

Appendix H – Indian Trust Assets

Introduction

This appendix contains the data and analyses used to determine whether alternatives for the Lower Yellowstone Intake Project would impact Indian trust assets (ITA). ITAs are defined as “...legal interests in property held in trust by the United States for Indian tribes or individuals” (Reclamation, 1993).

The relationship between the Federal government and tribes is defined in the U.S. Constitution. Article 1, Section 8 gives Congress the authority “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Until 1871, this relationship with individual tribes was enumerated through treaties, from which the concept of the “trust relationship” originated. According to the Supreme Court decision in *Cherokee Nation v. Georgia* (1831), Indian tribes are considered to constitute “domestic, dependent nations” whose “relationship to the United States resembles that of a ward to his guardian.” This decision established the doctrine of federal trusteeship – the trust relationship – in Indian affairs.

All federal agencies, including Reclamation, have a government-to-government relationship with tribes. Federally recognized tribes are to be respected as sovereign governments and federal agencies have a trust responsibility to respect this sovereignty by protecting and maintaining rights reserved by or granted to tribes or individual Indians by treaties, federal court decisions, statutes, and executive orders. The sovereignty of tribes and this trust relationship have been affirmed through treaties, court decisions, legislation, regulations, and policies. The result is that federal agencies are to assess the impacts of their activities on trust assets, to protect and conserve ITAs to the extent possible. This appendix provides the framework for the identification of ITAs that may possibly be affected by the proposed alternatives. It does not attempt to define, regulate, or quantify ITAs or any rights that tribes are entitled to by treaty or law.

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Examples of possible trust assets include “lands, minerals, hunting and fishing rights, and water rights” (Reclamation, 1993). To this extent, this definition of ITAs parallels that of “trust resources” in 25 CFR Part 1000.352:

- (a) Trust resources include property and interests in property:
 - (1) That are held in trust by the United States for the benefit of a tribe or individual Indians; or
 - (2) That are subject to restrictions upon alienation.
- (b) Trust assets include:

- (1) Other assets, trust revenue, royalties, or rental, including natural resources, land, water, minerals, funds, property, assets, or claims, and any intangible right or interest in any of the foregoing;
- (2) Any other property, asset, or interest therein, or treaty right for which the United States is charged with a trust responsibility. For example, water rights and off-reservation hunting and/or fishing rights.

Reclamation developed its ITA policy (Reclamation, 1993) in response to the statement by former President Bush dated June 14, 1991, affirming the government-to-government relationship between federal agencies and tribal governments. Former President Clinton reaffirmed this policy in a memorandum issued on April 29, 1994. Both were incorporated by the Department of the Interior in “Departmental Responsibilities for Indian Trust Resources” (512 Department of the Interior Manual, Chapter 2):

It is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety.

The Department of the Interior Manual and Reclamation’s ITA policy require that potential impacts to ITAs need to be identified, considered, and addressed when planning and implementing federal actions. Effects must be identified and addressed in planning and decision documents, especially those prepared in association with the National Environmental Policy Act (NEPA) process. Reclamation’s (draft) NEPA Handbook (Reclamation 2000) specifies that all NEPA documents are to address ITAs and whether the proposed action(s) would have an impact on any such asset(s).

Methods

Consultation with Tribes to Identify ITAs

Tribes were invited to consult throughout preparation of the EA. In October 2008 Reclamation sent letters to 25 tribes in the Upper Missouri River basins. Follow-up telephone calls were made to each tribe. The tribes identified in that plan are listed in table H.1.

The plan identified 25 tribes in the Missouri River Basin (Figure H.1). Thirteen of the Missouri River Basin tribes are located directly on the Missouri River, while others are scattered throughout the rest of the basin. All of these tribes could directly or indirectly have historic ties to the Project area (Table H.1).

The tribes were contacted in writing, followed by telephone calls. Reclamation requested that the tribes identify any ITAs that could be affected by the Project alternatives and invited them to meet and consult on impacts to any potentially affected ITAs. None of the tribes expressed interest in continuing direct consultations. Some tribes stated they were not interested while others wanted to be kept informed and possibly comment later. Still others did not respond. All

of these tribes were sent copies of the scoping package and public notice during the public comment period (see Chapter 5 distribution list).

Table H.1 – Tribes Located within the Area of Potential Effect

Figure H.1 Location Number	Missouri River Tribes
4	Assiniboine and Sioux Tribes of Fort Peck
13	Cheyenne River Sioux Tribe
14	Crow Creek Sioux Tribe
24	Iowa Tribe of Kansas
15	Lower Brule Sioux Tribe
23	Omaha Tribe
20	Ponca Tribe
25	Sac and Fox Nation
21	Santee Sioux Nation
24	Standing Rock Sioux Tribe
8	Three Affiliated Tribes (Mandan, Hidatsa, and Arikara)
22	Winnebago Tribe
18	Yankton Sioux
Figure H.1 Location Number	Missouri Basin Tribes
1	Blackfeet Tribe
2	Chippewa Cree Tribe, Rocky Boy Reservation
5	Crow Tribe
7	Eastern Shoshone Tribe
19	Flandreau Santee Sioux Tribe
3	Fort Belknap Assiniboine and Gros Ventre Tribes
26	Kickapoo Tribe
7	Northern Arapaho Tribe
6	Northern Cheyenne Tribe
16	Oglala Sioux Tribe
27	Prairie Bend of Potawatami Nation
17	Rosebud Sioux Tribe

Treaty Research

The Lower Yellowstone Intake is located in Section 36, Township 18 North, Range 56 East of the Montana Meridian. Reclamation purchased the lands from the state of Montana on April 17, 1908. Section 36 was provided to the State of Montana as a school section under its charter of statehood in November 8, 1889.

Historically, many Indian tribes occupied this area for hunting, fishing, gathering and other purposes. These included but are not limited to the Assiniboine, Arapaho, Arikara, Blackfeet, Cheyenne, Crow, Gros Ventre, Mandan, and Sioux or Lakota Nation.

Reclamation reviewed the treaties with the Missouri River Basin tribes to determine if any ITAs were specified in them (Royce, 1899). The United States entered into at least 54 treaties with these tribes, many of which applied to multiple tribes (Table H.2). Frequently treaties involved land cessions in which the tribes retained certain rights of access, most often for hunting, fishing, and gathering on the ceded lands. U.S. Supreme Court decisions have defined other retained rights not specified in the treaties. These decisions are based on the “reserved rights” doctrine:

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“...the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted” (United States v. Winans 1905).

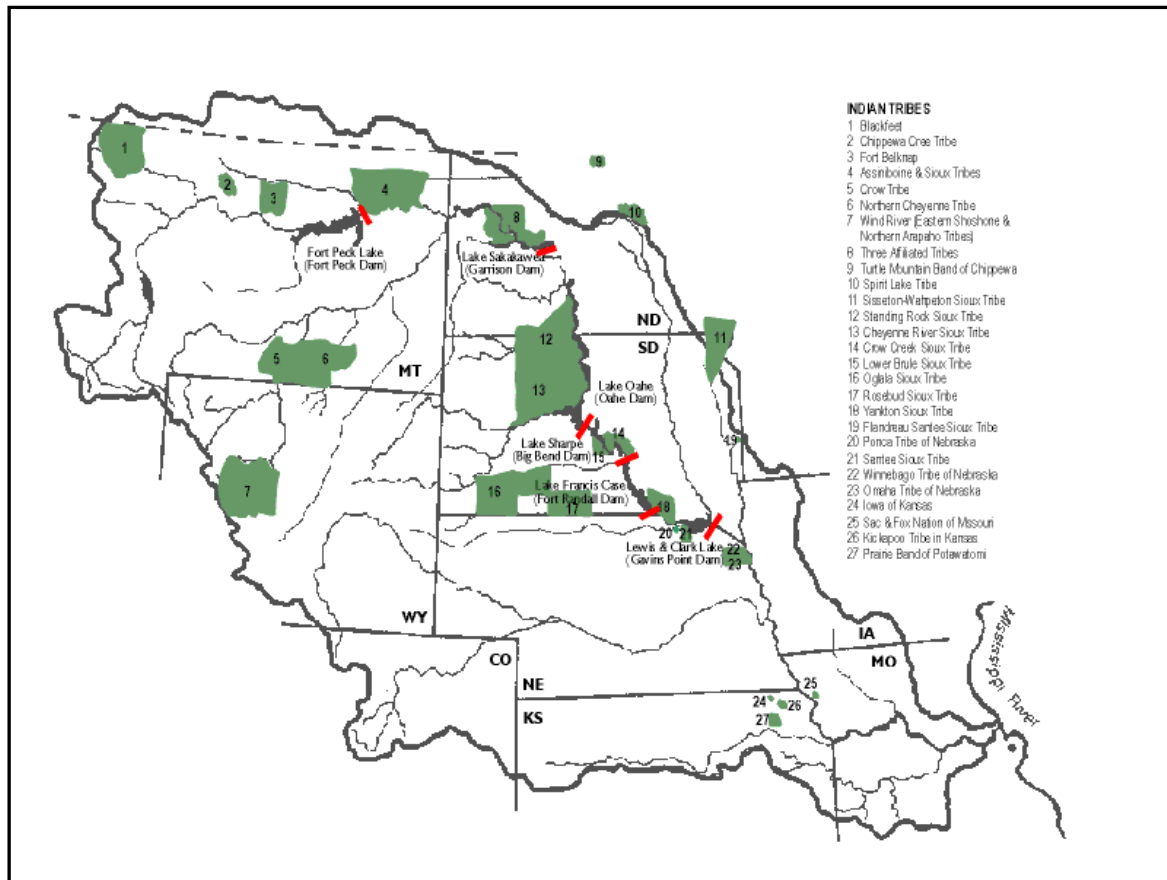


Figure H.1 – Map of Missouri River Basin Indian Tribes.

The following discussion addresses potential treaty rights of tribes in this area. The sources used were Indian Land Cessions in the United States by Charles C. Royce; Master Title plat files, Montana Area Office, Reclamation; and the U.S. Indian Claims Commission website, <http://digital.library.okstate.edu/icc/index.html>. In addition Joel Ames, Native American Coordinator, Omaha Division, Corp and Brenda Schilf, Bureau of Indian Affairs Realty Specialist provided information.

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The Fort Laramie Treaty of 1851 included the area of the Lower Yellowstone in the territories boundaries for several tribes:

- Boundaries of the Gros Ventre, Mandan, and Arikara nations defined as follows: Commencing at the mouth of the Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of the Powder River, in a southeasterly direction, to the headwater of the Little Missouri River; thence along the Black Hills to the head of Heart River; and thence down Heart River to the place of beginning.
- Boundaries of the Assiniboine: Commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head waters of Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of the Powder River; and thence down the Yellowstone River to the place of beginning.
- The Assiniboine ceded this country by treaty in 1866. This treaty was never ratified, but their acceptance of a home on the reserve for the Blackfeet, Blood, Gros Ventre, Piegan, and River Crow, established April 15, 1874, relinquished it in all practicality.

The Fort Laramie Treaty of 1868 redefined the boundaries of the Sioux Nation and Arapahoe Tribe to assure the undisturbed use and occupation of certain lands. No changes were made in the boundaries of lands for the Gros Ventre, Mandan, Arikara, or Assiniboine as noted in the 1851 Ft. Laramie Treaty.

The Executive Order of April 12, 1870, set aside a reservation at Fort Berthold, Dakota Territory, and redefined the Fort Berthold Reservation as described in the 1851 Fort Laramie Treaty by ceding lands south and east of a line extending from the point where the Little Powder River unites with Powder River to a point on the Missouri River four miles below the Indian Village of Berthold.

Executive Orders on July 13, 1880, ceded lands around the intake that were formerly reserved to the Arikara, Mandan and Gros Ventre.

An act of Congress on May 1, 1888, established the Fort Peck and Fort Belknap Reservations for the Gros Ventre and Assiniboine as currently defined and ceded all other lands to the United States.

The Indian Claims Commission addressed tribal land claims during its tenure from 1946 to 1978. Unresolved claims were transferred to the U. S. Court of Claims. There are no known pending cases before the U. S. Court of Claims.

A review of the master title plat files at the Montana Area Office indicates that lands within two miles of the Intake are currently either privately owned or within the jurisdiction of Reclamation.

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There are no vacant and unreserved public domain lands or individual Turtle Mountain Chippewa allotments within two miles of the Intake.

Reclamation has consulted with the Rocky Mountain Region of the Bureau of Indian Affairs (BIA) and the Omaha District of the U.S. Army Corps of Engineers (Corps), as well as Reclamation cultural resource specialists. These sources were not aware of any quantified treaty rights in the area of the Intake.

Results

Trust Lands

Trust lands are lands set aside for Indians with “...the United States holding naked legal title and the Indians enjoying the beneficial interest” (Canby, 1991). The Bureau of Indian Affairs land database was reviewed, and the tribes listed in Table H.1 were contacted to determine if any trust lands were within the areas of potential effect for the Project alternatives. No trust lands were identified in the Intake Project area.

Table H.2 – Treaties of Missouri River Basin Tribes and Retained Rights (Royce, 1899)

Tribe	Treaty	Retained Rights
Assiniboine and Sioux Tribes of Fort Peck	1851 Fort Laramie Treaty 1868 Treaty with Sioux Brule/Fort Laramie Treaty 1873 Executive Order established the Fort Peck Reservation 1889 Congress established boundaries	1851-hunting and fishing 1868-hunting
Blackfeet Tribe	1855 Treaty with Blackfeet Sioux	1855-hunting, fishing, gathering, and grazing
Cheyenne River Sioux Tribe	1851 Fort Laramie Treaty 1868 Treaty with Sioux Brule/Fort Laramie Treaty 1889 Congressional Act; Great Sioux Settlement	1851-hunting and fishing 1868-hunting 1889-irrigation
Chippewa Cree Tribe, Rocky Boy Reservation	1825 Treaty with the Sioux 1916 Executive Order establishing the Reservation boundary	1825-reciprocal hunting
Crow Creek Sioux Tribe	1825 Treaty with the Sioux 1851 Fort Laramie Treaty 1863 Executive Order establishing the Reservation boundary 1868 Treaty with Sioux Brule/Fort Laramie Treaty 1889 Congressional Act; Great Sioux Settlement	1825-reciprocal hunting 1851-hunting and fishing 1868-hunting 1889-irrigation
Crow Tribe	1826 Treaty 1851 Fort Laramie Treaty	1851-hunting and fishing
Eastern Shoshone Tribe	1863 and 1868 Fort Bridger Treaty 1872 Brunot Agreement 1898 and 1904 McLaughlin Agreement	

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Tribe	Treaty	Retained Rights
Flandreau Santee Sioux Tribe	1851 Fort Laramie Treaty 1858 Treaty with the Sioux 1863 Executive Order 1868 Treaty with Sioux Brule/Fort Laramie Treaty	1851-hunting and fishing 1868-hunting
Fort Belknap Assiniboine and Gros Ventre Tribes	1851 Fort Laramie Treaty 1855 Blackfeet Treaty 1889 Congressional Act; Great Sioux Settlement	1851-hunting and fishing 1855-hunting, fishing, gathering, and grazing 1889-irrigation
Iowa Tribe of Kansas	1825 Treaty with the Sioux 1830 Treaty with Sauk, Foxes	1825-reciprocal hunting
Kickapoo Tribe	1819 Treaty with the Kickapoo 1832 Treaty with the Kickapoo 1854 Treaty with the Kickapoo 1864 Amendment to Treaty with the Kickapoo	
Lower Brule Sioux Tribe	1851 Fort Laramie Treaty 1865 Treaty with Sioux Lower Brule Band 1868 Treaty with Sioux Brule/Fort Laramie Treaty 1889 Congressional Act; Great Sioux Settlement	1851-hunting and fishing 1868-hunting 1889-irrigation
Northern Arapaho Business Council	1863 and 1868 Fort Bridger Treaty 1872 Brunot Agreement 1898 and 1904 McLaughlin Agreement	
Northern Cheyenne Tribe	1851 Fort Laramie Treaty 1868 Treaty with Sioux Brule etc/Fort Laramie Treaty 1884 Executive Order 1889 Congressional Act; Great Sioux Settlement	1851-hunting and fishing 1868-hunting 1889-irrigation
Oglala Sioux Tribe	1851 Fort Laramie Treaty 1868 Treaty with Sioux Brule etc/Fort Laramie Treaty 1889 Congressional Act; Great Sioux Settlement	1851-hunting and fishing 1868-hunting 1889-irrigation
Omaha Tribe	1830 Treaty with Sauk, Foxes 1836 Treaty with the Oto etc. 1854 Treaty with the Omaha	
Ponca Tribe	1817 Treaty with the Ponca 1825 Treaty with the Sioux 1858 Treaty with the Ponca 1865 Treaty with the Ponca 1868 Treaty with Sioux Brule/Fort Laramie Treaty 1881 Act of Congress	1825-reciprocal hunting 1868-hunting
Prairie Bend of Potawatami Nation	1846 Treaty with the Potawatami Nation	
Rosebud Sioux Tribe	1851 Fort Laramie Treaty 1868 Treaty with Sioux BruleFort Laramie Treaty 1889 Congressional Act; Great Sioux Settlement	1851-hunting and fishing 1868-hunting 1889-irrigation
Sac and Fox Nation	1825 Treaty with the Sioux, 1830 Treaty with Sauk, Foxes. 1832 Treaty of Fort Armstrong	1825-reciprocal hunting

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Tribe	Treaty	Retained Rights
Santee Sioux Nation	1825 Treaty with the Sioux 1830 Treaty with Sauk, Foxes 1836 Treaty with the Oto 1851 Fort Laramie Treaty 1867 Treaty with the Sioux Sisseton and Wahpeton Bands 1868 Treaty with Sioux Brule/Fort Laramie Treaty	1825-reciprocal hunting 1851-hunting and fishing 1868-hunting
Standing Rock Sioux Tribe	1851 Fort Laramie Treaty 1868 Treaty with Sioux Brule etc/Fort Laramie Treaty 1882 Agreement with Sioux of various tribes (not ratified) 1889 Congressional Act; Great Sioux Settlement	1851-hunting and fishing 1868-hunting 1889-irrigation
Three Affiliated Tribes (Mandan, Hidatsa, and Arikara)	1851 Fort Laramie Treaty 1866 Fort Berthold Agreement (not ratified) 1868 Treaty with Sioux Brule/Fort Laramie Treaty 1870 Executive Order 1880 Executive Order	1851-hunting and fishing 1868-hunting
Winnebago Tribe	1825 Treaty with the Sioux 1830 Treaty with Sauk, Foxes 1832 Treaty with Winnebago 1837 Treaty with Winnebago 1846 Treaty with Winnebago 1855 Treaty with Winnebago 1859 Treaty with Winnebago 1865 Treaty with Winnebago	1825-reciprocal hunting
Yankton Sioux	1815 Treaty with Yankton Sioux 1825 Treaty with the Teton etc. 1830 Treaty with Sauk, Foxes 1836 Treaty with the Oto 1837 Treaty with Yankton Sioux 1858 Treaty with Yankton Sioux 1865 Treaty with the Sioux Yanktonai 1868 Treaty with Sioux Brule/Fort 1894 Act of Congress reduced reservation	

Hunting, Fishing, and Gathering Rights

According to Reclamation’s (1993) ITA policy, hunting and fishing rights and, by extension, gathering rights may qualify as ITAs. This is because in many treaties tribes retained the right to continue hunting, fishing, and gathering on ceded lands (Table H.2). However, no court has ruled on whether these activities collectively constitute ITAs although the U.S. Supreme Court ruled in *Minnesota v. Mille Lacs* (1999) that hunting, fishing, and gathering were usufructuary rights.

Usufructuary rights are those rights to obtain food, water, and other necessities on ceded lands, which include the right to use the ceded property to hunt, fish and gather on the land.

Indian Water Rights

The United States government has recognized that tribes in the western United States (west of the Mississippi) may hold rights to water in streams running through or alongside the boundaries of their reservations. The basis for Indian water rights stems from the U. S. Supreme Court decision *Winters v. United States* (1908), which enunciated the Winters Doctrine. According to the Winters Doctrine, implicit in the establishment of an Indian reservation was a reservation of sufficient water to fulfill the purposes for which the reservation was created, with the priority date being the date the reservation was established. As such, Indian water rights for both surface water and groundwater, when quantified, constitute an ITA.

When a reservation is established with expressed or implicit purposes beyond agriculture, such as to preserve fishing, then water may also be reserved in quantities to sustain use. The U.S. Supreme Court upheld this concept in *Arizona v. California* (1963). The Court held that tribes need not confine the actual use of water to agricultural pursuits, regardless of the wording in the document establishing the reservation. However, the amount of water quantified was still determined by the amount of water necessary to irrigate the “practicably irrigable acreage” on a reservation. The Court also held that the water allocated should be sufficient to meet both present and future needs of the reservation to assure the viability of the reservation as a homeland. Case law also supports the premise that Indian reserved water rights are not lost through non-use.

The Winters Doctrine will apply to any Indian water rights in Montana or along the Missouri River.

Surface Water

The Corps is the federal agency responsible for operations of the Missouri River. The Corps has recognized that certain Missouri River Basin tribes are entitled to water rights in streams running through and along their reservations under the Winters Doctrine. Several Missouri River Basin tribes have quantified or are in the process of quantifying their water rights. Currently, the only tribal reserved water rights that have been legally quantified are:

- State of Wyoming settlement with tribes of the Wind River Reservation (adjudicated under the McCarran Amendment)
- Compact between the state of Montana and the tribes of the Fort Peck Reservation (awaiting congressional approval)
- Compact between the state of Montana and the tribes of the Fort Belknap Reservation (ratified by the state legislature)
- Compact between the state of Montana and the Crow Tribe (Crow Tribe Water Rights Settlement Act of 2010 [PL 111-291])
- Compact between the state of Montana and the tribes of the Rocky Boys Reservation (Chippewa Cree Tribe of the Rocky Boy’s Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999 [PL 106-163])
- Compact between the State of Montana and the Northern Cheyenne Tribe (The Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 [P.L. 102-374])

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The Lower Yellowstone Intake is a “run of the river” diversion structure and will continue to function in this capacity upon completion of the project. There will be no change in the amount of water diverted, the time of diversion, the priority date, or the purpose. The only change may be the point of diversion. None of the alternatives currently under consideration are anticipated to have an adverse impact on Indian Treaty rights.

The diversion is operated and maintained by the Board of Control under contract with Reclamation. It is anticipated that this arrangement would continue upon completion of the project.

Groundwater

Groundwater also can constitute an ITA as a water right. Montana regulates and permits groundwater withdrawals. It is not anticipated that this project will affect groundwater resources.

Impacts to Indian Trust Assets

The following discussion addresses the potential impacts of the proposed alternatives on ITAs. The alternatives potentially could affect three different categories of ITAs, if any are identified: 1) trust lands, 2) hunting, fishing, and gathering rights, and 3) Indian water rights. The potential impacts are summarized in Table H.3.

Table H.3 – Summary of the Consequences of No Action and Potential Impacts to ITAs by Action Alternatives

Indian Trust Assets	No Action Alternative	Action Alternatives
Trust Lands – none identified	No consequences	No effect
Hunting, Fishing & Gathering Rights – none identified	The existing Intake Diversion Dam is a partial barrier to some fish species and a total barrier to others, like the pallid sturgeon.	No effect; all action alternatives would improve pallid sturgeon fisheries in the Yellowstone River to varying degrees.
Indian Water Rights – surface water	No consequences	Undetermined Most tribes within the Missouri River Basin have not quantified these rights; those that have will not receive any water directly from the Lower Yellowstone.
Indian Water Rights - groundwater	No consequences	No effect

Trust Lands

Trust lands are lands set aside for Indians to which the United States holds legal title and the Indians receive the beneficial interest. A review of the Bureau of Indian Affairs land database for the tribes listed in Table H.1 indicates that no trust lands are within the area of potential effects for the proposed alternatives.

No Action Alternative There are no trust lands in the area of potential effects.

Bypass Channel and Rock Ramp Alternatives Neither of the action alternatives would affect trust lands.

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Hunting, Fishing, and Gathering Rights

Many of the treaties with the tribes in the Missouri River basin provided for continued hunting, fishing, and gathering on ceded lands. If future federal court decisions affirm the hunting, fishing, and gathering rights of the tribes, those rights may need to be given consideration.

No Action Alternative The existing Intake Diversion Dam is a partial barrier to some fish species and a total barrier to others, like the pallid sturgeon. Because no fishing rights have been identified in the area of potential effects, there would be no consequences to ITAs.

Bypass Channel and Rock Ramp Alternatives Both of the proposed action alternatives would improve pallid sturgeon fisheries in the lower Yellowstone River to varying degrees. These improvements are discussed in the aquatic resources impacts section of chapter four.

Indian Water Rights

The basis for Indian water rights in the western United States stems from the U. S. Supreme Court decision in *Winters v. United States* (1908), commonly known as the Winters Doctrine. According to the Winters Doctrine, the establishment of an Indian reservation implied that sufficient water was reserved to fulfill purposes for which the reservation was created, with the priority date being the date the reservation was established. As such, Indian water rights to both surface water and groundwater constitute an ITA.

No Action Alternative The No Action Alternative would not have consequences for surface water or groundwater rights.

Bypass Channel and Rock Ramp Alternatives Surface water rights have been quantified for the two tribes upstream of Intake, Montana. The Northern Cheyenne Water Rights Compact with the State of Montana was ratified by Congress in September 1992. The Crow Water Rights Compact with the state of Montana was ratified by the state in June 1999. The Crow Settlement Act was introduced into Congress and signed into law in 2010. All of these water rights have an earlier priority date than the water rights diverted by the Lower Yellowstone Project. The proposed Intake Project would not affect Indian water rights.