domestic and economic use, as well as hunting and fishing.⁵³⁴ Clearly, Congress intended that, notwithstanding the construction of Oahe Dam and the acquisition of

917, 928 (9th Cir. 2008) (requiring Corps of Engineers to consider pre-dam conditions under the Endangered Species Act).

⁵³⁰ *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017 (8th Cir. 1997).

⁵³¹ The Fort Laramie Treaty of April 29, 1868 established the Great Sioux Reservation, the eastern boundary of which was the east bank of the Missouri River, placing the river bed within the Reservation. 15 Stat. 635, *available at* <http://digital.library.okstate.edu/kappler/Vol2/treaties/sio0998.htm>. The Congress divided the Great Sioux Reservation into six separate Reservations in the Act of March 2, 1889, with the Missouri River main channel comprising the boundary of the present-day Standing Rock, Cheyenne River Crow Creek, and Lower Brule Reservations. Act of March 2, 1889, 25 Stat. 889.

⁵³² *E.g.*, U.S. ARMY CORPS OF ENG'RS, OMAHA DIST., DRAFT SURPLUS WATER REPORT FORT RANDALL DAM/LAKE FRANCIS CASE PROJECT, SOUTH DAKOTA 2-20 (2011) (this language is included in the draft surplus water report for each Pick-Sloan reservoir), *available at* <http://srstwater.com/data/upfiles/programs/news/Fort%20Randall%20Surplus%20Report.pdf>.

⁵³³ Standing Rock Land Taking Act, Pub. L. 86-915, § 10, 72 Stat. 1752 (1958), *available at* http://digital.library.okstate.edu/kappler/Vol6/html_files/v6p0861.html.

⁵³⁴ H.R. REP. NO. 85-1888, at 6 (1958).

Tribal land for Oahe Reservoir, the Tribe retained the right to access and divert water.⁵³⁵ Thus, in implementing Section 6 of the Flood Control Act through the proposed surplus water requirements, the Corps of Engineers may be violating statutory rights of the Tribes along the Missouri River.

Moreover, the surplus water reports would create requirements for water diversions on the Missouri River between Gavins Point and Fort Peck, while nothing comparable applies on the Missouri River upstream from Fort Peck and downstream from Gavins Point. Since the Pick-Sloan dams were developed on the Missouri River main stem, the water depletions from Gavins Point downstream to Nebraska City, Nebraska, have far outpaced the depletions upstream from Gavins Point.⁵³⁶ In the draft surplus water reports, the Corps of Engineers proposed making it more difficult to divert water above Gavins Point,⁵³⁷ exacerbating the inequities with respect to the regional economic benefits of water supply under the Pick-Sloan program. This contravenes the Congressional declaration in Section 1 of the Flood Control Act for “comprehensive and coordinated development” of the Missouri River.⁵³⁸

The Corps of Engineers contends that it must identify surplus water in the Missouri River main stem reservoirs, to ensure that existing Pick-Sloan water uses (e.g., lower Missouri River navigation and water supply intakes) are not harmed by the increased demand for water for energy development in the upper basin.⁵³⁹ But the surplus water reports ignore the fact that numerous Indian tribes possess reserved water rights to divert the water of the Missouri River for consumptive use on their Reservations, and that their water rights

⁵³⁵ *Id.*

⁵³⁶ See THORSON, *supra* note 333, at 89–90.

⁵³⁷ See *supra* note 531 and accompanying text.

⁵³⁸ Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (codified in scattered Sections of 16, 33, and 43 U.S.C.), available at <http://www.usbr.gov/power/legislation/fldcntra.pdf>.

⁵³⁹ See *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1185–86 (11th Cir. 2011) (remanded to the Corps of Engineers to determine long-term water allocation for Lake Lanier, in longstanding dispute over water supply contracts and their impact on downstream fish and wildlife); *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1141 (10th Cir. 1981) (Bureau of Reclamation exceeded authority in contracting with city of Albuquerque for San Juan-Chama project water surplus to meet the city’s needs).

include future municipal and industrial uses.⁵⁴⁰ Moreover, the tribes' statutory rights to access the Missouri River are being ignored in the rush to secure water for energy development.⁵⁴¹ As William Veeder testified to the Senate Committee on Interior and Insular Affairs in 1975, "the energy crisis is truly an Indian crisis."⁵⁴²

The Corps of Engineers has made it so, by proposing to limit future municipal and industrial water uses in the upper Missouri Basin, including Indian water uses. The Corps' proposed surplus water regulations lend uncertainty to the ability of the Tribes to develop water for future municipal and industrial uses—literally jeopardizing economic development on the impoverished Reservations. This uncertainty complicates the tribes' ability to perfect their rights, through a negotiated settlement or water rights adjudication.

B. Quantification of Indian Water Rights to the Missouri River

The state of South Dakota petitioned the Supreme Court to invoke original jurisdiction for an equitable apportionment of the Missouri River, but the Court refused to entertain the action.⁵⁴³ This demonstrates the tension placed on the Missouri River between competing interests in the upper and lower basins.⁵⁴⁴ That tension

⁵⁴⁰ Professor Frank J. Trelease has evaluated the impacts of federal water development on water rights from the perspective of the states. Frank J. Trelease, *Water Rights of Various Levels of Government—States' Rights vs. National Powers*, 19 WYO. L. REV. 189 (1965); Frank J. Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957); Frank J. Trelease, *A Federal-State Compact for Missouri Basin Development*, 7 WYO. L.J. 161 (1953). He suggested that impending conflicts over the federal management of navigable and non-navigable rivers will be resolved in favor of extensive federal power, "except for some of the Indian cases." Trelease, *Government Ownership and Trusteeship of Water*, *supra*, at 652. The implication is that although the authority of federal water management agencies such as the Corps of Engineers may be broad with respect to state law, it is more limited in relation to the proprietary interests of the Tribes.

⁵⁴¹ See *supra* notes 531–33 and accompanying text.

⁵⁴² *Missouri River Basin Indus. Water Mktg.: Hearing Before the Subcomm. on Energy Research and Water Res. of the Comm. on Interior and Insular Affairs*, 79th Cong. 141 (1975).

⁵⁴³ *South Dakota v. Nebraska*, 485 U.S. 902 (1988). A state may file an original petition to the Court, to apportion the water rights to an interstate river amongst two or more states. TARLOCK, *supra* note 366, at §§ 10.2 to 10.3. The Court developed the doctrine of equitable apportionment for the allocation of water rights between states. *Kansas v. Colorado*, 206 U.S. 46 (1907). The Court requires a high standard of injury to entertain such an action. *Missouri v. Illinois*, 200 U.S. 496 (1906).

⁵⁴⁴ *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 637 (8th Cir. 2005), *cert. denied*, *North Dakota v. U.S. Army Corps of Eng'rs*, 547 U.S. 1097 (2006); Tarlock, *supra* note 83, at 1–2.

affects Indian water rights also.⁵⁴⁵ South Dakota initiated a general stream adjudication for the Missouri River and its tributaries, in order to quantify Indian reserved water rights, but the expensive and unwieldy action was dismissed without prejudice.⁵⁴⁶

The issue of the quantity of water from the Missouri River main stem, its tributaries, and groundwater, to which the North and South Dakota tribes are entitled, will ultimately be resolved by adjudication or negotiated settlement. Many of the tribes have resisted this, for good reason.⁵⁴⁷ But there is too much demand on the valuable water resource of the Missouri River for Indian reserved water rights to remain unadjudicated indefinitely.⁵⁴⁸

There is considerable commentary on the respective merits of negotiation and litigation of Indian reserved water rights.⁵⁴⁹ Suffice to say, the North and South Dakota tribes with water claims to the Missouri River main stem and its tributaries will be facing costly and time-consuming water rights litigation or negotiations, or both. The legal and policy environment in which that will take place is made more difficult by the Corps of Engineers' Missouri River operations under the Master Manual, and its proposed surplus water regulations.

⁵⁴⁵ GETCHES ET AL., *supra* note 133, at 816 ("A tribe's reserved water right with an early priority date leaves all junior rights holders uncertain For that reason, states and non-Indian water users have pressed for quantification of Indian reserved rights. The quantification process has proved difficult and expensive." *Id.*).

⁵⁴⁶ *Fraser v. Water Rights Comm'n of Dep't of Natural Res. Dev.*, 294 N.W.2d 784 (S.D. 1980).

⁵⁴⁷ See LLOYD BURTON, *AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF THE LAW* 64–65 (1991).

⁵⁴⁸ See *supra* note 540 and accompanying text.

⁵⁴⁹ Robert T. Anderson, *Indian Water Rights, Practical Reasoning and Negotiated Settlements*, 98 CAL. L. REV. 1133 (2010); A. Dan Tarlock, *Tribal Justice and Property Rights: The Evolution of Winters v. United States*, 50 NAT. RESOURCES J. 471 (2010); John B. Weldon et al., *Future Indian Water Settlements in Arizona: The Race to the Bottom of the Waterhole?*, 49 ARIZ. L. REV. 441 (2007); K. Heidi Gudgel et al., *The Nez Perce Tribe's Perspective on the Settlement of its Water Rights Claims in the Snake River Basin Adjudication*, 42 IDAHO L. REV. 589, 593 (2006); Jennifer E. Pelphrey, Note, *Oklahoma's State/Tribal Water Compact: Three Cheers for Compromise*, 29 AM. INDIAN L. REV. 127 (2004–2005); DANIEL MCCOOL, *NATIVE WATERS: COTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA* (2002); Gina McGovern, *Settlement or Adjudication: Resolving Indian Water Rights*, 36 ARIZ. L. REV. 95 (1994).

CONCLUSION

The massive water development of the Missouri River Basin under the Corps of Engineers' Pick-Sloan program negatively and disproportionately impacted the Indian tribes. The socioeconomic hardship facing many of the upper Missouri Basin Tribes is directly attributable to Pick-Sloan. The water supplies needed by these tribal communities for economic and human development are controlled by the Corps of Engineers, through its operation of the main stem dams.

The Corps' Missouri River operations give priority in streamflow allocations to navigation and water supply in the lower basin. This degrades the water supplies of the tribes, and could affect their reserved water rights claims under the *Winters* Doctrine. The Corps possesses treaty, statutory, and trust responsibilities to preserve the Tribes' waters, but the criteria for streamflow management in the Corps' Master Manual focus exclusively on downstream water needs. Meanwhile, erosion caused by reservoir operations has destroyed significant Native American cultural resources and unearthed human remains and artifacts. Tribal water and environmental resources continue to suffer the ongoing effects of the Corps' operations of the main stem dams. Much of the harm could be mitigated through revisions to the Master Manual by modernizing the operational priorities to fulfill tribal rights.⁵⁵⁰ However, with the release of the surplus water reports for Lake Sakakawea and the other main stem reservoirs, the Corps appears to be moving in the opposite direction by imposing limits and additional costs on future tribal water uses in the upper basin.

Consequently, Congressional action may be necessary to protect tribal waters for use on the Reservations in the upper Missouri basin. However, the navigation industry, municipal, and agricultural water users in the lower Missouri basin benefit from the status quo and have resisted reform.⁵⁵¹ The upper Missouri Basin Tribes face the dual challenges of perfecting their water rights and assuring that the Corps

⁵⁵⁰ The Standing Rock Sioux Tribal leader Mike Claymore described his Tribe's frustration in attempting to obtain administrative relief by the Corps of Engineers, for revisions to the Missouri River Master Manual: "We have corresponded, attended meetings, and been visited by officials of the Corps of Engineers . . . and all has been to no value to the Standing Rock Sioux Tribe. The Corps of Engineers has proven it cannot analyze our environmental impacts, much less impacts on our invaluable water rights." *Missouri River Master Manual: Hearing Before the Committee on Indian Affairs, U.S. Senate*, 108th Cong. 27 (2003).

⁵⁵¹ See *supra* notes 333, 334 and accompanying text.

of Engineers reforms its Missouri River operations to ensure adequate water supplies on the Reservations.

The claims by tribes for proper equitable compensation for the lands, resources, and cultures that were inundated should also be revisited. All lands that were taken from the tribes for Pick-Sloan, but which are retained by the Corps of Engineers and lay fallow above the reservoirs, should be returned. Ultimately, environmental justice for the affected Tribes must be a central focus of the Pick-Sloan program moving forward.

