

INTERSTATE WATER COMPACT VERSION 3.0: MISSOURI RIVER BASIN COMPACT DRAFTERS SHOULD CONSIDER AN INTER-SOVEREIGN APPROACH TO ACCOMMODATE FEDERAL AND TRIBAL INTERESTS IN WATER RESOURCES

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ABSTRACT

In the aftermath of the historic 2011 Missouri River flood, Missouri River Basin (MRB) state representatives and governors criticize the U.S. Army Corps of Engineers (Corps) for operating the Missouri River Mainstem Reservoir System (System) in support of the multiple, often conflicting, purposes outlined in the Flood Control Act of 1944. These officials envision entering into an interstate compact to divest the Corps of some of its operational authority and to broaden their role in managing water resources. Similarly, MRB tribal leaders argue that the Corps fails to operate its System in a manner that respects the interrelated issues of Indian reserved water rights and tribal sovereignty. As States and Tribes contemplate a rebalancing of power in the MRB, it is essential that any water resources management solution provide a forum in which affected States, Tribes, and the Federal government might work together in pursuit of interconnected interests. Accordingly, it is time for stakeholders to think beyond the dualistic “federal-interstate” compact arrangement and seriously consider a pluralistic “federal-interstate-tribal” approach – even if Indian reserved water rights are not yet quantified. Although such a tripartite approach is a departure from traditional compacting practice, the great weight of Indian reserved water rights warrants tribal representation on any commission charged with implementing a twenty-first century MRB water resources compact. Further, it would be unrealistic to expect a federal commissioner to represent tribal interests until such time as rights are quantified, given the Federal government’s conflict of interest in operating the System for other consumptive users. This Article concludes that the

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Federal government's interests in flood protection, navigation, and national security, and the Tribes' interests in protecting reserved water rights and tribal sovereignty, warrant an inter-sovereign approach whereby power is shared equally among signatories to this compact.

I.	INTRODUCTION.....	99
II.	A TWENTY-FIRST CENTURY WATER COMPACT FOR THE MISSOURI RIVER BASIN	104
	A. RESERVING A BROAD ROLE FOR THE FEDERAL GOVERNMENT ON A MRB COMPACT COMMISSION	106
	B. SAFEGUARDING FEDERAL INTERESTS PRIOR TO AND POST MRB COMPACT RATIFICATION	108
	C. A POTENTIAL FOR SCARCITY REQUIRES THAT THE COMPACT ALLOCATE WATERS AMONG SOVEREIGNS	109
III.	FEDERAL INTERESTS CALLING FOR EQUAL PARTICIPATION ON THE COMMISSION	112
	A. THE FEDERAL GOVERNMENT’S DOMINANT INTEREST IN FLOOD CONTROL	112
	B. AN ENTRENCHED NAVIGATION MANDATE, UNMINDFUL OF REDUCED COMMERCIAL SHIPPING	115
	C. EVOLVING NATIONAL SECURITY IMPLICATIONS CALLS FOR ROBUST FEDERAL PARTICIPATION	118
IV.	TRIBAL INTERESTS REQUIRING EQUAL PARTICIPATION ON THE COMPACT COMMISSION	120
	A. INDIAN RESERVED WATER RIGHTS PRESENT THE GREATEST OBSTACLE TO COMPREHENSIVE PLANNING	121
	B. TRIBAL SOVEREIGNTY IMPLIES JOINT RESPONSIBILITY IN WATER RESOURCES MANAGEMENT	130
V.	CONCLUSION.....	136

I. INTRODUCTION

*“In order to survive, a plurality of true communities would require not egalitarianism and tolerance but knowledge, and understanding of the necessity of local differences”*¹

After the historic 2011 Missouri River flood,² once and current state officials in the Missouri River Basin (MRB) argue the United States Army

1. WENDELL BERRY, *Sex, Economy, Freedom, and Community*, in *SEX, ECONOMY, FREEDOM, AND COMMUNITY* 117, 173 (1993).

Corps of Engineers (Corps) failed to operate its Missouri River Mainstem Reservoir System (System) to maximize flood control³ in accordance with the Flood Control Act of 1944.⁴ In a recent hearing before the House Subcommittee on Water Resources and Environment, MRB farmers, elected leaders, and interested persons criticized the Corps for operating the System to benefit enumerated multiple purposes beyond flood control.⁵ These officials are revisiting the idea of forming an interstate compact among MRB States to expand⁶ their role in managing the river.⁷

2. Ms. Jody Farhat, Chief of Missouri River Basin Water Management in the United States Army Corps of Engineers (Corps) Omaha District, described the flood event as a “perfect storm,” where Rocky Mountain snowmelt – which was 140% of average – and historic rainfalls forced the Corps to release water from its reservoir system twice as fast as had ever been attempted. Paul Quinlan, *‘Perfect Storm’ Along Missouri River Puts Army Corps Policies in Cross Hairs*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/gwire/2011/06/17/17greenwire-perfect-storm-along-missouri-river-puts-army-c-55680.html>.

3. Missouri Representative Sam Graves expressed, “I believe that we are asking the Corps of Engineers to juggle too many priorities We must make clear once and for all that the prevention of flooding has to be the number one priority.” *Graves: Flood Control Should be Top Priority*, CONGRESSMAN SAM GRAVES (Nov. 30, 2011), <http://graves.house.gov/index.cfm?sectionid=25&itemid=197>. Governors from seven basin states and senior staff of the Wyoming Governor; called for an independent review of how the Corps operated the System during the 2011 flood. John P. Tretbar, *Missouri River Governors Call for Congressional Flood Probe*, ST. JOSEPH POST (Oct. 17, 2011), <http://www.stjosephpost.com/2011/10/17/missouri-river-governors-call-for-congressional-flood-probe/>. Regarding the perceived failure of the Corps to take into account rising snowpack levels in managing water stored in the large reservoirs in 2011, Missouri Senator Brad Lager described the Corps’ actions as “border[ing] on the criminal.” Dave Helling & Scott Canon, *As Missouri Floods, Anger Spills Over at Army Corps*, MORNING CALL (July 4, 2011), <http://www.mcall.com/news/aan-1a.07-04-11.missflood-20110704,0,5730126.story?page=2>.

4. Act of Dec. 22, 1944 (Flood Control Act of 1944), ch. 665, 58 Stat. 887 (codified at 16 U.S.C. § 460d (2006) and scattered sections of Titles 33 and 43 U.S.C.). Section 9 of the Flood Control Act of 1944 authorizes the Corps to operate the System for flood control, navigation, irrigation, power, water supply, water quality control, recreation, and fish and wildlife. *Id.* § 9. In consultation with Tribes and States, the Corps developed a Master Water Control Manual (Master Manual) to achieve integrated operation across six mainstream reservoirs and other federal tributary reservoirs. NW. DIV., U.S. ARMY CORPS OF ENG’RS, MISSOURI RIVER MASTER WATER CONTROL MANUAL I-1 (Mar. 1, 2006) [hereinafter MASTER MANUAL], available at <http://www.nwd-mr.usace.army.mil/rcc/reports/mmanual/MasterManual.pdf>.

5. *Gibbs Holds Hearing to Examine 2011 Missouri River Flood*, TRANSP. AND INFRASTRUCTURE COMM. (Nov. 30, 2011), <http://transportation.house.gov/News/PRArticle.aspx?NewsID=1466;157> CONG. REC. D1292 (daily ed. Nov. 30, 2011).

6. States, via local levee sponsors, operate and maintain one hundred percent of all MRB levees. E-mail from Michael L. Beaird, Reg’l Emergency Manager, Nw. Div., U.S. Army Corps of Eng’rs, to author (Dec. 5, 2011, 10:14 PST) (on file with author) (including both federally and privately constructed flood control works).

7. In a speech at the University of Nebraska-Lincoln on December 12, 2011, former Nebraska Senator and Governor Bob Kerrey argued that a MRB compact would provide a better way to manage the river. *Kerrey: More Local Authority Needed over Missouri River Basin*, UNIV. OF NEB.-LINCOLN, INST. OF AGRIC. AND NAT. RESOURCES (Dec. 13, 2011), <http://ianrnews.unl.edu/static/1112130.shtml>. In early August 2011, North Dakota Governor Jack Dalrymple also argued that MRB States, through forming a compact, could better manage the Missouri River than the Corps. *Dalrymple: Take Missouri River Management Away from Corps*, BISMARCK TRIB. (Aug. 19, 2011), <http://bismarcktribune.com/news/state-and-regional/dalrymple->

At present the Corps serves as a de facto river master,⁸ exercising considerable authority in managing the System pursuant to the Flood Control Act of 1944.⁹ Thus, any solution that grants States increased authority to manage MRB water resources necessarily divests the Federal government of some amount of managerial authority. In such an arrangement, States will inevitably wade into areas of federal jurisdiction, including flood control,¹⁰ navigation,¹¹ and national security.¹² Given this danger, Congress will evaluate whether any proposed compact threatens such federal interests¹³ and, if it consents to establishing a commission charged with implementing the compact, whether a federal commissioner could protect these interests.

Tribal leaders also argue the Corps is operating the System in a way that threatens Indian reserved water rights.¹⁴ The great weight of such present-perfected¹⁵ – but not yet quantified¹⁶ – reserved rights stymies the development of water resources given the potential for insufficient supply

take-missouri-river-management-away-from-corps/article_a413d14e-ca80-11e0-ad97-001cc4c002e0.html#ixzz1iLK87RVJ.

8. COMM. ON MO. RIVER ECOSYSTEM SCI., NAT'L RESEARCH COUNCIL, THE MISSOURI RIVER ECOSYSTEM: EXPLORING THE PROSPECTS FOR RECOVERY 35 (2002) [hereinafter MR ECOSYSTEM].

9. Flood Control Act of 1944 § 9; *see also* South Dakota v. Ubbelohde, 330 F.3d. 1014, 1027 (8th Cir. 2003) (“The Flood Control Act clearly gives a good deal of discretion to the Corps in the management of the River.”); ETSI Pipeline Project v. Missouri, 484 U.S. 495, 505 (1988) (holding that the six mainstem reservoirs are under the control of the Corps such that even the “Interior Secretary’s authority is subordinate to that of the Army Secretary”) (citing Act of Dec. 22, 1944 (Flood Control Act of 1944), ch. 665, § 4-6,8, 58 Stat. 887, 889-91).

10. *See infra* Part III.A. Beyond the six mainstem reservoirs, the Corps also owns, operates, and maintains forty-four MRB reservoirs from its Kansas City and Omaha District offices. WILLIAM K. JOHNSON & RICHARD J. DIBUONO, PR-19, U.S. ARMY CORPS OF ENG'RS, AUTHORIZED AND OPERATING PURPOSES OF CORPS OF ENGINEERS RESERVOIRS 1, app. D at D-1 to D-2 (1994) (including those dam and reservoir, or lock and dam projects “for which water control management is routinely required to control either water level, flow, or both”).

11. *See infra* Part III.B.

12. *See infra* Part III.C.

13. *See infra* notes 46-47 and accompanying text.

14. Charles Carvell, *Indian Reserved Water Rights: Impending Conflict or Coming Rapprochement Between the State of North Dakota and North Dakota Indian Tribes*, 85 N.D. L. REV. 1, 38 (2009) (observing the Corps “is regularly criticized for managing the river in a way that disregards, if not undermines tribal water rights”).

15. Reserved water rights are considered present-perfected because, unlike rights perfected under state law in a prior appropriation jurisdiction, they need not be applied to beneficial use before the right is considered certified under state law. *See* Arizona v. California, 373 U.S. 546, 600 (1963); William Douglas Back & Jeffery S. Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River?*, 20 NAT. RESOURCES J. 71, 77 n.32 (1980); JOHN W. JOHNSON, UNITED STATES WATER LAW: AN INTRODUCTION 45 (2008); *see, e.g.*, NEV. REV. STAT § 533.030 (2011).

16. *See* Carvell, *supra* note 14, at 3.

in relation to other established uses.¹⁷ Under the practicably irrigable acreage standard announced by the United States Supreme Court in *Arizona v. California*,¹⁸ rough estimates indicate that the total amount of outstanding reserved water rights is greater than the total available flow of the Missouri River.¹⁹ Although the authors of the Model Interstate Water Compact (Model Compact) suggest Tribes should not join a compact until after their rights are quantified,²⁰ this approach contributes to uncertainty, and consequently undermines water rights under state law.²¹ While difficult to envision in the wake of the recent 500-year flood, multiple factors may ultimately reduce surface water supplies and, consequently, threaten Indian reserved rights: downstream States argue for reduced reservoir volumes to accommodate spring runoff in the face of increased precipitation variability;²² oil and gas developers seek access to System water for oil and gas development;²³ and the ever present threat of transbasin diversions may also reduce supplies.²⁴ Because preserving reserved rights is intertwined with protecting tribal sovereignty,²⁵ compact drafters should reach out to their sister sovereigns and accommodate tribal participation in any compact commission authorized to make decisions affecting water availability.²⁶ In

17. *Id.* at 50; *see also* *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) (noting that “open-ended water rights are a growing source of conflict and uncertainty in the West” and that until they are settled “state-created water rights cannot be relied on by property owners” (citations omitted)); N.D. STATE WATER COMM’N, 1983 STATE WATER PLAN, I-43 (stating that “reserved water rights create uncertainty” and, consequently, “water rights under State law cannot be guaranteed”); FINAL ENVIRONMENTAL IMPACT STATEMENT, RED RIVER VALLEY WATER SUPPLY PROJECT, app. J at 16-17, *available at* <http://www.rivwsp.com> (finding that quantification could affect Corps’ operations and the amount of water available to holders of prior appropriative water rights under state law).

18. 460 U.S. 605, 617 (1983); *see also infra* note 111 and accompanying text.

19. Peter Capossela, *Indian Reserved Water Rights in the Missouri River Basin*, 6 GREAT PLAINS NAT. RESOURCES J. 131, 159 (2002) (citing ROY MCCALLISTER, U.S. ARMY CORPS OF ENG’RS, NW. DIV., TREND DATA FOR THE USES AND RESOURCES OF THE MISSOURI RIVER MAINSTEM RESERVOIR SYSTEM (1999)).

20. JEROME C. MUYS ET AL., MODEL INTERSTATE WATER COMPACT 27 (2009) [hereinafter MODEL COMPACT].

21. *See infra* notes 13 and accompanying text.

22. Algis J. Laukaitis, *Governors Along Missouri Ask for Lower Lake Levels*, JOURNAL STAR (Oct. 17, 2011), http://journalstar.com/news/state-and-regional/nebraska/article_1ca13260-9865-5943-be4e-d4dd2b829259.html.

23. *See infra* note 58 and accompanying text.

24. *See infra* note 57 and accompanying text.

25. Rebecca Tsosie, *Tribal Sovereignty and Intergovernmental Cooperation*, in TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS 13, 33 (John E. Thorson et al. eds., 2006).

26. Negotiated settlement of conflicting claims to Indian rights is preferable to litigation. *Id.* at 22, 25 (noting Congress adopted such an approach in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (2006)). Stakeholders recognize that federalism is “better understood as a horizontal relationship among national, state, and tribal governments, each exercising its inherent or delegated sovereign powers.” *Id.* at 31.

addition, it is unrealistic to expect a federal commissioner to adequately represent tribal interests in reserved water rights given the Federal government's conflicting interest in operating the System for other competing uses.²⁷ Finally, because the compact device provides each sovereign with a means to quantify water rights through negotiation – or elect to charge the compact commission with quantifying – it is essential that Tribes be invited to participate in any compact negotiation.²⁸

In spite of the state-centric nature of the compact device,²⁹ with the requisite tweaks, a MRB compact has the potential to accommodate each sovereign's competing interests in water resources. Though a tripartite “federal-interstate-tribal” compact constitutes a departure from the “federal-interstate” approach, whereby a federal representative participates on an operationally charged compact commission,³⁰ there do not exist any express constitutional hurdles to States compacting with Tribes or with the Federal government.³¹ But it must be noted that the character of tribal-state compacts differs from federal-interstate compacts.³² Whereas authority to enter federal-interstate compacts springs from the Compact Clause,³³ authority to enter tribal-state compacts arises from the organic law

27. See *infra* notes 217-23 and accompanying text.

28. See *infra* notes 61-62 and accompanying text. The author concedes that some tribal members would prefer to litigate natural resources disputes because they believe that negotiating a compact has the potential to undermine tribal sovereignty, vis-à-vis state sovereignty, and compromise reserved water rights. Tsosie, *supra* note 25, at 33. But see Letter from Lawrin Hugh Baker, Chairman, Nat. Res. Comm., Three Affiliated Tribes, to Joe Christie, Deputy to the Asst. Sec'y for Indian Affairs (June 19, 1989) (“[T]he Tribes and the State both feel that mutually acceptable water management is preferable to adjudication”) (quoted in Charles Carvell, *Indian Reserved Water Rights: Impending Conflict or Coming Rapprochement Between the State of North Dakota and North Dakotan Indian Tribes*, 85 N.D. L. REV. 1, 46 n.334 (2009)).

29. Of all the mechanisms available under the Constitution to manage interstate relations in “supra-state” or “sub-federal” issues, the interstate compact is the most state-centric. CAROLINE N. BROUN, ET AL., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS 2* (2006) (listing mechanisms including regulation available under the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1; Congress' control over interstate commerce, U.S. CONST. art. I, § 8; Federal preemption doctrine and the Supremacy Clause, U.S. CONST. art. IV, § 2; and the United States Supreme Court's power to exercise original jurisdiction over interstate disputes, U.S. CONST. art. III, § 2).

30. See JEROME C. MUYS, *INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT 388* (Nat'l Water Comm'n ed., 1971).

31. Examples of Tribes and States compacting exist in areas spanning tax collection and cross-deputization, to detention of prisoners. Tsosie, *supra* note 25, at 32; see, e.g., State of Montana-Fort Belknap Indian Community of the Fort Belknap Reservation-United States Water Rights Compact. MONT. CODE ANN. § 85-20-1001 (2011); see also John H. Davidson, *Indian Water Rights, the Missouri River, and the Administrative Process: What Are the Questions?*, 24 AM. INDIAN L. REV. 1, 5 (2000) (noting States, Tribes, and Congress may settle issues by compact).

32. See Tsosie, *supra* note 25, at 32; see, e.g., Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961) (compacting States include Delaware, New Jersey, New York, and Pennsylvania) [hereinafter Delaware Compact].

33. U.S. CONST., art. I, § 10, cl. 3.

undergirding each sovereign, the treaty context, and the federal trust responsibility.³⁴ Therefore, while the federal system controls federal-state interplay, and the federal trust responsibility controls federal-tribal interplay, the compact device bridges the gap separating the familiar federal system from the unique tribal context. As applied, an inter-sovereign approach transforms the compact device into a tool that separate sovereigns might use to manage shared MRB resources.³⁵

The question then becomes whether the federal and tribal interests implicated in a new inter-sovereign arrangement warrant equal representation among federal, state, and tribal representatives to any operationally charged compact commission. In describing how the compact model balances power among sovereigns, Part II of this Article acknowledges the efficacy of a “federal-interstate” approach – what is, essentially, a second-generation (or ‘version 2.0’) water resources management scheme – and explores how the Federal government might safeguard its interests in any resultant compact commission. Part II also acknowledges the need for compact drafters to allocate MRB waters among sovereigns in the face of increasing consumptive uses and variability in precipitation events. Part III analyzes the Federal government’s interests in flood control and navigation in the face of reduced commercial shipping, and the emerging link between agricultural production and national security. Part IV explores the need for tribal participation on any compact commission in light of outstanding Indian reserved water rights, and asserts that tribal sovereignty itself implies joint responsibility in water resources management decisions. The Article concludes that federal interests in flood control, navigation, and national security call for equal federal participation and tribal interests in reserved water rights and tribal sovereignty require equal tribal participation.

II. A TWENTY-FIRST CENTURY WATER COMPACT FOR THE MISSOURI RIVER BASIN

Owing to its adaptability to regional nuances, an inter-sovereign compact would provide a viable means to protect each sovereign’s interests

34. See Tsosie, *supra* note 25, at 32.

35. The author is mindful of the success of the Missouri River Association of States and Tribes (MoRAST) in representing the interests of the States and Tribes in the MRB, but believes the compact device – specifically, the administrative entity charged with implementing the terms of a water compact – better accommodates each sovereign’s particular interests in managing water resources. See MISSOURI RIVER ASSOCIATION OF STATES AND TRIBES, <http://mo-rast.org/> (last visited Dec. 5, 2012).

in the development of MRB water resources.³⁶ As a negotiated agreement among signatories, compacts serve as both contract and statutory law and provide a means for States to address supra-state or sub-national problems³⁷ without directly encroaching on federal jurisdiction.³⁸ Because the Constitution conditions States' ability to compact on Congress' consent, the United States has oversight over the final negotiated agreement.³⁹ Although consent transforms the compact into federal law, consent does not ultimately transform a compact commission into a federal agency.⁴⁰ Accordingly, courts treat commissions "not as creatures of the federal government but rather creatures of the member states."⁴¹ The United States Supreme Court has expressed its preference for using compacts, rather than litigation, to solve interstate disputes.⁴² As a practical matter, the compact device presents a more realistic solution since the Court is unlikely to accept jurisdiction over a claim to equitably allocate MRB waters in the

36. See Jerome C. Muys, *Allocation and Management of Interstate Water Resources: The Emergence of the Federal-Interstate Compact*, 6 DENV. J. INT'L L. & POL'Y 307, 314 (1976).

37. See Marguerite Ann Chapman, *Where East Meets West in Water Law: The Formulation of an Interstate Compact to Address the Diverse Problems of the Red River Basin*, 38 OKLA. L. REV 1, 99-100 n.621 (1985) (discussing the employ of interstate compact commissions to address water quality problems that swell beyond the political geography of any one state).

38. BROUN ET AL., *supra* note 29, at 2-3. Also, because courts construe compacts as contracts, States may not pass subsequent legislation that encumbers or impairs compact obligations. Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 YALE L. & POL'Y REV. 163, 167 n.37 (2005).

39. U.S. CONST. art. I, § 10, cl. 3. In practice, forming a compact involves three steps: (1) Congress passes an act to authorize negotiations and often appoints a federal representative; (2) representatives of participating States engage in negotiations, culminating in a draft compact; (3) Congress consents to and legislatively approves the negotiated compact. C. Carter, *Water Rights in Interstate Streams*, in 2 WATER AND WATER RIGHTS, A TREATISE ON THE LAW OF WATER AND ALLIED PROBLEMS § 133.2 (R. Clark ed., 1967).

40. BROUN ET AL., *supra* note 29, at 68. It is the individual terms and conditions that determine which federal laws the commission must comply with. *Id.* The character of the operational decisions of any MRB compact commission, especially in the context of complying with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (2006), or immunity from takings claims under the Fifth Amendment, begs further analysis.

41. BROUN ET AL., *supra* note 29, at 69-70.

42. *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945) ("Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause . . . such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power."); *New York v. New Jersey*, 256 U.S. 296, 313 (1921) (describing the prudence of a compact to address pollution in New York Bay, "[such a problem] is one more likely to be wisely solved by co-operative study and by conference and mutual concession . . . than by proceedings in any court, however constituted"); see also Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 YALE L. J. 685, 707 (1925) ("[T]he Supreme Court has recognized its own inadequacy to give relief. Continuous and creative administration is needed; not litigation, necessarily a sporadic process, securing at best merely episodic and mutilated settlements, which leave the central problems for adjustment unsolved.").

absence of greater development of water resources.⁴³ While compacts take many forms,⁴⁴ two eastern compacts stand apart and establish a comprehensive managerial regime: the Delaware River Basin Compact (DRBC),⁴⁵ and the Susquehanna River Basin Compact (SRBC).⁴⁶ These compacts employ the “federal-interstate” approach, whereby a representative of the Federal government serves as a voting member of the commission charged with implementing and enforcing the compact.

A. RESERVING A BROAD ROLE FOR THE FEDERAL GOVERNMENT ON A MRB COMPACT COMMISSION

Despite the potential for state and tribal encroachment into areas of federal jurisdiction,⁴⁷ a compact, like the DRBC, that centralizes authority in a regional compact commission provides effective water resources management.⁴⁸ For example, the DRBC commission’s operational mandate

43. Since the Court requires that there exist an actual controversy among states before it exercises its original jurisdiction under 28 U.S.C. § 1251 (2006), the burden would be on downstream states to demonstrate that upstream consumptive uses have harmed their interests in developing water resources to such a degree as to constitute injury. Gene Olson, *The O’Mahoney-Milliken Amendments: The West Sinks the Navigation Power*, 65 N.D. L. REV. 91, 93-95 (1989). In twice denying South Dakota’s filing of an original action against lower MRB States, one commenter posited that the Court found no active controversy existed. *Id.* at 93-94 (citing *South Dakota v. Nebraska*, 475 U.S. 1093 (1986); *South Dakota v. Nebraska*, 108 S. Ct. 1071 (1988)). Speaking of the “chicken-or-the-egg” dilemma, former South Dakota Governor William Janklow described how private developers are hesitant to invest in water resources projects if the availability of water is uncertain. *Id.* at 95. “Consequently . . . it is unlikely that any state will allow an interstate water conflict to ripen to the point where the state can show by clear and convincing evidence that it is suffering real and substantial injury or harm.” George William Sherk, *Equitable Apportionment After Vermejo: The Demise of a Doctrine*, 29 NAT. RESOURCES J. 565, 578 (1989).

44. The American Society of Civil Engineers (ASCE) classifies compacts as Coordination and Cooperation, Limited Purpose, and Comprehensive Management. AM. SOC’Y OF CIVIL ENGR’RS, MODEL WATER SHARING AGREEMENTS FOR THE TWENTY-FIRST CENTURY 4, 41, 84 (Stephen E. Draper ed., 2002). The type of compact is contingent on the location of parties to the compact and when the compact was formed. Joseph W. Dellapenna, *Interstate Struggles Over Rivers: The Southeastern States and the Struggle Over the ‘Hooch*, 12 N.Y.U. ENVTL. L.J. 828, 836 (2005).

45. Delaware Compact, *supra* note 32. The 1961 compact was preceded by a less comprehensive compact. *See* Delaware River Basin Commission Compact, Pub. L. No. 82-573, 66 Stat. 738 (1952).

46. Susquehanna River Basin Compact, Pub. L. No. 91-575, 84 Stat. 1509 (1970) [hereinafter *Susquehanna Compact*].

47. *See supra* Part I.

48. State and federal DRBC commissioners expressed satisfaction and enthusiasm for the actions of the commission. MUYS, *supra* note 30, at 189-90. The federal commissioner reported “he felt ‘very strongly that a Federal-Interstate organization patterned after the Delaware can accomplish coordinated and comprehensive river basin development better than an interstate compact organization’” *Id.* at 199 (quoting Letter from U.S. Comm’r Paul M. Van Wegen to Hon. James R. Smith, Asst. Sec’y for Water and Power Dev., Dep’t of the Interior 1 (Jan. 29, 1970)). “As to the federal-interstate compact approach, it was, and is, my enthusiastic conclusion

is shared across federal and state commissioners.⁴⁹ Federal participation is useful in the DRB where the Corps owns and operates projects to protect communities from flooding, provide water supply, and enhance water quality and recreation.⁵⁰ Indeed, the “heart” of the DRBC and SRBC is the notion of centralizing authority at the regional level, where control of federal projects is vested in the commission – in which the federal representative has only one vote of five.⁵¹ In contrast, the Corps’ more expansive role in operating the Missouri River Mainstem System⁵² suggests the federal representative to a MRB compact commission should be entitled relatively greater voting strength. Regarding the DRBC, the United States only consented to the subordination of federal projects to the commission’s comprehensive plan after compact drafters inserted a reservation safeguarding the Federal government’s broader interests.⁵³ Therefore, Congress’ consent to a draft MRB compact is likely contingent on the inclusion of a similar reservation of federal authority that safeguards broader interests in flood control, navigation, and national security.

that the . . . [DRBC Commission] has compiled an impressive record.” Muys, *supra* note 36, at 313.

49. See generally Delaware Compact, *supra* note 32.

50. U.S. ARMY CORPS OF ENG’RS, PHILA. DIST., N. AK. DIV., <http://www.nap.usace.army.mil/Missions/CivilWorks.aspx> (last visited Dec. 30, 2012). Following the 1955 floods, the Corps Constructed – and now operates – five dams in eastern Pennsylvania. *Id.* The commission, “as agent for the states . . . acquire[s] the right to use and to control water supply facilities associated with federal projects authorized in the Comprehensive Plan.” MUYS, *supra* note 30, at 171 (describing the policy as applied to the Tocks Island, Blue Marsh, and Trexler projects).

51. MODEL COMPACT, *supra* note 20, at 208-09. See Delaware Compact, *supra* note 32, §§ 3.8, 11.1(b) (providing that the commission is authorized to review all projects having a “substantial effect on the water resources of the basin” for inclusion in the “comprehensive plan”; and the prohibition, relating to federal, state, and local projects, that “no expenditure or commitment shall be made for or on account of the construction, acquisition or operation of any project or facility nor shall it be deemed authorized, unless it shall have first been included . . . in the comprehensive plan”).

52. See MR ECOSYSTEM, *supra* note 8, at 35.

53. MODEL COMPACT, *supra* note 20, at 154, 209 (describing the reservation at section 15.1(s), DRBC, as an “escape valve”). A member of the Federal Water Resources Council summarized this arrangement:

[P]owers of Federal agencies under other existing or future law are not limited by the compact except that such agencies are required to coordinate their comprehensive planning through the commission and . . . they may not exercise powers conferred under other law in a manner which substantially conflicts with a comprehensive plan concurred in by the Federal member.

Id. at 211 (citing *Hearings on a Susquehanna River Basin Compact before Subcomm. No. 3 of the H. Judiciary Comm.*, 91st Cong., 1st Sess. 102, 157 (1970)).

B. SAFEGUARDING FEDERAL INTERESTS PRIOR TO AND POST MRB COMPACT RATIFICATION

Assuming MRB compact drafters settle on a framework that divests the Federal government of some amount of authority under the Flood Control Act of 1944, the Federal government remains free to protect its interests prior to and post ratification of the compact. First, Congress will carefully evaluate the balance of power among sovereigns⁵⁴ to ensure that drafters include sufficient safeguards to protect federal interests implicated in operating the System.⁵⁵ This act of preserving federal authority is somewhat similar to the Indian treaty context whereby treaties are construed as preserving tribal authority, but for those rights granted to the United States. In entering treaties, the United States effects a grant of rights *from* the Tribes such that Tribes retain control of those rights not granted.⁵⁶ Therefore, in a sense, congressional consent calls attention to States' and Tribes' inherent sovereignty and capacity for self-government.

Yet, Congress' limited power to *consent* under the Compact Clause may be distinguished from its plenary power to *regulate* under the Commerce Clause, post compact ratification. In *Tobin v. United States*⁵⁷ the United States Court of Appeals for the D.C. Circuit held consent does not render an operational compact immune from subsequent congressional supervision or constitutional constraints.⁵⁸ Citing Congress' plenary powers in interstate commerce and national security, the court concluded it has "abundant authority to supervise and regulate the activities of

54. *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893) (holding that congressional consent is required for those compacts that might affect the distribution of political power between the States and Federal government); *see also* U.S. CONST. art. I, § 10 ("No State shall, without the Consent of Congress . . . enter into any . . . Compact with another State . . ."). The Executive also retains veto power over any legislative agreements that may jeopardize federal prerogatives. For example, President Franklin Roosevelt vetoed an act granting consent to the Republican River Compact because he believed the compact sought to "withdraw the jurisdiction of the United States over the waters of the Republican Basin for purposes of navigation, and . . . to restrict the authority of the United States to construct irrigation works and to appropriate water for irrigation purposes in the basin." 88 CONG. REC. 3286 (1942).

55. Under the *Virginia v. Tennessee* standard, a MRB compact will require consent given the extensive federal projects and interests at issue in the basin; *see* Jerome C. Muys, *Interstate Compacts and Regional Water Resources Planning and Management*, 6 NAT. RESOURCES L. 153, 174 (1973) ("[T]here is a very strong presumption that any compact or agreement dealing with water resources is subject to the consent requirements of the compact clause.").

56. In *United States v. Winans*, the Court referred indirectly to a larger group of retained rights, including the right to take fish at all usual and accustomed places, and how the treaty effected a grant of rights from the Indians – such that those rights not granted were reserved. 198 U.S. 371, 381 (1905).

57. 306 F.2d 270 (1962), *cert. denied*, 371 U.S. 902 (1962).

58. *Tobin*, 306 F.2d at 273.

operational compacts” to protect “more compelling federal concerns.”⁵⁹ Therefore, if Congress consents to a MRB compact that establishes an operationally charged commission, Congress retains Commerce Clause power to protect its interests – such power would, in turn, serve as a backstop to greater state control of federal projects.⁶⁰

C. A POTENTIAL FOR SCARCITY REQUIRES THAT THE COMPACT ALLOCATE WATERS AMONG SOVEREIGNS

The hallmark of the compact device is its ability to address region-specific challenges.⁶¹ And, true to the vision of John Wesley Powell,⁶² the wisdom of managing water resources on a drainage basin-scale, impervious to state jurisdictions, has withstood the test of time.⁶³ Yet the greatest obstacle to forming a MRB compact is reconciling the consumptive uses of agriculture and industry in the upper arid basin, with the need to regulate water for navigation and flood control to benefit the more humid lower basin.⁶⁴ Developers envision large municipal projects to divert water to eastern North Dakota, southeastern and western South Dakota,

59. *Id.*

60. This is not to say that Congress’ plenary power subsumes that aspect of state sovereignty exercised in implementing compact purposes. See Kevin J. Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 ST. JOHN’S L. REV. 1, 23 (1985) (quoting *NAACP v. Thompson*, 357 F.2d 831, 832-33 (5th Cir. 1966) (“[T]he sovereignty of the States, within the boundaries reserved to them by the Constitution, is one of the keystones upon which our government was founded and is of vital importance to its preservation.”)).

61. See Muys, *supra* note 36, at 314.

62. Donald Worster, *Watershed Democracy: Recovering the Lost Vision of John Wesley Powell*, 23 J. LAND RESOURCES & ENVTL. L. 57, 58 (2003).

63. See Janet Neuman, *Are We There Yet? Weary Travelers on the Long Road to Water Policy Reform*, 50 NAT. RESOURCES J. 139, 142-46 (2010) (chronicling various federal commission recommendations from 1949 to 1998, each embracing a river basin commission approach).

64. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 499-500 (1988). Managing the System boils down to trade-offs. Observers note the “direct conflict between flood control and navigation”: if the Corps were to evacuate more water from its system for flood control, it would reduce that amount available for downstream barge operators and municipal water systems. Helling & Canon, *supra* note 3 (quoting David Pope, Exec. Dir. of the Mo. River Ass’n of States and Tribes (MoRAST)). The Executive Director of MoRAST cautioned that reducing the amount of water stored for flood protection purposes would also adversely affect fishing guides and motels dependent on the recreational fishing industry that relies on full reservoirs later in the year: “You just make a bigger flood pool and have less water in the storage, for all the other uses Those are really direct tradeoffs, and you can’t have it both ways.” *Id.* In response to the perception that the Corps’ support of fish and wildlife, an express purpose under the Flood Control Act of 1944, exacerbated flood damage, Missouri Representative Sam Graves introduced H.R. 2993 to prioritize flood control above all other system purposes, and remove fish and wildlife as an authorized purpose. H.R. 2993, 112th Cong. § 1 (2011). See also *South Dakota v. Ubbelohde*, 330 F.3d. 1014, 1027 (8th Cir. 2003) (explaining that the Flood Control Act of 1944, 58 Stat. 887, does not provide a metric to determine whether the Corps “correctly” balanced the dominant functions of flood control and navigation against secondary purposes).

northwestern Iowa, and southwestern Minnesota.⁶⁵ States⁶⁶ and Tribes⁶⁷ seek access to System water for use in hydraulic fracturing (“fracking”) to develop oil and gas reserves in the prolific Bakken shale and Three Forks formations in western North Dakota. Agricultural researchers recognize the potential for downstream lands to produce biomass crops that would stimulate local economies and reduce the nation’s dependence on fossil fuels.⁶⁸ Fortunately, MRB compact drafters maintain the flexibility to quantify, negotiate, and ratify each sovereign’s rights to water by means of

65. Seth Tupper, *Water Fight Brewing in South Dakota*, DAILY REPUBLIC (Dec. 15, 2007), <http://www.moafs.org/newsletter/April2008/water%20fight.htm> (forecasting consumptive uses including: greater irrigation attributed to increased corn production in response to sky-rocketing ethanol prices; the development of significant diversion projects including the Lewis and Clark Regional Water System, Red River Valley Water Supply Project, the Mni Wiconi Rural Water System; and the Hyperion oil refinery at Elk Point, South Dakota which is forecasted to consume up to 12 million gallons of water per day).

66. See S. Con. Res. 4002, 62d Legis. Assemb., Reg. Sess. (N.D. 2011) (urging the Corps to cede land that is riparian to the mainstem to North Dakota to improve access to water resources for use in hydraulic fracturing); H.R. 1216, 62d Leg. Assemb., Reg. Sess. (N.D. 2011) (enacted) (designating the use of hydraulic fracturing as “an acceptable recovery process”).

67. For example, the Missouri River Resources tribal energy company desires to capitalize on hydraulic fracturing techniques to develop 500,000 billion barrels (Bbl) of oil and natural gas reserves beneath tribal and allottee lands on the Fort Berthold Reservation, within the greater Bakken/Three Forks oil bearing formation. MO. RIVER RES., 2010 BUSINESS PLAN 5 (2010), http://www.missouririverresources.com/files/MRR_Business_Plan.pdf. But see James MacPherson, *Turtle Mountain Band of Chippewa Bans Hydraulic Fracturing on Reservation*, BISMARCK TRIB., Dec. 2, 2011, (describing a unanimous vote by the tribal council to ban hydraulic fracturing on reservation land in advance of the U.S. Bureau of Indian Affairs’ (BIA) auction of leasing rights).

68. Megan Cassidy, *MU Professor Helps to Plant Seeds for an Advanced Biofuel Economy*, MISSOURIAN (July 29, 2011), <http://www.columbiamissourian.com/stories/2011/07/28/biofuel-corridor/> (describing a plan by Shibu Jose, Director of Missouri University’s Center for Agroforestry, to “create a corridor of sustainable biomass and biofuel production” in the Missouri River floodplain); Frank M. Howell et al., *Spatial Contours of Potential Biomass Crop Production: An Examination of Variations by U.S. Region*, 25 J. OF RURAL SOC. SCI. 1, 4-5 (2010) (identifying the North and South Plains as “lucrative” regions for switchgrass, and referencing the Midwestern region’s potential for producing the “largest gross biomass yields”); 152 CONG. REC. H18 (daily ed. Jan. 31, 2006) (statement of Pres. George W. Bush) (outlining the President’s goal of producing ethanol from switchgrass to reduce the nation’s dependence on Middle Eastern oil); 153 CONG. REC. H882 (daily ed. Jan. 23, 2007) (statement of Pres. George W. Bush) (highlighting the President’s continued goal to produce ethanol from grasses). See also Barton H. Thompson, Jr., *A Federal Act to Promote Integrated Water Management: Is the CZMA a Useful Model?*, 42 ENVTL. L. 201, 223 (2012) (noting achievement of these energy goals is dependent on “adequate and sustainable” water supplies); see also MASTER MANUAL, *supra* note 4, at IV-29 (illustrating that since only one-fifth of irrigable land is developed, the MRB can expect increased water use in the future).

the compact itself;⁶⁹ or, punt the issue of negotiating water rights to the respective compact commission.⁷⁰

Addressing allocation within the compact framework is also crucial in the face of increasing variability in precipitation events. In evacuating water from System reservoirs for flood control during the fall, System operators would need to keep tabs on the amount remaining and available to satisfy each sovereign's water rights during the summer.⁷¹ Such an approach would mitigate the uncertainty that each sovereign's consumptive and non-consumptive uses might not be met during droughts.⁷² The epic flood of 2011 was indicative of a new climatological "normal" that features increased fluctuation of wet and dry periods and increased intensity in precipitation events.⁷³ This increased variability, and climate change's role in more intense precipitation events,⁷⁴ illustrates the need for a flexible

69. For example, the State of Montana, the Fort Belknap Indian Community of the Fort Belknap Reservation, and the United States entered into a compact to settle water rights claims of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation. MONT. CODE ANN. § 85-20-1001 (2011).

70. Excluding those water rights previously adjudicated by the Supreme Court, DRBC drafters ultimately charged the compact commission with "work[ing] out" any permanent consumptive use allocations among signatory States. MUYS, *supra* note 30, at 330.

71. The author hypothesizes that once amounts are allocated among sovereigns, the Corps' Missouri River Basin Water Management Division could reserve such amounts in the "Carryover Multiple Use" zone when preparing reservoir-specific annual operating plans (AOPs). See U.S. ARMY CORPS OF ENG'RS, GARRISON DAM/LAKE SAKAKAWEA PROJECT NORTH DAKOTA SURPLUS WATER REPORT 2-6 to 2-8 (2010) [hereinafter SURPLUS WATER REPORT]. While the engineering feasibility investigations designed to quantify System surplus water in the Garrison Dam / Lake Sakakawea Surplus Water Report show it's possible to earmark surplus water for municipal and industrial (M&I) uses, this Article does not evaluate whether Section 6 of the Flood Control Act of 1944 or the Water Supply Act of 1958 (Title III of Public Law 85-500—the 1958 River and Harbor Act) authorizes the Corps to reserve waters for specific States or Tribes. See Memorandum from Jo-Ellen Darcy, Asst. Sec'y of the Army of Civil Works, to the Dir. of Civil Works 1-2 (May 8, 2012), available at [http://www.nwo.usace.army.mil/html/pd-p/Plan_Formulation/Review/ASA\(CW\)_Memorandum_Lake_Sakakawea_Surplus_Water_Report_08May12.pdf](http://www.nwo.usace.army.mil/html/pd-p/Plan_Formulation/Review/ASA(CW)_Memorandum_Lake_Sakakawea_Surplus_Water_Report_08May12.pdf).

72. The relative abundance of water associated with the 2011 flood draws attention away from the devastating effects of drought in the basin. For example, the drought of 1988 contributed to insufficient water depth and shoals that stranded barges below St Louis, Missouri. Stanley A. Changnon, *The 1988 Drought, Barges, and Diversion*, 70 BULL. OF THE AM. METEOROLOGICAL SOC'Y 1092, 1092-94 (1989); see also Manoj Jha, et al., *Impacts of Climate Change on Streamflow in the Upper Mississippi River Basin: A Regional Climate Model Perspective*, 109 J. OF GEOPHYSICAL RESEARCH 1, 1 (2004). Emblematic of present meteorological variability, the Great Flood of 1993 followed closely on the heels of the 1988 drought, costing the region eighteen billion dollars. *Id.*

73. The streamflow record indicates that the MRB is transitioning into a period with "more variability and extremes" with "larger outlier events." REVIEW OF THE REGULATION OF THE MISSOURI RIVER MAINSTEM RESERVOIR SYSTEM DURING THE FLOOD OF 2011, at 55 (2011), available at <http://www.nwd.usace.army.mil/docs/MRIndependentReviewPanel.pdf> (citing a 2011 written communication of David Garen, Natural Res. Conservation Serv.) [hereinafter INDEPENDENT PANEL].

74. In light of studies suggesting that climate change is contributing to heavy precipitation events, Tom Karl, Director of the National Climatic Data Center stated "[e]xtremes of

management paradigm. In summary, although the MRB presently suffers from the “paradox of conflict without scarcity,”⁷⁵ the potential for such scarcity requires that compact drafters address allocation.

III. FEDERAL INTERESTS CALLING FOR EQUAL PARTICIPATION ON THE COMMISSION

Should MRB stakeholders ultimately support a compact approach to manage water resources, the compact itself will need to accommodate federal interests in flood control, navigation, and national security. Federal courts have consistently held that the Federal government has a significant interest in operating its projects for flood control purposes.⁷⁶ Second, while anemic commercial shipping on the Missouri River might entitle MRB States to divest the Federal government of some operational functions, the Corps retains significant authority under the Commerce Clause and Flood Control Act of 1944 to manage the System for navigation purposes.⁷⁷ Finally, proper operation of the System itself is crucial to sustaining agricultural production that, in terms of food security, has the potential to impact the Federal government’s interest in national security.⁷⁸ For each of these reasons, it is imperative that any commission charged with administering a MRB compact includes a federal representative who can speak to these significant interests.

A. THE FEDERAL GOVERNMENT’S DOMINANT INTEREST IN FLOOD CONTROL

In their quest to divest the Corps of some amount of managerial authority, MRB States will inevitably wade into areas of federal responsibility for multipurpose projects involving flood control and navigation. The Eighth Circuit Court of Appeals held that the Flood Control Act of 1944 vests the lion’s share of responsibility for System

precipitation are generally increasing because the planet is actually warming, and more water is evaporating from the oceans.” David Kroodsma, *Track the Nation’s Rivers: Missouri River Floods and Southern Drought*, CLIMATE CENTRAL (June 20, 2011), <http://www.climatecentral.org/blogs/track-the-nations-rivers-floods-in-the-north-drought-in-the-south/>. Mr. Call concluded this pattern “allows snow and rain events ‘to become more extensive and intense’ [than they otherwise would be].” *Id.*

75. In charting MRB States’ inability to agree on a permanent allocation or management scheme, Professor Tarlock succinctly described the present “paradox of conflict over absolute abundance rather than scarcity.” A. Dan Tarlock, *The Missouri River: The Paradox of Conflict Without Scarcity*, 2 GREAT PLAINS NAT. RESOURCES J. 1, 1-2 (1997).

76. *See infra* Part III.A.

77. *See infra* Part III.B.

78. *See infra* Part III.C.

operation with the Corps.⁷⁹ The Corps' unenviable role of operating the System for multiple purposes can be traced to Congress' announcement of an integrated flood-control policy in the Flood Control Act of 1936.⁸⁰ This Act affirmed the notion that flood control was *principally* a federal activity but was executed "in cooperation with the States, their political subdivisions, and localities thereof."⁸¹ Congress expanded this policy of federal-state coordination in section 1 of the Flood Control Act of 1944 when it "recognize[d] the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control."⁸²

Today, MRB States can either pursue a frontal attack against this bulwark of federal control by championing a purely interstate compact whose charter might supersede the Flood Control Act of 1944, or launch a flanking attack by exploiting the 'state interests' seams in section 1 of the Act.⁸³ Regarding the latter method, States might argue section 1 of the Flood Control Act of 1944⁸⁴ evinces a congressional intent to broaden state authority, vis-à-vis federal authority, over flood control works. In terms of water resources development, Clifford H. Stone, past director of the Colorado Water Conservation Board, testified that section 1 "placed a real responsibility on the states."⁸⁵ And in the water rights context, the Corps has observed that section 1(b) of the Flood Control Act of 1944 protects and recognizes rights perfected under state law, such that the use of water for

79. See *In re Operation of the Mo. River Sys. Litig. v. U.S. Army Corps of Eng'rs*, 418 F.3d 915, 918-20 (8th Cir. 2005).

80. IRA G. CLARK, *WATER IN NEW MEXICO: A HISTORY OF ITS MANAGEMENT AND USE* 260 (1987); see also Act of June 22, 1936 (Flood Control Act of 1936), ch. 688, §§ 1-5, 49 Stat. 1570, 1570-72 (codified at 33 U.S.C. § 701(a)(2006)). Announcing "the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes" and "destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare." *Id.* § 1.

81. Flood Control Act of 1936 §1. The Act also established a policy of expanding local control by delegating the operation and maintenance of flood control works in exchange for federal funds. *Id.* § 3.

82. Act of Dec. 22, 1944 (Flood Control Act of 1944), ch. 665, § 1, 58 Stat. 887, 887-89. Acknowledging state interests was intended to quash a growing anti-federal sentiment that arose in response to greater federal control of water resources – whereby the Federal government under its Commerce Clause power was allegedly "stripping appropriative-doctrine [S]tates of their authority to administer unappropriated waters in the best interests of those [S]tates." CLARK, *supra* note 80, at 566-67. States also sought a "veto" power over any federal projects that they found objectionable. JOHN R. FERRELL, *BIG DAM ERA* 102 (1993).

83. See Flood Control Act of 1944 § 1.

84. *Id.*

85. FERRELL, *supra* note 82, at 101-02 (quoting statement of C.H. Stone, Dir., Co. Water Conservation Bd., to President's Mo. Basin Survey Comm. (MBSC), Nov. 17, 1952) (quotations omitted).

navigation is subordinate to the use of water for “beneficial consumptive uses” in western states.⁸⁶ Finally, in the planning context, the Act requires federal agencies to submit plans or proposals “to affected states for their views and recommendations.”⁸⁷ But by no means does the Flood Control Act of 1944 confer any power upon States to approve or disapprove federal projects.⁸⁸ It follows that to effect a rebalancing of power among sovereigns, States will need to rely on Congress to either (1) amend the Flood Control Act of 1944, or (2) consent to a compact that supersedes the Act.

Also, federal courts have consistently upheld the Federal government’s dominant interest in operating multipurpose projects for flood control.⁸⁹ For example, only four years after Congress passed the Flood Control Act of 1936, the Supreme Court concluded the Federal government’s authority over “flood protection” is “as broad as the needs of commerce.”⁹⁰ And the Court has held in instances when a federal flood control program is in conflict with a state program, “the latter must yield.”⁹¹ More recently, the Eighth Circuit Court of Appeals held the Corps enjoys significant discretion in operating the System in accordance with the Master Manual.⁹² In *In re Operation of the Missouri River System Litigation v. Corps (System Litigation)*⁹³ the Eighth Circuit held the Corps’ duty to balance the dominant purposes of flood protection and navigation against secondary purposes under the Flood Control Act of 1944 preempted North Dakota’s efforts to force the Corps to comply with state water quality standards.⁹⁴

86. U.S. ARMY CORPS OF ENG’RS, EP 1165-2-1, WATER RESOURCES POLICIES AND AUTHORITIES—DIGEST OF WATER RESOURCES POLICIES AND AUTHORITIES 18-7 (July 1999) (discussing the O’Mahony-Milliken Amendment to the Flood Control Act of 1944, H.R. 4485, 78th Cong., 2d Sess. (1944)).

87. Report of the Special Master re Winter Storage Motions at 348, *Kansas v. Colorado*, 533 U.S. 1 (2001) (No. 105, Orig.) (Sept. 15, 1989) (quoting Flood Control Act of 1944, ch. 665, § 1(a) and (c), 58 Stat. 887, 887-89).

88. *Id.*

89. See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426-27 (1940); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534-35 (1941); *In re Operation of the Mo. River Sys. Litig. v. U.S. Army Corps of Eng’rs*, 418 F.3d. 915, 918-20 (8th Cir. 2005).

90. *Appalachian Elec. Power Co.*, 311 U.S. at 427.

91. *Guy F. Atkinson Co.*, 313 U.S. at 534-35 (explaining that even if the federal dam and reservoir interferes with state water development and conservation, the “[state] program must bow before the superior power of Congress”) (internal quotation marks removed).

92. *In re Operation of the Mo. River Sys. Litig.*, 418 F.3d. at 918-20.

93. 418 F.3d. 915 (8th Cir. 2005).

94. *In re Operation of the Mo. River Sys. Litig.*, 418 F.3d. at 918-20. The court also held that the Clean Water Act’s “Navigation Exception,” at 33 U.S.C. § 1371(a), preserved the United States’ sovereign immunity in maintaining downstream navigation uses. *Id.* at 917-20. Of course, the Corps must still operate the System in accordance with the reasonable and prudent alternatives (RPAs) outlined in the 2003 amendments to the 2000 biological opinion, under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44 (2006). *Am. Rivers v. U.S. Army Corps of Eng’rs*, 271

Therefore, until Congress redistributes power via legislation or a compact, the Corps remains at the helm, serving as the de facto river master in operating the System for multiple purposes under the Flood Control Act of 1944.

B. AN ENTRENCHED NAVIGATION MANDATE, UNMINDFUL OF REDUCED COMMERCIAL SHIPPING

Before the Missouri River Bank Stabilization and Navigation Project⁹⁵ and the System transformed the river's braided channel geometry into a uniform 1,100-kilometer (km) channel,⁹⁶ historians considered steamboat navigation on the Missouri River to be more dangerous than on any other river.⁹⁷ Corps responsibility for navigation in the MRB began with the Rivers and Harbors Act of 1890,⁹⁸ in which Congress tasked the Secretary of War with regulating the construction of projects that had the potential to impair navigation.⁹⁹ Congress authorized separate studies in 1917,¹⁰⁰

F. Supp. 2d 230, 252-53 (D.D.C. 2003). *See generally* U.S. FISH AND WILDLIFE SERV., 2003 AMENDMENT TO THE 2000 BIOLOGICAL OPINION ON THE OPERATION OF THE MISSOURI RIVER MAIN STEM RESERVOIR SYSTEM, OPERATION AND MAINTENANCE OF THE MISSOURI RIVER BANK STABILIZATION AND NAVIGATION PROJECT, AND OPERATION OF THE KANSAS RIVER RESERVOIR SYSTEM (2003) [hereinafter 2003 BIOP]. For example in *American Rivers*, the United States District Court for the District of Columbia enjoined the Corps from deviating from its Master Manual in the face of potential disruption to downstream navigation during the recommended summer low flow period. 271 F. Supp. 2d at 252-53 (holding the Corps has "sufficient discretion" to consider its ESA duties even if such compliance "come[s] at the expense of other interests, including navigation and flood control").

95. *See* Act of July 25, 1912 (River and Harbors Act of 1912), ch. 253, 37 Stat. 201 (authorizing a six foot depth from Kansas City to the river's mouth); Act of Aug. 8, 1917 (River and Harbor Act of 1917), ch. 49, 40 Stat. 250 (extending navigation channel to Quindaro Bend, near Kansas City); Act of Mar. 3, 1925 (River and Harbor Act of 1925), 43 Stat. 1186 (expanding the channel width to 200 feet from Kansas City to the mouth of the Missouri River); Act of Jan. 21, 1927 (River and Harbor Act of 1927), ch. 47, 44 Stat. 1010 (extending the navigation channel to Sioux City); Act of Mar. 2, 1945 (River and Harbor Act of 1945), ch. 2, 59 Stat. 10 (authorizing a navigation channel nine foot in depth and three hundred foot in width).

96. ARTHUR C. BENKE & COLBERT E. CUSHING, *RIVERS OF NORTH AMERICA* 438 (2005).

97. 4 SEYMOUR DUNBAR, *A HISTORY OF TRAVEL IN AMERICA* 1149 (1915) (describing the Missouri River pilot as "the most skillful representative of his profession"). *See* HIRAM MARTIN CHITTENDEN, *HISTORY OF EARLY STEAMBOAT NAVIGATION ON THE MISSOURI RIVER: LIFE AND ADVENTURES OF JOSEPH LA BARGE* 115 (1903). Regarding the danger of whirlpools, one author described:

[T]he whirl of the water was so swift that the center of the eddy was nearly twelve feet below its circumference. The boat was trying to pull itself by with a line when it was caught by the eddy, swung out into the stream, whirled violently around and careened over until the river flowed right across the lower deck.

Id. at 122-23.

98. Act of Sept. 19, 1890 (River and Harbor Act of 1890), Pub. L. No. 51-907, § 6, 26 Stat. 593-96.

99. *Id.*; CLARK, *supra* note 80, at 138. Later, amendments to the General Dam Act of 1906 partially constrained the Corps' purview of waterway improvement activities but indicated that authority for the regulations rested on the Federal government's power over navigation. CLARK, *supra* note 80, at 144; *see also* General Dam Act of 1910, Pub. L. No. 246, 36 Stat. 593-96.

1927,¹⁰¹ and 1928¹⁰² to evaluate: (1) the benefits to navigation and agriculture from flood control projects that reduced erosion and siltation, (2) revenues attributed to the use of reservoir waters, and (3) whether such waters should be made available to public and private use, respectively.¹⁰³ These studies culminated in the Flood Control Act of 1936,¹⁰⁴ which announced an integrated flood-control policy that embraced navigation, among other benefits.¹⁰⁵

The Supreme Court has held that improving navigation through flood control is a valid exercise of power under the Commerce Clause.¹⁰⁶ Further, in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*¹⁰⁷ the Court held the “exercise of the authority conferred on Congress” is not constrained even if the waterway was non-navigable at the project site.¹⁰⁸ Another example of the Federal government’s considerable power under the Commerce Clause is the application of the navigation servitude, whereby the government can impair or destroy interests in private property in acts incidental to the regulation of navigable waters, without having to pay just compensation under the Fifth Amendment.¹⁰⁹ Therefore, in distributing power across representatives to a commission, federal control of multipurpose projects is premised on purposes *incidental to the navigation power*.¹¹⁰

100. Act of Mar. 1, 1917 (Flood Control Act of 1917), ch. 144, 39 Stat. 948, 950 (codified at 33 U.S.C. §§ 643, 701-703 (2006)).

101. Act of Jan. 21, 1927, ch. 47, § 10, 44 Stat. 1010, 1010-21; *see also* Act of May 15, 1928 (Flood Control Act of 1928), ch. 569, § 10, 45 Stat. 534, 538 (codified at 33 U.S.C. § 702(j) (2006)) (providing that the Secretary of War should submit to Congress “at the earliest practicable date projects for flood control on all tributary streams of the Mississippi River system”).

102. Flood Control Act of 1928, ch. 569, 45 Stat. 534, 538.

103. CLARK, *supra* note 80, at 259.

104. Act of June 22, 1936 (Flood Control Act of 1936), ch. 688, 49 Stat. 1570 (codified at 33 U.S.C. § 701a, 701f, 701h (2006)).

105. CLARK, *supra* note 80, at 260.

106. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940).

107. 313 U.S. 508, 516, 533-34 (1941).

108. *Guy F. Atkinson Co.*, 313 U.S. at 533-34.

109. *United States v. Rands*, 389 U.S. 121, 124 (1967). In essence, a property owner’s interest in land riparian to navigable water “is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use . . . as may be consistent with or demanded by the public right of navigation.” *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900). For when Congress “appropriates the flow either of a navigable or a non-navigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one.” *United States v. Grand River Dam Auth.*, 363 U.S. 229, 233 (1960).

110. *See* CLARK, *supra* note 80, at 557.

Although the Corps still prioritizes navigation above competing uses in operating the System pursuant to the Flood Control Act of 1944,¹¹¹ and maintains a nine foot deep and three hundred foot wide commercial navigation channel pursuant to the Rivers and Harbors Act of 1945,¹¹² both the total navigation tonnage and its market value are at record lows.¹¹³ The rapid decline in the value of goods shipped on the Missouri River is primarily due to the fact that shipments of relatively inexpensive sand and gravel now dwarfs those of all other commercial goods.¹¹⁴ In addition, though barge traffic serves four States,¹¹⁵ commercial navigation is constrained to the lowest reach of the river.¹¹⁶ In sum, while the Corps retains significant authority to support navigation under the Commerce Clause¹¹⁷ and Flood Control Act of 1944,¹¹⁸ for all practical purposes, commercial navigation usage is a shadow of its former steam-powered self. Therefore, Congress might endorse a compact framework that divests some

111. *See In re Operation of the Mo. River Sys. Litig. v. U.S. Army Corps of Eng'rs*, 418 F.3d 915, 919-20 (8th Cir. 2005) (citing *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1019-20 (8th Cir. 2003)); Flood Control Act of 1944, ch. 665, 58 Stat. 887.

112. Pub. L. No. 79-14, ch. 19, 59 Stat. 10 (1945).

113. By 2011, total navigation tonnage fell to 4 million (from a previous high of 9.73 million in 2001); total tonnage value based on 2011 present worth fell to just above \$100MM (from a previous high of \$1.37BB in 1977); total commercial tonnage fell to 0.1 million (from a previous high of 3.34 million in 1977); present total commercial tonnage value fell to approximately \$90MM (from a previous high of \$1.33BB in 1977). JOHN LARANDEAU, U.S. ARMY CORPS OF ENG'RS, MISSOURI RIVER COMMERCIAL TONNAGE 1960-2011 AND 2011 PRESENT WORTH TONNAGE VALUE 1960-2011 (2011) (acknowledging that 2011 values are an estimate only and not yet confirmed by U.S. Army Corps of Engineers' Waterborne Commerce Statistics Center) (presentation on file with author).

114. JOHN LARANDEAU, U.S. ARMY CORPS OF ENG'RS, MISSOURI RIVER NAVIGATION TONNAGE 1935-2011 (2011) (showing that between 2003 and 2009 sand and gravel accounted for over 90% of all commercial tonnage) (spreadsheet on file with author). For comparison purposes, farm products (corn and soybeans) accounted for less than one percent of commercial tonnage in 2010. *Id.* (2010 data is in a preliminary state). But as a function of river miles travelled, sand and gravel accounts for a de minimis amount since a majority of it is mined directly from the river and processed at adjacent facilities. GOV'T ACCOUNTABILITY OFFICE, GAO-09-224R, DATA ON COMMODITY SHIPMENTS FOR FOUR STATES SERVED BY THE MISSOURI RIVER AND TWO STATES SERVED BY BOTH THE MISSOURI AND MISSISSIPPI RIVERS 7 fig. 4 (2009) (showing fifty-four percent was transported one mile or less) [hereinafter GAO NAVIGATION REPORT].

115. Below Sioux City, Iowa, the Missouri River forms the border between Iowa and Nebraska and the border between Kansas and Missouri, before merging with the Mississippi River below St Louis, Missouri. GAO NAVIGATION REPORT, *supra* note 114, at 2 fig.1.

116. *Id.* at 3 fig. 1 (showing Missouri commanded 83% of the total tonnage between 1994 and 2006).

117. U.S. CONST., art. 1, § 8, cl. 3. The Commerce Clause also allows Congress to regulate the instrumentalities of interstate commerce and activities that have a substantial effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *United States v. Morrison*, 529 U.S. 598, 610 (2000); *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (holding Congress may regulate so long as the activity still "bears a substantial relation to commerce"). Therefore, the Commerce Clause still allows Congress – should it desire – to regulate the "channels of interstate commerce" despite how narrow, shallow, or unoccupied they might be.

118. *See supra* note 83 and accompanying text.

amount of authority to maintain the navigation channel away from the Corps and vest it in an operationally charged compact commission.

C. EVOLVING NATIONAL SECURITY IMPLICATIONS CALLS FOR ROBUST FEDERAL PARTICIPATION

A link between agricultural production in the Missouri River floodplain and the Federal government's interest in national security is beginning to emerge. Proper operation of System reservoirs is critical to safeguarding fertile bottomlands that are responsible for producing much of the nation's food. Coordinating operation of System reservoirs to accommodate snowmelt and rainfall over one-sixth of the lower forty-eight's landmass requires a centralized command and control system¹¹⁹ that States, by themselves, would have difficulty establishing.¹²⁰ Accurately predicting streamflow values from large meteorological datasets is critical to preventing the deposition of sand and silt atop cropland that is responsible for producing forty-six percent of the wheat, thirty-four percent of the cattle, and twenty-two percent of the corn in the United States.¹²¹

Such significant agricultural production implicates national security concerns. First, food availability – in essence, a “sufficient quantit[y] of food available on a consistent basis” – is a major component of food security.¹²² And food security bears heavily on national security in both the

119. “[T]o achieve the multi-purpose benefits . . . the six System reservoirs must be operated as a hydraulically and electrically integrated system.” MASTER MANUAL, *supra* note 4, at I-1. For example, the Independent Panel, charged with reviewing Corps operation of the System during the historic 2011 flood, noted the need for “improved data infrastructure and incorporation of scientific modeling tools” to estimate runoff attributed to Great Plains snowmelt. INDEPENDENT PANEL, *supra* note 73, at 4.

120. See FERRELL, *supra* note 82, at 101 (describing how States have historically struggled to assume a larger role in regional resources development due to a lack of money and manpower).

121. Brian Kahn, *Missouri River Flood Drama Likely Took Direction from La Nina*, CLIMATE WATCH MAGAZINE (Nov. 10, 2011), <http://www.climatewatch.noaa.gov/article/2011/missouri-river-flood-drama-likely-took-direction-from-la-nina>. Of the approximately 1.4 million acres of agricultural land in the MRB that is subject to flooding, tribal land comprises approximately 42,800 acres, or three percent of the total land in production. MASTER MANUAL, *supra* note 4, at IV-17.

122. The World Health Organization (WHO) considers “food availability” as one of three pillars supporting “food security.” *Food Security*, WHO, <http://www.who.int/trade/glossary/story028/en/> (last visited Dec. 5, 2012). The United States Department of Agriculture's (USDA) working definition of “food security” is “access by all people at all times to enough food for an active, healthy life.” *Briefing Rooms*, USDA, ECONOMIC RES. SERV., <http://www.ers.usda.gov/Briefing/FoodSecurity/> (last visited Dec. 5, 2012). In the United States, 14.5% of households (17.2 million households) were food *insecure* at some point during 2010. ALISHA COLEMAN-JENSEN, ET AL., ERR-125, USDA, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2010 4 (2011), *available at* <http://www.ers.usda.gov/Publications/Err125/>. Perhaps more importantly, since 1998, the percentage of food insecure households in the United States has generally risen, from 11.8% in 1998 to a high of 14.7% in 2009. *Id.* at 6 tbl. 1A.

international¹²³ and domestic context.¹²⁴ In essence, a country's ability – or inability – to produce food has important security implications. For example, a country's ability to produce food lends it a considerable strategic advantage in the embargo and economic sanction settings.¹²⁵ And the most direct link between food security and national security simply boils down to a nation-state's ability to feed its armed forces.¹²⁶ As applied to the MRB, the United States' ability to project power, in a military sense,¹²⁷ is premised on robust agricultural production. Accordingly, a dramatic decrease in crop or livestock production in a time of war could adversely affect national security.¹²⁸ Therefore, it is important the Federal government retain an equal amount of control over System operations in a MRB compact arrangement to safeguard its interest in national security.

123. In October of last year, Vice President Biden remarked “[i]nvestments made to ward off food insecurity and prevent its recurrence can prevent the vicious cycles of rising extremism, armed conflict, and state failure that can require far larger commitments of resources down the road.” Jonathan Shrier, *Food Security Contributes to National Security*, U.S. DEP'T OF STATE (Oct. 28, 2011), http://blogs.state.gov/index.php/site/entry/food_national_security/ (describing how food security is inextricably linked to national security). Also, in urging Congress to continue funding programs such as the Food for Peace Program that distributes United States grown commodities to people enduring natural and manmade disasters, Representative McGovern expressed “[t]his isn't a question of charity. It's an issue of national security, of what happens when desperate people can't find or afford food, and the anger that comes from people who see no future for their children except poverty and death.” 157 CONG. REC. H1397 (daily ed. Mar. 1, 2011) (statement of Rep. McGovern). “Strategists need to understand that the world food supply is a global challenge that bears most heavily on the peace and prosperity of the international system.” Lief R. Rosenberger, *Towards Food Security*, in 3 U.S. PACIFIC COMMAND-ASIA PACIFIC ECONOMIC UPDATE 52, 65 (2005). The Asia-Pacific Center for Security Studies (APCSS) hosted a seminar on Food Security that highlighted the evolving notion of “national security” that now includes “non-military threats to the welfare of the nation-state.” *Food Security and Political Stability in the Asia-Pacific Region*, APCSS (Sept. 11, 1998), http://www.apcss.org/Publications/Report_Food_Security_98.html [hereinafter APCSS Seminar].

124. One military scholar put it succinctly, “food — who has it, who doesn't — and the arable land from which it is produced become legitimate strategic considerations.” Leif R. Rosenberger, *The Strategic Importance of the World Food Supply*, 27 *Parameters* US Army War College Quarterly 84, 85 (Spring 1997). Despite the complexity of the global food supply system, Mr. Rosenberger notes that the amount of arable land in cultivation bears on national security issues. Rosenberger, *supra* note 123, at 56.

125. Seminar participants described how food may be used as a weapon, hypothesizing that “China's growing dependence on the United States as a provider of food (particularly grain) may temper Beijing's often turbulent relations with Washington, which are often dominated by contentious disagreements on a number of policy questions.” APCSS Seminar, *supra* note 123.

126. *Id.* (noting the importance of food to soldier morale and exhaustion).

127. The Department of Defense (DOD) defines “power projection” as “[t]he ability of a nation to apply all or some of its elements of national power – political, economic, informational, or military – to rapidly and effectively deploy and sustain forces in and from multiple dispersed locations to respond to crises, to contribute to deterrence, and to enhance regional stability.” DOD, *THE DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 254 (2010).

128. APCSS Seminar, *supra* note 123.

IV. TRIBAL INTERESTS REQUIRING EQUAL PARTICIPATION ON THE COMPACT COMMISSION

In addition to federal representation, it is equally important that a tribal representative participate in administering the compact in order to protect the interrelated issues of Indian reserved water rights¹²⁹ and tribal sovereignty.¹³⁰ Although tribal participation in compacts has historically been limited to those Tribes with quantified reserved water rights, the potential for non-Indian consumptive uses to adversely affect Indian rights requires that compact drafters afford equal representation to potentially affected Tribes.¹³¹ Moreover, since it is not yet known whether state and federal courts in the MRB will embrace recent decisions acknowledging that Indian reserved water rights extend to groundwater sources, it is paramount that Tribes be afforded a forum in which to protect their present and future consumptive uses in groundwater.¹³² Finally, the concept of tribal sovereignty itself – and the Federal government’s conflict of interest between operating the System for competing purposes and its fiduciary duty to protect tribal resources – implies participation in MRB water resources management activities.¹³³

129. State water agencies estimate that potential Indian reserved water rights could amount to approximately 8.6 million acre-feet of water per year (MAF/yr) against the average flow of fifty-seven MAF/yr measured at the mouth of the Missouri River. MO. RIVER BASIN STATES ASS’N, MISSOURI RIVER BASIN HYDROLOGY FINAL REPORT 1–8 (1983) [hereinafter FINAL REPORT]; see also John E. Thorson, *Resolving Conflicts Through Intergovernmental Agreements: The Pros and Cons of Negotiated Settlements*, in 8 INDIAN WATER 25, 27 (1986). Estimates by State: Montana, 6.6 MAF/yr; Nebraska, 26.5 thousand acre-feet/yr (TAF/yr); North Dakota, 190 TAF/yr; South Dakota, 1.3 MAF/yr; Wyoming, 477 TAF/yr; Kansas is not included. *Id.* at 1-3. For comparison purposes, experts believe the Navajo Nation may be entitled to two MAF/yr of the more than fifteen MAF/yr in outstanding western reserved water rights. Karen Crass, *Eroding the Winters Right: Non-Indian Water Users’ Attempt to Limit the Scope of the Indian Superior Entitlement to Western Water to Prevent Tribes from Water Brokering*, 1 U. DENV. WATER L. REV. 109, 119-20 (1997).

130. The idea that Tribes’ enjoy a sovereignty that entitles them to a degree of control in managing Missouri River water resources, also finds support in the related concept of “water sovereignty,” whereby Tribes have “the right to develop and manage their own water resources to appropriately meet the needs of their people.” Dena Marshall & Janet Neuman, *Seeking a Shared Understanding of the Human Right to Water: Collaborative Use Agreements in the Umatilla and Walla Walla Basins of the Pacific Northwest*, 47 WILLAMETTE L. REV. 361, 370-71 (2011).

131. See *infra* Part IV.A.

132. See *infra* Part IV.A.

133. See *infra* Part IV.B.

A. INDIAN RESERVED WATER RIGHTS PRESENT THE GREATEST OBSTACLE TO COMPREHENSIVE PLANNING

Tribal development of not-yet-quantified Indian reserved water rights has the potential to affect how the System is managed¹³⁴ for downstream navigation¹³⁵ and other uses, such as that amount available to satisfy downstream water right holders.¹³⁶ In addition, Tribes are presently making consumptive use of Missouri River water for domestic, industrial, and agricultural use.¹³⁷ Therefore, even though including a tribal representative on any compact commission prior to the quantification of reserved rights constitutes a departure from compacting practice,¹³⁸ Tribes should have a voice in decisions that may adversely affect their ability to make beneficial use of reserved water on over 18.4 million acres of reservation land in the MRB.¹³⁹

Speaking to the importance of reserved rights to upper basin Tribes, one author stated they are “the basis for their continued existence as a separate and distinct people.”¹⁴⁰ But it must be noted certain tribal

134. Richard Bad Moccasin of the Mni Sose Tribal Water Rights Coalition suggested that “allocating some of the reservoirs’ storage capacity for Indian purposes might be a physical solution for tribes when other means of preserving, protecting, and developing Indian water rights are impractical or are foreclosed.” *Tribes Voice Views Over Missouri River*, U.S. WATER NEWS ONLINE (June 1995), <http://www.uswaternews.com/archives/arcrights/5tribes.html>.

135. By 1997, the Missouri Department of Natural Resources determined tribal use of Indian reserved water rights for out of basin diversions has the potential to “ultimately reduce the flow of the river through the State of Missouri, to the point where its many benefits would be severely reduced.” 6 JERRY D. VINEYARD, MO. DEP’T OF NATURAL RES., WATER RESOURCE SHARING: THE REALITIES OF INTERSTATE RIVERS 23 (1997), available at <http://www.dnr.mo.gov/env/wrc/statewaterplanPhase1.htm#WRS> (referencing tribal efforts to pursue water marketing – in essence, transferring water across basin boundaries for profit).

136. The United States Supreme Court has applied the reserved rights doctrine “as an exception to Congress’s deference to state water law.” *In re Gen. Adj. of All Rights to Use Water in Gila River Sys. and Source (Gila River I)*, 989 P.2d 739, 747 (Ariz. 1999) (en banc) (citing *United States v. New Mexico*, 438 U.S. 696, 714 (1978)).

137. Senator Conrad acknowledged Tribes’ fears that federal water supply contracts with downstream users creates a situation that will “make it impossible for [Tribes] to access water for present and future uses.” *Impact Suffered by the Tribes in the Upper Basin of the Missouri River: Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. 22 (2003) (statement of Sen. Kent Conrad of North Dakota, Member, S. Comm. on Indian Affairs). Senator Tim Johnson also recognized “a certain use it or lose it dynamic,” suggesting that by the time Congress determines how much water is needed for the Tribes it will have to “undo previous commitments” and, at that point, it will “get very complicated.” *Id.*; see also SURPLUS WATER REPORT, *supra* note 71 (noting that, while not yet critical in terms of total volume, “numerous irrigators withdraw water directly from the reservoirs and downstream river reaches”).

138. See MODEL COMPACT, *supra* note 20, at 89-90.

139. See JOHN E. THORSON, RIVER OF PROMISE, RIVER OF PERIL: THE POLITICS OF MANAGING THE MISSOURI RIVER 47 (1994) (showing such land comprises six percent of the 328 million acres in the MRB).

140. William H. Veeder, *Indian Water Rights in the Upper Missouri River Basin*, 48 N.D. L. REV. 617, 618 (1972).

constituencies oppose entering into a compact to quantify outstanding reserved water rights for several reasons. First, in light of the traditional view of the interconnectedness of water and land, some tribal members fear allocation constitutes a concession to the Federal government's supreme interest in Missouri River water and all the land west of it in South Dakota.¹⁴¹ Therefore, such a concession could adversely impact the Tribe's outstanding claim against the United States for the land within the Black Hills of South Dakota that was reserved for the Great Sioux Nation by the Fort Laramie Treaty of 1868.¹⁴² Second, other tribal constituencies fear that entering into a state-centric compact would validate the perception that States have the authority to allocate water rights to sovereign Tribes.¹⁴³ Third, Tribes are fearful that quantification would fail to take into account potential future development on the reservations.¹⁴⁴ Finally, present abundance fosters a sense of complacency that may ultimately jeopardize limited groundwater and surface water sources.¹⁴⁵

One hundred and five years ago the United States Supreme Court announced the "Great Charter" of Indian reserved water rights in *Winters v. United States*,¹⁴⁶ where the Court held the act of reserving land also impliedly reserved a sufficient quantity of water to fulfill the purposes of the reservation. Most importantly, the priority date of the reserved water

141. *Tribes Hold Wild Cards in Missouri River Water Fight*, NEWS FROM INDIAN COUNTRY (Dec. 2007), http://indiancountrynews.net/index.php?option=com_content&task=view&id=2188&Itemid=33.

142. *Id.* ("We can't quantify unless the outstanding land claims have been settled." (quoting Robert Quiver, Jr., resident of the Pine Ridge Reservation)). Robert Quiver, Jr. also serves as Executive Director of the Great Plains Tribal Water Alliance, an organization formed by the Standing Rock, Oglala, and Rosebud Sioux Tribes in response to the view that the Mni Sose Inter-Tribal Water Rights Coalition was no longer effective at furthering the Coalition's original purpose. STANDING ROCK SIOUX TRIBE – DEP'T OF WATER RES., <http://www.standingrocktreatywater.com/projects/view.asp?ID=9> (last visited Dec. 5, 2012)).

143. Tupper, *supra* note 65 ("[Allocation] begins to talk about sovereignty and control factors that I don't believe we can give away." (quoting Michael Jandreau, Chairman, Lower Brule Sioux Tribe)).

144. *Id.* (considering that present water availability may "turn out to be inadequate decades into the future"); see also Carvell, *supra* note 14, at 48 ("[T]he Standing Rock Sioux has repeatedly stated that it is not interested in any process by which its water right might be quantified, and, in fact, expressly opposes the idea.").

145. Carvell, *supra* note 14, at 50 ("The Standing Rock Sioux and Three Affiliated Tribes are content to leave their water rights unquantified, believing that those rights are secure and that the water, particularly that of Missouri River, will be there on that day when they call for it.").

146. 207 U.S. 564, 577 (1908). In addition to a *Winters* right, a Tribe might also have an aboriginal water right for uses existing prior to the establishment of the reservation (e.g., instream flow for wildlife) with an immemorial priority date. *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).

right is the date on which the United States established the reservation.¹⁴⁷ Thus, in the event a particular water source is over appropriated, the holder of any junior right that was perfected under state law after the government established the reservation would have to curtail her usage until the holder of the senior reserved water right could satisfy her water right.¹⁴⁸

Vacillating federal policy on tribal sovereignty is partly responsible for the unsettled state of Indian reserved water rights in the MRB.¹⁴⁹ Present incongruities between adjudicated amounts and the actual needs of Tribes, combined with States' efforts to establish a "blanket formula" to quantify such rights, fosters uncertainty.¹⁵⁰ These rights may be quantified during (1) litigation in general stream adjudication in state court,¹⁵¹ (2) negotiated settlement approved by a federal trustee,¹⁵² (3) congressionally ratified tribal-state compact,¹⁵³ or (4) federal legislation.¹⁵⁴ But MRB Tribes tend to be wary of state quantification efforts and see them as attempts to minimize their rights in light of the undeveloped condition of Indian water.¹⁵⁵

The presumptive method by which Indian rights are quantified is the "practicably irrigable acres" (PIA) standard that measures the amount of reservation land that is susceptible to irrigation, and takes into account both

147. *Winters*, 207 U.S. at 577. Upper MRB States rely on the prior appropriation system – where the priority date is critical among competing rights – while the lower basin States draw from the riparian system – where water is shared among riparian users. *See infra* note 150.

148. Although Indians have "the best water rights in the West," it will take significant development "to translate the dry paper water rights into wet water in the ditches." Gary Weatherford & Helen Ingram, *Legal-Institutional Limitations on Water Use, in WATER SCARCITY: IMPACTS ON WESTERN AGRICULTURE* 51, 78 (Ernest A. Engelbert & Ann Foley Scheuring eds., 1984) (comments of discussant Frank J. Trelease).

149. CLARK, *supra* note 80, at 665.

150. A. D. Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, 22 LAND & WATER L. REV. 631, 635 (1987) [hereinafter Tarlock, *One River*].

151. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[6], at 1224-27, § 19.05[1], at 1245 (2012) (noting that after adjudication, courts apply state law when administering an Indian water right) [hereinafter COHEN 2012]. The McCarran Amendment waives the Federal government's immunity and subjects the United States to state court water rights adjudication. 43 U.S.C. § 666 (2006). Although the amendment does not waive tribal sovereignty, state courts can adjudicate Indian reserved water rights when the United States files claims in its trust capacity, on behalf of Tribes. *Arizona v. California (Arizona v. California IV)*, 460 U.S. 605, 626-27 (1983); *United States v. Dist. Court for Eagle Cnty.*, 401 U.S. 520, 525 (1971). In adjudicating Indian reserved water rights, state courts apply federal, not state law. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

152. *See* Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223, 9223-25 (Mar. 12, 1990).

153. *See supra* note 29 and accompanying text.

154. *See, e.g.*, Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990 (Settlement Act), Pub. L. No. 101-618, 104 Stat. 3289.

155. *See* Carvell, *supra* note 14, at 47-48.

the present as well as the future needs of the inhabitants.¹⁵⁶ But in light of limited arable land,¹⁵⁷ owing to the fact that most of the fertile bottomlands are inundated by federal reservoirs, the PIA standard may be less useful in the MRB.¹⁵⁸ Further, since Indian water rights settlements have not recognized off-reservation reserved water rights,¹⁵⁹ it is uncertain whether arable off-reservation, Indian-owned allotments would be included in the PIA calculation. In addition, courts have not yet determined the implications associated with recent judicial determinations that MRB reservations are “diminished” from historical treaty borders due to subsequent population demographics.¹⁶⁰ As applied to MRB reservations, diminishment may occur in areas where a portion of a county lies on the edge of an open reservation without a contiguous border that makes it difficult to determine the character of land ownership.¹⁶¹ In light of this danger, Tribes must take care to factor diminished areas into the arable land calculations under the PIA standard.

In somewhat of an anomaly, the Arizona Supreme Court recently rejected the PIA standard and articulated a new “homeland” standard that incorporates a multi-faceted approach in light of each reservation’s “minimal needs.”¹⁶² Similar to the argument that North Dakota Tribes

156. *Arizona v. California IV*, 460 U.S. at 617. While the amount is predicated on whether agriculture is a primary purpose of the reservation – based on the relevant treaty or executive order establishing the reservation – PIA water may be used for purposes other than agriculture. *United States v. Walker River Irr. Dist.*, 104 F.2d 334, 340 (9th Cir. 1939) (concluding *Winters* rights may also be used for domestic purposes and to generate electricity); *In re Gen. Adjudication of all Rights to Use Water in the Big Horn River Sys. (Big Horn I)*, 753 P.2d 76, 99 (Wyo. 1988) (assuming certain domestic and municipal uses are subsumed in PIA water); see also *Arizona v. California (Arizona v. California III)*, 439 U.S. 419, 422-23 (1979) (approving the Special Master’s conclusion that rights predicated on an agricultural standard may also be used for other purposes).

157. See Arable, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/arable> (last visited Dec. 5, 2012) (defining arable as “fit for or used for the growing of crops”).

158. Professor Tarlock has cautioned that the unique agronomic challenges faced by each reservation may warrant a separate negotiated settlement with each Tribe. Tarlock, *One River*, *supra* note 150, at 635.

159. See Alexander Hays, *The Nez Perce Water Rights Settlement and the Revolution in Indian Country*, 36 ENT. L. 869, 887 (2006). Many Indian stakeholders live off the reservation in allotments and courts have not yet determined whether such rights allow diversions of “reservation water” off the reservation.

160. “Diminishment” has been found in areas where historical state regulation and land ownership by non-Indians permanently changes the character of “Indian country.” *Solem v. Bartlett*, 465 U.S. 463, 475-76 n.13 (1984) (holding that while the Surplus Acts did not establish an express congressional purpose to diminish the reservation, subsequent exercise of state or federal jurisdiction and demographics may contribute to a finding of diminishment).

161. 18 U.S.C. § 1151 still serves as a guidepost in determining “Indian country”: in essence, (1) all land within the exterior boundaries of a reservation, (2) Indian trust land, and (3) in those dependent Indian communities. COHEN 2012, *supra* note 151, § 304[2][c][iii]-[iv], at 189-98.

162. *Gila River I*, 35 P.3d 68, 76-79 (Ariz. 2001).

present,¹⁶³ the “homeland” standard evaluates the Tribe’s history (including the cultural significance of water), economic base, past water use, present and projected population, and topography, among other criteria.¹⁶⁴ In light of the challenging topography and limited natural resources in the upper reaches, especially in the Dakotas, this “homeland standard,” may provide for more water than under PIA.¹⁶⁵

Another issue bearing on the MRB is tribal reliance on groundwater sources for present and future consumptive uses¹⁶⁶ in the face of continued uncertainty as to whether such rights extend to groundwater.¹⁶⁷ Resolving this legal question is critical to integrated water resources management¹⁶⁸ since the ability – or inability – of Tribes to access groundwater bears heavily on both System operation and the health and welfare of those living on reservations. First, in light of the hydrological connection between surface and groundwater sources,¹⁶⁹ extensive groundwater use has the potential to reduce surface water flows,¹⁷⁰ and thereby affect downstream

163. Carvell, *supra* note 14, at 35.

164. *Gila River I*, 35 P.3d at 79-80.

165. See Carvell, *supra* note 14, at 26 nn.176-79, 27-29 nn. 185-87. But see *United States v. Washington*, 375 F. Supp. 2d. 1050, 1065 (W.D. Wash. 2005), *vacated pursuant to settlement agreement by United States v. ex rel Lummi Nation v. Washington*, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007) (concluding *Gila River’s* “homeland” standard is contrary to the “primary purpose” standard – which evaluates the Federal government’s intent in establishing the reservation).

166. A majority (over 1500) of Indian and non-Indian MRB communities rely exclusively on groundwater sources; in terms of population, approximately thirty-five percent is served exclusively from groundwater while almost fifty-four percent is served exclusively from surface water. MASTER MANUAL, *supra* note 4, at E-8. Of the estimated 11.4 million acres of land irrigated in the MRB, approximately thirty percent is served by groundwater. *Id.* at IV-29.

167. 2 WATERS AND WATER RIGHTS § 37.02(d) (Robert E. Beck & Amy L. Kelly eds., 3d ed. 2009) (“The principal unresolved issue concerning the scope of waters subject to reserved rights is whether groundwater may be claimed.”).

168. See Thompson, *supra* note 68, at 205.

169. *Id.* (citing T. C. WINTER ET AL., U.S. GEOLOGICAL SURVEY, GROUND WATER AND SURFACE WATER: A SINGLE RESOURCE 3-5, figs.2, 4 & 5 (1998), available at <http://pubs.usgs.gov/circ/circ1139/pdf/circ1139.pdf>).

170. *Id.* Moreover, MRB groundwater sources are susceptible to overdraft. Rollin H. Hotchkiss et al., *Regulated River Modeling for Climate Change Impact Assessment: The Missouri River*, 36 J. AM. WATER RESOURCES ASS’N 375, 375 (2000); see also EDWARD BRADLEY, U.S. GEOLOGICAL SURVEY, GEOLOGY AND GROUND-WATER RESOURCES OF THE UPPER NIOBARA RIVER BASIN, NEBRASKA AND WYOMING, 36-38 (1956) (describing the potential for increased well development to cause a noticeable reduction in the flow of Missouri River tributaries). In addition, the alluvial hydrogeology of the lower MRB makes it difficult to gauge how the flow of groundwater influences MRB streams. T.C. WINTER ET AL., U.S. GEOLOGICAL SURVEY, GROUND WATER AND SURFACE WATER: A SINGLE RESOURCE 40-41, figs. I-2A, B (1998). For example, the altitude of the water table adjacent to the Missouri River near Glasgow, Missouri “indicates that ground water flows into the river at right angles in some reaches, and it flows parallel to the river in others.” *Id.* The flow of many Missouri River tributaries, like the Loup and Niobrara Rivers in the Sandhills area of Nebraska, is attributed mainly to groundwater accretions. MASTER MANUAL, *supra* note 4, at III-8.

uses. Conversely, since surface water flows have the potential to feed groundwater sources,¹⁷¹ competing uses that reduce surface water flows may also drawdown important aquifers. Second, should courts with jurisdiction in the MRB hold that reserved rights do not extend to groundwater, Tribes would necessarily face a Hobson's choice of either diverting and conveying mainstem surface water great distances to satisfy their reserved rights,¹⁷² or acquiring rights under state law to appropriate groundwater from aquifers beneath their reservations.¹⁷³

Fortunately for MRB Tribes, high court decisions in Arizona and Montana, and a federal court decision in Washington, show a growing consensus that, as a matter of law, reserved water rights do extend to groundwater.¹⁷⁴ Though the United States Supreme Court ultimately failed to reach the issue in *Cappaert v. United States*,¹⁷⁵ the Court's recognition of the surface-groundwater connection constituted a tacit endorsement¹⁷⁶ of the Ninth Circuit Court of Appeals express finding that reserved rights do extend to groundwater.¹⁷⁷ The next court to directly address the issue, the Wyoming Supreme Court, declined to follow the Ninth Circuit and, seizing on language in *Cappaert*, that focused on reserving surface water, did not find any precedent for such rights.¹⁷⁸ But eleven years later, the Arizona Supreme Court held reserved water rights lie in groundwater if such

171. Thompson, *supra* note 68, at 206.

172. See Missouri River Authorized Purposes Study (MRAPS), MISSOURI RIVER & THE TRIBES, http://www.mraps.org/study_info/missouri-river-tribes (last visited Jan. 28, 2012) (illustrating that some reservations, including the Turtle Mountains, Spirit Lake, Lake Traverse, Pine Ridge, and Rosebud Sioux, are not riparian to the mainstem) [hereinafter MRAPS]. *But see* Dakota Water Resources Act of 2000, S. 623, 106th Cong. § 7, 1st Session (2000) (providing Indian municipal, rural, and industrial water supplies to the Turtle Mountain and Fort Totten Indian reservations).

173. While the more arid basin states of Montana, Wyoming, the Dakotas, Kansas, and Nebraska follow the prior appropriation system of water rights, the more humid basin states of Iowa, Minnesota, and Missouri follow the common law of riparian rights, supplemented by a permit system. See MR ECOSYSTEM, *supra* note 8, at 25.

174. See *Gila River I*, 989 P.2d 739, 747 (Ariz. 1999); *Confederated Tribes of the Flathead Reservation v. Stultz*, 59 P.3d 1093, 1098 (Mont. 2002); *United States v. Washington*, 375 F.Supp.2d 1050, 1068 n.8 (W.D. Wash. 2005), *vacated pursuant to settlement agreement by United States v. ex rel Lummi Nation v. Washington*, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007).

175. *Cappaert v. United States*, 426 U.S. 128 (1976); see *Gila River I*, 989 P.2d at 747.

176. *Cappaert*, 426 U.S. at 143 (“[S]ince the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.”).

177. See *United States v. Cappaert*, 508 F.2d 313, 317-18 (9th Cir. 1974).

178. *Big Horn I*, 753 P.2d 76, 99-100 (Wyo. 1988) (agreeing with Special Master Roncalio and the district court that the reserved water doctrine did “not extend to groundwater”).

supplies are necessary to fulfill the primary purpose of the reservation.¹⁷⁹ Three years later, the Montana Supreme Court also held reserved water rights apply to groundwater but disavowed any prioritization of surface over groundwater.¹⁸⁰ Recently, the United States District Court for the Western District of Washington followed the Ninth Circuit's lead and agreed that, as a matter of law, reserved rights extend to groundwater – even in the absence of a surface water connection – and found no precedent for a preference for surface water.¹⁸¹ Therefore, the three recent decisions in Arizona, Montana, and Washington indicate MRB Tribes stand a chance at prevailing in adjudications involving claims to reserved rights in groundwater.

Going forward, it is still uncertain exactly how the above decisions will influence general stream adjudication or state-tribe compacting within the jurisdiction of the Eighth Circuit Court of Appeals. But, given the unique facts animating the Supreme Court's decision in *Cappaert*,¹⁸² there exists ample authority within the treaty context and under the Property Clause¹⁸³ to support state and federal court findings that reserved rights apply to groundwater anytime such sources are needed to support the primary purpose¹⁸⁴ for which the land was reserved from the public domain.¹⁸⁵

In *Cappaert*, the Court relied on premises first established in the Indian treaty context that were not altogether applicable to the national monument context.¹⁸⁶ First, in *Winters v. United States*,¹⁸⁷ the Court construed a treaty

179. *Gila River I*, 989 P.2d at 747. In prioritizing the utilization of surface water to fulfill its needs, the court clarified that the location of the source is less important than “whether it is necessary to accomplish the purpose of the reservation.” *Id.* at 747-48.

180. *Confederated Tribes of the Flathead Reservation v. Stultz*, 59 P.3d 1093, 1098 (Mont. 2002).

181. *United States v. Washington*, 375 F. Supp. 2d 1050, 1068 n.8 (W.D. Wash. 2005), *vacated pursuant to settlement agreement by United States v. ex rel Lummi Nation v. Washington*, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007).

182. In *Cappaert* the Court examined “the scope” of the reserved water rights doctrine (doctrine) as it applies to maintaining the depth of an underground pool in Devil's Hole so as to preserve the scientific value of the national monument, for which the reservation was established. 426 U.S. at 141-47. Devil's Hole is a limestone cavern containing a pool that provides habitat for the Devil's Hole pupfish (*Cyprinodon diabolis*), a species listed as endangered under the ESA. *United States v Cappaert*, 375 F. Supp. 456, 460 (D. Nev. 1974); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (2006). In 1952, President Truman withdrew from the public domain land surrounding Devil's Hole via Proclamation pursuant to Executive authority under the American Antiquities Preservation Act (Antiquities Act). *See also* 16 U.S.C. § 431 (2006); Exec. Proc. No. 2961, 17 Fed. Reg. 691 (Jan. 23, 1952).

183. The Property Clause provides that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST., art. IV, § 3, cl. 2.

184. *See Winters v. United States*, 207 U.S. 564, 577 (1908).

185. *See supra* notes 165-69 and accompanying text.

186. *See infra* notes 186-93 and accompanying text.

187. 207 U.S. 564 (1908).

establishing Fort Belknap Indian Reservation¹⁸⁸ in light of the Federal government's trust obligations to the Indians.¹⁸⁹ The reserved water rights doctrine was thus the product of interpreting a treaty, pursuant to canons of construction, in a manner favorable to the Indians.¹⁹⁰ The Court also intimated that treaty power was sufficient to sustain the doctrine when it declined to address whether it is premised on riparian rights.¹⁹¹ Thus, the *Winters* Court based its decision on the United States' special trust obligation to the Indians and the particular purpose in establishing the reservation.

The *Winters* Court also relied on *United States v. Rio Grande Dam & Irrigation Co. (Rio Grande)*¹⁹² for its conclusion that the United States may reserve water from appropriation under state law.¹⁹³ However, the Court's conclusion in *Rio Grande* was based on the inability of a State to destroy the Federal government's common law right, as *owner of land* bordering the Rio Grande, to the continued flow of its waters,¹⁹⁴ and the government's authority to preserve the *navigability* of waters under the Commerce Clause.¹⁹⁵ Thus, the reserved water right is partially rooted in the

188. *Winters*, 207 U.S. at 547-77; Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, *reprinted in* 1 LAWS & TREATIES 601 (1904).

189. 207 U.S. 564, 576 (1908) (noting "ambiguities occurring will be resolved from the standpoint of the Indians").

190. The three canons of construction are: (1) treaties are liberally construed to favor Indians; (2) ambiguity is resolved in favor of Indians; (3) treaties are construed as Indians would have understood them – therefore, resource rights are *implied* from treaties. COHEN 2012, *supra* note 151, § 2.02[i], at 113-14. The need to exercise such canons "was rooted in the special trust relationship between the United States and Indian tribes." *Id.* at 223-24. In addition, the express purpose in establishing the reservation was to change the Indians from a "nomadic and uncivilized" people to a "pastoral and civilized" people through settlement and agriculture – which required water for irrigation. *Winters*, 207 U.S. at 576. Moreover, with respect to the establishment of Indian reservations, "[i]t would be unconscionable for the United States to have coerced or induced Indians onto a Reservation without providing the water necessary to make the lands habitable" and "[i]t would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive." Report of the Special Master at 260, *Arizona v. California*, 372 U.S. 549 (1963) (No. 8, Orig.) (Dec. 5, 1960), *available at* http://www.colorado.edu/colorado_river/law/html [hereinafter Special Master's 1960 Report]; *see also* Walker River Irr. Dist., 104 F.2d 344, 339 (9th Cir. 1939).

191. The navigable Milk River forms the northern boundary of the reservation; thus, the United States could alternatively have asserted a reserved – riparian – water right.

192. 174 U.S. 690 (1899).

193. *Winters*, 207 U.S. at 577.

194. The Court explained that a State may not interfere with the Federal government's *riparian* right to the continuous flow of water. *Id.* at 703-04.

195. The Court based its authority to enjoin construction of the dam on the likelihood of the dam interfering with navigation downstream. *Id.* at 709; *see also* U.S. CONST., art. I, § 8, cl. 3. Even in instances when the Court acquiesces to an attenuated link to navigability, the Court makes an effort to describe how the particular reservation might affect navigation. For example, in *Arizona v. California (Arizona v. California I)* the Court "preserved the fiction that a navigation purpose would be served" when it upheld Congress' power to authorize multipurpose dams for primarily *non-navigable* purposes (e.g., electricity generation and water storage), notwithstanding

government's superior right as a landowner.¹⁹⁶ Therefore, *Cappaert* should not bar future MRB tribal claims to groundwater since reserved water rights are premised on the unique Indian treaty context and the Federal government's power under the Property Clause to reserve land from the public domain.

Even though States and Tribes have pursued quantification of reserved rights through state-tribal compacts,¹⁹⁷ general stream adjudications,¹⁹⁸ and settlements,¹⁹⁹ the great weight of such rights still presses down, stifling comprehensive basin planning. Development of the potential 8.6 MAF in Indian reserved water rights would upset established uses²⁰⁰ and prevent the Corps from meeting program objectives.²⁰¹ And in the absence of congressional legislation to reform the archaic Flood Control Act of 1944,

the dams' propensity to destroy the navigability of affected rivers. Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 40 (1966).

196. In *Arizona v. California II*, Special Master Rifkind explained as much: "In the *Winters* case the United States exercised its power to reserve water by a *treaty*; but the power itself stems from the United States' *property rights* in the water, not from the treaty power." Special Master's 1960 Report, *supra* note 190, at 259 (emphasis added); *see also* United States v. Gratiot, 39 U.S. 526, 537-38 (1840) (holding that Congress' power over the public lands under the Property Clause is vested *without limitation*, such that the President may withdraw land even if the effect is to encroach on state rights). Since the pool in Devil's Hole Monument is wholly removed from navigable water, it was incumbent upon the *Cappaert* Court to announce whether Property Clause authority might make up for an absence of Commerce Clause authority sufficient to enjoin the Cappaerts' pumping.

197. Montana has taken the lead in quantifying Indian reserved water rights within its borders through compacts with various Tribes and federal agencies. For example, Tribes have compacted for the following amounts: Assinboine and Sioux Tribes of the Fort Peck Reservation, 1.05 MAF/yr for marketing on the reservation (50 TAF/yr off the reservation), or that necessary for consumptive use of 525 TAF/yr; Northern Cheyenne, total of 34.3 TAF/yr; Chippewa Cree Tribe, 8.5 TAF/yr; Crow Tribe, 547 TAF/yr; Fort Belknap Reservation, 645 cfs of the United States' share and 4 TAF/yr for non-irrigation purposes; Blackfeet Tribe, 100 cfs to Birch Creek and 50 TAF/yr to St. Mary Drainage. MONT. CODE ANN. §§ 85-20-201, -301, -601, -901, -1001, -1501 (2009).

198. *See, e.g., In re Gen. Adjudication of All Rights to Use Water and Water Rights on the Mo. River Sys., State of South Dakota*, 531 F. Supp. 449 (D.S.D. 1982) (dismissing South Dakota's general adjudication, on the State's motion). In Wyoming, the Arapahoe and Shoshone Tribes of the Wind River Reservation secured approximately 500 TAF/yr through the *Big Horn* general stream adjudication. *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 835 P.2d 273, 286 (Wyo. 1992).

199. Elsewhere in the MRB, States like North Dakota have entered into settlement negotiations with Tribes, but to no avail. *See* Carvell, *supra* note 14, at 42-46 (describing unsuccessful efforts to reach an agreeable settlement negotiation framework with the Turtle Mountain Band, Three Affiliated Tribes, and Standing Rock Sioux Tribe).

200. *See supra* note 137 (statement of Sen. Conrad).

201. Capossela, *supra* note 19, at 159. It's also uncertain whether the Master Manual affords sufficient flexibility to accommodate future diversions for Indian reserved water rights in the basin; *see* SURPLUS WATER REPORT, *supra* note 71, at 2-12. For example, while demand for irrigation use is relatively low, "reservoir levels and low river stages can at times make access to the available water supply difficult or inconvenient to obtain . . ." *Id.* at 2-15.

the Corps remains a prisoner to the status quo.²⁰² Yet the inter-sovereign compact provides a way forward, as it constitutes federal legislation that would supersede the present regime.²⁰³

B. TRIBAL SOVEREIGNTY IMPLIES JOINT RESPONSIBILITY IN WATER RESOURCES MANAGEMENT

The drive of Tribes to preserve reserved water rights is intertwined with the complementary mission to further tribal sovereignty²⁰⁴ – that is, a government’s ability to govern all of the people and things within its territory.²⁰⁵ The Constitution expressly provides that Tribes comprise a third sovereign under the Indian Commerce Clause,²⁰⁶ and this idea also finds support in the United States’ treaty making power.²⁰⁷ Although the notion of the Federal government’s trust relationship is borne of a colonizing doctrine,²⁰⁸ even the current judicial formulation of tribal sovereignty requires that Tribes be offered a seat at the table in any discussions involving the management of tribal resources. And since a ratified compact becomes a “law of the United States”²⁰⁹ with the power to supersede inconsistent state²¹⁰ and federal laws,²¹¹ Congress’ power to

202. The Corps maintains: “[u]nless specifically provided for by Federal statute, quantification of water rights does not entail an allocation of storage at Corps reservoirs. The Corps recognizes, however, that the tribes have claims to reserved water rights, and will, to the extent possible, continue to operate the Mainstem Reservoir System [System] based on that recognition.” *Water Problems on the Standing Rock Sioux Reservation: Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. 27 (2004) (statement of Brig. Gen. Grisoli, Nw. Div. Eng’r, U.S. Army Corps of Eng’rs). The Corps’ stance mirrors that of Interior: while its water supply contracts “would be subject to final legal determination” of reserved rights, “[w]e cannot stop all water development projects until Indian water rights are quantified.” Tarlock, *One River*, *supra* note 150, at 634 n.19 (quoting statement of James A. Rawlings, Reg’l Supervisor of Water and Land, Upper Mo. Region Bureau of Reclamation). Although developers terminated the ETSI project, it’s unclear whether Reclamation has changed its policy toward major diversionary projects. See *Indian Policy of the Bureau of Reclamation*, BUREAU OF RECLAMATION, <http://www.usbr.gov/native/naao/policies/policy.html> (last visited Dec. 5, 2012); see Tupper, *supra* note 65.

203. See *supra* notes 182-85 and accompanying text.

204. CLARK, *supra* note 80, at 669.

205. FRANK POMMERSHEIM, *BRAID OF FEATHERS* 54 (1997).

206. If Tribes were not sovereign, there would have been no need for the founders to expressly include them with respect to Congress’ power to regulate commerce. See U.S. CONST. art. I, § 8, cl. 3.

207. Though implicit, treaties are simply diplomatic agreements between sovereigns. See U.S. CONST. art. II, § 2.

208. POMMERSHEIM, *supra* note 205, at 42 (chronicling the doctrine’s reinforcement of notions of inferiority that chip away at tribal sovereignty).

209. *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)). *Accord Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (“[U]nless the compact to which Congress consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.”).

210. *Okla. ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534-35 (1941).

attach conditions to the agreement²¹² also has the potential to threaten tribal jurisdiction over natural resources.

The origin of a contemporary concept of tribal sovereignty is found in the first of Justice Marshall's three seminal opinions on Indian Law, *Johnson v. McIntosh*.²¹³ In *McIntosh*, Justice Marshall laid the groundwork for the notion of a trust responsibility by announcing how the act of discovery gave Europeans title to the land and subsequent conquest extinguished the Indian right to occupancy.²¹⁴ Later, in *Cherokee Nation v. Georgia*,²¹⁵ the Court highlighted how the constitution contradistinguishes "Indian Tribes" from "foreign Nations," concluding that the Tribes' distinct political society exists beneath the United States' broader sovereignty, like a "domestic dependent nation."²¹⁶ In deciding *Worcester v. Georgia*²¹⁷ two years later, the Court expanded on its analysis, recognizing that the character of the treaty between the Cherokee Nation and the United States evinced notions of *equality* and, as such, did not reduce the Tribe's political existence or national character.²¹⁸ The acts and treaties considered Indian Nations as distinct political communities with exclusive authority within their boundaries, and thus negated the effect of state laws within the reservation.²¹⁹ Thus, MRB Tribes enjoy a limited sovereignty²²⁰ over their right to self-government that perseveres to this day.

This notion of limited sovereignty, however, is limited in the sense that tribal authority falls under the umbrella of broader federal constitutional

211. NORMAN J. SINGER, 1A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 23:18, at 525-26 (6th ed. 2002) ("[T]he latest expression of the legislative will prevails, the statute last passed will prevail over a statute passed before it.").

212. See COHEN 2012, *supra* note 151, § 5.02[3], at 393-94, § 7.05[1][b], at 639-40 (noting a Tribe's sovereign powers are subject to qualification by the express legislation of Congress); see also MODEL COMPACT, *supra* note 20, at 89-90. Yet the authors of the Model Compact failed to announce by what constitutional mechanism a compact could possibly "supersede" inconsistent tribal law. In essence, while the Supremacy Clause and the concept of preemption control the interplay of federal and state law in the natural resources arena, Tribes still maintain "extra-constitutional" authority – borne of tribal organic law – to exercise their right to self-government. See *Montana v. United States*, 450 U.S. 544, 560 (1981).

213. 21 U.S. 543 (1823).

214. *McIntosh*, 21 U.S. at 587.

215. 30 U.S. 1 (1831).

216. *Cherokee Nation*, 30 U.S. at 2, 18.

217. 31 U.S. 515 (1832).

218. *Worcester*, 31 U.S. at 549, 555.

219. *Id.* at 556-57.

220. A sovereignty in which: (1) Tribes possess all the powers of a sovereign State; (2) conquest renders the Tribes subject to the legislative power of the United States but preserves internal sovereignty (i.e., self rule); and (3) such powers are subject to qualification by treaties, and the express legislation by Congress. COHEN 2012, *supra* note 151, § 4.01[1][a] and [b], § 4.02[1], at 206-12, 222.

authority, but is no less powerful in its application in Indian country.²²¹ For example, the Court in *United States v. Wheeler*²²² affirmed the notion of a preexisting independent tribal sovereignty,²²³ holding the Federal government never took away the Navajo's power to punish.²²⁴ Therefore, MRB Tribes exist as separate sovereigns, whose political communities stand apart from those distinct state and federal political communities that operate within the constraints imposed by the federal constitution. By tweaking the federal compact device, Tribes would be afforded the means to exercise their separate sovereignty in a manner similar to that of the States.

Aside from examples of States treating Tribes as sister sovereigns in compacts related to allocation²²⁵ or gaming,²²⁶ there exists additional support for the notion that tribal sovereignty is equal in stature²²⁷ to that of state sovereignty in the environmental regulation context. After the Tenth Circuit Court of Appeals ruled that environmental laws also apply to Indian lands,²²⁸ the United States Environmental Protection Agency (EPA) adopted a policy of treating "tribes as states" for purposes of implementing nearly all of the major pollution control programs.²²⁹ In practice, EPA

221. "Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain a separate people, with the power of regulating their internal and social relations." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (citing *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)). For example, the Court's decision in *Ex Parte Crow Dog* endorsed a robust tribal sovereignty in holding that federal courts did not have jurisdiction over Indian-on-Indian crimes. 109 U.S. 556, 571-72 (1883). The Court reasoned that a strict interpretation of the treaty language of "subject to laws of United States" would reverse the prevailing federal policy of advancing the dependent community into a self-supporting orderly government. *Id.*

222. 435 U.S. 313 (1978).

223. *Wheeler*, 435 U.S. at 322-23; see *Talton v. Mayes*, 163 U.S. 376, 382-83 (1896) (holding tribal power to make laws, and provide for trial and punishment is not a federal power in that it does not spring from the federal constitution but derives from its own organic law).

224. *Wheeler*, 435 U.S. at 323-24. In essence the Navajo retain that aspect of primeval sovereignty that has not yet been divested via treaty, statute, or by implication of the Tribe's dependent status. *Id.*

225. See, e.g., State of Montana-Fort Belknap Indian Community of the Fort Belknap Reservation-United States Water Rights Compact. MONT. CODE ANN. § 85-20-1001 (2011).

226. Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, 2710(d)(3)(A) (2006). Congress envisioned state-tribal compacts in the gaming context as "negotiated agreement[s] between two political entities that resolves questions of overlapping jurisdictions." CORNTASSEL WITMER, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD 110-11 (2006).

227. But state and tribal authority remain distinct, since each "derive[s] power from different sources;" specifically, "the organic law that established it." *Wheeler*, 435 U.S. at 313.

228. *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 555-56 (10th Cir. 1986).

229. In the 1990 amendments to the Clean Air Act (CAA), Congress granted Tribes primary authority to administer an implementation plan to meet National Ambient Air Quality Standards (NAAQS) within the exterior boundaries of the reservation or within the Tribe's jurisdiction. 42 U.S.C. § 7601(d) (2006); 40 C.F.R. Pt. 49 (2011). See *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d

views tribal governments as appropriate non-federal parties for making decisions and carrying out environmental laws on the reservation, even if the nature of authority in implementing a national pollution control program is different from that authority undergirding tribal regulatory jurisdiction.²³⁰ Thus, Congress' broad policy of acknowledging Tribes' inherent *authority* to regulate pollution – and Tribes' governmental *capacity* to implement national programs – indicates a congressional amenability to full tribal participation in administering a MRB water resources compact.

While Congress' historical exercise of its plenary power in regulating the affairs of Indians often has the effect of reducing tribal authority and jurisdiction,²³¹ Congress could instead wield this power in its consent to an

1280, 1290-91 (D.C. Cir. 2000) (striking down a challenge to EPA's interpretation of tribal authority to regulate individual air pollutants). In a nod to the sometime divergent views of state and tribal regulators, EPA assumes responsibility for those provisions of the relevant program that the Tribes choose not to implement. Congress has similarly vested Tribes with authority to implement Clean Water Act (CWA) programs, principally through issuance of permits under the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. § 1377 (2006) (treating "tribes as states" so long as the Tribe has a governmental body, reservation, and the capability to implement the relevant provisions); 40 C.F.R. § 123.31-.34 (2011). Tribes are also empowered to administer section 404 permits regulating the discharge of dredged or fill material in non-navigable reservation wetlands and waterways; the Corps continues to regulate navigable waters under section 10 of the Rivers and Harbors Act of 1899. 40 C.F.R. § 233.60-.62 (2011); Clean Water Act, Section 404 Tribal Regulations, 58 Fed. Reg. 8171 (Feb. 11, 1993) (codified at 40 C.F.R. pts. 232 and 233 (2011)). EPA may treat "tribes as states" under the 1986 amendments to the Safe Drinking Water Act. 42 U.S.C. § 300(f)-(j) (2006); 40 C.F.R. §§ 142.72, .76, .78, 144.2, 145.52, .56, .58 (2011). Also, EPA treats Tribes "substantially" as States under the 1986 amendments to the Comprehensive Environmental Recovery Compensation and Liability Act (CERCLA). 42 U.S.C. §§ 9601-9657 (2006) (waiving the cost-sharing requirements under section 9604(c)(3) that applies to States when hazardous waste cleanup is initiated by the Tribe). The Resource Conservation and Recovery Act (RCRA) is the only federal pollution control program administered by EPA that does not specifically delegate authority to Tribes. 42 U.S.C. § 6901 (2006) (defining Tribes as "municipalities"). Though RCRA's "municipality" exception should not be read as Congress vouchsafing greater authority upon the States: in *Washington Dept. of Ecology v. EPA*, the Ninth Circuit upheld EPA's interpretation of RCRA as not granting States authority to enforce state hazardous waste regulations against Tribes or individual Indians on Indian lands. 752 F.2d 1465, 1467-68 (9th Cir. 1985).

230. Whereas Tribes receive delegated regulatory authority to implement federal programs on the reservation, Tribes exercise their inherent sovereignty in regulating activities that have a direct effect on the political integrity, economic security, or health or welfare. See Indian Reservation Water Quality Standards Rule, 56 Fed. Reg. 64,876 (Dec. 12, 1991) (outlining the regulatory jurisdiction of Tribes); *Montana v. United States*, 450 U.S. 544, 564-65 (1981); *City of Albuquerque v. Browner*, 97 F.3d 415, 423-24 (10th Cir. 1996) (holding EPA's decision to allow Pueblo Isleta to impose water quality standards for that reach of the Rio Grande flowing through the reservation was "permissible, because it is in accord with powers inherent in Indian tribal sovereignty"); *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) (holding Tribes have inherent authority to regulate all sources of pollutant emissions in the reservation so long as activities are "serious and substantial") (citing *Montana v. United States*, 450 U.S. 544, 560 (1981)).

231. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903) (establishing the plenary power authority theory by which Congress has unlimited political power to modify treaties so long as it does so in explicit terms). The source of Congress' plenary power springs from the Indian Commerce Clause, Article I, Section 8, Clause 3, and the Treaty Clause, Article II, Section 2,

inter-sovereign compact that artfully accommodates each sovereign's interests in Missouri River water resources. Also, there is no explicit constitutional language suggesting a limitation on Congress' authority to relax restrictions on tribal jurisdiction²³² – in essence, the Constitution does not dictate the metes and bounds of tribal autonomy.²³³ Therefore, Congress is permitted to modify the degree of autonomy in light of Tribes' "dependent sovereign" status.²³⁴ Also, since Congress' plenary power is partly political in nature,²³⁵ it retains significant discretion to advance the federal policy of championing tribal self-government and self-determination²³⁶ through its endorsement of a tripartite compact.²³⁷

Finally, it is uncertain whether the United States could meet its trust responsibility to MRB Tribes if it were to task a federal representative on a compact commission with representing tribal interests until Indian reserved water rights are quantified. In upholding the Court of Claims' embrace of the "good faith effort" test in *United States v. Sioux Nation*,²³⁸ the Supreme

Clause 2. *United States v. Lara*, 541 U.S. 193, 200 (2004). Congress often flexes its plenary power in the abrogation of Indian treaties. *See generally* *United States v. Dion*, 476 U.S. 734, 743-44 (1986) (holding Congress abrogated the Yankton Sioux Tribe of its exclusive rights to hunt and fish on reservation such that hunting of protected bald eagles was punishable under the Endangered Species Act (ESA) (87 Stat. 884, as amended, 16 U.S.C. § 1531 *et seq.* (1982 ed. And Supp. II)) and Bald Eagle Protection Act (54 Stat. 250, 16 U.S.C. § 668 *et seq.* (1986))); *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960) (holding tribal fee land may be taken because general acts of Congress apply equally to Indians in the absence of "clear expression to contrary"); *Seneca Nation of Indians v. Brucker*, 262 F.2d 27, 27 (D.C. Cir. 1958) (holding Congress had in a "sufficiently clear and specific way, shown an intention" to authorize the taking of Seneca land through flooding attributed to the operation of a Corps dam); *South Dakota v. Borland*, 508 U.S. 679, 690 (1993) (holding that Congress, in passing the Cheyenne River Act, extinguished the Tribe's original treaty right to regulate non-Indian hunting and fishing on federal water project lands). Perhaps, suprisingly, this plenary power is grounded on the concept of dependency in that Congress wields the power to protect Tribes. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850-51 (1985).

232. *Lara*, 541 U.S. at 200.

233. *See id.* at 194 (noting that Congress is free to change "judicially made" Indian law through legislation).

234. *Id.* at 205 (explaining that Congress' intent to lift restrictions on tribal criminal jurisdiction does not interfere with state authority or power).

235. *Lone Wolf*, 187 U.S. at 565.

236. Memorandum from President to All Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951 (May 4, 1994); Exec. Order No. 13,007, Indian Sacred Sites, 61 Fed. Reg. 26,771 (May 24, 1996) (requiring the Federal government and its agencies to engage in government-to-government consultation with Tribes); Exec. Order No. 13,084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27,655 (May 19, 1998); Exec. Order No. 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

237. Critics of an inter-sovereign compact approach should not construe tribal participation as an action to "rekindl[e] embers of sovereignty that long ago grew cold," since MRB Tribes never relinquished the reins of government nor their exclusive treaty rights. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 (2005).

238. 448 U.S. 371, 416 (1980).

Court agreed Congress could not simultaneously act as trustee for the benefit of Indians (in essence, exercising plenary power for the Indians' best interest), and exercise its eminent domain power through a taking of Indian property under the Fifth Amendment.²³⁹ The Court has also held the Executive is similarly accountable under the trust relationship. In *Seminole Nation v. United States*,²⁴⁰ the Court held United States officials are to be judged by the most exacting fiduciary standards in meeting trust obligations in their dealings with dependent Indians.²⁴¹ Moreover, the Federal government's duty to conform its actions to this exacting standard flows beyond the Indian property context,²⁴² to situations where the government maintains supervisory and managerial responsibility for natural resources.²⁴³ Therefore, federal agencies are beholden to this heightened fiduciary standard in managing the trust corpus, which includes MRB water resources.

Even at present, federal control²⁴⁴ exacerbates a historical conflict of interest²⁴⁵ between the Federal government's duty to operate the System for multiple purposes and the government's fiduciary duty to protect tribal trust

239. "In any given situation in which Congress has acted with regard to Indian people, it must have acted in one capacity or the other . . . Congress can own two hats, but it cannot wear them both at the same time." *Id.* at 408-09.

240. 316 U.S. 286, (1942).

241. *Seminole Nation*, 316 U.S. at 296-97; *see also* Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy, 898 F.2d 1410, 1420-21 (9th Cir. 1990).

242. *Tribe v. Navy*, 898 F.2d at 1420.

243. For example, the Federal government owes a "fiduciary duty" to Tribes to leverage its authority to the fullest extent possible to preserve water resources. *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 258 (D.D.C. 1972). The Ninth Circuit also held that the Federal government's duty to "preserve and protect" the fishery "extend[ed] to any federal government action." *Tribe v. Navy*, 898 F.2d at 1420. *See* *United States v. Mitchell*, 463 U.S. 206, 224-25 (1983) (finding the existence of a fiduciary relation in light of the language of statutes regulating timber harvests on reservations).

244. Davidson, *supra* note 31, at 11; *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 505 (1988) (holding that even the Secretary of the Interior must seek approval from the Secretary of the Army before diverting any water from System reservoirs). Given the sheer size of each mainstem reservoir, the scope of the Federal government's jurisdiction is expansive, as it encompasses the entire impoundment area, often stretching for miles upstream of each dam. *See* MASTER MANUAL, *supra* note 4, at pt. IV.

245. Federal interests in flood protection and reclamation have long dominated Indian interests in the MRB. In inundating ninety-four percent of Fort Berthold Reservation's prime agricultural land, the Corps displaced approximately three hundred forty families and plunged the Mandan, Hidatsa, and Arikara Tribes into an existence premised on federal social services. 2 SALLY THOMPSON ET AL., TRIBAL PERSPECTIVES ON AMERICAN HISTORY: GREAT PLAINS-UPPER MISSOURI RIVER 110 (2009). "Seizure of Indian lands and rights to the use of water in disregard of human rights and dignities is the hallmark of the outrage [of] Indians of that reservation." Veeder, *supra* note 140, at 634 & n.90 (tabulating federal projects' interference with Indian rights). President Nixon, in an address to Congress, remarked: "No self-respecting law firm would allow itself to represent two opposing clients in one dispute, yet the Federal government has frequently found itself in that position." 116 CONG. REC. 10,894, 10,896 (daily ed. July 9, 1970).

resources.²⁴⁶ Corps water supply agreements cultivate both a reliance on water resources and an expectation of access to such supplies on the part of irrigators, municipalities, and other contracting parties.²⁴⁷ Even if the organizational structure of a MRB compact commission divested the Federal government of its primary control, such water supply agreements have the potential to directly and indirectly harm the trust corpus. First, it is uncertain whether MRB Tribes would have access to sufficient surface water to fulfill quantified rights given the present allocation scheme.²⁴⁸ Second, while there exists recognition that economic development strengthens tribal sovereignty,²⁴⁹ contracts to divert reservoir water for oil and natural gas development may ultimately harm tribal resources.²⁵⁰ Given this present conflict of interest, it is essential that a tribal representative be allowed to participate on an equal footing with other representatives to any future compact commission in decisions affecting water resources.

V. CONCLUSION

Given the Federal government's substantial interest in flood protection, navigation, and national security, and tribal interests in reserved water rights and tribal sovereignty, compact drafters should distribute power equally among federal, state, and tribal representatives to any future compact commission. Although Congress retains plenary power to regulate compact commission activities that bear on federal interests, a federal presence is instrumental in coordinating the massive network of flood

246. In *United States v. Sioux Nation*, the Supreme Court articulated the common sense notion that the federal government "cannot wear both hats at the same time" in upholding its trust obligation and advancing its own interests. 448 U.S. 371, 408-09 (1980). The Court ultimately held that the Act of 1877 ratifying the agreement between the Sioux Nation and United States effected a compensable taking of land in the Black Hills of South Dakota. *Id.* at 421, 422.

247. North Dakota Congressman Kent Conrad recognized that Corps water supply contracts with downstream users creates a situation that will "make it impossible for [Tribes] to access water for present and future uses." *Impact Suffered by the Tribes in the Upper Basin of the Missouri River: Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. 22 (2003) (statement of Sen. Kent Conrad of North Dakota, Member, S. Comm. on Indian Affairs).

248. In preparation of the Missouri River Master Manual Draft Environmental Impact Statement (DEIS), the Corps considered a low-end estimate of 3.5 million acre-feet (MAF) of potential claims for Indian reserved water rights and a high-end estimate of 6.5 MAF. VINEYARD, *supra* note 135, at 25. The Mni-Sose Intertribal Water Rights Coalition estimated that Tribes were entitled 21.5 MAF in total rights – of which 10.9 MAF could be depleted – against an average Missouri River annual outflow of 20 MAF. *Id.*

249. POMMERSHEIM, *supra* note 205, at 138.

250. See *supra* notes 58-59 and accompanying text. See also U.S. ENVTL. PROT. AGENCY, PLAN TO STUDY THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER SOURCES 35 (2011) (citing a number of reports, EPA expressed that "improperly sealed wells may be able to provide subsurface pathways for ground water pollution by allowing contaminant migration to sources of drinking water").

control works to protect downstream agricultural land, whose production contributes to national security. It is also of critical importance that any compact provide Tribes with a forum in which they can protect reserved rights to MRB surface and groundwater, and exercise tribal sovereignty. A purely federal-interstate compact necessarily encroaches on tribal sovereignty by limiting Tribes' ability to enter into realistic government-to-government relationships in the management of MRB water resources.²⁵¹ Because the inability of Tribes to access reserved water rights threatens aspects of self-government, it is critical they are invited to participate in regional decision making.²⁵² As applied, a tripartite approach recognizes the third sovereign's zone of authority, free from intrusion by other sovereigns.²⁵³

Since justice is, at its root, relational,²⁵⁴ a new forum in which each sovereign could redefine her relationships through collaborative problem solving would directly address a history of heartbreak in the MRB.²⁵⁵ Though allowing for tribal participation prior to quantification would depart from traditional compacting practice, authors of the Model Compact conceded "it is both equitable and essential that the [Tribes] collectively be represented in any compact governance institution in a voting capacity by a representative of their choice."²⁵⁶ Yet, unlike the authors' insistence that *one* commissioner represent the collective interests of all basin Tribes, drafters of a twenty-first century MRB compact should carefully consider how to create a tribal bloc whose voting weight is equal to that of its sister sovereigns.' This will likely prove difficult: in the allocation and gaming spheres, States usually compact with one Tribe. However, the Forum Committee of the Columbia River Basin Forum (CRBF), formerly known

251. Tribes retain broad civil authority to regulate on-reservation actions that affect their political integrity, economic security, or health and welfare of their members. *Montana v. United States*, 450 U.S. 544, 560 (1981).

252. To be clear, the author is not a tribal member nor purports to know whether there exists a present consensus – if any exists – of MRB tribal amenability to a tripartite compact approach. However, in light of state and tribal disagreement as to the prioritization of conflicting water uses, from an outsider's perspective, a forum, such as that provided by a commission charged with implementing an inter-sovereign compact, presents a more inclusive means to manage Missouri River water resources. Such an arrangement likely has a better chance of moving the reserved water rights quantification discussion forward and honoring the robust sovereignty that MRB Tribes presently enjoy.

253. See POMMERSHEIM, *supra* note 205, at 100. Professor Pommersheim acknowledges that regional forums, like tribal-state water compacts, foster meaningful dialogue that improves inter-sovereign relations. *Id.* at 160.

254. See JAMES BOYD WHITE, *JUSTICE AS TRANSLATION*, at xiv (1990).

255. See THOMPSON ET AL., *supra* note 245, at 110.

256. MODEL COMPACT, *supra* note 20, at 27 n.27.

as the Three Sovereigns,²⁵⁷ might offer a viable model for an equal balance of federal-state-tribal representation and participation. Though short-lived, CRBF served as a regional forum for communication, coordination, and collaboration in the preparation of the National Marine Fisheries Service's (NMFS) 2000 Biological Opinion on the Federal Columbia River Power System.²⁵⁸ Finally, this inclusive approach embraces the notion of a "new" west, where balancing water resources development with respect for the landscape is essential: the inter-sovereign compact would allow regional stakeholders to stand shoulder to shoulder in defending water resources against common enemies.²⁵⁹

257. Northwest Power and Conservation Council, http://www.nwcouncil.org/fw/3sov/crb_forum.htm (last visited Dec. 5, 2012).

258. Representation on the governing Forum Committee was shared equally among four tribal representatives, four federal representatives, and a representative of each of the four northwest States. Enclosure to the Memorandum from the Federal Caucus on the Multi-Species Framework Project 1-2 (June 22, 1999) (on file with author).

259. See POMMERSHEIM, *supra* note 205, at 139, 197.