



THE MISSOURI RIVER WILDLIFE HABITAT MITIGATION BILL -- 1999

INTRODUCTION

Two issues that reach far back into South Dakota's history generated controversy during 1999. The questions and issues surrounding the acquisition of lands by non-Indians during the 19th and 20th centuries continue to plague state and tribal officials and ordinary citizens. The Missouri River and how best to use the resources it provides has created an equally thorny set of issues and controversies for South Dakotans that spans the entire history of the state. The federal Missouri River Wildlife Habitat Mitigation bill, which includes a tribal land transfer proposal, has been the subject of protest and debate this year, with a diverse group of supporters and opponents from across the political spectrum. Negotiations on the mitigation bill began in 1996, and the bill was introduced in Congress in 1997 and passed in 1999.

BACKGROUND – SOUTH DAKOTA AND THE PICK-SLOAN PROGRAM

The Missouri River served as an artery of navigation and commerce long before the arrival of white traders and settlers and continues to tantalize inhabitants with possibilities for commerce, navigation, hydropower, irrigation, water use and development, fishing and hunting, and water recreation. In addition, flooding along the Missouri River had been a

persistent and devastating problem for generations of people in the area.

In 1944, Congress passed the 1944 Flood Control Act, establishing the Pick-Sloan Program, one of the most significant events in South Dakota's economic history, resulting in the construction of four large dams and reservoirs on the Missouri River and an end to much of the area's flooding problems, not only in South Dakota and the upper Missouri Basin states, but in the downstream states as well. However, construction of the dams and reservoirs resulted in the permanent flooding of more than half a million acres of Indian and non-Indian Missouri River bottomland and the relocation of several Indian and non-Indian communities. In addition, many of the Pick-Sloan benefits promised for South Dakota, particularly irrigation benefits, did not materialize, and most of the proposed irrigation projects are no longer being actively pursued.

Loss of the inundated land also meant devastating losses of wildlife habitat, and part of the federal legislation governing the Pick-Sloan Program called for mitigation of wildlife habitat losses incurred after 1958 as a result of the Pick-Sloan Program. Wildlife mitigation efforts under existing Pick-Sloan legislation apply to Lake Oahe and Lake Sharpe, which were created after 1958, but do not apply to Lake Francis Case and Lewis

and Clark Lake, which were in existence before 1958.

In the course of constructing the dams and planning for the creation of the Missouri River reservoirs, the Corps of Engineers acquired lands to create a zone or "take line" outside the expected new shoreline of the reservoirs. This land, which was acquired from adjacent tribes and from private owners, both Indian and non-Indian, has been in federal ownership ever since.

Since the late 1970s, when the Oahe Project, the largest of the proposed Pick-Sloan irrigation projects in South Dakota, was halted, the state has pressed the federal government for an appropriate substitute for the loss of inundated lands and the failure of the proposed federal irrigation projects. These efforts include scaled-down irrigation projects, rural water systems, and recreational programs and have met with mixed success. Many state policymakers view these as partial, but incomplete, repayment for state losses under the Pick-Sloan Program.

Part of the state's motivation in the Missouri River Wildlife Habitat Mitigation bill has been to receive some benefits in the Missouri River area to offset Pick-Sloan wildlife habitat losses and to provide additional recreational opportunities for the public.

BACKGROUND – TRIBAL LAND ISSUES

The long history of the loss of tribal lands, the violation of federal Indian treaties, and the federal government's periodic Indian policy reversals are familiar to many people; but the damage caused by those actions and policies has continued to the present day. One of the most frequently

cited examples is the Fort Laramie Treaty of 1868, one of a series of federal treaties and acts that established and guaranteed the boundaries of certain tribal lands while opening other lands to settlement. The Treaty of 1868 designated all lands west of the Missouri River in present-day South Dakota, as well as some areas in Wyoming, Montana, North Dakota, and Nebraska, as the Great Sioux Reservation. In an act ratified by Congress in 1889 and in subsequent actions during the late 19th and early 20th centuries, the Great Sioux Reservation was divided into separate reservations and eventually reduced to their present boundaries, opening much land west of the Missouri River to non-Indian settlement. The last of these, which opened certain surplus or unallotted lands in Mellette and Washabaugh (now Jackson) counties to settlement, was adopted by the U.S. Congress in 1910.

In 1980, the U.S. Supreme Court found that the 1877 Mannypenny Treaty, which opened the Black Hills to non-Indian settlement, had not been agreed to by three-fourths of the male members of the affected tribes, as required by the Treaty of 1868, and was therefore invalid. The court found the congressional act ratifying the 1877 treaty to be a taking and awarded the tribes monetary damages. The tribes have so far not accepted the monetary settlement, fearing that acceptance would amount to tacit approval of other agreements that conflicted with the Treaty of 1868 and could be interpreted as an end to Indian land claims in other situations.

In addition to outright cession of Indian lands by treaty or agreement with the federal government, other federal policies from the 19th and early 20th centuries have contributed to Indian land problems and inequities. The 1887 Dawes Act

sought to eventually divide reservations among individuals and allotted tribal lands among individual tribal members. This policy was reversed in 1934, but it resulted in the sale of much Indian-owned land to non-Indians and eventually to the creation of a complex and unwieldy system of lands held in trust for individual tribal members. Federal policies with respect to Indian lands, and federal Indian policy in general, have undergone major reversals over time, leaving a fragmented past, a complex present-day situation that is difficult to administer, and a lack of confidence in the federal government's long-term intentions and in its commitment to adhere to a consistent policy.

MISSOURI RIVER LAND TRANSFER PROPOSAL

The Missouri River Wildlife Habitat Mitigation bill was drafted primarily as an attempt to seek additional compensation for South Dakotans for the loss of lands under the Pick-Sloan Program and the failure of many Pick-Sloan projects to materialize, as discussed above. The basic concept is that Corps of Engineers "take land" along the Missouri River that is adjacent to Indian reservations would be returned to the respective tribes, and Corps take land adjacent to non-Indian land would be ceded to the state for public use.

Of particular interest was the opportunity for additional public hunting areas, given the controversies that have intensified in recent years over the increasing commercialization of hunting and declining opportunities for South Dakota residents to hunt. Because of their proximity to the Missouri River, these lands have special relevance for goose hunting, which has been a lightning rod for landowner-hunter disputes in recent

years. The Missouri River Wildlife Habitat Mitigation legislation was a result of joint state, federal, and tribal efforts and involved lengthy negotiations with various Indian tribes and with federal and state agencies.

In general terms, the legislation turns over Corps of Engineers land along the Missouri River that is located within reservation boundaries to the affected tribes that agree to the transfer. Corps of Engineers land that lies outside reservation boundaries would be transferred to the state of South Dakota to be used for public recreational and wildlife habitat purposes. Existing public recreation areas operated by the Corps of Engineers within reservation boundaries would be administered by the tribe, if the tribe entered into the agreement; otherwise, those areas would continue to be managed by the Corps of Engineers. Other existing agreements between the state and various tribes by which the state leases and manages areas from the tribe for public recreational purposes would not be affected by the legislation. The legislation also establishes trust funds to compensate the tribes and the state for a portion of wildlife habitat that was lost because of the construction of the Missouri River dams and reservoirs.

Because of the complex nature of tribal land ownership and trust land status, there are some inevitable exceptions to the general rule, such as situations in which a tribe or tribal member had purchased nontribal, off-reservation land before it was acquired by the Corps of Engineers, in which case the private or tribal nature of the land becomes more complicated. Other factors that are addressed in the legislation include effects on county tax bases in certain circumstances, grazing rights, and protection of rights-of-way and

easements for entities such as electric utilities. Hunting and fishing regulations on Corps lands transferred to the tribes would be under tribal management and administration, unlike the present situation. The legislation also includes direct assurances that it does not affect water rights, reservation boundaries, treaty rights in existence on the date of the act, or certain state or federal authority under existing law.

The legislation involved lengthy and complex negotiations to address these types of specific concerns. In general, however, the legislation would turn over unneeded Corps land lying outside reservation boundaries to the state of South Dakota for public recreational purposes and transfer unneeded Corps land within reservation boundaries to tribes that agree to the transfer.

CURRENT LEGISLATIVE STATUS

The Missouri River Wildlife Habitat Mitigation Act, also referred to as the Missouri River Land Transfer Act, has had a convoluted path through Congress but was approved and will be implemented pending required environmental reviews. The bill was introduced in 1997 as part of the Water Resources Development Act, which is normally renewed every two years to fund Corps of Engineers water projects. When problems developed with that bill, the mitigation language was inserted into the 1998 omnibus spending bill and was passed. In 1999, however, that language was repealed and removed from the omnibus bill. Meanwhile, problems with the Water Resources Development Act were resolved and that legislation was approved in August of 1999 with the mitigation language intact.

IMPACTS AND REACTION TO THE FEDERAL LEGISLATION

Two tribes, the Lower Brule Sioux Tribe and the Cheyenne River Sioux Tribe, entered into agreements under the Missouri River Wildlife Habitat Mitigation legislation to receive land from the Corps of Engineers. The Standing Rock Sioux Tribe and the Crow Creek Sioux Tribe, however, chose not to participate and declined the transfer of Missouri River land from the Corps of Engineers to the tribe.

Although two tribes opted to participate in the land transfer process established by the Missouri River mitigation bill, the bill generated significant opposition among South Dakota's Native American population, including several tribes whose reservation land does not border on the Missouri River. Part of the opposition stems from the belief that transferring federal land west of the Missouri River to the state would violate the Ft. Laramie Treaty of 1868, even though much of that land had been in private ownership before being acquired by the Corps of Engineers for the Pick-Sloan Program. Opponents feel that some or all of the federal acts during the late 19th and early 20th centuries that diminished size of the Great Sioux Reservation violated the spirit, if not the letter, of the 1868 Treaty and that some of those acts were accomplished using unfair or deceptive procedures. Any official tribal recognition of a new transfer of land to the state would then violate the principles of the 1868 treaty. Opponents also fear that the land transfer could open the door to improper development of some of the areas to be transferred and that the legislation could lead to attempts to quantify or allocate Missouri River water rights.

The most visible action by opponents to the Missouri River Wildlife Habitat Mitigation legislation was the establishment of an encampment on La Framboise Island between Pierre and Ft. Pierre in the spring of 1999. Participants intend to remain at the camp until the legislation is overturned and have gained statewide and national media attention. The Corps of Engineers has issued and extended a permit to allow the camp to continue in an area in which camping is normally not allowed, although encampment members did not apply for a permit and do not recognize the authority of the Corps of Engineers over the area. Encampment members have also held demonstrations in Pierre at the Capitol and the Federal Building.

The bill also generated some non-Indian opposition from persons whose land was taken for Pick-Sloan project features, such as canals or irrigation reservoirs, that were never built or were only partially completed. Some of these landowners believe that such areas should be returned to private ownership rather than transferred to the state for hunting and recreation purposes.

Proponents of the bill hope to address several long-standing problems and issues in addition to compensation for Pick-Sloan losses. These include the provision of additional public hunting, fishing and recreational areas, clarification and simplification of

jurisdiction over hunting and fishing regulation and enforcement, improvement of wildlife habitat, protection of Native American cultural sites, and providing funding for those purposes. In addition, proponents view the legislation as a good opportunity to make better use of land currently not needed by the Corps of Engineers by transferring the land to the respective tribes or to the state.

SUMMARY

The Missouri River Wildlife Habitat Mitigation Act, which is based on the simple concept of transferring unneeded Corps of Engineers land along the Missouri River and Missouri River Reservoirs to Indian tribes within reservation boundaries and to the state in areas outside reservation boundaries, has stirred unexpected controversy in two areas that are fundamental to South Dakota's history and continue to be debated today. The proper use and development of the Missouri River, including the sweeping impacts of the Pick-Sloan Program, is one of these. Coming to terms with the loss of tribal lands, the general treatment and condition of Native American people through history, and the continuing tension between tribal and nontribal cultural groups is the other. The mitigation bill has touched nerves in both of these areas and illustrates the depth and importance of these issues for the people of South Dakota.

This issue memorandum was written by Tom Magedanz, Principal Research Analyst for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
