

STATEMENT OF JOHN YELLOW BIRD STEELE

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BEFORE THE UNITED STATES SENATE

COMMITTEE ON INDIAN AFFAIRS

OVERSIGHT HEARING ON ARMY CORPS OF ENGINEERS

MISSOURI RIVER MASTER MANUAL

October 16, 2003

Chairman Nighthorse Campbell and members of the Committee on Indian Affairs, my name is John Yellow Bird Steele. I serve as President of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation. I thank Chairman Nighthorse Campbell, Senator Inouye and the members of the Committee on Indian Affairs for conducting this oversight hearing on the Army Corps of Engineers Missouri River Master Water Control Manual.

There is no more immediate threat to the water rights and treaty rights of the Oglala Sioux Tribe than the Army Corps of Engineers. The Corps of Engineers consistently and completely disregards the reserved water rights of the Oglala and other Sioux Tribes in its operations of the Missouri River. The Corps disregards the need to accommodate the present and future water needs of our Reservation, in the Master Manual revision process.

The Master Manual Review and Update process has become a tool to lock-in existing non-Indian water uses, such as downstream navigation and fish and wildlife, to the detriment of water uses on the Pine Ridge and other Sioux Reservations. Consequently, the Corps of Engineers' planning documents would render our water rights as secondary to the existing water users supplied by the Corps, although under federal law our water rights are prior and superior to non-Indian water rights.

As the region's largest Tribe, the Oglala Sioux Tribe suffers severe harm as a result of the Corps of Engineers Master Manual Review and Update process. We have

pervasive land and water rights under the 1868 Fort Laramie Treaty, extending throughout a large part of the upper Missouri River basin. We have the most to lose at the hands of the Corps of Engineers. For this reason, today I ask the Committee on Indian Affairs to consider a legislative solution to the water rights and treaty violations of the Army Corps of Engineers.

The Corps of Engineers has proven that, left to its own devices in the Master Manual Review and Update, it shall violate the 1868 Fort Laramie Treaty, ignore the reserved water rights of the Sioux Nation, circumvent the National Environmental Policy Act, violate Executive Order 13175 on Consultation with Indian Tribes, and destroy valuable Native American cultural resources along the Missouri River. This is the legacy of the Corps of Engineers' Missouri River operations. My testimony shall focus on these areas, and emphasize the need for the Committee on Indian Affairs to consider a legislative solution to this problem.

The Corps of Engineers Proposes to Abrogate the Treaty Rights of the
Oglala Sioux Tribe Under the Fort Laramie Treaty of April 29, 1868

The Oglala Sioux Tribe retains unresolved off-Reservation claims under the Fort Laramie Treaty of April 29, 1868. Article II of the 1868 Treaty defines the boundaries of the Great Sioux Reservation, as follows -

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River, where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the (Sioux Nation)... (15 Stat. 635, 636).

The Sioux Nation rejected the judgment award that was affirmed by the United States Supreme Court in *United States v. Sioux Nation of Indians*. (448 U.S. 371, 100 S.

Ct. 2716 (1980)). Consequently, we retain our claims under the 1868 and 1851 Fort Laramie Treaties.

Article II of the 1868 Treaty makes clear that our land claims extend from the 104th parallel to “the east bank of the Missouri River.” (15 Stat. 636). Clearly, the Missouri River and the river bed of the Missouri are defined in the 1868 Fort Laramie Treaty as Sioux Country.

Nevertheless, this is reflected nowhere in the planning documents of the Army Corps of Engineers, in the Missouri River Master Manual Review and Update. Our treaty rights are completely ignored by the Corps of Engineers. By establishing long-term plans for Missouri River water flows in the Master Manual Review and Update and disregarding our Treaty claims in the planning process, the Corps of Engineers seeks to establish *de facto* abrogation of our rights.

Our Treaty rights are not an historical anomaly. They exist today. In the case of *Worcester v. Georgia*, the United States Supreme Court stated –

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, selected in our diplomatic proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They are all applied in the same sense.

31 U.S. (6 Pet.) 515, 559-60 (1832).

Thus, our Treaties remain in effect, today. The Corps of Engineers ignores our rights, however, and prepares to finalize long-term water allocations in the Missouri River that divert Indian water to non-Indian water uses, in violation of our treaty right to the use of water.

The Corps of Engineers Proposes to Allocate Indian Water to Supply Non-Indian Water Uses and Threatens and Diminishes the Water Rights of the Oglala Sioux Tribe

Under the principles enunciated by the Supreme Court in *United States v. Winters* (207 U.S. 564 (1908)), our reserved water rights stem from our treaties with the United States. Our reserved water rights are extensive, including all of the water that is reasonably needed for our present and future water needs. (*Arizona v. California*, 373 U.S. 546 (1963)). As stated above, the Oglala Sioux Tribe is the largest Tribe in the Missouri River Basin. Accordingly, our reserved water rights to the Missouri River and its tributaries are of substantial magnitude.

The Corps of Engineers' *Missouri River Revised Draft Environmental Impact Statement* proposes water allocation alternatives which utilize water subject to Indian claims, to supply non-Indian water uses. It is bureaucratic architecture for the theft and confiscation of our water.

The Corps of Engineers agreed to review the current Master Water Control Plan ("Master Manual") for the Missouri River, in 1991. University of South Dakota Law Professor John Davidson has explained the importance of the Master Manual Review and Update to Tribes such as the Oglalas, as follows –

...the final Master Manual may lock in the status of the specific river uses with a firmness that is every bit as solid as Supreme Court apportionments. Any given process is as important as the finality and enforceability of the final decision, be it judicial, legislative or administrative. For Missouri River water users, the Master Manual process may be as important as the litigation in *Arizona v. California* was to Colorado River water users.

(John H. Davidson, *Indian Water Rights, the Missouri River, and the Administrative Process, What are the Questions?* 24 American Indian L. Rev. 1 (2000)).

The region's water rights experts thus warn us that the allocation of Missouri River water flows by the Corps of Engineers in the Master Manual Review and Update, shall lock in water uses for the foreseeable future. In the *Revised Draft Environmental Impact Statement, Missouri River Master Water Control Manual Review and Update*, released in August 2001, the Corps outlines numerous alternatives for the future

management of Missouri River water flows. These alternatives provide for varying levels of spring rise below Gavins Point Dam and varying levels of navigation service in the lower Missouri. Adaptive management and drought conservation measures are also proposed.

However, none of the alternatives in the *Revised Draft EIS* contemplate future consumptive water uses on the Pine Ridge and other Sioux Reservations. The Corps of Engineers has given no consideration to Indian water needs to the Missouri River and its tributaries.

Nevertheless, the Corps has indicated that depletions totaling 7.1 million acre-feet annually closes down the computer model used to calculate the impacts of various water management alternatives. If there is a diversion of water of this magnitude, the existing uses are shut off.

A study conducted by the United Sioux Indians Tribes estimated the irrigation water requirements of 11 Sioux Reservations at twice the amount of water determined by the Corps to close down its computer models. As the largest Sioux Tribe, the water requirements of the Oglala comprise a substantial portion of the overall Sioux water needs. (United Sioux Indian Tribes, *Missouri River Basin Water Supply and Water Requirements of United Sioux Indian Reservations* (February 1979), Table 3-1.) Yet even partial irrigation service on the Sioux Reservations would close down the computer model used by the Corps of Engineers for water flow management in the Missouri River.

All of the assumptions used by the Corps of Engineers in developing the alternatives contained in the Revised Draft Environmental Impact Statement depend on the Oglala and other Sioux Tribes not exercising our reserved water rights. The finalizing by the Corps of the Environmental Impact Statement and the implementation of a new Water Control Plan will lock-in water allocations in a manner that relies upon the Indians to not use our Treaty-protected water rights in the future.

The Corps of Engineers state in the *Revised Draft EIS* at page 3-105 – “In no way do (the non-Indian water uses supplied by the Corps) attempt to define, regulate or quantify any treaty water rights...” However, by exclusively providing water flows to non-Indian uses and excluding Tribal water needs, the Corps of Engineers essentially has

the effect of locking in water flows for the identified uses. There is no water managed by the Corps for the supply of Tribal water needs, now or in the future.

Moreover, the *Revised Draft EIS* considers Indian water rights as existing only if they are quantified through an adjudication or an act of Congress. The *Revised Draft EIS* states at pages 113 –114,

Certain Missouri River Basin Indian Nations are entitled to water rights in streams running through and along their Reservations under the Winters Doctrine... Currently, Tribal Reservation-reserved rights have not been quantified in an appropriate legal forum or by compact, except in four instances (citing Fort Peck, Wind River, Northern Cheyenne and Rocky Boys)...Potential Tribal rights associated with (other) uses were not considered....

The reserved water rights of the Oglala Sioux Tribe have not been adjudicated or quantified. We oppose this, because of the Supreme Court's interpretation of the McCarran Amendment (43 U.S.C. §666), that Indian reserved water rights may be adjudicated in state courts. (*Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983)). Our unquantified water rights are nevertheless present, vested property rights. (*Arizona v. California*, 373 U.S. 546).

The Corps of Engineers suggests that there is some vagueness to our ownership of our property rights, because they are unquantified. In the water allocation alternatives outlined in the *Revised Draft EIS*, the Corps ignores our rights altogether, in order to supply the maximum amount of water to existing non-Indian water uses.

In the *Missouri River Revised Draft EIS*, the Corps of Engineers establishes future water allocation plans that undermine Indian water uses in order to provide water flows for non-Indian uses. All of the current alternatives provide water for varying levels of service for enumerated non-Indian water uses. No stored water is identified for Tribal water rights. Accordingly, the region's non-Indian economy is to be propped up at the expense of the Indian economy, which shall remain undeveloped because our resources are allocated to non-Indians under the Master Water Control Manual. The Congress cannot permit this to happen.

The Corps of Engineers Routinely Destroys Native American Cultural Resources and the Revised Draft EIS Contains No Mitigation or Other Compliance Plan as Required Law

No agency of the federal government has destroyed more cultural resources or desecrated more Native American human remains than the Army Corps of Engineers, in its Missouri River operations. Yet the *Missouri River Revised Draft EIS* contains no mitigation or other compliance plan as required under the National Historic Preservation Act. (16 U.S.C. §470a et seq.)

The National Historic Preservation Act requires the Corps of Engineers to evaluate the impact of its “undertakings” on historic properties along the Missouri River. (NHPA §106, 16 U.S.C. §470f). The federal courts have determined that wave action caused by water releases at the Missouri River dams are “undertakings” requiring compliance with the NHPA. (*Yankton Sioux Tribe v. Army Corps of Engineers*, 83 F. Supp. 2d 1047 (D.S.D. 2000)).

Indeed, the Corps of Engineers had a programmatic agreement with the Advisory Council on Historic Preservation, outlining the agreed-upon procedures for compliance with section 106 of the NHPA, when wave action of the Missouri River impacts cultural sites at the water’s edge. However, on July 17, 2000, the Advisory Council terminated the agreement, informing the Corps –

The Omaha District’s handling of this matter evidences a serious lack of understanding of Federal historic preservation laws and regulations, a lack of commitment to fulfill historic preservation legal responsibilities, and an unwillingness to seek and consider the views and recommendations of State officials, tribal governments, and the Council....

The PA was intended to allow the Corps greater flexibility in how it met its obligations under Section 106 while fostering better long-term planning for and stewardship of historic properties... (T)he Omaha District has disregarded commitments it made in the PA and the resulting (negative) consequences it has had for irreplaceable resources under its care. The Council is forced to conclude that the Corps is unable, or unwilling to carry out the terms of the PA.

(Letter of Carolyn Buford Slater, Chairperson, Advisory Council on Historic Preservation, to Secretary of the Army, dated July 17, 2000).

Thus, the Advisory Council points out that the Corps of Engineers has failed in its responsibility of stewardship for sacred Native American cultural resources along the Missouri River. The Corps disregarded its commitments under the Programmatic Agreement, which was consequently terminated by the Advisory Council. The Revised Draft EIS contains no provisions for the protection of the identified cultural sites in the future, or mitigation of damage that is caused by wave action. There is no corrective action, period.

The Corps of Engineers has developed a new Programmatic Agreement for Cultural Resources. The Omaha District has sent form letters to me concerning this, and held several inter-Tribal meetings on it. However, there was no effort to communicate with the Oglala Sioux Tribe on a government-to-government basis, or address the concerns expressed by our Tribe, as required in the NHPA and Executive Order 13175 on Consultation With Indian Tribal Governments. (65 Fed. Reg. 67250, November 6, 2000). Indeed, of all of the federal agencies that I work with, none gives less effort toward government-to-government consultation than the Corps of Engineers. The new draft PA is inadequate, substantively and procedurally.

With respect to cultural resources, Native American human remains are entitled to special protection under the Native American Graves Protection and Repatriation Act. (NAGPRA) (25 U.S.C. §3001 *et seq*). Yet the Corps has completely disregarded its obligation to avoid disturbance of existing grave sites, and to properly repatriate human remains upon inadvertent unearthings due to wave action of the Missouri River.

These legal requirements are extremely important to our Tribe. Under NAGPRA, Indian Tribes enjoy presumptive rights of ownership and repatriation of human remains and cultural objects that are unearthed within its aboriginal territory, as adjudicated by the Indian Claims Commission. (25 U.S.C. §3002). As stated above, the Oglala Sioux Tribe retains treaty and aboriginal claims throughout an extensive area, including the bed of the Missouri River and the lands adjacent to the Missouri. Consequently, our Tribe enjoys rights of ownership and repatriation under NAGPRA on lands along the Missouri River.

The wave action caused by COE water releases for hydropower generation and downstream navigation causes erosion and the destruction of cultural resources of Lakota and Arikara origin, along the Missouri River. This violates the NHPA and NAGPRA. Yet the Corps of Engineers continues these actions, and is now finalizing long-term plans which fail to address them.

The failure of the Corps of Engineers to comply with the National Historic Preservation Act and Native American Graves Protection and Repatriation Act directly and adversely impacts cultural resources and human remains of Lakota origin along the Missouri River. For this reason, also, I implore the Committee on Indian Affairs to entertain legislation for enhanced management of water flows and the establishment of a development fund for the Missouri River Basin Indian Tribes, as proposed by my colleague Standing Rock Sioux Tribal Chairman Charles Murphy.

Conclusion – There is an Urgent Need for Legislation for the Protection
of Indian Rights and Claims to the Missouri River

The Army Corps of Engineers has a terrible record violating the water rights and treaty rights of the Sioux Nation in its Missouri River operations under the Pick-Sloan program. The Advisory Council on Historic Preservation has terminated the Programmatic Agreement with the Corps for the mitigation of impacts on cultural resources, due to the agency's "lack of commitment to fulfill historic preservation legal responsibilities." The *Missouri River Revised Draft EIS* illustrates that the Corps is finalizing plans to continue the violation of our rights, well into the twenty-first century.

We need sufficient water supplies on the Pine Ridge Reservation to survive. This was guaranteed to us in the 1851 and 1868 Fort Laramie Treaties.

Yet, today, the Corps of Engineers proposes to administer water flows to supply water for navigation and fish and wildlife in the lower Missouri Basin. The Corps has proven its lack of concern for the rights of the Oglala Sioux Tribe. The only question that remains, at this point, is whether the Congress shall permit the Corps to get away with it.

I urge the Committee on Indian Affairs to intervene in the Army Corps of Engineers Missouri River Master Manual Review and Update on an urgent basis. The Corps of Engineers should not be permitted to finalize the Master Water Control Plan, in

the absence of full implementation of Indian water rights and treaty rights in the upper Missouri River basin.

Standing Rock Sioux Tribal Chairman Charles Murphy and I have proposed legislation to address this. I urge you to fully consider our proposal. Thank you.