

The Missouri River and the Pick-Sloan Plan: The Combination That We Can't Live With and Never Would Have Survived Without.

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Water Law
Final Paper
Spring 2010

I. Introduction

The Missouri River Basin spans ten states and two countries.¹ An area this large and with so many boundaries impacting one water source is bound to create conflict. The Missouri River is debatably the longest river in the United States. Extending from its headwaters in Three Forks, Montana to St. Louis where it flows into the Mississippi River, the Missouri River Basin encompasses over 338.5 million acres.² The drainage basin stretches to the west as far as the Continental Divide formed by the Rocky Mountains. On the north it reaches into Canada and is bordered by the Hudson Bay watershed. The Missouri Basin's eastern most border stretches to the Mississippi River drainage basin and to the south it goes into central Kansas as far as the Arkansas River drainage basin.³ Thorson notes that adding "some endangered or threatened species to the equation, a major federal statute or two, and several federal and state regulatory agencies, and you have a river roiling with controversy."⁴ The government's regulation of the Missouri River for years has positioned states against states in a battle over the beneficial uses

¹ See generally John E. Thorson, *River of Promise, River of Peril: The Politics of Managing the Missouri River* (University Press of Kansas 1994).

² Clifton Stone, Missouri River, What is the Missouri River?
<http://www3.northern.edu/natsource/HABITATS/Missio1.htm> (March 2010)

³ U.S. Army Eng'r Div., Water Resources Development by The U.S. Army Corps of Engineers in Missouri (Jan. 1985). It drains all of Nebraska, large parts of North Dakota and South Dakota, all of Montana and Wyoming east of the Continental Divide, parts of Colorado, Iowa, Kansas and Missouri, and a small part of Minnesota. The Basin also includes parts of Alberta and Saskatchewan, Canada.

⁴ Thorson, *River of Promise* at 12.

ranging from irrigation and recreation interests to navigation and flood control in combination with economic and environmental concerns.⁵ It was the vision and arrogance of two men that lead us to the Missouri River as we know it, both good and bad. It was the combination of these two visions that created the Pick-Sloan Plan, taming the river by implementing the six main stream dams.

This paper will review the history of the Missouri River, its impact on civilization in the Dakotas and the evolution of the Pick-Sloan Plan. Furthermore, it will discuss three court cases that deal directly with the impact of the Pick-Sloan Plan on the upper states of the Missouri River Basin.

II. History of the River

Prior to 1940 and the construction of the six main stem dams that now regulate it, the banks of the Missouri moved annually and varied with the changing of the seasons, and flooding was a regular occurrence as the river ran wild.⁶ The Missouri River was subject to minor development in an attempt to promote navigation as early as the 1800s.⁷ The first modern development of the Missouri River began in the Mid-1930s with the authorization of the Fort Peck Dam in Montana.⁸ In 1940 the Corps completed the 140-mile long reservoir behind the Fort Peck Dam in eastern Montana.⁹ Originally designated as a flood control reservoir, the Fort

⁵ See generally Thorson, *River of Promise*.

⁶ Thorson, *River of Promise* at 14.

⁷ John R. Ferrell, *Big Dam Era: A Legislative and Institutional History of the Pick-Sloan Missouri Basin Program* (1993).

⁸ Michael S. Houdyshell, Introductory Note: A Brief History of the Development of the Missouri River, 9 *Great Plains Nat. Resources J.* 28. (2005)

⁹ Brian Morris, Unanswered Prayers: The Upper Basin States Take on the U.S. Army Corps of Engineers, 68 *N.D. L. Rev.* 897. (1992)

Peck Dam represents the first major effort by the Corps' to lessen the devastating succession of drought and flooding that impacted the basin.¹⁰

The River naturally flooded to some extent every year in the spring. While annual flooding was a regular occurrence, major floods occurring in 1844, 1881, 1903, 1915, 1926, and 1934 caused severe damage. Some of the higher estimates put the “the flood damage caused by the Missouri and its tributaries as high as \$77 million per year.”¹¹ However, it wasn't until the three unusually severe floods in 1943 that the government took decisive action. It was the “three big floods during March, May and June of 1943 inundated the Missouri River Basin and riveted public attention to the flooding problems.”¹² Much of Omaha was under water and navigable only by boat, including its airport, vital to the war effort.¹³ Along with the damage came an unprecedented outcry from both the public and congress on the Missouri River basin to advance flood control beyond the Fort Peck Dam.¹⁴

III. History of the Plan

On September 30, 1933 the Pick-Sloan Plan was informally implemented when the Chief of Engineers of the U.S. Army formally recommended the construction of Fort Peck Dam in eastern Montana.¹⁵ By the middle of October President Franklin Roosevelt approved the project to be carried out by the Corps and construction began for the greater development of the water

¹⁰ *Id.*

¹¹ Michael C. Robinson, *Water for the West, the Bureau of Reclamation 1902-1977* 83 (1979).

¹² Marian E. Ridgeway, *The Missouri Basin's Pick-Sloan Plan* 191(1955).

¹³ National Park Service, *Missouri National Recreation River*, (National Park) <http://www.nps.gov/mnrr/planyourvisit/upload/PickSloanbulletin.pdf> (last visited March 20, 2010)

¹⁴ *Id.*

¹⁵ Ferrell *supra* note 7 at 5.

resources that included the main stem Missouri River.¹⁶ The dam was completed in 1939, and at the time was the largest earth-filled dam in the world as it 19.1 million acre feet of water behind it.¹⁷ The project was approved for two main reasons. Not only did it supply greatly needed jobs during the Great Depression, but it was also intended to support navigation on the lower portion of the river.¹⁸

While technically the Fort Peck Dam project had nothing to do with the Pick-Sloan Plan, in reality it was just a step leading to the much larger project controlling the rest of the river. Twelve years after the authorization of the Fort Peck Dam, the Corps and the Bureau of Reclamation (Bureau) each presented their own plan regarding how the much larger project to come should be carried out. The Corps and the Bureau battled over the next phase of water development in the Missouri River Basin.¹⁹ The decision on how to move forward would be solved in Omaha, but “the battle would pit the interests of irrigation and power, championed by the Bureau, against the interests of navigation and flood control, championed by the Corps. Out of the skirmish in 1944 would emerge the so-called Pick-Sloan plan for the Missouri Basin water development.”²⁰

A. The Two Men and Their Agencies

The heat of the battle arose between the leaders of the two agencies vying for the control of the river. Two larger than life characters with equally large egos presented plans for a management project to the government with complete disregard for the other. The two shared a

¹⁶ *Id.*

¹⁷ See generally Clark C. Spence, *Montana, A Bicentennial History 152-153* (1978).

¹⁸ *Id.* at 6

¹⁹ *Id.*

²⁰ Norman W. Thorson, *Damned if You Do, Damned if You Don't- Reflections on John Ferrell's Big Dam Era*, 2 *Great Plains Nat. Resources J.* 13. (1997)

hatred for each other, and were often disliked by most of those who worked with them. While they both generally disagreed with everyone, their plans “principally disagreed for the appropriate use of water” and neither was willing to meet in the middle.²¹

B. Colonel Lewis A. Pick

Colonel Lewis A. Pick led the Corps and was based out of Omaha, Nebraska. Pick took merely 90 days to review the previous Corps flood-control plans and his agency’s huge 1935 report and, submitted a twelve plus page plan. The plan was criticized by many for it’s “extremely brief as Corps engineers’ reports go, it was terse and concise to the point of bareness.”²²

Colonel Pick’s plan requested five dams on the Missouri River below Fort Peck, and 1,500 miles of levees on both sides of the river from Sioux City, Iowa, to the confluence with the Mississippi River.²³ In essence, the plan revolved around flood control and navigation, with only some hydroelectric power production at major dam, and barely mentioned irrigation. His estimated cost for the entire project was \$490 million. Pick maintained that his plan would provide for all uses of the river’s water, “including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation.”²⁴ However, it was apparent in the execution of his plan that these secondary purposes were never intended be explored to their potential. This was just an effort on his part to address the desires of the upper basin states until the plan was approved.

C. U.S. Army Corps of Engineers

²¹ Ross K. Den Herder, *The Battle for the Basin: The Struggle for Priority Among Competing Interests In the Management of the Missouri River Reservoir System*, 9 *Great Plains Nat. Resources J.* 34 at 38. (2005)

²² National Park, <http://www.nps.gov/mnrr/planyourvisit/upload/PickSloanbulletin.pdf>

²³ *Id.*

²⁴ *Id.*

Since the end of the Revolutionary War the civilian branch of the Corps has played a role in the nation's navigable waterways.²⁵ It started by removing driftwood and sunken ships. The Corps expanded its role during the nineteenth century when it started to survey land and waterways.²⁶ However, it was not until the 1900s that the Corps concentrated its activities on navigation and flood control.²⁷ Before dams, to help increase navigation, the Corps dredged and straightened rivers and otherwise manipulated river and port bottoms to accommodate barge and ship traffic.²⁸ In an attempt to control floods, the Corps built levees and dikes rather than dams and reservoirs²⁹. Until the 1930s the Corps had very little activity in the western United States and the East offered very few steep canyons or natural basins in which dams and reservoirs are more suitable.³⁰

When the Corps expanded to the West it quickly discovered the virtues of dams and reservoirs as part of comprehensive flood control programs.³¹ The dams built by the Corps also provided an unplanned advantage as well. The reservoirs created were better for irrigations than those created by the Bureau. Since it was already there, it was free.³²

D. William G. Sloan

Assistant Director of the Billings, Montana office, William G. Sloan, led the charge for the Bureau of Reclamation. Sloan's document was far more detailed and specific than Picks. It was a 211-page report that stemmed from years of research and planning not months. Sloan centered his plan around irrigation and hydroelectric power generation. The Bureau engineers

²⁵ Ridgeway, *The Missouri Basin's Pick Sloan Plan* at 48.

²⁶ *Id.*

²⁷ Marc Reisner, *Cadillac Desert, The American West and its Disappearing Water* 179-180 (1986).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 181.

³¹ Morris, *supra note 9* at 903.

³² *Id.*

created plans for large-scale water development projects in the Basin. They planned that in addition to the project increase the potential for agriculture, it would also provide construction jobs for thousands of basin residents.³³ Sloan had a bold vision that “called for some seventeen power plants, ninety reservoirs—nearly four times as many as Pick’s—and the irrigation of nearly 5 million acres of the Great Plains. Its \$1.26 billion price tag was twice the cost of Pick’s, startling Congress and the public when it became known.”³⁴ The downside of this plan is that while it addressed flood control that was not the center of attention. It is clear from the history of the area and the immediate attention toward creating funding that flood control was what was at the forefront of concern.

E. Bureau of Reclamation

The Bureau of Reclamation began in 1902 with the Reclamation Act.³⁵ It authorized the federal government to develop water storage facilities in promising locations throughout the West.³⁶ The government agreed to deliver water to irrigators under contract, and “recover its costs through payments that the irrigators would make over time from the profits of their newly irrigated land.”³⁷ In 1907, the Reclamation Service permanently became an independent agency within the Department of Interior³⁸

The Bureau completed its first major project, Roosevelt Dam, on the Salt River in southern Arizona in 1911.³⁹ Today, the Bureau's work can be seen all across the West. It is responsible for over “300 dams, 7000 miles of canals and aqueducts, 50 hydroelectric generators, and 140

³³ National Parks, <http://www.nps.gov/mnrr/planyourvisit/upload/PickSloanbulletin.pdf>

³⁴ *Id.*

³⁵ Joseph L. Sax, *Legal Control of Water Resources* 644 (2d ed. 1991).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Robinson, *supra note* 11 at 19.

³⁹ *Id.*

pumping stations.”⁴⁰ Twenty percent of all irrigated land in the West relies on water that the Bureau provides. Furthermore, the Bureau supplies drinking water to twenty million domestic users.⁴¹

F. When the Plans Came Together

“While devastating floods paved the way for the Pick-Sloan Plan so too did the Great Depression and the progressive conservation movement’s belief that multiple-purpose water projects would stimulate growth in the arid West.”⁴²

On May 21, 1943, in response to the recent devastating basin floods in Omaha, Pick spoke at the first ever basin-wide meeting of the recently formed Missouri River Basin States Committee.⁴³ This initial meeting prompted Congress to take quick action to resolve the flooding crisis. Since the Bureau and the Corps could not agree on which plan was better, they agreed to combine the two.⁴⁴ Each agency sent a representative to a meeting in Omaha on October 16 and 17 of 1944 to propose the combined plan. In the short two-day meeting the two complete plans were put together⁴⁵ and on December 22, 1944, the President signed the Flood Control Act of 1944, which approved the coordinated plan and authorized appropriations to each of the two agencies for construction of the initial stages.⁴⁶ Less than three years after Pick’s initial meeting, the Corps began construction on what has become the 74 million acre-foot system of reservoirs that shapes the Missouri River.⁴⁷

⁴⁰ Sax *supra* note 32 at 621.

⁴¹ *Id.*

⁴² National Parks, <http://www.nps.gov/mnrr/planyourvisit/upload/PickSloanbulletin.pdf>

⁴³ Ferrell *supra* note 7 at 11.

The Missouri Basin States Committee was formed in May 21, 1943, as a ten state coalition to lobby Congress for water resources development programs in the basin.

⁴⁴ National Parks, <http://www.nps.gov/mnrr/planyourvisit/upload/PickSloanbulletin.pdf>

⁴⁵ *Id.*

⁴⁶ Ferrell *supra* note 7 at 180.

⁴⁷ *Id.*

It was the rising tensions over who had final authority of the project led to The Flood Control Act of 1946, approved on July 24, 1946. This revised Act authorized additional appropriations to the Department of the Interior for the further development of the comprehensive plan adopted by the Flood Control Act of 1944.⁴⁸ States were divided with the leaders of each plan. The lower basing states, Nebraska, Missouri, and Kansas with the Corps were pitted against the upper basin states Montana, North Dakota, and South Dakota with the Bureau.⁴⁹ The amendments in 1946 were designed to ease the tension in the Basin and assure the upper basin states they would get the benefits promised in the original agreement when the plans were combined.⁵⁰

In reality the assurance intended by the proposed reconciliation, failed to overcome the fears of the upper basin states members of Congress that were still concerned that “their water and hopes of economic development would be washed downstream to float the barges favored by the Corps.”⁵¹ Only the adoption of the O'Mahoney-Millikin Amendment assured congressional approval of the combined development plan. Senators Joseph O'Mahoney of Wyoming and Eugene Millikin of Colorado introduced a series of amendments designed to protect the interests of arid western states in this and future projects contemplated by the Bureau and Corps.⁵²

Ridgeway notes that:

The most important provision for our purposes dealt with the priority of uses in the operation of the system. An amendment to the Flood Control Act of 1944 stated:

(c) The use for navigation, in connection with the operation and maintenance of such works herein or hereafter authorized for construction, of waters arising west

⁴⁸ U.S. Department of Interior, Pick-Sloan Missouri Basin Project http://www.usbr.gov/projects/Project.jsp?proj_Name=Pick%20Sloan%20Missouri%20Basin%20Program%20Project, May 13, 2009. (Last visited March 21, 2010).

⁴⁹ Den Herder *supra note* 21 at 47.

⁵⁰ *Id.*

⁵¹ Ridgeway *supra note* 12 at 91.

⁵² *Id.*

of the ninety-seventh meridian shall be subordinate to and shall not adversely affect at any time the beneficial consumptive use, west of the ninety-seventh meridian, of such waters for domestic, irrigation, mining, or industrial purposes.⁵³

While this seemed to solve some debate at the time and was good in theory, it simply ended up being a continuance of Pick's original plan. There were no metaphorical teeth to this amendment and in essence gave the Bureau no more authority than they already had. Navigation is still the first thing mentioned and still ranked above all the other secondary uses.

G. Master Manual

Congress and the Secretary of Interior instructed the Corps to set up a manual to guide operation of the main stem system when the Flood Control Act of 1944 was approved.⁵⁴ In 1960 the Corps created the Missouri River Main Stream Reservoir Regulation Manual (Master Manual). It is a detailed management program that sets guidelines and mandates of how the Corps has to manage the river.⁵⁵ Furthermore, the Master Manual specified priorities in water use, listing them as follows:

First, flood control; second, all irrigation and other upstream water uses for beneficial consumptive purposes; third, downstream municipal and industrial water supply and water quality requirements; fourth, equitable service to navigation and power; [and] fifth, [hydroelectric] power generation efficiency consistent with other uses.... and ' insofar as possible, without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefit to recreation, fish and wildlife'.⁵⁶

This standard set forth in 1960 is still the most pertinent part of the Master Manual today. While the Master Manual is nearly 500 pages and much has changed

⁵³ *Id* at 335.

⁵⁴ Office of Counsel, Dep't of the Army, *The Role of Recreation in the Regulation of the Corps of Engineers Constructed and Operated Main Stem Reservoirs of the Missouri River* 16 (Aug. 16, 1990).

⁵⁵ Morris, *supra note* 9 at 922.

⁵⁶ Office of Counsel, *supra note* 49 at 16.

since 1960 this is still the ranking standard that decisions are made on today. The biggest issue that is discussed in this paper is where navigation ranks in relation to recreation, fish and wildlife. As will be discussed later, from an economic standpoint, navigation never developed as planned and recreation exploded far beyond anyone's expectation in 1960.

The Corps' standard response to criticism of its water management is to claim that it is bound by the priorities established in its Master Manual and that congressional authorization would be required to adjust those priorities.⁵⁷ They claim that "any revision involving a long term or permanent change in the operation of the system that would serve as a significant deterrent to one or more of the actual purposes or the currently settled priorities of the system would suggest the need for prior congressional authorization."⁵⁸ While it is true that changing the list of priorities is a complicated process that would affect everyone involved, it appears that the Corps hides behind this excuse to keep their navigation interests from dropping down the list.

VI. Unfulfilled Promises

As the installation of the dams and reclamation projects progressed tensions between the two agencies continued to build into the conflict we deal with currently.⁵⁹ In large part due the fact that the Bureau agreed to let the Corps build its main stem reservoirs in the beginning with money that was available up front, and postpone its own projects in the upper basin until after these main stem reservoirs were in place.⁶⁰ This turned out to be a "fateful decision for the

⁵⁷ Morris, *supra* note 9 at 922

⁵⁸ Office of Counsel, *supra* note 49 at 16.

⁵⁹ Reisner *supra* note 25 at 194.

⁶⁰ *Id.*

Bureau, because little money proved to be available when it was finally ready to go ahead with its projects.”⁶¹

A. Navigation

The Corps followed its plans to construct a navigation channel below Sioux City, Iowa and to construct the 1,500 miles of levees. However, the projected barge traffic failed to materialize, peaking in 1977 “at a disappointingly low 3.3 million tons, far below the 12 to 20 million ton capacity”.⁶² By 1990 it had fallen to a mere 1.5 million tons.⁶³ Comparatively the Mississippi River barges carry over 380 million tons per year and at least 150 million tons each year on the Ohio River.⁶⁴

B. Irrigation

The Corps is not the only agency that failed up to follow through with its plans. The Bureau has fallen short of completing all of the projects it had designed in the upper basin as well. While the Corps dams were all on the main stem, the Bureau planned on damming many of the tributaries for irrigation. However, money for these dams was not appropriated by Congress. For example, in South Dakota, “Congress did not appropriate money for irrigation of more than 24,000 acres, although the legislation envisioned potential development of more than 900,000 acres for irrigation in the state.”⁶⁵ Similarly, plans to amass irrigation projects in Nebraska never materialized due to costs in excess of \$1,000 per acre-foot of water that would be delivered to the

⁶¹ *Id.*

⁶² Peter Carrels, Missouri River Feud Could Dry up Navigation, Chi. Trib., Aug. 15, 1991, at C1

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Morris, *supra note 9* at 916

dry land farmers.⁶⁶ Other than some irrigation projects being scrapped because of their excessive cost, Congress halted others due to the high cost of productive land lost.⁶⁷ Originally, the Garrison Diversion Project would have sacrificed 220,000 acres to create canals and reservoirs to gain 250,000 new acres irrigated.⁶⁸ While it would have created a net gain of 30,000 acres, much of the land lost was more fertile than the land that was supposed to receive irrigation water.⁶⁹

C. Real Benefit

While the navigation and irrigation projections have fallen short, the flood control component of these reservoirs, especially in the lower basin, has saved billions of dollars of damage.⁷⁰ It is important remember that this was the primary purpose for building the dams, as it was the debilitating floods that got the attention from Congress to allocate funding for the project.

Beyond flood control, there has been a surprising consolation prize developed for the upper basin states. Despite the setbacks and disappointments that were realized in navigation and irrigation, the huge amounts of stored water behind the six main stem dams spawned a booming recreation industry.⁷¹ Increased waterfowl hunting, sport fishing, which includes salmon, northern pike and walleye, boating, water sports, and overall tourism have all benefited from the presence of the reservoirs.⁷² The economic benefits are great, but vary depending on how broad of a scope one considers. It varies from a few million dollars a year to what economist predicts that the existence of the reservoirs, “increases the number for South Dakota to \$125 million

⁶⁶ Reisner *supra* note 25 at 200.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Morris, *supra* note 9, at 920.

⁷⁰ The Missouri River, Back to Nature?, *The Economist*, Oct. 13, 1990, at 29

⁷¹ Morris, *supra* note 9, at 921

⁷² Ridgeway *supra* note 12, at 48.

annually when he includes money spent on boats, trailers and fishing licenses.”⁷³ Regardless of the exact figures, the recreation industry brings in desperately needed money and the accompanying jobs to the underdeveloped region.⁷⁴

Beyond the court battles discussed next, an underlying issue is the legislative power held by the lower basin states. It is true that the upper basin states benefit more from recreation than the lower basin states do from navigation. However, the lower basin states do benefit more from the required nine foot channel than they do from their recreational benefits, and with their greater population and stronger national representation, they will not be giving those up soon.

V. Legal Battles

It is not surprising that a project of over a billion dollars, which has been disputed since before its inception, would be contested in a courtroom. If there was ever a doubt that the Corps was primarily in charge of the project from the beginning, it has been quashed by the courts on several occasions.

A. *ETSI Pipeline v. Missouri*

In *ETSI Pipeline v. Missouri* the Court gave affirmation of the Corps authority from the United States Supreme Court in 1988 when it handed down its decision.⁷⁵ Unlike the typical water law case over shortage of water this case was a battler of water surplus in Missouri River reservoirs.

⁷³ William Robbins, States Turn to the Courts for Water As the Rain-Starved Missouri Falls, N.Y. TIMES, June 7, 1990, at A16 (quoting Dr. Michael K. Madden, University of South Dakota).

⁷⁴ Morris, *supra* note 9 at 904

⁷⁵ *ETSI Pipeline v. Missouri*, 484 U.S. 495 (1988).

In 1982, Energy Transportation Systems, Inc. (“ETSI”) and the Secretary of the Interior entered into a contract to withdraw water from Lake Oahe, a Missouri River reservoir. The contract was for the purpose of operating an interstate coal slurry pipeline.⁷⁶ Lower Basin states, Missouri, Iowa, and Nebraska consequently sued to enjoin performance of the contract. They alleged that the Secretary's actions, without prior approval of the Secretary of the Army, were beyond the authority granted by the Flood Control Act.⁷⁷ The district court granted the injunction,⁷⁸ which the Eighth Circuit Court of Appeals affirmed.⁷⁹ In affirming the lower courts' decisions, “the Supreme Court noted that there was no dispute that Lake Oahe was built, operated, and maintained by the Army, nor that under the explicit terms of the Act such reservoirs are under the control or direction of the Secretary of the Army.”⁸⁰ In its decision the Court made a point of emphasizing the provisions of the Act. It highlighted the Secretary of the Army’s authority over reservoirs the Department of the Army controlled, most notably over surplus water from such a reservoir, and the Interior Secretary's subordination in such matters.⁸¹ One analysis of the opinion is that, “this power over the reservoirs, combined with the long-standing authority over downstream navigation, places the Corps in practical control of the River.”⁸² If there was ever a doubt that the Corps had primary control of the river, this case extinguishes that. While this case did further the precedent of the Corps control, it was unique in its debate over surplus water. Cases in the years to come would prove much more heated and controversial when drought brings a scarcity of water.

⁷⁶ *Id.* at 498

⁷⁷ *Id.*

⁷⁸ Tim Garrison, What Does a Pallid Sturgeon Say when it Runs Into a Cement Wall? “Dam” The Interminable Revision of the Missouri River Master Manual, 10 Mo. Env'tl. L. & Pol'y Rev. 61 (2003).

⁷⁹ *Id.*

⁸⁰ *ETSI Pipeline Project*, 484 U.S. at 505.

⁸¹ *Id.* at 497.

⁸² John H. Davidson and Thomas Earl Geu, The Missouri River and Adaptive Management: Protecting Ecological Function and Legal Process, 80 Neb. L. Rev. 816, at 826 (2001).

B. *South Dakota v. Hazen*

In a more typical fashion, this case involves a battle over water when there is a shortage of supply. As mentioned above, it is the Master Manual that prioritizes the water uses of the Missouri River. In times of drought as described in this case, the reservoir levels drop and “a Corps policy that favors navigation over recreation in operation of the reservoirs imperils the recreation industry.”⁸³ The increased release rates that facilitate navigation on the lower basin authorized by the Master Manual were “threatening the recreation industry that developed as a consolation prize for the upper basin states.”⁸⁴ As the popular sport fish, walleye, spawn they lay their eggs in the shallow waters of the reservoirs. In this case the Corps continued to release water at a rate of 30,000 cubic feet per second (cfs) when the inflow replenished the reservoirs at a rate of only 22,000 cfs. This was causing the water level to drop, leaving the walleye eggs above water and unable to hatch.⁸⁵

As a result of this scenario, the upper basin states, including, Montana, North Dakota and South Dakota sought a preliminary injunction in order to stop the Corps from discharging water from the reservoirs during the spring spawning season of the walleye in 1990.⁸⁶ This resulted in a serious threat to the only benefits the upper basin states receive from the Missouri River system and for some stability in the economic future of their states.⁸⁷

The Corps rested their argument on the theory that failure to maintain the level of the Missouri below Lake Oahe through the discharges would stall downstream navigation, including

⁸³ Morris, *supra note*, 9 at 920.

⁸⁴ Morris, *supra note*, 9 at 921

⁸⁵ *Id.*

⁸⁶ *South Dakota v. Hazen*, 914 F.2d 147, 148 (8th Cir.1990).

⁸⁷ Morris, *supra note*, 9 at 922

barge traffic.⁸⁸ The Corps further argued that reducing discharges from Lake Oahe, even temporarily, and restoring them to normal after June 1st after the spawning season as the upper basin states requested would effectively halt navigation for the entire summer.⁸⁹ This was due to the presence of two endangered species of birds, the least tern and the piping plover. Release of water later in the season would inundate their nests in violation of the Endangered Species Act.⁹⁰ Despite the protest of the Corps, on May 9, 1990, a federal district court in North Dakota enjoined the Corps from releasing water from the Lake Oahe reservoir at a greater rate than it was replenishing until June 1, 1990.⁹¹

The Corps expedited the appeals process by filing an emergency motion for stay pending appeal of the preliminary injunction to the Eighth Circuit. The Eighth Circuit granted the stay on May 11, 1990, and heard oral argument of the appeal on an expedited basis on May 16, 1990, releasing its written opinion on September 12, 1990.⁹² In overruling the lower courts, the court accepted the Corps' argument that there is no "law to apply" in either the statutes or the regulations.⁹³ The court found that applicable law was the Corps' own Master Manual. The Master Manual places navigation as one of the primary purposes of the project, with recreation relegated to a secondary purpose.⁹⁴ However, it is important to note that this decision did not come down until after the spawning season ended. So even though the upper basin states lost the war in this case, they won the battle since the court failed to come to a long term decision as the

⁸⁸ *Hazen*, 914 F.2d at 148.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 150. The standard of review under the Administrative Procedure Act (APA) is whether the decision is arbitrary or capricious. 5 U.S.C. § 706(2)(A) (1988).

⁹⁴ *See Morris*, *supra* note 9.

ruled the matter moot.⁹⁵ There were several similar legal battles, with similar results that lead up to the next case. These battles would continue until decisive action was taken by the Judicial Branch.

C. S.D. v. Ubbelohde

This is a similar example of upper basin states battling the lower basin states over water released from Lake Oahe. Nebraska was in favor of the Corps' decision to release additional water for navigation instead of holding the reservoir level in favor of sporting fish. However, South Dakota, and North Dakota sought injunctions prohibiting or requiring the Corps' lake water releases. Similar to the *Hazen* case, the years leading up to this case in 2003 the majority of the Great Plains experienced severe drought conditions.⁹⁶ The 2002 yearly operating plan enacted by the Corps included a management plan to alleviate drought conditions by maintaining water levels at strategic points along the river by planned releases throughout the reservoir system, specifically additional releases from Lake Oahe.⁹⁷ However, this would have a negative impact reduced walleye population that serves as the centerpiece of South Dakota's multimillion dollar recreation industry.⁹⁸ Since the rainbow smelt lay their eggs in very shallow water, the success of the smelt spawn depended upon stability of the water level in the reservoir.⁹⁹ Water level reductions of as little as six inches would expose many of the eggs, killing them and ultimately making the spawn unsuccessful.¹⁰⁰ Federal District Courts in North Dakota and South Dakota granted temporary restraining orders against the Corps and the Federal District Court in

⁹⁵ *Id.*

⁹⁶ Den Herder, *supra note*, 21 at 35

⁹⁷ *Id.* at 36

⁹⁸ *Id.*

⁹⁹ Sandra B. Zellmer, A New Corps of Discovery for Missouri River Management, 83 Neb. L. Rev. 305, 319 (2004). Lake Oahe had been a key destination for trophy walleye fishing. Ubbelohde, 330 F.3d at 1021.

¹⁰⁰ *Id.*

Nebraska granted a preliminary injunction ordering the Corps to release sufficient water to support downstream navigation. The Corps appealed the rulings of the Federal District Courts for North Dakota, South Dakota, and Nebraska.¹⁰¹ The appeals of the decisions of all three Federal Districts Courts were consolidated and heard by the Eighth Circuit Court of Appeals to create this case.¹⁰²

Of the four issues presented before the court, there were two key issues that created a lasting impact. First, whether the appeals of the North Dakota and South Dakota injunctions were moot because both have expired by their own terms, as so many of the similar previous cases were deemed.¹⁰³ Second, whether the Corps' actions were subject to judicial review, and whether the Corps is bound to operate by the guidelines found in the Corps' self created Master Manual.¹⁰⁴

Turning over a new leaf, the court decided that even though the preliminary injunctions were expired, the issue was not moot and the court would hear it. The court used the logic that the issue would be likely to be litigated again in future drought conditions and they should solve this issue preemptively.¹⁰⁵ While the decision was surprising, based on the list of similar cases the court dismissed as moot and adverted making a tough decision, it only made sense considering the chances of addressing the same problems in the future was very likely. On the second issue the court decided that since the Code of Federal Regulations requires such a manual, the Corps treated the Master Manual as binding, and language in the manual itself was directing in nature, that the Corps is bound by the Master Manual.¹⁰⁶

¹⁰¹ *Ubbelohde*, 330 F.3d at 1022; The Montana injunction was not appealed to the Ninth Circuit Court of Appeals. *Id.* at n.2. Once that injunction ran its course, the State of Montana dropped the issue. *Id.* at 1022

¹⁰² *Id.*

¹⁰³ *Ubbelohde*, 330 F.3d at 1022.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Den Herder, *supra note*, 21 at 42

Underneath all of the procedural issues the real issue facing the court is whether the Master Manual allows the Corps to release water during a drought for navigation if it negatively impacts wildlife? The court decided that the Master Manual does not require equal treatment of specified priorities- released water for navigation. Even though the court decided that the Corps was bound by the Master Manual it seems as though it is only a suggestion.

VI. Conclusion

It is an uphill battle for the upper basin states to ever see the Bureau's vision that they were promised become a reality. The Corps had a leg up from the first meeting in Omaha and never looked back, jumpstarting "a trend that developed during the legislative process that works to the great disadvantage of the upper basin states today: reasonable assurances of flexible priorities to the upper basin states in the lobbying stage, followed by vague language ... and operation guidelines developed by the Corps that clearly favor the interests of the lower basin states."¹⁰⁷

While there is much to be resolved with the shortcomings of the Pick-Sloan Plan, especially in the battle over navigation, there are great benefits that should not be overlooked. Despite many of the promises by two lavish egos left unresolved, the implementation of the dams has saved billions of dollars in flood damage and, while inadvertent, recreational benefits have boosted the economy of the upper basin states. Although it is easy to blame the Corps for all of the issues that arise out of the Missouri River, it was all of the basin that desired the six main stem dams that shape the river we see today.

¹⁰⁷ Morris, *supra note*, 9 at 929.