



US Army Corps
of Engineers
Omaha District

Final
Garrison Dam/Lake Sakakawea Project
North Dakota
Surplus Water Report



Volume 2

**Appendix B – Public and Agency Coordination and
Letters / Views of Federal, State, and
Local Interests**

March 2011

APPENDIX B
**Public and Agency Coordination and Letters / Views of Tribal,
Federal, State and Local Interests**

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PUBLIC MEETING TRANSCRIPT AND SUBMITTED COMMENTS

OMAHA DISTRICT SWR AND EA TRANSMITTAL LETTERS



ATTORNEY GENERAL OF MISSOURI

CHRIS KOSTER
ATTORNEY GENERAL

JEFFERSON CITY

65102

P.O. Box 899
(573) 751-3321

December 22, 2010

Commander, U.S. Army Corps of Engineers
Attn: Ms. Kayla Eckert-Uptmor
Chief, Planning Branch, Omaha District
161 Capitol Avenue
Omaha, NE 68102-4901

Re: Garrison Dam/Lake Sakakawea Project, North Dakota
Surplus Water Report

Dear Ms. Eckert-Uptmor:

On behalf of the State of Missouri, I am requesting a thirty day extension of the public comment period for the Surplus Water Report, which will end on January 17, 2011. The Report contains 284 pages of highly technical information and involves complex legal and policy issues. Thirty days is an insufficient amount of time to review this material and provide meaningful comment, especially considering that the current comment period includes the Christmas and New Year holidays, which is a period when many people have scheduled vacations.

Please let me know at your earliest convenience if you intend to grant this request, as it will greatly affect many people and their schedules over the next few weeks. Thank you for your consideration.

Sincerely,

CHRIS KOSTER
Attorney General

/s/ Jennifer S. Frazier

JENNIFER S. FRAZIER
Deputy Chief Counsel
Agriculture & Environment Division
jenny.frazier@ago.mo.gov
573-751-8803

c: Mike Wells, Department of Natural Resources
Jack McManus, Office of the Attorney General



ATTORNEY GENERAL OF MISSOURI

CHRIS KOSTER
ATTORNEY GENERAL

JEFFERSON CITY

65102

P.O. Box 899
(573) 751-3321

January 11, 2011

Commander, U.S. Army Corp of Engineers
Attn: Ms. Kayla Eckert-Uptmor
Chief, Planning Branch, Omaha District
1616 Capitol Ave.
Omaha, NE 68102-4901

Dear Ms. Eckert-Uptmor

The U.S. Army Corp of Engineers has requested comments on the Lake Sakakawea/Garrison Dam, North Dakota Surplus Water Report and accompanying Environmental Assessment. In order to provide meaningful comment, I would like to request the following information:

- Please provide copies of letters, agreement, memorandum agreements, or any other documentation between the Corps of Engineers and any private or public entity, including the Bureau of Reclamation, approving the withdrawal of water from Lake Sakakawea for municipal, industrial or irrigation uses.

Given the very short comment period and impending deadline, we request this information be provided in a timely manner. Our address for overnight mailing is Missouri Attorney General's Office, ATTN: Jennifer S. Frazier, 221 West High Street, Jefferson City, MO 65102. Please feel free to contact me at 573-751-8796 if you should have any questions regarding this request or are able to transmit the requested information electronically.

Sincerely,

CHRIS KOSTER
Attorney General

/s/ Jennifer S. Frazier
JENNIFER S. FRAZIER
Deputy Chief Counsel
Agriculture & Environment Division

JSF:mg



ATTORNEY GENERAL OF MISSOURI

CHRIS KOSTER
ATTORNEY GENERAL

JEFFERSON CITY

65102

P.O. Box 899
(573) 751-3321

January 31, 2011

Via Email and U.S. Mail

Commander, U.S. Army Corps of Engineers
Attn: Ms. Kayla Eckert-Uptmor
Chief, Planning Branch, Omaha District
1616 Capitol Ave.
Omaha, NE 68102-4901

Re: *Comment to Garrison Dam/Lake Sakakawea Project, North Dakota, Surplus Water Report and Environmental Assessment*

Dear Ms. Eckert-Uptmor:

On behalf of the Missouri Attorney General, we are providing the following comments to the *Garrison Dam/Lake Sakakawea Project, North Dakota, Surplus Water Report and Environmental Assessment* (hereafter collectively "Report"). In addition, we are offering our full support of and concurrence with the comments offered by the Missouri Department of Natural Resources.

The Corps proposes to "temporarily" make available 100,000 acre-feet/year (or 257,000 acre-feet of storage) of water from the "sediment storage portion of the carryover multiple use zone" of Lake Sakakawea for North Dakota's municipal and industrial water supply needs. While the temporary surplus water contracts are in place over the next ten years, the Corps intends to conduct a permanent allocation study to address the potential for permanent changes in the allocation of storage in Lake Sakakawea.

A. Section 6 of the 1944 Flood Control Act and its implementing regulations do not allow temporarily surplus water contracts for permanent municipal and industrial water supply.

The Report cites Section 6 of the 1944 Flood Control Act as its authority for entering into the surplus water contracts referenced above. This authority is inappropriate for both the existing municipal and industrial intakes and the proposed contracts related to oil development. The Corps has interpreted its surplus water authority under Section 6 to be appropriate where the

use of water is short term only or temporary pending the development of an authorized use. ER 1105-2-100, paragraph E-57b(2)(b)(3) states in pertinent part:

“ . . . Use of the Section 6 authority is allowed only where non-Federal sponsors do not want to buy storage because the need of the water is short term or the use is temporary pending the development of the authorized use. . . . ”

With respect to the numerous existing intakes for municipal and industrial water supply, the use of water is clearly not short term or temporary pending development. They have existed for a number of years and will continue to exist indefinitely. While the proposed contracts may be temporary, the need for and use of water related to the existing intakes is not. The Corps is not following its own regulation in this regard.

Similarly, the use of water for oil development is not short term or temporary pending development, despite assertions in the Report to the contrary. The Corps asserts that water demand from the oil and gas industry will abruptly end in 2021. This conclusion is arbitrary because it has no basis in historical trends, includes no valid analysis of price trends and their potential impacts on drilling, and it ignores the efforts that have begun to exploit other shale formations below the Bakken formation. The Corps is mischaracterizing the use of water for oil development as short term and/or temporary.

B. The proposed surplus water contracts constitute a reallocation of storage in Lake Sakakawea for municipal and industrial water supply, and the Corps' proposed action violates Water Supply Act of 1958.

There is currently no storage allocated in Lake Sakakawea for municipal and industrial water supply. The Report suggests the 257,000 acre-feet/year of storage will be allocated temporarily to municipal and industrial users to ensure a yield of 100,000 acre-feet annually. This action constitutes an unauthorized reallocation of storage.

The Corps' authority to allocate storage is not found in the 1944 Flood Control Act, but in the 1958 Water Supply Act (WSA), Public law 85-500, Title III, as amended (72 Stat. 319). Section 301(b) of the WSA states in part “. . . it is hereby provided that storage may be included in any reservoir project surveyed, planned, or constructed . . . to impound water for present or anticipated future demand or need for municipal and industrial water supply.” Corps guidance document ER1105-2-100 specifically provides:

Reallocation or addition of storage that would seriously affect other authorized purposes or that would involve major structural or operational changes requires Congressional approval. Provided these criteria are not violated, 15 percent of the total storage capacity allocated to all authorized project purposes or 50,000 acre feet, whichever is less, may be allocated from storage authorized for other

purposes. Or this amount may be added to the project to serve as storage for municipal and industrial water supply at the discretion of the Commander, USACE.” [emphasis added.]

We believe that the Corps’ proposed action of allocating 257,000 acre-feet of storage to municipal and industrial water supply uses would constitute a major operational change under the Water Supply Act requiring congressional approval.

C. The Report inappropriately concludes that surplus water is available.

Even if the Corps has authority under Section 6 of the 1944 Flood Control Act to enter into surplus water contracts, that authority is limited. There must be a finding that surplus water exists and will not “adversely affect then existing lawful uses of such water.” The Corps has identified surplus water in the sediment storage portion of the carryover multiple use zone. However, the carryover multiple use zone has never been assigned sediment storage, as more fully described by the Missouri Department of Natural Resource’s comment letter and attachments. Moreover, because the purpose of the carryover multiple use zone is to provide carry-over storage for maintaining downstream flows for irrigation, navigation, power production and other beneficial conservation uses during low flow conditions, any other use of that water during low flow conditions would adversely affect other lawful uses. The Corps fails to address how its proposed action will affect reservoir operations, which in turn could adversely affect existing lawful uses.

D. The Environmental Assessment (EA) fails to comply with the National Environmental Policy Act (NEPA).

The Environmental Assessment (EA) attached to the Report fails to comply with NEPA in numerous respects. First, the entire impacts analysis is flawed because the Corps’ no-action alternative does not represent the appropriate baseline and therefore does not allow for meaningful comparison with the proposed action. For its no-action alternative, the Corps makes two erroneous assumptions regarding the “future without project” condition: 1) it assumes that all but 527 acre-feet of the 100,000 acre-feet would either be withdrawn from the free-flowing reaches of the Missouri River (requiring the relocation of existing intakes without regard to cost or feasibility); and/or 2) that withdrawals would continue to occur from existing, illegal water intakes. The only difference between the no-action alternative and the proposed action is that no-action alternative utilizes 527 acre-feet of groundwater rather than surface water. Consequently, almost the entire NEPA evaluation of impacts is based upon 527 acre-feet, instead of evaluating the full impact of 100,000 acre-feet of water or 257,000 acre-feet of storage being converted to municipal and industrial uses. The cumulative impacts are evaluated based upon 50,527 acre-feet, which is also inappropriate as discussed below.

This type of mischaracterization was soundly rejected by Court of Appeals for the D.C. Circuit in *Southeastern Federal Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1324 (D.C. Cir. 2008). In that case the Corps attempted to argue that when evaluating whether a settlement agreement for the reallocation of storage in Lake Lanier constituted a major operational change requiring congressional approval under the 1958 Water Supply Act, it was appropriate to consider the existing water storage allocations which had been allowed to occur over time. The court disagreed and ruled that “**the appropriate baseline for measuring the impact of the Agreement’s reallocation of water storage is zero**, which was the amount allocated to storage space for water supply when the lake began operation.” [emphasis added.] The appropriate no-action alternative under NEPA would have been a future with no withdrawals for municipal and industrial purposes. Or at a minimum, an alternative where the costs of moving existing intakes and hauling water extra distances for oil drilling in order to access the free flowing Missouri River were considered in the equation.

Second, the Corps should conduct an environmental impact statement because reallocating storage for 100,000 acre-feet from the multi-purpose pool is controversial and constitutes a major federal action with the substantial possibility of affecting the quality of the human environment. Even though this action is couched as temporary, more than half of the annual 100,000 acre-feet is for existing, permanent intakes. So while the surplus water contracts are temporary, the impact of those contracts is permanent and requires a more comprehensive approach in allocating water storage than is currently contained in the EA. The concerns expressed herein by Missouri and other downstream states regarding the potential impact of this action on the authorized uses that support our interests demonstrate the controversial nature of this action.

Third, the cumulative impacts analysis in the EA is deficient. NEPA requires the Corps to evaluate the cumulative impacts of the proposed action, which is defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. *See also Government and Province of Manitoba v. Salazar*, 691 F. Supp. 3d 37 (D.D.C. 2010) (holding that the Bureau of Reclamation failed to fully analyze the cumulative impacts of the Northwest Area Water Supply project on the Missouri River basin and Lake Sakakawea). The Corps makes some effort to evaluate cumulative impacts, but it unfortunately falls far short of its NEPA obligation.

The Corps makes an assumption that there may be 50,000 acre-feet of municipal and industrial water supply usage in the other Missouri River reservoirs and so bases its cumulative impact analysis on 50,527 acre-feet. This number is completely arbitrary as it is not based upon any supporting data or accompanying analysis. Nor does it include other reasonably foreseeable projects. As was demonstrated in *Government and Province of Manitoba v. Salazar*, water supply projects continue to be advanced without regard for the cumulative impacts on existing uses. The Corps has yet to complete a current, comprehensive depletion analysis for the

Comment to *Garrison Dam/Lake Sakakawea Project, North Dakota, Surplus Water Report and Environmental Assessment*

January 31, 2011

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Missouri River. In order to fulfill its NEPA responsibilities, the Corps must complete a comprehensive analysis of the impact of all reasonable foreseeable projects that will take water from the River and its reservoirs.

Finally, because we have not yet received a response to our Request for Information dated January 11, 2011, in which we requested copies of all agreements between the Corps and any public or private entities for water supply, we are unable to provide meaningful comment regarding the impact of specific agreements, including Basin-Electric Power Company. We certainly question the Corps' (and its predecessor, the Bureau of Reclamation's) authority to enter into such a contract with Basin-Electric when no water has been allocated for municipal and industrial uses in Lake Sakakawea. Considering this lack of information and the Corps' unwillingness to provide more than 45 days for public comment to a complicated, technical report, we believe the state of Missouri and the public were not given a meaningful opportunity for comment as required by NEPA.

Thank you for your consideration.

Sincerely,

CHRIS KOSTER
Attorney General

/s/ Jennifer S. Frazier

JENNIFER S. FRAZIER
Deputy Chief Counsel
Agriculture & Environment Division

JSF

c: Mike Wells, DNR Deputy Director



Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director

DEPARTMENT OF NATURAL RESOURCES

www.dnr.mo.gov

JAN - 3 2011

Commander, U.S. Army Corps of Engineers
Attn: Ms. Kayla Eckert-Uptmor
Chief, Planning Branch, Omaha District
1616 Capitol Avenue
Omaha, NE 68102-4901

Dear Ms. Eckert-Uptmor:

The U.S. Army Corps of Engineers (Corps) has requested comments on the Lake Sakakawea/Garrison Dam, North Dakota Surplus Water Report (Report) and accompanying Environmental Assessment (EA) by January 17, 2011. The Report and EA conclude that due to available sediment storage in the multiple-use zone, there is sufficient capacity in Lake Sakakawea to provide 257,000 acre-feet of surplus storage over the 10-year planning period. In order to provide meaningful comments, we are requesting copies of the information/documentation used by the Corps in making this determination. Some of the specific information/documentation we request includes:

- a. The amount of sediment storage that was planned over the effective life of the Lake Sakakawea;
- b. The portion of this planned sediment storage that was in the carryover multiple use zone of Lake Sakakawea;
- c. The determination of storage filled by sediment in each of the storage zones of Lake Sakakawea;
- d. The amount of storage that remains available;
- e. Design reports for Lake Sakakawea; and
- f. Sediment survey reports.

We also request a copy of the reference cited in the Environmental Assessment: AECOM 2010, Analysis of Hydraulic Impacts for Lake Sakakawea Withdrawals, November 16, 2010, and electronic copies of the DRM output files (e.g. Q2D, Q1D, NVY, D11, ELD, PRM, etc.) used in the analysis.

Given the very short comment period and impending deadline, we request this information be provided in a timely manner. Our address for overnight mailing is Missouri Department of Natural Resources, ATTN: Mike Wells, 1101 Riverside Drive, Jefferson City, MO, 65101. Please feel free to contact me at (573) 751-4732 if you should have any questions regarding this request, or are able to transmit the requested information electronically.

Ms. Kayla Eckert-Uptmor
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Sincerely,

DEPARTMENT OF NATURAL RESOURCES

A handwritten signature in black ink that reads "Michael D. Wells". The signature is written in a cursive style with a large, looping initial "M".

Michael D. Wells
Deputy Director and Chief of Water Resources

c: Jenny Frazier, Deputy Chief Counsel, Missouri Attorney General's Office



STATE OF MISSOURI
DEPARTMENT OF NATURAL RESOURCES

Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director

www.dnr.mo.gov

JAN 28 2011

Colonel Robert J. Ruch, Commander
U.S. Army Corps of Engineers, Omaha District
1616 Capitol Ave.
Omaha, NE 68102-4901

Dear Colonel Ruch:

The Missouri Department of Natural Resources (Department) represents and protects the interests of the State of Missouri in all matters pertaining to interstate use of water, water quantity, and water quality. The Department also represents the Governor of Missouri on all interstate water issues. As the water resources agency for the State of Missouri, the Department submits the following comments on the Garrison Dam/Lake Sakakawea Surplus Water Report and accompanying Environmental Assessment (Surplus Water Report/EA).

The U.S. Army Corps of Engineers (Corps) has proposed to use its authority under Section 6 of the 1944 Flood Control Act (surplus water authority) to permit the “temporary” use of up to 100,000 acre-feet of water from Lake Sakakawea for municipal and industrial use. To provide this water, the proposal would require 257,000 acre-feet of storage allocated to municipal and industrial use in Lake Sakakawea. We have identified numerous areas of significant concern in the Surplus Water Report/EA:

1. Inappropriate application of the Corps’ Section 6 authority,
2. Identification of surplus water where none exists,
3. Failure to properly account for water use,
4. The continued unlawful use of easements for water withdrawals,
5. Failure to comply with the National Environmental Policy Act, and
6. Reliance on flawed analyses and assumptions.

Due to these substantive and procedural problems we strongly recommend the Corps withdraw its Surplus Water Report/EA and revise its approach.

The Corps has inappropriately applied its Section 6 authority.

The Corps has allowed the unlawful withdrawal of municipal and industrial water from Lake Sakakawea without agreements and without storage allocated in Lake Sakakawea for municipal and industrial purposes since at least 1989. To rectify these unauthorized withdrawals and to provide water for the growing demand for water for oil development, the Corps is proposing to unlawfully use its authority under Section 6 of the 1944 Flood Control Act. As defined in Engineering Regulation 1105-2-100, page 3-33: “Use of the

Section 6 authority is allowed only where non-Federal sponsors do not want to purchase storage because: use of the water is needed for a short term only or use would be temporary pending development of the authorized use and reallocation of storage is not appropriate.” The Surplus Water Report/EA violates this regulation by improperly implying that the “surplus water” is for a short term or temporary use, when in fact the Surplus Water Report/EA documents numerous permanent intakes withdrawing water from Lake Sakakawea. In the Surplus Water Report/EA, the Corps establishes that some of these intakes have been withdrawing water since at least 1989. These unauthorized intakes are not temporary and have clearly been in place for well beyond the 5-year term provided for under the Corps’ surplus water authority.

The 1958 Water Supply Act grants the Corps authority to provide long-term municipal and industrial water supply. Regulations promulgated under this Act identify the requirement for a permanent storage reallocation: “*When the user desires long-term use, a permanent storage reallocation should be performed under the authority of the Water Supply Act of 1958, as amended.*” (Engineering Regulation 1105-2-100, page 3-33). The Corps has improperly and unlawfully applied Section 6 of the 1944 Flood Control Act when in fact the 1958 Water Supply act is appropriate.

The Corps has identified surplus water where none exists.

Even if a portion of the municipal and industrial water use could be categorized as temporary use, there is no “surplus water” in the carryover multiple-use zone. Under Section 6 of the 1944 Flood Control Act, the Secretary of the Army may enter into contracts for surplus water provided that “*no contract for such water shall adversely affect then existing lawful uses of such water*” [emphasis added]. The carryover multiple-use zone was designed to provide water to downstream uses during times of water shortages. In ten of the past eleven years, the Corps has reduced releases from the reservoir system to conserve water. This adversely affected navigation and other downstream uses, which is evidence that there was no surplus water in the carryover multiple-use zone in Lake Sakakawea. In the 1944 Flood Control Act, Congress clearly designated navigation and flood control as the two dominant purposes of the Mainstem Reservoir System. This designation was reaffirmed in 2005 by the Eighth Circuit Court of Appeals (In re Operation of Missouri River System, 421 F.3d 618 (8th Cir. 2005)). Any unauthorized reduction in the carryover multiple-use zone, as proposed in the Surplus Water Report/EA, that would cause additional adverse impacts to existing lawful uses therefore would be an unlawful act subject to legal challenge.

The Corps also selects “*the sediment storage portion of the carryover multiple use zone as the source of surplus water*” (Surplus Water Report, at 3-19; EA, at 18). However, the

carryover multiple-use zone contains no sediment storage. Any assertion that the carryover multiple-use zone contains sediment storage is directly counter to historical design documents and other Corps reports. In numerous publications (see enclosures), the Corps has stated that sediment storage is assigned to the permanent pool. The Surplus Water Report/EA reinforces this view in its descriptions of the storage zones of the Missouri River Mainstem Reservoir System. The permanent pool, or inactive storage zone, is specifically designed for sediment storage. Per the Surplus Water Report, "...there is the 5.0 million acre foot (MAF) permanent pool...This zone provides minimum power head and sediment storage capacity..." (page 2-7). However, sediment is not included in the description of the carryover multiple-use zone. The report continues, "...*(T)he 13.1 MAF carry-over multiple-use zone...provides a storage reserve for irrigation, navigation, power production, and other beneficial conservation uses. This zone also provides carry-over storage for maintaining downstream flows through a succession of years in which runoff is below normal.*" The definitions of the storage zones are consistent with the descriptions found in the 2006 Missouri River Mainstem Reservoir System Master Water Control Manual (Master Manual) and have remained constant through multiple revisions of the Master Manual from 1960 to the present. Now the Corps is attempting to change decades of established definitions in order to create "surplus water" by claiming that there is some un-quantified volume of sediment storage in the carryover multiple-use zone.

In the Corps' response to a request made by Missouri Department of Natural Resources for documentation pointing to any mention of sediment storage in the carryover multiple-use zone the following statement was made (enclosure #8), "*There was not any storage specifically planned for or set aside for sediment when the project was originally designed.*" In contrast, the Surplus Water Report states, "*A total of 5,125,000 AF of sediment storage was planned over the effective life of the project.*" (page 3-19). It is apparent that the Corps has erroneously determined that there is surplus water storage in the carryover multiple-use zone. If there were actually surplus storage because of currently unused sediment storage, it would be in the permanent pool, not the carryover multiple-use zone.

The Corps failed to properly account for water use.

Our review found that the Corps has failed to reasonably account for existing and future municipal and industrial uses. To rectify this error the Corps must complete an accounting of all intakes withdrawing water from Lake Sakakawea and other Mainstem Reservoirs; including those intakes belonging to public, private, state, and federal agencies.

According to the Surplus Water Report, the Corps has issued 142 easements on lands adjacent to Lake Sakakawea, and estimates that there are 130 water intakes based on

North Dakota state water permits (Table 3-5, page 3-11). However, totaling the number of intakes listed in the last paragraph of page 2-12 results in 217 intakes. These intakes would also require agreements and storage allocated to the uses. A search of the North Dakota State Water Commission water permits database yields 297 surface water permits in the Lake Sakakawea basin that are perfected, conditionally approved or being processed. Combined, these 297 permits have a permitted volume of over 3.5 million acre-feet of water. Although permits do not equate to water use, water agreements and storage allocation would also be required for these water users to withdraw water.

The Corps should have contacted potential water users and obtained more accurate estimates of water use. According to U.S. Geological Survey water use data, statewide municipal and industrial use amounts to approximately 81,088 acre-feet per year (USGS, Estimated Use of Water in the United States in 2005). Per capita for North Dakota, this equates to approximately 0.127 acre-feet per year. Even if Basin Electric and Dakota Gasification are not included in the Surplus Water Report totals, per capita use is 0.385 acre-feet per year; three times the amount of water used statewide. These discrepancies bring into question the Corps' water use estimates in the Surplus Water Report/EA.

The Surplus Water Report/EA proposes to continue unlawful use of easements for water withdrawals.

The Corps estimates that only 77 percent of the small municipal and industrial water users would enter into a surplus water agreement in the next ten years. The Corps does not address why 100 percent of these users would not be required to enter into agreements for municipal and industrial water, or why these agreements would not be required immediately. The Corps has stated that there is no storage currently allocated in Lake Sakakawea for municipal and industrial water use (Surplus Water Report, page 3-15). As such, the past practice of issuing easements for water withdrawals from Lake Sakakawea appears unlawful. As discussed above, most, if not all of the municipal and industrial intakes are long-term and therefore it is inappropriate to apply the Corps' surplus water authority, which is valid only for short-term, temporary use. The Corps' Water Supply Handbook also indicates that surplus water will normally be for small amount of water; 257,000 acre-feet is not a small amount. The 1958 Water Supply Act provides the legal authority to reallocate storage for long-term municipal and industrial water use. Conversely, the path the Corps is following appears to be neither proper nor legal.

The Corps' regulations and policies lay out a process for reallocating storage for municipal and industrial use under the 1958 Water Supply Act (Engineering Regulations 1105-2-100, and Water Supply Handbook). This process includes the identification of local sponsors and study cost-share. The Corps provides no evidence that it has identified local sponsors that would enter into agreements for 257,000 acre-feet of reservoir storage and its associated costs. The Corps must follow its regulations and

policies. This may result in much less demand than the Corps' rough estimate of 257,000 acre-feet.

The Surplus Water Report/EA fails to comply with the National Environmental Policy Act (NEPA).

The Corps has failed to meet the minimum standard of NEPA by not conducting a credible and comprehensive examination of the options available or of current and reasonably expected actions and their cumulative impacts. The Corps does not provide the information required for a critical examination of its analyses and conclusions nor does it appear to have used appropriate models in the determination of critical assumptions. Nor has the Corps provided a reasonable set of alternatives, concluding *a priori* that the current water uses and trends will continue, even though the Corps recognizes that its policy of allowing withdrawals of municipal and industrial water is unlawful.

The Corps has not assessed how charging for water that had been available at no cost will affect demand. While the Corps has presented a model for water pricing; it has not applied that price model to demand. The Corps shows no analysis of how the additional costs of building and operating pipelines to reach the flowing stretches of the Missouri River will impact demand or affects small and large users' decisions on where to draw water or in what quantities water would be drawn. By defining a demand that is inflexible to price, the Corps has failed to create a credible water needs analysis.

The Corps has indicated that this is the first Surplus Water Report/EA and it intends to prepare five additional Surplus Water Reports for the other Mainstem Reservoirs. The Missouri River Mainstem Reservoirs are operated as a system. The volume of water stored in the system is used to determine releases (*e.g.* navigation guide curves) for downstream uses. As such, the Corps must be more comprehensive while considering cumulative impacts at all six Mainstem Reservoirs, as well as other reasonably anticipated projects. The Corps cannot divide this analysis into small and separate pieces in order to justify a Finding of No Significant Impact (FONSI).

The Corps is inappropriately using its surplus water authority under the 1944 Flood Control Act. To put the amount of water in perspective, the 1958 Water Supply Act authorizes the Corps to reallocate reservoir storage for municipal and industrial purposes. When the reallocation exceeds 50,000 acre-feet, Congressional approval is required (Engineering Regulation 1105-2-100). It is alarming that the Corps is considering reallocating 257,000 acre-feet of reservoir storage without conducting an Environmental Impact Statement (EIS). Reallocating this volume of water is controversial, and will likely have significant affects on the human environment in which case an EIS must be prepared.

The Surplus Water Report/EA relies heavily on flawed analyses and assumptions.

The Surplus Water Report/EA analyses of the impacts of depletions caused by the withdrawals are irrational. The Surplus Water Report/EA considers the affect of only 527 acre-feet of water use when the Corps' own estimate is for 100,000 acre-feet of annual use. The Corps fails to show any authority that exists to provide water for municipal and industrial use from Lake Sakakawea absent the Surplus Water determination, or provide the results of any analysis that demonstrates this assumption.

The Surplus Water Report illogically assumes that *"the vast majority of withdrawals will come from the free-flowing reaches of the Missouri River upstream of Lake Sakakawea"* (Surplus Water Report, page ii). To forecast a future condition without project in which the vast majority of all water intakes would move to the river is indefensible. The Surplus Water Report also states that *"under both with and without conditions it is expected that existing Garrison Dam/Lake Sakakawea M&I water users will continue to withdraw water from the project to meet their current water needs."* (Surplus Water Report, page 3-28). It is also indefensible that the Corps would forecast the future condition in which the Corps would continue to allow unlawful water users to continue withdrawing water. This use of with and without project conditions usurps the intent of the NEPA and fails to evaluate the extent of the impacts in comparing the appropriate differences between with and the without project conditions.

As summarized above, the Surplus Water Report/EA analyzes only a small amount of water that will be used from Lake Sakakawea (527 acre-feet per year). However, the Corps analysis shows that less water in the reservoirs will produce \$13,000 per year more hydropower benefits (Surplus Water Report, at Table 3-21, page 3-42). This result is illogical as it is supported by a flawed analysis. A few pages later the Corps calculates revenues forgone if 527 acre-feet are withdrawn and shows a negative impact to hydropower of \$10,000 per year (Surplus Water Report, at Section 3.7.2.3, page 3-45). Extrapolating this to 100,000 acre-feet per year would result in annual adverse impacts to hydropower of approximately \$1.9 million. A proper logical analysis needs to be completed that addresses all foreseeable actions as required by NEPA.

The estimates for water use by the oil and gas industry appear arbitrary, include no valid analysis of price trends and their potential impacts on drilling, and do not match extensive past experience in other oil and gas fields. The Corps' claims that water demand from the oil and gas industry will drop precipitously in 2021 is based on the Corps' interpretation of estimates of the total wells expected to be drilled into the Bakken Formation by the North Dakota Oil and Gas Division (NDOGD). However, the State of North Dakota has recently requested that the U. S. Geological Survey re-analyze the

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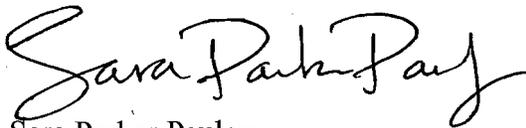
Bakken and other formations in western North Dakota, claiming that the estimated reserves are grossly underestimated based on actual production data.

In addition, other formations below the Bakken have shown promise for oil and gas and are likely to be exploited as the Bakken is exhausted. These formations and their petroleum-bearing nature are detailed in the Surplus Water Report/EA, but ignored in the analysis. This subsequent development of deeper fields would follow a similar pattern of development in stratigraphically layered oil and gas fields elsewhere. The Corps arbitrarily stops the drilling of new wells in 2021 when the count reaches 21,000 without citing a single historic example of a similar pattern for gas field development. The Corps' water use estimate (Table 3-3 of the Surplus Water Report) does not match the active drill rig projections of the NDOGD, nor is it based on any data-driven model for gas or oil field development. The Corps has conducted no market analysis of oil and gas drilling and thus has no basis for any of the resultant estimates of water use. NEPA does not allow the Corps to simply choose a model arbitrarily, and then use that model to drive the Surplus Water Report/EA to a predetermined conclusion.

As outlined above, the State of Missouri is concerned that the Corps is inappropriately using Section 6 of the 1944 Flood Control Act to reallocate municipal and industrial water in Lake Sakakawea. Not only do we believe the current approach is unlawful, but if implemented as proposed would significantly adversely impact the State of Missouri and other downstream states. The State of Missouri urges the Corps of Engineers to pursue other more appropriate authorities to allocate water for municipal and industrial uses in the basin. The State of Missouri looks forward to continuing to work with the Corps to address the municipal and industrial water needs of the basin without adversely impacting the dominant Congressionally-authorized purposes. Please contact Mike Wells, Deputy Director and Chief of Water Resources at (573) 751-4732, if you have any questions or to discuss these comments.

Sincerely,

DEPARTMENT OF NATURAL RESOURCES



Sara Parker Pauley
Director

c: Brigadier General John R. McMahon (w/o enclosures)
Missouri Congressional Delegation (w/o enclosures)

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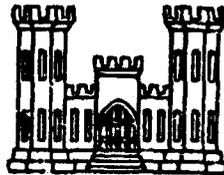
Enclosures:

1. Missouri River Main Stem Reservoir System Reservoir Regulation Manual Master Manual, December 1960, pg V-1 – V-3
2. Missouri River Main Stem Reservoir System Reservoir Regulation Manual Master Manual, 1979, pg V-1 – V-3
3. Missouri River Mainstem Reservoir System Master Water Control Manual, March 2004, pg VII-5 – VII-7
4. Missouri River Mainstem Reservoir System Master Water Control Manual, March 2006, pg VII-5 – VII-7
5. Missouri River Master Water Control Manual Review and Update, Final Environmental Impact Statement Volume I: Main Report, Part 1, March 2004, pg 2-2
6. Water Supply Handbook, Institute for Water Resources, U.S. Army Corps of Engineers, IWR Report 96-PS-4, December 1998, Chapter 4 (B)(1)(a)
7. Garrison Dam/Lake Sakakawea Master Plan & EA, page 2-23, December, 2007
8. Response Letter, Ms. Eckert-Uptmor to Mr. Wells, January 5, 2011

ENCLOSURES

**MISSOURI RIVER
MAIN STEM RESERVOIR SYSTEM
RESERVOIR REGULATION MANUAL**

MASTER MANUAL



PREPARED BY
U. S. ARMY ENGINEER DIVISION, MISSOURI RIVER
CORPS OF ENGINEERS
OMAHA, NEBRASKA

██████████
DECEMBER 1960

SECTION V - SYSTEM STORAGE ALLOCATIONS

5-1. General. The storage capacity of the main stem system has been developed to provide beneficial service to the multi-purpose functions as described in preceding Sections of this manual. Reservoir operation for one of the functions may be compatible, to a varying degree, with operation for another function while for still another function the operation may be incompatible. For example, the vacating of storage capacity after a flood event to assure control of possible subsequent events is compatible with providing releases for power, navigation, irrigation, and public health; however, it is incompatible with the objective of providing stored reserves for continuation of these functions during a subsequent drought period. These factors make it advisable to divide the storage, in both the system and individual reservoirs, into distinct operational zones, each with separate operating criteria, in order to obtain the maximum possible service to all of the functions consistent with the physical and authorizing limitations of the projects. In this manner the primary objectives of operation and the priority of service are determined by the total storage contents existing at the time, although this regulation may affect all of the other basic functions to some degree.

5-2. Operational Zones. The operational zones, and governing criteria for operation in these zones, considered necessary to achieve the multi-purpose benefits for which the reservoirs were authorized are as follows:

a. Exclusive Flood Control Reserve. A top zone is reserved exclusively for flood control. The storage space therein will be utilized only for detention of extreme or unpredictable flood flows, and will be evacuated as rapidly as feasible within limitations imposed by consideration of flood control alone.

b. Annual Flood Control and Multiple-Use Capacity. An upper normal operating zone reserved annually for retention and regulation of normal flood flows, and for annual regulation of the impounded flood flows for multiple-purpose usage. The capacity in this zone, which is immediately below the top zone of exclusive flood control reserve, will normally be evacuated to a predetermined level by about March 1 to provide adequate storage capacity for the flood season. This level will remain more or less fixed from year to year. During the flood period water will be impounded and storage capacity will be retained in this space as required by consideration of flood control. This space will also be filled during the flood period in the interests of general conservation functions on an annual basis, provided sufficient inflows occur. After the close of the flood season, the evacuation of flood control and multiple-use storage capacity is scheduled to maximize service to the conservation functions with the only limitation imposed by the flood control function being that the evacuation must be completed by the beginning of the next flood season, provided such evacuation is possible without contributing to serious downstream flooding.

c. Carryover Multiple-Use Capacity. An intermediate zone providing a reserve of joint-use storage for irrigation, navigation, power production, and other beneficial conservation uses. The storage in this zone will provide carry-over storage for regulation over terms of years and will be used to provide annual regulation in the event the storage in the annual flood control and multiple use zone is exhausted. No drawdown into this zone will ordinarily be made to provide flood control storage capacity.

d. Inactive Capacity. A bottom inactive zone providing minimum power heads and sediment storage capacity. It will also serve as a minimum pool for recreation, fish and wildlife, and an assured minimum level for pump diversion of water from reservoirs. After initial fill reservoirs will never be drawn down into this zone.

5-3. Allocation of Storage as Related to Functions. The ratio of the gross storage capacity of the main stem reservoir system to the annual inflow to the system is unusually high for a major river system, the storage being equal to the volume of three average years of run-off of the river at Sioux City. The large amount of storage provided stems largely from the physical characteristics of the reservoirs and damsites. Economic studies at the time of project planning indicated the desirability of the fullest practical site development. Consequently, all of the major storage sites were constructed to the maximum level permitted by major relocations in the reservoir areas. The relatively flat slope of the Missouri Valley results in a large amount of storage for a given height of dam. Competition between functions in the allocation of system storage is minimized by this relatively large amount of storage capacity available.

5-4. The selected minimum operating pool level at each project establishes the inactive storage capacity as well as the base of the carryover multiple-use storage zone. Although, due to the large amount of storage available, competition between the flood control and general conservation function does not exist at these low levels, competition between various conservation functions may exist, particularly in an extended drought period. At the time of project design, firm establishment of the minimum level was necessary to provide the minimum assured power peaking capabilities at the projects as well as for the design of surge tanks. To a lesser degree, the cavitation limits of runners are also predicated on these minimum levels. The minimum operating pool as established at each of the projects can generally be considered final and not subject to being changed in the future. Increasing the levels (failure to draw the system and individual projects to these storage levels in the event of the occurrence of an extreme drought, comparable in severity and duration to that of the 1930's) is also unlikely, since studies indicate it would not only reduce service to navigation and other non-power functions, but would also severely curtail energy generation toward the close of the drought period.

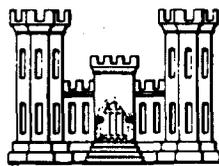
5-5. Competition between flood control and conservation functions exists, to a degree, in establishing the top of the multiple-use carry-over zone which in turn establishes the base of the annual flood control and multiple-use capacity. This is because the maximum limits of service (ignoring economic feasibility) in the case of flood control would be the provision of sufficient storage space to store flows from flood events of the most remote probability of occurrence. On the other hand, in the case of navigation, power, and other conservation functions, the entire capacity of the system could be utilized as carryover to provide improved service to these functions during a recurrence of the drought of the severity of that of the 1930's without reaching the full desirable level of service (again without regard to economic feasibility). In view of the magnitude of the potential flood damages, (urban as well as rural and to the extensive transportation and communication facilities) it has been generally recognized that the flood control function of the main stem reservoir system should provide for adequate control of floods of about the Standard Project Flood magnitude. Allocation of sufficient storage within the combined exclusive flood control reserve and annual flood control and multiple-use zone to control this event would fix the top level utilized for carryover purposes.

5-6. As referenced in the preceding paragraph, the total flood control storage space should provide for floods of about Standard Project magnitude. Within this total space, the level separating the exclusive flood control storage zone from the annual flood control and multiple-use zone is dictated by the flood control function. Sufficient storage should be provided in the exclusive zone to control flood flows (again of approximate Standard Project magnitude) which might occur after such time the annual flood control and multiple-use space was filled. Normally, Missouri River flood flows are of a distinct seasonal nature and developed regulation techniques take cognizance of this fact in the utilization of the annual flood control and multiple-use spaces. However, flood flows, at times entirely unanticipated, may occur after such time the annual flood control and multiple-use space has been filled for conservation purposes. Exclusive flood control storage should be sufficient to control such floods. Studies have indicated that, on an annual basis, at the present level of basin development, about six million acre-feet will need be impounded in the annual zone during the high-water season to assure full service to the conservation functions of the system (35,000 c.f.s. at Sioux City to the end of the full eight-month navigation season, maximum winter releases of 15,000 c.f.s., and the provision of sufficient head for 115 percent of nameplate capacity at the power plants). Competition between flood control and conservation functions (once the top of the carryover multiple-use zone has been established) would exist only if an annual flood control and multiple-use zone with a capacity of less than about six million acre-feet of system storage was believed desirable in order to provide sufficient exclusive flood control storage.

5-7. The tops of the exclusive flood control zone in each of the reservoirs are restricted by site design limitations, and as such are not subject to change in the future. Sufficient surcharge and free-board space must be provided at each project, which, in combination with the spillways, will pass the most extreme flood considered possible

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MASTER MANUAL



**U. S. ARMY ENGINEER DIVISION, MISSOURI RIVER
CORPS OF ENGINEERS
OMAHA, NEBRASKA
1979**

SECTION V - SYSTEM STORAGE ALLOCATIONS

5-1. General. The storage capacity of the main stem system has been developed to provide beneficial service to the multipurpose functions described in preceding Sections of this manual. Regulation of a particular project for one of the functions may be compatible, to a varying degree, with regulation for another function while for still another function the regulation may be incompatible. For example, the vacating of storage capacity after a flood event to assure control of possible future events is compatible with providing releases for power, navigation and irrigation; however, it is incompatible with the objective of providing stored reserves for continuation of these functions during a subsequent drought period. These factors made it advisable to divide the storage in individual reservoirs into operational zones in order to obtain the maximum possible service to all of the functions consistent with the physical and authorizing limitations of the projects. Totalling the capacity provided in the respective zones of the individual main stem projects provides the total system capacity available in each operational zone.

5-2. Operational Zones. The operational zones, and governing criteria for operation in these zones considered necessary to achieve the multipurpose benefits for which the reservoirs were authorized, are as follows:

a. Exclusive Flood Control Reserve. A top zone in each reservoir is reserved exclusively for flood control. The storage space therein is utilized only for detention of extreme or unpredictable flood flows, and is evacuated as rapidly as feasible within limitations imposed by considerations of flood control. These considerations include project release limitations, status of storage in the other main stem projects and the level of system releases being maintained, as designated by criteria discussed in Sections IX and X.

b. Annual Flood Control and Multiple-Use Capacity. An upper "normal operating zone" is reserved annually for retention of normal flood flows and for annual multiple-purpose regulation of the impounded flood waters. The capacity in this zone, which is immediately below the top zone of exclusive flood control reserve, will normally be evacuated to a predetermined level by about 1 March to provide adequate storage capacity for the flood season. This level will remain more or less fixed from year to year. During the flood period, water will be impounded in this space as required by consideration of flood control and in the interests of general conservation functions on an annual basis. The evacuation of flood control and multiple-use storage

capacity is scheduled to maximize service to the conservation functions. Schedules are limited by the flood control function in that the evacuation must be completed by the beginning of the next flood season, provided such evacuation is possible without contributing to serious downstream flooding.

c. Carry-Over Multiple-Use Capacity. An intermediate zone provides a storage reserve for irrigation, navigation, power production, and other beneficial conservation uses. At the major projects (Fort Peck, Garrison and Oahe) the storage space in this zone will provide carry-over storage for maintaining downstream flows through a succession of well below normal runoff years. It will be used to provide annual regulation in the event the storage in the annual flood control and multiple-use zone is exhausted. Storage space assigned to this zone in the Fort Randall project serves a different purpose. A portion of the Fort Randall space will be evacuated each year immediately preceding the winter season to provide recapture space for upstream winter power releases. The recapture operation results in complete refill of the space during the winter months. Deliberate long-term drawdown into the Fort Randall carry-over zone is not contemplated. While a minor amount of space in the Big Bend and Gavins Point projects was initially provided in this zone, deliberate drawdown into this zone has never been made during normal operation nor was such drawdown contemplated. Therefore, the carry-over multiple-use capacity in these projects has been reassigned into the lower inactive storage zone.

d. Inactive Capacity. A bottom inactive zone provides minimum power head and sediment storage capacity. It also serves as a minimum pool for recreation, fish and wildlife, and an assured minimum level for pump diversion of water from the reservoir. Reservoir drawdown into this zone will not be scheduled except in an unusual emergency.

5-3. Allocation of Storage as Related to Functions. The ratio of the gross storage capacity of the main stem reservoir system to the annual inflow to the system is unusually high for a major river system, the storage being in excess of the volume of three average years of runoff of the river above Gavins Point, the lowermost project. The large amount of storage provided results largely from the physical characteristics of the reservoirs and damsites. Economic studies at the time of project planning indicated the desirability of the fullest practical site development. Consequently, all of the major storage sites except Fort Peck were constructed to the maximum level permitted by major relocations in the reservoir areas. The relatively flat slope of the Missouri Valley results in a large storage volume for a given dam height. Competition between functions in the utilization of system storage is minimized by this relatively large storage capacity.

5-4. The inactive storage capacity at each project establishes the normal minimum operating pool level as well as the base of the carry-over multiple-use zone (at Big Bend and Gavins Point the base of the annual flood control and multiple-use zone). Although, due to the large amount of storage available, competition between the flood control and the other multiple-use functions was minimal in the establishment of minimum operating levels, competition between these other multiple-uses is apparent, particularly during extended periods of subnormal water supply. At the three major projects, as well as at Fort Randall, surge tank design, established runner cavitation limits, and minimum assured peaking capability were based on the selected minimum operating pool. Therefore, future lowering of these levels would appear very unlikely. Raising the minimum pool levels is also unlikely, since studies indicate that failure to draw the system and individual projects to these storage levels in the event of the occurrence of an extreme drought comparable in severity and duration to that of the 1930's would not only reduce service to navigation and other non-power functions, but would also severely curtail energy generation during the drought period. The established minimum level at Big Bend and Gavins Point could be lowered, and reservoir levels could temporarily fall somewhat below the minimum rather frequently. However, due to the relatively minor amounts of storage space involved and the lake shore development that has occurred based on the established minimums, any deliberate long-term lowering of these pools below presently established minimums is very unlikely.

5-5. Competition between flood control and other multiple-use functions existed, to a degree, in establishing the zonal boundaries between the multiple-use carry-over zones and the annual flood control and multiple-use zones. This was because the maximum limits of service (ignoring economic feasibility) in the case of flood control would be the provision of sufficient storage space to store flows from flood events of the most remote probability of occurrence. On the other hand, in the case of navigation, power and other water-use functions, the entire capacity of the system could be utilized as carry-over to provide improved service to these functions during a recurrence of the drought of the severity of that of the 1930's without reaching the full desirable level of service (again without regard to economic feasibility). In view of the magnitude of the potential flood damages, (to urban as well as rural areas and to the extensive transportation and communication facilities) it was recognized that the flood control function of the main stem reservoir system should provide for adequate control of a very severe flood which could be expected to recur at only very infrequent intervals. At the time of initial design of the main stem reservoir system in the 1940's it was considered impracticable to establish any single flood event as the "Reservoir Design Flood." However, the great flood of 1881 comprised the most critical flood



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March 2004

Table VII-8) is usually provided in drought times to provide a minimum level of navigation service (7.5 feet of draft) while conserving water in the System in case of an extended drought. Consideration is also given to using System Replacement Flood Control Storage in cooperation with the U.S. Bureau of Reclamation (USBR), which will be discussed in greater detail later in this chapter. Also, within the framework of the overall goals stated above, there are seasonal decisions to optimize the benefits obtained for the various authorized purposes, such as fish spawning, endangered species nesting and releases during river ice formation periods.

7-03.1. System Regulation Zones. The storage capacity of the System has been developed to provide beneficial service to the Congressionally authorized purposes. Regulation of a particular project for one authorized purpose may be compatible, to a varying degree, with regulation for most of the other authorized purposes. For another authorized purpose, this regulation may be detrimental. For example, the vacating of storage capacity after a flood event to assure control of possible future flood events is compatible with providing releases for power, navigation, and water supply; however, it is incompatible with the objective of providing stored reserves for continuation of these purposes during a subsequent drought period. These factors made it advisable to divide the storage in individual System reservoirs into regulation zones to obtain the maximum possible service to all of the purposes consistent with the physical and authorizing limitations of the System. Totaling the storage capacity in the respective zones of the individual projects provides the total System storage capacity available in each regulation zone for use in System regulation. These values are not fixed but vary slightly over time according to changes in reservoir capacity from sediment collection in the reservoirs and shoreline erosion. For example, when the System was first considered filled in 1967, the total storage capacity was 75.2 MAF, and as of March, 2004, total storage capacity is 73.4 MAF. This change in storage capacity has been reflected in the System storage zones by adjusting the elevations of the various storage zones within the individual projects to reflect the correct amount of storage according to the change that has occurred. In some cases, the elevations have not changed but the actual System storage number has been adjusted for that zone. The regulation zones, and the guidance criteria for regulation in these zones considered necessary to achieve the multipurpose benefits and operational objectives for which the reservoirs were authorized, are described in the following paragraphs.

7-03.1.1. Exclusive Flood Control Zone. Flood control is the only authorized purpose that requires empty space in the reservoirs to achieve the objective. A top zone in each System reservoir is reserved for use to meet the flood control requirements. The storage space therein is used only for detention of extreme or unpredictable flood flows and is evacuated as rapidly as soon as downstream conditions permit, while still serving the overall flood control objective of protecting life and property. Considerations to achieve the flood control objective include a release limitation for each of the projects, status of storage in the other projects and the level of System or the Gavins Point Dam release being maintained, as designated by criteria discussed later in this chapter. The Exclusive Flood Control Zone represents 4.7 MAF (the upper 6 percent) of the total System storage volume, and this zone, from 73.4 MAF down to 68.7 MAF, is normally empty. The large four reservoirs, Fort Peck Lake, Lake Sakakawea, Lake Oahe, and Lake Francis Case, contain 98 percent of the total storage reserved for the Exclusive Flood Control Zone.

7-03.1.2. **Annual Flood Control and Multiple Use Zone.** An upper “normal operating zone” is reserved annually for the capture and retention of normal and flood runoff and for annual multiple-purpose regulation of this impounded water. The System storage capacity in this zone represents 11.6 MAF (16 percent) of the total System storage volume, and extends from 68.7 MAF down to 57.1 MAF. This storage zone, located immediately below the Exclusive Flood Control Zone, will normally be evacuated to the base of this zone by about March 1 to provide adequate storage capacity for capturing runoff during the next flood season. Exceptions may occur. One example would be if System Replacement Storage were requested in conjunction with regulation of the USBR reservoirs in the upper Missouri River basin. On an annual basis, water will be impounded in this zone as required to achieve the System flood control purpose and also be stored in the interest of general water conservation to serve all the other Congressionally authorized System purposes. The evacuation of water from the Annual Flood Control and Multiple Use Zone is scheduled to maximize service to the authorized purposes that depend on the release of water from the System. Scheduling releases from this zone is limited by the flood control objective in that the evacuation must be completed by the beginning of the next flood season. This is normally accomplished as long as the evacuation is possible without contributing to serious downstream flooding. Evacuation is, therefore, accomplished mainly during the summer and fall because Missouri River ice formation and the potential for flooding from higher release rates limit System release rates during the December through March period.

7-03.1.3. **Carryover Multiple Use Zone.** A second lower intermediate zone provides a storage reserve for irrigation, navigation, power production, water supply, recreation, and fish and wildlife. The water stored in this zone at the three larger reservoirs (Fort Peck, Garrison, and Oahe) will maintain downstream flows through a succession of well-below-normal runoff years into the System. Serving the authorized purposes during an extended drought is an important regulation objective of the System and the primary reason the upper three System reservoirs are so large compared to other Federal water resource projects. The System storage capacity in this the largest storage zone represents 39.0 MAF (53 percent) of the total System storage volume and extends from a volume of 57.1 MAF down to 18.1 MAF. The Carryover Multiple Use Zone is often referred to as the “bank account” for water in the System because of its role in providing assistance to the basin during critical dry periods. Water stored in the Carryover Multiple Use Zone will be used to meet project purposes in the event that the storage in the Annual Flood Control and Multiple Use Zone is exhausted. Only Fort Peck, Garrison, Oahe, and Fort Randall have this storage as a designated storage zone. The three larger projects of Fort Peck, Garrison, and Oahe serve the Missouri River basin during drought periods and water from this zone is called upon to meet operational objectives stated in this plan. The storage space assigned to this zone in Fort Randall serves a different purpose. A portion of the Fort Randall space is normally evacuated each year during the fall season to provide recapture space for upstream winter power releases. The recapture results in complete refill of the space during the winter months. Deliberate, long-term drawdown into the Fort Randall Carryover Multiple Use Zone is not contemplated. During drought periods, the three smaller System projects (Fort Randall, Big Bend, and Gavins Point) are maintained at the same elevation they would be at if runoff conditions were normal. While a minor amount of space in Big Bend and Gavins Point was initially provided in this zone, deliberate drawdown into this zone is generally not contemplated.

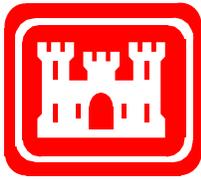
7-03.1.4. **Permanent Pool Zone.** A bottom inactive zone, called the Permanent Pool Zone, provides for a minimum power head and for future sediment storage capacity. It also serves as a minimum pool for recreation, fish and wildlife, and as an assured minimum level for water access from the reservoir. A drawdown into this zone is generally not scheduled except in unusual conditions. The System storage capacity in this the lowermost storage zone represents 18.1 MAF (25 percent) of the total System storage volume (extends from 18.1 MAF down to 0 MAF). To date, this zone has been increased by the addition of storage originally in the Carryover Multiple Use Zones of Big Bend and Gavins Point. The regulation of System in the Permanent Pool Zone has been changed slightly due to the changes in the storage used in the Carryover Multiple Use Zone. The likelihood of using water stored in the Permanent Pool Zone has been reduced in the CWCP.

7-03.1.5. **Current System Storage Zone Allocations.** As of this time, the System has been regulated as an integrated system for 50 years. During this 50-year period, many regulation techniques have been evaluated. System regulation procedures have been modified to provide a plan for sustaining and balancing all of the Congressionally authorized project purposes. A basic method of evaluating proposed changes in System reservoir regulation has been the long-range System regulation study, as described in Chapter VI of this Master Manual. Numerous long-range studies have been made since 1964, and long-range study criteria have been modified so that release restrictions imposed by the flood control purpose are reflected in the studies. These many long-range studies have been supplemented by detailed examination of particularly severe flood events, which are described in detail in Appendix A of this Master Manual. The Master Manual Study included over 500 long-range studies, exceeding the total number of studies conducted prior to that time.

7-03.1.5.1. Long-term studies have also been made to investigate the effects of continued water resource development in the Missouri River basin. In general, these studies indicate that the flood control zone elevations currently used will continue being applicable well into the future. The loss of storage in the flood control zones of the System reservoirs due to sedimentation will be balanced by the reductions of flood runoff resulting from continuing water resource development, land treatment, and depletions that includes future appropriation of tribal water rights. Studies will continue to be made to determine the effects of such changes in Missouri River basin water resource development and in associated System regulation techniques. A major purpose of these studies will be the re-evaluation of System and individual System project storage zone allocations. If deemed necessary, appropriate action toward modification of System project storage zones will be initiated.

7-03.1.5.2. The current storage allocations and associated elevations in each of the zones of individual System projects, as well as for the System as a whole, is shown on Plates II-1 and II-2. Storages given in this table reflect the January 2004 elevation-storage relationships. Minor modifications from previous allocation tables are discussed below.

7-03.1.5.2.1. **Fort Peck.** The elevation of the top of the Permanent Pool Zone, or the bottom of the Carryover Multiple Use Zone, has not changed for Fort Peck; however, this updated water control plan has changed the regulation of the System during drought, or water conservation, periods. This change will result in the reservoir being approximately 22 feet higher during a

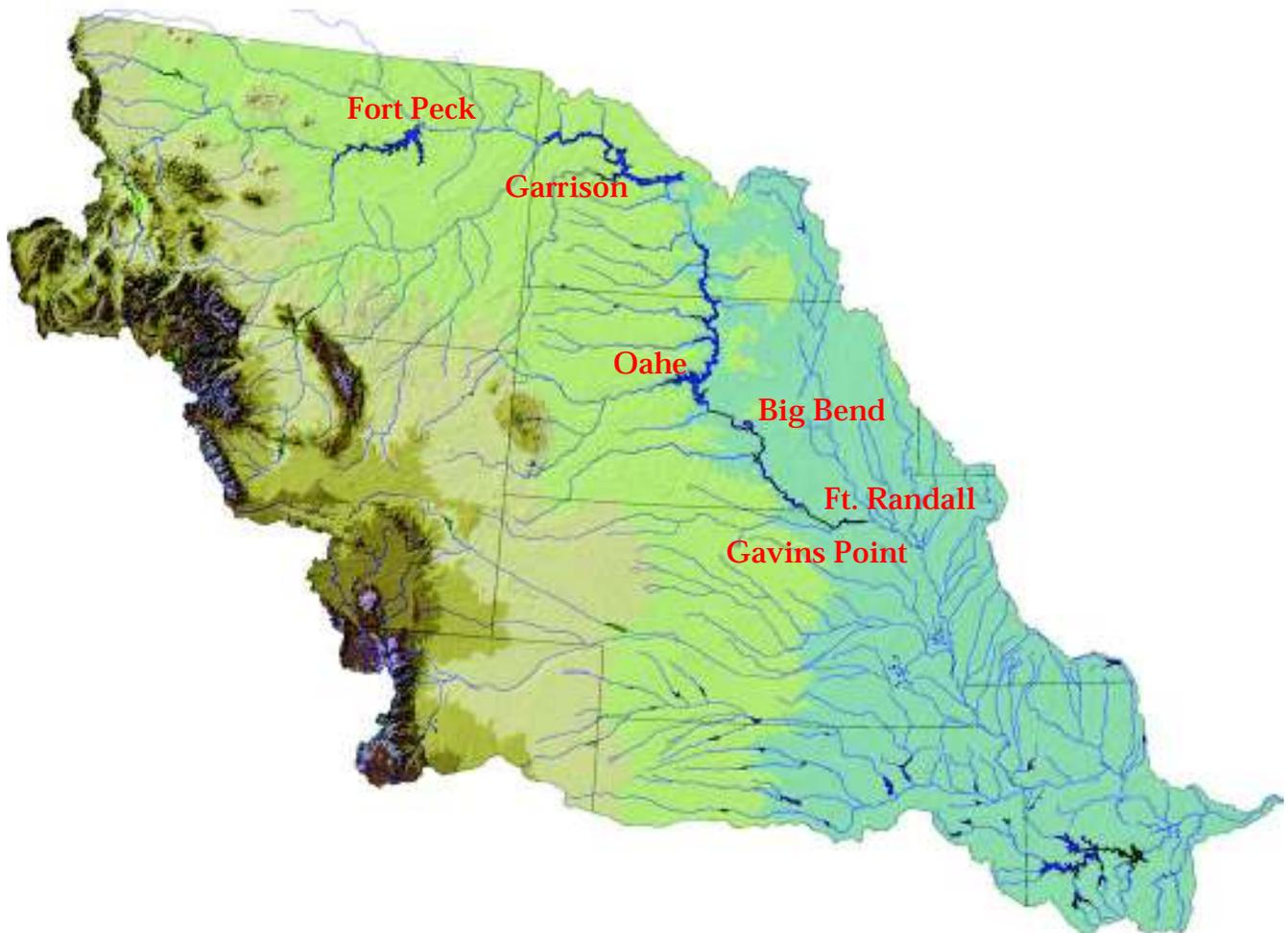


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Omaha, Nebraska*

Revised March 2006

Table VII-8) is usually provided in drought times to provide a minimum level of navigation service (7.5 feet of draft) while conserving water in the System in case of an extended drought. Consideration is also given to using System Replacement Flood Control Storage in cooperation with the U.S. Bureau of Reclamation (USBR), which will be discussed in greater detail later in this chapter. Also, within the framework of the overall goals stated above, there are seasonal decisions to optimize the benefits obtained for the various authorized purposes, such as fish spawning, endangered species nesting and releases during river ice formation periods.

7-03.1. System Regulation Zones. The storage capacity of the System has been developed to provide beneficial service to the Congressionally authorized purposes. Regulation of a particular project for one authorized purpose may be compatible, to a varying degree, with regulation for most of the other authorized purposes. For another authorized purpose, this regulation may be detrimental. For example, the vacating of storage capacity after a flood event to assure control of possible future flood events is compatible with providing releases for power, navigation, and water supply; however, it is incompatible with the objective of providing stored reserves for continuation of these purposes during a subsequent drought period. These factors made it advisable to divide the storage in individual System reservoirs into regulation zones to obtain the maximum possible service to all of the purposes consistent with the physical and authorizing limitations of the System. Totaling the storage capacity in the respective zones of the individual projects provides the total System storage capacity available in each regulation zone for use in System regulation. These values are not fixed but vary slightly over time according to changes in reservoir capacity from sediment collection in the reservoirs and shoreline erosion. For example, when the System was first considered filled in 1967, the total storage capacity was 75.2 MAF, and at this time, total storage capacity is 73.4 MAF. This change in storage capacity has been reflected in the System storage zones by adjusting the elevations of the various storage zones within the individual projects to reflect the correct amount of storage according to the change that has occurred. In some cases, the elevations have not changed but the actual System storage number has been adjusted for that zone. The regulation zones, and the guidance criteria for regulation in these zones considered necessary to achieve the multipurpose benefits and operational objectives for which the reservoirs were authorized, are described in the following paragraphs.

7-03.1.1. Exclusive Flood Control Zone. Flood control is the only authorized purpose that requires empty space in the reservoirs to achieve the objective. A top zone in each System reservoir is reserved for use to meet the flood control requirements. The storage space therein is used only for detention of extreme or unpredictable flood flows and is evacuated as rapidly as soon as downstream conditions permit, while still serving the overall flood control objective of protecting life and property. Considerations to achieve the flood control objective include a release limitation for each of the projects, status of storage in the other projects and the level of System or the Gavins Point Dam release being maintained, as designated by criteria discussed later in this chapter. The Exclusive Flood Control Zone represents 4.7 MAF (the upper 6 percent) of the total System storage volume, and this zone, from 73.4 MAF down to 68.7 MAF, is normally empty. The large four reservoirs, Fort Peck Lake, Lake Sakakawea, Lake Oahe, and Lake Francis Case, contain 98 percent of the total storage reserved for the Exclusive Flood Control Zone.

7-03.1.2. Annual Flood Control and Multiple Use Zone. An upper “normal operating zone” is reserved annually for the capture and retention of normal and flood runoff and for annual multiple-purpose regulation of this impounded water. The System storage capacity in this zone represents 11.6 MAF (16 percent) of the total System storage volume, and it extends from 68.7 MAF down to 57.1 MAF. This storage zone, located immediately below the Exclusive Flood Control Zone, will normally be evacuated to the base of this zone by about March 1 to provide adequate storage capacity for capturing runoff during the next flood season. Exceptions may occur. For example, if System Replacement Storage were requested in conjunction with regulation of the USBR reservoirs in the upper Missouri River basin. On an annual basis, water will be impounded in this zone as required to achieve the System flood control purpose and also stored in the interest of general water conservation to serve all the other Congressionally authorized System purposes. The evacuation of water from the Annual Flood Control and Multiple Use Zone is scheduled to maximize service to the authorized purposes that depend on the release of water from the System. Scheduling releases from this zone is limited by the flood control objective in that the evacuation must be completed by the beginning of the next flood season. This is normally accomplished as long as the evacuation is possible without contributing to serious downstream flooding. Evacuation is, therefore, accomplished mainly during the summer and fall because Missouri River ice formation and the potential for flooding from higher release rates limit System release rates during the December through March period.

7-03.1.3. Carryover Multiple Use Zone. A second lower intermediate zone provides a storage reserve for irrigation, navigation, power production, water supply, recreation, and fish and wildlife. The water stored in this zone at the three larger reservoirs (Fort Peck, Garrison, and Oahe) will maintain downstream flows through a succession of well-below-normal runoff years into the System. Serving the authorized purposes during an extended drought is an important regulation objective of the System and the primary reason the upper three System reservoirs are so large compared to other Federal water resource projects. The System storage capacity in this the largest storage zone, represents 39.0 MAF (53 percent) of the total System storage volume and extends from a volume of 57.1 MAF down to 18.1 MAF. The Carryover Multiple Use Zone is often referred to as the “bank account” for water in the System because of its role in providing assistance to the basin during critical dry periods. Water stored in the Carryover Multiple Use Zone will be used to meet project purposes in the event that the storage in the Annual Flood Control and Multiple Use Zone is exhausted. Only Fort Peck, Garrison, Oahe, and Fort Randall have this storage as a designated storage zone. The three larger projects of Fort Peck, Garrison, and Oahe serve the Missouri River basin during drought periods, and water from this zone is called upon to meet operational objectives stated in this plan. The storage space assigned to this zone in Fort Randall serves a different purpose. A portion of the Fort Randall space is normally evacuated each year during the fall season to provide recapture space for upstream winter power releases. The recapture results in complete refill of the space during the winter months. Deliberate, long-term drawdown into the Fort Randall Carryover Multiple Use Zone is not contemplated. During drought periods, the three smaller System projects (Fort Randall, Big Bend, and Gavins Point) are maintained at the same elevation they would be at if runoff conditions were normal. While a minor amount of space in Big Bend and Gavins Point was initially provided in this zone, deliberate drawdown into this zone is generally not contemplated.

7-03.1.4. **Permanent Pool Zone.** A bottom inactive zone, called the Permanent Pool Zone, provides for a minimum power head and for future sediment storage capacity. It also serves as a minimum pool for recreation, fish and wildlife, and as an assured minimum level for water access from the reservoir. A drawdown into this zone is generally not scheduled except in unusual conditions. The System storage capacity in this the lowermost storage zone represents 18.1 MAF (25 percent) of the total System storage volume (extends from 18.1 MAF down to 0 MAF). To date, this zone has been increased by the addition of storage originally in the Carryover Multiple Use Zones of Big Bend and Gavins Point. The regulation of System in the Permanent Pool Zone has been changed slightly due to the changes in the storage used in the Carryover Multiple Use Zone. The likelihood of using water stored in the Permanent Pool Zone has been reduced in the CWCP.

7-03.1.5. **Current System Storage Zone Allocations.** As of this time, the System has been regulated as an integrated system for 50 years. During this 50-year period, many regulation techniques have been evaluated. System regulation procedures have been modified to provide a plan for sustaining and balancing all of the Congressionally authorized project purposes. A basic method of evaluating proposed changes in System reservoir regulation has been the long-range System regulation study, as described in Chapter VI of this Master Manual. Numerous long-range studies have been made since 1964, and long-range study criteria have been modified so that release restrictions imposed by the flood control purpose are reflected in the studies. These many long-range studies have been supplemented by detailed examination of particularly severe flood events, which are described in detail in Appendix A of this Master Manual. The Master Manual Study included over 500 long-range studies, exceeding the total number of studies conducted prior to that time.

7-03.1.5.1. Long-term studies have also been made to investigate the effects of continued water resource development in the Missouri River basin. In general, these studies indicate that the flood control zone elevations currently used will continue being applicable well into the future. The loss of storage in the flood control zones of the System reservoirs due to sedimentation will be balanced by the reductions of flood runoff resulting from continuing water resource development, land treatment, and depletions that includes future appropriation of tribal water rights. Studies will continue to be made to determine the effects of such changes in Missouri River basin water resource development and in associated System regulation techniques. A major purpose of these studies will be the re-evaluation of System and individual System project storage zone allocations. If deemed necessary, appropriate action toward modification of System project storage zones will be initiated.

7-03.1.5.2. The current storage allocations and associated elevations in each of the zones of individual System projects, as well as for the System as a whole, is shown on Plates II-1 and II-2. Storages given in this table reflect the January 2004 elevation-storage relationships. Minor modifications from previous allocation tables are discussed below.

7-03.1.5.2.1. **Fort Peck.** The elevation of the top of the Permanent Pool Zone, or the bottom of the Carryover Multiple Use Zone, has not changed for Fort Peck; however, this updated water control plan has changed the regulation of the System during drought, or water conservation, periods. This change will result in the reservoir being approximately 22 feet higher during a

Missouri River
Master Water Control Manual
Review and Update

Final
Environmental Impact Statement
Volume I: Main Report, Part 1



U.S. Army Corps
of Engineers
Northwestern Division

March 2004

2 CURRENT AND ALTERNATIVE WATER CONTROL PLANS

2.1.1 System Storage Zones

The division of total available system storage volume into zones affects Mainstem Reservoir System operation. Zones are prescribed for flood control, multiple uses, and the permanent pool. Figures 2.1-1 and 2.1-2 show this division for the total system and individual lakes, respectively.

Exclusive Flood Control Zone

The exclusive flood control zone is the total upper volume of the mainstem lakes maintained exclusively for flood control. This zone represents the upper 6 percent of the total system storage volume, or that between 68.7 and 73.4 MAF (Figure 2.1-1). Water is released from this zone as quickly as downstream channel conditions permit so that sufficient storage remains available for capturing future inflows. The larger four lakes—Fort Peck Lake, Lake Sakakawea, Lake Oahe, and Lake Francis Case—hold most (98 percent) of the volume retained exclusively for flood control (Figure 2.1-2).

Annual Flood Control and Multiple Use Zone

The next 16 percent of the system storage volume is reserved for annual flood control and multiple uses. It includes the system storage from 57.1 to 68.7 MAF (Figure 2.1-1). This zone is used to store the high annual spring and summer inflows to the lakes. Later in the year, water stored in this zone is released for riverine uses so that the zone is evacuated by the beginning of the next flood season on March 1. Evacuation is accomplished mainly during the summer and fall navigation season, because icing of the river may preclude high evacuation flows during the winter.

Carryover Multiple Use Zone

The largest portion of the system storage capacity, 53 percent, is designed to provide water for all uses during drought periods. The carryover multiple use zone includes storage between 18.1 and 57.1 MAF and is confined to Fort Peck Lake, Lake Sakakawea, Lake Oahe, and Lake Francis Case (Figures 2.1-1 and 2.1-2). It is operated so that it remains full during periods of normal inflow but is gradually drawn down during drought periods.

Permanent Pool

The remaining 25 percent of the total storage capacity is reserved as the permanent pool. Total capacity allocated for the permanent pool is 18.1 MAF. The permanent pool provides the minimal water level necessary to allow the hydropower plants to operate and to provide reserved space for sediment storage. It also serves as a minimum pool for recreation and for fish and wildlife habitat and as an ensured minimum level for pump diversion of water from the lakes.

2.1.2 Water Releases from the Lakes

The Master Manual provides criteria for releases from the flood control and carryover multiple use zones for flood control, navigation service, and non-navigation service. Each criterion relates to the amount of water in system storage. The criteria were designed so that system storage in the flood control zone can be evacuated in an orderly manner before the beginning of the next flood season. When storage volumes fall during extended droughts, cutbacks in system releases are made to conserve water. The criteria were originally designed so that the water in the carryover multiple use zone would be adequate to provide navigation service, though at a reduced level through a drought comparable to that of 1930 to 1941.

Navigation Service Criteria

Augmenting downstream tributary flows by releasing water from the Mainstem Reservoir System provides support for navigation on the Missouri River below Sioux City. In drought periods, storage water is limited and cutbacks in releases may shorten the navigation season and reduce navigation service. The CWCP has two criteria for reducing navigation service in droughts: navigation service level and season length.

The first step in conserving water in storage is to cut back releases to those necessary to provide a full service level (approximately a minimum of 8.5 feet of draft). As storage declines in a drought, the navigation service level is reduced a maximum of 6 thousand cubic feet per second (kcfs) to minimum service (7.5 feet of draft). The full navigation service level designation for the Missouri River navigation project is 35 kcfs. The downstream target flows are a minus or plus value from this service level designation. To meet full service, target flows are set

WATER SUPPLY HANDBOOK

*A Handbook on
Water Supply Planning
and
Resource Management*

**Institute for Water Resources
Water Resources Support Center
U.S. Army Corps of Engineers
7701 Telegraph Road
Alexandria, Virginia 22315-3868**

**Prepared by
Theodore M. Hillyer
with
Germaine A. Hofbauer
Policy and Special Studies Division**

CHAPTER 4:

STORAGE REALLOCATION

DECEMBER 1998

A. AUTHORITY

1. Water Supply Act of 1958. Reallocation is the reassignment of the use of existing storage space in a reservoir project to a higher and better use. Authority for the Corps to reallocate existing storage space to municipal and industrial (M&I) water supply is contained in Public Law 85-500, Title III, Water Supply Act of 1958, as amended (72 Stat. 319)(see Appendix A). Section 301(b), of this Act states ". . . it is hereby provided that storage may be included in any reservoir project surveyed, planned, constructed or to be surveyed, planned, and/or constructed . . . to impound water for present or anticipated future demand or need for municipal and industrial water supply." Section 301(d) of the Act states "[M]odifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b), which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes, will be made only upon the approval of Congress as now provided by law."

2. Guidance. Official Headquarters guidance on reallocations can be found in ER 1105-2-100. In this regulation, the guidance on reallocation of water supply storage is contained in Chapter 4, Section VII (Water Supply), Paragraph 4-32d, dated 31 October 1997. Additional information in the ER is contained in Chapter 6, Section XV (Cost Allocation), Paragraph 6-205, dated December 1990. Periodic Engineering Circulars and Policy Guidance Memorandums can also be issued on this procedure. The intent of this chapter is not only to capture all current policies and procedures, but also to provide additional information that may be helpful to Corps planners attempting to reallocate storage.

B. OPPORTUNITIES

1. Reservoirs.

a. Multipurpose Pools. A typical multipurpose reservoir consists of three pools; a flood control pool, a conservation pool, and an inactive or sediment pool. The flood control pool is normally kept empty to permit storage of runoff during times of high inflow. The conservation pool can consist of dedicated storage for one or more of the following purposes: hydropower, navigation, water supply, water quality, or irrigation. Recreation can also have dedicated storage, but in most all Corps multipurpose reservoir projects, the recreation feature uses the top of the conservation pool. The inactive or sediment pool, while it can be used, is generally not available to meet downstream water needs. This storage is normally set aside for hydropower head and/or to store the sediment expected to accumulate over the life of the project.



**U.S. Army Corps
of Engineers**
Omaha District

**Garrison Dam/Lake Sakakawea Master Plan with Integrated Programmatic
Environmental Assessment**

Missouri River, North Dakota

Update of Design Memorandum MGR-107D

December 14, 2007

Table 2.7.1. Missouri River Mainstem Flood Control Reservoirs

Project (Dam and Reservoir)	Incremental Drainage Area (Square Miles)	Year of Closure	Flood Control and Multiple Use Storage in Acre-Feet (AF)	Total Storage in Acre-Feet
Fort Peck Dam / Fort Peck Lake	57,500	1937	2,717,000	18,688,000
Garrison Dam / Lake Sakakawea	123,900	1953	4,222,000	23,821,000
Oahe Dam / Lake Oahe	62,090	1958	3,201,000	23,137,000
Big Bend Dam / Lake Sharpe	5,840	1963	117,000	1,798,000
Fort Randall Dam / Lake Francis Case	14,150	1952	1,309,000	5,418,000
Gavins Point Dam / Lewis and Clark Lake	16,000	1955	90,000	470,000

Lake Sakakawea provides a significant storage contribution to the mainstem system of reservoirs. It is the largest of the six reservoirs, with a storage capacity of 23.8 million acre-feet (MAF), which comprises 32 percent of the total 73.3 MAF storage capacity in the mainstem system.

2.7.2. RESERVOIR REGULATION

For the purpose of regulation, the storage capacity at Lake Sakakawea is divided into four zones. Starting at the bottom, there is the 4.9 MAF permanent pool between elevations 1775.0 and 1673.0 feet msl. This zone provides minimum power head and sediment storage capacity and assures minimum level for pump diversion of water from the reservoir. Above the permanent pool there is the 13.1 MAF carry-over multiple-use zone between elevations 1837.5 and 1775.0 feet msl. This intermediate zone provides a storage reserve for irrigation, navigation, power production, and other beneficial conservation uses. This zone also provides carry-over storage for maintaining downstream flows through a succession of years in which runoff is below normal. The next zone is the 4.2 MAF annual flood control and multiple use zone between elevations 1837.5 and 1850.0 feet msl. This is the desired operating zone. Water stored in this zone is normally evacuated by March 1 of each year to provide adequate storage capacity for the flood season. During the flood period, water is impounded in this space as required. Finally, the upper zone, or exclusive flood control zone, consists of 1.5 MAF of storage between elevations 1850.0 and 1854.0 feet msl. This zone is used only during periods of extreme floods and is evacuated as soon as downstream conditions permit.

Regulating the Missouri River mainstem reservoir system is essentially a repetitive annual cycle. Unless water conservation measures are being implemented, the reservoirs are evacuated to the bottom of the annual flood control and multiple use zone by March 1. Because the major portion of the annual runoff enters the reservoirs between March and July, storage accumulates and usually reaches a peak during early July. During an average year, the Lake Sakakawea elevation crests near 1840 feet msl. Releases from Lake Sakakawea are scheduled throughout the remainder of the year to provide support



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

REPLY TO
ATTENTION OF

5 January 2011

Planning, Programs, and Project Management Division

Mr. Michael D. Wells
Deputy Director and Chief of Natural Resources
Missouri Department of Natural Resources
1101 Riverside Drive
Jefferson City, Missouri 65101

Dear Mr. Wells:

I have received your request dated January 3, 2011 for specific documentation the Corps used in making the determination in the *Garrison Dam/Lake Sakakawea Project, North Dakota Surplus Water Report* that due to available sediment storage in the multiple-use zone, there is sufficient capacity in Lake Sakakawea to provide 257,000 acre-feet of surplus storage over the 10-year planning period. In your letter you specifically request the following documents:

1. The amount of sediment storage that was planned over the effective life of the Lake Sakakawea;
2. The portion of this planned sediment storage that was in the carryover multiple use zone of Lake Sakakawea;
3. The determination of storage filled by sediment in each of the storage zones of Lake Sakakawea;
4. The amount of storage that remains available;
5. Design reports for Lake Sakakawea; and
6. Sediment survey reports.

This information has been placed on an ftp site at ftp://ftp.usace.army.mil/pub/nwo/LakeSak_MO_Info/ and enclosed on a CD. Please note that information uploaded to the ftp site is automatically removed every seven days.

Additionally, you requested a copy of the reference cited in the Environmental Assessment: AECOM 2010, Analysis of Hydraulic Impacts for Lake Sakakawea Withdrawals, November 16, 2010, and electronic copies of the DRM output files (e.g. Q2D, QID, NVY, DI 1, ELD, PRM, etc.) used in the analysis. The DRM output files used in the Surplus Water Report and EA have been placed on the ftp site referenced above. AECOM 2010 is a draft report that was prepared by a subcontractor and submitted by the contractor. It was never approved or accepted by the Corps, nor was any of the information contained in the report relied on by the Corps. Reference to it was inadvertently left in the report. All reference to the AECOM 2010 report will be removed from the final Surplus Water Report and EA as it is irrelevant to the conclusions reached in the analysis. The document is considered to be pre-decisional and will not be made public.

If you have any additional questions please do not hesitate contacting me or Mr. Larry Janis, Water Supply Business Line Manager, at 402-995-2440.

Sincerely,

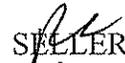
A handwritten signature in black ink that reads "Kayla A. Eckert Uptmor". The signature is written in a cursive style with a large initial 'K'.

Kayla A Eckert Uptmor
Chief, Planning Branch

Enclosure

 VANOSDALL/CENWO-PM-AA/2695/blr

 JOHNSON/CENWO-PM-AA

 SELLERS/CENWO-PM-AC

 JANIS/CENWO-OD-T

 GROW/CENWO-OC

 ECKERT-UPTMOR/CENWO-PM-A

Responses:

- a. The amount of sediment storage that was planned over the effective life of the Lake Sakakawea; There was not any storage specifically planned for or set aside for sediment when the project was originally designed. The original project design did include an evaluation of the estimated sediment inflow rate which was used to determine a project life. The original sediment deposition rate was estimated as 48,000 acre-feet/year. The estimated sediment deposition within the reservoir through 1988 is less than the rate originally estimated.
- b. The portion of this planned sediment storage that was in the carryover multiple use zone of Lake Sakakawea;
The original evaluation did not separate sediment deposition by zones within the pool.
- c. The determination of storage filled by sediment in each of the storage zones of Lake Sakakawea;
See the following summary table.
- d. The amount of storage that remains available;
See the following summary table.
- e. Design reports for Lake Sakakawea; and
The best available electronic versions of the original design reports are provided.
- f. Sediment survey reports.
The most recent sediment survey report is provided.

GARRISON RESERVOIR STORAGE DEPLETION SUMMARY														
SURVEY YEAR	TOTAL STORAGE BELOW THE POOL ELEV IN 1,000 ACRE FEET				INCREMENTAL STORAGE BETWEEN POOL ZONES IN 1,000 ACRE FEET				INCREMENTAL STORAGE CHANGE SINCE THE ORIGINAL IN 1,000 ACRE FEET				TOTAL DEPLETION	
	EXCLUSIVE FLOOD CONTROL	FLOOD CONTROL & MULTIPLE USE	CARRYOVER MULTIPLE USE	INACTIVE	EXCLUSIVE FLOOD CONTROL	FLOOD CONTROL & MULTIPLE USE	CARRYOVER MULTIPLE USE	INACTIVE	EXCLUSIVE FLOOD CONTROL	FLOOD CONTROL & MULTIPLE USE	CARRYOVER MULTIPLE USE	INACTIVE	1000 AC-FT	PERCENT
POOL ELEV.	1854	1850	1837.5	1775	1854	1850	1837.5	1775	1854	1850	1837.5	1775		
1953	24728	23225	18917	5152	1503	4308	13765	5152						
1958	24504	23000	18694	5004	1504	4306	13690	5004	-1	2	75	148	224	0.9%
1959	24477	22973	18670	4989	1504	4303	13681	4989	-1	5	84	163	251	1.0%
1964	24355	22846	18517	4981	1509	4329	13536	4981	-6	-21	229	171	373	1.5%
1969	24137	22635	18348	4976	1502	4287	13372	4976	1	21	393	176	591	2.4%
1979	23923	22439	18209	4990	1494	4220	13219	4990	9	88	546	162	805	3.3%
1988	23821	22332	18110	4980	1489	4222	13130	4980	14	86	635	172	907	3.7%

NOTES

- 1) Listed pool elevation correlates to the top of each pool zone (i.e. 1850 is the top elevation of the flood control and multiple use zone).
- 2) The survey listed in 1953 corresponds to the original condition.
- 3) The last survey date of 1988 is the most recent survey. Current conditions were determined by extrapolating from 1988 to present using the average sediment depletion rate.
- 4) The incremental storage change compared to the original indicates the zone in which the depletion occurred. The sum of all zones equals the total depletion.

OFFICE OF THE GOVERNOR
STATE OF MONTANA

BRIAN SCHWEITZER
GOVERNOR



JOHN BOHLINGER
LT. GOVERNOR

February 1, 2011

Colonel Robert Ruch, District Commander
U.S. Army Corps of Engineers, Omaha District
CENWO-OD-T
Attn: Lake Sakakawea Surplus Water Report and EA
1616 Capital Avenue
Omaha, NE 68102-4901

Dear Colonel Ruch:

The State of Montana has reviewed the *Garrison Dam/Lake Sakakawea Draft Surplus Water Report and EA* issued by the Corps in December 2010. While the Report is limited to analyzing surplus water availability at Garrison Dam/Lake Sakakawea, it is my understanding that the Corps will be conducting similar studies for the remaining Missouri River System reservoirs. On behalf of the State of Montana I write this letter to express a number of concerns regarding the analysis of surplus water at Lake Sakakawea and how that analysis may affect future studies on the remaining Missouri River System reservoirs. My comments address some of those concerns, however, the State of Montana reserves the right to submit more detailed and specific comments if the Corps conducts future surplus water studies on the remaining Missouri River System reservoirs including Fort Peck.

The Report cites language from Section 6 of the Flood Control Act of 1944 in defining the constraints of its surplus water analysis. The Report determined that storage reserved for but not yet filled with sediment at Lake Sakakawea constitutes surplus water and is available for temporary M & I use. However, it is unclear whether the Corps has limited its definition of surplus water for purposes of Lake Sakakawea to water made available from unfilled sediment storage, or whether additional surplus water may be made available at Lake Sakakawea based upon the Section 6 criteria cited in the Report. This issue requires clarification because it has been suggested that the Corps will conduct future surplus water studies on the remaining Missouri River System reservoirs using a similar approach. Accordingly, the State of Montana seeks clarification on the precise definition of surplus water and whether future surplus water studies will be limited to water made available by unfilled sediment storage.

North Dakota and South Dakota have raised the issue of their respective authorities over natural flow in the Missouri River. The State of Montana likewise maintains that use of Missouri River natural flow, now impounded by Missouri River System reservoirs, remains subject to the exclusive authority and jurisdiction of the individual states. The Report analyzes North Dakota's authority over water in the Missouri River above Lake Sakakawea and below Garrison Dam. However, it does not analyze or account for North Dakota's authority and jurisdiction over use of Missouri River natural flows now impounded by Garrison Dam. Thus it appears that the Corps intends to charge for use of water that is subject to the authority and jurisdiction of the individual states. The State of Montana maintains that the Report should analyze easement access and infrastructure development for access to Missouri River natural flow water now impounded by Missouri River System reservoirs under alternative 3.6.1.4 Missouri River – Other Sources in the Report. In the meantime, the State of Montana maintains that upon obtaining the appropriate easements for access to Missouri River System reservoirs, new uses and existing uses of natural flow in Missouri River System reservoirs are authorized according to the authority and jurisdiction of the individual states over water use within their boundaries.

Colonel Ruch
Page two
February 1, 2010

On a related topic, I am concerned with the Corps' position that existing water users may be required to obtain surplus water agreements prior to renewing their existing leases. Specifically, page 3-9 of the Report provides:

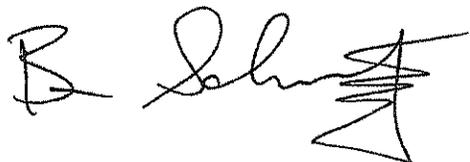
"The Corps has issued 142 water intake easements around Lake Sakakawea, only one of which has a water supply agreement (Basin Electric Power Cooperative). Of these 142 water intake easements, approximately 77% (110) will expire during the 10-year study period. According to Corps policy, holders of these easements may be required to execute surplus water agreements with the Corps of Engineers as a pre-condition of re-issuance of their current easements."

It is unclear how this requirement might serve effectively the purposes of the Corps in meeting its obligations and the demands of water users. Furthermore, it is doubtful that temporary surplus water contracts will serve the long term needs of these existing users. The State of Montana requests that the Corps reconsider this statement or further clarify its intent. I trust that use of water at Missouri River System reservoirs, including Fort Peck, will not be interrupted pending the development of this policy by the Corps.

Growing regional demands for water will continue to focus attention on the reservoirs of the Missouri River System. The Corps' treatment of these vital resources in meeting the needs of municipal and industrial users will continue to be of strong interest to the State of Montana if the surplus water reports proceed to Fort Peck and as the Missouri River Authorized Purposes Study addresses authorized water supply uses.

Thank you in advance for your serious consideration of these concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Schweitzer". The signature is stylized with a large initial "B" and a long, sweeping underline.

BRIAN SCHWEITZER
Governor

cc: Senator Max Baucus
Senator Jon Tester
Representative Dennis Rehberg
Governor Jack Dalrymple, State of North Dakota
Governor Dennis Daugaard, State of South Dakota
Director Mary Sexton, Montana DNRC



IOWA DEPARTMENT OF AGRICULTURE AND LAND STEWARDSHIP

Bill Northey, Secretary of Agriculture

January 7, 2011

Ms. Kayla Eckert-Uptmor
Chief, Planning Branch, Omaha District
161 Capitol Avenue
Omaha, NE 68102-4901

Re: Garrison Dam and Lake Sakakawea Project, North Dakota
Surplus Water Report and Permit Decision

Dear Ms. Eckert-Uptmor

The Iowa Department of Agriculture and Land Stewardship appreciates the opportunity to provide comment on the proposed surplus water permitting and potential use of federal waters within the Lake Sakakawea project of North Dakota.

This proposal may or may not have significant impacts to the State of Iowa's agricultural and broader interests. At this time however, we are unable to provide such comments in lieu of the extremely short period that had been granted to fairly evaluate a proposal of such magnitude. I am hopeful that you will agree that thirty (30) days is not a practical period to adequately evaluate the published report.

As you are likely aware, the issues of hydro-fracturing and future Missouri River water depletions are both matters of serious concern to the citizens of Iowa.

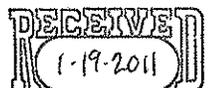
I would like to formally request an additional sixty (60) days for my Department staff and others here in Iowa, to review the report and provide and to discuss whether comments from our agency and other agencies in Iowa are warranted. Please contact me at your earliest convenience regarding your decision on this request.

Sincerely,

A handwritten signature in black ink that reads "Bill Northey". The signature is written in a cursive, flowing style.

Bill Northey
Secretary of Agriculture

Cc. Hon. Tom Miller, Iowa Attorney General
State of Iowa, Missouri River Authority Members





STATE OF NEBRASKA
Office of the Attorney General

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JON BRUNING
ATTORNEY GENERAL

DAVID D. COOKSON
CHIEF DEPUTY ATTORNEY GENERAL

February 1, 2011

VIA Email

U.S. Army Corps of Engineers Omaha District
Attn: CENWO-OD-T
Lake Sakakawea Surplus Water Report and EA
1616 Capital Avenue
Omaha, NE 68102-4901

garrisonsurplusstudy@usace.army.mil

Re: Nebraska Attorney General's Comments on Garrison Dam / Lake Sakakawea
Project Surplus Water Report

Dear Colonel Ruch:

The Nebraska Attorney General's Office (the "NE AG") appreciates the opportunity to provide these comments on the Corps of Engineers' Garrison Dam / Lake Sakakawea Project Surplus Water Report (the "Report"). We incorporate by reference herein and join DNR's comments. As discussed below, the NE AG questions the timing of the Corps' surplus water analysis and has multiple concerns with the manner in which the analysis was conducted. As currently configured, the Report and accompanying environmental assessment ("EA") are technically and legally deficient and must be revised prior to any decision. In the meantime, we look forward to working with the Corps to ensure Nebraska's interests are protected.

1. The Corps Should Refrain from any Reallocation Pending Completion of the Missouri River Authorized Purposes Study.

Section 108 of the 2009 Omnibus Appropriations Act authorized a comprehensive study of the existing Missouri River Basin projects to review the original project purposes and determine whether changes to those purposes might be warranted. The Missouri River Authorized Purposes Study ("MRAPS") is presently underway. The federal agencies in the Basin and the Missouri River Basin States are spending significant time and resources on the MRAPS process (as well as the ongoing Missouri River Recovery Program and its Implementation Committee and the Missouri River Ecosystem Restoration Plan). The entry of surplus water contracts is premature pending completion of MRAPS, which is a more appropriate context in which to identify surplus water, if

River Ecosystem Restoration Plan). The entry of surplus water contracts is premature pending completion of MRAPS, which is a more appropriate context in which to identify surplus water, if any, in the Missouri River Basin. The Corps should refrain from entering into any such contracts at this time.

Awaiting the outcome of MRAPS should not present a serious constraint on energy development, as it appears alternative water supplies are available. As the EA explains, water supply “is not a limiting factor on the rate of drilling, hydrofracing or the industry’s rate of growth in North t.” EA at 113 (emphasis original). Moreover, if the “only difference” between the no-action and proposed action alternatives is “an administrative action” designed to comply with Corps policy, Report at 3-28, then there is no *actual* urgency to contract with entities presently withdrawing water without a contract.

2. Section 6 of the Flood Control Act Does Not Authorize the Temporary Allocation of Storage.

The Report implies that up to 257,000 acre-feet of storage in Lake Sakakawea will be allocated temporarily to prospective municipal and industrial users to ensure a yield of 100,000 acre-feet annually. *See, e.g.*, Report at 6-1 (Recommendations). However, Section 6 of the Flood Control Act does not authorize the reallocation of storage space in Corps reservoirs. Rather, this provision merely provides for the sale of surplus water, which may be satisfied from – but *not* guaranteed out of – available storage. Corps policy recognizes this distinction. For example, Engineering Regulation 1105-2-100 (04/00) at 3-33 acknowledges Section 6 authority may be used “only where non-Federal sponsors *do not want to purchase storage* because: use of the water is needed for a short term only or use would be temporary pending development of the authorized use and reallocation of storage is not appropriate.” (Emphasis supplied).

To the extent the Corps desires to allocate storage in Lake Sakakawea to M&I use, it must do so pursuant to the Water Supply Act of 1958. However, that authority has not been cited in the Report and will require a different kind of analysis. The Corps should clarify that the recipients of any Section 6 contract will not be entitled to a storage allocation in Lake Sakakawea and that any such allocation would need to be pursued under separate authority.

3. Section 6 Should Not Be Used to Summarily “Paper” Existing Withdrawals.

While early portions of the Report convey the impression that surplus water is needed primarily to meet growing energy demands, it becomes clear the Corps has a secondary goal: To provide contracts to those entities withdrawing water, which do not presently have contracts. Indeed, the volume of water associated with these proposed contracts is nearly twice that being evaluated for energy purposes. Report at Table 3-6. This is not an appropriate use of Section 6.

According to the Report, the Corps has issued 142 water intake easements around Lake Sakakawea, but has entered into only one water supply contract (with Basin Electric Power Cooperative). The report does not make clear what authority was used to support that contract. Nor does the report identify any authority pursuant to which existing withdrawals are being made. The Report explains, however, it is “Corps policy” to ensure each easement holder has a water supply

contract. Report at 3-9. But, this policy has been violated to date and that fact does not justify summarily papering over the past violation.

The Report assumes users who do not hold contracts will continue to withdraw water whether or not contracts are issued. Report at 3-28. This assumption is inappropriate and should be revisited. Rather, the Corps should explore as one alternative the possibility those withdrawals are terminated and an alternative source located. If the Corps does not issue contracts for these users, then the users will have no express entitlement to withdraw water from Lake Sakakawea, and the validity of their withdrawals will continue to be in question. The Corps should not use this process to validate *post hoc* withdrawals the Corps knows violate federal policy today.

4. Impacts to the Missouri River are Underestimated.

a. Extent and Duration of Demand are Underestimated.

The Report appears to underestimate the potential demand associated with development of the Bakken formation. In comments already submitted (Nov. 17, 2010), the North Dakota Petroleum Association, citing in turn the North Dakota Department of Mineral Resources, *expects* 2,140 wells annually to be drilled over the next 10 years, with a possibility of as many as 2,940 wells annually. The Report, in contrast, estimates *at most* 1,800 new wells per year will be drilled with a total annual demand of 27,000 acre-feet. Thus, even assuming the Corps' per well water demand estimates are correct, the Corps has underestimated demand by somewhere between 16% and 39%. As discussed next, this is compounded by the Corps' failure to account for additional cumulative withdrawals from Lake Sakakawea.

b. The Cumulative Impact Analysis is Deficient.

Although the Report mentions the existence of the Red River Valley ("RRV") Project and the Northwest Area Water Supply ("NAWS") Project, the EA fails to address the cumulative impact of these projects. These must be considered in conjunction with the proposed surplus contracts because all three are designed to remove water from the Missouri River Basin at the same general location.

The EA's impact analysis "forms the scientific and analytic basis" upon which to compare identified alternatives. 40 C.F.R. § 1502.16. If this section is not rigorously developed, decision makers are compromised. The Bureau must analyze all direct and indirect environmental effects of the various alternatives. 40 C.F.R. § 1502.16(a), (b) and (d). But, according to the Council on Environmental Quality, "[e]vidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time." COUNCIL ON ENVIRONMENTAL QUALITY, *Considering Cumulative Effects Under the National Environmental Policy Act* (Jan. 1997), Ch. 1 at 1. The Corps must, therefore, evaluate the cumulative impact of the proposed contracts *in addition* to evaluating their direct and indirect effects. "Cumulative impact" means "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

The importance of this analysis was underscored last year by a federal district court in *Government and Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37 (D.D.C. 2010). There, the court set aside an environmental impact statement prepared by the Bureau of Reclamation for the NAWIS Project precisely because it failed to fully evaluate the cumulative impacts of other withdrawals from the Missouri River. The court explained “Reclamation failed even to consider the cumulative impacts of the Project in conjunction with other planned Missouri River water withdrawal projects, such as the [RRV Project].” *Id.* at 47. The court also went on to admonish the Bureau to consult with the Corps and to evaluate the overall impact of all withdrawals from the River.

The Corps should not make the same mistake the Bureau made. Rather, the Corps must complete a comprehensive analysis of the impact of all reasonably foreseeable projects that will take water from the River and its reservoirs.

c. The Depletions Analysis is Misguided.

As noted above, Section 6 contracts do not include storage allocations. Provided the Corps agrees with this interpretation, then it is possible the impact of a 100,000 acre-foot annual withdrawal could be marginal. However, it is impossible to make this determination because the Corps has not analyzed that impact. Instead, the Corps has analyzed only the impact of an additional 527 acre-foot depletion (which represents the difference between the no-action and action alternatives). *See, e.g.*, Report at Section 3.7.1. But, the mere fact that there is a minor difference between the two actions does not excuse the Corps’ duty to evaluate the practical consequences of both actions. This too was made clear in *Manitoba v. Salazar*. There, the Bureau did not evaluate the actual potential for interbasin biota transfer because the Bureau concluded the risk of potential pipeline and treatment failures were nearly identical under all alternatives. The court rejected the approach and stressed the importance of evaluating the potential *consequences* of any such failure, regardless of how it happened. *Id.* at 49-50.

As the Bureau erred, so has the Corps. Here, the Corps must analyze the full 100,000 acre-foot annual depletion from Lake Sakakawea (in conjunction with cumulative impacts) because, according to the Corps, that is precisely what will occur under either the no-action or action alternative. The Corps’ misguided analysis of the delta between the two alternatives is technically and legally meaningless.

Finally, to the extent the Corps actually is contemplating a reallocation of storage space in the sediment pool as part of the proposed contracts, the Corps must recognize the impact such action might have on reservoir operations. Simply put, we are deeply concerned about the impact of the potential for reservoir operations to be modified in furtherance of protecting the storage required to yield 100,000 acre feet annually. As the Report explains, and as articulated more fully in the Missouri River Master Water Control Manual and related Biological Opinions, nearly all existing project purposes are satisfied contingent on the availability of water in storage. *See, e.g.*, Report at Table 2-3. Similarly, the triggers associated with “spring rise” mitigation elements are tied to storage volumes. To the extent storage space is reallocated in a project reservoir, these functions might be compromised. Yet, the Report contains no analysis of the potential for the proposed contracts to affect reservoir operations in this way.

5. Water Quality Concerns Associated with Water Disposal are Not Addressed.

While the EA purports to address water quality impacts, EA at 72-4, that discussion fails to address disposal of water withdrawn pursuant to the proposed contracts. While the exact content of fracturing fluids is generally proprietary, they are known to contain chemicals that can be toxic to humans and wildlife, and chemicals that are known to cause cancer. These include potentially toxic substances such as diesel fuel, which contains benzene, ethylbenzene, toluene, xylene, naphthalene and other chemicals; polycyclic aromatic hydrocarbons; methanol; formaldehyde; ethylene glycol; glycol ethers; hydrochloric acid; and sodium hydroxide. Even very small quantities of chemicals such as benzene are capable of contaminating millions of gallons of water. The Report and EA must address the manner in which process wastewater will be disposed of, and whether and to what extent such disposal practices might eventually lead to contamination of the Missouri River or its tributaries (including groundwater resources).

6. There is No Discussion of Mitigation.

The EA must include a “reasonably complete discussion of possible mitigation measures.” *Wilderness Soc’y v. Bosworth*, 118 F. Supp. 2d 1082, 1106 (D. Mont. 2000) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351(1989)). “Mitigation must ‘be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.’ ” *Neighbors of Cuddy Mt. v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). See also *Natural Resources Defense Council, Inc. v. U.S. Forest Service*, 634 F. Supp. 2d 1045, 1064 (E.D. Cal. 2007); *San Francisco Baykeeper v. U.S. Army Corps of Engineers*, 219 F. Supp. 2d 1001, 1018 (N.D. Cal. 2002). The EA in this case fails to include any discussion of mitigation measures that might be employed to reduce the impact of water withdrawals, potential water quality concerns or any other downstream impact. Such analysis should be undertaken to determine if the effects of the proposed action (once properly evaluated) can be reduced to insignificance.

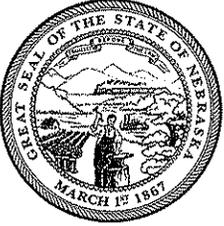
In closing, the NE AG supports responsible energy development in the Missouri River Basin and appreciates the potential importance of the Bakken formation as a source of energy to the State of North Dakota, the region and the United States. However, for the reasons discussed above, the NE AG does not believe the surplus water contracts can or should be executed until further analysis is performed. We welcome the opportunity to discuss further these issues with you if it will aid your supplemental analyses.

Sincerely,

JON BRUNING
Attorney General



David D. Cookson
Chief Deputy Attorney General



Dave Heineman
Governor

STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES
Brian P. Dunnigan, P.E.
Director

January 3, 2011

IN REPLY TO:

Commander, U.S. Army Corps of Engineers
Attn: Ms. Kayla Eckert-Uptmor
Chief, Planning Branch, Omaha District
161 Capitol Avenue
Omaha, NE 68102-4901

RE: Garrison Dam/Lake Sakakawea Project, North Dakota Surplus Water Report

Dear Ms. Eckert-Uptmor:

I am requesting that the U.S. Army Corps of Engineers extend the public comment period for the above-referenced Surplus Water Report until February 16, 2010. As of the date of this letter, I have not received answers to the questions posed in my letter of November 30, 2010 (attached) related to surplus water and reallocation. Answers to those questions are necessary so that Nebraska can comprehensively comment on the report. I would also note that the report is 284 pages and the comment period of December 16, 2010 to January 17, 2011 covered the holiday season when many staff members were not available to review the report. An extension would allow the Corps of Engineers time to respond to our previous questions and provide the needed time for us to review and comment on the report.

Your consideration of this request and a timely answer is greatly appreciated.

Sincerely,

A handwritten signature in black ink that reads "Brian P. Dunnigan".

Brian P. Dunnigan, P.E.
Director

Attachment

admin-dir/Dunnigan/2011

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The following information was obtained from the records of the
Department of the Interior, Bureau of Land Management, and
the National Archives and Records Administration, and is being
provided to you for your information. It is not intended to be
used as a basis for any legal action.

Very truly yours,
[Signature]



Dave Heineman
Governor

STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES
Brian P. Dunnigan, P.E.
Director

November 30, 2010

IN REPLY TO:

Larry Janis
Department of the Army
Corps of Engineers, Omaha District
1616 Capitol Avenue
Omaha, NE 68102-4901

Dear Mr. Janis:

This letter is a response to the September 21, 2010, letter to Governor Heineman from Colonel Ruch notifying the state of the soon to be released Surplus Water Letter Reports. Thank you for the information you previously provided including the Water Supply Handbook. The Department has reviewed the handbook, specifically those portions relating to surplus water and reallocation and has the following questions. I would appreciate receiving a timely response so that Nebraska can properly comment on any Surplus Water Letter Reports you might release.

1. Where are the amounts of the original allocations made for the different water uses in each of the Missouri River Basin reservoirs for the original authorized purposes documented? Can you send us this information including the amounts of the allocations?
2. Have any allocations been made in addition to the original allocations and, if so, where is that information documented? Please provide the amounts of such allocations, the purpose for the allocations, and the Missouri River Basin reservoir each allocation is associated with.
3. Will the Surplus Water Letter Reports provide us information to tell what the source of water is for each surplus water allocation? In other words, will we be able to tell whether the surplus water is coming from unallocated water, or from water previously allocated to a use which was never developed or no longer used? If this will not be provided in the Surplus Water Letter Reports, where can we find this information?
4. If allocations of specific quantities were not made for the original authorized purposes, what is the basis for declaring this action a surplus water determination rather than a reallocation that requires congressional approval?

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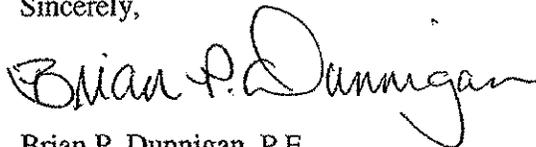
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Mr. Larry Janis
November 30, 2010
Page 2

5. Section 7 of 33 U.S.C. § 709 states in part, "Hereafter, it shall be the duty of the Secretary of the Army to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations." Please provide a copy of these regulations as they currently exist or a citation to a readily accessible version of the regulations. If they do not exist, please note that in your response.
6. Are there other guidance documents or court decisions or regulations that we should be aware of when reviewing the Surplus Water Letter Reports?
7. If a situation exists where there is both a state-granted water right and a USACE contract for the same diversion from a Missouri River Basin reservoir, how does the USACE see coordination occurring between the USACE and the states regarding the use and regulation of use for such water?
8. With the MRERP and MRAPS studies currently underway, is any water from the reservoirs being reserved or allocated for the possible needs of these studies? Is the water needed to meet the flows required under the current Master Manual considered an allocation?

Sincerely,



Brian P. Dunnigan, P.E.
Director



Dave Heineman
Governor

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES
Brian P. Dunnigan, P.E.
Director

January 31, 2011

IN REPLY TO:

Colonel Robert Ruch
U.S. Army Corps of Engineers
Attention: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, NE 68102-4901

Dear Colonel Ruch:

Thank you for the opportunity to comment on the Draft Surplus Water Report for Lake Sakakawea, North Dakota.

In November of 2010, the Nebraska Department of Natural Resources (Department) wrote to the U.S. Army Corps of Engineers (USACE) requesting specific information regarding the surplus water process. On Friday, January 21, the Department received a response to that letter and we are still assessing the response at this time.

The report's conclusion that the proposed action will "not impede the capability and function of Garrison Dam / Lake Sakakawea to serve its authorized purposes" is apparently dependent on the determination that the increased depletions to the Missouri system will only total 527 acre-feet per year (as opposed to the total potential surplus water use agreements for 100,000 acre-feet per year). This determination is dependent on the assumptions presented in Table 3-18, that this 100,000 acre-feet per year of water use would occur under the no-action alternative. This assumption does not appear to be adequately justified in your report. Consequently, please provide an explanation of how existing users will be able to use the water that has been taken from the reservoir in the past without permits from the Corps and the legal and economic justification that alternative locations for withdrawal are available. Additionally please identify the types of uses that all 142 current users are making of the water that has been withdrawn from the reservoir. This information is critical because the subsequent economic and other analyses related to the impact of the action would obviously be significantly different if the full 100,000 acre-feet per year (or even a larger portion of this total) were considered.

Also, in paragraph 5c of Chapter 2 of the Water Supply Handbook it states, "Use of the Section 6 authority is allowed only where non-Federal sponsors do not want to purchase storage because: use of the water is needed for a short term only; or use would be temporary pending development of the authorized use and reallocation of storage is not appropriate." The use of water for

admin-directors/dunnigan/2011

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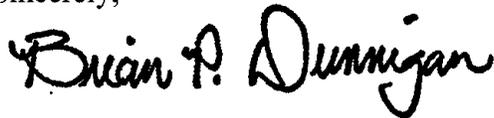
Colonel Robert Ruch
January 31, 2011
Page 2

development of the oil and gas field in the next few years may meet "short term only" if current estimations of time are correct. However, the large institutional users described in Table 3-7 do not appear to meet the standards described in the quote above, and there isn't enough specific information on the actual kinds of uses made to assess the "small users with expiring easements." An explanation of how these diversions meet your requirements for temporary surplus storage permits is needed. Additionally an explanation is needed to provide assurance that the uses will remain "short-term" in duration.

It is our understanding that in the next few months you will be releasing Draft Surplus Water Reports on other mainstem reservoirs, all located upstream of Nebraska. The Department would like an opportunity to review all proposed temporary uses from any of the reservoirs to determine the possible cumulative impacts to Nebraska and request you allow us this opportunity and to make additional comments, if required, before a final decision is made on any specific reservoir.

The Department would like an opportunity to discuss the issues raised by this report with the USACE staff and will be contacting your office to schedule such a meeting.

Sincerely,

A handwritten signature in black ink that reads "Brian P. Dunnigan". The signature is written in a cursive, slightly slanted style.

Brian P. Dunnigan, P.E.
Director



Mayor Dennis R. Walaker
200 3rd Street North
Fargo, North Dakota 58102
Phone (701) 241-1310
Fax (701) 476-4136

January 27, 2011

Colonel Robert J. Ruch, Commander
U.S. Army Corps of Engineers, Omaha District
CENWO-OD-T
Attn: Lake Sakakawea Surplus Water Report and EA
1616 Capital Avenue
Omaha, NE 68102-4901

Re: City of Fargo Official Comments on the Lake Sakakawea Draft Surplus Water Report

Dear Colonel Ruch:

Please accept this letter as official protest from the City of Fargo regarding the Garrison Dam/Lake Sakakawea Project, North Dakota, Draft Surplus Water Report, in which your agency suggests that water users pay for the water taken out of the Missouri River.

The City of Fargo is a member of the Lake Agassiz Water Authority (LAWA), which was established by the Dakota Water Resources Act of 2000 to provide emergency water supply to the 13 eastern most counties in North Dakota, including the City of Fargo. The City of Fargo and LAWA have worked with the Bureau of Reclamation (BOR) to study the needs and options for emergency water supply. The Final Needs and Options Report, published November 28, 2005, and Final Environmental Impact Statement, published December 21, 2007, recommend the Garrison Diversion Unit to Sheyenne River option as the preferred Red River Valley Water Supply Project (RRVWSP).

The total RRVWSP withdrawal from the Missouri River system, when utilizing the preferred alternative, was set at an annual maximum of approximately 88,000 acre-feet. This volume covers both the maximum shortage realized within a single year by the Municipal, Rural, and Industrial (MR&I) users of 55,000 acre-feet in addition to supplying water for environmental concerns (minimum stream flows and lake levels) and multiple sources of inefficiencies within the system (peak user demands occurring during different timeframes, evaporation, channel losses, etc.). The water for the RRVWSP is part of the BOR's water authorized

for irrigation in the Garrison Diversion Unit Act of 1965 and re-authorized for MR&I by the Dakota Water Resources Act of 2000. This water is exempt from surplus water agreements with the U.S. Army Corps of Engineers (USACE).

The City of Fargo has invested considerable time and effort into developing the RRWSP. The City of Fargo and LAWA are committed to completing the RRWSP and want to ensure that the water for this project is allocated from the Missouri River System and remains exempt from any payments to the USACE. We appreciate the opportunity to provide comments on the draft report and trust that this letter will be included as written testimony for the proposed action.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis R. Walaker". The signature is fluid and cursive, with a long horizontal stroke at the end.

Dennis R. Walaker
Mayor

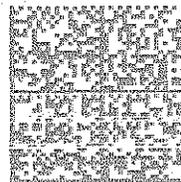
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wwusacecomment

cc: Pat Zavoral, City Administrator
Bruce Grubb, PE, Enterprise Director



OFFICE OF THE MAYOR
200 3rd Street North
Fargo, North Dakota 58102

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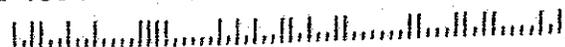


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Mailed From 58102
US POSTAGE

Colonel Robert J. Ruch, Commander
U.S. Army Corps of Engineers, Omaha District
CENWO-OD-T
Attn: Lake Sakakawea Surplus Water Report
and EA
1616 Capital Avenue
Omaha, NE 68102-4901

4 LRCJR11 68102





OFFICE OF MAYOR
MICHAEL R. BROWN

City of Grand Forks

255 North Fourth Street • P.O. Box 5200 • Grand Forks, ND 58206-5200

(701) 746-2607
FAX # (701) 787-3773

January 24, 2011

U.S. Army Corps of Engineers, Omaha District CENWO-OD-T
616 Capitol
Omaha, NE 68102-4901
ATTN: Lake Sakakawea Surplus Water Report and EA

Re: City of Grand Forks, Grand Forks, ND Comments to U.S. Army Corps of Engineers
Lake Sakakawea Surplus Water Study & Environmental Assessment.

To Whom It May Concern:

The City of Grand Forks, ND feels that the U. S. Army Corps of Engineers assessment of surplus water in the Missouri River reservoirs, such as Lake Sakakawea, is not acceptable. The State and its water consumers have the right to appropriate water from the natural flows of the Missouri River. These flows are crucial to the economic viability and vitality of the state of North Dakota. In addition, the State of North Dakota made a substantial commitment and contribution of 550,000 acres of farmland for the construction of the Lake Sakakawea reservoir. For the commitment and contribution there was a promise of water to benefit ND farmers with irrigation benefits. To date there has not been a recognition or repayment of this sacrifice by the Federal government or downstream beneficiaries.

An additional levy or fee placed on this water is not appropriate without assessing downstream users to contribute to project costs for flood control, navigation, and other water uses.

Sincerely

Mayor Michael R. Brown

CC. Grand Forks City Council
Todd Sando, ND State Engineer
David Koland, Garrison Conservancy District
Mike Dwyer, ND Water Coalition
Richard Duquette, City Administrator
Todd Feland, Public Works Director
Hazel Sletten, Water Utility Superintendent
Alan Grasser, City Engineer

City of Minot

Office of the Mayor

January 4, 2011

U.S. Army Corps of Engineers, Omaha District
CENWO-OD-T
Attn: Lake Sakakawea Surplus Water Report and EA
1616 Capital Ave.
Omaha, Neb. 68102 – 4901

Thank you for the opportunity to comment on the draft Lake Sakakawea Surplus Water Report and Environmental Assessment. As Mayor of the City of Minot, North Dakota I wish to go on record as being opposed to the proposal by the U.S. Army Corps of Engineers to begin charging water storage fees for most, if not all, new water withdrawals from Lake Sakakawea. As you know, the City of Minot along with other communities in North Central and Northwest North Dakota and several rural water districts have been working on the Northwest Area Supply Project (NAWS) for more than 20 years. We expect to have water from Lake Sakakawea being pumped in the NAWS line within a few years. Up to 26M gallons a day is expected to flow through the line to help service the needs in our region. To have the Corps impose storage fees on this water would be a major impediment to our ability to operate this project.

As you know, the State of North Dakota has steadfastly asserted that we are entitled to appropriate water from the Missouri Rivers natural flow, as that is water that would be available without the mainstem reservoirs. Natural flow of the Missouri would be ample to meet all of North Dakota's water needs, including NAWS. The reservoir stands in the way of accessing our Missouri River water along vast stretches. The City of Minot concurs in the position of the State of North Dakota that our water users must not be required to pay for access to Missouri River water whether it be natural flow or stored.

Frankly we are astonished that the Corps would even consider imposing such a storage fee. Many communities and countless acres of farmland in lower basin states enjoy flood control benefits provided by the mainstem dams yet most communities have never been asked and are not being asked to share in the costs of the project repayment. This is also the case for the lower basin states municipal water intake, navigation, and power plants. The proposal for storage fees is clearly unfair and unreasonable.

As noted earlier, the waters of the Missouri River flowed long before the construction of the mainstem dams. The Constitution of the State of North Dakota indicates flowing streams and

★ The Magic City ★

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mayor@web.ci.minot.nd.us

natural water courses shall forever remain the property of the state. The State of North Dakota has indicated that previously existing river flows that continued through Lake Sakakawea should not be considered stored water. Clearly, we would have had access to that water even if the Garrison dam did not exist.

The State of North Dakota has also pointed out that Section 301(b) of the 1958 Water Supply Act provided that recovery of capital costs may extend for a period of up to 50 years. The 50 year time period noted has passed, therefore the Corps should not have the ability to charge for water storage cost to repay for the construction costs of the dam.

In conclusion, we believe that the Corps of Engineer's proposal to charge water storage fees for withdrawals from Lake Sakakawea is unfair, unreasonable, illegal, and that this proposal be denied.

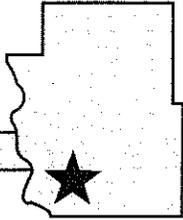
Respectfully,



Curt Zimbelman
City of Minot Mayor

DW/tks

CC: Garrison Surplus Study



STATE OF NORTH DAKOTA

County of Burleigh

221 NORTH 5TH STREET • P.O. BOX 5518 • BISMARCK, NORTH DAKOTA 58506-5518

US Army Corps of Engineers
Omaha District
CENWO-OD-T

January 27, 2011

Attn: Lake Sakakawea Surplus Water Report and EA
1616 Capitol Ave.
Omaha, NE 68102-4901

This is to provide formal comments relative to the proposed US Army Corps of Engineers (COE) study of possible excess water in Lake Sakakawea and a subsequent determination of charging water users within the State for such water.

By Resolution of Jan. 19, 2011, the Burleigh County Commission of Burleigh County, Bismarck, ND has adopted, by unanimous agreement, a position of opposition to such study and to specifically oppose any attempt by the COE to limit the use of water from the Missouri River system, including Lake Sakakawea and Lake Oahe, by users and for beneficial purposes within the State of North Dakota.

Our Commission further supports the testimony provided to you at the Jan. 6, 2011 public hearing on this issue which was provided by our Governor, our Attorney General, and our State Engineer. Their testimonies, individually and collectively, vigorously opposes this effort. Those testimonies were also joined in message by nearly 30 other local leaders and landowners and water users who also vigorously and adamantly oppose this proposed study, restriction of water use, and charges for water.

Our State has simply paid enough. We have had over 500,000 acres of land burdened with a permanent flood for primary benefits accruing to downstream states. We have tolerated the COE operating the reservoir system in an adverse manner to our interests in times of drought, again to the benefit of downstream states. And now it appears we are asked to provide funding to maintain and operate such dams while no such similar request is made of users downstream and away from the main stem reservoirs.

Please provide our concerns and position of this proposed Study with proper consideration.

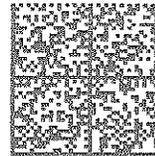
Sincerely

Brian Bitner
Chairman, Burleigh County Commission

c.c. Governor's Office, State of ND
Attorney General Office, State of ND
ND State Engineer
Offices of Senator Hoeven, Conrad and Representative Berg

BURLEIGH COUNTY
221 NORTH 5TH - P.O. BOX 5518
BISMARCK, NORTH DAKOTA 58506-5518

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US ARMY CORPS OF ENGINEERS
OMAHA DISTRICT
CENWO-OD-T
ATTN: LAKE SAKAKAWEA SURPLUS WATER REPORT & EA
1616 CAPITOL AVE
OMAHA, NE 68102-4901

LRXZLM1 66102





STATE OF NORTH DAKOTA
DEPARTMENT OF AGRICULTURE
600 E BOULEVARD AVE, DEPT 602
BISMARCK, ND 58505-0020

DOUG GOEHRING
COMMISSIONER

February 1, 2011

U.S. Army Corps of Engineers, Omaha District
CENWO-OD-T
ATTN: Lake Sakakawea Surplus Water Report and EA
1616 Capital Avenue
Omaha, NE 68102-4901

RE: Comments for the Lake Sakakawea Draft Surplus Water Report and Environmental Assessment

To whom it may concern:

I appreciate the opportunity to submit written comments on the Lake Sakakawea Draft Surplus Water Report and Environmental Assessment released by the U.S. Army Corps of Engineers on Dec 16, 2010.

As North Dakota Agriculture Commissioner, I object to the new restrictions and policies regarding access to water in the Missouri River. It appears the Corps is attempting to block access to the free flow of the Missouri River, which is the rightful property of the State of North Dakota and cannot be considered stored water in Lake Sakakawea. Access to the water must be with no cost and without the regulatory burden of a surplus water supply agreement.

When the reservoirs of the Missouri River were created in North Dakota, over 550,000 acres of farmland were consumed. There is no reason for the Corps to be charging water users who directly withdraw from reservoirs in the upper basin states a water storage fee and do not charge downstream states a similar fee. These reservoirs benefit users of downstream states with no similar fee through flood control, navigation, hydropower, and water supply.

Lake Oahe, Lake Sakakawea, and the Missouri River are influential to the growth and prosperity of the State of North Dakota and should be accessible without cost. Access to the water that is rightfully owned by the State is important to our communities, businesses, oil industry, and farmers and ranchers who rely on the water for irrigation.

I strongly urge the Corps to revise any new policy that restricts North Dakota's rightful access to Missouri River water.

Sincerely,

A handwritten signature in blue ink, appearing to read "Doug Goehring".

Doug Goehring
Agriculture Commissioner

received 1/3/11



NORTH DAKOTA
DEPARTMENT of HEALTH

ENVIRONMENTAL HEALTH SECTION
Gold Seal Center, 918 E. Divide Ave.
Bismarck, ND 58501-1947
701.328.5200 (fax)
www.ndhealth.gov



December 27, 2010

U.S. Army Corps of Engineers
Attn: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, NE 68102-4901

Re: Draft Surplus Water Report and Environmental Assessment for
Lake Sakakawea, North Dakota

Dear Mr. Janis:

The North Dakota Department of Health has reviewed the above referenced report and environmental assessment submitted to us under date of December 17, 2010. We have no comments on the report or environmental assessment. If you have any questions, please feel free to contact me.

Sincerely,

L. David Glatt, P.E., Chief
Environmental Health Section

LDG:cc

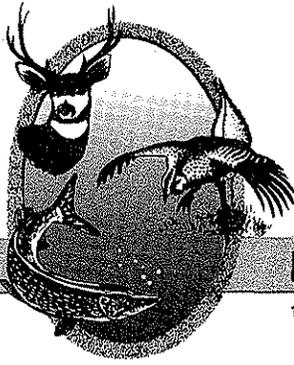
Environmental Health
Section Chief's Office
701.328.5150

Division of
Air Quality
701.328.5188

Division of
Municipal Facilities
701.328.5211

Division of
Waste Management
701.328.5166

Division of
Water Quality
701.328.5210



"VARIETY IN HUNTING AND FISHING"

NORTH DAKOTA GAME AND FISH DEPARTMENT

100 NORTH BISMARCK EXPRESSWAY BISMARCK, NORTH DAKOTA 58501-5095 PHONE 701-328-6300 FAX 701-328-6352

January 17, 2011

US Army Corps of Engineers Omaha District
Attn: CENWO-OD-T (Larry Janis)
Lake Sakakawea Surplus Water Report
1616 Capital Avenue
Omaha, NE 68102-4901

Dear Sir:

Re: Lake Sakakawea Surplus Water Report and EA Comments

The North Dakota Game & Fish Department (Department) has been notified that the US Army Corps of Engineers (COE) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. The report proposes temporarily making up to 257,000 acre-feet of storage per year available within the Garrison Dam/Lake Sakakawea Project for municipal and industrial water supply. The identification of surplus water will allow the COE to enter into temporary surplus water agreements to meet regional water needs for oil and gas until a permanent reallocation study is completed. An Environmental Assessment (EA) identifies the baseline environmental conditions and provides an analysis of potential impacts from the proposed use of surplus water.

Recently, the Department has commented on numerous proposals for water intake around Lake Sakakawea. In most instances, the Department has encouraged the COE to conduct a comprehensive inventory of all existing water intakes and to evaluate all reasonable alternatives prior to approving a site. The Department understands the need for industrial water, however, it is our responsibility to oversee and minimize impacts to fish and wildlife resources. This EA should set forth a management plan that reduces impacts to fish and wildlife resources by limiting the number of intake facilities through careful evaluation of site locations.

The North Dakota State Water Commission was required through House Bill No. 1322 to investigate the availability of water supplies for the energy industry. The process developed a map identifying areas where access to the Missouri River System is least likely to cause cultural, historical and wildlife issues. Our Department participated in the development of the map. This map is included in the EA (Figure 4 - Coordination Index). One of the Department's main concerns during that process was to assure water access does not occur on our Wildlife Management Areas (WMA). The mission statement of the Department is "To protect, conserve, and enhance fish and wildlife populations and their habitats for sustained consumptive and non-consumptive use." Water intakes, depots and/or roads placed on a WMA

destroys habitat, increases disturbance and results in habitat fragmentation, ultimately impacting wildlife on a greater scale than the actual footprint of the facilities. Water intakes and associated facilities located on a WMA are not consistent with the mission of the Department or the goals and objectives of any WMA; therefore, we do not support the placement of these facilities on Department managed lands.

Other significant areas of concern in evaluating site locations for intakes are back bays within the Missouri River system. These areas are the most productive areas in the lake providing habitat for primary production, spawning and rearing of most fish species. The placement of intakes in these areas increases the occurrence of entrainment and/or impingement, especially of young fish. The areas of concern are depicted on the SWC map within the EA.

Additionally, the Department does not support the development of water depots in high recreational use areas (i.e. Deepwater Bay, White Earth Bay, Van Hook Arm, etc.). These areas attract large volumes of boaters, hunters and other outdoor enthusiasts. The potential volume of truck traffic associated with a water depot will surely cause traffic and safety concerns.

Although the following intake conditions have been included in the EA, the Department wants to reiterate the importance of incorporating them into the design of any permitted intake:

1. Intake velocities shall not exceed $\frac{1}{2}$ foot/second.
2. Intake shall be screened and maintained with $\frac{1}{4}$ " or smaller mesh size openings.
3. Intakes located within Lake Sakakawea should be located below 1790 msl when attainable.
4. Only floating intakes shall be installed in the Yellowstone River and in that portion of the Missouri River above river mile 1519 in Williams and McKenzie Counties to minimize potential impacts to larval pallid sturgeon.
 - a. Intakes shall be located over water with a minimum depth of 20 feet.
 - b. If the 20 foot depth is not attainable, the intake shall be located over the deepest water available.
 - c. If the water depth falls below 6 feet the intake shall be moved to deeper water or maximum intake velocity limited to $\frac{1}{4}$ foot per second, with intake placed over maximum practicable attainable depth.
5. Intakes located in Lake Sakakawea, below river mile 1519, and the Missouri River below Garrison Dam shall be submerged.
 - a. The intake shall be placed at least 20 vertical feet below the existing water level.
 - b. The intake shall be elevated 2 to 4 feet off the bottom.

- c. If the 20 foot depth is not attainable, then the intake velocity shall be limited to $\frac{1}{4}$ foot per second, with intake placed at maximum practicable attainable depth.
6. Any work that may take place within the waterway not occur from April 15 to June 1 to protect the fishery resource.
7. Any disruption or displacement of the lake bed or banks must be restored to pre-project conditions.
8. Any unavoidable losses of native forest or riparian forest shall be replaced with similar species on a 2:1 basis by incorporating a mitigation planting into the impacted forest to complement the existing woody vegetation.
9. Any disturbed area shall be reseeded to a native grass mixture.

Thank you for allowing the Department the opportunity to comment on the Draft Surplus Water Report. I hope that you will be able to strongly consider our suggestions and remain consistent with these and other recommendations that have been implemented for Lake Sakakawea in the past few years.

Sincerely,



Paul Schadewald

Chief

Conservation & Communication Division

blk



Jack Dalrymple, Governor
Mark A. Zimmerman, Director

1600 East Century Avenue, Suite 3
Bismarck, ND 58503-0649
Phone 701-328-5357
Fax 701-328-5363
E-mail parkrec@nd.gov
www.parkrec.nd.gov

January 27, 2011

US Army Corp of Engineers Omaha District
Attn: CENWO-OD-T (Larry Janis)
Lake Sakakawea Surplus Water Report
1616 Capital Avenue
Omaha, NE 68102-4901

RE: Garrison Dam/Lake Sakakawea Project, ND Draft Surplus Water Report

Dear Sir:

The North Dakota Parks and Recreation Department (the Department) has attended several meetings related to Lake Sakakawea Surplus Water Report and has reviewed the Surplus Water Report. Our agency scope of authority and expertise covers recreation and biological resources.

The Department mission's is to provide and enhance outdoor recreation opportunities through diverse parks and programs that conserve the State's natural diversity. Water intake and associate infrastructures will negatively impact the visitors overall outdoor experience, therefore we will not support the placement of new intake facilities on or adjacent to Department lands we own or manage or in areas of ecological significance.

We also have concerns regarding impacts that potential water intake developments on existing Land and Water Conservation Fund (LWCF) sites on Lake Sakakawea. Of particular concern are projects within Lake Sakakawea, Fort Stevenson and Lewis Clark State Parks. Without knowing exact location of proposed intake structures and associated infrastructure one can't determine that there will be no impacts or are "non applicable" as the report stated. These areas receive assistance from the federal Land and Water Conservation Fund and are under protection of section 6(f) of the LWCF Act. Any property taken from within the 6f boundary of these sites must be replaced with property of equal market value. Should any public or private utilities need to be added or relocated on the LWCF recreational lands, the NDPRD must be consulted prior to any action taken. Please contact Jessica Riepl (701-328-5364 or jriep1@nd.gov) if additional LWCF information is needed.

As stated in your report, water levels are key factor in recreational use on the lake. In the past, low water levels caused by years of drought and system operations for Lake Sakakawea have created significant problems and economic losses at the State Parks and recreation areas on the reservoir along with regional businesses linked to lake recreation activities. Page 2-15 discusses annual visitation numbers for recreation facilities around Lake Sakakawea using 2006 figures. Lake Sakakawea was still affected by drought driven water levels in 2006. It would be helpful to include 2009 or 2010 visitation numbers so correlation can be made between high and low water and the corresponding effects on recreation area visitation and economic activity. For an example, ND Parks and Recreation visitation numbers on the reservoir show a 12% increase between 2006 (low water)and 2009 (normal water). The decrease in recreation based economic impact during drought years should be an indication to the Corps of the need to include drought considerations in your surplus water allocation study.

The Department has concerns to the number of intake facilities and more importantly the location of these intake facilities. Water intakes and associate infrastructure numbers should be limited and a systematic evaluation of each site needs to be completed to reduce impacts to fish, wildlife and significant ecological community resources. As previously stated, the Department will not support the placement of structure or infrastructure on State Parks and Recreation lands we own or manage.

.....
Play in our backyard!

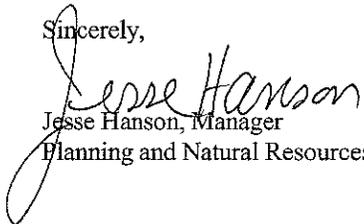
January 28, 2011
Page 2

As stated in the report, The Department will have the opportunity to review all applications. The North Dakota Natural Heritage biological conservation database will be reviewed to determine if any current or historical plant or animal species of concern or other significant ecological communities are known to occur within an approximate one-mile radius of the project area. Of particular concern is the potential for negative impacts to the piping plover (*Charadrius melodus*). Proposed plans of new water intake and water depot development sites along Lake Sakakawea pose a serious threat to this federally listed threatened species.

The Department recommends that the project be accomplished with minimal impacts and that all efforts be made to ensure that critical habitats not be disturbed in the project area to help secure rare species conservation in North Dakota. Regarding any reclamation efforts, we recommend that any impacted areas be revegetated with species native to the project area.

We appreciate your commitment to rare plant, animal and ecological community conservation, management and inter-agency cooperation to date. For additional information please contact Kathy Duttonhefner (701-328-5370 or kgduttonhefner@nd.gov) of our staff. Thank you for the opportunity to comment on this proposed project.

Sincerely,

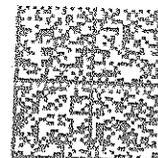

Jesse Hanson, Manager
Planning and Natural Resources Division

R.USNDNHI*2011-030 KD/1/26/2011/DL2.1.11



**NORTH DAKOTA PARKS &
RECREATION DEPARTMENT**
1600 E. Century Avenue, Suite 3
Bismarck, ND 58503-0649

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Army Corp of Engineers Omaha District
Attn: CENWO-OD-T (Larry Janis)
Lake Sakakawea Surplus Water Report
1616 Capital Ave.
Omaha, NE 68102-4901



**STATE
HISTORICAL
SOCIETY
OF NORTH DAKOTA**

Jack Dalrymple
*Governor of North
Dakota*

December 23, 2010

**North Dakota
State Historical Board**

Chester E. Nelson, Jr.
Bismarck - President

Gerold Gerntholz
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Director

*Accredited by
the American Association
of Museums since 1986*

Mr. Larry Janis
US Army Corps of Engineers
ATTN: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, Nebraska 68102-4901

**ND SHPO Ref: 10-2117 COE Draft Surplus Water Report and Draft
Environmental Assessment Lake Sakakawea/Garrison Reservoir, North
Dakota**

Dear Larry:

We have received and reviewed NDSHPO Ref: 10-2117 COE electronic documents: "Draft Surplus Water Report and Draft Environmental Assessment Lake Sakakawea/Garrison Reservoir, North Dakota."

As indicated in the forwarded electronic documents, Sections 6.16 (pp. 98-99) and Section 8. (p. 122), we await further consultation and formal agency correspondence regarding the COE determination of effects for the individual proposed projects and for the proposed project cumulative effect determination.

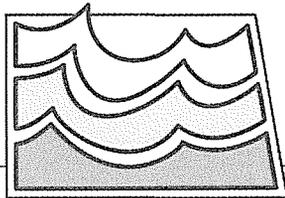
Thank you for the opportunity to review this project and we look forward to further consultation on it. Please include the ND SHPO reference number listed above in any further correspondence for this specific project. If you have any questions, please contact either Paul Picha at (701) 328-3574 or ppicha@nd.gov or Susan Quinnell at (701) 328-3576 or squinnell@nd.gov

Sincerely,

Merlan E. Paaverud, Jr.
State Historic Preservation Officer (North Dakota)

and

Director, State Historical Society of North Dakota



North Dakota State Water Commission

900 EAST BOULEVARD AVENUE, DEPT 770 • BISMARCK, NORTH DAKOTA 58505-0850
701-328-2750 • TDD 701-328-2750 • FAX 701-328-3696 • INTERNET: <http://swc.nd.gov>

February 1, 2011

Colonel Robert Ruch
United States Army Corps of Engineers
Omaha District
1616 Capitol Avenue
Omaha, Nebraska 68102-4901

Dear Colonel Ruch:

This letter presents my position, as the State Engineer of North Dakota and Secretary of the North Dakota State Water Commission, in response to the December 2010 Surplus Water Report and the appended draft Environmental Assessment for Garrison Dam/Lake Sakakawea.

This letter and attached comments do not imply an endorsement of the December 2010 Surplus Water Report. I consider the entire surplus storage initiative to be an illegal taking of state water rights by an agency of the federal government, and a violation of the Tenth Amendment of the Constitution of the United States.

The actions the United States Army Corps of Engineers (Corps) have taken in the last several months to deny access and charge for access to Missouri River water flowing through Lake Sakakawea are wrong. The upper Missouri River Basin states and tribes have sacrificed greatly in loss of land and resources and suffered personal hardship for the Missouri River Basin. Most of the promised benefits for the upper basin states and tribes have never been realized. Now, to add to the injustice, the Corps presumes to require payment for access to natural flows simply because those flows lie within the boundaries of the reservoirs. The natural flows of the Missouri River belong to the states for the beneficial use of their citizens, and as long as natural flows are sufficient, the reservoirs provide no service to water users and in fact, impede their access to the states' waters.

I am opposed to the Corps requiring payment from water users to withdraw water from the Missouri River within the boundaries of the lands taken for the mainstem reservoirs. The Surplus Water Report maintains that the intent is to charge for "surplus storage" in the reservoirs by requiring water storage contracts as a condition for an easement to construct intake works on Corps property. In so doing, the Corps is obstructing access to and use of Missouri River natural flows, which are the waters owned by the people of North Dakota. As the chief officer of the state agency responsible for the appropriation of North Dakota's waters, I do not believe

the Corps has the legal or Constitutional ability to encumber our appropriations for beneficial uses in this manner.

The Corps, through the Surplus Water Report process, is clearly challenging the State of North Dakota and the upper basin states' rights to access their natural flows. The choice being presented to the regions most impacted by the construction of the reservoirs is either: 1) no water access, or 2) incurring additional costs for water access even when the original benefits of water supply for the State have never been fully realized. Any reference in the report that the State of North Dakota's preferred alternative for water supply is use of "surplus water" is incorrect. The State's preferred option, and we maintain the State's legitimate right, is water supply from the natural flows of the Missouri River, accessed through a Corps land easement.

The Corps first halted access to Missouri River water in North Dakota in May 2010, when it refused to issue an easement to South Central Water District for a drinking water intake. After the Bureau of Reclamation provided an exhaustive briefing of the Garrison Diversion legislative history, which amended the Flood Control Act of 1944, the Corps finally acknowledged the South Central project would not require a water storage contract and an easement was issued. This was the first attempt by the Corps to misapply the need for storage contracts in North Dakota and delay projects that benefit the State.

The Corps has refused to process any further easement applications and issued the Surplus Water Report based on Real Estate Policy Guidance Letter Number 26. That policy states, "...no easement that supports any type of water supply agreement will be executed prior to the water supply agreement being executed by all parties..." The Corps' current assumption is that all requests for easements to Lake Sakakawea need to use stored water. This is entirely wrong. The natural flows are nowhere near being fully appropriated. Due to the availability of natural flows, which North Dakota and the tribes within North Dakota have a pre-existing right to, water storage agreements are not needed. The Corps of Engineers must recognize that any easement requests currently before them do not require the Corps to operate the system to provide the water. Thus, the current real estate policy does not apply and will never apply when the water used is within the natural flows. For these reasons the requested easements should be processed immediately.

The Corps is ignoring both Federal and North Dakota state constitutional rights. The Tenth Amendment of the United States Constitution states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Article XI, Section 3 of the North Dakota Constitution states that, "[a]ll flowing streams and natural watercourses shall forever remain the property of the state..." Furthermore, the 1944 Flood Control Act states, "it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water

utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers[.]” Prior to construction of the Garrison Dam, the Missouri River in North Dakota was a free flowing river with natural flows. Accordingly, waters of the Missouri River belong to the public and are subject to appropriation by the North Dakota State Engineer for beneficial use.

Quoting from House Document 325, dated February 4, 1960, which was supporting documentation in the 1965 amendments to the 1944 Flood Control Act:

A large source of additional water is a recognized need everywhere east of the Missouri River in the Dakotas. The Missouri is the only available source of such a supply. On the main stem near Williston N.Dak, at the head of Garrison Reservoir, historic annual riverflows have, since 1898, varied between 25,800,000 and 9,150,000 acre-feet with an average of 17,600,000 acre-feet.

This is a federal recognition that the natural flows in the Missouri River constitutes a large volume of water, some of which can be put to beneficial use by the people of North Dakota.

North Dakota has always maintained its right to use Missouri River water within its boundaries. This was acknowledged in the development of the Garrison Diversion Unit Reformulation Act of 1986, which also amended the 1944 Flood Control Act. Congress declared that one of the purposes of this act is to “preserve any existing rights of the State of North Dakota to use water from the Missouri River.” Congress also stated, “[n]othing in this Act shall be deemed to diminish the quantity of water from the Missouri River which the State of North Dakota may beneficially use... .” The legislative history has been to protect beneficial use in the Upper Basin states; it has not been to deny, restrict, and obstruct access.

The Corps’ tacit acknowledgement of the legitimacy of states’ rights to natural flows was confirmed by the attached letters of Acting Assistant Secretary of the Army Robert Dawson to Senator Quentin Burdick (2 Aug 1985) and South Dakota Congressman Tom Daschle (2 Aug 1985) in reference to a previous attempt by the Corps to charge for withdrawals from Lake Sakakawea and Lake Oahe.

From Dawson to Burdick:

As you explained during our meetings on this subject, it is not clear that withdrawals do benefit from the storage pool of Lake Sakakawea.

Because of this uncertainty, the Corps of Engineers has embarked on a study to determine yield thresholds for each of the main stem Missouri River reservoirs at which reliable water supplies would require storage.

Unfortunately, since the study described above involves complex issues and requires extensive coordination with State and local officials, we do

not expect it to be completed prior to the middle of 1987. Because some needs must be met much sooner than that date, we are actively seeking an interim solution within existing authorities that will allow withdrawals to begin immediately at no cost.

The Dawson letter tacitly acknowledges the states' rights to allocate natural flows, and further acknowledges legitimate doubts about the needs of storage for many uses. In exempting new uses from storage fees until the benefits of storage are defined, the letter also acknowledges the necessity for establishing storage benefits before storage charges can be levied. However, the study promised to Senator Burdick and Congressman Daschle never materialized, nor am I aware of subsequent communication on the matter with the states. Having never resolved the question, the Corps is now attempting to sidestep the issue and take control of the water by limiting land access. The Corps should honor its commitment to complete the natural flow study and allow withdrawals without payment to resume immediately.

The philosophy and policy behind the Surplus Water Report is wrong. However, I do not want my protest of this report to delay current easement applications from being processed. Of the many concerns I have with the report there are a few that stand out and are described below.

I have strong concerns that the Surplus Water Report does not clearly address irrigation. The report recognizes that irrigation has accounted for nearly half of the water usage in the Lake Sakakawea area over the last two decades. The report states that 110 of the 142 water intake easements at Lake Sakakawea will expire over the next 10 years and they may require surplus water agreements prior to renewal. It is misleading to say they "may require" agreements when the report also states that no temporary surplus water agreements can be made for crop irrigation. Charging surplus storage fees for irrigation will most certainly "diminish the quantity of water from the Missouri River which the people of the state may beneficially use," and impair the "existing rights of the State of North Dakota to use water from the Missouri River." The impairment will be even more severe if the storage fees are based on allocated use rather than the usually smaller, actual use.

The construction repayment costs presented in the Surplus Water Report are also of concern. With the Corps Real Estate Policy only enforcing water service contracts for those entities crossing reservoir lands, it is only forcing those nearest and most directly affected by the construction of the dams to repay the costs. Those receiving benefits downstream, including flood control and navigation, are incurring no costs under this policy. Those in the upper basin, who were forced to accept a permanent flood and have not received the full benefits of water supply originally planned, are charged for storage from which they receive no benefit and for works that only impede access to their water. In addition, the Corps is attempting to recover costs for power intake works, levees and floodwalls, and multiple reservoirs. These costs

are not attributable to the water storage contracts the Corps is now requiring in North Dakota.

The Corps reports that they paid \$59 million in relocation land and damage costs when the dam was constructed. They are now stating those closest to the reservoir, some whose family homes and farms were condemned, need to repay close to \$1 billion to the federal government for these relocations and land costs just to access natural flows to which they are entitled under state appropriation. Further, there was no provision in the 1944 Flood Control Act requiring the indexing of costs of storage contracts from 1949 dollars to 2011 dollars. In doing so, the Corps has escalated the cost by 1500 percent.

In conclusion, the State of North Dakota has the right to allocate and manage both the natural flows of the Missouri River and the originally authorized water diversions from Lake Sakakawea for the people of North Dakota. The State has these rights without storage contracts. The Corps is wrong in its current position. The Corps continues to cause harm to the state's citizens by denying their timely access to the waters of North Dakota and holding water users hostage to surplus storage fees.

Thank you for the opportunity to provide my comments on your draft report. I hope the Corps will reaffirm the states' rights to natural flow and that the Corps' de facto usurpation of water appropriation authority belonging to the states by using real estate easements to prohibit access to natural flows will be reconsidered without requiring litigation.

Sincerely,



Todd Sando, PE
State Engineer
Secretary of the State Water Commission

Enclosures

CC: Governor Jack Dalrymple
Senator Kent Conrad
Senator John Hoeven
Congressman Rick Berg
Attorney General Wayne Stenehjem
North Dakota Water Users Association
Garland Erbele, Chief Engineer, South Dakota Department of Environment &
Natural Resources
Mary Sexton, Director, Montana Department of Natural Resources

Colonel Robert Ruch
February 1, 2011
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David W. Barfield, Chief Engineer, Kansas Department of Agriculture,
Division of Water Resources
Brian Dunnigan, Director of Natural Resources, Nebraska Department of
Natural Resources
David Pope, Executive Director, Missouri River Association of States and
Tribes (MoRAST)

TS:KC:mmb/1392

COMMENTS ON THE DECEMBER 2010 CORPS OF ENGINEERS GARRISON DAM/LAKE SAKAKAWEA DRAFT SURPLUS WATER REPORT AND ENVIRONMENTAL ASSESMENT

Specific comments are outlined below for the draft Surplus Water Report and Environmental Assessment from the Corps of Engineers. These specific comments are offered with the caveat:

These comments are offered in an effort to make the subject report and environmental assessment grammatically and technically correct. These comments do not imply an endorsement of the report by the State Engineer and the North Dakota State Water Commission. The State Engineer and the North Dakota State Water Commission consider the entire surplus storage initiative to be an illegal taking of state water rights by an agency of federal government in violation of the Tenth Amendment of the Constitution of the United States.

Letter Report:

Pg 1-1: "Prior to the end of the 10-year study period, it is anticipated that reallocation studies of the six Federal reservoir projects within the Missouri River basin (including the Garrison Dam/Lake Sakakawea Project) will be completed, which will determine if changes to the permanent allocation of storage among the authorized project purposes and modifications to existing Federal water resource infrastructure may be warranted."

Comment: If, for some reason, the reallocation study is not completed within 10 years, will the 100,000 surplus storage reallocation per year continue? Surplus Storage Contracts are not needed because the natural flow of the Missouri River has an adequate amount of water to satisfy any need for water.

Pg 1-2: "[The] Secretary of War is authorized to make *surplus water agreements* with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: Provided, That no *surplus water agreements* for such water shall adversely affect then existing lawful uses of such water. All moneys received from such *surplus water agreements* shall be deposited in the Treasury of the United States as miscellaneous receipts." (italics added)

Comment: The quote from section 6 of the 1944 Flood Control is incorrect. The actual quote from the 1944 Flood Control Act as codified as 58 Stat. 887 is:

"[The] Secretary of War is authorized to make *contracts* with States, municipalities, private concerns, or individuals, at such prices on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War department; Provided, That no *contracts* for such water shall adversely affect then existing lawful uses of such

water. All monies received from such *contracts* shall be deposited in the Treasury of the United States as miscellaneous receipts.” (italics added)

Note that the quote in the Surplus Water report replaces “*contract*” with “*surplus water agreements*.”

Pg 1-3 Fifth sentence: “Use of the Section 6 authority *is allowed* only where non-Federal sponsors do not want to buy storage because the need of the water is short term or the use is temporary pending the development of the authorized use.” (italics added)

Comment: The quote generated from the Corps own Planning Guidance Handbook has been misquoted. There are several misquotes in this section, but in particular The Planning Guidance Handbook (ER 1105-2-100) has this sentence as: “Use of section 6 authority *should be encouraged* where non-Federal sponsors do not want to buy storage because the need of the water is short term or the use is temporary pending the development of the authorized use.” (italics added)

Pg 2-4: “As shown in Figure 2-2 about 55,000 surface acres of Lake Sakakawea and about 600 miles of its shoreline are included within the boundaries of the Fort Berthold Reservation.”

Comment: In this statement the 55,000 surface acres of Lake Sakakawea within the boundaries of the Fort Berthold Reservation is an incorrect number. Based on the GIS data used by the North Dakota State Engineers Office, the number of acres should be 155,000.

Pg 2-13: “In regard to water supply provided by the Bureau of Reclamation from the Garrison Dam/Lake Sakakawea Project, the Dakota Water Resources Act of 2000 (P.L. 89-108) shifted the supply emphasis from irrigation to municipal, rural, and industrial (MR&I) water supply. The Red River Valley Water Supply Project would divert water from Lake Sakakawea via GDU facilities and a pipeline to the Sheyenne River.”

Comment: This statement should go on to explain that the Dakota Water Resources Act of 2000 (DWRA 2000) stipulates that the Southwest Pipeline Project (SWPP), Northwest Area Water Supply (NAWS), Red River Valley Water Supply (RRVWS), and other municipal industrial, and rural water systems in North Dakota, and the cost of features constructed on the Missouri River by the Secretary of the Army before the date of enactment of the DWRA of 2000 shall be nonreimbursable.

Pg 2-16 (2.6): “Water permits for competing applications from the same source, where the source is insufficient to supply all applicants, are granted in the following priority order (if they have the same application date:)”

Comment: The phrase “if they have the same application date” needs to be changed to “if they are received by the State Engineer within 90 days of each other.”

Pg 2-16: “Surplus water agreements are negotiated agreements between the Army Corps of Engineers and a non-Federal entity for the authorized use of surplus water in a Corps project or facility.”

Comment: The Corps seems to have neglected to include any negotiations that were made in the appendices, or make reference to them in 3.7.

Pg 2-16: “Execution of a Surplus Water Agreement may be required from any entity requesting water from the Garrison Dam/Lake Sakakawea Project.”

Comment: Lake Sakakawea is operated as part of the Missouri River System. Technically speaking withdrawals at Gavin’s Point Dam or anywhere in the watershed could affect the storage in Lake Sakakawea. This statement needs to reference that a real estate easement is the mechanism that enables the Corps to initiate surplus storage agreements.

Pg 2-16 (2.7): “Surplus water agreements, easements, and any necessary permits will be required for any non-Federal entity requesting surplus water from the Garrison Dam/Lake Sakakawea Project.”

And

Pg 2-17 (2.7.4): “As of November 2010, the Corps has only one water supply agreement for Lake Sakakawea.” (Basin Electric)

Comment: Based on data recently provided by the Corps there are 36 irrigation agreements (easements) between private parties and the Corps to divert water from Lake Sakakawea. The data provided by the Corps also indicates the duration/term of the agreements are 25 year, 50 year, and perpetual. Before or after these agreements expire, will surplus storage fees be levied by the Corps? Will perpetual agreements be subject to surplus storage fees in the future? Is there language in the 25-year, 50-year, and perpetual agreements that will permit the Corps to levy annual surplus storage fees?

Pg 2-19: Table 2-4 has two asterisks more than needed under the heading of “Environmental Assessment”. The asterisk at the totals for International Western’s three sites and the asterisk at the total for Lake Sakakawea and Associates are not needed and should be removed. Furthermore, the Southwest Pipeline Project is funded under MR&I funding through the Bureau and should not be considered as requiring a surplus water agreement.

Pg 3-1: Paragraph 3 “Because of uncertainty in the rate of oil and gas development, and resulting water demand over the 10-year planning period, temporary use of 257,000 acre-feet storage (equivalent to a yield of 100,000 acre feet/year of surplus water is being evaluated.”

Comment: It needs to be clearly stated that the allocation of 100,000 acre-feet can be drawn on an annual basis and is not the total amount that will be allocated over the 10-year study period.

Pg 3-2 (3.2.1, Paragraph 2): “The boom in oil and gas exploration in western North Dakota is in large part due to the recent advancement of hydraulic fracturing (also know as hydro-fracing, or fracing) technology which allows for cost-effective extraction of oil and gas from hydrocarbon -rich oil slate.”

Comment: In the discussion of hydraulic fracturing in this section, the host rock type is called slate, in 3 instances. Although the hydrocarbons have been thermally altered, the parent formation is still considered shale rather than the metamorphosed equivalent, slate.

Pg 3-4, Fig 3-1: The “Y” axis is titled “Millions of Barrels of Oil.” This needs to be clarified. The axis label should be “Millions of Barrels of Oil per month” or “Monthly Oil Production.”

Pg 3-4: “In addition to water used for fracing, drilling, and casing of wells, there is additional water required for maintenance of existing wells. Maintenance of existing wells my include another water-intensive activity known as “de-brining.”

Comment: This paragraph discusses water occasionally required for maintaining operating oil wells, primarily for “de-brining” in some oils wells. Most of the water use permits granted for brine dilution water have been for oil wells completed in either the Ratcliffe interval, which is near the Charles salt, or the Interlake Formation, which underlies the Prairie salt, the proximity of the bedded salt deposits make the water entrained with produced oil particularly salty. The Bakken and Three Forks oil wells produce little water and do not require brine dilution to keep precipitate from forming on production tubing and equipment. Therefore, a large increase in the number of Bakken or Three Forks wells is not expected to increase the number of oil wells requiring supplemental water in the oil production process.

Pg 3-7: “Table 3-3 shows estimates of 1,500 and 1,800 new wells per year over the next twenty years. This estimated (sic) was obtained from the North Dakota State Water Commission.”

Comment: Estimated should be changed to estimate. Furthermore, the estimate of 1,500 and 1,800 new wells per year is originally from the NDIC Oil & Gas Division and is not an independent estimate by the North Dakota State Water Commission.

Pg 3-9 through 3-13: Section 3.2.2. states, “The Corps has issued 142 water intake easements around Lake Sakakawea, only one of which has a water supply agreement (Basin Electric Power Cooperative). Of these 142 water intake

easements, approximately 77% (110), will expire during the 10 year study period. According to the Corps policy, holders of these easements may be required to execute surplus water agreements with the Corps of Engineers as a precondition of re-issuance of their current easements." Paragraph 3, pg 3-12 states, "Therefore, 23,754 acre-feet is used as the estimate of future demand from current Lake Sakakawea small water intake easement holders during the 10-year study period." This annual allocation of 23,754 acre-feet for "small water users" is included in the total 10-year reallocation of 100,00 acre-feet annually.

Comment: According to Section 6 of the 1944 Flood Control Act, surplus water agreements may be for domestic and municipal and industrial uses but not for crop irrigation. On Pg 3-15 (Section 3.3.2 – Planning Constraints), it is stated, " The formulation and evaluation of alternative plans is constrained by the limitations imposed by Congress and Corps policy for temporary reallocation of surplus water. These constraints/limitations include: ... No temporary surplus water agreement can be made for crop irrigation."

3-9: "An analysis of all North Dakota state water permits for surface water withdrawals within one mile of Lake Sakakawea shows that there are 115 permits totaling 30,664 acre-feet of allocations for small water users."

Comment: The buffer used for this analysis is misleading. The data should have been analyzed with the criteria that will be used to determine the need for a surplus storage permit. According to State Water Commission records there are 82 water permits within Corps land between the North Dakota/Montana border and Garrison Dam, and 76 water permits between the Williston Intake and Garrison Dam. What is the criterion the Corps is going to use to determine if a surplus storage contract is needed? If surplus storage contracts are only needed in the lake, where does the lake end and river begin? However, Surplus Storage Contracts are not needed because the natural flow of the Missouri River has an adequate amount of water to satisfy any need for water.

Pg 3-9, 3-10: Table 3-4

Comment: Many of the water users listed in this table are through the Bureau of Reclamation or other entities that would not require surplus storage contracts, even under the misguided Corps policy. Furthermore, permit numbers 2179, 1901A and 3688 use the same intake.

If the Corps is using these permit holders for planning purposes only, to allocate surplus storage, the estimates would fall short. The Corps has looked at the average use over the past ten years and the maximum use of the same past ten years. Nowhere were projections for the next ten years studied. Water use under several of these permits is poised to increase greatly in this ten-year time frame and the only allowance the Corps made was the "unidentified demand" that rounded the overall number to 100,000 acre-feet.

Regardless of any of this analysis, the natural flow of the Missouri River is adequate to provide for any of the water needed for all these permits and more.

Pg 3-11: "The total of 130 state permits compares somewhat closely with the Corps' count of 142 intake easements."

Comment:

CATEGORY	CORPS EASEMENT	STATE WATER PERMITS
Community waterlines (RURAL WATER)	8	2
Domestic water well	1	
Domestic waterlines	69	
Drainage	1	
Industrial waterlines	2	15
Irrigation	35	39
Municipal waterlines	3	
Municipal	2	8
Pipeline ROW	1	
Snake Creek Pumping Plant (SCPP)	1	1
Terminated	8	
Water pipeline	9	
Waterline (POWER GENERATION)	2	1
FISH & WILDLIFE		6
MULTIPLE USE (LESS SCPP)		4
TOTAL	142	76

*It is assumed the Corps Easements are all easements from the North Dakota/Montana Border, and Garrison Dam. The State Water Permits are from the Williston Intake to Garrison Dam.

The data shown does not compare "somewhat closely."

Also included in the Corps 142 easements are eight easements that have been terminated, and 11 easements that are for pipeline crossings easements and not taking water. Based on the Corps' logic, these easements would have to get water storage contracts.

Pg 3-14 (3.3.1): The first sentence, second paragraph states "National water policy states that the primary responsibility for water supply rests with states and local entities, not the Federal government."

Comment: North Dakota is responsible for managing the volume of "natural flow" in the Missouri River. These are the waters of the state. Why is the Corps trying to usurp this responsibility?

Pg 3-14: First sentence, paragraph 4 states, "Planning objectives for this study were developed to be consistent with Federal, State and local laws and policies..."

Comment: The Corps planning objectives for this study are not consistent with state law. Prior to construction of Garrison Dam, the Missouri River in North Dakota was a free (natural) flowing river. Based on Article XI, Section 3 of the North Dakota Constitution, which was ratified by the U.S. Congress, "All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes." North Dakota Century Code Chapter 61-01 provides that waters of the Missouri River belong to the public and are subject to appropriation for beneficial use. The right to use this water must be acquired pursuant to North Dakota Century Code 61-04. Requiring water users in North Dakota to pay "surplus storage fees" for waters of the state (natural flows) is not consistent with state laws.

Pg 3-18 Paragraph 1: "Water users in North Dakota require a permit from the State for groundwater withdrawals in excess of 12.5 acre-feet for any purpose other than domestic or livestock use."

Comment: This is incorrect. The paragraph should read "Water users in North Dakota require a permit from the state for ground water withdrawals for industrial use, withdrawals for irrigation of more than five acres, and for domestic or livestock use in excess of 12.5 acre-feet."

Pg 3-18: Paragraph 2 states that aquifers are "stressed beyond natural recharge rates" and further it is stated that the ground water is "over-stressed."

Comment: Western North Dakota ground water resources are limited but not overstressed or stressed beyond natural recharge ranges. One might incorrectly infer from the paragraph that northwest North Dakota aquifers have been over appropriated. They WOULD be overstressed IF they were used to supply a substantial amount of current oil fields needs. "Beyond natural recharge rates" "and overstressed" should be deleted and "to contribute meaningfully" should be replaced with "meet."

Pg 3-18: Groundwater withdrawals – Paragraphs 3 and 4.

Comment: These paragraphs need to be rewritten. Priority date is not when the permit application is approved, but rather when the Office of the State Engineer receives the permit application. Priority of use is only invoked when competing applications (those filed within 90 days of each other) from the same source and that source is insufficient to supply the competing applicants. Refer to Section 2.6 of the Surplus Water Report North Dakota Water Permit Process (pg 2-15, 2-16) for an accurate, concise description of the North Dakota water permit process.

Pg 3-20: Paragraph 3 states, "Provision of surplus water from Lake Sakakawea is the preferred alternative of the state of North Dakota (as stated in public documents.)"

Comment: Any reference in the report that the State of North Dakota's preferred alternative for water supply is use of "surplus water" is wrong. Water supply from the natural flows of the Missouri River, accessed through a Corps land easement is preferred.

Pg 3-22: Paragraph 2 states, "The cost of only the water required to develop a well ranges from over \$400,000 to over \$4.5 million per well."

Comment: It is unclear where these numbers came from. The footnote on this page states, "Estimate based on range of reported sales costs by ND water providers of \$0.50 - \$1.05 per barrel, multiplied by 2.6 -13.2 acre-feet of water per well (as estimated in Section 3.2.1)." Using this information the cost of water to develop a well would be between \$10,112 and \$107,811.

Pg3-24, Table 3:5: This table states, "Groundwater permit reviews include extensive pressure testing of neighboring wells and consideration of the potential availability of alternative water sources. Permit applications are denied if the allocation from the proposed well reduces head pressure at existing wells."

Comment: That is incorrect. Replace with, "Groundwater permit reviews include projections of the effect of the proposed water use on area water levels and water users. Permit applications are not granted if development of the allocation will unduly affect existing water users with efficiently completed wells."

Pg 3-25, Paragraph 4: "The average annual usage limit is applied to all non-Missouri River/Lake Sakakawea irrigation State permit holders in an effort to mitigate for potential losses of water from the overall aquifer system."

Response: This paragraph does not cite the main reason for the "average annual use limit." The average annual usage limit is applied to all non-Missouri/Lake Sakakawea irrigation permit holders to protect from severe groundwater overdraft. Irrigation allocations are generally based on an 18-inch per acre annual application. The 18-inch annual application is expected to be used only during severe drought periods. On average, over the long-term, and depending on climate zone, about half this application (9 or 10 inches) is actually pumped. If a large number of irrigation permit holders were to temporarily convert to industrial use from a more limited water source, the water source could become over appropriated because the permit holders would likely pump their full 18-inch annual allocations for industrial use. The elimination of irrigation "return flows" as cited in this paragraph is also a consideration in applying the average use amount that can be diverted for industrial use.

Pg 3-36 (3.6.2): Proposed Action – Use of Surplus Water – Paragraph 1 “The Proposed Action would also allow for the execution of surplus water agreements with holders of current easements for existing water intakes at Lake Sakakawea, pursuant to current policy.”

Comment: As stated before, existing irrigation water users cannot enter into surplus water agreements based on Section 6 of the 1944 Flood Control Act.

Pg 3-43 (3.7.2.1): This section is attempting to explain the derivation of the storage-yield ratio.

Comment: This section needs to be rewritten. It is confusing. Furthermore, references need to be provided for the formulas that were used in the derivation of the ratio. If there is no explicit guidance on the computation of this factor, the methods used to derive it, should be negotiated. Although, this may not be needed because the natural flow of the Missouri River has an adequate amount of water to satisfy any need for water.

Pg 3-52 (3.7.3): Paragraph 3 – The cost of water sold is shown as “per gallon.” These should be shown as “per barrel.”

Pg 3-53: Table 3-30

Comment: The category “From GD/LS existing intakes” considers the cost of the Corps charges only. The cost of any needed infrastructure construction was not included. Using only Corps costs may be applicable for one or two existing industrial intake sites, but the majority of existing sites are not for industrial use. Infrastructure needs to be included to make the comparison being made in the table analogous.

Environmental Assessment:

Pg 2: “[The] Secretary of War is authorized to make *surplus water agreements* with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: Provided, That no *surplus water agreements* for such water shall adversely affect then existing lawful uses of such water. All moneys received from such *surplus water agreements* shall be deposited in the Treasury of the United States as miscellaneous receipts.” (italics added)

Comment: The quote from section 6 of the 1944 Flood Control is incorrect. The actual quote from the 1944 Flood Control Act as codified as 58 Stat. 887 is:

“[The] Secretary of War is authorized to make *contracts* with States, municipalities, private concerns, or individuals, at such prices on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War department; Provided, That no *contracts* for such water shall adversely affect then existing lawful uses of such water. All monies received from such *contracts* shall be deposited in the Treasury of the United States as miscellaneous receipts.” (italics added)

Note that the quote in the Surplus Water report replaces “*contract*” with “*surplus water agreements*.”

Pg 3: “Use of the Section 6 authority *is allowed* only where non-Federal sponsors do not want to buy storage because the need of the water is short term or the use is temporary pending the development of the authorized use.” (italics added)

Comment: The quote generated from the Corps own Planning Guidance Handbook has been misquoted. There are several misquotes in this section, but in particular The Planning Guidance Handbook (ER 1105-2-100) has this sentence as: “Use of section 6 authority *should be encouraged* where non-Federal sponsors do not want to buy storage because the need of the water is short term or the use is temporary pending the development of the authorized use.” (italics added)

Pg 9, 2.1, paragraph 3: The first sentence is incomplete.

Pg 11, 2.1.2 paragraph 1: “According to Corps policy, holders of these easements may be required to execute surplus water agreements with the Corps of Engineers as a pre-condition of re-issuance of their current easements.”

Comment: Some of these intake easements are for irrigation and according to Section 6 of the 1944 Flood Control Act, surplus water agreements may be for domestic and M&I uses, but not for crop irrigation. How can the COE execute water supply agreements for irrigation?

Pg 12, 3.1 paragraph 1, sentence 1: “...whether providing surplus water from Project the is....”

Comment: Move “the” in front of “Project”.

Pg 14: Contains an additional bullet that is not needed. The last bullet point under the second paragraph of Section 3.2, Planning Constraints, should read: “Temporary Surplus water reallocations are time limited and can be granted for a period of up to 5 years, with one 5-year renewal option (for a total period of 10 years)”

Pg 17: The first sentence of the third paragraph under “Groundwater Withdrawals” contains the phrase: “...and are already being stressed beyond natural recharge rates.” Western North Dakota ground water is limited but not currently overstressed. They WOULD be overstressed IF they were used to supply a substantial amount of current oil field needs. “Beyond natural recharge rates” “and overstressed” should be deleted and “to contribute meaningfully” should be replaced with “meet.”

Pg 17, 3.3.2.1: paragraph 4, sentence 1: Water rights are allocated according to the date the water permit application is received at the Office of the State Engineer and not the date the water permit is approved. In addition, sentence 3 is incorrect. Water permits are only considered subordinate to higher priority uses when there are competing applications from the same water source and the water source is insufficient to provide water to all water permit applications. Competing applications are those filed within 90 days of each other.

Pg 17, 3.3.2.1 paragraph 5, sentence 1: The first sentence is incorrect. Only higher priority of use is invoked under the conditions described above, not in all cases.

Pg 23: Includes two typographical errors, both of which are the reference citations at the conclusion of paragraph two and the quotation immediately following paragraph two. The citations are missing the correct number of parenthesis. Each citation should read as: “(NDSWC, 2010a)”.

Pg 23, 3.3.2.2: The fifth paragraph does not cite the main reason for the “average annual usage limit.” The average annual usage limit is applied to all non-Missouri/Lake Sakakawea irrigation state permit holders to protect from severe groundwater overdraft. Irrigation allocations are generally based on an 18-inch per acre annual application. The 18-inch annual application is expected to be used only during severe drought periods. On average, over the long-term, and depending on climate division, about half this application (9 or 10 inches) is actually pumped. If a large number of irrigation permit holders were to temporarily convert to industrial use from a more limited water source, the water source could become over appropriated because the permit holders would likely pump their full 18-inch annual allocations for industrial use. The elimination of irrigation “return flows” as

cited in this paragraph is also a consideration in applying the average use amount that can be diverted for industrial use.

Pg 26, 4.2 paragraph 1, number 2: “...new water supply easements and, and” – remove the first and second “and.”

Pg 45: Condition 5 of the “Typical USACE Easement Conditions” describes the minimum pool elevation that “will best serve the authorized functions of the Project.”

Comment: The elevation listed is 1854 ft msl, which is the maximum elevation of the exclusive flood control zone. Would not the minimum elevation to best serve the authorized functions of the Project be 1837.5 ft msl, the maximum elevation of the Carryover and Multiple Use Zone?

Pg 45: Based on the preceding Letter Report, Condition 6 should be modified. The three references to a “water supply agreement” should be modified to “water storage agreement.”

Pg 47: A word is missing from the fourth sentence of the first paragraph under Section 5.1.2, “Indirect, Cumulative, and Growth-Induced Effects”. The fourth sentence should read: “The indirect effect of these actions would include changes to the water surface elevation in Lake Sakakawea and changes to the releases from Garrison Dam.”

Pg 51: The second full paragraph has an incorrect reference to Table 4 in the first sentence. The correct reference should be Table 5.

Pg 69, Section 6.4.1, Groundwater: The occurrence of groundwater in western North Dakota is better described by replacing the three paragraphs in the section by:

“Groundwater supplies approximately 60% of North Dakota’s drinking water and 97% of the rural population’s drinking water (USACE, 2007). Groundwater in western North Dakota occurs in glacial deposits (drift) and in bedrock sediments. The unconsolidated glacial sediments include sorted outwash deposits and glaciofluvial valley-fills that are typically less than one mile wide . Though highly transmissive, glacial aquifers are commonly too small to store sufficient quantities of water to supply large industrial users.”

“Groundwater in bedrock aquifers in western North Dakota occur in fine-grained and lenticular sediments deposited on an aggrading continental landmass of Tertiary and late Cretaceous age, or in the underlying beach/delta deposits of the Fox Hills-Hell Creek aquifer. The bedrock sediments overlying the Fox Hills Formation are usually too clayey and lenticular to supply more than five or ten gallons per minute to individual wells. The Fox Hills Formation, occurring between about 1,000 and 2,000 feet below land surface in much of the central Williston basin,

is the deepest fresh water aquifer in western North Dakota and can yield 100 or more gallons per minute to wells, but recharge to the aquifer is very low. The Fox Hills-Hell Creek aquifer is laterally continuous, extending southwest to higher elevations, which gives the aquifer a pressure head above land surface in low-lying parts of the Missouri and its tributary river valleys. The flowing pressure head is a valuable asset to ranchers in that electrical power does not have to be provided in remote pasture locations. The large number of Fox Hills' wells and the low recharge rate has resulted in a declining pressure head of one to two feet per year in the central Williston basin. Eventually the wells will stop flowing as the pressure head declines below land surface. So as to not increase the rate of pressure head decline, water users in the central Williston basin that require a permit are now directed to other sources."

Page 129: There is an incorrect spelling of an individual's name attending the Agency Coordination Meeting in Bismarck. The name *Dan Farren* should be changed to *Dan Farrell*.



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

2 AUG 1985

Honorable Quentin Burdick
United States Senate
Washington, D. C. 20510

Dear Senator Burdick:

This is in response to your June 28, 1985, letter concerning proposed charges for water withdrawals from Lake Sakakawea.

As we have discussed, it is especially important in this time of national fiscal concern for the Department of the Army to conscientiously pursue recovery of past water project investments from project beneficiaries as required by law. However, as you explained during our meetings on this subject, it is not clear that withdrawals do benefit from the storage pool of Lake Sakakawea.

Because of this uncertainty, the Corps of Engineers has embarked on a study to determine yield thresholds for each of the main stem Missouri River reservoirs at which reliable water supplies would require storage. In addition, current and future demands are being identified for comparison to the yield thresholds. This information will enable us to determine which withdrawals, if any, benefit from the presence of the projects and will assist in identifying the impacts of withdrawals on other project purposes. This, in turn, will assist us in determining if any of the water users should be charged a fee.

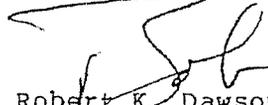
Unfortunately, since the study described above involves complex issues and requires extensive coordination with State and local officials, we do not expect it to be completed prior to middle of 1987. Because some needs must be met much sooner than that date, we are actively seeking an interim solution within existing authorities that will allow withdrawals to begin immediately at no cost. We intend to keep in close contact with you as we develop this interim solution. We also plan to work very closely

(LD) F -

with you in developing a long term policy for water and storage sales from the main stem reservoirs after the results of longer term study are received in 1987.

I appreciate your continuing concern in this matter and feel confident that we will find a solution satisfactory to all parties.

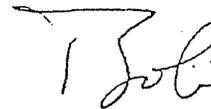
~~Best regards,~~
~~Secretary,~~



Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

Senator Burdick,

I believe this will lead
us to a fair solution.



ROBERT T. STAFFORD, VERMONT, CHAIRMAN

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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510

C5070349

June 28, 1985

Mr. Robert Dawson
Acting Assistant Secretary of the Army
(Civil Works)
Room 2E570
The Pentagon
Washington, D.C. 20310

Dear Mr. Dawson:

It is my understanding that the Army Corps of Engineers will be working with the North and South Dakota Congressional Delegations on the proposed water user service charge for the Missouri River and Lake Sakakawea reservoir. I further understand that the Corps is preparing a plan to submit to the delegations following the current recess, which ends July 8.

I am, of course, vitally interested in this issue and wish to be informed in a timely manner of all scheduled meetings and developments regarding these proposals. Please have your staff or the Congressional Liaison office contact Paulette Hansen at the Environment and Public Works Committee at 224-6844, or Laurie Boeder of my personal staff at 224-2551.

Thank you for your cooperation and interest in working toward an equitable solution for all concerned in this matter.

With kind regards, I am

Sincerely,



Quentin N. Burdick

QNB:11b



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY

WASHINGTON, DC 20310-0103

2 AUG 1985

Honorable Tom Daschle
House of Representatives
Washington, D. C. 20515

Dear Congressman Daschle:

This is in response to your recent letter concerning the proposal by the Corps of Engineers to begin charging the WEB Water Development Association in South Dakota a fee for the withdrawal of water from Lake Oahe.

It is Corps policy to charge when water is withdrawn or storage for water is reserved in one of its lakes. The Corps has two general authorities upon which to base this charge. One of these, Section 6 of the Flood Control Act of 1944, authorizes the Secretary of the Army to make contracts with non-Federal interests, at such prices and on such terms as the Secretary may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Secretary. The other general authority is the Water Supply Act of 1958. This Act authorized the Secretary of the Army, among other provisions, to reallocate reservoir storage for domestic and industrial uses at any reservoir under the control of the Secretary provided that the reallocation does not seriously affect the purposes for which the reservoir was authorized and non-Federal interests agree to pay for the cost of the storage allocated to water supply.

We feel that it is especially important in this time of national fiscal concern for the Department of the Army to conscientiously pursue recovery of past water project investments from project beneficiaries as required by law. However, as indicated in your letter, it is not clear that the WEB Project does benefit from the storage pool of Lake Oahe.

Because of this uncertainty, the Corps of Engineers has embarked on a study to determine yield thresholds for each of the main stem Missouri River reservoirs at which reliable water supplies would require storage. In addition, current and future demands are being identified for comparison to the yield thresholds. This information will enable us to

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determine which withdrawals, if any, benefit from the presence of the projects and will assist in identifying the impacts of withdrawals on other project purposes. This, in turn, will assist us in determining if any of the water users should be charged a fee.

Unfortunately, since the study described above involves complex issues and requires extensive coordination with State and local officials, we do not expect it to be completed prior to middle of 1987. Because the needs of the WEB Project must be met much sooner than that date, we are actively seeking an interim solution within existing authorities that will allow withdrawals to begin immediately at no cost. We intend to keep in contact with you as we develop this interim solution. We also plan to keep in contact with you as we develop a long term policy for water and storage sales from the main stem reservoirs after the results of longer term study are received in 1987.

I appreciate your continuing concern in this matter and feel confident that we will find a solution satisfactory to all parties.

Sincerely,

(Signed)

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

cf: SASG
DAEN-CW-SA (file)
DAEN-CWZ-X/CWP
SACW (read, signer)
Doc. #119, 61,5
ls, 7/31/85
C5062407

TOM DASCHLE

AT LARGE, SOUTH DAKOTA

COMMITTEES:

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Congress of the United States
House of Representatives
Washington, D.C. 20515

June 13, 1985

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Mr. Robert K. Dawson
Principal Deputy Assistant Secretary
Army Civil Works
2813 Central Avenue
Alexandria, VA 22302

Dear Mr. Dawson:

I am writing with regard to the Army Corps of Engineers proposal to begin charging the WEB Water Development Association in South Dakota a fee for the drawing of water from Lake Oahe.

It is my understanding that this proposal came from the District Office in Omaha. I would appreciate your advising me if this proposal is consistent with the National Office's interpretation of current law?

If it is determined that this is to be the policy of the Corps in the years to come, I would like to pose some additional questions to you.

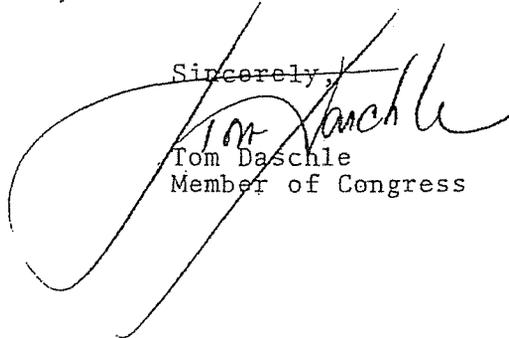
- 1) Does the Corps have any plans to similarly begin charging a fee to navigational, flood control, or independent irrigation interests in downstream states who enjoy many of the benefits of the federal dams you are asking WEB and a selected few other projects to pay for?
- 2) Does the Corps also have plans to begin charging this fee to rural water systems who draw their water from federal resevoirs or is the policy limited to WEB?
- 3) Is the Corps of Engineers aware of the fact that the WEB project is not dependent, in whole or in part, on the existence of federal project facilities? If you accept this as fact, aren't you, in effect, charging the citizens of South Dakota for their own water?
- 4) Is the Corps of Engineers willing to conduct both public and private meetings in the impacted area to obtain input from municipal water users who will ultimately bear the brunt of this new policy? Would you also be willing to withdraw your proposal to WEB until such hearings are conducted?

Page Two
Mr. Robert K. Dawson

As you can see, Mr. Dawson, there are many unanswered questions in my mind and in the minds of my constituents concerning this new policy of the Corps. I would very much appreciate it if you could advise me of the Corps' position on these critical issues at your earliest convenience.

With best wishes, I am,

Sincerely,

A large, stylized handwritten signature in black ink, which appears to read "Tom Daschle". The signature is written over the typed name and title.

Tom Daschle
Member of Congress



Memo

To: U.S. Corps of Engineers

From: Tami Norgard and Josh Swanson, Vogel Law Firm

Date: January 24, 2011

Re: McKenzie County Water Resource District Comments on the Corps Surplus Water EA

The McKenzie County Water Resource District (MCWRD) submits these comments in connection with its review of the Corps of Engineers' Surplus Water EA. MCWRD joins the State of North Dakota and numerous other North Dakota water stakeholders in sharing concerns and strong objections to the United States Army Corps of Engineers' (Corps) newly crafted position that it has the ability to limit access to and charge for the use of water stored behind the Garrison Dam. This memo provides comments on the Corps ability to charge for access to North Dakota water supplies.

A THE CORPS CANNOT CHARGE FOR MR&I WATER SUPPLIES AS 'SURPLUS WATER'

Congress has spoken, unambiguously, that North Dakota, and by extension its political subdivisions, public and private water systems are allowed access to Missouri River water from Lake Sakakawea for municipal and industrial ("MR&I") purposes. That right is unequivocally provided the State to compensate for the state's sacrifice of thousands of acres of fertile river-bottom land as a result of the Pick-Sloan Missouri Basin program. The flooding suffered by North Dakota was a compromise required to provide protection from flooding in downstream states. Historic legislation evidences that the benefits afforded to North Dakota as a result included providing North Dakota with a water supply stored behind Garrison Dam. The Corps' policy disintegrates the benefit of the bargain for North Dakota.

The Corps recently enacted policy requiring water supply agreements with North Dakota public and private water systems for easements to access Missouri River water is flawed because § 6 of the Flood Control Act of 1944, ("FCA"), does not allow agreements adversely affecting existing lawful uses of Missouri River water. Further, because the water already has an existing lawful use, it cannot, by law, be classified as "surplus water." The result is that the Corps cannot charge North Dakota, its political subdivisions, or private water franchises for access to Missouri River water.

Over the course of the last half century, Congress has unambiguously granted North Dakota the right to access MR&I water from the Missouri River. *See* the Act of August 5, 1965, (PL 89-108, 79 Stat. 443); the 1985 Energy and Water Development Act, (PL 98-360, 98 Stat. 403); the

Garrison Diversion Reformulation Act of 1986, (PL 99-294, 100 Stat. 418); and the Dakota Water Resources Act of 2000, (S.623, incorporated in H.R. 4577); collectively, the “Garrison Acts.” Providing MR&I water has been a primary purpose of the Garrison Acts since its inception in 1965.

That the general plan for the Missouri-Souris unit of the Missouri River Basin project, heretofore authorized in section 9 of the Flood Control Act of December 22, 1944 (58 Stat. 887), as modified by the report of the Secretary of the Interior contained in House Document Numbered 325, Eighty-sixth Congress, second session, is confirmed and approved under the designation “Garrison diversion unit,” and the construction of a development providing for the irrigation of two hundred and fifty thousand acres, municipal and **industrial water**, fish and wildlife conservation and development, recreation, flood control, and other project purposes shall be prosecuted by the Department of Interior substantially in accordance with the plans set out in the Bureau of Reclamation report dated November 1962 (revised February 1965) supplemental report to said House Document Numbered 325.

Act of April 5, 1965, PL 89-107, 79 Stat. 443, (“1965 Act”), at § 1 (emphasis added). Any suggestion and reliance by the Corps that irrigation was once and remains the primary purpose of the GDU essentially ignores the changes in fundamental purposes of the GDU over the past 30 years as GDU legislation has been amended. While irrigation was certainly one initial purpose of the GDU, subsequent legislation by Congress removed any question that meeting North Dakota’s MR&I water need is the primary current purpose of the Garrison Acts.

In 1984, Congress recognized that North Dakota’s contemporary water needs were not being met, *see* Act of July 16, 1984, PL 98-360, § 207(a), 98 Stat. 403,¹ and authorized the creation of a commission, the Garrison Diversion Unit Commission, (“GDUC”), to “examine the water needs of North Dakota and propose development alternatives which will lead to the early resolution of the problems identified.” *Id.* at § 207(a)(7). In so doing, Congress directed the GDUC take into consideration several factors related to the GDU, North Dakota’s water needs, and putting water from the Missouri River to beneficial use, as follows.

(2) The commission is directed to examine, review, evaluate, and make recommendations with regard to the contemporary water needs of the State of North Dakota, taking into consideration –

(A) the costs and benefits incurred and opportunities foregone by the State of North Dakota between 1944 and 1984 as a result of the establishment and implementation of the Pick-Sloan Missouri Basin program;

(B) the need and potential for North Dakota to put to beneficial use within the State water from the Missouri River;

(C) the need for construction of additional facilities to put to beneficial use water from the Missouri River;

¹ Congress stated that there was “a need to put to beneficial use water from the Missouri River within the State of North Dakota,” § 207(a)(2), directly after which Congress noted that there were “municipal and industrial water resource problems in North Dakota that are presently unmet.” § 207(a)(3).

(D) the municipal and industrial water needs and development potential within the State of North Dakota, including such matters as –

- (i) quality of water supply,
- (ii) the ability of existing systems to meet present and future demand,
- (iii) related groundwater problems,
- (iv) water treatment,
- (v) water delivery by pipeline, and
- (vi) instream flow needs;

Id. at § 207(2)(A) – (D). Per Congress’s directive, the GDUC issued its report, the Garrison Diversion Unit Commission Final Report, (“Final Report”), on December 20, 1984.

In the Final Report, the GDUC immediately called for expanding the availability of Missouri River water for MR&I uses. “The Commission Report contains several recommendations that expand significantly the availability of Missouri River water and potentially available ground water to municipal, industrial, and rural supply systems.” Final Report at ii. Specifically, to meet North Dakota’s MR&I water needs, the GDUC recommended reallocating water that was previously used for irrigation. “The Commission recommends establishment of MR&I (municipal, rural, and industrial) systems for treatment and delivery of quality water to approximately 130 communities in North Dakota. Pick-Sloan Missouri Basin Program preference power, which has been previously reserved for irrigation pumping purposes, is recommended to be made available for operation of these systems.” *Id.* at 5.

GDUC’s emphasis on expanding the availability of Missouri River water for MR&I purposes reinforced the need for the development of municipal and industrial water sources in North Dakota as first recognized in the 1965 Act, *supra*. “Both the Commission Plan and the 1965 Authorized Plan provide for the development of water supplies needed for irrigation; municipal, rural, and industrial purposes; fish and wildlife mitigation and enhancement; and recreation.” Final Report, Appendix E, *Comparison of Commission Plan to 1965 Authorized Plan*, at 53. The GDUC then emphasized the growing need for MR&I water compared to that authorized in the 1965 Act. “The Commission Plan will develop less land for irrigation (130,940 acres) compared with 250,000 acres under the 1965 Plan, but will provide municipal, rural, and industrial water service to many more North Dakota citizens (as many as 130 communities with 376,000 people) than contemplated under the 1965 Plan, which would have served only 14 unidentified communities.” *Id.*

This new emphasis on the expanded use of MR&I water from the Missouri River for North Dakota’s towns, industries, and rural users was not lost on Congress. Rather, as explained by the Bureau of Reclamation in its issue paper, “MR&I Authorization Under the Garrison Reformulation Act of 1968 and Amendatory Acts,” Congress took particular note of the GDUC’s recommendation for expanded use of MR&I water from the Missouri River when reviewing the Final Report, which it ultimately approved, *infra*, in adopting the Garrison Diversion Reformulation Act in 1986.

The House Report accompanying H.R. 1116, which became the 1986 Reformulation Act, described this aspect of the Commission's Report as follows: "As a result of its investigations, the Commission formulated a plan which placed a *completely new emphasis* on the development of water supply systems for cities, towns, industries, and rural domestic water users."

Bureau of Reclamation Issue Paper, ("Reclamation's Issue Paper"), *supra*, June 25, 2010, at 5 n. 3 (quoting House Report 99-525 at 22 (April 9, 1986)).

Shortly after the GDUC issued its Final Report, Congress passed PL 99-294, the Garrison Diversion Reformulation Act of 1986, ("Reformulation Act"). The Reformulation Act included, among its purposes, implementing the recommendations of the GDUC and meeting the water needs within North Dakota, including MR&I needs, as identified in the Final Report. "**The Congress declares that the purposes of this Act are to: (1) implement the recommendations of the Garrison Diversion Unit Commission Final Report (dated December 20, 1984) in the manner specified by this Act; (2) meet the water needs of the State of North Dakota, including municipal, rural and industrial water needs, as identified in the Garrison Diversion Unit Commission Final Report.**" Act of May 12, 1986, PL 99-294, § 1(a)(1) – (2), 100 Stat. 418 (emphasis added). Importantly, one of those recommendations in the Final Report was to make water previously allocated to irrigation available for the expanded MR&I use. In short, Congress approved reallocation of the irrigation water supply uses of water behind Garrison Dam to make them available for MR&I uses. As such, the Corps' recent position and belief that it can unilaterally reallocate irrigation and other waters behind the dam as 'surplus water' fails to recognize the legal significance of Congressional action already approving the reallocation of irrigation and other waters behind the dam for North Dakota municipal, rural and industrial purposes.

More recently, Congress reaffirmed its long-standing commitment to make Missouri River water available to North Dakota for MR&I purposes when it passed the Dakota Water Resources Act of 2000, ("DWRA"). In his remarks on the United States Senate floor immediately following the vote approving the DWRA, United States Senator Byron Dorgan left no doubt as to the purpose of the subsequent amendments to PL 89-108, the Act of August 5, 1965.

Mr. President, I am pleased that today the Senate has passed S. 623, the Dakota Water Resources Act. My colleague from North Dakota, Senator Kent Conrad, and I have worked on this legislation for quite some time. We have worked closely with others who have an interest in this bill and passage of S. 623 today is a result of the tireless negotiation between our delegation and the downstream states, especially Missouri and Minnesota. The compromise that the Senate adopted today strikes an important balance between meeting the water needs of North Dakota and protecting the needs of other states.

This bill is essential to meeting the water needs of North Dakota. **The bill, as amended, will provide authorization for the development of municipal, rural, and industrial water projects across the State of North Dakota. ...**

The Dakota Water Resources Act authorizes \$631.5 million. This includes a \$200 million authorization for municipal, rural and industrial water development, Mr. President, the

Dakota Water Resources Act represents a responsible way for the federal government to fulfill their role in the state. It also represents a serious compromise on the part of North Dakota, while still meeting our highest priority water supply needs. ...

This is a good bill that reflects hard work and compromise of many stakeholders all along the Missouri River. I am pleased that we were able to develop a win-win solution, that allows us to move forward in meeting the needs of North Dakotans while protecting the interests of those who are downstream.

146 Cong. Rec. S10534 – 535 (2000) (emphasis added). Time and time again, as demonstrated by the Garrison Acts and Sen. Dorgan’s comments, Congress has recognized that the water held behind the Garrison Dam plays a critical role in meeting North Dakota’s MR&I water needs and Congress has authorized the use of Missouri River water to meet those specific statewide needs.

Considering the foregoing, it is beyond dispute that Congress has spoken, unambiguously, as to North Dakota’s use of Missouri River water for MR&I purposes. The primary purpose of the GDU, as stated by Congress, is to “meet the water needs within the State of North Dakota, including municipal, rural and industrial water needs, as identified in the Garrison Diversion Unit Commission Final Report.” See 1965 Act as amended by the DWRA at § 1(a)(2) (emphasis added). To accomplish that end, the Reformulation Act, as noted in the House Report accompanying its authorizing legislation, *supra*, greatly expanded and placed a new emphasis on meeting North Dakota’s MR&I needs.

As such, the use of Missouri River water is currently contemplated to be used for MR&I purposes by public and private water systems throughout North Dakota. This contemplation is consistent with the purposes for the water behind Garrison Dam when it was authorized in 1965 and throughout the amendments to the legislation. Accordingly, the use of this water for industrial water supplies is not ‘surplus water’, but is instead within the original purposes and contemplated uses authorized by Congress.

B. THE CORPS ERRONEOUSLY RELIES ON THE FLOOD CONTROL ACT BECAUSE ANY WATER SUPPLY AGREEMENT WITH STAKEHOLDERS WOULD ADVERSELY AFFECT AN EXISTING LAWFUL USE OF MISSOURI RIVER WATER

The Corps unduly relies on § 6 of the FCA as the basis of its power to require North Dakota MR&I water users to pay for water supply agreements before granting easements for access to Missouri River water. “Larry Janis of the Corps’ Omaha office said the Flood Control Act of 1944 has provisions that allow the corps to quantify surplus water in the dam and charge a fee.” Brian Gehring, *State officials blast Corps of Engineers water storage fee proposal*, Bismarck Tribune, January 6, 2011, at A1, available at http://www.bismarcktribune.com/news/local/govt-and-politics/articles_43593ee2-1a19-11e0-9028-001cc4c03286.html. The Corps explained their position during a public meeting in early January 2011 in Bismarck.

The [Corps’] report proposes temporarily making up to 257,000 acre-feet of storage per year within the Garrison Dam/Lake Sakakawea Project available for municipal and industrial

water use. This will allow the Omaha District to enter into surplus water agreements to meet regional water needs until a permanent reallocation study is completed, the corps says.

“It means that, before they can place a water intake into the water, they have to have a contract in place,” Omaha-based spokeswoman Monique Farmer said. “There is going to be a fee for taking water out of the lake.” ... The corps cites the 1944 Flood Control Act as its authority, saying the secretary of war is authorized to make surplus water agreements with states, municipalities, private concerns or individuals at such prices and on such terms as he may deem reasonable.

Teri Finneman, *N.D. Speaks out against Army Corps plan*, Fargo Forum, Jan. 6, 2011, <http://www.northdakota.areavoices.com/2011/01/06/n-d-speaks-out-against-corps-plan/>.

The provision of the FCA the Corps relies on for its power to charge North Dakota stakeholders for Lake Sakakawea water, § 6, provides, in relevant part, that the Secretary of the Army can charge for “surplus water” so long as such water supply agreements do not adversely affect already existing lawful uses of the water.

The Secretary of the Army is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water.

FCA at § 6, 33 U.S.C. § 708 (emphasis added). Surplus water is defined as “all water that can be made available from the reservoir without adversely affecting other lawful uses of the water.” *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 506, 108 S.Ct. 805, 812 (1988). Therefore, if the water in question already has an existing lawful use, it cannot be ‘surplus water.’

Therein lies the problem with the Corps’ position that it can charge North Dakota stakeholders for water from Lake Sakakawea for MR&I purposes. Contrary to the Corps’ position, § 6 of the FCA does not apply because charging stakeholders for MR&I water from Lake Sakakawea adversely affects an already existing lawful use of that water. As explained above, Congress has authorized North Dakota’s broad use of water from the Missouri River for MR&I purposes through the Garrison Acts – particularly the Reformulation Act. According to *ETSI Pipeline, supra*, water cannot be designated as surplus water if it already has an existing lawful use. Such is the present case. The Corps cannot designate the Missouri River water in question as surplus water because it already has an existing lawful use – to supply North Dakota with MR&I water (along with other lawful uses).

Our position is supported by the Corps’ own definition of surplus water. In Chapter 2 of its Water Supply Handbook, the Corps states there are two categories of surplus water: (1) water stored in a Corps’ reservoir “that is not required because the authorized need for the water never developed or the need was reduced by changes that have occurred since authorization,” and; (2) water “more beneficially used as municipal and industrial water than for the authorized purpose.” Water Supply Handbook, Revised IWR Report 96-PS-4 at 2-7. Neither definition fits the present facts under

consideration. In fact, the opposite is true. The water stored in Lake Sakakawea is required by North Dakota and its public and private water systems, as has been authorized for MR&I use by Congress through the Garrison Acts.

To further call into question the Corps' current definition of 'surplus water,' it is noteworthy that the Corps' own view of what constitutes 'surplus water' has shifted over the years. The Corps' own prior, inconsistent views of what constitutes 'surplus water' was outlined by the United States Supreme Court in *ETSI Pipeline Project v. Missouri*, where the US Supreme Court noted that, "At one time, the Army took the view that the only 'surplus water' in the main-stem reservoirs was the water that neither was held in the reservoirs nor was run through the generators to produce hydroelectric powers--in other words, that no 'surplus water' existed in reservoirs themselves--apparently because it assumed that all water contained in the reservoirs is 'otherwise being used' for specific purposes." 484 U.S. at 506 n. 3.

Despite the position taken in this instance by the Corps, the United States has recognized that North Dakota's need for Missouri River water for MR&I purposes has never been greater. This point was illustrated in the United States' brief opposing Manitoba's request for a permanent injunction in *Manitoba v. Salazar*, (the NAWS litigation) 691 F.Supp.2d 37 (D.C. Cir. 2010), where the United States underscored the importance of projects distributing water stored behind the Garrison Dam to North Dakota interests is well established and the "successful result of a decades-long effort to improve both the water supply and quality of water in North Dakota" through utilizing the Missouri River as a source of MR&I water. *See* 2005 WL 6173817. In his comments on the passage of the DWRA, Sen. Dorgan referenced this decades-long effort to bring North Dakota a quality MR&I water supply courtesy of the Missouri River and noted that this "represents a responsible way for the federal government to fulfill their role in the state."

Allowing the Corps to require water supply agreements before granting easements to stakeholders contravenes the intent of Congress to provide North Dakota with MR&I water from the Missouri River as provided in the Garrison Acts. Importantly, "[T]he Executive Branch is not permitted to administer the [FCA] in a manner that is inconsistent with the administrative structure that Congress enacted in law." *ETSI Pipeline*, 484 U.S. at 517. Allowing the Corps to charge stakeholders for Missouri River water for MR&I purposes would do exactly that, allow the executive branch to administer the FCA in a manner inconsistent with Congress's intent as expressed in the Garrison Acts.

Furthermore, the Corps is precluded from arguing that it is only reallocating water designated for irrigation to MR&I purposes because Congress already made this reallocation when it adopted the GDUC's recommendations in the 1986 Act. The GDUC recommended that water "previously reserved for irrigation pumping purposes, ... be made available" for the expanded MR&I water uses contemplated in the Final Report. It's axiomatic that one cannot reallocate that which has already been reallocated. How could the Corps reallocate this water if Congress, in adopting the GDUC's recommendations, already designated it for MR&I purposes? The answer is simple, the Corps cannot do so.

This reinforces the ultimate purpose that Congress intended for the Garrison Acts: that Missouri River water be available to North Dakota for MR&I purposes as compared to making the

water available to the Corps to sell to North Dakota stakeholders under the FCA. It appears the Corps has capitulated to this position, at least insofar as it relates to water accessed by North Dakota stakeholders when accessed through the Bureau of Reclamation facilities, programs and agreements. [See, Reclamation’s Issue Paper at 2 – 3 (“Reclamation presents this paper to the Corps to outline its position that the Project intake does not require a water supply agreement pursuant to Section 6 of the 1944 Flood Control Act or the 2008 Letter No. 26 policy because the [South Central Water District] Project has subsequently received specific congressional authorization.”)]

Just as there was no question that Congress has spoken with regard to authorization of the South Central Water District project, thus not requiring a water supply contract or storage fees, Congress has spoken clearly on its intent to allow North Dakota stakeholders access to Missouri River water for MR&I purposes. “As this Court has stated in a recent opinion on the proper limits of deference to an agency’s construction of the statute which it administers: ‘If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of the Congress.’” *ETSI* at 517 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 – 43, 103 S.Ct. 2778, 2781 (1984)). In this factual scenario, the Corps’ interpretation of the FCA is not entitled to deference because the Garrison Acts speak directly to the dispute in this case. The intent of Congress as expressed in the Garrison Acts indicates clearly that the Corps cannot charge stakeholders for Missouri River water used for MR&I purposes. “That is ‘the end of the matter.’” *Id.* (quoting *Chevron*, 467 U.S. at 842).

C. THE CORPS FEE STRUCTURE DOES NOT APPLY TO THE GARRISON DAM WATER.

The Corps’ fee structure to access surplus water is excessive and unfounded. The Corps takes the position that any entity that needs an easement to cross Corps land to get access to the North Dakota water supply must enter a water supply agreement and effectively pay a ‘toll’ for access to the water. These charges for water are calculated based upon the costs of constructing, operating and maintaining the Garrison Dam. While the Corps may have the ability to impose charges in such a fashion on surplus water contracts in general, the Corps does not have the authority to include the costs of construction, operation and maintenance of the Garrison Dam for storage costs fees charged to North Dakota stakeholders. Congress has unequivocally excluded all construction, operation and maintenance charges incurred prior to 2000 as being non-reimbursable to the federal government, so there is no basis for charging storage fees to North Dakota stakeholders for repayment of the construction costs through storage fee assessments.

The Corps has cited to the Water Supply Act of 1958 (WSA) as a source of its authority for contracting and supplying surplus water from its reservoirs. The Water Supply Act of 1958 authorizes storage as part of:

any reservoir project surveyed, planned, constructed or to be planned, surveyed... to impound water for present or anticipated future demand to need for municipal or industrial water, and the reasonable value thereof may be taken into account in estimating the economic value of the entire project...

43 U.S.C. § 390b. Notably, the statute provides for the repayment of storage costs. *Id.* However, the statute grants to the Corps the limited ability to permit water storage at existing projects that had

not been planned or granted initial authorization for such purpose. *Id.*; see also *Southern Federal Power Customers, Inc. v. Caldera*, 301 F. Supp.2d 26, 31 (D.D.C. 2004). It permits the Corps to charge users for any modifications required to accommodate their particular, newly contemplated storage and use. Yet, in our case, MR&I water supply uses were originally contemplated as an authorized use of waters held behind Garrison Dam, and the GDU legislation amendments over the years make that crystal clear. This is not a newly contemplated use for water held behind the Garrison Dam.

Further, the Dakota Water Resources Act of 2000 (DWRA) contained critical amendments to the WSA with regard to the ability to charge for storage costs. Section 7(c) of the DWRA states:

With respect to the Southwest Pipeline Project, the Northwest Area Water Supply Project, the Red River Valley Water Supply Project, and **other municipal, industrial, and rural water systems** in North Dakota, the costs of the features constructed on the Missouri River by the Secretary of the Army before the date of enactment of the Dakota Water Resources Act of 2000 **shall be non-reimbursable**.

(emphasis added). The discretionary nature of the WSA, allowing the Secretary of the Army the discretion to charge for surplus water from reservoirs, has been modified by and should be read as subordinate to the mandatory provision within DWRA. The language quoted above allows North Dakota MR&I interests to withdraw water from Corps facilities without the requirement to reimburse the Corps for either the construction costs or the operation and maintenance costs of those Corps facilities that was incurred prior to 2000. The reference to “features constructed on the Missouri River by the Secretary of the Army before the date of enactment of the [DWRA]” is a clear reference to the main-stem reservoirs on the Missouri River constructed under the Pick-Sloan Plan, including the Garrison Dam. Given the direction from Congress that water for the supply of MR&I projects developed under authority of Reformulation Act of 1986 and DWRA should be withdrawn from Corps reservoirs, and that the costs associated therewith are non-reimbursable, a clear conclusion is that the only necessary document required from the Corps for the construction of the Project is an easement.

The EA appears to seek pro-rata reimbursement for all water storage feature costs. It is unclear whether the Corps included a reduction in their calculation of storage feature costs for amounts that have been periodically identified as not reimburseable by Congress, such as sunk costs of supply works of \$213 million or \$40 million in infrastructure, as well as operating costs incurred as a federal obligation to meet the Boundary Water Treaties Act. Further analysis of the cost assumptions is included in a separate technical memorandum.

Further, North Dakota stakeholders should not be required to pay the pro rata storage costs calculated without any portion of the overall cost attributed to downstream interests. The Corps calculates the water storage fee based on an allocation of construction, operation and maintenance costs on the basis of each acre foot of water stored behind the dam. Such an allocation does not assess any cost for flood control, and other non-consumptive water uses. Such an allocation artificially escalates the per acre foot charge. During the consideration of the Flood Control Act, Secretary Ickes testified at the Senate Hearings on the proposed bill recognizing that the bill

"disregards the problem of allocating costs for multiple-purpose facilities serving other uses in addition to irrigation." Hearings on H.R. 4485 before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., 2 at 458 (1944).

D. FUTURE WATER SUPPLIES OF THE STATE ARE ALSO PROTECTED

The Corps' Master Manual calls for the Corps to consider water supply in managing the system. As a result, it is clear that municipal purposes and authorized industrial uses are among the project uses and would not be properly fulfilled with "surplus waters." There is an explicit reference in the O'Mahoney-Milliken Amendment that preserves the right to future water uses by states lying wholly or partially west of the ninety-eighth meridian for all domestic uses of Missouri River water throughout the state, which includes North Dakota.

At the time the Flood Control Act passed, upstream states and downstream states were in the midst of a thorny dispute. Lower basin states were concerned about flood control and navigation while upper basin states asserted the need for irrigation and consumptive uses. The Act proposed to facilitate navigation by deepening and widening the Missouri River channel below Sioux City, Iowa and in the process, created a federal water right for navigation. This federal right had the potential to preempt state rights for consumptive uses, which were of primary importance to upper basin states with irrigation and industrial needs. In order to get the Flood Control Act passed, a compromise had to be made. That compromise took the form of the O'Mahoney Milliken Amendment, which states:

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

33 U.S.C. § 701-1(b). This provision specifically recognized the fact that water was being specifically held behind the Garrison Dam for future industrial purposes. This Amendment clarifies that, if a conflict arose between an industrial water supply needed in Western North Dakota over a specific downstream state demand for navigation interests, the industrial water supply would take priority. *See In re Operation of the Missouri River System Litigation*, No. 03-MD-1555 (PAM), slip op. at 5 (D. Minn. June 21, 2004). The Corps cannot now take the position that Western North Dakota's industrial water needs are simply not contemplated within the authorized uses of the Garrison Dam storage, necessitating a determination of 'surplus water' to fill the need outside the scope of authorized uses is belied by the very purpose of the O'Mahoney Milliken Amendment, along with other GDU legislation. Given the clear contemplation of Congress in prohibiting interference with future consumptive uses in states lying wholly or partly west of the ninety-eighth meridian, waters for future municipal and industrial use are recognized as priority project/authorized uses.

E. CORPS INTERNAL GUIDANCE EXEMPTS MINERAL EXTRACTION FROM REQUIRING AN EASEMENT FOR ACCESS TO CORPS FACILITIES

It is noteworthy that the Corps developed guidance on March 30, 2009 which sets a policy for non-recreational outgrant requests that apply to proposals for easements and licenses to use the lands and waters of the Corps for water resource projects. This guidance recognizes that the Corps can charge a fee for easements across federal land to access federal projects and that the Corps can charge “fair market value” of the civil works. That said, it is noteworthy that specifically excluded from the Corps’ policy is “oil, gas or mineral exploration or extraction.” (Letter at 2.) As such, the Corps’ operational guidance documents calls into question whether it is appropriate for the Corps to attempt to charge for easements to obtain a water supply necessary solely for mineral extraction.

CONCLUSION

Congress has spoken through the lineage of GDU legislation. North Dakota, its political subdivisions and water systems, have both the authority for and the right to access Missouri River water from Lake Sakakawea for MR&I purposes without payment to the federal government. The Corps consideration of the MR&I water requests as ‘surplus water’ is inconsistent with its own internal guidance on what constitutes ‘surplus water’.

Further, the Corps is precluded from charging water storage fees for water stored behind the Garrison Dam since Congress declared the costs of the dam, operation and maintenance as being non-reimbursable, so there is no legal justification for any such charges. As such, the Corps can neither restrict access to, nor charge North Dakota stakeholders for access to Missouri River water.

McKenzie County Water Resource District

Testimony

Public Hearing on Garrison Dam/ Lake Sakakawea Project

North Dakota

Draft Surplus Water Report

1-6-2011

Robert J. Ruch

Colonel, Corps of Engineers

District Engineer

Good evening. My name is Gene Veeder. I am a Board Member with the McKenzie County Water Resource District. We are prime sponsors and managers of the development of the Western Area Water Supply Project in partnership with the City of Williston, Williams Rural Water District, and the R&T Water Supply Association. Thank you for providing the opportunity to present input and comment on the analysis that the Corps of Engineers has completed. We recognize and applaud the Corps for protecting a resource that we treasure, but to ask the people of McKenzie County to pay for storage that they do not need is just plain wrong. The Missouri River provides an ample supply of water and we simply do not need the storage.

I am here tonight to inform you that we are very disappointed and dissatisfied with the analysis and the basis of recommendations. We are preparing detailed comments on the report and will submit them in writing at a later date. It is frustrating that only one public meeting has been scheduled on this topic. The heart of the current activity, and the primary comparison between alternatives revolved around the developing oil industry; yet there have been no meetings close to the actual area concerned.

The major basis of the Corps of Engineers report is that the sale of water out of the reservoir is the least cost alternative to providing water for the area compared to the Western Area Water Supply Project which is a public water supply. The analysis assumes that the total cost of increased capacity of the Williston water treatment plant and the cost of installing the pipelines

is being contemplated to serve the oil industry. The fact is that the primary benefit of the Western Area Water Supply Project is to provide a much needed municipal and rural water system for the region. These benefits are not recognized, and as such creates a flaw in the analysis.

The fact is that when you design a municipal and rural water system, you need to design for a peak day demand. The peak day demand is in excess of three times the volume of the average day. Therefore, there is significant capacity that is available to sell industrial water at little to no additional cost to the Western Area Water Supply Project. In order to complete a true analysis, all of the benefits need to be addressed.

The Western Area Water Supply Project will provide a backbone water supply in the heart of the developing industry. Yet, the analysis indicates that the impacts to roads will be significantly less than the no-action alternative. McKenzie County is extremely concerned about the potential locations of the roads, to potentially hundreds of new water intakes. The analysis on the transportation impacts seems extremely simplified and needs to be re-evaluated.

In closing, I want to stress that it seems inconceivable that the Corps of Engineers would pick this time to start charging a storage fee for water out of the reservoir. The people of McKenzie County have paid dearly for the reservoir and given up hundreds of acres of prime bottom land for the protection of the lower Missouri Basin. In recent years, the US Government has decided that we cannot drive a four wheeler on the shore, we cannot camp on the shore, access for ice fishing is limited, and now we get to pay for a permanent flood in order to access the water.

To think that the first place the Corps starts charging for water storage from the main stem dams is in North Dakota is simply wrong!

Thank you.



TECHNICAL MEMORANDUM

To: Denton Zubke, Chairman
McKenzie County Water Resource District

From: David Johnson, P.E., Operations Manager, AE2S

Re: **Draft Surplus Water Report
Garrison Dam/Lake Sakakawea Project**

Copy: Ward Koeser, Williston City Commission President
Jake Stokke, Williams Rural Water District President
Jerry Ranum, R&T Water Supply Association President

Date: January 29, 2011

At the request of McKenzie County Water Resource District, Advanced Engineering and Environmental Services, Inc. (AE2S) reviewed the Draft Surplus Water Report dated December 2010 as prepared by the Omaha District of the US Army Corps of Engineers for the Garrison Dam/Lake Sakakawea Project, North Dakota (Draft Report). To assist in this review AE2S solicited a review by EES Consulting Inc. to assist in reviewing the cost benefit analysis that was completed in the report. AE2S also reviewed the accompanying Draft Environmental Assessment, which is dated December 2010.

Per your request, AE2S is providing comments regarding the Draft Report and Draft Environmental Assessment. The comments, which are organized by the following subject headings for your consideration, have been prepared with the intent that you will forward the comments to the US Army Corps of Engineers for consideration:

- General Comments
- Alternative Development Concerns
- Comparison of Alternatives Identified in Draft Report
- Financial Considerations
- Environmental Assessment Comments

Comments on the Draft Report were also prepared by EES Consulting. These comments are attached and referenced in the comments provided herein.



General Comments

- Regarding information presented on page 3-52 of the Draft Report, the cost reported for water sold from existing water depots appears to be erroneously listed in units of cost per gallon instead of cost per barrel.

Alternative Development Concerns

- The Use of Surplus Water (Action) Alternative does not appear to be developed on an equivalent basis to the No Action Alternative. For instance, the Action Alternative presented in the Draft Report with the intent of using surplus water agreements from Lake Sakakawea does not appear to include the costs associated with the infrastructure required to deliver water to the end user(s). The inconsistencies create potential errors in the financial comparison of the alternatives, which are described in considerable detail in the attached comments provided by EES Consulting.
- The water quality of the unfiltered raw surface water should be compared to the requirements of the oil and gas industry. The cost to remove suspended solids does not appear to be considered in the cost of the alternative.
- At a minimum, the cost of infrastructure omitted from the Action Alternative includes:
 - Temporary intake facilities;
 - Raw water transmission pipelines;
 - Water treatment equipment and related facilities;
 - Pump system facilities;
 - Water storage and depot facilities;
 - Support systems, such as electrical power, chemical feed, transportation (haul routes), and basic utility services; and
 - Demobilization, demolition, and site restoration activities when the infrastructure is no longer needed.
- The construction standards and operations strategies of any temporary water delivery system components intended for implementation in cold weather conditions under the Action Alternative (i.e. freezing temperatures) should be addressed.
- With respect to the water delivery systems proposed under the Action Alternative, it is unclear whether the water will be delivered to the actual points of use by temporary pipeline conveyance systems, hauled by truck, or accomplished via a combination of methods. This should be clarified in the report for the purpose of better understanding truck traffic and transportation system requirements.



Comparison of Alternatives Identified in Draft Report

- There are substantial differences between the scopes of the No Action Alternative and the Action Alternative. Such differences, which are not identified, explained, or evaluated in the Draft Report, consist of the following:
 - The estimated periods of use and respective benefits provided by the alternatives. The regional water system component identified under the No Action Alternative would provide a substantial benefit beyond the anticipated 10-year period indicated for the Action Alternative. This difference between the alternatives is intensified by the uncertainty generated by the need to complete the reallocation process of storage beyond the initial 10-year period, as identified in the Draft Report for the Action Alternative. The potential inability to meet industrial water demands associated with continued industrial development beyond the initial 10-year period should be discussed in greater detail, especially since the Draft Report suggests that “technological change in industry drilling practices has resulted in increasing water demand” (page 2-18).
 - The integration of water service to industrial entities while meeting the long-term water service objectives of municipal and rural water users. This benefit is provided by the regional water system component identified under the No Action Alternative.
 - The location(s) of water availability for industrial use provided by the alternatives. For instance, the anticipated locations of water service for industrial use were not identified for the regional water system component under the No Action Alternative.
- It is recommended that McKenzie County Water Resource District forward a copy of the water demand analysis for the Western Area Water Supply Project. The regional water system is sized to meet the domestic demands on a peak day basis. That requires a treatment plant capacity of approximately three times the average day capacity for this region. This results in significant capacity to serve the industrial demand with very limited additional costs to the system. It is anticipated that this information would assist the US Army Corps of Engineers in completing a more accurate evaluation of alternatives included in the Draft Report.

Financial Considerations

- The policy of the US Army Corps of Engineers to exclude storage allocated to the permanent pool from all usable storage calculations (Fredericks, Water Supply Economic Analysis Presentation) should be considered, as identified in the comments provided by EES Consulting.
- The draft report indicates that the cost evaluation was based on a loan repayment strategy over a period of 30 years at 4.25 percent interest; however, the period of benefit provided



by the Action Alternative is only 10 years. Due to this discrepancy, clarification as to how the permit and user fees would be charged under the Action Alternative should be provided.

- As noted above, there are substantial differences in the scopes of the No Action Alternative and the Action Alternative. The inconsistency regarding the inclusion or omission of various cost factors, which are discussed in further detail below and in the attached comments provided by EES Consulting, makes it difficult to compare water resource costs included in the alternatives.
 - Infrastructure costs should be accounted for in a consistent manner for the alternatives discussed in the Draft Report to promote a more comprehensive and accurate cost comparison.
 - Groundwater costs used in the Draft Report are based on the retail rate of water between the industrial water users and irrigation users. Based on the results of a sensitivity analysis completed by EES Consulting, which are presented in the attached comments, the valuation methodology and corresponding analysis used in the Draft Report appears to be fundamentally flawed.
 - The financial evaluation should consider the municipal and rural water supply benefits provided by the regional water system component of the No Action Alternative. As recommended in the comments provided by EES Consulting, any comparisons to the Action Alternative should be based on the incremental cost components of the No Action Alternative attributable to providing a benefit associated with meeting industrial water demands.
 - The Draft Report indicates the assumption that all water obtained from free-flowing portions of the Missouri River will incur the same cost as the Williston regional water system component. This assumption should be revisited based on the analysis and discussion provided in the attached comments by EES Consulting.
 - The feasibility of the regional water system component of the No Action Alternative may be impacted by the economy of scale associated with the intended sale of water to the oil industry. The methodology to determine financial feasibility does not consider the lost revenue of selling water from the Williston regional water system component to industrial customers. As indicated in the comments provided by EES Consulting, such lost revenues should be considered in the benefits foregone portion of the cost analysis.
 - The Draft Report does not identify or consider operations and maintenance costs on a consistent basis for the evaluated alternatives. The annual costs associated with operating staff, electrical power, heat, chemical use, intake access road maintenance, etc. would seem relatively significant and should be included in the development of a comprehensive life cycle cost analysis.
 - The estimated salvage value of infrastructure proposed for construction under the alternatives may also be warranted for consideration in the life cycle cost analysis.



- The financial feasibility test provided in the Draft Report compares the incremental unit cost of surplus water storage from Lake Sakakawea to the total weighted average of the No Action Alternative costs. It would seem more appropriate to compare the total weighted average of the storage costs under the Action Alternative to the weighted average of storage costs under the No Action Alternative. A suggested strategy for completing this comparison is provided in the EES Consulting comments.
- The financial analysis uses current power market prices for firm power, which may underestimate future foregone revenue. Justification for considering increased power costs is included in the comments provided by EES Consulting.

Environmental Assessment Comments

- The environmental consequences identified in the Draft Environmental Assessment regarding Air Quality in Section 6.6 suggest that the total miles to supply water from the source to the end users in the oil field would decrease under the Proposed Action as compared to the No Action Alternative. Any inference or conclusions regarding a reduction in total miles required by haul truck without substantiating data and information is inappropriate, potentially inaccurate, and could be misleading. The Draft Report and Draft Environmental Assessment should consider the location and configuration of transmission pipeline system improvements proposed under the regional water system component of the No Action Alternative. It is anticipated that water depots could be located along well maintained and strategic transportation routes to minimize the number of total miles required to supply water to the end users in the oil field. Such information should be used to better assess the consequences identified in Section 6.9 regarding Traffic, Truck Traffic, and Accidents.
- The benefits to the municipal and rural communities provided by the regional water system component of the No Action Alternative need to be recognized with respect to the Environmental Justice discussion in Section 6.12 of the Draft Environmental Assessment. The feasibility of the regional water system component of the No Action Alternative may be impacted by the economy of scale associated with the intended sale of water to the oil industry. Therefore, the affordability criteria of providing drinking water to minority and low income populations in the affected area would be adversely affected with the implementation of the Proposed Action in lieu of the No Action Alternative. The adverse impact imposed by the Proposed Action on water rates and the potential inability to provide quality drinking water to minority and low income populations in the affected area should be identified in the Environmental Assessment.

AE2S appreciates the opportunity to provide comments on the Draft Report and Draft Environmental Assessment documents prepared by the US Army Corps of Engineers. If you have any questions or care to discuss any of the information provided herein, please do not hesitate to contact me at (701) 580-5494.

Mountrail County Water Resource District

P. O. Box 968
Stanley, North Dakota 58784

U.S. Army Corps of Engineers, Omaha District
CENWO-OD-T
Attn: Lake Sakakawea Surplus Water Report and EA
1616 Capital Avenue
Omaha, NE 68102-4901

Dear U.S. Army Corps of Engineers:

The Board of the Mountrail County Water Resource District has many concerns that a very valuable water resource within our district will be restricted. Further, the Lake Sakakawea Surplus Water Report and EA says that water uses within our district will be subjected to "water storage fees".

Citizens of Mountrail County and North Dakota have given up some of the best farm/ranch land for this water storage. Communities and cultures have been disrupted for this water storage. The justification that the money the federal government spent for the land that the Corps took for the reservoirs must be repaid by the citizens who gave up the land is wrong. Are those who benefit down stream of the Lake Sakakawea also being asked to repay this "debt"?

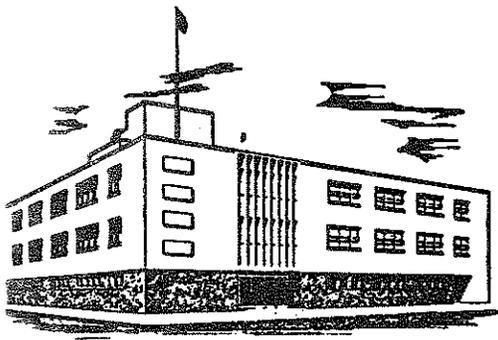
As Mountrail County's economy and population expands, so does our water needs. We are entitled to appropriate water from the Missouri River's natural flow, as that water would be available without the mainstem reservoirs. The natural flow of the Missouri would be ample to meet the water needs of Mountrail County. The reservoirs stand in the way of accessing our Missouri River water.

Our position is that the water users of Mountrail County should not be required to pay for access to the Missouri River water whether it is natural or stored. Nor should the volume of water used be restricted to amounts less than the volume of water that historically flowed in the Missouri River.

Sincerely,



Trudy Ruland
Chairman Mountrail County Water Resource District



WILLIAMS COUNTY WATER RESOURCES DISTRICT

POST OFFICE BOX 2047
WILLISTON, ND 58802-2047

KEITH SKAARE
Chairman
Williston, ND 58801
ROGER GUNLIKSON
Grenora, ND 58845
EVERETT GIBBINS
Williston, ND 58801
COREY PARYZEK
Williston, ND 58801
HERMAN H. BACKHAUS
Tioga, ND 58852
BETH M. INNIS
Sec./Treas.
Williston, ND 58801

TELEPHONE
(701) 577-4500

January 27, 2011

US Army Corps of Engineers
Omaha District; CENWO-OD-T
ATTN: Lake Sakakawea Surplus Water Report and EA
1616 Capitol Avenue
Omaha, NE 68102-4901

REF: Lake Sakakawea Surplus Water Report

To Whom It May Concern:

North Dakota has lost a lot throughout the last 50 years with the building of the reservoir and ND should not be forced to pay again for a structure that benefits an entire nation.

The North Dakota State Constitution states "free flowing water in the Missouri River is property of North Dakota". In the logic of the COE, ND should charge the COE for allowing our water to flow downstream for navigation, hydro-electric, and other purposes for other States.

The Williams County Water Resources District is opposed to the COE charging for water out of the reservoir.

Sincerely,
Williams County Water Resources District Members



WILLIAMS COUNTY
WATER RESOURCES DISTRICT
P. O. Box 2047
Williston, ND 58802-2047



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US Army Corps of Engineers
Omaha District; CENWO-OD-T
ATTN: Lake Sakakawea Surplus Water Report and EA
1616 Capitol Avenue
Omaha, NE 68102-4901



— State of —
North Dakota

Office of the Governor

Jack Dalrymple
Governor

January 31, 2011

US Army Corps of Engineers
Omaha District
CENWO-OD-T
ATTN: Lake Sakakawea Surplus Water Report and EA
1616 Capitol Avenue
Omaha, NE 68102-4901

Dear Sirs:

As stated previously in letters dated June 10, 2010 and October 28, 2010, the State of North Dakota has serious concerns about the US Army Corps of Engineers' (Corps) recently introduced restrictions and policies regarding access to water in the Missouri River. It seems that Corps policies are now blocking access to the free flow of the Missouri River which is rightful property of the State of North Dakota.

In 1957, the Corps completed construction of the Garrison Dam, creating a reservoir that holds more than 24 million acre feet of water. Today, Lake Sakakawea is the third largest man-made lake in the United States and is unique to all other reservoirs in the United States. The Corps' reason for the sudden implementation of this policy stems from problems that have arisen on East Coast reservoirs due to their smaller size. Unlike the East Coast reservoirs, the storage capacity of the Missouri River main stem reservoirs vastly overshadows any proposed water storage needs within North Dakota by several orders of magnitude. The blanket policy proposed by the Corps is utterly inappropriate for the State of North Dakota.

Prior to the enactment of a 2008 Corps Real Estate Policy, water users were able to gain access to water in the Missouri River main stem system through a land easement application process and associated permits without being charged a fee. The Draft Report states that the Corps has issued 142 water intake easements around Lake Sakakawea, only one of which has a fee-based "surplus water supply agreement." These easements were issued over the last 60 years without the need for a reallocation study or a water storage contract. Thus, the Corps' recent change in position of requiring the allocation of storage in reservoirs and issuance of water storage contracts to existing and potential water users under the 1944 Flood Control Act and the Water Supply Act of 1958 is unjustifiable for a number of reasons.

First, the Missouri River is a vital water source to the State of North Dakota that existed prior to the construction of the main stem reservoirs. According to Article XI, Section 3 of the North Dakota Constitution, “[a]ll flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes.” The Missouri River continues to flow through Lake Sakakawea today and cannot be considered stored water due to permanent rights held by the State. North Dakota water users must have access to the river without cost and without the requirement of surplus water supply agreements.

Second, the main stem reservoirs were constructed with planned benefits to the States where land and resources were impacted. Approximately 550,000 acres of prime farmland were taken in North Dakota for the construction of the main stem reservoirs. Congress has since recognized the majorities of these benefits have been realized downstream and has provided amendments to the 1944 Flood Control Act to address some of these inequities.

Additionally, section 301(b) of the 1958 Water Supply Act provides that recovery of capital costs may extend for a period of up to 50 years. That 50 year time period noted has expired. The Corps should not have the ability or a federal responsibility to charge water storage costs to repay for the construction costs of the dams for surplus water when original repayment contracts were never required at the start of construction. The Corps’ proposal to charge for construction costs is unacceptable. Basing fees on what would be the costs to construct the dam today is also ill-conceived.

Third, the Draft Report only proposes a storage fee for water users in the upper basin states that withdraw water directly from the main stem reservoirs, but does not charge downstream users a similar fee. Reservoirs, like Lake Sakakawea, provide numerous benefits for all users not just those that withdraw water directly from the reservoirs. Hydropower, navigation, water supply, and flood control are just some of the benefits reaped by downstream users that are not charged a fee.

The Missouri River, including Lake Sakakawea and Lake Oahe, is valuable to the State of North Dakota and is a resource that should be readily available to access without cost. Access to Lake Sakakawea alleviates environmental and infrastructure concerns within the western part of the State and also benefits communities statewide through water projects such as the Red River Water Supply Project, the Northwest Area Water Supply Project, and the Southwest Pipeline Project. Restrictions in access would affect these very projects; the farmers, and ranchers that rely on access for irrigation purposes; hinder the development of domestic energy resources and eliminate the Three Affiliated Tribes and the Standing Rock Nation from freely accessing water supply.

USACE, Omaha District
January 31, 2011
Page 3

As development in North Dakota continues, Missouri River water becomes an important component to the growth of the State and the nation. Just as important is the ability to access Missouri River water in a timely manner in order to meet the immediate water supply needs of the people of North Dakota. In summary, I ask you to continue to expedite the work required to process easement requests that are currently before the Corps. Further delay of processing these easements is unacceptable. Using U.S. Army Corps of Engineers' easements to block North Dakota's access to its own rightful water supplies is not only an improper use of the intended purpose of these easements, but is also an unconscionable and unjust attempt to achieve monetary gain where none is justified. Financial claims have not been sought in the past and contradict states' rights and congressional authorizations. All considerations for the use of Missouri River water have been settled in the past and should not be open to further discussion. I urge the Corps to continue to provide water access to existing and potential water users without cost.

Sincerely,


Jack Dalrymple
Governor

37:68:56

KENT CONRAD
NORTH DAKOTA

website: <http://conrad.senate.gov>

COMMITTEES:
BUDGET, CHAIRMAN
AGRICULTURE, NUTRITION, AND FORESTRY
FINANCE
INDIAN AFFAIRS

United States Senate

January 14, 2011

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GRAND FORKS, ND 58203-3738
(701) 775-9601

100 1ST STREET, S.W., ROOM 105
MINOT, ND 58701-3848
(701) 852-0703

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, DC 20310-0108

Dear Assistant Secretary Darcy:

I write regarding the U.S. Army Corps of Engineer's draft surplus water report for the Garrison Dam/Lake Sakakawea in North Dakota and urge you to use the discretion provided in the 1944 Flood Control Act to withdraw the proposal to charge for the storage of surplus water.

I am deeply concerned about the Corps' proposal to charge North Dakota users for storage in Lake Sakakawea as a condition for granting easements to access surplus water. With the exception of one entity, no other users along the entire Missouri River system are charged for such storage.

The Flood Control Act of 1944 authorized the construction of the Missouri River mainstem dams. Two of the reservoirs created by the dams, Lake Sakakawea and Lake Oahe, are located in North Dakota. With the creation of these large reservoirs, which flooded more than 500,000 acres of prime bottom land, North Dakota's landscape changed forever. In exchange for this permanent flood, North Dakota was promised the ability to utilize these water resources to meet our needs. The state was given access to approximately 3 million acre-feet of water to complete projects specified in the 1944 Act. This amount has never been revoked, and only a small fraction has been used. While we have had the permanent flood for decades, we have still not received the benefits promised so long ago. As a matter of fairness and equity, North Dakota should not be charged to utilize this water for municipal and industrial uses, which are authorized project purposes and to which we are rightly entitled.

The fact of the matter is North Dakota has stored this water for more than 50 years for the authorized purposes under the Act, including navigation and flood control, providing substantial benefits for users. And the majority of benefits have accrued to those downstream, while North Dakota has borne the costs. The Corps' own analysis has demonstrated \$37 billion in flood damage prevention as a result of the storage provided by the reservoirs, \$11.5 billion of which is directly attributable to the Garrison Dam. However, the Corps has not charged any of these beneficiaries for that flood control storage. Many have also benefited from the storage provided for navigation and other purposes provided by the system without having to pay for it. Now the Corps wants to punish us for using some of the storage at a time when our domestic energy development is thriving and access to this resource is critical to its continued development. It

simply defies logic that the Corps can advance a proposal to charge only some authorized users of the system and not others.

The Corps report also fails to recognize the right of our Indian tribes to the use of this water. In 1908, the United States Supreme Court affirmed that when the Indian reservations were created, the right of the tribes to use the water was also reserved. The Court noted "fundamentally, the United States as a trustee for the Indians, preserved...the title to the right to the use of water which the Indians had 'reserved' for themselves..." The Corps of Engineers cannot ignore the clear and indisputable fact that the Tribes have an irrefutable right to water in the basin. It is a right that has existed for more than 100 years when the Tribes signed treaties with the United States and a right that was reaffirmed by the Supreme Court. Those rights are never forfeited, and the Tribes in no way should be charged to access this water.

The fact of the matter is that North Dakota and both the Three Affiliated Tribes and the Standing Rock Sioux Tribe had no choice on whether we wanted to host these permanent floods created by the Garrison and Oahe dams. We have sacrificed heavily in doing so, and we have not yet received the full benefits we were promised by the federal government in return.

The 1944 Act provides discretion to the Secretary when entering into contracts for surplus water to determine the prices and the terms of those contracts as he/she deems reasonable. This project has already been paid for. It makes no sense to require users to pay for it a second time by requiring water storage contract payments. As a matter of fairness and equity to users in my state, and in recognition of the long-standing federal commitment to North Dakota to compensate us for the loss of land due to the dam's construction, you should use this discretionary authority and rescind the proposal to charge for water storage.

I look forward to working with you to develop a plan to allow free access to the water to which we are entitled.

Sincerely,



KENT CONRAD
United States Senate



JOHN HOEVEN
NORTH DAKOTA

DIRKSEN SENATE OFFICE BUILDING
TELEPHONE: (202) 224-2651

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COMMITTEES:
APPROPRIATIONS
ENERGY AND NATURAL RESOURCES

United States Senate

WASHINGTON, DC 20510

Col. Robert Ruch
Omaha District Commander
1616 Capital Ave.
Omaha, NE 68102

Jan. 31, 2011

Dear Col. Ruch,

Pursuant to our conversation, the following information summarizes public input presented at the Jan. 18, 2011, roundtable discussion I hosted in Bismarck regarding the U.S. Army Corps of Engineers' proposal to charge users for Missouri River water stored in the Lake Sakakawea Reservoir.

The meeting in Bismarck followed-up on my phone calls and discussions with you, Gen. William T. Grisoli, Commander and Division Engineer of the U.S. Army Corps of Engineers; Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works; as well as a letter I wrote to Corps Chief Robert Van Antwerp in early January asking him to withdraw the proposal and resume drafting the usual easements.

Invited participants at the Jan. 18 meeting included Watford City Mayor Brent Sanford; New Town Mayor Dan Uran; Parshall Mayor Richard Bolkan; Garrison Mayor Shannon Jeffers; Williston Mayor Ward Koeser; Bismarck Mayor John Warford; Williams County Commissioner Daniel Kalil; Mountrail County Commissioner David Hynek; McKenzie County Commissioner Roger Chinn; McLean County Commissioner Julie Hudson; Dunn County Commissioner Daryl Dukart; Mercer County Commissioner Lyle Latimer; Three Affiliated Tribes Chairman Tex Hall; McKenzie County Jobs Development Authority Director Gene Veeder; North Dakota Rural Water Systems Association Eric Volk; North Dakota Irrigation Association Executive Director Mike Dwyer; Missouri River Joint Water Board Chairman Ken Royse; State Water Commissioner Todd Sando.

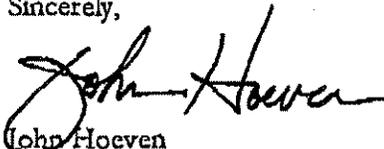
Across the board, local, county and state leaders expressed opposition to the plan. Key objections include:

1. **State's Rights:** The state has a right to the natural flows of the Missouri River, which fills the Sakakawea Reservoir. Without the dam and the stored water North Dakotans would have complete, unencumbered access to the free-flowing water of the Missouri River 365 days/year.
2. **The Dakota Water Resources act of 2000** clearly stated that the costs associated with construction of facilities on the Missouri River are non-recoverable from the people of North Dakota.

3. The Garrison Dam already creates real challenges for the state, forcing communities to deal with huge fluctuations in water level that require very expensive water intakes, expensive boat ramps and the loss of land—all for promises that have been largely undelivered.
4. The Bakken Oil Field is a resource with significant value for the state and nation, and developing this resource requires water. Companies could use the water in Sakakawea and reduce the need to truck water, which causes significant damage to roads and compounds safety and traffic issues. Water in the Sakakawea is plentiful. If the oil industry relied SOLELY on water from the reservoir the net effect on the lake would be one inch per year according to the ND Petroleum Council.
5. The oil industry creates a lot of jobs and generates significant revenue for the federal government. The federal government should be working to support industry not hurt it.
6. This proposal has stalled the permitting process, which needs to be expedited to support the water demands of the Bakken development. This issue demands common sense and a practical solution.
7. The Corps should allocate all the estimated 24 million acre feet of water flowing through the dam rather than the currently proposed 100,000 acre feet so this process doesn't need to be repeated when/if demand outpaces the Corps' projections.
8. Historically, the primary existence of the Three Affiliated and Sioux Tribes has been tied to the river. The Garrison Dam project has been devastating to these tribes and the people have struggled to recover from the loss of land and change of lifestyle. Oil and gas development offers a legitimate promise for the Tribes to build back their economy and the Corps' proposal to restrict Tribal access to the water severely hampers their ability to take advantage of these economic development opportunities.
9. The state and Tribes have not received the full compensation promised in the Just Compensation Act, which was part of the original Garrison Dam project, such as the promised \$60 million in irrigation infrastructure.
10. The Corps' proposal contains a significant number of legal flaws and technical problems. By recognizing North Dakota's rights to the natural flow of the Missouri River, the Corps has clear legal room to give North Dakota what it wants and needs in terms of access to the water while still supporting a consistent, national policy.

Please add this letter to the official public record you are gathering on this issue. Thank you for your time and attention to this matter, which is of vital interest to the people of our state.

Sincerely,


John Hoeven
Senator



STATE OF SOUTH DAKOTA
DENNIS DAUGAARD, GOVERNOR

January 19, 2011

U.S. Army Corps of Engineers, Omaha District
CENWO-OD-T
ATTN: Lake Sakakawea Surplus Water Report and EA
1616 Capitol Avenue
Omaha, NE 68102-4901

Dear Sirs:

Thank you for the opportunity to review the Garrison Dam/Lake Sakakawea, North Dakota Draft Surplus Water Report and Environmental Assessment as published by the U.S. Army Corps of Engineers (Corps). When South Dakota first learned of the intent of the Corps to begin publishing surplus water reports and charging for stored water in all reservoirs in the Missouri upper basin states, former Governor M. Michael Rounds forwarded objections to the Corps from the State of South Dakota (see enclosed letter).

In that same letter, former Governor Rounds also provided a number of recommendations to the Corps. However, we do not see any of those recommendations included in the Garrison Dam/Lake Sakakawea North Dakota Draft Surplus Water Report and Environmental Assessment. Therefore, for all the reasons previously articulated by former Governor Rounds, please be assured South Dakota remains strongly opposed to the proposal by the Corps to begin charging for stored water in the reservoirs in the upper basin states as outlined in the Garrison Dam/Lake Sakakawea North Dakota Draft Surplus Water Report and Environmental Assessment.

We look forward to working with the Corps to implement those recommendations as outlined in the enclosed letter. Thank you again for the opportunity to provide comments.

Sincerely,

Dennis Daugaard

Enclosure

cc w/enclosure: Senator John Thune
 Senator Tim Johnson
 Representative Kristi Noem
 Governor Jack Dalrymple, State of North Dakota
 Governor Brian Schweitzer, State of Montana
 Marty Jackley, Attorney General
 Jeff Vonk, Secretary, Game Fish & Parks
 Walt Bones, Secretary, Department of Agriculture
 Dusty Johnson, Chief of Staff
 Charlie McGuigan, Attorney General's Office
 Jason Glodt, Policy Advisor-Governor's Office
 Nathan Sanderson, Policy Advisor-Governor's Office



STATE OF SOUTH DAKOTA
M. MICHAEL ROUNDS, GOVERNOR

November 10, 2010

Colonel Robert Ruch, District Commander
Department of the Army
Corps of Engineers, Omaha District
1616 Capitol Avenue
Omaha, NE 68102-4901

Dear Colonel Ruch,

Thank you for your letter (copy enclosed) regarding the Surplus Water Storage Reallocation Study which the Corps is conducting on the Missouri River reservoir system. I particularly appreciate you traveling to Pierre on September 29 to provide us an opportunity to begin a discussion on this study, and, as we agreed, this letter is a follow-up to that meeting.

We understand this proposal to be a two-part study that first attempts to identify and quantify surplus water storage which the Corps can use to execute temporary surplus water storage contracts. Contracts would then be executed with users who divert water from the reservoirs for the purpose of covering O&M costs of the mainstem reservoirs. Secondly, the study will specifically examine the long-term storage reallocation for municipal and industrial use on the mainstem reservoirs. We also understand, the Corps is implementing a policy that no new withdrawals of Missouri River water will be allowed pending completion of the study.

This action by the Corps raises several grave concerns for South Dakota. Our first concern is one of timing. With the ongoing Missouri River Authorized Project Purposes Study (MRAPS) under Section 108 of the 2009 Omnibus Appropriations Act, it would seem appropriate for the reallocations study to be delayed until after the MRAPS study is completed. Because the authorized project purposes may change given the outcome of the ongoing study, it makes no sense to now begin a reallocation study which was authorized in 1944, only to have the outcome undone by a broader MRAPS study and potential reauthorization of the 1944 Flood Control Act.

Our second concern is one of equity. It appears water supply contracts will only be with those users who divert directly from the mainstem reservoirs. If the purpose of the contracts is truly to recover the cost of O&M for the reservoirs, then it would seem only fair that all authorized users of the stored water, up and down the entire river, share in the expense associated with maintaining the reservoir system, and not paid by just people in the upper basin states. In fact, many of the Corps's own studies have documented the tremendous benefits those people in downstream states enjoy by having controlled water supplies, such as for water intakes and cooling purposes, hydropower, and, of course, flood control.

Please remember, the upstream states have already paid, and continue to pay, a heavy price for the Missouri River reservoirs. It is true we receive many benefits from the reservoirs as well, but when the reservoirs filled, more than 500,000 acres of our most fertile river bottom lands in the state were permanently flooded. In return, the federal government promised South Dakota it would develop 950,000 acres for irrigation to help offset that loss. However, today, only 25,000 acres have actually been developed, or less than 3 percent of what was promised. Therefore, to now say users in only the upstream states are responsible for the O&M costs of the reservoirs seems to add insult to injury.

We are also very troubled by the fact natural flows are not being factored into the allocation study. Basin states have long enjoyed the state right to issue water permits for the use of Missouri River water. The ability for states to manage their own water supplies for the benefit of their citizens is a sacred state's right that has long been recognized by the federal government. For example, other federal agencies, such as the Bureau of Reclamation, make allowances for natural flows in its projects. Therefore, regardless of the reservoir system, natural flows exist on the Missouri River, and states should have access to those flows through their state water rights program without contracts from the Corps.

The Corps's response to our request to factor out natural flows has been that users of the reservoirs enjoy the benefits of storage. We assume this means the reservoirs are providing access to a guaranteed pool of water. However, the fact is, access to the pools is far from guaranteed as the Corps can draw the pool down to the top of the permanent pool. As a result, intakes have to be moved and installed at a level that can accommodate those lower elevations.

As an example, Lake Oahe typically floats between 1590-1610 feet mean sea level. However, the Corps can draw the reservoir down to 1540 feet, which means intakes must be lowered to this depth to remain operational, and this can entail significant expenses. A recent case, of which the Corps is well aware, is the Mni Waste Rural Water System on the Cheyenne River Indian Reservation. As the Oahe Reservoir water level dropped, the system had to extend its drinking water intake at a cost in excess of \$16 million. While the Corps was instrumental in installing this new intake, many different entities had to help, to include South Dakota which awarded the system a \$1 million grant from the state Water and Environment Fund. Therefore, it is difficult for us to see the logic of the Corps's argument that the benefits of the pools are so great as to negate any recognition of natural flows.

Another area of concern is that the Corps's short term water surplus study, under Section 6 of the 1944 Flood Control Act, only authorizes issuing temporary water storage contracts for municipal and industrial uses. Section 6 does not provide for temporary contracts for irrigation use. Therefore, any action on intake easement requests by irrigators would be postponed until the long-term surplus water study under the 1958 Water Supply Act is completed. This effectively places a multi-year moratorium on any new irrigation development. Considering that irrigation was a promised, but still unfulfilled, benefit to South Dakota under the 1944 Flood Control Act, and that agriculture is a large part of South Dakota's economy, this study cannot be allowed to delay or otherwise become an impediment to the development of irrigation projects.

Finally, the apparent rigidity of the Corps's policy to allow no new water users while the study is underway is of great concern as well. An example of this rigidity occurred in mid-August after the South Dakota Department of Environment and Natural Resources (DENR) issued a temporary water right permit for 3-acre feet of water to be withdrawn from Big Bend Reservoir over a 10-day period. The temporary permit was issued to a federal BIA contractor for use in

constructing a road on the Crow Creek Indian Reservation. The timeline was short as he was utilizing federal stimulus funding.

When the rest of the federal government is trying to recover our national economy and create jobs, the Corps's new policy to not allow any new water users had the exact opposite effect. The Corps ran off the BIA contractor and prohibited him from withdrawing the 3-acre feet of water he needed from the reservoir. At the same exact time, the Corps was discharging more than 80,000 acre-feet per day from that reservoir to reduce system storage for next year's inflows. This simply makes no sense. There has to be consideration given to allowing water to be withdrawn from the reservoir system to avoid shutting down local economies and impacting the day-to-day commerce and business conducted in the upper basin states.

In summary, we strongly recommend the following:

1. The timing of the study, which was authorized back in 1944, is poor and should continue to be delayed until after the MRAPS study is completed.
2. The proposed contracts, which unfairly target a select group of upper basin users, need to be eliminated until an approach is identified that equitably spreads the O&M costs to all benefactors in the whole basin.
3. Natural flows need to be accounted for and factored out of the study because states must retain the right to issue state water permits from these flows.
4. This study cannot be allowed to delay or otherwise become an impediment to the development of irrigation projects.
5. During the interim, the Corps needs to continue to allow water to be withdrawn from the reservoirs by both existing and new users subject to state water right programs to avoid shutting down local economies and impacting the day-to-day commerce and business in the upper basin states.

We look forward to working with you to adopt these recommendations.

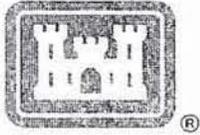
Sincerely,



M. Michael Rounds

cc w/enclosure:

Senator Tim Johnson
Senator John Thune
Representative Stephanie Herseth Sandlin
Representative-elect Kristi Noem
Governor Hoeven, North Dakota



NEWS RELEASE

U.S. ARMY CORPS OF ENGINEERS

BUILDING STRONG®

For Immediate Release:
Dec. 16, 2010

Contact:
Monique Farmer 402-995-2416
monique.l.farmer@usace.army.mil

Larry Janis 402-995-2440
garrisonsurplusstudy@usace.army.mil

Corps seeks public comment on Lake Sakakawea Draft Surplus Water Report, Environmental Assessment

Omaha, Neb. – The U.S. Army Corps of Engineers announced the release of the draft surplus water report and environmental assessment for Lake Sakakawea today; the draft identifies and quantifies surplus water storage, which the Secretary of the Army, the Honorable John McHugh, can use to execute temporary surplus water agreements for municipal and industrial purposes.

Surplus water agreements are typically in place for five years, with the option for a five-year extension.

The National Environmental Policy Act requires the Corps to assess and report the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

"This report for Lake Sakakawea is the first in a series of surplus water reports that the Corps will be releasing in the months to come," said Larry Janis, project manager. "We are in the process of completing draft reports for the other main stem reservoirs."

The public is encouraged to provide comments on the draft report and environmental assessment during the open comment period from Dec. 16, 2010 to Jan. 17, 2011. A public meeting is tentatively scheduled for Jan. 6, 2011 at the Doublewood Inn, 1400 East Interchange Ave., in Bismarck, N.D., from 5 p.m. to 8 p.m.

THE OIL AND GAS INDUSTRY: In recent years, oil and gas exploration has risen dramatically in the area surrounding Lake Sakakawea, N.D., including water demand for the well drilling process known as hydro fracturing. Because of its proximity to this activity, the state of North Dakota has identified Lake Sakakawea as a viable source of water to support the industry's needs. The Corps currently has

-more-

U.S. Army Corps of Engineers – Omaha District
1616 Capitol Ave., Omaha, Neb. 68102
<http://www.nwo.usace.army.mil/>

applications for water intake easements, which cannot be processed until a water surplus letter report with appropriate NEPA documentation has been completed.

The draft report proposes temporarily making up to 257,000 acre-feet of storage (100,000 acre-feet of yield) per year within the Garrison Dam / Lake Sakakawea Project, N.D. available for municipal and industrial water supply. Temporarily making surplus water available will allow the Omaha District to enter into surplus water agreements for up to 257,000 acre-feet of storage for surplus water to meet regional water needs until such time that a permanent reallocation study might be completed. The draft EA, attached to the report, identifies baseline environmental conditions and analyzes potential impacts from the proposed use of surplus water.

The draft Lake Sakakawea Surplus Water Report and environmental assessment are available for viewing at: www.nwo.usace.army.mil/html/pd-p/review_plans.html and in hardcopy at libraries in Bismarck, Dickinson, Garrison, Riverdale, Williston, New Town, Beulah and Hazen, N.D. The public may submit comments via comment forms available at the public meeting and at libraries where the report is located. Written comments should be sent to: U.S. Army Corps of Engineers, Omaha District; CENWO-OD-T; ATTN: Lake Sakakawea Surplus Water Report and EA; 1616 Capitol Avenue; Omaha, NE 68102-4901. Comments can also be emailed to: garrisonsurplusstudy@usace.army.mil. Comments must be postmarked or received no later than Jan. 17, 2011.

###

U.S. Army Corps of Engineers – Omaha District
1616 Capitol Ave., Omaha, Neb. 68102
<http://www.nwo.usace.army.mil/>

Charles W. Murphy
Chairman

TRIBAL COUNCIL
(DISTRICTS)

TRIBAL COUNCIL
(AT LARGE)

Jesse "Jay" Taken Alive

Margaret M. Gates

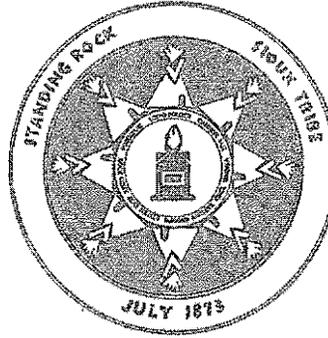
Avis Little Eagle

Dave Archambault II

Joseph McNeil Jr.

Jesse McLaughlin

Mike Faith
Vice Chairman



Adele M. White
Secretary

Sharon Two Bears
Cannonball District

Henry Harrison
Long Soldier District

Duane Claymore
Wakpala District

Kerby St. John
Kenel District

Errol D. Crow Ghost
Bear Soldier District

Milton Brown Otter
Rock Creek District

Frank Jamerson Jr.
Running Antelope District

Samuel B. Harrison
Porcupine District

January 14, 2011

Colonel Robert J. Ruch,
District Commander
US Army Corps of Engineers, Omaha District
CENWO-OD-T
1616 Capitol Avenue
Omaha, NE 68102-4901

ATTN: Garrison Dam/Lake Sakakawea Project North Dakota
Surplus Water Report

Dear Colonel Ruch:

Please find the attached statement of the Standing Rock Sioux Tribe on the *Garrison Dam/Lake Sakakawea Project, North Dakota, Draft Surplus Water Report*.

If you have questions or require additional information, please advise.

Sincerely,

Charles W. Murphy, Chairman
Standing Rock Sioux Tribe

Attachment

STATEMENT OF CHARLES W. MURPHY, CHAIRMAN
STANDING ROCK SIOUX TRIBE

The Standing Rock Sioux Tribe has considerable concern with the *Garrison Dam/Lake Sakakawea Project, North Dakota, Draft Surplus Water Report*, dated December 2010. The opinion of the Tribe is that Corps has proceeded in clear and demonstrable error to seek to control the waters of the Missouri River to the detriment of the Tribe and its membership.

The forefathers of the Standing Rock Sioux Tribe and its members occupied the Missouri River Basin well before 1803 when Napoleon sold the "Louisiana Territory" to the United States to finance France's wars in Europe. We held title to and possession of the territory before France and clearly before the United States. Upon acquisition of the Louisiana Territory, including the present states of North Dakota and South Dakota and the Standing Rock Indian Reservation, the United States only acquired the rights of France to bargain with us. None of our territory had been ceded or sold, and our title was unbroken.

We were the ancient possessors of the lands of the Missouri River Basin to which no patents had been issued by any European power or subsequently by the United States. We possessed the Missouri River Basin portion of those lands and territories lying to the westward of the sources of the rivers which fell into the Atlantic Ocean from the west and North West. During colonial days the European powers had strictly forbid their subjects from making any purchases or settlements whatever, or taking possession of any of the lands reserved to us, without their special leave for that purpose. All of their subjects were strictly enjoined from either willfully or inadvertently seating themselves upon any of the western lands above described, including the Louisiana Territory, which, not having been ceded or purchased, remained fully reserved by our forefathers. If at any time any of us had been inclined to dispose of the said lands, the same would necessarily have been purchased from us at some public meeting or assembly to be held for that purpose.

Upon discovery of gold in California and recognition of the Nebraska Territory as important to the power in Congress on the slavery issue, the United States assembled with our leaders at Fort Laramie and entered into a Treaty in 1851. The United States recognized our exclusive territory as extending throughout the Dakotas and into Montana and Wyoming. Our leaders made it clear that the entirety of the Missouri River would remain within our boundaries, and we retained a continuous and unbroken title to the lands within those territorial boundaries.

Within the limits aforesaid, we remained invested with all the rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, rights and temporal franchises whatsoever which comprehended all the soil, plains, woods, mountains, marshes, lakes, rivers, including the entirety of the Missouri River to its eastern bank, with the hunting and fishing of every kind, within the said limits and with all mines of whatsoever kind.

In the Fort Laramie Treaty of 1868, the Great Sioux Reservation was established to accommodate the pressures of eastern migration and travel within our broader territory. The Great Sioux Reservation occupied all of present day South Dakota west of the eastern bank of the Missouri River, which we reserved to ourselves. We retained a continuous and unbroken chain of title and retained all rights to all resources.

In 1889 Congress created the Standing Rock Indian Reservation from the 1851 territory and the 1868 Great Sioux Reservation, including the Missouri River, which we have retained to present. The Corps of Engineers took our lands along the Missouri River in 1958 to build Oahe Dam and create Lake Oahe and inequitably compensated us for the taking, but we retained our water reserved water rights and mineral rights in the Missouri River with priority dates well before 1803 and senior to any priority date asserted by the United States on its own behalf.

Our water rights have been continuously developed for irrigation, domestic, commercial, industrial, fishery, recreation and other purposes.

Upon that background of title to land and water reserved by the Standing Rock Sioux Tribe to itself and its members for all beneficial purposes within the Reservation, the Tribe objects to any retention of its prior and superior rights to the use of water by the Corps of Engineers in Lake Sakakawea or Lake Oahe. The Corps of Engineers, on behalf of the United States, is a junior water user with no priority date that can approach the senior pre-1803 priority date of the Tribe. The Corps of Engineers must release all flows of the Missouri River needed by the Tribe for its present and future purposes.

In its *Garrison Dam/Lake Sakakawea Project, North Dakota, Draft Surplus Water Report*, the Corps assumes in error that it has exclusive power to allocate surplus storage rights in Lake Sakakawea to new industrial users in western North Dakota. In fact, the Corps has no power to allocate storage rights in any Pick Sloan reservoir that interferes with the prior and superior rights to the use of water by the Standing Rock Sioux Tribe. The Corps must release water from Lake Sakakawea to meet our present needs and the growth of our needs in the future, all of which we have reserved to ourselves from time immemorial and prior to 1803. After our water rights are satisfied, we join the State of North Dakota in its position that any surplus waters of the Missouri River are then allocable by the State prior to the allocation of water from storage by the Corps of Engineers.

We are presently engaged in reaching agreement with the States of North Dakota, South Dakota and the United States, if the latter chooses to join, in an agreement that would settle the magnitude of our future rights. Any action by the Corps of Engineers to assert its exclusive right to allocate water in North Dakota to new industrial users is subject to the outcome of an agreement on our future, senior water rights and is subject to our present, senior water rights prior to agreement.

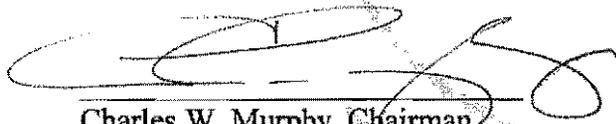
The grave error of the Corps is that it has failed to consider the water rights to the natural and depleted flow of the Missouri River separately from its asserted rights to

storage in Lake Sakakawea. For purposes of illustration, the water rights to the flows of the Missouri River may be considered A rights and the water rights in storage, including the sediment and conservation pools in Lake Sakakawea, may be considered B rights. The Standing Rock Sioux Tribe has A rights that are vested and senior to all other rights in the Missouri River.

After satisfaction of Standing Rock Sioux A Rights, we agree that the State of North Dakota has been given the power by the United States to permit the appropriation of A rights, junior to the Standing Rock priority, but separate from all B rights of the Corps. An industrial appropriator in 2011 in western North Dakota may seek to acquire B rights from the Corps of Engineers at the costs proposed by the Corps of Engineers or could likewise seek A water rights that are junior to the Standing Rock Sioux Tribe. The Corps cannot deny access to A rights in the Missouri River that are taken along the shore of Lake Sakakawea except for violation of conditions needed to comply with the Clean Water Act.

Those A rights could be acquired from the Standing Rock Sioux Tribe by contract for deferral of existing irrigation or other uses selected by the Tribe for a limited and specified period of time. Those A rights could also be acquired by appropriation from the State of North Dakota from A waters that are surplus to the water rights of the Standing Rock Sioux Tribe or other senior A water rights. The Corps of Engineers cannot impose its B rights ahead of the foregoing options for acquiring A water rights.

The Standing Rock Sioux Tribe respectfully rejects *the Garrison Dam/Lake Sakakawea Project, North Dakota, Draft Surplus Water Report* and requests that the United States re-evaluate its position, which currently is in serious error.



Charles W. Murphy, Chairman
Standing Rock Sioux Tribe



Date

From: [Adrienne Swallow](#)
To: [Ames, Joel O NWO](#)
Cc: [Garrison Surplus Study](#)
Subject: Draft Surplus Water Report
Date: Wednesday, December 22, 2010 12:26:54 PM

Hi,

Please send me a HARD COPY of the Draft Surplus Water Report. My mailing address is below.

My street address is

Building 1 North Standing Rock Avenue

Fort Yates, ND 58538

Thanking you in advance!

Adrienne

Adrienne Swallow

Environmental Protection Specialist

Standing Rock Sioux Tribe

PO Box D

Fort Yates, ND 58538

701-854-8582

cell: 701-226-0291

fax: 701-854-3488

aswallow@standingrock.org



T RIBAL HISTORIC PRESERVATION OFFICE
S TANDING ROCK SIOUX TRIBE
Administrative Service Center
North Standing Rock Avenue
Fort Yates, N.D. 58538
Tel: (701) 854-2120
Fax: (701) 854-2138

February 1, 2011

U.S. Army Corps of Engineers
Attention: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, NE 68102-4901

Dear Mr. Janis,

The Standing Rock Sioux Tribe's Tribal Historic Preservation Office (SRST-THPO) offers its comments via this letter. The Garrison Dam/Lake Sakakawea Project North Dakota Draft Surplus Water Report (Draft Report) was issued in December of 2010. Although the U.S. Army Corps of Engineers (ACOE) states on page 27 of the report that the Standing Rock Sioux Tribe was invited to participate, the SRST-THPO did not know of the existence of the Draft Report or the Environment Analysis (EA) that accompanies the Draft Report until the announcement for the public hearing of January 06, 2011 which was sent out by email on December 17, 2010. Nevertheless, the SRST-THPO offers its participation, which is our right under Section 106 and something the ACOE has denied us up until this point. The SRST-THPO strongly disagrees with the ACOE that this proposed project will not create a significant impact to resources and submits that the ACOE did not account for indirect or cumulative effects that the proposed project will create for the reasons outlined below. The ACOE is also in violation of Section 106 of the National Historic Preservation Act (NHPA) by not conducting surveys at the intake locations and associated infrastructure and by ignoring their responsibilities to consult with tribes per Section 106 of the National Historic Preservation Act (NHPA), Section 101 (d) (6) (b) and Executive Order 13175 respectively. Additionally, the ACOE has failed to provide sufficient evidence that this proposed action will not significantly impact the human and natural environment per National Environmental Policy Act (NEPA) 1508.27.

The SRST-THPO offers comments pertaining to the following:

- 1) At 4.2.1. on page 27 of Appendix A, Draft Environmental Assessment (DEA), the ACOE makes reference to its past invitation to the Standing Rock Sioux and the Three Affiliated Tribes cultural offices and states that both Tribes declined to participate. The SRST-THPO did not receive invitation or notice of any sort referenced here. In the appendix listing the invitations to participate at public hearings, there is no invitation to the Standing Rock Sioux Tribe in any

document. The SRST-THPO asks for the documentation that they were invited to participate in any discussions or meetings for this project to compare that with our files. The ACOE is legally obligated, per Section 101 and Section 106, to consult with tribes on federal undertakings which have the potential to affect cultural resources or resources that the tribes consider to be of religious or cultural significance and the ACOE has failed to accomplish this for this undertaking.

2)At 4.2.1. on page 28 of Appendix A to the DEA, the ACOE states that the maps contained within the Draft Report and DEA do not differentiate between cultural, historical, park and recreation, and fish and wildlife resources. This is not acceptable. You cannot make a blanket statement to cover all of the potential effects to the individual environmental and cultural resources that are potentially in the area. Each one of these resources has different ways of mitigating effects and by covering it under a blanket statement, as the ACOE is attempting to do in this draft EA, it diminishes the importance of each resource. This statement also shows that the ACOE may have actual knowledge of cultural resources if it could have differentiated cultural from other resources. The SRST-THPO requests that you communicate any known cultural resources to the SRST-THPO in a private manner. The final statement on this page pertaining to avoiding significant environmental effects does not address the cultural aspect. All effects to cultural resources are significant as it is not a resource that can rebound over time. It is a finite resource that once destroyed can never be recovered.

3)At 4.2.2. on pages 30-31 of Appendix A to the DEA, the ACOE states that in the DEA the engineering and design have not been completed as of December, 2010. As the known proposed locations are defined, the SRST-THPO reminds the ACOE that the ACOE is required to consult with the SRST-THPO pursuant to the recently issued memorandum on tribal consultation from the current Federal Administration as it relates to Executive Order 13175 and § 106 of the National Historic Preservation Act (16 USC § 470 et seq.). It is one thing for the ACOE to state that the proposed actions will have no effect when it admits that it does not quite know the locations of the intakes and the proposed 75 foot pathways that will necessarily disturb any potential cultural resources. Once these potential 75 foot pathways, ranging in length from 1000 feet to 10 miles, are known the SRST-THPO needs to be informed so that it may conduct its own Tribal Cultural Property surveys of the areas. Additionally, a federal finding of no adverse effect to historic properties has been recommended for this DEA. The SRST-THPO has major issues with this finding based on what is written in this report. First and foremost, a federal determination of effect for cultural resources cannot be made on concept level of design and reasonable assumptions as is stated on page 30 of the DEA. Cultural resource inventories cannot be conducted until final plans for the proposed undertaking are completed. The basic concepts of design and footprints for the implementation of the proposed undertaking might be the same between concept and final product but the location may change and this will affect any federal determination made for that undertaking as the potential to impact any cultural resources has changed.

4)The SRST-THPO would like to know what qualifies as “...substantial changes to the proposed actions that could result in unforeseen impact to the natural or human environment would require the preparation of a supplemental NEPA analysis.” As this DEA is being conducted at the concept only level, it is reasonable to assume that substantial parts of this proposed project will change. The ACOE needs to explain how they will be addressing any changes and how they do or do not qualify as substantial. An example of this can be seen with the proposed locations of the intakes themselves and how they could be changed by unforeseen events around them. Page 35 of the DEA details the plans for the Mandaree intakes. If the cultural resource study or TCP study conducted for this proposed road finds that this proposed road is not acceptable, how will this affect the intake location? If the new location for a redesigned road removes the intake location from a low delay (green) area and places it within a greater delay area (yellow or red). How will the ACOE address this? The ACOE has failed to provide any alternatives apart from the no action alternative and is required under NEPA to provide these in their considerations for an EA. The ACOE is trying to force a decision of accepting this proposed undertaking or nothing and this is simply unacceptable.

5)At 4.2.3. on page 32 of Appendix A to the DEA, the ACOE states that as this process moves toward finalization of potential locations of pipeline and other associated infrastructure that it will notify several federal and/or State agencies to ascertain whether or not its proposed plans are acceptable; the SRST-THPO is not included in the host of agencies that will receive notice and an opportunity to be heard before the final decision is made regarding any proposed intakes. The SRST-THPO demands to be included on this list for this and any future federal undertakings as required by law.

6)A) The ACOE states that this EA is for seven intakes for three separate applicants out of a total of nine potential applicants. The map on page 29 has intakes in every low delay permitting spot (green) on the map. The SRST-THPO is extremely alarmed by the use of this map as it relates to the environment and to cultural resources in particular. In almost every instance, the low delay area is surrounded by areas of higher delays or in areas where no determination is made on the potential for delays in the permitting process. The criteria for low, medium and high delays are never fully explained. Are concerns for cultural resources given less or more of a delay rating than some other regulatory agency? If the area in question only had cultural resource delays would that be a low delay or high delay assignation? Please provide the criteria to determine the assignation of low, medium and high delays.

B) Additionally, as there are currently six applicants in the process of submitting proposals for surplus water; where would their intake pumps be located? Considering that all low delay areas have been used in the current proposal. The additional proposals can be considered a cumulative effect on the depletions of water surface elevations along the Missouri River and are ignored by the ACOE in determining cumulative effects.

7)A) At 5.1.1. on page 47 of Appendix A to the DEA, the ACOE states :

The National Environmental Policy Act (NEPA) and the Council on Environmental Quality's Implementing Regulations require that an Environmental Assessment identify the likely environmental effects of a proposed project and that the agency determine whether those impacts may be significant. The determination of whether an impact significantly affects the quality of the human environment must consider the context of an action and the intensity of the impacts (40 CFR 1508.27).

The SRST-THPO would appreciate the ACOE explaining how the ACOE has considered whether the proposed actions would have any effects on the water intakes on the Standing Rock reservation. In December of 2003 the city of Fort Yates experienced a loss of drinkable water, closure of its hospital, businesses, government agencies, and other disastrous consequences as a result of ACOE actions in operating dams of the Missouri river, including not accounting for sediment buildup, among other things. This is not a speculative concern and this concern fits within the context of the ACOE proposed action here.

B) In relation to the statements about context and intensity on page 47, the SRST-THPO believes that any TCP or cultural sites in and around the area of potential effect would be significantly impacted by the construction of, and the cumulative effects of, additional well pads, retention ponds, and increased traffic within the area. The SRST-THPO believes that these would result in a significant detrimental effect to these resources.

8) Section 5.1.2 on page 47 explains indirect and cumulative effects according to NEPA.

Cumulative effects is defined as *"the impact on the environment which results from the incremental impact of the action when added to other past, present and foreseeable future actions regardless of what agency (Federal or non -federal) or person undertakes such other action (40 CFR 1508.7)*. The past, present and foreseeable actions involved with this proposed project include, but are not limited to, the oil and gas industry in terms of wells, rigs, increased traffic and the associated pipelines and infrastructure that are constructed with them. This entire document downplays all of the cumulative and indirect effects of the proposed undertaking and only addresses the direct impacts of the construction of the intakes and not the actual industry that will grow around the proposed action. The ACOE has tried to make it appear that growth in the industry is not an indirect action of identifying surplus water and that this growth in industry is limited not by access to this water but by access to oil crews which may or may not be the case. However, to simply ignore the cumulative effects outlined above that access to a stable water source that this proposed project will provide is severely misleading and undercuts the credibility of the DEA.

9)A) Section 5.1.3 on page 48 lists environmental effects which could occur including *"where depletions in water from Lake Sakakawea would result in changes to the water surface elevations in Lake Sakakawea"*. Any changes in water surface elevations are a federal undertaking and are subject to Section 106 compliance. As it is stated that these same depletions could affect the water surface elevations throughout the entire Missouri River then

the entire Missouri River and other water surfaces that could be affected by this federal undertaking need to be subjected to Section 106 compliance including surveys and federal determinations. Please provide documentation that this was completed for this federal undertaking. Even slight changes in water surface elevations can create catastrophic erosion on sites along the Missouri River. The SRST-THPO has never seen a document relating to this project to indicate that compliance with Section 106 has been completed and we were never given the opportunity to comment on any such document should it in fact exist which is our right under Section 106.

B) Additionally, the ACOE states (page 49) that *“There is typically a two month wait for a hydrofrac crew. If the water necessary to hydrofrac the well is not present when the crew arrives, the crew will move on to their next assignment and will have to be rescheduled, leading to significant and costly delays in the production process. The net effect of improving the availability and distribution of water in the region by identifying surplus water in Lake Sakakawea and allowing new intakes would not be to change the growth rate of the industry, but rather to diminish the distance of transporting the water needed to support the industry’s ongoing growth”*. Previous to this statement, the ACOE (pg 48-49) quotes Bill Hicks *“water supply – while necessary to oil and gas production is not the limiting factor on the rate of drilling and hydrofracing in North Dakota. Rather, the availability of drill rigs and hydrofracing crews are the critical factors limiting the rate at which the oil and gas industry grows within the region.”* A final statement on page 49 by the ACOE states that additional *“water availability is not expected to influence the rate of oil drilling and production.”* These three statements are incompatible with one another. First and foremost, it is stated that when the hydrofrac crew shows up and water is not available, it will cause delays and slow down growth of the industry yet the ACOE then states that water availability is not expected to influence the rate of oil drilling and production. These two statements published by the ACOE are completely incompatible with one another. If the fracing crew is held up by water not being present when they arrive and there now exists a stable water supply due to the proposed project, the fracing crew will be able to complete their jobs without delays, thereby increasing the growth of the oil and gas industry by making a non producing well into a producing well and maximizing profits for the industry. Once again, the ACOE has failed to account for, and has in fact dismissed the idea, that their proposed project will have indirect and cumulative affects upon the natural and human environment in terms of a growth within the industry. If the ACOE continues to maintain that the only intended result of their proposed project is to decrease water hauling distances, it should be noted that an increase in wells located closer to the retention ponds is an easily foreseeable future effect as the companies try to maximize profits in relation to well location and water. This is simple economics and is a cumulative and indirect effect of the proposed project which the ACOE has also ignored.

- 10) Page 59 and 60 of the DEA state that the Missouri reservoirs operate on an integrated system and that 257,000 acre feet of storage could conceivably impact or reduce flows and surface

elevations in the other five reservoirs. These changes in water surface elevations have the potential to affect the environmental resources throughout the system. This depletion of water surface elevations within the Missouri reservoirs is a federal undertaking and as such it is subject to Section 106 compliance. The SRST-THPO is unaware of any studies done anywhere along the Missouri River to address these new surface elevations and their potential affect to cultural resources. If these studies have not been completed, the ACOE is in violation of Section 106 and if they have, the SRST-THPO program was never provided copies for their comments as required by Section 106 and as such the ACOE is once again in violation with the regulations. The ACOE then states that the *"the determination of whether an impact significantly affects the quality of the human environment must consider the context and intensity of the impacts (40 CFR 1508.27). The less intense of an impact, the less scrutiny even sensitive resources need because of the overt inability of an action to affect change to the physical environment."* Even slight water surface elevation fluctuations will affect erosion rates at sites along the Missouri and lower water surface elevations will expose sites currently underwater. When regarding this context and intensity approach to the inability of the proposed project to affect cultural resources it is the opinion of the SRST-THPO that it fails miserably. Erosion of sites is one of the most destructive effects happening to cultural sites along the Missouri along with looting. In 2004, when the *Programmatic Agreement for the Operation and Management of the Missouri River Main Stem System for Compliance with the National Historic Preservation Act, as amended (PA)* was signed, the Tribes included the effects of erosion in their list of concerns at the beginning of the document on P-2. This is a genuine concern to all tribes that are losing sites at a rate of 30 feet per year on sites along the Missouri River due to erosion. Any effect to a cultural site is significant as it is a finite resource that cannot rebound or be replaced like other resources. In addition, the ACOE is neglecting to include cumulative effects of additional intake pumps from the other six current applicants and additional applicants in the future in their rates of depletion and how that increased rate of depletion will affect water surface elevations throughout the entire system.

- 11) At 6.4.2 on page 70 of Appendix A to the DEA, the ACOE has determined that in both the proposed project and the no action alternative that there would be no effect to ground water resources. Once again, the ACOE is neglecting to include the indirect and cumulative effects of their proposed project. The creation of the intakes will increase the number of well pads within the vicinity of the intakes themselves as the costs associated with long distance water hauling will be minimized and can be shifted to the creation of new wells. A foreseeable indirect and cumulative effect that will affect groundwater is the increased amount of chemicals put into the ground associated with the hydrofracturing process. These chemicals associated with the hydrofracturing process are a highly controversial topic within the oil and gas and environmental law cases throughout the country today.
- 12) At 6.5.1 on page 72 of Appendix A to the DEA, the ACOE states its parameters regarding water quality. The SRST-THPO is extremely concerned about the potential effects of hydrofracture

drilling, also known as “fracing”, on surface and ground water supplies of our most precious resource, water. Does the ACOE address this practice by its permittees? This is an indirect and cumulative effect upon the natural and human environment in and around the proposed intakes as more well pads will be placed closer to this stable water source to mitigate the costs of long distance water hauling, which is the main reason for this proposal according to the oil and gas industry as the ACOE repeatedly points out throughout the DEA.

- 13) In regarding air quality in 6.6.2 on page 77 the ACOE has determined that air quality emissions would actually be worse as trucks would have to haul water from greater distances if the proposed project is not undertaken. This assumes that the locations where the water is needed for hydrofracturing are actually closer to Lake Sakakawea and not closer to the areas where the water would be hauled under the no action alternative. If the first assumption is correct, in that the water needed for hydrofracturing new wells is actually closer to Lake Sakakawea this further supports our comments that this should be considered an indirect and cumulative effect for this project and that ACOE is ignoring its responsibilities to document this within the DEA.
- 14) In 6.7.7 on pg 78 the ACOE documents that the number of wells within the area nearly doubled within one year and that the no action alternative would have no effect on the oil and gas industry as they would just get water up or downstream of Lake Sakakawea. The proposed action then tries to downplay this by stating that access to water is not a limiting factor in oil and gas production, availability of hydrofracing crews is the main limiting factor on oil and gas production. These statements are misleading in that they do not follow through on the logical sense from a business perspective. Given that there will be no effect to the oil and gas industry from not being allowed to use water from the proposed action. We can reasonably expect no change in the production and growth of the industry and it will stay the same as last year which was still almost doubling the number of wells in one year which is alarming. However, with the proposed action, the oil and gas industry would have access to a stable water resource and save money by not hauling water as far, which would indicate yet again that new wells are going to be placed closer to the proposed intakes. This would diminish the water delays relating to hydrofracing crews having to move on to other wells and rescheduling and would create more capital, thereby increasing the number of wells that can be made and resulting in a growth in the number of wells. This would lead to more production leading to more capital to invest in additional crews to put up more wells and the cycle will continue. Contrary to what the ACOE is stating, an increase in the availability of water for the oil and gas industry will have a cumulative and indirect effect upon the resources in the area by lowering the costs associated with long distance water hauling and those profits easily being shifted to offset the costs of additional production thereby creating larger profits in the foreseeable future. The ACOE is simply ignoring these indirect and cumulative effects.
- 15) In 6.10.2 on page 89, the ACOE states the growth being experienced due to the oil and gas industry would not be affected by the increased availability of water through the proposed

action as it pertains to demographics. The SRST-THPO would like clarification on this. Is the increased availability of water for municipalities accounted for in the 257,000 acre feet of storage within the proposed action? If this is not accounted for and the ACOE has full intentions of using this EA to supply water to housing infrastructure needs, the entire EA would need to be redone as it something that is possible and apparently being planned for within the foreseeable future. There is no explanation on this statement about the increased availability of water as it pertains to demographics. The EA only references water availability for the oil and gas industry to cut down on long distance water hauling and not any impacts which might occur in relation to municipalities using this same water. Where will the municipalities get their water? The SRST –THPO assumes it will not be from the same retention ponds as the oil and gas industry. Where will the intakes for the municipalities be located? Have cultural resource inventories been conducted at any of these potential locations? If these are new depletions from Lake Sakakawea please provide the effects that these depletions would have throughout the Missouri River system by including them within this EA.

- 16) In 6.14 on pages 96 and 97, the ACOE mentions that western North Dakota has been extensively intruded upon by pads, gas flares and drill rigs and that this would be expected to continue based on factors other than an improved availability of water associated with the proposed project. Once again, the ACOE is ignoring and downplaying the indirect and cumulative effects that this proposed project would have upon the aesthetics and visual resources within the area surrounding the proposed project. As outlined previously in these comments, there would be an increase in the number of well pads, gas flares and drill rigs within the area surrounding these intakes and this would be an extensive intrusion upon these visuals. Additionally, in terms of areas that the tribes use for traditional cultural practices, the sense of seclusion would be lost by the increased oil and gas activities within the area which is integral to their activities. This is omitted within the DEA since the ACOE never contacted the tribes for comments prior to the draft EA being completed.
- 17) A) At 6.16.2 of Appendix A to the DEA, the ACOE states that “*no site-specific cultural resources investigations were performed at proposed intake sites but that the sites were selected by Garrison Project staff with knowledge of existing cultural resources on project lands.*” This is simply unacceptable. The ACOE must consult with Tribes and must perform site specific cultural resource investigations for all federal undertakings per Section 106. The creation of a GIS map to determine areas where potential for high or low delays in the permitting process does not allow the ACOE to ignore their responsibilities to conduct surveys per Section 106. The SRST-THPO needs to be included, as does the Three Affiliated Tribes and any other interested tribes, in making recommendations about the potential locations or risk factors as related to any cultural and TCP resources in that area. As mentioned above, the ACOE is legally obligated to consult with the Tribal Cultural Resource officials, including the SRST-THPO per Section 106 and are in violation of this by not doing so.

B) Additionally, the ACOE states that *"if such cultural resources may be discovered on premises that the grantee would immediately notify the District Engineer, Omaha District, and the site and the material would be protected by the grantee from further disturbance until a professional examination could be made or until clearance to proceed was authorized by the District Engineer"*. The SRST-THPO assumes that this statement addresses any concerns about inadvertent discoveries in the field. However, it is severely deficient in a number of ways. First and foremost, no ground disturbing activities can be conducted for the proposed project until a federal determination has been made. A federal determination cannot be made until ground surveys are conducted on the finalized plans for the proposed project per Section 106. Any deviation from the original plans submitted for survey requires additional surveys for cultural resources. Any federal determination of effect for a federal undertaking includes a review period by the SHPO, and for tribes that have assumed the responsibilities, the THPO, to make recommendations on this finding. The ACOE has not done this and they have recommended a determination of no adverse effect (pg 122 of the DEA) yet the SRST-THPO has not seen a report indicating how this determination was achieved. The SRST-THPO submits that the "professional examination" of any sites found in the field after a federal determination has been made that allows the proposed project to proceed would need to be a determination of eligibility to the potential for inclusion of any site on the National Register and not just an archaeologist in the field stating that the material does not warrant further examination. This is not a request. This is a legal obligation under Section 106 that the ACOE appears to be attempting to ignore.

C) This "professional examination" must also include an opportunity for Tribal Cultural Resource officials to participate and make comments upon the federal determination and have input into whether or not clearance to proceed should be granted as there are no qualified archaeologists who can make determinations on TCP sites should one be found. TCP sites can only be evaluated for their significance by people with knowledge on how those sites were used and what they mean; there is no way for an archaeologist to learn this knowledge through their education. The PA, which the ACOE and signatory tribes signed, accounted for the special knowledge and expertise that tribes have regarding their tribal values, history, and culture, and properties that may possess traditional religious and cultural significance to them on page 15. Yet the ACOE acts like this does not matter in regards to this EA as they did not consult with tribes for this special knowledge and only listened to the "professionals". Once again, this is not a request but is a legal responsibility that appears to be ignored by the ACOE.

D) The SRST-THPO would like an explanation on what qualifies the District Engineer to allow a project to proceed should a site be found in the field. The wording in that sentence appears to allow the district engineer to make recommendations on cultural resource sites in the field and to allow projects to proceed. Please provide the documentation in any Act that allows a district engineer, who is likely not qualified to make determinations for cultural resource eligibility to the National Register to allow a project to proceed. Any site impact to a site that has not had its eligibility to the National Register determined by qualified personnel is a clear

violation of the Archaeological Resource Protection Act (ARPA) and the SRST-THPO will file the paperwork as needed with the Advisory Council on Historic Places (ACHP) to prosecute those involved should this occur.

- 18) The ACOE states within 7.1 on page 113 that the cumulative effects of the proposed action *“could affect the location of preferred water sources and how water is distributed and moved within the region, but changes in the rate of growth in the oil and gas industry as a consequence of implementing the proposed action, would not be expected.”* The fact that this chapter is only four sentences is pretty telling about the credibility of this EA. The omitted foreseeable indirect and cumulative effects that are pointed out throughout the SRST-THPO comments are good examples of what should have been covered here. This sentence by the ACOE is demonstrably false as well since the addition of new intakes to shorten hauling distances and create a stable water supply will have a positive net impact on the rate of growth by diminishing the number of delays due to water availability for fracing crews and the increased profits that shortened hauling routes will create. This increased capital can then be invested in additional pads to generate more profit. The ACOE is downplaying any future foreseeable effects by only concentrating on the rate of growth and incorrectly assuming that there will be none. The ACOE maintains throughout the draft EA that the rate of growth in the oil and gas industry will not be affected by the proposed action. The SRST-THPO disagrees. The ACOE ignores the fact that the location of new well pads will be designed to maximize the potential for profit on water hauling distance by selecting locations closer to these new intakes. This is not speculative, this is a foreseeable future effect which they are intentionally ignoring to avoid any discussions of the cumulative effects of their proposed action. The only way in which the statements made by the ACOE in section 7.1 of the draft EA make any sense is if there are never any new pads or rigs created in North Dakota and the location of the intakes are closer to the existing pads than the no action alternative. This simply will not happen and pads and rigs will be placed closer to the intakes creating an indirect and cumulative effect which is ignored by this draft EA.
- 19) The comments made in section 7.2 starting on page 114 of the draft EA assume that there will be a constant average daily depletion from Lake Sakakawea. This might be fine under optimal situations, however, this average daily depletion does not account for many outside factors which are foreseeable events since they have occurred in the past such as the drought of 2006 which the ACOE mentions within this draft EA. If another drought occurs, what would the effect be on water depletions as it pertains to this proposed action? Would these easements for the oil and gas industry take precedence over the needs of the communities which rely on that water? When the drought or other environmental or human factor ends, would the depletions from Lake Sakakawea increase to resupply the water surplus easements and how would that affect the total surface elevations throughout the integrated Missouri River system? Detailing only the average daily depletions is a documentation of only the best case scenario which unfortunately is never the case as the ACOE is fully aware. The ACOE has

ignored environmental factors which will affect average daily depletions and they have ignored the cumulative effects of six additional current applications, with more foreseeable in the future, to water depletions within the river system.

- 20) In Section 7.3 on page 117 of the draft EA the ACOE comments that the operators for the trucks are driven by profit maximizing, in that they would want to choose the least costly source for the water they need. It is good that the ACOE has finally mentioned the real thrust behind getting this proposed action in place which is to increase profits for the oil and gas industry. What is disheartening is that the ACOE fails to account for this in every other part of this document as outlined throughout the SRST-THPO comments. Tex Hall, chairman of the Three Affiliated Tribes, commented in his opening address to the State House on January 06, 2011, that there are currently 83 producing wells on the Fort Berthold Reservation with 11 more being drilled currently and 41 waiting on completion of a pipeline. He also commented that as many 1000 more could be put in place in the future. The comments are available in the house journal notes for that day. 1000 more, yet the ACOE acts like the proposed action will not have any consequence on where those well pads, and the associated infrastructure, are placed and instead just looks at the actual construction of the intakes. This is simply not acceptable per the requirements of NEPA when addressing cumulative and indirect effects as the SRST-THPO has repeatedly documented throughout these comments. Tex Hall also comments to the state house that the cost of repair of roads is 350 million which is directly attributable to the effects of increased traffic associated with the oil and gas industry. The ACOE has failed to mention the indirect effect that an upgrade of all the roads used to and from the proposed action will have on the human and natural environment. The ACOE also states that the costs associated with maintenance of roads and highways would decrease due to their proposed action. The SRST-THPO respectfully disagrees. The effects on the roads would be less wide spread across the state as trucks are not travelling as far for the water, however, with an increase in the number of wells closer to the proposed action, as outlined within these comments, the detrimental effects on roads would be concentrated in a smaller area and could potentially increase the costs to infrastructure depending on the rate of growth experienced by maximizing profits with long distance hauling and by hydrofracing crews not having to reschedule due to a lack of water. The ACOE comments on the potential decreases associated with the proposed action ignores the simple fact that the increased profits will result in increased production through the placement of new wells to create new capital and as such there will be no net reduction in terms of anything they have outlined.
- 21) The ACOE states on page 118 of the draft EA under Section 8 that *“making the water surplus determination and the subsequent water intake and distribution infrastructure would not commence until the proposed action achieves environmental compliance with all applicable laws and regulations.”*The SRST-THPO disagrees with the ACOE on a number of the laws and regulations in which they state that they are in compliance or are in partial compliance with.

- A) The ACOE states that they are in compliance with the American Indian Religious Freedom Act (AIRFA) on page 188 of the draft EA by stating that access to sacred sites by tribal members would not be affected. This is extremely misleading. How does the ACOE know that there are no sacred sites within the proposed action? Who did they consult for information on sacred sites? Tribal members are the only individuals with personal knowledge of sacred sites and their locations and this information is rarely, if ever, communicated with outsiders. The SRST-THPO office was never consulted for information they might have on sacred sites within the area nor where we contacted to conduct a TCP study to identify sacred sites for the proposed action. Therefore, the ACOE is not in compliance with AIRFA as they have stated. If no consultation with the tribes was conducted to identify sacred sites within the proposed action the ACOE cannot make the statement that access to sacred sites will not be impeded since the ACOE has no direct knowledge of where sacred sites are located no matter how they might spin this otherwise.
- B) Additionally, the ACOE does not consider the indirect and cumulative effect their proposed action might have on sacred sites within the area. The illusion of seclusion within the modern world is of great importance to traditional practices within sacred areas and in the practices themselves. Increased traffic to and from the intakes and retention ponds at all hours of the day coupled with an increase of gas flares, well pads and rigs would create a detrimental effect on the sacred sites and the practices which are continued today wherever the sacred site is located in relation to these effects. The ACOE continues to ignore this.
- C) At page 122 of Appendix A to the DEA, the ACOE states that it has partially complied with the NHPA 16 U.S.C. 470 et seq. In its explanation of its partial compliance the ACOE states that it has had discussion with the State Historic Preservation Office (SHPO). The SRST-THPO would like to participate in future discussions as it has not had that opportunity in this case. First and foremost, the ACOE needs to understand that there is no partial compliance with Section 106. A proposed undertaking is either in compliance or it is in violation. The SRST-THPO submits that this proposed undertaking is in violation of Section 106 of NHPA. The ACOE has not fulfilled any of the requirements of section 106. The ACOE has not conducted surveys in the areas that will be impacted by construction. The ACOE specifically states no cultural resource surveys were conducted for the intake locations and they had consulted with Garrison staff knowledgeable about cultural resources within the area. For a federal determination, per Section 106, to be made on a proposed undertaking, it is required that a cultural resource inventory be conducted on the proposed project. To put it simply, no federal determination can be made without surveys being conducted on the proposed undertaking. Yet, the ACOE states on page 122 of the draft EA that they have "*made the determination that the proposed project does not have the potential to adversely affect cultural resources.*" The SRST-THPO would like to know

how this determination of effect was achieved. A federal determination without a survey is a clear violation of Section 106. Additionally, the tribes have the legal right to comment on Section 106 determinations and the SRST-THPO was never given the opportunity to comment on any paperwork that was submitted for this determination. Please provide the SRST-THPO with the documents that support this federal determination including the survey reports so that they might be reviewed. The ACOE is denying the SRST-THPO their right under Section 106 to comment on a federal determination. This is clearly a violation of NHPA.

- D) Per Section 106, a federal agency must consult with any tribe that attaches religious and cultural significance to historic properties on and off tribal lands. The proposed action clearly falls under this category as the entire taken lands of the Missouri River were used prior to inundation by the ACOE. Many sacred sites including burials and cemeteries are now located in and around the lakes which formed subsequent to inundation. The SRST-THPO was never consulted to conduct TCP studies to determine if any sites exist at the intake locations or would be affected by the indirect effects caused by their construction. The ACOE did not conduct cultural resource inventories of the proposed intakes and their associated infrastructure therefore the SRST was denied the right to comment on anything that was or was not found. This is a clear violation of this act and NHPA 101.
- E) Section 106 requires that tribes be considered consulting parties and requires the federal agency to consult with any Indian Tribe that attaches religious and cultural significance to historic properties that may be affected by the proposed undertaking. This consultation with tribes shall ensure that the tribes are given a reasonable opportunity to identify their concerns about historic properties, advise on the identification and evaluation of historic properties, articulate its views on the undertakings effects on such properties and participate in the resolution of adverse effects. The ACOE has denied the tribes these rights by not consulting with them early in the identification process, by not conducting cultural resource inventories on the proposed undertaking, by making a determination of effect on the proposed project with no consultation and in clear violation of the law, and by ignoring the cumulative and indirect effects that the proposed action will have on historic properties and TCP sites. This consultation process applies no matter where the proposed federal undertaking occurs. The SRST-THPO will be contacting the ACHP about this federal determination without actual inventories being conducted and will be looking into foreclosure of this project for violations of Section 106.

22) The ACOE states that they are in compliance with the National Environment Policy Act (NEPA) on page 122-123 by completing this draft EA. According to NEPA, per 40 CFR Chapter 7 1508.9 (a)(1), the Environmental Assessment will briefly provide sufficient evidence and analysis for determining whether to prepare an Environmental Impact Statement (EIS) or a Finding of No Significant Impact (FONSI). The draft EA has failed in numerous regards to provide sufficient evidence that an EIS is not necessary for this proposed action and that a FONSI should be

issued. The ACOE has repeatedly ignored the foreseeable indirect and cumulative effects that the proposed action will have. The draft EA and the procedures followed by the ACOE have been conducted in clear violation of NHPA, AIRFA and Executive Order 13175 by not consulting with tribes and by not conducting cultural resource inventories. The ACOE has also not provided any inherent need for the proposed action that differs from the no action alternative beyond saving the oil and gas industry money as it relates to hauling water distances for their projects. The ACOE states this proposed action will not have a significant effect yet an examination of significance according to NEPA 1508.27 determines they have failed to prove this, in particular with regards to intensity and the severity of impacts as they relate to significance per 1508.27 (b). The SRST-THPO will outline the ways in which this document fails to prove that significance has been determined by examining the ways in which the ACOE failed to account for the severity of impacts and that a finding of no significant effect is erroneous.

- A) 1508.27 (b) (7) of NEPA stipulates that significance must account to whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

The ACOE has attempted to only focus on the intake construction itself and not the cumulative effects of the greater access to water from Lake Sakakawea and the environmental effects that will be created in terms of increased oil and gas production and in the location of the infrastructure for increased production as outlined in the SRST-THPO comments. They have neglected to account for the significance of these impacts in order to minimize any potential impacts these undertakings might create to the natural and human environment.

- B) 1508.27(b) (8) of NEPA refers to the degree to which the proposed action might affect properties on or eligible for inclusion to the National Register. The ACOE has determined that the proposed action will not adversely affect historic resources. This determination was not made following the standard procedures as set out in Section 106 of NHPA. No cultural resource inventories were conducted on the intake site location or apparently any other aspect of the proposed action. Additionally, consultation with the tribes is another integral part of the Section 106 process that the ACOE has failed to undertake. A finding of no significant impact cannot be made due to the illegal actions of the ACOE in filing a determination without following the regulations.
- C) 1508.27 (b) (3) of NEPA establishes that unique characteristics of the geographic area such as proximity to historic and cultural resources must be accounted for as well. The ACOE consulted with people knowledgeable about cultural resources within the area but failed under Section 106 of NHPA and AIRFA to consult with tribes and as such their concerns pertaining to any locations that they have attached religious or cultural significance to or to

any potential areas where there might be religious and cultural significance were not addressed. As the SRST-THPO was not consulted to comment on any surveys or to identify these areas, the ACOE is not providing sufficient evidence to determine the significance of the proposed action.

- D) 1508.27 (b) (4) of NEPA establishes that the degree to which the effects on the quality of the human environment are likely to be highly controversial must be addressed. The proposed action itself is not highly controversial; however, quantifying the allocation of water rights within the Missouri river and the environmental questions surrounding the hydrofracturing process are both highly controversial indirect effects. The draft EA ignores both of these highly controversial effects due to its failure to address any indirect and cumulative effects.
- E) 1508.27 (b) (6) of NEPA pertains to addressing the degree to which the proposed action may establish precedent for future actions with significant effects or represents a decision in principle about a future consideration. The ACOE states that this draft EA only addresses three proposals for easements out of nine submitted so far and in the letter submitted to the Governors on September 21, 2010 attached to the surplus water letter report it states that *the US Army Corps of Engineers, Omaha District (Corps) has received new requests for water storage at several of its reservoirs, which cannot be processed until a Surplus Water Letter Report with appropriate National Environmental Policy Act documentation has been completed at each reservoir.* The SRST-THPO submits that the current proposed action does in fact set precedence for future actions involving surplus water throughout the entire Missouri River system as the ACOE has basically stated this very fact in their letter to the Governors and that this will be the model for future EA on the other reservoirs and for the six other applicants on Lake Sakakawea alone. This is ignored when considering the significance of this EA.
- F) 1508.27 (b) (10) of NEPA addresses whether the action threatens a violation of federal, state and local law. Section 106 procedures were not adhered to when determining a finding of no adverse effect to historic properties and by requesting a concurrence from SHPO for such a finding. This is a clear violation of the law. Additionally, the federal agency is obligated under 36 CFR 800.4 d (7) to report the findings and to provide the documentation of this finding to the SHPO and THPO. They are also obligated to provide this documentation of a federal finding to all consulting parties including Indian Tribes who may enter the consultation process at any stage of the proposed action. This has yet to be done. Additionally, the Three Affiliated Tribe may have a cultural resource code similar to the Standing Rock Sioux Tribes cultural resource code which stipulates that all activities that have the potential to affect cultural or historic resources or traditional cultural properties must be subject to a cultural resource survey within the exterior boundaries of the Standing Rock Sioux Tribe Reservation. If any of these proposed intake sites and associated infrastructure are planned within the Three Affiliated Tribes Reservation and the Three Affiliated Tribes has legislation similar to Standing Rock Sioux Tribe then the ACOE will also be in violation of tribal law. The ACOE is in violation of NHPA and as such has not properly addressed the significance of the proposed action. The SRST-THPO will be exercising its right to consult with the ACHP under Section 106

for these violations and potential ARPA violations if a site is impacted by any construction should this federal finding of no adverse effect to historic properties be accepted by the SHPO. Additionally, any infrastructure relating to the surplus water must be considered a federal undertaking and be subject to Section 106 compliance no matter where it occurs or by whom as the involvement of the ACOE in granting the easement for the water rights and the depletions of the water surface elevations to supply these easements are considered federal undertakings thereby making it subject to Federal Laws and not just state laws.

The corps is also in violation of Section 101 (d) (6) (b) of NHPA which stipulates that consultation must occur with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by a proposed federal undertaking subject to Section 106 determinations. As no cultural resource inventories were conducted and the tribes were not requested to conduct TCP studies it is unknown if any properties that would fall under Section 101 (d) (6) (b) are being affected by the proposed project contrary to what the draft EA proposes. However, the SRST-THPO believes that all of the taken lands, now under ACOE's administrative control, prior to inundation are culturally significant due to their importance within the yearly cycle and for the unique characteristics contained within them upon the landscape as a whole. Numerous archaeological and traditional cultural properties are located within the Taken Lands and as such Section 101 (d) (6) (b) applies to any project within these lands.

Additionally, the Corps is in violation of its own *Programmatic Agreement for the Operation and Management of the Missouri River Main Stem System for Compliance with the National Historic Preservation Act, as amended* (PA) in managing its lands. Consultation with tribes under their own PA requires that tribes shall be provided the opportunity to participate in the development and implementation of agreements, management plans, and activities developed or required under this PA which is most certainly the case for this proposed action. 6 (c) of the PA stipulates the manner in which the corps is required to promote effective and meaningful consultation. The Corps shall notify the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties of the need to consult on the various matters called for in this PA as soon as possible and pre-decisionally as follows:

- i) provide a notification letter with information about the proposed undertaking or matter to each PA representative, with a copy to the head of the agency or tribal government, as early as possible and prior to making any decisions about the proposed undertaking or matter;
- ii) follow-up via telephone with the PA representative after distributing the notification letter to establish a person-to-person contact;
- iii) provide further information as the PA representative may need for informed input and judgment;
- iv) provide draft agendas, request input from the PA representative, and finalize the agenda based on this input;
- v) coordinate consultation for this PA with consultation requirements for other legal bases to the extent possible and inform the PA representative of all pertinent legal bases for consultation.

None of this was followed in regards to the current proposed action. Additionally, 6 (d) of the PA details the manner in which meaningful and effective consultation with the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties, the Corps shall:

- i) Listen carefully before any decisions are made so as to understand the needs and perspectives of the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties;
- ii) Work as equal partners with the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties to consider and devise means to identify and preserve cultural resource sites and avoid effects to them, consistent with tribal viewpoints and values. If avoidance is not possible, the Corps shall work with the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties as equal partners to minimize effects to such sites to the greatest extent possible;
- iii) Provide all pertinent documents and other information, consistent with Federal law, to the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties to enable fully informed decisions and meaningful consultation;
- iv) Plan consultations jointly with the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties, including meetings (when and where), conference calls, agendas based on requested input from all involved.
- v) Engage in consultation to discuss, dialogue, and make agreements, and do so through face-to-face consultation meetings to the greatest extent possible;
- vi) Make and provide written accurate records of all consultations and make copies available to Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties within 30 days of the consultation. Written verbatim records will be made utilizing a court reporter, on a case-by-case basis when requested by a signatory for a face-to-face consultation. When requested by a signatory, verbatim records of telephone conference calls may be made by using a tape recorder, and copies of the tape provided to the requesting signatory. Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties shall have the opportunity to review, offer corrections, and add alternative views to the record;
- vii) the federal agencies, affected tribes, THPOs, SHPOs, and other consulting parties shall facilitate and cooperate in the consultation process toward the mutual goal of information sharing, promotion, and respect for the unique relationship of each party and the trust doctrine and trust responsibility of the federal parties.

Once again the ACOE has failed to follow its own PA in regards to the current project by not properly consulting with tribes. The SRST is a non-signatory entity to this PA. 8 (b) of the PA stipulates that the following will be adhered to concerning non-signatory THPO or SHPO:

The Corps shall comply with Section 106 in accordance with 36 CFR part 800, subpart B for Corps undertakings that may affect lands, or historic properties, many of which

are cultural resources sacred to Tribes, located within the exterior boundaries of an Indian reservation, including Corps lands, if that tribe is not a signatory to this PA or if that tribe has withdrawn from this PA or terminated this PA on its tribal lands (refer to Stipulation 4). Similarly, the Corps shall comply with 36 CFR part 800, subpart B for actions or undertakings within a SHPO's area of jurisdiction, if that SHPO has withdrawn from this PA or terminated this PA within its area of jurisdiction.

The ACOE has not complied with Section 106 and is therefore in violation of its own PA on how it manages lands along the Missouri River. Additionally, the ACOE acknowledges in 21 (b) of the PA in regarding who is qualified to conduct research and work that *Affected Tribes possess special knowledge and expertise regarding their tribal values, history, and culture, and properties that may possess traditional religious and cultural significance to them*. Yet the ACOE does not request any TCP study to be conducted for the proposed action. This is in violation of the intent of this section which allows the Tribes to have their knowledge and expertise stand on an equal and level playing field as someone who is qualified to conduct research per the Secretary of the Interior Standards.

- 23) In chapter 9, page 125 of the DEA the ACOE states that *"Sound planning methods, including the easement applicant's coordination with resource agencies and Corp of Engineering Regulatory, and Garrison Project staff has been successful in avoiding the significant environmental and cultural resources of Lake Sakakawea."* Please provide documentation on how the known and unknown cultural resources were avoided. As stated within the document (pg 99), no site specific cultural surveys were conducted at the intake locations and as such, there can be no accounting for what is actually on the ground at these locations in terms of cultural properties or properties that the tribes attach religious or cultural significance to. The ACOE is denying the tribes their right to participate in the Section 106 process and as such, any ground altering activities that take place are in clear violation of federal law. Additionally, the SRST-THPO was never consulted for their knowledge of TCP sites or sites to which they attribute religious or cultural significance within the area of the intakes or within the area where indirect or cumulative effects of the project would affect such sites. Once again, this is done in clear violation of Federal Law including, but not limited to, Executive Order 13175 and Section 106 of NHPA. A GIS file and map determining areas where delays in permitting would occur is not sufficient for Section 106 compliance and the SRST-THPO program finds it extremely alarming that the ACOE thinks that it is according to this DEA.
- 24) On page 126 of the draft EA, the ACOE has falsely claimed that *the expected environmental consequences of implementing the three different actions identified as the proposed action would not be expected to be significant and would not require an EIS*. The SRST-THPO, on pages 14 through 18 of their comments, have outlined the failures of the ACOE to account for six out of the ten criteria used within 1508.27 of NEPA for determining intensity of the impacts as it relates to significance so this statement is demonstrably false.

25) At page 127 of Appendix A to the DEA, the ACOE lists the agencies and persons consulted; noticeably absent is the SRST-THPO. The SRST-THPO needs to be included in future efforts.

In conclusion, the SRST-THPO submits its concerns regarding the proposed ACOE actions. The ACOE has failed to consult with the SRST as required under federal regulations. The ACOE has not provided sufficient evidence that an EIS is not required for this proposed action. The ACOE has violated federal law in the manner in which they have conducted this draft EA. The SRST-THPO submits that this draft EA has not proven that a finding of no significant effect is in order for this project. It is recommended that a full EIS be conducted for this project to address the deficiencies outlined within our comments. Please include us in future efforts by providing the SRST-THPO with timely notice of proposed actions.

Sincerely,

A handwritten signature in black ink that reads "WYoung". The signature is written in a cursive, flowing style.

Waste'win Young

Standing Rock Sioux Tribe

Tribal Historic Preservation Officer



MANDAN, HIDATSA & ARIKARA NATION

*Three Affiliated MHA Nations * Fort Berthold Indian*

Reservation

404 Frontage Road * New Town, North Dakota 58763

OFFICE OF THE CHAIRMAN,
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February 1, 2011

Colonel Robert J. Ruch
United States Army Corps of Engineers
1616 Capitol Ave.
Omaha, NE 68102-4901

Brig. General John R. McMahon
Commander
Northwest Division
United States Army Corps of Engineers
P.O. Box 2870
1125 NW Couch St., Ste. 500
Portland, OR 97209

Re: Lake Sakakawea Surplus Water Report and EA

Dear Brigadier General McMahon and Colonel Ruch:

This letter is intended to notify you of my concerns regarding the Garrison Dam/ Lake Sakakawea Project, North Dakota Draft Surplus Water Report. I am concerned that required laws, regulations, and protocol of the United States Army Corps of Engineers (USACE) regarding Tribal Consultation on any action with potential adverse effects on the Mandan, Hidatsa and Arikara Nation (MHA Nation) (known as the Three Affiliated Tribes of North Dakota) has not been followed in relation to the Lake Sakakawea Water Report and Environmental Assessment. As discussed herein, violation of the law, and USACE protocols, with respect to the USACE proposed action to approve the Plan to declare surplus water available, and to charge water users, including water users located upon the Fort Berthold Reservation of the MHA Nation, is unacceptable. As Chairman of the MHA Nation, accordingly, I am writing to request that the USACE comply with the legal requirements for government-to-government consultation with the MHA Nation prior to issuing a recommendation and final report on this Project. The appropriate action to remedy this violation is to consult directly with the MHA Nation prior to finalizing the Garrison Dam/ Sakakawea, North Dakota Draft Surplus Water Report and Environmental Assessment, and prior to finalizing a decision to adopt the recommended course of action in this draft report.

As Chairman of the MHA Nation, I hereby invoke the MHA Nation's rights to government-to-government consultation, and request that you contact my office directly to establish the dates, times, and location for this consultation. I look forward to government-to-government consultation with you regarding this issue which has the potential to directly adversely impact the MHA Nation and our Reservation in violation of the Environmental Justice Act, and to negatively impact our reserved and senior water rights in the Missouri River in violation of Sections 1(b) and 6 of the Flood Control Act of 1944.

With the United States' recent signing of the United Nations Declaration on the Rights of Indigenous People, it is important now more than ever that the United States government abide by its own agency policies on the rights of tribal nations to make decisions regarding the use of their natural resources.

Enclosed herewith are the preliminary issues of concern that I would like to discuss during government-to-government consultation.

Sincerely,



Tex Hall, Chairman
Mandan, Hidatsa and Arikara Nation
Tribal Business Council

**PRELIMINARY CONCERNS OF CHAIRMAN TEX HALL, MANDAN,
HIDATSA AND ARIKARA NATION WITH THE GARRISON DAM/LAKE
SAKAKAWEA, NORTH DAKOTA DRAFT SURPLUS WATER REPORT 2010
PREPARED FOR THE UPCOMING GOVERNMENT-TO-GOVERNMENT
CONSULTATION WITH THE UNITED STATES ARMY CORPS OF
ENGINEERS.**

I. Failure to Properly Consult with the Mandan, Hidatsa and Arikara Nation (MHA Nation) on a Government-to-Government Basis Prior to the Decision.

Executive Order 13175 requires the United States Government and all of its agencies to consult directly with Tribal Nations with respect to any proposed action that is likely to have a substantial and direct effect upon the tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Executive Order 13175, Section 1a. As President Obama's Memorandum to the Heads of Agencies of November 5, 2009 explains,

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

The United States Army Corps of Engineers has acknowledged its responsibilities regarding government-to-government consultation as well:

As sovereigns, tribal governments have an inherent interest in all proposed and ongoing activities that may have a potential to significantly benefit or impact tribal trust lands, resources, or other interests. This special relationship is defined by Federal trust responsibilities, treaty obligations, and the inherent sovereignty of tribal governments.

Corps of Engineers Northwestern Division Native American Program Desk Guide pp. 1. Further, the Corps of Engineers has adopted policy and regulations requiring pre-decisional consultation. Specifically, the Corps of Engineers has issued Policy Guidance Letter No. 57, which requires "pre-decisional and honest consultation," and commits the Corps of Engineers to:

[R]each out, through designated points of contact, to involve tribes in collaborative processes designed to ensure information exchange, consideration of disparate viewpoints **before and during decision making**, and utilize fair and impartial dispute resolution mechanisms. (Emphasis added.)

The USACE has also committed itself to promote self-reliance, capacity building, and growth, committing to:

search for ways to involve tribes in programs, projects and other activities that build economic capacity and foster abilities to manage Tribal resources while preserving cultural identities.

These responsibilities, by law, include the responsibility to consult on a government-to-government basis **prior** to decision making. Yankton Sioux Tribe v. Kempthorne, 492 F.Supp.2d 460 (D.S.D. 2006).

In this instance, USACE has not directly consulted with the MHA Nation on a government-to-government basis regarding this proposed action. The Garrison Dam/Lake Sakakawea, North Dakota Draft Surplus Water Report (hereinafter "Draft Report") itself acknowledges that a letter was sent "to each of the 29 Tribes in the basin" "on 24 August 2010 informing them of the Omaha District's intent to prepare the Surplus Water Report and requesting their review once the draft Report had been completed." Draft Report, p. 4-1. The Draft Report also references a presentation of the study made at a "Tribal Programmatic Agreement meeting in Pierre, SD on November 18, 2010." Id. As the MHA Nation have made clear in prior correspondence with USACE spanning over the past ten years, presentation of information at a Tribal Programmatic Agreement meeting does not constitute government-to-government consultation. Further, these meetings are held to discuss cultural resources and historic sites - they are issue specific meeting. Finally, the Draft Report itself reflects the lack of information, data, or study of the concerns of the MHA Nation. The sources of data and information are State sources. While the August 2010 letter from USACE to the MHA Nation specifically expresses intent to have the report reviewed by the MHA Nation **post-report** drafting, this after the fact review is not government-to-government consultation before and during the decision making process. The lack of investigation of the impact of this Plan on the MHA Nation is evident from the exclusion of any information on the MHA Nation, its current and future planned water uses, and potential impacts upon the Reservation.

The MHA Nation lost over 156,000 acres of its heartland when the dams were constructed in the 1940's. The losses included the original communities of Elbowoods, the central business community, which housed the Indian Bureau, the Indian school, and the hospital; Red Butte, Lucky Mound, Nishu, Beaver Creek, Independence, Shell Creek, and Charging Eagle. The Mandan had settled in the Red Butte and Charging Eagle area, the Arikara/Sahnish settled in the Nishu and Beaver Creek area. Independence was settled by the Mandan and Hidatsa, and Lucky Mound and Shell Creek by the Hidatsa. Elbowoods was a combination of all three tribes. The other communities had government, Indian day and boarding schools, churches, communal playgrounds, parks, cemeteries, and ferries. Although parts of these communities remain, gone were the close traditional gatherings and community living, as were natural resources, such as desirable land for agriculture- timber that provided logs for homes, fence posts-shelter for stock-coal and oil deposits-natural food sources-and wild life habitats, for which most would or could never be compensated. For USACE to now propose to charge the Tribe to access the very waters which destroyed the heart of the MHA Nation, and caused the present day poverty and economic distress the MHA Nation is struggling to defeat is not only illegal, it is morally reprehensible.

Just one of the many potential adverse impacts of this Plan is interference with MHA Nation's potential opportunity to sell or lease water from the Lake to the oil and gas industry on the Reservation. The MHA Nation has entered into oil and gas agreements pursuant to the Indian Mineral Development Act (IMDA), 25 U.S.C. §§ 2201 et seq. These agreements contain provisions for the sale and use of the MHA Nation's water. Consultation is necessary to determine the impact of the proposed plan on these agreements and the potential revenue the MHA Nation would realize from this opportunity. It is not appropriate for the federal government to compete with the MHA Nation by selling water to oil and gas companies on the Reservation. Such a plan is inconsistent with the congressional policy under the IMDA to maximize the revenue of the MHA Nation in the development of their resources. Competing with the MHA Nation is also inconsistent with the federal trust responsibility.

The MHA Nation is also concerned about the potential adverse impact the Plan would have on its existing and planned water treatment facilities and the completion and operation of its rural pipeline. The potential adverse impacts on the Reservation shoreline and water levels is also a concern.

For these reasons, the Draft Report should not be finalized until such time as appropriate government-to-government consultation has occurred, and until such time as appropriate information relevant to the impacts on the MHA Nation has been incorporated into the analysis presented in the Draft Report.

II. The Draft Report Fails to Acknowledge or Analyze the Treaty Rights and Trust Responsibilities of the United States to the MHA Nation, and Fails to Analyze how the Proposed Action Impacts those Rights and Responsibilities.

The MHA Nation entered into the Fort Laramie Treaty of September 17, 1851, which set apart for the exclusive use and occupation of the Mandan, Hidatsa and Arikara tribes a territory including a large portion of the Missouri River in North Dakota under Article 5. This Treaty, ratified by the Senate, was held valid and binding upon the United States in Indians of Ft. Berthold Indian Reservation v. U.S., 71 Ct. Cls. 308 (1930). The lands described in Article 5 of the Treaty of Fort Laramie of 1851 include the present day Ft. Berthold Reservation.

In 1789, the Constitution of the United States was ratified. It recognizes and affirms the sovereignty of our Indian nations in at least three important ways. First, the Constitution provides in the Supremacy Clause that, “[a]ll Treaties made, or which shall be made. . . . shall be the Supreme Law of the Land.” (U.S. Const, art. VI.) Chief Justice Marshall explained the full importance of the Supremacy Clause in Indian affairs:

The Constitution, by declaring treaties already made, as well as those to be made, to be the Supreme Law of the Land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language . . . We have applied them to Indians as we have applied them to the other nations of the earth. (Worcester v. Georgia, 31 U.S. 515, 559-560 (1832))

Chief Justice Marshall acknowledged that our Indian treaties “recognise the preexisting power of [each Indian] Nation to govern itself.” (*Id.* at 562.) This principle is enshrined in the Constitution by virtue of the Supremacy Clause and its ratification of our Indian treaties “already made.”

Second, the Constitution provides in the Indian Commerce Clause that, “Congress shall have the power to ... regulate Commerce ... with the Indian tribes.” (U.S. Const., art. I, sec. 8, cl. 3.) Chief Justice Marshall explained the meaning of this clause in Worcester v. Georgia:

From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. (*Id.* at 556-557.)

The Indian Commerce Clause respects the sovereignty of our Indian nations. Congress is not given the power to regulate commerce “for” the Indian nations. Nor is it given the power to regulate commerce “among” the Indian nations, as it is in respect to the States through the Interstate Commerce Clause. (U.S. Const., art. I, § 8, cl. 3.) Instead, Congress is given the power to regulate the United States’ commerce “with” the Indian nations. This power is to be exercised between nations. It is bilateral. It respects the independence of Indian nations and our prior sovereignty.

Third, Indians are mentioned in the Apportionment Clause of the original Constitution (U.S. Const., art. I, § 2), and again in the Apportionment Clause of the Fourteenth Amendment (U.S. Const., amend XIV, § 2, cl. 1). In both places, our tribal citizens were excluded, as “Indians not taxed,” from the apportionment of Representatives in the House.¹

By excluding “Indians not taxed” from the American electorate in the original Constitution, the Founding Fathers recognized the separate sovereign status of Indian nations. Indian people stood outside the Federal union. We had our own unions, our own democracies. Through the Treaty Clause (U.S. Const., art. II, § 2, cl. 2), the United States entered into approximately 350 treaties with our Indian nations in the first eighty years of the American union. Inherent in the treaty-making process was a bilateral, nation-to-nation relationship based on mutual respect.

In the Fourteenth Amendment, ratified in 1868, the United States repeated the exclusion of “Indians not taxed” from apportionment of Representatives in the House. In so doing, the Federal government reaffirmed its long-standing policy of treating Indians as citizens of separate nations - and its corresponding policy of dealing with Indian nations through government-to-government diplomacy.

¹ We were also excluded from the Citizenship Clause of the Fourteenth Amendment. (U.S. Const., amend XIV, § 1, cl. 1.) This is because we owed our primary allegiance to our separate, independent, native nations. (*See Elk v. Wilkins*, 112 U.S. 94 (1884).) Indians were not made citizens of the United States until the 1924 Indian Citizenship Act. (Act of June 2, 1924, 43 Stat. 253 (1924).)

The Fort Laramie Treaty of 1851 acknowledges that a vast stretch of the Missouri River is the territory of the MHA Nation and not the United States or the State of North Dakota, which entered the Union of the United States on November 2, 1889. North Dakota, as a condition of statehood, acknowledged that it lacks jurisdiction over Indian territories pre-existing the State's existence, and agreed to the additional condition that the state forever foreswear such jurisdiction, pursuant to Section 2 of the Enabling Act of February 22, 1889, which was acknowledged under Section 4 of the Compact with the United States.

The United States recently signed the United Nations Declaration on the Rights of Indigenous People (UNDRIP), which acknowledges the rights of the tribal nations in this country to make decisions about the use of their natural resources. Particularly, Article 32 of the UNDRIP clearly states:

1. Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free prior and informed consent prior to the approval of any project affecting their lands or territories and other resources, **particularly in connection with the development, utilization or exploitation of mineral, water or other resources.** (emphasis added).
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

One fundamental problem with the USACE Draft Report is that it does not acknowledge or recognize the rights of the MHA Nation, preserved in the 1851 Treaty of Fort Laramie, to the control of their territory and their decision making authority with respect to the natural resources within that territory, including the Missouri River. Perhaps even more disturbing, the Draft Report refers to the Fort Berthold Reservation repeatedly as "associated with the MHA Nation." See, e.g. Draft Report, 2-4; Appendix A, p. 3. Nor does the Draft Report acknowledge or recognize the MHA Nations' rights and the United States' obligations under the UNDRIP. The Draft Report, to be accurate, must, after government-to-government consultation with the MHA Nation, include a discussion of the Treaty rights and the MHA Nation's rights under the UNDRIP, including reserved water rights of the MHA Nation, and the legal significance of the Reservation.

The Draft Report includes other inaccuracies stemming from the USACE error in not clearly delineating the significance of the Reservation and the rights of the MHA Nation preserved under the 1851 Fort Laramie Treaty. The Fort Berthold Reservation "lands" are inaccurately described as being "adjacent to six counties," when in fact the Fort Berthold Reservation includes portions of six counties in North Dakota. Draft Report, Appendix A, p. 91.

The Draft Report further fails to delineate when a water permit is required from the MHA Nation and when a water permit is required from the State Water Commission, simply referring throughout the report, inconsistently, to water permits being required from “either the Three Affiliated MHA Nations or the State of North Dakota.” This inaccuracy must be corrected to clearly specify when water permits are required from the MHA Nation for water permits located upon the Fort Berthold Indian Reservation. See, e.g. Draft Report, p. 2-16; Draft Report, p. 3-18.

Most disturbing is the lack of analysis or even recognition of the pre-existing and senior water rights of the MHA Nation in the Missouri River. Section 6 of the Flood Control Act of 1944 specifically requires a finding, prior to entering into surplus water supply agreements with “**States, municipalities, private concerns, or individuals . . .**,” that “no contracts for such water shall adversely affect then existing lawful uses of such water.” The MHA Nation has senior water rights in the Missouri River, including the natural flow of the Missouri River, that are vested, and are protected under federal law. Winters v. United States, 207 U.S. 564, 576 (1908). The MHA Nation’s water rights include sufficient water to make the Reservation “viable.” Arizona v. California, 373 U.S. 546, 599 (1963). The MHA Nation’s rights are protected and senior to any off-reservation or on-reservation proposed withdrawals of water that threaten or impair the MHA Nation’s senior water rights. Winters v. United States, 207 U.S. at 576; Colville Confederated MHA Nations v. Walton, 647 F.2d 42, 47 (9th Cir. 1981). The MHA Nation has the senior, vested rights in the natural flows of the Missouri River under the 1851 Treaty of Fort Laramie, which includes stored waters. The natural flows of the Missouri River are estimated at approximately 20 million acre feet of average annual flow. Further, tribal members have the right to access the Missouri River without charge under the Treaty, and pursuant to easements approved by the B.I.A. for construction of waterlines served by Missouri River water intakes.

The Draft Report does not assess the impact of its proposed plan to sell surplus water on the MHA Nation’s vested rights. The Draft Report further does not assess how its plan to sell water to three proposed water intake operators on the Fort Berthold Indian Reservation, and four new intakes upstream from the Reservation, affects the MHA Nation access to water at the four water intakes of the MHA Nation that are located at Four Bears, Mandaree, White Shield, and Twin Buttes. Draft Report, 2-12. The Draft Report fails to consider the adverse impact on the MHA Nation’s right to the benefits from economic uses of its senior reserved water rights and the rights and obligation of the parties under the current IMDAs for oil and gas development on the Reservation. The MHA Nation must receive its fair share of any economic benefit contemplated by any sale of water from intake facilities constructed on the Reservation. Furthermore, to the extent the three proposed intake facilities will cross or be located on trust land, they are not lawful without tribally approved permits and easements. Easements across Reservation trust land require the approval of the Secretary of the Interior. The Draft Report does not address these issues.

The Draft Report excludes any calculation of the present or future use of water from the four existing tribal water intakes, which have expanded their current services areas drastically in the past five years. Over 800 miles of water pipeline have been added

or are in the process of being added to the four intakes since 2003. An additional 400 miles of pipeline are in the process of completion in the next two years for domestic water supply. In addition, the MHA Nation has completed a study of irrigation indicating a conservative estimate of 100,000 acres that are practicably irrigable on the Reservation. The Draft Report excludes analysis of the unmet and planned needs for water of the Reservation population. This is a fundamental error, and contributes to an underestimate of the water needs of the area, and current water usage in the area. The Draft Report concludes that water use needs have remained stable and flat for the past 20 years, based upon data that excludes the Tribal water intakes, federally authorized irrigation projects on the Reservation, and excludes the acre feet of water being utilized and planned for utilization by the MHA Nation. The Draft Report quite simply excludes any analysis of the current and future water needs of the MHA Nation and the Ft. Berthold Reservation.

Other examples of the failure of this report to recognize, respect, and acknowledge the responsibility of USACE to the MHA Nation abound in this report. Section 3.3.1 establishing the Planning Goals and Objectives of the Draft Report indicates the “Planning objectives for this study were developed to be consistent with Federal, State and local laws and policies, and technical, economic, environmental, regional, social, and institutional considerations.” Draft Report, p. 3-14. Thus, even in its design, the Draft Report objectives do not include Tribal goals, objectives and considerations, or federal Indian policy and law, including policies and laws concerning the use and protection of reservation resources and treaty rights. The MHA Nation sets the policy objectives for a significant portion of the shoreline and surface acres of Lake Sakakawea. The Draft Report, Section 2.3.2, indicates that 15% of the surface waters and 40% of the shoreline of Lake Sakakawea are on the Reservation. The MHA Nation believes this is an underestimation of the portions of the Lake and shoreline located on the Reservation, but it does indicate the significant interests the MHA Nation has in Lake Sakakawea. USACE needs to consult with the MHA Nation to ensure accurate figures are included in this Draft Report on the MHA Nation’s interests. The report does not meet the criterion of “completeness,” “effectiveness,” or “acceptability” because it excludes consideration of the uses, needs, and impacts upon the MHA Nation and the Fort Berthold Indian Reservation.

III. The Draft Report Fails to Recognize USACE is Not Legally Authorized to Require the MHA Nation or the Bureau of Reclamation to Enter into Water Supply Agreements as a Condition of Access to Missouri River Water Supply.

The Draft Report repeatedly assumes USACE has legal authority pursuant to Section 6 of the Flood Control Act of 1944 to require current water permittees to enter into water supply agreements. However, Section 6 clearly does not authorize USACE to enter into water supply agreements with MHA Nations or other Federal Agencies. Section 6 only authorizes water supply agreements with “states, municipalities, private concerns or individuals. . . .” Consequently, the USACE Draft Report must acknowledge and recognize USACE has no legal authority to require the MHA Nation or the Bureau of Reclamation to enter into any water supply contract or agreement in order to access Missouri River water. Current easements from USACE for tribal water intakes are not subject to Section 6 of the 1944 Flood Control Act. Further, Section 7(c) and 7(d) of the Dakota Water Resources Act of 2000 make clear that the costs of construction of the

dams are not reimbursable from operation of water intakes and water systems constructed under the Dakota Water Resources Act of 2000. Federal law may also restrict or prohibit USACE from entering into water supply agreements with tribal members for whose benefit the Reservation was established. Meaningful tribal consultation is required to ensure USACE does not engage in unauthorized activity without legal authority.

Not only are MHA Nation and federal agencies excluded from Section 6 of the Flood Control Act of 1944, USACE is prohibited from charging the MHA Nation for accessing the Missouri River Waters to which it has vested, senior water rights. The MHA Nation has ownership of the riverbed subject only to the navigational servitude of the United States. USACE must, in this Report, acknowledge it cannot and will not attempt to require water supply agreements from the MHA Nation or the Bureau of Reclamation, even when the easements in place for Tribal Water intakes existing, or proposed in the future, expire.

The Draft Report also erroneously reports that the intakes at Mandaree, Four Bears, Twin Buttes, and White Shield are for “communities.” Draft Report, p. 2-12. While these water intakes do service “communities,” the intakes are authorized for provision of municipal, industrial and agricultural water supply for the Fort Berthold Indian Reservation. At the current time, many of the current easements over allotted trust lands secured for water pipeline construction require the provision of water without charge to the landholders. Any effort of USACE to charge under existing or future easements for Tribal water intakes interferes with these agreements, and results in economic hardship on the MHA Nation.

IV. The USACE Issuance of Permits to Private Entities on the Reservation, and USACE Efforts to Sell Missouri River Water on the Ft. Berthold Reservation Violates the Federal Trust Responsibility, the U.N. Declaration on the Rights of Indigenous Peoples, Executive Order 13175, and the intent of the Flood Control Act of 1944, Section 1(b) and Section 6.

The MHA Nation is concerned about USACE planning to authorize easements to private entities to access to Missouri River water located on the Ft. Berthold Indian Reservation without the consent of the MHA Nation, and without consulting with the MHA Nation. One proposed new water intake is located less than ¼ mile from the existing Tribal water intake. Consequently, it will be in competition with the existing tribal Mandaree water intake, and may affect the operation of the Mandaree water intake.

USACE selling water to private companies on the Ft. Berthold Reservation has two potential negative impacts this Draft Report fails to consider. First, USACE charging private companies for water may result in decisions not to access water for oil and gas development on the Reservation. This would negatively affect the Tribal economy. Second, the proposed water intakes would require easements across tribal lands, and may conflict with existing pipelines from existing water intakes. These newly proposed water intakes may compete with tribal sales of water to the oil and gas industry again negatively affecting the MHA Nation. Certainly, the U.N. Declaration, Executive Order 13175, and COE regulations and policy require USACE to engage the MHA Nation in government-to-government consultation prior to making the decision to

implement this Plan to ensure it has no negative impact on the MHA Nation or its economy.

Section 6.12 of Appendix A, p. 90-93 concludes there is no environmental justice impact under the Environmental Justice Act, because the Plan will not affect “subsistence fishing or hunting utilized.” The Environmental Justice Act requires more than an assessment of the impacts on “subsistence hunting and fishing.” Rather, it requires USACE to ensure three things.

First, USACE must ensure full and fair participation by all affected communities in the decision-making process. USACE has not held any public meeting within any of the six segments of the Fort Berthold Reservation where the Plan will be implemented and consequently has not met this responsibility. The low-income minority population of the Reservation cannot afford to travel to the far away locations in which USACE held “public” meetings.

Second, the EJA requires USACE to prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations. The Plan to charge the MHA Nation for water from easements for its four intakes and future intakes located on the Reservation will prevent and deny the receipt of benefits of water supply to the protected populations. It will make water more unaffordable, violate existing use rights, and may well result in industry declining to locate on the Reservation due to the charge levied by USACE for access to water. It will also hamper the MHA Nation and its member landowners in obtaining the highest and best use of their federally recognized reserved water rights.

Finally, the EJA requires USACE to avoid, minimize or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority and low-income populations. The Draft Report does not assess the effects of charging a fee for water on human health by increasing the cost of water. By charging the MHA Nation for its access to water, the USACE Plan would increase operational costs which would either be borne by water users, or the MHA Nation, which would in turn reduce the funds available for construction of water supply pipeline to underserved areas of the Reservation. Further, the Draft Report fails to consider the deterrent effect to industry that would locate upon the Reservation because of the cost of water supply being proposed by USACE, and fails to look at the cost to the MHA Nation of competing water intakes located upon the Reservation under this Plan. Given the high unemployment rate and its concomitant effects on human health, any risk of deterring industry, reducing water supply for human consumption on the Reservation, or reducing revenues or increasing costs of operating tribal water systems, are adverse economic effects that must be considered by USACE, and not ignored in the Draft Report.

V. The Draft Report Includes Additional Inaccuracies and Failures to Properly Investigate Impacts.

The MHA Nation is gravely concerned about numerous inaccurate, and unsupported conclusions drawn within the Draft Report. This section provides a preliminary list of serious concerns with the inaccuracies in this report not set forth above.

A. Failure to Recognize Legally Required Uses Under the Flood Control Act of 1944.

Section 2.5 of the Draft Report, p. 2-7 fails to recognize the Carryover Multiple Use zone includes municipal and industrial uses of water as legally required, stating only that the zone provides “a storage reserve for irrigation, navigation, power production, and other beneficial conservation uses.” Section 1(b) of the 1944 Flood Control Act specifically lists the uses which are given preference over navigation uses, which include “domestic, municipal, stock water, irrigation, mining, or industrial purposes” whether they are present or future uses. To exclude the entirety of this list indicates USACE is not acknowledging what is required by law – these uses, whether present or future, may not be impaired by use of water for navigational purposes. Section 1(b) of the 1944 Flood Control Act provides for industrial uses of water to take precedence over USACE’s use of water for navigation. Nowhere in the 1944 Flood Control Act or the Pick Sloan Act or the Reports to Congress from USACE on the construction of the dams is there discussion of charging private water users only in the Upper reservoirs for access to water. In fact, the cost benefit analysis that USACE has always used to justify the dams includes the benefits of water supply to Upper Basin users, without subtracting the cost of USACE charging for water access.

In a similar vein, the Draft Report states that “water supply is a state and local responsibility” Draft Report, Section 3.3.1, p. 3-14. However, on the Fort Berthold Reservation, and under the Dakota Water Resources Act of 2000, this is an inaccurate statement. The cost of water supply is born by federal agencies and the MHA Nation on the Reservation.

B. Failure to Properly Document and Analyze Potential Plan Impacts Based Upon Faulty Data Collection and Assumptions.

The Draft Report has several major flaws in assessing the Plan’s impact on senior water rights holders, and the reservoir. First it assumes that the net result is only 527 acre feet of additional use over what will be used without the Plan. This is based upon a series of projections for water use that do not include current uses of water on the Fort Berthold Reservation or planned near term future uses. Section 2-21 of the Draft Report clearly excluded analysis of non-State Water Commission uses of water. See Table 2-5, p. 2-21. This represents a major underestimate of current water usage, given that a vast portion of Lake Sakakawea’s surface waters and shoreline lies within the Fort Berthold Reservation. The study assumes there will be an additional 21,884 acre-feet of water yield available but unallocated under the Plan. This is not sufficient to remedy the USACE failure to document the annual withdrawals of water occurring under USACE permits on the River that are not reflected in State Water permit data, including all withdrawals from intakes on the Fort Berthold Indian Reservation.

Second, USACE assumption and assessment that only 527 additional acre feet will be used from the Lake is based upon pure speculation that if the Plan is not implemented, potential water users would access water and use all of the projected water needed. This is pure sleight of hand. The Draft Report should assess the impact of 100,000 acre feet of water in full – not just the impact of 527 acre feet of projected ground water usage.

Third, the Draft Report does not include data on the elevations for Lake Sakakawea for the time period of 2007-2010, Draft Report, p. 2-8, but instead assumes water availability based upon the forty year period of 1967-2006. The Draft Report should consider the current elevations of Lake Sakakawea as of 2010, and forecast based upon the more recent time period which includes a prolonged drought from 2000-2008. The current projected lake level for the next ten years based upon recent drought conditions must be included in order to be accurate. This affects all analysis of the Plan's impact on lake levels.

C. The Draft Report Fails to Provide a Rationale for the Water Usage Charge Proposed.

The Draft Report provides four mechanisms for analyzing the charges proposed for water usage. Draft Report, p. 3-52, Section 3.7.2.8. The USACE has arbitrarily chosen the measurement of cost that is the most beneficial to USACE, maximizing what USACE charges to water users. The other three methods for cost calculation result in no charge to water users. Under what authority does USACE index the cost of dam construction in 1944 and add over 60 years of interest? How did USACE determine the appropriate index to utilize to come up with its figures? Traditionally, it requires specific authorizing language enacted by Congress prior to adding inflation to cost figures. The legal authority for indexing the costs of dam construction should be provided in this Draft Report. In addition, Section 6 of the 1944 Flood Control Act specifies all revenues derived from water supply agreements are deposited into the United States Treasury – they are not allocated to the MHA Nation, the State, or USACE. Consequently, the rationale for selecting the method of cost calculation that results in the highest rate of charges is unjustified in this Draft Report.

D. The Draft Report Fails to Acknowledge Responsibility for Water Quality on Reservoir Intakes.

The Draft Report acknowledges responsibility to maintain water quantity and quality only for downstream intakes. Draft Report, p. 2-12. As USACE is well aware, it has previously conceded in the Annual Operating Plans, and in Tribal consultations, that as a result of its obligations under Section 1(b) of the 1944 Flood Control Act, USACE has responsibility to maintain water quantity and quality for reservoir intakes in addition to downstream water intakes. In addition, the Draft Report erroneously reports that problems with water intakes “have been a matter of restricted access to the river rather than insufficient water supply.” USACE is well aware of the problems experienced by water intakes on the Fort Berthold, Standing Rock, and Cheyenne River Reservations resulting directly from decisions to release water from the Upper Reservoir dams made by USACE in times of drought. These problems were caused by lower water levels in

the reservoirs caused by USACE operating decisions. This must be corrected in the Draft Report.

E. Failure to Acknowledge the Jurisdiction of the MHA Nation Over Water on the Fort Berthold Reservation, and Failure to Accurately State the law regarding Water Supply contracts.

Section 2.6 of the Draft Report, p. 2-15, must be modified to indicate allocation of water on lands within the Reservation is under the jurisdiction of the MHA Nation. Likewise, Section 2.6 of the Report erroneously reports that any permittee on the Missouri River must enter into a water supply agreement or surplus water agreement with USACE. Section 6 of the Flood Control Act of 1944 is permissive, and not mandatory in its language. While USACE may enter into water agreements, they are not mandatory. This is further evidenced in Section 2.7.4 of the Draft Report, in which USACE acknowledges it currently has only one water supply contract in place. Further, USACE is not authorized under Section 6 of the 1944 Flood Control Act to enter into water supply agreements or contracts with the MHA Nation or federal agencies, and it is questionable whether water supply agreements with tribal members could legally require tribal members to pay for water access, given that allottees have senior reserved water rights as well as the MHA Nation. Section 3.1 of the Report repeats this error, in relying upon Real Estate Policy Guidance Letter No. 26 issued for the first time on June 10, 2008, which misstates the applicable law.

Further, Sections 7(c) & (d) of the Dakota Water Resources Act of 2000 are very clear that water projects on the Ft. Berthold Reservation are not subject to any charges for accessing stored water, nor is the Secretary of the Army permitted to charge the MHA Nations for any cost reimbursements. Consequently, any effort by USACE to charge the MHA Nation for use of its own water is illegal not only under Section 6 of the 1944 Flood Control Act, but also under the Dakota Water Resources Act of 2000.

F. The Draft Environmental Assessment Fails to Assess Impacts to Cultural Resources, and contains other flawed analysis.

The Draft EA assumes there would only be an additional 527 acre feet of withdrawals from Lake Sakakawea as a result of the Plan, assuming other withdrawals would occur upstream and under existing permits totaling 99,473 acre feet of water. Draft Report, Appendix A, p. 6-2. There is simply no foundation for this premise in the report. It is not based upon examination of where withdrawals would occur in the future. Further, USACE is well aware of the flaws and limitations of the DRM, which partially resulted in the exacerbation of the drought effects on the Upper Reservoirs during the most recent drought. Even under the flawed DRM analysis, the largest impacts will occur on Gavins Point, and Lake Oahe, where problems with water intakes supplying Reservations, and impacts on recreation and wildlife already have been repeatedly reported in the past decade. All Tribal Nations on the Missouri River have been repeatedly reporting additional severe impacts on protected historic and cultural sites, with numerous instances of litigation. The Draft Report does not assess any impacts on federally protected cultural and historical sites, or NAGPRA protected sites resulting

from the elevation changes in the Reservoirs, rather simply concluding without analysis there is no impact.

Section 6.5.2 of Appendix A, p.73-74 assumes no detrimental effects to water quality from construction of additional intakes without assessing the proximity of new intakes to existing intakes on the Reservation. This is not only impermissible legally, it is irresponsible on the part of USACE, given that the four intakes on the Fort Berthold Reservation supply water to over 1,000 homes; three of the proposed new intakes are on the Reservation, and there are no acceptable alternative water supplies in the area.

Section 6.16.1 of Appendix A concludes there is no adverse effect on cultural resources. The Draft Report concedes that “no site specific cultural resources investigations were performed at the proposed intake sites.” Draft Report, Appendix A, p. 99. Further, USACE has relied exclusively on its own report from 2007, at a time when much of the mapping of eligible NHR sites was incomplete. USACE does not indicate it has consulted with the MHA Nation THPO as required by law under the NHPA and NAGPRA. Consequently, the EA is incomplete, and must be completed prior to the conclusion of No Impact being reached regarding this issue. Further, the EA fails to assess the impact of changes in elevations of Lake Sakakawea from the Plan on cultural resources as is required by law.

As further evidence of the flawed analysis in the EA, the EA does not even list the Native American Graves Protection and Repatriation Act (NAGPRA) as one of the laws that must be complied with in Section 8 of the EA. The Draft Report indicates that “discussions between the Corps and North Dakota SHPO are ongoing, and final coordination with regard to this law would be completed before construction.” **No discussion is occurring with the MHA Nation THPO, in violation of federal law.** This required action must be completed before the final report is issued. The North Dakota SHPO has no authority to provide concurrence for compliance with NAGPRA and the NHPA on tribal lands or USACE lands on the Reservation.

VI. Conclusion

The Draft USACE Report is not drafted in compliance with applicable federal laws, regulations, policies or Executive Orders. The failure of this report to accurately assess the impacts upon the residents of the Fort Berthold Reservation and the MHA Nation of North Dakota stems from the failure of USACE to meet its obligations to engage in pre-decisional government-to-government consultation. This Plan, as it currently stands, could have disastrous implications for the tribal economy, environment, cultural resources, and the health of the members of the MHA Nation, in addition to serious legal consequences to USACE for failing to abide by required laws. The Reservation was created for the exclusive use and benefit of the MHA Nation and its members. The MHA Nation and its people paid a serious and devastating price in the past from the United States’ failure to adequately assess the impacts of its actions on the Missouri River to the MHA Nation and its people. We lost over 156,000 acres of our heartland, including our major communities, and all major infrastructure on the Reservation, when the Garrison Dam was constructed. The MHA Nation was never fairly compensated for the abrogation of its Treaty rights and the taking of the heart of its

homeland for the Garrison Reservoir. The cultural, social and economic damage that came as a result of the flood and the uprooting of our families is immeasurable. The proposed plan, which would require our Nation and its people to buy the same water that flooded the heart of our land, land which was promised to us by treaty, shows a complete insensitivity to and disregard for these historic and well documented injustices. To now attempt to charge the MHA Nation and its industry partners locating on the Reservation for water, just when recent oil and gas industry development is bringing the first glimmer of economic recovery from the devastation wrought by the Pick-Sloan Act, is not only illegal, it is unconscionable.

For these reasons, the USACE must immediately engage in government-to-government consultation with the MHA Nation of the Fort Berthold Indian Reservation, and base its conclusions and analysis in the Draft Report and Draft EA upon data and law that includes the MHA Nation and its Reservation. At this time, the MHA Nation opposes the Plan for the reasons stated herein.



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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February 1, 2011

Ref: EPR-N

Ms. Kayla A. Eckert Uptmor
U.S. Army Corps of Engineers, Omaha District
Attn: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, NE 68102-4901

Re: Lake Sakakawea Draft Environmental
Assessment and Surplus Water Report

Dear Ms. Eckert Uptmor:

The U.S. Environmental Protection Agency (EPA) Region 8 has reviewed the Army Corps of Engineers' (Corps') Draft Environmental Assessment (EA) for the Garrison Dam/Lake Sakakawea Project. Our comments are provided for your consideration pursuant to our responsibilities and authority under Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. Section 4332(2)(C), and Section 309 of the Clean Air Act (CAA), 42 U.S.C. Section 7609 and in response to your December 17, 2010 letter.

PROJECT BACKGROUND

The EA accompanies the Garrison Dam/Lake Sakakawea Draft Surplus Water Report (Draft Report). The Draft Report identifies and quantifies surplus water available as defined in Section 6 of the 1944 Flood Control Act, which the Secretary of the Army can use to execute surplus water supply agreements with water users to meet regional water needs. The Corps is proposing to develop agreements which would supply surplus water to easement holders whose easements will expire within the next 10 years, the oil and gas industry, and unidentified future demand. These agreements would utilize 257,000 acre-feet (AF) of storage to supply 100,000 AF of yield or withdrawals. The primary demand driving regional water needs at this time is the North Dakota oil and gas industry. Of the 100,000 AF of yield, 27,000 AF would supply the oil and gas industry. The EA addresses three of nine applications for easements, recognizing that additional NEPA documentation will be necessary for the additional six applications. Each of these easements will entail the construction of at least one new intake, pipeline, and water depot. The EA indicates that a total of 17 new intakes will be constructed if all nine applications are granted.

EPA ISSUES

Based on EPA's review of the EA, we have identified several concerns with the project. Our primary issues relate to the adequacy of the hydrologic analysis and depletions projections; water quality impacts; indirect impacts; the alternatives analysis; and cumulative impacts. Limited information is presented to support the conclusions reached in the EA. Consequently, EPA is concerned the EA may not fully recognize potential direct, indirect, or cumulative impacts and encourages the Corps to consider additional NEPA documentation to address the concerns and recommendations outlined below and described in detail in the attachment.

EPA is concerned that the EA's characterization of the depletions associated with the proposed action may underestimate future depletions from Lake Sakakawea. The EA evaluates 527 AF of depletions to Lake Sakakawea although the agreements would enable the withdrawal of up to 49,000 AF of water. EPA recommends the EA characterize the proposed action in terms of the potential depletions that it would enable and assess them against the existing hydrologic condition to determine their effect. An underestimation of depletions may lead to an underestimation of impacts not only to the water levels and releases but also water quality, the necessary length of intakes, alluvial groundwater, and the volume of water which will be disposed into injection wells or through evaporation ponds. Consequently, reconsideration and revision of these sections may be warranted. EPA is also concerned that the EA does not present assessment of the potential for impacts to the riverine portions of the Missouri River and recommends that anticipated changes in flow be described.

The EA indicates that because the no action alternative would lead to the same depletions as the proposed action, there are no water quality impacts with respect to dissolved oxygen (DO) and temperature (i.e., coldwater habitat) from depletions. EPA disagrees with this logic. The EA should assess impacts associated with the proposed action based upon existing conditions, independent of the no action alternative. Additionally, assessment and characterization of project impacts should be transparent and complete. The EA stops short of presenting predicted changes to water quality (DO and temperature), citing uncertainty in the model. EPA encourages the Corps to include an assessment of the DO and temperature standards for coldwater habitat, explaining the uncertainty associated with its temperature and DO modeling, and provide the modeling report as an appendix or through an internet link.

The EA states that if the provision of surplus water markedly changed the rate at which the oil and gas industry grows, then the changes in the industry's growth and the associated environmental consequences would be an indirect effect of the Corps' action and would need to be quantified in the EA. It concludes that this is not the case and does not identify any indirect impact of the use of the water it is providing. EPA has concerns with this approach. Regardless of whether the oil and gas industry's rate of growth is markedly increased by the proposed action, the production of oil is clearly an indirect effect of the project. Development of the Bakken formation will continue rapidly in this area. However, it appears that some portion of this oil and gas development would be induced by the availability of clean, low-cost water. EPA recommends adding a discussion of the portion of oil and gas development that would be induced by the proposed new water supply. EPA anticipates that the commodity prices of oil and gas, pipeline capacity, and drill rig availability will also be major factors affecting the rate of

development. EPA recommends the EA include a qualitative summary of indirect impacts associated with the provision of water through this project, such as air quality, waste disposal, transportation, water quality, and groundwater. The Bureau of Land Management is in the process of developing a Resource Management Plan for oil and gas development in Montana, North Dakota, and South Dakota that may be a helpful reference.

The EA considers two alternatives: the proposed action and no-action alternative (the most likely future without project scenario). EPA recommends including additional information that more fully characterizes the no action alternative. For example, the EA should clarify where depletions are likely to occur and should substantiate the likelihood of the no action alternative as well as the conclusion that there is little difference between the no action alternative and the proposed action. Section 3.0 indicates several alternatives were screened out of consideration, including water reuse and recycling. While reuse or recycling may not currently meet the full water demand of the oil and gas industry, recycling and reuse by treating produced water may be able to meet a portion of demand such as that for heavy brine water and, as fracking fluid technology progresses, new opportunities to utilize recycled produced water with high salinity may arise. Although water reuse and recycling to produce water for use in fracking have been determined economically infeasible based upon studies in the Barnett Shale in Texas, EPA encourages pilot projects aimed at enabling production water reuse within the Bakken formation as a possible future, if not current, means to reduce depletions from Lake Sakakawea and any possible impacts.

Similar to our concerns for direct impacts, EPA is concerned that the cumulative impacts analysis in the EA underestimates potential future depletions to Lake Sakakawea and the system as a whole and that cumulative impacts to the riverine portions of the Missouri River system were not assessed. The cumulative impacts analysis utilizes 10,000 AF depletions from each of the other reservoirs on the Missouri River but does not provide a basis for this estimation. EPA recommends the Corps provide additional explanatory information within the cumulative impacts section to accompany the figures presented, evaluate impacts to the reservoirs and the riverine portions of the system from the full volume of potential future cumulative depletions, and explain the basis for the 10,000 AF depletions from each of the other reservoirs.

If you have any questions about our comments, please contact me at 303-312-6004 or Maggie Pierce of my staff at 303-312-6550.

Sincerely,

//osb DbA// for

Larry Svoboda
Director, NEPA Compliance and Review Program
Office of Ecosystems Protection and Remediation



**EPA’s Detailed Comments on the
Garrison Dam/Lake Sakakawea
Environmental Assessment**

Environmental Consequences

Hydrologic Analysis and Depletions

EPA is concerned that the EA’s characterization of the depletions associated with the proposed action may underestimate future depletions from Lake Sakakawea. EPA recommends the EA characterize the proposed action in terms of the potential depletions that it would enable and assess their effect against the existing condition. Potential depletions that may not already be captured in the analysis include 48,473 AF of water yield to be newly allocated, the total amount of current easements which are not fully withdrawn, increases in depletions since 2002, and 7,150 AF of what is described as “excess easement requests” in Section 2.7.5. An underestimation of depletions may lead to an underestimation of impacts not only to the water levels and releases but also water quality, the necessary length of intakes, alluvial groundwater, and the volume of water which will be disposed into injection wells or through evaporation ponds. Consequently, reconsideration and revision of these sections may be warranted. EPA is also concerned that the EA does not present assessment of the potential for impacts to the riverine portions of the Missouri River.

Section 6 analyzes the effects of depletions as predicted by the Daily Routing Model (DRM). Despite the agreement’s provision for up to 48,473 AF of currently unallocated yield (Table 2) and recognition that a fraction of yield currently allocated with easements is being utilized, the hydrologic analysis for the proposed action evaluates only 527 AF of depletions to Lake Sakakawea. The basis for this volume of depletions is a comparison of the proposed action to the no action alternative. The EA asserts that the difference between the no action alternative and the proposed action is 527 AF, effectively treating the no action alternative as a baseline (see discussion on “No Action Alternative”). Based upon the information presented in the EA, it appears that depletions to Lake Sakakawea associated with the proposed action would be at least 49,000 AF and possibly more, given the DRM reflects depletions from 2002. The volume of depletions from 2002 may not have captured increased water depletions over the 2002 to 2010 period to supply water for significant growth in oil and gas production in North Dakota (Section 6.7.1). EPA recommends the EA evaluate the potential hydrologic impacts associated with the full amount of depletions enabled by this project and compare the results of the evaluation to the existing condition. As a component of this evaluation, EPA recommends the EA address whether depletions increased from 2002 to 2010.

The EA describes all nine of the easement applications as “credible” (Section 2.7.5) but addresses only the three received prior to June 2010. The EA notes that it considers the other six in the cumulative impacts analysis; however, it is not clear if the depletions from these six applications were considered in the direct impacts section. Section 2.7.5 describes the total yield of the nine new applications to supply water to the oil and gas industry as 34,150 AF. However, the Corps estimates the demand for the oil and gas industry at 27,000 AF and describes the

difference between 34,150 AF and 27,000 AF (7,150 AF) as “excess easement requests.” Table 2 includes 21,884 AF for “remaining unidentified future users demand.” EPA recommends the Corps clarify whether it intends to allocate the water for unidentified demand, or a portion of it, to meet the portion of water described as excess easement requests.

EPA recommends comparison of both the proposed and no action alternatives to an existing condition instead of only a comparison between the proposed action and no action alternatives as illustrated in Figures 18-24. Figures 18-23 present distribution curves for changes in water releases and water surface elevation for the reservoirs at the Fort Peck, Garrison, and Oahe Dams and Figure 24 presents a distribution curve of the changes in releases for the Gavins Point Dam. The distribution curves are helpful illustrative tools but EPA recommends narrative explanation and assessment of changes over a range of seasonal conditions to accompany the revised figures.

EPA questions the utility of the period of record used to predict hydrologic changes given the potential impacts of climate change and land use development to impact hydrology. Figures 18-24 are based upon a daily time-step over an 80-year period of record (1930-2009). This period of record is used to predict future conditions. It does not appear that adjustments for climate change were built into the model. Temperature, evaporation, and drought frequency are predicted to increase in this region.¹ EPA recommends the Corps consider whether the potential impacts of climate change and land use development over this period may confound the model’s predictive ability.

Neither the figures nor the text of Section 6 characterize changes to the riverine portions of the system. The EA references hydrologic analyses for the riverine portions of the Missouri River and maps the nodes where predictions were made (Figure 17), but does not include the predicted impacts. In addition to hydrologic impacts, depletions to the riverine portions of the Missouri River may lead to impacts to water quality, aquatic resources, river geomorphology, and recreation. EPA recommends the EA address potential cumulative impacts to the riverine portions of the river based upon the full potential depletions of the project with graphical and narrative descriptions of the changes to the magnitude, duration, and frequency of flow.

Water Quality

Section 6.5.1 indicates that because the no action alternative would lead to the same depletions as the proposed action, there are no impacts to dissolved oxygen (DO) and temperature (i.e., cold water habitat) from depletions. EPA disagrees with this logic. The EA should assess impacts associated with the proposed action based upon existing conditions independent of the no action alternative. Additionally, assessment and characterization of project impacts should be transparent and complete. The EA stops short of presenting predicted changes to water quality citing uncertainty in the model.

North Dakota’s 2010 Integrated Report prepared pursuant to Clean Water Action Sections 303(d) and 305(b) indicates that Lake Sakakawea was previously impaired for DO and temperature.

¹ <http://www.globalchange.gov/publications/reports/scientific-assessments/us-impacts/regional-climate-change-impacts/great-plains#issue1>

Because reductions in water quantity have the potential to lead to increased water temperature and nutrient concentrations, an evaluation of whether or not the proposed action has the potential to cause or contribute to a violation of water quality standards is warranted. The water quality standard requires at least 500,000 AF within Lake Sakakawea to maintain a temperature less than or equal to 15°C and DO greater than or equal to 5 mg/L.² Instead of indicating what potential impact the proposed action may have on water quality or whether or not the action has the potential to cause or contribute to an exceedance of water quality standards, the EA concludes the model is not sensitive enough to assess effects for the associated predicted pool elevation changes. It does not provide an explanation of the basis for the uncertainty associated with the model or the data utilized. The EA also indicates that summer pools must be maintained above 1825 mean sea level (MSL) to maintain sufficient habitat with respect to DO, but does not describe the basis for this threshold or assess predicted exceedances based upon this project. EPA encourages the Corps to do the following:

- Explain the uncertainty associated with its temperature and DO modeling,
- Present the potential changes as a range of volumes,
- Provide the modeling report as an appendix or on-line with a link, and
- Describe the basis for and predicted exceedance of the 1825 MSL threshold.

Wetlands

The EA does not explicitly address whether any of the intake or pipeline construction will disturb wetlands. EPA recommends the EA explicitly address this potential impact. The prairie potholes of this region are a unique type of wetland. EPA encourages their protection consistent with Executive Order 11990. The pipeline from the Mandaree intake is the longest of those associated with the three applications covered by this EA. It is slightly more than 5.6 miles in length and will disturb 52 acres. The water depot itself will disturb two acres. The pipelines associated with the other two applications appear to be much shorter; however, potential impacts to wetlands associated with those easements should also be disclosed.

Indirect Impacts

The EA states that if the provision of surplus water markedly changed the rate at which the oil and gas industry grows, then the changes in the industry's growth and the associated environmental consequences would be an indirect effect of the Corps' action and would need to be disclosed in the EA. It concludes that this is not the case and does not identify any indirect impact of the use of the water it is providing. EPA has concerns with this approach. Regardless of whether the oil and gas industry's rate of growth is markedly increased by the proposed action, the production of oil is clearly an indirect effect of the project. The reasonably foreseeable growth in oil and gas production, as recognized by Section 5.1.2, is substantial. Each new well is estimated to require between 2.6 and 13.6 AF of water for drilling, casing, fracking, and de-brining. The Draft Report and EA indicate that of the 100,000 AF of surplus water allocated within the contract, 27,000 AF would be available for oil and gas production and

² <http://www.legis.nd.gov/information/acdata/pdf/33-16-02.1.pdf>

21,884 AF would be available for unanticipated demand. A 27,000 AF allocation enables development of 1,985 to 10,384 wells based upon the individual well demand estimates above. Both the lower and upper end of this range represent a large number of wells especially in consideration of the 4,606 wells already in operation (Table 3-1, Draft Report).

Development of the Bakken formation will continue rapidly in this area. Some portion of this oil and gas development would be induced by the availability of clean, low-cost water. EPA recommends adding discussion on the portion of oil and gas development that would be induced by the proposed new water supply. EPA anticipates that the commodity prices of oil and gas, pipeline capacity, and drill rig availability will also be major factors affecting the rate of development. EPA recommends the EA include a qualitative summary of indirect impacts associated with the provision of water through this project, such as air quality, waste disposal, transportation, water quality, and groundwater. The Bureau of Land Management is in the process of developing a Resource Management Plan for oil and gas development in Montana, North Dakota, and South Dakota that may be a helpful reference. BLM has also completed reasonably foreseeable development forecasts for oil and gas development in Montana and North Dakota to quantify greenhouse gas emissions for several leasing environmental assessments. This information is available at:
http://www.blm.gov/mt/st/en/prog/energy/oil_and_gas/leasing/leasingEAs.html.

Alternatives

Alternatives Analysis

The EA screens out water reuse and recycling from further consideration as an alternative. The reuse of frack water for drilling and use of recycled produced water in other industrial applications are described as currently economically infeasible. While reuse or recycling may not meet the full demand of the oil and gas industry, recycling and reuse by treating produced water may be able to meet a portion of demand such as that for heavy brine water. Additionally, as fracking fluid technology progresses, new opportunities to utilize recycled produced water with high salinity may arise.

Ongoing pilot projects and research regarding reuse and recycling include pilot projects in the Barnett Shale in Texas and a partnership between the Energy and Environmental Research Center at the University of North Dakota and the U.S. Department of Energy. The EA states that none of the pilot projects in the Barnett Shale have proven economically feasible. The North Dakota Industrial Commission describes 37 years as the production life for an average North Dakota oil well.³ Over the production life of the well, this region may experience an increasing demand for water in the face of increasing droughts and hydrologic uncertainty. In consideration of the length of production life and site-specific economic, hydrologic, and geologic factors within different formations and regions, EPA encourages pilot projects aimed at enabling production water reuse within the Bakken formation as a possible future, if not current, means to reduce depletions from Lake Sakakawea and any possible impacts.

³ <https://www.dmr.nd.gov/oilgas/presentations/HouseApprop2011-01-07.pdf>

No Action Alternative

The EA asserts that the no action alternative, the most likely future condition without the project, is very similar to the proposed action because the oil and gas industry will acquire the water from elsewhere in the region. The document is unclear as to where depletions are likely to occur and does not substantiate the likelihood of the no action alternative or the conclusion that there is little difference between the no action alternative and the proposed action. EPA recommends the EA more fully characterize the conditions associated with the no action alternative and the basis for these predictions.

The EA's descriptions of the locations where water would be withdrawn under a no action scenario are vague and inconsistent. Section 4.1 indicates that the no action alternative is assumed to also result in depletions of 100,000 AF from Lake Sakakawea and the withdrawals would likely be from free-flowing sections of the Missouri River *upstream* of Lake Sakakawea. However, Section 6.7.2 states that the oil and gas industry would access water from either upstream or downstream of Lake Sakakawea. Section 5.1.4 asserts that in the absence of the allocation of water from Lake Sakakawea, the water would be acquired from upstream of Lake Sakakawea except for 527 AF from agricultural sources (p. 49) while Section 4.0 describes the 527 AF as being from groundwater (p. 25). Clarification and additional explanation is necessary in order to understand the potential impacts of the no action alternative. EPA recommends clarification of how the industry is currently acquiring water, where the withdrawals could occur under the no action alternative, and potential impacts of those actions. If the no action alternative would lead to 527 AF of groundwater withdrawals, Section 6.4 (Environmental Consequences—Groundwater) should be revised to reflect this and potential impacts evaluated.

In order to better understand the most likely future without the project (i.e., no action alternative) it would be helpful to understand if water could limit the growth of the industry if it were not provided for by these agreements. The EA does not describe its presumptions regarding the no action alternative. A description of the basis for the certainty that the oil and gas industry will be able to acquire sufficient water in the absence of this contract and where that water is available for acquisition would help substantiate and clarify the no action alternative. EPA recommends the EA include discussion of whether associated water rights are available, the reliability of such water, the location of withdrawals, if the cost of such water would be prohibitive, and if the use of water from outside Lake Sakakawea would have different impacts.

EPA also questions the EA's use of the no action alternative as a *de facto* baseline for evaluation of hydrologic impacts of the proposed action and recommends a different approach for the reasons described above in the "Environmental Consequences" section.

Cumulative Impacts

Hydrologic analysis

Section 7 of the EA appears to carry the characterization of the proposed action as having only 527 AF of depletions from Lake Sakakawea into the cumulative impacts analysis. It combines 527 AF of depletions from Lake Sakakawea with 10,000 AF of depletions from each of the other five reservoirs to evaluate the cumulative impact of 50,527 AF of depletions to all six Missouri River reservoirs. Similar to our concerns described above, EPA is concerned that the 527 AF and the 50,527 AF values underestimate potential future depletions to Lake Sakakawea and the system as a whole. EPA is also concerned that cumulative impacts to the riverine portions of the Missouri River system were not assessed.

The cumulative hydrologic impacts analysis, Section 7, appears to present changes anticipated from the no action alternative as a result of both the proposed action alternative and a cumulative impacts scenario. Based upon changes in frequency alone, the EA concludes that the project impacts are minimal. The figures depicting the changes have no accompanying narrative descriptions. They include frequency distribution plots of the predicted changes WSE at Lake Sakakawea and the difference in releases at Garrison Dam on a daily time-step for each day of an 80-year period (1930-2009) (Figures 31-33). EPA is concerned by the lack of descriptive and explanatory information accompanying the hydrologic analysis portion of the cumulative effects section. EPA provides the following recommendations in order to facilitate understanding of the cumulative impacts analysis:

- Describe the basis for the 10,000 AF depletions in each of the other mainstem reservoirs.
- Describe what conditions and assumptions are represented by the run names GAR100, CUM10, CC2010 and Figures 31-33 in Section 7.
- Provide a comparison of the full cumulative effects scenario (including the depletions described in the first section above) to the existing condition. Such information may include:
 - A narrative description, which utilizes quantified terms, of the changes from the baseline to the project/cumulative condition,
 - Analysis of changes to critical, low-flow or low water-level conditions (based upon seasonal and annual variation), and
 - Description and graphical depiction of changes to the frequency, duration, and timing of different water levels and releases with the cumulative project condition.

Based upon Figure 31, it appears that when comparing the cumulative impacts scenario utilizing only 50,527 AF of depletions to the no action alternative, the surface of Lake Sakakawea would be lower (ranging from 0 to 4 feet) approximately 50% of the time and a few inches higher approximately 5% of the time. The timing of these changes is not discussed nor is the possibility that these changes would occur more frequently based upon trends over the 80-year predictive period. Growth and development (through land use impacts) and climate change may have affected the hydrology of the system since 1930 rendering those early data unrepresentative of

current conditions. EPA recommends the EA address whether these changes are exhibit increased frequency over the 1930-2010 period.

Neither the figures nor the text of Section 7 characterize changes to the riverine portions of the system. The EA references hydrologic analyses for the riverine portions of the Missouri River and maps the nodes where predictions were made (Figure 17) but does not include the predicted cumulative impacts. EPA recommends the EA address potential cumulative impacts to the riverine portions of the river based upon the full potential depletions of the project with graphical and narrative descriptions of the changes to the magnitude, duration, and frequency of flow.

Water Quality

Lake Sakakawea is currently identified as impaired by methylmercury for fish consumption on North Dakota's 2010 Integrated Report;⁴ accordingly, it also has a site-specific fish consumption advisory. While the ultimate sources of mercury to waterbodies are commonly anthropogenic air emissions or natural, water-level fluctuations in Lake Sakakawea have been linked with increased methylation rates and concentrations of methylmercury in fish.⁵ In combination, the effects of increased water withdrawals, climate change through increased climactic extremes of drought and precipitation, and reservoir management could exacerbate these water-level fluctuations in Lake Sakakawea. EPA recommends the EA consider the cumulative effects of climate change, increased withdrawals, and reservoir management as they may affect water-level fluctuations and mercury concentrations in fish in Lake Sakakawea.

⁴http://www.ndhealth.gov/WQ/SW/Z7_Publications/IntegratedReports/2010_Final_Approved_IntegratedReport_20100423.pdf

⁵ Pearson, E. and M. Ell. 1997. Effects of Rising Reservoir Water Levels Resulting from the 1993 Flood on the Methyl-Mercury Concentrations in Fish Tissues in Lake Sakakawea, ND. North Dakota Department of Health.



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Western Area Power Administration
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Billings, MT 59107-5800

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JAN 3 1 2011

U.S. Army Corps of Engineers
Omaha District
CENWO-OD-T
ATTN: Lake Sakakawea Surplus Water Report and EA
1616 Capitol Avenue
Omaha, NE 68102-4901

Dear Sir or Madam:

Western Area Power Administration (Western) staff has reviewed the U.S. Army Corps of Engineers (Corps) December 2010 Draft Garrison Dam/Lake Sakakawea, ND Surplus Water Report. The Report makes several statements and assumptions concerning impacts to hydropower generation and we offer the following comments that Western believes should be clarified or modified in the Report.

As you are aware, Western, by law, is responsible for the marketing and delivery of the hydropower produced from the Federal hydro generation assets that are a part of the Pick-Sloan Missouri River Basin Program (Pick-Sloan). These generation assets are maintained and operated by the Corps and the Bureau of Reclamation (Reclamation). Western is responsible to market the power and energy produced to preference entities in the region and collect revenues from these customers sufficient to recover Western, Corps, and Reclamation annual power costs and repay power and certain non-power capital asset costs associated with the dams. Non-power capital asset costs include costs associated with storage features of the dams and reservoirs (i.e. a portion of the multipurpose or "joint" costs of the Pick-Sloan dams and reservoirs system). These costs are required to be repaid by the power customers because the power function of Pick-Sloan benefits from the storage features of the dams and power is a fully reimbursable function in Pick-Sloan. It is also important to note that Congress envisioned as part of the Pick-Sloan plan that the Municipal and Industrial (M&I) features would also be reimbursable for its specific costs and a portion of the multipurpose features of Pick-Sloan. Therefore, Western supports the Corps's position in this draft Report that the M&I users pay for an appropriate share of the Pick-Sloan storage features to which the M&I users benefit. In consideration of the above discussion, we offer the following comments to the Report.

1. In Section 3.7.1, Impacts of Authorized Project Purposes, the Report states that the no action alternative and the proposed action only nets to a 527 acre-feet per year of depletions. In Section 3.7.2.3, the Report goes on to state that the net energy revenues lost due this 527 acre-foot per year depletion is approximately \$10,000 per year. We believe this is misrepresenting the true impact to hydropower. In reality, there will no longer be 100,000 acre-feet per year of water flowing down through the five downstream power generation facilities. Extrapolating the Corps's own data where 527 acre-feet depletion equates to \$10,000 of lost energy revenues, the 100,000 acre-foot depletion equates to approximately \$1.9 million per year of lost energy revenues. Western believes the loss of 100,000 acre-feet per year represents a \$2.0 to \$2.5 million of lost revenue or increased expense per year at this year's energy prices of approximately \$35 to \$40 per MWh. Just a couple of years ago, real-time energy prices were around \$50 to \$55 per MWh and it is realistic to believe those prices could easily return to the region within the next 10 years. Therefore, it is reasonable to assume that the loss of this water through the five downstream dams for the 10 year study period would result in \$20 to \$40 million in lost hydropower revenues or increased replacement energy expenses.
2. Section 3.7.2.5, Updated Cost of Storage, and summarized on Table 3-28, evaluates the cost of 257,000 acre-feet of storage in Garrison at FY2011 costs and results in an annual cost of \$2,090,537 for the proposed action of using excess storage to provide this M&I water. This analysis ignores the benefits of the up-stream storage features associated with the Fort Peck Dam and the costs associated with that storage. This is a key issue as any evaluation of Pick-Sloan benefits must recognize that Pick-Sloan is a comprehensive program of flood control, navigation, M&I, irrigation, and hydroelectric production for the entire Missouri River Basin and no single action can be evaluated alone by itself.
3. The Report outlines the authorities for the study in Section 1.2 and quotes Section 6 of the 1944 Flood Control Act "moneys received from such surplus water agreements shall be deposited in the Treasury of the United States as miscellaneous receipts." The report does not specify what function those receipts would be credited to in the Corps's financial statements. Western believes the Corps should apply any receipts received from these surplus water agreements to the power financial statements offsetting reimbursable storage costs assigned to power for repayment.
4. Section 3.8, Environmental Considerations, outlines impacts the proposed action would have on the environment. It is not clear in the report or draft Environmental Assessment if the Corps evaluated the impact of the lost hydropower due to this proposed action, especially the impact of CO2 releases from replacement energy.

We also respectfully request that Corps work closely with Reclamation and Western to ensure consistent interpretation of Pick-Sloan legislation and Congressional intent so that associated water and repayment issues are addressed.

Thank you for the opportunity to comment and please call me at 406-255-2911 if you have any questions on the above comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Jody Sundsted". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Jody S. Sundsted
Power Marketing Manager

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U.S. Army Corps of Engineers
Omaha District
CENWO-OD-T
Attn: Lake Sakakawea Surplus Water Report and EA
1616 Capitol Avenue
Omaha, NE 68102-4901

68102+4901





United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Great Plains Regional Office
115 Fourth Avenue S.E.
Aberdeen, South Dakota 57401



IN REPLY REFER TO:

Natural Resources
MC-301

Larry Janis
Water Supply Business Line Manager
U.S. Army Corps of Engineers, Omaha District
1616 Capitol Avenue
Omaha, Nebraska 68102-4901

JAN 28 2011

Dear Mr. Janis:

We have reviewed the Lake Sakakawea Draft Surplus Water Report and offer the following comments with emphasis on the impact to the Tribes at Lake Sakakawea/Garrison Dam and elsewhere in the Missouri River Basin.

The proposed storage fees attached to water withdrawn from the reservoir at Garrison Dam place an extraordinary burden and barrier to the development of resources for a community that gave up much for the dam to be built in the first place. Additionally, we take the position that Tribes and Tribal members should be exempt from such fees.

The Corps relies on language in Section 6 of the 1944 Flood Control Act to claim the authority to assess fees on the Tribes, but that is questionable because Section 6 states that the Corps may enter into agreements for surplus water with "states, municipalities, private concerns, or individuals". Neither the Tribes nor Tribal members are identified. We do not believe the 1944 Flood Control Act contemplated the Corps charging storage fees for water to be supplied to a Federal enclave which is what an Indian reservation is.

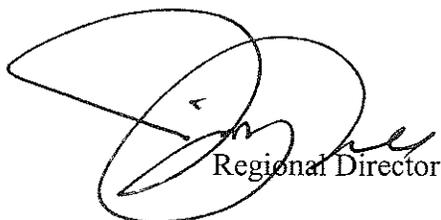
Furthermore, should the plan outlined in this report become a template for operations at other dams impacting Indian country, the same exemption would apply for any other Tribes potentially affected.

Some Tribes of North Dakota are in the initial stages of negotiating the quantification of their water rights and others in the Basin may be preparing to do so. The introduction of the storage fee issue may jeopardize what is anticipated to be a delicate and contentious process for both the Tribes and the States and add to the adversarial nature of any discussions.

The Tribes along the Missouri River sacrificed their best lands for the projects authorized by the 1944 Flood Control Act and many development projects associated with the compensation have yet to be realized. To charge fees for storage of water in the reservoirs that inundated the lands of these Tribes is inevitably going to be interpreted by them as adding insult to injury. We ask that the Corps proceed with this plan with sensitivity to that fact.

If you have any questions or need additional information, please contact Wayne Stone, Water Rights Specialist, at (605) 226-7621.

Sincerely,



Regional Director

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JD

Larry Janis, Water Supply Business Line Manager
US Army Corps of Engineers, Omaha District
1616 Capitol Avenue
Omaha, NE 68102-4901



United States Department of the Interior

BUREAU OF RECLAMATION

Great Plains Region

P.O. Box 36900

Billings, Montana 59107-6900



IN REPLY REFER TO:

GP-4100

WTR-4.00

JAN 31 2011

Commander, U.S. Army Corps of Engineers

Attn: Ms. Kayla Eckert-Uptmor

Chief, Planning Branch, Omaha District

1616 Capitol Avenue

Omaha, NE 68102-4901

Subject: Comments on the Garrison Dam/Lake Sakakawea, North Dakota Surplus Water Report (Report), Garrison Diversion Unit, North Dakota

Dear Ms. Eckert-Uptmor:

The Bureau of Reclamation appreciates the opportunity to review and provide the following comments on the December 2010 Report. We have general comments regarding topics in the Report which are followed by specific comments. In order to ensure consistent interpretation of Pick-Sloan and associated water and repayment issues, we strongly suggest that the U.S. Army Corps of Engineers (Corps) work closely with both Reclamation and Western Area Power Administration (WAPA).

Rate Determination

The Report states that the Corps derives the water users' capital investment of storage as the highest of:

- benefits foregone by the use of surplus water;
- revenues foregone by the use of surplus water;
- replacement cost of the storage necessary to provide the surplus water;
- updated cost of storage in Federal project.

We have concerns about the revenue foregone methodology and believe it may under estimate the full impact of depletions on hydroelectric power generation. The Report computes the revenue foregone rate by comparing the no action alternative against the proposed action; however, we believe that it would be more appropriate to develop a revenue (power) foregone rate by basing it on the revenues lost from the full impact of the proposed action, which is a loss of 100,000 acre-feet (af) per year out of Lake Sakakawea. We believe that power revenue foregone should be based on the 100,000 af of yield because if the marketed surplus water remained in the river it would generate power at the main stem dams downstream of Fort Peck: Garrison, Oahe, Big Bend, Fort Randall, and Gavins Point. We believe that the rate should be based on the costs incurred by WAPA to purchase power at times when WAPA cannot market enough power to meet their firm demand. We acknowledge that WAPA's purchase power rate best signifies the opportunity cost to the United States for marketing water. Based on these assumptions, the power foregone rate, without an operation, maintenance, and replacement (OM&R) component, is approximately \$25.00 per af (yield).

Although the Report states that surplus water marketing is for a temporary basis, we are concerned about the precedent the proposed rate would have on Reclamation's ability to recapture costs. It would be detrimental to Reclamation if the Corp's proposed rate for municipal and industrial water supply is substantially less than the rate Reclamation charges. By law, Reclamation is directed to, at a minimum,

charge actual OM&R. Reclamation currently negotiates our municipal and industrial contracts using a market rate approach. As a regional comparison, Reclamation has a municipal and industrial contract at Dickinson Reservoir for \$36.00 per af. This rate includes a water service charge as well as an OM&R charge. In addition, Dickinson Reservoir serves an irrigation contractor at a current rate of approximately \$20.00 per af, which also includes a water service and OM&R charge.

We believe it is confusing to state the rate of storage throughout the Report is \$8.13 per af when the water marketed will be based on the yield, which was calculated to be \$20.61 per af. We suggest that the primary rate be referred to as the yield amount, rather than the storage amount, in the Report.

Surplus Water Determination

First, we are concerned that storage allocated for authorized irrigation projects administered by Reclamation is identified as a demand to be met by surplus storage (See Table 3-6 and other references throughout the Report). The Report (p. 2-7) states that irrigation diversions come from both the permanent pool and the carryover multiple use zone. Consequently, we believe Reclamation's storage demand, along with other certain users such as Basin Electric, should be characterized as using storage from either the permanent pool or the carryover multiple use zone. In our opinion, characterizing water or storage as surplus to meet the demand for an authorized purpose, such as irrigation, has adverse implications to Reclamation and our contractors.

Second, we are concerned that the Report appears to only plan for the historically used portion of Reclamation's North Dakota surface water permit. We believe the Report should plan for the full quantity allocated to Reclamation under our water permit to ensure there is sufficient water to meet future demand of authorized projects. Even though the Report characterizes the action as a short-term effort, the storage and water for authorized projects should be accounted for and an assurance provided that these authorized purposes, including future development, will not be harmed. While there may be surplus water available partially because water permits issued under North Dakota state law have not been perfected for Reclamation projects authorized by Congress, we believe that adequate discussion and consultation has not yet taken place between our agencies to validate that premise. This is particularly relevant to water intended to be used for irrigation by the Garrison Diversion Unit that has not yet been fully developed. In these particular cases, it would be appropriate that those discussions also involve our respective state partners.

Further, we believe it is inappropriate to include surface water permits for Reclamation projects authorized by Congress within the estimate of demand for surplus water associated with existing easement holders (i.e. large institutional users). Reclamation projects, including the Northwestern Area Water Supply Project (NAWS), other certain municipal, rural, and industrial projects (in both Lake Sakakawea and Oahe), and irrigation within the Garrison Diversion Unit, etc., are specifically authorized by Congress to utilize water from the Missouri River system under provisions of Section 9 of the 1944 Flood Control Act and Reclamation laws, and therefore, exempt from water or storage contracting under Corps authorities. This change in the Report would result in a slight decrease in identified demand and corresponding increase in unidentified surplus water demands. We believe the Report must include a determination that surplus water contract requirements proposed by the Corps will not apply to projects authorized by Congress and constructed under Reclamation law, pursuant to Section 9 of the 1944 Flood Control Act.

Lastly, it would be helpful if the Corps would define words that appear to be used interchangeably in a definitions appendix, specifically: storage zone, storage reserve, storage capacity, allocated storage, cost allocation, etc. Furthermore, providing a summary that assists in better understanding what surplus water is and how it is differentiated between natural flows and storage would aid in the reading of this Report. For clarification, we suggest including a summary of the definition and relationship between surplus water, natural flows, and storage.

Future Allocation/Reallocation Studies

The Report (p. 1-1) indicates “that reallocation studies of the six Federal reservoir projects within the Missouri River basin (including the Garrison Dam/Lake Sakakawea Project) will be completed, which will determine if changes to the permanent allocation of storage among the authorized project purposes and modifications to existing Federal water resource infrastructure may be warranted.” It is unclear from the Report if an initial allocation study was completed, and if so, we suggest that allocation study be specifically cited. Please clarify that reference or mention of a proposed future study would be an allocation, not a reallocation, study. We seek clarification about whether the study that the Corps is proposing is a reallocation of Pick-Sloan Missouri Basin costs to the respective benefits/authorized purposes (which requires congressional authorization), or is a reallocation of reservoir storage (to convert temporary surplus water contracts to long-term storage contracts and/or assignment of storage priority) taking into account basin hydrology and existing and reasonably foreseeable authorized diversions, or both, and the extent to which these analyses may be interdependent.

In addition, Indian water rights in Lake Sakakawea under Winters Doctrine should be acknowledged and that whenever they are adjudicated would influence future determinations of storage and surplus water. Through Garrison Diversion Unit authorities, reservation-wide municipal, rural, and industrial systems are under construction on Standing Rock and Fort Berthold Indian Reservations. We understand that both the Standing Rock Sioux Tribe and the Three Affiliated Tribes have initiated preliminary discussions with the North Dakota State Engineer concerning their desire to negotiate their respective water rights. While this issue may be more appropriately addressed in the future reallocation study proposed, it should be identified in this report.

We are encouraged by your inclusion of Reclamation’s 2002 Missouri River Basin development-level streamflow depletions in assessing temporary surplus water in Lake Sakakawea. As you are aware, the Corps and Reclamation are developing updated depletion’s data for the NAWS study and WAPA’s Power Marketing Initiative. Also, it is our belief that the updated depletion studies will play an important part in your potential reallocation study.

We respectfully request participation in any future allocation studies of main-stem Missouri River reservoirs. We also request, because of our special expertise and jurisdiction, to be a cooperating agency under National Environmental Policy Act (NEPA) processes.

Grammatical and Formatting Comment

The Report should be edited to address incomplete sentences and variation in fonts.

Specific Comments

Page 2-1, Section 2.2, Paragraph 2 – The second paragraph should be followed by another paragraph that notes that WAPA is now in charge of power marketing for Corps projects.

Suggested language – The Department of Energy Act (1977 Department of Interior Organization Act) established the Department of Energy and simultaneously withdrew the power marketing function from the Department of Interior and moved it to the new Department of Energy.

Page 2-11, Section 2.5.3, Paragraph 4 – This section states, “The Snake Creek Pumping Plant, McClusky Canal and New Rockford Canal are completed components of the authorized Principal Supply Works of the GDU.” Reclamation requests that the sentence be changed to the following: “The Snake Creek Pumping Plant, McClusky Canal, and New Rockford Canal are largely constructed components of the authorized Principal Supply Works of the GDU, however these features are not yet considered plant in service.”

Page 2-12, Section 2.5.3, Last Paragraph – The statement made, “Demand for irrigation use is relatively small...” and “present use for irrigation is relatively minor...” misrepresents the highly consumptive nature

of irrigation verses other uses like water supply. In other words, irrigation is played down in this section yet makes up over 50% of the water used in Lake Sakakawea (see page 2-21 of this report). The consumptive nature of irrigation should be addressed in this section.

Page 2-13, Section 2.5.4 – This section addresses future projects such as the NAWS Project and the Red River Valley Water Supply Project as potential withdrawals from Lake Sakakawea yet future withdrawals for other project purposes are not addressed. This appears inconsistent. It should also be noted that while withdrawal of water from Lake Sakakawea was the preferred alternative for the Environmental Impact Statement for the Red River Valley Water Supply Project, a Record of Decision has not been signed.

This section lists that the NAWS project, when completed, would withdraw 2 million gallons of Missouri River water per day – Reclamation believes that this number should be verified with the State water commission because according to the NAWS Environmental Impact Statement on Water Treatment prepared by Reclamation in December 2008, the withdrawal would be approximately 26 million gallons per day. We suggest that the numbers be illustrated as per acre-feet instead of million gallons.

Page 2-14, Section 2.5.6 – We note the mistake identifying the least tern as threatened and the piping plover as endangered. It is exactly the opposite. We suggest referencing in this section the Fish and Wildlife Service’s Biological Opinion on the operations of the Missouri River, in this “Fish and Wildlife” section.

Page 3-1, Section 3.1 – This section includes references to the Corps policy that “no easement that supports any type of water supply agreement will be executed prior to the water supply agreement being executed by all parties.” It is important to note that Reclamation projects that have been specifically authorized by Congress for withdrawal from the Missouri River System are exempt from the Corps policy; this should be acknowledged in this section.

Page 3-4, Section 3.2.1, Paragraph 2 and Page 3-22, Section 3.4.2.1, Paragraph 2 – The estimated values representing the amount of water, in acre-feet, required to produce oil in each well appear inconsistent.

Page 3-9 to 3-10, Section 3.2.2 – Information used in Table 3-4 also includes upstream water users as noted in the comparison between this table and Table 3-15 on page 3-34. It would be more useful to try and tease out users specific to Lake Sakakawea.

Page 3-9, Section 3.2.2 – From the discussion, it appears that the Corps is not sure of quantities of water being withdrawn for its easements. It appears that the State has some records of reported usage. Obtaining reliable water usage records, even for relatively smaller diversions, are essential considering the current water use contention in the basin. If the Corps is presently not compiling water usage data for existing users, how will actual water diversions be obtained and verified by the Corps for the proposed surplus water permits?

Page 3-9, Section 3.2.2, Table 3-4 and Page 3-34, Section 3.6.1.4, Table 3-16 – The Report quantifies historic average use figures for Reclamation withdrawals from Lake Sakakawea and downstream of the Garrison Dam (e.g. Table 3-4 and Table 3-16). It appears that this information was obtained from the North Dakota State Water Commission report; we suggest that a citation be provided that illustrates the source of the information.

Page 3-19, Section 3.4.2.1, Paragraph 4 – The statement is made: “Storage originally reserved for the irrigation purpose has not been fully utilized...” This statement implies that a specific amount of storage has been reserved for irrigation, yet previous statements on page 3-15 state “...only flood control has a specific amount of allocated storage in Lake Sakakawea. The same confusion is also noted for “storage planned for sediment”. Clarification is needed.

Page 3-40, Section 3.7.1.1 – For clarity, please identify the “80- year period” (the first time it is mentioned as historic) and list the specific years (i.e. 1930-2009) for comparison with any future periods.

Page 3-41, Section 3.7.1.1 – The source of Reclamation depletions used by the Corps for their modeling purposes should be provided.

Page 3-41, Section 3.7.1.1 – The Report states: “The DRM adjusts these inflow data by the difference for depletions that have been estimated to occur between each year and 2002.” This sentence seemed a bit vague in meaning. We inferred that what was meant could be better stated as: “The DRM adjusts these inflow data by the difference between historic depletions and the 2002-development-level depletions. This effectively adjusts the inflows used by the DRM to reflect the 2002 level-of-development in the basin.”

Page 3-41, Section 3.7.1.1 – The Report states 80 years of daily simulation were used for comparison of impacts for the alternatives. It also mentions that alternatives were simulated for one study year of 2010. It is not clear to the reviewer as to how one study year was simulated to provide 80 years of output. Further description of that process would improve understanding.

Page 3-43, Section 3.7.1.2 – The analyses used to identify the storage requirement in Lake Sakakawea for a 100,000 af yield were based on system-wide composite flows and parameters. Rather than using system-wide composite values, it may have been better to simulate Lake Sakakawea reservoir operations and demands individually. It would provide a required storage volume that would have more solid footing than using system-wide parameters.

Page 3-53, Table 3-30 – The Title of the table is “Cost of the Next Least Costly Alternative” but one of the water sources is “From GD/LS Existing Intakes” and the cost per acre-foot is \$20.91. We believe this is the cost the Corp proposes to charge and not the next least costly alternative.

EA Comments

Please note that we offer the following comments on the EA but these are not all inclusive as we focused our review on the Report.

Appendix A., Page 2, Section 1.2 – The way this section is written “ER 1105-2-100, paragraph 3-8a” and other ER references appear to be a part of Section 6 of the Water Supply Act rather than from the Corps Planning Guidance Notebook. The “ER” or engineering regulation notations should be attributed to the appropriate document.

Appendix A., Page 19, Paragraph 1 – This paragraph states “no water supply agreement or easement would be required from the Corps for water obtained from river reaches not contained within a Corps reservoir or on Corps project lands, provided the Corps does not operate the system to meet the needs of an intake”. This statement appears to contrast a statement made on page 2-12, first paragraph under 2.5.4 that states “Minimum daily releases at Garrison (and also at Fort Peck, Fort Randall, and Gavins Point) are established as those necessary to supply water quality control and **downstream water intake requirements.**” [emphasis added]. If the Corps is operating the system to meet the needs of downstream intakes, will water supply agreements be necessary for downstream intakes?

Appendix A., Page 26, End of the Last Paragraph - This paragraph mentions that best management practices would be expected to avoid impacts but fails to identify what those practices are and where they can be found. The statement does not support the conclusion of the last sentence in this paragraph. It might be helpful to the reader if a reference was provided regarding conditions listed on pages 45-46.

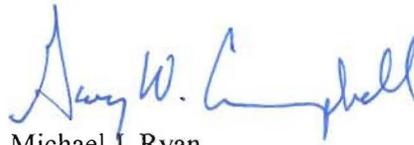
Appendix A., Page 33, Figure 7 – The IW-Iverson intake appears to be on the river and not the lake.

Appendix A, Page 59, Section 6 – As in an above previous comment, citation should be provided for 2002-level depletions data provided by Reclamation. It was also mentioned that depletions were adjusted to 2020 level for cumulative effects by incorporation of anticipated additional development in basin. It may be that these additional depletions were also provided by Reclamation and citation should be provided. It is not clear if depletions from the Red River Valley Project are included in the cumulative effects analysis.

Appendix A., Page 114, Section 7.2 – It is unclear in this section how future projects are addressed for cumulative impacts.

Thank you for the opportunity to comment. If you have any questions, please call Daniel S. Fritz of my staff at 406-247-7730.

Sincerely,



Michael J. Ryan
Regional Director

For

logged

FEB 3 2011

U.S. Army Corps of Engineers, Omaha District
ATTN: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, Nebraska 68201-4901

RE: Garrison Dam/Lake Sakakawea Project
North Dakota Surplus Water Report

Dear Mr. Janis:

The U.S. Fish and Wildlife Service (Service) has reviewed the U.S. Army Corps of Engineers (Corps) Draft Surplus Water Report (Report) which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. The document appended a Draft Environmental Assessment (EA) which evaluates seven specific intakes that would be covered for a ten year study period. We offer the following comments under the authority of and in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4327) (NEPA), the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) (FWCA), the Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d, 54 Stat. 250) (BGEPA), the Migratory Bird Treaty Act (16 U.S.C. 703 et seq.) (MBTA), and the Endangered Species Act (16 U.S.C. 1531 et seq.) (ESA).

General Comments

MRAPS

The Corps of Engineers has recently begun a restudy of the 1944 Flood Control Act to re-examine the authorized purposes of the Missouri River system (MRAPS). The use of Missouri River water for oil and gas production represents significant new potential consumption (this water use is entirely consumptive since it will not return to the water supply) that was not considered in the original authorization for the Missouri River project. While the Report includes a brief discussion of the authorized purposes of the system, it does not provide information to place this water use into context of the authorized purposes. The Service suggests that the document clearly define how this report relates to the MRAPS program.

Water allocation

The Service recommends that the document evaluate the water that would be removed under this proposal in terms of all water rights that have already been permitted on the Missouri River

system. The natural hydrograph has been dramatically altered by dam construction and operation, with significant impacts to the native species that rely on the Missouri River system. Water withdrawals may further alter both the magnitude and variance of river flows, causing additional impacts to native species, including those protected under the authorities listed above.

The document should include a plan to track the amount of water obligated along the entire Missouri River system and identify a critical threshold beyond which no additional water withdrawal permits will be granted. Additionally, the amount of water in storage in the Missouri River system varies dramatically from year to year. The document should include a commitment to maintaining not only a minimum storage in the reservoirs, but also minimum flows in the riverine portions of the Missouri River system. Surplus Water Use Agreements should be curtailed when existing Water Use Agreements might be impaired.

Monitoring

It is not clear in the document how the amount of water that the intakes withdraw will be monitored. The Service suggests that rather than the permittees self-reporting their intake volume, the Corps require an independent gauge that they can check to ensure that the intakes are not exceeding their allotment.

The document should include a description of how the Corps will monitor compliance with other environmental requirements to ensure that migratory birds, interjurisdictional fish, or threatened and endangered species are not impacted by maintenance activities.

Comments on Appendix A: Environmental Assessment/FONSI

The Environmental Assessment describes the impacts of the seven specific water intake sites proposed to go forward under this water surplus report. The specific site locations are:

Element Solutions Sak. Water Depot LLC Mandaree	T. 150 N., R. 93 W., S.18, SE ¼	Dunn
International Western – Charlson	T. 154 N., R. 94 W., S. 33, NE ¼	McKenzie
International Western - Iverson	T. 153 N., R. 101 W., S. 30, NW ¼	McKenzie
Lake Sak. and Associates #3	T. 148 N., R. 91 W., S. 20, SE ¼	Dunn
Lake Sak. and Associates #5	T. 150 N., R. 91. W., S. 32, SW ¼	Dunn
Lake Sak. and Associates #8	T. 154 N., R. 95 W., S. 32, SE ¼	McKenzie
International Western –Thompson	T. 154 N., R. 97 W., S. 23, NE ¼	Williams

We provide comments on these specific projects below.

Threatened and Endangered Species

Pallid sturgeon

The Service concurs with the Corps' determination of "may affect, not likely to adversely affect" for the pallid sturgeon. This concurrence is predicated on all intakes being screened with a maximum ¼ inch screen and ½ foot per second velocity of intake flow.

The document refers to pallid sturgeon critical habitat. Critical habitat has not been designated for the pallid sturgeon; this reference is not accurate.

Piping plover and least tern

Due to the potential for piping plover and least tern nesting near the water intakes when conditions are suitable, the Service does not concur with the "may affect, not likely to adversely affect" determination without additional requirements to minimize the potential for impacts.

There is a potential for disturbance of piping plovers and least terns if there is overland access during the piping plover and least tern breeding season (April 1-August 15). Individuals of both species have been documented to be crushed by vehicles driving across breeding habitat. Additionally, there is the potential for impacts if there is overland access at a time when the substrate is soft and ruts are left in piping plover and least tern breeding habitat. Piping plover chicks have been documented to be stuck in wheel ruts, impacting their ability to escape from danger. The risk of ruts impacting least tern or piping plover breeding habitat is particularly likely for the proposed International Western-Thompson and International Western – Charlson wells, which are very close to historic piping plover nests. However, if water conditions allow, there is the potential for nesting anywhere along the Lake Sakakawea shoreline, so all of the proposed projects could potentially impact least terns or piping plovers under low water conditions.

We recommend that the permits include restrictions on overland access during the breeding season or at any time when ruts may be left in suitable nesting habitat. During those times, we recommend that the permittee either access their intakes from the water only or coordinate with the Corps and the Service to ensure that the area to be impacted is surveyed prior to overland access. These restrictions are especially important when lake levels are low, exposing bare shoreline that is suitable for nesting. Under low water conditions, the permittees are especially likely to want to access the intakes, since the intakes may become exposed or inefficient due to sediment build-up under low water conditions. The EA should include a commitment from the Corps describing how they will monitor this restriction and coordinate with the Service to ensure that the birds are not disturbed by the construction and maintenance of the proposed intakes.

The Corps should provide its determination for the least tern and piping plover, independent from the determination for the potential impacts on piping plover critical habitat.

The document refers to least tern critical habitat. Critical habitat has not been designated for the least tern; this reference is not accurate.

Piping plover Critical Habitat

The Corps has made a determination that the proposed project will not adversely modify piping plover critical habitat. However, as the action agency, the appropriate determination for the Corps to make is whether the project would or would not impact piping plover critical habitat. The Service then determines if the proposed project, in conjunction with all of the other projects that may impact critical habitat, will destroy or adversely modify critical habitat. As discussed above, the Service believes that without appropriate safeguards, piping plover critical habitat may be negatively impacted by the proposed project.

Whooping crane

Due to the potential for whooping cranes to use the proposed project location, the Service does not concur with the “may affect, not likely to adversely affect” determination without additional requirements to minimize the potential for impacts.

Whooping cranes are unlikely to spend more than a few days in any one spot during migration. The Service suggests that the Environmental Assessment (EA) include a requirement that if a whooping crane is sighted within one mile of the proposed projects’ construction, that all work cease within one mile of that part of the project (i.e. that intake) and the Service be contacted immediately. In coordination with the Service, work may resume after the bird(s) leave the area.

Gray wolf

As a matter of policy, the Service does not concur with “no effect” determinations. However, we acknowledge your “no effect” determination for the gray wolf.

Black-footed ferret

As a matter of policy, the Service does not concur with “no effect” determinations. However, we acknowledge your “no effect” determination for the black-footed ferret.

Shovelnose sturgeon

The shovelnose sturgeon was listed as Threatened under the similarity of appearance provisions of the ESA associated with commercial fishing activity. Since the proposed projects are not associated with commercial fishing, a determination for the shovelnose sturgeon is not required.

Candidate Species

The Service acknowledges your analysis of potential impacts on the Dakota skipper. By locating the proposed water intakes and associated facilities (roads, depots, retention ponds etc.) in previously disturbed areas, impacts to the Dakota skipper should be minimized.

In 2010, the Sprague’s pipit was added to the candidate species list. Migratory bird species, such as the Sprague’s pipit, that are candidates are still protected under the MBTA. Sprague’s pipits require large patches of grassland habitat for breeding, with preferred grass height between 4 and 12 inches. The species prefers to breed in well-drained, open grasslands and avoids grasslands

with excessive shrubs. They can be found in lightly to heavily grazed areas. They avoid intrusive human features on the landscape, so the impact of a development can be much larger than the actual footprint of the feature. If Sprague's pipit habitat is present within or adjacent to the proposed project area, the Service requests that you document any steps taken to avoid and minimize disturbance of this habitat.

Bald and Golden eagles

The EA includes a discussion of the BGEPA and the Service's 2007 National Bald Eagle Management Guidelines to avoid impacts to bald. As the document indicates, the Service suggests that surveys be conducted to ensure that there are no active bald or golden eagle nests within one-half mile of the proposed project sites and associated facilities. However, the draft EA does not state whether the Corps will perform surveys for bald and/or golden eagle nests. We recommend that the Corps require a qualified biologist to perform nest surveys. The Service recommends that aerial raptor surveys be conducted prior to any on-the-ground activities. The Service recommends that an aerial nest survey (preferably by helicopter) be conducted within one mile of any proposed ground disturbances to identify active and inactive eagle nest sites near the proposed intake sites, as well as active nests of other raptor species. The aerial surveys should include surveys for proposed new roads and any other appurtenances. Aerial surveys should be conducted between March 1 and May 15, before leaf-out so that nests are visible.

Aerial surveys should include the following:

1. Due to the ability to hover and facilitate observations of the ground, helicopters are preferred over fixed wing aircraft, although small aircraft may also be used for the raptor surveys. Whenever possible, two observers should be used to conduct the surveys. Even experienced observers only find approximately 50 percent of nests on a flight, so we recommend that two flights be performed prior to any on-the-ground work, including other biological surveys or other work.
2. Observations of raptors and nest sites should be recorded using GPS. The date, location, nest condition, activity status, raptor species, and habitat should be recorded for each sighting.
3. We request that you share the qualifications of the biologist(s) conducting the survey, method of survey, and results of the survey with the Service.

Migratory Bird Treaty Act

The MBTA prohibits the taking, killing, possession, and transportation, (among other actions) of migratory birds, their eggs, parts, and nests, except when specifically permitted by regulations. While the MBTA has no provision for allowing unauthorized take, the Service realizes that some birds may be killed during project construction and operation even if all known reasonable and effective measures to protect birds are used. The Service's Office of Law Enforcement carries out its mission to protect migratory birds through investigations and enforcement, as well as by fostering relationships with individuals, companies, and agencies that have taken effective steps

to avoid take of migratory birds, and by encouraging others to implement measures to avoid take of migratory birds. It is not possible to absolve individuals, companies, or agencies from liability even if they implement bird mortality avoidance or other similar protective measures. However, the Office of Law Enforcement focuses its resources on investigating and prosecuting individuals and companies that take migratory birds without identifying and implementing all reasonable, prudent, and effective measures to avoid that take. All parties are encouraged to work closely with Service biologists to identify available protective measures when developing project plans and/or avian protection plans, and to implement those measures prior to/during construction or similar activities.

To the extent practicable, schedule construction for late summer or fall/early winter so as not to disrupt migratory birds during the breeding season (February 1 to July 15). Note that the breeding season for piping plovers and least terns extends through August 15. If work is proposed to take place during the breeding season or at any other time which may result in the take of migratory birds, their eggs, or active nests, the Service recommends that the project proponent implement all practicable measures to avoid all take, such as suspending construction where necessary, and/or maintaining adequate buffers to protect the birds until the young have fledged. The Service further recommends that if you choose to conduct field surveys for nesting birds with the intent of avoiding take, that you maintain any documentation of the presence of migratory birds, eggs, and active nests, along with information regarding the qualifications of the biologist(s) performing the survey(s), and any avoidance measures implemented at the project site. Should surveys or other available information indicate a potential for take of migratory birds, their eggs, or active nests, the Service requests that you contact this office for further coordination on the extent of the impact and the long-term implications of the intended use of the project on migratory bird populations.

High Value Habitat Avoidance

- Avoid construction in native prairie, if possible, and reseed disturbed native prairie with a comparable native grass/forb seed mixture. The Service recommends planting a diverse mixture of native cool and warm season grasses and forbs. Recent research has suggested that a more diverse mix, including numerous forb species, is not only ecologically beneficial, but is also more weed resistant, allowing for less intensive management and chemical use. In essence, the more species included in a mixture, the higher the probability of providing competition to resist invasion by non-native plants. The seed source should be as local as possible, preferably collected from the nearby native prairie. Obtain seed stock from nurseries within 250 miles of the project area to insure the particular cultivars are well adapted to the local climate. The Natural Resources Conservation Service (NRCS) compiles a list of vendors in North Dakota that supply conservation seed and plants (<http://www.plant-materials.nrcs.usda.gov/pubs/ndpmcmt8152.pdf>). Additional information on native grasses and forbs may be found at the NRCS Bismarck Plant Materials Center (<http://www.plant-materials.nrcs.usda.gov/ndpmc/>).
- Make no stream channel alterations or changes in drainage patterns.

- Locate construction to avoid placement of fill in wetlands along the proposed pipelines carrying water to the depot locations.
- Replace unavoidable loss of wetland habitat with functionally equivalent wetlands.
- Install and maintain appropriate erosion control measures to reduce sediment transport to adjacent wetlands and stream channels.

Thank you for the opportunity to comment on this project. If additional information is required, please contact Carol Aron of my staff, at (701) 250-4481 or at the letterhead address.

Sincerely,

Jeffrey K. Towner

Jeffrey K. Towner
Field Supervisor
North Dakota Field Office

cc: Refuge Hydrologist, Division of Water Resources, FWS, Denver
(Attn: M. Estep)
Resident Agent in Charge, FWS, Bismarck
(Attn: R. Grosz)
Missouri River Coordinator, FWS, Bismarck

Vanosdall, Tiffany K NWO

From: aarestad farm [aafarm@mlgc.com]
Sent: Wednesday, January 05, 2011 9:55 PM
To: Garrison Surplus Study
Cc: ndirrigation@btinet.net
Subject: irrigation

According to the garrison irrigation plan developed to partially offset the flooding of the Missouri River land, I was to be able to obtain Garrison water via canal to irrigate some of my farmland. This, of course never happened and probably will not, breaking an agreement made with the citizens of North Dakota.

Although I will not benefit from Garrison water directly, I feel charging irrigators for water rightfully theirs is egregious and a further erosion of trust North Dakotans have for the governance of the Missouri River.

Sincerely,

Casper Aarestad
Cooperstown, ND

Vanosdall, Tiffany K NWO

From: Randy Asbury [moriver@howardelectricwb.com]
Sent: Saturday, January 29, 2011 3:16 PM
To: Garrison Surplus Study
Cc: McMahon, John R BG NWD; 'Ashley McCarty'; 'Bob Bacon'; 'Dale Ludwig'; 'Dan Cassidy'; David Sieck; 'Doris Moore'; 'Garrett Hawkins'; 'John C. Pozzo'; Muench, Lynn M LRP; 'Mindy Larson Poldberg'; 'Paul Rohde'; Trent Summers; Brian Klippenstein (Senator Blunt); Chad Ramey (Congressman Graves) ; Chris Brown (Congressman Luetkemeyer) ; Dan Engemann (Congressman Luetkemeyer); Don Lucietta (Senator Blunt); Dukes, Corey (Senator McCaskill); Eric Bohl (Congresswoman Hartzler) ; Mitas, Jim MVS External Stakeholder; Justin Rone (Congresswoman Emerson); Katy Hartnett (Congressman Carnahan); Lauren Ellis (Congressman Akin); Mike Matousek (Congressman Graves) ; Nichole Distefano (Senator McCaskill) ; Peter Henry (Senator Blunt); Porter, Clark (McCaskill); Robin Robinson (Congressman Clay); Scott Shiller (Congressman Long) ; 'Shupe, Brooke (Congressman Graves)'; Trent, Curtis (Congressman Long); Zach Kinne (Senator Blunt)
Subject: Garrison Dam/Lake Sakakawea Surplus Water Report and accompanying Environmental Assessment (Surplus Water Report/EA)
Attachments: MODNR Garrison Dam_Lake Sakakawea Surplus Water Report_EA 1-28-2011.pdf
Importance: High

January 29, 2011

Colonel Robert J. Ruch, Commander
U.S. Army Corps of Engineers, Omaha District
1616 Capitol Ave.
Omaha, NE 68102-4901

Dear Colonel Ruch:

Thank you for the opportunity to comment on the Garrison Dam/Lake Sakakawea Surplus Water Report and accompanying Environmental Assessment (Surplus Water Report/EA). I submit these comments on behalf of the Coalition to Protect the Missouri River (CPR) which represents the diverse interests of agricultural, navigational and utility interests within the Missouri River Basin. CPR supports responsible management of Missouri River resources and the maintenance of congressionally authorized purposes of the river including flood control and navigation.

Numerous substantive and procedural issues with the Surplus Water Report/EA demand that I urge the U.S. Army Corps of Engineers (Corps) to withdraw it immediately.

I concur with the Missouri Department of Natural Resources' (MODNR) analysis of the Surplus Water Report/EA. Specifically, I agree with the six items identified by MODNR as "of significant concern". They are:

1. Inappropriate application of the Corps' Section 6 authority;
2. Identification of surplus water where none exists;
3. Failure to properly account for water use;
4. The continued unlawful use of easements for water withdrawals;
5. Failure to comply with the National Environmental Policy Act; and,
6. Reliance on flawed analyses and assumptions.[1]

I have attached the complete statement of MODNR, without enclosures, as further detail of our concerns with the Surplus Water Report/EA. I respectfully request that each concern be addressed individually and by a detailed Corps' response.

I reiterate my appreciation for the opportunity to comment on the Surplus Water Report/EA.

Sincerely,

Randy Asbury

Executive Director

Coalition to Protect the Missouri River (CPR)

4849 Hwy B

Higbee, MO 65257

660-273-9903 Phone

573-823-7906 Cell

636-594-8401 Fax

moriver@howardelectricwb.com

www.ProtectTheMissouri.com

[1] Missouri Department of Natural Resources' letter dated January 28, 2011 to Colonel Robert J. Ruch, Commander, U.S. Army Corps of Engineers, Omaha District

[1] Missouri Department of Natural Resources letter dated January 28, 2011 to Colonel Robert J. Ruch, Commander - U.S. Army Corps of Engineers, Omaha District

Draft Surplus Water Report and Environmental Assessment for Lake Sakakawea, N.D.

Public Meeting | January 6, 2011 | 5-8 pm
Doublewood Inn, Bismarck, N.D.

Comment Form

The public review comment period for the Lake Sakakawea Draft Surplus Water Report and Environmental Assessment will run through January 17, 2011. Please return this form by Jan. 17, 2011 in order for your comments to be considered.

How to submit your comments for this public review period:

- Complete and drop off this comment form at the public meeting on January 6, 2011 at the Doublewood Inn, Bismarck, N.D.
- E-mail your comments to: garrisonsurplusstudy@usace.army.mil.
- Mail your comments to:

U.S. Army Corps of Engineers Omaha District
ATTN: CENWO-OD-T
Lake Sakakawea Surplus Water Report and EA
1616 Capital Avenue
Omaha, NE 68102-4901

Feb 1 2011

All comments must be received by January 17, 2011.

Comments are being collected under the Garrison Dam/Lake Sakakawea Project North Dakota Surplus Water Report, authorized by Public Law 534 (The Flood Control Act of 1944, Section 6). Submission of comments, including personal information, is voluntary. Providing personal information, including name, address and contact information, will allow Corps personnel to follow up on and/or clarify comments and may put ambiguous comments into context. All comments will be included in the record and considered. Personal information may be included in the public record or may be excluded upon request.

Name: Dwight Beyer
Street Address: 3740 11st SW
City: Stanton State: ND Zip Code: 58571
Organization/Tribe Represented: Fort Clark Irrigation
E-mail: jzyheart@westriv.com

If you do not want your name and address to be available to the public, check here [].

Please write legibly so your comments can be recorded completely and accurately. Please complete this form and drop it off at the registration table or mail it to the address shown on the left.

1. Do you have comments or concerns regarding a specific Authorized Purpose? If so, please provide those comments in the appropriate section below.

Authorized Purposes

Water Quality:

Irrigation:

Comments on next page

January 19, 2011

Comments to the Corps of Engineers::

Our irrigation project , Fort Clark Irrigation, was built the summer of 1953. It is part of the Pick-Sloan Project. The Bureau of Reclamation did the project. Originally the project was for 2100 acres now acreage is about 1700 acres. The project was put in and was to receive water from the Missouri River about 12 miles south of the Garrison Dam. Garrison Dam was not completed until 1955. Our water was to be supplied from a free flowing stretch of the Missouri. I have read that Garrison Dam will provide flood & navigation control on the Missouri River and produce 85,000 horsepower for use on lines now existing in the Dakotas as hydroelectric development. This POWER DEVELOPMENT AS POINTED OUT WOULD PAY THE ENTIRE COST AND MAINTENANCE AND OPERATION OF BOTH. THE POWER PLANT AND DIVERSION WORKS.

Fort Clark Irrigation has an annual income of about \$22,000. That's not a whole of money to maintain a system that was built in 1953. We have replaced the pump at our intake, do annual maintenance, pay a ditch rider, and manage to keep it going. We are always looking at ways to conserve water, pivots vs. flood , pipe instead of open ditch, and other things. The Bureau of Reclamation has assisted as much as they can. We are now on a pay what you can afford basis. This extra cost of paying for storage well might be the end of Fort Clark Irrigation . Our permit (#417) is for 8600 acre feet of water, that will come to almost 2000 dollars. The priority date on our permit is 1951, 3 years before the dam was put in service. Our fore-fathers were promised the world if they put in the system and now the Corps wants us to pay for storage on water from a free flowing stretch of the Missouri River . This is not right. Please reconsider.

Dwight Berger
Director
Fort Clark Irrigation

Signatures of the patrons of the Fort Clark Irrigation District are on the following page.

- 1 Dwight Berger Director Fort Clark Irrigation
- 2 Wayne Windhorst Director Ft Clark Irrigation & Landowner
- 3 Kathleen Windhorst Landowner (By Wayne Windhorst POA)
- 4 Delores Berger Landowner - Fort Clark Irrigation
- 5 Jay Pears-Hipp Landowner
- 6 Wallace Olander - Chairman Landowner
- 7 Clayton Olander
- 8 Earl J. Faithy
- 9 Oscar Klindworth Landowner
- 10 Lee Alden
- 11 Charles Allen Landowner
- 12 Dale Burtz

DARRIE J. BERGER
DWIGHT M. BERGER
3740 11TH ST SW
STANTON, ND 58571

REGISTERED MAIL
JAN 2014 PM 11



U.S. Army Corps of Engineers Omaha District

ATTN: CENW0-OD-T

Walle Sakakawa Supply Water Report and EA

16110 Capital Avenue

Omaha, NE 68102-4901

6810234501



Vanosdall, Tiffany K NWO

From: Jonathan Bry [jonbry@bis.midco.net]
Sent: Tuesday, February 01, 2011 11:16 PM
To: Garrison Surplus Study
Subject: Lake Sakakawea Draft Surplus Water Report and Environmental Assessment Comments

Lake Sakakawea Draft Surplus Water Report and Environmental Assessment.

February 1st, 2011, 11:14 PM CST

Although we are very concerned about the affects of using surplus water for municipal, agricultural and industrial uses, our main concerns are related to industrial uses. Municipalities needs are unavoidable and completely acceptable uses of surplus water as long as they are used within the Missouri River Basin. Agricultural and industrial uses must be considered much more carefully.

We are concerned about the consequences of using surplus water for agricultural and industrial uses. These include but are not limited to the health of fish and wildlife, the impacts on recreation, the status of water quality and water quantity, the impacts on cultural resources and the recovery of threatened and endangered species.

For the purpose of these comments, we will focus on the industrial uses of surplus water. We are deeply concerned about all of the intentional or unintentional affects resulting from the distribution of water taken from Lake Sakakawea for the purpose of oil and gas production in the use of hydrofracting in North Dakota.

One of the most drastic problems that we face with any kind of water diversion is when out of basin transfers occur. We are opposed to any water use that is diverted outside of the Missouri River basin for a variety of reasons. When water is diverted outside of the Missouri River basin, it does not return to the Missouri River. Most water used in both municipal uses and agricultural uses will eventually find its way back into the Missouri River either by entering tributaries or by percolating through the soil which also acts as a filtration system.

Most, if not all of the water used in extracting oil and gas through the method of hydrofracting is pumped deep into the earth and therefor, is never returned to the basin. As a matter of fact, we would not want the water used in hydrofracting to return to the surface because it would be severely contaminated with a variety of toxins. At any rate, this water is still gone forever as if it were diverted outside of the basin.

Since oil and gas companies are profit maximizing producers, they will most likely find a way to to guarantee the least expensive source of water for hydrofracting. Lake Sakakawea is their choice and unfortunately, they have so much political power that they will very likely have their way if we allow them to circumvent polices enacted to protect our environment. This was clearly demonstrated when the USACE refused to give water permits until the ten year Surplus Water Report and Environmental Assessment was completed. The governor of North Dakota and the North Dakota delegation in congress forced the USACE to reconsider and thus folded in to the demands of the oil and gas industry.

Since the oil and gas industry have an unjustified amount of political leverage, they are complaining about paying a nominal storage fee of just \$20.91 per acre-foot of yield as if this very profitable and growing industry can not afford the fee. This in only a fraction of a penny per gallon when one considers the fee of just \$20.91 for 325,851 gallons of water.

We feel that the Lake Sakakawea Draft Surplus Water Report and Environmental Assessment does not address all of the problems that we will face in the future if the oil and gas industry is allowed to use approximately 25 million gallons a day for the environmentally unsound method of hydrofracturing. In addition, they do not even feel that they should pay a storage fee.

The Lake Sakakawea Draft Surplus Water Report and Environmental Assessment needs to address the problems associated with hydrofracturing and deny the oil and gas companies any water permits at least until the ten year study is completed.

Sincerely,

Jonathan Bry
National Missouri River Working Group Chair
Dacotah Chapter of the Sierra Club
Bismarck, North Dakota



211 South Harth Ave. | P.O. Box 227
Madison, SD 57042-0227

Telephone: (605) 256-4536
Fax: (605) 256-8058

A Touchstone Energy® Cooperative 

January 31, 2011

U.S. Army Corps of Engineers
Omaha District
CENWO-OD-T
ATTN: Lake Sakakawea Surplus Water Report and EA
1616 Capitol Avenue
Omaha, NE 68102-4901
(garrisonsurplusstudy@usace.army.mil)

Dear Corps of Engineers:

On behalf of East River Electric Power Cooperative, Inc. (East River), I wish to express our strong opposition to the terms the Corps of Engineers (Corps) has proposed to provide storage and water supply to the oil and gas industry in western North Dakota. Specifically, these terms are described in the draft Lake Sakakawea Surplus Water Report dated December 2010. Please consider this letter as East River's comments which we request be included in the record of proceedings on this matter.

East River is a wholesale electric supplier owned by twenty-four cooperatives and one municipal electric system. These systems provide retail electric service to over 100,000 residential, farm, commercial, and industrial accounts in eastern South Dakota and western Minnesota. On behalf of its members, East River purchases bulk electric power supply from the Pick Sloan Missouri Basin Project through a contract with Western Area Power Administration. This bulk power supply represents over twenty percent of the total wholesale power supply East River delivers to its twenty-five members.

We offer the following comments:

- 1. Storage Costs:** The Corps has limited its calculation of storage costs to Garrison Dam. We believe the cost calculation should recognize system Joint Costs of the system and include similar costs for Ft. Peck which also stores water in support of Lake Sakakawea.
- 2. Hydropower:** The Corps' analysis of hydropower impacts makes no sense. In fact, removing 100,000 acre feet of water from Lake Sakakawea results in the loss of at least energy production at Garrison, Oahe, Big Bend, Ft. Randall, and Gavins Point dams. During the recent eight-year drought, which began in 2002,

there was no surplus water. For hydropower contract holders who are obligated to repay, with interest, the substantial system costs allocated to power, the low water conditions created by this drought required Western to raise hydropower rates by over 130% during the last few years. Most of that increase was due to Western's need to purchase power to meet its contract obligations to customers like East River and continue payment to the Treasury for operations, maintenance, and assigned investment costs of the federal power facilities. Imposing a 'contract' drought which reduces water availability by consumptive use for oil and gas extraction must carry with it a 'hold harmless' for customers which hold long-term power supply contracts with the Western Area Power Administration. The 'hold harmless' must include all costs, including the cost of purchased power needed to replace the generation lost from the five affected main stem dams. Such amounts must be included in the cost of any water supply furnished to the oil and gas industry and recognize Western's costs which vary based on changes in the purchase power markets.

3. Use of Funds: The Corps cites its intent to place funds collected from this sale of storage space and water into a 'miscellaneous receipts' account. Because power is allocated repayment of the storage costs assigned to this transaction, we believe the Corps should credit funds collected to reimburse storage costs which are now paid by power users. In addition, the Corps should include as part of its water related charges amounts to be credited to the Western Area Power Administration to offset (hold harmless) its full costs to purchase power for lost generation in the system.

We also request a complete listing of all contracts currently in effect between the Corps and third parties for M&I water supply from the Pick Sloan Missouri Basin Project. We request the Corps disclose the following features from each contract or agreement:

- Name of contracting party or parties;
- Initial effective date of contract;
- Duration (term) of contract;
- Defined use for water;
- Amount of storage and/or water quantity contracted for withdrawal;
- Fees and charges for storage and/or water withdrawn;
- The basis for fees and charges;
- Amounts collected for each year the contract or agreement has been in effect;
- The disposition of funds collected from each contract.

We believe a realistic estimate of the impact on power users will be \$20 to \$25 million for each 100,000 acre feet of water withdrawn from Lake Sakakawea during the proposed 10-year period. These costs will be paid by the end consumers of non-profit cooperatives, municipally owned utilities, and state and federal government entities.

We do not believe the Corps should cause the transfer of revenue and increase the cost of electricity for power consumers in this region by providing a subsidy to the oil and gas industry. We strongly urge the Corps to revise its proposal and 'hold harmless' the region's power users.

Sincerely,



Jeffrey L. Nelson
General Manager

JLN/sl

c: Senator Tim Johnson
Senator John Thune
Representative Kristi Noem
Governor Dennis Daugaard

East River
E L E C T R I C

A Touchstone Energy® Cooperative 

211 South Harth Ave. | P.O. Box 227
Madison, SD 57042-0227

Hasler

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ZIP 57042
011D11618395

U.S. Army Corps of Engineers
Omaha District
CENWO-OD-T
ATTN: Lake Sakakawea Surplus Water Report
and EA
1616 Capitol Avenue
Omaha, NE 68102-4901

68102*4901 C007



Buford Trenton Irrigation District
PO Box 27
Trenton, ND 58853

January 31, 2011

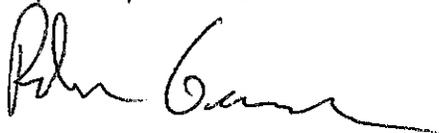
US Army Corps of Engineers Omaha District
ATTN: CENWO-OD-T
Lake Sakakawea Surplus Water Report and EA

Dear Sirs:

I represent an irrigation district located on the Missouri River directly upstream of Lake Sakakawea in North Dakota. While your recent proposal has no direct effect on our project, I would like to express my deepest concern for any further federal regulation on our River. We feel that to impose usage fees and any type of further restriction on the Missouri River or Sakakawea Reservoir will impede economic and social development for our small state.

The recent economic good fortune which North Dakota has experienced is rare and one which is well deserved. For this opportunity to be waylaid by federal regulation is an atrocity to Democracy and the American way of life.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "Robert Gannaway". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert Gannaway
Chairman
Buford Trenton Irrigation District

Draft Surplus Water Report and Environmental Assessment for Lake Sakakawea, N.D.

Public Meeting | January 6, 2011 | 5-8 pm
Doublewood Inn, Bismarck, N.D.

Comment Form

The public review comment period for the Lake Sakakawea Draft Surplus Water Report and Environmental Assessment will run through January 17, 2011. Please return this form by Jan. 17, 2011 in order for your comments to be considered.

How to submit your comments for this public review period:

- Complete and drop off this comment form at the public meeting on January 6, 2011 at the Doublewood Inn, Bismarck, N.D.
- E-mail your comments to: garrisonsurplusstudy@usace.army.mil.
- Mail your comments to:

U.S. Army Corps of Engineers Omaha District
ATTN: CENWO-OD-T
Lake Sakakawea Surplus Water Report and EA
1616 Capital Avenue
Omaha, NE 68102-4901

All comments must be received by January 17, 2011.

Comments are being collected under the Garrison Dam/Lake Sakakawea Project North Dakota Surplus Water Report, authorized by Public Law 534 (The Flood Control Act of 1944, Section 6). Submission of comments, including personal information, is voluntary. Providing personal information, including name, address and contact information, will allow Corps personnel to follow up on and/or clarify comments and may put ambiguous comments into context. All comments will be included in the record and considered. Personal information may be included in the public record or may be excluded upon request.

Name: MAX GLENTHNER

Street Address: 3807 3rd St SW

City: WUNDERWOOD State: ND Zip Code: 58576

Organization/Tribe Represented: SELF

E-mail: _____

If you do not want your name and address to be available to the public, check here [].

Please write legibly so your comments can be recorded completely and accurately. Please complete this form and drop it off at the registration table or mail it to the address shown on the left.

1. Do you have comments or concerns regarding a specific Authorized Purpose? If so, please provide those comments in the appropriate section below.

Authorized Purposes

Water Quality:

It is good now without you.

Irrigation:

I am an irrigator out of the Missouri River now and the management has been poor. When we need water to irrigate you hold the water in Sept. Oct. Nov. Dec. you release it. I we don't need it then.

Recreation:

We can take care of this as we are doing now.

Navigation:

Not necessary

Fish & Wildlife:

We have done a good job in this field without your help.

Hydropower:

We can take care of this without you.

Flood Control:

The down stream states should provide their own flood control

Water Supply:

2. What comments or concern do you have regarding the Draft Water Surplus Report?

North Dakota has the water and they own it. We don't need the W.S. Corps of engineers to manage it. You stole the land when you build the dam & I was employed at the dam site during construction. You don't know how to manage our Missouri River now so please get out. We will be able to handle the oil drilling business without you.

3. What comments or concerns do you have regarding the Draft Environmental Assessment?

With the deficit as it is I think it is ~~sp~~ about time we stop spending money you don't have and the water & the river belong to N. Dak.

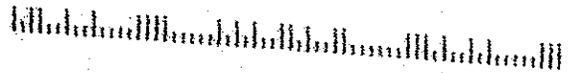
Max Guenther
3807 3rd St. SW
Derwood, ND 58576

BISMARCK ND 58102



U. S. Army Corps of Engineers Omaha District
attn Conoco-00-T
Lake Sakowas Surplus Water Report and EA
1616 Capitol Ave.
Omaha, NE 68102-4901

681024901



Vanosdall, Tiffany K NWO

From: Neil Iversen [neiliversen@gmail.com]
Sent: Tuesday, January 18, 2011 12:34 PM
To: Garrison Surplus Study
Subject: Comment form for Lake Sakakawea Draft Water Surplus Report and EA

Neil Iversen
1919 17th Ct W

Williston, ND 58801

My name may be made available to the public.

For the past 10 years I have worked in the field of water and have learned that water is one of the most precious natural resources we have. We are privileged to live in a state where a strong emphasis has been placed on water development and have a most capable staff at the State Water Commission that oversees the water permitting process in North Dakota. The frustration lies in dealing with the Federal government, (USACOE) who has denied North Dakotans access to our water while determining a tax on water. This surplus water report is a slam on private industry and represents government by government for government.

Page 3-14 of the Report: National water policy states that the primary responsibility for water supply rests with state and local entities, not the Federal government. However, the Corps can participate and cooperate with state and local entities . . . There was no cooperation in 2010. No permits were issued. Surplus water contracts are limited to five years with an option to renew for another five years at rates established by the Corps. Will the permit holder pay for the amount reserved on an annual basis or the amount used each year?

Page 3-18 discusses overstressed aquifers in northwest North Dakota. However, it fails to report the two major aquifers in northwest North Dakota, the Hofflund Aquifer east of Williston and Little Muddy Aquifer north of Williston, currently have 10,000 irrigated acres and can currently pump 80 million gallons of water per day with very little impact on the groundwater. Both currently have 15,000 acre feet appropriated for use and could double in size with the current economic conditions. Both aquifers are full and not in any danger of being overstressed.

Page 3-19: Based on this assessment, structural measures involving groundwater withdrawals have been eliminated from further consideration (screened out) for reasons of lack of completeness and lack of public acceptability. Two major aquifers, the former Yellowstone River channel and the other aquifer fed directly by the Missouri River, are mistakenly screened out of this Report.

Page 3-22 states The cost of only the water required to develop a well ranges from over \$400,000 to over \$4.5 million per well while the actual cost for water to hydrofrac a well is \$12,600 to \$44,100, an error to the magnitude of 100.

Page 3-25 discussed the uncertainty regarding percolation and aquifer recharging due to irrigating and not being able to quantify that number. Sprinkler irrigation is 90% efficient with most losses due to evaporation and negligible losses due to percolation back to the aquifer; therefore, you can estimate the total volume of water measured.

Allowing the conversion from irrigation to industrial use was implemented to satisfy the immediate need for water. Over 60 industrial permits are pending at the State Water Commission that have the capacity to fulfill all the water needs without costing the taxpayers of North Dakota one cent.

Page 3-53, Table 3-30 presents the greatest misconception in the Report, the Cost of the Next Least Costly Alternative. The average cost to install or convert groundwater depots is \$1,000 per acre foot, not \$6,517.03 as stated. The cost of the regional water supply system is

estimated at \$172,500,000 or \$15,401 per acre foot to construct, not the \$229.70 per acre foot as stated.

This Report misleads the public into believing the preferred alternative and least costly alternative to meet the industrial water needs in northwest North Dakota is a regional water supply costing the State of North Dakota \$172 million while in fact the least costly alternative is allowing the private sector to continue to meet and expand private water depots in northwest North Dakota at no cost to the taxpayers.

--

Neil J Iversen

Vanosdall, Tiffany K NWO

From: Jim Johnson [jjj826@hotmail.com]
Sent: Sunday, January 30, 2011 10:54 PM
To: Garrison Surplus Study
Subject: Public Comments on U.S. Army Corps of Engineers Lake Sakakawea Surplus Water Study & Environmental Assessment

To the US Army Corps of Engineers:

I am an active irrigator and water permit holder from the state of ND. I also hold a permit from the Corps of Engineers to withdraw water from Lake Sakakawea. I have reviewed the Lake Sakakawea Draft Surplus Water Report, Environmental Assessment. I respectfully object to the plan to start charging State of North Dakota water permit holders storage fees for water in Lake Sakakawea for the following reasons:

1. A vast amount of water flowed through the Missouri River in North Dakota prior to construction of Lake Sakakawea. According to Art XI, Section 3 of the North Dakota constitution, all flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes. Previously existing river flows that continue through Lake Sakakawea should not be considered stored water and should not be subject to any storage fee, because the State would have access to that water even if the dam did not exist.

2. In my opinion the Corps of Engineers does not have authority to charge for water storage, as section 301(b) of the 1958 Water Supply Act provides that recovery of capital costs may extend for a period of up to 50 years. The 50 year time period has passed, therefore the COE should not have the ability to charge for water storage costs to repay the construction cost of the Garrison Dam.

3. The State of North Dakota has access to Missouri River Water outside the Lake Sakakawea project, as recognized in your No Action Alternative, therefore State authorized users should not be charged for water withdrawn from inside the project. The project restricts access to a vast portion of the Missouri River.

4. In addition to natural flows, it is my understanding that the State of North Dakota has the right to develop 1.9MM acre feet reassigned from the Bureau of Reclamation in 1986 without payment of any storage fees.

5. I further understand that Section 7 of 1944 Flood Control Act provides that water systems in North Dakota do not have to pay for water features constructed prior to December 2000.

6. Finally, the proposed storage fees would make irrigation uneconomic in many cases.

Accordingly, the plan should be revised to remove any charge for water storage.

Yours Truly,

James Johnson

16755 Cleary Circle

Dallas, Tx 75248

January 12, 2011

Comments Regarding the Corps of Engineers Water Report

Robert E. Johnson, Bismarck, ND, January 11, 2011

I heard the excellent testimony given by our governor, attorney general and other state officials. Therefore, I am not going to reiterate what they said so eloquently and to the point. As a lifelong resident of North Dakota, a state that has undergone many hardships and has been looked upon as a minor player in the search for economic development, I can't believe the audacity of those who disregard the needs of the upper states in the use of water resources that were and are ours from the beginning of statehood. Now that our state has the potential of developing natural resources that can benefit the whole country, some bureaucratic ploy is being put forth to restrict that development and make us pay for what we already own. I can't imagine a more ludicrous scenario than the one that is being enacted: that the states that gave up land, 550,000 acres in North Dakota, and all that was on it, to provide flood relief for downstream states and for barge traffic. It's been proven many times that the dollar value that is accrued is far greater for the upstream states than the downstream ones. Now through some political machinations, the upstream states are supposed to pay for storage of water when it is not needed or wanted while the downstream states are not being assessed at all. What did they give up? And why aren't they being assessed? If any payment should be involved, the downstream states should be paying the upstream states for the water they have helped control to provide relief for the downstream states over these 70+ years. In the interest of fairness and honesty, I think the Corps, which has done many good things in the past, should forego any attempt of charging us for *our* water, and get on with the job of providing equitable use of the water that is so important to us all. I may be one lone voice crying in the wilderness, but I am asking that you put my voice together with the others you heard, and the many you won't hear from, to treat us as a honestly and fair as you would want to be treated. Thank you

Robert E. Johnson
315 Lunar Lane
Bismarck, ND 58503

From:



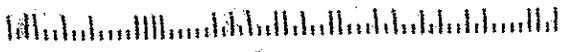
Mr. Robert Johnson
315 Lunar Ln.
Bismarck, ND 58503

BISMARCK ND 58503

12-11-2011 09:11



U.S. Army Corps of Engineers, Omaha District
ATTN: OENW0-05-T
Lake Sakakawea Surplus Water Report to A
1616 Capital Avenue
Omaha, NE 68102-4901



kelly.txt

-----Original Message-----

From: Kelly [mailto:kpwing@bis.midco.net]

Sent: Friday, January 07, 2011 3:56 PM

To: HQ-PUBLIC AFFAIRS

Subject: do not charge for the water storage

Where in the hell do you people get off charging storage fees for water? I live in North Dakota. One of your people told our paper that she was worried about water being take for Garrison dam. They been letting water out for the last five months. They say they are getting ready for spring run off. So, why are you now wanting to charge people for storage after 67 years of it sitting there?

Vanosdall, Tiffany K NWO

From: Robert Kleeman [cakleman@ndsupernet.com]
Sent: Tuesday, January 04, 2011 8:54 PM
To: Garrison Surplus Study
Subject: Lake Sakakawea Water Surplus Draft Comments

Since, from reading the draft, it does not sound like it is costing the Corps of Engineers anything to keep the water surplus that nature has given us. I feel the proposal to charge for storage of the surplus water is another case of the GREED that I am ashamed to say has hit North Dakota because of the oil industry entering the state.

Everywhere you turn someone or some group is trying to figure out how they can charge the industry or an individual for something that they do nothing for and usually charge an outrageous price.

We use Southwest Water for our personal use because we do not have access to water unless we drill a well over 2000 feet deep and then are not guaranteed good water. At this time we have been informed that this policy will not influence our water bill, but how long will that hold if the Corps is allowed to charge for something that is not costing them anything. It will probably trickle down to us eventually and we really cannot handle any more increases in our living expenses.

Contrary to popular belief not everyone who lives in Southwest North Dakota is making money off the oil and in many cases like ours, we are making none and still having to pay the inflated prices which once again GREED dictates because the demand is here.

Also, we live on the Missouri River system and that land that you use for storage was our ancestors for which you reimbursed what should be considered an embarrassing amount.

If you save the money you will spend to run a study and hire people to regulate the policy, you will probably be money ahead.

Candyce Kleemann
10680 Hwy 22N
Killdeer, ND 58640
701-764-5545

From: [Klippenstein, Brian \(Blunt\)](mailto:Klippenstein, Brian (Blunt))
To: ["moriver@howardelectricwb.com"](mailto:moriver@howardelectricwb.com); [Garrison Surplus Study](#)
Cc: [McMahon, John R BG NWD](#); ["amccarty@mocorn.org"](#); ["Bob@erc-env.org"](#); ["dludwig@mosoy.org"](#); ["dcassidy@mofb.com"](#); ["iowafarmrboy@gmail.com"](#); ["dmoore@mofb.com"](#); ["ghawkins@mofb.com"](#); ["jcpozzo@ameren.com"](#); [Muench, Lynn M LRP](#); ["mpoldberg@iowacorn.org"](#); ["PRohde@vesselalliance.com"](#); ["tsummers@mochamber.com"](#); ["Chad.Ramey@mail.house.gov"](#); ["chrisbrown@mail.house.gov"](#); ["dan.engemann@mail.house.gov"](#); ["Farmerdon@sbcglobal.net"](#); [Dukes, Corey \(McCaskill\)](#); ["Eric.Bohl@mail.house.gov"](#); [Mitas, Jim MVS External Stakeholder](#); ["justin.rone@mail.house.gov"](#); ["katy.hartnett@mail.house.gov"](#); ["lauren.ellis@mail.house.gov"](#); ["mike.matousek@mail.house.gov"](#); [Distefano, Nichole \(McCaskill\)](#); [Henry, Peter \(Blunt\)](#); [Porter, Clark \(McCaskill\)](#); ["robin.robinson@mail.house.gov"](#); ["scott.shiller@mail.house.gov"](#); ["brooke.shupe@mail.house.gov"](#); ["Curtis.Trent@mail.house.gov"](#)
Subject: Re: Garrison Dam/Lake Sakakawea Surplus Water Report and accompanying Environmental Assessment (Surplus Water Report/EA)
Date: Saturday, January 29, 2011 4:46:16 PM

Don_Lucietta@blunt.senate.mmMm_m

From: Randy Asbury [<mailto:moriver@howardelectricwb.com>]
Sent: Saturday, January 29, 2011 04:15 PM
To: garrisonsurplusstudy@usace.army.mil <garrisonsurplusstudy@usace.army.mil>
Cc: John.R.McMahon@usace.army.mil <John.R.McMahon@usace.army.mil>; 'Ashley McCarty' <amccarty@mocorn.org>; 'Bob Bacon' <Bob@erc-env.org>; 'Dale Ludwig' <dludwig@mosoy.org>; 'Dan Cassidy' <dcassidy@mofb.com>; David Sieck <iowafarmrboy@gmail.com>; 'Doris Moore' <dmoore@mofb.com>; 'Garrett Hawkins' <ghawkins@mofb.com>; 'John C. Pozzo' <jcpozzo@ameren.com>; 'Lynn M. Muench' <lmuench@vesselalliance.com>; 'Mindy Larson Poldberg' <mpoldberg@iowacorn.org>; 'Paul Rohde' <PRohde@vesselalliance.com>; Trent Summers <tsummers@mochamber.com>; Klippenstein, Brian (Blunt); Chad Ramey (Congressman Graves) <Chad.Ramey@mail.house.gov>; Chris Brown (Congressman Luetkemeyer) <chrisbrown@mail.house.gov>; Dan Engemann (Congressman Luetkemeyer) <dan.engemann@mail.house.gov>; Don Lucietta (Senator Blunt) <farmerdon@sbcglobal.net>; Dukes, Corey (McCaskill); Eric Bohl (Congresswoman Hartzler) <Eric.Bohl@mail.house.gov>; James D. Mitas (Congressman Akin) <jim.mitas@mail.house.gov>; Justin Rone (Congresswoman Emerson) <justin.rone@mail.house.gov>; Katy Hartnett (Congressman Carnahan) <katy.hartnett@mail.house.gov>; Lauren Ellis (Congressman Akin) <lauren.ellis@mail.house.gov>; Mike Matousek (Congressman Graves) <mike.matousek@mail.house.gov>; Distefano, Nichole (McCaskill); Henry, Peter (Blunt); Porter, Clark (McCaskill); Robin Robinson (Congressman Clay) <robin.robinson@mail.house.gov>; Scott Shiller (Congressman Long) <scott.shiller@mail.house.gov>; 'Shupe, Brooke (Congressman Graves)' <brooke.shupe@mail.house.gov>; Trent, Curtis (Congressman Long) <Curtis.Trent@mail.house.gov>; Kinne, Zach (Blunt)
Subject: Garrison Dam/Lake Sakakawea Surplus Water Report and accompanying Environmental Assessment (Surplus Water Report/EA)

January 29, 2011

Colonel Robert J. Ruch, Commander

U.S. Army Corps of Engineers, Omaha District

1616 Capitol Ave.

Omaha, NE 68102-4901

Dear Colonel Ruch:

Thank you for the opportunity to comment on the Garrison Dam/Lake Sakakawea Surplus Water Report and accompanying Environmental Assessment (Surplus Water Report/EA). I submit these comments on behalf of the Coalition to Protect the Missouri River (CPR) which represents the diverse interests of agricultural, navigational and utility interests within the Missouri River Basin. CPR supports responsible management of Missouri River resources and the maintenance of congressionally authorized purposes of the river including flood control and navigation.

Numerous substantive and procedural issues with the Surplus Water Report/EA demand that I urge the U.S. Army Corps of Engineers (Corps) to withdraw it immediately.

I concur with the Missouri Department of Natural Resources' (MODNR) analysis of the Surplus Water Report/EA. Specifically, I agree with the six items identified by MODNR as "of significant concern". They are:

1. Inappropriate application of the Corps' Section 6 authority;
2. Identification of surplus water where none exists;
3. Failure to properly account for water use;
4. The continued unlawful use of easements for water withdrawals;
5. Failure to comply with the National Environmental Policy Act; and,
6. Reliance on flawed analyses and assumptions.[1]

I have attached the complete statement of MODNR, without enclosures, as further detail of our concerns with the Surplus Water Report/EA. I respectfully request that each concern be addressed individually and by a detailed Corps' response.

I reiterate my appreciation for the opportunity to comment on the Surplus Water Report/EA.

Sincerely,

Randy Asbury

Executive Director

Coalition to Protect the Missouri River (CPR)

4849 Hwy B

Higbee, MO 65257

660-273-9903 Phone

573-823-7906 Cell

636-594-8401 Fax

moriver@howardelectricwb.com

www.ProtectTheMissouri.com

[1] Missouri Department of Natural Resources' letter dated January 28, 2011 to Colonel Robert J. Ruch, Commander, U.S. Army Corps of Engineers, Omaha District

[1] Missouri Department of Natural Resources letter dated January 28, 2011 to Colonel Robert J. Ruch, Commander – U.S. Army Corps of Engineers, Omaha District

From: [Linda Knox](#)
To: [Garrison Surplus Study](#)
Subject: need link for report
Date: Wednesday, January 05, 2011 9:19:34 PM

Lake Sakakawea Surplus Water Report and EA. I can't find this on the website, please forward. Thank You



GARRISON DIVERSION
CONSERVANCY DISTRICT
P.O. BOX 140
CARRINGTON, N.D. 58421
(701) 652-3194
FAX (701) 652-3195
gdcd@daktel.com
www.garrisondiversion.org

January 31, 2011

Colonel Robert J. Ruch
Omaha District Commander
U.S. Army Corps of Engineers
1616 Capitol Ave, Suite 9000
Omaha, NE 68102-4901

Dear Colonel Ruch:

This letter is intended to provide comments from the Garrison Diversion Conservancy District on the Lake Sakakawea Surplus Water Report and Environmental Assessment released by the U.S. Army Corps of Engineers.

Providing municipal, rural and industrial water has been a primary purpose of the Garrison Diversion Unit legislation and amendments since 1965. Any suggestion by the Corps that irrigation remains the primary purpose of the GDU ignores the changes in the GDU over the past 30 years as GDU legislation has been amended.

Congress passed the GDU Reformulation Act of 1986, which implemented the recommendations of the GDU Commission and focused on meeting North Dakota's MR&I needs, stating, "The Congress declares that the purposes of this Act are to: (1) implement the recommendations of the Garrison Diversion Unit Commission Final Report (dated December 20, 1984) in the manner specified by this Act; (2) meet the water needs of the State of North Dakota, including municipal, rural and industrial water needs, as identified in the Garrison Diversion Unit Commission Final Report." Importantly, one of those recommendations in the Final Report was to make water previously allocated to irrigation available for the expanded MR&I use. Congress approved a reallocation of the irrigation water supply uses of water behind Garrison Dam to make that water available for MR&I uses. As such, the Corps' recent position that it can unilaterally reallocate waters behind the dam as 'surplus water' fails to recognize the legal significance of Congressional action already approving the reallocation of irrigation and other waters behind the dam for North Dakota municipal, rural and industrial purposes.

Congress reaffirmed its long-standing commitment to make Missouri River water available to North Dakota for MR&I purposes when it passed the Dakota Water Resources Act of 2000, (DWRA). In his remarks on the United States Senate floor immediately following the vote approving the DWRA, Senator Byron Dorgan left no doubt as to the purpose of the subsequent amendments to PL 89-108, the Act of August 5, 1965, and its authorization of MR&I projects.

Mr. President,...This bill is essential to meeting the water needs of North Dakota. The bill, as amended, **will provide authorization for the development of municipal, rural, and industrial water projects across the State of North Dakota.** ...Mr. President, the Dakota Water Resources Act represents a responsible way for the federal government to fulfill their role in the state. It also represents a serious compromise on the part of North Dakota, while still meeting our highest priority water supply needs. ...

146 Cong. Rec. S10534 – 535 (2000). Congress has repeatedly recognized that the water held behind the Garrison Dam plays a critical role in meeting North Dakota's MR&I water needs and authorized the use of Missouri River water to meet those statewide needs. Since the water behind the dam has already been allocated for MR&I purposes throughout the state, there is no basis on which the Corps can claim the requested industrial uses to be 'surplus water' that can be reallocated. Water cannot be designated as surplus water if

Colonel Robert J. Ruch
January 31, 2011
Page 2

it already has an existing lawful use. The Corps cannot designate the Missouri River water in question as surplus water because it already has an existing lawful use – to supply North Dakota with MR&I water.

The requested industrial water does not meet the Corps' own definition of surplus water, which is: (1) water stored in a Corps' reservoir "that is not required because the authorized need for the water never developed or the need was reduced by changes that have occurred since authorization," and (2) water "more beneficially used as municipal and industrial water than for the authorized purpose." Water Supply Handbook, Revised IWR Report 96-PS-4 at 2-7. Neither definition fits the present facts under consideration. In fact, the opposite is true. The water stored in Lake Sakakawea is required by North Dakota and its public and private water systems, as has been authorized for MR&I use by Congress through the Garrison Acts.

Further, while the Corps relies upon the Water Supply Act of 1958 as a source of its authority for contracting and supplying surplus water from its reservoirs, that Act merely grants the limited ability to permit water storage at existing projects that had not been planned or granted initial authorization for that purpose. It permits the Corps to charge users for any modifications required to accommodate their particular, newly contemplated storage and use. MR&I water supply uses were originally contemplated as an authorized use of waters held behind Garrison Dam, and the GDU legislation amendments over the years make that crystal clear, so this is not a newly contemplated use for water held behind the Garrison Dam.

Finally, the DWRA contains critical amendments to the WSA with regard to the ability to charge for storage costs. Section 7(c) of the DWRA states:

With respect to the Southwest Pipeline Project, the Northwest Area Water Supply Project, the Red River Valley Water Supply Project, and **other municipal, industrial, and rural water systems** in North Dakota, the costs of the features constructed on the Missouri River by the Secretary of the Army before the date of enactment of the Dakota Water Resources Act of 2000 **shall be non-reimbursable.**

This language allows North Dakota MR&I interests to withdraw water from Corps' facilities without the requirement to reimburse the Corps for either the construction costs or the operation and maintenance costs of those Corps' facilities that were incurred prior to 2000. The reference to "features constructed on the Missouri River by the Secretary of the Army before the date of enactment of the [DWRA]" is a clear reference to the main-stem reservoirs on the Missouri River constructed under the Pick-Sloan Plan, including the Garrison Dam. The Corps' assessment of storage costs on the basis of the cost to construct the dam would nullify the DWRA.

Sincerely,



Dave Koland
General Manager

DK/kac

31 JAN '11

TO THE ARMY CORPS OF ENGINEERS

I AM WRITING IN REGARDS TO
THE ISSUE OF SURPLUS WATER
IN LAKE SAKAKAWEA.

AS FAR AS I UNDERSTAND IT, THE
CORPS (U.S. FEDERAL GOVT) DOES HAVE
A RIGHT TO CHARGE SOMETHING
TO USERS OF SURPLUS WATER IN
THE LAKE TO PAY FOR MAINTNANCE
COSTS. ~~WITH~~ ^{I THINK THIS IS REASONABLE} ONE EXCEPTION.

NATIVE PEOPLE SHOULD NEVER HAVE
TO PAY FOR ANY WATER ~~FOR~~ THAT
IS NECESSARY TO SUPPORT LIFE AND
THE ABILITY TO SURVIVE ECONOMICALLY.
THEY HAVE SACRIFICED AND SUFFERED
MUCH MORE THAN ANYONE ELSE AS
FAR AS LOSS OF LAND, CULTURE (EVERYTHING
REALLY).

AFTER THAT I BELIEVE PRIORITIES
MUST BE SET AS FAR AS WHO
RECEIVES WATER FIRST AND WHAT

IS PAID FOR IT.

MUNICIPAL DRINKING WATER SHOULD ALWAYS BE CONSIDERED FIRST, AS THE SIZE OF COMMUNITIES DOES CHANGE AND IF THERE IS INCREASED NEED FOR DRINKING WATER, THAT SHOULD BE SUPPLIED AT A VERY LOW COST — OR MAYBE ALSO NO COST. OTHER MUNICIPAL NEEDS SHOULD BE CONSIDERED AFTER DRINKING WATER AND THAT ASSESSED A LOWER COST (THAN THE SET AMOUNT PER CUBIC FOOT) AFTER THESE TWO ESSENTIAL NEEDS, THEN IRRIGATION, RECREATION AND ... I CAN'T THINK OF OTHERS THOUGH I AM SURE THERE ARE OTHER ENTITIES THAT WISH TO USE THE SURPLUS WATER. SHOULD PAY FOR WHATEVER THEY WANT AT THE SET PRICE. LASTLY, I DO NOT THINK THE OIL COMPANIES SHOULD GET ONE DROP OF THAT WATER TO USE IN THE HYDRO FRACTURING PROCESS

I DO NOT THINK THE PROCESS IS "SAFE" — NO MATTER WHAT THE OIL COMPANY'S PROPAGANDA SAYS. HOW CAN SOMETHING BE SAFE THAT HAS TOXIC CHEMICALS IN IT? I DON'T BELIEVE THAT IT WILL NOT POISON THE LAND AND WATER WHEN IT IS RETURNED TO THE EARTH AFTER THE OIL IS TAKEN OUT.

THE STATE GOVERNMENT HAS PRETTY MUCH ALWAYS SUPPORTED THE POLLUTERS (OIL, GAS, & COAL) BECAUSE A FEW PEOPLE CAN GET RICH WHILE THE REST HAVE TO LIVE WITH THE DESTRUCTION IT CAUSES. EVEN THOUGH WE HAVE OTHER RENEWABLE SOURCES OF ENERGY, THEY CONTINUE TO SUPPORT THE POLLUTERS SO I SAY CHARGE THEM ^{FOR ANY WATER} ACCORDING TO THE PROFITS THE OIL COMPANIES ARE MAKING. IF THEY WANT THAT WATER

AND IT LOOKS LIKE THEY HAVE
FULL SUPPORT OF THE GOVERNOR,
LEGISLATURE, WATER COMMISSION, ETC.
THEY THEY SHOWS PAY ACCORDING
TO THE PROFITS THEY ARE MAKING,
THANK YOU FOR ALLOWING
ME TO COMMENT ON THIS,

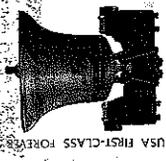
SINCERELY,

CARINNE LEE
711 2ND ST N.
BISMARCK, ND
58501

Corinne Lee
711 N 2nd St.
Bismarck, ND 58501

BISMARCK ND 58501

01 FEB 2001 PM 11



U.S. Army Corps of Engineers

OMAHA DISTRICT; CENW0-0A-T

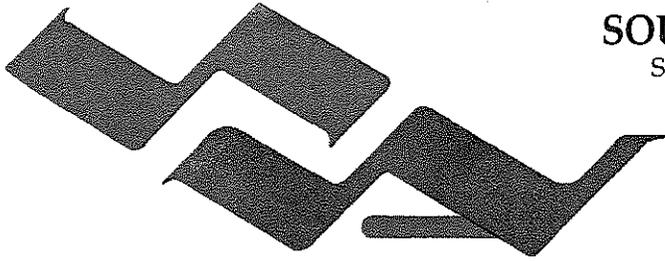
ATTN: LTJG SAKAKAWA SURPLUS WATER

1616 CAPITOL AVENUE

OMAHA, NE

68102-4901





SOUTHWEST WATER AUTHORITY

SOUTHWEST PIPELINE PROJECT BUILDING

West Industrial Park

4665 2nd Street SW

Dickinson, ND 58601-7231

(701) 225-0241 • Fax (701) 225-4058

Toll Free: 1-888-425-0241

E-mail: swa@swwater.com

Web Site: www.swa.swc.state.nd.us

January 25, 2011

U.S. Army Corps of Engineers, Omaha District
CENWO-OD-T
Attn: Lake Sakakawea Surplus Water Report and EA
1616 Capitol Avenue
Omaha, NE 68102-4901

Dear Colonel Ruch:

The release of the *Draft Lake Sakakawea Surplus Water Report and Environmental Assessment* is disturbing – to farmers, ranchers, businesses, and individuals – all who depend on the water from Lake Sakakawea to meet everyday needs. The energy, industrial, and agricultural industries, among others, offer abundant opportunities in southwest North Dakota. Unhindered and free access to Lake Sakakawea water is critical to meet the needs of these industries and individuals.

The water from Lake Sakakawea helps our cities, rural areas, and economic development prosper. This water is vital to our quality of life. Charging storage fees on water which is inherently North Dakota's is unjust.

Southwest Water Authority (SWA) wants assurances from the Corps of Engineers that the Southwest Pipeline Project (SWPP) is exempt from these storage fees and will remain so for our citizens and customers. It is our understanding the SWPP was made exempt through the Dakota Water Resources Act of 2000. SWA would also request a commitment from the Corps of Engineers that an additional intake will also be exempt.

We urge you to make the right decision for North Dakota. The state and its citizens are entitled to the natural flow of the Missouri River. Lake Sakakawea's waters should be free. It's the right thing to do.

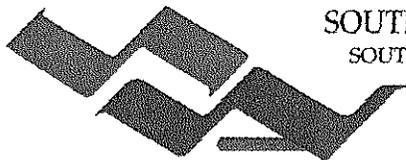
Sincerely,

Mary Massad
Manager/CEO
Southwest Water Authority

cc: Todd Sando, P.E., State Engineer, North Dakota State Water Commission



People and business succeeding with quality water.
Management, Operation, and Maintenance of the Southwest Pipeline Project



SOUTHWEST WATER AUTHORITY
SOUTHWEST PIPELINE PROJECT BUILDING

West Industrial Park
4665 2nd Street SW
Dickinson, ND 58601-7231



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U.S. Army Corps of Engineers, Omaha District
CENWO-OD-T
Attn: Lake Sakakawea Surplus Water Report and EA
1616 Capitol Avenue
Omaha, NE 68102-4901

Vanosdall, Tiffany K NWO

From: Glenn McCrory [gmccrory@bektel.com]
Sent: Monday, January 31, 2011 10:22 AM
To: Garrison Surplus Study
Cc: Ruch, Robert J COL NWO; Eileen Wehri; Jack Dalrymple; Ken Royse; Mike Dwyer
Subject: Surplus Water Study

I wish to comment on the proposed policy of charging for water taken from the Missouri River system. I am opposed to charging for water removed from the system. The 1944 Flood Control Act did not provide for such policy and later legislation does not either.

My family had to give up nearly 750 acres of productive agriculture land under threat of condemnation . Some of that land was Homesteaded by my Great-Great Grandfather. Land that would be worth probably 70 to 80 times what the Corps of Engineers paid for it to store water. Now The COE proposes to charge for water that would have been available to the landowner from the Missouri River. That water is still available and the COE does not have aright to charge for it.

Steamrolling the people of North Dakota, South Dakota and Montana with this proposal is not right and forcing legal action to stop it is not in the best interest of USA. Is there any wonder why the people question the sensibility of the Federal Government.

It is my hope that thoughtful heads in the Corps of Engineers will do the right thing and scrap this proposal!

Sincerely

Glenn McCrory
7475 Hwy 1804
Linton, ND 58552

Vanosdall, Tiffany K NWO

From: junkrigsailor@gmail.com on behalf of Jeffrey McFadden [jeffreykmc@gmail.com]
Sent: Wednesday, January 12, 2011 5:46 PM
To: Garrison Surplus Study
Subject: not surplus water

The "surplus" study, also known as the Garrison Diversion plan, does not take into significant consideration the needs of the downstream states, in particular the state of Missouri.

Anyone who remembers the Master Manual fights surely knows that there are already more claimants to the water in the Missouri Basin than there is water in many years. Communities in Missouri have increasing difficulties drawing water out of the river during low water periods.

It is without question that the users who benefit from the "surplus" water will develop permanent needs for it during the times it is available because of so-called "surpluses", and become additional claimants on this limited resources in low runoff years.

Keeping Missouri in sufficient water is hard enough now. There could be no excuse for creating an additional claimant on that water.

Sincerely,

Jeffrey K. McFadden
11054 Saint Cloud Road
Richmond, MO 64085



DENNIS ZIMMERMAN
PRESIDENT

BRAD ROOS
VICE PRESIDENT

ALLEN THIESSEN
SECRETARY/TREASURER

THOMAS P. GRAVES
EXECUTIVE DIRECTOR

January 31, 2011

U.S. Army Corps of Engineers
Omaha District
CENWO-OD-T
ATTN: Lake Sakakawea Surplus Water Report and EA
1616 Capitol Avenue
Omaha, Nebraska 68012-4901
(garrisonsurplusstudy@usace.army.mil)

Dear Corps of Engineers:

The Mid-West Electric Consumers Association appreciates the opportunity to comment on the U.S. Army Corps of Engineers' "Draft Surplus Water Report "Garrison Dam/Lake Sakakawea Project."

The Mid-West Electric Consumers Association was founded in 1958 as the regional coalition of over 300 consumer-owned utilities (rural electric cooperatives, public power districts, and municipal electric utilities) that purchase hydropower generated at federal multi-purpose projects in the Missouri River basin under the Pick-Sloan Missouri Basin Program.

The Draft Surplus Water Report ("Draft Report") contains a wealth of information and background on Lake Sakakawea and the proposed determination or surplus water. We appreciate the Corps putting together such a wide-reaching background document.

Mid-West does not oppose the Corps efforts, but insists on a more complete and accurate assessment of impacts, particularly on hydropower.

There are some serious omissions in the Draft Report's scope. The Corps does not include projects of the U.S. Bureau of Reclamation ("Reclamation") in its assessment. **Reclamation facilities are an important part of the Pick-Sloan Missouri Basin Program and should be included.**

The Western Area Power Administration ("Western") has similarly been overlooked. The Corps did not include Western in its multi-agency consultations (p.4-1, and Environmental Assessment p. 54). The models the Corps uses to measure impacts to

hydropower do not properly reflect the real costs to federal hydropower customers. **Mid-West requests that the Corps make the Western Area Power Administration a cooperating agency in this study.**

Studying the Draft Report raises a number of questions and concerns. The matter of reservoir allocations is particularly confusing. On page 2-6-7, the Draft Report identifies three zones within Lake Sakakawea: exclusive flood control, Annual Flood Control and Multiple Use, Carryover Multiple Use, and Permanent Pool. Yet, on page 3-19, the Draft Report notes that “Storage originally reserved for the irrigation purpose has not been fully utilized since the project has was [sic] place in operation, and releases for the navigation from this zone are only required during drought years.”

Our question is “What zone?” Nowhere does the Draft Report identify or quantify reservoir allocations for authorized project purposes. **We ask that the Corps provide the information on reservoir allocations by project purpose within each of the four zones identified in the Draft Report that supports the statement on page 3-19, as well as data and information on allocation by project purpose.**

Since the hydropower authorized project purpose is responsible for paying an equitable share of multi-purpose costs, how will cost allocations be shifted to reflect this change in use?

The Draft Report also notes that the Corps will use storage in the Carryover Multiple Use Zone hitherto reserved for sedimentation as the source for storage of surplus water. The Permanent Pool also has a “zone” for sediment storage, but the Corps does not consider using that storage stating:

Storage within this zone is the minimum necessary to maintain project operations (sediment storage and irrigation diversion) and to meet minimum head requirements need to support hydropower operations. For these reasons, surplus water is not available within the permanent pool. (p. 3-19)

What is the economic effect in determining costs or impacts to hydropower of using the Carryover Multiple Use zone rather than the Permanent Pool?

In calculating impacts and costs, the Draft Report does not include Ft. Peck’s support of Lake Sakakawea. Ft. Peck plays an important role in maintaining reservoir levels at Lake Sakakawea, since Montana accounts for 51% of the Missouri River’s runoff, while the entire state of North Dakota contributes 8%. **Ft. Peck costs must be included in the analysis.**

It is not entirely clear how much water is being used at Lake Sakakawea. The differing jurisdiction of the Corps (Sakakawea) and the State of North Dakota (free running river above and below Sakakawea) undoubtedly makes this a difficult undertaking. The Corps admits “The quantities of water withdrawn through these easements [existing Lake Sakakawea water users] are difficult to determine from the available data. The Corps keeps records on easement allocations, but does not collect data on actual water usage.” (3-9). **The Corps must coordinate with the State of North Dakota to get a more accurate assessment of water use.**

Mid-West is concerned about the analysis of hydropower impacts in the Draft Report. While the Corps operates the six mainstem dams as an integrated system, the 100,000 acre/feet of water is all going to come out of North Dakota – either directly from Lake Sakakawea or above and perhaps below. The additional 157,000 acre/feet of storage needed to provide this

surplus water will also come out of Lake Sakakawea. The 257,000 acre/feet dedicated to this proposal is 257,000 acre/feet that will never pass through hydro generators at Oahe, Big Bend, Ft. Randall, or Gavins Point. **We do not entirely understand this analysis and request that the Corps consult with the Western Area Power Administration to get a more accurate assessment of impacts to hydropower.**

The Draft Report notes:

. . . it is anticipated that a reallocation study of the six Federal reservoir projects within the Missouri River basin . . . will be completed, which will determine if changes to the permanent allocation of storage among the authorized project purposes and modifications to existing Federal water resources infrastructure may be warranted. (Exec summary ii)

Given that state of affairs, how does the Corps propose to integrate this Draft Report with its reallocation study, which will not be completed for several years?

To further complicate the situation, Congress authorized the Corps to study Pick-Sloan's authorized project purposes and potentially make recommendations for changes in authorized project purposes (The Missouri River Authorized Purposes Study).

Mid-West understands the urgency of the situation at Lake Sakakawea with new demands for water. However, for the Corps to move forward, there must some linkage with the other two studies noted above. Otherwise, the Corps could be conducting an analysis that will be almost immediately taken over by other events. **How is the Corps going to coordinate these various studies, all of which deal with project purposes and allocations – including cost allocations?**

Mid-West looks forward to continue working with the Corps to help resolve these issues.

Sincerely,



Thomas P. Graves
Executive Director

Vanosdall, Tiffany K NWO

From: Steve Mortenson [smortens@wil.midco.net]
Sent: Thursday, January 27, 2011 11:12 PM
To: "garrisonsrplusstudy@usace.army.mil."
Subject: Storage Fees

On the issue of COE to charge storage fees on the state of North Dakota's water I believe it is illegal and wrong. The water that flows from the Missouri River and into Lake Sakakawea is the states to manage and allocate as they feel fit. The COE has forgotten they are a government agency funded by the people and directed by the people of the United States of America. The COE has tried to become their own entity. I don't disagree that the COE needs to address the parts of flood control and power generation and a certain amount of regulation, but to deny access to the shoreline of these waters and to manage the land they have taken which prevents both recreation, energy and agriculture to grow is wrong. I am sure the initial intent was it not to be this way. Common sense has left the vocabulary of the COE. They spend wastefully on meetings, studies and anything to justify their jobs. If anyone has asked for this study by the COE on the storage fees for North Dakota waters I would like to know who it was. The letter sent to Terrence C. Rock Salt on October 28,2010 by Governor Hoeven complete states why the COE should not be charging these fees . I have worked with COE through land leases and flowage easements in the last twenty years and I have seen the changes going from bad to worse were situations with the COE arise. In conclusion I am against any storage charges that the COE are trying to impose, I believe the water belongs to the state and they should issue allocations and permits for the intakes not the COE.

Steven Mortenson water user from northwest North Dakota

Draft Surplus Water Report and Environmental Assessment for Lake Sakakawea, N.D.

Public Meeting | January 6, 2011 | 5-8 pm
Doublewood Inn, Bismarck, N.D.

Comment Form

The public review comment period for the Lake Sakakawea Draft Surplus Water Report and Environmental Assessment will run through February 1, 2011. Please return this form by Feb. 1, 2011 in order for your comments to be considered.

How to submit your comments for this public review period:

- Complete and drop off this comment form at the public meeting on January 6, 2011 at the Doublewood Inn, Bismarck, N.D.
- E-mail your comments to: garrisonsurplusstudy@usace.army.mil.
- Mail your comments to:

U.S. Army Corps of Engineers Omaha District
ATTN: CENWO-OD-T
Lake Sakakawea Surplus Water Report and EA
1616 Capital Avenue
Omaha, NE 68102-4901

All comments must be received by February 1, 2011.

Comments are being collected under the Garrison Dam/Lake Sakakawea Project North Dakota Surplus Water Report, authorized by Public Law 534 (The Flood Control Act of 1944, Section 6). Submission of comments, including personal information, is voluntary. Providing personal information, including name, address and contact information, will allow Corps personnel to follow up on and/or clarify comments and may put ambiguous comments into context. All comments will be included in the record and considered. Personal information may be included in the public record or may be excluded upon request.

Name: Ron Ness

Street Address: 120 N 3rd Street, Suite 200

City: Bismarck State: ND Zip Code: 58501

Organization/Tribe Represented: North Dakota Petroleum Council

E-mail: ronness@ndoil.org

If you do not want your name and address to be available to the public, check here [].

Please write legibly so your comments can be recorded completely and accurately. Please complete this form and drop it off at the registration table or mail it to the address shown on the left.

1. Do you have comments or concerns regarding a specific Authorized Purpose? If so, please provide those comments in the appropriate section below.

Authorized Purposes

Water Quality:

Irrigation:

Recreation:

Navigation:

Fish & Wildlife:

Hydropower:

Flood Control:

Water Supply:

The Petroleum Council supports the water supply needs as outlined, and the report appears to recognize adequately the needs of the oil and gas industry.

2. What comments or concern do you have regarding the Draft Water Surplus Report?

We support the findings of the report with regard to the needs of the oil and gas industry. We also agree that the authorization will have a positive impact to the area by reducing the road miles of the water haul trucks. It is critical that the Corps allow several access points to the resources at key locations around the lake to reduce traffic and increase safety.

3. What comments or concerns do you have regarding the Draft Environmental Assessment?

No major concerns are noted. The report does discuss site specific assessments are needed and the timeliness of such work would be important to industry.



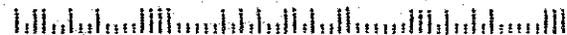
120 N. 3rd Street, Suite 200 (58501)
P.O. Box 1395
Bismarck, ND 58502-1395

BISMARCK ND 585
26 JAN 2011 174 17



U.S. Army Corps of Engineers Omaha District
ATTN: CENWO-OD-T
Lake Sakakawea Surplus Water Report and EA
1616 Capital Avenue
Omaha, NE 68102-4901

681024901



Vanosdall, Tiffany K NWO

From: LaRondeau, John R NWD
Sent: Tuesday, January 11, 2011 8:58 AM
To: Laux, Eric A NWO
Cc: Farmer, Monique L NWO; Janis, Larry D NWO
Subject: Lake Sak comment - Mike Olson (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Eric,

You have another comment if you want.

Mike Olson

Consolidated Blenders, Inc

3303 W 12th St

Hastings, NE 68902

402-463-3191

John

From: Mike Olson [mailto:mikeo@morent.net]
Sent: Tuesday, January 11, 2011 8:50 AM
To: LaRondeau, John R NWD
Subject: Re: Corps Clippings - January 10, 2011 (UNCLASSIFIED)

John,

I guess I just felt the need to comment, but mostly to share with you my frustration with river politics.

If my comment isn't nonsense, you may forward it.

Mike Olson

----- Original Message -----

From: LaRondeau, John R NWD <<mailto:John.R.LaRondeau@usace.army.mil>>

To: Mike Olson <<mailto:mikeo@morent.net>>

Sent: Tuesday, January 11, 2011 8:23 AM

Subject: RE: Corps Clippings - January 10, 2011 (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Mike,

Do you want your comment to be part of the official review process. I can forward it officially?

John

From: Mike Olson [<mailto:mikeo@morent.net>]

Sent: Monday, January 10, 2011 4:40 PM

To: LaRondeau, John R NWD

Subject: Re: Corps Clippings - January 10, 2011 (UNCLASSIFIED)

John,

When I'm reading these articles, I am more than a little troubled by the remarks of the North Dakotans. I have always understood that one may own the land under the water, but not the water flowing over it. Nebraska farmers understand that even when irrigating from a flowing stream, there are rules and regulations that apply, and in many cases a cost may be charged by whichever governing body is responsible. This whole effort by North Dakota is to gain control of the Missouri River at the expense of others downstream. I would certainly hope the Corps of Engineers will be diligent in maintaining its authority.

Mike Olson

----- Original Message -----

From: LaRondeau, John R NWD <<mailto:John.R.LaRondeau@usace.army.mil>>

Sent: Monday, January 10, 2011 4:15 PM

Subject: Corps Clippings - January 10, 2011 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Vanosdall, Tiffany K NWO

From: corey paryzek [paryzek@nemont.net]
Sent: Friday, January 21, 2011 10:46 PM
To: Garrison Surplus Study
Subject: Opposed to Charge for our own water

I am opposed to COE charging for water already owned by the state of ND. It is the states right to use the water flowing through our state. Just because it is impounded temporarily does not justify the government in charging for it. It is impounded over ND lands given up by the people of ND in the interest of using the water and protecting down stream people.

Corey Paryzek
4874 hwy. 85 lot 334
Williston ND 58801

Vanosdall, Tiffany K NWO

From: Caroline Pufalt [cpufalt@sbcglobal.net]
Sent: Tuesday, February 01, 2011 3:27 PM
To: Garrison Surplus Study
Subject: Garrison Surplus Study -public review

Thank you for the opportunity to comment on the Garrison Dam/Lake Sakakawea Project North Dakota Draft Surplus Water Report.

The Army Corp has failed to consider and evaluate several critical environmental impacts in this report.

It has failed to assess the impacts of the use of diverted water in the oil and gas industry, in particular its use in hydrofracking. Given the history of the oil and gas industry, it is likely that some of the diverted water, mixed with chemicals, will pollute groundwater. That groundwater may also be

a well water source.

The Army Corp has a greater responsibility under the law than just evaluating the absence (diversion) of an estimated amount of water over a period of time. If it knows for what and approximately where that water will be used, it should evaluate whether that activity will likely impact the Missouri river and watershed, or impact the Army Corps' ability to further carry out its mission under the Master Manual and other guiding documents and laws.

Hydrofracking is exempt from some requirements of the Clean Water Act and Safe Drinking Water Act. The legality of past and future practices is currently in dispute. Thus the Army Corps' release of water from the Missouri for this purpose potentially exposes communities and natural resources to threats of contamination.

The report should also evaluate potential for water contamination through subsurface migration by examining existing migration pathways, as well as new pathways which may result from fracking. Hydrofracking also results in contaminated waste water and poses a risk of surface spills.

The report also fails to examine the impact of this diversion and the resulting oil and gas industry expansion on the Williston reach of the Missouri river, from the Yellowstone to headwaters of Lake Sakakawea. This is one of the few relatively natural sections of the Missouri and is critical for the recovery of the Pallid Sturgeon.

The report also fails to adequately examine and explain its estimates for the future water needs from oil and gas industry using hydrofracking. If its estimates are low the Army Corps could be creating a greater problem in the future, limiting its ability to meet its management responsibilities for all purposes and communities along the Missouri. For example, might this commitment lead to the need to release more water from other reservoirs, or reduce flows needed for fish and wildlife?

The Army Corp has not fulfilled its responsibilities in this report. It has failed to take a reasonable view of the scope of impacts resulting from the proposed diversion. Given these failures in the report, this planned diversion is not appropriate.

Thank you for consideration of our comments.

Sincerely,

Caroline Pufalt

on behalf of MO Chapter, Sierra Club.

cpufalt@sbcglobal.net

7530 Delmar

St Louis MO 63130

Vanosdall, Tiffany K NWO

From: Quandt Brothers [quandtbr@drtel.net]
Sent: Friday, January 07, 2011 3:51 PM
To: Garrison Surplus Study
Subject: Water Charge

Dear sirs;

This is a very disturbing idea to try to charge for surplus water in lake Sakakawea that our natural flows of the Missouri river. These were promised back when ND had to make a huge sacrifice that we are paying for everyday for rest of our life, In the loss of revenue off the 550,000 acres of land that was took from them to develop flood control for down river. In exchange for this loss we were promised water for irrigation that already was blow smoke up our but. We farm along the James River and right now are trying to keep the 5000 Acre Test Projected funded, principal challenge lack of dependable water that was promised through the Mcclusky canal out of Missouri river. Let's wake up and put a quick end of this issue and move on to more important issue. Thank You John Quandt

Vanosdall, Tiffany K NWO

From: Redmond, Jim [Jim.Redmond@briarcliff.edu]
Sent: Sunday, January 30, 2011 5:52 PM
To: Garrison Surplus Study; Eckert Uptmor, Kayla A NWO; Laux, Eric A NWO; Janis, Larry D NWO
Subject: Lake Sakakawea Surplus Water Report

Thank you for the opportunity to comment on the Garrison Dam/Lake Sakakawea Project North Dakota Draft Surplus Water Report.

As the Sierra Club Representative to the Missouri River Recovery Implementation Committee, I must highlight one of the major oversights in the Surplus Water Report. While the Corps must consider and plan carefully for any diversion of Missouri River water from Lake Sakakawea, the authors of the report are defining the Corps role on the Missouri too narrowly. They are not considering the environmental impacts of the Oil and Gas industry along the mainstem in North Dakota. Most especially the Report makes no reference to the industry's threats to the \$40 million Recovery Program strategy of redesigning and reconstructing the Yellowstone Irrigation Intake. The authors of the report instead encourage the continued diversion of water by the oil and gas boom from the Williston Reach of the Missouri River. The Army Corps is shirking their role under the Endangered Species Act when they assume that industry is subject only to the North Dakota Industrial Commission. I will be sharing my concerns with the MRRIC Recovery Program Work Group.

The North Dakota Game and Fish Department claims in their policy papers: "The critical importance of this [Williston] reach to several fish species of national predominance, as well as its significance to other federally listed and important wildlife species, indicates that this reach is the most significant aquatic habitat in North Dakota." The Yellowstone Intake program multiplies the significance of that claim. While the Corps report on Surplus Water focuses on the feasibility and cost of taking the water from Lake Sakakawea, it also seems to condone or encourage the exploitation of the Williston reach. Given the Oil and Gas industry's history of leaving areas polluted and of responding to a boom without adequate training for its workers, there is great danger to the pallid sturgeon and other native fish of this important free flowing reach of the Missouri River.

In addition to this failure to place this project in the larger context of Species Recovery, the Report should include in its financial calculations the maintenance costs of addressing the problems faced by North Dakota in the reservoir. The North Dakota representative to the Missouri River Recovery Implementation Committee has repeatedly asked for Ecosystem Restoration monies to address accretion, invasive species, access and other maintenance issues with Lake Sakakawea. \$8 an acre foot for diverted water is too low a figure if you take into account requests to the federal government. Too low a cost for Missouri River water becomes a federal subsidy of the oil and gas industry—an industry that has already flourished with federal subsidies.

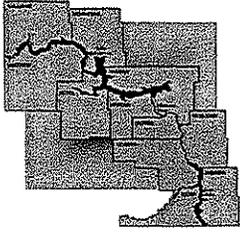
When the damage from the oil and gas boom has affected the waters of the state of North Dakota, the Army Corps will be assigned a role to remedy that damage. Merely because the industry has obtained a temporary exemption from regulations of the Clean Water Act does not mean that they will be protecting the lands and waters of the Missouri watershed. The Environmental Assessment of the Surplus Water Project for Lake Sakakawea is not complete if it ignores the unregulated use of this water within the state. Much of the water used in fracking will not affect accessible ground water. However the size of this oil /gas frenzy

insures that there will be thousands of acres of land and wetlands contaminated with chemically laced water. Some operations will not contaminate, but some will.

My last concern is that the authors of the Report have drastically underestimated the amount of water this industry will need once the 10 year Study Period has ended. The Report merely reiterates the industry claim that this diversion will be temporary. But to financial circles, industry leaders are predicting that North Dakota will surpass Alaska in 10 years in the pumping of oil. In addition to the increased water usage from horizontal drilling, the multiplication of wells in a short period of time (BOOM), and the need to REFRAC many of these wells, the Corps in its reservoir management role will be faced in 2020 with an argument that the oil and gas industry is too important to starve it of water. Then the Corps management options will be constrained.

Dr. Jim Redmond

Conservation Chair Northwest Iowa Group of the Sierra Club
Sierra Club Representative to the Missouri River Recovery Implementation Committee



Missouri River Joint Water Board

3501 Winnipeg Drive, Bismarck ND 58503

Phone 701.202-5459

Jan. 6, 2011

Comments Provided to the Corp of Engineers

Proposed System Storage Study

Gentlemen, my name is Ken Royse and I am offering these comments on behalf of the Missouri River Joint Water Resource Board. The Joint Board represents counties along the Missouri River in North Dakota and I have the privilege of serving as chairman of that Board.

I want to start my testimony by saying that I am very disappointed in this effort by the Corps to conduct a study which appears to have an 'end game' plan solely designed to charge water users within the State for water from the Missouri River system. The Study concept seems to stem from either a notion that 1) the 1944 Act authorized such a storage fee, or 2) that waters of the Lakes (both Sakakawea and Oahe) are dangerously short of available water and therefore is a resource that needs to be carefully metered.

Let's deal with the notion of 'possible authorization' first. The Corps simply cannot quote from the 1944 Act as having such authorization and now, nearly 70 years since the passage of the Act, believes that it needs to be implemented. The Corp either fails to recognize or refuses to recognize that there have been amendments to that Act which have changed any possible such requirement. One very recent amendment to the 1944 Act is contained in the Dakota Resource Act of 2000 which says clearly that reimbursement of systems features constructed before the date of the Dakota Water Resource Act of 2000 shall not apply to municipal, industrial, and rural water systems in North Dakota (cite Section 7.c of the

Dakota Water Resource Act of 2000). It is a federal law. It was passed by our US Congress. It applies to the Corps of Engineers. It simply is not allowed.

If the concern is shortage of water from the system, then that is a completely different logic. We can understand the average person on the street being concerned when there are numerous reports stating that oil well fracking takes nearly a million gallons and that hundreds if not thousands of such wells are envisioned in our State in the near future. But the Corps should be able to put such language and numbers in a proper perspective, even if the average person on the street cannot. Even at a million gallon allocated per oil well for fracking needs that is only 3 acre feet of water per well. And even at a 1000 such wells, that is only approximately 3,000 acre feet. That amounts to 3,000 acre feet out of a Lake that has a capacity to hold nearly 25 million acre feet of water.

Three thousand out of potentially 25 million; it is a single penny out of an \$8,000 bill.

If the Corp believes water availability is the concern, then they are clearly making a problem appear where there is none. The water is available and it is illogical and irrational to attempt to charge for water, which could be put to a beneficial use, which otherwise will flow essentially unused to the Gulf of Mexico.

The best case defense of the Corp in this issue is simply that you made an error; an error in interpreting or applying current water withdrawal requirements, or an error in calculating or projecting the needs that may occur from Lake Sakakawea. If you made that error, or errors, now is the time to pull back, admit those mistakes, and allow all of us in ND to continue to use water from the system in the manner and fashion which conforms to State and Federal laws and requirements.

The worst case in this issue is that there is some manipulation occurring. That manipulation may be by interests who have a desire to deprive the State and users within the State of withdrawing water from the reservoir system. Does someone or some interest have an agenda to stop irrigation in ND; does someone or some interest have a desire to

limit water supply for MRI needs. Is there some interest or desire by someone to reserve water in the system for downstream needs. Or is this just some attempt to add money to the federal pocket book by what really amounts to a tax and levy on our use of the water.

As this gets discussed we in North Dakota see no corresponding Study proposed for a tax on benefits for flood control, power generation, fish and wildlife enhancements, or navigation. Certainly the water behind the dams serves to provide those benefits. Perhaps the Corps believes that such benefits are a 'non-consumptive' use of the water and therefore are independent from the storage issues of the dams. We disagree. Without the dams there is no flood control. Without the water from the lake there are no navigation releases. Navigation is just as much as a consumptive use of the water of Lake Sakakawea as is water supply. Water used for navigation is water that is reserved, it is used, it is discharged and it is gone from the Lake to satisfy a very small benefit. It is a consumptive use.

The Corps needs to be reminded of the fact that water supply is one of the eight original and current authorized purposes of the 1944 Flood Control Act. It is one of the reasons that ND agreed and participated in a forfeiture of over 500,000 acres of land for the Lake; it is one of the benefits that the Three Affiliated Tribes were assured they would receive by sacrificing over 150,000 acres of their best land, the most fertile and productive land of the reservation, for the Lake.

This issue is now one of the most significant water management issues for the State of North Dakota. It is equal to solving the Devils Lake dilemma, it is equal to flood control in the Red River Valley and it is equal to the ongoing MRAPS process.

We urge the Corps to reconsider this proposed Study and action. We urge our State leaders to continue to aggressively resist this effort to deprive us of an unencumbered use of water from the Lakes of the system

Vanosdall, Tiffany K NWO

From: pete scheel [petescheel@gmail.com]
Sent: Friday, January 07, 2011 3:05 PM
To: Garrison Surplus Study
Subject: opposition to plan

Please do not block North Dakotas and the Three Affiliated Tribes rightful access to Lake Sakakawea water. Thankyou, Pete Scheel, Fargo, ND

Voices for Lake Oahe

January 13, 2011

U.S. Army Corps of Engineers

1616 Capitol Avenue

Omaha, NE 68102-4901

P.O. Box 482 • Linton ND 58552

701-254-4267

RE: System Surplus Storage Study

Sixty seven years after the 1944 Flood Control Act was established you say that the flood control act authorizes you to do a study on surplus reservoir water in Lake Oahe and Lake Sakakawea. Your system storage study will attempt to identify and quantify surplus reservoir water which will then give you the ability to issue contracts and charge a fee to anyone wishing to use this water, including industrial operations, rural irrigators and municipal water supplies. Even current users who have not paid fees in the past may be required to pay them now. The fees will be based on allocated annual amounts of water not on the amount of water that is actually used. All this is being done to try and recover the costs for the initial construction of the dams as well as the ongoing maintenance of these federal facilities. This study is going to proceed even though you are currently doing a five year, \$25 million Authorized Purposes study which, depending on its findings, could render the surplus storage study's findings useless.

Even though North Dakotans gave up 500,000 acres of prime farm land to construct the reservoirs, they never received the full benefits which were promised to them. Now North Dakotans are being asked to pay again. The down stream states which received the flood control benefits from the original construction of the dams will not have to pay one cent! We will be repaying money the federal government spent for the land they took for the reservoirs in the first place.

North Dakotans should be allowed to use the water that is available from the rivers natural flow and not be charged for it just because there is now a reservoir. The rivers natural flow would provide ample water to meet all of North Dakota's water needs even if the reservoirs did not exist.

It seems ridiculous that North Dakotans have to once again foot the bill. You have to wonder who gave the authorization to do another study before the first one is complete. Who ever authorized this second study needs to step back, take a look at what they are proposing and realize this is not a fair and equitable proposal.

Randy G. osch
Chairman VFLO

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Vanosdall, Tiffany K NWO

From: Tom Schrempp [tschrempp@waterone.org]
Sent: Tuesday, February 01, 2011 11:43 AM
To: Garrison Surplus Study
Cc: Michael J. Armstrong; Chuck J. Weber; Eric R. Arner; Tom Schrempp; Peterson, Sandy MVS External Stakeholder; jepp@bpu.com; dlgray@bpu.com; djohnson@bpu.com; cstewart@bpu.com; mcauthon@boonville-mo.org; kkelley@indepmo.org; mmclaughlin@indepmo.org; rmach@sioux-city.org; fgenovese@stlwater.com; drea@stlwater.com; cskouby@stlwater.com; ddrummey@cbwaterworks.com; waterdir@ctcis.net; mike_klender@kcmo.org; jim_mellem@kcmo.org; jeffa@lvnworth.com; dennislwater@kc.rr.com; lesia@kc.rr.com; johnlvwater@kc.rr.com; lcnrd@hartel.net; Shields, Jim; Siadek, Gene; bob.fuerman@amwater.com; cindy.hebenstreit@amwater.com; thomas.simmons@amwater.com; greg.weeks@amwater.com; Taylor, Deborah A NWK; Myers, Larry L NWK
Subject: MRPWSA comment on Lake Sakakawea Draft Surplus Water Report, Environmental Assessment
Attachments: image001.gif

The Missouri River Public Water Supply Association appreciates the opportunity to make comments concerning the Lake Sakakawea Draft Surplus Water Report, Environmental Assessment. Below are the concerns our organization and its member utilities have with the report:

- It is our understanding that none of this would be an out of basin transfer.
- The surplus is out of sedimentation storage, which is below conservation storage and not above it. From a water accounting standpoint, if we get into a drought, will target levels be lowered by the volume of the surplus contract? Otherwise we may see curtailments in flow sooner in a drought than was designed. An example is the Navigation Preclude is at 32 million acre ft. Does it reduce to 31.9 MAF? Granted 100,000 AF is not very significant, but it sets a precedent.
- There is a statement that they expect storage to be reallocated in the next 10 years. Is this reallocation study actually MRAPS? MRAPS is a study to consider whether the Authorized Purposes are still appropriate, but it doesn't go the next step of reallocating storage. Is there another study or plan underway to reallocate storage? MRPWSA doesn't think the Corps should be making statements like this that seem to indicate reallocation is a done deal.
- On the flip side, the study says that almost all of the water could be diverted from the free flowing stretches of the Missouri River anyway, so they will get their water whether it's from storage or a diversion from the Missouri River. Preventing it from being taken from storage won't significantly affect the volume of the reservoir system.

Based on the above discussion, MRPWSA can support the short term use of Surplus Water from Lake Sakakawea so long as:

1. None of the water is transferred out of the Missouri River Basin.
2. The storage accounting won't penalize us for sediment storage being used, i.e. we would expect the target levels for flow reductions be reduced by the amount of the sediment storage used.
3. This is not the venue for the Corps to speculate on whether storage will be reallocated in the next 10 years and any reference to that concept should be stricken from the report.

Tom Schrempp

President

Missouri River Public Water Supply Association (MRPWSA)

913-895-5820

From: U.S. Army Corps of Engineers, Omaha District [mailto:monique.l.farmer@usace.army.mil]
Sent: Wednesday, January 12, 2011 11:13 AM
To: Tom Schrempp
Subject: Corps extends public comment period for Draft Lake Sakakawea Surplus Water Report

Corps extends public comment period for Draft Lake Sakakawea Surplus Water Report

Omaha, Neb.- The U.S. Army Corps of Engineers, Omaha District, has extended the public comment period for the Draft Lake Sakakawea Surplus Water Report and Environmental Assessment by an additional 15 days, giving the public an opportunity to provide their input and recommendations through Feb. 1, 2011.

"This report has generated a significant amount of public interest, and our goal is to ensure that the public has enough time to review the report, and provide us with their comments and input, which we will take into consideration as we move forward with developing the final report," said Larry Janis, project manager.

The draft Lake Sakakawea Surplus Water Report and EA are available for viewing at: www.nwo.usace.army.mil/html/pd-p/review_plans.html <<http://USACEARMY.pr-optout.com/Url.aspx?520028x314260x830016>> and in hardcopy at libraries in Bismarck, Dickinson, Garrison, Riverdale, Williston, New Town, Beulah and Hazen, N.D. The public may submit comments via comment forms available at libraries where the report is located. They may also provide written comments, which should be mailed to: U.S. Army Corps of Engineers, Omaha District; CENWO-OD-T; ATTN: Lake Sakakawea Surplus Water Report and EA; 1616 Capitol Avenue; Omaha, NE 68102-4901. Comments can also be emailed to: garrisonsurplusstudy@usace.army.mil. All comments must be postmarked or received no later than Feb. 1, 2011.

BACKGROUND: The draft surplus water report proposes temporarily making up to 257,000 acre-feet of storage (100,000 acre-feet of yield) per year within the Garrison Dam / Lake Sakakawea Project, N.D. available for municipal and industrial water supply use. Temporarily making surplus water available will allow the Omaha District to enter into surplus water agreements for up to 257,000 acre-feet of storage for surplus water to meet regional water needs until a permanent reallocation study can be completed. The draft EA, attached to the report, identifies baseline environmental conditions and analyzes potential impacts from the proposed use of surplus water.

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<http://us.vocuspr.com/Url.aspx?520028x314261x515498>

If you would rather not receive future communications from U.S. Army Corps of Engineers, Omaha District, let us know by clicking here. <<http://USACEARMY.pr-optout.com/OptOut.aspx?520028x24691x302837x3x1875733x24000x6&Email=tschrempp%40waterone.org>>
U.S. Army Corps of Engineers, Omaha District, 1616 Capitol Ave., Ste. 9000, Omaha, NE 68102
United States

Vanosdall, Tiffany K NWO

From: Jerry Shae [jerry.shae@BARTWEST.COM]
Sent: Monday, January 31, 2011 1:41 PM
To: Garrison Surplus Study
Subject: Public Comments on U.S. Army Corps of Engineers Lake Sakakawea Surplus Water Study & Environmental Assessment

To the US Army Corps of Engineers:

I am an active irrigator and water permit holder from the state of ND. I also hold a permit from the Corps of Engineers to withdraw water from Lake Sakakawea. I have reviewed the Lake Sakakawea Draft Surplus Water Report, Environmental Assessment. I respectfully object to the plan to start charging State of North Dakota water permit holders storage fees for water in Lake Sakakawea for the following reasons:

1. A vast amount of water flowed through the Missouri River in North Dakota prior to construction of Lake Sakakawea. According to Art XI, Section 3 of the North Dakota constitution, all flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes. Previously existing river flows that continue through Lake Sakakawea should not be considered stored water and should not be subject to any storage fee, because the State would have access to that water even if the dam did not exist.

2. In my opinion the Corps of Engineers does not have authority to charge for water storage, as section 301(b) of the 1958 Water Supply Act provides that recovery of capital costs may extend for a period of up to 50 years. The 50 year time period has passed, therefore the COE should not have the ability to charge for water storage costs to repay the construction cost of the Garrison Dam.

3. The State of North Dakota has access to Missouri River Water outside the Lake Sakakawea project, as recognized in your No Action Alternative, therefore State authorized users should not be charged for water withdrawn from inside the project. The project restricts access to a vast portion of the Missouri River.

4. In addition to natural flows, it is my understanding that the State of North Dakota has the right to develop 1.9MM acre feet reassigned from the Bureau of Reclamation in 1986 without payment of any storage fees.

5. I further understand that Section 7 of 1944 Flood Control Act provides that water systems in North Dakota do not have to pay for water features constructed prior to December 2000.

6. Finally, the proposed storage fees would make irrigation uneconomic in many cases.

Accordingly, the plan should be revised to remove any charge for water storage.

Yours Truly,

Jerry Shae

4650 Tomahawk Trail South

Mandan, ND 58554

This e-mail and any files transmitted with it are confidential and intended solely for the use of the addressee. If you receive this transmission in error, please notify the sender and delete this e-mail. No employee or agent is authorized to conclude any binding agreement on behalf of Bartlett & West, Inc. with another party by e-mail.

Vanosdall, Tiffany K NWO

From: dakota woman [onedakotawoman@yahoo.com]
Sent: Thursday, January 13, 2011 8:33 AM
To: Garrison Surplus Study
Subject: Lake Sakakawea Comment

Hanh. I absolutely disagree with the idea to charge for 'water storage' in our lake.

I've been in business most of my life, and last I heard, dams notwithstanding, the Great Holy put that water in the river for everyone without charge. While it costs money to maintain the dams, we Indns have suffered hugely from them. Which you know, whether you give a tinker's flying damn or not - and we believe for you of the Corps, the operational word is "not"..

You are supported by taxes, so are the dams. You already have a budget to maintain the dams. There is no need to charge businesses for 'storage' when it's already stored behind those dams.

The idea to charge for storage is just another way to try to double taxes for a segment of the population. i.e., the business segment. And it's a bad idea.

So drop this idea. Now. Thank you for hearing me in a good way now.

Carel Two-Eagle; CVO; Indian Maid Products Inc.; Mandan, ND 58554

<< I am woman! I am invincible! I am TIRED! >> You might take a look at my custom work & pass the word: www.Dogmocassins.DevHub.com or www.PhotoBucket.com/Dakota Woman << Buy Handmade >> Wopila tanka! / Thank you!

COMMENTS ON LAKE SAKAKAWEA SURPLUS WATER REPORT AND EA:

There is a water depot in Howie Township south of New Town, ND operated by Mike Ames of Agri-Industries of Williston, ND and a local farming family. There was irrigation in place prior to the depot being installed. This water depot is used by the oil companies for their millions of gallons of water needed for their industry. The innumerable trucks that are accessing this water have contributed greatly to the destruction of the county road which is travelled to reach the depot. The operators of the depot have no responsibility in repairing this road and are yet the ones making the money by selling the free lake water. No money goes to the Corps, county, or township. If the water is to be available to the public at no cost, then the water depot should either be not allowed or it should be there as a service, not as a business that is seeing a profit. Millions of gallons are being removed from the lake and are being sold by individuals who received it for nothing. The oil companies are paying for it, so why shouldn't the water depot operators also have to pay for it? Since oil companies are already paying for water, there is little to no chance of them leaving if the Corps asks for a payment for water. Irrigation is a different scenario as it is used IN a personal business, not AS a personal business such as is the case with a water depot. Maybe there should be a small to moderate gallon amount set for free use (normal usage by an average person) and a charge for anything above that (which could include intense irrigation, also).

Shelly Ventsch
8861-34th St. NW
New Town, ND 58763
701-627-4270

Tom Littlefield
3375-86th Ave. NW
New Town, ND 58763
701-627-4981

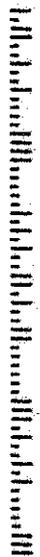
Shelly Ventsch
8851 34th St. NW
New Town, ND 58763

Mid County Council of Engineers, Brooke R. Birk
Order: for the for the answer - Burphey ASOTAR Report + EA
1616 Capital Avenue
Brookings, NE 68102-4901

MINOT ND 58701
PM
25 JAN
2011



6810234901



Vanosdall, Tiffany K NWO

From: Paul Waletzko [pbletzko@aol.com]
Sent: Wednesday, January 05, 2011 10:49 PM
To: Garrison Surplus Study
Subject: Tax on ND water

Dear Garrison Surplus folks,

My Name is Paul Waletzko:

I am writing you about the appalling information I am hearing about the taxing of North Dakota's water. This is the very reason why North Dakota is not seeking federal government help on the Devil's Lake and Red River diversion projects. As a citizen of North Dakota, this is the reason we don't want anything to do with the spending that the federal government is doing and why we replaced all the folks that want a huge federal government (Pomeroy and Dorgan). This akin to the federal government wanting to take money from the rich and giving it to the poor (distribution of wealth). Just because the state of North Dakota has a billion dollar surplus the federal government thinks they have a right to that money. Well this is not something the citizens of the USA want. We thoroughly reject this proposal. Please do not pursue this any further - this water is already North Dakota's water - we should not have to pay for this water.

Thank you,

Paul

Public Meeting Transcript and Submitted Comments

January 6, 2011

Meeting Sign-In Sheet (Elected Official/Press)	
Project: Lake Sakakawea Draft Surplus Water Report/EA	Meeting Date: January 6, 2011
Facilitator: Larry Janis	Place/Room: Doublewood Bismarck, ND

Name	Affiliation	City	State
Gov. Dalrymple	ND Gov		
Chairman Hall	Three Affiliated Tribes		
Shane Goettle	State Director for Sen. Horne's office		
Todd Sando	ND State H2O Commission		
Wayne Stenehjem	ND Attorney General		

MEETING SIGN-IN SHEET

(INDIVIDUALS PROVIDING VERBAL PUBLIC COMMENTS)

Project: Lake Sakakawea Draft Surplus Water Report/EA

Meeting Date: January 6, 2011

Facilitator: Larry Janis

Place/Room: Doublewood Bismarck, ND

Number	Name	Affiliation	City	State
1	Alan Water	DPW City of Minot		
2	Maynard Helgeas	Irrigator in Kidder Co. Greenvision Grp.	West Fargo	
3	Pat Wheeler	Private	Minot	
4	Bill Sheldon	Farming	Ray	ND
5	Mike Ames	Agri Industries	Williston	ND
6	Mary Massed	SW H2O Auth.	Dickinson	
7	Roy Packineau	Property owner	Independence Point	ND
8	Brian Grossman	Irrigator/Farmer	Linton	ND
9	Kevin Schmidt	Irrigator	Mandan	
10	Steve Mortenson	Irrigator/Industrial	Williston	
11	Dean Harman	Irrigator	Bainville	MT
12	Roger Bearce	Irrigator	Beauford	
13	Dale Behaa	International Western	Williston	ND
14	Milton Lindvig	ND Irrigation Assoc.	Bismarck	
15	Brandon Ames	Element Solutions	Bismarck	ND
16	Terry Fleck	Chairman Friends of Lake Sak.	Bismarck	ND
17	Ken Royse	Mo River Joint H2O		
18	Gene Veeder	Board McKenzie Co.	Watford City	ND
19	Herb Grenz	H2O District Private Citizen		

MEETING SIGN-IN SHEET (INDIVIDUALS PROVIDING VERBAL PUBLIC COMMENTS)

Project: Lake Sakakawea Draft Surplus Water Report/EA

Meeting Date: January 6, 2011

Facilitator: Larry Janis

Place/Room: Doublewood Bismarck, ND

Number	Name	Affiliation	City	State
20	Lanny Nelson ^(left)	Private Citizen	Bismarck	ND
21	Robert Harms	Private Citizen	Bismarck	ND
22	Mike Dwyer	ND H2O Users	Bismarck	ND
23	Wes Klein	ND Farm Bureau	Hazen	ND
24	Darrell ^{Casteel}	Element Solutions	Bismarck	ND
25	Todd Sands	ND State Hwy		
26	Kris Kitko	Private Citizen ^{Commission}	Bismarck	ND
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**MEETING SIGN-IN SHEET
(INDIVIDUALS PROVIDING VERBAL PUBLIC COMMENTS)**

Project: Lake Sakakawea Draft Surplus Water Report/EA

Meeting Date: January 6, 2011

Facilitator: Larry Janis

Place/Room: Doublewood Bismarck, ND

Number	Name	Affiliation	City	State
39	Eric Volk	Exec. Dir. ND Rural H2O systems Assoc.		
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MEETING SIGN-IN SHEET (INDIVIDUALS PROVIDING VERBAL PUBLIC COMMENTS)

Project: Lake Sakakawea Draft Surplus Water Report/EA

Meeting Date: January 6, 2011

Facilitator: Larry Janis

Place/Room: Doublewood Bismarck, ND

Number	Name	Affiliation	City	State
58	Kate Vandemore	Private citizen		
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U.S. ARMY CORPS OF ENGINEERS
OMAHA DISTRICT

Draft Surplus Water Report
and Environmental Assessment
(EA) for Lake Sakakawea,
North Dakota

TRANSCRIPT OF
PUBLIC HEARING

Taken At
Doublewood Inn
1400 Interchange Avenue
Bismarck, North Dakota
January 6, 2011

BEFORE MR. LARRY JANIS
-- U.S. ARMY CORPS OF ENGINEERS --

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1 (The proceedings herein were had and made
2 of record, commencing at 6:02 p.m., Thursday,
3 January 6, 2011, as follows:)

4 MR. JANIS: Let's go ahead and get
5 started, it's six o'clock, have everybody take
6 their seats. If you don't have a seat, I
7 apologize.

8 My name is Larry Janis. I'm with the
9 Corps of Engineers out of Omaha, Nebraska, the
10 Omaha District, and I'm glad to be here. Thank you
11 for coming. It's a very full house. We expected a
12 good turnout and I appreciate you taking the time
13 to come and spend with us. Tonight we'll be having
14 a public comment period where we will take public
15 comment.

16 I wanted to share a couple things about
17 that, but before I do that, I wanted to let you
18 know that we will have a court reporter that will
19 be recording those comments and I will be asking
20 folks to come down the -- what's left of the aisle
21 and make the presentation over here at the podium,
22 and we will have a list. I think most of you
23 signed up, but I'll let you know that if you'd like
24 to speak and if you could sign up, feel free to
25 stand up and go sign up and then come back and that

1 way we can make sure we get through everybody.

2 I'll go over some of these ground rules
3 again, but due to the size we want to make sure we
4 try to get everybody in, so comments, if you can
5 keep them to three minutes or less, that would be
6 fabulous. That way we can make sure we get through
7 everybody and so everybody has an opportunity.

8 Well, again, tonight's public comment
9 meeting is really structured in an open forum
10 presentation and public comment. From 5 to 6 we
11 had the open forum. The posters are now gone and
12 they're in the hallway to provide for more seats,
13 but I'm giving the welcome now. We'll go through a
14 short presentation for those of you who haven't had
15 a chance to read the report. I'll try to hit the
16 highlights of that report. For those of you who
17 have, I don't want to bore you, but I thought it
18 would be just good to get everybody on the same
19 playing field, then after that we'll start with the
20 public comment.

21 So, again, the report is structured in a
22 certain way. We do planning studies in the
23 specific order and use guidance to do those, and
24 this is the outline for the report. Basically it
25 starts with an introduction, goes to a little bit

1 of background on Lake Sakakawea, goes into plan
2 formulation, which we'll define a little bit
3 because some may not be familiar with plan
4 formulation, how we would implement the plan,
5 conclusions, recommendations and appendices.

6 So let's go ahead and start with the
7 introduction, what's in there. The Corps of
8 Engineers has two water supply authorities. The
9 first is a 1958 Water Supply Act. It allows for
10 permanent reallocation of storage to municipal and
11 industrial purposes, but the one we use for this is
12 Section 6 of the Flood Control Act of 1944. We've
13 taken a quote and put it on the screen for you and
14 it was also on the posters, but basically it allows
15 the Secretary of Army to make a decision on if
16 there's surplus water, quantify that surplus water,
17 and then if they deem it reasonable, charge for
18 that surplus water.

19 And while it would be nice to be able to
20 have a very clear, definitive number for the amount
21 of surplus water, over a number of surplus, under a
22 number, the law has given us and the guidance has
23 given us these two definitions that we need to meet
24 to define surplus water: Water stored in a
25 reservoir that's not required because the

1 authorized need never developed, and then the
2 second definition of surplus water, water that
3 could be more beneficially used M&I -- and I'll use
4 M&I in place of municipal and industrial quite a
5 bit, so hopefully that's okay -- then the
6 authorized purpose that, when withdrawn, it
7 wouldn't significantly affect the other purposes.
8 So you can see these are two subjective, but
9 they're two definitions that we worked with in the
10 report to be able to define surplus water.

11 There's some additional information our
12 guidance gives, and that's listed here on the
13 screen. As I mentioned earlier, prices and terms
14 as the Secretary deems reasonable, and that for
15 surplus water, the amounts are normally small, the
16 contracts are for temporary, so they're five,
17 expandable to another five, and their agreements
18 are for M&I purposes, and that's what the report
19 addresses.

20 So let's move on to background. In the
21 report we talk about Lake Sakakawea, and that's the
22 purpose of the report. It happens to be the first
23 of six that will be coming out. We will do surplus
24 water reports for all six reservoirs. Because of
25 the need and the information that we received from

1 the state and the industry, the municipal and
2 industrial agencies, we decided to do Lake
3 Sakakawea first.

4 So this is the study area. I'm sure
5 you're very familiar with the lake. And I wanted
6 to let everybody know that there are eight
7 authorized purposes for Lake Sakakawea, and we list
8 those in the report, also, and you can see those on
9 the screen. We're talking specifically tonight
10 about the municipal and industrial water supply
11 authorized purpose and that's the focus of the
12 study.

13 Another thing I think that's really
14 helpful is just to explain how the reservoir is
15 separated. We have different zones for each of our
16 lakes. We have a permanent pool down at the
17 bottom, we have what we call a carryover multiple
18 use zone, then we have an annual flood control and
19 multiple use zone, and then an exclusive flood
20 control zone. Several years ago we didn't think we
21 were going to get up into here, but this year we
22 actually were in the exclusive flood control pool,
23 but as of today we are nearing where we would
24 normally want to be by March 1st, and that would be
25 at this elevation at the top of the carryover

1 multiple use zone. We're slightly above that. I
2 believe 1842 or so is where we're at today.

3 In the report we have a table, and I know
4 this is hard to see and, again, the report is the
5 best place to see it, but I put this up because
6 under the background section I wanted to let people
7 know that we have received requests for intakes and
8 these are the ones that we received to date. Now,
9 there are only three applicants that you will find
10 in the report, and these asterisks actually show
11 seven locations for those three applicants, and the
12 reason for that is that when we started on this
13 report, those were the three that were in place and
14 the requests were in place and, therefore, we
15 included them in these reports. It doesn't mean
16 the other ones will be excluded. They will be
17 evaluated. We will complete applications with the
18 rest, but those three, International Western,
19 Element Solutions, Lake Sakakawea Water Depot, and
20 Sakakawea & Associates are the three that are
21 mentioned in the report. And it also shows the
22 amounts that they have been asking for in terms of
23 an amount of storage or amount of yield.

24 So we move on to the plan formulation
25 section in the report. In that section we go

1 through the plan formulation process. This, again,
2 is a process that the Corps goes through for all of
3 its studies, and you can see it's a step-by-step.
4 Basically we identify the problem and
5 opportunities, we do an inventory and forecast what
6 we call existing conditions, formulate alternative
7 plans, evaluate those, compare them and then we
8 select the recommended plan. So you should see in
9 the report that sequence being followed.

10 Now, the purpose of the study is very
11 important to line out in the very beginning. The
12 purpose has two -- is twofold. Basically it's to
13 identify and quantify whether surplus water is
14 available, and then it is to determine whether the
15 use of this water, the surplus water, is the most
16 efficient method for meeting the needs of the area,
17 in this case the area around Lake Sakakawea.

18 UNIDENTIFIED SPEAKER: How much poison are
19 you putting into the water -- in your clear water
20 supply with all the chemicals? I want to hear
21 about that.

22 MR. JANIS: Well, sir, we're going to do
23 the presentation and take comments.

24 UNIDENTIFIED SPEAKER: I don't want to
25 hear about the presentation. I want some answers.

1 How much chemicals -- of toxic chemicals are you
2 going to poison our water supply so that we don't
3 have to take showers in toxic chemicals and there's
4 people that are dying? Answer that question.

5 MR. JANIS: Sir, I would be more than
6 willing to entertain that question afterwards, but
7 not right now, so let's continue with the
8 presentation.

9 UNIDENTIFIED SPEAKER: What about the 596
10 chemicals that aren't disclosed and Dick Cheney
11 didn't have to -- the Clean Water Act and the Clean
12 Air Act and the Clean Breathing Air Act, what about
13 that? Answer those questions. I want to hear
14 about it.

15 MR. JANIS: If you could please take a
16 comment sheet and I'll make sure that you list
17 those and I'll be able to answer those for you
18 after the presentation.

19 UNIDENTIFIED SPEAKER: You're destroying
20 western North Dakota. You're destroying our
21 western state.

22 UNIDENTIFIED SPEAKER: We want to hear the
23 presentation.

24 UNIDENTIFIED SPEAKER: I'll leave.

25 MR. JANIS: All right. The second part

1 after we identified the purpose of the study is
2 what are the needs. The needs basically are the
3 needs of the oil and gas industry. Those are many
4 of the applications that we currently have on file.
5 We also have other M&I water needs and those are
6 identified in the report.

7 Here's a table, Table 3.6 in the report,
8 that really itemizes those demands. We have the
9 oil and gas industry demand at 27 thousand
10 acre-feet per year, we have the other small and
11 large institutional users at 23 and 27 thousand
12 acre-feet, and then we have an unidentified.
13 Basically it's what we think even more future
14 demands could be. We've come up in the report and
15 stated that about a hundred thousand acre-feet is
16 what we believe is needed to identify this amount
17 of surplus water in this report for M&I purposes.

18 One concept that's in the report that's
19 kind of hard to understand that we wanted to make
20 sure that we talked about, and I bring it up here,
21 is storage versus yield. While we would think it
22 would be a one-to-one relationship, one acre-foot
23 of storage equals one acre-foot of yield, that's
24 not true. Basically to be able to reliably provide
25 the water storage that's needed, you have to have

1 more storage than the actual water that you're
2 going to need. So when you get a water right from
3 the state or the tribe, you need more storage to be
4 able to have access to that because of the
5 fluctuation year by year in the water levels and
6 reliability of pool levels.

7 So in the report it does a better
8 explanation, but what it comes down to is you
9 divide the carryover multiple use storage, which in
10 the report is defined as 39 million acre-feet, by
11 the net yield of 15.2 million acre-feet, which
12 results in a ratio of 2.57. We will come back to
13 this so remember this, if you can. So if you
14 wanted one acre-foot, it would require 2.57
15 acre-foot of storage.

16 In a report we usually identify a no
17 action alternative and a proposed action, so let me
18 talk a little bit about those.

19 First, the no action alternative, what
20 would happen if nothing was done, if we continue on
21 the way we are, and this basically outlines that
22 the no action alternative that we used was a
23 combination of the following: Missouri River
24 water, some conversions of irrigation, the
25 groundwater that's currently being used, and then

1 the continued use of existing water depots. So
2 those things are included in what we call the no
3 action alternative, and it's really what's being
4 used to compare the proposed action to.

5 The proposed action really is saying we're
6 going to temporarily provide water from storage
7 dedicated to other authorized purposes, i.e., use
8 water out of Lake Sakakawea. And we're going to
9 use -- in the report we state we would propose that
10 we use water storage out of the sediment area. If
11 you remember that cross-section, the sediment area
12 showed that permanent pool at the bottom, but
13 actually it carries up because sediment doesn't
14 always go straight to the bottom, so you have some
15 sediment storage in the carryover multiple use
16 zone. But basically when we design a dam, there's
17 always some amount of acre-feet designated for
18 sedimentation because that's just one of those
19 inevitable things that happens, and so in the
20 report we talk about 70 percent of what was
21 designed for sediment load has not been used, so 30
22 percent to this point has been used since the
23 construction of the dam. There's a load of about
24 25,000 acre-feet per year of sediment coming in.
25 And then basically we determined in the report that

1 sediment -- or surplus water would be available
2 from the sediment storage, and then we would
3 continue to use other continuing existing sources,
4 like groundwater that had been identified before in
5 the proposed alternative.

6 So what does this mean? Basically this
7 chart again is Table 3.20 in the report, but it
8 shows the no action alternative where the water
9 would come from for the hundred thousand, shows the
10 proposed action alternative where the water would
11 come from for that alternative, and it was
12 interesting that the difference between the
13 proposed action and the no action really was there
14 would be an additional 527 acre-feet difference
15 between the two. So you can tell that that's not a
16 lot different because, again, under this no action
17 alternative the water would still be coming from
18 sources, but it would just be different sources.
19 Here the proposed action shows the water coming
20 from the different sources listed on the table,
21 but, again, proposed action only uses 527 acre-feet
22 more surface water than the no action alternative.

23 Table 3.21 really talks about the impacts
24 to other project purposes, which is one of the
25 requirements we need to do in our report because,

1 if you remember, two of the reasons for declaring
2 surplus water had to make sure that you didn't
3 impact other project purposes.

4 When we did our quantitative analysis, our
5 modeling, basically we showed very small to
6 negligible impact to the other project purposes.
7 And that's listed here on the bottom of the table.

8 The last thing we do in plan formulation
9 is we do a cost comparison. The no action
10 alternative, and I will go ahead and use the yield
11 numbers, resulted in a \$364 per acre-foot of yield.
12 The proposed action was \$20 -- or almost \$21 per
13 acre-foot of yield. And, again, not to get into
14 too many details, it was really based on the
15 updated cost of storage that we made that
16 determination of \$20.91.

17 Moving on to plan implementation, which
18 was the next chapter in the report, we talk a
19 little bit about how we shared this information,
20 got information back from the public, we sent
21 letters to the tribes, the governors and we've done
22 agency coordination, and, again, we did the public
23 meeting tonight and we will be reviewing those
24 comments.

25 The conclusion section really goes back to

1 what was the purpose of the study, what was our
2 conclusion. I've listed the two purposes, and
3 basically we believe sufficient surplus water is
4 available to provide a hundred thousand acre-feet
5 of yield, and we've also determined, as we said, it
6 is the most efficient way to do it, and that's
7 using surface water from Lake Sakakawea.

8 The final thing is we had to make a
9 recommendation, and that's in the last chapter of
10 the report, and these are the two recommendations
11 that the Colonel made in the report. Basically the
12 use of surplus water from 257,000 acre-feet of
13 storage by M&I water supply be approved. That was
14 the first recommendation. And the second
15 recommendation is awful long, but basically the
16 annual payment for that surplus water would be 8.13
17 per acre-foot of storage, or \$20.91 per acre-feet
18 of yield, and those are at 2011 price levels and
19 they're annual figures.

20 The appendices -- I won't go through all
21 the appendices, but I know that the environmental
22 assessment is an important part of every document
23 that we do. The NEPA requirements in general
24 require that agencies make an informed decision, we
25 can do the report, we put out a draft, we get

1 public comment, we need that public comment, and
2 that's why we're here tonight, as well as having a
3 public comment period to receive those comments.

4 The agencies such as ourself must use a
5 planning process or a NEPA process so that we
6 consider alternatives and that we provide that so
7 people can take a look at that decisionmaking
8 process. The EA for us is the document that we're
9 using as the NEPA document. And we did prepare one
10 for this action, and the purpose and need, which
11 goes back to the first things I shared with you, is
12 the basis for that alternative analysis that
13 happens in the EA. And then we have to be diligent
14 and we have to inform the public and involve the
15 public in this process and, therefore, we're here
16 tonight.

17 Specifically, when you read the EA, here
18 are just a few of the things that are in that, and
19 it's just a summary, but the depletion impacts were
20 very small, and you can read about that in the
21 report. The direct effects from the anticipated
22 water intake construction -- and, again, that's for
23 those three applicants and seven locations I listed
24 earlier in that very small chart. I apologize it
25 was so small. And, again, the impacts for that

1 direct effects appear to be small and minor. And
2 then the secondary and cumulative effects from
3 that, actually we found that there could be some
4 benefits to using Lake Sakakawea water, primarily
5 from reducing the total truck traffic. And the
6 other thing in terms of the secondary cumulative
7 effects from the research that we've done is that
8 the availability of water is not a controlling
9 factor for the oil and gas industry. There are
10 other controlling factors for that.

11 So that was a brief presentation of the
12 report, trying to go front to back, to familiarize
13 everybody with what the content is.

14 We are now to the public comment period.
15 Just a few ground rules that I want to go over.
16 Again, you probably already know and, again, if you
17 haven't gotten on this list, feel free to still go
18 back and put your name on the list and we'll get
19 updates to that. If you hear something you want to
20 comment on, we can always add you to the list.

21 The general order will be elected
22 officials first and then the general public.
23 That's just the protocol we follow. I will call
24 your name, and I do apologize in advance if I
25 butcher your name, so I will try to pronounce it as

1 best as I can, but I'm not perfect on that matter.
2 And then if we could limit comments to three
3 minutes or less, I think we should be able to get
4 through the list of people and let everyone
5 comment. If for some reason we have time at the
6 end and you want to comment again or add to your
7 comment, I would be more than willing to do that,
8 but we'll see what the time allows and how it goes.

9 One other thing, if people could come down
10 to the front and use the podium, I think the mike
11 is on, but I'll make sure that it's on before we
12 have people come down, and then as I call the next
13 name, we'll just have people come down and leave at
14 the same time.

15 We also have a court reporter here. We
16 might have to take a break every once in a while,
17 at least every hour, if not before. She'll give me
18 the high sign, that dirty look that says I need a
19 break and we'll take a short break. It doesn't
20 mean you have to leave, but we do have water in the
21 back, you can get a breath of fresh air, but we'll
22 make sure that that break is no longer than five
23 minutes so that we can make sure we get everybody
24 in.

25 Without any further information, we'll go

1 ahead and get started on calling people for their
2 comments. All right. The first commenter will be
3 the Governor of North Dakota.

4 GOVERNOR DALRYMPLE: Good evening. I am
5 Jack Dalrymple, the Governor of North Dakota. I
6 appreciate the opportunity to comment on the Lake
7 Sakakawea draft surplus water report and
8 environmental assessment released by the U.S. Army
9 Corps of Engineers on December 16, 2010. As stated
10 previously in letters dated June 10, 2010, and
11 October 28, 2010, the State of North Dakota has
12 serious concerns about the Corps' recently
13 introduced restrictions and policies regarding
14 access to water in the Missouri River. It seems
15 that Corps policies are now blocking access to the
16 free flow of the Missouri River which is rightful
17 property of the State of North Dakota. This is an
18 outrage.

19 In 1957, the Corps completed construction
20 of the Garrison Dam, creating a reservoir that
21 holds more than 24 million acre-feet of water.
22 Today Lake Sakakawea is the third largest manmade
23 lake in the United States and is unique to all
24 other reservoirs in the United States. The Corps'
25 reason for the sudden implementation of this policy

1 stems from problems that have arisen on East Coast
2 reservoirs due to their smaller size. Unlike the
3 East Coast reservoirs, the storage capacity of the
4 Missouri River main stem reservoirs vastly
5 overshadows any proposed water storage needs within
6 North Dakota by several orders of magnitude. The
7 blanket policy proposed by the Corps is utterly
8 inappropriate for the State of North Dakota.

9 Prior to the enactment of a 2008 Corps
10 Real Estate Policy, water users were able to gain
11 access to water in the Missouri River main stem
12 system through a land easement application process
13 and associated permits without being charged a fee.
14 The draft report states that the Corps has issued
15 142 water intake easements around Lake Sakakawea,
16 only one of which has a fee-based surplus water
17 supply agreement. These easements were issued over
18 the last 60 years without the need for a
19 reallocation study or water storage contract.
20 Thus, the Corps' recent change in position of
21 requiring the allocation of storage in reservoirs
22 and issuance of water storage contracts to existing
23 and potential water users under the 1944 Flood
24 Control Act and the Water Supply Act of 1958 is
25 unjustifiable for a number of reasons.

1 First, the Missouri River is a vital water
2 source to the State of North Dakota that existed
3 prior to the construction of the main stem
4 reservoirs. According to Article XI, Section 3 of
5 the North Dakota Constitution, "all flowing streams
6 and natural watercourses shall forever remain the
7 property of the state for mining, irrigating, and
8 manufacturing purposes." The Missouri River
9 continues to flow through Lake Sakakawea today and
10 cannot be considered stored water due to permanent
11 rights held by the State. North Dakota water users
12 must have access to the river without cost and
13 without the requirement of surplus water supply
14 agreements.

15 Second, the main stem reservoirs were
16 constructed with planned benefits to the states
17 where land and resources were impacted.
18 Approximately 550,000 acres of prime farmland were
19 taken in North Dakota for the construction of the
20 main stem reservoirs. Congress has since
21 recognized the majorities of these benefits have
22 been realized downstream and has provided
23 amendments to the 1944 Flood Control Act to address
24 some of these inequities.

25 Additionally, Section 301(b) of the 1958

1 Water Supply Act provides that recovery of capital
2 costs may extend for a period of up to 50 years.
3 That 50-year time period has expired. The Corps
4 should not have the ability nor a federal
5 responsibility to charge water storage costs to
6 repay for the construction costs of the dams for
7 surplus water when original repayment contracts
8 were never required at the start of construction.
9 The Corps' proposal to charge for construction
10 costs is unacceptable. They then exacerbate this
11 ill-conceived idea by basing their fees on what
12 would be the costs to construct the dam today.

13 Third, the draft report only proposes a
14 storage fee for water users in the upper basin
15 states that withdraw water directly from the main
16 stem reservoirs, but does not charge downstream
17 users a similar fee. Reservoirs like Lake
18 Sakakawea provide numerous benefits for all users,
19 not just those that withdraw water directly from
20 the reservoirs. Hydropower, navigation, water
21 supply, and flood control are just some of the
22 benefits reaped by downstream water users that are
23 not charged a fee.

24 The Missouri River, including Lake
25 Sakakawea and Lake Oahe, is valuable to the State

1 of North Dakota and is a resource that should be
2 readily available to access without cost. Access
3 to Lake Sakakawea alleviates environmental and
4 infrastructure concerns within the western part of
5 the state and also benefits communities statewide
6 through water projects such as the Red River Valley
7 Water Supply Project, the Northwest Area Water
8 Supply Project, and the Southwest Pipeline Project.
9 Restrictions in access would affect these very
10 projects, the farmers and ranchers that rely on
11 access for irrigation purposes, hinder the
12 development of domestic energy resources and
13 eliminate the Three Affiliated Tribes and the
14 Standing Rock Nation from freely accessing water
15 supply.

16 As development in North Dakota continues,
17 Missouri River water becomes an important component
18 to the growth of the state and the nation. Just as
19 important is the ability to access Missouri River
20 water in a timely manner in order to meet the
21 immediate water supply needs of the people of North
22 Dakota.

23 In summary, I ask you to continue to
24 expedite the work required to process easement
25 requests that are currently before the Corps.

1 Further delay of processing these easements is
2 unacceptable. Using U.S. Army Corps of Engineers'
3 easements to block North Dakota's access to its own
4 rightful water supplies is not only an improper use
5 of the intended purpose of these easements, but is
6 also an unconscionable and unjust attempt to
7 achieve monetary gain where none is justified.
8 Financial claims have not been sought in the past
9 and contradict states' rights and congressional
10 authorizations.

11 All considerations for the use of Missouri
12 River water have been settled in the past and
13 should not be open to further discussion. I urge
14 the Corps immediately to continue to provide water
15 access to existing and potential water users
16 without cost.

17 MR. JANIS: Thank you, Governor. I was
18 going to also mention if people have actually
19 written out their comments and they want to leave
20 them with me, that would be fine, too. Again, I'll
21 have them recorded on the transcript, but I want to
22 make that available.

23 The second person I have on the list is
24 the chairman of the Three Affiliated Tribes,
25 Chairman Hall.

1 CHAIRMAN HALL: Thank you. Larry, I
2 remember you from a few years ago working with you
3 when I was chairman my first term. My name is Tex
4 Hall. I'm the tribal chairman of the Three
5 Affiliated Tribes, the Mandan, Hidatsa and Arikara
6 Tribal Nation, located on the Fort Berthold Indian
7 Reservation in west central North Dakota.

8 We're very concerned about this proposed
9 action that the Corps is putting forward with this
10 study. First of all, there was no consultation.
11 Larry, as you know, we're a federally recognized
12 tribe and as part of your requirements under
13 presidential executive order, you are mandated as a
14 federal agency to consult with an Indian tribe that
15 is adversely affected by this type of action, so
16 I'm very concerned. Has that -- has that
17 consultation order been repealed by President
18 Obama? In my understanding it's not.

19 And I was just in D.C. in December and
20 Secretary Salazar was talking and was putting forth
21 that the Interior has the best consultation policy,
22 so I'm curious as to why the Army Corps has not
23 provided an example of consulting with our tribe.
24 And we clearly feel this would be an adverse
25 action, not only on our MR&I, or our municipal and

1 rural and industrial water needs, but our economic
2 with oil and gas as well as recreation and for our
3 individual households, that many of our tribal
4 citizens are still hauling water, yet the Army
5 Corps wants to study this for seven years and store
6 this and charge a fee while our water needs have
7 barely 50 percent at best been provided under acts.

8 And the second point I'd like to make is
9 that we're -- we are a treaty tribe -- an 1851 Fort
10 Laramie Treaty tribe and we were inundated by the
11 1944 Flood Control Act and also the 1948 Taken Act,
12 and in the congressional act it's very clear that
13 our tribe was -- as condemnation was forced upon us
14 by the Army Corps of Engineers 60-plus years ago,
15 it was clearly stated that we would have ample
16 supply of water needs for present day and for
17 future and yet, again, this would be an adverse
18 action on that.

19 And then the next item I'd like to talk
20 about is the Winters Doctrine. As you know, Larry,
21 that is a Supreme Court case decision that
22 authorizes our tribe, the Three Affiliated Tribes,
23 to primary water rights. We're a primary water
24 rights user, and so the Winters Doctrine is very
25 clear, you know, that our tribe as we're looking to

1 look at our water needs and looking at a
2 quantification study of our water for present day
3 and for future uses, again this would have an
4 adverse effect and it's in violation of the
5 President's executive order on consultation.

6 So, again, Larry, I don't know what
7 happened to Colonel Ruch. I know in my previous
8 negotiations with Colonel Jeff Beaty back in the
9 day when I first met you actually, Larry, you guys
10 were very good about exercising that consultation
11 and working with the tribes on a government-to-
12 government consultation on any type of a -- when we
13 were talking about burying or repatriating
14 ancestral remains for our tribe, Standing Rock and
15 all the tribes along the Missouri, you guys did a
16 good job at that, so I don't know what happened,
17 Larry. I've been gone for four years, but I
18 haven't been gone that long. I mean, there's some
19 clear actions that to me the Army Corps has stepped
20 over here.

21 And so we are requiring that, Larry, that
22 the Army Corps live up to that executive --
23 presidential executive order that President Obama
24 has reaffirmed. And so we're hopeful that we be
25 given a chance -- our tribe be given a chance to do

1 that, to work with you. And, finally, the bottom
2 line is that since we've just been made aware of
3 this -- actually, I was made aware of it through
4 the newspaper, and not a good way to be made aware
5 of what the Army Corps is -- I never got a letter
6 from your office, from the Omaha District and that
7 really surprises me. I think it's beyond an
8 oversight, Larry. And I just came from an
9 intertribal meeting, Standing Rock was there,
10 Turtle Mountain, Spirit Lake, and all of the tribes
11 talked about not receiving a letter from the Army
12 Corps, so this doesn't look -- this doesn't bode
13 good for your agency on the complete lack or total
14 disregard for consulting with us tribes.

15 But the bottom line, everybody feels
16 collectively, all the tribes, that this would have
17 an adverse effect and limit our ability to use
18 water for our tribal needs and we have our water
19 rights, so if we have our own water rights, why
20 would the Corps try to even think that it would
21 store and then charge a fee for us to use our own
22 water? Larry, that doesn't make any sense. If you
23 own something, why would you -- why would the Corps
24 charge us for our own water.

25 So it really befuddles me. It's really

1 amazing that, again, this type of action -- and I
2 haven't met Colonel Ruch, but if you could take a
3 message that our tribal council would like to meet
4 with Colonel Ruch, and we join the State's efforts
5 and the Governor's words about this would have an
6 immediate economic harm to our tribal nation and we
7 oppose any type of a proposed action that the Corps
8 is putting forward. Thank you very much.

9 MR. JANIS: All right. Next is Shane
10 Goettle --

11 MR. GOETTLE: Goettle.

12 MR. JANIS: Goettle?

13 MR. GOETTLE: Yes.

14 MR. JANIS: -- from Senator Hoeven's
15 office.

16 MR. GOETTLE: Good evening. My name is
17 Shane Goettle and I am the state director for U.S.
18 Senator John Hoeven.

19 Senator Hoeven extends his greetings to
20 those gathered here this evening, and he's asked me
21 to make a few remarks on his behalf regarding the
22 Lake Sakakawea draft surplus water report and
23 environmental assessment released by the U.S. Army
24 Corps of Engineers on December 16, 2010.

25 I want to state from the outset that I

1 believe Senator Hoeven shares the sentiments
2 expressed by Chairman Hall, and the Senator also
3 fully concurs with the legal position and points
4 outlined by Governor Jack Dalrymple this evening.
5 I want to commend the Governor for laying out the
6 issues so succinctly. I won't repeat his points,
7 but please know they concur with Senator Hoeven's.

8 So, rather, tonight I intend to appeal to
9 history and common sense. And while there are many
10 legal points to be made, these legal arguments can
11 only stand the test of time if they are centered on
12 principles of fairness and equity, and, I might
13 add, with the respect to the traditional conduct of
14 all the parties in question.

15 First let me say, in 1889 North Dakota
16 became a state, and at the time that it did, it
17 took possession and control of the waterways of
18 North Dakota, including the Missouri River as it
19 enters the western border of the state near
20 modern-day Williston and exits the border south of
21 modern-day Bismarck. This is explicitly recognized
22 in North Dakota's constitution.

23 That was the state of play before Garrison
24 Dam was built. North Dakota controlled this river.
25 It controlled access and use. It could tap this

1 water for recreational, agricultural, domestic,
2 industrial and other uses. The federal 1944 Flood
3 Control Relief Act did nothing to alter North
4 Dakota's rights to the natural flow in the Missouri
5 River. While a reservoir was indeed created behind
6 the dam, North Dakota maintains its rights to the
7 natural flow. So, in other words, if all the water
8 behind the dam were to be released downstream
9 tomorrow, leaving nothing in the reservoir except
10 what remains in the Missouri River and its natural
11 flow, that water would belong to the State of North
12 Dakota.

13 So the state has a right to the natural
14 flow of this water. We have the absolute right of
15 access before it hits the reservoir, and the right
16 of access and use after it flows over Garrison Dam.

17 Now, the easement application and
18 permitting process in place prior to 2008 respected
19 North Dakota's access to the Missouri River water
20 for the state's use and, correspondingly, for the
21 use by the state's citizens and businesses. On the
22 other hand, the allocation of storage and water
23 storage contracts does not.

24 My second main point this evening, that
25 the idea of using water storage contracts more than

1 50 years after the fact to begin recovering costs
2 for construction is not only beyond the provisions
3 of the 1958 Water Supply Act, but also beyond any
4 rationally articulated policy. It simply does not
5 make sense.

6 After half a century, that burden should
7 not be imposed on the citizens and businesses of
8 North Dakota. We in North Dakota bore the heavy
9 costs and disruption associated with establishing
10 this reservoir. Families were moved, tribes lost
11 land, whole towns were relocated. And as a state,
12 we accepted this for the benefits that would accrue
13 not only to this state, but to the country in terms
14 of flood control and the safety of downstream
15 residents and businesses who were benefited from
16 the taming of the Missouri River. As a matter of
17 equity, our industries and citizens should not now
18 be looked to as the sole source for such recovery.

19 At a time when our nation needs jobs,
20 North Dakota is moving forward. We have a business
21 climate that is the envy of the country. But we
22 need water to expand our economic base and create
23 more jobs through the many farms, businesses and
24 citizens that look to the Missouri River for this
25 basic commodity.

1 Senator Hoeven urges the Corps to process
2 the easement requests in front of it expeditiously
3 and withdraw from its proposals to seek capital
4 recovery from North Dakota-based companies and
5 citizens who seek to access Missouri River water
6 from the reservoir.

7 It's a matter of states' rights. It's a
8 matter of equity and fairness, and it's a matter of
9 common sense. I thank you for the time you've
10 allotted me this evening.

11 MR. JANIS: Next is Wayne Stenehjem from
12 the North Dakota Attorney General.

13 MR. STENEHJEM: Close. My name is Wayne
14 Stenehjem. I'm the Attorney General of North
15 Dakota, and I appreciate the opportunity to be here
16 this evening to provide testimony.

17 North Dakota has been blessed with many
18 natural resources, and the Missouri River is one of
19 the greatest of those natural resources. As a
20 remarkable and grand river, American law, not just
21 North Dakota law, but also the law of the United
22 States, gives the river special legal status and
23 recognizes the state's special interest in it.

24 Consistent with this status, prior to
25 statehood the United States held the Missouri River

1 in trust for the benefit of the future State of
2 North Dakota. Federal law prohibited the
3 government, except in limited and exceptional
4 circumstances, from holding onto the river or
5 conveying it to other interests or otherwise
6 depriving North Dakota of this asset.

7 The United States Supreme Court has
8 repeatedly recognized that navigable rivers like
9 the Missouri are a fundamental attribute of a state
10 and its sovereignty. It is a principle adopted by
11 the citizens of our state in our state
12 constitution, which declares that flowing streams
13 and natural watercourses shall forever remain the
14 property of the state. There is good reason why we
15 here in North Dakota refer to the bed of the
16 Missouri not as public land, but as sovereign land.

17 Before the federal government dammed the
18 Missouri, the river provided the needs for those
19 who lived near it. Our people, the farmers, the
20 ranches, the businesses, along with the wildlife,
21 all relied on it and all were satisfied while
22 leaving much, much water to spare and to send on
23 downstream to our neighbors. Its natural flow even
24 during the lowest of flow periods was, and
25 continues to be, more than plentiful for those

1 needs. Nature's providence is more than enough to
2 continue to meet our needs.

3 Article 3 -- Section 3 of Article XI that
4 has already been referred to, but which I think
5 bears repeating, clearly provides that all flowing
6 streams and natural watercourses shall forever
7 remain the property of the state for mining,
8 irrigation, and manufacturing purposes, and this
9 provision in the constitution was accepted by the
10 United States Congress at the time when it admitted
11 North Dakota into the union on those terms.

12 River flows that continue to Lake
13 Sakakawea are not, and should not be, considered
14 stored water because the state would have been
15 entitled to access to that water even if the
16 Garrison Dam had never been built. While it is not
17 just, nor do I think legal, for you to demand that
18 we get your permission to use water that naturally
19 flows through our state, it borders on insult, on
20 insult to demand that we pay for it. And the law,
21 recognizing as it does North Dakota's unique and
22 sovereign interest in the Missouri River, limits
23 the Corps' authority over those natural flows.

24 You are aware, I'm sure, as aware as I am,
25 that changes in the operation of the river system

1 often brings litigation. I will not reiterate the
2 specifics of our legal position, the Governor has
3 covered them, Senator Hoeven has covered them as
4 well, I'm not going to reiterate them here tonight
5 and I know you have been provided with an outline
6 of our legal position previously, but know this,
7 North Dakota sacrificed enormously for the
8 construction of the Garrison Dam, and while the
9 Corps built those dams, it did not put natural
10 flows through the Missouri River valley. The Corps
11 has some authority to manage the dam, but not the
12 kind of authority that it asserts here, and I'm
13 confident that a court would recognize such limits
14 and the extent to which the proposal that you have
15 in front of us exceed those limits.

16 For the record, there should be no doubt
17 that the State of North Dakota is obligated and I
18 am, as Attorney General of the State of North
19 Dakota, obligated to do everything that it must to
20 assure its authority over and ownership of the
21 water that belongs to us. We think the course that
22 you are proposing is contrary to law and in
23 violation of federal law, state law and clearly
24 established Supreme Court juris prudence. Thank
25 you very much.

1 MR. JANIS: All right. Next is Todd
2 Sando.

3 MR. SANDO: Good evening, Larry. I'm Todd
4 Sando. I'm the state engineer and chief engineer
5 and secretary for the North Dakota State Water
6 Commission. I thank you for the opportunity to
7 provide testimony.

8 The North Dakota State Water Commission
9 and the Office of the State Engineer are opposed to
10 the Corps of Engineers requiring payment from water
11 users to withdraw water from the Missouri River
12 within the boundaries of the lands taken for the
13 main stem reservoirs. The Lake Sakakawea surplus
14 water report maintains that the intent is to charge
15 for surplus storage in the reservoirs by requiring
16 water storage contracts as a condition for an
17 easement to construct intake works on the Corps'
18 property. In doing so, the Corps is clearly
19 obstructing access to, and use of, Missouri River
20 natural flows, which are the waters owned by the
21 people of North Dakota. As the agency responsible
22 for appropriations of North Dakota's waters, the
23 Corps does not have the legal or constitutional
24 standing to encumber our appropriations for
25 beneficial uses in this manner.

1 The Corps of Engineers is clearly
2 challenging the State of North Dakota and the upper
3 basin states' rights to access our natural flows
4 through this surplus water report process. The
5 choice being presented to the regions most impacted
6 by the construction of the reservoirs is, one, no
7 water access or, two, to incur additional costs for
8 water access, even when the original benefits of
9 water supply for the state have never been fully
10 realized. Any reference in the report that the
11 State of North Dakota's preferred alternative for
12 water supply is use of surplus water is incredibly
13 wrong. Water supply from the natural flows of the
14 Missouri River, accessed through a Corps land
15 easement, is preferred.

16 We do not want our protest to the surplus
17 water report to delay current easement applications
18 from being processed. However, we do need to
19 assert our rightful claim that surplus water
20 contracts are not required for these water
21 withdrawals from the Missouri River, even within
22 the reaches inundated by the reservoirs.

23 The Corps first halted access to Missouri
24 River water in North Dakota this past June, when it
25 refused to issue an easement to South Central Water

1 District for a drinking water intake. After
2 providing an exhaustive briefing of the Garrison
3 Diversion legislative history, which amended the
4 Flood Control Act of 1944, the Corps finally
5 acknowledged the South Central project would not
6 require a water storage contract and an easement
7 was issued. This was the first attempt by the
8 Corps to misapply the need for storage contracts in
9 North Dakota and delay projects that benefit the
10 state.

11 The Corps has refused to process any
12 further easement applications and started this
13 surplus water report based on Real Estate Policy
14 Guidance Letter Number 26. That policy states, "no
15 easement that supports any type of water supply
16 agreement will be executed prior to the water
17 supply agreement being executed by all parties."
18 The Corps' assumption is that all requests for
19 easements from Lake Sakakawea need to use stored
20 water. This is entirely wrong. The natural flows
21 are nowhere near being fully appropriated. Due to
22 the availability of natural flows, water storage
23 agreements are not needed. The Corps of Engineers
24 must recognize that any easement requests currently
25 before them do not require the Corps to operate the

1 system to provide the water, and do not require
2 storage contracts. So the policy does not apply,
3 and will never apply, when the water used is within
4 the natural flows. For these reasons the easements
5 should be processed immediately.

6 Our outrage in part is with how the Corps
7 is ignoring our state Constitution and our long
8 history with amendments to the 1944 Flood Control
9 Act.

10 Prior to the construction of the Garrison
11 Dam, the Missouri River in North Dakota was a free,
12 natural flowing river, and based on Article XI,
13 Section 3 of the North Dakota Constitution, the
14 flowing streams and natural watercourses shall
15 forever remain the property of the state.
16 Accordingly, waters of the Missouri River belong to
17 the public and are subject to appropriation by the
18 North Dakota State engineer for beneficial use.

19 Quoting from House Document 325, dated
20 February 4th, 1960, which was supporting
21 documentation in the 1965 amendments for the 1944
22 Flood Control Act, A large source of additional
23 water is a recognized need everywhere east of the
24 Missouri River in the Dakotas. The Missouri is the
25 only available source of such a supply. On the

1 main stem near Williston, North Dakota, at the head
2 of Garrison Reservoir, historic river flow since
3 1898 have varied between 25.8 million acre-feet to
4 as low as 9,150,000 acre-feet with an average of
5 17.6 million acre-feet of water flowing through
6 North Dakota. This federal recognition of the
7 natural flows in the Missouri River constitutes a
8 large volume of water that can be put to beneficial
9 use by the people of North Dakota.

10 North Dakota has steadfastly maintained
11 its right to use Missouri River water within its
12 boundaries. This was acknowledged in the
13 development of the Garrison Diversion Reformulation
14 Act of 1986, which also relates to the 1944 Flood
15 Control Act. Congress declared that one of the
16 purposes of this act is to preserve any existing
17 rights of the State of North Dakota to use water
18 from the Missouri River. It also states, "Nothing
19 in this act shall be deemed to diminish the
20 quantity of water from the Missouri River which the
21 State of North Dakota may beneficially use,
22 pursuant to any right or rights it may have under
23 federal law existing immediately before the date of
24 enactment of this act and consistent with treaty
25 obligations of the United States."

1 The legislative history has been to
2 protect beneficial use in the upper basin states.
3 It has not been to deny access.

4 I also have strong concerns that the
5 surplus water report does not clearly address
6 irrigation. The report recognizes that irrigation
7 has accounted for nearly half of the water usage in
8 Lake Sakakawea over the last two decades. The
9 report states that 110 of the 142 water intake
10 easements at Lake Sakakawea will expire in the next
11 10 years and it also said they may require surplus
12 water agreements prior to renewal. It is
13 misleading to say that they may require agreements
14 when the report also states that no temporary
15 surplus water agreements can be made for crop
16 irrigation. If the irrigation easements coming up
17 for renewal in the next 10 years will be denied or
18 if irrigation will be charged \$20.91 per acre-foot,
19 either of these extremes has tremendous impacts to
20 our agricultural economy and this must be disclosed
21 to the public.

22 The construction repayment costs presented
23 in the surplus water report are also of concern.
24 With the Corps' real estate policy only enforcing
25 water service contracts for those entities crossing

1 reservoir lands, it is only forcing those nearest
2 and directly affected by the construction of the
3 dams to repay costs. Those receiving annual
4 benefits for flood control, hydropower and
5 navigation downstream are seeing no costs. Those
6 of us in the upper basin that were forced to accept
7 a permanent flood, and have not yet received the
8 full benefits of water supply originally planned,
9 are hindered from accessing our national flows
10 along these reservoirs. In addition, the Corps is
11 attempting to recover costs for power intake works,
12 levies and flood walls and multiple reservoirs. We
13 do not understand how these are directly
14 attributable to the water storage contracts the
15 Corps is now requiring in North Dakota.

16 The Corps reports that they paid \$50
17 million -- actually, \$59 million in relocations,
18 land and damage costs when the dam was constructed.
19 They are now stating those closest to the
20 reservoir, some whose family homes and farms were
21 condemned, need to repay close to \$1 billion to the
22 federal government for these relocations and land
23 costs to access our natural flows. Further, there
24 is no provision in the 1944 Flood Control Act
25 requiring the indexing of costs from 1949 dollars

1 to 2011 dollars. However, this is precisely what
2 the Corps is trying to do to escalate the costs by
3 1500 percent.

4 In conclusion, let me clearly state for
5 the record that the State of North Dakota has the
6 right to allocate and manage both the natural flows
7 of the Missouri River and the originally authorized
8 diversions from Lake Sakakawea for North Dakota.
9 The state has these rights without storage
10 contracts. The Corps is wrong in their current
11 position and it is causing tremendous harm by
12 denying our access to the waters for North Dakota.

13 The State Water Commission will be
14 providing much more detailed comments. We have
15 been spending the last couple weeks, a lot of our
16 hydrologists and engineers, reviewing it, so there
17 will be very lengthy comments provided for the
18 deadline January 17th. So thank you for the time.

19 MR. JANIS: Thank you all of those that
20 have commented at the very beginning here, the
21 public elected officials.

22 I did want to make one announcement. I
23 didn't share this earlier, but I needed to.
24 Colonel Ruch has made a decision to extend the
25 comment period for 15 days, so the new due date for

1 comments, and we will be issuing a public release,
2 too, will be February 1st. So comments would need
3 to be posted by February 1st and, again, that
4 extension is for 15 days and I wanted to make sure
5 I passed that on before we left tonight.

6 All right. Next on the list is Ken Royse.

7 MR. ROYSE: Good evening. My name is Ken
8 Royse. I'm offering these comments on behalf of
9 the Missouri River Joint Water Resource Board. The
10 Joint Board represents counties along the Missouri
11 River in North Dakota and I have the privilege of
12 serving as chairman of that board.

13 I want to start my testimony by saying
14 that my board and I, we are very disappointed in
15 this effort by the Corps to conduct a study which
16 appears to have an end game plan solely designed to
17 charge water users in the State of North Dakota for
18 water from the Missouri River system. The study
19 concept seems to stem from either a notion that,
20 one, the 1944 Act authorized such a storage fee or,
21 two, that the waters of the lakes, both Sakakawea
22 and Oahe, are dangerously short of water and,
23 therefore, it is a resource that needs to be
24 carefully metered.

25 Let's deal with the notion of possible

1 authorization first. We cannot understand how the
2 Corps can try to use a provision from the 1944 Act
3 to claim such authorization and to do it now,
4 nearly 70 years since the passage of that Act. The
5 Corps either fails to recognize or refuses to
6 recognize that there have been many amendments --
7 or several amendments to that Act which have
8 changed any possible such requirement. One very
9 recent amendment to the 1944 Act is contained in
10 the Dakota Water Resources Act of 2000 which says
11 clearly that reimbursement of system features
12 constructed before the date of the Dakota Water
13 Resources Act shall not apply to municipal,
14 industrial and rural water systems in North Dakota,
15 and that is in Section 7.c of that Act. It is a
16 federal law. It was passed by our U.S. Congress.
17 It applies to the Corps of Engineers. It simply is
18 not allowed.

19 If the concern is shortage of water from
20 the system, then that is a completely different
21 logic. We can understand the average person on the
22 street being concerned when there are reports
23 stating that oil well fracking takes nearly a
24 million gallons per well and that hundreds, if not
25 thousands, of such wells are envisioned in our

1 state in the near future. But the Corps should be
2 able to put that language and number in a proper
3 perspective, even if the average person on the
4 street cannot. Even at a million gallons per well
5 and if there are three -- that allowed three
6 acre-feet per well, and you have a thousand such
7 wells, that is only 3,000 acre-feet. That amounts
8 to 3,000 acre-feet out of a lake that has a
9 capacity to hold 25 million acre-feet. That's
10 3,000 out of a potential 25 million. It's a single
11 penny out of an \$8,000 bill.

12 If the Corps believes water availability
13 is a concern, then they are clearly making a
14 problem appear where there is none. The water is
15 available and it's illogical and irrational to
16 attempt to charge for the water, which could be put
17 to a beneficial use, which otherwise will flow
18 unused to the Gulf of Mexico.

19 The best case defense of the Corps in this
20 issue is simply that you made an error, an error in
21 interpreting or applying current water withdrawal
22 requirements, or an error in calculating or
23 projecting the needs that may occur. If you made
24 that error or errors, now is the time to pull back,
25 admit those mistakes, and allow us in North Dakota

1 to continue to use that water from the system in a
2 manner and a fashion which conforms with state and
3 federal laws and requirements.

4 The worst case in this issue is that there
5 is some manipulation occurring. That manipulation
6 may be by interests who have a desire to deprive
7 the state and users within the state of withdrawing
8 water from the reservoir. Does someone or some
9 interest have an agenda to stop irrigation in North
10 Dakota? Does someone or some interest have a
11 desire to limit water supply for MR&I needs? Is
12 there an interest or desire by someone to reserve
13 water in the system for downstream needs? Or is
14 this just an attempt to add money to the federal
15 pocketbook by what really amount to a tax and a
16 levy on our use of our water.

17 And as this gets discussed in North
18 Dakota, we wonder why there's no corresponding
19 study proposed for a tax on benefits for flood
20 control, power generation, fish and wildlife
21 enhancements or navigation. Certainly the water
22 behind the dam serves to provide those benefits.
23 Perhaps the Corps believes that such benefits are
24 nonconsumptive use of water and, therefore, are
25 independent from the storage issues of the dams.

1 We disagree. Without the dams there is no flood
2 control. Without the water from the lake there are
3 no navigation releases. Navigation is just as much
4 a consumptive use of the water at Lake Sakakawea as
5 is water supply. Water used for navigation is
6 water that is reserved, it is used, it is
7 discharged and it is gone from the lake to satisfy
8 a very small benefit. It is a consumptive use.

9 The Corps also needs to be reminded of the
10 fact that water supply is one of the eight original
11 and current authorized purposes of the 1944 Flood
12 Control Act. It is one of the reasons that North
13 Dakota agreed and participated in a forfeiture of
14 over 500,000 acres of land for the lake. It is one
15 of the benefits that the Three Affiliated Tribes
16 were assured they would receive by sacrificing over
17 150,000 acres of their best land, the most fertile,
18 the most productive land of the reservation, for
19 the lake.

20 This issue is now one of the most
21 significant water management issues for the State
22 of North Dakota. It is equal to solving the Devils
23 Lake dilemma, it is equal to flood control in the
24 valley, and it is equal to the ongoing MRAPS
25 process.

1 We urge the Corps to reconsider this
2 proposed study and action. We urge our state
3 leaders to continue to aggressively resist this
4 effort to deprive us of an unencumbered use of
5 water from the lakes of our system. Thank you.

6 MR. JANIS: Thank you. The next name is
7 Alan Walker, City of Minot -- Walter. Sorry.

8 MR. WALTER: I am Alan Walter. I'm
9 director of public works for the City of Minot.
10 I'm also on a number of state water boards,
11 including Garrison Diversion Conservancy District,
12 and I'm here to respond to this proposal that the
13 Corps is doing to charge us for our water. I also
14 have written testimony from the mayor of the City
15 of Minot.

16 To begin, the State of North Dakota was
17 asked in 1944 to sacrifice a number of acres of
18 land for the benefit of the rest of the nation.
19 When we did that, we were made promises, and based
20 on those promises we starting building out those
21 promises through the '50s, '60s and '70s through
22 the expenditures of our state and federal dollars
23 and trying to establish the promises that were
24 made.

25 In 1986 those promises were taken away

1 from us and other promises were made. We swallowed
2 that pill, regrouped, started addressing the new
3 promises, and have been attempting to build those
4 out since. When we started that, some of us were
5 sued, not only by other states in our union, but
6 also by a foreign country. We were sued because we
7 wanted to use our water in our state for our
8 people, and I think it's been stated here enough
9 that's our right.

10 We are still going through that lawsuit
11 process with a foreign country and other states in
12 our union for our ability to use the water. We
13 will get through that. We will start using the
14 water, but we don't think it's right that we have
15 to pay for water that's coming from the land in our
16 state running into a reservoir in our state that
17 will be put to good use of the water in our state
18 for the citizens of our state. We think it's a
19 little bit ridiculous that we have to pay for the
20 storage of our water for our use.

21 I thank you for your time. I give you the
22 comments from the mayor.

23 MR. JANIS: Thank you. The next speaker
24 is Maynard Helgaas.

25 MR. HELGAAS: My name is Maynard Helgaas.

1 I represent a client that's a potato grower, the
2 Dawson Farms, and I also represent Green Vision
3 Group, which is a development consulting company.

4 First of all, my client that's a potato
5 grower -- a rather large potato grower in Kidder
6 and Burleigh County, drawing water from the
7 Missouri, he just tells me that \$40 an acre -- and
8 when you're dealing with high-value crops, you're
9 probably dealing with more draw on water than you
10 would on small grains, so you're not talking about
11 one acre-foot. You're probably talking closer to
12 two. That's \$40 an acre. That's totally uncalled
13 for. This is for water that belongs to the State
14 of North Dakota. Those people have used that water
15 for many years without charge and now you want to
16 charge them. Very unfair. Very difficult for
17 growers to budget and project when they don't know
18 what's coming up around the corner. So he's very
19 opposed to this action that the Corps is proposing.

20 The other one is -- we're working with as
21 a rural development group, we were very
22 instrumental in bringing a potato plant to central
23 North Dakota and production, as well. If it wasn't
24 for that activity, we probably wouldn't have a
25 potato industry in the state today, because now 80

1 percent of the potatoes that are grown are grown
2 under irrigation for French fry production and
3 processing. So that's very important.

4 The other one we're working on currently
5 is to bring energy beets into North Dakota for
6 biofuels. We have targeted 12 areas of which 40 to
7 50 percent of those areas are in the Missouri River
8 corridor. If farmers -- and farmers are not going
9 to pay \$40 an acre for water use when they have to
10 pay for the infrastructure of bringing that water
11 to the fields, as well. It's just prohibitive.
12 It's going to slam the door on projects like that
13 we're working with. That's 30,000 acres per plant.
14 Four, five plants is significant. Employs about 23
15 people per plant. We can produce twice the
16 alcohol -- twice the ethanol or biofuel on an acre
17 of land using energy beets versus corn. So the
18 land use is significantly reduced in trying to make
19 this country fuel efficient and not reliant on
20 foreign oil.

21 I thank you for the time.

22 MR. JANIS: Thank you. All right. Pat
23 Wheeler is next.

24 MR. WHEELER: My name is Pat Wheeler. I'm
25 from the Minot area. I have some business and

1 farming interests in Ray and Williston. I'm going
2 to be a little bit more on the personal side of
3 this problem in that I grew up in the Ray area and
4 was very involved and spent a lot of time in the
5 river -- we called it the river. Back in the '50s,
6 '60s, even '70s, we had total access of the river.
7 I remember driving right up to the river, my
8 grandparents had became to an age they couldn't get
9 around, but we could still drive up to the river,
10 we could enjoy camping, bonfires, just about
11 anything.

12 I was away. I was in the Marine Corps, I
13 did my military obligation two years. By the way,
14 that was a good Corps. I come out of the Corps and
15 we had some time off farming, and I helped my dad a
16 lot, and that winter I did a lot of ice fishing.
17 We had total access of the river. I mean, it was
18 just a great thing. Our family actually lost land,
19 it was condemned, so we were pretty sore about that
20 for a long time. But we kind of got over it, we
21 got to enjoy the recreational side of the lake and
22 just had good family time with it. And the '70s
23 was pretty good.

24 And I don't know where it happened
25 exactly, but late in the '70s, maybe '80s all of a

1 sudden we got Corps people coming around and
2 they're starting to restrict access, and it seems
3 every year since it's getting to be less and less
4 access, more and more fence. And you try to take
5 old people -- some older people -- and I'm not
6 young anymore -- but get them close to the lake,
7 you can't do it. I mean, you've got to go to where
8 there's crowded beaches or, you know, campgrounds.
9 And it's just wrong.

10 And now to put the dam in and charge money
11 for that water, to me it's like the people back
12 then that lost their land who are, most of them,
13 gone and buried, had they known that that dam was
14 built so that -- for them to store water in and
15 then have to pay a fee for it, I mean, it's just to
16 me totally asinine. I mean, was nobody ever
17 explained the Corps is going to build a dam to
18 store water for you and then, guess what, down the
19 road we're going to charge. How ridiculous is
20 that?

21 I had an uncle -- in fact, his children
22 still have land close to the river -- and he was an
23 engineer for the Corps, and he was proud of the
24 Corps, and he retired out of the Corps out of
25 Portland quite a few years ago, and I dare say if

1 he was alive today, he would be embarrassed at what
2 the Corps is doing to the State of North Dakota, to
3 the Missouri River. And that's all I got to say.
4 Thank you.

5 MR. JANIS: Next is Bill Sheldon.

6 MR. SHELDON: My name is Bill Sheldon and
7 I farm and irrigate south of Ray, North Dakota,
8 it's called the Nessen Valley. I grow potatoes and
9 corn, some alfalfa and soybeans.

10 And I've had lake water since the mid '70s
11 and we've been, you know, appreciative of the dam,
12 and then we saw a few years ago when the lake went
13 low and I lost my water for a few years. Now with
14 this proposed charge on the water, even if my water
15 went down, I understand it's a charge that's there
16 on your acre-feet allotment, and I would have to
17 pay even if I couldn't draw water from the lake.
18 And I had to put in some wells, but our well water
19 is not as good of quality, so I do enjoy the lake
20 water now that it's back. I appreciate the lake.
21 But this charge would adversely affect my crop. I
22 would not be able to pump from the lake anymore
23 with this charge. It would not be reliable for me.
24 Thank you.

25 MR. JANIS: Thank you. Mike Ames.

1 MR. MIKE AMES: My name is Mike Ames. I'm
2 a resident from Williston, North Dakota.

3 For the past 30 years I've worked in the
4 field of water and I've learned that water is one
5 of the most precious natural resources we have. We
6 are privileged to live in a state where strong
7 emphasis has been placed on water development and
8 have a most capable staff at the State Water
9 Commission that oversees the water permitting
10 process in the State of North Dakota.

11 The frustration lies in dealing with the
12 federal government, namely, the Corps of Engineers,
13 who has denied North Dakotans access to our water
14 while determining a tax on water. This surplus
15 water report is a slam on private industry and
16 represents government by government for government.

17 I've read your report and I would like to
18 point out a few misconceptions that are in this
19 report. On page 3-14 of the report, I quote,
20 National water policy states that the primary
21 responsibility for water supply rests with the
22 state and local entities and not the federal
23 government. However, the Corps can participate and
24 cooperate with state and local entities, unquote.
25 When does the Corps ever cooperate? It's the

1 Corps' way or no way.

2 On page 3-18, discusses overstressed
3 aquifers in northwest North Dakota. However, it
4 fails to report two major aquifers in northwest
5 North Dakota, the Hawklime Aquifer east of
6 Williston and the Little Muddy Aquifer north of
7 Williston, currently have 10,000 irrigated acres
8 and can currently pump 80 million gallons of water
9 per day with very little impact on the groundwater.
10 Both currently have 15,000 acre-feet of water
11 appropriated and could substantially increase in
12 size with current economic conditions. Both
13 aquifers are not in any danger of being
14 overstressed as your report says.

15 On page 3-22 states, and I quote, The cost
16 of only the water required to develop a well ranges
17 from over \$400,000 to \$4.5 million per well,
18 unquote. While the actual cost of water to hydro
19 frac a well is \$12,600 to \$44,100, an error in the
20 magnitude of 100.

21 On page 3-25, discusses the uncertainty
22 regarding percolation and aquifer recharge due to
23 irrigating and not being able to quantify that
24 number. Sprinkler irrigation is 90 percent
25 efficient with most of the losses due to

1 evaporation and negligible losses due to
2 percolation. Therefore, you can estimate the total
3 volume of water measured. Concerning irrigated
4 acres, how can we develop our irrigated acres when
5 we have no access to our water?

6 On page 3-53, Table 30, presents the
7 greatest misconception in the report, the cost of
8 next least costly alternative. The average cost to
9 install or convert groundwater depots is a thousand
10 dollars per acre, not the \$6,517 as stated in your
11 report. The cost of the regional water supply
12 system is estimated at \$172,500,000, or \$15,401 per
13 acre, to construct, not \$229.70 per acre as stated
14 in your report.

15 Is it any wonder that the federal
16 government is broke? This report misleads the
17 public into believing the preferred alternative and
18 least costly alternative to meet industrial water
19 needs in northwest North Dakota is a regional water
20 supply costing the State of North Dakota \$172
21 million, while in fact the least costly alternative
22 is allowing the private sector to continue to meet
23 and expand private water depots in northwest North
24 Dakota at no cost to the taxpayer.

25 President George W. Bush stated that free

1 market provides the fairest way to allocate
2 resources, lower taxes, reward hard work and
3 encourage risk taking, which spurs job creation.
4 Government should respect its constitutional limits
5 and give people the freedom to live their lives.
6 The Corps of Engineers needs to stop fencing out
7 the citizens of North Dakota and let us have access
8 to our water. Thank you.

9 MR. JANIS: Thank you. Next is Mary
10 Massad.

11 MS. MASSAD: Good evening. My name is
12 Mary Massad. I am the manager/CEO of the Southwest
13 Water Authority. The North Dakota Legislature
14 created the Southwest Water Authority to provide
15 for the supply and distribution of water to the
16 people of southwest North Dakota. We were also
17 created to provide for future economic welfare and
18 prosperity of the people of this state,
19 particularly the people of southwestern North
20 Dakota, by making available waters from Lake
21 Sakakawea and the Missouri River for beneficial and
22 public use.

23 It was further declared necessary to study
24 and further develop these water resources to
25 provide adequate water supplies for energy,

1 industrial, agriculture and other opportunities in
2 southwest North Dakota. Unhindered and free access
3 to Lake Sakakawea is critical to meet these needs.

4 The Southwest Water Authority manages,
5 operates and maintains the Southwest Pipeline
6 Project for the people of the State of North
7 Dakota. The Southwest Pipeline Project is the
8 first large multicounty regional rural water
9 project developed in this state. The water source
10 for the Southwest Pipeline Project is Lake
11 Sakakawea. We serve more than 4,000 rural
12 customers, 28 communities, 15 small businesses, 18
13 raw water contract customers, which includes an
14 ethanol plant, a water depot, as well as Perkins
15 County Rural Water System in South Dakota. The
16 current North Dakota population served by our
17 system is approximately 35,000. It is truly the
18 lifeblood of our region. People and business
19 succeed with quality water.

20 The Southwest Water Authority and the
21 Southwest Pipeline Project include the 12 counties
22 in southwest North Dakota. The project has been
23 under construction for 25 years. To date more than
24 4,000 miles of pipeline have been installed and
25 more than \$180 million have been spent building an

1 efficient network of pipelines, pump stations,
2 reservoirs and treatment facilities to bring an
3 adequate supply of quality water to our region.

4 We began providing water service in
5 October of 1991 to the City of Dickinson. Our
6 first rural service began the following year. The
7 Southwest Pipeline Project is an example of water
8 used from Lake Sakakawea. The reliability, quality
9 and quantity of water available from this lake make
10 it the water source of choice for our state.

11 Groundwater in North Dakota is scarce and
12 the quality of the water is very limited at best,
13 especially in our region of the state. In the
14 early days of project design, mayors of communities
15 were quoted as saying they could not entice
16 businesses to move to their communities due to the
17 quality of the water. Our customers have their own
18 water stories, so to speak. Of the 4,000 rural
19 customers we serve, many had an inadequate supply
20 and poor-quality water, if any water at all.

21 This is one example of the need for access
22 to Lake Sakakawea water. Without access to the
23 lake, southwest North Dakota would not be thriving
24 and growing. This is a quality-of-life issue.
25 When most people turn on the tap, they do not think

1 about where their water comes from. They assume
2 there will always be quality water. We want our
3 communities and our rural areas to be sustainable
4 and to grow. How many young people today would
5 live in a home if they had to haul the water in
6 order to live there? How many would live there if
7 they couldn't drink the water when they turned on
8 the faucet? Not many.

9 It's also an economic issue. Quality
10 water for business and industry is a necessity. It
11 is not an option. As I stated, the supply of
12 quality water for our state is Lake Sakakawea. It
13 should not be subject to studies and fees as
14 suggested by the Corps of Engineers. This would
15 also put an additional burden on the citizens and
16 businesses and industries that we serve. It will
17 also put an undue burden on those who still need
18 access to this water or who might yet be subjected
19 to the study, supply contracts and easements.

20 The Dakota Water Resources Act of 2000 and
21 other federal legislation may have made our project
22 exempt from the surplus water study and fees. I
23 would like clarification and assurances from the
24 Corps of Engineers that this is the case, both now
25 and in the future. Should additional intakes for

1 the Southwest Pipeline Project be necessary, will
2 we still be exempt?

3 This need for a water supply study and
4 related fees seems unfair when North Dakotans have
5 given up so much over so many years for the benefit
6 of all. Why should we be denied access to the
7 natural flows of water through our state because
8 Lake Sakakawea is in the way, so to speak? Studies
9 have been done to show that the supply is there.
10 We can see it is there. We can feel its effects,
11 both good and bad, throughout our state.

12 The Southwest Water Authority supports the
13 right of access to water from Lake Sakakawea. The
14 authority supports this being allowed both now and
15 in the future. Access to the waters from Lake
16 Sakakawea should not be limited by studies nor
17 should fees for water storage be imposed. Please
18 let us have access to our water for us, for our
19 citizens and for our future generations. Please
20 allow free access to Lake Sakakawea water for
21 municipal, rural and industrial use, including
22 irrigation for our fine state. With this water,
23 our cities, rural areas and economic development
24 prosper. Without access to Lake Sakakawea water,
25 they wither, dry up and blow away.

1 It is important to North Dakota. It is
2 important for quality of life. It is important to
3 industry, to agriculture, to energy development.
4 It is important for economic development. It is
5 important for energy independence for the United
6 States. It is important to use Lake Sakakawea
7 water without storage or other fees. We have paid
8 enough.

9 North Dakota should have free access to
10 its water without studies and without fees. It is
11 just the right thing to do. Thank you.

12 MR. JANIS: Thank you. Roy Packineau.

13 MR. PACKINEAU: Hello. My name is Roy
14 Packineau. One of the -- my chairman just spoke
15 here, Tex Hall, and I agree and support my chairman
16 what he said. I have property on the shoreline. I
17 know what it is when you've got Corps of Engineers
18 coming around, checking your areas out, and you're
19 wondering who's on the property and just there's a
20 lot of issues.

21 I grew up on by the river. My father
22 talks about this with my grandparents, what was
23 lost, all that bottomland, then you want to charge
24 everybody for what we had lost and you want to
25 charge us some more. I don't agree with it. This

1 news came out suddenly that we heard on the news.
2 I have a lot of family and relatives that would
3 like to hear what's going on. It caught them off
4 guard. Because I remember what was said that we
5 would all get free power, free water, free
6 irrigation, and I've never seen nothing really come
7 about with this.

8 But, you know, what goes on, it's just --
9 I'm glad that the Senator was here and the new
10 Governor and everything, but I have been seeing you
11 at a meeting with the Grave Repatriation Act at
12 United Tribes and you're talking about the water
13 issues, down flow, what goes down river. I
14 remember seeing you, talking with you then, with
15 Chairman Hall. I don't agree with what you're
16 doing now. I voice -- you know, stand with you
17 people, too. Thank you.

18 MR. JANIS: Thank you. Brian Grossman.

19 MR. GROSSMAN: My name is Brian Grossman.
20 I'm a recent NDSU agricultural economics graduate.
21 And ever since I was born, my life dream is to go
22 home and farm. Now the opportunity to raise
23 irrigated crops along the Missouri River is being
24 challenged.

25 Has anyone ever considered the economic

1 impact not only to potato farmers, but as well as
2 to corn, soybean and wheat growers along the river?
3 What kind of impact would that make not only
4 economically, but also look around the room. I'm a
5 rare example in here. I'm not very young -- I'm
6 not very old, but what do you think the average age
7 in this room is? I'm only 23. Now, how many
8 farmers out there are my age? How many young
9 farmers are willing to come back to the farm and
10 produce America's food source? It won't be much
11 easier if we're adding additional expenses.

12 Now, think back just two years ago. The
13 Missouri River was down, water was not available.
14 Yeah, there was no tax then, but we weren't being
15 able to use the water. We were not being able to
16 use the land. We were not able to generate a
17 profit. Now that the water is available again and
18 we can use our land, another tax is put on.
19 Granted, it's called whatever you guys were saying,
20 a fee or whatever. It's nothing but a tax in
21 disguise.

22 Give the agricultural producers a chance
23 to actually make a profit during good economic
24 times, because I promise you another drought is
25 coming and it's not getting any easier for young

1 farmers to come back to the farm with growing input
2 costs, growing land costs, more land is getting
3 taken away by larger farmers, and it's just not an
4 easy task.

5 Now, think about the North Dakota economy.
6 What is it based off of? Rural life, agriculture.
7 Well, in fact, agriculture. Think about the U.S.
8 economy. It's not doing very good. North Dakota
9 is doing great out of the union. Do we really want
10 to put another burden on the one state that is
11 doing great?

12 I don't need to repeat what everyone else
13 said, but one thing that I'd like to bring up,
14 earlier Governor Jack Dalrymple mentioned that the
15 50 years has passed. Allow it to be passed, allow
16 North Dakota to continue to use the water that
17 we've had the right to use for all these years and
18 let our economy grow as it should. Do not try to
19 restrain something that our region needs.

20 MR. JANIS: Thank you. Kevin Schmidt.

21 MR. SCHMIDT: I'd like to yield to the
22 next person on the list.

23 MR. JANIS: All right. Will do. Steve
24 Mortenson.

25 MR. MORTENSON: My name is Steve

1 Mortenson. I'm a farmer, rancher, irrigator. I
2 represent the Buford-Trenton Irrigation District up
3 there in northwest North Dakota by Williston and
4 have interest in industrial water use up there.

5 I've worked with the Corps of Engineers
6 probably about the last 25 years. We have a group
7 there that leases and manages land owned by the
8 Corps of Engineers. I've worked with the water
9 intakes and flow easements. It seems like a
10 considerable change in the last -- I mean, the
11 first 10 years the Corps was great to work with. I
12 mean, they had common sense, their promises were
13 good.

14 And if you listen to everybody talk up
15 here, it's one thing that keeps coming up, is
16 common sense and broken promises. I'm sure it
17 wasn't the intent of the original Garrison project
18 to change the format or the scale. I have lessees
19 on the one project that -- where their land was
20 originally bought from the Corps. The Corps come
21 out and told them that you pay the rent, the
22 practices that you have right now, they won't
23 change, we won't take this away from you. Right
24 now all the practices have changed, we're subject
25 to any provisions, any situations that the Corps

1 want to hand to us.

2 As I'm going along here, I mean, I don't
3 deny that the Corps needs to be involved with part
4 of Garrison. I mean, as far as the hydropower and
5 the flood control, I mean, them are the issues that
6 they were brought onboard to take care of for us.
7 But to charge a storage fee to the people of North
8 Dakota is wrong. I mean, we have paid for our
9 storage fee in Garrison Dam. And having a domestic
10 energy program developing up there in northwestern
11 North Dakota, reducing the imports of foreign oil
12 is a resource that we have to develop in our state.

13 We talk about how our state is financially
14 fit right now. Well, this is a lot of the reason
15 why that is. Do we want to keep asking for more
16 handouts from Washington? I mean, here we have a
17 resource we can develop, that we can bring our
18 state and keep our state going, and here the Corps
19 wants to tax us because they feel there's money out
20 there.

21 And in that Corps report that they made
22 the indication that it needed to be a large water
23 area project that needed to supply water to the oil
24 industry, I mean, they're talking about a \$172
25 million project where they want to send treated

1 water to the oil industry. The oil industry don't
2 need treated water. The Missouri River water we
3 have now is capable of doing all the hydraulic
4 fracking that we need to do.

5 So in closure it is wrong for the Corps to
6 charge this, and I believe they should allow access
7 to the lake to supplement the oil industry in
8 western North Dakota.

9 MR. JANIS: All right. Thank you. Next
10 is Don Harmon or Dean Harmon.

11 MR. HARMON: Dean.

12 MR. JANIS: Dean. Sorry.

13 MR. HARMON: Thank you, Larry. I'm unique
14 here. I'm a Montanan, eight miles into Roosevelt
15 County from Williams County. I've been on the
16 Missouri River all my life, and for the last 49
17 years I've been developing irrigation. I know a
18 little bit about the water. I know a little bit
19 about what it takes to get the job done.

20 I'm suggesting to you the only reason I'm
21 here is because what happens here tonight and the
22 results of this meeting will affect Montana and
23 South Dakota and on down through all six main stem
24 reservoirs. I depend on the Fort Peck Dam.

25 And in your defense, Larry, I know you

1 have been picked on, I have an excellent working
2 relationship with the Corps of Engineers. When I
3 want to know how much water is being let out of
4 Fort Peck Dam so I know whether or not I should put
5 a pump in the river, I call the powerhouse. They
6 say, well, you should call over here to the
7 administration. I said, No, I want to talk to the
8 man with the hand on the switch, not secondhand.
9 And, you know, they're very nice to me, and I want
10 you to know I appreciate the Corps of Engineers and
11 I believe, unfortunately, you're wrong on this
12 count.

13 MR. JANIS: Thank you. Roger Bearce.

14 MR. BEARCE: I have nothing to add at this
15 time.

16 MR. JANIS: All right. Thank you. Dale
17 Behan.

18 MR. BEHAN: I'm Dale Behan, the president
19 of International Western Company. We are one of
20 these applicants that has applied for some 12,000
21 acre-feet, Larry. And I want to echo what the last
22 speaker said, I certainly don't envy you sitting
23 there and being a scapegoat for all of our
24 animosity directed toward the Corps of Engineers.
25 I want you to know that.

1 I do want to say that I appreciate the
2 opportunity to address this issue in this forum.
3 You know that this is a democratic process in
4 action. Over the Christmas holidays my wife and I
5 viewed the eight-hour documentary John Adams which
6 addresses the formulation and structure of our
7 American society. That is what we have the
8 privilege of here tonight to address, and that is
9 an opportunity. In many countries this issue is
10 addressed in much different means.

11 I want you to look around the room
12 tonight, look at the person sitting next to you.
13 We're all Americans. We all live in the greatest
14 country in the history of the world. We have an
15 opportunity tonight to come here to listen to what
16 is said, to let common sense prevail and reach a
17 solution to a problem that enhances what needs to
18 be done here.

19 I want to echo what the Governor has said
20 and all the public officials, but I want to also
21 add that we have a chance in this area to develop
22 what could conceivably be the largest oil play in
23 the United States. Coupled with that, we have a
24 great resource in Sakakawea to enhance the
25 development of the Bakken.

1 In working with your group, the reception
2 and receptiveness of our projects have been well
3 received at Riverdale. I could never ask for
4 better people to work with than Linda Phelps or
5 Charles Sorensen. However, in addressing this
6 issue my group with our attorneys offered to go to
7 Omaha and discuss the very issues that we're
8 talking about tonight. We were told that would not
9 be necessary.

10 The situation as it currently exists
11 evolves, moves, changes and it inhibits our ability
12 to address the needs of the energy sector. The
13 people at Riverdale cannot respond responsibly, and
14 that is problematic. Consequently, as the
15 situation stagnates as to the storage fees, our
16 ability to respond to the demand of the energy
17 sector is stymied. We need to go forward from this
18 meeting, and as we frequently hear from our
19 nation's capital, both sides of the aisle need to
20 come together and solve the problem. We think the
21 storage fees are inappropriate. In fact, as
22 proposed, they would add more than a quarter of a
23 million dollars yearly to our project and possibly
24 take our project out of play.

25 I encourage you to consider the public

1 response tonight, Larry, and change the course of
2 action in this matter. Thank you.

3 MR. JANIS: Thank you. Milton Lindvig.

4 MR. LINDVIG: Good evening. My name is
5 Milton Lindvig. I'm making this statement on
6 behalf of the North Dakota Irrigation Association.
7 The chairman of our association was unable to be
8 here this evening.

9 The release of the Lake Sakakawea draft
10 surplus water report environmental assessment is
11 the first step by the Corps of Engineers to
12 formulate a basis for establishing storage fees and
13 begin charging North Dakota water users for water
14 withdrawn from Lake Sakakawea and ultimately, it
15 sounds, from Lake Oahe.

16 The Missouri and Yellowstone Rivers
17 discharge more than 15 million acre-feet of water
18 annually through Lake Sakakawea and later through
19 Lake Oahe. This flow was occurring long before the
20 construction of the dams on the Missouri River, and
21 we heard the quotation of the North Dakota
22 Constitution that all flowing streams and natural
23 watercourses shall forever remain property of the
24 state. North Dakota water law is based on this
25 section of the Constitution.

1 North Dakota has consistently asserted
2 that it has a right to capture water from the
3 natural flow to meet its needs irrespective of the
4 storage in Lake Sakakawea or Lake Oahe. In fact,
5 the reservoirs represent an impediment to gaining
6 reliable access to the water because of the wide
7 fluctuations that occur in the level of the
8 reservoirs during periods of below normal
9 precipitation. Significant expenditures are
10 usually required for the modification of pump
11 intakes in order to follow the water as it recedes
12 and eventually the cost becomes prohibitive. This
13 is particularly true for the irrigators, which
14 usually have more or less temporary intake
15 structures in this case. During the last drought
16 period it appeared that the Corps of Engineers was
17 more of a hindrance to implementing ways to pump
18 water than it was in providing help in processing
19 the permits needed to modify pump intakes.

20 The report indicates that irrigators may
21 not have continued access to Lake Sakakawea unless
22 a surplus water agreement is executed as a part of
23 the real estate easement process. On page 1-2 of
24 the report in Section ER 1105-2-100, states that
25 surplus water agreements are not authorized for

1 crop irrigation. In reading the language of the
2 section, it can be concluded that requiring a
3 surplus water agreement for irrigation is
4 prohibited.

5 North Dakota sacrificed 550,000 acres of
6 prime farmland and many families were disrupted as
7 a result of the construction of the main stem
8 reservoirs. After already paying such an enormous
9 price, it is outrageous for the Corps of Engineers
10 to consider charging for natural flows of the
11 Missouri River because they happen to pass through
12 Lake Sakakawea.

13 Irrigation benefits from the construction
14 of the main stem reservoirs were promised in the
15 1944 Flood Control Act and essentially remain
16 unrealized. In addition, electric power generated
17 by the main stem dams has not been allocated for
18 irrigation as provided for in the Act and instead
19 the power has gone to others.

20 It is unjust to consider charging North
21 Dakota water users when downstream and other
22 beneficiaries have not been asked to pay project
23 costs for flood control, navigation, industrial and
24 municipal purposes.

25 The current proposed action would place

1 unacceptable and unjust burdens on the ability of
2 the State of North Dakota to rightly develop its
3 water resources. Therefore, the Corps of Engineers
4 must abandon the proposal to require surplus water
5 agreements when renewing real estate easements for
6 the purposes of imposing charges for the water
7 allocated by the State of North Dakota and which
8 represents really the natural flow of the river.
9 This proposed action is just completely unjust and
10 violates the longstanding right of the state to
11 manage its own water resources. Thank you very
12 much.

13 MR. JANIS: Thank you. I'm going to
14 suggest that we take a five-minute break. We don't
15 have too many more, but I know that our court
16 reporter probably needs a short break. So if you
17 will bear with me, we'll take a five-minute break.
18 We'll reconvene in five minutes.

19 (Recess taken.)

20 MR. JANIS: All right. Let's go ahead and
21 get started. I've been asked a couple times so
22 I'll share with the group there's approximately 10
23 people left and that's it, if nobody adds to the
24 list. So about 10 people left so we'll go ahead
25 and get started. I also wanted to let people know,

1 even though it's eight o'clock, we will make sure
2 that we stay until everybody has had a chance to
3 talk, so we'll go ahead and continue. I have
4 Brandon Ames next.

5 MR. BRANDON AMES: I own Element
6 Solutions. You may have seen our name in the
7 report. I grew up in Williston. I grew up working
8 and playing on the banks of the Missouri River and
9 the shores of Lake Sakakawea.

10 And what I wanted to start out with was
11 the mission statement of the U.S. Army Corps of
12 Engineers. "The U.S. Army Corps of Engineers
13 provides design and engineering services, and
14 construction support for a variety of military and
15 civilian projects world wide. One of the Army
16 Corps' primary civil roles is to manage the
17 nation's waterways and wetlands. The Army Corps
18 activities include, but are not limited to,
19 construction projects approved by Congress for
20 flood control, commercial navigation, or shipping
21 channel maintenance; emergency response to natural
22 disasters; operating and maintaining flood control
23 reservoirs and public reclamation facilities; and
24 regulating activities in wetlands including issuing
25 dredge and fill permits and authorizing the

1 establishment of wetland areas."

2 I did not read anywhere in there monetary
3 gain or the repayment of federal debts as one of
4 the mission statements of the Army Corps of
5 Engineers. I feel that it is a great injustice to
6 the State of North Dakota and to the hard-working
7 people here.

8 I just want to paint a picture for you.
9 I've had four members of the Three Affiliated
10 Tribes and three other members of the State of
11 North Dakota come to me and ask me to design and
12 install a water project for them. They would like
13 to earn money for their families. They would like
14 to improve their livelihood by using the resource
15 that is rightfully theirs. I would like to feed my
16 six-, four- and two-year-old by doing the project
17 using the resource that is rightfully mine.
18 Unfortunately, I have to turn them away and say,
19 I'm sorry, I cannot help you, I do not know when
20 we'll ever be able to do this project. Keep your
21 money and store your dreams. Thank you.

22 MR. JANIS: Thank you. Next is Terry
23 Fleck.

24 MR. FLECK: Good evening, Larry. I'm
25 Terry Fleck, chairman of the Friends of Lake

1 Sakakawea, an organization entrusted with
2 safeguarding the interests of a variety of
3 stakeholders, from cities, to chambers, to
4 fishermen and recreational enthusiasts.

5 I'd like to begin by apologizing, although
6 he's not here, to Governor Dalrymple, our
7 congressional delegation, my fellow North Dakotans,
8 my friends at the Corps, and especially the members
9 of the Friends of Lake Sakakawea. As a rule when I
10 share my comments, I practice being nice. It's a
11 personal and professional belief, but not tonight.

12 Tonight it's about the Flood Control Act
13 of 1944--six dams and eight authorized purposes.
14 In 1944 four of the eight authorized purposes were
15 front and center: Flood control, navigation,
16 irrigation and hydroelectric power. Flood control
17 was the focus.

18 The dams have done the job when it comes
19 to flood control. On October 7, 2009, at the
20 Corps' annual operating plan meeting here in
21 Bismarck, the Corps stated that the flood damage
22 prevention index stood at \$37.9 billion. And with
23 all the water stored in the six main stem dams in
24 2010, we expect that number to be over \$40 billion
25 saved by the federal government through flood

1 control.

2 In addition, our government sells
3 electricity to its people. The Garrison project
4 last year generated \$35.8 million. Since 1967, the
5 Garrison project generated more than \$901 million
6 from electricity. The six dams since 1967
7 generated \$3 billion, 777.5 million in cash to the
8 federal government.

9 But wait. As part of the Flood Control
10 Act, our government came to the upper basin and
11 confiscated -- excuse me, compensated -- the
12 landowners for the land needed for this worthy
13 project. I want to say that again. Compensated
14 the landowners for the land needed for this worthy
15 project.

16 And in many cases the government bought
17 the mineral rights, as well, long before any of
18 these good people would understand the value of
19 those minerals. Unfortunately, I was unable to get
20 the amounts paid to the federal government for
21 rental and royalty payments for federal oil and gas
22 leases collected from the Garrison project by
23 tonight's meeting. They promised to have it to me
24 in the next couple weeks.

25 Now, understand something, the flood

1 prevention index will grow in savings to the people
2 in the basin and the federal government as we as a
3 society move forward. Electricity is being sold in
4 today's dollars and it's good for all of us, and I
5 don't have to explain to anyone in this room
6 tonight, my fellow North Dakotans, the value of gas
7 and oil revenue.

8 And yet our government stands before us
9 tonight here in Bismarck and wants to charge us for
10 our own water. On June 11th, 1953, President
11 Dwight D. Eisenhower came to North Dakota to do his
12 address at the closing ceremonies of the Garrison
13 Dam. And I wondered, what could a president have
14 said on that day to make us feel good about what
15 had happened to the Indian and nonIndian people who
16 lived on the Missouri River who gave so much and
17 lost a way of life.

18 I'll share five paragraphs from President
19 Eisenhower's speech, and I quote, "Now, possibly it
20 would be appropriate for me to express here a bit
21 of my own philosophy as to the kind of partnership
22 that would develop these great works," his
23 reference to the dam. "As I said, I believe that
24 the federal government has a major role to play.

25 "But we must not forget that our founding

1 fathers found and believed it was necessary that in
2 diffusing and dispersing power--the control over
3 our lives in this country--it wasn't enough to
4 disperse it and diffuse it functionally in the
5 executive branch, the legislative branch and the
6 judicial. They felt it also necessary to diffuse
7 it geographically.

8 "In other words, the state has not only a
9 tradition but a very necessary function to perform
10 in our country, if we are to be assured of
11 remaining the kind of people under the kind of
12 governmental system that we now enjoy and which has
13 brought us to this point."

14 He went on to say, "And so I believe that
15 in a great work" -- again, his reference to the
16 dam -- "a great development such as this, the state
17 has a very distinct function and it must be
18 performed. Else too much power will be
19 concentrated in Washington and all people will have
20 to look to that far off place to say, 'What may I
21 do and what may I not do,' whether you be an
22 industrialist in the city or a farmer tilling the
23 soil.

24 "And in the same way the community, the
25 municipality has a function. And finally there is

1 always a place in our country for private
2 enterprise. Indeed, when that function disappears
3 then we will be under some other alien form of
4 government and one that we would not recognize
5 now."

6 He went on to say, "I wonder if you would
7 allow me to read an observation from one of the
8 greatest presidents our country has produced --
9 Abraham Lincoln. He said once, 'The legitimate
10 object of the government is to do for a community
11 of people whatever they need to have done but
12 cannot do at all or cannot do so well. In all that
13 the people can individually do so for themselves,
14 government ought not to interfere," end of quote.
15 Government ought not to interfere.

16 I brought my easel and my canvas to make
17 my point tonight. Our government can paint this
18 picture however they want to, but when you frame it
19 and you finally hang it on the wall for all the
20 people in this country to see, they will see it for
21 what it is.

22 And I believe in my heart, given a jury of
23 my peers, they would look at your picture and say,
24 "What's wrong with this picture."

25 I don't believe President Eisenhower could

1 have envisioned what's happening here tonight, and
2 I don't believe that was his vision. So let me be
3 clear and on the record, we are mad as hell and
4 we're not going to take it anymore. This is our
5 water, our water. Thank you.

6 MR. JANIS: Thank you. Gene Veeder.

7 MR. VEEDER: Good evening. My name is
8 Gene Veeder. I am a board member with the McKenzie
9 County Water Resource District. I'm also here
10 representing McKenzie County in western North
11 Dakota. The McKenzie County Water Resource
12 District are the prime sponsors and managers in the
13 development of Western Area Water Supply Project in
14 partnership with the City of Williston, Williams
15 Rural Water District and our R&T Water Supply
16 Association.

17 We thank you for providing the opportunity
18 to present this input and comment on the analysis
19 you completed. We also recognize and applaud the
20 Corps for protecting a resource that we treasure,
21 but to ask the people of McKenzie County to pay for
22 the storage of water that we do not need is just
23 plain wrong. The Missouri River has plenty of
24 water and we don't need the storage.

25 It's interesting that this particular

1 study impacts -- especially the Missouri River
2 project and Lake Sakakawea impact all the areas of
3 foundations of our economy, agriculture, energy,
4 and tourism. All of those areas have been impacted
5 in our talks tonight, but one that disappoints us
6 the most is the flaws that we found in this study.
7 I spent 16 years doing what I do, a lot of that has
8 been dealing with the U.S. Forest Service and the
9 Corps of Engineers. Our county should not have the
10 burden of trying to defend common sense in our
11 reports.

12 We prepared a quick overview, to not cover
13 some of the other topics, of the basis the Corps of
14 Engineers used on the report. We've talked about
15 the sale of water out of the reservoir, and a
16 number of people have referenced that. There's a
17 flaw in this report and it looked at the sale
18 analysis in determining the total cost of increased
19 capacity in the Williston water treatment plant and
20 the cost of installing pipelines that's being
21 contemplated to serve the oil industry.

22 We're interested in serving the oil
23 industry, it's a vital industry to our state and
24 our local economy, but we think we've X'd out a
25 project that can serve our municipal needs, our

1 rural needs, as well as oil and energy needs. The
2 fact is that the primary benefit of that Western
3 Area Water Supply Project is to provide needed --
4 it's to provide needed water for municipal and
5 rural water in that system. Those benefits were
6 not recognized in this report ever. It talked
7 about a \$150 million project to serve the oil
8 industry when the primary beneficiaries of that
9 industry -- of that water supply project is to get
10 water to western North Dakota.

11 When you design a municipal and rural
12 water system, you need to design for peak day
13 demand, and the peak day demand is in excess of
14 three times the volume of the average day.
15 Therefore, there's significant capacity available
16 to sell industrial water at little to no additional
17 cost to the Western Water Area Supply Project. In
18 order to complete a true analysis, all those
19 benefits needed to be addressed.

20 The Western Area Water Supply will provide
21 a backbone of water supply in the heart of a
22 developing industry that we support, yet the
23 analysis indicates that the impacts to roads would
24 be significantly less than the no action
25 alternative.

1 McKenzie County is very concerned about
2 the potential locations of roads and with the
3 potential locations of the new water intakes. Be
4 what it may, that analysis was not included and
5 transportation impacts seem extremely simplified in
6 this report. We will provide a detailed analysis
7 for you prior to the closing remark date on those
8 impacts.

9 In closing and to cover what most of the
10 others have said here, I want to stress it seems
11 inconceivable that the Corps of Engineers would
12 pick this time to start charging a storage fee for
13 water out of the reservoir. People in McKenzie
14 have paid dearly for the reservoir, we've given up
15 hundreds of acres of prime bottomland for the
16 protection of the lower Missouri basin.

17 In recent years the U.S. Government has
18 decided we can't drive a four-wheeler on the shore,
19 we can't camp on the shore, access for ice fishing
20 is limited, and now we get to pay for permanent
21 flood in order to access the water. You wonder why
22 we're angry in McKenzie County. To think, in the
23 first place, the Corps starts charging for water
24 storage from the main stem dam in North Dakota is
25 simply wrong, and I thank you for the opportunity

1 to say that.

2 MR. JANIS: All right. Thank you. Herb
3 Grenz.

4 MR. GRENZ: My name is Herb Grenz. I
5 represent the Horsehead Irrigation District. Most
6 of the irrigators along there, Horsehead Irrigation
7 District, parents lost land to the Oahe Reservoir,
8 and, of course, the irrigation district as of this
9 day are the younger generations that set up the
10 irrigation systems themselves and for five years
11 during the low elevation of Oahe they were out of
12 water and did not irrigate, and they suffered
13 enough when they had to pay to the RECs the demand
14 power every month that they use the water or not.
15 Now if we want to add a water charge to that, it's
16 a very bleak situation.

17 I'm trying to squeeze in between all the
18 testimony here tonight, but I do want to attribute
19 one thing to our governor and our attorney general
20 that finally maybe the State of North Dakota has
21 drawn a line in the sand and said enough is enough,
22 we've given enough.

23 I'm still alive -- I'm one of the few
24 that's still alive that negotiated directly with
25 the Corps of Engineers during the taking of our

1 family's property for the Oahe Reservoir. Eight
2 years we were in litigation. And do you think I
3 asked the question -- we were irrigating before
4 litigation -- what the results of water would be
5 when the government took over the property? That
6 question was asked many times, are we going to have
7 water, are we going to have to pay for it or are we
8 going to have the freedom to use it? And every
9 indication there was no limitations or charge for
10 water.

11 The next question was, access to that
12 water. Are we going to have a problem to access to
13 that water? No problem. Wherever you can put a
14 pump site in, you put it in. Number one, that
15 turned out to be a disaster. Right after that,
16 after the condemnation procedures and everything
17 else, met with the Pierre office and they said you
18 will have to buy an easement back to the water. We
19 bought an easement. Every irrigator in Oahe
20 Reservoir had to buy an easement. My easement, I
21 think, is a hundred foot wide from the point of
22 private property across Corps property up to the
23 water -- access to the water. That, as I
24 understand, was a one-time payment.

25 And I will testify to that under court,

1 because I already have testified to it under court
2 during our litigation, and I feel, you know, that
3 the landowners along there definitely got cheated
4 because we were not given all the facts. Don't
5 tell me that a jury wouldn't have give different
6 severance damage allocations if they would have
7 said you are going to have to pay for water down
8 the road or you're going to have to pay access
9 rights to get to that water. That's all I have to
10 say. Thank you.

11 MR. JANIS: Thank you. Next is Larry
12 Nelson or Lanny Nelson.

13 MR. FLECK: He left. That's not Larry.

14 MR. JANIS: Okay. We'll go on to the
15 next. Mike Dwyer.

16 MR. DWYER: My name is Mike Dwyer. I
17 represent the North Dakota Water Users Association.
18 And I just want to make sure that it's clear to you
19 that we have over a thousand members across the
20 state, individuals, businesses on Main Street,
21 water companies, businesses, companies, and they
22 unanimously oppose this action that you're
23 proposing in our most recent convention. So across
24 the state -- not just those that are along the
25 Missouri River, but across the entire state are

1 vigorously opposed to your proposed action.

2 Brandon Ames talked about the mission of
3 the Corps of Engineers, and I'd just like to relay
4 a story -- a personal story. I have some land in
5 McKenzie County and was looking at purchasing some
6 additional land which had some -- which was
7 adjacent to the Lake Sakakawea, and so I talked to
8 one of your employees in your Williston office and
9 asked if the livestock grazing permit would be
10 continued, and he said, no, we're not going to
11 continue that because you need to understand our
12 mission is wildlife. Now, I thought how far astray
13 has the Corps of Engineers gotten with the lower
14 minion's understanding that your mission is
15 wildlife.

16 Let me just conclude by just telling a
17 story. When General Custer was leaving Mandan, the
18 Corps of Engineers office at that time was located
19 in Mandan, and when he was going by to the Battle
20 of the Little Bighorn, all your staff came outside,
21 and being as you're part of the department of Army,
22 he saluted and said, Don't do anything until I get
23 back. But now that you're doing something, it's
24 dead wrong, and it's wrong from a legal standpoint,
25 it's wrong from a policy standpoint, it's wrong

1 from a commonsense standpoint. It's just dead
2 wrong, and we just urge you to reconsider.

3 MR. JANIS: Thank you. Darrell Casteel.

4 MR. CASTEEL: Good evening. My name is
5 Darrell Casteel and I'm representing Element
6 Solutions.

7 It is unacceptable for the Corps to halt
8 and then prolong the process to get easements
9 across Corps land, costing my clients thousands of
10 dollars in lost production, not to mention
11 uncertainty for construction planning. Not only is
12 the delay frustrating, but it is also unwarranted.
13 We do not need surplus storage contracts. If the
14 lakes had not been in the way of accessing the
15 river, there would be no problem accessing the
16 water today. The storage the dam provides gives no
17 benefits except to block us from the Missouri
18 River, which the Corps has no jurisdiction over.

19 According to your letter report, storage
20 contracts are negotiated agreements between the
21 Army Corps of Engineers and a nonfederal entity for
22 the authorized use of surplus water. I would like
23 to see the negotiations between my client and you
24 that allowed you to set the price of \$20.91 an
25 acre-foot. Furthermore, the process used to derive

1 the factor of 2.57 needs further explanation than
2 the statement this is close to what was previously
3 used for Basin Electric.

4 And, finally, the report states that 110
5 of 142 existing easements for water intakes at Lake
6 Sakakawea will expire over the 10-year period of
7 analysis and may require surplus water agreements
8 prior to renewal. The report also states surplus
9 storage cannot be used for irrigation. Under this
10 logic, the Corps is unable to grant easements to
11 private irrigators until the final allocation
12 report is completed in 10 years. This is
13 unacceptable.

14 The Corps must make an exemption for
15 private irrigators. You flooded 550,000 acres of
16 prime farmland to protect downstream interests
17 while convincing us it would be worth it because we
18 would receive the benefit of millions of acres of
19 irrigation. As an irrigation equipment dealer, I
20 can tell you that it is apparent that this never
21 happened. Now to compound this injustice, you
22 expect us to pay for the damages you inflicted upon
23 us.

24 The implementation of this policy is
25 unfair and unjust. I hope you can see this and I

1 hope the people that are in charge of making this
2 decision can see this. Thank you for the
3 opportunity and time to comment on this appalling
4 injustice. Thank you.

5 MR. JANIS: Thank you. Kris Kitko.

6 MS. KITKO: Thank you. Thank you for
7 having this hearing. My name is Kris Kitko and I
8 am with a new organization called Bakken Watch and
9 I would just like to take a moment.

10 I don't know how it came to be that oil
11 companies, farmers and tribes are all considered
12 one and the same. How did it happen that farmers
13 are sticking up for oil developers? And I think
14 we're missing something here. There's no EOG --
15 there's no "we" in EOG or Halliburton.

16 I want to take a moment to say that I
17 don't want these companies to have access to our
18 water, not for free, not for pay. Fracking is not
19 a sustainable practice. We are not ready to hand
20 over our water from our creeks, rivers, farmlands
21 or lakes to multibillion-dollar private businesses.
22 Thank you.

23 MR. JANIS: Thank you. Two left. Erik
24 Volk.

25 MR. VOLK: Well, thank you and thank you

1 for everybody sticking around. I have a short
2 45-minute PowerPoint presentation, so, Mike, if you
3 would kick it in for me. That's good about going
4 39th, there's not a lot of extra to put in.

5 My name is Erik Volk. I'm the executive
6 director for the North Dakota Rural Water Systems
7 Association. Our membership serves more than 250
8 cities, 28 rural and regional systems and four
9 tribal water systems. Our commitment is to ensure
10 that all North Dakota residents receive affordable
11 drinking water of excellent quality and sufficient
12 quantity.

13 Today I have submitted some written
14 testimony and am going to talk just a little bit on
15 our strong opposition to what the Corps is
16 proposing to do.

17 Twenty-three of our systems are currently
18 using water from mainstream -- Missouri River
19 mainstream reservoirs or in the future will be
20 getting water from them -- all or part of their
21 use, use for rural residential customers, numerous
22 communities and industrial uses.

23 Being charged an unjustified water storage
24 fee is wrong. Being charged for something that is
25 rightfully yours or ours is crazy. The natural

1 flow of the Missouri River through North Dakota is
2 sufficient to meet the state needs. Our water
3 systems should have the right to at least that flow
4 and to have that flow without charge.

5 So with that said, in closing, North
6 Dakota Rural Water Systems Association strongly
7 encourages the Corps of Engineers to reconsider any
8 thought of charging water storage fees on Lake
9 Sakakawea. Thank you.

10 MR. JANIS: Thank you. Last, but not
11 least, Kate Vademore.

12 MS. VANDEMORE: Thank you. Please stay, I
13 promise it's different than what everyone else is
14 saying. And the last gentleman took my line. I
15 usually say it's a 10-hour hydrology lecture.

16 Thank you very much. My name is Kathryn
17 Vandemore and I live in Mandan, North Dakota. I'm
18 a professional hydrologist and water resource
19 manager with nearly 30 years of experience working
20 on resolving water issues and devising water
21 management plans with tribes, states and the
22 federal government across the western U.S. I'm a
23 former member of the Missouri River Recovery
24 Implementation Committee, having represented a
25 tribe for two years. I'm also a former federal

1 employee for the Interior and Commerce Departments
2 and have provided comments to the Corps over the
3 last year regarding the MRAP study. I am currently
4 the president and CEO of my own water resource
5 company.

6 My comments this evening represent my own
7 point of view and no organization, tribe or
8 governmental authority, so if you're mad and don't
9 want to hire me, I'm right here, it's me. And I am
10 thus speaking to you as an American citizen, as a
11 citizen of the great State of North Dakota, and who
12 just happens to be a hydrologist and water manager
13 interested in the Missouri River basin.

14 I find it very interesting today that the
15 new House of Representatives opened its session by
16 reading the U.S. Constitution, which they and you,
17 as a government employee, take an oath to uphold.
18 I still feel bound to take that oath when I joined
19 the government, to uphold that oath as my oath, as
20 also to my oath of naturalization at the age of 18.
21 While born in Mexico of one U.S. parent, I probably
22 took my oath to the U.S. Constitution, as well.

23 As a resource manager, the Constitution is
24 not too far away from my work because it guides
25 what you can and cannot do. My comments are both

1 really to your boss, because I know you're just
2 doing your job here, but this is a constitutional
3 issue what the Corps is proposing. As the House
4 read the Constitution, I grabbed my copy to read
5 along, and in thinking about tonight's meeting, I
6 looked for clauses in that Constitution which would
7 justify the Corps' actions in particular and in
8 particular your action to charge the State of North
9 Dakota and its American citizen taxpayers for rent
10 of water stored in a project built by American
11 taxpayer dollars.

12 This is not okay. This is not only not
13 your water, but it's -- your projects are due to
14 the benefit of the American people. Let me repeat
15 that. What you're trying to do is charge the State
16 of North Dakota and its citizen American taxpayers
17 for rent and use of water stored in a project built
18 by American taxpayers. You owe your salary to us
19 in the room.

20 When that project was built, it did not
21 have the consent of the government, and it doesn't
22 right now, notwithstanding the authority that you
23 say you have listed for rent.

24 Instead of finding authority for the U.S.
25 Army Corps of Engineers' proposed actions for Lake

1 Sakakawea, I found that the Army has no independent
2 authority to charge North Dakota, the tribes or
3 local citizens for the storage of water in North
4 Dakota, to-wit: Article I of the Constitution
5 makes it clear that only Congress can make such
6 laws to impose a tax -- excuse me -- rent charge,
7 not federal agencies. I don't care what you call
8 this, this is a tax. You don't have the authority
9 independently to do this. I submit the Corps has
10 no independent legal authority to charge rent on
11 surplus water that, number one, it did not
12 generate; number two, in a reservoir that was
13 constructed using taxpayer dollars.

14 Item 2 about constitutionality, the
15 commerce clause, Article I, Section 8 gave Congress
16 alone the power to regulate interstate commerce and
17 trade among the Indian nations. I submit that the
18 Corps as an agent of commerce charged with
19 authorized purposes only in managing the Pick-Sloan
20 project has no independent authority to both charge
21 for and divide the surplus water absent clear
22 congressional legislation and direction and the
23 consent of the governed, the states and the tribes.

24 Number two, under the commerce clause
25 Congress was authorized to regulate the trade among

1 Indian nations, not to destroy the tribes. The
2 Congress was not authorized to destroy the trade
3 among Indian nations which happened by the flooding
4 of all the Indian lands in the basin. The Corps
5 projects did that by inundating tribal lands, and
6 there's much work left to be done. In other words,
7 you have no surplus water. Your list out there of
8 a little bit of surplus water, you don't have it.
9 When you consider the potential needs of the tribes
10 not only in Lake Sakakawea, but everywhere else,
11 you don't have any surplus water.

12 The commerce clause also did not authorize
13 the federal government, the Corps of Engineers, to
14 use the tribes as a wedge to divide the states and
15 citizens by ignoring those rights which you freely
16 acknowledge that the Corps does not have any
17 authority over the water rights, Reclamation does,
18 and then to all of a sudden start moving to
19 quantify and identify them.

20 I am concerned that there will be a ploy
21 to do that, and I want to put this on the record in
22 front of everybody here. In case anything happens
23 to me, you all heard it from me. I don't want to
24 see that happen. It's a great trick, but it's gone
25 on far too long. There are millions of acre-feet

1 of water belonging to the tribes and should have --
2 the states and the tribes should have the right to
3 figure that out.

4 Article V of the Constitution guarantees
5 to each state a, quote, republican form of
6 government to guard against federal encroachment.
7 The decision to hold a hearing on the federal
8 decision to allocate water it does not own, has not
9 produced, and cannot sell is federal encroachment.
10 What's the value of an acre-foot of water in
11 Missouri? Is it 20 bucks or is it more like \$7,000
12 an acre-foot in Missouri? What does North Dakota
13 do but store water for Missouri?

14 The Bill of Rights, the first 10
15 amendments to the Constitution, apply to the
16 federal government, not the states, and guaranteed
17 to the states through the 9th and 10th amendments
18 the authority to act on many issues, including the
19 allocation of water generated and stored within its
20 boundaries. By virtue of the tribes' land
21 ownership, they, too, have a say in how water
22 should be stored and used.

23 Without the requisite authority, I
24 conclude that the Corps proposal is more about
25 watershed governance and control and federal water

1 control than any specific allocation plan for Lake
2 Sakakawea. You know, you use taxpayers' money to
3 build this stuff, now you're using all our time and
4 resources to run around chasing you around 50,000
5 meetings in the Missouri basin when you don't even
6 have the authority to do what you're doing.

7 I conclude the Corps proposal again is
8 more about federal water control. I asked the
9 Corps to verify this information that I think this
10 is about federal water control by consulting with,
11 oh, Mr. Obama's water czar, David Hayes, the Deputy
12 Secretary of the Interior, the organization that
13 runs the other side of Pick-Sloan, Reclamation. I
14 think there are larger policy plans that are going
15 on, not this allocation of surplus water.

16 In short, I conclude the Corps of
17 Engineers is without the authority to propose what
18 it's doing right now. Neither the Constitution or
19 federal case law permit this intrusion on a vital
20 state and tribal resource. I urge the Corps to
21 stand down from any proposals until it can prove to
22 the states, to me, and to the tribes that you have
23 the requisite authority from Congress to allocate
24 and charge for water or water resources it does not
25 own.

1 Further, I urge the Corps again to stand
2 down until you can verify through Congress and all
3 the way up to the office of the President, who
4 signs your legislation, that the requisite
5 authority exists to add this new twist to the Corps
6 Pick-Sloan program. Thank you very much.

7 MR. JANIS: Thank you. I appreciate
8 everybody staying until we were done. I don't
9 believe there's anybody else on the list.

10 I will remind people that we do have
11 comment sheets in addition to what we recorded
12 tonight, and those, as well as anything else you
13 have, again will be accepted until February 1st.

14 Thank you for coming and have a great
15 evening.

16 (Concluded at 8:41 p.m., the same day.)

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CERTIFICATE OF COURT REPORTER

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

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

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

Bismarck, North Dakota, this 11th day of
January, 2011.

Denise M. Andahl
Registered Professional Reporter

TESTIMONY OF CATHERINE VANDEMOER, Ph.D.
U.S. ARMY CORPS OF ENGINEERS
PUBLIC HEARING ON
DRAFT LAKE SAKAKAWEA SURPLUS WATER PLAN
January 6, 2011
Bismarck, ND

BY WHAT AUTHORITY?

- Good evening. My name is Catherine Vandemoer and I live in Mandan, North Dakota. I am a professional hydrologist and water resource manager with nearly thirty years of experience working on resolving water resource issues and devising water management plans with Tribes, states, and the federal government across the western United States.
- I am a former member of the Missouri River Recovery Implementation Committee, having represented one of the Missouri River basin Tribes for two years; a former federal employee of the Interior and Commerce Departments, and have provided comments to the Corps over the last year regarding the MRAPS study. I am currently the President and CEO of my own water resource consulting company.
- My comments this evening represent my own point of view and no organization, Tribe, or governmental authority. Thus I am speaking to you as an American citizen, as a citizen of the Great State of North Dakota, who just happens to be a hydrologist and water manager interested and working in the Missouri River basin.
- I find it interesting that today the new House of Representatives opened its session by reading the U.S. Constitution, which they, and you, as government employees, take an oath to uphold. I still feel bound to that oath I took when I joined the government; as to my oath of naturalization at the age of 18. While born in Mexico of one U.S. citizen parent, I proudly took my oath to the Constitution as well. As a resource manager, that Constitution is not too far from my work as it does guide what the federal government can and cannot do.
- As the House read the constitution, I grabbed my copy to read along, and in thinking about tonight's meeting, I looked for clauses in that constitution which would justify the Corps' actions, in particular, **charging the state of North Dakota and its citizen American taxpayers for 'rent' of water stored in a project built by American taxpayers.** Let me repeat that.
- Instead of finding authority for the U.S. Army corps of engineers proposed actions for Lake Sakakawea, I found that the Army has no independent authority to charge north Dakota, the Tribes, or local citizens for 'storage' of water in north Dakota. To wit:
 - a. Article I of the Constitution makes it clear that only Congress can make laws which impose a 'tax', excuse me, rent charge, not federal agencies. I submit the Corps has no independent legal authority to charge rent on surplus water that
 - i. It did not generate
 - ii. In a reservoir that was constructed using taxpayer funds

- b. The Commerce Clause, Article 1 Section 8, gave Congress to regulate interstate commerce, and the trade among the Indian nations
 - i. I submit that the Corps, as an agent of Congress charged with authorized purposes only in managing the pick sloan project, has no independent authority to both charge for and divide the surplus water absent clear congressional legislation and direction, and, the consent of the governed—the states and the Tribes.
 - ii. The Congress was not authorized to destroy the trade among the Indian nations. The Corps projects did that by inundating Tribal lands. There is much work left to be done.
 - iii. The Commerce clause did not authorize the federal government to use Tribes as a wedge to divide the states and citizens...by ignoring those rights and now moving to quantify them
 - c. Article V of the constitution guarantees to each state a 'republican form of government', to guard against federal encroachment. The decision to 'hold a hearing' on the federal decision to allocate water it does not own, has not produced, and cannot sell is federal encroachment.
 - d. The Bill of Rights—the first ten amendments to the Constitution—apply to the federal government, and guarantee to the states—through the 9th and 10th amendments, the authority to act on many issues, including the allocation of water generated and stored within its boundaries. By virtue of the Tribes' land ownership, they too have a say in how the water should be stored and used.
- Without the requisite authority, I conclude that Corps proposal is more about watershed governance, and federal water control than any specific water allocation plan for Lake Sakakawea. I ask the Corps to verify this information with Mr. Obama's water czar, David Hayes, Deputy Secretary of the Interior.
 - In short, I conclude that the USCOE is without authority to propose what it is doing right now. Neither the Constitution nor federal case law permit this intrusion on a vital state and Tribal resource.
 - a. I urge the Corps to stand down from any proposals until it can prove to the states and Tribes that it has the requisite authority—from Congress—to allocate and charge for a resource it does not own.
 - b. Further, I urge the Corps to verify through the Congress and the office of the President, that the requisite authority exists to add this new authority to the Corps Pick Sloan program.

Friends of Lake Sakakawea
Corps' Surplus Water Meeting
Chairman Terry Fleck
Jan. 6, 2011

Good evening. I'm Terry Fleck, chairman of the Friends of Lake Sakakawea, an organization entrusted with safeguarding the interests of a variety of stakeholders, from cities, to chambers, to fishermen and recreational enthusiasts.

I'd like to begin by apologizing to Gov. Dalrymple, our congressional delegation, my friends at the Corps, our friends of North Dakota and the members of the Friends of Lake Sakakawea. As a rule when I share my comments, I practice being nice. It's a personal and professional belief, but not tonight.

Tonight it's about the Flood Control act of 1944 – six dams and eight authorized purposes. In 1944 four of the eight authorized purposes were front and center: flood control, navigation, irrigation and hydroelectric power. Flood control, though, was the focus.

The dams have done the job when it comes to flood control. On Oct. 7, 2009 at the Corps' Annual Operating Plan meeting, the Corps reported that the Flood Damage Prevention Index stood at \$37.9 billion dollars. And with all of the water in 2010 it will be over 40 billion saved by the federal government through flood control.

In addition our government sells electricity to its people. The Garrison project last year generated \$35.8 million. Since 1967, the Garrison project generated more than \$901 million from electricity. And the six dams since 1967 generated 3 billion, 777.5 million in cash to the federal government.

But, wait, as part of the Flood Control Act, our government came to the Upper Basin and confiscated – oh, I mean compensated – the landowners for the land needed for this worthy project.

And in many cases the government bought the mineral rights, as well, long before any of these good people would understand the value of those minerals. Unfortunately, I was unable to get the amounts paid to the federal government for rental and royalty payments for federal oil and gas leases collected from the Garrison project.

Now understand the Flood Damage Prevention Index will grow in savings to the people in the basin and the federal government as we move forward. The electricity is being sold in today's dollars and I don't have to explain to anyone here the value of gas and oil revenue in today's dollars.

Now you stand before us and you want to charge us for our own water. On June 11, 1953, President Dwight D. Eisenhower came to North Dakota to do his address at the closing ceremonies at the Garrison Dam. I wondered, what could a president have said on that day to make us feel good about what had happened to the Indian and Non-Indian people who lived on the Missouri River who gave so much and lost their way of life.

I'll share five paragraphs from President Eisenhower's speech that day.

“Now, possibly it would be appropriate for me to express here a bit of my own philosophy as to the kind of partnership that would develop these great works. As I said, I believe that the federal government has a major role to play.

“But we must not forget that our founding fathers found and believed it was necessary that in diffusing and dispersing power – the control over our lives in this country – it wasn't enough to disperse it and diffuse it functionally in the executive branch, the legislative branch and the judicial. They felt it also necessary to diffuse it geographically.

“In other words, the state has not only a tradition but a very necessary function to perform in our country, if we are to be assured of remaining the kind of people under the kind of governmental system that we now enjoy and which has brought us to this point.

“And so I believe that in a great work, a great development such as this, the state has a very distinct function and it must be performed. Else too much power will be concentrated in Washington and all people will have to look to that far off place to say, 'What may I do and what may I not do,' whether you be an industrialist in the city or a farmer tilling the soil.

“And in the same way the community, the municipality has a function. And finally there is always a place in our country for private enterprise. Indeed, when that function disappears then we will be under some other alien form of government and one that we would not recognize now.

“I wonder if you would allow me to read an observation from one of the greatest presidents our country has produced – Abraham Lincoln. He said once, “The legitimate object of the government is to do for a community of people whatever they need to have done but cannot do at all or cannot do so well. In all that the people can do individually do so for themselves, government ought not to interfere.”

You can paint this picture however you want but when you frame and finally hang it on the wall for all the people in this country to see, they will see it for what it is.

And I believe in my heart, given a jury of my peers, they would look at this picture and say, “What's wrong with this picture?”

So I would thank you tonight. I don't believe President Eisenhower could have envisioned what's happening here this evening. I don't believe this was his vision. Let me be clear: We are mad as hell and we're not going to take it anymore.

This is our water ... our water.

Corp Meeting January 6, 2011

ORAL COMMENTS

My name is Shane Goettle and I am the State Director for U.S. Senator John Hoeven.

Senator Hoeven extends his greetings to those gathered here this evening, and he has asked me to make a few remarks on his behalf regarding the Lake Sakakawea Draft Surplus Water Report and Environmental Assessment released by the U.S. Army Corps of Engineers on December 16, 2010.

The Senator fully concurs with legal position and points outlined by Governor Jack Dalrymple this evening. I want to commend the Governor for laying out the issues so succinctly. I won't repeat his points, but please know they concur with Senator Hoeven's.

Rather, I intend to appeal to history and common sense this evening. While there are many legal points to be made, these legal arguments can only stand the test of time if they are centered on principles of fairness and equity, and, I might add, with respect to traditional conduct of all parties in question.

FIRST

In 1889 North Dakota became a state, and at the time it did, it took possession and control of the waterways in North Dakota, including the Missouri River as it enters the western border of the state near modern-day Williston and exits the border south of modern-day Bismarck. This is explicitly recognized in North Dakota's constitution.

That was the state of play before Garrison Dam was built. North Dakota controlled this river—it controlled access and use. It could tap this water for recreational, agricultural, domestic, industrial and other uses.

The Federal 1944 Flood Control Relief act did nothing to alter North Dakota's rights to the natural flow in the Missouri River. While a reservoir was created behind the dam, North Dakota maintains its rights to the natural flow. If all the water behind the dam were to be released downstream tomorrow, leaving nothing in the reservoir except what remains of the Missouri River and its natural flow, that water would belong to the State of North Dakota.

So the state has a right to the natural flow of this water—we have absolute right of access before it hits the reservoir and right of access and use after it flows over Garrison Dam.

The easement application and permitting process in place prior to 2008 respected North Dakota's access to the Missouri River for the State's use and, correspondingly, for the use by the State's citizens and businesses. On the other hand, the allocation of storage and water storage contracts does not.

SECOND

The idea of using water storage contracts more than 50 years after the fact to BEGIN recovering costs for construction of is not only beyond the provision of the 1958 Water Supply Act, but also beyond any rationally articulated policy—it simply does not make sense.

After half a century, that burden should not be imposed on the citizens and businesses of North Dakota. We in North Dakota bore the heavy costs and disruption associated with establishing this reservoir. Family's were moved, tribes lost land, whole towns were relocated. As a state,

we accepted this for the benefits that would accrue not only to this state, but to the country in terms of flood control and the safety of downstream residents and businesses who benefitted from the “taming of the Missouri River.” As a matter of equity, our industries and citizens should not now be looked to as the sole source for such recovery.

At a time when our nation needs jobs North Dakota is moving forward. We have a business climate that is the envy of the country. But we need water to continue to expand our economic base and create more jobs through the many farms, businesses, and citizens that that look to the Missouri River for this basic commodity.

Senator Hoeven urges the Corps to process the easement requests in front of it expeditiously and withdraw from its proposals to seek capital recovery from North Dakota-based companies and citizens who seek to access Missouri River water from the reservoir.

It’s a matter of State’s rights. It’s a matter of equity and fairness. It’s a matter of common sense.

Draft Surplus Water Report and Environmental Assessment for Lake Sakakawea, N.D.

Public Meeting | January 6, 2011 | 5-8 pm
Doublewood Inn, Bismarck, N.D.

Comment Form

The public review comment period for the Lake Sakakawea Draft Surplus Water Report and Environmental Assessment will run through January 17, 2011. Please return this form by Jan. 17, 2011 in order for your comments to be considered.

How to submit your comments for this public review period:

- Complete and drop off this comment form at the public meeting on January 6, 2011 at the Doublewood Inn, Bismarck, N.D.
- E-mail your comments to: garrisonsurplusstudy@usace.army.mil.
- Mail your comments to:

U.S. Army Corps of Engineers Omaha District
ATTN: CENWO-OD-T
Lake Sakakawea Surplus Water Report and EA
1616 Capital Avenue
Omaha, NE 68102-4901

All comments must be received by January 17, 2011.

Comments are being collected under the Garrison Dam/Lake Sakakawea Project North Dakota Surplus Water Report, authorized by Public Law 534 (The Flood Control Act of 1944, Section 6). Submission of comments, including personal information, is voluntary. Providing personal information, including name, address and contact information, will allow Corps personnel to follow up on and/or clarify comments and may put ambiguous comments into context. All comments will be included in the record and considered. Personal information may be included in the public record or may be excluded upon request.

Name: Kenny Graner

Street Address: 5355 Hwy 1806

City: Mandan State: ND Zip Code: 58554

Organization/Tribe Represented: _____

E-mail: granerangus@extendwireless

If you do not want your name and address to be available to the public, check here [].

Please write legibly so your comments can be recorded completely and accurately. Please complete this form and drop it off at the registration table or mail it to the address shown on the left.

1. Do you have comments or concerns regarding a specific Authorized Purpose? If so, please provide those comments in the appropriate section below.

Authorized Purposes

Water Quality:

No Charge

Irrigation:

You took land from my families for flood control most of the flood is above, the high water mark. It should be giving back.

Mike Ames

United States citizen, taxpayer and resident of the Great State of North Dakota
5547 Highway 85 North
Williston, North Dakota

For the past 30 years I have worked in the field of water and have learned that water is one of the most precious natural resources we have. We are privileged to live in a state where a strong emphasis has been placed on water development and have a most capable staff at the State Water Commission that oversees the water permitting process in North Dakota. The frustration lies in dealing with the Federal government, (USACOE) who has denied North Dakotans access to our water while determining a tax on water. This surplus water report is a slam on private industry and represents government by government for government.

Page 3-14 of the Report: "National water policy states that the primary responsibility for water supply rests with state and local entities, not the Federal government. However, the Corps can participate and cooperate with state and local entities . . ." There was no cooperation in 2010. No permits were issued. Surplus water contracts are limited to five years with an option to renew for another five years at rates established by the Corps. Will the permit holder pay for the amount reserved on an annual basis or the amount used each year?

Page 3-18 discusses overstressed aquifers in northwest North Dakota. However, it fails to report the two major aquifers in northwest North Dakota, the Hofflund Aquifer east of Williston and Little Muddy Aquifer north of Williston, currently have 10,000 irrigated acres and can currently pump 80 million gallons of water per day with very little impact on the groundwater. Both currently have 15,000 acre feet appropriated for use and could double in size with the current economic conditions. Both aquifers are full and not in any danger of being overstressed.

Page 3-19: "Based on this assessment, structural measures involving groundwater withdrawals have been eliminated from further consideration (screened out) for reasons of lack of completeness and lack of public acceptability." Two major aquifers, the former Yellowstone River channel and the other aquifer fed directly by the Missouri River, are mistakenly screened out of this Report.

Page 3-22 states "The cost of only the water required to develop a well ranges from over \$400,000 to over \$4.5 million per well" while the actual cost for water to hydrofrac a well is \$12,600 to \$44,100, an error to the magnitude of 100.

Page 3-25 discussed the uncertainty regarding percolation and aquifer recharging due to irrigating and not being able to quantify that number. Sprinkler irrigation is 90% efficient with most losses due to evaporation and negligible losses due to percolation back to the aquifer; therefore, you can estimate the total volume of water measured.

Allowing the conversion from irrigation to industrial use was implemented to satisfy the immediate need for water. Over 60 industrial permits are pending at the State Water Commission that have the capacity to fulfill all the water needs without costing the taxpayers of North Dakota one cent.

Page 3-53, Table 3-30 presents the greatest misconception in the Report, the Cost of the Next Least Costly Alternative. The average cost to install or convert groundwater depots is \$1,000 per acre foot, not \$6,517.03 as stated. The cost of the regional water supply system is estimated at \$172,500,000 or \$15,401 per acre foot to construct, not the \$229.70 per acre foot as stated.

This Report misleads the public into believing the preferred alternative and least costly alternative to meet the industrial water needs in northwest North Dakota is a regional water supply costing the State of North Dakota \$172 million while in fact the least costly alternative is allowing the private sector to continue to meet and expand private water depots in northwest North Dakota at no cost to the taxpayers.

President George W. Bush stated "...that free market provides the fairest way to allocate resources, lower taxes, reward hard work and encourage risk taking which spurs job creation. Government should respect its constitutional limits and give people the freedom to live their lives."

JL MA
6 Jan. 2011

\$172,500,000 to increase Williston Water Treatment plant by 11,200 acre feet and provide that additional water for oil industry use

The actual cost is then \$15,401.79 per acre foot.

A private water depot that provides 200 acre feet costs approximately \$200,000.

The proven cost is \$1,000 per acre foot.

\$15,401.79 project cost per acre ft. X 11,200 acre ft. = \$172,500,000

\$ 1,000 private cost per acre ft. X 11,200 acre ft. = \$ 11,200,000

\$14,401.79 excess cost per acre ft. X 11,200 acre ft = \$161,300,000

56 water depots at a cost of \$11,200,000 could provide the 11,200 acre ft.

Compound Period : Annual

$$150m = 8,939.737$$

$$127.5m = 7,598$$

Nominal Annual Rate : 4.250 %

$$45m = 2,682$$

CASH FLOW DATA

Event	Date	Amount	Number	Period	End Date
1 Loan	01/05/2011	172,500,000.00	1		
2 Payment	01/05/2012	10,280,697.51	30	Annual	01/05/2041
3 Payment	01/05/2042	0.00	1		

AMORTIZATION SCHEDULE - Normal Amortization

Date	Payment	Interest	Principal	Balance
Loan 01/05/2011				172,500,000.00
2011 Totals	0.00	0.00	0.00	
1 01/05/2012	10,280,697.51	7,331,250.00	2,949,447.51	169,550,552.49
2012 Totals	10,280,697.51	7,331,250.00	2,949,447.51	
2 01/05/2013	10,280,697.51	7,205,898.48	3,074,799.03	166,475,753.46
2013 Totals	10,280,697.51	7,205,898.48	3,074,799.03	
3 01/05/2014	10,280,697.51	7,075,219.52	3,205,477.99	163,270,275.47
2014 Totals	10,280,697.51	7,075,219.52	3,205,477.99	
4 01/05/2015	10,280,697.51	6,938,986.71	3,341,710.80	159,928,564.67
2015 Totals	10,280,697.51	6,938,986.71	3,341,710.80	
5 01/05/2016	10,280,697.51	6,796,964.00	3,483,733.51	156,444,831.16
2016 Totals	10,280,697.51	6,796,964.00	3,483,733.51	
6 01/05/2017	10,280,697.51	6,648,905.32	3,631,792.19	152,813,038.97
2017 Totals	10,280,697.51	6,648,905.32	3,631,792.19	
7 01/05/2018	10,280,697.51	6,494,554.16	3,786,143.35	149,026,895.62
2018 Totals	10,280,697.51	6,494,554.16	3,786,143.35	
8 01/05/2019	10,280,697.51	6,333,643.06	3,947,054.45	145,079,841.17
2019 Totals	10,280,697.51	6,333,643.06	3,947,054.45	
9 01/05/2020	10,280,697.51	6,165,893.25	4,114,804.26	140,965,036.91
2020 Totals	10,280,697.51	6,165,893.25	4,114,804.26	
10 01/05/2021	10,280,697.51	5,991,014.07	4,289,683.44	136,675,353.47
2021 Totals	10,280,697.51	5,991,014.07	4,289,683.44	
11 01/05/2022	10,280,697.51	5,808,702.52	4,471,994.99	132,203,358.48
2022 Totals	10,280,697.51	5,808,702.52	4,471,994.99	
12 01/05/2023	10,280,697.51	5,618,642.74	4,662,054.77	127,541,303.71

McKenzie County Water Resource District

Testimony

Public Hearing on Garrison Dam/ Lake Sakakawea Project

North Dakota

Draft Surplus Water Report

1-6-2011

Robert J. Ruch

Colonel, Corps of Engineers

District Engineer

Good evening. My name is Gene Veeder. I am a Board Member with the McKenzie County Water Resource District. We are prime sponsors and managers of the development of the Western Area Water Supply Project in partnership with the City of Williston, Williams Rural Water District, and the R&T Water Supply Association. Thank you for providing the opportunity to present input and comment on the analysis that the Corps of Engineers has completed. We recognize and applaud the Corps for protecting a resource that we treasure, but to ask the people of McKenzie County to pay for storage that they do not need is just plain wrong. The Missouri River provides an ample supply of water and we simply do not need the storage.

I am here tonight to inform you that we are very disappointed and dissatisfied with the analysis and the basis of recommendations. We are preparing detailed comments on the report and will submit them in writing at a later date. It is frustrating that only one public meeting has been scheduled on this topic. The heart of the current activity, and the primary comparison between alternatives revolved around the developing oil industry; yet there have been no meetings close to the actual area concerned.

The major basis of the Corps of Engineers report is that the sale of water out of the reservoir is the least cost alternative to providing water for the area compared to the Western Area Water Supply Project which is a public water supply. The analysis assumes that the total cost of increased capacity of the Williston water treatment plant and the cost of installing the pipelines

is being contemplated to serve the oil industry. The fact is that the primary benefit of the Western Area Water Supply Project is to provide a much needed municipal and rural water system for the region. These benefits are not recognized, and as such creates a flaw in the analysis.

The fact is that when you design a municipal and rural water system, you need to design for a peak day demand. The peak day demand is in excess of three times the volume of the average day. Therefore, there is significant capacity that is available to sell industrial water at little to no additional cost to the Western Area Water Supply Project. In order to complete a true analysis, all of the benefits need to be addressed.

The Western Area Water Supply Project will provide a backbone water supply in the heart of the developing industry. Yet, the analysis indicates that the impacts to roads will be significantly less than the no-action alternative. McKenzie County is extremely concerned about the potential locations of the roads, to potentially hundreds of new water intakes. The analysis on the transportation impacts seems extremely simplified and needs to be re-evaluated.

In closing, I want to stress that it seems inconceivable that the Corps of Engineers would pick this time to start charging a storage fee for water out of the reservoir. The people of McKenzie County have paid dearly for the reservoir and given up hundreds of acres of prime bottom land for the protection of the lower Missouri Basin. In recent years, the US Government has decided that we cannot drive a four wheeler on the shore, we cannot camp on the shore, access for ice fishing is limited, and now we get to pay for a permanent flood in order to access the water.

To think that the first place the Corps starts charging for water storage from the main stem dams is in North Dakota is simply wrong!

Thank you.

Testimony for the U.S. Army Corps of Engineers Public Scoping Meeting on the Lake Sakakawea Letter Report and Environmental Assessment
January 6, 2011
Bismarck, ND

Good evening, I am Jack Dalrymple, the Governor of North Dakota. I appreciate the opportunity to comment on the Lake Sakakawea Draft Surplus Water Report and Environmental Assessment released by the U.S. Army Corps of Engineers on December 16, 2010. As stated previously in letters dated June 10, 2010 and October 28, 2010, the State of North Dakota has serious concerns about the Corps' recently introduced restrictions and policies regarding access to water in the Missouri River. It seems that Corps policies are now blocking access to the free flow of the Missouri River which is rightful property of the State of North Dakota. This is an outrage.

In 1957, the Corps completed construction of the Garrison Dam, creating a reservoir that holds more than 24 million acre feet of water. Today, Lake Sakakawea is the third largest man-made lake in the United States and is unique to all other reservoirs in the United States. The Corps' reason for the sudden implementation of this policy stems from problems that have arisen on East Coast reservoirs due to their smaller size. Unlike the East Coast reservoirs, the storage capacity of the Missouri River main stem reservoirs vastly overshadows any proposed water storage needs within North Dakota by several orders of magnitude. The blanket policy proposed by the Corps is utterly inappropriate for the State of North Dakota.

Prior to the enactment of a 2008 Corps Real Estate Policy, water users were able to gain access to water in the Missouri River main stem system through a land easement application process and associated permits without being charged a fee. The Draft Report states that the Corps has issued 142 water intake easements around Lake Sakakawea, only one of which has a fee-based "surplus water supply agreement." These easements were issued over the last 60 years without the need for a reallocation study or a water storage contract. Thus, the Corps' recent change in position of requiring the allocation of storage in reservoirs and issuance of water storage contracts to existing and potential water users under the 1944 Flood Control Act and the Water Supply Act of 1958 is unjustifiable for a number of reasons.

First, the Missouri River is a vital water source to the State of North Dakota that existed prior to the construction of the main stem reservoirs. According to Article XI, Section 3 of the North Dakota Constitution, "[a]ll flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes." The Missouri River continues to flow through Lake Sakakawea today and cannot be considered stored water due to permanent rights held by the State. North Dakota water users must have access to the river without cost and without the requirement of surplus water supply agreements.

Second, the main stem reservoirs were constructed with planned benefits to the States where land and resources were impacted. Approximately 550,000 acres of prime farmland were taken in North Dakota for the construction of the main stem reservoirs. Congress has since recognized the majorities of these benefits have been realized downstream and has provided amendments to the 1944 Flood Control Act to address some of these inequities.

Additionally, section 301(b) of the 1958 Water Supply Act provides that recovery of capital costs may extend for a period of up to 50 years. That 50 year time period noted has expired! The Corps should not have the ability nor a federal responsibility to charge water storage costs to repay for the construction costs of the dams for surplus water when original repayment contracts were never required at the start of construction. The Corps' proposal to charge for construction costs is unacceptable. They then exacerbate this ill-conceived idea by basing their fees on what would be the costs to construct the dam today.

Third, the Draft Report only proposes a storage fee for water users in the upper basin states that withdraw water directly from the main stem reservoirs, but does not charge downstream users a similar fee. Reservoirs, like Lake Sakakawea, provide numerous benefits for all users not just those that withdraw water directly from the reservoirs. Hydropower, navigation, water supply, and flood control are just some of the benefits reaped by downstream users that are not charged a fee.

The Missouri River, including Lake Sakakawea and Lake Oahe, is valuable to the State of North Dakota and is a resource that should be readily available to access without cost. Access to Lake Sakakawea alleviates environmental and infrastructure concerns within the western part of the State and also benefits communities statewide through water projects such as the Red River Water Supply Project, the Northwest Area Water Supply Project, and the Southwest Pipeline Project. Restrictions in access would affect these very projects; the farmers, and ranchers that rely on access for irrigation purposes; hinder the development of domestic energy resources and eliminate the Three Affiliated Tribes and the Standing Rock Nation from freely accessing water supply.

As development in North Dakota continues, Missouri River water becomes an important component to the growth of the State and the nation. Just as important is the ability to access Missouri River water in a timely manner in order to meet the immediate water supply needs of the people of North Dakota. In summary, I ask you to continue to expedite the work required to process easement requests that are currently before the Corps. Further delay of processing these easements is unacceptable. Using U.S. Army Corps of Engineers' easements to block North Dakota's access to its own rightful water supplies is not only an improper use of the intended purpose of these easements, but is also an unconscionable and unjust attempt to achieve monetary gain where none is justified. Financial claims have not been sought in the past and contradict states' rights and congressional authorizations. All considerations for the use of

Missouri River water have been settled in the past and should not be open to further discussion.
I urge the Corps to continue to provide water access to existing and potential water users
without cost today!



North Dakota Irrigation Association

P.O. Box 2254
Bismarck, ND 58502
701-223-4615, 701-223-4645 (fax)
e-mail: ndirrigation@btinet.net

Dedicated to strengthening and expanding irrigation to build and diversify our economy.

Comments on the Corps of Engineers on Lake Sakakawea Draft Surplus Water Report, Environmental Assessment

Presented at the Corps of Engineers Public Comment Meeting
January 6, 2011, Doublewood Inn
Bismarck, North Dakota

The release of the “Lake Sakakawea Draft Surplus Water Report, Environmental Assessment” is the first step by the U.S. Army Corps of Engineers (COE) to formulate a basis for establishing storage fees and begin charging North Dakota water users, with some exceptions specified by statute, for water withdrawn from Lake Sakakawea and ultimately from Lake Oahe. Singling out Lake Sakakawea for imposing surplus water fees is unacceptable, unfair, and unlawful under North Dakota Law.

The Missouri and Yellowstone Rivers discharge more than 15 million acre-feet of water annually through Lake Sakakawea and later through Lake Oahe. This flow was occurring long before the construction of the dams on the Missouri River. Article XI, Section 3 of the North Dakota Constitution states “all flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes.” North Dakota water law is based on this section. Records show that the natural flow of the Missouri River is ample to meet North Dakota's water needs.

North Dakota has consistently asserted that it has a right to capture water from the natural flow to meet its needs irrespective of the storage in Lake Sakakawea or Lake Oahe. In fact, the reservoirs represent an impediment to gaining reliable access to the water because of the wide fluctuations that occur in the level of the reservoirs during periods of below normal precipitation. Significant expenditures are usually required for the modification of pump intakes in order to follow the water as it recedes and eventually the cost becomes prohibitive. During the last drought period, it appeared that the COE was more of a hinderance to implementing ways to pump water than it was in providing help in processing the permits needed to modify pump intakes.

The report indicates that irrigators may not have continued access to Lake Sakakawea unless a surplus water agreement is executed as a part of the real estate easement required for access. On page 1-2 of the report, ER 1105-2-100 states that surplus water agreements are not authorized for crop irrigation. In reading the language of the section, it can be concluded that requiring a surplus water agreement for irrigation is prohibited.

North Dakota sacrificed 550,000 acres of prime farmland and many families were disrupted as the result of the construction of the main stem reservoirs. After already paying such an enormous price, it is outrageous for the COE to consider charging for the natural flows of the Missouri River because they pass through Lake Sakakawea. Irrigation benefits from the construction of the main stem reservoirs were promised in the 1944 Flood Control Act and remain unrealized. In addition, electric power generated by the main stem dams has not been allocated for irrigation as provided in the Act and instead the power has gone to others. It is unjust to consider charging North Dakota water users when downstream and other beneficiaries have not been asked to pay project costs for flood control, navigation, industrial and municipal water supplies. The current proposed action would place unacceptable and unjust burdens on the ability of the state of North Dakota to rightfully develop its water resources.

Therefore, the COE must abandon the proposal to require surplus water agreements when renewing real estate easements for the purpose of imposing charges for the water allocated by the North Dakota State Engineer and which represents the natural flow of the river. The proposed action by the Corps is illegal and violates the long standing right of the state to manage its water resources. To implement such a requirement is coercion

Testimony of Eric Volk

Executive Director – ND Rural Water Systems Association

Lake Sakakawea Draft Surplus Water Report

January 6, 2011-Bismarck, ND

My name is Eric Volk and I am the executive director of the North Dakota Rural Water Systems Association (NDRWSA). NDRWSA serves a membership of more than 250 cities, 28 rural/regional water systems, and four tribal systems.

The NDRWSA is committed to ensuring North Dakota's residents receive affordable drinking water of excellent quality and sufficient quantity. Today I am submitting written comments and testifying in strong opposition of any federal attempt from the Corps of Engineers or any other federal agency to regulate, permit, charge or otherwise control the use of water by municipal, rural and industrial users from Lake Sakakwea.

Approximately 23 of the state's rural/regional water systems are currently or will be receiving all or a portion of their water from a Missouri River mainstream reservoir. These systems provide water to rural residential customers, numerous communities and industrial users. Rules, regulations, aging infrastructure, the increased cost of providing water service and other factors are taking a toll on many North Dakota water systems. Being charged an unnecessary water storage fee is not an option. Being charged for something that is rightfully yours is asinine. The natural flow of the Missouri River through North Dakota would be sufficient to meet the states needs. Our water systems should have the right to at least that flow and to have that flow without charge.

With that said, NDRWSA strongly encourages the Corps of Engineers to reconsider any thought of charging water storage fees on Lake Sakakawea. Thank you for giving me the opportunity to testify and provide written testimony on behalf of the members of NDRWSA in strong opposition of any federal attempt from the Corps of Engineers or any other federal agency to regulate, permit, charge or otherwise control the use of water by municipal, rural and industrial users from Lake Sakakawea.

Good evening. My name is Mary Massad. I am the Manager/CEO of the Southwest Water Authority (SWA). The North Dakota Legislature created the Southwest Water Authority to provide for the supply and distribution of water to the people of southwestern North Dakota. We were also created to provide for the future economic welfare and prosperity of the people of the state, particularly the people of southwestern North Dakota, by making available “waters from Lake Sakakawea and the Missouri River” for beneficial and public uses.

It was further declared necessary to study and further develop these water resources to provide adequate water supplies for energy, industrial, agriculture, and other opportunities in southwest North Dakota. Unhindered and free access to Lake Sakakawea water is critical to meet these needs.

The Southwest Water Authority manages, operates and maintains the Southwest Pipeline Project for the people of the state of North Dakota. The Southwest Pipeline Project (SWPP) is the first large multi-county regional rural water project developed in the state. The water source for the SWPP is Lake Sakakawea. We serve more than 4,000 rural customers, 28 communities, 15 small businesses, 18 raw water contract customers which includes an ethanol plant, a water depot as well as Perkins County Rural Water System in South Dakota. The current North Dakota population served by our system is approximately 35,032. It is truly the lifeblood of our region. People and business succeed with quality water.

The Southwest Water Authority and the Southwest Pipeline Project include the 12 counties in southwest North Dakota. This Project has been under construction for 25 years. To date, more than 4,000 miles of pipeline have been installed and more than \$180 million has been spent building an efficient network of pipelines, pump stations, reservoirs and treatment facilities to bring an adequate supply of quality water to our region.

We began providing water service in October of 1991 to the city of Dickinson. Our first rural service began the following year. The Southwest Pipeline Project is an example of water use from Lake Sakakawea. The reliability, quality and quantity of water available from this lake make it the water source of choice in our state.

Ground water in North Dakota is scarce and the quality of the water is very limited at best. In the early days of Project design, mayors of communities were quoted as saying they could not entice businesses to move to their communities due to the quality of the water. Our rural customers have their own “water stories.” Of the 4,000 rural customers we serve, many had an inadequate supply and poor quality of water, if any water at all.

This is one example of the need for access to Lake Sakakawea water. Without access to the Lake, southwest North Dakota would not be thriving and growing. This is a quality of life issue. When most people turn on the tap, they do not think about where their water comes from. They assume there will always be quality water. We want our communities and our rural areas to be sustainable, and to grow. How many young people today would live in a home if they had to haul water to live there? How many would live there if they couldn't drink the water when they turn on the faucet? Not many.

It is also an economic issue. Quality water for business and industry is a necessity. It is not an option. As I stated, “the supply” of quality water for our state is Lake Sakakawea. It should not be subject to studies and fees as suggested by the Corps of Engineers. This would put an additional burden on the citizens and businesses and industries we serve. It will also put an undue burden on those who still need access to this water or who might yet be subjected to the study, supply contracts and easements.

The Dakota Water Resources Act of 2000 and other federal legislation may have made our Project exempt from the surplus water study and fees. I would like clarification and assurances from the Corps of Engineers this is the case, both now and in the future. Should additional intakes for the SWPP be necessary, will we still be exempt?

This need for a water supply study and related fees seems unfair when North Dakotans have given up so much over the years for the benefit of all. Why should we be denied access to the natural flows of water through our state because Lake Sakakawea is in the way, so to speak? Studies have been done to show the supply is there. We can see it is there. We can feel its effects both good and bad throughout our state.

The Southwest Water Authority supports the right of access to water from Lake Sakakawea. The Authority supports this being allowed both now and in the future. Access to waters from Lake Sakakawea should not be limited by studies nor should fees for water storage be incurred. Please let us have access to our water for us our citizens and our future generations. Please allow free access to Lake Sakakawea water for municipal, rural and industrial use including irrigation in our fine state. With this water, our cities, rural areas and economic development prosper. Without access to Lake Sakakawea water, they wither, dry up and blow away.

It is important to North Dakota. It is important for quality of life. It is important to industry, to agriculture, to energy development. It is important for economic development. It is important for energy independence for the United States. It is important to use Lake Sakakawea water without storage or others fees. We have paid enough.

North Dakota should have free access to its state's waters without studies and without fees. It is just the right thing to do. Thank you.

Testimony for the Corps of Engineers Public Scoping Meeting on the Lake
Sakakawea Letter Report and Environmental Assessment

January 6, 2011

Bismarck, ND

I am Todd Sando, North Dakota State Engineer and Chief Engineer-Secretary to the North Dakota State Water Commission. Thank you for the opportunity to provide this testimony.

The North Dakota State Water Commission and the Office of the State Engineer are opposed to the Corps of Engineers requiring payment from water users to withdraw water from the Missouri River within the boundaries of the lands taken for the mainstem reservoirs. The Lake Sakakawea Surplus Water Report maintains that the intent is to charge for “surplus storage” in the reservoirs by requiring water storage contracts as a condition for an easement to construct intake works on Corps property. In so doing, the Corps is clearly obstructing access to, and use of, Missouri River natural flows, which are the waters owned by the people of North Dakota. As the agency responsible for the appropriations of North Dakota’s waters, I believe the Corps does not have the legal or constitutional standing to encumber our appropriations for beneficial uses in this manner.

The Corps of Engineers is clearly challenging the State of North Dakota and the upper basin states rights to access our natural flows through this Surplus Water Report process. The choice being presented to the regions most impacted by the construction of the reservoirs is 1) no water access or 2) incur additional costs for water access, even when the original benefits of water supply for the State have never been fully realized. Any reference in the report that the State of North Dakota’s preferred alternative for water supply is use of “surplus water” is incredibly wrong. Water supply from the natural flows of the Missouri River, accessed through a Corps land easement, is preferred.

We do not want our protest to the Surplus Water Report to delay current easement applications from being processed. However, we do need to assert our rightful claim that surplus water contracts are not required for these water withdrawals from the Missouri River, even within the reaches inundated by the reservoirs.

The Corps first halted access to Missouri River water in North Dakota in June 2010, when it refused to issue an easement to South Central Water District for a drinking water intake. After providing an exhaustive briefing of the Garrison Diversion legislative history, which amended the Flood Control Act of 1944, the Corps finally acknowledged the South Central project would not require a water storage contract and an easement was issued. This was the first attempt by the Corps to misapply the need for storage contracts in North Dakota and delay projects that benefit the State.

The Corps has refused to process any further easement applications and started this Surplus Water Report based on Real Estate Policy Guidance Letter Number 26. That policy states, "no easement that supports any type of water supply agreement will be executed prior to the water supply agreement being executed by all parties." The Corps' assumption is that all requests for easements for Lake Sakakawea need to use stored water. This is entirely wrong. The natural flows are nowhere near being fully appropriated. Due to the availability of natural flows, water storage agreements are not needed. The Corps of Engineers must recognize that any easement requests currently before them do not require the Corps to operate the system to provide the water, and do not require storage contracts. So the policy does not apply, and will never apply when the water used is within the natural flows. For these reasons the easements should be processed immediately.

Our outrage is in part with how the Corps is ignoring our state constitution and our long history with amendments to the 1944 Flood Control Act.

Prior to construction of the Garrison Dam, the Missouri River in North Dakota was a free (natural) flowing river, and based on Article XI, Section 3 of the North Dakota Constitution, the flowing streams and natural watercourses shall forever remain the property of the state. Accordingly, waters of the Missouri River belong to the public and are subject to appropriation by the North Dakota State Engineer for beneficial use.

Quoting from House Document 325, dated February 4, 1960, which was supporting documentation in the 1965 amendments to the 1944 Flood Control Act, "A large source of additional water is a recognized need everywhere east of the Missouri River in the Dakotas. The Missouri is the only available source of such a supply. On the main stem near Williston North Dakota, at the head of Garrison Reservoir, historic annual riverflow have, since 1898, varied between 25,800,000 and 9,150,000 acre-feet with an average of 17,600,000 acre-feet." This federal recognition of the natural flows in the Missouri River constitutes a large volume of water that can be put to beneficial use by the people of North Dakota.

North Dakota has steadfastly maintained its right to use Missouri River water within its boundaries. This was acknowledged in the development of the Garrison Diversion Unit Reformulation Act of 1986, which also relates to the 1944 Flood Control Act. Congress declared that one of the purposes of this act is to preserve any existing rights of the State of North Dakota to use water from the Missouri River. It also states, "Nothing in this act shall be deemed to diminish the quantity of water from the Missouri River which the State of North Dakota may beneficially use, pursuant to any right or rights it may have under Federal law existing immediately before the date of enactment of this act and consistent with treaty obligations of the United States."

The legislative history has been to protect beneficial use in the upper basin states, it has not been to deny access.

I also have strong concerns that the Surplus Water Report does not clearly address irrigation. The report recognizes that irrigation has accounted for nearly half of the water usage in the Lake Sakakawea area over the last two decades. The report states that 110 of the 142 water intake easement at Lake Sakakawea will expire over the next 10 years and they may require surplus water agreements prior to renewal. It is misleading to say they “may require” agreements when the report also states that no temporary surplus water agreements can be made for crop irrigation. If the irrigation easements coming up for renewal in the next ten years will be denied or if irrigation will be charged \$20.91 per acre-foot, either of these extremes has tremendous impacts to our agricultural economy and this must be disclosed to the public.

The construction repayment costs presented in the Surplus Water Report are also of concern. With the Corps Real Estate Policy only enforcing water service contracts for those entities crossing reservoir lands, it is only forcing those nearest and directly affected by the construction of the dams to repay the costs. Those receiving annual benefits for flood control, hydropower, and navigation downstream are seeing no costs. Those of us in the upper basin that were forced to accept a permanent flood, and have not yet received the full benefits of water supply originally planned, are hindered from accessing our natural flows along these reservoirs. In addition, the Corps is attempting to recover costs for Power Intake Works, Levees & Floodwalls, and multiple Reservoirs. We do not understand how these are directly attributable to the water storage contracts the Corps is now requiring in North Dakota.

The Corps reports that they paid \$59 million in relocations, land and damage costs when the dam was constructed. They are now stating those closest to the reservoir, some whose family homes and farms were condemned, need to repay close to \$1 billion to the federal government for these relocations and land costs just to access our natural flows. Further, there is no provision in the 1944 Flood Control Act

requiring the indexing of costs from 1949 dollars to 2011 dollars, however this is precisely what the Corps is doing to escalate the cost by 1500 percent.

Let me clearly state for the record that the State of North Dakota has the right to allocate and manage both the natural flows of the Missouri River and the originally authorized water diversions from Lake Sakakawea for North Dakota. The State has these rights without storage contracts. The Corps is wrong in their current position and it is causing tremendous harm by denying our access to the waters of North Dakota. The State Water Commission will provide detailed comments prior to the closing of the comment period.

Omaha District SWR and EA Transmittal Letters



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Tex Hall, Jr. Chairman
Three Affiliated Tribes
404 Frontage Road
New Town, North Dakota 58763

Dear Chairman Hall:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

The draft report proposes temporarily making up to 100,000 acre feet of water yield per year (equivalent to 257,000 acre-feet of storage per year) available within the Garrison Dam/Lake Sakakawea Project, North Dakota for municipal and industrial water supply. The identification of surplus water will allow the Omaha District to enter into temporary surplus water agreements for up to 100,000 acre-feet of yield per year (257,000 acre-feet of storage per year) to meet regional water needs for oil and gas development until such time that a permanent reallocation study might be completed. The draft EA, which is attached to the report, identifies baseline environmental conditions and analyzes potential impacts from the proposed use of surplus water.

The Corps is committed to transparent communication regarding these important decision documents. Members of Tribal, state, and federal agencies, as well as the general public, are encouraged to provide comments on the draft report and EA during the open comment period of December 16, 2010 to January 17, 2011. A public involvement meeting is planned for January 6, 2011 at the Doublewood Inn, 1400 East Interchange Avenue, Bismarck, North Dakota, from 5-8 p.m.

The draft report and EA are available for viewing at www.nwo.usace.army.mil/html/pd-p/review_plans.html and in hardcopy at libraries in Bismarck, Dickinson, Garrison, Riverdale, Williston, New Town, Beulah and Hazen, North Dakota. Hard copies are also available by request from the Corps of Engineers at the contact information below. Comments may be submitted via comment forms available at the public meeting and at libraries where the report is located.

Written comments should be sent to:

U.S. Army Corps of Engineers
Attention: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, Nebraska 68102-4901
Phone number: (402) 995-2440
Fax number: (402) 995-2411

Comments can also be emailed to: garrisonsurplusstudy@usace.army.mil. Comments must be postmarked or received no later than January 17, 2011.

The Corps looks forward to receiving your comments on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kayla A Eckert Uptmor". The signature is written in a cursive style with a large initial "K" and a long, sweeping tail.

Kayla A Eckert Uptmor
Chief, Planning Branch



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Fred Fox, Tribal Energy Department Administrator
Three Affiliated Tribes
404 Frontage Road
New Town, North Dakota 58763

Dear Mr. Fox:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Comments can also be emailed to: garrisonsurplusstudy@usace.army.mil. Comments must be postmarked or received no later than January 17, 2011.

The Corps looks forward to receiving your comments on this important matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kayla A Eckert Uptmor", with a small "fw" written to the right of the signature.

Kayla A Eckert Uptmor
Chief, Planning Branch



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Ms. Annette Young Bird, Natural Resource Administrator
Three Affiliated Tribes
404 Frontage Road
New Town, North Dakota 58763

Dear Ms. Young Bird:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Written comments should be sent to:

U.S. Army Corps of Engineers
Attention: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, Nebraska 68102-4901
Phone number: (402) 995-2440
Fax number: (402) 995-2411

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,

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Kayla A Eckert Uptmor
Chief, Planning Branch



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

REPLY TO
ATTENTION OF

17 December 2010

Planning, Programs, and Project Management Division

Ms. Alicia Waters,
Bureau of Reclamation
Dakotas Area Office
304 East Broadway Avenue
Bismarck, North Dakota 58501

Dear Ms. Waters:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Kayla A Eckert Uptmor
Chief, Planning Branch



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Donald Felch,
Natural Resources Conservation Service
220 East Rosser Avenue
Federal Building, Room 270
Bismarck, North Dakota 58501

Dear Mr. Felch:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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REPLY TO
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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Dan Cimarosti,
U.S. Army Corps of Engineers
North Dakota State Regulatory Office - Bismarck
1513 South 12th Street
Bismarck, North Dakota 58504

Dear Mr. Cimarosti:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Kayla A Eckert Uptmor
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REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Lonnie Bagley,
Bureau of Land Management
North Dakota Field Office
99 23rd Avenue West
Dickinson, North Dakota 58601

Dear Mr. Bagley:

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REPLY TO
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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Jeffrey Towner,
U.S. Fish and Wildlife
Ecological Services
3425 Miriam Avenue
Bismarck, North Dakota 58501

Dear Mr. Towner:

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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
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OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Greg Wicke,
USGS North Dakota Water Science Control
821 East Interstate Avenue
Bismarck, North Dakota 58503

Dear Mr. Wicke:

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REPLY TO
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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Larry Svoboda,
EPA Region 8 (8EPR-N)
1595 Wynkoop Street
Denver, Colorado 80202-1129

Dear Mr. Svoboda:

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REPLY TO
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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

To Whom It May Concern,
North Dakota Public Service Commission
600 East Boulevard, Dept. 408
Bismarck, North Dakota 58505-0480

Dear To Whom It May Concern:

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CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Michael Bowen,
Federal Highway Administration
1471 Interstate Loop
Bismarck, North Dakota 58503-0567

Dear Mr. Bowen:

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CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Ms. Alice Harwood, Regional Director
Bureau of Indian Affairs
115 4th Avenue S.E.
Aberdeen, South Dakota 57401

Dear Ms. Harwood:

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,

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Kayla A Eckert Uptmor
Chief, Planning Branch



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Terry Steinwand,
North Dakota Game and Fish
100 North Bismarck Expressway
Bismarck, North Dakota 58501-5095

Dear Mr. Steinwand:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Written comments should be sent to:

U.S. Army Corps of Engineers
Attention: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, Nebraska 68102-4901
Phone number: (402) 995-2440
Fax number: (402) 995-2411

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Kayla A Eckert Uptmor
Chief, Planning Branch



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ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. David Glatt,
North Dakota Department of Health
Environmental Health Section
918 East Divide Avenue
Bismarck, North Dakota 58501-1947

Dear Mr. Glatt:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Todd Sando,
North Dakota State Water Commission
900 East Boulevard Avenue, Dept. 770
Bismarck, North Dakota 58505-0850

Dear Mr. Sando:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Ms. Francis Ziegler,
North Dakota Department of Transportation
680 East Boulevard Avenue
Bismarck, North Dakota 58505-0700

Dear Ms. Ziegler:

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CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Merlin Paaverud,
North Dakota State Historical Society
612 East Boulevard Avenue
Bismarck, North Dakota 58505

Dear Mr. Paaverud:

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REPLY TO
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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Ms. Cheryl Kulas,
North Dakota Indian Affairs Commission
State Capitol Building
600 East Boulevard Avenue 1st Floor, Judicial Wing, Room #117
Bismarck, North Dakota 58505

Dear Ms. Kulas:

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REPLY TO
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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. John Hoganson,
North Dakota Geological Survey
600 East Boulevard
Bismarck, North Dakota 58505-0840

Dear Mr. Hoganson:

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CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Mark Zimmerman,
North Dakota Parks and Recreation Department
1600 East Century Avenue, Suite 3
Bismarck, North Dakota 58503

Dear Mr. Zimmerman:

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DEPARTMENT OF THE ARMY
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1616 CAPITOL AVENUE
OMAHA NE 68102-4901

17 December 2010

Planning, Programs, and Project Management Division

Mr. Rick Ross,
North Dakota Petroleum Council
P.O. Box 1395
Bismarck, North Dakota 58502-1395

Dear Mr. Ross:

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DEPARTMENT OF THE ARMY
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REPLY TO
ATTENTION OF

17 December 2010

Planning, Programs, and Project Management Division

Ms. Lynn D. Helms,
North Dakota Industrial Commission
State Capitol, 14th Floor
600 East Boulevard Avenue, Department 405
Bismarck, North Dakota 58501

Dear Ms. Helms:

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REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Ms. Donna Rae Petersen, Cultural Preservation Office
Cheyenne River Sioux Tribe
98 South Willow Road
Eagle Butte, South Dakota 57625

Dear Ms. Petersen:

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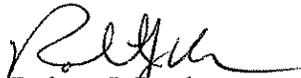
U.S. Army Corps of Engineers
Attention: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, Nebraska 68102-4901
Phone number: (402) 995-2440
Fax number: (402) 995-2411

Comments can also be emailed to: garrisonsurplusstudy@usace.army.mil. Comments must be postmarked or received no later than January 17, 2011.

Should Tribes desire formal consultation please contact Mr. Joel Ames, 402-995-2909, joel.o.ames@usace.army.mil, or by mail to USACE, 1616 Capitol Avenue Suite 9000, Omaha, Nebraska 68102 Attn: Mr. Ames.

The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copies Furnished:

Mr. Kevin Keckler, Chairman
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, South Dakota 57625

Mr. Robert Walters
Cheyenne River Sioux Tribe
Tribal Council
P.O. Box 590
Eagle Butte, South Dakota 57625



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. A.T. Stafne, Chairman
Assiniboine and Sioux Tribes of Fort Peck
P.O. Box 1027
510 Medicine Bear Road
Poplar, Montana 59255

Dear Chairman Stafne:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Robert J. Rich
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Curley Youpee
Director Cultural Resource Department
Assiniboine and Sioux Tribes of Fort Peck
P.O. Box 1027
Poplar, Montana 59255



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Felix Kitto, Environmental Specialist
Santee Sioux Nation, Environmental Protection Department
Land and Resource Management Office 52948 Highway 12
Santee, Nebraska 68760

Dear Mr. Kitto:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Sincerely,


Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Roger Trudell, Chairman
Santee Sioux Nation
108 Spirit Lake Avenue, West
Niobrara, Nebraska 68760



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Reid Nelson, Director, Office of Federal Agency Programs
Advisory Council for Historic Preservation
1100 Pennsylvania Avenue Northwest, Suite 809
Washington, DC 20004-2501

Dear Mr. Nelson:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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District Commander



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Terry Steinacher, State Archeologist
Nebraska State Historical Society
P.O. Box 304
Fort Robinson Museum, 3200 West Highway 20
Crawford, Nebraska 69339

Dear Mr. Steinacher:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,


Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Michael J. Smith
State Historic Preservation Officer
Nebraska State Historical Society
P.O. Box 82554
Lincoln, Nebraska 68501



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Paul Coughlin, Habitat Management Program Administrator, Wildlife Division
South Dakota Department of Game, Fish and Parks
523 East Capital Avenue
Pierre, South Dakota 57501-3182

Dear Mr. Coughlin:

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Robert J. Ruch
Colonel, Corps of Engineers
District Commander



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Dennis Williams, Environmental and Cultural Resources Specialist
South Dakota Department of Game, Fish and Parks
523 East Capitol Avenue
Pierre, South Dakota 57501-3182

Dear Mr. Williams:

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Sincerely,


Robert J. Rauch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Jeffrey R. Vonk, Secretary
South Dakota Department of Game, Fish and Parks
523 East Capitol Avenue
Pierre, South Dakota 57501-3182



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Ms. Paige Hoskinson-Olson, Historical Archaeologist Review and Compliance Coordinator
South Dakota State Historical Society
900 Governors Drive
Cultural Heritage Center
Pierre, South Dakota 57501-2217

Dear Ms. Hoskinson-Olson:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Robert J. Rych
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Jay D. Vogt, SHPO
South Dakota State Historical Society
Cultural Heritage Center
900 Governors Drive
Pierre, South Dakota 57501-2217



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Merle St. Claire, Chairman
Turtle Mountain Band of Chippewa
P.O. Box 900
Tribal Historic Preservation Office, Highway 5 West
Belcourt, North Dakota 58316

Dear Chairman St. Claire:

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REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Kade Ferris, M.S., Tribal Historic Preservation Officer
Turtle Mountain Band of Chippewa
P.O. Box 900
Tribal Historic Preservation Office, Highway 5 West
Belcourt, North Dakota 58316

Dear Mr. Ferris, M.S.:

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U.S. Army Corps of Engineers
Attention: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, Nebraska 68102-4901
Phone number: (402) 995-2440
Fax number: (402) 995-2411

Comments can also be emailed to: garrisonsurplusstudy@usace.army.mil. Comments must be postmarked or received no later than January 17, 2011.

Should Tribes desire formal consultation please contact Mr. Joel Ames, 402-995-2909, joel.o.ames@usace.army.mil, or by mail to USACE, 1616 Capitol Avenue Suite 9000, Omaha, Nebraska 68102 Attn: Mr. Ames.

The Corps looks forward to receiving your comments on this important matter.

Sincerely,


Robert J. Ruch
Colonel, Corps of Engineers
District Commander



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Michael Jandreau, Chairman
Lower Brule Sioux Tribe
187 Oyate Circle
Lower Brule, South Dakota 57548-0187

Dear Chairman Jandreau:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Sincerely,



Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Ms. Clair S. Green
Public Relations/Cultural Preservation Office
Lower Brule Sioux Tribe
187 Oyate Circle
Lower Brule, South Dakota 57548-0187



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Perry "No Tears" Brady, Tribal Historic Preservation Officer
Three Affiliated Tribes
Tribal Administration Building
404 Frontage Road
New Town, North Dakota 58763

Dear Mr. Brady:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Robert J. Buch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Tex Hall, Chairman
Three Affiliated Tribes
Tribal Administration Building
404 Frontage Road
New Town, North Dakota 58763



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Gary Robinette, Director of Cultural Affairs
Ponca Tribe of Nebraska
P.O. Box 288
252-1 Spruce Avenue
Niobrara, Nebraska 68760

Dear Mr. Robinette:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,


Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Ms. Rebecca White, Chairperson
Ponca Tribe of Nebraska
P.O. Box 288
Niobrara, Nebraska 68760



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Ms. Wanda Wells, Tribal Government Liaison
Crow Creek Sioux Tribe
P.O. Box 50
100 Drifting Goose Drive
Fort Thompson, South Dakota 57339-0050

Dear Ms. Wells:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,


Robert J. Kuch
Colonel, Corps of Engineers
District Commander

Copies Furnished:

Ms. Kitty Wells
Tribal Council Member
Crow Creek Sioux Tribe
P.O. Box 50
Fort Thompson, South Dakota 57339-0050

Mr. Duane Big Eagle, Chairman
Crow Creek Sioux Tribe
P. O. Box 50
Fort Thompson, South Dakota 57339-0050



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Linwood Tallbull, Tribal Historic Preservation Officer
Northern Cheyenne Tribe
P.O. Box 128
Little Wolf Capitol Building, South Cheyenne Avenue
Lame Deer, Montana 59043

Dear Mr. Tallbull:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,


Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Leroy Spang, President
Northern Cheyenne Tribe
P.O. Box 128
Lame Deer, Montana 59043



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Dr. Stan Wilmoth, State Archeologist
Montana State Historic Preservation Office
P.O. Box 201202
1410 Eighth Avenue
Helena, Montana 59620-1202

Dear Dr. Wilmoth:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

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Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Dr. Mark F. Baumler
State Historic Preservation Officer
Montana State Historic Preservation Office
P.O. 201202
Helena, Montana 59620-1202



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Ms. Fern Swenson, Deputy State Historic Preservation Officer
North Dakota Historical Society
Heritage Center
612 East Boulevard Avenue
Bismarck, North Dakota 58505-0830

Dear Ms. Swenson:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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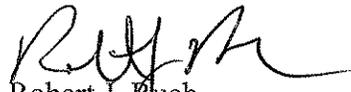
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The Corps looks forward to receiving your comments on this important matter.

Sincerely,


Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Merlan E. Paaverud Jr., SHPO
North Dakota Historical Society
Heritage Center
612 East Boulevard Avenue
Bismarck, North Dakota 58505-0830



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Anthony Reider, President
Flandreau Santee Sioux Tribe
P.O. Box 283
603 West Broad Avenue
Flandreau, South Dakota 57028

Dear Mr. Reider:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Sincerely,


Robert J. Fuch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Sam Allen
Cultural Preservation Officer
Flandreau Santee Sioux Tribe
P.O. Box 283
Flandreau, South Dakota 57028



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Harvey Spoonhunter, Chairman
Northern Arapaho Tribe
P.O. Box 396
533 Ethete Road, Ethete, Wyoming 82520
Fort Washakie, Wyoming 82514

Dear Chairman Spoonhunter:

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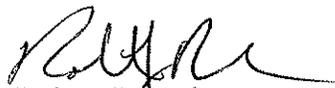
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Sincerely,



Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Ms. Jo Ann White
Tribal Historic Preservation Officer
Northern Arapaho Tribe
P.O. Box 396
Fort Washakie, Wyoming 82541



REPLY TO
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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Ivan D. Posey, Chairman
Eastern Shoshone Tribe
P.O. Box 538
15 North Fork Road
Fort Washakie, Wyoming 82514

Dear Chairman Posey:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Written comments should be sent to:

U.S. Army Corps of Engineers
Attention: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, Nebraska 68102-4901
Phone number: (402) 995-2440
Fax number: (402) 995-2411

Comments can also be emailed to: garrisonsurplusstudy@usace.army.mil. Comments must be postmarked or received no later than January 17, 2011.

Should Tribes desire formal consultation please contact Mr. Joel Ames, 402-995-2909, joel.o.ames@usace.army.mil, or by mail to USACE, 1616 Capitol Avenue Suite 9000, Omaha, Nebraska 68102 Attn: Mr. Ames.

The Corps looks forward to receiving your comments on this important matter.

Sincerely,


Robert J. Rich
Colonel, Corps of Engineers
District Commander



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Robert Shepherd, Chairman
Sisseton-Wahpeton Sioux Tribe
P.O. Box 509
100 Veterans Memorial Drive
Agency Village, South Dakota 57262-0509

Dear Chairman Shepherd:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Ms. Dianne Desrosiers
Tribal Historic Preservation Officer
Sisseton-Wahpeton Sioux Tribe
P.O. Box 907
Sisseton, South Dakota 57262



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. John Blackhawk, Chairman
Winnebago Tribe of Nebraska
P.O. Box 687
100 Bluff Street
Winnebago, Nebraska 68071-0687

Dear Chairman Blackhawk:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Darwin Snyder
Tribal Council Member
Winnebago Tribe of Nebraska
P.O. Box 687
Winnebago, Nebraska 68071-0687



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Ms. Twen Barton, Chairperson
Sac and Fox Nation of Missouri in Kansas and Nebraska
305 North Main Street
Reserve, Kansas 66434

Dear Chairperson Barton:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Robert J. Ruch
Colonel, Corps of Engineers
District Commander



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Ms. Barbara Pahl, Director, Mountains/Plains Office
National Trust for Historic Preservation
535 16th Street, Suite 750
Denver, Colorado 80202

Dear Ms. Pahl:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Robert J. Ruch
Colonel, Corps of Engineers
District Commander



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Weldon Loudermilk, Regional Director
Bureau of Indian Affairs
115 Fourth Avenue, Southeast
Aberdeen, South Dakota 57401

Dear Mr. Loudermilk:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Robert J. Rich
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Dr. Carson Murdy, Regional Archaeologist
DESCRM, Bureau of Indian Affairs
115 Fourth Avenue, Southeast
Aberdeen, South Dakota 57401



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Jake Parker, Chairman
Chippewa Cree Tribe of the Rocky Boys' Reservation
Rural Route 1, Box 544
Box Elder, Montana 59521-9724

Dear Chairman Parker:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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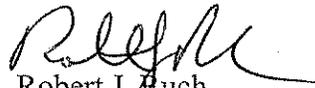
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Sincerely,



Robert J. Buch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Alvin Windy Boy
Tribal Historic Preservation Officer
Chippewa Cree Tribe of the Rocky Boys' Reservation
Rural Route, Box 800
Box Elder, Montana 59521



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Ms. Myra Pearson, Chairperson
Spirit Lake Sioux Tribe
P.O. Box 359, Tribal Office
Fort Totten, North Dakota 58335

Dear Chairperson Pearson:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Robert J. Ruch
Colonel, Corps of Engineers
District Commander



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Rodney M. Bordeaux, President
Rosebud Sioux Tribe
P.O. Box 430
111 Legion Avenue
Rosebud, South Dakota 57570-0430

Dear Mr. Bordeaux:

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Sincerely,


Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Russell Eagle Bear
Tribal Historic Preservation Officer
Rosebud Sioux Tribe
P.O. Box 809
Rosebud, South Dakota 57570-0430



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Ms. John Yellow Bird Steele, President
Oglala Sioux Tribe
P.O. Box 2070
Red Cloud Building, Main Street
Pine Ridge, South Dakota 57770

Dear Mr. Yellow Bird Steele:

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Comments can also be emailed to: garrisonsurplusstudy@usace.army.mil. Comments must be postmarked or received no later than January 17, 2011.

Should Tribes desire formal consultation please contact Mr. Joel Ames, 402-995-2909, joel.o.ames@usace.army.mil, or by mail to USACE, 1616 Capitol Avenue Suite 9000, Omaha, Nebraska 68102 Attn: Mr. Ames.

The Corps looks forward to receiving your comments on this important matter.

Sincerely,


Robert J. Buch
Colonel, Corps of Engineers
District Commander



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Willie A. Sharp, Jr. Chairman
Blackfeet Tribe
P.O. Box 850
850 Government Square
Browning, Montana 59417

Dear Chairman Sharp:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

The draft report proposes temporarily making up to 100,000 acre feet of water yield per year (equivalent to 257,000 acre-feet of storage per year) available within the Garrison Dam/Lake Sakakawea Project, North Dakota, for municipal and industrial water supply. The identification of surplus water will allow the Omaha District to enter into temporary surplus water agreements for up to 100,000 acre-feet of yield per year (257,000 acre-feet of storage per year) to meet regional water needs for oil and gas development until such time that a permanent reallocation study might be completed. The draft EA, which is attached to the report, identifies baseline environmental conditions and analyzes potential impacts from the proposed use of surplus water.

The Corps is committed to transparent communication regarding these important decision documents. Members of Tribal, state, and Federal agencies, as well as the general public, are encouraged to provide comments on the draft report and EA during the open comment period of December 16, 2010 to January 17, 2011. A public involvement meeting is planned for January 6, 2011 at the Doublewood Inn, 1400 East Interchange Avenue, Bismarck, North Dakota, from 5-8 p.m.

The draft report and EA are available for viewing at www.nwo.usace.army.mil/html/pd-p/review_plans.html and in hardcopy at libraries in Bismarck, Dickinson, Garrison, Riverdale, Williston, New Town, Beulah and Hazen, North Dakota. Hard copies are also available by request from the Corps of Engineers at the contact information below. Comments may be submitted via comment forms available at the public meeting and at libraries where the report is located.

Written comments should be sent to:

U.S. Army Corps of Engineers
Attention: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, Nebraska 68102-4901
Phone number: (402) 995-2440
Fax number: (402) 995-2411

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. John Murray
Tribal Historic Preservation Officer
Blackfeet Tribe
P.O. Box 2809
Browning, Montana 59417



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Tracey King, President
Fort Belknap Indian Community
Gros Ventre and Assiniboine Tribes
Rural Route 1, Box 66, BIA Square
Harlem, Montana 59526-9705

Dear Mr. King:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,


Robert J. Ruch
Colonel, Corps of Engineers
District Commander



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Charlie Murphy, Chairman
Standing Rock Sioux Tribe
Building #1 North Standing Rock Ave
P.O. Box D
Fort Yates, North Dakota 58538

Dear Chairman Murphy:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Ms. Adrienne Swallow
Environmental Protection Specialist
Standing Rock Sioux Tribe
Building #1, North Standing Rock Avenue
P.O. Box D
Fort Yates, North Dakota 58538



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Ms. Waste' Win Young, Tribal Historic Preservation Officer
Standing Rock Sioux Tribe
Building #1 North Standing Rock Ave
P.O. Box D
Fort Yates, North Dakota 58538

Dear Ms. Young:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Robert J. Ruch
Colonel, Corps of Engineers
District Commander



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Robert Cournoyer, Chairman
Yankton Sioux Tribe
P.O. Box 248
100 North Main Street
Marty, South Dakota 57361

Dear Chairman Cournoyer:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Robert J. Kuch
Colonel, Corps of Engineers
District Commander

Copies Furnished:

Ms. Lana Gravatt
Tribal Historic Preservation Officer
Yankton Sioux Tribe
P.O. Box 248
Marty, South Dakota 57361

Mr. Baptiste Cournoyer
Yankton Sioux Business and Claims Member
Yankton Sioux Tribe
P.O. Box 248
Marty, South Dakota 57361

Mr. Myron Turner
Yankton Sioux Business and Claims Member
Yankton Sioux Tribe
P.O. Box 248
Marty, South Dakota 57361



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Cedric Black Eagle, Chairman
Crow Nation
P.O. Box 159
Crow Tribal Administration Building, Bacheeitché Avenue
Crow Agency, Montana 59022

Dear Chairman Black Eagle:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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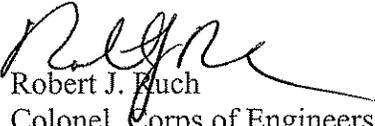
U.S. Army Corps of Engineers
Attention: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, Nebraska 68102-4901
Phone number: (402) 995-2440
Fax number: (402) 995-2411

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,


Robert J. Fuch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Dale Old Horn
Tribal Historic Preservation Officer
Crow Nation
P.O. Box 159
Crow Agency, Montana 59022



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Ms. Sandra Massey,
Sac and Fox Nation of Oklahoma
Route 2, Box 246
Stroud, Oklahoma 74079

Dear Ms. Massey:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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Robert J. Ruch
Colonel, Corps of Engineers
District Commander



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

District Commander

Mr. Tony Provost,
Omaha Tribe of Nebraska
P.O. Box 368
Tribal Office, 100 Main Street
Macy, Nebraska 68039-0368

Dear Mr. Provost:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Robert J. Ruch
Colonel, Corps of Engineers
District Commander

Copy Furnished:

Mr. Amen Sheridan, Chairman
Omaha Tribe of Nebraska
P.O. Box 368
Macy, Nebraska 68039-0368

ROS 1-20-11

SHIPMAN/CENWO-PM-AB/blr/2468

DM ANOSDALL/CENWO-PM-AA

JD PRICE/CENWO-PM-AB

JP BRANDON/CENWO-PM-AB



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

20 January 2011

Planning, Programs, and Project Management Division

Merlan E. Paaverud, Jr., SHPO
State Historical Society of North Dakota
612 East Boulevard Avenue
Bismarck, North Dakota 58505

Dear Mr. Paaverud:

This letter is a follow up on the recently released Draft Surplus Water Report for Lake Sakakawea, North Dakota. (SHPO #10-2117 COE). The Draft Environmental Assessment (EA), which is attached to the report, identifies baseline environmental conditions and analyzes potential impacts from the proposed use of surplus water.

The Corps has determined that temporarily making surplus water available for municipal and industrial water supply from sediment storage will result in a No Historic Properties Affected.

The Draft EA also included seven (7) proposed easement applications. The Corps has determined that the approval of the seven (7) easement applications will result in six (6) No Historic Properties Affected determinations and one (1) No Adverse Effect determination. We invite you to concur with these determinations. Easement application information and recorded sites are listed in Enclosure 1.

All Corps lands have been inventoried for cultural resources. Sites located within the same section are listed in Enclosure 1. Site polygons are provided on the maps which accompany each of the seven (7) proposed intake packets (Enclosure 2).

The first proposed intake, Mandaree Intake request from Sakakawea Water Company, Steve Kelly, would utilize directional drilling and direct bury methods to construct the intake. Directional drilling will not affect strata that contain cultural resource sites. The remainder of the water line would be installed by direct bury method approximately seven feet (below frost line) for approximately 350 feet in length across Corps lands. Disturbances to Corps land will not impact any eligible or listed National Register of Historic Places sites. We have determined that the proposed intake would result in a No Historic Properties Affected.

The second proposed intake, Charlson Intake request from International Western, will also use directional drilling from off-Corps land to construct the intake pipeline. This is the first of three intakes requested by International Western. None of the sites located in this vicinity will be impacted by the proposed drilling. We have determined that the proposed intake would result in a No Historic Properties Affected.

The third proposed intake, Iverson Intake request from International Western, will use an existing water intake. This intake would utilize the pre-existing infrastructure from an irrigation pump

facility. They do not plan to change the system at all and the depot would be off Corps lands. We have determined that the proposed intake would result in a No Historic Properties Affected.

The fourth proposed intake, Thompson Intake request from International Western, will also utilize directional drilling at this location. No impacts to Corps land are anticipated. We have determined that the proposed intake would result in a No Historic Properties Affected.

The fifth proposed intake, Intake 3, McKenzie Water Depot requested by Lake Sakakawea and Associates, will utilize direct bury method. There are no known sites in this vicinity. We have determined that the proposed intake would result in a No Historic Properties Affected.

The sixth proposed intake, Intake 5, Independence Point Water Depot requested by Lake Sakakawea and Associates, will utilize direct bury method. An eagle trapping pit, 32DU690, is located within the proposed route of the pipeline. As this site is potentially eligible for the National Register of Historic Places, we have informed Lake Sakakawea and Associates that their pipeline route needs to avoid the site, see alternative routes on enclosure. They have agreed to comply. An archeological monitor will be present during installation of the pipeline to ensure that no damage occurs to the site. With the realignment of the pipeline route, we have determined that the proposed intake easement will result in a No Adverse Effect.

The seventh requested intake, Intake 8, Charlson Water Depot request from Lake Sakakawea and Associates, will utilize direct bury method. This installation will not impact any recorded sites. The Elk Landing Post Office, 32MZ(XX)16, was located in the vicinity of the proposed intake but has been inundated for approximately 56 years. We have determined that the proposed intake would result in a No Historic Properties Affected.

We invite you to concur with our determinations. If you have any questions or would like to discuss this further, please contact Becky Shipman at 402-995-2468 or by e-mail Rebecca.j.shipman@usace.army.mil or me at 402-995-2706 julie.a.price@usace.army.mil.

Sincerely,



Julie Price, Manager
Cultural Resource Program
Planning Branch

Enclosures

Draft Surplus Water Report for Lake Sakakawea Proposed Easement Applications

	Name	Sites Recorded in Same Section	Section	T	R	County
Element Solutions	Mandaree Intake		19	150	93	Dunn
		32DU8 32DU674 - eagle trapping pit 32DU(IF)88				
International Western	Charlson		31	154	94	McKenzie
		32MZ1892 - stone circle 32MZ1893 - prehistoric artifact scatter 32MZ1894 - historic artifact scatter 32MZ1476 - schoolhouse, not on COE land				
	Iverson		30	153	101	McKenzie
		32MZ1882 - prehistoric artifact scatter				
	Thompson		24	154	97	Williams
		32WI1983 32WI1978				
Lake Sak and Associates	Intake 3		20	148	91	Dunn
	Intake 5		32	150	91	Dunn
		32DU690 - Eagle trapping pit, Lippincott 1986				
	Intake 8		32	154	95	McKenzie
		32MZ(xx)16 - Elk Landing Post Office, inundated				



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

Planning, Programs, and Project Management Division

Howard Bemer, Fort Berthold Superintendent
Bureau of Indian Affairs
Fort Berthold Agency
PO Box 370
New Town, North Dakota 58763

Dear Mr. Bemer:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies and quantifies surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

The draft report proposes temporarily making up to 100,000 acre feet of yield per year (270,000 acre-feet of storage per year) available within the Garrison Dam/Lake Sakakawea Project, North Dakota for municipal and industrial water supply. Temporarily making surplus water available will allow the Omaha District to enter into temporary surplus water agreements for up to 100,000 acre-feet of yield per year (270,000 acre-feet of storage per year) for water supply to meet regional water needs until such time that a permanent reallocation study might be completed. The draft EA, which is attached to the report, identifies baseline environmental conditions and analyzes potential impacts from the proposed use of surplus water, and identifies impacts of intakes to be placed by three water providers. Please note that the EA represents the Corps' assessment and findings regarding these intakes for our own decision making processes. However, many of these intakes lie on or adjacent to Fort Berthold Reservation or Forest Service lands. As such, the Corps would expect the applicants to coordinate with your agency regarding these actions, and comply with any requirements that you may have prior to Corps approval for intakes to be placed into Lake Sakakawea.

The Corps is committed to transparent communication regarding these important decision documents. Members of state, tribal and federal agencies, as well as the general public, are encouraged to provide comments on the draft report and EA during the open comment period of December 16, 2010 to January 17, 2011. A public involvement meeting is planned for January 6, 2011 at the Doublewood Inn, 1400 East Interchange Avenue, Bismarck, North Dakota, from 5-8 p.m.

The draft report and EA are available for viewing at www.nwo.usace.army.mil/html/pd-p/review_plans.html and in hardcopy at libraries in Bismarck, Dickinson, Garrison, Riverdale,

comment forms available at the public meeting and at libraries where the report is located.
Written comments should be sent to:

U.S. Army Corps of Engineers
Attention: CENWO-OD-T (Larry Janis)
1616 Capitol Avenue
Omaha, Nebraska 68102-4901
Phone number: (402) 995-2440
Fax number: (402) 995-2697

Comments can also be emailed to: garrisonsurplusstudy@usace.army.mil. Comments must be postmarked or received no later than January 17, 2011.

The Corps looks forward to receiving your comments on this important matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kayla A Eckert Uptmor".

Kayla A Eckert Uptmor
Chief, Planning Branch

Distribution List

CF: (Electronic Distribution)

CENWO-OD-T (Janis)
CENWO-OD-GA (Lindquist)
CENWO-PM-AA (Vanosdall)



REPLY TO
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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

Planning, Programs, and Project Management Division

Jeffery Towner
Field Supervisor
U.S. Fish and Wildlife Service
North Dakota Field Office
3425 Miriam Avenue
Bismarck, North Dakota 58501-7926

Dear Mr. Towner:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies and quantifies surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

The draft report proposes temporarily making up to 100,000 acre feet of yield per year (270,000 acre-feet of storage per year) available within the Garrison Dam/Lake Sakakawea Project, North Dakota for municipal and industrial water supply. Temporarily making surplus water available will allow the Omaha District to enter into temporary surplus water agreements for up to 100,000 acre-feet of yield per year (270,000 acre-feet of storage per year) for water supply to meet regional water needs until such time that a permanent reallocation study might be completed. The draft EA, which is attached to the report, identifies baseline environmental conditions and analyzes potential impacts from the proposed use of surplus water.

We look to your agency for comments on the draft documents under the authority of the Migratory Bird Treaty Act (16 U.S.C. 703 et seq.), the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) and the Endangered Species Act (16 U.S.C. 1531 et seq.) (ESA). In fulfilling our requirements under Section 7 of the ESA, we also look for your concurrence with our finding of effects of the proposed action on federally listed species. The EA represents the assessment and findings regarding the Proposed Action and serves as the Biological Assessment with a determination of no effect to the Dakota wild buckwheat (*Eriogonum visheri*), Western prairie fringed orchid (*Platanthera praeclara*), the black footed ferret (*Mustela nigripes*), gray wolf (*Canis lupus*), and the whooping crane (*Grus americana*). The findings also allow a determination of not likely to adversely affect the Dakota skipper (*Hesperia dacotae*) and pallid sturgeon (*Scaphirynchus albus*), and not likely to adversely affect and not expected to adversely modify the critical habitat for the piping plover (*Charadrius melodus*), and interior least tern

(*Sterna antillarum athalassos*). The findings can specifically be found at section 6.18. of the report "*Fish and Wildlife, and Listed Species*".

The Corps is committed to transparent communication regarding these important decision documents. Members of state, tribal and federal agencies, as well as the general public, are encouraged to provide comments on the draft report and EA during the open comment period of December 16, 2010 to January 17, 2011. A public involvement meeting is planned for January 6, 2011 at the Doublewood Inn, 1400 East Interchange Avenue, Bismarck, North Dakota, from 5-8 p.m.

The draft report and EA are available for viewing at www.nwo.usace.army.mil/html/pd-p/review_plans.html and in hardcopy at libraries in Bismarck, Dickinson, Garrison, Riverdale, Williston, New Town, Beulah and Hazen, North Dakota. Comments may be submitted via comment forms available at the public meeting and at libraries where the report is located. Written comments should be sent to:

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The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Kayla A Eckert Uptmor
Chief, Planning Branch

CF: (Electronic Distribution)

CENWO-OD-T (Janis)
CENWO-OD-GA (Lindquist)
CENWO-PM-AA (Vanosdall)



REPLY TO
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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

December 17, 2010

Planning, Programs, and Project Management Division

David Valenzuela, Minerals and Land Manager
USDA Forest Service
McKenzie Ranger District
1901 South Main Street
Watford City, North Dakota 58854-6705

Dear Mr. Valenzuela:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies and quantifies surplus water storage for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

The draft report proposes temporarily making up to 100,000 acre feet of yield per year (270,000 acre-feet of storage per year) available within the Garrison Dam/Lake Sakakawea Project, North Dakota for municipal and industrial water supply. Temporarily making surplus water available will allow the Omaha District to enter into temporary surplus water agreements for up to 100,000 acre-feet of yield per year (270,000 acre-feet of storage per year) for water supply to meet regional water needs until such time that a permanent reallocation study might be completed. The draft EA, which is attached to the report, identifies baseline environmental conditions and analyzes potential impacts from the proposed use of surplus water, and identifies impacts of intakes to be placed by three water providers. Please note that the EA represents the Corps' assessment and findings regarding these intakes for our own decision making processes. However, many of these intakes lie on or adjacent to Fort Berthold Reservation or Forest Service lands. As such, the Corps would expect the applicants to coordinate with your agency regarding these actions, and comply with any requirements that you may have prior to Corps approval for intakes to be placed into Lake Sakakawea.

The Corps is committed to transparent communication regarding these important decision documents. Members of state, tribal and federal agencies, as well as the general public, are encouraged to provide comments on the draft report and EA during the open comment period of December 16, 2010 to January 17, 2011. A public involvement meeting is planned for January 6, 2011 at the Doublewood Inn, 1400 East Interchange Avenue, Bismarck, North Dakota, from 5-8 p.m.

The draft report and EA are available for viewing at www.nwo.usace.army.mil/html/pdf-review_plans.html and in hardcopy at libraries in Bismarck, Dickinson, Garrison, Riverdale, Williston, New Town, Beulah and Hazen, North Dakota. Comments may be submitted via comment forms available at the public meeting and at libraries where the report is located. Written comments should be sent to:

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Comments can also be emailed to: garrisonsurplusstudy@usace.army.mil. Comments must be postmarked or received no later than January 17, 2011.

The Corps looks forward to receiving your comments on this important matter.

Sincerely,



Kayla A Eckert Uptmor
Chief, Planning Branch

CF: (Electronic Distribution)

CENWO-OD-T (Janis)
CENWO-OD-GA (Lindquist)
CENWO-PM-AA (Vanosdall)



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

DEC 17 2010

District Commander

«Prefix» «FirstMiddle_Name» «Last_Name», «Suffix»«Title»
«Organization»
«Address1»
«Address2»
«City», «State» «Zip»

Dear «Salutation» «Last_Name»:

This letter is to inform you that the U.S. Army Corps of Engineers, Omaha District (Corps) has released the Draft Surplus Water Report which identifies a quantity of surplus water for municipal and industrial uses in the area surrounding Lake Sakakawea, North Dakota. A Draft Environmental Assessment (EA) has also been released as per the National Environmental Policy Act which assesses and reports the socio-economic and environmental effects of providing excess storage for these temporary municipal and industrial uses.

The draft report proposes temporarily making up to 100,000 acre feet of water yield per year (equivalent to 257,000 acre-feet of storage per year) available within the Garrison Dam/Lake Sakakawea Project, North Dakota for municipal and industrial water supply. The identification of surplus water will allow the Omaha District to enter into temporary surplus water agreements for up to 100,000 acre-feet of yield per year (257,000 acre-feet of storage per year) for water supply to meet regional water needs for oil and gas development until such time that a permanent reallocation study might be completed. The draft EA, which is attached to the report, identifies baseline environmental conditions and analyzes potential impacts from the proposed use of surplus water.

The Corps is committed to transparent communication regarding these important decision documents. Members of Tribal, state, and Federal agencies, as well as the general public, are encouraged to provide comments on the draft report and EA during the open comment period of December 16, 2010 to January 17, 2011. A public involvement meeting is planned for January 6, 2011 at the Doublewood Inn, 1400 East Interchange Avenue Bismarck, North Dakota, from 5-8 p.m.

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1616 Capitol Avenue
Omaha, Nebraska 68102-4901
Phone number: (402) 995-2440
Fax number: (402) 995-2411

Comments can also be emailed to: garrisonsurplusstudy@usace.army.mil. Comments must be postmarked or received no later than January 17, 2011.

The Corps looks forward to receiving your comments on this important matter.

Sincerely,

SIGNED
COL ROBERT J. RUCH

Robert J. Ruch
Colonel, Corps of Engineers
District Commander

CF: (Electronic Distribution)

CENWO-OD-T (Janis)
CENWO-OD-GP (Becker)
CENWO-OD-FR (Curran)
CENWO-OD-BB (Fink)
CENWO-OD-OA (Eric Stasch)
CENWO-OD-GA (Lindquist)
CENWO-OD-FP (Daggett)
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