

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 TRANSCRIPT OF  
11 PUBLIC HEARING  
12

13  
14  
15  
16  
17 Taken At  
18 Prairie Knights Casino  
19 Fort Yates, North Dakota  
20 January 30, 2002

21  
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

8 -----

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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.)

4 -----

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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 4th day of  
February, 2002.

---

Denise M. Andahl  
Registered Professional Reporter

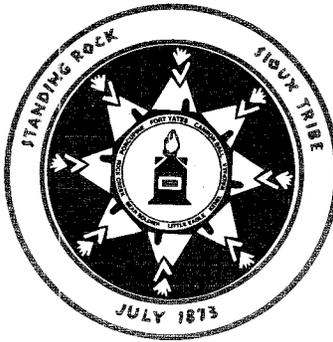
**Public Hearing on the Master Manual  
Standing Rock Sioux Tribe**

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

**Table of Contents**

- 1. Remarks of Charles W. Murphy, Chairman**
- 2. Standing Rock Sioux Tribe - Resolution 106-01**
- 3. Letter to Honorable Gale A Norton, Secretary  
U.S. Department of Interior**
- 4. Letter to Joseph W. Westphal, Acting Secretary  
U.S. Department of Army**
- 5. Treaty of 1868**

**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 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.*

\*\*\*

*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 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

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,

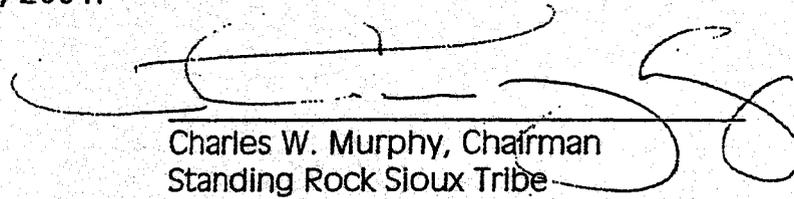
United States Supreme Court, when engaged in a Whiggish course, to subject the least powerful to the will of the States in matters involving property rights as evidenced by the *Dred Scott*, the *O'Connor Ghost* and comparable decisions of expediency.

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.

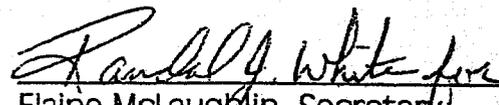
### CERTIFICATION

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

Page Two

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.

THE HONORABLE GALE A. NORTON, SECRETARY  
October 30, 2001  
Page Three

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.

---

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

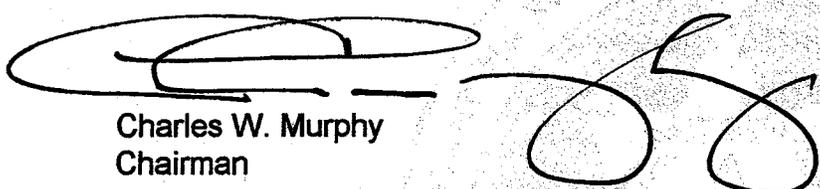
THE HONORABLE GALE A. NORTON, SECRETARY  
October 30, 2001  
Page Four

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.*

\*\*\*

*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,

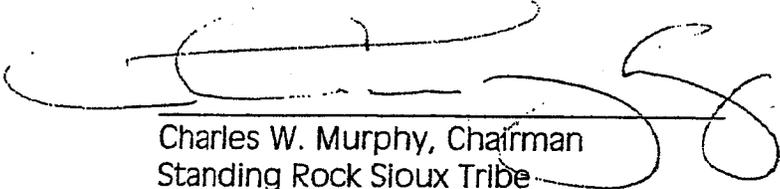
United States Supreme Court, when engaged in a Whiggish course, to subject the least powerful to the will of the States in matters involving property rights as evidenced by the *Dred Scott*, the *O'Connor Ghost* and comparable decisions of expediency.

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

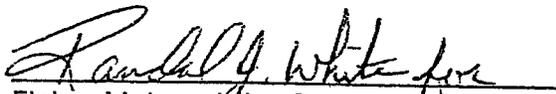
We, the undersigned, Chairman and Secretary of the Tribal Council of the Standing Rock Sioux Tribe, hereby certify that the Tribal Council is composed of (17) members, of whom 12 constituting a quorum, were present at a meeting thereof, duly and regularly, called, noticed, convened and held on the 5<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

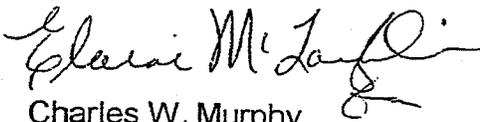
The drafts of the environmental impact statement prepared by the Corps of Engineers have failed completely to address the economic impact of the Master Manual Update on the Standing Rock Sioux Tribe. No consideration has been given to economic conditions on the Reservation and the impact that Master 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.

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 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.

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. 6, 98.  
Executed by the above on this date.  
All of the Indians are Ogishlaha excepting Thunder Man and Thunder Flying Running, who are Brude.

Wm. McE. Dye,  
Major Fourth Infantry, and Brevet Colonel  
U. S. Army, Commanding.

Attest:

Jan. G. O'Connor,  
Nicholas J. J. interpreter.  
Francis La Frenchie, interpreter.  
Saml. D. Hinman, 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.

Ok-ha-lay-ye, his x mark, The [seal.]  
Mam-ha-ye, his x mark, The [seal.]  
Me-to-ye-ye-ye, his x mark, [seal.]  
Tye-to-ye-ye, his x mark, [seal.]  
Kam-ye-ye, his x mark, [seal.]  
Kam-ye-ye, his x mark, [seal.]  
A-ki-ye-ye, his x mark, [seal.]  
Long Soldier, [seal.]  
Wah-ye-ye, his x mark, [seal.]  
One who Shoots Walking, [seal.]  
Mam-ye, his x mark, [seal.]  
Kam-ye-ye, his x mark, [seal.]  
Crow, [seal.]  
Hem-on, his x mark, from Horn, [seal.]  
Child Soldier, [seal.]

Attest:  
Jan. G. O'Connor,  
Nicholas J. J. interpreter.  
Francis La Frenchie, interpreter.  
Saml. D. Hinman, missionary among the Indians.

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.

Yan-to-pe-ta, his x mark, Fire Hand, [seal.]  
Yan-to-pe-ta, his x mark, The One who Kills Eagle, [seal.]  
Sho-to, his x mark, Smoke, [seal.]  
Wah-ye-ye, his x mark, Walking Eagle, [seal.]  
Wah-ye-ye, his x mark, Chief White Man, [seal.]  
Pah-ye-ye, his x mark, Sitting Crow, [seal.]  
Kish-ye-ye, his x mark, The One that Rattles as he Walks, [seal.]  
Wah-ye-ye, his x mark, Black Shield, [seal.]  
Cah-ye-ye, his x mark, Two Hearts, [seal.]

Attest:

Jan. G. O'Connor,  
Nicholas J. J. interpreter.  
Francis La Frenchie, interpreter.  
Saml. D. Hinman, missionary among the Indians.

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, [seal.]  
To-ka-ye-ye, his x mark, Thunder Bull, [seal.]  
Shin-ye-ye, his x mark, [seal.]  
Cah-ye-ye, his x mark, The One who Took the Stick, [seal.]  
Pa-ye-ye, his x mark, Big Head, [seal.]

Attest:

Jan. G. O'Connor,  
Nicholas J. J. interpreter.  
Francis La Frenchie, interpreter.  
Saml. D. Hinman, missionary among the Indians.

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, his x mark, Long Mender, [seal.]  
Cah-ye-ye, his x mark, Red War Club, [seal.]  
Cah-ye-ye, his x mark, The Log, [seal.]

Attest:

Jan. G. O'Connor,  
Nicholas J. J. interpreter.  
Francis La Frenchie, interpreter.  
Saml. D. Hinman, 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.

Hem-on-ye-ye, his x mark, The One that has Neither Horn, [seal.]  
O-ye-ye, his x mark, Red Plume, [seal.]  
O-ye-ye, his x mark, Yellow Hair, [seal.]  
Hem-on-ye-ye, his x mark, No Horn, [seal.]

Attest:

Jan. G. O'Connor,  
Nicholas J. J. interpreter.  
Francis La Frenchie, interpreter.  
Saml. D. Hinman, missionary among the Indians.

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.

Wah-ye-ye, his x mark, Red Eagle, [seal.]  
Wah-ye-ye, his x mark, Shooter, [seal.]  
Hem-on-ye-ye, his x mark, Red Egg, [seal.]  
Cah-ye-ye, his x mark, Rattles all over, [seal.]  
Cah-ye-ye, his x mark, Big Eagle, [seal.]  
Cah-ye-ye, his x mark, [seal.]  
Teh-ye-ye, his x mark, The Iron Log, [seal.]

Attest:

Saml. D. Hinman, R. H., missionary,  
J. N. Chelkoting,  
Several lieutenant, Twenty-second Infantry, brevet captain, U. S. Army,  
Nicholas J. J. interpreter,  
Francis La Frenchie, interpreter.



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)





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)



## **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.