

## Federal Water Projects and Indian Lands: The Pick-Sloan Plan, A Case Study

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The history of the application of the European doctrines of discovery and conquest to American Indian tribes in the eighteenth and nineteenth centuries--and the evolution of policies which defined tribes as "domestic dependent nations"--is well known. The subsequent saga of massacres, depredations and broken treaties which resulted from the exercise of territorial imperatives on both sides has likewise occupied the pens of many historians. What is less familiar is that the struggle for land and sovereignty did not end in the bloody snows of Wounded Knee in 1890 but has continued, for even greater stakes, into the present century.

Preoccupied until recently with the dramatic military confrontations of the nineteenth century, historians of federal Indian policy have paid too little attention to the erosion of Native land and water rights persisting to the present day. Because of the marginal nature of much of the Indians' remaining land and resources, this neglectful situation has become even more detrimental to tribal interests. Since land has long been essential to tribal existence, and since so many of today's tribes depend on their ability to utilize and control their own resources, these issues are far too grave to ignore.

Increasingly in the twentieth century, the United States has used its power of eminent domain to seize large parcels of Indian land for the construction of flood control and reclamation projects. While federal water agencies claim these dams provide multiple benefits for the general public, Native Americans seem always to be the last to receive these advantages.

In the Missouri River Basin the Pick-Sloan Plan--the joint water development program the Army Corps of Engineers and the Bureau of Reclamation designed in 1944--caused more damage to Indian land than any other public works project in America. Whether or not these Federal agencies deliberately chose Indian over non-Indian land for their project sites, as some tribal leaders have charged, their plans ultimately affected twenty-three different reservations.

Three of the dams constructed under Pick-Sloan (Fort-Randall, Oahe and Big Bend) flooded over 202,000 acres of Sioux land on the Standing Rock, Cheyenne River, Lower Brule, Crow Creek and Yankton Reservations. These five reservations provide material for an especially appropriate case study of both the federal acquisition of Indian trust land and the application of recent Indian policies.

The development of the Pick-Sloan Plan represented a compromise between the separate water resource programs which Colonel Lewis A. Pick of the Army Corps of Engineers and W. Glenn Sloan of the Bureau of Reclamation designed. The Pick Plan primarily focused on the development of flood control measures to protect the lower Missouri Valley, while the Sloan Plan's thrust was the construction of irrigation projects in the upper Missouri Basin. Although two powerful agencies traditionally at odds proposed these seemingly conflicting programs, Congress very quickly achieved remarkable conciliation of the two plans and rather hastily pushed the package through as a part of the Flood Control Act of 1944. This modern "Missouri Compromise" was accomplished partly as a result of the urgent demand for federal action following the disastrous Missouri River floods of 1942 and 1943. It also represented an attempt to head off growing support for an alternative plan to develop a Missouri Valley Authority (MVA)--an independent public corporation patterned after the successful Tennessee Valley Authority (TVA) (1).

Congress gradually expanded Pick-Sloan, officially labelled the Missouri River Basin Development Program, to include the construction of the 150 multiple-purpose reservoir projects. In addition to flood control and irrigation these dams were designed to provide the benefits of hydroelectric power, navigation, recreation and improved water supplies (2).

The backbone of the Pick-Sloan Plan emerged in the six massive dams the Army Corps of Engineers constructed on the main-stem of the Missouri, two of which (Fort Peck and Oahe) rank among the largest earth dams in the world. Together, these six projects destroyed over 550 square miles

of tribal land and displaced more than 900 Indian families. The five Sioux reservations with which this study primarily concerns itself are: Standing Rock and Cheyenne River, which lost 160,000 acres to the Oahe project; Yankton, which was reduced by 3300 acres by the Fort Randall Dam; and Crow Creek and Lower Brule, which gave up a total of 38,000 acres to the Fort Randall and Big Bend projects (3). In addition, the construction of the Garrison Dam on the Fort Berthold Reservation in western North Dakota resulted in the destruction of 152,000 acres of land belonging to the Three Affiliated Tribes of Mandan, Arikara and Hidatsa Indians (4).

These projects uprooted approximately 600 Sioux families. The marginal lands remaining after inundation could not replace the natural advantages of their former homes. The shaded bottomlands had provided a pleasant living environment with plenty of wood, game, water and natural food resources. Livestock could graze on abundant grasses and take shelter under the trees. The barren upland regions to which these tribal members were forced to move proved less hospitable and more rigorous in its challenges to their survival (5).

The Pick-Sloan projects destroyed 90 percent of the reservations' timber land and 75 percent of the wild game and plant supply. Trees along the Missouri had provided the tribes with their primary source of fuel and lumber and had protected both man and beast from the ravages of winter blizzards and scorching summer heat. The gathering and preserving of wild fruits and vegetables was a traditional part of Sioux culture. The numerous types of herbs, roots, berries and beans that grew in the bottomlands added bulk and variety to the Indian diet and were also used for medicinal and ceremonial purposes. The wooded bottomlands also served as a shelter and feeding ground for many varieties of wildlife. Hunting and trapping had provided the tribes an important source of food, income and recreation. The loss of bottomland grazing areas seriously crippled tribal livestock operations which had been the primary industry on most of the reservations. Artificial shelters had to be built to replace the natural resources of the old habitat. Stockraising thus proved far more difficult, expensive and risky (6).

Damages the Pick-Sloan projects caused touched every aspect of Sioux life. Abruptly the tribes lost their base for subsistence and had to develop new ways of making a living in a cash economy. The relocation of the agency headquarters on Cheyenne River, Crow Creek and Lower Brule disrupted federal services, disorganized the social, economic, political and religious life of well-integrated tribal groups, and had a serious effect on the entire reservation population. It was an onerous imposition for tribal members to have to relocate their ancestors and to excavate their cemeteries and private burial grounds (7).

Physical losses Pick-Sloan inflicted are more easily quantified than psychological and aesthetic damages. Like any People forced to relinquish their homes, the Sioux hated to give up their land and to seek unfamiliar places to live. But their particular circumstances made the situation even more difficult. Unlike others public works projects affected, they were not able to duplicate their old way of life by moving to a similar environment. After inundation no Indian land like the old existed. Leaving the reservation was not a viable alternative, because of the disadvantageous it meant in terms of the loss of federal services and close kinship ties (8).

Much of the Indians' suffering came as a result of the federal government's failure to provide an adequate administrative structure for the Pick-Sloan Plan. In response to the apparently overwhelming opposition to the creation of a Missouri Valley Authority, the Truman Administration placed the program under the rather loose-knit coordination of the Missouri Basin Inter-Agency Committee, a non-statutory body which quickly fell under the domination of the Corps of Engineers (9).

The Inter-Agency Committee's piecemeal approach to Missouri Basin problems and its preoccupation with engineering methods did not allow for adequate consideration of such important human factors as the condemnation of farms and ranches and the relocation of families. The Army Engineers had nothing in their training or background that prepared them to deal fairly or knowledgeably with Indians. The federal agency usually

charged with that responsibility, the Bureau of Indian Affairs, was hampered during this period by a severely reduced budget, and survived under threat of being abolished altogether by those in Congress who supported the so-called "termination movement" (10).

While a centralized and regionally-located Missouri Valley Authority would have received an annual block appropriation for all of its work, the numerous agencies involved with Pick-Sloan had to deal with several separate committees in Congress for their particular part of the overall program. Thus, the Army often received generous amounts for dam construction during years when the Sioux tribes were not able to receive compensation for their resulting damages. Because of this lack of coordination, tribal members were systematically denied most of the important benefits of Pick-Sloan, their efforts at reconstruction fell far short of their needs, and their reserved water rights were completely ignored (11).

The Sioux knew little of the Pick-Sloan plan until long after it was approved. Despite treaties which provided that their reservations could not be taken without their consent, none of the tribes was consulted prior to the program's enactment. So confident was the Corps of Engineers about acquiring the Indian land it needed through condemnation that it began construction on dams, including those actually on reservation property, even before opening formal negotiations with respective tribal leaders (12).

Pick-Sloan was thus presented to the tribes as a fait accompli. The federal government was determined to move the Sioux out of the way and there was simply nothing they could do about it. Though angry and bitter that the United States would again break the faith of its treaty obligations and sacrifice their interests in order to satisfy White demands for progress, the Indians realized that resistance was futile. Intertribal cooperation was then virtually non-existent, and the individual tribes were too politically fragmented to permit organized opposition. Access to influential legislators and competent legal counselors was extremely limited and tribal members were not then inclined to take radical action. Federal officials ignored the protests that did emerge and the Sioux were eventually forced to accept the inevitable consequences of Pick-Sloan. Gradually,

they resigned themselves to making the most of whatever alms might be offered in compensation, but their bitterness did not subside (13).

Realizing they were powerless to stop the dams, tribal leaders were determined, nevertheless, to negotiate for payments and benefits which would allow them fully to utilize their remaining resources. In light of the Congressional debate over termination they also sought compensation which might permit them to make a giant step toward self-sufficiency, a goal previously established and facilitated in the so-called "Indian New Deal" administration of Commissioner John Collier between 1933 and 1945. Thus, Sioux negotiators reasoned that a generous settlement might include the development of new programs and facilities for health, education, housing, community growth and employment. They also hoped for such direct benefits from the reservoir projects as low-cost electrical power, irrigation and improved water supplies (14).

Recognizing its obligation to see that the Sioux received just compensation, Congress in 1950 authorized the Department of Interior and the Army Corps of Engineers to negotiate separate settlement contracts with respective tribal representatives. In addition to providing payment for all damages these agencies were also directed to cover the costs for relocating tribal members "so that their economic, social and religious life can be reestablished and protected." Each of these agencies was required to prepare a detailed analysis of damages, and in the event that they could not reach a satisfactory agreement in the field, Congress was to arbitrate a final settlement (15).

Negotiations with the separate Sioux tribes carried on over a period of fourteen years (1948-1962) followed a similar pattern. Inevitably, Army, Indian Bureau and tribal officials arrived at different estimates of damage. The BIA was often willing to compromise with the Indians. But the Corps of Engineers refused to acknowledge its obligation to provide for relocation and reconstruction and ultimately failed to reach a satisfactory agreement with any of the tribes. Negotiations dragged far beyond established time limits, and Congress was extremely tardy in considering con-

tract provisions. The Yankton, agreeing to a settlement, and the Standing Rock Sioux received funds only at the last possible moment. On all of the reservations except Cheyenne River the Corps of Engineers was able to obtain the immediate Indian land it needed for its projects through condemnation proceedings in the U.S. District Court, despite a 1920 Supreme Court decision which held that a federal agency must have the specific authorization of Congress to do so without tribal consent (16).

In contract negotiations, tribal representatives such as Frank Ducheneaux of Cheyenne River and Josephine Kelly of Standing Rock were simply outgunned. Unversed and unwary, they were forced to do battle with experienced federal experts. Settlement demands the Indians drafted were very often circumvented or ignored, and in every case the Army resorted to strongarm tactics by posing the threat of its illegally assumed powers of eminent domain. Local Congressmen, such as Representative E. Y. Berry of South Dakota, generally did what they could for their Sioux constituents but too often fell victim to split allegiances and shifting loyalties. The result was a half-loaf settlement for each tribe. Although each in turn gained more money and better terms, none of the Sioux tribes came close to receiving what they considered just compensation (17).

Although the Indians eventually received a total of more than \$34 million in compensation, this was less than half the amount they had requested. Because of the arbitrary fashion in which terms were adopted, settlements provided to the five individual tribes differed considerably. Thus, although the Cheyenne River Sioux sustained the most damages, the Standing Rock Sioux received the best overall settlement, and the Crow Creek and Lower Brule tribes the most generous reconstruction provisions. In addition, the government denied requests of all the tribes for benefits such as unlimited shoreline access, the retention of all mineral rights, and the right to have a block of hydroelectric power reserved for their exclusive use (18).

As long and arduous as was the process of negotiating final settlements, it represented only the first stage of the Pick-Sloan ordeal for these tribal groups. Once compensation was determined, plans had to be implemented for the relocation of tribal members and their property, the recon-

struction and restoration of reservation facilities, and the rehabilitation of entire Indian communities. The disruption, chaos and uncertainty this experience generated made it a most painful one for all tribal members. So short-sighted was Corps of Engineers' planning in regard to its projects on the Crow Creek Reservation, for example, that families forced to move by the Fort Randall Project were relocated within the projected site of the Big Bend reservoir area. Consequently, when time came to open the second dam, these unfortunate tribal members were compelled to move once again (19).

Congress allocated over \$20 million of the compensation to the Sioux tribes to establish social and economic programs which would help them gain self-sufficiency, so that the federal government might eventually withdraw services and supervision. Because of this intent, the Indians were given far greater responsibility for the administration and use of this so-called "rehabilitation money" than had been permitted with any previous federal programs. In this respect, rehabilitation proved a valuable educational experience, a praiseworthy experiment in self-determination, and altogether the most worthwhile aspect of the Pick-Sloan compensation; although it was absurd, of course, to expect that the Tribes could make giant strides toward solving their many social and economic problems with the limited funds available to them (20).

The Corps of Engineers completed the construction of its five main stem dams on the Missouri in 1966. If the benefits which the Sioux have received from these projects are to be gauged, they should first be measured in terms of the purposes for which these dams were originally constructed. Assuming that the \$30 billion Pick-Sloan was truly designed to be beneficial to the people of the Missouri River Basin, then it should be equally beneficial to those people, both Indian and non-Indian, who have suffered the most as a result of its implementation. But such is not the case. The

Bureau of Reclamation and the Corps of Engineers designed their integrated Missouri River Basin development program to provide improved flood control, hydroelectric power, irrigation, navigation, recreation and other important benefits. On balance, however, an evaluation of their efforts at this juncture reveals that Pick-Sloan has not measurably improved the lives of the Sioux people in regard to any of these provisions.

To its credit, the Army has succeeded in making long stretches of the Missouri safe from the catastrophe of high floods. This is particularly true in the populous region between Kansas City and Sioux City. However, that the dams have improved flood control does not particularly impress the Sioux, since--as one woman on Cheyenne River pointed out--it is quite natural to assume that "if you flood the bottomlands you will then have flood control" (21). Floods on the reservations were never as serious or as frequent as those in the lower Basin, and the Corps of Engineers' efforts have still not prevented the continuation of tributary inundations. What concerns the Indians is that the Army, in most cases, took far more reservation land than was necessary to maintain the reservoirs at their maximum pool level. Yet, in some areas the waters have infringed on Sioux land the federal government never purchased, and all along the banks, the fluctuation of these undulating waters has created a far greater hazard to tribal livestock and resources than any of the infrequent inundations of the past (22).

Although the Pick-Sloan powerplants have definitely increased the availability of electrical power in the Missouri Basin, affordability continues to be the most important factor as far as the Sioux are concerned. For lack of money, vast areas of the reservations are still without electrical service, and the federal government has done nothing to make lower power rates available to the tribes, although the Department of Energy has acknowledged that they qualify as preferential low-cost customers under Section 5 of the Flood

Control Act of 1944. The catch is that most of this power already is committed to non-Indian municipalities and rural cooperatives (23).

The long and heated debate over the suitability and practicability of reclamation in the upper Missouri Basin has caused frustrating delays, serious cutbacks, and drastic revisions in the original Pick-Sloan irrigation plans. Consequently, environmentalists and others, who have shifted their support to alternative water development programs, effectively have halted the Bureau of Reclamation's two major projects in the Dakotas, the Garrison and Oahe diversion units. Neither is the outlook particularly bright for the Pick-Sloan irrigation projects proposed for Sioux lands, since Congress deauthorized most of those in 1964. Because of the heavy shale deposits on many of the reservations, it thus remains to be seen whether or not the Indians' marginal land holdings are truly irrigable and whether irrigation farming can ever be financially feasible for tribal members (24).

Many of the tribes have experimented with irrigation but only the Lower Brule Sioux have come close to success. With the help of a generous grant from the Economic Development Administration (EDA), the tribe constructed the Grass Rope Unit in 1976 and developed irrigation for some 1500 acres, raising corn, milo and pinto beans. Plans are presently underway to expand this project to 5000 acres, at an estimated cost of \$4.9 million, and a bill recently enacted by Congress will permit the Tribe to obtain Pick-Sloan hydropower for its pumping units at a cost of only 2.5 mills per kilowatt hour (25).

Due to the nature of the clearing operations the Corps of Engineers conducted, the large number of trees left standing above the water surface presently obstructs navigation on many of the Missouri River reservoirs. These obstacles also interfere with recreational activities on the lakes, another of the purposes for which the dams were created (26).

Of all the benefits Pick-Sloan promised, the most immediate and successful results in the Dakotas are in the areas of outdoor recreation and tourism. Although some of the Sioux tribes have attempted to capitalize on the sudden

recreation boom, none have succeeded in sharing in this new prosperity. Since traditional tribal members seldom engaged in fishing, boating and swimming, the dam projects, by causing the destruction of the wildlife and a subsequent decline in hunting, have actually reduced the Indians' favored recreational activity on the reservations (27). Furthermore, a U.S. District Court has held that the tribes no longer have authority to regulate hunting and fishing on that portion of the reservations which are within the taking area of the reservoirs (28).

While another of the promised Pick-Sloan benefits was the development of an adequate reservoir water supply for domestic, municipal and industrial use, most areas on the Sioux reservations are still dependent on the ground water sources, which in many cases exceed federal standards for maximum impurities and are generally unfit for human use (29).

The Missouri River Sioux have received, therefore, almost none of the benefits which were supposed to come through Pick-Sloan, although they have suffered a great deal as a result of its implementation. Although many observers feel that the \$20 million Congress appropriated for the rehabilitation of the tribes should rightfully be considered a direct benefit of the water development program, it is clear that these five Sioux tribes could have received money for this purpose independent of the dam project settlements, as did the Navajo, Hopi, Pine Ridge Sioux and numerous other tribes during this period. These federal funds certainly could have been put to more effective use if the Army's dam projects had not so thoroughly disrupted the life of the reservations.

What, then, has been learned from the Pick-Sloan experience? For the Missouri River Sioux tribes the lessons have been bitter and many. But the federal government does not appear to have learned to recognize Native Americans as human beings with legitimate property rights.

As for the critical issue of Indian water rights, the United States has also maintained the tradition of failing to abide by its own rules as far as the Sioux are concerned. The federal agencies involved in the Pick-Sloan program have

never acknowledged the legal doctrine the United States Supreme Court propounded in the 1908 case of Winters v. United States, which held that Indians have a reserved right for the purpose of irrigation to waters that flow either through or along their reservations (30). In their interpretation of the complex body of law developed from the Winters decision, some legal scholars have claimed the Indian right also included the preferential use of water for all existing and potential beneficial uses, a view to which the Sioux tribes have enthusiastically clung (31).

Granted, neither the Supreme Court nor Congress has ever adequately specified the full nature and extent of Indian water rights. But even the unambiguous provisions of the Winters decision would seem to dictate that Congress should have given statutory recognition of the Indians' reserved rights in the Flood Control Act of 1944, and that the Corps of Engineers and Bureau of Reclamation should have made an effort to quantify tribal irrigation needs, at the very least, and should have guaranteed that those irrigation needs would be met before committing any Missouri Basin water to Pick-Sloan project uses.

Since the possession of preferential water rights is absolutely essential for the future economic development of reservation lands, the Sioux should have challenged the federal government on this issue. They did not do so largely because they have been led to assume that the Winters Doctrine, in its broadest and most liberal interpretation, is legally concrete. In other words, they have paramount rights, based on their prior occupancy of the land, to use as much of the Missouri water as they can. Thus, they have tended to view any discussion of quantification as an attempt to limit rather than protect their water rights.

In the meantime the federal government has found new ways to exploit Missouri Basin water resources. In 1975 the Corps of Engineers and Reclamation Bureau launched a program to market an additional million acre-feet of reservoir water yearly to private water users (32). The latest beneficiary of this federal marketing program was Energy Transportation Systems, Inc. (ETSI), a San Francisco-based consortium of heavyweight energy and con-

struction investors. This firm has purchased the right to divert fifty-thousand acre-feet per year from the Oahe Reservoir in South Dakota for the purpose of supplying water for what will be the nation's largest coal slurry pipeline, which will link coal fields in Wyoming to powerplants in Oklahoma, Arkansas and Louisiana (33).

The ETSI water sale has made it evident that judicial decisions or statutes are crucial to settle the points of ambiguity and disagreement which continue to shroud not only the Indians' water rights, but also those of the individual states within the Missouri Basin. If these legal questions can be clarified, federal and state governments might be compelled to quantify the future water needs of the Sioux and other tribes before committing any more of the Missouri's precious water to non-Indian users.

A quantification of the water rights of seven of the Sioux tribes might be the positive result of a suit which the State of South Dakota brought to court in 1980. This litigation, docketed as South Dakota v. Rippling Water Ranch, et al., has been filed against approximately sixty-thousand defendants, including the Tribes and their individual members, to determine all private and public rights to the use of the Missouri River water system within the state boundaries. But it has taken more than two years just to determine a court of competent jurisdiction, and the recent decision of a federal judge to remand the suit from U.S. District Court to a state tribunal traditionally hostile to Indian interests has served to justify the trepidations of those tribal leaders who have always feared having their water rights adjudicated (34).

The saga of the Pick-Sloan Plan and its effects on the Sioux tribes of the Missouri River will thus continue well into the future. While it will always be impossible to ignore the abuse of Indian rights which has characterized this program up to now, one sincerely hopes that someday one can write a more optimistic conclusion to the episode.

## NOTES

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