

# Update on Missouri River Issues

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The overarching issue is whether the Corps of Engineers and the beneficiaries of the status quo can maintain business as usual in the management of the Missouri R.

# Forces of the Status Quo

- Approval of easement for the Dakota Access Pipeline
- Draft Missouri River Recovery Implementation Program Environmental Impact Statement
- Proposed Regulation – Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal and Industrial Supply (81 Fed. Reg. 91556, December 16, 2016)

# Current Status Quo

## Missouri River Main Stem

- Downstream demand for water – navigation and water intakes
- Army Corps of Engineers' regulation of Missouri River water flows under the Master Water Control Manual
- Upstream demand for water – hydraulic fracturing, municipal use. Army Corps of Engineers Surplus Water Reports / Proposed Regulation
- Risk to water quality – oil and gas development

# Who Benefits from the Status Quo?

- Oil companies
- Navigation industry in lower Missouri and Mississippi Rivers.
- Municipal and power plant intakes on lower Missouri River.
- Irrigators in lower Missouri Basin whose depletions are offset by navigation releases at Gavins Point Dam.
- Electric ratepayers in WAPA Eastern Division.

“The energy crisis is an Indian crisis.”

William H. Veeder, Testimony to the  
U.S. Senate Comm. on Interior and  
Insular Aff., 79<sup>th</sup> Cong. 141 (1975)



# DAPL Threats to Water Quality

- Large capacity pipeline under high pressure
- Threat of catastrophic release
- Threat of undetected release
- Groundwater
- Fish and wildlife
- Medicinal and culturally significant plants

# Missouri River Recovery Implementation Committee

“...The secretary shall establish a committee to be known as the Missouri River recovery implementation committee... in order to:

(a) to mitigate losses of... habitat;

(b) To recover federally listed species;

(C) to restore the ecosystem to prevent further declines among native species.”

Sec. 5018, Water Resources Dev. Act of  
2007 (121 Stat. 1199)

# Missouri River Recovery Implementation Program Draft EIS

\* “It is an effort to replace lost habitat and avoid a finding of jeopardy to threatened and endangered species (pallid sturgeon, least tern and piping plover) resulting from u.s. army corps of engineers (corps) projects on the Missouri river.

\* This program includes development of emergent sandbar habitat, shallow water habitat, and wetland and terrestrial habitat. It also include on-going data collection and monitoring.

\* These actions are being taken pursuant to the 2000 biological opinion, amended in 2003 (collectively referred to here as the biop).”

[http://moriverrecovery.usace.army.mil/mrrp/f?p=136:1:0:::::~#nepa092215](http://moriverrecovery.usace.army.mil/mrrp/f?p=136:1:0:::::#nepa092215)

# Tribal Issues Arising From MRRIC Draft EIS

- The Corps of Engineers is proposing to implement the Missouri River Recovery Plan without addressing significant inequities in the management of water flows under the Pick-Sloan Program.
- The Missouri River Master Water Control Manual must be revised as part of the implementation of the recovery plan.
- The Missouri R. Programmatic Agreement must also be revised .

# Six Alternatives in Draft EIS

- **No action** – defines as the current levels of construction of sandbar and shallow water habitat and periodic spring rise
- **F & WS 2003 Biological Opinion** – a more rigorous effort to recreate a natural hydrograph
- **Mechanical construction only** – preferred alternative
- **Spring early stage habitat** – high spring rise
- **Fall early stage habitat** – high fall rise
- **Pallid sturgeon spawning cue** – Emphasizes shallow warm water habitat

# Impacts on Tribal Water

- “Several Tribes are served by water supply intakes along the Missouri River including the Assiniboine and Sioux, Three Affiliated, Standing Rock Sioux, Cheyenne River Sioux and Lower Brule Sioux. The Mni Wiconi Pipeline project supplies water to several reservations that are not located on the Missouri River, including the Oglala Sioux Tribe and the Rosebud Sioux Tribe.”
- “Water supplies access in the upper river, including Tribal intakes would experience more impacts under Alternative 3 than locations in the lower river. (During periods of drought) costs could increase to access water in the upper river.”

Draft EIS, p. 3-501

# Impacts on Tribal Gathering

The preferred alternative will cause “Decrease in habitat suitable for subsistence gathering in Garrison and Oahe reach.”

Draft EIS, p. 3-544, Table 3-247

# Cumulative Impacts

“Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to the other past, present and reasonably foreseeable future actions...”

40 CFR §1508.7

MRRIC  
EIS

MASTER  
MANUAL

Mo. R  
PA

DAPL



# Army Corps of Engineers

## *Missouri River Master Water Control Manual*

- Supply water flow for downstream navigation March 15 - Nov. 15 w/ full service 35,000 cfs.
- Supply water flow for hydropower, and downstream water supply and water quality Nov. 16 - March 14 w/ full service 17,000 cfs.
- System releases for ice jams in winter, peak hydropower, evacuation for flood control storage
- ESA flows – spring rise.

*[www.nwd-mr.usace.mil/mmanual/mast-man](http://www.nwd-mr.usace.mil/mmanual/mast-man)*

# COE Mo. R. Operations under the Master Manual Undermine Indian Water Rights

- The waters supplied for downstream navigation, water intakes and agricultural depletions are subject to the unresolved water claims of the Tribes in the upper basin.
- The beneficiaries of COE operations – downstream navigation, municipal and power plant intakes and irrigators – invested \$ in reliance on continued stream flows from COE releases from main stem reservoirs.
- Reserved rights for future uses limited to economically feasible projects, and uncertainty over water supply affects feasibility.

# Proposed Rule for the Use of Army Corps of Engineers' Reservoir Projects

“The Corps has allowed water to be withdrawn from its reservoirs simply by means of an easement across federal project lands.. Without formal determination that surplus water is available.”

81 Fed. Reg. 91557.

# Proposed Rule for the Use of Army Corps of Engineers' Reservoir Projects

- The term “surplus water” means water, available at any reservoir... that the Assistant Secretary of the Army determines is not required .. To accomplish an authorized federal purpose.”
- “Determinations of the availability of surplus water.. Shall require the approval of the Assistant Secretary.”

81 Fed. Reg. 91589

# Proposed Rule for the Use of Army Corps of Engineers' Reservoir Projects

“Prior to making a final determination... that surplus water... is available at a Corps reservoir, a written report shall be prepared.”

81 Fed. Reg. 91589

# Draft Surplus Water Reports for Fort Peck, Oahe, Sharpe, Francis Case and Lewis and Clark Lake (2012)

- Identify maximum quantities of water for future M&I withdrawal from each reservoir & propose fees
- New users must enter water supply agreements
- Existing users must enter water supply agreement when easements, permits expire, except for federally-authorized projects.

# Proposed Surplus Water Limits & Fees

- Lake Sakakawea – 100,000 af/yr @ \$20.91/af
- Fort Peck Lake - 6,932 af/yr @ \$38.51/af
- Lake Oahe – 57,317 af/yr @ \$17.19/af
- Lake Sharpe – 62,268 af/yr @ \$36.65/af
- Lake Francis Case – 27,973 af/yr @ \$51.86
- Lewis and Clark Lake – 28,427 af/yr @ \$68
- Total – 282,917 af/yr

# Do the water use limitations and other regulations in the surplus water reports apply to Tribes?

“Water rights are a pre-condition of entering into agreements with the Corps for the use of surplus water. Tribes are not considered differently in this respect than a state or private entity”

*Draft Lake Oahe Surplus Water Report,*

p. 4-9 – 4-10

# Do the water use limitations and other regulations in the surplus water reports apply to Tribes?

“The proposed rule would apply only to reservoir project operated by the Corps... it would not apply to uses of water or storage that may be authorized by other federal law or implementing regulations, or to the exercise of Tribal reserved water rights.”

81 Fed. Reg. 91582

# Asst. Sec. of Army Jo-Ellen Darcy Memorandum to Corps of Engineers, May 8, 2012

“I direct...

For all new municipal and industrial uses of surplus water at Lake Sakakawea... proceed... to enter into surplus water agreements...

Confirm the source of authority for all water withdrawals in the Missouri River main stem... Bureau of Reclamation authority may be applicable.

Water use for irrigation may continue without a Department of the Army contract until the gap in the authority is remedied by Congress.”

# Pick-Sloan Impacts - Historic Properties

“Surveys at Lake Oahe recorded 1,114 archaeological sites including 241 historic sites and 874 prehistoric sites... The prehistoric sites include 230 earthlodge villages, 9 Plains woodland mounds, 87 stone alignment sites (tipi rings, rock cairns, 342 scatter of stone tool waste, and 1 bison jump.”

Army Corps Of Engineers, *Final Environmental Impact Statement, Missouri River Master Water Control Manual Review and Update* (2004) 3-167

# Missouri River Programmatic Agreement

“The Corps shall comply with section 106 in accordance with 36 cfr part 800 for the following activities:

- i) Projects, activities, policies by the state of south Dakota on so-called title vi lands.
- ii) corps lands or exchanges.
- iii) Corps regulatory actions pursuant to section 404 of the clean water act.”

Sec. 3 B, Final PA, p. 3

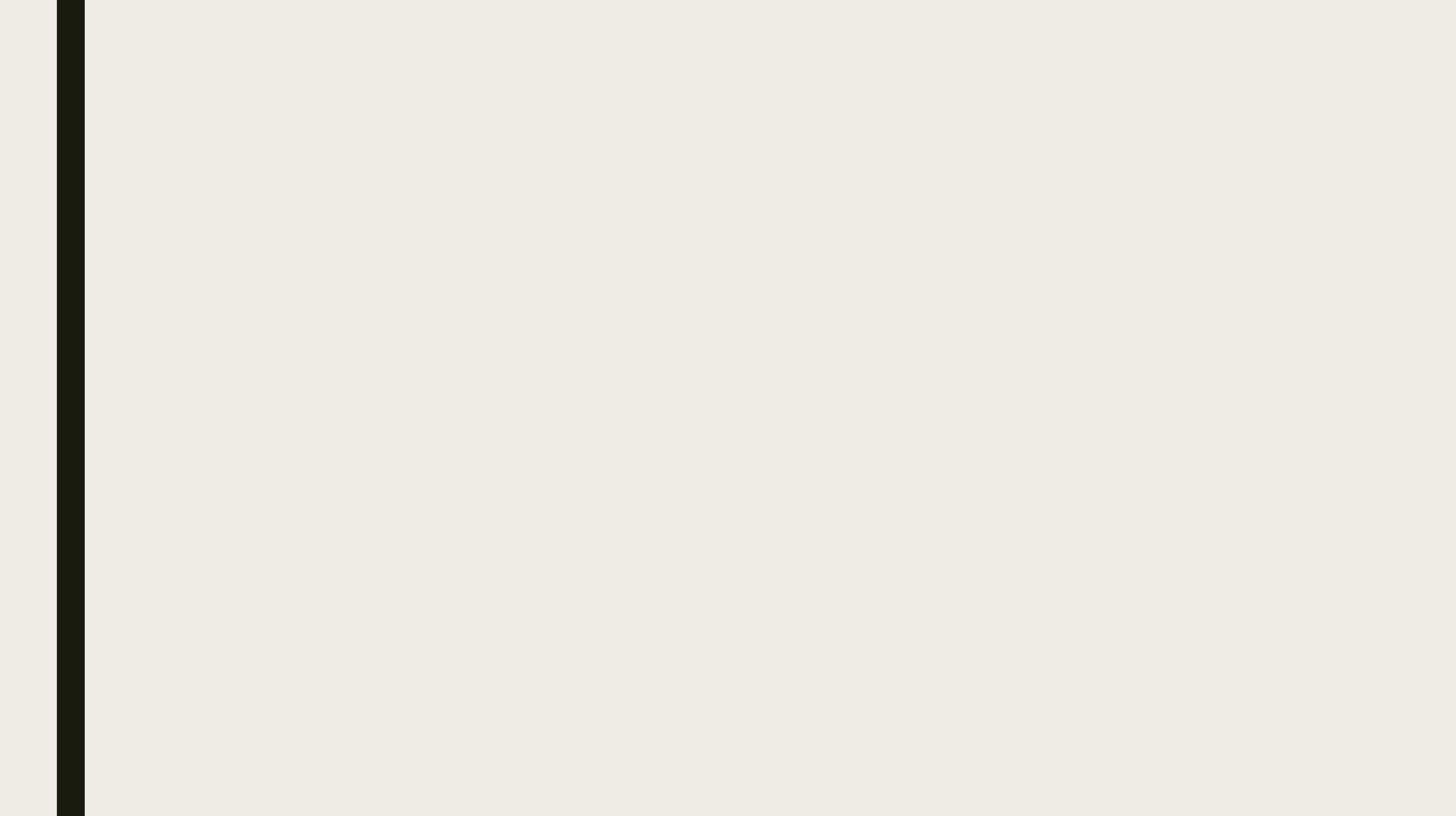
# Next Steps

- MRRIC Comments due April 24, 2017
- Comments on Proposed Rule on Use of COE Reservoirs due May 15, 2017
- Meetings with Corps of Engineers on MRRIC; Surplus Water Rule
- Terminate PA
- Other

# For more information

- John H. Davidson, *Missouri River Reservoirs in a Century of Climate Change: National or Local Resource?* 20 JOURNAL OF ENVIRONMENTAL AND SUSTAINABILITY LAW 1 (2014)
- *Impacts of the Pick-Sloan Program on the Indian Tribes of the Missouri River Basin*, 30 JOURNAL OF ENVIRONMENTAL LAW & LITIGATION 143 (2015)

<https://scholarsbank.uoregon.edu/xmlui/handle/1794/18887>



# Executive Order 12898 on Environmental Justice

- Requires all agencies to determine if proposed project disproportionately impacts Tribal community or other minority community
- Requires additional public outreach and mitigation prior to approval of projects with disproportionate impacts on Tribal or minority communities
- The Draft environmental assessment does not comply with EO 12898

# ENVIRONMENTAL JUSTICE

## Guidance Under the National Environmental Policy Act



## Agencies should consider enhancing their outreach through the following means:

- Religious organizations (e.g., churches, temples, ministerial associations);
- Newspapers, radio and other media, particularly media targeted to low-income populations, minority populations, or Indian tribes;
- Civic associations;
- Minority business associations;
- Environmental and environmental justice organizations;
- Legal aid providers;
- Homeowners', tenants', and neighborhood watch groups;
- Federal, state, local, and tribal governments;
- Rural cooperatives;
- Business and trade organizations;
- Community and social service organizations;
- Universities, colleges, vocational and other schools;
- Labor organizations;
- Civil rights organizations;
- Local schools and libraries;
- Senior citizens' groups;
- Public health agencies and clinics; and
- The Internet and other electronic media .

# National Historic Preservation Act

- Requires all agencies to determine the effect of their projects on cultural resources (16 USC §470f)
- Requires consultation with THPO's in the identification of affected historic properties and the determination of affects
- DAPL conducted surveys without consulting with SRST THPO in violation of 16 USC 470f and 36 CFR §§800.2(c)(1)(ii), 800.2(c)(2)(ii)
- Consultation is also required in the preparation of an unanticipated discovery plan and dispute resolution mechanism. DAPL failed to do so. 36 CFR §800.13.

# Executive Order 13007 on Sacred Sites

- “In managing federal lands, each executive branch agency shall... avoid adversely affecting the physical integrity of such sites.”
- There may be sacred sites in the immediate vicinity of the Missouri River crossing
- The Corps of Engineers must deny the DAPL permit to protect these sites in compliance with EO 13007

# Department of Defense

## American Indian and Alaska Native Policy

- “Meaningful consultation...(to) ensure these tribal interests are given due consideration in a manner consistent with tribal sovereign authority”
- “Manag(e)...DoD lands consistent with the conservation of protected tribal resources and in recognition of Indian treaty rights”
- “Address...tribal concerns related to protected tribal resources, tribal rights, or Indian lands”
- The Corps of Engineers have not followed the DoD’s American Indian policy on DAPL
- “It is the...Corps’ responsibility to ensure that Indian treaty rights are given full effect ....[T]he Corps owes a fiduciary duty to ensure that the [Indian] Nation’s treaty rights are not abrogated” *Northwest Sea Farms v. U.S. Army Corps of Engineers*

# SRST Efforts Against DAPL

- Comments on Draft environmental assessment
- Letter to President Obama, EPA, DOI, CEQ
- Corps of Engineers meeting at Standing Rock on February 26, 2016 – request EIS
- Chairman meeting with DOI, EPA, DoD – week of February 29, 2016 – request agencies to pressure Corps of Engineers to prepare EIS
- Consultation with Great Plains Tribal Chairman's Association and Great Plains Tribal Water Alliance