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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.”

The Late Rueben Snake
Chairman, Winnebago Indian Tribe

INTRODUCTION

“Rivers are nature’s landscape painters.” 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. This statute

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.\(^14\)


\(^5\) § 9, 58 Stat. at 891.


\(^9\) 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. 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. 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.


"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.


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

18 LAWSON, supra note 7, at 4.
19 Id. at 8–9.
20 Id.
21 BOTKIN, supra note 2, at 8.
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
Treaty. 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. The Missouri River Basin truly was Indian Country.

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. Severe floods in the early 1940s led to a clamor in the lower Missouri Basin for more federal assistance for flood control. 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.

The Chief of Engineers for the Corps was Colonel Lewis A. Pick. 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.

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.

The Bureau of Reclamation planned a different approach. Established under the Reclamation Act of 1902, the agency’s mission
involved water supplies for irrigation in the semiarid west. Accordingly, the agency proposed numerous small dams on the tributaries to the Missouri River in the upper basin. 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. This proposal became known as the “Sloan Plan,” named after Glenn Sloan, the director of the agency’s Billings, Montana Regional office.

The two agencies pitched their respective plans. The Corps appealed to urban communities in the lower basin, which suffered the loss of life and property in the recent flooding. The Corps’ plan also fit neatly with the Roosevelt administration’s vision of large projects, and comprehensive planning. But, the governors of Wyoming, Montana, and North Dakota came out for the Sloan plan. Like the Pick Plan, the estimated costs and proposed benefits of the irrigation projects appeared dubious. However, the Sloan Plan was presented with greater engineering detail, while the Corps’ plan seemed oversold by the blustery Colonel Pick. 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.”

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

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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. 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. In what a critic called, “a shameless, loveless shotgun wedding,” the two agencies agreed simply to combine their two plans. Thus, the “Pick-Sloan Program” came about.

The resulting compromise was enacted as the Flood Control Act of 1944. Section 9(a) of the act contains the operative language. 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.

The act authorized “channel and major drainage improvements” in the lower Missouri Basin. Along with work conducted under the authority of the River and Harbors Act, 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. 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

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53 S. 2089, 78th Cong. (1944).
54 LAWSON, supra note 7, at 18.
55 Id. at 19.
58 Id. at 891.
60 58 Stat. at 798.
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.
68 58 Stat. at 807.
69 Id.
Thus, the Congress established extremely generous principles for the repayment of the federal investment for the Pick-Sloan program.\textsuperscript{72} This enabled the federal government to market the hydropower produced at the Pick-Sloan dams at very low rates.\textsuperscript{73} In fact, Pick-Sloan’s hydropower benefit became its most economically valuable project function.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{76} Recent determinations by the Corps for the amount of surplus water available in the Missouri River main stem reservoirs led to considerable controversy.\textsuperscript{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.”\textsuperscript{78}

\textbf{C. A River Transformed}

“Today, Lewis and Clark (as well as the Indians who helped them) would hardly recognize much of the Missouri River.”\textsuperscript{79} The river “would simply be \textit{unrecognizable} to them.”\textsuperscript{80} “This historic river is
now one-third reservoirs, one-third dredged channels, and only one-
third ecologically vulnerable free-flowing water.”

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. This constitutes “the largest amount of water stored on any United States river system.” These dams transformed the free-flowing Missouri River into a chain of very large reservoirs in the upper basin. The reservoirs inundated vast riparian forests of the Missouri River bottomlands, resulting in a dramatically altered landscape. Damming permanent disrupted patterns of flooding and sedimentation and altered the geomorphology of a river spanning twenty-five miles.

The river channel was dammed, the riparian habitat inundated, and huge reservoirs replaced the braided, rolling river. “The worst natural damage was the flooding of some of the best riparian waterfowl habitat in the world.” The wooded river bottomlands on numerous Indian Reservations were destroyed. The Indians relied on this land for fish, game, timber, and agriculture. 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. This enabled the Corps to alter the natural hydrograph pattern of spring flooding, and stabilize water flows for navigation. 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.

84 REISNER, supra note 38, at 191–92.
85 LAWSON, supra note 7, at 56.
87 REISNER, supra note 38, at 199.
88 Id.
89 S. REP. NO. 111-357, at 1-2 (2010).
90 Id.
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

95 Id.
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. These Tribes, along with the Yankton Sioux Tribe and the Nebraska Tribes downstream, were directly and severely impacted by the Pick-Sloan program.

Numerous Tribal communities were established on these reservations in the Missouri River riparian bottomlands. The thick, wooded lands of the Missouri River corridor in the upper basin became the Treaty-protected Reservation homelands of numerous Tribes. There was plenty of timber and natural cover for livestock and the soil was fertile. Wildlife was abundant and the water supplies were plentiful. 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,

100 Davidson & Geu, supra note 17, at 824–25.
101 LAWSON, supra note 7, at 56–57.
102 Id.
103 Id.
Impacts of the Army Corps of Engineers’ Pick-Sloan Program on the Indian Tribes of the Missouri River Basin

...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

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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.


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).

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).

112 See Cross, supra note 9, at 484–87.
113 LAWSON, supra note 7, at 57.
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 benefit . . . .120

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. Hitchcock122 the federal courts deferred to Congressional authority in the taking of Tribal lands for most of the twentieth century. This is the case even if the Tribe’s title to forcibly acquired land was guaranteed by Treaty.123

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118 Id. at 57–58.
119 Cross, supra note 9, at 484–87.
120 REISNER, supra note 38, at 196.
121 Id. at 46.
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. 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.” 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. 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. However, the document presented contained different terms than the agreement the parties had reached. 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. 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.” Moreover, “[T]he power exists to abrogate the provisions of an Indian treaty.”

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.” 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 perpetrated on the Kiowas was described as “the usual process.”\footnote{David H. Getches et al., Cases and Materials on Federal Indian Law 181 (4th ed. 1998).}


Nevertheless, a taking of Indian land must be authorized by Congress.\footnote{United States v. Winnebago Tribe, 542 F.2d 1002, 1006 (8th Cir. 1976).} Executive branch agencies lack the authority to exercise eminent domain over these lands.\footnote{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).} This is because the United States generally has recognized the Tribes’ title to their lands by Treaty or statute.\footnote{See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).} The Secretary of the Interior holds trust title to Indian lands for the purpose of maintaining the Indian land base through...
restrictions on alienation. The Court treated reservations established by Executive Order no differently than those established in treaties.\(^\text{139}\)

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.\(^\text{141}\) The district court for South Dakota ruled in favor of the Tribe, enjoining the taking, for lack of prior authorization by Congress.\(^\text{142}\)

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.\(^\text{143}\) 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.\(^\text{144}\) 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.\(^\text{145}\)

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


\(^{142}\) Id.


\(^{146}\) 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. Free markets and individual freedoms buttressed notions of Soviet collectivism. 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. Certain policy-makers in Congress sought to impose the individualist American ethic on Tribal communities by terminating Tribal status and disestablishing Reservations. This would relieve the budget of federal program outlays on the Reservations, though the programs to be eliminated were Treaty obligations. There was an obvious element of racism to the “termination” policy.

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.” The following year, Congress passed legislation terminating seventy Tribes, most notably Oregon’s Klamath Tribe and Wisconsin’s Menominee Tribe.
In contrast, none of the upper Missouri Basin Tribes affected by the Pick-Sloan plan were terminated. 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.

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. 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. The Army Corps of Engineers had set aside $5.1 million from prior-year appropriations to acquire the Fort Berthold lands. Public Law 81-437 authorized an additional $7.5 million payment for total compensation of $12.6 million. 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.

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. 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


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.


164 63 Stat. at 1027.

165 Id.

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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

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.
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.
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.).
The Fort Randall and Big Bend Dams are the other Missouri River main stem dams that impacted the Sioux Tribes.\textsuperscript{184} Both projects affected the Lower Brule and Crow Creek Sioux Tribes.\textsuperscript{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 $976,503\textsuperscript{186} and 9,418.69 acres at Crow Creek for $1.4 million.\textsuperscript{187} This land was inundated by Lake Francis Case, created by Fort Randall Dam.\textsuperscript{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.\textsuperscript{189} Like at Fort Berthold, Standing Rock, and Cheyenne River, the entire communities of Fort Thompson and Lower Brule had to be relocated.\textsuperscript{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.\textsuperscript{191} Lower Brule was forced to cede an additional 14,299 acres for payment of $1.25 million plus approximately $2 million for rehabilitation.\textsuperscript{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.\textsuperscript{193} The Tribes retained

\textsuperscript{184} See LAWSON, supra note 7, at 125–34.

\textsuperscript{185} Id.


\textsuperscript{188} LAWSON, supra note 7, at 130–34.

\textsuperscript{189} Id.


\textsuperscript{192} Pub. L. No. 87-734, 76 Stat. 698 (1962).

\textsuperscript{193} 76 Stat. at 702–706.
grazing, hunting, and fishing rights subject to the Corps of Engineers’ regulations.\textsuperscript{194}

Overall, Pick-Sloan caused more damage to Indian land and resources than any public works project in American history.\textsuperscript{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.\textsuperscript{196}

The upper Missouri River basin Indian Tribes were negatively and disproportionately affected by the Pick-Sloan program.\textsuperscript{197} The payments authorized, often belatedly, were based on hasty appraisals, and were clearly inadequate in light of the harm that was suffered.\textsuperscript{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.\textsuperscript{199} The forced relocation of Tribal communities for the Pick-Sloan program caused socioeconomic depression which has lingered for decades.\textsuperscript{200} For these reasons, Congress revisited the question of compensation to the Tribes a generation later.

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\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{195} See LAWSON, supra note 7, at 134.
\item \textsuperscript{196} Mni Sose Intertribal Water Rights Coalition, supra note 22.
\item \textsuperscript{197} S. 3648, 111th Cong., § 2(6) (1965).
\item \textsuperscript{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).
\item \textsuperscript{200} Id.
\end{itemize}
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. A main component of this was the Missouri-Souris Project, a plan to irrigate 1,275,000 acres in North Dakota. 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.

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. 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. 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.
The project as authorized was still a huge and inefficient inter-basin transfer of water. Numerous large canals would crisscross the plains in North Dakota with drain irrigation run-off directed into Canada’s pristine Hudson Bay basin. 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. 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.

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

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. 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. 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

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207 See REISNER, supra note 38, at 200–01 (discussing the economic infeasibility of the Garrison Diversion Unit).
208 Id.
209 Id.
212 Id.
214 Id.
affected by Pick-Sloan.\textsuperscript{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.\textsuperscript{217}

Congress generally accepted the Commission’s recommendations and enacted the Garrison Diversion Unit Reformulation Act of 1986.\textsuperscript{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.\textsuperscript{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.\textsuperscript{220}

The thrust of the act was the significant authorization of funding for the development of municipal water supplies in North Dakota.\textsuperscript{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.\textsuperscript{222} Additionally, the act extended Pick-Sloan subsidized power rates to the new water systems.\textsuperscript{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.”\textsuperscript{224} As stated above, in issuing its recommendations to

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\item\textsuperscript{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.” \textit{Id.} at 25.
\item\textsuperscript{217} \textit{Id}.
\item\textsuperscript{218} Pub. L. 99-294, 100 Stat. 418 (1986).
\item\textsuperscript{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.” \textit{McCooL}, \textit{supra} note 1, at 171 (quoting John Narcho, Papago (Tohono O’odham) Water Commission).
\item\textsuperscript{220} H. REP. NO. 99-525, at 18–19.
\item\textsuperscript{221} \textit{Id}.
\item\textsuperscript{222} \textit{Id}.
\item\textsuperscript{223} \textit{Id}.
\item\textsuperscript{224} \textit{Id}.
\end{thebibliography}
reformulate the project, the Garrison Diversion Unit Commission recognized that the Tribes suffered a tremendous loss of land that should be redressed. 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.

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. The JTAC issued its Final Report on May 23, 1986. 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. 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.

Congress acted on the JTAC Report with the passage of the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act of 1992. 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.”

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

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225 Id. at 83.
228 Id.
229 Id. at 50–52, 55, 57.
230 Id. at 49–52.
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.\footnote{Id. at 4732–4733.} 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.\footnote{Id. at 4732.} 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.\footnote{Id. at 4732–4733.} 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.\footnote{Id.}

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).\footnote{Id.} 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.\footnote{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).} 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.\footnote{§§ 3503–3506, 106 Stat. at 4732–4733.} 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.\footnote{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.} The Army Corps of Engineers acquired much more
land for the Pick-Sloan reservoirs than is used for the site of the reservoirs. As a result, large tracts of federal lands enclosed the reservoirs. 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 owner . . . .

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. Nevertheless, the statutory provision vests discretionary authority with the Army Secretary to determine whether to return land to the Tribe. It was not a mandate. 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.

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. The lands to be transferred were those tracts acquired from the Tribes or Tribal members but that lay above the reservoirs’ maximum pool level. The transfer was subjected to a flowage easement for reservoir operations, although by

242 Id.
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).
249 Id. at 4732, 4736.
definition they were above the reservoir pool elevation. 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. If the right was not exercised, then Secretary administered the land as Tribal land.

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. The statute obligated the Interior Secretary to make the offer of first refusal to the Tribes and former landowners within one year. 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.

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. 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

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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 mishandling 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.
256 *Id.*
the Equitable Compensation Act. 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

258 See infra note 294, at E-9.
260 Id. at 391–94.
261 Id.
262 Id.
263 Id. at 389–90.
Impacts of the Army Corps of Engineers’ Pick-Sloan Program on the Indian Tribes of the Missouri River Basin

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 funds 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.
276 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.
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

277 § 104, 114 Stat. at 2366–2368.
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. 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. 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. On November 1, 2007, the Senate Committee on Indian Affairs conducted a hearing on unresolved Tribal claims under Pick-Sloan. In testimony to the committee, the General Accounting Office (GAO) presented its established ranges of recommended compensation for each of the Missouri River Tribes. The GAO testimony suggests that at least one Tribe, the Standing Rock Sioux, may be entitled to additional compensation, relative to the other Tribes.

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. The bill was reported by the Committee on Indian Affairs, but was not acted upon by the Senate. Its future remains uncertain.

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288 Id.
289 Id. at 5–19 (statement of Robin Nazarro, Director Natural Res. Div., Gov’t Accountability Office).
290 Id. at 11–12.
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”). 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. Each year, the Corps publishes an Annual Operating Plan (“AOP”), which estimates the precipitation and run-off and applies the criteria prescribed in the Master Manual to establish flow rates at the dams.

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

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. The vast reservoirs contain storage space for millions of acre-feet of water. 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).
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.\footnote{U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., supra note 62, at 2-4.}

The water releases for navigation on the lower Missouri River are the central feature of the Missouri River system operation.\footnote{U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., supra note 294, at VII-50 to VII-54.} 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.\footnote{Id. at VII-10, VII-25. The navigation full-service target established in the Master Manual is 35,000 cfs. Id.} 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.\footnote{In re Operation of the Mo. River Sys. Litig., 421 F.3d 618, 625–26 (8th Cir. 2005).} 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.\footnote{Sandra B. Zellmer, A New Corps of Discovery for Missouri River Management, 83 NEB. L. REV. 305, 319 (2004).}

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.\footnote{U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., supra note 62, at 3-111.} 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.\footnote{U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., supra note 294, at VII-2.} The navigation releases cause the water levels in the reservoirs to decline precipitously during the course of the navigation season.\footnote{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).}

The Corps also releases water from the dams periodically, for other Pick-Sloan program functions.\footnote{U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., supra note 294, at VII-2.} There are releases to generate hydropower during the off-navigation season, which are at their highest level when demand peaks in the winter.\footnote{Id.} During the off-
navigation season, the Corps maintains sufficient river levels below Gavins Point Dam, for municipal intakes and nuclear plants along the lower Missouri.\textsuperscript{311} The Corps also releases water as needed to break up winter ice jams in the river reaches between the reservoirs to prevent flooding.\textsuperscript{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.\textsuperscript{313}

The Corps of Engineers first issued the Missouri River Master Manual in 1960.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{319} That language may go too far,

\begin{itemize}
\item \textsuperscript{311} \textit{Id}.
\item \textsuperscript{312} \textit{Id}.
\item \textsuperscript{313} \textit{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).
\item \textsuperscript{314} Missouri \textit{ex rel.} Nixon v. Craig, 163 F.3d 482, 483 (8th Cir. 1998).
\item \textsuperscript{315} ETSI Pipeline Project v. Missouri, 484 U.S. 495, 499 (1988).
\item \textsuperscript{316} \textit{Id.} at 497–98.
\item \textsuperscript{317} \textit{Id}.
\item \textsuperscript{318} \textit{Id.} at 498.
\item \textsuperscript{319} \textit{Id.} at 512.
\end{itemize}
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

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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).
331 See infra Part IV.
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Impacts of the Army Corps of Engineers’ Pick-Sloan Program on the Indian Tribes of the Missouri River Basin

the operational priorities of the Master Manual.\textsuperscript{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.\textsuperscript{333} The Supreme Court explained the respective water needs of the upper and lower basin, in \textit{ETSI Pipeline Project v. Missouri},

\begin{quote}
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.\textsuperscript{334}
\end{quote}

Meanwhile, the \textit{Missouri River Master Water Control Manual Review and Update} took nearly fifteen years to complete, and then only by court order.\textsuperscript{335} On March 19, 2004, the Corps released the \textit{Final Environmental Impact Statement: Missouri River Master Water Control Manual, Review and Update} (hereinafter “Final EIS”) and the updated 2004 Master Manual.\textsuperscript{336} They established “drought conservation measures,” to enhance flexibility to reduce navigation releases from the dams during drought.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{332} South Dakota v. Hazen, 914 F.2d 147, 150–51 (8th Cir. 1990).
\item \textsuperscript{333} \textit{In re Operation of the Mo. River Sys. Litig.}, 421 F.3d 618, 637 (8th Cir. 2005).
\item Professor Tarlock wrote,
\begin{quote}
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 . . . .
\end{quote}
Tarlock, \textit{supra} note 83, at 1–2; see also \textit{John E. Thorson, River of Promise, River of Peril: The Politics of Managing the Missouri River} (1994).
\item \textsuperscript{334} ETSI Pipeline Project v. Missouri, 484 U.S. 495, 499–500 (1988).
\item \textsuperscript{335} \textit{In re Operation of the Mo. River Sys. Litig.}, 305 F.Supp. 2d 1096, 1096–99 (D. Minn. 2004).
\item \textsuperscript{336} \textit{Id.} at 1099.
\item \textsuperscript{337} \textit{U.S. Army Corps of Eng’rs, Northwest Div.}, \textit{supra} note 62, at 8-5.
\end{itemize}
year.\textsuperscript{338} If the amount of stored water declines to identified “target” levels due to drought, the Corps reduces or eliminates navigation service.\textsuperscript{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.\textsuperscript{340} The release of a high volume of water for navigation continues, but with the prospect of reduced streamflows during drought.\textsuperscript{341} The 2004 Master Manual provides administrative authority to the Corps to reduce the water releases for navigation during periods of extreme drought.\textsuperscript{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.\textsuperscript{343}

A series of lawsuits against the Corps of Engineers over the 2004 Master Manual by upper Missouri basin states,\textsuperscript{344} lower basin states,\textsuperscript{345} and environmental groups,\textsuperscript{346} was consolidated in the District Court of Minnesota.\textsuperscript{347} In \textit{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

\textsuperscript{338} Id. at 8-7.

\textsuperscript{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. \textit{Id.} at Figures 8.2-1 and 8.2-2. \textit{See also U.S. Army Corps of Engineers, Northwestern Div., supra note 294, at VII-50 to VII-53.}


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

\textsuperscript{342} \textit{Id.}

\textsuperscript{343} \textit{U.S. Army Corps of Engineers, 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.}

\textsuperscript{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).

\textsuperscript{345} South Dakota v. Ubbelohde, 330 F.3d 1014 (8th Cir. 2003).


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The district court entered summary judgment for the Corps of Engineers and other named federal defendants, and the Eighth Circuit affirmed. 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.’” It held that, “The FCA ‘clearly gives a good deal of discretion to the Corps in the management of the River.’” 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.

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. The court held that, “The Corps’ balancing of water-use interests in the 2004 Master Manual is in accordance (with the Flood Control Act).” 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. Thus, the Eighth Circuit invoked its prior dicta that navigation is the

348 In re Operation of the Mo. River Sys. Litig., 363 F.3d at 1155.
349 Id.
350 Id.
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.
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]ecognizing 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.


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


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. 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.” 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.

The prior appropriation doctrine of water law applies in most western states, including Montana. 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. The date in which water is first diverted and put to beneficial use is generally the priority date for that water use. 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. Permittees with later priority dates obtain water only after more senior holders fulfill their water right. Shortages are not pro-rated. Prior appropriation water law favors “first in time, first in right.”

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

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364 Id. at 625.
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).
needed on the Reservation for a Tribal irrigation project. 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]."

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. Even though Winters' water use predated the Tribal irrigation project, the Indian water right prevailed because the Reservation was established before Winters began irrigating. Federal law reserves Indian water rights, 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. "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.

373 Id.
374 Id. at 577 (citations omitted).
375 Id. at 575–76.
376 Id.
379 COHEN'S HANDBOOK, supra note 150, at § 19.03(1).
Many Indian Reservations were established with an agricultural purpose. \footnote{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 \textit{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.”\footnote{Arizona v. California, 373 U.S. 546, 596 (1963).} 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.”\footnote{Id. at 600.} Ultimately, the over-arching purpose of most Indian Reservations is to provide a permanent homeland for that Tribe,\footnote{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).} which encompasses water for all beneficial uses, including livestock,\footnote{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, \textit{How Water Rights Are Won in the West: Three Case Studies from the Northwest}, 37 AM. INDIAN L. REV. 283 (2012–2013).} fish and wildlife,\footnote{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., \textit{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, \textit{Note & Comment, Extending Winters to Water Quality: Allowing Groundwater for Hatcheries}, 77 WASH. L. REV. 1193, 1121–26 (2002) (contending that \textit{Winters} rights should extend to groundwater of good quality for fisheries).} and ceremonial uses.\footnote{See, e.g., Water Rights Compact, Mont.-Northern Cheyenne Tribe-U.S., May 20, 1991, Mont. Code Ann. § 85-20-301.}

The precise quantity of a Tribe’s reserved water right may be determined in an adjudication or by compact.\footnote{Robert T. Anderson, \textit{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 . . . .” \textit{COHEN’S HANDBOOK}, supra note 150, at § 19.03.} In the Missouri Basin, the Shoshone-Arapaho Tribes of the Wind River Reservation
in Wyoming had their water rights quantified by state court decree.\textsuperscript{388} and several Montana Tribes have entered reserved water rights compacts with the State of Montana.\textsuperscript{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.\textsuperscript{390}

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


\textsuperscript{389} \textit{See supra} notes 384, 386.

\textsuperscript{390} Charles Carvell, \textit{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).

\textsuperscript{391} \textit{Winters} v. United States, 207 U.S. 564, 574–76 (1908).

\textsuperscript{392} \textit{United States v. Adair}, 723 F.2d 1394, 1413–15 (9th Cir. 1983).

\textsuperscript{393} \textit{COHEN’S HANDBOOK, supra} note 150, at \textsection 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. The Fort Berthold Reservation, and the Standing Rock, Cheyenne River, Crow Creek, Lower Brule, Yankton, and Santee Sioux Reservations all border the Missouri River. “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.” 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.

As of the present, those claims remain unadjudicated. 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.

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

394. See supra Part IV.A.
395. Davidson & Getu, 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).
compromised by conflicts of interest and politics. Nevertheless, it imposes responsibilities on agencies managing waters subject to the reserved rights claims of Indian Tribes.

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. The court upheld the denial by the Corps of a permit for sea bed farming, due to the potential impact on Treaty fishing rights. 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.

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

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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.*).


407 *Id.*

408 *Id.* (citations omitted).
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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

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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.\footnote{Pyramid Lake Paiute Tribe, 354 F. Supp. at 256.} 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.\footnote{Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng’rs, 931 F. Supp. 1515, 1519–20 (D. Wash. 1996).}

The Corps’ historian, John R. Ferrel, explained, “Indian rights regarding water management were not clarified nor considered in operational plans.”\footnote{JOHN R. FERREL, U.S. ARMY CORPS OF ENGINEERS, BIG DAM ERA 123 (1993).} 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.\footnote{See Carvell, supra note 390, at 3.} 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 exercised . . . .\footnote{U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., supra note 294, at E-10.}

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.\footnote{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.} 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
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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

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421 See supra notes 402–09 and accompanying text.
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=pur1.32754077962 433;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.
to beneficial use. The resulting uncertainty complicates the Tribes’ ability to perfect their Winters Doctrine claims through an adjudication or negotiated settlement.

The quantification of Indian reserved water rights involves economic feasibility determinations for future water development projects. In Arizona v. California, the Court recognized the Tribal reservation of agricultural water for the “practically irrigable acreage” on the Reservations. This has led some state courts, when adjudicating Indian water rights, to delve into the minutiae of irrigation engineering and agricultural economics. 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.

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. 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.

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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).


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

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 Practically 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.


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.
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doctrine” applies to federal reserved water rights for national forests and parks, not Indian reserved water rights. Nevertheless, the economy in the lower Missouri basin has come to rely on the steady flow of Corps-managed water. 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.

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.

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. Not all of the Tribal cemeteries were properly relocated. The operation of the dams has resulted in the erosion of grave sites and other historical sites. Native American human remains, and artifacts and cultural objects routinely wash up on the shores of the Missouri River.

436 Tarlock, supra note 83, at 2.
437 Davidson, supra note 93, at 18.
438 Id.
439 See supra Part III.
441 Id. at 1056–57.
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].

Two federal statutes, the Native American Graves Protection and Repatriation Act (NAGPRA), and the National Historic Preservation Act (NHPA) 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. Section 3(d) of NAGPRA governs the inadvertent discoveries of these objects. 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.

443 Id. at 3-167.
Water releases at the main stem dams cause wave action and erosion along the Missouri River.\textsuperscript{449} This results in the unearthing of Native American human remains and cultural objects on the Corps of Engineers’ Pick-Sloan project lands.\textsuperscript{450} When this occurs, it constitutes an inadvertent discovery under Section 3(d) of NAGPRA, triggering the mitigation and repatriation requirements.\textsuperscript{451} The federal court in the \textit{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.\textsuperscript{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.”\textsuperscript{453}

The NHPA is a procedural statute designed to ensure consideration of the impacts of federally-funded activities on historically-significant sites or objects.\textsuperscript{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].”\textsuperscript{455} The agency

\textsuperscript{449} See U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., supra note 62, at 3-167 to 3-168.
\textsuperscript{451} Id.
\textsuperscript{452} Id. at 1056–57.
\textsuperscript{453} Id. at 1057.
\textsuperscript{454} Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 278–79 (3d Cir. 1983).
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

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).
460 36 C.F.R. § 800.6(a) (2004).
461 Id. at § 800.6(a), (c).
462 Id. at § 800.6(b).
464 Id. at P-2.
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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.
468 See U.S. ARMY CORPS OF ENG’RS, NORTHWEST DIV., supra note 62, at 3-168.
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. The Executive Order specifies that programs affecting Native Americans are to be included in the Environmental Justice mission of all federal agencies.

Many of the functions contemplated in the Executive Order and its implementing memorandum are conducted in accordance with the National Environmental Policy Act (NEPA). 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. The Guidance provides for “tribal representation [in the NEPA process] in a manner that is consistent with . . . treaty rights.”

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

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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).


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alternatives and mitigation measures. 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.

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

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).” 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. 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.

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).
485 Id.
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.\textsuperscript{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.\textsuperscript{489}

\section*{IV
NEW CHALLENGES FACING THE MISSOURI BASIN TRIBES}

\subsection*{A. New Demands for a Limited Resource}

\emph{1. Mississippi River Navigation}

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

The drought from 2012 to 2013 threatened to ground navigation in the lower Mississippi River.\textsuperscript{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

\textsuperscript{488} U.S. ARMY CORPS OF ENGR’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.).

\textsuperscript{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.”).

\textsuperscript{490} Doyle Rice, \textit{Flooding Descends on the Midwest Mere Months After Drought Disrupted River Traffic}, USA TODAY, Apr. 22, 2013.

\textsuperscript{491} James Hansen, \textit{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.”).

\textsuperscript{492} Id.

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

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.
504 Id.
505 Id.
506 Id.
507 Id.
The imposition of fees was delayed pending a formal rulemaking establishing a nationwide policy for storage fees.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{512} This prohibition expires ten years from the date of the act, and the Corps may attempt to impose water fees at that time.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{516}
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, 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.

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.” According to the Corps of Engineers, “Tribes are not considered differently in this respect than a State or private water user.” 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. These Tribes possess reserved water rights for future municipal and industrial uses. The specific quantity of water reserved by the Tribes for these purposes has not been established by court decree or compact. The amount of water that is ultimately required to fulfill the reserved water rights for municipal and

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518 Veeder, supra note 409, at 92–93.
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. 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. 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. 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. 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. 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.
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. The Tribes retain reserved water rights to the Missouri River, whose natural river bed borders or traverses their Reservations.

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.

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 . . . .” 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. Clearly, Congress intended that, notwithstanding the construction of Oahe Dam and the acquisition of

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


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.


Tribal land for Oahe Reservoir, the Tribe retained the right to access and divert water. 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. In the draft surplus water reports, the Corps of Engineers proposed making it more difficult to divert water above Gavins Point, 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.

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. 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

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535 See supra note 333, at 89–90.
536 See supra note 531 and accompanying text.
538 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. Moreover, the tribes’ statutory rights to access the Missouri River are being ignored in the rush to secure water for energy development. As William Veeder testified to the Senate Committee on Interior and Insular Affairs in 1975, “the energy crisis is truly an Indian crisis.”

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. This demonstrates the tension placed on the Missouri River between competing interests in the upper and lower basins. That tension

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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.


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

affects Indian water rights also. 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.

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. But there is too much demand on the valuable water resource of the Missouri River for Indian reserved water rights to remain unadjudicated indefinitely.

There is considerable commentary on the respective merits of negotiation and litigation of Indian reserved water rights. 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.).


548 See supra note 540 and accompanying text.

549 See supra note 540 and accompanying text.
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.