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COMMENT

THE MISSOURI RIVER COMPROMISE: NEGOTIATED RULEMAKING
AS A SUGGESTED RESOLUTION TO THE RIVER BASIN DISPUTE

Marya Kathryn Lucas*

I. INTRODUCTION

The Missouri River—a meandering muddy river with side channels and sandbars—is no more.¹ For the past fifty years or so, the Army Corps of Engineers has constrained it, straightened it and created a fast-paced deep-water channel designed to control flooding and to accommodate modern-day commerce.²

Although channelization allowed the Corps to partially tame the Missouri's flooding,³ the Corps has been unable to tame the diverse and varied interests of the ten Missouri River basin states.⁴ Each spring, the Missouri floods not with water, but with lawsuits⁵ whereby these various interests—which include the barge, recreation and power plant industries, farmers, environmentalists, and others⁶—challenge the regulatory authority of the Corps, granted to the agency through the Flood Control Act of 1944⁷ and in the Supreme Court decision, *ETSI Pipeline Project v. Missouri*.⁸ As of April 2004, six consolidated lawsuits relating to the Missouri's management were pending in the District Court of Minnesota under Judge Paul A. Magnuson, in *In re Operation of the Missouri River System Litigation*.⁹

The lawsuits of 2004 as well as previous lawsuits center around the *timing* and *amount* of water that the Corps releases from the six large reservoirs,¹⁰ constructed under the Flood Control Act,¹¹ and located along the

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¹ Bert Schneiders, *The Myth of Environmental Management: The Corps, the Missouri River, and the Channelization Project*, 70 *Agric. Hist.* 337 (Mar. 1996).

² *Id.* See also Pam Belluck, *An Expedition for a Consensus on the Future of the Missouri River*, *N.Y. Times* (Jan. 2, 1999). Native American tribes also maintain interests in the Missouri River. See *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 258 F. Supp. 2d 1027 (D.S.D. 2003). This comment, however, does not expressly address tribal interests because of their complex history in connection with the Missouri River. See John E. Thorson, *Voyage of Rediscovery: Lessons from Lewis & Clark for Missouri River Managers*, 6 *Great Plains Nat. Resources J.* 121, 127 (2002).

³ See *Missouri River Master Control Manual Review and Update FEIS*, Description of Existing Environment, 3.3.1, Water in Storage and River Flows <http://www.nwd-mr.usace.army.mil/mmanual/Volume%20I/Section_3.pdf> (accessed May 20, 2004) [hereinafter Description of Existing Environment].

⁴ John E. Thorson, *River of Promise, River of Peril: The Politics of Managing the Missouri River*, University Press of Kansas, 18 and 69 (1994).

⁵ See *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378, 1379 (D. Minn. 2003).

⁶ Belluck, *supra* n. 2.

⁷ Pub. L. No. 78-534, § 7, 58 Stat. 887, 890 (1944) (codified at 16 U.S.C. § 460d et seq. (2000) and 33 U.S.C. § 701 et seq.).

⁸ 484 U.S. 495 (1988).

⁹ 277 F. Supp. 2d at 1379. Originally there were seven separate lawsuits involving the Missouri's management. *Id.* at 1378. The Judicial Panel on Multidistrict Litigation, however, excluded the District of South Dakota *Lower Brule* tribal action which was settled from consolidation, accepting the parties' claims that the facts of the settlement would have no bearing on the other six lawsuits. *Id.* at 1379.

¹⁰ *Missouri River Mainstem Reservoir System Master Water Control Manual*, 4-01 <<https://www.nwd.usace.army.mil/pa/missouri2003aop.asp>> (accessed May 20, 2004) [hereinafter, New Master Manual]. The six reservoirs, or "lakes" contain about 73.4 million acre-feet of storage capacity and serve as the largest reservoir system in the United States. *Id.*

¹¹ Thorson, *supra* n. 4, at 67.

upper Missouri river.¹² The *timing* and *amount* of water release are determined by the Corps' general management guidelines embodied in the Master Manual and the Corps' specific guidelines embodied in the Corps' Annual Operating Plan.¹³ The Corps' Master Manual is a general guideline, which contains engineering specifications related to the management of the river and its reservoirs.¹⁴ The Corps engineers are to follow the guidelines set forth in the Master Manual to determine the time and amount of water released into the Missouri River during different seasons and weather conditions.¹⁵

However, determinations of the *time* and *amount* of water released may be complicated by climate and weather changes such as drought.¹⁶ These determinations and the climate/weather changes affect the various interests along the river.¹⁷ The river interests typically split along the arid upper basin and humid lower basin state-divide.¹⁸ For example, to maintain their interests during drought, lower basin farmers, barge operators, power plants, and recreation industries want the Corps to release water from the reservoirs primarily in the summer.¹⁹ Environmentalists and upper basin recreation industries, on the other hand, want the Corps to release water primarily in the spring.²⁰ Thus, when the Corps satisfies one or several interests, the Corps does so at the expense of the others.²¹

When various river interests are threatened, as in times of drought, lawsuits ensue.²² Drought has afflicted the basin states two times in the recent past—in the late 1980s and early 1990s, and in early 2000.²³ Each time, upper basin states attempted to resolve Missouri River management in their favor through litigation calling for injunctions against the Corps' release of reservoir waters.²⁴ Historically, the Corps has tended to place lower basin state interests and navigation interests above upper basin recreation and environmental interests.²⁵ The Corps' Master Manual of 1979, for example, imposed a hierarchical ordering of interests which included, respectively, flood control, irrigation, water supply and water-quality, navigation, power, and finally recreation, fish and wildlife, and thus required the maintenance of high summer flows rather than high spring

¹² Peter Capossela, *Indian Reserved Water Rights in the Missouri River Basin*, 6 Great Plains Nat. Resources J. 131, 132. See also New Master Manual, *supra* n. 10, at 4-03. The reservoirs include Fort Peck, located in Montana; Garrison, located in North Dakota; and *four reservoirs*—Oahe, Big Bend, Fort Randall, and Gavins Point—all in South Dakota. *Id.*

¹³ New Master Manual, *supra* n. 10, at 1-01, 1-02, and 1-02.3. Note, that the Corps receives input with regard to the Annual Operating Plan from other agencies of the Federal government, state and local authorities, public utilities, irrigation districts, fish and wildlife interests, and other groups. *Id.* at 1-02.5. As this comment demonstrates, however, "input" is not enough—interested parties must communicate with one another and directly take part in the planning process.

¹⁴ *Id.* at 1-01, 1-02, and 1-02.5.

¹⁵ *Id.* at 1-01, 1-02, and 1-02.3.

¹⁶ See New Master Manual, *supra* n. 10, at 7.03 and 7.03.1 on pages 121-22. See also John H. Davidson & Thomas Earl Geu, *The Missouri River and Adaptive Management: Protecting Ecological Function and Legal Process*, 80 Neb. L. Rev. 816, 820 (2001).

¹⁷ Davidson & Geu, *supra* n. 16, at 820.

¹⁸ Thorson, *supra* n. 4, at 18.

¹⁹ Belluck, *supra* n. 2.

²⁰ *Id.*

²¹ *Id.* See also *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1019 (8th Cir. 2003).

²² See *South Dakota v. Hazen*, 914 F.2d 147 (8th Cir. 1990); *South Dakota v. Bornhoft*, No. CV-91-26 JDS-BLG (D. Mont. Feb. 3, 1993); *North Dakota v. U.S. Army Corps of Engineers*, 264 F. Supp. 2d 871 (D.N.D. 2003); *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003); *American Rivers v. U.S. Army Corps of Engineers, et al.*, 271 F. Supp. 2d 230 (D.D.C. 2003).

²³ Description of Existing Environment, *supra* n. 3, at 3.3.1. See also *North Dakota*, 264 F. Supp. 2d at 877.

²⁴ See citations accompanying n. 22.

²⁵ *Id.* See also Dan A. Tarlock, *The Missouri River: The Paradox of Conflict Without Scarcity*, 2 Great Plains Nat. Resources J. 1, 3 (1997).

flows.²⁶ The Corps interpreted this hierarchical ordering of interests as required by the Flood Control Act.²⁷ Because the ordering was in lower basin states' interests, lower basin states did not dispute it.²⁸ Upper basin states, however, have argued against the interpretation.²⁹

In the early 1990s, upper basin states instituted litigation against the Corps, which looked much like the litigation today.³⁰ The courts, however, never reached the merits of the cases because they were either settled or declared moot.³¹ In the Eighth Circuit's June 2003 decision in *Ubbelohde*, however, the court declared the issue of the Corps' management reviewable.³² This declaration set the stage for further conflict not just among the river interests but among the courts.³³

A month after the Eighth Circuit in *Ubbelohde* ruled that the Corps was required to implement the high summer flows, in favor of lower basin state interests and navigation interests, the District Court for the District of Columbia enjoined the Corps from implementing such a flow regime in *American Rivers*.³⁴ The D.C. District Court ruled that such a flow regime would further threaten the survival of three species already listed under the Endangered Species Act.³⁵ The Eighth Circuit, on the other hand, in ruling that the Corps was required to implement a high summer flow, deferred to the Corps' Master Manual of 1979 and declared it a binding instrument.³⁶

The two courts, then, in reaching conflicting dispositions on the Missouri's management, employed entirely different frames of analysis, with the court in *Ubbelohde* focusing on the binding nature of the Corps' Master Manual and the court in *American Rivers* focusing on the Master Manual in light of the Endangered Species Act.³⁷

As *Ubbelohde*, *American Rivers*, and other Missouri River litigation illustrate, the courts are not necessarily the most effective forum for resolution of the management disputes. This comment proposes that the proper resolution for the disputes is negotiation, rather than litigation, under the framework of the Negotiated Rulemaking Act.³⁸ Negotiated rulemaking is a process that allows parties affected by federal regulations to directly participate with the agency in decision-making.³⁹ Thus, the federal government, including the Corps, the Fish and Wildlife Services, and the Department of Interior, could engage the ten Missouri River basin states (and their various interests) in a negotiated rulemaking process to develop effective management of the Missouri River on both the federal and local state levels.⁴⁰

The negotiated rulemaking framework is an appropriate remedy for the management dispute for three reasons. First, negotiated rulemaking allows for resolution of the complex policy issues involved in the Missouri River dispute and is a way both to facilitate communication among and between the various parties as

²⁶ *Missouri River Main Stem Reservoir System Reservoir Regulation Manual of 1979*, section 9-3.

²⁷ Thorson, *supra* n. 4, at 178.

²⁸ See Thorson, *supra* n. 4, at 179.

²⁹ See citations accompanying n. 22.

³⁰ See *South Dakota v. Hazen*, 914 F. 2d 147 (8th Cir. 1990); *South Dakota v. Bornhoft*, No. CV-91-26 JDS-BLG (D. Mont. Feb. 3, 1993); *North Dakota v. U.S. Army Corps of Engineers*, 264 F. Supp. 2d 871 (D.N.D. 2003).

³¹ See *Hazen*, 914 F. 2d at 148; *Bornhoft*, at *3; *North Dakota*, 264 F. Supp. 2d at 880 (here, the court held that North Dakota had not met the requirements for a temporary restraining order).

³² 330 F.3d at 1029-1030.

³³ See generally *In re Operation of the Missouri River System*, 277 F. Supp. 2d 1378.

³⁴ 271 F. Supp. 2d at 257-58.

³⁵ *Id.* at 257.

³⁶ *Ubbelohde*, 330 F.3d at 1028-29.

³⁷ See 271 F. Supp. 2d at 257-58 and 330 F.3d at 1028-29, respectively.

³⁸ See 5 U.S.C. §§ 568 & 563.

³⁹ Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 Duke L.J. 1389, 1400 (1997).

⁴⁰ See *id.*

well as to generate creative solutions.⁴¹ The sharing of interests, research and perspectives tends to facilitate understanding—leading to an interest-based, future-oriented focus rather than a focus on the positions and past harms attendant to litigation.⁴² Through negotiation in this context, states and their various interests would be able to participate in making “political choices,” such as whether the recreation industry really does deserve greater priority over the navigation industry—choices that profoundly affect the states’ socio-economic well-being.⁴³ By giving the states some autonomy in decision-making, states are arguably more likely to comply with the regulations that result therefrom and refrain from litigation.⁴⁴ Even if states do not achieve their ultimate interests in negotiation, they will still be able to grow in understanding of all sides—which again arguably tempers the desire to litigate.⁴⁵ Furthermore, the negotiated rulemaking technique has proven useful in the past in resolving other complex environmental disputes.⁴⁶

Second, the dispute over management of the Missouri River has reached its peak, and thus the time for negotiation is ripe.⁴⁷ The dispute has reached its peak in the form of litigation and in the form of dissatisfaction over the Corps’ new Master Manual, released in March 2004, after fourteen years of revision.⁴⁸ Litigation reached its peak when the Supreme Court refused to grant certiorari to hear the upper basin states’ arguments in opposition to *Ubbelohde* and thus left the lower courts with the task of resolving the conflicts.⁴⁹ Unless the lower courts reach a resounding resolution, which is highly unlikely absent a Supreme Court pronouncement, the costly and ineffective litigation over management issues is likely to continue.⁵⁰ Litigation is likely to continue because disagreement between upper basin and lower basin states and among environmentalists over the Corps’ management authority in light of the Flood Control Act persists.⁵¹

Dissatisfaction with the revised Master Manual has reached its peak because the dissatisfaction now exists on all sides.⁵² Navigation and power interests in the lower basin protest the plan to shorten the navigation season, which decreases water releases to the lower basin states.⁵³ Upper basin states, meanwhile, protest the support of a navigation season.⁵⁴ Environmentalists protest the lack of spring rise and claim that the Corps’

⁴¹ See Philip J. Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 Am. U.L. Rev. 471, 475 (1983). See also New Master Manual, *supra* n. 10, at 2.01.14, 2.01.14.1—2.01.14.15 (for a description of federal agencies and acts involved in management of the Missouri River).

⁴² Harter, *supra* n. 39, at 1400.

⁴³ See *id.* See generally *Ubbelohde*, 330 F.3d 1014.

⁴⁴ Harter, *supra* n. 39, at 1400.

⁴⁵ See *id.*

⁴⁶ Henry H. Perritt Jr., *Negotiated Rulemaking before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 Geo. L.J. 1625, 1627-28 (1986).

⁴⁷ See Harter, *supra* n. 41, at 479.

⁴⁸ See *Ubbelohde*, 330 F.3d 1014; *American Rivers*, 271 F. Supp. 2d 230; Bill Lambrecht, *Corps’ Master Manual Plan Draws Laments*, St. Louis Post-Dispatch B1 (Mar. 21, 2004).

⁴⁹ Bill Lambrecht, *Court Helps States Along Lower Missouri/Justices Reject Dakotas’ Appeal of Decision on Uses for the River*, St. Louis Post-Dispatch A7 (Apr. 20, 2004). The Supreme Court, without comment, turned down North and South Dakota’s appeal of *Ubbelohde*. *Id.* See also *Ubbelohde*, Petition for Writ of Certiorari <<http://www.usdoj.gov/osg/briefs/search.html>> (accessed May 20, 2004).

⁵⁰ See generally *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378.

⁵¹ *Id.*

⁵² Lambrecht, *supra* n. 48.

⁵³ *Id.* See also *Record of Decision Missouri River Master Water Control Manual and Review Update*, approved by William T. Grisoli, Brigadier General, U.S. Army Division Engineer (Mar. 19, 2004) <<http://www.nwd-mr.usace.army.mil/rcc/reports/pdfs/recordofdecision.pdf>> (accessed May 20, 2004) [hereinafter *Record of Decision*].

⁵⁴ *Id.*

plan of rebuilding habitat is a poor proxy.⁵⁵ Thus, all sides have an incentive to negotiate the issues.⁵⁶ Should the federal court initiate negotiated rulemaking, parties would most likely feel participation was their best alternative.⁵⁷

Three, the interested parties have expressed an interest in negotiating in the past, but were unable to develop a proper framework within which to negotiate disputes.⁵⁸ Negotiated rulemaking provides this framework.⁵⁹

Part II of this comment will discuss the history of the conflict over management of the Missouri River, including key provisions of the Flood Control Act, and the present conflict among the basin interests. Part III will discuss the present litigation in light of the facts and holdings of both *Ubbelohde* and *American Rivers*. Part IV will discuss the history of the litigation between the basin interests, and the present Master Manual. Part V will discuss the resolution of the conflict in the negotiated rulemaking context.

II. THE HISTORY AND CURRENT INTERESTS

A. *The Geographical Divide*

The Missouri River, at 2,473 miles, is the longest river in the United States.⁶⁰ It flows from Fort Peck, Montana through 10 states and 25 Native American tribal lands to St. Louis, Missouri, where it empties into the Mississippi.⁶¹ Literature usually separates the 10 states through which the Missouri and its tributaries flow into two groups: the upper basin states (Colorado, Wyoming, Montana, North Dakota, and South Dakota) and the lower basin states (Minnesota, Nebraska, Iowa, Kansas, and Missouri).⁶² This division represents the climatic and environmental divide between the arid West and humid Midwest.⁶³ The differences in climate mean that, while the upper basin typically suffers from the threat of drought, the lower basin typically suffers from the threat of flood.⁶⁴

B. *Historic Interests*

Because of this climatic divide, the upper and lower basins developed divergent interests in utilizing the Missouri River waters.⁶⁵ The upper basin developed interests traditionally associated with water shortage⁶⁶—agriculture (irrigation), other consumptive uses (including mining and municipal uses), and water conservation.⁶⁷ The lower basin developed interests traditionally associated with water surplus—flood control,

⁵⁵ Bill Lambrecht, *Corps is Ready to Adopt Plan, but Controversy Continues to Flow*, St. Louis Post-Dispatch A1 (March 19, 2004).

⁵⁶ See Harter, *supra* n. 41, at 479.

⁵⁷ See Perritt, *supra* n. 46, at 1635.

⁵⁸ Thorson, *supra* n. 4, at 163-174.

⁵⁹ See Harter, *supra* n. 41, at 479.

⁶⁰ Davidson & Geu, *supra* n. 16, at 821.

⁶¹ *Id.* See also Capossela, *supra* n. 12, at 132.

⁶² Thorson, *supra* n. 4, at 18.

⁶³ *Id.* The climatic divide follows the hundredth meridian of longitude. *Id.* For example, while Big Horn, Wyoming may receive only six inches of annual rainfall, areas in Missouri may receive as much as 44 inches. Davidson & Geu, *supra* n. 16, at 820.

⁶⁴ Davidson & Geu, *supra* n. 16, at 821.

⁶⁵ Thorson, *supra* n. 4, at 21.

⁶⁶ Davidson & Geu, *supra* n. 16, at 822.

⁶⁷ *Id.*; Thorson, *supra* n. 4, at 22.

navigation, and land drainage.⁶⁸ Historically, these interests tended to clash.⁶⁹ If the water was being used downstream for navigation, it could not be used and diverted upstream for irrigation.⁷⁰

C. Current Interests

Recent weather anomalies as well as environmental and economic developments have further exacerbated the tensions between the upper and lower basin state interests.⁷¹ Drought, which has plagued the upper and lower basin states the past three to five years, has served as the linchpin for outlining the contours of these still prevalent tensions.⁷²

To avoid the effects of the drought and to maintain the navigation industry, among other interests, lower basin states demand that the Corps release water from the upper basin reservoirs during the summer.⁷³ Barge operators want the water to stay swift and deep, so towboats and barges can continue to haul such things as fertilizer upriver from Kansas City and St. Louis and haul such things as grain, soybean and soybean mill during harvest time downriver.⁷⁴

Lower basin states further argue that navigation is not the only benefit of high rise summer waters—such a flow regime also sustains lower basin interests in power plants, water supplies, recreational industries, and farming.⁷⁵ The lower basin power industry, for example, argues that lowering the summer flow could cost utilities millions of dollars by forcing them to buy outside power during peak demand.⁷⁶ The industry further argues that a blackout during the sweltering summer days would be an additional threat, which would cost millions.⁷⁷ Farmers, for example, worry that the spring rise will cause flooding or preclude them from draining their fields in time for planting.⁷⁸

This demand to maintain downstream navigation and other interests, however, conflicts with upper basin states' newfound interest in recreation and environmentalists' concerns about the endangered species at stake along the Missouri.⁷⁹ The recreation or fishing/tourism industry requires that the Corps maintain a steady water level during the summer.⁸⁰ This steady water level is necessary so that Rainbow smelt, the prey of the Walleye, can lay their eggs, and so that the lake docks will not be separated from the lakes due to low water levels.⁸¹ Upper basin states support their interest in recreation by pointing to evidence that the recreation industry, unlike

⁶⁸ Davidson & Geu, *supra* n. 16, at 822.

⁶⁹ *Id.* at 23.

⁷⁰ *Id.*

⁷¹ *Id.* See also Belluck, *supra* n. 2; Ubbelohde, 330 F. 3d at 1019.

⁷² *Id.* at 832. See also Belluck, *supra* n. 2; Ubbelohde, 330 F. 3d at 1019.

⁷³ Michael Mansur, *Proposed Legislation Aims to Improve Recreation, Restore Habitat Along Missouri River*, The Kansas City Star (June 24, 1999).

⁷⁴ Belluck, *supra* n. 2. See also Steve Brisendine, *Ag, Barge Industries Rally Against Proposed Changes on Missouri River*, Yankton Press & Dakotan (Aug. 29, 2000).

⁷⁵ *Id.* See *North Dakota*, 264 F. Supp. 2d at 881.

⁷⁶ Ben Shouse, *Study: Low Flow May Bring Blackouts*, Argus Leader (Sioux Falls, SD) 1B (Jan. 8, 2004).

⁷⁷ *Id.*

⁷⁸ *Id.* For example, one farmer said, "If it's too wet to get a crop planted by the first of June, you're not farming this year." *Id.*

⁷⁹ Mansur, *supra* n. 73, at 2. See also Davidson & Geu, *supra* n. 16, at 834.

⁸⁰ Mansur, *supra* n. 73, at 2.

⁸¹ Kevin Woster, *River Policy This Spring Could Hurt Smelt, Walleye*, Argus Leader (Sioux Falls, SD) 1D (Apr. 16, 2002); Terry Woster, *The Mighty Missouri: Special Report*, Argus Leader (Sioux Falls, SD) 1A (May 17, 1999). Because smelt lay their eggs in extremely shallow water (3 to 6 inches of water), the eggs become especially vulnerable to any changes in the water level. *Id.*

the barge industry, is economically thriving and spurring growth.⁸² Recreation proponents, for example, point out that while recreation garners approximately \$65 to \$85 million, navigation only garners approximately \$1 to \$6.9 million.⁸³ Proponents also point out that the barge traffic, which has never been heavy, has diminished further in the past 20 years, thus vitiating navigation claims.⁸⁴ Even the Corps acknowledges its insignificance, comparing the 100 million tons of cargo that travel along the Mississippi each year to the 2 million tons that travel along the Missouri.⁸⁵ Navigation proponents, however, continue to argue that the barge industry remains crucial because it forces railroads to set competitive shipping prices and also reduces the number of trucks traveling the highways.⁸⁶

Environmentalists also support the high spring rise, low summer flow regime.⁸⁷ Environmentalists claim that this flow regime would return the Missouri to its natural, free-flowing state and help restore what decades of human management has destroyed—natural habitat and endangered species' populations.⁸⁸ The endangered species include the pallid sturgeon, an exotic-looking fish that exists primarily in the Missouri River, and the piping plover and least tern, which are both species of birds.⁸⁹ Environmentalists point out that the Corps' damming and channelization of the river destroyed the exposed sandbars which the two birds used to nest and forage and the sediment and river structure which was key for the pallid sturgeon's survival.⁹⁰ Environmentalists argue that a spring rise would restore the species' environment and thus increase their chances of survival—by providing a better environment for the pallid sturgeon, increasing the breeding of the piping plover and least tern in the spring, and preventing the flooding of the birds' nests/habitat in the summer.⁹¹

D. Navigation and the Development of the Missouri for National Welfare

The history of governmental management of the Missouri River further highlights the conflict between the upper and lower Basin states and their divergent interests.

As part of a larger conservation movement, the federal government of the late nineteenth and early twentieth centuries sought to utilize the navigable waters of the United States for multiple beneficial uses.⁹² The Missouri was among those waterways.⁹³ Early in the Missouri's history, two federal agencies primarily became involved in its management—the Bureau of Reclamation (which later became part of the Department of

⁸² See *North Dakota*, 264 F. Supp. 2d at 881.

⁸³ *Id.* See also Chad Smith, *National Academy of Sciences calls for immediate Missouri River Restoration* <<http://www.amrivers.org/index.php?module=HyperContent&func=display&cid=521>> (accessed May 20, 2004).

⁸⁴ *Id.* See also Belluck, *supra* n. 2.

⁸⁵ *Id.*

⁸⁶ *Id.* See Belluck, *supra* n. 2. See also Brisendine, *supra* n. 74.

⁸⁷ Belluck, *supra* n. 2.

⁸⁸ *Id.*

⁸⁹ 271 F. Supp. 2d at 242.

⁹⁰ *Id.* See also Randy Hascall, *Keeping Sturgeon From Extinction*, Argus Leader (Sioux Falls, SD) 1A (Apr. 29, 2002).

⁹¹ *Id.* at 237.

⁹² Thorson, *supra* n. 4, at 57-59. The development of hydro-electric power in the late 1800s spread the seed of this idea of multiple-beneficial use. *Id.* The first legislation to reflect the multiple-purpose river development was the Tennessee Valley Authority proposal, signed into law by Franklin Roosevelt in 1933. *Id.* The proposal "proclaimed a policy for the unified development of a watershed for the national welfare, for the restoration of exhausted lands, for the development of Tennessee in its entirety, for the reforestation of cut-over lands, for the alleviation of unemployment, for promotion of the interests of national defense, and for the revitalization of an entire region economically." *Id.* The act's comprehensive approach to river basin development was a model for other river basins, including the Missouri. *Id.*

⁹³ *Id.*

Interior) helped upper basin states develop irrigation with the passage of the 1902 Reclamation Act and the Corps helped lower basin states develop their navigation interests, lobbying Congress for a series of appropriations for improvement purposes.⁹⁴ Beginning in 1882 and lasting into the mid-1930s, Congress appropriated the money for navigation improvements in the form of channelization, which consisted of narrowing and deepening the river.⁹⁵

Channelization profoundly changed the physical and ecological make-up of the Missouri River.⁹⁶ Channelization transformed the river from a “slow, meandering, silt-laden stream with islands, sandbars, side channels, and oxbow lakes into a fast, clear, uniform stream, with only a few of its original characteristics remaining.”⁹⁷ These physical changes, originally intended for human benefit, created one significant and unanticipated problem—that of flooding.⁹⁸ The narrowing of the river meant that it could no longer carry increased volumes of water during high precipitation.⁹⁹ Devastating floods occurred in 1942 and 1943, prompting Congress’ adoption of the Flood Control Act of 1944.¹⁰⁰

E. *The History of the Flood Control Act of 1944*

The Flood Control Act of 1944 and its passage, like other developments in the Missouri River basin, reflected the conflict between upper and lower basin interests. The Act is based on two separate plans, one proposed by the upper basin states, as represented by the Bureau of Reclamation in the person of William Glenn Sloan, an assistant engineer in the Montana office, and one proposed by lower basin states, as represented by the Corps in the person of Colonel Lewis A. Pick, a division engineer in the Missouri office.¹⁰¹ The Pick plan primarily emphasized flood control and navigation and proposed the construction of five mainstem dams and reservoirs as well as a series of levees along the river below Sioux City and construction of a deeper, wider navigational channel from the mouth of the river to Sioux City, Iowa.¹⁰² The Sloan plan emphasized irrigation and reclamation interests and proposed the construction of ninety dams and reservoirs throughout the upper basin and the construction of power plants to produce hydroelectric power.¹⁰³

⁹⁴ Street, Craig A., Student Author, *Addressing Missouri’s Domestic Conflict of Interests in the Missouri River: A Suggested Approach for Resolution*, 5 Mo. Envtl. L. & Policy Rev. 117, 120, 123 (1998). See also Thorson, *supra* n. 4, at 58. Because of the forces of the industrial revolution, navigation interests came to dominate the Missouri’s development. While steamboat navigation on the Missouri had flourished between the 1850s and the 1880s, competition from the spread of railroad systems in the region caused navigation’s temporary demise. Street, *supra* n. 94, at 119-20. When the railroad system became too monopolistic, dominating Midwestern commerce, basin residents together with the Corps, lobbied Congress to appropriate funds allowing for improvements to the river for navigation. *Id.* at 120.

⁹⁵ *Id.* at 120-22. In 1910, Congress appropriated \$1 million to establish a six-foot-deep, 200-foot-wide navigational channel between Kansas City, Missouri and the river’s mouth. *Id.* at 121. In 1927, Congress extended the channelization project up to Sioux City, Iowa and approved creating a nine-foot (rather than six-foot) channel. *Id.* at 122. Channelization, in addition to promoting navigation during the 1930s, was also part of Roosevelt’s public-works projects, designed to provide jobs for the unemployed, stimulate economic growth, and lift the country out of the Great Depression. *Id.* Congress gave President Roosevelt the authority to implement federally funded public-works projects with the passage of the National Industrial Recovery Act of 1933 (“NIRA”). *Id.*

⁹⁶ *Id.*

⁹⁷ Schneiders, *supra* n. 1.

⁹⁸ Street, *supra* n. 94, at 124.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* 124-25.

¹⁰² *Id.*

¹⁰³ *Id.*

The two agencies eventually compromised and agreed on a plan integrating both proposals, known as the Pick-Sloan Plan.¹⁰⁴ The upper basin states, however, refused to compromise until they received assurances that the government would not promote navigation interests at the expense of upper basin interests.¹⁰⁵ Upper basin states continued to harbor concerns that the proposed 9-foot navigation channel (for which Congress had appropriated money in 1927, but which had not yet been completed by 1944) below Sioux City would squander the river water and “permit no additional irrigation development at all in the upper basin.”¹⁰⁶ The O’Mahoney-Millikin Amendment, which served as a precondition to the upper basin states’ approval of the Pick-Sloan plan, provided the upper states with their desired assurances.¹⁰⁷ This amendment, which was included in the text of the Flood Control Act, protects upper basin interests by limiting the use of water for navigation to “such use as *does not conflict* with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, or industrial purposes.”¹⁰⁸

F. Key Provisions of the Flood Control Act of 1944

The following four key provisions of the Flood Control Act provide a cursory background understanding of the positions behind the upper and lower basin states’ arguments in the current debate.

1. *The O’Mahoney-Millikin Amendment safeguarded not only irrigation interests, but developing interests as well*

Based on the O’Mahoney-Millikin Amendment, one of the major premises of the Flood Control Act is the honoring of western interests, particularly irrigation, where in conflict with lower basin navigation interests.¹⁰⁹ While the amendment clearly protects irrigation interests against navigation, the intended meaning of “beneficial consumptive use” remains unclear.¹¹⁰ Some argue that this phrase, the inclusion of which was enough to garner approval from western congressional members for the amendment’s ultimate passage, was intended as a catchall phrase included for the protection of upper basin interests.¹¹¹ Legislative history supports this assertion.¹¹²

¹⁰⁴ Thorson, *supra* n. 4, at 67.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 69.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* See 33 U.S.C. § 701-1(b).

¹⁰⁹ Davidson & Geu, *supra* n. 16, at 832.

¹¹⁰ Brian Morris, *Unanswered Prayers: The Upper Missouri River Basin States Take On The U.S. Army Corps of Engineers*, 68 N.D. L. Rev. 897, 913 (1992).

¹¹¹ *Id.* For example, one Corps member, when asked whether the construction of the reservoirs would conflict with upper basin water interests, responded, “I do not see how they possibly could, Mr. Chairman. They are below the general region in which water rights exist and there is absolutely no priority of water use set up in the [Pick Plan] in any way whatsoever.” *Id.*

¹¹² *Id.* Testimony by the Chief of Engineers of the Corps supports this assertion. The Chief testified that:

Due allowance must be made for any changed conditions that may arise in the future . . . The adjustment of water use to meet the changing needs of the Missouri Basin as a whole can and will be made as the comprehensive development proceeds step by step toward ultimate accomplishment. When completed the basin plan will be operated for maximum multiple purpose use. Thus preference can be given to the functions which contribute most significantly to the welfare and livelihood of the people of various parts

Based on that interpretation, some argue that the O'Mahoney-Millikin Amendment now protects recreation—a “future” interest which consists of a “consumptive use.”¹¹³ Section 1 of the Act further supports the view that Congress intended to support navigation so long as it did not interfere with other existing or later significant interests.¹¹⁴ Section 1 states that construction of navigation is limited to works which will *substantially* benefit navigation “and which can be operated consistently with appropriate and economic use of the waters of such rivers by *other users*.”¹¹⁵

2. *Legislative History, Emanating From Section 9 of the Flood Control Act, Supports Maximizing All Interests*

When reviewing the Flood Control Act, one tends to gloss over section 9 which reflects the tumultuous history behind the Act's passage – two competing plans represented by two competing interests, the upper and the lower basins.¹¹⁶ But, section 9 speaks to this history of conflict and compromise, stating, “The general comprehensive plans set forth in House Document 475 [the Pick or lower basin plan] and Senate Document 191 [the Sloan or upper basin plan] . . . as revised and coordinated by Senate Document 247 . . . are hereby approved.”¹¹⁷ Many, especially upper basin states, point to the legislative history behind the two competing plans and also the joint plan, to support their arguments concerning the river flow.¹¹⁸ Upper basin interests, for example, note that the joint Pick-Sloan plan, embodied in Senate Document 247, contained language promoting

of the basin, and at the same time adequate steps can be taken to meet new economic situations that may arise in the future.

Id. at 914.

¹¹³ See Morris, *supra* n. 110, at 913-14.

¹¹⁴ See 33 U.S.C. § 701-1.

¹¹⁵ *Id.* (emphasis added). Furthermore, the development of the river for recreational purposes was in the purview of Congress when passing the Flood Control Act, as evidenced by section 4, which authorizes the Corps to “construct, maintain, and operate public park and recreational facilities in reservoir areas.” 16 U.S.C. § 460d.

¹¹⁶ See Thorson, *supra* n. 4, at 69.

¹¹⁷ Pub. L. No. 78-534, § 9, 58 Stat. 887, 891 (1944).

¹¹⁸ Great Plains Natural Resources Journal, *Legal Claim to Missouri River Water Uses In South Dakota*, 5 Great Plains Nat. Resources J. 102, 105 (2001). For example, upper basin state interests point to the Bureau of Reclamation's comments on the Pick Plan:

In planning the control and utilization of the waters of the Missouri Basin, the widest range of multiple benefits should be sought in each feature or group of features. All reservoirs included in the comprehensive plan, including Fort Peck, should be operated to obtain the maximum benefits in common for flood control, navigation, irrigation, power generation, and other water-conservation activities, including but not limited to, utilization for fish and wild-life preservation, recreation, pollution abatements maintenance of surface and ground water levels, silt control, and domestic and industrial purposes. To the extent, however, that several functions of water control and utilization are conflicting, preference should be given to the functions which contribute most significantly to the welfare and livelihood of the largest number of people. It is, for example, the view of the Bureau of Reclamation, that the waters of the Missouri River and its tributaries west of or entering above Sioux City are more useful to more people if utilized for domestic, agricultural, and industrial purposes than for navigation-improvement purpose. To the extent that these uses are competitive, agricultural and industrial uses should have preference.

Id. (citing H.R. Doc. 78-475, at 7). For a more intricate understanding of the legislative history behind the Pick and Sloan plans, see *generally* 5 Great Plains Nat. Resources J. 102.

the “maximum” use and “multi-purpose” benefit of “flood control, navigation, irrigation, power, domestic and sanitary purposes, wildlife and recreation” when managing the reservoirs.¹¹⁹ These statements, which propose maximizing *all* of the interests, become particularly important to upper basin states in their argument for promotion of the recreation industry.¹²⁰

3. *The Management of the Missouri River is to be a Comprehensive and Coordinated Effort and Between the Federal Government and States*

In addition to considering navigation and flood control, Congress, in the first section of the Act, adopts a policy “to facilitate the consideration of projects on a basis of *comprehensive* and *coordinated* development.”¹²¹ Part of this coordination involves balancing federal and state interests within the Act.¹²² The first section of the Act provides that while Congress retains power over “the rivers of the Nation through construction of works of improvement, for navigation or flood control,” Congress is also “to recognize 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, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for *all purposes*, of the waters of the Nation’s rivers”¹²³ That is, Congress adopts a policy of balancing the federal rights to control and manage the Missouri River with those of the states’ rights.¹²⁴

4. *Congress Granted Management Authority to the Corps*

Section 7 of the Flood Control Act provides that the Army Corps of Engineers retains the power to manage flood control and navigation.¹²⁵ Section 7 directs the Secretary of the Army or the Corps “to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds” and that “the operation of any such project shall be in accordance with such regulations.”¹²⁶ This regulatory authority also encompasses directing the use of surplus waters on the reservoirs (or waters not used for flood control or navigation).¹²⁷

III. THE PRESENT LITIGATION—*UBBELOHDE* AND *AMERICAN RIVERS*

One aspect of the present conflict over the Missouri River management results from confusion about how the Corps is to value the river basin interests in light of the Flood Control Act and in light of changing conditions such as the emergence of new interests in recreation and endangered species’ preservation. The Supreme Court has never directly spoken on the issue of how the Corps is to value interests, and so interested parties continue to doubt the Corps’ authority.¹²⁸

¹¹⁹ Morris, *supra* n. 110, at 914 (citing Sen. Doc. 78-247, 78th at 2 (1944)). See also *Ubbelohde*, 330 F. 3d at 1030.

¹²⁰ See generally Morris, *supra* n. 110, at 105-15; *Ubbelohde*, 330 F.3d at 1030.

¹²¹ 33 U.S.C. § 701-1.

¹²² Thorson, *supra* n. 4, at 72.

¹²³ 33 U.S.C. § 701-1.

¹²⁴ Thorson, *supra* n. 4, at 72.

¹²⁵ Pub. L. No. 78-534, § 7, 58 Stat. 887, 890 (1944).

¹²⁶ *Id.*

¹²⁷ Pub. L. No. 78-534, § 6, 58 Stat. 887, 890 (1944).

¹²⁸ *ETSI Pipeline Project*, 484 U.S. at 498, 502, & 513. Although the court in *Ubbelohde* claimed that the Supreme Court in *ETSI* identified flood control and navigation as the dominant interests controlling management of the reservoirs, the *Ubbelohde* court’s reading of the case is misplaced. See *Ubbelohde* 330 F. 3d at 1027. The Supreme Court in *ETSI* did

Thus, although the Supreme Court in *ETSI Pipeline Project v. Missouri*, a 1988 decision, affirmed the Corps' authority as the dominant regulatory body of the Missouri River reservoir system and thus affirmed the Corps' discretion over balancing interests along the river, upper basin states and environmentalists¹²⁹ have since challenged the Corps' authority and in particular the Corps' *valuing* of basin interests.¹³⁰ *Ubbelohde* and *American Rivers* are no exception.

The following serves as a more in-depth discussion of the facts and holdings of the cases, which lends an understanding to the present dispute, the complexity of litigation in resolving the issue, and the necessity for negotiation.

In *Ubbelohde*, the state of South Dakota requested that the Army Corps of Engineers adjust its management of the Missouri River by delaying the release of water from the Lake Oahe reservoir, located in South Dakota.¹³¹ This request would have required the Corps to act in contravention of its Master Manual, the Corps' overall management plan for the Missouri River,¹³² and also its 2002 Annual Operating Plan, the Corps' specific management plan for the year.¹³³ Both the Master Manual and the Annual Operating Plan required the Corps to implement high summer flows on the Missouri River to maintain downstream navigation, which was threatened by the prolonged drought that year.¹³⁴ The Corps planned to implement the high summer flows by releasing water from South Dakota's Lake Oahe.¹³⁵

The Corps desired to release water from Lake Oahe, rather than the other five reservoir lakes, because according to the Corps it was Lake Oahe's turn.¹³⁶ As the court noted, the Corps alternates the lowering of water from the six reservoirs from year to year.¹³⁷ Because Lake Oahe's water level had not been lowered the year before, "the Corps chose Lake Oahe to bear the burden of the drought in 2002."¹³⁸

South Dakota, however, opposed the release because the state claimed it would reduce the state's recreation/fishing industry income.¹³⁹ The state argued that Lake Oahe, which was popular for its trophy walleye fishing, needed to maintain a steady water level from late April to late March in order to support the

say that the Sloan Plan recognized flood control and navigation as dominant functions. 484 U.S. at 512. However, this reading of functions within the plan was confined to the specific issue in *ETSI*, which concerned federal agency jurisdiction over water allocation—not the balancing of interests along the basin. *Id.*

¹²⁹ See citations accompanying n. 21.

¹³⁰ 484 U.S. at 495. *ETSI* addressed whether the Secretary of Interior (of the Bureau of Reclamation) could enter into a contract with ETSI Pipeline Project, allocating the surplus water for industrial use. *Id.* at 498, 513. The Supreme Court held that based on a plain reading of the Flood Control Act, the Secretary of Interior could not unilaterally enter into a water allocation contract without first seeking the approval of the Secretary of Army or the Corps. *Id.* at 512, 517. Although *ETSI* specifically addressed the Corps' management authority as compared with that of the Bureau of Reclamation, many authors interpret the case as assigning the Corps broad and sweeping authority over managing the Missouri River, beyond the narrow facts of the case. See Street, *supra* n. 94, at 129; Norman W. Thorson, *Damned If You Do, Damned If You Don't—Reflections On John Ferrell's Big Dam Era*, 2 Great Plains Nat. Resources J. 13, 26 (1997). With the Corps' all-encompassing management authority over the River, authors believe the Supreme Court was according the Corps' judgment a large amount of deference. *Id.*

¹³¹ 330 F. 3d at 1019.

¹³² The Master Manual thus serves as the Corps (or the agency) interpretation of how to implement the Flood Control Act. *Id.* at 1020.

¹³³ *Id.*

¹³⁴ *Id.* at 1020-21.

¹³⁵ *Id.* at 1020.

¹³⁶ *Id.* at 1021.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

industry.¹⁴⁰ This steady water level, the state claimed, would allow for fruitful fish spawn.¹⁴¹ In arguing for the maintenance of a steady water level, South Dakota noted that the Corps' release of water from Lake Oahe in 1997 had led to a reduction in the quality of fish in the lake and reduced recreation.¹⁴²

The Corps declined to honor South Dakota's request and indicated that it would abide by the Master Manual, which required the Corps to consider navigation interests before recreation interests,¹⁴³ and its Annual Operating Plan, which required the Corps to release water from Lake Oahe in order to maintain downstream navigation.¹⁴⁴

As a result, South Dakota filed suit on April 25, 2002 in the District Court of South Dakota, requesting an injunction against the Corps' release of water from Lake Oahe until after the spawning season and a declaration that the Corps' practice of requiring water release from the reservoirs was unlawful.¹⁴⁵ To support its request for an injunction and declaration, South Dakota claimed that the Corps was acting arbitrarily and capriciously in maintaining downstream navigation interests over recreation interests.¹⁴⁶ After a hearing, the District Court entered a preliminary injunction requiring the Corps to maintain the water level of Lake Oahe.¹⁴⁷

The Corps, unable to lower the reservoir in South Dakota, thereafter sought to lower Lake Sakakawea, located in North Dakota.¹⁴⁸ North Dakota, however, followed South Dakota's lead and filed for and received an injunction preventing the lowering of the lake from the federal District Court of North Dakota.¹⁴⁹

Nebraska, concerned about its navigation interests, filed suit in federal District Court in Nebraska for an injunction that would *require* the Corps to operate the Missouri River as planned in the Master Manual and Annual Operating Plan.¹⁵⁰ The court granted the injunction and the Corps was left in a "thorny predicament"—*unable* to abide by its plan because of the upstream states' injunctions and *required* to abide by its plans because of the Nebraska injunction.¹⁵¹

The Corps appealed each of the federal District Court judgments to the Eighth Circuit Court of Appeals.¹⁵² On appeal, the Corps argued that it was immune from judicial review because the decisions regarding water release were committed to the Corps' agency discretion.¹⁵³ South Dakota argued that the Corps' consideration of navigation over recreation interests was contrary to the Flood Control Act, in

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² South Dakota concluded that the water release in 1997 caused a significant decrease in the number of rainbow smelt, the fish upon which the walleye prey, which in turn led to an overpopulation of walleye and the reduced the quality of fish in the lake. *Id.* at 1021. In order to remedy the problem, South Dakota encouraged increased walleye fishing, which in turn increased the rainbow smelt population by reducing their predators. *Id.* The state concluded that in the summer of 2002, the rainbow smelt would have an extremely fruitful spawn, which would increase their population in the lake and also increase the quality of fish. *Id.* However, the state noted that the spawn would not be successful if the Corps reduced the water level by even as much as six inches. *Id.*

¹⁴³ The Master Manual addresses, in hierarchical order, flood control, irrigation, water supply and water-quality requirements, navigation and power, and finally recreation, fish and wildlife. *Id.* at 1020.

¹⁴⁴ *Id.* at 1021.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1022.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 1027.

contravention of judicial estoppel principles and was arbitrary and capricious.¹⁵⁴ The court of appeals, after ruling that the Corps' decisions were reviewable, struck down the North and South Dakota injunctions and upheld the Nebraska injunction.¹⁵⁵ In so doing, the court held that the Master Manual was akin to a formal agency rule and thus binding on the Corps.¹⁵⁶ In deferring to the Corps and their binding rule (the Master Manual), the court ruled that the Corps' practice of placing navigation interests above recreation was not in contravention of the Flood Control Act and that the Corps' practice of releasing water from the reservoirs once a year was not arbitrary and capricious, but rather supported by a rational basis.¹⁵⁷ In short, the court reaffirmed earlier holdings, which gave the Corps discretion over balancing the various interests of the Missouri River.¹⁵⁸

A month after the Eighth Circuit Court of Appeals decided *Ubbelohde*, the United States District Court for the District of Columbia in *American Rivers* essentially ruled the Eighth Circuit's holding immaterial.¹⁵⁹ In *American Rivers*, plaintiffs, a number of national and local environmental organizations (collectively "American Rivers"), filed suit against the Corps and Fish and Wildlife Service¹⁶⁰ as well as other federal defendants, alleging violations of the Flood Control Act and the Endangered Species Act.¹⁶¹ American Rivers argued that the Corps' management of the Missouri River and the Fish and Wildlife's failure to abide by the Endangered Species' statutory guidelines threatened three species, the least tern,¹⁶² the Great Plains piping plover,¹⁶³ and the pallid sturgeon¹⁶⁴—all of which were listed as endangered under the Endangered Species

¹⁵⁴ *Id.* at 1030.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1028-29.

¹⁵⁷ *Id.* at 1032.

¹⁵⁸ *Id.* at 1020.

¹⁵⁹ 271 F. Supp. 2d at 263.

¹⁶⁰ The court noted that the Fish and Wildlife Service is a government agency, acting under section 4 of the Endangered Species Act, whose job is to review the biological status of and threats to species, and based on this review, list the species as threatened or endangered. *Id.* at 241. The court further noted that once listed, the species and their habitats "are afforded considerable protections, and *all federal agencies* must assume special responsibilities to conserve them." *Id.* (emphasis added).

¹⁶¹ *Id.* at 236.

¹⁶² The least tern is a "small, fish-eating bird that historically nested on exposed sandbars on the Mississippi and Missouri Rivers." *Id.* at 242. The Fish and Wildlife Service found that the Corps, in altering the flow of the Missouri River, destroyed the sandbars that the least tern needed to nest and raise its chicks. *Id.*

¹⁶³ The Great Plains piping plover is a migratory bird, which also uses exposed sandbars to nest and forage. *Id.* at 242. The Fish and Wildlife Service found that the Corps' "[d]amming and channelization of rivers [had] eliminated nesting and sandbar habitat along hundreds of miles of rivers in the Dakotas, Iowa, and Nebraska." *Id.* (citing 50 Fed. Reg. 50362, 50371 (Dec. 10, 1985)). In 2002, the Fish and Wildlife Services set apart 767 miles on the Missouri River as habitat essential for the piping plover's survival. *Id.* (citing 67 Fed. Reg. 57638, 57642 (Sept. 11, 2002)). The court further noted that on the Missouri River the piping plover population was approximately 2,000 and the least tern 7,000. *American Rivers*, 271 F. Supp. 2d at 259. The court said that the Corps decision in its Annual Operating Plan to release a high percentage of water during the summer (*rather than the spring*) would result in the flooding of the birds nests. *Id.* The court admitted that while such actions would not lead directly to the birds' extinction that year, the actions would have a deleterious effect on the birds' long term recovery. *Id.*

¹⁶⁴ The pallid sturgeon is "a large fish that exists primarily on the Missouri River, can live more than fifty years, and can grow to more than six feet in length and 80 pounds in weight." *Id.* at 242. The Fish and Wildlife Service found that "[a]lteration of habitat through river channelization, impoundment, and altered flow regime has been a major factor in the decline of this species." *Id.* (citing 55 Fed. Reg. 36641, 36645 (Sept. 6, 1990)). The court said that with fewer than 2,000 pallid sturgeon left alive, the species was near extinction. *Id.* at 259. Again, the court noted that release of a high percentage of water during the summer would further threaten the extinction of the pallid sturgeon. *Id.*

Act.¹⁶⁵ Specifically, American Rivers argued that the court should grant an injunction, forcing the Corps to change its water release schedule from low flows in the spring and high flows in the summer *to high flows in the spring and low flows in the summer*—and thus in essence, asked the D.C. District Court to ignore the Eighth Circuit ruling.¹⁶⁶ American Rivers argued that the adoption of this water release schedule would prevent further harm to the species and provide for their recovery.¹⁶⁷

This high spring flow water release schedule was originally recommended by the Fish and Wildlife Service in its 2000 Biological Opinion as necessary to “insure the survival of the three species.”¹⁶⁸ The Fish and Wildlife Service’s 2000 Biological Opinion merely reiterated what the Fish and Wildlife Services had expressed to the Corps since 1990.¹⁶⁹ As the court noted, throughout the 1990s, the Fish and Wildlife Services had negotiated with the Corps for a changed flow of the Missouri River but without making any substantive progress.¹⁷⁰ In the Fish and Wildlife Service’s 2000 opinion, it gave the Corps until 2003 to implement the recommendations.¹⁷¹

In 2003, after the Corps had failed to incorporate the Fish and Wildlife Service’s recommended water release schedule in the Corps’ Annual Operating Plan, the Fish and Wildlife Services suddenly changed its position, and said that the endangered species could survive one more summer of high rise summer waters (as opposed to low summer waters, as originally recommended).¹⁷² The Fish and Wildlife Service claimed its changed position rested on faith that the Corps would incorporate the original water release recommendation in future operating plans.¹⁷³

American Rivers argued that both the Fish and Wildlife Service’s changed position, as codified in its 2003 Supplemental Biological Opinion, and the Corps’ Annual Operating Plan (which again failed to change the water release schedule) violated the Endangered Species Act.¹⁷⁴ The Fish and Wildlife Service argued that its change in position was not arbitrary and capricious.¹⁷⁵ In addition to relying on the Fish and Wildlife Service’s changed position, the Corps argued that the decision in *Ubbelohde*, which held that the Master Manual was binding, required the Corps to operate the Missouri River as planned by supporting downstream navigation with high summer flows.¹⁷⁶ The court essentially ruled the Eighth District appellate court decision in *Ubbelohde* immaterial as to the D.C. Circuit.¹⁷⁷ The court held that although the Corps retained discretion over balancing the various interests along the Missouri River, this discretion did not allow for the Corps to place navigation interests above those of endangered species (by implementing the high summer flow as called for in the Annual Operating Plan).¹⁷⁸ The court reasoned that the Supreme Court had recognized that “Congress

¹⁶⁵ *Id.* at 236.

¹⁶⁶ *Id.* at 236-37, 240. This water schedule, whereby flows would rise in the spring and decrease in the summer was to be implemented once every three years, according to the Fish and Wildlife Service. *Id.* at 237.

¹⁶⁷ *Id.* at 237. Specifically, American Rivers claimed that adoption of this water release schedule would lead to increased breeding of the least tern and the piping plover in the spring, prevent the flooding of their nests/habitat and the death of their chicks in the summer, as well as provide a better environment for the pallid sturgeon. *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 242.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 243.

¹⁷² *Id.* at 237.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 236, 246

¹⁷⁵ *Id.* at 249.

¹⁷⁶ *Id.* at 250.

¹⁷⁷ *Id.* at 262.

¹⁷⁸ *Id.* at 252.

spoke in the ‘plainest of words’ in enacting the ESA, ‘making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.’”¹⁷⁹

The court held for American Rivers and concluded that the Fish and Wildlife Service’s changed position was arbitrary and capricious because the Fish and Wildlife Service failed to explain its abandonment of the original Biological Opinion recommendations, which were supported by extensive research and peer review.¹⁸⁰ Consequently, the court ruled that the Corps was bound by the original Biological Opinion to implement a low summer flow “no later than 2003” and said that failure to do so would result in irreparable harm to the three endangered species.¹⁸¹

IV. HISTORY OF LITIGATION AND THE MASTER MANUAL

A. Litigation Throughout the 1990s Over the Missouri’s Management

The challenges to the Corps’ authority over balancing interests, as already discussed, are not new. Challenges by upper basin states to the Army Corps management of the Missouri ensued as a result of a major drought throughout the basin, which lasted from 1987 to 1993.¹⁸² As with *Ubbelohde* and *American Rivers*, the history of litigation demonstrates that lawsuits are not necessarily the most effective way to pursue state interests against the Corps.

As in *Ubbelohde*, in 1990, upper basin states, including Montana, South Dakota, and North Dakota sought an injunction in the district court to prevent water releases from Lake Oahe until June 1, 1990.¹⁸³ As in *Ubbelohde*, the upper basin states argued that releasing the water would preclude successful spawn of sport and forage fish in the lake.¹⁸⁴ In response, the Corps argued that a failure to release the water downstream would adversely affect navigation.¹⁸⁵ The Corps further argued that failure to release water would hurt downstream utilities and would threaten two endangered species.¹⁸⁶ The District Court ordered the injunction only after expressing “very serious doubts about [its] power” to issue an injunction against the Corps.¹⁸⁷ In *South Dakota v. Hazen*, the Eighth Circuit Court of Appeals reversed the district court, in a temporary opinion, holding that the Corps management actions were not arbitrary and capricious.¹⁸⁸ Later, after considering the issue more fully, the court declared it moot and therefore unreviewable.¹⁸⁹

A year after *Hazen*, South Dakota, North Dakota, and Montana again filed suit against the Corps in *South Dakota v. Bornhoft*, only this time in the United States District Court for the District of Montana.¹⁹⁰ The three states claimed that the Corps illegally assigned the downstream uses of the Missouri River higher priority than upstream uses, where recreation and fish and wildlife were concerned—as codified in the Master Manual.¹⁹¹ The upper basin states requested that the Corps develop a new plan reflecting contemporary needs

¹⁷⁹ *Id.* at 249. (quoting *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 194 (1978)).

¹⁸⁰ *Id.* at 257.

¹⁸¹ *Id.* at 257-58.

¹⁸² See Description of Existing Environment, *supra* n. 3, at 3.3.1. See also *South Dakota v. Hazen*, 914 F.2d 147; *South Dakota v. Bornhoft*, No. CV-91-26 JDS-BLG.

¹⁸³ *Hazen*, 914 F. 2d at 148.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 149.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 148.

¹⁹⁰ No. CV-91-26 JDS-BLG, slip op. at 1.

¹⁹¹ *Id.* at 1-2.

and uses of the basin.¹⁹² Such a plan, the upper basin states claimed, should establish only flood control and upper basin consumptive uses as primary purposes.¹⁹³ The rest of the interests could be left to the Corps to balance at its discretion.¹⁹⁴

B. The Restructuring of Interests

The Corps would have continued to resist requests by upper basin states to restructure priorities had the U.S. General Accounting Office not become involved in an investigation of the Corps' management priorities, at the request of an upper basin congressman.¹⁹⁵ Indeed, in response to the General Accounting Office's inquiry into the Corps' legal opinion on the priority basin interests, the Corps expressed that according to the Pick-Sloan Plan, the interests of primary importance were flood control, navigation, irrigation, and hydropower—not recreation.¹⁹⁶ The General Accounting Office concluded otherwise.¹⁹⁷ In a 1992 report, resulting from the investigation, the Office concluded that Congress had not established any priorities within the Flood Control Act and thus the Corps did not need to gain congressional approval to restructure priorities.¹⁹⁸

The General Accounting Office's report prompted the Corps' settlement offer to upper basin states in *Bornhoft* within which the Corps acknowledged that Congress did not establish a priority of interests and that the Corps could change priorities based on economic and environmental concerns.¹⁹⁹ Lower basin states immediately expressed opposition to the settlement offer and demanded that the Corps continue to honor downstream commercial navigation interests.²⁰⁰

However, the Corps had already initiated a review of its Master Manual.²⁰¹ Because the Corps promised the upper basin states that, during the revision process, "all current Missouri River water uses" would receive "equal consideration," the judge declared the lawsuit moot.²⁰²

In the mid-1990s, faced with pressure on all sides, including recreation, navigation, and environmental, the Corps attempted to achieve a more balanced flow to appease all interests.²⁰³ The Corps developed a Draft

¹⁹² *Id.* at 2.

¹⁹³ Thorson, *supra* n. 4, at 178.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ GAO/RCED-92-4 (1992). (can't find this source on Westlaw: not in Marya's pile either)

¹⁹⁸ *Id.* Within the report, the Office wrote:

[T]he Corps maintains on the basis of its interpretation of the authorizing legislation that unless it obtains congressional approval to change existing operating priorities, it must continue to give recreation a lower operating priority than other authorized purposes even if this lower priority results in system benefits. GAO sees no appropriate basis for the Corps' view. A lawsuit filed in federal court by three upper-basin states questions the legality of the Corps' position on recreation.

Id.

¹⁹⁹ Thorson, *supra* n. 4, at 179.

²⁰⁰ *Id.* Twenty-two members of Congress from Missouri and Mississippi signed a letter expressing this sentiment and sent it to the assistant secretary for the Army. *Id.*

²⁰¹ *Bornhoft*, No. CV-91-26 JDS-BLG, slip op. at 2.

²⁰² *Id.* at 3.

²⁰³ Bill Lambrecht, *Aversion to Compromise Marks Fight Over Missouri River's Future*, St. Louis Post-Dispatch A8 (Oct. 2, 2000).

Environmental Impact Statement in 1994, which included a plan to implement a spring rise.²⁰⁴ In attempting to balance all interests, however, the Corps failed to fully appease anybody, and its plan was largely denounced.²⁰⁵ Environmentalists said spring rise did not go far enough (even though the water rise was higher and for a longer duration than recommended by the Fish and Wildlife Service).²⁰⁶ Upper basin states did not like the plan because it did not guarantee a higher level of water necessary for recreation.²⁰⁷ Lower basin states did not like the plan because it cut short the navigation season and they feared floods would result.²⁰⁸ Because of the widespread dissatisfaction with the plan, the 1994 plan was never implemented.²⁰⁹

In 1995, the Corps again attempted to satisfy upper basin interests and conservationists by cutting short the navigation season.²¹⁰ This flow regime, in turn, inflamed lower basin states relying on navigation.²¹¹ The state of Missouri, proving that it could be litigious as well, and the Mo-Ark Association, a nonprofit organization promoting various lower basin interests, sued the Corps, claiming that the Corps' Annual Operating Plans for 1995-96 and 1996-97 violated the National Environmental Act.²¹² Missouri claimed that the Annual Operating Plans drastically changed the Corps' management of the Missouri River without taking into consideration necessary regulations under the National Environmental Act.²¹³ In essence, the state sued the Corps because the Corps' plan increased the likelihood that the navigation season would be shortened—that is, a larger amount of water had to be in storage as of July 1 to avoid the shortening of the season.²¹⁴ The court, as in other cases involving the Missouri's management, declared the issue moot.²¹⁵

C. Litigation Throughout 2000

The present disputes regarding release of water began in 2002 when conflicting orders were issued by federal courts in South Dakota, North Dakota, Montana and Nebraska.²¹⁶ In 2002, however, the Governors of South Dakota, North Dakota, and Nebraska reached an agreement with the Corps whereby upper basin states satisfied their interest in protecting fish spawn and lower basin states in adequate downstream flow.²¹⁷

In 2003, the upper and lower basin states were unable to come to such an agreement.²¹⁸ That summer, nine lawsuits were filed over the Missouri River operations.²¹⁹ Upper basin states as well as lower basin barge

²⁰⁴ Telephone Interview with Paul Johnston, Public Affairs Officer, Northwestern Division Army Corps of Engineers in Omaha (May 18, 2004).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See Description of Existing Environment, *supra* n. 3, at 3.13.2; Telephone Interview with Paul Johnston, *supra* n. 204.

²¹¹ See *Nixon v. Craig*, 163 F.3d 482 (8th Cir. 1998).

²¹² *Id.* at 483.

²¹³ *Id.*

²¹⁴ *Id.* at 484.

²¹⁵ *Id.* at 485.

²¹⁶ Chet Brokaw, *River Plan To Comply With Court Orders*, Bismarck Tribune 11A (May 17 2002).

²¹⁷ *Id.* The governors of South Dakota, North Dakota, and Nebraska, for example, agreed to drop the levels in Lake Oahe, Lake Sharpe, and Lewis and Clark Lake by approximately 6 inches—enough to support downstream uses but not enough to harm fish spawn. *Id.*

²¹⁸ See *Ubbelohde*, 330 F.3d at 1020-22.

²¹⁹ Megan Boldt, *Corps Again Allowed To Release More Water To River*, Bismarck Tribune 1A (May 30, 2003).

industries brought suit.²²⁰ Five barge companies sued North Dakota, South Dakota, Montana, and the Corps, as well as other federal agencies, to maintain water levels for navigation.²²¹

D. The Master Manual

The Master Manual—as the document outlining the management of the Missouri’s flow from the reservoirs—remains at the center of the war between the states and various interests. Although the court in *Ubbelohde* declared the Master Manual of 1979 a binding instrument,²²² thus requiring the Corps and others to abide by its mandates, the Corps claimed then and still claims that it is merely a guideline.²²³ The Master Manual was first drafted in 1960 and subsequently revised in 1973, 1975, and 1979.²²⁴ The most recent revision was released on March 19, 2004, after fourteen years,²²⁵ at the behest of and under the threat of contempt from Judge Magnuson in *In re Operation of the Missouri River System Litigation*.²²⁶ As Judge Magnuson noted, the Corps began the revision in 1989 and repeatedly assured parties in litigation and courts that the manual would soon be complete.²²⁷ In this manner, the Corps evaded judicial review because courts, on account of the soon-to-be complete manual, tended to declare the cases moot.²²⁸ When the court in *Ubbelohde* finally decided that the Corps’ management actions were reviewable, the court was forced to rely on the Corps’ 1979 Master Manual.²²⁹

The Corps, in making repeated promises to complete the manual, in failing to do so, and in presenting the outmoded manual to the court in *Ubbelohde*, thus engendered distrust in all interested parties—especially upper basin states.²³⁰ The lawsuits merely reflect this distrust and also reflect a desire of the states to partake in the planning process to a greater degree—as the following comments reveal.²³¹ North Dakota Attorney General Wayne Stenehjem said in reference to the restraining order filed in 2003 to prevent water releases that “[Corps officials] have not revised their operating manual as they promised . . . We only filed this lawsuit as a last resort. There’s nowhere else to go but the federal court.”²³² South Dakota’s Governor Bill Janklow, upon filing for a restraining order in 2002 to prevent water releases, indicated that he had lost faith that the river management policy would ever change, and in reference to *Bornhoft*, said that the Corps was supposed to revise the Master Manual eleven years ago.²³³ Janklow said of the Corps, “They live in Omaha, and all they listen to is navigation, navigation, navigation . . . They give us good listening to, but they don’t care about our interests.”²³⁴ The environmental group American Rivers called the Corps’ failure to implement the spring rise,

²²⁰ Kevin O’Hanlon, *Barge Industry Sues North Dakota*, Bismarck Tribune 1A (May 13, 2003).

²²¹ *Id.*

²²² 330 F.3d at 1029.

²²³ *Record of Decision*, *supra* n. 53.

²²⁴ *Street*, *supra* n. 94, at 129.

²²⁵ *Record of Decision*, *supra* n. 53.

²²⁶ *See In re Operation*, 305 F. Supp. 2d 1096, 1100 (D. Minn. 2004).

²²⁷ *Id.* at 1097-98.

²²⁸ *Id.* at 1098 (citing *Hazen*, 914 F.2d at 151 and *Bornhoft*, No. CV-91-26 JDS-BLG, slip op. at 3).

²²⁹ 330 F.3d at 1020-21, 1027-28. The court’s analysis in *Ubbelohde*, then, hinged on the Corps’ hierarchical ordering of interests within the 1979 Master Manual, which included respectively—flood control, irrigation, water supply and water-quality, navigation, power, and finally recreation, fish and wildlife. *Id.* at 1020.

²³⁰ *See generally In re Operation*, 305 F. Supp. 2d 1096; Boldt, *supra* n. 219.

²³¹ *Id.*

²³² *Id.*

²³³ Kevin Woster, *Lawsuits are likely to meet any Missouri Water-Flow Plan*, Argus Leader (Sioux Falls, SD) 1A (April 28, 2002).

²³⁴ *Id.*

originally recommended in 2000 by the Fish and Wildlife Services, “a slap in the face to everyone in the basin.”²³⁵

Although the Corps’ new Master Manual attempts to balance all interests,²³⁶ dissatisfaction with the new manual seems just as prevalent, if not more so.²³⁷ The plan imposes a new drought conservation measure that holds water in the upstream reservoirs when there is persistent drought.²³⁸ Missouri and navigation interests are upset because this drought conservation measure slices one month from the normal eight-month navigation season and also threatens lower basin drinking supplies, water quality, and power.²³⁹ Also upsetting Missouri interests is the manual’s plan to implement a spring rise flow regime by 2006 for endangered species, instilling in citizens the fear of flooding and the anger that species are being placed above human needs and interests.²⁴⁰ Missouri’s Governor Bob Holden expressed his displeasure with yet another threat to sue the Corps.²⁴¹ Environmentalists, on the other hand, are upset that the Corps is putting off implementing the spring rise for another two years.²⁴² Instead, the Corps’ 2004 Annual Operating Plan calls for the recreation of 1,200 acres of habitat along the river in Missouri and Nebraska by July 1 to sustain the species until a spring rise can be implemented.²⁴³ Meanwhile, South Dakota and other upper basin states are upset that the new manual continues to support navigation interests in the lower basin.²⁴⁴

The criticism comes in spite of the fourteen years and \$29 million the Corps spent on what is the most significant revision of the Master Manual in forty-four years.²⁴⁵ Senator Tom Daschle of South Dakota called the plan, “[n]othing short of abysmal;” Senator Kit Bond of Missouri indicated there were “significant problems;” and American Rivers, in a statement, said the manual displayed an “appalling lack of leadership.”²⁴⁶ The Corps, however, views the new Master Manual as a fair balance among the interests.²⁴⁷ Brigadier General William Grisoli, commander of the Corps’ Northwestern Division, said, “You’ll find that there are no winners in the basin, that there are some compromises that have to be made. What we try to do is find that delicate balance.”²⁴⁸

²³⁵ Bill Lambrecht, *White House Backs Delay In River Changes: Move is Victory For Officials Here; Plan Would Have Mimicked Missouri’s Natural Flow*, St. Louis Post-Dispatch A1 (July 14, 2002).

²³⁶ *Record of Decision*, *supra* n. 53. The new Master Manual does not retain the hierarchical ordering of interests as in the previous manual. *Id.*

²³⁷ Lambrecht, *supra* n. 49.

²³⁸ *Record of Decision*, *supra* n. 53.

²³⁹ See *Record of Decision*, *supra* n. 53. See also Lambrecht, *supra* n. 49. In a letter of objection to the Corps, Missouri’s Governor Bob Holden said that the 2 million Missourians who drink from the river outnumber the combined populations of South Dakota, and Montana. Lambrecht, *supra* n. 49.

²⁴⁰ *Id.*

²⁴¹ Lambrecht, *supra* n. 55.

²⁴² *Id.*

²⁴³ *Record of Decision*, *supra* n. 53.

²⁴⁴ Lambrecht, *supra* n. 49.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Bill Lambrecht, *Corps Plan For Missouri River Upsets Everyone*, St. Louis Post-Dispatch 2 (Feb. 28, 2004).

²⁴⁸ *Id.*

V. NEGOTIATED RULEMAKING

A. *The Corps and Political Choice*

If the present lawsuits are of any significance, the Corps has not yet achieved that delicate balance.²⁴⁹ Even though the Corps has provided ample opportunities for public comment on the Master Manual's contents,²⁵⁰ widespread dissatisfaction prevails.²⁵¹

Dissatisfaction, as discussed above, stems from the fact that interested parties lack direct decision-making authority regarding such monumental decisions as species preservation and the socio-economic well-being of large populations. Although the parties may offer input and suggestions to the Corps, they lack control over the final decisions. In this manner, the Corps' job has gone beyond the traditional agency model of filling in the gaps that Congress left open and entered the province of political choice.²⁵² In this province of political choice, the Corps must make short-term and long-term decisions based on incomplete data.²⁵³ In this province of political choice, there are no right or wrong answers—either the data offered is incomplete, not furnished, or the question at issue is full of inherent uncertainty.²⁵⁴ Even if the data is complete, the Corps must make subtle distinctions and value choices, for example, over such decisions as whether the Fish and Wildlife Service's 2000 Biological Opinion really does mean that the Corps must implement a high summer flow in order to save species or whether the recreation industry deserves greater priority over downstream interests.²⁵⁵ That the parties are unable to actually participate in formulating these regulations exacerbates their unrest.²⁵⁶ Basin parties' political polarity also prevents them from reaching a consensus.²⁵⁷ So, as the comments above demonstrate, the parties are left with either negotiating with the Corps or the courts.²⁵⁸ At this point they have chosen the latter as a solution, thus leading to what Professor Philip J. Harter termed a "crisis of legitimacy" with the regulation.²⁵⁹

However, absent a U.S. Supreme Court opinion on the issue (again, this is unlikely given the Supreme Court's denial of certiorari to the upper basin states in *Ubbelohde*), the history of the Missouri River litigation thus far indicates that litigation is unlikely to solve the coordination and sovereignty issues that plague the basin states and federal agencies.²⁶⁰ Although court pronouncements may elucidate the meaning of the Flood Control Act of 1944 and how it is to be reconciled with the Endangered Species Act or whether the Corps' Master Manual is in fact a binding instrument, courts cannot necessarily resolve the complex and interconnected public

²⁴⁹ See *In Re Operation of the Missouri System Litigation*, 277 F. Supp. 2d at 1378-80 and text accompanying nn. 236-44.

²⁵⁰ See *Record of Decision*, *supra* n. 53 ("Over 500 alternatives were addressed in four draft EISs and the FEIS. The analysis of the alternatives, and the comments and discussions they engendered are incorporated here by reference."). See generally RDEIS and Hearing Transcripts <<http://www.nwd-mr.usace.army.mil/mmanual/mast-man.htm>> (accessed May 20, 2004).

²⁵¹ See *In Re Operation of the Missouri System Litigation*, 277 F. Supp. 2d at 1378-80 and text accompanying nn. 236-44.

²⁵² See Harter, *supra* n. 41, at 475.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* See generally New Master Manual, *supra* n. 10; *Record of Decision*, *supra* n. 53.

²⁵⁶ See Harter, *supra* n. 41, at 475.

²⁵⁷ *Id.*

²⁵⁸ See text accompanying nn. 236-44.

²⁵⁹ See Harter, *supra* n. 41, at 475. See also *In Re Operation of the Missouri System Litigation*, 277 F. Supp. 2d at 1378-80.

²⁶⁰ See generally *Hazen*, 914 F.2d 147; *Bornhoft*, No. CV-91-26JDS-BLG; *American Rivers*, 271 F. Supp. 2d 230 (2003); *Ubbelohde*, 330 F.3d 1014.

policy issues that surround the river management.²⁶¹ Furthermore, the policy choices that the Corps must make shift according to the changing weather and socio-economic conditions along the river as well as evolving science—factors a static court decision cannot capture. Such issues are better left to the legislature and agencies via delegation, because agencies maintain the expertise.²⁶² As North Dakota's Federal District Court Judge Daniel L. Hovland rightly said in his 2003 decision:

What has become increasingly clear is that the federal courts are not the appropriate forum to manage the Missouri River dams and reservoir systems. This Court would again urge the parties to engage Government officials, political representatives at the state and national levels, attorney generals from each of the Missouri River Basin states, and other concerned entities, to become quickly involved in this crisis and seek to attempt to work on an acceptable resolution designed to address the divergent and important needs of all of the states effected. The endless stream of lawsuits will continue until the political forces and the Corps of Engineers attempt to seek a resolution in a forum other than the federal courts.²⁶³

At this juncture—the height of crisis in Missouri River management—the time for negotiation is ripe.²⁶⁴ Negotiation within the framework of the Negotiated Rulemaking Act would serve not only as a mechanism by which to enforce the original dictates of the Flood Control Act, which call for state and federal coordination and the maximizing of interests along the basin,²⁶⁵ but also would set the stage for resolution of any disputes that might arise in the future as new scientific, environmental, and socio-economic information is gathered.

B. Negotiated Rulemaking

Negotiated rulemaking, first pioneered by Professor Philip J. Harter, became a common and accepted agency practice in the early 1980s, along with other alternative dispute resolution techniques.²⁶⁶ Negotiated rulemaking allows affected parties to directly participate with the agency in the decision-making process.²⁶⁷ Affected parties may include those who are directly regulated as well as environmental and consumer groups or state and local governments.²⁶⁸

Negotiated rulemaking begins when either the agency proposes a new rule or an interested party requests negotiated rulemaking to be employed for the proposed rule.²⁶⁹ If the agency decides the issue is appropriate for negotiated rulemaking, the agency then chooses a neutral “convenor.”²⁷⁰ The convenor conducts research on the affected parties and issues at stake, ascertains whether the development of a committee representing the affected parties and their interests is feasible, and submits the report to the agency.²⁷¹ This

²⁶¹ See Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 Duke L.J. 427, 429 (1985). See also generally New Master Manual, *supra* n. 10.

²⁶² *Id.*

²⁶³ *North Dakota*, 264 F. Supp. 2d at 881-82.

²⁶⁴ See Harter, *supra* n. 41, at 479.

²⁶⁵ *Id.*

²⁶⁶ Shi-Ling Hsu, *A Game-Theoretic Approach To Regulatory Negotiation And A Framework For Empirical Analysis*, 26 Harv. Evntl. L. Rev. 33, 37 (2002). See also Harter, *supra* n. 41, at 471; Harter, *supra* n. 39, at 1389.

²⁶⁷ Harter, *supra* n. 39, at 1400.

²⁶⁸ Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 Cap. U.L. Rev. 21, 88 (2001).

²⁶⁹ *Id.*

²⁷⁰ 5 U.S.C. §§ 568(a)(1), 563(a).

²⁷¹ *Id.* at § 563(a), (b)(1)-(2). Section 563(a) provides that an agency head shall consider the following factors in determining whether to employ negotiated rulemaking: whether

stage of the process is critically important because it lays the groundwork for the selection of parties/committees and the issues to be resolved.²⁷² That is, a proper convening ensures that parties representing sufficiently diverse interests will circle the negotiation table such that all major issues will be “fully and fairly raised, discussed, and negotiated.”²⁷³

Upon receiving the convenor’s report, the agency then makes a final determination of whether to use negotiated rulemaking, identifies interested parties and publishes notice in the Federal Register, so that no party will be left out.²⁷⁴ The process then begins.²⁷⁵ After the committees and agencies develop the proposed rule, the agency reenters the confines of the Administrative Procedure Act and publishes it for comment.²⁷⁶

The concept of negotiated rulemaking arose out of dissatisfaction with agencies’ traditional practice under the Administrative Procedure Act of notice and comment and hybrid rulemaking—procedures, which resulted in legislative-type agency rules.²⁷⁷ These agency procedures often resulted in adversarial posturing or adjudication among affected parties.²⁷⁸ Polarity among affected parties was in part a result of the growing political role that agencies took on in the second half of the twentieth century.²⁷⁹ That is, unelected officials in

(1) there is a need for a rule; (2) there are a limited number of identifiable interests that will be significantly affected by the rule; (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who – (A) can adequately represent the interests identified under paragraph (2); and (B) are willing to negotiate in good faith to reach a consensus on the proposed rule; (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time; (5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule; (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and (7) the agency, to the maximum extent possible consistent with the legal obligations of the agency will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

²⁷² Harter, *supra* n. 39, at 1404, 1406.

²⁷³ *Id.* at 1405.

²⁷⁴ Stewart, *supra* n. 268, at 89-90. See also Harter, *supra* n. 39, at 1407.

²⁷⁵ Stewart, *supra* n. 268, at 90. Negotiated rulemaking is conducted in formal meetings that are open to the public. Ellen Siegler, *Regulatory Negotiations: A Practical Perspective*, 22 *Env'tl. L. Rep.* 10647, *4 (1992). The participants sit as a panel and a facilitator leads the sessions. *Id.* However, much of the actual negotiation takes place outside the formal sessions, for coalitions generally form and members communicate before and after the sessions and during breaks. *Id.*

²⁷⁶ *Id.*

²⁷⁷ Perritt, *supra* n. 46, at 1625. There are different types of agency rules. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 *Harv. L. Rev.* 467, 476 (2002). There are legislative and nonlegislative rules. *Id.* at 476-77. Legislative rules are comparable to a statute with the force and effect of law, while nonlegislative rules are simply statements about what the agency intends to do in the future without the force and effect of law. *Id.* Another type of distinction is between substantive and procedural rules. *Id.* at 477. Substantive rules can be legislative, interpretive, or policy statements. Legislative substantive rules regulate behavior outside the agency walls with the force of law, while interpretive substantive rules inform the public about how an agency interprets a particular statute or rule it administers. *Id.* Policy statements are nonbinding legislative rules that inform the public about how the agency intends to use its discretionary powers. *Id.* Under the Administrative Procedure Act, agencies must engage in notice and comment rulemaking before creating legislative rules but not before creating procedural or interpretive rules or policy statements. *Id.* at 478. Hybrid rulemaking is when Congress requires the agency to respond to comments. Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 *Cornell L. Rev.* 95, 117 (2003).

²⁷⁸ *Id.*

²⁷⁹ Harter, *supra* n. 41, at 473-74.

agencies received wide discretion to make policy choices that were traditionally made by elected members within the legislature.²⁸⁰

Although agencies employed negotiated rulemaking fairly regularly from 1950 on, Congress formally embraced the practice in 1990 with the passage of the Negotiated Rulemaking Act, which amended the Administrative Procedure Act.²⁸¹ Following the passage of the Negotiated Rulemaking Act, President Clinton issued an executive order and memorandum to agencies urging them to use negotiated rulemaking.²⁸² Since the practice emerged, such agencies as the Environmental Protection Agency, the Federal Aviation Administration, and the Occupational Safety and Health Administration have employed negotiated rulemaking as a technique.²⁸³

Proponents of negotiated rulemaking argue that the process results in more workable rules based on sound information.²⁸⁴ Negotiated rulemaking, by allowing direct participation, increases the legitimacy of the rule because parties focus on the issues that actually separate them and the parties' underlying interests rather than entrenched political positions.²⁸⁵ This in turn reduces the costs since the parties are less likely to engage in adversarial research to support their positions.²⁸⁶ Because parties perceive the rule as more legitimate, they are less likely to challenge it.²⁸⁷ By enlisting the affected parties to contribute ideas and information in the

²⁸⁰ Perritt, *supra* n. 46, at 1631. John T. Dunlop, Secretary of Labor from 1974-1975 and former head of President Nixon's wage and price controls program, influenced the policy currents regarding negotiated rulemaking. *Id.* at 1633. In a paper in which he identified eleven problems with the existing approach to regulation, he said, "the parties who will be affected by a set of regulations should be involved to a greater extent in developing those regulations." *Id.*

²⁸¹ Harter, *supra* n. 39, at 1391. See 5 U.S.C. § 561. Congressional findings supporting the passage of the Negotiated Rulemaking Act include: "(1) Government regulation has increased substantially since the enactment of the Administrative Procedure Act . . . (2) Agencies currently use rulemaking procedures that may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules. (3) Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties. (4) Negotiated rulemaking, in which the parties who will be significantly affected by a rule participate in the development of the rule, can provide significant advantages over adversarial rulemaking. (5) Negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court. It may also shorten the amount of time needed to issue final rules . . ." *Id.*

²⁸² William Funk, *Bargaining Toward The New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 Duke L.J. 1351, 1354 (1997). The Negotiated Rulemaking Act, originally passed as sunset legislation, was made permanent by congressional amendment in 1996. *Id.* at 1354-55.

²⁸³ Perritt, *supra* n. 46, at 1627-28.

²⁸⁴ Stewart, *supra* n. 268, at 88.

²⁸⁵ Harter, *supra* n. 39, at 1400. In an empirical study comparing negotiated rulemaking to conventional rulemaking by Jody Freeman and Laura I. Langbein, participants in negotiated rulemaking reported greater satisfaction in the process and a greater perception of legitimacy of the rule than in conventional rulemaking. Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 31 ELR 10811, *3 (2001). They also found that perception of the rule's legitimacy turned, largely, on the participation process rather than the outcome of the rule, thus confirming the work of social psychologists in that arena. *Id.* at *4. Freeman and Langbein also found that participants reported learning a great deal during the course of the negotiations—such as scientific/technical aspects of the rule, party positions, and how negotiation actually works. *Id.* at *13. When asked whether the participant's organization gained from the negotiated rulemaking process, 32% reported they obtained a better rule, 28% reported gaining a better understanding of a substantive issue or the rule-developing process, and 11% reported they had exerted some influence in the process—only 6% reported they gained nothing from the participation. *Id.* at *19.

²⁸⁶ Harter, *supra* n. 39, at 1400.

²⁸⁷ *Id.*

development of the rule, negotiated rulemaking further closes the information gap that centralized federal agencies may face when attempting to develop effective governing rules.²⁸⁸

Negotiated rulemaking is ideal for agencies when developing controversial rules or rules for which the customary notice-and-comment has not worked.²⁸⁹ In some instances, the negotiation committees have been able to expeditiously develop rules that the agency has delayed promulgating for years because the agency has been unable to resolve the underlying conflicts.²⁹⁰ Furthermore, because regulatory negotiation retains few fixed rules, the rule-making process allows for tremendous flexibility and creativity.²⁹¹ Rules can also be developed to take into account changing circumstances.²⁹²

Negotiated rulemaking is also ideal when issues are ripe for consideration.²⁹³ Otherwise, the interested parties may lack the incentive to reach a consensus.²⁹⁴ For example, if a party's "Best Alternative to Negotiated Agreement" or BATNA is superior to what can be gained through negotiation, that party is unlikely to participate.²⁹⁵ Parties perceive the value of alternatives based on their perceptions of what the agencies will do in the absence of negotiated rulemaking.²⁹⁶ That is, if a party believes negotiation would result in a more advantageous rule than simply allowing the agency to act unilaterally, that party will generally want to participate in the negotiated rulemaking process.²⁹⁷

Although most scholars and participants praise the success of negotiated rulemaking, there exists a healthy debate on its formal merits.²⁹⁸ For example, some scholars claim that the procedure does not in fact lead more quickly to the development of regulations and does not in fact reduce the likelihood of litigation.²⁹⁹ Professor Cary Coglianese performed an empirical analysis of negotiated rulemaking and found that there was no significant time savings in the development of regulations in the negotiated rulemaking context and that challenges to the regulations were frequent.³⁰⁰ Formal evaluation of the process, however, is difficult because the "success" of negotiated rulemaking is not easily defined. For example, even if a negotiating committee fails to reach consensus over a rule, the process usually succeeds in narrowing the issues and providing valuable information to both the parties and the agencies.³⁰¹ Costs are equally difficult to define.³⁰²

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 1402.

²⁹⁰ *Id.* at 1403.

²⁹¹ *Id.* at 1404. Freedman and Langbein also reported a study finding that most parties participating in negotiated rulemaking found it a "flexible, broadly inclusive, resource-intensive process through which they learned a great deal, particularly from each other, and through which they exerted significant influence on outcomes. Two-thirds of participants considered their contributions to have had a major or moderate impact on the outcome." Freedman & Langbein, *supra* n. 285, at *10.

²⁹² *Id.*

²⁹³ Harter, *supra* n. 41, at 479.

²⁹⁴ *Id.*

²⁹⁵ Perritt, *supra* n. 46, at 1635.

²⁹⁶ *Id.*

²⁹⁷ *Id.* Perritt says that the factors a party weighs in deciding whether to enter into negotiated rulemaking is comparable to those weighed in civil litigation settlement negotiations, in which the party determines BATNA based on what a nonparty, the judge, or the jury will do. *Id.*

²⁹⁸ Funk, *supra* n. 282, at 1365-66.

²⁹⁹ Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 *Duke L.J.* 1255, 1261 & 1310 (1997).

³⁰⁰ *Id.* at 1278-1310.

³⁰¹ *Id.* at 1366.

³⁰² *Id.*

C. Why Missouri River Basin Interests are Ripe for Negotiated Rulemaking

Because dissatisfaction reigns supreme on all sides of the debate with respect to the new Master Manual, court cases, and the management history of the Missouri River basin, the time for negotiated rulemaking is now ripe.

While upper basin states and environmentalists, as the generally disfavored river interests, have retained incentive to negotiate for nearly a decade now, the lower basin states, especially Missouri, have not.³⁰³ Because the flow regime practiced by the Corps and the hierarchical ordering of interests favored Missouri and other lower basin states, they retained a vested interest in maintaining the status quo rather than negotiating their way out of it.³⁰⁴ Even the White House, which backed lower basin interests, gave them an interest in maintaining the river's status quo.³⁰⁵ President Bush, for example, not only promised in his 2000 campaign to maintain the management of the Missouri River, but in 2002 also supported a five-year delay in implementing the spring-rise, which had been recommended *immediately* by the Fish and Wildlife Service.³⁰⁶

Missouri's favorable position was presumably the reason it remained the lone holdout in negotiations over the river's management in 1999. Missouri was the only state among the eight member states of the Missouri River Basin Association that refused to agree on a draft plan, created in September of 1999, on the river's management.³⁰⁷ The draft plan, which was much like the current plan adopted by the Corps, provided for shortening the navigation season during prolonged drought.³⁰⁸

Because the new Master Manual—with its shortening of the navigation season and plan for implementing a spring-rise—now disfavors Missouri, the state likely has incentive to negotiate.³⁰⁹ Furthermore, uncertainty as to the Endangered Species Act's influence on river basin interests remains to be decided in *In re: Operation of the Missouri River Basin System*—thus providing Missouri with extra incentive to negotiate.

History has proven that negotiations between basin states and interests are possible.³¹⁰ In the mid-1980s, states and interest groups banded together and held a symposium in an effort to identify the issues surrounding the Missouri River.³¹¹ The symposium inspired the creation of the Missouri River Assembly, an organization of 100 members including ten states (governors, state senators, representatives), twenty-five Native American tribes, important federal water management agencies (the Corps, Bureau of Reclamation,

³⁰³ See citations accompanying n. 21. See also Tarlock, *supra* n. 25, at 3.

³⁰⁴ *Id.*

³⁰⁵ Frederic Smith, *Editorial*, Bismark Tribune 4A (Nov. 14, 2003); Lambrecht, *supra* n. 235.

³⁰⁶ *Id.*

³⁰⁷ Adam Goodman, *Corps Pushes Proposal For Management of The Missouri*, St. Louis Post-Dispatch D6 (Jan. 21, 2000); Adam Goodman, *State Will Play Key Role in Meeting This Week to Decide Fate of Missouri River*, St. Louis Post-Dispatch A1 (Nov. 15, 1999).

³⁰⁸ *Id.*

³⁰⁹ Perritt, *supra* n. 46, at 1635.

³¹⁰ Thorson, *supra* n. 4, at 163-174.

³¹¹ Thorson, *supra* n. 4, at 163. A public interest group initiated the Missouri River Management Project, which sought to increase communications among basin decision makers, develop river management plans and institutions. *Id.* In the late 1980s, the Project convened a committee consisting of fifteen representatives, including lower and upper basin states and Indian tribes and held a symposium focusing on long-term management issues. *Id.* at 166. Approximately 150 people attended, including state representatives, tribes, federal agencies and private interests. *Id.* Case studies and papers were presented and exchanged and relevant statutes discussed. *Id.* At the event's conclusion, symposium participants formally recognized the need for a public forum in which to discuss regional socio-economic issues in connection with the river and also recognized the need for a formal organization to be formed. *Id.* at 166-67.

Western Area Power Administration, Bureau of Indian Affairs, Tribal governments), and other basin interests (agricultural, environmental, public power, etc).³¹²

The first meeting, held in November 1989, looked much like current negotiated rulemaking.³¹³ Groups and coalitions formed prior to and during the formal meeting to discuss river issues, and participants identified important and controversial management issues including the impacts of drought, communications among basin interests, and upstream and downstream beneficiaries.³¹⁴ The second meeting went even further, with members proposing various plans for the basin.³¹⁵ Because funding for the Assembly dried up, however, the coalition fell apart.³¹⁶

Thereafter, the Missouri River Basin Association, already an entrenched organization, adopted some of the Assembly's organizational ideas.³¹⁷ One of the proposals that the Association considered was the creation of a Missouri River Council—which would consist of ten state representatives, a tribal representative, and nonvoting federal agency representatives and which would supplant the Corps through congressional legislation.³¹⁸ The proposal called for voting power to shift to the states, whereby upon a majority vote by the states, the Corps would be required to implement the policy.³¹⁹ The proposal, in the form of a congressional bill, was eventually rejected.³²⁰ Litigation over the Missouri River management ensued.³²¹

Litigation since has resolved little in the Missouri River Basin battle and only served to solidify basin interests and positions—making relationships more acrimonious. Clearly the time for negotiation is here. The states have recognized this. In September 2003, the governors from eight river basin states and tribal representatives met with the Corps in South Dakota to discuss possible negotiation of management issues involving the Missouri River.³²² South Dakota Governor Mike Rounds said of the meeting, “We think rather than spend our time in court, we’d rather try to work through a proposal with the corps in advance.”³²³

The negotiated rulemaking law provides the ideal framework for resolving Missouri basin disputes—under the Act, federal agencies with a history and knowledge of the Missouri River and affected parties will be able to meet face to face and discuss regional, federal, economic, and socio-economic issues.

During the sessions, parties should focus on finding a scientific consensus and understanding concerning the endangered species and environmental issues at stake. Parties should also focus on interests rather than positions. The interest of all basin states, for example, is to maintain socio-economic stability. If upper basin interests insist on pursuing recreation over downstream navigation, upper basin states could offer to buy out the navigation industry and perhaps supplement the costs to downstream power.³²⁴

Negotiation in the context of managing the Missouri River is likely to face challenges. Identifying the parties to negotiate may leave some interests either unrepresented or underrepresented. Also, negotiations may be excessively complex and long. However, negotiations truly seem to be the best alternative. Without them, parties are left squabbling over the Corps' authority in light of the Flood Control Act and left focusing on their

³¹² *Id.* at 167-69.

³¹³ *Id.* at 170-71. *See also* Siegler, *supra* n. 275.

³¹⁴ Thorson, *supra* n. 4, at 170-71.

³¹⁵ *Id.* at 171.

³¹⁶ *Id.* at 172.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 173.

³²² Chet Brokaw, *S.D. Governor Seeks Deal on River*, *The Bismarck Tribune* 2B (Sept. 22, 2003).

³²³ Ben Shouse, *Missouri River Summit*, *Argus Leader* (Sioux Falls, SD) 1A (Sept. 25, 2003).

³²⁴ *See* Terry Woster, *S.D. Would Defend River to High Court*, *Argus Leader* (Sioux Falls, SD) 3B (May 15, 2002).

positions. Negotiation under the Negotiated Rulemaking Act is a way to develop coordination for the future and for long-term resolution of management disputes.

VI. CONCLUSION

Clearly the time for resolution of the Missouri River management dispute is here. As discussed, the issues involved in managing the Missouri River are extremely complex, extremely technical, and have a great impact on the socio-economic well-being of the river basin states and the survival of endangered species. Litigation, as illustrated in *Ubbelohde* and *American Rivers* and previous cases, has served as an inadequate proxy for communication among the states, interested parties, and the federal government and, if anything, has complicated these communications by producing confusing and conflicting decisions. Because dissatisfaction with the Corps' management authority, as embodied in the New Master Manual, and disagreement over the interpretation of the Flood Control Act persist, litigation is unlikely to stop unless parties seek alternate resolution.

The Negotiated Rulemaking Act provides the necessary framework for resolution of the disputes. As discussed, affected parties are able to directly interact with the federal government in the creation of regulations. As a result, interested parties could grow in mutual understanding, thus decreasing the likelihood of litigation, and hopefully, over time, the creation of solutions could replace position posturing. The federal government should initiate negotiated rulemaking because parties on all sides of the management issue retain an incentive to negotiate their best interests. Indeed, at this juncture, with widespread dissatisfaction on all sides, the time for negotiation is now.