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**Missouri River**  
**Master Water Control Manual**  
*Review and Update*

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**Final**  
**Environmental Impact Statement**  
**Volume IV: Appendix A, Tribal Issues, Part 2**



U.S. Army Corps  
of Engineers  
Northwestern Division

March 2004

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*Missouri River Master Water Control Manual  
Review and Update FEIS*

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# Appendix A

## Tribal Information

### Part 2



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Appendix A, Part 2 (Volume IV) contains Section A-15, record numbers 71 through 104.

**A-15 COMPENDIUM OF  
AMERICAN INDIAN  
COMMENTS**

This section is a compendium of Tribal hearing transcripts, meeting records, comments, correspondence, and meeting materials. It provides

a written record of consultation between the Corps and the Tribes arranged chronologically from 1989 to the present. Following a comprehensive, chronological list of records, this volume, Appendix A, Part 2 (Volume IV) contains copies of record numbers 71 through 104. Appendix A, Part 1 (Volume III) contains copies of record numbers 1 through 70.

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Review and Update FEIS*

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# Tribal Correspondence

# 2001

October to December



# FORT PECK TRIBES

Assiniboine & Sioux  
October 5, 2001

U. S. Army Corps of Engineers  
Northwest Division  
12565 West Center Road  
Omaha, Nebraska 68144-3869

ATTN: Missouri River Master Manual RDEIS

Dear RDEIS Staff:

These comments on the "Fort Peck spring rise" are formally filed by the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in northeastern Montana. The Tribes' Reservation is bounded on the south by the Missouri River below Fort Peck Dam over a distance of 141 miles, between river miles 1621 and 1762. Our interest in this matter is significant. Approximately 75% of the north or left bank of the Missouri River between Fort Peck Dam and the backwaters of Lake Sakakawea near the border with North Dakota lie within the Fort Peck Indian Reservation in the reach to be affected by testing and future operations to generate a spring rise.

The Tribes have previously corresponded with Becky Latke relative to the "mini" and "full" tests to ensure preservation and protection of our valuable Missouri River and its valley. Please review that correspondence, which has been largely ignored. We have been advised recently by the Corps' staff on the testing that they really do not have "jurisdiction" over the matters raised by the Tribes with them nearly a year ago, but that Division has jurisdiction over all matters except the "mini" test. It would have been helpful to have known earlier. Until recently, the staff dedicated to the testing dealt with us as if they were responsible for responding to our concerns.

There has been no substantive consultation nor coordination with the Assiniboine and Sioux Tribes respecting the "Fort Peck mini-test" or the "Fort Peck full-test" as required by the "Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994; 3 CFR, 1994 comp., p. 1007) or Executive Order 13175 (Nov. 6, 2000). In this case, the degree of proprietary interests of the Tribes, tribal members and private landowners within the Fort Peck Indian Reservation compel attention to our concerns respecting the testing and any proposed changes in the operation of Fort Peck Dam in furtherance of the update and revision of the Master Manual for the operation of the Missouri River.

Executive Order 13175 acknowledges a unique legal relationship with Indian tribal governments set forth in the Constitution of the United States, treaties, statutes, Executive Orders and court decisions, including the enactment of numerous statutes and promulgation of numerous regulations that establish and define a trust relationship with Indian tribes.

Until our concerns are fully addressed and action is taken by the governing body of the Tribes, the Corps of Engineers is respectfully requested to comply with Executive Order 13175 and to refrain from testing. Any testing is opposed until our concerns and requests are addressed as set forth below.

The Assiniboine and Sioux Tribes and Dry Prairie Rural Water are the beneficiaries of Public Law 106-382, the Fort Peck Reservation Rural Water System Act of 2000, executed by the President on October 27, 2000, which provides, among other things, for the diversion of Missouri River water at an intake near Poplar, Montana, treatment of diverted water to meet requirements on the Safe Drinking Water Act, as amended, and distribution of drinking water throughout the Fort Peck Indian Reservation and a

A2-9

four county area of northeastern Montana. The Corps of Engineers must provide the Tribes with a plan for protection of the intake site, including related facilities in the floodplain of the Missouri River, and a plan for mitigation and/or replacement of facilities stemming from the full-test and any proposed change in operating procedures at Fort Peck Dam to accommodate a future, artificial spring rise. The plan for mitigation and/or replacement of facilities must address a mechanism for financing repairs and/or replacement of the intake and related facilities through funds available from the Corps of Engineers or federal entities other than the entity established for the operation, maintenance and replacement of the Fort Peck Reservation Rural Water System.

The Corps of Engineers must likewise provide the Tribes with a plan for funding the additional costs of treating Missouri River water to remove enhanced levels of suspended solids at the water treatment plant for the Fort Peck Reservation Rural Water System.

The Corps of Engineers must provide the Tribes with a plan for protection/mitigation/replacement/funding of existing intake sites along the north bank of the Missouri River for the Fort Peck Irrigation Project and for other intakes for irrigation or other purposes, including new tribally-proposed irrigation intakes, within the boundaries of the Reservation.

The Corps of Engineers must provide an analysis of the impact of the mini-test, full-test and any future operational changes at Fort Peck Dam on the erosion of the north or left bank of the Missouri River. The analysis should include the impact of future operations on the mechanisms of accretion and avulsion and the impact of future operations on changes in ownership that might be caused by movement of the banks or channels of the Missouri River. The analysis should also include the impact of future operations on the elevation of the bed of the River as a result of aggradation or degradation. The analysis should provide maps of the Missouri River Valley between the east and west boundaries of the Fort Peck Indian Reservation outlining the soil types, geologic anomalies and any other factors that will permit definition of areas more susceptible to erosion and areas less susceptible to erosion. The analysis must provide conclusions with respect to means of compensating landowners within the Fort Peck Indian Reservation for loss of land whether those landowners are the Tribes, allottees or private owners.

The Corps of Engineers must provide a plan for review by the governing body for assurances of safety during testing and future operations. The plan should address, among other things, the methods of notification and warning before and during testing or operating procedures to artificially produce a spring rise. The plan should acknowledge and address warning and safety procedures for cultural and spiritual ceremonialists, recreationists, landowners, wood gatherers, hunters, fishermen and others, that would normally occupy the River, its banks and its floodplain. The plan should also address the potential for rainfall and/or snow melt events in the Missouri River Basin above Fort Peck Dam, such as the 1948, 1952 and 1964 events, and a loss of flood control capability due to revised operational procedures to maintain reservoir levels at or near spillway elevations in the May/June period in order to accomplish the release of water from the spillway for an enhanced spring rise. The plan should also address any known concerns with regard to the capability of the spillway to perform properly during the mini-test, the full-test or during future operations.

The Corps of Engineers must provide a plan for review by the governing body for the protection of human remains, cultural, historical and archeological resources known to exist in the Missouri River Valley and that may in the future be exposed by testing and/or future operating procedures.


The Corps of Engineers must clearly present a report to the governing body on the benefits to the Tribes, their lands and their resources of the proposed revisions in operations of Fort Peck Dam. The

report must address economic, environmental and cultural benefits. The report must also address the impact of the mini-test, full-test and any future operational changes on aquatic habitat, riparian habitat (with special attention on our cottonwood forest), endangered or threatened species and upon species that are not threatened or endangered. Moreover, the report must address the impact of changes in operation of Fort Peck Dam on hydropower resources of the Eastern Division of Pick-Sloan and, more specifically, on the resource pool from which the Fort Peck Assiniboine and Sioux Tribes will receive federal power at preference rates beginning January 1, 2001. The report should provide the Tribes with an assessment of the financial impact of operational changes on the Tribes' hydropower allocation as well as the financial impact on the Tribes from any other positive or negative changes.

Finally, the Corps of Engineers must prepare and present a detailed plan to establish field baseline conditions and thereafter to monitor changes in the field to the River banks, the River bed, suspended sediments, bedload, aquatic habitat, riparian habitat and other resources and facilities. The plan should describe how changes caused by revised operating procedures will be determined (relative to historic operating procedures) and how those determinations of marginal changes will be used to define damages, mitigation requirements and compensation. Independent investigations have been undertaken by the tribes on the increase in suspended sediments that may be expected as a result of the spring rise. Those investigations conclude that a 7% increase in suspended sediment can be expected with a change in flows from the historic pattern to the proposed pattern with spring rise. This is of significant concern and inter-relates with aggradation, degradation, bank erosion, riparian habitat and other resources. The Tribes are willing to share this analysis with the Corps of Engineers given a showing of attention to our concerns.

Please provide the name of a Corps of Engineers representative responsible for this matter and a time frame for response to our request for consultation and coordination consistent with Executive Order 13175. The Tribes are willing to correspond and/or meet with representatives of the Corps of Engineers at any time to clarify our concerns and requests.

Sincerely,

  
Arlyn Headdress, Chairman  
Fort Peck Assiniboine and Sioux Tribes

cc The Honorable Conrad Burns  
The Honorable Max Baucus  
The Honorable Dennis Rehberg  
The Honorable Judy Martz  
Secretary Gale Norton  
Rick Kruck

WHEREAS, The Fort Peck Tribal Executive Board is the duly elected body representing the Assiniboine and Sioux Tribes of the Fort Peck Reservation and is empowered to act on behalf of the Tribes. All actions shall be adherent to provisions set forth in the 1960 Constitution and By-Laws and Public Law #83-449, and

WHEREAS; the Army Corp of Engineers has proposed a Spring Rise on the Missouri River; and

WHEREAS; the Tribal Executive Board has requested a formal consultation with the Army Corp of Engineers and the Fish & Wildlife Programs; and


WHEREAS; this consultation will be to discuss the Revised Environmental Impact Statement; now

THEREFOR BE IT RESOLVED; that the Tribal Executive Board does hereby request a formal consultation with Army Corp of Engineers and the Fish & Wildlife Programs to discuss the Revised Environmental Impact Statement for the proposed Spring Rise on the Missouri River.

CERTIFICATION

I, the undersigned Secretary Accountant of the Tribal Executive Board of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, hereby certify that the Tribal Executive Board is composed of 12 voting members of whom 11, constituting a quorum were present at a Special Board meeting duly called and convened on this 8<sup>th</sup>, day of October, 2001 that the foregoing resolution was duly adopted at such meeting by the affirmative vote of 10 for.

APPROVED:

  
Secretary-Accountant/Secretary

  
Chairman/Vice Chairman  
Fort Peck Tribal Executive Board

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Superintendent  
Fort Peck Agency

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U.S. ARMY CORPS OF ENGINEERS

PUBLIC HEARING  
RE: REVISED DRAFT ENVIRONMENTAL IMPACT STATEMENT

POPLAR, MONTANA  
OCTOBER 10, 2001  
7:00 P.M.

Personnel in Attendance:

Lt. Col. David Ubbelohde  
Larry Cieslik  
Rose Hargrave  
Roy McAllister  
Paul Johnston  
Richard Moore  
Patti Lee  
Jody Farhart  
John LaRandeau  
Betty Newhouse

Witnesses:

Mark Wilson  
Buzz Mattelin

1           BE IT REMEMBERED, that on October 10, 2001, at the  
2           American Legion, Poplar, Montana, before Hearing Officer  
3           Lt. Col. David Ubbelohde, the following proceedings were  
4           had:

5                   (Proceedings commenced at 7:00 p.m.)

6           LTC. UBBELOHDE: Good evening. If we could get  
7           started.

8                   Welcome to this evening's comment session on the  
9           Revised Draft Environmental Impact Statement for the  
10          Missouri River Master Manual.

11                  My name is Lt. Col. Ubbelohde, Commander of the Omaha  
12          District for the U.S. Army Corps of Engineers. With me  
13          tonight are the members of the team that prepared the  
14          Revised Draft Environmental Impact Statement. They are  
15          Larry Cieslik, Roy McAllister, Richard Moore, John  
16          LaRandeau, Patti Lee, Rosemary Hargrave, Paul Johnston,  
17          Jody Farhart, and Betty Newhouse.

18                  This is the second of fourteen sessions from Helena  
19          to New Orleans. This afternoon we conducted an open house  
20          workshop. I hope that many of you were able to stop by  
21          and study some of the displays, pick up handouts and talk  
22          to our staff. If you weren't, please take a few moments  
23          this evening to visit the displays set up in the room next  
24          door.

25                  Our agenda tonight will start with a short video.

1           There's a welcome from Col. David Fastabend, the  
2           Northwestern Division Commander, followed by a description  
3           of the projects, the features of the Revised Draft  
4           Environmental Impact Statement and the major impacts.

5           We want everyone to have a common understanding of  
6           the RDEIS. Copies of the summary and handouts, as well as  
7           the entire document, are available at libraries and  
8           project offices throughout the basin. Also, you can get a  
9           copy by writing to us or off of our web site. Addresses  
10          are available, so just see one of our team members.

11          Following the video, I will give a little fuller  
12          description of the comments process tonight and then take  
13          your comments. We'll stay as long as necessary for  
14          everyone to be heard. With that, we'll begin.

15          (Video presentation.)

16          LT. COL. UBBELOHDE: This hearing session will come  
17          to order.

18          Good evening, ladies and gentlemen. My name is Lt.  
19          Col. Ubbelohde, Commander of the Omaha Engineer District,  
20          U.S. Army Corps of Engineers, and I will be the Hearing  
21          Officer for tonight's session.

22          Our purpose this evening is to conduct a public  
23          hearing on proposed changes to the guidelines of the  
24          Missouri River Mainstem system operations.

25          I would like to acknowledge and thank the Assiniboine



1 and Sioux Tribes of Fort Peck for requesting and  
2 participating in this public hearing. This hearing is  
3 held in the true spirit of government-to-government  
4 relations that the Corps of Engineers wants to maintain  
5 with the tribes in the Missouri River basin.

6 Assisting me this evening are Larry Cieslik, Rose  
7 Hargrave, Roy McAllister, Paul Johnston, Rick Moore, Patti  
8 Lee, Jody Farhart, John LaRondeau and Betty Newhouse.  
9 These folks will be available after the hearing if you  
10 have any questions.

11 Before I proceed, I want to recognize any elected  
12 officials or representatives that may be present. Are  
13 there any elected officials here? Okay.

14 This hearing is being recorded by Lisa Devine. She  
15 will be taking verbatim testimony that will be the basis  
16 for the official transcript and a record of this hearing.  
17 This transcript, with all written statements and other  
18 data, will be made a part of the Administrative Record for  
19 Action.

20 Persons who are interested in obtaining a record of  
21 the transcript for this session or another session can do  
22 so. A copy of this transcript will be provided to  
23 participating tribes. Persons interested in receiving a  
24 copy need to indicate this on one of the cards available  
25 at the table by the entrance. Also, if you are not on our

1 mailing list and desire to be so, please indicate so on  
2 one of the cards as well.

3 In order to conduct an orderly hearing, it is  
4 essential that I have a card from anyone desiring to speak  
5 that gives your name, and if you are representing anyone  
6 other than yourself, please state that as well. If you  
7 desire to make a statement and have not filled out a card,  
8 please raise your hand and we will make a card available  
9 to you.

10 The primary purpose of tonight's session is to help  
11 ensure that we have all the essential information that we  
12 need to make our decision on establishing the guidelines  
13 for the future operations of the Mainstem system and that  
14 this information is accurate. This is your opportunity to  
15 provide us with some of that information. We view this as  
16 a very important opportunity for you to have an influence  
17 on that decision; therefore, I'm glad that you're here  
18 tonight.

19 I want you to remember that tonight's forum is to  
20 discuss the proposed changes in the operation of the  
21 Missouri River Mainstem system that are analyzed in the  
22 recently released Revised Draft Environmental Impact  
23 Statement. We should concentrate our efforts this evening  
24 on issues specific to that decision and should refrain  
25 from discussing the Corps of Engineers in general.

1           It is my intention to give all interested parties an  
2           opportunity to express their views on the proposed changes  
3           fully, freely and publicly. It is in the spirit of  
4           seeking full disclosure and providing an opportunity for  
5           you to be heard regarding the future decision that we have  
6           called this hearing. Anyone who wishes to speak or make a  
7           statement will be given the opportunity to do so.

8           The Missouri River Mainstem system consists of Corps  
9           of Engineers constructed and operated projects, so  
10          officially, that makes us a project proponent. However,  
11          it is our intention that the final decision on the future  
12          operational guidelines for these projects reflects a plan  
13          that considers all views of all interests focusing on the  
14          contemporary and future needs served by the Mainstem  
15          system and meets the requirements established by Congress.

16          As the Hearing Officer, my role and responsibility is  
17          to conduct this hearing in such a manner as to ensure full  
18          disclosure of all relevant facts bearing on the  
19          information that we have currently before us. If the  
20          information is inaccurate or incomplete, we need to know  
21          that, and you can help us make this determination.

22          Ultimately, the final selection of a plan that  
23          provides the framework for the future operations of the  
24          Mainstem system will be based on the benefits that may be  
25          expected to accrue from the proposed plan, as well as the

1       probable negative impacts, including cumulative impacts.  
2       This includes significant social, economic and  
3       environmental factors.

4               Should you desire to submit a written statement and  
5       do not have it prepared, you may send it to the U.S. Army  
6       Corps of Engineers in Omaha, and we'll provide the  
7       address. You may also fax your comments, and we can  
8       provide the fax number if you are interested in that.

9               The official record for this hearing will be open  
10       until 28 February 2002. To be properly considered, your  
11       written statement must be postmarked by that date.

12              Before I begin taking testimony, I would like to say  
13       a few words about the order and procedure that will be  
14       followed. When we call your name, please come forward to  
15       the lectern, state your name and address, specify whether  
16       or not you are representing a group, agency, organization,  
17       or if you are speaking as an individual.

18              If you are going to read a statement, we would  
19       appreciate it if you could provide a copy to the court  
20       reporter prior to speaking, so that your remarks will not  
21       have to be taken down verbatim.

22              After all statements have been made, time will be  
23       allowed for any additional remarks. During the session  
24       I may ask questions to clarify points for my own  
25       satisfaction. Since the purpose of this public hearing is

1 to gather information which will be used in evaluating the  
2 proposed plan or alternatives to it, and since open debate  
3 between members of the audience would be counterproductive  
4 to this purpose, I must insist that all comments are  
5 directed to me, the Hearing Officer.

6 With the exception of public officials, and  
7 apparently we have none tonight, persons will be given an  
8 equal opportunity to comment.

9 I will now begin by calling names of those who have  
10 submitted cards, beginning with...

11 MR. MOORE: Mark Wilson.

12 MR. WILSON: "Good evening, my name is Mark Wilson  
13 and I'm here this evening on behalf of the U.S. Fish and  
14 Wildlife Service to issue a brief statement on the Revised  
15 Draft Environmental Impact Statement for the Missouri  
16 River Master Water Control Manual. I'm also here to  
17 personally listen to the comments of the citizens who are  
18 here this evening to testify on this important issue.

19 "Under the Endangered Species Act Congress has given  
20 the Fish and Wildlife Service primary responsibility for  
21 the stewardship of our nation's rarest animals and plants.  
22 The Missouri River is home to the endangered pallid  
23 sturgeon and least tern, and the threatened piping plover.  
24 The decline of these species indicates that the river has  
25 changed in ways which now prevent it from sustaining some

1           formerly abundant populations of native fish and  
2           wildlife....and suggests that we should consider adjusting  
3           our present method of river management and try to restore  
4           the Missouri River to a healthier condition.

5                     "The Missouri River should provide wildlife habitat,  
6           and support fishing, boating and other recreational  
7           activities. The river can also act as an enticement for  
8           tourism, as well as provide water to drink, to irrigate  
9           with and to support navigation...if we moderate and temper  
10          these uses and don't allow excessive use to impair the  
11          river's ability to provide a wider array of social  
12          benefits.

13                    "Congress has committed the Federal Government to  
14          work to prevent extinctions of rare animals and plants by  
15          requiring all Federal agencies to use their authorities to  
16          conserve endangered and threatened species. One of the  
17          Fish and Wildlife Service's primary roles is to assist  
18          other Federal agencies in designing and planning their  
19          programs to help them avoid actions that would contribute  
20          to further declines of rare species such as the pallid  
21          sturgeon, least tern, and piping plover. Over the last  
22          12 years our agency has been working with the U.S. Army  
23          Corps of Engineers to modernize the management of the  
24          Missouri River to help stabilize and hopefully, begin to  
25          increase and recover populations of these very rare

1 animals. Our recommended approach was described recently  
2 in a document called the 'Missouri River Biological  
3 Opinion,' published in November 2000.

4 "Our biological opinion outlines the status of the  
5 threatened and endangered species that are associated with  
6 the Missouri River and describes the effects that the  
7 current management scheme has upon them. The biological  
8 opinion also provides a reasonable and prudent alternative  
9 to the current operation that we believe will allow the  
10 Corps of Engineers to manage the river and also be in  
11 compliance with the legal stipulations of the Endangered  
12 Species Act.....which in a nutshell says that no federal  
13 agency can take actions that would jeopardize the  
14 continued existence of a threatened or endangered species  
15 or destroy or adversely modify habitat of such species  
16 which is determined to be critical. With the biological  
17 opinion as a foundation, we will continue to work with the  
18 Corps to evaluate the six alternatives for a new Master  
19 Manual presented in the Revised Draft Environmental Impact  
20 Statement.

21 "Our biological opinion is based on the best  
22 available science and includes nearly 500 scientific  
23 references. In addition, we sought advice from six  
24 respected scientists - 'big river specialists' - who  
25 confirmed that there is a need to address flow management,

1 in addition to physically restoring portions of the river  
2 channel to a more natural condition. Further, the  
3 Missouri River Natural Resources Committee has endorsed  
4 the science encompassed within the biological opinion.  
5 This is a group comprised of Missouri River management  
6 experts from the state fish and wildlife conservation  
7 agencies in each of the eight states in the Missouri River  
8 basin.

9 "Management changes identified in the biological  
10 opinion include a 'spring rise' out of Fort Peck Dam, an  
11 improved hatchery operation to assist declining pallid  
12 sturgeon populations, restoration of approximately 20% of  
13 the lost aquatic habitat in the lower 1/3 of the river,  
14 and intrasystem unbalancing of the three largest  
15 reservoirs. We are also recommending incorporation of an  
16 adaptive management strategy that would include improved  
17 study and monitoring of the river.

18 "In closing, the Service endorses the identified goal  
19 of the revised master manual - to manage the river to  
20 serve the contemporary needs of the Missouri River Basin  
21 and Nation. These needs include taking steps to ensure  
22 that threatened and endangered species are protected while  
23 maintaining many other socioeconomic benefits being  
24 provided by the operation of the Missouri River dams. The  
25 Service stands behind the science used in the biological



1 opinion and is confident that the operational changes  
2 identified in the biological opinion, in addition to  
3 subsequent discussions with the Corps, will ensure that  
4 rare species of fish and wildlife continue to be a part of  
5 the Missouri River's living wildlife legacy.

6 "The Missouri River is a tremendous river, with a  
7 cherished and celebrated heritage. Human influence has  
8 altered the river greatly. Changes are needed to  
9 modernize and restore biologic health to the river - for  
10 the benefit of rare species and for people, too."

11 LT. COL. UBBELOHDE: Thank you.

12 MR. MOORE: Buzz Mattelin.

13 MR. MATTELIN: Buzz Mattelin, P.O. Box 601,  
14 Culbertson, Montana 59218.

15 My name is Buzz Mattelin. I'm an irrigator and  
16 farmer about 15 miles downstream of Poplar, and I would  
17 like to thank you for coming to Montana to relieve some of  
18 our travel problems to get to these type of meetings.

19 My family's got quite a long history with the river.  
20 My grandfather came here in the early 1900s and settled  
21 along the river. He was here before the dam. I had a  
22 great uncle that died working on the Fort Peck. I have  
23 lived here all my life, except for some college years.

24 We've seen lots of changes over these years. In the  
25 recent past, in the true pioneer spirit, we decided to

1 help ourselves to the natural resources. We have had a  
2 large increase in the irrigation in this reach of the  
3 river in the last ten years, probably up in the  
4 neighborhood of 40 to 50,000 acres from Fort Peck to the  
5 confluence of the Yellowstone. A lot of this expansion  
6 has been fueled by increases in high-value crops, such as  
7 sugar beets, and a lot of projects that were built based  
8 on historic stream flows.

9 And I pulled something off the USGS site this summer,  
10 and it gives the stream flow for June 9th through the  
11 16th, and out of 54 -- 53 years of record, it ranged  
12 between about 8,200 CFS to a height of 9,000.

13 And I guess I'm speaking specifically to the proposed  
14 flow modifications out of the Fort Peck. The mini test  
15 and full test proposed releases will be about three times  
16 what this median daily stream flow would be. This is  
17 quite a burden on the irrigators, and as a close  
18 assessment, there's about 125 water intakes on this reach  
19 of the river. Most of the irrigation is private  
20 development, it's not a public -- it's not a government  
21 project.

22 There's one government project between Wolf Point and  
23 Oswego, it's about 18,000 acres, and on the other side of  
24 the confluence to get to the Buford Trenton project, but  
25 all the other development in between is private.

1           I guess some of the unknowns with the spring rise on  
2           the Fort Peck is how high the water's going to get. And  
3           currently there's no flow model that will accurately  
4           predict what the stage of the river will be at 23,000 CFS.

5           To back up, I guess, there was a timely thing in the  
6           Sunday Billings Gazette (indicating). It talks about  
7           farming for produce, and it talks about this  
8           Montana/Dakota region, North Dakota and Montana raising  
9           high-value crops. And the research centers at Sidney and  
10          Williston have done quite a bit of work on vegetables, and  
11          specifically sugar beets, potatoes, carrots and onions, as  
12          far as providing produce to some of the metropolitan areas  
13          and Canada and in the northern United States.

14          Dollar-wise, we can't raise high-value crops if we  
15          can't pump water for three weeks every three years, which  
16          is the proposed spring rise. The dollar impact is that if  
17          we can't raise sugar beets and we are forced into a crop  
18          and to wait for water, we are talking about 5 to \$10  
19          million on this reach of river.

20          I guess some other concerns that we have -- that  
21          I have is rolling the mini test and full test into an  
22          RDEIS. We were kind of highlighted in the environmental  
23          assessment process with the district, and when we were  
24          going through that process we were wondering if we were  
25          going to get lost in the vastness of this process.

1           Of the alternatives, I don't see which one's the  
2 preferred alternative. It's kind of a moving target when  
3 we can't focus on one. It's hard to find anything  
4 positive to Fort Peck Lake and this part of Montana and  
5 North Dakota in any of the alternatives.

6           Of all the alternatives, I think in only one did  
7 Fort Peck stay three feet higher than it did in the '80s.  
8 The other ones dropped to the same level.

9           Adaptive management I think is a good thing, as long  
10 as there's some local voice in it. I would like to see  
11 some type of recovery team maybe in the area for the  
12 implementation of the whole test.

13           And I think that's it. Thank you.

14           LT. COL. UBBELOHDE: Thank you.

15           Is there anyone else that wishes to testify? Okay.

16           In closing, I would like to remind you that the  
17 hearing administrative record will be open through  
18 28 February 2002 for anyone who wishes to submit written  
19 facts or fax or electronic comments.

20           Also, if you want to be on our mailing list to  
21 receive a copy of the transcript, you need to fill out one  
22 of the cards available at the table by the entrance.

23           If there are no further comments, I would like to  
24 thank everybody for coming. The session is closed.

25           (Public hearing adjourned.)

CERTIFICATE OF REPORTER

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I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled  
matter.

*Lisa Lewis Devine RMR* 10/17/01

LISA LEWIS DEVINE, RMR

DATE

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1 U.S. ARMY CORPS OF ENGINEERS, OMAHA DISTRICT  
2 MISSOURI RIVER BASIN WATER MANAGEMENT DIVISION

3  
4 In Re: Proposed Changes to the  
5 Guidelines for the Missouri River  
6 Mainstem Systems Operation  
7  
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10  
11 TRANSCRIPT OF  
12 PUBLIC HEARING  
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17 Taken At  
18 Four Bears Community Center  
19 New Town, North Dakota  
20 October 24, 2001  
21  
22

23 BEFORE COL. DAVID A. FASTABEND  
24 NORTHWESTERN DIVISION COMMANDER  
25



1 C O N T E N T S

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1           (The proceedings herein were had and made  
2 of record, commencing at 7:10 p.m., Wednesday,  
3 October 24, 2001, as follows:)

4           (Videotape played and introduction given  
5 by Col. Fastabend.)

6           COL. FASTABEND: I'll now call the names  
7 of those who submitted cards beginning with  
8 Chairman Tex Hall.

9           MR. HALL: Once again, thank you, Colonel  
10 Fastabend. Before I begin my comments, I would  
11 like to call on one of our spiritual leaders, one  
12 of our elders in our community of the Mandan,  
13 Hidatsa and Arikara Nation, Ted Balman, Jr., to do  
14 an opening prayer. When we talk about the river,  
15 we talk about our Grandfather, we also talk about  
16 our ancestors, and we will show in the power point  
17 presentation the devastation of the flood of the  
18 Garrison Dam 50 years ago and how our Tribe has  
19 come from then to where we're at today. And then  
20 after that I would like to call on the councilman  
21 from Four Bears, Marcus Wells, Jr., to give a  
22 welcome.

23           So with that I would call on Ted Balman,  
24 Jr., to do an opening prayer and then to talk about  
25 our Grandfather, the Missouri River.

1 (Prayer given.)

2 MR. HALL: Next, I would call on Marcus  
3 Wells, Jr.

4 MR. WELLS: Good evening. My name is  
5 Marcus Wells, Jr. I am a Four Bears council  
6 representative, tribal business councilman. I  
7 would like to welcome you here tonight and make one  
8 short comment about this session and recordkeeping,  
9 I guess, is that I hope that we can get back on the  
10 table to get back those individual landowners from  
11 the allotted landowners of the Tribe. What comes  
12 to them in '92 was taken back almost overnight with  
13 the Earthquake Bill. And I know a family out here  
14 in Four Bears who are still living who were happy  
15 one day and sad the next day because of the  
16 McKenzie Bay area, they had land again promised to  
17 them, given back, which was taken away. So  
18 hopefully one day that can happen. I know there's  
19 powers that be that have a lot to do with that, but  
20 as a councilman I would like to speak on their  
21 behalf. I don't see them here tonight, but it's  
22 the Smith family.

23 In addition to that, what I would like to  
24 say on behalf of the elders who are here is that  
25 they suffered at one point in time and didn't

1 receive as much attention as the pallid sturgeon  
2 does today. I was reading the handout here  
3 tonight. There's a lot of issues that they want to  
4 make right with the wildlife and different things,  
5 but when it was time for us to move 50-some odd  
6 years ago, we had to move. I would like to say  
7 that. Thank you, Chairman Hall, for giving me a  
8 few minutes this evening.

9           MR. HALL: I would like to introduce a  
10 couple of my staff people, Colonel, members of the  
11 Corps. Richard Mayer will give the brief power  
12 point presentation. I recognize our Master Manual  
13 team. We have a Master Manual team. If you would  
14 please stand and I will recognize you. Elgin Crows  
15 Breast, Pemina Yellow Bird, Linda Emery, John  
16 Danks. Who else? And we have Patti Jo Thomas and  
17 Ed Hall. Our Tribal Missouri River Master Manual  
18 team formulated our comments and put together our  
19 presentation.

20           So with that I will call on Richard Mayer  
21 to begin our power point. I will submit a copy for  
22 the record, my comments. I think I have some extra  
23 ones here. I'm trying not to waste paper so I will  
24 pass those out. Our tribal attorney, Mr. Dan  
25 Israel, has flown in from Phoenix, Arizona, and

1 will also provide comments.

2           With that, Rich, we'll begin. For the  
3 record, my name is Red Point. Spell that correctly  
4 for the record. It's my Indian name. My English  
5 name is Tex Hall, chairman of the Mandan, Hidatsa  
6 and Arikara Nation.

7           As you can see from our logo, we have been  
8 established by federal treaty in 1851, so with our  
9 tribes we are a sovereign tribal government. And  
10 as I mentioned earlier, Colonel Fustabend, tribes  
11 are in our country, in the United States, the only  
12 country in the world that has three systems of  
13 government: The federal government, which you  
14 represent; the state government, which Governor  
15 Hoeven represented yesterday; and tribal  
16 government, which we are representing today. So  
17 it's a very unique democratic system with a  
18 three-tiered federal system that we speak on behalf  
19 of our nation tonight.

20           So with that, Richard, you can take on the  
21 next slide.

22           We were established by treaty in 1851.  
23 You can see that we covered many states, and we're  
24 down into -- all the way from the present location  
25 up towards the top, which we border on, we go past

1 the Knife River in Beulah and Hazen and over to the  
2 Missouri, down to the Heart south of Bismarck and  
3 Mandan, and then down into South Dakota to the edge  
4 of the Black Hills, up along the Powder River in  
5 Wyoming and over to the Yellowstone in Montana and  
6 then back up north to our present-day Fort Berthold  
7 Indian Reservation. So we went from 12 and a half  
8 million acres set aside and later become four  
9 separate states into our present day. You can see  
10 on the bottom, the 1910 Homestead Act sold surplus  
11 reservation land to the Indian homesteaders and  
12 further emaciated the Tribe's total acreage, so  
13 today we are on the Indian reservation. So, Rich,  
14 go on to the next slide.

15           You can see from this picture, this  
16 picture really represents trauma and dramatic grief  
17 that happened in 1948. We are probably the only  
18 tribe in this country that was completely  
19 devastated by one of these mainstem dams. The six  
20 dams along Fort Peck all the way down to Gavins  
21 Point where the Garrison Dam impacted the Three  
22 Affiliated Tribes.

23           Our chairman at that time, George  
24 Gillette, vice chairman, was my grandfather, Jim  
25 Hall, in the background and the rest of the tribal

1 council and you have a representative from the Army  
2 Corps of Engineers to the left and one from the  
3 Department of the Interior that signed the bill  
4 that forced the dam upon our Tribe and completely  
5 devastated not just a few -- not just a few farms,  
6 an entire capital of Elbow Woods with all the  
7 infrastructure, including the hospital, all the  
8 economic development projects, a comprehensive  
9 boarding school, all of the housing, all the water  
10 and sewer, a complete capital and, further, 156,000  
11 acres of an entire bottomland in class I and class  
12 II soil.

13           So, again, Colonel Fastabend, you will not  
14 find another Tribe that had complete devastation as  
15 the Three Affiliated Tribes in the Mandan, Hidatsa  
16 and Arikara Nation. This picture has been used by  
17 sociologists and professors that talk about the  
18 negative relationship that the United States  
19 Government has had with Indian tribes, and this is  
20 the position that we have come from.

21           The next slide, Richard. Here you have  
22 one of our tribal elders in 1946, Mr. Thomas  
23 Spotted Wolf, who said to the Corps when the Tribe  
24 was trying to negotiate with the Corps at that time  
25 when the Tribe was trying to say we have a

1 resolution. The resolution says we don't want the  
2 dam here. Research has shown that the dam could  
3 have been placed somewhere else and had less  
4 detrimental impact.

5           Imagine if we could have done an  
6 environmental assessment at that point in time in  
7 1948 what it would show. Rather than negotiate  
8 with the tribes, it was forced, the dam was forced,  
9 and as a result this famous quote, You have come to  
10 destroy us. When the negotiations ceased,  
11 negotiations did not continue, he pointed his  
12 finger at a representative from the Army Corps of  
13 Engineers and stated very eloquently in his own  
14 way.

15           Next slide. This is a picture of our  
16 capital, Elbow Woods, as the waters were coming up  
17 in 1952. In 1953 all the people were forced to  
18 relocate, and at that point in time, as Councilman  
19 Wells indicated, the families, the tribes still had  
20 a resolution opposing it and the Corps was moving  
21 towards this relocation, this forced relocation,  
22 and it was one of the worst relocation methods that  
23 the United States Government had bestowed upon  
24 anybody because there really was no relocation  
25 plan, it was forced removal, get out, the water is

1 coming, it's 1953, get on your tractor, get on the  
2 move, find a house, relocate, find a new homestead,  
3 find a new log cabin, find a new place to live or  
4 you will drown.

5           Next slide, please. This is the -- this  
6 picture is of the Four Bears Bridge. I also want  
7 to note for the record that Ed Hall is the project  
8 manager for our new Four Bears Bridge, and so he  
9 will make comments later on, Colonel Fastabend,  
10 about the possible impact and expense of putting  
11 the bridge together, that if the lake levels are  
12 lower, it will be cheaper to build the bridge.

13           But the old bridge which you see there,  
14 the middle span is right here, and this is in  
15 1952. This bridge was designed in 1934. It was  
16 built 22 feet in width. It was built for Model As  
17 and Model Ts. We have had that since 1934. Lo and  
18 behold, sometimes Congress works in mysterious ways  
19 and the United States Government works in  
20 mysterious ways, we got the funding to do that. So  
21 this is a very historic bridge. You can see the  
22 beautiful bottomlands in Elbow Woods right there.  
23 The bridge is close to Elbow Woods. You can see  
24 all the cottonwood trees. We call the bridge today  
25 a bridge without a home because the Army Corps of



1 Engineers is playing horseshoe on the bridge when  
2 we're trying to get new money, so we had to go  
3 directly to Congress. The Army Corps said we're  
4 not in the business of building bridges anymore.  
5 We did it in 1934. We dismantled it in 1953, but  
6 we're not in the business of building bridges, you  
7 have to go on your own, so we did.

8           Next slide, please. Colonel Fastabend,  
9 representatives of the Corps, this is the midwest,  
10 we like to see as the Great Plains region of  
11 tribes, and there are 16 tribes that are along the  
12 river or close to the river in North Dakota, South  
13 Dakota and Nebraska, and we work in a very cohesive  
14 manner. The tribes are all unified in making sure  
15 that the Master Manual reflects tribal concerns,  
16 and we will get into those comments more  
17 specifically later on.

18           The next slide, please. This is a map of  
19 North Dakota and South Dakota. There is one thing  
20 I want to point out for the record, Colonel  
21 Fastabend, and that's with the Mandan, Hidatsa and  
22 Arikara Nation. When Lewis and Clark came up the  
23 river 200 years ago approximately, in 1804,  
24 President Jefferson said in 1803, Captain Lewis,  
25 your mission is to find a passageway to the

1 Northwest through this area that the Mandan,  
2 Hidatsa and Arikara villages occupied. He said  
3 that because we had a huge trade network that was  
4 right here on the Knife River Indian Village just  
5 south of our present location, approximately 17  
6 miles to the south. You literally had a city on  
7 the prairie. There were hundreds of tribes. Our  
8 tribes were early traders on the river. We had  
9 flint, so we used that for weapons and tools. We  
10 traded that flint. You could find pottery from  
11 Mexico to the Southwest. Our trade network went  
12 out to the Pacific Northwest, all the way out to  
13 the Hudson Bay. So our tribes were here literally  
14 thousands of years before either North Dakota or  
15 South Dakota became states in 1889. And so,  
16 clearly, the uniqueness of the United States  
17 Congress and Government, these lands that you see  
18 before you are lands that are under the complete  
19 jurisdiction and sovereignty of these sovereign  
20 tribes that you see listed here.

21           But my final point on this map is that the  
22 Mandan, Hidatsa and Arikara Nation went down into  
23 South Dakota and down into Nebraska. So when we  
24 talk about the 1999 Water Resources Development  
25 Act, specifically Title VI of that Act, there are

1 over 3,000 sites down into South Dakota and some in  
2 Nebraska, but into South Dakota. Many members of  
3 the Army Corps of Engineers do not know that the  
4 Tribe has 3,000 known sites down there and that we  
5 are looking to preserve these cultural and sacred  
6 sites, and the Cultural Resource Protection Office  
7 is most assuredly working on this issue. So our  
8 tribes are clearly much further down in this area.

9           Next slide, please. And here you have the  
10 map of North Dakota and you have the four  
11 reservations, which include the Fort Berthold, the  
12 Turtle Mountain towards the top, the Turtle  
13 Mountain Band of Chippewa, the Spirit Lake Sioux  
14 Nation around Devils Lake and the Standing Rock  
15 Sioux Nation down south of Bismarck there, and over  
16 to the far right we have the Sisseton Wahpeton, so  
17 they come into North Dakota just a little bit, as  
18 well.

19           So we thank the Corps for the meeting that  
20 they held with Rose and Rick. We held a meeting in  
21 Bismarck at the Civic Center. We thank the Corps  
22 for having a preliminary meeting to address the  
23 Tribe's concerns at that time, also. We really  
24 appreciate that meeting in terms of talking about  
25 the Master Manual, talking about the impact of the

1 tribes. It really helped us as we are preparing  
2 our comments today. So we thank the Army Corps of  
3 Engineers particularly for helping us do that.

4           Next slide, please. Right here, and  
5 correct me if I'm wrong, this is a map of all of  
6 the known -- this is the land description. Green  
7 is the Corps of Engineers' land and the brown is  
8 the tribal land. And let me say this for the  
9 record, Colonel Fastabend, that the Tribe, as  
10 Marcus Wells, Jr., indicated his concerns about  
11 leaving lakeshore lands. The Tribe is submitting  
12 legislation to Senator Kent Conrad for the return  
13 of lakeshore lands that most assuredly the Corps  
14 has held as excess property. When they flooded us  
15 50 years ago, they took too much land, this is  
16 excess property. Other particular tribes and other  
17 states have received lands. Specifically South  
18 Dakota has received 92,000 acres. The Lower Brule  
19 and Sheyenne River Sioux Tribe have received  
20 hundreds of acres, as well.

21           We had our legislation in 1992 and their  
22 legislation happened in 1999, they're getting their  
23 lakeshore back and we are not getting our lakeshore  
24 back. So we have been urging the Army Corps of  
25 Engineers to do an administrative transfer, it is

1 not occurring, so we have to look to legislation to  
2 get that accomplished. But as you can see,  
3 Garrison impacted Fort Berthold right in the  
4 middle, right in the middle and heart of our  
5 reservation and flooded 556,000 acres.

6           Next slide, please. This is just a  
7 closeup of the northern part of the reservation.  
8 And there are a lot of recreation sites, and we  
9 will work towards trying to meet all concerns and  
10 we are looking for the Corps to favorably approve  
11 of the land transfer back to the Three Affiliated  
12 Tribes.

13           Next slide, please. This is a map of the  
14 Four Bears Park area. The reason I mention this  
15 slide is because back about approximately ten years  
16 ago the Tribe received these lands of Four Bears  
17 through the administrative transfer process. And I  
18 might also add this slide does not show the issue  
19 there was land given back to the Three Affiliated  
20 Tribes by the Army Corps of Engineers through the  
21 administrative land process, which they do not do  
22 for the rest of the lakeshore. So today we're  
23 forced to look back to legislation.

24           Next slide. On this particular slide  
25 we're showing this is Crows Fly Butte. This is a

1 real significant butte right over here to the  
2 west. You can see the erosion. The erosion that  
3 is cutting away this very significant Crows Fly  
4 Butte. It was named after one of our chiefs, Chief  
5 Crows Fly. And Chief Crows Fly lived back in the  
6 1800s and resisted the reservation life and led a  
7 lot of the people of the Hidatsa away to Fort Union  
8 and across the Yellowstone and hunted the buffalo.  
9 They refused the reservation life. Clearly we feel  
10 this is one -- this is a butte that is worth  
11 preserving. We want to preserve the very  
12 significant butte. You can see where the erosion  
13 needs bank stabilization. We need funding to do  
14 that. This is another shot of this. Again, if we  
15 don't put appropriate bank stabilization, we will  
16 lose this very significant butte.

17           Next slide, please. Right here, this is  
18 over on the eastern segment of Fort Berthold. You  
19 can see this is a rock formation. This was used  
20 for the tribes, back then used and they still use  
21 it today. Everything is passed down through world  
22 history. This is probably the sundance area or a  
23 spiritual ceremony. These would probably be in a  
24 circular formation used for spiritual purposes.  
25 They were used for prayer, they were used for

1 fasting and all of those things. And, again, these  
2 are left unprotected and we're very concerned that  
3 the Corps needs to protect these. Or what we would  
4 like is the Corps to contract with the Tribe for us  
5 to manage them.

6           We're very proud of our Cultural  
7 Protection Office. We're very proud of our Game  
8 and Fish Office. We're a sophisticated tribe. We  
9 take pride in the fact that 50 years ago we  
10 demonstrated we're very strong and our population  
11 is very strong. The smallpox in 1837 killed our  
12 Chief Four Bears. But we have our language,  
13 Mandan, Hidatsa, Arikara in our curriculum, we have  
14 our elders organization. John Danks here is a  
15 member of the elders organization. And the elders  
16 organization is taking a very active role in taking  
17 the lead for traditions, for language and  
18 preservation. I'm very proud of that fact our  
19 Tribe has the sophistication to protect these sites  
20 if we're given the opportunity. We also have -- I  
21 see Paul Danks back there. We have Richard Mayer  
22 who put together this slide, so we can track these  
23 areas that we need to safeguard, we can take care  
24 of.

25           Next slide, please. This is another

1 example on the eastern side of our reservation of  
2 again a droppage in the lake where we have somebody  
3 that's walking around looking at the erosion. You  
4 can see that, again, bank stabilization. We feel  
5 we're very short-funded in not only bank  
6 stabilization, but also the protection of our  
7 cultural sites and of our historical sites.

8           Next slide, please. I believe this is the  
9 last one, the last slide. Again, this is Fort  
10 Berthold, and these are approximately 700 single  
11 sites that you see. We have got more sites down in  
12 South Dakota, but these are 700 of our known sites  
13 that we have. There's over 3,000 sites here.  
14 There's over 3,000 sites here on Fort Berthold.  
15 These are 700 that are categorized right here. And  
16 you can see the impact, as I mentioned in my  
17 opening comments, the devastation of the Garrison  
18 Dam was the worst at Fort Berthold of any Indian  
19 reservation in the United States. And so most  
20 definitely these sacred sites are at risk. They  
21 are at risk with the advent of the Lewis and Clark  
22 bicentennial where they project 30 million visitors  
23 to come from St. Louis, we feel many are going to  
24 stop here because Sakakawea was here, she was a  
25 member of the Hidatsa Tribe, and people will want



1 to stop and see these things. But we're concerned  
2 about possible looting because it is occurring  
3 today, Colonel. There is looting occurring today,  
4 and, again, we want to look to co-manage these  
5 issues. Rather than sit here and point fingers at  
6 the Corps or the Corps can point fingers at the  
7 Tribe, we want to work in a partnership to help  
8 co-manage today so that tomorrow these known sites  
9 will be protected in perpetuity.

10           So that is the end of our slides. Thank  
11 you very much, Richard, for that.

12           Then I have my comments right here and  
13 I'll just read them for the record. I'll be as  
14 quick as I can.

15           On behalf of the people of the Mandan,  
16 Hidatsa and Arikara Nation, I welcome the Army  
17 Corps of Engineers to our homelands. The Three  
18 Affiliated Tribes was established in 1851 by the  
19 Fort Laramie Treaty. According to our Constitution  
20 and the United States Government, treaties are the  
21 supreme law of the land and we as a treaty tribe  
22 are considered sovereign nations. As chairman of a  
23 sovereign nation, I welcome this opportunity to  
24 provide comments on the draft environmental impact  
25 statement for the Master Manual for control of the

1 Missouri River. We will be providing very detailed  
2 comments on the draft environmental impact  
3 statement prior to February 28, 2002, the deadline  
4 for receiving comments.

5           Tonight I would like to comment on several  
6 concerns that tribes have and how the Master Manual  
7 will impact these concerns. In particular, I want  
8 to stress that the river is a trust asset and the  
9 Army Corps of Engineers as a federal agency is a  
10 trustee. We need joint management of the river.  
11 The Mandan, Hidatsa and Arikara Nation is prepared  
12 to work cooperatively with the Army Corps of  
13 Engineers on management of the river and on the  
14 following subject matters.

15           1. Government-to-government  
16 consultation. This is absolutely essential.  
17 Consultation with tribal nations, according to  
18 Presidential Executive Order 13175, is vital to  
19 development of the Master Manual. Prior to the  
20 finalization of the Master Manual, all tribal  
21 nations along the river should be provided with  
22 in-depth consultation about how the final Master  
23 Manual will be constructed. The Mandan, Hidatsa  
24 and Arikara people particularly have been adversely  
25 affected by the activities of the Army Corps in the

1 past. Our reservation, our homelands were  
2 displaced by the building of the Garrison Dam.

3           2. Recognition of the Winters Doctrine,  
4 which has reserved water rights for the Tribes from  
5 the river. Our reserved water rights under the  
6 Winters Doctrine must be acknowledged. The final  
7 EIS must recognize this before the Master Manual is  
8 finished. In recognition of this doctrine, the MHA  
9 Nation is ready to act collaboratively with the  
10 Army Corps on how the river, specifically our water  
11 rights, are to be managed.

12           3. Protection of economic activity along  
13 the river. The draft EIS must consider the effects  
14 of the various alternative flow schedules on the  
15 economic well-being of the MHA Nation; for example,  
16 how the water levels will impact the various  
17 economic development plans we have for the Four  
18 Bears Casino and Lodge and other tribal  
19 businesses. Remember, tribes, as well as states  
20 and private enterprises, have economic interests in  
21 the flow of the river.

22           4. Indian trust assets. The United  
23 States has a trust responsibility to protect and  
24 maintain rights reserved by or granted to American  
25 Indian tribes or individuals. When an Indian trust

1 asset has been impacted by a federal project such  
2 as trust lands, mineral rights, cultural resources,  
3 water rights, or hunting and fishing rights, then  
4 the federal agency in its action document must  
5 analyze those interests, the adverse impacts, and  
6 set forth appropriate mitigation and/or  
7 compensation commitments. We are ready to work  
8 again collaboratively with the Army Corps of  
9 Engineers to mitigate the following:

10           Lake levels at Sakakawea and Oahe have  
11 dropped up to 12 feet, particularly in response to  
12 low precipitation in the Missouri Basin over the  
13 last several years. This substantial drop has also  
14 been caused by the disproportionate role given by  
15 the Corps to navigation in the lower Missouri  
16 River.

17           The dropping of the lake levels deprives  
18 the tribes and their members and nonIndian business  
19 partners of the tribes full and unconditional  
20 access to these important reservoirs.

21           The lake dropping also creates a  
22 substantial scar to the land and waters and takes  
23 away from the ongoing efforts of tribes to enhance  
24 our recreation opportunities, to protect historic  
25 cultural properties, and to restore endangered

1 fish, native fish and aquatic and terrestrial  
2 habitat.

3           5. Environmental justice claims.

4 Environmental justice issues evolve out of  
5 Executive Order 12898 dated February 11, 1994. The  
6 order provides that a federal agency shall make  
7 achieving environmental justice part of its mission  
8 by identifying and addressing as appropriate  
9 disproportionately high and adverse human health  
10 and environmental effects of its programs.  
11 Environmental justice includes any adverse effect  
12 on minority and low-income populations. In the  
13 Missouri River, as Congress expends millions of  
14 dollars to recover endangered species, restore  
15 native fish, aquatic and terrestrial habitat,  
16 cultural resources and river economies,  
17 environmental justice requires a review of the  
18 availability of those federal benefits to minority  
19 and low-income households and appropriate  
20 follow-through commitments.

21           When the Garrison Dam was constructed by  
22 the Corps, we were relocated from the rich, fertile  
23 agricultural bottomlands to grasslands not suited  
24 for our agricultural traditions.

25           Lake Sakakawea created by the Garrison Dam

1 is a long lake and has virtually eliminated  
2 meandering of the upper Missouri River, as well as  
3 the flood lands, wetlands, and fish and game  
4 central to the Tribe's way of life. In their place  
5 has emerged over time noxious weeds that are  
6 endemic to the reservoir area.

7           The lands adjacent to the reservoir are  
8 barren and have very few of the wetland  
9 characteristics that existed prior to the  
10 construction of the Garrison Dam.

11           6. United States Constitution and Equal  
12 Protection Clause. The Draft Master Manual EIS  
13 fails to adequately set forth the Indian trust  
14 assets and environmental justice concerns of the  
15 Three Affiliated Tribes. Moreover, to the extent  
16 that the Master Manual draft EIS relies upon tribal  
17 input and tribal documentation as set forth in  
18 Volume II, it violates the equal protection clause  
19 of the U.S. Constitution. Specifically, the Corps  
20 has elected to expend its funds to describe  
21 fisheries, flows, navigation, power and other  
22 socioeconomic concerns and included them in Volume  
23 I of the draft. But when it comes to setting forth  
24 the tribal concerns relating to the Indian trust  
25 assets and environmental justice, the Corps,

1 notwithstanding repeated requests from the Tribes,  
2 has relied upon the Tribes, themselves, to provide  
3 the documentation. Because there is no rational  
4 basis for this distinction, the Corps is violating  
5 the equal protection clause of the United States  
6 Constitution.

7           To correct this constitutional deficiency  
8 and to comply with the contemporary Council on  
9 Environmental Quality requirements, the Corps in  
10 its final EIS should at its expense specifically  
11 address Indian trust assets and environmental  
12 justice concerns for those tribes whose  
13 reservations have been adversely affected by the  
14 Missouri River operations.

15           And, finally, 7. Protection of cultural  
16 sites. Changing the flows along the river under  
17 several of the preferred alternatives presented by  
18 the Army Corps following the issuance of the  
19 Biological Opinion will most likely create  
20 additional erosion along the shores of the upper  
21 three reservoirs. These reservoirs are projected  
22 to be the reservoirs that will provide the flow  
23 necessary to implement the preservation of economic  
24 activities along the river and to provide  
25 protection of endangered species. The analysis of

1 these changes must include complete studies of how  
2 they will affect our cultural sites along the  
3 river. And I would like to put in that study,  
4 because in Bismarck there was discussion -- I think  
5 it was just -- what was that discussion about the  
6 wave lap. The wave lap along the bank was the  
7 formula that was used for cultural protection, and  
8 we feel there are many other areas with more  
9 in-depth formulas that should be adopted for this.  
10 The analysis of these changes must include complete  
11 studies of how they will affect our cultural sites  
12 along the river and how any damage to our sites  
13 will be mitigated or prevented altogether. Under  
14 the Native American Graves Protection and  
15 Repatriation Act, to allow such sites to be eroded  
16 away or left unprotected is unacceptable.  
17 Protection of these sites (the vast majority of  
18 which are associated with the Mandan, Hidatsa and  
19 Arikara) needs to be the subject of lengthy review  
20 within the Master Manual.

21           Substantial government-to-government  
22 consultation should be referenced not just for  
23 cultural site protection, but for all phases of the  
24 Master Manual, itself.

25           And one final comment, as well, Colonel.



1 Some of the ranchers that could not be here today  
2 indicated to me that when the lake levels drop --  
3 when the lake levels drop, it tears all the fencing  
4 away. To keep their cattle from going into the  
5 river, they have to fence off, the water goes up,  
6 drops the lake levels, rips all the fences down.  
7 Not only do noxious weed comes in, but the cattle  
8 go into the river and go through bogs and many  
9 times -- one rancher told me he lost seven head of  
10 cattle, another one told me he lost four head of  
11 cattle, went through the bottom. And one of the  
12 ranchers mentioned somewhere in South Dakota  
13 there's a tribe that the Army Corps of Engineers  
14 had looked to getting some funding for refencing  
15 when the lake levels go back and forth in order to  
16 put up new fence.

17           That's what some of the representatives of  
18 the Corps did with the tribe down there. So I ask  
19 that more as a request than a comment, that if that  
20 is the case, that the Three Affiliated be included  
21 in something like that because as you can see on  
22 the map, the lake is right in the middle, so we  
23 have fencing on both sides, top side, bottom side  
24 and all directions. We also have over a hundred  
25 range units and agriculture is a primary economic

1 base for our Tribe.

2           So with that I want to thank you for again  
3 -- I want to recognize Colonel Fastabend. He is  
4 the highest ranking official in the Army Corps of  
5 Engineers, second person. General Strock who was  
6 at Fort Berthold, he was here, General Strock was  
7 at Fort Berthold, but it didn't take you very long  
8 to be here. We very much appreciate your  
9 presence. Colonel, we are very honored to have you  
10 in our presence and all your complete staff to work  
11 with us.

12           COL. FASTABEND: Thank you, Chairman  
13 Hall.

14           Marcus Wells, do you want to make another  
15 statement, or was your earlier statement all you  
16 needed? Mr. Crows Breast.

17           MR. CROWS BREAST: Good evening. My name  
18 is Elgin Crows Breast. The reason I did that, the  
19 reason I shook your hand, is I welcome you here.  
20 It's quite ironic 55 years ago, my  
21 great-grandfather stood before the Army Corps of  
22 Engineers and said this. I stand before you  
23 today. Instead of saying destroy, you have come to  
24 help us, all our issues, all the things we stand  
25 for as Indian people.

1           I recall my Grandma many years ago said,  
2 come here, Son, come with me, go for a ride. We  
3 went on this flat, the water was backing up, you  
4 could see it coming, just barely moving. She  
5 looked at the water, she started crying. That's  
6 many memories she had down there on the water just  
7 like a lot of our elders, a lot of what went on  
8 before us.

9           The social and economic impacts of our  
10 Tribe were devastated, not to mention our cultural  
11 sites. Us tribes, no matter where we're at, we  
12 understand the natural process of the water when it  
13 comes to Indian ceremonies. We understand that  
14 water. We know what that water is about. We know  
15 what that water can do. And we know we have to  
16 have respect for that water. I've seen in my time  
17 ceremonies where older men, older women were  
18 indoctrinated in the Indian way with that water.

19           We find all of the scientific technology.  
20 I've seen the rains come and some of our elders  
21 stand there and split those storms. I've seen  
22 those. So we know that the water is something,  
23 it's a spirit that moves. It's got its own mind.  
24 You can't stop it. It's going to go wherever it  
25 wants to go is what I have been told.

1           Today we talk about that water. There's  
2 many issues in that water. There's water rights.  
3 There's irrigation. There's quantification. And  
4 in the future way 50 years from now when our Tribe  
5 multiplies by maybe 20, 30 thousand and most of us  
6 will be gone, that water is still going to be  
7 there.

8           I don't expect you to understand what I'm  
9 saying when it comes to the Tribes, Indian people,  
10 but all we know is that water is life. From that  
11 water grows a lot of things. My friend, this man  
12 over here from Western Area Power Administration,  
13 in an annual year the dams make almost \$700  
14 million. That water flows through that land, that  
15 flows through our land, it goes through that dam  
16 and it turns those wheels to make that electricity,  
17 and that water, when you sell that electricity, it  
18 makes money. We have seen a small portion.

19           I was on the first council, the seven-man  
20 council in 1986-88, when we left our home to attend  
21 that meeting of committee affairs in Washington,  
22 D.C. We videotaped it. At that time the  
23 recommendations for our Tribe they said was \$612  
24 million, is what they justified for our Tribes.  
25 Through the years they whittled down to 149.2.

1 \$612 million is not enough to pay for what my  
2 Grandma felt in here as she looked over that water  
3 and seen her home go under and all the ancestors  
4 whose blood and bones are all over the area.

5           So at this time, Colonel, I would ask you  
6 as a member, as one of the former leaders of our  
7 Tribe, to dig deep inside your heart and find a way  
8 to help our people economically, socially,  
9 culturally, legally, environmentally. Help us. We  
10 have lost a lot. And we're barely making it back.  
11 I want to say thank you and I'll close here. Thank  
12 you very much.

13           COL. FASTABEND: Thank you, Mr. Crows  
14 Breast.

15           MR. MOORE: John Danks.

16           MR. DANKS: Good evening. My name is John  
17 Danks. I'm a member of the Three Tribes. I'm a  
18 member of the elders organization and I was  
19 privileged to provide testimony to Senator Conrad  
20 about three weeks ago and now I want to repeat some  
21 of it here tonight for you.

22           The elders are very interested in getting  
23 the excess lands along Lake Sakakawea returned to  
24 them. We made that comment to Senator Conrad.

25           The elders are very interested in getting

1 free power from Lake Sakakawea. There is a program  
2 where we can get reduced rates for power generated  
3 by the lake, but that program was never put in  
4 place for the tribal reservation. That program was  
5 put in place for municipalities and cities along  
6 throughout the area.

7           When you're looking at the map that our  
8 chairman so ably presented to you, you see that  
9 this is the only reservation that has given its  
10 heart for flood control somewhere further south.  
11 We have given our absolute heart. And if you look  
12 at the research and the testimony, they refer to  
13 that research and that land as our economic engine,  
14 and we lost our economic engine.

15           I wonder, have you calculated the acres of  
16 class I and II land that the Corps flooded to  
17 achieve flood control? I heard you talking about  
18 millions and millions of acres of land you're  
19 trying to keep from flooding today. How many acres  
20 of land did you flood to build the dams? And I  
21 would like to echo the chairman's comment, had  
22 there been an environmental impact requirement way  
23 back then, maybe there wouldn't be a lake here  
24 today. I'm here to make those comments as an  
25 observation.

1           When the lake took our bottomland, it took  
2 large amounts of our coal deposits, it took all of  
3 our timber that we used for fire and for heat, and  
4 the free power would be a method to replace that.

5           The other observation we have as elders is  
6 the lake has fluctuated too greatly. It's so high  
7 one year and the next year it's way down. We would  
8 like to see a little more stabilization.

9           I thank you for giving me this opportunity  
10 to speak to you tonight. Thank you.

11           COL. FASTABEND: Thank you, Mr. Danks.

12           MR. MOORE: Pemina Yellow Bird.

13           MS. YELLOW BIRD: Good evening. My name  
14 is Pemina Yellow Bird. I'm an enrolled member here  
15 at Three Affiliated Tribes and I work for my Tribe  
16 to protect and preserve our sacred and cultural  
17 sites, as well.

18           And about all I can add to all of the  
19 information you received so far is that since 1978  
20 the Omaha District has spent just under \$3 million  
21 for shoreline stabilization on lands within its  
22 district, yet every year almost \$150 million is  
23 earned in hydropower from Garrison Dam alone. And  
24 that seems to me a very great disparity. Lots of  
25 money is being made off the dam that flooded the

1 bottomland, but nothing is being spent -- almost  
2 nothing is being spent to preserve and protect our  
3 sacred and cultural sites.

4           Our elder that offered the prayer talked a  
5 little bit about how much water means to us and how  
6 our people lived always along the Missouri River.  
7 The evidence of that is in dozens and dozens of  
8 earth lodge village sites, hunting territories,  
9 ceremonial sites, all of which are critically  
10 necessary to the continuity and survival of our  
11 people as a nation.

12           You see because of this big reservoir we  
13 don't have any bottomlands left within our exterior  
14 boundaries. We have to leave our reservation to  
15 see bottomlands, to see our people's earth lodge  
16 villages. And even as we're speaking this evening,  
17 more and more of them have fallen into the water.

18           Our chairman has made a number of offers  
19 to go to Congress and assist in lobbying for  
20 increased funding for the shoreline stabilization,  
21 but there remains an unmet need for funding in the  
22 area of shoreline stabilization, and it has to be  
23 up to the Army Corps to take the initiative to ask  
24 for increased levels of funding so that our sites  
25 can be protected. And until that happens we're



1 just going to be hearing the same old responses.

2           The revised draft environmental impact  
3 statement is weakest in its analysis of the impacts  
4 to our sacred and cultural sites. The issue of our  
5 sites needs to be raised at a key issue level  
6 within the Master Manual process. They are worthy  
7 of the same kinds of investigation and  
8 consideration as the fish and the birds and the  
9 water and the hydropower. And we have been working  
10 very hard with the Army Corps to protect these  
11 sites, and now it's time for that issue to receive  
12 the kind of consideration that it deserves.

13           I say thanks to you and thanks for coming  
14 here to see us in our homelands.

15           COL. FASTABEND: Thank you, Miss Yellow  
16 Bird.

17           MR. MOORE: Bruce Engelhardt.

18           MR. ENGELHARDT: For the record, my name  
19 is Bruce Engelhardt. I'm with the State Water  
20 Commission. I'm here tonight representing Dale  
21 Frink, the state engineer.

22           Last night in Bismarck Governor Hoeven  
23 presented testimony describing North Dakota's  
24 position on the Master Manual review. Today I will  
25 briefly reiterate the same strong and clear message

1 that North Dakota and adjoining states have been  
2 voicing for years. The Missouri River Master  
3 Manual must be changed to meet the contemporary  
4 needs of the basin and the time for this change is  
5 far past due.

6 The five mainstem dams authorized by the  
7 Flood Control Act of 1944 were constructed in 18  
8 years. If the Master Manual revision is completed  
9 in 2003, it will have taken 14 years. This delay  
10 is unacceptable.

11 The Missouri River is of vital importance  
12 to the State of North Dakota for its various uses  
13 for hydropower, water supply, both for  
14 municipalities, rural people and industry.  
15 Irrigation, about 16 percent of the total land  
16 irrigated in North Dakota uses the Missouri River  
17 water. And for recreation, hundreds of thousands  
18 of residents of the state and visitors to the state  
19 recreate on the river, Lake Sakakawea and Lake  
20 Oahe.

21 The quality of the water in the Missouri  
22 River is also important to the state, both for  
23 municipal water supply and coldwater habitat. If  
24 the elevation of Lake Sakakawea falls below 1825  
25 during mid to late summer, the reduced oxygen

1 concentration puts the nationally acclaimed sports  
2 fishery of the big lake in serious jeopardy. Low  
3 lake levels also increase the risk to human health  
4 through the resuspension of sediment from the delta  
5 portions of the lake.

6           The cultural resources, as Chairman Hall  
7 mentioned, are also important to the state, as well  
8 as both the Three Affiliated Tribes and the  
9 Standing Rock Sioux Tribe. We feel they also  
10 further warrant the changes described in the  
11 alternatives in the Master Manual. Stable lake  
12 levels would result in fewer sites being impacted.

13           The draft EIS supports change by the  
14 benefits outlined in the five alternatives. They  
15 improve conditions for endangered species and  
16 conserve water in the mainstem reservoirs during  
17 times of drought. Unbalancing the reservoirs and  
18 increasing releases at Fort Peck may provide  
19 benefits for the pallid sturgeon, least tern and  
20 piping plover. Conserving water in the reservoirs  
21 during dry periods improves conditions for fish  
22 survival and thus recreation, and translates into  
23 more head for hydropower. If these alternatives  
24 would have been in place during the drought of the  
25 late 1980s, Lake Sakakawea would have been four to

1 six feet higher, translating into far better fish  
2 habitat, more efficient hydropower and an overall  
3 improvement in the economy of the areas that border  
4 the Missouri River.

5           The drought conservation measures included  
6 in the five new alternatives are essentially those  
7 agreed to by seven of the eight Missouri River  
8 Basin Association member states. Strictly from  
9 North Dakota's standpoint, they don't go far  
10 enough, but they are likely the most equitable  
11 means of distributing hardship during drought and  
12 for that reason are supported by seven of the eight  
13 states within the basin, including North Dakota.  
14 These drought conservation measures proposed by the  
15 Missouri River Basin Association should be  
16 implemented as soon as possible and will be a vast  
17 improvement over the 40-year-old Master Manual.

18           In conclusion, I urge the Corps to adhere  
19 to its current schedule for completing the Master  
20 Manual revision process. The time for equitable  
21 distribution of the benefits of the Missouri River  
22 and equitable sharing of water shortages is now.

23           There is no question that any of the five  
24 proposed alternatives is a marked improvement over  
25 the current water control plan. The results of the

1 economic and environmental studies clearly  
2 illustrate how the Missouri River and the  
3 reservoirs can be better managed to benefit  
4 everyone in the basin. If we manage them  
5 intelligently, realization of their potential can  
6 benefit all. On behalf of the people of North  
7 Dakota and the Missouri River Basin, it is time for  
8 a change on the Missouri River. Thank you,  
9 Colonel.

10 COL. FASTABEND: Thank you, Mr.  
11 Engelhardt.

12 MR. MOORE: Ed Hall.

13 MR. HALL: Thank you. My name is Edward  
14 Hall. I'm a member of the Tribe. And I would like  
15 to, first of all, make the comment on behalf of the  
16 Tribe and follow up on the comment the chairman  
17 made.

18 I know you have a very difficult task of  
19 balancing all of the interests in the dams, but we  
20 would like to ask you to consider one more. You  
21 know we're in the process of replacing the bridge  
22 across that you probably came across here, the  
23 narrow bridge, and you saw the picture of the  
24 original bridge that was moved up here.

25 We're working with the North Dakota State

1 Highway Department and consultant firms to replace  
2 that bridge with a new bridge. We have several  
3 design options that we're looking at and we hope  
4 that we can come up with the -- what you might call  
5 a bridge with some excellence to it that will add  
6 to our economy here in the future.

7           But one of the things to do that, we're  
8 always working with a tight budget. But in talking  
9 with the consultants, and so forth, it would  
10 probably save us quite a bit of money if we could  
11 somehow write a formula to balance the water level  
12 in the middle dam here so that during the  
13 construction season the water level is as low as  
14 possible. My understanding is that working with  
15 the footings, and so forth, in the deep water, the  
16 depth of that water increases the cost by quite a  
17 bit. And I think it would really be helpful. And  
18 I know somebody -- your engineers and your  
19 statisticians and mathematicians somehow with those  
20 gates, if they would look at it and see if they can  
21 somehow balance upstream or downstream or whatever,  
22 but try to keep the level of Garrison as low as  
23 possible through two construction seasons. We hope  
24 that construction will start in the spring of 2003  
25 and it will be completed in the fall of 2004.

1           So if that is possible, we would like to  
2 make that request. We know it's difficult, but if  
3 it's possible, it could save us a lot of money.  
4 And if we could have some plan that says, yes,  
5 that's possible when we go to bid, it will make a  
6 big difference in the bid price. But if the  
7 contractor has to bid that bridge without any  
8 assurance, he's going to bid the maximum. So that  
9 would be one request.

10           COL. FASTABEND: Mr. Hall, what's the time  
11 schedule for your bid process? Do you know that?

12           MR. HALL: Well, we hope to open bids the  
13 fall of 2002 so that construction can start the  
14 spring of 2003. So it would be late 2002 when the  
15 bids are opened.

16           The other request I have on the part of  
17 the Tribe is, I think if you see on the shoreline,  
18 we have approximately 600 miles of shoreline, and  
19 if you go back to the rest of the pictures you've  
20 looked at, and so forth, of our acres of land that  
21 we had from the treaty on down to where we're at  
22 today, you can see that it seems like every time we  
23 dealt with the federal government and Congress,  
24 that they took economic resources. The first one,  
25 they took us down from our land base, you can hold

1 it right there, we lost our land till they brought  
2 us down to this reservation here you see today. So  
3 everything they take from us is our economic base.

4           And if you look at the light area there up  
5 in the upper right-hand corner, that white area  
6 that's in the reservation boundary. When I was a  
7 kid, I grew up under the water down there south  
8 about in the middle of the reservation, and I  
9 always assumed that that area, that line there,  
10 that was our reservation boundary because that's  
11 where we had the red steel posts and barbed wire  
12 fence, and we always assumed that was our  
13 reservation boundary. It wasn't until later when  
14 one of our enrolled members became an attorney and  
15 researched this that he found that when they opened  
16 that white area up for homesteading, that they did  
17 not officially change our reservation boundary. So  
18 now we have a reservation boundary that goes up  
19 around that white area, but you know which creates  
20 a heck of a jurisdictional issue, and so forth.

21           But when we were down -- you can imagine,  
22 that's all farmland. That's the best farmland in  
23 the country there. So when they opened that up for  
24 homesteading, they took our economic base away from  
25 us again.



1           Now, the next step, when they took that  
2 fence down there along the homestead area, our  
3 economy -- we lived off the land, of course, but  
4 most of us had horses. We didn't run cattle. We  
5 had horses. But I can remember as a kid that fence  
6 there was along the farmland and the farmers  
7 complained to the Bureau of Indian Affairs that the  
8 Indian horses were getting into their fields along  
9 there. So an order came out you guys sell your  
10 horses, so we had horse roundups and we drove  
11 horses up there and sold horses. So we lost that  
12 economic base.

13           What I'm getting at, now we have 600 miles  
14 of shoreline. We're down to that now. That could  
15 be an economic base for us, and that's why it's so  
16 important that we get this shoreline back. But if  
17 we get it back, what do we do with it? We look at  
18 it as an economic resource for future economic  
19 development in tourism. If we get this bridge and  
20 we want to take advantage of future tourism, we  
21 have that 600 miles of shoreline, and if we can do  
22 a proper plan in development of it so that people  
23 want to come here and enjoy the shoreline, I think  
24 we can use it.

25           But I guess what we would ask is that the

1 Corps work with us, give us some technical  
2 assistance and work with us to develop our parks  
3 and recreation areas along that shoreline. We  
4 would like to make them the best recreation areas  
5 in the country. I think when you look at a  
6 regional scale, this is the best spot in the  
7 country. We would like to make it that. But we  
8 need to develop our parks and recreation areas so  
9 that we maintain them and we keep them nice for our  
10 future generations. We could use some help there.

11           The third item that I would like to make a  
12 request on is not from the Tribe, but it's from the  
13 Memorial Congregational Church here on the  
14 reservation located in Parshall.

15           One of the items that we haven't talked  
16 about much, hasn't come up, is when we were flooded  
17 out, we had to move our graveyards, we had to move  
18 our dead. And that is an item that really hasn't  
19 received much attention. But I know I'll give you  
20 one example. Down at the Elbow Woods there we had  
21 the Memorial Congregational Church, and that was  
22 the first church where Christianity was brought to  
23 the reservation, a church was built. So that's  
24 kind of a historic building. It was moved to what  
25 they call the deep water area. Okay. And the

1 cemeteries were moved. And that was quite another  
2 process where people had signed up and they said  
3 where they wanted their graves moved to, what  
4 cemetery. And as a young man, I worked for a  
5 contractor moving those graves. So I know a little  
6 bit about how they were moved and it wasn't all  
7 that good. But right now they moved them up there  
8 and a lot of the people that had their family  
9 buried there, they moved them there, but they  
10 couldn't move there to make a living, they had to  
11 move away. So what we have is a lot of graves  
12 there where the families that moved away and we  
13 don't have organized cemeteries like you have other  
14 places, so there's no way of maintaining those  
15 cemeteries. So that's quite a job.

16           But the thing that we're asking is that we  
17 have -- that's 500 feet off the Lewis and Clark  
18 Trail, and we want to do some history of the  
19 church, and so forth, and the church is writing  
20 their history so that they can use the income from  
21 their sale of the history book to maintain that  
22 church as a historical site.

23           But what the Corps did, they put little  
24 four-by-four concrete posts as foot markers for  
25 graves, and over the last 40-some years those have

1 deteriorated so now the names that were on little  
2 plates on there and they have been bumped off by  
3 lawn mowers or whatever or they have just rusted  
4 out, you can't read them, we would like to have  
5 these markers replaced with a permanent marker  
6 because there's going to be a time coming before  
7 too long nobody will know whose grave it is. And I  
8 think that they deserve some permanent markers.

9           The other thing is our fence. Instead of  
10 placing a new fence there, they moved the old  
11 fence, and those items I think should be replaced.  
12 And so on behalf of the church, I will submit  
13 further testimony, but we just wanted to make that  
14 an item. And I'm sure that once this graveyard --  
15 if we can get it done, I'm sure about fifteen other  
16 graveyards very similar on the reservation need the  
17 same thing. So thank you.

18           COL. FASTABEND: Thank you, Mr. Hall.

19           MR. MOORE: Ted Balman.

20           MR. BALMAN: Good evening, Colonel, your  
21 staff. Thank you for coming to this meeting here.  
22 I guess one of the things I want to mention, also  
23 apologize for, is the lack of Indian participation  
24 here, but I think that my brother, the chairman,  
25 has pretty much led with confidence in presenting

1 the very eloquent presentation here.

2 I point out in any society when people are  
3 in dire straits, get in a difficult situation, they  
4 come with arms and protest and whatnot, and I'm  
5 glad that we don't have a protest tonight, although  
6 I think that this issue is very important to the  
7 Indian people.

8 I'm one of the very few full-force  
9 Hidatsas on this reservation. Some of the Mandan I  
10 think that were full-force Mandan are no longer in  
11 existence today. We are pretty much a combination  
12 of the Three Affiliated Tribes today. I am also  
13 one of the very few that actually participated in  
14 dance in the old Sante Hall. I have experience in  
15 several people's moccasins. I grew up as a young  
16 person in the Lucky Mountain area, I moved to  
17 Mandaree. I walked the bottom of this great dam  
18 and experienced seeing all of the beauty there, and  
19 I can't -- words cannot actually express the beauty  
20 that was there, and this inclement weather, the  
21 weather was calm and sheltered, berries and  
22 whatnot, I guess a lot of this stuff has already  
23 been told. But my grandfather raised cattle and I  
24 remember him having four-year-old steers in the  
25 herd and he would butcher them as we needed them

1 and also share in the community and the gatherings  
2 and the powwows.

3           As I mentioned, we are very resilient  
4 people. We have acclimated to this way of life  
5 through all our difficulties. At a very young age  
6 I was sent to a boarding school, and I'm sure that  
7 you've heard the horror stories of a boarding  
8 school, and I tell you they are true. We were  
9 prohibited from speaking our own language, and  
10 somehow or other I have retained my first  
11 language. I am fluent in the Hidatsa language and  
12 able to communicate with some of the elders in our  
13 community. I have also traveled throughout the  
14 country and I've also experienced the mainstream  
15 and the working class of this blue collar work, and  
16 in my experience, I was number 484 of employment in  
17 the big bed dam. I was there when they poured the  
18 first cement bucket and was there at the last one,  
19 when they loaded out some of the last equipment on  
20 the rail. So I'm familiar with the dams and how  
21 they were built and how the turbines and everything  
22 works.

23           And I also have had the experience of  
24 serving two terms in the tribal business council.  
25 And this is not the only talk we've had with the

1 Corps of Engineers in regards to this taken area.  
2 I guess one of the real concerns in speaking  
3 tonight, a lot of issues haven't been covered, but  
4 I think one of the things is this shoreland. This  
5 shoreland is very important to our people. We talk  
6 about Indian self-determination, but one of the  
7 keys of Indian self-determination is going to be  
8 determined by this Corps land around the lake.

9           Like I mentioned before, I have been  
10 around the country, I have been down in Colorado,  
11 and into various parts, I've seen the structure  
12 that has developed around these dams, and I can see  
13 what would happen in the future for us. And you  
14 devastated us very much. And I fear this deeply  
15 for the future generations of this reservation.  
16 We've lived our life, we've done what we could, but  
17 we have future generations to think about, where  
18 they're going to grow up, if they're going to be  
19 able to stay home, make a living, and I guess this  
20 is where my brothers made comments before about the  
21 future generation, the future generation,  
22 education, economic development, and I guess also  
23 we'll get working with other people in tourism.

24           Even hunting and fishing have become an  
25 issue in jurisdiction and the control. You see

1 articles today in the paper, people up in arms  
2 because they can't come on the reservation and  
3 hunt. At the very same time, if I was to go to  
4 Sioux Falls, New York or wherever and step on  
5 somebody's lawn, what would they do to me? Keep  
6 off the grass, they'll fine me if I stepped on  
7 their lawn, but they seem very free to want to come  
8 and explore every little corner that we have on the  
9 reservation. And I think that needs to be somehow  
10 controlled and regulated so that they don't dig up  
11 our graves and look in our windows in our homes.  
12 And I've seen situations in South Dakota where it  
13 looked like the Continental Army walking across the  
14 field with shotguns in pheasant season, going  
15 across Corps land and adjacent to tribal land.

16           You know, some of these issues that are  
17 very near and dear to us need to be addressed and  
18 we need to work in cooperation. I think the Three  
19 Affiliated Tribes has demonstrated from almost the  
20 beginning of time where our heart is and where our  
21 cooperation is, how we have taken in the Lewis and  
22 Clark, but what do we get in return? You know,  
23 take a look at that. We're cooperating and being a  
24 good guy, they take your land away more and more  
25 and more. There should be enough of that now.



1           You look at some of this water  
2 development. The water from the Missouri running  
3 clear into Minnesota, clear into Wyoming this way,  
4 to the Black Hills, but yet people in the Three  
5 Affiliated Tribes are without water and have to  
6 haul water today to their homes.

7           I think there's a lot of these types of  
8 things that we need to take a look at and work in  
9 cooperation, and when we talk about Indian  
10 self-determination, has taught Indian self-  
11 determination and some of these tribes determined  
12 where they're going.

13           I haven't really had time to prepare a  
14 written statement, but I will put something  
15 together for you and send it to you on some of the  
16 items I have addressed tonight. And I hope that  
17 this is a unified, true effort in working together,  
18 not just, what you would say, something you have to  
19 do, one of the items that is on the agenda of part  
20 of a law we have to go by, we have to have a  
21 meeting so let's go have a meeting and forget about  
22 it later, whatever we say is forgotten. I hope  
23 that's not the case. Thank you very much.

24           COL. FASTABEND: Thank you, Mr. Balman.

25           MR. MOORE: Dick Messerly.

1           MR. MESSERLY: Thank you, Colonel. Dick  
2 Messerly, Garrison, North Dakota, the Garrison  
3 Chamber of Commerce.

4           The economic impact felt by Lake Sakakawea  
5 area communities, especially Garrison and New Town,  
6 goes with the level of the lake. If water levels  
7 are at a normal level, around 1840 feet mean sea  
8 level mark, then the economy of communities along  
9 the lake points to a substantial increase. When  
10 lake levels decline to a low point, economies show  
11 a drop in direct correlation to the lake level.

12           This correlation has been tracked by the  
13 Garrison Chamber of Commerce through collecting  
14 data on taxable sales, Lake Sakakawea elevations  
15 and visitations at Fort Stevenson State Park, a  
16 major state park on the north shore of Lake  
17 Sakakawea, just three miles south of Garrison.  
18 These figures are not estimates, but are hard  
19 facts.

20           In the low water year of 1991 when levels  
21 of Lake Sakakawea plunged to a low of 1815.5 feet  
22 mean sea level, the visitation at Fort Stevenson  
23 State Park also reached a low of 59,000. The  
24 taxable sales in Garrison were also cut to about  
25 \$7.5 million annually. In the year 1999 when water

1 levels were more normal with a summer operating  
2 season of 1840 feet mean sea level, sales were 9.7  
3 million and visitation at Fort Stevenson State Park  
4 was 124,000. This is over a \$2 million increase  
5 from the low water year of 1991 for the Garrison  
6 community. Similar taxable sales correlations can  
7 be seen in the New Town figures. In 1991 New Town  
8 had taxable sales of 2.6 million. In 1999 taxable  
9 sales were 4 million.

10           As annual Lake Sakakawea elevations have  
11 been tracked and compared to taxable sales in  
12 Garrison and New Town and to visitation at Fort  
13 Stevenson State Park, starting with the year 1978 a  
14 pattern of impact becomes graphically obvious. Low  
15 lake levels, below 1830 feet mean sea level, mean  
16 lower taxable sales and lower park visitation.  
17 These translate into a tremendous negative economic  
18 impact to this area. I included them on these  
19 charts and the testimony, but I just want to show  
20 you graphically how the charts do track lake  
21 elevations, and also in this case the park  
22 visitations are dramatic and rise and fall at the  
23 same rate. On this same chart we have tracked the  
24 Garrison taxable sales, as well as the lake levels  
25 and they dramatically show the same rise and falls

1 of the lake levels.

2           According to the most recent RDEIS  
3 summary, navigation under the best conditions  
4 generates about \$7 million annually. Under the  
5 five proposed alternatives to the current water  
6 control plan, navigation's benefit in a reduced  
7 flow year would be cut by about \$2 million. If we  
8 add up the losses in 1991, a \$3.5 million cut in  
9 taxable sales were the impacts on two towns on the  
10 north shore of Lake Sakakawea, that is, Garrison  
11 and New Town. What needs to be taken into account  
12 with these figures is that this is just the impact  
13 on two communities. If this figure were increased  
14 to include the low water impact to all the  
15 communities, resorts and recreation areas on the  
16 three upper reservoirs, the total would be  
17 staggering.

18           If the Corps of Engineers is going to  
19 follow through with its mission of meeting the  
20 contemporary needs of the basin while protecting  
21 its natural resources, then it's time for a  
22 change. The Corps studies have shown that a change  
23 in the Master Water Control Manual would have  
24 positive overall economic and environmental  
25 benefits. Seven of the eight basin states agree

1 it's time for a change. When seven out of eight  
2 votes are cast in favor of an issue, that is a  
3 mandate of 88 percent favoring the change. The  
4 Corps has the mandate from the basin states to make  
5 a change. It is specifically time to stop being  
6 intimidated and bullied by a few officials from the  
7 State of Missouri.

8           In an AP story in The Minot Daily  
9 Newspaper dated September 30, 2001, State of  
10 Missouri Assistant Attorney General William Bryan  
11 is quoted as saying, "They want to control our  
12 water." "They" means North Dakota, South Dakota  
13 and Montana. First of all, Missouri River Basin  
14 water is not the State of Missouri's water. It's a  
15 valuable resource for the entire basin. Second,  
16 the six mainstem dams only collect on the average  
17 about one-third of the runoff into the Missouri  
18 River Basin. The other 60 percent runs into the  
19 Missouri River below Gavins Point Dam.

20           In this same story Commissioner Howard  
21 Wood from the State of Missouri is quoted as  
22 saying, "We don't want North Dakota to get the  
23 water either." It is time for the Corps of  
24 Engineers to take a stand against such contentious  
25 rhetoric like this from a few Missouri state

1 officials and change the Master Manual so it  
2 reflects contemporary needs of the basin while  
3 protecting its natural resources. Garrison cannot  
4 afford to go through another drought on Lake  
5 Sakakawea under the current water control plan.

6 Garrison would favor summer elevations not  
7 dropping below 1830 feet mean sea level to support  
8 the fishery and keep Fort Stevenson State Park  
9 Marina fully operational and also raising the  
10 permanent pool by 20 feet. However, any of the  
11 proposed alternatives would be better than the  
12 current water control plan. Thank you.

13 COL. FASTABEND: Thank you, Mr. Messerly.

14 MR. MOORE: Mike Olson.

15 MR. OLSON: Good evening, Colonel  
16 Fastabend, Chairman Hall, tribal elders. My name  
17 is Mike Olson, and I'm here this evening on behalf  
18 of the U.S. Fish and Wildlife Service to issue a  
19 brief statement on the revised draft EIS for the  
20 Missouri River Master Water Control Manual.  
21 Perhaps more importantly, I'm also here this  
22 evening to listen to the important statements we've  
23 heard the first few hours of this hearing in person  
24 from the citizens in this part of the basin.

25 The service has the primary authority for

1 oversight of our nation's rarest plants under the  
2 Endangered Species Act. The Missouri River is home  
3 to the endangered pallid sturgeon, the least tern  
4 and the threatened piping plover. The decline of  
5 these species tells us that the river is not  
6 healthy for its native fish and wildlife and that  
7 there needs to be a change in its management to  
8 restore the Missouri to a more naturally  
9 functioning river system. A healthy river not only  
10 provides wildlife habitat, but also supports  
11 fishing and makes boating a more attractive  
12 recreational activity.

13           Congress committed the Federal Government  
14 to preventing extensions by requiring federal  
15 agencies to use their authorities to conserve  
16 endangered and threatened species. During the last  
17 12 years our two agencies have been working  
18 together to modernize management of the Missouri  
19 River to help stabilize and hopefully begin to  
20 increase and recover populations of these very rare  
21 animals. This new approach was described recently  
22 in a document called the Missouri River Biological  
23 Opinion, published last November.

24           That opinion looks at the river as a  
25 system and outlines the status of these rare

1 species, the effects of the current operation on  
2 them and, most importantly, a reasonable and  
3 prudent alternative to the current operation and  
4 not jeopardize these species' continued existence.

5           Perhaps if you've read the RDEIS or the  
6 summary document provided by the Corps, you  
7 understand that the GP alternatives encompass the  
8 range of flows identified by our agency as  
9 necessary below Gavins Point Dam to keep the listed  
10 species from being jeopardized. Our agency, and  
11 the Corps, also, recognize the importance of some  
12 flexibility in management that would enable the  
13 Missouri River managers to capitalize on existing  
14 water conditions to meet the endangered species  
15 objectives without having to go through another  
16 12-year arduous process.

17           Other management changes identified in the  
18 biological opinion include a spring rise out of the  
19 Fort Peck Dam, an improved hatchery operation to  
20 assist declining pallid sturgeon populations,  
21 restoration of approximately 20 percent of the lost  
22 aquatic habitat in the lowest one-third of the  
23 river, infrasystem unbalancing of the reservoirs,  
24 and an acceptance of an adaptive management  
25 framework that would include improved overall



1 monitoring of the river.

2           In closing, my agency supports the  
3 identified goal of the revised Master Manual to  
4 manage the river to serve the contemporary needs of  
5 the basin and nation. These needs include taking  
6 steps to ensure that threatened endangered species  
7 are protected while maintaining other socioeconomic  
8 benefits provided by the operation of this system.  
9 The service stands behind the science used in the  
10 opinion, and is confident that the operational  
11 changes identified and included in the RDEIS as GP  
12 alternatives will ensure that these rare species  
13 continue to be part of the Missouri River's living  
14 wildlife legacy.

15           As you said earlier, Colonel, the Missouri  
16 River is a tremendous river with a significant and  
17 revered heritage. Our influence has altered this  
18 great river, and changes are needed to modernize  
19 and restore health to the river for the benefit of  
20 rare species and for the citizens of the basin, as  
21 well. Thank you.

22           COL. FASTABEND: Thank you, Mr. Olson.

23           MR. MOORE: Jim Berkley.

24           MR. BERKLEY: Good evening. I'm here  
25 representing the U.S. Environmental Protection

1 Agency. I'm not going to read exactly from my  
2 statement because I think that the contents makes a  
3 difference here.

4           What I would like to talk about in my  
5 statement is why EPA is involved, what their role  
6 is and some of the things we're doing relating to  
7 the master plan.

8           The EPA, one of the things -- one of our  
9 roles in the Master Manual process is we're  
10 required by law to review all environmental impact  
11 statements. In this review, it's an independent  
12 review and we will provide written comments and a  
13 rating or a grade on that Master Manual EIS.

14           The law requires us also to make our  
15 written comments available to the public, and when  
16 we do this, we're going to put them on our Website,  
17 and I have some cards with me, and if people are  
18 interested in the Website address and how to find  
19 that, I will be glad to talk to you after I make my  
20 comments or after the meeting is over.

21           When EPA reviews and rates an  
22 environmental impact statement, it focuses on two  
23 main areas. One is the degree of the environmental  
24 effects of the proposed action. The other is  
25 whether the environmental impact statement includes

1 sufficient analysis needed for the public and  
2 decisionmaker to understand the impacts of the  
3 alternative plans under consideration.

4           So in this Master Manual -- in this  
5 addition of the EIS Master Manual, what we're going  
6 to do, because there is not a preferred alternative  
7 selected, is we will rate each one of the  
8 alternatives, so you'll see that in our review.

9           A critical aspect of our responsibility is  
10 to assess whether or not the Corps has complied  
11 with all environmental laws, and to look at the  
12 regulations, to look at executive orders, and we'll  
13 look at laws such as the Endangered Species Act,  
14 Clean Water Act and Environmental Justice.

15           In our efforts during the past review of  
16 Master Manual documents, we have tried to work with  
17 the tribes to understand their concerns and their  
18 issues and then tried to express those concerns in  
19 our comments. And we are very much interested in  
20 working with the Three Affiliated Tribes to make  
21 sure we accurately express those concerns and  
22 understand them.

23           EPA is currently in the process of  
24 reviewing the RDEIS. Once our review is complete,  
25 our comments will be provided to the Corps in

1 written form, as I mentioned earlier, and will be  
2 on the Website. We understand that the issues and  
3 concerns are very complex. This is why we -- one  
4 of the reasons why we have teamed up with the Corps  
5 of Engineers and asked the National Academy of  
6 Sciences to provide an objective study by national  
7 experts on the state of the scientific information  
8 about the Missouri River ecosystem. The study will  
9 also recommend ways to improve scientific knowledge  
10 on the Missouri River infrasystem and approaches to  
11 adaptive management of the Missouri River and  
12 floodplain ecosystem.

13           We look forward to working with all the  
14 stakeholders and the tribes in the basin, and  
15 please feel free to contact me later on. Thank  
16 you.

17           COL. FASTABEND: Thank you, Mr. Berkley.

18           MR. MOORE: Susan Paulson.

19           MS. PAULSON: Good evening, Honorable  
20 Chairman Hall and to all my relatives and friends  
21 and all the people from the feds, whoever you guys  
22 are. My name is Susan Paulson and I'm a member of  
23 the Three Affiliated Tribes. I just came to  
24 listen, but since there wasn't many tribal members  
25 here, I feel an obligation to say a few words.

1           I'm here to acknowledge and to say a few  
2 words about my Grandfather, the Missouri River, the  
3 one that you're trying to manage. And I guess I  
4 feel kind of funny reading these papers talking  
5 about the Missouri River like it's not a thing with  
6 the spirit. Something with the spirit of our  
7 grandfather who followed this river for centuries,  
8 our people have lived along it all the way from  
9 Mexico up to this lake, mostly Arikara. I guess I  
10 feel obligated because my Grandfather Joe Packineau  
11 was standing in back of George Gillette as they  
12 signed the thing. I had to live in that house with  
13 them after we moved up here. I was very young and  
14 the trauma that we experienced.

15           I listened to all you nice gentlemen talk  
16 about the environmental impact statement. I wish  
17 someone would have done that with Indian people  
18 about how it was going to impact us when it was  
19 accomplished for your people. I really don't see  
20 any benefit for tribal people. I feel it's been a  
21 big violation and it's part of our historical  
22 trauma as we continue to suffer today. We have a  
23 lot of social problems. And my feeling is social  
24 services -- I'm the human services instructor at  
25 the college, having recently returned home and

1 tried to pick up the pieces that was caused by  
2 Garrison Dam, which was our biggest trauma which  
3 has really affected our people.

4           Today I talked in my class about  
5 posttraumatic stress syndrome and how the impact of  
6 the Garrison Dam has caused a lot of problems that  
7 we have. I know that it's happened, but I would  
8 just like to say these few words because I really  
9 feel that we're missing the boat in this whole  
10 thing.

11           Money isn't everything. Money is the  
12 reason of the world's power struggle. This kind of  
13 thinking, this kind of world view is the reason  
14 we're sitting in this state that we are today. I  
15 truly understand Osama bin Laden, and I think that  
16 the disrespect that is shown for native people or  
17 people anywhere are just unbelievable. The social  
18 impacts on our people are just unbelievable. I  
19 listened to the EPA person talk about the fish and  
20 all that kind of stuff, and I love my relatives,  
21 the fish, but when has anyone really looked at what  
22 our needs are? I look at how much money is spent  
23 on riprapping in reservation areas, which is almost  
24 nothing, but we make sure that the lands around  
25 Bismarck are riprapped. Our bodies are falling

1 into the water.

2           On top of this psychological impact that  
3 it's had on our people, we're still watching it,  
4 we're still being disrespected. We have people who  
5 I call rogues who rob our gravesites. We try to  
6 protect them as best we can with not very much  
7 resources. I beg that we look towards those  
8 things.

9           One of the biggest problems I have with  
10 everything about the government, and I have done a  
11 lot of work with the government, and it tends to be  
12 with every branch of the government, that is the  
13 inability for the federal government to learn how  
14 to do consultation. And I noticed that our  
15 chairman has a government-to-government  
16 consultation in here, and I would hope that you  
17 would ask him what that means. I would hope that  
18 you would call together our leadership and all the  
19 tribes along the Missouri, and I would hope that  
20 you would ask them to define consultation and  
21 develop an agreement of how that would be done, not  
22 after the fact, not after the plans have been made,  
23 not down the road. That's usually what happens to  
24 us. That's also part of the trauma that also  
25 contributes to the psychological trauma that our

1 people are going through today.

2           I would also like to bring your attention  
3 to the spiritual and emotional impacts, because  
4 spiritually there's a lot of stuff that goes with  
5 it that I won't even try to address because you  
6 wouldn't understand what I'm talking about, but I  
7 just want you to know there's a lot of spiritual  
8 impacts that's happened because of what's happened  
9 to our people along the river, our dead ones and  
10 our sacred sites.

11           And there is a legal responsibility of the  
12 Corps of Engineers, there's several laws, and I'm  
13 not going to quote them because you know what they  
14 are, that give you the obligation to try to protect  
15 these sites, these cultural sites. And I would  
16 hope that you would try to make that more a  
17 prominent feature in the Master Manual with  
18 consultation from the Tribes.

19           I listened to Mr. Balman talk about  
20 boarding school, and I, too, am a product of  
21 boarding school. Because they moved us up to the  
22 top lands up here, we didn't have enough food to  
23 eat, there was nine of us, and a lot of people went  
24 to boarding school in my generation because we  
25 really couldn't live, we had no income, we had no



1 economy, and that really caused a lot of the trauma  
2 we see today because our families were broken up  
3 very successfully. The Army Corps divided us up  
4 and promised us hospitals, but there was never an  
5 intent to build a hospital. And all the promises  
6 that were made were pretty much not accomplished.  
7 And I guess I have these words for you, is nothing  
8 sacred to you? Is everything about money?

9           And I was visiting with some other people  
10 and I told them, you know, the thing about western  
11 thinking is that they always want to defy nature.  
12 You know we have prophecies that say the water is  
13 going to run backwards and that will be the end for  
14 us. But we follow the river. That's part of our  
15 culture. We are the river. Nobody did an  
16 environmental impact statement about how it was  
17 going to affect our cultures and what it does to  
18 devastate us. There's just very few of us left.  
19 8,000 maybe here, 9,000. We're the last of the  
20 Three Affiliated Tribes, the Mandan, Hidatsa,  
21 Arikara. Colonel, maybe that doesn't mean anything  
22 to you, but it has a lot of meaning for me.

23           So we're a great people, but you came to  
24 see us. It's all about money. It's capitalism run  
25 amuck. It's always about money. Everything is --

1 all the decisions are based on money. But I ask  
2 this question once again, is anything sacred? So I  
3 just needed to say that much for my Grandfather,  
4 the river, and the concept of the statement from  
5 the Master Manual for the control of the Missouri  
6 River, and it's offensive to me because how can you  
7 control your grandfather? That thought is crazy.  
8 But we think as human beings we have control of  
9 things. That even those towers when they bombed  
10 the Pentagon, how many people died? A couple  
11 hundred. When they bombed those Twin Towers, how  
12 many people died? Thousands. And you know why?  
13 Because as human beings we thought we were smarter  
14 than God. We thought that we could build against  
15 nature. We thought that we could defy the law of  
16 gravity. And these are the lessons that we never  
17 learn and why the world is at war and why we  
18 disrespect each other nationally, internationally,  
19 in every kind of way.

20           And even listening to the rhetoric of the  
21 President makes me nauseous. They used the same  
22 words they used on us, uncivilized, barbarian. I  
23 can understand Osama bin Laden. We did a lot to  
24 cause that. We're not innocent bystanders in that  
25 either. The same thing happened to us. So I make

1 that analogy in all due respect. That's all I have  
2 to say. Thank you.

3 MR. MOORE: Lisa Johnson.

4 MS. JOHNSON: I'm a community member  
5 here. My husband is an enrolled member. And I was  
6 here earlier in the day and spoke with several of  
7 the people, the engineers, and I was told that  
8 studies are being conducted by the Corps to  
9 determine the cultural sites. But all the cultural  
10 sites are important. The shoreline is the Corps'  
11 responsibility. And they're failing in their  
12 duties. The erosion has taken many of the cultural  
13 sites and has disposed of a lot of them. The  
14 destruction of these sites by erosion, looting or  
15 vandalism is a heinous crime, and it's as bad to  
16 these people as the destruction of the World Trade  
17 Center is to nonIndians.

18 And I know I've seen -- a lot of people  
19 have seen homes and cities that are designated as  
20 historical landmarks, they're protected. I've seen  
21 sites along the highway that are historical  
22 markers. To these people cultural sites are also  
23 historically significant to them. And I also heard  
24 a lot of testimony about the fish and the birds and  
25 the water levels, but are these more important than

1 human beings? Thank you.

2 COL. FASTABEND: Does anyone else have a  
3 comment?

4 MR. MAYER: May I make a comment? My name  
5 is Richard Mayer. I'm a representative of the  
6 Three Affiliated Tribes. I guess one of the things  
7 I would like to say out of respect for my elders  
8 and the chair, your staff that's here, is that the  
9 importance of the taken lands. I think it's the  
10 United Nations Human Rights Council that issued a  
11 statement that to take away a land base from a  
12 cultural people is an act of genocide.

13 And if you look at our map right now, you  
14 can look at the land that we have and what we used  
15 to have, and by you giving back our taken lands, I  
16 believe that would be a step in the right  
17 direction, but not really is it going to make a big  
18 difference, but it will make a heck of a lot of  
19 difference to me to get some of that land back to  
20 create that cultural land base not only for us  
21 today, but for our future generations. It's going  
22 to mean a lot to my children. It's going to mean a  
23 lot to their children, too, if you give that back  
24 to us. We're talking about you taking  
25 responsibility for taking care of the cultural --

1 our cultural artifacts that are alongside the river  
2 lines, that we would be more than happy to do that  
3 ourselves if we had control of that land. And  
4 that's all I have to say. Thank you.

5 COL. FASTABEND: Thank you. Does anyone  
6 else have a comment tonight?

7 MS. ALBERTS: Good evening. My name is  
8 Bonnie Alberts. I am an enrolled member here of  
9 the Three Affiliated Tribes.

10 First of all, I want to take this  
11 opportunity to thank you for coming to us tonight  
12 rather than having us have to travel a distance to  
13 give testimony. But I'm a student here at the Fort  
14 Berthold Community College and I'm also the editor  
15 of our Tribe's tribal newspaper. But I'm only 21  
16 years old, and some of the things that Miss Paulson  
17 spoke about, I understand from a young person's  
18 point of view exactly what my elders are talking  
19 about and what it is my instructor -- she's my  
20 instructor at the community college -- is talking  
21 about.

22 When she was addressing the religious  
23 issues of our people, primarily the Arikara people,  
24 coming up the river from Mexico, one of the  
25 traditions that we have among our Arikara people,

1 and my grandmother still practiced it -- or she had  
2 practiced it in the past couple years that I was  
3 able to be fortunate to be a part of it, was there  
4 was a ceremony where -- there were two different  
5 ceremonies and one she talked about in our  
6 classroom where they would tie baby moccasins.  
7 After they finished a ceremony, they would tie baby  
8 moccasins to a cedar tree and send it down river so  
9 that the villages or our relatives down the river  
10 would be notified that we had had -- a ceremony had  
11 been done, and it also meant that whoever that  
12 child was or that baby was whose moccasins they  
13 were, prayers would be sent to that for a long  
14 life.

15           And I have a younger sister who is nine  
16 years old, and one of the ceremonies my grandmother  
17 had, it was a changing of the dress ceremony, and I  
18 guess I was able to witness those baby moccasins  
19 being tied after a dress had been changed and it  
20 was taken to near Washburn and placed in the river  
21 and sent down the river, and my grandmother told me  
22 that those were so my sister could live a good,  
23 strong life and grow to be a good, strong woman.

24           And the impacts, like she said, of the  
25 Garrison Dam are numerous, and from a very young

1 person's perspective, I understand completely what  
2 it is that my ancestors went through and it is -- I  
3 am still suffering from it today emotionally  
4 because what they had, everything related to the  
5 land, everything that made them a culture,  
6 everything that made them happy, everything about  
7 who they were is now under water.

8           And now two generations later I'm a  
9 product of some of that loss of culture and it's  
10 really -- it is really sad to know that, and why  
11 someone would take away another person's culture or  
12 another person's livelihood is hard to comprehend,  
13 it's hard to understand.

14           And I just ask that we be included when  
15 decisions are being made about the river and when  
16 choices are being made about the river because we  
17 were the first native inhabitants of this land or  
18 this country, and I feel as a young person that  
19 it's important for generations after me to know  
20 about the rich history of our culture, the rich  
21 history of who we are.

22           And even though I'm as young as I am, I  
23 have a younger daughter that's one year old, she's  
24 one now, and there's so much that I want to share  
25 with her, there's so much I'm going to want to

1 teach her, but how can I do that when already a lot  
2 of what we've lost can't be replaced? And what we  
3 have, it's important that we keep that, that we  
4 keep that alive.

5           And I just thank you for coming to us  
6 tonight and letting us testify in front of you  
7 because it's a -- to me I see it as a big step in  
8 tribal and federal government relations that we're  
9 able to today actually sit together and work things  
10 out together rather than us sitting back blindly  
11 unaware of what's going on. Thankfully today we're  
12 educated enough to understand what's going on.  
13 Again, that's thanks to the federal government that  
14 we have this education that we have today. So  
15 thank you.

16           COL. FASTABEND: Thank you very much for  
17 your comments. Does anyone else have any  
18 comments?

19           In closing, I would like to remind all of  
20 you that the hearing administrative record will be  
21 open through 28 February 2002 for anyone wishing to  
22 submit written, faxed, or electronic comments. In  
23 addition, if you want to be on our mailing list or  
24 receive a copy of the transcript, you need to fill  
25 out one of the cards available at the table by the



1 entrance.

2           If there are no further comments, once  
3 more, thank Chairman Tex Hall, Three Affiliated  
4 Tribes, Lower Brule Sioux Tribe for requesting and  
5 participating in this hearing in their tribal  
6 homelands. This session is closed. Thank you very  
7 much.

8           (Concluded at 9:53 p.m., October 24,  
9 2001.)

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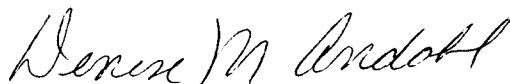
CERTIFICATE OF COURT REPORTER

I, Denise M. Andahl, a Registered  
Professional Reporter,

DO HEREBY CERTIFY that I recorded in  
shorthand the foregoing proceedings had and made of  
record at the time and place hereinbefore  
indicated.

I DO HEREBY FURTHER CERTIFY that the  
foregoing typewritten pages contain an accurate  
transcript of my shorthand notes then and there  
taken.

Bismarck, North Dakota, this 12th day of  
November, 2001.



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Denise M. Andahl  
Registered Professional Reporter



# **MASTER MANUAL PUBLIC HEARING**

**October 24, 2001**

**Oral Comments by Tex G. Hall**

**Chairman, Mandan, Hidatsa & Arikara Nation**

**On behalf of the people of the Mandan, Hidatsa & Arikara Nation, I welcome the Army Corps of Engineers to our homelands. The Three Affiliated Tribes was established in 1851 by the Fort Laramie Treaty. According to our Constitution and the United States government, treaties are the supreme law of the land and we as a Treaty Tribe are considered sovereign nations. As Chairman of a sovereign nation, I welcome this opportunity to provide comments on the Draft Environmental Impact Statement for the Master Manual for Control of the Missouri River. We will be providing very detailed comments on the Draft Environmental Impact Statement prior to February 28, 2002, the deadline for receiving comments.**

**Tonight, I'd like to comment on several concerns that tribes have and how the Master Manual will impact these concerns. In particular I want to stress that the river is a trust asset and the Army Corps as a federal agency is trustee. We need joint management of the river. The Mandan, Hidatsa and Arikara Nation is prepared to work cooperatively with the Army Corps on management of the river and on the following subject matters.**

- 1. Government-to-Government Consultation: This is absolutely essential. Consultation with tribal nations, according to Presidential Executive Order 13175, is vital to development of the Master Manual. Prior to the finalization of the Master Manual, all Tribal Nations along the River should be provided with in-depth consultation about how the final Master Manual will be constructed. The Mandan, Hidatsa & Arikara**

people particularly have been adversely affected by the activities of the Army Corps in the past. Our reservation – our homelands were displaced by the building of the Garrison Dam.

2. **Recognition of Winters Doctrine – Reserved Rights to Water from the River** Our reserved water rights under the Winters Doctrine must be acknowledged; the final Environmental Impact Statement must recognize this before the Master Manual is finished. In recognition of this Doctrine, the Mandan, Hidatsa and Arikara Nation is ready to act collaboratively with the Army Corps on how the river, specifically our water rights, are to be managed.
3. **Protection of Economic Activity Along the River** The Draft Environmental Impact Statement must consider the effects of the various alternative flow schedules on the economic well being of the Mandan, Hidatsa and Arikara Nation, for example, how the water levels will impact the various economic development plans we have for the Four Bears Casino and Lodge and other tribal businesses. Remember, Tribes, as well as States and private enterprises have economic interests in the flow of the river.
4. **Indian Trust Assets:** The United States has a trust responsibility to protect and maintain rights reserved by or granted to American Indian Tribes or individuals. When an Indian Trust Asset has been impacted by a federal project such as trust lands, mineral rights, cultural resources, water rights, or hunting and fishing rights then the federal agency in its action document must analyze those interests, the adverse impacts, and set forth appropriate mitigation and/or compensation

**commitments. We are ready to work collaboratively with the Corps to mitigate the following:**

- **Lake levels at Sakakawea and Oahe have dropped up to 12 feet, partly in response to low precipitation in the Missouri Basin over the last several years. This substantial drop has also been caused by the disproportionate role given by the Corps to navigation in the lower Missouri River.**
- **The dropping of the lake levels deprives the Tribes and their members and non-Indian business partners of the Tribes full and unconditional access to these important Reservoirs.**
- **The lake dropping also creates a substantial scar to the land and waters and takes away from the ongoing efforts of Tribes to enhance our recreation opportunities, to protect historic cultural properties and to restore endangered fish, native fish and aquatic and terrestrial habitat.**

**5. Environmental Justice Claims Environmental Justice Issues evolve out of Executive Order 12898 dated February 11, 1994. The Order provides that a federal agency shall make achieving Environmental Justice part of its mission by identifying and addressing as appropriate disproportionately high and adverse human health and environmental effects of its programs. Environmental Justice includes any adverse effect on minority and low-income populations. In the Missouri River, as Congress expends millions of dollars to recover endangered species, restore native fish, aquatic and terrestrial habitat, cultural resources and River economies, Environmental Justice requires a review of the availability of those federal benefits to minority and low income households and appropriate follow-through commitments.**

- **When the Garrison Dam was constructed by the Corps, we were relocated from the rich, fertile agricultural bottomlands, to grasslands not suited for our agricultural traditions.**
- **Lake Sakakawea created by the Garrison Dam is a long lake and has virtually eliminated meandering of the upper Missouri River as well as the flood lands, wetlands, and fish and game central to the Tribes' way of life. In their place has emerged over time noxious weeds that are endemic to the reservoir area.**
- **The lands adjacent to the reservoir are barren and have very few of the wetland characteristics that existed prior to the construction of the Garrison Dam.**

#### **6. United States Constitution and Equal Protection Clause**

**The Draft Master Manual Environmental Impact Statement fails to adequately set forth the Indian Trust Assets and Environmental Justice concerns of the Three Affiliated Tribes. Moreover to the extent that the Master Manual Draft Environmental Impact Statement relies upon Tribal input and Tribal documentation as set forth in Volume II, it violates the Equal Protection clause of the United States Constitution. Specifically, the Corps has elected to expend its funds to describe fisheries, flows, navigation, power and other socioeconomic concerns and included them in Volume I of the Draft. But when it comes to setting forth the Tribal concerns relating to the Indian Trust Assets and Environmental Justice, the Corps – notwithstanding repeated requests from the Tribes has relied upon the Tribes themselves to provide the documentation. Because there is no rational basis for this distinction the Corps is violating the Equal Protection clause of the United States Constitution.**

To correct this Constitutional deficiency and to comply with contemporary Council on Environmental Quality requirements, the Corps in its final Environment Impact Statement should at its expense specifically address Indian Trust Assets and Environmental Justice concerns for those Tribes whose reservations have been adversely affected by the Missouri River operations.

7. **Protection of Cultural Sites:** Changing the flows along the River under several of the preferred alternatives presented by the Army Corps following the issuance of the “Biological Opinion” will most likely create additional erosion along the shores of the upper three reservoirs. These reservoirs are projected to be the reservoirs that will provide the flow necessary to implement the preservation of economic activities along the river and to provide protection of endangered species. The analysis of these changes must include complete studies of how they will affect our cultural sites along the river and how any damage to our sites will be mitigated or prevented altogether. Under the Native American Graves Protection and Repatriation Act, to allow such sites to be eroded away or left unprotected is unacceptable. Protection of these sites (the vast majority of which are associated with the Mandan, Hidatsa & Arikara) needs to be the subject of lengthy review within the Master Manual.

**Substantial government-to-government consultation should be referenced not just for cultural site protection, but for all phases of the Master Manual itself.**



Last night in Bismarck Governor Hoeven presented testimony describing North Dakota's position on the Master Manual review. Today I will briefly reiterate the same strong and clear message that North Dakota and adjoining states have been voicing for years. The Missouri River Master Manual must be changed to meet the contemporary needs of the basin and the time for this change is far past due.

The five mainstem dams authorized by the Flood Control Act of 1944 were constructed in 18 years. If the Master Manual revision is completed in 2003, it will have taken 14 years. The people of North Dakota and the Missouri River Basin can wait no longer. Any further delay to the Master Manual is not acceptable.

The Missouri River is of vital importance to the State of North Dakota for the various uses it provides. The power generated by the Missouri River dams, provides affordable electric rates for our citizens and to the citizens of neighboring states who receive much of the power from Garrison dam. 20% of North Dakota citizens get their water from the river. Seven coal fired power plants use river water for cooling and six other industrial users make use of Missouri River water. Approximately 16% of the total irrigated area in North Dakota uses Missouri River water. The Missouri River, Lake Sakakawea, and Lake Oahe provide recreation opportunities to hundreds of thousands of residents and visitors to the state.

The quality of the water in the Missouri River is important for municipal water supply and cold-water habitat. If the elevation of Lake Sakakawea falls below 1825 feet during mid to late summer, the reduced oxygen concentration puts the nationally acclaimed sport fishery of the big lake in serious jeopardy. Low lake levels also increase risk to human health through the resuspension of sediment from the delta portion of the lake. Wave actions of low water disturb the sediment, releasing chemicals into the water that is subsequently used for municipal water supplies.

The cultural and historical sites along the Missouri River are important to the State, the Three Affiliated Tribes, and the Standing Rock Sioux Tribe and further warrant change in the management of the river. Many of these resources are destroyed on a daily basis through erosion, looting, and the absence of shoreline protection and stabilization. Stable lake levels would impact fewer sites, so that a change in the operating plan that results in more stable lake levels in times of drought would benefit a resource, that may otherwise be lost forever. These steps should be followed by the commitment of resources to stabilize the shoreline in order to protect and preserve these cultural and historical sites.

The draft EIS supports change by the benefits outlined in the five alternatives. They improve conditions for endangered species and conserve water in the mainstem reservoirs during times of drought. Unbalancing the reservoirs and increasing releases at Ft Peck may provide benefits for the pallid sturgeon, least tern and piping plover. Conserving water in the reservoirs during dry periods improves conditions for fish survival and thus recreation, and translates into more 'head' for hydropower. If these alternatives would have been in place during the drought of the late

1980s, Lake Sakakawea would have been 4 to 6 feet higher, translating into far better fish habitat, more efficient hydropower and an overall improvement in the economy of the areas that border the Missouri River.

The drought conservation measures included in the five new alternatives are essentially those agreed to by seven of the eight Missouri River Basin Association member states. Strictly from North Dakota's standpoint they do not go far enough. But, they are likely the most equitable means of distributing hardship during drought and are supported by seven of the eight states within the basin, including North Dakota. These drought conservation measures proposed by MRBA should be implemented as soon as possible and will be a vast improvement over the 40-year-old Master Manual. .

In conclusion, I urge the Corps to adhere to its current schedule for completing the Master Manual revision process. The time for equitable distribution of the benefits of Missouri River and equitable sharing of water shortages is now.

There is no question that any of the 5 proposed alternatives is marked improvement over the current water control plan. The results of the Economic and Environmental studies clearly illustrate how the Missouri River and the reservoirs can be better managed to benefit our children, the entire Missouri River Basin, and us. . If we manage them intelligently, realization of their potential can benefit all. On behalf of the people of North Dakota, and the Missouri River Basin, it is time for change on the Missouri River.

## **RECREATION IMPACT ON LAKE SAKAKAWEA**

**By Dick Messerly**

**10-24-01**

The economic impact felt by Lake Sakakawea area communities especially Garrison goes with the level of the lake. If water levels are at a "normal" level, around 1840 fmsl mark, then the economy of communities along the lake point to a substantial increase. When lake levels decline to a low point, economies show a drop in direct correlation to the lake level.

This correlation has been tracked by the Garrison Chamber of Commerce through collecting data on taxable sales, Lake Sakakawea elevations and visitation at Fort Stevenson State Park, a major state park on the north shore of Lake Sakakawea, just 3 miles south of Garrison. These figures are not estimates but hard facts.

In the low water year of 1991 when levels on Lake Sakakawea plunged to a low of 1815.5 fmsl the visitation at Fort Stevenson State Park also reached a low of 59,000 the taxable sales in Garrison were also cut to about \$7.5 million annually. In the year 1999 when water levels were more normal with a summer operating season of 1840 fmsl or above visitation at Fort Stevenson State Park was at 124,000 and Garrison taxable sales were at \$9.7 million. This is over a \$2 million increase from the low water year of 1991. Similar taxable sales correlations can be seen in the New Town figures. In 1991 New Town had taxable sales of \$2.6 million in 1999 taxable sales were at \$4 million.

As annual Lake Sakakawea elevations have been tracked and compared to taxable sales in Garrison and New Town and to visitation at Fort Stevenson State Park starting with the year 1978 a pattern of impact becomes graphically obvious. Low lake levels, below 1830 fmsl mean lower taxable sales and lower park visitation. These translate into a tremendous negative economic impact to this area. Show charts which graphically show the impacts. (See attached graphs)

According to the most recent RDEIS Summary navigation under the best conditions generates about \$7 million annually. Under the five proposed alternatives to the CWCP, navigation's benefit in a reduced flow year would be cut by about \$2 million. But a \$3.5 million cut in taxable sales were the impacts two towns on the north shore of Lake Sakakawea, Garrison and New Town. What needs to be taken into account with these figures is that this is just the impact on two communities. If this figure were increased to include the low water impact to all the communities, resorts and recreation areas on the three upper reservoirs the total would be staggering.

If the Corps of Engineers is going to follow through with its mission of "meeting the contemporary needs of the basin while protecting its natural resources" then it is time for change. The Corps studies have shown that a change in the Master Water Control Manual would have positive overall economic and environmental benefits. 7 of the 8 basin states agree it is time for a change. When 7 out of 8 votes are cast in favor of an issue that is a mandate of 88% favoring the change. The Corps has the mandate from the

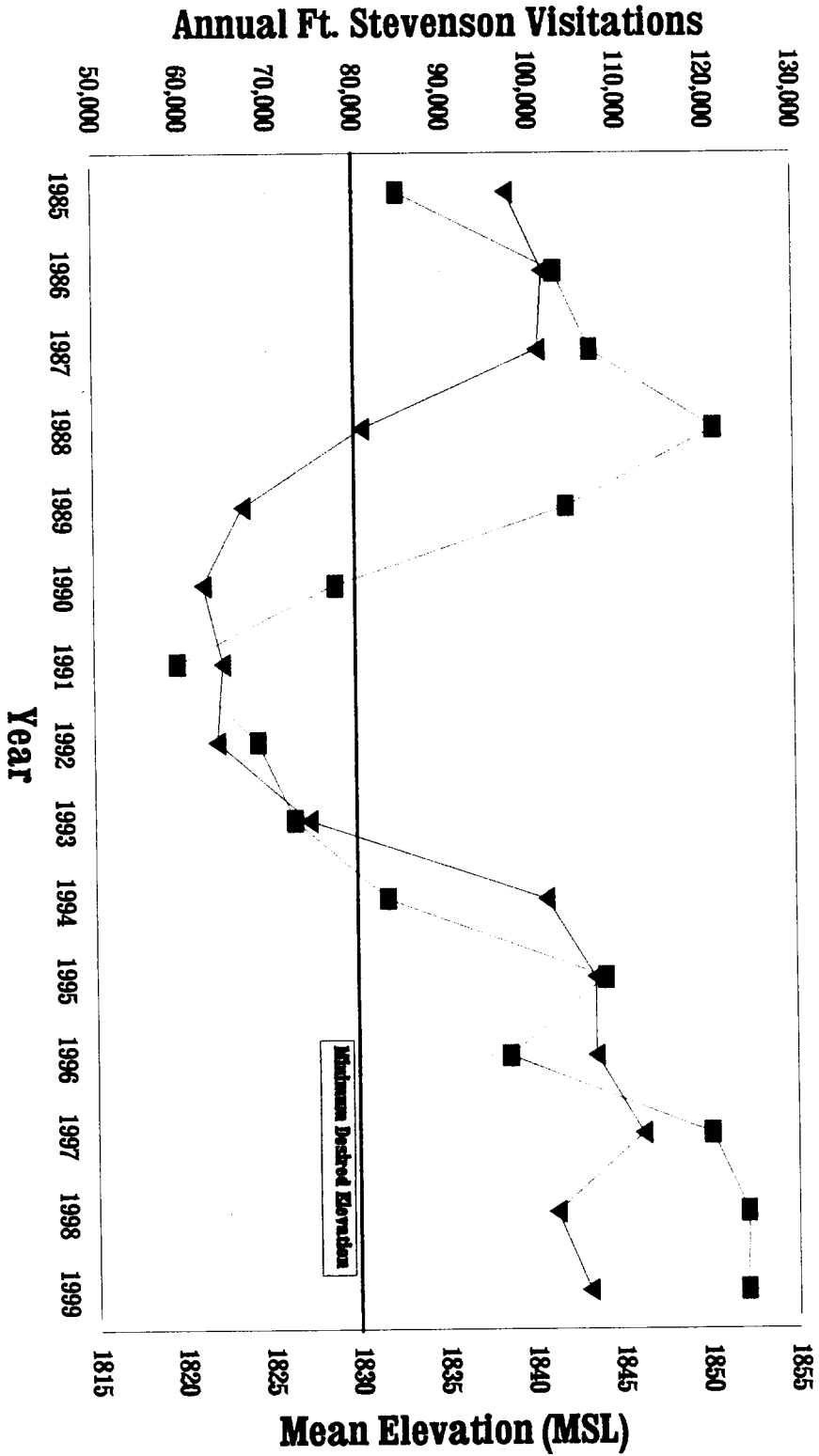
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basin states to make a change. It is specifically time to stop being intimidated and bullied by a few officials from the state of Missouri.

In an AP story in the Minot Daily News paper dated September 30, 2001, state of Missouri Assistant Attorney General William Bryan is quoted as saying "They want to control our water" they meaning North Dakota, South Dakota and Montana. First of all Missouri river basin water in not the state of Missouri's water, it's valuable resource for the entire basin. Second the six main stem dams only collect on the average about 1/3<sup>rd</sup> of the runoff into the Missouri River basin. The other 60% runs into the Missouri River below Gavins Point Dam. In this same story Commissioner Howard Wood from the state of Missouri is quoted as saying "We don't want North Dakota to get the water either," It is time for the Corps of Engineers to take a stand against contentious rhetoric like this from a few Missouri State Officials and change the master manual so it reflects contemporary needs of the basin while protecting its natural resources. Garrison cannot afford to go through another drought on Lake Sakakawea under the CWCP.

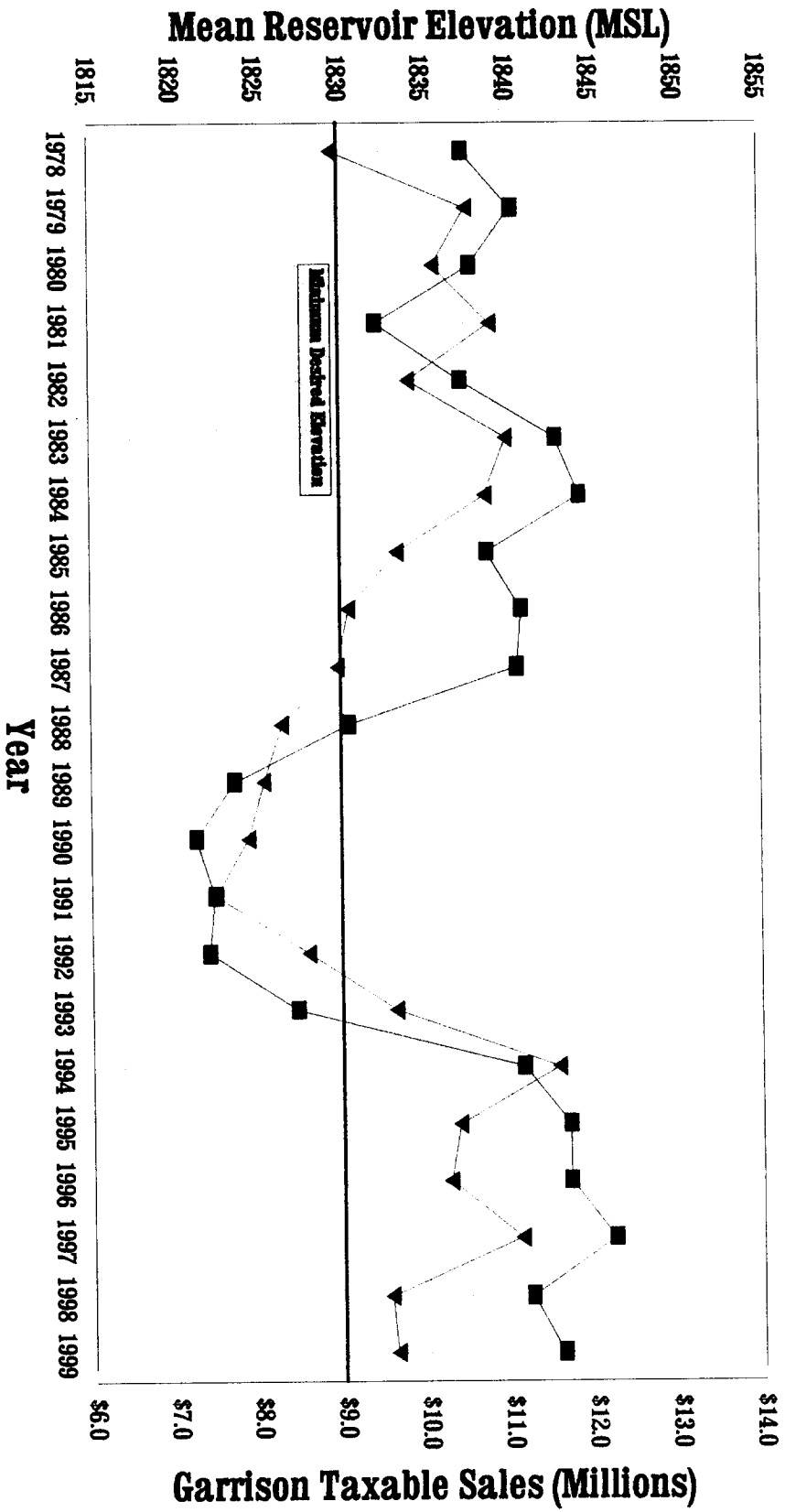
Garrison would favor summer elevations not dropping below 1830 fmsl to support the fishery and keep Fort Stevenson State Park Marina fully operational and raising the permanent pool by 20 feet. But any of the proposed alternatives would be better than the CWCP.

# Garrison Reservoir Elevation Study Park Visitations vs. Mean Elevation



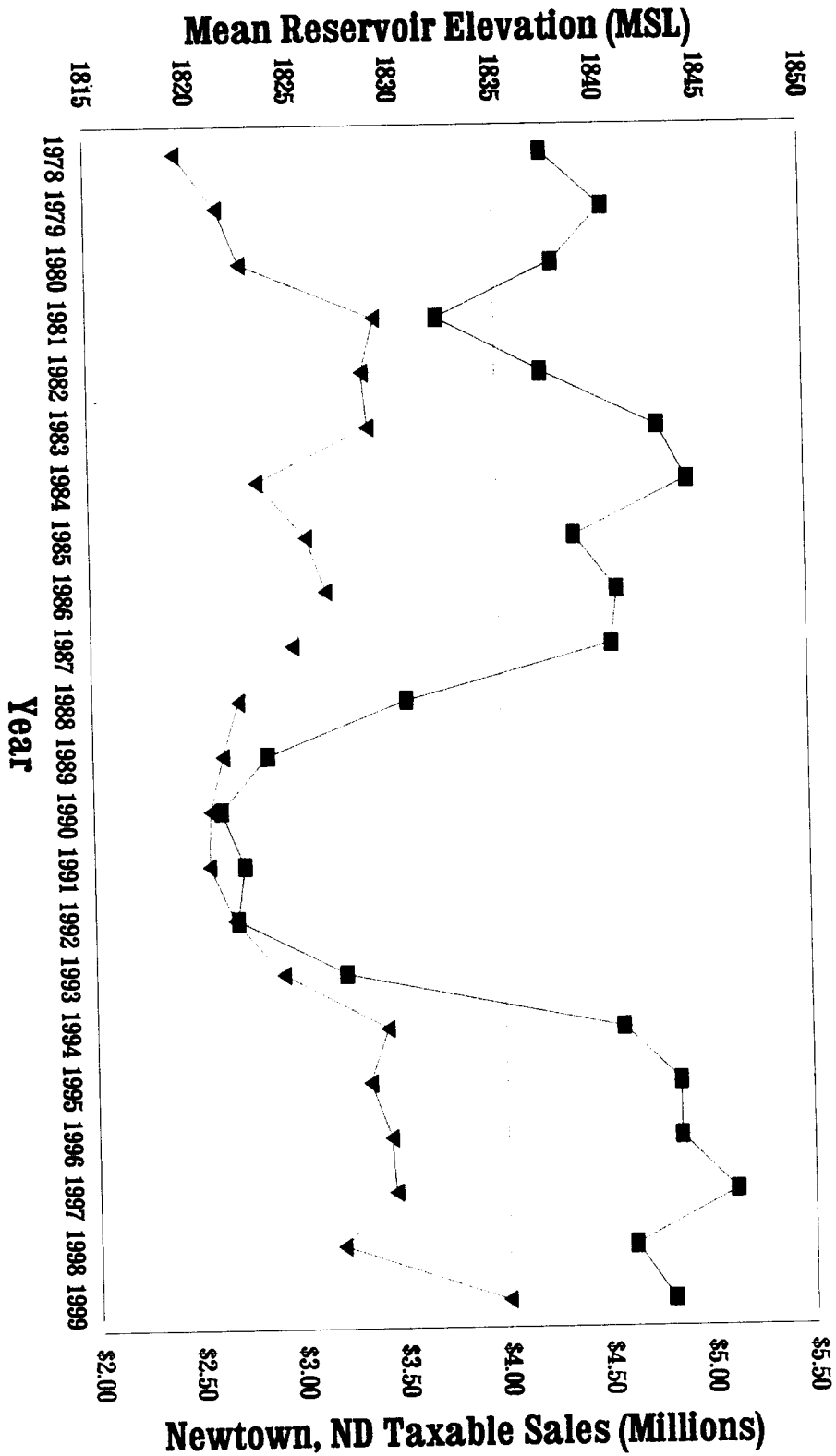
# Garrison Reservoir Elevation Study

## Mean Elevation vs. Garrison Sales



# Garrison Reservoir Elevation Study

## Mean Elevation vs. Newtown, ND Sales





**U.S. Fish and Wildlife Service  
Public Comments  
Missouri River Master Manual Hearing  
New Town, North Dakota, October 24, 2001**

**Good evening, my name is Mike Olson and I'm here this evening on behalf of the U.S. Fish and Wildlife Service to issue a brief statement on the Revised Draft Environmental Impact Statement for the Missouri River Master Water Control Manual. I'm also here to listen to the comments in person from citizens on this important issue.**

**The Service has primary authority for oversight of our nation's rarest animals under the Endangered Species Act. The Missouri River is home to the endangered pallid sturgeon and least tern, and the threatened piping plover. The decline of these species tells us that the river is not healthy for its native fish and wildlife, and that there needs to be a change in its management to restore the Missouri to a more naturally functioning river system. A healthy river provides wildlife habitat, supports fishing, and makes boating an attractive recreational activity.**

**Congress committed the Federal Government to preventing extinctions by requiring Federal agencies to use their authorities to conserve endangered and threatened species. During the last 12 years our agency has been working with the U. S. Army Corps of Engineers to modernize the management of the Missouri River to help stabilize and hopefully, begin to increase and recover populations of these vary rare animals. This**

**new approach was described recently in a document called the “Missouri River Biological Opinion,” published in November 2000.**

**The biological opinion looks at the river as a system and outlines the status of these rare species, the effects of the current operation on them, and a reasonable and prudent alternative to the current operation that will not jeopardize their continued existence.**

**Our biological opinion is based on the best available science and includes nearly 500 scientific references. In addition, we’ve sought out 6 respected scientists – “big river specialists” – who confirmed the need to address flow management, as well as habitat restoration. Further, the Missouri River Natural Resources Committee, a group comprised of the state experts on Missouri River management, endorses the science in the opinion.**

**If you have read the RDEIS or summary document, you understand that the “GP alternatives” encompass the range of flows identified by the Service as necessary below Gavin’s Point Dam to keep the listed species from being jeopardized. Our agency, and the Corps, also recognized the importance of some flexibility in management that would enable Missouri River managers to capitalize on existing water conditions to meet endangered species objectives without having to go through another 12-year process.**

**Other management changes identified in the biological opinion include a “spring rise” out**

**of Fort Peck Dam, an improved hatchery operation to assist declining pallid sturgeon populations, restoration of approximately 20% of the lost aquatic habitat in the lowest 1/3 of the river, intrasystem unbalancing of the three largest reservoirs, and acceptance of an adaptive management framework that would include improved overall monitoring of the river.**

**In closing, the Service supports the identified goal of the revised master manual - to manage the river to serve the contemporary needs of the Missouri River Basin and Nation. These needs include taking steps to ensure that threatened and endangered species are protected while maintaining many other socioeconomic benefits being provided by the operation of the Missouri River dams. The Service stands behind the science used in the opinion, and is confident that the operational changes identified in our opinion, and included in the RDEIS as GP alternatives will ensure that these rare species continue to be a part of the Missouri River's living wildlife legacy.**

**The Missouri River is a tremendous river, with a significant and revered heritage. Our influence has altered the river greatly. Changes are needed to modernize and restore health to the river – for the benefit of rare species and for people, too.**

# **Intertribal Council On Utility Policy**

>>>> P.O. Box 831, Rosebud, SD 57570 Phone: 605-747-4097 Fax: 605-747-4099 <<<<  
President Patrick Spears <Pnspears2@aol.com > Secretary Robert Gough <Rpwgough@aol.com >

October 30, 2001

Lieutenant Colonel Kurt F. Ubbehohdt, Commander  
Omaha District  
U.S. Army Corps of Engineers  
Northwestern Division

RE: Comments on the RDEIS Missouri River Master Manual

The Intertribal Council On Utility Policy respectfully submits the following comments to the U.S. Army Corps of Engineers opened a six-month public comment period on its Revised Draft Environmental Impact Statement (RDEIS) on their proposed "Master Water Control Manual" for the operation of the six dams on mainstem of the Missouri River. These comments address renewable energy options, specifically wind and Missouri River.

Over ten years in the works, this revised draft EIS lays out a series of seven operating alternatives that juggle the needs and impacts on a variety of river interests and activities – from protecting water quality, shorelines, wetland and riparian habitats, cultural resources and endangered species along the Missouri, to protecting navigation and barge traffic on the lower Mississippi – while trying to provide a balance of flood control and hydropower to communities throughout the Missouri River basin. Each alternative tips the balance in favor of some interests over others.

Going into a public comment process on its RDEIS, the Corps has provided hundreds of pages of information detailing the arguments for and against the various alternatives, along with the likely impacts of each alternative on the river system. The RDEIS fails to provide an agency preference among the various alternatives, as such documents usually offer. However, an even more extraordinary omission, and one with far reaching economic and environmental implications for communities throughout the Missouri River Basin, is the role that wind power generated on the farms, ranches and reservations of the northern Great Plains could play in giving the Corps greater flexibility in managing the Missouri River.

Over the past two years, the Intertribal Council On Utility Policy has raised the issue of the wind power potential to help meet not only the Corps obligations on the river, but also the Western Area Power Administration's (WAPA) dependence on hydropower for the transmission of low cost energy throughout the region.

This potential for clean, low-cost, home-grown energy grows in importance given the shifts in precipitation patterns and reduced mountain snowpack seen again this year. These weather shifts are consistent with scenarios for longer-term climate change and variability in our region. Shortfalls in hydropower production are expected to increase costs in supplemental electrical power necessary for WAPA to meet its present contractual obligations.

A recent report, in the Sioux Falls Argus Leader (6/17/01), Kevin Woster noted that:

*The U.S. Army Corps of Engineers estimates that Missouri River dams will fall about 4 billion kilowatt hours short of normal power generation this year. If WAPA has to buy that at 6 cents per kilowatt hour, the cost will be about \$240 million.*

*The agency already has spent \$140 million to buy power since the federal fiscal year began October 1. By comparison, WAPA spent a total of \$57 million, \$38 million and \$25 million in the three years prior to this one, said Dale Strege, power marketing manager for WAPA in Watertown...*

*Corps water specialists are projecting the lowest total power generation for the Missouri River system this year since record keeping began in 1967.*

*The corps is projecting total power generation for the year at 6.2 billion kilowatt hours. Normal is 10.2 billion.*

The U.S. Army Corps of Engineers and the Western Area Power Administration should explore the potential of adding distributed wind generation to the Missouri River basin's electrical grid system in terms of cost, power supply, and greater operational flexibility in river management, not to mention the enhanced environmental resulting from an energy source with no toxic emissions or waste storage problems associated with more conventional fossil or nuclear based energy generation.

The wind resources of the Great Plains could meet 75% of the electricity demand in the lower 48 states. In the Northern Plains, the wind potential on the Indian Reservations in North and South Dakota alone exceeds 250,000 megawatts, well over 100 times the hydropower generation of the Missouri River. Development of even a small portion of this Tribal potential could significantly contribute to the energy budget of the entire West, as well as to the local economies surrounding the reservations.

Intertribal COUP has formally requested that the relevant federal energy agencies explore the tremendous potential of utilizing both intermittent, but predictable and unlimited wind resources and the firm, but limited and diminishing hydropower resources, in tandem to create an even more powerful western renewable energy system built on a federal-tribal partnership.

In addition to being a clean renewable resource, wind energy can be cost-effective at 3 cents per kilowatt hour. Further, wind has several major advantages over its conventional rival sources of energy. The cost of its energy input never changes over the life of the installation (30 years) in contrast to natural gas-fired plants where fuel costs have sky rocketed this past year. Wind generation is ideally suited to providing dependable supplies of predictable power at long-term fixed rates. Moreover, electricity generated from wind can be commissioned in a matter of months as opposed to the years it takes for conventional generation projects to be brought on line. And all of this can be had without the NOx, SOx, heavy metals, or green house gas emissions associated with conventional fossil fuels.

Expenditures in the development of distributed wind generation would hardly exceed even a few years of supplemental purchases at today's retail electricity market costs.

Investment today in distributed wind generation could continue to provide clean renewable electricity over the next thirty plus years regardless of changes in precipitation patterns, lower river flow levels or rising energy costs.

Developing a regional wind-hydro hybrid system built upon the treaty relationship between Great Plains Tribes and the federal government (COE, BOR, WAPA, DOE and BIA) will require visionary leadership and perhaps a national commitment to reconfigure and enhance our country's electrical transmission system not unlike the commitment made decades ago to develop our national interstate highway system. It is time to rethink not only the way we manage our greatest and most threatened river, but how we plan to power our economy through the 21<sup>st</sup> century.

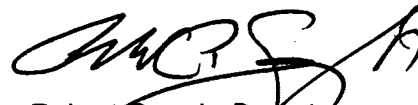
The Intertribal Council On Utility Policy has actively supported the efforts of Tribes in the Northern Great Plains to develop opportunities for Tribal energy development, with particular emphasis on renewable wind energy development. Intertribal COUP has sought agency consultation and inclusion of a formal consideration of wind power generation in the operation of the Missouri River hydropower system. More broadly, COUP has worked with the Inter-Tribal Energy Network over the past two years in developing a number of federal legislative and policy recommendations, which are incorporated in the Tribal Energy Self-Sufficiency Act.

Intertribal COUP encourages the U.S. Corps of Engineers to consult with every Tribe to formally support these Intertribal initiatives. Further, Intertribal COUP requests that the Master Manual adequately consider a wind-hydropower hybrid generation scenario, and incorporate an analysis of the impacts of climate change and variability on the proposed management plan for the Missouri River.

Thank you for your consideration and attention to these important issues.

Sincerely,

  
Patrick Spears, President

  
Robert Gough, Secretary

Attachments:

Intertribal COUP Letter Re: Master Manual  
Answer from Department of Energy  
Answer from Department of Defense

# **INTERTRIBAL Council On Utility Policy**

**>> Box 831, Rosebud, SD 57570 • Phone: 605-747-4097 • Fax: 605-747-4099 <<  
Patrick Spears, President: 605-945-1908 or Pnspears2@aol.com Robert Gough, Secretary, Rpwgough@aol.com**

June 27, 2001

The Honorable Thomas E. White  
Secretary of the Army  
U.S. Department of the Army  
101 Army – Pentagon  
Washington, D.C. 20310-0101

The Honorable Spencer Abraham, Secretary  
U.S. Department of Energy  
1000 Independence Ave. SW  
Washington, D.C. 20585

The Honorable Gale Norton, Secretary  
U.S. Department of the Interior  
1849 C St. NW  
Washington, D.C. 20240

And

Administrator Michael Hacskaylo  
Western Area Power Administration  
12155 W. Alameda Parkway  
Lakewood, Colorado, 80228-8213

Honorable Secretaries and Administrator Hacskaylo:

On behalf of our member Tribes in the Missouri River basin and the Great Plains Regional Tribal Chairman's Association, the Intertribal Council On Utility Policy submits these comments in light of the growing interest in wind development among the Tribes of the Northern Great Plains.

Upon our review of materials related to release by the U.S. Army Corps of Engineers of its "draft implementation plan" and our understanding that an analysis of the impacts of several alternative management proposals is being conducted by the Western Area Power Administration in terms of the effects of those proposals on the production of hydropower marketed by Western, the Intertribal Council On Utility Policy notes that

Cheyenne River Sioux Tribe · Cheyenne River Telephone Authority · Flandreau Santee Sioux Tribe  
Lower Brule Sioux Tribe · Omaha Tribe · Rosebud Sioux Tribe · Spirit Lake Tribe · Standing Rock Sioux Tribe

It would appear to be both prudent and advantageous for both the U.S. Army Corps of Engineers and the Western Area Power Administration to explore the potential of adding distributed wind generation to the Missouri River basin's electrical grid system in terms of cost, power supply, and enhanced operational flexibility in river management.

The wind potential on Indian Reservations in the United States is tremendous. On reservations in the Pacific Northwest there is an estimated potential of between 28,000 and 57,000 megawatts, up to seven times the installed hydropower generation capacity of the Bonneville Power Administration, which has just announced its intention to purchase of 830 megawatts of wind power as part of a major wind power initiative in the Northwest.

The U.S. Department of Energy has reported that the wind resources of the Great Plains alone could meet 75% of the electricity demand in the lower 48 states. In the Northern Plains, the wind potential on the Indian Reservations in North and South Dakota alone exceeds 250,000 megawatts, well over 100 times the hydropower generation of the Missouri River. Development of even a small portion of this Tribal potential can make a significant contribution to the energy budget of the entire West.

The Intertribal Council On Utility Policy formally requests that the relevant federal energy agencies explore the tremendous potential of utilizing both intermittent, but unlimited wind resources and the firm, but limited and potentially diminishing hydropower resources, in tandem to create an even more powerful western renewable energy system. The Department of the Interior has a special role to play here with regard to both the BOR's operation of smaller dams in the region and historically unfulfilled authorizations for renewable energy development on Tribal lands under the 1992 Energy Policy Act. Developing a regional wind-hydro hybrid system will require visionary leadership and perhaps a national commitment to reconfigure and enhance our country's electrical transmission system, not unlike the commitment made decades ago to develop our national interstate highway system.

In addition to being a clean renewable resource, wind energy can be cost effective at 3 to 4 cents per kilowatt hour. Further, wind has several major advantages over its conventional rival sources of energy. The cost of its fuel input never changes over the life of the installation (30 years) in contrast to natural gas-fired plants where running costs have sky rocketed this past year. Wind generation is ideally suited to providing dependable supplies of predictable power at long-term fixed rates. Moreover, electricity generated from wind can be commissioned in a matter of months as opposed to the years it takes for conventional generation projects to be brought on line. And all of this can be had without the NO<sub>x</sub>, SO<sub>x</sub>, heavy metals, or green house gas emissions associated with conventional fossil fuels.

Expenditures in the development of distributed wind generation would hardly exceed even a few years of supplemental purchases at today's electricity market costs. While

Cheyenne River Sioux Tribe · Cheyenne River Telephone Authority · Flandreau Santee Sioux Tribe  
Lower Brule Sioux Tribe · Omaha Tribe · Rosebud Sioux Tribe · Spirit Lake Tribe · Standing Rock Sioux Tribe



Northern Plains for appropriate engineering and interconnection studies to fully assess the integration of reservation wind potential into the federal electricity grid and our Nation's energy supply.

On behalf of the member Tribes in the Great Plains Regional Tribal Chairman's Association and the Intertribal Council On Utility Policy, we appreciate your earliest consideration of the above mentioned matters, and would be happy to engage in further conversation and consultation on developing an ecologically and economically sustainable energy infrastructure utilizing renewable energy generation on Tribal lands.

Sincerely,

Patrick Spears, President  
Intertribal COUP

Robert Gough, Secretary  
Intertribal COUP

Cheyenne River Sioux Tribe · Cheyenne River Telephone Authority · Flandreau Santee Sioux Tribe  
Lower Brule Sioux Tribe · Omaha Tribe · Rosebud Sioux Tribe · Spirit Lake Tribe · Standing Rock Sioux Tribe



**The Secretary of Energy**  
Washington, DC 20585

August 9, 2001

Mr. Patrick Spears, President  
Mr. Robert Gough, Secretary  
Intertribal Council On Utility Policy  
Box 831  
Rosebud, SD 57570

Dear Mr. Spears and Mr. Gough:

Thank you for your June 27, 2001, letter regarding the growing interest in wind development among the Tribes of the Northern Great Plains. I appreciate your views, and share your interest in the potential of this important renewable resource.

I am aware of the importance of the Master Operating Manual process, being conducted by the U.S. Army Corps of Engineers (Corps), to the Missouri River region. To the extent the Corps decides to consider the potential of wind generation in its process, I will encourage the Western Area Power Administration (Western) to participate in an analysis of the impacts.

As you are aware, Western has adopted a marketing plan for power generated from the Pick-Sloan Missouri Basin Program-Eastern Division through the year 2020. Your proposal to integrate hydroelectric and wind power must be considered in light of the provisions of this marketing plan. Western's established policy for purchase of renewable resources is very compatible with your goal of "clean, reliable, low cost, rate based energy supply."

Due to budgetary constraints, I cannot commit to technical and financial support for engineering and interconnection studies at this time. Requests for transmission service and interconnection are subject to the provisions of Western's open access transmission tariff. The Department of Energy (Department) continues to explore the costs and benefits of a "green tag" program, and will consider funding after evaluation of other energy priorities.

Pursuant to the National Energy Policy, the Department is examining the benefits of establishing a national transmission grid in a report, which will be completed by the end of the year. The United States must invest in a clean, reliable and diverse portfolio of domestic energy supplies as part of a sound national energy policy.



I appreciate your interest in harnessing abundant, naturally occurring sources of wind energy and look forward to continued consultation with Tribes, pursuant to the Department's American Indian policy.

Sincerely,

A handwritten signature in black ink that reads "Spencer Abraham". The signature is written in a cursive style with a large, sweeping initial "S".

Spencer Abraham

cc:

The Honorable Thomas E. White  
Secretary of the Army  
Washington, DC 20310-0101

The Honorable Gale Norton  
Secretary of the Interior  
Washington, DC 20240

Mr. Michael S. HacsKaylo  
Administrator  
Western Area Power Administration  
P.O. Box 281213  
Lakewood, CO 80228-8213



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
CIVIL WORKS  
108 ARMY PENTAGON  
WASHINGTON DC 20310-0108

28 SEP 2001

REPLY TO  
ATTENTION OF

Mr. Patrick Spears  
President, Intertribal Council  
on Utility Policy  
Box 831  
Rosebud, South Dakota 57570

Dear Mr. Spears:

Thank you for your letter of June 27, 2001, to The Honorable Thomas E. White, Secretary of the Army, concerning the growing interest in wind development among the Indian tribes of the Northern Great Plains. We agree with you that there may be ways in which the Army Corps of Engineers can consult and cooperate with Indian tribes in the Missouri River Basin to study and deploy wind technologies. If successful, such activities would help sustain Indian economies and significantly augment the availability of electric power in the region.

After a preliminary review of the information you provided, the Corps advises me that there may be opportunities to examine further the type of natural resource development you propose under Section 203 of the Water Resources Development Act (WRDA) of 2000, referred to as the Tribal Partnership Program (TPP). The TPP authorizes the Secretary of the Army, acting through the Corps, to conduct studies that "substantially benefit Indian tribes" and that "are located primarily within Indian country." Under this authority, the Army can work with Indian tribes and the heads of other Federal agencies, to determine what kinds of projects might be studied and implemented. Although this office did not specifically envision wind power generation projects when we included this provision in the Administration's WRDA proposal to the Congress, we do believe that the provision is flexible enough to allow the Corps to study such proposals, and implement them, if authorized, under Section 203. One potential limitation is that we would need to focus our efforts on projects located within the exterior boundaries of Indian reservations associated with civil works projects (i.e., Pick-Sloan Missouri River Basin Project, Fort Peck Project).

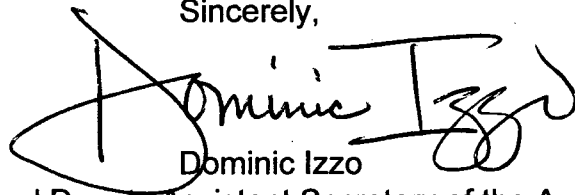
Your letter also notes that wind power generation should be considered by the Corps as they move forward with plans to revise the Missouri River Master Water Control Manual. On August 28, 2001, Corps published in the Federal Register a notice of availability (enclosed) for the Draft Environmental Impact Statement (DEIS) for the Missouri River Master Water Control Manual Review and Update. I will forward a copy

of your letter to the Corps Northwestern Division for their consideration during the comment period on the DEIS. I encourage you to contact the Corps and work with them to explore your ideas concerning the generation of wind power.

Proposals for TPP studies will be developed by Corps Commands and submitted to Corps Headquarters for consideration in the President's budget request. I would encourage you to open a dialogue with Lieutenant Colonel (P) Kurt F. Ubbelohdt, Commander of the Corps Omaha District, concerning the development of a study proposal under the TPP. The President's budget proposal for Fiscal Year (FY) 2002 has been submitted to Congress. In the meantime, I would encourage you to contact the Omaha District to see if there are other ways the Corps can assist you, such as providing technical information or discussing potential implementation issues in advance.

I am hopeful that communication and consultation with the Corps will serve to forge a solid and responsive relationship with your organization. To aid in the development of effective communication, I am providing Lieutenant Colonel Ubbelohdt with a copy of this letter. Additionally, the next time you visit Washington, D.C., perhaps we can meet and discuss further our Nation's energy goals. Please continue to coordinate with Mr. Chip Smith, my Acting Deputy Assistant Secretary of the Army (Policy and Legislation). Mr. Smith can be reached at (202) 761-7769.

Sincerely,

A handwritten signature in black ink that reads "Dominic Izzo". The signature is stylized with a large, sweeping initial "D" and a long, horizontal stroke extending to the right.

Dominic Izzo  
Principal Deputy Assistant Secretary of the Army  
(Civil Works)

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PUBLIC HEARING  
ACCEPTING COMMENTS REGARDING  
MISSOURI RIVER REVISED DRAFT ENVIRONMENTAL IMPACT STATEMENT  
MASTER WATER CONTROL MANUAL

PROCEEDINGS HELD AT:

Golden Buffalo Convention Center  
Lower Brule, South Dakota 57548

Tuesday, October 30, 2001  
7:00 o'clock p.m.

Reported by Carla A. Bachand, RMR, Capital Reporting  
Services, P.O. Box 903, Pierre, South Dakota 57501 (605)  
224-7611.

1 TUESDAY, OCTOBER 30, 2001

2 (Colonel David Fastabend gave a short welcome and  
3 opening statement, followed by the showing of a video.)

4 MICHAEL JANDREAU: My name is Michael Jandreau. I am  
5 the chairman of the Lower Brule Sioux Tribe. Our address is  
6 Box 187, Lower Brule Sioux Tribe, Lower Brule, South Dakota  
7 57548. I come tonight to speak on behalf of the Lower Brule  
8 Tribe. Written comments will be submitted in a much more  
9 lengthy version at a later date.

10 First of all, let me say I appreciate your coming here  
11 to hold this hearing. I think it's an opportunity for us not  
12 only to speak to you directly but to indicate to you our  
13 interest in the Missouri River. Having lived all my life on  
14 the Lower Brule Reservation and having been born in this area,  
15 the river and what happens with it is very important to me.  
16 The Master Manual is a fine document and it's a document of  
17 expediency that the Corps of Engineers in their process has  
18 done a great deal to develop. There are many flaws in that  
19 document in as far as how it addresses native concerns. I  
20 will speak to very few of those.

21 The U.S. Fish and Wildlife portion is very troubling  
22 for a number of reasons. One of the reasons primarily is that  
23 as far as endangered species, Lake Sharpe, which the majority  
24 of our reservation is affected by, and Lake Francis Case,  
25 there is not a real concern about doing anything about that

CAPITAL REPORTING SERVICES

1 particular situation. In fact we are all but excluded. That  
2 portion also seems to address the idea of quantification of  
3 our water rights, which is not appropriate, which is not  
4 acceptable to us as a tribe. The power generation portion,  
5 which we have finally been able to access through Western Area  
6 Power, has the potential under the variety of the plans of  
7 being adversely affected. That's very troubling to me as a  
8 tribal leader who is concerned about those benefits that need  
9 to accrue to our membership.

10 As far as the fluctuations of the lake, the siltation  
11 problem that we have, at least on our reservation, is not  
12 solely due to instream flows. Roughly 75 to 80 percent of the  
13 siltation that has occurred has occurred as a result of  
14 erosion of the shoreline. Big Bend Dam is one of the primary  
15 electrical generators for its size and has to be maintained at  
16 a more significant stable level than any of the other  
17 reservoirs simply because of the generation capacity of that  
18 facility. That is good for America but it's terrible for our  
19 tribe. We can take you and show you areas of our reservation  
20 where the shoreline is now tribal land and it's tribal land  
21 because everything that was acquired by the Corps is now in  
22 the bottom of the lake and it is encroaching upon our lands.

23 We are in a position now to do something. We can do  
24 it cooperatively or we can do it through mechanisms that we  
25 all hate, that only make a certain segment of our population



1 wealthy, and stay in the courthouse forever. It's not in our  
2 interests to do that and it's not in the government's  
3 interest. We need to address what is contained in that manual  
4 more significantly than receiving final comments and going  
5 through the finalization, even though we know politically that  
6 there are two laws that have been passed whose continued  
7 funding, which is beneficial to tribal people as well as to  
8 state people and to federal people, that will not receive the  
9 funding unless this plan is finalized, and it puts us in a  
10 very, very difficult position. We want to do something about  
11 trying to correct the errors that have been created. We lack  
12 the resources financially and we lack the resources physically  
13 to be able to stop or to change what is occurring.

14           As I stated earlier, the siltation is a major problem  
15 on our particular reservation. We need more significantly for  
16 it to be addressed in a fashion where there is a developed  
17 plan resulting from what is stated to adequately deal with  
18 this. In the brochure that was sent out, it talked about what  
19 has occurred in the years that have gone by since the  
20 development of the dams and where approximately the siltation  
21 is at. That approximation, by my own physical knowledge of  
22 what has happened in that lake here at Lower Brule and  
23 adjacent to our reservation, is vastly different. It's far --  
24 it has far accelerated what the projected ideals are.

25           The studies that have been done have been minimal to

1 meet base requirements and they have not really addressed the  
2 plan as to how to deal with this. The plans that are also  
3 being currently utilized follow and parrot what is being  
4 expressed in the potential of the film that you have. We  
5 watch this lake and we watch what happens with it. We watch  
6 when there are increased flows to move siltation, even though  
7 by verbiage, that is denied. At least in this document, it is  
8 being honestly expressed, but it's happening right now.

9           And those things create in our minds the ideal that do  
10 we really have a true relationship that we are all concerned  
11 with or do we have a relationship that a document that lays  
12 out guidelines for what is to happen for the next who knows  
13 how many years, because I don't think anybody wants to go  
14 through the effort again, and we just step back and accept  
15 it. We just can't do that.

16           And so although my remarks have kind of been all over  
17 the place, I hope that you understand my concerns, and we will  
18 have a document to you that more expressly and concisely  
19 identifies the total of our concerns. Thank you very much for  
20 this opportunity.

21           COLONEL DAVID FASTABEND: Well, Chairman, for someone  
22 who was reluctant to stand up, you certainly spoke eloquently  
23 and I thank you for your remarks. I have a question. You  
24 talked about concerns about the fish and wildlife portion of  
25 the document. By that do you mean the portions of the

1 document that address the Endangered Species Act?

2 MICHAEL JANDREAU: Yes.

3 COLONEL DAVID FASTABEND: I wanted to make sure I  
4 understood that. Thank you very much.

5 RICHARD MOORE: John Cooper.

6 JOHN COOPER: Good evening. I am John Cooper,  
7 Secretary for South Dakota Department of Game, Fish and  
8 Parks. Our address is the Foss Building, 523 East Capitol,  
9 Pierre, South Dakota 57501. I am here to read into the record  
10 the joint comments from the South Dakota Department of  
11 Environment and Natural Resources and the Department of Game,  
12 Fish and Parks on Revised Draft Environmental Impact Statement  
13 for the Missouri River Master Water Control Manual.

14 I want to thank you for this opportunity to provide  
15 comments on the Revised Draft Environmental Impact Statement  
16 for the Missouri River Master Water Control Manual. As you  
17 know, this subject is not new to the Corps, it's not new to  
18 the South Dakota Department of Environment and Natural  
19 Resources, nor is it new to the Department of Game, Fish and  
20 Parks. For the past 12 years, the Corps has been engaged in a  
21 process to change the management of the Missouri River.  
22 Publication of the Revised Draft Environmental Impact  
23 Statement by the Corps, which contains six different  
24 alternatives, is a huge step forward. But this is no time to  
25 rest. It is time to study the alternatives, make the final

CAPITAL REPORTING SERVICES

1 decisions and move forward with implementing a new Master  
2 Manual that definitely works for the river.

3           Officials of the Corps have said that the final  
4 decision or alternative must meet all three of the following  
5 objectives. Number one, it must serve congressionally  
6 authorized project purposes. Number two, it must serve the  
7 contemporary needs of the basin. And number three, it must  
8 comply with all applicable laws to include the federal  
9 Threatened and Endangered Species Act.

10           The Department of Game, Fish and Parks and the  
11 Department of Environment and Natural Resources agree with  
12 using these three criteria to make the final alternative and  
13 decision. We believe that approach will result in the best  
14 plan for the entire Missouri River basin.

15           The Corps included the current Water Control Plan as  
16 one of the six alternatives in the Revised Draft Environmental  
17 Impact Statement. However, using the three criteria above, it  
18 is clear that the current 40-year-old Master Manual cannot be  
19 the final alternative. When the mainstem dams were built, the  
20 vision for the river was one of flood control, hydropower,  
21 navigation, and irrigation. While flood control and  
22 hydropower followed the vision and have been very successful,  
23 irrigation and navigation have not. Less than 10 percent of  
24 the land authorized for irrigation under the Flood Control Act  
25 of 1944 is irrigated today. Only slightly more than 10

1 percent of the annual commercial navigation anticipated under  
2 the Flood Control Act of 1944 takes place today, and the Corps  
3 currently estimates that to be a \$7 million industry.

4           Clearly the contemporary uses of the Missouri River no  
5 longer reflect those 40-year-old visions. Instead of using  
6 the river for large scale irrigation and navigation projects,  
7 people have found other uses for the Missouri River. Fishing,  
8 boating, and recreation uses have increased tenfold and  
9 recreation is now estimated at an annual \$87 million industry  
10 in the basin. However, the current Master Manual drains the  
11 upper basin reservoirs during even moderately dry periods to  
12 maintain navigation flows downstream and therefore leaves  
13 recreational users high and dry. Therefore, the contemporary  
14 uses of the river demand that changes are made to the Master  
15 Manual and keeping the current Master Manual is simply not an  
16 acceptable option.

17           The remaining five alternatives in the Revised Draft  
18 Environmental Impact Statement share several of the following  
19 changes from the existing Master Manual, all of which we  
20 strongly support. Number one, adaptive management. In a  
21 river whose watershed encompasses one-sixth of the continental  
22 United States, there will never be what is termed normal  
23 conditions. There will be constant changes in the weather  
24 patterns, the runoff, and river uses. Consequently, giving  
25 the Corps the authority and flexibility to address constantly

1 changing conditions must be a component of the final  
2 decision. Having the Corps locked into the current inflexible  
3 Master Manual makes no sense at all. It breeds hostility  
4 between the users of the river and has driven certain species  
5 onto the federal threatened and endangered species List.

6           Number two, drought conservation measures. The  
7 current Master Manual does very little for water  
8 conservation. America has entered a new era. We are no  
9 longer a country with unlimited natural resources. Upper  
10 basin states know conservation measures are important because  
11 we have seen the consequences of river management with little  
12 or no conservation measures under the current Master Manual.  
13 Low water levels in upper basin reservoirs eliminate those  
14 recreational uses, devastate local economies, and increase the  
15 risk of having catastrophic drought impacts downstream. It is  
16 absolutely critical, then, that drought conservation measures  
17 be part of the final decision.

18           Number three, unbalancing of the upper three  
19 reservoirs. Unbalancing the reservoirs will improve habitat  
20 conditions for nesting terns and plovers and trigger spawning  
21 for the pallid sturgeon. At the same time, unbalancing of the  
22 reservoirs provides benefits to other fisheries in these three  
23 lakes. Game, Fish and Parks and the Department of Environment  
24 and Natural Resources support the concept of unbalancing and  
25 recommend that it be a component of the final decision.

1           Number four, flow modifications from Fort Peck  
2 reservoir. Construction of the mainstem reservoirs have had  
3 very negative effects on several of our native river species.  
4 Flow modification from Fort Peck is a logical and reasonable  
5 approach to help restore these species. If these species can  
6 be restored, the entire basin benefits by avoiding the  
7 potential court-ordered management of the river through the  
8 Endangered Species Act. Game, Fish and Parks and DENR  
9 strongly support the concept of flow modifications from Fort  
10 Peck whenever water availability makes those flows feasible.

11           Four of the alternatives in the Revised Draft  
12 Environmental Impact Statement share the following attribute,  
13 which Game, Fish and Parks and Department of Environment and  
14 Natural Resources also recommend. Flow modifications from  
15 Gavins Point Dam. As mentioned above, construction of the  
16 mainstem reservoirs has had very negative impacts on several  
17 of our native river species. Flow modifications from Fort  
18 Peck, when water availability makes it feasible, has been  
19 largely agreed upon as a way to help restore these species.  
20 However, proposed flow modifications from Gavins Point have  
21 been much more controversial. The Department of Game, Fish  
22 and Parks and the Department of Environment and Natural  
23 Resources support flow modifications from Gavins Point Dam for  
24 the same reasons as we support the flow modifications from  
25 Fort Peck reservoir.

1           Of the four alternatives in the Revised Draft  
2 Environmental Impact Statement that contain flow modifications  
3 from Gavins Point, Department of Game, Fish and Parks and the  
4 Department of Environment and Natural Resources strongly  
5 support the Corps having the ability to implement GP20/21  
6 alternative through adaptive management. The science behind  
7 this alternative has gained nearly universal support from the  
8 technical fish and wildlife community and it provides maximum  
9 recreational benefits to the state of South Dakota. Missouri  
10 River recreation is critical to South Dakota's economy and its  
11 quality of life.

12           This concludes our comments and recommendations for  
13 the Revised Draft Environmental Impact Statement. Using the  
14 criteria established by the Corps for selecting the final  
15 alternative, the Department of Game, Fish and Parks and the  
16 Department of Environment and Natural Resources are confident  
17 that our recommendations will become the Corps's final  
18 decision. We look forward to working with the Corps and the  
19 other basin states to implement the new Master Manual and to  
20 maximize those beneficial uses and quality of life throughout  
21 the entire Missouri River basin.

22           And these comments are signed jointly by John Cooper,  
23 Secretary of Game, Fish and Parks, and by Steve Pirner, who is  
24 the Secretary of Environment and Natural Resources  
25 Department.



1 COLONEL DAVID FASTABEND: Thank you, Mr. Cooper.  
2 Appreciate your comments.

3 RICHARD MOORE: Nell McPhillips.

4 NELL McPHILLIPS: Good evening. My name is Nell  
5 McPhillips and I am here this evening on behalf of the U.S.  
6 Fish and Wildlife Service to issue a brief statement on the  
7 Revised Draft EIS for the Missouri River Master Water Control  
8 Manual. I am also here to listen to the comments in person  
9 from tribal people on this important issue.

10 The Service has primary authority for oversight of our  
11 nation's rarest animals under the Endangered Species Act. The  
12 Missouri River is home to the endangered pallid sturgeon and  
13 least tern, and the threatened piping plover. The decline of  
14 these species tells us that the river is not healthy for its  
15 native fish and wildlife and that there needs to be a change  
16 in its management to restore the Missouri to a more naturally  
17 functioning river system. A healthy river provides wildlife  
18 habitat, supports fishing, and makes boating an attractive  
19 recreational activity.

20 Congress committed the federal government to  
21 preventing extinctions by requiring federal agencies to use  
22 their authorities to conserve endangered and threatened  
23 species. During the last 12 years our agency has been working  
24 with the Corps of Engineers to modernize the management of the  
25 Missouri River to help stabilize and hopefully begin to

CAPITAL REPORTING SERVICES

1 increase and recover populations of these very rare animals.  
2 This new approach was recently described in a document called  
3 the Missouri River Biological Opinion, which was published in  
4 November of 2000.

5           The Biological Opinion looks at the river as a system  
6 and outlines the status of these rare species, the effects of  
7 the current operation on them, and a reasonable and prudent  
8 alternative to the current operation that will not jeopardize  
9 their continued existence.

10           Our biological opinion is based on the best available  
11 science and includes nearly 500 scientific references. In  
12 addition, we have sought out six respected scientists or big  
13 river specialists who confirm the need to address flow  
14 management as well as habitat restoration. Further, the  
15 Missouri River Natural Resources Committee, a group comprised  
16 of state experts on Missouri River management, endorses the  
17 science used in the opinion.

18           If you have read the Revised Draft EIS or summary  
19 document, you understand that the GP alternatives encompass  
20 the range of flows identified by the Service as necessary  
21 below Gavins Point Dam to keep the listed species from being  
22 jeopardized. Our agency and the Corps also recognize the  
23 importance of some flexibility in management that would enable  
24 Missouri River managers to capitalize on existing water  
25 conditions to meet endangered species objectives without

1 having to go through another 12-year process.

2           Other management changes identified in the biological  
3 opinion include a spring rise out of Fort Peck Dam, an  
4 improved hatchery operation to assist declining pallid  
5 sturgeon populations, restoration of approximately 20 percent  
6 of the lost aquatic habitat in the lower third of the river,  
7 intrasystem unbalancing of the three largest reservoirs, and  
8 acceptance of an adaptive management framework that would  
9 include improved overall monitoring of the river.

10           In closing, the Service supports the identified goal  
11 of the revised Master Manual, to manage the river to serve the  
12 contemporary needs of the Missouri River basin and the  
13 nation. These needs include taking steps to insure that  
14 threatened and endangered species are protected while  
15 maintaining many other socioeconomic benefits being provided  
16 by the operation of the Missouri River dams. The Service  
17 stands behind the science used in the opinion and is confident  
18 that the operational changes identified in our opinion and  
19 included in the Revised Draft EIS as GP alternatives will  
20 insure these rare species continue to be part of the Missouri  
21 River's living wildlife legacy.

22           The Missouri River is a tremendous river with a  
23 significant and revered heritage. Our influence has altered  
24 the river greatly. Changes are needed to modernize and  
25 restore health to the river for the benefit of rare species

1 and for people, too. Thank you.

2 COLONEL DAVID FASTABEND: Thank you, Ms. McPhillips.

3 RICHARD MOORE: Patrick Spears.

4 PATRICK SPEARS: If you don't mind, I would like to  
5 stand here, too. I feel more comfortable speaking to you  
6 people than having you look at my back. My name is Patrick  
7 Spears. I am the president of Intertribal Council on Utility  
8 Policy, address is P.O. Box 224, Fort Pierre, South Dakota. I  
9 represent eight tribes in North Dakota, South Dakota and  
10 Nebraska, those being Spirit Lake Tribe, Three Affiliated  
11 Tribes, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe,  
12 the Lower Brule Sioux Tribe, Rosebud Sioux Tribe, Flandreau  
13 Sante Sioux Tribe, and the Omaha Tribe in Nebraska. I am a  
14 member of the Lower Brule Sioux Tribe and represent my tribe  
15 Intertribal Council on Utility Policy, our acronym is ICoup.

16 I am thankful that you have come here to Lower Brule  
17 to host this hearing. I thank you and my tribal leadership  
18 here for hosting this meeting and all of you for coming. I  
19 know that you have a myriad of problems that are impacts of  
20 the Missouri River because of the reservoir system. And we  
21 all have a particular interest in some of those, from the  
22 endangered species, cultural resources, shoreline protection,  
23 managing the upstream versus downstream interests of  
24 recreation, navigation, and flood control and power  
25 generation.

1           I have come to offer an alternative, which has not  
2 been addressed or enlisted in the Revised EIS for the Master  
3 Control Manual and that is the generation of wind energy,  
4 which I think could help, being blended into the power and  
5 become a significant part of the power that's generated by the  
6 reservoir system and that has to meet contracts with all of  
7 the customers that are all around this area, within the state  
8 and most of the majority of which are out of state.

9           We have a tremendous potential for wind energy here in  
10 the Great Plains. The Department of Energy estimates that 75  
11 percent of the energies of this country could be met through  
12 wind energy if it were all harnessed and the transmission  
13 would accommodate that. The reservoir system generates  
14 approximately 2500 megawatts annually. On the reservations  
15 alone it's been estimated by the National Energy Laboratory  
16 that 100 times that amount could be generated on the  
17 reservations alone. That's over 250,000 megawatts. We are  
18 asking that a portion of that power be developed in concert  
19 with the Corps of Engineers to help minimize this problem  
20 that's created by lower water levels created by less  
21 precipitation and runoff.

22           We have seen over the past decade the lowest water  
23 levels in the reservoir in history and I guess it's quoted  
24 even this coming year may be the lowest level yet and the  
25 lowest year for power production, yet the greatest need for

CAPITAL REPORTING SERVICES

1 the need to buy supplemental power to meet contractual  
2 obligations of the 20-year contracts. What we are proposing  
3 is that the Corps consider the merging of wind and hydropower  
4 and blending that into the power that's generated throughout  
5 the year, and we think that is possible because of your peak  
6 seasons being winter, and in summertime in particular, there  
7 are higher demands. It would complement the strong wind  
8 seasons we have here, beginning October through March.

9 That power could be generated into the system and fed  
10 into it all along the river and into the WAPA power lines by  
11 intertribal wind farm operations. That could be happening all  
12 along the year and it could be balancing. We realize that  
13 needs some study and we would encourage you to support that,  
14 as we are encouraging our congressional delegation to do so  
15 also.

16 We work with a number of other intertribal  
17 organizations across the country on policy and legislative  
18 recommendations affecting energy use and the generation of  
19 this country. We think tribes can significantly contribute to  
20 the energy economy and our own restoration of our economy,  
21 which have been greatly impacted by the construction of the  
22 reservoir system, and contribute to the energy security of the  
23 United States. And we think that this can be done in  
24 partnership with the Corps, that is probably unprecedented in  
25 that we have been at odds with the Corps, as well as many

1 states have and a number of groups have been over all of these  
2 issues that are impacted there.

3           We think it's a time of cooperation that is needed  
4 right now. There has never been a stronger need for it. If  
5 you look at the flow of the river and the climate change  
6 scenarios that are projected, the climate variability models,  
7 it looks to be that one of less precipitation. In the last 12  
8 years it has probably shown that. If so, you need to be ready  
9 with a plan and an alternative to address that, because with  
10 the need to buy supplemental power on the market, the cost of  
11 power is going to be going up and that's going to drive up  
12 that cost of power for all of the customers, and we as tribal  
13 governments, who have gotten some of that power for the  
14 first -- other than irrigation use for the first time in  
15 history in January 2001 and now, that has taken some 30 years,  
16 and actually it's more than that, since the '44 Flood Control  
17 Act, but it's been a long time.

18           Now if that power that has been paid for we feel over  
19 and over again by the taking of our land and the economic  
20 recovery that we are still in, if that's going to be going up,  
21 that negates all of that effort that's went into that to date  
22 and we think that is wrong and we should do something about  
23 it.

24           To give you an idea of the economic sense of this for  
25 all of us that are here, we have seen over the past four years

1 the amount of supplemental power that WAPA has had to purchase  
2 on the spot market go from 30 to 40, 50 million to 140 million  
3 in June of this year, since October 1 of 2000. The Corps of  
4 Engineers has projected that's going to be at that same rate  
5 240 million in 2002, so we are offering to partner with you in  
6 generation so that we can stabilize the limited and decreasing  
7 water level of the Missouri River, and hopefully help the  
8 economies of everybody that's affected by the flow of the  
9 river and impact all those areas that you are dealing with and  
10 that often have ended up in court and may do so again.

11 As our chairman on Lower Brule just indicated, nobody  
12 wants to go there again. It's been our time in court, we have  
13 better things to do and it's time to take a look at a new way  
14 of looking at management of the river and of the energy that's  
15 produced from there. So we have put this together in a  
16 written document also, which I am leaving with you, and I  
17 would just encourage you to give it some serious thought,  
18 discuss it with the other tribes. I do commend you for  
19 consulting with each of the tribes at these hearings. I  
20 understand there may be more to come, some of our relatives up  
21 the river, and I think that is the best thing that you can  
22 do. So I thank you for that and this time to talk to you.

23 COLONEL DAVID FASTABEND: Thank you, Mr. Spears. Is  
24 there anyone else that would like to make a statement  
25 tonight? Well, in closing I would like to remind you that the



1 hearing administrative record is going to be open through 28  
2 February 2002 for anyone wishing to submit written facts or  
3 electronic comments. Also if you would like to be on our  
4 mailing list or receive a copy of the transcript, you need to  
5 fill out one of the cards available at the table at the back.  
6 If there are no further comments, I want to once more thank  
7 Chairman Jandreau and the Lower Brule Sioux Tribe for  
8 requesting and participating in this hearing on their tribal  
9 homelands. This session is closed. Thank you.

10 (Whereupon, the proceedings were concluded at 8:20  
11 p.m.)

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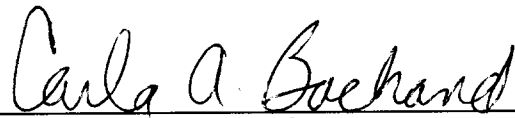
STATE OF SOUTH DAKOTA     )  
  )  ss.  
COUNTY OF HUGHES         )

I, Carla A. Bachand, RPR, CM, Freelance Court Reporter for the State of South Dakota, residing in Pierre, South Dakota, do hereby certify:

That I was duly authorized to and did report the testimony and evidence in the above-entitled cause;

I further certify that the foregoing pages of this transcript represents a true and accurate transcription of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on this the 5th day of November, 2001.

  
\_\_\_\_\_  
Carla A. Bachand, RPR, CM  
Freelance Court Reporter  
Notary Public, State of South Dakota  
Residing in Pierre, South Dakota.

My commission expires: June 10, 2006.





October 29, 2001

U.S. Army Corps of Engineers  
Attn: Project Manager, Master Manual Review and Update  
12565 West Center Road  
Omaha, NE 68144

Re: Comments from South Dakota Department of Environment & Natural Resources and Game, Fish & Parks on Revised Draft Environmental Impact Statement for the Missouri River Master Water Control Manual

Dear Project Manager:

Thank you for the opportunity to provide comments on the Revised Draft Environmental Impact Statement for the Missouri River Master Water Control Manual. This subject is not new to the Corps, South Dakota Department of Environment & Natural Resources (DENR) or Game, Fish & Parks (GF&P). For the past twelve years, the Corps has been engaged in a process to change the management of the Missouri River. Publication of the Revised Draft Environmental Impact Statement by the Corps which contains six different alternatives is a huge step forward. But this is no time to rest. It is time to study the alternatives, make the final decisions, and move forward with implementing a new Master Manual that works for the river.

Officials of the Corps have said the final decision or alternative must meet all three of the following objectives:

1. it must serve congressionally authorized project purposes;
2. it must serve the contemporary needs of the basin; and
3. it must comply with all applicable laws to include the federal Threatened and Endangered Species Act.

GF&P and DENR agree with using these three criteria to make the final alternative and decision. We believe that approach will result in the best plan for the entire Missouri River basin.

The Corps included the current Water Control Plan as one of the six alternatives in the Revised Draft Environmental Impact Statement. Using the three criteria above, it is clear the current 40-year old Master Manual cannot be the final alternative. When the mainstem dams were built, the vision for the river was one of flood control, hydropower, navigation, and irrigation. While flood control and hydropower followed the vision and have been very successful, irrigation and navigation have not. Less than 10 percent of the land authorized for irrigation under the Flood

Control Act of 1944 is irrigated today. Only slightly more than 10 percent of the annual commercial navigation anticipated under the Flood Control Act of 1944 takes place today, and the Corps estimates it to be \$7 million industry.

Clearly, the contemporary uses of the Missouri River no longer reflect those 40-year old visions. Instead of using the river for large-scale irrigation and navigation projects, people have found other uses for the river. Fishing, boating, and recreation uses have increased ten-fold, and recreation is now an annual \$87 million industry in the basin. However, the current Master Manual drains the upper basin reservoirs during even moderately dry periods to maintain navigation flows downstream and leaves recreational users high and dry. Therefore, the contemporary uses of the river demand that changes are made to the Master Manual and keeping the current Master Manual is simply not an acceptable option.

The remaining five alternatives in the Revised Draft Environmental Impact Statement share several of the following changes from the existing Master Manual, all of which we strongly support:

- **Adaptive management** - In a river whose watershed encompasses one-sixth of the continental United States, there will never be "normal" conditions. There will be constant changes in the weather patterns, runoff, and river uses. Consequently, giving the Corps the authority and flexibility to address constantly changing conditions must be a component of the final decision. Having the Corps locked into the current inflexible Master Manual makes no sense, breeds hostility between the users of the river, and has driven certain species onto the federal threatened and endangered species list.
- **Drought conservation measures** - The current Master Manual does very little for water conservation. America has entered a new era. We are no longer a country with unlimited natural resources. Upper basin states know conservation measures are important because we have seen the consequences of river management with little or no conservation measures under the current Master Manual. Low water levels in upper basin reservoirs eliminate recreational uses, devastate local economies, and increase the risk of having catastrophic drought impacts downstream. It is absolutely critical that drought conservation measures be part of the final decision.
- **Unbalancing of the upper three reservoirs** - Unbalancing the reservoirs will improve habitat conditions for nesting terns and plovers and trigger spawning for the pallid sturgeon. At the same time, unbalancing of the reservoirs provides benefits to other fisheries in these three lakes. GF&P and DENR support the concept of unbalancing and recommend it be a component of the final decision.
- **Flow modifications from Fort Peck reservoir** - Construction of the mainstem reservoirs has had very negative impacts to several of the native river species. Flow modification from Fort Peck is a logical and reasonable approach to help restore these species. If these species can be restored, the entire basin benefits by avoiding the potential court-ordered management of the river through the Endangered Species Act. GF&P and DENR strongly support the concept of flow modifications from Fort Peck when water availability makes it feasible.

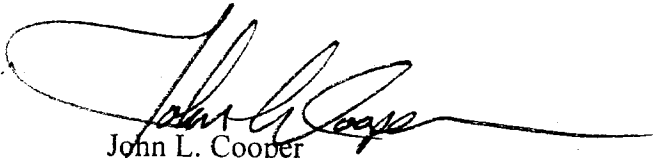
Four of the alternatives in the Revised Draft Environmental Impact Statement share the following attribute, which GF&P and DENR also support:

- **Flow modifications from Gavins Point dam** - As mentioned above, construction of the mainstem reservoirs has had very negative impacts on several native river species. Flow modification from Fort Peck when water availability makes it feasible has been largely agreed upon as a way to help restore these species. However, proposed flow modifications from Gavins Point have been much more controversial. GF&P and DENR support flow modifications from Gavins Point dam for the same reasons as we support flow modifications from Fort Peck.


Of the four alternatives in the Revised Draft Environmental Impact Statement that contain flow modifications from Gavins Point, GF&P and DENR strongly support the Corps having the ability to implement the GP20/21 alternative through adaptive management. The science behind this alternative has gained nearly universal support from the technical fish and wildlife community and provides maximum recreational benefits for South Dakota. Missouri River recreation is critical to South Dakota's economy and quality of life.

This concludes our comments and recommendations for the Revised Draft Environmental Impact Statement. Using the criteria established by the Corps for selecting the final alternative, GF&P and DENR are confident our recommendations will become the Corps' final decision. We look forward to working with the Corps and the other basin states to implement the new Master Manual and maximize the beneficial uses and quality of life throughout the entire Missouri River basin.

Sincerely,



John L. Cooper  
Secretary  
Game, Fish & Parks



Steven M. Pirner  
Secretary  
Environment & Natural Resources

cc: Governor William J. Janklow  
U.S. Senator Tom Daschle  
U.S. Senator Tim Johnson  
U.S. Congressman John Thune



U.S. Fish and Wildlife Service  
Public Comments  
Missouri River Master Manual Hearing  
Lower Brule, South Dakota, October 30, 2001

**Good evening, my name is Nell McPhillips and I'm here this evening on behalf of the U.S. Fish and Wildlife Service to issue a brief statement on the Revised Draft Environmental Impact Statement for the Missouri River Master Water Control Manual. I'm also here to listen to the comments in person from citizens on this important issue.**

**The Service has primary authority for oversight of our nation's rarest animals under the Endangered Species Act. The Missouri River is home to the endangered pallid sturgeon and least tern, and the threatened piping plover. The decline of these species tells us that the river is not healthy for its native fish and wildlife, and that there needs to be a change in its management to restore the Missouri to a more naturally functioning river system. A healthy river provides wildlife habitat, supports fishing, and makes boating an attractive recreational activity.**

**Congress committed the Federal Government to preventing extinctions by requiring Federal agencies to use their authorities to conserve endangered and threatened species. During the last 12 years our agency has been working with the U. S. Army Corps of Engineers to modernize the management of the Missouri River to help stabilize and hopefully, begin to increase and recover populations of these vary rare animals. This**



**new approach was described recently in a document called the “Missouri River Biological Opinion,” published in November 2000.**

**The biological opinion looks at the river as a system and outlines the status of these rare species, the effects of the current operation on them, and a reasonable and prudent alternative to the current operation that will not jeopardize their continued existence.**

**Our biological opinion is based on the best available science and includes nearly 500 scientific references. In addition, we’ve sought out 6 respected scientists – “big river specialists” – who confirmed the need to address flow management, as well as habitat restoration. Further, the Missouri River Natural Resources Committee, a group comprised of the state experts on Missouri River management, endorses the science in the opinion.**

**If you have read the RDEIS or summary document, you understand that the “GP alternatives” encompass the range of flows identified by the Service as necessary below Gavin’s Point Dam to keep the listed species from being jeopardized. Our agency, and the Corps, also recognized the importance of some flexibility in management that would enable Missouri River managers to capitalize on existing water conditions to meet endangered species objectives without having to go through another 12-year process.**

**Other management changes identified in the biological opinion include a “spring rise” out**

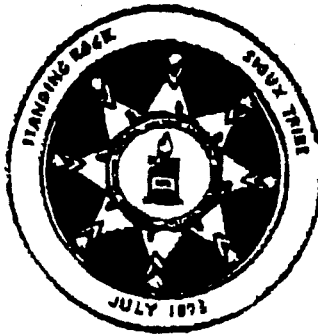
**of Fort Peck Dam, an improved hatchery operation to assist declining pallid sturgeon populations, restoration of approximately 20% of the lost aquatic habitat in the lowest 1/3 of the river, intrasystem unbalancing of the three largest reservoirs, and acceptance of an adaptive management framework that would include improved overall monitoring of the river.**

**In closing, the Service supports the identified goal of the revised master manual - to manage the river to serve the contemporary needs of the Missouri River Basin and Nation. These needs include taking steps to ensure that threatened and endangered species are protected while maintaining many other socioeconomic benefits being provided by the operation of the Missouri River dams. The Service stands behind the science used in the opinion, and is confident that the operational changes identified in our opinion, and included in the RDEIS as GP alternatives will ensure that these rare species continue to be a part of the Missouri River's living wildlife legacy.**

**The Missouri River is a tremendous river, with a significant and revered heritage. Our influence has altered the river greatly. Changes are needed to modernize and restore health to the river – for the benefit of rare species and for people, too.**



Charles W. Murphy  
Chairman



Tom Iron  
Vice Chairman

Elaine McLaughlin  
Secretary

**DISTRICTS**

Robert Cardova  
Cannonball District

Raphael See Walker  
Fort Yates District

Joe Strong Heart  
Wakpala District

Palmer Defender  
Kenel District

Dean Bear Ribs  
Bear Soldier District

Milton Brown Otter  
Rock Creek District

Farren Long Chase  
Little Eagle District

Randal White Sr.  
Porcupine District

**AT LARGE**

Jesse Taken Alive

Reva Gates

Pat McLaughlin

Miles McAllister

Ron Brown Otter

Isaac Dog Eagle, Jr.

November 21, 2001

Mr. Pem Hall, N.A. Coordinator  
U.S. ACOE - Executive Office  
106 South 15<sup>th</sup> Street  
Omaha, NE 68102

Dear Mr. Hall:

This letter is to inform you that due to sudden emerging priorities of the Standing Rock Sioux Tribe, the Standing Rock Tribal Council is requesting that the hearing on the Master Manual scheduled for December 4, 2001 be rescheduled December 20, 2001 or later.

I apologize for any inconvenience this may have caused. If you have any questions, please contact Tim Mentz, Sr., THPO Officer at 701-854-7201.

Sincerely,

STANDING ROCK SIOUX TRIBE

Charles W. Murphy, Chairman



# FORT PECK TRIBES

Assiniboine & Sioux

November 27, 2001

U. S. Army Corps of Engineers  
Northwest Division  
12565 West Center Road  
Omaha, Nebraska 68144-3869

ATTN: Missouri River Master Manual RDEIS

Dear RDEIS Staff:

These comments on the Biological Opinion in support of the RDEIS for the Missouri River Master Manual are formally filed by the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in northeastern Montana. The Tribes' Reservation is bounded on the south by the Missouri River below Fort Peck Dam over a distance of 141 miles, between river miles 1621 and 1762. Our interest in this matter is significant. Approximately 75% of the north or left bank of the Missouri River between Fort Peck Dam and the backwaters of Lake Sakakawea near the border with North Dakota lie within the Fort Peck Indian Reservation in the reach to be affected by Master Manual operating procedures, including testing and future operations to generate a spring rise.

The Biological Opinion on p. 172 only addresses Indian water rights as follows:

*In United States v. Winters, 207 U.S. 564 (1908), the United States Supreme Court recognized the doctrine of reserved water rights, which assures that Native American lands (and other public lands set aside by the government for a particular purpose) will receive sufficient water to fulfill the purposes of the reservation. Most water rights in the western United States (which includes all Missouri River Basin states, except Minnesota, Iowa and Missouri) have priority based on when water was first put to a beneficial use such as agriculture. However, Federal reserved water rights for Native American reservations and other federally-reserved lands have priorities dating back to at least as early as when the reservations were established (and, in the case of Native American reserved water rights, possibly earlier), even if water use on the reserved lands begins at a much later date. As many as twenty-eight tribes claim water rights to the Missouri River, and in most cases these claims precede the water rights of any non-Indians. Although Congress has consented to the adjudication of Native American reserved water rights in state courts in general stream adjudications, reserved rights are not subject to state law and can be adjudicated in Federal court.*

*Many reservations along the Missouri River now use or have plans to use Missouri River water for drinking water and irrigation. The Fort Peck tribes have applied for a Federal appropriation for a municipal, rural, and industrial project in Montana that will extract approximately 4,000 acre-feet of water annually from the Missouri River.*

The water rights of the Fort Peck Assiniboine and Sioux Tribes totally near 1 million acre feet annually from the Missouri River have been settled by compact with the State of Montana as of 1985 with a priority dating as early as 1888. The Biological Opinion does not address those water rights in the baseline analysis; and, therefore, the Biological Opinion is deficient.

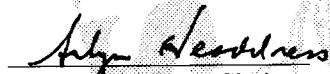
The Working Group on the Endangered Species Act and Indian Water Rights, Department of Interior, published recommendations for consideration of Indian water rights in Section 7 Consultation, in national guidance for undertakings such as the Master Manual, as follows:

*The environmental baseline used in ESA Section 7 consultations on agency actions affecting riparian ecosystems should include for those consultations the full quantum of: (a) adjudicated (decreed) Indian water rights; (b) Indian water rights settlement act; and (c) Indian water rights otherwise partially or fully quantified by an act of Congress...*

The environmental baseline for ESA Section 7 consultation on the Missouri River does not include the water rights of the Fort Peck Assiniboine and Sioux Tribes as settled by Compact with the State of Montana and is therefore in need of revision.

Please provide the name of a Corps of Engineers' and U. S. Fish and Wildlife representatives responsible for this matter and a time frame for response to our concern. The Tribes are willing to correspond and/or meet with representatives of the Corps of Engineers and USFWS at any time to clarify our concerns and the need for a proper resolution.

Sincerely,



Arlyn Headdress, Chairman  
Fort Peck Assiniboine and Sioux Tribes

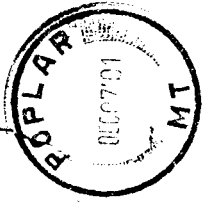
cc The Honorable Conrad Burns  
The Honorable Max Baucus  
The Honorable Dennis Rehberg  
The Honorable Judy Martz  
Secretary Gale Norton  
Rick Knick

**FORT PECK TRIBES**

Assiniboine & Sioux

P.O. Box 1027 Poplar, MT 59255

3814



U.S. POSTAGE



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H METER 703521

Ms. Rosemary C. Hargrave M.S.  
USACE, Northwestern Division  
ATTN: CENWD-ET-R (Hargrave)  
12565 West Center Road  
Omaha, NE 68144-3869

A2-167

68144+3869 21





**Interim Executive Director:**  
Elwood Corbine

**Member Tribes:**  
Fort Peck Assiniboine & Sioux  
Tribes Poplar, Montana

Cheyenne River Sioux Tribe  
Fagle Butte, South Dakota

Chippewa Cree Tribe  
Box Elder, Montana

Crow Tribe  
Crow Agency, Montana

Crow Creek Sioux Tribe  
Fort Thompson, South Dakota

Eastern Shoshone Tribe  
Fort Washakie, Wyoming

Flandreau Santee Sioux Tribe  
Flandreau, South Dakota

Fort Belknap Tribes  
Harlem, Montana

Kickapoo Tribe in Kansas  
Horton, Kansas

Lower Brule Sioux Tribe  
Lower Brule, South Dakota

Northern Arapaho Tribe  
Fort Washakie, Wyoming

Northern Cheyenne Tribe  
Lame Deer, Montana

Oglala Sioux Tribe  
Pine Ridge, South Dakota

Omaha Tribe  
Macy, Nebraska

Ponca Tribe of Nebraska  
Niobrara, Nebraska

Prairie Band Potawatomi Nation  
Mayetta, Kansas

Rosebud Sioux Tribe  
Rosebud, South Dakota

Sac & Fox Nation of Missouri  
Reserve, Kansas

Santee Sioux Tribe  
Niobrara, Nebraska

Sisseton-Wahpeton Sioux Tribe  
Agency Village, South Dakota

Spirit Lake Tribe  
Fort Totten, North Dakota

Standing Rock Sioux Tribe  
Fort Yates, North Dakota

Three Affiliated Tribes  
New Town, North Dakota

Turtle Mt. Band of Chippewa  
Belcourt, North Dakota

Winnebago Tribe of Nebraska  
Winnebago, Nebraska

Yankton Sioux Tribe  
Marty, South Dakota

## Mni Sose Intertribal Water Rights Coalition, Inc.

P.O. Box 2890, 514 Mt. Rushmore Road  
Rapid City, South Dakota 57709-2890

November 27, 2001

Colonel David A. Fastabend  
Commander and Division Engineer  
U.S. Army Corps of Engineers  
Northwestern Division  
PO Box 2870  
Portland, OR 97208-2870

Dear Col. Fastabend:

On behalf of the delegates of the Mni Sose Intertribal Water Rights Coalition, I invite you to participate in the Coalition's Annual 2002 Board of Directors' meeting, which will be held on January 8-10, 2002, in Lawrence, Kansas.

If your schedule permits, I would like you to provide the Tribal Leaders with an overview of the Revised Draft Environmental Impact Statement for the Missouri River Master Manual, during the afternoon of January 8, 2002.

A representative from the Mni Sose Coalition will contact your office within the next few days to confirm your participation. If you have questions in the meantime, please contact Dawnette Owens, Program Coordinator, at 605-343-6054.

I appreciate your consideration of my invitation.

Sincerely,

  
Gary Collins

President

cc: Rosemary Hargrave

A2-169



# Tribal Correspondence 2002



**Interim Executive Director:**  
Elwood Corbine

**Member Tribes:**

Fort Peck Assiniboine & Sioux  
Tribes Poplar, Montana

Cheyenne River Sioux Tribe  
Eagle Butte, South Dakota

Chippewa Cree Tribe  
Box Elder, Montana

Crow Tribe  
Crow Agency, Montana

Crow Creek Sioux Tribe  
Fort Thompson, South Dakota

Eastern Shoshone Tribe  
Fort Washakie, Wyoming

Flandreau Santee Sioux Tribe  
Flandreau, South Dakota

Fort Belknap Tribes  
Harlem, Montana

Kickapoo Tribe in Kansas  
Horton, Kansas

Lower Brule Sioux Tribe  
Lower Brule, South Dakota

Northern Arapaho Tribe  
Fort Washakie, Wyoming

Northern Cheyenne Tribe  
Lame Deer, Montana

Ogala Sioux Tribe  
Pine Ridge, South Dakota

Omaha Tribe  
Macy, Nebraska

Ponca Tribe of Nebraska  
Niobrara, Nebraska

Prairie Band Potawatomi Nation  
Mayetta, Kansas

Rosebud Sioux Tribe  
Rosebud, South Dakota

Sac & Fox Nation of Missouri  
Reserve, Kansas

Santee Sioux Tribe  
Niobrara, Nebraska

Sisseton-Wahpeton Sioux Tribe  
Agency Village, South Dakota

Spirit Lake Tribe  
Fort Totten, North Dakota

Standing Rock Sioux Tribe  
Fort Yates, North Dakota

Three Affiliated Tribes  
New Town, North Dakota

Turtle Mt. Band of Chippewa  
Belcourt, North Dakota

Winnebago Tribe of Nebraska  
Winnebago, Nebraska

Yankton Sioux Tribe  
Marty, South Dakota

# Mni Sose Intertribal Water Rights Coalition, Inc.

P.O. Box 2890, 514 Mt. Rushmore Road  
Rapid City, South Dakota 57709-2890

January 25, 2002

Brigadier General David A. Fastabend  
Commander and Division Engineer  
U.S. Army Corps of Engineers  
Northwestern Division  
PO Box 2870  
Portland, OR 97208-2870

Dear Brigadier General Fastabend:

On behalf of the delegates of the Mni Sose Intertribal Water Rights Coalition, I appreciated the Army Corps of Engineer's presentation on the Revised Draft Environmental Impact Statement for the Missouri River Master Manual at the Coalition's January 2002 Board of Directors' meeting.

Based upon the presentation, the Board of Directors' passed Mni Sose Resolution No. 02-11, which requests the Corps extend the public comment period for the RDEIS for an additional 60 days. The purpose of the request is to provide the Tribes with additional time to conduct comprehensive reviews of the alternatives outlined in the RDEIS. Attached is a copy of the resolution.

If you have questions concerning Mni Sose Resolution No. 02-11, please contact the Coalition at (605) 343-6054.

Sincerely,

  
Gary Collins

President

enc.

A2-173



**Interim Executive Director:**  
Elwood Corbine

## Mni Sose Intertribal Water Rights Coalition, Inc.

P.O. Box 2890, 514 Mt. Rushmore Road  
Rapid City, South Dakota 57709-2890

**Member Tribes:**

Fort Peck Assiniboine & Sioux  
Tribes Poplar, Montana

Cheyenne River Sioux Tribe  
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Fort Yates, North Dakota

Three Affiliated Tribes  
New Town, North Dakota

Turtle Mt. Band of Chippewa  
Belcourt, North Dakota

Winnebago Tribe of Nebraska  
Winnebago, Nebraska

Yankton Sioux Tribe  
Marty, South Dakota

January 30, 2002

Richard Moore  
Natural Resources Manager  
Army Corps of Engineers  
12565 West Center Road  
Omaha, NE 68144

RE: February 7, 2002 Tribal/Energy Planning and Management Meeting

Dear Mr. Moore:

The Mni Sose Intertribal Water Rights Coalition will be hosting a Tribal/Energy Planning and Management Meeting on February 7, 2002, in Rapid City, South Dakota. Attached is a draft agenda for the meeting.

I invite you and other appropriate Army Corps of Engineers' officials to participate in the meeting by making a presentation on the subject of Missouri River Hydrology and Hydropower Generation. The Tribal Leaders are particularly interested in an analysis of how the various alternatives outlined in the Revised Draft Environmental Impact Statement will affect hydropower costs.

Please contact Dawnette Owens at 605-343-6054 or [mnisose@qwest.net](mailto:mnisose@qwest.net) with the names of Army Corps officials who will be able to participate in the meeting.

I look forward to the Army Corps of Engineers' participation in the meeting.

Sincerely,

  
Gary Collins  
President

cc: Rosemary Hargrave

Enc.

A2-175

## **Tribal/Energy Planning and Management Meeting**

**Ramkota Hotel and Conference Center  
2111 LaCrosse Street ~ Rapid City, SD**

**February 7, 2002**

### **Agenda**

*Sylvan I Conference Room*

7:30 a.m.     **Registration**

8:30 a.m.     **Invocation**

**Welcome and Introduction** — *Gary Collins*, President, Mni Sose Intertribal Water Rights Coalition

#### **Energy Planning and Management Program Update and 2005 Resource Pool Allocation for the Upper Great Plain Region**

- *Doug Hellekson*, Manager of Contracts and Energy Services for the Upper Great Plains, Western Area Power Administration

#### **Question and Answer Session**

#### **Missouri River Hydrology and Hydropower Generation**

- *Rick Moore*, Natural Resources Manager, Army Corps of Engineers
- *Robert Riehl*, Manager of Rates for the Upper Great Plains, Western Area Power Administration

#### **Questions and Answer Session**

12:00 Noon   **Lunch** (on your own)

1:00 p.m.     **Tribal Planning Session**

TBD           **Adjourn**



1 U.S. ARMY CORPS OF ENGINEERS, OMAHA DISTRICT  
2 MISSOURI RIVER BASIN WATER MANAGEMENT DIVISION

3  
4 In Re: Proposed Changes to the  
5 Guidelines for the Missouri River  
6 Mainstem Systems Operation  
7  
8  
9

10  
11 TRANSCRIPT OF  
12 PUBLIC HEARING  
13  
14  
15  
16

17  
18 Taken At  
19 Prairie Knights Casino  
20 Fort Yates, North Dakota  
21 January 30, 2002  
22

23 BEFORE COL. DAN KRUEGER  
24 NORTHWESTERN DIVISION DEPUTY COMMANDER  
25

1 C O N T E N T S

2 STATEMENTS BY: Page No.

3 COL. KRUEGER 3

4 TOM IRON 4

MILO CADOTTE 8

5 MILES MCALLISTER 14

DEL LECOMPTE 18

6 ROBERT GIPP 22

BYRON OLSON 26

7 IONE GAYTON 27

COL. KRUEGER 28

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1           (The proceedings herein were had and made  
2 of record, commencing at 1:06 p.m., Wednesday,  
3 January 30, 2002, as follows:)

4           COL. KRUEGER: With the appointed hour  
5 here, on behalf of Brigadier General David  
6 Fastabend, the Commander of the Northwestern  
7 Division of the United States Army Corps of  
8 Engineers, let me welcome you to our public  
9 hearing. This is the seventeenth comment session  
10 that we have conducted during this public comment  
11 period on the Revised Draft Environmental Impact  
12 Statement for the Missouri River Master Manual.

13           I am Colonel Dan Krueger. I'm the Deputy  
14 Division Commander for the Northwestern Division.  
15 And I have several members of the project team for  
16 the Missouri River Master Manual, the team that  
17 prepared the Revised Draft Environmental Impact  
18 Statement, with me here this afternoon. I would  
19 like to quickly introduce them.

20           Firstly, Mr. John LaRondeau, Miss Patti  
21 Lee standing in the back of the room, Mr. Roy  
22 McAllister, Mr. Paul Johnston also standing in the  
23 back of the room, and Mr. Rick Moore will be  
24 assisting me today. We also have Mr. Dan Cimarosti  
25 with us here today. Dan is our project manager in

1 the North Dakota regulatory office up in Bismarck.

2           We want everyone to have a common  
3 understanding of the Revised Draft Environmental  
4 Impact Statement and copies of the executive  
5 summary were available. These copies and handouts,  
6 as well as the entire document, are available at  
7 libraries and project offices throughout the basin,  
8 and you may also receive a copy by writing to us or  
9 from our website. The addresses to write are  
10 available at the registration table or we will take  
11 your address at the registration table.

12           And very quickly, I will remark as to how  
13 the comment process will take place this  
14 afternoon. We'll stay as long as necessary for  
15 your comments to be heard. At this time I would  
16 like to recognize Mr. Tom Iron. I understand that  
17 he would like to make some welcoming comments. Mr.  
18 Iron.

19           MR. IRON: Colonel, members of the staff  
20 of the Corps of Engineers, I want to welcome you to  
21 Standing Rock Sioux Tribe. I'm glad we didn't have  
22 bad weather to battle to come here. It's been  
23 really nice the last two days.

24           What we want to share, sir, on behalf of  
25 Chairman Murphy, because I've had some eye surgery

1 a couple weeks ago, I have a hard time reading my  
2 testimony and stuff, so I'm going to call on one of  
3 the staff members to read that for me and then I'm  
4 going to give you the original copy for the  
5 record. And I'm going to call on Cynthia Moore,  
6 the executive director for Standing Rock Sioux  
7 Tribe to read this for the record.

8 MS. MOORE: Thank you. Good afternoon.  
9 The Standing Rock Sioux Tribe and its membership  
10 welcomes the staff of the United States Army Corps  
11 of Engineers to the Standing Rock Sioux Indian  
12 Reservation.

13 The subject of the meeting today is the  
14 future operating plan for the Missouri River. This  
15 plan has been controversial and has taken  
16 considerable time in its development. The states  
17 have competing interests in the river. Threatened  
18 and endangered species have needs, and many private  
19 interests expect to develop property rights and  
20 economies on the future operation of the Missouri  
21 River.

22 The plan has considerable historical  
23 significance to the Standing Rock Sioux Tribe. Our  
24 ancestors were parties to the Fort Laramie Treaty  
25 of 1868 which established the Great Sioux

1 Reservation, recognizing the area now occupied by  
2 the Standing Rock Sioux Indian Reservation and all  
3 of western South Dakota as the ancestral homeland  
4 of the Great Sioux Nation. The eastern boundary of  
5 the Great Sioux Reservation and the Standing Rock  
6 Indian Reservation was the low water mark of the  
7 east bank of the Missouri River. Our ancestors  
8 successfully included all of the Missouri River  
9 within the boundaries of the lands reserved by them  
10 pursuant to the treaty of 1868. Although our lands  
11 lay west of the Missouri River, our 19th Century  
12 chiefs insisted that the eastern boundary contain  
13 the full course and flow of the Missouri River.  
14 The westerly bank was not a satisfactory boundary,  
15 nor was the middle of the river, a conventional  
16 American property boundary, considered adequate.  
17 The easterly high bank was the only boundary  
18 acceptable to them because their health, welfare  
19 and economy depended on the full course of the  
20 river.

21           There is no change today. The Standing  
22 Rock Sioux Tribe successors to the 1868 Treaty  
23 continue to depend on the Missouri River for our  
24 health, welfare and economy. Our ancestors  
25 reserved for present and future generations of

1 Standing Rock Sioux water rights, titles and  
2 interest in the Missouri River, and we retain those  
3 interests today. Those interests were not a grant  
4 from the United States, but rather a reservation of  
5 property our people held from time immemorial. In  
6 exchange for our reservation all those properties,  
7 our ancestors were willing to grant rights to the  
8 United States outside the boundaries of the Great  
9 Sioux Reservation.

10           Our problem in the development of the  
11 Master Manual by the Corps of Engineers was the  
12 failure to properly address our property rights in  
13 the Missouri River. This is of tremendous concern  
14 to the Standing Rock Sioux Tribal Council and the  
15 constituency that they represent.

16           Last spring the Tribal Council rejected  
17 the Master Manual as it enacted legislation in  
18 Resolution No. 106-01. Members of our technical  
19 staff will provide the details of that resolution.  
20 This resolution constitutes our concerns with  
21 respect to the Master Manual.

22           We expect that this meeting will satisfy  
23 the federal requirements that the Corps of  
24 Engineers has for meeting with stakeholders in the  
25 Missouri River Basin. We also recognize that this

1 meeting will not address our concerns.

2           While we disagree strongly with the Master  
3 Manual, we are a hospitable people and graciously  
4 welcome you to our homeland today. We look forward  
5 to a civil exchange of ideas and invite you back at  
6 any time on any subject. There are subjects beyond  
7 the Master Manual in which we must share common  
8 objectives, such as the return to the Tribe of  
9 lands administered by the Corps of Engineers, the  
10 protection and enhancement of habitat and the  
11 development of water-based enterprises.

12           Thank you for giving us this opportunity  
13 to present our concerns regarding this Master  
14 Manual review and update.

15           MR. IRON: Also we have one of my staff  
16 members of the tribe government to also share some  
17 additional testimony on behalf of our tribe, Mr.  
18 Gary Marshall -- oh, Milo. Milo is a councilman  
19 from Wakpala District.

20           MR. CADOTTE: Thank you, Tom, Corps of  
21 Engineers and staff. Remarks of Standing Rock  
22 Sioux Tribal Council.

23           The Great Sioux Reservation contained the  
24 area now occupied by the Standing Rock Indian  
25 Reservation, all of western South Dakota and the



1 entire course of the Missouri River in the Dakota  
2 Territory from the east bank to the west bank. Our  
3 predecessors, along with the present governing body  
4 and membership, regarded the area that we reserved  
5 unto ourselves to include all the soil, plains,  
6 woods, prairies, mountains, marshes, lakes and  
7 rivers within the region, with the fish and  
8 wildlife of every kind, within the said limits and  
9 all mines of whatsoever kind. The Standing Rock  
10 people were invested with all the rights,  
11 jurisdictions, privileges, prerogatives, royalties,  
12 liberties, immunities, and temporal franchises  
13 whatsoever from time immemorial.

14           The Corps of Engineers in its Master  
15 Manual Update and Revision, as well as in the  
16 Environmental Impact Statement, has failed to  
17 identify these rights, titles and interests in the  
18 Missouri River and to properly address them as  
19 issues. This has been done by the Corps of  
20 Engineers over the repeated objections of the  
21 Standing Rock Sioux Tribe.

22           The Corps of Engineers has improperly  
23 disposed of consideration of our rights, titles and  
24 interests by stating in effect that only those  
25 rights confirmed by a final court of competent

1 jurisdiction or by congressional settlement will be  
2 considered in the Master Manual and EIS. The Corps  
3 of Engineers has then proceeded to allocate water  
4 to be utilized by upstream and downstream states,  
5 by threatened and endangered species, by recreation  
6 and navigation interests with no treatment of the  
7 prior and superior, vested and perfected water  
8 rights of the Standing Rock Sioux Tribe. Nor has  
9 the Corps of Engineers addressed any decreed or  
10 settled water rights of any Indian tribe in the  
11 Missouri River Basin.

12           With the decisions made in any final  
13 Master Manual and EIS, countless interests in the  
14 Missouri River, including barge traffickers,  
15 marinas, environmental advocates, municipalities  
16 and states, among others, will undertake  
17 investments, encumber loans, commit appropriations,  
18 settle estates and otherwise make irretrievable  
19 commitments that will severely prejudice the future  
20 development of the prior and superior rights to the  
21 use of water by the Standing Rock Sioux Tribe and  
22 its membership. Courts and legislative bodies will  
23 be forced into immoral decisions and a twisting of  
24 the legal system to confirm the rights established  
25 by the Master Manual and EIS against the rights of

1 the Standing Rock Sioux Tribe.

2           This is not necessary in the Missouri  
3 River Basin where sufficient water is currently  
4 available to properly and morally treat and  
5 acknowledge the water rights of the Standing Rock  
6 Sioux Tribe and other tribes with interest in the  
7 Missouri River, its tributaries and its aquifers.  
8 It is not necessary in the year 2002 to impose an  
9 allocation in the Missouri River that will forever  
10 prejudice the water rights of the Tribe. The  
11 United States can act scientifically, honorably and  
12 morally at the present time to properly address,  
13 not ignore, our water rights and avoid the tragedy  
14 in other regions of this great nation. We are 100  
15 years beyond the birth of the Reclamation Act,  
16 which immediately created a monopolization of water  
17 supply in Arizona that now causes state courts to  
18 pervert Indian title to maintain the investments of  
19 the land speculators that benefited from the  
20 Reclamation Act and allocated all available Indian  
21 water to the Phoenix metropolitan area.

22           Recently the Arizona Supreme Court, faced  
23 with the prospect of four million people relying  
24 upon three sources of water: Indian water rights  
25 in the Salt River, the Central Arizona Project

1 (investing billions to divert and pump the Colorado  
2 River) and severe overpumping of finite groundwater  
3 resources, committed one of the most immoral acts  
4 of any court in this nation in our history by  
5 deciding that any Indian water right relying upon  
6 irrigation, the longstanding heart of the Winters  
7 Doctrine espoused by the United States Supreme  
8 Court, can no longer be proved and that any Indian  
9 water right for any other purpose must be based on  
10 a standard of minimal use for that purpose: 160  
11 gallons per Indian per day or less.

12           The following is quoted by a southwestern  
13 newspaper presenting an article by a hydrologist  
14 for the Navajo Nation: "Take from the Indian  
15 people...their life sustaining Winters Doctrine  
16 rights and you take from them the basis for their  
17 continued existence as a separate and distinct  
18 people." William Veeder, federal attorney, 1972.

19           "For over a century, Arizona politicians,  
20 farmers, cities, businesses and industries have  
21 sought to control the state's water resources.  
22 Water from the Colorado River and the Gila River  
23 Basin is what keeps the state's economic engines  
24 running. Only within the past two decades,  
25 however, have most of the state's 21 tribes been

1 allowed a serious seat at the water rights table.  
2 The rules on water rights will determine these  
3 tribes' economic survival. But, just as they get  
4 more involved, the rules are changing."

5 "The Arizona Supreme Court, in a decision  
6 last November about rights in the Gila River Basin,  
7 set new rules for measuring Indian right. The  
8 Court felt tribes might get too much water under  
9 existing law, so it set a 'minimalist' standard for  
10 quantifying Winters rights." (Gallup Independent,  
11 by Jack Utter).

12 There is no need for this kind of approach  
13 to Indian water rights in the Missouri River Basin,  
14 but the Corps of Engineers in its Master Manual and  
15 EIS has failed as crudely in 2002 as federal policy  
16 did in 1902 when the Salt River project was  
17 initiated, totally committing all water of the Salt  
18 and Gila Rivers away from the Indian tribes and to  
19 the agriculturalists and land speculators in the  
20 Salt River Valley. It is not too much to ask for  
21 improvement in federal Indian water right policy  
22 over a century of failure. The policies, or lack  
23 thereof, presented in the Master Manual and EIS are  
24 consistent with the concern expressed by the Ninth  
25 Circuit Court of Appeals in its Ahtanum decision:

1           "From the very beginnings of this nation,  
2 the chief issue around which federal Indian policy  
3 has revolved has been, not how to assimilate the  
4 Indian nations whose lands we usurped, but how best  
5 to transfer Indian lands and resources to  
6 nonIndians." (United States v. Ahtanum Irrigation  
7 District, 236 F. 2nd 321, 337).

8           The Standing Rock Sioux Tribe formally  
9 files its Resolution 106 with the Corps of  
10 Engineers as its reason and rationale for fully and  
11 completely rejecting the Master Manual and EIS.

12           COL. KRUEGER: Thank you, sir. We have  
13 others that wish to make statements this  
14 afternoon. Others that wish to make a statement, I  
15 would appreciate if you would fill out a card that  
16 Patti has in the back and that would be helpful to  
17 us. The other person that has indicated they wish  
18 to make a statement is Mr. Miles McAllister.

19           MR. McALLISTER: Good afternoon, folks.  
20 Welcome. I wanted to -- we've been to meetings  
21 like this before and made comments and you were  
22 just made aware of a resolution signed by the Sioux  
23 Tribe.

24           My names is Miles McAllister. I sit on  
25 the Tribal Council of Standing Rock Sioux, a member

1 at large. And one of the reasons why we have to  
2 totally outright reject revisions of the Master  
3 Manual in general is simply because it can't even  
4 be considered because the Tribe really isn't  
5 considered in it, nor is all the Indian nations  
6 considered in it, as far as ownership of the water  
7 and the resources that you're managing. Those  
8 things have to be considered first before you can  
9 even do the Master Manual.

10           And we understand what you're attempting  
11 to do here. You're attempting to manage a river  
12 system. We understand that. We do natural  
13 resource management, those things here, too,  
14 locally. But in order for you to do a Master  
15 Manual, I feel that you have to consider ownership  
16 of what you're managing. I think that just isn't  
17 being covered. And so we can't even consider even  
18 accepting any part of the Master Manual because of  
19 that. There's some obvious treaty rights,  
20 recognized rights that's been recognized in U.S.  
21 courts. Those things have to be considered first.  
22 And that's why I'm limiting my remarks to that, is  
23 we just can't consider approving any part of the  
24 revisions of the Master Manual.

25           But I did want to mention today what some

1 of our priorities are. We understand that we live  
2 next to Lake Oahe and we deal with some of the  
3 consequences of having, you know, dams on this  
4 river here. And with that we have to live our  
5 day-to-day lives and try to attempt to develop an  
6 economy in rural America, and one of the problems  
7 -- the big problems, and you hear it from the  
8 local governments besides us, too, is water  
9 levels. We feel that you need to maintain a steady  
10 and high water level so that economic development  
11 can occur locally.

12           We're rural enough that we don't need to  
13 be put in a place where we're at a disadvantage to  
14 where we can't depend on a shoreline or that we  
15 have to deal with erosion at such a variable level  
16 that we can't even try to manage it. Unless the  
17 water -- that's true anyplace. You're all familiar  
18 with natural resource management, water  
19 management. It's very hard to do any managing.  
20 You're trying to do that now and you're having  
21 difficulty with it. Think of us at the local  
22 level, too, trying to do that management. We have  
23 a lot of trouble with that, especially with the  
24 varying water levels.

25           I have to say that with the membership I



1 represent that we prefer a steady high water level  
2 so at least we have something to depend on, and we  
3 have that resource that we feel we own available to  
4 us.

5           And also I notice that it talks about  
6 priorities. There must be ranking systems in how  
7 you manage the water the way you do. Economic  
8 development is number one with us. I feel, and my  
9 constituents feel, that economic development is  
10 number one. There are other priorities, sure, but  
11 I feel economic development is number one. That  
12 needs to be considered. The Tribe has backed that  
13 with an overall economic development plan that's  
14 been in place for years. That has prior  
15 commitments to any other comments you may have  
16 heard as to what our priorities are. Economic  
17 development is still number one on Standing Rock  
18 because that leads to our self-sufficiency. We  
19 just can't get there if we can't depend on the  
20 resources that we feel is ours and being managed by  
21 another entity that doesn't put us first.

22           So I wanted to limit my comments to that,  
23 my comments on the Master Manual, et cetera, but we  
24 can't even consider it because of that, not  
25 considering ownership of the resource at all of the

1 surrounding land. And it's an issue that you as an  
2 agency have to deal with, not only with us, but  
3 probably with the U.S. Government in general which  
4 you're a part of, other divisions. We understand  
5 that stuff.

6           We want to make it clear what our  
7 priorities are and who has ownership of those  
8 properties that you're talking about in managing of  
9 the resource. We feel it all belongs to us. And  
10 there's even court precedence in saying that it all  
11 belongs to us.

12           So with that I want to just say you have  
13 our resolution and we just can't even consider the  
14 Master Manual because of that. I'm going to limit  
15 my comments to that today. I thank you for your  
16 time.

17           COL. KRUEGER: Thank you, Mr. McAllister.  
18 Mr. Del LeCompte.

19           MR. LeCOMPTE: Thank you, Colonel, members  
20 of the Corps of Engineers. My name is Del  
21 LeCompte. I'm an enrolled member of the Standing  
22 Rock Sioux Tribe. I'm also a land coordinator with  
23 the Standing Rock Sioux Tribe for the last ten  
24 years. I work with land issues. I also work with  
25 water issues, and so forth, in our office, or the

1 Department of Tribal Land Management.

2           My grandfather in 1889 when they give out  
3 allotments and enrolled our people into the  
4 reservation, my grandfather and his family were the  
5 first enrolled members. They were the first to  
6 receive allotments. Being that, they chose land  
7 that was close to the river, all the way from right  
8 south of Mobridge to the Sitting Bull Monument  
9 which now exists. That was our livelihood. My  
10 grandfather, his brothers and sisters, my father,  
11 there was 13 in my father's family, all lived in  
12 that area. We made a living, we were  
13 self-sufficient.

14           In the 1950s when I was just in high  
15 school, my family was asked to move to higher  
16 ground. We had an island called LeCompte Island,  
17 which is right -- was in the middle of the Missouri  
18 River. We had a church which was called LeCompte  
19 Church. We had a cemetery which was called  
20 LeCompte Cemetery. All our relatives, our  
21 ancestors were buried there. Our neighbors who  
22 lived in that area, the Ducheneaus, the Traversies,  
23 the Laboes, the Marshalls, they all lived in that  
24 area, they were buried in that cemetery. Then we  
25 were asked to move to higher ground. We will

1 replace this for you, we will give you this, we  
2 will give you that.

3           My mother died nine years ago still  
4 waiting for water, still waiting for electricity  
5 that was promised many years ago. We lost 2,480  
6 acres. We lost a cemetery with our descendants in  
7 it. We lost our church. Two years ago we  
8 discovered one of our headstones of my uncle, Urban  
9 LeCompte, laying in the water broken. We contacted  
10 the Corps of Engineers and asked, would you have  
11 the decency to please replace this headstone? Oh,  
12 we'll do it right away, and it's been two years, we  
13 have not received any word, still has not been  
14 replaced.

15           I guess we have had so much taken from us,  
16 we have had so much promised to us and I think, you  
17 know, the Corps has spent thousands and millions of  
18 dollars having meetings such as this, and yet they  
19 cannot replace a headstone.

20           I guess it hits home pretty hard because  
21 this is where I was raised, this is where I grew  
22 up, this was my life, my family's life. And now we  
23 have nothing down there. All the trees, all the  
24 animals. We only went to town probably once a  
25 month because everything was right there for us.

1 That was taken from us. Nothing replaced. Our  
2 Indian way of life is when you take something from  
3 somebody, you return something else, and this has  
4 not been done. As I said, we lost 2,480 acres down  
5 there, which was our livelihood. Now we don't have  
6 anything. My father passed away, my mother passed  
7 away waiting for all those things. I'm getting up  
8 in age, I'll probably pass away and still won't be  
9 seen.

10 I guess I can identify ourselves with the  
11 people in Bosnia, the people in Afghanistan, what  
12 is happening to them by people moving in and taking  
13 over and ruling what they feel is right to them.  
14 And I feel our Indian people have gone through  
15 similar things by our own United States  
16 Government. You know, our United States Government  
17 made treaties, signed treaties with our ancestors  
18 and said we will provide these in return for  
19 peace. The United States Government was granted to  
20 come onto the Mother Earth and stake claim, and as  
21 time went on we grew smaller. We grew smaller  
22 because land was taken from us illegally through  
23 the courts. And I guess one of the things that  
24 we've asked over the years is that we be recognized  
25 as tribes, as a people, as citizens of the United

1 States, that we be offered the same rights as those  
2 living off the reservation.

3           As I said, you know, we can identify with  
4 people in Afghanistan, Bosnia and other countries  
5 when people come in and put their foot down. Our  
6 own United States Government is doing it to us  
7 right here in the United States, and then we say  
8 we're a free country, we're a proud country. But  
9 rights are being taken. And I don't mean to sound  
10 this way, but it's been years and years now that  
11 I've seen this and I work with it. I work with the  
12 Corps of Engineers, I work with the people down  
13 there. And I just wanted to make a few statements  
14 personally. This does not reflect on the tribe  
15 whatsoever. This is only personally coming from me  
16 as a landowner, as someone who lost a lot, as  
17 someone who was hurt, who has had his livelihood  
18 taken away from him, you know, my father and mother  
19 made when it was that, but yet all this was taken  
20 away from us.

21           I want to thank you for allowing me a  
22 little time to speak here. Thank you.

23           COL. KRUEGER: Thank you, sir. Mr. Robert  
24 Gipp.

25           MR. GIPP: Good afternoon. Good

1 afternoon, people. My name is Robert Gipp and I'm  
2 from Fort Yates here and I've lived here most of my  
3 life, I was born here. I was born in 1938 and I  
4 lived here before the flood, before the water  
5 came. I have a -- I also have a father-in-law that  
6 had lost land in the taken area, you know. I live  
7 south of here about four miles. I'm a rancher.

8           And at that time the government paid them  
9 \$35 an acre while across the river they got more  
10 money. That was one of the injustices done. And I  
11 guess that's already been compensated through just  
12 compensation through the JTAC law.

13           But, anyway, I'm going to kind of repeat  
14 some of the things that were said here. As a  
15 rancher, I'm more interested in flood control. One  
16 of the things that I see is the wind and water  
17 erosion on our shoreline, it's really bad,  
18 especially where the hillsides are. We have  
19 cliffs, I guess, about 30 or 40 feet tall, you  
20 know. I guess you could just go down to the river  
21 and you can see these things. And I suppose  
22 they're all the way down the river. I suppose  
23 people are complaining about that. This creates --  
24 and I know there's an extreme raising and lowering  
25 of the dam. I've seen it at its highest point

1 since I've lived here, been here for 30 years, I  
2 have been a rancher, and at its lowest point where  
3 you can just walk across the little dams or the  
4 little streams that run into the river.

5           What this does is it really creates a  
6 hazard, a fencing problem for ranchers, you know.  
7 And I guess I can compensate and I can say, well, I  
8 get a chance to use the taken area, you know, but  
9 we are continuously fixing fence along the  
10 shoreline. And in some cases for the last -- I've  
11 lost fence -- I probably lost a quarter-mile of  
12 fence in the last -- three or four times in the  
13 last 30 years, you know. And I just lose it. It's  
14 there, it's buried in the mud, the wire is rotten.  
15 You just have to completely redo your fencing. So  
16 that's one.

17           The other thing is the hazardous wind  
18 erosion. The other day I was going to Fort Yates,  
19 I was driving to Fort Yates and I couldn't see Fort  
20 Yates. Fort Yates was like a dirt storm. The wind  
21 -- the dirt erosion was blowing so bad, you know.  
22 And on one hand, we try to -- we talk about  
23 conservation, you know, through the Agriculture  
24 Department, and, on the other hand, we just let the  
25 wind -- you know, the Corps of Engineers has



1 managed their dams so we have this dirt, wind  
2 erosion very bad. Have you ever seen it? You've  
3 seen it?

4 I guess I kind of covered some things on  
5 flood control. And I don't understand why there  
6 has to be such raising and lowering of these dams.  
7 You know, the dams are on the Missouri River. The  
8 people that live along the Missouri River are the  
9 ones that have to suffer because that water is  
10 lowered and let down the river, that water runs  
11 into the Mississippi for barge control to keep  
12 those barges afloat, and I don't think we can  
13 change that here. One gentleman said to me this  
14 morning, well, what do you want to go to that  
15 meeting for? The state can't change it. What  
16 makes you think you can change it? Can we change  
17 it? I don't think we can, can we?

18 COL. KRUEGER: That's what this whole  
19 process is about.

20 MR. GIPP: We'll see. The other thing, a  
21 little bit about the hydropower production. I'm  
22 also a director on the Mor-Gran-Sou Electric  
23 Cooperative out of Flasher, and we borrow money  
24 from the Rural Electric and we provide -- we wheel  
25 power. We also get hydropower off of the dams.

1 Now, what happens is the water release is out of  
2 sync with the demand. Okay. The dams are down  
3 right now, so they're releasing very little water,  
4 they're generating very little power right now in  
5 the wintertime. This is when we need the power.  
6 So we're out of sync. See what I'm saying? Okay.  
7 That's the end of my comments.

8 COL. KRUEGER: Thank you, Mr. Gipp. And  
9 Mr. Byron Olson has indicated a desire to make a  
10 statement.

11 MR. OLSON: My name is Byron Olson. I'm  
12 not a member of the Standing Rock Sioux. I came  
13 down here to this meeting, though, didn't intend to  
14 make comments until it struck me that this kind of  
15 meeting is a continuation of an American  
16 governmental policy stretching back for 150 years  
17 or more, and the structure is you will sit there at  
18 a table and listen, but then somewhere back in  
19 Washington the great white father will make the  
20 decision about what is appropriate for the Tribe.

21 When I leafed through the little  
22 instruction or the summary that was handed out,  
23 there is not one word said about Standing Rock  
24 water rights, land rights. This issue should not  
25 be a surprise to you. It was raised 20 years ago

1 on the original land management stop, and yet what  
2 happens? It's ignored. It seems to me you would  
3 like the Standing Rock Sioux to go away, and one  
4 way to do that is to simply not address in your  
5 manual their issues.

6 I think instead of listening to comments,  
7 you ought to have a consultation and exchange of  
8 views. Maybe you don't agree with their position,  
9 but at least it has to be a two-way process rather  
10 than a one-way one. Thank you.

11 COL. KRUEGER: We have no further cards  
12 that indicate persons in attendance who wish to  
13 make statements. I would call for anybody who has  
14 not indicated on a card, is there anybody else who  
15 desires to make a statement during our hearing this  
16 afternoon? Yes, ma'am.

17 MS. GAYTON: My name is Ione Gayton. I  
18 work with the Standing Rock Sioux Tribal Historic  
19 Preservation Office. And for the record, the  
20 Standing Rock Sioux Tribal Historic Preservation  
21 Officer will be submitting written comments  
22 detailing where the Master Manual, Revised Draft  
23 Environmental Impact Statement is flawed, detailing  
24 the National Historic Preservation Act, National  
25 Environmental Policy Act and other federal laws

1 that are violated. Thank you.

2 COL. KRUEGER: Thank you. Is there  
3 anybody else who would like to make a statement in  
4 attendance?

5 I'll bring the hearing to a close then. I  
6 would like to remind all who are present here this  
7 afternoon that the hearing period, the comment  
8 period and the administrative record for the  
9 Revised Draft Environmental Impact Statement will  
10 remain open through the 28th of February, 2002, for  
11 anyone who wishes to submit a written fax or  
12 electronic comment. And if you need assistance in  
13 how to get those to us, we will be glad to assist  
14 you at the table. If you want to be on our mailing  
15 list or to receive a copy of the transcript that's  
16 being prepared of this hearing this afternoon,  
17 please fill out a card that's also available at the  
18 registration table.

19 I would like to once more thank the  
20 Standing Rock Sioux Tribe for requesting,  
21 participating and hosting this meeting in the heart  
22 of their tribal homeland. I appreciate all of  
23 those who have come today, your presence,  
24 participation and sharing of perspectives.

25 This hearing is now closed. Thank you

1 very much. Have a safe drive home.

2 (Concluded at 1:47 p.m., January 30,

3 2002.)

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1 CERTIFICATE OF COURT REPORTER

2

3 I, Denise M. Andahl, a Registered  
4 Professional Reporter,

5 DO HEREBY CERTIFY that I recorded in  
6 shorthand the foregoing proceedings had and made of  
7 record at the time and place hereinbefore  
8 indicated.

9 I DO HEREBY FURTHER CERTIFY that the  
10 foregoing typewritten pages contain an accurate  
11 transcript of my shorthand notes then and there  
12 taken.

13 Bismarck, North Dakota, this 4th day of  
14 February, 2002.

15

16

17 \_\_\_\_\_  
Denise M. Andahl  
Registered Professional Reporter

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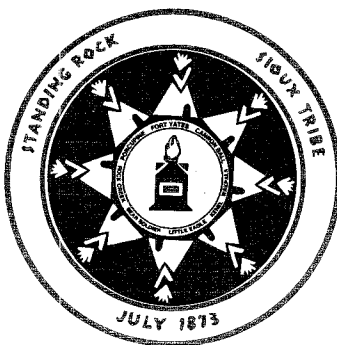
**Public Hearing on the Master Manual  
Standing Rock Sioux Tribe**

**Prairie Knights Casino and Resort  
Standing Rock Sioux Indian Reservation  
January 30, 2002 – 1:00 P. M.**

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**Charles W. Murphy**  
*Chairman*



**Tom Iron**  
*Vice Chairman*

**Sharon Two Bears**  
*Secretary*

## DISTRICTS

**Carol White Eagle**  
*Cannonball District*

**Verna Bailey**  
*Fort Yates District*

**Milo Cadotte**  
*Wakpala District*

**Frank White Bull**  
*Kenel District*

**Avis Little Eagle**  
*Bear Soldier District*

**Milton Brown Otter**  
*Rock Creek District*

**Allen Flying Bye**  
*Little Eagle District*

**Randal White Sr.**  
*Porcupine District*

## AT LARGE

**Jesse Taken Alive**

**Reva Gates**

**Pat McLaughlin**

**Miles McAllister**

**Ron Brown Otter**

**Isaac Dog Eagle, Jr.**

## REMARKS OF CHARLES W. MURPHY, CHAIRMAN STANDING ROCK SIOUX TRIBE

### Public Hearing on the Master Manual Review and Update

### Prairie Knights Casino and Resort Standing Rock Sioux Indian Reservation January 30, 2002 - 1:00 P.M.

The Standing Rock Sioux Tribe and its membership welcomes the staff of the United States Army Corps of Engineers to the Standing Rock Sioux Indian Reservation. The subject of the meeting today is the future operating plan for the Missouri River. This plan has been controversial and has taken considerable time in its development. The States have competing interests in the River. Threatened and endangered species have needs, and many private interests expect to develop property rights and economies on the future operation of the Missouri River.



The plan has considerable historical significance to the Standing Rock Sioux Tribe. Our ancestors were parties to the Fort Laramie Treaty of 1868 which established the Great Sioux Reservation, recognizing the area now occupied by the Standing Rock Sioux Indian Reservation and all of Western South Dakota as the ancestral homeland of the Great Sioux Nation. The eastern boundary of the Great Sioux Reservation and the Standing Rock Indian Reservation was the low-water mark of the east bank of the Missouri River. Our ancestors successfully included all of the Missouri River within the boundaries of the lands reserved by them, pursuant to the Treaty of 1868.. Although our lands lay west of the Missouri River, our 19<sup>th</sup>-century chiefs insisted that the eastern boundary contain the full course and flow of the. Missouri River. The westerly bank was not a satisfactory boundary.. Nor was the middle of the River, a conventional American property boundary, considered adequate. The easterly high bank was the only boundary acceptable to them because their health, welfare and economy depended on the full course of the River.

There is no change today. The Standing Rock Sioux Tribe, successors to the 1868 Treaty, continue to depend on the Missouri River for our health, welfare and economy. Our ancestors reserved for present and future generations of Standing Rock Sioux water rights, titles and interest in the Missouri River, and we retain those interests today. Those interests were not a grant from the United States but rather a reservation" of property our people held from time immemorial. In exchange for our reservation all those properties, our ancestors were willing to grant rights to the United States outside the boundaries of the Great Sioux Reservation.

**Our problem in the development of the Master Manual by the Corps of Engineers was the failure to properly address our property rights in the Missouri River. This is of tremendous concern to the Standing Rock Sioux Tribal Council and the constituency that they represent. Last spring the Tribal Council rejected the Master Manual as it enacted legislation in Resolution No.106-01. Members of our technical staff will provide the details of Resolution No.106-01. This Resolution constitutes our concerns with respect to the Master Manual.**

**We expect that this meeting will satisfy the federal requirements that the Corps of Engineers has for meeting with stakeholders in the Missouri River Basin. We also recognize that this meeting will not address our concerns.**

**While we disagree strongly with the Master Manual, we are a hospitable people and graciously welcome you to our homeland today. We look forward to a civil...exchange of ideas and invite you back at any time on any subject. There are subjects beyond the Master Manual in which we must share common objectives, such as .the return to the Tribe of lands administered by the Corps of Engineers, the protection and enhancement of habitat and the development of water-based enterprises.**

**Thank you for giving us this opportunity to present our concerns regarding the Master Manual Review and Update.**

## RESOLUTION NO. 106-01

FORMALLY ESTABLISHES THE STANDING ROCK SIOUX TRIBE'S  
POLICY ON ITS ABORIGINAL, TREATY AND WINTERS RIGHTS TO THE USE  
OF WATER IN THE MISSOURI RIVER TO MEET ALL  
PRESENT AND FUTURE USES; AMONG OTHER THINGS

WHEREAS, the Standing Rock Sioux Tribe is an unincorporated Tribe of Indians, having accepted the Indian Reorganization Act of June 18, 1934, with the exception of Article 16, and the recognized governing body of the Tribe is known as the Standing Rock Sioux Tribal Council; and

WHEREAS, the Standing Rock Sioux Tribal Council, pursuant to the Constitution of the Standing Rock Sioux Tribe, Article IV, Section(s) 1 (a,b,c,h and j), is authorized to negotiate with Federal, State and local governments and others on behalf of the Tribe, is further authorized to promote and protect the health, education and general welfare of the members of the Tribe and to administer such services that may contribute to the social and economic advancement of the Tribe and its members; and is further empowered to authorize and direct subordinate boards, committees or Tribal officials to administer the affairs of the Tribe and to carry out the directives of the Tribal Council; and is empowered to manage, protect, and preserve the property of the Tribe and natural resources of the Standing Rock Sioux Reservation; and

### Master Manual EIS Specifically Excludes Consideration of Indian Water Rights

WHEREAS, the United States Army Corps of Engineers makes the following statement describing how the Corps fails to recognize or consider Indian water rights in its Master Water Control Manual for the future operation of the Missouri River, thereby committing Missouri River water to operational priorities and creating an insurmountable burden for the future exercise of the rights to the use of water by the Standing Rock Sioux Tribe as reserved from time immemorial:

*The Missouri River basin Indian tribes are currently in various stages of quantifying their potential future uses of Mainstem System water. It is recognized that these Indian tribes may be entitled to certain reserve or aboriginal Indian water rights in streams running through and along reservations. Currently, such reserved or aboriginal rights of tribal reservations have not been quantified in an appropriate legal forum or by compact with three exceptions.... The Study considered only existing consumptive uses and depletions; therefore, no potential tribal water rights were considered. Future modifications to system operation, in accordance with pertinent legal requirements, will be considered as tribal water rights are quantified in accordance with applicable law and actually put to use. Thus, while existing depletions are being considered, the Study process does not prejudice any reserved or aboriginal Indian water rights of the Missouri River basin Tribes. (PDEIS 3-64); and*

WHEREAS, the failure of the United States, acting through the Corps, to recognize and properly consider the superior rights of the Standing Rock Sioux Tribe must be rejected by the Tribe for the reason that the Master Manual revision and update is making irretrievable commitments to (1) navigation in the lower basin, (2) maintenance of reservoir levels in the upper basin and (3) fish, wildlife and endangered species throughout the upper and lower basins. These commitments are violations of the constitutional, civil, human and property rights of the Tribe; and

Endangered Species Guidance Specifically Excludes Consideration of Indian  
Water Rights in Missouri River Basin

WHEREAS, the Working Group on the Endangered Species Act and Indian Water Rights, Department of Interior, published recommendations for consideration of Indian water rights in Section 7 Consultation, in national guidance for undertakings such as the Master Manual, as follows:

*The environmental baseline used in ESA Section 7 consultations on agency actions affecting riparian ecosystems should include for those consultations the full quantum of: (a) adjudicated (decreed) Indian water rights; (b) Indian water rights settlement act; and (c) Indian water rights otherwise partially or fully quantified by an act of Congress... Biological opinions on proposed or existing water projects that may affect the future exercise of senior water rights, including unadjudicated Indian water rights, should include a statement that project proponents assume the risk that the future development of senior water rights may result in a physical or legal shortage of water. Such shortage may be due to the operation of the priority system or the ESA. This statement should also clarify that the FWS can request reinitiation of consultation on junior water projects when an agency requests consultation on federal actions that may affect senior Indian water rights.*

The Working Group recommendations further the failure to address unadjudicated Indian water rights. It is unthinkable that the United States would proceed with water resource activities, whether related to endangered species, water project implementation or Missouri River operation in the absence of properly considering Indian water rights that are not part of an existing decree – presuming, in effect, that the eventual quantification of Indian water rights will be so small as to have a minimal impact on the operation of facilities in a major river, such as the Missouri River, or so small as to be minimally impacted by assignment of significant flow to endangered species. The flows required to fulfill or satisfy Indian water rights are, in fact, not small nor minimal but are significant; and

Final Indian Water Right Agreements and Claims of the United States on Behalf  
of Tribes Are Denigrated by Master Manual and Other Regional Water Allocation  
Processes

WHEREAS, failures of federal policy to properly address Indian water rights in planning documents such as the Master Manual is underscored by example. Tribes in Montana

have water right compacts with the State that are complete and final but have not been incorporated into a decree. Incorporation is certain, however, and will be forthcoming. It is not a matter of "if", it is a matter of "when". The water rights agreed upon by compact are substantial, but neither the Corps of Engineers' Master Manual nor the Secretary of Interior's ESA guidance, as currently constituted, will consider these rights -- they presume the rights do not exist -- until they become part of a decree. At such time as the decree in Montana is complete, the Master Manual conclusions will be obsolete and any assignment of Missouri River flows to upstream reservoirs, downstream navigation or endangered species, relied upon by the various special interest groups, will be in conflict with the decree; and

WHEREAS, in Arizona, as another example, these same flawed federal policies to ignore Indian water rights in the allocation of regional water supplies are manifest. The United States is in the process of reallocating part of approximately 1.4 million acre-feet of water diverted from the Colorado River and carried by aqueduct system in the Central Arizona Project for the Phoenix area. The reallocation is purportedly for the purpose, in part, of resolving Indian water right claims in Arizona, but careful review of the reallocation demonstrates that only two Indian tribes are involved. The Bureau of Reclamation, agent for the trustee in the reallocation process, has given short shrift to other Indian concerns that the EIS should address the impacts of the reallocation on all affected tribes and on all non-Indian claimants that will be impacted by ongoing adjudication of Indian water rights. In response Reclamation describes claims filed by the Department of Justice on behalf of the tribes as *speculative*. Thus, Arizona tribes are in the same dilemma as Missouri River basin tribes, but the process to determine the magnitude of Indian claims in Arizona is much further advanced. The United States is, on the one hand, pursuing a claim for adjudication of Indian water rights; and the United States, on the other hand, is reallocating water necessary to supply non-Indian interests impacted by Indian water rights-- but is refusing to recognize any potential for Indian water rights success in ongoing adjudications. This denigrates the claims of the United States on behalf of the tribes and draws into question the intent and commitment of the Department of Justice in the proper advancement of Indian claims, claims which at least some tribes consider deficient and poorly prosecuted by the Department of Justice; and

WHEREAS, the Standing Rock Sioux Tribe cannot tolerate these policies: cannot permit reliance by wide and diverse interest groups in the Missouri River -- states, environmental, federal agencies and economic sectors-- on conclusions associated with the preferred alternative in the Master Manual when the conclusions are based on the presumption of no Indian water rights and insignificant future Indian water use throughout the Basin; cannot expect future courts to undo investments, undertakings, mortgages and economies that build on the basis of the Master Manual conclusions; cannot expect future Congresses to act more favorably than future courts; and

Importance of Master Manual Process is Underscored by Congressional and

## Other Activity

WHEREAS, the Master Manual of the Corps of Engineers is the name presently given to the operating procedures for the mainstream dams and reservoirs. The Corps of Engineers has responsibility for those operations as directed by the 1944 Flood Control Act, the controlling legislation for the Pick-Sloan Project. Since 1944, all dams (except Fort Peck Dam) were constructed and have been operated by the Corps of Engineers or the Bureau of Reclamation. The current Master Manual revision is the first public process update of Corps of Engineers operating procedures, and its importance to future exercise of the Tribe's water rights cannot be ignored by the Tribe; and

WHEREAS, the Master Manual is intended by the federal courts and Congress to resolve issues between the upper and lower basin states, irrespective of tribal issues. The federal courts have dismissed cases brought by the states over the last decade and a half, cases designed to settle issues of maintenance of water levels in the reservoirs in North and South Dakota and the conflicting release of water for downstream navigation; and

WHEREAS, most recently, the Energy and Water Resource Development appropriations for FY 2001 were vetoed by the President because upstream senators supported by the President opposed language by downstream senators in the appropriations bill, which contained controversial language as follows:

*Sec. 103. None of the funds made available in this Act may be used to revise the Missouri River Master Water Control Manual when it is made known to the Federal entity or official to which the funds are made available that such revision provides for an increase in the springtime water release program during the spring heavy rainfall and snow melt period in States that have rivers draining into the Missouri River below the Gavins Point Dam.*

The provisions cited above require the Corps of Engineers or any other official to refrain from using any funds to revise the Master Manual if it is determined that the revision would cause any increase in water releases below Gavin's Point Dam in springtime. There is apparently concern by downstream members of Congress that the Master Manual will recommend an increase in releases to the detriment of downstream navigation, environmental values or flood control. Upstream members of Congress stopped the approval of appropriations over this controversy until the above-cited language was omitted from the bill; and

WHEREAS, given the importance of the Master Manual revision and update to the States, the Congress and Courts, the Standing Rock Sioux Tribe cannot tolerate the exclusion of proper consideration of their water rights, nor can the Tribe tolerate the inadequate representation of the Trustee on this matter; and

## Brief Historical Review of Indian Water Rights

WHEREAS, the right of the Crown of Great Britain to the territory of North America was derived from the discovery of that continent by Sebastian Cabot, who in 1498 explored a greater part of the Atlantic Coast under a Commission from King Henry VII and took formal possession of the continent as he sailed along the coast. But those commissioned by the Crown to settle in North America were cognizant of the rights, titles and interests of the original possessors. In the proprietary of Maryland, granted to George Calvert, Lord Baltimore, in 1632, for example, it was recognized by English law evolving from invasions against the Celtic tribes and their successors by the Romans, Anglo-Saxons and Normans, among others, over a period of 1,500 years prior to the discovery of America that the rights of the ancient possessors were specific and could not be ignored by a just occupier. The following was the rationale:

*The roving of the erratic tribes over wide extended deserts does not formed a possession which excludes the subsequent occupancy of immigrants from countries overstocked with inhabitants. The paucity of their numbers in their mode of life, render them unable to fulfill the great purposes of the grant [by the King to the Proprietary of Maryland]. Consistent, therefore, with the great Charter to mankind, they (Tribes) may be confined within certain limits. Their rights to the privileges of man nevertheless continue the same: and the Colonists who conciliated the affections of the aborigines, and gave a consideration for their territory, have acquired the praise due to humanity and justice. Nations, with respect to the several communities of the earth, possessing all the rights of man, since they are aggregates of man, are governed by similar rules of action. Upon those principles was founded the right of emigration of old: upon those principles the Phenicians and Greeks and Carthagenians settled Colonies in the wilds of the earth.... In a work treating expressly of original titles to Land it has been thought not amiss to explain... the manner in which an individual obtaining from his Sovereign an exclusive licence, with his own means, to lead out and plant a Colony in a region of which that Sovereign had no possession, proceeded to avail himself of the privilege or grant, and to reconcile or subject to his views the people occupying and claiming by natural right that Country so bestowed... in particular, an history, already referred to, of the Americans settlements, written in 1671, after speaking of the acquisition of St. Mary's continues 'and it hath been the general practice of his Lordship and those who were employed by him in the planting of the said province, rather to purchase the natives' interest... than to take from them by force that which they seem to call their right and inheritance, to the end all disputes might be removed touching the forcible encroachment upon others, against the Law of nature or nations... When the earth was the general property of mankind, mere occupancy conferred on the possessor such an interest as it would have been unjust, because contrary to the Law of Nature, to take from him without his consent: and this state has been happily compared to a theatre, common to all; but the individual, having appropriated a place, acquires a privilege of which he cannot be dispossessed without injustice! ... the Grant [to Lord Baltimore] comprehended 'all Islands and Islets within the limits aforesaid, and all Islands and etc. within ten marine leagues of the Eastern Shore, with all Ports, Harbors, Bays, Rivers, and Straits, belonging to the region or Islands aforesaid, and all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Days, and Straits, with the fishing of every kind, within the said limits; all mines of whatsoever kind, and patronage and advowson of all Churches. Lord Baltimore ... was invested with all the Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and Royal Rights and Temporal Franchises whatsoever, as well by sea as by land, within the Region, Islands, Islets, and limits aforesaid...'(Source: John Kilty. Land Holder's Assistant and Land Office Guide.*

*Islands, Islets, and limits aforesaid...*(Source: John Kilty. *Land Holder's Assistant and Land Office Guide*.

Baltimore: G. Dobbin & Murphy, 1808. MSA SC 5165-1-1).; and

WHEREAS, 130 years later the Proclamation of 1763 by King George III recognized title to the land and resources reserved by the American Indians of no lesser character or extent than the Charter to Lord Baltimore:

*And whereas it is just and reasonable, and essential to our interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no... Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them. And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, ... all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid. And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained. And We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements. And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose....*

*Given at our Court at St. James's the 7th Day of October 1763, in the Third Year of our Reign.*

*GOD SAVE THE KING; and*



WHEREAS, after the American Revolution and consistent with the foregoing, the United States Supreme Court by 1832 relied upon the ancient concepts of its predecessor Great Britain and recognized the property rights of Indians in the classical case of *Worcester v. the State of Georgia*:

*America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.* (6 P 515, p. 543)

*... This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man....*

*... This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The Crown could not be understood to grant what the Crown did not effect to claim; nor was it so understood.*

(6 P 515, p. 544-545) (Emphasis supplied); and

WHEREAS, the principles in the case of *Worcester v. Georgia* are ancient as shown above and are the foundation of the principles announced by the U. S. Supreme Court three quarters of a century later relating to the Yakima Indian Nation in the case of *United States v. Winans* (198 U.S. 371). Title of the Indians in their property rights was fully acknowledged, and the Treaty was interpreted as a grant of property to the United States in the area not reserved by the Tribe to itself.

*The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words the Treaty was not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted.*

(Emphasis supplied); and

WHEREAS, the Supreme Court case of *Henry Winters v. United States* (207 US 564) found that reservation of water for the purposes of civilization was implied in the establishment of the Reservations:

*The Reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be adequate with a change of conditions. The lands were arid and, without irrigation, were practically valueless.*

... That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, [at Fort Belknap] and it would be extreme to believe that within a year later [when the state of Montana was created] Congress destroyed the Reservation and took from the Indians the consideration of their grant, leaving them a barren waste - took from them the means of continuing their old habits, yet did not leave them the power to change to new ones." (207 U S 574, p. 576 577); and

WHEREAS, the case of *United States v. Ahtanum Irrigation District* (236 Fed 2nd 321, 1956) applied the *Worcester-Winans-Winters* concepts on Ahtanum Creek, tributary to the Yakima River and northern boundary of the Yakima Indian Reservation:

*The record here shows that an award of sufficient water to irrigate the lands served by the Ahtanum Indian irrigation project system as contemplated in the year 1915 would take substantially all of the waters of Ahtanum Creek. It does not appear that the waters decreed to the Indians in the Winters case operated to exhaust the entire flow of the Milk River, but, if so, that is merely the consequence of it being a larger stream. As the Winters case, both here and in the Supreme Court, shows, the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers. Our *Conrad Inv. Co. Case, supra*, held that what the non-Indian appropriators may have is only the excess over and above the amounts reserved for the Indians. It is plain that if the amount awarded the United States for the benefit of the Indians in the Winters Case equaled the entire flow of the Milk River, the decree would have been no different. (236 F. 2nd 321, p. 327) (Emphasis supplied); and*

WHEREAS, these concepts were further advanced in *Arizona v California*, 373 U.S. 546, 596-601 (1963):

*The Master found as a matter of fact and law that when the United States created these reservations or added to them, it reserved not only land but also the use of enough water from the Colorado [River] to irrigate the irrigable portions of the reserved lands. The aggregate quantity of water which the Master held was reserved for all the reservations is about 1,000,000 acre-feet to be used on around 135,000 irrigable acres of land....*

*It is impossible to believe that when Congress created the Great Colorado River Indian reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of desert kind -- hot scorching sands -- and the water from the River would be essential to the life of the Indian people and to the animals they hunted and crops they raised. We follow it [Winters] now and agree that the United States did reserve the water rights for the Indians effective as of the time Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act [Boulder Canyon Project Act] became effective on June 25, 1929, are present perfected rights and as such are entitled to priority under the Act. We also agree with the Master's conclusion as to the quantity intended to be reserved. He found that water was intended to satisfy the future as well as present needs of the Indian reservations.... We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreage of irrigable land which the Master found to be on the different reservations we find to be reasonable; and*

### General Nature of Attacks on Winter Doctrine

WHEREAS, notwithstanding the injunctions of Lord Baltimore, King George III and favorable decisions of the United States Supreme Court, in practice, Congress, the executive branch and the judiciary have (1) limited Indian reserved water rights, (2) suppressed development of Indian reserved water rights, and (3) permitted reliance by state, federal, environmental and private interests on Indian water, contrary to trust obligations. The federal policy has clearly been .. *how best to transfer Indian lands and resources to non-Indians..* rather than to preserve, protect, develop and utilize those resources for the benefits of the Indians.

*With an opportunity to study the history of the Winters rule as it has stood now for nearly 50 years, we can readily perceive that the Secretary of the Interior, in acting as he did, improvidently bargained away extremely valuable rights belonging to the Indians.... viewing this contract as an improvident disposal of three quarters of that which justly belonged to the Indians, it cannot be said to be out of character with the sort of thing which Congress and the Department of the Interior has been doing throughout the sad history of the Government's dealings with the Indians and Indian tribes. That history largely supports the statement: From the very beginnings of this nation, the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped, but how best to transfer Indian lands and resources to non-Indians. (United States v Ahtanum Irrigation District, 236 F. 2nd 321, 337); and*

WHEREAS, the McCarran Amendment interpretation by the United States Supreme Court, if not in error, is a further example of the contemporary attack on Indian water rights. The discussion of the McCarran Amendment here is intended to show why tribes are (1) opposed to state court adjudications and (2) negotiated settlements under the threat of state court adjudication. In 1952 the McCarran Amendment, 43 U.S.C. 666 (a), was enacted as follows:

*Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a River system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner or in the process of acquiring water rights by appropriation under State law, by purchase, by exchange or otherwise, and the United States is a necessary party to such suit; and*

WHEREAS, the McCarran Amendment has been interpreted by the U.S. Supreme Court to require the adjudication of Indian water rights in state courts. *Arizona v San Carlos Apache Tribe*, 463 U.S. 545,564,573 (1981) held:

*We are convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on State Court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment.*

In dissent, however, Justice Stevens stated:

*To justify virtual abandonment of Indian water right claims to the State courts, the majority relies heavily on Colorado River Water Conservancy District, which in turn discovered an affirmative policy of federal judicial application in the McCarran Amendment. I continue to believe that Colorado River read more into that amendment than Congress intended... Today, however, on the tenuous foundation of a perceived Congressional intent that has never been articulated in statutory language or legislative history, the Court carves out a further exception to the virtually unflagging obligation of Federal courts to exercise their jurisdiction. The Court does not -- and cannot -- claim that it is faithfully following general principles of law... That Amendment is a waiver, not a command. It permits the United States to be joined as a defendant in state water rights adjudications; it does not purport to diminish the United States right to litigate in a federal forum and it is totally silent on the subject of Indian tribes rights to litigate anywhere. Yet today the majority somehow concludes that it commands the Federal Courts to defer to State Court water right proceedings, even when Indian water rights are involved; and*

WHEREAS, in Arizona, Montana and other states, general water right adjudications to quantify *Winters* Doctrine rights are ongoing. For example in the state of Montana:

- (1) the state of Montana sued all tribes in a McCarran Amendment proceeding.
- (2) the State of Montana established a Reserved Water Rights Compact Commission. The purpose of the Commission was to negotiate the *Winters* Doctrine rights of the Montana tribes.
- (3) the Department of Interior has adopted a negotiation policy for the settlement of Indian water rights. The United States Department of Interior has a negotiating team which works with the Montana Reserve Water Rights Compact Commission and Indian tribes, some forced by the adjudication in

state court, to negotiate, while others are willing to negotiate.

(4) the Department of Interior makes all necessary funding available to any Tribe willing to undertake negotiations. A Tribe refusing to negotiate cannot obtain funding to protect and preserve its *Winters* Doctrine water rights.

(5) upon reaching agreement between the State of Montana and an Indian tribe, congressional staff are assigned to develop legislation in the form of an Indian water rights settlement that may or may not involve authorization of federal appropriations to develop parts of the amount of Indian water agreed upon between the Tribe and the State or for other purposes.

(6) in the absence of the desire of a Tribe to negotiate, the State of Montana will proceed to prosecute its McCarran Amendment case against the Tribe; and

WHEREAS, this process relies on ongoing litigation to accomplish negotiated settlements of *Winters* Doctrine Indian water rights. The process is held out to be a success by the state and federal governments. However, comparison with the taking of the Black Hills from the Great Sioux Nation, the taking of the Little Rocky Mountains from the Fort Belknap Indian Reservation and the taking of Glacier Park from the Blackfeet are valid comparisons. There are elements of force and extortion in the process; and

WHEREAS, in the Wind River adjudication, 753 P. 2nd 76, 94-100 (WY 1988), the State of Wyoming utilized the McCarran Amendment to drastically diminished the Arapaho and Shoshone *Winters* Doctrine water rights in the Big Horn River Basin. The Wyoming Supreme Court found as follows:

*The quantity of water reserved is the amount of water sufficient to fulfill the purpose of the lands set aside for the Reservation.*

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*The Court, while recognizing that the tribes were the beneficial owners of the reservations timber and mineral resources... and that it was known to all before the treaty was signed that the Wind River Indian Reservation contained valuable minerals, nonetheless concluded that the purpose of the reservation was agricultural. The fact that the Indians fully intended to continue to hunt and fish does not alter that conclusion.... The evidence is not sufficient to imply a fishery flow right absent a treaty provision.... The fact that the tribes have since used water for mineral and industrial purposes does not establish that water was impliedly reserved in 1868 for such uses. The District Court did not err in denying a reserved water right for mineral and industrial uses... the District Court did not err in holding that the Tribes and the United States did not introduce sufficient evidence of a tradition of wildlife and aesthetic preservation that would justify finding this to be a purpose for which the Reservation was created or for which water was impliedly reserved... not a single case applying the*

*reserved water right doctrine to groundwater is cited to us.... In Colville Confederated Tribes v. Walton, supra, 547 F.2d 42, there is slight mention of the groundwater aquifer and of pumping wells, id at 52, but the opinion does not indicate that the wells are a source of reserved water or even discuss a reserve groundwater right.... The District Court did not err in deciding there was no reserved groundwater right; and*

WHEREAS, the statement by the Wyoming Supreme Court that *Colville* does not discuss a reserved water right to groundwater is in error, for *Colville* did decree reserved groundwater rights; and

WHEREAS, the *Wind River* case must be carefully examined by all tribes, including those of the Missouri River Basin. The single purpose of the Wind River Indian Reservation recognized by the Wyoming Supreme Court was limited to agriculture: severely limited relative to the... *Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and Royal Rights and Temporal Franchises whatsoever, ... within the Region, ..comprehending... 'all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Dags, and Straits, with the fishing of every kind, within the said limits'; all mines of whatsoever kind...* received by from the King by Lord Baltimore in the Proprietary of Maryland, which were, nevertheless, subject to purchase from the Native possessors. The Arapaho and Shoshone must have believed that the purpose of the reservation was to provide a permanent home and abiding place for their present and future generations to engage and pursue a viable economy and society. Despite existing oil and gas resources, they were denied reserved water for mineral purposes. Despite the need for industry in a viable economy, they were denied reserved water for industry. Despite a tradition of hunting and fishing, they were denied reserved water for wildlife and aesthetic preservation. Despite the existence of valuable forests, they were denied reserved water for this purpose. Despite the existence of valuable fisheries, established from time immemorial, they were denied a reserved water right to sustain their fisheries; and

WHEREAS, the United States Supreme Court reviewed the *Wind River* decision on the following question:

*In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in presence of substantial state water rights long in use on the reservation, may reserved water rights be implied for all practicably irrigable lands within reservation set aside for specific Tribe? 57 LW 3267 (Oct. 11, 1988); and*

WHEREAS, acting without a written opinion and deciding by tie vote, the United States Supreme Court affirmed the decision of the Supreme Court of the State of Wyoming and rejected the thought process presented in the question above that the Tribes needed no additional water than the amount they were using and that state created water rights with long use should not be subjected to future Indian water rights. But a change in vote by a single justice would have reversed the decision and severely

constricted the benefits of the *Winters* Doctrine to the Indian people, a subject to be discussed further. The decision is limited to the State of Wyoming on critical issues, namely that Indian reserved rights do not apply to groundwater; the absence of a reserved water right for forest and mineral purposes; the absence of a reserved water right for fish, wildlife and aesthetic preservation; and a reduction of the Tribes claims to irrigation from 490,000 to less than 50,000 acres; and

WHEREAS, the acreage for irrigation finally awarded to the Wind River Tribes for future purposes was 48,097 acres involving approximately 188,000 acre-feet of water annually:

*In determining the Tribes claims to practicably irrigable acreage, the United States (trustee for the tribes) began with an arable land-base of approximately 490,000 and relied on its experts to arrive at over 88,000 practicably irrigable acres. The claim was further "trimmed" by the United States to 76,027 acres for final projects. The acreage was further reduced during trial to 53,760 acres by Federal experts with a total annual diversion requirement of about 210,000 acre-feet. (Teno Roncalio, Special Master. In Re: The General Adjudication of All Rights to the Use of Water in the Big Horn River System and All Other Sources, State of Wyoming, Concerning Reserved Water Right Claims by and on Behalf of the Tribes of the Wind River Indian Reservation, Wyoming, Dec. 15, 1982, pp. 154 and 157); and*

WHEREAS, the *purposes* of reservation issue addressed by the Wyoming courts evolved from the 1978 United States Supreme Court case, *United States v. New Mexico* (438 U.S. 696), involving the water rights of the Gila National Forest:

*The Court has previously concluded that Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, impliedly authorized him to reserve "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."... The Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."... Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.... The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes -- "to conserve the water flows, and to furnish a continuous supply of timber for the people."... Not only is the Government's claim that Congress intended to reserve water for recreation and wildlife preservation inconsistent with Congress's failure to recognize these goals as purposes of the national forest, it would defeat the very purpose for which Congress did intend the national forest system.... While Congress intended the national forest to be put to a variety of uses, including stockwatering, not inconsistent with the two principal purposes of the forest, stock watering was not, itself, a direct purpose of reserving the land; and*

WHEREAS, there may be debate with respect to the purposes for which a national

forest was created and for which purposes water was reserved, but it is a "slender reed" upon which to found a debate that when Indian reservations were established by the Indians or Great Britain or the United States, the purpose of establishment might vary among the Indian reservations; and, depending upon that purpose, the Indians would be limited in the beneficial uses to which water could be applied. Indian neighbors could apply water to any beneficial purpose generally accepted throughout the Western United States, but Indians could not. It is inconceivable that an Indian Reservation was established for any other "purpose" than an "Indian" reservation or that each Reservation was established for some arcane reason other than the pursuits of industry, self-government and all other activities associated with a modern, contemporary and ever-changing society embracing all of the ... *Rights, Jurisdictions, Privileges, Prerogatives, ... and Temporal Franchises whatsoever, ... within the Region, ..comprehending... 'all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Days, and Straits, with the fishing of every kind, within the said limits; all mines of whatsoever kind; and*

WHEREAS, nevertheless, the Wyoming courts relied upon the "purposes" argument to exclude water reserved for the pursuit of many of the arts of civilization.... industry, mineral development, fish, wildlife, aesthetics... on the basis that the purpose of the Wind River Indian Reservation was limited to an agricultural purpose absent specific Treaty language to the contrary. As crude as this conclusion may be, however, Tribes of the Missouri River basin and throughout the Western United States are faced with the "purposes" limitation originally applied in 1978 to national forests; and

WHEREAS, if there may be a question that the issue ended in Wyoming, it is only necessary to examine the state court general adjudication process in Arizona. A June 2000 pretrial order by the Special Master in the *General Adjudication of All Rights to Use Water in the Gila River System and Source* summarizes the issues as follows:

*... Does the "primary-secondary" purposes distinction, as announced by the U.S. Supreme Court in United States v. New Mexico, 438 U.S. 696 (1978), apply to the water rights claimed for the Gila River Indian Reservation?...*

*.... The State Litigants takes the position that the distinction does apply.*

*... If the "primary-secondary" purposes distinction does apply to the Gila River Indian Reservation, what were the primary and secondary purposes for each withdrawal or designation of land for the Gila River Indian Reservation? May the Reservation have more than one "primary" purpose?....*

*.... The State Litigants takes a position that the federal government withdrew or designated land to protect existing agriculture, create a buffer between the community and non-Indians who were settling in the area, provide substitute agricultural lands when non-Indians encroached on existing Indian agricultural lands, and provide for other specific economic activities such as grazing; and*



WHEREAS, the restriction or limitation of Indian water rights in the Missouri River basin is not confined to a federal denial of them in federal actions, such as the Master Manual and endangered species consultation. The limitations are expected to grow and expand from these federal actions. Indian water right opponents will concentrate on the language of *United States v. New Mexico* that "...only that amount of water necessary to fulfill the purpose of the reservation, no more..." has been reserved by the Tribes or the United States on behalf of the tribes. The effort will be to first limit the purposes for which an Indian reservation was established and second limit the amount of water necessary to fulfill that purpose. If, for example, opponents could successfully argue that the purpose of an Indian reservation in the Missouri River Basin was primarily a "permanent homeland" and that agriculture was secondary, they would further argue that the amount of water reserved was limited to domestic uses, and no water was reserved for irrigation; and

WHEREAS, *Cappaert v. United States* (426 U.S. 128, 1976) was the basis, in part, for the decision in *United States v. New Mexico* discussed above. Here again the purposes of a "federal" reservation (as distinguished from a reservation by Indians or a reservation by the United States on behalf of Indians) and the use of water for that purpose is the subject. But the Cappaert decision is helpful in showing the extreme interpretations to which the State Court in Wyoming went in its *Wind River* decision:

*....The District Court then held that, in establishing Devil's Hole as a national monument, the President reserved appurtenant, unappropriated waters necessary to the purpose of the reservation; the purpose included preservation of the pool and pupfish in it.... The Court of Appeals for the Ninth Circuit affirmed... holding that the "implied reservation of water" doctrine applied to groundwater as well as surface water...and*

WHEREAS, the purpose of establishing the national monument was clearly limited -- to preserve the Devil's Hole pupfish, which rely on a pool of water that is a remnant of the prehistoric Death Valley Lake System an object of historic and scientific interest. This is not an Indian reservation which embraces all of the purposes related to civilization, society and economy. Yet, Wyoming seized on the concept of an Indian reservation with purpose limited in the same manner as a national forest or a national monument. Note, however, that the Wyoming case (1988) grasps at the purposes argument to diminish the Indian water right but ignores the damaging aspect of *Cappaert* (1976) that reserved water concepts apply to groundwater as well as surface water. Not only did Wyoming ignore *Colville Confederated Tribes*, it ignored *Cappaert*. Recently, the Arizona Supreme Court, after considering the Wyoming decision, could not countenance a similar decision in Arizona, specifically rejected the Wyoming decision and found as follows:

*...the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater...and...holders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law rights...; and*

WHEREAS, similarly, Wyoming ignored *Cappaert*, a U.S. Supreme Court decision about federally reserved water rights in a National Monument in Nevada, where *Cappaert* specifically rejected the concept of "sensitivity" or balancing of equities when water is needed for the purpose of a federal or Indian Reservation. In *Cappaert* the Court cited the *Winters* decision as a basis for rejecting the notion of Nevada that competing interests must be balanced between federal (or Indian) reserved water rights and competing non-federal (or non-Indian) water rights. Wyoming returned to the U.S. Supreme Court seeking a more favorable decision respecting "sensitivity" than provided by *Cappaert*:

*Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in Winters v. United States, supra, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of the water. The "Statement of the Case" in Winters notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that, when the Federal Government reserves land, by implication, it reserves water rights sufficient to accomplish the purposes of the reservation; and*

WHEREAS, the United States Supreme Court reviewed the decision of the Wyoming Supreme Court and upheld the decision by a tie vote as discussed above. However, the majority of the court had apparently been swayed by the Wyoming argument:... *In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in presence of substantial state water rights long in use on the reservation, may reserved water rights be implied for all practicably irrigable lands within reservation set aside for specific Tribe?... and had prepared a draft opinion referred to by the Arizona Supreme Court as the "ghost" opinion. The draft opinion was apparently not issued because Justice Sandra Day O'Connor, author of the "ghost" opinion on behalf of the majority, disqualified herself because she learned that her ranch had been named as a defendant in the Gila River adjudication in Arizona. Despite more than 350 years of understanding of justice and law relating to Indian property, the O'Connor opinion would have destroyed the basic tenets of the Winters Doctrine:*

*...The PIA standard is not without defects. It is necessarily tied to the character of land, and not to the current needs of Indians living on reservations....And because it looks to the future, the PIA standard, as it has been applied here, can provide the Tribes with more water than they need at the time of the quantification, to the*

detriment of non-Indian appropriators asserting water rights under state law....this Court, however, has never determined the specific attributes of reserve water rights – whether such rights are subject to forfeiture for nonuse or whether they may be sold or leased for use on or off the Reservation....Despite these flaws and uncertainties, we decline Wyoming's invitation to discard the PIA standard... The PIA standard provides some measure of predictability and, as explained hereafter, is based on objective factors which are familiar to courts. Moreover no other standard that has been suggested would prove as workable as the PIA standard for determining reserve water rights for agricultural reservations....we think Master Roncolio and the Wyoming Supreme Court properly identified three factors that must be considered in determining whether lands which have never been irrigated should be included as PIA: the arability of the lands, the engineering feasibility (based on current technology) of necessary future irrigation projects, and the economic feasibility of such projects (based on the profits from cultivation of future lands and the costs of the project... Master Roncolio found...that economic feasibility will turn on whether the land can be irrigated with a benefit-cost ratio of one or better.... Wyoming argues that our post-Arizona I cases, specifically Cappaert and New Mexico, indicate that quantification of Indian reserved water rights must entail sensitivity to the impact on state and private appropriators of scarce water under state law.... Sensitivity to the impact on prior appropriators necessarily means that "there has to be some degree of pragmatism" in determining PIA....we think this pragmatism involves a "practical" assessment – a determination apart from the theoretical economic and engineering feasibility – of the reasonable likelihood that future irrigation projects, necessary to enable lands which have never been irrigated to obtain water, will actually be built....no court has held that the Government is under a general legal or fiduciary obligation to build or fund irrigation projects on Indian reservations so that irrigable acreage can be effectively used.... massive capital outlays are required to fund irrigation projects...and in today's era of budget deficits and excess agricultural production, government officials have to choose carefully what projects to fund in the West. ... Thus, the trier of fact must examine the evidence, if any, that additional cultivated acreage is needed to supply food or fiber to resident tribal members, or to meet the realistic needs of tribal members to expand their existing farming operations. The trier must also determine whether there will be a sufficient market for, or economically productive use of, any crops that would be grown on the additional acreage....we therefore vacate the judgment insofar as it relates to the award of reserved water rights for future lands and remand the case to the Wyoming Supreme Court for proceedings not inconsistent with this opinion; and

WHEREAS, the United States Supreme Court has virtually unlimited power to arrive at unjust decisions as evidenced by the *Dred Scott* decision, and the opinion of the minority would have had no force and effect in *Wyoming* as given by Justice Brennan:

...In the Court might well have taken as its motto for this case in the words of Matthew 25:29: "but from him that has not shall be taken away even that which he has." When the Indian tribes of this country were placed on reservations, there was, we have held, sufficient water reserved for them to fulfill the purposes of the reservations. In most cases this has meant water to irrigate their arable lands.... The Court now proposes, in effect, to penalize them for the lack of Government investment on their reservations by taking from them those water rights that have remained theirs, until now, on paper. The requirement that the tribes demonstrate a "reasonable likelihood" that irrigation

*projects already determined to be economically feasible will actually be built – gratuitously superimposed, in the name out “sensitivity” to the interests of those who compete with the Indians for water, upon a workable method for calculating practicably irrigable acreage that parallels government methods for determining the feasibility of water projects for the benefit of non-Indians – has no basis in law or justice; and*

WHEREAS, whether inspired by the “ghost” opinion of Justice O’Connor or not, the Arizona Supreme Court held arguments in February 2001 on the issue of: “what is the appropriate standard to be applied in determining the amount are water reserved for federal lands?”, particularly Indian lands, which were not reserved by the United States for the Standing Rock Sioux Tribe but were, rather, reserved by the Tribe by its ancient ancestors from time immemorial. The outcome by the Arizona Supreme Court is immaterial but provides the question for review by the United States Supreme Court with full knowledge from the “ghost” opinion of the probable outcome. The Salt River Project and Arizona, principal losers in *Arizona v California I*, make the following arguments in *Gila River* against Indian reserved rights to the use of water:

*... Under the United States Supreme Court’s decision in United States v New Mexico..., all federal land with a dedicated federal purpose “has reserved to it that minimum amount of water which is necessary to effectuate the primary purpose of the land set aside.” Judge Goodfarb also found, however, that this “purposes” test does not apply to Indian reservations. Instead, he held that, for Indian reservations, “the courts have drawn a clear and distinct line”....that mandates that reserved rights for all Indian reservations must be quantified based on the amount of “water necessary to irrigate all of the practicably irrigable acreage (PIA) on that Reservation” without considering the specific purposes for which the Reservation was created...this interlocutory proceeding with respect to Issue 3 arose because Judge Goodfarb incorrectly ruled (as a matter of law and without the benefit of any factual record, briefing, or argument) that PIA applies to all Indian reservations...*

*....as shown below, the Supreme Court in that case [Arizona I] and the courts in all reported decisions since that time, have applied the following analysis: first, review the historical evidence relating to the establishment of the Reservation and, from that evidence, determine the purposes for which the specific land in question was reserved (a question of fact). Second, determine, based upon the evidence, the minimum quantity of water necessary to carry out those purposes (a mixed question of law and fact). ...and in Colville Confederated Tribes V. Walton, for instance, the ninth circuit stated: “to identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances.”*

*...the Zuni Reservation in northeastern Arizona, for example, was established*

by Congress expressly "for religious purposes."...the original 1859 creation of the Gila Reservation and each of the seven subsequent additions had different rationales and were intended to address different purposes or combinations of purposes (e.g. protecting existing farmlands, adding lands for grazing, including lands irrigated by Indians outside the Reservation as part of the Reservation...

....in addition to varying in size, Indian reservations also vary in location and terrain. Reservations in Arizona, for instance, run the gamut from desert low lands to the high mountains and everything in between. Certain reservations along the Colorado River include fertile but arid river bottom land and were created for the purpose of converting diverse groups of "nomadic" Indians to a "civilized" and agrarian way of life...other reservations, such as the Navajo Reservation in extreme northeastern Arizona, consist largely of "very high plateaus, flat-top mesas, inaccessible buttes and deep canyons. ....there can be little doubt that the PIA standard works to the advantage of tribes inhabiting alluvium plains or other relatively flat lands adjacent to stream courses. In contrast, tribes inhabiting mountainous or other agriculturally marginal terrains are at a severe disadvantage when it comes to demonstrating that their lands are practicably irrigable....

...the special master [Arizona I] conducted a trial, accepted and reviewed substantial evidence regarding the purposes of the five Indian reservations at issue in that case, made factual findings as to purposes, and only then found that the minimum amount of water necessary to carry out those purposes was best determined by the amount of water necessary to irrigate all "practicably irrigable" acres on those reservations. ....the special master stated: "moreover the 'practicably irrigable' standard is not necessarily a standard to be used in all cases and when it is used it may not have the exact meaning it holds in this case. The amount reserved in each case is the amount required to make each Reservation livable."

...although the United States Supreme Court affirmed the Wyoming court's decision in that case without opinion, events surrounding that review shed considerable light on the Supreme Court's concerns about the continued viability of PIA as a standard, at least in the form it was applied in Arizona I. ....several Justices challenged the United States's defense of PIA.... "at this point, Chief Justice Rehnquist challenged the precedential validity of Arizona I by noting that the opinion 'contains virtually no reasoning' and the Court merely had accepted the special master's conclusion as to the PIA standard...arguing that Congress must of contemplated the size of the tribe that would live on the Wind River Reservation, ...the Chief Justice stated that he found it difficult to believe that 'in 1868 Congress...should be deemed have said we're giving up water to irrigate every - every inch of arable land. No matter how large the tribe they thought they were settling. Did they expect to make some tribes very rich so that they can have an enormous export business... in agricultural products?" (State Litigant's Opening Brief on

Interlocutory Issue 3, Gila River Adjudication); and

Historical Analysis of Thought Processes Embraced by Master Manual

WHEREAS, the means employed by the Corps of Engineers to deny consideration of Indian water rights in the preparation of the Master Manual and those same means employed by the Department of Interior to deny consideration of Indian water rights in baseline environmental studies of endangered species have been presented. Also, presented was the favorable body of law supporting the proper consideration of Indian water rights followed by the denigration of that law in state court adjudications, namely in Wyoming and, more recently, in Arizona. Briefly examined here are historical examples of the diminishment of property rights by a superior force and the strikingly similar arguments in support of that diminishment, and

WHEREAS, the concepts and techniques for diminishing the water rights of the Standing Rock Sioux Tribe in the Missouri River, its tributaries and aquifers are not novel. The colonization of Ireland by the English (*circa* 1650), for example, was justified in a manner that provides insight in the federal treatment of Indian water rights in the Missouri River Basin. Sir Thomas Macaulay, a prominent English politician in the first half of the 19<sup>th</sup>-century and one of the greatest writers of his or any other era, rationalized the taking of land from the native Irish and the overthrow of King James II in 1692, which overthrow was due, in part, to the King's efforts to restore land titles to the native Irish: (Sir Thomas Macaulay, 1848, *The History of England*, Penguin Classics, pp 149-151)

*To allay national animosity such as that which the two races [Irish and English] inhabiting Ireland felt for each other could not be the work of a few years. Yet it was a work to which a wise and good Prince might have contributed much; and King James II would have undertaken that work with advantages such as none of his predecessors or successors possessed. At once an Englishman and a Roman Catholic, he belonged half to the ruling and half to the subject cast, and was therefore peculiarly qualified to be a mediator between them. Nor is it difficult to trace the course which he ought to have pursued. He ought to have determined that the existing settlement of landed property should be in violable; and he ought to have announced that determination in such a manner as effectually to quiet the anxiety of the new proprietors, and to extinguish any wild hopes which the old proprietors might entertain. Whether, in the great transfer of estates, injustice had or had not been committed, was immaterial. The transfer, just or unjust, had taken place so long ago, that to reverse it would be to unfix the foundations of society. There must be a time limitation to all rights. After thirty-five years of actual possession, after twenty-five years of possession solemnly guaranteed by statute, after innumerable leases and releases, mortgages and devises, it was too late to search for flaws in titles. Nevertheless something might have been done to heal the lacerated feelings and to raise the fallen fortunes of the Irish gentry. The colonists were in a thriving condition. They had greatly improved their property by building, planting and fencing..... There was no doubt that the next Parliament which should meet at Dublin, though representing almost exclusively the English interest, would, in return for the King's promise to maintain that interest in all its legal rights, willingly grant to him a considerable sum for the purpose of indemnifying, at*

least in part, such native families as had been wrongfully despoiled.

*Having done this, he should have labored to reconcile the hostile races to each other by impartially protecting the rights and restraining the excesses of both. He should have punished with equal severity that native who indulges in the license of barbarism and the colonists who abused the strength of civilization..... no man who was qualified for office by integrity and ability should have been considered as disqualified by extraction or by creed for any public trust. It is probable that a Roman Catholic King, with an ample revenue absolutely at his disposal, would, without much difficulty, have secured the cooperation of the Roman Catholic prelates and priests in the great work of reconciliation. Much, however, might still have been left to the healing influence of time. The native race might still have had to learn from the colonists industry and forethought, arts of life, and the language of England. There could not be equality between men who lived in houses and men who lived in sties, between men who were fed on bread and men who were fed on potatoes, between men who spoke the noble tongue of great philosophers and poets and men who, with the perverted pride, boasted that they could not writhe their mouths into chattering such a jargon as that in which the Advancement of Learning and the Paradise Lost were written. Yet it is not unreasonable to believe that if the gentle policy which has been described had been steadily followed by the government, all distinctions would gradually have been effaced, and that there would now have been no more trace of the hostility which has been the curse of Ireland ...and*

WHEREAS, the Master Manual rationale... *Currently, such reserved or aboriginal rights of tribal reservations have not been quantified in an appropriate legal forum or by compact with three exceptions.... The Study considered only existing consumptive uses and depletions; therefore, no potential tribal water rights were considered.... or the ESA rationale.... The environmental baseline used in ESA Section 7 consultations on agency actions affecting riparian ecosystems should include for those consultations the full quantum of: (a) adjudicated (decreed) Indian water rights; (b) Indian water rights settlement act; and (c) Indian water rights otherwise partially or fully quantified by an act of Congress... Biological opinions on proposed or existing water projects that may affect the future exercise of senior water rights, including unadjudicated Indian water rights, should include a statement that project proponents assume the risk that the future development of senior water rights may result in a physical or legal shortage of water....* does not represent a significant step forward from that advanced by Macaulay given the opportunity of 150 years for refinement in America. There cannot be significant differences between the statement of the Corps of Engineers and the Macaulay logic; and

WHEREAS, it is material, not immaterial, whether there has been injustice or a fitting of the law to the purpose in the transfer of Standing Rock waters of the Missouri River, its tributaries and its aquifers to non-Indians in the Master Manual update. It is rejected as correct ... that after the new proprietor's (downstream navigation, upstream recreation and endangered species) have enjoyed the Indian "estate" for a period of 25 to 35 years, the wild hopes of the Indian proprietors for participation must be extinguished. It is rejected as correct that the lacerated Indian feelings be healed, or for a considerable sum, despoiled Indian families can be made whole and the new possessors of Standing Rock Sioux water rights can be indemnified. It is rejected as proper that this be justified on the basis that the new possessor has greater industry, forethought, arts of life, language, diet, and housing. It is rejected

as untrue that after numerous leases, releases, and mortgages by non-Indians relying upon unused Indian *Winters* doctrine water rights, it is too late to search for flaws in titles. It is accepted as true that the Master Manual promotes reliance by non-Indians upon unused Indian *Winters* doctrine water rights; and

WHEREAS, the rationale of Supreme Court Justices, Master Manual and ESA is but a limited improvement from historical examples even earlier than Macaulay. Over 400 years ago, the sovereigns of England and Scotland, upon their union, sought possession of the borderlands between the two nations and to dispossess the native tribal inhabitants. The following provides the rationale of the Bishop of Glasgow against those ancient inhabitants as they sought (in vain) to stay in possession of their ancient lands:

*I denounce, proclaim and declare all and sundry acts of the said murders, slaughters,... thefts and spoils openly upon daylight and under silence of night, all within temporal lands as Kirklands; together with their partakers, assistants, suppliers, known receivers and their persons, the goods reft and stolen by them, art or part thereof, and their counselors and defenders of their evil deeds generally CURSED, execrated, aggregate and re-aggregate with the GREAT CURSING.*

*I curse their head and all their hairs on their head; I curse their face, their eye, their mouth, their nose, their tongue, their teeth, their crag, their shoulders, their breast, their heart, their stomach, their back, their wame (belly), their arms, their legs, their hands, their feet, and every part of their body, from the top of their head to the sole of their feet, before and behind, within and without.*

*I curse them going and I curse them are riding; I curse them standing, and I curse them sitting; I curse them eating, I curse them drinking; I curse them walking, I curse them sleeping; I curse them arising, I curse them laying; I curse them at home, I curse them from home; I curse them within the house, I curse them without the house; I curse their wives, their barns, and their servants participating with them in their deeds. I wary their corn, their cattle, their wool, their sheep, their horses, their swine, their geese, their hens, and all their livestock. I wary their halls, their chambers, their kitchens, their storage bins, their barns, their cowsheds, their barnyards, their cabbage patches, their plows, their harrows, and the goods and houses that is necessary for their sustenance and welfare.*

*The malediction of God that lighted upon Lucifer and all his fellows, that struck them from the high heaven to the deep hell, must light upon them. The fire in the sword that stopped Adam from the gates of Paradise, must stop them from the glory of heaven until they forbear and make amends; and*

WHEREAS, truly, the rationale of the Master Manual may be a slight improvement in the techniques that were used to justify dispossession 400 years ago and represents progress, Standing Rock and other tribes have repeatedly encountered equally effective, if less colorful, opposition to their efforts to preserve, protect, administer and utilize their water rights; and

WHEREAS, the distinguishing feature for the Standing Rock Sioux Tribe, however, is



the fact that the water right "estate" in the Missouri River has not been taken from them, even though it is under attack in the Master Manual. It is proposed in the Master Manual to commit water away from the Indians, but the process is not accomplished, and those who would rely on unused Indian water rights have not yet taken possession and executed mortgages, leases and releases on the basis of them. The Standing Rock Sioux Tribe remain in position to retain its "estate" in the Missouri River by rejecting the Master Manual and taking affirmative action to protect its ancient and intact possessions; and

WHEREAS, by taking steps to protect their ancient possessions the Standing Rock Sioux Tribe recognizes that it cannot expect support from the United States or its agencies acting as Trustee. Strong reaction can be expected from any current attempt to do so, including strong reaction by the Trustee. First, the Trustee has no funds for litigation of Indian water right issues. Second, the Trustee has considerable funds for settlement of Indian water right issues, but the Indian costs in lost property are great. Third, the Trustee has considerable technical criteria and requirements to impose on the Indian tribes as a basis for limiting the Indian water right "estate": irrigable land criteria, water requirement criteria, limitation on beneficial uses and, most limiting, economic feasibility criteria that few, if any, existing non-Indian water projects could survive.

NOW THEREFORE BE IT RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe rejects the Master Manual Review and Update by the U. S. Army Corps of Engineers for the express reason that it establishes a plan for future operation of the Missouri River addressing inferior downstream navigation, upstream recreation and endangered species water claims of the States and Federal interests and specifically denies proper consideration or any consideration of the superior, vested water rights of the Standing Rock Sioux Tribe while committing reservoir releases to purposes and interests in direct opposition to those of the Tribe.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe, seeking to protect and preserve its valuable rights to the use of water in the Missouri River, its tributaries and aquifers upon which the Tribe relies and has relied since ancient times for its present and future generations, directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups to petition members of Congress and officials at the highest levels in the Bush Administration, including the Department of Justice, among other proper steps, for the single purpose of ensuring a full rejection and re-constitution of the Master Manual as now proposed for action by the Corps to properly reflect the rights, titles and interests of the Standing Rock Sioux Tribe.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe proclaims its continued dominion over all of the lands within the boundaries of the Standing Rock Sioux Indian Reservation as reserved from time immemorial including

but not limited to rights, jurisdictions, privileges, prerogatives, liberties, immunities, and temporal franchises whatsoever to all the soil, plains, woods, wetlands, lakes, rivers, aquifers, with the fish and wildlife of every kind, and all mines of whatsoever kind within the said limits; and the Tribal Council declares its water rights to irrigate not less than 303,650 arable acres with an annual diversion duty of 4 acre feet per acre, to supply municipalities, commercial and industrial purposes and rural homes with water for not less than 30,000 future persons having an annual water requirement of 10,000 acre feet annually, to supply 50,000 head of livestock of every kind on the ranges having an annual water requirement of 1,500 acre feet annually: such proclamation made on the basis of the status of knowledge at the start of the third millennia and subject to change to include water for other purposes, such as oil, gas, coal or other minerals, forests, recreation, and etc; and such proclamation for the purposes and amount of water required to be adjustable in the future to better reflect improved knowledge and changing conditions.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups to petition members of Congress and officials at the highest levels in the Bush Administration to support and promote legislation that would, among other things, enable the Standing Rock Sioux Tribe to exercise its rights to the use of water in the Missouri River, in part, by purchasing the generators and transmission facilities of the United States at Oahe Dam at fair market value, subject to such offsets as may be agreed upon, with provisions to sell power generated at Oahe Dam at rates necessary to honor all existing contracts for the sale of pumping power and firm, wholesale power during their present term and sufficient to retire debts of the United States that may be agreed upon; provided, however, that the Tribe may increase power production at the dam by feasible upgrades and market the new power at market rates and after expiration of current contracts market power at rates reflective of the market; and provided further that legislation to purchase generators and transmission facilities will also include provisions to finance wind and/or natural gas power generation on the Standing Rock Indian Reservation to combine with hydropower production, thereby using Tribe's water and land resources effectively for the benefit of the Tribe without further erosion, diminishment and denigration of Tribe's water right claims.

BE IT FURTHER RESOLVED THAT, the Standing Rock Sioux Tribal Council rejects all reports and investigations of the Bureau of Reclamation on the Cannonball and Grand Rivers watersheds and any and all proposals by Bureau of Reclamation for an Indian Small Water Projects Act and that all ongoing efforts of the Bureau of Reclamation respecting these specific efforts will cease by this directive of the Tribal Council.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups, to petition members of Congress,

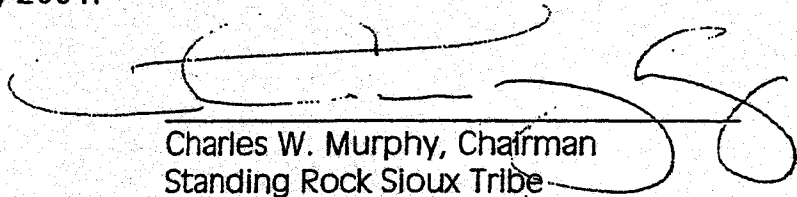
United States Supreme Court, when engaged in a Whiggish course, to subject the least powerful to the will of the States in matters involving property rights as evidenced by the *Dred Scott*, the *O'Connor Ghost* and comparable decisions of expediency.

BE IT FURTHER RESOLVED THAT, the Chairman and Secretary of the Tribal Council are hereby authorized and instructed to sign this resolution for and on behalf of the Standing Rock Sioux Tribe.


## CERTIFICATION

We, the undersigned, Chairman and Secretary of the Tribal Council of the Standing Rock Sioux Tribe, hereby certify that the Tribal Council is composed of (17) members, of whom 12 constituting a quorum, were present at a meeting thereof, duly and regularly, called, noticed, convened and held on the 5<sup>th</sup> day of April, 2001, and that the foregoing resolution was duly adopted by the affirmative vote of 11 members, with 0 opposing, and with 1 not voting. THE CHAIRMAN'S VOTE IS NOT REQUIRED, EXCEPT IN CASE OF A TIE.

DATED THIS 5<sup>th</sup> DAY OF APRIL, 2001.

  
Charles W. Murphy, Chairman  
Standing Rock Sioux Tribe

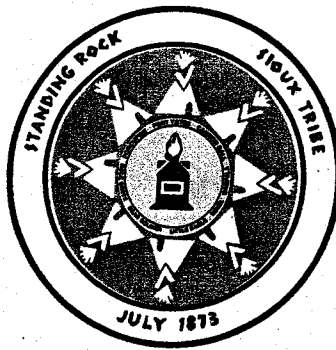
ATTEST:

  
Elaine McLaughlin, Secretary  
Standing Rock Sioux Tribe

(OFFICIAL TRIBAL SEAL)



Charles W. Murphy  
Chairman



Tom Iron  
Vice Chairman

Elaine McLaughlin  
Secretary

#### DISTRICTS

Robert Cordova  
Cannonball District

Raphael See Walker  
Fort Yates District

Joe Strong Heart  
Wakpala District

Palmer Defender  
Kenel District

Dean Bear Ribs  
Bear Soldier District

Milton Brown Otter  
Rock Creek District

Allen Flying Bye  
Little Eagle District

Randal White Sr.  
Porcupine District

#### AT LARGE

Jesse Taken Alive

Reva Gates

Pat McLaughlin

Miles McAllister

Ron Brown Otter

Isaac Dog Eagle, Jr.

October 30, 2001

The Honorable Gale A. Norton, Secretary  
U. S. Department of the Interior  
1849 C. Street N.W.  
Washington, DC 20240

RE: Missouri River Master Manual

Dear Secretary Norton:

On October 26, 2001, your Solicitor, Ann Klee, and Deputy Assistant Secretary for Indian Affairs, Sharon Blackwell, among other representatives from agencies of the Department of Interior participated with us in a conference call on the concerns of the Standing Rock Sioux Tribe respecting the Corps of Engineers' Missouri River Master Manual Update and Revision. Ms. Klee and Ms. Blackwell were attentive to our concerns and suggested that we correspond with regard to specific recommendations that could be made to the Corps of Engineers to resolve the failure of that agency to properly address the water rights of the Standing Rock Sioux Tribe in either the Master Manual Update and Revision or the Environmental Impact Statement on the proposed federal action.

The efforts of Ms. Klee and Ms. Blackwell are highly appreciated. The Standing Rock Sioux Tribe is pleased that you have brought thoughtful and active staff to this Administration. We look forward to a continuing effort on this subject. Please refer to the initial request for a meeting on this subject by letter of April 27, 2001.

As indicated by our Resolution No. 106-01 (enclosed) and relevant correspondence (enclosed), the Standing Rock Sioux Tribe claims more than 1.3 million acre-feet annually for diversion from the Missouri River and its tributaries. Other Tribes in the Missouri River Basin may have similar claims. Of the 26 Tribes in the Missouri River Basin, only the Wind River Arapahoe and Shoshone Tribes have water rights established by decree with a completed appeals process. Other Tribes have concluded Congressionally recognized settlements, and still other Tribes may be

THE HONORABLE GALE A. NORTON, SECRETARY

October 30, 2001

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engaged in a negotiation process. Most Tribes, including the Standing Rock Sioux Tribe, do not have an ongoing adjudication or negotiation.

The alternatives considered by the Corps of Engineers in the Missouri River Master Manual rely exclusively on the current level of depletions in the Missouri River to arrive at conclusions. At the suggestion of the Standing Rock Sioux Tribe and other Tribes, the Corps of Engineers conducted a study of increase in depletion (by Tribes or any other combination of users) that showed significant impact on the quantity of water available for future use and significant conflicts between competing uses, such as Indian Tribes, endangered species, downstream navigation in the Missouri and Mississippi Rivers and maintenance of water levels in upstream reservoirs for recreation, among other competing uses. This peripheral analysis by the Corps of Engineers clearly demonstrated that the level of claims and actual future use by Tribes could have a significant impact on the future operation of the Missouri River.

The Corps of Engineers failed, however, to address the impact of its alternatives on the water rights of the Standing Rock Sioux Tribe, among other Tribes, or the impact of the Tribe on the Corps' alternatives. The Corps of Engineers simply concluded that the future operations of the Missouri River would be adjusted to accommodate future perfected uses by the Tribes. This permitted the Corps of Engineers to proceed on the presumption that Indian water rights have no impact on future operation of the River. The Master Manual becomes a pronouncement to downstream navigation, upstream reservoir-based recreation, endangered species and all other interests that a final proposed operating plan can be relied upon subject to a risk that future decrees and settlements favoring the Standing Rock Sioux Tribe and other Tribes may affect the proposed operating plan.

A higher burden is thus placed on the Standing Rock Sioux Tribe at some future date to prove its water right, which would require the undoing of commitments made in the Master Manual and the undoing of subsequent investments relying on the Master Manual: the replacement of barges, the replacement of docks; investment in upstream marinas, sporting goods outlets, resorts; and the overstatement of quantities of water available for maintenance of flows for threatened and endangered species, etc. Please be aware that objection by Congressional delegates (numerically powerful) from downstream navigation states to any legislation proposed by the Standing Rock Sioux Tribe or other Tribes involving significant or insignificant depletions of the Missouri River and its tributaries is the current standard of practice. Similar objections can be expected in the future from upstream lake based recreation interests and environmental interests. Considerable pressure will be exerted on the Courts and Congress to diminish the claims and any final adjudication or settlement of the water rights of the Standing Rock Sioux Tribe.

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The Standing Rock Sioux Tribe objects to the presumption in the Master Manual and EIS that Indian water rights depend upon use. The Corps of Engineers has relied on the concept that Indian water rights are appropriative and depend upon use, but the principal that distinguishes Indian water rights from appropriative rights is the reserved nature of them dating from the time of the creation of the Reservation or earlier. Our water rights are currently vested irrespective of the fact that they have not been quantified in an adjudication or a settlement.

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Our specific recommendation is to include in the Master Manual a reasonable level of claim by the Standing Rock Sioux Tribe and other Tribes and to assess the impact of those claims on the alternatives considered in the EIS, including the proposed alternative. Absent this analysis, the Master Manual and its EIS are deficient for not properly assessing impacts of known issues on the alternatives. Further, our specific recommendation is to assess the damage of the alternatives, including the proposed alternative, to the Standing Rock Sioux Tribe in future efforts to adjudicate or settle its claims given the level of commitment to future streamflows in the proposed alternative.

Moreover, the Master Manual should include an analysis of federal steps that can be taken to mitigate the impact of the proposed alternative on the ability of the Standing Rock Sioux Tribe to adjudicate or settle its claims in the future. An example of the kind of mitigation that could be undertaken, is Congressional action to authorize the Standing Rock Sioux Tribe to purchase part of the generating capacity on the Missouri River and to undertake the development of other sources of renewable or non-renewable energy, such as wind generation, gas-fired generation or other. This would permit to Tribe to benefit from an interim commitment of Missouri River water supplies to those purchased generators and other developments until such time as a final decree or final settlement of water rights is implemented. The mitigation as described would not adversely impact other interests. The Nation would also benefit. An example of the kind of mitigation that could be considered is enclosed with this correspondence. No action has been taken by the governing body of the Standing Rock Sioux Tribe on such an action, whether connected to our water rights or considered separately aside from water rights. Therefore, the example is provided for illustration only.

The Corps of Engineers has effectively ignored the water rights of the Standing Rock Sioux Tribe in its Master Manual and accompanying EIS. The support of the Secretary is respectfully requested to include a much broader analysis and presentation of the impact of Standing Rock Sioux Tribe water rights on the Master Manual alternatives and the impact of Master Manual alternatives on the water rights of the Standing Rock Sioux Tribe. Most important is the need for proposed mitigation of the impacts of the Master Manual alternatives on the water rights of the Standing Rock

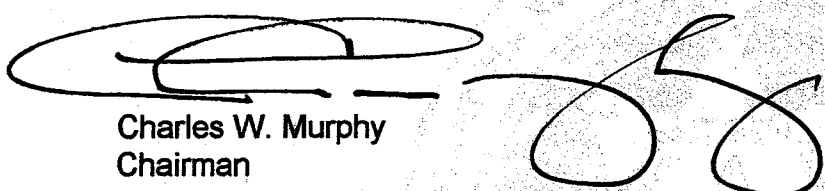
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Sioux Tribe. With dialog and proper analysis, a sound plan for mitigation can be developed while the Standing Rock Sioux Tribe continues to pursue the protection of its water rights claims in the future.

Finally, the Standing Rock Sioux Tribe respectfully requests that a team from the Department of Interior is assigned to work with us on this most important issue. We are hopeful that Ms. Ann Klee and Ms. Sharon Blackwell can be key members of that team.

Sincerely,

STANDING ROCK SIOUX TRIBE

A handwritten signature in black ink, appearing to read 'Charles W. Murphy', is written over a large, faint circular stamp. The signature is fluid and cursive.

Charles W. Murphy  
Chairman

CWM/mw

cc: John Ashcroft, Attorney General  
Ms. Claudia L. Tornblom, Deputy Assistant  
Secretary of the Army  
Ms. Ann Klee  
Ms. Sharon Blackwell  
The Honorable Tom Daschle  
The Honorable Tim Johnson  
The Honorable Johnson Thune  
The Honorable Byron Dorgan  
The Honorable Kent Conrad  
The Honorable Earl Pomeroy



## RESOLUTION NO. 106-01

FORMALLY ESTABLISHES THE STANDING ROCK SIOUX TRIBE'S  
POLICY ON ITS ABORIGINAL, TREATY AND WINTERS RIGHTS TO THE USE  
OF WATER IN THE MISSOURI RIVER TO MEET ALL  
PRESENT AND FUTURE USES; AMONG OTHER THINGS

WHEREAS, the Standing Rock Sioux Tribe is an unincorporated Tribe of Indians, having accepted the Indian Reorganization Act of June 18, 1934, with the exception of Article 16, and the recognized governing body of the Tribe is known as the Standing Rock Sioux Tribal Council; and

WHEREAS, the Standing Rock Sioux Tribal Council, pursuant to the Constitution of the Standing Rock Sioux Tribe, Article IV, Section(s) 1 (a,b,c,h and j), is authorized to negotiate with Federal, State and local governments and others on behalf of the Tribe, is further authorized to promote and protect the health, education and general welfare of the members of the Tribe and to administer such services that may contribute to the social and economic advancement of the Tribe and its members; and is further empowered to authorize and direct subordinate boards, committees or Tribal officials to administer the affairs of the Tribe and to carry out the directives of the Tribal Council; and is empowered to manage, protect, and preserve the property of the Tribe and natural resources of the Standing Rock Sioux Reservation; and

### Master Manual EIS Specifically Excludes Consideration of Indian Water Rights

WHEREAS, the United States Army Corps of Engineers makes the following statement describing how the Corps fails to recognize or consider Indian water rights in its Master Water Control Manual for the future operation of the Missouri River, thereby committing Missouri River water to operational priorities and creating an insurmountable burden for the future exercise of the rights to the use of water by the Standing Rock Sioux Tribe as reserved from time immemorial:

*The Missouri River basin Indian tribes are currently in various stages of quantifying their potential future uses of Mainstem System water. It is recognized that these Indian tribes may be entitled to certain reserve or aboriginal Indian water rights in streams running through and along reservations. Currently, such reserved or aboriginal rights of tribal reservations have not been quantified in an appropriate legal forum or by compact with three exceptions.... The Study considered only existing consumptive uses and depletions; therefore, no potential tribal water rights were considered. Future modifications to system operation, in accordance with pertinent legal requirements, will be considered as tribal water rights are quantified in accordance with applicable law and actually put to use. Thus, while existing depletions are being considered, the Study process does not prejudice any reserved or aboriginal Indian water rights of the Missouri River basin Tribes. (PDEIS 3-64); and*

WHEREAS, the failure of the United States, acting through the Corps, to recognize and properly consider the superior rights of the Standing Rock Sioux Tribe must be rejected by the Tribe for the reason that the Master Manual revision and update is making irretrievable commitments to (1) navigation in the lower basin, (2) maintenance of reservoir levels in the upper basin and (3) fish, wildlife and endangered species throughout the upper and lower basins. These commitments are violations of the constitutional, civil, human and property rights of the Tribe; and

Endangered Species Guidance Specifically Excludes Consideration of Indian  
Water Rights in Missouri River Basin

WHEREAS, the Working Group on the Endangered Species Act and Indian Water Rights, Department of Interior, published recommendations for consideration of Indian water rights in Section 7 Consultation, in national guidance for undertakings such as the Master Manual, as follows:

*The environmental baseline used in ESA Section 7 consultations on agency actions affecting riparian ecosystems should include for those consultations the full quantum of: (a) adjudicated (decreed) Indian water rights; (b) Indian water rights settlement act; and (c) Indian water rights otherwise partially or fully quantified by an act of Congress... Biological opinions on proposed or existing water projects that may affect the future exercise of senior water rights, including unadjudicated Indian water rights, should include a statement that project proponents assume the risk that the future development of senior water rights may result in a physical or legal shortage of water. Such shortage may be due to the operation of the priority system or the ESA. This statement should also clarify that the FWS can request reinitiation of consultation on junior water projects when an agency requests consultation on federal actions that may affect senior Indian water rights.*

The Working Group recommendations further the failure to address unadjudicated Indian water rights. It is unthinkable that the United States would proceed with water resource activities, whether related to endangered species, water project implementation or Missouri River operation in the absence of properly considering Indian water rights that are not part of an existing decree – presuming, in effect, that the eventual quantification of Indian water rights will be so small as to have a minimal impact on the operation of facilities in a major river, such as the Missouri River, or so small as to be minimally impacted by assignment of significant flow to endangered species. The flows required to fulfill or satisfy Indian water rights are, in fact, not small nor minimal but are significant; and

Final Indian Water Right Agreements and Claims of the United States on Behalf  
of Tribes Are Denigrated by Master Manual and Other Regional Water Allocation  
Processes

WHEREAS, failures of federal policy to properly address Indian water rights in planning documents such as the Master Manual is underscored by example. Tribes in Montana

have water right compacts with the State that are complete and final but have not been incorporated into a decree. Incorporation is certain, however, and will be forthcoming. It is not a matter of "if", it is a matter of "when". The water rights agreed upon by compact are substantial, but neither the Corps of Engineers' Master Manual nor the Secretary of Interior's ESA guidance, as currently constituted, will consider these rights -- they presume the rights do not exist -- until they become part of a decree. At such time as the decree in Montana is complete, the Master Manual conclusions will be obsolete and any assignment of Missouri River flows to upstream reservoirs, downstream navigation or endangered species, relied upon by the various special interest groups, will be in conflict with the decree; and

WHEREAS, in Arizona, as another example, these same flawed federal policies to ignore Indian water rights in the allocation of regional water supplies are manifest. The United States is in the process of reallocating part of approximately 1.4 million acre-feet of water diverted from the Colorado River and carried by aqueduct system in the Central Arizona Project for the Phoenix area. The reallocation is purportedly for the purpose, in part, of resolving Indian water right claims in Arizona, but careful review of the reallocation demonstrates that only two Indian tribes are involved. The Bureau of Reclamation, agent for the trustee in the reallocation process, has given short shrift to other Indian concerns that the EIS should address the impacts of the reallocation on all affected tribes and on all non-Indian claimants that will be impacted by ongoing adjudication of Indian water rights. In response Reclamation describes claims filed by the Department of Justice on behalf of the tribes as *speculative*. Thus, Arizona tribes are in the same dilemma as Missouri River basin tribes, but the process to determine the magnitude of Indian claims in Arizona is much further advanced. The United States is, on the one hand, pursuing a claim for adjudication of Indian water rights; and the United States, on the other hand, is reallocating water necessary to supply non-Indian interests impacted by Indian water rights-- but is refusing to recognize any potential for Indian water rights success in ongoing adjudications. This denigrates the claims of the United States on behalf of the tribes and draws into question the intent and commitment of the Department of Justice in the proper advancement of Indian claims, claims which at least some tribes consider deficient and poorly prosecuted by the Department of Justice; and

WHEREAS, the Standing Rock Sioux Tribe cannot tolerate these policies: cannot permit reliance by wide and diverse interest groups in the Missouri River -- states, environmental, federal agencies and economic sectors-- on conclusions associated with the preferred alternative in the Master Manual when the conclusions are based on the presumption of no Indian water rights and insignificant future Indian water use throughout the Basin; cannot expect future courts to undo investments, undertakings, mortgages and economies that build on the basis of the Master Manual conclusions; cannot expect future Congresses to act more favorably than future courts; and

Importance of Master Manual Process is Underscored by Congressional and

## Other Activity

WHEREAS, the Master Manual of the Corps of Engineers is the name presently given to the operating procedures for the mainstream dams and reservoirs. The Corps of Engineers has responsibility for those operations as directed by the 1944 Flood Control Act, the controlling legislation for the Pick-Sloan Project. Since 1944, all dams (except Fort Peck Dam) were constructed and have been operated by the Corps of Engineers or the Bureau of Reclamation. The current Master Manual revision is the first public process update of Corps of Engineers operating procedures, and its importance to future exercise of the Tribe's water rights cannot be ignored by the Tribe; and

WHEREAS, the Master Manual is intended by the federal courts and Congress to resolve issues between the upper and lower basin states, irrespective of tribal issues. The federal courts have dismissed cases brought by the states over the last decade and a half, cases designed to settle issues of maintenance of water levels in the reservoirs in North and South Dakota and the conflicting release of water for downstream navigation; and

WHEREAS, most recently, the Energy and Water Resource Development appropriations for FY 2001 were vetoed by the President because upstream senators supported by the President opposed language by downstream senators in the appropriations bill, which contained controversial language as follows:

*Sec. 103. None of the funds made available in this Act may be used to revise the Missouri River Master Water Control Manual when it is made known to the Federal entity or official to which the funds are made available that such revision provides for an increase in the springtime water release program during the spring heavy rainfall and snow melt period in States that have rivers draining into the Missouri River below the Gavins Point Dam.*

The provisions cited above require the Corps of Engineers or any other official to refrain from using any funds to revise the Master Manual if it is determined that the revision would cause any increase in water releases below Gavins Point Dam in springtime. There is apparently concern by downstream members of Congress that the Master Manual will recommend an increase in releases to the detriment of downstream navigation, environmental values or flood control. Upstream members of Congress stopped the approval of appropriations over this controversy until the above-cited language was omitted from the bill; and

WHEREAS, given the importance of the Master Manual revision and update to the States, the Congress and Courts, the Standing Rock Sioux Tribe cannot tolerate the exclusion of proper consideration of their water rights, nor can the Tribe tolerate the inadequate representation of the Trustee on this matter; and

## Brief Historical Review of Indian Water Rights

WHEREAS, the right of the Crown of Great Britain to the territory of North America was derived from the discovery of that continent by Sebastian Cabot, who in 1498 explored a greater part of the Atlantic Coast under a Commission from King Henry VII and took formal possession of the continent as he sailed along the coast. But those commissioned by the Crown to settle in North America were cognizant of the rights, titles and interests of the original possessors. In the proprietary of Maryland, granted to George Calvert, Lord Baltimore, in 1632, for example, it was recognized by English law evolving from invasions against the Celtic tribes and their successors by the Romans, Anglo-Saxons and Normans, among others, over a period of 1,500 years prior to the discovery of America that the rights of the ancient possessors were specific and could not be ignored by a just occupier. The following was the rationale:

*The roving of the erratic tribes over wide extended deserts does not formed a possession which excludes the subsequent occupancy of immigrants from countries overstocked with inhabitants. The paucity of their numbers in their mode of life, render them unable to fulfill the great purposes of the grant [by the King to the Proprietary of Maryland]. Consistent, therefore, with the great Charter to mankind, they (Tribes) may be confined within certain limits. Their rights to the privileges of man nevertheless continue the same: and the Colonists who conciliated the affections of the aborigines, and gave a consideration for their territory, have acquired the praise due to humanity and justice. Nations, with respect to the several communities of the earth, possessing all the rights of man, since they are aggregates of man, are governed by similar rules of action. Upon those principles was founded the right of emigration of old: upon those principles the Phenicians and Greeks and Carthagenians settled Colonies in the wilds of the earth.... In a work treating expressly of original titles to Land it has been thought not amiss to explain... the manner in which an individual obtaining from his Sovereign an exclusive licence, with his own means, to lead out and plant a Colony in a region of which that Sovereign had no possession, proceeded to avail himself of the privilege or grant, and to reconcile or subject to his views the people occupying and claiming by natural right that Country so bestowed... in particular, an history, already referred to, of the Americans settlements, written in 1671, after speaking of the acquisition of St. Marys continues 'and it hath been the general practice of his Lordship and those who were employed by him in the planting of the said province, rather to purchase the natives' interest... than to take from them by force that which they seem to call their right and inheritance, to the end all disputes might be removed touching the forcible encroachment upon others, against the Law of nature or nations... When the earth was the general property of mankind, mere occupancy conferred on the possessor such an interest as it would have been unjust, because contrary to the Law of Nature, to take from him without his consent: and this state has been happily compared to a theatre, common to all; but the individual, having appropriated a place, acquires a privilege of which he cannot be dispossessed without injustice'. ... the Grant [to Lord Baltimore] comprehended 'all Islands and Islets within the limits aforesaid, and all Islands and etc. within ten marine leagues of the Eastern Shore, with all Ports, Harbors, Bays, Rivers, and Straits, belonging to the region or Islands aforesaid, and all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Days, and Straits, with the fishing of every kind, within the said limits; all mines of whatsoever kind, and patronage and advowson of all Churches. Lord Baltimore ... was invested with all the Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and Royal Rights and Temporal Franchises whatsoever, as well by sea as by land, within the Region, Islands, Islets, and limits aforesaid... (Source: John Kilty. Land Holder's Assistant and Land Office Guide.*

*Islands, Islets, and limits aforesaid...* (Source: John Kilty. *Land Holder's Assistant and Land Office Guide*.

Baltimore: G. Dobbin & Murphy, 1808. MSA SC 5165-1-1).; and

WHEREAS, 130 years later the Proclamation of 1763 by King George III recognized title to the land and resources reserved by the American Indians of no lesser character or extent than the Charter to Lord Baltimore:

*And whereas it is just and reasonable, and essential to our interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no... Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them. And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, ... all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid. And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained. And We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described. or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements. And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests. and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose....*

*Given at our Court at St. James's the 7th Day of October 1763, in the Third Year of our Reign.*

*GOD SAVE THE KING; and*

WHEREAS, after the American Revolution and consistent with the foregoing, the United States Supreme Court by 1832 relied upon the ancient concepts of its predecessor Great Britain and recognized the property rights of Indians in the classical case of *Worcester v. the State of Georgia*:

*America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.* (6 P 515, p. 543)

*... This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man....*

*... This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The Crown could not be understood to grant what the Crown did not effect to claim; nor was it so understood.*

(6 P 515, p. 544-545) (Emphasis supplied); and

WHEREAS, the principles in the case of *Worcester v. Georgia* are ancient as shown above and are the foundation of the principles announced by the U. S. Supreme Court three quarters of a century later relating to the Yakima Indian Nation in the case of *United States v. Winans* (198 U.S. 371). Title of the Indians in their property rights was fully acknowledged, and the Treaty was interpreted as a grant of property to the United States in the area not reserved by the Tribe to itself.

*The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words the Treaty was not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted.*

(Emphasis supplied); and

WHEREAS, the Supreme Court case of *Henry Winters v. United States* (207 US 564) found that reservation of water for the purposes of civilization was implied in the establishment of the Reservations:

*The Reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be adequate with a change of conditions. The lands were arid and, without irrigation, were practically valueless.*

... That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, [at Fort Belknap] and it would be extreme to believe that within a year later [when the state of Montana was created] Congress destroyed the Reservation and took from the Indians the consideration of their grant, leaving them a barren waste - took from them the means of continuing their old habits, yet did not leave them the power to change to new ones. (207 U S 574, p. 576 577); and

WHEREAS, the case of *United States v. Ahtanum Irrigation District* (236 Fed 2nd 321, 1956) applied the *Worcester-Winans-Winters* concepts on Ahtanum Creek, tributary to the Yakima River and northern boundary of the Yakima Indian Reservation:

*The record here shows that an award of sufficient water to irrigate the lands served by the Ahtanum Indian irrigation project system as contemplated in the year 1915 would take substantially all of the waters of Ahtanum Creek. It does not appear that the waters decreed to the Indians in the Winters case operated to exhaust the entire flow of the Milk River, but, if so, that is merely the consequence of it being a larger stream. As the Winters case, both here and in the Supreme Court, shows, the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers. Our *Conrad Inv. Co. Case, supra*, held that what the non-Indian appropriators may have is only the excess over and above the amounts reserved for the Indians. It is plain that if the amount awarded the United States for the benefit of the Indians in the Winters Case equaled the entire flow of the Milk River, the decree would have been no different. (236 F. 2nd 321, p. 327) (Emphasis supplied); and*

WHEREAS, these concepts were further advanced in *Arizona v California*, 373 U.S. 546, 596-601 (1963):

*The Master found as a matter of fact and law that when the United States created these reservations or added to them, it reserved not only land but also the use of enough water from the Colorado [River] to irrigate the irrigable portions of the reserved lands. The aggregate quantity of water which the Master held was reserved for all the reservations is about 1,000,000 acre-feet to be used on around 135,000 irrigable acres of land....*



*It is impossible to believe that when Congress created the Great Colorado River Indian reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of desert kind -- hot scorching sands -- and the water from the River would be essential to the life of the Indian people and to the animals they hunted and crops they raised. We follow it [Winters] now and agree that the United States did reserve the water rights for the Indians effective as of the time Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act [Boulder Canyon Project Act] became effective on June 25, 1929, are present perfected rights and as such are entitled to priority under the Act. We also agree with the Master's conclusion as to the quantity intended to be reserved. He found that water was intended to satisfy the future as well as present needs of the Indian reservations.... We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreage of irrigable land which the Master found to be on the different reservations we find to be reasonable; and*

### General Nature of Attacks on Winter Doctrine

WHEREAS, notwithstanding the injunctions of Lord Baltimore, King George III and favorable decisions of the United States Supreme Court, in practice, Congress, the executive branch and the judiciary have (1) limited Indian reserved water rights, (2) suppressed development of Indian reserved water rights, and (3) permitted reliance by state, federal, environmental and private interests on Indian water, contrary to trust obligations. The federal policy has clearly been .. *how best to transfer Indian lands and resources to non-Indians...* rather than to preserve, protect, develop and utilize those resources for the benefits of the Indians.

*With an opportunity to study the history of the Winters rule as it has stood now for nearly 50 years, we can readily perceive that the Secretary of the Interior, in acting as he did, improvidently bargained away extremely valuable rights belonging to the Indians.... viewing this contract as an improvident disposal of three quarters of that which justly belonged to the Indians, it cannot be said to be out of character with the sort of thing which Congress and the Department of the Interior has been doing throughout the sad history of the Government's dealings with the Indians and Indian tribes. That history largely supports the statement: From the very beginnings of this nation, the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped; but how best to transfer Indian lands and resources to non-Indians. (United States v Ahtanum Irrigation District, 236 F. 2nd 321, 337); and*

WHEREAS, the McCarran Amendment interpretation by the United States Supreme Court, if not in error, is a further example of the contemporary attack on Indian water rights. The discussion of the McCarran Amendment here is intended to show why tribes are (1) opposed to state court adjudications and (2) negotiated settlements under the threat of state court adjudication. In 1952 the McCarran Amendment, 43 U.S.C. 666 (a), was enacted as follows:

*Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a River system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner or in the process of acquiring water rights by appropriation under State law, by purchase, by exchange or otherwise, and the United States is a necessary party to such suit; and*

WHEREAS, the McCarran Amendment has been interpreted by the U.S. Supreme Court to require the adjudication of Indian water rights in state courts. *Arizona v San Carlos Apache Tribe*, 463 U.S. 545,564,573 (1981) held:

*We are convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on State Court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment.*

In dissent, however, Justice Stevens stated:

*To justify virtual abandonment of Indian water right claims to the State courts, the majority relies heavily on Colorado River Water Conservancy District, which in turn discovered an affirmative policy of federal judicial application in the McCarran Amendment. I continue to believe that Colorado River read more into that amendment that Congress intended... Today, however, on the tenuous foundation of a perceived Congressional intent that has never been articulated in statutory language or legislative history, the Court carves out a further exception to the virtually unflagging obligation of Federal courts to exercise their jurisdiction. The Court does not -- and cannot -- claim that it is faithfully following general principles of law... That Amendment is a waiver, not a command. It permits the United States to be joined as a defendant in state water rights adjudications; it does not purport to diminish the United States right to litigate in a federal forum and it is totally silent on the subject of Indian tribes rights to litigate anywhere. Yet today the majority somehow concludes that it commands the Federal Courts to defer to State Court water right proceedings, even when Indian water rights are involved; and*

WHEREAS, in Arizona, Montana and other states, general water right adjudications to quantify *Winters* Doctrine rights are ongoing. For example in the state of Montana:

- (1) the state of Montana sued all tribes in a McCarran Amendment proceeding.
- (2) the State of Montana established a Reserved Water Rights Compact Commission. The purpose of the Commission was to negotiate the *Winters* Doctrine rights of the Montana tribes.
- (3) the Department of Interior has adopted a negotiation policy for the settlement of Indian water rights. The United States Department of Interior has a negotiating team which works with the Montana Reserve Water Rights Compact Commission and Indian tribes, some forced by the adjudication in

state court, to negotiate, while others are willing to negotiate.

(4) the Department of Interior makes all necessary funding available to any Tribe willing to undertake negotiations. A Tribe refusing to negotiate cannot obtain funding to protect and preserve its *Winters* Doctrine water rights.

(5) upon reaching agreement between the State of Montana and an Indian tribe, congressional staff are assigned to develop legislation in the form of an Indian water rights settlement that may or may not involve authorization of federal appropriations to develop parts of the amount of Indian water agreed upon between the Tribe and the State or for other purposes.

(6) in the absence of the desire of a Tribe to negotiate, the State of Montana will proceed to prosecute its McCarran Amendment case against the Tribe; and

WHEREAS, this process relies on ongoing litigation to accomplish negotiated settlements of *Winters* Doctrine Indian water rights. The process is held out to be a success by the state and federal governments. However, comparison with the taking of the Black Hills from the Great Sioux Nation, the taking of the Little Rocky Mountains from the Fort Belknap Indian Reservation and the taking of Glacier Park from the Blackfeet are valid comparisons. There are elements of force and extortion in the process; and

WHEREAS, in the Wind River adjudication, 753 P. 2nd 76, 94-100 (WY 1988), the State of Wyoming utilized the McCarran Amendment to drastically diminished the Arapaho and Shoshone *Winters* Doctrine water rights in the Big Horn River Basin. The Wyoming Supreme Court found as follows:

*The quantity of water reserved is the amount of water sufficient to fulfill the purpose of the lands set aside for the Reservation.*

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*The Court, while recognizing that the tribes were the beneficial owners of the reservations timber and mineral resources... and that it was known to all before the treaty was signed that the Wind River Indian Reservation contained valuable minerals, nonetheless concluded that the purpose of the reservation was agricultural. The fact that the Indians fully intended to continue to hunt and fish does not alter that conclusion.... The evidence is not sufficient to imply a fishery flow right absent a treaty provision.... The fact that the tribes have since used water for mineral and industrial purposes does not establish that water was impliedly reserved in 1868 for such uses. The District Court did not err in denying a reserved water right for mineral and industrial uses... the District Court did not err in holding that the Tribes and the United States did not introduce sufficient evidence of a tradition of wildlife and aesthetic preservation that would justify finding this to be a purpose for which the Reservation was created or for which water was impliedly reserved... not a single case applying the*

*reserved water right doctrine to groundwater is cited to us.... In Colville Confederated Tribes v. Walton, supra, 547 F.2d 42, there is slight mention of the groundwater aquifer and of pumping wells, id at 52, but the opinion does not indicate that the wells are a source of reserved water or even discuss a reserve groundwater right.... The District Court did not err in deciding there was no reserved groundwater right; and*

WHEREAS, the statement by the Wyoming Supreme Court that *Colville* does not discuss a reserved water right to groundwater is in error, for *Colville* did decree reserved groundwater rights; and

WHEREAS, the *Wind River* case must be carefully examined by all tribes, including those of the Missouri River Basin. The single purpose of the Wind River Indian Reservation recognized by the Wyoming Supreme Court was limited to agriculture: severely limited relative to the... *Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and Royal Rights and Temporal Franchises whatsoever, ... within the Region, ..comprehending... 'all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Dells, and Straits, with the fishing of every kind, within the said limits'; all mines of whatsoever kind..received by from the King by Lord Baltimore in the Proprietary of Maryland, which were, nevertheless, subject to purchase from the Native possessors. The Arapaho and Shoshone must have believed that the purpose of the reservation was to provide a permanent home and abiding place for their present and future generations to engage and pursue a viable economy and society. Despite existing oil and gas resources, they were denied reserved water for mineral purposes. Despite the need for industry in a viable economy, they were denied reserved water for industry. Despite a tradition of hunting and fishing, they were denied reserved water for wildlife and aesthetic preservation. Despite the existence of valuable forests, they were denied reserved water for this purpose. Despite the existence of valuable fisheries, established from time immemorial, they were denied a reserved water right to sustain their fisheries; and*

WHEREAS, the United States Supreme Court reviewed the *Wind River* decision on the following question:

*In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in presence of substantial state water rights long in use on the reservation, may reserved water rights be implied for all practicably irrigable lands within reservation set aside for specific Tribe? 57 LW 3267 (Oct. 11, 1988); and*

WHEREAS, acting without a written opinion and deciding by tie vote, the United States Supreme Court affirmed the decision of the Supreme Court of the State of Wyoming and rejected the thought process presented in the question above that the Tribes needed no additional water than the amount they were using and that state created water rights with long use should not be subjected to future Indian water rights. But a change in vote by a single justice would have reversed the decision and severely

constricted the benefits of the *Winters* Doctrine to the Indian people, a subject to be discussed further. The decision is limited to the State of Wyoming on critical issues, namely that Indian reserved rights do not apply to groundwater; the absence of a reserved water right for forest and mineral purposes; the absence of a reserved water right for fish, wildlife and aesthetic preservation; and a reduction of the Tribes claims to irrigation from 490,000 to less than 50,000 acres; and

WHEREAS, the acreage for irrigation finally awarded to the Wind River Tribes for future purposes was 48,097 acres involving approximately 188,000 acre-feet of water annually:

*In determining the Tribes claims to practicably irrigable acreage, the United States (trustee for the tribes) began with an arable land-base of approximately 490,000 and relied on its experts to arrive at over 88,000 practicably irrigable acres. The claim was further "trimmed" by the United States to 76,027 acres for final projects. The acreage was further reduced during trial to 53,760 acres by Federal experts with a total annual diversion requirement of about 210,000 acre-feet. (Teno Roncalio, Special Master. In Re: The General Adjudication of All Rights to the Use of Water in the Big Horn River System and All Other Sources, State of Wyoming, Concerning Reserved Water Right Claims by and on Behalf of the Tribes of the Wind River Indian Reservation, Wyoming, Dec. 15, 1982, pp. 154 and 157); and*

WHEREAS, the *purposes* of reservation issue addressed by the Wyoming courts evolved from the 1978 United States Supreme Court case, *United States v. New Mexico* (438 U.S. 696), involving the water rights of the Gila National Forest:

*The Court has previously concluded that Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, impliedly authorized him to reserve "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."... The Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."... Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.... The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes -- "to conserve the water flows, and to furnish a continuous supply of timber for the people."... Not only is the Government's claim that Congress intended to reserve water for recreation and wildlife preservation inconsistent with Congress's failure to recognize these goals as purposes of the national forest, it would defeat the very purpose for which Congress did intend the national forest system.... While Congress intended the national forest to be put to a variety of uses, including stockwatering, not inconsistent with the two principal purposes of the forest, stock watering was not, itself, a direct purpose of reserving the land; and*

WHEREAS, there may be debate with respect to the purposes for which a national

forest was created and for which purposes water was reserved, but it is a "slender reed" upon which to found a debate that when Indian reservations were established by the Indians or Great Britain or the United States, the purpose of establishment might vary among the Indian reservations; and, depending upon that purpose, the Indians would be limited in the beneficial uses to which water could be applied. Indian neighbors could apply water to any beneficial purpose generally accepted throughout the Western United States, but Indians could not. It is inconceivable that an Indian Reservation was established for any other "purpose" than an "Indian" reservation or that each Reservation was established for some arcane reason other than the pursuits of industry, self-government and all other activities associated with a modern, contemporary and ever-changing society embracing all of the ... *Rights, Jurisdictions, Privileges, Prerogatives, ... and Temporal Franchises whatsoever, ... within the Region, ...comprehending... 'all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Days, and Straits, with the fishing of every kind, within the said limits'; all mines of whatsoever kind; and*

WHEREAS, nevertheless, the Wyoming courts relied upon the "purposes" argument to exclude water reserved for the pursuit of many of the arts of civilization.... industry, mineral development, fish, wildlife, aesthetics... on the basis that the purpose of the Wind River Indian Reservation was limited to an agricultural purpose absent specific Treaty language to the contrary. As crude as this conclusion may be, however, Tribes of the Missouri River basin and throughout the Western United States are faced with the "purposes" limitation originally applied in 1978 to national forests; and

WHEREAS, if there may be a question that the issue ended in Wyoming, it is only necessary to examine the state court general adjudication process in Arizona. A June 2000 pretrial order by the Special Master in the *General Adjudication of All Rights to Use Water in the Gila River System and Source* summarizes the issues as follows:

*... Does the "primary-secondary" purposes distinction, as announced by the U.S. Supreme Court in United States v. New Mexico, 438 U.S. 696 (1978), apply to the water rights claimed for the Gila River Indian Reservation?...*

*.... The State Litigants takes the position that the distinction does apply.*

*... If the "primary-secondary" purposes distinction does apply to the Gila River Indian Reservation, what were the primary and secondary purposes for each withdrawal or designation of land for the Gila River Indian Reservation? May the Reservation have more than one "primary" purpose?....*

*.... The State Litigants takes a position that the federal government withdrew or designated land to protect existing agriculture, create a buffer between the community and non-Indians who were settling in the area, provide substitute agricultural lands when non-Indians encroached on existing Indian agricultural lands, and provide for other specific economic activities such as grazing; and*

WHEREAS, the restriction or limitation of Indian water rights in the Missouri River basin is not confined to a federal denial of them in federal actions, such as the Master Manual and endangered species consultation. The limitations are expected to grow and expand from these federal actions. Indian water right opponents will concentrate on the language of *United States v. New Mexico* that "...only that amount of water necessary to fulfill the purpose of the reservation, no more..." has been reserved by the Tribes or the United States on behalf of the tribes. The effort will be to first limit the purposes for which an Indian reservation was established and second limit the amount of water necessary to fulfill that purpose. If, for example, opponents could successfully argue that the purpose of an Indian reservation in the Missouri River Basin was primarily a "permanent homeland" and that agriculture was secondary, they would further argue that the amount of water reserved was limited to domestic uses, and no water was reserved for irrigation; and

WHEREAS, *Cappaert v. United States* (426 U.S. 128, 1976) was the basis, in part, for the decision in *United States v. New Mexico* discussed above. Here again the purposes of a "federal" reservation (as distinguished from a reservation by Indians or a reservation by the United States on behalf of Indians) and the use of water for that purpose is the subject. But the Cappaert decision is helpful in showing the extreme interpretations to which the State Court in Wyoming went in its *Wind River* decision:

....The District Court then held that, in establishing Devil's Hole as a national monument, the President reserved appurtenant, unappropriated waters necessary to the purpose of the reservation; the purpose included preservation of the pool and pupfish in it.... The Court of Appeals for the Ninth Circuit affirmed... holding that the "implied reservation of water" doctrine applied to groundwater as well as surface water...and

WHEREAS, the purpose of establishing the national monument was clearly limited -- to preserve the Devil's Hole pupfish, which rely on a pool of water that is a remnant of the prehistoric Death Valley Lake System an object of historic and scientific interest. This is not an Indian reservation which embraces all of the purposes related to civilization, society and economy. Yet, Wyoming seized on the concept of an Indian reservation with purpose limited in the same manner as a national forest or a national monument. Note, however, that the Wyoming case (1988) grasps at the purposes argument to diminish the Indian water right but ignores the damaging aspect of *Cappaert* (1976) that reserved water concepts apply to groundwater as well as surface water. Not only did Wyoming ignore *Colville Confederated Tribes*, it ignored *Cappaert*. Recently, the Arizona Supreme Court, after considering the Wyoming decision, could not countenance a similar decision in Arizona, specifically rejected the Wyoming decision and found as follows:

*...the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater...and...holders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law rights...; and*

WHEREAS, similarly, Wyoming ignored *Cappaert*, a U.S. Supreme Court decision about federally reserved water rights in a National Monument in Nevada, where *Cappaert* specifically rejected the concept of "sensitivity" or balancing of equities when water is needed for the purpose of a federal or Indian Reservation. In *Cappaert* the Court cited the *Winters* decision as a basis for rejecting the notion of Nevada that competing interests must be balanced between federal (or Indian) reserved water rights and competing non-federal (or non-Indian) water rights. Wyoming returned to the U.S. Supreme Court seeking a more favorable decision respecting "sensitivity" than provided by *Cappaert*:

*Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in Winters v. United States, supra, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of the water. The "Statement of the Case" in Winters notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that, when the Federal Government reserves land, by implication, it reserves water rights sufficient to accomplish the purposes of the reservation; and*

WHEREAS, the United States Supreme Court reviewed the decision of the Wyoming Supreme Court and upheld the decision by a tie vote as discussed above. However, the majority of the court had apparently been swayed by the Wyoming argument:.... *In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in presence of substantial state water rights long in use on the reservation, may reserved water rights be implied for all practicably irrigable lands within reservation set aside for specific Tribe?... and had prepared a draft opinion referred to by the Arizona Supreme Court as the "ghost" opinion. The draft opinion was apparently not issued because Justice Sandra Day O'Connor, author of the "ghost" opinion on behalf of the majority, disqualified herself because she learned that her ranch had been named as a defendant in the Gila River adjudication in Arizona. Despite more than 350 years of understanding of justice and law relating to Indian property, the O'Connor opinion would have destroyed the basic tenets of the Winters Doctrine:*

*...The PIA standard is not without defects. It is necessarily tied to the character of land, and not to the current needs of Indians living on reservations....And because it looks to the future, the PIA standard, as it has been applied here, can provide the Tribes with more water than they need at the time of the quantification, to the*



detriment of non-Indian appropriators asserting water rights under state law....this Court, however, has never determined the specific attributes of reserve water rights – whether such rights are subject to forfeiture for nonuse or whether they may be sold or leased for use on or off the Reservation....Despite these flaws and uncertainties, we decline Wyoming's invitation to discard the PIA standard... The PIA standard provides some measure of predictability and, as explained hereafter, is based on objective factors which are familiar to courts. Moreover no other standard that has been suggested would prove as workable as the PIA standard for determining reserve water rights for agricultural reservations....we think Master Roncolio and the Wyoming Supreme Court properly identified three factors that must be considered in determining whether lands which have never been irrigated should be included as PIA: the arability of the lands, the engineering feasibility (based on current technology) of necessary future irrigation projects, and the economic feasibility of such projects (based on the profits from cultivation of future lands and the costs of the project... Master Roncolio found...that economic feasibility will turn on whether the land can be irrigated with a benefit-cost ratio of one or better....Wyoming argues that our post-Arizona I cases, specifically Cappaert and New Mexico, indicate that quantification of Indian reserved water rights must entail sensitivity to the impact on state and private appropriators of scarce water under state law.... Sensitivity to the impact on prior appropriators necessarily means that "there has to be some degree of pragmatism" in determining PIA....we think this pragmatism involves a "practical" assessment – a determination apart from the theoretical economic and engineering feasibility – of the reasonable likelihood that future irrigation projects, necessary to enable lands which have never been irrigated to obtain water, will actually be built....no court has held that the Government is under a general legal or fiduciary obligation to build or fund irrigation projects on Indian reservations so that irrigable acreage can be effectively used.... massive capital outlays are required to fund irrigation projects...and in today's era of budget deficits and excess agricultural production, government officials have to choose carefully what projects to fund in the West. ... Thus, the trier of fact must examine the evidence, if any, that additional cultivated acreage is needed to supply food or fiber to resident tribal members, or to meet the realistic needs of tribal members to expand their existing farming operations. The trier must also determine whether there will be a sufficient market for, or economically productive use of, any crops that would be grown on the additional acreage....we therefore vacate the judgment insofar as it relates to the award of reserved water rights for future lands and remand the case to the Wyoming Supreme Court for proceedings not inconsistent with this opinion; and

WHEREAS, the United States Supreme Court has virtually unlimited power to arrive at unjust decisions as evidenced by the *Dred Scott* decision, and the opinion of the minority would have had no force and effect in *Wyoming* as given by Justice Brennan:

...In the Court might well have taken as its motto for this case in the words of Matthew 25:29: "but from him that has not shall be taken away even that which he has." When the Indian tribes of this country were placed on reservations, there was, we have held, sufficient water reserved for them to fulfill the purposes of the reservations. In most cases this has meant water to irrigate their arable lands.... The Court now proposes, in effect, to penalize them for the lack of Government investment on their reservations by taking from them those water rights that have remained theirs, until now, on paper. The requirement that the tribes demonstrate a "reasonable likelihood" that irrigation

*projects already determined to be economically feasible will actually be built – gratuitously superimposed, in the name of “sensitivity” to the interests of those who compete with the Indians for water, upon a workable method for calculating practicably irrigable acreage that parallels government methods for determining the feasibility of water projects for the benefit of non-Indians – has no basis in law or justice; and*

WHEREAS, whether inspired by the “ghost” opinion of Justice O’Connor or not, the Arizona Supreme Court held arguments in February 2001 on the issue of: “what is the appropriate standard to be applied in determining the amount of water reserved for federal lands?”, particularly Indian lands, which were not reserved by the United States for the Standing Rock Sioux Tribe but were, rather, reserved by the Tribe by its ancient ancestors from time immemorial. The outcome by the Arizona Supreme Court is immaterial but provides the question for review by the United States Supreme Court with full knowledge from the “ghost” opinion of the probable outcome. The Salt River Project and Arizona, principal losers in *Arizona v California I*, make the following arguments in *Gila River* against Indian reserved rights to the use of water:

*...Under the United States Supreme Court’s decision in United States v New Mexico..., all federal land with a dedicated federal purpose “has reserved to it that minimum amount of water which is necessary to effectuate the primary purpose of the land set aside.” Judge Goodfarb also found, however, that this “purposes” test does not apply to Indian reservations. Instead, he held that, for Indian reservations, “the courts have drawn a clear and distinct line”....that mandates that reserved rights for all Indian reservations must be quantified based on the amount of “water necessary to irrigate all of the practicably irrigable acreage (PIA) on that Reservation” without considering the specific purposes for which the Reservation was created....this interlocutory proceeding with respect to Issue 3 arose because Judge Goodfarb incorrectly ruled (as a matter of law and without the benefit of any factual record, briefing, or argument) that PIA applies to all Indian reservations...*

*....as shown below, the Supreme Court in that case [Arizona I] and the courts in all reported decisions since that time, have applied the following analysis: first, review the historical evidence relating to the establishment of the Reservation and, from that evidence, determine the purposes for which the specific land in question was reserved (a question of fact). Second, determine, based upon the evidence, the minimum quantity of water necessary to carry out those purposes (a mixed question of law and fact). ...and in Colville Confederated Tribes V. Walton, for instance, the ninth circuit stated: “to identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances.”*

*...the Zuni Reservation in northeastern Arizona, for example, was established*

by Congress expressly "for religious purposes."...the original 1859 creation of the Gila Reservation and each of the seven subsequent additions had different rationales and were intended to address different purposes or combinations of purposes (e.g. protecting existing farmlands, adding lands for grazing, including lands irrigated by Indians outside the Reservation as part of the Reservation...

....in addition to varying in size, Indian reservations also vary in location and terrain. Reservations in Arizona, for instance, run the gamut from desert low lands to the high mountains and everything in between. Certain reservations along the Colorado River include fertile but arid river bottom land and were created for the purpose of converting diverse groups of "nomadic" Indians to a "civilized" and agrarian way of life...other reservations, such as the Navajo Reservation in extreme northeastern Arizona, consist largely of "very high plateaus, flat-top mesas, inaccessible buttes and deep canyons. ....there can be little doubt that the PIA standard works to the advantage of tribes inhabiting alluvium plains or other relatively flat lands adjacent to stream courses. In contrast, tribes inhabiting mountainous or other agriculturally marginal terrains are at a severe disadvantage when it comes to demonstrating that their lands are practicably irrigable....

...the special master [Arizona I] conducted a trial, accepted and reviewed substantial evidence regarding the purposes of the five Indian reservations at issue in that case, made factual findings as to purposes, and only then found that the minimum amount of water necessary to carry out those purposes was best determined by the amount of water necessary to irrigate all "practicably irrigable" acres on those reservations. ....the special master stated: "moreover the 'practicably irrigable' standard is not necessarily a standard to be used in all cases and when it is used it may not have the exact meaning it holds in this case. The amount reserved in each case is the amount required to make each Reservation livable."

...although the United States Supreme Court affirmed the Wyoming court's decision in that case without opinion, events surrounding that review shed considerable light on the Supreme Court's concerns about the continued viability of PIA as a standard, at least in the form it was applied in Arizona I. ....several Justices challenged the United States's defense of PIA.... "at this point, Chief Justice Rehnquist challenged the precedential validity of Arizona I by noting that the opinion 'contains virtually no reasoning' and the Court merely had accepted the special master's conclusion as to the PIA standard...arguing that Congress must of contemplated the size of the tribe that would live on the Wind River Reservation, ...the Chief Justice stated that he found it difficult to believe that 'in 1868 Congress...should be deemed have said we're giving up water to irrigate every - every inch of arable land. No matter how large the tribe they thought they were settling. Did they expect to make some tribes very rich so that they can have an enormous export business... in agricultural products?" (State Litigant's Opening Brief on

Historical Analysis of Thought Processes Embraced by Master Manual

WHEREAS, the means employed by the Corps of Engineers to deny consideration of Indian water rights in the preparation of the Master Manual and those same means employed by the Department of Interior to deny consideration of Indian water rights in baseline environmental studies of endangered species have been presented. Also, presented was the favorable body of law supporting the proper consideration of Indian water rights followed by the denigration of that law in state court adjudications, namely in Wyoming and, more recently, in Arizona. Briefly examined here are historical examples of the diminishment of property rights by a superior force and the strikingly similar arguments in support of that diminishment, and

WHEREAS, the concepts and techniques for diminishing the water rights of the Standing Rock Sioux Tribe in the Missouri River, its tributaries and aquifers are not novel. The colonization of Ireland by the English (*circa* 1650), for example, was justified in a manner that provides insight in the federal treatment of Indian water rights in the Missouri River Basin. Sir Thomas Macaulay, a prominent English politician in the first half of the 19<sup>th</sup>-century and one of the greatest writers of his or any other era, rationalized the taking of land from the native Irish and the overthrow of King James II in 1692, which overthrow was due, in part, to the King's efforts to restore land titles to the native Irish: (Sir Thomas Macaulay, 1848, *The History of England*, Penguin Classics, pp 149-151)

*To allay national animosity such as that which the two races [Irish and English] inhabiting Ireland felt for each other could not be the work of a few years. Yet it was a work to which a wise and good Prince might have contributed much; and King James II would have undertaken that work with advantages such as none of his predecessors or successors possessed. At once an Englishman and a Roman Catholic, he belonged half to the ruling and half to the subject cast, and was therefore peculiarly qualified to be a mediator between them. Nor is it difficult to trace the course which he ought to have pursued. He ought to have determined that the existing settlement of landed property should be in violable; and he ought to have announced that determination in such a manner as effectually to quiet the anxiety of the new proprietors, and to extinguish any wild hopes which the old proprietors might entertain. Whether, in the great transfer of estates, injustice had or had not been committed, was immaterial. The transfer, just or unjust, had taken place so long ago, that to reverse it would be to unfix the foundations of society. There must be a time limitation to all rights. After thirty-five years of actual possession, after twenty-five years of possession solemnly guaranteed by statute, after innumerable leases and releases, mortgages and devises, it was too late to search for flaws in titles. Nevertheless something might have been done to heal the lacerated feelings and to raise the fallen fortunes of the Irish gentry. The colonists were in a thriving condition. They had greatly improved their property by building, planting and fencing..... There was no doubt that the next Parliament which should meet at Dublin, though representing almost exclusively the English interest, would, in return for the King's promise to maintain that interest in all its legal rights, willingly grant to him a considerable sum for the purpose of indemnifying, at*

least in part, such native families as had been wrongfully despoiled.

*Having done this, he should have labored to reconcile the hostile races to each other by impartially protecting the rights and restraining the excesses of both. He should have punished with equal severity that native who indulges in the license of barbarism and the colonists who abused the strength of civilization.... no man who was qualified for office by integrity and ability should have been considered as disqualified by extraction or by creed for any public trust. It is probable that a Roman Catholic King, with an ample revenue absolutely at his disposal, would, without much difficulty, have secured the cooperation of the Roman Catholic prelates and priests in the great work of reconciliation. Much, however, might still have been left to the healing influence of time. The native race might still have had to learn from the colonists industry and forethought, arts of life, and the language of England. There could not be equality between men who lived in houses and men who lived in sties, between men who were fed on bread and men who were fed on potatoes, between men who spoke the noble tongue of great philosophers and poets and men who, with the perverted pride, boasted that they could not writhe their mouths into chattering such a jargon as that in which the Advancement of Learning and the Paradise Lost were written. Yet it is not unreasonable to believe that if the gentle policy which has been described had been steadily followed by the government, all distinctions would gradually have been effaced, and that there would now have been no more trace of the hostility which has been the curse of Ireland ...and*

WHEREAS, the Master Manual rationale... *Currently, such reserved or aboriginal rights of tribal reservations have not been quantified in an appropriate legal forum or by compact with three exceptions.... The Study considered only existing consumptive uses and depletions; therefore, no potential tribal water rights were considered.... or the ESA rationale.... The environmental baseline used in ESA Section 7 consultations on agency actions affecting riparian ecosystems should include for those consultations the full quantum of: (a) adjudicated (decreed) Indian water rights; (b) Indian water rights settlement act; and (c) Indian water rights otherwise partially or fully quantified by an act of Congress... Biological opinions on proposed or existing water projects that may affect the future exercise of senior water rights, including unadjudicated Indian water rights, should include a statement that project proponents assume the risk that the future development of senior water rights may result in a physical or legal shortage of water....* does not represent a significant step forward from that advanced by Macaulay given the opportunity of 150 years for refinement in America. There cannot be significant differences between the statement of the Corps of Engineers and the Macaulay logic; and

WHEREAS, it is material, not immaterial, whether there has been injustice or a fitting of the law to the purpose in the transfer of Standing Rock waters of the Missouri River, its tributaries and its aquifers to non-Indians in the Master Manual update. It is rejected as correct ... that after the new proprietor's (downstream navigation, upstream recreation and endangered species) have enjoyed the Indian "estate" for a period of 25 to 35 years, the wild hopes of the Indian proprietors for participation must be extinguished. It is rejected as correct that the lacerated Indian feelings be healed, or for a considerable sum, despoiled Indian families can be made whole and the new possessors of Standing Rock Sioux water rights can be indemnified. It is rejected as proper that this be justified on the basis that the new possessor has greater industry, forethought, arts of life, language, diet, and housing. It is rejected

as untrue that after numerous leases, releases, and mortgages by non-Indians relying upon unused Indian *Winters* doctrine water rights, it is too late to search for flaws in titles. It is accepted as true that the Master Manual promotes reliance by non-Indians upon unused Indian *Winters* doctrine water rights; and

WHEREAS, the rationale of Supreme Court Justices, Master Manual and ESA is but a limited improvement from historical examples even earlier than Macaulay. Over 400 years ago, the sovereigns of England and Scotland, upon their union, sought possession of the borderlands between the two nations and to dispossess the native tribal inhabitants. The following provides the rationale of the Bishop of Glasgow against those ancient inhabitants as they sought (in vain) to stay in possession of their ancient lands:

*I denounce, proclaim and declare all and sundry acts of the said murders, slaughters,... thefts and spoils openly upon daylight and under silence of night, all within temporal lands as Kirklands; together with their partakers, assistants, suppliers, known receivers and their persons, the goods reft and stolen by them, art or part thereof, and their counselors and defenders of their evil deeds generally CURSED, execrated, aggregate and re-aggregate with the GREAT CURSING.*

*I curse their head and all their hairs on their head; I curse their face, their eye, their mouth, their nose, their tongue, their teeth, their crag, their shoulders, their breast, their heart, their stomach, their back, their wame (belly), their arms, their legs, their hands, their feet, and every part of their body, from the top of their head to the sole of their feet, before and behind, within and without.*

*I curse them going and I curse them are riding; I curse them standing, and I curse them sitting; I curse them eating, I curse them drinking; I curse them walking, I curse them sleeping; I curse them arising, I curse them laying; I curse them at home, I curse them from home; I curse them within the house, I curse them without the house; I curse their wives, their barns, and their servants participating with them in their deeds. I wary their corn, their cattle, their wool, their sheep, their horses, their swine, their geese, their hens, and all their livestock. I wary their halls, their chambers, their kitchens, their storage bins, their barns, their cowsheds, their barnyards, their cabbage patches, their plows, their harrows, and the goods and houses that is necessary for their sustenance and welfare.*

*The malediction of God that lighted upon Lucifer and all his fellows, that struck them from the high heaven to the deep hell, must light upon them. The fire in the sword that stopped Adam from the gates of Paradise, must stop them from the glory of heaven until they forbear and make amends; and*

WHEREAS, truly, the rationale of the Master Manual may be a slight improvement in the techniques that were used to justify dispossession 400 years ago and represents progress, Standing Rock and other tribes have repeatedly encountered equally effective, if less colorful, opposition to their efforts to preserve, protect, administer and utilize their water rights; and

WHEREAS, the distinguishing feature for the Standing Rock Sioux Tribe, however, is

the fact that the water right "estate" in the Missouri River has not been taken from them, even though it is under attack in the Master Manual. It is proposed in the Master Manual to commit water away from the Indians, but the process is not accomplished, and those who would rely on unused Indian water rights have not yet taken possession and executed mortgages, leases and releases on the basis of them. The Standing Rock Sioux Tribe remain in position to retain its "estate" in the Missouri River by rejecting the Master Manual and taking affirmative action to protect its ancient and intact possessions; and

WHEREAS, by taking steps to protect their ancient possessions the Standing Rock Sioux Tribe recognizes that it cannot expect support from the United States or its agencies acting as Trustee. Strong reaction can be expected from any current attempt to do so, including strong reaction by the Trustee. First, the Trustee has no funds for litigation of Indian water right issues. Second, the Trustee has considerable funds for settlement of Indian water right issues, but the Indian costs in lost property are great. Third, the Trustee has considerable technical criteria and requirements to impose on the Indian tribes as a basis for limiting the Indian water right "estate": irrigable land criteria, water requirement criteria, limitation on beneficial uses and, most limiting, economic feasibility criteria that few, if any, existing non-Indian water projects could survive.

NOW THEREFORE BE IT RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe rejects the Master Manual Review and Update by the U. S. Army Corps of Engineers for the express reason that it establishes a plan for future operation of the Missouri River addressing inferior downstream navigation, upstream recreation and endangered species water claims of the States and Federal interests and specifically denies proper consideration or any consideration of the superior, vested water rights of the Standing Rock Sioux Tribe while committing reservoir releases to purposes and interests in direct opposition to those of the Tribe.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe, seeking to protect and preserve its valuable rights to the use of water in the Missouri River, its tributaries and aquifers upon which the Tribe relies and has relied since ancient times for its present and future generations, directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups to petition members of Congress and officials at the highest levels in the Bush Administration, including the Department of Justice, among other proper steps, for the single purpose of ensuring a full rejection and re-constitution of the Master Manual as now proposed for action by the Corps to properly reflect the rights, titles and interests of the Standing Rock Sioux Tribe.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe proclaims its continued dominion over all of the lands within the boundaries of the Standing Rock Sioux Indian Reservation as reserved from time immemorial including

but not limited to rights, jurisdictions, privileges, prerogatives, liberties, immunities, and temporal franchises whatsoever to all the soil, plains, woods, wetlands, lakes, rivers, aquifers, with the fish and wildlife of every kind, and all mines of whatsoever kind within the said limits; and the Tribal Council declares its water rights to irrigate not less than 303,650 arable acres with an annual diversion duty of 4 acre feet per acre, to supply municipalities, commercial and industrial purposes and rural homes with water for not less than 30,000 future persons having an annual water requirement of 10,000 acre feet annually, to supply 50,000 head of livestock of every kind on the ranges having an annual water requirement of 1,500 acre feet annually: such proclamation made on the basis of the status of knowledge at the start of the third millennia and subject to change to include water for other purposes, such as oil, gas, coal or other minerals, forests, recreation, and etc; and such proclamation for the purposes and amount of water required to be adjustable in the future to better reflect improved knowledge and changing conditions.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups to petition members of Congress and officials at the highest levels in the Bush Administration to support and promote legislation that would, among other things, enable the Standing Rock Sioux Tribe to exercise its rights to the use of water in the Missouri River, in part, by purchasing the generators and transmission facilities of the United States at Oahe Dam at fair market value, subject to such offsets as may be agreed upon, with provisions to sell power generated at Oahe Dam at rates necessary to honor all existing contracts for the sale of pumping power and firm, wholesale power during their present term and sufficient to retire debts of the United States that may be agreed upon; provided, however, that the Tribe may increase power production at the dam by feasible upgrades and market the new power at market rates and after expiration of current contracts market power at rates reflective of the market; and provided further that legislation to purchase generators and transmission facilities will also include provisions to finance wind and/or natural gas power generation on the Standing Rock Indian Reservation to combine with hydropower production, thereby using Tribe's water and land resources effectively for the benefit of the Tribe without further erosion, diminishment and denigration of Tribe's water right claims.

BE IT FURTHER RESOLVED THAT, the Standing Rock Sioux Tribal Council rejects all reports and investigations of the Bureau of Reclamation on the Cannonball and Grand Rivers watersheds and any and all proposals by Bureau of Reclamation for an Indian Small Water Projects Act and that all ongoing efforts of the Bureau of Reclamation respecting these specific efforts will cease by this directive of the Tribal Council.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups, to petition members of Congress,



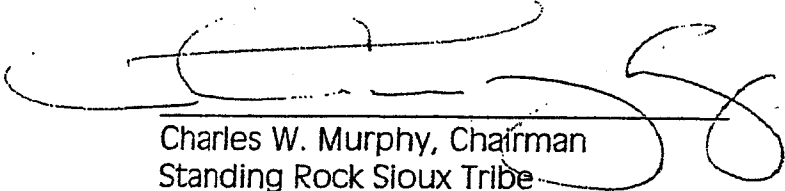
United States Supreme Court, when engaged in a Whiggish course, to subject the least powerful to the will of the States in matters involving property rights as evidenced by the *Dred Scott*, the *O'Connor Ghost* and comparable decisions of expediency.

BE IT FURTHER RESOLVED THAT, the Chairman and Secretary of the Tribal Council are hereby authorized and instructed to sign this resolution for and on behalf of the Standing Rock Sioux Tribe.

## CERTIFICATION

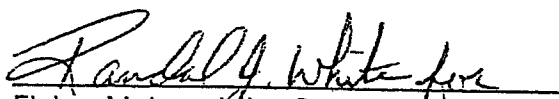
We, the undersigned, Chairman and Secretary of the Tribal Council of the Standing Rock Sioux Tribe, hereby certify that the Tribal Council is composed of (17) members, of whom 12 constituting a quorum, were present at a meeting thereof, duly and regularly, called, noticed, convened and held on the 5<sup>th</sup> day of April, 2001, and that the foregoing resolution was duly adopted by the affirmative vote of 11 members, with 0 opposing, and with 1 not voting. THE CHAIRMAN'S VOTE IS NOT REQUIRED, EXCEPT IN CASE OF A TIE.

DATED THIS 5<sup>th</sup> DAY OF APRIL, 2001.



Charles W. Murphy, Chairman  
Standing Rock Sioux Tribe

ATTEST:

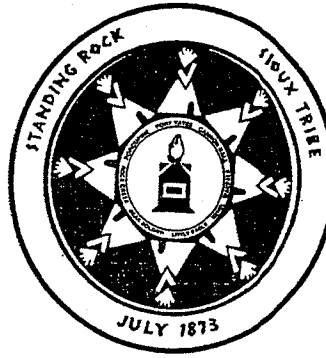


Elaine McLaughlin, Secretary  
Standing Rock Sioux Tribe

(OFFICIAL TRIBAL SEAL)



Charles W. Murphy  
Chairman



Tom Iron  
Vice Chairman

Elaine McLaughlin  
Secretary

DISTRICTS

Robert Cordova  
Cannonball District

Raphael See Walker  
Fort Yates District

Joe Strong Heart  
Wakpala District

Palmer Defender  
Kenel District

Dean Bear Ribs  
Bear Soldier District

Milton Brown Otter  
Rock Creek District

Farren Long Chase  
Little Eagle District

Randal White Sr.  
Porcupine District

AT LARGE

Jesse Taken Alive

Reva Gates

Pat McLaughlin

Miles McAllister

Ron Brown Otter

Isaac Dog Eagle, Jr.

May 1, 2001

The Honorable Joseph W. Westphal, Acting Secretary  
of the Army  
U.S. Department of the Army  
101 Army - Pentagon  
Washington, D.C. 20310-0101

Dear Secretary Westphal:

The Standing Rock Sioux Tribe respectfully submits the attached resolution rejecting, among other things, the Master Manual Update and environmental impact statement documents and processes in support of the Master Manual Update.

The commitment that the Master Manual Update makes to downstream navigation interests, upstream recreation interests and endangered and threatened species is a considerable concern to the Tribe and its membership. Of equal concern is the lack of commitment to the protection or preservation of the water rights of the Standing Rock Sioux Tribe. These factors have caused the governing body to fully reject the effort and to call upon congressional members and others in President Bush's Administration to fully review the consequences of the Master Manual Update on our water rights and to join us in seeking a better course and outcome.

The Corps of Engineers contends in Master Manual documents that future operation of the mainstem Missouri River dams and reservoirs will be modified to reflect future decrees at completion of the appeal process or federal legislation establishing the measure of Indian water rights. Overlooked by the Corps of Engineers is the fact that commitments in the Master Manual diminish the ability of a future Court or Congress to equitably address the water rights of the Standing Rock Sioux Tribe in the future because mortgages, releases, debt, titles and, more generally, economic development outside the Reservation will be based on the commitments now proposed in the Master Manual. It is these pressures on the state, federal and Supreme Courts and the Political Process that result in Creative Laws to Diminish Our Vested Rights to the Use of Water and Circumvent the Equitable Compensation Provisions of the Constitution.

THE HONORABLE JOSEPH W. WESTPHAL

May 1, 2001

Page Two

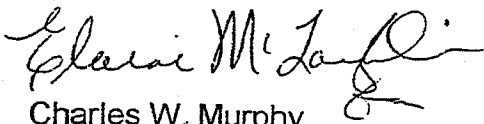
The drafts of the environmental impact statement prepared by the Corps of Engineers have failed completely to address the economic impact of the Master Manual Update on the Standing Rock Sioux Tribe. No consideration has been given to economic conditions on the Reservation and the impact that Master Manual commitments will have on the future Indian population given that the Tribe possesses an equitable title to rights to the use of water in the Missouri River.

Without diminishing the force or effect of our conclusions respecting the Master Manual, please accept our observation that the Corps of Engineers' staff working on the Master Manual Update have, for the most part, conducted themselves in an honorable and professional manner. It is the policy of the Corps of Engineers on this matter that is at issue.

Finally, please ensure that the documents prepared by the Corps of Engineers on the Master Manual reflect the opposition of the Standing Rock Sioux Tribe to the complete set of documents including the environmental impact statement.

Sincerely,

STANDING ROCK SIOUX TRIBE



Charles W. Murphy  
Chairman

CWM/eie

cc: The Honorable John Ashcroft, Attorney General  
The Honorable Gale Norton, Secretary  
The Honorable Christie Whitman, EPA Administrator  
The Honorable Tom Daschle  
The Honorable Tim Johnson  
The Honorable John Thune  
The Honorable Byron Dorgan  
The Honorable Kent Conrad  
The Honorable Earl Pomeroy

**TREATY WITH THE SIOUX—BRULÉ, OGLALA, MINICONJOU, YANKTONAI, HUNKPAPA, BLACKFEET, CUTHEAD, TWO KETTLE, SANS ARCS, AND SANTEE—AND ARAPAHO, 1868.**

Apr. 29, 1868.

15 Stat., 625.  
Ratified, Feb. 16, 1869.  
Unclaimed, Feb. 24, 1869.

*Articles of a treaty made and concluded by and between Lieutenant-General William T. Sherman, General William S. Harney, General Alfred H. Terry, General C. C. Augur, J. B. Henderson, Nathaniel G. Taylor, John B. Sanborn, and Samuel F. Tappan, duly appointed commissioners on the part of the United States, and the different bands of the Sioux Nation of Indians, by their chiefs and head-men, whose names are hereto subscribed, they being duly authorized to act in the premises.*

War to cease and peace to be kept.

ARTICLE 1. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.

Offenders against the Indians to be arrested, etc.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

Wrongdoers against the whites to be punished.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no one sustaining loss while violating the provisions of this treaty or the laws of the United States shall be re-imbursed therefor.

Damages.

Reservation boundaries.

ARTICLE 2. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employés of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

Certain persons not to enter or reside thereon.

ARTICLE 3. If it should appear from actual survey or other satisfactory examination of said tract of land that it contains less than one hundred and sixty acres of tillable land for each person who, at the time, may be authorized to reside on it under the provisions of this treaty, and a very considerable number of such persons shall be disposed to commence cultivating the soil as farmers, the United States agrees to set apart, for the use of said Indians, as herein provided,

Additional arable land to be added, if, etc.

such additional quantity of arable land, adjoining to said reservation, or as near to the same as it can be obtained, as may be required to provide the necessary amount.

ARTICLE 4. The United States agrees, at its own proper expense, to construct at some place on the Missouri River, near the center of said reservation, where timber and water may be convenient, the following buildings, to wit: a warehouse, a store-room for the use of the agent in storing goods belonging to the Indians, to cost not less than twenty-five hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding five thousand dollars.

Buildings on reservation.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular-saw mill, with a grist-mill and shingle-machine attached to the same, to cost not exceeding eight thousand dollars.

ARTICLE 5. The United States agrees that the agent for said Indians shall in the future make his home at the agency-building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

Agent's residence, office, and duties.

ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "land-book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Heads of families may select lands for farming.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

Others may select land for cultivation.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it, by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Sioux Land-Book."

Certificates.

The President may, at any time, order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper. And it is further stipulated that any male Indians, over eighteen years of age, of any band or tribe that is or shall hereafter become a party to this treaty, who now is or who shall hereafter become a resident or occupant of any reservation or Territory not included in the tract of country designated and described in this treaty for the permanent home of the Indians, which is not mineral land, nor reserved by the United States for special purposes other than Indian occupation, and who shall have made improvements thereon of the value of two hundred dollars or more, and continuously occupied the same as a homestead for the term of three years, shall be entitled to receive from the United States a patent for one hundred and sixty acres of land including his said improvements, the same to be in the form of the legal subdivisions of the sur-

Surveys.

Alienation and descent of property.

veys of the public lands. Upon application in writing, sustained by the proof of two disinterested witnesses, made to the register of the local land-office when the land sought to be entered is within a land district, and when the tract sought to be entered is not in any land district, then upon said application and proof being made to the Commissioner of the General Land-Office, and the right of such Indian or Indians to enter such tract or tracts of land shall accrue and be perfect from the date of his first improvements thereon, and shall continue as long as he continues his residence and improvements, and no longer. And any Indian or Indians receiving a patent for land under the foregoing provisions, shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all the privileges and immunities of such citizens, and shall, at the same time, retain all his rights to benefits accruing to Indians under this treaty.

Certain Indians may receive patents for 160 acres of land.

Such Indians receiving patents to become citizens of the United States.

ARTICLE 7. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.

Education.

Children to attend school.

Schoolhouses and teachers.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid, not exceeding in value twenty-five dollars.

Seeds and agricultural implements.

And it is further stipulated that such persons as commence farming shall receive instruction from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be needed.

Instructions in farming.

Second blacksmith.

ARTICLE 9. At any time after ten years from the making of this treaty, the United States shall have the privilege of withdrawing the physician, farmer, blacksmith, carpenter, engineer, and miller herein provided for, but in case of such withdrawal, an additional sum thereafter of ten thousand dollars per annum shall be devoted to the education of said Indians, and the Commissioner of Indian Affairs shall, upon careful inquiry into their condition, make such rules and regulations for the expenditure of said sum as will best promote the educational and moral improvement of said tribes.

Physician, farmer, etc., may be withdrawn.

Additional appropriation in such cases.

ARTICLE 10. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any treaty or treaties heretofore made, the United States agrees to deliver at the agency-house on the reservation herein named, on or before the first day of August of each year, for thirty years, the following articles, to wit:

Delivery of goods in lieu of money or other annuities.

For each male person over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, pantaloons, flannel shirt, hat, and a pair of home-made socks.

Clothing.

For each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

Census.

And in addition to the clothing herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be

Other necessary articles.

annually appropriated for a period of thirty years, while such persons roam and hunt, and twenty dollars for each person who engages in farming, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if within the thirty years, at any time, it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the Indians named herein, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery. And it is hereby expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians or family of persons legally incorporated with them, who shall remove to the reservation herein described and commence farming, one good American cow, and one good well-broken pair of American oxen within sixty days after such lodge or family shall have so settled upon said reservation.

ARTICLE 11. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase. And they, the said Indians, further expressly agree:

1st. That they will withdraw all opposition to the construction of the railroads now being built on the plains.

2d. That they will permit the peaceful construction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home, or travelling, nor molest or disturb any wagon-trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. They will never capture, or carry off from the settlements, white women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte River and westward to the Pacific Ocean, and they will not in future object to the construction of railroads, wagon-roads, mail-stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head-man of the tribe.

7th. They agree to withdraw all opposition to the military posts or roads now established south of the North Platte River, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE 12. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty.

Appropriation to continue for thirty years.

Army officer to attend the delivery.

Meat and flour.

Cows and oxen.

Right to occupy territory outside of the reservation surrendered.

Right to hunt reserved.

Agreements as to railroads.

Emigrants, etc.

Women and children.

White men.

Pacific Railroad, wagon roads, etc.

Damages for crossing their reservation.

Military posts and roads.

No treaty for cession of reservation to be valid unless, etc.



ARTICLE 13. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

United States to furnish physician, teachers, etc.

ARTICLE 14. It is agreed that the sum of five hundred dollars annually, for three years from date, shall be expended in presents to the ten persons of said tribe who in the judgment of the agent may grow the most valuable crops for the respective year.

Presents for crops.

ARTICLE 15. The Indians herein named agree that when the agency-house or other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article 11 hereof.

Reservation to be permanent home of tribes.

ARTICLE 16. The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained, to pass through the same; and it is further agreed by the United States that within ninety days after the conclusion of peace with all the bands of the Sioux Nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

Unceded Indian territory.

Not to be occupied by whites, etc.

ARTICLE 17. It is hereby expressly understood and agreed by and between the respective parties to this treaty that the execution of this treaty and its ratification by the United States Senate shall have the effect, and shall be construed as abrogating and annulling all treaties and agreements heretofore entered into between the respective parties hereto, so far as such treaties and agreements obligate the United States to furnish and provide money, clothing, or other articles of property to such Indians and bands of Indians as become parties to this treaty, but no further.

Effect of this treaty upon former treaties.

In testimony of all which, we, the said commissioners, and we, the chiefs and headmen of the Brulé band of the Sioux nation, have hereunto set our hands and seals at Fort Laramie, Dakota Territory, this twenty-ninth day of April, in the year one thousand eight hundred and sixty-eight.

N. G. Taylor, [SEAL.]  
 W. T. Sherman, [SEAL.]  
 Lieutenant-General.  
 Wm. S. Harney, [SEAL.]  
 Brevet Major-General U. S. Army.  
 John B. Sanborn, [SEAL.]  
 S. F. Tappan, [SEAL.]  
 C. C. Augur, [SEAL.]  
 Brevet Major-General.  
 Alfred H. Terry, [SEAL.]  
 Brevet Major-General U. S. Army.

Attest:

A. S. H. White, Secretary.

Executed on the part of the Brulé band of Sioux by the chiefs and headmen whose names are hereto annexed, they being thereunto duly authorized, at Fort Laramie, D. T., the twenty-ninth day of April, in the year A. D. 1868.

Ma-za-pon-kaska, his x mark, Iron Shell. [SEAL.]	Bella-tonka-tonka, his x mark, Big Partisan. [SEAL.]
Wah-pat-shah, his x mark, Red Leaf. [SEAL.]	Mah-to-ho-honka, his x mark, Swift Bear. [SEAL.]
Hah-sah-pah, his x mark, Black Horn. [SEAL.]	To-wis-ne, his x mark, Cold Place. [SEAL.]
Zin-tah-gah-lat-skah, his x mark, Spotted Tail. [SEAL.]	Ish-tah-skah, his x mark, White Eye. [SEAL.]
Zin-tah-skah, his x mark, White Tail. [SEAL.]	Ma-ta-loo-zah, his x mark, Fast Bear. [SEAL.]
Me-wah-tah-ne-ho-skah, his x mark, Tall Mandas. [SEAL.]	As-hah-kah-nah-zhe, his x mark, Standing Elk. [SEAL.]
Shu-cha-chat-kah, his x mark, Bad Left Hand. [SEAL.]	Can-te-te-ki-ya, his x mark, The Brave Heart. [SEAL.]



Hradinga, Fort Lakawin, Nov. 9, 98.

Executed by the above on this date. All of the Indians are Ogishlala excepting Thunder Man and Thunder Flying Running, who are Brule.

Wm. McE. Dye,  
Major Fourth Infantry, and Brevet Colonel  
U. S. Army, Commanding.

Attent:

Jas. G. O'Connor, [ ]  
 Nicholas Jank, Interpreter, [ ]  
 Frank La Frenchie, Interpreter, [ ]  
 Saml. D. Hinnam, missionary among the Indians, [ ]  
 Executed on the part of the Ute group band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

Osh-ha-lay-ye, his x mark, The	Shun-ka-ya-pa, his x mark, [ ]
Man-ha-ye, his x mark, The	Wu-ye-ye, his x mark, [ ]
Me-to-ye-ye-ye, his x mark, [ ]	Ev-shi-ye, his x mark, The Man
Ye-to-ye-ye-ye, his x mark, [ ]	who bleeds from the mouth, [ ]
Kanung, his x mark, [ ]	He-lay-ye, his x mark, Elk
Looking Crow, his x mark, [ ]	Head, [ ]
Ak-ta-lay-ye, his x mark, [ ]	Iron, his x mark, Grind Stone, [ ]
Long Soldier, [ ]	Stone, his x mark, [ ]
Wah-ye-ye, his x mark, The	Dog, [ ]
One who shoots a Viking, [ ]	Ma-ye-ye-ye, his x mark, Blue
Man-ha-ye, his x mark, [ ]	Cloud, [ ]
Ma-ye-ye, his x mark, [ ]	Wen-to-ye-ye, his x mark, Red
Kan-ye-ye, his x mark, Fleety	Heart, [ ]
Crow, [ ]	Ma-ye-ye, his x mark, Bear, [ ]
Hon-ye, his x mark, Iron Horn, [ ]	Heart, [ ]
	Ak-ta-lay-ye, his x mark, [ ]
	Child Soldier, [ ]

Executed on the part of the Blackfoot band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

Yas-to-ye-ye, his x mark, Fire Hand, [ ]  
 Yas-to-ye-ye, his x mark, The One who Kills Eagles, [ ]  
 Sho-ye, his x mark, Smoke, [ ]  
 Wa-ye-ye-ye, his x mark, Walking Eagle, [ ]  
 Ye-ye-ye-ye-ye, his x mark, Chief White Man, [ ]  
 Pe-ye-ye-ye, his x mark, Sitting Crow, [ ]  
 Kish-ye-ye, his x mark, The One that Rattles as he Walks, [ ]  
 Wah-han-ye-ye, his x mark, Black Shield, [ ]  
 Can-ye-ye-ye, his x mark, Two Hearts, [ ]

Executed on the part of the Outhead band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

To-ka-ye-ye, his x mark, The One who Goes Ahead Running, [ ]  
 To-ka-ye-ye, his x mark, Thunder Bull, [ ]  
 Shin-ye-ye-ye, his x mark, [ ]  
 Can-ye-ye, his x mark, The One who Took the Stick, [ ]  
 Pa-ye-ye, his x mark, Big Head, [ ]

Executed on the part of the Two Kettle band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

Ma-ye-ye-ye-ye, his x mark, Long Mender, [ ]  
 Can-ye-ye, his x mark, Red War Club, [ ]  
 Can-ye-ye, his x mark, The Log, [ ]

Attent:

Jas. G. O'Connor, [ ]  
 Nicholas Jank, Interpreter, [ ]  
 Frank La Frenchie, Interpreter, [ ]  
 Saml. D. Hinnam, missionary among the Indians, [ ]  
 Executed on the part of the Sane Arch band of Sioux by the chiefs and headmen whose names are hereto annexed, they being thereunto duly authorized.

He-ye-ye-ye-ye, his x mark, The One that has Neither Horn, [ ]
Wen-to-ye-ye, his x mark, Red Plume, [ ]
Os-ye-ye, his x mark, Yellow Hawk, [ ]
He-ye-ye-ye-ye, his x mark, No Horn, [ ]

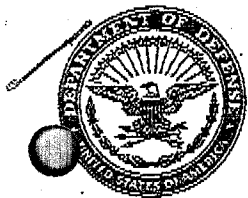
Executed on the part of the Sautice band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

We-ye-ye-ye, his x mark, Red Eagle, [ ]  
 Wa-ye-ye-ye, his x mark, Shooter, [ ]  
 He-ye-ye-ye, his x mark, Red Egg, [ ]  
 Ye-ye-ye-ye-ye, his x mark, Rattles all over, [ ]  
 Ye-ye-ye-ye-ye, his x mark, Big Eagle, [ ]  
 Ye-ye-ye-ye-ye, his x mark, [ ]  
 Ye-ye-ye-ye-ye, his x mark, [ ]

Executed on the part of the Twenty-second Infantry, Brevet Captain, U. S. Army.

Jas. G. O'Connor, [ ]  
 Nicholas Jank, Interpreter, [ ]  
 Frank La Frenchie, Interpreter, [ ]  
 Saml. D. Hinnam, missionary among the Indians, [ ]





DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
CIVIL WORKS  
108 ARMY PENTAGON  
WASHINGTON DC 20310-0108  
20 JUN 2001



REPLY TO  
ATTENTION OF

Mr. Charles W. Murphy  
Chairman, Standing Rock Sioux Tribe  
Post Office Box D  
Fort Yates, North Dakota 58538-0522

Dear Chairman Murphy:

Thank you for your letter of May 1, 2001, to the Honorable Joseph W. Westphal, former Acting Secretary of the Army, regarding the Missouri River Master Water Control Manual (Master Manual) and draft environmental impact statement (DEIS). I am responding to your letter because this office has oversight responsibility for civil works activities of the Army Corps of Engineers.

I regret that I am unable to provide you with a final response at this time. Your concerns regarding the potential impacts of revisions to the Master Manual on water rights of your Tribe and regarding economic impacts require additional research and coordination. Working with the Corps, I expect to be able to provide you with a final response within 45 days. Regardless of what our final response may be, I can assure you that the Corps will appropriately include the views of the Standing Rock Sioux Tribe in the draft Master Manual and DEIS. Additionally, the Corps is planning to hold a six-month comment period for these draft documents, along with a series of workshops throughout the Missouri River Basin where opportunities will be available to provide input and ask questions. Also, separate consultation meetings with Missouri River Basin Tribes are being planned.

Finally, I have been informed that Mr. Chip Smith, our Assistant for Environment, Tribal and Regulatory Affairs, spoke with you several days ago and confirmed a meeting with you in Bismarck, North Dakota, for June 27, 2001. Mr. Smith will be prepared to discuss this and other matters during that meeting.

Please do not hesitate to contact this office if you have any additional questions.

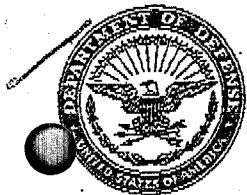
Sincerely,

Claudia L. Tomblom  
Deputy Assistant Secretary of the Army  
(Management and Budget)

A2-277



F



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
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Please do not hesitate to contact this office if you have any additional questions:

Sincerely,

Handwritten signature of Claudia L. Tomblom in cursive.

Claudia L. Tomblom  
Deputy Assistant Secretary of the Army  
(Management and Budget)

A2-278



## **REMARKS OF STANDING ROCK SIOUX TRIBAL COUNCIL MEMBER**

The Great Sioux Reservation contained the area now occupied by the Standing Rock Indian Reservation, all of Western South Dakota and the entire course of the Missouri River in the Dakota Territory from the east bank to the west bank. Our predecessors, along with the present governing body and membership, regarded the area that we reserved unto ourselves to include all the soil, plains, woods, prairies, mountains, marshes, lakes and rivers within the region, with the fish and wildlife of every kind, within the said limits and all mines of whatsoever kind. The Standing Rock people were invested with all the rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, and temporal franchises whatsoever from time immemorial.

The Corps of Engineers in its Master Manual Update and Revision, as well as in the Environmental Impact Statement, has failed to identify these rights, titles and interests in the Missouri River and to properly address them as issues. This has been done by the Corps of Engineers over the repeated objections of the Standing Rock Sioux Tribe.

The Corps of Engineers has improperly disposed of consideration of our rights, titles and interests by stating, in effect, that only those rights confirmed by a final court of competent jurisdiction or by congressional settlement will be considered in the Master Manual and EIS. The Corps of Engineers has then proceeded to allocate water to be utilized by upstream and downstream states, by threatened and endangered species, by recreation and navigation interests with no treatment of the prior and superior, vested and perfected water rights of the Standing Rock Sioux Tribe. Nor has the Corps of Engineers addressed any decreed or settled water rights of any Indian Tribe in the Missouri River Basin.

With the decisions made in any final Master Manual and BIS, countless interests in the Missouri River, including barge traffickers, marinas, environmental advocates, municipalities and states, among others, will undertake investments, encumber loans, commit appropriations,

settle estates and otherwise make irretrievable commitments that will severely prejudice the future development of the prior and superior rights to the use of water by the Standing Rock Sioux Tribe and its membership. Courts and legislative bodies will be forced into immoral decisions and a twisting of the legal system to confirm the rights established by the Master Manual and EIS against the rights of the Standing Rock Sioux Tribe.

This is not necessary in the Missouri River Basin where sufficient water is currently available to properly and morally treat and acknowledge the water rights of the Standing Rock Sioux Tribe and other tribes with interest in the Missouri River, its tributaries and its aquifers. It is not necessary in the year 2002 to impose an allocation in the Missouri River that will forever prejudice the water rights of the Tribe. The United States can act scientifically, honorably and morally at the present time to properly address, not ignore, our water rights and avoid the tragedy in other regions of this great nation. We are 100 years beyond the birth of the Reclamation Act, which immediately created a monopolization of water supply in Arizona that now causes State courts to pervert Indian title to maintain the investments of the land speculators that benefited from the Reclamation Act and allocated all available Indian water to the Phoenix metropolitan area.

Recently, the Arizona Supreme Court, faced with the prospect of 4 million people relying upon three sources of water: Indian water rights in the Salt River, the Central Arizona Project (investing billions to divert and pump the Colorado River) and severe over-pumping of finite groundwater resources, committed one of the most immoral acts of any court in this nation in our history by deciding that any Indian water right relying upon irrigation, the long-standing heart of the Winters Doctrine espoused by the United States Supreme Court, can no longer be proved and that any Indian water right for any other purpose must be based on a standard of minimal use for that purpose: 160 gallons per Indian per day or less.

The following is quoted by a southwestern newspaper presenting an article by a hydrologist for the Navajo Nation:

*"(T)ake from the Indian people. . . their lift sustaining Winters doctrine rights and you take from them the bases for their continued existence as a separate and distinct people.'  
William Veeder, federal attorney, 1972."*



*"For over a century, Arizona politicians, farmers, cities, businesses and industries have sought to control the state's water resources. Water from the Colorado River and the Gila River basin is what keeps the State's economic engines running. Only within the past two decades, however, have most of the state's 21 tribes been allowed a serious seat at the water rights table. The rules on water rights will determine these tribes' economic survival. But, just as they get more involved, the rules are changing."*

*"The Arizona Supreme Court, in a decision last November about rights in the Gila River basin, set new rules for measuring Indian right. The court felt tribes might get too much water under existing law, so it set a "minimalist" standard for quantifying Winters rights (Gallup Independent, by Jack Utter)*

There is no need for this kind of approach to Indian water rights in the Missouri River Basin, but the Corps of Engineers in its Master Manual and EIS has failed as crudely in 2002 as federal policy did in 1902 when the Salt River Project was initiated, totally committing all water of the Salt and Gila Rivers away from the Indian tribes and to the agriculturalists and land speculators in the Salt River Valley. It is not too much to ask for improvement in federal Indian water right policy over a century of failure. The policies, or lack thereof, presented in the Master Manual and EIS are consistent with the concern expressed by the Ninth Circuit Court of Appeals in its Ahtanum Decision:

*From the very beginnings of this nation, the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped, but how best to transfer Indian lands and resources to non-Indians. (United States v Ahtamum Irrigation District, 236 F. 2nd 321, 337).*

The Standing Rock Sioux Tribe formally files its Resolution 106 with the Corps of Engineers as its reason and rationale for fully and completely rejecting the Master Manual and EIS.



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PUBLIC HEARING  
ACCEPTING COMMENTS REGARDING  
MISSOURI RIVER REVISED DRAFT ENVIRONMENTAL IMPACT STATEMENT  
MASTER WATER CONTROL MANUAL

PROCEEDINGS HELD AT:  
Cultural Resource Center  
Eagle Butte, South Dakota  
February 12, 2002  
1:00 p.m. MST

Reported By: Ms. Lynne M. Ormesher, RPR, Capital Reporting  
Services, P.O. Box 903, Pierre, South Dakota 57501  
(605) 224-7611

\* \* \* \* \*

1 Tuesday, February 12, 2002

2 CHAIRMAN BOURLAND: We're going to go ahead and  
3 get started right now. But I guess before I do, it's always  
4 been a tradition at Cheyenne River that we start all of our  
5 meetings with a prayer. So if everyone will please rise,  
6 remove cover, we'll open this meeting with a prayer.

7 (Opening prayer lead by Chairman Bourland.)

8 Recess was taken at this time.)

9 I want to welcome everybody here today. As  
10 Chairman of the Cheyenne River Sioux Tribe it's indeed an  
11 honor and privilege to be able to be here today and welcome  
12 the United States Army Corps of Engineers as they have come up  
13 here today to take comments on the revised draft environmental  
14 impact statement for the Missouri River Master Manual.

15 I guess for those of you that may not be aware of  
16 some of the history regarding the Corps of Engineers and the  
17 Cheyenne River Sioux Tribe, it kind of goes back to about  
18 1991. I was only the Tribal Chairman for about five months  
19 when I was asked by now Senator, and then Congressman Tim  
20 Johnson, to testify at a hearing in Washington, D.C. regarding  
21 the Corps of Engineers control of the river system.

22 And basically at that time there was a huge  
23 battle between the downstream states and the upstream states  
24 regarding navigation versus recreation. And so anyway, I was  
25 asked to testify on behalf of the tribes, and it was after my

CAPITAL REPORTING SERVICES

1 testimony in Washington, D.C. that the first time to anyone's  
2 recollection or knowledge that the Corps of Engineers sent a  
3 delegation to Cheyenne River, and basically asked what they  
4 could do for us and how they could help accommodate some of  
5 our wishes.

6                   It was at that first meeting that we sat down  
7 and we looked for the first time at the Master Manual, and we  
8 realized then that the Master Manual was not only an  
9 incredibly complex document, but it had set forth a lot of  
10 acres and lands for certain types of objects that had not been  
11 carried out when the river was dammed up. There was a lot of  
12 talk about recreation, reforestation, a number of different  
13 things that never really happened.

14                   So we have had kind of a love-hate relationship  
15 over the years with the Corps of Engineers as a result of  
16 that. We don't always agree or see eye to eye on how the  
17 river has been controlled, and a lot of times we would like to  
18 give our comments to the Corps as to how we think that things  
19 should be done.

20                   One area that has been a particular concern, and  
21 I do think that the Corps most recently have begun to address,  
22 is cultural preservation. Over the years we all know that an  
23 immense amount of taking area lands have eroded away into the  
24 reservoirs. And I say reservoirs plural because it's a  
25 problem that is common to all the reservoirs on the Missouri

1 River in the State of South Dakota.

2                   And with the erosion comes the constant problem  
3 of cultural properties being lost. Everything from burial  
4 sites to various different other sacred areas that have  
5 basically washed away over the decades and are now laying in  
6 the bottom of the lake. And so with this again the Cheyenne  
7 River Sioux Tribe has attempted to work with the Corps to look  
8 and do an assessment, I guess, of these properties.

9                   But the issue that I know that is probably first  
10 and foremost on a lot of people's minds is the environmental  
11 impact. We all know and we all need to be very realistic  
12 about the fact that these reservoirs or dams were created with  
13 certain intentions of the United States Congress in mind.

14                   Now for those of you that may not have a complete  
15 background or history, essentially what happened is they have  
16 this big flood, and I think it was in 1942 when the actual  
17 flood happened, down on the Mississippi River. It didn't  
18 happen in the Missouri River; it happened on the Mississippi  
19 River. And by 1944 Congress passed a law that they called the  
20 Flood Control Act, which basically was a result of a lot of  
21 finagling and negotiation and politicing.

22                   Now if the truth be known, and studies have shown  
23 that the real culprit in that particular flood was not the  
24 Missouri River, it was actually, I believe, the Mississippi  
25 itself and the Ohio. But, of course, it was then politically

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1 unacceptable to propose damming up the Ohio River, so they  
2 picked on the big Missouri. Then, of course, the Missouri  
3 River didn't have a lot of communities, with the exception of  
4 Bismarck, Pierre, Chamberlain and a few others, and they  
5 believed that there would be the least impact by controlling  
6 this particular river.

7                   And in doing so, Congress never took into account  
8 that the river had its own ecosystem. It had its own  
9 environment. As a matter of fact, by damming up this river,  
10 the Missouri River, they not only destroyed hundreds of  
11 thousands of acres of prime river bottom land, but an entire  
12 ecosystem that existed in those river bottoms, that had  
13 existed for thousands of years. Entire species were  
14 displaced, moved or destroyed as a result of this damming.

15                   In addition to that, the dams were created by the  
16 engineers to have a certain life, a certain not only capacity  
17 of water, but a certain life. And as a result of that they  
18 took additional lands adjacent to the shoreline of the dam  
19 called the taking area that it was considered that those lands  
20 would erode. They would fall off and flake off into the  
21 river, eventually up to the point where the dams would be all  
22 silted in, and no longer usable, would no longer serve the  
23 purpose of flood control or would no longer serve the purpose  
24 of rural electrification, or whatever purpose they had in  
25 mind, and thereby the system would be done.

1                   Well, the problem with that is the fact that  
2 where there was once a hilltop, now there was water, and the  
3 end result is not only did they destroy an ecosystem by  
4 damming up the river, but now they had moved it into new  
5 territory, into lands that were never intended to have water.  
6 And you can go down to the Missouri River right now, or go  
7 down to Lake Oahe, you'll see entire shale cut banks eroding  
8 at a tremendous rate, while our people buried their dead up on  
9 those hills.

10                   In addition, you have different ecosystems that  
11 exist in these areas, and many of those ecosystems have since  
12 washed away, have again went to the bottom of the lake. So  
13 these are some of the concerns that we have.

14                   In addition, the fact that one of the projects  
15 that was promised was irrigation, and while the Cheyenne  
16 River Sioux Tribe only had one irrigation project, on the  
17 other side of the river there are many, many irrigation  
18 projects.

19                   One of the big concerns that we have had, and I  
20 personally have had, of being a fairly environmental-minded  
21 person, is the fact that many of these farmers have irrigated  
22 these lands for a long time. They have dumped all sorts of  
23 pesticides and fertilizers, insecticides, different things on  
24 the land, and a lot of that was washed now down into the  
25 watershed and may cause some problems. We don't know what



1 those problems may be, but we would sure like to know, because  
2 of all of those, we could potentially have a mess.

3 Now, true, one irrigated farm is probably not  
4 going to contaminate the entire river system, but if you put a  
5 whole bunch of them in mass, it could have some impact.

6 Finally, the last thing that I have to say is  
7 the potential impact that mining in the Black Hills has had  
8 upon the river system. We all know that Homestake Gold Mine  
9 dumped virtually hundreds of thousands or possibly millions of  
10 tons of mine tailings into Whitewood Creek in just mining  
11 alone and that's Homestake.

12 That washed down, of course, into the Belle  
13 Fourche River. From there it washed down into the Cheyenne  
14 River, and it all come to settle in one place -- actually two  
15 places. It came to settle before the river was dammed up at  
16 the original mouth of the Cheyenne River.

17 And after the river was dammed up, all the  
18 tailings, up until the federal government forced them to  
19 clean up their act, would have settled at the new mouth of  
20 the Cheyenne River, which is only about a mile or better  
21 upstream from the water intake that we have at Cheyenne  
22 River.

23 I could stand here today and give you  
24 statistics. I could give you all sorts of incidents of  
25 health problems that our people have encountered on this

1 reservation since we began drinking the water out of that  
2 intake. As a matter of fact, I notice these guys all have  
3 bottled water here today, so you're very safe, but the rest of  
4 us that live here don't always have bottled water, and we  
5 believe that's an environmental concern.

6           We have talked to the Corps of Engineers in the  
7 past about the problem that we have encountered in this  
8 particular area with flooding. What happens, and it's  
9 probably not going to happen this year, but what happens is  
10 the ice jams. The ice on the Cheyenne River will break up.  
11 It will all jam up and create a big dam. The water will back  
12 way up and eventually it will burst free. When it bursts free  
13 it moves that sediment base from the mouth of the river  
14 downstream. In 1979 it moved it right through the intake of  
15 the water we're drinking.

16           We have been working with EPA to try to determine  
17 what is in that sediment base; that we realize the sediment is  
18 well over 30 foot deep, but we would like to know what is in  
19 there. And if there's any of these heavy metals or harmful  
20 chemicals that have settled in that area, we would like to  
21 know because that is an environmental concern.

22           So I guess with that being said, there's more  
23 people than myself that have a few things to say, and I want  
24 to thank the good colonel for coming on up to Eagle Butte, the  
25 Corps of Engineers for coming and hearing what we have to say,

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1 and I encourage the people here to step forth to the mike.  
2 This is your day to testify. This is a formal hearing and  
3 everything that you say is being recorded by a court reporter  
4 and will be part of the official record. So please speak  
5 freely and speak with your mind and your heart.

6           Again, I want to thank everyone for coming out  
7 today and may God be with you. Thank you.

8           COL. KURT UBBELOHDE: Good afternoon. Welcome to  
9 this tribal hearing. This is the 18th comment session on the  
10 Revised Draft Environmental Impact Statement for the Missouri  
11 River Master Manual. My name is Col. Kurt Ubbelohde. I'm  
12 commander of the Omaha District of the United States Army  
13 Corps of Engineers. With me today are members of the team  
14 that prepared the RDEIS, Rick Moore, John Larandean, Jody  
15 Farhut; and other core participants are Pem Hall, who is our  
16 Native American coordinator out of the Omaha District, as well  
17 as representing our cooperating agency WAPA, Mr. Jimmy Black.

18           We want everyone to have a common understanding  
19 of the RDEIS. Copies of that, summaries and handouts, as well  
20 as the environmental impact study are available at libraries  
21 and project offices throughout the basin. You can get a copy  
22 by writing us or get information off our web site, and any  
23 member of the team can provide you with the addresses to do  
24 that.

25           In my opening remarks I'll give a brief

1 description of the comment process, and then we'll take your  
2 comments, and we'll stay as long as necessary to be sure that  
3 everyone is heard.

4           This hearing session will come to order. Our  
5 purpose this afternoon is to conduct a hearing on proposed  
6 changes to the guidelines for the Missouri River Mainstem  
7 System Operations. I would like to acknowledge and thank the  
8 Cheyenne River Sioux Tribe for requesting and participating in  
9 this hearing. This hearing is held in the true spirit of  
10 government-to-government relations that the Corps wants to  
11 maintain with the tribes of the Missouri River Basin.

12           Before I proceed, I would like to thank the  
13 chairman for his openings remarks, and I would like to  
14 identify any other elected members. If they wish to be  
15 designated or identified at this time, if they would stand  
16 up. Mr. Dave Hump, who is councilman and chairman of the  
17 Water, Energy and Environmental Committee.

18           Ms. Lynne Ormesher of Capital Reporting Services  
19 is recording this hearing today. She'll be taking the  
20 testimony verbatim and will provide the basis for the  
21 official transcript and record of this hearing. This  
22 transcript, as well as all of the written statements and  
23 other data, will be made part of the administrative record of  
24 this action.

25           A copy of that transcript will be provided to

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1 participating tribes. Persons interested in receiving is a  
2 copy of the transcript for this session, or any other session,  
3 need to indicate on one of the cards that are available from  
4 Jody at the table.

5           Also, if you're interested in adding to our  
6 mailing list, you can also indicate that on your card as  
7 well. In order to conduct an orderly hearing it is essential  
8 that I have a card from everybody wishing to speak; and on  
9 your card give the name and whom you represent. If you desire  
10 to make a statement and have not filled out a card, please  
11 raise your hand and we'll furnish you a card.

12           The primary purpose of today's session is to help  
13 insure that we all have the essential information we will need  
14 to make our decision on establishing the guidelines for the  
15 future operations of the mainstem system, and that this  
16 information is accurate. This is your opportunity to provide  
17 us with some of that information. We view this as a very  
18 important opportunity for you to have an influence on the  
19 decision. Therefore, I'm glad that you're here this  
20 afternoon.

21           I want you to remember that today's forum is to  
22 discuss the proposed changes in the operation of the Missouri  
23 River Mainstem System that are analyzed in the Revised Draft  
24 Environmental Impact Statement; and therefore, we should  
25 concentrate our comments on that issue specifically.

1           It's my intention to give all interested parties  
2 an opportunity to express their views on the proposed changes  
3 freely, fully and publicly. It is in the spirit of seeking  
4 full disclosure and providing an opportunity for you to be  
5 heard regarding future decisions that we have called this  
6 hearing. Anyone wishing to speak or make a statement will be  
7 given the opportunity to do so.

8           The Missouri River Mainstem System consists of  
9 Corps of Engineers constructed and operated projects, so  
10 officially that makes us a project proponent; however, it is  
11 our intention that the final decision on the future  
12 operational guidelines on this project reflect a plan that  
13 considers the views of all interests, focuses on the  
14 contemporary and future needs served by the mainstem system  
15 and meets the requirements established by Congress.

16           As hearing officer my role and responsibility is  
17 to conduct this hearing in such a manner as to insure the full  
18 disclosure of all relevant facts bearing on the information  
19 that we currently have before us. If the information is  
20 inaccurate or incomplete, we need to know that and you can  
21 help us make that determination.

22           Ultimately the final selection of a plan that  
23 provides framework for the future operations of the mainstem  
24 system will be based on the benefits that we may be expected  
25 to approve from the proposed plan, as well as the probable

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1 negative impacts, including cumulative impacts. This includes  
2 significant social, economic and environmental factors.

3           Should you desire to submit a written statement  
4 and do not have it prepared, you may send it to the U.S. Army  
5 Corps of Engineers and we can provide you that information as  
6 to the address. You may also FAX in your comments or provide  
7 them electronically via e-mail. The bottom line is that the  
8 official record closes on the 28th of February 2002. To be  
9 properly considered, all remarks, written or otherwise, must  
10 be received by that date.

11           Before I begin taking testimony I would like to  
12 say a few words about the order and procedure that will be  
13 followed. When we call your name, please come forward to the  
14 lectern; state your name and address; specify whether or not  
15 you are representing a group, agency, organization or speaking  
16 on behalf of yourself.

17           We would appreciate it if you would limit your  
18 remarks so that everybody has an opportunity to express their  
19 views, but we'll stay here as long as is necessary for  
20 everybody to have their full say. If you are going to be  
21 reading a statement, we would appreciate it if a copy could be  
22 provided to the court reporter prior to speaking so that that  
23 may facilitate her taking a verbatim transcript.

24           After all statements have been made, time will be  
25 allowed for any additional remarks. And during the session I

1 may ask questions to clarify points for my own satisfaction.  
2 It is the purpose of this hearing to gather information which  
3 we will use to evaluate the proposed plan or alternatives to  
4 it. And since open debate between members of the audience  
5 will be counter productive to this process, I must insist that  
6 all comments are directed to me, the hearing officer.

7 At this time we'll begin.

8 MR. RICK MOORE: Julie Thorstenson.

9 MS. JULIE THORSTENSON: Good afternoon. My name  
10 is Julie Thorstenson, habitat biologist with the Cheyenne  
11 River Game, Fish and Parks. The statement I'll be reading  
12 will be on behalf of the Game, Fish and Parks Department.

13 There are several issues that need to be  
14 addressed in the Revised Draft Environmental Impact statement,  
15 such as noxious weeds cottonwood stands, and the tern and  
16 plover lake habitat.

17 Noxious weeds are increasing problem throughout  
18 the State of South Dakota. For years the Corps has  
19 contracted with individuals to spray state lands. However,  
20 until recently the reservation lands have been ignored. If  
21 the entire shoreline is not addressed it is ultimately  
22 pointless to spray noxious weeds. Seed dispersal occurs when  
23 Lake Oahe water levels are fluctuated.

24 The Cheyenne River Sioux Tribe is working to  
25 eradicate noxious weeds on tribal land within the



1 reservation. Since agriculture, mainly cattle production, is  
2 the prime source of income for the Cheyenne River Sioux Tribe  
3 tribal members, noxious weeds are extremely detrimental to  
4 the economy. Noxious weeds lessen the productivity for  
5 cattle and compete with valuable native species.

6           Noxious weeds affect the range quality,  
7 productivity and the overall economy of the Cheyenne River  
8 Reservation. That is why we feel that this must be  
9 considered in revising the Corps Master Manual.

10           We are concerned with the negative effects that  
11 the lake levels are having to the cottonwood trees. There is  
12 very little to no age structure or recruitment within the  
13 existing the cottonwood stands. When the lake is low, the  
14 cottonwoods come in very thick, but they are then flooded,  
15 not allowing a diverse age class.

16           The cottonwood is very important to the Lakota  
17 people. It provided winter shelter and heat to our  
18 ancestors. It is also vital habitat to the eagles. Eagles  
19 are very culturally significant to the Lakota people.  
20 Destruction of habitat along this flyway will lead to  
21 reduction or elimination of eagles from the Cheyenne River  
22 Sioux Reservation. It is important for the Lakota people to  
23 be able to live with the eagles as they have for centuries.

24           If the cottonwood stands diminish, the Lakota  
25 people will lose a part of their culture. In times when many

1 of our children are strangers to their culture and language,  
2 we cannot afford to lose any more of our cultural ties.  
3 Therefore, we feel cottonwood stands must be considered in  
4 the revising of the Master Manual.

5           The RDEIS discusses the threatened piping plover  
6 and the endangered least tern. However, when doing so there  
7 is no mention of lake habitat. Therefore, we feel the RDEIS  
8 is essentially incomplete. If the U.S. Fish and Wildlife  
9 Service considers the lake habitat to be critical habitat for  
10 these species, how then can it not be considered when  
11 revising the Corps Master Manual.

12           The Cheyenne River Sioux Tribe has been  
13 conducting adult census on Lake Oahe since 1994. We cannot  
14 make a sound decision concerning the piping plover and  
15 interior least tern without knowing how the proposed  
16 alternatives will affect Lake Oahe habitat and essentially  
17 their population.

18           In conclusion, we feel the Revised Draft  
19 Environmental Impact Statement is incomplete and inaccurate  
20 and are unable to fully support any alternative until  
21 appropriate information is obtained.

22           COL. CURT UBBELOHDE: Thank you.

23           MR. RICK MOORE: Pamela Snyder.

24           MS. PAMELA SNYDER: Colonel and co-members of the  
25 wildlife service representatives, thank you for coming today,

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1 for listening to our comments. I've provided a statement to  
2 the court reporter. I will speak from that in general, but  
3 don't hold me to that, please.

4 My name is Pam Snyder. I am counsel to the  
5 environmental protection department of the Cheyenne River  
6 Sioux Tribe. Our address is Box 590, Eagle Butte, South  
7 Dakota 57625. The comments that I make today are made on  
8 behalf of the EPA and the weed committee for the tribal  
9 council. The tribal council is considering final comments  
10 which will be submitted to the Corps prior to the deadline for  
11 the comments period.

12 The Cheyenne River Sioux Tribe is a major  
13 stakeholder in the Missouri River Basin. As such, the Tribe  
14 has a vested interest in the management of the Missouri River  
15 Mainstem Reservoir System by the U.S. Army Corps of  
16 Engineers. Revisions to the Corps' master water control  
17 manual, the Master Manual, will directly and significantly  
18 impact the Cheyenne River Sioux Tribe. By way of introduction  
19 I would like to quote an excerpt from Executive Order 12898:

20 To the greatest extent practicable and permitted  
21 by law, each federal agency shall make achieving environmental  
22 justice part of its mission by identifying and addressing, as  
23 appropriate, disproportionately high and adverse human health  
24 or environmental effects of its programs, policies, and  
25 activities on minority populations and low income populations

1 in the United States; Executive Order 12898, 1994.

2           Executive order 12898 places on federal agencies  
3 the task of achieving environmental justice. To do so, the  
4 agencies must identify and address disproportionately high  
5 and adverse effects of their actions on minority and low  
6 income populations.

7           Operation of the Missouri River is an action of  
8 the Corps of Engineers requiring compliance with EO 12898.  
9 Preparation of the Revised Draft Environmental Impact  
10 Statement for the Missouri River Master Manual, the RDEIS,  
11 requires the Corps to comply with the National Environmental  
12 Policy Act, NEPA.

13           The combination of EO 12898 and NEPA creates a  
14 process in which the Corps must not only identify the impacts  
15 of its operation of the Mainstem Reservoir System, which  
16 disproportionately and adversely affect the basin tribes, it  
17 must also come up with ways to mitigate those impacts. While  
18 the Corps has gone to great lengths to fulfill the former  
19 obligation, much work remains to achieve the latter, for  
20 example, to achieve environmental justice.

21           Water level fluctuations in Lake Oahe are of  
22 great concern to the Cheyenne River Sioux Tribe. Fluctuating  
23 water levels are eroding the western shoreline of Oahe and  
24 destroying tribal, cultural and historic sites at an alarming  
25 rate. Water quality is affected by lake level fluctuation

1 and ice movement near the intake for the tribe's main  
2 drinking water supply. Water level changes also result in  
3 the propagation of noxious weeds, as Ms. Thorstenson just  
4 commented. This adversely impacts the tribe's cattle  
5 industry. Each of these impacts will be discussed in my  
6 remarks.

7                   Lake level fluctuations are perpetuated under  
8 all six alternative plans for operation of the Mainstem  
9 Reservoir System being considered by the Corps of Engineers  
10 in this RDEIS process, and to that reason and others, other  
11 reasons I will touch upon in my remarks, the Cheyenne River  
12 Sioux Tribe does not endorse any the current water control  
13 plan or any of the alternatives under consideration at this  
14 time.

15                   Turning first to historic properties: According  
16 to the Corps' Historic Properties Technical Report, the  
17 Smithsonian Institution conducted a survey of historic  
18 properties in the Missouri River Basin prior to inundation.  
19 Although archeologically significant at the time, the surveys  
20 are very meager by modern standards.

21                   The Corps began comprehensive survey and  
22 inventory programs in 1974. Because they took place after the  
23 lakes were filled, these surveys involve lands at or above  
24 normal pool elevations. The combination of the Smithsonian  
25 and Corps surveys include 212,000 acres surveyed and 1400

1 sites inventoried.

2                   Although the 21,000-acre figure sounds  
3 impressive, the Corps goes on to state at page four of its  
4 report that it is reasonable to speculate that not less than  
5 50 percent of all historic properties existing within the five  
6 downstream projects are normally inundated. In other words,  
7 this cuts the number of surveyed sites above the pool from  
8 1400 down to 700 or less.

9                   Incidentally, only the five downstream reservoirs  
10 are included in these numbers because Fort Peck was inundated  
11 at the time of the Smithsonian surveys. Little was known  
12 about Fort Peck's archeological resources until recently,  
13 states the Corps at page 3-169 of the Master Manual RDEIS.  
14 Little was known until the Corps sponsored a survey of 2.3  
15 percent of the shoreline of Fort Peck Reservoir. And this  
16 survey revealed 159 sites, which, when extrapolated, could  
17 yield 2000 more sites on the shoreline of that reservoir. Why  
18 is extrapolation necessary? Why were only 2.3 percent of the  
19 shoreline surveyed?

20                   Regarding historic properties at the five  
21 downstream reservoirs, the Corps lists 1402 archeological  
22 sites in and adjacent to Lake Sakakawea, 1,114 at Lake Oahe  
23 and 165 other archeological sites, for a total of 2,681  
24 sites, found at RDEIS page 3-169. Obviously, these numbers  
25 differ from the Corps' reference to 1400 sites in its

1 technical report on historic properties supporting the  
2 RDEIS.

3           The difference raises the question, what are the  
4 real numbers? Even more important, however, is the question  
5 are the numbers accurate and complete? The answers to these  
6 questions are crucial because the Corps' evaluation of the  
7 potential for erosion of historic properties from the RDEIS  
8 alternatives for operation of the Mainstem Reservoir System  
9 were based upon the Corps' estimation of the number of  
10 historic properties on the shorelines of the respective  
11 reservoirs.

12           It is the position of the Cheyenne River Sioux  
13 Tribe that the Corps has not taken steps necessary to  
14 adequately identify historic properties within the area of  
15 potential effect of its operation of the Mainstem Reservoir  
16 System.

17           Title 36 of the Code of Federal Regulations  
18 Section 800.4 requires the Corps to gather information from  
19 Indian tribes and take the steps necessary to identify  
20 historic properties within the area of potential effects,  
21 found at 36 CFR section 800.4(a)(4) and (b). The level of  
22 effort required of the Corps includes making a reasonable and  
23 good faith effort to carry out appropriate identification  
24 efforts, which may include background research, consultation,  
25 oral history, interviews, sample field investigation, and

1 field survey. The agency official shall take into account  
2 past planning, research and studies, the magnitude and nature  
3 of the undertaking, and the degree of federal involvement, the  
4 nature and extent of potential effects on historic properties,  
5 and the likely nature and location of historic properties  
6 within the area of potential effects, found at 36 CFR Section  
7 800.4(b)(1).

8                   The Tribe acknowledges that the Corps' has  
9 consulted with it concerning historic properties. However,  
10 the Tribe lacks the capacity to adequately respond to Corps  
11 inquiries because it lacks the funding and manpower to  
12 undertake a comprehensive survey of historic properties on the  
13 shoreline of Lake Oahe. Moreover, while the Corps has  
14 apparently conducted studies of historic properties in the  
15 Missouri River Basin, those studies do not constitute a  
16 systematic, comprehensive survey. Such a survey is needed.

17                   In 2000 more than 150 previously unrecorded  
18 traditional and cultural properties were found by the CRST,  
19 the Cheyenne River Sioux Tribe's preservation office in the  
20 course of surveying recreational lands slated for transfer  
21 from the Corps to the Tribe under the Terrestrial Wildlife  
22 Habitat Restoration Legislation, known as mitigation.

23                   These recreation areas constitute a small  
24 percentage of Oahe's western shore within the Cheyenne River  
25 Sioux Tribe Reservation. If the numbers are extrapolated to



1 the entire western shoreline, then many more sites could be  
2 added to the Corps' list of known sites based on this  
3 relatively small survey alone.

4           It is unlikely that the newly found sites were  
5 utilized by the Corps in calculating its historic properties  
6 index values for Lake Oahe in the RDEIS. The properties are  
7 not listed in the Omaha District's Historic Properties  
8 Database file, attached as Exhibit A to the Historic  
9 Properties Technical Report. This is not surprising, since  
10 the date of the database file is 1993, and the date of the  
11 technical report is 1994.

12           If these newly discovered sites were not included  
13 in the Corps' evaluation of the impacts of the proposed  
14 alternatives on historic properties, then certainly the as-yet  
15 undiscovered sites on the remaining lands on the western shore  
16 of Lake Oahe were not considered. The Corps clearly states in  
17 the RDEIS that its evaluation of the impacts of its operation  
18 of the Mainstem Reservoir System is based upon known sites  
19 only.

20           In Section 5 of the RDEIS, the Corps states that  
21 the long-term potential for erosion at each known site was  
22 evaluated based on the monthly water level in each of the  
23 three upstream lakes and Lake Sharpe, RDEIS page 5-137. It  
24 states at page 7-183 that only the effect to known sites is  
25 considered in the Historic Properties Index.

1                   Getting back to 36 CFR Code of Federal  
2 Regulations, Part 800, given the nature and extent of  
3 potential effects on historic properties, and the likely  
4 nature and location of historic properties within the area of  
5 potential effects, the Corps' efforts to date do not  
6 constitute a reasonable and good faith effort to carry out  
7 appropriate identification efforts, which may include  
8 background research, consultation, oral history interviews,  
9 sample field investigation and field survey, found at 36 CFR  
10 Section 800.4(b)(1).

11                   It is a foregone conclusion that operation of the  
12 Mainstem Reservoir System on the Missouri River is a federal  
13 undertaking of incredible magnitude pursuant to 36 CFR Section  
14 800.4(b)(1). So is changing that operation. The Corps' level  
15 of effort in identifying historic properties on the shorelines  
16 of the reservoirs is also driven by the nature and extent of  
17 the potential effects of river operations on historic  
18 properties.

19                   The Corps recognizes that historic properties  
20 located within the reservoir zone are subject to annual  
21 fluctuation, and properties located within a few vertical  
22 feet up or down from that zone, are likely to receive a wide  
23 range of severe impact. Now, given the magnitude of the  
24 Corps' undertaking and the extent of the potential effects on  
25 historic properties, the level of effort required of the Corps

1 in identifying historic properties subject to destruction due  
2 to wave action and erosion, is high.

3           The Corps' obligation with regard to historic  
4 properties does not stop there, however. In addition to  
5 identifying historic properties and assessing adverse effects  
6 on them, Corps officials must develop measures in the RDEIS  
7 to avoid or mitigate such effects. The Corps acknowledges  
8 this obligation at Page 12 of its Technical Report on Historic  
9 Properties, where it states, Procedural compliance with the  
10 National Historic Preservation Act and NEPA further requires  
11 description, evaluation of, and agreement upon, any measures  
12 proposed to mitigate the adverse effect, or selection of an  
13 alternative to the federal undertaking in question.

14           The Corps quickly rules out the idea of  
15 developing an alternative to operating the existing reservoir  
16 system, or an alternative for operating the reservoir system  
17 that would not adversely impact historic properties. Instead,  
18 it admits that mitigative measures to lessen the severity of  
19 the impact may be the only means of compliance.

20           Unfortunately, mitigation measures called for  
21 under Section 106 of the National Historic Preservation Act  
22 are lacking in the RDEIS. The Corps tells us that lake level  
23 fluctuations and wave action are inevitable in the operation  
24 of the Mainstem Reservoir System. It states that known  
25 historic properties, which include, but are not limited to,

1 prehistoric sites, tribal cultural resources, and historic  
2 sites, are adversely affected by all the alternatives.  
3 Increased conservation during droughts is likely the primary  
4 factor leading to this result, and this is at Page 7-233.

5           The Corps then points to the bank stabilization  
6 efforts undertaken in the lower basin as evidence of its  
7 attempts to mitigate the adverse impacts of reservoir  
8 operations on historic properties. Table 3.15-1 at Page 3-171  
9 of the RDEIS details those efforts. Only 21 bank  
10 stabilization projects are listed for a total expenditure of  
11 \$1,759,000 over 23 years.

12           Repatriation of Native American remains under  
13 the Native American Grave Protection and Repatriation Act  
14 adds little to the Corps' column. When compared with the  
15 millions, if not billions of dollars being spent or  
16 sacrificed to mitigate the adverse impacts of river operation  
17 on three listed species in the basin, the Corps' efforts at  
18 addressing the destruction of irreplaceable historic  
19 properties would be laughable if the situation were not so  
20 serious.

21           Clearly, the Corps has thrown up its hands. In  
22 its Historic Properties Technical Report, the Corps advises  
23 that measures to mitigate the loss of value inherent in  
24 historic properties involve either site protection or  
25 information retrieval, archeology. Either measure, says the

1 Corps, requires substantial investment of money and manpower,  
2 both of which have historically been in short supply compared  
3 with the legislative compliance requirements.

4           The Corps concludes its discussion of mitigation  
5 requirements at Section 7.20.1 of the RDEIS with the following  
6 remarkable statement: Because the Corps has existing programs  
7 to address the protection of sites or their documentation if  
8 protection cannot be accomplished, new effort to mitigate the  
9 effects of the operation of the Mainstem Reservoir System on  
10 known sites are not required. Continued effort to protect the  
11 sites are necessary to limit the adverse effects of the  
12 exposure or loss of the known sites.

13           Finally, NEPA and the National Historic  
14 Preservation Act require the Corps to not only develop  
15 measures to avoid, minimize or mitigate adverse effects on  
16 historic properties of operation of the Mainstem Reservoir  
17 System, but to include a binding commitment to such measures  
18 in its Record of Decision on the Master Manual. The  
19 near-nonexistent status of the Corps' mitigation measures for  
20 historic properties raises the question: Binding commitment  
21 to what?

22           In sum, historic properties are as priceless and  
23 threatened as the least tern, piping plover and pallid  
24 sturgeon. The entire river system is being altered to address  
25 the plight of these animal species. The Cheyenne River Sioux

1 Tribe is requesting that the Corps give the same consideration  
2 to its endangered historic properties.

3           Turning to quality, in the water quality sections  
4 of the RDEIS, the Corps tells us that problems exist.  
5 Elevated concentrations of arsenic, manganese, iron and  
6 beryllium have been monitored in Lake Oahe and its inflows.  
7 In 2000, state water quality standards for mercury,  
8 phosphorus, sulfate and iron were exceeded at Lake Oahe.  
9 Arsenic commonly exceeds state water quality standards in  
10 Missouri River lakes.

11           Although arsenic, selenium and mercury occur  
12 naturally in the soils of the basin, mining in the Black Hills  
13 has contaminated the Cheyenne River with high levels of  
14 mercury. The Cheyenne flows into Lake Oahe and forms the  
15 southern boundary of the Cheyenne River Sioux Tribe  
16 reservation.

17           In addition to these elements, sediment is being  
18 eroded, transported and deposited within the dam system. This  
19 is a normal process. Sediment was continually moved by the  
20 Missouri River even before it was dammed. Now, however,  
21 sediment is settling out in the reservoirs and at the mouth  
22 of tributaries flowing into them.

23           Significant sediment deposition is apparent at  
24 the mouth of the four major tributaries that flow into Lake  
25 Oahe: The Cheyenne, the Moreau, the Grand and the Cannonball

1 Rivers. The sediment in these deltas contains arsenic,  
2 mercury and other metals. Arsenic and mercury are of  
3 particular concern to the Cheyenne River Sioux Tribe, because  
4 the intake for the tribes main public water supply system is  
5 located in Lake Oahe adjacent to the Cheyenne River delta.

6 Wave action, lake level fluctuation and ice  
7 movement stir up sediment. Let's look at wave action quickly.  
8 According to tables 5.4-1 and 7.4-1 in the RDEIS, wave action  
9 erodes and agitates the lake sediments during low lake levels,  
10 potentially causing elevated dissolved arsenic concentrations  
11 in the water column. These elevated arsenic concentrations  
12 during low lake elevations and drought conditions may affect  
13 domestic water use, requiring additional treatment prior to  
14 domestic use and cause chronic effects to aquatic life in  
15 lakes. The adverse effects are greatest during droughts when  
16 lakes are drawn down and bottom sediments are exposed to wave  
17 action, RDEIS pages 5-6-28 and 7-26-28.

18 Both Oahe Dam releases and lake levels have  
19 varied considerably. In its water quality technical report  
20 supporting the RDEIS, the Corps states releases have been  
21 extremely variable since the project became fully  
22 operational. Daily outflows range from less than 1000 cubic  
23 feet per second up to 55,000 cubic feet per second. Regarding  
24 lake levels, the technical report states: Much fluctuation  
25 has occurred throughout the history of the reservoir; Corps

1 1994, page 19.

2                 Several years ago the Missouri River Basin States  
3 Association asked the Corps to sample and analyze delta  
4 sediment to test the hypothesis that raising and lowering lake  
5 levels result in sediment resuspension, potentially adding  
6 contaminants to the reservoir and degrading water quality.  
7 This is a main concern brought to the Corps attention. The  
8 Corps did sample several pollutants, including mercury,  
9 cadmium, lead, chromium, zinc, selenium, arsenic, nickel and  
10 pesticides. Significantly, arsenic consistently showed  
11 significant increases, sometimes exceeding a factor of 10.

12                 Moreover, the finer the sediment, the greater the  
13 arsenic concentrations. Corps 1994, Pages 44 and 52. Finer  
14 sediments are generally more chemically active, thus  
15 perturbations such as wind-wave action can result in chemical  
16 changes associated with the transfer of materials from an  
17 anaerobic environment in the sediment to an aerobic  
18 environment in the overburden water. It is also suspected  
19 that storm events and high winds, which are common in the  
20 Missouri River Basin, cause high metal concentrations in the  
21 water.

22                 The Corps emphasizes that the stirring of bottom  
23 sediments in shallow areas of the reservoir is going to occur  
24 no matter what the pool elevation. This is a natural, ongoing  
25 process which occurs at all reservoirs with relatively soft



1 bed sediments, Corps 1994 page 44.

2                   On the other hand, delta growth is a dynamic  
3 process, and as the reservoir fills, areas which are now  
4 comprised of fine sediments, silts and clays, will eventually  
5 become areas dominated by more coarse sediments, sand, as the  
6 delta grows in the downstream direction. As particle size  
7 increases, arsenic concentrations generally decrease.  
8 Unfortunately, the Oahe, the Moreau and the Grand River deltas  
9 could not be analyzed for particle size relationship, since  
10 only one sample was taken.

11                   In sum, arsenic exists in the sediment of the  
12 deltas of tributaries flowing into Lake Oahe. The arsenic is  
13 found in higher concentrations in the fine sediment. Wave  
14 action, lake level fluctuation and ice movement stir up the  
15 arsenic bearing sediment and suspend it in the water column.  
16 None of the alternatives being considered by the Corps in the  
17 RDEIS will change this fact of reservoir operations.

18                   The Corps' solution, test and treat your drinking  
19 water because the stirring of sediment in shallow areas is  
20 inevitable no matter what the Corps does. This suggestion is  
21 hardly encouraging to the Cheyenne River Sioux Tribe, whose  
22 intake for its main public water supply system is located in  
23 the Cheyenne River arm of Lake Oahe.

24                   Turning to mercury, we learn that this pollutant  
25 is ubiquitous in basin, but more of it was contributed to Lake

1 Oahe from mining operations at the Homestake Gold Mine in the  
2 Black Hills. Although the mine was declared a Superfund site,  
3 and thus this point source of contamination has been  
4 controlled, the Cheyenne River sediments remain contaminated  
5 and continue to be deposited into the Cheyenne arm. Corps  
6 1994, Page 32.

7                   While observed mercury levels are below EPA  
8 drinking water standards, the Corps advises that the presence  
9 of mercury and its variable concentration suggests that it  
10 should be monitored by municipalities which use the lake as a  
11 water supply.

12                   Fish tissue samples collected by the South Dakota  
13 Department of Game, Fish and Parks and the Cheyenne River  
14 Sioux Tribe in 2000 in the Cheyenne River, the Moreau and the  
15 Grand Rivers and these arms of Lake Oahe contained sufficient  
16 mercury to warrant a consumption advisory on fish caught in  
17 waters adjacent to tribal lands. As a result of the study,  
18 the South Dakota Department of Game, Fish and Parks was to  
19 extend the area of study to other portions of Lake Oahe in  
20 2001.

21                   As with historic properties, the Corps'  
22 identification and assessment of water quality problems in the  
23 Missouri River Basin have been less than stellar. There is  
24 limited information regarding how water quality has changed  
25 since the construction of the Mainstem Reservoir System, says

1 the Corps in Section 3.5.7 of the RDEIS. Although monitoring  
2 information is gathered by the Corps, the basin states, the  
3 U.S. Geological Survey and EPA, no monitoring program exists  
4 that integrates and evaluates all the information. RDEIS  
5 pages 3-36 and 3-44.

6           Spatial variability prevents our monitoring  
7 program from being a reliable indicator of the conditions  
8 which exist at the water supply intakes says the RDEIS.  
9 What's the Corps' suggestion? In light of this problem the  
10 Corps suggests that personnel responsible for water quality  
11 sampling should be updated in sampling techniques. The  
12 Cheyenne River Sioux Tribe agrees.

13           The Tribe also agrees with the Missouri River  
14 Natural Resources Committee and the Biological Resources  
15 Division of the U.S. Geological Survey, that more science is  
16 needed. The Missouri River Environmental Assessment Program  
17 is a good start.

18           The purpose of the program is to provide the  
19 scientific foundation for Missouri River management  
20 decisions. The program hopes to expand current state and  
21 federal monitoring efforts and start new ones. It will  
22 establish a system-wide database containing information on  
23 fish, wildlife, habitat and water quality and define the  
24 baseline of current river conditions. The Tribe is pleased to  
25 learn that both the public and government agencies will have

1 equal access to this database.

2           The environmental assessment program will also  
3 conduct long-term monitoring of river resources and focused  
4 investigations of the cause and effect relationship between  
5 river operations and the river's response. Of course the  
6 program is entirely dependent upon funding. Given the fact  
7 that tribal drinking water is at stake, funding of the program  
8 has environmental justice implications.

9           Neither has the Corps developed viable mitigation  
10 measures for the water quality issues raised in the RDEIS.  
11 Although the Corps acknowledges that resuspension of arsenic  
12 and mercury from delta sediments and bioaccumulation of metals  
13 in fish tissues are concerns of tribes in the basin. The  
14 Corps' solution is not development of mitigation measures to  
15 address these issues. Rather, the Corps advises local  
16 governments to test their water before drinking it.

17           Along the same lines, we are told in the RDEIS  
18 that the MCP leaves more water in the three upper mainstem  
19 lakes during drought and reduces lake level fluctuation. The  
20 increased volume improves water quality by diluting  
21 pollutants. The GP options will improve water quality even  
22 more because they will leave even more water in the lakes than  
23 the MCP.

24           However, none of the alternatives limits the  
25 suspension of metals into the water column and the

1 accumulation of toxic elements in fish tissue in Lake Oahe.  
2 Thus, neither the CWCP nor any of the RDEIS alternatives being  
3 considered by the Corps mitigate the water quality issue of  
4 greatest concern to the Cheyenne River Sioux Tribe.

5           The Corps is correct in stating that it is not  
6 the source of pollutants entering the Missouri River. Neither  
7 does it regulate water quality in the basin. States, tribes  
8 and the federal Environmental Protection Agency, EPA, manage  
9 water quality under the Clean Water Act and Safe Drinking  
10 Water Act. That the Corps is not the source of water  
11 pollution or the regulator of water quality, however, does not  
12 relieve it of its responsibility to satisfy the environmental  
13 justice principles of Executive Order 12898 by identifying and  
14 mitigating water quality problems created or exacerbated by  
15 its management of the Missouri River Mainstem Reservoir  
16 System. So far, no solutions have been offered.

17           What about dredging and removing the contaminated  
18 delta sediments? What about erecting barriers to minimize  
19 lake level fluctuation in the deltas and prevent ice  
20 movement? What about covering the contaminated sediment with  
21 coarser sediment? What about moving the intake for the  
22 Tribe's public water supply system away from the Cheyenne  
23 River delta?

24           Finally, let's take a brief look at hydropower.  
25 The Cheyenne River Sioux Tribe is very concerned about

1 increased electricity rates for tribal members. It is the  
2 tribe's understand that all of the alternatives being  
3 considered in the RDEIS process would increase measures of the  
4 MCP and the GP options would leave more water in the  
5 reservoirs. This held-back water, known as head, constitutes  
6 the capacity of the dams to produce hydropower.

7           As the water is released and run through the  
8 turbines in the dams, power is generated. In this way GP 1528  
9 would produce the greatest hydropower benefits. The CWCP  
10 produces the least. The other alternatives fall in between.  
11 The difference between GP 1528 and CWCP, however, is only 2.3  
12 percent.

13           In spite of the fact that the MCP and the GP  
14 options increase the capacity of the mainstem dams to generate  
15 hydropower, all of the GP options decrease hydropower  
16 revenues. How? By releasing water from the dams other than  
17 during the summer and winter peak demand periods when the  
18 hydropower is most valuable. The higher the demand for power,  
19 the greater its value. Because demand is greatest in summer  
20 and winter, energy produced during these seasons is of greater  
21 overall value than energy produced in the spring and fall.

22           When water is released from the dams other than  
23 during these summer and winter peak demand periods, revenue  
24 is lost. And beyond that, WAPA, Western Area Power  
25 Administration distributes the power, has to buy power to

1 replace the power that could have been generated if it could  
2 release the water during these peak seasons.

3           In this way GP 1528 and GP 2028, the two GP  
4 options which release only enough water in the summer to  
5 maintain minimum navigation service, decrease annual  
6 hydropower revenue by an average of \$8 to \$9 million when  
7 compared to the CWCP. The GP options which split summer  
8 season releases and release the least amount of water during  
9 the summer peak demand period, that's GP 1521 and GP 2021,  
10 have about a \$30 million average annual adverse impact on  
11 hydropower revenues.

12           These revenue losses translate into increased  
13 electricity rates for customers who purchase power from the  
14 Pick-Sloan project through the Western Area Power  
15 Administration, WAPA.

16           The magnitude of the hit caused by these  
17 increased rates depends on the amount of power a particular  
18 customer purchases from Pick-Sloan, from the Missouri River  
19 dams. WAPA estimates that basin tribal customers purchase 60  
20 percent of their total power from Missouri River hydropower  
21 sources. As shown in figure 7.10-22 in the RDEIS, and Figure  
22 A-9 in the Tribal Appendix to the RDEIS, the increase in  
23 power costs incurred by basin tribes under the Gavins Point  
24 options ranks from two percent for GP 1528 up to ten percent  
25 for GP 1521 and GP 2021.

1                   In other words, it appears to the Tribe from the  
2 RDEIS that tribal electrical rates could increase anywhere  
3 from two to ten percent, depending upon which alternative the  
4 Corps selects. This is a serious increase to tribal members.  
5 It will adversely impact affordable housing to tribal members,  
6 and for that reason the Tribe is very concerned about the  
7 impact of the alternatives on hydropower.

8                   I want to thank the Corps representatives,  
9 particularly you, Colonel, for coming today and listening to  
10 our comments.

11                   COL. KURT UBBELOHDE: Thank you.

12                   MR. RICK MOORE: Next testimony, Harold Frazier.

13                   MR. HAROLD FRAZIER: My name is Harold Frazier,  
14 vice chairman of the Cheyenne River Sioux Tribe.

15                   Just to elaborate on some of this, I guess on the  
16 Master Manual, one of the things I got was the hydropower, and  
17 from the way I read it, I see that some of your alternatives  
18 are going to affect our electricity rates, and that's a huge  
19 concern of tribal members, Native American members. If you  
20 look on the census, the 2000 census, Ziebach County is the  
21 poorest county in the nation, and that county is half of our  
22 reservation, and I think Dewey County is like fifth overall.

23                   So there's a lot of concern on the cost of  
24 electricity. Many of our members only get about \$4,000 per  
25 year to live on and can't afford electricity rates, and I

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1 cannot understand why the federal government allows  
2 cooperatives to charge outrageous electricity rates, because  
3 we have the tributary flowing into the Missouri River into  
4 Lake Oahe, the Cheyenne and Moreau River and lots of creeks  
5 and draws.

6 Another thing, to comment on erosion, sediment,  
7 you know, a lot of our land is going into the water and is  
8 useless for the people. And I'm really upset about the  
9 history and what the Corps has not done, I guess, on Cheyenne  
10 River. The only trees that we have is along the Moreau  
11 River. There's no -- we don't have no trees or any type of  
12 vegetation like that.

13 I take offense to what the Corps has done in  
14 regards to 1804 and 1806 roads. You know, look on our side of  
15 the river, Cheyenne River here, there's no -- you go to the  
16 east side of the river, on the non Indian side you have paved  
17 roads up and down the river, and on our side there's no kind  
18 of improvement, no recreation sites have ever been developed  
19 on our reservation by the Corps, which I think there should  
20 have been. It's in the past, but maybe they should  
21 appropriate money and try to assist the Tribe in trying to  
22 develop recreation sites.

23 And I'm going to problems in some portions of  
24 your manual. I know one of them said there were seven sites  
25 on our reservation by water intakes. We only know of two, and

1 the only question you guys gave your presentation to the Tribe  
2 and I don't know, we were promised that map would be provided  
3 to us and I haven't heard or seen of any map that's been  
4 developed.

5                   Again, I guess the main thing I'm concerned with  
6 is the electricity rates. I think that we should get direct  
7 power from Lake Oahe here. Thank you.

8                   COL. KURT UBBELOHDE: Thank you very much.

9                   Are there any others who care to make a  
10 statement? Ma'am, could we get you to fill out a card?

11                   MS. GERMAINE MEANS: I'm an elder of the Cheyenne  
12 River Sioux Tribe, and I happen to be one of the left-over  
13 products of the old Cheyenne Agency which was flooded by the  
14 Corps of Engineers. And we have suffered not only in the area  
15 of our land and historic elements, but there were so many  
16 promises.

17                   The other two areas have been addressed by the  
18 government and Corps of Engineers, which as of today has not  
19 been done, such as the permanent road system. And I drove the  
20 road on the east side of the river, in essence, to the one we  
21 received on the west side, and there's such a great,  
22 tremendous difference there, and that never has been followed  
23 through by the Corps of Engineers to my knowledge.

24                   The other area is the historical site that is  
25 very dear to us, and that's Medicine Rock Historical site

1 that sat on the east bank of the Missouri, right opposite the  
2 Cheyenne River, Cheyenne Agency. There's a few other sites  
3 that I don't have with me right now. I wasn't really  
4 prepared to make any kind of statements that I could use  
5 statistics.

6 But these are some of the things that just comes  
7 to my mind that need to be addressed yet, and so then I'm  
8 sitting here thinking of all of these other things that are  
9 entering into play here, what's going to say and who is going  
10 to live up to all this planning that is being done now; it  
11 wasn't done and will it be done now.

12 There are so many other areas that we have  
13 suffered as a result of the taking area, such as the  
14 livestock. There was a lot of livestock which was lost down  
15 along the Corps land because the high level mark far exceeded  
16 what was anticipated. And so a lot of cattle have wandered  
17 out in there because there was water and there was a big loss  
18 that we still continue to take as of today.

19 The other thing is destroying continually,  
20 continued on to destroy a lot of trees and shrubbery along  
21 areas that are from the mouth of the Moreau west where again  
22 high water level has far exceeded and is continuing to destroy  
23 the land up in that area. A lot of these areas have not been  
24 addressed as of yet today.

25 And so I have question in my mind, and a lot of

1 these statistics that have been taken and evaluations that  
2 were taken, there's a lot of historical sites that a lot of  
3 us old-timers are aware of that as of today have not been  
4 considered or reviewed by the Corps of Engineers and I am  
5 against this plan unless there is more input and more  
6 specific areas that need to be addressed where we're going to  
7 get some recognition and some action on behalf of the Tribe.  
8 Thank you.

9 MS. MADONNA THUNDER HAWK: My name is Madonna  
10 Thunder Hawk. I live on the east end of the reservation in  
11 Swiftbird Community, where the old Cheyenne Agency used to  
12 be. And as far as people that still live down in that area,  
13 thanks to the Army Corps there's no mention of the old  
14 Cheyenne Agency ever being in existence, after being gone  
15 about 20 years. This was in the early '90s I came back and  
16 there was a sign up that said Forrest City ramp, or  
17 something. Anyway, that's just something that's bugged me  
18 over the years.

19 But I just have a few comments. I'm not sure of  
20 the process of the Army Corps of Engineers, and I mean to me  
21 it's just this huge bureaucracy, like they all are, but the  
22 comments I would like to make is I was really glad to see this  
23 document here furnished by our tribe, comments of the Cheyenne  
24 River Sioux Tribe, Department of Game, Fish and Parks. I'm  
25 really proud of that, proud of our tribe and really proud of

1 this document, very impressed.

2           You know, we are no longer going to sit by and  
3 let things happen. We're not going to acquiesce anymore. I  
4 realize, also, that the Bush administration, and what's going  
5 to happen with money appropriations and the cuts that are  
6 going to come in all areas, so maybe this is just, you know,  
7 something that has to be done because it's asked for, you  
8 know. Maybe the plans are already cut and dried. Maybe you  
9 guys are just going to go on in the first place.

10           But out here we're still tribal people and we  
11 still have feelings for our land and we still have ties to the  
12 land, and we know we're going to be struggling in generations  
13 of struggle on issues like this. So I don't know your federal  
14 agency, or what have you, but out here we're still people. We  
15 have different feelings for the land and our resources.

16           So I'm glad to see that you've finally come, and  
17 I think John had a lot to do with that because she's an  
18 enrolled member here, and she also grew up down at Old  
19 Agency. We stood by and watched that. The water come and  
20 covered our homeland. So I have children and grandchildren  
21 and they will still be here after I'm gone as the tribe, being  
22 concerned about this whole issue of holding the federal  
23 government's feet to the fire, regardless of what agency you  
24 represent.

25           So I want to -- I'm sure you've had many welcomes

1 here, but I'll add mine. Thank you.

2 MR. LANNY LaPLANT: Hello. My name is Lanny  
3 LaPlant and I'm a councilman from District 5, and I am  
4 probably one of the last ones, with Madonna, from the Old  
5 Agency who graduated, 1959, the last graduating class from  
6 that school. Right after we got out, we got flooded. So I  
7 guess that means a lot to us.

8 But my major concern here is as a long time  
9 council representative we done the study here and I made  
10 amendments or introduced resolutions to amend, being worried  
11 about the intake of the waterlines down along the Cheyenne  
12 River arm. I've introduced resolutions to move it over here  
13 on the north side of the Moreau River where there's less  
14 chance of pollutants from the gold mines.

15 I know it was in the news here Perkins County  
16 applied for water, such as everybody else is doing. It was  
17 not only approved but it would be feasible if we could extend  
18 our waterlines over west to there, pick up their water needs  
19 and also in the same process move our intake over on the  
20 Moreau River side. If you have anything to do with it, I  
21 think that would be a good thing for us, because a study was  
22 done here within District 5.

23 I represent District 5, which is from Highway 212  
24 south and Main Street east, like within a mile area. We had  
25 the highest rate of cancer deaths within the last few years

1 since we've been here, and that study has been done, and I  
2 don't know if it's material that was used to build the  
3 pipeline. I probably blame part of it on that, plus the  
4 remaining blame on the water that comes out of the Cheyenne  
5 River. So that is my biggest concern, and I wish you could do  
6 something to help us out, and I thank you.

7 COL. KURT UBBELOHDE: Are there any others who  
8 wish to speak? Ma'am?

9 MS. GERMAINE MEANS: I have a question, but this  
10 is off the record.

11 (Off the record discussion.)

12 COL. KURT UBBELOHDE: All right. If there are no  
13 other speakers I would like to remind you that the  
14 administrative record will be closed on the 28th of February  
15 2002, and that anyone wishing to submit further testimony in  
16 writing, electronically or by FAX, should do so by that time.

17 Again, if you wish to be added to our mailing  
18 list to receive a copy of this transcript or any other  
19 transcripts, please fill out one of the mailing cards at the  
20 front table. Once again, I would like to thank the Cheyenne  
21 River Sioux Tribe for requesting and participating in this  
22 hearing in their tribal homeland, and this hearing session is  
23 closed. Thank you.

24 (End of proceedings.)

25

1 STATE OF SOUTH DAKOTA )  
2 ) CERTIFICATE  
3 COUNTY OF HUGHES )

4  
5

6 I, Lynne M. Ormesher, Registered Professional Reporter,  
7 hereby certify that the foregoing pages 1 through 45,  
8 inclusive, are a true and correct transcript of my stenotype  
9 notes.

10 Dated at Pierre, South Dakota, this 20th day of February,  
11 2002.

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Lynne M. Ormesher, RPR



1 MISSOURI RIVER MASTER MANUAL HEARING AND  
2 THE GOVERNMENT-TO-GOVERNMENT CONSULTATION  
3 ON THE REVISED ENVIRONMENTAL IMPACT  
4 STATEMENT (RDEIS) FOR THE MISSOURI RIVER  
5 MASTER MANUAL AND THE SPRING RISE  
6 (M.R. & I. WATER PIPELINE DEPARTMENT,  
7 OFFICE OF ENVIRONMENTAL PROTECTION,  
8 FISH & GAME DEPARTMENT,  
9 AND THE WATER RESOURCE DEPARTMENT)

10

11

12 HELD AT: Fort Peck Tribes Cultural Center  
13 Poplar, Montana  
14 February 13, 2002, 11:10 a.m.

15

16

## APPEARANCES:

17

18 Hearing Officer: Col Kurt F. Ubbelohde,  
19 Commander and District Engineer of the Omaha  
20 District, U. S. Army Corps of Engineers

21

22 Missouri River, Master Manual  
23 representatives: Jody Farhat, Bill Miller,  
24 Doug Latka, Pem Hall, Rick Moore, John  
25 LaRandeau

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1                   The following proceedings were had:

2

3                   COL KURT F. UBBELOHDE: Good  
4 morning. Welcome to the tribal hearing.

5                   This is the 19th comment session on  
6 the Revised Draft Environmental Impact  
7 Statement for the Missouri River Master  
8 Manual.

9                   My name is Colonel Kurt Ubbelohde.  
10 I'm the commander of the Omaha District,  
11 United States Army Corps of Engineers. With  
12 me today are members of my team that  
13 prepared the Revised Draft Environment  
14 Impact Statement, Rick Moore, John  
15 LaRondeau, Jody Farhat, also Pem Hall, from  
16 the Omaha District, and Bill Miller. And  
17 representing our WAPA Cooperating Agency is  
18 Brad Warren.

19                   We want everybody to have a common  
20 understanding of the RDEIS. Copies of the  
21 summary and handouts, as well as the entire  
22 document, are available at libraries and  
23 project offices throughout the nation. Also  
24 you can get a copy by writing us or over the  
25 web site. And the address is available from

1 one of the team members.

2 In a moment I'll give you a further  
3 description of the comment process and then  
4 we'll take your comments. And I just want  
5 everybody to understand that we'll stay here  
6 as long as necessary so that everyone can be  
7 heard.

8 This hearing session will come to  
9 order. Our purpose this morning is to  
10 conduct a hearing on proposed changes to the  
11 guidelines to the Missouri River mainstem  
12 system operation. I would like to  
13 acknowledge and thank the Assiniboine and  
14 Sioux Tribes of Fort Peck for requesting and  
15 participating in this hearing.

16 This hearing is held in the true  
17 spirit of government-to-government relations  
18 that the Corps wants to maintain with the  
19 Tribes of the Missouri River Basin.

20 Before I proceed, do we have any  
21 elected officials or representatives here  
22 that wish to be recognized?

23 TOM ESCAISEGA: (Raises hand.)

24 COL KURT F. UBBELOHDE: If  
25 you'd just stand and state your name.

1                   TOM ESCAISEGA: Tom Escaisega,  
2                   Fort Peck Tribe, Municipal Rural and  
3                   Industrial Water Pipeline Project.

4                   COL KURT F. UBBELOHDE: Ron  
5                   LaPierre is our reporter this morning.  
6                   He'll be taking verbatim testimony that will  
7                   serve as the basis for the official  
8                   transcript and record of this hearing.

9                   This transcript with all written  
10                  statements and other data will be made part  
11                  of the administrative record. A copy of  
12                  this transcript will be provided to  
13                  participating tribes.

14                 Persons interested in receiving a  
15                 copy of the transcript for this session or  
16                 any other session need to indicate so on one  
17                 of the cards available by the entrance.

18                 Also if you're not on our mailing  
19                 list and desire to be so, indicate that on a  
20                 card as well.

21                 In order to conduct an orderly  
22                 hearing, it is essential that I have a card  
23                 from anyone desiring to speak giving your  
24                 name and whom you represent. If you desire  
25                 to make a statement and have not filled out

1 a card, please raise your hand and we'll  
2 furnish one for you.

3 The purpose of today's session is to  
4 help insure we have all the essential  
5 information we will need to make our  
6 decision on establishing the guidelines for  
7 the future operations of the mainstem and  
8 that this information is accurate. This is  
9 your opportunity to provide us with some of  
10 that information. We view this as very  
11 important. You have an influence on the  
12 decision.

13 I want you to remember that today's  
14 forum is to discuss the proposed changes in  
15 the operation of the Missouri River mainstem  
16 system that are analyzed in the RDEIS, which  
17 concentrate our efforts on this specific  
18 issue.

19 It is my intention to give all  
20 interested parties an opportunity to express  
21 their views on the proposed changes fully,  
22 freely, and publicly. It is in the spirit  
23 of speaking a full disclosure and providing  
24 an opportunity for you to be heard regarding  
25 the future decision that we have called this

1 hearing. Anyone wishing to speak or make a  
2 statement will be given the opportunity to  
3 do so.

4 The Missouri River mainstem system  
5 consists of corps of engineering constructed  
6 and operated projects. So officially that  
7 makes us a project proponent. However, it  
8 is our intention that the final decision on  
9 the future operational guidelines for these  
10 projects reflect a plan that considers the  
11 views of all interests, focuses on the  
12 contemporary and future needs served by the  
13 mainstem system, and meets the requirements  
14 established by Congress.

15 As hearing officer, my role and  
16 responsibility is to conduct this hearing in  
17 such a manner as to insure the full  
18 disclosure of all relevant facts bearing on  
19 the information that we currently have  
20 before us. If the information is inaccurate  
21 or incomplete, we need to know that and you  
22 can help us make this determination.

23 Ultimately the final decision -- or,  
24 excuse me -- the final selection of a plan  
25 that provides the framework for the future

1 operation of the mainstem System will be  
2 based on the benefits that may be expected  
3 to accrue from the proposed plan as well as  
4 probable negative impact including  
5 cumulative impact. This includes  
6 significant social, economic, and  
7 environmental factors.

8 Should you desire to submit a written  
9 statement and do not have it prepared, you  
10 may send it to the U.S. Army Corps of  
11 Engineers, Northwestern Division in the  
12 Omaha office, attention Missouri River  
13 Master Manual. You may also submit your  
14 comments via FAX or electronically.

15 If you need further information on  
16 how to submit your comments, we can provide  
17 you that information. Just ask one of the  
18 team members.

19 The official record for this hearing  
20 closes on the 28th of February, 2002. To be  
21 properly considered, all the information  
22 must be postmarked by that date.

23 Before I begin taking testimony, I'd  
24 like to say a few words about the order and  
25 the procedure that will be followed. When



1 we call your name, please come forward to  
2 the podium, state your name and address, and  
3 specify whether or not you are representing  
4 a group, agency, organization, or if you're  
5 speaking as an individual.

6 We would appreciate it if you would  
7 provide anything that you're reading  
8 verbatim, written, that you provide a copy  
9 of that to the court reporter to facilitate  
10 his taking down your remarks.

11 After all of the statements have been  
12 made, I will be allowed, in case there are  
13 any additional remarks and during the  
14 session, I may ask questions which will  
15 clarify points for my own satisfaction.

16 Since the purpose of the hearing is  
17 to gather information which will be used for  
18 evaluating the proposed plan or alternatives  
19 to it, and since open debate between members  
20 is counterproductive to this purpose, I  
21 insist that all comments be directed to me,  
22 the hearing officer.

23 At this time I think we're ready to  
24 begin.

25 RICK MOORE: Okay. We have one

1 card. Tom Escaisega.

2 TOM ESCAISEGA: My name is Tom  
3 Escaisega, the manager of the M.R.&I. Water  
4 pipeline project with the Fort Peck Tribes.  
5 And we had previously went to the Corps when  
6 we had a consultation here or, I guess, a  
7 public meeting and we requested this  
8 consultation between the Corps and the Fort  
9 Peck Tribes.

10 And at this present time, I'm the  
11 only one here from the Tribes. I also have  
12 with me in attendance our engineer for our  
13 M.R.&I. Project, Mr. Mike Watson, and also  
14 for your EA person, environmental  
15 statements, is Joe Elliott. And after I get  
16 done, I think they may want to give a little  
17 bit of testimony.

18 But to start with the history a  
19 little bit, in 1888 our reservation was  
20 formed by an executive order; and at that  
21 time we had all rights to water, land, and  
22 minerals. And through the years it's been  
23 dwindling away. And we're still under the  
24 belief that we still own all our water  
25 rights, our minerals, and land; but through

1 compacts and through treaty, we know we have  
2 all these rights still inherent to the  
3 tribe. But, now, to this day, we have a  
4 compact with the State of Montana which was  
5 ratified with the State in 1985. Under that  
6 compact we have a million-acre feet of water  
7 out of the Missouri River, and ground water.

8 And out of one of those stipulations  
9 in the compact we were able to secure  
10 50,000-acre feet to be marketed off  
11 reservation. That hasn't materialized yet.

12 And I think one of the biggest  
13 concerns from the Tribal Council was that we  
14 make an issue with our water rights and with  
15 the alternatives that are being proposed,  
16 and we would like to see that incorporated  
17 into the document here.

18 I see one of our other people came  
19 in. I think she needs to fill out one of  
20 those cards. And I think she might be  
21 giving testimony too.

22 Also we had -- as part of the  
23 consultation, we want to cover a lot of  
24 issues with the Corps, ranging from cultural  
25 rights to cultural sites. We have done some

1 study on it but we need to study it a little  
2 further.

3 And I think the other issue was  
4 pipeline. We need to discuss the 404 permit  
5 off the streams, wetlands on the  
6 reservation.

7 And I know from some of the tribes in  
8 South Dakota a big issue arises when we find  
9 human remains or skeletal remains or  
10 dinosaurs, whatever, who has the ownership  
11 of it. And we believe that the ownership is  
12 the Fort Peck Tribes. And I would sure hate  
13 to see any confrontation between the Corps  
14 and the Tribes when it comes to ownership,  
15 Because I know in South Dakota this has  
16 happened -- and it's kind of a situation for  
17 both parties -- and would like to have a  
18 win-win situation for both parties.

19 I know we sent some correspondence to  
20 the Corps requesting information on  
21 different aspects, like total sediment.

22 COL KURT F. UBBELOHDE: Pardon.  
23 Repeat that, please.

24 TOM ESCAISEGA: Total sediment.  
25 And with the many tests being proposed with

1 the full tests, who is going to be  
2 responsible for the intakes, the damages.  
3 And we ask that the Corps identify that for  
4 us.

5 And from what I understand, it's  
6 still under the Corps' investigation, I  
7 guess, for future reference. But we still  
8 contend that it's the Corps' responsibility.

9 And one of the other issues that was  
10 in our compact, I know we have stored water  
11 rights behind the Fort Peck Dam. And I  
12 think at one time I had asked Mr. Dave  
13 Vader, when he was with the Corps, to  
14 research that for us, how much of that  
15 stored water behind the dam that we have  
16 access to.

17 Now, please, when you do these tests,  
18 there are many tests, don't say that's the  
19 Fort Peck Tribes' water you guys are  
20 releasing.

21 COL KURT F. UBBELOHDE:

22 (Laughter.) All right.

23 TOM ESCAISEGA: (Laughter.)

24 And I think at one point when we first  
25 started this M.R.&I. project, we asked the

1 Corps about putting the intake into the lake  
2 and also into the dam. But at that time we  
3 talked to Mr. Bill Miller, and we had Mr.  
4 Date, who did some renovation with the dam,  
5 put that in there. Then he went away and  
6 referred us to some people. And that never  
7 materialized. And we thought about  
8 originally putting the intake right there in  
9 the dredge cuts below the dam, but that  
10 didn't materialize because Fort Peck doesn't  
11 have any land out here.

12 So we moved it onto the reservation.  
13 And we've wanted to identify a spot there  
14 for the intake. I think we have three sites  
15 identified now. I think one of the biggest  
16 ownerships, the intake will be on tribal  
17 land.

18 And we would like to indulge the  
19 Corps to help us stabilize the banks around  
20 the intake if that's possible. I know  
21 that's one of the items we asked the Corps  
22 to help identify for the Fort Peck Tribes to  
23 develop.

24 But from my perspective, being a  
25 manager of our directive program, it's

1 always through the non-Indians that are not  
2 tribal Indians that get the benefits of the  
3 Corps programs and somehow we would like to  
4 see that switched around.

5 I know in the consultation coming up,  
6 maybe that's a start. And it might be  
7 beneficial to the Fort Peck Tribes with the  
8 Corps help. But I know in the past the  
9 Tribes and Corps didn't really see eye to  
10 eye.

11 And one of the other things was the  
12 Biological Opinion from the U. S. Fish &  
13 Wildlife and also the Corps saying that:  
14 When we put our intake in, it was for the  
15 pallid sturgeon. Then the last thing that  
16 came in was the tern and the piping plover  
17 on there.

18 And some of the comments made by the  
19 council people was that: How can we put the  
20 animals above the life of the individual, or  
21 the tribal members, if we want to give them  
22 good water. This comes into a big play, I  
23 guess.

24 I guess what I understand is that you  
25 and Fish & Wildlife has the authority to

1 stop the project. And we did have the  
2 meeting with the U.S. Fish & Wildlife  
3 people; and they said it wasn't really a big  
4 item on their agenda, and would get it  
5 pretty much through. But then I don't know  
6 how the Corps fits in there with U. S. Fish  
7 & Wildlife. I guess what we're asking here  
8 is the Corps to give us some kind of answer  
9 back, how the U.S. Fish & Wildlife tells the  
10 Corps what to do or what.

11 But the other things that are coming  
12 up, I think, through the consultation, I  
13 know we asked Mr. Bill Miller to be here to  
14 identify the full test and mini test. And  
15 we had a conversation back before we started  
16 that it probably wouldn't happen this year  
17 because of our kind of a drought situation  
18 that we're in and the dam not being up to  
19 speed or storage up there.

20 And I'll say again, if you release  
21 that water, don't say it's the Fort Peck  
22 Tribes' portion. I know we had a compact  
23 with the Corps that we had a traditional  
24 resources cultural inventory. And some of  
25 the things we encountered was from the



1 landownership from the non-Indians or fee  
2 land. We went to them and asked them to  
3 sign it. They said, "Well, who are you  
4 doing it for?" We say the Corps, and they'll  
5 tell us no, flat out.

6 But we still go back and bombard them  
7 with a, "Yes, you can do that. It will be  
8 beneficial to this investigation from the  
9 Corps and also help us in the M.R & I  
10 project."

11 I guess we go up to get the consent  
12 to enter their land so we can give them  
13 water. It will be beneficial both ways.  
14 That's what we're trying to find out. And  
15 so far we have completed the reservation  
16 part of the Corps on that part, but on the  
17 south side of the river which is primarily  
18 off the reservation, we have about 85  
19 percent of that completed for consent forms  
20 over there.

21 But I don't know what you guys did to  
22 the people over there in that fee land, but  
23 they do not like the Corps for some reason.

24 I'm trying to help you. I think from  
25 us trying to help you guys you should give

1 us about a million dollars to kind of smooth  
2 out the problems. (Laughter.)

3 COL KURT F. UBBELOHDE: A  
4 finder's fee?

5 TOM ESCAISEGA: Yeah.

6 I think that's about all I have.  
7 I'll ask Mr. Mike Watson to come up. I  
8 think he'll handle the technical aspect of  
9 the project. Then Joe Elliot. Then I think  
10 probably after that Deb Madison who is the  
11 director of the EOP.

12 COL KURT F. UBBELOHDE: Okay.

13 MIKE WATSON: Thank you, Tom.

14 My name is Mike Watson and I'm  
15 representing the Fort Peck Assiniboine and  
16 Sioux Tribes this morning as their engineer  
17 on the rural water project that Mr.  
18 Escaisega is the director, as well as other  
19 matters related to the river.

20 The Tribes' reservation is bounded on  
21 the south by the Missouri River below Fort  
22 Peck Dam over a distance of 141 miles,  
23 between River Miles 1621 and 1762.  
24 Therefore, the interest of the Tribes in  
25 this matter is significant.

1                   Approximately 75 percent of the north  
2                   bank or the left bank of the Missouri River  
3                   between the dam and the backwaters of Lake  
4                   Sakakawea near the border with North Dakota  
5                   lies within the reservation in the reach to  
6                   be affected by the testing and future  
7                   operations to generate a spring rise.

8                   The tribes have communicated with the  
9                   Corps of Engineers on this subject on  
10                  several occasions, and we would request that  
11                  as part of our testimony this morning that  
12                  the Corps reexamine that correspondence,  
13                  some to Becky Latka and some to the  
14                  Northwest Division.

15                  There has been some confusion on our  
16                  part with regard to where this communication  
17                  should go. Mr. Miller, who is here this  
18                  morning, has been working on the mini tests  
19                  and the full tests. And we're also  
20                  concerned about the entire scope of the  
21                  operation of the Missouri River that is part  
22                  of the Master Manual update, and there has  
23                  been some jurisdictional gray area between  
24                  Mr. Miller's efforts and those staff that  
25                  are working on the Master Manual in general.

1                   So we want to make sure that the  
2                   correspondence that we filed previously is  
3                   examined by the right parties within the  
4                   Corps.

5                   Now, the concerns that the Tribes  
6                   have had have been fairly well documented in  
7                   this correspondence. As Mr. Escaisega  
8                   points out, the Tribes as the beneficiaries  
9                   of Public Law 106-382, the Fort Peck  
10                  Reservation Rural Water Act of 2000,  
11                  executed on October 27, 2000, which provides  
12                  for the diversion of the Missouri River at  
13                  an intake near Poplar. And this will serve  
14                  a large area of Northeastern Montana. And  
15                  we can provide maps that show the full scope  
16                  of this project.

17                  But it involves all of the Fort Peck  
18                  Indian Reservation and four counties outside  
19                  the reservation, and reliance will be placed  
20                  on the intake and water treatment plant that  
21                  will divert water from the Missouri River.

22                  The Tribes have asked that the Corps  
23                  provide a plan for the protection of the  
24                  intake site including facilities in the  
25                  floodplain of the Missouri River and a plan

1 for mitigation or replacement of facilities  
2 stemming from the full tests and any  
3 proposed change in the operating procedures  
4 at Fort Peck Dam.

5 So there is concern about the intake  
6 on this facility, and the Tribes have asked  
7 for the Corps to provide a plan for the  
8 protection of the intake.

9 The plan must address a mechanism for  
10 financial repairs and replacement of the  
11 intake and related facilities through funds  
12 available through the Corps of Engineers or  
13 federal entities other than the entity  
14 established for the operation, maintenance,  
15 and replacement of the water system.

16 The Tribes have asked that the Corps  
17 provide a plan for funding the additional  
18 costs of treating Missouri River water to  
19 remove enhanced levels of suspended  
20 sediments at the water treatment plant for  
21 this project.

22 The Tribes have asked for a plan for  
23 protection, mitigation, replacement, funding  
24 of existing intake other than municipal  
25 water systems irrigating project and other

1 intakes that the Tribes have or will have  
2 within the boundaries.

3 The Tribes are also considering the  
4 diversion of the Missouri River water for a  
5 new irrigation project and that irrigation  
6 project would irrigate between 10 and 20  
7 thousand acres. And there is concern about  
8 how the future operation of the river would  
9 impact that intake.

10 The Tribes have asked that the Corps  
11 provide an analysis of the impact of the  
12 mini tests, full tests and any future  
13 operational changes at Fort Peck Dam on the  
14 erosion of the north or left bank of the  
15 Missouri River across the reservation.

16 The Tribes have asked that the  
17 analysis include the impact of future  
18 operations on the mechanisms of accretion  
19 and avulsion and the impact of future  
20 operations on changes in ownership that may  
21 be caused by movement of the banks or  
22 channels of the Missouri River. The  
23 analysis should also include the impact of  
24 future operations of the elevation of the  
25 bed of the River as a result of aggradation

1 or degradation.

2 Now, this comes from knowledge of the  
3 history of the degradation between the dam  
4 and Wolf Point and from there down stream  
5 the history of aggradation and its  
6 consequences.

7 The Tribes have asked that the Corps  
8 provide maps of the Missouri River Valley  
9 between the east and the west boundaries of  
10 the Fort Peck Indian Reservation outlining  
11 the soil types, geologic anomalies and any  
12 other factors that will permit definition of  
13 areas more susceptible to erosion and areas  
14 less susceptible to erosion. The Tribes  
15 have asked that that analysis must provide  
16 conclusions with respect to means of  
17 compensating landowners within the Fort Peck  
18 Indian Reservation for loss of land whether  
19 those landowners are the Tribes, allottees,  
20 or private owners.

21 The Tribes have asked that the Corps  
22 provide a plan for review by the governing  
23 body, a plan that would provide for safety  
24 during testing and future operations. This  
25 plan should include, among other things, the

1 methods of notification and warning before  
2 and during testing or operating procedures  
3 to artificially produce a spring rise. The  
4 plan should acknowledge and address warning  
5 and safety procedures for cultural and  
6 spiritual ceremonies, recreation,  
7 landowners, wood gathers, hunters, fishermen  
8 and others that would normally occupy the  
9 river, its banks, and its floodplain.

10 The plan should address the potential  
11 for rainfall and snow melt events in the  
12 Missouri River above Fort Peck Dam, such as  
13 the 1948, 1952, and 1964 events, and a loss  
14 of flood control capability due to revised  
15 operational procedures to maintain reservoir  
16 levels at or near spillway elevations in the  
17 May-June period in order to accomplish the  
18 release of water from the spillway for an  
19 enhanced spring rise. The plan should  
20 address any known concerns with regards to  
21 the capability of the spillway to perform  
22 during the mini test, the full test, or  
23 during future operations.

24 The Tribes have requested that the  
25 Corps provide a plan for review by the



1 governing body for the protection of human  
2 remains, cultural, historical and  
3 archeological resources known to exist in  
4 the Missouri River Valley and that may in  
5 the future be exposed by testing and/or  
6 future operating procedures.

7 The Tribes have asked that the Corps  
8 clearly present a report to the governing  
9 body on the benefits to the Tribes, their  
10 lands, and their resources of the proposed  
11 revisions in operations of Fort Peck Dam.  
12 The Tribes ask that the report address  
13 economic, environmental and cultural  
14 benefits. The report must also address the  
15 impact of the mini test, full test and any  
16 future operational changes on aquatic  
17 habitat, riparian habitat with special  
18 attention on our cottonwood forest,  
19 endangered or threatened species, and upon  
20 species that are not threatened or  
21 endangered.

22 Moreover, the report must address the  
23 impact of changes in the operation of Fort  
24 Peck Dam on hydropower resources of the  
25 Eastern Division of Pick-Sloan particularly

1 on the resource pool from which the Fort  
2 Peck Assiniboine and Sioux Tribes will  
3 receive federal power starting on January 1,  
4 2001, and continuing for the next 20 years.

5 The report is requested to include an  
6 assessment of the financial impact of  
7 operational changes on the Tribes'  
8 hydropower allocation as well as the  
9 financial impact on the Tribes from any  
10 other positive or negative changes.

11 And finally the Tribes request the  
12 Corps prepare and present a detailed plan to  
13 establish field baseline conditions and  
14 thereafter to monitor changes in the field  
15 to the river banks, the river bed, suspended  
16 sediments, bed load, aquatic habitat,  
17 riparian habitat, and other resources and  
18 facilities. They've requested that this  
19 plan should describe how changes caused by  
20 revised operating procedures will be  
21 determined relative to historic operating  
22 procedures and how those determinations or  
23 marginal changes will be used to define  
24 damages, mitigation requirements and  
25 compensation.

1                   The Tribes have gone forward with  
2                   some investigation to determine the impact  
3                   of proposed operating procedures on  
4                   suspended sediment and those investigations  
5                   have concluded that there would be a 7  
6                   percent increase in suspended sediment with  
7                   a change in flows from the historic pattern  
8                   to the proposed pattern with the spring  
9                   rise.

10                   This is a significant concern and  
11                   interrelates with aggradation, degradation,  
12                   bank erosion, riparian habitat and other  
13                   resources. The Tribes have shared this  
14                   knowledge with the Corps of Engineers but  
15                   have not received any response with regard  
16                   to that analysis.

17                   This concludes my comments. We will  
18                   be happy to provide anything in writing to  
19                   further assist in the understanding.

20                   JOE ELLIOTT: My name is Joe  
21                   Elliott. I'm from Missoula, Montana. I'm a  
22                   consultant to the Fort Peck Assiniboine and  
23                   Sioux Tribes. And I just have a question.

24                   Will the Fish & Wildlife report be  
25                   prepared for the revised operations of the

1 system? And if not, why not? Thank you.

2 COL KURT F. UBBELOHDE: Are  
3 there any others who wish to make a  
4 statement.

5 DEB MADISON: Yes.

6 COL KURT F. UBBELOHDE: This is  
7 being done in a formal testimony way, so you  
8 come to the podium, state your name, who you  
9 are, etc., and we'll do that.

10 DEB MADISON: Okay. I'm going  
11 to submit comments later on through the  
12 Tribes.

13 COL KURT F. UBBELOHDE: That's  
14 perfectly all right.

15 DEB MADISON: All right. Let  
16 me give you this then. My name is Deb  
17 Madison. I'm the environmental program  
18 manager for the Fort Peck Tribes.

19 And a couple things on the Master  
20 Manual, Adaptive Management. I think that  
21 is a terrific idea. We're working  
22 cooperatively right now with the State of  
23 Montana on a number of issues. And I know  
24 the State of Montana is also interested in  
25 adaptive management.

1                   I would propose, though, that results  
2                   of the adaptive management, when we're  
3                   talking about bringing together, you know,  
4                   high level science in the basin to come and  
5                   do large river ecology, I would propose that  
6                   there be separate breakout sessions, though,  
7                   for the Tribes, Fish & Game Department,  
8                   Water Resource Department, Environmental  
9                   Protection, simply because I think in a  
10                  purely Tribal -- through a Corps setting and  
11                  a Tribal setting it's much better than if we  
12                  bring in other interests. It will give the  
13                  Tribes a much more, I would say, higher  
14                  level of comfort that we would feel more  
15                  free to ask questions, questioning the  
16                  results, and learn from that experience  
17                  than if we're mixed together with a lot of  
18                  state agencies, environmental advocacy  
19                  groups and that type of setting. I think in  
20                  the spirit of government consultation that  
21                  would be a good first step.

22                  And also in terms of those Basin work  
23                  groups, the State of Montana met with us  
24                  last week and are very interested in putting  
25                  together a Montana-Missouri River Basin

1 group to bring together these same kinds of  
2 professionals that exist within this part of  
3 Montana and, you know, to the head waters as  
4 well.

5 And I think that's a really good  
6 idea. And I know they're going to be  
7 proposing that, and we would suppose that  
8 effort.

9 And once again, we would like to see  
10 that in terms of either figuring out a way  
11 to fund it, you know, through congressional  
12 authorization, or other agencies. Because I  
13 think the Corps has done a good job of  
14 putting together a lot of information  
15 already and providing it in a format.  
16 You've got the contacts, you've got the  
17 documents, you've got a lot of the issues in  
18 the Basin examined and reexamined. I think  
19 this is really good to keep you in that  
20 mode, sort of being the team leader, so to  
21 speak, on that particular issue.

22 COL KURT F. UBBELOHDE: If I  
23 could ask for clarification. Is it a state  
24 basin ----

25 DEB MADISON: Yes.

1 COL KURT F. UBBELOHDE: ---  
2 organization that you're asking for the  
3 Corps to kind of take a leadership role  
4 over?

5 DEB MADISON: To help support,  
6 yes.

7 COL KURT F. UBBELOHDE: The  
8 Corps?

9 DEB MADISON: Yes. We'll  
10 probably be looking for that kind of issue.

11 Let's see. What else can I think of?

12 Winter flows. We've done a lot of  
13 research up here -- not a lot -- the last  
14 three years on ice flows and erosion from  
15 ice. And there's beginning to be some  
16 results that point to ice being more of a  
17 problem than increased spring flow. And  
18 we're looking at a number of around 90,000  
19 CSF maximum release during the winter months  
20 out of Fort Peck Dam as a way to possibly  
21 minimize the effect of ice flows over the  
22 winter.

23 Because what can happen when that ice  
24 moves out, then you have trouble with  
25 sandbars, pumps suddenly moved a quarter

1 mile away from where they were before, and  
2 the open water channel and all that sort of  
3 thing.

4 Okay. The water quality section of  
5 the analysis section of the RDEIS from  
6 August 2001, I felt, was a little bit short  
7 of information, specifically about metals.  
8 I think we need to take a really hard look  
9 at the impact of metals.

10 Right now specifically mercury and  
11 arsenic, we're working with the State of  
12 Montana on a TMDL, and starting that process  
13 hopefully this summer for intensive  
14 monitoring, this summer on the Missouri  
15 River. And I think the Corps needs to  
16 examine some of -- I know they have some  
17 really good data available on it -- help us  
18 get a handle on how much is actually coming  
19 from the Fort Peck Dam, and some options  
20 like how does hydro modification affect  
21 those levels, specifically.

22 And that has impact to our water  
23 supply as well, because when we talk about  
24 putting in a large intake system, obviously  
25 we're going to have to know what we can



1           | expect in terms of mercury and arsenic.

2                         Let's see. Also there was a little  
3           bit of discussion earlier about stop  
4           criteria on the spring rise. We're not as  
5           concerned about the Yellowstone River,  
6           although the State of Montana is quite  
7           concerned about the Yellowstone River and  
8           flood levels there and initiating some stop  
9           criteria at that point. I think that's  
10          something that needs to be negotiated, and  
11          I'm sure you are going to look at it as part  
12          of the spring rise. Many tests -- That  
13          isn't going to happen for awhile, it doesn't  
14          look like, at least not here. So I still  
15          think that's something that needs to be  
16          flushed out a little further, especially  
17          when we're looking at cultural and  
18          historical sites and inventory that's soon  
19          to be completed along this stretch of the  
20          Missouri River.

21                         Finally -- I guess not finally -- But  
22          what I want to talk about right now is the  
23          hydropower section of the manual. I had a  
24          little trouble understanding that part  
25          exactly. I did talk to our utilities

1 director this morning, who has been  
2 intricately involved with Western Power  
3 Administration and getting WAPA Power to the  
4 Sioux Tribes. At this point we are about --  
5 90 percent of our power comes from MDU,  
6 which is only about 25 percent relying on  
7 WAPA Power.

8 So actually the impact to those 90  
9 percent is relatively small, at least from  
10 what I can figure out from the manual  
11 section. The other part of the reservation,  
12 10 percent is on the rural electric  
13 cooperatives. One of the cooperatives, I  
14 believe, is 100 percent relying on WAPA  
15 Power. And those folks could see some  
16 issues with their power bills.

17 And I guess out of all of that, I'm  
18 trying to figure out, although the manual  
19 had no direct impact to tribes for  
20 hydropower, I think there are some impacts  
21 there and we need to flush those out a  
22 little better in the review process, just so  
23 it's easier maybe to look at a graph or a  
24 chart or something.

25 And I think we have people available

1 to help with that. They've already done a  
2 lot of the leg work that needs to happen.

3 Finally, I guess, from our office's  
4 prospective, we are pushing pretty heavily.  
5 And I don't want to go on the record as  
6 being firm on this, but we are looking very  
7 hard on pushing pretty heavily on it. It  
8 seems to fit a lot of the criteria, the  
9 priorities of the Tribes, in terms of water  
10 supply, recreation, and at the same time  
11 makes efforts to protect the endangered  
12 species. I don't think the Tribes are  
13 opposed to that, but they want to make sure  
14 that individual tribal members and overall  
15 tribal interest is protected. And I think  
16 that GP1528 option is very close to meeting  
17 that.

18 But I, you know, I wouldn't cast that  
19 in stone until we get a letter from the  
20 chairman, which should be coming by the end  
21 of the month. And we've got some other  
22 folks looking at that.

23 It was interesting to note in the  
24 manual that the Corps thinks that's a good  
25 starting point. And I think -- I wish in

1 light of NEPA that the Corps had selected  
2 preferred alternatives. It would have made  
3 my job easier and I would feel a little  
4 more, I guess, comfortable making a  
5 recommendation on behalf of the Tribes.

6 And I'll conclude right there, if  
7 that's okay.

8 COL KURT F. UBBELOHDE: Okay.  
9 Thank you.

10 All right. With respect to the  
11 testimony to the Manual, Master Manual, are  
12 there any others who wish to make a  
13 statement?

14 Part of our purpose for coming up  
15 today, of course, is to pursue government  
16 -to-government talks, so I'd like to sort of  
17 transform the discussion from specific  
18 testimony regarding the Master Manual into  
19 addressing and carrying on a dialog to  
20 address some of the concerns of the Tribes  
21 as put forth in some of the statements  
22 you've already made as well as some of the  
23 documents that have been referred to in the  
24 mailings, etc.

25 But in order to do that, let me just

1 close out officially the testimony for the  
2 Master Manual.

3 This will remain on the record for  
4 purposes of just having a good transcript of  
5 what occurs here.

6 Since I'm relatively new to this  
7 process, having been in the Omaha District  
8 for just, oh, around six months -- and this  
9 is certainly an important process, I don't  
10 want to get off on the wrong foot or  
11 anything -- so I'm going to ask if there's a  
12 specific question that we should dialog over  
13 first to kind of -- if there's something of  
14 a higher priority or something so I don't  
15 come in at the wrong level from your  
16 prospective, Tom, is there something  
17 specifically? My goal is to try and address  
18 everything, but if there is a particular  
19 thing that we should start with from your  
20 prospective, let's do that.

21 TOM ESCAISEGA: I think we  
22 requested information from the Corps on  
23 stuff said to them earlier but we haven't  
24 had an official response to it from them. I  
25 understand the response is to a different

1 agency in your department from the Tribes  
2 perspective, and we haven't received  
3 anything on that.

4 COL KURT F. UBBELOHDE: Okay.  
5 We have an organization that is divided, as  
6 I think you probably know. The Northwestern  
7 Division, which is commanded by Brigadier  
8 General Fastabend headquartered out of  
9 Portland, Oregon, serves as a regional  
10 command for things going on in the Missouri  
11 Basin.

12 Subordinate to the Division is the  
13 District or the Omaha District being one,  
14 Kansas City, etc.

15 So I served as a subordinate  
16 commander with focus over portions of the  
17 entire basin. And there are other  
18 commanders that have other pieces and other  
19 responsibilities. And we attempt to serve  
20 our stakeholders in a virtual way.

21 So what you're commenting on is that  
22 when you sent a letter to the Corps, it may  
23 be that it's coming to the District, because  
24 we have responsibility of maybe something  
25 that has to be handled by the Division

1           because of their responsibilities and the  
2           roles that they play. And so we're not  
3           doing a very credible job right now serving  
4           your needs in a virtual way.

5                     To focus on a specific piece of --  
6           specific request, I think we can answer some  
7           of the requests that you made to us in  
8           letters by, I think, probably having Bill  
9           come up and talk about the things that we're  
10          doing with respect to the mini and the full  
11          tests. Because that will discuss some of  
12          the various actions that are ongoing, which  
13          you have asked for plans on. And we are  
14          working those things in a matrix way,  
15          working with the Division, as well as at the  
16          district level. And hopefully by presenting  
17          some of this information we can sort of  
18          address those concerns.

19                    And if we don't do it adequately  
20          through this dialog, we'll find out where  
21          the gaps are and we can try and get some  
22          sort of an idea of where we need to do a  
23          better job of communicating.

24                    So why don't we have Bill come up and  
25          talk a little bit about some of those.

1 BILL MILLER: Tom, what I first  
2 want to do is address your request for  
3 plans. And I'm talking from the March 19,  
4 2001, list. Most of the lists are separate.  
5 I think the list that you quoted today,  
6 there are several versions of this list. It  
7 may have a few additional things that I  
8 haven't addressed on this one, but this is a  
9 list I will talk from.

10 The first issue we would want to  
11 address is the plan for protection of the  
12 regional MRI intake site and related  
13 facilities in the floodplain, including a  
14 plan for the repair and/or replacement of  
15 those facilities if damaged by future  
16 operations connected with a spring rise or  
17 otherwise.

18 The plan that we address, it  
19 addresses the actual intake. And as I  
20 talked before, to fully address this, we are  
21 making -- we are envisioning an intake  
22 similar to other industrial water intakes,  
23 but it's just in the process. Those  
24 documents, you know, don't exist at this  
25 time. So we're operating at that level.



1                   And operating from that level, we  
2                   have not foreseen damages from the mini  
3                   tests. And that is what I'm addressing  
4                   mainly. Nor do we feel that there would be  
5                   damage anticipated in the full tests or  
6                   implementation, you know, based on what we  
7                   know now.

8                   The next item that we want to address  
9                   is the plan for the funding of additional  
10                  water treatment plans associated with the  
11                  enhanced levels of solids caused by the  
12                  spring rise.

13                 This kind of falls, both these  
14                 questions -- and when I address what we're  
15                 doing, at this point in time, we're  
16                 gathering data, getting information, as far  
17                 as having a plan, we're getting towards that  
18                 point where you have to have a certain  
19                 amount of information to be in a position to  
20                 develop a plan. Related to these two  
21                 things, they kind of tie into your suspended  
22                 sediment, you know, proposal that we have  
23                 received and we are reviewing.

24                 And at this time we have done, in the  
25                 last couple months, we have furthered out

1 research into that and have got our analysis  
2 to such a point that we are going to present  
3 it to the Project Review Board for the  
4 implementation regarding the BiOp and the  
5 process.

6 COL KURT F. UBBELOHDE: Again  
7 let me interject. This is again part of the  
8 hierarchal structure which exist in the  
9 Corps. What he's referring to is the  
10 district has responsibility for a portion,  
11 the division, the Project Review Board, as a  
12 higher level organization, which has  
13 responsibility for a much broader spectrum  
14 of issues.

15 And so this fits into their big  
16 picture, and they're the ones that will have  
17 a determination. So that's what he's  
18 referring to, the process right now.

19 BILL MILLER: Thank you, sir.

20 And we have -- Jody Farhat is here  
21 with provisions, and also Mr. Moore. And I  
22 am going to, with your permission, address  
23 these in total; but I want to stress that  
24 the mini tests, with the movement of the  
25 full tests under the umbrella of the RDEIS

1           for the Master Manual, I no longer manage  
2           that. I'm still doing the technical  
3           activities, you know, the testing of the  
4           spillway, the coordination of the Tribes  
5           for, you know, the cultural resources. I'm  
6           forming more tasks now for the division.  
7           But the management of it is with the  
8           Division. And also management and the  
9           comments on the stock protocol, I'm in the  
10          same function. I may provide footwork for  
11          that, gather that for them; but they are the  
12          ones that would speak to those two issues.  
13          I will address them together.

14                 And, Jody, any time you feel you want  
15          to add something, jump right in.

16                 Moving on to the next item on the  
17          list is the plan for protection, mitigation,  
18          replacement, and associated financing of  
19          existing intake sites along the Missouri  
20          River within the Fort Peck Indian  
21          Reservation for the Fort Peck Irrigation  
22          Project and other private intakes and newly  
23          proposed intakes.

24                 As the Tribe is aware of, because  
25          they were part of the process, we have

1           contracted with the Roosevelt County Natural  
2           Resource Commission for this study, for  
3           study of the intakes along the whole reach  
4           of the Missouri River in Montana. And that  
5           study has been completed. We have not  
6           received our final copy.

7                     We have received drafts of the  
8           summary. And some of our technical staff  
9           have received the internal stuff. Becky  
10          Latka has looked at it and put together her  
11          environmental assessment, but I have not  
12          seen or reviewed the final report.

13                    But we have collected that data and  
14          also addressed the tribal intakes, as well  
15          as all intakes in Montana.

16                    Also as a part of that, we are -- we  
17          will do, as a part of the mini tests and as  
18          a part of the full tests, we will refine the  
19          weather profiles for the river. To do that,  
20          we have to have a stabilized flow.

21                    There was discussion among the  
22          communities about doing it this summer, but  
23          it would have caused us about seven-tenths  
24          of water out of the lake that was already  
25          depleted. It was a joint State-Corps

1 decision it was best to wait and do it as  
2 part of a mini test.

3 And so we will make that  
4 determination at the 15,000 level. And  
5 then, once again, if we do the full test, we  
6 would make it 23,000 CFS level and establish  
7 new after profiles. The water profiles  
8 we're currently using are reasonable for  
9 estimates, but they were prior to the 1997  
10 event, which quite possibly made some  
11 changes to the dynamics of the river, which  
12 may not make them as accurate as they were  
13 at one time.

14 So that, coupled with the data that's  
15 available from the Roosevelt County survey  
16 should provide reasonable information.

17 The next item is analysis of the  
18 impact of future operations on erosion of  
19 the north bank, including maps (GIS) of the  
20 Missouri River Valley outlining soil types,  
21 geologic anomalies and other factors  
22 relevant to erosion.

23 At this time we have added three  
24 additional erosion monitoring sites with new  
25 mechanisms that geotechnical people

1 purchased about a year and a half ago.

2 On one of our first sets of scoping  
3 meetings on the mini tests and full tests we  
4 asked for volunteers because we had to have  
5 permission to put them in people's sites.  
6 And three volunteers came forward that had  
7 active erosion sites, and that's where they  
8 are located now.

9 This is in addition to our normal  
10 erosion monitoring that occurs just at the  
11 sedimentation monitoring lines. At certain  
12 periodic times they're resurveyed, and we  
13 also have aerial photos flown of the river  
14 that compares over a series of years which  
15 monitor the erosion rates.

16 It is still the Corps' position that  
17 overall the mini tests, the full tests, and  
18 the implementation taken as a whole will not  
19 affect the erosion rates over a long period  
20 of time.

21 But because there's still some  
22 concern among the Tribes and the public,  
23 we've went ahead and added these additional  
24 erosion sites.

25 The other thing ----

1 COL KURT F. UBBELOHDE:

2 Monitoring sites?

3 BILL MILLER: Monitoring sites,  
4 yes. Thank you, sir.

5 The other thing that has taken  
6 place -- we work jointly as a part of  
7 this -- is the NRCS with their ag research  
8 center has performed some independent soil  
9 stability type of tests in conjunction with  
10 the same place that the Corps has sites and  
11 tests and has compiled a report that they  
12 have provided to your CRM group. And the  
13 Tribes have tribal interests represented in  
14 that association.

15 In addition to that, as was mentioned  
16 in earlier testimony, the Corps under  
17 Section 33 has sponsored an ice study that  
18 did a very detailed look at the operations  
19 of the river under while it was covered with  
20 ice. And that report has been brief. We  
21 have not put out a report. Our overall plan  
22 was to do several years of monitoring to  
23 develop a profile.

24 We have one year of data, and we  
25 would have liked to have more data before we

1           came to, you know, a concrete conclusion of  
2           what it is. But the representation of the  
3           preliminary data was accurate.

4                     The next item is the plan for  
5           compensation of landowners for erosion. At  
6           this time, the best mechanism that is  
7           available for landowners to address erosion  
8           is the Section 33 program.

9                     One of the mechanisms is for the  
10          landowners, if they are willing, they can  
11          get a slough easement where the Corps would  
12          provide payment for an easement to let the  
13          land that was eroding continue to erode.

14                    There is possibility that certain  
15          criteria can be met for the four-banks  
16          stabilization project to be built. One was  
17          built, I believe at the Pipal site here  
18          in -- not far from here in Montana. Another  
19          site is being considered across from the --  
20          directly across from the spillway at this  
21          time.

22                    COL KURT F. UBBELOHDE: Let me  
23          just make a point of clarification.

24                    That particular determination, again  
25          to show you the hierarchy of the



1 organization, resides outside of the Corps  
2 of Engineers. It's at the Secretary of the  
3 Army Level, and it's done on a not  
4 economically justifiable basis.

5 So where we would be restrained to  
6 pursuing actions that are economically  
7 supportable, that sort of decision would be  
8 one that would be handled well above our  
9 rank and pay structure and is not -- It's  
10 for completely different sorts of reasons,  
11 so there's different motivation for a  
12 structural report.

13 DEB MADISON: Construction in  
14 the river intakes. So you think that  
15 somehow that base stabilization with prior  
16 tests for that area is kind of where this is  
17 going to head to, or not?

18 BILL MILLER: It's a separate  
19 program. It's a whole separate thing. I  
20 had managed that program one time. I think  
21 it's got a very set criteria. And up till  
22 now several people applied, and there's only  
23 been three structures built under that  
24 program at this time. So it has to be a  
25 very unique set of conditions for this to

1 occur.

2 COL KURT F. UBBELOHDE: Do you  
3 have anything to add on that, Alan? Do you  
4 have any prospective on that at all?

5 ALAN STEINLEY: No.

6 BILL MILLER: I'm not currently  
7 managing that project, but it is my belief  
8 that the consideration for the site as it  
9 falls from the spillway was based on a  
10 provision that allows you to relocate your  
11 water intake. In other words, we would  
12 relocate water intakes. If there's two  
13 water intakes that are close together, one  
14 stable, one not, and if a willing neighbor  
15 has a site he's willing to give easement, we  
16 would try to relocate the site so both pumps  
17 were at the stable site.

18 In that process if it's cheaper for  
19 us to actually do a structure and we can get  
20 the permits than to relocate it, then we  
21 would possibly build some limited rock  
22 structure. But once again, those are  
23 very -- the situation has to exist for those  
24 to be supported. It usually does not occur,  
25 and then we still have to get permits.

1                               DEB MADISON: I guess the  
2                               reason, when that first started that whole  
3                               CRM thing, the issue was actually not just  
4                               intakes. And now I think they can see even  
5                               those type of structures aren't going to  
6                               help the situation, so they're starting to  
7                               concentrate more on just what you need to  
8                               do.

9                               So I guess I'm just -- They're  
10                              starting to point their efforts. I don't  
11                              think that's what they're asking: How can  
12                              we stabilize at least the pumping sites  
13                              because they have such a direct impact?

14                             BILL MILLER: I think you hit  
15                             on it. Hopefully when we get the  
16                             information from the study that Roosevelt  
17                             County has done -- We received it, but I  
18                             don't believe we've had a chance to analyze  
19                             it. And we need to couple that actually  
20                             with the new water profiles. The data we've  
21                             had we need to be able to match up where the  
22                             water is going to be at based on the best  
23                             estimate they can with the data that's  
24                             available to them.

25                             And I think the mini tests will tell

1 us a lot. The mini test is basically no  
2 more than 15,000. It's at the upper level,  
3 but it is a type of flow that would be in  
4 the normal operation range. And I do not  
5 believe that it is as big a concern to the  
6 Tribes or the landowners. And once we run  
7 that mini tests, then I think a lot of these  
8 other questions will fall into place.

9 Do you want me to continue on, sir?

10 COL KURT F. UBBELOHDE: Sure.

11 BILL MILLER: Plan for safety  
12 during the testing and future operations,  
13 including assessment of the spill to perform  
14 properly.

15 We have -- As a part of our  
16 operations, one of our tasks was to develop  
17 a safety plan as a part of our overall  
18 testing plan. And a draft of that has been  
19 put together.

20 Given that, we are probably at a  
21 25 -- 15 percent chance of the test being  
22 implemented this year. We're still moving  
23 forward in the event that the water  
24 conditions will change that we could run a  
25 mini test.

1                   A draft is existing, but it is not  
2                   being pushed at this time, given the  
3                   probabilities. If things start to change,  
4                   we can finalize that document in a short  
5                   period of time. It addresses the type of  
6                   issues that you're concerned with.

7                   Regarding the spillway as a part of  
8                   previous contracts, we've already  
9                   completed -- with an engineering consultant,  
10                  we have developed an overall plan for  
11                  monitoring the spillway to use in the mini  
12                  test and the full test flows regarding the  
13                  erosion around the structure. And slab  
14                  uplift and instrumentation has already been  
15                  installed. Later this year, we will execute  
16                  another contract with the same consultant to  
17                  do some preliminary work. And so they're in  
18                  line to actually do the testing during the  
19                  full testing analysis.

20                  The next item is the plan for  
21                  protection of human remains, cultural,  
22                  historical, and archaeological resources.

23                  As you're well aware, the Tribe  
24                  has -- we award the contract to the Tribe to  
25                  do the cultural resource work on both sides

1 of the river from Fort Peck to the  
2 government boundary. And as it was  
3 previously briefed in the earlier  
4 testimony ----

5 (Brief interruption.)

6 BILL MILLER: I'll start over.  
7 Obviously the Tribe has a contract for the  
8 cultural resource inventory, and they also  
9 have the contract for some preliminary work  
10 we did on cottonwood surveys inventory. The  
11 contract is moving along. As Tom earlier  
12 briefed, the Tribes and the Corps have some  
13 landowners that are reluctant to give  
14 permission for the inner-land survey.

15 Discounting those areas, when the  
16 survey is completed, I anticipate sometime  
17 in the May-June timeframe, we will have hard  
18 data on the location of the cultural sites.

19 What we are anticipating is having  
20 some sort of monitoring program, say, if  
21 there are significant sites, you know,  
22 during the full tests. And once again those  
23 from the Division that are here, speak up if  
24 you don't agree, to insure that, you know,  
25 if there are significant sites that are

1 close, that we do not have impact to those  
2 sites.

3 It must be noted, at the current time  
4 we don't expect erosion rates being  
5 different than they are now. At this time  
6 we are not -- we don't know of any known  
7 occurrences. There's no known immediate  
8 problem sites. And erosion, if it stays at  
9 the current rate, doesn't seem to be causing  
10 a problem. So we wouldn't anticipate any  
11 difference during the mini tests or full  
12 tests.

13 If we would get water, we would  
14 probably propose to move forward with the  
15 mini test based on our current existing  
16 knowledge and monitoring plan.

17 The next item is the plan for  
18 baseline measurements and future monitoring  
19 of resources including water quality, total  
20 sediments, aquatic habitat, riparian habitat  
21 and other resources.

22 Yes, Tom.

23 TOM ESCAISEGA: Can you back up  
24 to that last one?

25 BILL MILLER: Yes.

1 TOM ESCAISEGA: On the  
2 cottonwood study, now we completed that?

3 BILL MILLER: Correct.

4 TOM ESCAISEGA: Can we expect  
5 some comments back from the Corps on that or  
6 do we have to wait until the whole project  
7 is completed, until like May or June?

8 BILL MILLER: I'll check on  
9 that. A lot of times we wait until the  
10 whole project -- in fact, if you haven't  
11 heard a comment, it's probably a good thing.  
12 We're probably happy with the work. But  
13 I'll check on that.

14 TOM ESCAISEGA: Okay.

15 BILL MILLER: We are still  
16 debating that within the Corps technical  
17 family.

18 DEB MADISON: We can expect  
19 some sort of response?

20 BILL MILLER: After we  
21 presented -- Portions of that debate would  
22 be presented to the review group that I  
23 mentioned earlier, and they would, they're  
24 responses to the different analysis that we  
25 performed would lend towards whatever the



1 response is.

2 DEB MADISON: Okay.

3 BILL MILLER: Ready to move on?

4 DEB MADISON: Yes.

5 BILL MILLER: Once again, the  
6 Tribes have been a part of all this, so this  
7 isn't new thing I'm telling you. We have  
8 a very aggressive, I think, detailed  
9 monitoring plan for the biological responses  
10 that we completed last year, and we would do  
11 this year. It would be done -- All the base  
12 years until we do the mini tests, during the  
13 mini tests, during the full test, during  
14 implementation then a year after is our base  
15 plan.

16 And we're collecting the type of  
17 information on water quality, on  
18 temperature, a limited amount of humidity.  
19 We are collecting a multitude of information  
20 on the movement and the habit of the fish  
21 and the pallid. And that is a part of our  
22 monitoring plan. We also have completed the  
23 cottonwood study.

24 Now, it goes back to the information  
25 that we have at hand that erosion will not

1           increase at a rate other than normal as far  
2           as the effect of the mini test and the full  
3           test, that there is -- other than the work  
4           that you have done, we consider that kind of  
5           our monitoring plan. There is no other  
6           additional monitoring that we see that would  
7           occur actually during the tests, as far as  
8           what would happen to this data. And when  
9           you talk in terms of baseline, data  
10          collected over a year is not a baseline.  
11          That's probably the next phase.

12                 I would like to get together with  
13          Deb, talk to you after the meeting. I  
14          believe the Tribes have a previous long  
15          history of water temperature, water quality  
16          data, and we'd like to talk with you, if we  
17          could, to try to make some sort of  
18          connection match up to our data and use that  
19          to extend the baseline.

20                 And so we go to the Tribes which  
21          probably have some of the best data and some  
22          other agencies and see if we can use that  
23          data to develop the baseline.

24                 And once again, the sediment portion  
25          of this, your monitoring plan would be tied

1 to, you know, the comment that we receive  
2 from our senior review group.

3 The last item that I have on this  
4 list is the analysis and presentation of  
5 benefits of spring rise to Fort Peck  
6 Assiniboine and Sioux Tribes.

7 But the main benefit, I think the  
8 Tribes have had a long history of being  
9 concerned for the environment. And I  
10 believe that this whole process will improve  
11 the river habitat and especially the habitat  
12 and the chances of survival of the pallid  
13 sturgeon.

14 In addition to that, this process has  
15 made it possible for us to do a complete  
16 cultural resource survey of the river, which  
17 I think was another -- There's a lot of  
18 interest groups that that is a benefit to,  
19 but I think the Tribes have a primary  
20 interest in that particular action  
21 occurring, and the information being  
22 available has benefited the Tribes.

23 Even though our initial start is  
24 limited, the cottonwood survey work is of  
25 benefit to the Tribes. And even though it's

1 a secondhand benefit because it was for the  
2 benefit of the Corps to take the contract,  
3 there has been some contractual work that  
4 has provided income into the tribal  
5 community based on this process.

6 And the last abstract benefit is that  
7 both the mini and the full tests will  
8 provide a bank of data. In other words,  
9 adaptive management is based on having data  
10 seen, what happens there.

11 If you, in a part of the process,  
12 have some confidence in the data and you had  
13 data, then you can anticipate in the  
14 adaptive management process.

15 Those are all the comments I have.  
16 Were there any others you wanted to address,  
17 Tom, on this list?

18 TOM ESCAISEGA: One of the  
19 things that we're thinking is, what we need  
20 is a response in writing on this so we  
21 understand where we are. And we understand  
22 you're not totally complete with all the  
23 things that you're doing, but if you could  
24 respond to the things that you can respond  
25 to and give us a status report on your

1 projection when that will be finished, I  
2 think that would go a long ways in answering  
3 the questions that the Tribes will have  
4 posed in their correspondence.

5 And that would be very helpful to the  
6 Tribes in being able to evaluate what your  
7 plans are. Without that we really don't  
8 have much to work with. We've got the  
9 correspondence out there asking for those  
10 plans.

11 With regard to the baseline data  
12 collection, again, the oral statement given  
13 that there has been significant progress on  
14 some of the things in the report, aerial  
15 topography of the river to establish where  
16 the banks are, your cross sections of every  
17 mile that you maintain and update, that  
18 gives a good handle of where the river is at  
19 any particular point in time and where the  
20 bed is, X, Y, and Z coordinates, we're  
21 talking about the lateral position of the  
22 river and the vertical position of the bed,  
23 that gives a lot of good information.

24 So far we haven't seen that. We'd  
25 like to see it so that we can understand

1           what the baseline looks like and then can  
2           work from there. We've got a lot of  
3           information of baseline from USGS. We just  
4           need to figure out how we're going to  
5           supplement that during the testing so we can  
6           fill out the points where USGS is collected  
7           data.

8                        So I think all I'm trying to say is,  
9           it would be very helpful to get all the  
10          things that Bill has said very well in a  
11          written response so that we can evaluate it.  
12          And I don't think the Tribal Council or Deb  
13          are asking for things that we can't have yet  
14          because they're not finished. We just need  
15          to know what you can say about the things  
16          you have and what you can say about the  
17          things that are in process.

18                       BILL MILLER: I can do that,  
19          sir.

20                       COL KURT F. UBBELOHDE: I think  
21          that's a very prudent thing to do. It also  
22          allows us to gauge, I think, anticipate a  
23          completion time. And we can kind of gauge  
24          when things need to be completed, etc.

25                       I don't know if we've got the record.

1                   It would be sort of a comprehensive document  
2                   then addressing each of the points. Because  
3                   I know Mr. Elliott had asked about the  
4                   cottonwood study and expecting a response on  
5                   that. And that seems appropriate. We've  
6                   got the document. We should be doing the  
7                   review, the response back what it means,  
8                   etc., from our prospective, to roll all  
9                   those together in one comprehensive thing  
10                  for the Tribal Council to look at.

11                  Then you would be able to determine  
12                  whether you're satisfied, etc. That would  
13                  be appropriate.

14                  Okay. Any other directions for us,  
15                  comments?

16                  JOE ELLIOTT: I think from  
17                  my standpoint, I'd like to see an  
18                  organizational chart of you guys. You know,  
19                  you're talking about hierarchy. That would  
20                  help us to send letters.

21                  RICK MOORE: Did you have any  
22                  concerning the regulatory process? Did you  
23                  want to discuss them here?

24                  TOM ESCAISEGA: Yes. When we  
25                  start construction of our intake, which will

1 take place probably this fall, we need to  
2 know who to go to and get permits and stuff  
3 like that.

4 COL KURT F. UBBELOHDE: Okay.

5 RICK MOORE: He wants to go  
6 there to get a permit, Alan. Come right up  
7 in front.

8 COL KURT F. UBBELOHDE:

9 Introduce yourself, Alan.

10 ALAN STEINLEY: Hi, I'm Alan  
11 Steinley. I work out of Helena. We talked  
12 on the phone the other day. And I run the  
13 regulatory program here in Montana, and I  
14 didn't quite get your question.

15 TOM ESCAISEGA: I guess we need  
16 to know about the permits, who we need to  
17 know, who to work through. I'm not too  
18 sure.

19 ALAN STEINLEY: Okay. We've  
20 had some contact on that project back in  
21 March with the Bureau of Reclamation and  
22 DEQ. Are you working with them to put this  
23 project together? They informed us that  
24 they were taking care of environmental  
25 documentation at the state and federal



1 level.

2 TOM ESCAISEGA: Okay. We have  
3 the Fort Peck.

4 ALAN STEINLEY: Okay. So  
5 they're only handling the Dry Prairie part.  
6 I didn't catch on there. But what I think  
7 would probably be the prudent thing to do  
8 would be to get together on a pre-  
9 application basis probably as soon as  
10 possible and lay out the project and  
11 then we can discuss different permitting  
12 ramifications and what we could do for the  
13 process.

14 It would probably be an involved  
15 permit. There will be a lot of issues that  
16 have to be dealt with and some of those have  
17 been discussed today, railroad, cultural  
18 resources, and I assume -- Will the Tribes  
19 be handling a lot of those types of issues  
20 in review?

21 TOM ESCAISEGA: Yes.

22 ALAN STEINLEY: Okay. That  
23 will help.

24 Probably one of the issues that we'll  
25 have to look at is how much of this project

1 are we going to try to run off of a permit.  
2 And I'm not quite sure where you're at in  
3 the planning or construction.

4 One of the things we'll have to  
5 determine is: Can we permit the intake  
6 separately or are we going to have to look  
7 at the permit of the delivery system  
8 together.

9 And I think that's something that we  
10 need to do, like I say, pre-application  
11 consultation to find out where you're at on  
12 this project, where you're at on design.  
13 Then we'll probably be able to get you a  
14 better answer as to what type of permitting  
15 requirements you'll be looking at, and more  
16 importantly probably how long it's going to  
17 take before we can provide a permit to you.

18 COL KURT F. UBBELOHDE: To help  
19 him understand, what would be some of the  
20 restrictions or limitations on that  
21 particular matter and time on this issue,  
22 just to kind of characterize it for them?

23 ALAN STEINLEY: Well,  
24 determining the scope of the project, like I  
25 said, how much the project we're going to

1 try to bite off. I think I heard you say  
2 you want to start construction in the fall?

3 TOM ESCAISEGA: Right. The  
4 intake.

5 ALAN STEINLEY: Okay. We'll  
6 have to decide how much of the project is  
7 available to evaluate, basically, and how  
8 much of it -- So we'll have to determine the  
9 scope of the project.

10 And then there will be the typical  
11 issues, the endangered species, cultural  
12 resources. Those are normally the ones that  
13 add length to the process. If we have to go  
14 into consultation with Fish & Wildlife,  
15 they're kind of a wild card process, as I'm  
16 sure you're aware. And it could -- It's out  
17 of our control basically how long it takes  
18 sometimes.

19 So as we deal with those types of  
20 issues, I would recommend getting started as  
21 soon as we can. Because, like I say, we  
22 don't really have control on how long some  
23 of that takes.

24 TOM ESCAISEGA: The only thing  
25 we'd be interest in permitting is the

1 intake.

2 ALAN STEINLEY: Okay. And  
3 that's a decision we'll have to make. When  
4 we were talking with the Bureau and DEQ  
5 on -- This is quite a network, the pipeline  
6 that goes along with this thing, crossing  
7 many waters of the United States. And we  
8 wouldn't have the pipelines without the  
9 intake.

10 Normally we like to look at the  
11 entire scope of the project at one time and  
12 evaluate the impact and put out our  
13 information to the public for comment, as  
14 much of the project as we can. But I  
15 understand some of that information isn't  
16 going to be available.

17 TOM ESCAISEGA: We've got  
18 everything available. We know the streams  
19 we're crossing, where we're crossing. All  
20 of the details are going to change, but the  
21 general nature, the general scope of the  
22 project is not going to change.

23 ALAN STEINLEY: I think we can  
24 work with that. Because when the time  
25 comes, if we need to amend the permit to

1 recognize the change in the crossing  
2 locations, that's not a problem.

3 JOE ELLIOTT: Well, yeah.  
4 We've addressed that in considerable detail.  
5 What we've done there, there was individual  
6 permits in South Dakota for permits more  
7 nation-wide. As this has been going along,  
8 we've done a detailed site specific  
9 assessment of wetlands before each segment  
10 is built. Because when we did our surveys,  
11 we weren't sure where the pipes were going  
12 to be, so we did a specific site survey  
13 before applying for each segment as it was  
14 built.

15 ALAN STEINLEY: Okay. And  
16 they're handling some of those?

17 JOE ELLIOTT: Right. Right.  
18 But the main ones you can handle the  
19 separate individual permits.

20 ALAN STEINLEY: Separate  
21 individual permits?

22 JOE ELLIOTT: Yes.

23 ALAN STEINLEY: Okay.

24 JOE ELLIOTT: Yes. We've done,  
25 you know, quite a bit of field work, but

1           it's difficult. From one side of the road  
2           to the other, it can be very different when  
3           you're looking at wetlands, particularly on  
4           the uphill side of the wetlands.

5                     So we can address it adequately for  
6           complying, but probably not adequately for,  
7           you know, to determine, depending on what  
8           your needs are. Sometimes that's adequate  
9           for nation-wide permits.

10                    ALAN STEINLEY: Yes.

11                    JOE ELLIOTT: But we have a lot  
12           of information which we can provide you,  
13           which we probably should do that. I was  
14           assuming that the Bureau of Reclamation was  
15           keeping you in the loop on this, but that  
16           apparently isn't the situation.

17                    ALAN STEINLEY: I haven't spoke  
18           to them since March. And our Billings  
19           office wants to be the project manager for  
20           the 404 program.

21                    JOE ELLIOTT: Should I sent  
22           information to you or to him?

23                    ALAN STEINLEY: Send it -- I  
24           think for this project, send it to me. Then  
25           I'll route it to Larry.

1                   JOE ELLIOTT: Okay. I'll start  
2                   sending you stuff then.

3                   ALAN STEINLEY: And I talked  
4                   with the District a little bit, my  
5                   counterparts down in Omaha. And I think  
6                   once we get into some of the smaller lines  
7                   and some of the case-by-case exact  
8                   locations, we probably have the option of  
9                   going either way, either individual permits  
10                  or nation-wide permits.

11                  But we have flexibility on this. But  
12                  I would encourage you, we should probably  
13                  get the process rolling as soon as we can.  
14                  Because an individual permit can take awhile  
15                  anyway. And then because there are some  
16                  wild cards that we don't have any control  
17                  over, I think we should just get -- If we  
18                  want to meet your construction schedule, we  
19                  should probably get rolling.

20                  TOM ESCAISEGA: The first train  
21                  crossing will be 2004. That will be a  
22                  crossing in Poplar.

23                  ALAN STEINLEY: Okay. I would  
24                  definitely start consultation on that.  
25                  Maybe the best thing to do would be to come

1 back up here, have Larry come up and talk it  
2 over on a pre-application basis. And then  
3 maybe even get -- see what their needs or  
4 requirements are going to be, Fish &  
5 Wildlife.

6 JOE ELLIOTT: Right. We've had  
7 Rob getting them involved, but they need to  
8 be requested officially for their  
9 participation.

10 ALAN STEINLEY: Okay.  
11 Requested by whom?

12 JOE ELLIOTT: The Bureau of  
13 Reclamation. Or in our case, you can do it.  
14 You're another government agency, but I'm  
15 not a designated representative.

16 ALAN STEINLEY: Okay.

17 JOE ELLIOTT: So it's got  
18 to be from either you or the Bureau of  
19 Reclamation.

20 ALAN STEINLEY: Okay. So you  
21 can negotiate or consult directly with them.

22 JOE ELLIOTT: Well, we would  
23 consult -- We have to be designated as the  
24 representative, and we're not at this point.

25 ALAN STEINLEY: Okay.



1                   JOE ELLIOTT:  If the Bureau of  
2                   Reclamation maintains that themselves, but  
3                   they haven't made contact to any great  
4                   extent with the Fish & Wildlife Service.

5                   ALAN STEINLEY:  Okay.  Maybe  
6                   you folks can help me.  What's the  
7                   connection of the Bureau to your project?

8                   JOE ELLIOTT:  They're the  
9                   federal lead agency writing the documents.

10                  ALAN STEINLEY:  So they are  
11                  involved in the Fort Peck work, as well?

12                  JOE ELLIOTT:  Yes.

13                  ALAN STEINLEY:  Okay.  Well, in  
14                  that case, I'm sorry, I thought you were  
15                  saying earlier that they were not involved  
16                  in the Fort Peck project.  And if they are,  
17                  then ----

18                  JOE ELLIOTT:  No.  They're  
19                  involved in the Fort Peck project.

20                  ALAN STEINLEY:  All right.

21                  JOE ELLIOTT:  They're the lead  
22                  federal agency at this point.

23                  ALAN STEINLEY:  Good.  Then  
24                  they'll be responsible.

25                  JOE ELLIOTT:  I was actually

1 looking for somebody else that might be able  
2 to use a little government leverage to get  
3 the Fish & Wildlife Service involved.

4 ALAN STEINLEY: Yes. And I'd  
5 be glad to talk to the folks in Helena about  
6 who they would designate or if they're going  
7 to need help.

8 JOE ELLIOTT: They've  
9 designated a guy in Billings, but he's so  
10 overwhelmed that he can't really handle it.  
11 And the guys in Bismarck have volunteered  
12 very willingly to participate.

13 ALAN STEINLEY: Okay.

14 JOE ELLIOTT: And we've been  
15 really pushing for this to get them  
16 involved. We've had a lot of trouble  
17 getting it moving.

18 ALAN STEINLEY: Okay. Would  
19 you like me to inquire where they're at?

20 JOE ELLIOTT: Absolutely.

21 ALAN STEINLEY: Okay. Is there  
22 anything else? I'm not sure I answered all  
23 your questions.

24 COL KURT F. UBBELOHDE: Thanks,  
25 Alan.

1                   Are there any other issues that we  
2                   want to discuss further.

3                   TOM ESCAISEGA: No, I guess  
4                   that's it.

5                   COL KURT F. UBBELOHDE: Just as  
6                   a way of a recap, then, the Corps, we will  
7                   pull together as quickly as we can, a  
8                   response which addresses the various issues.  
9                   And one of the things ----

10                  DEB MADISON: I have one  
11                  request.

12                  COL KURT F. UBBELOHDE: Okay.

13                  DEB MADISON: Can we get  
14                  diagrams through the winter months? We've  
15                  got it from April through June, but there  
16                  isn't one in the RDEIS for July through  
17                  March.

18                  COL KURT F. UBBELOHDE: Flow  
19                  Diagram 1528 for the winter months.

20                  DEB MADISON: Yes. The release  
21                  is from the dam, from Fort Peck.

22                  COL KURT F. UBBELOHDE: The  
23                  release. In the 1528 model.

24                  DEB MADISON: July through  
25                  March. You have April, May and June.

1 COL KURT F. UBBELOHDE: Okay.

2 RICK MOORE: But those releases  
3 are only for, what, a three-week period,  
4 Jody, the 1528 releases, 15 in the spring --  
5 15,000?

6 JODY FARHAT: What are they,  
7 monthly releases?

8 COL KURT F. UBBELOHDE: From  
9 Fort Peck.

10 JODY FARHAT: Releases from  
11 Fort Peck Dam, the ones that aren't in there  
12 now?

13 DEB MADISON: Yes.

14 COL KURT F. UBBELOHDE: Okay.  
15 Thank you very much for the opportunity.

16 (Whereupon, the proceedings  
17 were concluded at 1:45 p.m.)

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25

1 STATE OF MONTANA )  
2 ) ss.  
3 COUNTY OF DAWSON )

4 I, RONALD J. LAPIERRE, a Notary  
5 Public of the State of Montana, and official  
6 Court Reporter of the Seventh Judicial  
7 District of the State of Montana, hereby  
8 certify that I reported in machine shorthand  
9 the above-entitled hearing and that the  
10 transcript herein set forth was done under  
11 my supervision and control and is a true and  
12 correct transcript of my original shorthand  
13 notes to the best of my ability.

14 I further certify that I am not a  
15 relative or employee or counsel or attorney  
16 for any of the parties in the foregoing  
17 proceeding, or in any way interested in the  
18 outcome of the cause.

19 IN WITNESS WHEREOF, I have hereunto  
20 set my hand and affixed my notarial seal  
21 this \_\_\_\_ day of February 2002.

22 \_\_\_\_\_  
23 RONALD J. LAPIERRE  
24 Official Court Reporter  
25 Dawson County Courthouse  
P. O. Box 1249  
Glendive, Montana 59330  
Phone (406) 365-2666



## HISTORIC PROPERTIES

The C.R.S.T. Preservation Office has reviewed the United States Army Corp of Engineers Missouri River Master Water Control Manual and prepared the following commentary on behalf of the Cheyenne River Sioux Tribe. Historic properties under National Historic Preservation Act include historic and prehistoric archaeological sites, historic architectural and engineering features and structures and resources of significance to Native Americans and other social or cultural groups. The Master Manual has a property value index for historic sites that reflects an increase or a decrease in value concerning impacts to sites based on water levels. The higher the value the less effect on a historic site. The value index is created upon the number of "known" sites that exist along the lakeshores and then mathematically computing the percentage of site degradation occurring as a result of a water level impact.

The National Historic Preservation Act identifies properties that are included under the term historic properties however NHPA does not include in its definition section any language pertaining to Traditional Cultural Properties (TCP). Traditional Cultural Properties are discussed in NPS Bulletin 38 and this document the Master Manual does not reference. NHPA does make reference to "*Traditional religious and cultural properties*" in section 101(6)(A) but it does not identify specifics and makes absolutely no mention of these in the definitions section 301 (16 U.S.C. 47w).

The tribal position is that the Corp has failed to adequately identify all of the property types that are located along the lakeshores and that it has based its property value index on outdated and inaccurate information. The database used to develop the value index is dated for 1993 while the technical report is dated 1994. Furthermore the tribe believes that the projected impact zone used by the Corp to assess and/or calculate impacts to sites is inadequate because it does not extend far enough off of the 1620 elevation line. Erosion along the lakeshore causes sloughing and this sloughing reaches back onto the land quite a distance from the lakeshore and sites that are located above the 1620 line and sites located out of the impact zone do receive impacts and suffer degradation as a result of sloughing. Another concern the tribe has concerns the east bank of the lakeshore. Corp take lands on the east bank do not extend as far back from the shoreline as they do on the west bank lands. The take lands on the east bank and the Corp

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Preservation Office  
COE Master Manual

obligation to mitigate and preserve known sites only extends to the take land boundary line. Sites located above this line are receiving impacts due to lake operations but are they included in the known sites listing?

The Corp data used to establish its value index is simply too old and outdated to be used as the basis for the index. A case in point is in 2001 surveys were done on 20+ recreation areas scheduled to transfer to the State of South Dakota. Known sites located at these recreation areas were surveyed to check their condition and determine if or how they had been impacted since their original discovery. In this particular project several of the sites listed in the database and revisited by Corp archaeological personnel to investigate them were gone. They had been eroded and washed out into the lake. The tribe asserts that follow up surveys on the "known" sites has not been done on a regular basis to gauge whether or not existing sites lying along the lakeshore are 100%, 75%, 50%, 25% intact or have already been destroyed. This is extremely important to know because this information directly affects the existing database. The tribal assumption is the value index is based upon the number of known sites and that these sites are at 100% integrity. If however this is not true then the database information is already flawed and inaccurate and the value of the sites is off.

## CONCLUSION

The tribe wants new surveys done on the lakeshores to locate and identify previously unknown sites referenced in NHPA but also TCP sites, which the Corp has little information on. Follow up surveys on known sites must be done to measure their current integrity against their original integrity when first recorded. To truly calculate the impact effect on sites based upon water levels TCP property types must also be included into the COE value index and all of the above concerns must be done. Remember that the alternatives presented in the Master Manual address impacts only to known historic properties and the tribal position is that no efforts have been made to factor in impacts to TCP sites or impacts to sites outside the projected impact zone. Based on the commentary the tribe at this time cannot endorse any of the alternatives currently listed in the Master Manual. If as we suspect that the database is inaccurate then the value index reflecting impacts to known sites is also inaccurate and does not portray a true measurement.





## TELEFAX COVER SHEET

Cheyenne River Sioux Tribe  
Preservation Office  
P.O. Box 590  
Eagle Butte, South Dakota 57625  
(605) 964 - 7554  
Fax: (605) 964 - 7552

DATE: 2/25/02

TO: MARY LEE Johns COE

FAX NO. 402-221-4886

FROM: Sebastian (Bronco) LeBeau C.R.S.T. Preservation Officer

NUMBER OF PAGES (INCLUDING COVER SHEET) 3

COMMENTS: HERE ARE my COMMENTS on the MASTER  
Manual. Sorry I couldn't deliver them on the  
11<sup>th</sup> & 12<sup>th</sup>

The C.R.S.T. Cultural Preservation Office was established in 1992 under the authority of Tribal Ordinance No. 57 the Cultural Resources Protection Act of the Cheyenne River Sioux Tribe. The Preservation Office is responsible for administering and regulating cultural preservation activities and those responsibilities include: Oral History, Repatriation, Historic Preservation, Tribal Archives.



## MASTERMANUAL NWD02

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**From:** tony provost  
**Sent:** Monday, February 25, 2002 3:28 PM  
**To:** Mastermanual  
**Subject:** Omaha Tribal Comments

To whom it may concern,

This letter is in regards the comments to the Missouri Master Manual from the Omaha Tribe of Nebraska and Iowa. The Missouri River has sustained our whole existance since the late 1700's to the present day. Prior to 1934, the river was untouched and prestine. Since then it has suffered massive amounts of pollutants and other changes. Without the consultation of Native's that have lived by the river for hundreds of years. Adding Dam's from Montana to South Dakota, altering its flow forever. Well, that was then, and this is now. With saying that, let me introduce myself. I am, Antione A. Provost, the Director of the Environmental Protection Department for the Omaha Tribe. I have full authority to comment on this subject by the Omaha Tribal Council and Donald Grant - Chairman. After several meetings with the tribal council over this matter, the following comments were the consensus of the Omaha Tribe of Nebraska and Iowa.

1. Consultation with the Omaha Tribe has been little or none at all.
2. Inherent Sovereign Water Rights of the Omaha Tribe have not been mentioned nor addressed.
3. No working relationship between the Omaha Tribe and The U.S. Army Core of Engineers.

There were other comments as well, yet these were the highlights. The different management plans were all very neat and scientific. However, the most simple aspects of them all were not addressed. Will the Land allow such changes? Thank you for your time and attention. If you have any other questions please feel free to contact me at your convience.

Antione A. Provost - Director

Omaha Tribe Environmental Protection Department

phone: 402-837-5291 fax: 402-837-5223

[provost@huntel.net](mailto:provost@huntel.net)

2.

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A2-412

3/10/2002

# FORT PECK TRIBES

Assiniboine & Sioux

February 27, 2002

**VIA FACSIMILE & U.S. MAIL**

Carl A. Strock, Brigadier General, Division Engineer  
U.S. Army Corps of Engineers, Northwestern Division  
Missouri River Master Manual RDEIS  
12565 West Center Road  
Omaha, NE 6814403869

Dear Brigader General Strock:

The Assiniboine and Sioux Fort Peck Tribes ("Tribes") hereby present written comments to the U.S. Army Corps of Engineers' ("USACOE") Revised Draft Environmental Impact Statement ("RDEIS") that was published on August 31, 2001.

The Tribes are extremely troubled by the changing face of the Missouri River and its precious ecosystem. The Tribes feel burdened with the challenge of restoring and protecting our reach of the Missouri River, when others are responsible for its current, degraded state. There is no question that federal water operations on the River have adversely impacted the environment and the River's ecosystem. The increasing demands on water resources and the resistance to conserve water also greatly contribute to the problem. The Tribes also fear that when we seek to exercise our senior water rights, we will be viewed as contributing to the problem instead of legitimately using water in a conservative manner to meet the needs of our people.

The Tribes are encouraged that the federal government is attempting to address these problems. However, as a general matter, the Tribes feel that the RDEIS does not provide a sufficient response. First, the Tribes found it extremely difficult to evaluate the RDEIS because it lacked a preferred alternative. This approach is contrary to NEPA and its regulations which require the federal agency to identify a preferred alternative or alternatives. 40 C.F.R. 1502.14. Second, the alternatives in the RDEIS contain serious information gaps that make it impossible to render an opinion. Likewise, the USACOE's model is deficient in that it does not include important data regarding the Tribes' reach of the river. The RDEIS also fails to consistently address mitigation measures, and furthermore, fails to specifically discuss impacts to tribal land use plans and policies, any conservation potential under each alternative, and impacts to historic and cultural resources on tribal lands. The Tribes are also greatly troubled by the lack of an analysis of impacts to water quality, especially since the Tribes have EPA-approved water quality standards under the Clean Water Act. The Tribes also found other issues, such as erosion, sedimentation, groundwater impacts, and baseline considerations, absent from the analysis.

These concerns are addressed in greater detail in the attachment prepared by the Tribes' Office of Environmental Protection. The Tribes request that this cover letter and the attachment be made a part of the administrative record and that the USACOE provide a response to these documents, as required under the NEPA process. The Tribes also request that government-to-government consultations continue to address the specific concerns raised herein to ensure that

A2-413



the Tribes' trust resources are not adversely impacted.

Your consideration of the Tribes' comments is greatly appreciated.

Sincerely,



*Arlyn* Arlyn Headdress  
Chairman  
Fort Peck Assiniboine and Sioux Tribes

cc: Jack McGraw, Regional Administrator, Region 8 EPA  
Ralph Morgenwech, Regional Office, USFWS  
Keith Beartusk, Director, Rocky Mountain Regional Office, BIA

US Army Corps of Engineers, Missouri River Revised Draft Environmental Impact Statement  
Comments for the Fort Peck Tribes  
prepared by  
the Office of Environmental Protection  
February 25, 2002

The U.S. Army Corps of Engineers ("USACOE") set forth fourteen parameters for impacts in the Revised Draft Environmental Impact Statement (RDEIS). Of the fourteen parameters, the USACOE claims to have examined nine parameters for the Fort Peck Indian Reservation. These fourteen evaluated impacts are wetland habitat, riparian habitat, tern and plover habitat, reservoir young fish production, reservoir coldwater fish habitat, river coldwater fish habitat, river warmwater fish habitat, native river fish physical habitat, flood control, water supply, hydropower, recreation, navigation, and historic properties. The nine impacts evaluated for Fort Peck include wetland habitat, riparian habitat, tern and plover habitat, river coldwater fish habitat, river warmwater fish habitat, native river fish physical habitat, flood control, water supply, and recreation.

The Missouri River reach extending from River Mile 1766 to River Mile 1630.4 serves as the Reservation's southern boundary and is the longest stretch of river located on Indian lands within the action area. Fort Peck's Reservation is located at the top of the basin and hence, is the first to be impacted by any modified flow regimes proposed by the USACOE. The Reservation is downstream of the first dam completed on the Missouri River System - the Fort Peck Dam.

Recently, American Rivers identified this stretch of the Missouri River as one of the most endangered river reaches in the United States and the State of Montana listed this reach as impaired on its 303(d) list. Pallid sturgeon, the piping plover, and the interior least tern are listed as endangered species that inhabit this stretch. Other species of concern on the Reservation include bald eagles, whooping cranes, paddlefish, sturgeon chub, and sicklefin chub.

The RDEIS laid out the original alternatives in the Draft EIS for the Master Manual, submitted alternatives from different stakeholders in the basin from the Preliminary Revised Draft EIS (PRDEIS) circulated in 1998, and new alternatives derived from the Biological Opinion submitted by the US Fish and Wildlife Service (USFWS), which raised management concerns for several endangered species including those listed above. The Tribes found that all of the alternatives were problematic. The only alternative which resulted in the least adverse impacts to the Tribes appears to be GP 1528, but given information gaps the Tribes have been unable to fully evaluate this alternative at this time.

Below is a short summary of these alternatives, followed with the Tribes' substantive comments to these alternatives.

## ORIGINAL ALTERNATIVES

Original alternatives evaluated in the RDEIS included the Current Water Control Plan (CWCP), navigation service criteria, nonnavigation service levels, flood control constraints, changed service levels during the navigation season to benefit fish and wildlife, intrasystem regulation of storage water among the upper three lakes, and release modifications at Fort Peck Dam to benefit downstream endangered species.

## SUBMITTED ALTERNATIVES

Submitted alternatives include the Missouri Levee and Drainage District (MLDDA), the Missouri River Basin Association (MRBA), American Rivers (AR), Missouri River Natural Resources Committee (MRNRC), Missouri Department of Conservation (MODC), and the USFWS's Draft Biological Opinion (BIOP) and FWS30. The American Rivers and Missouri River Natural Resources Committee recommendations were combined to form the ARNRC option. The BIOP and FWS30 are nearly identical except for the spring rise release target flows from Gavins Point Dam.

Differences in these submitted alternatives reflect the differences in the basin interest groups. The MLDDA is focused on reducing flood impacts, managing interior drainage, and high groundwater impacts on the farms field along the lower portion of the Lower River and is opposed to raising the level of Lake Oahe and overall asks for a increase in the annual operating pool for flood control from Gavins Point as well as opposing any plan to reduce flows to minimum flow for navigation.

The MRBA included additional storage in the upper reservoirs, reduction in navigation based on checks at critical periods throughout the year, unbalancing of the upper reservoirs, trial fish enhancement releases from Fort Peck Dam and Gavins Point Dam, habitat acquisition and enhancement, additional data acquisition with review from the National Academy of Science.

The ARNRC alternatives include increased spring flows and reduced summer flows from Gavins Point Dam, spring rise from Fort Peck Dam, stream bank erosion monitoring before, during and after spring rise, unbalancing of the three upper lakes, and adaptive management based on governmental monitoring and assessment programs.

Closely following the Modified Conservation Plan, the MODC alternative calls for unbalancing the upper reservoirs, a spring rise for Fort Peck Dam, increase storage in the reservoirs, and a flat release from Gavins Point from August 1<sup>st</sup> to September 15<sup>th</sup> of 41 kcfs. When compared to the Modified Conservation Plan, the major difference is the flat release occurs continually downstream from August 1<sup>st</sup> to August 20<sup>th</sup> at 34.5 kcfs.

BIOP and FWS30 include adaptive management, flow enhancement which includes a



spring rise from Fort Peck Dam, unbalanced intrasystem regulation, habitat restoration/creation/acquisition and also include releases from Gavins Point of increased spring rise of 17.5 kcfs over full service navigation and a reduced summer flow to 21kcfs. The FWS30 has these same provisions except it call for 30 kcfs spring rise from Gavins Point over full service navigation.

## NEW ALTERNATIVES

The Modified Control Plan (MCP) would include an adaptive management process, increasing minimum storage levels in the upper lakes to 43 MAF(million acre feet), applied navigation criteria based on the storage at strategic points during the year, intrasystem unbalancing of the upper three reservoirs, spring rise from Fort Peck, flat release from Gavins Point of 34.5kcfs.

The Gavins Point (GP) release alternatives are the same as the MCP with the exception of changes in releases from Gavins Point Dam. These options are GP 1528, GP 1521, GP 2021, and Gp2028. Under the GP options, the spring rise would occur every years between May 1 and June 15, as conditions allow. The potential starting point for the spring rise under the GP alternatives is 15 kcfs above full navigation service releases. The rise is intended to provide a spawning cue for the pallid sturgeon.

Summer flows would be lower every year as conditions allow under the GP options. The lower summer flows would occur on the lower river from mid June to September 1. These summer low flows range from 28.5 kcfs to 21 kcfs. The 28.5 kcfs would allow for reduced navigation services. The USACOE believes the GP options represent a reasonable compromise for the operation of the Mainstem Reservoir System (RDEIS Master Water Control Manual, Missouri River, August 2001, Volume 1: Main Report, Pp 6-4, 2<sup>nd</sup> paragraph).

## TRIBES' SUBSTANTIVE COMMENTS

### Adaptive Management Strategy

The Tribes support an adaptive management approach; provided, however, that the USACOE develop an accurate baseline for the Fort Peck Indian Reservation as described in Attachment A. This baseline assessment requested by the Tribes in October of 2001 was in response to the proposed spring rise from Fort Peck Dam, and is an element of every alternative except the CWCP and the MLDDA. The Tribes request representation on the Federal team. In addition, scientific interests should be participants in the team with expertise in the following areas: biology, water quality, geomorphology, riparian and wetland ecology. The Tribes further request that the team develop ongoing monitoring and analysis of erosion, deposition, groundwater levels, water quality, water supply, native versus non-native vegetation, and any other trust resources along the Fort Peck Reservation's reach of the Missouri River.

Tribal 21

Moreover, in addition to participating on the Federal team, the Tribes request that the federal government engage in government-to-government consultation with the Tribes in separate meetings, specifically with the Fish and Game Departments, Assiniboine and Sioux Rural Water System, and the Environmental Protection Department, to discuss and analyze the results of the Teams's activities, any proposed changes to the Annual Operating Plan, and any impacts to the Tribes' trust resources.

The Tribes believe that the USACOE should be the Team Leader for the Adaptive Management Planning process and should secure funding to ensure broad participation by all, and guidance from expertise in the areas of large river ecology, economics and water supply, to name a few. The plan outlined in the RDEIS is a first step, but it is evident that an effort to obtain funding for this process is essential.

### Wetland and Riparian Habitat

The USACOE evaluated the impact to wetland and riparian habitat only in terms of lost acreage. In this regard, the parameter is limited in scope. The current model does not address geomorphic activities. In addition, the current model, which uses the 100 year hydrology, would not reflect any new wetlands and riparian habitat that would be created under the new flow regimes. Given this lack of information, the Tribes are unable to completely evaluate any of the alternatives. The Tribes have identified deficiencies in the existing baseline of the USACOE and have identified a need for (1) a determination from aerial photography and other relevant information of the amount of wetland lost on the Reservation since the construction of Fort Peck Dam and (2) a plan for mitigation. This is required for adaptive management.

Cottonwood regeneration has been a high priority for the Tribes. Indeed, the Tribes are considering the option of planting in the new riparian corridor. Partial inundating of the cottonwood seedlings is important to wipe out competing vegetation. Although the riparian impacts developed by USACOE show a zero percent change from the CWCP, the Tribes question this finding and request a determination of the amount of cottonwood forest either damaged or lost since the construction of Fort Peck Dam. Furthermore, as stated above, the Tribes have identified deficiencies in the existing baseline of the USACOE and have identified a need for (1) a determination from aerial photography and other relevant information of the amount of cottonwood forest lost on the Reservation since the construction of Fort Peck Dam and (2) a plan for mitigation. This is required for adaptive management.

Oth.

The wetlands impacts under the submitted alternatives range from a negative 14% impact, under the BIOP alternative, to a positive 6% impact, under the MRBA alternative, when compared to the CWCP. For the selected alternatives, all of the GP options result in a negative impact when compared to the CWCP ranging from negative 14% to negative 7% under the GP 1528 and GP2028 respectively. We assume this loss is to increased water levels. However the MCP has a positive impact of 3%.

Loss of wetland habitat in a river system has impacts to the water quality and aquatic systems. Therefore, none of the GP alternatives, the MLDDA, BIOP or FWS30 would be acceptable. The ARNRC, MRBA, and MCP have small but positive effects on the wetland resource. However, the model cannot account for any newly created wetlands and therefore makes it difficult to support any of the listed alternatives.

In reality, the Tribes still suffer effects that result from the CWCP to begin with. The Fort Peck reach, which has the most riparian habitat of any Indian Reservation in the action area, also is only reach which would see a decrease in riparian vegetation under all of the submitted and selected alternatives except the MLDDA. With the maturity of the present cottonwood forest and the lack of regeneration, significant decline in the cottonwood forest and interrelated resources can be expected in the future. Thus, the Tribes are reluctant to endorse any alternative proposed by the USACOE since none of them provide a net benefit result to the Tribes' wetland and riparian habitat.

#### Tern and Plover Habitat

The habitat parameter is limited in scope and makes it difficult for the Tribes to endorse any of the proposed alternatives. The Tribes have an interest in this parameter since twenty-two percent of the Tern and Plover habitat is located on the Fort Peck reach. The Tern and Plover model simulates the vegetation encroachment and removal process as river flows and associated stages rise and fall in four river reaches. Unfortunately the model does not simulate the geomorphic process of island and sandbar building that takes place at very high flows with a relatively long duration, such as a spring rise.

Under the GP options, habitat for the terns and plovers is reduced along the Reservation segment of the river, dropping from the current 50.4 acres to a range of 27.4 acres to 36.5 acres. We assume this loss is to increased water levels. The Tribes are unclear as to why the USFWS advocates changes in releases from Gavins Point to protect habitat below that dam which also result in negative impacts to the habitat below Fort Peck Dam. Based on discussions with the USFWS and after review of the RDEIS, populations of these birds in the Fort Peck reach are quite low compared to the Garrison reach and the Gavins Point reach, both of which have the majority of the habitat downstream, roughly 62%. The increases in habitat acreage, approximately 137.8 acres or 77%, from the GP1528 option below Garrison and Gavins Point far exceed the losses below Fort Peck Dam.

#### River Coldwater and Warmwater Fish Habitat

The coldwater fish habitat parameter evaluates the amount of water released from the upstream dam and the water temperature. Generally, higher lake levels and higher releases result in more miles of coldwater habitat downstream from dams. All of the percent changes are positive for any of the alternatives and is much high for those alternative which keep additional water in the reservoirs for drought conservation. However, the model does not address spillway flows

expected from the spring rise which are higher in temperature. Under the GP 1528 option, modeled increases in the coldwater fish habitat increase by 11.1 miles or 7.9% compared to the CWCP, which is the lowest amount for any of the GP options. However, the lowest increase in coldwater fish habitat is the MRBA and MLDDA.

Under drought conditions of the late 1930s and early 1940s, the GP1528 option maintains higher habitat values during this period than the remaining alternatives. We assume this increase is due to increased water levels. However, coldwater fisheries in the river reach have propagated since the construction of the dam due to the reduced water temperatures and reduction in sediments.

Warm water fish habitat is based on total river miles available and has an inverse relationship to the coldwater fish habitat values. The higher the coldwater habitat mileage, the lower the warmwater habitat mileage. The model decreases the number of miles available for warmwater fish habitat, thereby negatively impacting warm fisheries. The Tribes have an interest in impacts to warmwater fish habitat since the Fort Peck reach below Fort Peck Dam has more than 60% of the warmwater fish habitat. All of the alternatives which call for a spring rise from Fort Peck Dam should be generally higher than presented because there is a warmer water release over the spillway. However, the USACOE's model does not include these spillway releases. Based on the available model, under the GP 1528 option, warmwater habitat would be reduced by 17%, just the opposite of the coldwater habitat changes, but to a greater degree. Increased releases from the dam would reduce the warmwater stream while increasing coldwater. The Tribes find this result disturbing and worthy of further evaluation.

In order for the Tribes to make an educated evaluation of the alternatives impact to fisheries, a more specialized model needs to be developed along with government-to-government consultation with USACOE and the USFWS. At best, the model is convoluted, at worst, it's completely incorrect regarding these parameters. Therefore the Tribes are unable to endorse any of the alternatives presented for consideration.

#### Native River Fish Physical Habitat

The model for native river fish was based on how the velocity and/or depth distributions match "natural" flow condition based on pre-Mainstem Reservoir System channel conditions. In April, May and June, the habitat value is dependent on the potential for overbank flooding (increased river levels due to the spring rise). Within the Fort Peck Reservation, the MCP and four GP option all increase the physical habitat index values for native river fish. The greatest index value increases occur under the GP 2028 and GP 1528 options.

It is important to remember that some of the native fisheries in the Fort Peck Reach are currently in a downward trend for population numbers. The sturgeon chub and sicklefin chub are considered species of special concern by the USFWS. Other sport species that are suffering

declines in numbers include the sauger and the paddlefish. The Tribes support any alternative which protects native river fish habitat, and especially any alternative which enhances that habitat. All of the alternatives except the MLDDA alternative increases native river fish habitat although most of the increases are only by one to two percent. The ARNRC increases the habitat by five percent.

### Water Supply, Flood Control, and Recreation

All of these parameters are influenced by river levels. Although no parameter is specifically addressed by river levels except possibly recreation, the model seems to be reflecting a higher river level. Currently, there are 109 water supply intakes and intake facilities located on the Missouri River serving the Fort Peck Reservation. All of the alternatives except the MLDDA and MRBA increase water supply benefits. The GP options increase water supply benefits to Fort Peck reach by 14 %, or a dollar amount of \$30,000 annually. The Tribes request that any purported benefit of 14% or \$30,000 annually needs to be weighed against any negative changes in erosion, sediment concentrations, river bed aggradation and degradation, and habitat. Flood control results in a negative 2% impact, the result of increased water levels, mostly due to the spring rise, amounting to roughly \$20,000 in losses along the Fort Peck Reach.

Under the GP1528 option, recreation appears to have an average eight percent increase in benefits, resulting in an increase of \$30,000 for the entire reach. However, there are only three boat ramps in this reach and only one boat ramp along the entire reach that borders the Reservation. Assuming that boat ramp access directly relates to the recreation dollar amount, the Tribes could expect a \$10,000 increase in recreation. In order to reap additional benefits, the Tribes would need to install additional boat ramps on the Reservation. The Tribes are currently working to develop additional access sites along the Missouri River.

### Other Parameters

The Tribes believe that the RDEIS impact evaluation is not comprehensive regarding the Fort Peck Reservation's reach on the Missouri River. Water quality, sedimentation, erosion, ice processes and cultural and historic properties need further evaluation by the USACOE. Obviously historical and cultural properties are important to the Tribes and the lack of an evaluation of this parameter is significant. Every effort should be made to make some kind of evaluation of the alternatives on this parameter.

Water quality is extremely important to the Tribes, especially since the Tribes have their own water quality standards and the listing of Fort Peck's reach on the State's 303(d) list. The RDEIS does not sufficiently evaluate water quality impacts. Although the RDEIS evaluates alternatives for mercury and metals impacts and shows a negative impact for the alternatives for aquatic life and a positive impact for habitat relating to thermal water quality standards, it

provides no numeric values for these impacts. In addition, there is no substantive discussion in any of the alternatives regarding how future water operations and uses on the River will impact water quality. The Tribes request government-to-government consultation with EPA and USACOE on this issue to determine water quality impacts once and for all.

The Tribes believe that the State of Montana and irrigators along the Fort Peck reach are very concerned about erosion and sedimentation from the spring rise. The Tribes share these concerns and have also informed the USACOE about the need for mitigation of impacts to intake sites on the Reservation. Again, the Tribes request a geomorphologic study of the river channel, similar to those being conducted between the USACOE and the State on the Yellowstone River, to determine impacts to the Reservation's resources. In addition, the State has requested a maximum 9000 cfs winter release for the Fort Peck Dam in order to stabilize banks below Fort Peck Dam upset by ice erosion. Based on the draft results of the ice study for this segment of the river, the Tribes would support that release ceiling.

### Hydropower and Navigation

Although the Fort Peck Reservation is not directly involved in hydropower or navigation, it is important to consider how these economic activities impact the Tribes. Hydropower is of particular interest to the Tribes due to the fact that the Tribes have an allocation of Pick-Sloan power for both the Assiniboine and Sioux Rural Water System and at-large uses throughout the Reservation. Of all the alternatives, the greatest hydropower benefits occur under the GP 1528 option (RDEIS August 2001, 7-144 paragraph 2). Average annual impacts to Western Area Power Administration (WAPA) for meeting Pick-Sloan firm power commitments increase by 8.6 million dollars compared to the CWCP. As increased reliance on Federal power goes up, those power suppliers that have a higher percent of Federal power are also affected. If the amount of electricity generated drops under any of the alternatives, power companies would be forced to fill their electrical obligations with higher electrical contracts, which would increase rates to individual households on these systems.

Navigation economic impacts would be reduced under all of the alternatives presented for review. Of the GP options, the GP1528 option exhibits the mildest impact to navigation reducing the economic impact by 1.66 million dollars or twenty four percent while the GP1521 option reduces navigation benefits by 5.98 million dollars or eighty six percent. The GP1528 option provides for 86 full or partial service years over a 100 year period. Although navigation does not directly effect the Tribes, all of the alternatives are tied to navigation service criteria. The MLDDA provides the highest benefits of all the alternatives to navigation, but provides very little change to any of the parameters evaluated for the Fort Peck Reach, as it is closely tied to the CWCP.

## Summary

In sum, the Tribes believe that there are numerous problems with the majority of the alternatives presented, that there are some positive aspects that are mostly found in GP 1528, but that the Tribes cannot endorse any specific proposal at this time because of model deficiencies, the absence of certain important parameters, and the lack of a comprehensive evaluation regarding impacts to the Tribes' trust resources.

## ATTACHMENT A

October 4, 2001

U. S. Army Corps of Engineers  
Northwest Division  
12565 West Center Road  
Omaha, Nebraska 68144-3869

ATTN: Missouri River Master Manual RDEIS

Dear RDEIS Staff:

These comments on the "Fort Peck spring rise" are formally filed by the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in northeastern Montana. The Tribes' Reservation is bounded on the south by the Missouri River below Fort Peck Dam over a distance of 141 miles, between river miles 1621 and 1762. Our interest in this matter is significant. Approximately 75% of the north or left bank of the Missouri River between Fort Peck Dam and the backwaters of Lake Sakakawea near the border with North Dakota lie within the Fort Peck Indian Reservation in the reach to be affected by testing and future operations to generate a spring rise.

The Tribes have previously corresponded with Becky Latke relative to the "mini" and "full" tests to ensure preservation and protection of our valuable Missouri River and its valley. Please review that correspondence, which has been largely ignored. We have been advised recently by the Corps' staff on the testing that they really do not have "jurisdiction" over the matters raised by the Tribes with them nearly a year ago, but that Division has jurisdiction over all matters except the "mini" test. It would have been helpful to have known earlier. Until recently, the staff dedicated to the testing dealt with us as if they were responsible for responding to our concerns.

There has been no substantive consultation nor coordination with the Assiniboine and Sioux Tribes respecting the "Fort Peck mini-test" or the "Fort Peck full-test" as required by the "Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994; 3 CFR, 1994 comp., p. 1007) or Executive Order 13175 (Nov. 6, 2000). In this case, the degree of proprietary interests of the Tribes, tribal members and private landowners within the Fort Peck Indian Reservation compel attention to our concerns respecting the testing and any proposed changes in the operation of Fort Peck Dam in furtherance of the update and revision of the Master Manual for the operation of the Missouri River.

Executive Order 13175 acknowledges a unique legal relationship with Indian tribal governments set forth in the Constitution of the United States, treaties, statutes, Executive Orders and court decisions, including the enactment of numerous statutes and promulgation of numerous regulations that establish and define a trust relationship with Indian tribes.

Until our concerns are fully addressed and action is taken by the governing body of the Tribes, the Corps of Engineers is respectfully requested to comply with Executive Order 13175 and to refrain from testing. Any testing is opposed until our concerns and requests are addressed as set forth below.



The Assiniboine and Sioux Tribes and Dry Prairie Rural Water are the beneficiaries of Public Law 106-382, the Fort Peck Reservation Rural Water System Act of 2000, executed by the President on October 27, 2000, which provides, among other things, for the diversion of Missouri River water at an intake near Poplar, Montana, treatment of diverted water to meet requirements on the Safe Drinking Water Act, as amended, and distribution of drinking water throughout the Fort Peck Indian Reservation and a four county area of northeastern Montana. The Corps of Engineers must provide the Tribes with a plan for protection of the intake site, including related facilities in the floodplain of the Missouri River, and a plan for mitigation and/or replacement of facilities stemming from the full-test and any proposed change in operating procedures at Fort Peck Dam to accommodate a future, artificial spring rise. The plan for mitigation and/or replacement of facilities must address a mechanism for financing repairs and/or replacement of the intake and related facilities through funds available from the Corps of Engineers or federal entities other than the entity established for the operation, maintenance and replacement of the Fort Peck Reservation Rural Water System.

The Corps of Engineers must likewise provide the Tribes with a plan for funding the additional costs of treating Missouri River water to remove enhanced levels of suspended solids at the water treatment plant for the Fort Peck Reservation Rural Water System.

The Corps of Engineers must provide the Tribes with a plan for protection /mitigation/ replacement/funding of existing intake sites along the north bank of the Missouri River for the Fort Peck Irrigation Project and for other intakes for irrigation or other purposes, including new tribally-proposed irrigation intakes, within the boundaries of the Reservation.

The Corps of Engineers must provide an analysis of the impact of the mini-test, full-test and any future operational changes at Fort Peck Dam on the erosion of the north or left bank of the Missouri River. The analysis should include the impact of future operations on the mechanisms of accretion and avulsion and the impact of future operations on changes in ownership that might be caused by movement of the banks or channels of the Missouri River. The analysis should also include the impact of future operations on the elevation of the bed of the River as a result of aggradation or degradation. The analysis should provide maps of the Missouri River Valley between the east and west boundaries of the Fort Peck Indian Reservation outlining the soil types, geologic anomalies and any other factors that will permit definition of areas more susceptible to erosion and areas less susceptible to erosion. The analysis must provide conclusions with respect to means of compensating landowners within the Fort Peck Indian Reservation for loss of land whether those landowners are the Tribes, allottees or private owners.

The Corps of Engineers must provide a plan for review by the governing body for assurances of safety during testing and future operations. The plan should address, among other things, the methods of notification and warning before and during testing or operating procedures to artificially produce a spring rise. The plan should acknowledge and address warning and safety procedures for cultural and spiritual ceremonialists, recreationists, landowners, wood gatherers, hunters, fishermen and others, that would normally occupy the River, its banks and its floodplain. The plan should also address the potential for rainfall and/or snow melt events in the Missouri River Basin above Fort Peck Dam, such as the 1948, 1952 and 1964 events, and a loss of flood control capability due to revised operational procedures to maintain reservoir levels at or near spillway elevations in the May/June period in order to accomplish the release of water from the spillway for an enhanced spring rise. The plan should also address any known concerns with regard to the capability of the spillway to perform properly during the mini-test, the full-test or during future operations.

The Corps of Engineers must provide a plan for review by the governing body for the protection of human remains, cultural, historical and archeological resources known to exist in the Missouri River Valley and that may in the future be exposed by testing and/or future operating procedures.

The Corps of Engineers must clearly present a report to the governing body on the benefits to the Tribes, their lands and their resources of the proposed revisions in operations of Fort Peck Dam. The report must address economic, environmental and cultural benefits. The report must also address the impact of the mini-test, full-test and any future operational changes on aquatic habitat, riparian habitat (with special attention on our cottonwood forest), endangered or threatened species and upon species that are not threatened or endangered. Moreover, the report must address the impact of changes in operation of Fort Peck Dam on hydropower resources of the Eastern Division of Pick-Sloan and, more specifically, on the resource pool from which the Fort Peck Assiniboine and Sioux Tribes will receive federal power at preference rates beginning January 1, 2001. The report should provide the Tribes with an assessment of the financial impact of operational changes on the Tribes' hydropower allocation as well as the financial impact on the Tribes from any other positive or negative changes.

Finally, the Corps of Engineers must prepare and present a detailed plan to establish field baseline conditions and thereafter to monitor changes in the field to the River banks, the River bed, suspended sediments, bedload, aquatic habitat, riparian habitat and other resources and facilities. The plan should describe how changes caused by revised operating procedures will be determined (relative to historic operating procedures) and how those determinations of marginal changes will be used to define damages, mitigation requirements and compensation. Independent investigations have been undertaken by the tribes on the increase in suspended sediments that may be expected as a result of the spring rise. Those investigations conclude that a 7% increase in suspended sediment can be expected with a change in flows from the historic pattern to the proposed pattern with spring rise. This is of significant concern and inter-relates with aggradation, degradation, bank erosion, riparian habitat and other resources. The Tribes are willing to share this analysis with the Corps of Engineers given a showing of attention to our concerns.

Please provide the name of a Corps of Engineers representative responsible for this matter and a time frame for response to our request for consultation and coordination consistent with Executive Order 13175. The Tribes are willing to correspond and/or meet with representatives of the Corps of Engineers at any time to clarify our concerns and requests.

Sincerely,

---

Arlyn Headdress, Chairman  
Fort Peck Assiniboine and Sioux Tribes

cc    The Honorable Conrad Burns  
      The Honorable Max Baucus  
      The Honorable Dennis Rehberg  
      The Honorable Judy Martz  
      Secretary Gale Norton  
      Rick Knick



**FORT PECK ASSINIBOINE & SIOUX TRIBES  
NORMAN HOLLOW RESOURCE CENTER**

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**OEP-4163**

Carl A. Strock, Brigadier General,  
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U.S. Army Corps of Engineers,  
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Missouri River Master Manual RDEIS  
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A2-427



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Avis Little Eagle  
Bear Soldier District

Milton Brown Otter  
Rock Creek District

Allen Flying Bye  
Little Eagle District

Randal White Sr.  
Porcupine District

**AT LARGE**

Jesse Taken Alive

Reva Gates

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Miles McAllister

Ron Brown Otter

Isaac Dog Eagle, Jr.

February 27, 2002

Colonel David Fastabend  
Army Corps of Engineers  
Northwestern Division  
12565 West Center Road  
Omaha, Nebraska 68144-3869

RE: Missouri River Master Water Control Manual Review and  
Update Revised Draft Environmental Impact Statement

Dear Colonel Fastabend:

Enclosed you shall find the comments of the Standing Rock Sioux Tribe on the above referenced matter. For the reasons outlined therein, the Standing Rock Sioux Tribe rejects the RDEIS.

I am extremely concerned with this matter. I look forward to discussing it with you soon.

Sincerely,

Charles W. Murphy, Chairman  
Standing Rock Sioux Tribe  
Fort Yates, North Dakota 58538

A2-429



Standing Rock Sioux Tribe  
Rejection of the Army Corps of Engineers  
Revised Draft Environmental Impact Statement  
Missouri River Master Water Control Manual Review and Update  
February 20, 2002

I. Introduction

Historically and today, no agency of the United States government has harmed the Standing Rock Sioux Tribe as much as the Army Corps of Engineers. In 1958, the Corps rammed through Congress Public 85-915, providing for the forced acquisition of 56,000 acres of valuable Missouri River bottomlands from the Standing Rock Sioux Tribe. The Corps inundated and destroyed most of this land, for the site of Oahe Reservoir.

Today, the Corps refuses to restore lands taken but not used for Oahe Reservoir. With respect to Missouri River water management, the Corps has released the Revised Draft Environmental Impact Statement for the Missouri River Master Water Control Manual (RDEIS), in August 2001. The RDEIS provides for the allocation of water that is subject to the Winters Doctrine claims of the Standing Rock Sioux Tribe, for endangered species habitat and other non-Indian uses.

In the RDEIS, the Corps of Engineers proposes to supply water that is needed on the Standing Rock Indian Reservation for Indian water uses and for the survival of the Standing Rock Sioux Tribe, for downstream water flows below Gavins Point Dam. The "GP," "MCP" and "CWCP" alternatives proposed by the Corps in the RDEIS shall result in the confiscation of our water. The Standing Rock Sioux Tribe strongly opposes all alternatives contained in the RDEIS. New alternatives should be developed, for the protection of Indian water rights through future depletions, and for the protection of Native American cultural resources.

The Standing Rock Sioux Tribe objects to the RDEIS, for the following reasons -

1. The alternatives contained in the RDEIS provide for non-Indian water flows and water uses, although the water is subject to the claims of the Standing Rock Sioux Tribe under the Winters Doctrine. No provision is made for full use of the water to which our Tribe is entitled under the Winters Doctrine. The RDEIS threatens and suppresses the water rights of the Tribe.

2. The RDEIS fails to account for the destruction of Native American cultural resources on the Missouri River, and fails to provide any alternative for the protection of these resources.

3. The RDEIS fails to account for the environmental damage and destruction on the Standing Rock Indian Reservation resulting from the Pick-Sloan program and the on-going Corps of Engineers' operations.

4. The RDEIS lacks any provisions for mitigation of the damage to the Standing Rock Reservation in violation of the Executive Order on Environmental Justice, (E.O. 12898).

5. In the NEPA process, the Corps has failed to undertake any meaningful discussion and dialogue with the Standing Rock Sioux Tribe as required in Executive Order 13175. Public meetings are mere formalities, and the concerns of the Tribe are never addressed.

## II. Illegal Suppression of Indian Water Rights in RDEIS

The position of the Standing Rock Sioux Tribe with respect to the Corps of Engineers' impacts on the Tribe's water rights is embodied in Standing Rock Sioux Tribe Resolution 106-01 (attached hereto). This Resolution states in part

WHEREAS, notwithstanding the injunctions of Lord Baltimore, King George III and favorable decisions of the United States Supreme Court, in practice, Congress, the executive branch and the judiciary have (1) limited Indian reserved water rights, (2) suppressed development of Indian reserved water rights; and (3) permitted reliance by state, federal, environmental and private interests on Indian water, contrary to trust obligations. The federal policy clearly has been... "how best to transfer Indian lands and resources to non-Indians" ...rather than to preserve, protect develop and utilize those resources for the benefits of the Indians. (United States v. Ahtanum Irrigation District, 236 F.2d 321, 327 (9th Cir. 1958)).....

WHEREAS, the means employed by the Corps of Engineers to deny consideration of Indian water rights in the preparation of the Master Manual and those same means employed by the Department of the Interior to deny consideration of Indian reserved water rights in baseline environmental studies of endangered species (constitute) diminishment of property rights...



NOW THEREFORE BE IT RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe rejects the Master Manual Review and Update by the U.S. Army Corps of Engineers for the express reason that it establishes a plan for the future operation of the Missouri River addressing inferior downstream navigation, upstream recreation and endangered species water claims of the States and Federal interests and specifically denies proper consideration or any consideration of the superior, vested water rights of the Standing Rock Sioux Tribe while committing reservoir releases to purposes and interests in direct opposition to those of the Tribe.

Pre-eminent Indian law scholar Felix Cohen described the Tribe's conundrum as follows -

Application of a duty of loyalty to administrative officials in their dealing with Indians is of particular importance because conflicts of interests between Indian claims to natural resources and the programs and policies of agencies not directly responsible for Indian affairs frequently impede the faithful discharge of trust obligations to Indian by federal officials. Indian Tribes have claims...to water which is coveted for non-Indian water, power and flood control projects by the Corps of Engineers... Non-Indians are more numerous and usually politically more powerful, so substantial political pressure can frequently be applied on executive officials to compromise or ignore Indian rights.

F. Cohen, *Handbook of Federal Indian Law*, 225 (1982 ed.), pp. 227-228.

This is precisely what is occurring in the Missouri River basin. In the Missouri River RDEIS, the Corps has clearly responded to the economics of hydropower, upstream recreation, and to environmental values. Yet the RDEIS ignores the future water depletions planned by the Tribe under the Winters Doctrine.

The Standing Rock Sioux Tribe claims water rights to the Missouri River, its tributaries and the basin's groundwater of not less than 1.3 million acre-feet. As trustee for the Tribe, the United States has a duty to protect and enhance these rights. Consequently, the Corps of Engineers must operate the dams in a manner which respects the right of the Standing Rock Sioux Tribe to utilize our water for irrigation, domestic supplies, livestock, industry, wildlife enhancement, cultural resources and other beneficial uses. The RDEIS fails to do so.

The U.S. Supreme Court has determined that when the Indian Tribes reserved rights to land, we similarly reserved the right to use that amount of water needed to survive and prosper on our Reservations. *Winters v. United*

*States*, 207 U.S. 564 (1907). The Court held that "The power of the Government to reserve the waters (for the Indian Tribe) and exempt them from appropriation under the state laws is not denied and could not be..... the Government did reserve them.... and for a use which would be necessarily extended through the years." 207 U.S. at 576.

Later in this century, when Indian reserved water rights were attacked by non-Indian water users in the Colorado River basin, the Supreme Court reconfirmed these principles. In *Arizona v. California*, the Court held that "when the United States created these reservations, or added to them, it reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands." 373 U.S. 546, 596 (1963).

The RDEIS proposes water management alternatives that undermine our rights to the use of water, in favor of non-Indian water uses such as navigation, recreation, hydropower and water supply, and for endangered species habitat. Waters subject to the claims of the Standing Rock Sioux Tribe under the principles enunciated by the United States Supreme Court in the *Winters* case are allocated to non-Indians and to ameliorate damage to the habitat of endangered species that has been caused by non-Indian development.

In the RDEIS, the Corps of Engineers proposes to put Standing Rock's water to use by others. This diminishes our ability to use our own water.

The alternatives considered by the Corps of Engineers in the RDEIS rely exclusively on the current level of depletions in the Missouri River to arrive at its conclusions. Yet the Corps of Engineers' own depletions analysis clearly demonstrates that the level of claims and actual future use by Tribes, including Standing Rock, shall have a significant impact on the Missouri River. This is completely ignored in the RDEIS.

The RDEIS fails to address both the impact of its alternatives on the water rights of the Standing Rock Sioux and other Indian Tribes, and the impact of the Tribe's water claims on the alternatives themselves. The Corps simply concludes that the future operations of the Missouri River would be adjusted to accommodate future perfected uses by the Tribes. The Corps proceeds on the presumption that Indian water rights shall not impact future operations on the Missouri River.

The RDEIS is a flawed planning guide that addresses the needs non-Indian water users and environmental interests and ignores future water users by Tribes such as Standing Rock, which possess very extensive water claims. The fact that it fails to contemplate future Indian uses has the effect of minimizing the prospect of future Indian uses, because the water is allocated for other uses.

In its depletions analysis, the Corps has determined that there is 7.1 million acre-feet of water in the Missouri River, which, when depleted, impacts the existing non-Indian uses. Clearly, there is adequate water in the Missouri

River to accommodate the consumptive and non-consumptive water needs of the Standing Rock Sioux Tribe.

In the final Environmental Impact Statement, the Corps should affirmatively commit to assisting Standing Rock in putting water to use and protecting our water rights. With respect to water rights, the Corps should recognize that Standing Rock possesses a justified claim under the *Winters Doctrine* of not less than 1.3 million acre-feet of water, and set aside 1.3 million acre-feet from the 7.1 million acre-feet of surplus water, for consumptive use at Standing Rock.

In the final EIS, the Corps should identify the Lake Oahe water levels that are required to supply the water intakes on the Standing Rock Reservation, including intakes for domestic water supplies at Fort Yates and Wakpala, and for irrigation at Fort Yates and for the Eagle Unit irrigation project on the Grand River, and select no alternative in the Environmental Impact Statement that would threaten these intakes during periods of drought. In addition, there should be a calculation of the lost economic opportunities on the Standing Rock Reservation due to the Pick-Sloan program, and develop a plan to redress these losses through greater participation in the National Economic Development benefits of Pick-Sloan. The valuations contained in the RDEIS are inaccurate, for failure to account for these costs that our Tribe bears.

The RDEIS misstates the import of Indian reserved water rights. The RDEIS states-

*Certain Missouri River basin Indian Tribes are entitled to water rights in streams running through and along their reservations under the Winters Doctrine.... The basin Indian Tribes are in various stages of quantifying their rights. Currently, tribal reservation reserved water rights have not been quantified in an appropriate legal forum or compact except in four instances...*

*The Study considered only existing consumptive uses and depletions.*

COE, RDEIS, 3-113.

This seriously misstates the nature of Indian water rights, and the responsibility of the Corps of Engineers to act in accordance with our rights. The Corps' must revise its description of Indian water rights for the final EIS.

The water rights of the Tribes under the *Winters Doctrine* are vested, perfected rights. *Arizona v. California*. Standing Rock has not quantified our *Winters Doctrine* water rights. We oppose the quantification of our reserved water rights, because there is no fair or adequate legal forum. However, the Standing Rock Sioux Tribe owns our water regardless of whether our rights have been quantified. It is ludicrous to suggest that Standing Rock "may be

entitled" to reserved water rights to the Missouri's main stem. This blatantly contradicts the status of the law.

Indian reserved water rights are vested, regardless of whether they have been quantified. Standing Rock possesses the right to use all of the water from the Missouri River (and its tributaries and groundwater) that is reasonably needed for all beneficial uses. *Arizona v. California*. But the Corps of Engineers mis-states the existence of our rights, and ignores the impact that our rights, when exercised, shall have on existing uses. It is suggested that there is some vagueness underlying Indian reserved water rights. The Corps overstates the import of quantification of Indian water rights, and falsely suggests that Indian reserved water rights need not be recognized if they are not quantified.

Indian water rights in the Missouri River are extensive and will dramatically impact water resource allocation in the Missouri in the 21st century. This must be clearly acknowledged in the RDEIS. By failing to do so, the Corps of Engineers diminishes our ability to use implement our reserved water rights, for the survival of the Standing Rock Sioux Tribe.

University of South Dakota Law Professor John H. Davidson described the jeopardy put on our rights by the Corps of Engineers as follows -

*...the final Master Manual may lock in the status of 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.*

John H. Davidson, *Indian Water Rights, the Missouri River, and the Administrative Process: What are the Questions?* 24 American Indian L. Rev. 1, 10 (2000).

As stated in Standing Rock Sioux Tribe Resolution 106-01, the Tribe takes the threat to our water rights from the Corps of Engineers very seriously. We shall use all forums available in international and federal law to defend these valuable rights against the attack of the Corps of Engineers that is contained in the RDEIS.

### III. Illegal Treatment of Native American Cultural Resources

In the Missouri River operations and the RDEIS, the Corps of Engineers violates numerous federal historic preservation laws that are very important to our Tribe.

The National Historic Preservation Act requires that "all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency." 16 U.S.C. §470h-2(a)(1). The agency shall ensure that cultural resources "are managed And maintained in a way that considers the preservation of their historic, archaeological... and cultural values..." §470h-2(a)(2). Before any undertakings - such as release of water from a dam - the agency must "take into account the effect of the undertaking" on cultural resources. 16 U.S.C. §470f. The Corps of Engineers is responsible for ensuring "that historic properties under the jurisdiction or control of (the Corps) are identified, evaluated, and nominated to the National Register." 16 U.S.C. §470h-2.

The Native American Graves Protection and Repatriation Act (NAGPRA) also applies. 25 U.S.C. §3001 et seq. Under NAGPRA, human remains or funerary objects on Corps projects lands within the Standing Rock Reservation belong to the Standing Rock Sioux Tribe. 25 U.S.C. §3002(a)(2). The Tribe also owns such items that located on Corps land outside of the Reservation, but which can be identified as Standing Rock Sioux. *Id.* Once an inadvertent discovery takes place, no additional damage may be done, and the objects must be immediately transferred to the custody of the Tribe, which is empowered to perform repatriation. 25 U.S.C. §3002(a).

The Advisory Council on Historic Preservation has determined that under the Current Water Control Plan (alternative CWCP in the RDEIS) the Corps of Engineers is seriously violating these provisions. On July 17, 2000, the National Advisory Council on Historic Preservation terminated its Programmatic Agreement with the Corps of Engineers, for management of cultural sites on Missouri River Basin Pick-Sloan Program lands. The Council stated -

*The PA was intended to allow the Corps greater flexibility in how it met its obligations under section 106 while fostering better long-term planning for and stewardship of historic properties. The most recent occurrence with the White Swan burial ground serves to illustrate the degree to which the Omaha District has disregarded commitments it made in the PA and the resulting consequences this has had for irreplaceable resources under its care. The council is forced to conclude that the Corps is unable, or unwilling to carry out the terms of the PA.*

Cathryn Buford Slater, Chairperson, National Advisory Council on Historic Preservation, Letter to Louis Caldera, Secretary of the Army, dated July 17, 2000, p. 2.

The NHPA requires that "such properties... are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values..." 16 U.S.C. §470h-2(2)(B). Moreover, the defendants' "preservation-related activities (must be) carried out in consultation with ... Indian Tribes." 16 U.S.C. §470h-2(2)(D).

The RDEIS fails to address this matter at all. There should be one or more "Cultural resources protection alternative" in the RDEIS. The document contains numerous alternatives for protection of threatened and endangered species - there is an entire set of such alternatives denominated as the GP alternatives. However, there is no similar consideration of the need to protect Native American cultural resources, notwithstanding the statutory responsibility of the Corps to protect these sites.

In the RDEIS, the Corps mistakes "destruction" for "protection." The RDEIS states on page 7-183,

*Undiscovered sites within the lake have already been damaged to some extent by inundation; however, inundated sites are somewhat protected from the adverse effects of shoreline erosion and looting.*

COE RDEIS, 7-183.

The inundated sites are completely destroyed, by definition. This constitutes a violation of section 106 of the NHPA, as evidenced by the Advisory Council termination of the Programmatic Agreement.

The RDEIS states -

*The assumption for potential erosive action was that the site had to be within 3 feet above and 5 feet below the water surface of the lake to be effected by erosive forces.*

COE RDEIS, 7-183.

Under the Current Water Control Plan, Lake Oahe is subject to fluctuations of over 20 feet. The intrasystem regulation of the upper reservoirs and the spring rise provided under the GP alternatives shall exacerbate the fluctuation in water levels. Accordingly, the 8 foot zone of study for erosive effects is far too narrow, and significantly understates the actual impact on the resource. It must be broadened, to 30 feet, to adequately account for the increased damage under the GP alternatives. Otherwise, actual erosive impacts are not included in the model.

In the RDEIS, the Corps recognized the existence of "historic properties" along the reservoirs. The Corps identifies 158 sites at Fort Peck, 676 at Lake Sakakawea and 945 at Lake Oahe.

Nevertheless, the entire framework for these analysis on pages 7-183 - 7-185 is flawed. Due to lack of consultation with Tribes as required under the NHPA and NAGPRA, there is a substantial amount of information in this area which the COE does not possess. The scope of the survey is too limited. For those sites which have been identified, the COE does not properly identify the significance of the sites.

In the RDEIS, the Corps fails to adequately consider the need to protect these sites. As is evidenced by the Advisory Council termination of the Programmatic Agreement, the Corps is in violation of these requirements, under the Current Water Control Plan. None of the other alternatives contained in the RDEIS contain more protections. The RDEIS provides no provision whatsoever for compliance.

Ultimately, the NHPA and NAGPRA require that water and land management schemes must be integrated for the protection of Indian remains and cultural resources. The protection of these sites must be a priority of an integrated management scheme.

The RDEIS makes no provision for this. It violates the National Historic Preservation Act and Native American Graves Protection and Repatriation Act. The Standing Rock Sioux Tribe stands prepared to defend our rights under these laws.

#### IV. Failure to Account for and Mitigate Environmental Damage on the Standing Rock Indian Reservation

The RDEIS fails to account for and mitigate the environmental damage on the Standing Rock Indian Reservation. This includes the destruction of Tribal communities on the Standing Rock Reservation, harm to plant and wildlife resources, flood damage in Wapakala, erosion of Tribal lands along Lake Oahe, and water quality in Lake Oahe. There are no provisions to mitigate this damage.

The DEIS ignores the widespread destruction caused by the Pick-Sloan project on our Indian Reservations of the Missouri River basin. The scholar and best-selling author, Vine Deloria, Jr., an enrolled member of the Standing Rock Sioux Tribe, has described Pick-Sloan as "the singlemost destructive act ever perpetuated on any tribe by the United States."

After the destruction of the buffalo herds and the establishment of the Reservation lifestyle at the turn of the century, the economy on the Standing Rock Reservation depended in large part on the natural resources found in the

Missouri River bottomlands. The riparian area along the Missouri contained shaded grazing land and accessible water. Wildlife was abundant. Timber was available for fuel. Several communities on the Standing rock Reservation relied on these resources, and became economically self sufficient, well into the twentieth century.

The Pick-Sloan program destroyed these resources on the Reservation. Four communities on Standing Rock were relocated in whole or in part. Author Michael Lawson has described Pick-Sloan's impacts as follows:

The shaded bottom lands provided a pleasant living environment with plenty of wood, game, water and natural food resources. The trees along the Missouri and its tributaries were a primary source of fuel and lumber for the tribes and (provided protection)... from the ravages of winter and the scorching summer heat. The gathering and preserving of wild fruits and vegetables was traditional facet of Plains Indian culture. The numerous types of herbs, roots, berries and beans that grew in the bottom lands added bulk and variety to the diet, and were used for medicinal and ceremonial purposes.

The wooded bottom lands also served as shelter and feeding grounds for many species of wildlife, and hunting and trapping were important sources of food, income, and recreation for the tribes. The loss of bottom land grazing areas crippled tribal livestock operations, once the primary industry on many reservations. Artificial shelters had to be built to replace the natural resources of the old habitat. Stock raising thus became far more difficult, expensive, and risky....

The Pick-Sloan projects damaged every aspect of reservation life. Abruptly the tribes lost the basis for their subsistence and had to develop new ways of making a living in a cash economy. The relocation of the agency headquarters and largest communities on Fort Berthold, Cheyenne River, Crow Creek and Lower Brule disrupted federal and tribal services, and tipped the social, economic, and religious fabric of the well-integrated tribal life. It was especially onerous for the Indians to excavate their cemeteries and private burial grounds and to relocate their ancestors' remains.

Psychological and aesthetic damages are impossible to measure, but the Indians' lifestyle made the effects of Pick-Sloan especially difficult. Unlike most non-Indians affected by public works projects, these tribal members could not



duplicate their old ways of life by moving to a similar environment. Their old ways of life were shaped by a land which no longer existed, after the bottom lands were flooded....

The marginal lands which remained after inundation could not replace the natural advantages of the Indians' former homes. The barren uplands regions where the Indians were forced to move, were less hospitable and more difficult to survive.

Michael M. Lawson, Dammed Indians - Pick-Sloan Plan and the Missouri River Sioux, University of Oklahoma Press (1982), pp. 29, 56-7.

The Environmental Impact Statement must tell this story. Indian land was used for the sites of the projects; Indian water is used to produce hydropower, support navigation, and for the other uses of the system.

Prior to construction of Oahe Dam, the plant life in the Missouri River bottomlands on the Reservation enhanced the quality of life for our Tribal members. The draws carved into the riparian area at the crest of the river bottom contained cherry bushes and plum trees. There were abundant choke cherries, sand cherries and buffalo berries in the wooded bottomlands on the Reservation. These plants were harvested by Tribal members for subsistence. They have diminished dramatically.

There were other plants used for subsistence food purposes, in the bottomlands. This includes onions, wild turnips, Elm Cap (*Pleurotus Ulmarius*), Baby's Navel, a mushroom, Arrowleaf, wild rice, Pursh and Bulrush.

Yet other plants, such as Cedar, were used for ceremonial purposes. Medicinal plants located in the river corridor included Pursh, Twin-flower, and clover and other roots. Gilmore, *Uses of Plants by the Indians of the Missouri River Region* (1977).

Trees were more abundant in the old flood Missouri flood plain. There were more abundant cottonwoods and willow trees, and more cedars in the draws above the flood plain.

These plants have important ceremonial uses. Cedar is used in the sweat lodge ceremony. Cottonwood is used at the center of perhaps the most important Lakota ceremony, the Sun Dance.

There was more diversity of the native grasses. The native Common Reed Grass, Prairie Cordgrass, Foxtail Barley, Green Muhly and Inland Saltgrass were more abundant. Non-native species are more common today.

Big game herds were more abundant and consistent. Mule deer and white tail deer, the most common big game on the Reservation, were much

more abundant in the wooded bottomlands. Fur bearers, such as white-tailed and black-tailed jackrabbits and eastern and desert cottontails were more concentrated and accessible.

Tribal members used to travel to the river bottom from throughout the Reservation, for subsistence hunting. The ecosystem has been destroyed, and now there is more upland game hunting. The methods and patterns of subsistence hunting, and gathering of plants and berries, has been completely disrupted. The Environmental Impact statement must state this, and contain a plan for mitigation.

There is severe periodic flooding at Wakpala, in the lower reach of Oak Creek just two miles from its confluence with the Missouri. The Corps of Engineers disputes Standing Rock's concern that the impoundment of water at Oahe Dam contributes to the conditions that exacerbate flooding at Wakpala.

The entire area surrounding the mouth of Oak Creek is now part of Oahe Reservoir. The patterns of erosion and sedimentation have been altered. The Corps of Engineers must evaluate this in the Environmental Impact Statement. In calculating flood control savings for the lower Missouri basin, the Corps fails to include the cost of flooding at Standing Rock.

Other Tribal lands and trust allotments above the take line get flooded by the Missouri River.

The Corps must revise its values for flood control, taking into account flood damage caused in part by COE operations. At the very least, mitigation of flood damage at Wakpala should be proposed and planned.

Tribal lands and trust allotments above the COE take line are eroding, due to the operation of Lake Oahe. This results in potential liabilities on the part of the Corps, in favor of the Tribe and Tribal members. The Corps does not account for these liabilities in its valuations of NED benefits. The Corps must adjust the values downward to reflect this damage. Mitigation of erosion should be proposed and planned.

The RDEIS fails to profile the current water quality baseline of the Missouri River, or to explain the impacts of the various alternatives on Lake Sharpe water quality. The RDEIS should also state that the Standing Rock Sioux Tribe has instituted use designations and Tribal water quality standards for the Missouri River.

V. RDEIS Violates Executive Order 12898  
and Executive Order 13175

Executive Order 12898 on Environmental Justice requires mitigation of disproportionate impacts of federal actions on minority and impoverished communities. The Draft EIS fails to comply with the requirements Executive Order 12898.

The major components of every operational alternative have disproportionate environmental impacts on Indian Tribes. The Fort Peck Spring rise, included in every alternative, disproportionately impacts the Assiniboine and Sioux Tribes of the Fort Peck Reservation. The unbalancing of reservoir levels disproportionately affects the Standing Rock Sioux Tribe.

We strenuously object to the intrasystem regulation scheme involving Lake Oahe on our Reservation. Lake Oahe water level fluctuations detrimentally impact Native American cultural resources on the Standing Rock Indian Reservation. Now, without mitigation or consultation, the RDEIS proposes to write into the new master manual a system of intrasystem reservoir regulation that shall exacerbate water level fluctuations on our Reservation.

The Standing Rock Sioux Tribe has already suffered enough for downstream navigation and flood control. Now, because of the harm caused by the provision of navigation flows to upper reservoir fisheries, our Reservation is proposed to be used for an unbalanced reservoir regulation system designed to purposely intensify the fluctuations in water levels. This threatens our water intakes and fishing opportunities for Tribal members, in favor of off-Reservation fish enhancement and recreation opportunities for non-Indians.

This is environmental racism against our people. Executive Order 12898 prohibits this.

Moreover, here has been no government-to-government consultation with our Tribe as required in Executive Order 13175. Executive Order 13175, entitled Consultation and Coordination With Indian Tribal Governments requires the Defendant to engage in "meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." 65 Fed. Reg. 67249 (Nov. 9, 2000). This results from the fact that "The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions." *Id.* Accordingly, Executive Order 13175 provides that "Agencies shall respect Indian tribal self government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique relationship between the Federal Government and Indian Tribal governments." *Id.*

The preparation of the Draft EIS, the Defendant must also comply with the Department of Defense American Indian and Alaska Native Policy. The Policy states in part -

DoD personnel must consider the unique qualities of individual Tribes when applying these principles.... (Tribal) concerns should be addressed *prior* to reaching decisions on matters that may have the potential to significantly affect protected tribal resources, tribal rights or Indian lands.

U.S. Department of Defense, *American Indian and Alaska Native Policy* (emphasis added).

The RDEIS proposes to supply water for downstream navigation and endangered species that is subject to the Winters Doctrine claims of our Tribe. The proposed unbalancing of reservoirs included in the GP and MCP alternatives exacerbates water level fluctuations on the Standing Rock Indian Reservation, damaging our environment and fishing opportunities in order to enhance off-reservation fisheries for non-Indians. Accordingly, compliance with Executive Order 13175 is required.

However, no decisionmaker has consulted with Chairman Murphy and the Standing Rock Tribal Council. The Corps has used a revolving door of Omaha District or Northwestern Division Commanders to conduct meetings with the Tribe, who merely state that they "shall inform their superiors" of the Tribe's concerns.

The Tribe's concerns are never addressed. They are merely packaged in an appendix to the Environmental Impact Statement.

Colonels come and go. There is no genuine consultation for the Tribe with decisionmakers in the Corps.

Racism and oppression by the Corps of Engineers against the Standing Rock Sioux Tribe remains constant. The RDEIS is more of the same.

Pursuant to Resolution 106-01, the Standing Rock Sioux Tribe rejects the Corps of Engineers' Revised Draft Environmental Impact Statement as an attempt to justify the confiscation of our water in favor of navigation, recreation and environmental concerns. The RDEIS constitutes environmental racism at its worst. It is rejected in its entirety.

## RESOLUTION NO. 106-01

FORMALLY ESTABLISHES THE STANDING ROCK SIOUX TRIBE'S  
POLICY ON ITS ABORIGINAL, TREATY AND WINTERS RIGHTS TO THE USE  
OF WATER IN THE MISSOURI RIVER TO MEET ALL  
PRESENT AND FUTURE USES; AMONG OTHER THINGS

WHEREAS, the Standing Rock Sioux Tribe is an unincorporated Tribe of Indians, having accepted the Indian Reorganization Act of June 18, 1934, with the exception of Article 16, and the recognized governing body of the Tribe is known as the Standing Rock Sioux Tribal Council; and

WHEREAS, the Standing Rock Sioux Tribal Council, pursuant to the Constitution of the Standing Rock Sioux Tribe, Article IV, Section(s) 1 (a,b,c,h and j), is authorized to negotiate with Federal, State and local governments and others on behalf of the Tribe, is further authorized to promote and protect the health, education and general welfare of the members of the Tribe and to administer such services that may contribute to the social and economic advancement of the Tribe and its members; and is further empowered to authorize and direct subordinate boards, committees or Tribal officials to administer the affairs of the Tribe and to carry out the directives of the Tribal Council; and is empowered to manage, protect, and preserve the property of the Tribe and natural resources of the Standing Rock Sioux Reservation; and

### Master Manual EIS Specifically Excludes Consideration of Indian Water Rights

WHEREAS, the United States Army Corps of Engineers makes the following statement describing how the Corps fails to recognize or consider Indian water rights in its Master Water Control Manual for the future operation of the Missouri River, thereby committing Missouri River water to operational priorities and creating an insurmountable burden for the future exercise of the rights to the use of water by the Standing Rock Sioux Tribe as reserved from time immemorial:

*The Missouri River basin Indian tribes are currently in various stages of quantifying their potential future uses of Mainstem System water. It is recognized that these Indian tribes may be entitled to certain reserve or aboriginal Indian water rights in streams running through and along reservations. Currently, such reserved or aboriginal rights of tribal reservations have not been quantified in an appropriate legal forum or by compact with three exceptions.... The Study considered only existing consumptive uses and depletions; therefore, no potential tribal water rights were considered. Future modifications to system operation, in accordance with pertinent legal requirements, will be considered as tribal water rights are quantified in accordance with applicable law and actually put to use. Thus, while existing depletions are being considered, the Study process does not prejudice any reserved or aboriginal Indian water rights of the Missouri River basin Tribes. (PDEIS 3-64); and*

WHEREAS, the failure of the United States, acting through the Corps, to recognize and properly consider the superior rights of the Standing Rock Sioux Tribe must be rejected by the Tribe for the reason that the Master Manual revision and update is making irretrievable commitments to (1) navigation in the lower basin, (2) maintenance of reservoir levels in the upper basin and (3) fish, wildlife and endangered species throughout the upper and lower basins. These commitments are violations of the constitutional, civil, human and property rights of the Tribe; and

### Endangered Species Guidance Specifically Excludes Consideration of Indian Water Rights in Missouri River Basin

WHEREAS, the Working Group on the Endangered Species Act and Indian Water Rights, Department of Interior, published recommendations for consideration of Indian water rights in Section 7 Consultation, in national guidance for undertakings such as the Master Manual, as follows:

*The environmental baseline used in ESA Section 7 consultations on agency actions affecting riparian ecosystems should include for those consultations the full quantum of: (a) adjudicated (decreed) Indian water rights; (b) Indian water rights settlement act; and (c) Indian water rights otherwise partially or fully quantified by an act of Congress... Biological opinions on proposed or existing water projects that may affect the future exercise of senior water rights, including unadjudicated Indian water rights, should include a statement that project proponents assume the risk that the future development of senior water rights may result in a physical or legal shortage of water. Such shortage may be due to the operation of the priority system or the ESA. This statement should also clarify that the FWS can request reinitiation of consultation on junior water projects when an agency requests consultation on federal actions that may affect senior Indian water rights.*

The Working Group recommendations further the failure to address unadjudicated Indian water rights. It is unthinkable that the United States would proceed with water resource activities, whether related to endangered species, water project implementation or Missouri River operation in the absence of properly considering Indian water rights that are not part of an existing decree – presuming, in effect, that the eventual quantification of Indian water rights will be so small as to have a minimal impact on the operation of facilities in a major river, such as the Missouri River, or so small as to be minimally impacted by assignment of significant flow to endangered species. The flows required to fulfill or satisfy Indian water rights are, in fact, not small nor minimal but are significant; and

### Final Indian Water Right Agreements and Claims of the United States on Behalf of Tribes Are Denigrated by Master Manual and Other Regional Water Allocation Processes

WHEREAS, failures of federal policy to properly address Indian water rights in planning documents such as the Master Manual is underscored by example. Tribes in Montana

have water right compacts with the State that are complete and final but have not been incorporated into a decree. Incorporation is certain, however, and will be forthcoming. It is not a matter of "if", it is a matter of "when". The water rights agreed upon by compact are substantial, but neither the Corps of Engineers' Master Manual nor the Secretary of Interior's ESA guidance, as currently constituted, will consider these rights -- they presume the rights do not exist -- until they become part of a decree. At such time as the decree in Montana is complete, the Master Manual conclusions will be obsolete and any assignment of Missouri River flows to upstream reservoirs, downstream navigation or endangered species, relied upon by the various special interest groups, will be in conflict with the decree; and

WHEREAS, in Arizona, as another example, these same flawed federal policies to ignore Indian water rights in the allocation of regional water supplies are manifest. The United States is in the process of reallocating part of approximately 1.4 million acre-feet of water diverted from the Colorado River and carried by aqueduct system in the Central Arizona Project for the Phoenix area. The reallocation is purportedly for the purpose, in part, of resolving Indian water right claims in Arizona, but careful review of the reallocation demonstrates that only two Indian tribes are involved. The Bureau of Reclamation, agent for the trustee in the reallocation process, has given short shrift to other Indian concerns that the EIS should address the impacts of the reallocation on all affected tribes and on all non-Indian claimants that will be impacted by ongoing adjudication of Indian water rights. In response Reclamation describes claims filed by the Department of Justice on behalf of the tribes as *speculative*. Thus, Arizona tribes are in the same dilemma as Missouri River basin tribes, but the process to determine the magnitude of Indian claims in Arizona is much further advanced. The United States is, on the one hand, pursuing a claim for adjudication of Indian water rights; and the United States, on the other hand, is reallocating water necessary to supply non-Indian interests impacted by Indian water rights-- but is refusing to recognize any potential for Indian water rights success in ongoing adjudications. This denigrates the claims of the United States on behalf of the tribes and draws into question the intent and commitment of the Department of Justice in the proper advancement of Indian claims, claims which at least some tribes consider deficient and poorly prosecuted by the Department of Justice; and

WHEREAS, the Standing Rock Sioux Tribe cannot tolerate these policies: cannot permit reliance by wide and diverse interest groups in the Missouri River -- states, environmental, federal agencies and economic sectors-- on conclusions associated with the preferred alternative in the Master Manual when the conclusions are based on the presumption of no Indian water rights and insignificant future Indian water use throughout the Basin; cannot expect future courts to undo investments, undertakings, mortgages and economies that build on the basis of the Master Manual conclusions; cannot expect future Congresses to act more favorably than future courts; and

Importance of Master Manual Process is Underscored by Congressional and

## Other Activity

WHEREAS, the Master Manual of the Corps of Engineers is the name presently given to the operating procedures for the mainstream dams and reservoirs. The Corps of Engineers has responsibility for those operations as directed by the 1944 Flood Control Act, the controlling legislation for the Pick-Sloan Project. Since 1944, all dams (except Fort Peck Dam) were constructed and have been operated by the Corps of Engineers or the Bureau of Reclamation. The current Master Manual revision is the first public process update of Corps of Engineers operating procedures, and its importance to future exercise of the Tribe's water rights cannot be ignored by the Tribe; and

WHEREAS, the Master Manual is intended by the federal courts and Congress to resolve issues between the upper and lower basin states, irrespective of tribal issues. The federal courts have dismissed cases brought by the states over the last decade and a half, cases designed to settle issues of maintenance of water levels in the reservoirs in North and South Dakota and the conflicting release of water for downstream navigation; and

WHEREAS, most recently, the Energy and Water Resource Development appropriations for FY 2001 were vetoed by the President because upstream senators supported by the President opposed language by downstream senators in the appropriations bill, which contained controversial language as follows:

*Sec. 103. None of the funds made available in this Act may be used to revise the Missouri River Master Water Control Manual when it is made known to the Federal entity or official to which the funds are made available that such revision provides for an increase in the springtime water release program during the spring heavy rainfall and snow melt period in States that have rivers draining into the Missouri River below the Gavins Point Dam.*

The provisions cited above require the Corps of Engineers or any other official to refrain from using any funds to revise the Master Manual if it is determined that the revision would cause any increase in water releases below Gavin's Point Dam in springtime. There is apparently concern by downstream members of Congress that the Master Manual will recommend an increase in releases to the detriment of downstream navigation, environmental values or flood control. Upstream members of Congress stopped the approval of appropriations over this controversy until the above-cited language was omitted from the bill; and

WHEREAS, given the importance of the Master Manual revision and update to the States, the Congress and Courts, the Standing Rock Sioux Tribe cannot tolerate the exclusion of proper consideration of their water rights, nor can the Tribe tolerate the inadequate representation of the Trustee on this matter; and

## Brief Historical Review of Indian Water Rights



WHEREAS, the right of the Crown of Great Britain to the territory of North America was derived from the discovery of that continent by Sebastian Cabot, who in 1498 explored a greater part of the Atlantic Coast under a Commission from King Henry VII and took formal possession of the continent as he sailed along the coast. But those commissioned by the Crown to settle in North America were cognizant of the rights, titles and interests of the original possessors. In the proprietary of Maryland, granted to George Calvert, Lord Baltimore, in 1632, for example, it was recognized by English law evolving from invasions against the Celtic tribes and their successors by the Romans, Anglo-Saxons and Normans, among others, over a period of 1,500 years prior to the discovery of America that the rights of the ancient possessors were specific and could not be ignored by a just occupier. The following was the rationale:

*The roving of the erratic tribes over wide extended deserts does not formed a possession which excludes the subsequent occupancy of Immigrants from countries overstocked with inhabitants. The paucity of their numbers in their mode of life, render them unable to fulfill the great purposes of the grant [by the King to the Proprietary of Maryland]. Consistent, therefore, with the great Charter to mankind, they (Tribes) may be confined within certain limits. Their rights to the privileges of man nevertheless continue the same: and the Colonists who conciliated the affections of the aborigines, and gave a consideration for their territory, have acquired the praise due to humanity and justice. Nations, with respect to the several communities of the earth, possessing all the rights of man, since they are aggregates of man, are governed by similar rules of action. Upon those principles was founded the right of emigration of old: upon those principles the Phenicians and Greeks and Carthagenians settled Colonies in the wilds of the earth.... In a work treating expressly of original titles to Land it has been thought not amiss to explain... the manner in which an individual obtaining from his Sovereign an exclusive licence, with his own means, to lead out and plant a Colony in a region of which that Sovereign had no possession, proceeded to avail himself of the privilege or grant, and to reconcile or subject to his views the people occupying and claiming by natural right that Country so bestowed... in particular, an history, already referred to, of the Americans settlements, written in 1671, after speaking of the acquisition of St. Mary's continues 'and it hath been the general practice of his Lordship and those who were employed by him in the planting of the said province, rather to purchase the natives' interest... than to take from them by force that which they seem to call their right and inheritance, to the end all disputes might be removed touching the forcible encroachment upon others, against the Law of nature or nations... When the earth was the general property of mankind, mere occupancy conferred on the possessor such an interest as it would have been unjust, because contrary to the Law of Nature, to take from him without his consent: and this state has been happily compared to a theatre, common to all; but the individual, having appropriated a place, acquires a privilege of which he cannot be dispossessed without injustice! ... the Grant [to Lord Baltimore] comprehended 'all Islands and Islets within the limits aforesaid, and all Islands and etc. within ten marine leagues of the Eastern Shore, with all Ports, Harbors, Bays, Rivers, and Straits, belonging to the region or Islands aforesaid, and all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Days, and Straits, with the fishing of every kind, within the said limits; all mines of whatsoever kind, and patronage and advowson of all Churches. Lord Baltimore ... was invested with all the Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and Royal Rights and Temporal Franchises whatsoever, as well by sea as by land, within the Region, Islands, Islets, and limits aforesaid...'(Source: John Kilty. Land Holder's Assistant and Land Office Guide.*

*Islands, Islets, and limits aforesaid...*(Source: John Kilty. *Land Holder's Assistant and Land Office Guide*.

Baltimore: G. Dobbin & Murphy, 1808. MSA SC 5165-1-1).; and

WHEREAS, 130 years later the Proclamation of 1763 by King George III recognized title to the land and resources reserved by the American Indians of no lesser character or extent than the Charter to Lord Baltimore:

*And whereas it is just and reasonable, and essential to our interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no... Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them. And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians. ... all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid. And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained. And We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements. And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose....*

*Given at our Court at St. James's the 7th Day of October 1763, in the Third Year of our Reign.*

*GOD SAVE THE KING; and*

WHEREAS, after the American Revolution and consistent with the foregoing, the United States Supreme Court by 1832 relied upon the ancient concepts of its predecessor Great Britain and recognized the property rights of Indians in the classical case of *Worcester v. the State of Georgia*:

*America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.* (6 P 515, p. 543)

*... This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.....*

*... This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The Crown could not be understood to grant what the Crown did not effect to claim; nor was it so understood.*

(6 P 515, p. 544-545) (Emphasis supplied); and

WHEREAS, the principles in the case of *Worcester v. Georgia* are ancient as shown above and are the foundation of the principles announced by the U. S. Supreme Court three quarters of a century later relating to the Yakima Indian Nation in the case of *United States v. Winans* (198 U.S. 371). Title of the Indians in their property rights was fully acknowledged, and the Treaty was interpreted as a grant of property to the United States in the area not reserved by the Tribe to itself.

*The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words the Treaty was not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted.*

(Emphasis supplied); and

WHEREAS, the Supreme Court case of *Henry Winters v. United States* (207 US 564) found that reservation of water for the purposes of civilization was implied in the establishment of the Reservations:

*The Reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be adequate with a change of conditions. The lands were arid and, without irrigation, were practically valueless.*

... That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, [at Fort Belknap] and it would be extreme to believe that within a year later [when the state of Montana was created] Congress destroyed the Reservation and took from the Indians the consideration of their grant, leaving them a barren waste - took from them the means of continuing their old habits, yet did not leave them the power to change to new ones." (207 U S 574, p. 576 577); and

WHEREAS, the case of *United States v. Ahtanum Irrigation District* (236 Fed 2nd 321, 1956) applied the *Worcester-Winans-Winters* concepts on Ahtanum Creek, tributary to the Yakima River and northern boundary of the Yakima Indian Reservation:

*The record here shows that an award of sufficient water to irrigate the lands served by the Ahtanum Indian irrigation project system as contemplated in the year 1915 would take substantially all of the waters of Ahtanum Creek. It does not appear that the waters decreed to the Indians in the Winters case operated to exhaust the entire flow of the Milk River, but, if so, that is merely the consequence of it being a larger stream. As the Winters case, both here and in the Supreme Court, shows, the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers. Our Conrad Inv. Co. Case, supra, held that what the non-Indian appropriators may have is only the excess over and above the amounts reserved for the Indians. It is plain that if the amount awarded the United States for the benefit of the Indians in the Winters Case equaled the entire flow of the Milk River, the decree would have been no different. (236 F. 2nd 321, p. 327) (Emphasis supplied); and*

WHEREAS, these concepts were further advanced in *Arizona v California*, 373 U.S. 546, 596-601 (1963):

*The Master found as a matter of fact and law that when the United States created these reservations or added to them, it reserved not only land but also the use of enough water from the Colorado [River] to irrigate the irrigable portions of the reserved lands. The aggregate quantity of water which the Master held was reserved for all the reservations is about 1,000,000 acre-feet to be used on around 135,000 irrigable acres of land....*

*It is impossible to believe that when Congress created the Great Colorado River Indian reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of desert kind -- hot scorching sands -- and the water from the River would be essential to the life of the Indian people and to the animals they hunted and crops they raised. We follow it [Winters] now and agree that the United States did reserve the water rights for the Indians effective as of the time Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act [Boulder Canyon Project Act] became effective on June 25, 1929, are present perfected rights and as such are entitled to priority under the Act. We also agree with the Master's conclusion as to the quantity intended to be reserved. He found that water was intended to satisfy the future as well as present needs of the Indian reservations.... We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreage of irrigable land which the Master found to be on the different reservations we find to be reasonable; and*

### General Nature of Attacks on Winter Doctrine

WHEREAS, notwithstanding the injunctions of Lord Baltimore, King George III and favorable decisions of the United States Supreme Court, in practice, Congress, the executive branch and the judiciary have (1) limited Indian reserved water rights, (2) suppressed development of Indian reserved water rights, and (3) permitted reliance by state, federal, environmental and private interests on Indian water, contrary to trust obligations. The federal policy has clearly been .. *how best to transfer Indian lands and resources to non-Indians..* rather than to preserve, protect, develop and utilize those resources for the benefits of the Indians.

*With an opportunity to study the history of the Winters rule as it has stood now for nearly 50 years, we can readily perceive that the Secretary of the Interior, in acting as he did, improvidently bargained away extremely valuable rights belonging to the Indians.... viewing this contract as an improvident disposal of three quarters of that which justly belonged to the Indians, it cannot be said to be out of character with the sort of thing which Congress and the Department of the Interior has been doing throughout the sad history of the Government's dealings with the Indians and Indian tribes. That history largely supports the statement: From the very beginnings of this nation, the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped, but how best to transfer Indian lands and resources to non-Indians. (United States v Ahtanum Irrigation District, 236 F. 2nd 321, 337); and*

WHEREAS, the McCarran Amendment interpretation by the United States Supreme Court, if not in error, is a further example of the contemporary attack on Indian water rights. The discussion of the McCarran Amendment here is intended to show why tribes are (1) opposed to state court adjudications and (2) negotiated settlements under the threat of state court adjudication. In 1952 the McCarran Amendment, 43 U.S.C. 666 (a), was enacted as follows:

*Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a River system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner or in the process of acquiring water rights by appropriation under State law, by purchase, by exchange or otherwise, and the United States is a necessary party to such suit; and*

WHEREAS, the McCarran Amendment has been interpreted by the U.S. Supreme Court to require the adjudication of Indian water rights in state courts. *Arizona v San Carlos Apache Tribe*, 463 U.S. 545,564,573 (1981) held:

*We are convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on State Court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment.*

In dissent, however, Justice Stevens stated:

*To justify virtual abandonment of Indian water right claims to the State courts, the majority relies heavily on Colorado River Water Conservancy District, which in turn discovered an affirmative policy of federal judicial application in the McCarran Amendment. I continue to believe that Colorado River read more into that amendment than Congress intended... Today, however, on the tenuous foundation of a perceived Congressional intent that has never been articulated in statutory language or legislative history, the Court carves out a further exception to the virtually unflagging obligation of Federal courts to exercise their jurisdiction. The Court does not -- and cannot -- claim that it is faithfully following general principles of law... That Amendment is a waiver, not a command. It permits the United States to be joined as a defendant in state water rights adjudications; it does not purport to diminish the United States right to litigate in a federal forum and it is totally silent on the subject of Indian tribes rights to litigate anywhere. Yet today the majority somehow concludes that it commands the Federal Courts to defer to State Court water right proceedings, even when Indian water rights are involved; and*

WHEREAS, in Arizona, Montana and other states, general water right adjudications to quantify *Winters* Doctrine rights are ongoing. For example in the state of Montana:

(1) the state of Montana sued all tribes in a McCarran Amendment proceeding.

(2) the State of Montana established a Reserved Water Rights Compact Commission. The purpose of the Commission was to negotiate the *Winters* Doctrine rights of the Montana tribes.

(3) the Department of Interior has adopted a negotiation policy for the settlement of Indian water rights. The United States Department of Interior has a negotiating team which works with the Montana Reserve Water Rights Compact Commission and Indian tribes, some forced by the adjudication in

state court, to negotiate, while others are willing to negotiate.

(4) the Department of Interior makes all necessary funding available to any Tribe willing to undertake negotiations. A Tribe refusing to negotiate cannot obtain funding to protect and preserve its *Winters* Doctrine water rights.

(5) Upon reaching agreement between the State of Montana and an Indian tribe, congressional staff are assigned to develop legislation in the form of an Indian water rights settlement that may or may not involve authorization of federal appropriations to develop parts of the amount of Indian water agreed upon between the Tribe and the State or for other purposes.

(6) in the absence of the desire of a Tribe to negotiate, the State of Montana will proceed to prosecute its McCarran Amendment case against the Tribe; and

WHEREAS, this process relies on ongoing litigation to accomplish negotiated settlements of *Winters* Doctrine Indian water rights. The process is held out to be a success by the state and federal governments. However, comparison with the taking of the Black Hills from the Great Sioux Nation, the taking of the Little Rocky Mountains from the Fort Belknap Indian Reservation and the taking of Glacier Park from the Blackfeet are valid comparisons. There are elements of force and extortion in the process; and

WHEREAS, in the Wind River adjudication, 753 P. 2nd 76, 94-100 (WY 1988), the State of Wyoming utilized the McCarran Amendment to drastically diminished the Arapaho and Shoshone *Winters* Doctrine water rights in the Big Horn River Basin. The Wyoming Supreme Court found as follows:

*The quantity of water reserved is the amount of water sufficient to fulfill the purpose of the lands set aside for the Reservation.*

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*The Court, while recognizing that the tribes were the beneficial owners of the reservations timber and mineral resources... and that it was known to all before the treaty was signed that the Wind River Indian Reservation contained valuable minerals, nonetheless concluded that the purpose of the reservation was agricultural. The fact that the Indians fully intended to continue to hunt and fish does not alter that conclusion.... The evidence is not sufficient to imply a fishery flow right absent a treaty provision.... The fact that the tribes have since used water for mineral and industrial purposes does not establish that water was impliedly reserved in 1868 for such uses. The District Court did not err in denying a reserved water right for mineral and industrial uses... the District Court did not err in holding that the Tribes and the United States did not introduce sufficient evidence of a tradition of wildlife and aesthetic preservation that would justify finding this to be a purpose for which the Reservation was created or for which water was impliedly reserved... not a single case applying the*

*reserved water right doctrine to groundwater is cited to us.... In Colville Confederated Tribes v. Walton, supra, 547 F 2d 42, there is slight mention of the groundwater aquifer and of pumping wells, id at 52, but the opinion does not indicate that the wells are a source of reserved water or even discuss a reserve groundwater right.... The District Court did not err in deciding there was no reserved groundwater right; and*

WHEREAS, the statement by the Wyoming Supreme Court that *Colville* does not discuss a reserved water right to groundwater is in error, for *Colville* did decree reserved groundwater rights; and

WHEREAS, the *Wind River* case must be carefully examined by all tribes, including those of the Missouri River Basin. The single purpose of the Wind River Indian Reservation recognized by the Wyoming Supreme Court was limited to agriculture: severely limited relative to the... *Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and Royal Rights and Temporal Franchises whatsoever, ... within the Region, ..comprehending... 'all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Daps, and Straits, with the fishing of every kind, within the said limits'; all mines of whatsoever kind...* received by from the King by Lord Baltimore in the Proprietary of Maryland, which were, nevertheless, subject to purchase from the Native possessors. The Arapaho and Shoshone must have believed that the purpose of the reservation was to provide a permanent home and abiding place for their present and future generations to engage and pursue a viable economy and society. Despite existing oil and gas resources, they were denied reserved water for mineral purposes. Despite the need for industry in a viable economy, they were denied reserved water for industry. Despite a tradition of hunting and fishing, they were denied reserved water for wildlife and aesthetic preservation. Despite the existence of valuable forests, they were denied reserved water for this purpose. Despite the existence of valuable fisheries, established from time immemorial, they were denied a reserved water right to sustain their fisheries; and

WHEREAS, the United States Supreme Court reviewed the *Wind River* decision on the following question:

*In the absence of any demonstrated necessity for additional water to fulfill reservation purposes; and in presence of substantial state water rights long in use on the reservation, may reserved water rights be implied for all practicably irrigable lands within reservation set aside for specific Tribe? 57 LW 3267 (Oct. 11, 1988); and*

WHEREAS, acting without a written opinion and deciding by tie vote, the United States Supreme Court affirmed the decision of the Supreme Court of the State of Wyoming and rejected the thought process presented in the question above that the Tribes needed no additional water than the amount they were using and that state created water rights with long use should not be subjected to future Indian water rights. But a change in vote by a single justice would have reversed the decision and severely



constricted the benefits of the *Winters* Doctrine to the Indian people, a subject to be discussed further. The decision is limited to the State of Wyoming on critical issues, namely that Indian reserved rights do not apply to groundwater; the absence of a reserved water right for forest and mineral purposes; the absence of a reserved water right for fish, wildlife and aesthetic preservation; and a reduction of the Tribes claims to irrigation from 490,000 to less than 50,000 acres; and

WHEREAS, the acreage for irrigation finally awarded to the Wind River Tribes for future purposes was 48,097 acres involving approximately 188,000 acre-feet of water annually:

*In determining the Tribes claims to practicably irrigable acreage, the United States (trustee for the tribes) began with an arable land-base of approximately 490,000 and relied on its experts to arrive at over 88,000 practicably irrigable acres. The claim was further "trimmed" by the United States to 76,027 acres for final projects. The acreage was further reduced during trial to 53,760 acres by Federal experts with a total annual diversion requirement of about 210,000 acre-feet. (Teno Roncallo, Special Master. In Re: The General Adjudication of All Rights to the Use of Water in the Big Horn River System and All Other Sources, State of Wyoming, Concerning Reserved Water Right Claims by and on Behalf of the Tribes of the Wind River Indian Reservation, Wyoming, Dec. 15, 1982, pp. 154 and 157); and*

WHEREAS, the *purposes* of reservation issue addressed by the Wyoming courts evolved from the 1978 United States Supreme Court case, *United States v. New Mexico* (438 U.S. 696), involving the water rights of the Gila National Forest:

*The Court has previously concluded that Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, impliedly authorized him to reserve "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."... The Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."... Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.... The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes -- "to conserve the water flows, and to furnish a continuous supply of timber for the people."... Not only is the Government's claim that Congress intended to reserve water for recreation and wildlife preservation inconsistent with Congress's failure to recognize these goals as purposes of the national forest, it would defeat the very purpose for which Congress did intend the national forest system.... While Congress intended the national forest to be put to a variety of uses, including stockwatering, not inconsistent with the two principal purposes of the forest, stock watering was not, itself, a direct purpose of reserving the land; and*

WHEREAS, there may be debate with respect to the purposes for which a national

forest was created and for which purposes water was reserved, but it is a "slender reed" upon which to found a debate that when Indian reservations were established by the Indians or Great Britain or the United States, the purpose of establishment might vary among the Indian reservations; and, depending upon that purpose, the Indians would be limited in the beneficial uses to which water could be applied. Indian neighbors could apply water to any beneficial purpose generally accepted throughout the Western United States, but Indians could not. It is inconceivable that an Indian Reservation was established for any other "purpose" than an "Indian" reservation or that each Reservation was established for some arcane reason other than the pursuits of industry, self-government and all other activities associated with a modern, contemporary and ever-changing society embracing all of the ... *Rights, Jurisdictions, Privileges, Prerogatives, ... and Temporal Franchises whatsoever, ... within the Region, ..comprehending... 'all the soil, plains, woods, mountains, marshes, Lakes, Rivers, Days, and Straits, with the fishing of every kind, within the said limits'; all mines of whatsoever kind; and*

WHEREAS, nevertheless, the Wyoming courts relied upon the "purposes" argument to exclude water reserved for the pursuit of many of the arts of civilization.... industry, mineral development, fish, wildlife, aesthetics... on the basis that the purpose of the Wind River Indian Reservation was limited to an agricultural purpose absent specific Treaty language to the contrary. As crude as this conclusion may be, however, Tribes of the Missouri River basin and throughout the Western United States are faced with the "purposes" limitation originally applied in 1978 to national forests; and

WHEREAS, if there may be a question that the issue ended in Wyoming, it is only necessary to examine the state court general adjudication process in Arizona. A June 2000 pretrial order by the Special Master in the *General Adjudication of All Rights to Use Water in the Gila River System and Source* summarizes the issues as follows:

*... Does the "primary-secondary" purposes distinction, as announced by the U.S. Supreme Court in United States v. New Mexico, 438 U.S. 696 (1978), apply to the water rights claimed for the Gila River Indian Reservation?...*

*.... The State Litigants takes the position that the distinction does apply.*

*... If the "primary-secondary" purposes distinction does apply to the Gila River Indian Reservation, what were the primary and secondary purposes for each withdrawal or designation of land for the Gila River Indian Reservation? May the Reservation have more than one "primary" purpose?...*

*.... The State Litigants takes a position that the federal government withdrew or designated land to protect existing agriculture, create a buffer between the community and non-Indians who were settling in the area, provide substitute agricultural lands when non-Indians encroached on existing Indian agricultural lands, and provide for other specific economic activities such as grazing; and*

WHEREAS, the restriction or limitation of Indian water rights in the Missouri River basin is not confined to a federal denial of them in federal actions, such as the Master Manual and endangered species consultation. The limitations are expected to grow and expand from these federal actions. Indian water right opponents will concentrate on the language of *United States v. New Mexico* that "...only that amount of water necessary to fulfill the purpose of the reservation, no more..." has been reserved by the Tribes or the United States on behalf of the tribes. The effort will be to first limit the purposes for which an Indian reservation was established and second limit the amount of water necessary to fulfill that purpose. If, for example, opponents could successfully argue that the purpose of an Indian reservation in the Missouri River Basin was primarily a "permanent homeland" and that agriculture was secondary, they would further argue that the amount of water reserved was limited to domestic uses, and no water was reserved for irrigation; and

WHEREAS, *Cappaert v. United States* (426 U.S. 128, 1976) was the basis, in part, for the decision in *United States v. New Mexico* discussed above. Here again the purposes of a "federal" reservation (as distinguished from a reservation by Indians or a reservation by the United States on behalf of Indians) and the use of water for that purpose is the subject. But the Cappaert decision is helpful in showing the extreme interpretations to which the State Court in Wyoming went in its *Wind River* decision:

....The District Court then held that, in establishing Devil's Hole as a national monument, the President reserved appurtenant, unappropriated waters necessary to the purpose of the reservation; the purpose included preservation of the pool and pupfish in it.... The Court of Appeals for the Ninth Circuit affirmed... holding that the "implied reservation of water" doctrine applied to groundwater as well as surface water...and

WHEREAS, the purpose of establishing the national monument was clearly limited -- to preserve the Devil's Hole pupfish, which rely on a pool of water that is a remnant of the prehistoric Death Valley Lake System an object of historic and scientific interest. This is not an Indian reservation which embraces all of the purposes related to civilization, society and economy. Yet, Wyoming seized on the concept of an Indian reservation with purpose limited in the same manner as a national forest or a national monument. Note, however, that the Wyoming case (1988) grasps at the purposes argument to diminish the Indian water right but ignores the damaging aspect of *Cappaert* (1976) that reserved water concepts apply to groundwater as well as surface water. Not only did Wyoming ignore *Colville Confederated Tribes*, it ignored *Cappaert*. Recently, the Arizona Supreme Court, after considering the Wyoming decision, could not countenance a similar decision in Arizona, specifically rejected the Wyoming decision and found as follows:

*...the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater...and...holders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law rights...; and*

WHEREAS, similarly, Wyoming ignored *Cappaert*, a U.S. Supreme Court decision about federally reserved water rights in a National Monument in Nevada, where *Cappaert* specifically rejected the concept of "sensitivity" or balancing of equities when water is needed for the purpose of a federal or Indian Reservation. In *Cappaert* the Court cited the *Winters* decision as a basis for rejecting the notion of Nevada that competing interests must be balanced between federal (or Indian) reserved water rights and competing non-federal (or non-Indian) water rights. Wyoming returned to the U.S. Supreme Court seeking a more favorable decision respecting "sensitivity" than provided by *Cappaert*:

*Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in Winters v. United States, supra, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of the water. The "Statement of the Case" in Winters notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that, when the Federal Government reserves land, by implication, it reserves water rights sufficient to accomplish the purposes of the reservation; and*

WHEREAS, the United States Supreme Court reviewed the decision of the Wyoming Supreme Court and upheld the decision by a tie vote as discussed above. However, the majority of the court had apparently been swayed by the Wyoming argument:... *in the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in presence of substantial state water rights long in use on the reservation, may reserved water rights be implied for all practicably irrigable lands within reservation set aside for specific Tribe?... and had prepared a draft opinion referred to by the Arizona Supreme Court as the "ghost" opinion. The draft opinion was apparently not issued because Justice Sandra Day O'Connor, author of the "ghost" opinion on behalf of the majority, disqualified herself because she learned that her ranch had been named as a defendant in the Gila River adjudication in Arizona. Despite more than 350 years of understanding of justice and law relating to Indian property, the O'Connor opinion would have destroyed the basic tenets of the Winters Doctrine:*

*...The PIA standard is not without defects. It is necessarily tied to the character of land, and not to the current needs of Indians living on reservations...And because it looks to the future, the PIA standard, as it has been applied here, can provide the Tribes with more water than they need at the time of the quantification, to the*

detriment of non-Indian appropriators asserting water rights under state law....this Court, however, has never determined the specific attributes of reserve water rights – whether such rights are subject to forfeiture for nonuse or whether they may be sold or leased for use on or off the Reservation....Despite these flaws and uncertainties, we decline Wyoming's invitation to discard the PIA standard... The PIA standard provides some measure of predictability and, as explained hereafter, is based on objective factors which are familiar to courts. Moreover no other standard that has been suggested would prove as workable as the PIA standard for determining reserve water rights for agricultural reservations....we think Master Roncolio and the Wyoming Supreme Court properly identified three factors that must be considered in determining whether lands which have never been irrigated should be included as PIA: the arability of the lands, the engineering feasibility (based on current technology) of necessary future irrigation projects, and the economic feasibility of such projects (based on the profits from cultivation of future lands and the costs of the project... Master Roncolio found...that economic feasibility will turn on whether the land can be irrigated with a benefit-cost ratio of one or better.... Wyoming argues that our post-Arizona cases, specifically Cappaert and New Mexico, indicate that quantification of Indian reserved water rights must entail sensitivity to the impact on state and private appropriators of scarce water under state law.... Sensitivity to the impact on prior appropriators necessarily means that "there has to be some degree of pragmatism" in determining PIA....we think this pragmatism involves a "practical" assessment – a determination apart from the theoretical economic and engineering feasibility – of the reasonable likelihood that future irrigation projects, necessary to enable lands which have never been irrigated to obtain water, will actually be built....no court has held that the Government is under a general legal or fiduciary obligation to build or fund irrigation projects on Indian reservations so that irrigable acreage can be effectively used..... massive capital outlays are required to fund irrigation projects...and in today's era of budget deficits and excess agricultural production, government officials have to choose carefully what projects to fund in the West. ... Thus, the trier of fact must examine the evidence, if any, that additional cultivated acreage is needed to supply food or fiber to resident tribal members, or to meet the realistic needs of tribal members to expand their existing farming operations. The trier must also determine whether there will be a sufficient market for, or economically productive use of, any crops that would be grown on the additional acreage....we therefore vacate the judgment insofar as it relates to the award of reserved water rights for future lands and remand the case to the Wyoming Supreme Court for proceedings not inconsistent with this opinion; and

WHEREAS, the United States Supreme Court has virtually unlimited power to arrive at unjust decisions as evidenced by the *Dred Scott* decision, and the opinion of the minority would have had no force and effect in Wyoming as given by Justice Brennan:

...in the Court might well have taken as its motto for this case in the words of Matthew 25:29: "but from him that has not shall be taken away even that which he has." When the Indian tribes of this country were placed on reservations, there was, we have held, sufficient water reserved for them to fulfill the purposes of the reservations. In most cases this has meant water to irrigate their arable lands.... The Court now proposes, in effect, to penalize them for the lack of Government investment on their reservations by taking from them those water rights that have remained theirs, until now, on paper. The requirement that the tribes demonstrate a "reasonable likelihood" that irrigation

*projects already determined to be economically feasible will actually be built – gratuitously superimposed, in the name of “sensitivity” to the interests of those who compete with the Indians for water, upon a workable method for calculating practicably irrigable acreage that parallels government methods for determining the feasibility of water projects for the benefit of non-Indians – has no basis in law or justice; and*

WHEREAS, whether inspired by the “ghost” opinion of Justice O’Connor or not, the Arizona Supreme Court held arguments in February 2001 on the issue of: “what is the appropriate standard to be applied in determining the amount of water reserved for federal lands?”, particularly Indian lands, which were not reserved by the United States for the Standing Rock Sioux Tribe but were, rather, reserved by the Tribe by its ancient ancestors from time immemorial. The outcome by the Arizona Supreme Court is immaterial but provides the question for review by the United States Supreme Court with full knowledge from the “ghost” opinion of the probable outcome. The Salt River Project and Arizona, principal losers in *Arizona v California I*, make the following arguments in *Gila River* against Indian reserved rights to the use of water:

*...Under the United States Supreme Court’s decision in United States v New Mexico..., all federal land with a dedicated federal purpose “has reserved to it that minimum amount of water which is necessary to effectuate the primary purpose of the land set aside.” Judge Goodfarb also found, however, that this “purposes” test does not apply to Indian reservations. Instead, he held that, for Indian reservations, “the courts have drawn a clear and distinct line”....that mandates that reserved rights for all Indian reservations must be quantified based on the amount of “water necessary to irrigate all of the practicably irrigable acreage (PIA) on that Reservation” without considering the specific purposes for which the Reservation was created....this interlocutory proceeding with respect to Issue 3 arose because Judge Goodfarb incorrectly ruled (as a matter of law and without the benefit of any factual record, briefing, or argument) that PIA applies to all Indian reservations...*

*....as shown below, the Supreme Court in that case [Arizona I] and the courts in all reported decisions since that time, have applied the following analysis: first, review the historical evidence relating to the establishment of the Reservation and, from that evidence, determine the purposes for which the specific land in question was reserved (a question of fact). Second, determine, based upon the evidence, the minimum quantity of water necessary to carry out those purposes (a mixed question of law and fact). ...and in Colville Confederated Tribes V. Walton, for instance, the ninth circuit stated: “to identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances.”*

*...the Zuni Reservation in northeastern Arizona, for example, was established*

by Congress expressly "for religious purposes."...the original 1859 creation of the Gila Reservation and each of the seven subsequent additions had different rationales and were intended to address different purposes or combinations of purposes (e.g. protecting existing farmlands, adding lands for grazing, including lands irrigated by Indians outside the Reservation as part of the Reservation...

....in addition to varying in size, Indian reservations also vary in location and terrain. Reservations in Arizona, for instance, run the gamut from desert low lands to the high mountains and everything in between. Certain reservations along the Colorado River include fertile but arid river bottom land and were created for the purpose of converting diverse groups of "nomadic" Indians to a "civilized" and agrarian way of life...other reservations, such as the Navajo Reservation in extreme northeastern Arizona, consist largely of "very high plateaus, flat-top mesas, inaccessible buttes and deep canyons. ....there can be little doubt that the PIA standard works to the advantage of tribes inhabiting alluvium plains or other relatively flat lands adjacent to stream courses. In contrast, tribes inhabiting mountainous or other agriculturally marginal terrains are at a severe disadvantage when it comes to demonstrating that their lands are practicably irrigable....

...the special master [Arizona I] conducted a trial, accepted and reviewed substantial evidence regarding the purposes of the five Indian reservations at issue in that case, made factual findings as to purposes, and only then found that the minimum amount of water necessary to carry out those purposes was best determined by the amount of water necessary to irrigate all "practicably irrigable" acres on those reservations. ....the special master stated: "moreover the 'practicably irrigable' standard is not necessarily a standard to be used in all cases and when it is used it may not have the exact meaning it holds in this case. The amount reserved in each case is the amount required to make each Reservation livable."

...although the United States Supreme Court affirmed the Wyoming court's decision in that case without opinion, events surrounding that review shed considerable light on the Supreme Court's concerns about the continued viability of PIA as a standard, at least in the form it was applied in Arizona I. ....several Justices challenged the United States's defense of PIA.... "at this point, Chief Justice Rehnquist challenged the precedential validity of Arizona I by noting that the opinion 'contains virtually no reasoning' and the Court merely had accepted the special master's conclusion as to the PIA standard...arguing that Congress must of contemplated the size of the tribe that would live on the Wind River Reservation, ...the Chief Justice stated that he found it difficult to believe that 'in 1868 Congress...should be deemed have said we're giving up water to irrigate every - every inch of arable land. No matter how large the tribe they thought they were settling. Did they expect to make some tribes very rich so that they can have an enormous export business... in agricultural products?" (State Litigant's Opening Brief on

Interlocutory Issue 3, Gila River Adjudication); and

Historical Analysis of Thought Processes Embraced by Master Manual

WHEREAS, the means employed by the Corps of Engineers to deny consideration of Indian water rights in the preparation of the Master Manual and those same means employed by the Department of Interior to deny consideration of Indian water rights in baseline environmental studies of endangered species have been presented. Also, presented was the favorable body of law supporting the proper consideration of Indian water rights followed by the denigration of that law in state court adjudications, namely in Wyoming and, more recently, in Arizona. Briefly examined here are historical examples of the diminishment of property rights by a superior force and the strikingly similar arguments in support of that diminishment, and

WHEREAS, the concepts and techniques for diminishing the water rights of the Standing Rock Sioux Tribe in the Missouri River, its tributaries and aquifers are not novel. The colonization of Ireland by the English (*circa* 1650), for example, was justified in a manner that provides insight in the federal treatment of Indian water rights in the Missouri River Basin. Sir Thomas Macaulay, a prominent English politician in the first half of the 19<sup>th</sup>-century and one of the greatest writers of his or any other era, rationalized the taking of land from the native Irish and the overthrow of King James II in 1692, which overthrow was due, in part, to the King's efforts to restore land titles to the native Irish: (Sir Thomas Macaulay, 1848, *The History of England*, Penguin Classics, pp 149-151)

*To allay national animosity such as that which the two races [Irish and English] inhabiting Ireland felt for each other could not be the work of a few years. Yet it was a work to which a wise and good Prince might have contributed much; and King James II would have undertaken that work with advantages such as none of his predecessors or successors possessed. At once an Englishman and a Roman Catholic, he belonged half to the ruling and half to the subject cast, and was therefore peculiarly qualified to be a mediator between them. Nor is it difficult to trace the course which he ought to have pursued. He ought to have determined that the existing settlement of landed property should be inviolable; and he ought to have announced that determination in such a manner as effectually to quiet the anxiety of the new proprietors, and to extinguish any wild hopes which the old proprietors might entertain. Whether, in the great transfer of estates, injustice had or had not been committed, was immaterial. The transfer, just or unjust, had taken place so long ago, that to reverse it would be to unfix the foundations of society. There must be a time limitation to all rights. After thirty-five years of actual possession, after twenty-five years of possession solemnly guaranteed by statute, after innumerable leases and releases, mortgages and devises, it was too late to search for flaws in titles. Nevertheless something might have been done to heal the lacerated feelings and to raise the fallen fortunes of the Irish gentry. The colonists were in a thriving condition. They had greatly improved their property by building, planting and fencing..... There was no doubt that the next Parliament which should meet at Dublin, though representing almost exclusively the English interest, would, in return for the King's promise to maintain that interest in all its legal rights, willingly grant to him a considerable sum for the purpose of indemnifying, at*



least in part, such native families as had been wrongfully despoiled.

Having done this, he should have labored to reconcile the hostile races to each other by impartially protecting the rights and restraining the excesses of both. He should have punished with equal severity that native who indulges in the license of barbarism and the colonists who abused the strength of civilization.... no man who was qualified for office by integrity and ability should have been considered as disqualified by extraction or by creed for any public trust. It is probable that a Roman Catholic King, with an ample revenue absolutely at his disposal, would, without much difficulty, have secured the cooperation of the Roman Catholic prelates and priests in the great work of reconciliation. Much, however, might still have been left to the healing influence of time. The native race might still have had to learn from the colonists industry and forethought, arts of life, and the language of England. There could not be equality between men who lived in houses and men who lived in sties, between men who were fed on bread and men who were fed on potatoes, between men who spoke the noble tongue of great philosophers and poets and men who, with the perverted pride, boasted that they could not writh their mouths into chattering such a jargon as that in which the Advancement of Learning and the Paradise Lost were written. Yet it is not unreasonable to believe that if the gentle policy which has been described had been steadily followed by the government, all distinctions would gradually have been effaced, and that there would now have been no more trace of the hostility which has been the curse of Ireland ...and

WHEREAS, the Master Manual rationale... *Currently, such reserved or aboriginal rights of tribal reservations have not been quantified in an appropriate legal forum or by compact with three exceptions.... The Study considered only existing consumptive uses and depletions; therefore, no potential tribal water rights were considered.... or the ESA rationale.... The environmental baseline used in ESA Section 7 consultations on agency actions affecting riparian ecosystems should include for those consultations the full quantum of: (a) adjudicated (decreed) Indian water rights; (b) Indian water rights settlement act; and (c) Indian water rights otherwise partially or fully quantified by an act of Congress... Biological opinions on proposed or existing water projects that may affect the future exercise of senior water rights, including unadjudicated Indian water rights, should include a statement that project proponents assume the risk that the future development of senior water rights may result in a physical or legal shortage of water...* does not represent a significant step forward from that advanced by Macaulay given the opportunity of 150 years for refinement in America. There cannot be significant differences between the statement of the Corps of Engineers and the Macaulay logic; and

WHEREAS, it is material, not immaterial, whether there has been injustice or a fitting of the law to the purpose in the transfer of Standing Rock waters of the Missouri River, its tributaries and its aquifers to non-Indians in the Master Manual update. It is rejected as correct ... that after the new proprietor's (downstream navigation, upstream recreation and endangered species) have enjoyed the Indian "estate" for a period of 25 to 35 years, the wild hopes of the Indian proprietors for participation must be extinguished. It is rejected as correct that the lacerated Indian feelings be healed, or for a considerable sum, despoiled Indian families can be made whole and the new possessors of Standing Rock Sioux water rights can be indemnified. It is rejected as proper that this be justified on the basis that the new possessor has greater industry, forethought, arts of life, language, diet, and housing. It is rejected

as untrue that after numerous leases, releases, and mortgages by non-Indians relying upon unused Indian *Winters* doctrine water rights, it is too late to search for flaws in titles. It is accepted as true that the Master Manual promotes reliance by non-Indians upon unused Indian *Winters* doctrine water rights; and

WHEREAS, the rationale of Supreme Court Justices, Master Manual and ESA is but a limited improvement from historical examples even earlier than Macaulay. Over 400 years ago, the sovereigns of England and Scotland, upon their union, sought possession of the borderlands between the two nations and to dispossess the native tribal inhabitants. The following provides the rationale of the Bishop of Glasgow against those ancient inhabitants as they sought (in vain) to stay in possession of their ancient lands:

*I denounce, proclaim and declare all and sundry acts of the said murders, slaughters, ... thefts and spoils openly upon daylight and under silence of night, all within temporal lands as Kirklands; together with their partakers, assistants, suppliers, known receivers and their persons, the goods reft and stolen by them, art or part thereof, and their counselors and defenders of their evil deeds generally CURSED, execrated, aggregate and re-aggregate with the GREAT CURSING.*

*I curse their head and all their hairs on their head; I curse their face, their eye, their mouth, their nose, their tongue, their teeth, their crag, their shoulders, their breast, their heart, their stomach, their back, their wame (belly), their arms, their legs, their hands, their feet, and every part of their body, from the top of their head to the sole of their feet, before and behind, within and without.*

*I curse them going and I curse them are riding; I curse them standing, and I curse them sitting; I curse them eating, I curse them drinking; I curse them walking, I curse them sleeping; I curse them arising, I curse them laying; I curse them at home, I curse them from home; I curse them within the house, I curse them without the house; I curse their wives, their barns, and their servants participating with them in their deeds. I wary their corn, their cattle, their wool, their sheep, their horses, their swine, their geese, their hens, and all their livestock. I wary their halls, their chambers, their kitchens, their storage bins, their barns, their cowsheds, their barnyards, their cabbage patches, their plows, their harrows, and the goods and houses that is necessary for their sustenance and welfare.*

*The malediction of God that lighted upon Lucifer and all his fellows, that struck them from the high heaven to the deep hell, must light upon them. The fire in the sword that stopped Adam from the gates of Paradise, must stop them from the glory of heaven until they forbear and make amends; and*

WHEREAS, truly, the rationale of the Master Manual may be a slight improvement in the techniques that were used to justify dispossession 400 years ago and represents progress, Standing Rock and other tribes have repeatedly encountered equally effective, if less colorful, opposition to their efforts to preserve, protect, administer and utilize their water rights; and

WHEREAS, the distinguishing feature for the Standing Rock Sioux Tribe, however, is

the fact that the water right "estate" in the Missouri River has not been taken from them, even though it is under attack in the Master Manual. It is proposed in the Master Manual to commit water away from the Indians, but the process is not accomplished, and those who would rely on unused Indian water rights have not yet taken possession and executed mortgages, leases and releases on the basis of them. The Standing Rock Sioux Tribe remain in position to retain its "estate" in the Missouri River by rejecting the Master Manual and taking affirmative action to protect its ancient and intact possessions; and

WHEREAS, by taking steps to protect their ancient possessions the Standing Rock Sioux Tribe recognizes that it cannot expect support from the United States or its agencies acting as Trustee. Strong reaction can be expected from any current attempt to do so, including strong reaction by the Trustee. First, the Trustee has no funds for litigation of Indian water right issues. Second, the Trustee has considerable funds for settlement of Indian water right issues, but the Indian costs in lost property are great. Third, the Trustee has considerable technical criteria and requirements to impose on the Indian tribes as a basis for limiting the Indian water right "estate": irrigable land criteria, water requirement criteria, limitation on beneficial uses and, most limiting, economic feasibility criteria that few, if any, existing non-Indian water projects could survive.

NOW THEREFORE BE IT RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe rejects the Master Manual Review and Update by the U. S. Army Corps of Engineers for the express reason that it establishes a plan for future operation of the Missouri River addressing inferior downstream navigation, upstream recreation and endangered species water claims of the States and Federal interests and specifically denies proper consideration or any consideration of the superior, vested water rights of the Standing Rock Sioux Tribe while committing reservoir releases to purposes and interests in direct opposition to those of the Tribe.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe, seeking to protect and preserve its valuable rights to the use of water in the Missouri River, its tributaries and aquifers upon which the Tribe relies and has relied since ancient times for its present and future generations, directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups to petition members of Congress and officials at the highest levels in the Bush Administration, including the Department of Justice, among other proper steps, for the single purpose of ensuring a full rejection and re-constitution of the Master Manual as now proposed for action by the Corps to properly reflect the rights, titles and interests of the Standing Rock Sioux Tribe.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe proclaims its continued dominion over all of the lands within the boundaries of the Standing Rock Sioux Indian Reservation as reserved from time immemorial including

but not limited to rights, jurisdictions, privileges, prerogatives, liberties, immunities, and temporal franchises whatsoever to all the soil, plains, woods, wetlands, lakes, rivers, aquifers, with the fish and wildlife of every kind, and all mines of whatsoever kind within the said limits; and the Tribal Council declares its water rights to irrigate not less than 303,650 arable acres with an annual diversion duty of 4 acre feet per acre, to supply municipalities, commercial and industrial purposes and rural homes with water for not less than 30,000 future persons having an annual water requirement of 10,000 acre feet annually, to supply 50,000 head of livestock of every kind on the ranges having an annual water requirement of 1,500 acre feet annually: such proclamation made on the basis of the status of knowledge at the start of the third millennium and subject to change to include water for other purposes, such as oil, gas, coal or other minerals, forests, recreation, and etc; and such proclamation for the purposes and amount of water required to be adjustable in the future to better reflect improved knowledge and changing conditions.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups to petition members of Congress and officials at the highest levels in the Bush Administration to support and promote legislation that would, among other things, enable the Standing Rock Sioux Tribe to exercise its rights to the use of water in the Missouri River, in part, by purchasing the generators and transmission facilities of the United States at Oahe Dam at fair market value, subject to such offsets as may be agreed upon, with provisions to sell power generated at Oahe Dam at rates necessary to honor all existing contracts for the sale of pumping power and firm, wholesale power during their present term and sufficient to retire debts of the United States that may be agreed upon; provided, however, that the Tribe may increase power production at the dam by feasible upgrades and market the new power at market rates and after expiration of current contracts market power at rates reflective of the market; and provided further that legislation to purchase generators and transmission facilities will also include provisions to finance wind and/or natural gas power generation on the Standing Rock Indian Reservation to combine with hydropower production, thereby using Tribe's water and land resources effectively for the benefit of the Tribe without further erosion, diminishment and denigration of Tribe's water right claims.

BE IT FURTHER RESOLVED THAT, the Standing Rock Sioux Tribal Council rejects all reports and investigations of the Bureau of Reclamation on the Cannonball and Grand Rivers watersheds and any and all proposals by Bureau of Reclamation for an Indian Small Water Projects Act and that all ongoing efforts of the Bureau of Reclamation respecting these specific efforts will cease by this directive of the Tribal Council.

BE IT FURTHER RESOLVED THAT, the Tribal Council of the Standing Rock Sioux Tribe directs the Chairman to take all reasonable steps, through the appointment of himself, Tribal Council members and staff to working groups, to petition members of Congress,

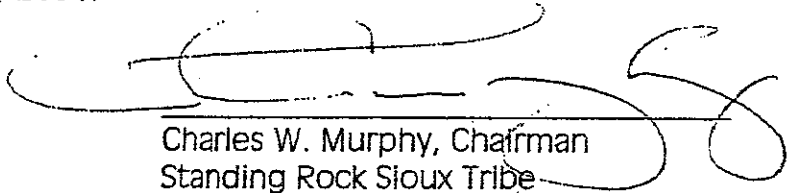
United States Supreme Court, when engaged in a Whiggish course, to subject the least powerful to the will of the States in matters involving property rights as evidenced by the *Dred Scott*, the *O'Connor Ghost* and comparable decisions of expediency.

BE IT FURTHER RESOLVED THAT, the Chairman and Secretary of the Tribal Council are hereby authorized and instructed to sign this resolution for and on behalf of the Standing Rock Sioux Tribe.

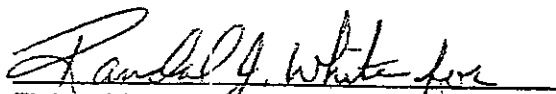
## CERTIFICATION

We, the undersigned, Chairman and Secretary of the Tribal Council of the Standing Rock Sioux Tribe, hereby certify that the Tribal Council is composed of (17) members, of whom 12 constituting a quorum, were present at a meeting thereof, duly and regularly, called, noticed, convened and held on the 5<sup>th</sup> day of April, 2001, and that the foregoing resolution was duly adopted by the affirmative vote of 11 members, with 0 opposing, and with 1 not voting. THE CHAIRMAN'S VOTE IS NOT REQUIRED, EXCEPT IN CASE OF A TIE.

DATED THIS 5<sup>th</sup> DAY OF APRIL, 2001.

  
Charles W. Murphy, Chairman  
Standing Rock Sioux Tribe

ATTEST:

  
Elaine McLaughlin, Secretary  
Standing Rock Sioux Tribe

(OFFICIAL TRIBAL SEAL)





**P.O. Box 590  
Eagle Butte, South Dakota 57625  
(605) 964 - 4155  
Fax: (605) 964 - 4151**

February 28, 2002

U.S. Army Corps of Engineers  
Northwestern Division  
Attn: Missouri River Master Manual RDEIS Project Manager  
12565 West Center Road  
Omaha, NE 68144-3869


**Reference: Master Manual RDEIS Comments**

Dear Sir/Madam;

On behalf of the Cheyenne River Sioux Tribe, I am honored to submit the enclosed comments on the Master Manual RDEIS for the Cheyenne River Sioux Tribe. The Cheyenne River Sioux Tribe appreciates the opportunity to provide comments on the Master Manual RDEIS.

If you should have any further questions, please feel free to contact David Nelson, Director for the CRST Environmental Protection Departments' office at (605)964-6559.

Sincerely,

  
Gregg J. Bouffland, Chairman  
**CHEYENNE RIVER SIOUX TRIBE**

GJB/ddn

**David D. Nelson, Director**  
**Cheyenne River Sioux Tribe**  
**Environmental Protection Department**  
**P.O. Box 590 South Willow and Airport Road**  
**Eagle Butte, South Dakota 57625**  
**Phone: 605-964-6559**  
**Fax: 605-964-1072**  
**E-Mail: [crstepd@sat.net](mailto:crstepd@sat.net)**



EXECUTIVE RESOLUTION NO. E-49-02-CR

WHEREAS, the Cheyenne River Sioux Tribe is an unincorporated Tribe of Indians, having accepted the provisions of the Act of June 18, 1934, (48, Stat. 84), and

WHEREAS, the Tribe, in order to establish its tribal organization; to conserve its tribal property; to develop its common resources; and to promote the general welfare of its people, has ordained and established a Constitution and By-Laws, and

WHEREAS, the Cheyenne River Sioux Tribe is committed to the protection of its natural resources and environment; and

WHEREAS, the Cheyenne River Sioux Tribe is a major stakeholder in the Missouri River Basin and the Tribe has a vested interest in the Management of the Missouri River Mainstem Reservoir System by the U.S. Army Corps of Engineers; and

WHEREAS, the intent of the Revisions to the Corps' Master Water Control Manual will directly and significantly impact the Cheyenne River Sioux Tribe ; now

THEREFORE BE IT RESOLVED, that the Cheyenne River Sioux Tribal Executive Committee on behalf of the Cheyenne River Sioux Tribe does hereby authorize the submission of comments from the Tribe concerning the Corps' proposed alternatives for revising the Master Manual.

CERTIFICATION

This is to certify that the foregoing resolution has been reviewed and approved by the undersigned Executive Committee acting in the best interest of the Cheyenne River Sioux Tribe, this 28<sup>th</sup> day of February 2002, in Eagle Butte, South Dakota.

Gregg J. Bourland, Chairman

Benita Clark  
Benita Clark, Treasurer

Colette Ifon Hawk  
Colette Ifon Hawk, Secretary



## MASTER MANUAL COMMENTS

The Cheyenne River Sioux Tribe is a major stakeholder in the Missouri River Basin. As such, the Tribe has a vested interest in the management of the Missouri River Mainstem Reservoir System by the U.S. Army Corps of Engineers. Revisions to the Corps' Master Water Control Manual (Master Manual) will directly and significantly impact the Cheyenne River Sioux Tribe. Following are the Tribe's comments concerning the Corps' proposed alternatives for revising the Master Manual..

### GENERAL

*To the greatest extent practicable and permitted by law, . . . 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 populations and low-income populations in the United States . . . .* (emphasis added)

Executive Order 12,898, 1994

Executive Order 12898 places on federal agencies the task of achieving environmental justice. To do so, the agencies must identify and address disproportionately high and adverse effects of their actions on minority and low-income populations. Operation of the Missouri River is an action of the Corps of Engineers requiring compliance with EO 12898. Preparation of the Revised Draft Environmental Impact Statement for the Missouri River Master Manual (RDEIS), requires the Corps to comply with the National Environmental Policy Act (NEPA). The combination of E.O. 12,898 and NEPA creates a process in which the Corps must not only *identify* the impacts of its operation of the Mainstem Reservoir System which disproportionately and adversely affect the basin tribes, it must also come up with ways to *mitigate* those impacts. While the Corps has gone to great lengths to fulfill the former obligation, identification, little has been done to fulfill the latter, mitigation. In short, much work remains to achieve environmental justice.

Water level fluctuations in Lake Oahe are of great concern to the Cheyenne River Sioux Tribe. Fluctuating water levels are eroding the western shoreline of Oahe and destroying tribal cultural and historic sites at an alarming rate. Water quality is affected by lake level fluctuation and ice movement near the intake for the Tribe's main drinking water supply. Water level changes also result in the propagation of noxious weeds, adversely impacting the Tribe's cattle industry. Each of these impacts are discussed below.

Lake level fluctuations are perpetuated under all six plans for operation of the Mainstem Reservoir System being considered by the Corps of Engineers in this RDEIS process. For that reason and others discussed herein, the Cheyenne River Sioux Tribe does not endorse any of the alternatives under consideration.

## **HISTORIC PROPERTIES**

According to the Corps' Historic Properties Technical Report (Corps 1994q), the Smithsonian Institution conducted a survey of historic properties in the Missouri River basin prior to filling the lakes. Although archaeologically significant at the time, the surveys are very meager by modern standards. The Corps began comprehensive survey and inventory programs in 1974. Because they took place after the lakes were filled, these surveys involve lands at or above normal pool elevations. The combination of the Smithsonian and Corps surveys includes 212,000 acres surveyed and 1,400 sites inventoried. Although the 212,000-acre figure sounds impressive, the Corps goes on to state at p. 4 of its report that "it is reasonable to speculate that not less than 50 percent of all historic properties existing within the five downstream projects are normally inundated." (Corps 1994q p. 4) This cuts the number of surveyed sites above the pool from 1,400 down to 700 or less. Incidentally, only the five downstream reservoirs are included in these numbers, because Ft. Peck was inundated at the time of the Smithsonian surveys.

Little was known about Ft. Peck's archaeological resources until recently, states the Corps at p. 3-169 of the Master Manual RDEIS. Little was known until the Corps sponsored a survey of 2.3% of the shoreline of Ft. Peck Reservoir. The survey revealed 159 sites, which, when extrapolated, could yield 2,000 more sites on the shoreline of that reservoir. Why is extrapolation necessary? Why were only 2.3% of the shoreline surveyed?

Regarding historic properties at the five downstream reservoirs, the Corps lists 1,402 archaeological sites in and adjacent to Lake Sakakawea, 1,114 at Lake Oahe, and 165 "other archaeological sites" for a total of 2,681 sites. (RDEIS p. 3-169). Obviously, these numbers differ from the Corps' reference to 1,400 sites in its technical report on historic properties supporting the RDEIS. The difference raises the question, "What are the real numbers?" Even more important, however, is the question "Are the numbers accurate and complete?" The answers to these questions are crucial, because the Corps' evaluation of the potential for erosion of historic properties from the RDEIS alternatives for operation of the Mainstem Reservoir System were based upon the Corps' estimation of the number of historic properties on the shorelines of the respective reservoirs. It is the position of the Cheyenne River Sioux Tribe that the Corps has not taken steps necessary to adequately identify historic properties within the area of potential effects of its operation of the Mainstem Reservoir System.

Title 36 of the Code of Federal Regulations § 800.4 requires the Corps to gather information from Indian Tribes and "take the steps necessary to identify historic properties within the area of potential effects." 36 C.F.R. § 800.4(a)(4) and (b). The level of effort required of the Corps includes making a "reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the *nature and extent of potential effects on historic properties*, and the *likely nature and location of historic properties within the area of potential effects*." 36 C.F.R. § 800.4(b)(1) (emphasis added).

The Tribe acknowledges that the Corps has consulted with it concerning historic properties. However, the Tribe lacks the capacity to adequately respond to Corps inquiries because it lacks the funding and manpower to undertake a comprehensive survey of historic properties on the shoreline of Lake Oahe. Moreover, while the Corps has apparently conducted studies of historic properties in the Missouri River basin, those studies do not constitute a systematic, comprehensive survey. Such a survey is needed. In 2000, more than 150 previously unrecorded traditional and cultural properties were found by the CRST's Preservation Office in the course of surveying recreational lands slated for transfer from the Corps to the Tribe under the Terrestrial Wildlife Habitat Restoration legislation (known as "Mitigation"). These recreation areas constitute a small percentage of Oahe's western shore within the CRST Reservation. If the numbers are extrapolated to the entire western shoreline, then many more sites could be added to the Corps' list of "known sites" based on this relatively small survey alone. It is unlikely that the newly found sites were utilized by the Corps in calculating its historic properties index values for Lake Oahe in the RDEIS. The properties are not listed in the Omaha District's Historic Properties Database File, attached as Exhibit A to the historic properties technical report. This is not surprising, since the date of the Database file is 1993, and the date of the technical report is 1994.

If these newly discovered sites were not included in Corps' evaluation of the impacts of the proposed alternatives on historic properties, then certainly the as-yet undiscovered sites on the remaining lands on the western shore of Lake Oahe were not considered. The Corps clearly states in the RDEIS that its evaluation of the impacts of its operation of the Mainstem Reservoir System is based upon known sites only. In section 5 of the RDEIS, the Corps states that "[t]he long-term potential for erosion at each *known site* was evaluated based on the monthly water level in each of the three upstream lakes and Lake Sharpe." (RDEIS p. 5-137) It states at p. 7-183 that "only the effect to *known sites* is considered in the historic properties index . . . ." (emphasis supplied) Given "*the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects,*" the Corps' efforts to date do not constitute a "reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey." 36 C.F.R. § 800.4(b)(1) (emphasis added).

It is a foregone conclusion that operation of the Mainstem Reservoir System on the Missouri River is a federal undertaking of incredible magnitude pursuant to 36 C.F.R. § 800.4(b)(1). So is changing that operation. The Corps' level of effort in identifying historic properties on the shorelines of the Reservoirs is also driven by the nature and extent of the potential effects of River operations on historic properties. 36 C.F.R. § 800.4(b)(1). The Corps recognizes that "[h]istoric properties located within the reservoir zone are subject to annual fluctuation, and properties located within a few vertical feet up or down from that zone, are likely to receive a wide range of severe impacts." Given the magnitude of the Corps' undertaking and the extent of the potential effects on historic properties, the level of effort required of the Corps in identifying historic properties subject to destruction due to wave action and erosion, is high.

The Corps' obligation with regard to historic properties does not stop there, however. In addition to identifying historic properties and assessing adverse effects on them, Corps officials must develop measures *in the RDEIS* to avoid or mitigate such affects. 36 C.F.R. § 800.8(c)(4). The Corps acknowledges this obligation at p. 12 of its technical report on historic properties, where it states: "Procedural compliance [with the National Historic Preservation Act and NEPA] further requires description, evaluation of, and agreement upon, any measures proposed to mitigate the adverse effect, or selection of an alternative to the Federal undertaking in question." The Corps quickly rules out the idea of developing an alternative to operating the existing reservoir system, or an alternative for operating the reservoir system that would not adversely impact historic properties. Instead, it concludes that mitigative measures to lessen the severity of impact may be the only means of compliance. Corps 1994q p. 12.

Unfortunately, mitigation measures called for under Section 106 of the National Historic Preservation Act are lacking in the RDEIS. The Corps tells us that lake level fluctuations and wave action are inevitable in the operation of the Mainstem Reservoir System. It states that "Known historic properties, which include but are not limited to prehistoric sites, Tribal cultural resources, and historic sites, are adversely affected by all the alternatives. Increased conservation during droughts is likely the primary factor leading to this result." RDEIS p. 7-233. The Corps then points to the bank stabilization efforts undertaken in the lower basin as evidence of its attempts to mitigate the adverse impacts of Reservoir operations on historic properties. Table 3.15-1 at p. 3-171 of the RDEIS details these efforts. Only 21 bank stabilization projects are listed for a total expenditure of \$1,759,000 over 23 years. Repatriation of Native American remains under the Native American Grave Protection and Repatriation Act adds little to the Corps' column. When compared with the millions of dollars being spent or sacrificed to mitigate the adverse impacts of River operation on three listed species in the basin, the Corps' efforts at addressing the destruction of irreplaceable historic properties would be laughable if the situation were not so serious.

Clearly, the Corps has thrown up its hands. In its historic properties technical report, the Corps advises that measures to mitigate the loss of value inherent in historic properties involve either site protection or information retrieval (archaeology). Either measure, says the Corps, requires substantial investment of money and manpower, both of which have historically been in short supply compared with the legislative compliance requirements. Corps 1994q p. 12. The Corps concludes its discussion of Mitigation Requirements at § 7.20.1 of the RDEIS with a remarkable statement:

Because the Corps has existing programs to address the protection of sites or their documentation if protection cannot be accomplished, new efforts to mitigate the effects of the operation of the Mainstem Reservoir System on known sites are not required. Continued efforts to protect the sites are necessary to limit the adverse effects of the exposure or loss of the known sites.

(emphasis supplied).

Finally, NEPA and the National Historic Preservation Act require the Corps to not only develop measures to avoid, minimize or mitigate adverse effects on historic properties of operation of the Mainstem Reservoir System, but to include a binding commitment to such

measures in its Record of Decision on the Master Manual. The near-nonexistent status of the Corps' mitigation measures for historic properties raises the question, "binding commitment to what?"

In sum, historic properties are as priceless and threatened as the least tern, piping plover and pallid sturgeon. The entire River System is being altered to address the plight of these animal species. The Cheyenne River Sioux Tribe is requesting that the Corps give the same consideration to its endangered historic properties.

In light of the above, the Cheyenne River Sioux Tribe objects to the RDEIS on the grounds that it does not meet the standards set forth in 36 C.F.R. § 800.8(c)(1).

## **WATER QUALITY**

In the water quality portions of the RDEIS, the Corps tells us that problems exist. "Elevated concentrations of arsenic, manganese, iron and beryllium have been monitored in Lake Oahe and its inflows." RDEIS p. 3-56. In 2000, state water quality standards for mercury, phosphorus, sulfate and iron were exceeded at Lake Oahe. U.S. Army Corps of Engineers 2000 Annual Report, pp. 11-12. Arsenic commonly exceeds state water quality standards in Missouri River Lakes. RDEIS p. 3-47. Although arsenic, selenium and mercury occur naturally in the soils of the basin, mining in the Black Hills has contaminated the Cheyenne River with high levels of mercury. The Cheyenne flows into Lake Oahe and forms the southern boundary of the Cheyenne River Reservation.

In addition, sediment is being eroded, transported, and deposited within the dam system. This is a normal process – sediment was continually moved by the Missouri River even before it was dammed. Now, however, sediment is settling out in the reservoirs and at the mouths of tributaries flowing into them. Significant sediment deposition is apparent at the mouths of the four major tributaries that flow into Lake Oahe -- the Cheyenne, Moreau, Grand, and Cannonball Rivers. Corps, 1994t, p. 19. The sediment in these deltas contains arsenic, mercury, and other metals. Arsenic and mercury are of particular concern to the Cheyenne River Sioux Tribe, because the intake for the Tribe's main public water supply system is located in the Cheyenne Arm of Lake Oahe.

Wave action, lake level fluctuation and ice movement stir up sediment. According to Tables 5.4-1 and 7.4-1 in the RDEIS, "wave action erodes and agitates the lake sediments during low lake levels, potentially causing elevated dissolved arsenic concentrations in the water column." These "[e]levated arsenic concentrations during low lake elevations and drought conditions may affect domestic water use (requiring additional treatment prior to domestic use) and cause chronic effects to aquatic life in lakes." The adverse effects are greatest during droughts, when lakes are drawn down and bottom sediments are exposed to wave action. RDEIS pp. 5-26-28, 7-26-28.

Both Oahe Dam releases and lake levels vary considerably. In its water quality technical report supporting the RDEIS, the Corps states, "[R]eleases have been extremely variable since

the project became fully operational.” Daily outflows range from less than 1,000 cubic feet per second up to 55,000 cubic feet per second. Regarding lake levels, the technical report states, “Much fluctuation has occurred throughout the history of the reservoir.” Corps 1994t, p. 19.

Several years ago, the Missouri Basin States Association asked the Corps to sample and analyze delta sediment to test the hypothesis that raising and lowering lake levels result in sediment resuspension, potentially adding contaminants to the reservoir and degrading water quality. Corps 1994t, p. 36. Sampled pollutants included mercury, cadmium, lead, chromium, zinc, selenium, arsenic, nickel, and pesticides. Significantly, *arsenic consistently showed significant increases sometimes exceeding a factor of 10.* Corps 1994t, p. 44.

Moreover, the finer the sediment, the greater the arsenic concentrations. Corps 1994t, pp. 44 and 52. “[F]iner sediments are generally more chemically active thus, perturbations such as wind-wave action can result in chemical changes associated with the transfer of materials from an anaerobic environment in the sediment to an aerobic environment in the overburden water.” It is also suspected that storm events and high winds, which are common in the Missouri River basin, cause high metal concentrations in the water. Corps 1994t p. 44.

The Corps emphasizes that the stirring of bottom sediments in shallow areas of the reservoir is going to occur no matter what the pool elevation. “This is a natural, on-going process which occurs at all reservoirs with relatively soft bed sediments.” Corps 1994t, p. 44.

On the other hand, “[d]elta growth is a dynamic process, and as the reservoir fills, areas which are now comprised of fine sediments [silts and clays] will eventually become areas dominated by more coarse sediments [sand] as the delta grows in the downstream direction.” As particle size increases, arsenic concentrations generally decrease. Unfortunately, “[t]he Oahe, Moreau, and Grand River Deltas could not be analyzed for particle size relationship, since only one sample was taken.” Corps 1994t, pp. 44-45, 52.

In sum, arsenic exists in the sediment of the deltas of tributaries flowing into Lake Oahe. The arsenic is found in higher concentrations in fine sediment. Wave action, lake level fluctuation and ice movement stir up the arsenic-bearing sediment and suspend it in the water column. None of the alternatives being considered by the Corps in the RDEIS will change this fact of reservoir operations. The Corps’ solution? Test and treat your drinking water, because the stirring of sediment in shallow areas is inevitable no matter what the Corps does. RDEIS Tables 5.4-1 and 7-4.1. This suggestion is hardly encouraging to the Cheyenne River Sioux Tribe, whose intake for its main public water supply system is located in the Cheyenne Arm of Lake Oahe.

Turning to mercury, we learn that this pollutant is ubiquitous in basin, but more of it was contributed to Lake Oahe from mining operations at the Homestake Gold Mine in the Black Hills. Although the Mine was declared a Superfund site and, thus, this point-source of contamination has been controlled, Cheyenne River sediment remains contaminated and continues to be deposited into the Cheyenne Arm. Corps 1994t, p. 32. While observed mercury levels are below EPA drinking water standards, the Corps advises that the presence of mercury and its variable concentration suggests that it should be monitored by municipalities which use



the lake as a water supply. U.S. Army Corps of Engineers 2000 Annual Report, RDEIS Appendix B, p. B-497. Fish tissue samples collected by the South Dakota Department of Game, Fish & Parks and the Cheyenne River Sioux Tribe in 2000 in the Cheyenne River, Moreau and Grand Rivers and these arms of Lake Oahe contained sufficient mercury to warrant a consumption advisory on fish caught in waters adjacent to tribal lands. As a result of the study, the South Dakota Department of Game, Fish & Parks was to extend the area of study to other portions of Lake Oahe in 2001.

As with Historic Properties, the Corps' identification and assessment of water quality problems in the Missouri River Basin have been less than stellar. "There is limited information regarding how water quality has changed since the construction of the Mainstem Reservoir System," says the Corps in Section 3.5.7 of the RDEIS. Although monitoring information is gathered by the Corps, the basin states, the U.S. Geological Survey and EPA, no monitoring program exists that integrates and evaluates all the information. RDEIS, pp. 3-36 and 3-44. "Spatial variability prevents our monitoring program from being a reliable indicator of the conditions which exist at the water supply intakes." RDEIS Appendix B, p. B-497. The Corps suggests that personnel responsible for water quality sampling should be updated in sampling techniques. RDEIS Appendix B, p. B-498. The Cheyenne River Sioux Tribe agrees.

The Tribe also agrees with the Missouri River Natural Resources Committee and the Biological Resources Division of the U.S. Geological Survey that *more science is needed*. The Missouri River Environmental Assessment Program is good start. RDEIS Appendix B, p. B-515. The purpose of the Program is to provide the scientific foundation for Missouri River management decisions. The Program hopes to expand current state and federal monitoring efforts and start new ones. It will establish a system-wide database containing information on fish, wildlife, habitat, water quality, and define the baseline of current river conditions. The Tribe is pleased to learn that the public as well as government agencies will have equal access to this database. The Environmental Assessment Program will also conduct long-term monitoring of river resources and focused investigations of the cause and effect relationship between river operations and the River's response. Appendix B, p. B-515, B-539. Of course, the Program is entirely dependent upon funding. Given the fact that tribal drinking water is at stake, funding of the Program has environmental justice implications.

Neither has the Corps developed viable mitigation measures for the water quality issues raised in the RDEIS. Although the Corps acknowledges that resuspension of arsenic and mercury from delta sediments and bioaccumulation of metals in fish tissues are concerns of tribes in the basin, RDEIS 7-33 and 7-34, the Corps' solution is NOT development of mitigation measures to address these issues. Rather, the Corps advises local governments to test and treat their water before drinking it.

Along the same lines, we are told in the RDEIS that the MCP leaves more water in the three upper mainstem lakes during drought and reduces lake level fluctuation. The increased volume improves water quality by diluting pollutants. The GP options will improve water quality even more because they will leave even more water in the lakes than the MCP. RDEIS p. 7-33. However, none of the alternatives limits the suspension of metals into the water column and the accumulation of toxic elements in fish tissue in Lake Oahe. RDEIS 7-33 to -34. Thus, neither the

CWCP nor any of the RDEIS alternatives being considered by the Corps mitigate the water quality issue of greatest concern to the Cheyenne River Sioux Tribe.

The Corps is correct in stating that it is not the source of pollutants entering the Missouri River. Neither does it regulate water quality in the Basin. RDEIS p. 3-46. States, tribes and the federal Environmental Protection Agency (EPA) manage water quality under the Clean Water Act and Safe Drinking Water Act. That the Corps is not the source of water pollution or the regulator of water quality, however, does not relieve it of its responsibility to satisfy the environmental justice principles of Executive Order 12898 by identifying and mitigating water quality problems created or exacerbated by its management of the Missouri River Mainstem Reservoir System. So far, no solutions have been offered.

What about dredging and removing the contaminated delta sediments? What about erecting barriers (NAME?) to minimize lake level fluctuation in the deltas and prevent ice movement? What about covering the contaminated sediment with courser sediment? What about moving the intake for the Tribe's public water supply system away from the Cheyenne River delta?

## **HYDROPOWER**

The Cheyenne River Sioux Tribe is very concerned about increased electricity rates for tribal members.

It is the Tribe's understanding that all of the alternatives being considered in the RDEIS process would increase overall hydropower economic benefits for the reservoir system. The drought conservation measures of the MCP and the GP options would leave more water in the reservoirs. This held-back water, known as "head," constitutes the capacity of the dams to produce hydropower. As the water is released and run through the turbines in the dams, power is generated. In this way, GP1528 would produce the greatest hydropower benefits. The CWCP produces the least. The other alternatives fall in between. The difference between GP1528 and the CWCP, however, is only 2.3%.

In spite of the fact that the MCP and GP options increase the *capacity* of the mainstem dams to generate hydropower, all of the GP options *decrease* hydropower *revenues*. How? By releasing water from the dams other than during summer and winter peak demand periods, when the hydropower is most valuable. The higher the demand for power, the greater its value. "Because demand is greatest in summer and winter, energy produced during these seasons is of greater overall value than energy produced in the spring and fall." RDEIS p. 3-122. When water is released from the dams other than during these summer and winter peak demand periods, revenue is lost. In this way, GP1528 and GP2028, the two GP options which release only enough water in the summer to maintain minimum navigation service, decrease annual hydropower revenue by an average of \$8 to \$9 million when compared with the CWCP. The GP options which split summer season releases and release the least amount of water during the summer peak demand period, GP 1521 and GP2021, have about a \$30 million average annual adverse impact on hydropower revenues. RDEIS p. 7-228. These revenue losses translate into increased

electricity rates for customers who purchase power from the Pick-Sloan Project through the Western Area Power Administration (WAPA).

The magnitude of the hit caused by these increased rates depends on the amount of power a particular customer purchases from Pick-Sloan. WAPA estimates that basin Tribal Customers purchase 60 percent of their total power from Missouri River hydropower. As shown in Figure 7.10-22 in the RDEIS and Figure A-9 in the Tribal Appendix to the RDEIS, the increase in power costs incurred by basin tribes under the Gavins Point options ranges from two percent for GP1528 up to ten percent for GP1521 and GP2021. These increases will adversely impact affordable housing for tribal members.

**COMMENTS OF THE CHEYENNE RIVER SIOUX TRIBE**  
**DEPARTMENT OF GAME, FISH & PARKS**

**NOXIOUS WEEDS**

In an effort to accommodate the paradigm shift from the multiple uses originally established for the Pick-Sloan Project to increased emphasis on environmental protection, the Corps has proposed alternatives aimed at protecting three threatened or endangered species -- the interior least tern, the piping plover and the pallid sturgeon. In 2000, the U.S. Fish & Wildlife Service issued a Biological Opinion (BiOp) for the Missouri River, which included a Reasonable and Prudent Alternative for operation of the Mainstem Dams to avoid jeopardy to the three species. The Gavins Point alternatives discussed in the RDEIS embody the Corps' efforts to incorporate the Reasonable and Prudent Alternative into the Master Manual.

The Reasonable and Prudent Alternative in the BiOp calls for flow enhancement, habitat restoration, creation and acquisition for the three listed species, and adaptive management. It also calls for unbalancing of the water levels in the three upstream reservoirs -- Ft. Peck, Lake Sakakawea, and Lake Oahe. Unbalancing would consist of lowering the level of one of the three lakes by three feet to allow vegetation to grow around the rim. The unbalancing would rotate among the three lakes on a three-year basis. In the first year, the water level would be lowered in one of the lakes. The lowered level would be held constant the second year, and then raised back up to normal the third year. RDEIS p. 6-3.

This unbalancing plan is anticipated to greatly benefit the listed species inhabiting the reaches between the three lakes, as high flows are good for native river fish and for clearing vegetation from islands and sandbars. The subsequent low flows will expose the cleared islands and sand bars, which the least tern and piping plover use for nesting. Lake fisheries will also benefit, as the vegetation growing on the lake perimeters for two years will be inundated the third year, becoming spawning and hiding habitat for young-of-the-year fish.

Unfortunately, little mention is made in the RDEIS of the *type* of vegetation that will grow on the lake perimeters when unbalancing kicks in. Noxious weed infestations have reached crisis proportions on Cheyenne River Sioux Tribe reservation lands. Canada thistle has exploded within the past two years, and leafy spurge has been reported in several new locations. Noxious weeds are beginning to take over the Lake Oahe shoreline, posing a serious threat to native

grasses. Even without unbalancing, wetlands at Oahe are flooded and emerge as lake levels fluctuate. RDEIS p. 3-70. The water disperses seeds. Canada thistle predominates in these emergent wetlands. When working to establish habitat on Corps land within the Reservation, tribal Game Fish & Parks employees encounter Canada thistle nearly 75% of the time when the soil is disturbed. The Tribe's Game, Fish & Parks, Prairie Management, the BIA and several South Dakota counties consider Lake Oahe to be the primary source of Canada thistle, which is a water loving plant.

Cattle production is the prime source of income for the Cheyenne River Sioux Tribe. Noxious weeds are extremely detrimental to this agricultural economy. They substantially reduce the productivity of grazing lands by competing with valuable native grasses. This reduction in range quality adversely impacts cattle production. The Cheyenne River Sioux Tribe is working with Dewey, Ziebach, and neighboring counties to eradicate noxious weeds. Control programs are costly.

For years, the Corps has funded spraying of noxious weeds on state lands on the shoreline of Lake Oahe. However, Reservation lands have been largely ignored. Unless the entire shoreline is addressed, the battle with noxious weeds will be lost. The Cheyenne River Sioux Tribe is very concerned that unbalancing will exacerbate the serious noxious weeds problem along the shores of Lake Oahe, with potentially devastating effects on the Reservation.

### **MISCELLANEOUS COMMENTS AND QUESTIONS**

On p. 3-6 of the RDEIS, current land uses on the Cheyenne River Sioux Reservation are described. The Tribe wishes to make a correction to this description, which indicates that grazing is a minor land use. To the contrary, grazing is the most predominant land use on the Reservation. Roughly 80% of the Reservation 2.8 million acres are utilized for grazing.

Page 3-56 of the RDEIS states, "Lake Oahe is used as a water supply by Fort Yates, North Dakota, and Mobridge, Wakpala, Gettysburg, Eagle Butte, Swiftbird, Blackfoot, Promise, White Horse, Green Grass, Bear Creek, LaPlante, Dupree, Iron Lightning, Faith, Bridger, Cherry Creek, Red Scaffold, Thunder Butte, Red Elm, and Lantry, South Dakota, as well as some individual cabins." Why are Takini and WEB Water not included? The WEB water intake is near Akaska, South Dakota. To our knowledge, it serves several East River areas, including Ipswich and Aberdeen, South Dakota.

With regard to Chapter 3, Section 3.6 of the RDEIS, the Cheyenne River Sioux Tribe's Game, Fish & Parks Department has the following questions and comments:

1. What was mapped for riparian and wetland areas pertaining to the Cheyenne River Sioux Reservation?
2. Are noxious weed infestations in the wetland and riparian areas mapped?

3. We are concerned about the negative effects of fluctuating lake levels on Cottonwood trees. Little to no age structure or recruitment is occurring within the existing stands. When the lake level is low, young cottonwoods come in very thick. When the level rises, these young trees are inundated and die. This precludes diverse age classification. When the older trees die, no younger trees will be there to replace them. These cottonwoods provide habitat for bald eagles, which are culturally significant to us as native people. Destruction of the cottonwoods along the River flyway will result in reduction or elimination of the eagle from the Cheyenne River Sioux Reservation. This would be a great loss to the Lakota people.

With regard to other sections of Chapter 3 of the RDEIS, the CRST Game, Fish & Parks Department has the following comments:

1. At p. 3-109, the RDEIS states, "The Cheyenne River Reservation is located adjacent to Lake Oahe on the *right* bank of the lake." The Reservation is located on the *left*, or west, bank of Lake Oahe.
3. On p. 3-134, the RDEIS refers to two existing recreational sites and four future recreational sites on the Cheyenne River Sioux Reservation, for a total of 1,123 acres. The Tribe requests amendment of the language of the sentence to include a reference to the fact that the two existing recreational sites are considered primitive.
1. On p. 3-151, the RDEIS states, "The Mainstem Reservoir System is a valuable source of jobs, recreation, hydropower, transportation of goods, and water supply for powerplants and domestic, agricultural, and industrial uses." Other than electricity, the Mainstem Reservoir System has not constituted a valuable source of the listed benefits to the Cheyenne River Sioux Tribe. Recreation epitomizes the unbalanced distribution of benefits generated by the Mainstem Reservoir System. In the absence of the anticipated irrigation development on the Mainstem System, recreation has become a primary use. Of the 52 recreation sites on Lake Oahe, only six are tribal, only two of which belong to the Cheyenne River Sioux Tribe, and those two are primitive - undeveloped. Further, any attempts by the Tribe to share in the recreation benefit are met with jurisdictional challenges by the state of South Dakota. In short, the Cheyenne River Sioux Tribe does not benefit economically from recreation on Lake Oahe. Distribution of the recreation benefit is unbalanced, as is distribution and enjoyment of the other benefits and uses of the Mainstem Reservoir System whose praises are sung in the RDEIS.

In the discussion of tern and plover habitat for Four Tribal Reservations in Section 5.6.1 of the RDEIS, p. 5-49, no mention is made of lake habitat for these birds. The Cheyenne River Sioux Tribe's Game, Fish & Parks Department believes that lake habitat for the tern and plover should be included in the discussion of the alternatives, particularly if the U.S. Fish Wildlife Service intends to designate the shoreline of Lake Oahe as critical habitat for the piping plover. The Tribe's Game, Fish & Parks Department has been surveying tern and plover habitat and conducting adult census on Lake Oahe since 1994. Game, Fish & Parks would be happy to

provide the data it has compiled to the Corps. GF&P does not believe a sound decision can be made concerning tern and plover habitat in the Missouri River Basin without knowing how the proposed alternatives will benefit or impact lake habitat for these listed species.

February 28, 2002

Brigadier General David A. Fastabend  
Commander and Division Engineer  
U.S. Army Corps of Engineers  
Northwestern Division  
PO Box 2870  
Portland, OR 97208-2870

**RE: Comments on the Revised Draft Environmental Impact Statement for the Missouri River Master Water Control Manual**

Dear Brigadier General Fastabend:

I thank you and the Project Team Members for the Missouri River Master Manual Review and Update for the opportunity to provide comments on the alternatives proposed in the Revised Draft Environmental Impact Statement (RDEIS) Report.

The Fort Belknap Indian Community's comments on the RDEIS will focus on the following areas:

- Lack of Data on the Alternative's Impacts on Tribes
- RDEIS Comment Period
- Impacts the RDEIS Alternatives would have on the Tribes
- Mitigation
- Recommendations

**Lack of Data on the Alternative's Impacts on Tribes**

Under the National Environmental Policy Act (NEPA), the Corps must compile and analyze the history, socioeconomic conditions, cultural resources, and environmental baseline conditions of the affected Indian Tribes. Although the RDEIS is an extensive document, it does not include an adequate assessment of the alternative's impacts on tribal concerns. The Mni Sose Coalition submitted comments on September 1993, September 1994, March 1995, June 1999, and September 1999 on the inadequacy of the treatment of the tribal economic, environmental, and historic resource impacts of the alternatives outlined in the PDEIS and PRDEIS. However, the RDEIS still does not include sufficient data for most Tribal Leaders to provide meaningful comments on the proposed alternatives.

The models do not properly articulate the difference between the states economies and tribal economies. There is a need for an Indian economic component in a *regional* analysis as opposed to a national economic development. The September 1999 document mentioned in the previous paragraph included a proposal whereas the Mni Sose Coalition would accumulate data and analyze of impacts on social-economic, environmental data, historic resource information.

**RDEIS Comment Period**

Although the six-month comment period for the RDEIS is considerably longer than required under the National Environmental Policy Act, the Fort Belknap Indian Community does not believe six months is a long enough time-frame for the Tribes to analyze the RDEIS. At the Mni Sose Coalition's January 2002, Board of Directors meeting, which the Fort Belknap Indian

Community is member, passed Resolution No. 02-11, which requests a 60-day extension to the RDEIS comment period. The resolution was submitted to your office on January 25, 2002. As of today, we have not received a response to the extension request.

### **Impacts the RDEIS Alternatives Would have on Tribes in Relation to the Current Water Control Plan (CWCP)**

Based upon the information provided in the RDEIS study, a number of generalities can be made regarding the impacts the Modified Conservation Plan (MCP) and the four Gavins Point (GP) alternatives would have on all the Tribes located in the Missouri River Basin, in relation to the CWCP. Those impacts are listed below:

#### Advantages—The MCP and GP Alternatives would:

- Improve the chances of survival for the piper plover, the interior least tern, and the pallid sturgeon;
- Increase the quality of recreational use, particularly along the Upper Missouri River;
- Improve drought conservation;
- Increase coldwater fish habitat;
- Enhance native river fish habitat; and
- Expand wetland habitat.

#### Disadvantages—The MCP and GP Alternatives would:

- Adversely impact tribal cultural resources and Native remains;
- Provide less flood control;
- Increase damage to interior drainage;
- Increase crop damage;
- Reduce warmwater fish habitat;
- Diminish riparian acreage;
- Increase spillway releases, which could lead to supersaturation of dissolved gases in the downstream river reach; and
- Increase hydropower costs from 3% to 13 % (under the GP alternatives; the MCP alternative would slightly decrease hydropower costs);

Two of the disadvantages, in particular, need further discussion:

#### 1. Adverse Impact to Cultural Resource and Native Remains

The RDEIS does not focus on the alternatives' impacts on tribal cultural resources and Native remains, other than stating that cultural resources may be impacted by any or all of the options, depending on location, type, elevation, and proximity to the riverine environment. The RDEIS does not include adequate research on the impacts the alternatives would have on tribal cultural resources and Native remains.

#### 2. Increased Hydropower Costs

The National Economic Development (NED) analysis utilized by the Army Corps, which indicates the GP and MCP alternatives would produce increased hydropower benefits is flawed in that the analysis does not look at the cost to the customers. Based upon Western Area Power Administration's analysis of the RDEIS, tribal customers could see increases of between 3-13% under the GP alternatives (Under the MCP alternative, customers would see a slight decrease in hydropower costs.)

Historically, the Tribes in the Missouri River Basin have borne a disproportionate burden of the environmental, cultural, and economic costs associated with the Pick-Sloan project. Ironically, these Tribes pay some of the highest energy prices in the country, despite their



high poverty rates. After years of negotiations, 25 of the Missouri River Basin Tribes now receive low-cost, federally generated hydropower from Western Area Power Administration. If one of the GP alternatives is selected by the Army Corps, tribal citizens will see their energy bills increase by up to 13 %. The Tribal hydropower benefits would essentially be wiped out.

**Mitigation**

Under the Executive Order on Environmental Justice, the Corps must propose plans to mitigate the impacts of its operations on the Tribes, because of the disproportionate impact of its operations on Native American communities. However, none of the alternatives outlined in the RDEIS address mitigation measures.

**Fort Belknap Indian Community's RDEIS Recommendations:**

- Work with the Mni Sose Coalition to compile and incorporate the requisite tribal data into the RDEIS. A multi-year plan should be developed and implemented to ensure the Corps possesses and considers tribal data that is required by NEPA.
- Extend the comment period for the RDEIS for an additional 60 days to allow the Tribes and other stakeholders with additional time to analyze the effects of the proposed alternatives;
- Coordinate with Tribes on mitigation efforts for impacts to cultural sites of the proposed alternative.

The Fort Belknap Indian Community appreciates the opportunity to voice its concerns regarding the RDEIS and is willing to work with the Army Corps of Engineers to ensure that tribal concerns are addressed in the Master Water Control Manual.

Sincerely, Benjamin Speakthunder President VIA email [h2otribe@ttc-cmc.net]



February 28<sup>th</sup>, 2002

TO: Missouri River Master Manual RDEIS Project Manager  
FROM: Michael B. Jandreau, Chairman, Lower Brule Sioux Tribe  
SUBJECT: Comments of the Lower Brule Sioux Tribe in response to the MRRDEIS

Dear RDEIS Project Manager:

By this letter and its attachments, the Lower Brule Sioux Tribe formally submits comments on the Revised Draft Environmental Impact Statement for the Master Manual (RDEIS) for inclusion in the record.

The Lower Brule Sioux Tribe, after extensive review finds the RDEIS is completely inadequate in addressing major environmental issues. The document, as the original DEIS, contains information that is completely insufficient, and offers no mitigation, beyond the six, (6) alternatives presented for discussion. Those alternatives specifically address the USFWS Biological Opinion and even then in an inadequate manner. Those six alternatives have very little prominence in the issues faced on the upper river. Other environmental issues of critical concern are addressed in a minimal fashion with outdated, inaccurate data – or simply not addressed at all.

The Lower Brule Sioux Tribe has spent several years pro-actively attempting to work with the ACE Omaha District and ACE HQ in Washington, DC, to address major environmental issues faced on the River. Those issues are specifically noted in Attachment 1 to this letter. This work has resulted in specific documents and processes which create the foundation for long term partnership with the ACE in addressing and creating resolution to these most critical problems, many of which are the cause for the update of the Master Manual. These documents and processes are the long-term mitigation for operation and planning on the River, and yet, are not even mentioned in the RDEIS.

It is extremely frustrating to continually devote extraordinary staff time and resources to attempt to engage the ACE in a working relationship, the fruits of this time and energy being the creation of workable documents and processes which provide for interaction

over the long term. Only to have these documents disappear in final draft form, into the dark reaches of a federal file cabinet.

Attachment 1 specifically reviews all of the issues that are inadequately addressed in the RDEIS, or issues that were not addressed at all. Attachment 1b reviews existing documents that have been created to address and mitigate these issues. None of the documents noted in Attachment 1b are addressed or mentioned in the RDEIS.

In light of the fact that this RDEIS is a second attempt to correct the inadequacies of the original draft, and that it has not done so successfully. The LBST respectfully requests that any final selection resulting from this RDEIS, be an interim document for a period of 3 to 5 years. This time frame would allow some flexibility in addressing some of these long-term environmental issues and provide the time to create/finalize on-going mitigation processes, as well as reviewing the benefits and impacts that the selected "Alternative" will have.

We request that the COE incorporate these comments into the Final EIS and the Record of Decision (ROD). We further request that you include the Draft MOA that was submitted to the COE 2/01, as well as the existing CRMPs that were developed for the Lake Sharpe and Lewis and Clark Projects in the Final EIS and ROD as well.

Thank you.

Sincerely,

Michael B. Jandreau, Chairman  
Lower Brule Sioux Tribe

Cc: file

February 28th, 2002

# Attachment 1

Issues identified by the Lower Brule Sioux Tribe

that are not addressed in the COE RDEIS, for the Master Water

Control Manual (AUGUST 2001)

Consultation and Coordination	ESA Issues	Cultural Resource Issues	Economic Issues	Water Quality Issues
<p><u><i>Draft MOA with Lower Brule Sioux Tribe (submitted for review to COE on 2/01) is not addressed.</i></u></p> <p>EIS does not reflect issues and questions raised by Tribes throughout NEPA process.</p> <p>Funding</p> <p>The RDEIS does not cite existing Tribal law that is applicable to the Mainstem Projects. For example, the Lower Brule Sioux has established a Water Code Ordinance No. LB-86-D As well as a Clean Water Ordinance, LB-01-A</p>	<p><u><i>Lack of coordinated consultation on USFWS critical habitat between COE, USFWS and Tribes.</i></u></p> <p>Sand Hills Prairie</p> <p>Least terns</p> <p>Piping Plovers</p> <p>Pallid Sturgeon</p> <p>Sacred Plants</p>	<p><u><i>CRMPs (2 projects completed out of 6) are not referenced in the EIS.</i></u></p> <p>NHPA- On transfer lands ARPA - On transfer lands NAGPRA- on transfer lands</p> <p>Data used is outdated. Inadequate data found in the EIS on all Mainstem Projects and how they will consider the effects on cultural/historic properties.</p> <p>Lake Sharpe data is not included. Severe erosion, vandalism and looting are occurring, directly impacting cultural properties</p>	<p><u><i>No analysis of impacts of the various "Alternatives" on Basin Tribes, is included in the EIS.</i></u></p> <p>Irrigation Issues</p> <p>Tribal recreation issues</p> <p>Sedimentation</p> <p>Contaminants</p> <p>Haying, grazing, and sub-surface mineral rights.</p>	<p><u><i>Water Quality Issues are not addressed in any substantive way in the EIS, particularly as they relate to the Tribes and the various "Alternatives"</i></u></p> <p>Intake structures integrity</p> <p>Turbidity</p> <p>Sedimentation</p> <p>Contaminants</p>

**Attachment 1 (Continued), February 28th, 2002**  
**Issues identified by the Lower Brule Sioux Tribe**

**That are not addressed in the COE RDEIS, for the Master**

**Water Control Manual (August 2001)**

<b>Water Rights Issues</b>	<b>Title VI Funding Issues</b>	<b>Environmental Justice Issues</b>	<b>Sacred Sites Issues</b>
<p><i>Water rights are not recognized in a substantial manner in the document.</i></p> <p>The EIS does not discuss how unresolved water rights were taken into account in the development of the various Alternatives and the various water allocations associated with each.</p>	<p><i>Schedule of work related to Title VI not included in the EIS.</i></p> <p>Sedimentation Study</p> <p>Stabilization and preservation schedule</p> <p>Involvement with the Cultural Resources Commission Established by Title VI.</p>	<p><i>Environmental Justice Issues are not addressed in the EIS.</i></p> <p>Title VI provides limited land returns and funding for mitigation. No process or approach is identified on how non-Title VI, non-transferred lands will be managed.</p> <p>No process or approach for identifying or resolving Environmental Justice Issues.</p>	<p><i>Executive Order 13007 is not addressed in the EIS.</i></p> <p>Identification of Sacred sites has not been undertaken by the COE on most of the Take lands.</p> <p>No process or approach for protection of sacred sites is included.</p>

## MASTERMANUAL NWD02

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**From:** Disselhors@aol.com  
**Sent:** Friday, March 01, 2002 12:03 AM  
**To:** Mastermanual  
**Cc:** pemina@hotmail.com  
**Subject:** Master Manual Comments cover

Dear General Fastabend: The cover letter to our Master Manual comments is attached.  
Thank you. Thomas M. Disselhorst, Attorney for the Three Affiliated Tribes

Colonel Fastabend  
February 28, 2002  
Page two

It is our hope that you will give this request your serious consideration. Our Nation has a great deal at stake in all areas of the Master Manual, thus we require accurate, current and useful data to help us reach a determination among the proposed alternatives.

Sincerely,

Tex G. Hall, Chairman  
Mandan, Hidatsa and Arikara Nation



February 28, 2002

David A. Fastabend, P.E.  
Colonel, Corps of Engineers  
Commander and Division Engineer  
Northwest Division  
12565 West Center Road  
Omaha NE 68144-3869

ATTENTION: Missouri River Master Manual RDEIS

Dear Colonel Fastabend:

Thank you for the opportunity to comment on the Revised Draft Environmental Impact Statement prepared for the the Army Corps' Master Manual.

Herein, the Mandan, Hidatsa and Arikara Nation officially request that your agency carry out a Supplemental Environmental Impact Study. We ask this for the following reasons:

1. The RDEIS does not respond in any serious manner to any concern raised by tribes.
2. The RDEIS offers scarce, inconsistent, flawed or confusing data, with which Tribes are expected to make determinations which will affect us for decades.
3. Tribes do not have the technical resources to extrapolate data offered in the RDEIS.
4. The completion of an SEIS will ensure that your agency fully complies with mandates in federal preservation laws such as NEPA and NHPA, which require archeological and traditional cultural property surveys on all projects lands for an undertaking like the Master Manual.



Revised Draft Environmental Impact Study  
United States Army Corps of Engineers Master Manual  
Public Comments  
submitted by  
Tex G. Hall, Chairman  
Mandan, Hidatsa and Arikara Nation

February 28, 2002



***You have come here to destroy us!***  
Plain Voice, Hidatsa Chief at the time of the  
construction of the Garrison Dam

***You are changing the holy face of our Mother, the Earth.***  
Ronald Little Owl, Spiritual Leader  
Mandan, Hidatsa and Arikara Nation

***These are our homelands. We have a responsibility to our dead who are buried there.***  
Malcolm Wolf, Sr., Councilmember  
Mandan, Hidatsa and Arikara Nation

***Of 380 Plains Village earthlodge villages (post-A.D.1000) identified along the Missouri River in South Dakota, 215 are inundated or otherwise inaccessible; 43 are immediately threatened with destruction due to lake action or other causes; 91 are suffering ... (from) lake erosion or agricultural impact; and (only) 31 are in good or excellent condition.***

Peter Winham, et.al., 1992

and

***The average annual erosion at all the Mainstem Reservoir System lakes is estimated at between 1 and 2 square miles, resulting in the loss of 40 to 80 sites per year.***  
Revised Draft Environmental Impact Statement, August 2001

***And justice must run down like water . . .***  
Reverend Martin Luther King, Jr.

### **Introduction**

For thousands of years, peoples along the Missouri River lived in harmony with the river and the tremendous variety of life it supported as the river ebbed and flowed its way through the grasslands at the heart of the North American continent. Mandan, Hidatsa and Arikara communities were constructed above the river on bluffs high enough to avoid being flooded in spring rises, but close enough to the river to be able to use it to their advantage, growing a wide variety of crops in the fertile bottomlands of the river made rich from the nutrients brought by spring flooding, catching the native species of fish and other wildlife found in the river, making use of the many large mammals that were also at peace with the river, traveling and trading on the river, and always using the river's bounty and diversity without destroying it. Long before it was fashionable to consider "environmental protection" an important government policy, the peoples of the Missouri River, our ancestors from whom we continue to learn many lessons, culturally,

spiritually and intellectually, had learned to live with the river as a rich and permanent provider, a “Holy Grandfather” as many called it.<sup>1</sup>

The culture of our ancestors was a rich and vibrant one, often the envy of those who lived away from the river. Our social system and culture was complex, but peaceful, a society that was warm and inviting, even to strangers who came into our midst.

Our ancestors along the river suffered greatly for their generosity and friendliness to strangers. The history of our peoples from the time of the arrival of the Europeans is not an easy one for us to recount. Community after community of Mandan and Arikara were abandoned and destroyed when smallpox swept up the river like a plague from the mid to late 17<sup>th</sup> century well into the 19<sup>th</sup> century. At times, this loathsome disease brought by Europeans was inflicted on us intentionally. Thousands upon thousands of our ancestors suffered horribly in hundreds of sites along the river which are now located in states as far south as Nebraska.

Yet our sufferings did not end with the eradication of smallpox. We entered into a treaty with the United States at Fort Laramie in 1851 that defined our territory, more than 12.5 million acres, **and which decidedly did not grant the United States permission to flood our lands and take our property.** The Fort Laramie Treaty of 1851 should still be the Supreme Law of the land, and should put the Mandan, Hidatsa and Arikara Nation as one of the principal decision makers in how the Missouri River is to be managed.

But, less than 150 years after the U.S. expedition of Lewis and Clark came upon the Arikara, Hidatsa and Mandans living in communities near what is now the town of Washburn, North Dakota, *idHidHida* great changes were made to the river, changes which are, according to the National Academy of Sciences (NAS), leading to the slow death of our ancient “holy grandfather”, the Missouri River. Little of what was life giving about the Missouri River remains for us after the construction of the Garrison Dam in the late 1940’s and early 1950’s, a dam positioned exactly so that the most significant amount of land permanently flooded behind the dam were our ancient homelands contained within the Fort Berthold Reservation of the Mandan, Hidatsa and Arikara Nation. The same is true for other Tribal Nations along the Missouri, from the Sac and Fox and Ponca Tribes in Iowa, to the Omaha, Santee and Winnebago peoples in Nebraska, to the Sioux Tribes living in South and North Dakota, to the us, the Mandan, Hidatsa and Arikara Nation, to the Assiniboine Sioux of the Fort Peck Reservation in Montana.<sup>2</sup>

The loss of our way of life along the Missouri River cannot be compensated for and we cannot regain that way of life any time soon. Yet, despite our intense suffering because of the building of the dams along the Missouri River, despite our ownership of the lands that lay underneath the lakes created behind the dams, our needs, despite our Treaty with the United States Government in 1851 at Fort Laramie, our concerns, as sovereign Tribal Nations with a Nation-to-Nation relationship with the United States, are relegated to a “Tribal Appendix” and are deemed to be outside the scope of the Study. We are essentially being treated as a footnote, an afterthought in the Revised Draft Environmental Impact Statement (RDEIS) on the Master Manual for USACE operations along the Missouri River, and that is unacceptable.

**Therefore, we firmly believe that the affects of the USACE’s manipulation of water levels in the lakes along the Missouri created behind the dams and the USACE’s manipulation (some might say mutilation) of our sacred “grandfather” in those few places where the water flows naturally downstream demands a Supplemental Environmental Impact Statement process (SEIS) that should be commenced immediately upon the end of the public input process for the present RDEIS. There are many, many issues concerning our environmental, cultural and physical resources that are simply ignored, or left out, or treated so lightly in the RDEIS that it is hard to understand just what was done for the last several years as the RDEIS was being prepared. We are prepared to discuss**

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<sup>1</sup> See the section on “Historic Properties”, below.

<sup>2</sup> Please see the attached short description of the manner in which the Mandan, Hidatsa and Arikara Nation lost its lands over the past 150 years, entitled “*Lost Lands, Lost Communities*”.

**these issues far more fully in an SEIS than we can do so now, because we have not been provided the resources to properly show the kinds of impacts that a master manual revision will have on our way of life.**

We are, for many reasons, some of which have been explained in this introduction, and some of which are explained elsewhere in this testimony (see discussion on Winters Doctrine rights and the government-to-government relationship), the owners of the Missouri River and its water flow. We, as the Sovereign Nations that have lived along the river for thousands of years, are not simply displaced peoples whose lands just happened to be flooded for the purposes of flood control, power generation and recreational development for the non-Indians who so recently took our land along the river and brought diseases that nearly destroyed us. We have been the caretakers of our “grandfather”, the Missouri River, far longer than the USACE has been in existence and our rights to the river are such that our concerns must be made paramount and not secondary as the USACE tries to come up with a plan for management the system of dams, floodgates, bank stabilization efforts, taken lands and wildlife mitigation efforts that is leading to the slow death of our “holy grandfather”.

We believe that a SEIS is the only mechanism which can forthrightly address our many concerns about the Master Manual and its development. A new round of true consultations must be conducted in which all resources of affected Tribes and the USACE are brought to bear to conduct the necessary studies to ensure that our environmental resources, our Tribal trust assets, and our “holy grandfather” are protected to the maximum extent possible and such that environmental justice will be forthcoming in this process of developing a new Master Manual for control of the Missouri River, one that truly reflects our concerns, our values and our culture.

#### **Government-to-government consultation**

The RDEIS summarizes, in the Tribal Appendix in Section A-11 the general consultation process required, and that will not be repeated here. The RDEIS then lists what it believes were efforts at consultation during the time period when the RDEIS was being developed and the various alternatives for control of the Missouri River were being analyzed. But these series of meetings did not consistently apply either of the Executive Orders that required each Executive branch agency of the Federal government to consult with Tribes, which are now contained in Executive Order 13175.

**Most importantly, the consultation process conceived by the USACE never truly involved the Tribes in the decision making process going on at the Corps headquarters in Washington, D.C. or even in the Northwest Division offices or Omaha District offices.** Tribes were never invited to any internal meetings of the USACE at which discussions of selection of the Preferred Alternative were taking place, which is truly what consultation requires, nor were they even apprised of such meetings ahead of time so that the interests of Tribes could be addressed at such meetings.

That is likely why the RDEIS treats Tribal issues an “afterthought” in an Appendix. The National Environmental Policy Act, the National Historic Preservation Act, and many other statutes which require review of the affects of significant governmental actions on the areas in which those actions are taking place do not permit such a narrow definition of the issues that should be discussed in relation to the interested Tribes. When such acts are applied to Tribes, resolution of matters that are ambiguous should be made in favor of the affected Tribes. The USACE could have dealt with our issues, but has chosen not to do so.

Nor is it acceptable, in the context of development of a Master Manual which will stay in effect for many years, to simply suggest that the Tribal issues raised can be considered in another forum other than the RDEIS of the development of the Master Manual. That puts those issues in a “holding” pattern in which there is no specific action of the USACE which would require an initiation of the consultation process on the issues which the Tribes believe are important to resolve with the USACE. Thus, the USACE can simply sidestep the impacts of its river control function on Tribes without addressing their fundamental concerns.

### Winters Doctrine and Treaty Issues

The RDEIS similarly cavalierly dismisses the import of the Winters Doctrine tribal water rights and Treaty Issues, briefly summarized in the RDEIS in Appendix A-5 and A-7. Simply because most of the tribes along the Missouri River have not quantified their Winters doctrine rights to the waters of the Missouri does not imply that those rights are not paramount when it comes to manipulation of the lake levels behind the dams that have so seriously impacted the Missouri River tribes.

The argument seems to be that because the rivers flow is so large, the Tribes cannot possibly claim enough of the water of the river to have an impact on the USACE's operation of the dam system, especially in the three upstream reservoirs, including Lake Sakakawea, that will become the regulation mechanism for the Preferred Alternative established by the Corps. That is a tremendously uncertain assumption to make. The entire river flow has once been used by the tribes to sustain their way of life. There exists no reason now to suggest that the entire river flow is still not necessary for the tribes to regain some semblance of an economy which supports their needs.

A practical example of this is the recreational needs of the Mandan, Hidatsa and Arikara Nation. Maintaining the level of Lake Sakakawea at certain elevations is critical to improving recreational opportunities for the Tribe along the extensive part of the shoreline in which it has an interest. Keeping lake levels high enough for recreational interests to thrive is, for all intents and purposes, the exercise of a fundamental Winters doctrine right and becomes critically important during years of drought that we are now experiencing and, during the upcoming years of the Lewis and Clark Bicentennial Celebration during the years 2003-2006. Without adequate lake levels, the business ventures of the Tribe and its members will simply not realize their potential.

### HISTORIC PROPERTIES

#### I. **Overview of Revised Draft Environmental Impact Statement (RDEIS)**

The RDEIS is weakest in its analysis of impacts to Historic Properties, or more specifically, the sacred and cultural sites associated with the Mandan, Hidatsa and Arikara Nation (hereinafter referred to as "Nation") and other Indigenous Nations of the Missouri River. Models used are flawed and simply fail to consider all impacts to our sites. Scarce data offered for consideration in the RDEIS are inconclusive, meaningless, confusing and inconsistent. Instead of the useful guidance needed by tribes to make a choice among the proposed alternatives, twenty-year-old survey data is offered to us for review, and even this information is incomplete for all reservoirs, each of which contain sites associated with our Nation; moreover, the data is obsolete due to its relative antiquity.

Archeological data, particularly on constantly-shifting, heavily-impacted Missouri River soils, has a "shelf life" of 8 to 10 years, and must be replaced with updated surveys to be useful to tribes and agency land managers alike. **Class III archeological surveys and Traditional Cultural Property surveys, required by law, should have been undertaken for a project with the breadth and scope of the Master Manual, in consultation with Missouri River tribes, and their results distributed for tribal use in decisions to be made regarding the RDEIS. This did not happen, despite repeated requests by Tribes.** The lack of current survey data makes those decisions impossible to make in any reasoned or meaningful manner.

**Due to the paucity of accurate and useful data concerning our sacred and cultural sites on Project lands, our Nation requests a Supplemental Environmental Impact Statement to carry out Class III pedestrian archeological surveys, as well as Traditional Cultural Property surveys, of all project lands, to be carried out by the Corps prior to the completion of the FEIS, in consultation with Tribes, to fulfill their trust responsibilities to tribes and their Indian Trust Assets which have been neglected by the Corps in favor of other Corps responsibilities on the River.** While millions of dollars and several years have been spent to study project impacts to fish and wildlife and other resources, our review



of the RDEIS shows that our sacred and cultural sites have yet to appear on the Corps' radar as an important resource analyzed in any *serious* sense by the agency, despite repeated requests by Tribes that our sacred and cultural sites be given the same consideration as any other impacted resource analyzed in the RDEIS. According to Roy McCallister of the Corps' Master Manual team, however, study data available to Tribes at the time of this writing consists of the results of one study model used to determine a single impact (erosion), which counted the number of times a wave hit an 8-foot section of shoreline.

For our Nation, protection starts with analysis, which begets information, which begets knowledge. Knowledge of the number and types of sites, their location, their condition, their level of endangerment. Combined, these types of knowledge can then empower Tribes and the Corps together to secure the funds necessary to stabilize shoreline where our sacred and cultural sites still exist, and to work together to monitor and protect these sites. In over fifteen years of expressing these needs to the Omaha District Corps office during various consultation meetings, however, we still have no accurate idea of exactly how many or what types of sites still exist. We have little or no idea how many of our precious sacred and cultural sites have fallen into reservoir waters as a result of the Corps' neglect, and we have little or no idea of the numbers of sites that can be saved if we act now to stabilize shorelines. One can see that Tribes have had little success in getting the Corps to meet these needs, even though the preservation of our sacred and cultural sites is a federally mandated responsibility of all federal land-managing agencies.

**To illustrate this point, since 1978, a total of only \$1,933,000 has been spent on shoreline stabilization for a total of 19 sites out of an estimated 3,000 + known sites on project lands (as compared to the several millions spent on developing analysis models on fish and wildlife populations for this study alone).** (See page 3-171, RDEIS) Moreover, many of these sites received protection solely because of their perceived high archeological value, and our Nation was not consulted in decisions as to which sites would receive protection, as required by existing federal preservation laws. **The RDEIS, instead, makes repeated statements concerning the project's purpose, statements which are meant to exclude the need to protect shorelines which cradle our sites (as well as other Tribal issues raised throughout the EIS process), conveniently side-stepping the Corps' responsibility to preserve and protect sites which hold important spiritual significance to tribes.**

Sites like White Swan and Leavenworth have received some shoreline protection, but only as a direct result of negative press and lawsuits brought by the Yankton and Standing Rock Sioux tribes, respectively, to protect the sites. In the late 1990's, sites at Lower Brule received some shoreline stabilization, but this was the result of years of efforts on the part of the Lower Brule Sioux Tribe applying pressure to the Corps to do their duty by the sites in question. Also, sites at the Lower Brule and the Cheyenne River reservations have been surveyed and some have been protected by shoreline stabilization, but again this was the result of recent Congressional legislation, not the Corps simply doing its job, which we have a right to expect.

This lack of attention to sites considered valuable by tribes and not necessarily archeologists is **completely unacceptable**, particularly when the record will show that Tribes have made repeated requests for (a) current surveys; (b) for shoreline stabilization of sacred and cultural sites, (c) to be consulted on all cultural resources issues *before* the agency makes any decisions concerning them; and (d) for financial resources to be obtained by the Corps to protect spiritually important sites from looting and other endangerment caused as a direct result of the Corps' operation of its mainstem dams, and the public's use of the resultant reservoirs, on the Missouri River. Tribes, in the past 20 years, have repeatedly expressed an **urgent, unmet need** for the Corps to make our sites an agency priority, both policy-wise and in terms of obtaining necessary resources, and to this date all we have to show for our efforts are repeated, unfulfilled promises from the Corps.

Impacts to our sacred and cultural sites include, but are not limited to: inundation of sites; erosion due to wave action; erosion due to increased rates of water flows from reservoir to reservoir to support hydropower sales and the southern barge industry; raising and lowering of pool levels alternately causes wetting and drying of exposed artifacts, breaking them down; exposure of sites and sacred and material culture to looters and other elements of nature during low pool level periods; freeze-up and thaw of the reservoirs hastens erosion and causes shoreline slumping which exposes ancestral burials and other features, making them ripe for looting on unmonitored, isolated Corps lands; the development and use of

recreational areas and other areas where tourists are directed increases the chances of looting and destruction of sites which are present; destruction through archeological excavation, and livestock and other agricultural use of lands containing sites heavily impact sites which are plowed or overgrazed. Data to measure these impacts to our sacred and cultural resources is, as stated above, **either totally absent in the RDEIS, or flawed, confusing and misleading if it is present.**

The Mandan, Hidatsa and Arikara Nation have called the Missouri River our home since time immemorial. In our respective languages, we call ourselves the *Nueta*, or the People of the First Man; the *Hidatsa*, or the Willow or River Crow, and the *Sanish*, the Friendly People. Though smallpox and warfare reduced our numbers to the point where we shared one final earthlodge village for mutual protection, and have lived together on one reservation when the Allotment Act forced us out of our close village lifestyle, we continue to maintain our tribal identities and strong, spiritual ties with our ancestors through the places where they once lived, our aboriginal homelands.

To us, the Missouri River is a holy being, one we approach and regard with reverence and respect. Since time out of mind, we have looked to our Mysterious or Holy Grandfather, as we call the river, for the continuity of all life. We have sought shelter in the timbers which once lined his shorelines, planted our abundant gardens on the rich alluvial terraces, and traded our produce with other Nations traveling his waters and shorelines. Our entire identity as indigenous peoples is so closely tied with our Grandfather that we could not conceive of a time when we did not live in his protective embrace, until we were forced out of our riverine homes by the U.S. government. Even now that our Grandfather has been dammed up and diverted, his flowing waters stilled and reversed, this holy being continues to look after his *Nueta*, *Hidatsa* and *Sanish* children, providing us with the water of life for our families, our crops, our livestock and other industries.

We still conduct ancient ceremonies by the waters of our Grandfather, the purpose of which ensures the continuity and survival of our Peoples. Sometimes the elderly conductors of those ceremonies need to travel far distances to find a stretch of shoreline where the river still flows freely, as required, and sometimes those precious elders have been shot at while trying to approach our Holy Grandfather for their prayers. Though almost fifty years have passed since we lost our own meandering stretch of the river within our reservation's exterior boundaries, our tribal members who lived during that very sad and painful time still recall with crystal clarity all the places which are now inundated by the Garrison Dam; places of sacred purpose, places which hold significant importance in the stories of our people; places lost now to us forever.

Though we have endured the unendurable, the loss of our treaty-guaranteed, river-bottom homes, we know that there are other sites created by our ancestors still in existence within the Omaha District, and these village and ceremonial sites are precious to us ***because they are all that we have left*** of our ancestors, of our good ways, when the world was still clean and we were guided by our own rich and loving ceremonial lifeways. More than anything, however, the continued existence of our ancestors' sites means the continued existence of ourselves as Nations, for we can utilize these special places to revitalize our spiritual and cultural lifeways, and to restore happiness and peace in the hearts of our People. We can use them to ensure that there will be *Nueta*, *Hidatsa* and *Sanish* cultures and languages to pass on to those yet unborn, for the nature of our learning depends on quiet, isolated sacred places for the People to talk to our Creator. ***It is not possible to overstate our need for the continued existence of these holy places where our ancestors once walked***, and so much depends on our ability to preserve them for the future generations' use and education. As shown by the dedication and persistence of our Nation's leadership to see that these sacred places are preserved and protected, these sites ***are critically important to us, and that in itself, the sacred and cultural importance these sites have to our Nation, has to matter. It has to matter to all those whose job it is to preserve and protect our sacred and cultural sites, and it has to matter now, before these precious sites are all destroyed through the "management" of our Mysterious or Holy Grandfather, the Missouri River.***

The Mandan, Hidatsa and Arikara Nation realizes that most people outside of our culture do not, and probably cannot, understand our need to preserve the places that are holy to us. It is perhaps not necessary that the decision and policy makers within the U.S. Army Corps of Engineers understand our urgent and

critical need to protect these holy places; it is only necessary that they understand their own laws and regulations, and fulfill the spirit, intent and letter of those laws, even if that requires that they make the preservation and protection of our sacred sites an agency priority which requires the expenditure of funds.

## II. COMMENTS SPECIFIC TO RDEIS ISSUES

1. Due to the lack of an effort to obtain data specific to impacts to our sacred and cultural sites, the RDEIS is consistent only in its underestimation of project impacts to our sites in all the alternatives proposed.

2. The lack of useful data could explain the absence of any proposed, meaningful mitigation of impacts to sites, yet this is information required by federal preservation law, and it is missing from the discussion of our sites in the RDEIS.

3. Also missing is a meaningful discussion which proposes ways in which the federal agency (the Corps) is to identify and obtain the necessary financial resources to fulfill its obligations to our sites in the areas of protection, preservation and the stabilization of Missouri River and reservoir shorelines. Instead, we have only, "Site-stabilization work is contingent upon available funds." (RDEIS, p. 3-170)

4. The only model used to estimate one project impact (erosion) to sites is flawed, misleading and meaningless. The RDEIS discussion of the public's impression of flawed study models (p. 6-10) will not protect or preserve our sacred and cultural sites, nor will it bring back the precious holy places that have already fallen into the water.

5. To provide Tribes with meaningful information on which to base a decision about the proposed alternatives, new and complete surveys must be conducted and the results distributed to all Missouri River tribes. This can be accomplished through the completion of a *Supplemental Environmental Impact Statement, which our Tribe has requested herein.*

6. The scarce data available in the EIS concerning our sacred and cultural sites comes from incomplete and obsolete surveys, rendering it useless information.

7. There is an overall tone to cultural resource discussions in the RDEIS that imply the Corps' management of the Missouri River will continue to have acceptable levels of impact to our sacred and cultural sites. Our Nation strongly objects to this tone, and asserts that the annual loss of 40-80 sites is unacceptable and a violation of federal preservation laws. At this rate of loss, within 20 years 1,600 sites will have disappeared. **Within another 20 years, there will be no trace of our Nations' millennia-long occupation of our homelands along the shores of the Missouri River. This cannot be allowed to happen - our survival as a Nation depends on these holy places.**

8. Given the conservative estimate of the loss of 40-80 sites per year, the 19 sites which have received some shoreline stabilization during the last 30 years clearly indicates the utterly ineffective mitigation program in place at the Omaha District offices. **Our sacred and cultural sites are disappearing! The current mitigation program must be replaced with Cultural Resource Management Plans such as the one developed for Lake Sharpe, whereby tribal sacred and cultural sites are co-managed by affected Tribes and the Corps.** Monies must be identified and secured for shoreline stabilization and other mitigation projects, and this effort must be made a priority within the Omaha District.

9. Although Omaha District staff have spoken of it during meetings with Tribes, we see no evidence of the Corps' expressed intention to address mitigation issues within the RDEIS through the development of a Programmatic Agreement between Tribes, states, THPOs, SHPOs, and the Corps. This important agreement would replace the earlier, now voided, PA which was foreclosed by the National

Council on Historic Preservation, or the Advisory Council, because it was never initiated by the Corps, which if it had been activated, would have brought **some level** of protection to our sites in the last ten years, even though Tribes were not allowed to participate in that PA.

The FEIS must address the Corps' silence on mitigation issues, which discussion must include serious initiatives to create, in consultation with Tribes, (a) Cultural Resource Management Plans where **Tribes are co-managers** of all sacred and cultural sites with the Corps, and (b) a Programmatic Agreement whereby the Corps agrees to make our sites an agency priority and backs that priority with a significant, separately-funded, permanent stabilization budget. No more avoiding the issue by stating that the Corps' policy is to take stabilization funds from their O & M budget, which is chronically short and never includes enough monies for tribal concerns. The Corps must create a separate initiative and budget for shoreline stabilization, and to do this they must take their federally-mandated responsibilities to our sites seriously.

10. The RDEIS discusses the Corps' desire to work with Tribes as partners, to respect the government-to-government relationship it shares with tribes, and to work in earnest, good faith to address Tribal issues. The discussion which takes place on page 4-2 of the RDEIS, however, **flatly contradicts** these expressed desires by dismissing tribally proposed alternatives as "not within the scope of the Study." In the comment process of the PRDEIS, the Mni Sose Intertribal Water Rights Coalition, on behalf of Missouri River tribes, submitted in 1999 a proposal for a \$2.2 million dollar study which would provide the study and analysis the Corps is **required** by federal law to do for the RDEIS to address tribal concerns, yet the Corps dismissed this initiative with the following statement: "The Corps feels it has adequate data and analyses to complete the EIS process while fulfilling all of the requirements required by NEPA and the Executive Order on Environmental Justice."

Once again, our review of the RDEIS reinforces our belief that the data and analysis of our sacred and cultural sites presented in the RDEIS is utterly inadequate, misleading, inconsistent and flawed. Had the Corps done the studies requested by Mni Sose, **studies federal agencies are required by law to do**, the opposite would have been true. Moreover, we are repeatedly assailed in the RDEIS by the alternative proposals of groups like the Missouri River Basin Association, the American Rivers Association, and others. **The RDEIS is a very large document, however it appears there is no room within this document for the concerns and issues of tribes, and the manner with which our issues have been dismissed is there for all to see in the pages of the RDEIS.**

11. Speaking of the EO on Environmental Justice, our Nation is one of this country's first victims of environmental **injustice**, in that we were required to bear the lion's share of the burden in creating the dams in the first place, and that legacy continues to this day. As evidenced in the RDEIS, it is Tribes' concerns that are ignored, it is Tribal issues that are never responded to in any serious manner, and it is Tribal sovereign rights that are categorically denied, ignored or side-stepped in the entire EIS process. The Corps' statements in the RDEIS, a public document, which declare that they are in compliance with NEPA (what about NHPA, ARPA and NAGPRA?), let alone the Executive Order on Environmental Justice is akin to the Emperor who admired his new set of clothes so much that he wanted all the people in his realm to admire them, too. **Let the record show that the people of the Mandan, Hidatsa and Arikara Nation wish to play the role of the little child in the Emperor's story who pointed out that, in fact, the Emperor fooled no one but himself.**

12. Consultation throughout the entire EIS process has been largely a waste of time when you consider that Tribes traveled hundreds of miles, spent badly needed travel dollars and precious time consulting with an agency, that in the end, utterly failed to address in the RDEIS, in any serious manner, even one concern raised by Tribes.

13. The study model used in the RDEIS to calculate impacts to our sacred and cultural sites does not acknowledge the cumulative impacts to our Nation's sites located in and around the three lower reservoirs, assuming that the stable pools of these reservoirs do not have the same affects as

pools which are raised and lowered in the north. This is an **outright pretension**, and if this were indeed true, why spend scarce mitigation dollars setting down riprap on the Lower Brule and Crow Creek reservations? If erosion were not a problem on Lake Sharpe, how did an entire Mandan/Arikara village disappear from that area (the White Dog site)? Why was the Corps sued over exposed burials on Yankton homelands if erosion were not an issue on the lower three lakes?

14. Scarce survey data included in the RDEIS is not only rendered useless to Tribes because of its relative antiquity, but it does not include the special type of survey data that only Tribes can provide when Traditional Cultural Property surveys are conducted. The RDEIS is incomplete and no decisions concerning the operation of the river can be made until TCP data is gathered and distributed among Tribes and land managers. This issue was raised by Tribes in the PRDEIS, yet it is still ignored in the RDEIS process. **Both NHPA and NEPA require TCP data, and the Corps has failed to fulfill the requirements of these federal preservation laws.**

15. **The Corps is, therefore, in violation of federal preservation law for (a) failing to provide accurate, timely and useful archeological and TCP survey data, and to coordinate those surveys in consultation with affected tribes (b) failing to act to preserve irreplaceable sacred and cultural sites (c) failing to mitigate losses and destruction to the vast majority of sites on lands under its control and (d) failing to address their responsibility to preserve, protect and mitigate adverse affects to our sites within the RDEIS.**

16. Attached to this comment section, to be made a part of the RDEIS record, please find the following document:

\* A briefing paper for the Indian Trust Asset and Environmental Justice meeting held November 29, 2000 between Tribes and the Omaha District Corps office.

#### **Conclusion**

**We believe that a Supplemental Environmental Impact Statement process must be started as soon as possible to address our many concerns. Our culturally significant properties along the Missouri River cannot be relegated to issues that should be addressed in a different forum. The effects of the Master Manual revisions will be profound on our sites, our way of life, and if they are not addressed now our sites will be lost to future generations of our people. This cannot be permitted to happen.**



**Interim Executive Director:**  
Richard Corbine

**Member Tribes:**  
Fort Peck Assiniboine & Sioux  
Tribes Poplar, Montana

Cheyenne River Sioux Tribe  
Eagle Butte, South Dakota

Chippewa Cree Tribe  
Box Elder, Montana

Crow Tribe  
Crow Agency, Montana

Crow Creek Sioux Tribe  
Fort Thompson, South Dakota

Eastern Shoshone Tribe  
Fort Washakie, Wyoming

Flandreau Santee Sioux Tribe  
Flandreau, South Dakota

Fort Belknap Tribes  
Harlem, Montana

Kickapoo Tribe in Kansas  
Horton, Kansas

Lower Brule Sioux Tribe  
Lower Brule, South Dakota

Northern Arapaho Tribe  
Fort Washakie, Wyoming

Northern Cheyenne Tribe  
Lame Deer, Montana

Oglala Sioux Tribe  
Pine Ridge, South Dakota

Omaha Tribe  
Macy, Nebraska

Ponca Tribe of Nebraska  
Niobrara, Nebraska

Prairie Band Potawatomi Nation  
Mayetta, Kansas

Rosebud Sioux Tribe  
Rosebud, South Dakota

Sac & Fox Nation of Missouri  
Reserve, Kansas

Santee Sioux Tribe  
Niobrara, Nebraska

Sisseton-Wahpeton Sioux Tribe  
Agency Village, South Dakota

Spirit Lake Tribe  
Fort Totten, North Dakota

Standing Rock Sioux Tribe  
Fort Yates, North Dakota

Three Affiliated Tribes  
New Town, North Dakota

Turtle Mt. Band of Chippewa  
Belcourt, North Dakota

Winnebago Tribe of Nebraska  
Winnebago, Nebraska

Yankton Sioux Tribe  
Marty, South Dakota

## Mni Sose Intertribal Water Rights Coalition, Inc.

P.O. Box 2890, 514 Mt. Rushmore Road  
Rapid City, South Dakota 57709-2890

February 28, 2002

Brigadier General David A. Fastabend  
Commander and Division Engineer  
U.S. Army Corps of Engineers  
Northwestern Division  
PO Box 2870  
Portland, OR 97208-2870

**RE: Comments on the Revised Draft Environmental Impact Statement for the Missouri River Master Water Control Manual**

Dear Brigadier General Fastabend:

I thank you and the Project Team Members for the Missouri River Master Manual Review and Update for the opportunity to provide comments on the Revised Draft Environmental Impact Statement (RDEIS) Report.

The Mni Sose Intertribal Water Rights Coalition's comments will focus on:

- The Lack of Data on the Alternatives' Impacts to Tribes;
- The RDEIS Comment Period;
- General Ramifications to Tribes;
- Tribal Mitigation; and
- Recommendations.

### **Lack of Data on the Alternatives' Impacts to Tribes**

Under the National Environmental Policy Act (NEPA), the Army Corps must compile and analyze the history, social and economic conditions, cultural resources, and environmental conditions of the affected Indian Tribes. Although the RDEIS is an extensive document, it does not include an adequate assessment of the alternatives' impacts on tribal concerns. The Mni Sose Coalition submitted comments to the Army Corps in September 1993, September 1994, March 1995, June 1999, and September 1999 on the inadequate treatment of tribal concerns in the PDEIS and PRDEIS. Because the RDEIS also lacks sufficient tribal data, most Tribal Leaders may not be able to provide meaningful comments on the proposed alternatives.

On May 13 and 14, 1999, the Mni Sose Coalition Technical Team held a PRDEIS meeting with Army Corps officials, at which Mni Sose voiced concern regarding the Army Corp's economic development modeling. The models do not properly articulate the difference between state and tribal economies. Mni Sose followed up the May 1999 meeting with its September 1999 PRDEIS comment document, which included a proposal for the Mni Sose Coalition to accumulate and analyze tribal social-economic

statistics, environmental data, and historical resource data for inclusion in the RDEIS. However, the Army Corps rejected the proposal.

### **RDEIS Comment Period**

Although the six-month comment period for the RDEIS is considerably longer than required under NEPA, the Mni Sose Intertribal Water Rights Coalition does not believe six months is a sufficient amount of time for the Tribes to analyze the RDEIS. At the Mni Sose Coalition's January 2002 Board of Directors' meeting, the tribal leaders passed Resolution No. 02-11, which requests a 60-day extension to the RDEIS comment period. The resolution was submitted to the Army Corps on January 25, 2002. As of today, Mni Sose has not received a response to the extension request.

### **General Ramifications to Missouri River Basin Tribes**

Based upon the information provided in the RDEIS study, a number of generalities can be made regarding the ramifications the Modified Conservation Plan (MCP) and the four Gavins Point (GP) alternatives would have on all the Tribes located in the Missouri River Basin, in relation to the Current Water Control Plan (CWCP).

#### Advantages—The MCP and GP Alternatives would:

- Improve the chances of survival for the piping plover, the interior least tern, and the pallid sturgeon;
- Increase the quality of recreational use, particularly along the Upper Missouri River;
- Improve drought conservation;
- Increase coldwater fish habitat;
- Enhance native river fish habitat; and
- Expand wetland habitat.

#### Disadvantages—THE MCP and GP Alternatives would:

- Adversely impact tribal cultural resources and Native remains;
- Provide less flood control;
- Increase damage to interior drainage;
- Increase crop damage;
- Reduce warmwater fish habitat;
- Diminish riparian acreage;
- Increase spillway releases, which could lead to supersaturation of dissolved gases in the downstream river reach; and
- Increase hydropower costs from 3% to 13% under the GP alternatives (the MCP alternative would slightly decrease hydropower costs);

Two of the disadvantages, in particular, need further discussion:

#### 1. Adverse Impacts to Cultural Resource and Native Remains

The RDEIS does not focus on the alternatives' impacts to tribal cultural resources and Native remains, other than stating that cultural resources may be impacted by any or all of the options, depending on location, type, elevation, and proximity to the riverine environment. As discussed earlier, the RDEIS does not include adequate research on the alternatives' impacts on tribal cultural resources.

#### 2. Increased Hydropower Costs

The National Economic Development (NED) analysis utilized by the Army Corps, which indicates the GP and MCP alternatives would produce increased hydropower benefits, is flawed in that the analysis does not consider the cost to the customers. Based upon Western Area Power Administration's analysis of the RDEIS, tribal customers could see increases of between 3-13% under



the GP alternatives (Under the MCP alternative, customers would see a slight decrease in hydropower costs.)

Historically, the Tribes in the Missouri River Basin have borne a disproportionate burden of the environmental, cultural, and economic costs associated with the Pick-Sloan project. Ironically, these Tribes pay some of the highest energy prices in the country despite their high poverty rates. After years of negotiations, 27 of the Missouri River Basin Tribes now receive low-cost, federally generated hydropower from Western Area Power Administration. If the Army Corps selects one of the GP alternatives, tribal citizens will see their energy bills increase by up to 13%. The tribal hydropower benefits would essentially be eliminated.

### **Tribal Mitigation**

Under Presidential Executive Order 12898 on Environmental Justice, the Army Corps must propose plans to mitigate the impacts of its operations on the Tribes because of the disproportionate impact of its operations on Native American communities. However, none of the alternatives outlined in the RDEIS address tribal mitigation measures.

### **Mni Sose Coalition's RDEIS Recommendations:**

- Work with the Mni Sose Coalition to compile and incorporate the requisite tribal data into the RDEIS. A multi-year plan should be developed and implemented to ensure the Corps possesses and considers the tribal data required by NEPA.
- Extend the comment period for the RDEIS for an additional 60 days to allow the Tribes and other stakeholders with additional time to analyze the effects of the proposed alternatives;
- Coordinate with Tribes on mitigation efforts in regards to the alternatives' impacts to tribal communities and cultural sites.

The Mni Sose Intertribal Water Rights Coalition appreciates the opportunity to voice its concerns and recommendations regarding the RDEIS and is willing to work with the Army Corps of Engineers to ensure that tribal concerns are addressed in the revised Master Water Control Manual.

Sincerely,

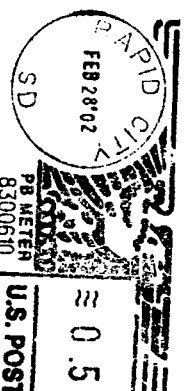
  
Gary Collins  
President

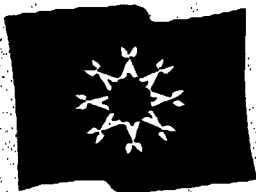
cc: Missouri River Basin Tribal Presidents and Chairpeople  
Mni Sose Tribal Delegates  
MRBA Board Members

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Omaha, NE 68144-3869





Tom Conroy-Chair  
 Jim Mecks-V-Chair  
 Lucille Bull Bear  
 Frank "Popo" Means  
 Robert Two Bulls  
 Bernard White Face

# Oglala Sioux Tribe

## Land Committee

P.O. Box H Pine Ridge, SD 57770  
 Phone: 605-867-2244 Fax 605-867-2609



## Oglala Sioux Tribe

### Statement in Opposition to Army Corps of Engineers

### Missouri River Master Water Control Manual Review and Update

### Revised Draft Environmental Impact Statement

The Oglala Sioux Tribe is a signatory of the Treaty of Fort Laramie of 1851, and the Treaty of Fort Laramie of April 29, 1868. Under the 1868 Fort Laramie Treaty, the Missouri River's east bank constitutes the treaty-recognized boundary of the Great Sioux Reservation. Article 2 of the Treaty reads as follows -

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River, where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the (Sioux Nation)...

15 Stat. 635.

Consequently, the Oglala Sioux Tribe possesses Treaty-protected property rights to the Missouri River, its waters and river bed. The Treaty boundary of our Nation extends to the "east bank of the Missouri River." The Missouri River is within the boundaries of the Great Sioux Reservation, as defined in Article 2 of the 1868 Treaty. The Oglala Sioux Tribe, along with the other bands of the Great Sioux Nation, have a Treaty claim to all land and water of the Missouri River, including the bed of the Missouri, under the 1868 Treaty.

In Article 2 of the 1868 Treaty, the United States "solemnly agree(d)" that no unauthorized persons "shall ever be permitted to pass over, settle upon, or reside in (this) territory." (Id.) Further, Article 12 of the Treaty provides that -

No treaty for the cession of any portion or any part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same.

15 Stat. at 638.

The United States purported to take Sioux Nation Treaty lands under the Act of February 28, 1877 (Black Hills land taking), and the Act of March 2, 1889 (carved out existing Reservation boundaries from Great Sioux Reservation and illegally conveyed title of remaining land to homesteaders). The United States Supreme Court determined that these acts constituted "unfair and dishonorable dealings," and that there was no compliance with Article 12 of the 1868 Treaty. *United States v. Sioux Nation*, 448 U.S. 371 (1980).

The United States has a legal duty to protect and enhance these rights. Consequently, the Corps of Engineers' operations must respect the right of the Oglala Sioux Tribe to utilize our water for irrigation, domestic supplies, livestock, industry, wildlife enhancement, cultural resources and other beneficial uses.

The U.S. Supreme Court has determined that when the Indian Tribes reserved rights to land, we similarly reserved the right to use that amount of water needed to survive and prosper on our Reservations. *Winters v. United States*, 207 U.S. 564 (1907). The Court held that "The power of the Government to reserve the waters (for the Indian Tribe) and exempt them from appropriation under the state laws is not denied and could not be..... the Government did reserve them.... and for a use which would be necessarily extended through the years." 207 U.S. at 576.

The Mni Wiconi Project Act of 1988 bolsters the Tribe's claim to Missouri River water rights, providing congressional authorization for diversion of municipal water supplies from the Missouri River main stem to the Pine Ridge Indian Reservation.

In *Arizona v. California*, the Court held that "when the United States created these reservations, or added to them, it reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands." 373 U.S. 546, 596 (1963). Consequently, the Tribe also possesses the right to divert all of the water that is needed for irrigation on the Pine Ridge Reservation, as well as for all other reasonable beneficial uses.

The Environmental Impact Statement must include our water rights in the environmental baseline for Missouri River operations. However, it fails to do so. Instead, the RDEIS proposes non-Indian water uses such as navigation, recreation, hydropower and water supply, and for endangered species habitat. Waters subject to the claims of the Oglala Sioux Tribe under the principles enunciated by the United States Supreme Court in the *Winters* case are allocated to non-Indians and to ameliorate damage to the habitat of endangered species that has been caused by non-Indian development.

In the RDEIS, the Corps of Engineers proposes to put the reserved water rights of the Oglala Sioux Tribe for the beneficial uses of non-Indians and for endangered species. This diminishes our ability to use our own water in the future.

The alternatives considered by the Corps of Engineers in the RDEIS rely exclusively on the current level of depletions in the Missouri River. Yet the Corps of Engineers' own depletions analysis clearly demonstrates that the level of claims and actual future use by Tribes, including the Oglala Sioux Tribe, shall have a significant impact on the Missouri River. However, this is completely ignored in the RDEIS.

The Corps simply concludes that the future operations of the Missouri River would be adjusted to accommodate future perfected uses by the Tribes. The Corps proceeds on the presumption that Indian water rights shall not impact future operations on the Missouri River.

The RDEIS is a flawed planning guide that addresses the needs non-Indian water users and environmental interests and ignores future water users by Indian Tribes. The fact that it fails to contemplate future Indian uses has the effect of minimizing the prospect of future Indian uses, because the water is allocated for other uses.

We are also concerned with the treatment of cultural resources. In the RDEIS, the Corps of Engineers merely estimates the amount of damage to cultural resources. The COE's long term model for operation of the system purports to incorporate the "value" of our ancestors remains and cultural objects into a computer model for alternatives for system operations.

This preposterous notion must be rejected. Instead, the COE must work in close coordination with the Tribes to identify the culturally significant areas, and establish models for reservoir regulations that will protect them.

Various interest groups want the COE to regulate the reservoirs in a manner that benefits their respective interest. The native people impacted by the Pick-Sloan project are not an interest group. We are nations, and have treaties with the United States. We are merely asking that the treaties be honored in the regulation of the reservoirs and administration of project lands. Specifically, the Environmental Impact Statement should develop criteria for water management that ensures protection of our remains and cultural objects. The Corps of Engineers should operate its projects in a manner which protects these areas, instead of destroying them.

The socioeconomic analysis utilizes false and inaccurate data. Outdated census data is used rather than more accurate Bureau of Indian Affairs Labor Force Reports for unemployment on the affected Indian Reservations.

The Pine Ridge Reservation is mischaracterized as a third tier county. The socioeconomic figures are not accurately set out in the RDEIS. This is actually acknowledged on page 3-151 of the RDEIS - "the socioeconomic data presented in this section are based on regional data and are not specific to any reservation." This despite the fact that we are identified as an "Identified Reservation(s) affected along the Mainstem Reservoir System." That makes no sense.

Since the Tribe is acknowledged to be "affected" by COE operations, Executive Order 12898 on Environmental Justice requires the corps to determine

the impacts on our minority community. Yet the Corps admits that it lacks data "specific to any reservation."

The Corps of Engineers has a legal duty to work with our Tribe on a government-to-government basis to obtain this data. The RDEIS itself explains that despite the request of the Tribes, the Corps failed to do so -

*... the (Tribes) felt that Indian water rights had not been adequately addressed in the PRDEIS nor would they be taken adequately into account as the Corps worked with various basin groups to get feedback on potential recommendations for water control plans. Second, (there is) concern that the Corps had inadequate data on which to identify a selected plan and to address the impacts on the Tribes as it completed the RDEIS. Finally, the PRDEIS did not identify 'any plans to mitigate the impact of its operations on the tribes, because of the disproportionate impacts of its operations on the Native American communities,' as required under the Executive Order on Environmental Justice... The Corps feels it has adequate data and analyses to complete the EIS process while fulfilling all of the requirements required by NEPA and the Executive Order on Environmental Justice....*

RDEIS, 4-3.

Yet the Corps makes repeated references to "1994 Mni Sose surveys." That data is outdated and unreliable. The Tribes were not consulted directly. The Corps itself admits that the data "are not specific to any reservation." RDEIS, 3-151. Consequently, the RDEIS fails to meet the requirements of NEPA and Executive Order 12898.

The Executive Order requires that impacts on minority communities be identified and mitigated. The RDEIS does neither. It must be completely revised, in order to accurately determine and mitigate the impacts on the Oglala Sioux Tribe.

In sum, the RDEIS fails to provide for use of Winters Doctrine water rights by the Oglala Sioux Tribe. These valuable rights stem from the 1868 Fort Laramie Treaty, which guarantees our right to the land and water of the Missouri River.

Cultural resources surveys are too narrow, and there is no protection plan as required by the National Historic Preservation Act and Native American Graves Protection and Repatriation Act. Socioeconomic data is inaccurate, and in fact the RDEIS admits this. The Corps rejected a request by the Indian Tribes to work with us to obtain more accurate data. The Corps refused, and continues to use outdated U.S. Census and Mni Sose surveys. More accurate data is available but remains unused by the Corps of Engineers. Impacts are not identified. Mitigation is not provided. The RDEIS violates the Executive Order on Environmental Justice, the

requirements of the National Environmental Policy Act, and the 1868 Fort Laramie Treaty. For these reasons, it is opposed and rejected by the Oglala Sioux Tribe.

CONCURRED:

  
John Yellow Bird Steele, President  
Oglala Sioux Tribe

# Prairie Knights Casino

## Fax Cover Sheet

To: Army Corps of Engineers  
Attention: Rose Hargrave

Fax Number: (402) 697-2504

From: John Yellow Bird Steele  
Oglala Sioux Tribe

Fax Number:

Number of Pages (including cover sheet): 6





# Sisseton - Wahpeton Sioux Tribe

## Lake Traverse Reservation

Office of Environmental Protection  
Old Agency Box 509, Agency Village, SD 57262-0509  
PHONE: (605) 698-4998 FAX: (605) 698-4999  
Email: swstoep@basec.net

February 28, 2002

U.S. Army Corps of Engineers  
Northwestern Division  
Attn.: Missouri River Master Manual RDEIS Project Manager  
12565 West Center Road  
Omaha, NE 68144-3869

Sirs:

The Sisseton Wahpeton Sioux Tribe (SWST) extends the following comments to the Army Corps of Engineers on the alternatives outlined in the Revised Draft Environmental Impact Statement (RDEIS) for the Missouri River Master Manual:

1. The Missouri River Basin Tribes (MRBT) lack participation in the management of the Missouri River water system.
2. If the responsible federal agencies would involve MRBT as cooperating agencies in the management of the Missouri River, Tribes lack the financial resources to collect and analyze the data before making their recommendations.
3. The MRBT, individually, have been unable to address water rights issues due to the Federal agencies complex infrastructure, the Tribe's geographical isolation, lack of financial resources, technical skills and appropriate technology.
4. The MRBT lack data on the alternative's impacts on tribal concerns. The RDEIS does not include sufficient data for most Tribal Leaders to provide meaningful comments on the proposed alternatives.
5. The SWST concurs with the Mini Sose's request for an extended comment period to adequately assess the impact of the proposed alternatives of the RDEIS.

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6. The SWST particularly points out that in the Current Water Control Plan (CWCP) the Adverse Impact to Cultural Resource and Native Remains needs in-depth research on this very sensitive matter (i.e. the current matter in the state of Georgia).
7. The SWST concurs with Mini Sose's indication that Increased Hydropower Costs would increase and in no way benefit the Tribe.
8. The SWST concurs with Mini Sose's recommendation that the U.S. Army Corps of Engineers must propose plans to mitigate the impacts of its operations on the tribes, because of the disproportionate impact of its operations on Native American communities, none of the alternatives outlines in the RDEIS address mitigation measures.

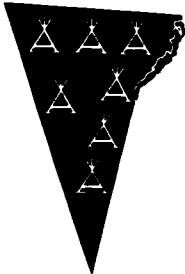
The Sisseton Wahpeton Sioux Tribe and Office of Environmental Protection appreciates the opportunity to voice its concerns regarding the RDEIS and is willing to work the U.S. Army Corps of Engineers to ensure that tribal concerns are addressed in the Master Water Control Manual.

Sincerely,



Myrna German  
 Administrator  
 Office of Environmental Protection  
 Sisseton Wahpeton Sioux Tribe

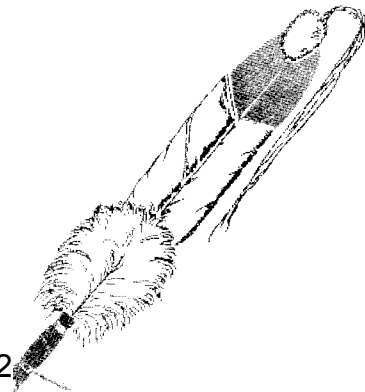
OFFICE OF ENVIRONMENTAL PROTECTION



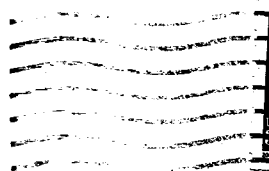
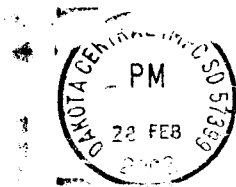
*Sisseton - Wahpeton Sioux Tribe*

**Lake Traverse Reservation**

Old Agency Box 509  
 Agency Village, South Dakota 57262-0509



A2-522



U.S. Army Corps of Engineers  
 Northwestern Division  
 Attn: Missouri River Master Manual RDEIS Project Manager  
 12565 West Center Road  
 Omaha, NE 68144-3869



MASTER MANUAL TRIBAL SUMMIT  
U.S. ARMY CORPS OF ENGINEERS  
GREAT PLAINS TRIBAL LEADERS

April 16, 2002  
Ramkota Inn  
Rapid City, South Dakota  
1:15 p.m.

U.S. ARMY CORPS OF ENGINEERS PARTICIPANTS:

BG David A. Fastabend, COL Kurt F. Ubbelohde,  
Rosemary Hargrave, Roy McAllister, Richard Moore,  
John LaRandeau, Larry Janis, Pem Hall, Mike White,  
Mary Lee Johns, Lynda Walker, Patti Lee,

PARTICIPANTS:

Harold Frazier, David Small, Gary Collins, Tom Ranfranz,  
Tex Hall, Bob Gough, Randy Perez, John Thomas,  
Boyd Gourneau, Harvey White Woman, Johnson Holy Rock,  
Antione Provost, Fremont Fallis, Don Bucky Pilcher,  
Paul Danks, Bob Riehl, Nick Stas, Lyle Denny,  
Holly Vielle, Daunette Owens, Bill Schuler, Felix Kitto,  
Aubrie James, Richard Bad Moccasin, Leon Romero,  
Yvonne Clown, Chuck Mickel, Deb Madison, Dave Nelson,  
Pemina Yellow Bird, Elgin Crows Breast, Jackie Stocklin,  
Pat Spears, Pam Snyder, Roger Collins, Lonnie Lion Bear,  
Paul Hofmann, John Bartel, Richard Sully, Rhonda Azure,  
Clarence Sky, Charmaine White Face, Donald Grant

ORIGINAL

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1 THE FOLLOWING PROCEEDINGS WERE HAD AND  
2 MADE OF RECORD:

3 -----

4 HAROLD FRAZIER: Before we begin, I  
5 guess I'd like to ask one of our elders from the  
6 Oglala Nation, Johnson Holy Rock, to do the  
7 invocation.

8 (Invocation by Johnson Holy Rock.)

9 HAROLD FRAZIER: Okay. Thank you,  
10 Mr. Holy Rock. Just for those who don't know me,  
11 my name is Harold Frazier and I'm the Aberdeen  
12 Area Vice President for NCAI, as well as the  
13 Council representative for the Cheyenne River  
14 Sioux Tribe and the Vice Chairman for the Tribe,  
15 and I come from the Itazipco Band of the Great  
16 Sioux Nation and on our reservation there's four  
17 bands that live there, Itazipco, Minniconjou and  
18 Two Kettle Band, and I guess at this time we're  
19 going to drop down into introductions, and I guess  
20 we'll start here and go around the table.

21 DAVID SMALL: David Small, Crow Tribe.

22 GARY COLLINS: Gary Collins, Northern  
23 Arapaho Tribe, President of Mni Sose Intertribal  
24 Water Rights Coalition.

25 TOM RANFRANZ: Tom Ranfranz, the

1 Chairman for the Flandreau Santee Sioux Tribe,  
2 also representing the Tribes of the Great Plains  
3 Area as Tribal Chairman for the Tribal Chairmen's  
4 Association. I'm happy to be here and I'm honored  
5 by the invitation and I'm looking for a good  
6 meeting. Thank you.

7 RANDY PEREZ: Randy Perez, I work for  
8 the Fort Belknap Tribe.

9 JOHN THOMAS: John Thomas, delegate to  
10 the Mni Sose, Vice Chairman for the Kickapoo Tribe  
11 in Kansas.

12 BOYD GOURNEAU: Boyd Gourneau, Lower  
13 Brule Sioux Tribe.

14 HARVEY WHITE WOMAN: Harvey White Woman,  
15 the Administrative Assistant to the five members  
16 of the Oglala Sioux Tribe.

17 JOHNSON HOLY ROCK: Johnson Holy Rock,  
18 member of the executive committee and the Sioux  
19 Tribal Council, Pine Ridge.

20 ANTIONE PROVOST: Antione Provost, the  
21 Omaha Tribe of Nebraska and Iowa.

22 FREMONT FALLIS: Can we introduce  
23 ourselves in our native language? You're supposed  
24 to have an interpreter. This is Fremont Fallis,  
25 Rosebud Sioux Tribe, Council Rep.

1 DON BUCKY PILCHER: Don Bucky Pilcher,  
2 Sac and Fox Nation of Missouri, also Vice Chairman  
3 for the Mni Sose Coalition.

4 PEM HALL: My name is Pem Hall, I'm the  
5 Tribal Liaison for the Omaha District Corps of  
6 Engineers.

7 PAUL DANKS: I'm Paul Danks of the Three  
8 Affiliated Tribes and I would like to inform the  
9 General that Chairman Tex Hall will be here  
10 approximately about 3:30. He's en route here now.

11 BOB RIEHL: I'm Bob Riehl with Western  
12 Area Power Administration.

13 NICK STAS: Nick Stas, Western Area  
14 Power Administration.

15 LARRY JANIS: Larry Janis, Omaha  
16 District, Cultural Resources Program Manager.

17 ROY MCALLISTER: Roy McAllister, Corps  
18 of Engineers, Omaha, and I'm the Coordinator of  
19 the Technical Information for the Master Manual.

20 JOHN LARANDEAU: I'm John LaRandeau, I'm  
21 a team member of the Master Manual team with  
22 hydropower and navigation.

23 MIKE WHITE: I'm Mike White, I work in  
24 Portland as Director of Civil Works for the  
25 Northwestern Division.



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ROSEMARY HARGRAVE: Rose Hargrave, I'm with the Corps, I'm in Omaha and I'm a Project Manager for the Master Manual.

COL KURT F. UBBELOHDE: Kurt Ubbelohde, District Commander, Omaha Corps of Engineers.

BG DAVID A. FASTABEND: David Fastabend, Commanding General, Northwestern Division, US Army Corps of Engineers.

RICHARD MOORE: Rick Moore, I'm one of the Master Manual team working Tribal Coordination for the Master Manual.

PATTI LEE: Patti Lee, Corps of Engineers on the Master Manual, and our court reporter is Sandy Semerad.

LYLE DENNY: Lyle Denny, Assiniboine and Sioux Tribes of Fort Peck.

HOLLY VIELLE: Holly Vielle, Mni Sose Intertribal Water Rights Coalition.

DAUNETTE OWENS: Daunette Owens, Mni Sose Coalition.

BILL SCHULER: Bill Schuler, Mni Sose Coalition.

FELIX KITTO: Felix Kitto, Santee Sioux Tribe of Nebraska.

MARY LEE JOHNS: Mary Lee Johns, I'm a

1 consultant with the Army Corps of Engineers, I'm  
2 working on the BiOp.

3 AUBRIE JAMES: Aubrie James, Tribal  
4 Liaison for US Senator Tim Johnson, member of  
5 Cheyenne River Sioux Tribe.

6 RICHARD BAD MOCCASIN: Richard Bad  
7 Moccasin, Crow Creek Sioux Tribe.

8 LEON ROMERO: Leon Romero, Oglala Sioux  
9 Tribe.

10 YVONNE CLOWN: Yvonne Clown, Cheyenne  
11 River Sioux Tribe.

12 CHUCK MICKEL: Chuck Mickel, General  
13 Counsel, Mni Sose.

14 DEB MADISON: Deb Madison, Fort Peck  
15 Tribe.

16 LYNDA WALKER: Lynda Walker, Native  
17 American Liaison, Corps of Engineers.

18 DAVE NELSON: I'm Dave Nelson,  
19 Environmental Director for the Cheyenne River  
20 Sioux Tribe.

21 PEMINA YELLOW BIRD: Pemina Yellow Bird,  
22 Mandan, Hidatsa and Arikara Nation.

23 ELGIN CROWS BREAST: Elgin Crows Breast,  
24 Three Affiliated Tribes, Cultural Preservation  
25 Officer.

1 JACKIE STOCKLIN: I'm Jackie Stocklin  
2 with Senator Tom Daschle's office, I'm located  
3 here in Rapid City.

4 PAM SNYDER: Pam Snyder, counsel to the  
5 Cheyenne River Sioux Tribe, Environmental  
6 Protection Department.

7 ROGER COLLINS: Roger Collins with the  
8 US Fish & Wildlife Service in Bismarck.

9 LONNIE LION BEAR: I'm Lonnie Lion Bear  
10 from the Fort Peck Tribes and M.R. & I Water  
11 Pipeline.

12 PAUL HOFMANN: Paul Hofmann, Regional  
13 Hydrologist for the Bureau of Indian Affairs.

14 JOHN BARTEL: John Bartel with the Corps  
15 of Engineers, Operation Manager of the Oahe  
16 Project.

17 HAROLD FRAZIER: Once again, my name is  
18 Harold Frazier and I just want to say to the  
19 General, welcome to He Sapa, the sacred Black  
20 Hills of the Great Sioux Nation. The Great Sioux  
21 Nation needs to be firmly involved as a major  
22 player with the administration of the Missouri  
23 River because it is located within our treaty  
24 territory.

25 In addition, the Mandan, Arikara, Hidatsa

1 Tribes also need to be involved with the  
2 management of the Missouri River because not only  
3 are they signatories of the 1851 Treaty, but they  
4 also reside along the river.

5 The Cheyenne River Sioux Tribe has great  
6 concerns on how the river is managed because of  
7 the following reasons:

8 One, the fluctuating water levels are not  
9 only eroding the shoreline, but exposing and  
10 destroying cultural, historic and grave sites.

11 Secondly, the Cheyenne River Sioux Tribe's  
12 main drinking water supply's intake is located at  
13 the mouth of the Cheyenne River, which currently  
14 houses a large amount of mine tailings from the  
15 Homestake Gold Mine that is affecting the quality  
16 of our water, and which the Oahe Dam is presently  
17 today preventing the Cheyenne River from flowing  
18 naturally and cleaning itself; therefore, causing  
19 a lot of diseases and sicknesses.

20 Another issue that you know we're concerned  
21 with is the electricity rates that are charged to  
22 our members currently on the Cheyenne River.  
23 There's a 78 percent unemployment rate on our  
24 reservation, and, in addition, Ziebach County,  
25 which encompasses half of our reservation, now is

1 the poorest in the nation.

2 Our people believe that we should be  
3 receiving directly a hundred percent power from  
4 WAPA in return for everything that they gave up  
5 for the construction of the Oahe Dam.

6 And finally, with the constant changes of the  
7 water levels it's causing a rapid growth of  
8 noxious weeds that is impacting our Tribe's cattle  
9 industry in which 90 percent of our Tribal lands  
10 are utilized for grazing by our members for their  
11 ranching operations.

12 I'm glad that the Corps of Engineers is  
13 providing us an opportunity to be partner in how  
14 the river is to be managed, because the United  
15 States Government still owes -- still needs to  
16 fulfill obligations that are owed to us.

17 When they flooded our lands they promised to  
18 reconstruct cemeteries, relocate cemeteries and  
19 reconstruct chapels. That has never been done.

20 Roads on the east side of the river got -- I  
21 think it's 1806, good paved highway. On Cheyenne  
22 River, there's nothing. Comes up from Lower Brule  
23 and it stops.

24 And another thing that the Corps owes us is a  
25 golf course. That's something that was done under

1 our old agency and that's something that the Corps  
2 of Engineers still owes us.

3 And I want to welcome you, and I guess at  
4 this time I'd like to introduce Tom Ranfranz, he's  
5 the Tribal President of Flandreau Sioux Tribe, as  
6 well as the President of the -- or Chairman of the  
7 Great Plains Tribal Leaders Association.

8 Mr. Ranfranz.

9 TOM RANFRANZ: Thank you, Harold. I  
10 appreciate that. I want to welcome the US Army  
11 Corps of Engineers and their -- the people that  
12 they've sent here for this meeting today. I'd  
13 like to welcome the General. I appreciate your  
14 attendance here.

15 I want to welcome all my fellow Native  
16 Americans that are here today because we've got  
17 some issues here with the Missouri River, and one  
18 of the things that I'm concerned in with  
19 visiting -- and this -- I've been testifying all  
20 across the country, myself and Tex Hall, here, in  
21 the last year and now this is another opportunity  
22 for us to speak out.

23 One of the areas, as you know, we've been  
24 fighting for in Indian Country is the BIA,  
25 restructuring for the BIA. That is one front that

1 we really have to spend a lot of time in Indian  
2 Country on because it's so important to us.

3 Another area is health care. Health care --  
4 I just came from a meeting in St. Paul, Minnesota,  
5 where they're fast-tracking the consultation  
6 requirements on that, and that's the second area.

7 The third area that we have concerns with is  
8 privatization of our schools in Indian Country.

9 And now this is my fourth meeting on the  
10 Missouri River and the Corps of Engineers in  
11 regards to the Environmental Impact Statement  
12 Studies. I would rather put it as Environmental  
13 Tribal Impact Studies, because all this affects  
14 the Tribes along the Missouri River, and the dams  
15 also affect our way of life, and I believe that in  
16 any partnership that we have, we have to have  
17 cooperation.

18 The cooperation that I would ask of you folks  
19 today is that the information that we are  
20 gathering here today, we need time to be able to  
21 discuss that information, rather than  
22 fast-tracking it, so we can get it back to our  
23 people on the reservations and talk to our  
24 councils and talk to our people.

25 You know, in the Great Plains area we believe

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very strongly in treaties and we respect those treaties and our elders. We learned from our elders and our elders want us to follow and we want -- we want those treaties to be up front, and that's very important to us, so fast-tracking these meetings, we're not going to accept that.

We've got a lot of good people here that have a lot more knowledge on the Missouri River and the impact on their reservations than I do. I'm just newly elected in the last three months, but I'm here today to represent our Tribes in our area so that we can communicate, keep this partnership going strong and make sure that the Tribes -- their issues are heard, and I think we're going to have some people speak here today, hopefully, and talk about our issues.

I think Harold mentioned a few of them, you know, the long-term effects of the drinking water. He talked about the water levels and how they affect our lands, the electric rates for our people, the high level of the electric rates, and all these things are very important issues to us today, so what I'd like to do is, again, welcome you.

I welcome all our Tribal leaders that are



1 here today, those that are involved in the  
2 Missouri River Impact Study, and I guess I'm going  
3 to turn the mike over to Gary Collins at this time  
4 and Gary's got a few good words to say.

5 So thank you and I'm here for support. I'll  
6 be here all day and through the night, if you need  
7 me.

8 Thank you.

9 GARY COLLINS: Thank you. Some of what  
10 I have to say this afternoon has already been  
11 said. Nonetheless, I appreciate being here with  
12 regards to the Mni Sose Intertribal Water Rights  
13 Coalition. It's great to see everybody be able to  
14 be here and participate.

15 The Coalition has been very much involved  
16 with the Master Manual for a little over ten  
17 years, or so, now, recognizing that we are the  
18 conduit for information. The decision-making  
19 process lies with the Tribes themselves.

20 There's some issues here that we certainly  
21 need to address and some of those I can touch on  
22 now that we've basically briefed the Corps on  
23 earlier. Primarily, though, the lack of the data  
24 with regard to the impacts to the Tribes has been  
25 a significant issue that we've been dealing with.

1           We've all received the Draft RDEIS that comes  
2           in large boxes, and certainly at the Tribal level  
3           we need additional personnel attending technical  
4           assistance, deciphering what's all going on there,  
5           and, of course, that takes time.

6           Secondly, the concerns we've had with the  
7           appearance of fast-tracking, and we also support  
8           the area of looking at a Supplemental  
9           Environmental Impact Statement.

10          Additionally, we've got some ramifications  
11          that are significantly large with regards to  
12          cultural and hydropower and other issues regarding  
13          the economy, and, of course, the NEPA process,  
14          again, is something that we would very much be a  
15          participant in, notwithstanding the National  
16          Historic Preservation Act.

17          So these are some of the things that we will  
18          be looking at for resolve.

19          The cultural concerns are significant. Each  
20          Tribe has their own concerns, as well, and the  
21          decision on those needs to come from the Tribes  
22          themselves. I don't want it to be -- meant to be  
23          construed the Tribal consultation is working with  
24          the Coalition. We facilitate information and we  
25          provide that, but the real consultation comes

1 Government-to-Government, which is very  
2 significant in the area of the Trust  
3 responsibility, and there's those issues that each  
4 Tribe is being very concerned about.

5 Recognizing Elder Johnson Holy Rock being  
6 here and some of the concerns he has, all of those  
7 are important. Recognizing, there again, the  
8 Tribal membership within the Coalition itself.  
9 Some of the work that's been done prior to me  
10 being involved with the Coalition is due to, in  
11 large part, Richard Bad Moccasin, who is here, so  
12 I don't take any credit for the Coalition, per se,  
13 because it's all been very much a team effort and  
14 we would expect to have that with the Army Corps  
15 as we move through our next few periods of time.

16 Thank you. And I guess Tex was next on the  
17 agenda, but he, as Paul mentioned earlier, will be  
18 here a little bit later on this afternoon, and the  
19 additional speaker would be the General himself.

20 BG DAVID A. FASTABEND: I've got a mike  
21 on under this jacket. Can you all hear this?

22 UNIDENTIFIED SPEAKERS: Yes.

23 BG DAVID A. FASTABEND: Okay. Great.

24 GARY COLLINS: Is it from the CIA?

25 BG DAVID A. FASTABEND: No, it's from

1 Senator Daschle's office. (Laughter.)

2 Let me put myself in a position where the  
3 United States Army has found itself in the Upper  
4 Missouri River Region before, surrounded by  
5 Indians, and tell you that I welcome this  
6 opportunity.

7 I particularly appreciate all the efforts  
8 that you took to join us here today to continue  
9 our Government-to-Government consultation process.  
10 This is very, very important and I'm going to give  
11 a little bit of a speech before we start, because  
12 I think it's important for you to understand a  
13 little bit about me and how I come at our  
14 discussions today.

15 I'm Commander of the Northwestern Division of  
16 the Corps of Engineers. Two of my districts  
17 include the Omaha District and the Kansas City  
18 District, which, of course, deal with the Missouri  
19 River Basin and all the issues associated with the  
20 Missouri River Master Manual.

21 The decision process on the Missouri River  
22 Master Manual revision is mine at this point and I  
23 have been very intimately involved in it.

24 I've been Commander of the Northwestern  
25 Division for about eight months. It's my first

1 job of significance in the US Army Corps of  
2 Engineers. All of the rest of my military  
3 experience, I've been on the tactical side of the  
4 Army as an Engineer Platoon Leader.

5 I was in the 18th Airborne Corps as a Company  
6 Commander. I was in the 3d Infantry Division in  
7 Germany. As a Major I was with the 9th Infantry  
8 Division. As a Lieutenant Colonel I commanded a  
9 Light Engineer Battalion in the 13th -- I was the  
10 Commander of the 13th Engineer Battalion, and then  
11 my most recent tactical assignment was Commander  
12 of the 555th Combat Engineer Group, and I will  
13 tell you from my heart right from the beginning, I  
14 approach these issues as a soldier, and let me  
15 just give you a couple things about soldiers and  
16 how they'll think about a problem like this.

17 The first things soldiers in a unit need to  
18 understand is their responsibility, and I've taken  
19 a lot of time to personally learn and ensure that  
20 my people know their responsibilities to Native  
21 Americans and to Federally Recognized Tribal  
22 Governments. We have obligations. We accept  
23 those obligations and we have to understand that,  
24 but a soldier needs to know his duty from the  
25 beginning.

1           The next thing that has to happen is soldiers  
2           in a unit, if they're going to climb a hill,  
3           they've got to build trust with each other. They  
4           need to have confidence. As many of you know, as  
5           many of you have been soldiers, sailors and airmen  
6           and Marines, you know that you've got to trust  
7           your buddy that he's going to be there for you.  
8           You have to build trust with each other. And you  
9           and I are climbing a hill together on this Master  
10          Manual decision. We have to trust each other,  
11          and, in the past, there have been many, many  
12          opportunities where my Government has done things  
13          that has destroyed that trust and our trust  
14          between each other is not very high.

15                 There have been some success stories. Not as  
16                 many as I would want, not as many as you would  
17                 want. We have to earn your trust, and trust is  
18                 something you have to earn every day by fixing  
19                 past wrongs, making things right, and then  
20                 continuing to succeed.

21                 I've got to know my duties. I've got to earn  
22                 your trust. Even if you have that, it's not  
23                 necessarily enough to capture the top of the hill.  
24                 You've got to communicate. I mean really  
25                 communicate.

1 I mean, on a battlefield it's hard because  
2 there's smoke and noise and dust and confusion,  
3 and there's a lot of smoke and noise and dust and  
4 confusion out here associated with the Master  
5 Manual process.

6 Some days I'm not sure which kind of  
7 battlefield I'd rather be on, but we've got to  
8 communicate, and when I communicate with you,  
9 frankly, I'm less worried in giving you my message  
10 than in hearing what you've got to say. That's  
11 why I'm here.

12 Now, I'm going to tell you what I've got to  
13 say and I'm going to listen to what you have to  
14 say. If you don't tell me much, I'm going to try  
15 to draw it out of you, because, my friends, we are  
16 near the top of this hill. We have got to get to  
17 the top.

18 And here's the deal. We don't have an option  
19 of saying, well -- you know, I don't have the  
20 option, at least, of saying I'd rather not climb  
21 that hill. This is my job, to figure out what's  
22 going to happen with the Master Manual.

23 I'm not saying I don't want to climb that  
24 hill. I can say I wish people in the past would  
25 not have brought us to this hill. We are going up

1 this hill. I hope you're going to go up it with  
2 me and that we can help each other, give each  
3 other a boost at the appropriate point.

4 I hope, at least, you will tell me which side  
5 you want me to climb up on, because I need your  
6 input and I intend to prove to you today that I'm  
7 very, very serious about getting that input from  
8 you, because we have 55,000 comments working there  
9 in the office at Omaha, but it's not over because  
10 we've got to have this consultation and it's not  
11 just this afternoon.

12 Consultation is an ongoing process, it's not  
13 an event, so I welcome the opportunity to meet  
14 with you today and I thank you for making the  
15 effort to get here and I look forward to our  
16 discussions.

17 FREMONT FALLIS: Could I ask you one  
18 question, Sir? Fremont Fallis, Rosebud Sioux  
19 Tribe. There was a gentleman here in Rapid City  
20 about four, five years ago that made those similar  
21 comments like you did, he's Assistant Secretary of  
22 the Army, and he was going to do all this and that  
23 for the Tribes and he was -- he would do a treaty  
24 analysis, that was five years ago, and work side  
25 by side with the Tribes. We're still waiting.



1 We're still waiting for an answer. What happened?

2 BG DAVID A. FASTABEND: Frankly, I do  
3 not know what happened to the treaty analysis. I  
4 know that issue went to Washington with Secretary  
5 Westphal. I believe that's Joe Westphal you're  
6 talking about.

7 FREMONT FALLIS: Yes.

8 BG DAVID A. FASTABEND: And it was an  
9 issue that they had to resolve with the Department  
10 of Justice and the Secretary of the Army. I do  
11 not know how that turned out.

12 FREMONT FALLIS: See, that's what I'm  
13 getting at. You know, they said they were going  
14 to do this and this for the Tribes, and nothing  
15 happens, so I hope you --

16 BG DAVID A. FASTABEND: Let's try to  
17 make something happen.

18 FREMONT FALLIS: Okay. I hope so.  
19 About time, you know.

20 BG DAVID A. FASTABEND: Any other  
21 questions?

22 (No response.)

23 BG DAVID A. FASTABEND: Okay. I look  
24 forward to our discussions.

25 ROSEMARY HARGRAVE: Okay. My name is

1 Rose Hargrave and I'm the Project Manager for the  
2 Missouri River Master Manual. First of all, you  
3 know, maybe I should bring us all up-to-date a  
4 little bit about where we're at.

5 The Revised Draft Environmental Impact  
6 Statement was published last August and we had a  
7 six-month public comment period, and I guess what  
8 I want to tell the Tribes is, you know,  
9 irrespective of the comment period that extended  
10 till the 28th of February, our consultation with  
11 the Tribes goes on and it will go on through the  
12 Record of Decision, and then later on maybe we'll  
13 talk about how our consultation will even go on  
14 beyond that.

15 So the -- we got a number of comments from  
16 the Tribes and Tribal affiliations. I think we  
17 got 13 comments from either Tribes or Tribal  
18 affiliations. We would be happy to make the  
19 complete set of comments available to anybody who  
20 requests those comments. The comments will be in  
21 the Final EIS and we intend to address every  
22 single comment that the Tribes raise in that  
23 document, so you will see a response to every  
24 issue the Tribes have raised in the Final EIS.

25 We held a number of workshops. We did an

1 orientation workshop in Bismarck in September, and  
2 then at the request of different Tribes we did  
3 workshops at Eagle Butte, at Lower Brule, at New  
4 Town and at Fort Peck. We also took testimony  
5 from the Tribes at various locations, and we did  
6 that at Lower Brule. We took testimony also from  
7 Cheyenne River Sioux Tribe, Standing Rock Sioux  
8 Tribe, and of course the Fort Peck Tribe in  
9 Montana. So the Tribal input into the Revised  
10 Draft Environmental Impact Statement has just been  
11 really tremendous. A lot of good input from the  
12 Tribes.

13 What I would like to do now is take you a  
14 little bit through the alternatives that we  
15 presented in the Revised Draft EIS and the  
16 features of those alternatives, then I guess what  
17 I'd like to do is just give you a little  
18 presentation of maybe what some of the positive  
19 things are. And, of course, the Tribal perception  
20 may differ, but what -- some of the positive  
21 things that might come out of those features and  
22 maybe some of the concerns that we've heard from  
23 the Tribes about some of the features of the  
24 alternatives.

25 And then I guess, you know, what I'll say is,

1 I'd be happy during the course of this  
2 presentation to -- if anybody wants to stop me, if  
3 anybody wants to ask questions, you know, please  
4 do. We'll be happy to answer them. And we have a  
5 lot of folks here who can help answer those  
6 questions.

7 Okay. First of all, these are the RDEIS  
8 alternatives. What we did is present six  
9 alternatives in the Revised Draft Environmental  
10 Impact Statement. The first one of those  
11 alternatives was the Current Water Control Plan.  
12 That's how we operate the dams now.

13 The second thing we -- alternative was called  
14 the Modified Conservation Plan, and it has all of  
15 the features that you see here, with the exception  
16 of changes in releases from Gavins Point Dam, the  
17 lowest dam on the system. And then we presented  
18 four alternatives that we called the GP  
19 alternatives, and these alternatives all involve  
20 changes in releases from Gavins Point Dam. They  
21 represent the full range of the flows that the  
22 Service recommended to us in their Biological  
23 Opinion in November of 2000.

24 So these are the alternatives that we looked  
25 at, and then if we go down this column we have the

1 features of those alternatives. These are the  
2 main components of those alternatives, and I won't  
3 get into them, you know, in a lot of depth here,  
4 but we'd be happy to chat with anybody, you know,  
5 during the course of the meeting or afterwards.

6 Okay. The first feature of the alternatives  
7 is adaptive management. Every single alternative  
8 that we presented in the RDEIS embraces the  
9 concept of adaptive management. What adaptive  
10 management is, is, it's a method for dealing with  
11 uncertainty, and, frankly, we don't know all of  
12 the impacts that might result from changes in our  
13 operation.

14 There's a lot of uncertainties in terms of,  
15 for example, how species might respond to some of  
16 the flow changes recommended by the Fish &  
17 Wildlife Service, and so what adaptive management  
18 is, it's a method for dealing with scientific  
19 uncertainty.

20 We're going to have to try some things.  
21 We're going to have to monitor the impacts of  
22 those things, and that doesn't mean just  
23 biological monitoring, it means we also have to  
24 monitor economic impacts, monitor social impacts,  
25 so it recognizes that we're going to have to try

1 some things, monitor them, see what works and see  
2 what doesn't work and how we may need to change  
3 our course of action.

4 Again, monitoring and evaluation are  
5 absolutely critical to adaptive management or else  
6 we just don't have the feedback on the impacts,  
7 and Tribal involvement in an adaptive management  
8 process that leads toward recovery of the Missouri  
9 River ecosystem, it's absolutely critical here.

10 I think our greatest concern is that we don't  
11 want to be, at the Corps, defining how the Tribes  
12 should participate or who should participate. You  
13 know that we would like, I guess, to work with the  
14 Tribes to see how the Tribes might want to  
15 participate in that long-term process.

16 BG DAVID A. FASTABEND: Now, Rose,  
17 before you go forward, I'd like to invite  
18 anybody -- and obviously this doesn't preclude  
19 making comments later, but would anybody like to  
20 make any kind of comment on this notion of  
21 adaptive management?

22 (No response.)

23 BG DAVID A. FASTABEND: Okay.

24 PAUL DANKS: What kind of comments are  
25 you looking for on this adaptive management?

1 BG DAVID A. FASTABEND: If you have a  
2 concern about the way it is often characterized;  
3 if it does not, in your view, adequately meet the  
4 concerns of the Tribes; if there's a new answer  
5 you would like us to consider, because I think  
6 part of the thing we're going to have to do in our  
7 Final Environmental Impact Statement is, we are  
8 going to work hard to try to give some more rigor  
9 to the definition of what adaptive management is,  
10 because it's frequently defined by others in ways  
11 that portray it to be a process that allows the  
12 Federal Government to make changes on the system  
13 without public and Tribal participation, and that  
14 is not our intent whatsoever, so we're going to be  
15 looking to try to put some structure into this  
16 definition of adaptive management. If you have  
17 input into that definition, I would love to hear  
18 it.

19 PEMINA YELLOW BIRD: Pemina Yellow Bird,  
20 Mandan, Hidatsa and Arikara Nation. I have a  
21 concern about adaptive management because I  
22 attended -- well, I saw you there, Rose, at the  
23 CLE International Conference along the Missouri  
24 River last year where there was that huge debate  
25 among experts in the field who could not agree on

1 the definition of adaptive management.

2 From our Tribe's perspective, adaptive  
3 management has to include co-management of all of  
4 the resources by all of the Missouri River Tribes.  
5 That needs to be part of the definition,  
6 co-management of all of the resources by all of  
7 the Missouri River Tribes.

8 HARVEY WHITE WOMAN: Harvey White Woman  
9 from the Oglala Sioux Tribe. I just want to make  
10 the statement right now, since this is a  
11 consultation with the Tribes, and everything, the  
12 Oglala Sioux Tribe reserves the right -- and I  
13 want this on the record -- reserves the right to  
14 submit comments after this consultation on this as  
15 we have our people look at this.

16 The other question I have is this Revised  
17 EIS, as you stated, was that revised as a result  
18 of comments -- the comments that were submitted  
19 during the draft or -- and also, too, was it based  
20 on, also, comments from the Tribes themselves?

21 ROSEMARY HARGRAVE: Sure.

22 BG DAVID A. FASTABEND: Yes.

23 ROSEMARY HARGRAVE: Yes, it was. There  
24 was a Draft Environmental Impact Statement put out  
25 in 1994 and this revised that Draft Environmental



1 Impact Statement, and then we also put another  
2 document out in 1998 called a Preliminary Revised  
3 Draft, and so this updated that document, as well,  
4 and it was because of the comments that we got  
5 that we did a lot of additional analyses and that  
6 we updated the document.

7 HARVEY WHITE WOMAN: How many of those  
8 comments were a direct result from the Tribes  
9 submitting them or Tribal organizations?

10 ROSEMARY HARGRAVE: Gosh, I don't think  
11 I would -- I don't think we've ever done a count  
12 of that, but I will tell you, in terms of the  
13 Tribes -- and again, this is my perspective. You  
14 know, I'm sure the Tribal perspective is very  
15 different, but I think we've come a long way from  
16 where we were at in 1994 in terms of trying to get  
17 a handle on what the Tribal issues are, trying to  
18 address the Tribal issues, trying to consult with  
19 the Tribes. You know, I kind of look at it of  
20 where we were in '94 and where we're at now and I  
21 think it's come a long, long way.

22 JOHNSON HOLY ROCK: Johnson Holy Rock of  
23 the Oglala Sioux Tribe representing the Tribe here  
24 today, and the last line in the thing on the wall  
25 there, I find it difficult for the Oglala Sioux

1 Tribe, I don't know about the others, how we're  
2 going to define involvement coming from many  
3 different directions.

4 In fact, in this issue that we are discussing  
5 here today, relating to the water Master Manual,  
6 the Oglala Sioux Tribe is far removed from the  
7 Missouri River Basin. In fact, the issue of  
8 mitigation ruled out all of this imbalancing of  
9 nature that the Great Spirit had put in place and  
10 all these activities. Bringing science into the  
11 picture seems to present us as having more brains  
12 than the Great Spirit, when, in reality, we are  
13 creating an imbalance in that which was perfectly  
14 balanced environmentally.

15 Yes, there was floods, maybe disastrous  
16 floods, but for some reason the Great Spirit  
17 permitted it, and in this setting we are asked to  
18 consider adaptive management views.

19 This is the first time I have been able to  
20 participate in this -- on this issue, because when  
21 we -- when the reservoirs were being created it  
22 disagreed with the views and the thoughts of the  
23 Great Spirit when he made creation and he made  
24 water and made the earth and everything attached  
25 to it, and seemingly over the years the human

1 being was able to live within that balanced  
2 environment.

3 Now, because of the desire for development we  
4 create the imbalance in the environment, and as  
5 far as I'm concerned, the first occupants of this  
6 continent were perfectly in balance with the  
7 environment. They had no problem.

8 Now we are -- all these problems arise and we  
9 are asked to get ourselves involved in reviewing  
10 adaptive management. I wouldn't even know where  
11 to begin. I don't know about other fellow  
12 Tribesmen, but I would guess they're just about as  
13 much in the dark as I am.

14 I think we've got a long way to go before we  
15 can create a partnership. I'd rather have an  
16 equal partnership rather than a junior and senior  
17 partnership, if that's possible.

18 Thank you.

19 ELGIN CROWS BREAST: Elgin Crows Breast,  
20 Three Affiliated Tribes. On the adaptive  
21 management, I have a thought as to the other  
22 federal agencies other than the Corps. Have they  
23 been able to give what they think is right for the  
24 Missouri River Basin, as opposed to the Tribes?  
25 Because I won't be able to make a decision on any

1 kind of adaptive management unless I know what  
2 they're thinking.

3 I got to know what Western Area Power  
4 Administration's thinking, the US Fish & Wildlife  
5 Service is thinking, and any other federal agency  
6 and nonfederal agency to really get a gist of what  
7 we're trying to do here, because if I -- if I show  
8 my cards first -- you know what I'm saying?

9 BG DAVID A. FASTABEND: I'm not sure I  
10 know completely what you're saying. I share a lot  
11 of everyone's concerns as expressed here because  
12 there is a lot of uncertainty. I, too, do not  
13 know where to begin, but I think wherever we begin  
14 we need to be there together working, because it's  
15 going to take everyone's perspective to try to  
16 figure it out.

17 For instance, the Corps of Engineers does not  
18 have all the expertise it needs to figure out  
19 what's best for the Missouri River system. It  
20 needs the help of Fish & Wildlife Service and WAPA  
21 and Bureau of Reclamation. All the other federal  
22 agencies have to participate. There are  
23 nongovernment bodies that need to participate, and  
24 our thinking is that as we define adaptive  
25 management and the process that's involved, it's

1 going to have to be as participatory and  
2 collaborative as we possibly can make it and still  
3 make it effective.

4 I'm concerned about your comment about being  
5 able to show -- not wanting to show cards on the  
6 table, because if we don't share our perspectives,  
7 we're going to not have the benefit of each  
8 other's expertise and history and perspective on  
9 what's right.

10 ELGIN CROWS BREAST: These particular  
11 issues that we have -- say we have a concern  
12 about, number one, treaty rights, okay? Number  
13 two, Trust responsibility, the sovereignty of our  
14 Tribes and water rights, but our -- their  
15 comments, are they in that Master Manual book too?  
16 Because I'm, like, halfway through with it and  
17 it's, like -- I think it's a foot thick. I'm not  
18 too sure. It's about like this -- (indicating) --  
19 and I'm only right about here. (Indicating.)

20 BG DAVID A. FASTABEND: If you think  
21 that's thick, wait until you see the Final  
22 Environmental Impact Statement where we include  
23 the 55,000 comments, which vary from a very  
24 concise E-mail to something about this size.  
25 (Indicating.) All the comments from all the

1 agencies, all the comments that we receive will be  
2 available in the Final Environmental Impact  
3 Statement.

4 PAUL HOFMANN: I'm Paul Hofmann,  
5 hydrologist with the Bureau of Indian Affairs, and  
6 while I share Mr. Holy Rock's concerns about the  
7 management of rivers, because as a hydrologist I  
8 often see the management of rivers almost  
9 inevitably mismanaged, let me ask a more  
10 procedural question, which is speaking of adaptive  
11 management.

12 Is it the expectation that the allowable  
13 adjustments in the various operational components  
14 is going to be carefully defined; that is, the  
15 degree to which the rise will be allowed to rise  
16 or fall, to a certain degree, outside of the  
17 preferred alternative that eventually emerges, or  
18 the degree to which reservoirs will be unbalanced  
19 and every other component within them, will that  
20 be defined within the plan?

21 BG DAVID A. FASTABEND: Our perspective  
22 is that whatever alternative we determine and list  
23 in the preferred alternative, that that  
24 alternative has to have NEPA coverage, that it has  
25 to have been adequately addressed within this

1 process of getting stakeholder comment and  
2 participation, that we can't -- we can't evolve to  
3 a solution that is far outside what was described  
4 or even outside whatsoever the range of solutions  
5 that's been described in this EIS process.

6 HAROLD FRAZIER: I got a question.

7 Harold Frazier, Cheyenne River Sioux Tribe. On  
8 that Tribal involvement, you know, one of the  
9 things we know -- we live out there on the Oahe  
10 Dam, and it seems like the non Indian population,  
11 the sportsmen that are around Mobridge,  
12 Gettysburg, they have more say on how the water  
13 level is, because I know for a fact that they're  
14 pushing to keep the Oahe Lake at a higher level,  
15 which will cause flooding on our lands, especially  
16 the Moreau River and the Cheyenne River, so we  
17 should -- if we're going to have Tribal  
18 involvement, how much? Like what Mr. Holy Rock  
19 said, are we going to be equal partners? Are we  
20 going to be the junior/senior kind of a deal?

21 But we live out there and we're -- you know,  
22 we see it every day, and our people, you know,  
23 they're really affected by this. A lot of our  
24 Tribal members are not sportsmen because there's  
25 nothing ever built on our side of the river by the

1 Corps, no recreation area, that's on the east  
2 side, so I guess if that's the case, then this  
3 should have been done first before any  
4 alternatives were drafted, if it's going to be  
5 Tribally driven or Tribal involvement. We should  
6 have been involved in the process from the  
7 beginning, because the statements I'm hearing from  
8 everybody is like we're just getting to know each  
9 other.

10 Those are my only comments on that.

11 Thank you.

12 GARY COLLINS: I want to add just an  
13 additional comment. Gary Collins, for the record.  
14 Some of the comments we've received from the  
15 Tribes, if not all of them, is that they aren't  
16 prepared to really seek and make a decision on any  
17 one of the alternatives. There again, falls back  
18 to some of my opening remarks; whereas, the  
19 document, the draft that's out, that was nearly a  
20 foot thick, as was mentioned earlier, needs to be  
21 assessed and addressed, and not only just reading  
22 the technical aspects and the dialogue that's in  
23 there, but how it relates to each one of the  
24 Tribes themselves, and each one, of course, has  
25 their own concerns and issues.



1           Some may be similar, some may not, but my  
2           point is, the alternatives that have been proposed  
3           out of the several, I think there was 50, or so,  
4           or more, that was at least looked at in the  
5           beginning, those alternatives that you've broken  
6           it down to now still need more assessment by the  
7           Tribes themselves, and that's where we're looking  
8           at the opportunity of technical assistance or  
9           something in that realm to where it is understood,  
10          it is an understood document.

11           So so far speaking collectively from the  
12          Coalition, not for each individual Tribe, it  
13          appears that the data is not assimilated enough to  
14          be useful, and so there's no real point that I'm  
15          understanding that this says, okay, we choose this  
16          operating alternative as compared to another, and  
17          so forth.

18           BG DAVID A. FASTABEND: I share your  
19          concerns that there is a lot of uncertainty  
20          associated with the issues, all the issues related  
21          to the system, and, in particular, many of the  
22          issues associated with the Tribes. I've read  
23          every word of the Tribal input. It's been my  
24          recreational reading -- I must not say that. It's  
25          been my discretionary reading for the last ten

1 days. I've read every word of the Tribal input  
2 and I know that there's a recurring theme of  
3 concern over the lack of information.

4 Now, we have been working trying to get good  
5 surveys throughout the system so we know where the  
6 cultural sites are, so we know where the TCP sites  
7 are. We don't have it yet, but I take you back to  
8 my metaphor I opened with today. I've got to go  
9 up that hill whether or not I've got perfect  
10 information. I don't think we're ever going to  
11 have perfect information. I'd like to have better  
12 information, but I think we have to go forward.

13 I think we have enough information to  
14 reasonably estimate the relative value of the  
15 alternatives. Not the absolute value, because you  
16 can't put an absolute value on cultural resources,  
17 but I believe we have enough information to move  
18 forward to determine a decision based on what we  
19 know and what we anticipate will be the  
20 consequences of the various alternatives.

21 I accept your position that we don't have  
22 perfect information about particularly cultural  
23 resources throughout the system and we accept the  
24 obligation to get some of that information. We  
25 have an active program ongoing to work on that.

1           Much of that process is funded. There are  
2           still a few parts of that that are not funded,  
3           particularly on Fort Peck Reservoir, but we need  
4           to keep going and do the best we can. We'll never  
5           have perfect information.

6                     DAVE NELSON: Again, my name is Dave  
7           Nelson, I'm the Environmental Director for the  
8           Cheyenne River Sioux Tribe. Myself, our in-house  
9           legal counsel, Ms. Snyder, and some of the other  
10          ones are who worked on preparing our comments.

11                    Now, when you look at adaptive management,  
12          when you look at it in the alternatives, the only  
13          thing adaptive in the whole concept is for  
14          downstream navigation. That's the big push in the  
15          whole document is to make sure there's enough flow  
16          downstream to make sure the navigation is met.

17                    Now, that causes a concern with me on a river  
18          system that has been contaminated, that at one  
19          time was a natural flowing river. So I guess in  
20          the alternatives, we didn't see anything in there  
21          that would benefit the Tribes. It benefited  
22          everybody else, but not the Tribes.

23                    The method for dealing with scientific  
24          uncertainty. Now, how do you deal with the  
25          science of a culture, of traditional practices,

1 when you're looking at it on a dollar side? We're  
2 looking at it as a way of life, as far as how we  
3 relate to the water, the fish, the whole resource  
4 that we have available.

5 So, I mean, I find it real hard for another  
6 entity to come and say we're going to deal with  
7 this scientifically, when you do not have the  
8 scientific background as far as us as a people and  
9 different practices that we do -- that we have, as  
10 far as tying back to our resources and the water,  
11 the cultural aspect of that.

12 How are you going to monitor? What are you  
13 going to monitor it for? Are you going to monitor  
14 the people because of our relationship to the  
15 water, the resources in the water? And how do you  
16 evaluate that? What do you use as criteria to  
17 look at an evaluation?

18 There's no -- I mean, to -- again, you have a  
19 system that, like I said, is -- its primary use of  
20 this water system, as everybody knows, is for  
21 navigation.

22 We're in a situation right now where we're  
23 probably heading into a drought, unless we get an  
24 extreme amount of rain to fill this reservoir back  
25 up for our needs. We have ranchers along those --

1 on the reservoir on our side that use that for  
2 water. Well, some of those areas are so boggy the  
3 cattle can't even get in to drink, so we're  
4 wanting to get dams built. It causes an impact no  
5 matter what. The more you drop it the lower the  
6 water gets, the farther out the cattle go, you  
7 have loss of livestock. Trees start coming back  
8 up. Well, you raise it back up, we lose those  
9 resources again.

10 So, I mean, I have a hard time understanding  
11 how you're going to apply adaptive management when  
12 the Corps does not know the Tribal side of it, the  
13 cultural aspect, our religious and spiritual  
14 aspects, how we're tied to that river system.

15 So I guess if there's going to be an  
16 involvement -- and, again, I would like to state  
17 for the record that I don't think this is the  
18 official consultation with the Cheyenne River  
19 Sioux Tribe. We're here at a summit. If you're  
20 going to do something official with the Cheyenne  
21 River Sioux Tribe, you should be on our  
22 reservation talking with our people and having --  
23 listening to their input.

24 Thank you.

25 BG DAVID A. FASTABEND: Okay. Well, let

1 me tell you something. You know, we're here for a  
2 substantive discussion and to make it substantive  
3 I'll tell you that I don't accept everything that  
4 you just said.

5 Adaptive management is not solely for  
6 navigation. Frankly, the people that scream the  
7 loudest about adaptive management are the  
8 downstream interests that are most worried about  
9 it, navigation. They're the ones that reject the  
10 concept the most.

11 The Corps of Engineers does not take solely a  
12 navigation perspective on the revision of the  
13 Master Manual. We're responsible for the multiple  
14 authorized purposes of the project, as well as  
15 compliance with environmental law, so I want to  
16 have these discussions be substantive and give you  
17 some feedback and I will tell you when I hear  
18 something from you that I just fundamentally don't  
19 agree with, so I'm giving you that feedback here.

20 I could be polite and just sit here and nod  
21 my head and just get to the next speaker, but I  
22 want to give you the feedback I don't accept  
23 everything you just said.

24 And finally, you said, you know, how are you  
25 going to do adaptive management? I'm not going to

1 do adaptive management, we are going to do  
2 adaptive management. The whole essence of the  
3 concept is that everybody is involved in it, all  
4 the stakeholders for the multiple purposes of the  
5 projects.

6 DON BUCKY PILCHER: My name is Don Bucky  
7 Pilcher, I am a delegate from the Sac and Fox  
8 Nation of Missouri, and maybe about a month ago I  
9 was invited to a symposium in Omaha, Nebraska, at  
10 the University of Nebraska, Omaha site, and it  
11 was -- this was brought about by the students that  
12 are at the campus, and at that meeting there was a  
13 lot of people that were -- that had concerns for  
14 the Missouri River, and I sat there and listened  
15 to a lot of the concerns that some of the people  
16 had, and the most I could come up with, you know,  
17 were farmers' complaints or some of the people's  
18 complaints about, well, we have farmlands along  
19 there, you know, if they let this water go it's  
20 going to flood out our farmlands.

21 And way back there when I was going to school  
22 at Marty Mission on the Yankton Sioux Reservation  
23 I was -- I was -- they started building Fort  
24 Randall at that time, and living on the Winnebago  
25 Reservation, Omaha Reservation where I was born

1 and raised, we used to experience floods down  
2 there, and that's when the river was wild and it  
3 was doing what it was supposed to do, it was  
4 flowing under natural conditions, and every year  
5 we knew there was runoff from the snows, but for  
6 some reason these people were concerned about  
7 their cities and towns along that river.

8 But then I said, you know, the thing about it  
9 is, us Indians, we lived on there centuries ago.  
10 We lived along that river and we knew what it was  
11 going to do at certain times of the year, so we  
12 never made a permanent structure. When we knew it  
13 was going to come up over its banks, we moved up  
14 there where it wouldn't interfere with our way of  
15 life, but we lived off that river. That was our  
16 way of life.

17 But then I was sitting there listening to  
18 these people talk about this and it wasn't about  
19 the life of that river, it was about money, and  
20 when it come to my turn I told those people down  
21 there, I says, you know -- and I told them this  
22 story. I said, we knew how that was, I said,  
23 because that river used to go out for miles from  
24 its bank.

25 I remember we used to go from Sioux City down



1 to Winnebago, it used to be right up to the edge  
2 of the highway and it used to flood our little  
3 creeks that fed it, and, subsequently, Winnebago  
4 used to be under water, Walthill and all those  
5 towns along there, because the river came down and  
6 did what it was supposed to.

7 But now, here we are, you know, when they  
8 started building that over, Fort Randall there,  
9 you know, I didn't know exactly what the purpose  
10 was, but then later on in my life I worked with  
11 the Indian Health Services and I worked with  
12 engineers and I found out what engineers like to  
13 do. They like to draw stuff on paper, you know,  
14 and that's basically what happened here.

15 I don't think -- I don't think anyplace in  
16 the history of this Master Manual I read that they  
17 went out prior to and had all these concerns for  
18 what was going to happen to the people around  
19 them, and then the people that suffered the most  
20 was these people that work right on the Missouri  
21 River, especially the Three Affiliated Tribes up  
22 in North Dakota.

23 All that land that was taken for backup  
24 water. Even now, with these plans you got, your  
25 erosion for lands that you said you was going to

1 give some kind of compensation to the Indians for,  
2 but yet with these plans you go three cycle here,  
3 three-year cycle here, and it backs up, erosion.  
4 You know, it's taken away more than you ever said  
5 you was going to do, and that's why we all have  
6 concerns, you know, about this river, because when  
7 they did this, you know, that's what they talk  
8 about, their culture.

9 The respect we had for our elders, that went  
10 beyond -- we had certain places that we put them.  
11 Nobody came and took those things and put them in  
12 a safer place, so now you have the waters flood,  
13 they recede, and then you find all these bones,  
14 you know.

15 I don't think anyplace in the history of the  
16 white man's world that -- I have seen towns in  
17 Kansas where they bought out the town and they  
18 moved all the bones that were there prior to them  
19 flooding the river, the Blue River.

20 I worked on a bridge there and they bought  
21 out the whole town and they moved all those bones  
22 before they started any part of their project, but  
23 that wasn't so with us Indian people. And, you  
24 know, I've been with this Mni Sose now since 1995  
25 and learning about all these things that I never

1 knew before, and the thing is, you know, it's  
2 like, "Well, I talked to these Indians over  
3 there." That's not consultation. You're talking  
4 to a bunch of Indians, you know.

5 And the thing about it is, you know, I went  
6 over to a place here in Rapid City, I was going to  
7 buy something from that person and he thought he  
8 knew me. He said, "Hey, how are you doing, Joe?"  
9 I said, "My name's not Joe." I said, "We all look  
10 alike, but," I said, "we got different names," I  
11 said. (Laughter.)

12 And, you know, listening to this, the way  
13 these things are going here, that's what's  
14 happening here, but when people get up and  
15 express, you know, we all have problems, but  
16 they're different problems. It's not all just one  
17 big problem for one -- you know, for Indian  
18 people.

19 We're all different. We have different  
20 concerns and different things, the way this river  
21 affects us, so I just thought I'd like to say  
22 that, because, you know, to me, this whole thing  
23 is all about money to the other side.

24 Recreational, you know.

25 If you look at all the recreation that's been

1 put on these lands where the river is, there ain't  
 2 nothing for the Indians, and I don't think there's  
 3 a plan for it, either, you know.

4 Even when I went up to this bicentennial  
 5 thing, my Tribe was invited up there, up to the  
 6 Four Bear Lodge, and that lady says "I would like  
 7 to ask you, since your Tribe was the first ones  
 8 that Lewis and Clark encountered on their trip,"  
 9 she said, "what are your feelings?" I said, "Well  
 10 I'm just going to give you my personal feelings,  
 11 not the Tribe's." I says, "You know, wherever  
 12 that -- that person went, those two people went,"  
 13 I said -- "now," I said, "they weren't explorers,  
 14 they were surveyors and they were under the  
 15 Department of Army when they went on that trip,  
 16 and," I says, "every place they touched down and  
 17 wrote a little history, there's now a dam and  
 18 there's a reservation all the way to the west  
 19 coast."

20 So, you know, that's why I got great feelings  
 21 about what's going on here, because it's always  
 22 that one-sided thing, you know. We're always  
 23 included at the last minute and it's always "I  
 24 think we know what's best for you."

25 I heard that lady say the consultation's

1 going to go on and that's after the decision's  
 2 made. What good is consultation after you make a  
 3 decision? That's what I'm saying and that's what  
 4 I'm hearing. "Say all you want to say, but my  
 5 mind's made up," that's what I'm hearing here,  
 6 because we're -- that man just said something back  
 7 there. You want to talk to somebody, you go to  
 8 their homeland and talk to them, and that's how  
 9 things are done.

10 So like I say, I'm a representative -- I'm a  
 11 delegate from my Tribe, but if you want to talk to  
 12 my Tribe personally about this, you go down there.  
 13 I just take information back to them. So if you  
 14 don't agree with him, I do, because that's the way  
 15 it should be.

16 In the beginning of this thing, this  
 17 Coalition sat down and they wrote -- they wrote  
 18 28 -- 38 major points that you people had to  
 19 address, and there it was in the last addition you  
 20 made of this thing, you finally recognized the  
 21 Indian people, and that's what kind of ticks me  
 22 off, you know.

23 No place else in that Master Manual, except  
 24 this last time, you recognized us as Federally  
 25 Recognized People, and that's who you talk to,

1 Federally Recognized Tribes, and that's consulting  
2 each one of them, not a group of them.

3 Thank you.

4 (Clapping.)

5 BG DAVID A. FASTABEND: Okay. Let me  
6 clarify the -- let me clarify the statement about  
7 the decision. There is no decision on the Master  
8 Manual until we get to the Record of Decision.  
9 That's what we talked about as far as the  
10 consultation continuing. I appreciate your views,  
11 Sir. I understand them.

12 PEMINA YELLOW BIRD: What are the  
13 Army -- what's the Army Corps' definition of  
14 adaptive management?

15 BG DAVID A. FASTABEND: We are working  
16 on that, and, Pemina, if you'll excuse me, I don't  
17 want to give you something off the top of my head  
18 that's not going to stand the test of the final  
19 definition we put together based on your input,  
20 the input from the other federal agencies, the  
21 input from all the stakeholders.

22 PEMINA YELLOW BIRD: Excuse me, Sir.  
23 It's included in all of the alternatives. Surely  
24 your agency has a definition of what they mean by  
25 adaptive management.

1                   BG DAVID A. FASTABEND: Pemina, I think  
2                   you know yourself, it is a very controversial  
3                   topic, and that conference you alluded to, they  
4                   were not able to define it. We are going to try  
5                   to come out with a definition that is an  
6                   improvement, that moves it to a greater level of  
7                   detail that everybody can understand.

8                   PEMINA YELLOW BIRD: How can Tribes make  
9                   a decision on an alternative when we don't even  
10                  know what that means or you don't even know what  
11                  adaptive management means, and yet it's included  
12                  in all the alternatives?

13                  BG DAVID A. FASTABEND: We are asking  
14                  you to participate in the input to that definition  
15                  by giving us some of your views, one of which we  
16                  got today, which is also in your input, which is  
17                  co-management.

18                  ELGIN CROWS BREAST: Elgin Crows Breast,  
19                  Three Affiliated Tribes. I've got -- by  
20                  listening, adaptive management, I think, for the  
21                  Tribes needs to be in a -- plus economically,  
22                  socially, environmentally and financially. The  
23                  cultural resources in which the Tribes are  
24                  interested along the Missouri River Basin -- I can  
25                  only speak for our Tribe -- is that we would like

1 to do those surveys.

2 You provide us the funds to do those surveys,  
3 we'll prioritize them, we'll do a plan for you.  
4 Along with your technical assistance we'll be able  
5 to find out which surveys are which, but at the  
6 same time we have our Sioux brothers over here and  
7 they have an issue and it's treaties.

8 Everything east of the Missouri River up to  
9 the east bank was given to them by the United  
10 States Government with this Title VI land  
11 transfer. That's a big obstacle, because the  
12 Tribes there felt that if anybody should have  
13 received that land back it should have been the  
14 Sioux people first from the Corps of Engineers.  
15 We acknowledge that. Three Affiliated, we  
16 understand that.

17 Also, the other one is talking to Western  
18 Area Power Administration. Fellows, we need some  
19 of your cash. Let's just put it bluntly. We need  
20 some of your cash to do these surveys. How are  
21 you going to help us Tribes to provide maybe 20 or  
22 30 workers to go down there and survey this entire  
23 Missouri River Basin so that environmentally the  
24 scientists can make a decision on it? Who's that  
25 money going to go through? Is it going to go



1 through the Corps? Is it going to go through -- I  
2 know that the Western Area Power Administration,  
3 in the annual budget, is pretty close to \$750  
4 million in the clear.

5 With one of the alternatives that the warm  
6 water from the top spills over the dams, you're  
7 going to lose money to save a sturgeon, a fish,  
8 and with these alternatives you're going to come  
9 back and you're going to some of the Tribes and  
10 some of the people along the Missouri River Basin  
11 and some of the preferential customers that WAPA  
12 has, like RECs, are going to up the electricity a  
13 little bit because of that water that doesn't go  
14 through that turbine to make that money.

15 Now, that water that runs through that  
16 turbine, we own some of that. So that's why I  
17 ask, how are you going to be able to help us?  
18 That's one thing.

19 We have technical people out there and  
20 experts that we can contract to bring into our  
21 Tribes and formalize a plan and do those things.

22 The cultural resources is probably one of the  
23 main things that our -- is a stopping block for  
24 this Master Manual, so there's a lot of issues,  
25 and we're willing -- the Three Affiliated Tribes

1 is willing to do that.

2 Today is different. We're in a cash economy.  
3 I'm not chasing buffalo to feed my family. I'm  
4 working for the Government. I'm working for the  
5 Tribe, and that's kind of a sad thing, but if you  
6 really want to know the history as to why we're  
7 all sitting here, it goes back farther, way back,  
8 General and Colonel.

9 It goes back to a time where everybody was  
10 here, the Tribes, it goes back to a time where  
11 they took things off the earth and they applied it  
12 to their everyday living.

13 Now, some of those things are disappearing,  
14 they're leaving us, and we're concerned about it,  
15 and this is the rationale for some -- and I gave  
16 you an idea. You want -- you wanted ideas. I  
17 gave you one. Are you willing to do that? Are  
18 you willing to afford us some type of compensation  
19 as to when these dams were all built for the  
20 erosion, the bank stabilization, monitoring  
21 projects all along the Missouri and let the Tribes  
22 watch over that? Not only that, with our Game &  
23 Fish, we can enforce jurisdiction on that river.  
24 That's what we want to do. Can you help us?

25 See, those are my ideas. Those are not my

1 chairman's, they're not Paul's, they're not  
2 anybody else's here, but those are the things I  
3 think are important, and I think it's a good thing  
4 that we're sitting here talking.

5 But still, we still have a little bit of --  
6 we want to back up a little bit. You know,  
7 everybody's like that, but we want to move ahead.  
8 Tribal involvement as defined by Tribes. Those  
9 are some of the things I think we can do.

10 We're not in TV days anymore. We got  
11 experts, we got -- we're on the net, you know, so  
12 to speak. You know, we're updated, we're -- you  
13 know, we're not Tribes that don't know nothing  
14 anymore. We're savvy. We're up there. We're the  
15 fastest moving group of people that come from the  
16 TV into the 21st century than any other race on  
17 the face of the earth. We have adapted to every  
18 situation that has been put in front of us and  
19 we'll do it again.

20 BG DAVID A. FASTABEND: Okay. Please  
21 don't misunderstand me and help me not  
22 misunderstand you. I'm not trying to back up when  
23 I give you feedback that I did not agree with  
24 something you said or anyone out there said. I am  
25 inviting you to help me understand.

1           Now, I can make this afternoon a lot easier  
2           for myself by sitting here and just nodding at  
3           whatever you say, but I thought you came here for  
4           a meaningful discussion, and I know you did, and  
5           for that reason I'm committed to tell you when I  
6           don't agree or don't understand the message you're  
7           giving me, because without that, we're not going  
8           to have meaningful discussions.

9           We've gotten a lot of input on adaptive  
10          management and I've heard several people talk  
11          about things related to lake unbalancing and  
12          changing the flows. We have other slides on each  
13          of those topics and other topics where we want to  
14          show you what we see as the potential pros and  
15          cons from your perspective on those issues, and  
16          then at each one I'm going to invite you to  
17          comment on those specific issues.

18          Is there anyone else that wants to give a  
19          comment on adaptive management before we go ahead?

20                 JOHNSON HOLY ROCK: Johnson Holy Rock.  
21          I'm back again. Again, going back to the subject  
22          matter and the issues, which I would guess, just  
23          on its face, is very numerous and just lines on a  
24          log, makes me very apprehensive, because I come  
25          from a culture that was considered unlettered. We

1 have no written language. We had no printed words  
2 to communicate. We're an orally oriented culture,  
3 and yet over the years the United States has dealt  
4 with us on equal bases across the table in treaty  
5 making, and despite later years when educators  
6 came to our part of the territory we were seen as  
7 incompetent.

8 And looking at the second line, the message  
9 for dealing with scientific uncertainty, only that  
10 simple line there makes me understand what a fish  
11 feels like when it jumps out of the water.

12 Before I came up here I discussed very  
13 quickly in the short time what I would -- the  
14 position that I would present to you at this  
15 setting. Now, the position of the Oglala Sioux  
16 Tribe would be for a lengthy postponement  
17 considering this water Master Manual issue  
18 because, as it says up there, how to deal with  
19 scientific uncertainty.

20 For me, just the water Master Manual creates  
21 scientific uncertainty for me, in that I cannot  
22 convey with any degree of confidence to my fellow  
23 members in a convincing manner that would convey  
24 to them that I know what I'm talking about, and  
25 not that they would believe what I tell them at

1           this moment, I can't, because if the water Master  
2           Manual is anything like EIS -- I attended a  
3           meeting to consider Environmental Impact Statement  
4           and I walked in there with the one in my arm with  
5           all the confidence of Alexander on the  
6           battlefield, then to my dismay I found out I had  
7           only one of 14 volumes. I was about as -- felt as  
8           weak as a wet noodle, and this water Master Manual  
9           is the same way.

10           You who deal in the science of engineering,  
11           creating, know things that would relate to water  
12           and all of these different phases and uses and  
13           spoken and printed with scientific language, and  
14           so just based on that alone -- oh, I can recite  
15           the ABCs, but I would ask just on the basis -- I  
16           don't know how many volumes the water Master  
17           Manual involves, but if it's anywhere near like  
18           the 14 volumes I ran smack-dab into, I cannot, in  
19           all honesty, tell my people that it's a good  
20           thing. No.

21           Based on my knowledge in a controversy over  
22           the issue of water, the usage and the rights to  
23           it, and in any litigation where you run into an  
24           impasse, generally the ball ends up in the hands  
25           of the water master and the water master enters

1 his decision as to what direction it should go,  
2 and for Indian people, especially for my Tribe, it  
3 would be like fish out of water. And, generally,  
4 in any litigation, controversial, whether it's  
5 small or great, the water master has a lot to say  
6 in his recommendation, and I doubt if our  
7 representatives here can, in all confidence, say  
8 that they will endorse a water Master Manual at  
9 this time.

10 I would, in all honesty, ask you to forgo  
11 review of this for about ten years just based on  
12 my incompetency in relation to water. The only  
13 thing I know about water is it quenches my thirst.  
14 Beyond that, when it gets into the scientific  
15 field, I don't belong in the same league, and just  
16 as it is, history repeating itself here, the Corps  
17 of Engineers, in all of their scientific  
18 knowledge, asking the Indian Tribes to endorse the  
19 proposition is like asking a child if he would  
20 trade his lollypop for a penny. It's unfair.

21 It would take me several years just to  
22 understand what's in that manual. And looking  
23 down the road at the issue of water, which one day  
24 is going to be just as valuable or more than gold,  
25 and we have the first right to it, it would be

1           unfair to ask us to endorse this manual.

2           I can't, and I told my chairman that that was  
3           the position I was going to take at this setting,  
4           so I will listen politely and gather as much  
5           intelligence about the subject matter, but that's  
6           all the assurance I can give you.

7           Whatever report I give to him will reveal the  
8           position that the Oglala Sioux Tribe will take in  
9           relation to the water Master Manual.

10          Thank you.

11                  PAM SNYDER: What I'm hearing today is I  
12                  don't know if we are communicating with you  
13                  effectively, because you, Sir, are a soldier. I'm  
14                  Pam Snyder, counsel to the Cheyenne River Sioux  
15                  Tribe's Environmental Protection Department.

16                  Many of you gentlemen are engineers. You  
17                  have a lot of technical expertise. Our knowledge  
18                  is general. The Tribes do not have the same  
19                  contingency of experts assisting them in rising to  
20                  the same level to have an effective discussion  
21                  here, and what I'm hearing from the Tribes is --  
22                  well, I'm a lawyer. When you have a contract and  
23                  you're negotiating it and you have two parties, if  
24                  one party is very sophisticated and the other is  
25                  not and they enter into a contract that's not



1 fair, that contract is considered void as against  
2 public policy.

3 I think what the Tribes are asking for, is,  
4 we want to be on the same level of sophistication  
5 in absorbing the Revised Draft EIS as you are in  
6 drafting it, and when you have a consultation  
7 between two entities such as the Corps and the  
8 Tribes, in order for that to be worth anything,  
9 the levels of sophistication have to be at least  
10 somewhat equal, and there's a concern that  
11 although we appreciate your efforts in consulting  
12 with the Tribes, unless there is an understanding  
13 that is sufficient, it's not worth anything.

14 I believe that's what we're asking for, as  
15 far as Tribal involvement as defined by the  
16 Tribes.

17 BG DAVID A. FASTABEND: I'm surprised to  
18 hear you say that, because I will tell you the  
19 Tribal input we received was really excellent, and  
20 although we, as an organization, are proud of our  
21 engineering skills, I think the assessments we  
22 received from the various Tribal inputs was  
23 excellent, from an engineering perspective, and,  
24 of course, you have a type of sophistication that  
25 we don't have, anything like with respect to local

1 impacts, impacts on your culture and impacts on  
2 your interest, and so I frankly have to admit to  
3 you, I never envisioned this as trying to -- I  
4 would throw up my hands if I had to try to have my  
5 guys achieve your cultural understanding, and I  
6 think you would admit to me that we can't get  
7 there, and I don't at all dismiss your own  
8 engineering understanding so far, but I hear your  
9 concerns and I understand the sensitivity of the  
10 issue.

11 The difficulty of going through all this  
12 information is, indeed, daunting. That's about  
13 all we can say about it, it is daunting. It's  
14 very, very difficult, but I fear if we took  
15 another ten years, Mr. Holy Rock, that we'd only  
16 have ten more year's worth of input to try to plow  
17 through and I'm not sure the decision would be  
18 easier or harder at the end of that ten years.

19 PAM SNYDER: In the end, the Missouri  
20 will continue to run and the dams will continue to  
21 be operated, it's a matter of how.

22 BG DAVID A. FASTABEND: Yes.

23 PAM SNYDER: The other issue that we're  
24 dealing with is adaptive management, and because  
25 the definition is difficult to get a grasp on from

1 both sides, I think the concern of the Tribes is  
2 accountability. When you have a broad definition  
3 or plan where there is room for movement, while  
4 that can be a good thing, it also removes a  
5 certain amount of, at least, perception of  
6 accountability, and that seems to be a concern of  
7 the Tribes.

8 It's like setting a tire rolling down the  
9 hill or rolling on a level and you kick it if it  
10 slows down. That seems to be what adaptive  
11 management is, or if it gets off to one direction  
12 or the other you move it back to where you want it  
13 to go, and that can be a good thing, but it can  
14 also be -- it can be a bad thing in the sense that  
15 in the process where there is supposed to be some  
16 structure, it seems that the structure is not  
17 there, and that obviously creates concern.

18 PAT SPEARS: Hello. Thank you, General,  
19 and the rest of you, the delegation of the Corps  
20 and all of the Tribal leadership, the members of  
21 the relatives here. Pat Spears, President of the  
22 Intertribal Council on Utility Policy, and I want  
23 to say a few things about adaptive management,  
24 what it means, I think, to me and what I would  
25 like to see out of it.

1           My particular interest is in the wind/hydro  
2           study that we have proposed that is in the current  
3           energy bill legislation that we have discussed,  
4           and you've heard my comments at the hearings and I  
5           appreciate your favorable comments that you'd made  
6           down the line on that about the potential of the  
7           wind and hydro for power generation and what I  
8           took as agreement that wind and hydro blended  
9           power can help increase the flexibility of  
10          management in the Master Manual and that you would  
11          consider adapting wind/hydro as an -- as a -- not  
12          as a separate alternative, as it was too late in  
13          the process, but that whatever alternative you  
14          selected, that it be included and receive some  
15          attention, and I think it does fit.

16                 Adaptive management describes what we would  
17                 like to do with wind/hydro. It may not fit every  
18                 other decision or other area of impact, but I  
19                 think if we are proven right in our concept and  
20                 what we see in our vision, that it can impact each  
21                 one of the areas of river management and generate  
22                 some income to help address it also.

23                 What we would like to do is work closer with  
24                 your staff in actually looking at what those  
25                 issues are, from the engineering perspective in

07  
1 monitoring the data and becoming familiar with  
2 that data, so that we can discuss engineering and  
3 bring ourselves up to speed a bit.

4 We're going to look for some help, also, from  
5 other experts on the Tribal side to address the  
6 accountability issue that's been raised. That's  
7 very real.

8 What we're looking at doing, what we think we  
9 need to prepare for, should this legislation be  
10 enacted, or if it's not, is looking at the  
11 methodology of a wind/hydro study, because we have  
12 other funding in mind and we're going to pursue  
13 other funding if Congress does not appropriate it,  
14 and we'd like to have that plan ready, because  
15 it's -- we're going to bring it up again and  
16 again, because we see that as necessary.

17 Because when you look at the method for  
18 dealing with scientific uncertainty, that's  
19 exactly one of the reasons for the study. We  
20 don't know the engineering details and impacts of  
21 wind/hydro and blending it into the system, given  
22 the transmission constraints and capacity on the  
23 line, so that's very much a part of it.

24 We want to know how possible that is and what  
25 kind of upgrades will be necessary to do it and

1 we'd like to demonstrate it as a next step.

2 One scientific uncertainty that is not  
3 addressed is climate change. In all of the  
4 alternatives and all of the discussions it is  
5 the -- it appears that climate is being held  
6 constant. When we see the river flow going down  
7 the record levels begin and the temperature  
8 increases that are happening and the variability  
9 that we're all experiencing, especially the last  
10 ten years, gets recorded very well, so examination  
11 of that data and its relationship to stream flow,  
12 power generation and the economic impact of that  
13 is what we want to get at.

14 So that's the other side of the study, is the  
15 economic impact, and we think we can save the  
16 Government money. We think we can generate income  
17 and jobs for Tribes through the blending of wind  
18 and hydropower, so monitoring, evaluation are  
19 critical.

20 We have plans for monitoring some climate  
21 data, also wind speed direction and temperature,  
22 and such, that we have proposals out under  
23 consideration both at the legislative level and  
24 are going to pursue other federal and private  
25 funding so that we can monitor wind speed and

1 direction and weather patterns and what climate  
2 variability will have on that, because we think it  
3 will have an impact on load forecasting and can be  
4 a tool that will aid in management, along with our  
5 scheduling department at your switchyard, so to  
6 speak, which is very serious business. So the  
7 Tribal involvement there at that level.

8           What I suggest is, I would like to meet with  
9 you and discuss the assignment of some of your  
10 engineering staff, Tribal resource liaison staff  
11 and others that may have economic interest to  
12 understand the power system, and WAPA, of course,  
13 will be a part of that team, as we see it. So  
14 some of this model, perhaps, could be applied to  
15 the other areas in addressing cultural resources,  
16 and certainly power generation overall is the key  
17 in this and some of the other impacts that are  
18 there, but I think that type of partnering and  
19 working with the Tribes, pulling us into your  
20 teams in establishing real working partnerships is  
21 Tribal involvement, in my opinion.

22           Thank you.

23           ROSEMARY HARGRAVE: Just to -- I guess I  
24 wanted to make a final comment on the adaptive  
25 management slide. We're engineers. We're

1 scientists. The other federal agencies are  
2 biologists. They bring their expertise, but in  
3 terms of restoring the Missouri River, the Tribes,  
4 the spiritual dimension, the cultural dimension,  
5 the way of life issues, you know, those are  
6 perceptions that we don't have, and, you know,  
7 without participation by the Tribes, you know, the  
8 whole effort would be missing -- would be missing  
9 that whole dimension of how we move forward with  
10 the Missouri River, so I guess I just, you know,  
11 on that note, want to urge Tribal participation.

12 Okay. I guess what we're moving to now is  
13 the next feature that is in the alternative. All  
14 of the alternatives, with the exception of the  
15 Current Water Control Plan, have what we call more  
16 stringent drought conservation measures, and what  
17 that means is, basically, that they conserve a  
18 little bit more water in the upper three lakes  
19 during a drought.

20 And what we're experiencing right now, of  
21 course, I think most of you folks realize, that  
22 under the current manual, when we start to enter  
23 into a drought, we draw down the upper three lakes  
24 fairly quickly, so what we've included is measures  
25 so that the upper three lakes remain a little bit



1 higher during a drought.

2 ~~These are the major benefits. As you know,~~

3 first of all, there is less impact to lake  
4 recreation if the lakes are a little bit higher.

5 Now, some of the Tribes on the lakes have  
6 recreation facilities, some don't.

7 HAROLD FRAZIER: Are you going to build  
8 us some?

9 ROSEMARY HARGRAVE: Pardon?

10 HAROLD FRAZIER: On Cheyenne River, are  
11 you going to build us some so our people can  
12 benefit, Rose?

13 ROSEMARY HARGRAVE: I wouldn't commit  
14 the Corps, but I guess what I would say is that's  
15 an area we need to work together on as we move  
16 forward.

17 The other thing, in terms of benefits, is  
18 that because the lakes are a little bit higher  
19 during a drought there is the capacity there to  
20 produce more hydropower when the lakes are a  
21 little bit higher.

22 These are, I guess, some of the concerns that  
23 we've had. When the lakes are a little bit higher  
24 there is increased wave erosion on the known  
25 cultural sites. Most of the known cultural sites

1 on the lakes are at the higher elevations and if

2 ~~the lakes are a little bit higher, they~~

3 have more wave action that hits those cultural  
4 sites potentially exposing the sites, and we've  
5 heard loud and clear from the Tribes on that.

6 The other thing, and we heard this  
7 particularly from the Fort Peck Tribe, was that in  
8 our summary document on the revised draft there  
9 was not benefits in terms of lake elevations  
10 showing to Fort Peck Lake, that the benefits, in  
11 terms of increased elevation, showed at Oahe,  
12 showed at Sakakawea, but not at Fort Peck.

13 In real-time operations, and we will clarify  
14 this in the final, the benefit in terms of lake  
15 elevations will be shared equally among the upper  
16 three lakes, including Fort Peck.

17 ROY MCALLISTER: Rose, I just think it  
18 needs to be emphasized, you're talking about  
19 higher lake levels in droughts. When the drought  
20 starts during normal times the lakes will be drawn  
21 down to the base of the flood control zone in the  
22 normal year, and so the goal in normal times is to  
23 pull down to the same level that it currently is  
24 pulled down, so we're talking about having higher  
25 lake levels only in drought years.

ROSEMARY HARGRAVE: Thanks, Roy.

2 PAUL DANKS: Can I make a comment real  
3 quick? Paul Danks, Three Affiliated Tribes.  
4 You're talking about the higher lake levels that  
5 are basically eroding the banks and getting the  
6 sites that are up there, but when you have the  
7 extreme low levels too the sites that are already  
8 flooded out are becoming exposed, so whenever you  
9 go to both extremes that's when we're having a  
10 problem, and I just want to make sure that you  
11 knew that.

12 ROSEMARY HARGRAVE: Absolutely. I  
13 mean -- and we're aware of that. You're right. I  
14 mean, absolutely.

15 Okay. The third feature of the alternatives  
16 is the unbalancing of the upper three lakes, and  
17 if everybody picked up a summary when they came in  
18 there is a really excellent kind of discussion of  
19 that on page -- it's on page 12 of that summary,  
20 looks like this, but let me tell you basically  
21 what unbalancing of the upper three lakes is.

22 What we would do is rotate the lake levels  
23 three to five feet on a three-year cycle, so  
24 just -- this is just an example. One year Fort  
25 Peck might be high, the next year Fort Peck, we

74  
1 would maybe float the level in Fort Peck. The  
2 next year maybe we would draw Fort Peck down three  
3 to five feet, and the lakes would be on this  
4 continual cycle, and this is, I guess, what it's  
5 intended to do.

6 In the year that you would draw the lake down  
7 a little bit, and we're talking three to five  
8 feet, we're not talking, like, 30 feet, in the  
9 year that you would draw the lake down, what you  
10 would do is expose bare sandbar habitat around the  
11 rim of the reservoirs, and that's what the  
12 endangered terns and plovers need to nest in, that  
13 bare sandbar habitat.

14 Also, the year that you draw that lake down  
15 you're going to be moving water from that lake, so  
16 you would also be creating sandbar habitat on the  
17 river, so the one intent of the unbalancing is to  
18 get the bare sandbar habitat for the terns and  
19 plovers.

20 The other intent of it is to provide hiding  
21 places for young-of-year reservoir fish, and this  
22 is basically what happens. When you -- after you  
23 drew the lake down, the next year or two  
24 vegetation is going to grow. The first year it  
25 will probably be bare so the terns and plovers

1 could use it. The next year vegetation is going  
2 to grow around the rim of that lake, and then when  
3 you brought the lake back up there would be  
4 vegetation around the rim that the reservoir fish  
5 would hide in. So it's intended to provide hiding  
6 places for the little fish so they're less subject  
7 to predators.

8         These are concerns that we've heard. Impacts  
9 to cultural resources on the lakes and the river  
10 reaches on the lakes. Getting back to your  
11 issue, you know, the issue would relate to wave  
12 action from the raising and exposure from the  
13 lowering, and then on the river reaches, of  
14 course, when we're making these adjustments we  
15 would be moving some water on the river reaches,  
16 and the concern there is that we would have  
17 increased erosion on the river reaches and  
18 potential impacts to cultural sites from that.

19         We've also heard folks concerned about  
20 increased -- and again, this gets to the river  
21 reaches -- increased erosion below the dams when  
22 we move the water. We've also heard a concern  
23 about the loss of forage fish, and, you know,  
24 we're talking about smelt here when the reservoirs  
25 are low. So in the year that the reservoir was

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pulled down, we've heard a lot of concerns that  
smelt eggs would be left high and dry and that  
there could be damage to the fishery that way.

Finally, and someone raised it earlier about  
the noxious weed issue. There is a concern about  
when we lower the reservoirs that we would be  
making that issue worse, so we've heard that.

Also, the Cheyenne River Sioux Tribe has also  
raised the water quality concern particularly  
relative to exposing sediments brought in by the  
Homestake mining operation, that they're concerned  
when we draw the lake down we would expose those  
sediments, and that's the water quality concern,  
and then also that relates to the sedimentation  
concern. Okay.

BG DAVID A. FASTABEND: Does anybody  
want to make a comment specific to the lake  
unbalancing before we go forward?

HAROLD FRAZIER: I have a question.  
Harold Frazier, Cheyenne River. Are we -- is the  
Corps making any funding available to the Tribes  
to adapt to these fluctuations? I think that's  
really important, because I know our Game, Fish  
and Park director, before I left, he was kind of  
worried about loss of smelt, and so how are we

1 going to, you know, restore it? So I think that's  
 2 something that the Corps should start looking at,  
 3 is to provide funding for Tribes so they can adapt  
 4 to the fluctuation of the water level.

5 ROSEMARY HARGRAVE: One thing, just  
 6 maybe to respond a little bit here, we're going to  
 7 be proposing mitigation in the Final Environmental  
 8 Impact Statement for impacts to the Tribes. We're  
 9 going to be proposing it. Some of these we  
 10 really, in terms of the details of the full extent  
 11 of what the impact might be, it's going to take  
 12 some monitoring and evaluation to define that.  
 13 But I guess what I would say is, we are going to  
 14 propose mitigation for what we see as potential  
 15 Tribal impacts in the Final EIS.

16 All that is well and good, but proposing  
 17 mitigation doesn't mean it's going to happen, so I  
 18 guess what I would suggest is, this is another  
 19 area where the Tribes and the Corps really would  
 20 have to work together to make that happen.

21 PEMINA YELLOW BIRD: Rose, can we get a  
 22 hard copy of this -- of these slides?

23 ROSEMARY HARGRAVE: Sure. I'll leave it  
 24 with you when I leave today.

25 PEMINA YELLOW BIRD: Can everybody here

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get a copy?

ROSEMARY HARGRAVE: Absolutely.

PEMINA YELLOW BIRD: Before we leave

today?

ROSEMARY HARGRAVE: Sure.

RICHARD MOORE: Not a hard copy for today, not for everybody.

ROSEMARY HARGRAVE: But we certainly have the addresses and the names. We'll mail them out to everybody.

PEMINA YELLOW BIRD: Also, a point of clarification. The opposite of benefits is not concerns, the opposite of benefits are liabilities.

ROSEMARY HARGRAVE: Right. The only thing I would say --

PEMINA YELLOW BIRD: The issues raised here, they're more than concerns, they're problems.

ROSEMARY HARGRAVE: Right. And I guess what I would say, some of them, we don't know to what extent they are problems or to what extent they're valid concerns that people have raised, but, you know, not necessarily do we know enough to define them as problems yet.



FREMONT FALLIS: Fremont Fallis, Rosebud

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Sioux Tribe. In regards to that water quality  
where it's impacting the Cheyenne River Sioux  
Tribe, but the Corps of Engineers, have they  
considered any issues regarding all of this  
methane well drilling that's going on in Wyoming?  
You know, they're pumping that water out along  
side and then they are just letting it run off and  
all those pollutants are going to eventually get  
into the Cheyenne, into the Missouri River, so are  
you people considering some of those issues, the  
problems?

ROSEMARY HARGRAVE: We did look at water  
quality in the Revised Draft EIS. I don't  
believe, correct me if I'm wrong, that we  
specifically looked at the coal methane.

BG DAVID A. FASTABEND: Yeah, I believe  
that issue primarily is resident with the EPA,  
and, of course, we'll coordinate with EPA and I'll  
bring that up with them the next time I meet with  
them.

FREMONT FALLIS: I mean, the federal  
agencies, you know, they come in and quantify some  
of the Tribes, you know, with their water  
compacts, yet the State of Wyoming, they cry about

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water, and yet they just let that water go to  
waste like that. What's the difference here, you  
know?

ROSEMARY HARGRAVE: Okay.

HARVEY WHITE WOMAN: Harvey White Woman  
from the Oglala Sioux Tribe. I find it very hard  
to comprehend what you just said about -- and even  
accepting it when you said that whenever Tribes  
have a concern it's very difficult or -- to  
mitigate the concerns, and from the Corps'  
perspective that's telling the Tribes that -- that  
basically is telling us your concerns aren't  
valid. That's pretty much what I'm hearing here,  
because of the mitigation, where part of that is  
coming together to mitigate the issues concerning  
either one of the parties.

I find it very hard to accept that analogy,  
and it goes back to you, General. With all due  
respect to your position, when you say that it's  
going to take the both of us to climb that hill,  
well, that's our hill. That is the Sioux Nation's  
hill, and for us to try to do that, I don't see  
that here, because it's like the Army Corps of  
Engineers telling us we're listening to your  
concerns, and stuff, but these things that we find

1 like water quality, the impacts to the Cheyenne  
2 ~~River Sioux Tribe and maybe other Sioux Tribes~~  
3 here in the room, now, if that's something that  
4 cannot be mitigated, well, we also have been  
5 saying to the Army Corps of Engineers that  
6 cultural areas cannot be mitigated also, but are  
7 we being listened to? We're not.

8 So that's where I find it very difficult to  
9 try to accept that.

10 Thank you.

11 BG DAVID A. FASTABEND: And I understand  
12 your concern. The problem we have on our side of  
13 it is the authorities we're given to spend money,  
14 and as you can well imagine, those are limited.  
15 What we can do, where appropriate, is recommend  
16 mitigation efforts as part of our recommendation  
17 on the Master Manual, and that puts us on the  
18 record as advocating these as measures that should  
19 be taken, but ultimately the authorizing of those  
20 mitigation measures and the funding of them, as  
21 you know, has to happen through the executive  
22 branch in Congress.

23 HARVEY WHITE WOMAN: So basically, in  
24 the end run, the concern of the Tribes will not be  
25 addressed because of the money issue. Now, I know

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for a fact that Army Corps of Engineers in  
Congress, the appropriations are going to be  
dropped. They're cutting those now, and, in fact,  
these supposedly consultation meetings are going  
to pretty much be, you know -- just not be done in  
a way that the concerns of the Tribes are going to  
be accepted because of, basically, budget cuts.

BG DAVID A. FASTABEND: I hope your  
concerns are not correct, because I, frankly, take  
some encouragement from the gentleman from Three  
Affiliated there that says the Tribes are becoming  
more adaptive, more effective, and that their  
voice will increasingly be heard, but our voice  
alone is not going to get you the resources you  
need to accomplish what you need to get done.

COURT REPORTER: Can we take a break? I  
need to change paper.

BG DAVID A. FASTABEND: I would ask  
Mr. Frazier.

HAROLD FRAZIER: A 10-minute break or  
15? 15?

BG DAVID A. FASTABEND: That's fine with  
me.

HAROLD FRAZIER: We can take about a  
15-minute break.

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A break was had from 3:14 p.m. to 3:36 p.m.

~~HAROLD FRAZIER: I guess we'll get~~

started here. The General has seated himself.

BG DAVID A FASTABEND: Okay. Let's start.

ROSEMARY HARGRAVE: All right. We just have a few more features to go through here, so I'll go ahead with the Fort Peck flow change here.

What we're looking at in terms of Fort Peck flow changes is an increase in releases from the powerhouse and the spillway on an average once every three years. This was included as a flow recommendation for the pallid sturgeon in the Fish & Wildlife Service Biological Opinion and there's actually two components to it, flows and temperature.

By water going over the spillway that's warmer water and then just the increased volume of water going over the spillway and through the powerhouse, the intent of that is to increase flows and temperature so that you trigger the pallid sturgeon to spawn in that reach of the river. So that's what the Fort Peck flow change is intended to do.

Concerns that we have heard mostly from the

1 Fort Peck Tribe are that they're concerned about  
2 ~~increased erosion, and sedimentation resulting in~~  
3 impacts to intakes and the loss of cultural  
4 surveys. There's 143 intakes downstream from Fort  
5 Peck, some of those are Tribal. The Tribes are  
6 concerned that those could be impacted.

7 Right now we're working on an environmental  
8 assessment for the mini test, which is kind of a  
9 scaled-down version of the Fort Peck flow change,  
10 and one of the things they are looking at in that  
11 study is the potential impacts to the intakes.

12 The other issue that they're concerned about  
13 are water quality issues and treatment costs from  
14 the increased releases. Also they're concerned  
15 about a stop protocol. You know, under what  
16 conditions would we stop the release from Fort  
17 Peck.

18 And then finally, the last issue I raised  
19 here was cottonwood regeneration, and, of course,  
20 the Fort Peck Tribe is concerned about that. We  
21 do have a study now that is looking at the  
22 cottonwood regeneration issue, as well, and we  
23 also, I believe -- Rick, correct me if I'm  
24 wrong -- but we have contracted with the Fort Peck  
25 Tribe to do the cultural resource surveys

downstream of Fort Peck.

RICHARD MOORE: Right.

ROSEMARY HARGRAVE: But those are -- I guess that kind of summarizes the Fort Peck flow changes and the major concerns that we've heard from the Fort Peck Tribe.

Deb, is there anything you maybe wanted to add to that?

(No response.)

ROSEMARY HARGRAVE: Okay. And finally, the last feature here, and this is by far the most controversial feature in terms of the public, general public, you know, maybe not the Tribes, but the general public, is the changes in releases from Gavins Point Dam, and this is what we're looking at, an increase in spring releases on an average of once every three years and lower summer releases every year, and I say those both meaning conditions permitting.

So, for example, if we were having a flooding situation downstream we would not run the rise, you know, or if we were having extreme drought conditions we may not cut back the summer releases. So, again, those are conditions permitting.

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These changes, again, were recommended by the  
Fish & Wildlife Service in their Biological  
Opinion.

These are the benefits. The increase in  
spring releases may provide a spawning cue for the  
pallid sturgeon downstream of Gavins Point Dam.  
The increased -- the other thing in terms of the  
low summer flows is the lower summer flows expose  
more bare sandbar habitat in the river and the  
terns and plovers need that sandbar habitat to  
nest on, so that's what the lower summer releases  
are directed at.

These are the concerns that we've heard, and,  
you know, Bob, WAPA folks, feel free to pipe in  
here if you want to, but the concern we've really  
heard from the Tribes is that with the lower  
summer releases, if you're releasing less water in  
the summer, that means you're holding it back  
behind the dams, and if you're holding it back  
behind the dams it means you're not running it  
through the powerhouse, so the concern is that we  
would be generating less power at the time of year  
when WAPA -- when we have the most demand, which  
is the hot months of summer.

That's also the time of year when WAPA gets



1 the most money for that power, so there would be a  
2 ~~loss of revenue, which WAPA would pass on to their~~  
3 customers. Some of their customers are the  
4 Tribes, and that's why the Tribes have really  
5 raised that issue.

6 Some of the Tribes have mentioned this in the  
7 context of Environmental Justice because a lot of  
8 WAPA's customers are Tribes and small communities,  
9 so -- yes?

10 DON BUCKY PILCHER: I think on that  
11 part, too, with WAPA, you know, we're talking  
12 about when the -- they have to cut the generation  
13 down because of the low flows. Is that on top of  
14 that? You know, they gave us a certain amount of  
15 allocation, but then turn around a year later and  
16 take that back, so actually the Tribes aren't  
17 really getting nothing.

18 BG DAVID A. FASTABEND: Let's give WAPA  
19 a chance to talk.

20 BOB RIEHL: This is Bob Riehl.

21 DON BUCKY PILCHER: Don Pilcher with the  
22 Sac and Fox Nation of the Missouri.

23 BOB RIEHL: This is Bob Riehl with  
24 Western Area Power Administration just to address  
25 Don's question or concern. First of all, with the

1 low releases. we won't be reducing our allocation  
2 to the Tribes. ~~With the low releases, if we need~~  
3 to, we will be buying that power from someone  
4 else, which adds to our cost, and that's the only  
5 reason we identified these up here.

6 Plus, as Rose stated, if we do have surplus  
7 water in the summertime and we aren't able to  
8 release it in the peak times and have to sell it  
9 either in the spring or the fall we'll receive  
10 less money for that and that will, in effect,  
11 increase our rates also, which, again, does impact  
12 you, because you, as a customer, would be paying  
13 our rates, yes.

14 Does that help a little bit?

15 DON BUCKY PILCHER: Well, no. All I'm  
16 saying here is we've really been hit on this, the  
17 Tribes.

18 ANTIONE PROVOST: How about that  
19 allocation that we were given that we were told  
20 that one percent over two years will be pulled  
21 back of the allocations that were given to the  
22 Tribes? I think that's what he was talking about.  
23 You were shaking your head no, so is that true or  
24 not true?

25 BOB RIEHL: That's a part of the public

process that will be separate from this one to

~~determine what the allocations are after 2006, and~~

that's what you're talking about with the one percent withdrawals?

ANTIONE PROVOST: Right. Antione Provost, Omaha Tribe.

DON BUCKY PILCHER: I would like to say something else towards that. You know, I don't know why everybody keeps -- I don't know why everybody keeps forgetting we are nations here. We're not just common customers, you know, and so you're saying we have to deal with you on the same level as other customers. You know, nobody else in that area prior to -- nothing was taken away from them, you know.

These people here, they lost a lot of land and that river that's flowing past them every day is generating electricity from their flow of water, so there should be some kind of consideration here from WAPA to give these people, like the gentleman from Cheyenne River said, a hundred percent.

You know, you said 65 percent of our total, but then you reach that, then what you gave us a year later is going to be taken back, so, you

1 know. It's like a what? What are we getting?

2 ~~BOB RIEHL: You said 65 percent?~~

3 DON BUCKY PILCHER: Yeah. That's what  
4 was in the original thing. You said that you  
5 would -- 65 percent was the goal that was set,  
6 but -- and reached that, you know. Matter of  
7 fact, some of our Tribes didn't even get an  
8 allocation that means anything to them because  
9 they didn't take into consideration the winter  
10 months and the summer months, their peak months,  
11 you know.

12 BOB RIEHL: I think that's part of a  
13 discussion between the -- let's see, that's the  
14 Flandreau Tribe, I think, and I think Doug  
15 Hellekson and Jon Horst have been talking with the  
16 Tribe about that. I believe that's an issue  
17 that's discussed between the two groups, yes.

18 DON BUCKY PILCHER: Yeah, but, I mean,  
19 the part that -- you know, even if you gave us a  
20 full 65 percent of our total, that would even  
21 help, but it hasn't even, you know, come up to  
22 that point yet.

23 BOB RIEHL: Okay. I understand that. I  
24 understand what you're saying, I mean, and I know  
25 that that's a part of another discussion and I

1 don't have the information with me right now, so I

2 ~~really can't deal with it too well.~~

3 DON BUCKY PILCHER: Well, yeah, that was  
4 always -- always my point, you know, is it's like  
5 that last -- supposed to be a consultation last  
6 time, too, but they sent some people down there  
7 that said they couldn't make the decision, you  
8 know. I said so if you're calling this a  
9 consultation, why are they sending people down to  
10 talk to us that can't make a decision?

11 I said that was always going to be our  
12 stumbling block, because they did not receive what  
13 was coming to them, and so if you're a man that  
14 can make a decision, you know, why are we going  
15 through this?

16 BOB RIEHL: I'm here to answer  
17 questions. Making a decision is sometimes not my  
18 responsibility or I'm not in authority to make  
19 those decisions. I believe someone else said here  
20 that they're here to represent. I guess I'm here  
21 to represent also and I can take back and explain  
22 things to folks, and I'm not necessarily the one  
23 that makes the decision, just like others made a  
24 claim that they were here to represent also.

25 DON BUCKY PILCHER: Well, I mean, it's

1 only to the point, though, you know what I'm

2 saying? ~~They gave, but they take back. That's~~

3 where that word "Indian Giver" come from.

4 (Laughter.) They gave us something, they said,

5 "Oh, by the way, I want that back, you know. I

6 change my mind." (Laughter.)

7 BG DAVID A. FASTABEND: Now, when you --

8 DON BUCKY PILCHER: Thank you.

9 BG DAVID A. FASTABEND: On that issue of  
10 taking back, are you saying they're taking back as  
11 far as the percentage of allocation or they're  
12 taking back in the sense that the rates are going  
13 to go up?

14 DON BUCKY PILCHER: Oh, no. They say  
15 they're taking back one percent for new customers,  
16 going to call for new customers, but who are those  
17 customers? Are they within our region or are they  
18 out in California?

19 BOB RIEHL: Okay. None are in  
20 California.

21 DON BUCKY PILCHER: Why should we have  
22 to give up something for people way out there  
23 because they don't know how to manage their  
24 resources?

25 BOB RIEHL: I would say that you make

1           sure you make that comment in that other public  
2           process.

3                       FREMONT FALLIS:  Fremont Fallis, Rosebud  
4           Sioux Tribe.  In regards to your WAPA firm power,  
5           when you're living by hydropower or coal power, or  
6           whatever from other entities, what about the  
7           Tribes with wind generating farms?  Have you  
8           people got everything lined up to buy this green  
9           power now or are we still given the runaround?

10                      BOB RIEHL:  At this point in time we  
11           only buy energy when we need it.  We have not  
12           committed anything long-term as far as purchases  
13           go.

14                      FREMONT FALLIS:  So we should go in and  
15           look for -- look for the most abusers of EPA regs  
16           that burn this coal-fired plants that we could  
17           turn our green power to them to buy?

18                      BOB RIEHL:  I'm not real sure what you  
19           just said.

20                      FREMONT FALLIS:  Well, these big  
21           polluters, these big industries, they buy the  
22           green power to say that they're in compliance with  
23           this green power, so is there any law against  
24           going after their people to buy our power?

25                      BOB RIEHL:  Asking them to buy your

1 power? No. I don't think there's a law against  
2 it.

3 HAROLD FRAZIER: Harold Frazier of the  
4 Cheyenne River Sioux Tribe. Since you're here  
5 just to take messages back, why don't you take one  
6 back to who can make a decision. I think it's  
7 time that WAPA needs to sit at the table with the  
8 Sioux Nation to discuss that, whether you guys are  
9 trying to take this allocation back.

10 BOB RIEHL: Okay.

11 HAROLD FRAZIER: I think you need to sit  
12 down and start negotiating, talking about it. I  
13 think -- I mean, you guys broke your agreement, in  
14 my books, so I think we need to sit down on that  
15 WAPA allocation. I understand we're going to get  
16 a decrease.

17 BOB RIEHL: Okay. That agreement that  
18 you're speaking of is a part of the public  
19 process, it was in the Federal Register Notice, I  
20 want to say, five years ago.

21 HAROLD FRAZIER: I mean, I'm aware. All  
22 I'm saying is, I think we need to have a meeting.  
23 You need to set up a meeting with the Tribes and  
24 discuss that. I know this ain't the place for  
25 WAPA.



1 BOB RIEHI: Okay. I can take that back  
2 for you.

3 PAT SPEARS: This issue of the pool of  
4 energy that's available there, you know, based on  
5 the river flow that's decreasing -- my name is Pat  
6 Spears, Intertribal COUP. This available -- this  
7 pool of power has been -- is decreasing. We're  
8 going to take a piece of it from everybody to make  
9 one percent for new utilities that are there, and  
10 the concerns are that by addressing threatened  
11 species and letting water flow in the spring, as  
12 it does naturally, you know, the impacts up and  
13 down the river on that that you deal with here, we  
14 think that generation of wind throughout the  
15 winter can help you store more water, hold more  
16 water back and use the river like a storage  
17 battery so that you have enough there to both  
18 generate power and enough to let flow to protect  
19 the threatened species.

20 So that's precisely why we want to study that  
21 issue, because we think that we can -- we can have  
22 a positive impact on every issue that deals with  
23 the management of the river. And when you have to  
24 go out and buy power on the spot market sometimes  
25 up to 6 cents a kilowatt hour, that's going to

1           increase the cost of power at some point.

2           You know, it is said that it's a cycle that  
3           you're going through and will absorb those high  
4           costs that have been peaking for the last five  
5           years, it will go back down. Well, I'm not so  
6           sure about that, and neither are 25 prominent  
7           scientists around the world that deal with climate  
8           changes.

9           I think you need an alternative plan, and  
10          that's what we're proposing to be included in the  
11          Master Manual so that we can produce wind energy  
12          at half that price and save the Government money  
13          and we can lock that price in for a 30-year  
14          period, and I think that's the economic side of  
15          this study that we want to bring out so that the  
16          Tribal allocations are not going to be reduced  
17          further that were promised to us so we can  
18          maintain those and use them for use at home.

19                   BOB RIEHL: Okay.

20                   BG DAVID A. FASTABEND: If I can, I'd  
21          like to drill this slide with you guys a little  
22          bit because I think this slide is one of the most  
23          challenging ones from you, and I'll explain to you  
24          why I think that is.

25                   And I can't put myself in your shoes, but if

1 I was trying to, I would see on the one hand, if

2 ~~you accept the argument of the Fish & Wildlife~~

3 Service and a lot of the environmentalists that  
4 say that the Gavins Point rises are important for  
5 the species, and I've heard many times from your  
6 community that you have great affinity for the  
7 ecological concerns, this is very important to you  
8 because of your lifestyle and your culture and  
9 your connection with the river, on the one hand  
10 you would want the Gavins Point rises, but on the  
11 other hand we can see some physiological impacts  
12 and some economic impacts that we think are going  
13 to hit you, we think, because of the change in the  
14 timing of the flows. The financial impact is  
15 going to cost hydropower users more, and you are  
16 hydropower rate payers, and so your costs are  
17 going to go up.

18 So I'm asking you flat out, given the fact  
19 that it gives you cost in some cases, but benefits  
20 on the other, what would you do if you were in my  
21 shoes? How would you do it? Gavins Point rises  
22 up or down? Does anybody want to make that vote?

23 PAT SPEARS: I'll just reiterate what I  
24 just said, is if you supplement the hydropower  
25 with wind power throughout the year, that we can

1 help lessen or mitigate, we can help mitigate some

2 ~~of that need for the increase in power and buying~~

3 supplemental power to meet one of your contracts  
4 with the utilities. We think Tribes can fulfill  
5 that niche, to a large part, and decrease that  
6 obligation, and at the same time conserve water  
7 and mitigate some of the other damages to  
8 threatened species and cultural resources and  
9 generate positive economic impact on reservations.

10 BG DAVID A. FASTABEND: Sac and Fox, you  
11 guys are downstream of Gavins Point, how do you  
12 see the Gavins Point rises, up or down on that?

13 DON BUCKY PILCHER: Well, you know, it  
14 was like that gentleman, our elder said, we're far  
15 removed from the Missouri River right now where  
16 our reservation is. We're some miles from it, but  
17 we still have our reserved water right off it, and  
18 the thing about it is, is that what's happening  
19 right now is that we have -- the Kickapoo Tribe  
20 has a study going on, a feasibility to pipe water  
21 out of the Missouri for a rural water system, and  
22 the only thing that we can see that that's  
23 bothering, you know, with the flows, and stuff, is  
24 because we're getting all the silt, and the thing  
25 that's going to affect us environmentally, you

1 know, the Clean Water Act, and all this other  
2 ~~stuff, you know, so whatever -- and our thing is,~~  
3 is that whatever benefits any Tribe along that  
4 Missouri River, even if we have to suffer a little  
5 bit, we'll suffer, because somebody has to be --  
6 you know, not everybody is going to be happy with  
7 the results, you know.

8 I mean, we knew that coming into this  
9 Coalition, but yet, you know, we joined it because  
10 it's going to benefit Indians period, and  
11 because -- I mean, it probably wouldn't be that  
12 way if the dams weren't there, we'd all have the  
13 natural benefit from it.

14 It's like I was saying, you know, when they  
15 first did that, everything looked good on paper.  
16 Nobody thought about the end results. Now we're  
17 trying to fix something that was created a long  
18 time ago because nobody had no input and the first  
19 people were the Indians.

20 If somebody would say, hey, how is this going  
21 to affect you, they could have told you way back  
22 then, then you could have made a plan, you know,  
23 but, like I say, you know, as far as I'm  
24 concerned -- because I never grew up where I'm at  
25 now.

1 I grew up amongst my Omaha and Winnebago  
2 people. I'm a person with different Tribal  
3 affiliations because of my mother and my father,  
4 but down there, like I say, we're far removed from  
5 the river, but we have our reserved rights to the  
6 water and the only thing that's going to affect us  
7 on that flow is that -- because that river is  
8 becoming a channel.

9 There's no sandbars down there where we're  
10 at. All that sand is on this side of the dam,  
11 and so whatever happens to us down there is --  
12 it's going to be through the flows at whatever you  
13 release down there. We're not worrying about  
14 running barges up there. That's Missouri's  
15 problem over there.

16 BG DAVID A. FASTABEND: I'm not asking  
17 you to worry about the navigators, I'm just, you  
18 know --

19 DON BUCKY PILCHER: No, but what I'm  
20 saying is that, sure, it's going to affect us in  
21 one way or another, the flows itself, but the  
22 thing we're worried about is the damage that is  
23 being done right now.

24 BG DAVID A. FASTABEND: But if your hand  
25 was on the switch, would you do this or not do

1 this?

2 DON BUCKY PILCHER: Well, I mean, you're  
3 asking me to -- like I'm saying, you know, they  
4 give us that great big book and there's  
5 terminology in it that you don't even understand.

6 BG DAVID A. FASTABEND: That's right. I  
7 get that book too.

8 DON BUCKY PILCHER: Once everybody  
9 defines all those different terminologies to us,  
10 then we can probably make a decision, but I'm not  
11 going to do it today and I'm not going to tell you  
12 today what I think.

13 BG DAVID A. FASTABEND: How about the  
14 Omaha Tribe, what do you think?

15 ANTIONE PROVOST: Sort of a loaded  
16 question here. I would have to say we would have  
17 to lean towards the side of the environment and  
18 the ecosystems. The power -- us paying a few  
19 cents higher for power wouldn't be our decision  
20 anyway, it would be Western Area Power  
21 Association, so we would have to lean towards  
22 the -- either on or off of the ecosystem side  
23 because you're holding that in front of me. You  
24 reinstated that, well, you know, you're all part  
25 of the -- spiritually, culturally and other things

1 of our areas, so if I said no and pushed away the  
2 ecosystem, that would be held against us.

3 However, that's the side we would have to --  
4 the Omaha Tribe would have to lean towards,  
5 because you're right, that is our way of life,  
6 that is a part of our cycle of life, and  
7 everything, so us paying a little higher price for  
8 our electricity, that would have to be one of the  
9 things we would have to swallow, so we would have  
10 to protect the ecosystems that are already there  
11 within our boundaries of our reservation.

12 However, recreation side and all the economic  
13 development side, that would have no play in it  
14 anyway, because the recreation we have along our  
15 Missouri River in our boundaries is waving at the  
16 barges when they go by.

17 There's been economic development to the  
18 south of us on the river, economic and recreation  
19 to the north of us; however, within the two  
20 reservations that are back to back, which the  
21 Winnebago Tribe is not present, so I will not  
22 speak for them, but along our reservation it's  
23 blank. So to answer your question, I would have  
24 to lean towards the side of the ecosystem and save  
25 the naturalization of the river on our banks.



1                   BG DAVID A. FASTABEND: Okay. I'm not  
2                   trying to put anybody on the spot.

3                   ANTICONE PROVOST: That was all I had to  
4                   say.

5                   FELIX KITTO: I'm Felix Kitto, I'm from  
6                   the Santee Sioux Tribe of Nebraska and I have a  
7                   few concerns. We're on the Gavins Point Dam.  
8                   We're in their tailwaters, actually. The lake has  
9                   backed up so far that we've lost several acres of  
10                  our Tribal land, and due to increased  
11                  sedimentation we probably have lost quite a bit of  
12                  our habitat, and if it was up to me, I know what  
13                  I'd do. I went to a nice little workshop about  
14                  dam removal and that's what I'd love to see,  
15                  because then I'd get our land back.

16                  I grew up on the Santee Sioux Reservation and  
17                  in the 29 years -- or probably the 22 years that I  
18                  remember, our land, the quality of our land has  
19                  gone down considerably. We've lost a lot of  
20                  habitat and I'd like to see that back.

21                  Oh, and then I was looking through these  
22                  slides. Will you please put Santee Sioux Tribe of  
23                  Nebraska on your last slide?

24                  ROSEMARY HARGRAVE: Sure. Absolutely.

25                  FELIX KITTO: Thank you very much.

1 HARVEY WHITE WOMAN: Sitting here just  
2 listening to what you're doing here, I don't want  
3 to make a comment about what you're talking about  
4 as far as a WAPA allocation, but I'm sitting here  
5 and you're telling each Tribe what you think  
6 you're going to do and how it's going to affect  
7 another Tribe.

8 It's almost like you're trying to get a  
9 divide and conquer thing going on here, and that's  
10 what I'm getting from here. You're saying, okay,  
11 what are you going to do that's going to better  
12 your Tribe, but it's going to impact this Tribe  
13 over here negatively, and you're trying to bring  
14 that out and it's almost like a divide and conquer  
15 tactic here that I'm seeing, and you may not know  
16 it, you may know it, and I'm saying you're  
17 probably doing it in a subtle manner, but that's  
18 what we're seeing here.

19 That's what I'm seeing here, is you're trying  
20 to compare this Tribe's needs to that Tribe's  
21 needs, based on something that they have,  
22 something in common, and that's the water and what  
23 that means to them, but I see this as a divide and  
24 conquer tactic. I don't know if anybody else is  
25 seeing that.

1                   BG DAVID A. FASTABEND: It's not my  
2                   intent to do that. Again, I can't account for  
3                   what I'm doing subconsciously, as you say, but  
4                   what I heard is that you're tired of coming to  
5                   meetings like this and nobody asks you what you  
6                   really think, and I'm trying to find out what you  
7                   really think, that's all I'm doing, because these  
8                   are hard, hard trade-offs and I think they're hard  
9                   trade-offs for you. I think nobody's opinion is  
10                  more important on how we trade off those two  
11                  things, the environmental concerns versus what I  
12                  see as direct economic impacts on Native  
13                  Americans, and I don't distinguish which Tribes.

14                  I mean, I think -- I don't see it as a  
15                  trade-off between the Tribes, as far as one  
16                  Tribe's going to pay more and one Tribe's going to  
17                  pay less. If that's happening indirectly, I  
18                  apologize for that, because that would be -- that  
19                  would not be good of me to come in and try to do  
20                  something like that. Frankly, I'm just not that  
21                  clever, but I am asking what -- you know, what you  
22                  want.

23                  DAVE NELSON: Again, my name is Dave  
24                  Nelson. Some of the questions I have is -- and  
25                  I'll go to the WAPA one first. They negotiated

1 this agreement out here years ago or a few years  
2 ago, Tribes get a certain allocation and they  
3 spread that allocation out how they see fit. Now,  
4 if you raise the rates based on lower flows, then  
5 shouldn't the allocation be raised? Because we're  
6 the ones that are losing as far as resources.  
7 It's the water going through our reservation  
8 boundaries and off our lands that are helping  
9 produce this.

10 Now, what happens is, when you raise it, the  
11 vendors that come back to us to sell it to us,  
12 they raise it, they put their raised rates on  
13 there, and, in a sense, it's -- it doesn't  
14 really -- it doesn't really benefit the Tribe, if  
15 you're to look at it, if you'd sit down and really  
16 look at the numbers.

17 And I think you were up at Cheyenne River  
18 before. I can't remember your name, but I  
19 remember seeing you up there, and that's what they  
20 were trying -- that's what the people are trying  
21 to say, is, you know, here's what -- some of the  
22 losses that we're seeing and you're not helping us  
23 any by your raising it, but you're not raising  
24 your allocation, so it's like the money that  
25 you're allocating -- or the power you're

1 allocating is less than what was first negotiated,  
2 and I think that's what he was trying to get at  
3 before.

4 BG DAVID A. FASTABEND: Yeah, I  
5 understand that, and I share the impression that  
6 doing this decreases the hydropower value to the  
7 Tribes, and that's why I'm asking, given that, and  
8 it gives you some environmental impacts, but  
9 decreases the hydropower value, how do you trade  
10 those off? I'm --

11 DAVE NELSON: Well -- and if I can  
12 finish, I'll jump up to your benefit. Now, I know  
13 we have a gentleman here with US Fish & Wildlife,  
14 but it says that some of these benefits may  
15 provide spawning cue for pallid sturgeon. Do they  
16 know that? Does the Corps know that or is it just  
17 based off theory? Science? I mean, what's --  
18 what's that based on? You think it might do it,  
19 but you don't know that.

20 BG DAVID A. FASTABEND: Do I get a  
21 chance to talk?

22 DAVE NELSON: Hold on. The sandbar part  
23 of it that I've been looking at is -- and what was  
24 discussed a little bit earlier, there's so much  
25 erosion and sedimentation occurring because of

1 either wicking action or wave action, whatever  
2 occurred. Now, if you raise it, you lower it, or  
3 leave it whatever level, you're going to have the  
4 erosion, sedimentation.

5 Now, the stabilization of those banks and  
6 building, perhaps, what you could call artificial  
7 sandbars to where your terns and plovers still  
8 have habitat to nest in, you could leave the river  
9 system at one level.

10 I can't say what Gavins Point is, that's not  
11 my concern, mine is Oahe, and what I see, what  
12 happens to Oahe is, we're kind of the middle guy  
13 and it doesn't matter if we need the water there,  
14 it goes, I mean, so -- I mean, I'd like to see --  
15 if you're going to -- you're talking sound science  
16 and we're talking, you know, factual deal, then I  
17 want to see where it's going to affect that pallid  
18 sturgeon. I want to see how it's going to affect  
19 that tern and plover.

20 I mean, I've did studies out there with my  
21 staff, with Game, Fish and Park staff from our  
22 Tribe, they come back every year. I don't think  
23 we've ever seen a sturgeon, but they keep telling  
24 us they're down there, so, I mean, that's the  
25 thing I'm saying, is, you're basing that off of

1 theory or is it factual evidence that Fish &  
2 Wildlife is doing that on?

3 ROGER COLLINS: Roger Collins with the  
4 Fish & Wildlife Service, the Senior Biologist  
5 that's been working on Missouri River issues for  
6 the last 13 years, ever since the Master Manual  
7 started. The Biological Opinion that we wrote --  
8 well, we actually have written two of them.  
9 One -- we wrote one in 1994 on the Draft EIS at  
10 that time, and then most recently we completed an  
11 opinion in November of 2000. Those opinions are  
12 based on the best scientific information  
13 available.

14 We had over approximately 500 citations in  
15 that opinion. We utilized biological information  
16 from various articles, various agencies, Tribes,  
17 etcetera. We know that pallid sturgeon and other  
18 native fish need spawning cues. We also know that  
19 there are no spawning cues right now based on the  
20 current hydrograph, the current operations of the  
21 system, and so what we have done is to try to  
22 identify a spring rise component that would be  
23 beneficial for pallid sturgeon, least tern, piping  
24 plover and other native species.

25 Anything we've recommended in the Biological

1 Opinion certainly is directed towards those three  
2 species, but it's going to provide ecological  
3 benefits to all species and habitats up and down  
4 the river.

5 Now, as far as knowing exactly what spawning  
6 cue is needed, we know historically what occurred.  
7 We know that today there's no way that we would  
8 recommend nor could the Corps operate to achieve  
9 historical spring rises, etcetera.

10 Based on the literature, we believe that if  
11 we can restore approximately 25 percent of a  
12 hydrograph or 25 percent of the habitat that was  
13 available historically, most big river researchers  
14 believe that this may be sufficient to prevent  
15 these species from going extinct, so what we did  
16 was to develop these recommendations and what we  
17 call a reasonable and prudent alternative, and  
18 this is, basically, a recommendation that we  
19 believe is necessary to avoid jeopardizing these  
20 species.

21 And when we talk about adaptive management,  
22 just like the Corps, we don't have all the  
23 specific answers. We know that a spawning cue is  
24 needed. We know that habitat is needed, and so  
25 forth, so what we have recommended are starting



1 points.

2 Based on that starting point you need to  
3 monitor, you need to evaluate the success or  
4 failure, and then you need to adapt. You may want  
5 to go higher, maybe you can live with going lower,  
6 so that's basically, in a very generic nutshell,  
7 how we addressed that particular component.

8 BG DAVID A. FASTABEND: Thank you,  
9 Roger. I see Chairman Hall's here. Welcome,  
10 Mr. Hall. Do you want to give us any input on  
11 this Gavins Point business?

12 TEX HALL: On the -- specific to the  
13 Gavins Point or just overall?

14 BG DAVID A. FASTABEND: We're going  
15 to -- as soon as we get done with this briefing  
16 each of the Tribes is going to have to chance to  
17 speak, if they want. We're getting a lot of input  
18 as we go through.

19 TEX HALL: So just do --

20 BG DAVID A. FASTABEND: Just do Gavins  
21 Point now.

22 TEX HALL: Just do Gavins Point. You  
23 know, the -- we had requested, I believe, in --  
24 you know, getting to the EIS, the Environmental  
25 Impact Statement and the Biological Opinion that

1 the gentleman was talking about back here, that's  
2 obviously very important to the Tribes, and I  
3 thought we had requested an additional revised --  
4 or what do they call it, Supplemental --

5 BG DAVID A. FASTABEND: I read your  
6 input. You did request an SEIS.

7 TEX HALL: An SEIS, because we thought  
8 the original EIS, General Fastabend, did not  
9 include the Tribes' concerns, because we look at  
10 all of this as an Indian Trust Asset. You know,  
11 there's a legal requirement here in the Winters  
12 Doctrine, there's a legal requirement here that  
13 the flows, based on the alternative, will  
14 affect -- there is no question about it, that will  
15 affect the Tribes' assets in the river.

16 The water itself is also a huge economic  
17 impact, based on the ownership that has been  
18 established by law, so the water, and then of  
19 course the cultural properties are all part of  
20 that, that asset that the Tribes have, so I don't  
21 know where the Corps is at with the SEIS that had  
22 been requested, the Supplemental Environmental  
23 Impact Statement, because we felt that the  
24 original EIS did not address those concerns that  
25 the Tribes had laid out, so we're wondering about

1 that and what the Corps' position is.

2 And also a little sidebar note, I'll stop at  
3 that, is the overall comments themselves. I don't  
4 know how many overall comments, I imagine it's  
5 been thousands that the Corps has received.

6 BG DAVID A. FASTABEND: Over 55,000.

7 TEX HALL: Over 55,000. I guess I'm  
8 interested to know how many comments are from the  
9 Tribes, how many comments are from the States, how  
10 many comments are from the local recreation users,  
11 and my point is -- my point is this, General  
12 Fastabend, my point is this, is that if the Tribes  
13 have an Indian Trust Asset, we own, under the  
14 establishment of the Winters Doctrine and the  
15 cultural property rights, we own -- and we all  
16 agree, which I think we do, I think we're on the  
17 same page, I think the Corps, you know, is on the  
18 same page with the Tribe, that this is an Indian  
19 Trust Asset.

20 My follow-up question is, on all of those  
21 comments, what weight is given to the Tribes'  
22 comments versus, you know, the local recreation  
23 user and the States, and all that, what weight is  
24 going to be given? And also, is there a general  
25 theme of the Tribes' comments? Is there a

1 consistency, you know, of the Tribes' comments?

2 And obviously, how do we follow that up? How do  
3 we continue to work collaboratively in  
4 consultation with you as you move towards a  
5 decision?

6 And obviously we have a resolution from the  
7 Great Plains that had requested a task force, and  
8 I think that is a -- that offer is still there.  
9 We're awaiting response on that. So that would  
10 be -- my three questions would be the SEIS, the  
11 comments, and then the -- what did I say?

12 BG DAVID A. FASTABEND: Task force.

13 TEX HALL: Task force. Those are my  
14 three questions.

15 BG DAVID A. FASTABEND: How many more  
16 slides do we have?

17 ROSEMARY HARGRAVE: Just a few. Just a  
18 couple.

19 BG DAVID A. FASTABEND: Okay. Chairman  
20 Hall, if you will, let me finish these slides,  
21 then I'll take --

22 TEX HALL: Sure.

23 BG DAVID A. FASTABEND: I'll answer  
24 those three questions directly, because I think  
25 they're pretty broad and are of interest to all

1 the Tribes, and then we'll get on to the rest of  
2 this.

3 TEX HALL: Okay.

4 BG DAVID A. FASTABEND: Thanks.

5 PATTI LEE: Rose, before you start, has  
6 everyone signed the sheet that came around? We'd  
7 like to make copies for everybody so we can have  
8 them before the end of the day. If you haven't,  
9 please come over to the table.

10 ROSEMARY HARGRAVE: Okay. I think where  
11 we had left off here was, in addition to the  
12 hydropower issue, the lower summer releases that  
13 are included in the alternatives do put some  
14 thermal generation at risk.

15 There are coal-fired plants and there are  
16 nuclear plants on the Missouri River and those  
17 plants have to meet certain temperature  
18 requirements for their intakes and for their  
19 discharges, and what happens is when they can't  
20 meet those temperature requirements, in the case  
21 of the coal-fired plants, they have to step down  
22 generation so that they're releasing less hot  
23 water into the river. In the case of the nuclear  
24 plants, they have to actually shut down the  
25 nuclear facility altogether.

1           So the lower summer flows do put some thermal  
2 generation on the river at risk. To the extent  
3 that Tribes get their power -- and I'm  
4 particularly thinking about the lower river  
5 Tribes -- get their power from those entities that  
6 generate the thermal energy, there is a potential  
7 increased rate involved relative to thermal  
8 generation also.

9           Then we've heard from the Winnebago Tribe.  
10 They are developing a ferry project. Their  
11 concern is that the lower summer releases, that  
12 their little marina type area on the river would  
13 dry up and would silt in as a result of the lower  
14 summer flows. And also we have heard from the  
15 Omaha Tribe that they're concerned about, from the  
16 spring rise, the potential of downstream erosion  
17 and loss of cultural resources.

18           So that, I guess, kind of sums up this  
19 particular feature of the alternatives.

20           Okay. We actually got into this a little bit  
21 earlier, the mitigation issue, and, you know, I  
22 guess what I indicated earlier is that we will be  
23 proposing mitigation for the Tribal impacts  
24 resulting from the changes in operation. These  
25 are the challenges that we face.

1           You know, it's all well and good, like I said  
2 earlier, for us to put these proposals in that  
3 EIS, but as General Fastabend mentioned, it's not  
4 enough for the Corps to go up to Congress and say  
5 we want more money. To make these things happen  
6 there may be authorities and funding that are  
7 required, and I guess what I put here is that I  
8 think the Corps and the Tribes need to work  
9 together to define the needs, the methods and --  
10 so that we actually get appropriations and  
11 authorizations to execute any mitigation that we  
12 might propose.

13           And finally, I guess these were just some  
14 Corps recommendations. We believe that, first of  
15 all, the Corps needs to make a concerted effort to  
16 pull the Tribes into the Annual Operating Plan  
17 process to a much greater extent than we have, and  
18 I guess I view this from the point of cultural  
19 resources particularly.

20           We're getting a very good GIS database of  
21 those sites. At some point we're going to be able  
22 to tie that GIS database with our annual  
23 operations and the lake elevations and we're going  
24 to have a pretty good idea of what sites are going  
25 to be impacted in our annual operations each year.

1           You know, by knowing that, we will be able  
2 to, I think, work with the Tribes to get those  
3 sites protected before we run into trouble, so I  
4 guess I think that's -- and the Corps believes  
5 that's very important.

6           And then finally, I just put this on here,  
7 that we have a lot of good processes in place and  
8 I think as much as we talk about maybe our  
9 negative relationships with the Tribes, we also  
10 have some really positive relationships going. I  
11 think we need to build on those and build on -- we  
12 have some very good processes in place and build  
13 on those processes and move forward.

14           Okay. These are some of the -- this next  
15 slide, and this is the second to the last slide,  
16 these, I guess, are what we call overarching  
17 Tribal issues. You know, they are the backdrop  
18 for all the discussions that we have with the  
19 Tribes, all of our consultations and meetings with  
20 the Tribes.

21           First of all, the impacts due to construction  
22 of the dams. I mean, a very real, devastating  
23 impact and it -- and, of course, the Master Manual  
24 study is, you know, from dams in place moving  
25 forward, but a tremendous issue we need to deal



1 with the Tribes here, and we've heard so many  
2 times today about the reserved water rights, the  
3 treaty rights, cultural resources, our Tribal  
4 Trust responsibilities. All these are huge issues  
5 that we have to deal with the Tribes on.

6 And then lastly here I just included a  
7 listing down here. This is a listing of the  
8 Tribes that we have either engaged in  
9 Government-to-Government consultation with or who  
10 have requested Government-to-Government  
11 consultation.

12 And again, Rick, is there any additions or  
13 deletions, or do I pretty much have the --

14 RICHARD MOORE: No. The gentleman here  
15 said the Santee.

16 ROSEMARY HARGRAVE: Santee has to be  
17 added.

18 FREMONT FALLIS: Yankton too.

19 ROSEMARY HARGRAVE: Okay. Great. And  
20 just reminding folks, just even on the Master  
21 Manual, the consultation with the Tribes goes  
22 through the Record of Decision, so that any  
23 Tribes -- I'd encourage Tribes who we are not in  
24 direct consultation with to please get into  
25 consultation with us. It really helps us to

1 identify the specific issues because the Tribes  
2 know those and we don't.

3 Oh, and lastly, the schedule. Just for --  
4 the Record of Decision is scheduled for October of  
5 2002, and, again, the Biological Opinion from the  
6 Fish & Wildlife Service says we need to have a new  
7 plan implemented by 2003, so that's not an  
8 arbitrary date, so we're going to try to meet that  
9 2003 implementation date.

10 BG DAVID A. FASTABEND: Okay. Chairman  
11 Hall, before I give my response to you, you might  
12 want to make some general comments, because I  
13 forgot you were delayed getting here and the other  
14 folks had a chance to make some general comments.  
15 If you want to do that now, then I can -- if you'd  
16 rather do that first, then I'll chat --

17 TEX HALL: Thank you, General and  
18 Colonel Ubbelohde. Appreciate, first of all, the  
19 Corps' -- Army Corps of Engineers' commitment to  
20 the summit, to having a Tribal summit. I really  
21 think this is outstanding to have a summit. To  
22 me, it recognizes and affirms the  
23 Government-to-Government relationship that we have  
24 and it shows me that you are making an attempt to  
25 do that, you are making an attempt to include the

1 Tribes on this very important issue of deciding on  
2 the Master Manual.

3 Secondly, I guess you've heard our comments  
4 from many of the Tribes, General Fastabend and  
5 Colonel Ubbelohde, that there are many concerns  
6 that the Tribes have had and the relationship  
7 always hasn't been very positive with the Army  
8 Corps of Engineers, starting with the Flood  
9 Control Act in 1944, and so I've seen a lot of  
10 improvement with the Army Corps of Engineers and  
11 want to build on a relationship that is with a  
12 partnership, as we just indicated with the  
13 previous slides, but that's why I guess in my  
14 three questions I continue to bring -- the overall  
15 comments are -- you know, on the overall comments,  
16 you said 55 or 59,000?

17 BG DAVID A. FASTABEND: 55,000.

18 TEX HALL: 55,000 comments. Again, you  
19 know, what weight will the Tribes, as an owner,  
20 you know, as an Indian Trust Asset, the river,  
21 will weigh into those decisions, and I hope that  
22 we're on the same page, General. I hope we're on  
23 the same page and that the Tribes' concerns will  
24 carry a priority with the 59,000.

25 I think we're looking for those kind of --

1 that kind of a feedback from the Army Corps that  
2 shows that, number one, our comments will be a  
3 priority with the Army Corps.

4 Number two, when it comes to financial  
5 resources, we know that the Corps is underfunded  
6 and we're committed to working with our  
7 congressional staff people. It's good to see  
8 Aubrie James from Senator Johnson's office. I  
9 don't know if anybody else is here from any other  
10 congressional offices, but I know Aubrie is  
11 actively involved on behalf of Senator Johnson and  
12 has taken an active role with the Tribes along the  
13 Missouri and that we will take -- we will do our  
14 part, General.

15 We will do our part as Tribes to increase the  
16 funding above and beyond the President's budget  
17 request, and we will do our part, but, of course,  
18 in order for Congress -- in order for the Tribes  
19 to want to do that we have to know that our issues  
20 are a priority, our issues will be addressed.

21 And cultural resources, for example, there is  
22 little to no money that will be available in the  
23 next fiscal year budget, is my understanding, and  
24 we need to know that commitment that exists,  
25 because whatever alternative that is decided upon,

1           whatever alternative -- and I think the  
2           consultation process, as you heard, is a big issue  
3           for Tribes, because we're -- we're the owners, as  
4           well as the Federal Government, and so we want to  
5           be at the table, and that's why I raise the issue  
6           of the task force that has been passed by  
7           resolution or a request to the Omaha District, and  
8           I can see the consultation process developed such  
9           as we are here in the summit, but allow  
10          individually Tribal concerns, as well, to consult  
11          with the Army Corps and to see that its issues are  
12          being addressed.

13                 And we know that all the answers will not  
14                 come in all at one time, but as long as we know  
15                 our issues are being addressed and they're  
16                 recognized, that the Tribe has these rights, I  
17                 think that that Government-to-Government  
18                 relationship and that partnership will move  
19                 forward, it will continue on.

20                 So we're committed to looking at funding,  
21                 funding for the issues, and in terms of the Master  
22                 Manual itself, I think that's why we requested the  
23                 SEIS, the Supplemental Environmental Impact  
24                 Statement, is because of the concerns in the  
25                 original EIS that were not addressed. So we're

1 hoping that the Corps -- and we're not foolish.  
2 We know that you're on a time line, but we're  
3 hoping that the time line does not become the  
4 thing where it's the priority instead of our  
5 priorities.

6 If the time line becomes a priority, then  
7 we're working for a time line, we're not working  
8 to address our needs, and I think if we would work  
9 that way, I think it would be all for not. But if  
10 the commitment, again, is to work on the  
11 priorities of getting the best alternative to take  
12 into consideration the Tribes' concerns, then I  
13 think everybody will be at the table working one  
14 hundred percent in partnership with the Army Corps  
15 of Engineers.

16 So that is a critical -- that is a critical  
17 component. That's a mouthful, but, you know,  
18 we've raised this issue in Indian Health Service.  
19 The President released a budget and through our  
20 congressional staff with Senator Johnson, Senator  
21 Daschle and Senator Conrad, from the budget  
22 committee, we, as Tribes of working with  
23 congressional, have increased and passed our  
24 budget committee a \$1 billion increase.

25 Obviously the job ain't over. We have to go

1 to the full floor and get all the Senate to agree  
2 with it, but all the Tribes are now working to  
3 that effect. That is an example. That could  
4 happen with the Army Corps of Engineers.

5 Don't underestimate, General, the strategy  
6 and the savvy of all Tribes working in unity. We  
7 can raise the budget issue, whatever it is,  
8 whatever the numbers we decide are important. My  
9 understanding, we're in the hundreds of millions,  
10 you know, potentially for a budget request, and so  
11 we will definitely work on that, and I know that  
12 we at Three Affiliated have provided our comments  
13 and we had our concerns.

14 We didn't have the -- we didn't have, really,  
15 the hard numbers. We didn't have that TA, that  
16 technical assistance to get into some real hard  
17 number crunching to exactly choose which  
18 alternative, and the Biological Opinion and the  
19 need for the SEIS really has moved, I think, most  
20 Tribes to that opinion, and we need to have the  
21 most environmentally safe protection of the  
22 wildlife and habitat and of the cultural  
23 resources, and that's the alternative that we  
24 would like to choose.

25 But, again, you know, if our comments are not

1 taken into consideration and we just -- just for  
2 time line, just to complete a time line and  
3 without taking into consideration our issues, I  
4 think we're not going to be working collectively  
5 the way that I think we can, but we want to  
6 continue to work as a partner with the Corps,  
7 because we are forever going to be working with  
8 each other.

9 We are forever partners no matter what's --  
10 no matter how many master manuals come and go,  
11 we're going to continue to be partners in caring  
12 for the Missouri River.

13 But also, then, finally, then, you know,  
14 the -- and I think Rose might have hit on the  
15 slide about the mainstem Tribes. I don't know if  
16 you can pull that back, but is that -- no, that's  
17 more on Government-to-Government, isn't it? But I  
18 think I put that in my comments, as well, Colonel,  
19 that was on -- most of those -- all those Tribes  
20 there are mainstem Tribes, aren't they?

21 ANTIONE PROVOST: They're minus a few.

22 TEX HALL: Minus a few. So what have we  
23 got, nine or ten names? It's a question, Colonel.  
24 Do we have nine or ten? How many mainstem Tribes  
25 have we got?



1                   RE DAVID A. FASTABEND: Nine.

2                   TEX HALL: Nine. Okay. In my comments  
3                   that I sent to you, Colonel, dated October 24,  
4                   2000, I talked about the United States  
5                   Constitution and the Equal Protection Clause, and  
6                   in this -- in this comment, it's bullet No. 6, and  
7                   I basically state that the Draft Master Manual EIS  
8                   fails to adequately set forth the Indian Trust  
9                   Assets, Environmental Justice concerns of the  
10                  Three Affiliated Tribes. Moreover, to the extent  
11                  that the Master Manual Draft EIS relies upon  
12                  Tribal input or Tribal documentation as set forth  
13                  in Volume 2, it violates the Equal Protection  
14                  Clause of the United States Constitution.

15                  Specifically, the Corps has elected to expend  
16                  its funds to describe fisheries, flows,  
17                  navigation, power, and other socioeconomic  
18                  concerns and included them in Volume 1 of the  
19                  draft, but when it comes to setting forth the  
20                  Tribal concerns relating to the Indian Trust  
21                  Assets and Environmental Justice, the Corps,  
22                  notwithstanding repeated requests from the Tribes,  
23                  has relied upon the Tribes themselves to provide  
24                  this documentation, and because there is no  
25                  rational basis for this distinction, the Corps is,

1 in essence, violating the Equal Protection Clause  
2 of the United States Constitution.

3 And to correct this constitutional deficiency  
4 and to comply with contemporary counsel on  
5 environmental quality requirements, the Corps, in  
6 its Final FEIS, should, at its expense,  
7 specifically address Indian Trust Assets and  
8 Environmental Justice concerns for those Tribes  
9 whose reservations have been adversely affected by  
10 the Missouri River operations.

11 That was my point on the mainstem Tribes.  
12 And so I haven't received an official response,  
13 General Fastabend, on that concern, on the SEIS  
14 and the potential violations of the Equal  
15 Protection Clause, so those are the concerns that  
16 we have, and the time line's coming, but we're  
17 still waiting for responses to those.

18 BG DAVID A. FASTABEND: Thank you,  
19 Chairman Hall. Let me go right at your questions.  
20 I appreciate your input.

21 With respect to the weight of the Tribal  
22 comments, as I mentioned before you got here, I  
23 have -- I have read every word of the Tribal  
24 input. You asked how much input there is. It's  
25 basically 13 major inputs, many of them multipage.

1 This is all of them together. (indicating.)

2 The kind of themes we draw out of the Tribal  
3 input, I'll read them off to you. They're not  
4 exactly the same as on that chart, but this is  
5 what we're looking at in the internal analysis:  
6 Impacts from construction of the dams, inequitable  
7 shares of the Pick-Sloan benefits, Indian reserved  
8 water rights, treaty rights, cultural resources,  
9 the consultation process, sedimentation, water  
10 quality, lake erosion beyond the take areas,  
11 noxious weeds and impacts on the cattle industry,  
12 cottonwood forest and riparian habitat, drinking  
13 water intakes, contamination, hydropower cost  
14 increases to Tribal users, groundwater impacts,  
15 failure to address mitigation measures, warm water  
16 fish habitat, and Environmental Justice.

17 13 inputs may not sound like much compared to  
18 55,000, but there was no other group for which I  
19 have traveled and brought my staff to have  
20 Government-to-Government consultations like we  
21 have here. No other group's getting that.

22 Frankly, at some risk to myself, I'm probably  
23 telling you that at least at this point there's no  
24 other group for which I have read every word of  
25 their input, so we take your input very, very

1 seriously. You guys are more than just a common  
2 stakeholder.

3           TEX HALL: General, thank you for that  
4 Just a quick technical question on your points.  
5 Does that mean that those are 13 Tribal Government  
6 comments that represent thousands of people  
7 instead of just 13?

8           BG DAVID A. FASTABEND: These are  
9 comments of the Tribal Governments and in some  
10 cases we have multiple comments from elements of  
11 the Tribe, for instance, both their environmental  
12 office or their office of counsel or the  
13 leadership body might be inputted. We're taking  
14 all of that input. This does not count -- this  
15 does not include input of individual --  
16 individuals who are members of Tribes.

17           TEX HALL: Do you have an idea how many  
18 of those individual Indian Tribal comments there  
19 was?

20           BG DAVID A. FASTABEND: Any idea on  
21 the -- no.

22           TEX HALL: But, in essence, that really  
23 represents thousands of people, when you take 13  
24 times whatever the average enrollment is of a  
25 Tribe, 20,000, or, you know, that's -- I don't

1 know. I can't do the math in my head, but that's  
2 a lot of people.

3 BE DAVID A. FASTABEND: Let me be  
4 straightforward with you. We evaluate the input  
5 based on its impact on our evaluation of the  
6 science and engineering judgment associated with  
7 this decision. It's not a quantitative vote  
8 process.

9 I will tell you there are tens of thousands  
10 of identical E-mails that are in this list. Now,  
11 am I supposed to take a five-sentence E-mail that  
12 someone, all they had to do was push a button on  
13 the internet, and say that there's 13,000 of  
14 those, but only 13 of these, so their input is  
15 worth a thousand, as much as all this? Of course  
16 not, because there's more substance in this,  
17 frankly, so I have to evaluate the input on the  
18 substance, and I assure you I'm doing that. I'm  
19 giving this input a level of attention that other  
20 input is not getting.

21 TEX HALL: I really appreciate your  
22 points and the detail that you're speaking to,  
23 because we've seen that in other comment periods  
24 where it's just, basically, a number of comments,  
25 so that's why you'll get one person pushing the

1 E-mail for 13,000 people, but really it's the same  
2 comment, so I appreciate the detail in terms of  
3 analyzing those comments.

4 BG DAVID A. FASTABEND: Let's move on to  
5 the task force request. You visited me in  
6 Portland and gave me the request for a task force.  
7 I immediately transmitted your concerns both up to  
8 headquarters, US Army Corps of Engineers, but also  
9 to my Omaha District Commander Colonel Kurt  
10 Ubbelohde. We've been in discussions since then  
11 on the task force idea and I know he's been out to  
12 see you and has had some discussions with you. I  
13 don't know if he played basketball against you  
14 personally, but I know there was a basketball game  
15 up there.

16 TEX HALL: No. I didn't get a chance,  
17 but he played against the staff here and they got  
18 beat.

19 (Laughter.)

20 COL KURT F. UBBELOHDE: They did. We'll  
21 leave it at that. Let them figure out who "they"  
22 is.

23 (Laughter.)

24 BG DAVID A. FASTABEND: But we have been  
25 having ongoing discussions on this and I'm still

1           trying to wind those up with Kurt. We've got  
2 ~~several forums that are ongoing right now to~~  
3 address these type issues, but none of them are  
4 exactly a perfect fit with respect to what you  
5 want to do with addressing cultural resources, and  
6 we think we can -- we can do this task force.  
7 It's going to involve bringing in some entities  
8 into the process we don't normally have.

9           Now, we may not have the authority over these  
10 other entities, but what we are willing to do, and  
11 I'm speaking for you, too, so speak up if you  
12 think I'm misspeaking, is that we are willing to  
13 have the Omaha District be the emerging peer  
14 leader, if you will, that it will take -- it will  
15 take the lead among the federal family, try to  
16 bring people together.

17           You know, there's overhead associated with  
18 being the guy that says, okay, we're going to try  
19 to have a meeting, we're going to try to get  
20 everybody lined up, we're going to try to get them  
21 together, we will take that on and try to make  
22 this happen, because these concerns are important  
23 to us.

24           Is there anything you want to add to that?

25           COL KURT F. UBBELOHDE: Just to

1 recognize, and as I think we mentioned to you when  
2 **we visited you, Chairman, the importance of the**  
3 cultural resource initiatives is of strategic  
4 importance to both yourself and us in our  
5 operation of the projects, and certainly we would  
6 benefit, in an era of limited resources, in being  
7 able to understand your priorities and allow that  
8 to influence the way we conduct our business,  
9 because, as a very important stakeholder in the  
10 business, we serve the needs of the region and  
11 your needs really reflect a tremendous percentage  
12 of that workload, so it's important for all the  
13 Tribes to be able to participate in that  
14 prioritization process and allow us to understand  
15 and help direct our efforts at where those limited  
16 resources can be used to the most advantage.

17 TEX HALL: Thank you for that. I really  
18 think that my understanding is the Corps is  
19 looking for solutions. I think this is one  
20 solution right there, how we can work side by  
21 side.

22 I hope the Corps has an understanding, and  
23 maybe I'm preaching to the choir, maybe the Corps  
24 does, but, you know, with Indian people, with  
25 American Indian people and Tribes, and no matter



1           what Tribe you're from, our culture is land based,  
2           ~~it's tied to the land, it's tied to the water, and~~  
3           that is why I know -- I know sometimes the white  
4           man will say, "Well, how come the Indians are  
5           always so concerned about cultural resource  
6           protection? Jeez, what's the big deal about it?"

7           It's because it's our relatives and there is  
8           no -- there is no break in terms of recognition,  
9           in taking care of remains, artifacts. I mean,  
10          that's part of today, it's part of tomorrow, even  
11          though it was yesterday it will be a part of our  
12          future, so that's why, you know, Tribes are  
13          willing to go to -- go to jail, litigate, go to  
14          jail, whatever it is, whatever it is, to protect  
15          their cultural resources.

16          I just -- it's just kind of more of an FYI or  
17          more of a question. I hope that the Corps -- a  
18          lot of what we do, we have to be on the same page,  
19          and I hope there's an understanding by the Corps  
20          that that is why the Tribes keep pushing for  
21          protection of its sacred sites, but the task force  
22          is a great opportunity to work together, to work  
23          side by side and to create that awareness of why  
24          it is so important for Tribes.

25          And you'll get Tribes that are willing to,

1 you know, go to Washington. write letters to  
2 ~~Congress, you know, continue to work, you know,~~  
3 collectively, collaboratively to increase the  
4 budget, so it may cost -- as you said, General, it  
5 may cost a little money, you know, up front, but  
6 it will pay for huge dividends.

7 It will save on litigation costs, it will  
8 save on just meetings. Instead of arguing about  
9 points not being taken care of, instead the task  
10 force will have taken care of those things and  
11 instead we'll be moving on to other issues, and so  
12 it's really -- the land is part of our culture and  
13 it's connected to our community today. It's all  
14 interconnected, it's interrelated, so that is why  
15 you see that.

16 So again, it's not just another task force.  
17 I think this is a critical task force and I urge  
18 the Corps to make a decision real soon on it, and  
19 I don't think the costs are going to be real huge.  
20 You know, I really don't. Many of our people  
21 travel with little or nothing anyway. They do it  
22 when there's a meeting in regards to cultural  
23 resources, they'll just go because it's important,  
24 so I urge the Corps to move quickly on it.

25 BG DAVID A. FASTABEND: And the third

1 point you brought up was on the Supplemental  
2 ~~Environmental Impact Statement.~~ I read your input  
3 to the Master Manual very carefully. You have a  
4 lot of concerns about the uncertainty associated  
5 with the location and condition of the cultural  
6 resources. I have those concerns, as well. I  
7 would have those concerns even if, imagine this,  
8 there was no Master Manual process on the table  
9 right now, because we still have that obligation  
10 under NAGPRA, NHPA, all those legal obligations,  
11 Trust and Treaty obligations to you whether or not  
12 there is a Master Manual process.

13 So what I have to do is to determine if an  
14 SEIS is necessary, and my honest position to you  
15 right now is I don't think it's necessary right  
16 now for the Master Manual decision.

17 Now, it is necessary to get the information  
18 we need to protect cultural resources, and we are  
19 working very hard to do that and to get the  
20 additional funding we need in order to do that,  
21 and I think the cultural resource process is going  
22 to help, but we are going to work very hard to  
23 correct the deficiencies you've identified in the  
24 RDEIS.

25 For the FEIS, the Final Environmental Impact

1 Statement, we're going to continue consultation  
2 ~~with you all the way up to the Record of Decision~~

3 and then continue working with you past that to  
4 try to address the cultural resource problem.

5 TEX HALL: It's kind of disappointing,  
6 General. The time line is what, next month?

7 BG DAVID A. FASTABEND: Well, let me  
8 talk to you about why there is a time line. We  
9 would like to have perfect information about  
10 exactly what causes the pallid sturgeon to spawn,  
11 exact -- we'd like to have better models about the  
12 hydrology system. I'd like to know the location  
13 and condition of every archaeological site and  
14 every TCP out there, I honestly would, but I've  
15 got a Biological Opinion with the recommended  
16 preferred alternative that says I must take action  
17 by 2003.

18 Now, if I don't take action by 2003, under  
19 the Endangered Species Act we are vulnerable to  
20 chaos, or let me put it another way, even more  
21 chaos in the Missouri River Basin as people come  
22 in and try to control the current flow of the  
23 system, a system that affects both you and me and  
24 all the stakeholders in the basin and to the  
25 Corps.

1 I feel like I have an obligation to fulfill  
2 ~~my mission, to make this decision as properly as I~~  
3 can, and I think I'm going to have enough  
4 information to do that, but the main, hard point  
5 for me, as far as timing, is the Endangered  
6 Species Act and the Biological Opinion from the  
7 Fish & Wildlife Service that says do it by 2003.

8 We've asked them why 2003 and, in their  
9 opinion, they believe that the species are running  
10 out of time and we have to take action by then.

11 TEX HALL: I think I understand what  
12 you're saying, General, and I kind of like what  
13 I'm hearing. I think you want to work with us  
14 after the release of the FEIS. My question is,  
15 how do we do that? How do we go about that? If  
16 the request is no for the SEIS, and you've just,  
17 in your comments, according to my understanding,  
18 you've agreed to continue to work with us on our  
19 issues. How do we do that? I mean, what  
20 mechanism can we say is in place so we all can go  
21 home knowing that our issues will be continued to  
22 be worked on by yourself and by Colonel Ubbelohde  
23 at the Omaha District?

24 What -- you know, because it's -- obviously  
25 the Cultural Resource Task Force is going to be

1 great for cultural resources, but now on the

2 ~~Master Manual, is that something similar we should~~

3 consider, or what do you have in mind, Colonel?

4 General? Excuse me. General. How do we go about

5 that? So, you know, it just goes back to that

6 consultation.

7 BG DAVID A. FASTABEND: Right. Well,  
8 you know -- well, we haven't tested it in the last  
9 13 years, but history is not going to stop once we  
10 make a decision on the Master Manual. I mean, a  
11 lot of people forget that the Master Manual is an  
12 internal Corps document that describes how we  
13 intend to operate the regulation of the system.  
14 It is a document that is always subject to review,  
15 but, more importantly, part of our decision, I am  
16 highly confident, is going to include the adaptive  
17 management process, which we are begging the  
18 Tribes to have a seat at the table in and  
19 participate actively, so there's one venue for  
20 you.

21 We also have the Annual Operating Plan  
22 process which we are going to encourage you to  
23 continue to participate in and to increase your  
24 participation in.

25 And with respect to other obligations such as

1 cultural resources and other requirements, there  
2 ~~is other operative legislation that if you don't~~  
3 trust our commitment to continue to work with you,  
4 we've got laws out there that will make us  
5 continue to work with you whether we decide we  
6 want to, or not.

7 Now, we want to work with you. We've got an  
8 obligation. We've got Trust and Treaty  
9 obligations. We intend to pursue them, but  
10 there's other things besides the Master Manual  
11 that are going to throw us into rooms to work  
12 together and solve problems.

13 TEX HALL: Thank you, General. Can I  
14 get your response, Colonel, in terms of the Omaha  
15 District specifically, and how -- if the General  
16 is saying no to the SEIS, but has committed to  
17 working with the Tribes' concerns after the FEIS,  
18 what would you recommend how we can work  
19 collectively in the Omaha District?

20 COL KURT F. UBBELOHDE: It's been our  
21 attempt all along to seek out opportunities and to  
22 frequently visit with the Tribes on Tribal land to  
23 carry on conversations that are important to the  
24 Tribes, to discuss issues, to be sure that we are  
25 aware of them, sensitive to them, with respect to

1 all of the various programs that we have

2 ~~obligation to fulfill within the District.~~ That

3 dialogue is extremely important.

4 I see that continuing, and, you know, I would  
5 point to the visit that we made up to Three  
6 Affiliated not too long ago, that being an example  
7 of what I see continuing in the future, and I have  
8 done that with other Tribal entities, as well, and  
9 I would continue to do that.

10 TEX HALL: Let me just throw something  
11 at you, Colonel. Would you agree to a Tribal  
12 Master Manual Committee?

13 COL KURT F. UBBELOHDE: The idea of a  
14 Tribal Master Manual -- the Master Manual is a  
15 Northwestern Division document. I'm going to have  
16 to defer that to the General.

17 BG DAVID A. FASTABEND: He's trying to  
18 dodge that one. (Laughter.) We will consider a  
19 Tribal Master Manual Committee. Now, let me tell  
20 you something. The Master Manual is an internal  
21 document of the Northwestern Division of the Corps  
22 of Engineers. We're going to welcome your input  
23 into it. We'll take that suggestion under  
24 advisement and see if there's a way that we can  
25 make it work to help you input into the process,



1 but, you know, once the -- once Fastabend does

2 ~~what the last seven division commanders have not~~

3 been able to do and effects this Master Manual  
4 decision -- mine? I wasn't trying to brag. It's  
5 too early to brag. (Laughter.)

6 Once Fastabend impales himself on this  
7 decision, the most important thing that's going to  
8 be happening in the basin, with respect to the  
9 mainstem system, is not going to be the Master  
10 Manual, it's going to be the Annual Operating  
11 Plan, it's going to be adaptive management as we  
12 move to implement the Biological Opinion and run  
13 the system to maximize its benefit for the  
14 multiple stakeholders, including the Tribes, and  
15 continue to comply with environmental law.

16 So I know Master Manual has had preeminence,  
17 it's been the only train to throw issues on, but  
18 my mission is to bring that train to a halt and  
19 move on to solving other problems that are just as  
20 important, particularly to the Tribes, and we will  
21 have venues that are going to enable us to do  
22 that.

23 TEX HALL: Maybe it was a wrong choice  
24 of words on the Tribal Master Manual Task Force,  
25 but just a Tribal Leaders Tasks Force that would

1 work on all those things, Master Manual, the  
2 ~~Annual Operating Plan, as we see this whole~~  
3 process through, in terms of what alternative is  
4 finally selected, in terms of what button you  
5 push, and as it affects each and every one of us  
6 along the river, if we could be -- if you would  
7 consider that task force, so that if you're saying  
8 no to an SEIS, that that -- if you would strongly  
9 consider and hopefully agree to what I'm asking  
10 you about a Tribal Task Force that would work on  
11 the issues as to why -- that are outstanding as to  
12 why I want an SEIS.

13 BG DAVID A. FASTABEND: Okay. We will  
14 entertain that and we will obtain the dialogue  
15 with you to determine exactly what that would  
16 entail.

17 HAROLD FRAZIER: I got a question.  
18 Harold Frazier, Cheyenne River. So you're  
19 accepting the concept of creating a task force for  
20 you guys to work with?

21 BG DAVID A. FASTABEND: No. I am  
22 telling you that I commit to going into a dialogue  
23 with you so I can understand exactly what you mean  
24 by a task force, how frequently you would want it  
25 to meet, what kind of scope you would want it to

1 have, now it would fit into our normal processes,

2 ~~what are its resource requirements, and what~~

3 impact would those resource requirements have on  
4 the other things I've got to do out here in the  
5 Missouri River Region. I would enter into a  
6 dialogue with you on that.

7 HAROLD FRAZIER: All right.

8 BG DAVID A. FASTABEND: And see where  
9 that goes. Well, I'm not sure -- see, that's why  
10 we need to discuss it for clarity, because Tex  
11 started out with a discussion of a Master Manual  
12 Task Force, but he said what he might have meant  
13 would be a Tribal Issues Task Force, or something  
14 to that, so we can start talking about that and  
15 try to figure out what we have.

16 I mean, right now we're here in this forum  
17 because we have a Master Manual decision and it's  
18 part of the overall consultation process, but I  
19 see a lot of merit in having some kind of forum  
20 where we can periodically get together and talk  
21 about issues with respect to our Native American  
22 responsibilities at large.

23 I know Kurt is willing to do that. I'm  
24 willing to do that in my capacity, but we -- I  
25 need to understand exactly what you -- what you

1 perceive that could entail from your end.

2 ~~TEX HALL: If I could just fear briefly,~~  
3 I don't want to belabor it. Even if it met  
4 quarterly, a Tribal Issues Task Force that met  
5 quarterly, I think that's a -- I think that's a --  
6 I mean, I think that's a proactive solution. It's  
7 a proactive solution instead of reactive, get mad  
8 at each other, sue each other, cuss each other  
9 out.

10 This is a proactive solution to meet  
11 quarterly, and I think that whatever -- I know  
12 you're concerned about financial resources, and  
13 those sort of things, and what the task force -- I  
14 think if we limit it like that, start limiting it,  
15 I think we're going to say no and then we go back  
16 to getting mad at each other and litigating  
17 against each other and not addressing each other's  
18 concerns and underfunded -- an underfunded Army  
19 Corps that cannot meet the needs of the Tribes,  
20 but I think that this will pay for itself, and  
21 then some, if we really consider this.

22 But I think maybe the Tribes need to sit down  
23 and collectively flesh this out. Maybe, you know,  
24 provide a position paper, or something, to you on  
25 it, and I don't know who you'd recommend that we

1 work with, General, if it's you or the Colonel or,  
2 ~~you know, somebody that we can start kind of~~

3 negotiating with on the development of this task  
4 force.

5 BG DAVID A. FASTABEND: Well, in order  
6 not to delay it, let me have you start negotiating  
7 with Kurt, with Colonel Ubbelohde, and keep me  
8 appraised of it as it goes through, because I feel  
9 personally committed to this problem, as well.

10 COL KURT F. UBBELOHDE: If I could  
11 interject, Sir. This is not a foreign notion to  
12 the Corps of Engineers. We frequently meet with  
13 important stakeholders to find out what is on  
14 their mind. I have quarterly sessions, we have  
15 the semiannual SERG, which is the Senior Executive  
16 Review Group. Depending on the customer,  
17 depending on the topic we'll -- and often the  
18 speed at which various things move sort of dictate  
19 how frequently you might conduct one of these  
20 sessions, but those are extremely important for  
21 strategic planning and listening to issues and  
22 being able to discuss topics. I am very amenable  
23 to doing that.

24 What we have done in the past has been much  
25 more a piecemeal approach, meeting individually

1 with Tribal Chairmen, meeting individually with

2 ~~Tribal Councils, talking with important~~

3 stakeholders, NDIRC, and folks like that, to --  
4 you know, to make sure we understand what the  
5 issues are, but to be able to do it on a more  
6 formal or organized basis, I'm certainly agreeable  
7 to that.

8 And we have folks within the staff that would  
9 be well suited to be able to support the dialogue  
10 and be able to take that back, and that's a minor,  
11 minor expensive overhead for the District  
12 Commander to be able to understand what's going on  
13 with -- you know, between the Tribes.

14 TEX HALL: I really appreciate that and  
15 like the comments I'm hearing, Colonel and  
16 General. I just think it's a proactive solution  
17 that can pay dividends. Is it possible, and maybe  
18 I'm pushing my luck, but is it possible to meet  
19 before the FEIS?

20 BG DAVID A. FASTABEND: Probably not  
21 possible before the FEIS, but before the Record of  
22 Decision.

23 TEX HALL: When is that?

24 BG DAVID A. FASTABEND: October '02.

25 TEX HALL: Okay. What happens between

1 May and October? What does that mean, Record of

2 ~~Decision signed, is that~~

3 BG DAVID A. FASTABEND: Okay. What's  
4 going to happen is we are going to announce what  
5 we view as the preferred alternative sometime in  
6 May, is what we're trying to do, as we work  
7 through these comments and your input, and that's  
8 going to -- then when we do that, that's going to  
9 involve an assessment from the Fish & Wildlife  
10 Service to determine whether or not they think our  
11 preferred alternative keeps the species out of  
12 jeopardy.

13 It's going to initiate a public comment  
14 period on the FEIS, so we'll have another  
15 opportunity to receive comments, and as per the  
16 original consultation plan that we developed with  
17 the Tribes at the very beginning of this process,  
18 we plan to have another session before the Record  
19 of Decision.

20 TEX HALL: Okay. Thank you very much.

21 BG DAVID A. FASTABEND: Harold, if  
22 you're all right with it, I thought we'd go ahead  
23 to the next part of the agenda.

24 HAROLD FRAZIER: You bet.

25 BG DAVID A. FASTABEND: And is that --

1 what is that. Larry, did you want to give us a  
2 ~~cultural resources presentation?~~ Did you know you  
3 were on for that?

4 LARRY JANIS: Well, I can do a little  
5 bit.

6 BG DAVID A. FASTABEND: Okay. Why don't  
7 you explain what you've got going on right now.

8 LARRY JANIS: Can everybody hear me  
9 okay? Maybe it needs to go up a little bit more.  
10 How about that? Oh, that works. That works.

11 Well, my name's Larry Janis and I'm the  
12 Cultural Resource Program Manager from the Omaha  
13 District Corps of Engineers. I just wanted to  
14 share a couple things since I'm fairly new.

15 There's thoughts that I've been able to put  
16 around the program and my goal, number one, is to  
17 try to meet everybody in this room eventually and  
18 listen. One of my jobs is to be able to listen to  
19 those stakeholders that we've been talking about  
20 and be able to find out what the concerns are,  
21 make sure that the concerns that I hear match with  
22 what I've been hearing from other sources too, and  
23 so that we can both all work together to  
24 accomplish those.

25 I might go the low tech route and bring out



1 the white board, because I just wanted to share

2 ~~three things that you'll probably see from me when~~

3 we talk about cultural resources, and this  
4 primarily deals with planning, programming, which  
5 we've talked a little bit about, and pardon me if  
6 I misspell something, and then the third element  
7 of that, I don't know if everybody can see, is  
8 probably the key element which we've already  
9 talked a little bit about and that's partnering.

10 Partnering. We've got some examples. In  
11 fact, one was handed out, and so you should have  
12 an example of how we want to take a look at our  
13 program internally to make sure we're doing the  
14 right thing, and so on the table there, it was  
15 handed out during the last break, an internal peer  
16 review and program assessment that we did in  
17 September, 2000.

18 That peer review was done by a person from  
19 our headquarters, as well as some other people  
20 from different districts, and what it did was took  
21 a look at how we were structured, what we are  
22 working on and the approach we were taking towards  
23 cultural resources.

24 I won't go through all the things in that,  
25 but that's an example of some of the planning that

1 we like to do to be able to make sure we check  
2 ~~what we're working on, check that we're in the~~  
3 right direction, and then continue to make  
4 improvements

5 And so what I would like to do with this  
6 specifically is hand it out at this meeting, be  
7 able to let everybody start taking a look at it,  
8 and then later officially distribute it to the  
9 different Tribes in our basin and be able to  
10 dialogue on that, get feedback on this document  
11 and be able to continue to have checks and  
12 balances on our program and continue to look at it  
13 from not only internally, but externally. And so  
14 that's one example of this plan that I was talking  
15 about.

16 Another example that you may be familiar with  
17 is the Cultural Resource Management Plans. Those  
18 plans are for our program, and that "our" is  
19 everybody in this room, to be able to look at what  
20 we have lake by lake in terms of cultural resource  
21 sites.

22 We currently have over 4,000 sites in our  
23 database that we've been able to identify, and  
24 that inventorying and identification process  
25 continues to grow and we continue to look at

1 traditional cultural properties also, and so while  
 2 ~~that number grows, we felt like we needed some~~  
 3 sort of document, the Cultural Resource Management  
 4 Plans, to be able to organize that, and so lake by  
 5 lake we're producing these documents, with the  
 6 help of the Tribes.

7 I know several people in this room, as well  
 8 as that aren't in this room, have had input  
 9 into -- specifically one for Lake Sharpe and Lewis  
 10 and Clark Lake. Those are two Cultural Resource  
 11 Management Plans that are completed, to be able to  
 12 help us, again, point in the right direction to be  
 13 able to fulfill our Section 106 responsibilities  
 14 as the other -- as well as the other 20 plus laws,  
 15 executive orders and regulations that we're  
 16 required to follow.

17 So that's an example of the planning process,  
 18 also, and so we've got two completed. We're in  
 19 the process of completing two additional ones, and  
 20 then have two final, and these are mainstem  
 21 documents, to complete. Once completed with those  
 22 we'll continue with other project Corps lands that  
 23 we have responsibility for too; again, with the  
 24 need to be able to quantify what we're dealing  
 25 with and gather input, and that input comes from

all parties, all stakeholders.

~~So that planning process, we want to make~~  
sure that it's not an isolated thing. We want to make sure that we're partnering with the right people, bringing the right people to the table to talk about it. Again, it goes back to the task force or working group concept, how can we work together to get this input, and so we're trying to do that not only lake by lake, but also on an umbrella situation where we deal with the whole system, and that's where a good application of the task force could come in also.

So, again, as we plan, we want to partner, we want to be able to get involvement, and that includes ourselves, it includes the Tribes, includes other federal agencies, includes State agencies, includes anybody else that has a stake in these issues.

And then the second part of this process is programming. We need to identify how are we going to accomplish -- I don't know if you can see all this, but how are we going to accomplish these plans that we've collectively come up with, and that really comes down to not only money, but it comes down to resources. Comes down to what can

1 we do, what personally can we do, what personally  
 2 ~~can other partners in the process do to be able to~~  
 3 fulfill what we've asked of ourselves as a  
 4 collective group to accomplish.

5 And so this not only is internal, which I've  
 6 got great support in terms of getting funding,  
 7 getting people available to come to meetings to be  
 8 able to meet, to plan, to be able to accomplish  
 9 some of the cultural resource needs that we have,  
 10 but this also has to do with some of the things  
 11 Chairman Hall's talked about, is if we're in this  
 12 together and we're planning on an ongoing basis,  
 13 then the group can also look for resources  
 14 externally to be able to accomplish that, whether  
 15 that's another federal or state agency going back  
 16 and reallocating some of its funding, whether it's  
 17 a Tribe being able to help with some discussions  
 18 with people that they know, however that may be  
 19 accomplished, but we're all focused on trying to  
 20 accomplish the same thing, and that's the planning  
 21 part of it.

22 So that's just three things that I wanted to  
 23 focus on, three things that you'll see from me,  
 24 and I'll ask that you hold me to these three  
 25 things, that we continue to work together to plan,

work together to program, and working together

means getting the right people to work on that,

and that's one of the things I'll continue to try to do is ask the questions who, who should I have at a specific meeting to be able to accomplish what we need to accomplish.

Often times we maybe don't invite the right people. It is good to know that when you're working towards something together we have the right people so that the decisions can be made. I've heard that mentioned a couple times where, you know, if the right person's not at the meeting we can't make decisions. I think it's important to be able to have the right people there.

So that's just a little bit that I wanted to talk about. I gave one example, and we will have a separate submittal of this to everybody so that we can gather some feedback and continue to ask for how we're doing and we'll continue to try to get the proper people involved in the Cultural Resource Management Plans. As we plan, we'll try to work together to accomplish what we all feel strongly about and what I'm still learning about, and so I appreciate your understanding as I -- as I go through this process and work with each one

of 1991

~~That's about all I have.~~

3                   BG DAVID A. FASTABEND: You have a  
4 question in the corner?

5                   ELGIN CROWS BREAST: In this peer review  
6 process that's documented that the Corps has  
7 drafted up to show the Tribes, or somebody higher  
8 up than them, that all the bases are covered;  
9 right? According to cultural resource, it's  
10 supposed to be. Let's put it like that, all  
11 right?

12                   LARRY JANIS: Actually not. Actually,  
13 what it was, was, there was --

14                   ELGIN CROWS BREAST: Before you go on, I  
15 got one more.

16                   LARRY JANIS: Okay. Go ahead.

17                   ELGIN CROWS BREAST: And if that is,  
18 there needs to be a lot of input. If you have  
19 this peer review committee, the Tribes here need  
20 to be involved directly, and I know that's what  
21 you said, but now -- for the record, my name's  
22 Elgin Crows Breast, and we need to be a part of  
23 that, because we're the ones that understand that.  
24 See, we understand the cultural resources, some of  
25 us a little bit more than the others.

Some of the old-time medicine men, you know,

~~some of the people on the reservation, and there's~~

1 still them people, but when that's done, we need  
2  
3 somebody -- not an archaeologist, because I did my  
4  
5 research on this, okay? And I know that this  
6  
7 Rubenstein guy, he's a chief archaeologist of  
8  
9 something, and he may have -- he doesn't know. He  
10  
11 looks at it from a scientific point of view, and  
12  
13 if you're going to -- if the Corps is going to be  
14  
15 able to turn around and look at their document and  
16  
17 say this is a peer review process, then they need  
18  
19 to understand where the Tribes are coming from,  
20  
21 and the only way that can happen is if the Tribes  
22  
23 are involved within the plan, and it can't come  
24  
25 from headquarters in Washington, DC, then trickle  
down. We need to be there.

17 And I know Chairman Hall talked about an  
18  
19 Indian desk within the Pentagon. I think that's  
20  
21 needed, and the Cultural Resource Task Force  
22  
23 that's going to go along with this is going to be  
24  
25 a great asset to the Tribes, because we're going  
to be right there, we're going to understand,  
we're going to know and we're going to lead you  
what's important to us in the Missouri River.

And I was looking at this chart here with



1 this alternatives, RD -- and I know -- I'm going  
2 ~~to make a guess, though, but I know that the~~  
3 alternatives, the last four, that's what's going  
4 to be, it's going to be one of them four.

5 It ain't going to be the first ones, because  
6 you've got Xs marked in all those spots, and  
7 Mr. Colonel -- General Fastabend was specifically  
8 asking the Tribes, okay, what do you think about  
9 this, and if it's all right, GP, GP whatever  
10 number, but we need -- we need some help on it,  
11 you know.

12 There needs to be technical advice to the  
13 Tribes as to what this means, because when you  
14 have thermal -- what they call that, thermal --  
15 what's that, Rose?

16 ROSEMARY HARGRAVE: Thermal impacts.  
17 Thermal energy at risk.

18 ELGIN CROWS BREAST: Yeah. Hey, come  
19 on. Cultural resources ain't going to be over  
20 thermal energy. Let's get real here. You're  
21 talking about shutting down a nuclear plant, so we  
22 know that it's going to be Gavins Point some  
23 alternative, it's not going to be no other one. I  
24 don't know which one it's going to be, but either  
25 one, it's going to go against us and we need to

1 try and eliminate some of the bad things out of

2 ~~these, you know, coming through the Tribes, and~~

3 that's all I wanted to say, but your peer review  
4 process there needs to be done by us here. We  
5 need to help you.

6 LARRY JANIS: And I appreciate that, and  
7 that's exactly what I want. One of the things we  
8 first did was in January we met as a group and one  
9 of the items we shared as a group was this peer  
10 review, where we stood in implementing items in  
11 it, and the Colonel said, "Have we shared this  
12 with any of the Tribes?" And the response back  
13 from the group was no.

14 It was truly just an internal check on how we  
15 were doing, should we change things, and the  
16 desire out of that being done was to say are we  
17 pointed in the right direction, and several things  
18 in there, kind of management things, were, no, we  
19 needed -- we needed additional staffing to be able  
20 to accomplish that. We needed to continue to work  
21 on specific things that were listed in there and  
22 to change some of our directions.

23 And so the Colonel said, "Well, why don't we  
24 just -- why don't we go ahead and share that with  
25 the Tribes and start a dialogue to gather

1 feedback," just exactly like you were saying from

2 ~~those outside the Corps that would know also, and~~

3 so we're excited about the chance to get that  
4 feedback. and so that's why you have that today,  
5 and it will be formally -- you know, this is  
6 fairly informal, it's not official by any means,  
7 but it's an attempt to get the information out so  
8 you have it, so when it does come with a cover  
9 letter and it does come with a request to review  
10 and take a look and provide some feedback, at  
11 least some will know what it's about and have had  
12 an advanced look at it. Yes?

13 PEMINA YELLOW BIRD: Larry, you mention  
14 the Cultural Resource Management Plans as being a  
15 priority for your office. That was also a  
16 priority for your predecessor, Randy Behm. And  
17 another priority that he had was putting together  
18 a prioritized list of endangered sites that are on  
19 Army Corps lands and come under Army Corps  
20 management. Is that project still ongoing, and  
21 are you consulting with Tribes in the construction  
22 of this prioritized list of endangered sites?

23 LARRY JANIS: Yes and yes. I have a  
24 list. I have a list that I inherited and I  
25 continue to work from that list. Yes, we did get

1 feedback. We got responses from some, but not all

~~2 tribes. That disappointed me just from the fact~~

3 that I would love to have responses from  
4 everybody. Now, I don't know why we didn't get  
5 responses, whether it was lack of time, lack of  
6 understanding.

7 I know that you're just like I am, we've got  
8 a lot of demands on us and so we don't always get  
9 to the things we need to do because there's other  
10 more pressing demands, but I would love to have  
11 feedback from everybody on what the important  
12 sites are, yes.

13 PEMINA YELLOW BIRD: I haven't seen that  
14 list, Larry, and I'd be happy to give you  
15 feedback.

16 LARRY JANIS: Okay.

17 PEMINA YELLOW BIRD: I need to see a  
18 copy of it, though, but it's not completed, it's  
19 still ongoing; right?

20 LARRY JANIS: It's a dynamic list. We  
21 continue with the commitment that I inherited, was  
22 that every two years, and that comes up again in  
23 February of 2003, which is this next February, is  
24 an opportunity to, again, review that. And the  
25 two years really, from my understanding, came from

1 a fact that I'm not sure we all have the time to

~~2 deal with it every year and that it's not that~~

3 dynamic, that the priority sites will change  
4 totally. There may be some sites that change from  
5 top priority to second priority, or vice versa,  
6 but as we took a look at it, from what I  
7 understand, every two years was the cycle that was  
8 proposed. Again --

9 PEMINA YELLOW BIRD: By whom?

10 LARRY JANIS: I think that was the  
11 proposal that was sent out when the request was  
12 made. And, again, in the responses that we  
13 received, there was no request to change that.  
14 I'd entertain more frequently, but that's really  
15 where it stands. If you'd like to have it -- if  
16 anybody would like to have it more frequently, we  
17 surely can do that. It's just something that is  
18 an additional requirement that you may want to  
19 respond to, and so I'm open to feedback on that,  
20 but that's where we stand, is to look at it every  
21 two years, and we do have a list and that's what  
22 we're trying to work off of.

23 As funding's available we go to that list and  
24 say here should be our top priority. Did that  
25 answer the question?

PEMINA YELLOW BIRD: Sort of.

~~LARRY JANIS: Sort of. Okay. I'll try~~

again.

PEMINA YELLOW BIRD: No, no, no. I

mean, this is a list that needs to be looked at and amended annually, if not twice in one year, because we have, you know, an estimated 40 to 80 sites per year falling into the river, and so if we have a list of endangered sites that contains maybe 12 sites, I think it's safe to assume all 12 of them are going to disappear. This is something that needs to be looked at more often than twice a year -- or every two years, excuse me.

RICHARD MOORE: Excuse me, Pemina.

Going back through and researching our documents we've discovered it's not 40 to 80 sites per year, it was -- there was an error carried forward out of a document into the '94 document and what it amounts to is 40 -- it's speculative, 40 to 80 sites in a ten-year period would be lost.

PEMINA YELLOW BIRD: Do you want me to respond to that?

TEX HALL: I was just wondering, Rick, do we have that document somewhere that reflects that change? That's a significant change.

RICHARD MOORE: I know it's a

~~sign figure change, and Roy and I discovered that~~

error here about a week or so ago.

ROY MCALLISTER: When it got put directly into the EIS itself it was incorrectly put there in the technical report, and, again, your comments earlier about these -- all these technical reports, but the technical report it was pulled from, the words "over a ten-year period" were -- must have been overlooked, because if we go back to the past technical report, it should have been 4 to 8 in the --

BG DAVID A. FASTABEND: And, Tex, this research we did was a response to this input, because I asked the question, okay, what's the basis of the estimate, is it 40 to 80? How do we know it's not 80 to 160? How did they try to come up with this, and that sent up back to the original source document. Then we determined that actually there had been a transposition error and we got this factor that's kicking around out there. Now, I'm not saying it's 4 to 8, it's -- there's uncertainty there. One is too many and we've got to deal with the issue.

PEMINA YELLOW BIRD: Yes.

1 BG DAVID A. FASTABEND: But I want to

2 ~~try to get a dialogue going, because I got that~~ 40  
3 to 80 number kicking around and people are using  
4 it and I want us to use things that are accurate  
5 to reflect the best of our estimates, limited  
6 though they may be, because we're estimating  
7 uncertainty, as you know.

8 TEX HALL: Just whatever the figure is,  
9 we're going to need that final analysis. If we're  
10 going to look to lobby Congress, we'll look  
11 foolish if we don't have a finalization on it.  
12 But just go back 50 years. If it was 40 every  
13 ten, that's 200 sites.

14 BG DAVID A. FASTABEND: Right. But it's  
15 important that we correct it, because if someone  
16 goes back to us and finds that error, then we'll  
17 look even more foolish, so that's why I looked to  
18 Rick to start that dialogue with you right now  
19 because we just, last week, determined that we had  
20 a glitch.

21 TEX HALL: Has the Corps looked at some  
22 sort of economic analysis or the potential impact  
23 for the loss of a site that is known within the  
24 Omaha District? I mean, in this document, Larry,  
25 for example, you've got the 3,000 sites, known



sites that are under management. Is that -- does

~~it vary immensely from a site to another site, or~~

3 has there been some analysis of that as we're  
4 looking to discuss more funding?

5 COL KURT F. UBBELOHDE: Yes. I mean,  
6 yes, the answer is the cost associated with  
7 stabilization, mitigation, protection on a site  
8 varies, depending on the soils, depending on where  
9 it's located, and all of that, and for the number  
10 of projects that we have gone through the extent  
11 of characterizing a solution and drafting up how  
12 we would take care of the particular issue, we  
13 have what? 94 of those sorts of projects which  
14 account for a considerably larger number of  
15 specific sites, because one project can be  
16 multiple sites, and we have a fairly extensive  
17 program identified on how to do that, but, as  
18 Larry mentioned, it is dynamic.

19 Things do change from year to year, and I  
20 would agree with Pemina that -- and I would  
21 suggest that the task force, that the Cultural  
22 Task Force would be an excellent body to do the  
23 periodic review. That's exactly the kind of  
24 feedback we need to identify priorities and to  
25 review and discuss the sorts of issues that she

has identified on a recurring, frequent basis.

~~LARRY JANIS:~~ I just wanted to add one  
3 more thing about the review of that list. I think  
4 eventually that list may go away and be replaced  
5 by the lists that come out in the Cultural  
6 Resource Management Plans as each lake or  
7 reservoir or entity like Lewis and Clark or Lake  
8 Sharpe working groups get going, they're going to  
9 be dealing with the sites that are related to that  
10 lake or reservoir, then, on an umbrella systemwide  
11 basis, we'll probably do an evaluation of all  
12 those sites, so it could eventually go away. It  
13 may not.

14 PEMINA YELLOW BIRD: How many sites  
15 total are on this endangered -- this prioritized  
16 endangered sites list? Just a ballpark.

17 LARRY JANIS: We stopped at 40.

18 PEMINA YELLOW BIRD: Stopped at 40?

19 LARRY JANIS: There's more than that,  
20 but we rank them up to number 40.

21 PEMINA YELLOW BIRD: Thank you.

22 LARRY JANIS: And that was  
23 specifically -- that was specifically for  
24 stabilization. That had -- that did not include  
25 inventory, testing, evaluation, impact assessment.

FEMINA YELLOW BIRD: Right.

~~TEX HALL: Right, and any of those 40,~~  
or whatever, I guess you stopped at 40, I don't know why, but any of those 40, are they in that transfer, the Title VI transfer?

LARRY JANIS: I don't know the exact answer to that. I have to believe that some are.

TEX HALL: If they are, that is a bigger concern, as you're talking about a priority, and we still haven't figured out -- and I keep -- I sound like a broken record, but we still haven't figured out the federal protection upon that transfer.

LARRY JANIS: Right. And what the Colonel spoke to is those 94 projects which take that list, sites that are prioritized, along with the inventorying we need to do, along with the evaluations we need to do, the Cultural Resource Management Plans, those are all part of that 94 group that is prioritized, and as funding is available we can start to accomplish each one of those, and so the transferred lands are included in that list of 94 projects.

BG DAVID A. FASTABEND: Because, Chairman Hall, we still think we have the

obligation to do that. I mean, we did not

~~transfer away our obligation to comply with~~

3 NAGPRA.

4 TEX HALL: So what happens if we have  
5 a -- what's the dispute resolution in that if we  
6 have a dispute with the State on a site?

7 BG DAVID A. FASTABEND: Well, I think  
8 it's going to be specific to the nature of the  
9 dispute.

10 TEX HALL: Well, they want to recreate,  
11 we want to mitigate, preserve and protect, what  
12 would be the scenario in that dispute, would  
13 federal -- would the Federal Trust  
14 responsibilities apply or would they --

15 BG DAVID A. FASTABEND: Yes. Yes.

16 COL KURT F. UBBELOHDE: Yes. The Court  
17 has -- the Court has upheld that ruling, that the  
18 transfer of lands did nothing to obviate our  
19 obligations to fulfill our Trust responsibilities,  
20 so what occurred before the transfer of land is  
21 the same process that we would follow post  
22 transfer of lands.

23 TEX HALL: What Court, Colonel?

24 COL KURT F. UBBELOHDE: District Court  
25 in DC.

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TEX HALL: Which case?

~~COL KURT F. UBBELOHDE: I still have to get~~

that for you, Chairman.

BG DAVID A. FASTABEND: But it was pretty recent.

COL KURT F. UBBELOHDE: This was in the January review prior to the February transfer.

TEX HALL: Has anybody got a copy of that somewhere, a reference point? Can we ask for that?

COL KURT F. UBBELOHDE: Yes.

BG DAVID A. FASTABEND: Yes. We will get it to you.

TEX HALL: Okay. Thank you. And then so that includes, then -- thanks for that answer, but that includes any financial requests, too? We're talking about mitigation and federal laws applying, but does that include any budgeting concerns that would come from the Corps?

BG DAVID A. FASTABEND: I still have the fiduciary obligation to meet that requirement. I still have to try to come up with the money to do that. It doesn't relax my fiduciary obligation. It does not get transferred to the States. I still have it.

1 Now, I will tell you, Chairman Hall, one

~~2 problem I'm having with the transfer that I'm~~

3 learning about is -- and I'm going to need help  
4 from Larry and other people here from the  
5 District, is because the land is not under the  
6 control of the Corps now, we don't have our --  
7 what's it called, Title 36? -- Title 36  
8 enforcement ability on that transfer of land, so,  
9 whereas, before we could issue a citation for  
10 violation, now that requirement has to go over to  
11 the State.

12 Now, the State, I understand, can do that,  
13 but because it's no longer our land, if we see  
14 something happening we've got to coordinate with  
15 them, and that process has been ongoing, but it's  
16 complicated our ability to do it.

17 We're going to start working that process  
18 hard. We're starting a dialogue between the  
19 various entities to determine if there aren't some  
20 ways with the Tribes to try to get some transfer  
21 and leveling of authority so that we can continue  
22 to pursue our obligations as best we can.

23 TEX HALL: Is that something, General,  
24 that you're working on specifically, or who can  
25 you point to and work with on that issue? Because

1 the question -- obvious question would be so if

2 ~~There's a violation by an officer on these~~

3 transferred lands of looting of a site, or  
4 whatever. as to what law applies? What penalty?  
5 Is it State, is it Federal, or what is it? What  
6 applies? These are the kind of questions that  
7 need to be raised. So who would be our point of  
8 contact with the Corps, then, that's working on  
9 this?

10 BG DAVID A. FASTABEND: The Omaha  
11 District. Colonel Ubbelohde is working that.

12 LARRY JANIS: I can add one thing to  
13 that. This kind of goes back to the Aberdeen  
14 conference where we started talking about  
15 monitoring and the different parts of monitoring.  
16 One of those parts was enforcement and then  
17 getting a group together, whether we call it a  
18 working group or a task force, I don't know if the  
19 details like that have been worked out, but our  
20 thought, and this was part of the session that I  
21 was involved in, is to try to get that group to  
22 meet in May, and that was what we had talked about  
23 in terms of a monitoring meeting.

24 Whether we call that the official task force,  
25 I don't know, because it's difficult to find -- if

1 I could go back to the previous point -- the right

~~2 people to have at the meeting, because often~~

3 times we represent and we have to take information  
4 back and we understand Government-to-Government  
5 consultation on things like this really needs to  
6 be done with each Tribe and the Council, and so  
7 whether it's through Tribal resolution that a  
8 person is on that committee or working group, or  
9 whether it's some other mechanism, I guess I  
10 personally would need somebody to tell me how best  
11 to make that happen.

12 But I'm willing to do the coordination of  
13 that, but that was one of the issues that we said  
14 we would follow up on, and that's not only the  
15 Tribes, but to get groups, state agencies like the  
16 Game & Fish, the BIA. The FBI, I mean, was one of  
17 the groups we thought could come to the table on  
18 that specific monitoring slash enforcement issue.

19 RICHARD MOORE: If I might interject a  
20 little bit here. The Corps of Engineers has never  
21 had the authority to enforce ARPA, per se, by  
22 writing a citation, only Title 36. We could  
23 enforce Title 36 to get them into federal court.  
24 We had to depend upon other federal agencies, such  
25 as the Bureau of Indian Affairs Special Officers,



1 U S Fish & Wildlife Service, FBI, people that had

~~2 Federal law enforcement authority, and could take~~  
3 them -- could cite them, take them into custody,  
4 could actually take them into court.

5 We did not have -- we were never given that  
6 authority, and, thereby, the only authority we had  
7 was Title 36, so we had -- even now, at this point  
8 in time, if we -- I may be talking out of school  
9 here, but if we -- one of our rangers does  
10 discover some looting going on of a cultural site,  
11 then he would have to contact either the US  
12 Attorney's Office or one of those other federal  
13 agencies that has the authority, ARPA authority  
14 for enforcement. That's the way it stands as of  
15 now.

16 PEMINA YELLOW BIRD: It's also  
17 appropriate to throw into the mix here a reminder  
18 that the North Dakota Tribes have signed a legally  
19 binding document with the Omaha District, an MOA,  
20 to determine treatment and disposition of all  
21 unmarked native burials in the entire Omaha  
22 District that are associated with our Tribes and  
23 that there's a notification procedure in this MOA  
24 that wasn't followed in the incidents that  
25 Chairman Hall brought up.

1 And this MOA was negotiated under NAGPRA, so

~~2 if NAGPRA applies to the transfer lands, the MOA~~

3 applies to the transfer lands and these  
 4 recreational areas, as well, where these ancestors  
 5 came up. There already is a procedure to  
 6 determine treatment and disposition of these  
 7 ancestors, the contents of these burials, if  
 8 they're associated with any of our North Dakota  
 9 Tribes, and it's my understanding that these  
 10 burials were associated with our Tribe, and yet we  
 11 were told that the State of South Dakota issued an  
 12 order that our ancestors not be released to us,  
 13 and we fought really hard for three years to get  
 14 this legally binding document with the entire  
 15 Omaha District, not just the State of North  
 16 Dakota, the entire District, and it's not being  
 17 followed.

18 We need to sit down and discuss the ways in  
 19 which this MOA is being violated, because if  
 20 it's -- when it's used, it works. This MOA has  
 21 been in place since '92, '93 and it's worked all  
 22 this time and there has never been any discussion  
 23 to have that MOA vacated or otherwise not  
 24 followed, but it's not being followed and we need  
 25 to talk about that.

ELGIN CROWD BREAUST: Also, I was

~~approached by one of our elders last week. Now,~~

3 this has something to do with what we're talking  
4 about. Two skulls were found in an area, part of  
5 the land that was transferred. Last week or week  
6 before two men supposedly asked Ron Little Owl to  
7 come down, but the State of South Dakota said  
8 that's on State land, so they kept them. They  
9 didn't allow us to go and pick them up and rebury  
10 them, so somebody might want to check into that in  
11 the Corps. I don't know.

12 LARRY JANIS: I can check into it.

13 JOHN BARTEL: They've been recovered and  
14 turned over to the Tribe. My name's John Bartel,  
15 I'm the Operations Manager for the Oahe Project,  
16 Corps of Engineers.

17 The ones that you're talking about, the  
18 reason that we were not taking them out of the  
19 ground was because the ground was frozen and we  
20 didn't want to destroy them or create more damage  
21 to them than we thought we could if we tried to  
22 chip them out, so Rick Harnois was working with  
23 them, with the local authorities and the State up  
24 there, and we posted them, told people to stay  
25 away from them.

As the ground chawed last week they were --

~~they were excavated and removed and they were~~

turned over to George Iron Shield, I think. Yeah.

PEMINA YELLOW BIRD: Was that done in consultation with our Tribe?

JOHN BARTEL: It was -- notification was done through the process where the Tribes were notified. This went out through the normal process, through the emergency management of the Tribes.

LARRY JANIS: That is correct. One of the things we've -- Pemina raised earlier during the break is the notification was -- goes down a very structured list. If someone can't be contacted at a certain level, they go to the secondary person, and so it may have gone to the secondary person, but you can't go beyond that level without contacting someone, so there's two or three people at a certain level that have to be contacted, so maybe that may have caused some problems, but someone was contacted exactly as the agreement says, and so as we had talked before, I think it's important that we continue to look at some of these agreements and see if they are working, and I agree that this is working, and

1 then if it needs to have some updating, whether  
2 it's people change, whether it's -- something else  
3 has happened, we need to update that, but it is  
4 working.

5 And again, the issue may be, in this case,  
6 the two or three people at this certain level that  
7 need to be notified, the primary wasn't there, but  
8 the secondary was, so we'll have to investigate  
9 that.

10 PEMINA YELLOW BIRD: We'll check it out.

11 ELGIN CROWS BREAST: The point that we  
12 were trying to make here is that the Corps still  
13 has that Trust responsibility through NAGPRA, not  
14 the State of South Dakota.

15 BG DAVID A. FASTABEND: We do. That is  
16 correct.

17 PEMINA YELLOW BIRD: Right.

18 JOHN BARTEL: And in this particular  
19 case the ranger up there was -- even though it was  
20 on land, it was turned over to the State because  
21 it was above the 1607 and a half elevation, he was  
22 very reluctant to even, you know, get involved  
23 with it. He would help us protect it, but he  
24 didn't want anything else -- anything else to do  
25 with it, as far as removal or making the contacts,

1 or anything else, but they worked very closely  
2 with our people in the area to make sure that they  
3 were protected, and then when the opportunity was  
4 right to remove the remains it -- you know, they  
5 got removed.

6 They're also looking at doing some work up  
7 there and they're understanding the sensitivity of  
8 this issue and they're going to move their work  
9 away from that area.

10 PEMINA YELLOW BIRD: The State?

11 JOHN BARTEL: The State is.

12 TEX HALL: Larry, can I throw a  
13 suggestion out?

14 LARRY JANIS: Sure.

15 TEX HALL: I think it would be  
16 helpful if we had -- you probably have a process  
17 somewhere in terms of what we were just talking  
18 about, you know, when sites are found --

19 LARRY JANIS: Yes.

20 TEX HALL: -- who's contacted. If there  
21 was a step-by-step procedure on Corps land and on  
22 this transferred land, if it changes, then we need  
23 to put it there. If it's not, then we need to  
24 just list -- the question is, is that process out  
25 there somewhere and does it need to be revised or

1 changed anywhere?

2 LARRY JANIS: That's --

3 TBY HALL: That would really be helpful  
4 if we had that.

5 LARRY JANIS: That's one of the things  
6 that I've taken upon myself is to take a look at  
7 that, and it currently stands and has a very good  
8 structure to it. My name wasn't on there, in  
9 terms of internally who needed to be contacted, so  
10 that was one of the changes I was going to  
11 propose, but right now that won't change. It  
12 stays with exactly what was agreed upon, what was  
13 signed. The changes have to be part of a group  
14 action. The same group that started it needs to  
15 be involved in the revisions, any revisions, but,  
16 yes, there is a very structured "who needs to be  
17 contacted" if something's been discovered.

18 BG DAVID A. FASTABEND: Harold, I just  
19 wanted to make clear, from my viewpoint, I hope  
20 you share it, this is just time for Tribal issues  
21 of any nature that related to the Master Manual,  
22 or anything you want to take advantage of the  
23 opportunity of the fact we're together.

24 HAROLD FRAZIER: Okay.

25 COURT REPORTER: I need to take a break.

1 (A break was had from 5:44 p.m. to 5:54 p.m.)

2 HAROLD FRAZIER: I guess we're going to  
3 get started again, and one of the things I'd  
4 really -- you know, this is a -- this is for Great  
5 Plains Tribal Leaders, I really encourage that,  
6 you know, we get involved and, you know, get some  
7 input, and I think the General's here to, you  
8 know, hear our viewpoints from all the Tribes that  
9 are in this area, so I really encourage Oglala and  
10 Rosebud, and I know they got some concerns with  
11 cultural resources also.

12 BOYD GOURNEAU: Hello, my name is Boyd  
13 Gourneau. I'd like to apologize for our chairman,  
14 he was -- I got to wing it here. He faxed me this  
15 to present and caught me off guard, but I'll do  
16 the best I can.

17 Okay. Today I'm here to file with the United  
18 States Army Corps of Engineers our opposition to  
19 the finalization and publication of the Master  
20 Manual on the operation of the mainstem of the  
21 Missouri River. The Tribes opposition is based  
22 simply on the following factors:

23 No. 1, the Master Manual does not address in  
24 any form the identification of Indian water rights  
25 in total.



1           No. 2, ongoing problems of sediment  
2           accumulating in the Missouri River dams and  
3           correction of those problems is addressed in  
4           detail to allow for any long-term depends on the  
5           Missouri River for the utilization of high quality  
6           domestic water use or sustained irrigation for  
7           which Tribes are developing a depends on.

8           No. 3, the Master Manual in addressing  
9           cultural sites and it does not address the  
10          protection of such sites in a meaningful and  
11          in-depth manner.

12          No. 4, the Master Manual in addressing the  
13          endangered species and wildlife use section, it  
14          appears to contain language that would have the  
15          impact of quantify Indian water rights.

16          No. 5, the failure of the Master Manual to  
17          address compiled problems that are identified in  
18          the Master Manual creates an idea that the life of  
19          the Missouri River in its complexity is only  
20          viewed as economic interests and fails to give  
21          recognition to the spiritual connections of the  
22          Indian people that have a lifetime attachment to  
23          the water.

24          No. 6, there has not been an economic  
25          analysis for the five alternatives and hydropower

1 rate increases and the overall impact to the

2 Tribes.

3 In summary, although the stated positions do  
4 not detail and address all concerns of the Native  
5 Americans' relationship to the Missouri River, we  
6 respectfully submit this brief testimony to you in  
7 the hopes that you will sincerely take the time to  
8 see these issues contained in the Master Manual  
9 before finalization.

10 That's from our chairman, Michael Jandreau.

11 BG DAVID A. FASTABEND: Are you going to  
12 give me a copy of that statement?

13 BOYD GOURNEAU: Yes, Sir.

14 BG DAVID A. FASTABEND: Okay. Thank  
15 you.

16 GARY COLLINS: Thank you. Gary Collins,  
17 for the record. Likewise, I have a statement,  
18 prepared statement here done by the Spirit Lake  
19 Tribe in North Dakota. The author is by Frank  
20 Myrick, M-Y-R-I-C-K. I'll provide a copy, as  
21 well, but I wanted to touch base on at least six  
22 points that he addressed in his letter.

23 Initially, the RDEIS must provide a concise  
24 approach to account for Native American religions.

25 No. 2, the assessment and alternative ranking

1 methodology should utilize criteria for measuring  
2 commensurable, i.e., dollar-based, and  
3 non-commensurable, nonmonetary-based, criteria and  
4 values.

5 Thirdly, social, cultural and religious  
6 information are severely lacking in the RDEIS.

7 And four, there is insufficient access to  
8 information used in the development of or in  
9 support of the RDEIS.

10 Fifth, there is a need for the Tribes to  
11 develop a decision-making model that integrates  
12 environmental, cultural, social, religious, health  
13 and economic factors and that can be used to  
14 independently assess the adequacy of COE findings  
15 and/or to provide its input into the process  
16 followed.

17 And lastly, No. 6, resources are lacking for  
18 meaningful Tribal participation.

19 Several of these have been discussed at  
20 length during the course of the day. This is sort  
21 of a summary, in part, although it wasn't intended  
22 as such, but I'll provide this to you for the  
23 record.

24 RANDY PEREZ: For the record, my name's  
25 Randy Perez, I represent the Fort Belknap Tribes

1 and I'm a staff member of the Tribe. I don't have  
2 a sheet written down, or anything, but I just want  
3 to present some comments here, and I guess for one  
4 thing, I would want to thank Brigadier General  
5 Fastabend for his participation here.

6 I think through his dialogue with our Tribal  
7 leaders here I probably learned more concerning  
8 this Master Manual than some of the meetings that  
9 have taken place.

10 But in regard to the Master Manual and how it  
11 operates with the process that we're going  
12 through -- now, Mni Sose, we've been working on  
13 this issue for a long time. It's not something  
14 that has been new here and requesting a couple  
15 months. I'm not really sure if that process is of  
16 benefit here, but my point is that, you know, as  
17 Fort Belknap, which is in Montana now, I would  
18 think that, you know, for our Tribe the best  
19 benefit would be, you know, more electricity, but  
20 looking at the issues here, you know, the cultural  
21 issues and the environmental issues are very  
22 important aspects along the river here and no  
23 matter what choice we take, alternative, and I'm  
24 sure that alternative is going to be soon here,  
25 you know, it's come to the end of the rope where

1 time has passed and there's got to be a decision  
2 made and it's going to take place soon.

3 But in that regard, you know, I think that  
4 the facts that we've discussed here are very  
5 important, that the Tribes brought up a dialogue  
6 here, is that the cultural resources that pertain  
7 to the Tribes here, they have to continue, and I  
8 think that -- I don't know what process that we're  
9 going to take, you know, it's been discussed here,  
10 there's -- you know, that's an alternative itself  
11 and should take place.

12 There's issues here I didn't realize that --  
13 you know, still finding skulls that are important  
14 to the Indian people here, that that has to be  
15 addressed in a very respectful manner, and I'm  
16 sure that the people that have dealt with these in  
17 the past here have good solid recommendations to  
18 the Corps that some kind of process be developed  
19 that they can address those effectively, and I  
20 think that's probably one of the more important  
21 things that I seen at this particular meeting.

22 And I think that, you know, monitoring is  
23 going to be a necessity in order for this whole  
24 Master Manual to be effective and to be honestly  
25 placed in gear so that it can address the whole

1 Missouri River Basin.

2 And as Tribes, you know, I realize that we're  
3 one of, you know, several entities that have a  
4 benefit of the Missouri River, and there's all  
5 kinds of activities on the Missouri River, and  
6 with respect to the Tribes, you know, I think, you  
7 know, we think ours are probably just as important  
8 or more important than other people.

9 But in closing here, is that I would think  
10 that monitoring the cultural resources would be a  
11 prime concern down the road and that should be  
12 addressed respectively.

13 Thank you.

14 GARY COLLINS: Just in closing -- I  
15 think we're closing, but maybe not. At least I  
16 want to make a couple of comments that I do  
17 appreciate, from the Coalition standpoint, those  
18 who made this meeting happen.

19 Chairman Hall's comments are very on the  
20 point and that's exactly what the Coalition had  
21 hoped for, was to have elected Tribal members in  
22 the official capacity represent their Tribes and  
23 the issues that are profound to them.

24 With so many Tribes involved in the basin,  
25 each Tribe has their own important issues. Some

1 are overlapping, some aren't, but, nonetheless,  
2 they all need to be addressed and the Coalition  
3 can help facilitate that, but the real strength  
4 comes from the Tribes themselves, and I appreciate  
5 those who put this meeting together and we're glad  
6 to be part of that.

7 Just a quick note. After this is over I'd  
8 like to have a small Tribal meeting in one of the  
9 rooms we had this morning, just so we can make  
10 some closure.

11 Thank you.

12 FREMONT FALLIS: Fremont Fallis, Rosebud  
13 Sioux Tribe. Again, I've given the statement to  
14 the General already, but, for the record, I'll  
15 read the Rosebud Sioux Tribe's position on the  
16 Missouri River Master Manual.

17 The Corps of Engineers is the federal agency  
18 primarily responsible for operating the system of  
19 reservoirs and dams located on the mainstem of the  
20 Missouri River. The Corps of Engineers operates  
21 the dam and reservoir system in accordance with  
22 the Master Manual. The operation of the dam and  
23 reservoir system in accordance with the Master  
24 Manual during a major drought, 1987 to 1993, did  
25 not satisfy many people, parties and special

1 interests.

2 As a result of the drought and public outcry  
3 over Master Manual operations, the Corps of  
4 Engineers began a lengthy process to revise the  
5 Master Manual. This process is considered a major  
6 federal action and requires the preparation of an  
7 Environmental Impact Statement. The Corps of  
8 Engineers prepared Preliminary Draft and Draft  
9 EISs in 1993 and 1994. Dissatisfaction with these  
10 documents and processes resulted in the  
11 preparation of a prepared -- a Preliminary Revised  
12 Draft Environmental Impact Statement, 1998, and  
13 then the Revised DEIS, 2001, which is currently  
14 under review.

15 The Rosebud Sioux Tribe is very interested  
16 and concerned with the flow of the Missouri River.  
17 The Tribe has reserved rights to the flow in the  
18 river and its tributaries. These reserved rights  
19 are for the use and benefit of the Sicangu Oyate  
20 for now and forever. The Indian reserved rights  
21 are senior in the Missouri River Basin and predate  
22 the purposes for which the Master Manual operates  
23 the system. As of today the Sicangu Oyate -- by  
24 the way, Sicangu is the Indian word for -- that's  
25 what we use for the Lakota word, but it's for



1 Rosebud Sioux Tribe, for the recorder.

2 As of today, the Sicangu Oyate have exercised  
3 only a small portion of their reserved rights.

4 The Rosebud Sioux Tribe adamantly opposes any  
5 action or activity that threatens or diminishes  
6 these rights.

7 The Master Manual is not an adjudication or a  
8 quantification of water rights. However, by  
9 prescribing specific flows and releases it has a  
10 potential to impact our reserved rights. The  
11 RDEIS and any Master Manual that result must  
12 acknowledge, number one, the superiority of our  
13 reserved rights. Number two, that operation of  
14 the dams and reservoirs is subservient to these  
15 rights.

16 The Corps of Engineers in this Master Manual  
17 Update and Revision, as well as in the  
18 Environmental Impact Statement, has failed to  
19 identify Tribal water rights, titles and interest  
20 in the Missouri River and to properly address them  
21 as issues. This has been done by the Corps of  
22 Engineers over the repeated objections of Indian  
23 Tribes.

24 The Corps of Engineers has improperly  
25 disposed of consideration of our rights, titles

1 and interests by stating, in effect, that only  
2 those rights confirmed by a final court of  
3 competent jurisdiction or by congressional  
4 settlement will be considered in the Master Manual  
5 and EIS.

6 The Corps of Engineers has then proceeded to  
7 allocate water to be utilized by upstream and  
8 downstream states, by threatening and endangered  
9 species, by recreation and navigation interests  
10 without addressing the prior and superior, vested  
11 and perfected water rights of the Indian Tribes,  
12 nor has the Corps of Engineers addressed any  
13 decreed or settled water rights of any Indian  
14 Tribe in the Missouri River Basin.

15 The Rosebud Sioux Tribe believes that "Take  
16 from the Indian Tribes their life sustaining  
17 Winters Doctrine rights and you take from them the  
18 basis for their continued existence as a separate  
19 and distinct people."

20 Now, I have submitted a copy of this to the  
21 General already and that's for the record for the  
22 Rosebud Sioux Tribe.

23 I thank you very much.

24 BOB GOUGH: General, Colonel, my name is  
25 Bob Gough, I'm the secretary for the Intertribal

1 Council on Utility Policy. I also serve as the  
2 attorney for the Rosebud Sioux Tribe Utility  
3 Commission and I sit on the Rosebud Sioux Tribe's  
4 NAGPRA committee. I wanted to just make a couple  
5 of comments with regard to the Master Manual  
6 process and then a few more general comments.

7 One of the issues that the Intertribal  
8 Council on Utility Policy has been looking at and  
9 has submitted comments already, as you are aware,  
10 is the opportunity for the Tribes and the Corps of  
11 Engineers to work in a partnership with regard to  
12 their wind resources.

13 The wind resources assessment that the Tribes  
14 are just beginning to undertake now is something  
15 that probably should have been done 25 years ago  
16 as part of the general assessment of Tribal Trust  
17 Assets.

18 These are resources on the reservations that  
19 are significant, significant for use within the  
20 reservation to meet Tribal energy demands, clean  
21 energy demands, but also a product that can help  
22 sustain -- build a sustainable Tribal economy  
23 within the reservation boundaries with an  
24 inexhaustible resource, but what is lacking is the  
25 transmission capabilities, the delivery of

1 renewables to various sources along the  
2 farm-to-market road, the wire highway that is  
3 basically the federal -- federally built and  
4 federally controlled highway running off of the  
5 dams and providing power to this north -- the  
6 Northern Plains Region.

7 I had an opportunity, I believe, the  
8 beginning of March to be in Portland and to meet  
9 with some of your staff, Lynda Walker arranged for  
10 that to occur, and we discussed some beginning  
11 opportunities, some just general opportunities  
12 that are available to the Tribes throughout the  
13 entire Missouri River Basin.

14 I've had occasion to submit to the Colonel a  
15 copy of the map that was prepared by the National  
16 Renewable Energy Laboratory showing what the  
17 current estimates of the wind resources are on the  
18 20 plus Tribes on the upper basin, and just the  
19 wind resources on those reservations alone exceed  
20 200 gigawatts of potential power, and we think  
21 that that's, what, over a hundred times what the  
22 dams currently produce, and we would certainly  
23 look forward to engaging you in further  
24 conversation about the opportunities.

25 I know we brought it up at Lower Brule and

1 the meeting in Pierre in October and those  
2 comments are in the record. We've got an updated  
3 map showing the Montana and Wyoming resources, as  
4 well as those in North and South Dakota.

5 I've also provided a copy of a pamphlet  
6 entitled "Methods of Integrating Wind Energy With  
7 Hydroelectric Systems" that was prepared by the  
8 Bureau of Reclamation, Department of the Interior,  
9 in 1979 looking at wind opportunities in Wyoming,  
10 coupled with some of the Colorado River projects,  
11 and provided a copy to the Corps as an example of  
12 the kind of methodology we would like to look at  
13 in application to the Missouri River hydro system.

14 In discussions we had with the  
15 representatives of the Corps here about a month  
16 ago, a little over a month ago, we understood that  
17 it was too late for our comments to impact the  
18 Master Manual process, in that you were not going  
19 to be able to examine every scenario and see how  
20 wind may be able to compliment or give you greater  
21 flexibility in your other responsibilities, but we  
22 did certainly welcome the opportunity that once a  
23 preferred alternative is selected to look  
24 carefully at that selection and see what the  
25 opportunities may be for the Tribes to work

1 together with the Corps on putting that kind of  
2 Tribal resource to work in building those Tribal  
3 economies, working also with Western Area Power  
4 Administration. And I do have a copy of those,  
5 but I think it's probably in your old Bureau of  
6 Rec files, in any case, but I do have a copy here  
7 for WAPA, as well.

8 I can never resist the opportunity when we  
9 have the Corps and WAPA in the same room to bring  
10 up these issues, because that's a time that we get  
11 and I think we bring them and the people involved,  
12 bring the appropriate attention to the issues.

13 I would like to thank the Corps here again  
14 publicly, and WAPA, for meeting with us and  
15 Senator Johnson about a month ago tomorrow,  
16 actually a month ago tomorrow, to examine -- begin  
17 examining these issues in greater detail and begin  
18 working out what opportunities may arise for the  
19 Tribes in terms of exploring wind potentials on  
20 the reservations.

21 In getting these maps from NREL I've inquired  
22 down there and the National Renewable Energy Lab  
23 has pledged its assistance, as well, to work with  
24 the Corps, with WAPA, to see how this  
25 integration -- these integration studies may be

1 able to work, so I wanted to bring that  
2 information to you.

3 Looking past the issues of wind and hydro,  
4 although they're becoming more and more critical,  
5 especially with regard to the diminishing water  
6 resources in the northern reaches of the Missouri,  
7 the climate change that I understand was raised  
8 earlier by Pat Spears; basically, what we've come  
9 to understand, and I just want this on the record,  
10 is that most of the processes, most of the  
11 planning that's being done for our water resources  
12 has been looking at the last hundred years or the  
13 last 50 years and we're making our decisions for  
14 the future based on those numbers, those  
15 realities.

16 And what concerns me is that all of the  
17 climate scientists, especially those engaged in  
18 the studies of the Northern Plains and the  
19 Rockies, are telling us that the kind of drought  
20 conditions we're seeing now, the reduced snow pack  
21 or the lack of snow pack in the Rockies and less  
22 water coming into the upper reaches and more storm  
23 systems shifting to the Omaha/Minneapolis  
24 corridor, that eastern end of the Missouri, will  
25 be the kind of scenario we can expect to see more

1 often than not in the future.

2 And what concerns me is that if we look only  
3 at the past, it's like driving a car, steering  
4 through the rearview mirror and hoping that the  
5 future, that that road ahead of us is just as  
6 straight as the road behind us.

7 And the concern that arises is that the  
8 climate scientists are saying it's not going to be  
9 the same road, it's changing, and this is what we  
10 have to be aware of.

11 So I'm offering to request that this -- that  
12 the flexibility be kept in the process, kept in  
13 the system with climate in mind, not to keep  
14 climate as a constant, but to be aware that these  
15 droughts are cyclical, yes, but we may never  
16 return to the kind of normal we've been used to  
17 and we need to be aware of that in our planning.

18 Beyond the river, looking at the basin, the  
19 overall basin area, two points that were made  
20 during the last discussion on cultural resources.  
21 I just want to emphasize, the opportunity arises  
22 for the Tribes and the Corps to partner on  
23 protecting the resources in and around the  
24 Missouri River, especially during this Lewis and  
25 Clark Bicentennial.



1           By looking at the -- looking back at history,  
2 we do that for the water resources, let's look  
3 back for a model. The Core of Discovery at that  
4 time presented peace medals to the Tribes along  
5 the way and I would think there may be an  
6 opportunity for the Corps and the Tribes to look  
7 at peace marshals, Tribal peace marshals who may  
8 be able to fill some of the protection functions  
9 and enforcement functions that may be necessary,  
10 particularly with the influx of people that are  
11 likely to be coming up the river over the next  
12 couple of years.

13           The Core of Discovery came here only after  
14 the so-called Louisiana Purchase in which really  
15 no property was purchased by the United States.  
16 The US just simply bought the franchise rights of  
17 the European powers to be able to deal with the  
18 Tribes in that territory and then commissions had  
19 to be sent out to negotiate actual purchase of  
20 property, ceding of territories.

21           And there was a Senate, a NAGPRA committee  
22 hearing that Chairman Hall and myself testified at  
23 and Senator Inouye asked us point-blank after our  
24 testimony on the issues we had come before him  
25 about, he was concerned about the ancestors at the

1 Smithsonian for whom there was no cultural  
2 affiliation and very little information, but they  
3 remain in the Smithsonian, and he asked about how  
4 we can bring those back home, what suggestions  
5 would there be.

6 And one of the suggestions that came out of  
7 that was looking at the -- at history, that model,  
8 setting up some commission with the Tribes that  
9 would be effective, the Tribes who got territories  
10 within that Louisiana territory, aboriginal  
11 territories there, those that have  
12 responsibilities for the ancestors, and perhaps  
13 have the Tribes come up with some solutions, one  
14 of which was the possibility of bringing them  
15 back, bringing those ancestors back into certain  
16 areas, repatriating them there and honoring them  
17 as unknown ancestors.

18 They may not have a Tribal affiliation. The  
19 military in this country can recognize an unknown  
20 soldier with great respect. We believe that the  
21 ancestors for the people who lived here first also  
22 deserve that respect, and if we can entomb them as  
23 the unknown ancestors and respect them in that  
24 way, it's far better than leaving them in the  
25 Smithsonian.

1           So I just wanted to bring that to your  
2 attention as we look at the next couple of years  
3 of the Lewis and Clark Bicentennial.

4           That's been one of the issues that came  
5 directly out of the Senate Indian Affair Committee  
6 looking at these NAGPRA issues.

7           So those are the primary issues and I would  
8 look forward to working with any task force that  
9 may be set up on these issues, and particularly  
10 the wind/hydropower integration, and appreciate  
11 your interest in this area.

12           Thank you.

13           HARVEY WHITE WOMAN: Harvey White Woman  
14 with the Oglala Sioux Tribe, and Johnson had to  
15 leave early and I can't really say that I'm going  
16 to speak here for him, because I don't think I can  
17 speak as eloquently as he does, but I'll give it a  
18 try, but from the standpoint of the Tribe, the  
19 Oglala Sioux Tribe, they stand opposed to this  
20 Master Manual in its entirety based upon the  
21 agreements that were made that we call treaties.

22           Now, I look at Johnson and what he's gone  
23 through through his 84 years of his life and the  
24 things that he's gone through to educate and to  
25 teach the Federal Government and to struggle with

1           them with our treaties and then trying to have the  
2           Federal Government understand and uphold the  
3           treaties that they signed and our ancestors  
4           signed, or I should say touched the pen, but I  
5           also like to refer to the fact that Johnson is  
6           also a World War II veteran.

7           He will not stand here and brag, but he's a  
8           World War II veteran and he tells me the story  
9           that really exemplifies the treatment that Native  
10          Americans even today are going through.

11          Johnson was at war in another country and he  
12          always stated that as he was fighting on the  
13          foreign soil overseas, fighting for this country,  
14          fighting for the Constitution, fighting for the  
15          flag that this country stands on, in the back of  
16          him that very same government was violating his  
17          rights as a Native American and is continuing to  
18          do that today.

19          So this frustration that he feels in knowing  
20          that no matter what we say here, no matter what we  
21          do, we can talk till we're blue in the face about  
22          culture, treaty, what the river means to us, what,  
23          you know, MniWiconi, water of life, means to us,  
24          it will be pushed aside, and I base that analogy  
25          on experience with other federal agencies.

1           And so I sit here and I listened all day to  
2           what was being discussed and I hear and we felt  
3           partnership, working together, and that's fine,  
4           that's great, but also that's a two-way street,  
5           and when the Tribes are up against profits, money,  
6           then we stand to lose the battle. So with that  
7           the Tribe, again, like I stated earlier, stands  
8           opposed to the Master Manual.

9           And as Fremont alluded to earlier about a  
10          promise that was made in a similar consultation  
11          meeting with the Army Corps of Engineers, and  
12          after Johnson had basically told those people at  
13          that time the very story I just told you a little  
14          while ago about him serving in World War II,  
15          Dr. Westphal came up to him and stated that he  
16          would do a treaty analysis. Promised, promised a  
17          treaty analysis of Title VI, which was never done.

18          In the final issuance of the Final EIS it's  
19          stated in the EIS that it was the fault of the  
20          Tribes for not providing information for them to  
21          do an EIS.

22          Now, if memory -- if I can remember, all the  
23          documents that -- the true documents are there in  
24          Washington available to everybody, but to ensure  
25          that what people have been talking about today,

1           about treaties, you've heard that all day today,  
2           treaty rights, treaty, the treaty is the  
3           foundation of everything that these -- us Native  
4           Americans, us Indians stand on, and it's not only  
5           standing on it for existence, because we've always  
6           been here even before treaties, we're saying the  
7           relationship between the Federal Government --  
8           and, General, you said it earlier, and I quote,  
9           "We have a Trust and Treaty obligation," and we  
10          will hold you to that.

11                 We'll hold you to that because we feel  
12          that -- we have always felt that there has always  
13          been that Trust and Treaty obligation by the  
14          Federal Government to the Native Americans. So  
15          with that, to ensure -- and I want to make sure  
16          that that never happens again, that you guys would  
17          understand treaties, because you had it written up  
18          there in your presentation, that I have copies of  
19          the 1851 and 1868 Treaty here and I wanted it  
20          stated for the record that I have handed it to  
21          you, so that way you can really look at that and  
22          understand where we're coming from as a people, as  
23          a nation.

24                 I kind of tend to disagree with the  
25          Government-to-Government, because that's based on

1 1889. I'd like to go back to the Nation-to-Nation  
2 relationship, because we're still a nation and I  
3 still consider myself a nation. We're a sovereign  
4 nation.

5 So with that, I'd like to go ahead and  
6 present this to you, to go ahead and give you a  
7 copy of it so that way you'll know where we're  
8 coming from. And also the Oglala Sioux Tribe  
9 reserves the right to submit other comments and  
10 documents as it pertains to that and the reason  
11 why we take the stand that we do, and all we're  
12 saying, basically, from a Nation-to-Nation, is  
13 saying uphold the laws that are there, and that's  
14 what we're saying.

15 Thank you.

16 (Clapping.)

17 TEX HALL: That's good, Harvey. Just  
18 briefly. General Fastabend and Colonel Ubbelohde,  
19 once again, thank you for your invitation to the  
20 Tribes to talk about this very important issue,  
21 the Master Manual, and other issues that are being  
22 discussed.

23 We too at Fort Berthold are a 1851 Fort  
24 Laramie Treaty Tribe and it is true what Harvey  
25 said, it's the supreme law of the land that's in

1 our Constitution. The Master Manual itself is  
2 weakest when it talks about the impacts to the  
3 historic properties, clearly, and I think the Army  
4 Corps will probably admit that itself, that it's  
5 at its weakest right there.

6 And that really is an outstanding issue that  
7 must be addressed, and I think collectively, as  
8 Tribes, we must come to the table and decide what  
9 we can do for ourselves here on this issue of  
10 protecting our sacred sites and historic  
11 properties.

12 I think we should look at some type of  
13 legislation. We have the Senator's staff right  
14 here, Aubrie James, and it's going to come down to  
15 money. It's going to come down to mazaska owajan,  
16 is how we say it, it's going to come down to  
17 owajan. It's got to be driven by us in order to  
18 come up with this legislation because it has to  
19 come from us to work in concert, but it has to  
20 start here, and we know where that money is at.

21 WAPA's got that money, we know that, so  
22 that's where we need to decide, whatever it is,  
23 you know, if it's a percentage -- if it's one  
24 percent of all WAPA profits, whatever it is,  
25 whatever, we need to collectively decide, look at



1       some draft legislation, otherwise, as you all  
2       said, we're going to talk to -- we're going to  
3       talk and talk and it's going to be like the wind,  
4       it's going to carry our words, the wind will carry  
5       it away and we won't have that meeting, so we need  
6       to get serious about developing some legislation  
7       collectively.

8               And I think our -- I think our congressional  
9       friends will carry that forward, because if you  
10      analyze the Master Manual, General, I think the  
11      Corps will agree that you are at your weakest  
12      right there in terms of the negative impacts on  
13      historic properties. So, to me, my brothers and  
14      sisters, that's the solution. We have to look for  
15      a legislative solution to correct that.

16             You know, Bob Gough talked a lot about the  
17      preferred alternatives, and I hope, General  
18      Fastabend, that the Tribal opinion carries as much  
19      weight as a Biological Opinion. Clearly, I think  
20      we, as people with those rights that have been  
21      here before this country was a country, should  
22      have that.

23             Our Tribal opinion should be held higher than  
24      a Biological Opinion, and I think it's in your  
25      power, General Fastabend, you have been given the

1 authority to choose the preferred alternative that  
2 best fits all the peoples, and clearly the Tribe  
3 has an Indian Trust Asset, Environmental Justice.  
4 These are federal mandates that are set forth, and  
5 I know you've mentioned in your comments today how  
6 the Biological Opinion has driven the time frame,  
7 but, again, I encourage you to look even more to  
8 the Tribal opinion.

9 I appreciate your dissecting the comments in  
10 terms of what your words were before. When you  
11 say that, obviously that's -- that carries a lot  
12 of weight with us, and I encourage you to look  
13 beyond that, to look beyond the Biological  
14 Opinion, because whatever alternative you choose,  
15 it has some affect.

16 And already, you know, we have countless  
17 calls that come about the lake. What is it, three  
18 feet lower than it was last year? And that's --  
19 what is it? Last year it was 12 feet lower. You  
20 know, what is it now? 15 feet lower or 14 feet  
21 lower? It's getting lower and lower, as was  
22 mentioned about possible climate changes, and of  
23 course we -- that's more a detriment, that's more  
24 an adverse impact. It is an adverse impact.

25 We see that. We live there. We walk those

1 same lands, General, so there clearly is an  
2 adverse impact to Tribes. My Tribe has the  
3 river -- we have our reservation on both sides of  
4 the river, it's not on one side, it's on both  
5 sides, and so clearly that's an issue I want you  
6 to consider, that you must choose the alternative  
7 that fits the Tribes best, and, of course, that is  
8 the highest -- when it's at its highest in the  
9 spring, you know, that's when you should be --  
10 that's the alternative that should be considered  
11 as a standard of release, most of the release  
12 should be then, and when it's at its summer there  
13 shouldn't be -- there should be some standard  
14 where it doesn't drop below a certain level so we  
15 have all -- everything exposed, but clearly this  
16 legislation is going to help that exposure, that  
17 bank stabilization, that protection of historic  
18 properties.

19 We're there, General, every day. We see  
20 that, the ugliness of that dropage of the lake and  
21 the drought that it's creating, and what is left  
22 for us is a bunch of looters, a bunch of looters  
23 come in. We have no one -- we have little to no  
24 enforcement. We must address that issue.

25 We will come to the table with you, with

1 Colonel Ubbelohde. If Larry calls that meeting,  
2 we will come and look for joint enforcement  
3 efforts, and maybe that's legislation too. Maybe  
4 the penalty -- maybe the first offense, \$500, is  
5 not good enough. Maybe it should be a felony on  
6 the first offense, because evidently people are  
7 not getting the message, and these are some people  
8 that are supposedly some outstanding citizens.

9 I've even heard some of the people that are  
10 looting are even school teachers, history  
11 teachers. So the law is not working as it is  
12 written now, so we must have this meeting, Larry.  
13 We must have this meeting and we must be thinking  
14 about it ourselves in terms of the legislative  
15 solution.

16 The task force, I encourage you to decide on  
17 the Tribal Issues Task Force to meet quarterly.  
18 We'll take a stab at that, and I think as Tribes  
19 we need to do that. We need to come up with a  
20 position in terms of what are some of the issues  
21 that are outstanding that we want to address and  
22 we must be at the table. We must all come at the  
23 table.

24 Sometimes I see the same guys, the same guys  
25 and gals at the table and I'm -- I congratulate

1           you, but everybody needs to come. All the Tribes  
2           in the Omaha District, it's important that they  
3           come, so that way we move it forward, because we  
4           can't be held back when somebody's not here and  
5           they say, well, hey, I didn't come to that meeting  
6           or -- you know, you took your time. You came  
7           here. You know, you left all your issues and  
8           situations at home, you know. They were pressing,  
9           but you came, and I thank you for that, but we  
10          collectively must move forward. We must continue  
11          to be proactive, because these things are on a  
12          time line, and they clearly are.

13                 And then the Cultural Resource Task Force, I  
14          encourage you to make that decision soon, very  
15          soon, General. That issue, we've had it for a  
16          while now. We've requested it and it needs to be  
17          there and I'll defer that SEIS to that Tribal  
18          Issues Task Force, if we have some assurance, and  
19          I appreciate you taking it under consideration,  
20          that we'll wait for your response on that and that  
21          we look to meet right after that between that --  
22          whatever you call those two dates, that -- when  
23          you do it you identify an alternative --

24                         BG DAVID A. FASTABEND: Final  
25          Environmental Impact Statement, then the Record of

1 Decision.

2 TEX HALL: Right there. Okay.

3 BG DAVID A. FASTABEND: I got it.

4 TEX HALL: We look in between there to  
5 have that meeting, so other than that, you know,  
6 it's -- you know, just final sentence again, just,  
7 you know, consider that. I know the Biological  
8 Opinion really moves the Army Corps of Engineers.  
9 Consider that Tribal opinion collectively, that  
10 Tribal opinion of all the Tribes, that it has to  
11 have the same amount of weight.

12 And don't be sidetracked by non Tribal  
13 recreation users that use the lake occasionally,  
14 once a month or twice a summer. They shouldn't  
15 have that same weight as the Tribes who have an  
16 Indian Trust Asset here.

17 Thank you for your attention and we look  
18 forward to working with you in the Omaha District.

19 And then the public comments, Larry, it kind  
20 of goes to you. The Tribes are requesting a  
21 public comment period on the peer review  
22 assessment document done on the cultural  
23 resources, so I'll leave that, you know, to you,  
24 for the record, that that's what the Tribes are  
25 requesting, and thank you.

1 (Clapping.)

2 BOB GOUGH: I just wanted to make one  
3 follow-up. I was reminded by Chairman Hall, there  
4 is an article that was written with regard to the  
5 Environmental Justice implications on the river  
6 and I'd like to present that, as well, for the  
7 record and make sure that that's included.

8 Thank you.

9 HAROLD FRAZIER: Okay. Thank you. I  
10 guess I just got some closing comments too. One  
11 of the things on the agenda you had on there is  
12 opportunities for partnering, and one of the  
13 things I'd like to say that we, in Indian Country,  
14 you know, we take partnerships seriously, and so  
15 I'm really hoping that you don't let us down, and  
16 I think this idea of a task force, I'm looking  
17 forward to that and I think that would be a good  
18 opportunity for us to work together.

19 I'm really hoping that at our next meeting  
20 that you guys do come prepared in forming this  
21 partnership. I'd like to see things done, you  
22 know, at a power point and just start putting  
23 things down on paper, because then I believe we're  
24 starting to take action, we're starting to walk,  
25 because other than that, you know, we're just

1 sitting here talking and nothing gets done, so I'm  
2 really hoping that at our next meeting that, you  
3 know, we're prepared, all of us, and that we're  
4 willing to roll our sleeves up and get down to  
5 work.

6 And I guess at this time, if there's no one  
7 else, I'm going to ask Mr. Fremont Fallis, he's on  
8 the Tribal Council at the Rosebud Sioux Tribe, to  
9 do a closing prayer.

10 (Closing prayer by Fremont Fallis.)

11 (Whereupon the proceedings were  
12 adjourned at 6:40 p.m.)

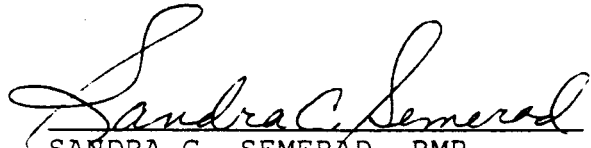
13 -----



1 STATE OF SOUTH DAKOTA )  
2 COUNTY OF PENNINGTON ) SS. CERTIFICATE  
3 )

4 I, SANDRA C. SEMERAD, RMR, Court Reporter,  
5 hereby certify that the foregoing pages 1 through  
6 214, inclusive, are a true and correct transcript  
7 of my stenotype notes.

8 Dated at Rapid City, South Dakota, this 24th  
9 day of April, 2002.

10  
11  
12  
13  
14   
15 SANDRA C. SEMERAD, RMR  
16 Registered Merit Reporter  
17 My Commission Expires: 3/7/06  
18  
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A Perspective on the REIS Approach  
And  
Consultation/Cooperation Strategy for Comprehensive Assessment of the  
Missouri River Master Control Manual

By  
Frank Myrick  
Spirit Lake Tribe, Spirit Lake ND

April 4, 2002

The following discussion has been prepared to put into perspective selected issues relevant to the Mni Sose Intertribal Coalition intended role in the NEPA process. It also aims at avoiding unintentional abridgments of religious freedom and way of life of Native Americans as a result of major decisions by the U.S. Army Corps of Engineers (COE) regarding implementation of the proposed Revised Draft Environmental Impact Statement (RDEIS) alternatives.

- The RDEIS must provide a concise approach to account for "Native American Religions": Although freedom of religion is a right guaranteed to all Americans by the First Amendment to the United States Constitution, the special nature of Indian religions has resulted in conflicts between federal policies and Indian religious freedom. The essence of Native American religions is to remain in a constant and consistent relationship with nature. This emphasis permeates the Indians' daily life and "cannot be separated" from the social, political, or cultural aspects of Indian lifestyles.
- The assessment and alternative ranking methodology should utilize criteria for measuring commensurable (e.g. dollar-based) and non-commensurable (non-monetary based) criteria and values: Because social, political, cultural, and religious factors cannot be assigned monetary values, the current REDIS approach seems to be largely omitting a component of the decision-making process that is vital to the Native American way of life. Further implementation of comprehensive scientific methodologies would be required to achieve compromising solutions or optimal alternatives by utilizing proper multicriteria-multicriteria methodologies. Active participation of Tribes as major players in the planning, formulation and selection of alternatives is crucial in order to reach a fair and equitable solution to the problem on hand.
- Social, cultural, and religious information are severely lacking in the RDEIS: This data is crucial in the identification of the nature and scope of the impact of the Current Water Control Plan. Without establishment of a

comprehensive information system that can only be revealed and/or developed by the native populace and its elders, the RDEIS is bound to reflect multifaceted decisions that have unintentional abridgments of federal laws and policies (e.g. the American Indian Religious Freedom, Water Rights), tribal sovereignty, etc.

- There is insufficient access to information used in the development of or in support of the RDEIS: Because of the complex nature of the RDEIS, technical studies and investigations (in final or draft form) must be accessed for any meaningful review and assessment of the COE findings. The review process by the tribe cannot begin at the time RDEIS comments are requested, but must be initiated concomitantly with the ongoing work of the COE and its subcontractors. The COE would need to avail in a timely fashion its scope of work, schedules, and information generated in this process. For example, past and recent issues on environmental contamination in the Missouri River (non-point or point source pollution, nature and extent of pollution), impact on surface and ground water resources, impact on wildlife and fish habitat (e.g. at dam sites), wetland restoration or creation, flood attenuation, etc., are concerns that tribes would like to be informed about a priori in order to guarantee a meaningful consultation and cooperation effort as required by the COE and necessary for the success of the Federal Water Control Plan. Information sharing also allows tribal leaders to take appropriate actions, to the extent possible, through its environmental, cultural, and health programs.
- There is a need for the Tribes to develop a decision-making model that integrate environmental, cultural, social, religious, health, and economic factors and that can be used to independently assess the adequacy of COE findings and/or to provide its input into the process followed.
- Resources are lacking for meaningful tribal participation: Without adequate level of funding, tribal participation into the NEPA process and in compliance with the Executive Order on Environmental Justice will remain superficial potentially causing unintentional abridgments of federal laws and policies.



# Rosebud Sioux Tribe

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Sergeant-at-arms

## A SYNOPSIS OF ROSEBUD SIOUX TRIBE'S POSITION ON THE MISSOURI RIVER MASTER MANUAL

The Corps of Engineers (COE) is the federal agency primarily responsible for operating the system of reservoirs and dams located on the mainstream of the Missouri River. The COE operates the dams and reservoir system in accordance with the Master Manual. The operation of the dam and reservoir system in accordance with the Master Manual during a major drought (1987-1993) did not satisfy many people, parties and special interests.

As a result of the drought and public outcry over Master Manual operations, the COE began a lengthy process to revise the Master Manual. This process is considered a major federal action and requires the preparation of an Environmental Impact Statement (EIS). The COE prepared Preliminary Draft and Draft EISs in 1993 and 1994. Dissatisfaction with those documents and processes results in the preparation of a Preliminary Revised Draft Environmental Impact Statement (PRDEIS - 1998) and the RDEIS (2001) which is currently under review.


The Rosebud Sioux Tribe is very interested and concerned with the flow of the Missouri River. The Tribe has reserved water rights to flow in the River and its tributaries. These reserved rights are for the use and benefit of the Sicangu Oyate for now and forever. The Indian reserved rights are senior in the Missouri River Basin and predate the purpose for which the Master Manual operates the system. As of today, the Sicangu Oyate have exercised only a small portion of their reserved rights. The Rosebud Sioux Tribe adamantly opposes any action or activity that threatens or diminishes these rights.

The Master Manual is not an adjudication or quantification of water rights. However, by prescribing specific flow and releases it has the potential to impact our reserved rights. The RDEIS and any Master Manual that result must acknowledge: (1) the superiority of our reserved rights and (2) that operation of the dams and reservoirs is subservient to those rights.

The Corps of Engineers in its Master Manual Update and Revision, as well as in the Environmental Impact Statement, has failed to identify Tribal water rights, titles and interest in the Missouri River and to properly address them as issues. This has been done by the Corps of Engineers over the repeated objections of the Indian Tribes.

The Corps of Engineers has improperly disposed of consideration of our rights, titles and interests by stating, in effect, that only those rights confirmed by a final court of competent jurisdiction or by congressional settlement will be considered in the Master Manual and EIS. The Corps of Engineers has then proceeded to allocate water to be utilized by upstream and downstream status, by threatened and endangered species, vested and perfected water rights of the Indian Tribes, nor has the Corps of Engineers addressed any decreed or settled water rights of any Indian Tribe in the Missouri River Basin.

Rosebud Sioux Tribe believes that "Take from the Indian Tribes the life sustaining Winters doctrine rights and you take from them the basis for their continued existence as a separate and distinct people."

  
\_\_\_\_\_  
WILLIAM KINDLE,  
RST PRESIDENT

Wk/cfh

United States Corp Of Engineers  
Date: 4 / 16 / 02

Ramkota Inn, Rapid City, South Dakota

*Boyd Goussaux Tribal Council Member*

My name is ~~Clarence W. Skye~~, I am the ~~Executive Director~~ of the ~~United Sioux Tribes of South Dakota~~, *Lower Brule Sioux Tribe*

~~including, the Development Corporation that was established in May of 1970.~~ The Development

~~Corporation purpose is economic development for the Indian Reservations in the Tri-State Area.~~ Today, *Today*

am here to file with United States Army Corp of Engineers, our opposition to the finalization and publication of the Master Manual on the operation of the Main Stem of the Missouri River. The Tribes opposition is based simply on the following factors.

1. The Master Manual does not address in any form the identification of Indian Water Rights in total.
2. The ongoing problems of sediment accumulating in the Missouri River Dams and correction of those problems is addressed in detail to allow for any long term depends on the Missouri River for the utilization of high quality domestic water use or sustained irrigation for which Tribes are developing a depends on.
3. The Master Manual in addressing cultural sites and it does not address the protection of such sites in a meaningful and in-depth manner.
4. The Master Manual in addressing the endangers species and wildlife use section, it appears to contain language that would have the impact of quantify Indian Water Rights.
5. The failure of the Master Manual to address compiled problems that are identified in the Manual creates an idea, that the life of the Missouri River in its complexity is only to be viewed as an economic interests and fails to give recognition to the Spiritual Connections of the Indian People, who have a life time attachment to the Water.

*with on each.*

In summary, although, the stated positions do not in detail address all the concerns of all the Native America's relationship with the Missouri River. We respectfully submit this brief testimony to you in hopes, that you will sincerely take the time to see that these issues contained in the Master Manual, before finalization.

*(over)*

#6. There has not been an economic analysis for the 5 alternatives and the <sup>hydroelectric</sup> rate increases and the overall impact to the Tribes.



**Executive Director:**  
Eiwood Corbine

**Executive Committee:**  
Gary Collins, President  
Northern Arapaho Tribe  
Fort Washakie, WY

Don Pilcher, Vice President  
Sac & Fox Nation of Missouri  
Reserve, KS

Rhonda Azure, Treasurer  
Turtle Mt. Band of Chippewas  
Belcourt, ND

Boyd Gourneau, Secretary  
Lower Brule Sioux Tribe  
Lower Brule, SD

**Member Tribes:**  
Assiniboine & Sioux Tribes of  
Ft. Peck - Poplar, MT

Blackfeet Nation  
Browning, MT

Cheyenne River Sioux Tribe  
Eagle Butte, SD

Chippewa Cree Tribe  
Box Elder, MT

Crow Tribe  
Crow Agency, MT

Crow Creek Sioux Tribe  
Fort Thompson, SD

Eastern Shoshone Tribe  
Fort Washakie, WY

Flandreau Santee Sioux Tribe  
Flandreau, SD

Fort Belknap Assiniboine & Gros  
Ventre Tribes - Harlem, MT

Kickapoo Tribe in Kansas  
Horton, KS

Northern Cheyenne Tribe  
Lame Deer, MT

Oglala Sioux Tribe  
Pine Ridge, SD

Omaha Tribe - Macy, NE

Ponca Tribe of Nebraska  
Niobrara, NE

Prairie Band Potawatomi Nation  
Mayetta, KS

Rosebud Sioux Tribe  
Rosebud, SD

Santee Sioux Tribe  
Niobrara, NE

Sisseton-Wahpeton Sioux Tribe  
Agency Village, SD

Spirit Lake Tribe - Fort Totten, ND

Three Affiliated Tribes of  
Fort Berthold - New Town, ND

Winnebago Tribe of Nebraska  
Winnebago, NE

Yankton Sioux Tribe - Marty, SD

# Mni Sose Intertribal Water Rights Coalition, Inc.

P.O. Box 2890, 514 Mt. Rushmore Road  
Rapid City, South Dakota 57709-2890

Department of Interior's Conservation Service Award Recipient for 2000

July 18, 2002

Brigadier General David A. Fastabend  
Commander and Division Engineer  
U.S. Army Corps of Engineers  
Northwestern Division  
PO Box 2870  
Portland, OR 97208-2870

**RE: August 6 and 7, 2002 Intertribal Cultural Resources Working Group Meeting**

Dear General Fastabend:

I invite you to participate in an intertribal Cultural Resources Working Group Meeting, which is being hosted by the Three Affiliated Tribes of Fort Berthold on August 6 and 7, 2002, in New Town, North Dakota. Attached is the draft agenda. The Mni Sose Intertribal Water Rights Coalition will assist the Three Affiliated Tribes in conducting this meeting.

The meeting is an extension of the June 20 and 21, 2002, Army Corps Cultural Resources Tribal Task Force meeting held in Bismarck, North Dakota. The August meeting will focus on collaborating on: 1) a Programmatic Agreement for the operation and management of the Missouri River Mainstem system and 2) a cultural site monitoring and enforcement plan.

The meeting will be held at the:

4 Bears Lodge  
202 Frontage Road  
New Town, ND 58763  
1-800-294-5454  
(701) 627-4018  
(701) 627-4012 fax

A limited number of rooms has been reserved at the 4 Bears Lodge. To receive the group rate of \$55, call the lodge by August 1 and refer to the Mni Sose/Cultural Resources block.

If you have questions regarding the meeting, please contact Dawnette Owens, Mni Sose Project Coordinator at 605-343-6054.

Thank you for considering my invitation.

Sincerely,



Gary Collins  
President

enc.

A2-745



**Three Affiliated Tribes of Fort Berthold/Mni Sose Intertribal Water Rights Coalition  
Missouri River Basin Tribal Cultural Resources Meeting**

**4 Bears Casino and Lodge  
New Town, North Dakota  
August 6 and 7, 2002**

**Draft Agenda**

The Missouri River Basin Tribes will meet to design the method for forming a partnership with the U.S. Army Corps of Engineers in the preservation, protection, and management of Tribal Cultural Resources in the Missouri River Basin.

*August 6, 2002*

8:00 a.m.

**Registration**

9:00

**Invocation** — Three Affiliated Tribal Elder

**Welcome and Introductions** — Three Affiliated Tribal Representative

**Purposes of the Meeting**

- Mni Sose Intertribal Water Rights Coalition Official
- U.S. Army Corps of Engineers Representative

**U.S. Army Corps' Cultural Resource Program** — Larry Janis, Program Manager

**Government-to-Government Elements:** A discussion of the program designs that incorporate Tribes in the policy and decision-making process of Missouri River cultural resources protection and management.

Moderator: Harold Salway, Oglala Sioux Tribe  
U.S. Army Corps of Engineers Representative  
Tribal Representatives

12 Noon

**Lunch** (on your own)

1:00 p.m.

**Tribal Cultural Resource Programmatic Agreements:** A discussion of the purposes of working agreements with Tribes. The discussion will include the identification of tribal cultural priorities, collaborative cultural enforcement and monitoring mechanisms, cultural resource training, and program opportunities.

**Recess**

6:00 p.m.

Three Affiliated Tribes will provide an evening meal at the 4 Bears Casino.

*August 7, 2002*

9:00 a.m.

**Cultural Site Monitoring and Enforcement Plan:**

**Cultural Resource Communication Network:** A discussion of establishing a communication network between Tribes and Army Corps of Engineers regarding cultural resource training opportunities and programs.

**Presentation to Cultural Resource Task Force and Schedule**

12 Noon

**Adjourn**

N:\Working Files\DATA\ACOE\Cultural Resources\Ft. Bethold Meeting August\Agenda.doc

Michael B. Jandreau  
Chairman



187 Oyate Circle  
Lower Brule, SD 57548  
605-473-5561 - Phone  
605-473-5554 - Fax

November 7, 2002

David A. Fastabend, Brigadier General  
U.S. Army Corps of Engineers  
Northern Division  
12565 West Center Road  
Omaha, Nebraska 68144-3869

Re: Trust Responsibilities, Government-to-Government Relations, Consultation, Natural and Cultural Resources Protection, and Implementation of Draft Missouri River Main Stem System 2002-2003 Annual Operating Plan

Dear General Fastabend:

On behalf of the Lower Brule Sioux Tribe, we thank you for the opportunity to provide comments on the Draft Missouri River Main Stem System 2002-2003 Annual Operating Plan (2002-2003 AOP), which you provided to us last month. As you are aware, we are currently involved in litigation surrounding matters arising from the operation of the Missouri River Main Stem System, *Lower Brule Sioux Tribe and Crow Creek Sioux Tribe v. Rumsfeld, et al.*, Case No. 02-3014 (D.S.D), and we appreciate your providing us the draft AOP while we continue to work together towards resolving those matters.

The Lower Brule Sioux Tribe, however, is deeply concerned that the 2002-2003 AOP has been developed and will be implemented without appropriate acknowledgement of and regard for Department of Defense (DoD) Indian policies. We urge you, in the strongest terms possible, to review and, as appropriate, revise the draft 2002-2003 AOP to take into account these federal mandates and policies and ensure that their goals are met.

A2-749

## **U.S. Federal Government Obligations**

DoD has acknowledged that the central mission of the U.S. military forces is the defense of the United States – its people, its land, and its heritage. Protecting the cultural heritage of American Indians is also a fundamental part of that DoD mission. In testimony before the United States Senate Committee on Indian Affairs, senior DoD officials testified regarding DoD policy on American Indians and Alaska Natives. They described that policy as “designed to underscore the obligations derived from current laws, regulations, and executive orders governing our relationship with tribal governments.” Prepared Statement of Philip W. Grone, Principal Assistant Deputy Undersecretary of Defense (Installations and Environment) for the Oversight Hearing Before the Committee on Indian Affairs, United States Senate, June 4, 2002 (hereinafter “Grone Statement”) at 3.

Mr. Grone went on to express the goals of DoD policy:

We regard our policy as the cornerstone of DoD/tribal relations and the policy has resulted in significant improvements in the way we interact with tribal governments. The policy reaffirms DoD’s commitment to meet its Federal trust responsibility and other obligations to tribes and to consult with affected Federally recognized tribes on a Government-to-Government basis. The policy includes four guiding principles for our interactions with tribes: Trust Responsibilities; Government-to-Government Relations; Consultation; and Natural and Cultural Resources Protection.

*Id.*

These four guiding principles each address a different component of the complex relationship of the U.S. Government to federally recognized tribes as dependent domestic sovereign nations. The first, “Trust Responsibility,” arise out of treaties, federal laws, and executive pronouncements. The second, “Government-to-Government Relations,” reaffirms the practical aspects of working with federally recognized tribes in partnership. The third guiding principle, “Consultation,” “recognizes our obligation to meaningfully consult with tribal governments whenever tribal lands or tribal interests may be affect by DoD activities.” Grone Statement at 5. The fourth guiding principle, “Natural and Cultural Resources Protection,” underscores DoD’s intent to be mindful of the special significance of natural and cultural resources and traditional cultural properties in the management of lands under DoD control. *Id.*

We have reviewed the draft 2002-2003 AOP along side prior Annual Operating Plans. There have been amendments to the plan to address concerns other than those addressed in DoD policy on American Indians and Alaskan Natives. With the single exception of a reference to management of the Fort Randall Dam to preserve a tribal gravesite, the other amendments address other DoD plans arising from *other* legal obligations. The following are examples from the draft 2002-2003 AOP in which the plan addresses its other obligations:

Consideration has been given to all of the authorized project purposes, and to the needs of threatened and endangered (T&E) species, and relies on a wealth of operational experience.

AOP at 4.

This plan may require adjustments when; [sic] substantial departures from expected runoff occur, *to meet emergencies, or to meet the provisions of other applicable law, including the Endangered Species Act (ESA) and the conclusion of ongoing Corps and U.S. Fish and Wildlife Service (Service) consultation under Section 7 of that Act.*"

AOP at 1 (emphasized language added in draft 2002-2003 AOP from that appearing in 2001-2002 AOP).

These additional conservation measures may be necessary during drought to offset increased release requirements for water supply due to degradation (lowering) of the channel bed, and to serve navigation, while meeting the Corp's obligations, in consultation with the [Fish and Wildlife] Service, under the ESA.

AOP at 5.

There are no similar provisions of the draft 2002-2003 AOP that address any consultation with any tribe. While it is evident that the draft 2002-2003 AOP can accommodate other obligations under some federal statutes and can consult with other entities within the U.S. Government, the draft 2002-2003 AOP does not accommodate obligations arising under the U.S. federal Government's Trust Responsibilities, its obligations with respect to Government-to-Government Relations, its duty to engage in Consultation with federally recognized tribes, and statutory mandates with respect to Natural and Cultural Resources Protection.

This DoD policy is not merely precatory language. The Water Resources Development Act (WRDA) of 2000 not only authorized, but also appropriated funds to ensure that the Secretary of the Interior would "integrate civil works activities of the Department of the Army with activities of the Department of the Interior to avoid conflicts, duplications, of effort, or unanticipated adverse effects on Indian tribes." 33 U.S.C. § 2269(c)(2). This "Tribal Partnership Program" established under WRDA is precisely the type of vehicle that DoD requires to implement its American Indian and Alaska Native Policy.

#### **Implementation of U.S. Federal Government Obligations in the 2002-2003 AOP**

The draft 2002-2003 AOP, however, appears completely disconnected from the obligations of the U.S. Federal Government and DoD policy. Despite the clear enunciation of DoD policy this past summer, and the institution of suit against DoD arising out of the operation of the Missouri River Mainstem System precisely raising the question of U.S. Federal Government Obligations and policy towards the Lower Brule Sioux Tribe, the draft 2002-2003 AOP does not address, *at all*, either obligations or policy with respect to Lake Sharp, releases from Oahe Dam above Lake Sharp, or releases from Big Bend at the base of Lake Sharp.

As you are aware, on May 21, 2002, the Lower Brule Sioux Tribe and the Crow Creek Sioux Tribe filed suit seeking declaratory and injunctive relief to prevent the United States Army Corps of Engineers (Corps of Engineers) from exposing and damaging culturally sensitive Indian areas, destroying forage and game fish spawn, and hindering irrigation and drinking water access by releasing excess amounts of water from Lake Sharpe through the Big Bend Dam, a federally created and managed Missouri River reservoir located within the state of South Dakota, contrary to federal law. Although the preliminary injunction sought was denied on May 31, the case is still active. The tribes found this action necessary precisely because the Corps of Engineers' actions under the Annual Operating Plan was damaging the tribes and in violation of federal law.

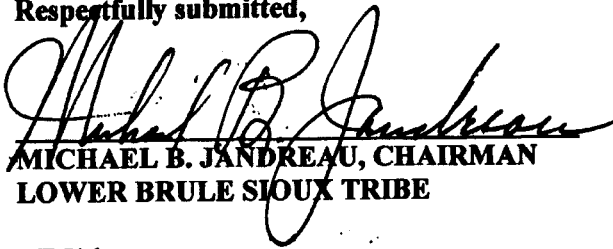
The suit did not directly attack the Annual Operating Plan. The suit does, however, underscore the fact that the Lower Brule Sioux Tribe and the Crow Creek Sioux Tribes are not receiving the benefits of DoD policy in the management of the Missouri River Basin.



The draft 2002-2003 AOP does assert that Lake Sharpe will fluctuate between 1420 and 1421 feet above mean sea level (msl). There is no assurance, however, that if events similar to those that occurred this past spring are repeated, or if other unusual situations arise, that the Corps of Engineers will abide by DoD policy with respect to actions that it may consider on the Missouri River.

We urge you, in the strongest possible terms, to review and, as appropriate, revise the draft 2002-2003 AOP to take into account these federal mandates and policies and ensure that their goals are met. Specifically, the Corps of Engineers must commit itself to abide by DoD Policy on American Indians and Alaska Natives by remaining faithful to its Trust Responsibilities, deal with tribes on a Government-to-Government Basis, provide Consultations when Corps actions would affect tribal interests, and take all necessary actions to uphold Natural and Cultural Resources Protection. This commitment should be articulated clearly within the 2002-2003 AOP. If it can be done to meet obligations under the Endangered Species Act, it can be done for the purposes of honoring obligations to sovereign Indian nations.

Respectfully submitted,



MICHAEL B. JANDREAU, CHAIRMAN  
LOWER BRULE SIOUX TRIBE

MBJ/slc

cc: file



*Missouri River Master Water Control Manual  
Review and Update FEIS*

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# Tribal Correspondence 2003



Charles W. Murphy  
Chairman



Tom Iron  
Vice Chairman

Sharon Two Bears  
Secretary

January 7, 2003

**AT LARGE**

Jesse Taken Alive

Reva Gates

Pat McLaughlin

Miles McAllister

Ron Brown Otter

Isaac Dog Eagle, Jr.

**DISTRICTS**

**Carol White Eagle**  
Cannonball District

**Verna Bailey**  
Fort Yates District

**Milo Cadotte**  
Wakpala District

**Frank White Bull**  
Kenel District

**Avis Little Eagle**  
Bear Soldier District

**Milton Brown Otter**  
Rock Creek District

**Allen Flying Bye**  
Little Eagle District

**Randal White Sr.**  
Porcupine District

Brigadier General David A. Fastabend  
Division Commander  
U.S. Army Corps of Engineers  
Missouri River Division  
12565 West Center Road  
Omaha, Nebraska 68144-3869

RE: Request for Meeting on Missouri River Flows and  
Status of Master Manual Review and Update

Dear General Fastabend:

I write to request a meeting with you to discuss issues that are of great concern to me. As you know, Missouri River water levels are as low as they have been since construction of Oahe Dam. The water intakes for the Fort Yates irrigation project are nearly inoperative. Our water treatment plant for our MR&I water system is affected. Our Tribe possesses extensive water rights to the Missouri River, and never relinquished title to the riverbed of the Missouri River.

The Corps of Engineers' Missouri River operations have significant adverse impacts on our Reservation. I was hoping for positive changes in the Master Manual Review process. I am concerned with the status of the Master Manual Review. I am especially concerned with the low water levels, caused by continued water releases at Gavins Point Dam, for navigation and endangered species downstream.

I would appreciate the opportunity to discuss the following issues with you:

- Operational changes under consideration to protect Indian Trust assets such as the Fort Yates irrigation intake and water treatment plant intake, as required by Executive Order 13175.

P.O. BOX D • FORT YATES, NORTH DAKOTA 58538  
PHONE: 701-854-7201 or 701-854-7202 • FAX 701-854-7299

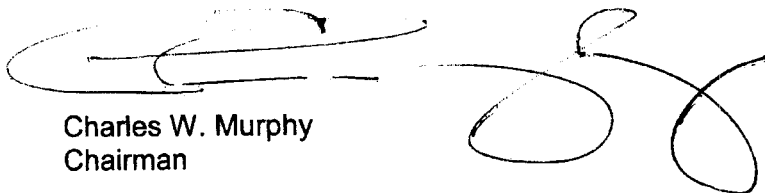
A2-757

- Operational changes under consideration to protect Native American human remains along the Missouri River, as required by the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001.
- Operational changes that are required for compliance with the National Historic Preservation Act (NHPA). 16 U.S.C. 470a. This is particularly important, because the Advisory Council on Historic Preservation terminated the previous Programmatic Agreement (PA) with the Corps, and now the Corps is pushing for a new PA. Yet there has been no demonstration of any actual improvement on the part of the Corps, with respect to compliance with the NHPA.
- Steps that are being taken by the Corps to address the disproportionate adverse impacts suffered by our Reservation, as required by Executive Order 12868 (Environmental Justice).
- Status of transfer of Corps of Engineers' lands within the Standing Rock Reservation, to the Tribe.

I invite you to discuss these issues at your earliest convenience; however, in the event you cannot meet at Standing Rock we would appreciate the opportunity to meet at a location of your choice. These matters are urgent, and I would appreciate your contacting my office to arrange a meeting.

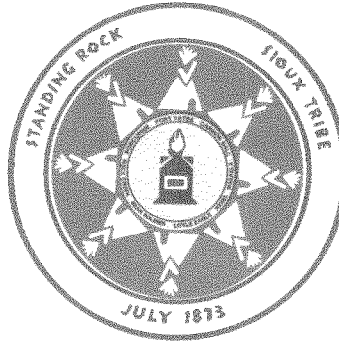
Sincerely,

STANDING ROCK SIOUX TRIBE



Charles W. Murphy  
Chairman

Charles W. Murphy  
Chairman



Tom Iron  
Vice Chairman

Sharon Two Bears  
Secretary

#### DISTRICTS

Carol White Eagle  
Cammonball District

Verna Bailey  
Fort Yates District

Milo Cadotte  
Wakpala District

Frank White Bull  
Kenel District

Avis Little Eagle  
Bear Soldier District

Milton Brown Otter  
Rock Creek District

Allen Flying Bye  
Little Eagle District

Randal White Sr.  
Porcupine District

#### AT LARGE

Jesse Taken Alive

Reva Gates

Pat McLaughlin

Miles McAllister

Ron Brown Otter

Isaac Dog Eagle, Jr.

February 10, 2003

Mr. Kurt F. Ubbelohde  
Colonel, Corps of Engineers  
District Engineer, Omaha District  
106 South 15<sup>th</sup> Street  
Omaha, Nebraska 68102-1618

Dear Colonel Ubbelohde:

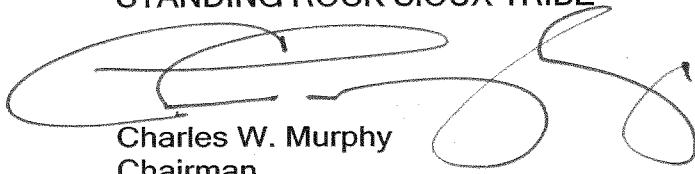
I am in receipt of a Proposed Agenda for a Cultural Resources Task Force Meeting to be held February 11-12, 2003 at Prairie Knights Casino. This proposed agenda contains discussion on the Programmatic Agreement (PA), specifically, "...the process that was followed to obtain participation of interested parties" and "Input/Recommendations".

I must be adamant in stating that this Cultural Resource Task Force meeting does not constitute "consultation" on a PA for the entire Missouri River. Especially since we have not seen the draft PA that has been developed, I am requesting a copy of the draft PA as soon as possible. Upon receiving the draft PA, we would "consult" prior to any decision is made in reference to the Master Manual.

I appreciate your immediate response. If you have any questions, please feel free to contact me at 701.854.7201.

Sincerely,

STANDING ROCK SIOUX TRIBE



Charles W. Murphy  
Chairman

A2-759



Charles W. Murphy  
Chairman

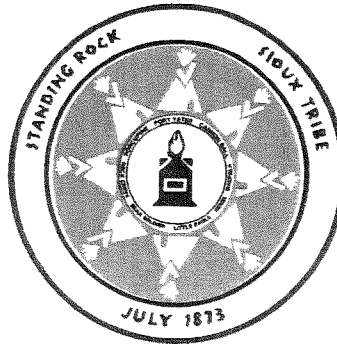
DISTRICT

Carl Whelan  
Vernon  
Mike Gaden  
Frank White  
Auntie  
Diane  
The  
Sue

**AT LARGE**

Jesse Taken Alive  
Reva Gates  
Mike Claymore  
Miles McAllister  
Ron Brown Otter  
Isaac Dog Eagle, Jr.

Tom Iron  
Vice Chairman



Sharon Two Bears  
Secretary

May 15, 2003

Colonel Kurt F. Ubbelohde, District Engineer  
U.S. Department of the Army  
Corps of Engineers, Omaha District  
106 South 15<sup>th</sup> Street  
Omaha, Nebraska 68102-1618

RE: So-Called Consultation by the Army Corps of Engineers

Dear Colonel Ubbelohde:

I write to respond to your letter to me dated April 18, 2003. In your letter, you requested a contact person with whom to conduct consultation, for a programmatic agreement for the operation and management of the Missouri River Main Stem Reservoir system. Is it your understanding that discussions with one person constitutes consultation with our entire nation under the National Historic Preservation Act (NHPA) and Executive Order 13175?

I am concerned with the approach being taken by the Corps of Engineers. The Corps has yet to propose any alternatives that provide for protection of cultural resources on the Standing Rock Reservation. There are no operational or management alternatives that comply with the requirements of the National Historic Preservation Act or Native American Graves Protection and Repatriation Act (NAGPRA).

The Corps of Engineers has developed management alternatives for the exclusive benefit of non-Indian water uses and threatened and endangered species. Indian reserved water rights are ignored. The existing alternatives are a blueprint for the continuing destruction of Native American human remains and cultural resources. It appears that the April 18<sup>th</sup> letter is designed to provide the appearance of consultation, while in actuality the Corps of Engineers prepares to finalize a preferred alternative that violates our water rights, and our rights under NAGPRA and NHPA.

A2-761



COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, USACE

May 15, 2003

Page Two

Meaningful consultation affords Indian Nations with the opportunity to meet with decision-makers prior to final agency decisions. The Standing Rock Sioux Tribe refuses to engage in mock consultation meetings between low-level Corps of Engineers outreach workers and the Mni Sose Inter-Tribal Water Rights Coalition, while the Corps negotiates water flow management regimes with the U.S. Fish and Wildlife Service and the states. That is not consultation.

I am prepared to meet with the decision-maker for a new preferred alternative. Accordingly, I ask you to provide me with the name of that person. I also ask that you articulate the status of the Missouri River Master Manual Review and Update. I refuse, however, to join discussions on a programmatic agreement that purports to legitimize the violations of our water rights and the desecration of our cultural resources along the Missouri River.

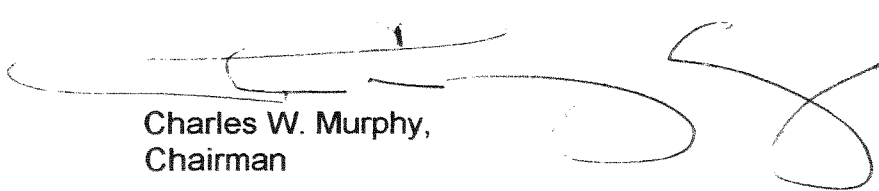
I do not take lightly the violations of our rights by the Corps of Engineers. I stand prepared to defend our rights, in court and before the Congress.

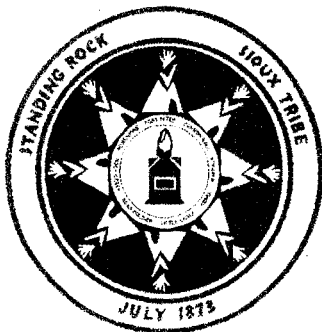
Our Tribe has many members serving in the armed forces. Yet, the April 18<sup>th</sup> letter is condescending in tone and substance. I resent this.

Nevertheless, when you explain who within the Department of the Army is making decisions on the preferred alternative, and the status of these decisions, I shall consider your request for consultation with our Tribe. In the meantime, it is premature to develop a programmatic agreement, until the Corps of Engineers proposes operational alternatives that protect our rights, rather than violate them.

Sincerely,

STANDING ROCK SIOUX TRIBE

  
Charles W. Murphy,  
Chairman



**T** RIBAL HISTORIC PRESERVATION OFFICE  
**S** TANDING ROCK SIOUX TRIBE

P.O. Box D  
Fort Yates, N. D. 58538  
Tel: (701) 854-2120  
(701) 854-7265  
(701) 854-3476  
Fax: (701) 854-2138

July 22, 2003

Colonel Kurt F. Ubbelohde  
U.S. Department of the Army  
Corps of Engineers, Omaha District  
106 South 15<sup>th</sup> Street  
Omaha, Nebraska 68102-1618

Dear Colonel Ubbelohde:

This letter outlines discussions between the Standing Rock Sioux Tribe and the Omaha District (District) and provides recommendation required for completion of the EIS for the Missouri River Master Manual. We appreciate your attempt to clarify your April 18, 2003 letter requesting a contact person to conduct official consultation, for a programmatic agreement to address adverse impacts in the Missouri River Master Manual Environmental Impact Statement.

**Part I. Responsibility within the Exterior Boundary of the Standing Rock Reservation:**

The Omaha District, and other federal entities proposing a federal undertaking, are required to consult on immediate/potential impacts that have or will have an adverse effect to **all resources** within the exterior boundary of the Standing Rock Reservation. Besides consultation on cultural resources or historic properties and environmental impacts, our office requires the District to consult on the following, including, but not limited to:

1. Clean Water Act;
2. Responsibilities in Section 110 of the National Historic Preservation Act;
3. U.S.G.S. Water Flows (Re: Title Vi P.L. 106-53);
4. Existing Valid Treaty in Title Vi - Master Manual EIS;
5. Biological Opinion of U.S. F&W.;
6. De-federalizing land, water rights, minerals (re: Missouri River);
7. Role of other Federal/Non-federal agency, (re; responsibilities);
8. Executive Order 13007-Access to Sacred Sites;
9. Identification of Traditional Cultural Properties;
10. Status of Inadvertent Discovery of Human Remains

**Memorandum of Agreement between North Dakota Intertribal**

Tim Mentz, Sr. ♦ Tribal Historic Preservation Officer ♦ e-mail: tmentz@westriv.com

Leo Red Horse, Jr. ♦ Program Assistant ♦ e-mail: lredhorse@westriv.com

Waste Win Young ♦ Tribal Historian ♦ e-mail: wwinyoung@westriv.com

Byron Olson ♦ Tribal Archaeologist ♦ e-mail: bolson@westriv.com

Mary Wilson ♦ Environmental Protection Specialist ♦ e-mail: mwilson@westriv.com

George Ironshield ♦ Repatriation Coordinator ♦ e-mail: gishield@westriv.com

A2-763

Page 2.  
Letter-Colonel Ubbelohde  
July 22, 2003

- Reinternment Committee and District implemented in South Dakota;
11. Landscape Survey of Taken Area lands;
  12. Lake Oahe Cultural Resource Management Plan;
  13. Mad Bear Settlement Agreement;
  14. Enforcement within Taken Area;
  15. Jurisdiction within Taken Area;
  16. Co-Management with Standing Rock Sioux Tribe;
  17. Proposed Cemeteries within Taken Area;
  18. Other external agreements required for management;

The THPO requires the Master Manual EIS to address the listed issues through consultation (Executive Order 13175) with the Tribal government of the Standing Rock Sioux Tribe. Again, the THPO will not consult for the Standing Rock Sioux Tribe. These areas must be reflective in the DEIS including the proposed programmatic agreement before the THPO would concur with your determination.

Other Federal Cooperating agencies:

Custer National Forest provides for management of federal minerals within the Sioux Ranger District in northwestern South Dakota. The annual spring run off empties into the Grand River, Moreau River and the Little Missouri River. Because uranium mining at numerous sites had never been reclaimed, radiation levels continue to elevate. This poses a serious threat to the water quality in the Grand River. What are you doing to address this serious concern to water quality in tributaries emptying into the Missouri River?

Part II. Signatories to Programmatic Agreement:

The THPO again acknowledges the right of the Preservation Officer to be a signatory to the PA completing the Section 106 process of the National Historic Preservation Act. We accept this responsibility outlined in your April 18, 2003 letter to Chairman Charles W. Murphy. The THPO cannot accept your interpretation of 36 CFR 800.2 (C) (2) (i) (A) only requiring the THPO to sign off. We would require the Chairman's signature for completing the Tribal consultation which complies with E.O. 13175. The Tribal Historic Preservation Officer signature will be required to complete a Section 106 determination by the District regarding the PA.

Page 3  
Letter-Colonel Ubbelohde  
July 22, 2003

This section Mr. Larry Janis cited to Chairman Murphy reads:

*“(A) Tribal Historic Preservation Officers. For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.”*

The regulations **do not provide** for the THPO to represent the tribe in consultation under E.O. 13175, or make decisions on behalf of the tribe, from consultation. What the District wants from the THPO has no legal standing. The THPO was certified (August 14, 1996) between the Secretary of Interior and the Standing Rock Sioux Tribe for the purposes of section 106 of the act. National Park Service provided a letter to all designated Federal Preservation Officers in the Nation on assumption of section 106 responsibilities. I will not provide a resolution to the District. I understand the District did not ask the SHPO's for documentation on establishment.

The meeting conducted by you and District personnel on July 14, 2003 on the programmatic agreement was questionable. It sets a dangerous precedence on requiring THPO's to provide documentation prior to initiating consultation. **I am requesting your draft PA.** Just because our office did not respond to your April 18, 2003 letter by providing the THPO resolution, you cannot withhold the draft PA from the THPO based on the lack of responding to your letter. This position will have far reaching effects to all tribes.

Also, your stated position on restricting participation of Chairman Murphy and Tribal Council members of the Standing Rock Sioux Tribe in the PA must be clarified. Please read EO 13175 again. The Tribal Historic Preservation Officer **cannot** consult on behalf of the Standing Rock Tribal Government on a government-to-government level. You can only achieve this process by consulting with the governing body of the Standing Rock Sioux Tribe. If this is still not your understanding, please provide your response again as stated at our meeting for a matter of record.

A2-765

I believe it was a deliberate set-up pitting the Chairman and Tribal Council members against the Tribal Historic Preservation Officer. I adamantly take exception to your skillful tack on creating conflict on signatory authority between

Page 4.  
Letter-Colonel Ubbelohde  
July 22, 2003

the Tribe and my office. Your actions are un-retractable and have created problems that never existed. This action has malicious intent and damaging to the extent that it has exposed your approach to getting the PA signed to complete the EIS process for the Missouri River Master Manual. The THPO will carefully consider your future actions to achieve signature on a final PA.


Conclusion:

The THPO requires a detailed response, from the District, to the letter dated May 15, 2003 from Chairman Charles W. Murphy. Also, the Omaha District, told the THPO and other individuals, that you would respond to questions outlined at the meeting from the THPO held at Prairie Knights Casino this past spring, regarding the PA. We have no indication you will address the questions you have on record. Part I provides some of these issues given at this previous meeting.

Our office looks forward to resolving these unfortunate understandings of the District. Should you, again assume these issues in Part I & II are resolved, your efforts to achieve a signature from the Tribal Historic Preservation Officer regarding the PA will only occur when all issues are resolved.

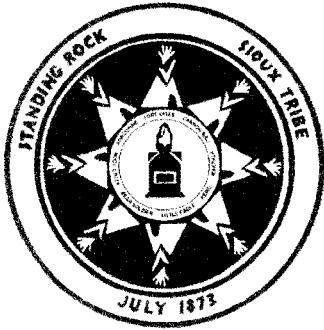
The District must address these concerns with the THPO regarding section 106 of the act. The District must initiate consultation with the THPO on section 106 and initiate consultation with the tribe on their draft Programmatic Agreement and their Cultural Resource Management Plan (CRMP) within the Standing Rock Reservation boundaries.

Sincerely,



Tim Mentz Sr.  
Tribal Historic Preservation Officer  
Standing Rock Sioux Tribe

- c.c- Chairman Charles W. Murphy
- Advisory Council Historic Preservation
  - Federal Preservation Officer-ACOE
  - Tribes-Missouri River Basin



**T** RIBAL HISTORIC PRESERVATION OFFICE  
**S** TANDING ROCK SIOUX TRIBE

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August 29, 2003

Colonel Kurt F. Ubbelohde  
U.S. Department of the Army  
Corps of Engineers, Omaha District  
106 South 15<sup>th</sup> Street  
Omaha, Nebraska 68102-1618

Dear Colonel:

The Tribal Historic Preservation Officer for the Standing Rock Sioux Tribe sent a letter dated July 22, 2003 outlining THPO concerns. Although your office did not respond to the concerns they still remain as unresolved.

This letter also addresses the comment request from the ACOE on the proposed draft of the Programmatic Agreement for the Missouri River Master Manual due August 29, 2003. We would provide comments but your staff will not recognize our office authority and would not allow me to provide participation in your first official consultation on the PA. This raises question to the THPO submitting comments to the draft PA and if they will be recognized.

I am requesting consultation with our office on the proposed PA per 36 CFR 800.3 (c) (1). The ACOE is required to consult with a tribe who has assumed SHPO responsibilities. Your lack of recognizing the Standing Rock THPO needs an explanation for not initiating consultation to resolve an adverse effect of management of the Missouri River through the Master Manual EIS.

Until the ACOE initiates consultation and recognizes our office responsibilities, we will await your response. We request your interpretation on consultation with Tribal Council per E.O. 13175 and a THPO under 36 CFR 800?

Sincerely,

Tim Mentz Sr.

Tribal Historic Preservation Officer

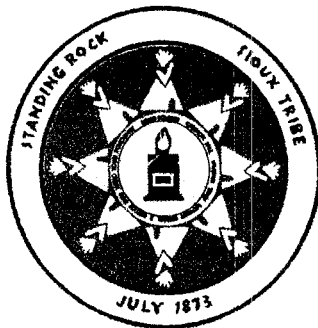
**c.c.- Chairman Murphy**

Tim Mentz, Sr. ♦ Tribal Historic Preservation Officer ♦ e-mail: tmentz@westriv.com  
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A2-767



Charles W. Murphy  
Chairman



Tom Iron  
Vice Chairman

Sharon Two Bears  
Secretary

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Running Antelope District

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**AT LARGE**

Jesse Taken White

Mike Claymore

Archie Fool Bear

Archie Lopez

Archie White

Jesse McLaughlin

November 19, 2003

Kurt F. Ubbelohde  
Colonel, Corps of Engineers  
Department of the Army  
106 South 15<sup>th</sup> Street  
Omaha, NE 68102-1618

Dear Colonel:

The Standing Rock Sioux Tribe is very concern how the Army Corps of Engineers is conducting consultation on the Cultural Resource Management Plan, Programmatic Agreement and the Mad Bear Settlement Agreement.

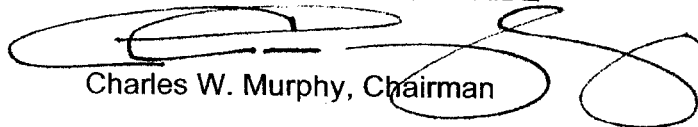
The Standing Rock Tribal Council request your attendance to discuss:

1. The management of the Missouri River Master Manual EIS and the dangerous low level of water that will effect our reservation water source;
2. Consultation on the current three documentation listed, including, but not limited to, re-survey within Standing Rock boundaries and site evaluation;
3. Consultation on Memorandum for Commanders, Major Subordinate Commands, and District Commands dated October 2, 2002, as it relates to the Lake Oahe Cultural Resource Management Plan and the Programmatic Agreement.

We require this consultation prior to any future development of a final PA or a final CRMP. Mr. Tim Mentz will address this further at your scheduled meeting at United Tribes. If this is not acceptable, Standing Rock will take appropriate legal action to protect the interest of the Tribe. Please contact Mr. Mentz at 701-854-2120 to make arrangements.

Sincerely,

STANDING ROCK SIOUX TRIBE

  
Charles W. Murphy, Chairman

A2-769



