
APPENDIX B: TRIBAL CORRESPONDENCE

Table of Contents

Open House Scoping Letter Example

Government to Government Consultation Letter Example

National Historic Preservation Act Letter Example

EIS Notice of Availability and Consultation Letter Example

Table of Letter Recipients

Fort Peck Assiniboine and Sioux Tribes Draft EIS Comments

Fort Peck Assiniboine and Sioux Tribes Consultation Agenda



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

FEB 06 2019

Planning, Programs, and Project Management Division

Mr. Floyd Azure, Chairman
Assiniboine and Sioux Tribes of Fort Peck
P.O. Box 1027
510 Medicine Bear Road
Poplar, Montana 59255

Dear Chairman Azure:

The U.S. Army Corps of Engineers (USACE) Omaha District is preparing an Environmental Impact Statement (EIS) to evaluate impacts of potential test flows from Fort Peck Dam related to pallid sturgeon recruitment. In accordance with the National Environmental Policy Act, (NEPA) and recognizing our Federal Tribal Trust responsibility, we are looking for comments from your Tribe to help guide this effort. Please join us for our open house scoping meetings on February 19, 5:30-7:30 pm at Ft. Peck Interpretive Center, Yellowstone Rd, Fort Peck, MT, and February 20, 5:30-7:30 pm at the Williston County Administration Building, 206 E. Broadway, Williston, ND. This meeting will provide an opportunity for the Tribes to identify any sensitive resources or areas that may be potentially impacted by the study.

The open house will also serve as a public scoping meeting per the NEPA, giving residents and others interested in the project, a chance to learn why the study is important, what will be done during the study process, possible benefits and impacts, and provide an opportunity to provide comments regarding concerns. A formal presentation on the study will begin at 6:00 pm, each evening. For those unable to attend, public meeting materials and opportunities to comment on the study will be available at <https://www.nwo.usace.army.mil/MRRP/>. **This website will be updated with information as this study progresses.**

We will be happy to set up a phone call to discuss any question or concerns to better help your Tribe address their comments on this EIS. If you have any questions or require additional information, please contact Ms. Cathi Warren, Native American Consultation Specialist, at 402-995-2684 or catherine.j.warren@usace.army.mil. Thank you in advance for your time and considerations of this important project.

Sincerely,

Eric A. Laux, PMP
Chief, Environmental and Cultural Resources



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA, NEBRASKA 68102-4901

JUL 17 2019

Planning, Programs and Project Management Division

Mr. Floyd Azure, Chairman
Assiniboine and Sioux Tribes of Fort Peck
P.O. Box 1027
Poplar, Montana 59255

Dear Chairman Azure:

The U.S. Army Corps of Engineers (USACE) Omaha District is preparing an Environmental Impact Statement (EIS) to evaluate impacts of potential test releases from Fort Peck Dam on the Missouri River intended to benefit the federally endangered pallid sturgeon. You received a letter in February 2019 inviting you to participate in scoping meetings. We appreciate and value the input from those who were able to participate in the scoping meetings and encourage your continued involvement.

We would like to offer you the opportunity to meet and discuss the development of the Draft EIS and share your thoughts and concerns related to the project with us. The Draft EIS will be released in February 2020 and the document will be made available for your review. At that time, we will invite you to meet or consult on the Draft EIS and the Preferred Alternative. We also welcome requests for government-to-government consultation on the development of the EIS at any time throughout this process. A separate letter regarding Section 106 consultation under the National Historic Preservation Act will be sent to your Tribe.

If you have any questions or require additional information, please contact Ms. Cathi Warren, Native American Consultation Specialist, at 402-995-2684 or catherine.j.warren@usace.army.mil.

We recognize our Government-to-Government responsibilities and will work to meet with you and your staff for consultation at any time. If your Tribe is interested in Government-to-Government consultation, please contact Mr. Joel Ames, Tribal Liaison at (402) 995-2909 or email joel.o.ames@usace.army.mil.

Thank you in advance for your time and consideration of this important project.

Sincerely,

SIGNED
COL JOHN L. HUDSON

John L. Hudson, P.E.
Colonel, Corps of Engineers
District Commander



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

REPLY TO
ATTENTION OF

AUG 09 2019

Planning, Programs, and Project Management Division

Mr. Floyd Azure, Chairman
Assiniboine and Sioux Tribes of Fort Peck
P.O. Box 1027
Poplar, Montana 59255

Dear Chairman Azure:

The U.S. Army Corps of Engineers (USACE) has a responsibility under the Endangered Species Act to take actions to ensure that the operation of the Missouri River is not likely to jeopardize the continued existence of threatened and endangered species or destroy or adversely modify designated critical habitat. USACE Omaha District is preparing the Fort Peck Dam Test Flows Environmental Impact Statement (EIS) to evaluate impacts of potential test releases from Fort Peck Dam on the Missouri River, intended to benefit the federally endangered pallid sturgeon. The Draft EIS will be released in February 2020 and the document will be made available for your review.

If you have any comments or concerns regarding potential effects to Historic Properties under Section 106 of the National Historic Preservation Act related to this study, or wish to consult on this matter, please respond in writing no later than September 9, 2019. In your correspondence, please reference "Ft. Peck Flow Study." If you have any questions please contact Sandra Barnum at Sandra.V.Barnum@usace.army.mil or (402) 995-2674.

Sincerely,

A handwritten signature in black ink, reading "Julie Jacobsen", is positioned above the typed name.

Julie Jacobsen, Manager
Cultural Resource Program, Planning Branch

Draft EIS Notice of Availability and Consultation Invitation



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA, NE 68102-4901

March 26, 2021

Planning, Programs, and Project Management Division

«Prefix» «FirstMiddle_Name» «Last_Name», «Title»
«Organization»
«Address1»
«Address2»
«City», «State» «Zip»

Dear «Salutation» «Last_Name»:

The U.S. Army Corps of Engineers' Fort Peck Dam Test Releases Draft Environmental Impact Statement (FPDTR-EIS) is an effort being undertaken in accordance with the Final Biological Opinion (BiOp) concerning the Operation of the Missouri River Mainstem Reservoir System, the Operation and Maintenance of the Bank Stabilization and Navigation Project, the Operation of the Kansas River Reservoir System, and Implementation of the Missouri River Recovery Management Plan (2018 BiOp). The FPDTR-EIS is now available for review and comment. The Corps recognizes and respects the importance that Tribes and agencies attribute to the resources and land surrounding this project and we encourage you to participate in this project.

On February 8, 2019, the United States Army Corps of Engineers (USACE) issued a Notice of Intent to prepare an environmental impact statement for the Fort Peck Dam Test Release EIS (FPDTR-EIS). The purpose of the FPDTR-EIS is to assess the capacity of test flows out of Fort Peck Dam to promote growth and survival of pallid sturgeon (*Scaphirynchus albus*) to free swimming juvenile stage before settling out in the headwaters of Lake Sakakawea. Pallid sturgeon are listed as endangered under the Endangered Species Act of 1973.

The FPDTR-EIS has been filed with the Environmental Protection Agency (EPA). The EPA Notice of Availability will be posted in the Federal Register on March 26, 2021. The review is March 26, 2021 through May 25, 2021(60 days).

The FPDTR-EIS can be accessed online at:
<https://www.nwo.usace.army.mil/Missions/Civil-Works/Planning/Project-Reports/>

Comments can be submitted via the following methods through May 25, 2021:

- Comment letters can be attached via email at:
cenwo-planning@usace.army.mil

- Hard-copy written comments can be submitted to:
U.S. Army Corps of Engineers
Omaha District

ATTN: CENWO-PM-AC – Fort Peck Flow Modification DEIS Comments
1616 Capitol Avenue
Omaha, NE 68102

Due to ongoing COVID-19 related concerns with large gatherings and travel, public hearings during the comment period will be held virtually. A press release and other notification (e.g. email notification) of public meeting dates and online access information will be announced as soon as available.

Comments or questions can be directed to Aaron Quinn, Project Manager, at (402) 995-2669 or aaron.t.quinn@usace.army.mil, or Julie Jacobsen, Cultural Resource Manager, at (402)-995-2706 or julie.a.jacobsen@usace.army.mil. If emailing comments, please use "Fort Peck Flow Modification DEIS" as your subject. Government to Government Consultation requests can be submitted to Joel Ames, Tribal Liaison, at 402-995-2902 or joel.o.ames@usace.army.mil.

We look forward to discussing this important safety effort with you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Rebecca L. Podkowka', with a stylized, flowing script.

Rebecca L. Podkowka
Chief, Environmental & Cultural Resources

TABLE OF LETTER RECIPIENTS

Nelson	Advisory Council for Historic Preservation	Mr.	Reid
Daniel	Advisory Council for Historic Preservation	Mr.	Chris
Azure	Assiniboine and Sioux Tribes of Fort Peck	Mr.	Floyd
Youpee	Assiniboine and Sioux Tribes of Fort Peck	Ms.	Dyan
Barnes	Blackfeet Tribe	Mr.	Harry
Murray	Blackfeet Tribe	Mr.	John
LaPointe	Bureau of Indian Affairs	Mr.	Timothy
LeBeau	Bureau of Indian Affairs	Mr.	Sebastian "Bronco"
Vance	Cheyenne River Sioux Tribe	Mr.	Steven
Petersen	Cheyenne River Sioux Tribe	Ms.	Donna Rae
In The Woods	Cheyenne River Sioux Tribe	Mr.	Bryce
Frazier	Cheyenne River Sioux Tribe	Mr.	Harold
Baker	Chippewa Cree Tribe of the Rocky Boys' Reservation	Mr.	Harlan
Marks	Crow Creek Sioux Tribe	Ms.	Merle
Thompson	Crow Creek Sioux Tribe	Mr.	Lester
Thompson Jr.	Crow Creek Sioux Tribe	Mr.	Barry
Not Afraid	Crow Nation	Mr.	Alvin
Big Day	Crow Nation	Mr.	William
Wagon	Eastern Shoshone Tribe	Mr.	Clint
Reider	Flandreau Santee Sioux Tribe	Mr.	Anthony
Kills A Hundred	Flandreau Santee Sioux Tribe	Mr.	Garrie

Werk Jr.	Fort Belknap Indian Community Gros Ventre and Assiniboiné Tribes	Mr.	Andrew
Gourneau	Lower Brulé Sioux Tribe	Mr.	Boyd
Green	Lower Brulé Sioux Tribe	Ms.	Clair S.
Coffey	Mandan, Hidatsa & Arikara Nation	Mr.	Pete
Fox	Mandan, Hidatsa & Arikara Nation	Mr.	Mark
Wilmoth	Montana State Historic Preservation Office	Dr.	Stan
Baumler	Montana State Historic Preservation Office	Dr.	Mark F.
Pahl	National Trust for Historic Preservation	Ms.	Barbara
Bozell	History Nebraska	Mr.	Rob
Smith	History Nebraska	Mr.	Michael J.
Swenson	North Dakota Historical Society	Ms.	Fern
Berg	North Dakota Historical Society	Ms.	Claudia
Spoonhunter	Northern Arapaho Tribe	Mr.	Lee
Oldman	Northern Arapaho Tribe	Mr.	Devin
Limpy	Northern Cheyenne Tribe	Ms.	Teanna
Whiteman-Pena	Northern Cheyenne Tribe	Ms.	Rynalea
Bear Runner	Oglala Sioux Tribe	Mr.	Julian
Brings	Oglala Sioux Tribe	Mr.	Thomas
Parker	Omaha Tribe of Nebraska	Mr.	Thomas
Sherman	Omaha Tribe of Nebraska	Mr.	Isaac
Mouro	Ponca Tribe of Nebraska	Mr.	Nick

Wright Jr.	Ponca Tribe of Nebraska	Mr.	Larry
Bordeaux	Rosebud Sioux Tribe	Mr.	Rodney M.
Eagle Bear	Rosebud Sioux Tribe	Mr.	Russell
Rhodd	Rosebud Sioux Tribe	Mr.	Ben
Carnes	Sac and Fox Nation of Missouri in Kansas and Nebraska	Ms.	Tiauna
Massey	Sac and Fox Nation of Oklahoma	Ms.	Sandra
Whipple	Santee Sioux Nation	Mr.	Duane
Trudell	Santee Sioux Nation,	Mr.	Roger
Robertson	Sisseton-Wahpeton Sioux Tribe	Ms.	Ella
Desrosiers	Sisseton-Wahpeton Sioux Tribe	Ms.	Dianne
Coughlin	South Dakota Department of Game, Fish and Parks	Mr.	Paul
Williams	South Dakota Department of Game, Fish and Parks	Mr.	Dennis
Hepler	South Dakota Department of Game, Fish and Parks	Mr.	Kelly
Olson	South Dakota State Historical Society	Ms.	Paige
Vogt	South Dakota State Historical Society	Mr.	Jay D.
Pearson	Spirit Lake Sioux Tribe	Ms.	Myra
Faith	Standing Rock Sioux Tribe	Mr.	Mike
Eagle	Standing Rock Sioux Tribe	Mr.	Jon

Azure	Turtle Mountain Band of Chippewa	Mr.	Jamie
Defjarlais Jr.	Turtle Mountain Band of Chippewa	Mr.	Jeff
White	Winnebago Tribe of Nebraska	Mr.	Frank
Teboe	Winnebago Tribe of Nebraska	Mr.	Randy
Flying Hawk	Yankton Sioux Tribe	Mr.	Robert
Spotted Eagle	Yankton Sioux Tribe	Mr.	Kip

FORT PECK TRIBES

Assiniboine & Sioux

May 25, 2021

Aaron Quinn, Environmental Resources Specialist
U.S. Army Corps of Engineers, Omaha District
CENWO-PMA-C
ATTN: Fort Peck Draft EIS Comments
1616 Capitol Avenue
Omaha, NE 68102-4901

*RE: Draft Environmental Impact Statement for Fort Peck Dam Test Releases
86 Fed. Reg. 16207; Agency Docket No. ER-FRL-9055-8; Doc. No. 2021-06280*

Dear Mr. Quinn:

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation ("Tribes") submit the following comments regarding the United States Army Corps of Engineers' ("Corps") Draft Environmental Impact Statement for Fort Peck Dam Test Releases ("DEIS"). While the Tribes support the restoration of the pallid sturgeon, the Tribes are also concerned about how the proposed actions will affect the Fort Peck Reservation's ("Reservation") boundaries, the Tribes' water rights, tribal water supply and irrigation systems, and tribal inclusion in the planning process.

I. Fort Peck Reservation Boundaries

By the Act of April 15, 1874 ("1874 Act")¹, Congress set aside a 20-million-acre reservation for "the use and occupation of" a number of Indian tribes, including the Plaintiff Tribes, in what is now Montana north of the Missouri River, east of the Continental Divide, and south of the Canadian border. The Tribes continued to reside on this Reservation after it was established,

By the Act of May 15, 1886², Congress directed the Secretary of the Interior to negotiate with the tribes occupying the Reservation created by the 1874 Act to secure a substantial land cession from those tribes prior to admission of Montana as a state. By virtually identical agreements entered into in 1886 and 1887, the various tribes ceded major portions of the 1874 Act Reservation to the United States, retaining three smaller and separate reservations—the present-day Fort Peck, Fort Belknap, and Blackfeet Indian Reservations.

Congress ratified these agreements by the Act of May 1, 1888 ("1888 Act")³. In those congressionally ratified agreements, the United States agreed that the Reservations would be "permanent homes" for the Indians that would provide them with "the means to enable them to become self-supporting"⁴

¹ 18 Stat. 28, 28-29.

² 24 Stat. 29, 44.

³ 25 Stat. 113

The 1888 Act established the southern boundary of the separate Fort Peck Indian Reservation in northeastern Montana as follows: “[b]eginning at a point in the middle of the main channel of the Missouri River opposite the mouth of Big Muddy Creek; thence up the Missouri River, in the middle of the main channel thereof, to a point opposite the mouth of Milk River; thence up the middle of the main channel of Milk River”⁵ These boundaries established a Reservation that includes a substantial part of the bed and waters of the Missouri River between the Big Muddy Creek and Milk River. Congress has never altered or diminished these boundaries.

Within the Fort Peck Reach, “[t]he channel . . . exhibits a meandering pattern with occasional straight reaches.”⁶ The DEIS states “the Fort Peck Dam to Lake Sakakawea reach has little to no bank stabilization.”⁷ Additionally, that area is subject to degradation which “extends from the [Fort Peck Dam] downstream until tapering off between Brockton and Culbertson, MT.”⁸ “Degradation reaches located downstream of each dam are subject to scour, bank failure, and channel widening with generally lowering river stages over time.”⁹ The DEIS states “the effects of an elevated flow release followed by a period of low flow is likely to have a detrimental effect on bank stability.”¹⁰ Historically, changes in channel geometry “occurred during flood events.”¹¹

Alternative 2 calls for a change in flow from 28,000 cfs on June 10-13 to 8,000 cfs on June 28.¹² Alternative 1 will have similar effects depending on the spring release. Such rapid changes would increase stream bank destabilization, and therefore, promote lateral shifting of the Missouri River. Both Alternatives would guarantee flood events each year. Thus, the Alternatives would encourage channel-bed shifting. This would alter the physical location of the southern boundary of the Reservation.

The legal ramifications of these actions are unclear. Shifts in the Missouri River channel due to test releases could be classified as either accretion or avulsion. Accretion is the slow movement of a river over time and results in one property owner gaining land taking title from the property owner losing land.¹³ Avulsion is the rapid shift of “in the location of the banks of a waterway”

⁴ 25 Stat. at 113.

⁵ 25 Stat. at 116.

⁶ DEIS at 3-20.

⁷ *Id.* at 3-19.

⁸ *Id.* at 3-22.

⁹ *Id.* at 3-17.

¹⁰ *Id.* at 3-28.

¹¹ *Id.* at 3-17.

¹² DEIS Executive Summary at x – xv; 2-11; 2-16 – 2-20.

¹³ A. Dan Tarlock, et al., *Water Resources Management*, Foundation Press, 54 (7th Ed. 2009)

and results in no change of ownership—the boundaries remain as described in their original location.¹⁴

Accretion events can lead to quiet title actions; whereby, the Tribes could lose part of their Reservation and result in costly litigation. Avulsion events would require ignoring the current boundary and require continuous relation to the original boundary—if that boundary did not change by accretion. “In most jurisdictions, changes are presumed to be by accretion.”¹⁵ The law is also unclear what happens to the land when the changes in the river course is due to a governmental program.¹⁶ Finally, there is uncertainty about what would happen to the mineral interests in the accreted lands (i.e., whether they would be severed from the surface estate).¹⁷

There is no mention of this issue in the DEIS. The Corps must consider how these artificial flood events will affect the Fort Peck Tribes’ Reservation boundaries. The United States agreed to set this boundary in federal legislation that should not and cannot be altered by agency action.

II. The Tribes’ Water Right

The United States reserved all the water needed for the Tribes to make their Reservation productive.¹⁸ In 1985, the Tribes, assisted by the U.S. Departments of Justice and the Interior, negotiated the Fort Peck-Montana Water Compact (“Compact”) with the State of Montana to settle water rights adjudications of the Tribes’ water rights that were then pending in state and federal courts and to quantify the water rights reserved to the Tribes. The Compact was approved by the U.S. Departments of Justice and the Interior, ratified in 1985 by the Fort Peck Tribal Executive Board and the State of Montana¹⁹, and approved and confirmed by the Montana Water Court in 2001²⁰. This water right “is held in trust by the United States for the benefit of the Tribes.”²¹

Article III(A) of the Compact quantifies the Tribes’ reserved water rights as the right to divert annually from the Missouri River “950,000 acre-feet per year.”²² The Tribes’ “[d]iversions of water for use within or outside the Reservation may be made in the exercise of the Tribal Water Right from . . . the mainstem of the Missouri River . . . in the following amounts:

¹⁴ *Id.*

¹⁵ Tarlock at 55.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Winters v. U.S.*, 207 U.S. 564, 577 (1908).

¹⁹ Mont. Code Ann. § 85-20-201 (2019).

²⁰ *In re Adjudication of Existing & Reserved Rights to the Use of Water*, No. WC-92-1, 2001 WL 36525512 (Mont. Water Ct. Aug. 10, 2001).

²¹ Mont. Code Ann. § 85-20-201.

²² *Id.* art. F(1).

- (a) during the months of November, December, January, February and March, not to exceed 40,000 acre-feet per month;
- (b) during the months of April and October, not to exceed 50,000 acre-feet per month;
- (c) during the months of May and September, not to exceed 105,000 acre-feet per month;
- (d) during the month of June, not to exceed 145,000 acre-feet;
- (e) during the month of July, not to exceed 215,000 acre-feet;
- (f) during the month of August, not to exceed 180,000 acre-feet.²³

The Tribes' priority date is May 1, 1888—the date of creation of the Reservation—making it one of the oldest water rights on the Missouri River.

The Montana Department of Natural Resources and Conservation (“DNRC”) has stated that water is not legally available during the month of July from the Missouri River and only 879 cfs available during the month of August.²⁴ The DNRC uses “the median of the mean monthly flow rates and volumes for the stream gaging station” to determine water availability.²⁵ The U.S. Geological Survey stream gage No. 06132000 is located on the Missouri River below Fort Peck Dam.²⁶ According to that gage, there are only 8,554 cfs physically available in the month of July and 9,072 cfs available in the month of August.²⁷

The DEIS plans to keep dam releases at 8,000 cfs from June 28 to September 1.²⁸ This means there will be no water legally available in the months of July and August. While the Corps has stated it must protect the Tribes' water right²⁹, such low flows, combined with the Tribes' senior water right, would require the Tribes to make “calls” on junior appropriators to preserve the Tribes' water right. This would increase expenses for the Tribes. The Corps states it did not consider water rights in making drafting the DEIS³⁰, but the Corps should consider these issues when making its final decision.

The DEIS acknowledges that the Tribes have created their own water quality standards for the Missouri River.³¹ However, the Tribes water quality standards differ from the Montana's

²³ Mont. Code Ann. § 85-20-201, art. F(1).

²⁴ *In the Matter of Application for Beneficial Water Use Permit No. 40S-30119937*, Mont. Dept. Nat. Resources and Conserv., Final Or. at 10 (Mar. 16, 2021).

²⁵ Admin. R. Mont. 36.12.1702.

²⁶ USGS, *National Weather Information System*, available at: https://waterdata.usgs.gov/mt/nwis/uv?site_no=06132000 (last accessed May 21, 2021).

²⁷ Final Or. at 10.

²⁸ DEIS Executive Summary at x – xv; 2-11; 2-16 – 2-20.

²⁹ *Id.* at 6-6.

³⁰ *Id.*

standards. The Tribes require the water have a quality that will protect its sacred and cultural uses. The Corps fails to consider these important cultural impacts to the Tribes.

III. Tribal Water Supply and Irrigation Systems

The Missouri River water pumped through the Fort Peck Irrigation Project (“Irrigation Project”) and the Assiniboine and Sioux Rural Water Supply System (“ASRWSS”) is the only reliable source of fresh water on the Reservation. Due to the pollution of groundwater and other sources of surface water on and near the Reservation by prior oil and gas development, there is no other reliable source of fresh water for tribal members.

A. Fort Peck Irrigation Project

In 1908, Congress authorized construction of the Irrigation Project.³² Congress authorized the Irrigation Project to allow for irrigated agriculture by members of the Tribes on the Reservation to make the Reservation lands more valuable. Congress thereafter appropriated funds for construction of the Irrigation Project.³³ The Irrigation Project’s basic infrastructure has been in operation for over a century, with periodic modifications to pumping equipment to reflect advances in technology. The Irrigation Project covers an irrigable area of approximately 32,000 acres.³⁴

The Irrigation Project diverts all its water for irrigation from the Missouri River at two intakes located on the Reservation at Wiota and Frazer, which are only ten and fourteen miles, respectively, downstream from the Fort Peck Dam. The Irrigation Project uses a flood irrigation technique, under which the Project pumps water from the Missouri River through pipes to croplands, where the water is distributed over the soil by force of gravity. The Irrigation Project is the sole source of irrigation water for tribal members on the Reservation and supports a substantial portion of the Reservation’s economic activity.

In the DEIS, the Corps mistakenly compare the intakes of the Irrigation Project with other intakes.³⁵ However, the Irrigation Project intakes are different than other intakes because “the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes”³⁶ Therefore, the Corps must consider how changes in the release flows will protect the Tribes agricultural land.³⁷

³¹ *Id.* at 3-286.

³² Act of May 30, 1908, ch. 237, § 2, 35 Stat. 558, 558 (“1908 Act”).

³³ *E.g.*, Act of Aug. 24, 1912, ch. 388, § 10, 37 Stat. 518, 526; Act of June 30, 1913, ch. 4, § 10, 38 Stat. 77, 90.

³⁴ Garrit Voggeser, *Fort Peck Project*, Bureau of Reclamation, 2 (2001).

³⁵ DEIS at 3-245 to 246.

³⁶ 25 U.S.C. § 3701.

B. Assiniboine and Sioux Rural Water Supply System

In 2000, Congress passed the Fort Peck Reservation Rural Water System Act of 2000³⁸ utilizing a portion of the Tribes' reserved water rights quantified in the Compact. A purpose of the 2000 Act is "to ensure a safe and adequate municipal, rural, and industrial water supply for the residents of the Fort Peck Indian Reservation."³⁹ The 2000 Act provides that the Secretary of the Interior "shall plan, design, construct, operate, maintain, and replace a municipal, rural, and industrial water system, to be known as the 'Assiniboine and Sioux Rural Water System.'"⁴⁰ As authorized by Congress, the ASRWSS provides water to users on the Reservation.⁴¹

The ASRWSS consists of:

- (1) pumping and treatment facilities located along the Missouri River within the boundaries of the Fort Peck Indian Reservation;
- (2) pipelines extending from the water treatment plant throughout the Fort Peck Indian Reservation;
- (3) distribution and treatment facilities to serve the needs of the Fort Peck Indian Reservation, including—
 - (A) public water systems in existence on the date of the enactment of this Act that may be purchased, improved, and repaired in accordance with the cooperative agreement entered into under subsection (c); and
 - (B) water systems owned by individual tribal members and other residents of the Fort Peck Indian Reservation; . . .
- (4) appurtenant buildings and access roads;
- (5) all property and property rights necessary for the facilities described in this subsection; . . . and
- (7) such other pipelines, pumping plants, and facilities as the Secretary determines to be appropriate to meet the water supply, economic, public health, and environmental needs of the Fort Peck Indian Reservation, including water storage tanks, water lines, and other facilities for the Fort Peck Tribes and the villages, towns, and municipalities in the Fort Peck Indian Reservation.⁴²

The 2000 Act acknowledges that the operation and maintenance of the ASRWSS must meet conditions "that are adequate to fulfill the obligations of the United States to the Fort Peck

³⁷ The DEIS notes "the smaller of the two intakes does have some tier 1 impacts during some, but not all, of the full or partial flow years depending on the alternative or variation relative to the No Action Alternative." DEIS at 3-246. This analysis is insufficient under the Corps fiduciary obligations to the Tribes.

³⁸ Pub. L. No. 106-382, 114 Stat. 1451 ("2000 Act").

³⁹ *Id.* at § 2, 114 Stat. at 1451.

⁴⁰ *Id.* at § 4(a), 114 Stat. at 1452.

⁴¹ *Id.* at § 4(d), 114 Stat. at 1453.

⁴² *Id.* at § 4(b), 114 Stat. at 1452.

Tribes.”⁴³ Title to the ASRWSS “shall be held in trust by the United States for the Fort Peck Tribes and shall not be transferred unless a transfer is authorized by an Act of Congress enacted after the date of the enactment of [the 2000 Act].”⁴⁴ Congress has never retreated from its commitment to meet its trust responsibilities to provide water to the Tribes nor has it authorized the transfer of title to the ASRWSS to any other entity.

The ASRWSS diverts water from the Missouri River under the Tribes’ water right guaranteed by the Compact. Operating under the terms of the 2000 Act, the ASRWSS delivers potable water for municipal, residential, commercial, and industrial purposes on the Reservation, providing clean, safe drinking water to homes, schools, religious and cultural institutions, hospitals, and businesses on the Reservation. It also provides water for the operation of tribal governmental services and tribal enterprises, as well as to the county and municipal governments that provide services to tribal members and non-Indians on the Reservation.

The ASRWSS intake is in the Missouri River, fifty-seven river miles downstream from the Pipeline’s proposed Missouri River crossing. The water is piped through ASRWSS pipelines throughout the Reservation. Those pipelines also connect to the Dry Prairie Rural Water System, which provides water to a service area outside of the Reservation.⁴⁵ When fully completed in the early 2020s, these water systems will have been funded by Congress in the amount of approximately \$302 million and will supply water to 31,200 people in Daniels, Roosevelt, Sheridan, and Valley Counties and on the Reservation.

The Tribes are concerned that changes to the water releases at the Fort Peck Dam will adversely affect the Tribes’ water intakes. Changes to the flows from the Fort Peck Dam have the potential to increase the sediment load and drop the water level of the River. The DEIS acknowledges that suspended sediment can clog intake screens and impede the withdrawal of water through the intakes.⁴⁶ Additionally, sediment that moves through intake screens must be removed from the ASRWSS before the water can be delivered to residents and businesses on the Reservation. Increased sediment from high test flows will only increase the cost of removing sediment.

The Irrigation Project and ASRWSS are held in trust by the United States for the benefit of the Tribes. Thus, the Corps has a duty to protect these water infrastructures. The Irrigation Project is overseen by the Bureau of Indian Affairs (“BIA”)⁴⁷ and the Bureau of Reclamation is responsible for construction of the ASRWSS while BIA oversees operations, maintenance, and repairs. The Corps should consult with these agencies and the Tribes to ensure these tribal water projects are not harmed from the test release flows.

IV. Tribal Consultation

⁴³ *Id.* at § 4(c)(4)(B), 114 Stat. at 1453.

⁴⁴ *Id.* at § 4(f), 114 Stat. at 1453.

⁴⁵ Pub. L. No. 106-382 § 5(d)(2), 114 Stat. at 1455.

⁴⁶ DEIS at 3-252 to 253.

⁴⁷ 25 U.S.C. ch. 11.

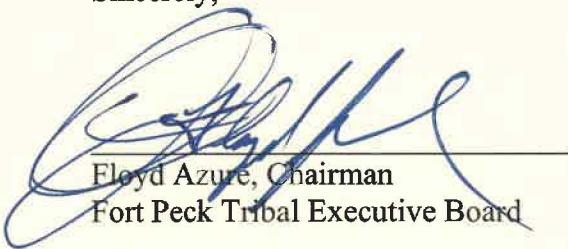
According to Appendix B, the Corps has only sent a form letter to the Tribes regarding the DEIS.

While the Tribes support the restoration of the pallid sturgeon, the Tribes are also concerned about how the proposed actions will affect the Fort Peck Reservation's boundaries, the Tribes' water rights, tribal water supply and irrigation systems, and tribal inclusion in the planning process.

Thus, the Tribes request formal consultation with the Corps to discuss these important issues.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Floyd Azure", is written over a horizontal line. Below the line, the text "Floyd Azure, Chairman" and "Fort Peck Tribal Executive Board" is printed.

Floyd Azure, Chairman
Fort Peck Tribal Executive Board

Agenda
Government-to-Government Consultation
Between Fort Peck Assiniboine and Sioux Tribes
and the
U.S. Army Corps of Engineers Omaha District
August 13, 2021
0900-1200 MST

Location/Venue: Tribal Chambers, Poplar, MT

List of Attendees

Fort Peck Tribes:

Chairman Floyd Azure
Tribal Council Members
Leonard Crow Belt, Land Committee Chairman
Arnold Big Horn, Director of Water Resources
Martina Wilson, Director of OEP Office
Ashley Weeks, Manager of ASRW Program
Dyan Youpee, THPO

U.S. Army Corps of Engineers:

Colonel Mark Himes, District Engineer
John Remus, Chief, Missouri River Basin Water Management
Sheila Newman, Chief, Operations Division
Joel Ames, Tribal Liaison
Tiffany Vanosdall, Missouri River Liaison
Aaron Quinn, Project Manager
Joe Bonneau, Missouri River Recovery Program Manager
Jamie Myers, Project Counsel
Darin McMurry, Fort Peck Operations Project Manager
Julie Jacobsen, Cultural Resources Program Manager

U.S. Fish and Wildlife Service:

Wayne Nelson-Stastny, Missouri River Basin Coordinator

Draft Agenda

- Welcome and Opening Prayer
- Introductions and Opening Statements (Chairman Azure and Colonel Himes)
- Discussion Topics
 - Fort Peck Test Release EIS Background/Summary (Quinn)
 - Fort Peck Tribes' Comments on the Draft EIS (All)
 - Fort Peck Reservation Boundaries
 - The Tribes' Water Right

- Water Supply
 - Irrigation System
 - Cultural Resources
- Concluding Remarks
 - Chairman Azure
 - Colonel Mark Himes
- Adjourn