

APPENDIX 2

Building a Water and Energy Homeland

Three Affiliated Tribes

(Mandan, Hidatsa and Arikara Tribes)

Ft. Berthold Indian Reservation, North Dakota

**A Case Study on Tribal Natural Resource Asset Control,
Management and Protection**

The quickest and most merciful way to exterminate the three tribes is by mass execution, like they did to the Jews in Germany. We find it strange that the treaty made between you and the aggressor nations of Japan and Germany are more sacred than the treaty you made with the three tribes. Everything will be lost if Garrison is built. We will lose our homes, our communities, our economy, and our resources. We took in the Lewis and Clark expedition in the winter of 1804. We took those men in and watched them like hawks to keep them from freezing and starving to death. If you are determined to remove us from our land, you might as well take a gun and put a bullet through us. The principles that we fought for in this last war, right beside you, was for the very homes, lands, and resources that you are trying to take from us today.

–Mark Mahto, Three Affiliated Tribes Council Member, in testimony before Congress, July 17, 1947 (VanDevelder, 2004)

Introduction

This Case Study tells the story of the Three Affiliated Tribes' efforts to regain control of their *lives, community, culture, and economy* through control of their natural resource assets after having suffered serious and rather recent displacement from their ancestral homelands. The Three Tribes' heroic journey to this point now places them in a position to regain nearly full control of their natural resource assets, including significant water, oil, gas and coal resources.

The Three Affiliated Tribes' case study reveals three distinct, culturally intact peoples who had full control of their natural resource assets, and all the interrelated aspects of their societies, prior to contact with the Lewis and Clark expedition (Ewers, 1968). The loss of tribal natural resource assets led directly to community disruption, poverty and despair. However, the Tribes' collective strength is in knowing that the survival of their people is fundamentally related to regaining full control over their remaining natural resource assets. The Mandan, Hidatsa and Arikara people are poised to secure a sustainable future for themselves in ways that can serve as a fresh new model for tribal natural resource asset control.

Historical Context for Natural Resource Asset Loss & Control

About one thousand years ago, the northward-migrating Mandan people made a “left turn” into the river bottomlands of the Missouri River (VanDevelder), after historically occupying large portions of the central Mississippi River bottomlands along with many other tribes. The weather and shelter provided by the Missouri River bottomlands was perfect for their extensive gardens and their two-thousand mile migration up the river had led them to extensive trade networks and routes used by the high plains Indians for thousands of years (Ewers). The Mandan were already cultivating different types of corn from seed acquired by the Aztecs by the time they arrived at the mouth of the Heart River in what is now central North Dakota (VanDevelder). Through pollination the Mandan had developed varieties of corn that would ripen in 70 days. The conditions the Mandan found in the upper Missouri River bottomlands gave them a “degree of social and economic stability that they could count on from year to year” (Ewers 21, note 1).

At the same time the Mandan were migrating up the Missouri River, the Arikara were approaching the central Missouri River bottomlands from the wooded lowlands region of modern-day Iowa. About 1500, the Hidatsa began migrating southwards along the Missouri River and eventually met up with the Arikara and Mandan people who had settled at the junction of the Heart and Missouri Rivers. The Hidatsa settled upstream of the Heart River area at the mouth of the Knife River. The general prosperity of the Mandan led to a mutual association or alliance and the tribes lived in earth lodges in villages constructed close to each other for defense purposes. While the three tribes lived in close proximity, each tribe retained its own language, culture and social structure.

The river bottomlands provided everything the tribes needed for survival. The river valley was wide with fertile soils sub-irrigated by the Missouri River; a wooded bottomland provided shelter for homes where berries and other wild foods were gathered; soils enabled crop cultivation; and game provided meat, furs, and clothing. Exposed coal seams in the sidewalls of the Missouri River bottomlands provided fuel for heat, and springs of varying temperature and quality were used consistently for medicinal, ceremonial or drinking water purposes (Ewers). The trade routes assured steady trade providing an influx of items to be traded for food grown in the valley, including horses, metals, guns and fur (Ewers).¹ The Mandan exchanged corn for sheet metal, which was used to fashion battle axes and arrowheads that Lewis and Clark observed later when they encountered the Nez Perce Tribe in present day Idaho.

The thousands-years old occupation, cultivation and development of the bottom lands of the Missouri River by these three tribes ensured a vibrant, complex, culturally intact, self-sufficient community in harmony with its riverine ecosystem. The control of all of the natural resource assets necessary for survival, including food, water, heat, shelter and fertile agricultural soils, enabled the cultural traditions, learning and practices to continue and evolve over thousands of years, producing a cohesive community, intact cultures and a tradition of collective decision-making.

Background on the Land

The prosperity, cohesiveness, economy and survival of the Three Affiliated Tribes were severely challenged after the expedition of Lewis and Clark and the westward migration of the non-native population. First came the diseases and epidemics that ravaged the tribal population: smallpox in 1837 and cholera shortly thereafter. These diseases were brought primarily by steamships going upriver on the Missouri and became epidemics to which many Native people succumbed (Stannard 1992). Though diminished from an estimated 25,000 to less than 1,000 members by these diseases and other pressures, the Three Tribes remained culturally intact (VanDevellder 74). The ability to protect the land base from intrusion and to fully utilize its resources, however, was severely diminished.

Through successive treaties and executive orders, the Tribes' aboriginal territory was reduced from more than 12 million acres to 2.9 million acres in a period of less than twenty years, as shown in Table 1 and in the Appendix showing the reduction of the Tribes' land base over time.

¹ In Lewis and Clark's journals, they made it imperative to "wrest control" of the Canadian trade from the Mandan-Hidatsa and for the first time revealed the potential sources of valuable furs north of the Indian villages (Ewers).

Table 1 History of Land Base Three Affiliated Tribes

Year	Treaty/Executive Order/ Legislation/Event	Effect	Notes
1790's	Louisiana Purchase; Northwest Ordinance	Led to expeditions by Lewis & Clark, Powell, others, 1800s	Reduction of population by disease; trading; growth
1825	U.S. made treaties with each of the three tribes individually	Assured mutual guarantees of peace and friendship	Ease of relationships with U.S.
1851	Fort Laramie Treaty 11 Stat. 409. (Horse Creek)	Set aside original area of tribal lands extending from Canadian border to present-day Wyoming	<i>Ft. Berthold Indians v. U.S.</i> , 71 Ct. Cl 308 (1930) held that the 1851 treaty bound all parties
1866	Agreement at Ft. Berthold	Permanent friendship in exchange for goods and services	Not ratified. Various land cessions for railroad rights of way
1870	Executive Order, April 12, 1870	Confirmed the Three Tribes' previously recognized treaties and land occupancy	Recognized minerals on reservation
1880	Executive Order, July 13, 1880	Reduced reservation to 2.9 million acres and placed remaining lands in the public domain	Tribes still occupying the bottomlands, using uplands for some hunting and migration
1886/1891	Act of March 3, 1891, 26 Stat. 1032	Reduced reservation size to current 2.3 million acres	Recognized minerals
1892	Executive Order, July 17, 1892	Added more land to the reservation	Returned part of the homestead lands
1910	Act of June 1, 1910, 36 Stat. 455	Applied Homestead Act to reservation lands opening them to non- Indian settlement; reserved minerals, reservoir and power sites from sale	Cumulative result was about 40% land held in trust, the remaining amount of land allotted to Indian and non- Indian, roughly the "Homestead lands" and "diminished reservation"
1914	Act of August 13, 1914 38 Stat. 681	Congress reserved all coal lying under the homestead lands to the Three Tribes	Referenced congressional recognition of mineral estate
1934	Indian Reorganization Act or Wheeler-Howard Act of 1934, 25 USC 461	Reorganization of tribes along the model of U.S. government if accepted by tribes	Secretary of Interior's approval needed on most land or water use actions
1949	Garrison Construction authorized by the 1944 Flood Control Act	Loss of 150,000+ acres of historically occupied bottom-land and creation of reservoir of 24 million acre feet capacity	Dislocation of the tribal community to disparate upland sites; compensation for land lost less than \$5 million

1953	Public Law 83-280	Imposed state law on certain reservations, including Ft. Berthold	Largest give-away of jurisdiction over Indians to states in history; part of termination policy
1984	Ft. Berthold Mineral Restoration Act, P.L. 98-602, 98 Stat. 3419	Restored mineral ownership to the Tribes on 150,000 acres beneath Lake Sakakawea	As of 2008 100% tribal land base leased for exploration

In 1825, the United States sought peace and friendship with each tribe separately and in the 1851 Treaty of Ft. Laramie, included all three tribes as signatories. This treaty recognized the tribal right of use and occupancy of a vast extent of land extending from Canada to present day Wyoming, including the Missouri River bottom lands, an area of more than 12 million acres.

The United States sought more land cessions from the Three Affiliated Tribes in the 1860s in order to satisfy certain public needs such as land grants for railroads, rights of way for telegraph lines and other uses. The first significant land cession occurred in 1870; however, it *reaffirmed* the Tribes' rights to the use and occupancy of the original 12 million acres of land outlined in the 1851 treaty. Ten years later the reservation land base was reduced to 2.9 million acres by an executive order.

The present reservation, consisting of approximately 2.2 million acres, was established in 1886 through agreement between the Tribes and the United States and became law on March 3, 1891. The preamble to this agreement recites that the Tribes are disposing of the larger part of their reservation in order to obtain "the means necessary to enable them to become wholly self-supporting by the cultivation of the soil and other projects of husbandry" (Kappler, Vol. I, 425). Article II of this agreement indicates that agriculture was just *one* of the methods to achieve the broader purpose of the "civilization and well-being of the Tribes."²

In 1910, approximately 354,000 acres of the reservation were opened to non-tribal settlement under the General Homestead Act and other laws, although the reservation boundaries remained the same.³ In 1914 Congress reserved all the remaining coal underneath these lands for the Tribes' exclusive use.

The three tribes agreed to reorganize as the Three Affiliated Tribes, a federal corporation under the Indian Reorganization Act of 1934. One aspect of this act that was not fully understood at the time was the extent to which the United States Secretary of the Interior would have ultimate control over the Tribes' use and control of their resources.

In the early 1940s, the Tribes' still lived in the river bottom while the non-tribal communities were springing up on the plains. However, during the period between 1944 and 1954 the Three Affiliated

² The relevance and importance of this language in all treaties has to do with the "purpose of the reservation", which is used in water rights quantification to determine the volume of the tribal water award.

³ A 1972 ruling by the Eighth Circuit Court of Appeals affirmed the reservation boundaries had not changed when the lands were opened to homesteading in 1910. *City of New Town v. United States* (454 F.2d 121). The "homestead area" as it is now known is a mixture of tribal and non-tribal ownership on various allotment sizes.

Tribes lost more than 150,000 acres of the Tribes' most precious homeland, the bottomlands of the Missouri River, which were inundated through the construction of Garrison Dam. The resulting reservoir split the reservation in two. Many years passed before a bridge was constructed across the lake to connect the tribal communities.

Although drilling and development of oil had occurred in regions surrounding the reservation, in the early 1970s the reservation was found to overlay one of the largest oil fields in the United States aside from Alaska, with an estimated 250 billion barrels of oil reservoir-wide and hundreds of millions of barrels of oil, millions of cubic feet of gas, and tons of coal beneath the reservation itself. The largest reservoir of oil is found beneath the Lake Sakakawea that formed when Garrison was built (Figure 1). It is estimated that 60% of the Tribes' oil resources are beneath the lake.⁴

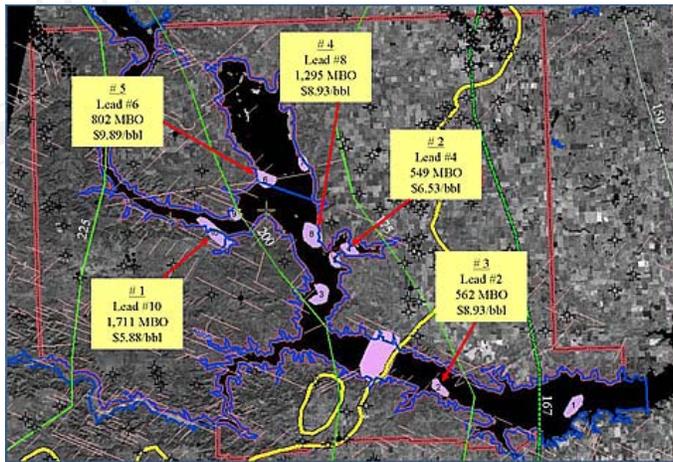


Figure 1. Oil Deposits beneath Lake Sakakawea
Ft. Berthold Reservation

Background on Water

No challenge to the cohesiveness of the Three Affiliated Tribes was greater than the flooding of the Tribes' entire aboriginal river bottom homeland by the construction and filling of Garrison Dam in 1949, the largest dam on the Missouri River. The people were forced to move from the bottom lands to the harsh, windy, extreme plains 300 to 500 feet above the river bottom.⁵ In a seeming instant, given the thousands of years on the river bottom lands, the entire economy, social structure, subsistence life style and culture was turned upside-down and inside-out.

The *trauma* of that event only 60 years ago is difficult to imagine and describe, but lingers palpably today. There are generations of tribal people who are alive today who remember living in the bottomlands, remember the flooding of those lands and the difficult life in transition to the uplands. And there are generations of tribal members who were born after the dam who have no memory of those lands or that lifestyle, except through the stories, drawings, written records and few photos that remain.

⁴ Steve Kelly, MHA Nation attorney, power point presentation June 2007.

⁵ The tribal members were not moved as communities, they were moved to allotments assigned to them by the government, thus disrupting the cohesiveness of the Three Tribes' collective and distinct communities.

In the late 1930s and early 1940s, several significant floods on the Missouri River system and on the Mississippi River prompted the federal Bureau of Reclamation and Army Corps of Engineers to study the feasibility of constructing several reservoirs on the Missouri River and its tributaries to control the flooding of downstream urban centers. These investigations led to the plan expressed in the 1944 Flood Control Act, otherwise known as the Pick-Sloan Program, to construct several reservoirs on the Missouri River main stem.

The largest reservoir, Garrison Dam, was planned for the upper Missouri River in North Dakota. To construct it meant flooding the aboriginal homelands of the Mandan, Hidatsa, and Arikara Tribes. The flooding would clearly violate the treaties made between the United States and the Three Affiliated Tribes in 1851 and 1891. Tribal leaders valiantly tried to stop the construction of the dam through personal visits to Washington D.C. and with allies both in Congress and the Department of the Interior. However, the final construction of Garrison was forced upon the Tribes by threatening to withhold *all* land and monetary compensation.

The final compensation offered to the Tribes in a take-it-or-leave-it fashion was a paltry \$5 million for the land loss and moving homes to the uplands. In addition the Tribes were promised water system and other infrastructure for the new tribal community, which were never completed.

When the tribal people arrived on the allotments located on the uplands, they were not welcomed by non-Indian residents who had settled on the homestead lands and believed the area to have been removed from the Reservation. The complete shock to the tribal members, who were literally dumped in non-tribal communities, albeit on *tribal land*, expressed itself in many destructive ways, including suicide, much community despair and sense of loss. A history and specifics of the taking of the Missouri River bottomlands from the Three Affiliated Tribes is shown in Table 2, and a “snapshot” of the trauma of this event for the tribal people is forever memorialized in this photograph:



Tribal Chairman George Gillette watches the signing of the authorization for the Garrison Dam project, 1948 (*AP National Archives*)

Thus a culture of people, a way of life and a two-thousand year history of living with the river environment of the Missouri and Mississippi bottomlands was written off in the stroke of a pen and wiped out in a period of less than ten years.

As destructive as they were to the Tribes, the combined effects of Public Law 280, which handed criminal and civil jurisdiction over the Reservation to the State of North Dakota, and the Garrison Dam served

as catalysts for the Tribes to reestablish tribal authority and seek a permanent, full and just compensation for the taking of the Missouri River bottomlands. The mineral wealth of the Tribes has in part made this journey possible.

Table 2 History of activities involving the taking of the Three Affiliated Tribes' river bottomlands through the construction of Garrison Dam

Year	Treaty/E.O./Legislation/Event	Effect	Notes
1934	Indian Reorganization Act or Wheeler-Howard Act of 1934, 25 USC 476	Reorganized tribes adopted an IRA boilerplate constitution	Constitution required BIA approval for most tribal actions
1940-1944	Investigations of Pick-Sloan development of Missouri River	Investigations conducted to develop flood control facilities; irrigation was an afterthought	Plans for several tributary and main stem storage facilities
1944	Flood Control Act of 1944, Pick-Sloan development program. 58 Stat. 891	Initial plans to construct Garrison Dam	Tribal opposition
1947	61 Stat. 1026-1049	Legislation outlining taking area (154,911 acres) and compensation plan for Garrison Dam. Dam construction underway	Amended in 1949
1949	Takings Act of 1949, P.L. 437	Forced the signature of Tribes for the taking of land for the Garrison Project	Compensation minimal; promises never implemented
1949-1954	Relocation of the tribal community from the bottomlands	Army Corps of Engineers moved houses, villages, gravesites, buildings to the prairie lands above the river bottom	
1953	Public Law 83-280	Gave criminal and civil jurisdiction over tribes to certain states, including ND	
1954	Garrison closes and fills	Garrison filled; entire population displaced	

Regaining Control over Tribal Water, Land & Mineral Resources: An Integrated Effort to Build a Homeland

Fortunately for the Three Affiliated Tribes, the quality of tribal leadership has never been destroyed even during the most trying times for the people. This is a testament to the cultural strength, foundation and statesmanship of the Three Affiliated Tribes, which is legendary and remains strong.

Like the tribes at the Wind River Reservation in Wyoming, the Three Affiliated Tribes began the struggle to retain control of their resource base just as soon as losses started and continue their efforts in the face of enormous obstacles. Unlike Wind River, however, it has been relatively recently that the Three Affiliated Tribes were displaced from their homelands, that oil was discovered on the reservation and that the subsistence economy was replaced with a cash economy.

Because of strong tribal leadership, the three major natural resource challenges to the Three Affiliated, loss of tribal jurisdictional authority under Public Law 280, the losses from the Garrison Dam construction and the lack of control over the mineral wealth discovered in the early 1970s, were turned into opportunities to retrieve and achieve tribal self-sufficiency. A summary of the nature of these three challenges and the Tribes' strategies for resource control is shown in Table 3, at the end of this case study.

Termination Policy and Public Law 83-280

As part of the Termination Policy, which would end the federal-tribal relationship, Congress had to decide what to do about federal criminal and civil jurisdiction over tribes. In 1953 Congress enacted Public Law 83-280, which transferred this jurisdiction to certain states, including North Dakota.⁶ An amendment to the law in 1968 made subsequent assumptions of jurisdiction subject to Indian consent in a special tribal election (Wilkinson 1982).

The sweeping Termination Policy and its implementing legislation, including Public Law 280, were designed so that "Federal responsibility for administering the affairs of individual Indian tribes should be *terminated* as rapidly as the circumstances of each tribe will permit" (VanDevellder 152).⁷ A list of fifty or sixty tribes to be terminated was drawn up; the Three Affiliated Tribes was at the top of the list.⁸ Termination abrogated the treaties made between the Tribes and the United States.⁹

Ironically, it was a water resource issue on the Ft. Berthold Reservation that brought P.L. 280 before the United States Supreme Court in 1986 and exposed the law's deep contradictions and flaws (*Three Affiliated Tribes v. Wold Engineering*, 476 USC 877 (1986)). A company named Wold Engineering had placed faulty pumps in Lake Sakakawea and failed to install them at the proper depths. The Three Affiliated Tribes

⁶ Moreover, the State of North Dakota passed further restrictive laws refusing to recognize the verdicts or jurisdiction of tribal courts over non-Indians on the reservation.

⁷ A confidential letter from Assistant Secretary of Interior Orme Lewis assured the Senate that Interior wanted to get out of the Indian business (VanDevellder 152).

⁸ The list also included the Klamath Tribe in Oregon and the Menominee in Wisconsin, both highly productive tribes due to their control over and use of natural resource assets, primarily timber.

⁹ At one point Congress threatened to withhold all compensation for the Garrison takings until the Three Affiliated Tribes agreed to be "terminated" under the new federal policy. The Tribes successfully resisted this attempt.

sued the company for damages in its tribal court, but North Dakota refused to recognize a tribal court conviction. The Tribes could bring suit in state court, because North Dakota had accepted jurisdiction over the dispute under Public Law 280, but North Dakota law also required that the Tribes waive their sovereign immunity. The Tribes refused and the dispute was carried out in several iterations between the United States Supreme Court and the North Dakota courts. The Supreme Court agreed with the Three Affiliated Tribes that the North Dakota court had to hear the case without requiring a waiver of the Tribes' sovereign immunity.¹⁰ Both the tribal and state courts were deemed to have jurisdiction over the suit. North Dakota ended up rewriting their law to recognize tribal sovereignty, tribal courts and tribal jurisdiction (VanDevelder).¹¹ Once the jurisdiction issue was settled the Tribes' case proceeded and the Tribes ultimately won an award of damages.

The *Wold* case and the Supreme Court's interpretation of Public Law 280 lay the foundation for the assertion and exercise of tribal control over the water, land, fishing, hunting and mineral resources in the future. This sudden leap in the Tribes' ability to control their natural resource assets assures that the Tribes have a remedy for any abuses of or theft from their land base in tribal courts, whose judgment can be affirmed by state and federal courts, or in the state courts. In addition, important exemptions to jurisdiction over tribes in P.L. 280 apply to state taxation of tribal mineral resources. This implies that the Tribes have considerable authority and latitude to negotiate with the State regarding mineral and water development.

The Garrison Dam Taking: Formation of the Joint Tribal Advisory Committee (JTAC)

The rush to build support for dam building in the Missouri River system rested on promises to non-tribal people of turning the high plains into a lush garden of irrigated farmlands. In addition, the Army Corps of Engineers had moved on to construct the Oahe, Ft. Randall and then the Gavins Point dams, all impacting tribal lands down the Missouri River system, using these same promises of irrigation in addition to flood control.

By the early 1960s these "farmers in waiting" began to feel the construction of these facilities was all a ruse and began to complain loudly to Washington officials. Congress, in an urge to mollify these concerns,

¹⁰ To summarize, the Tribes wanted to sue Wold in state court and the North Dakota Supreme Court said that in order for the Tribes to have access to the state court, state law required a complete waiver of tribal sovereign immunity, which the Tribes did not want to give. Wold was complaining of equal protection violations and the Tribes were saying that requiring a waiver to gain access to state courts was a violation of their sovereignty and of P.L. 280, under which the State had assumed jurisdiction. In *Wold I*, 467 U.S. 138 (1984), the United States Supreme Court said North Dakota could not disclaim the jurisdiction over the Tribes that it had assumed under P.L. 280 and sent the case back to the North Dakota Supreme Court for a reinterpretation of the state law in light of P.L. 280. On remand the North Dakota Supreme Court said that the state law barred tribes from suing in state court, unless the Tribes waived their immunity. In *Wold II*, 467 U.S. 877 (1986), the United States Supreme Court struck down the North Dakota law requiring complete waiver of the Tribes' sovereign immunity and held that P.L. 280 did not waive a tribe's sovereign immunity. The result was that the State, having assumed jurisdiction under P.L. 280, could not condition the Tribes' access to state court on a waiver of its immunity.

¹¹ The excellent book entitled *Coyote Warrior* provides a very moving account of the Tribes' struggle on PL 280 as well as the Garrison Dam taking, focusing on the Cross family and its leadership role over decades, along with the Three Affiliated Tribes, in securing the Tribes' sovereignty.

formed the Garrison Commission whose purpose was to take testimony and devise strategies to bring to fruition the promises of the Pick-Sloan program. Hearings were held up and down the Missouri River system throughout the 1960s. In 1963, the editorial board of the *St. Louis Post Dispatch* “pulled the mask off the Pick-Sloan Plan, noting that after the floods had ceased Congress seemed to have no interest in allocating any dollars on irrigation projects.” The *Dispatch* noted that “this would be a good time for the governors and senators and representatives of the Missouri Valley states to decide whether they want to be held liable for the consequences of the most gigantic boondoggle in American history” (VanDevellder 178). Virtually none of these hearings took tribal testimony on the impacts of the dams on tribal communities.

In the early 1970s, Congress agreed to begin work on several promised but as yet un-built irrigation projects in response to the pressure from citizens and lawmakers alike. The projects immediately ran into difficulty because of their negative impacts on waterfowl and other wildlife values. All irrigation construction projects were stopped due to the newly enacted National Environmental Policy Act (NEPA) and its regulatory requirements. It is truly ironic that nothing stopped the government from building these reservoirs and irrigation projects—not the solemn obligation to uphold treaties, not the enormous suffering and displacement of Indian people, not the catastrophic loss of the history of and the fertile Missouri River bottomlands. Nothing would stop them except birds and geese, under NEPA.

At the urging of two North Dakota Senators, the Pick-Sloan plan was brought before Congress again in 1984. The Senators pleaded for the formation of a congressional commission to study and resolve the impasse in development that had been generated by the Audubon Society’s lawsuits over destruction of water fowl habitat. While the Tribes were busy arguing the *Wold Engineering* case, in 1984 Congress appropriated a half million dollars to assemble the Garrison Diversion Unit Commission. The Charter of the Commission specifically directed the investigating team to resolve all outstanding legal issues impeding “the entitlement of the state of North Dakota to a federally funded water-development program as compensation for North Dakota’s contribution to the Pick-Sloan Missouri Basin program.”

Although the Garrison Diversion Unit Commission had not planned on reviewing any Indian claims, it concluded that it was the Tribes who had suffered the most and taken the brunt of the construction of the dams on the Missouri River. At least one-half of the 550,000 acres the states claimed they lost to Pick-Sloan were owned by tribes. The Commission also reported to Congress that it could not fulfill its responsibilities to resolve the “institutional inequities” as directed by its Charter unless it could hear from and report on the recommendations of the Indians.

The history of this settlement is a tragedy from which the tribes have never recovered. The Indians can demonstrate explicit treaty language that guaranteed them rights which were violated by the inundations. The evidence I have seen regarding the construction of the Garrison and Oahe Dams points to the fact that gross and fundamental injustices were done to these people, and not to reexamine this as part of the commission’s mandate to consider if issues of “institutional equity” would effectively close the last opportunity these tribes may have to rebuild the communities that were destroyed” (Report of the Garrison Diversion Commission).

In its final report to Congress, the Garrison Diversion Unit Commission recommended the establishment of a Joint Tribal Advisory Committee to explore and develop plans for the just compensation of the Tribes for the taking of tribal lands through the construction of these dams. On May 10, 1985 the Garrison Unit Joint Tribal Advisory Committee (JTAC) was established by the Secretary of the Interior. This committee

role was threefold:

- to examine and make recommendations with respect to the effects of the impoundment of waters under the Pick-Sloan Missouri Basin Program (Oahe and Garrison Reservoirs);
- to study their impact on the Fort Berthold and Standing Rock Reservations; and
- to replace what was destroyed by the creation of the two dams.

The committee was authorized and directed to examine and make recommendations on the following issues:

- Full potential for irrigation
- Financial assistance for on-farm development costs
- Development of shoreline recreation potential
- Return of excess lands
- Protection of reserved water rights
- Funding of all items from the Garrison Diversion Unit funds, if authorized
- Replacement of infrastructures lost by the creation of the Garrison Dam, Lake Sakakawea, the Oahe Dam and Lake Oahe
- Preferential rights to Pick-Sloan Missouri River Basin Power
- Additional financial compensation and other items the committee deemed important

The substance of the JTAC Report provided the initiative for the Three Tribes to seek legislation for additional economic and financial recovery funds. The Tribes' efforts continued until 1992, with the assistance of the State's congressional delegation. As a result, Congress passed Public Law 102-575 in 1992 providing \$142.9 million in economic recovery funds to the Three Affiliated Tribes. The fund, known as the Economic Recovery Fund, was to be used for education, economic development, social welfare and other needs. The capitalization of the fund was made possible by excess revenue generated by hydropower operations at Garrison Dam. The Tribes only spend the interest on this fund each year.

Some fifty years after the construction of Garrison Dam, the Three Affiliated Tribes were finally able to secure significant compensation for the loss of tribal lands. Although nothing will ever replace the lifestyle and memories of the Missouri River bottomlands, the Three Affiliated Tribes' grit, determination and leadership made it possible now for the Tribes to move forward with plans to control their natural resource assets, even within the context of P.L. 280 and having lost their ancestral homelands due to Garrison Dam.

Mineral Resource Discovery and Development

Although coal seams and oil seeps in the Missouri River cliff banks and bottom lands were known to the Three Affiliated Tribes, the extent and volume of valuable liquid (oil) and solid (coal) minerals beneath the current reservation was unknown until the 1970s. At that time the Reservation was determined to lie over a portion of the Williston Basin, and specifically the Bakken Formation, a spectacularly productive oil-bearing geologic unit located in northwestern North Dakota and eastern Montana. Significant coal resources were found to underlie the eastern portion of the reservation through extensive seismic surveys conducted in the late 1970s. Approximately 60% of the Tribes' oil deposits were found to occur beneath Lake Sakakawea. The treaties signed between the Three Affiliated Tribes and the United States reserved the subsurface minerals for the Tribes' exclusive use and development.

One of the first major efforts by the Three Affiliated Tribes to secure control over these resources resulted in the federal Ft. Berthold Mineral Restoration Act of 1984, which restored to tribal ownership the subsurface minerals beneath Lake Sakakawea. The subsurface ownership of reservation lands includes approximately 230,000 tribal acres, 373,000 acres on individual Indian allotments, held in trust by the United States and approximately 385,000 acres owned by the United States or non-Indians.

There are development challenges for mineral resources on the Ft. Berthold Reservation. The bulk of tribally owned and developable resources lie beneath the lake and its buried tributaries or under scattered tracts of land throughout the reservation. Mineral resources beneath the Ft. Berthold tribal allotted lands have dozens of surface owners as a result of fractionized ownership, a fact that for some reservations has led to a designation of the lands as being “unmanageable.” As a result of these land distribution and subsurface mineral ownership patterns, minimal oil and gas development has occurred on tribal lands in the last fifty years. Almost no development has occurred on the tribal allotted lands due to the 100% signature requirement for any leasing to occur. Most of the current development on the Ft. Berthold Reservation is in the northeast quadrant on non-tribal allotted lands in the non-Indian homestead area of the reservation.

Control of Oil & Gas Leasing and Development

After mineral ownership was secured, the Three Tribes began to pursue the control of the oil and gas leasing process for both tribal lands and allotted lands. Historically the leasing of oil and gas at Ft. Berthold was under the control of the Bureau of Indian Affairs and involved the U.S. Geological Survey and the Minerals Management Service. The standard leases issued by BIA were usually for a term of five (5) years, involved a standard 1/6th royalty rate, negotiated bonus and a per acre leasing requirement. Competitive and non-competitive standard leases were issued. The Three Affiliated Tribes were successful in reducing the 100% signing requirement for tribal allotted lands to 51%, which has enabled some increased leasing of allotted lands. But both tribal and allottee leasing has progressed considerably slower than the Tribes would like.¹²

Reforms in the Indian Minerals leasing program led to the negotiation of the first Indian Minerals Development Agreement (IMDA) in 1997 at Ft. Berthold. The option to lease tribal minerals under the IMDA program offers tribes competitive bidding programs and considerable flexibility in negotiating the terms of leasing directly with the oil companies. In addition, tribes may negotiate any size of lease, impose certain conditions and require higher royalties, bonuses and rental rates.

While the IMDAs still have to be approved by the BIA, the Three Tribes became motivated to develop the internal tribal expertise and infrastructure to take advantage of the opportunities offered by IMDAs and the potential gradual assumption of control over the entire bidding, leasing, and development process. Prior to 2007, the Three Affiliated Tribes approved two (2) IMDAs and three (3) standard BIA leases. The IMDA leases allowed the company sufficient land base to enter into lease arrangements with individual tribal allottees as part of the program, allowing their direct negotiation. Approximately 8,500 mineral acres were leased.

¹² Senator Dorgan has been extremely critical of the Bureau of Indian Affairs for the delays in Tribal mineral development.

The Tribes' aggressive program of developing its own expertise and actively courting oil companies for leasing have recently paid off with the nearly 100% leasing of tribal land at Ft. Berthold for oil and gas exploration pursuant to IMDAs as of 2008. The Three Tribes have pursued the streamlining of leasing procedures, the clarification of applicable state and tribal taxation, the adoption of spacing, pooling and permitting rules and other measures to improve its ability to better control the development of tribal minerals.¹³

The same success in leasing cannot be claimed for allotted lands, owing to difficulties with ownership patterns, knowledge of the resource base, fair market value for leases and other factors. Allottees are particularly vulnerable to speculation, where lands are leased at rock bottom prices, not developed, and then sold to others for a higher price. The Three Tribes are adamant that the allottees be brought into the process and assisted in the development of their lands.¹⁴

Water and Mineral Resource Planning

After fifty years of acting to regain control of the land and natural resource assets of the Ft. Berthold Reservation and building internal capacity to do so,¹⁵ the Three Tribes began a process of planning for the long-term development and protection of reservation lands and natural resources. As described only briefly here, the Three Tribes' efforts required an unprecedented level of legal talent, tenacity and alertness of the entire tribal leadership, and decades of letter-writing, travel to and testimony in Washington D.C.¹⁶ It is no wonder then, that planning for future resource development began to take shape in 2000. The "breather" allowed now for the Three Affiliated Tribes to plan and develop a future vision was a result of *decades* of successful work.

There are several pieces of the previous story that brought the Tribes to this point. First, although the Tribes were promised a drinking water system when they were removed from the bottom lands the system has never been completed.¹⁷ In addition, lake level fluctuations have often exposed the drinking water intake pumps making them ineffectual.

The lack of a completed drinking water system has forced the development of shallow wells in geologic units that have very poor water quality, owing to their association with oil and gas deposits (HKM Associates 1975). The close relationship between ground water quality and the location of oil and gas on the reservation is a significant planning issue that has been identified by the Three Affiliated Tribes as necessary to understand and resolve. This has focused interest on the interaction between mineral

¹³ In the summer and fall of 2008, the Three Affiliated Tribes energy department received training from the Southern Ute Tribe on negotiating lease agreements.

¹⁴ The Tribes' Chairman has conducted meetings with tribal allottees and the Tribes' energy department has conducted workshops to provide training for allotted land owners.

¹⁵ The Tribes have a petroleum geologist, contract specialists, engineers and environmental personnel staff.

¹⁶ The cost of this effort to secure the tribal natural resource assets likely has run into the millions of dollars, and is often unfunded by grants, the government, or other entities aside from the Tribes themselves. These costs can be prohibitive for many tribes; this can compromise the effort needed to secure natural resource rights. Of course, even these costs pale in comparison to the loss of traditional homelands.

¹⁷ Part of the funds needed to complete the project is the JTAC funds, raising the need to continue to seek the funds from Washington each year. The Three Tribes need only \$3 million to finish the project.

development beneath Lake Sakakawea and water quality and ways to prevent damage through regulations on drilling and development.

The second factor that has brought the Tribes to the point of planning and strategic action is the fluctuating water levels of Lake Sakakawea. Not only does this compromise the drinking water intakes as discussed above, but it frustrates the Tribes' recreational development on thousands of shoreline acres of the reservation. A fluctuating lake level also compromises tribal cultural resources.

This final challenge for the Three Affiliated Tribes is the one that will launch them forward for *seven generations*, and will inevitably involve the quantification of the Tribes' water rights. This need to quantify water rights was recognized almost thirty years ago by tribal leaders, and efforts were undertaken to begin discussions with the State of North Dakota (Van Ness 2007). The emergence of new facts about the reservation's mineral potential and water resources in the intervening 25 years has spurred renewed interest in the quantification of tribal water rights.

Like many other events and efforts in the Three Affiliated Tribes' past, the water rights quantification effort will of necessity involve a unique solution crafted by the Tribes' leadership in a way that has worked for them for generations.

Ft. Berthold Energy Conference

Under a grant from First Nations Development Institute, the Three Tribes conducted an energy planning conference in May 2008. The conference brought together a wide variety of specialists from all over Indian Country to cover topics focusing on the tribal control of natural resource assets, including:

- Tribally controlled development of energy resources, including green energy
- Summary of Bakken formation development on the Ft. Berthold Indian Reservation
- Operating a tribal energy company
- Budgeting and Financial investment strategies
- Legal principles of government-owned energy companies
- Cultural resource preservation
- Hydrology
- Case presentation by Southern Ute Tribe, which has taken control of all their resources and diversified investments ensuring long term economic stability

What is most important of course is the outcome of the conference. Four significant outcomes are highlighted here:

- As of December 2008 the Tribes have leased out their entire land base for exploration pursuant to primarily IMDAs and standard BIA lease agreements.
- One of the lease agreements involves work with the Southern Ute Indian Tribe, which is working in a turn-key fashion to help the Three Tribes actually develop their own energy company.
- The discussion identified the need to conduct wealth management and investment workshops on the reservation for both the tribal leaders as well as community members. As a follow-up, First Nations Development Institute conducted Financial Education workshops for all five communities at Ft. Berthold during the summer of 2008.

- The Tribes recognize the importance of assisting tribal members who are allottees on lands bearing significant mineral development potential and so have incorporated the allottee's goals into overall tribal government objectives, coordinated federal and private assistance to landowners, and provided for increased tribal technical assistance.¹⁸

The Tribes will likely seek to focus additional resources on the development of its internal technical, managerial, financial and administrative staff so as to provide a tribally-defined, environmentally sustainable framework for full development of the resource once the exploration phase is completed. The Tribes have begun to increase their environmental staff and capabilities by hiring a petroleum geologist and hired a natural resources program director.

Water Management and Water Rights Quantification Research¹⁹

The volume of water that flows through or arises on the Ft. Berthold Indian Reservation approximates 16.9 million acre feet. This is based on the average annual flow of the Missouri River at points above the reservation in northwestern North Dakota, stream flow discharge from several tributaries arising on or flowing through the reservation and estimates of the volume of ground water in storage beneath reservation lands. Lake Sakakawea, at water surface elevation of 1,855 feet, impounds an estimated 24 million acre feet of water, the largest reservoir on the Missouri River system. The lake is approximately 138 miles long, with an average depth of 200 feet and provides over 1,300 miles of shoreline on the reservation.

The current focus of the Three Tribes' work to control the water resource asset includes:²⁰

- Developing a water management program and Water Code for the protection and management of surface and ground water resources on the Ft. Berthold Reservation, with particular emphasis on protecting water quality and mineral development opportunities. This includes development of tribal infrastructure and expertise to manage water resources;
- Lake Sakakawea lake level management to protect water uses, recreational values, drinking water supply and on-reservation mineral development opportunities; and
- Developing an appropriate water rights quantification strategy for the unique circumstances prevalent at Ft. Berthold.

The purpose of developing a water management plan and a Water Code first before quantifying the tribal water right is to have the tribal expertise, desired uses and management infrastructure in place in order to contribute to effective negotiations with state and federal entities on water.²¹

It is particularly important to the Three Tribes to have a plan for the management of water levels in Lake

¹⁸ Follow-up workshops were conducted with the Ft. Berthold Tribal allottees association by the Southern Ute Tribe and others pursuant to this conference. Other allottee associations were involved. A "one stop shopping" center for mineral exploration has been established at Ft. Berthold.

¹⁹ The Tribes have had a water permit program in place for many years, as well as public water supply program.

²⁰ This process will likely be finalized by the fall of 2009 with increased staff devoted to water.

²¹ According to the Indian Reorganization Act, the Secretary of Interior is required to approve tribal codes for natural resources management, but currently has a moratorium on tribal water codes. This will be a challenge for the Tribes, yet without a water management program the Tribes will be unable to develop the Reservation as intended by treaties and agreements with the United States.

Sakakawea as part of its water management program, shoreline management program and Water Code. The key for the Tribes is to stabilize and maintain water levels within a certain range in Lake Sakakawea. To enable that, a way will have to be found to reduce the downstream navigation and hydropower demand from Garrison Dam. Reducing hydropower demand could be accomplished using the Tribes' extensive wind resources in a combined wind-hydropower renewable energy system. Reducing navigation demand requires a regional discussion to address the effects of navigation downstream and its impact on other tribes on the Missouri River system.

 Developing the appropriate water quantification strategy is critically important to the Three Tribes for several important reasons. First, while it may involve some litigation, the Tribes' desire is to achieve quantification through negotiation with State and federal officials. 

Second, the common quantification strategies, such as determining the purpose of the reservation, or measuring the water right by the amount of the reservation's practicably irrigable acreage, have been turned on their head with the flooding of the Tribes' most irrigable homeland by the construction of Garrison Dam. There are many "purposes" of the treaties between the Three Tribes and the United States which could not be met today. Quantification using the standard methods would have the negative effect of limiting the volume of water the Tribes are entitled to and their authority to control and use it.

Finally, Public Law 280 and the existence of the JTAC legislation both complicate and provide opportunities for control of water resource assets. Inappropriate application of state jurisdiction under P.L. 280 to the Tribes' water resources could occur without strategic thought and action. P.L. 280 has specific language that could offer the Tribes unique opportunities. Public Law 280 states that:

 Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights*, belonging to any Indian tribe...that is held in trust by the United States...[or the] regulation of use of such property in a manner inconsistent with any Federal treaty, agreement, or statute...*(Emphasis added)*. 

The last statement is particularly important in the strategy used for water rights quantification; the task is determining how to secure the Tribes' wet water rights in perpetuity and their right to control them in the context of P.L. 280.

The JTAC legislation may also provide an important link to a water rights quantification settlement. In that legislation, funds are earmarked for the irrigation of more than 70,000 acres of tribal land, water system development, community development and recreational development. JTAC offers an important source of funding for shovel-ready projects that current settlement options might not offer in this current budget climate. Importantly the language in JTAC reaffirms the Tribes' enormous sacrifice for both North Dakota and the United States. The JTAC legislation may offer one interesting way to introduce a final settlement of water rights before Congress, *if done carefully and strategically*.

Conclusions

The struggle for water and mineral natural resource control has been underway at Ft. Berthold for decades, and the shining characteristic of all of the Tribes' efforts is the people's leadership, tenacity, and determination. The planning for the long-term, sustained use and management of water and mineral

resource assets is just now beginning. This is an opportunity for future generations of the Three Affiliated Tribes and the tasks are large on minds of the tribal leadership.

The major challenges to the Tribes' control over natural resource assets and the strategies that the Tribes used to regain and secure control are shown in Table 2.5. Each and every challenge was met by the grit and determination of tribal leadership, as evidenced by a repetitive pattern of showing up at hearings, securing allies in Congress and strategically selecting key legal cases to advance tribal natural resource asset issues. The Tribes were blessed to have secured such effective legal counsel in the long battles involving Public Law 280 and the Garrison taking. The Three Affiliated Tribes have also joined other tribes in national efforts to secure natural resource asset control, such as the advancements in Indian mineral development legislation.

Though the landscape has been changed forever, nothing has been erased from the people's hearts. The long history of the people is written in their hearts. The present generation of tribal leadership is poised to come full circle to regain control, use and benefits of their natural resource assets, and of all the critical aspects of a whole tribal society, as shown in First Nations Asset Control framework, the "Elements of Development."²²

²² The "Elements of Development" appear as Diagram 2 in the main body of this report, *Native American Asset Watch: Rethinking Asset-Building in Indian Country*, and on First Nations website: www.firstnations.org.

Table 3. Natural Resource Asset Challenges & Solutions Three Affiliated Tribes

Challenge	Nature of Issue	Action Taken	Result	Components of Solution
Public Law 280	Tribal sovereignty and jurisdiction	Sought “right” legal case (<i>Wold Engineering</i>) to pursue to Supreme Court	Tribal sovereignty and jurisdiction upheld (1986); most odious part of State law rewritten	Collective tribal support and persistence; smart lawyering; fact pattern; tribal efforts to resolve first; sympathetic state judge
Garrison Dam Takings Act P.L. 484	Taking of tribal land; compensation; the future	Sought to stop dam through testimony; negotiated for compensation	Small compensation; insufficient relocation and community development	Lobbying; direct negotiations, publication of Tribes’ plight; tribal leadership and determination
Garrison Diversion Unit Commission	Opportunity to revisit compensation for takings	Testimony, acting with Congress to craft legislation	JTAC legislation and report; \$149.1 million in compensation; various projects	Testimony, lobbying, direct negotiations, technical work. tribal technical and administrative infrastructure development
Mineral Resource Development	Discovery of significant mineral reserves at Ft. Berthold. Managing leasing, bidding, development	Seismic studies; Mineral restoration activities; Standard Leases IMDA leases; Negotiation w/ state; development of tribal expertise	Leased tribal land as of 2008; streamlined processes; tribal expertise	Technical studies & research; leadership education; build tribal expertise; streamline administrative processes
Water and Mineral Resource Planning	Long term planning for sustainable resource use	Targeted research and strategic discussions	Desired water quantification and JTAC	Build allies in Congress and State delegation; build tribal expertise and systems for management; conduct strategic research; community education; development of tribal resource laws; learning from other tribes’ experience a key element.

Works Cited

- Dingman, Robert James, Ellis D. Gordon and H. A. Swenson. *Geology and Ground-Water resources of the Fort Berthold Indian Reservation, North Dakota, With a Section on the Chemical Quality of the Ground Water.* by H. A. Swenson: U.S. Geological Survey Water-Supply Paper 1259. Web <<http://pubs.er.usgs.gov/pubs/wsp/wsp1259>>. March 23, 2009.
- Ewers, John C. *Indian Life on the Upper Missouri.* Norman: University of Oklahoma Press, 1968.
- Kappler, Charles. *Indian Affairs: Laws and Treaties.* Vol 1. Washington DC: Government Printing Office, 1904.
- Kelly, Steve. "Oil and Gas Business Development on the Fort Berthold Reservation." Fort Totten, ND. March 7, 2007. <<http://www.ipams.org/resources/presentations/indianLands/kelly.pdf>> 29 March 2009.
- Meyer, Roy W. *The Village Indians of the Upper Missouri: The Mandans, Hidatsas and Arikaras.* Lincoln: University of Nebraska Press, 1977.
- Stannard, David. *American Holocaust,* New York: Oxford University Press, 1992.
- United States. Garrison Diversion Unit Commission. Report of Garrison Diversion Unit Commission. [Bismarck, ND:] Secretary of the Interior, 1984.
- VanDevellder, Paul. *Coyote Warrior.* Lincoln: University of Nebraska Press, 2004.
- Memorandum from Raymond Cross to Technical and Legal Consultants,* June 5, 1984.
- Wilkinson, Charles and Rennard F. Strickland (Eds). *Felix S. Cohen's Handbook of Federal Indian Law.* Norman: University of Oklahoma Press, 2002.

Cases

- City of New Town v. United States,* 454 F.2d 121 (8th Cir. 1972).
- Three Affiliated Tribes v. Wold Engineering,* 476 US 877 (1986).

Laws

- Public Law 83 -280, 18 U.S.C., §1162(b), 28 U.S.C. § 1360(b).



