

**STATEMENT OF JOHN YELLOWBIRD STEELE, PRESIDENT, OGLALA
SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION**

**BEFORE THE UNITED STATES COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON THE IMPACT OF FLOOD CONTROL ACT OF
1944 ON INDIAN TRIBES ALONG THE MISSOURI RIVER**

November 1, 2007

Mr. Chairman and members of the Committee on Indian Affairs, my name is John Yellow Bird Steele. I serve as President of the Oglala Sioux Tribe.

Let me begin by thanking you for holding this important hearing. The Missouri River Basin Pick-Sloan Program has had significant adverse impacts on land, water and cultural resources of the Oglala Sioux Tribe and Great Sioux Nation. The costs of the Pick-Sloan program have disproportionately fallen on the Tribes, while the benefits are enjoyed in predominantly non-Indian communities, with little spillover benefits on the Indian Reservations.

The impact of the 1944 Flood Control Act and Pick-Sloan program on our Tribe requires reference to our treaties, and the tribal land claims filed in the Indian Claims Commission. Our reserved water rights to the Missouri River and its tributaries, and to the cultural resources along the banks of the Missouri River, have their source in our Treaties.

TRIBAL TREATIES

The Oglala Sioux and other Tribes of the upper Missouri River basin are treaty Tribes. As such, we are entitled to special consideration with respect to the impacts of federal public works projects, on our land and resources.

The 1868 Ft. Laramie Treaty (11 Stat. 749) recognized title to the Teton and Yankton Sioux to 60 million acres of territory west of the Missouri River in the States of South Dakota and North Dakota.

The 1868 Treaty (15 Stat. 635) carved a 26 million acre reservation out of our 1851 Treaty territory for the Sioux bands. This reservation, called the "Great Sioux Reservation" included all of western South Dakota west of the low water mark of the east bank of the Missouri River. Thus, the 1868 Treaty recognized an undivided ownership interest in the entire bed of the Missouri River in the Oglala Sioux Tribe from the North Dakota boarder to the Nebraska border.

The United States maintains that it acquired the western portion of the Great Sioux Reservation known as the "Black Hills" under the Act of February 28, 1877 (19 Stat. 254) even though its confiscation of this area violated Article 12 of the 1868 Treaty which provided that no part of the reservation could be ceded to the United States without three-fourths consent of the adult male Sioux Indians occupying or interested in the Great Sioux Reservation.

The United States also maintains that it acquired an additional 9 million acres of the Great Sioux Reservation under the Act of March 2, 1889 (25 Stat. 888). The Act also established five smaller Sioux reservations from the remainder of the Great Sioux Reservation including the Pine Ridge Indian Reservation.

Thus, the Pine Ridge Indian Reservation is the current home of the Oglala Sioux Tribe, although the Tribe has claimed unextinguished rights to our treaty lands including the Missouri River.

INDIAN CLAIMS COMMISSION

I believe that a discussion of the Indian Claims Commission Act proceedings is also necessary because I don't believe the Oglala Sioux Tribe can quantify its water rights in the Missouri River without first settling its outstanding land claims with the United States.

The Oglala Sioux Tribe filed a land claim in the Indian Claims Commission in 1950. This case was designed as "Docket 74." The case was divided into two cases in 1960, Docket 74-A and 74-B. Docket 74-A involves a claim for 34 million acres of 1851 treaty land located outside of the Great Sioux Reservation. It also involved an aboriginal title claim that included the east bank of the Missouri River in South Dakota from Pierre, S.D. northward into North Dakota.

There were two acts of fraud perpetuated by the Government upon the Sioux tribes regarding Docket 74-A lands. The first Act was when some federal official inserted "relinquishment language" in Article 2 of the 1868 Treaty. The ICC acknowledged that the Sioux bands would not have signed the 1868 Treaty, which ended the Powder River War of 1866-1867, had they known they were giving up any land. Nevertheless, the ICC ruled that Article 2 constituted a voluntary cession of 1851 treaty territory.

The second was when the U.S. Claims Court rammed a \$44 million final money judgment down the Sioux tribes' throats in Docket 74-A based on a stipulated settlement agreement that the claims lawyers signed behind the backs of the Sioux tribes. The claims attorneys also stipulated away \$3.7 million as an offset to the U.S. without the consent of the Sioux tribes.

The Oglala Sioux Tribe filed a motion for relief from judgment, which was denied by the Claims Court. The U.S. Court of Appeals for the Federal Circuit affirmed, but Judge Newman wrote the following in her dissenting opinion which exposes the

collusion between the tribes' claims attorneys, government attorneys and the federal courts:

The entry of judgment is surely not a routine 'evidentiary stipulation' such as is encountered in day to day trial management: not only because the stipulation disposes of some 3.7 million dollars in moneys previously adjudged to be due the Sioux Indians; but because counsel for both sides knew that since at least 1979 tribes representing the majority of Sioux Indians had given instructions contrary to the settlement. The record contains two resolutions of the Oglala Sioux Tribal Council informing counsel that it no longer sought money damages, but wanted to pursue legal and legislative strategies to gain return of ancestral lands. These resolutions also directed counsel to have the Oglala Sioux Tribe dismissed from this litigation..

A lawyer cannot be authorized by a court to make a settlement and bind the client contrary to the client's wishes. Nor can either the court or the United States ignore the tribes' several attempts to discontinue Mr. Lazarus' representation. The court does not discuss the asserted violation of 25 U.S.C. 81.

In light of this extended history, the Claims Court's acceptance of the Stipulation of Facts and the grant of the Joint Motion to Enter Judgment is incongruous; and its denial of appellants' motion for relief (from judgment) under Rule 60 (b) is in plain error, in light of the undisputed assertion that they were given no prior notice of the settlement. [Emphasis Supplied].

See Oglala Sioux Tribe and Rosebud Sioux Tribe v. United States, 862 F.2d 275 (Fed. Cir. 1988).

We can never accept the award for Docket 74-A under these circumstances, for to do so would be tantamount to closing our eyes and affirming these two acts of fraud perpetuated upon our Tribe by the Federal Government. And I don't see how we can quantify our water rights to the Missouri River without reaching an agreement with Congress to resolve our Docket 74-A land claim.

Docket 74-B was a claim for the Black Hills Claim. The ICC awarded \$17.1 million, plus \$85 million in simple interest, for the 7.3 million acres of Black Hills lands that was confiscated by the United States in the Act of February 28, 1877 (19 Stat. 254).

On appeal, the Court of Claims dismissed the ICC award on the basis that it had already ruled on the Black Hills Claim in a 1942 case. The Teton Sioux Tribes (except for the Oglala Sioux Tribe) and other 1868 Treaty signatory tribes got Congress to pass a new Court of Claims special jurisdictional act in 1978 that allowed for *de novo* consideration of the claim. The claim was refiled under the Act and the Court of Claims as Docket 148-78 and affirmed the ICC award in 1979 based on the record made in the ICC.

The Supreme Court affirmed the ICC award on June 30, 1980 on the basis that the confiscation of the Black Hills violated the Just Compensation Clause of the U.S. Constitution.

However, the Oglala Sioux Tribe did not renew its contract with its claims attorney Arthur Lazarus, Jr. when it expired by its own terms in 1975. It also never authorized its former claims to refile the claim under the 1978 act and did not regard itself as a party to the 1979 Court of Claims decision and the U.S. Supreme Court decision. It therefore filed a quiet title and trespass damages action in U.S. District Court in 1980, after the Supreme Court made its ruling.

The U.S. Court of Appeals for the Eighth Circuit, however, ruled that the tribe could not sue in the Article III courts of the

United States because the Indian Claims Commission, which could only award money damages for the tribe's treaty lands, was the tribe's exclusive remedy and that the tribe was a party to the 1980 Supreme Court case.

Docket 74-B, like Docket 74-A, needs to be settled in a fair and honorable manner by negotiation and the implementation of any negotiated settlement through Congressional legislation

THE 1944 FLOOD CONTROL ACT

The U.S. Army Corps of Engineers was placed in charge of constructing six dams on the main stem of the Missouri River under the Missouri River Pick-Sloan Program that was authorized by the 1944 Flood Control Act (58 Stat. 887). The Corps acquired approximately two million acres for the dams, and areas flooded by the lakes created by the dams. Three lakes, Lake Oahe, Lake Sharpe, Lake Francis Case are located within our treaty territory.

It is common knowledge that a substantial amount of land taken by the Federal Government for the main stem dams was located on Indian reservations that bordered the Missouri River.

The Oglala Sioux Tribe was impacted by the 1944 Flood Control Act because it has unextinguished rights to the river bed of the Missouri River, and to treaty lands located in its 1851 and 1868 Treaty areas, as well as the aboriginal title lands located east of the Missouri River that were taken by the Government for the main stem dams and reservoirs under the Missouri River Pick-Sloan Program. It also has cultural resources along the Missouri River that were impacted by the Act. The Corps never acquired the Oglala Sioux Tribe's interests in these properties when it attempted to extinguish Indian title for the dams and reservoirs.

THE WHITE RIVER AND CHEYENNE RIVER PICK SLOAN PROJECTS

The Flood Control Act authorized two dams on the Pine Ridge Reservation at Slim Buttes and Rockyford for irrigation, recreation and flood control. The projects were never constructed, however. This failure has resulted in the Tribe not being able to develop its irrigation potential that would have created economic opportunities for the tribe and its members.

THE OGLALA SIOUX RURAL WATER SUPPLY SYSTEM

The western portion of the Pine Ridge Reservation in White Clay District (now Oglala District) was suffering from lack of good potable water in the 1980s. The Tribe took the initiative to join the West River and Lyman Jones rural water projects in developing and getting Congress to pass the Mni Wiconi Act (P.L. 100-516) in 1988. The Act authorized the construction of a Core pipeline and related facilities from the Missouri River at Ft. Pierre to the Pine Ridge Indian Reservation, as well as a reservation delivery system. The Core pipeline is 95 % completed and the reservation delivery system is 40 % completed. The core pipeline and reservation delivery system is held in trust by the United States for the Oglala Sioux Tribe.

There are now three inter-connectors to the OSRWSS, the West River/Lyman Jones Rural Water System, the Lower Brule Rural Water System, and the Rosebud Rural Water System.

This OSRWSS is a good project that allows the Tribe to reap some of the benefits that it has been denied over the years from its lands along the Missouri River, and from the Missouri River itself. It also allows us to improve the health and general welfare of our tribal members and plan for future water shortages that may be caused by global warming.

We want to thank Congress for the annual appropriations that has allowed the OSRWSS and other systems to be

constructed, and we look forward to the day when the Mni Wiconi Project is completed.

Missouri River Land Issues

The Oglala Sioux Tribe presently has a civil action pending in the United States District Court for the District of Columbia challenging the transfer of title to Corps lands and recreational sites along the Missouri River to the State of South Dakota under Title VI of the Water Resources Development Act of 1999, as amended by Title VI of the Water Resources Development Act of 2000. The tribe still has unextinguished claims of ownership to these lands and recreation sites and they should not be transferred to the State of South Dakota until these claims are settled.

There is a Need For Comprehensive Reform of the Pick-Sloan Program

Comprehensive reform is needed to ensure that the Indian Tribes share more equitably in the water supply and hydropower benefits of the Pick-Sloan program. Reforms should address at least four areas. First, the water management by the Corps of Engineers on the Missouri River main stem, and the Bureau of Reclamation on the tributaries to the Missouri, must be revised to ensure adequate water supplies for the Tribes. Second, reforms should include the authorization to use hydropower revenue generated by the Pick-Sloan program, to fund development projects on Indian Reservations in the Missouri River basin. Third, Congress should address the claims of individual Indian Tribes that are directly impacted by a dam project under the Pick-Sloan program. Fourth, the historic preservation laws need to be strengthened to ensure that cultural resources along the Missouri River are protected from erosion and destruction.

1. The Water Management by the Corps of Engineers and Bureau of Reclamation Must be Revised

The Corps of Engineers operates the dams on the Missouri River pursuant to the Missouri River Master Water Control Manual. The Master Manual, as revised by the Corps of Engineers in 2004, provides for steady seasonal flows from Gavins Point Dam for downstream navigation. Daily releases are significant, with 35,000 cfs designated as full navigation service for an eight month navigation season. In addition, the Corps of Engineers designates water releases for the spring rise for habitat restoration, and for hydropower generation, at the various times of the year.

In its Missouri River operations, the Corps of Engineers gives no consideration to Tribal water supply needs. This is the case even though the Oglala Sioux Tribes operates the water treatment and intake facilities on the Missouri River for the Mni Wiconi Project, which serves the West River Lyman Jones Water District, Lower Brule Sioux, Rosebud Sioux and Oglala Sioux Tribes. The Indian Reservations along the Missouri River, such as the Standing Rock Sioux and Cheyenne River Sioux Tribes, have suffered diminished drinking water supplies. The reservoir levels in the upper Missouri basin diminished substantially, as a result of the continuing navigation flows, during the current period of severe drought.

The Corps of Engineers violates our Treaties and our rights under the Winters Doctrine, by managing water flows in a manner that causes diminished water supplies in the upper Missouri River basin. The water releases for downstream navigation and habitat restoration directly impact the water supplies that are needed by

the Oglala Sioux and our fellow Indian Tribes on the upper Missouri River.

Yet the Corps of Engineers manages the Missouri River water flows in a manner that allocates water flows for non-Indian uses in the lower Missouri River. The Master Manual must be revised, to decrease navigation flows and stabilize water supplies on the upper Missouri River, to fulfill the rights of the Tribes.

The water supplies and rights of our Tribe should not be jeopardized by the regional disputes between the upper and lower Missouri basin. The Congress should take action requiring the Corps to maintain stable reservoir levels on the upper Missouri River, for Tribal consumptive and instream water needs.

The Bureau of Reclamation operates the tributary dams for irrigation and recreation. One such project, the USBR Angostura Unit, impounds water flows of the Cheyenne River immediately upstream from the Pine Ridge Reservation. The USBR completely blocks off Cheyenne River water flows, in order to provide water service of 48,000 acre-feet per year for irrigation of 12,218 acres at the Angostura Irrigation District.

The Bureau of Reclamation released the *Final Environmental Impact Statement, Angostura Unit, Contract Negotiation and Water Management*, in August, 2002. Reclamation confirmed the incidence of fish with lesions and problems with water quality and riparian vegetation on the Pine Ridge Reservation, downstream from Angostura.

The water management by the Bureau of Reclamation of the Cheyenne River at Angostura provides for the diversion of waters subject to the water claims of the Oglala Sioux Tribe for the Angostura Irrigation District. Water flows have diminished and

the environment on the Pine Ridge Reservation has been degraded as a direct result of the USBR water management.

As is described below, Representative Herseth-Sandlin has introduced HR 883, to establish a trust fund for the Oglala Sioux Tribe and restores certain water flows in Cheyenne River. This legislation addresses the problems caused by water management by the Bureau of Reclamation on the Cheyenne River.

2. The Congress Should Authorize the Use of Pick-Sloan Hydropower Revenues for Development Projects on Indian Lands

The comprehensive reform of the Pick-Sloan program should include the authorization for the use of hydropower generated by the Pick-Sloan program, to fund development projects on Indian Reservations in the Missouri River basin. Hydroelectric revenues of the Western Area Power Administration are collected for debt service of the multi-purpose functions of the Pick-Sloan program. The re-designation of these funds for Tribal development projects would constitute a cost effective manner of addressing the historic inequities of the Pick-Sloan program.

The waters of the Missouri River produce a hydroelectricity system estimated by the Corps of Engineers as contributing approximately \$800 million to the national economy each year. The economy on the Pine Ridge and other Indian reservations in the upper Missouri River Basin remain generally impoverished, however.

The population of the Pine Ridge Reservation is approximately 47,000, making the Oglala Sioux one of the largest Tribes in the United States. (Bureau of Indian Affairs, *Indian Labor Force Report*, 2003). The 2003 unemployment rate was

estimated by the Bureau of Indian Affairs at 87 percent. *Id.* The 2000 Census indicates that per capita income in Shannon County, the Reservation's largest county, was \$6,286. This compares with the per capita income nationwide of \$21,587. Median household income on the Reservation in 2001 was \$20,916, less than one-half the national average of \$41,994.

The revenue produced by the sale of the hydroelectricity in the Pick-Sloan program should be authorized for the use by the Tribes of development on our Reservations. This will address the historical inequities of in the allocation of the costs and benefits of the Pick-Sloan program, and address the far-reaching infrastructure and economic development needs of the Indian Tribes in the upper Missouri River basin.

3. There Must Be Redress for Indian Tribes Under Pick-Sloan

Throughout the upper Missouri River basin, individual components of the Pick-Sloan program have adversely affected the lands, waters and economic resources of Indian Tribes. Many Tribes retain claims that have not been addressed, for the taking of land, relocation of communities, destruction of infrastructure, diminished water supplies, and degraded environment, from the construction and on-going operation of the Pick-Sloan program.

For example, the Oglala Sioux Tribe has suffered from diminished water flows, riparian vegetation, wildlife and degraded water quality, due to the impoundment of water and irrigation at the USBR Angostura Unit. The Bureau of Reclamation impounds 133,000 acre-feet of water at Angostura Reservoir, completely disrupting natural water flows in the Cheyenne River on the Pine Ridge Reservation.

The harm suffered by the Tribe is documented in the *Final Environmental Impact Statement, Angostura Unit, Contract Negotiation and Water Management*. Accordingly, Rep. Herseth-Sandlin has introduced HR 883. This legislation establishes a trust fund for the Oglala Sioux Tribe in the amount of \$90.5 million, and restores water flows in Cheyenne River through efficiency improvements at the Angostura Irrigation District. It will provide resources for the Tribe to address the environmental impacts of the Angostura Unit, and for much needed economic development on the Pine ridge Reservation.

This legislation is long overdue. The Congress should enact HR 883, and should address the claims of all Tribes which suffered adverse impacts from the Pick-Sloan program.

4. Enhanced Protection for Cultural Resources is Needed

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 in its operations of the Missouri River dams, the Corps of Engineers has failed to implement a 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)).

A Corps of Engineers 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).

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 Missouri River Master Manual contains no provisions for the protection of the identified cultural sites in the future, or mitigation of damage that is caused by wave action.

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. The current Programmatic Agreement of the Corps of Engineers provides no plan to put an end to this destruction caused by wave action from COE water releases for navigation.

In conclusion, the Congress should develop and enact comprehensive reform of the Pick-Sloan program. The stabilization of reservoir levels and enhanced protection of historic properties must be an important part of the reforms. The need to respect the rights of the Oglala Sioux and other Indian Tribes is intensified by the climate change we are experiencing, which further stresses the water resources of the Missouri River basin.

This hearing is thus very timely. I look forward to working with the Committee on Indian Affairs to develop comprehensive reform of the Missouri River Pick-Sloan program, to respect and implement the Treaty rights of the Oglala Sioux Tribe.